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Justiciability of All Human Rights: Scottish Independence as Redress for British Human Rights Abuses

Ann M. Piccard

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ARTICLE

JUSTICIABILITY OF ALL HUMAN RIGHTS: SCOTTISH INDEPENDENCE AS REDRESS FOR BRITISH HUMAN RIGHTS ABUSES

*Ann M. Piccard**

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* Professor of Legal Skills, Stetson University College of Law. This Article was written with the assistance of a summer research grant, for which I am indebted to the administration of the College of Law. Special thanks to Julie Ann Embler for her incredible research support to these many years, and to my daughter Elizabeth Piccard Reischmann for her shared interest in the Highlanders and for being an outstanding travel companion, even when her mother persisted in asking far too many personal questions of virtually every Scottish person with whom we had even the briefest encounter in July 2013. In my own defense, I did pay for her plane ticket (as well as my own; the research grant was not quite that generous).

Come boil 'round my body, Scottish blood
 I'll try not to spill a drop
 For I'm sure you've spilled enough
 And the English f***** rule
 Will mean nothing to these towns
 Ah, run forever in my veins, bold Scottish blood.¹

I. INTRODUCTION

On September 18, 2014, an overwhelming number of Scottish residents turned out to vote on one simple question: Should Scotland be an independent country? The deceptively simple yes or no question on the ballot could not begin to reflect the complex underlying issues. If the Independence Referendum had been approved—meaning a “yes” vote, the goal of Independence proponents and of the Scottish National Party (SNP)—every facet of life for the Nation and its citizens could have been affected. The presence of nuclear weapons; membership in the European Union; the very nature and name of the currency used in every transaction every day, no matter how large or small; the availability of jobs, pensions, and health and child care; and always—at the true heart of things—ownership of the North Sea oil rights: everything was on the line and reflected in that yes/no ballot question.

The debate leading up to the referendum focused² incessantly on politics and economics, but rarely on human rights or on the context of the long, ugly history of England's domination of Scotland and the centuries of disregard for the human rights of the Scots, which was, and will continue to be, the underlying motive for any talk of Scottish Independence. England has been actively seeking to consume and perhaps obliterate Scotland for hundreds of years, beginning (perhaps) with its systematic genocide of the most indigenous Scots, the

1. FRIGHTENED RABBIT, *Scottish Winds*, on *A Frightened Rabbit E.P.* (Atlantic Records 2011). These are the lyrics that spurred my interest in, as Scott Hutchison says, “the English f***** rule” of Scotland. Scott and his brother Grant are the founders of Frightened Rabbit, an “indie folk rock” band from Selkirk, Scotland. Having been a devoted fan for many years, I am deeply indebted to Scott for his intelligent, thought-provoking lyrics. I had the pleasure of spending a little time with the Frabbit boys in Jacksonville, Florida in October 2013 (having won a “meet and greet” with the band due to slight obsessive-compulsive behavior in buying tickets for their shows) and can assure any reader that they are as thoughtful and generous in person as in their live performances. If you ever have an opportunity to hear Frightened Rabbit live, do not mess around.

2. A note here about the tense in which this Article is written: Research began in Winter 2013, and most of the writing was completed during Winter 2014, but as of November 2014, two months after the vote took place and independence was defeated, this Article is still being edited and has not yet been submitted to any journal for possible publication. Most of the writing thus took place before the vote but after the vast majority of the campaigning had taken place.

Highlanders known as the Picts. Atrocities that took place hundreds of years ago do not make the news today, despite the fact that their consequences are ongoing, current, and never-ending. “Those who cannot remember the past are condemned to repeat it.”³ The purpose of this Article, therefore, is to draw attention and remembrance to the consequences of England’s hundreds of years of human rights violations, particularly violations of civil, political, social, economic, and cultural rights, in Scotland, and to propose that these human rights violations ought to be addressed rather than suppressed regardless of the outcome of the 2014 referendum.

II. THE POINTLESS DISTINCTIONS BETWEEN “JUSTICIABLE” AND “NON-JUSTICIABLE” RIGHTS

International human rights covenants and international customary laws protect individuals, as opposed to nation-states, from violations of their economic, social, cultural, civil, and political rights.⁴ Unfortunately, such violations are not generally compensable: the damage wrought cannot be adequately compensated by the payment of money.⁵ This means traditional common or civil law systems of adjudication cannot provide remedies. With no remedy in traditional legal settings available, these “non-justiciable” human rights are relegated to a second tier of “soft” rights.⁶ These are the non-justiciable rights about which few people talk.

When people and news reports do talk about international human rights laws and norms (and violations thereof), the focus is almost invariably on “justiciable rights.” Attention-grabbing horrors cannot, and should never, be ignored: the Holocaust, genocide in Rwanda, “ethnic

3. GEORGE SANTAYANA, *THE LIFE OF REASON: REASON IN COMMON SENSE* 284 (1905).

4. For example, 162 nations are parties to the International Covenant on Economic, Cultural, and Social Rights; 168 are parties to the International Covenant on Civil and Political Rights. The United States is a member of the latter but not the former, and is one of a very small number of nations to decline to join most of the major human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women, to which only one other nation (Palau) has declined to become a party.

5. For this reason, some human rights, including genocide, are treated as violations of international criminal, rather than civil, law.

6. Even health care has been referred to as a social right, and thus as a “soft” or “third tier” right. See Martin Buijsen, *The Meaning of ‘Justice’ in Health Care*, 27 *MED. & L.* 535, 540 (2008). Dr. Buijsen notes that social rights require more from states parties than non-interference; social rights protected by international law require action by governments. *Id.* at 541. How this could be seen as a “soft” right is a mystery when constitutionally guaranteed individual rights in the United States, such as freedom of speech, only require that the federal and state governments refrain from interference. A right that requires government action certainly seems more “hard” than a right that merely requires governments to stay out of individuals’ way.

cleansing” in the former Yugoslavia, child soldiers in Africa, human trafficking in the Americas, the never-ending violence between Israel and Palestine, the militant Islamists’ horrific methods of punishing women who attempt to exercise any human right and the practice of female genital mutilation, the use of chemical warfare by the Syrian and Egyptian governments on their own citizens, and the insertion of U.N. “peacekeeping” measures to quell or perhaps provide some form of retaliation against random acts of terrorism. These are the human rights abuses about which most cultures are aware. Violence gets our attention; it always has and it always will.⁷

These are the violations of international law that can be brought before international criminal tribunals, either permanent or ad hoc.⁸ Perpetrators can be sentenced to prison, or even to death,⁹ restitution in the form of money can be ordered and its payment monitored by international bodies. These are the human rights violations that can be remedied in traditional legal settings and adjudicated, and in that sense alone, horrific as they are, they lend themselves more easily to recognition and redress than the “non-justiciable” rights.

Genocides occur across the globe; genocide is not an historical event but rather a current event.¹⁰ But citizens of the Global North and West, in “developed” nations, tend to see only what we want to see. It is simply a matter of human nature that some atrocities garner more attention than others. In the United States, for example, the horrors of the genocide in the former Yugoslavia, despite being delicately labeled “ethnic

7. The complex reasons for our affinity for violent stories are explored in *HIDDEN GENOCIDES: POWER, KNOWLEDGE, MEMORY* (Alexander Laban Hinton ed., 2013).

8. Such tribunals include the International Criminal Court, the regional human rights courts around the globe, and special tribunals such as those established to adjudicate the atrocities in the former Yugoslavia and Rwanda. It must be noted, again, that the United States does not submit to the jurisdiction of such international criminal courts.

9. Klaus Barbie, for example, was sentenced to life in prison in 1987, approximately four decades after his participation in the Nazi’s Holocaust. Barbie died in prison in 1995. The case made international headlines, as can be seen in front-pages from the *BBC News* for July 3, 1987, and the *Chicago Tribune*, July 5. See 1987: *Nazi War Criminal Klaus Barbie Gets Life*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/july/3/newsid_2492000/2492285.stm; Julian Nundy, *Barbie is Convicted, Gets Life in Prison*, CHI. TRIB., http://articles.chicagotribune.com/1987-07-05/news/8702180936_1_judge-andre-cerdini-klaus-barbie-jacques-verges.

10. William A. Schabas notes that his views of genocide are still evolving, based on “a certain logic that views progressive development as synonymous with constant expansion of definitions so as to encompass an increasingly broad range of acts.” WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* xiii (2d ed. 2009). Thus, while there may be ongoing rhetorical questions about whether “cultural genocide” or “ethnic cleansing” are encompassed within the international law definition of genocide, there is no debate whatsoever about whether what is happening in Darfur and Sudan today does, indeed, constitute genocide. *Id.* The Holocaust was the Holocaust; everything else that has happened and continues to happen for a similar purpose is genocide.

cleansing,” were more immediately identified than was the almost-simultaneous genocide in Rwanda because politicians and voters in the United States tend to pay more attention when people who look like us are being slaughtered.¹¹ While there is no method by which to determine an exact number of lives lost to each conflict, scholars estimate that perhaps 150,000 people were killed in the former Yugoslavia while perhaps one million were killed in Rwanda.¹² However many U.S. citizens inversely reflected this disparity in the quantity of horrors in the reaction to the two situations, many of whom found white-skinned corpses more relatable than black-skinned corpses. The former Yugoslavia is in Europe, not Africa, and is thus more “relatable” to most Americans. There is also a simple fact of geography: unless oil is involved, many Americans do not generally pay attention to the slaughter of non-whites from far-off continents.

While only selectively attentive to violations of justiciable human rights, most Western “developed” nations pay almost no attention to violations of the non-justiciable rights. Violations of non-justiciable international human rights norms occur at home and around the world on a daily basis, and almost never attract media attention or legal repercussions. These are violations of the norms and international covenants that protect civil, political, economic, social, and cultural rights.¹³

It is inhumane and pointless to characterize these as “non-justiciable” or “second generation” rights. Every nation on earth ought to recognize these as the quiet rights that affect every citizen of every country on a daily basis. Violations of civil, political, economic, social, and cultural rights cannot, and should not, be distinguished or separated from the more dramatic violations that grab our attention when they hit the headlines around the world, and nothing is gained by drawing the artificial line

11. For example, it has only just come to light the full extent to which British and U.S. forces abetted the instigation of the Rwandan genocide by that country’s ruling party. See Edward S. Herman & David Peterson, *Rwanda: The Kagame-Power Lobby’s Dishonest Attack on BBC Documentary*, ALLAFRICA, <http://allafrica.com/stories/201411141162.html>. In contrast, the former Yugoslavia atrocities were the subject of immediate, widespread public outcry in the West, despite the disparity in reported crimes: Estimates are that one hundred thousand Serbs were killed during a three-year period in the former Yugoslavia, while between eight hundred thousand and one million mainly Tutsis were killed in one hundred days in Rwanda.

12. SANTAYANA, *supra* note 3, at 284.

13. During her tenure as the U.N. High Commissioner for Human Rights, Louise Arbour wrote in 2007 about “The Neglect of Economic, Social and Cultural Rights in Mainstream Justice,” surmising that a framework of justice that revolves around the roles of an accused and a victim does not fit the notion of social, economic, or cultural rights, but that this is a flaw in the framework of justice rather than a relegation of such rights to some second- or third-tier status. Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 N.Y.U. J. INT’L L. & POL. 1, 4 (2007).

between “justiciable” and “non-justiciable” rights. Any time atrocities are perpetrated against human beings, we need to pay attention; every human rights violation matters—not just the bloody ones.¹⁴

Perpetrators of violent atrocities can be prosecuted in traditional adversarial judicial settings, such as the International Criminal Court, where there are defense and prosecuting attorneys, and where a judge (or judges, or jury) hands down decisions regarding guilt or innocence. The fact that these human rights violations lend themselves to resolution in a judicial setting does not, of course, automatically make them somehow more important than violations that do not.

Violations of the quiet human rights are typically categorized and dismissed as non-justiciable for the sole reason that they are not so easily redressed.¹⁵ Taking a person’s life has been a punishable offense throughout the recorded history of the human race; but taking that person’s language, culture, clothing, name, religious practices, family or community structure¹⁶ are harder to remedy, and they cannot usually be resolved in a courtroom setting. Nonetheless these are the international human rights norms that are violated more often—and affect more people—than the atrocities that make headlines.

Civil, political, social, economic, and cultural rights are acknowledged and addressed by both customary international law—those rules that States collectively agree to out of a sense of legal responsibility and common concern¹⁷—and treaties. The International Covenant on Civil and Political Rights entered into force in 1976, and currently has 116 Member States, including the United States and the United Kingdom.¹⁸ The International Covenant on Economic, Social and Cultural Rights also entered into force in 1976, and it currently has 116 Member States. The United States is notably not among those nations that have joined the Covenant on Economic, Social and Cultural Rights.

14. Of course this discussion does not, and cannot, include the other international law violations that garner so much attention: the private law that governs trade between nations’ matters to most because it involves money, and in our world, money matters more than people.

15. For in-depth analysis questioning the legitimacy of labeling some human rights “non-justiciable,” as well as explaining the distinction and its origins, see Tara J. Melish, *Rethinking the ‘Less as More’ Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT’L L. & POL. 171, 238–48 (2006).

16. These atrocities have also occurred throughout the history of the world, from ancient times to modern. Many examples are available: Egyptians were enslaved, Africans were enslaved, Native Americans, Jews, homosexuals, and Roma have all been forced from their homes, stripped of their identities and cultures and languages, generations and communities decimated because some “quiet” human rights are so easily violated that the world pays no attention.

17. See *Flores v. S. Peru Copper Co.*, 414 F.3d 233, 247–48 (2d Cir. 2003) (explaining that it is difficult for judges and lawyers to understand customary international law because it is created by the general customs and practices of nations, and it does not stem from any definitive source).

18. Int’l Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966), at <https://treaties.un.org/Home.aspx?lang=en>.

Despite the fact that President Jimmy Carter signed it in 1977, U.S. Senate ratification is not yet forthcoming. Only Belize, Colombia, Comoros, Cuba, South Africa, Sao Tome and Principe, and Palau share the U.S. failure to join this treaty.¹⁹

Because genocide is a crime that can be adjudicated in a traditional legal forum, a genocide survivor has the possible benefit of seeing a perpetrator punished.²⁰ But most human rights violations are never formally addressed or resolved. The quiet rights, such as the right to one's personal and political identity, language, and culture, as well as the rights to adequate food, shelter, health care, and education, are violated on a daily basis in every part of the world, with no ramifications or consequences to the perpetrators, leaving those whose rights are violated without redress in any public or formal setting. Those human rights violations remain unresolved for the victim and are passed from one generation to the next.²¹ Just because there is no remedy, the trauma does not simply disappear into thin air. Both the injuries and the damages stay with the victims, their families, their communities, and, perhaps most importantly, with their descendants until they are somehow exorcised.

III. INTERGENERATIONAL TRAUMA: "AH, RUN FOREVER IN MY VEINS, BOLD SCOTTISH BLOOD"²²

Ordinary people all over the world carry within them the weight of human rights violations that occurred in generations past. An unresolved

19. All of these, and many other reliable statistics, may be found in the online U.N. treaty collection. *Id.*

20. See generally PHIL CLARK, *THE GACACA COURTS, POST-GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA: JUSTICE WITHOUT LAWYERS* (2010). Dr. Clark's book describes the use of gacaca courts by the Rwandan people in an effort to adjust to post-genocide life. Individuals accused of participating in the genocide were brought to local community gatherings to face the families, friends, and neighbors of those they were accused of killing. No lawyers were involved, no judges, no courtrooms. This traditional method of Rwandan dispute resolution may or may not have been well-suited to addressing the aftermath of genocide, but it did provide a forum in which those who had suffered could address the accused perpetrators while remaining in the company of their own community, without having to endure the formal judicial processes which intimidate and deter so many witnesses around the world.

21. See Charles Portney, *Intergenerational Transmission of Trauma: An Introduction for the Clinician*, *PSYCHIATRIC TIMES* (Apr. 1, 2003), <http://www.psychiatrictimes.com/articles/intergenerational-transmission-trauma-introduction-clinician> (describing the increased rate of post-traumatic stress disorder, depression, anxiety, and psychological distress among the offspring of parents whose lives were marked by excessive trauma). Psychiatrists began identifying intergenerational trauma in the 1800s in terms of parents transferring neuroses to their children. Post-World War II studies of Holocaust survivors and their children revealed intergenerational trauma as well. *Id.*

22. SCOTT HUTCHISON, *Scottish Winds, on A FRIGHTENED RABBIT* E.P. (Atlantic Records 2011).

injury inflicted on any one person or an entire race, religion, gender, or ethnic group is carried from one generation to the next, passed from parent to child to grandchild in the documented pattern known as intergenerational, or historical, trauma.²³ “Historical trauma is cumulative emotional and psychological wounding over the lifespan and across generations, emanating from massive group trauma.”²⁴

Historical trauma is addressed across a spectrum of disciplines but has not yet been acknowledged in most legal systems. In the United States, for example, the legal system refuses to accept historical trauma as a mitigating factor in criminal cases, despite testimony from the world’s best-known experts on the matter.²⁵ Psychologists, psychiatrists, social workers, and mental health counsellors frequently refer to intergenerational trauma when explaining continuous and current social difficulties or living conditions of those whose histories are steeped in trauma: the children and grandchildren of survivors of the Holocaust, genocides, and ethnic cleansing all carry their parents’ and grandparents’ burdens down through time, passing them, like ghastly family heirlooms, from one generation to the next.

Intergenerational trauma explains why patterns of abuse, neglect, and abandonment can be traced from their roots in a group trauma, such as that suffered by Native Americans across the generations from arrival of the Europeans on this continent up to today. But criminal actions by those who carry that heavy burden of trauma are not mitigated by historical trauma in the U.S. courts. Those courts are not impressed by horrific historical trauma and do not accept explanations from expert witnesses for the behaviors of the accused. No one argues that historical trauma is a “get out of jail free” card, but psychiatrists and even some dissenting judges acknowledge that generations of decimating trauma might explain some otherwise unexplainable behaviors.

A Native American mother left her newborn child to die,²⁶ at least in part because she had been horribly abused by both of her own parents who had, in turn, been abused by their own parents.²⁷ The young mother

23. Dr. Maria Yellow Horse Braveheart, Ph.D., conceptualized historical trauma in the 1980s, as a way to articulate, and to foster a stronger understanding of, the reality in this country that life for many Native Americans cannot even approach “the American Dream.” Maria Yellow Horse Braveheart, *Welcome to Takini’s Historical Trauma*, <http://www.historicaltrauma.com/> (accessed May 5, 2014).

24. *Id.*

25. *United States v. Deegan*, 605 F.3d 625, 627 (8th Cir. 2010).

26. *Id.* at 639–40.

27. Dana Deegan’s family and community spoke out about the specific abuses she suffered at home and in foster care, and the relationship of those abuses to the abuses inflicted on their parents, grandparents, and community as a whole for at least four generations. Some community members initiated petitions asking President Obama to free Dana Deegan from prison; see, for example, the petition initiated by Change.org, which can be found at <https://www.change.org/p/>

had no support system nor any resources to turn to, due to the history of abuse and neglect that prevailed, not just in her family, but throughout her entire culture and community.²⁸ Her parents, the grandparents of the deceased infant, were undoubtedly abused by their own parents, who were among the generations who were raised in the U.S. federal system of Indian Boarding Schools in violation of all international human rights norms for social, economic, and cultural rights.²⁹ The Eighth Circuit chose not to consider that this young mother, alone in a bleak trailer on an even more bleak Reservation, with the three young children she had already borne, acted as a result of the trauma that had traumatized her parents, who in turn were traumatized by human rights violations inflicted on their parents, when she delivered, cleaned, fed, and clothed the newborn on whom she then firmly closed the trailer's door, driving away with three young children, leaving the infant to perish.³⁰ In a society where intergenerational trauma is ignored, human rights violations can and do thrive, as demonstrated by the ten year prison sentence imposed on the young mother described here.³¹

The current effects of historical trauma can be seen around the world, from the refugee camps in sub-Saharan Africa to the rolling hills of America's heartland. Life on the Pine Ridge Reservation in South Dakota, one of the poorest places in the United States, leaves no doubt

clemency-for-dana-deegan. According to the *Wall Street Journal's* April 21, 2015 issue, the U.S. Sentencing Commission is currently reviewing sentencing disparities between Native Americans and non-Indians charged with identical crimes. Dan Frosh, *Federal Panel Reviewing Native American Sentencing*, WALL ST. J. (Apr. 21, 2015), at <http://www.wsj.com/articles/federal-panel-reviewing-native-american-sentencing-1429608601>. For example, a 2003 Sentencing Commission study found that in new Mexico, state court convictions for assault (even when the defendant was a Native American) averaged 6 months in jail; Native Americans charged with assault and tried in federal court, in contrast, were sentenced to an average of 54 months in prison. *Id.* Only Native Americans can be charged with federal offenses for crimes that occur on Reservation land. *See, e.g.*, The Indian Major Crimes Act, 18 U.S.C. § 1153 (2015).

28. *Id.* at 644–45; *see generally* Ann Piccard, *Death by Boarding School: The "Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137 (2013–2014) (discussing the length and brutality of Native Americans' intergenerational trauma).

29. *See supra* note 27.

30. *Deegan*, 605 F.3d at 657–58 (Bright, J., dissenting) (“None of [the] matters [included in Ms. Deegan’s sister’s letter] made any difference to the district court when sentencing under the guidelines.”).

31. *Id.* at 627 (*affirming, en banc*, Dana Deegan’s 121 month sentence), *cert. denied*, 131 S. Ct. 2094 (2011). The young mother’s three daughters are growing up without their mother, whose sentence will not be completed for at least four more years. Meanwhile, the federal courts never even thought to hold the abusive, drug-addicted father of the deceased baby legally responsible in any way for the infant’s death. Further, the prosecuting U.S. Attorney, who pursued a far harsher sentence than anything that might have been imposed in a state court, seems to be riding the coattails of this success in putting Dana Deegan behind bars for more than ten years right into the Lieutenant Governor’s office in South Dakota. Many factors were at play in this travesty of a case; justice was not one of them.

that a history of human rights violations is not overcome in a single generation. The Lakota live with “unresolved grief” from the loss of life, land, and culture their people suffered at the hands of the United States. The rates of poverty, suicide, depression, domestic and other violence, and dysfunction in general on the Lakota’s reservation are sky-high.³²

In recognizing historical trauma, doctors and social scientists acknowledge that the past is inseparable from the present and the future. Even though the U.S. legal system does not recognize historical trauma, it is observed in other contexts, including the trauma suffered by Vietnamese who fled their country and struggled to adapt in the United States.

A young Vietnamese man, whose parents fled their country and eventually came to the United States, asked a U.S. District Court to consider the traumatic effect his parents had on him.³³ He was raised in a silent, angry home in which no one ever articulated the horrors they had witnessed or the struggles they were currently enduring.³⁴ The young Vietnamese man felt a cultural obligation to financially support his impoverished family, and so, even though he was a brilliant student, he turned to gambling and eventually violence to provide the financial support his culture and parents expected of him.³⁵ The district court remained unimpressed.³⁶

Think of the children of Holocaust survivors, living with parents who survived the worst atrocities in the history of the human race. It is beyond one’s imagination to think that the trauma would not be passed, in some form, from one generation to another. Two generations after the Holocaust, the son of survivors who had fled to Venezuela sought refuge from the anti-Semitic fervor there on behalf of his daughter, on whom the anti-Semitism had a disproportionate impact due to the intergenerational trauma from which she and her Jewish family suffered.³⁷ In his application for an immigration visa waiver to allow entry into the United States, this second-generation Holocaust survivor wrote:

As the direct descendant of Holocaust survivors, I possess an emotional heritage which makes me exceptionally vulnerable to anxiety and depression borne of intergenerational trauma and this

32. See WINONA LA DUKE, *ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE* 148 (1999).

33. See Sentencing Memorandum, *United States v. Dinh*, No. 09 Cr. 327-01, 2011 WL 1197666 (S.D.N.Y. Jan. 13, 2011), (No. 09 Cr. 327); see also *Dinh*, 2011 WL 1197666, at *6.

34. Sentencing Memorandum, *Dinh*, 2011 WL 1197666 (No. 09 Cr. 327).

35. *Id.*

36. See *Dinh*, No. Cr. 327-01, 2011 WL 1197666, at *6.

37. Application for Waiver of the Foreign Residence Requirement under Section 212(e) of the Immigration and Nationality Act; 8 U.S.C. § 1182(e), 2009 WL 7441650 (DHS).

makes my American citizen daughter [IDENTIFYING INFORMATION REDACTED BY AGENCY] far more susceptible to emotional and psychological damage than other American children in the event that she is forced to live in Venezuela, surrounded by an oppressive atmosphere of anti-Semitic rhetoric and violence . . .³⁸

In one state juvenile court case, the defense attempted to introduce intergenerational trauma as a mitigating factor in the murder trial of an adolescent Native American; the attempt was unsuccessful because “the witness was ill at the time of trial.”³⁹ The court was presented with, and accepted as evidence during the sentencing phase of the trial, sordid details of the teen’s life: he was physically abused by his mother and sisters on the reservation, raped by his uncle while visiting his grandmother, and began regular use of marijuana and alcohol between the ages of eight and ten.⁴⁰ At age 14 the boy attempted suicide by hanging.⁴¹ Multiple expert reports accepted by the court diagnosed the juvenile with Post-Traumatic Stress Disorder stemming from the abuse he suffered at the hands of his closest family members, who had themselves been abused and who bore the inherited trauma of their people.⁴² At the time of the sentencing of the teen, both his parents were in prison for federal narcotics conspiracy crimes.⁴³ Yet the court chose not to view his history as a mitigating factor in sentencing the youth, who was 15 at the time he killed a man whose sexual overtures triggered the boy’s post-traumatic stress disorder.⁴⁴ The court would not even consider the possibility that intergenerational trauma could have played a part in the crime.⁴⁵ When the teen was sentenced as an adult, the generations of abuse that influenced his perpetration of the crime, although of no significance to the court, were carried with him into prison, and will remain with him, his family, the family of his victim, and our entire national experience. These horrors do not disappear, no matter how long the prison sentence may be. Nothing has been addressed.⁴⁶

38. *Id.*

39. *In re Welfare of G.S.G.*, No. 27-JV-08-9898, 2009 WL 3736134, at *6 (Minn. Ct. App. Nov. 10, 2009).

40. *Id.* at *1.

41. *Id.*

42. *Id.* at *2.

43. *Id.*

44. *Id.* at *8–9.

45. *Id.* at *6.

46. There is a colloquial definition of insanity as doing the same thing over and over but expecting a different result. That seems to fit the methods of our criminal justice system’s refusal to acknowledge intergenerational trauma.

IV. THE HIGHLAND CLEARANCES

“Many evil deeds have been associated with the abuse of the monopoly power of land ownership . . . but it is safe to say that nowhere . . . else at any time have blacker or more foul deeds been committed in the sacred name of property than in the Highlands of Scotland in those days.”⁴⁷

In the mid-1700s, at approximately the same time that England was preparing to wage its unsuccessful battle to hold onto the North American colonies, English landowners in the Scottish Highlands prepared to rid themselves of their human tenants in favor of more lucrative inhabitants: sheep. A systematic process of forcible evictions began. The tenant farmers had no legal title to the land, but “by moral law, if not by the law of the land, they had a right to the soil which had been defended with their own right arm and that of their ancestors.”⁴⁸

Tenant families acquiesced and went quietly to the shores of the North Sea, as instructed by their lords or clan leaders, not because they did not feel that they belonged to the land and the land belonged to them but because they were religious men and women who believed the ministers who told them that their eviction was God’s will, the punishment they had earned for their own sins.⁴⁹ Acquiescing was God’s will, and so the tenant farmers left when told to do so.⁵⁰ Those who were too old or infirm to leave were assisted by their neighbors.⁵¹ No resistance was offered as the Highlanders were sent “to search through great privation for some foothold on rugged ground beside the western sea.”⁵²

The atrocities committed during the Highland Clearances, like those committed during the Holocaust, the genocide in Rwanda, the “ethnic cleansing” in the former Yugoslavia, and the “forced assimilation” of the indigenous peoples of North America, took place within organized legal and cultural systems, and demonstrate what happens to a people whose

47. ALEXANDER MACKENZIE, *THE HISTORY OF THE HIGHLAND CLEARANCES*, at ix–x (2d ed. 1914).

48. *Id.* at xi.

49. *Id.* This concept of inherent evil is familiar to many members of various organized religions, including, in this country, Catholics and Baptists.

50. *Id.* “[The Crofters] regarded the minister as the stern oracle of trust, and the strict interpreter of the meaning of the ways of God to man. What happened was right. The pages that follow will show what a mean use many of these ministers made of the power which their faithful flock vested in them.” *Id.*

51. *Id.* at 18 (6% Kindle e-book version) (quoting Donald Macleod, author of ‘Gloomy Memories’: “Fire was immediately set to [the 100 year-old woman’s] house, and the blankets in which she was carried out were in flames before she could be got out. She was placed in a little shed, and it was with great difficulty that they were prevented from firing it also. The old woman’s daughter arrived while the house was on fire, and assisted the neighbours in removing her mother out of the flames and smoke, presenting a picture of horror which I shall never forget, but cannot attempt to describe.’ Within five days she was a corpse.”).

52. *Id.* at xiii.

social and cultural rights are destroyed with and for a purpose. These events give rise to intergenerational trauma, and the result is, without exception, a community plagued by unspoken horrors that are never officially recognized but that are carried forward to further traumatize the next generation, and the next after that, apparently without end.

Cultural anthropologists and most scholars of interdisciplinary studies, such as political scientists and sociologists, understand that historical or intergenerational trauma makes past atrocities relevant today. Psychiatrists also recognize that intergenerational trauma provides fertile soil for disproportionately high rates of depression, anxiety, and post-traumatic stress disorders in future generations. Past atrocities can never be swept under a rug because their impact spreads across generations in tangible and quantifiable ways. Put another way, individual members of any traumatized group experience their own individual traumas, and many “deposit” their trauma into their own children as if the children could somehow remedy the trauma; but children are no more able to address the trauma deposited in them by their parents than were the parents themselves, and so the children simply pass it on to their own children in the uniquely human experience referred to as “intergenerational transmission of trauma.”⁵³

Obviously, there can be no judicial remedy for that injury, when a legal system turns a blind eye to a demonstrated injury. This may be the true definition of a “non-justiciable” violation of human rights. When judicial remedies are either unavailable or ineffective, the injured parties sometimes attempt alternative solutions, whether intra- or extra-judicial, peaceful or violent, socially acceptable or otherwise. Some places, like South Africa, Canada, and even Greensboro, North Carolina and Tulsa, Oklahoma, have turned to peaceful, quasi-judicial, officially sanctioned and organized alternatives such as Truth and Reconciliation Commissions to give entire communities, including both victims and perpetrators, the opportunity to tell their stories and to be heard. In Canada the government not only established a Truth and Reconciliation Commission (Canadian TRC), it also distributed significant cash payments to those who survived the Canadian Indian Residential Boarding Schools, and to their heirs if the immediate victims had already passed away. The Canadian government was being neither altruistic nor magnanimous in its efforts to redress the wrongs committed between the 1880s and the 1980s; Canada acted only in response to a class-action lawsuit filed by survivors of the schools.⁵⁴ Despite its less-than-noble

53. Vamik D. Volkan, *Transgenerational Transmissions and Chosen Traumas: An Aspect of Large-Group Identity*, 32 *GROUP ANALYSIS* 79, 86 (2001).

54. The lawsuit was a national class action suit, but involved numerous court file numbers, named plaintiffs, named defendants, settlement dates. See generally WIKIPEDIA, http://en.wikipedia.org/wiki/Nora_Bernard (last visited Oct. 15, 2015).

motivating factors, however, the Canadian TRC's mission statement poignantly and accurately recognizes that "[t]he truth of our common experiences will help set our spirits free and pave the way to reconciliation."⁵⁵

The United States, in contrast, only recently acknowledged the wrongdoing inflicted on the indigenous peoples of this nation. In an odd placement, the Senate included a one sentence apology for past atrocities in the middle of H.R. 3326, the 2010 Department of Defense Appropriations Bill. However, while issuing those brief words of apology, the Senate simultaneously made clear that its sentiment of regret, comprising all of one line in the Bill, gave rise to absolutely no cause of action by or on behalf of anyone affected by the U.S. Indian boarding schools.⁵⁶ Those U.S. schools were remarkably similar to Canada's, with the exception that the United States entrusted management of the schools to government employees while Canada "outsourced" management of its schools to the Catholic Church.

Yet both had the same impact:⁵⁷ children were stolen and forcibly "assimilated" by prohibitions against practicing their own religions, speaking their own languages, using their own names, or wearing their own clothes. Untold numbers of children were abused and died of disease or deprivation of basic human necessities and families and communities were irreparably shattered and lost.⁵⁸ Nothing on earth could compensate for such losses, even if the United States had not made it crystal clear that there is no cause of action available by which to bring any such claims to court. However, the notion that non-compensable atrocities do not give rise to legitimate causes of action—that they are, in other words, non-justiciable—is absurd.

V. THE BLOODY BRITISH RULE

In Scotland, hundreds of years of oppression began with the indigenous Picts⁵⁹ and proceeded through the Highland Clearances and

55. Schedule "N," Mandate for the Truth and Reconciliation Commission (of the Indian Residential Schools Settlement Agreement), available at http://www.trc.ca/websites/trc_institution/File/pdfs/SCHEDULE_N_EN.pdf (last visited Nov. 27, 2015).

56. The quote is the Canadian TRC's Mission Statement, its primary guiding principle. DEPARTMENT OF DEFENSE APPROPRIATIONS ACT OF 2010, H.R. 3326, 111th Cong. § 8113 (2009).

57. See Julian Brave Noisecat, *Canada Just Confronted Its 'Cultural Genocide' of Native People. Why Can't the U.S. Do The Same?*, HUFFPOST: POLITICS (Oct. 21, 2015), http://www.huffingtonpost.com/2015/06/05/native-american-boarding-schools_n_7513310.html.

58. *Id.*

59. Brian Milne, *The Tribes Within: The Search for Identity in the Modern State*, 1 STUD. TRIBES TRIBALS 29 (2003).

on into the present.⁶⁰ Scotland's ongoing limited political autonomy, perhaps the primary reason the question of independence made its way onto the ballot in 2014 when others before it had failed, could finally have been addressed if the referendum had been approved rather than rejected.⁶¹ Ironically, the requirements for casting a vote on the referendum raised more eyebrows than, possibly, the referendum itself, as many in Scotland and around the world wondered why a sixteen-year-old school boy could cast a ballot but a sixty-year-old Scotswoman whose work had taken her to London for a few months could not.⁶² Nonetheless, the referendum at least gave evidence that Scotland had spent centuries in an identity crisis, stemming from its own sordid past.

Identifying the truly indigenous Scots is not an easy task. "The ancient Celtic peoples of the British Isles were not newcomers from elsewhere but the descendants of an indigenous population whose ancestry lay in the pre-Celtic past and whose ultimate origins reached back into the Stone Age."⁶³ Apparently the Roman conquerors abandoned any hope of including in their conquest the high mountains in the north of Britain. "After a few half-hearted incursions, in the time of Hadrian they built a wall to protect Roman Britain, and abandoned Caledonia to its seemingly ungovernable inhabitants. Those inhabitants were of two sorts--Britons, and a people the Romans called 'Picts' from their habit of painting their bodies."⁶⁴ Thus began the image of the Scottish Highlands as home to a wild and unruly people. In the eighteenth century Scots were culturally and legally included in the nation known as Great Britain.⁶⁵

In 1745 the English began a campaign to clear all human residents from the Scottish Highlands, to rid the land of small farms and make way for the sheep that would graze on the grasses of the emptied farmlands and produce the wool that would make the English landowner, or even the Scottish clan leader, wealthy beyond the farmers' imaginations.⁶⁶ The landlords ordered the Highland farmers, also known as crofters, to leave their homes, and those who did not leave quickly enough for the landlords' liking watched their homes burned to the ground with all of

60. *Id.* at 29–30.

61. *Scottish Referendum: Scotland Votes 'No' to Independence*, BBC NEWS, Sept. 19, 2014, <http://www.bbc.com/news/uk-scotland-29270441> trctrc.ca/websites/trcinstitution/index.php?p=7 (last visited Oct. 21, 2015).

62. Any resident of Scotland aged sixteen or over at the time of the referendum was eligible to vote. Scottish citizens residing anywhere beyond the country's borders, for any reason or any length of time, were not.

63. TIM CLARKSON, *THE MAKERS OF SCOTLAND: PICTS, ROMANS, GAELS AND VIKINGS* loc. 207 (2013) (Kindle ebook).

64. William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053, 1066. (2010).

65. *Id.* at 1055.

66. *Id.* at 1087–88.

their earthly goods inside them.⁶⁷ “Evictions took place for the object that was at the moment most profitable. The Napoleonic Wars made sheep runs temporarily more profitable; but the moment there was more profit to be obtained from sport and deer forests, then deer forests were to a large extent substituted for sheep runs.”⁶⁸

Untold numbers of farmers were instructed to move to the coast of Scotland and become fishermen. The coastline of the North Sea became crowded with the makeshift houses of Highlanders who had neither the knowledge nor the tools required to actually subsist on fishing the frigid and dangerous waters of the North Sea.⁶⁹ Those who could not succeed may have starved in the makeshift hovels that quickly sprouted along Scotland’s coast.

Viewed in the context of human history, Scotland’s relationship with England is relatively young, and English control over Scotland is not as ancient as many may believe. England and Scotland were technically united in 1707, but many Scots still view that as something quite different from a union. English rule, and particularly Westminster’s power over all things Scottish, looks more like conquest than union to many Scots and outsiders. The year 1707 is thus as far back as one might trace the impetus for the Fall 2014 referendum on whether to officially separate from Westminster, to form a true Scottish government, to write a Scottish Constitution, to reclaim Scotland’s nationhood, and to face the challenges and opportunities that accompany existence as an independent nation.

The Scots’ pride in their cultural and national identity runs deep, and nowhere is it felt more deeply than in the Highlands.⁷⁰ The unique culture and history of the Highlanders, and the intergenerational trauma that undoubtedly stems from the Highland Clearances, explain the importance of the independence referendum to those whose ancestors were Highlanders: “The Highland Clearances devastated Gaelic culture and clan society, driving people from the land their families had called home for centuries.”⁷¹

67. MACKENZIE, *supra* note 47, at 12–13.

68. *Id.* Loc. 148–49.

69. *See id.* at 19.

70. On Feb. 10, 2014, a Scottish Member of Parliament, Charles Kennedy, noted the unique nature of the Highlands, and the need for “sensible engagement” on the question of independence, calling for “more devolution . . . within and across Scotland. . . . And nowhere more so than here in the Highlands.” *See* BBC News, *Scottish Independence: Charles Kennedy Calls for ‘Positive’ Campaign*, BBC NEWS, Feb. 10, 2014, <http://www.bbc.com/news/uk-scotland-scotland-politics-26119778> (accessed May 25, 2014).

71. The quotation comes from the Scottish government’s official Scottish education website, which devotes entire sections of Scottish history lessons to the Jacobite uprising and the Clearances: *Scotland’s History – Jacobites, Enlightenment and the Clearances: The Clearances*, EDUCATION SCOTLAND, <http://www.educationscotland.gov.uk/scotlandshistory/jacobitesenlightenmentclearances/clearances/> (last visited June 27, 2014).

Unlike the experts in fields as diverse as psychiatry, political science, sociology, and anthropology, international human rights courts, lawyers, and scholars do not yet recognize the effects of intergenerational trauma that would inevitably follow the Highland Clearances—and in that failure, the international human rights establishment risks enabling repetitions of past atrocities. Thousands of Highlanders were driven from their farms, forced to emigrate, or left to die of sickness and starvation on the North Sea coast, by their own clansmen working in tandem with the British upper class and their insatiable greed, in which the clan chiefs were more than happy to partake.⁷² Devastation on this level does not disappear from the collective memory of a nation.

The Westminster legal system, like the systems of Canada and the United States have done in the not-so-distant past, promoted a policy of genocide. The Highland Clearances were carried out with the purpose and effect of obliterating a culture, a language, and a people. The government-sanctioned policy of the Clearances criminalized the Gaelic Highland culture by prohibiting the speaking of the Gaelic language and the wearing of traditional kilt and sporran (the pouch that served as a pocket or wallet for a man wearing a kilt), and by abolishing the heritable jurisdictions of clan lands.⁷³

While genocide may seem too strong a word, it is not. There is no difference between “ethnic cleansing,” “cultural genocide,” and “genocide.” Genocide is defined in international covenants, and accepted in customary international law, as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;

72. See MACKENZIE, *supra* note 47, at 94–95.

73. “Heritable jurisdictions” enabled the Highlanders to pass their farmlands from one generation to the next, resulting in some families occupying the same acreage for centuries without ever holding title to that land. The Heritable Jurisdiction Act of 1747, part of the government’s Clearance policy, abolished all heritable jurisdictions, essentially divesting the Highlanders of their farms. As a small aside, this is probably as good a place as any to note that the notion of clans claiming individualized tartan kilts is largely a Hollywood myth, a la “Braveheart.” Kilts were never meant to be easily seen, much less used as symbols of clan identity; bright colors would have defeated the goal of camouflage.

(e) Forcibly transferring children of the group to another group.⁷⁴

When the English cleared the Highlands of people to make way for the more lucrative business of running sheep or deer, the result was genocide. Generations later that trauma is sure to linger. It would be unsurprising, then, that emotions tend to run high in light of the “bloody English rule.”

But emotions did not, in fact, seem to run very high throughout the eighteen months of campaigning. From the very inception of the referendum campaigns none of the public opinion polls (and there were many) indicated any clear majority opinion on the referendum’s single question: “Should Scotland be an independent country?” Some surveys showed the Yes-voters holding a very small lead, while others gave the No-voters a clear majority, and those results seemed to vary from one moment to the next. The six public opinion polls completed in February, 2014, showed the Yes-vote moving upward to around 40%, but according to the non-partisan WhatScotlandThinks.org, the March 2014 opinion polls were too close to call.⁷⁵ The only certainty was that people’s minds were not changing based on either side’s white papers, promises, or campaigns.

Scottish self-identity runs strong:

We perhaps should not be surprised that it is proving difficult for both sides to secure a decisive change in the balance of opinion. For in part people’s views are a reflection of their sense of identity, that is whether they feel Scottish or British - and people do not change their sense of identity very easily.⁷⁶

Perhaps that sense of self-identity remains unwavering. But perhaps the rules of enfranchisement were as responsible as self-identity for the respective campaigns’ apparent inability to influence voters. Several commentators, including the BBC, questioned the wisdom of giving the vote to sixteen- and seventeen-year-olds,⁷⁷ even though this was itself a compromise from the original proposal by the SNP to allow fourteen- and fifteen-year-olds to vote. The U.S. electoral system does not entertain even a possibility of allowing anyone under the age of eighteen to vote,

74. U.N. General Assembly Resolution 260, Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948. G.A. Res. 3/260, art. II, U.N. Doc. A/RES/3/260 (Dec. 9, 1948).

75. WHAT SCOTLAND THINKS, <http://whatscotlandthinks.org/questions/should-scotland-be-an-independent-country#table> (last visited Oct. 18, 2015).

76. John Curtice, *Scottish Independence: What Have the Polls Been Saying?*, 18 BBC NEWS (Sept. 18, 2013), <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-24124631>.

77. See Vanessa Barford, *Should 16-Year-Olds Get the Vote Following Referendum?* BBC NEWS (Sept. 23, 2014), <http://www.bbc.com/news/uk-29327912>.

presumably because American culture views anyone younger than eighteen as incapable of possessing the maturity, judgment, reasoning, or capability of handling such grave responsibilities as voting, drinking or purchasing alcohol, or serving in the armed forces (although we hesitate very little to give those young people the license necessary to drive an automobile, directly causing thousands of deaths on U.S. roads and highways every year⁷⁸). It would take a Constitutional Amendment to lower the voting age to sixteen in the United States.

In addition to giving the vote to the youngest people ever allowed to vote in Scotland, the rules extended the referendum franchise to anyone legally residing in Scotland on September 18, 2014, regardless of nationality. During a week of informal conversations with Scottish residents from a wide range of backgrounds, socioeconomic levels, and nationalities (conducted the last week of July, 2013, in and around Edinburgh), it became clear to this author that age was a more troubling prospect than nationality. This was puzzling to an American voter. In the United States, only citizens may vote, regardless of whether a non-citizen is a resident of fifty years or fifty minutes, and regardless of the legality of that non-citizen's presence in this country. The only citizens (over the age of eighteen) whose voting rights are broadly limited are convicted felons. Some states do allow convicted felons to vote from prison,⁷⁹ but no state may constitutionally permit non-citizens to vote. Non-resident citizens routinely vote via absentee ballots, even if they have lived or worked abroad for dozens of years, as their right to vote is unaffected by their physical presence or absence from American soil so long as U.S. citizenship is retained. From the perspective of the United States, therefore, giving the vote to a cab driver from Bulgaria, who has lived in Edinburgh for two years on a valid E.U.-member work visa, is a concept much more foreign than allowing a sixteen-year-old to vote.

Both sides of the referendum campaign addressed the franchise questions in their campaigns. Interestingly, the very act of deciding on the franchise⁸⁰ was, at first blush, beyond the devolved powers of the Scottish Parliament: the power to change the rules of voting eligibility in Scottish political elections remained in Westminster. Through minor

78. *Teen Drivers: Get the Facts*, CENTER FOR DISEASE CONTROL AND PREVENTION (Oct. 14, 2015), http://www.cdc.gov/motorvehiclesafety/teen_drivers/teendrivers_factsheet.html. It is commonly accepted that in the United States, automobile crashes are the leading cause of death for young people ages 15–20. The Center for Disease Control and Prevention issues statistical reports that consistently show that the drivers most likely to be killed in car crashes are males between the ages of 16 and 19. *Id.*

79. For a chart outlining felon disenfranchisement laws in all fifty states, see *Felony Disenfranchisement Laws in the United States*, at http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf.

80. *Scottish Independence Referendum (Franchise) Act, 2013*, (A.S.P. 13), at <http://www.legislation.gov.uk/asp/2013/13/contents>.

linguistic contortions the Independence Referendum was categorized as something other than a political election and thus the franchise change was within the Scottish Parliament's powers.

As it turned out, the franchise for voting in the Independence Referendum differed from general Scottish franchise rules primarily in expanding the vote to those ages sixteen and seventeen years. The Bulgarian taxi driver would be allowed to vote for a member of the Scottish Parliament just as he was eligible to vote on the question of independence. For him and other similarly situated non-citizen residents of Scotland, national identity was certainly not the issue when it came time to cast a vote for or against independence. The cab driver's national identity and self-identity was Bulgarian, and his disdain for all people Scottish was clear as he explained that he and his wife were gainfully employed because the Scots were more content to collect welfare and live comfortably than to work hard to improve their lot in life (the implication being clear that Bulgarians' work ethic is superior to Scots'). His inclination to vote against independence rose from concerns about his own employability should Scotland suddenly find itself cast out of the European Union, in need of applying for admission, as an independent nation, to regain the membership in the European Union that made it possible for the cab driver to legally work in Scotland in the first place.

In the Highlands, emotions undoubtedly run more to national identity and to the pride of being Highlanders, those long-suffering but most indigenous of the Scots. But the Highlands are sparsely populated; the referendum was not likely to be won or lost based on the votes of Highlanders. Given the number of Scottish citizens living abroad at the time of the referendum, it might be worth questioning whether the vote was even won or lost on the vote of Scots. The ultimate rejection of independence may not reflect in any way the existence of any strong sense of national identity or of the very real and ongoing ramifications of intergenerational trauma. The referendum, if it were decided by the votes of non-Scottish citizens, might be realistically viewed as a complete failure—for both sides.⁸¹

In a perfect political world, the referendum would have provided a meaningful platform from which to address hundreds of years of oppression and human rights violations on many levels. While most commentators focused on the impact independence might have on the financial state of Scotland, Britain, and the European Union, it is worth considering that the human rights violations that began with the "union" of 1707 are of equal or even greater importance. Giving the right to vote

81. It must be noted that voter turnout for the Referendum was astonishingly high, especially by U.S. standards: by all accounts, more than 84% of eligible voters cast their ballots on Sept. 18, 2014, a number so high that it broke the existing voter-turnout record in the United Kingdom, which generally sees greater voter participation than does the United States.

to non-citizens might have brought home to all Scots that the Independence Referendum, or any other legal or political process, can be but one part of any solution. The Independence Referendum could have been an opportunity to correct prejudices that stem from human rights violations which, when left unchecked, have historically escalated into crimes against humanity and could just as easily do so again in the future. It is unfortunate that this is apparently an opportunity lost in the unprecedented and unnecessary expansion of the rules of the franchise.

VI. INDEPENDENCE AS REDRESS FOR THE HIGHLAND CLEARANCES

This analysis thus returns to the difficult question of who the Scots actually are. Scotland was settled over a thousand years ago, so it is no easy task to identify its indigenous peoples. Yet, identification is a necessary step in any logical analysis of the complete failure of both sides of the referendum question to persuade voters to change their minds about independence. The question of “self-identity” raised by some commentators appears to be a non-issue outside of the Highlands. Perhaps then, the Highlanders are, for all practical purposes, Scotland’s indigenous people. It is certainly they who pay the price of intergenerational trauma.

The Irish crossed the body of water now known as the Irish Sea to definitively settle in Scotland and were among Scotland’s earliest inhabitants.⁸² Therefore, depending on one’s definition of “indigenous,” the Irish could be considered as such.⁸³ “Indigenous” peoples have been defined as follows:

[T]hey are the descendants - according to a common definition - of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived. The new arrivals later became dominant through conquest, occupation, settlement or other means.⁸⁴

82. See generally TIM CLARKSON, *THE PICTS: A HISTORY 1* (rev. ed. 2010).

83.

“Picts” was the name given to a people who inherited a large part of what is now Scotland during the first millennium A.D. . . . After less than 600 years, they seem to vanish from the pages of history, leaving behind no written records of their own nor any significant trace of their language.

Tim CLARKSON, *THE PICTS: A HISTORY 1* (rev. ed. 2011). The Picts did leave stone-carved monuments that can be seen throughout the Highlands. *Id.*

84. *Indigenous People Indigenous Voices FactSheet*, UNITED NATIONS PERMANENT FORUM

Factors used to determine whether a people is indigenous include self-identification on the personal and group level, as well as the following:

Historical continuity with pre-colonial and/or pre-settler societies;
 Strong link to territories and surrounding natural resources;
 Distinct social, economic or political systems;
 Distinct language, culture and beliefs;
 Form non-dominant groups of society;
 Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.⁸⁵

If analysis of the Independence Referendum focuses on the inhabitants of the Scottish Highlands in particular, it is important to acknowledge that there were generations upon generations of “crofters.” Until the Highland Clearances commenced in 1745 in the wake of the Protestant majority’s defeat of the Catholic Jacobites, the crofters’ heritable tenancies enabled their families to farm the same small plots of land for hundreds of years.⁸⁶

Some historians see the Clearances as nothing more or less than authorized and warranted evictions.⁸⁷ The lawful owners of the land decided they could make more money by raising sheep than by collecting the ever-increasing rents that the crofters had been paying for generations.⁸⁸ Perhaps the saddest part of the whole process—aside from images of babies and old women being carried out in their beds as government—sanctioned soldiers set torches to the thatched roofs of their huts—was that clan chiefs aided the perpetrators and turned against their people in favor of money offered by the Southern landowners.⁸⁹ The combination of a clan leader and a clergyman proved too much for most Highlanders, who accepted their fate and went to the sea shore to eke out a living catching and selling a limited supply of fish, as they were ordered to do by the authority figures in their lives.⁹⁰ Those Highlanders who chose not to cooperate were simply burned out of their family homes.⁹¹ The first person stories are horrific, and it is this horror that requires that

ON INDIGENOUS ISSUES, http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (accessed May 5, 2014) (last visited Oct. 13, 2015).

85. *Id.*

86. T.M. DEVINE, *THE SCOTTISH NATION: A HISTORY 1700–2000*, 231 (1999).

87. JAMES HUNTER, *THE MAKING OF THE CROFTING COMMUNITY* 57 (2d ed. 2000).

88. DEVINE, *supra* note 86; *see also* Cynthia A. Lohman, *Crofting: Securing the Future of the Scottish Highlands Through Legislative Challenge and Cultural Legacy*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 663, 669. (2007). Lohman’s 45-page article devotes one scant paragraph to the Clearances.

89. DEVINE, *supra* note 86.

90. *Id.*

91. *Id.*

these stories never be forgotten.

In human rights law, it is axiomatic that for every personal story of atrocity that survives there are hundreds that are never told. This is the role of a Truth and Reconciliation Commission: to provide a forum in which the stories of perpetrators and victims alike can be both told and heard.⁹² The simple yes or no question on the Scottish referendum ballot did not permit any stories to be either told or heard. When the traumatic past of a people remains unspoken, there can be no movement forward. Keeping human rights abuses anchored in the past permits those abuses to carry forward through generations as historical trauma. As the generations unfold, there is little or nothing that any legal system, not even a Truth and Reconciliation Commission, can provide in the nature of healing or redress. There is neither a simple solution nor any precedent to turn to for guidance. Some problems are simply too big for any legal system to handle.

The rules of franchise for the referendum disenfranchised many Scottish citizens, whose histories lay at the heart of the independence question. This exclusion provided fertile ground for the spreading scourge of intergenerational trauma. Ignoring historical trauma opens the door to re-imposing the traumas inflicted on generations past, which, as Elie Weisel so poignantly observed, is akin to killing the dead all over again.⁹³ Common wisdom has long recognized that those who ignore the past are doomed to repeat it. Ignoring the past in Scotland permits intergenerational trauma to flourish, and sets the stage for a recurrence of the attitude that enabled the Highland Clearances to happen: if some people are viewed as “less than” others, it is not difficult to debase those “lesser” people, to see them as not quite human, and thus to accept extreme and horrific violations of their human rights. The international community should keep a close watch on Scotland to see what happens to a nation that fails to account for its past. If Scotland’s past is disregarded, the underlying history of Scotland, particularly the Highland Clearances, sets the stage for a terrible and unnecessary risk, no matter the outcome of the referendum vote.

A meaningful referendum would have been one that allowed the hidden stories, especially that of the Highland Clearances, to be told and heard. Only a legitimate vote for independence could have generated a legitimate independence, one decided by the people whose stories comprise Scotland’s history. Money, formal apologies, or even a Truth and Reconciliation Commission, can never redress the injuries suffered or produce meaningful atonement. Independence might have generated

92. ROBERT ROTBERG, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 3 (2000).

93. ELIE WIESEL, *Introduction to NIGHT XV* (2012).

the first truly significant form of reparation for “non-justiciable” human rights violations that caused extensive intergenerational trauma; however, as it stands, there will be no reparation. Even an overwhelming victory for the “yes” voters would have reflected primarily economic concerns—such as jobs, North Sea Oil, E.U. membership—rather than any recognition of the dangers of sweeping more generations of trauma under the proverbial rug. The referendum’s legitimacy was compromised by the rules of the franchise, and the independence vote’s outcome was rendered nearly meaningless. A singular opportunity for a traumatized people to be recognized and given non-monetary, but supremely significant reparations, has been lost. The world may never again observe such an opportunity to make international human rights norms work.

VII. CONCLUSION

After the “union” of 1707, the Highland clan chiefs engaged in assisting English landlords remove the Scottish Highlanders,⁹⁴ whose fields and houses would be plowed under and planted in grass.⁹⁵ That grass would then feed sheep whose wool could be sold in the South for a far greater profit, which would further line the pockets of those who already held the wealth and power.⁹⁶ What followed may be described as technically lawful evictions, but any common definition denotes that the Clearances resulted in genocide of the Highlanders. While genocide, like other crimes against humanity, is beyond compensation, it is not beyond justice. The Scottish referendum vote succumbed to economic pressures and thus lost the opportunity to address past atrocities. The impact of those atrocities will only continue to live on, to spread and grow through intergenerational trauma. In the long run, recognition of the underlying human rights abuses would have been more significant than independence from Westminster, for the referendum question, at its heart, arose not from economics or politics, but from the backs of hundreds of Scottish Highlanders who lost their homes, their families, their language, their culture, and ultimately their lives, at the hands of “the English f*****g rule.”⁹⁷ Human rights abuses may not be compensable, but they are reparable, and therefore justiciable. It is never too late for a nation to address the wrongs in its past.

94. DEVINE, *supra* note 86, at 50.

95. *Id.*

96. *Id.*

97. SCOTT HUTCHINSON, *SCOTTISH WIND* (Atlantic Records 2011).