KRUGER V THE COMMONWEALTH: DOES GENOCIDE REQUIRE MALICE?

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I. BACKGROUND TO THE *KRUGER* GENOCIDE CLAIM

On 31 July 1997, the High Court handed down its decision in the case of *Kruger & Ors v The Commonwealth of Australia.*[1] The plaintiffs in the action, members of the Stolen Generation of the Northern Territory, had argued that the legislation which authorised their removal from their Aboriginal families was unconstitutional and thus invalid. The legislation in question was the *Aboriginals Ordinance* 1918 (NT). The Ordinance provided in part:

> s 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 interests of the aboriginal or half-caste for him to do so ...

Section 67 of the Ordinance was a regulation making power and provides for the making of regulations:

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> (b) providing for the care custody and education of the children of aboriginals and half-castes;

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1 *Kruger & Ors v The Commonwealth of Australia* (unreported, HC, 31 July 1997). Herein referred to as *Kruger*.

(c) enabling any aboriginals or half-caste child to be sent to and detained in an Aboriginal institution or Industrial school ...

The Court noted that such regulations were in fact made and "conferred on Protectors 'at their discretion' the powers to 'forward any aboriginal or half-caste children to the nearest aboriginal institution or school'"[2]

The plaintiffs asserted the Ordinance's invalidity on a number of grounds.[3] One of these was that the Ordinance:

> ... was contrary to an implied constitutional right to freedom from and/or immunity from any law, purported law or executive act:
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> A. providing for or having the purpose, the effect or the likely effect of the destruction in whole or in part of a racial or ethnic group, or the language and culture of such a group ...
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> C. constituting or authorising the crime against humanity of genocide by, inter alia, providing for, constituting or authorising:
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> (i) the removal and transfer of children of a racial or ethnic group in a manner which was calculated to bring about the group's physical destruction in whole or in part;
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> (ii) actions which have the purpose, the effect or the likely effect of causing serious mental harm to members of a racial or ethnic group; and
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> (iii) the deliberate infliction on a racial or ethnic group of conditions of life calculated to bring about its physical destruction in whole or in part.[4]

This aspect of the plaintiffs' claim clearly relies upon the definition of genocide in the Genocide Convention 1948.[5]

It should be noted that Dawson J (with whom Gummow J concurred) also suggested that the plaintiffs' claim included an assertion that the authorisation of 'cultural genocide' is beyond the constitutional power of the Commonwealth. His Honour went on to note: "the Genocide Convention is not concerned with cultural genocide, references to cultural genocide being expressly deleted from it in the course of its being drafted".[6]

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2 *Ibid*, per Brennan CJ at 4.

3 For a statement of these see the decision of Brennan CJ, *ibid*, at 7-8.

4 Amended Statement of Claim para 29.

5 The 1948 Convention on the Prevention and Punishment of Crime of Genocide. Art II of the Convention defines genocide the following terms:

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

6 Note 1 *supra*, per Dawson J at 44. In his Honour's view, the matter is not relevant to determining the claim as he found the impugned Ordinance was in fact supported by the s 122 of the Constitution (the Territories power).

II. THE COURT'S CONSIDERATION OF GENOCIDE

All the members of the Court found that the Ordinance did not violate the asserted freedom or immunity because the words of the Ordinance did not display the necessary intent.[7] Justice Gaudron succinctly summarised the opinion of the Count when she stated:

> Although it may be taken that the Ordinance authorised the forcible transfer of Aboriginal children from their racial group, the settled principles of statutory construction, to which reference has been made, compel the conclusion that it did not authorise persons to remove those children 'with intent to destroy in whole or in part ... [their] racial ... group, as such'.[8]

While Toohey and Gaudron JJ emphasised[9] the principles of statutory interpretation that suggest a statute should be read as being in conformity with international law; Dawson, McHugh and Gummow JJ and (as noted at footnote 7) Brennan CJ emphasised more the phrase "necessary or desirable in the interests of the aboriginal or half-caste" in s 6 of the impugned ordinance to suggest a beneficial intent on the part of the legislature.[10] Despite this distinction in emphasis, all their Honours concurred in finding failure to establish genocide in part because an "intent to destroy" was not displayed by the Ordinance.

This discussion investigates the issue of genocidal intent as it applies to the facts underlying the *Kruger* litigation. Of course, the finding of the Court was based on more than just this issue. Amongst these considerations were issues relating to an implied constitutional prohibition on genocidal legislation, the status of genocide at various times this century, and the interrelation of the Ordinance and the policy of child removal. With some slight exception with regard to the last matter, all of these additional issues are beyond the scope of this paper. Accordingly, the suggested conclusions of this paper should not be seen as questioning the decisions of the Court in the *Kruger* action.

III. INTENT AND MOTIVE

Some light is shed on the definition of intent in the Convention by an examination of the discussion during the drafting of the Convention that preceded its inclusion.

Much of the refinement of the original version of the Genocide Convention that had been prepared by Professors Lemkin, Donnedieu de Vabres and Pella, was carried out by an Ad Hoc Committee of the Unite Nations Economic and

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7 *Ibid*, per Dawson J at 43-4, Toohey J at 64, Gaudron J at 89, McHugh J at 133, Gummow J at 152. Chief Justice Brennan expressed similar views regarding intent, but expressed them in the context of mental harm when his Honour noted at 9; "... as a matter of statutory interpretation, none of the impugned provisions can be taken to have authorised or purportedly authorised acts done for the purpose or with the intention of causing mental harm as alleged in [amended Statement of Claim] sub-par (iv)".

8 *Ibid*, per Gaudron J at 89.

9 *Ibid* at 63 and 85 respectively.

10 *Ibid*, see in particular Dawson J at 24

Social Council.[11] Art II of the Ad Hoc Committee's draft defined genocide as "deliberate acts committed with the intent to destroy a national, racial, religious or national political group on grounds of the national or racial origin, religious belief, or opinion of its members".

The work of drafting the Convention was later referred by the United Nations General Assembly to the Assembly's (Legal) Sixth Committee. The Sixth Committee's Draft of the Convention was adopted without amendment by the General Assembly.[12] Commenting on some of the Sixth Committee's amendments from the Ad Hoc Committee's version, Lippman notes:

> In the end, there was uncertainty over interpretation of the phrase 'as such'. It was pointed out that the phrase 'as such' might mean either 'in that the group is a national racial religious or political group' or 'because the group is a national racial, religious, or political group'. It is clear that under Art II the requisite intent to commit genocide must be accompanied by proof of motive, however the motive requirement may be interpreted. Delegates feared that if intent was not linked with a motive requirement that situations such as 'bombing which might destroy whole groups ... might be called a crime of genocide; but that would obviously be untrue'.[13]

An explanation of the meaning of the words "as such" is given by the delegate from Venezuela who moved the amendment to include "as such" into the Ad Hoc Committee's draft. The delegate stated:

> ... that an enumeration of motive was useless and even dangerous, as such a restrictive enumeration would be a powerful weapon in the hands of the guilty parties and would help them to avoid being charged with genocide ... It was sufficient to indicate that intent was a constituent factor of the crime.
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> ...
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> The purpose of [the amendment] was to specify that for genocide to be committed a group - for instance, a racial group - must be destroyed qua group.[14]

The issue of motive has been discussed by a number of commentators.[15] For the purposes of the present discussion a concise summary is provided by Starkman when he suggests that:

> ... the impetus behind genocidal policies must be a combination of motives. Must the genocidal motive be the predominant one? The drafters of the Genocide Convention in the United Nations Sixth Committee were unable to agree on a resolution of this question and a proposal to make special mention of the motives in the Convention rejected. Opinion opposing the proposal suggested that the intent to destroy the group was sufficient to constitute the crime regardless of any underlying motives. Commentators who have addressed this issue agree that *the reasons for perpetrating the crime and the ultimate purpose of the deed are irrelevant. The*

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11 For a history of the drafting of the convention (on which this portion of the current discussion relies) see M Lippman, "The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide" (1985) 3 *Boston University International Law Journal* 1.

12 *Ibid* at 58 (footnotes omitted).

13 *Ibid* at 42 (footnotes omitted).

14 3 GAOR Part I, Sixth Committee Summary Records (1948) at 124-5 (76th and 77th mtgs) cited in H Hannum, "International Law and Cambodian Genocide: The Sounds of Silence" (1989) 11 *Human Rights Quarterly* 85 at 109.

15 See in particular Le Blanc, "The Intent to Destroy Groups in the Genocide Convention: The Proposed US Understanding" (1984) 78 *Am J Int'l L* 369; P Drost, *The Crime of the State: Genocide*, Sythoff (1959).

> *crime of genocide is committed whenever the intentional destruction of a protected group takes place.*[16]

The essence of the intent requirement in genocide then, would appear to be the undertaking of one of the prohibited acts in relation to one of the protected groups with the intent to destroy that group as a group in whole or part.[17] The fact that this act is committed with a beneficial motive is apparently irrelevant. Genocide does not require malice; it can be (misguidedly) committed "in the interests of" a protected population.

Before moving to re-examine the Ordinance in light of this discussion of intent, one additional aspect of the genocide definition needs to be considered. That aspect is "to destroy".

IV. TO DESTROY

As previously noted, Dawson J referred to the exclusion of cultural genocide from the Convention. The deletion of cultural genocide from the convention occurred during the Sixth Committee's revision of the Ad Hoc Committee's draft.[18] The Ad Hoc Committee had defined cultural genocide as: "any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group".[19] However, the removal of cultural genocide was subject to one slight exception. As Lippman notes:

> Although included under 'cultural genocide' in the draft Convention, the Greek delegate, Mr Vallindas, successfully argued that the 'forced transfer of children to another human group should be categorised as physical genocide'.[20]

The inclusion of the 'forced transfer of children' provision and the 'imposing measures intended to prevent births within the group' provision in the definition of genocide would suggest that physical genocide extends beyond simply killing the protected population. Rather, physical genocide is constituted by steps aimed at eliminating "in whole or in part" the actual existence of a group *as a group*. The 'forced transfer' provision and the 'measures to prevent birth' provisions both envisage actual elimination taking place over a period of a generation or more (if employed in isolation). With both of these provisions, the elimination occurs through denying the group the means of self perpetuation.

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16 P Starkman, "Genocide and International Law: Is There a Cause of Action" (1984) 8(1) *ASILS Int'l LJ* 1 at fn 14 (emphasis added).

17 Relevantly, Starkman (*ibid* at 7), shortly after the note reproduced above, comments: "It is also clear that the ability of perpetrators to actually destroy a group is irrelevant to the offence.". He refers to the genocidal actions of the Pakistani army against the 75 million strong Bengali population: "It would have been difficult ... to destroy the entire Bengali people"; *ibid* at fn 16. Le Blanc, note 15 *supra*, notes intent to destroy a group in part constitutes genocide.

18 At its 83rd meeting, see Lippman, note 11 *supra* at 44.

19 Ad Hoc Committee draft Art III, reproduced in Lippman, *ibid* at 30.

20 *Ibid* at 44.

The self perpetuation of a group takes place on two planes: first, the physical reproduction of members of the group;[21] and second, the continuation of the features that define the group as a group, distinct from the broader community. (It should be noted that viewed thus, an act of forced transfer of children can constitute both physical *and* cultural genocide).

Recalling the previous discussion of intent and motive, it can be seen that an agency, carrying out acts (at least in some way) beneficial to the individual members of a group, but bringing about the destruction of part of the group by denying it the means of self perpetuation (on one or both levels mentioned above) could be engaged in a genocidal act. Of course, the acts beneficial to the individuals would have to be carried out with the intent to destroy *the group* (or part of it). However, while there must be this destructive intent, it does not have to be the sole, or even predominant, motive. Indeed, the primary motive may be a desire to benefit (or act "in the interests of") the individuals comprising the group.

V. ASSIMILATION AND GENOCIDE

It is suggested then, that a program that was designed to benefit the children of a racial group by removing them from that group and eliminating from those children the features that distinguish the group as a group constituted genocide. It is further suggested that this is so even where an aspect of the removal program was the (intended) substantial improvement in the material condition of the children.

Clearly then, it is also suggested that the policy of removal as part of the assimilationist policies of previous governments constituted genocide. A precis of the operation of the policy of assimilationist policies in the Northern Territory is given in the report of John William Bleakley: Bleakley was Chief Protector of Aboriginals in Queensland and appointed by the Commonwealth (Bruce-Page) Government to report on Aborigines in the Northern Territory.[22] With regard to 'half castes', Bleakley noted the need to identify "how to check the breeding of them and how to deal with those now with us".[23] Bleakley made two recommendations to deal with this issue:

> complete separation of half-castes from the Aboriginals with a view to their absorption by the white race; [and] complete segregation from both blacks and whites in colonies of their own and to marry amongst themselves.[24]

Barbara Cummings analyses these recommendations thus:

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21 Although, noting the inclusion of religious groups in the genocide definition, arguably this form of self perpetuation is not crucial.

22 JW Bleakley, *Report of the Aboriginals and Half Castes of Central Australia and North Australia*, Commonwealth Parliamentary Paper 21, 1928.

23 *Ibid*, p 27.

24 *Ibid*, p 28, quoted in B Cummings, *Take This Child*, Aboriginal Studies Press (1990), p 13

> Bleakley's policy was one of biological as well as cultural assimilation and depended firmly on the control of the breeding habits of those ostensibly in the process of becoming 'more European'.[25]

The implementation of Bleakley's recommendations can be identified in the official reports of the period after his report was delivered:

> In the Territory the mating of an Aboriginal with any person other than an Aboriginal is prohibited. The mating of coloured aliens with any female of part Aboriginal blood is also forbidden. Every endeavour is being made to breed out the colour by elevating female half-castes to the white standard with a view to their absorption by mating into the white population.[26]

It is suggested that the foregoing demonstrates the intent to cease the actual existence of part of a group; the mixed descent Aboriginal population of the Northern Territory, on both of the levels of self perpetuation described earlier. It remains to be seen whether this policy of assimilation was authorised by the impugned legislation.

VI. THE *ABORIGINALS ORDINANCE* 1918

The relevant sections of the Ordinance have been reproduced above in Part I. From the discussion in this paper it will be apparent that the reference in s 6 of the Ordinance to an action by the Chief Protector being "necessary or desirable in the interests of the aboriginal or half-caste" does not prevent the legislation from evincing the necessary intent. A beneficial motive can coexist with a genocidal intent. Indeed much of the policy documentation of the period suggest it is in the interests of half-caste children to be denied their Aboriginality.[27]

However, as noted in Part II, members of the Court in *Kruger* held "settled principles of statutory construction ... compel the conclusion that it did not authorise persons to remove those children 'with intent to destroy in whole or in part'"[28]. Thus, while it would appear open to the Court to have concluded that the fact that the legislation (and not just its operational implementation) operated on an explicitly racial basis demonstrated the necessary intent, this opportunity has apparently been rejected. Rather, the Court has suggested that the legislation did *not* authorise genocide because the statute should not be construed as authorising such acts (either because of interpretative principles or based on an interpretation of 'interests').

This being the case, the question is posed: If the Ordinance did not authorise genocide, what would be the legal effect of an implemented policy of genocide purportedly authorised under the legislation? Justice Gaudron perhaps provides an indication of the Court's response to this question when she notes:

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25 B Cummings, *ibid.*

26 Northern Territory Administrator's Report, 1933, p 7; quoted in B Cummings, *ibid*, p 14

27 B Cummings, *ibid*, see chapter 4 generally, and in particular, pp 39-45.

28 Note 1 *supra*, per Gaudron J at p 89.

> ... subject to a consideration of the existence of a time bar, if acts were committed with the intention of destroying the plaintiffs' racial group, they may be the subject of an action in damages whether or not the Ordinance was valid.[29]

No doubt this is a matter that will tested when the common law claims that the Stolen Generation are currently pursuing in the Federal Court go to trial.

29 *Ibid.*