

Racial Discrimination: What Racial Discrimination?

The Racially Discriminatory Treatment of Indigenous Australians

I INTRODUCTION

With the revelations of the horrors that emerged out of World War II, international law became more concerned with human rights.¹ The new era saw a greater recognition of human rights under both customary² and conventional³ international law.⁴ These human rights customs and conventions are of course laudable. However, individuals' inability to effectively utilise such laws to 'right wrongs' suggests they may in fact be worthless in the practical context of real world human rights abuses. In another earlier article the author has considered in detail the

¹ Louis Henkin, 'Human Rights and State Sovereignty' (1995) 25 *Georgia Journal of International and Comparative Law* 31; Julie Cassidy, 'Emergence of the Individual as an International Juristic Entity: Enforcement of International Human Rights' (2004) 9(2) *Deakin University Law Review* 533, 533 ('Cassidy 1'); Julie Cassidy, 'Watchdog or Paper Tiger: The Enforcement of Human Rights in International Forums' (2008) 10 *University of Notre Dame Australia Law Review* 35, 35 ('Cassidy 2'); Michael Haas, *International Human Rights: A Comprehensive Introduction* (2008), 96.

² Such as customary international law's protection against racial discrimination (*South West Africa cases (Second Phase)* 1966 ICJ Rep 6, 291-294; *Barcelona Traction case (Second Phase)* 1970 ICJ Rep 3; *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia* 1971 ICJ Rep 16, 78-81) and customary international law's prohibition against genocide (*Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) ICJ Rep 15, 23; *Attorney General of Israel v Eichmann* (1962) 36 ILR 277, 296-297). Both of these norms are considered in the context of the case studies below.

³ Today innumerable declarations, instruments, protocols and treaties protecting human rights exist. In addition to fundamental documents such as *Charter of the United Nations* and *Universal Declaration of Human Rights*, other conventions that are particularly relevant to the context of this article include *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 1021 UNTS 78 (entered into force 12 January 1951); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 24 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 60 UNTS 13 (entered into force 4 January 1969), *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *United Nations Declaration on the Rights of Indigenous Peoples* opened for signature 13 September 2007, A/RES/61/295.

⁴ See further Henkin, note 1 above; Cassidy 1, note 1 above.

inability of aggrieved individuals to enforce their rights in international forums.⁵ As noted above, the author has also explored the difficulties involved in enforcing customary international law in the domestic courts.⁶ The second part of this paper builds on this previous research and again highlights the role that international law can play in the municipal arena. However, its primary focus is to consider certain principles that make both conventional and customary international law vulnerable sources of human rights. This is highlighted through two contemporary examples involving the application of international law to the Indigenous peoples of Australia. The first example is the racially discriminatory extinguishment of aboriginal/Native title pursuant to the *Native Title Amendment Act 1998 (Cth)* ('NTA 1998'). It will be seen that this legislation was purposely enacted in breach of the *Racial Discrimination Act 1975 (Cth)* ('RDA'). The RDA had in turn been enacted in furtherance of Australia's international obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966). The second example involves what is known as the 'Northern Territory intervention.' Again, the three key statutes giving effect to the 'Northern Territory intervention'⁷ are also based on the suspension of the RDA so that the government can affect an extremely evasive racially discriminatory policy.

It will be seen that, *inter alia*, the Committee on the Elimination of Racial Discrimination ('CERD') has time and again reported that these enactments breach Australia's international law obligations. While to some extent it is not surprising that the former Howard Liberal Coalition government ignored all United Nations' directive to rectify the breaches, the racial discrimination continues under the current Labor government. Both governments seem to wear 'blinkers', denying the obvious racially discriminatory nature of these legislative policies. These two examples show

⁵ Cassidy 2, note 1 above. This analysis highlighted how the jurisdictional limits of international courts prevent such forums from providing effective mechanisms for the enforcement of international human rights norms by individuals. The author has suggested in turn that these jurisdictional limitations, effectively precluding individuals from bringing actions before them, are excessively rigid and outdated and require reconsideration.

⁶ Cassidy 3, note 5 above.

⁷ Namely the *Northern Territory National Emergency Response Act 2007 (Cth)*, *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)* and the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth)*.

that international law, whether conventional or customary international law, has failed to protect the Indigenous people of Australia. While the relevant international legal norms that Australia is breaching are easy to identify, enforcing such to a meaningful resolution appears to be the difficulty.⁸ It is interesting that in the 1970's Australia was one of the most vocal critics of the apartheid system in South Africa,⁹ yet today it has an appalling human rights record. The injustices highlighted in this article continue and international law appears to be unable to prevent this 'disturbing' 'horrific' abuse of Australia's Indigenous peoples' rights continuing. Australia has a lot to learn from post-apartheid modern South Africa.

II VULNERABILITY OF INTERNATIONAL LAW

(a) Enforcement of customary international law in the domestic area

As the author has elsewhere discussed in detail,¹⁰ customary international law is part of the domestic common law and thus is enforceable in the municipal courts. The judiciary has recognised that in the absence of formal transformation of international law into domestic law through legislation, customary international law automatically flows into the national legal systems, becoming part of the 'law of the land.'¹¹ This reception rule is known as the incorporation or adoption theory.¹²

⁸ Mark Janis, *An Introduction to International Law* (2nd ed, 1993), 249. See also Daniel Bodansky, 'Human Rights and Universal Jurisdiction' in Mark Gibney (ed), *World Justice? US Courts and International Human Rights* 1, 1; Henkin, note 1 above, 41.

⁹ Department of International Relations and Cooperation, 'Australia (Commonwealth of): History of Relations' (<http://www.dfa.gov.za/foreign/bilateral/australia.html>). See also GL Shelton, R Catley and AD Schmulow, 'Trading politics for the politics of trade: South African and Australian relations in the New Millenium (2000) 24 *Journal of Australian Studies* 48.

¹⁰ Cassidy 3, note 5 above.

¹¹ (1735) Cas T Talb 281.

¹² The term 'adoption' was first used by Blackstone in his *Commentaries on the Laws of England* (1765-1769) ch 5, who saw international and municipal law to be one body of law. As Blackstone asserted 'the law of nations, wherever any question arises which is properly the object of its jurisdiction is here adopted in its full extent by the common law, and it is held to be a part of the law of the land': at 67. In regard to modern commentaries see Brownlie, note

The weight of jurisprudence in the common law Nations of England,¹³ Australia¹⁴ and Canada¹⁵ strongly supports this theory. As Lord Alverstone reaffirmed in *West Rand Central Gold Mining Co v R*¹⁶ ‘whatever has received the common consent of civilised nations must have received the assent of our country’ and is therefore part of the law of England, notwithstanding the absence of legislation specifically transforming the rule into domestic law. Similarly in Australia in *Polites v Commonwealth*¹⁷ Williams J noted that customary international law, once ‘established to the satisfaction of the courts, is recognised and acted upon as a part of English municipal law so far as it is not inconsistent with the rules enacted by statutes or finally declared by courts.’

At common law there is a presumption against parliament intending to breach international law and this requires legislation to be construed to avoid conflicts with international norms.¹⁸ However, customary international norms are not enforceable if

23 above, 42; Shaw, note 51 above, 105-110; Harris, note 53 above, 74-83; Donald Greig, *International Law* (2nd ed 1976), 57.

13 *Triquet v Bath* (1764) 3 Burr 1478; *Heathfield v Chilton* (1767) 4 Burr 2015; *Dolder v Huntingfield* (1805) 11 Ves 283; *The Duke of Montellano v Christin* (1816) 5 M & S 503; *Wolff v Oxholm* (1817) 6 M & S 92; *The Parliament Belge* (1879) 5 PD 197; *Hopkins v De Robeck* (1789) 3 TR 79; *Viveash v Becker* (1814) 3 M & S 284; *Novello v Toogood* (1823) 1 B & C 554; *Brunswick v The King of Hanover* (1844) 6 Beav 1; *DeHaber v The Queen of Portugal* (1851) 17 QB 17; *Magdalena Steam Navy Co v Martin* (1859) 2 El & El 94; *De Wutz v Hendricks* (1861) 30 LJ Ch 690, 700; *West Rand Central Gold Mining Co v R* [1905] 2 KB 391, 407 More recently see *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529, 554; *Re International Tin Council* [1990] 2 AC 418; *I Congreso del Partido* [1983] 1 AC 244; *Re McKerr* [2004] All ER 210, paras 51 and 54.

14 *Polites v The Commonwealth* (1945) 70 CLR 6, 80-81; *Chow Hung Ching v The King* (1949) 77 CLR 449, 462, 470-471, 487; *Seas and Submerged Lands case* (1975) 135 CLR 337, 500-501; *Raptis v South Australia* (1977) 138 CLR 346, 394-395; *Kruger v Commonwealth* (1997) 146 ALR 126, 187; *Nulyarimma v Thompson* (1995) 165 ALR 621, paras 83, 113-114, 117 and 132.

15 See, in particular, *R v Hape* [2007] SCC 26. See also the comments of former Justice Gerard Vincent La Forest, ‘The Expanding Role of the Supreme Court of Canada in International Law Issues’ (1996) 34 *Canadian Year Book of International Law* 89, 100. See also Stephen Toope, ‘The Use of Metaphor: International Law and the Supreme Court of Canada’ (2001) 80 *Canadian Bar Review* 534, 536; Anne-Marie Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29 *University of Richmond Law Review* 99; Anne-Marie Slaughter, ‘Governing the Global Economy Through Government Networks’ in Michael Byers (ed), *The Role of Law in International Politics* (2000, Oxford University Press) 177; Kindred, note 31 above, 184.

16 [1905] 2 KB 391, 407.

17 (1945) 70 CLR 6, 80-81.

18 In the Australian context see *Polites v Commonwealth* (1945) 70 CLR 60 (Latham CJ); *Polites v Commonwealth* (1945) 70 CLR 60, 74 (Rich J); *Polites v Commonwealth* (1945) 70 CLR 60, 77 (Dixon J); *Polites v Commonwealth* (1945) 70 CLR 60, 79 (McTiernan J); *Polites v Commonwealth* (1945) 70 CLR 60, 81 (Williams J); *Dietrich v The Queen* (1992) 177 CLR 292, 306 (Mason CJ and McHugh J); *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, 287-288 (Mason CJ and Deane J); *Minister for Immigration and*

they are inconsistent with national legislation, whether enacted before or after the creation of the customary international law.¹⁹ Thus customary international law is enforceable in the domestic courts ‘But only so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.’²⁰ As the court explained in *R v Keyn*,²¹ whether that legislation was ‘consistent with the general law of Nations or not, [the national laws] would be binding on the tribunals of this country.’ The problem of such inconsistency is then left to the government to resolve. Lord Dunedin reaffirmed in *Mortensen v Peters*:²²

[The courts] have nothing to do with the question of whether the Legislature has or has not done what foreign powers may consider an usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms.

By way of example, in *Polites v Commonwealth*²³ two Greek nationals challenged the validity of conscription legislation that extended to resident aliens in breach of customary international law. The High Court held the conscription legislation before it ‘expressly permitted the making of such regulations’ so as to extend to resident aliens who were otherwise immune under international law.²⁴ The court held that the express words of the statute were inconsistent with customary international law.²⁵ The first case study also provides an example of this principle. As noted above, customary international law’s prohibition of racial discrimination

Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 272, 315 (McHugh J); *Kruger v Commonwealth* (1997) 190 CLR 1, 71 (Dawson J); *Kruger v Commonwealth* (1997) 190 CLR 1, 87-88 (Toohey J); *Re Woolley* (2004) 225 CLR 1, paras 11 (Gleeson CJ) and 201 (Kirby J); *Plaintiff S157/2002* (2003) 211 CLR 476, 492 (per Gleeson CJ); *Coleman v Power* (2004) 220 CLR 1, [225] and [240]; *Wurridjal & Ors v Commonwealth* [2009] HCA 2, para 271 (Kirby J). See also the discussion of the ‘Bangalore principles’ in Kirby, note 56 above. In the South African context see *CC Maynard et alii v The Field Cornet of Pretoria* (1894) 1 SAR 214, 223. See also Du Plessis, note 56 above, 173.

¹⁹ *The Zamora* [1916] 72 AC 77, 93; *R v Keyn* (1876) 2 Ex D 63, 203; *Polites v Commonwealth* (1945) 70 CLR 6, 72; *Re Woolley* (2004) 225 CLR 1, paras 107-108.

²⁰ Lord Atkin in *Chung Chi Cheung v R* [1939] AC 160, 167-168.

²¹ (1876) 2 Ex D 63, 203.

²² (1906) 14 SLT 227.

²³ (1945) 70 CLR 6.

²⁴ (1945) 70 CLR 6, 72.

²⁵ (1945) 70 CLR 6, 72.

predates²⁶ the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966). Thus the *NTA 1998* provides another example where the Australian government has through express legislation acted inconsistently with customary international law. Similarly, the second example, the ‘Northern Territory intervention’ legislation²⁷ is clearly inconsistent with customary international law’s prohibition against racial discrimination. As the prohibition against racial discrimination is a human rights principle of *jus cogens*,²⁸ legally these enactments are void.²⁹

(b) Enforcement of conventional international law in the domestic arena

While the primary impetus for the ability to use conventional international law in the municipal arena is domestic legislation incorporating treaty obligations, such international norms have a role in the municipal arena even if they have not been formally incorporated through legislation. First, as noted above, there is a common law presumption against parliament intending to breach international law.³⁰ Thus,

26 (1945) 70 CLR 6, 72.

27 Note 86 above.

28 Tanaka J in *South West Africa cases (Second Phase)*, ICJ Rep p 298; *Barcelona Traction case (Second Phase)* 1970 ICJ Rep p 3; Ammoun J in the *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia* 1971 ICJ Rep 16, 78-81. See also American Law Institute, above n 49, s 702; Charlesworth and Chinkin, note 52 above, 68 and 70; Anthony Aust, note 52 above, 10.

29 Charlesworth, note 47 above, 3-4; Brownlie, note 23 above, 10; Jennings note 50, 29; Donaghue, note 50 above 224-6, 261; Kindred note 31 above, 244.

30 In the Australian context see *Polites v Commonwealth* (1945) 70 CLR 60 (Latham CJ); *Polites v Commonwealth* (1945) 70 CLR 60, 74 (Rich J); *Polites v Commonwealth* (1945) 70 CLR 60, 77 (Dixon J); *Polites v Commonwealth* (1945) 70 CLR 60, 79 (McTiernan J); *Polites v Commonwealth* (1945) 70 CLR 60, 81 (Williams J); *Dietrich v The Queen* (1992) 177 CLR 292, 306 (Mason CJ and McHugh J); *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, 287-288 (Mason CJ and Deane J); *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, 315 (McHugh J); *Kruger v Commonwealth* (1997) 190 CLR 1, 71 (Dawson J); *Kruger v Commonwealth* (1997) (1997) 190 CLR 1, 87-88 (Toohey J); *Re Woolley* (2004) 225 CLR 1, paras 11 (Gleeson CJ) and 201 (Kirby J); *Plaintiff S157/2002* (2003) 211 CLR 476 at 492 (per Gleeson CJ); *Coleman v Power* (2004) 220 CLR 1, paras 225 and 240; *Wurridjal & Ors v Commonwealth* [2009] HCA 2, para 271 (Kirby J). See also the discussion of the ‘Bangalore principles’ in Michael Kirby, ‘The Australian use of international human rights norms: From Bangalore to Balliol’ (1993) 16 *University of New South Wales Law Journal* 363; Michael Kirby, ‘The Bangalore Principles’ (1997) 78 *The Parliamentarian* 326; Michael Kirby, ‘Domestic implementation of international human rights norms’ (1999) 5(2) *Australian Journal of Human Rights* 109. In the South African context see Lourens du Plessis, *Re-Interpretation of Statutes* (2002), 173.

where possible, legislation will be interpreted in a manner that accords with conventional international law.

Second, these interpretive provisions will also impact on the scrutiny of executive acts. Executive acts are often challenged in a context that requires an interpretation of the enabling legislation that affords it with authority to act. Such legislation will again be interpreted in accordance with international law.

Third, in Australia, in the controversial³¹ decision *Minister for Immigration and Ethnic Affairs v Teoh*,³² the High Court of Australia held that where the Executive Government of Australia had ratified an unimplemented international convention, the fact of ratification founded a legitimate expectation that the Commonwealth Executive and its agencies would act in conformity with that convention.³³ Mason CJ and Deane J reasoned that if the government was not required to make decisions consistent with its treaty obligations, Australia's ratification of international treaties was a 'platitudinous and ineffectual act.'³⁴

However, despite these interpretative rules, compared to customary international law, discussed below, conventional international law has had a limited role in domestic human rights litigation. One of the reasons³⁵ is that a number of steps

³¹ Donaghue, note 50 above, 258; Mathew, note 53 above; Michael Taggart, 'Legitimate Expectation and Treaties in the High Court of Australia' (1996) 112 *The Law Quarterly Review* 50, 50; James Crawford, 'International Law and Australian Federalism: Past, Present and Future' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 330, 335-336; Donald Rothwell, 'Quasi-Incorporation of International Law in Australia: Broadcasting Standards, Cultural Sovereignty and International Trade' (1999) 27 *F L Rev* 527, 529; Peter Heerey, 'Storytelling, Postmodernism and the Law' (2000) 74 *ALJ* 681; Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, *No Country is an Island: Australia and International Law* (2006, UNSW Press), 39-40.

³² (1995) 183 CLR 273, 288 and 291.

³³ See *Vaitaki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608; *Morales v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 374; *Long v Minister for Immigration, Multicultural and Indigenous Affairs* [2003] FCAFC 218. See also the New Zealand decision *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 260 where Cooke J asserted '[a] failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand courts, if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.' In the Canadian context see *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, paras 69-71; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, paras 77-79.

³⁴ (1995) 183 CLR 273, 291.

³⁵ Bradley also points out that governments may qualify their ratification of a Convention. He points out that the United States attached to its ratification of the *International Covenant on Civil and Political Rights* (1966) 'five reservations, five understandings, and four declarations' qualifying its acceptance of its underlying substantive obligations: Craig Bradley, 'Customary International Law and Private Rights of Action' (2000) 1 *Chi J Int'l L* 421, 422. Similar reservations have been made in regard to the United States' ratification of the *International Convention on the Elimination of All*

must occur before conventional international law becomes an enforceable legal principle in the municipal courts. Specifically, conventional international law must be formally incorporated into the municipal arena through domestic legislation before it can be enforced by the courts.³⁶

Moreover, despite being signatories, governments often fail to actually transform conventions into domestic laws. The Australian government has at times failed to ratify important treaties. For example, despite the Australian federal government signing the *International Covenant on Civil and Political Rights* (1966)³⁷ nearly 30 years ago, there has been no federal legislation³⁸ that comprehensively incorporates the Convention into domestic law.³⁹ As McHugh notes, Australia has also failed to comply with Article 2 of the Convention which requires that individuals must have access to ‘effective and enforceable remedies’ if their rights are violated.⁴⁰ The *Genocide Convention* was signed by Australia on 8 July 1949. Domestic

Forms of Racial Discrimination (1966): Craig Bradley, ‘Customary International Law and Private Rights of Action’ (2000) 1 Chi J Int’l L 421, 422. See further US Reservations, Declarations and Understandings, *International Convention on the Elimination of All Forms of Racial Discrimination*, 140 Cong Rec S7634-02 (June 24, 1994). The United States is not alone in this practice. Of those States who have lodged declarations of acceptance of the compulsory jurisdiction of the ICJ, most (51 of 65) include reservations: ICJ, *International Court of Justice* (5th ed, 2004), 43-44. See also Charlesworth, note 65 above, 35 and 64.

³⁶ In the Australia context see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-287; *Sumner v United Kingdom of Great Britain* [2000] SASC 91, para 25; *Wurridjal & Ors v Commonwealth* [2009] HCA 2, para 271. In the South African context see *Minister of the Interior v Beier* v *Minister of the Interior* 1948 (3) SA 409(A), 447; *Ex parte Savage* 1914 CPD 827, 830; *Policansky v Minister of Agriculture* 1946 CPD 860, 865; *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A), 161; *S v Tuhadeleni & Others* 1969 (1) SA 153 (A), 173-175; *Maluleke v Minister of Internal Affairs* 1981 (1) SA 707 (B), 712; *Binga v Administrator-General, South West Africa & Others* 1984 (3) SA 949 (SWA), 968; *Tshwete v Minister of Home Affairs* 1988 (4) SA 586 (A), 606; *S v Muchindu* 1995 (2) SA 36 (W), 38; *Azapo v President of the Republic of South Africa* 1996 (4) SA 671 (CC), 688. Bradley also notes that government will often have expressly declared conventions not to be self-executing, reinforcing that the treaty is unenforceable in the courts until it has been transformed into municipal law by domestic legislation: *ibid* 422.

³⁷ Relevantly, the ‘Northern Territory Intervention’ legislation, briefly discussed in this article, has also been criticised by the United Nations Human Rights Committee for also breaching this Convention.

³⁸ Core human rights protections have been enacted through the *Racial Discrimination Act 1975* (Cth), *Sexual Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth). The federal Labor government has recently announced that it will consolidate these specific federal anti-discrimination laws into a single Act. See ‘Reform of Anti-Discrimination Legislation’ Joint Media Release of Attorney-General Robert McClelland and Minister for Finance and Deregulation, Lindsay Tanner, 21 April 2010. However, it is unclear whether the new legislation will be confined to the existing protections or will entail a legislative implementation of all provisions of the *ICCPR*.

³⁹ HRC, *Concluding Observations: Australia*, (95th Session, 7 May 2009), para 8.

⁴⁰ Michael McHugh, *Does Australia Need a Bill of Rights?* (2007) New South Wales Bar Association (www.nswbar.asn.au/docs/resources/lectures/bill_rights.pdf.) See HRC *ibid* para 10.

legislation implementing the *Genocide Convention* in Australia was to follow the Convention coming into force on 12 January 1951. However, no legislation specifically making genocide a crime in Australia was enacted until relatively recently, *International Criminal Court (Consequential Amendments) Act 2002* (Cth). This Act made genocide a Commonwealth offence under the *Criminal Code 1995* (Cth).

As domestic legislation is required to incorporate conventional international law into the municipal arena, the government may choose to instead breach international law by enacting legislation that is inconsistent with conventional law.⁴¹ For example, s 189 *Migration Act 1958* (Cth) provides for the detention of children in breach⁴² of the Australian government's obligations under, *inter alia*, the *Convention on the Rights of the Child*.⁴³ Moreover, as discussed below, while Australia has ratified⁴⁴ the *International Convention on the Elimination of All Forms of Racial Discrimination*⁴⁵ and formally incorporated it into domestic law through the *RDA*, the Australian government has legislatively overridden the *RDA*. Through this legislation the Australian government has expressly suspended the *RDA* so that it can act in a racially discriminatory manner against the Indigenous people of Australia. The first case study below looks at one example, known as the 'Wik amendments'⁴⁶ to the *NTA 1998*. Unfortunately, this is not the only example of such a breach. The three key statutes giving effect to what is known as the 'Northern Territory intervention'⁴⁷ are also based on the suspension of the *RDA* so that the government can affect an extremely evasive racially discriminatory policy.

In light of its relevance to the two examples considered below, one other method by which governments often qualify their acceptance of conventional international laws needs to be briefly addressed. Each of the core human rights

⁴¹ *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262, 272-274; *Re Kavanagh's Application* (2003) 78 ALJR 305, 308; (2003) 204 ALR 1, 5.

⁴² See further *Re Woolley* (2004) 225 CLR 1, paras 11, 31, 107, 108, 114, 199 and 201.

⁴³ Ratified by Australia on 17 December 1990. Ratified by South Africa 16 June 1995.

⁴⁴ Ratified by Australia on 30 September 1975. Ratified by South Africa on 10 December 1998.

⁴⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 60 UNTS 13 (entered into force 4 January 1969).

⁴⁶ *Native Title Amendment Act 1998* (Cth).

⁴⁷ Namely the *Northern Territory National Emergency Response Act 2007* (Cth), *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) and the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

conventions has associated with it a United Nations' committee with responsibility for monitoring the implementation of the convention.⁴⁸ Governments' acceptance of the enforcement mechanism for a particular convention has at times been optional. For example, some States have ratified the *International Covenant on Civil and Political Rights* (1966), but refused to ratify the *Optional Protocol* which provides for the United Nations' jurisdiction to ensure compliance with human rights protected under the Convention through the United Nations' Human Rights Committee.⁴⁹ The *International Convention on the Elimination of All Forms of Racial Discrimination* (1966) has a similar enforcement mechanism, through the Committee on the Elimination of Racial Discrimination ('CERD'). While the Australian government did not refuse to ratify the *Optional Protocols* to these conventions, in 2000 it resolved⁵⁰ not to sign or ratify the *Optional Protocol*⁵¹ to *Convention on the Elimination of all Forms of Discrimination against Women* (1979),⁵² which created the Committee on Elimination of all Forms of Discrimination Against Women ('CEDAW'). The then Howard Liberal federal government stood resolute that it would not adopt the *Optional Protocol*. It was only with the subsequent change in government in 2007 that Australia reversed its position,⁵³ signed the *Optional Protocol* and acceded to its

48 William Schabas, *Preventing Genocide and Mass Killing: The Challenge for the United Nations* (2006), 19. The conventions require parties to submit periodic reports and these are in turn publicly examined by the relevant United Nations' committee which makes recommendations in the form of 'concluding observations': William Schabas, *Preventing Genocide and Mass Killing: The Challenge for the United Nations* (2006), 19; Michael Haas, *International Human Rights: A Comprehensive Introduction* (2008), 217. The committee may engage in further follow-up monitoring by evaluating the State's response to these recommendations: Michael Haas, *International Human Rights: A Comprehensive Introduction* (2008), 217. As noted above, several conventions allow individuals to submit petitions alleging a violation of their rights and the UN committee has the role of investigating these allegations against the State: William Schabas, *Preventing Genocide and Mass Killing: The Challenge for the United Nations* (2006), 19. Such investigations may also be triggered by a failure of a party State to submit its periodic reports: Haas, note 49 above, 217. However, the committee's report on any allegation of a breach is not legally binding.

49 These provisions came into effect in March 2009 and require, *inter alia*, four-yearly reports. The *Optional Protocol* also includes an individual petition mechanism.

50 Alexander Downer, Phillip Ruddock and Daryl Williams, 'Improving the Effectiveness of United Nations Committees' (Joint Press Release, 29 August 2000).

51 *Optional Protocol* opened for signature 6 October 1999, 2131 UNTS 83 (entered into force 22 December 2000).

52 *Convention on the Elimination of all Forms of Discrimination against Women* (1979), opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

53 This was pursuant to recommendation 9 Joint Standing Committee on Treaties, *Report 95: Treaties Tabled on 4 June, 17 June, 25 June and 26 August 2008*.

obligations in December 2008.⁵⁴ These provisions came into effect in March 2009 and require, *inter alia*, four-yearly reports to CEDAW. The Optional Protocol also includes an individual petition mechanism.

In regard to the signed *Optional Protocols to the International Covenant on Civil and Political Rights* (1966) and *International Convention on the Elimination of All Forms of Racial Discrimination* (1966), the then Howard Liberal government declared that it would limit the ability of United Nations' human rights treaty committees to investigate human rights breaches in Australia, contrary to its conventional international law obligations.⁵⁵ Moreover, as discussed below,⁵⁶ the former Howard Liberal government consistently refused to address international findings of domestic breaches of human rights.⁵⁷ Instead, the response, whether from the then Prime Minister,⁵⁸ Minister of Foreign Affairs⁵⁹ or Attorney-General,⁶⁰ was effectively to declare that the United Nations should not interfere in domestic issues.

⁵⁴ See also 'Reaffirming our commitment to International Human Rights Obligations' Joint Media Release of Attorney-General, Robert McClelland and Minister for Foreign Affairs, Stephen Smith, 21 April 2010.

⁵⁵ Hilary Charlesworth, 'Human Rights: Australia versus the UN' (Discussion Paper 22, Democratic Audit of Australia, 2006); Charlesworth, note 65 above, 89.

⁵⁶ See further Cassidy 2, note 1 above, 54-55. Charlesworth *ibid* 83-91.

⁵⁷ These decisions include *Hagan v Australia* (2002) Communication No. 26/2002, CERD/C/62/D/26/2002; *A v Australia* (2006) Communication No. 560/1993, CCPR/C/59/D/560/1993; *Winata v Australia* (2001) Communication No. 930/2000, CCPR/C/72/D/930/2000; *Rogerson v Australia* (2002) Communication No. 802/1998, CCPR/C/74/802/1998; *Young v Australia* (2003) Communication No. 941/2000, CCPR/C/78/D/941/2000; *Cabal and Bertran v Australia* (2003) Communication No. 1020/2001, CCPR/C/78/D/1020/2001; *Bakhtiyari v Australia* (2003) Communication No. 1069/2002, CCPR/C/79/D/1069/2002; *Brough v Australia* (2006) Communication No. 1184/2003, CCPR/C/86/D/1184/2003; *D & E v Australia* (2006) Communication No. 1050/2002, CCPR/C/87/D/1050/2002.

⁵⁸ See, for example, the then Prime Minister John Howard's response to the CERD Report on the failure to apologise or offer redress to the stolen generations where he asserted that 'We are not told what to do by anybody': ABC, 'The Hon. John Howard MP: Radio Interview with Sally Sara', *AM Program*, 18 February 2000.

⁵⁹ See, for example, the then Foreign Minister Alexander Downer's response to a decision of CERD where he asserted that 'If a UN Committee wants to play domestic politics here in Australia, then it will end up with a bloody nose': ABC, 'Australia headed for bottom of the human rights barrel', *7.30 Report*, 31 March 2000. See also Alexander Downer, 'Government to Review UN Treaty Committees' (Press Release, 30 March 2000).

⁶⁰ See, for example, then Attorney-General Daryl Williams response to the CERD Report on the failure to apologise for the stolen generations where he asserted that 'It is unacceptable that Australia, which is a model member of the United Nations, is being criticised in this way for its human rights records': 'CERD Report Unbalanced' (Press Release, 26 March 2000).

At face value the subsequent Labor federal government has adopted a very different attitude in regard to its international obligations,⁶¹ in particular, United Nations' scrutiny. The Labor government has complied with its conventional law reporting obligations, including providing reports to CERD for the period when the former Howard Liberal government breached its conventional law obligations.⁶² The difference in attitude is reflected in the most recent report to CERD which states that the 'Australian Government is committed to the effective operation of the United Nations human rights and treaty system and looks forward to the Committee's consideration of this report.'⁶³ A recent joint media release from the then Attorney-General, Robert McClelland and Minister for Foreign Affairs, Stephen Smith⁶⁴ echoes this change in attitude to international scrutiny. In the media release the government announced its accession to the *Optional Protocols to the Convention on the Elimination of all Forms of Discrimination against Women* (1979) and *Convention on the Rights of Persons with Disabilities* (2007)⁶⁵ and the signing of the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* (1984),⁶⁶ thereby submitting to the jurisdiction of the relevant treaty bodies. More generally, the media release indicates a greater openness to United Nations' scrutiny by issuing a 'standing invitation to international rapporteurs to visit and examine Australia's compliance with our international human rights obligations.' It will be suggested below, however, that the Labor government nevertheless warrants criticism for its continuing racially discriminatory treatment of Indigenous Australians.

61 As noted the above, the Labor government subsequently declared its support for the *United Nations Declaration on the Rights of Indigenous Peoples 2007* on 3 April 2009. See media release of Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma 'United we stand – Support for United Nations Indigenous Rights Declaration a watershed moment for Australia' (3 April 2009).

62 See *Combined Fifteenth, Sixteenth and Seventeenth Periodic Reports of the Government of Australia under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination* (2009), covering the period 1 July 2002 to 30 June 2008.

63 Ibid para 7.

64 See note 93 above.

65 *Convention on the Rights of Persons with Disabilities* (2006), opened for signature 30 March 2007, 933 UNTS 3 (entered into force 3 May 2008).

66 It also includes an announcement that the government will legislate to create a comprehensive Commonwealth offence of torture, in accordance with the obligations under the *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* (1984). See note 93 above.

III THE WIK AMENDMENTS

A particularly insidious aspect of Indigenous policy under the former Howard Liberal federal Australian government was its overt racial discrimination.⁶⁷ The first case study involves the then Howard federal government knowingly enacting racially discriminatory legislation that breached the *RDA* and, in turn, its conventional international obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966). The relevant legislation is *NTA 1998*.

A number of preliminary points need to be considered before the implementation of this legislation is considered. First, aboriginal title was not recognised in Australia until the landmark decision in decision *Mabo v Queensland*⁶⁸ (*'Mabo 2'*) in 1992. A majority⁶⁹ of the High Court in *Mabo 2* held that Australia was not *terra nullius*, uninhabited or inhabited by peoples so low in the social scale that they could not be recognised.⁷⁰ Moreover, aboriginal title was not extinguished upon the annexation of Australia.⁷¹ Rather this tenure continued, providing the original occupants with the right to occupy and use their traditional lands in accordance with their customs and laws.⁷² Aboriginal title was recognised and protected by the common law.⁷³

Second, in *Mabo 2*⁷⁴ and the subsequent decision in *Wik Peoples v Queensland*⁷⁵ (*'Wik'*) the courts also concluded that upon settlement, the traditional owners' aboriginal title became susceptible to the Crown's sovereign power to extinguish such rights. Legally, for an

⁶⁷ See further the discussion of the role of racism in the then Howard Liberal government's immigration and refugee policies and Indigenous affairs in Andrew Markus, *Race, John Howard and the Remaking of Australia* (2001) chap 4.

⁶⁸ (1992) 175 CLR 1. See further Julie Cassidy, 'Observations on *Mabo v Queensland*' (1994) 1 Deakin Law Review 37; Julie Cassidy, 'Aboriginal title: "An overgrown and poorly excavated archaeological site"?' (1999) 10(1) International Legal Perspectives Journal 39.

⁶⁹ Brennan J (with whom Mason CJ and McHugh J agreed), Deane, Gaudron and Toohey JJ; Dawson J dissenting.

⁷⁰ See, for example, *Mabo 2* (1992) 175 CLR 1, 42 per Brennan J.

⁷¹ *Mabo 2* (1992) 175 CLR 1, 65.

⁷² *Mabo 2* (1992) 175 CLR 1, 15 per Mason CJ and McHugh J. No formal governmental recognition of this aboriginal title was necessary before such tenure could be acknowledged by the common law: *Mabo 2* (1992) 175 CLR 1, 55 per Brennan J; (1992) 175 CLR 1, 81-82 per Deane and Gaudron JJ; *Mabo 2* (1992) 175 CLR 1, 183-184 per Toohey J.

⁷³ *Mabo 2* (1992) 175 CLR 1, 110 and 113.

⁷⁴ *Mabo 2* (1992) 175 CLR 1, 63-64, 89 and 111.

⁷⁵ (1996) 141 ALR 129.

effective extinguishment to occur there must be a clear and plain intention to extinguish the aboriginal title⁷⁶ and the granting of a right to exclusive possession that is inconsistent with the aboriginal title.⁷⁷ As may be apparent from the latter requirement, not all dealings with traditional lands will extinguish aboriginal title. Thus a key basis for the implementation of the *NTA 1998* was the finding in *Wik*⁷⁸ that the subject pastoral (farming) leases did not confer an exclusive right of possession to the land occupier and thus had not necessarily extinguished the plaintiffs' aboriginal title.⁷⁹ Equally the conferral of mining licences will not necessarily confer the required exclusive occupation rights that would be inconsistent with the continuation of aboriginal title. Ironically, given the analysis below, in one of the leading New Zealand decisions on aboriginal title, *R v Symonds*⁸⁰ the court stressed that the rationale for the Crown's exclusive right of pre-emption was to protect the aboriginal owners from exploitation by land speculators. Yet, as discussed below, under the *NTA 1998* the power of extinguishment came to be used for the benefit of pastoralists and mining companies, not traditional owners.

Third, while unclear,⁸¹ subsequent courts⁸² have concluded that the majority of the court⁸³ in *Mabo 2* held that aboriginal title could be unilaterally extinguished without compensation. Thus, contrary to the weight of authority in other jurisdictions,⁸⁴ in Australia

⁷⁶ *Mabo 2* (1992) 175 CLR 1, 67, 111 and 195-196; *Wik* (1996) 141 ALR 129, 182-184, 220, 222, 223 and 279.

⁷⁷ *Wik* (1996) 141 ALR 129, 170, 176 and 192.

⁷⁸ *Wik* (1996) 141 ALR 129, 181, 188-189, 207-208, 209 and 245-247, 268, 271 and 279.

⁷⁹ *Wik* (1996) 141 ALR 129, 181, 188-189, 207-208, 209 and 245-247, 268, 271 and 279. Note, in *Mabo 2* the majority of the court held that the mere annexation of the Murray Islands did not extinguish aboriginal title and general waste lands legislation governing the subject area failed to evince a 'clear and unambiguous' intent to extinguish the aboriginal title: *Mabo 2* (1992) 175 CLR 1, 65.

⁸⁰ *R v Symonds* (1847) NZPCC 387, 391.

⁸¹ See further note 107 above.

⁸² See for example *Wik* (1996) 141 ALR 129. This also accords with Mason CJ and McHugh JJ's summation in *Mabo 2* (1992) 175 CLR 1, 15-16.

⁸³ Brennan J (with whom Mason CJ and McHugh J agreed) and Dawson J (who dissented from the Court's ultimate finding).

⁸⁴ See, for example, *Worcester v Georgia* 31 US (6 Pet) 515, 545 (1832); *Mitchel v United States* 34 US 711 745-746 (1835); *Jones v Meehan* 175 US 1, 8 and 16 (1899); *US v Shoshone Tribe of Indians* 304 US 111, 115-116 (1938); *Paul v Canadian Pacific Ltd* (1983) 2 DLR (4th) 22, 34; *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193, 341 and 378-379; *R v Symonds* (1847) NZPCC 387, 390.

there is no common law right to compensation for the extinguishment of aboriginal title. This in turn brings the *RDA* into play. The *RDA* provides an alternative source for the legal obligation to pay compensation for the extinguishment of aboriginal title. Section 10(1) of the *RDA* effectively prohibits any law⁸⁵ that impairs the enjoyment of a right⁸⁶ on the basis of, *inter alia*, race. In *Mabo v Queensland*⁸⁷ (*'Mabo 1'*) the court held that s 10(1) conferred on Indigenous peoples the 'same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community.' As an uncompensated act of extinguishment would deprive the traditional owners of their right to just compensation, enjoyed by other Australians, that act would be contrary to s 10.

Fourth, the *Native Title Act 1993* (Cth)⁸⁸ was enacted in response to *Mabo 2*. The Act was to provide certainty to this area of law by providing a mechanism by which aboriginal title as recognised under the common law could be verified and compensation provided for acts that extinguish or impair aboriginal title.⁸⁹ The *Native Title Act 1993* (Cth) does not provide for the payment of compensation for the extinguishment of title prior to the operative date of *RDA*, 31 October 1975. Post this date, Pt 2 Div 5 *Native Title Act 1993* (Cth) provides a complex statutory scheme for the payment of compensation for the extinguishment of Native title by certain past,⁹⁰ intermediate⁹¹ and future⁹² acts. McRae *et al*⁹³ note that no application for compensation has ever been successfully brought in the

85 Note, s 10(2) *RDA* expressly refers to discriminatory laws, while s 9(1) refers to discriminatory acts. While s 9(1), therefore, extends to any 'act' done in performance of a duty imposed by legislation (*Gerhardy v Brown* (1985) 159 CLR 70 [29] per Brennan J), where the 'act' is the enactment of legislation s 10(1) is the appropriate provision: *Western Australia v Ward* (2002) 213 CLR 1, [103].

86 Including any right referred to in Art 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966): s 10(2) *RDA*.

87 (1988) 166 CLR 186, 219.

88 See further Richard Bartlett, *Native Title in Australia*, (2nd ed, 2004).

89 See the preamble to the *Native Title Act 1993* (Cth); Second Reading speech, *Native Title Bill 1993*, House of Representatives, 16 November 1993, Hansard, 2877-2883.

90 See ss 17, 19, 20 and 51 *Native Title Act 1993* (Cth).

91 See ss 22D and 22E *Native Title Act 1993* (Cth).

92 See ss 24EB(7), 24GB(8), 24GD(8), 24HA(6), 24ID(2), 24KA(6), 24MD(4) and 24NA(7) *Native Title Act 1993* (Cth).

93 Heather McRae, Garth Nettheim, Thalia Anthony, Laura Beacroft, Sean Brennan, Megan Davis and Terri Janke, *Indigenous Legal Issues* (4th ed, 2009) at 375.

Federal Court. The only litigated compensation application was unsuccessfully brought in regard to the construction of the Yulara tourist resort near Uluru.⁹⁴

Finally, while the court in *Western Australia v Commonwealth*⁹⁵ stated that ambiguous provisions of the *Native Title Act 1993* (Cth) should be interpreted in accordance with the *RDA*, it recognised that unambiguous provisions of the *Native Title Act 1993* (Cth) could prevail over the *RDA*.⁹⁶ The court noted that the ‘general provisions of the *Racial Discrimination Act 1975* (Cth) must yield to the specific provisions of the *Native Title Act* in order to allow those provisions a scope for operation.’⁹⁷ If legislation manifests a clear intention to operate contrary to the *RDA*, the latter Act can be overridden and its operation effectively suspended. This can occur through provisions that ensure that the legislative intent is very specifically detailed or, more blatantly, an express section excluding the operation of the *RDA*. It will be seen that the *NTA 1998* provides an example of both methods.

Turning now to the *NTA 1998*, while the enactment is often referred to as the ‘Wik amendments’, its genesis predated the decision in *Wik*⁹⁸ in December 1996. When the Howard Liberal federal government was elected to government in 1996, part of its platform was the amendment of the *Native Title Act 1993* (Cth). On 22 May 1996 the government released its paper *Towards a More Workable Native Title Act*,⁹⁹ outlining the proposed amendments to reduce the impact of *Native Title Act 1993* (Cth) on mining and farming.¹⁰⁰ The proposals were in turn incorporated into the *Native Title Amendment Bill 1996* (Cth). This was followed by another outline of the proposals and draft legislation on 8 October

⁹⁴ See *Jango v Northern Territory* (2006) 159 FCR 531. The plaintiffs failed to establish their Native title over the site.

⁹⁵ (1995) 183 CLR 373, 453.

⁹⁶ (1995) 183 CLR 373, 484. See further Richard Bartlett, ‘Racism and the Constitutional Protection of Native Title in Australia: the 1995 High Court Decision’ (1995) 25 *Uni of Western Australia LR* 27.

⁹⁷ (1995) 183 CLR 373, 484. See further Bartlett *ibid*.

⁹⁸ (1996) 141 ALR 129.

⁹⁹ Office of Indigenous Affairs (AGPS, Canberra, 1996).

¹⁰⁰ *Ibid* para 18. The proposals included increasing the threshold test for the registration of native title claims, narrowing the right to negotiate and validating renewals of pre-1994 mining titles and pastoral leases.

1996. Following the handing down of *Wik*,¹⁰¹ the then Howard Liberal government responded with its *Ten Point Plan*.¹⁰² In addition to the initial proposals, the plan proposed the diminishing of any native title interests that might survive, for example, pastoral leases and in reserves, towns and cities. The consequent *Native Title Amendment Bill 1997* (Cth) was, however, subject to considerable amendment by the Senate, concerned that it was inconsistent with the *RDA*. After being rejected again by the Senate in 1998, the legislation was ultimately passed after the Howard Liberal government negotiated a deal with Senator Harradine, who held the balance of power in the Senate. *NTA 1998* received royal assent and came into effect on 30 September 1998.

The Explanatory Memorandum stated that the ‘Government has been concerned to ensure its amendments to the NTA are consistent with the principles of the *Racial Discrimination Act 1975*.’¹⁰³ Disturbingly the Explanatory Memorandum continued by stating that compliance with the *RDA* is ‘not a legal requirement, but flows from government policy.’¹⁰⁴ The Explanatory Memorandum went on to assert that the government was concerned that the amendments met standards of formal and substantive equality, appropriately taking into account the different interests of the relevant parties.¹⁰⁵ As Bartlett notes,¹⁰⁶ the subsequent explanation of the Ten Point Plan asserts that the legislation respects Native title, ‘preserving the principle of native title as established in the *Mabo* case and allowing claims to proceed’,¹⁰⁷ but there is no further reference to the *RDA*.

The then Howard Liberal government was clearly aware its amendments breached the *RDA* and thus its obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966). The aims of the legislation make it clear that the

101 (1996) 141 ALR 129.

102 *The Ten Point Plan: The Federal Government’s Response to the Wik Decision* (AGPS, Canberra, 1997).

103 Explanatory Memorandum to the *Native Title Amendment Bill 1997*, para 18.23.

104 *Ibid.*

105 *Ibid* para 18.27.

106 Bartlett, note 127 above, 54.

107 *Wik: The Ten Point Plan Explained* (AGPS, Canberra, 1997), 3.

intention was to racially discriminatorily weaken Native title rights. Bartlett summarises the government's stated underlying policy:¹⁰⁸

- validation of non-aboriginal grants from 1994 to *Wik*;
- certainty for pastoralists;
- 'confirmation' of extinguishment by freehold and most leases;
- removal of impediments to the development of municipal services;
- assurance of government powers over water;
- 'workability, through removing impediments to development';
- 'devolution to the States and Territories';
- 'speedy and sustainable resolution of concerns and uncertainty.'

These goals were in turn effected through provisions that, *inter alia*:

- validated certain land grants, thereby extinguishing Native title;
- introducing a presumption of non-existence of Native title in relation to future acts;
- subordinating Native title to future legislation relating to the management or regulation of, *inter alia*, water and airspace;
- limiting the right to negotiate;
- increasing the burden of proof on Native title applicants; and
- limiting the maximum compensation payable on a compulsory acquisition of Native title.

It is beyond the scope of an article of these parameters to consider the consequences of each of these legislative amendments. Bartlett's text provides a comprehensive and critical appraisal of such.¹⁰⁹ Rather, the article considers the racially discriminatory nature of the *NTA 1998*, in particular its extinguishment of native title. Thus the focus is particularly on the racially discriminatory validation of non-Indigenous interests under *NTA*

¹⁰⁸ Bartlett, above n 127, 54, citing *ibid* 3.

¹⁰⁹ Chapter 5 provides an overview. The discussion is expanded upon in subsequent chapters, in particular chapters 11, 17-21 and 30: Bartlett *ibid*.

1998 that guaranteed the ‘bucket-loads of extinguishment’¹¹⁰ that the then Howard Liberal government promised the non-Indigenous Australian public. In addition to the validation of the past¹¹¹ extinguishment of aboriginal title that had already been affected by Div 2 *Native Title Act 1993* (Cth), *NTA 1998* provided for the extinguishment of Native title by intermediate period acts¹¹² and specified future acts¹¹³; extinguishment that would otherwise have been prohibited by the *RDA*. More specifically, the amendment validated pre-*Wik* non-Indigenous land titles, including freehold and leasehold grants (Part 2, Divs 2A and 2B). It expanded the categories of past acts that could extinguish Native title to include variations in reservations (Part 2, Div 3, Subdiv J). It deemed the establishment of all public works to permanently extinguish Native title (s 24JB(2)). It provided for the extinguishment of Native title by future acts, such as resources legislation (Part 2, Div 3, SubDiv H) and the expansion of existing freehold estates or pastoral or agricultural leases (ss 24GA-24GE). Legislation relating to the management or regulation of water resources and airspace, including the granting of rights such as licences and leases to non-Indigenous interests, were also included in extinguishing future acts (Part 2, Div 3, SubDiv H). It also allowed State and Territory governments to identify ‘Scheduled interests’. This was significant as it allows these governments to name extensive areas with regard to which Native title claims cannot be made (Schedule 1). In addition, procedurally, where a non-claimant¹¹⁴ application is made there is a presumption against Native title. Such non-claimant applications that are not withdrawn or dismissed are in turn deemed to have validly extinguished Native title unless a Native title claim is lodged within 3 months of the non-claimant application. As Bartlett¹¹⁵ notes, the extensive facilitation of extinguishment, particularly by future acts, provided a dramatic shift from the protection of ‘existing’ non-native holders rights, to ensuring that the *Native Title Act 1993* (Cth) would not ‘prevent any future action authorised’ by law.¹¹⁶

The then Howard Liberal government’s explanation for this extensive extinguishment of native title was to protect the interests of pastoralists, miners and other

110 Mick Dodson, *1995-1996 Native Title Report*, ATSI Social Justice Commission, 76. See also Richard Bartlett, ‘A Return to Dispossession and Discrimination: the Ten-Point Plan’ (1996) 27 *Uni of Western Australia LR* 44, 53-54.

111 Acts prior to 1 January 1994, the operative date of the *Native Title Act 1993* (Cth): s 13A *Native Title Act 1993* (Cth).

112 Acts between 1 January 1994 to 23 December 1998: s 21 *Native Title Act 1993* (Cth).

113 See ss 24AA and 233 *Native Title Act 1993* (Cth).

114 Non-claimant applications seek to establish that Native title does not exist.

115 Bartlett, note 127 above, 57.

116 Note 146 above, 4.

non-government holders of land. It was stated as being necessary to ensure the aspirations and expectations of non-native titleholders were met.¹¹⁷ Thus the Explanatory Memorandum states that validation of pastoral leases was based on a so-called¹¹⁸ pre-*Wik* assumption that pastoral leases extinguished native title.¹¹⁹ The justification for the above noted ‘Scheduled interests’ provision was again to ensure that native title claims could not affect ‘pastoralists, miners and other non-government holders of land’ in the designated areas.¹²⁰ The public infrastructure protection measures were designed to ensure that the government could provide ‘normal municipal services without the agreement of the native title holders.’¹²¹ The then Howard Liberal government’s explanation for allowing future resources legislation and grants to extinguish Native title was the provision of certainty for governments and to ensure they can properly manage resources.¹²²

Why then did these provisions not fall foul of the *RDA*? The operation of the *RDA* was excluded by the *NTA 1998* in both the possible manners detailed above. First, the *NTA 1998* contains a clear unambiguous legislative intent through its extensive specific provisions. The *NTA 1998* was over 300 pages long, containing complex,¹²³ but very specific extinguishment of native title provisions.¹²⁴ As Bartlett notes,¹²⁵ this ensured that within the principles stated in *Western Australia v Commonwealth*¹²⁶ a clear intent to override the *RDA* was established through the unambiguous provisions of the *NTA 1998*. Second, s 7(2) and (3) expressly provide that the *RDA* does not affect the above-discussed validation of past and intermediate acts pursuant to the *NTA 1998*.

That facilitating the extinguishment of native title is in itself racially discriminatory is not only self-evident, but supported by precedent. As noted above, in *Mabo I*¹²⁷ the High Court held that the singling out of native title for legislative extinguishment under the

117 See Bartlett, note 127 above, 57 and 410.

118 See further *ibid* 55 and 393.

119 *Native Title Amendment Bill 1997, Explanatory Memorandum*, paras 4.3-4.5.

120 Note 146 above, 4.

121 *Ibid* 5.

122 Bartlett, note 127 above, 432.

123 *Wilson v Anderson* (2002) 190 ALR 313, [126]. See also Bartlett, *ibid* 106.

124 Bartlett *ibid* 54-55.

125 Bartlett *ibid* 54, 106 and 410.

126 (1995) 183 CLR 373, 484.

127 (1988) 166 CLR 186, 198.

Queensland Coast Islands Declaratory Act 1985 (Qld) offended the principle of equality found in s 10(1) *RDA*. As the rights protected by this provision include the right to own and inherit property,¹²⁸ the arbitrary extinguishment of native title was held to be contrary to *RDA*.¹²⁹ This was affirmed in *Mabo 2*¹³⁰ where Deane and Gaudron JJ asserted that the *RDA* provides an important restraint upon the 'legislative power to extinguish or diminish common law native title.' Subsequently, in *Western Australia v Commonwealth*¹³¹ the High Court held that the conversion of native title into a diminished statutory form of title under s 7 *State Land (Titles and Traditional Usage) Act 1993* (WA) was also contrary to the right of equality protected by s 10 *RDA*. As affirmed in *Attorney-General (NT) v Ward*,¹³² *RDA* is breached where a law provides for 'differential treatment of land holding according to race' and native title 'characteristically is held by members of a particular race'.

As noted above, CERD is the treaty body charged under the *Optional Protocol* with responsibility to monitor the implementation of the *International Convention for the Elimination of Racial Discrimination* (1966). Under the *Optional Protocol* Australia is bound to provide bi-annual reports to CERD. In addition, the Convention includes an individual petition mechanism for alleged violations of rights. In response to petitions alleging the racially discriminatory extinguishment of aboriginal/native title under the *NTA 1998* CERD investigated and concluded that the *Native Title Act 1993* (Cth) post these amendments discriminates on the basis of race. Even prior to the amendments, CERD had expressed concerns that the *Native Title Act 1993* (Cth) itself may have breached Australia's obligations under *International Convention on the Elimination of All Forms of Racial Discrimination 1966*.¹³³ Following on from such concerns, on 11 August 1998 CERD

128 Section 10(2) *Racial Discrimination Act 1975* (Cth). See also Art 5(d) *International Convention on the Elimination of All Forms of Racial Discrimination 1966*.

129 (1988) 166 CLR 186, 217 and 229-230.

130 (1992) 175 CLR 1, 112.

131 (1995) 183 CLR 373.

132 [2003] FCAFC 283, para 117.

133 Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues* (2003), 263. See further Darren Dick and Margaret Donaldson, 'The Compatibility of the Amended *Native Title Act 1993* (Cth) with the United Nations Convention on the Elimination of All Forms of Racial Discrimination' (1999) *Land, Rights, Laws: Issues of Native Title*, vol 1, Issues Paper No 29 (August 1999, AIATSIS, Canberra).

requested the Australian government to provide it with information to address concerns as to whether the *NTA 1998* breached Australia's international obligations under this Convention.¹³⁴ The Howard government provided a 16-page response on 15 January 1999, setting out the above-discussed justifications for the amendments.¹³⁵

CERD responded in its Report of 18 March 1999, expressing concern that the *NTA 1998* extensively provided for the extinguishment and/or impairment of the exercise of Indigenous title rights and interests.¹³⁶ In the course of such the Committee particularly focused on the above validation provisions and consequent deemed extinguishment, concluding:¹³⁷

These provisions raise concerns that the amended Act appears to wind back the protection of indigenous title offered in the *Mabo* decision of the High Court of Australia and the 1993 *Native Title Act*. As such, the amended Act cannot be considered to be a special measure within the meaning of articles 1(4) and 2(2) of the Convention and raises concerns about the State party's compliance with articles 2 and 5 of the Convention. ... The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State party's compliance with its obligations under article 5(c) of the Convention.

The Report asserted that while 'the original 1993 *Native Title Act* was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.'¹³⁸ CERD called for a suspension of the amendments and continued negotiations between the government and the Indigenous community.¹³⁹ The Commonwealth Attorney-General rejected the conclusions.¹⁴⁰

134 CERD, *Decision 2 (54) on Australia* (54th Session, 18 March 1999). See also McRae *ibid* 263; Dick *ibid*. See further Bartlett, note 149 above; Gillian Triggs, 'Australia's Indigenous Peoples And International Law: The Validity Of The Native Title Amendment Act 1998' (1999) 23 MULR 372.

135 See CERD *ibid*.

136 CERD *ibid* para 6. The decision is set out at (1999) 4(2) *AILR* 140-141.

137 CERD *ibid*.

138 CERD *ibid* para 6.

139 CERD *ibid* para 21.

140 The then Howard Liberal government's formal response is set out in (1999) 4(4) *AILR* 144-147.

The racially discriminatory nature of the amendments was subsequently confirmed in the Committee's Report of 16 August 1999.¹⁴¹ Further, on 19 March 2000 CERD expressed continuing concerns about the impact of 1998 Amendments on Native title lands, particularly pastoral lands.¹⁴² On 10 March 2005 CERD again met and reiterated:¹⁴³

[T]he 1998 Amendments wind back some of the protections offered to indigenous peoples, and provide legal certainty for government and third parties at the expense of indigenous title. ... The Committee recommends that the State party should not adopt measures withdrawing existing guarantees of indigenous rights and that it should make all efforts to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.

In its most recent report CERD noted with regret the lack of concrete measures being taken by Australia to address the above concerns.¹⁴⁴

CERD is not the only United Nations' treaty body concerned about this racially discriminatory legislation. The United Nations' Human Rights Committee (HRC) is the monitoring body of the *International Covenant on Civil and Political Rights* (1966). Under the convention, party States are required to submit compliance reports every four years. As with subsequent CERD Reports,¹⁴⁵ the HRC reports have been particularly concerned with the Australian government's breaches of the *International Covenant on Civil and Political Rights* (1966) through the 'Northern Territory intervention.'¹⁴⁶ However, it has also been critical of the *NTA 1998*.¹⁴⁷ The then Howard Liberal government's response to such was to merely state that the amendments were to rectify the 'shortcomings of the original *Native Title Act 1993 (Cth)*'.¹⁴⁸

141 CERD, *Draft Decision on Australia* (55th Session, 16 August 1999), reproduced in (1999) 4(4) *AILR* 144-147.

142 CERD, *Concluding Observations on Australia*, (56th Session, 19 April 2000), para 10: reproduced in (2000) 5(4) *AILR* 135-137.

143 CERD, *Concluding Observations: Australia*, (66th Session, 10 March 2005), para 16, reproduced in (2005) 9(4) *AILR* 117-119.

144 CERD, *Concluding Observations: Australia*, (77th Session, 27 August 2010), para 9.

145 See, for example, CERD *ibid* para 16.

146 See HRC, *Concluding Observations: Australia*, (95th Session, 7 May 2009), para 14.

147 HRC *ibid* para 16.

148 See *Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights* (2006), para 130.

Despite CERD's criticism of Australia's continuing disregard of its international obligations, the then Howard Liberal government steadfastly refused to rectify the racially discriminatory extinguishment of Native title pursuant to *NTA 1998*. During this period the required bi-annual reports were often not lodged with CERD and the former Howard Liberal government's norm was simply not to publicise CERD's critical findings and/or the government's response, contrary to its conventional international law obligations.¹⁴⁹ As noted above, when government responses were forthcoming, they merely rebuked CERD's findings against Australia and asserted that the United Nations was interfering in domestic affairs.¹⁵⁰

However, it is not just the former Howard Liberal government that is worthy of criticism in this regard. While the subsequent Labor federal government has complied with its reporting obligations, including providing reports to CERD for the period when the Howard Liberal government breached its conventional law obligations,¹⁵¹ the discussion of the *Native Title Act 1993* (Cth) reforms in the latest Report to CERD does not address the suspension of the *RDA*.¹⁵² In its Concluding Observations CERD in turn noted that insufficient information had been provided by the government as to what measures were being taken by Australia to address the above concerns.¹⁵³

When the subsequent Rudd Labor government was voted into power in November 2007 one of its stated policies was to address the racially discriminatory nature of both the *NTA 1998* and the 'Northern Territory intervention' legislation. While the Labor government recently initiated the enactment of the *Social Security and Other Legislation Amendment (Welfare and Reinstatement of RDA) Act 2010* (Cth), purportedly reinstating the operation of

149 Hilary Charlesworth, 'Human rights: Australia versus the UN' RegNet, ANU Discussion Paper 22/06; Charlesworth et al, note 65 above, 89.

150 As to the former Howard Liberal government's general response to negative findings by United Nations' committees, see further Charlesworth et al *ibid* 64 and 83-91; Charlesworth *ibid*; Elizabeth Evatt, 'How effective has the United Nations Human Rights system been in promoting human rights observance by Australian governments?' (August 2005, Democratic Audit of Australia, ANU, Canberra) <http://democratic.audit.anu.edu.au>.

151 See note 101 above.

152 See *ibid* paras 20-23.

153 CERD, note 183 above, para 9.

the *RDA* in regard to the ‘Northern Territory intervention’ legislation, the suspension of the *RDA* continues under the *Native Title Act 1993* (Cth).

The international law that is being breached by both the former and current Australian governments represents a significant conventional international law obligation. It in turn embodies a key principle of customary international law and these obligations are recognised as *jus cogens*.¹⁵⁴ As a consequence, legally, the *NTA 1998* and the ‘Northern Territory intervention’ legislation¹⁵⁵ are both void.¹⁵⁶ However, that has not prevented these racially discriminatory acts to continue to operate at the domestic level. This case example highlights how vulnerable conventional international rights are in the face of defiant governments. That the affected people constitute an Indigenous minority group is telling as these are just the people that human rights norms seek to protect. That such blatant racial discrimination continues to occur in a first world Nation such as Australia is extremely disturbing.

IV NORTHERN TERRITORY INTERVENTION

This is not an isolated example of the suspension of the *RDA*. Equally the imposition of restrictive measures on Australia’s Indigenous peoples; measures that have been paralleled with South Africa’s apartheid regime; remain in place under the ‘Northern Territory intervention’ laws.¹⁵⁷ While recent legislation (*Social Security and Other Legislation Amendment (Welfare and Reinstatement of RDA) Act 2010* (Cth)) purports to reinstate the operation of the *Racial Discrimination Act 1975* (Cth) in the context of this legislation, this is disputed by the author. As noted above, in *Western Australia v*

154 *South West Africa cases (Second Phase)* 1966 ICJ Rep 6, 298; *Barcelona Traction case (Second Phase)* ICJ Rep (1970) p 3; *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia* 1971 ICJ Rep 16, 78-81. See also American Law Institute, note 49 above, s 702; Charlesworth and Chinkin, note 52 above, 68 and 70; Aust, note 52 above, 10.

155 Note 86 above.

156 Charlesworth, note 47 above, 3-4; Brownlie, note 23 above, 10; Jennings, note 50 above 29; Donaghue, note 50 above, 224-6, 261; Kindred note 31 above, 138, 244.

157 Note 86 above.

*Commonwealth*¹⁵⁸ the court noted that legislation may prevail over the *Racial Discrimination Act 1975* (Cth), not only through an express provision excluding the Act,¹⁵⁹ but also through detailed provisions evincing a legislative intent to act in a discriminatory manner. As with the *NTA 1998*, the ‘Northern Territory intervention’ legislation utilised both methods. While the blatant express sections excluding the *Racial Discrimination Act 1975* (Cth) have been repealed by ss 1-3 *Social Security and Other Legislation Amendment (Welfare and Reinstatement of RDA) Act 2010* (Cth), the detailed discriminatory provisions remain intact. These provisions will in turn continue to prevail over the *Racial Discrimination Act 1975* (Cth). As Nicholson recently stated, ‘the spirit of the original Intervention still prevails.’¹⁶⁰ It is interesting that the government did not adopt the Aboriginal and Torres Islander Social Justice Commissioner’s recommendation¹⁶¹ that the exempting provisions be replaced by a *non-obstante* clause unequivocally providing that the Northern Territory Intervention legislation is subject to the *RDA*. The reason clearly is that such would have meant that the *RDA* would have prevailed over the continuing racially discriminatory provisions.

That the government is aware that the remaining provisions are racially discriminatory is evident by its attempt to justify them as ‘special measures.’¹⁶² They are not ‘special

158 (1995) 183 CLR 373, 484.

159 See s 132(1) and (2) *Northern Territory National Emergency Response Act 2007* (Cth), s 4(1) and (2) *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) and s 4(2) and (3) *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

160 Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michele Harris, ‘Will they be heard’ – a response to the *NTER Consultations June to August 2009* (November 2009, produced by the Research unit, Jumbunna Indigenous House of Learning), 4.

161 Note 52 above, 267.

162 See, for example, new s 6A and 30A and 91A *Northern Territory National Emergency Response Act 2007* (Cth). See also Jenny Macklin, ‘Second reading speech: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009’, House of Representatives, *Debates*, 25 November 2009, 12,784; Explanatory Memorandum *Social Security and Other Legislation Amendment (Welfare and Reinstatement of RDA) Bill 2009*, 2, 4 – 10, 32, 33, 40, 41, 42, 44, 45, 47, 50, 52, 64, 85 and 86; *Future Directions (for the Northern Territory Emergency Response) 7; Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2010), 4 and 10.

measures.’¹⁶³ The sole purpose of special measures must be to provide a beneficial advancement.¹⁶⁴ Special measures cannot entail negative discrimination; the restriction of rights. The ‘Northern Territory intervention’ provisions restrict Aboriginal persons’ rights.¹⁶⁵ As Kirby J recently noted, through this legislation the ‘Parliament authorised a remarkable governmental intrusion by the Commonwealth into the daily lives of Australian citizens in the Northern Territory, identified mostly by reference to their race.’¹⁶⁶ For example, the compulsory imposition of 5-year government leases¹⁶⁷ over traditional lands involves only negative discrimination. This can hardly be sustained as an ‘appropriate and adapted’,¹⁶⁸ much less a ‘necessary’,¹⁶⁹ measure to ensure Aboriginal people equally enjoy human rights and freedoms.¹⁷⁰ Furthermore under ss 8 and 10(3) of the *RDA* expressly states that a provision that impacts on the management of, *inter alia*, Aboriginal land without consent cannot be characterised as a special measure.¹⁷¹ It is pertinent that the Minister was advised against formal consultation with Aboriginal people regarding the

¹⁶³ See Arts 1(4) and 2(2) *International Convention on the Elimination of All Forms of Racial Discrimination* (1966). See also CERD’s relatively recent *General Recommendation No 32 of August 2009 on the meaning and scope of special measures in the Convention* (Seventy-fifth session, August 2009) <<http://www2.ohchr.org/english/bodies/cerd/comments.htm>>. Specifically in regard to the NT Intervention legislation see Alison Vivian and Ben Schokman, ‘The Northern Territory Intervention and the fabrication of ‘special measures’’ (2009) 13(1) *Australian Indigenous Law Review* 78.

¹⁶⁴ See CERD, *General Recommendation 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (Seventy-fifth session, August 2009), [12], [21], [22] and [33] <<http://www2.ohchr.org/english/bodies/cerd/comments.htm>>. See also *Gerhardy v Brown* (1985) 159 CLR 70, para 37 per Brennan J; McKean, *Equality and Discrimination Under International Law* (1983), 288; Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs* (10 August 2007), 9; Aboriginal and Torres Islander Social Justice Commissioner, note 52 above, 260 and 261.

¹⁶⁵ Aboriginal and Torres Islander Social Justice Commissioner, *ibid* 260.

¹⁶⁶ *Wurridjal & Ors v Commonwealth* [2009] HCA 2, para 243.

¹⁶⁷ That is, the compulsory imposition of five year leases over traditional land under ss 31-37 *Northern Territory National Emergency Response Act 2007* (Cth). The constitutional challenge to this racially discriminatory compulsory acquisition of Aboriginal interests in traditional lands was recently rejected by a majority (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel JJ, Kirby J in dissent) of the High Court in *Wurridjal & Ors v Commonwealth* [2009] HCA 2.

¹⁶⁸ *Gerhardy v Brown* (1985) 159 CLR 70, para 11 per Deane J. See also See CERD, note 317 above, para 16; Torres Islander Social Justice Commissioner, note 52 above, 263-264.

¹⁶⁹ See Arts 1(4) *International Convention on the Elimination of All Forms of Racial Discrimination* (1966). See also *Gerhardy v Brown* (1985) 159 CLR 70, [40], [41] and [47] per Brennan J; Aboriginal and Torres Islander Social Justice Commissioner, *ibid* 261.

¹⁷⁰ See further Law Council of Australia, note 312 above, 10 and 13; Aboriginal and Torres Islander Social Justice Commissioner, *ibid* 261 and 263.

¹⁷¹ See also Aboriginal and Torres Islander Social Justice Commissioner, *ibid* 266.

compulsory acquisition of their land through these five year leases on the basis that it would not be worthwhile as the affected communities were unlikely to consent.¹⁷² The subsequent Labor federal government has not only retained the provisions effecting this compulsory diminishing of Aboriginal interests,¹⁷³ but the *Social Security and Other Legislation Amendment (Welfare and Reinstatement of RDA) Act 2010* (Cth) facilitates the government's policy of converting these leases into long term (ie 40 year) leases, effectively dispossessing the traditional owners.¹⁷⁴ These provisions are nothing more than a racially discriminatory excision of traditional lands held under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).¹⁷⁵ Moreover, special measures may not be foisted on the supposed beneficiaries.¹⁷⁶ The government admits that the 'Northern Territory intervention' legislation was enacted without Aboriginal consultation.¹⁷⁷ Despite the government's

¹⁷² Briefing document from the Department of Families Housing Community Services and Indigenous Affairs to the Minister for Families Housing Community Services and Indigenous Affairs (25 March 2009) http://www.nit.com.au/downloads/files/Download_211.pdf.

¹⁷³ The High Court of Australia recognised in *Wurridjal & Ors v Commonwealth* [2009] HCA 2 paras 103, 173, 207, 214, 270, 289, 295, 289, 301, 417 and 452 that the legislation diminished traditional land ownership. Ultimately, however, the majority justices (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel JJ, Kirby J in dissent) allowed the Commonwealth's demurrer in regard to the plaintiff's claims that the 'Northern Territory intervention' legislation was unconstitutional.

¹⁷⁴ Section 37A *Northern Territory National Emergency Response Act 2007* (Cth) allows for further 'negotiations of the terms and conditions of another lease'. As the Explanatory Memorandum states: 'The purpose of section 37A is to facilitate the Commonwealth's intended transition from compulsory leases to voluntary leases by allowing the owners of the land to negotiate terms and conditions for the leasing of the land to the Commonwealth or to another government party': Explanatory Memorandum *Social Security and Other Legislation Amendment (Welfare and Reinstatement of RDA) Bill 2009*, 48. See also submission of Amnesty International to the Senate Standing Committee on Community Affairs: Reinstating the RDA in the NTER legislation, 11 February 2010; Law Council of Australia, note 313 above, 13. While the leases are said to be 'voluntary', many communities have been coerced into granting 99-year leases to the Commonwealth under the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth) as access to funding and services has been tied to the granting of the 99-year leases. See Rebecca Stringer, 'A Nightmare of the Neocolonial Kind: Politics of Suffering in Howard's Northern Territory Intervention' (2007) 6(2) *Borderlands* ejournal paras 11-12 <http://www.borderlands.net.au/vol6no2_2007/stringer_intervention.htm>; Nicole Watson, 'Implications of land rights reform for Indigenous health' (2007) 186(1) *Medical Journal of Australia* 534; Cassidy, note 267 above. It is telling that the Explanatory Memorandum states that one aim of this Act was 'to improve access to Aboriginal land for development, especially mining': Explanatory Memorandum, *Aboriginal Land Rights (Northern Territory) Amendment Act 2006*, para 8.

¹⁷⁵ See also the submission of Amnesty International to the Senate Standing Committee on Community Affairs: Reinstating the RDA in the NTER legislation, 11 February 2010.

¹⁷⁶ See CERD, note 317 above, para 18; *Gerhardy v Brown* (1985) 159 CLR 70, paras 37 and 43 per Brennan J. See also McKean, *Equality and Discrimination Under International Law* (1983), 288.

¹⁷⁷ See Australian Government, *Future Directions (for the Northern Territory Emergency Response)* 1 and 3 <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_

pretence,¹⁷⁸ equally the new measures are not founded upon the required consultation¹⁷⁹ and consent¹⁸⁰ of the affected Aboriginal people.¹⁸¹

V CONCLUSION

The purpose of this article is not to denigrate the achievements that international law has made in the advancement of human rights. However, in the context of the above discussed principles of international law that govern the reception of conventional and customary international law into domestic arenas, we find that international law is a vulnerable source of protection. As these examples evidence, even in a first world nation-State that has ratified and incorporated conventional international legal obligations into domestic law, minority groups are not guaranteed protection. A bloody minded government intent on racial discrimination will succeed even in the face of a *jus cogens* norm of international law.

discussionpaper/Documents/discussion_paper.pdf>. The Howard government rejected the need to obtain the informed consent of the affected Aboriginal communities, asserting that such a constraint on legislative power would be inconsistent with Australia's democratic system. See *Comments by the Government of Australia on the Concluding Observations of the Committee on the Elimination of Racial Discrimination*, 16 May 2006, CERD/C/AUS/CO/14/Add.1 [20] <<http://daccessods.un.org/TMP/224071.8.html>>.

178 See Explanatory Memorandum *Social Security and Other Legislation Amendment (Welfare and Reinstatement of RDA) Bill 2009; Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2010), 3 and 15.

179 See further Law Council of Australia, note 313 above, 6-7. The Explanatory Memorandum *Social Security and Other Legislation Amendment (Welfare and Reinstatement of RDA) Bill 2009*, para 35 recognises the requirement of consultation, but there is no reference to obtaining the consent of the affected so-called beneficiaries.

180 See CERD, note 317 above, paras 18 and 22; Aboriginal and Torres Islander Social Justice Commissioner, note 52 above, 262-263; Law Council of Australia, note 313 above, 10-11 and 14; Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (10 August 2007), paras 20 – 21.

181 In this regard see the very detailed report of Nicholson, note 309 above. The deficiencies were summarized as (i) 'Lack of independence from government on the part of the people undertaking the consultancy'; (ii) 'Lack of Aboriginal input into design and implementation'; (iii) 'Lack of notice'; (iv) 'An absence of interpreters'; (v) 'The consultations took place on plans and decisions already made by the government'; (vi) 'Inadequate explanations of the NTER measures'; (vii) 'Failure to explain complex legal concepts'; and (viii) 'Concerns about the government's motives in implementing consultation': note 309, 10. See also the submission of Amnesty International to the Senate Standing Committee on Community Affairs: Reinstating the RDA in the NTER legislation, 11 February 2010; James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009) [46]ff <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34.pdf>>.

Dugard's observation that '[a]lthough there is general support for *jus cogens* as a doctrine ... national courts [have] studiously avoided giving practical application to the notion of peremptory norms'¹⁸² is pertinent. However, Dugard also notes that one of the principle obstacles to such acceptance is the 'uncertainty that exists over which norms qualify as peremptory.'¹⁸³ Yet the international norms in both case studies fall into the category of well accepted principles of *jus cogens*.¹⁸⁴ Dugard's concluding comments on *jus cogens* are telling. He asserts that it is 'inconceivable that a state committed to compliance with international law, respect for human rights and the promotion of the rule of law under its own constitutional order would tolerate the violation of a norm of *jus cogens*.'¹⁸⁵ Yet Australia has not only tolerated the breach of these peremptory norms, but conscientiously entrenched the breaches. Perhaps Dugard is correct; this is simply indicative of Australia's concern (or lack thereof) of international human rights. Perhaps it is telling that Australia was one of the four Nations that voted against the *United Nations Declaration on the Rights of Indigenous Peoples 2007*.¹⁸⁶ Thus the injustices highlighted in this article continue – and international law appears to be unable to prevent this 'disturbing' 'horrific' abuse of Australia's Indigenous peoples continuing.

182 Dugard, note 75 above, 43. See also his commentary on the *Azanian People's Organization (AZAPO) v Truth and Reconciliation Commission 1996* (4) SA 562 (SA): *International Law: A South African Perspective* (3rd 3d, 2007), 46.

183 Dugard *ibid*.

184 Re racial discrimination see Tanaka J in *South West Africa cases (Second Phase)* 1966 ICJ Rep p 298; *Barcelona Traction case (Second Phase)* 1970 ICJ Rep p 3; Ammoun J in the *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia 1971* ICJ Rep 16, 78-81. See also American Law Institute, *Restatement of the Law Third, Foreign Relations Law of the United States* (1987), s 702; Charlesworth and Chinkin, note 52 above, 68 and 70; Aust, note 52 above, 10; Dugard, *ibid* 43. Re genocide see Brownlie, note 23 above, 517; Henry J Steiner and Philip Alston, note 53 above, 145–147; Hannikainen, note 53 above, 456; Lyal S Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997) 115, 117, 246; Meron, note 14 above, 11; Mathew, note 53 above, 179; Shearer, note 53 above, 49; Harris, note 53 above, 836–837; Cassese, note 37 above, 98; Dugard, *ibid* 43.

185 Dugard, *ibid* 46.

186 As noted above, the Rudd Labor government subsequently declared its support for the *United Nations Declaration on the Rights of Indigenous Peoples 2007* on 3 April 2009.