Genocide: It's a Crime Everywhere, But Not in Australia

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In Nulyarimma v Thompson, *the Full Court of the Federal Court held, by majority, that rules of customary international law making genocide a crime were not part of Australian common law. This was the first occasion that an Australian appellate court had squarely considered the relationship between customary international law and Australian law. In this article, the author questions the reasoning of the Full Court on the issue of the reception of customary international law and considers the implications of the observations of the court on what constitutes 'genocide'.*

THE primary sources of international law are international treaties and international custom evidencing a general practice accepted as law (ie, customary international law).[1] Each state has a duty to ensure that its domestic law conforms with obligations imposed by international law.[2] However, the manner in which a state discharges that duty is left to the domestic constitutional arrangements of the state. Those arrangements may reflect a 'monistic' or 'dualistic' approach to

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1. Other sources of international law mentioned in the Statute of the International Court of Justice, Art 38, are the general principles of law recognised by civilised nations, judicial writings and the writings of highly qualified academics.
2. R Jennings & A Watt (eds) *Oppenheim's International Law* 9th edn (London: Longman, 1992) vol 1, 82.

international law.[3] In a monistic state, international law is *automatically incorporated* into domestic law and is applied directly by domestic courts. In a dualistic state, domestic institutions operate as 'gatekeepers' in determining how (and whether) to *transform* international law into domestic law. Until transformation occurs, international law is not part of the domestic law of a dualistic state.

In Australia, there is no constitutional or legislative provision clarifying whether the 'automatic incorporation' or 'transformation' approach to international law is applicable. However, the High Court has made clear that, upon ratification, an international treaty is not automatically incorporated into Australian law.[4] Legislation providing for the transformation of the treaty into domestic law is necessary before an Australian court will apply the treaty as a source of law.[5]

Until the recent decision of the Full Federal Court in *Nulyarimma v Thompson,*[6] there was scant Australian authority on the question whether rules of customary international law were automatically incorporated into Australian law or whether those rules required transformation into Australian law and, if so, how that transformation would occur.[7] The alternatives were summarised in the judgment of Merkel J:[8]

> The [automatic] *incorporation* approach treats customary international law, upon its proof as such and without more, as part of the common law of England. The transformation theory requires a further step; a rule of international law only becomes

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3. IA Shearer 'The Relationship between International Law and Domestic Law' in BR Opeskin & DR Rothwell (eds) *International Law and Australian Federalism* (Melbourne: MUP, 1997) 34, 36 et seq.
4. *New South Wales v Commonwealth* (1975) 135 CLR 337, 450-451; *Simsek v MacPhee* (1982) 148 CLR 636, 641; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 192-193, 211-212, 225, 253; *R v Dietrich* (1992) 177 CLR 292, 305; *Victoria v Commonwealth* (1996) 187 CLR 416, 480-481. See also S Donaghue 'Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia' (1995) 17 Adel LR 213.
5. A treaty may influence the interpretation of statutes: *Minister for Foreign Affairs v Mango* (1992) 37 FCR 298, Gummow J 303 et seq. A treaty may also influence the development of the common law: *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42; *Newcrest Mining Co v Commonwealth* (1997) 147 ALR 42, 147-148; *Kartinyeri v Commonwealth* (1998) 152 ALR 540, 598-599; *R v Sinanovic* (unreported) HCA 1998, 40. The fact that Australia has ratified a treaty gives rise to a legitimate expectation that the contents of the treaty will be considered by the executive when making administrative decisions. The failure to have regard to a treaty is a ground for judicial review of an administrative decision: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. A legitimate expectation is subject to a legislative or executive indication to the contrary: *Collins v South Australia* (unreported) SA Sup Ct 25 Jun 1999, 257.
6. (1999) 165 ALR 621.
7. See the obiter dicta of the High Court identified in *Nulyarimma* ibid and discussed infra pp 61-66. See also Shearer supra n 3; A Mason 'International Law as a Source of Domestic Law' in Opeskin & Rothwell supra n 3, 210.
8. *Nulyarimma* supra n 6, Merkel J 643-644.

> a part of English law when it is accepted and adopted by judicial decision as such (common law adoption) or by legislation (legislative adoption). The point of practical distinction between the [automatic] *incorporation* and *common law adoption* approaches is that under the latter approach the rule of international law is adopted upon a court determining that the rule is not inconsistent with existing legislation, the common law, or public policy and that it is therefore appropriate that it should form part of the common law of England.

The majority in *Nulyarimma*[9] (Wilcox and Whitlam JJ) held that the rule of customary international law making genocide a crime was not automatically incorporated into Australian law. Merkel J agreed that genocide was not automatically incorporated into Australian law. However, contrary to the majority, his Honour held that genocide was capable of being transformed into Australian law by common law adoption.

In this article I will argue that, in rejecting the automatic incorporation of customary international law, Wilcox and Whitlam JJ took the wrong road and that, in favouring common law adoption, Merkel J took the hard road. In short, I will argue that, subject to inconsistent legislation, rules of customary international law ought to be automatically incorporated into Australian law. The judgment in *Nulyarimma* also includes observations on the issue of what constitutes genocide. In the final section of this article I compare those observations with the findings of the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*.[10]

THE JUDGMENT IN NULYARIMMA v THOMPSON

1. International law on genocide

At the outset it is convenient to set out five propositions concerning genocide that were accepted as correct by the whole court in *Nulyarimma*.[11]

First, it is a rule of customary international law that genocide is an international crime. A rule of customary international law exists where the general and habitual practice of states is consistent with the rule and those states believe that a legal norm requires the practice. An international crime exists where international law makes an individual liable to punishment for defined conduct.[12]

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9. Supra n 6.
10. Human Rights and Equal Opportunity Commission *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney, 1997).
11. Supra n 6, Wilcox J 627, Whitlam J 632, Merkel J 640 et seq.
12. Y Dinstein 'International Criminal Law' (1975) 5 Israel Yearbook on Human Rights 55.

Secondly, the definition of genocide in customary international law is the same as the definition in the Convention on the Prevention and Punishment of the Crime of Genocide ('the Genocide Convention').[13] Article II of the Convention defines 'genocide' as any one of the following acts committed with intent to destroy a racial group: (a) killing; (b) causing serious bodily or mental harm; (c) deliberately inflicting conditions of life calculated to bring about the physical destruction of the group; (d) imposing measures intended to prevent births; (e) forcibly transferring children of the group to another group.[14]

Thirdly, states enjoy universal jurisdiction in relation to genocide. Usually, international law demands that a person have a connection with a state before that state is entitled to exercise jurisdiction over the person.[15] However, in relation to some international crimes, including genocide, the 'usual rules' are replaced with the principle of universal jurisdiction. This principle provides that a state enjoys jurisdiction over a person alleged to have committed genocide notwithstanding that there is no connection either between the state and the offence or between the state and the nationality of either the defendant or the victim.[16] The nature of universal jurisdiction is captured by the maxim, 'Aut dedere aut judicare'.[17]

Fourthly, the rule of customary international law making genocide a crime is a peremptory norm. Peremptory norms (also known as jus cogens) are rules of customary international law that may not be altered by international treaty.[18] The

13. Australian Treaty Series No 2, 1951.
14. The other significant articles of the Genocide Convention are: Art I (providing that genocide is a crime); Art III (the acts punishable under the Convention are genocide, conspiracy to commit genocide, incitement to commit genocide, attempting to commit genocide and complicity in genocide); Art IV (persons committing genocide shall be punished); Art V (parties undertake to enact the necessary legislation to provide effective penalties); and Art VI (persons charged shall be tried by a competent tribunal).
15. The 'usual rules' require a connection with the state based on one of 5 principles: (i) conduct of any person within the state (the territorial principle); (ii) conduct of any person which has an effect on the 'physical' state (the effects principle); (iii) conduct of any person that has an effect on certain interests of the state, eg security interests (the protective principle); (iv) conduct of the nationals both inside and outside the state (the nationality principle); and (v) certain conduct (eg terrorism) where the victim is a national of the state (the passive personality principle). See American Law Institute *Restatement (3rd): The Foreign Relations Law of the United States* (Philadelphia, 1987) 402.
16. The Genocide Convention does *not* authorise the exercise of universal jurisdiction by a party to the convention. Art VI provides that genocide shall be tried by a domestic 'tribunal of the state *in the territory of which the act was committed*' (emphasis added). However, it has been held that the universal jurisdiction that exists at customary international law in relation to genocide supplements Art VI of the Convention. The result is that a party to the Convention continues, as a result of customary international law, to enjoy universal jurisdiction in relation to the crime of genocide: *A-G (Israel) v Eichmann* (1962) 56 American Journ of Int'l Law 805; (1962) 36 ILR 277. See also Dinstein supra n 12, 68.
17. 'Either you extradite (to a state that will exercise jurisdiction in accordance with the 'usual rules') or you punish'.
18. Art 53: *Vienna Convention on the Law of Treaties* Australian Treaty Series No 2, 1974.

characterisation of genocide as a peremptory norm reveals the strength of international conviction that genocide be deterred and punished.

Fifthly, the Genocide Convention Act 1949 (Cth) did *not* incorporate the Genocide Convention into domestic law.[19] I have already noted that the High Court has held that an international treaty is not automatically incorporated into domestic law; legislation is required if a treaty is to be transformed into domestic law. The Genocide Convention Act must be examined to determine whether Parliament intended to transform the Genocide Convention into domestic law. The Act merely provides Parliamentary approval for the ratification of the Genocide Convention by the Executive.[20] Legislative approval of the Executive ratification of a treaty was never common and has fallen into disuse.[21] Such approval does not reveal an intention to transform a treaty into domestic law.[22] The approval may be contrasted with examples of a clear manifestation of legislative intention to incorporate international criminal law into domestic law. For instance, section 7(1) of the Geneva Conventions Act 1957 (Cth) provides that 'a person who, in Australia or elsewhere, commits ... a grave breach of any of the [Geneva] Conventions ... is guilty of an indictable offence.'

2. The facts in Nulyarimma

The judgment in *Nulyarimma* concerns two separate cases that were heard together by the Full Federal Court. One case was an appeal from a decision of the ACT Supreme Court in *Re Thompson, Ex parte Nulyarimma*.[23] The Registrar of the ACT Magistrates' Court had refused to allow a private prosecution for the offence of genocide to be brought against Prime Minister John Howard, Deputy Prime Minister Tim Fischer, Senator Brian Harradine and Mrs Pauline Hanson ('the defendants') by four Aboriginal informants. The informants alleged that the defendants had committed the crime of genocide as a result of their role in securing the passage of

19. *Nulyarimma* supra n 6, Wilcox J 628, Merkel J 642.
20. Genocide Convention Act 1949 (Cth) s 4. The Genocide Convention was duly ratified on 8 July 1949 and entered into force in Australia on 12 January 1951.
21. In the Senate Legal and Constitutional References Committee *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (Canberra, 1995) <http://www.austlii.edu.au/au/other/dfat/reports/tortcon.html> para 7.17, it was observed: 'In the past, the Parliament has passed legislation to approve the ratification of treaties. For example, the Racial Discrimination Act 1975 contained a provision [s 7] whereby the Parliament approved the ratification of the Convention on the Elimination of All Forms of Racial Discrimination.... This practice of seeking Parliamentary approval for the signing and ratification of significant or controversial treaties appears to have lapsed.' See also A Twomey 'International law and the Executive' in Opeskin & Rothwell supra n 3, 69, 84 et seq.
22. *Bradley v the Commonwealth* (1973) 128 CLR 557, 583.
23. (1998) 136 ACTR 9.

the Native Title Amendment Act 1998 (Cth). That Act was said to facilitate acts of genocide by providing for the 'unjustifiable extinguishment' of native title. It seems to have been argued that extinguishment entails a denial of access to land resulting in (to use the language of Article II of the Genocide Convention) 'mental harm' or 'deliberately inflicted conditions of life calculated to bring about the physical destruction of the group'.[24] The informants made application to the Supreme Court of the ACT to compel the Registrar to allow the private prosecution to proceed. The informants were not legally represented before Crispin J in the ACT Supreme Court and the case was clearly novel. However, the informants maintained that the allegations raised serious issues and Crispin J embarked upon a lengthy hearing of evidence and submissions. Aspects of the hearing were also novel:[25]

> A number of people representing Aboriginal groups from different parts of Australia sought leave to intervene in the proceedings. Mr Bayliss, who appeared for the [defendants], indicated that he did not oppose their intervention and leave was duly granted.... At the commencement of the proceedings Mr Lindon [counsel acting as amicus curiae] indicated that each of the [informants] and intervenors wished to address the court.... Mr Bayliss indicated that he did not object to that course. Some of the [informants] and intervenors subsequently indicated that they had difficulty in explaining their position in the environment of a courtroom and, with the consent of all parties, I agreed to hear further submissions at the 'tent embassy' opposite the site of the old Parliament House....The addresses proved to be wide ranging and at times emotive. Each of the parties relied upon affidavits filed in the proceedings but also spoke movingly of events in his or her own life. In addition it soon became apparent that the [informants] and intervenors relied upon the suffering of Aboriginal people generally. The pain of dispossessed and alienated people was vividly conveyed.

The informants failed in their application to enable the private prosecution to proceed. However, Crispin J gave serious and detailed consideration to the issues raised by the informants. The judgment provided a foundation upon which the Full Federal Court could examine the issue of the relationship between customary international law and domestic law.

The second case, *Buzzacott v Hill*,[26] commenced as an application in the Federal Court against the Commonwealth, the Minister for the Environment and

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24. See the definition of genocide: supra p 62. There is some evidence to support this contention: see eg Royal Commission into Aboriginal Deaths in Custody *National Report* (Canberra: AGPS, 1991) vol 4, para 31.1.4 et seq; R McDermott, K O'Dea, K Rowley, S Knight & P Burgess 'Beneficial Impact of the Homelands Movement on Health Outcomes in Central Australian Aborigines' (1998) 22 ANZ Journal Public Health 653.
25. *Re Thompson* supra n 23, 12.
26. (Unreported) FCA 10 May 1999 no S23, 639.

the Minister for Foreign Affairs ('the respondents'). The applicant sought an injunction to compel the respondents to include the lands of the Arabunna People (including Lake Eyre) on the World Heritage List.[27] The applicant claimed that the respondents' failure to proceed with world heritage listing constituted genocide. In particular, the applicant argued that the respondents delayed proceeding with the world heritage listing in order to enable a uranium mine to commence operations near Lake Eyre and that the opening of the mine would result in genocide. The respondents moved to strike out the applicant's claim on the ground that it did not disclose a reasonable cause of action. The trial judge, O'Loughlin J, considered that the respondents' motion raised an important and novel question on the relationship between customary international law on genocide and the common law and referred the motion to the Full Federal Court.[28] The motion before the Full Federal Court was adjourned to be heard together with *Re Thompson* on the basis that it was undesirable that different Full Courts consider similar issues about genocide.[29]

The informants in *Re Thompson* and the applicant in *Buzzacott v Hill* (together, 'the Aboriginal plaintiffs') were represented at the joint hearing before the Full Court by the same counsel, JW Burnside QC and S Senathiraja, and the submissions on the relationship between customary international law on genocide and domestic law were the same in each case.

3. The result in Nulyarimma and a summary of the reasons

In separate judgments, each member of the Full Court agreed that the appeal in *Re Thompson* be dismissed and that *Buzzacott v Hill* be struck out (as disclosing no reasonable cause of action). Wilcox J disposed of the two cases by concluding that the rule of customary international law on genocide was not part of domestic law. The claim in each case was bound to fail. Whitlam J also held that genocide was not part of domestic law. Merkel J did not agree with the majority on that point. The reasons for this divergence are examined below.[30]

Merkel J (Whitlam J agreeing with him on this point) held that the conduct said by the Aboriginal plaintiffs to constitute genocide did not correspond with any one of the genocidal acts contained in the definition in Article II of the Genocide Convention.[31] Merkel J held that without a genocidal act the claim in each case

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27. *Buzzacott v Hill* ibid. The list is maintained pursuant to the *Convention for the Protection of the World Cultural and Natural Heritage*: Australian Treaty Series No 47 1975.
28. *Buzzacott v Hill* ibid.
29. Ibid, para 3.
30. Infra pp 66-75.
31. *Nulyarimma* supra n 6, 670 et seq; *Buzzacott v Hill* supra n 26, para 231.

must fail. The crime of genocide, moreover, requires a 'genocidal act' *and* an 'intention to destroy a racial group.' In an obiter dictum, Wilcox J doubted whether the Aboriginal plaintiffs could produce any evidence of such an intention. The implications of the views of Merkel and Wilcox JJ on the meaning of 'genocide' are examined below.[32]

Alternative reasons were offered by Merkel J for dismissing the two actions. Broadly speaking, the effect of each of the common law, section 16 of the Parliamentary Privileges Act 1987 (Cth) and the implied constitutional freedom of political communication was said to be that a Member of Parliament cannot be hindered in the conduct of Parliamentary business.[33] Merkel J held that the defendants in *Re Thompson* were engaged in Parliamentary business when participating in discussions that lead to enactment of the Native Title Amendment Act 1998 (Cth) and, accordingly, the criminal proceedings against them were bound to fail. In relation to *Buzzacott v Hill*, Merkel J held that the omissions of the respondents in relation to the world heritage listing process involved policy considerations within the prerogative of the Executive that were not justiciable.[34] Accordingly, he held that the application in *Buzzacott v Hill* must also be dismissed. Whitlam J agreed with the reasoning of Merkel J on the points summarised in this paragraph.[35]

THE RELATIONSHIP BETWEEN CUSTOMARY INTERNATIONAL LAW AND DOMESTIC LAW

1. The issues

In determining whether the rule of customary international law making genocide a crime was part of domestic law, three issues were considered in *Nulyarimma.* First, Wilcox and Whitlam JJ held that certain statements of Brennan J in *Polyukhovitch v the Commonwealth*[36] supported the view that legislative transformation was the sole means by which international criminal law might become part of domestic law. Merkel J disputed the majority's interpretation of those statements.

Secondly, each member of the court made reference to statements of the High Court in *R v Chow Hung Ching*[37] which suggested that, although customary

32. Infra pp 75-78.
33. *Nulyarimma* supra n 6, Merkel J 669-671.
34. Ibid, Merkel J 674-675.
35. Ibid, Whitlam J 638.
36. (1991) 172 CLR 501.
37. (1948) 77 CLR 449.

international law rules are not part of the common law, the courts may nevertheless use those rules as a source of common law. Merkel J embraced this approach as the common law adoption approach and used it to adopt genocide into the common law. Wilcox and Whitlam JJ did not expressly adopt or reject the approach. However, each concluded that the customary international law on genocide was incompatible with domestic law.

Thirdly, the court acknowledged that the weight of authority in England, Canada and New Zealand favoured the automatic incorporation of customary international law into the common law.[38] However, Wilcox and Whitlam JJ found the reasoning in the most recent judicial observations in favour of the automatic incorporation of customary international law[39] to be unpersuasive and declined to follow the overseas authority. Merkel J, preferring the common law adoption approach, also declined to follow the overseas authority. The reasoning of the court on each of the above issues is considered below.

2. The significance of Polyukhovitch

Wilcox and Whitlam JJ each referred to the observations of Brennan J in *Polyukhovitch v the Commonwealth*[40] in support of their view that legislative transformation is the 'appropriate means' to create the domestic jurisdiction of courts in relation to international criminal law.[41] On the other hand, Merkel J considered the observations of Brennan J to be irrelevant to the question whether legislation is an *essential* pre-condition to the exercise of criminal jurisdiction.[42] At issue in *Polyukhovitch* was whether the War Crimes Amendment Act 1988 (Cth) was within the external affairs power of section 51(xxix) of the Australian Constitution. Observations in the case that are construed as bearing on the relationship between rules of customary international law and domestic law are clearly obiter.

3. The common law adoption approach

In *R v Chow Hung Ching* there were obiter statements in the judgments of Latham CJ and Dixon J that may be construed as rejecting the automatic incorporation approach and favouring common law adoption. The case arose from

38. *Nulyarimma* supra n 6, Wilcox J 629, Merkel J 650-651.
39. *R v Bow Street Magistrate, Ex parte Pinochet (No 3)* [1999] 2 WLR 827, Lord Millett.
40. Supra n 36.
41. *Nulyarimma* supra n 6, Wilcox J 630, Whitlam J 636-637.
42. Ibid, Merkel J 658.

a fracas involving Chinese nationals, after which the Chinese nationals made a claim to immunity from criminal proceedings for assault. The Chinese nationals were civilians accompanying a visiting Chinese military delegation. The claim to immunity rested upon the rule of customary international law that gives immunity to members of any armed force which is present in a state with the consent of the government of that state. The High Court held that the rule of customary international law, if part of the common law, would not confer immunity in the circumstances of the case. Accordingly, it was not necessary to determine whether the rule was, or was not, part of the common law. However, the following observations were made. Latham CJ said:[43]

> International law is not as such part of the law of Australia, but a universally recognised principle of international law would be applied by our courts.

Dixon J said:[44]

> The theory of Blackstone ... that 'the law of nations ... is here adopted in its full extent by the common law, and is held to be a part of the law of the land' is now regarded as without foundation. The true view, it is held, is 'that international law is not a part, but is one of the sources, of English law'.... 'In each case in which the question arises the court must consider whether the particular rule of international law has been received into, and so become a source of, English law.'

The statement by Dixon J suggests that the court enjoys a discretion to determine whether or not a rule of customary international law is to be adopted into the common law. On this approach, it is necessary to articulate criteria to be applied by the court in exercising the discretion. Professor Shearer has suggested that it is possible to draw a distinction between 'self-executing' rules of customary international law and 'non-self-executing' rules of international law, with rules in the former category more amenable to common law adoption.[45] Wilcox J cited this distinction with approval.[46] A non-self-executing rule of customary international law was said to be one that requires *adaptation* to create domestic rights or obligations. Genocide is a non-self-executing rule of international law because it poses difficult questions about the criminal procedure to be followed on the laying of such a charge: which courts have jurisdiction, what procedure will govern the trial, what punishment may be imposed, and so on.[47]

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43 *R v Chow Hung Ching* supra n 37, 462 (footnotes omitted).
44. Ibid, 477.
45. IA Shearer supra n 3, 34, 42, 51.
46. *Nulyarimma* supra n 6, Wilcox J 629.
47. Ibid, Wilcox J 629-630.

The questions raised by Wilcox J are indicia of a non-self-executing rule only to the extent that the common law cannot answer those questions without adaptation of the rule on genocide. His Honour did not consider whether the common law of the ACT on criminal procedure would enable the prosecution of genocide except to note the policy consideration that no crime ought to be created except 'by law'.[48] This omission is surprising in light of section 477 of the Crimes Act 1900 (ACT) which expressly provides for the summary disposition of common law offences in the same way as certain (defined) statutory offences. I suggest that the distinction between a self-executing rule and a non-self-executing rule of international law is illusory. The proponent of adoption would interpret the common law so as to enable the rule of customary international law to be adopted without adaptation. Merkel J did as much in *Nulyarimma* when proposing to apply to genocide the common law rule that where no punishment is prescribed by statute for an offence, then the punishment is 'at large'.[49] The same flexibility would justify the refusal to adopt *every* rule of customary international law into the common law. The opponent of adoption would argue that there is no analogy that would enable the extension of the common law to support the adoption of the rule of customary international law. Wilcox and Whitlam JJ did as much in *Nulyarimma* when they asserted that, for policy reasons, the common law ought not now to proscribe certain conduct as criminal.[50]

Merkel J suggested an expansive approach to the common law adoption of rules of customary international law: a rule should be adopted into the common law unless there is a direct conflict between the rule and domestic law. A 'direct conflict' would arise if a rule of customary international law was inconsistent with a statute or with the 'general policy' or 'logical congruence' of the common law.[51] Much of the judgment of Merkel J in *Nulyarimma* is centred on a policy question: should the court create an offence under domestic law (viz, genocide) where none existed before? The approach of Merkel J would require the same policy question to be addressed by the court on every occasion that a rule of customary international law was considered for adoption. Should a *novel* right or duty be adopted into the common law? That question must involve a value judgment.[52]

48. Ibid, Wilcox J 629-630.
49. Ibid, Merkel J 663.
50. Ibid, Wilcox J 629-630; Whitlam J 637-638.
51. Ibid, Merkel J 629-630, 653-655 and 662 et seq.
52. Ibid, 668. Merkel J stated: 'I have no difficulty in determining that the "end" or "goal" which the law serves will be better served by treating universal crimes against humanity as part of the common law in Australia.'

4. Automatic incorporation into the common law

(i) The principle

An invaluable aspect of the common law is that it has an inherent flexibility to accommodate cases that were not clearly governed by any pre-existing rule. The formulation (or rejection) of a new common law rule involves weighing the views expressed in all relevant authoritative legal texts (cases, textbooks, articles, etc). The policy consequences of developing the common law are also considered. A decision is made. The decision is sometimes difficult to make, and may be difficult to predict, because there is no pre-existing common law rule. However, the process is transparent and draws on considerations of principle and policy.

In *Nulyarimma,* the whole court engaged in the process described in the previous paragraph. For Merkel J, it was a necessary part of the common law adoption process. He assumed that there was no pre-existing binding legal rule. However, where an existing rule of customary international law applies to a case, there exists a binding legal rule in the sense that every state is bound by the rules of customary international law. There is a logical inconsistency in a domestic court 'weighing' a binding legal rule of customary international law against other considerations. That logical inconsistency can only be avoided by automatically incorporating the rule of customary international law into the common law. The difficult and unpredictable task required of the common law adoption approach in determining *whether* to adopt a rule of customary international law would be avoided. However, it may still be necessary for a court to interpret the common law in order to facilitate the automatic incorporation of a rule of customary international law. The questions about criminal procedure posed by Wilcox J[53] must be answered by the common law.

The argument I have developed presents a picture of rules of customary international law filling gaps in the common law. However, what is to be done if the common law is in conflict with a rule of customary international law? The majority of the English Court of Appeal in *Trendex Trading Corporation v Central Bank of Nigeria*[54] held that in this case the rule of customary international law must prevail. This view was explained by Sir Anthony Mason (extra-judicially) as follows:[55]

> Lord Denning's conversion to the [automatic] incorporation theory in *Trendex* occurred when the English Court of Appeal was confronted with the doctrine of precedent and its impact when a change in a rule of customary international law

53. See supra p 68.
54. [1977] 1 QB 529.
55. Mason supra n 7, 210, 214-215.

> took place after the rule in its earlier form had been made part of English law by a decision of a higher court. It was thought that the doctrine of precedent would compel a court lower in the hierarchy to follow the decision of the higher court, notwithstanding that the rule of international law had changed in the meantime. This result, which was unacceptable, was avoided by the incorporation theory.... In any event, there would be no great difficulty in adjusting the doctrine of precedent to meet the special case of reception of rules of international law into domestic law.

In short, an inconsistent common law rule is no answer to the automatic incorporation of a rule of customary international law into the common law. An inconsistent statute, however, is a different matter. This is considered next.

Parliamentary sovereignty demands that the automatic incorporation of customary international law into the common law be subject to an inconsistent statute. This observation is particularly relevant to the automatic incorporation of genocide into the common law. Whitlam J noted that section 1.1 of the Criminal Code 1995 (Cth) provides, in effect, that Commonwealth legislation is the only source of Commonwealth offences. A small number of Federal common law offences were identified in the recent *Review of Commonwealth Criminal Law.*[56] These were offences that had a Federal element arising from a relationship with an officer, property or statute of the Commonwealth. Merkel J held that genocide would not answer that description. In addition, it seems most unlikely that Federal common law offences can exist after the High Court rejected the concept of a distinct Federal common law in *Lange v Australian Broadcasting Corporation.*[57] However, if genocide was a Federal common law offence, it is conceded that it would have been abolished when section 1.1 of the Criminal Code 1995 (Cth) came into force on 1 January 1997.

If genocide is not a Federal common law offence then it is simply a 'common law offence' and is subject to the jurisdiction of the states. Whitlam J noted that common law offences have been abolished in the Criminal Code jurisdictions (ie, Queensland, Tasmania, Western Australia and the Northern Territory.) Genocide cannot be an offence in those jurisdictions. It is the nature of a Federation that the common law — whether originating in customary international law or otherwise — may be abolished by statute in one or more States and remain intact in other States.

The possibility that, as a result of legislative inconsistency, genocide is not in fact part of Australian law points to an advantage of transformation of international law by Commonwealth legislation. However, this fact does not diminish the arguments I have made in favour of automatic incorporation compared to common law adoption.

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56. *Common Law Offences and the Commonwealth: Interim Report – Principles of Criminal Responsibility and Other Matters* (Canberra, 1990), ch 20.
57. (1997) 189 CLR 520, 562-563.

(ii) The cases

Automatic incorporation enjoyed strong support in the 19th century in England[58] and, after a period where some doubts were expressed,[59] was applied by Lord Denning MR and Shaw LJ in *Trendex Trading Corporation v Central Bank of Nigeria* to incorporate into the common law the customary international law rule excepting from sovereign immunity the commercial activities of a state.

The automatic incorporation approach appealed to Lord Millett in *R v Bow Street Magistrate, Ex parte Pinochet (No 3).*[60] At issue in this case was whether General Pinochet, the former President of Chile, was liable for extradition from England to Spain for torture offences alleged to have been committed by his government in Chile between 1972 and 1990. The United Kingdom had, by legislation, incorporated the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment into domestic law and created the criminal offence of torture ('the Torture legislation'). A person who, after the Torture legislation came into effect in 1988, committed torture anywhere in the world was liable to be tried and punished by a court in the United Kingdom. Counsel for Spain argued the case on the basis that the Extradition Act 1989 (UK) permitted extradition to Spain if, under UK law at the date of the application for extradition, the relevant act of the defendant was a criminal offence. On this argument, General Pinochet was liable to be extradited for all of the alleged torture offences because, at the date of the application for extradition (1999), torture was an offence under the Torture legislation. The House of Lords unanimously rejected Spain's argument. It held that the effect of the 'double criminality' principle is that extradition is only permitted if, under UK law *at the date of the defendant's act*, that act constituted an offence. Six members of the Judicial Committee held that General Pinochet could only be extradited for those crimes of torture alleged to have been committed after the Torture legislation commenced in 1988.[61] The seventh member, Lord Millett, argued that the rule of customary international law making torture a universal crime had been automatically incorporated into the common law of England before 1972. Accordingly, in his view, torture had long been a criminal offence under the domestic law of England and the double criminality principle was satisfied in relation to *all* of the offences alleged by Spain against General Pinochet. This argument had not been put to the House of Lords by Spain and no other member of the House discussed this possibility.

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58. See the cases reviewed in *R v Keyn* (1876) 2 Ex Div 63.
59. See the dicta in *R v Keyn* ibid; *R v West Rand Central Gold Mining Co Ltd* [1905] 2 KB 391; *R v Chung Chi Cheung* [1939] AC 160, discussed by Merkel J supra n 6, 644 et seq.
60. *Pinochet (No 3)* supra n 39.
61. Lords Browne-Wilkinson, Goff, Hope, Hutton, Saville and Phillips.

In the opinion of Wilcox and Whitlam JJ in *Nulyarimma*, Lord Millett's argument was dependant upon an incorrect interpretation of a decision of the Supreme Court of Israel in *Attorney-General (Israel) v Eichmann*.[62] *Eichmann* contained a statement which suggested that customary international law was automatically incorporated into the domestic law of Israel. Wilcox and Whitlam JJ found that *Eichmann* was distinguishable from *Pinochet (No 3)* on the basis that, notwithstanding what was said about customary international law in *Eichmann*, it was a statute of the Knesset that supported the criminal jurisdiction of Israel's domestic courts to punish crimes under international law. Wilcox and Whitlam JJ also found that, implicit in the reasoning of the two US decisions relied upon by Lord Millett,[63] was a recognition that a domestic statute was necessary to support the jurisdiction of a domestic court in relation to an international crime.[64]

Whether or not the criticism of Lord Millett's judgment subsequently made by Wilcox and Whitlam JJ is valid, his Lordship could have chosen to rely upon any one of a number of English decisions in support of his conclusion that rules of customary international law are automatically incorporated into English law.[65]

(iii) The policy

In *Nulyarimma,* Wilcox J stated that the automatic incorporation of the crime of genocide into the common law 'would lead to the curious result that an international obligation incurred pursuant to customary law has greater consequences than an obligation incurred, expressly and voluntarily, by Australia signing and ratifying an international convention'.[66]

It is true that one consequence of automatic incorporation is an *additional* source of law. However, this consequence does not come at the expense of a diminished role for Australian law-making institutions. The need to preserve the balance of power between the executive and legislative branches of government is one reason for the rule that treaty ratification does not itself create rights that may be enforced in Australian courts. However, neither the executive branch nor the judicial branch has the capacity unilaterally to select rules of customary international law for incorporation into the common law, and Parliament retains the power to legislate to abolish or alter rules incorporated into the common law.

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62. Supra n 16.
63. *Re Demanjuk* 603 F Supp 1468 (ND Ohio 1985); *Demanjuk v Petrovksy* 776 F 2d 571 (6th Cir 1985).
64. *Nulyarimma* supra n 6, Whitlam J 635 et seq; Wilcox J 630-631 agreeing.
65. Eg *Trendex Trading Corporation* supra n 54, Lord Denning MR and Shaw LJ.
66. *Nulyarimma* supra n 6, Wilcox J 628.

The balance of power between the three branches of government would not be affected by the automatic incorporation approach.

There is another reason, stemming from the status of genocide as both an international crime and a peremptory norm, to question the suggestion of Wilcox J that the automatic incorporation of genocide into Australian law cannot be justified in light of the fact that a treaty requires legislative transformation. In *Pinochet (No 3),* Lord Browne-Wilkinson, in the course of discussing the significance of the international crime of torture being a peremptory norm, adopted a statement from an unreported decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Anto Furundzija*:[67]

> Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

The automatic incorporation of jus cogens rules of international criminal law into the common law of Australia would maximise the opportunity for Australia to play a role in deterring such crimes. For example, within days of the delivery of the decision in *Nulyarimma* media reports revealed that it was distinctly possible that Indonesian militia, and those complicit with the militia, were committing crimes of genocide in East Timor. In the weeks following the judgment, it also became apparent that at least one member of the militia had come to Australia and had sought to remain here under a false pretext.[68] If genocide is not a criminal offence in Australia, a prosecutor could not bring proceedings in an Australian court against an Indonesian national for the crime of genocide.[69] It is also unclear whether Australia would be able to comply with a request from East Timor to extradite a person to be dealt with in East Timor in relation to the offence of genocide.[70]

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67. (Unreported) UN Int'l Tribunal 10 Dec 1998 no IT-95-17/1-T10, para 154 <http://www.un.org/icty/furundzija/trialc2/judgment/main.htm>.
68. An ABC Radio news report of 16 September 1999 carried the following item: 'Australia is sending home a suspected East Timorese militia member who was evacuated to Darwin by the airforce.The Immigration Department believes the man is a serving paratrooper who somehow slipped into the refugee group brought out of the UNAMET compound in Dili.'
69. Commonwealth legislation does provide for the exercise of universal jurisdiction by an Australian court in relation to an infringement of the Geneva Conventions: Geneva Conventions Act 1957 (Cth) s 7(1). A prosecutor could institute proceedings in relation to this offence.
70. A defendant is only eligible for surrender if a magistrate is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in Australia at the time at which the extradition request was

5. Summary

I have argued that for reasons of principle, authority and policy all rules of customary international law should be automatically incorporated into Australian common law. However, a rule cannot be incorporated if it would be inconsistent with statute. Statutory inconsistency may prevent genocide being incorporated into the common law of some or all State and Territory jurisdictions.

WHAT CONSTITUTES GENOCIDE? THE AUSTRALIAN EXPERIENCE

In customary international law, and under the Genocide Convention, the crime of genocide occurs when a person commits a defined act with the intention of destroying a racial or ethnic group. The defined acts appear in Article II[71] of the Convention and include killing members of the group and forcibly transferring children of the group to another group. Dinstein has observed:[72]

> The essence of genocide is not the actual destruction of a group, but the intent to destroy it as such (in whole or in part). This has a dual consequence: first, if a group was destroyed through acts committed without an intent to bring about such destruction, there is no genocide; secondly and conversely, the murder of a single individual may be categorised as genocide if it constitutes a part of a series of acts designed to attain the destruction of the group to which the victim belonged.

In its recent report *Bringing Them Home*, the Human Rights and Equal Opportunity Commission collated evidence of the systematic removal of Aboriginal children from their parents. The Commission concluded that the practice 'could properly be labelled "genocidal" in breach of binding international law from at least 11 December 1946.... The practice continued for almost another quarter of a century'.[73]

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received, that conduct would have constituted an offence in Australia: Extradition Act 1988 (Cth) s 19(2). The magistrate considering the request would need to consider whether the *conduct* the subject of extradition proceedings was an offence in the state in which extradition proceedings were instituted (eg Qld, NSW or Victoria). The result would turn on a detailed examination of the relationship between Australian criminal law and the conduct which was the subject of the extradition proceedings. The Anti-Genocide Bill 1999 (Cth) making genocide a Commonwealth offence was introduced into the Senate by the Australian Democrats and referred to the Senate Legal and Constitutional References Committee on 14 October 1999. The Bill is not supported by the Commonwealth Government.

71. Supra p 62.
72. Dinstein supra n 12, 60-61.
73. Supra n 10, 275.

This conclusion was rejected by the Commonwealth government[74] on the basis of the decision of the High Court in *Kruger v the Commonwealth.*[75] *Kruger* was authority for the proposition that genocidal acts were not authorised by the legislative regime that provided for the removal of Aboriginal children from their families in the Northern Territory. *Kruger* did not address the one question that the Commonwealth was required to address if it was meaningfully to respond to *Bringing Them Home.* That question was whether the Commonwealth accepts that the removal of Aboriginal children from their families, as detailed in *Bringing Them Home* — whether supported by legislation or not — constitutes genocide. The same question has been the subject of vigorous public debate among political scientists and media commentators.[76] Surprisingly, the conclusion in *Bringing Them Home* has been the subject of only limited critical scrutiny in legal literature.[77]

In *Nulyarimma*, Wilcox and Merkel JJ each made observations about what constitutes genocide for the purposes of international law. Those observations, though made in the context of the facts of *Re Thompson* and *Buzzacott v Hill,* are significant in light of the public debate following the publication of *Bringing Them Home.*

Wilcox J expressed reservations about the ability of the Aboriginal plaintiffs to prove an *intention* to destroy a racial group, as required by the definition of genocide under the Genocide Convention. He conceded that the *effect* of the Native Title Amendment Act 1998 (Cth) (relevant to *Re Thompson*), and the failure to conserve traditional lands (relevant to the *Buzzacott v Hill*), may be to 'further disadvantage indigenous people in relation to their traditional land' and be 'inimical to the survival' of Aboriginal peoples. However, Wilcox J stated that it is 'another matter' to infer an *intent* to destroy those peoples from that *effect.*[78] This observation might provide comfort to those who argue that any adverse *effects* of the practice of removing Aboriginal children from their homes upon Aboriginal peoples is irrelevant to the question whether there existed an *intention* to destroy Aboriginal peoples. The *effect* of a person's conduct does not always assist in

74. Senator John Herron *The Commonwealth's Response to Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (16 Dec 1997). See D Kinley *Bringing them Home: Implementation Progress Report* (Sydney: HREOC, 1998) 44.
75. (1997) 146 ALR 126.
76. See eg R Brunton 'Black and White' (1997) Institute of Public Affairs Review 50; R Manne 'The Stolen Generations' (1998) 42 Quadrant 53; H Wootten 'Ron Brunton and Bringing Them Home' (1998) 4 Indigenous Law Bulletin 4.
77. Royal Commission into Aboriginal Deaths in Custody supra n 24 vol 5, para 36.3.7 et seq, dealt with those aspects of genocide which relate to the stolen generations. See also M Storey 'Does Genocide Require Malice? (1997) Uni NSW Law Journal (Forum 4) 11 and other articles on aspects of *Bringing Them Home* in the same issue of the journal.
78. *Nulyarimma* supra n 6, Wilcox J 626-627.

determining the *intention* of the person. However, Wilcox J failed to state that there are circumstances when the *effect* of a person's conduct makes it possible to *infer* the intention of the person. In domestic criminal law, a jury may infer that the defendant possessed an intention to kill from any relevant fact including the probable *effect* of the defendant's conduct, and convict him of murder.[79] Similarly, in relation to genocide, the International Criminal Tribunal for Rwanda made this point in the *Judgment in Jean-Paul Akayesu's Case*:[80]

> On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed ... or ... the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.

The Tribunal's ruling suggests that the finding of an intention to destroy Aboriginal peoples in *Bringing Them Home* was on firm ground to the extent that it drew upon evidence of the deliberate and systematic nature of the removal of the children from their families without consent.

Merkel J considered that 'it is desirable [to] make certain observations as to the dangers of demeaning what is involved in the international crime of genocide'[81] and proceeded to draw a distinction between, on the one hand, an intention to destroy a culture ('cultural genocide') and, on the other hand, an intention to destroy a racial group. His Honour cited authority to support his opinion that cultural genocide is not prohibited by the Genocide Convention. In *Bringing Them Home* reference was made to assimilation policies having as their object the destruction of the 'cultural unit' of Indigenous peoples. In light of the comments of Merkel J, the authors of *Bringing Them Home* would have been on stronger ground if they had referred to the evidence, collated elsewhere in their report, that the assimilation policies were also intended to achieve the 'biological absorption' of Indigenous peoples with the non-Indigenous population.[82]

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79. *R v Willmot (No2)* (1985) 2 Qd R 413.
80. (Unreported) UN Int'l Crim Tribunal for Rwanda 2 Sept 1998 no ICTR-96-4-T, 6.3.1 <http://www.un.org/ictr/english/judgements/akayesu.html>. A similar statement appears in Int'l Crim Tribunal for the former Yugoslavia, Decision of Trial Chamber 1, *Radovan Karadzic, Ratko Mladic cases* (nos IT-95-5-R61 and IT-95-18-R61) para 94.
81. *Nulyarimma* supra n 6, Merkel J 671.
82. See eg HREOC supra n 10, 108.

CONCLUSION

John Kidd has questioned the value of incorporating international human rights law into Australian domestic law in light of the inevitable political controversy that would follow such incorporation.[83] On the other hand, the response of the Australian public and the Commonwealth government to the massacres that occurred in East Timor in September 1999 revealed strong support for Australia's role as a leader in a community of nations that would take steps to prevent genocide. A more muted response followed the revelation in *Bringing Them Home* that in the 50 years to 1960 thousands of Aboriginal children were forcibly removed from their parents. Australia cannot be seen to be above the international norms that it seeks to impose on others.[84] I have argued that the automatic incorporation of the rules of customary international law into Australian law would ensure that this does not happen.

83. J Kidd 'Can International Law Protect Our Civil Rights? The Australian and British Experience' (1995) 18 Uni Qld Law Journal 305, 317.

84. H Charlesworth 'Dangerous Liaisons: Globalisation and Australian Public Law' (1998) 20 Adel LR 57; D Cass 'Traversing the Divide: International Law and Australian Constitutional Law' (1998) 20 Adel LR 73.