

Genocide: the distance between law and life

Larissa Behrendt

When we left Port Augusta, when they took us away, we could only talk Aboriginal. We only knew one language and when we went down there, well we had to communicate somehow. Anyway, when I come back I couldn't even speak my own language. And that really buggered my identity up. It took me 40 odd years before I became a man in my own people's eyes, through Aboriginal law. Whereas I should've went through that when I was about 12 years of age.¹

The thing that people were denied in being removed from family was that they were denied being read as Aboriginal people, they were denied being educated in an Aboriginal way.²

The above quotes are cited from the Human Rights and Equal Opportunity Commission's 1997 report, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* and form part of the evidence collected by the inquiry. This same report concluded that the government policies of removing children were in breach of international laws prohibiting genocide and amounted to crimes against humanity.

However, use of the term 'genocide' to describe the colonial experience has been met with skepticism from some quarters, particularly by those engaged in the attack on the 'black armband' view of history.³ Yet the political posturing and semantic debates do nothing to dispel the feeling Indigenous people have that this is the word that adequately describes our experience as colonised peoples. This description of dispossession and the forced removal of children from the point of view of the victim/survivor of historical and colonial processes is hard to fit into academic and legal discourse. As Marcia Langton has written:

Some of us have lived through it, are living through it. It is not an exercise in historiography alone, and therefore presents problems beyond that of traditional historiography.⁴

1. Human Rights and Equal Opportunity Commission 1997, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Sterling Press, Sydney: 203.

2. Human Rights and Equal Opportunity Commission, 1997: 203.

3. For an account of this attack, see Colin Tatz 1999.

The emotional nearness of colonisation, particularly to the practices of dispossession and the removal of children, has meant that the articulation of experience has been contentious and politicised, characterised as emotive and therefore seen as subjective. At the same time, the voices of those who study Indigenous people, those who have not felt the personal impact of colonial processes, have been elevated as though their observations contain some kind of objectivity. This assumed objectivity and neutrality is also purported to exist in the legal analysis by jurists of Indigenous issues, experience and rights.⁵

Two recent claims against the Australian state by Indigenous plaintiffs have argued that there have been acts of genocide committed against Aboriginal and Torres Strait Islander peoples by the Australian government. This issue has been argued in a case that sought to have members of the Federal government charged with the crime of genocide for the passage of *Native Title Amendment Act 1998*, perceived to be a further act of dispossession (*Nulyarimma v Thompson* (1999) and in the first 'stolen generations' case to make its way to the High Court of Australia (*Kruger v The Commonwealth* (1997)). In both these cases, the plaintiffs sought to invoke rights to freedom from genocide under international law. The reasoning in these cases allows some assessment of the gap between the experiences of Indigenous Australians under colonisation, and the recognition and protection of the rights of Indigenous people as they are articulated under international law are extended by the legal system of that colonial state. These cases also highlight the weaknesses in the dominant Australian system in relation to the protection of rights recognised and enforceable under international laws.

Genocide under International Law

Article 2 of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*⁶ (the Genocide Convention) defines genocide as follows:

Article 2. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;

4. Marcia Langton, <http://www.lib.latrobe.edu.au/AHR/emuse/tabooos/langton2/html>.

5. This view of law as a neutral is encapsulated in the work of H.L.A. Hart 1958, 'Positivism and the separation of law and morals' *Harvard Law Review*, 17: 593; Ronald M. Dworkin 1982, 'Natural' law revisited', *University of Florida Law Review*, 34: 165. It has been seen as perpetuating power relations in the work of critical legal scholars. See Roberto Mangabeira Unger 1986, *The critical legal studies movement*, Cambridge, Harvard University Press; Duncan Kennedy 1982, 'Legal Education and the Reproduction of Hierarchy' *Journal of Legal Education*, 32: 591. Feminist jurisprudence has critiqued the supposed neutrality as perpetuating a patriarchal power relationship, see Robin West 1988, 'Jurisprudence and gender' *University of Chicago Law Review*, 55: 1; Catherine A. McKinnon 1989, *Towards a feminist theory of the state*, Cambridge, Harvard University Press; and Angela P. Harris 'Race and essentialism in feminist legal theory', *Stanford Law Review*, 42: 581. There is also the work of the critical legal studies movement that highlights racial bias in law making and judicial process, see Derrick Bell 1985, 'Foreword: The civil rights chronicles' *Harvard Law Review*, 99: 4; Kimberle Williams Crenshaw 1988, 'Race, reform and retrenchment: transformation and legitimation in anti-discrimination law', *Harvard Law Review*, 101: 1331.

6. Australia ratified the Convention on 8 July 1949.

- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

Article 3 deems genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide and complicity in genocide to be punishable offences under the Genocide Convention.

However, international conventions are often the codification of international customs and norms, and it has been generally accepted that the act of genocide breached international norms that existed at the time the Genocide Convention was passed.⁷ Although Australia ratified the Genocide Convention on 8 July 1949, legislation has not been passed to incorporate it into Australia's domestic legislation.⁸

In the draft of the Genocide Convention by the ad hoc committee that originally drafted the document, there was a prohibition on cultural genocide but this was deleted from the list of prohibited acts.⁹ Thomas D Musgrave points out that 'although the Convention guarantees the right of continued existence to *members* of minorities, it does not guarantee the continued existence of a *group* as a discrete identity.'¹⁰ However, Article 2(e) includes the forcible transfer of children in the definition of 'genocide'. This conceptualisation is also consistent with the emphasis on individual rights under international law, rather than on group rights, a framework that sees the individual, not the group, as the holder and beneficiary of rights.

Another principle of note is that 'genocide' is not the actual destruction of the members of a minority group but the *intention* of their destruction. This means that there must be an intention to destroy and it also means that the destruction of one person can be considered genocide if it is part of a series of actions designed to destroy the group to which the person belonged.¹¹ This requirement of intention is important as it is this element that has proved to be the greatest hurdle to claims of genocide made in Australia by Indigenous people in the courts. It should be noted that the authors of the *Bringing Them Home* report did not state that the actions of government agents lacked such intention.

7. See Henry Steiner and Philip Alston 1996, *International human rights in context: law, politics, morals*, Oxford University Press, Oxford: 26–9; William Schabas 2000, *Genocide in international law: the crime of crimes*, Cambridge University Press, Cambridge.

8. Andrew Mitchell (2000: 45–6) argues that the proposed Anti-Genocide Bill 1999 which would facilitate the extradition of war criminals who faced charges of genocide would bring Australia into line with its obligations under the Genocide Convention. The legislation would not be retrospective.

9. Thomas D Musgrave 1997, *Self-determination and national minorities*, Oxford, Oxford University Press, 1997: 131.

10. Musgrave 1997: 131.

11. Alston & Steiner (1996: 1028), citing Yorum Dinstein 1975, 'International criminal law' *Israel Yearbook on Human Rights*, 5: 55.

The Bringing Them Home report

I felt like a stranger in Ernabella, a stranger in my father's people. We had no identity with the land, no identity with certain people ... I've been learning culture and learning everything that goes with it because I felt, growing up, that I wasn't really a blackfella. You hear whitefellas tell you you're a blackfella. But blackfellas tell you you're a whitefella.¹²

The *Bringing Them Home* report concludes that:

One principal effect of the forcible removal policy was the destruction of cultural links. This was of course their declared aim. ... Culture land and identity were to be stripped from the children in the hope that the traditional law and culture would die by losing their claim on them and sustenance of them.¹³

It makes the case for the categorising of the removal of Indigenous children under the policy as genocide.¹⁴ Guided by the intention of the drafters of the Genocide Convention, the *Bringing Them Home* report observed that genocide includes 'a coordinated plan of different actions aimed at the destruction of the essential foundations of the life of national groups with the aim of annihilating the groups themselves'.¹⁵ As such, genocide 'can be committed by means other than actual physical extermination' and this includes the forcible transfer of children.¹⁶

After noting that the forcible transfer of children can be genocide, the report adds that genocide does not mean the total destruction of a group. Rather, 'the essence of the crime of genocide is the intention to destroy the group as such, not the extent to which that intention has been achieved.' This interpretation is faithful to the Genocide Convention that, under Article 3, deems both the *attempt* and the *conspiracy to commit* the crime of genocide punishable offences under international law.

The report concludes that a principal aim of the child removal policies, even while those administering the policy thought they were acting in the child's best interests, was to eliminate the child's connection to their Indigenous heritage. Such mixed intentions and motives do not 'negate or transform the intention to destroy'.¹⁷ Again, the report looks to the discussions concerning the definitions of 'genocide' that took place at the time the Genocide Convention was drafted in order to assert that 'an act or policy is still genocide when it is motivated by a number of objectives'.¹⁸

The *Bringing Them Home* report goes further and concludes, persuaded by evidence placed before it, that the 'practice of preferring non-Indigenous foster and adoptive families for Indigenous children' was also arguably 'genocidal' since the genocidal effect of these practices that took place in the 1970s and 1980s (after the period of formal child removal policies was over) was reasonably foreseeable.¹⁹

12. Human Rights and Equal Opportunity Commission (HREOC) 1997: 203.

13. Human Rights and Equal Opportunity Commission 1997: 202.

14. Human Rights and Equal Opportunity Commission 1997: 271–5.

15. Ibid, 271. The report is relying on the interpretation of genocide propounded by Raphael Lemkin (1944: 79), a drafter of the Convention, in his *Axis rule in occupied Europe*, Columbia University Press, New York. See the Introduction to this section by Ann Curthoys and John Docker.

16. Human Rights and Equal Opportunity Commission 1997: 271.

17. Human Rights and Equal Opportunity Commission 1997: 273.

18. Human Rights and Equal Opportunity Commission 1997: 274.

The report also considers the implications of a customary or normative international law existing before the drafting of the Genocide Convention and looked to the Preamble of the Convention to illustrate the fact that the crime of genocide was recognised as a pre-existing norm. As such, the removal of Indigenous children constituted a crime under international law before the Convention was drafted and ratified.²⁰

Bringing Them Home considers genocide to have been committed by the removal policy and considers that this was so both before the Genocide Convention was signed and after the government policy had formally ended.

The Australian jurisprudence of genocide

I don't know when I ever stopped being frightened of Aboriginal people. I don't know when I even realised I was Aboriginal. It's been a long hard fight for me.²¹

Two recent cases reveal the way in which Australian courts attempt to deal with the assertion that colonial practices and policies were and are genocidal: *Kruger v Commonwealth*²² and *Nulyarimma v Thompson*.²³

Genocide and the stolen generation case: *Kruger v Commonwealth* (1997)

Kruger v Commonwealth was the first opportunity for the High Court to consider the legal implications resulting from the policy of forcibly removing Indigenous children from their families. The plaintiffs, five people who had been taken from their families under the *Aboriginals Ordinance* 1918 (NT) and one parent whose child had been taken from her under the same provision, sought a declaration that the *Aboriginals Ordinance* 1918 (NT) (and its subsequent amendments in 1939 and 1953) was invalid. Section 6 of the Ordinance read as follows:

6. (1) The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any Aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interest of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the Aboriginal or half-caste is or is supposed to be, and may take him into his custody.

Section 7 deemed the Chief Protector of Aborigines to be the legal guardian of Indigenous children until the age of 18, regardless of the existence of parents or other living relatives.

The plaintiffs attacked the validity of the Ordinance on many grounds including that it contravened the protection of the freedom of religion in section 116 of the Constitution, infringed an implied freedom of movement and authorised involuntary detention of a 'penal' or 'punitive' character which was a decision of a judicial nature (and could therefore only be made by a court). They also argued that the Ordinance contravened the International Convention on the Prevention and Punishment of the Crime of Genocide. Specifically, the plaintiffs claimed that the Ordinance breached Article 2(d), imposing measures intended to prevent births within the group, and (e), forcibly transferring children of the group to another group.

19. Human Rights and Equal Opportunity Commission 1997: 274.

20. Human Rights and Equal Opportunity Commission 1997: 275.

21. Human Rights and Equal Opportunity Commission 1997: 211.

22. *Kruger v. The Commonwealth* (1997) 190 CLR 1.

23. *Nulyarimma & Ors. v. Thompson* (1999) 165 ALR 621.

The plaintiffs were unsuccessful on each count but the judicial reasoning as to why the Genocide Convention did not apply in this case deserves closer scrutiny. Arguments that the Ordinance breached the provisions of the Genocide Convention were rejected primarily on the basis that the Genocide Convention came into force in 1951 and the Ordinance was enacted in 1918, more than 30 thirty years before then. In taking this line of reasoning, the plaintiffs' argument that the Genocide Convention merely gave expression to a pre-existing international norm was unpersuasive.

Justice Dawson noted that at no time did the Convention become incorporated into domestic Australian law. He relied on the legal requirement that the provisions of international treaties be incorporated into Australian law through legislation, just as the *Racial Discrimination Act 1975 (Cth)* incorporates some of our obligations under the *Convention on the Elimination of all forms of Racial Discrimination*. Justice Dawson stated in his decision: 'Where such provisions have not been incorporated they cannot operate as a direct source of individual rights and obligations'.²⁴

By this reasoning, not only are the principles of the Genocide Convention unable to be relied upon by the plaintiffs, but the norms of international law are also out of their reach. It is only when the Australian law incorporates those norms in legislative form that there is an avenue of redress for people in that jurisdiction. Justice Dawson concluded that this meant that the provisions of the Ordinance were not invalid, even if they did offend the principles of the Genocide Convention. In doing so, he rejected the claim of the plaintiffs that there 'are some rights at common law which are so fundamental that it is beyond the sovereign power of parliament to destroy'.²⁵ Instead, he relied on the doctrine of parliamentary sovereignty, namely, that the Parliament has the highest authority to make laws as long as they are constitutional. This was consistent with his view that international law is not part of Australian law unless the Australian Parliament passes legislation to incorporate it.

According to the Genocide Convention, a necessary element in genocide is an 'intent to destroy' an ethnic, racial or religious group. Justice Toohey hinged his rejection of the plaintiffs' argument on the applicability of the Genocide Convention in part on the fact that the definition required 'intent to destroy'.²⁶ He found that the benevolent wording of the Ordinance — 'in the best interests of the child' — did not show such intention. Thus, the paternalistic wording of the Ordinance, according to the courts, defeated the argument of 'genocide' since it did not evidence the intent required to prove it under international law. Justice Dawson stated that:

There is nothing in the 1918 Ordinance, even if the acts authorised by it otherwise fell within the definition of genocide, which authorises acts committed with intent to destroy the whole or in part any Aboriginal group. On the contrary, as has already been observed, the powers conferred by the 1918 Ordinance were required to be exercised in the best interests of the Aboriginals concerned or of the

24. *Kruger v The Commonwealth* (1997) 190 CLR 1: 71. Justice Dawson does note that where legislation is unclear, relevant international treaties can be used to aid interpretation. This is a mechanism allowed under the Acts Interpretation Act (Cth).

25. *Kruger v The Commonwealth* (1997) 190 CLR 1: 72 Justice Dawson relies on *Union Steamship Co. of Australia Pty Ltd v King* (1988) 166 CLR 1.

26. *Kruger v The Commonwealth* (1997) 190 CLR 1: 88.

Aboriginal population generally. The acts authorised do not, therefore, fall within the definition of genocide contained in the Genocide Convention.²⁷

It was a sad irony that the benevolent language of the legislation defeated the plaintiffs' claims when that same Ordinance was used in a way that furthered the ideologies of assimilation, racial inferiority and 'breeding out'; but this context and legacy remained outside the sphere of judicial consideration since the court only looked at the wording of the statute.

Justice Gaudron, who has been more sympathetic to the view that there are basic rights that are so fundamental that they cannot be destroyed,²⁸ also concluded that, on the face of it, the Ordinance did not authorise acts of 'genocide' as defined and prohibited under the Genocide Convention. She did, however, add that 'if acts were committed with the intention of destroying the plaintiffs' racial group, they may be the subject of an action for damages, whether or not the Ordinance was valid'. This was the strongest statement that there may be a remedy for the crime of genocide within Australian law. However, it was the minority view.

Because the plaintiffs' claims had been limited to a challenge on the wording of the Ordinance, the High Court considered the legislation as a matter of fact, devoid of its ideological, social and historical context. This detachment from social context occurred in the face of the findings of the Human Rights and Equal Opportunity Commission's *Bringing Them Home* report on the enormous emotional, physical and psychological harm caused by the removal policy contained in the Aboriginals Ordinance.

Genocide and dispossession: *Nulyarimma v. Thompson* (1999)

This litigation was the joining of two cases, *Nulyarimma v Thompson* and *Buzzacott v Hill*. In the first suit, the plaintiffs brought an action seeking to have the Prime Minister John Howard, Deputy Prime Minister Tim Fischer, Senator Brian Harradine and Senator Pauline Hanson arrested on allegations that they had committed the criminal offence of genocide through their support and role in the implementation of the *Native Title Amendment Act 1998* (Cth). The second case was a motion to strike out proceedings by the plaintiff against the Minister for the Environment (Senator Robert Hill) and the Minister for Foreign Affairs (Alexander Downer) for failure to apply to UNESCO for World Heritage Protection of their land. The plaintiff argued that this failure to act amounted to genocide and was a breach of a fiduciary obligation. Both of these cases saw the plaintiffs argue that the lack of protection of land rights threatened the physical and cultural survival of the Indigenous people and amounted to the crime of genocide.

The argument in *Nulyarimma v Thompson*, as Justice Merkel set it out, ran as follows:

The prohibition against genocide is a customary norm of international law;

Australian municipal law incorporates customary norms of international law without the need for legislation;

²⁷. *Kruger v The Commonwealth* (1997) 190 CLR 1: 70.

²⁸. As per her judgements in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106: 212; *Kruger v The Commonwealth* (1997) 190 CLR 1: 196-7.

The universal crime of genocide, as a customary norm of international law, has been incorporated into the common law of Australia.²⁹

The issue in dispute in this case, as identified by Justice Merkel, was 'whether the crime of genocide, which attracts universal jurisdiction under international law, can become part of Australian law without a legislative act creating genocide as an offence'.³⁰ To rephrase, the issue that the Court saw the parties in disagreement over was whether it was necessary to pass legislation in order to incorporate international norms into Australian law or whether such norms are already an inherent part of our domestic laws.

Justices Wilcox and Whitlam held that a breach of the Genocide Convention does not mean a breach of Australian law. The crime is prohibited by international law and Australia has an obligation under the Convention to extradite or prosecute anyone within its jurisdiction. It would be constitutional for the Commonwealth Government to implement legislation to facilitate the trial of persons who have breached the Convention, though at the time of hearing it had not yet done so.

This is despite the fact that, in considering the evidence, Justice Wilcox made the following observation:

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 people have been wiped out, chiefly by exotic diseases and the loss of their traditional lands, but also the direct killing or removal of individuals, especially children.³¹

However, the issue for him, as it had been for the court in *Kruger v Commonwealth*, was one of intention:

However, deplorable as our history is, in considering the appropriateness of the term 'genocide', it is not possible too long to leave aside the matter of intent.³²

He explains:

Of course, there was an element of intent about all the killings. A squatter who shot at Aboriginals in reprisal for them spearing his cattle must be taken to have intended to kill the *individuals* at whom he shot; it cannot necessarily be presumed he intended to destroy the *group* as such, even in part.³³

He concluded that the element of intent in genocide seemed to have been overlooked by the plaintiffs in the formulation of their claims before the court and states:

However, if one is to use a legal term like 'genocide' to describe that process, it is important to remember this entails a requirement to prove an intent to destroy a people.³⁴

Further, Justices Wilcox and Merkel held that since the legislation was part of usual parliamentary business, it would be against the public interest if prosecution of this type sought by the plaintiffs could occur as it would circumvent the doctrine of

29. *Nulyarimma & Ors. v Thompson* (1999) 165 ALR 621: 641.

30. *Nulyarimma & Ors. v Thompson* (1999) 165 ALR 621: 642.

31. *Nulyarimma & Ors. v Thompson* (1999) 165 ALR 621: 624.

32. *Nulyarimma & Ors. v Thompson* (1999) 165 ALR 621: 626.

33. *Nulyarimma & Ors. v Thompson* (1999) 165 ALR 621: 626.

34. *Nulyarimma & Ors. v Thompson* (1999) 165 ALR 621: 627.

parliamentary privilege. Support for the passing of a valid legislative act could not constitute criminal conduct. They further considered that the opinions expressed by the defendants in this matter were of a political nature and protected by the implied freedom on communication under the Commonwealth Constitution.³⁵ It is hard to overlook the conclusion that there is an implied right to protect the political communication of the defendants but no implied right to the protection from genocide held by the plaintiffs.

Justice Merkel concluded:

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 action is not genocide.³⁶

The court also stated that the *Native Title Amendment Act 1998* (Cth) did not evidence the requisite intention needed to make out, *prima facie*, a case of genocide. In addition, the decision by the Federal Government not to proceed in seeking Heritage Protection listing for a site was a policy decision and not justiciable. The Justices also noted that obligations under the World Heritage Convention are owed to States, not to individuals so a private citizen cannot bring a suit if there is a breach of such a duty.

The High Court has refused special leave to have the case heard.³⁷

The gap between language and law

Claims to breach of the protection from genocide by the practice of child removal and from further dispossession have been unsuccessful in Australian courts. They have failed because of the legal definition of genocide, legal technicalities and the rules of evidence.

In both *Kruger v Commonwealth* and *Nulyarimma & Ors. v Thompson* the plaintiffs faced several hurdles. One was the definition of genocide and its demand of the element of intention. The benevolent wording of the ordinance that empowered agents of the state to remove children and the wording of the *Native Title Amendment Act 1999* in facilitating further extinguishment of native title interests did not show an intention to commit genocide. The court looked merely within the four corners of the laws, not delving into the social context in which those laws were made nor the effects of those provisions.

Genocide in this context is part of the colonisation process that takes place in many guises over many generations, with many attempts, with many policies, with many administrators. Henry Reynolds has been cautious about the label 'genocide'. In *Frontier: reports from the edge of white settlement*³⁸ he notes that decrease in numbers on the frontier are attributable to disease more than violence but that this does not answer what he sees as the central question: 'Did significant numbers of settlers seek the total

35. Justices Wilcox and Whitlam relied on *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

36. *Nulyarimma & Ors. v Thompson* (1999) 165 ALR 621: 671.

37. Special leave was denied on 4 August 2000.

38. Henry Reynolds 1987.

destruction of Aboriginal Australia?'³⁹ Reynolds tracks three colonial reactions: those who were horrified at the treatment of Aboriginal people, those who thought the 'dying out' of Aboriginal people was inevitable, and those who 'were pleased with the result and sought to hasten the predetermined result'.⁴⁰

In *Nulyarimma v Thompson*, Justice Merkel acknowledged that there was violence and that there were harmful assimilation practices, but could not fit those historical events into the legal definition. The court also had trouble dealing in isolation with just one of the elements that worked together to make Indigenous people vulnerable to physical violence and genocide. It is difficult for the court in its judicial process to take stock of the historical accounts of intentional murders on the frontier sanctioned by the government, not because of policy, command or order but because officials, through either indifference or impotence, did nothing to prevent them. In such ad hoc and multifaceted colonial violence, it is difficult to identify the agent of genocide. Is it the members of the colonising society? Is it someone in official authority? Is it the Crown? And with several colonies, how can a coordinated policy be determined? An intention might be inferred from the frontier invaders but it is hard to link it to the bureaucrat in the colonial office, especially when there are no 'smoking guns' in the colonial documentation.

Intention and blame are hard to attribute as a historical matter and, for that reason, are no less difficult in the legal context. Courts avoid these dilemmas by sticking to narrow questions and confining their questions to the wording of legislation.

A. Dirk Moses argues that genocide needs to be considered with a more dynamic analysis, one that looks holistically at the process of colonisation.⁴¹ He has argued that the debate around 'genocide' has become polarised as '[o]ne side claims that European colonisation of Australia was genocidal; the other denies it'.⁴² This polarisation has meant that the nuances in the debate have not been able to be properly explored. He concludes that 'the British colonisation of Australia was *objectively* and *inherently* ethnocidal and fatal for Aborigines, and potentially genocidal'.⁴³

Although Moses is talking about historiography, his observations work equally for the jurisprudence of genocide. It is no coincidence that the two sides on this historiographic debate are split on the issue of whether there was an intention to commit the genocidal act, the very part of the definition that raised difficulties for the plaintiffs in *Kruger* and *Nulyarimma*. His holistic and dynamic approach to understanding the phenomena of genocide would go some way towards countering the detached and isolated way in which courts to date have analysed the circumstances of genocide.

The other legal issue that has thwarted Indigenous claims of genocide is the issue of the extent to which the Genocide Convention is incorporated into Australian law. One school of jurisprudential thought says that, as a norm of international law, it is a

³⁹. Henry Reynolds 1987: 54.

⁴⁰. Henry Reynolds 1987: 54.

⁴¹. A. Dirk Moses 2000.

⁴². Moses 2000: 89.

⁴³. Moses 2000: 92.

part of our domestic laws. The other school holds that legislation is required before international law is incorporated.

Thus, the law concludes with a seemingly frustrated shrug that what is morally wrong is not always legally wrong. There are, as these cases bear out, lawyers' tricks to stop justice — definitions, intent, proof, evidence. Narrow formulations of questions facilitate the avoidance of the context and effects of legislation. There are also procedural issues of whether international norms are part of Australian laws, whether the Genocide Convention is part of Australian law. As the plaintiffs discovered, rights under international law may have no enforcement mechanism within Australia.

This ability of the colonial legal system to seemingly approach the claims of genocide with a façade of neutrality, has also meant that expressions from an Indigenous point of view are sidelined. For Indigenous plaintiffs, it doesn't matter whether the crime of genocide was committed as it was defined by international law and it doesn't matter whether there was intention or not. What seems to be more important from the Indigenous perspectives are the *effects* of the actions of the government — these actions have amounted to damage to Indigenous people, families and communities and they choose to use the word 'genocide' to describe it. This moves the discussion outside of the words of the statute to the side-effects and legacies of those sanctioned actions.

Massacres of Aboriginal people form part of the rich oral histories of Indigenous people all over Australia, with sites where such atrocities took place now taking their place amongst the other stories and lore and histories that mark land. Such acts of massacre were chronicled in letters home and diaries, places where candour revealed the acceptance of the bloodshed, and in the parliamentary documents when such incidents were reported and investigated.⁴⁴ Similarly, Indigenous families are riddled with the impacts of the child removal policy. Separation from family, disconnection from culture, and institutionalisation run through Indigenous lives, as the *Bringing Them Home* report attests. Yet, those on the right dismiss an expression of those effects as mere emotional rhetoric.⁴⁵ With these legal impotencies, it becomes clear why Indigenous people who feel that the rules of the coloniser, made by the coloniser, help the coloniser treat the perception of law's neutrality with skepticism.

The gap between justice and rules

The law is often portrayed and believed to be operating in a neutral, considered and objective manner. Legal deliberations on emotive subjects are considered rational and reasonable, governed by the rules of evidence and rule of law, above the emotive and passionate. However, Australian laws contain a colonial bias that the following account of colonial-sanctioned genocide bears out.

The Durack family, led by Patrick 'Patsy' Durack, formed an expedition to go into the Kimberley region in 1881 to 1882. Mary Durack, Patsy's granddaughter, chronicled the family's history in *Kings in grass castles*. It reads like a classic, heroic tale of taming

⁴⁴. Such incidents are chronicled in Bruce Elder 1988. The span of Elder's consideration is the 1820s to the 1920s.

⁴⁵. See generally Colin Tatz 1999.

the wild land and the wild beasts (including the Aborigines). In her book, Mary Durack described contact with the Aborigines in the following terms:

In a deserted camp [Michael Stumpy Durack] picked up some part-finished and broken spearheads, fashioned from the flint and agate of the rocks around, like relics of the stone age found in the drifts and caves of Europe. The camp had been left hurriedly, probably on his coming, and embers still glowed on a small cairn of stones. Hoping to find a bird or goanna, ready cooked in skin or feathers, to appease his hunger, he moved the hot stones to uncover in horror the part-cooked body of a child.⁴⁶

This excerpt is particularly telling. The colonial meta-narrative asserts that Indigenous people just disappeared in the face of on-coming European 'settlers' — the myth that supported the legal fiction of *terra nullius*. Also note the implied reference to the savage practice of cannibalism which was not practised in the Kimberley, a mechanism to dehumanise Indigenous people in that area.

On a closer look, it becomes apparent that *Kings in Grass Castles* masks the frontier violence for conquest. Mary Durack provides several examples of this force and violence, but in justified terms:

Punitive parties, meeting out stern retribution for the death of Jack Travers ... who had had his head chopped off while bent over his baking dish, had done nothing to intimidate them. Lately they had taken to mutilating horses, skulking on the outskirts of the mobs and sometimes causing a stampede.⁴⁷

Durack tells the typical colonial tale in which punitive expeditions were justified because they taught the natives a lesson and ensured that valuable stock was safe. We can read under these lines the usual colonial spin on these encounters. There is no investigation of the actual reasons of the conflict (we assume that Jack Travers was an innocent victim where historians reveal that most such attacks were provoked, most often by abuse of Aboriginal women.)⁴⁸ Also, we can read in her text that many people were punished for the death of one white man, and those so punished may or may not be the actual 'murderer(s)'.

Similarly, in the response to the death of a popular man, Big Johnnie (speared as he rode along a river bank by an unknown person), we see the usual colonial perspective:

Big Johnnie had been a hero to stockmen of Cooper's Creek and the overland trail and the shock of his death hardened their hearts to steel against the blacks.⁴⁹

One can only imagine what the vengeful passions of men whose hearts had hardened to steel against the Indigenous people led to. Durack advises further on:

One lesson they learned from this chase, however, was the 'treachery' on the part of the blacks must be met with 'strategy' by the whites.⁵⁰

46. Mary Durack 1959: 217.

47. Durack 1959: 247.

48. Ann McGrath 1984: 235. See also Ann McGrath 1987, *Born in the cattle*, Allen & Unwin, Sydney.

49. Durack 1959: 293.

50. Durack 1959: 294.

Criticisms made of 'excesses' on the frontier that flowed from those who lived away from such a brutal and violent existence are dismissed by the Duracks:

Disappointment was expressed throughout the north when, owing to the protests of so many 'uninformed sentimentalists' in safely settled areas, Forrest's motion was thrown out. What, demanded the bush people, was a handful of pioneers, menaced by savage tribes hundreds, perhaps thousands strong, supposed to do? Were they to admit defeat, clear out and give the country back to the Aborigines, or quietly turn the other cheek, confident that 'sweet reason' would at length prevail while their relatives and friends were murdered and their stock destroyed?⁵¹

Another member of the Durack family, Jim Durack, wrote the following verses, included in *Kings in Grass Castles*:

You who tread safe the city's beaten tracks,
 May well believe in kindness to the blacks.
 Would you still hold your dusky friend so dear
 If he was dodging round you with a spear?
 ...
 How else than cold the lonely stockman's heart
 Who sees his horse lie slain by savage dart?
 Picture the frenzy on the squatter's brain
 When spearing bullocks dot the spreading plain,
 Or, how the solitary traveller feels
 When round his camp the sneaking nigger steals ...
 No suppliants they face who would disguise
 Their bloody purpose from their victim's eyes ...
 Thoughtless he turns towards his waiting hack,
 Too late — too late! The spear is in his back ...
 Ah who shall judge the bushman's hasty crime
 Justified by both circumstance and clime?
 Righteous the hate with which the soul is filled
 When man must slaughter or himself be killed ...⁵²

Mary Durack attempts to put these genocidal sentiments in context:

Although his verses would no doubt have lent more weight to the other side of the argument, young Jim's indignation at the city critic was not unjustified for whatever principles men professed while 1,000 miles away, once in Kimberley they all more or less subscribed to the philosophy of 'us or them'.⁵³

Later on, in the period of 1891 to 1893, Durack notes the 'law' taking over the policing on the frontier:

51. Durack 1959: 313.

52. Durack 1959: 313–14.

53. Durack 1959: 314.

Moreover, a daily living allowance of 2s 5d 'per knob' for all natives arrested as suspects and witnesses made it profitable to bring in as many as they could manage. Chained together neck to neck, wrist to wrist, the long lines of prisoners, men, women, and children, wound their miserable way over the bush tracks to receive sentence in Wyndham, Derby or Hall's Creek.⁵⁴

The vengeful, calculated and senseless killing of Aboriginal people is no longer carried out by punitive expeditions, but becomes legitimised as 'policing', carrying the sanction of the legal system.

And the history of violence in the area is not a thing of the past, occurring during Mary Durack's lifetime. In fact, one does not have to look too far back in time to find violence on the frontier in the Kimberleys. The Forrest River Mission and Ernest River Massacres took place in the Kimberleys in 1926. Four white men (two mounted constables and two policeman) and two Aboriginal trackers moved through the camps of the area, killing indiscriminately as they went:

They would ride out in the morning, move into a camp, capture as many of the inhabitants as possible, chain them together, and bring them back to the base camp. They would separate the men from the women. The men, still chained together, were led away from the camp to a lonely place on the edge of Forrest River where they were tied to a tree and shot.

The women, who had been chained to a nearby tree, were forced to witness the death and cremation of their menfolk. They were then marched for another 10 kilometres along the riverbank. ... they were all executed ... and the bodies were burnt.⁵⁵

The gang moved along the Forrest River, which joins the Durack River, for a week capturing, killing and burning bodies to conceal the evidence:

Where the men had been done to death was a small tree to which the prisoners had evidently been fastened. Round this tree was a ledge of rock about a foot high. Dark stains were still visible, though great efforts had been made to clean up the declivity.⁵⁶

Men and women were slaughtered, their bodies burnt to dispose of them. The perpetrators were police and the crime took place on a reserve. Reverend Gribble presented a report on the murders to the Western Australian Parliament but it did lead to an investigation and action.⁵⁷ Two of the men involved in the massacre were arrested for murder. They received sympathy and support from the local white community and were acquitted.

At the moments in which the law took over where the 'policing' of the punitive expeditions left off and the point at which the law was impotent to prevent or punish frontier violence perpetrated by white men against Indigenous people, it became complicit in the colonial agenda of conquest, dispossession, violence and genocide. It is

⁵⁴. Durack 1959: 368.

⁵⁵. Bruce Elder 1998: 171.

⁵⁶. Reverend Gribble's report 6 Aug 1926 in 'Royal Commission into the killing and burning of bodies of Aborigines in East Kimberley, and into police methods when effecting arrest', vol 1, *West Australian Proceedings of Parliament and Papers* 1928, Perth: 10, in Stone (ed) 1974: 151.

⁵⁷. Reverend Gribble's report, 6 August 1926 in Stone (ed) 1974: 149–52.

hard to find neutrality within this role played by laws and the agents of the legal system.

Some conclusions: legacies and legal impotency

Historiography is readily acknowledged to be contested ground. It is less readily accepted that the legal system is also an arena of conflicting ideologies. Masked behind the façade of neutrality and reason, the legal system is often assumed to be the objective arbiter of truth. The manner in which Australian courts have dealt with claims of genocide evidences the parallel links between the different perspectives of history and the different perspective of law. Within both disciplines, there are conflicting narratives, conflicting views and many grey areas.

Underneath the Law's presumed neutrality are the grey spaces in which the genocidal practices of colonisation fall, as do debates about the way to categorise the crimes of the past. When the High Court overturned the doctrine of *terra nullius* in *Mabo v Commonwealth*⁵⁸ it did not address the issue of where this left the relationship with Indigenous people, leaving the assumption of a peaceful settlement. What this newly created legal fiction does is reinforce the skepticism of the use of the term 'genocide' to describe the experience of Indigenous people under colonisation.

While legal technicalities have seen claims of Indigenous peoples that genocide has been committed by the state defeated, these legal pronouncements do nothing to erase the conviction that Indigenous communities feel about 'genocide' being the word and the concept that describes the colonial legacy inherited and still pervasive. These convictions form part of the legitimate contest over the writing of Australia's colonisation. The law has more trouble recognising and accommodating that perspective.

Paul Keating, in the speech he delivered in Redfern Park in 1992, stated:

We took the traditional lands and smashed the traditional way of life. We brought the disasters. The alcohol. We committed the murders. We took the children from their mothers. We practiced discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done.⁵⁹

This approach needs to permeate not just Australia's psyche but Australia's jurisprudential psyche as well. The chasm between the use of the term 'genocide' as a descriptor of experience by Indigenous people and the refusal of the legal system to consider those acts as amounting to genocide says more about the conceptual leaps that still need to be made in the institutions of Australian society and those in positions of power than any delusion about the past by Indigenous people. We live with the legacies of those practices everyday, as the *Bringing Them Home* report evidenced and concluded.

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⁵⁸. *Mabo and Anor v Commonwealth* (1992) 165 CLR 1.

⁵⁹. Reproduced in Michelle Grattan (ed.) 2000, *Essays on reconciliation*, Black Inc., Melbourne: 60–4.

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