

**FACING THE PAST, FACING THE FUTURE:  
APPLYING THE TRUTH COMMISSION MODEL TO THE HISTORIC  
TREATMENT OF NATIVE AMERICANS IN THE UNITED STATES**

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**I. INTRODUCTION**

*We have to face the unpleasant as well as the affirmative side of the human story, including our own story as a nation, our own stories of our peoples. We have got to have the ugly facts in order to protect us from the official view of reality.*<sup>2</sup>

Bill Moyers, Journalist

The history of the United States is rife with “allegations”<sup>3</sup> of the most serious mistreatment of Native Americans:<sup>4</sup> broken treaties and abandoned promises; massacres of noncombatants; genocide; germ warfare; forced relocations; kidnapping for a global slave trade in American Indians; religious suppression; and abduction of young children to isolated “Indian schools” to achieve forced cultural assimilation.<sup>5</sup>

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2. *An Interview With Bill Moyers: Facing History and Ourselves*, NEWS, 1991, at 4, quoted in JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEACHER GOT WRONG* 208 (1995).

3. While some consider historical accounts of mistreatment to be well-documented and factual, others do not accept even the most authoritative accounts and consider them to be mere allegations.

4. No single descriptor for all native people in North America is entirely satisfactory. The term “Indigenous peoples of the United States” is sometimes used instead of the more common term “Native Americans” since the latter may presuppose that peoples of Indigenous ancestry seek to assimilate into and become part of American society, while the former honors those who wish to preserve their distinct existence and rights of self-determination. Some prefer to use the newer descriptor “Original Peoples.” While this note will use the more commonly recognized descriptor, the writer wishes to express respect for the integrity and autonomy of all Indigenous peoples. See generally 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. BLACKLETTER L.J. 107 (1999).

5. See generally L.R. BAILEY, *INDIAN SLAVE TRADE IN THE SOUTHWEST: A STUDY OF SLAVE-TAKING AND THE TRAFFIC IN INDIAN CAPTIVES* (1966); DEE BROWN, *BURY MY HEART AT WOUNDED KNEE; AN INDIAN HISTORY OF THE AMERICAN WEST* (1970); RICHARD DRINNON, *FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE BUILDING* (1980); ROGER C. ECHO-HAWK & WALTER R. ECHO-HAWK, *BATTLEFIELDS AND BURIAL GROUNDS: THE INDIAN STRUGGLE TO PROTECT ANCESTRAL GRAVES IN THE UNITED STATES* (1994); BRUCE E. JOHANSEN, *DEBATING DEMOCRACY: THE IROQUOIS LEGACY OF FREEDOM* (1998); WINONA LADUKE, *ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE* (1999); DAVID

Despite the pervasive nature of these allegations, the United States government, has never, in its two hundred and twenty five year history, undertaken the task of compiling an authoritative account of the incidents involved in the long history of its relations with Native Americans. Nor has the government issued a comprehensive, official acknowledgment or apology for alleged misdeeds committed against Native Americans by citizens and government officials.<sup>6</sup>

Typical citizens of the United States know little about the historical treatment of the Native Americans during the settlement of the United States, perhaps because the founding myths of the country invariably offer highly flattering accounts of its origins and revise or ignore the rights and treatment of Native Americans.<sup>7</sup> Many citizens either deny or do not know about the United States government's openly hostile policies nor about the egregious actions of early settlers and government soldiers against Native Americans.<sup>8</sup> Consequently, disputes and debates continue to arise over the accuracy of such claims and even well-documented incidents are disbelieved or denied by many citizens.<sup>9</sup>

A truth commission provides a means to settle these kinds of disputes by investigating broad patterns of human rights abuses in a country and creating an authoritative, officially recognized record of past crimes and misdeeds.<sup>10</sup> Truth

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LAVENDER, LET ME BE FREE: A NEZ PERCE TRAGEDY (1992); EDWARD LAZARUS, BLACK HILLS, WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT (1991); PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST (1987); LOEWEN, *supra* note 2; ROGER L. NICHOLS, INDIANS IN THE UNITED STATES AND CANADA: A COMPARATIVE HISTORY (1998); ROBERT A. TRENNERT, JR., THE PHOENIX INDIAN SCHOOL: FORCED ASSIMILATION IN ARIZONA, 1891-1935 (1988); WILCOMB E. WASHBURN, THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY (1973) (citing for background information on a spectrum of allegations of mistreatment).

6. In 1993, Congress passed Joint Resolution 107 Stat. 1510 apologizing to Native Hawaiians on behalf of the United States for the actions of American citizens and government officials that led to and resulted in the takeover of Hawaii and the overthrow of the legitimate government of Hawaii. S.J. Res. 19, 103rd Cong. (1993) (enacted). See DANIEL A. FARBER, ET. AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (2d ed. Supp. 2000). While this action constituted a significant step toward official acknowledgment of the treatment of one group of native peoples, no other official apologies or acknowledgments have since been issued to Native Americans by the United States government.

7. Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 590 (1995).

8. LOEWEN, *supra* note 2. (James W. Loewen, a historian at the University of Vermont, spent two years at the Smithsonian Institution researching the truth behind distorted and inaccurate accounts of historical events that are presented in twelve high school and college American history textbooks.)

9. See Edward T. Linenthal, *The Contested Landscape of American Memorialization: Levinson's Written in Stone*, 25 LAW & SOC. INQUIRY 249 (2000) (book review); LOEWEN, *supra* note 2.

10. Priscilla B. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative*

commissions operate on the fundamental principle that the truth, if faced squarely, discussed openly, documented thoroughly, and acknowledged officially, will reduce the likelihood that a repetition of human rights abuses will recur in the future.<sup>11</sup> Thus, a truth commission can be seen as an anti-revisionist effort to face the past and thereby create a more positive future.

The truth commission model can be compared to a psychological model of recovery from emotional trauma. Expert practitioners maintain that psychological healing typically requires that victims admit and talk about the traumatizing experience and that perpetrators acknowledge and express regret for the transgression.<sup>12</sup> Specifically, professionals seek to encourage aggressors to admit and reveal the nature and extent of each offense; provide victims and families with opportunities to talk openly about their injuries while receiving support and interpretive assistance; and guide perpetrators through a process of acknowledgment, apology, and repentance, which often involves learning to empathize with their victims while simultaneously admitting the truth of their misdeeds.<sup>13</sup> When misdeeds in a country or region have been pervasive and long-lasting, truth commissions provide a way for the entire society to begin the process of reconciliation. A truth commission can give victims and perpetrators an opportunity to talk about the past truthfully, tell their stories honestly, and face the painful truth courageously in order to put the past to rest and create a different future. Viewed from this perspective, truth commissions are, in essence, a country-wide process of healing and recovery.

This article undertakes to explore and explain the truth commission model and to apply its framework to the historic treatment of Native Americans in the United States. The truth commission model offers the government and citizens of the United States an opportunity to confront the truth about the country's past, establish an accurate and authoritative record, and thereby settle factual disputes about the past in order to promote healing among the cultures that continue to coexist in the United States. The article's objective is to encourage authoritative investigation and documentation of the history of human rights abuses, including allegations of genocide, that have occurred over the last several hundred years against Native Americans in the United States. A truth commission's authoritative record, if acknowledged officially, could help settle long-standing disputes over the facts, educate the public about the actual treatment of Native Americans in the distant and recent past, provide a conclusive resource for judges, and chart a positive and

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*Study*, 16 HUM. RTS. Q. 597, 598 (1994) (providing an excellent source of key information about the structure and function of truth commissions).

11. *Id.*

12. See Wes Crenshaw & Greg Tangari, *The Apology: Creating a Bridge Between Remorse and Forgiveness*, FAM. THERAPY NETWORKER, Nov./Dec. 1998, at 32.

13. See Molly Layton, *Ripped Apart: What Does It Take to Turn Bitter Obsession into Forgiveness?*, FAM. THERAPY NETWORKER, Nov./Dec. 1998, at 24; Mary Sykes Wylie, *Secret Lives: Pedophilia and the Possibility of Forgiveness*, FAM. THERAPY NETWORKER, Nov./Dec. 1998, at 39.

inclusive course for the future for all residents of the United States. Such a record would help prevent continued denial, misunderstanding, forgetting, and revisionism by citizens and officials in the United States.

Part II of this article will first lay out the framework of truth commissions, including their history, purposes and concerns, jurisdiction, problems, and effects. Part III explores Australia's Council for Aboriginal Reconciliation will examine a potential model for a truth commission such as the one being proposed. Part IV A 1 of this article will present potential justifications for a truth commission in the United States by examining some examples of historic and recent treatment toward Native Americans. Part IV A 2 will explore the applicability of the international definition of genocide to the historic and enduring treatment of Native Americans in order to determine whether any policies or incidents qualify as genocide and, thereby, justify a truth commission. Part IV B anticipates objections to the proposal and discusses them. Finally, Part IV C will discuss both the national and international possibilities for convening the proposed truth commission.

## II. THE STRUCTURE AND FUNCTION OF TRUTH COMMISSIONS

*[W]hen information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and - eventually - incapable of determining their own destinies.<sup>14</sup>*

Richard M. Nixon, United States President,<sup>15</sup>

*Concealment of the historical truth is a crime against the people.<sup>16</sup>*  
General Petro G. Grigorenko, U.S.S.R.

### A. Truth Commissions Defined

Truth commissions are official bodies, all of which have a mission to investigate and document a pattern of alleged human rights abuses during a specific period of time in a particular country.<sup>17</sup> Truth commissions are investigative bodies only; they prepare and "submit reports of their findings" yet possess no power to

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14. Tim Weiner, *The Cold War Freezer Keeps Historians Out*, N.Y. TIMES, May 23, 1993, at E5.

15. Despite his infamous mendacity, apparently even President Nixon understood the importance of knowing the truth.

16. Robert Slusser, *History and the Democratic Opposition*, in *DISSENT IN THE U.S.S.R.* 329, 337 (Rudolf L. Tokes ed., 1975).

17. See Hayner, *supra* note 10, at 598.

criminally sanction human rights abusers.<sup>18</sup> By investigating all sides of a conflict rather than the actions of only a few, truth commissions seek to ensure a balanced treatment of the facts and promote greater knowledge and acceptance of the truth as documented by the commission.<sup>19</sup>

According to Priscilla B. Hayner, an international affairs expert who worked on the United Nations-sponsored Commission on the Truth for El Salvador, the definition of a truth commission includes four basic elements.<sup>20</sup> First, truth commissions typically convene to investigate past abuses.<sup>21</sup> Second, truth commissions investigate and report on broad patterns of human rights violations and not simply on single incidents of atrocities.<sup>22</sup> Third, truth commissions are temporary bodies that are created for a clearly defined period of time and are typically disbanded after the preparation and submission of an official report.<sup>23</sup> Fourth, truth commissions are vested by the sponsor of the commission with sufficient authority to enable members to access information, to conduct the investigation with a measure of security and protection, and to gain legitimacy for the commission's official, published report.<sup>24</sup>

In 1996, a set of potentially far-reaching principles that defined minimum standards for the formation of truth commissions was proposed by the United Nations Subcommission for Prevention of Discrimination and Protection of Minorities.<sup>25</sup> In these principles, the United Nations recommended that the following guidelines be followed when forming and convening truth commissions: (1) adopt a universal investigative standard that will protect and allow access to evidentiary documents; (2) form extrajudicial investigative bodies; (3) designate nonremovable commission members; (4) protect and preserve the findings of the commissions; and (5) publish a final report that is public, widely available, and permanently preserved.<sup>26</sup>

Truth commissions differ significantly from adjudicative mechanisms such as domestic criminal trials and international war crimes tribunals that result in findings of liability.<sup>27</sup> Where criminal trials and war crimes tribunals typically involve bringing explicit charges against specific individuals based on discrete incidents involving criminal acts, truth commissions, in contrast, seek to discover the

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18. Michael P. Scharf, *Justice in Cataclysm; Criminal Trials in the Wake of Mass Violence: The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 375 (1997).

19. *Id.* at 384.

20. Hayner, *supra* note 10, at 602.

21. *Id.* at 604.

22. *Id.*

23. *Id.*

24. *Id.*

25. See U.N. Subcommission for Prevention of Discrimination and Protection of Minorities, Annex II at 10, U.N. Doc. E/CN.4/Sub.2/1996/18 (1996).

26. See *id.*

27. Jennifer L. Balint, *The Place of Law in Addressing Internal Regime Conflicts*, LAW & CONTEMP. PROBS. Autumn 1996, at 103, 118.

larger pattern of facts and conditions that led to massive human rights violations. Primarily, war crimes tribunals are convened to investigate conduct that violates international laws governing war, including “killing of hostages, abuse of civilians in occupied territories, abuse of prisoners of war, and devastation that is not justified by military necessity.”<sup>28</sup> While war crimes tribunals focus on individual perpetrators and emphasize prosecution, truth commissions focus on gaining knowledge and understanding of the entire pattern of human rights abuses in a country without proceeding to conduct prosecutions of offenders.<sup>29</sup> Despite differences in the fundamental orientation and the methods used, adjudicative processes and truth commissions exist as attempts to expose the truth of what actually happened during the commission of crimes and as a means of establishing final accountability for wrong-doing.

The Chief Prosecutor at Nuremberg, United States Supreme Court Justice Robert Jackson, emphasized the importance of establishing an official record after World War II that would discourage denial and revisionism over time.<sup>30</sup> He advocated documenting Nazi atrocities “with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.”<sup>31</sup> Jackson’s statement acknowledges the possibility and danger of revisionism and asserts the value of establishing an authoritative record of the facts after extensive and widespread incidents of human rights abuses.

In situations where neither individual criminal trials nor war crimes tribunals are appropriate,<sup>32</sup> truth commissions offer a way to create an officially sanctioned body that will facilitate a comprehensive exploration of the truth so that resolution is still possible. Clearly, there are circumstances where adjudication is neither feasible nor appropriate. For example, trials can be impossible when the numbers of perpetrators requiring prosecution would overwhelm the country’s criminal justice and court system. Historically, war crimes tribunals have not been suitable when the human rights offenses and mistreatment occurred under conditions other than war. Neither criminal trials nor war crimes tribunals are particularly useful nor productive when the perpetrators of grave offenses have died. In all of these situations, alternative avenues of seeking justice are necessary. Truth commissions offer another way to promote justice and create resolution after grave and extensive human rights abuses.

By focusing on the overall patterns, circumstances, governmental policies, and social dynamics that led to the alleged abuses, truth commissions can promote

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28. BLACK’S LAW DICTIONARY 1577 (7th ed. 1999).

29. Hayner, *supra* note 10, at 605.

30. Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, June 7, 1945, *reprinted in* 39 AM. J. INT’L L. 178 (Supp. 1945).

31. *Id.* at 184.

32. Balint, *supra* note 27, at 118.

resolution by allowing members of a society to learn as much as possible about all that happened in the past.<sup>33</sup> Where criminal trials and war crimes tribunals focus on individual responsibility for illegal acts, truth commissions focus on multiple acts by numerous individuals or groups and the overall circumstances of human rights violations in an entire society. When many, or even all, of the perpetrators of human rights abuses are long dead, a truth commission provides a way to investigate the allegations and establish an official record in order to prevent reoccurrence and promote healing for the remaining victims and relatives. In sum, the truth commission process provides a method for seeking the truth and setting the record straight while simultaneously discouraging or eliminating the possibility of revisionism and denial of crimes that would otherwise go uninvestigated. Although the goal of truth commissions is not necessarily to bring to justice some of the individuals who perpetrated abuses, the possibility is that truth commissions, by encouraging truthful accounts and facilitating an open national dialogue, can further a society's knowledge and understanding of events, heal cultural wounds, and prevent future human rights abuses.

### **B. Purposes of Truth Commissions**

The general purposes of truth commissions are fourfold: truth commissions (1) provide an historic record; (2) promote a sense of justice for victims; (3) encourage and expedite national reconciliation; and (4) discourage similar crimes in the future.<sup>34</sup> While the purposes of commissions of inquiry may overlap and serve numerous purposes simultaneously,<sup>35</sup> the fundamental objective is to establish a candid, genuine account of a country's history and its government's and citizens' human rights abuses.

Given, however, that the nature of the violent repression is often witnessed and widely understood, and that the identities of the perpetrators are often generally known, the larger purpose of truth commissions may be to facilitate a state's acknowledgment of its officials' and citizens' egregious misdeeds, as well as the state's own responsibility.<sup>36</sup> According to some observers, official acknowledgment of wrongdoing through official recognition of events and acts that have been long-denied may herald the beginning of the country's psychological healing process.<sup>37</sup>

South Africa's Truth and Reconciliation Commission has stated goals that express effectively the essential purpose of all truth commissions. The primary goal of the Truth and Reconciliation Commission is to promote reconciliation and facilitate multicultural, interracial, and interpersonal healing by filling the

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33. *Id.*

34. Scharf, *supra* note 18, at 379.

35. Hayner, *supra* note 10, at 607.

36. *Id.*

37. *Id.* at 608.

psychological gap left by the abolishment of apartheid.<sup>38</sup> In order to accomplish this goal, the Truth and Reconciliation Commission seeks to provide acknowledgment through survivor storytelling, perpetrator confessions and acceptance of culpability, and to encourage or require acceptance of appropriate responsibility and ameliorative acts such as apologies and restitution.<sup>39</sup>

The inability to prosecute all of the alleged perpetrators of serious human rights abuses<sup>40</sup> creates a motivation for finding an alternative means of achieving justice. For some, truth commissions can satisfy the search for justice by offering one effective alternative to prosecution. By creating a body that is responsible for investigating abuses and creating an authoritative historical account that is detailed enough to convince skeptics, yet broad enough to explain overall patterns of human rights violations, truth commissions may be able to achieve a measure of justice when traditional means are unavailable.<sup>41</sup>

### **C. Effects of Truth Commissions**

When a broad variety of groups and individuals participate in and observe a process as complex and intricate as a truth commission, the effects are difficult to generalize. Yet, the success of a truth commission may hinge on its success in investigating the facts and establishing the truth about what happened, and on its ultimate effects on the nation as a whole. Effects on victims may turn on the ability of the final report to inform relatives of the fate of family members, promulgate international condemnation of human rights abuses, and encourage positive changes for the future. Perhaps the best potential outcome from any truth commission is the possibility that future occurrences of human rights abuses would be reduced.<sup>42</sup> Another highly desirable outcome would be the creation of a viable, lasting state of peaceful coexistence and cultural reconciliation between the peoples of a country.<sup>43</sup>

Truth commissions seek these hoped-for effects in a variety of ways. For example, truth commissions encourage victims to come forward and speak openly about their actions and experiences. Truth commissions facilitate and encourage participants to name names, acknowledge misdeeds, and make apologies.<sup>44</sup> Each of these avenues of reconciliation is based on the idea that some form of reckoning with

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38. Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47, 55 (1997).

39. *Id.*

40. Various reasons for failure to prosecute might include inadequate court resources, lack of funding for judicial action, the death and consequent unavailability of defendants, and dauntingly large numbers of perpetrators.

41. See Scharf, *supra* note 18, at 384.

42. See Hayner, *supra* note 10, at 609.

43. ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* (1998).

44. Hayner, *supra* note 10.



past evil is an essential component in the ongoing struggles of a country to put the past to rest and move on with greater hope and optimism.<sup>45</sup>

Truth commissions have a variety of potential effects. Perhaps the most important effect results from publication of the commission's official investigative report, recounting past crimes and patterns of abuses. A truth commission's report is an official publication that aims to provide an accurate and authoritative record of the country's past history.<sup>46</sup> The creation and publication of an official, trustworthy account that communicates all of the known truth can prevent the past from being rewritten, denied, or forgotten. Thus, the report may establish an official record that is not subject to revisionism.<sup>47</sup> Such a complete and authoritative report may provide a foundation for judges who seek authoritative bases for innovative decisions that establish new legal precedents.

The honest accounting sought by truth commissions may also "allow[ ] a society to learn from its past in order to prevent a repetition of such violence in the future."<sup>48</sup> Thus, an authoritative report can help to reduce the potential for future atrocities by contributing to an informed citizenry that would recognize and resist future abuses.<sup>49</sup> According to this theory, citizens are more likely to recognize, talk about, and take early action against future human rights violations when they have collectively experienced the investigative process of a truth commission by listening to the stories told by victims and perpetrators and accepting the commission's final authoritative report.

Truth commissions, through the process of official recognition and acknowledgment of the past, may encourage some victims and families to accept the reality of past events and begin the process of psychological healing.<sup>50</sup> Some human rights activists assert that after widespread human rights abuses, a full truth-telling must precede this process.<sup>51</sup> While not all observers agree that exposure of the truth facilitates reconciliation,<sup>52</sup> others believe that truth commissions "play a critical role in a country struggling to come to terms with a history of massive human rights crimes" by "serving a 'cathartic' [e]ffect" in a society's efforts to formally acknowledge a long-silenced past.<sup>53</sup> Still others argue that an inherent right to the truth exists in human rights laws and that the mere existence of such an inherent right

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45. See Neil J. Kritz, *Book Note*, 93 AM. J. INT'L. L. 983 (1999) (reviewing MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998)); see also NEIER, *supra* note 43.

46. Hayner, *supra* note 10, at 607.

47. *Id.* at 607-609.

48. Hayner, *supra* note 10, at 607.

49. *Id.* at 609.

50. *Id.* at 607.

51. *Id.* at 609.

52. Jonathan Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 315, 315 (1999).

53. Hayner, *supra* note 10, at 600.

justifies the formation of truth commissions.<sup>54</sup>

A truth commission's final report often makes specific and definite recommendations for reform, and these recommendations potentially have another effect on the country and its people. Suggested reforms may include improvements to a country's military and police forces, reparations to victims, and reform of the judicial system.<sup>55</sup> A report's recommendations may provide information and authority to lobby for beneficial change,<sup>56</sup> as well as educate and motivate the populace in accepting necessary changes. The content of the recommendations may serve to assist government officials in making the recommended changes. All of these effects can have significant positive impacts on survivors, on perpetrators, on the government, on the country's society, and on the world community.

South Africa's Truth and Reconciliation Commission has taken testimony from thousands of alleged perpetrators with mixed results.<sup>57</sup> The Truth and Reconciliation Commission's goal of interracial healing has thus far resulted in successes and failures,<sup>58</sup> but observers emphasize that perpetrator apologies are only one step in a complex process of psychological healing and cultural reconciliation.<sup>59</sup> However, the long-term effects of this effort are not yet known nor is the project universally accepted as positive.<sup>60</sup> Still, contrary to some initial concerns, the work of the Truth and Reconciliation Commission had not led to widespread demands for revenge or exorbitant compensation but, instead, seems to have resulted in satisfaction among some participants at having their suffering acknowledged.<sup>61</sup> Ultimately, the Truth and Reconciliation Commission may meet its goal of genuine interracial reconciliation. On the other hand, it may in the long run fail to accomplish the hoped-for results of reduced racism and a greater sense of healing and justice among all of the people of South Africa. However, when analyzing South Africa's effort, perhaps it is useful to remember that none of the fifteen truth commissions examined by scholar Patricia Hayner in her extensive and ground-breaking study of truth commissions had the effect of fueling violence or causing a situation in a country to become worse.<sup>62</sup> Thus, while the efforts of truth commissions in South Africa and other countries may ultimately prove ineffective, apparently there is little

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54. *Id.* at 611.

55. *Id.* at 609.

56. *Id.*

57. See Marianne Guela, *South Africa's Truth and Reconciliation Commission as an Alternate Means of Addressing Transitional Government in a Divided Society*, 18 B.U. INT'L L.J. 57 (2000); see also Yamamoto, *Race Apologies*, *supra* note 38, at 56.

58. Yamamoto, *Race Apologies*, *supra* note 38, at 56.

59. Kader Asmal, *International Law and Practice: Dealing With the Past in the South African Experience*, Address Before the American Society of International Law's 94th Annual Meeting (Apr. 5, 2000), in 15 AM. U. INT'L L. REV. 1211 (2000); Yamamoto, *Race Apologies*, *supra* note 38, at 64.

60. Allen, *supra* note 52.

61. See Yamamoto, *Race Apologies*, *supra* note 38, at 52.

62. Hayner, *supra* note 10, at 610.

to lose by making the attempt.

#### **D. A Brief History of Truth Commissions**

Truth commissions are neither new nor rare. The first modern international commission to gather information and create a record of alleged war crimes was established during the Balkan Wars of 1912 and 1913.<sup>63</sup> Following World War I, the Allies convened the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties in order to investigate German and Turkish atrocities.<sup>64</sup> During World War II, two investigative commissions were created to investigate German and Japanese war crimes.<sup>65</sup>

After more than twenty years of dormancy, the truth commission concept was revived in response to political upheaval and repressive regime practices in South America.<sup>66</sup> In 1978, the International Fact-Finding Commission was established to investigate grave violations of the Geneva Conventions of 1949.<sup>67</sup> The first United Nations-sponsored truth commission, convened in 1991, was called the “Commission on the Truth for El Salvador”<sup>68</sup> and its success led to a notable increase in the status and use of truth commissions.<sup>69</sup>

Between 1974 and 1994 alone, fifteen major truth commissions were convened in Africa, Europe, South America, Central America, and Southeast Asia.<sup>70</sup> Between March of 1992 and the end of 1993, six truth commissions were established.<sup>71</sup> Some countries, such as Uganda and South Africa, have seen the operation of more than one truth commission.<sup>72</sup> Despite the long history and well-established presence of truth commissions, however, truth commissions have been insufficiently studied; only one comprehensive survey has been published, and that study covered only the twenty-year period between 1974 and 1994.<sup>73</sup>

The form of truth commissions is steadily evolving beyond the traditional state-sponsored model.<sup>74</sup> Increasingly, truth commissions are sponsored by the United Nations on behalf of the international community, by an opposition party, or

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63. Scharf, *supra* note 18, at 377.

64. Division of International Law, Carnegie Endowment for International Peace, 32, *reprinted in* 14 AM. J. INT'L L. 95, 154 (1920).

65. Scharf, *supra* note 18, at 377.

66. Hayner, *supra* note 10, at 627.

67. Scharf, *supra* note 18, at 377.

68. Hayner, *supra* note 10, at 627.

69. *Id.* at 605.

70. *Id.* at 601-603, tbl.I.

71. *Id.* at 606.

72. *Id.* at 600.

73. *Id.*

74. Hayner, *supra* note 10, at 607.

by an alliance of nongovernmental organizations.<sup>75</sup> Some have criticized old-style, government-sponsored truth commissions due to the potential for political limitations and manipulations that could influence the course of the investigation and dilute the strength of the final report.<sup>76</sup> In response to allegations of susceptibility to political exploitation, some observers have called for a permanent international truth commission to operate under the United Nations as an adjunct to the International Criminal Court.<sup>77</sup> The arguments for a permanent international truth commission illustrate four of the primary needs facing any truth commission.<sup>78</sup> First, every truth commission must secure sufficient funding to conduct a thorough and detailed investigation and prepare an authoritative history.<sup>79</sup> Second, truth commissions must operate in a manner and with a staff that can assure neutrality and independence.<sup>80</sup> Third, truth commissions must be able to operate in safety, insulated from domestic reprisals.<sup>81</sup> Fourth, a truth commission should be initiated as quickly as possible after grave human rights violations are recognized.<sup>82</sup>

#### **E. Universal Jurisdiction as the Legal Framework for Convening Truth Commissions**

Some crimes are so abhorrent to the world that customary norms have sprung up among nations obligating all states to deal similarly with them. The legal term *jus cogens* refers to norms so fundamental to the exercise of international law that individual states cannot, as a matter of international law, contravene them.<sup>83</sup> *Jus cogens* norms prevail over all other norms and are deemed to be “‘peremptory’ and non-derogable.”<sup>84</sup> Consequently, all states are obligated to prioritize the enforcement of these norms and to avoid taking any action that would limit their implementation.

Although there is some disagreement as to exactly which crimes do and do not contravene *jus cogens* norms, broad agreement exists to include the crimes of “aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.”<sup>85</sup> These crimes are considered to be so egregious

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75. *Id.*

76. Scharf, *supra* note 18, at 381.

77. *See id.*

78. *See id.*

79. *See id.* at 380-381.

80. *See id.*

81. *See id.* at 381-382.

82. *See id.* at 382.

83. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 125 (3d ed. 1999).

84. M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 67 (1996).

85. *Id.* at 68.

that every state may assert jurisdiction over the perpetrators.<sup>86</sup> Thus, jurisdiction is universal and exists regardless of where the violations were committed, by whom, against whom, and whether in peace or war<sup>87</sup> and, as a result, any state may prosecute perpetrators of crimes that qualify as *jus cogens* norms regardless of the nationality of the perpetrator or victim.<sup>88</sup>

Crimes that are generally recognized by the international community as rising to the status of *jus cogens* norms create, according to some scholars, a variety of related obligations for the nations of the world. These obligations include a duty to prosecute or extradite, a responsibility to forego statutes of limitations, and an obligation to recognize the universality of jurisdiction for certain crimes.<sup>89</sup> For instance, the Draft Convention on Genocide specifically provides that participants to the convention “pledge themselves to punish any offender [sic] under this Convention within any territory under their jurisdiction,” irrespective of the nationality of the offender or the place where the offense [of genocide] has been committed.<sup>90</sup>

The United States generally upholds the standard of universal jurisdiction for crimes that rise to a *jus cogens* norm.<sup>91</sup> The Restatement (Third) of the Foreign Relations Law of the United States provides that “[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, [and] war crimes.”<sup>92</sup> In *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), a United States Circuit Court approved the defendant’s extradition for the mass murder of Jews, even though none of his offenses had been committed in the requesting state, on the ground that “some crimes are so universally condemned that the perpetrators are the enemies of all people.”<sup>93</sup> The court concluded that when crimes are sufficiently heinous to rise to the level of a *jus cogens* norm, “any nation

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86. See Christopher C. Joyner, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 169 (1996).

87. Bassiouni, *supra* note 84, at 66.

88. See *Filartega v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1979) (*cert. denied*, 442 U.S. 901 (1979)) (holding that certain crimes justify prosecution by any state regardless of the location of the offense); see also Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot*, 106 YALE L.J. 2259, 2278 (1997).

89. Bassiouni, *supra* note 84, at 65-66.

90. Draft Convention on Genocide, G.A. Res. 6th Comm., U.N. GAOR, 2d Sess., Annex No. 3, at 215.

91. See *Filartega v. Pena-Irala*, 630 F.2d at 889.

92. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

93. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) (concluding the perpetrators of especially heinous crimes against humanity should be treated as *hostis humanis*, or the enemies of all humanity, over which all states may assert jurisdiction).

which has custody of the perpetrators may punish them according to its law.”<sup>94</sup>

The newly created International Criminal Court may bring to justice greater numbers of human rights violators than occurred when states were exclusively responsible for prosecution of offenders. For instance, the International Criminal Court may become especially active in countries where the necessary prosecution can not or does not proceed swiftly and appropriately. However, the International Criminal Court is unlikely to be useful in addressing contemporary claims of Indigenous peoples in the United States. First, in such circumstances, the International Criminal Court will operate primarily on the basis of “ceded jurisdiction” where jurisdiction is given through state consent,<sup>95</sup> and the United States is unlikely to give such consent. Second, the new Court is likely to be preoccupied with claims involving very recent, and perhaps ongoing, offenses that will leave few resources to investigate the long-term mistreatment of indigenous peoples in many countries throughout the world. Third, the structure of the International Criminal Court simply does not lend itself to the kind of broad-based historical and cultural inquiry that is necessary to investigate broad, cultural patterns of mistreatment of Indigenous peoples in the United States. Nor is long-past mistreatment within the jurisdiction of the International Criminal Court.<sup>96</sup> In addition, the goals of prosecution do not address the needs presented in the aftermath of a historical pattern of abuses that has persisted for hundreds of years. Therefore, under the circumstances that exist in the United States, a truth commission, with its focus on overall societal patterns, is a better choice than the International Criminal Court.

Even when jurisdiction is available, however, prosecution is not always feasible or possible. In such cases, a truth commission can provide an alternative for those who seek a degree of justice.<sup>97</sup> Thus, under certain circumstances, a truth commission can claim the requisite universal jurisdiction and can operate as a useful and acceptable substitute for prosecution. However, despite broad legal authority to prosecute, some states continue to behave as though the operation of a truth commission is simply a substitute for the prosecution of perpetrators of gross violations of human rights.<sup>98</sup> Instead, prosecution of human rights violators should proceed whenever possible. Truth commissions should not, without cause, simply be substituted for legal prosecution. Few would dispute, however, that when full

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94. *Id.*

95. Bradley E. Berg, *The 1994 I.L.C. Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure*, 28 CASE W. RES. J. INT'L L. 221, (1996).

96. Under Article 24, the International Criminal Court has limited its jurisdiction to criminal conduct that occurred after the treaty enters into force. Rome Statute of the International Criminal Court, July 17, 1998 U.N. Doc. A/Conf. 183/9, art. 24.

97. Reasons that prosecution might be impractical or impossible include the death or disappearance of perpetrators, lack of access to necessary records, and numbers of perpetrators that exceed the ability of a country's legal resources to prosecute effectively.

98. See Theresa Klosterman, Note, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT'L & COMP. L. 833, 835 (1998).

prosecution is not realistically possible, it is appropriate to seek a viable alternative. A truth commission would provide that alternative.

### **F. The Role of Impunity in the Search for Justice**

In exchange for participation in a truth commission process, perpetrators may receive immunity from prosecution and civil liability.<sup>99</sup> When truth commissions act to grant immunity or amnesty to perpetrators of atrocities, many international observers express concern and alarm.<sup>100</sup> Some observers contend that the very idea of truth commissions involves a sacrifice of justice for expediency.<sup>101</sup> Others argue that when prosecution is unrealistic, impractical, or simply impossible, an alternative must be found so that the incidents will not be denied, revised, or simply forgotten.

Ideally, all states would honor the duty to investigate, immediately and thoroughly, grave violations of human rights. All states have an obligation to take measures to prosecute the perpetrators of such violations.<sup>102</sup> However, prosecutions and trials following the report of a truth commission are very rare.<sup>103</sup> In general, there are two broad justifications for forgoing prosecution and granting immunity to perpetrators. First, the manifest realities of limited resources and weak cases prevent prosecution of every single case, even when human rights violations are undisputed. Second, the greater good may be served by convincing lower-level criminals to give information and testimony to the truth commission in order to gather evidence against even high-ranking officials that orchestrated criminal activity.<sup>104</sup>

International documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on

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99. Yamamoto, *Race Apologies*, *supra* note 38, at 56.

100. The Fall, 1996 issue of *LAW & CONTEMPORARY PROBLEMS* is entirely devoted to promoting accountability for serious violations of fundamental human rights. *See also* GEULA, *supra* note 57; Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 *DENV. J. INT'L L. & POL'Y* 591 (1998) [hereinafter *Redressing Impunity*]; Madeline H. Morris et al., 59 *LAW & CONTEMP. PROBS.* 1-197 (1996); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 *YALE L.J.* 2619 (1991); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 *CORNELL INT'L L.J.* 507 (1999).

101. *See generally* Peter Parker, *The Politics of Indemnities: Truth Telling and Reconciliation in South Africa: Ending Apartheid Without Forgetting*, 17 *HUM. RTS. L.J.* 1 (1996); Allen, *supra* note 52.

102. *See* Joyner, *Redressing Impunity*, *supra* note 100, at 592.

103. *See* Hayner, *supra* note 10, at 604.

104. *See generally* Michael P. Scharf, *The Letter of the Law: The Scope of the International Obligation to Prosecute Human Rights Crimes*, 59 *LAW & CONTEMP. PROBS.* 41 (1996); Joyner, *supra* note 100.

Human Rights, the American Convention on Human Rights, and the United Nations Convention Against Torture all recognize the right of victims to be compensated for injuries including loss of life, loss of liberty, physical or psychological injury, loss of or damage to property, and loss of opportunity caused by human rights abuses.<sup>105</sup> Satisfactory compensation, however, need not always be in the form of financial or property reparations, just as effective punishment need not always be in the form of a prison term.

Differences in punishment and compensation paradigms may be at least partly cultural. For instance, although Western legal systems largely favor adversarial and adjudicative processes in their approach to dispute resolution, African and other indigenous customs and traditions emphasize the role of consensus, mediation, and conciliation.<sup>106</sup> While Western legal systems engage extensively in plea bargaining – a well-established model of negotiating punishment – not all cultures accept that model of criminal justice.<sup>107</sup>

Acknowledging that different perceptions of justice exist in different cultures and countries is fundamental to acceptance of the operation of truth commissions. Some believe that, if grants of amnesty or impunity will result in more people coming forward to tell the truth about what they saw and did, then such grants are justified. Others simply accept that, for some victims and relatives, justice and compensation might come in the form of welcome information about missing relatives or sincere apologies from individuals or governments rather than in the form of reparations or strict prosecution of offenders.

### III. AUSTRALIA'S COUNCIL FOR ABORIGINAL RECONCILIATION

*The history of a nation is, unfortunately, too easily written as the history of its dominant class.*<sup>108</sup>

Prime Minister Kwame Nkrumah, Ghana

Australia's efforts to come to terms with its past history of enduring racism against Aboriginal and Torres Strait Islander peoples<sup>109</sup> provide an informative

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105. Scharf, *supra* note 18, at 388-389.

106. See BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER* 628 (3d ed. 1997).

107. One example of this is the South African Truth and Reconciliation Commission's de-emphasis on the "Western" concepts of prosecution and plea-bargaining. Guela, *supra* note 57.

108. KWAME NKUMAH, *CONSCIENCISM* 63 (1964).

109. The Torres Strait Islands consist of three island groups in the western Pacific Ocean just northeast of Australia, located in the passage between the Coral Sea and the Arafura Sea, south of the island of New Guinea and north of Cape York Peninsula, near Queensland, Australia. *NEW ENCYCLOPEDIA BRITANNICA*, 14 Macropedia 475 (15th ed. 1989).



illustration of one country's use of a truth commission to attempt to set the record straight, acknowledge past abuses and injustices, and create a better future. Australia's innovative and wholly domestic efforts to reconcile its past history have also demonstrated that the truth commission model can be successfully adapted to a greatly expanded purpose.

Australia's history is similar to that of the United States in that both countries were colonized by Europeans without regard for the rights of existing civilizations of Indigenous inhabitants. When the British first arrived in Australia, intending to establish a penal colony, they created records claiming that the continent was uninhabited, despite the presence of the Aboriginal and Torres Strait Islander peoples throughout the continent and its surrounding islands.<sup>110</sup> According to the international law of the day, a colonizing country was permitted to ignore the legal status of Indigenous peoples if the country was simply declared to be unoccupied (*terra nullius* or "land of no one.")<sup>111</sup> For the next nearly two hundred years of colonialism, the Indigenous peoples of the region were variously ignored, attacked, or excluded, both legally and culturally.<sup>112</sup>

Beginning in about 1937, Australia's official policy shifted toward "assimilation" of Indigenous peoples into the dominant culture.<sup>113</sup> The goal of assimilation is to induce minorities to adopt the practices and characteristics of the larger culture to the extent that they are transformed and, ultimately, are indistinguishable from the dominant culture.<sup>114</sup> By 1962, the official policy had shifted away from assimilation and toward integration of Indigenous peoples into the larger culture.<sup>115</sup> For example, in 1967, the Australian Constitution was finally amended to include Indigenous peoples and specifically allowed Aboriginal peoples to vote and be counted in the national census.<sup>116</sup> However, at the same time, the government continued its policy of removing Indigenous children from their families for placement in "proper" Christian homes.<sup>117</sup>

Although the last decade in particular has evidenced a political and legal shift toward multi-culturalism and self-determination in Australia, the devastating effects of racial discrimination are still readily apparent in the country.<sup>118</sup> For example, Indigenous Australians are so disproportionately represented in Australia's criminal justice system that researchers can predict, solely on the basis of race, rates

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110. See Rick Sarre, *Seeking Justice: Critical Perspectives of Native People: The Imprisonment of Indigenous Australians: Dilemmas and Challenges for Policymakers*, 4 GEO. PUB. POL'Y REV. 165, 165 (1999).

111. *See id.*

112. *See id.* at 167.

113. *See id.*

114. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 79 (1971).

115. *See Sarre, supra* note 110, at 165.

116. *See id.*

117. *See id.*

118. *See id.* at 168.

of arrest, remand in custody, sentences, and terms of imprisonment.<sup>119</sup>

Gradually, the Indigenous people of Australia, like groups of indigenous peoples around the world, have grown more vocal about their treatment, disenfranchisement, and legal status.<sup>120</sup> Conventional legal approaches have not adequately addressed historical disadvantages such as dispossession of lands, health problems, forced cultural assimilation, and lack of control over their lives and cultures.<sup>121</sup> Increasingly, Indigenous Australians are demanding to be treated as equal to other inhabitants of their state.<sup>122</sup> At the same time, the international community has responded to racism around the world with treaties prohibiting cultural and racial discrimination in participant countries.<sup>123</sup>

Finally, in 1991, Australia's Commonwealth Parliament voted unanimously to establish the Council for Aboriginal Reconciliation [hereinafter Council] in order to address the country's pervasive racial discrimination and to promote reconciliation between Aborigines and Torres Strait Islanders and European settlers.<sup>124</sup> The Council's objective was to improve relations between all Australians by providing Australians with an opportunity to "build a nation that lives out the values it proclaims."<sup>125</sup>

The preamble to the Council for Aboriginal Reconciliation Act of 1991 recognized that Australia "was occupied . . . for thousands of years before British settlement . . . [in] 1788," that the Indigenous people of Australia "suffered dispossession and dispersal from their traditional lands by the British Crown," and that reconciliation is a "most desirable" goal that has not yet occurred.<sup>126</sup> The statute incorporated seven functions: (1) promoting Indigenous cultures and history; (2) considering reconciliation initiatives; (3) advising Ministers of State; (4) developing strategic plans; (5) promoting open discussion forums among all Australians; (6) making recommendations regarding the need for a formal reconciliation document; and (7) making periodic progress reports to the Australian Government.<sup>127</sup> For its part of the reconciliation process, the Commonwealth promised to

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119. *See id.* at 165.

120. *See* Rhona K.M. Smith, *Conceiving the Lawyer as Creative Problem Solver: Specific Applications: The International Impact of Creative Problem Solving: Resolving the Plight of Indigenous Peoples*, 34 CAL. W. L. REV. 411, 411 (1998).

121. *Id.* at 412.

122. *See id.* at 413.

123. International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195; United Nations Declaration on Elimination of All Forms of Racial Discrimination, Declaration 1904 (XVIII), 18th Sess., U.N. Doc. A/RES/1904 (1963).

124. Reconciliation Australia, *Roadmap for Reconciliation*, Council for Aboriginal Reconciliation Archive, at <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/pg4.htm> (visited Oct. 21, 2001).

125. *Id.*

126. *Id.*

127. Smith, *supra* note 120, at 422.

[ ]seek an ongoing national commitment from governments at all levels to cooperate and to coordinate with the Aboriginal and Torres Strait Islander Commission as appropriate to address progressively Aboriginal disadvantage and aspirations in relation to land, housing, law and justice, cultural heritage, education, employment, health, infrastructure, economic development and any other relevant matters in the decade leading to the centenary of Federation [in] 2001 [when the Council's term will end.]<sup>128</sup>

The Council consists of twenty-five representatives from Aboriginal and Torres Strait islander areas, major business interests, and industry leaders.<sup>129</sup> The Council includes at least twelve Aborigines and two Torres Strait Islanders as well as an Aboriginal Chairperson, a Deputy Chairperson, and representatives nominated by the Parliament.<sup>130</sup> Initially, the Parliament instructed the Council to work with all parties to determine the appropriateness of a formal document or documents of reconciliation.<sup>131</sup> After extensive consultations, the Council concluded that any documents prepared by the Council would need to “express the Australian people’s hopes and aspirations for reconciliation,” share responsibility for negotiating steps toward overcoming disadvantages, design an ongoing process of collaboration, and “recognise that much remained to be done.”<sup>132</sup> The Council also expressed its belief that documents of reconciliation would need to gain acceptance and commitment from groups throughout Australia, including parliaments, local authorities, organizations, institutions, and communities.<sup>133</sup> In structuring efforts to achieve true reconciliation, the Council emphasized the need for participation and efforts of Australians in their everyday lives.<sup>134</sup> The Council formed a vision of “[a] united Australia which respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all.”<sup>135</sup> In its plan, the Council identified “the four Cs” (communication, consultation, cooperation, and community action) to be methods for achieving each of the three major steps toward reconciliation: first, looking together at the issues and recognizing the need for change; second, looking forward and agreeing to make the needed changes; and third, implementing change.<sup>136</sup>

The Council was designed to be a formal nine-year process of reconciliation

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128. Reconciliation Australia, *Roadmap for Reconciliation*, *supra* note 124.

129. Reconciliation Australia, *About the Council*, Council for Aboriginal Reconciliation Archive, at <http://www.reconciliation.org.au/council/about.htm> (last visited Oct. 2, 2000).

130. Smith, *supra* note 120, at 422.

131. Reconciliation Australia, *Roadmap for Reconciliation*, *supra* note 124.

132. *Id.*

133. *Id.*

134. *Id.*

135. Reconciliation Australia, *About the Council*, *supra* note 129.

136. Smith, *supra* note 120, at 423.

divided into three 3-year terms, each with different priorities and explicit goals.<sup>137</sup> For example, the Council's three primary goals for the period between 1998 and 2000 were stated as follows:

Goal 1: Documents of Reconciliation

Achieve recognition and respect for the unique position of Aboriginal and Torres Strait Islander peoples as the indigenous peoples of Australia through a national document of reconciliation and by acknowledgment within the Constitution of this country.

Goal 2: Partnerships in Reconciliation

Gain the commitment of governments, business, peak organisations and community groups to form partnerships which will achieve social and economic equality for Aboriginal and Torres Strait Islander peoples.

Goal 3: The People's Movement for Reconciliation

Encourage and support the people's movement for reconciliation to achieve justice and equity for all Australians, to embrace the unique place of indigenous peoples in the life of the nation and to ensure that the work of reconciliation continues beyond the life of the Council.<sup>138</sup>

Despite its modest successes,<sup>139</sup> the Council has yet to achieve the sweeping changes envisioned for Australia during the Council's inception.<sup>140</sup> Perhaps because the Council is an entirely domestic process, the exceptionally rigorous fact-finding functions that have occurred during investigations by other truth commissions seem absent here.<sup>141</sup> Yet, throughout Australia, the Council for Aboriginal Reconciliation has opened a nationwide dialogue in an attempt to educate the citizenry and set the record straight about the country's treatment of Aboriginal and Torres Strait Islanders.<sup>142</sup> Though not a perfect solution, at least the Council has begun the process of officially recognizing the brutality and tragedy of the country's origins and reconciling that reality with Australia's established modern society. Certainly, there

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137. *See* Reconciliation Australia, *About the Council*, *supra* note 129.

138. *Id.*

139. Success for a process as complex and extensive as a truth commission is particularly difficult to define and measure. Some changes that might be considered indicators of success include an increase in discussion and dialogue among citizens, greater scrutiny of potentially discriminatory governmental policies, and a more open acknowledgement of past wrongs by some citizens and government officials.

140. *See generally* Smith, *supra* note 120.

141. *Id.*

142. *See* Sarre, *supra* note 110; *see also* Smith, *supra* note 120.

is much room for improvement in the structure and function of future bodies convened for similar purposes. However, Australia's Council for Aboriginal Reconciliation has demonstrated that an official, domestic body convened to create reconciliation after centuries of oppression and mistreatment is realistic, feasible, and potentially useful.

#### IV. APPLYING THE TRUTH COMMISSION MODEL TO THE UNITED STATES

*God has not been preparing the English speaking and Teutonic peoples for a thousand years for nothing . . . He has given us the spirit of progress to overwhelm the forces of reaction throughout the earth. He has made us adept in government that we may administer government among savage and senile peoples . . . . And of all our race He has marked the American people as His chosen nation to finally lead in the regeneration of the world.*<sup>143</sup>

U.S. Senator Albert J. Beveridge

*The invaders also anticipated, correctly, that other Europeans would question the morality of their enterprise. They therefore [prepared] . . . quantities of propaganda to overpower their own countrymen's scruples. The propaganda gradually took standard form as an ideology with conventional assumptions and semantics. We live with it still.*<sup>144</sup>

Francis Jennings, Historian

When extensive human rights abuses have occurred in a country, some investigation is considered both necessary and desirable, and the truth commission model presents one potential vehicle for achieving these ends. In order for a truth commission to gain acceptance in the United States, the conduct of the government, its agents, and citizens would probably need to rise to the level of the most serious crimes and misdeeds.<sup>145</sup> The history of westward expansion of European settlers in the United States includes serious, and at times shocking, allegations of crimes

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143. 56 CONG. REC. 33, 705-711 (daily ed. Jan. 9, 1900) (statement of Sen. Beveridge).

144. FRANCIS JENNINGS, *THE INVASION OF AMERICA*, v (1975).

145. Historically, neither the government nor the citizens of the United States have displayed a ready willingness to openly accept culpability for even overt acts of mistreatment or oppression of minorities. Exceptions, however, include such situations as the lengthy, but ultimately successful, struggle of Americans of Japanese descent to obtain reparations after unwarranted incarceration in concentration camps during World War II, as well as the apology issued to native Hawaiians by Congress on behalf of the United States government. S.J. Res. 19, *supra* note 6.

against the country's original inhabitants. However, despite authoritative evidence of innumerable incidents of grave human rights abuses, uncertainty and ignorance about the record of treatment of Native Americans persist among citizens of the United States.

If even a few of the historical records, authoritative reports, and first-person accounts of past mistreatment of Native Americans are true, such mistreatment would constitute genocide that would justify convening a truth commission. However, in order for a truth commission to be warranted in the United States, it is not necessary that the entire truth already be established or widely recognized beforehand. Rather, it is only necessary that there exist credible reports and indicators pointing to incidents or patterns of grave human rights abuses that deserve comprehensive, authoritative investigation and full exposure. It is the truth commission itself that would ultimately have to establish the truth or falsity of the historical and contemporary records alleging human rights violations against Native Americans in the United States.

#### **A. Justifications for a Truth Commission in the United States**

*Suppose the government of the United States took your land, lost or stole your money, and broke virtually every promise it ever made to you. Suppose your rights, your constitutionally guaranteed rights, were being violated . . . what would you do to get justice?*<sup>146</sup>

John E. Echohawk, Executive Director, Native American Rights Fund<sup>147</sup>

What type or extent of offenses constitute justification for the convening of a truth commission? Historically, truth commissions have been formed to investigate only the most serious and far-reaching patterns of ethnic cleansing, mass genocide, torture, mutilation, murder, rape, disappearances, child abduction, forced assimilation, enslavement, dislocation, repression, and annihilation.<sup>148</sup> In some cases, however, even a single incident might serve to expose and illuminate the existence of a

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146. Fundraising letter from John E. Echohawk, Executive Director of the Native American Rights Fund (Sept. 2001) (on file with the Arizona Journal of International and Comparative Law).

147. John EchoHawk is a member of the Pawnee tribe and co-founder and executive director of NARF, whose purpose is to preserve tribal existence, protect natural resources, promote human rights, and develop Indian law. For more information on Mr. EchoHawk and NARF, see Ralph W. Johnson, *Indian Law into the Twenty-First Century: Indian Tribes and the Legal System*, 72 WASH. L. REV. 1021 (1997); Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953 (1998).

148. See generally Hayner, *supra* note 10.

widespread pattern of abuse that deserves authoritative investigation. To that end, consider whether the following event should trigger a truth commission:

During the course of peace negotiations between official representatives of a democratic government and several groups of displaced ethnic minorities, military officials helped create a temporary refugee encampment that consisted of hundreds of men, women, and children living in tents. During the peace talks, the government representatives gave specific and repeated assurances of safety and protection to the lead negotiators from the refugee camp. On one occasion during the course of the peace negotiations, the head government representative instructed nearly all of the adult men to go on an expedition away from the camp. The next morning at sunrise, about seven hundred government soldiers brutally attacked the women, elderly people, children, and remaining men who were asleep in the camp. During the slaughter, many people, including children, tried to surrender by raising the official flag of the soldiers' government as well as white surrender flags, but these signs of peace were disregarded by the soldiers. Later, the official government report concluded that four to five hundred refugees and nine government soldiers had been killed. Official eye-witness testimony (including at least one government lieutenant) provided documentation of the soldiers' war crimes, including the murder of unarmed people while attempting to surrender. Eye-witness accounts of atrocities committed by the soldiers included mutilation of all or nearly all of the victims' bodies. Soldiers were observed chopping out and placing on display the genitals of women, men, and children and skinning off, exhibiting, and proudly wearing the scalps of victims.<sup>149</sup>

This incident, detailed during hearings conducted by the United States Congress soon after, is an account of the 1874 attack on Native Americans by United States government soldiers that came to be known as the Sand Creek Massacre. Reading about the events that occurred that day could lead some to conclude that a pattern of official abuse toward Native Americans must have existed at the time that was so grave as to require, even at this late date, a process of investigation beyond the usual official inquiry. Others might argue that one such incident, no matter how

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149. This retelling of the 1864 Sand Creek incident was summarized from the detailed description that appeared in Dee Brown, *supra* note 5, at 68-102. Brown's description was drawn from accounts contained in Congressional reports of that period, including U.S. Congress 39th, 2nd session, Senate Reports 142 and 156, and Senate Executive Document 26. *See also* STAN HOIG, THE SAND CREEK MASSACRE (1961).

shocking or reprehensible, cannot justify an entire truth commission process and should, instead, result in a more typical process of investigation and adjudication. Still others may conclude that the incident is historical in nature, and argue that it was adequately discussed and recorded at the time, and, thus, that it has little or no relevance to modern issues.

It is true that truth commissions usually focus on only the most pervasive patterns of human rights abuses, and that one incident such as the one described above is unlikely to trigger a truth commission.<sup>150</sup> Yet a larger or more extensive pattern of similar human rights offenses over time represents the prototypical justification for convening a truth commission in order to conduct an extensive investigation, establish the truth of what happened, and create an authoritative, officially acknowledged report.<sup>151</sup> Sadly, records in the United States show that the Sand Creek Massacre, although perhaps one of the best-documented, is not the only massacre of Native Americans.<sup>152</sup> These past massacres and other examples of mistreatment that will be discussed *infra*, strengthen the justification for some additional measure of official investigation into the pattern or patterns of human rights abuses that preceded and followed these incidents in the United States.

In other countries, truth commission reports have revealed that even the most shocking and monstrous treatment of ethnic groups was often widely and generally known by citizens of the country, and that the human rights abuses were carried out with the implicit or explicit approval of high-ranking government officials.<sup>153</sup> Certainly, this was the case in the United States. For most of the country's history, officials of the United States government publicly promoted, sanctioned, and orchestrated mistreatment and alleged human rights abuses against Native Americans.<sup>154</sup> In addition, at least some incidents and perhaps even some patterns of mistreatment of American Indians were generally known to and accepted by many American citizens at the time and may be known to many Americans in the present as

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150. See generally Hayner, *supra* note 10.

151. *Id.*

152. In addition to the Sand Creek Massacre, documented massacres of noncombatants occurred at Wounded Knee and in Washita, Oklahoma in the last years of the nineteenth century. See DRINNON, *supra* note 5; FREDRICH E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984); Brown, *supra* note 149; Limerick, *supra* note 5; see also Steve Russell, *Seeking Justice: Critical Perspectives of Native People: A Black and White Issue: The Invisibility of American Indians in Racial Policy Discourse*, 4 Geo. Public Pol'y Rev. 129 (1999).

153. See Hayner, *supra* note 10.

154. BROWN, *supra* note 5; HOXIE, *supra* note 152. (establishing that the United States government, through its official representatives, sanctioned abuses against indigenous peoples., including, the Sand Creek Massacre which occurred under the military authority of U.S. Army Colonel Chivington. The Seventh Cavalry, under George Armstrong Custer, pursued and attacked Native American tribes on numerous occasions prior to the Battle of Wounded Knee in 1876).



well.<sup>155</sup> For example, the Trail of Tears, the infamous forcible relocation of Native Americans by government troops that resulted in the deaths of four thousand Cherokee, was common knowledge at the time and is still well known today.<sup>156</sup>

However, while some incidents of mistreatment, and perhaps even some patterns of abuse, may be well-known to many people, the complete history of westward expansion in the United States and the overall fate of the Indigenous inhabitants of the North American continent has not been widely known and understood by average citizens in past or current generations.<sup>157</sup> In the United States, misinformation and lack of information is the norm when it comes to understanding and acknowledging the history of the country and the treatment of Native Americans over the last several hundred years.<sup>158</sup> Schools in the United States, routinely teach children revisionist accounts of American history, including reports about the country's original inhabitants that misstate, misrepresent, or delete basic historical truths.<sup>159</sup> According to Smithsonian Institution researcher James W. Loewen, American history "[t]extbooks . . . leave out anything that might reflect badly upon our national character."<sup>160</sup> "Startling errors of omission and distortion mar American histories," and some of the information presented in elementary, high school, and college textbooks currently in use is "flatly wrong or unverifiable."<sup>161</sup> Consequently, many American children grow into adults who continue to believe myths, defend false accounts, and deny basic truths that are well known to historians.<sup>162</sup> As a result, unfair and unjust treatment of Native Americans, too often, is not recognized, accepted, or generally understood,<sup>163</sup> a fact which may contribute to the persistence of problems and tensions between the cultures and the failure of efforts to create a tolerant, integrated culture in the United States.<sup>164</sup>

In the United States, there are those who doubt or deny that Native Americans in the United States were mistreated, enslaved, subjected to germ warfare, exterminated or displaced. Others may acknowledge this treatment but justify it by

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155. See TRENNERT, *supra* note 5. The government's long-standing policy of forcibly removing Indian children from their homes for acculturation and education in Indian Schools constitutes an obvious example of racially-based mistreatment that was once common knowledge in the United States. For example, one of the major city thoroughfares in Phoenix, Arizona has long been called Indian School Road because of the long-established location of the local Indian School on that road. See generally TRENNERT, *supra* note 5.

156. See WASHBURN, *supra* note 5, at 62; see generally JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION (1988).

157. See LOEWEN, *supra* note 2; Russell, *supra* note 152.

158. See generally LOEWEN, *supra* note 2.

159. See *id.*

160. *Id.* at 2.

161. *Id.* at 4.

162. See generally *id.*

163. See *id.*

164. See David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 849 n.283 (1991).

maintaining that repression and annihilation of indigenous peoples were justified because of ruthless attacks by “blood-thirsty savages” against “innocent settlers” who were forced to use violence only to defend themselves and their families against unwarranted attacks. This view, though unsupported by the historical record, persists in some regions. For example, controversies over the historical facts, apparent in efforts to replace undisputedly inaccurate, racist monuments with historically accurate monuments,<sup>165</sup> lead to vigorous disputes over the representational accuracy, historical legitimacy, and cultural appropriateness of the country’s memorials and monuments.<sup>166</sup> Even at sites of well-documented offenses against Native Americans, some citizens continue to insist on retaining monuments and statues that praise the heroism of “settlers” against ruthless “savages.”<sup>167</sup> Some monuments, like those in Sand Creek, Colorado and Washita, Oklahoma, have memorialized the sites as “battlefields” and celebrate the heroism of the immigrant settlers despite historical records that document the landmarks as sites of infamous massacres of Native Americans men, women, and children at the hands of the United States Cavalry and groups of volunteer militia.<sup>168</sup> In other parts of the country such as Wisconsin, Minnesota, and the Pacific Northwest, white citizens routinely protest the legitimacy of the exercise of Native American hunting and fishing rights, using slogans such as “Spare a fish, spear an Indian.”<sup>169</sup>

These few examples of strained relations over the historical record demonstrate some of the ongoing controversy over Native American treatment and rights and support the call for a comprehensive, officially sanctioned investigation and authoritative report. As one scholar has noted, the abuses and wrongs suffered by Native Americans in the United States over hundreds of years have included a broad variety of well-documented examples of racially-motivated mistreatment and violence, including “brutal massacres, efforts to extinguish entire cultures, theft of

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165. See Linenthal, *supra* note 9, at 260-61.

166. See generally *id.*

167. In Santa Fe, New Mexico’s central town square, the historic monument memorializing the heroism of the town’s Spanish founders has been defaced since at least 1978 by chisel marks that have obliterated the monument’s reference to Native Americans as “savages.”

168. See Linenthal, *supra* note 9, at 258-60. Certainly it is possible for a more representative historical account to be presented and promoted. For instance, the Little Bighorn Battlefield National Monument was, at one time, a shrine to the “hero” George Armstrong Custer and the Seventh Cavalry despite allegations in the historical record that Custer and his men committed murder at this site and others. Now, however, the Monument manages to tell both sides of the stories at once; the accounts of the indigenous peoples as well as the perspective of the Seventh Cavalry. Thus, the site has become a historic monument that is neither claimed nor monopolized by either side’s interpretation of the incident. *Id.*

169. Robert Johnson, *Indians Send Signals that Rile Neighbors of Station WOJB*, WALL ST. J., July 8, 1988, at 1. Note that this newspaper headline subtly creates the impression that it is the Native Americans who, by participating in traditional hunting and fishing activities, are responsible for generating conflict with their white neighbors.

land with recognized title, routine treaty violations, and the whole range of exclusionary practices.”<sup>170</sup> Taken collectively, these actions constitute the gravest forms of mistreatment that can qualify as genocide. When a variety of records document such actions, the case for convening a truth commission becomes even stronger.

### 1. Allegations of Genocide

*One is astonished in the study of history at the recurrence of the idea that evil must be forgotten, distorted, skimmed over. We must . . . [only] remember the things we find creditable and inspiring. The difficulty, of course, with this philosophy is that history loses its value as an incentive and example; it paints perfect men and noble nations, but it does not tell the truth.*<sup>171</sup>

W.E.B. Du Bois, Historian

The record of mistreatment and exploitation of Native Americans contains accounts of human rights abuses as barbarous and cruel as any encountered during the last century by investigators conducting official inquiries into alleged genocide in countries around the world.<sup>172</sup> However, to determine whether the mistreatment of Native Americans qualifies as genocide, the word must first be defined, and then some acts of maltreatment and exploitation must be documented and compared to that definition.

Polish scholar Raphael Lemkin coined the term genocide in the 1940s to describe a coordinated attempt to annihilate a racial, national, or religious group.<sup>173</sup> In essence, “[g]enocide is a modern word for an old crime”<sup>174</sup> that derives from the combination of the Greek word *genos*, meaning “race or tribe,” and the Latin word *caedo*, meaning “to kill.”<sup>175</sup>

Following World War II, the United Nations negotiated within its membership to adopt a Convention on Genocide that would clearly define the term

170. Williams, *supra* note 164, at 818 n.205.

171. W.E.B. DUBOIS, *BLACK RECONSTRUCTION* 722 (World Meridian Books 1964) (1935).

172. See, e.g., JOHN BODNAR, *REMAKING AMERICA: PUBLIC MEMORY, COMMEMORATION, AND PATRIOTISM IN THE TWENTIETH CENTURY* (1992); MICHAEL KAMMEN, *MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE* (1991); EDWARD T. LINENTHAL, *SACRED GROUND: AMERICANS AND THEIR BATTLEFIELDS* (2d ed. 1993).

173. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944). Lemkin, a distinguished scholar, wrote that the term “ethnocide” could be used interchangeably with “genocide” since both refer to attempted annihilation based on race or ethnicity. *Id.*

174. Louis Rene Beres, *Justice and Realpolitik: International Law and the Prevention of Genocide*, 33 AM. J. JURIS. 123, 124 (1988) (misquoting the Genocide Convention).

175. Van Schaack, *supra* note 88, at 2262 n.20.

and describe the types of treatment that would qualify under the definition.<sup>176</sup> The General Assembly, at its fifty-fifth session in 1946, unanimously adopted a resolution<sup>177</sup> which condemned genocide as:

[the] denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations. The General Assembly, therefore, affirms that genocide is a crime under international law which the civilized world condemns.<sup>178</sup>

Although the final version of the resolution differed somewhat from this initial declaration,<sup>179</sup> the eventual codification clearly included protections for groups based on racial, national, linguistic, and religious categories.<sup>180</sup> However, the United States refused to adopt the 1948 Genocide Convention for nearly forty years.<sup>181</sup>

According to Lemkin, a genocidal effort to eradicate entire human

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176. *See id.* at 2263-64.

177. *Legal and Administrative Decisions*, U.N. WKLY. BULL, Dec. 31, 1946, at 17-18.

178. G.A. Res. 96, 1 GAOR, 1st Sess., 55th mtg. at 188-89, U.N. Doc. A/64/Add. 1 (1947); Universal Declaration of Human Rights, G.A. Res. 217 (III 1948), Dec. 10, 1948.

179. The final version differed most importantly by dropping from the list of protected groups human beings aligned by political beliefs. Van Schaack, *supra* note 88.

180. Van Schaack, *supra* note 88, at 2263. Scholar Beth Van Schaack argues that genocide is so clearly prohibited by customary international law that even groups aligned merely by political opinion are functionally included in the definition. Thus, she contends that the resulting "prohibition of genocide represents the paradigmatic *jus cogens* norm" from which no derogation can be permitted since genocide is "a crime under international law which the civilized world condemns . . . whether the crime is committed on religious, racial, political or any other grounds." Even though the final Genocide Conventions specifically excluded political groups from classes protected from genocide and limited the scope of protection to only national, ethnic, racial, and religious groups, Van Schaack argues persuasively that the Genocide Conventions' failure to protect political groups exists without legal force. If so, perpetrators of genocide cannot easily use the pretext of political affiliations to persecute otherwise-covered groups, as has been alleged in some cases. However, the inclusion of groups categorized by race and religion is undisputed. Van Schaack, *supra* note 88, at 2261, 2264, 2291.

181. *Symposium, Critical Perspectives on the Nuremberg Trials and State Accountability: Panel II: Comparative Analysis of International and National Tribunals*, 12 N.Y.L. SCH. J. HUM. RTS. 545, n.122 (1995). After decades of resistance to signing the 1948 Genocide Convention treaty, the United States in 1994 finally adopted the Genocide Convention, codifying it as 18 U.S.C. §1091(d). *Id.*

collectives has two general phases: first, the oppressor endeavors to destroy the cultural patterns of the oppressed group; and second, the oppressor seeks to impose its own national and cultural patterns on any survivors.<sup>182</sup> Historical records document a variety of assertions and claims alleging grave mistreatment of Native Americans by European settlers<sup>183</sup> that fit the definition of genocide. For instance, early British forces in North America advocated and practiced germ warfare under Commander General Lord Jeffrey Amherst, who was the namesake of Amherst, Massachusetts and Amherst College. Amherst corresponded in writing with Captain Simeon Ecuier and Colonel Henry Bouquet regarding their plan to “extirpate this execrable race” by collecting blankets and handkerchiefs from small pox hospitals and distributing them as gifts among Native Americans.<sup>184</sup> This early policy of extermination is summed up in the statement by Captain Ecuier that “out of our regard for [the Indians] we gave them two blankets and a handkerchief out of the smallpox hospital [in the] hope it will have the desired effect.”<sup>185</sup>

The Indian slave trade that existed during the early history of the United States constitutes another example of mistreatment that qualifies as genocide.<sup>186</sup> As one scholar and researcher discovered, “the capture and selling of Indian women and children” into slavery was highly lucrative and resulted in “many a man’s fortune.”<sup>187</sup>

The Indian slave trade along the east coast of the United States resulted in the routine capture, international export, and enslavement of Native Americans.<sup>188</sup> However, records of the period provide only meager, careless documentation of this slave trade.<sup>189</sup> For instance, some ship records contain only vague references to carrying captive Native Americans who were being “caried [sic] away with diverce [sic] others

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182. LEMKIN, *supra* note 173, at 79.

183. For purposes of this paper, the term “European settlers” includes representatives from all ethnicities and nationalities who immigrated to the North American continent.

184. E. WAGNER STEARN & ALLEN E. STEARN, *THE EFFECTS OF SMALLPOX ON THE DESTINY OF THE AMERINDIAN* 44-45 (1945); DONALD R. HOPKINS, *PRINCES AND PEASANTS: SMALLPOX IN HISTORY* 246 (1983); *see also* Peter d’Errico, *Jeffrey Amherst and Smallpox Blankets*, NativeWeb, at [http://www.nativeweb.org/pages/legal/amherst/lord\\_jeff.html](http://www.nativeweb.org/pages/legal/amherst/lord_jeff.html) (last modified Mar. 17, 2001).

185. STEARN, *supra* note 184, at 45.

186. For documentation of the Indian slave trade along the eastern seaboard of the United States, *see generally* WILLIAM BRADFORD, *BRADFORD’S HISTORY OF PLYMOUTH PLANTATION* 111 (William T. Davis ed., 1908); 2 JOHN FISKE, *OLD VIRGINIA AND HER NEIGHBOURS* 277 (Cambridge, Houghton Mifflin 1897); PHILIP RANLET, *ENEMIES OF THE BAY COLONY* 113 (1995). For information on the Indian slave trade in the southwestern United States, *see* CAROLYN T. FOREMAN, *INDIANS ABROAD 1493-1938*, 3-21 (1943); SONDRAL JONES, *THE TRIAL OF DON PEDRO LEON LUJAN: THE ATTACK AGAINST INDIAN SLAVERY AND MEXICAN TRADERS IN UTAH* (2000).

187. JONES, *supra* note 186, at 1.

188. FOREMAN, *supra* note 186, at 3-21; *see also* BAILEY, *supra* note 5.

189. *See* Ethel Boissevain, *Whatever Became of the North Eastern Indians Shipped to Bermuda to be Sold as Slaves?*, 21 *MAN IN THE NORTHEAST* 103 (1981).

... [by ship captains] who thought to sell them for slaves in Spain.”<sup>190</sup> Another early record referred to “sending sundry Indian lads and girls aboard ship, to be taken to Boston and ‘educated,’ [meaning] sold for slaves.”<sup>191</sup> Early accounts of the American colonies show that colonists routinely sold into slavery “once hostile Indians” who were taken as prisoners of war.<sup>192</sup> Yet, while the enslavement of African Americans is universally known and widely discussed in the United States, the contemporaneous abduction and enslavement of Native Americans in the United States is not similarly well-known nor generally discussed.<sup>193</sup>

Many accounts document that entire tribes of Native Americans were relentlessly pursued and many individuals murdered from the time of the earliest contact with Europeans; as a result, entire tribes were forcibly relocated from their homes and required to move inexorably westward.<sup>194</sup> Between 1835 and 1842, United States government troops assisted in the “removal and relocation” of tribes when “bribery, fraud, and intimidation had not cleared all the Indians from the East” quickly enough to satisfy the European settlers.<sup>195</sup> The United States government created reservations on marginal or worthless land deliberately to isolate and control Native Americans, and widely prohibited the free exercise of many forms of Native American religion on those reservations, in some cases imposing prison sentences for such practices.<sup>196</sup> The United States government has rewritten or ignored lawful treaties between it and tribes of Native Americans, breaking promises assuring property and hunting rights; courts have failed to uphold the rights of Native

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190. BRADFORD, *supra* note 186, at 111.

191. FISKE, *supra* note 186, at 277.

192. RANLET, *supra* note 186, at 113.

193. Even well-educated people report that they were taught nothing about the enslavement of Native Americans in high school, college, or graduate school. After personally questioning numerous law professors and classmates, this author has yet to find someone who previously knew about the Native American slave trade in the United States.

194. *See* WASHBURN, *supra* note 5, at v (documenting “the knotty problem of defining the relationship between the American Indian and the United States government” in four detailed, lengthy volumes); *see also* Linenthal, *supra* note 9 (discussing the controversies over efforts to replace monuments and memorials with historically accurate representations).

195. WASHBURN, *supra* note 5, at 62.

196. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 184-85 (4th ed. 1998); *see also* DAVID H. THOMAS, *THE NATIVE AMERICANS: AN ILLUSTRATIVE HISTORY* 360 (1993); WASHBURN, *supra* note 5, at 564-66, 711-14 (participants in traditional religious practice of ghost dancing subject to arrest); Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policies in Twentieth-Century Native American Free Exercise Cases*, 49 *STAN. L. REV.* 773, 792 (1997); Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 *OHIO ST. L.J.* 713, 790 (1993) (documenting forms of religious suppression); Jose Monsivais, *A Glimmer of Hope: A Proposal to Keep the Indian Child Welfare Act of 1978 Intact*, 22 *AM. INDIAN. L. REV.* 1, 3 (1997) (stating that all forms of traditional religious practice were prohibited on Indian reservations).

Americans, and this has contributed to a broad sense of cultural imperialism with its whole range of exclusionary practices.<sup>197</sup> Generations of Native American children were abducted from their families and confined in isolated boarding schools whose purpose, often openly stated, was to assimilate native tribes by destroying the connection between the children and their native cultures.<sup>198</sup>

These historical examples of violence and mistreatment constitute only part of the chronicle of human rights abuses against Native Americans. More recent examples of mistreatment, combined with the historical record of abuses, have created an enduring legacy of oppression and harm that has not ended but, instead, persists into the present era.<sup>199</sup>

## 2. The Enduring Legacy of the Treatment of Native Americans in the United States

*In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.*<sup>200</sup>

Frank Murphy, United States Supreme Court Justice

*[The Bureau of Indian Affairs of the United States] participated in the ethnic cleansing that befell the western tribes . . . This agency set out to destroy all things Indian. The legacy of these misdeeds haunts us.*<sup>201</sup>

Kevin Gover, Assistant Secretary of the Interior for Indian Affairs<sup>202</sup>

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197. Linenthal, *supra* note 9, at 205; *see generally* WILCOMB E. WASHBURN, RED MAN'S LAND, WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN (1995).

198. GETCHES, *supra* note 196; TRENNERT, *supra* note 5.

199. Assistant Secretary of Indian Affairs Kevin Gover, Dept. of Interior, Speech at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs (Sept 8, 2000), *available at* [http://www.rosecity.net/cherokee\\_trails\\_newsletter/links/kevin\\_gover\\_statement.html](http://www.rosecity.net/cherokee_trails_newsletter/links/kevin_gover_statement.html) (last visited Sept. 14, 2001).

200. Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943).

201. *Official Apologizes to Indians: Agency's legacy 'haunts us,' he says*, DALLAS MORNING NEWS, Sept. 9, 2000, at 10A.

202. Ironically, Kevin Gover, the first governmental official ever to publicly acknowledge that the United States government has any culpability for the mistreatment of Native Americans, is an American Indian. Vanessa Ho, *Indians Receive Apology from Bureau of*

In a controversial speech given at an official ceremony celebrating the 175<sup>th</sup> Anniversary of the Bureau of Indian Affairs of the United States (BIA)<sup>203</sup> in 2000, Assistant Secretary of Indian Affairs at the Department of the Interior, Kevin Gover, publicly acknowledged that many Native Americans continue to “live lives of unrelenting tragedy” where “[t]he trauma of shame, fear, and anger [is] passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country.”<sup>204</sup> In the interval since the speech, the United States government has refused to issue an official apology to Native Americans and has taken no official responsibility for its role in past human rights abuses.<sup>205</sup>

In addition to the insidious and widespread social ills referred to by Mr. Gover, reports about other, subtler forms of mistreatment of Native Americans have emerged as well. For example, in the 1940s, the United States Bureau of Reclamation designed and constructed a series of dams on the Missouri River in North Dakota. Although a variety of designs were considered and could have been chosen, the Bureau selected the one plan that deliberately spared all of the white towns and cities but completely inundated the thriving Fort Berthold Reservation.<sup>206</sup> As a result, the tribe was displaced and its robust self-sufficiency and 400-year-old way of life was completely altered and virtually destroyed.<sup>207</sup>

In another example, for many years BIA-operated health clinics subjected Native American women “to forced sterilization in appalling numbers.”<sup>208</sup> Records

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*Indian Affairs*, SEATTLE POST-INTELLIGENCER, Sept. 9, 2000, at A1.

203. In 1824 when the Bureau (then “Office”) of Indian Affairs was created, it was established under the authority of the War Department. Washburn, *supra* note 5, at Vol.1 p.5.

204. Gover, *supra* note 199. While some welcomed Gover’s remarks, others found them to be controversial. First, not all observers found his verbal acknowledgment and apology on behalf of the Bureau of Indian Affairs to be sufficient in light of the extensive mistreatment and losses suffered by Native Americans. Second, some protested that the apology should have been issued officially from the United States government rather than spoken unofficially by a lower level government official. Ho, *supra* note 202; *see also* Mark Shaffer et al., *Indians Hear BIA Apology, Arizona Tribes Want Action, Not Words*, ARIZONA REPUBLIC, Sept. 9, 2000, at A1.

205. Hundreds of major newspapers and other publications carried stories of Gover’s speech, and many referenced calls for an official apology from the United States government. *See, e.g., BIA Head Apologizes for Legacy of Racism*, L. A. TIMES, Sept. 9, 2000, at A16; Matt Kelley, *U.S. agency apologizes to Indians; Admits racism, inhumanity*, CHICAGO SUN-TIMES, Sept. 9, 2000, at 13; Matt Kelley, *U.S. Official Apologizes To Indian; ‘Legacy of Racism’ Is Acknowledged*, WASH. POST, Sept. 9, 2000, at A2; Shaffer, *supra* note 204; *Official apologizes to Indians: Agency’s legacy ‘haunts us,’ he says*, *supra* note 201.

206. MARC REISNER, CADILLAC DESERT 411 (1980).

207. *Id.*

208. Nancy Ehrenrich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 515 (1993). *See also* Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TULANE L. REV. 1945 (1993).



show that as recently as the 1970s, the BIA-operated Indian Health Service Hospital in Claremore, Oklahoma was still performing sterilization procedures on Native American women as a routine matter without appropriate consent, information, or knowledge.<sup>209</sup> Reports of these forced sterilizations have surfaced in “alarming numbers” and include accounts of women who were subjected to coercion, “blatant misinformation,” and threats to terminate health services or welfare benefits unless consent for sterilization was given.<sup>210</sup> In addition, the BIA clinics routinely misinformed Native American women about the risks of surgical sterilization and misled them about the permanency of the contraceptive procedure.<sup>211</sup>

The widespread existence of “Indian Schools” constitutes a notorious example of mistreatment of Native Americans. For over a hundred years, in fact until relatively recently, the United States and Canadian governments have forcibly abducted Native American children as young as five from their homes and taken them to government-sponsored “Indian schools” where they were “educated” and “assimilated” into the dominant culture.<sup>212</sup> Under this system, the Bureau of Indian Affairs of the United States assigned enormous numbers of children to boarding schools that “brutaliz[ed] them emotionally, psychologically, physically, and spiritually.”<sup>213</sup> Typically, the schools deprived the children of their native clothing, required them to wear only school uniforms, and forbade them from speaking their native languages even to each other.<sup>214</sup> The schools would not allow children to observe their traditional cultural or spiritual practices and, instead, forced them to practice Christianity, the religion of the dominant culture.<sup>215</sup> In many cases, the adults who were charged with the care of these children were actually abusing and molesting them.<sup>216</sup> Perhaps the most disruptive feature of all was the requirement that the children live at the schools for years at a time and see their parents and families for a few days once or twice a year.<sup>217</sup>

Other examples of abuses, inequities, and patterns of discrimination continue to emerge. Thus, the effects of past human rights abuses continue to oppress and marginalize native people in the present. BIA Director Gover expressed this view

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209. THOMAS M. SHAPIRO, *POPULATION CONTROL POLITICS: WOMEN, STERILIZATION, AND REPRODUCTIVE CHOICE* 91 (1985) (reporting the Indian Health Service routinely sterilized three thousand Native American women per year); see Roberts, *supra* note 208, at 1971.

210. SHAPIRO, *supra* note 209, at 91-92.

211. *Id.*

212. Gover, *supra* note 199; see also TRENNERT, *supra* note 5.

213. Gover, *supra* note 199.

214. See generally TRENNERT, *supra* note 5.

215. See Dussias, *supra* note 196.

216. James Brooke, *Indian Lawsuits on School Abuse May Bankrupt Canada Churches*, N.Y. TIMES, Nov. 2, 2000, at A1 (reporting that when a Canadian task force was formed to investigate allegations of abuse and molestation in Indian schools, it received 3,400 complaints in five years, and that, in May, 2000, eight Indian men committed suicide after receiving subpoenas to testify about being sexually molested at a Canadian Indian school.)

217. See generally TRENNERT, *supra* note 5.

poignantly in his 2000 speech.<sup>218</sup> He acknowledged that the BIA, created by the United States government first to control and then later to “assist” Native Americans, has more often served to oppress, persecute, and disenfranchise individuals and tribes.<sup>219</sup> Gover suggested that the problems created by centuries of racism and genocidal practices directed against Native Americans in the United States are far from over, considering the serious and extensive social problems that exist on reservations all over the country.<sup>220</sup> Gover stated that for generations, the BIA has “abused, brutalized and even sought to destroy Indian peoples and cultures,”<sup>221</sup> and that grave negative effects endure due to the Bureau’s history of participation in “ethnic cleansing” of Native American tribes through the use of the “ ‘deliberate spread of disease, the decimation of the mighty bison herds, the use of the poison alcohol to destroy mind and body, and the cowardly killing of women and children [that] made for tragedy on a scale so ghastly that it cannot be dismissed as merely the inevitable consequence of the clash of competing ways of life.’ ”<sup>222</sup> Concluding, Gover promised Native Americans that the BIA will “ ‘[n]ever again . . . attack your religions, your languages, your rituals or any of your tribal ways . . . [nor] seize your children, nor teach them to be ashamed of who they are.’ ”<sup>223</sup>

Yet, despite the candid comments and the sweeping promise, one public speech by a single mid-level government official - especially one who is a member of the oppressed minority - is unlikely to have much lasting impact without actual changes in government policies and citizen attitudes in the United States.<sup>224</sup>

Few would argue that the relationship between the United States government and Native tribes is settled.<sup>225</sup> One can glimpse the extent of the troubled relationship in actions of the United States government to defeat legally valid treaties and deny reparations, in court decisions that either have not upheld legally valid treaties or that have substituted meager financial reparations for the promises contained in valid treaties, and in Congressional acts that have disenfranchised individual Native Americans and tribal groups.<sup>226</sup> Perhaps some of the most significant indices of the

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218. See *Government Executive Apology to a Nation*, GOV’T EXECUTIVE, Nov. 1, 2000, at 20.

219. Gover, *supra* note 199.

220. *Id.*

221. *Footnote to Indian History*, PRESS ENTERPRISE, Sept. 18, 2000, at A8.

222. Matt Kelley, *Head of U.S. Agency Apologizes for Long Mistreatment of Indians*, CHI. TRIB., Sept. 9, 2000, at 1N.

223. *Id.*

224. See *Footnote to Indian History*, *supra* note 221.

225. According to a survey of the history of federal Indian policy, “inconsistency is a recurrent theme in the diverse programs and reforms of the dominant society for resolving its ongoing 200-year-old ‘Indian problem.’ ” DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* 259 (1993).

226. See David E. Wilkins, *John Quincy Adams: A Constitutional Conundrum: The Resilience of Tribal Sovereignty During American Nationalism and Expansion: 1810-71*, 25 OKLA. CITY U. L. REV. 87 (2000).

unsettled relationship are the fundamental contradictions inherent in attempts by Congress and the courts to confer sovereign status on tribes and yet retain the absolute “power to terminate or restrain that sovereignty at any time.”<sup>227</sup> One enduring element of this troubled relationship is the debate over the severity of abuse of Native Americans over the centuries. Seemingly, the problem is not that elements of the mistreatment of Native Americans are not known. Rather the United States has failed to document them in a cohesive and comprehensive form that can be publicly and officially acknowledged. Thus, controversies continue among citizens and within governmental agencies over what actually happened and what is continuing to happen to Native American peoples throughout the United States.

Establishing a truth commission would enable the United States to document the entire record and face its own role in the harm done to Native Americans. A truth commission could facilitate a nationwide dialogue by creating an official record of human rights abuses and violations. An authoritative record would also allow the United States government the opportunity to publicly acknowledge its past misdeeds and, where merited, to apologize. This acknowledgment would help the United States to maintain credibility and authority in the world community as a defender of human rights. By recognizing the mistreatment of Native Americans and apologizing for misdeeds, the United States government would be sending a message to countries around the world that the United States does not limit its support to investigations of human rights abuses in other countries, but is also willing to honestly assess violations that occur or have occurred in its own territory.

### **B. Countering Objections to Convening a Truth Commission in the United States**

*The road to equality of treatment is long, and the fact that we no longer stand at the beginning of that road is hardly a reason to call a halt.*<sup>228</sup>

Professor Sheri Lynn Johnson, Cornell Law School

Truth commissions operate on the fundamental premise that a complete understanding and genuine acknowledgement of past wrongs, no matter how painful, are useful steps in a nation’s efforts to make positive changes and to master forces that led to past abuses. According to scholar Jonathan Allen, because of this foundational premise, advocates of truth commissions assert that “recognition and disclosure of past offenses are necessary” in order for a democracy to distance itself from the past and establish – or maintain – its legitimacy.<sup>229</sup> Some experts posit that

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227. *Id.* at 87.

228. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1708 (1985).

229. Allen, *supra* note 52, at 315.

participation in truth commissions can result in a collective social catharsis or collective healing, and can thus serve as an important step by a government or a nation toward “formally acknowledging a long-silenced past.”<sup>230</sup>

However, in light of the history of ruthlessness and inconsistency of the United States government and citizens toward Native American tribes,<sup>231</sup> some observers believe that it is “naïve in the extreme to believe that we can achieve any genuine consensus” about our past.<sup>232</sup> However, this objection assumes that consensus is necessary. Perhaps consensus is less important than the process of investigation and publication of a complete, accurate, and authoritative report. Nonetheless, a truth commission could finally assemble the larger picture and facilitate understanding that would resist continued denial and revisionism by authoritatively investigating and documenting in an official record the true nature, extent, and severity of the historic and recent mistreatment of Native Americans.

Not all observers agree, however, that truth commissions create resolution and national reconciliation. Some scholars fear that truth commissions can exacerbate old issues and, thus, create deeper resentment and frustration.<sup>233</sup> However, in countries where truth commissions have convened and successfully concluded, citizens report satisfaction or relief at official efforts to understand and come to grips with past events and social forces that contributed to human rights abuses.<sup>234</sup> Some human rights organizations assert the existence of an inherent right to know the truth and argue that such a right obliges honest investigation and official acknowledgment of state-sanctioned violations of human rights.<sup>235</sup> Other observers point out that official apologies for past misdeeds can play a pivotal role in national healing. These observers use as examples, reparations for Japanese Americans wrongfully interned during World War II<sup>236</sup> and Congress’ recent Joint Resolution officially apologizing to indigenous Hawaiians for aiding in the overthrow of the lawful government of the sovereign Hawaiian nation.<sup>237</sup> The recent World Conference on Racism in Durban, South Africa, involving 190 nations in discussion on improving racial relations worldwide indicates that there has been progress.<sup>238</sup>

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230. Hayner, *supra* note 10, at 600.

231. See *Footnote to Indian History*, *supra* note 221.

232. Linenthal, *supra* note 9, at 260.

233. Hayner, *supra* note 10, at 609; see also Allen, *supra* note 52, at 316.

234. See Hayner, *supra* note 10.

235. *Id.* at 611.

236. See MICHIE WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA’S CONCENTRATION CAMPS* (1996); see also Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998) (reflecting on the Japanese American struggle for redress and examining the larger issues involved in seeking apologies, reparations, and redress for communities of color in the United States).

237. Yamamoto, *Race Apologies*, *supra* note 38, at 47; see also FARBER, *supra* note 6.

238. See *World Conference Against Racism* (National Public Radio, Morning Edition radio broadcast, Aug. 30, 2001). The Durban Conference, formally entitled the World Conference Against Racism: Racial Discrimination, Xenophobia, and Related Intolerance,

It could be argued that, even if allegations of widespread genocide and human rights abuse allegations are true, any crimes committed are long past and, therefore, are better left unexposed and unexplored. According to this argument, truth commissions should only convene to investigate recent abuses, and since any genocide that might have taken place against Native Americans in the United States occurred in the distant past, a truth commission is not appropriate. This argument is flawed. First, it presumes that human rights abuses against Native Americans are all in the past. Without investigation, we cannot know that this is true. Second, this argument supposes that past wrongs have no lasting effects on victims in the present, which is simply improbable and implausible. Third, there is “no statute of limitations on the prosecution and punishment of the crime of genocide”<sup>239</sup> or murder.<sup>240</sup> Instead, according to one prominent international law scholar, “national statutes of limitation violate international law if they apply to crimes against humanity.”<sup>241</sup> Thus, when “[n]o statute of limitations exists on [genocide or other] egregious violations of human rights, their prosecution as crimes against humanity cannot be barred by statute.”<sup>242</sup> Consequently, nations regularly bring national or international perpetrators to justice decades after egregious crimes. For instance, despite the passage of nearly forty intervening years, law enforcement agencies have continued to investigate and prosecute former members of the Klu Klux Klan whom they suspect committed a 1963 church bombing that killed four girls.<sup>243</sup> In another

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included delegates from 190 nations. Significantly, however, the United States refused to send its Secretary of State and instead sent only a “mid-level” delegation, partly because of concerns that reparations for slavery would be discussed. *Id.* See LOS ANGELES TIMES, Sept. 13, 2001, at A12 (addressing concerns about United States’ increasing isolationism and citing the government’s management of World Conference as one factor in rise of anger and violence toward the United States).

239. Matthew Lippman, *Genocide: The Crime of the Century: The Jurisprudence of Death at the Dawn of the New Millennium*, 23 HOUS. J. INT’L L. 467, 485, 488 (2001) (asserting that the “systematic and intentional murder of ethnic, racial, and religious minorities [even] absent the intent to exterminate such groups, remains punishable as mass murder under domestic law and as a crime against humanity . . . under international law.”); see also Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391, 23 U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968).

240. See Todd Taylor, *Exorcising the Ghosts of a Shameful Past: The Third Trial and Conviction of Byron de la Beckwith*, 16 B.C. THIRD WORLD L.J. 359 (1996) (reviewing MARY ANNE VOLLERS, *GHOSTS OF MISSISSIPPI: THE MURDER OF MEDGAR EVERS, THE TRIALS OF BYRON DE LA BECKWITH, AND THE HAUNTING OF THE NEW SOUTH* (1995)).

241. Joyner, *supra* note 100, at 614.

242. *Id.*

243. Jean Marbella, *Sins of Past Still Cry Out for Justice: Conscience: Witnesses are Breaking Years of Silence and Calling Aging Men to Answer for Crimes of the 1960s*, BALTIMORE SUN, May 20, 2001, at 1C; see also Colbert I. King, *No Thanks to Hoover*, WASH. POST, May 5, 2001, at A19 (lamenting FBI’s suppression of evidence and refusal to prosecute that allowed recently-convicted church bomber Thomas Blanton to remain free for nearly forty

example, prosecutors tried the suspected murderer of civil rights leader Medgar Evers a third time after two mistrials, and despite the passage of many years.<sup>244</sup> Similarly, efforts to find, expose, apprehend, prosecute, and punish Nazi war criminals have continued throughout the half-century since the end of World War II.<sup>245</sup> Perhaps humans take these actions because of the widespread belief that, even decades after the offense, suspected perpetrators of grievous crimes should be prosecuted so that, ultimately, “justice, no matter how late, can and will be served.”<sup>246</sup>

In addition, truth commissions by definition investigate and document only past actions. Although it is true that, in most cases, truth commissions investigate more recent human rights abuses, that is not always the case. Australia’s Council for Aboriginal Reconciliation presents a ready example of the appropriate use of the truth commission model in facing the present problems stemming from the long-past invasion of a country by European settlers. Additionally, the 1993 Congressional apology to Native Hawaiians concerned actions that took place in 1893.<sup>247</sup> Despite the passage of one hundred years, Congress apologized for its role and sought to “provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.”<sup>248</sup> The definition of “recent” in relation to past wrongs is subject to different interpretations. Victims of genocide and human rights abuses may consider their mistreatment to have occurred more recently than perpetrators, who, predictably, may be more eager to regard any offenses as having occurred in the remote, distant past. Even so, some of the previously described wrongs against Native Americans, such as forced sterilizations and forced attendance at Indian schools, have occurred in the years since World War II, which may qualify as the recent past by most people’s measure. However, the continuing effects of even long past human rights abuses against Native Americans could be more important than recent events. In all of these circumstances, a current investigation of past misdeeds would be justified. Therefore, it is unacceptably facile to simply dismiss the need for

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years before finally being prosecuted).

244. Taylor, *supra* note 240.

245. *See Suits Clog Route to Nazi Fund*, DALLAS MORNING NEWS, May 11, 2001, at 14A (reporting on payouts from billion-dollar fund to compensate victims of Nazi-era slave laborers). Interestingly, even Adolf Hitler, notorious for his orchestration of widespread genocide in Europe, recognized and discussed efforts in the United States to segregate and exterminate indigenous peoples, and he applauded those efforts by admiring the “efficiency of America’s extermination – by starvation and uneven combat – of the red savages who could not be tamed by captivity.” JOHN TOLAND, *ADOLF HITLER* (1976). Hitler apparently viewed the inexorable removal and disenfranchisement of North America’s indigenous populations by white European invaders as an effective model to be followed by Germany in its conquest of Europe. *See* RICHARD L. RUBENSTEIN, *MODERNIZATION AND THE POLITICS OF EXTERMINATION, A MOSAIC OF VOICES: NON-JEWS PERSECUTED AND MURDERED BY THE NAZIS* 8 (Michael Berenbaum ed., 1990).

246. Taylor, *supra* note 240, at 379.

247. S.J. Res. 19, *supra* note 6.

248. *Id.* § 1(4).

investigation, acknowledgements, and apologies by concluding that any misdeeds that could justify a truth commission occurred too long ago to be relevant today.

Another argument against convening a truth commission may rest on the belief that mistreatment of Native Americans is already commonly known and, therefore, need not be explored further. However, there is no basis for concluding that the comprehensive history of the mistreatment of Native Americans in the United States is common knowledge. A simple examination of the omissions and misinformation contained in school textbooks in the United States counters this argument. The absence of any official, published, comprehensive record of the history of Native Americans in the United States further belies this argument.

Still another argument against convening a truth commission concerns worries that the United States will ultimately have to make reparations to Native Americans. Just as debate over reparations for African-American slavery has increased in recent years,<sup>249</sup> it seems likely that discussion and debate over reparations for Native Americans will increase as well. Although objecting to a truth commission on this basis may seem facially plausible,<sup>250</sup> this objection breaks down upon further analysis. First, it is simply unreasonable and unjust to oppose a truth-finding investigation because a popular or powerful perpetrator might ultimately be required to make amends to victims. By analogy, this would be akin to objecting to a proposed investigation of political corruption because the outcome might implicate powerful people and result in losses of revenue to the district. This kind of reasoning is patently unacceptable in a lawful nation. We cannot forego the pursuit of justice merely because the result might be costly. Second, a justifiable truth commission should not be constrained just because reparations are unlikely or impossible. In other circumstances, the United States has demonstrated the ability to acknowledge responsibility and convey regret to indigenous peoples without simultaneously promising reparations or any other settlement. In fact, when Congress formally apologized on behalf of the United States to native Hawaiians for the abuse of authority by American citizens and government officials that resulted in the “illegal overthrow” of “the indigenous and lawful Government of Hawaii,” the Resolution included a specific disclaimer that “[n]othing in this Joint Resolution is intended to

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249. See Tamar Lewin, *Calls for Slavery Restitution Getting Louder*, N.Y. TIMES, June 4, 2000, at A15; see also Jeffrey Ghannam, *Repairing the Past*, A.B.A. J. (Nov. 2000). For a broad discussion of the arguments in favor of financial reparations for African-Americans, see RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000); *c.f. Report on World Conference Against Racism in South Africa* (National Public Radio, Morning Edition radio broadcast, Aug. 27, 2001) (noting that some African Americans have stated a preference for an official apology from the United States government over financial reparations); *Justice Talking*, (National Public Radio, Morning Edition radio broadcast, Aug. 28, 2001) (airing reparations debate between Professor Robert Seddler of Wayne State University and Adjoa Aiyetoro of National Coalition of Blacks for Reparations in America, including argument by latter that reparations involve more than “just receiving a check”).

250. “After all,” says a common aphorism in the United States, “we can’t give back Manhattan.”

serve as a settlement of any claims against the United States.”<sup>251</sup> Therefore, the United States government can convey an apology without regard for the separate issue of reparations. Truth commissions can have positive and constructive effects in a society regardless of the possibility of reparations. Therefore, when circumstances warrant a truth commission, it should not be delayed or thwarted because of fears about potential reparations.

Some observers might argue that convening a truth commission in the United States would be a distraction from the need to address current problems with far more serious human rights abuses in other parts of the world. This argument contains three fatal flaws. First, efforts to establish and acknowledge the truth about past crimes is never a distraction. Indeed, the search for truth and justice is exactly what the justice system seeks to do in every case, no matter how many more serious criminal prosecutions may exist simultaneously. Second, although different people might come to different conclusions about the “seriousness” of certain human rights abuses, projecting one’s own judgment on the suffering of others and on the merits of justice in a particular area of abuses is problematical and should be done cautiously. Just as it is risky to “rush to judgment” without a proper investigation, it may be equally risky to “rush to non-judgment” without comprehensive investigation. Third, such protests do not take into account the unfortunate and painful legacy that continues to surface after centuries of mistreatment.

Others might protest that convening the proposed truth commission in the United States would simply be too large an undertaking. These observers would presumably argue that the effort would simply require too much time and money and command far too many resources. This argument, however, cannot be squared with the historic orientation to crime in the United States, where the resources are allocated in whatever amounts are necessary in order to achieve a form of justice.<sup>252</sup> Typically, if the criminal acts in question are particularly extensive and involve a multitude of perpetrators and victims, there is even more reason to put forth the necessary resources to achieve justice in the situation. No matter how big a task, many might consider it worth the effort to take action that may bring about a measure of resolution and reconciliation among the cultures that coexist in the United States.

### **C. Convening a United States Truth Commission**

*Every state in the world has competence to prosecute international crimes under customary international law. There is universal jurisdiction, and the nationality of the perpetrator does not matter,*

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251. S.J. Res. 19, *supra* note 6, § 1(1) & § 3.

252. An illustrative example is the United States’ long and expensive “war on drugs,” which consumes massive amounts of money and resources at all levels of law enforcement from police departments to courts to prisons in an apparently ineffectual effort to apprehend and bring to justice the perpetrators of the drug trade.



*nor does the place of the perpetration; this is an ongoing international, national responsibility.*<sup>253</sup>

Professor Jordan Paust, University of Houston Law Center

*[I]f we want justice as an international community, we have an obligation to make it work.*<sup>254</sup>

Former Professor Paul Hoffman, Southwestern University School of Law

For the United States, two broad avenues exist that could lead to convening a truth commission to investigate the treatment of Native Americans. First, the United States government itself could convene an authoritative commission to investigate and document historic and recent abuses against Native Americans. Alternatively, an international body could assume the responsibility of sponsoring an official truth commission, although given the United States' history regarding its sovereign immunity, this seems unlikely.

In the United States, the president has the authority to appoint a special commission that could function as a truth commission, investigating and reporting on the truth of the alleged mistreatment and the current status of the treatment of Native Americans. Congress also has the authority to commence an official investigation via congressional hearings, a special commission, or a constitutional convention.<sup>255</sup> While either avenue is preferable to no action, special considerations are necessary when a government seeks to investigate itself. The first consideration is that extreme caution is needed in order to prevent bias and capture of the truth commission process. A lack of objectivity or the absence of a fair-minded approach would inevitably distort the record and skew the results, resulting in outcomes that could potentially defeat the purpose of convening a truth commission.

The second essential consideration is the attention necessary to support the participation of oppressed groups. When a society, through its government, enacts arrangements to address the past, such as the Council for Aboriginal Reconciliation in Australia or the Truth and Reconciliation Commission in South Africa, participation by the affected minority groups is imperative. Lack of support from Native Americans for an internal government investigative process could result in further distrust and antagonism, and might conclude in added divisions between the cultures.<sup>256</sup>

Although an internal United States government-sponsored investigative body presents some problems and cautions, a different set of equally thorny complications

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253. *Symposium, supra* note 181, at 625.

254. *Id.* at 612. Professor Hoffman also served for ten years as the Legal Director of the American Civil Liberties Union Foundation of Southern California.

255. Osiel, *supra* note 7, at 599 (asserting that an investigative body such as a constitutional convention is unnecessary when conventional prosecution is possible).

256. *Id.*

may arise when an international body representing the world community investigates an unwilling and powerful government. For example, some commentators posit that the United States' withdrawal of support for ratification of the Rome Statute forming the International Criminal Court may be related to its reluctance to cede jurisdiction over its citizens.<sup>257</sup> Even though it seems extremely unlikely to come about, an internationally sponsored truth commission bestows upon a proceeding the highly desirable degree of impartiality.

Regardless of whether a truth commission is convened by the government of the United States or is sponsored by an international body such as the United Nations, the purpose of the commission would be the same: to seek the truth, settle the past, and seek justice for the future. Additionally, a truth commission in the United States would create opportunities for dialogue that could educate the populace, expose ongoing problems, generate understanding and compassion, and, perhaps, gradually begin to facilitate reconciliation among the nation's cultures. No matter who sponsors a truth commission, perhaps no better purpose could emerge than that expressed many years ago in a presidential recommendation to Congress: "the goal of any new national policy toward the Indian people [must be] to strengthen the Indian's sense of autonomy without threatening his sense of community."<sup>258</sup>

## V. CONCLUSION

*[H]istory, despite its wrenching pain,  
Cannot be unlived, but if faced  
With courage, need not be lived again . . .*<sup>259</sup>  
Maya Angelou, American Poet

An officially sanctioned truth commission in the United States could play a powerful role in efforts to acknowledge the grave injustices and enduring problems created by the displacement of Native American tribes during the settlement of the North American continent. A truth commission offers a suitable alternative for seeking truth and justice and for promoting acknowledgment of past atrocities by agents of the United States government and its citizens under circumstances when

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257. See Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 391 (2001) (arguing that "the attempt to shield U.S. nationals from ICC jurisdiction at all costs seems woefully inappropriate" because "no state has a legitimate interest [in] shielding its nationals from criminal responsibility for genocide . . . . Suggestions to the contrary evoke a colonialist concept of exclusive extraterritorial rights, which has little relevance to modern practice").

258. Presidential Recommendations for Indian Policy, 91st Cong., 2d Sess., H.R. DOC. NO. 363, at 3 (1970).

259. Maya Angelou, *On the Pulse of Morning*, poem recited at the William Jefferson Clinton Presidential Inauguration (January 20, 1993).

individual prosecutions are impossible. Thus, even after hundreds of years of difficult relations, a truth commission could produce an officially acknowledged, authoritative record that could help to facilitate a measure of closure on the past and allow the creation of a more positive and harmonious future.

A truth commission would thoroughly and authoritatively investigate, document, and acknowledge the facts surrounding allegations of oppression, violence, genocide, and mistreatment of Native Americans in the United States. Full participation by the government of the United States would be an important step toward accepting its own history and reconciling its relations with Native American peoples. Thus, by facing the past honestly and courageously, and facing the future squarely, the United States may eventually be able to achieve its fundamental goal of assuring all citizens a future “with liberty and justice for all.”<sup>260</sup>

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260. 4 U.S.C. § 4 (Supp. 1999) (citing text of Pledge of Allegiance to Flag of United States). Originally, the Pledge read as follows: “I pledge allegiance to the Flag of the United States of America, and to the Republic from which it stands, one Nation, indivisible, with liberty and justice for all.” In 1954, Congress amended the Pledge by mandating that the words “under God” be inserted after the word “nation,” thus excluding those of different religious faiths. See ANSON PHELPS LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES*, 570-71 (1964).