

QUEENSLAND'S FRONTIER KILLING TIMES – FACING UP TO GENOCIDE

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Timothy Bottoms' recent work Conspiracy of Silence: Queensland's Frontier Killing Times comprehensively documents the systematic killing of thousands of Aboriginal people across the State from the mid-19th until the early 20th century. The record suggests that during this period, significant portions of clan groupings and, in some cases, arguably entire nations of people were slaughtered. The sustained use of State-sanctioned violence via the Queensland Native Police Corps and the consistent pattern of killings raise several questions: Did these acts of violence constitute genocide? If so, who is responsible? What legal and policy avenues are available to address the intergenerational impacts of these unrecognised acts of genocide?

I INTRODUCTION

Timothy Bottoms' *Conspiracy of Silence: Queensland's Frontier Killing Times* provides a systematic account of the mass killings of Aboriginal people that accompanied the expansion of the Queensland frontier in the nineteenth century.¹ Conservative estimates suggest that in the latter half of the nineteenth century, at least 24 000 Aboriginal people were killed at the hands of the Queensland Native Police.² The estimate doubles when private killings by white settlers are included in the tally.³ Bottoms has comprehensively mapped these killings, charting some 140 frontier massacres that occurred between 1831 and 1918. Bottoms examines these killings alongside settlement patterns, concluding that the escalation of violence in the mid- to late-19th century traced the pathway of pastoralist expansion, coinciding with Queensland's emergence as a separate colony and the arming of the Queensland Native Police Corps with more efficient weaponry.

Conspiracy of Silence marks a significant contribution to the historiography of the dispossession of Queensland's Aboriginal communities. It joins a growing body of historical work which highlights the scale and brutality of frontier violence in Queensland.⁴ From a legal

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¹ The authors have adopted the use of the term 'Aboriginal' rather than 'Indigenous' to reflect the scope of the paper being limited to the killing of Aboriginal people on Queensland's mainland.

² Raymond Evans, 'The Country Has Another Past: Queensland and the History Wars' in Frances Peters-Little, Ann Curthoys and John Docker (eds), *Passionate Histories: Myth, Memory and Indigenous Australia* (Aboriginal History Inc and Australian National University E-Press, 2010) 9, 31.

³ Timothy Bottoms, *Conspiracy of Silence: Queensland's Frontier Killing Times* (Allen & Unwin, 2013) 183.

⁴ See, eg, Henry Reynolds, *An Indelible Stain? The Question of Genocide in Australia's History* (Viking, 2001); Noel Loos, *Invasion and Resistance: Aboriginal-European Relations on the North Queensland Frontier*,

perspective, it also gives rise to the jurisprudential question of whether Queensland's frontier 'killing times' constituted crimes of genocide in the strict legal sense.

The earliest recognition of the crime of genocide in international customary law appears to have occurred just fewer than 20 years after the last of Queensland's recorded massacres.⁵ The *Convention on the Prevention and Punishment of the Crime of Genocide* came into force in 1951,⁶ and was only enacted domestically in 2002.⁷ The inability to retrospectively prosecute acts which occurred in the previous century means there is a lack of any prospect of criminal prosecution under domestic or international law. However, the apparent absence of any available legal redress does not detract from the gravity of the genocidal crimes which, as the evidence strongly indicates, were committed against Queensland's Aboriginal population.⁸ Indeed, there are nonetheless concrete steps that should be taken to recognise and address the traumatic inter-generational effects of genocidal acts upon Aboriginal people in Queensland.

This paper does not purport to give a voice to Aboriginal people. Nor does it seek to address the issue of the forcible transfer of children, or the treatment of Torres Strait Islanders as a distinct group. Rather, it aims to assess the evidence available to establish the physical and mental elements of genocide by killing, and to suggest options for meaningful action in recognition of past injustices. We commence by examining the concept of genocide as recognised in international law and adopted in Australia, then go on to consider evidence in support of the contention that acts of genocide were committed in Queensland. Finally, we recommend several measures for the recognition of past wrongs and genuine reconciliation.

II THE LEGAL CONCEPT OF GENOCIDE AND ITS APPLICATION TO AUSTRALIA

This Part defines genocide in international and Australian domestic law, and then examines judicial interpretation of the elements.

A *Genocide in International Law*

The *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*') declares in Article 2:

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

1861–1897 (Australian National University Press, 1982); Colin Tatz 'Confronting Australian Genocide' (2001) 25 *Aboriginal History* 16; A Dirk Moses, 'An Antipodean Genocide: The Origins of the Genocidal Moment in the Colonization of Australia' (2000) 2(1) *Journal of Genocide Research* 89.

⁵ It has been suggested that this recognition occurred by the late 1930s. See David Markovich, 'Genocide, a Crime of Which No Anglo-Saxon Nation Could be Guilty' (2003) 10(3) *Murdoch University Electronic Journal of Law* [20]. Eleven Aboriginal people are estimated to have been killed on Bentick Island in 1918. Bottoms, above n 3, 169.

⁶ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').

⁷ See *Criminal Code Act 1995* (Cth) div 268, as introduced by *International Criminal Court (Consequential Amendments) Act 2002* (Cth) sch 1.

⁸ Justice Gaudron suggested the availability of an action for damages '[i]f acts were committed with the intention of destroying the plaintiffs' racial group' in *Kruger v The Commonwealth* (1997) 190 CLR 1, 196–7.

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

However, this paper will concern itself only with killing, being driven by the evidence presented to this effect in *Conspiracy of Silence*.⁹ Article 3 stipulates that not only genocide itself, but also the inchoate acts of conspiracy, direct and public incitement, and attempt shall be punishable. Complicity in acts of genocide is also subject to sanction. Again, this paper will be restricted in its focus to complete and direct acts of genocide.

Article 4 declares that all ‘persons’ who have committed any Article 3 act shall be punished, regardless of their sovereign, public or private status. Article 5 requires state parties to enact legislation giving effect domestically to the *Genocide Convention*’s provisions — ‘in particular, to provide effective penalties for persons guilty’ of Article 3 acts.¹⁰

The remainder of the *Genocide Convention* is largely technical. It is of note, however, that although the drafters of the *Genocide Convention* sought to exclude universal jurisdiction for the crime of genocide, the *Genocide Convention* has been interpreted to allow this by virtue of customary international law.¹¹

The *Rome Statute of the International Criminal Court* (‘*Rome Statute*’)¹² was opened for signature on 17 July 1998 and entered into force from 1 July 2002. Article 5 states that the Court’s jurisdiction is ‘limited to the most serious crimes of concern to the international community as a whole’. This includes genocide, which Article 6 defines precisely as in Article 2 of the *Genocide Convention*. Article 25 grants the court jurisdiction over natural persons and also states that criminal responsibility under the Statute extends beyond commission of the specified crimes to acts of procurement or contribution to their actual or attempted commission. Article 27 affirms that public and private individuals are equally subject to the Statute and that ‘[i]mmunities or special procedural rules which ... attach to the official capacity of a person’ are of no effect. The *Rome Statute* has been interpreted as requiring genocidal conduct to have ‘[taken] place in the context of a manifest pattern of similar conduct directed against that group

⁹ The authors are aware of not perpetuating misconceptions of genocide as being limited to acts of direct killing. See Ann Curthoys and John Docker, ‘Introduction — Genocide: Definitions, Questions, Settler-Colonies’ (2001) 25 *Aboriginal History* 1, 12.

¹⁰ *Genocide Convention* art 5.

¹¹ *A-G (Israel) v Eichmann* (1961) 36 ILR 5, 29–30, 49–50. See also William A Schabas, ‘Convention for the Prevention and Punishment of the Crime of Genocide’ (2008) *United Nations Audiovisual Library of International Law*, 3 <http://legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf>.

¹² *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) (‘*Rome Statute*’).

or [been] conduct that could itself effect ... destruction' of the group, in whole or in part;¹³ however, this is not a necessary part of the crime in customary international law.¹⁴

The possibility of a body such as the International Criminal Court ('ICC') was foreseen by the drafters of the *Genocide Convention*. Article 6 expressly permits the trial of genocide offences in 'such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. Australia signed the *Rome Statute* on 9 December 1998, with ratification occurring on the instrument's entry into force. However, the *Rome Statute* explicitly applies only to acts occurring after its entry into force.¹⁵

Although the *Genocide Convention* was the first international instrument to declare the existence and content of the crime of genocide, the concept did not arise out of this document. Rather, at least since the middle of the 20th century, the prohibition of genocide has been recognised as a fundamental principle of customary international law. Thus, the International Court of Justice (which has declared itself able to adjudicate on charges of genocide against a state)¹⁶ declared that genocide is a crime under custom and that the underlying principles of the Convention are binding on all states.¹⁷ This is supported by the wording of Article 1 of the *Genocide Convention*, which states that '[t]he Contracting Parties confirm that genocide... is a crime under international law...'¹⁸ According to Douglas Guilfoyle, the content of the crime under custom is constituted at least by Articles 1 to 4 of the *Genocide Convention*.¹⁹ This issue is considered further below.

B Domestic Offences Relating to Genocide

Australia signed the *Genocide Convention* on 11 December 1948 and ratified it on 8 July 1949. Australia's commitment to the *Genocide Convention* is without reservation; in fact, it has several times rejected other nations' attempts at reservation.²⁰ However, at the time of ratification, it was apparently assumed that the *Genocide Convention* would never have any practical application to Australia.²¹

As noted above, the *Genocide Convention* requires that its provisions be enacted domestically. However, despite repeated advice that existing offences were insufficient to satisfy Article 5, such legislation was only passed in Australia in 2002 (as an amendment to the *Criminal Code Act 1995* (Cth)).²² This was motivated by the imminent entry into force of the *Rome Statute*, to

¹³ International Criminal Court, *Elements of Crimes*, Doc No ICC-PIDS-LT-03-002/11 (adopted 11 June 2010) art 6.

¹⁴ *Prosecutor v Krstic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [224].

¹⁵ *Rome Statute* arts 11(1), 24.

¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Judgement)* [1996] ICJ Rep 595. See also Schabas, above n 11, 4.

¹⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15. See also *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 32.

¹⁸ Emphasis added.

¹⁹ Douglas Guilfoyle, 'Nulyarimma v Thompson: Is Genocide a Crime at Common Law in Australia?' (2001) 29 *Federal Law Review* 1, 5 citing *Nulyarimma v Thompson* [1999] FCA 1192 (2 September 1999).

²⁰ The efficacy of such reservations was subsequently denied in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15.

²¹ See, eg, Commonwealth, *Parliamentary Debates*, Senate, 6 July 1949, 2004–5 (Reginald Murray).

²² This was via the *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

ensure Australia's ability to prosecute individuals accused of genocide and forestall the operation of the ICC's complementary jurisdiction with respect to Australian nationals.²³ The relevant offences replicate sub-paras (a) to (e) of Article 2 of the *Genocide Convention*,²⁴ along with the requisite intent. Each is punishable by life imprisonment. Again, the legislation only applies prospectively;²⁵ however, in contrast with the international instruments,²⁶ its application extends to corporate persons.²⁷

C Interpretation of Genocide Offences

Unsurprisingly, there has been no judicial interpretation to date of the genocide offences under the Commonwealth *Criminal Code Act 1995*. However, there is considerable case law from several international bodies on genocide under the *Genocide Convention* and the *Rome Statute*, relevant to customary international law. These sources of international law may be referred to in order to resolve ambiguities in the domestic legislation, as well as being relevant to any common law offence of genocide.²⁸

1 Intent

The 'intent to destroy' is not negated purely because members of the group still exist. In *Prosecutor v Mladic and Karadzic*, it was stated that:

[t]he degree to which the group was destroyed in whole or in part is not necessary to conclude that genocide has occurred. That one of the acts enumerated in the definition was perpetrated with a specific intent suffices.²⁹

This statement highlights the fact that, although genocidal intent may more easily be identified in a series of acts, a single act motivated by the intent to destroy can support a finding of genocide in customary law.³⁰ This conclusion is supported by the principle that the intent need not be the destruction of an entire group, but any part of it. It has been observed that:

²³ See Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) and *Criminal Code Act 1995* (Cth) s 268.1.

²⁴ See *Criminal Code Act 1995* (Cth) div 268 sub-div B.

²⁵ This is not explicitly stated as in the *Rome Statute*; however, it is a long-standing principle of the common law that Parliament must use exceptionally clear language if legislation is to be retrospective in effect, and such is not the case here. See *Maxwell v Murphy* (1957) 86 CLR 261, 267 (Dixon CJ).

²⁶ *Rome Statute* art 25(1); *Statute of the International Criminal Tribunal for Rwanda*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) art 5 ('*Statute of the International Criminal Tribunal for Rwanda*'); *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (7 July 2009) art 6 ('*Statute of the International Criminal Tribunal for the Former Yugoslavia*').

²⁷ See *Acts Interpretation Act 1901* (Cth) s 2C(1); *Criminal Code Act 1995* (Cth) s 12.1.

²⁸ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287, 315.

²⁹ *Prosecutor v Mladic and Karadzic (Decision on Review of Indictment under Rule 61)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case Nos IT-95-5-R61 and IT-95-18-R61, 11 July 1996) [986]. This fact was again emphasised in *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998).

³⁰ John Quigley, *The Genocide Convention: An International Law Analysis* (Ashgate Publishing, 2006) 99–100.

[t]he criminal act itself ... of genocide ... differs in its nature from the combination of all the individual acts of murder and the other crimes committed during its execution. The people, in whole or in part, is the victim ...³¹

The intent to destroy must be directed towards members of a particular group. Thus, its victims must have been identified because of their membership of a particular national, ethnical, racial or religious group,³² although this need not be the sole reason for their selection as targets.³³ Indeed, 'the existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide'.³⁴

In *Prosecutor v Akayesu*, the mental element of the crime was said to be 'a special intent', requiring 'that the perpetrator clearly seek to produce the act charged'.³⁵ Due to the difficulty of establishing intent without a confession, the Chamber deemed that this could be 'inferred from ... presumptions of fact' evident in the context of perpetration, such as the systematic nature of attacks; the targeting of members of particular groups but exclusion of others; and the scale of atrocities committed.³⁶ However, the International Criminal Tribunal for the Former Yugoslavia ('ICTY') made clear that such an inference 'must be the only reasonable inference available on the evidence'.³⁷

The definitions of certain genocidal acts include a further mental element, either expressly or by implication. Where this is not the case, as with killing under Article 2(a), the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda ('ICTR') indicates that the mental element of recklessness may be inferred.³⁸

2 'National, Ethnical, Racial or Religious Group'

The reasoning of the ICTY and ICTR has been instrumental in determining how a 'group' may be identified.³⁹ The accepted approach considers subjective characteristics, rather than objective ones reflecting formal membership criteria. The subjective approach acknowledges that group identities are social constructs, not verifiable facts, and was first

³¹ *A-G (Israel) v Eichmann* (1961) 36 ILR 5, 233.

³² *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [521].

³³ *Prosecutor v Niyitegeka (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No IT-95-10-A, 5 July 2001) [51]-[53].

³⁴ *Prosecutor v Jelisic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-14-A, 9 July 2004) [49].

³⁵ *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [521].

³⁶ *Ibid* [523]. See also *Prosecutor v Ncamihigo (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-01-63-T, 12 November 2008) [331].

³⁷ *Prosecutor v Krstic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [41], citing *Prosecutor v Vasiljevic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-32-A, 25 February 2004) [121], *Prosecutor v Vasiljevic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-98-32-T, 29 November 2002) [68], *Prosecutor v Krnojelac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-25-T, 15 March 2002) [83].

³⁸ See Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia, 2002) 581.

³⁹ Guglielmo Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49 *International and Comparative Law Quarterly* 578, 589.

referred to in *Prosecutor v Kayishema and Ruzindana*.⁴⁰ It was there stated that an ethnic group should be defined as one ‘whose members share a common language or culture’ and also ‘a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)’.⁴¹ The ICTY clearly affirmed this approach in *Prosecutor v Jelusic* with respect to ethnic, national and racial groups, stipulating as relevant ‘the stigmatisation of a group as a distinct national, ethnical or racial unit by the community...’⁴²

D Determining Responsibility for Genocide

Clearly, determining the responsibility of individuals for acts of genocide is a difficult task, particularly when a significant period of time has passed since the relevant acts occurred. However, where actors impugned are members or agents of a government (as this paper seeks to establish) evidence may more easily be gathered and inferences drawn to that effect. Previous Australian cases have identified responsible Ministers of government as defendants, on the basis that the source of authority for certain actions ultimately derived from their instructions.⁴³ This approach is consistent with the ‘command responsibility’ doctrine of international law. The waters become murkier where individuals appear to have acted entirely on their own motivation. However, it is contended that where it is within the ambit of state power to control unlawful conduct, yet authorities knowingly fail to act, the state in fact condones and thus implicitly authorises such actions. In those circumstances, the doctrine of command responsibility again requires that the responsible individuals be identified and punished.

1 Command Responsibility

The doctrine of command responsibility was originally developed through the case law of international tribunals in the context of international conflicts, but has subsequently been deemed to extend to the actions of civilian leaders.⁴⁴ In essence, for the doctrine to operate under customary law, three elements must be satisfied.⁴⁵ Firstly, there must be a relationship of superior and subordinate. The military hierarchy provides a strong basis for imputing responsibility for a subordinate’s acts to their superior. In the civilian context, leaders must hold a similar degree of effective control.⁴⁶ Thus, both military and civilian leaders must belong

⁴⁰ *Prosecutor v Kayishema and Ruzindana (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999).

⁴¹ *Ibid* [98].

⁴² *Prosecutor v Jelusic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-14-A, 9 July 2004) [70].

⁴³ See *Re Thompson; Ex parte Nulyarimma* (1998) 148 FLR 285; *Buzzacott v Hill* [1999] FCA 639 (10 May 1999).

⁴⁴ Antonio Cassese, *Cassese’s International Criminal Law* (Oxford University Press, 2013) 184, citing *United States v Brandt (Judgement)* (US Military Tribunal at Nuremberg, 19 July 1947); *Prosecutor v Delalic, Mucic, Delic and Landzo (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-21-T, 16 November 1998) [370], [377]–[378].

⁴⁵ *Prosecutor v Delalic, Mucic, Delic and Landzo (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-21-T, 16 November 1998) [346].

⁴⁶ See, eg, *Prosecutor v Nahimana, Barayagwiza and Ngeze (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-52-A, 28 November 2007) [605].

to some formal or informal hierarchy and have ‘a material ability to prevent or punish criminal conduct’ of those beneath them.⁴⁷

Secondly, leaders must have actual or constructive knowledge of the crimes being or to be committed by those under their control.⁴⁸ Constructive knowledge is satisfied by a superior, in the particular context, having ‘reason to know’ of subordinates’ crimes, such as by having information which would put the superior on notice and cause them to institute enquiries.⁴⁹ This applies both to civilian leaders and, according to the ICTR and ICTY, also to military commanders. Different standards of knowledge apply in the ICC to civilian and military commanders, as the *Rome Statute* explicitly provides for a form of command responsibility that differs from the customary law model. Consequently, a lower bar applies to the constructive knowledge of military superiors. They will be liable where they ‘should have known’ of current or future crimes. This requires them to actively seek information as to the conduct of their subordinates, even without any information suggesting misconduct.⁵⁰

Thirdly, a superior will be culpable for the criminal conduct of subordinates where they fail to take necessary and reasonable steps to prevent or punish those crimes. Where a superior is aware that crimes are to be committed, they will not evade responsibility simply by punishing after the fact where prevention was possible.⁵¹ However, a superior may be deemed to have taken appropriate measures where they do not punish directly but instead remit the allegations to competent authorities.⁵² What measures are appropriate is a question of fact, not law, and will be dictated by the circumstances.⁵³

The *Rome Statute* requires, fourthly, that there be some causal connection between the superior’s failure to act and the commission of the crimes.⁵⁴ However, the ICTY has constantly denied this as part of the doctrine in customary law.⁵⁵

⁴⁷ *Prosecutor v Delalic, Mucic, Delic and Landzo (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [256].

⁴⁸ As to actual knowledge, see *United States v Pohl (Judgement)* (US Military Tribunal at Nuremberg, 3 November 1947) 1011–12; *United States v von Leeb (Judgement)* (US Military Tribunal at Nuremberg, 27 October 1948) 543–5. As to constructive knowledge, see *United States v Soemu Toyoda (Judgement)* (US Military Tribunal at Tokyo, 7 September 1949) 5005–6.

⁴⁹ *Prosecutor v Strugar (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-42-A, 17 July 2008) [298], [303]–[304], [308]; *Prosecutor v Delalic, Mucic, Delic and Landzo (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [223], [241].

⁵⁰ *Prosecutor v Bemba Gombo (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [432]–[434].

⁵¹ *Prosecutor v Bagilishema (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-95-1-A, 7 June 2001) [49].

⁵² *Prosecutor v Blaskic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [72].

⁵³ *Ibid* [68], [632].

⁵⁴ *Rome Statute*, above n 12, art 28.

⁵⁵ See *Prosecutor v Hadzihasanovic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-47-A, 22 April 2008) [39].

2 *State Responsibility for Internationally Wrongful Acts*

After decades of debate, a test now exists for determining the responsibility of states for internationally wrongful acts, which include genocide.⁵⁶ It must be asked, firstly, whether the acts were committed by organs of the state, and if not, whether by persons or groups who were not organs, but nonetheless acted on the instructions, or under the direction or control of, the state. Notably, it has been held that the conduct of an organ of the state will be deemed an act of the state even if it is an organ of a territorial unit of the state, like Queensland.⁵⁷

Admittedly, the development of these principles was a contentious process. Additionally, command responsibility had not crystallised as distinct doctrine of international law prior to 1945. Therefore, it is difficult to assert that Queensland or Australia could actually be held responsible for genocide as an internationally wrongful act. This is a technical point which would prevent actual prosecution and legal culpability for the acts alleged. Insofar as international law in its present state of maturity would acknowledge state and individual responsibility for criminal acts, these principles advance the case consolidated by evidence below that substantial harm was done at the behest of the contemporary authorities.

III EVIDENCE OF GENOCIDE IN QUEENSLAND

This Part will examine evidence that attests to the occurrence of genocide in Queensland, addressing the elements identified above. Regardless of whether legal action is or was ever possible, this examination will make pellucid that acts undertaken, condoned or tolerated by Queensland's administrative regimes were of a genocidal character. The object of this section is to found the paper's fundamental case: that the scale and nature of unlawful killings of Aboriginal people compels the current Queensland government to take concrete steps for the recognition and reparation of past wrongs.

A *Preliminary Issues*

This paper does not seek to comply with formal rules of evidence. The word 'evidence' is used in its colloquial sense, despite the legal nature of this paper.

Additionally, several major issues arise in the examination of sources concerning acts committed against Aboriginal people. Firstly, primary evidence of killings is limited, much of this having been hidden. By way of example, seven white men were hanged in 1838 for their part in killing 28 Wirrayaraay people in the Myall Creek Massacre. This punishment is often cited as having provided an incentive for perpetrators of frontier violence to conceal evidence of deaths in order to avoid possible criminal proceedings.⁵⁸ Even so, there is an enormous volume of primary and secondary sources documenting such acts and it is beyond the scope of this paper to examine each and every source thoroughly.

⁵⁶ *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001).

⁵⁷ *Ibid.*

⁵⁸ A Dirk Moses, *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, 2004) 49.

Further, secondary evidence presented in historical accounts is often subject to criticism for apparent bias. In examining evidence recorded from secondary sources, it is imperative to trace the original source for a comprehensive view of the incidents described.

Efforts have been made to resolve these issues by limiting the paper's scope to incidents that occurred in Queensland, as documented by Bottoms' in *Conspiracy of Silence*. Further, the paper relies substantially on circumstantial evidence to establish a case for genocide. Such reliance is not without precedent; rather,

[i]t is rarely the case that the prosecutor will possess explicit or overt evidence of intent. The smoking gun is a myth. For instance, an intent to destroy a group may be inferred from labelling a protected group as an enemy of the state or the practice of systematic and destructive behavior patterns towards the group.⁵⁹

B Evidence of Genocide against Aboriginal People in Queensland

1 'National, Ethnical, Racial or Religious Group'

The crime of genocide envisages the existence of a distinct group against which acts have been directed. It is clear that at the outset of colonisation the Aboriginal population of Queensland was composed of many distinct clan and language groupings.⁶⁰ As noted above,⁶¹ the subjective criteria for defining an ethnic group can encompass both self-identification and identification by the perpetrators themselves.

Much has been written about the mistaken assumptions underpinning the doctrine of *terra nullius*, in particular the belief that Aboriginal people were randomly nomadic⁶² and, therefore, incapable of sustaining proprietary title to particular tracts of land. However, there is evidence to suggest that many pastoralists gleaned intimate knowledge of the proprietary habits of particular Aboriginal groups such that, for example, they were able to identify them as belonging to a particular river catchment.⁶³

The sheer scale of some larger massacres reported was such that entire clans may have been annihilated in single events or campaigns and that perpetrators would have been aware that the people killed were members of a particular Aboriginal group.⁶⁴ This is reflected by the occasional reference to a 'permanent dispersal'.⁶⁵ Therefore, whilst it is unnecessary to establish the degree by which a group has been destroyed,⁶⁶ by defining discrete groups by

⁵⁹ Markovich, above n 5, [49].

⁶⁰ See ABC, *Map of Aboriginal Australia* (2000) <http://www.abc.net.au/indigenous/map/images/indigi_map.png>.

⁶¹ See II (C)(2) above.

⁶² In 1836, Charles Darwin regarded Aboriginal people as 'a set of harmless savages wandering about without knowing where they shall sleep at night, and gaining their livelihood by hunting in the woods'. Charles Darwin, *The Voyage of the Beagle* (Heron Books, first published 1845, 1968 ed) 434, quoted in Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Allen & Unwin, 2012) 309.

⁶³ See, eg, 'McIntyre [River] Blacks' in Bottoms, above n 3, 34.

⁶⁴ For example, the campaign of killing that followed the Cullin-La-Ringo murders is estimated to have claimed the lives of between 300 to 370 Aboriginal people: Bottoms, above n 3, 54.

⁶⁵ Jonathan Richards, *A Question of Necessity: The Native Police in Queensland* (PhD Thesis, Griffith University, 2005) 105.

⁶⁶ 'The degree to which the group was destroyed in whole or in part is not necessary to conclude that genocide has occurred'; *Prosecutor v Mladic and Karadzic (Decision on Review of Indictment under Rule 61)*

reference to the perpetrator's identification, the requisite intent to destroy may more readily be inferred.

2 *Actus Reus*

During what may be characterised as the most violent period of Queensland's history, it is estimated that approximately 24 000 Aboriginal people were killed on the frontier.⁶⁷ In contrast, the number of Europeans killed by Queensland's Aboriginal population over the same period tallies in the hundreds.⁶⁸

Bottoms' *Conspiracy of Silence* documents at least 140 mass killings of Aboriginal people. According to the records, these massacres commenced at Moreton Island in 1831 with the deaths of about 20 Ngugi people by Crown military officers. The last reported event — the execution of about 11 Kaiadilt people by a private individual on Bentick Island — occurred as late as 1918.⁶⁹ Those atrocities for which dates are recorded can be broken down as follows:⁷⁰

<i>Decade</i>	<i>Number of recorded massacres</i>
1830s	4
1840s	6
1850s	9
1860s	34
1870s	20
1880s	13
1890s	2
1900s	5
1910s	1

The dates of 45 massacres on Bottoms' maps remain unknown. However, as many of the undated atrocities occurred in areas where others were recorded in the 1870s and 1880s, it may reasonably be inferred that they occurred relatively contemporaneously. Thus it is possible to conclude that a dramatic escalation in killings occurred in the early 1860s and that the majority of atrocities took place in the period from 1860 to 1890.

From the accounts collated by Bottoms, it is possible to discern the following features as common to many of the frontier killings of Aboriginal people in Queensland:

- victims were selected indiscriminately, comprising men, women and children;
- killing was occasioned by shooting, poisoning, stabbing and the practice of 'braining' children and infants;

(International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case Nos IT-95-5-R61 and IT-95-18-R61, 11 July 1996) 986. This was again emphasised in *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998).

⁶⁷ Evans, above n 2, 1. Recently, this figure has been substantially revised upwards to 66 680. See Raymond Evans and Robert Orsted-Jensen 'Assessing Violent Mortality on the Queensland Frontier' (Paper presented at the Australian Historical Association Annual Conference, University of Queensland, 9 July 2014).

⁶⁸ Richards, above n 65, 272, 357, has identified 327 non-Aboriginal deaths identified during the period 1827–1904.

⁶⁹ See Bottoms, above n 3, 169.

⁷⁰ Refer to Maps 1.1-1.3 in Bottoms, above n 3, xiv-xvi.

- perpetrators were private individuals, often in organised parties of neighbouring pastoralists acting alone, or on occasions, in concert with members of the Queensland Native Police;
- killings were extrajudicial and arbitrary;
- while atrocities often occurred in areas where pastoralists had recently taken up Crown leases, they occurred across the length and breadth of the colony of Queensland;
- killings were usually followed by attempts to destroy or conceal evidence by disposal of human remains in watercourses or through incineration;
- most occurred during ‘surprise raids’ on Aboriginal camps, rather than in locations of strategic advantage to hostile Aboriginal warriors (hence the presence of women and children amongst the deceased); and
- most represented a response to the killing of livestock or, far less frequently, of shepherds or pastoralists by Aboriginal people.

3 *Mens Rea*

The definition of genocide requires the perpetrators to possess a peculiar state of mind: ‘intent to destroy’.

There is no explicit evidence of a calculated plan by either the New South Wales or Queensland colonial governments, or the numerous private pastoralists, to destroy Queensland’s Aboriginal population.⁷¹ In this respect, it has been noted that ‘the structure and resources of the Queensland government were so limited during this [early colonial] period that any plan to systematically annihilate the Aborigines would have failed’.⁷²

However, at law, intent can be ‘inferred from ... presumptions of fact’ arising from the ‘general context of the perpetration of other culpable acts systematically directed’ against the group, as well as the ‘scale and general nature of the atrocities committed’.⁷³ Arguably, this approach is congruent with that suggested by A Dirk Moses to determine the presence or otherwise of genocidal intent. Moses notes that the British Colonial Office did not possess the requisite intent upon dispatching the First Fleet. Similarly, the New South Wales colonial government lacked such an explicit intention during the process Moses describes as ‘ethnocide’, marked by the ‘melting away’ of Aboriginal societal structure, culture and a rapid decline in population. Contrastingly, in Queensland, Moses identifies the specific genocidal intent

in the gradual evolution of European attitudes and policies as they were pushed in an exterminatory direction by the confluence of their underlying assumptions, the demands of the colonial and international economy, their plans for the land, and the resistance to these plans by the indigenous Australians.⁷⁴

Accordingly, the requisite intention clearly manifested when it became apparent that, in order for the economic model underpinning the colonisation project to succeed, the Aborigines ‘had

⁷¹ Richards, above n 65, 293.

⁷² Alison Palmer, *Colonial Genocide* (Crawford House Publishing, 2000) 58.

⁷³ *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [523]. See also *Prosecutor v Ncamihigo (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-01-63-T, 12 November 2008) [331].

⁷⁴ Moses, above n 4, 92.

to be subdued, and, if necessary, exterminated'.⁷⁵ This conclusion is borne out by the pattern of atrocities in Queensland which, as shown above, dramatically increased in the decade commencing in 1860.

It is possible to identify other relevant historical events and confluent forces that, incorporated into a dynamic or contextual analysis, suggest the gradual manifestation of 'intent to destroy' Aboriginal people.

Firstly, white settlers felt physically threatened by Aboriginal people and responded in kind, on magnitudes far greater in scale. Existing Aboriginal resistance to colonisation continued after the closure of the penal settlement in 1839. The subsequent entry of pastoralists into the Darling Downs saw an escalation in attacks by Aboriginal groups,⁷⁶ with a concerted series of assaults in 1843 leading to the abandonment of 17 stations on the McIntyre River.⁷⁷

In some cases, isolated shepherds and undermanned pastoralists were unable to mount physical assaults upon Aboriginal people. As a result, several resorted to poisoning: for example, at Kilcoy in 1842, 40 to 80 Aboriginal people died in this way.⁷⁸ In the late 1850s, William Stamer travelled to the Darling Downs and recorded:

It was enough to make ones [sic] blood run cold to listen to the stories that were told of the diabolical manner in which whole tribes were 'rubbed out' by unscrupulous squatters. No device by which the race could be exterminated had been left untried. They had been hunted and shot down like wild beasts — treacherously murdered whilst sleeping within the paddock rails, and poisoned wholesale by having arsenic or some other substance mixed with flour given to them for food. One 'lady' on the Upper Condamine [River] had particularly distinguished herself in the poisoning line, having, if report spoke the truth, disposed of more natives than any squatter by means of arsenic alone...⁷⁹

Secondly, the underlying purpose of establishing and maintaining the Queensland Native Police Corps ('Native Police') provides insight into the existence of a deliberate intention on the part of public and private actors to destroy Queensland's Aboriginal population. The Native Police commenced operating in the Queensland portion of the colony of New South Wales in 1848. From the outset, it was evident that the fate and fortune of the pastoralists were inextricably intertwined with the operation of the Native Police. Frederick Walker, the officer in charge of the original corps operating on the McIntyre River, asserted that land values increased fivefold in the period from May 1849 to January 1850, as a result of his activities.⁸⁰

It is apparent that, by the time of the 1861 Committee of Inquiry into the Native Police ('Inquiry'), there remained substantial confusion amongst members of the Queensland Parliament as to the precise legal character of the Native Police, which had been re-established under the authority of the Queensland colonial government. The President of the Legislative Council thought it an unconstitutional and illicit military force,⁸¹ while the Attorney-General

⁷⁵ Ibid.

⁷⁶ Bottoms, above n 3, 86.

⁷⁷ Ibid 31.

⁷⁸ Ibid 83–5.

⁷⁹ William Stamer, *Recollections of a Life of Adventure* (Hurst & Blackett Publishers, 1866) 98, quoted in Bottoms, above n 3, 86.

⁸⁰ NSW Legislative Assembly Votes & Proceedings (1852) 790, quoted in Bottoms, above n 3, 36.

⁸¹ Queensland, *Parliamentary Debates*, Legislative Council, 30 July 1861 (Maurice O'Connell).

described it as a semi-military force.⁸² One telling insight is Sir Lilley's belief that the Native Police had as 'its greatest object ... that the blacks should not stand in the way of civilisation.'⁸³

One of the outcomes of the Inquiry was the effective conclusion that Native Police were more 'efficient' than white police in providing protection against Aboriginal people. The following passage suggests one of the reasons why Native Police were preferred to white police:

They knew that in the scrub there was always fighting, shooting, and killing, but no prisoners were ever taken ... It appeared ... that when the native police entered the scrub the fight must be a fight of extermination, and if that were the object in view, the black police were the proper men.⁸⁴

Among other various reasons for the preference of Native Police was that their evidence was inadmissible in courts of law before 1876, hence the prospect of their white commanders being brought to account was (and was proven to be) negligible.⁸⁵

The Inquiry demonstrated that the Queensland colonial government had assumed responsibility for the Native Police and concluded that the use of 'black' troopers should continue. Thus, some years after the separation of the Queensland colony, a Regulation gazetted for the operation of the Native Police stipulated that 'it is the duty of the officers, at all times and opportunities, to disperse any large assembly of blacks without unnecessary violence...'⁸⁶

The intention of Parliament as to the meaning of 'disperse' was made clear during the Inquiry: 'When in the scrub they [Aboriginal people] must be invisible, and he could not understand dispersing them, unless the interpretation were that dispersement meant shooting'.⁸⁷ This Regulation unquestionably reveals an intention on the part of the Queensland colonial government to use a 'necessary' degree of pre-emptive violence – including lethal force – to disperse Aboriginal groups.

Following the Inquiry, the Native Police grew rapidly, in line with pastoral expansion and thus reflecting its role as a protective force for the pastoralists. In 1863, there were 14 detachments of Native Police and 137 personnel stationed at various locations throughout the State.⁸⁸ By 1869, the number of Native Police detachments had grown to 24 across Queensland.⁸⁹

In 1860, a land regulation permitted one-year licences (or 'runs') and 14-year leases, conditional on land being promptly stocked to a quarter of its capacity.⁹⁰ The presence of huge herds of livestock had a telling impact on the ability of Queensland's Aboriginal population to continue their intricate food production and land management practices. Central to these practices was the planned and systematic use of fire to activate the regeneration of favoured

⁸² Queensland, *Parliamentary Debates*, Legislative Assembly, 25 July 1861 (Sir Charles Lilley).

⁸³ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 July 1861.

⁸⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 July 1861 (Arthur Macalister).

⁸⁵ Richards above n 65, 280.

⁸⁶ Queensland, *Government Gazette*, 10 March 1866 (Regulation 31).

⁸⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 July 1861 (George Raff).

⁸⁸ Sergeant A Whittington, 'The Queensland Native Mounted Police' (1964) 7(3) *Royal Historical Society of Queensland Journal* 508, 514.

⁸⁹ Ibid.

⁹⁰ Geoff Ginn, 'Pastoralism 1860s–1915' (15 November 2010) *Queensland Historical Atlas* <<http://www.qhatlas.com.au/pastoralism-1860s-1915>>.

grass shoots, luring land animals out onto prepared hunting fields.⁹¹ These practices, developed over millennia, were necessarily adapted to the sustainable limits of the Australian environment. In contrast, European pastoralists had no understanding of the capacity of their leases. Driven by financial incentives, settlers increased livestock numbers to staggering levels, peaking at 21 million sheep in 1892 and 7 million cattle shortly afterwards.⁹²

Huge herds of domesticated animals frightened off native fauna essential to Aboriginal diets and damaged roots of edible plants relied upon in particular seasons. The foreseeable result was that Aboriginal people often commenced spearing cattle and sheep within a relatively short period of their lands being occupied to ensure their own survival. Thus, notwithstanding a British Colonial Office decree mandating that pastoral leases allow for dual usage (and the legal principle of co-existence that would emerge 150 years later in *Wik Peoples v Queensland*⁹³), the notion that pastoral lease holders could successfully co-exist with Aboriginal traditional owners was, in practical terms, hopelessly destined for failure.

In the 1860s, as the number of attacks on livestock increased, recognition of the irreconcilable nature of land usages must have crystallised in the minds of pastoralists, if not the administrators of the colonial government. The Native Police grew considerably in size and subsequent conflicts with Aboriginal people could not by any measure be described as proportionately retaliatory in nature.

The determination of the colonial government at the conclusion of the Inquiry, that ‘Aborigines must not stand in the way of civilisation’, left open few alternatives: the Aboriginal inhabitants of pastoral leases could be subdued, destroyed, or ‘civilised’.⁹⁴ Whilst they were unprepared to admit it openly, the path demonstrably taken by Queensland’s colonial government was to subdue by lethal force.⁹⁵

By choosing lethal force as the means of subjugation, the colonial government demonstrated its sanctioning of ‘conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result’⁹⁶ including the destruction of Aboriginal groups throughout Queensland. The following account of the Hon Lilley demonstrates the Queensland Parliament’s awareness of the foreseeable genocidal consequences of the continued use of the Native Police:

throughout the world where the white man set his foot the dark man gradually passed away, and it was for them to say could they stay that decline, or alleviate it as the shadow lengthened

⁹¹ It is only in recent times that the extent of sophistication involved in these practices has been fully comprehended by non-Indigenous people. See, eg, Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Allen & Unwin, 2012).

⁹² Ginn, above n 90.

⁹³ Bottoms, above n 3, 31; *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁹⁴ It is of interest to note that the Colonial Secretary rejected a suggestion by Inspector Marlow that Aboriginal women and children be removed to offshore islands as a means of responding to Aboriginal resistance. Richards, above n 65, 128.

⁹⁵ See generally Queensland, *Parliamentary Debates*, Legislative Assembly, 25 July 1861.

⁹⁶ *Prosecutor v Kayishema and Ruzindana (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [103], quoting *1996 Draft Code of Crimes against the Peace and Security of Mankind with Commentaries*, 51 UN GAOR Supp (No 10) at 14, UN Doc A/CN.4/L.532, Corr.1 and Corr.3 (adopted 26 July 1996) 44.

over the dark race. He thought they ought to be careful that they did not err so that they became guilty parties in driving the aborigines from the face of the earth.⁹⁷

Thus, the specific genocidal intent of public and private actors can be inferred to have materialised at various relevant times, at least by the late 1850s, and to have continued until at least the early 1890s.

4 *Culpability*

Upon the introduction of the *Police Act 1863* (27 Vic 11), David Thomson Seymour became Acting Commissioner of the Queensland Police Force. He remained in the position until 1895⁹⁸ and, although he inherited responsibility of a Native Police Force that was already well established, he presided over the conduct of what appears the bloodiest period of Australia's history outside of World Wars I and II.

An analysis of the culpability of individual actors in the perpetration of crimes of genocide is beyond the scope of this paper.⁹⁹ It is nonetheless noted that the elements of the doctrine of 'command responsibility' outlined above appear to be satisfied. That is, there was a relationship of superior and subordinate, the leaders had (at least a constructive) knowledge of crimes, and there was a failure to take necessary and reasonable steps to prevent or punish those responsible for atrocities.

In considering the Queensland colonial government's responsibility, there is clear evidence that the Native Police comprised an organ of the State and acted under the actual control of the Executive Council. For example, the Executive Council approved appointments and dismissals to the Native Police upon recommendation of the Police Commissioner. The Executive Council approved the gazettal of the Regulations. The Executive Council failed to take reasonable or adequate measures to prevent or punish the crimes of the Native Police. Records reveal disciplinary action taken against officers for drunkenness, financial irregularities and occasionally for indiscreet killings, but measures were not put in place to prevent the indiscriminate killing of Aboriginal people that was the inevitable consequence of imposing a 'duty to disperse' upon armed officers. Thus, the regime presided over by the Queensland colonial government, through the offices of the Commissioner of Police and Colonial Secretary, can be determined as responsible for the international crime of genocide.

IV RECOGNITION AND RECOMMENDATIONS

A *Overview*

As established in the previous parts of this article, genocidal crimes were committed against the Aboriginal population of Queensland. A successful prosecution of genocide, in an international or domestic tribunal, is not a prerequisite to recognition. The past must be

⁹⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 July 1861 (Sir Charles Lilley).

⁹⁸ See Whittington, above n 88, 514.

⁹⁹ Richards has carefully collated and examined the personnel files and other archival materials relevant to the Queensland Native Police. His doctoral thesis provides an excellent resource for a detailed consideration of the relationship between the various entities within the colonial government responsible for the conduct of the Queensland Native Police. See Richards, above n 65.

acknowledged before reconciliation can occur. Indeed ‘the excavation of individual and collective memory [is] a cultural and political act of community reconstruction’.¹⁰⁰

This Part will briefly summarise government responses to date, before presenting several international comparisons and recommendations. It should be noted that the authors have not consulted with the Indigenous community; the recommendations simply represent initial research-based proposals. However, it is stressed that genuine engagement is essential if reconciliation is to progress further.

B Government ‘Denialism’ and Inadequate Attempts

The Australian Government appears to have long suffered a form of ‘denialism’ that has consistently deprived the country’s Aboriginal population of acknowledgment of the crimes perpetrated against their ancestors. According to Colin Tatz, this denialism has taken several forms:

First... the denial of any genocidal basis in Australian history, whether physical killing or child removal. Second, the counter view that it is whites who have been the victims. Third, the hypothesis that concentration on ‘unmitigated gloom’ overwhelms the reality that there has been more good than bad in Australian race relations.¹⁰¹

Instead of affording respect to the Aboriginal population by acknowledging the systematic destruction committed by the past governments, focus has repeatedly been on ‘moving on’ from the ‘gloomy’ past and affording attention to creating a ‘better future’. Unfortunately the ‘past is never fully gone’.¹⁰²

A community cannot ‘move on’ if the past is not recognised. Rather, ‘[a]cknowledgment and apology are the key to any kind of reconciliation process ... [:] the antidote to denialism’.¹⁰³ Kevin Rudd’s 2008 apology to the Stolen Generation, while symbolic,¹⁰⁴ addressed only one aspect of the wrongs that have been committed against Australia’s Aboriginal population over the last 250 years. While apologising for past forced removals of children, the former Prime Minister failed to mention the mass killings of thousands of Aboriginal people or the possibility of classifying such destruction as genocide. Thus, the ‘apology ... not only “buried a history of genocide” ... but it imagined Australia as post-colonial when no meaningful structural or functional change to the colonial order has occurred’.¹⁰⁵ Similarly, former Prime Minister Keating’s 1992 Redfern Speech acknowledged the murders of Aboriginal people, but did not make explicit that killing of such a scale and nature might constitute genocide.¹⁰⁶

¹⁰⁰ Victoria Sanford, ‘What is an Anthropology of Genocide?’ in Alexander Hinton and Kewis O’Neill (eds), *Genocide: Truth, Memory and Representation* (Duke University Press, 2009) 29.

¹⁰¹ Colin Tatz, ‘Genocide in Australia’ (Research Discussion Paper No 8, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1999) 35.

¹⁰² Ibid 42.

¹⁰³ Ibid 43.

¹⁰⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167–77 (Prime Minister Kevin Rudd).

¹⁰⁵ Damien Short, ‘When Sorry Isn’t Good Enough: Official Remembrance and Reconciliation in Australia’ (2012) 5(3) *Memory Studies* 293, 302 (citation omitted).

¹⁰⁶ Paul Keating, ‘Redfern Speech’ (Speech delivered at Redfern Park, 10 December 1992) <https://antar.org.au/sites/default/files/paul_keating_speech_transcript.pdf>.

Neither apology was sufficient to address the Queensland case specifically. As such, the present authors maintain that no formal apology or acknowledgement of genocidal acts in Queensland has been made by either the Australian or Queensland governments, despite there being broader political and social benefits to doing so.¹⁰⁷

C Some International Comparisons

The record of Queensland (and of Australia more broadly) is disappointing, if not embarrassing, in its insufficiency. This is especially so having regard to other national governments that have taken measures to recognise genocide or mass killings and other atrocities committed against particular populations.

In South Africa, atrocities committed from 1960 during the apartheid regime have been addressed to some extent, and an accurate history written, through the Truth and Reconciliation Commission.¹⁰⁸ Similarly, in New Zealand, '[t]he Crown has apologised for its failure "to act towards Ngai Tahu reasonably and with the utmost good faith"',¹⁰⁹ while Germany has made efforts at reconciliation since the Holocaust (including the establishment of national monuments and museums) 'to remember to learn from their history'.¹¹⁰ Significantly, the Netherlands recently apologised to Indonesia for government-authorised mass killings that took place in 1947 under Dutch colonial occupation.¹¹¹ Compensation for victims' families has also been proposed.¹¹² In April 2014, despite falling short of using the term 'genocide', Turkish Prime Minister Recep Tayipp Erdogan expressed his condolences for the mass killings of the Armenian population in 1915 under the Ottoman rule.¹¹³

Another example of efforts at recognising past transgressions is including genocide education in national curricula. Such measures have been utilised in post-conflict societies to bring about understanding and to prevent the development of a skewed version of history, primarily amongst young people.¹¹⁴ Cambodia represents an interesting example, as the nation is 'implementing a formalized curriculum on genocide'¹¹⁵ 30 years after the end of the Khmer Rouge regime. Time should not be a barrier to educating youth about the truth of their nation's past. Uncovering history is vital to understanding continuing lived experiences (such as socio-economic disadvantage) of groups subject to persecution; in turn creating a more compassionate community.

The Australian and Queensland governments, on the other hand, have made no effort to formally recognise the genocidal acts committed against the Aboriginal peoples of Queensland.

¹⁰⁷ Julie Cassidy, 'Unhelpful and Inappropriate?: The Question of Genocide and the Stolen Generations' (2009) 13(1) *Australian Indigenous Law Review* 114, 130.

¹⁰⁸ See generally Martha Minow, 'Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission' (2007) 14(4) *Negotiation Journal* 319.

¹⁰⁹ Tatz, above n 101, 45.

¹¹⁰ Shay Marie Galto, *Education as a Form of Reconciliation or Recognition: Teachers' Perspectives on Genocide Education in Cambodia* (MA Thesis, Northern Illinois University, 2012) 31.

¹¹¹ BBC News, 'Netherlands Apology for Indonesia 1940s Killing', *BBC World News Asia* (online), 12 September 2013 <<http://www.bbc.co.uk/news/world-asia-24060913>>.

¹¹² BBC News, 'Dutch Apology for 1947 Indonesia Massacre at Rawagede', *BBC World News Asia* (online), 9 December 2011 <<http://www.bbc.co.uk/news/world-asia-16104751>>.

¹¹³ BBC News, 'Turkey Offers Condolences to Armenia over WWI Killings', *BBC World News Europe* (online), 23 April 2014 <<http://www.bbc.com/news/world-europe-27131543>>.

¹¹⁴ Galto, above n 110.

¹¹⁵ *Ibid.*

Indeed, measures such as those taken by other jurisdictions are few and far between in the Australian case. In the federal context, Tatz goes so far as to say that, '[i]f the former colonial dominions were to be viewed as competing to address the past as a way of confronting the present and future, Australia... would be running a clear last'.¹¹⁶

D *Recommendations*

Yet concrete steps must be taken to recognise and address the severe and on-going trauma to Indigenous people in Queensland flowing from colonial oppression. David Crocker identifies some key components of reconciliation: recognition of harm; public apology; truth commissions; criminal trials or lustration; upholding the rule of law; monuments or days of remembrance; moral educational activities; long-term development and institutional reform; and public deliberation.¹¹⁷

Utilising Crocker's norms, a number of preliminary recommendations may be made, that may aid the Queensland Government to address the violence of the past and pay respect to those who have suffered (and continue to do so).

1 *Formal Government Acknowledgement and Apology*

A first step would be for the Queensland Government to make a comprehensive apology to the State's Indigenous population for all past wrongs. As explained by Short, 'An apology requires the involvement of each party and consequently both reflects and constitutes moral community'.¹¹⁸ As such, direction and input from Queensland's Indigenous population and the general Queensland populace as to what would be appropriate and remedial must inform this.

As some limited compensation schemes for (non-genocidal) wrongs against Indigenous people have previously been undertaken, it seems unlikely that the Queensland government would be willing to accompany an apology with material compensation.¹¹⁹ However, acceptance of responsibility for the acts of past colonial authorities is needed at the very least. Indeed, '[f]ull acceptance of responsibility by the wrongdoer is the hallmark of a genuine apology, a crucial *sincerity* condition'.¹²⁰ In 2012 the then Premier, Campbell Newman, apologised for the 'great injustice' committed against the Wik Mungkan people by former Premier Bjelke-Petersen's refusal to return land at Cape York to its traditional owners in 1974.¹²¹ This act demonstrates that the current Queensland government has not only the obligation, but also, we contend, the ability, to acknowledge and apologise for genocidal acts committed during the colonial period.

¹¹⁶ Tatz, above n 101, 46.

¹¹⁷ David Crocker, *Reckoning with Past Wrongs: A Normative Framework* (1999) 13 *Ethics and International Affairs* 43, 48-62.

¹¹⁸ Short, above n 105, 297.

¹¹⁹ Regarding the Indigenous Wages and Savings Reparations Scheme 2002 (Qld), see *History of Indigenous Wages* (24 January 2014) <<https://www.qld.gov.au/atsi/cultural-awareness-heritage-arts/history-indigenous-wages/>>. For commentary, see Alan Bogg and Tonia Nevitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 108-111.

¹²⁰ Short, above n 105, 297 (emphasis in original).

¹²¹ Patrick Caruana, 'Cape Traditional Owners Win 38-year Battle', *Sydney Morning Herald* (online), 22 May 2012 <<http://news.smh.com.au/breaking-news-national/cape-traditional-owners-win-38year-battle-20120522-1z1t6.html>>.

2 *Memorials*

As far as the authors are aware, there are only a handful of formal memorials in Queensland marking particular sites where colonial massacres occurred. Two of those were erected to commemorate the only recorded mass killings of non-Aboriginal people (Hornet Bank and Cullin-la-ringo). Tellingly these memorials make no mention of the hundreds of Aboriginal people killed in response. Sadly, the memorial in honour of the Kalkadoon warriors killed in defending their homelands, near the site that became 'Battle Mountain', has reportedly been vandalised repeatedly by unknown persons.¹²²

Installing memorials may not be straightforward, as many massacres occurred upon what is now private land. However, where a mass killing was committed on or near public land, it would be, at the very least, respectful toward those who were killed by colonial authorities, for the government to erect a memorial. This could also inform passers-by of the brutal event. Negotiations should also be entered into with private landowners regarding the placement of memorials. Indeed, legislation could require this. Such memorials would remind the Queensland population of the past, encourage empathy, and reiterate the need for equality and inclusion, regardless of differences. To truly promote healing and reconciliation, the design and installation of such memorials must involve traditional owners, as well as members of the local community and government.

3 *Education and Curriculum Reform*

It is well-known that, in most schools, references to Indigenous culture and history — not to mention the issue of genocide — are scarce. This may be contrasted with the promotion of student appreciation of other nations' histories, cultures and languages through various subjects.¹²³ The authors pose the question: if students are not provided with an accurate account of our nation's past, how is reconciliation possible?

Australia shares [with Germany] the basic problem of national myths of origin and the consequent perpetrator trauma and process of political humanisation it inaugurates. Australia certainly needs to become a 'self-critical community.'¹²⁴

Learning about the true heritage of this country — the place we call home — should be vitally important for all students. If this is so, then it is the responsibility of every school within Australia to actively promote the recognition that Indigenous Australians deserve.¹²⁵ According to Andersen, 'a cohesive national history is essential in shaping how a community identifies as a whole.'¹²⁶ Education is, therefore, linked to reconciliation through its ability to shed light on history to build a 'platform of understanding'¹²⁷ giving recognition to victims and promoting a more empathetic population.

¹²² Interview with Timothy Bottoms (Brisbane, 6 June 2014).

¹²³ Clair Andersen, 'Teacher Education, Aboriginal Studies and the New National Curriculum' (2012) 41(1) *The Australian Journal of Indigenous Education* 40, 40.

¹²⁴ A Dirk Moses, 'Coming to Terms with Genocidal Pasts in Comparative Perspective: Germany and Australia' (2001) 25 *Aboriginal History* 91, 108.

¹²⁵ Andersen, above n 123, 41.

¹²⁶ Galto, above n 110, 12.

¹²⁷ Ibid 17.

Based upon the elements available from the website for the new Australian National Curriculum (implemented gradually from 2011 to 2014), it appears that some attempt has been made to include a slightly more inclusive and accurate version of Indigenous history into the History curricula. For example, the Year 4 History curriculum topic of ‘First Contacts’ includes ‘exploring early contact history with the British (for example Pemulwuy or the Black War) and the impact that British colonisation had on the lives of Aboriginal people (dispossession, dislocation and the loss of lives through conflict)’.¹²⁸ The content of the Year 9 History topic ‘Making a Nation’ includes education about ‘The extension of settlement, including the effects of contact (intended and unintended) between European settlers in Australia and Aboriginal and Torres Strait Islander peoples’. Elaborated upon within this topic is ‘explaining the effects of contact (for example the massacres of Aboriginal and Torres Strait Islander people; their killing of sheep; the spread of European diseases) and categorising these effects as either intended or unintended’.¹²⁹

The extent to which these curriculum recommendations will be implemented or perhaps again skewed toward a colonial version of events is unclear. Indeed, the persistence of the term ‘settlement’ in the new history curriculum continues to deny the violent colonisation of Australia and reiterates a myth of peaceful acquiescence by the Aboriginal population.¹³⁰ It is recommended that these particular elements of the new curriculum, describing mass killings of the Indigenous population, especially in Queensland schools, be compulsory, rather than simply ‘examples’ of what may be included in a topic. Oversight by educational authorities may also be needed to ensure this period of history is being taught from an objective and evidence-based perspective.

V CONCLUSION

Many decades have passed since horrific acts of violence were committed against Aboriginal people on the colonial frontier of present-day Queensland. Yet the legacy of these atrocities lives on in the continuing inequality between Indigenous and non-Indigenous Queenslanders. Works such as Timothy Bottoms’ *Conspiracy of Silence* serve to rekindle memory in a society that would prefer to forget.

This paper has sought to show that the term ‘genocide’ is appropriate to describe the killings that were carried out by both private individuals and public authorities during the 19th century. The crime of genocide in international law, as outlined, is complex and it is true that any criminal proceedings would be impossible to institute in practice. However, documentary evidence available suggests that the thousands of homicides committed by white settlers and Queensland police, at least from around the 1860s, were carried out with the requisite intent. The scale of the killings and the unconscionable mindset with which they were perpetrated alone, without legal compulsion, require as a very minimum that these wrongs be properly acknowledged by the current Queensland government.

Several brief recommendations have been made to address the Queensland government’s ‘denialism’ of Aboriginal genocide to date. To commemorate and reconcile the past, a formal

¹²⁸ Australian Curriculum Assessment and Reporting Authority, F-10 Curriculum — Humanities and Social Sciences — History (8 October 2014) <<http://www.australiancurriculum.edu.au/humanities-and-social-sciences/history/curriculum/f-10?layout=1>>.

¹²⁹ Ibid.

¹³⁰ Rachel Standfield, “‘These Unoffending People’: Myth, History and the Idea of Aboriginal Resistance’ in Peters-Little, Curthoys and Docker (eds), above n 2, 123, 123–4.

apology from the government is essential. However, recognition and apology only represent the starting point. Further steps must also be taken to substantively redress the ongoing harms caused by these and other transgressions against Queensland's Indigenous population. As such, it has been suggested that memorials be erected and curricula reformed, especially in light of the new national curriculum. Clearly, many more steps may be taken; those recommended here may be seen as a floor, certainly not a ceiling.

In 2015, the Queensland population voted for a new State government. The current Queensland government has an opportunity to reconcile and acknowledge the past and to be subsequently remembered by a legacy of genuine commitment to righting the wrongs of the past.

However, the recommendations made by this paper are simply that: any steps at reconciliation in relation to the wrongs addressed here and elsewhere require engagement with Aboriginal and Torres Strait Islanders on an equal footing. To do otherwise would simply be to overlay barbarity with structural violence, when moving forward instead requires a commitment to substantive justice.