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LESSONS FROM THE STOLEN GENERATIONS LITIGATION

INTRODUCTION

The Northern Territory Stolen Generations litigation involved two cases reserved before the High Court: *Kruger, Muir, Cole, Hansen, Hill, McClary v Commonwealth*;[1] *Bray v Commonwealth*.[2] Oral arguments were presented in February 1996. The decision is yet to be delivered.[3] The central focus of the case is the invalidity of the *Aboriginals Ordinance* 1918 (Cth). This Ordinance gave the Chief Protector power to separate Aboriginal children from their mothers, family and community. The plaintiffs argued that this was beyond the legislative power conferred under the Constitution. The circumstances of the "Stolen Generations" raise issues of relevance to feminism and international law. This article highlights those issues and discusses the strategies employed by the Stolen Generations Group in the utilisation of legal remedies.

HISTORICAL CONTEXT

In 1911 the Commonwealth Government assumed control of the Northern Territory from South Australia. It commissioned anthropologist Baldwin Spencer to make recommendations about the "difficult problem" of control of the Northern Territory's Aboriginal population.[4]

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1 File No M021/95.

2 File No D005/95.

3 Since the completion of this article the decision in *Kruger v Commonwealth; Bray v Commonwealth* has been handed down. It is reported in (1997) 146 ALR 126. The majority of the Court held that the *Aboriginals Ordinance* 1918 (Cth) was not an invalid exercise of the Territories power contained in s122 of the Constitution. The reasoning of the Court varied in relation to arguments based on implied rights and the separation of powers, however the Court was unanimous in deciding that the Ordinance did not authorise genocide. In contrast to the High Court decision, the *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* released in May 1997 found that the actions taken under the *Aboriginals Ordinance* 1918 did amount to genocide. The report contained wide ranging recommendations and personal testimony from those who had been affected by the policies of forced removal.

4 Spencer, "Preliminary Report on the Aboriginals of the Northern Territory" in *Report of the Administrator for the Year 1912*.

Spencer made recommendations regarding the removal of children. His view was that it was only the children of mixed Aboriginal descent who should be removed. His analysis of the ancestry of the children was as follows:

> In practically all cases, the mother is a full-blooded Aboriginal. The father may be a white man, a Chinese, a Japanese, a Malay or a Filipino. The mother is of very low intellectual grade, while the father most often belongs to the courser and more unrefined members of the higher races.[5]

Spencer concluded that the children of such unions were unlikely, in most cases, "to be of much greater intellectual calibre than those Aboriginal children of full descent".[6]

The essence of Spencer's recommendations were given legislative effect in the *Aboriginals Ordinance* 1918 (Cth). Section 16(1) provided (in part) as follows:

> The Chief Protector may cause any aboriginal or half-caste to be kept within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any reserve or aboriginal institution.

This provision reflects a policy which the Stolen Generations (NT) Group has characterised as genocide perpetrated against Aboriginal people. It is argued here that it was a policy of genocide particularly directed towards women. Its effects continue to the present.[7]

Section 16 of the *Aboriginals Ordinance* 1918 (Cth) was discretionary. The discretion led to a particularly brutal operation of the section. Not all children were removed. Terms such as "half caste" and "quadroon" were adopted by the authorities to classify the children. The white authorities were primarily interested in children of mixed Aboriginal descent. The idea was that children of mixed Aboriginal descent were "dangerous" if left in Aboriginal communities because their white blood would make them natural leaders. Conversely, the same white blood also meant that half castes could be given rudimentary education and placed in harmless menial jobs. New white settlers in the Northern Territory, particularly public servants, were provided with women and girls of mixed Aboriginal descent as domestics.

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5 At 41.

6 As above.

7 This legislation had equivalents in most states: *Aborigines Act* 1911 (SA); *Aborigines Act* 1934-62 (SA); *Aborigines (Protection) Act* 1869 (Vic); *Aborigines Protection Act* 1886 (Vic); *Aborigines Act* 1890 (Vic); *Aborigines Act* 1915 (Vic); *Aborigines Act* 1928-57 (Vic); *Aborigines Protection Act* 1886-1905 (WA); *Aborigines Act* 1897-1905 (WA); *Native Welfare Act* 1905-1954 (WA); *Aboriginals Protection and Restriction of Sale of Opium Act* 1897-1939 (Qld); *Aboriginals Preservation and Protection Act* 1939-1946 (Qld); *Aborigines Protection Act* 1909-1943 (NSW).

It was females who posed the real threat of miscegenation which led to the gender specific direction of the removal policy. It was presumed that half caste boys would only intermarry with Aboriginal girls and it was also presumed white men would find "half caste" women more attractive than "full blood" women, thus increasing the extent of the "coloured problem".

In 1928 it was reported that out of 76 Aboriginal people removed from various parts of the Northern Territory and housed at Kahlin compound in Darwin, 56 were female and 20 were male.[8] Another gender impact of the removals was that children were separated from their Aboriginal mothers. Usually, but not always, their white fathers had already moved on.

The main public justification for the policy was that the children removed needed "protection". A survey of official correspondence at the time indicates that on the whole what most patrol officers thought children needed protection *from* was their mother's culture. The "protection" from Aboriginal culture was said to be best for the children's welfare and to protect them from immorality. However, if protection was the basis for the removals, apparently "full blood" Aboriginal children did not need such protection.

Post 1957

After the repeal of the *Aboriginals Ordinance* 1918 (Cth), the *Welfare Ordinance* 1953 (Cth) was introduced. The *Welfare Ordinance* was carefully phrased so that it did not refer to Aboriginal people explicitly. However, in its operation it applied only to them. The *Welfare Ordinance* set out new criteria to allow for the removal of children, in effect Aboriginal children, from their families. A declaration of ward status (the legal basis for a removal) was assessed according to the following criteria: a person's manner of living; their inability without assistance to manage adequately their own affairs; their standard of social habit and behaviour; and their personal associations. A person could not be declared a ward if they were eligible to vote or would become so on turning twenty one. At the time, no Aboriginal person was eligible to vote.

Aboriginal women, who themselves had been removed from their mothers, were vulnerable to the application of the wardship criteria to their own children. Years of institutionalisation for Aboriginal women resulted in many women having no permanent accommodation. Further, many lacked skills for employment and lacked the support of association with Aboriginal kin. These factors combined to ensure the continuation of the genocidal policy of removal to the present.

8 Aust, Parl (Report by Bleakley) *The Aboriginals and Half Castes of Central Australia and the Northern Territory* (1928) p14.

Julia's Story[9]

Julia's mother was an Aboriginal woman and her father was a member of a white family with a high profile in the Northern Territory. Julia lived with her mother in a group based on the fringes of a town but also moving around the country in the area. Some members of this group were survivors who as children had seen their families decimated in a series of related massacres about ten or eleven years before Julia was born in about 1939. Over 100 people including small children are now known to have died in these massacres, which were officially investigated but whitewashed at the time. The group was intensely fearful of white people, particularly police, and Julia remembers them talking about the massacres all the time. The group felt safer coming in than staying out in the bush, where anything could happen and no-one would know or care.

In about 1945 Julia and other children of mixed Aboriginal descent from Julia's group were rounded up from the vicinity of the town by a patrol officer and walked to a mission about 40 kilometres away. The mother of one of the children later told Julia and others that some adults believed that the children were safer from white depredation at the mission, and so it was perceived at least by some as not a wholly bad thing that they were there. The children began to go to school there, which Julia enjoyed, but were able to keep up contact with their mothers and others who camped so as to be near their children, and in fact saw them more or less every day although the missionaries limited their contact with Aboriginal people. Ceremony continued in the area although the missionaries forbade it and attempted to suppress it. The children could hear the sounds of ceremony taking place in the distance. They were told then and later that ceremony, dance, song and their own language were heathen and wicked, and mention of them was punishable.

In 1946, as post-war conditions were being re-established, the Northern Territory Administration recommenced systematic removal. The mothers of the children at the mission were told that the children were to go to school somewhere else, and clothes were made for them by two of the women working at the mission. The mothers were not alarmed because they were used to the children living in the dormitories and going to school while still having contact with them and being visible most of the day. Until the day the children were actually taken they didn't envisage the children vanishing permanently to an unimaginably distant place and it was too late when they realised, just before the children left, that something unforeseen and disastrous was happening.

None of these mothers spoke standard English and most had either very little Aboriginal English or none. Some of the mothers have said that the day the patrol officer and a woman missionary arrived to remove them they were told that the children were going on a

9 Personal communication to Barbara Cummings. Also reproduced in NAALAS Stolen Generations Litigation Unit, Submission, *Complaint Regarding the Commonwealth Arrangements for the "National Inquiry Into Separation of Aboriginal and Torres Strait Islander Children from their Families"* (1996) p18. Copy on file with authors.

picnic, something they were used to. The children got ready in the same way as they would have done for a picnic. "We were tricked" one mother said afterwards and others agree. The children who remember the events also testify that they thought they were going on a picnic.

Sixteen children, all related in one way or another, were removed from the mission on a day Julia has never forgotten. The assembled children were loaded into the truck very suddenly and their things thrown in hastily after them. The suddenness and the suppressed air of tension shocked the mothers and the children and they realised something was seriously wrong. Everything was confused and happening very fast. Children began to cry and the mothers to wail and cut themselves. Julia remembers there being blood everywhere. The tailgate was slammed shut and bolted and the truck screeched off with things still hanging over the back and mothers and other children running after it crying and wailing. The children themselves were terrified. Later Julia's mother, when asked why she cut herself and wailed, told Julia (in Julia's words): "That was sorrow about youse being taken from us. To us you were all dead, and now we won't see you again."

This was the start of a 1000 kilometre trip from the edge of the desert straight to the sea.

Julia's group was very different from most of the other children in the home they went to. Many of the other children were fairer and had grown up in and around the town. Julia is very clear that her group's colour and their closeness to traditional living was despised and punished by the missionaries. They were discriminated against in every way by the missionaries, who expected the older ones including Julia to perform hard and unpleasant menial work daily from the time they arrived, never rewarded them for anything including any success they had at school, never believed their version of events, and punished them savagely for misdemeanours for which other children were not necessarily punished. Beatings by hand, stick or strap were common.

Their language was suppressed and their position as inferior was constantly reinforced verbally as well as by the work they were given, the privileges they were not given and other means. They had no-one to protect them or speak for them and their powerlessness invaded their lives and undermined their sense of self-worth.

All the children from the institution were bussed to the public school in town. Julia loved school, where she did well, although behind her age range because she had started late. She was dux of her primary school and won prizes in high school. She wanted desperately to continue at school and her teachers were always very supportive, but she was instead put to work in the institution nursery about the time she turned fifteen.

Most of the children left the institution virtually devoid of self-esteem and life skills, and the situation was intensified for them by the fact that they had absolutely nowhere to go when they left: no family, no extended network, no country, except so far away in time and

space, and so additionally distanced by missionary indoctrination that they had no idea what these might offer them.

Julia contracted a marriage because, as she later said, she felt it would be a way to become independent of the missionaries and would give her her own life. At that time she knew very little about life outside the home, nothing about family life and nothing about relationships with men. Her marriage was unhappy and she continued to have to work hard at menial jobs in order to support the family. A couple of years after her marriage she decided she had to leave it. She was unable to go to the only relatives she knew about, so she approached the mission asking if she could leave her child there in order to take a live-in job she was hoping to get. Her plan was to wait until she could get a place of her own and then get her child back. Despite Julia telling the woman missionary, the same one who had participated in the removal of the children, about the desperation of her circumstances the missionary refused to help her and told her she had to go back to her husband. Julia could see no other possible kind of support available and went back to her marriage for another 37 years or so until her husband died.

As the story of Julia shows, the effects of removals do not stop when a young woman walks out of the mission gates. The effects stay with that woman all of her life. They are passed on to her family. But the ongoing effects are not just personal, they are also institutional.

RECURRING THEMES IN THE HIGH COURT LITIGATION - AN OPPORTUNITY TO BE HEARD

The level of abstraction at which legal arguments were made in *Kruger v Commonwealth* masks the tragedy as retold by Julia and other members of the Stolen Generations (NT) Group. This is illustrated as follows:

> McHugh J:
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> But supposing it was done by consent of their parents, that it was an informed decision, that the mothers wanted the children to go away after it had been explained. I am not sure that you have not taken on a large burden on yourselves in this particular case.[10]
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> Alec Kruger (plaintiff in the Stolen Generations litigation):
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> They just come down and say, "We taking these kids". They just take you out of your mother's arms. That's what they done to me. I was still at my mother's breast when they took me.[11]

10 *Kruger v Commonwealth,* transcript of argument, 12 February 1996, p26.
11 MacDonald, *Between Two Worlds* (IAD Press, Alice Springs 1995) p15.

This difference between the reality of women's lives and the legal abstraction of international law has been one of the reasons given by Hilary Charlesworth for the absence of women from international law in the past.[12] One of the purposes of feminist interventions has, therefore, been to question assumptions of objectivity and the core rational values that international law is constructed around.[13] This is also the strategy of the Stolen Generations litigation: deconstructing and reconstructing constitutional theory so that Aboriginal people's lives and the harm of separation are taken seriously.

The multi-dimensional nature of a case such as *Kruger* may mean that specific gendered arguments are lost in the overall process. Whether the particular gender impact of the separation policies could be considered by the Court by presentation of an amicus curiae brief is problematic in Australian law. "The willingness of courts to listen to interveners is a reflection of the value that judges attach to people."[14] In Australian law, there exists a sharp distinction between the intervener, who must demonstrate a proprietary, material or financial interest to be granted intervener status, and the amicus curiae (friend of the court) who may be given permission to make submissions. The test to be able to make submissions as amicus curiae is strict, as can be seen in *Kruger* itself.[15] At the outset of *Kruger*, the International Commission of Jurists (ICJ) was refused leave to appear as amicus. The ICJ had sought to make submissions on fundamental constitutional freedoms, protection of the family from undue state interference, and the international obligation on states to ensure effective remedies when the state is in breach of international human rights instruments.[16] The Court refused the ICJ's application as it found there was no indication that the parties were unable or unwilling adequately to protect their own interests, nor that the intervention would assist the Court to come to the correct determination.[17] Of the ICJ's written submission, it must be said that most of the subjects covered were comprehensively dealt with by the parties, save the ICJ's proposed brief submission on the obligation at international law on states to provide a remedy for breaches of human rights.[18] The issue of effective remedies remains problematic for the Stolen Generations

12 Charlesworth, "Alienating Oscar" in Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (Studies in Transnational Legal Policy No 25, American Society of International Law, Washington DC 1993) p2.

13 At p12.

14 Counsel for the International Commission of Jurists in *Kruger v Commonwealth,* transcript of argument, 12 February 1996, p7, referring to *Webster v Reproductive Health Services* 492 US 490 at 522 (1988).

15 *Kruger*, transcript, 12 February 1996, p12. See also *Bropho v Tickner* (1993) 40 FCR 165 at 171-172 per Wilcox J; *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 331 per Dixon J; Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report No 27, 1985).

16 *Kruger*, Amended Submissions of the International Commission of Jurists (Australian Section) On the Questions Reserved pp1-12.

17 *Kruger*, transcript p12.

18 As above, fn16, p12. It is argued in this article that common law remedies in the Stolen Generations (NT) case could be informed by international law.

(NT) Group. Any civil proceedings may be barred by statutes of limitation[19] and because the type of harm suffered by the children and mothers is not easily accommodated by way of damages in common law remedies, a victory in the courts may not deliver appropriate redress. An Australian court would be dealing with distinctively new heads of damage in Stolen Generations litigation.

In jurisdictions which readily permit amicus briefs, or the granting of formal intervener status, cases which reveal the supposedly quintessential "women's" legal issues such as abortion and sexual assault are frequently represented.[20] Even in the more restrictive Australian context the High Court recently granted amicus status to the Catholic Health Care Association and Abortion Providers Federation of Australia in a medical negligence case for alleged failure to diagnose pregnancy.[21]

At the heart of feminist jurisprudence, including its engagement with international law, is the identification of the experiences of women. In cases of constitutional challenge, those experiences may not be placed before a court by virtue of the balance of convenience favouring the preliminary resolution of questions of law taking the facts at their "highest" or leaving resolution of any factual dispute. If the constitutional issues are capable of resolution without the evidence, it is curious that McHugh J, in the context of an exchange with counsel concerning the right to freedom of association stated: "This is where I feel the lack of evidence in this particular case because there is just no evidence as to what these children were deprived of in general terms or what they may have gained. How do we fill that gap?"[22] Counsel answered: "We cannot fill it with evidence, your Honour." It is suggested that an amicus brief directed at bringing issues of relevance to the women would seek to keep the questions as widely drawn as possible and would attempt to persuade the court to hear the evidence, the experiences of the plaintiffs, even against the balance of convenience.[23]

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19 There is disagreement on whether the limitation statute of the state or territory in which the proceedings were issued applies or whether the statute of the place of commission of the tort applies.

20 See, for example, the following cases in Canada in which the Women's Legal Education and Action Fund (LEAF) intervened: *Norberg v Wynrib* (1992) 92 DLR (4th) 449 (consent in the context of sexual activity in the medical setting); *Moge v Moge* (1992) 99 DLR (4th) 456 (maintenance); *Schachter v The Queen and Canada Employment and Immigration Commission* (1988) 52 DLR (4th) 524 (challenge to maternity leave).

21 "Abortion: The Mum who Holds the Key"; "Abortion Rights and Wrongs", *The Weekend Australian*, 21-22 September 1996, pp1, 21. This case was settled prior to argument on the merits.

22 *Kruger*, transcript p62.

23 In the directions hearing it had been determined that the trial on the constitutional issues be examined before any of the evidence: *Kruger v Commonwealth; Bray v Commonwealth* [1995] 69 ALJR 885.

GENOCIDE

It is curious that the characterisation of the *Aboriginals Ordinance* 1918 (Cth) and consequent acts as "genocide", which has so long been a part of the public debate raised by the Stolen Generations (NT) Group,[24] was not part of the oral argument before the Court. This was despite genocide being dealt with extensively in the plaintiff's written submission[25] and responded to by the Commonwealth.[26]

The specific operation of the separation policy actually developed distinctions with more precision than "half caste". Operationally, whether someone was a "half caste" with less than half white blood, a "half caste" with more than half white blood, a "quadroon" or an "octoroon" determined not only whether they were taken but also where they were sent. Generally (and there were exceptions), if a person had less than half white blood they were not taken. If they had less than half black blood but not "quadroon" they were sent to one of the remote island missions. If they were "quadroon" or "octoroon" they were likely to end up in a town-based mission or moved out of the Northern Territory to a southern state. The administrative enunciation of this policy is set out in the 1928 Bleakley Report.[27] The full implementation of separation began after World War II, that is, after Australia had ratified the Genocide Convention.

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide,[28] adopted by the UN General Assembly on 9 December 1948 and ratified by Australia by legislation in July 1949, defines acts of genocide as:

> any of the following acts committed with the intent to destroy, in whole or in part, any national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (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 designed to prevent births within the group;

24 Katona, "We've Been Waiting All Our Lives for This", address delivered to the National Press Club, Canberra, 13 February 1996.
25 *Kruger*, Plaintiffs' Submissions pp63-67.
26 "Fundamental Rights and Genocide", *Kruger*, Respondent's Submissions pp62-64.
27 As above, fn8.
28 (1951) 78 *UNTS* 277.

(e) Forcibly transferring children of the group to another group.

We would argue that the removal policy is genocide within more than one article of this definition. Not only is it genocide but, it is asserted here, it is genocide with a particular gender focus. The activities of government were directed particularly towards women.

The reliance on Article II(d) and (e) of the Genocide Convention (imposing measures intended to prevent births and forcible transfer of children of a group to another group) in the plaintiff's written submission raised an issue which indicated harm specifically towards women.[29]

The Commonwealth's submissions indicated that lack of intent would be argued to counter the genocide claim.[30] It was argued that the issue of genocide would be the subject of evidence, thus incapable of being raised in the context of the constitutional challenge. The controversy over the issue of "intent" within the Genocide Convention is well recognised.[31] A dominant view is that it must be shown that the acts comprising the genocide be committed "with intent to destroy, in whole or in part" the group.

It is suggested here that despite the difficulty of proving intent and consequentially genocide under the Convention, it is important to keep the characterisation of the acts of removal of children in the Stolen Generations litigation as acts of genocide alive. The loss suffered by the Stolen Generations can be more easily understood and reflected in an appropriate remedy if the wrongs perpetrated are seen as genocide, or de facto genocide.[32]

The Stolen Generations (NT) Group has described the nature of the loss as follows:[33]

For the mothers whose children were stolen, this meant:

- Loss of association, including cultural association, with her child.

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29 *Kruger*, Plaintiffs' Submissions p63.

30 *Kruger*, Respondent's Submissions p64.

31 Starkman, "Genocide and International Law: Is There a Cause of Action?" (1984) 8 *ASILS Int'l LJ* 1; Le Blanc, "The Intent to Destroy Groups in the Genocide Convention: The Proposed US Understanding" (1984) 78 *AJIL* 369; Clark, "Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor" (1981) 8 *Ohio NUL Rev* 321.

32 It is noted that Special Rapporteur Theo van Boven refers to "genocide, slavery and slavery-like practices" in UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Final Report, E/CN.4/Sub.2/1993/8, 2 July 1993 p7, as reproduced in Stolen Generations (NT), *Submission to the Human Rights Commission Inquiry into Separation of Aboriginal and Torres Strait Islander Children*, 29 July 1996.

33 As above, fn24.

- Loss of cultural experience and fulfilment in respect of her child.
- Loss of maternal experience and fulfilment, and other rights and entitlements associated with motherhood and the rearing of a child.
- Pain, suffering and mental anguish.

For the children taken away this meant:

- Loss of association with parents, family culture and community.
- Loss of cultural experience, fulfilment and spiritual affiliations.
- Loss of amenities and opportunities for education; formation of personal relationships with family and community; personal freedom and other opportunities of life because of institutionalisation in a different cultural and racial environment to that into which they were born.
- Pain, suffering and mental anguish.
- Loss, diminution of, or impediment to hereditary entitlements including entitlements to participate in land claims and right to land provided for or existing under Northern Territory or Commonwealth legislation or at common law.

If in fact what has occurred are acts of genocide, devoid of intent, it may be that what remains are, as Strickland has said of the situation in the United States, acts of "lawful" genocide:

> I am talking not about these cold-blooded atrocities but about law and the ways in which genocidal objectives have been carried out under colour of law - in de Tocqueville's phrase, "legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world". ...
>
> The legal genocide, cultural as well as physical, practised against the American Indian could only have been the product of a society such as ours, a society with a strong sense of the "rule of law".[34]

34 Strickland, "Genocide-at-Law: An Historic and Contemporary View of the Native American Experience" (1986) 34 *U Kan LR* 713 at 719.

Australia has an obligation to prevent acts of genocide.[35] In taking steps to comply with this part of the Genocide Convention Australia has asserted that laws in force in relation to the offences of "murder, manslaughter, assault, conspiracy and incitement and other matters are sufficient to enable Australia to comply with its obligations under the Convention."[36] Ironically it would appear that Australia had not conceived that to comply with the Genocide Convention it may need to prohibit conduct outside of the usual scope of those traditional criminal law offences.

If the obligation to prevent genocide cannot be reflected in the High Court's ruling on the validity of the *Aboriginals Ordinance* 1918 (Cth), then the acts amounting to or having the *effect* of genocide (even if *intent* in the full sense of mens rea is not proved) should, it is argued, inform the question of remedies if the *Aboriginals Ordinance* 1918 (Cth) is found to be invalid for other reasons.

Until the campaign and subsequent litigation of the Stolen Generations (NT), it would appear that little attention has been given in Australia to the legality of arbitrary forced removal of children by the state. It is as though the forced removal of children might be regarded as a less serious or softer form of genocide: "cultural genocide". It was the feminised genocide.

EQUALITY AND SOVEREIGNTY: THE HEARTLAND STRATEGY

Sustaining international law, as presently understood, are concepts of sovereignty and equality. Sovereignty creates unconnected, independent and equal entities. The equality between sovereign states is however a formal equality. James Crawford writes: "States are regarded in international law as 'equal', a principle also recognised by the [United Nations] Charter (article 2(1)). ... It is a formal, not a moral or political principle."[37]

The Stolen Generations (NT) litigation is also concerned with issues of sovereignty and equality. The *Aboriginals Ordinance* 1918 (Cth), it was argued, breached the separation of powers doctrine, s116 of the Constitution, and the implied right to equality, freedom of movement and association, and to be free from genocide.[38] All of these constitutional arguments depended on a certain view of sovereignty and equality. The Commonwealth rejected the application of the implied rights argument on the basis that the dominant

35 Genocide Convention Art I: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

36 De Stoop, "Australia and International Criminal Law" in Ryan (ed), *International Law in Australia* (Law Book Co, Sydney, 4th ed 1984) p163. The inclusion of manslaughter is curious. Not being a crime of intent, it is difficult to see how "non-intentional" killings could ever conceivably lead to proof of "intent" to destroy the group.

37 Crawford, *The Creation of States in International Law* (Clarendon, Oxford 1979) p32.

38 The application of constitutional implications and provisions to s122 of the Constitution was also extensively argued.

constitutional principle is the supremacy of parliamentary sovereignty, and equality, as it exists, is to be understood as a formal equality.

> Nor can an implication of equality under the law so as to fetter Parliament's legislative powers be drawn from the vesting of sovereign power in the people.[39]

> ... equal subjection of all persons to the law and their equality before the courts, and not that the laws themselves be equal. The principle is therefore concerned with procedural, as opposed to substantive, equality.[40]

In challenging the Commonwealth's arguments the Stolen Generations first contextualised the case:

> The *Aboriginals Ordinance* implemented a regime for the comprehensive subjugation of the Aboriginal people of the Northern Territory between the years 1918 and 1957.[41]

The Commonwealth's submission by contrast began with a legalistic account of the Constitutional history of the Northern Territory.[42]

The Stolen Generations then argued that the Constitution is based on the popular sovereignty of the people.

> Popular sovereignty is the basis for the initial and ongoing legitimacy of the Constitution, and has as its inevitable corollary the inherent equality of each of the possessors of sovereignty, past and present.[43]

This equality, it was argued, entailed a freedom from discrimination. It was argued to be a substantive notion of equality: one that conceived of discrimination as power.

> It is difficult to conceive of a form of discrimination more offensive to the inherent equality of all Australian citizens than that embodied in the *Aboriginal Ordinance*. Power was exercised under the *Aboriginal Ordinance* in relation to a people in a position of special vulnerability ....

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39 *Kruger*, Respondent's Submissions pp49-50.
40 At p47.
41 *Kruger*, Plaintiffs' Submissions p1.
42 "The *Aboriginals Ordinance* 1918 (NT) was enacted by the Governor-General on 12 June 1918 pursuant to the powers conferred by section 13(1) of the *Administration Act*." *Kruger*, Respondent's Submissions p8.
43 *Kruger*, Plaintiffs' Submissions p25, citing Detmold, "The New Constitutional Law" (1994) 16 *Syd LR* 228 at 229.

> They were left unprotected in every way against use, abuse or misuse of the arbitrary power conferred on officers of the Commonwealth .[44]

The litigation confirms that the strategy for breaking silence is in challenging the fundamental theory on which exclusion is based. The international feminist strategy is well placed, therefore, at what Hilary Charlesworth has called the "heartland of international law and its institutions."[45]

The Stolen Generations deconstructed and reconstructed equality arguments in a constitutional court. International feminists have no constitutional court in which to reimagine international law.[46]

Karen Engle has described three possible approaches taken by feminists in international law.[47] The doctrinalist focuses on a particular violation and then argues that it breaches a current international law right,[48] for example, clitoridectomy violates the right to health. The institutionalist concentrates on the institutions rather than the instruments to enforce human rights. They accept existing international structures but argue that they must rearrange their priorities and enforcement mechanisms to enforce women's rights. So they would, for example, consider that the Commission on the Status of Women should have wide investigatory functions in relation to the performance of clitoridectomies. The last category is the external critique, situating itself outside the discourse and raising questions as to whether human rights as presently understood can accommodate women's rights.

The Stolen Generations have not engaged in any one strategy, moving from institutionalist to doctrinalist to external critique. They are doctrinalist in bringing actions in torts, administrative law and breach of fiduciary duty. They are institutionalist in challenging the National Inquiry into the "Separation of Aboriginal and Torres Strait Islander Children from their Families", creating a memorandum of understanding with the Australian Archives for Access to Information and the initial attempt to negotiate out of court with the Commonwealth. They are also engaged in an external critique in reconceptualising their rights in the High Court. The Stolen Generations have maintained a revolutionary agenda within a variety of strategies.

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44 *Kruger*, Plaintiffs' Submissions p36.

45 Charlesworth, "Alienating Oscar" in Dallmeyer (ed), *Reconceiving Reality: Women and International Law* p15.

46 The International Court of Justice showed its reluctance to be perceived as a forum of fundamental challenge in *Case Concerning East Timor (Portugal v Australia)* ICJ Rep 30 June 1995.

47 See generally, Engle, "Female Subjects of Public International Law: Human Rights and the Exotic Other Female" (1992) 26 *New Eng L Rev* 1509.

48 This is understood by Engle as invoking liberal assumptions in that it accepts international law and works within it: as above at 1513. The argument I propose here is that the approach does not necessarily indicate a theory. It may be just a "place" for the struggle to occur.

Significantly, the Stolen Generations did not reject the rights discourse.[49] In the proceedings of the Going Home Conference, Betty Pearce, one of the participants, responded to advice by a QC that there may be limited legal remedies:[50]

> First of all, this QC you fellas have got here, even if he gets all that information on paper that you are not entitled to this, that, or whatever, fight for it.[51]

The Stolen Generations reconceptualised rights to take their lives into account. As Sarah Pritchard has said, "from socialist, critical and feminist perspectives it is possible to recognise that whilst rights can be obfuscatory, individualistic and sometimes disempowering, they can also provide significant foci for resistance".[52]

CHARACTERISATIONS

The characterisation of the *Aboriginals Ordinance* 1918 (Cth) is central to the case: was it penal, punitive, even genocidal, or was it for care and protection? The answer to the characterisation will determine whether it breaches the implied rights argued by the Stolen Generations. Characterisation is therefore a significant legal question. The characterisation turns on history. The history receiving most judicial notice is the history of justification. It runs along the lines of: they thought the act was for paternalistic purposes so it was. This ignores the history of the harm. The harm of stealing the children is only seen through the eyes and thoughts of those that perpetrated the act: did *they* think it was justifiable or not. These are the views that affect legal validity. The woman's harm by contrast is not significant. It does not affect the validity of the Ordinance both then and therefore now. *It is intertemporal exclusion.*

> The question must be whether at the time of enactment and operation ... in *light of the standards and perceptions then prevailing*, and in the light of the state of knowledge at that time, the provisions ... were reasonably capable of being considered to be - and we say that is the test, rather than were appropriate and adapted to the purpose of the protection and preservation of Aboriginal people in the Northern Territory.[53]

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49 According to Engle's analysis there are two variations of the external critique: a reconceptualisation of rights or a critique of rights itself. As above at 1520-1523.

50 The advice was not in relation to the Stolen Generations litigation but concerned a published editorial covering the Going Home Conference.

51 Going Home Conference, *The Long Road Home* (Karu Aboriginal Child Care Agency, Darwin 1996) p26.

52 Pritchard, "The Jurisprudence of Human Rights: Some Critical Thought and Development in Practice" (1995) 2 *Aust J Hum Rts* 11.

53 *Kruger*, transcript, 14 February 1996, Griffith QC, counsel for the Commonwealth, p230. Emphasis added.

In opening to the High Court, counsel for the Commonwealth stated:

> The Commonwealth admits the real issues of social and political concern; it is an area where there is intense attention being given to the serious social issues arising from the operation of these ordinances repealed so long ago, but the acceptance of this situation does not, we submit, enable this Court to involve itself in what is, in essence, an invitation for the retrospective re-writing of the course of our constitutional evaluation.
>
> We say to entertain this case would be, in effect, to apply back for 80 years or so the operation of newly articulated constitutional rights, entitlements, or freedoms.[54]

The Commonwealth maintained that the evolving nature of human rights meant that the *Aboriginals Ordinance* 1918 (Cth) should be judged according to the social, cultural and political context of the time.[55] The plaintiffs' sentiment on this point was concluded as follows:

> The proposition that racist or discriminatory views can dictate the meaning or effect of the Constitution directly contradicts the very nature of the compact and the inherent equality of the parties to it. Taken to its logical extreme, the Defendant's pleading would have justified the attempts by the Third Reich to subject Jews to unprecedented discrimination under the law - eventually leading to genocide - on the basis that such a plan accorded with the "contemporary values and perceptions" of the German people.[56]

At international law, the intertemporal issue is also problematic, although gross violations of human rights occurring in the past may still attract reparations. Recently the claim has been made that reparations are available as a matter of international law for the continuing damaging consequences of the slave system.[57] It has been argued that slavery was once accepted as the norm and in fact was legal in European states. However this does not necessarily defeat the claim brought by those who continue to be affected.[58]

International feminists are critiquing the history of justification. Judith Gardam argues that the justification supporting military necessity as the primary consideration in determining

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54 At p162.
55 *Kruger*, Respondent's Submissions pp95-98.
56 *Kruger*, Plaintiffs' Submissions p100.
57 Gifford, "The Legal Basis of the Claim for Reparations", paper presented to the First Pan-African Congress on Reparations, Abuja, Nigeria, 27-29 April 1993.
58 As above.

the rules governing armed conflict, loses its force when women's history and harm is taken seriously. In fact this would radically change the law of armed conflict.[59]

The need to document the history of women is highlighted in the Human Rights Committee communication of *Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario v Argentina,*[60] where expanded notions of harm were argued but held to be inadmissible due to lack of evidence. This case has parallels with the Stolen Generations. On 5 February 1977, Ximena Vicario's mother was taken with the then nine month old child to the Headquarters of the Federal Police in Buenos Aires. Her father was apprehended in the city of Rosario on the following day. The parents then disappeared. In 1984, investigations initiated by the grandmother located Ximena Vicario, who was living in the home of SS, who claimed to have been taking care of the child. Genetic blood tests revealed that the child was in fact the granddaughter. The arguments raised by the granddaughter and grandmother included: psychological torture every time she was visited by SS, in violation of Article 7 of the International Covenant on Civil and Political Rights, and that SS's regular visits to the grandchild entailed some form of "psychoaffective" involuntary servitude in violation of Article 8 of the Covenant. In respect of the author's claims under Articles 7 and 8, the Human Rights Committee found that the author had failed to substantiate her claims for purposes of admissibility. Significantly, however, the Committee took a liberal view of the intertemporal issues. Regardless of the fact that Argentina had not signed the Covenant or its Optional Protocol at the time of the disappearances, it was held to be in breach of Article 24 paragraphs 1 and 2 of the Covenant due to the ongoing harm suffered by the child.

The reality of women's history should be significant in all decisions. The High Commissioner for Human Rights is pursuing a policy of actively supporting the development of national human rights institutions.[61] This strategy needs to be assessed from a feminist perspective: how have national institutions served us in the past? Are they capable of enforcing the rights of women or are they engaged primarily in the traditional civil and political rights discourse? Significantly, will it mean the human rights of women are privatised behind the national human rights institutions?

At this stage of its development the forums on national human rights institutions have shown, at least in principle, a commitment to women's concerns. The draft recommendations state that national institutions should adopt a specific plan of action in

59 Gardam, "The Law of Armed Conflict: A Feminist Perspective" in Mahoney & Mahoney (eds), *Human Rights in the Twenty First Century: A Global Challenge* (Martinus Nijhoff, Dordrecht 1993) p419.

60 Communication No 400/1990, UN doc CCPR/C/53/D/400/1990 (1995).

61 The recent meeting in Darwin of the Asia-Pacific Regional Workshop of National Human Rights Institutions resulting in the *Larrakia Declaration* (1996) was conducted under the auspices of the United Nations Centre for Human Rights. The 1996 meeting in Darwin had in attendance the Special Adviser to the High Commissioner for Human Rights on National Human Rights Institutions.

conformity with the Declaration On the Elimination of All Violence Against Women,[62] and also support the development of a protocol (for individual complaints) to the Convention on the Elimination of All Forms of Discrimination against Women. This illustrates the interrelated and long term nature of the feminist project. The Declaration On Violence itself arises from a long history of theory and activism by women.

REPARATIONS

The work of the UN Commission on Human Rights refers to the necessity of successor governments being bound by the responsibilities incurred by predecessor governments for gross violations of human rights.[63] As a matter of state responsibility the new government must make reparations. Further, this work states that "[r]eparations may be claimed by the direct victims and, where appropriate, the immediate family, dependants or other persons having a special relationship to the direct victims."[64] Contrary to the Commonwealth's contention that this is a case of ancient history, the Stolen Generations (NT) litigants are the persons directly affected - as mothers and children. Australia's ratification of the Genocide Convention on 8 July 1949 does go some way towards indicating that at the time of the operation of the *Aboriginals Ordinance* 1918 (Cth), Australia had made a decision to be bound by an international obligation to refrain from acts of genocide. The arguments before the High Court in *Kruger* continually raise the need to examine the legislation according to the values at the time. How that is to be assessed is a problem in the Commonwealth's case. Ratification of the Genocide Convention signals that the community values of the time rejected genocidal practices. Even prior to Australia signing the Genocide Convention it was well accepted that genocide was contrary to international law.[65]

The possible acceptance in the High Court of a submission that intertemporal views defeat claims for redress of serious violations of human rights is of significant concern given that the expression of rights protecting women is relatively recent.[66]

Throughout the argument on "freedom of religion" canvassed in *Kruger*, there are a number of exchanges between counsel and the bench which indicate that various atrocities perpetrated on women readily spring to mind in the context of the legitimate bounds of state control of religion. Female circumcision and suttee are both mentioned during the

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62 *Manila Declaration and Recommendations of the Third International Workshop of National Institutions for the Promotion and Protection of Human Rights*, Manila, 18-21 April 1995, Specific Recommendation B2(e).

63 As above, fn32.

64 At p56. Another factor militating in favour of this approach is the principle that statutes of limitations should not apply.

65 Genocide Convention (Preamble); Lemkin, "Genocide as a Crime Under International Law" (1947) 41 *AJIL* 145 at 147.

66 Eg *Sex Discrimination Act* (Cth) 1984; *Affirmative Action (Equal Opportunity for Women) Act* (Cth) 1988; *Human Rights and Equal Opportunity Commission Act* (Cth) 1986.

course of argument.[67] Less dramatic but nonetheless fundamental rights historically denied to women in Australia are also discussed: the right to participate on juries[68] and the right to vote.[69] In one sense it is heartening to see these issues being considered in the context of argument on constitutional issues. However, it is also a reminder of some of the grossest violations against women. Consequently there is a need to persuade the Court to proceed cautiously before striking out the ability to remedy past wrongs.

The plaintiffs in *Kruger* claimed damages for breach of constitutional rights and guarantees independent of any common law cause of action. The arguments traversed whether or not a breach of the Constitution can give rise to an action sounding in damages; if so, how damages might be calculated; whether any State or Territory limitations statutes applied; and whether any declaratory relief or other equitable remedy was applicable. On each issue, the parties and members of the Court indicated there was significant uncertainty in the law, and the possible statutory reform of limitations statutes was raised.

1996 was the twentieth anniversary of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). This was cause for some celebration by the Land Councils established under the Act. But the Stolen Generations are not celebrating. The *Land Rights Act* is one further illustration of the loss suffered.

The *Land Rights Act* establishes two classes of Aboriginal person: those who come within the definition of "traditional owner" and those who do not. To be classified as a traditional owner an individual must come within the legal and anthropological definitions. They must be a member of the "appropriate" descent group and hold the "necessary" spiritual affiliation. In *form* the basis of distinction between the two classes lies in the statutory definition of "traditional Aboriginal owner", in *effect* the distinction is the extent to which an individual and their family has suffered genocidal oppression. The old assimilationist laws, having served as the basis for separation, continue to serve as the basis for the denial of land rights.

If the plaintiffs' case is successful to the point of calculation of damages and other relief, it is suggested here that the principles to be applied should be informed by Special Rapporteur Theo van Boven's recommendations on reparations.[70] It is suggested that reparations are more amenable to reflecting the appropriate remedy for the types of harms suffered by members of the Stolen Generations (NT) group. As noted above, even if the acts perpetrated against the Stolen Generations (NT) were not technically "genocide",[71] they should be considered a serious violation, capable of close analogy with other gross violations of human rights.

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67 *Kruger*, transcript pp111-112.
68 *Kruger*, Respondent's Submissions p93.
69 *Kruger*, transcript p131.
70 As above, fn32.
71 For reasons of lack of intent, or for failing to have a forum to try the issue.

Reparation by restitution is recommended by Special Rapporteur van Boven. In relation to Indigenous Peoples, this may include provision of lands by way of restitution, or, where not practicable, compensation. This is a particularly apt form of reparation for many of the Stolen Generations (NT).

Reparations also embrace compensation for mental harm, legal costs, pain and suffering, and emotional distress. They may also include reparations by way of rehabilitation - support, counselling and access to victim services, as well as reparations by way of satisfaction - public disclosure, declaratory judgment, apology, acceptance of responsibility, commemorations for victims and inclusion of an accurate record of the human rights violation in educational materials.[72]

CONCLUSION

The tragedy of this case is that it becomes the survivors of genocide who, rather than being the focus of increased services, receive less. One of Barbara Cumming's friends described the complete sense of abandonment she felt when, being too old for the institution she had been in since she was a child, was left in Darwin with no idea of who or where her family was. In a way, that abandonment is the situation faced today by the Stolen Generations.

Lois O'Donoghue wrote that, when her mother heard she and her sister were returning years later, "she waited by the roadside every day for three months until we finally turned up. In all, I was able to know my mother for ten years."[73]

This mother waiting by the roadside, her anguish, her expectations and harm are not legally significant. According to the Commonwealth they do not characterise the Ordinance. A successful High Court case will hopefully change this, but, even so, the challenge will remain to take women's lives seriously in their own context and diversity so that women will not be made by history but be history-makers.[74]

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72 As above, fn32, pp57-58.

73 O'Donoghue, "Forewords" in MacDonald, *Between Two Worlds* pvii.

74 Ann Scales wrote: "The notion that women can affect history by access to courts and legislatures presumes that women have equal potential as history-makers." Scales, "Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?" (1989) 12 *Harv Women's LJ* 25 at 34.