THE GENOCIDE CASE*
NULYARIMMA v THOMPSON

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INTRODUCTION

In *Nulyarimma v Thompson*[1] it was alleged in the Federal Court of Australia that certain politicians, together with the Commonwealth government, had committed acts of genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("the Convention") against members of the Australian Aboriginal community. The case was actually in two separate proceedings, both based on the premise that the international crime of genocide was part of Australian law and as such should be recognised by Australian courts.

The two proceedings were *Re Thompson*[2] and *Buzzacott v Hill*[3]. Although they concerned different parties and claims, they were heard together in *Nulyarimma v Thompson* due to their commonality. In the Federal Court the cases were dismissed unanimously. In the decision, two judges (Wilcox and Whitlam JJ) held that genocide was not a crime under Australian domestic law. On the other hand, although the third judge (Merkel J) dissented and held that genocide, an international crime, was part of the common law of Australia, he agreed with the majority. He held that in the particular instances, the claims were not sustainable and as such should be dismissed.

THE PROCEEDINGS

Re Thompson was an appeal by four appellants (including Nulyarimma) against a decision of Crispin J in the Supreme Court of the Australian

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* This contribution was originally a case summary which now includes some commentary.

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[1] [1999] Federal Court of Australia 1192, 1 September 1999.

[2] Proceedings A5 of 1999.

[3] Proceedings S23 of 1999. Instituted by Buzzacott in the South Australian Registry of the Federal Court of Australia.

Capital Territory.[4] The appellants claimed that the respondent Thompson, Registrar of the Australian Capital Territory Magistrate's Court, should have issued warrants for the arrest of the Prime Minister, his Deputy and two members of parliament.[5] The appellants claimed that the politicians had committed the offence of genocide by the formulation and support of the Commonwealth government's native title "Ten Point Plan" which later became the 1998 Native Title Amendment Act.

Buzzacott v Hill was a motion by two Ministers ("the Respondents")[6] to strike out proceedings instituted by Buzzacott in the Federal Court. Buzzacott had alleged on behalf of the Arabunna Aboriginal People that the respondents and the Commonwealth of Australia had committed genocide. He alleged that this occurred when the Australian government failed to apply to the World Heritage Committee of the United Nations Economic and Social Council ("UNESCO") to include the lands of the Arabunna People (which included Lake Eyre) on the World Heritage List maintained under the 1972 World Heritage Convention.[7] He did not seek criminal sanctions but claimed that the failure constituted an act of genocide. He sought administrative and civil remedies, including a mandatory injunction to compel the respondents to proceed with the World Heritage application and damages.

THE DECISION OF THE FEDERAL COURT

Judgment of Wilcox J

Early in his judgment Wilcox J made the following statements:[8]

1. Anybody who considers Australian history since 1788 will readily perceive why some people think it appropriate to use the term "genocide" to describe the conduct of non-indigenes towards the indigenous population. Many indigenous Peoples have been wiped

[4] Wadjularbinna Nulyarimma, Isobel Coe, Billie Craigie and Robbie Thorpe v Phillip R Thompson (1998) 136 Australian Capital Territory Reports 9.
[5] They were Independent Senator Harradine and Pauline Hanson, founder and President of the Pauline Hanson's One Nation Party.
[6] They were Robert Hill (Minister for the Environment and Heritage) and Alexander Downer (Minister for Foreign Affairs).
[7] The Convention for the Protection of the World Cultural and Natural Heritage, adopted by UNESCO on 16 November 1972 and ratified by Australia on 22 August 1974.
[8] Refer paras 4 and 7 respectively.

out; chiefly by exotic diseases and the loss of their traditional lands, but also by the direct killing or removal of individuals, especially children.

2. Leaving aside for the moment the matter of intent it is possible to make a case that there has been conduct by non-indigenous people towards Australian indigenes that falls within at least four of the categories of behaviour mentioned in the Convention definition of "genocide": killing members of the group; causing serious bodily harm or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and forcibly transferring children of the group to another group.

One "notable" example given by Wilcox J was the rounding up of the remaining Tasmanian Aboriginals in the 1830s and their removal to Flinders Island.[9] However, on the issue of "intent" as a requirement for the offence of genocide, he stated:[10]

> I mention the matter of intent to destroy an ethnical or racial group because it is something that may have been overlooked by those who instituted the proceedings now before the Court.

On this point, he was not convinced that such a genocidal intent existed. However, regardless of whether it existed or not, he held:[11]

> I do not think that, in the absence of appropriate legislation, it (the crime of genocide) is cognisable in an Australian court.

He accepted readily that the prohibition of genocide was a peremptory norm of customary international law or *jus cogens.*[12] As a peremptory norm, it could not be derogated from but could be modified only by a subsequent norm of general international law having the same character.[13] Thus this gives rise to a non-derogable obligation by each nation state to the entire international community, an obligation independent of the

[9] At para 12.
[10] At para 15.
[11] At para 17.
[12] It means "compelling law" in Latin.
[13] Note Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties.

Genocide Convention. He accepted that the obligation imposed by customary international law on each nation state is to extradite or prosecute any person found within its territory who appears to have committed any of the acts cited in the definition of genocide as set out in the Convention. He also approved the constitutional validity of laws based on such obligations.

However, he drew a clear distinction between (1) an international legal obligation to prosecute or extradite a genocide suspect found within Australian territory and the permissibility of the Commonwealth parliament to legislate to ensure that such an obligation was fulfilled, and (2) whether, without legislating to that effect, such a person could be put on trial for genocide before an Australian court. He stated:[14]

> If this were the position, it would lead to the curious result that an international obligation incurred pursuant to customary law has greater domestic consequences than an obligation incurred, expressly and voluntarily, by Australia signing and ratifying an international convention.

He therefore did not share the view of Merkel J that genocide, as one of several "international crimes" (such as piracy, torture and slavery) attracted "special status" as *jus cogens.* He held:[15]

> If genocide is to be regarded as punishable in Australia, on the basis that it is an international crime, it must be shown that Australian law permits that result. There being no relevant statute, that means Australian common law.

He was of the view that the "contest" between the "incorporation" approach and the "transformation" approach to international law becoming part of the domestic law of Australia was in the present context "somewhat academic".[16] He indicated also that domestic courts faced a policy issue in deciding whether to recognise and enforce a rule of international law.[17] However, in criminal cases, the presumption *"nullum crimen sine lege"*[18] should be applied.

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[14] At para 20.
[15] At para 22.
[16] At para 24.
[17] At para 26.
[18] It means "there is no crime unless expressly created by law" in Latin.

Judgment of Whitlam J

Whitlam J stated that it was accepted by all the parties to the proceedings that under customary international law there was an international crime of genocide that had acquired the status of *jus cogens*. This meant that states could exercise universal jurisdiction over this crime.[19] However, he did not agree with the submission of appellants that courts in all states had jurisdiction over genocide.[20] The appellants had relied on the opinion of Lord Millett in *Reg v Bow Street Magistrate, Ex p. Pinochet (No. 3).*[21] This led Whitlam J to examine several seminal international law cases such as *Attorney-General of Israel v Eichmann.*[22]

Whitlam J stated:[23]

> Nonetheless, counsel for the appellants submit that the status of genocide as *jus cogens* compels recognition of genocide as part of the common law of Australia. This submission strikes formidable statutory obstacles.

These "formidable statutory obstacles" were chiefly Section 1.1 of the 1995 Criminal Code (Cth) which provided:

> The only offences against laws of the Commonwealth are those offences created by, or under the authority of, this Code or any other Act.

This provision came into operation on 1 January 1997 and abolished common law offences under Commonwealth law. As a result, "genocide [could] not be recognised as a common law offence under Commonwealth law."[24] Moreover, since the law of the Australian Capital Territory made no express provision for an offence of genocide, he held that likewise, the crime of genocide was not an offence in that jurisdiction.

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[19] At para 36.
[20] At para 49.
[21] [1999] 2 Weekly Law Reports 827.
[22] (1962) 36 International Law Reports 5.
[23] At para 53.
[24] At para 54.

Judgment of Merkel J

Whilst agreeing that the two proceedings should be dismissed, Merkel J dissented on the issue as to whether genocide was an offence under the common law of Australia. He stated:[25]

> In the present case 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. Further, a decision to incorporate crimes against humanity, including genocide, as part of Australia's municipal law at the end of the 20th century satisfies the criteria of experience, common sense, legal principle and public policy.

Before arriving at the above conclusion, Merkel J embarked on an examination of the "incorporation" and "transformation" schools of thought in several common law jurisdictions.[26] He concluded:[27]

> It is plain from a survey of the case law in England, Canada, New Zealand and Australia that the courts have had considerable difficulty in formulating the principles to be applied in determining when a court is to give its imprimatur to the "jural quality" of a rule of international law or put another way, whether a rule of customary international law has become part of domestic law. However, it appears that in Australia at least, Dixon J's "source"[28] view, which equates generally with what I have loosely described as the common law adoption approach, holds sway over the incorporation or legislative adoption approaches.

In deciding the issue of what constituted the "source" view or the common law adoption approach, he set out six principles that should be applied. He held:[29]

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[25] At para 185.
[26] Beginning at para 83.
[27] At para 131.
[28] This was a reference to Dixon J in Chow Hung Ching v The King (1948) 77 Commonwealth Law Reports 449 at 477 where it was argued that international law was not a part, but was one of the sources of English Law.
[29] At para 132

1. A recognised prerequisite of the adoption in municipal law of customary international law is that the doctrine of public international law has attained the position of general acceptance by or assent of the community of nations "as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions.": see Compania Naviera Vascongado v SS Cristina [1938] AC 485 at 497 per Lord Macmillan. Once a rule has been established as having the general acceptance of nation States in the manner stated by Lord Macmillan it will have satisfied the "assent" or "acceptance" of nations criteria of Cockburn CJ in Keyn and Lord Atkin in Chung Chi Cheung and will be given "the force of law within the realm": see Lord Macmillan at 497.

2. The rule must not only be established to be one which has general acceptance but the court must also consider whether the rule is to be treated as having been adopted or "received into, and so become a source of English law": see Holdsworth at 268 and Chow Hung Ching at 477 per Dixon J.

3. A rule will be adopted or received into, and so a source of, domestic law if it is "not inconsistent with rules enacted by statutes or finally declared by [the courts]": Chung Chi Cheung (at 168) per Lord Atkin. Plainly, international law cannot be received if it is inconsistent with a rule enacted by statute. However, the position is less clear with a rule that might be inconsistent with the common law. To the extent that international law is to be received into domestic law, it will have necessarily altered or modified the common law and, to that extent, might be said to be inconsistent with it. Thus, in my view a strict test of inconsistency could not have been intended. I would accept Sawer's observation that inconsistency with the common law (that is, the rules declared by the courts) means "inconsistency with the general policies of our law, or lack of logical congruence with its principles": see Sawer "Australian Constitutional Law in Relation to International Relations and International Law and Australian Law" in O'Connell International Law in Australia 1965 at 50 and Mason at 215.

4. A rule of customary international law is to be adopted and received unless it is determined to be inconsistent with, and therefore "conflicts" with, domestic law in the sense explained above. In such circumstances no effect can be given to it without legislation to change the law by the enactment of the rule of customary international law as law: see Keyn at 202-203 per Cockburn CJ and Holdsworth at 270-271. This approach subordinates rules of customary international law to domestic law thereby avoiding a fundamental difficulty of the incorporation approach which, by requiring the common law to invariably change to accord with rules of international law, subordinates the common law to customary international law. In my view, to do so amounts to re-instating Blackstone's view which I regard Lord Atkin and Dixon J as having rejected. I do not regard Trendtex Trading as offering a sufficient foundation for the re-instatement of Blackstone's incorporation view. I agree with Mason's observation (at 214-215) that in Trendtex Trading there would have been no great difficulty in adjusting the doctrine of precedent to meet the special case of a change in a rule of international law being received into domestic law. Thus, whilst the result in Trendtex Trading is not in dispute, it could equally have been arrived at by the "source" view that is, the adoption of the current rules of customary international law to the extent their operation is not inconsistent with municipal law. Indeed that was, in part, the approach taken by Shaw LJ in Trendtex Trading.

5. The rules of customary international law, once adopted or received into domestic law have the "force of law" in the sense of being treated as having modified or altered the common law. The decision of the court to adopt and receive a rule of customary international law is declaratory as to what the common law is. Upon a court so declaring the common law to be different from what it was earlier perceived to be effect will be given to the declaration "as truly representing the common law": see Western Australia v The Commonwealth (1995) 183 CLR 373 at 485. A rule, once so declared, is applicable to both civil and criminal proceedings in a domestic court: see Keyn, Chung Chi Cheung and Chow Hung Ching.

6. As Trendtex Trading demonstrates international law evolves and changes from time to time. However, unlike the common law, the evolution of, and change, in international law is established by evidence and other appropriate material. Thus, it may be that in certain instances the adoption will only be as from the date the particular rule of customary law has been established.

Merkel J proceeded to consider if legislation was necessary for universal crimes to be adopted as crimes under municipal law. In relation to non-universal international crimes, such as drug trafficking, environmental protection and the taking of civilian hostages, the judge was of the view that a statutory vesting of jurisdiction in an Australian court was the only basis upon which jurisdiction could vest. On universal international crimes, he stated:[30]

> It is clear that under customary international law the jurisdiction to prosecute in respect of universal crimes vests in nation states, it being a matter for the legal system of the particular state how the jurisdiction is to be exercised.

He added:[31]

> [I]t is significant that under international law the duties in respect of universal crimes arise as non-derogable obligations of all states. Thus, save as to the question of prosecution or extradition there is no discretion as to whether to fulfil the obligation. Therefore a vesting under the common law, rather than by a discretionary exercise of legislative power, is consistent with the principles of international law.

On whether genocide was inconsistent with municipal law, he disagreed that section 1.1 of the 1995 Criminal Code (Cth) posed an insurmountable barrier. He stated:[32]

> The section provides that the only offences against "laws of the Commonwealth" are those offences created by, or under the authority of, the Code or any other Commonwealth law. However, it is plain that

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[30] At para 154.
[31] At para 156.
[32] At para 163.

> the reference in the Code to "laws of the Commonwealth" refers to Commonwealth statutory and common law offences and not to crimes arising under customary international law or the common law generally.

On whether the courts would be creating a criminal offence, he was of the view that the court would merely be "adopting" rather than "creating" a new offence. He stated:[33]

> It would be anomalous for the Municipal Courts not to continue their longstanding role of recognising, by adoption, the changes and developments in international law. Accordingly, in my view there is no inconsistency involved in the common law *continuing* to recognise the historical, and increasingly important, role of customary international law, always of course, subject to the legislature's power to abrogate, vary or confirm the operation of the common law of Australia in that regard.

Notwithstanding that he was of the opinion that the earlier proceedings in *Re Thompson* had been wrong in law in not finding that genocide was a crime cognisable in Australian courts, he maintained that the relief sought by the appellants should be refused. His reason was that it would be "futile" for the case to continue as there were "obviously fundamental difficulties confronting the appellants."[34] Such difficulties included:[35]

1. Section 16 of the 1987 Parliamentary Privileges Act (Cth), reproducing in part Article 9(1) of the 1688 Bill of Rights (UK), prohibited the court from inquiring into the propriety of the exercise of legislative power conferred on parliament by the Constitution or related parliamentary proceedings. Furthermore, members of parliament could not commit a crime in speaking to and voting on a bill.

2. It was of crucial importance that elected members of Parliament be free to act in the manner they considered to be in the national interest and without fear of punishment.

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[33] At para 181.
[34] At para 193.
[35] Ibid.

These principles protected members of parliament from prosecution both from introducing the Bill referred to above and for failure to give effect to the provisions of the World Heritage Convention. As such, the judge was not convinced that the "Ten Point Plan" or the resulting 1998 Native Title Amendment Act (Cth) constituted the crime of genocide. He observed:[36]

> However, before departing from this aspect of the case it is desirable that I make certain observations as to the dangers of demeaning what is involved in the international crime of genocide. Undoubtedly, a great deal of conduct engaged in by governments is genuinely believed by those affected by it to be deeply offensive, and in many instances harmful. However, deep offence or even substantial harm to particular groups, including indigenous people, in the community resulting from government conduct is not genocide law.

Whilst cautious to strike out the proceedings of *Buzzacott v Hill,* he believed that the claim in relation to the World Heritage Convention and the resulting 1983 World Heritage Properties Conservation Act (Cth) did not confer any justiciable right upon an individual. Consequently, the particular proceedings in the present case were "misconceived"[37] and accordingly he dismissed the proceedings. On the other hand, it should be noted that he did not rule out the possibility of other proceedings, though such proceedings would require, "radical change...and different parties."[38]

POSTSCRIPT

It did not take long for other allegations of genocide to surface in Australian courts. In *Sumner v United Kingdom of Great Britain and ors*[39] the plaintiff, Darrell Sumner, unsuccessfully attempted to move the Supreme Court of South Australia to grant an interlocutory injunction to stop the defendants from commencing construction of the Hindmarsh Island Bridge.[40]

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[36] At para 199.
[37] At para 233.
[38] At para 234.
[39] [1999] South Australian Supreme Court 456, Proceedings SCGRG-99-1257, Judgment delivered on 27 October 1999.
[40] See Kartinyeri v Commonwealth (1998) 72 Australian Law Journal Reports 722 (more commonly known as "the Hindmarsh Island Bridge Act case") which answered in the affirmative that the 1997 Hindmarsh Island Bridge Act (Cth) was supported by section

One of the arguments raised in support of the application before Nyland J in *Sumner* was that since there were no Australian laws on genocide, the applicable law should be that of the United Kingdom, namely, the 1969 Genocide Act (UK). In support of this contention, the Plaintiff submitted:[41]

> Where there has been a deliberate refusal and failure to pass genocide legislation protecting citizens who have a history of involvement with the United Kingdom, the subjects of the British Kingdom formally, then the extraterritorial jurisdiction of the United Kingdom Act is attracted, and attracted as the nearest and most appropriate Member of State of the United Nations to provide protection against what the preamble to genocide convention calls a scourge on mankind.
>
> We say that, ordinarily, citizens of a Member State of the UN can avail themselves of the protection against genocide encompassed by the Member State legislation.
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> Where such legislation is absent, and intentionally absent, then the Ngarrindjeri [people] are entitled to turn to the people who have a fiduciary obligation towards them, namely the United Kingdom, because they first invaded the Ngarrindjeri land and they can avail themselves to the protection of the United Kingdom.
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> We say there is sufficient connection between the Ngarrindjeri and the United Kingdom to, where the State of South Australia, *(sic)* which was subsequently the alleged successor in title, and where the Commonwealth of Australia, which have failed to – we say failed deliberately – to pass a Genocide Act – which the State of South Australia can do, they have sovereign power, they have failed to do that – and the Ngarrindjeri can turn to the next most likely country and Member State of that, the UK.
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> We say the history of the Ngarrindjeri is so inexplicably tied up with the history of the UK on that point, ie genocide, that the jurisdiction can be attracted.

51(xxvi), the "race power" of the Constitution.

[41] At para 27.

However, Nyland J was not persuaded that he could exercise any jurisdiction pursuant to the United Kingdom legislation. Referring to *Nulyarimma v Thompson* he stated:[42]

> In my view, that decision represents the current state of the law on the topic of genocide in Australia.

Accordingly, the Plaintiff's application for an interlocutory injunction was refused. An appeal[43] to the Full Court of the Supreme Court of South Australia from this decision was also unsuccessful. An application to the High Court of Australia before Gummow J[44] seeking an order for expedition of a special leave application and an interim injunction restraining further construction was also unsuccessful.

During submissions Gummow J took objection to the continued use of the term "white court". When dealing with the argument on the 1969 Genocide Act (UK) he stated:[45]

> It is the Act of a foreign country. It is a statute of a foreign country. I am not surprised no one is enthused about applying it. One of the arguments raised in support of the application before Nyland J in *Sumner* was that since there were no Australian laws on genocide, the applicable law should be that of the United Kingdom, namely, the 1969 Genocide Act (UK).

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[42] At para 32.

[43] Sumner v United Kingdom of Great Britain and ors [1999] South Australian Supreme Court 462, Proceedings SCGRG-99-1257; Judgment delivered 2 November 1999.

[44] Sumner v United Kingdom of Great Britain and ors A34/1999 (15 November 1999).

[45] The transcript of the application is available at http://www.austlii.edu.au/au/other/hca/transcripts/1999/A34/1.html