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**THE NEED FOR
ACCOUNTABILITY AND REPARATION: 1830-1976
THE UNITED STATES GOVERNMENT'S ROLE IN THE
PROMOTION, IMPLEMENTATION, AND EXECUTION
OF THE CRIME OF GENOCIDE AGAINST
NATIVE AMERICANS**

The opposite of love is not hate; it's indifference.
The opposite of art is not ugliness; it's indifference.
The opposite of faith is not heresy; it's indifference.
The opposite of life is not death; it's indifference.
Because of indifference, one dies before one actually dies.

Elie Wiesel.¹

INTRODUCTION

On September 8, 2000, the head of the Bureau of Indian Affairs (BIA) formally apologized for the agency's participation in the "ethnic cleansing"² of Western tribes.³ From the forced relocation and assimilation of the "sauvage"⁴ to the white man's way of life to the forced sterilization of Native Americans, the BIA set out to "destroy all things Indian."⁵ Through the exploration of the United States' Federal Indian policy, it is evident that this policy intended to "de-

1. Lionel VonFrederick Rawlins, *Indifference + Inaction = Genocide*, in ANATOMY OF GENOCIDE: STATE-SPONSORED MASS-KILLINGS IN THE TWENTIETH CENTURY 421 (Alexandre Kimenyi & Otis L. Scott eds., 2001).

2. It should be noted that "ethnic cleansing," which refers to the intent to remove a group from a specific location, is not considered a form of genocide. Matthew Lippman, *Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium*, 23 HOV. J. INT'L L. 467, 501 (2001).

3. Remarks of Kevin Gover, Assistant Secretary- Indian Affairs, Department of the Interior, at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs (September 8, 2000), available at http://www4.nau.edu/itep/gover_remarks.html (last updated January 7, 2002).

4. Beginning as early as the 1600s, some Colonizers commonly referred to Native Americans as "sauvages" because of the resistance they faced when attempting to take over Native American land. See BRIAN W. DIPP, THE VANISHING AMERICAN 5-6 (1982). The Supreme Court in *Johnson and Graham's Lessee v. M'Intosh* agreed with this proposition by stating, "[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war." *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. 543, 590 (1823).

5. Gover, *supra* note 3.

stroy, in whole or in part,"⁶ the Native American population.⁷ The extreme disparity in the number of Native American people living within the United States' borders at the time Columbus arrived, approximately ten million⁸ compared to the approximate 2.4 million Indians and Eskimos alive in the United States today,⁹ is but one factor that illustrates the success of the government's plan of "Manifest Destiny."¹⁰

No longer can we remain indifferent and justify these acts of genocide committed by the United States government, its agencies, and its personnel against Native Americans as a result of colonization or the need to establish a prosperous union. Instead, the United States government, its agencies, and those involved with carrying out the measures designed to inflict genocidal acts against the Native American

6. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, at art. II, 102 Stat. 3045, 3045, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention]. The mens rea required by the Genocide Convention includes the specific intent to "destroy, in whole or in part, a national, ethnical, racial or religious group." *Id.* See also John Webb, *Genocide Treaty-Ethnic Cleansing, Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT'L & COMP. L. 377, 388-90 (1993).

7. For further discussion on this topic, see *infra* notes 249-317 and accompanying text, where the Genocide Convention is applied to the United States Federal Indian policy, thereby finding that the practices carried out under the auspices of this policy clearly represent acts of genocide.

8. DIPPJE, *supra* note 4, at xvii. Henry F. Dobyns calculated the population of Native Americans at the time of Columbus' arrival "by multiplying the lowest figure for any given Indian population . . . by a depopulation factor of 20 . . . , representing the decrease due to disease and other causes related to white advance" *Id.* This calculation is commonly refuted and a scholarly debate continues regarding the true number of Native Americans living within, what is now considered, the United States. See WARD CHURCHILL, *A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS 1492 TO THE PRESENT* 131-37 (1997) (discussing the "statistical extermination" of Native Americans). Besides death, other tools used by the United States government to decrease the Indian population were certain federal policies, such as the Dawes Act of 1887, which purposely defined "Indian" as narrowly as possible to exclude even full-blooded Indians from claiming their native status. See *infra* notes 173-182 and accompanying text for a discussion on the Dawes Act of 1887. Interestingly, today Native Americans continue to be the only race that is required to prove their blood quantum in order to receive federal assistance. Rennard Strickland, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. GENDER RACE & JUST. 325, 329-331 (1998).

9. This figure represents those who reported only a single race in the 2000 Census. U.S. Bureau of the Census, Table DP-1. Profile of General Demographic Characteristics: 2000, at <http://www.census.gov/census2000/States/us.html> (last visited March 7, 2002).

10. WARD CHURCHILL, *INDIANS ARE US?: CULTURE AND GENOCIDE IN NATIVE NORTH AMERICA* 36-38 (1994). United States policy makers adopted the philosophy of "Manifest Destiny," which embodied the taking of all Indian lands and the extermination of all Indians in order to achieve expansion into the West. *Id.* This policy of "Manifest Destiny" also encompassed the government's plan to assimilate the Indian to the white man's way of life, which included the adoption of United States citizenship, the English language, and Christianity. Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACK-LETTER L.J. 107, 108-09 (1999).

population must be held in violation of customary international law, as well as conventional international law,¹¹ as proscribed in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).¹²

The term “genocide” was coined by Raphael Lemkin in 1944 and was derived from the Greek word *genos*, which means tribe or race, and the Latin word *cide*, which is commonly found in words such as homicide, infanticide, and fratricide.¹³ In his first enunciation of “genocide,” Lemkin defined the term in two different ways: (1) “the practice of extermination of nations and ethnic groups as carried out by invaders” and (2) “[the] destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor.”¹⁴ Currently, “genocide” is commonly defined as “acts committed with intent to destroy in whole or in part a national, ethnical, racial or religious group.”¹⁵

The crime of “genocide” is recognized as one of the most heinous international crimes under customary international law.¹⁶ A practice is proscribed as a crime under customary international law through the existence of the following: (1) uniformity of state practice, (2) generality of state practice, and (3) the opinion that state practice is required by law.¹⁷ Customary international law also recognizes any

11. International customs and conventions are two of the four sources of international law as defined in Article 38 of the Statute of the International Court of Justice, which states:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - (b) international custom, as evidence of a general practice accepted as law;
 - (c) the general principles of law recognized by civilized nations;
 - (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1031, 1060, T.S. No. 993. *See also* M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, INTERNATIONAL CRIMINAL LAW: CRIMES 3 (M. Cherif Bassiouni ed., 2d ed. 1999).

12. Genocide Convention, *supra* note 6, at art. III – IV.

13. JAMES J. MARTIN, *THE MAN WHO INVENTED “GENOCIDE”: THE PUBLIC CAREER AND CONSEQUENCES OF RAPHAEL LEMKIN* 137-38 (1984).

14. *Id.* at 138.

15. Genocide Convention, *supra* note 6, at art. II. *See also* Frank Chalk, *Redefining Genocide, GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS* 47-49 (George J. Andreopoulos ed., 1994) (discussing early definitions of the term “genocide”).

16. Genocide Convention, *supra* note 6, at Preamble.

17. Emily W. Schabacker, *Reconciliation or Justice and Ashes: Amnesty Commission and the Duty to Punish Human Rights Offenses*, 12 N.Y. INT’L L. REV. 1, 36-47 (1999). *See also* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-11 (5th ed. 1998).

crime that is universally condemned by the international community as a *jus cogens* international crime,¹⁸ which gives rise to obligations *erga omnes*.¹⁹ In accordance with customary international law, an obligation *erga omnes* requires a state party to extradite or prosecute perpetrators of these crimes found within its territory.²⁰ Because the international community has universally condemned genocide, as evidenced in part by the ratification of the Genocide Convention, it has risen to the level of a *jus cogens* international crime. As a result, any individuals, agencies, or states that commit genocide must be held accountable.²¹

On December 9, 1948, the United Nations General Assembly²² approved a draft of the Genocide Convention on the Prevention and Punishment of Genocide, and since then 135 states have ratified the Convention,²³ including the United States.²⁴ According to the Vienna

18. "The term '*jus cogens*' means 'the compelling law' and as such, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles." M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, LAW & CONTEMP. PROBS. Autumn 1996, at 67.

19. *Erga omnes* means "flowing to all," and because all *jus cogens* international crimes require an obligation "flowing to all," *obligatio erga omnes* is a consequence of a crime being recognized as *jus cogens*. *Id.* at 72-73.

20. *Id.*

21. Various scholars agree that genocide is a crime under customary international law, which has risen to the level of a *jus cogens* international crime, from which there is no derogation. Remarks by Jordan Paust, *Genocide: The Convention, Domestic Laws, and State Responsibility*, 83 AM. SOC'Y INT'L PROC. 314, 316-21 (1989). See *infra* notes 36-87 and accompanying text for further discussion on the crime of genocide as proscribed under customary international law.

22. Article 7 of the United Nations Charter established the General Assembly as one of the principal organs of the United Nations. U.N. CHARTER art. 7. The General Assembly is bestowed with the following duties, pursuant to Article 13 of the United Nations Charter:

The General Assembly shall initiate studies and make recommendations for the purpose of:

- a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;
- b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Id. The General Assembly has interpreted these duties to include the passage of resolutions addressing matters of international concern; the Genocide Convention was a resolution adopted by the General Assembly. G.A. Res. 260, U.N. GAOR, 3d Sess., 179th plen. mtg. at 174, U.N. Doc. A/810 (1948).

23. Those 135 states are: Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Chile, China, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Honduras, Hungary, Iceland, India, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Jordan, Kazakhstan, Ku-

Convention on the Laws of Treaties, conventions are binding and enforceable against all states that have signed and ratified the specific convention.²⁵ Therefore, in accordance to Article IV of the Genocide Convention, which requires all parties to prosecute those charged with genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide, regardless of their capacity as a ruler or public official,²⁶ in a

wait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Malaysia, Maldives, Mali, Mexico, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, The Former Yugoslav Republic of Macedonia, Togo, Tonga, Tunisia, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia, Zaire, and Zimbabwe. United Nations Treaty Documentation Center, at <http://untreaty.un.org:80/ENGLISH/> (last visited February, 2001). See generally LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* (1991).

24. The United States ratified the Genocide Convention on November 25, 1988 with the following reservations:

(1) That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

(2) That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

102 Stat. 3045, 3045 (1988). See also *infra* notes 99-108 and accompanying text for a discussion on the reasons the United States signed the Convention nearly forty years after its creation, and with such limiting reservations.

25. Vienna Convention on the Laws of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 26.

26. Article IV of the Genocide Convention states, "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Genocide Convention, *supra* note 6, at art. IV. The international community's recent refusal to uphold the granting of immunity to rulers or public officials who commit heinous international crimes can be evidenced in the Statutes of the International Criminal Tribunal for the Former Yugoslavia and for Rwanda as well as the Rome Statute of the International Criminal Court (ICC). Statute of the International Criminal Court Tribunal for the Former Yugoslavia, at art. 7, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th Mtg. at 1-2, U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, at art. 6, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/RES/955 (1994). On the issue of immunity, the Rome Statute of the International Criminal Court states as follows:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Rome Statute of the International Criminal Court, at art. 27(1), U.N. Doc. A/Conf. 183/9 (1998), 37 I.L.M. 999 (1998). Both Article 7 of the International Criminal Tribunal for the Former Yugo-

competent tribunal within the State where the crime took place or in a competent international tribunal that has proper jurisdiction over the case,²⁷ any persons or agencies that commit acts of genocide within the territory of the United States must be held accountable for their crimes.²⁸

Even though the crime of genocide remains universally condemned by the international community, the United States government, its agencies, and its personnel have been effectively granted de facto immunity.²⁹ The time has come to hold the perpetrators of these acts of genocide accountable and to formulate a system of reparation for the victims of these heinous international crimes, in order for the world, as well as the victims, to realize that justice does prevail in the international community.

This Comment will address the demise of Native Americans' livelihood, reproductive rights, and identity at the hands of the United States government, its agencies, and its personnel. Because the United States had a direct role in perpetrating genocidal acts against Native Americans, it must be held accountable for these acts. The international community must hold these agencies and persons responsible, and an apology and reparations must be awarded to Native

slavia and Article 6 of the International Criminal Tribunal for Rwanda mirror the language used in the Rome Statute of the ICC.

27. Genocide Convention, *supra* note 6, at art. IV. The Genocide Convention, therefore, has specific jurisdictional limitations. See *infra* notes 99-116 for a discussion on the jurisdictional limitations imposed by the United States in the Genocide Convention Implementing Act of 1988.

28. The Vienna Convention on the Law of Treaties came into force on January 27, 1980, thirty days after the thirty-fifth state deposited its instrument of ratification with the Secretary-General of the United Nations. Vienna Convention on the Laws of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339. The United States signed the Vienna Convention on April 24, 1970, but it has not yet ratified it. Although the United States has not yet ratified the Vienna Convention, it is now considered part of customary international law. *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000) (stating that "[t]he United States recognizes the Vienna Convention as a codification of customary international law"); *Doe I. v. Unocal Corp.*, 963 F. Supp. 880, 890 (C.D. Cal. 1997) (referring to the Vienna Convention for the definition of a *jus cogens* norm).

29. Throughout history, perpetrators of *jus cogens* international crimes were perceived to be above the law, and justice was commonly traded for impunity; however, to much of the international community's surprise, recent events, such as the Chilean Supreme Court's order requiring the re-arrest of General Augusto Pinochet on charges of kidnapping and murder committed during his seventeen-year rule, as well as the prosecution of Slobodan Milosevic for crimes against humanity, war crimes, and genocide, have proved otherwise. See Alfredo S. Lanier, *Chile Judge Orders Pinochet Under House Arrest For Trial*, CHI. TRIB., Jan. 30, 2001, § 1, at 4; Ian Fisher, *Power Drove Milosevic to Crime, Prosecutors Say as Trial Opens*, N.Y. TIMES, Feb. 13, 2002, § A, at 1. For a discussion on the need to hold perpetrators accountable for their actions regardless of their public official status, see M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need For Accountability*, LAW & CONTEMP. PROBS., Autumn 1996, at 9-28.

Americans for their grave losses. While the need for reparations is clear, the method used to provide these reparations remains at issue.

Part II of this Comment will explore the evolution of the crime of genocide as proscribed under both customary and conventional international law.³⁰ Part II will also address how international law is applied in the United States, specifically the Convention on the Prevention and Prohibition of Genocide and customary international law.³¹ Part III will explore the demise of Native Americans at the hands of the United States.³² Part IV will analyze how the United States government, its agencies, and its personnel committed acts of genocide against Native Americans.³³ Part V will explore the implications of these acts of genocide on Native Americans today and the appropriate method of reparation.³⁴ In conclusion, Part VI will address the role of truth and justice in aiding the victims' healing process.³⁵

II. BACKGROUND: THE CRIME OF GENOCIDE UNDER CUSTOMARY INTERNATIONAL LAW AND THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

A. *The International Crime of Genocide as Proscribed Under Customary International Law*

International conventions, international customs, general principles of law, and scholarly writings represent the four primary sources of international law.³⁶ These sources proscribe acceptable and unacceptable state practices, thereby defining crimes of international law and, commonly, the appropriate mechanisms for accountability.

Historically, a customary international law was established through the existence of “(1) uniformity of state practice, (2) generality of state practice, and (3) the sense that state practice is required by law, referred to as *opinio juris necessitatis*.”³⁷ The International Court of Justice in *The North Sea Continental Shelf Case*³⁸ found that “state practice . . . should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have oc-

30. *See infra* notes 36-98 and accompanying text.

31. *See infra* notes 99-125 and accompanying text.

32. *See infra* notes 126-248 and accompanying text.

33. *See infra* notes 249-310 and accompanying text.

34. *See infra* notes 311-348 and accompanying text.

35. *See infra* note 349 and accompanying text.

36. Statute of the International Court of Justice, *supra* note 11.

37. Schabacker, *supra* note 17, at 36. *See also* BROWNLIE, *supra* note 17, at 4-11.

38. 1969 I.C.J. 3, 43 (Feb. 20).

curred in such a way as to show a general recognition that a rule of law or legal obligation is involved."³⁹ Therefore, complete uniformity and universality of state practice are not necessarily required, but proof of such practice as obligator may be.⁴⁰ Moreover, it has been suggested that international crimes rise to the level of *jus cogens* only in the following situations:

(1) [they] are deemed part of customary international law; (2) [there is] language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law; (3) [a] large number of states [] have ratified treaties related to these crimes; and (4) [there are] *ad hoc* international investigations and prosecutions of perpetrators of these crimes.⁴¹

As early as the sixteenth century, the existence of international customary law can be evidenced in the writings of Grotius,⁴² who declared that certain acts, based on the nature of the act alone and committed against an individual, violated the "law of nature or nations."⁴³ Scholars of international law speculate that the act of piracy on the high seas was the first crime recognized as an act in violation of the law of nations.⁴⁴ The violent nature of piracy and its corresponding effects on commerce resulted in its universal condemnation by all states; therefore, states were not required to establish jurisdiction over the act or the perpetrator, rather the nature of the act itself granted any state jurisdiction over the crime of piracy.⁴⁵ As a result, prosecutions for the crime of piracy occurred in state courts.⁴⁶ Accordingly, piracy came to be recognized as a crime under customary interna-

39. *Id.* at 43.

40. BROWNIE, *supra* note 17, at 4-8 (noting that the International Court of Justice sometimes assumes the existence of *opinion juris* and does, therefore, not require any proof).

41. Bassiouni, *supra* note 18, at 68.

42. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, bk II, ch. XXI, secs. III and IV, 526-29 (F. Kelsey trans., 1925).

43. *Id.* at 504.

44. See Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States Is in Breach of its International Obligations*, 39 VA. J. INT'L L. 425, 434 (1999).

45. BROWNIE, *supra* note 17, at 235-37.

46. *Id.* at 235. See also *United States v. Holmes*, 18 U.S. 683, 686 (1820). This case states:

[M]urder or robbery committed on the high seas, may be an offence cognizable by the courts of the United States, although it was committed on board of a vessel not belonging to citizens of the United States, [] if she had no national character, but was possessed and held by pirates, or persons not lawfully sailing under the flag of any foreign nation.

Id. Therefore, as long as the ship was not flying a flag of a state, and pirates took the ship, the United States could claim jurisdiction over the crime and prosecute the perpetrators in its judicial system.

tional law.⁴⁷ Through the continued universal condemnation of piracy, and the establishment of both the Convention on the High Seas⁴⁸ and the Convention on the Laws of the Sea,⁴⁹ the crime of piracy rose to the level of a *jus cogens* international crime, which carried with it *obligatio erga omnes*, the requirement to extradite or prosecute perpetrators of these crimes.⁵⁰

In addition to piracy, slavery, slave-related practices, apartheid, crimes against humanity, war crimes, aggression, torture, and genocide are recognized as *jus cogens* international crimes.⁵¹ In fact, the evolution of the prohibition of the crime of genocide under customary international law and its rise to the level of a *jus cogens* international crime⁵² is analogous to the crime of piracy. A similar historical perspective of the crime of genocide proves that there exists a uniformity of state practice condemning genocide, which correspondingly requires the prosecution of the perpetrators of such a crime.

The Peace of Westphalia, which brought an end to the Thirty Years' War in 1648, represents the beginning of the international community's denouncement of the persecution of persons because of their ethnicity, nationality, race, or religion.⁵³ Similar protection for persons from such crimes can be found in the Martens Clause of the 1907 Hague Convention Respecting the Laws and Customs of War on Land.⁵⁴ The Martens Clause stated, "[T]he inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the *laws of humanity*, and the dictates of the public conscience."⁵⁵ Following World War I, the Commission on the Responsibilities of the Authors of War and on Enforcement of Penal-

47. BROWNIE, *supra* note 17, at 236 (noting that the definition of the crime of piracy as found in Article 15 of the Convention on the High Seas represents the definition of piracy recognized under customary international law).

48. Convention on the High Seas, *opened for signatures* Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82, entered into force Sept. 30, 1962. The United States ratified the Convention on April 12, 1961.

49. United Nations Convention on the Law of the Sea [Montego Bay Convention], *opened for signature*, December 10, 1982, 516 U.N.T.S. 205, 21 I.L.M. 1261, *entered into force* November 16, 1994.

50. Bassiouni, *supra* note 18, at 65-68.

51. *Id.* at 68.

52. For a definition of a *jus cogens* international crime, see *supra* note 18.

53. See Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20, 20 (1948). The Peace of Westphalia rejected the past persecution of persons based on their religion. *Id.*

54. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Preamble, 36 Stat. 2277, 2279-80 [hereinafter Hague Convention].

55. *Id.* (emphasis added).

ties for Violation of the Laws and Customs of War⁵⁶ intended to use the Martens Clause as grounds to prosecute the “Young Turk” government for the Armenian genocide⁵⁷ on the basis that the massacre and deportation of Armenians from the Ottoman Empire and the resulting deaths were all premised on the plan to create a homogenous state and constituted “crimes against the laws of humanity.”⁵⁸ It has been estimated that anywhere from 600,000 to 2,000,000 Armenians died as a result of the Turks’ actions.⁵⁹

Once again, in response to the atrocities committed against individuals because of their ethnicity, nationality, race, or religion, the international community created the London Charter in 1945⁶⁰ in order to prosecute the leaders of the Nazi regime.⁶¹ Most importantly, the Charter defined “Crimes Against Humanity” as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, . . . or persecutions on political, racial or religious grounds in execution of or in connection with any crime”⁶² “Crimes Against Humanity,” unlike genocide, must take place during an armed conflict in order to constitute prosecutable acts.⁶³

The crime of genocide clearly evolved from states’ universal condemnation of the persecution of persons based solely on their minority status, as seen through the establishment of the Hague

56. M. Cherif Bassiouni, “Crimes Against Humanity”: *The Need For a Specialized Convention*, 31 COLUM. J. TRANSNAT’L L. 457, 458 (1994).

57. It is interesting to note that various countries, including the United States, as well as international scholars refuse to recognize the existence of the “Armenian Genocide.” Israel W. Charny, *Toward a Generic Definition of Genocide*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 73-74 (George J. Andreopoulos ed., 1994); CHURCHILL, *supra* note 8, at 30, 34.

58. Richard G. Hovannisian, *Etiology and Sequelae of the Armenian Genocide*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 123-125 (George J. Andreopoulos ed., 1994); WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 17-23 (2000).

59. Hovannisian, *supra* note 58, at 125.

60. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284 [hereinafter London Charter]. The London Charter established “the jurisdiction, substantive law, and procedural principles governing the Nuremberg Tribunal.” STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 188 (2d ed. 2001).

61. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 23-29 (1997).

62. See London Charter, *supra* note 60, at art. 6(c). Note that Crimes Against Humanity were officially codified into international law through the United Nations General Assembly Resolution of December 11, 1946. G.A. Res. 95(1), U.N. Doc. A/64/Add. 1 (1946).

63. M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, INTERNATIONAL CRIMINAL LAW: CRIMES 617, 622-23 (M. Cherif Bassiouni ed., 2d. ed. 1999).

Convention⁶⁴ and the London Charter.⁶⁵ Even though these treaties never explicitly proscribed the crime of genocide, it was condemned within the definition of “Crimes Against Humanity.”

The Preamble to the Genocide Convention acknowledged the long existence of the crime of genocide by stating that “at all periods of history[,] genocide has inflicted great losses on humanity.”⁶⁶ Similarly, in 1951, the International Court of Justice in the *Reservations to the Convention on the Protection and Punishment of the Crime of Genocide* case,⁶⁷ recognized genocide’s status under customary international law when it stated that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”⁶⁸ Through the continuous state practice of prosecuting perpetrators of genocide, such as the prosecutions at the International Military Tribunal, the International Criminal Tribunal at Rwanda,⁶⁹ and the International Criminal Tribunal for the Former Yugoslavia,⁷⁰ and the universal condemnation of acts of genocide,⁷¹ which appears in various treaties, the crime of genocide has come to be proscribed under customary international law.⁷²

64. Hague Convention, *supra* note 54, at 2279-80 (using the laws of nations to define the dictates of a just war).

65. London Charter, *supra* note 60, at art. 63(c), which explicitly criminalizes “persecutions on political, racial or religious grounds in execution of or in connection with any crime.”

66. Genocide Convention, *supra* note 6, at Preamble.

67. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 14 (May 28, 1951) [hereinafter *Reservations* case]. The *Reservations* case explored the legal limitations on the reservations made by member states to the Genocide Convention, and found that a state that has made a reservation, which was thereby objected upon, will remain a party as long as the reservation is within the object and purpose of the Convention. *Id.* The International Court of Justice found that the Convention’s object and purpose was to encourage universal ratification, and, therefore, to eliminate a state as a party to the Convention based on its reservation would be contrary to the Convention’s object and purpose. *Id.* at 24. However, any state party that objects to the reservation may consider the reserving state as not a party to the Convention. *Id.* at 29.

68. *Id.* at 23.

69. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Sept. 2, 1998, at <http://www.ictt.org> (last visited Mar. 6, 2002), for an example of the first conviction for the crime of genocide at the International Criminal Tribunal for Rwanda. *Id.*

70. See *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Aug. 2, 2001, at <http://www.un.org/icty/krstic/TrialC1/judgement/index.htm> (last visited Apr. 8, 2002). On August 2, 2001, Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia, in the case of *Prosecutor v. Radislav Krstic*, found former Deputy Commander of the Drina Corps, General Krstic, guilty of genocide, persecutions, and murder. *Id.*

71. In the *Reservations* case, the International Court of Justice noted the “universal character [] of the condemnation of genocide.” *Reservations*, 1951 I.C.J. at 23.

72. *Id.*

Through the recognition of genocide as part of customary international law, the adoption of treaties,⁷³ the adoption of the Genocide Convention, and the implementation of the *ad hoc* tribunals⁷⁴ to prosecute perpetrators of genocide, it is evident that the crime of genocide has risen to the level of a *jus cogens* international crime.⁷⁵ As a result, all states have an obligation to prosecute or extradite perpetrators of the crime of genocide.⁷⁶

It should be noted that some scholars argue that the official proscription of “genocide” as an international crime did not come about until the adoption of the Genocide Convention, or in the alternative, as early as the end of the Second World War; therefore, acts committed prior to this time could not have been international crimes.⁷⁷ The Trial Chamber for the International Criminal Tribunal on Rwanda stated, however, “[The] holocaust of the Jews . . . [was] very much constitutive of genocide, but could not be defined as such because the crime of genocide was not defined until later.”⁷⁸ The statement above demonstrates that the crime of genocide, as we know it today, was proscribed and punished much earlier than the creation of the Genocide Convention, but in the form of “Crimes Against Humanity” and “war crimes.”

73. The London Charter and the Hague Convention are examples of treaties that proscribe crimes similar to genocide.

74. Following the genocides in the Former Yugoslavia and Rwanda, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda were established, respectively, to prosecute the perpetrators of the genocide. See Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., at U.N. Doc. S/RES/955 (1994). See also PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 242-55 (1998). Gourevitch, reflecting on the atrocities committed within the Republic of Rwanda, noted:

Decimation means the killing of every tenth person in a population, and in the spring and early summer of 1994 a program of massacres decimated the Republic of Rwanda. Although the killing was low-tech—performed largely by machete—it was carried out at dazzling speed: . . . [A]t least eight hundred thousand people were killed in just a hundred days. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki.

Id. at 3. Regardless of the severe need for prosecution in these areas, both tribunals have been criticized for their lack of effectiveness. In fact, between 1994 and January 2000, only 3,700 out of more than 125,000 prisoners had been prosecuted in Rwanda. Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1287 (2000).

75. See *supra* notes 41-50 discussing the requisite elements necessary in order for a crime to rise to the level of a *jus cogens* international crime.

76. Flowing from *jus cogens* international crimes is the obligation to prosecute or extradite perpetrators of such crimes. See Bassiouni, *supra* note 18, at 65.

77. *Developments in the Law: International Criminal Law*, 114 HARV. L. REV. 1944, 2008-09 (2001).

78. Lippman, *supra* note 2, at 508.

B. Customary International Law as Applied in the United States

Perpetrators of the crime of genocide, when committed within the United States or by United States' citizens, can be prosecuted under customary international law, which proscribes the crime of genocide as a *jus cogens* international crime.⁷⁹ In 1900, the United States Supreme Court, in the *Paquete Habana*⁸⁰ case, stated that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice. . . . For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”⁸¹ By relying on the “customs and usages of civilized nations” and by declaring that “international law is part of our law,” the *Paquete Habana* decision laid the groundwork for the role of customary international law in the United States judicial system.⁸² In fact, at least one scholar has declared that “customary international law has now been characterized as ‘federal common law.’”⁸³

Other cases, such as *Filartiga v. Pena-Irala*,⁸⁴ have supported the Supreme Court's reliance on customary international law when there is no treaty or controlling law. However, the *Filartiga* decision expanded the United States' responsibilities under international law by holding that the United States, as a party to the United Nations Charter,⁸⁵ is required to uphold the “universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.”⁸⁶ The court in *Filartiga*, relying on customary international law, further held that torture is clearly prohibited under the law of nations.⁸⁷ As evidenced by the *Filartiga* decision, the United States judiciary has come to accept international law as part of its law; therefore, it is bound to interpret, create, and apply customary and conventional international law when applicable.

79. See *supra* note 37 and accompanying text for a discussion of the formation of customary international law and *jus cogens* international crimes.

80. 175 U.S. 677, 700 (1900).

81. *Id.*

82. *Id.*

83. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-67 (1984).

84. 630 F.2d. 876 (2d Cir. 1980).

85. The United States of America is one of 185 states party to the United Nations Charter, which entered into force on October 24, 1945. INTERNATIONAL LAW: SELECTED DOCUMENTS 1-27 (Barry E. Carter & Phillip R. Trimble eds., 1999).

86. *Filartiga*, 630 F.2d. at 881.

87. *Id.* at 890.

C. *The Crime of Genocide as Proscribed Under the Convention on the Prevention and Punishment of the Crime of Genocide*

In response to the atrocities committed in Nazi Germany,⁸⁸ the international community adopted the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in hopes of prohibiting such atrocities from occurring again.⁸⁹ As previously noted, the Genocide Convention is binding upon any state that signs and ratifies the Convention.⁹⁰ The definition of genocide, as laid out in the Convention, includes the following crimes: (1) killing members of the group; (2) causing serious bodily or mental harm to members of the group; (3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction “in whole or in part”; (4) imposing measures intended to prevent births within the group; and (5) forcibly transferring children of the group to another group with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.⁹¹ Similarly, the Convention proscribes the following acts as punishable: genocide, as enumerated under Article II; conspiracy to commit genocide; attempt to commit genocide; and complicity to commit genocide.⁹²

The Genocide Convention requires proof of the “intent to destroy a group, in whole or in part,”⁹³ which has been interpreted not to require the extermination of an entire group to fulfill the proof requirement.⁹⁴ Interestingly, the text of the Genocide Convention excludes from its proscription genocide based on an individual’s culture or political views.⁹⁵ Such exclusions have been criticized for limiting the application of the Convention, and thereby failing to protect certain persons, such as in the case of the genocide in Cambodia.⁹⁶ In fact, “cultural genocide” was excluded from the Convention because some

88. Following the extermination of over six million Jewish persons and five million others from varying ethnic groups, such as the Gypsies, the Nuremberg Trials were convened to prosecute the military personnel of the Third Reich responsible for these gross violations of human rights. See CHURCHILL, *supra* note 8, at 19 (exploring the legacy of Holocaust denial and other genocides that are not widely known).

89. In 1958, a survivor of the Holocaust adopted a view of “never again”; however, in the last twenty years we have seen more conflicts than ever before. GOUREVICH, *supra* note 74.

90. See *supra* notes 25-28 (discussing the Vienna Convention on the Laws of Treaties and the binding nature of Conventions that have been signed and ratified).

91. Genocide Convention, *supra* note 6, at art. II.

92. *Id.* at art. III.

93. *Id.* at art. II.

94. Matthew Lippman, in *Genocide*, INTERNATIONAL CRIMINAL LAW: CRIMES 589, 597 (M. Cherif Bassiouni ed., 2d ed. 1999).

95. WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW 179-89 (2000).

96. *Id.*

feared that it might be interpreted as condemning the assimilation of minority groups, thereby discouraging certain member states from ratifying the Genocide Convention.⁹⁷

The Genocide Convention, however, protects against the destruction of any group based on their nationality, ethnicity, race, and religious affiliation and requires member-states to punish perpetrators of the crime of genocide accordingly. An example of a case in which the Convention would apply is the forced sterilization of Native American men and women, which occurred at the hands of the United States government, its agencies, and its personnel;⁹⁸ any person who implemented sterilization programs, carried out the actual sterilization, or knew of the sterilization program could be punished in the United States.

D. The Convention on the Punishment and Prevention of Genocide as Applied in the United States

In 1998, thirty-eight years after the approval of the Convention on the Punishment and Prevention of Genocide (Genocide Convention), the United States ratified the Convention.⁹⁹ The United States was reluctant to sign and ratify the Genocide Convention for two reasons: (1) the Convention was viewed as a possible invasion of state sovereignty¹⁰⁰ and (2) the existence of congressional concern surrounding certain federal discriminatory legislation and policies that might be seen as promoting and executing genocide.¹⁰¹ Because the language of the Convention allowed for the prosecution of acts committed with the intent to destroy the group "in part," various members of Congress were concerned that the implementors of the "Jim Crow" laws,¹⁰² the official toleration of the Ku Klux Klan, the forced sterilization programs,¹⁰³ and the forced transfer of Native American chil-

97. *Id.* at 599.

98. See *infra* notes 192-220 and accompanying text for a discussion of how the United States forced sterilization of Native Americans.

99. LEBLANC, *supra* note 23, at 2-4.

100. Article VI of the United States Constitution states that treaties are the "supreme law of the land." U.S. CONST. art. VI. Because of this constitutional clause, many opponents to the Convention feared that it would automatically trump preexisting domestic laws. LEBLANC, *supra* note 23, at 128-34. However, various scholars argue that the Genocide Convention is a non-self-executing treaty, which requires an act of Congress to implement the obligations into the domestic legal system, as opposed to a self-executing treaty, which automatically enters into effect after ratification. *Id.* at 134-35.

101. CHURCHILL, *supra* note 10, at 16-17; LEBLANC, *supra* note 23, at 129-130.

102. See *Bunn v. Atlanta*, 19 S.E.2d 553, 556-57 (Ga. App. 1942).

103. See *infra* notes 192-220 and accompanying text.

dren to boarding schools¹⁰⁴ would be perceived as having had the intent to destroy these groups "in part."¹⁰⁵ During the 1950 Congressional hearings, American Bar Association representative Schweppe and subcommittee chair Connecticut Senator Brien McMahon, stated the following:

SCHWEPPE: The point is that the intent does not need to exist to destroy the whole group.

MCMAHON: Part of the group Now let's take lynching for example, let's assume that there is a lynching and a colored man is murdered Is it your contention that that could be construed as being within the confines of the definition

SCHWEPPE: It is part of a racial group, and if it is a group of 5, a group of 10, a group of 15, and I proceed after them with guns in some community solely because they belong to some racial group that the dictators don't like, I think you have got a serious question, *That's what bothers me.*¹⁰⁶

Consequently, the United States required, as a prerequisite to the ratification of the Genocide Convention, that the instrument of ratification not be deposited with the Secretary General of the United Nations until Congress enacted implementing legislation.¹⁰⁷ On November 25, 1988, the United States deposited its ratification with reservations that mandated that nothing within the text of the Genocide Convention could require or authorize legislation or action by the United States that contradicted the principles espoused in the United States Constitution.¹⁰⁸ Various countries objected to these reservations by arguing that, in effect, they nullified the Convention by allowing the United States to use its Constitution to trump the authority of the Convention.¹⁰⁹ Parties to the Genocide Convention argued that the United States' reservations were not made in good faith because they allowed the United States to derogate from the Convention if its domestic law contradicted the requirements of the Convention; therefore, the United States' reservations were seen to be in conflict with Article 26 and Article 27 of the Vienna Convention on

104. See *infra* notes 221-248 and accompanying text.

105. Between the years of 1882-1930, it has been reported that at least 2,505 black men and women in the ten southern states were subjected to lynchings, but when the remaining states are included the number practically doubled. CHURCHILL, *supra* note 8, at 374-76.

106. CHURCHILL, *supra* note 8, at 374 (emphasis added).

107. LEBLANC, *supra* note 23, at 142-143 (noting that this prerequisite was made to ensure that the Genocide Convention was not self executing).

108. See *supra* note 24 for the explicit text of the reservations submitted by the United States for the Genocide Convention.

109. SCHABAS, *supra* note 95, at 348-49.

the Laws of Treaties.¹¹⁰ However, the United States did not rescind its reservations, and the Genocide Convention was ratified and implemented into United States law subject to the reservations.¹¹¹

Two years after the ratification of the Genocide Convention, Congress implemented legislation entitled the Genocide Convention Implementing Act of 1988 (Proxmire Act).¹¹² According to the Proxmire Act, the United States would prosecute a perpetrator of the crime of genocide either when the offense was committed within the United States or when the alleged offender was a national of the United States.¹¹³ As a result of the limitations in the Proxmire Act, the Genocide Convention cannot be used as a tool to prosecute acts of genocide committed outside of the United States.¹¹⁴ However, the acts committed against Native Americans, such as the forced relocation, sterilization, and the transfer of children into boarding schools, took place within the United States, and the perpetrators of these acts were United States citizens.¹¹⁵ Moreover, because there does not exist a statute of limitations for the crime of genocide, United States citizens can be prosecuted for these crimes at any time.¹¹⁶ Therefore, the Genocide Convention, as tailored by the United States in the Proxmire Act, can still be used as a basis to prosecute the perpetrators of the crime of genocide within the United States' borders, regardless of when the crimes were committed.¹¹⁷

Article IV of the Convention mandates prosecution regardless of the status of the perpetrator by stating that any person who commits genocide or acts in furtherance of genocide, regardless of their status,

110. The following countries objected to the United States' reservations: Denmark, Estonia, Finland, Greece, Ireland, Italy, Mexico, the Netherlands, Norway, Spain, Sweden, and the United Kingdom. United Nations Treaty Documentation Center, *supra* note 23. These objections were based on the fact that the United States reservations contradicted Article 26 and Article 27 of the Vienna Convention of the Laws of Treaties, which requires treaties to be performed in good faith. Vienna Convention on the Laws of Treaties, *supra* note 28, at art. 26. Good faith has been interpreted to mean that a country cannot ratify a Convention and then attach reservations allowing the country to derogate from the responsibilities of the Convention because of domestic laws or policies.

111. See 18 U.S.C. § 1091 (1994).

112. LEBLANC, *supra* note 23, at 144-45.

113. Proceeding, Eighty-Third Annual Meeting The American Society of International Law: Genocide: The Convention, Domestic Laws, and State Responsibility, comments by Steven Lubet (1989).

114. LEBLANC, *supra* note 23, at 146.

115. See *infra* notes 139-248 and accompanying text.

116. LEBLANC, *supra* note 23, at 150.

117. According to the Proxmire Act, the penalty for crimes resulting in the death of members of a protected group is mandatory life imprisonment and a fine of not more than one million dollars. However, in any other case, the penalty is imprisonment of not more than twenty years and a fine of not more than one million dollars, or both. LEBLANC, *supra* note 23, at 149-50.

as a constitutionally responsible ruler or a public official, must be held accountable.¹¹⁸ This provision was included in the Convention to prevent heads of state and other government officials from claiming immunity from prosecution for the crime of genocide.¹¹⁹

Even though genocide is condemned under customary international law and through the Genocide Convention, few perpetrators of the crime of genocide have been prosecuted for their actions. As a result, the trials at Nuremberg remain one of the most successful tribunals used to prosecute perpetrators of crimes committed against minorities solely because of their religion, ethnicity, or nationality. Interestingly, since then, the world has witnessed some of the most gruesome genocides, which include the genocides in Rwanda,¹²⁰ Yugoslavia,¹²¹ and Cambodia.¹²² These genocides, along with the Armenian genocide,¹²³ the sterilizations performed by Nazi Doctors during the Holocaust,¹²⁴ and the forced assimilation of the indigenous in Australia,¹²⁵ illustrate the continued existence of genocide and the need for the condemnation of genocide. Most importantly, these instances serve to highlight the genocidal nature of the acts committed by the United States against Native Americans.

118. Genocide Convention, *supra* note 6, at Article IV.

119. *See supra* note 26.

120. It is reported that from 10,000 to 100,000 Hutus were killed in the Genocide in Rwanda. Drumb, *supra* note 74, at 1222, n.1. "Notwithstanding the low-tech nature of the massacres [most of the murders were committed with machetes, sticks, tools, and large clubs studded with nails], the dead of Rwanda accumulated at nearly three times the rate of Jewish dead during the Holocaust. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki." *Id.* at 1246.

121. It has been estimated that between the years of 1945-1947, 82,000 persons were victimized based on their ethnicity and nationality, while between the years of 1944-1987 the number increased to 1,072,000 persons who were victimized for either indiscriminate or political reasons. Jennifer Baliut, *An Empirical Study of Conflict, Conflict Victimization and Legal Redress 1945-1996*, in 14 NOUVELLES ETUDES PENALES 101, 118 (1998).

122. Between the years of 1975-1979, approximately 1,800,000 persons were victimized under the Pol Pot regime. *Id.* at 116; *see also* Craig Etcheson, *The Persistence of Impunity in Cambodia*, in 14 NOUVELLES ETUDES PENALES 231 (1998).

123. *See infra* notes 249-276 and accompanying text, where the resettlement policy used by the Turks to remove the Armenians is analogized to the forced relocation of Native Americans.

124. *See infra* notes 277-297 and accompanying text, for a discussion of the similarities between the Nazi doctors' use of sterilization procedures in the Holocaust and the United States government's use of sterilization procedures from the 1930s until the late 1970s.

125. *See infra* notes 298-310 and the accompanying text for a discussion of commonalities between Australia's treatment of the indigenous and the United States' treatment of Indians.

III. THE DEMISE OF THE NATIVE AMERICAN POPULATION AT THE HANDS OF THE UNITED STATES GOVERNMENT, ITS AGENCIES, AND ITS PERSONNEL.

The definition of the crime of genocide and the United States' interpretation and proscription of the crime, as discussed above, will be helpful in explicitly highlighting the acts of genocide, such as the forced relocation, sterilization, and assimilation of Native American, committed by the United States government, its agencies, and its personnel.

A. *History of Broken Promises*

When told . . . no alternative remained to them [Native Americans] as a nation but death or removal, they seemed not to hesitate saying, "It is death anyhow. We may as well die here . . ." They cling to the graves of their fathers and say, "Let us die with them . . . if we leave this country, these hills and vales, this mountain air we shall sicken and die."¹²⁶

After the Revolutionary War, which ended on October 19, 1781, the United States government was left with what was termed as the "Indian Problem," which its predecessors had failed to extinguish after years of fighting and millions of deaths.¹²⁷ The "Indian Problem" dealt largely with the Native American occupation of land that was very attractive to settlers, as well as the uncivilized nature of Native Americans, which in the settlers' opinion threatened their way of life.¹²⁸ The government concluded that the best solution to the "Indian Problem" was the forced removal of all Native American nations from the East to the West; as a result, Native Americans were forced from their sacred land, their most valued possession, to foreign lands.¹²⁹

Native Americans claimed their right to the land based on their long occupation, as well as the preexisting treaties that granted them

126. DIPPIE, *supra* note 4 (quoting from a letter written by Sophia Sawyer, New Echota, Georgia, 1832).

127. See CHURCHILL, *supra* note 8, at 159-63, 168-75 for a list of the "Indian Wars" that took place in North America.

128. *Johnson & Graham's Lessee v. William McIntosh*, 21 U.S. 543, 590 (1823), where the Supreme Court stated that "to leave them [Indians] in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence." *Id.* This savage depiction of Native Americans inspired United States' officials to force them to the West in order for the white settlers to "be safe."

129. Porter, *supra* note 10, at 108. For a discussion on Indian land rights, see Lawrence B. Landman, *International Protection for American Indian Land Rights?* 5 B.U. INT'L L.J. 59 (1987).

specific rights to the land.¹³⁰ They further relied on Article VI of the United States Constitution, which states that “once [treaties are] ratified” they are the “supreme law of the land.”¹³¹ Therefore, Native Americans argued that because treaties are the supreme law of the land, the United States could not deviate from this standard by refusing to recognize past treaties granting them specific rights to the land.¹³² Native Americans also referred to the Northwest Ordinance¹³³ in support of their rights to the land.¹³⁴ On July 13, 1787, Congress passed the Northwest Ordinance, which stated, “[L]and and property shall never be taken from [Native Americans] without their consent[,] and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress.”¹³⁵ Contrary to this established law, the United States government claimed that as “discoverers,” their rights superceded that of the Native Americans.¹³⁶ Accordingly, the United States began

130. See HELEN HUNT JACKSON, A CENTURY OF DISHONOR 9-21 (1995).

131. U.S. CONST. art. VI.

132. JACKSON, *supra* note 130, at 9-21.

133. Northwest Ordinance, 1 Stat. 50 (1787).

134. JILL NORGREN, THE CHEROKEE CASES 119-20 (1996) (noting that Chief Justice Marshall relied on the Northwest Ordinance in *Worcester v. Georgia* to support Cherokee claims to sovereignty).

135. Northwest Ordinance, 1 Stat. 50 (1787). See also AMERICAN INDIANS: U.S. INDIAN POLICY TRIBES AND RESERVATIONS BIA: PAST AND PRESENT ECONOMIC DEVELOPMENT (Published by the Bureau of Indian Affairs, Department of Interior 1984).

136. The Supreme Court in *Johnson and Graham's Lessee v. M'Intosh* held that the doctrines of discovery and conquest grant a white man the right over land possessed by persons of a barbaric nature (the Indian nations). *Johnson & Graham's Lessee*, 21 U.S. at 589-90. But see VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 3 (1983), where the authors argue that historically title to land by discovery was only justifiable when the property was ownerless. Similarly, in the absence of a just war, the right to conquest can only be granted by the voluntary consent of the Indians. *Id.* For a discussion on Justice Thurgood Marshall's effect on the status and recognition of Indians today, see Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 496-503 (1994), where the author criticizes past Supreme Court decisions that dealt with Indians as a product of racism and paternalism. *Id.* However, in the twentieth century, the make-up of the Supreme Court changed and favorable decisions for Indians resulted. *Id.*

breaking treaties¹³⁷ and taking Native American lands until the passing of the Indian Removal Act of 1830.¹³⁸

B. *The Removal Period*

ANDREW JACKSON TO THE CREEK NATION, March 23, 1829:

Friends and brothers, listen: Where you now are, you and my white children are too near to each other to live in harmony and peace

.....

SPECKLED SNAKE, CREEK CHIEF, IN REPLY:

I have listened to a great many talks from our great father. But they always began and ended in this—"Get a little further; you are too near me."¹³⁹

In 1830, Congress passed the Indian Removal Act (IRA) as a tool to occupy Native American lands.¹⁴⁰ The IRA authorized the use of military force, if necessary, to compel the relocation of all Native Americans located east of the Mississippi River to the West.¹⁴¹ The government found support for the IRA in John Locke's theory that man's right to land stems solely from his use of it.¹⁴² The government reasoned that Native Americans lost all rights to the land because they had failed to cultivate such rich lands.¹⁴³ The story of the "Trail

137. It is claimed that the United States government violated more than three hundred treaties that it had established with the Indians. Christopher P. Cline, *Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy After Lyng v. Northwest Indian Cemetery Protective Association*, 42 HASTINGS L.J. 591 (1991). An example of a treaty broken by the United States is one that provided that the McKee tribes would relinquish their titles to their lands, and in exchange the United States government would set aside certain lands for the tribes' permanent use and occupancy. *Id.* at 601-02. In addition, the United States was to provide the tribes with supplies, horses, education, and training. *Id.* at 602. However, shortly thereafter the United States Senate rejected the treaty, deciding that because the United States obtained the land from Mexico, its rights to the land superceded that of the Indians. *Id.*

138. Indian Removal Act of 1830, in DOCUMENTS OF UNITED STATES INDIAN POLICY 52-53 (Francis Paul Prucha ed., 3rd ed. 2000).

139. DIPPIE, *supra* note 4, at 45 (quoting NILES WEEKLY REGISTER, Vol. XXXVI 274 (June 13, 1829)).

140. Indian Removal Act, *supra* note 138, at 52.

141. The Indian Removal Act stated,

[T]hat it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there.

Id.

142. See Ward Churchill, *The Oppression of the American Indian*, available at <http://www.ac.wvu.edu/~n9610899/writings/indians.html> (last visited Apr. 8, 2002).

143. *Id.*

of Tears,"¹⁴⁴ which encompasses hunger, fatigue, broken promises, and the loss of loved ones, best illustrates the effects of the Indian Removal Act.

In 1791, President George Washington's administration granted the Cherokee Indian Tribe seventy thousand square miles of territory, which included parts of Georgia, North Carolina, South Carolina, and what was recognized later as Alabama, Tennessee, and Kentucky.¹⁴⁵ The land was granted under the Treaty of Holston, which also promised the Cherokees \$1,000 for any land that they relinquished.¹⁴⁶ As the years passed, the Cherokees ceded more and more land to the United States government in exchange for promises of money.¹⁴⁷ However, the United States government never paid the money.¹⁴⁸

Despite ceding such large amounts of land, the Cherokee Nation numbered over 13,000 by 1825.¹⁴⁹ By that time, the Cherokee Nation had created its own language and made excellent use of its land by building brick houses, stores, schools, and a library.¹⁵⁰ With the growth of strong tribes like the Cherokee Nation, the United States faced great resistance when trying to enforce the Indian Removal Act.¹⁵¹ The Cherokee nation fought its forced removal by lobbying through newspaper articles that declared its rights to the land according to its treaty, which was supposed to be the "supreme law of the land."¹⁵²

As the United States government was attempting to enforce the Indian Removal Act, the Supreme Court decided the case of *Worcester v. Georgia*.¹⁵³ In 1831, Samuel A. Worcester, a missionary among the Cherokees, was arrested for failing to obey a Georgia law requiring

144. The Cherokee journey from Georgia to Oklahoma has been termed the "Trail of Tears" because the Native Americans were required to give up their ancestral lands under the most heinous conditions, which resulted in the loss of numerous lives along the way. DELORIA & LYTLE, *supra* note 136, at 7.

145. JOAN GILBERT, *THE TRAIL OF TEARS ACROSS MISSOURI* 5-26 (1996).

146. JACKSON, *supra* note 130, at 267. Article VII of the Treaty of Holston reaffirmed the Cherokees right to the land by stating, "[this treaty] solemnly guarantee[s] to the Cherokee nation all their lands not hereby ceded." *Id.*

147. *Id.* at 269-70. In 1816, the Cherokees gave up all lands in South Carolina in exchange for a promise of \$5000, and by 1817 more land was ceded with promises of new homes west of the Mississippi River. *Id.* at 270. After years of broken promises, in 1822, the Cherokees refused to give up any more land to the United States government. *Id.* at 271-72.

148. *Id.*

149. GILBERT, *supra* note 145, at 7.

150. GILBERT, *supra* note 145, at 6-9.

151. *Id.* at 9-16.

152. Article VI of the United States Constitution, which defines treaties as the "supreme law of the land" supported the Cherokees' right to the land under the Treaty of Holston.

153. *Worcester v. Georgia*, 31 U.S. 515 (1832).

persons of white ancestry to take an oath of allegiance to the state and obtain a permit to live on a reservation before moving onto a reservation.¹⁵⁴ The Court, in *Worcester*, overturned the Georgia Superior Court's holding in which Worcester was sentenced to four years in the state penitentiary.¹⁵⁵ The Court held that the state laws of Georgia did not apply on Native American lands.¹⁵⁶ In particular, Chief Justice John Marshall stated,

The Cherokee nation is then, a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.¹⁵⁷

This ruling supported the Cherokee Nation's claim that the United States did not have a right under the IRA to force its removal.¹⁵⁸ In response to the Supreme Court's decision, President Andrew Jackson stated, "[Chief Justice John] Marshall has made his law, now let him enforce it."¹⁵⁹ The executive branch then proceeded to ignore the Supreme Court's ruling,¹⁶⁰ forcing the removal of tribes by military personnel.¹⁶¹ Eventually, the government prevailed over the Native Americans, and thousands of deaths ensued along the "Trail of Tears."¹⁶²

"People were often rushed out of their homes with nothing but the clothes on their back Time was not always allowed to get children in from play or work. Husbands came home to find families gone."¹⁶³ All members of the Cherokee tribe, which was considered one of the most civilized, were forced from their homes by the United States military and required to relocate in the West after the prospect of gold was found on their land.¹⁶⁴ The removal process entailed walking fif-

154. *Id.* at 537-38.

155. *Id.* at 562.

156. *Id.* at 561.

157. *Id.*

158. Because Chief Justice Marshall, in *Worcester*, found that state laws were not applicable on Indian lands, states could not legally, in accordance to the holding of the case, force the removal of Indians from their lands. *Id.* at 561-62.

159. Rennard Strickland & William M. Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, The Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111, 114 (1994).

160. For a discussion on the effects of President Andrew Jackson's failure to adhere to the Supreme Court's decision in *Worcester v. Georgia*, see Strickland, *supra* note 159, at 124-25.

161. NORGREN, *supra* note 134, at 143 (noting that pursuant to the Treaty of New Echota the Cherokees were removed at the hands of U.S. troops).

162. GILBERT, *supra* note 145, at 32.

163. *Id.* at 32-33.

164. *Id.*

teen to twenty miles a day in sub-zero temperatures without the proper attire to stay warm.¹⁶⁵ At every stop, there were anywhere from four to ten bodies to bury, most often as a result of fatigue or illness.¹⁶⁶ It has been estimated that approximately 4,000 Cherokees (fifty percent of the tribe) died during this removal process.¹⁶⁷ As a result of the United States' federal policies, including the IRA and others, as well as the United States' military personnel, the Cherokees were successfully removed from the East; however, they left behind a "Trail of Tears."

C. *Ward of the Government and the Allotment Period*

The removal of all tribes from the East to western reservations did not sufficiently fulfill the principles of Manifest Destiny,¹⁶⁸ spurring the United States to abandon the traditional treaty system. This abandonment furthered the destruction of Native Americans.¹⁶⁹ On March 3, 1871, hidden within the text of an Indian appropriation bill, Congress outlawed any future treaties with Native Americans.¹⁷⁰ The appropriation bill stated that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."¹⁷¹ Thereby, the government abolished the recognition of Indian tribes as sovereign nations and inevitably took away their only bargaining tool, the right to govern their land as they wished.¹⁷² As a result, Native Americans became wards of the government, losing control of their land, the private education of their children, their traditions, and ultimately, their identity.

Traditionally, land occupied by Native Americans had been held collectively, which meant that no individual had the power to act for the tribe as a whole. Yet in 1887, the General Allotment Act (Dawes Act)¹⁷³ altered this traditional ownership by granting each Native American a fee simple in the land with a twenty-five year trust.¹⁷⁴

165. *Id.*

166. *Id.*

167. Sharon Johnston, *The Genocide of Native American: A Sociological View*, available at <http://isis.csuhayward.edu/ALSS/soc/NAN/dd/6800sj/slj.htm> (last visited March 7, 2002).

168. For a definition of "Manifest Destiny," see *supra* note 10.

169. Johnston, *supra* note 167.

170. ABOLITION OF TREATY MAKING, in DOCUMENTS OF UNITED STATES INDIAN POLICY 136 (Francis Paul Prucha ed., 3rd ed. 2000).

171. *Id.* See also DIPPIE, *supra* note 4, at 144-145.

172. DIPPIE, *supra* note 4, at 144-145.

173. General Allotment Act (Dawes Act) § 1, 5, reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 138, at 170.

174. *Id.* at 173.

Parcels of land were granted to individual Native Americans, while the “remaining land” was given or sold to whites. In many cases, the land parceled out by the government had been the land occupied by Native Americans under the treaty agreement; therefore, the “remaining land” was really land owned by Native Americans, but purchased by whites following the allotment.¹⁷⁵

The conditions of the deeds were largely dependent on the race of the individual. For example, full-blooded Indians were granted longer trust periods because they were viewed as less competent than mixed-blooded¹⁷⁶ individuals who were sometimes granted fee simples without trusts.¹⁷⁷

The government hoped that by individualizing ownership of the land, it would encourage Native Americans to cultivate the land and become civilized farmers.¹⁷⁸ In support of transforming the “savage beast” into a civilized farmer, Indian Commissioner Hiram Price stated, “Labor is an essential element in producing civilization The greatest kindness the government can bestow upon the Indian is to teach him to labor for his own support, thus developing his true manhood, and, as a consequence, making him self-relying and self-supporting.”¹⁷⁹

In fact, according to Section 6 of the Dawes Act, as each Indian accepted his individual plot of land, he became a United States citizen.¹⁸⁰ Ultimately, the government’s goal of turning Native Americans into civilized farmers largely failed, and at the end of the trust period, many Native Americans lost their land for failure to maintain good credit.¹⁸¹ As a result, two-thirds, or approximately eighty-seven million acres, of Indian lands held in 1887 were lost to the United States government by 1934.¹⁸²

175. DELOS S. OTIS, *DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 86-88 (Francis Paul Prucha ed. 1980).

176. Mixed Bloods commonly referred to a mixture of white and Indian.

177. Ward Churchill & Glenn T. Morris, *The State of Native Americans Crucible of American Indian Identity*, available at <http://www.zmag.org/zmag/articles/fed98ward.htm> (last visited Apr. 8, 2002).

178. OTIS, *supra* note 175, at 8-32.

179. *Indian Commissioner Price on Civilizing the Indians*, October 24, 1881, reprinted in *DOCUMENTS OF UNITED STATES INDIAN POLICY*, *supra* note 138, at 155-56.

180. General Allotment Act (Dawes Act), *supra* note 138, at 171. See also, Porter, *supra* note 10, at 119 (discussing how forcing American citizenship on Indians was another act of genocide committed by the United States government, by which the Indian race has suffered much instability based on identifying with their ethnicity and nationality).

181. *Id.* at 122.

182. *Id.* at 122-23. See also OTIS, *supra* note 175, at 87 (noting that “of the 155,632,312 acres of Indian lands in 1881, there were 104,314,349 acres left in 1890 and 77,865,373 in 1900”).

The forced removal of the Cherokee Nation, in opposition to the United States Supreme Court decision in *Worcester*, and the taking of Indian lands resulted in the loss of numerous lives and scared lands, thereby creating feelings of powerlessness for all Native Americans.¹⁸³ To date, not one individual or agency has been held accountable for the deaths that resulted from the forced removal of all Indian tribes from the East to the West. In 1946, the United States government established the Indian Claims Commission¹⁸⁴ with a mandate to ensure that those Native Americans who had suffered the illegal expropriation of their lands by the United States would “receive justice.”¹⁸⁵ However, many doubted the ability of the Commission to ensure justice for Native Americans; instead, the Commission was viewed as a consequence of the United States’ plan to prosecute the Nazis at Nuremberg for committing “Crimes Against Humanity.”¹⁸⁶ These crimes included the forced removal of the Jewish population into concentration camps, the sterilization of Jewish individuals, and the extermination of thousands of Jews.¹⁸⁷

The movement to sterilize Jewish individuals in Nazi Germany was largely based on the eugenics movement in the United States, which promoted the sterilization of certain individuals with “undesirable traits.”¹⁸⁸ In fact, Hitler’s 1933 Law for the Prevention of Offspring with Hereditary Diseases¹⁸⁹ contained language similar to a Virginia statute allowing for the involuntary sterilization of feeble minded persons.¹⁹⁰

In the United States, the eugenics movement began with the sterilization of “imbeciles and feeble minded persons” and transitioned into

183. Porter, *supra* note 10, at 161-69.

184. The Indian Claims Commission Act, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 136, at 231-233. The Indian Claims Commission Act of August 13, 1946 granted the Commission the authority to hear and adjudicate the following claims, in pertinent part, brought by Native Americans against the United States government:

(1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; . . . (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant

Id. at 231.

185. WARD CHURCHILL & GLEN T. MORRIS, KEY INDIAN LAWS AND CASES: THE STATE OF NATIVE AMERICA, 13-21 (1998).

186. *Id.*

187. *Id.*

188. Bill Baskerville, *Phony Science Rendered 60,000 Americans Sterile*, RICHMOND TIMES-DISPATCH at C1, March 19, 2000.

189. *Id.* at C6.

190. *Id.*

the sterilization of minorities because of their minority status. This included the sterilization of Native American women.¹⁹¹ These sterilization efforts constituted an attempt to destroy, in whole or in part, the Native American population.

D. *The Involuntary Sterilization of Native American Women*

“Eugenics” is defined as “a science that deals with the improvement (as by control of human mating) of hereditary qualities of a race or breed.”¹⁹² In the early 1900s, the United States, with the help of numerous American scientists, implemented the theory of eugenics by creating, mandating, and funding programs that sterilized individuals possessing “undesirable traits.”¹⁹³

“The first sterilization law . . . passed in 1907 . . . provided for the prevention of the procreation of confirmed criminals, idiots, imbeciles, and rapists.”¹⁹⁴ These programs were later endorsed by the Supreme Court in *Buck v. Bell*,¹⁹⁵ which allowed a physician, acting under the auspices of the government, to perform an operation that was neither desired by the patient nor medically necessary.¹⁹⁶ Carrie Buck, the daughter of a “feeble-minded” woman, was diagnosed as being of “moral imbecility,” and as a result of this diagnosis, Virginia law mandated that Carrie be sterilized.¹⁹⁷ Virginia legalized the compulsory sterilization of persons “afflicted with a hereditary form of insanity or imbecility.”¹⁹⁸ The Supreme Court rejected Buck’s argument that such programs violated her equal protection and due process rights.¹⁹⁹ The Court, in upholding the law, reasoned, “It is better for all the

191. Rennard Strickland, *Taking the Train to Tomorrow: Learning to See Beyond the Prison Gates*, 9 ST. THOMAS L. REV. 15, 19-21 (1996).

192. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 428 (1987). It is estimated that the eugenics movement left more than 60,000 Americans unable to have children. Baskervill, *supra* note 188, at C6.

193. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 59-65 (1997); Stephanie Hyatt, *A Shared History of Shame: Sweden’s Four-Decade Policy of Forced Sterilization and the Eugenics Movement in the United States*, 8 IND. INT’L & COMP. L. REV. 475, 487- 97 (1998).

194. Hyatt, *supra* note 193, at 490. See also Bruce E. Johansen, *Sterilization of Native American Women Reviewed by Omaha Master’s Student*, at <http://www.ratical.org/ratville/sterilize.html> (last visited March 11, 2002). By 1930, thirty states and Puerto Rico had established mandatory sterilization laws for various criminal acts and moral turpitudes. *Id.* Eleven of those states allowed for the sterilization of epileptics, while in Iowa a person declared a “menace to society” could be required under court order to lose his or her reproductive rights. *Id.*

195. 274 U.S. 200 (1927).

196. Hyatt, *supra* note 193, at 491.

197. *Id.*

198. *Id.* at 491-92.

199. ROBERTS, *supra* note 193, at 59-65.

world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough."²⁰⁰

By 1973, an estimated 100,000 to 150,000 indigent women had been sterilized annually under federally funded programs.²⁰¹ Thereafter, a study showed that more than half of those women were African American.²⁰² Similar sterilization programs were implemented against Puerto Rican²⁰³ and Native American women during this time.²⁰⁴ These activities, however, were not committed without public outcry from the victims subjected to forced sterilization.

On June 14, 1973, at the Montgomery Family Planning Clinic, fourteen-year-old Mary Alice Relf and twelve-year-old Minnie Lee Relf were subjected to an irreversible surgical tubal sterilization without their knowledge or consent.²⁰⁵ In the case that followed, *Relf v. United States*,²⁰⁶ the victims claimed that the doctor's failure to issue and distribute the sterilization guidelines was negligent and led to their involuntary sterilizations.²⁰⁷ The doctor who was employed by the Montgomery Family Planning Clinic under the auspices of the Office of Economic Opportunity claimed that he was immune from prosecution because of his role as a federal officer.²⁰⁸ In the end, the case was dismissed, and the court found that the doctor met the test for

200. *Buck*, 274 U.S. at 207.

201. *Id.* See also *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974); Charles England, *A Look at the Indian Health Service Policy of Sterilization, 1972-1976*, at <http://www.dickshovel.com/IHSSterPol.html> (last visited March 11, 2002) (stating "Dr. Louis Hellman, the Deputy Assistant Secretary for Population Affairs in the PHS [Public Health Service], presented statistics confirming that 150,000 low income people were sterilized in the U.S. from federal grants.").

202. ROBERTS, *supra* note 193, at 93.

203. The International Planned Parenthood Federation and the Puerto Rican government, with the support of federal funds, waged a crusade to sterilize all Puerto Rican women. ROBERTS, *supra* note 193, at 94-97. By 1968, more than one-third of the women of childbearing age in Puerto Rico had been successfully sterilized. *Id.* at 94-97. More recently, as of 1982, thirty-five percent of Puerto Rican women had been sterilized. Charles Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J.L. & FEMINISM 255, 273-74 (1992). For a discussion on the sterilization movement in Puerto Rico, see Laura Briggs, *Discourses of "Forced Sterilization" in Puerto Rico: The Problem with the Speaking Subaltern*, 10 DIFFERENCES: J. FEM. CULT. STUDIES 1 (1998).

204. For a detailed discussion on the sterilization of Native American women, see *infra* notes 210-220.

205. *Relf v. United States*, 433 F. Supp. 423, 424 (D.D.C. 1977). See also Taunya Lovell Banks, *Women and Aids—Racism, Sexism, and Classism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351, 361 (1990).

206. *Relf*, 433 F. Supp. at 424.

207. *Id.* at 429.

208. *Id.* at 424.

absolute immunity because his actions were within the scope of his employment and his position demanded freedom to make similar types of decisions without repercussions.²⁰⁹

Similarly, in 1977, ten Mexican American women sued Los Angeles County for failing to obtain their consent before performing surgical sterilizations on them.²¹⁰ In deciding the case, the court found that there was a mere lack of communication, and as a result, the doctors who conducted the surgeries were never held accountable.²¹¹ These same manipulation tactics used by the United States government to sterilize persons of minority descent, as well as the outcry of the victims caught within the government's control, can be found throughout the Native American community.

As early as the 1930s, the Bureau of Indian Affairs, under the auspices of the Indian Health Services, began to execute a covert program designed to sterilize all Native American women.²¹² As a result, sterilization became a regular practice at various Native American hospitals. The sterilization procedure was carried out under the guise of medical necessity to protect the woman's health, or in the alternative, the procedure was performed without the woman's knowledge or consent.²¹³ Between the early 1970s and early 1980s, these programs forcibly sterilized more than forty-two percent of all Native American women of childbearing age.²¹⁴ For many small Indian tribes, this led to an almost complete elimination of their entire tribe.²¹⁵

In the early 1970s, at the urging of Senator James Abourezk of South Dakota, the General Accounting Office investigated the complaints of various Native American women who were subjected to forced sterilization procedures.²¹⁶ The investigation was conducted

209. *Id.* at 429-31.

210. Banks, *supra* note 205, at 362-63.

211. *Id.*

212. CHURCHILL, *supra* note 8, at 249-250. Interestingly, in 1955, Indian Health Services was transferred from the Bureau of Indian Affairs to the Public Health Service in hopes of improving health care on Native American Reservations. England, *supra* note 201.

213. Strickland, *supra* note 8, at 328.

214. CHURCHILL, *supra* note 8, at 249-250. See also Rutherford, *supra* note 203, at 273-74. The author found that as of 1982, forty-two percent of Native American women had been sterilized. *Id.*

215. Because of the small population of certain tribes, the sterilization of one-third or more of a tribe's women impeded on a tribe's ability to reproduce and replenish its population. Similarly, the Bureau of Indian Affairs admitted that between 1920 and 1925 Indians averaged 22.8 deaths per 1,000 persons each year, which was double the rate of the white population. Many speculated that the "increase of forty-eight percent in the Indian death rate could lead to the extinction of the entire population in another quarter of a century." DIPPIE, *supra* note 4, at 345.

216. England, *supra* note 201.

and funded by the federal government.²¹⁷ The General Accounting Office found that the Indian Health Services' consent procedures lacked any type of informed consent.²¹⁸

In 1976, the Indian Health Services was formally eliminated, and the sterilizations stopped.²¹⁹ Yet, this was not before the government, through the Indian Health Services, had forcibly sterilized approximately 70,000 Native American women during its time of operation.²²⁰

*E. The Destruction of the Native American Tradition,
Language, and Culture*

“Gaa wiin daa-aangoshkigaazo ahaw enaabiyaan gaa-inaabid,” is an Ojibwe saying that translates in English to “You can not destroy one who has dreamed a dream like mine.” To various Native Americans, the Ojibwe language symbolizes a special bond, as it is their method of communication and a tool for distinguishing between tribes. The United States government destroyed this special bond, various other traditions, and the Native American identity by the involuntary indoctrination of American ideals.²²¹

The Northwest Ordinance of 1787²²² promised to provide the means to obtain a suitable education for all Native American people; however, money did not begin to flow to Indian reservations until the late 1870s.²²³ This allocation of resources brought about the rise of the federal Indian boarding school system, which took children away from their homes in order to “civilize” them.²²⁴ In fact, between 1879 and the early 1900s, Congress appropriated money to build more than one

217. *Id.*

218. *Id.* (citing Bill Wagner, *Lo the Poor and Sterilized Indian*, AMERICA 75, Jan. 29, 1977).

219. *Id.*

220. Anthony J. Hall, *Lighting A Candle or Exploding Bombs for Humanity? Ethnic Cleansing and Genocide in North America and Kosovo*, at <http://www.ualberta.ca/~nativest/pim/genocide.html> (last visited March 11, 2002) (quoting Bruce E. Johansen in Cornell University's Native Americans); Strickland, *supra* note 191, at 20-21.

221. For a discussion on how the forcing of American citizenship upon Indians destroyed their traditions, see Porter, *supra* note 10, at 161-69. See also Allison M. Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 905-908 (1999), where the author explores the effects of the suppression of Indian languages.

222. Northwest Ordinance, 1 Stat. 50 (1787) .

223. Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 950 (1999).

224. The federally funded boarding school system was paralleled to the system of religious boarding schools run by Christian missionaries. See Matt Kelley, *American Indian Boarding Schools: "That Hurt Never Goes Away"* (April 28, 1999) at http://www.canoe.ca/CNEWSFeatures9904/28_indians.html (last visited March 11, 2002).

hundred off-reservation boarding schools.²²⁵ In 1885, the Bureau of Indian Affairs issued regulations for Indian schools, which included an English only policy.²²⁶ In 1887, in support of the English only policy, the Commissioner of Indian Affairs, F.D.C. Atkins, in his Annual Report of the Commission of Indian Affairs reasoned,

This language [English], which is good enough for a white man and a black man, ought to be good enough for the red man. It is also believed that teaching an Indian youth in his own barbarous dialect is a positive detriment to him. The first step to be taken toward civilization, toward teaching the Indians the mischief and folly of continuing in their barbarous practices, is to teach them the English language.²²⁷

Therefore, Native American students were required to relinquish their given name for one in the English language, and were forced to respond to a name they did not recognize in a language they did not understand.²²⁸ In fact, students were often punished if they were caught speaking their first language.²²⁹

The Carlisle Indian Industrial School in Pennsylvania,²³⁰ recognized as the most prominent school for Indians in the United States, served as a model for other Indian schools.²³¹ Richard Henry Pratt, the head of the Carlisle Indian Industrial School, a former Captain in the army, and veteran of the Civil War, pledged to run the school and its students by “kill[ing] the Indian in [the student] and sav[ing] the man.”²³² A similar motto or mission statement for the educational practices of Native Americans existed in all other boarding schools.²³³ As a result, a typical arrival at a boarding school consisted of the removal of all distinguishing characteristics associated with being Indian, such as the

225. DELORES J. HUFF, *TO LIVE HEROICALLY: INSTITUTIONAL RACISM AND AMERICAN INDIAN EDUCATION* 4 (1997).

226. The United States government hoped that by regulating the language the Indians spoke, they would successfully eradicate the “inferior” language from use. See PETER IVERSON, *WE ARE STILL HERE: AMERICAN INDIANS IN THE TWENTIETH CENTURY* 21-23 (1998); Dussias, *supra* note 221, at 905-908.

227. Annual Report of the Commissioner of Indian Affairs, September 21, 1887, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 170, at 174. See also Dussias, *supra* note 221, at 905.

228. Dussias, *supra* note 221, at 905.

229. Gerald L. “Jerry” Brown, Reeve Love, & Bradley Scott, *An Historical Overview of Indian Education and Four Generations of Desegregation*, 2 J. GENDER RACE & JUST. 407, 410-11 (1999).

230. The Carlisle Indian School opened in November 1, 1879, and the Bureau of Indian Affairs closed its doors in 1918. DIPPIE, *supra* note 4, at 113-21.

231. *Id.*

232. See IVERSON, *supra* note 226, at 21.

233. Alison McKinny Brown, *Native American Education: A System in Need of Reform*, 2 KAN. J.L. & PUB. POL’Y 105, 107 (1993).

cutting of long hair, the removal of traditional tribal dress, and the renouncement of tribal religions.²³⁴

The curriculum of most schools consisted of a half-day of classroom instruction, while the rest of the day consisted of manual labor.²³⁵ Many historians claim that such manual labor required strength and capabilities that children between the ages of ten to twelve did not possess, especially considering the lack of nourishment provided to the children by the schools.²³⁶ The curriculum also included the indoctrination of Christianity, the Lockian theory of private property, and patriarchy.²³⁷ As a result, any student who was caught with an Indian medicine bundle was paddled.²³⁸

Native American boarding schools, including Carlisle used an “outing system,” which involved the transfer of a child from the school into the home of a white family to indoctrinate the children in the American way of life.²³⁹ This system was one of the quickest and most successful means of civilizing Native American children because the children had constant contact with American work ethics, patriotism, and values. A study conducted by the Association on American Indian Affairs in the 1970s showed that twenty-five to thirty-five percent of Native American children were transferred from their homes into foster care or adoptive families.²⁴⁰ Interestingly, eighty-five percent of those alternative placements were with Non-Indian homes.²⁴¹

In 1891, Congress passed the Indian Appropriation Act, which required all Native American children to attend school and authorized

234. *Id.*

235. Carolyn J. Marr, *Assimilation Through Education: Indian Boarding Schools in the Pacifica Northwest*, at <http://content.lib.washington.edu/aipnw/marr/page5.html> (last visited March 11, 2002).

236. HUFF, *supra* note 225, at 9-10. It is reported that children in federally financed boarding schools were fed on eleven cents a day, while their meals commonly consisted of moldy molasses and weak coffee. *Id.* See Kelley, *supra* note 224.

237. Kelley, *supra* note 224. See also Carla Christofferson, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 176-77 (1991), where the author noted that “Native American women have suffered a longer history of discrimination in the United States than any minority group” because of the government’s policies of assimilation, termination, and genocides. *Id.* Moreover, the author argued that Native Americans historically were nonsexist and “women enjoyed equal rights with men and in some cases were even considered superior to men.” *Id.* However, the United States government’s policies toward Native Americans altered these nonsexist views immensely. *Id.*

238. Kelley, *supra* note 224.

239. Commissioner Thomas J. Morgan, Supplemental Report on Indian Education, December 1, 1889, reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 170.

240. David Woodward, *The Rights of Reservation Parents and Children: Cultural Survival or the Final Termination*, in NATIVE AMERICANS AND THE LAW: NATIVE AMERICAN CULTURAL AND RELIGIOUS FREEDOM 101, 101-02 (John R. Wunder ed. 1996).

241. *Id.* at 102.

the Bureau of Indian Affairs to withhold federal rations from any Indian family who refused to send their child away to school.²⁴² In order to survive, Native American families had no choice but to allow their children to be taken to boarding school because they were often the only schools available for Native American children.²⁴³ Upon arrival at the boarding school, the children were not allowed to speak to their families in order to accelerate the assimilation process.²⁴⁴ Subsequently, students who cried from homesickness were often beaten, and those who attempted to run away were often chained in makeshift jails as punishment.²⁴⁵ All of these acts, the beatings and the regulations, were carried out with the specific purpose of assimilating the "savage beast" to the white man's way of life in order to destroy all things Indian.²⁴⁶

The Indian Child Welfare Act of 1978 brought about the end of the federal government's policy of forcibly transferring Native American children to boarding schools and white families. Acknowledging the history of removing Native American children from their homes, Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions"²⁴⁷ In response to the destruction of the Native American family at the hands of the United States government, the Indian Child Welfare Act designated procedures for both adoption and foster care in the hope of prohibiting the future transfer

242. Brown, *supra* note 233, at 107.

243. Brown, *supra* note 233, at 107.

244. Kelley, *supra* note 224.

245. *Id.* See Floyd Stephen Mowatt, Sr. v. Derek Clarke, The Anglican Church of Canada, *et al.*, Docket No. 7838, at <http://www.courts.gov.bc.ca/jdb%2Dtxt/sc/99/13/s99%2D1341.txt> (last visited March 11, 2002), for a discussion on the prevalence of abuse of students at Residential Schools in Canada. The Supreme Court of British Columbia held the Anglican Church of Canada, the General Synod of the Anglican Church of Canada, the Anglican Diocese of Cariboo, the Synod of the Diocese, and the Queen of Canada, as represented by the Minister of Indian Affairs, responsible for the sexual abuse of a student at the hands of his dormitory supervisor. Floyd Stephen Mowatt, Sr. v. Derek Clarke, The Anglican Church of Canada, *et al.*, Docket No. 7838, at <http://www.courts.gov.bc.ca/jdb%2Dtxt/sc/99/13/s99%2D1341.txt> (last visited March 11, 2002). See also The Anglican Church of Canada, *Residential Schools: Legacy and Response*, at <http://www.anglican.ca/ministry/rs/litigation/> (last visited March 11, 2002) (highlighting the fact that, at present, approximately 7,000 survivors of Canadian Residential Schools are suing the government of Canada; the Anglican Church is named as a co-defendant in approximately 1,200 of those cases).

246. IVERSON, *supra* note 226.

247. Indian Child Welfare Act, November 8, 1978, reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 138, at 294-95.

of Native American children into non-Native American homes without parental consent.²⁴⁸

IV. ANALYSIS: THE AMERICAN GENOCIDE: COMMITTED WITHIN OUR BORDERS BY OUR GOVERNMENT

As early as the 1800s, the United States government implemented measures calculated to destroy, in whole or in part, the Native American population. These measures, which included the forced relocation of Native Americans, the sterilization of Native American women, and the destruction of the cultural unit by the transfer of Native American children to boarding schools, were in clear violation of customary international law and the Genocide Convention, in particular Articles II(c), (d), and (e), respectively.²⁴⁹

To date, no government, agency, or individual has been held accountable for the genocidal acts committed by the United States government, its agencies, and its personnel against the Native American population. According to customary international law, which embodies the universal condemnation by states of the crime of genocide, the United States government and its actors, as perpetrators of acts of genocide, must be held accountable for these acts.²⁵⁰ Similarly, the United States, as a party to the Genocide Convention, can be held in violation of the Convention for not prosecuting or extraditing the persons responsible.²⁵¹ As a result, the problem of accountability remains.

In order to hold persons accountable for the crime of genocide within the United States there must be proof of genocide as enumerated under Article II, conspiracy to commit genocide, an attempt to commit genocide, or complicity to commit genocide committed by United States citizens or within the boundaries of the United States.²⁵² Similarly, the specific intent to “destroy, in whole or in part,

248. 25 U.S.C. § 1913(c)(1994) states: “In any voluntary proceeding for termination of parental rights to, or adoptive placement of an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption.” Similarly, 25 U.S.C. § 1903(1)(iv)(a) states: “consent to adoption . . . shall be or become irrevocable.” See Russel Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis, in NATIVE AMERICANS AND THE LAW: RECENT LEGAL ISSUES FOR AMERICAN INDIANS, 1968 TO THE PRESENT* 219 (John R. Wunder ed., 1997), for a discussion of the effects of the transfer of children from their homes into non-Indian homes and a critique of the Indian Child Welfare Act of 1978.

249. Genocide Convention, *supra* note 6, at Article II(c), (d), (e).

250. See *supra* notes 36-98 and accompanying text for a discussion of the obligations of customary international law.

251. SCHABAS, *supra* note 58, at 525.

252. See *supra* note 15 and accompanying text.

[a protected group]" must be shown.²⁵³ This intent can be proven through various means, such as evidence of written or oral orders to eliminate a specific group, the labeling of a protected group as an enemy of a state, or a systematic and destructive pattern of behavior with respect to a specific group.²⁵⁴ The existence of various United States governmental philosophies, policies, orders, and legislative acts regulating against Native American persons prove the requisite intent to commit the crime of genocide against those individuals.

A. *The Implementation of the Philosophy of Manifest Destiny*

When Jimmy Carter was running for the presidency, somebody asked him, in a T.V. interview, "for how long did your family have the farm?" He said, "ever[] since the Indians went away." That is not exactly how one would describe the Trail of Tears—went away with bayonets at their backs, perhaps. Five thousand Cherokees die[d] on that forced march, a third of the nation was exterminated. These are things we can no longer ignore.²⁵⁵

The United States government adopted the philosophy of "Manifest Destiny," which involved the taking of all Indian lands and the extermination of the Indian population in order to accomplish the goal of expansion into the West.²⁵⁶ Under the auspices of this philosophy, the United States government forced the relocation of the "savage beast."²⁵⁷ The journey began on a hot summer day when most Cherokees were forced from their homes with only the summer clothes on their backs and possibly a few other personal items.²⁵⁸ The trip continued through the winter when the Native Americans were subjected to the sub-zero temperatures typical of the region.²⁵⁹ The conditions of the trip were intolerable for most able-bodied individuals, let alone those who were ill, young, or elderly.²⁶⁰ Further, many had to walk because the government had provided only one wagon for every twenty people and one saddle horse for every four people.²⁶¹ As a result, many of the Cherokees were forced to walk approximately six-

253. Genocide Convention, *supra* note 6, at Article II.

254. RATNER & ABRAMS, *supra* note 60, at 34.

255. Rennard Strickland, *Things Not Spoken: The Burial of Native American History, Law and Culture*, 13 ST. THOMAS L. REV. 11, 17 (2000).

256. CHURCHILL *supra* note 10, at 37.

257. GILBERT, *supra* note 145, at 38-41. *See also supra* notes 126-190 and accompanying text.

258. GILBERT, *supra* note 145, at 38-41.

259. *Id.*

260. *Id.*

261. *Id.*

teen miles per day.²⁶² One man in charge of leading the Cherokees to the West stated,

On the morning of November 17th we encountered a terrific sleet and a snow storm with freezing temperatures and that day . . . the suffering of the Cherokees [was] awful. The trail of exiles was a trail of death. . . . They had to sleep in the wagons and on the ground without fire. And I have known an many as twenty-two . . . to die in one night of pneumonia.²⁶³

Death was common along the "Trail of Tears" due to exhaustion, the sub-zero temperatures, and the lack of medical supplies to treat disease.²⁶⁴ As a result, death was often a result of fatigue, pneumonia, or other deadly diseases.²⁶⁵

The government's practice along the "Trail of Tears" is clearly proscribed and prohibited under the Genocide Convention. Article II(c) of the Genocide Convention prohibits "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part."²⁶⁶ The International Criminal Tribunal for Rwanda interpreted provision II(c) of the Genocide Convention to include "subjecting a group of people to a subsistence diet, *systematic expulsion from homes*, and the *reduction of essential medical services below minimum requirement*."²⁶⁷

The United States government, under the mandate of Manifest Destiny, had the specific intent to remove the Cherokees from their homes with the intent that such removal would lead to their destruction. This was the final step in the plan of Manifest Destiny when assimilation failed.²⁶⁸ Even though the United States Supreme Court, in the case of *Worcester v. Georgia*, rejected the application of state law on Indian territories, the United States government, with the help of the military, forced the removal of the Cherokee Nation in accordance with the Indian Removal Act of 1830.²⁶⁹ After the Cherokees were removed, they were forced to walk thousands of miles in the dead of winter without sufficient clothes or medical supplies.²⁷⁰ Any

262. *Id.*

263. *Id.* at 38.

264. GILBERT, *supra* note 145, at 38.

265. *Id.*

266. Genocide Convention, *supra* note 6, at Article II (c).

267. SCHABAS, *supra* note 58, at 166 (quoting from the case of *Prosecutor v. Akayesu*) (emphasis added).

268. See DIPPIC *supra* note 4, at 45-46, where the author notes that President Andrew Jackson advocated the forced relocation of the Indians because they were too close to his white children.

269. Indian Removal Act of 1830, in DOCUMENTS OF UNITED STATES INDIAN POLICY 52 (Francis Paul Prucha ed., 3rd ed. 2000).

270. GILBERT, *supra* note 145, at 38.

reasonable person should have known that such conditions would inevitably cause the death and destruction of the population forced to endure such a journey. The United States government that implemented the Indian Removal Act, the military personnel who forced the Cherokees from their home, and the persons who led the Cherokees from their homes to the West committed acts of genocide in violation of customary international law and the Genocide Convention.

The forced removal of the Cherokees from the East to the West is analogous to the forced removal of Armenians from the Ottoman Empire beginning in 1915. The Turks, under the auspices of a “resettlement policy” forced the removal of all Armenians from the Ottoman Empire.²⁷¹ In reality, the “resettlement policy” represented the government’s means of fulfilling their plan of racial exclusivity. The removal process took place with little warning, a three-day notice was average, and some Armenians were removed by trains and wagons, and many more were forced to walk.²⁷² The blistering hot days and freezing cold nights, the failure of the government to make provisions for food and housing along the journey, and various diseases caused the death of seventy-five percent of the Armenians who were forced on the journey.²⁷³ Furthermore, they were given only scraps of food, and if they felt sick, they were left to die.²⁷⁴

These acts committed by the Turks were declared violations “against the laws of humanity” by the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties.²⁷⁵ The breaches detailed by the Commission were similar to what we know as the crime of genocide today. Even though the Turks were not held accountable for their actions, they would have been held accountable had justice not been exchanged for a political compromise.²⁷⁶ Accordingly, it is evident that the forced removal of persons

271. LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* 105-114 (1981). It is estimated that approximately 800,000 Armenians were murdered. *Id.* See also Hovannisian, *supra* note 58, at 123-26.

272. CHURCHILL, *supra* note 8, at 31-31, 32-33 (noting the ruthless nature of the Turkish policy of expulsion and resettlement).

273. KUPER, *supra* note 271.

274. *Id.*

275. M. Cherif Bassiouni, *Combating Impunity For International Crimes*, 71 U. COLO. L. REV. 409, 413 (2000) (stating that the Commission found that the “systematic killing of a civilian population pursuant to state policy . . . violated the ‘laws of humanity,’ [and] charge[d] the officials with ‘crimes against humanity’”).

276. *Id.* Although the Commission found that there had been a violation of the laws of humanity, the United States and Japan opposed using the theory that the Turks had committed crimes against humanity to prosecute the individuals involved. *Id.*

with knowledge that such removal would endanger lives is prohibited by international law.

The similarities between the actions taken by the Turks and those made by the United States government in the removal of the Cherokees from the East to the West are striking. The government of the Turks and the United States government, their agencies, and their personnel orchestrated the removal of an ethnic minority with the intent to destroy the particular group by subjecting them to conditions likely to cause their destruction. Further, the acts of both countries were genocidal and in violation of customary international law and the Genocide Convention. The only difference between the two situations is that the forced removal of Armenians from the Ottoman Empire has been recognized as a violation of customary international law; however, the removal of the Cherokees from the East to the West and the deaths that ensued have not been declared in violation of any national or international law.

It is important to note that at the time of the "Trail of Tears," the crime of genocide, as defined today by the Genocide Convention, had not yet been established. Even though the acts committed by the United States government, its agencies, and its personnel can be clearly recognized as genocidal in nature, for purposes of accountability and reparation, the perpetrators of the "Trail of Tears" would need to be found in "violation of the laws of humanity," as in the case of the Armenian Genocide.

The justifications for the removal of Indian tribes from the East to the West have been largely financial and rooted in the need to expand the strength and security of the United States. At the end of the Revolutionary War, the United States was forced to balance the interests of the United States as a whole against that of the Native Americans, and the interests of the United States won.

*B. The Destruction of the Native American Woman's
Ability to Reproduce*

During a discussion regarding the proposed Genocide Convention, Idaho's Senator Frank Church provided the following testimony to Assistant Attorney General William Rehnquist:

CHURCH: Another extreme criticism leveled at the Convention is that it would make birth control efforts . . . an act of genocide.

REHNQUIST: I think that any birth control effort that might reasonably be contemplated in this country would certainly be a voluntary one, and would likewise be directed towards all individuals rather than any particular race. I think it inconceivable that any sort of

birth control effort that would ever receive public approval in this county would violated the provisions of this treaty.

CHURCH: Is it true that if any such effort were to be made, based upon some compulsory method and directed toward some particular group, that the protections of the Constitution would be fully applicable whether or not the United States had ratified and become party to the Genocide Convention?

REHNQUIST: Certainly.²⁷⁷

Little did Mr. Rehnquist know that as early as the 1930s, the United States government had implemented forced sterilization programs against several minority groups. From his testimony, it is clear that Senator Church was worried that he could be held accountable for these programs under the Genocide Convention. The implementation of sterilization programs against Native Americans was designed to destroy their ability to reproduce, which could have led to the complete elimination of small tribes.²⁷⁸ These programs violated Article II(d) of the Genocide Convention, which prohibits “imposing *measures* intended to prevent births within the group” with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.²⁷⁹ The Secretariat Draft of the Genocide Convention suggested that such “measures,” as mentioned in Article II(d), could include sterilization and/or compulsory abortion, segregation of the sexes, and obstacles to marriage.²⁸⁰ The *mens rea*²⁸¹ required by the Genocide Convention is the specific intent “to destroy, in whole or in part, a national, ethnic, racial, or religious group,” while the *actus reus*²⁸² requires only the implementation of the measures.²⁸³ Therefore, there is no requirement that the measure, when implemented, must result in the successful prevention of births within the group. As a result, any person who carries out an act of sterilization with the intent that such action would destroy, in whole or in part, the Native

277. CHURCHILL, *supra* note 8, at 377-78 (quoting the Hearings on the Genocide Convention (1970), pp.18-19).

278. For a review of the United States government policies regarding the sterilization against Native Americans, see *supra* notes 192-220 and accompanying text.

279. Genocide Convention, *supra* note 6, at Article II(d).

280. SCHABAS, *supra* note 58, at 173-74.

281. *Mens reas* can be defined as the requisite intent necessary to find a person guilty of the crime at hand. In the case of genocide, the Genocide Convention under Article II requires the “specific intent,” not general intent, to “destroy, in whole or in part” a protected group. Genocide Convention, *supra* note 6, at art. II.

282. *Actus reas* can be defined as the physical act necessary to find a person guilty of an act. In the case of genocide, the person being prosecuted does not have to carry out the genocide, but he must only take measures in furtherance of committing the act of genocide. Genocide Convention, *supra* note 6, at art. II.

283. *Id.*

American race has committed an act of genocide and must be held accountable.

After rumors of sterilization spread throughout various reservations, the Northern Cheyennes' chief tribal judge, Marie Sanchez, investigated the prevalence of sterilization in the Indian country.²⁸⁴ In the late 1970s, Judge Sanchez encountered two fifteen year-old girls who recounted how physicians at the Indian Health Services hospital had told them that their tonsils were being removed, but instead the physicians removed their ovaries.²⁸⁵ As a result of this surgery, both girls were left unable to reproduce.²⁸⁶ In this case, the act of removing the girls' ovaries without their consent would undoubtedly meet the required *actus reus* because such measures could or would prevent the girls from conceiving.²⁸⁷ The perpetrator of the act was the Indian Health Services, an agency of the United States government.²⁸⁸ In fact, it was the government that created the Indian Health Services specifically to promote and implement the sterilization of all Native American women.²⁸⁹ Similarly, the individual doctor who performed the surgeries, an act in furtherance of the crime of genocide, also committed an act of genocide. Because the removal of a girl's ovaries would prevent her from reproducing, it is inevitable that if this measure or other sterilization procedures had been implemented against all Native American women, as the Indian Health Services mandate provided, the Native American population would have been destroyed. A program that is mandated to sterilize all Native American women is clearly designed to destroy, in whole or in part, the Native American population; therefore, it amounted to genocide and violated customary international law and the Genocide Convention.

The United States' practice of sterilizing criminals, mentally ill persons, and imbeciles, which led to the implementation of similar practices against minorities, inspired the creation of sterilization laws in Germany.²⁹⁰ The idea of the implementation of sterilization programs

284. England, *supra* note 201.

285. *Id.*

286. Johansen, *supra* note 194.

287. The physical act of removing a woman's ovaries would inevitably lead to her inability to reproduce; however, even if after the act she could reproduce, under the Genocide Convention the perpetrator would still be accountable because steps were taken in furtherance of the crime of genocide.

288. Johansen, *supra* note 194.

289. Strickland, *supra* note 8, at 328 (stating that "one tragic example of genocide in the medical profession was the involuntary sterilization of American Indian women").

290. Jeremiah A. Barondess, M.D., *Medicine Against Society: Lessons from the Third Reich*, 276 JAMA 1657, 1658 (1996). The first sterilization law in Germany was passed in 1933, providing for the sterilization of anyone "suffering from disease thought to be genetically determined,

was clearly American made.²⁹¹ However, in 1946, the United States government established a Military Tribunal under General Orders No. 68²⁹² to prosecute German doctors who carried out similar sterilization procedures, as well as other crimes against humanity and war crimes.²⁹³ Under the Law No. 10 of the Control Council for Germany,²⁹⁴ the defendants were charged with war crimes and crimes against humanity.

In the case that addressed the sterilizations in Nazi Germany, the court charged eight Nazi physicians specifically with conducting experimental sterilization procedures that were calculated to develop a method of sterilization that could be used to sterilize millions of people within a minimum amount of time and effort.²⁹⁵ Subsequently, the court convicted the Nazi doctors and sentenced some to life imprisonment and others to death by hanging.²⁹⁶

The sterilization program implemented by the Nazis is analogous to the sterilization program implemented by the United States government against Native Americans. In both situations, the act was sterilization that was implemented with the intent to destroy one group's ability to reproduce. However, unlike the Nazis, who have been held accountable for their actions, the perpetrators of the sterilizations of Native American women have not.

Various scholars have argued that the sterilization of Native American women was conducted on a voluntary basis. However, because of the disproportionate application of sterilization procedures on Native American women versus white women, it has become evident that the

including feeble-mindedness, schizophrenia, manic depressive disorder, epilepsy, Huntington chorea, congenital blindness or deafness, malformation, and severe alcoholism." *Id.*

291. See PHILIP R. REILLY, *THE SURGICAL SOLUTION* 106 (1991). The leaders in the sterilization movement in Germany confessed that their sterilization legislation was formulated after studying the California experiment under Mr. Gosney and Dr. Popenoe's leadership. *Id.* The study involved whether the current sterilization programs were cost effective, and found that they were effective. *Id.* at 80.

292. *THE NAZI DOCTORS AND THE NUREMBERG CODE* 94-95 (1992).

293. *Id.*

294. Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Against Humanity), *adopted at Berlin*, Dec. 20 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946, *reprinted in* 1 BENJAMIN B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE* 488 (1980).

295. Barondess, *supra* note 290, at 1664-65; Jay Katz, *The Nuremberg Code and the Nuremberg Trial: A Reappraisal*, 276 *JAMA* 1662, 1664-65 (1996); Ruth Faden, Ph.D., M.P.H., Susan E. Lederer, Ph.D., Jonathan D. Moreno, Ph.D., *US Medical Researchers, the Nuremberg Doctors Trial, and the Nuremberg Code: A Review of Findings of the Advisory Committee on Human Radiation Experiments*, 276 *JAMA* 1667, 1667 (1996)

296. See *supra* note 292.

sterilizations of Native American women were not performed voluntarily or with consent.²⁹⁷

C. The Physical Abuse and the Destruction of the "Cultural Unit"

The removal of all Indian children from their homes into boarding schools was implemented by the Bureau of Indian Affairs with the sole purpose to assimilate the "savage beast" to the white man's way of life. The mandate of these schools was to "kill the Indian and save the man."²⁹⁸ This motto promoted physical abuse as a means to destroy all things Indian. Burr, a Turtle Mountain Chippewa/Oglala Sioux and student at the Wahpeton Boarding School, remembered being beaten by the women in charge of the dormitory for not making her bed fast enough.²⁹⁹ In fact, such beatings were common practice in most boarding schools.³⁰⁰

Another means implemented by the boarding schools, in hopes of destroying all things Indian, was the prohibition of all practices common to the Indian tradition. For example, students were prohibited from speaking their tribal language, wearing their tribal dress, practicing their spiritual rituals, and wearing long hair.³⁰¹ Instead, the children were forced to speak English, practice Christianity, and conform to the white man's way of life.³⁰²

The forced removal of Native American children from their homes with the intent to force Native Americans to forgo their cultural identity and assimilate to that of the white man's identity is in clear violation of Article II(e) of the Genocide Convention.³⁰³ Article II(e) prohibits "forcing the transfer of children of the group to another group [with the intent to destroy the former, in whole or in part]."³⁰⁴ The Human Rights and Equal Opportunities Commission found that the Australian practice of moving indigenous persons from their homes to other non-indigenous institutions violated Article II(e) of

297. Susan Stefan, *Silencing the Different Voice: Competence, Feminist Theory and Law*, 47 U. MIAMI L. REV. 763, 809-810 (1993).

298. For a discussion on the common treatment of Native Americans in boarding schools, see *supra* notes 221-248 and accompanying text. See also Brown, Love & Scott, *supra* note 229, at 410 (stating that "the purpose of Indian education . . . was to 'de-Indianize' the children").

299. Kelley, *supra* note 224.

300. *Id.*

301. Peggy Doty, *Constitutional Law: The Right to Wear a Traditional Indian Hair Style—Recognition of a Heritage*, NATIVE AMERICANS AND THE LAW: NATIVE AMERICAN CULTURAL AND RELIGIOUS FREEDOMS 85, 86-87 (John R. Wunder ed., 1996).

302. Kelley, *supra* note 224.

303. See *supra* note 97 and accompanying text (discussing the fact that the Genocide Convention does not proscribe or protect against "cultural genocide").

304. Genocide Convention, *supra* note 6, at art. II. (e).

the Genocide Convention.³⁰⁵ The Commission found that the Australian government had committed acts of genocide against the indigenous population because the purpose of the removal was to destroy the “cultural unit” by forcing the indigenous to assimilate to non-indigenous practices.³⁰⁶ The Commission relied on evidence that destruction of the “cultural unit” would effectively cause the disappearance of the indigenous peoples’ culture and ethnicity.³⁰⁷

The Australian government’s practice of transferring the indigenous to non-indigenous institutions with the intent to eradicate the indigenous culture is analogous to the United States government’s forced removal of Native American children from their homes.³⁰⁸ Both resulted in the forced assimilation of different ethnic groups to the white man’s way of life. In fact, the Commissioner of the Bureau of Indian Affairs, Francis E. Leupp, condemned the United States’ practice of transferring Native Americans from their homes by stating, “[H]ow was it preparing Indians for citizenship to carry off the children indiscriminately [and] train them to despise practically all that their race stands for?”³⁰⁹ As the Australian government committed genocidal acts against the indigenous, so too did the United States government, its agencies, and its personnel commit genocidal acts against Native Americans.

Interestingly, Kevin Gover, the Assistant Secretary-Indian Affairs of the Department of the Interior, in his remarks at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs, best summarized the genocidal acts perpetrated against Native Americans and their long-term effects on Native Americans:

This agency forbade the speaking of Indian languages, prohibited the conduct of traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worst of all, the Bureau of Indian Affairs committed these acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually. . . . The trauma of shame, fear and anger has passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country [today]. . . .

305. Australian Human Rights and Equal Opportunities Commission, *Bringing them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From their Families*, at <http://www.austlii.edu.au/au/other/indigLRes/stolen> (last visited March 11, 2002). SCHABAS, *supra* note 95 at 178.

306. SCHABAS, *supra* note 95 at 178.

307. *Id.*

308. *Id.*

309. See Gover, *supra* note 3.

So many of the maladies suffered today in Indian country result from the failures of this agency. Poverty, ignorance, and disease have been the product of this agency's work.³¹⁰

V. IMPACT: THE IMPLICATIONS OF CENTURIES OF WRONGS: HOW DO WE MAKE THE WRONGS RIGHT?

Although the genocidal acts perpetrated by the United States government were committed in the past, the Native Americans who experienced the genocide and their descendants have been forever changed. Much of the population has patiently waited, wishing that someone, someday would be held accountable for their loss, pain, and grief; however, impunity has reigned, and Native Americans have failed to receive the justice so much deserved for each person in the world. Instead, they have been forced to coexist with the government, agencies, and persons who committed the acts of genocide so vivid in their collective memory.³¹¹ Regardless of when these crimes were committed, these victims deserve to see their perpetrators held accountable for their crimes, whether it is through a trial, an apology, or the implementation of a reparation scheme.

By highlighting the fate of Native Americans today, the need for accountability, which would enable Native Americans to relinquish their badge of inferiority and begin the healing process, becomes obvious.

A. *The Effects of the American Genocide on Native Americans Today*

"Thirty-one percent of the total American Indian population, and fifty-one percent of Indians residing on reservations, live below the official government poverty level; while only thirteen percent of the total United States population is in this predicament."³¹² When the taking of Native Americans' lands failed to turn them into civilized farmers, the United States government turned toward forced assimilation by implementing programs that disallowed Native Americans to speak their language, practice their religion, and cohabit with their

310. See RAWLINS, *supra* note 1.

311. Drumbl, *supra* note 74, at 1238.

312. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 65 (1999). The socio-economic situation facing Native Americans within the United States is, unfortunately, not uncommon to indigenous persons around the world. *Id.* The First Nations of Canada still, significantly, trail the remaining population in income, while the indigenous peoples of Mexico, especially in the State of Chiapas, face severe deprivation and degradation of values. *Id.* at 66-70, 87-89.

families.³¹³ After the assimilation programs failed to produce Native Americans' complete assimilation to the white man's way of life, Native Americans who did not speak their native language and were unknowledgeable of tribal ways were returned to their tribes with no guidance as to their roles in the tribe. Children who experienced forced assimilation are often described as "Apple Children," because they are red on the outside, but white on the inside.³¹⁴ For example, a forty-three-year-old Navajo woman, subjected to the United States government boarding school program, on her first day back to her tribe since her birth stated, "I don't know my own culture, . . . I am going to need your help in understanding Teach me, teach my children."³¹⁵ The transfer of Native Americans from their lands and then from their families, traditions, and tribes destroyed in whole or in part everything Native American and forced Native Americans to assimilate to the white man's way of life and to be ashamed of their ethnicity, leaving them with a badge of inferiority.³¹⁶ The effects of the United States' policy of removing children from their homes has been attributed as the cause of the high rate of poverty and suicide among Native American children, which is at a rate four times that of the general population.³¹⁷ Moreover, children transferred from their homes to white families are more likely to suffer from "significant social problems" as adolescents and adults.³¹⁸

The United States' policies toward Native American education, which focused more on labor than education, resulted in a lack of formal education for most Native Americans.³¹⁹ This lack of education, and the corresponding feelings of inferiority, coupled with the discriminatory treatment by the United States government led to the problems of Native American children today. Nationally, the high school dropout rate for Native Americans is estimated at forty-five to fifty percent and as severe as eighty-five percent in the most depressed areas of this country.³²⁰ Moreover, only approximately 7.7 percent of

313. For a historical perspective of the treatment of Native Americans by the United States government, see *supra* notes 126-248 and accompanying text.

314. *The Genocide of Native Americans: A Sociological View*, *supra* note 167.

315. Lorie M. Graham, "The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 1 (1998).

316. Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, in NATIVE AMERICANS AND THE LAW: NATIVE AMERICAN SOVEREIGNTY 151-52 (John R. Wunder ed., 1996).

317. Graham, *supra* note 315, at 31-32. See also Barsh, *supra* note 248, at 222-23.

318. Barsh, *supra* note 248, at 222-223.

319. Brown, *supra* note 233, at 106.

320. *Id.* at 105.

Native Americans over the age of twenty-five had completed four or more years of college compared to 17.8 percent of whites.³²¹

B. The Need For Accountability

You cannot get peace without justice If there is not justice, there is no hope of reconciliation or forgiveness because these people do not know who to forgive I don't think that justice depends on peace, but I think peace depends on justice.³²²

The United States can be characterized, in the case of the genocide of the Native Americans, as a homogenous post-genocidal society. In a homogenous post-genocidal society, the victim group is eliminated, in whole or in part, and/or pushed to the depths of society so as to barely exist to the public as a whole.³²³ Through the forced relocation of Native Americans from the East onto Western reservations, the United States government succeeded in secluding Native Americans to certain remote areas. Despite the forced seclusion, Native Americans have continued to live under the reign of the same government that victimized them.³²⁴ Because there has not been a change of government in the United States, but rather a change in the power position, an international criminal tribunal may be necessary to prosecute the United States government, its agencies, and its personnel for their actions in order to promote accountability. However, this would be unnecessary if the United States government were willing to accept criminal responsibility for its past actions and agreed to prosecute persons who ordered, planned, and executed the genocide of the Native Americans.³²⁵ Yet to date, the United States government has been unwilling either to accept criminal responsibility for the genocide or to prosecute the persons who ordered, planned, or executed these crimes.

The fact that the United States government is bound by both customary international law, as well as the Convention on the Prohibition and Prevention of Genocide (Genocide Convention), requires the United States government to extradite or prosecute persons who commit the crime of genocide.³²⁶ Moreover, because the genocide of Na-

321. *Id.*

322. Yael Danieli, *Justice and Reparation: Steps in the Process of Healing*, in 14 NOUVELLES ÉTUDES PÉNALES 303, 305 (M. Cherif Bassiouni ed., 1998).

323. Drumbl, *supra* note 74, at 1236.

324. *Id.*

325. *Id.*

326. For a discussion of the formation of customary international law and the creation of the Genocide Convention, as well as the obligations that flow from these laws, see *supra* notes 36-98 and accompanying text.

tive Americans was committed by United States citizens and within the boundaries of the United States, the narrow mandate of the Proxmire Act cannot prohibit the prosecution of these perpetrators.³²⁷ Therefore, if the United States government is unwilling to prosecute the perpetrators of these crimes, the international community must step in to ensure the victims' right to access justice.

The United Nations has established that a victim's right to a remedy includes not only access to justice, but also reparations for harm suffered and access to factual information concerning the violations.³²⁸ Champions for accountability and those fighting against the history of impunity declare that the "right to compensation and reparation acknowledges the truth and admits justice. Truth is fundamental to our knowledge of history And justice is fundamental to our collective aspirations" ³²⁹ Even though we may now have the truth, we do not have the justice or the reparations; however, the question remains: Are reparations in and of themselves sufficient to heal the loss, pain, and suffering of Native Americans?

C. *Reparations for the Crime of Genocide*

Compensation can never compensate.³³⁰

In 1988, President Reagan signed a federal bill that formally apologized to Japanese-Americans who were interned in the United States during World War II and authorized a reparation scheme, which granted each internee \$20,000.³³¹ Following this apology and the

327. See *supra* notes 99-125 and accompanying text.

328. *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission Resolution 1999/33*, U.N. Doc. E/CN.4/62 (18 Jan. 2000). See *The Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms: Note by the Secretariat*, U.N. Doc. E/CN.4/2001/61 (29 Dec. 2000) (stating, "At its fifty-sixth session, the Commission on Human Rights adopted resolution 2000/41, entitled *The Rights to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms*"). Madeline H. Morris, *International Guidelines Against Impunity: Facilitating Accountability*, 59 LAW & CONTEMP. PROBS. 29, 30 (1996) (stating that holding perpetrators accountable includes: prosecution, and reparation for the victim).

329. Iris Almeida, *Compensation and Reparation for Gross Violations of Human Rights: Advocating the International Discourse and Action*, in 14 NOUVELLES ETUDES PENALES 398, 403 (1998).

330. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 91 (1998) (quoting Joseph W. Singer).

331. Mark Gladstone & Jerry Gillam, *La Follette Assails U.S. Payments to Wartime Internees*, L.A. TIMES (Valley Edition), Aug. 11, 1988, at 8. Following the bombing of Pearl Harbor, more than 120,000 Japanese-Americans were relocated into internment camps. Cathleen Decker, *Politics 88: Bush Calls Payment of Reparations for Japanese-American Internees "Only Fair,"* L.A. TIMES, June 7, 1988, at 12.

granting of reparations, a Japanese-American woman who was forced into an internment camp stated that “she always felt the internment was wrong, but that, after being told by the military, the President and the Supreme Court that it was a necessity, she had come seriously to doubt herself. Redress and reparations and the recent successful court challenges, had now freed her soul.”³³² While various Japanese-Americans celebrated and rejoiced in the conquest of their painful memories of the past and their feelings of inferiority, many members of other minority groups felt ambivalent about the Japanese-American reparations.³³³ One African American scholar stated, “After some introspection, I guiltily discovered that my sentiments were related to a very dark, brooding feeling that I had fought long and hard to conquer—inferiority. A feeling that took first root in the soil of ‘Why them and not me.’”³³⁴ Native Americans, like various other minority groups that were victimized by the United States government, its agencies, and its personnel and have not as of yet received reparations or an apology, experienced somewhat the same ambivalence and were left asking the same question: “Why them and not me?”

Although the Bureau of Indian Affairs has recently apologized for its history of ethnic cleansing,³³⁵ the United States government has never implemented a sufficient reparation scheme to redress the crimes committed against Native Americans.³³⁶ This apology from a member of the government represents the first step in the healing process for those Native Americans victimized by the United States government, its agencies, and its personnel. Yet today, Native Americans remain left asking, “Why them and not me?”³³⁷

332. Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477, 478 (1998). Danieli, *supra* note 322, at 209 (stating that most Japanese-Americans finally felt vindication because they had harboured the belief that they were viewed by the United States government as enemies and second-class citizens).

333. Yamamoto, *supra* note 332, at 477-78.

334. *Id.* at 478.

335. Remarks of Kevin Gover, Assistant Secretary-Indian Affairs Department of the Interior at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs, *supra* note 3.

336. Past reparation schemes granted to Native Americans were usually applied to only one tribe in order to redress the appropriation of the tribe's land and resources. Examples include: \$81 million to the Klamaths of Oregon; \$105 million to the Sioux of South Dakota; \$12.3 million to the Seminoles of Florida; \$31 million to the Chippewas of Wisconsin; and \$32 million to the Ottowas of Michigan. However, none of these reparation schemes redress the sterilization of Native American women or the forced relocation of children into boarding schools. Yamamoto, *supra* note 332, at 484 n22.

337. It is argued that Japanese Americans, as a collective entity, not as individuals, succeeded on their reparation claims because:

(1) their challenge addressed a specific executive order and ensuing military orders; (2) the challenge was based on then-existing constitutional norms (due process and equal

D. *Under What Circumstances Are Reparations
Granted in the United States?*

In the opinion of the United States government, the internment of Japanese-Americans warranted reparations because of the underlying reasons for the internment, the indiscriminate nature of the internment, and the conditions of the internment.³³⁸ In 1988, Vice President George Bush stated that reparations were “an appropriate way to redress violations of civil rights of loyal, hard-working Japanese-Americans.”³³⁹ Similarly, in 1991, the United States attorney, defending Congress’ decision to enact legislation to redress the treatment of Japanese-Americans, stated that such redress was necessary because “the policy under which they were interned was driven by racial prejudice, wartime hysteria and a lack of political leadership.”³⁴⁰ However, even though Congress approved a reparation scheme for the Japanese-Americans, they refused similar redress for ethnic Germans and Italians who were interned during World War II because they were not subjected to the indiscriminate mass roundups imposed on the Japanese.³⁴¹

The forced relocation of Native American children to boarding school is analogous to the indiscriminate mass roundups imposed on Japanese-Americans during World War II. Moreover, because the philosophies of “Manifest Destiny,” the Indian Removal Act, and the Indian Health Services sterilization programs were all directed at Native American persons based solely on their ethnicity, it is obvious that such policies were rooted in racial prejudice. When we apply the United States’ justifications for the Japanese-Americans’ reparations, there seems to be no reason that Native Americans have not received their reparations. However, in cases of mass victimization, as in the case of Native Americans, we cannot rely on these ad hoc reparation

protection); (3) both a congressional commission and the courts identified specific facts amounting to violations of those norms; (4) the claimants were easily identifiable as individuals (those who had been interned and were still living); (5) the government agents were identifiable (specific military and Justice and War Department Officials); (6) these agents’ wrongful acts resulted directly in the imprisonment of innocent people, causing them injury; (7) the damages, although uncertain, covered a fixed time and were limited to survivors; and (8) payment meant finality.

Id. at 490.

338. *Id.*

339. Decker, *supra* note 331, at 12.

340. Sonni Efron, *German-American Challenges Reparations For War Internees; Courts: Man Claims Law Giving Japanese-Americans Compensation Discriminates on Basis of National Origin*, L.A. TIMES, Nov. 22, 1991, at A3.9.

341. *Id.*

schemes relied on by the United States government in the past.³⁴² Instead, we need to create a set of permanent guidelines for victim reparations.

E. Guidelines for Victim Reparations

The United Nations Guidelines for Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Right includes the three aforementioned remedies for victimization: (1) access to justice, (2) reparation, and (3) access to facts regarding what occurred, which is in essence the truth.³⁴³ Reparation, which can be defined as “the process of making amends for harm and injustice suffered,”³⁴⁴ includes not only the restoration of the victim to the original situation before the violations occurred, the compensation for any economically assessable damage resulting from the violations, and rehabilitation, but also satisfaction and guarantees of non-repetition.³⁴⁵ In addition to these guidelines, it is recommended that the compensation not be granted in one lump sum, but rather monthly installments.³⁴⁶ By receiving continual compensation, the victim will feel vindication over and over again until the pain weakens and at some point, hopefully, it disappears.³⁴⁷

Furthermore, the perpetrator should be required to reveal the truth of his crimes to the public at large, so the victim and his family can experience public vindication for their past victimization. Only at the moment that the truth is revealed will the pain disappear, the badge of inferiority vanish, and the victim realize that it was not his fault. As President Ronald Reagan so eloquently expressed while signing the bill that expressed the nation’s apology, as well as compensation for the internment of the Japanese-Americans, “No payment can make

342. The United States government has agreed to apologize or repatriate victims in the following instances: President Clinton apologized to indigenous Hawaiians for the illegal United States aided overthrow of the sovereign nation and the near decimation of Hawaiian life; the federal government offered reparation to the African American victims of the Tuskegee syphilis experiment; the government apologized and provided reparations for Japanese Latin Americans kidnapped from Latin American countries and placed in internment camps in the United States.

343. *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, supra* note 328.

344. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, Human Rights and Equal Opportunity Commission (Feb. 2001).

345. *Id.*

346. Danieli, *supra* note 322, at 309.

347. *Id.*

up for those lost years. What is most important in this bill has less to do with property than with honor. For here we admit wrong."³⁴⁸

The Native Americans victimized at the hands of the United States government, its agencies, and its personnel have heard the truth from the Bureau of Indian Affairs, yet not from the President of the United States; therefore, in essence, they are left waiting for both the public truth and the personal justice, which can be received through holding the perpetrators criminally responsible for their past genocidal acts.

VI. CONCLUSION

We are not alone. The world is changing, and we are a part of the transformation. Despite all the injustice in the world, and despite the things that happen to us that we feel we don't deserve, and despite the fact that we sometimes feel incapable of changing what is wrong with the world . . . love will help us grow. Only then will we be able to understand the stars and miracles.³⁴⁹

For my great aunt and thousands of other Native Americans who were victimized because of their "savage" nature and the United States' opportunistic dreams of westward expansion, love has helped them cope with their victimization, but the injustices that they experienced and continue to experience are not forgotten. Day to day, their voices go unheard and the pain deepens, while the next generation is raised with the victim's tainted view of truth, justice, stars, and miracles.

The time has come to break this cycle of injustice. As parties to the Convention on the Prevention and Prohibition of the Crimes of Genocide and according to customary international law, the United States is bound by international law to prosecute or extradite the perpetrators of these crimes. Once this task is accomplished, a public apology and reparations must be made to every victim of the genocide in order to facilitate the healing process. Thereby, the truth and justice will effectively restore the victim's ability "to understand the stars and miracles" of life on earth.

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348. MINOW, *supra* note 330, at 112-113.

349. PABLO COELHO, *THE VALKYRIES* (Alan R. Clarke trans., 1992).

350. As a Native American and being of twenty-five percent Native American blood, the stories of my ancestors inspired me to research the atrocities committed by the United States Government, its agencies, and its personnel against western Native Americans.

