

# FOURTH WORLD



## JOURNAL

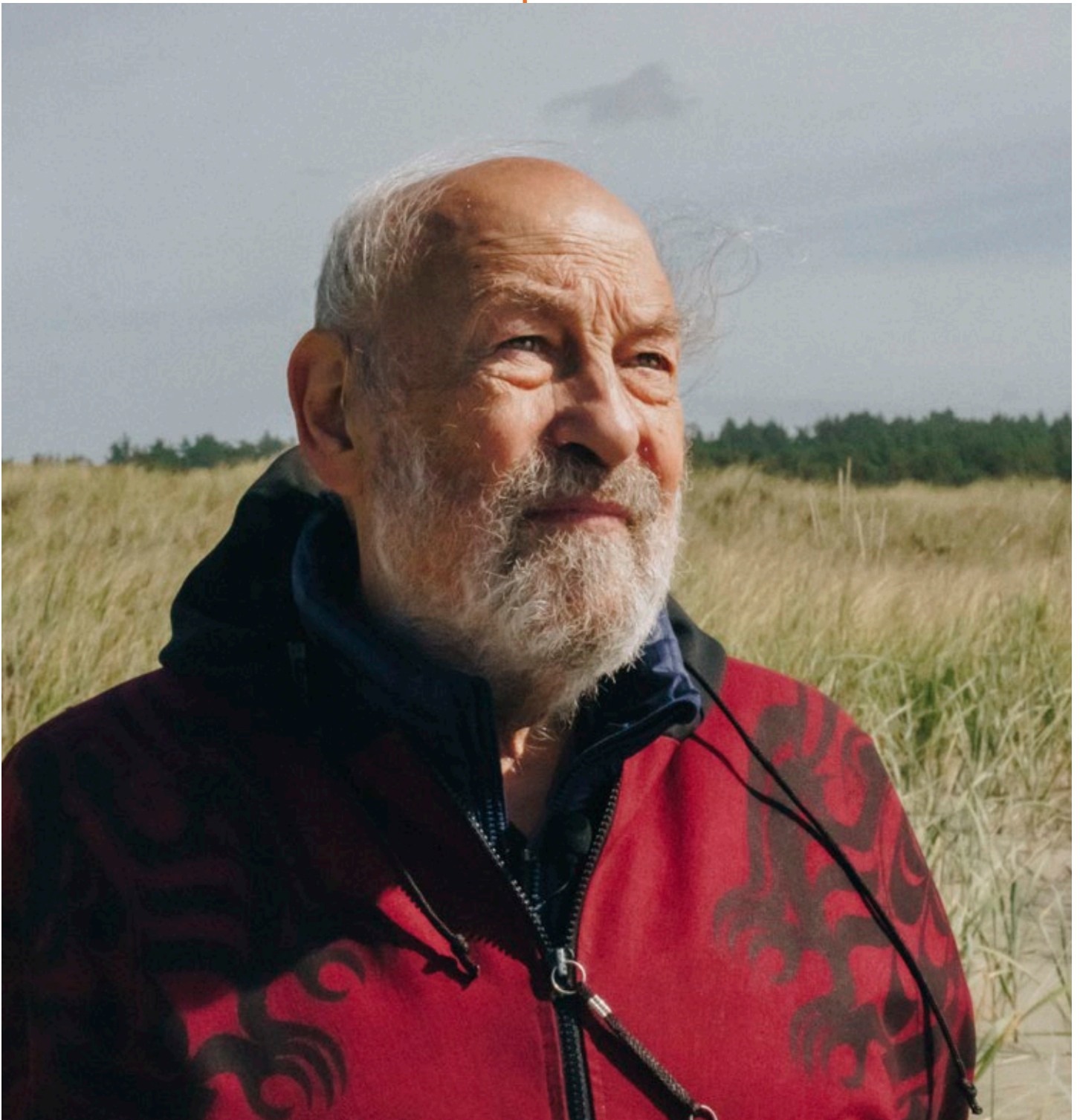
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### THE HIGHLIGHTS

- 1** The Special Issue for the Nations International Criminal Tribunal (NICT): The NICT Charter and the Realization of the Rights to Self-Determination of Indigenous Nations and Fourth World Peoples  
- Hiroshi Fukurai, Ph.D.
- 29** An Introduction to the Nations International Criminal Tribunal: The Case of The Yezidi People  
- Samuel Stoker, MA
- 45** Nations International Criminal Tribunal Charter  
- International NICT Charter Panel
- 137** Estatuto del Tribunal Penal Internacional de las Naciones  
- Panel Internacional del Estatuto del NICT
- 235** Ezidikhan Customary Laws: A Blueprint for Indigenous Justice  
- Patrick Harrigan, MA
- 247** The Slow Genocide of Indigenous Nations and Peoples: Hiding in Plain Sight  
- Andrew B. Reid, JD
- 335** El lento genocidio de las naciones y pueblos indígenas: Oculto a plena vista  
- Andrew B. Reid, JD
- 429** 18 Broken Treaties  
- Tashina Boyer
- 433** An International Criminal Court for Indigenous Women  
- Melissa Farley, Ph.D. & Jeri Moomaw
- 457** The Indigenous Oromo Nation: Victims of Natural Resource Theft under Abyssinian Imperialism and Colonialism in the Creation of Modern Ethiopia  
- Muhammad Al-Hashimi, Ph.D.
- BOOK REVIEW**
- 480** The Hidden Roots of White Supremacy and the Path to a Shared American Future. By Robert P. Jones  
- Dina Gilio-Whitaker, MA (Colville Confederated Tribes)



This special issue is dedicated to  
**Rudolph C. Rýser (1946–2023)**,  
founding editor of the *Fourth World Journal* and a  
visionary leader in the establishment of the  
Nations International Criminal Tribunal.

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# LUKANKA

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Lukanka is a Miskito word for “thoughts”

**Melina Corona**  
Executive Editor

This Special Issue brings together a powerful collection of articles that explore the foundations, structure, and transformative potential of the Nations International Criminal Tribunal (NICT).

Emerging from decades of visionary leadership by Dr. Rudolph Rÿser and the Center for World Indigenous Studies, the NICT presents a vision of justice rooted in Indigenous sovereignty, collective memory, and decolonial legal frameworks. These contributions critically interrogate the failures of international law to protect Indigenous peoples, illuminate the development of alternative legal mechanisms, and propose a future of global justice centered on reparative, culturally grounded, and community-driven responses to systemic harms.

Each article reflects the lived experiences of nations long excluded from state-based legal systems and invites a profound reckoning with what true accountability and reparative justice require.

This Special Issue also marks an expansion of our editorial vision. For the first time, we include a poetic piece and a journalistic essay—works that speak through analysis and embodiment, intuition, and image. These contributions underscore our belief that the art of noticing—paying attention deeply and with care—is a form of scholarship. In alignment with this ethos and

our continued commitment to accessibility and reciprocity, we are proud to make this and all future issues of FWJ fully open access.

These pieces highlight the depth and scope of Indigenous thought and action. They challenge us to reconsider the foundations of international law and to support systems of accountability that recognize the full humanity and sovereignty of Fourth World nations.

Our mission and most profound concern is to uphold Indigenous knowledge systems as living arts and sciences, creative forces, and ways of being that shape a more just and conscious future.

Understanding the critical role accountability structures play in Indigenous sovereignty and survival, we are honored to dedicate this issue to the ongoing fights for justice surrounding the Nations International Criminal Tribunal.

We are especially grateful to have Dr. Hiroshi Fukurai as guest editor for this issue. His decades of scholarship and advocacy have been a fundamental force in the development of the Tribunal and in advancing global understandings of Indigenous justice. In his article, **The Special Issue for the Nations International Criminal Tribunal (NICT): The NICT Charter and the Realization of the Rights to Self-Determination of Indigenous Nations and Fourth World Peoples**, Dr.

Fukurai traces the historical and geopolitical forces necessitating an autonomous Indigenous tribunal rooted in Indigenous legal traditions. He argues that existing international legal structures, such as the International Criminal Court (ICC) and the International Court of Justice (ICJ), are inadequate to address the crimes against Indigenous Peoples because they limit prosecution to individuals or state actors, excluding Indigenous nations from justice. Highlighting the pivotal role of Dr. Rudolph C. Rýser, Fukurai shows the NICT as a transformative institution challenging colonial legal paradigms and addressing systemic colonial violence that has marked nearly 90% of armed conflicts since World War II. His article presents the NICT as essential for a decolonial future, environmental justice, and Indigenous sovereignty.

**In An Introduction to the Nations International Criminal Tribunal**, Samuel Stoker, MA, traces the NICT's formation through the genocide of the Yezidi people by ISIS and their pursuit of justice after exhausting all legal recourse through institutions like the ICC and the UN. Drawing on correspondence with Dr. Rýser and foundational legal texts, Stoker shows how the Yezidi Nation turned to the Center for World Indigenous Studies to establish Ezidikhan and the NICT, creating an Indigenous-led court as both a necessity and a sovereignty declaration. He critiques international legal instruments for consistently failing Indigenous nations while highlighting the NICT's structural distinctiveness in prosecuting state and corporate actors, recognizing collective

harm, and grounding justice in cultural continuity and self-determination. Through the Yezidi experience, Stoker illustrates the NICT as a vehicle for Indigenous political transformation and international solidarity.

The **NICT Charter**, printed in this issue — and made available as a customizable document on the [cwis.org](http://cwis.org) website— outlines a hybrid legal framework enabling the prosecution of international crimes against Indigenous nations. Born from consultations between Dr. Rýser and the Yezidi nation following the 2014 genocide, the Charter upholds Indigenous jurisdiction, customary law, and the right to redress historical and ongoing harms. It addresses crimes long unrecognized by international courts while emphasizing reparative justice and Indigenous autonomy as central to the rule of law. The Charter establishes legal accountability without requiring state recognition to function.

**In Ezidikhan Customary Laws: A Blueprint for Indigenous Justice**, Patrick Harrigan, MA, explores how Yezidi legal traditions shape a transformative model blending restorative justice, spiritual continuity, and community healing. Based on discussions with Ezidikhan Justice Minister Nallein Sowilo, Harrigan presents the Ezidikhan Court for International Crimes as a precedent-setting structure merging customary law with global standards, including elder-led mediation, culturally specific reparations, and legal recognition of ecocide and culturicide. He details how Ezidikhan's legal leadership extends globally through partnerships with governments and institutions, forming a founding component of the NICT that challenges ICC and the

Declaration on the Rights of Indigenous Peoples (UNDRIP) limitations by asserting Indigenous jurisdiction and universal accountability for genocide, resource theft, and systemic erasure. Harrigan frames Ezidikhan as a path forward for Indigenous nations, reclaiming law as a tool for healing and sovereignty.

Andrew B. Reid, JD, in **The Slow Genocide of Indigenous Nations and Peoples: Hiding in Plain Sight**, explores “slow genocide” as an ongoing structural process of settler colonialism aiming to eliminate Indigenous nations through assimilation, attrition, and cultural destruction. Building on Patrick Wolfe’s idea of settler colonialism as a continuous system, Reid highlights how international law and genocide scholarship largely overlook this form of genocide. His article calls for the recognition of slow genocide as a systemic crime requiring urgent legal and scholarly attention.

This issue includes the powerful erasure poem **18 Broken Treaties** by Tashina Boyer, which resurrects the hidden histories of 18 unratified treaties signed by 122 California tribes between 1851 and 1852. Suppressed for over half a century, these treaties left generations of California Native peoples without land or legal protection. Through poetry, the author—a California Native—confronts the state’s failure to make amends, offering visibility to broken promises and celebrating the enduring creativity and resilience of the Mono people and Indigenous communities across the U.S.

In **An International Criminal Court for Indigenous Women**, Melissa Farley, Ph.D., and Jeri Moomaw examine the gendered dimensions

of colonial violence and the international legal system’s blind spots. Their article highlights how Indigenous women face environmental, sexual, and cultural violence and argues that the NICT offers a vital space to address these interconnected harms.

In his article, **The Indigenous Oromo Nation: Victims of Natural Resource Theft under Abyssinian Imperialism and Colonialism in the Creation of Modern Ethiopia**, Muhammad Al-Hashimi, Ph.D., traces the historical and ongoing exploitation of the Oromo people and their lands as foundational to modern Ethiopia. Al-Hashimi calls on the Oromo Nation to engage with the NICT and the International Coalition for the Rights of Indigenous Nations (ICRIN) in pursuing justice, land rights, and self-determination.

Finally, in her review of **The Hidden Roots of White Supremacy and the Path to a Shared American Future**, Dina Gilio-Whitaker, MA (Colville Confederated Tribes), critiques the theological and historical foundations of white Christian supremacy in the U.S. while emphasizing the critical distinctions between settler colonialism and race-based oppression. Her analysis contextualizes the spiritual and political struggle for truth and repair unfolding in settler nations today and contributes to ongoing conversations on race, memory, sovereignty, and repair.

**Melina Corona**  
Executive Editor

## ABOUT THE AUTHOR



### **Melina Corona**

Melina Corona is a trilingual writer, translator, and editor who received a BA in Modern German Language and Literature at Universidad Nacional Autónoma de México (UNAM). Her essays have been published in magazines, including *Este País* and *Punto en Línea*. She has translated and edited various academic, literary, and publicity texts and has also provided interpretation and writing for documentarians, as well as nonprofit and government-based projects. She is an editorial director and leads content development at CWIS and the Center for Traditional Medicine. She is passionate about contributing to meaningful projects behind the scenes.

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# LUKANKA

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Lukanka es una palabra miskita que significa “pensamientos”

**Melina Corona**  
Editora Ejecutiva

Este número especial reúne una valiosa colección de artículos que exploran los fundamentos, la estructura y el potencial transformador del Tribunal Penal Internacional de Naciones (NICT, por sus siglas en inglés).

Surgido de décadas de liderazgo del Dr. Rudolph Rÿser y del Centro de Estudios Indígenas del Mundo, el NICT presenta una visión de justicia arraigada en la soberanía indígena, la memoria colectiva y marcos jurídicos decoloniales. Estas contribuciones interrogan críticamente los fracasos del derecho internacional para proteger a los pueblos indígenas, iluminan el desarrollo de mecanismos jurídicos alternativos y proponen un futuro de justicia global centrado en respuestas reparadoras, culturalmente fundamentadas y guiadas por las comunidades ante los daños sistémicos que les afectan.

Cada artículo refleja las experiencias vividas por naciones que han sido excluidas de los sistemas legales estatales, e invita a una profunda reflexión sobre lo que la verdadera rendición de cuentas y la justicia reparadora significan.

Este número especial también marca una expansión de nuestra visión editorial. Por primera vez, incluimos una pieza poética y un ensayo periodístico: obras que hablan desde el análisis, la intuición y la imagen. Estas contribuciones

subrayan nuestra creencia de que el arte de observar—prestar atención con profundidad y cuidado—es una forma de conocimiento. En coherencia con nuestra filosofía y nuestro compromiso constante con la accesibilidad y la reciprocidad, nos enorgullece dar a conocer que este y todos los futuros números del *Fourth World Journal* estarán disponibles con acceso totalmente abierto.

Las diversas contribuciones de este número destacan la profundidad y el alcance del pensamiento y la organización indígena. Nos desafían a reconsiderar los fundamentos del derecho internacional y a apoyar a los sistemas de rendición de cuentas que reconocen la humanidad plena y la soberanía de las naciones del Cuarto Mundo.

Nuestra misión e interés más profundo es defender los sistemas de conocimiento indígena como artes y ciencias vivas, fuerzas creativas y formas de ser que configuran un futuro más justo y consciente.

Entendiendo el papel fundamental que juegan las estructuras de rendición de cuentas en la soberanía y la supervivencia indígenas, nos honra dedicar este número a las luchas en curso por la justicia en torno al **Tribunal Penal Internacional de Naciones**.

Estamos especialmente agradecidos de contar con el Dr. Hiroshi Fukurai como editor invitado de este número. Sus décadas de trabajo académico y defensa de los derechos indígenas han sido una fuerza fundamental en el desarrollo del Tribunal y en el avance de la comprensión global de la justicia indígena. En su artículo **The Special Issue for the Nations International Criminal Tribunal (NICT): The NICT Charter and the Realization of the Rights to Self-Determination of Indigenous Nations and Fourth World Peoples**, el Dr. Fukurai traza las fuerzas históricas y geopolíticas que hacen necesario un tribunal indígena autónomo arraigado en las tradiciones jurídicas indígenas. Sostiene que las estructuras legales internacionales existentes, como la Corte Penal Internacional (CPI) y la Corte Internacional de Justicia (CIJ), son inadecuadas para abordar los crímenes contra los pueblos indígenas porque limitan el enjuiciamiento a individuos o actores estatales, excluyendo así a las naciones indígenas del acceso a la justicia. Al resaltar el papel decisivo del Dr. Rudolph C. Rýser, Fukurai presenta al NICT como una institución transformadora que desafía los paradigmas legales coloniales y enfrenta la violencia colonial sistémica que ha marcado cerca del 90 % de los conflictos armados desde la Segunda Guerra Mundial. Su artículo presenta al NICT como esencial para un futuro decolonial, la justicia ambiental y la soberanía indígena.

En **An Introduction to the Nations International Criminal Tribunal**, el periodista Samuel Stoker, MA, documenta la formación del NICT a partir del genocidio

contra el pueblo yezidí y su búsqueda de justicia tras agotar todos los recursos legales a través de instituciones como la CPI y la ONU. Este artículo, que surge de una entrevista en vivo y de la correspondencia del autor con el Dr. Rýser, muestra cómo la Nación Yezidí recurrió al Centro de Estudios Indígenas del Mundo para establecer la nación de Ezidikhan y el NICT, creando un tribunal dirigido por pueblos indígenas como una declaración de soberanía. El autor critica los instrumentos legales internacionales por fallar sistemáticamente a las naciones indígenas y resalta la estructura distintiva del NICT: procesa a actores estatales y corporativos, reconoce los daños colectivos y basa la justicia en la continuidad cultural y la autodeterminación. A través de la experiencia yezidí, Stoker presenta al NICT como un vehículo para la transformación política indígena y la solidaridad internacional.

**El Estatuto del Tribunal Penal Internacional de Naciones**, incluido en este número con su traducción al español (y disponible como documento editable en el sitio web [cwis.org](http://cwis.org)), describe un marco jurídico híbrido que permite el enjuiciamiento de crímenes internacionales contra naciones indígenas. Surgido de las consultas entre el Dr. Rýser y la Nación Yezidí tras el genocidio de 2014, este estatuto defiende la jurisdicción indígena, el derecho consuetudinario y el derecho a reparar daños históricos y actuales. Aborda crímenes largamente ignorados por los tribunales internacionales, y enfatiza la justicia reparadora y la autonomía indígena como fundamentos del estado de derecho. Establece responsabilidad legal sin depender del reconocimiento estatal para su funcionamiento.

**Ezidikhan Customary Laws: A Blueprint for Indigenous Justice**, de Patrick Harrigan, MA, explora cómo las tradiciones jurídicas yezidíes conforman un modelo que integra justicia restaurativa, continuidad espiritual y sanación comunitaria. Basándose en conversaciones con la ministra de Justicia de Ezidikhan, Nallein Sowilo, Harrigan presenta la Corte de Crímenes Internacionales de Ezidikhan como una estructura pionera que fusiona el derecho consuetudinario con estándares globales, incluyendo la mediación liderada por ancianos, reparaciones culturalmente específicas y el reconocimiento legal del ecocidio y el culturicidio. Detalla cómo el liderazgo jurídico de Ezidikhan se expande a nivel internacional mediante alianzas con gobiernos e instituciones, conformando un componente fundador del NICT que desafía las limitaciones tanto de la CPI como de la Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas (UNDRIP, por sus siglas en inglés), al afirmar la jurisdicción indígena y la responsabilidad universal frente al genocidio, el saqueo de recursos y el borrado sistemático. Harrigan presenta a Ezidikhan como un camino hacia adelante para las naciones indígenas, reclamando el derecho como herramienta de sanación y soberanía.

En **El lento genocidio de las naciones y pueblos indígenas: Oculto a plena vista**, también disponible en español, Andrew Reid, JD, explora el concepto de “genocidio lento” como un proceso estructural continuo del colonialismo de asentamiento, cuyo objetivo es eliminar a las naciones indígenas mediante la asimilación, el desgaste y la destrucción cultural. Basándose en la tesis de Patrick Wolfe sobre el colonialismo

como un sistema permanente, Reid subraya cómo el derecho internacional y los estudios sobre genocidio han ignorado en gran medida esta forma de violencia. Su artículo llama a reconocer el genocidio lento como un crimen sistémico que exige una atención legal y académica urgente.

Este número incluye el poderoso poema de Tashina Boyer, titulado **18 Broken Treaties**, que saca a la luz las historias ocultas de 18 tratados no ratificados, firmados por 122 tribus de California entre 1851 y 1852. Suprimidos durante más de medio siglo, estos tratados dejaron a generaciones de pueblos nativos de California sin tierra ni protección legal. A través de la poesía, la autora—nativa de California—confronta el fracaso del Estado en hacer justicia, dando visibilidad a las promesas incumplidas y celebrando la creatividad y la resiliencia del pueblo Mono y de las comunidades indígenas en todo Estados Unidos.

En **An International Criminal Court for Indigenous Women**, Melissa Farley, Ph.D., y Jeri Moomaw examinan las dimensiones de género de la violencia colonial y los puntos ciegos del sistema legal internacional. Este artículo destaca cómo las mujeres indígenas enfrentan violencias ambiental, sexual y cultural, y sostiene que el NICT constituye un espacio fundamental para atender la complejidad de estos daños.

El artículo de Muhammad Al-Hashimi, Ph.D., **The Indigenous Oromo Nation: Victims of Natural Resource Theft under Abyssinian Imperialism and Colonialism in the Creation of Modern Ethiopia**, traza la explotación histórica y continua del pueblo

oromo y sus tierras como base de la Etiopía moderna. Al-Hashimi hace un llamado a la Nación Oromo a participar en el NICT y en la Coalición Internacional por los Derechos de las Naciones Indígena (ICRIN, por sus siglas en inglés) en su búsqueda de justicia, reconocimiento de derechos territoriales y autodeterminación.

Finalmente, en su reseña de **The Hidden Roots of White Supremacy and the Path to a Shared American Future**, Dina Gilio-Whitaker, MA (Tribus Confederadas de Colville),

critica las bases teológicas e históricas de la supremacía blanca cristiana en Estados Unidos, a la vez que enfatiza las distinciones cruciales entre el colonialismo de asentamiento y la opresión racial. Su análisis contextualiza la lucha espiritual y política por la verdad y la reparación que tiene lugar hoy en las naciones colonizadas, y aporta una perspectiva valiosa a los debates actuales sobre raza, memoria y soberanía.

**Melina Corona**  
 Editora Ejecutiva

## SOBRE EL AUTOR



### Melina Corona

Melina Corona es escritora, traductora y editora trilingüe. Estudió Lengua y Literatura Modernas Alemanas en la Universidad Nacional Autónoma de México (UNAM). Sus ensayos han sido publicados en revistas como *Este País* y *Punto en Línea*. Ha traducido y editado diversos textos académicos, literarios y publicitarios, además de colaborar en proyectos documentales, institucionales y de ONG como intérprete y redactora. Actualmente es directora editorial y coordinadora del desarrollo de contenidos en CWIS y el Centro de Medicina Tradicional. Le apasiona contribuir en proyectos significativos, especialmente desde el trabajo editorial y creativo detrás de escena.



Photo: Yazidi refugees in the Kurdistan region, Iraq. By Defend International. CC BY 2.0.

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## IN THIS ISSUE

### Lukanka

- 1** The Special Issue for the Nations International Criminal Tribunal (NICT): The NICT Charter and the Realization of the Rights to Self-Determination of Indigenous Nations and Fourth World Peoples  
- Hiroshi Fukurai, Ph.D.
  - 29** An Introduction to the Nations International Criminal Tribunal: The Case of the Yezidi People  
- Samuel Stoker, MA
  - 45** Nations International Criminal Tribunal Charter  
- International NICT Charter Panel
  - 137** Estatuto del Tribunal Penal Internacional de las Naciones  
- Panel Internacional del Estatuto del NICT
  - 235** Ezidikhan Customary Laws: A Blueprint for Indigenous Justice  
- Patrick Harrigan, MA
  - 247** The Slow Genocide of Indigenous Nations and Peoples: Hiding in Plain Sight  
- Andrew B. Reid, JD
  - 335** El lento genocidio de las naciones y pueblos indígenas: Oculito a plena vista  
- Andrew B. Reid, JD
  - 429** 18 Broken Treaties  
- Tashina Boyer
  - 433** An International Criminal Court for Indigenous Women  
- Melissa Farley, Ph.D. & Jeri Moomaw
  - 457** The Indigenous Oromo Nation: Victims of Natural Resource Theft under Abyssinian Imperialism and Colonialism in the Creation of Modern Ethiopia  
- Muhammad Al-Hashimi, Ph.D.
- BOOK REVIEW
- 480** The Hidden Roots of White Supremacy and the Path to a Shared American Future. By Robert P. Jones  
- Dina Gilio-Whitaker, MA (Colville Confederated Tribes)

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## ON THE COVER

Photo: Mother and child walking in the Urals,  
Bashkortostan, Russia. By Image-Source/Envato.

# The Special Issue for the Nations International Criminal Tribunal (NICT)

## The NICT Charter and the Realization of the Rights to Self-Determination of Indigenous Nations and Fourth World Peoples

By Hiroshi Fukurai, Ph.D.

### ABSTRACT

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Dr. Fukurai constructs an overview of this issue, its engagement with the Nations International Criminal Tribunal (NICT), and the perspectives that drive its articles. The necessity for an Indigenous-centered judicial body within the world system is not novel, and the NICT derives from centuries of Indigenous resistance against the Westphalian statist system. Yet the NICT took shape as a robust structure for accountability and justice based on the work of CWIS founder Dr. Ryser, who ensured that the NICT covered crimes previously excluded from human rights governance, including ethnocide, femicide, ecocide, and culturicide. The article begins with a discussion of the historical roots of the NICT in various resistance movements, as well as its legal precedents in the League of Nations and the Permanent Court of International Justice. The corpus of the NICT is expansive in defining genocide and proactively enforcing accountability mechanisms. Next, it outlines the six articles published and the various lenses through which the court is presented. Finally, it evaluates future directions for the NICT, examining its unique potential to advance both humanistic and ecological aims. These findings underscore the agency of Indigenous nations in sculpting alternative modes of anticolonial sovereignties.

**Keywords:** Indigenous sovereignty, Nations International Criminal Tribunal (NICT), Self-determination, Genocide, Yezidi people, International law, Restorative justice, Colonial violence, Indigenous legal traditions, Decolonial justice

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### Introduction

Europe's global colonial dominance emerged in the wake of the late fifteenth-century Age of Discovery, unleashing centuries of systematic

exploitation across continents. In response, indigenous peoples have consistently called for the creation of an autonomous judicial body rooted in indigenous legal tradition, both to halt ongoing destruction and to demand reparations

for Europe's imperial plunder. The establishment of such a judicial institution has long been proposed as a means of holding colonial powers accountable for centuries of land dispossession, ecological devastation, and genocidal violence. Despite the sustained advocacy for its creation, no international judicial body has yet been established to prosecute and adjudicate states, corporations, and other predatory proxies as criminal entities.

Existing institutions of the International Criminal Court (ICC) and the International Court of Justice (ICJ) remain fundamentally inadequate for addressing both historical atrocities and ongoing violations perpetrated by state and corporate actors against indigenous nations and peoples. The ICC, for instance, is limited to prosecuting individuals in positions of power within governments or corporations for a narrow set of crimes under its jurisdiction<sup>1</sup>, lacking authority to indict these entities themselves as criminal actors. Similarly, the ICJ recognizes only states as legitimate litigants, thereby excluding indigenous nations from bringing cases forward. Both the ICC and ICJ are also constrained by geopolitical realities, including the capacity of powerful states to obstruct investigations and prosecutions. This dynamic further marginalizes indigenous nations seeking justice and reparations, as these state-centric foundations of judicial institutions and international legal order systematically sideline indigenous legal tradition and conceptions of sovereignty, privileging Western judicial frameworks that often conflict with indigenous epistemologies and self-determination claims.

Since its founding in 1984, the Center for World Indigenous Studies (CWIS) has stood as a vanguard in the conceptualization and advancement of an autonomous judicial body rooted in indigenous legal traditions, a judicial body that would have the capacity to halt and prosecute state and corporate crimes against indigenous peoples worldwide.<sup>2</sup> Dr. Rudolph C. Rýser, CWIS's founding director, long envisioned and advocated for the Nations International Criminal Tribunal (NICT) as an essential judicial institution, one capable of identifying, exposing, and adjudicating the longstanding and ongoing impunity enjoyed by states and their predatory proxies in the systematic violation of indigenous nations, peoples, and other sub-state communities across the globe. The NICT seeks to challenge entrenched structures of state violence and to offer a juridical counterweight to centuries of unaccountable state oppression and exploitation directed at indigenous nations and peoples.

The absence of a robust international judicial system to prosecute state crimes has also contributed to persistent indigenous resistance, opposition movements, and armed conflicts in response to genocidal state policies and corporate exploitation around the globe. Empirical research reveals that between the end of World War II and 2020, an overwhelming majority (89.9%) of approximately 2,500 documented armed

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<sup>1</sup> ICC prosecutes four core international crimes, including war crimes, genocide, crimes against humanity, and crime of aggression. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

<sup>2</sup> Its main website is available at <https://www.cwis.org/>.

conflicts globally involved confrontations between state actors and indigenous communities or their allies, including land and water protectors, environmental advocates, and armed resistance groups defending indigenous rights, territories, and ways of life against state predation and their proxies.<sup>3</sup> This pattern underscores the persistent structural violence within state systems that suppress indigenous self-determination, land rights, and environmental stewardship. Between 1946 and the early 1960s, the majority of these armed conflicts were concentrated in Africa and the Middle East, where anti-colonial liberation struggles unfolded against European imperial powers. From the 1960s through the early 1990s, the geography of conflict shifted toward Asia and the Americas, reflecting both Cold War geopolitical tensions and indigenous resistance, intensifying struggles over decolonization, indigenous self-determination, and resource extraction. Following the dissolution of the Soviet Union in 1991, armed conflict zones increasingly emerged in Central and West Asia, often driven by geopolitical interventions and renewed indigenous resistance to encroachments on traditional territories, resource sovereignty,

and ethno-political autonomy.<sup>4</sup> These findings not only underscore the enduring legacies of colonialism, but also highlight the pivotal role of indigenous struggles in shaping the global landscape of conflict and resistance to state powers. The results of such empirical studies reinforce the urgent need to establish the NICT in order to create an international legal and political framework grounded in the genuine recognition of indigenous sovereignty, environmental justice, and anti-colonial futures. The formation of the NICT further emphasizes the imperative to protect and uphold indigenous knowledge systems, environmental stewardship, and biocultural diversity essential for planetary survival.

In response to these empirical realities, the CWIS's objective, under Dr. Rýser's leadership, has long been to forge a robust and enduring international tribunal with the authority to hold individuals, militias, corporations, states, and their proxy entities accountable for grave violations disproportionately inflicted upon indigenous nations and peoples worldwide.<sup>5</sup> Dr. Rýser insisted that the NICT's jurisdiction must extend beyond the limitations of conventional

<sup>3</sup> Hiroshi Fukurai, "Fourth World Nations vs. The States' 'Nation-Destroying' Projects from 1946 to 2020: Post-WWII Wars, Armed Conflicts, and Indigenous Military Resistance," *Fourth World Journal* 23: 33-48 (2023). The analytic data comes from the Uppsala University in Sweden and its Uppsala Conflict Data Program (UCDP), which is available at <https://ucdp.uu.se/>. See also Rudolph Rýser, *Indigenous Nations and Modern States: The Political Emergence of Nations Challenging State Power* (NY: Routledge, 2012). Indigenous scholars and historians such as Roxanne Dunbar-Ortiz, Ward Churchill and others have extensively documented the long-standing traditions of indigenous resistance to state violence and colonial exploitation throughout North America. See Roxanne Dunbar-Ortiz (2012) *An Indigenous People's History of the United States* (Boston, Beacon Press, 2015); *Not 'A Nation of Immigrants'* (Boston, Beacon Press, 2021). See also Ward Churchill, *A Little Matter of Genocide3: Holocaust and Denial in the Americas 1492 to the Present* (SF: A City Lights Publishers, 1997); Ward Churchill and Barbara Alice Mann, *Wielding Words Like Weapons* (NY: PM Press, 2017). Gerald Horne's historical research further highlights the enduring, century-long resistance of indigenous and original peoples across Africa, the Middle East, the Caribbean, and the South Pacific to Euro-American imperial domination. See *Confronting Black Jacobins* (NY: Monthly Review Press, 2015); *The White Pacific: U.S. Imperialism and Black Slavery in the South Seas After the Civil War* (HI: University of Hawaii Press, 2007); *White Supremacy Confronted: U.S. Imperialism and Anti-Communism vs. the Liberation of South Africa, from Rhodes to Mandela* (NY: International Publishers Co., 2019).

<sup>4</sup> *Ibid.*

<sup>5</sup> Rudolph C. Rýser, "The Nations International Criminal Tribunal: A Brief Introduction," *Fourth World Journal* 24: 146-148 (2024)

international legal frameworks to include deliberate acts conspicuously excluded from the 1948 U.N. Genocide Convention, such as ethnocide, femicide, culturicide, ecocide, and other criminal offenses absent from the ICC's mandate under the 1998 Rome Statute.<sup>6</sup> By centering these systemic crimes, the NICT seeks to confront the ontological violence inherent in colonial modernity, particularly the targeted destruction of indigenous nations' sovereignty, knowledge systems, and ecological stewardship. The NICT's jurisprudence not only exposes the mechanisms of state and corporate predation, but also affirms the profound interdependence between indigenous survival, biocultural diversity, and the ecological integrity upon which all life, including humanity, ultimately depends.

The introduction to this special issue is structured as follows: The first section explores the historical foundations of the formation and conceptualization of the NICT, situating it within a broader legacy of indigenous nations' efforts to establish a global tribunal to adjudicate crimes of the state, and those of their predatory proxy agencies, against indigenous nations and peoples. This includes the establishment of the Permanent Court of International Justice (PCIJ) in 1919, pursuant to the Covenant of League of Nations (LON), i.e., the first modern global governance body that offered an international forum for addressing indigenous grievance arising from state predation. Since the PCIJ was designed to adjudicate disputes between sovereign states, indigenous nations and other non-state actors, it lacked legal standing before the court. Nonetheless, Japan's Racial Equality Proposal

at the 1919 Paris Peace Conference created the opening to introduce the principle of racial and national equality into international discourse. It helped catalyze broader conversations about the recognition of racial and ethnic diversity in international law and laid groundwork for future efforts to enshrine the rights of indigenous nations and various groups' sub-state communities within the evolving framework of international legal order.

While Japan's proposal was ultimately rejected, through the combined efforts of the U.S., the U.K. and the British dominions of Australia, New Zealand, Canada and South Africa, the proposal had a profound impact, inspiring indigenous nations and their nationalist-oriented political activists to view the League of Nations as an international platform from which to advance their struggles, seek redress, and petition against genocidal policies affecting their populations. Indigenous nations such as the Iroquois Confederacy, the Cherokee Nation, the Māori of Aotearoa in New Zealand, and other indigenous representatives around the world began to mobilize their resistance within this international arena to insist on their sovereignty and to fight imperial domination and colonial exploitation. Indigenous representatives filed petitions against genocidal policies and transformed Geneva into a staging ground for anti-imperial resistance, laying crucial groundwork for contemporary indigenous legal activism. The movement also inspired

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<sup>6</sup> For specific descriptions of the crimes of genocide, see the NICT Charter included in this issue.

African Americans to suggest the creation of the “Black Belt Republic” in the U.S. South, to enshrine the aspiration of their own territory in the 1920s and 1930s.<sup>7</sup> The petition called “We Charge Genocide” was filed in 1951 by the Civil Rights Congress (CRC), led by prominent black activists, to expose genocidal violence against Africa’s diasporic populations in North America, urging the new global platform of the U.N. to investigate U.S. crimes under the 1948 Genocide Convention and calling for sanctions under the U.N. Charter.<sup>8</sup>

The second section analyzes the NICT Charter’s fundamental framework, which centers indigenous sovereignty and legal traditions through two revolutionary mechanisms. In the prosecution of crimes by states, corporations, and other proxy agencies, it enforces participatory justice by creating democratic jury panels composed of indigenous representatives, ensuring direct community oversight in adjudication. It also ensures prosecutorial accountability by creating the so-called Prosecution Review Commission (PRC), a novel institution first established in 1948 through U.S.-Japan collaboration in 1948, empowering the challenge of state prosecutors’ refusal to pursue cases of both state and corporate ecological violence in indigenous territories. The PRC addresses systemic state complicity by invoking the

“Right to Protect” (RTP), a sacred principle of international law, to prosecute crimes that state governments deliberately neglect. The section also explores the NICT Charter’s adoption by Ezidikhan and the government of Armenia in the Middle East. The adoption of the NICT Charter and its legal progress are detailed in one of the articles in this special edition, which explores examples of how indigenous nations could utilize the NICT Charter to assert and protect indigenous rights to self-determination and sovereignty across the globe. This section showcases articles and provisional sections of the NICT which are referenced through a weblink in the full article.

The third section introduces six individual papers which explore the establishment of the NICT in order to prosecute crimes by state and corporate actors. The authors include indigenous activists, legal specialists in indigenous legal traditions, and political allies who have long worked towards establishing international criminal tribunals to adjudicate crimes committed against indigenous nations and peoples worldwide.

The first article, “An Introduction to the Nations International Criminal Tribunal” by Sam Stoker, identifies the shortcomings of the 2007 U.N. Declaration of the Rights of Indigenous Peoples (UNDRIP), arguing for the NICT’s

<sup>7</sup> The African Blood Brotherhood (ABB)’s collaboration with the Community Party USA (CPUSA) laid the groundwork for the proposals of African autonomy, including the establishment of the “Black Belt Republic” in the U.S. South. See Hannah Foster, “Black Belt Republic (1928-1934),” *Black Past*, March 10, 2014.

<sup>8</sup> The full title of the 1951 U.N. Petition by WEB DuBois, Paul Robeson, and William L. Patterson was: “*We Charge Genocide: The Historic Petition to the United Nations for Relief from a Crime of the United States Government Against Negro People* (NY: Civil Rights Congress, 1951). The entire document is available at <https://depts.washington.edu/moves/images/cp/WeChargeGenocide.pdf>.

potential to incorporate indigenous legal practices of plaintiff juries with indigenous participation and alternative dispute resolution methods, which can serve as important enforceable tools for preserving reciprocal indigenous views of the land over state and corporate predation. The second article, “Ezidikhan Customary Laws: A Blueprint for Indigenous Justice,” by Patrick Harrigan, offers an important historical account of the creation of the NICT Charter through collaboration between the Ezidikhan government and the CWIS, under the leadership of its director Dr. Ryser. The indigenous nation of Ezidikhan, comprising over one million Yezidis across northern Iraq, Armenia, Georgia, Syria, Turkey, and other parts of the Middle East, endured a campaign of genocidal violence in 2014. This atrocity, perpetuated by ISIS and other predatory actors, underscores the urgent need for legal accountability and the prosecution of such extreme crimes.

The author of the third article, “The Slow Genocide of Indigenous Nations and Peoples: Hiding in Plain Sight,” is Andy Reid, a prominent legal scholar on global indigenous rights and struggles. He explores ongoing and persistent genocidal impacts of settler colonialism on indigenous peoples, explaining the urgent need for the international criminal tribunal to address and prosecute state-sponsored crimes in order to safeguard indigenous sovereignty worldwide. This special issue presents the first half of Reid’s powerful article, with a focus on the enduring genocidal legacies of settler colonialism in North America and beyond. The fourth contributor is Toshina Boyer, an indigenous scholar and activist

from the Bay Area in northern California. Her poetic narratives in “18 Broken Treaties,” explore the history of Anglo-Saxon settler colonialism and indigenous genocide in California, examining the historical erasure of California’s indigenous nations who signed treaties with the U.S. government in efforts to retain the rights to self-determination.

The fifth article, “An International Criminal Court for Indigenous Women” by Melissa Farley and Jeri Moomaw, discusses the urgent need to protect the rights of indigenous women, who have long been among the primary targets of Europe’s imperial and colonial projects throughout the world. Drawing on their decades of advocacy work in the Bay Area and beyond, the authors explore how the establishment of the NICT could advance the protection of indigenous women’s rights, not only in California, but also globally. In the last article, “The Indigenous Oromo Nation: Victims of Natural Resource Theft under Abyssinian Imperialism and Colonialism in the Creation of Modern Ethiopia,” Dr. Muhammad Al-Hashimi suggests that the proposed NICT could serve as a fair and impartial international forum for resolving disputes, particularly those involving natural resource exploitation in Oromo’s ancestral territories in West Africa. The author highlights ongoing disputes over gold and silver extraction from the Lega Dembi Mine in the Gujii Oromo Zone, suggesting that such cases would receive fairer adjudication under the NICT than within Ethiopia’s current judicial system.

The concluding section of this introduction reflects on the future possibilities of the NICT and its potential to uphold indigenous sovereignty,

safeguard bio-cultural diversity, and promote the ecological health of the Earth, on which all life, including humanity, ultimately depends, in the years and decades to come.

## History of the Nations International Criminal Tribunal (NICT)

The Center for World Indigenous Studies (CWIS) played a pivotal role in conceptualizing and advancing the Nations International Criminal Tribunal (NICT) as a judicial body grounded in indigenous sovereignty and legal traditions to adjudicate state-sponsored crimes committed against indigenous nations and peoples. Under the leadership of CWIS Director Rudolph C. R yser, a coalition of respected indigenous leaders, academic scholars, international legal experts, and global allies have collaborated to develop the legal and conceptual framework for the NICT.<sup>9</sup>

Before the rise of modern state systems, various tribunals operated under the authority of European monarchies and their colonial proxies. These included colonial courts, indigenous councils, and hybrid legal forums that addressed crimes against indigenous peoples and responded to grievances arising from Europe's settler colonialism, including genocidal violence, land dispossession, and forced displacement. During the Spanish conquest of the Americas, for instance, the Crown implemented legal reforms

such as the *Laws of the Indies*, and later, *New Laws of 1542*, which established local colonial courts and formerly recognized indigenous communities as *republicas de indios*.<sup>10</sup> These measures aimed to regulate colonial abuses under the *encomienda* system and within settler colonial governance.<sup>11</sup> Notably, early legal critiques of colonial violence emerged in these settings, most prominently from Bartolome de las Casas, a prominent Spanish jurist and scholar, who recounted documented atrocities committed against the Taino and other indigenous people of Hispaniola during the sixteenth century. Legal authority during the colonial period remained firmly under monarchic control, with little to no meaningful indigenous representation or inclusion in decision-making processes.<sup>12</sup> Although indigenous grievances were occasionally heard, these courts ultimately functioned to uphold imperial interests rather than to recognize or protect indigenous rights. With the transition from colonial rules to modern state systems, newly-established judicial institutions continued this legacy. These state-sponsored courts consistently failed to adjudicate cases brought by indigenous peoples in ways that would challenge the legitimacy of the state or dismantle its own predatory policies and structural foundation. Even domestic state courts and major political institutions have historically proven unwilling or

<sup>9</sup> The creation of the NICT Charter was also shaped by the invaluable contributions of numerous scholars, activists, and practitioners, including Nallein Sowilo, Aline Castenada, Irene Delfanti, Andrew Reid, Patrick Harrigan, Mohamed Aboelazm, Maureen Ngozi Eke, Francesco Chessa, Faraz Saberi, Sabina Singh, Giuliane Bertaglia Correia, Deborah S. Rogers, Melissa Farley, Muhammad Al-Hashimi, and many others whose knowledge, experience, and commitment have been essential in building the foundation of the tribunal. We wish to thank them for their valuable contributions.

<sup>10</sup> See, for example, Clarence Henry Haring. *The Spanish Empire in America* (1963, Oxford University Press).

<sup>11</sup> *Ibid.*

<sup>12</sup> For Bartolome de las Casas' description of genocidal violence in Hispaniola, see Howard Zinn, *A Peoples' History of the United States* (NY: Harper Perennial, 1980), pp.7-9.

unable to hold the state accountable for policies that target indigenous communities confined within and across arbitrarily imposed territorial boundaries.<sup>13</sup>

In the aftermath of the First World War (1914-1918), the League of Nations (LON) became the first modern intergovernmental organization explicitly designed to maintain global peace and security. As part of its mandate, the LON created the Permanent Court of International Justice (PCIJ) in 1919, to adjudicate legal disputes brought by sovereign states. Prior to its establishment as an international court, the First Hague Peace Conference in 1899 created the Permanent Court of Arbitration (PCA) as the first formal international judicial organ for the peaceful resolution of disputes among states. Unlike the PCIJ, which had a broader judicial mandate and addressed public international law, the PCA was primarily designed to facilitate arbitration and mediation in civil and administrative matters.<sup>14</sup> Both the PCA and PCIJ, however, operated strictly within a state-centric legal framework, recognizing only sovereign states and their authorized bodies as legitimate parties to legal proceedings. Consequently, indigenous nations were systematically excluded from these forums and denied recognition as rights-bearing entities capable of bringing cases or seeking redress for historical and ongoing injustices.

The voices of colonized and indigenous peoples began to find new resonance in the international area following the First World War (WWI). At the 1919 Paris Peace Conference, Japan, which was recognized as the leader of colored racial states after its victory over Tsarist Russia in the Russo-Japanese War (1904-1905) and the German Empire in WWI (1914-1918), introduced a proposal to include a racial equality clause in the Covenant of the League of Nations (LON). Although the proposal was ultimately rejected, Japan's advocacy for the "equal and just" treatment of all nationals, both "in law and in fact," sparked a broader global consciousness among indigenous and colonized peoples. This moment catalyzed a wave of political awakening in the colonized world, which began to see the LON and other international institutions not only as instruments of imperial power, but also as potential platforms from which to assert their sovereignty and to demand recognition of their rights to self-determination.

### **A. Japan's Racial Equality Proposal to the Covenant of the League of Nations in 1919**

The Permanent Court of International Justice (PCIJ), which was i in 1919 under the auspices of the League of Nations (LON), failed to provide a legal avenue for indigenous nations, as they were not recognized as subjects of international law under the LON's 1919 Covenant and its

<sup>13</sup> For the Spanish colonial judiciary, see Louis G. Kahle, "The Spanish Colonial Judiciary," *the Southwestern Social Science Quarterly*, 32: 26-37 (1951).

<sup>14</sup> SThe Permanent Court of Arbitration (PCA) adjudicated the investor-state dispute between Chevron and Ecuador, ultimately annulling \$19 billion punitive damages award issued by an Ecuadorian court against Chevron for the environmental damage caused by oil spills in the Ecuadorian Amazon since the late 1960s. Generally see Judith Kimerling, "Lessons from the Chevron Ecuador Litigation: The Proposed Intervenors' Perspective," *Stanford Journal of Complex Litigation*, (1): 241-294 (2013).

legal mandate. This exclusion was epitomized by the rejection of Japan's 1919 Racial Equality Proposal, which had sought to make a clear distinction between the state and the nation and to prohibit discrimination on account of "race or nationality" for all sub-state communities under the member-states' jurisdiction. Japan's proposed amendment to Article 21 of the LON Covenant explicitly stated: "The equality of nations being a fundamental principle of the League of Nations, the High Contracting Parties agree to accord, as soon as possible, to all alien nationals of States members of the League, equal and just treatment in every respect, making no distinction, either in law or in fact, on account of their race or nationality."<sup>15</sup>

While the majority of LON members supported Japan's Racial Equality Proposal, the defeat was orchestrated by Anglo-American powers, including the U.K. and its Dominions, specifically Australia, New Zealand, Canada and South Africa. U.S. President Woodrow Wilson served as Committee Chair in the deliberation and exploited procedural barriers, demanding unanimous rather than majority approval despite precedent for majority adoption.<sup>16</sup> The proposal's failure ultimately reaffirmed and institutionalized the state-centric legal framework, rendering indigenous peoples as invisible "non-entities" under international law and the emerging global order. This structural exclusion of indigenous nations' voices became embedded in the operations of PCIJ and its successors, such as ICJ and ICC, where the principle of state sovereignty continues to take precedence over indigenous self-determination.

The rejection of Japan's Racial Equality Proposal also reflected Anglo-Saxon settler colonial anxieties about the prospect of racial equality undermining white supremacy regimes in their respective territories.<sup>17</sup> Japan's 1919 Racial Equality Proposal introduced a revolutionary principle that decoupled the state from the nation, challenging the Westphalian doctrine of absolute state sovereignty over all territorial inhabitants, including indigenous nations and peoples within their borders. By asserting that "alien nationals" deserved "equal and just" treatment "in law and in fact," the proposal threatened to internationalize minority rights, including those of indigenous peoples, a notion so transformative at the time that its discussion at the Paris Peace Conference unsettled many nationalists and anti-colonial activists within the Anglo-American colonial establishment, including Ho Chi Minh of Vietnam in Indochina, Saad Zaghloul of Egypt, Jawaharlal Nehru of India, Sun Yat-sen of China, and many indigenous activists worldwide.<sup>18</sup>

Japan's Racial Equality Proposal also received widespread attention among African activists, including W.E.B. DuBois, Marcus Garvey, and other African diasporic intellectuals from North America and the Caribbean. Pan-African

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<sup>15</sup> Naoko Shimazu, *Japan, Race, and Equality: The Racial Equality Proposal of 1919* (NY: Routledge, 1998). P.20.

<sup>16</sup> *Ibid*, pp.15-16.

<sup>17</sup> *Ibid*.

<sup>18</sup> Many political activists of the colonized world began to see Japan as the leader of colored races against European imperial powers. For the international impacts of Japan's Racial Equality Proposal, see Gerald Horne, *Race War! White Supremacy and the Japanese Attack on the British Empire* (NY: NYU Press, 2005).

activists and organizations such as the African Blood Brotherhood promoted the creation of the separate nation called the “Black Belt Republic” in the U.S. South.<sup>19</sup> Elijah Muhammad, the co-founder and leader of the Nation of Islam, expressed solidarity with Japan as a member of the “Asiatic Black Men” in opposition to white supremacy.<sup>20</sup> To engage with Japan’s Racial Equality Proposal, W.E.B. DuBois also organized the 1919 Pan-African Congress, concurrent with the Paris Peace Conference, to consider this revolutionary proposal as a potential tool to dismantle the global order of white supremacy and racially discriminatory policies worldwide.<sup>21</sup> By asserting international legal recognition for “alien nationals,” the proposal threatened to erode two fundamental pillars of Anglo-American colonial domination: (1) the fiction of absolute state sovereignty over internal affairs, and (2) the racial hierarchy that underpinned and legitimized its colonial empire. Its adoption would have established the principle that the unequal and unjust treatment of sub-state national, ethnic, and indigenous groups was not merely an international matter, but a legitimate concern of international law, a principle to be only partially realized decades later with the adoption of the 1948 Genocide Convention and the gradual development of international “minority” rights protections.

Japan’s Racial Equality Proposal created a revolutionary precedent in international law by recognizing sub-state indigenous nations as rights-bearing entities capable of challenging discriminatory state and international policies. This initiative sparked significant debates and established two critical principles: (1) that self-determination and cultural autonomy were legitimate claims under international law, and (2) that the LON, despite its state-dominated structure, could serve as a forum for addressing racial and indigenous injustice. This precedent had immediate consequences, influencing later anti-colonial and human rights movements.

In 1920, the Nama people of South West Africa (present-day Namibia) petitioned the LON to challenge South Africa’s oppressive administration under its Mandate System.<sup>22</sup> Nama and Herero Nations had endured Germany’s genocidal campaign (1904-1908), which had marked the first genocide of the 20th century.<sup>23</sup> Though their efforts were ultimately suppressed, their strategic use of the LON’s mechanism to assert sovereignty set a precedent later adopted by other indigenous nations in anti-colonial struggles. The Six Nations Iroquois Confederacy engaged the LON to assert and defend treaty rights against Canada and the U.S., with Chief Deskaheh traveling to Geneva in

<sup>19</sup> For the history of the Black Belt Nation in the U.S. south, see William J. Maxwell, *New Negro, Old Left: African-American Writing and Communism Between the Wars* (NY: Columbia University Press, 1999), p.92.

<sup>20</sup> Abul Pitre, *An Introduction to Elijah Muhammad Studies: The New Educational Paradigm* (Maryland: University Press of America, 2021).

<sup>21</sup> Clarence G. Contee, “Du Bois, the NAACP, and the Pan-African Congress of 1919,” *The Journal of Negro History*, 57: 13-28 (1972).

<sup>22</sup> Ben Kienan, *Blood and Soli, a World History of Genocide and Extermination from Sparta to Darfur* (Connecticut, NH: Yale University Press, 2007), p.36.

<sup>23</sup> *Ibid.*

1923 to demand recognition of Haudenosaunee sovereignty.<sup>24</sup> Maori leaders from Aotearoa (New Zealand) also petitioned the LON, invoking the 1841 Treaty Waitangi to assert land rights and self-governance.<sup>25</sup> However, as an institution embedded in the colonial order of the post-WWI colonial context, the LON systematically marginalized and sidelined indigenous claims despite these petitions and interventions. Nevertheless, these efforts planted critical seeds for the recognition of international indigenous rights. Such activism created a critical space for legal discussions that would eventually influence subsequent foundational instruments, including the International Labor Organization (ILO) Conventions 169 (1989), and the U.N. Declaration of the Rights of Indigenous Peoples (UNDRIP) (2007), establishing precedents for transnational indigenous rights recognition.

## **B. The CWIS's Leadership Role in the Establishment of the NICT**

Similar to the League of Nations (LON) that emerged in the aftermath of World War I, the United Nations (U.N.) emerged in 1945 after World War II, established by the five principal Allied Powers who had been victorious, along with other founding states. Japan's 1919 Racial Equality Proposal had suggested the inclusion of "race and nationality" as protected categories under international law, and Article 1, Section 3 of the U.N. Charter did adopt the language of race as a cognizable category, affirming a commitment to promote human rights and prevent discrimination within the framework of international law and politics.<sup>26</sup> The omission of

"nationality" in Article 1(3) might have reflected post-WWII political compromise, so as to avoid historical challenges by indigenous nations to the principle of state sovereignty, as the Universal Declaration of Human Rights (UDHR) would in 1948 become the first to include "nationality" in its provision.<sup>27</sup> Following the global wave of decolonization movements during the 1960s and the early 1970s, numerous European colonies gained independence, formed sovereign states, and joined the U.N., expanding its membership from 51 states in 1945 to 193 states by 2025. While the U.N. Charter sought to advance universal human rights of individuals, including indigenous people, it fell short of recognizing the rights of indigenous nations as collective entities under international law, a principle that had been more directly addressed in Japan's 1919 Racial Equality Proposal, which had sought to secure the recognition of "nation" and "nationality" as racialized communities within the state jurisdiction.

The U.N. would be subject in coming years to persistent efforts of indigenous nations and activists to have it address indigenous rights and sovereignty, leading to the creation of the U.N. Working Group on Indigenous Populations (WGIP) in 1982 by the U.N. Economic and Social

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<sup>24</sup> "Six Nations Appeals to the League of Nations, 1922-31," *History Beyond Borders*, May 26, 2020, available at <https://historybeyondborders.ca/?p=189>.

<sup>25</sup> See Claudia Orange, *The Treaty of Waitangi* (Wellington, NZ: Bridget Williams Books, 2021).

<sup>26</sup> UN Charter, Article 1, Section 3.

<sup>27</sup> Article 16(1) specifies that "Everyone has the right to a nationality".

Council. CWIS Director Dr. Rudolph R yser participated in the WGIP discussions, and for more than 25 years, made annual visits to the U.N. Headquarters in Geneva and in New York to contribute to the shaping of international legal discourse on indigenous sovereignty. Consequently, the UNDRIP was finally adopted by the U.N. in 2007, despite strong opposition from four Anglo-American settler colonies, including the U.S., Canada, Australia, and New Zealand.<sup>28</sup> The united opposition paralleled their rejection of Japan's Racial Equality Proposal at the 1919 Paris Peace Conference. Dr. R yser noted that the U.N. Charter had been drafted by designees of fifty states at the U.N. Conference on International Organization in San Francisco in June 1945, to be implemented in October 1945. He also raised the concern that the U.N. was created to serve the interests of colonial state entities meshed with corporate interests, and was thereby unable to act in the interests of indigenous nations that had been captured and colonized across and within respective state boundaries.

Recognizing the inability of state-centric legal frameworks such as the League of Nations' PCIJ and the United Nations' ICJ or ICC, Dr. R yser directed his efforts towards envisioning an international judicial body rooted not in conventional, state-centric models, but in

indigenous legal traditions and ecologically holistic frameworks.<sup>29</sup> His advocacy was also informed by a broader mission to promote Fourth World governance systems that resist privatization agendas, elevate indigenous knowledge systems for the protection of ecological diversity, and secure meaningful indigenous participation in the formation of both domestic and international legal frameworks.

The NICT's operation is based on these foundational principles embraced by its signatories, comprising both indigenous nations and states that consent to its procedures. Distinct from the ICJ or ICC, one of the defining features of the NICT is its integration of indigenous legal traditions and respect for indigenous sovereignty. This ensures that its processes align with the cultural and legal norms of indigenous communities, and that states and their proxies will be held accountable for crimes of genocide, crimes against humanity, crimes of aggression, and other grave offenses committed against indigenous nations and communities. In addition, the NICT prosecutes indictable crimes such as ecocide, culturicide, gendercide and other genocidal violence, reflecting its commitment to addressing forms of violence and destruction that disproportionately affect indigenous peoples and their ways of life.<sup>30</sup>

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<sup>28</sup> Siegfried Wiessner, "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples," *Vanderbilt Journal of Transnational Law*, 41: 1141–1176 (2008). They later adopted it with significant reservations and qualifications as a non-legally binding declaration.

<sup>29</sup> For Dr. R yser's life-long advocacy for the indigenous nations' rights to self-determination and sovereignty see "In commemoration of the Life and Work of Rudolph C. R yser," *Fourth World Journal* 24:i-iii (2024).

<sup>30</sup> R yser, *supra note 6*.

By 2024, more than eighty indigenous nations worldwide had ratified the NICT Charter, signaling a powerful collective commitment to the indigenous-led vision of justice.<sup>31</sup> As explored in the following section, the NICT Charter introduces innovative provisions grounded in nation-based perspectives, including the incorporation of Rafael Lemkin's original definition of genocide, notably restoring the cultural component that was excluded from the 1948 Genocide Convention. In reclaiming this crucial aspect, the Charter directly assesses the ideological, cultural, and socio-historical erasure long experienced by indigenous nations and peoples. The NICT Charter also strengthens and builds upon existing international legal principles advanced by indigenous leadership, such as the UNDRIP and the requirement of Free, Prior and Informed Consent (FPIC) and others. The Charter also offers new, participatory legal mechanisms through which indigenous nations themselves can formerly bring charges, prosecute, and, where appropriate, sentence individuals, corporations and state actors responsible for violations against indigenous peoples, territories, and ways of life.

## II. The NICT Charter: Summaries, Application, and Implementation

The NICT Charter is composed of the Preamble and 13 sections, each of which provides distinct functions and components of the tribunal (see Table 1). As stated earlier, the Charter reinforces Rafael Lemkin's original, comprehensive definition of genocide to

include the systematic destruction of cultural institutions, languages, or spiritual practices of indigenous societies. Similar to the opposition of the Anglo-American and colonial bloc to Japan's Racial Equality Proposal at the 1919 Paris Peace Conference, the U.S., the U.K., Canada, Australia, New Zealand and other European colonial powers resisted the inclusion of cultural genocide in the 1948 Genocide Convention. Their opposition stemmed from a reluctance to acknowledge and be held accountable for their own histories of forced assimilation and systemic violence against indigenous nations and peoples within their own territories.<sup>32</sup> In contrast, the NICT Charter confronts these deliberate omissions from Lemkin's original framework and the 1948 U.N. Genocide Convention, explicitly recognizing cultural destruction (*ethnocide*) and the eradication of people's "essential foundations of the life,"<sup>33</sup> such as environment health and ecological diversity (*ecocide*) as constitutive elements of genocidal violence against indigenous nations and their ancestral lands.

<sup>31</sup> *Ibid.*

<sup>32</sup> The opposition was led by the U.S., Canada, the U.K., Australia, New Zealand, South Africa and others for the inclusion of cultural genocide from the 1948 Genocide Convention. See generally Jayme Herschkopf and Julie Hunter, "Genocide Reconsidered: An Analysis of the Genocide Convention's Potential Application to Canada's Indian Residential School System," the paper prepared for the Canadian Truth and Reconciliation Commission (2011), available at [https://law.yale.edu/sites/default/files/area/center/schell/canadian\\_trc\\_paper\\_final.pdf](https://law.yale.edu/sites/default/files/area/center/schell/canadian_trc_paper_final.pdf).

<sup>33</sup> Raphael Lemkin stated that the genocide "is intended ... to signify a coordinated plan of different actions aimed at the destruction of essential foundations of the life of natural groups." Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (D.C.: Carnegie Endowment for International Peace, 1944), p.79.

**Table 1. The Nations International Criminal Tribunal (NICT) Charter: Sections and Articles**

Section	Title	Article	Title
	Preamble		
1	The Establishment of the Tribunal	1 - 7	1. Purpose; 2. Definitions; 3. Principles; 4. The Tribunal; 5. Jurisdictional Relationships; 6. Seat of the Tribunal; 7. Legal Status and Powers of the Tribunal
2	Jurisdiction, Admissibility and Applicable Law	8 - 25	8. Crimes within the Jurisdiction of the Tribunal; 9. Crime of Aggression; 10. Genocide; 11. Crimes against Humanity; 12. War Crimes; 13. Elements of Crimes; 14. Limitations of Rules of International Law; 15. Jurisdictional (ratione temporis) Obligations over Time; 16. Preconditions to the Exercise of Jurisdiction; 17. Exercise of Jurisdiction; 18. Referral of a Situation by a Nation or State Party; 19. Principal; 20. Deferral of Investigation or Prosecution; 21. Issues of Admissibility; 22. Preliminary Rulings regarding Admissibility; 23. Double Jeopardy; 24. Challenges to the Jurisdiction or Admissibility of Evidence; 25. Applicable Law
3	Composition and Administration of the Tribunal	26 - 44	26. Organs of the Tribunal; 27. International Commission of Parties; 28. Prosecution Review Commission; 29. Justices; 30. Service, Qualification, Nomination, and Selection of Judges; 31. Judicial Seat Vacancies; 32. Principal Justice; 33. Chambers; 34. Judicial Independence; 35. Excusing or Disqualification of Judges; 36. Office of the Principal; 37. Registry; 38. Tribunal Staff; 39. Solemn Undertaking; 40. Removal from Office; 41. Disciplinary Measures; 42. Privileges and Immunities; 43. Official and Working Languages; 44. Rules of Procedure and Evidence
4	General Principles of Criminal Law	45-55	45. No Crime without Law; 46. No Penalties without Law; 47. Non-Retroactivity by Reason of Official Position; 48. Criminal Responsibility; 49. Irrelevance of Official Capacity; 50. Responsibility of Commanders and Superiors; 51. Non-applicability of Charter of Limitations; 52. Mental element; 53. Mitigation of Criminal Responsibility; 54. Superior Orders and Prescription of Domestic Law; 55. Rules of the Court
5	Legal Code, Investigation and Prosecution	56-57	56. Investigative Duties and Powers of the Principal; 57. Rights during an Investigation

<b>Section</b>	<b>Title</b>	<b>Article</b>	<b>Title</b>
6	Trial	58-71	58. Place of Trial; 59. Trial in the Presence of the Accused; 60. Functions and Powers of the Trial Division; 61. Admission of Guilt; 62. Presumption of Innocence; 63. Rights of the Accused; 64. Protection of Victims and Witnesses; 65. Evidence; 66. Offenses against the Administration of Justice; 67. Sanctions for Misconduct before the Court; 68. Requirement for a Decision; 69. Reparations; 70. Sentencing; 71. Protection of State or Nation Security
7	Penalties	72-75	72. Applicable Penalties; 73. Sentencing; 74. Trust Fund
8	Appeal and Revision	76-80	76. Appeal against Acquittal or Conviction or Sentence; 77. Appeals against Other Decisions; 78. Proceedings on Appeal; 79. Revision of Conviction or Sentence; 80. Unlawful Detention;
9	International Cooperation and Judicial Assistance	81-88	81. Commitment to Cooperation of Parties; 82. Requests for Cooperation; 83. Procedures under Domestic Law; 84. Surrender of Defendants; 85. Competing Requests; 86. Requests for Arrest and Surrender; 87. Provisional Arrest; 88. Other Forms of Cooperation
10	Enforcement	89-95	89. Role of the State or Nation in the Enforcement of Sentences of Imprisonment; 90. Transfer after Sentencing; 91. Enforcement and Supervision; 92. Enforcement of Fines and Forfeiture Measures; 93. Review by the Court concerning Reduction of Sentence; 94. Escape; 95. Special Assistance and Collaboration Arguments
11	International Commission of Parties		
12	Financial Support	96-101	96. Financial Regulations; 97. Payment of Expenses; 98. Funding; 99. Voluntary Contributions; 100. Assessment of Contributions; 101. Audits
13	Closing Clauses	102-111	102. Settlement of Disputes; 103. Reservations; 104. Amendments; 105. Amendments to Provisions of an International Nature; 106. Review of the Charter; 107. Transitional Provision; 108. Signature, Ratification, Acceptance, Approval, or Accession; 109. Entry into Force; 110. Withdrawal; 111. Official Texts
	ANNEXES	A-E	A. Treaty of Sevres; B. Establishment of the Provisional Government of Ezidikhan; C: Trial by Jury; D. International Covenant on the Rights of Indigenous Nations; E. ALDMEM for Negotiated Consent and Restorative Justice

The Charter also overcomes the limitations within existing international legal systems such as the ICC, the International Criminal Tribunal for the former Yugoslavia (ICTY) (1993), the International Criminal Tribunal for Rwanda (ICTR) (1994), and the Special Court for Sierra Leone (SCSL) (2002)<sup>34</sup> that have largely confined their prosecutorial mandates to individual actors, thereby leaving corporations, states and other collective entities essentially shielded from accountability for mass atrocities. The Preamble of the Charter states that the jurisdiction of the NICT extends to the investigation and adjudication of atrocities committed not only by individuals, but also by “business organizations, government and non-government organizations, intergovernmental organizations, armed groups, and other entities responsible for internationally recognized crimes.”<sup>35</sup> Further, the Charter notes that since 1945 many alleged crimes of genocide have been committed against indigenous nations and peoples worldwide, by “States, organizations, militias, or Nations [and the overwhelming majority of these crimes] remain unheard by judges or resolved by an objective judicial forum,” thereby perpetuating systemic impunity.<sup>36</sup> The 1998 Rome Statute that established the ICC further marginalized indigenous nations and peoples by requiring state referrals for prosecution, thereby excluding cases where the state itself is the perpetrators of crimes, such as forced assimilation, land dispossession, and other forms of genocidal violence. The Charter grants referral rights to indigenous nations, stating that “every Nation or State may exercise international jurisdiction to try to repair through restorative justice any harms resulting from the

commission of a crime under this Charter where located.”<sup>37</sup> Moreover, the Charter reinforces its commitment to the International Covenant on the Rights of Indigenous Nations (ICRIN) (1994), a well-respected document developed by the U.N. Working Group on Indigenous Populations, which further affirms the rights of indigenous nations to bring cases to pursue investigation and prosecution.<sup>38</sup>

Section One of the NICT Charter outlines the establishment and objective of the tribunal. Article 2 (Definitions) provides the definitions of key terms used throughout the Charter. For instance, “culturicide,” a concept absent from the ICC Statute, is defined as “willful act and measures undertaken to destroy nation’s or ethnic group’s culture through spiritual, natural, social, and cultural destruction, including destruction of cultural artifacts, such as books, artworks, and structures.” Similarly, “ecocide” is defined as “the willful destruction of the balance of ecological

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<sup>34</sup> This special tribunal tried individuals responsible for war crimes, including Charles Taylor, former Liberia President. See William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (NY: Cambridge University Press, 2006).

<sup>35</sup> NICT, Preamble.

<sup>36</sup> *Ibid.* See also NICT Charter, ANNEX E.

<sup>37</sup> *Ibid.* The NICT Preamble also includes any other individuals or collective entities in the planning of atrocities. See Article 3, Principles, Section 6 (“criminal responsibility for planning, instigating, or ordering the commission of such crimes.”)

<sup>38</sup> While the ICRIN was not formerly adopted by the UN, it emerged as a well-respected document developed by the UN Working Group on Indigenous Populations, which included Dr. Rýser and the International Indian Treaty Council. Notably, the ICRIN is included in the NICT Charter as Appendix D: International Covenant on the Rights of Indigenous Nations, Authorized Ratified Version, Initialed July 28, 1994, Geneva, Switzerland.

relationships and environment including destruction of foods and medicines on which a people depends.” “Gendercide” is defined to include “the killing of specific groups of people identified by their gender ... by way of feticide (sex-selective abortion), infanticide and gender-based violence.”

Section Three addresses the composition and administration of the tribunal (Articles 26-44), while Section Four establishes the general principles of criminal law (Articles 45 to 55). The procedures for investigation, prosecution, and the tribunal’s legal codes are detailed in Section Five (Articles 56-57). Section Six covers trial procedures, including provisions on the place of trial, the presence of accused, and presumption of innocence; offenses against the administration of Justice; sentencing; and the protection of state or national security (Articles 58-71). Section Seven (Article 72-75) specifies the types of penalties the tribunal imposes.

Section Eight (Articles 76-80) outlines protocols for international cooperation and judicial assistance, including surrender of defendants, requests for arrest, and other cooperative measures. Section Ten (Articles 89-95) covers the enforcement procedures, such as the roles of the states or nations in carrying out sentences, enforcing fines and forfeiture, and reviewing sentences for possible reduction. Section Eleven establishes the International Commission of Parties, and Section Twelve (Article 96-101) addresses the tribunal’s financial framework, including financial regulations, expense payment, contribution assessment, and

audits. Finally, Section Thirteen (Articles 102-101) includes the closing provisions, covering matters such as the settlement of disputes, reservations, and procedures for reviewing and amending the Charter.

### **A. Indigenous Participation and Decolonizing Justice in International Legal Processes**

Unlike the ICC and other U.N.-sponsored tribunals, the NICT Charter mandates the active inclusion of indigenous voices and participation at key stages of investigations and adjudication. It ensures that indigenous nations are not merely subjects of legal processes, but active shapers of legal outcomes. In contrast, the U.N. Charter and its associated institutions lack formal mechanisms for incorporating indigenous perspectives in prosecuting state-perpetrated crimes.

Second, as stated earlier, the ICC limits its prosecutorial scope to individual perpetrators, while the NICT Charter broadens the frame to include “state crimes,” holding states, corporations, and other collective entities accountable for crimes against indigenous nations. It does so while incorporating indigenous conceptions of justice, prioritizing community-centered, restorative, and collective forms of redress for harms inflicted at the state level. A key feature of the NICT model is the incorporation of an indigenous jury system, modeled after practices of Argentina’s *Jurado Indigena* (Indigenous Jury of the Twelve), which consists of randomly-selected six men and six women from indigenous and non-indigenous backgrounds, along with other collaborative

deliberation councils.<sup>39</sup> In this framework, community representatives and cultural knowledge holders, rather than international legal experts, serve as decision-makers. This ensures that verdicts are guided by the indigenous customary law, consensus-based justice, and the prioritization of social healing over punitive codes. This approach also ensures that verdicts, along with indigenous customary law, emphasize consensus-based justice, and prioritize social healing over punitive measures.

Third, under the NICT Charter, investigations commence following Principal's evaluation (Article 55) and incorporate a Prosecution Review Commission (PRC) (Article 28), reflecting a more collaborative, consensus-driven process that actively involves indigenous representatives. Inspired by Japan's Kensatsu Shinsakai (Prosecution Review Commission), which allows citizen panels to challenge prosecutors' decision not to indict, the NICT's PRC empowers indigenous nations and communities to protest prosecutorial inaction in cases of genocide, ecocide, and other forms of state or corporate violence.<sup>40</sup>

If state or tribunal prosecutors decline to pursue charges, the PRC, which is comprised of randomly-chosen indigenous representatives, can overturn non-prosecution decisions and compel prosecution. This mechanism disrupts state monopolies over legal decision-making, ensuring that crimes committed against indigenous nations cannot be buried by political elites or shielded by state impunity. The NICT's investigative and prosecutorial model uniquely fuses bottom-up accountability through indigenous participation

and oversight via the PRC, creating a dual system of justice that prioritizes cultural legitimacy, community involvement, and independence from state control. Conversely, the U.N. Charter and ICC lack civilian participatory mechanisms such as juries or independent civilian review panels. As a result, cases addressing state-perpetrated violence, particularly on the part of powerful states, are often derailed by geopolitical pressures and diplomatic maneuvering.

Fourth, the NICT Charter places indigenous legal traditions at the heart of its legal framework, establishing a pluralistic system that recognizes and elevates indigenous legal systems alongside international law. In contrast, the U.N. Charter, through treaties and reliance on customary international law, has historically treated indigenous legal systems as peripheral, only acknowledging them when formerly recognized by state governments. The NICT Charter fundamentally challenges the Westphalian model of absolute state sovereignty by centering indigenous legal pluralism, enabling collective accountability for state-sponsored harm, and ensuring the active participation of indigenous and marginalized communities in both investigations and legal-decision making processes. This marks a radical departure from the state-centric framework of the U.N. and

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<sup>39</sup> NICT Charter, ANNEX C: Trial by Indigenous Nation Jury.

<sup>40</sup> Hiroshi Fukurai and Zhuoyu Wang, "People's Grand Jury Panels and the State's Inquisitorial Institutions: Prosecution Review Commissions in Japan and People's Supervisors in China," *Fordham International Law Journal* 37: 929-972 (2014); Hiroshi Fukurai, "Lay Judge and Victim Participation in Japan: Japan's *Saiban'in* Trial, the Prosecution Review Commission (PRC), and the Public Prosecution of White-Collar Crimes," *Hastings Journal of Crime and Punishment* 1: 395-438 (2020).

ICC, which largely uphold state authority as the primary legal actor. Further, the NICT Charter affirms the status of indigenous nations as equal legal authorities, capable of exercising jurisdiction and prosecuting crimes collaboratively, while the ICC remains constrained by its reliance on state cooperation and consent to investigate and prosecute crimes, limiting its ability to hold states accountable for violence against indigenous nations.

Fifth, by centering indigenous traditions and legal cultures, the NICT Charter expands the scope of international criminal accountability to include crimes excluded from the ICC's jurisdiction. Among them are crimes against nature and indigenous culture, including ecocide and culturicide, and gender-based atrocities such as gendercide and femicide (Article 2 (f), (h)). Unlike the ICC's limited prosecutorial framework, the NICT Charter mandates the active participation of indigenous representatives in the investigation and prosecution of these crimes, particularly those targeting indigenous nations, lands, and ways of life. This participatory model ensures that legal responses are not only culturally appropriate, but also restorative, integrating indigenous philosophies of justice and sovereignty into decision-making processes.

For instance, ecocide is further defined in the NICT Charter as the destruction of "the balance of ecological relationships and enslavement including the destruction of foods and medicines on which a people depends." Similarly, culturicide is further defined to encompass acts such as "invasion, settlement, apartheid, military, or administrative occupation, taking of lands and

territories and resources, or national policies of assimilation by a dominant power." It also includes the "imposition of propaganda or other forms of public pronouncements designating a population in terms of separating 'us' – the colonizer – and 'them' – the colonized as a threat," and marginalization of indigenous peoples as "primitive," "backward," "savages," or "threats" to the dominant order, along with the policies and pronouncements that deny indigenous humanity, rights, and sovereignty. By enabling indigenous participation in investigative and adjudicative processes, the NICT Charter not only addresses these long-ignored harms but confronts the structures of state, corporate and proxy violence that have historically perpetuated them.

## **B. Punishments and Enforcement Mechanisms for Collective Proxies**

Unlike predominantly retributive, individually-focused punitive measures employed by the ICC or other U.N.-led tribunals, which emphasize criminal accountability for offenses committed by individuals, the NICT Charter establishes restorative justice as the principal framework for penalties. It recognizes that crimes such as ecocide, culturicide, and genocide often inflict collective, intergenerational harms on indigenous nations and require remedies beyond imprisonment. The Charter outlines several key forms of restorative and structural justice measures, including: (1) restorations in requiring financial, material, and ecological reparations to address the harms inflicted by crimes against indigenous nations, their lands, cultures, and ways of life; (2) restitution in mandating the

return of stolen lands, cultural artifacts, sacred sites, and resources to the rightful indigenous nations; (3) criminal accountability in permitting the prosecution of not merely individuals, but also of corporate leaders, state officials, and other actors responsible for planning, authorizing, or facilitating crimes under the Charter, such as genocide, apartheid, forced assimilation, and other violations specified under the Charter; and (4) removal of immunities in denying states, corporations, and their agents the ability to invoke legal immunities for crimes committed under the charter (Article 3.8), thereby demanding longstanding protections that have historically shielded powerful actors from accountability.

The NICT Charter thus differs fundamentally from the ICC in both its approach and its underlying objectives. While the ICC prioritizes retributive justice, focusing on individual criminal accountability through imprisonment, fines, and asset forfeiture, the NICT Charter emphasizes restorative and collective justice, addressing the distinct harms suffered by indigenous nations and peoples.

Further, the ICC framework acknowledges the value of reparations for victims, and its primary mandate remains the prosecution and punishment of individual perpetrators. By contrast, the NICT Charter envisions a broader, culturally-responsive range of penalties, designed to repair, restore, and sustain indigenous communities in the aftermath of violence and dispossessions. Such penalties would be tailored to the specific harms suffered by indigenous communities, such as financial and material

reparations; land restitution and the return of cultural artifacts; cultural preservation measures; rehabilitative programs designed to address psychological, social, and communal impacts of violence, displacement and historical trauma; and formal apologies, acknowledgements, and commitments to non-repetition as the formal official recognition of past harms <sup>41</sup> (Articles 69, 72).

### **C. The Proactive Genocide Framework and Enforcement Mechanisms**

Further, the NICT Charter's definition of genocide (Article 8) incorporates a ten-stage framework that includes early, pre-violent stages, such as classification, symbolization, and discrimination, as integral components of the genocidal process. By recognizing these foundational stages, the NICT is in a better position to identify the root causes of conflicts, foster early intervention, and promote healing and reconciliation within indigenous communities. This proactive framework empowers indigenous nations to safeguard their sovereignty and cultural survival before violence escalates. In addition, this comprehensive understanding of the genocidal process enables the NICT to develop holistic, culturally-grounded remedies that address not only the immediate

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<sup>41</sup> The NICT Charter emphasizes the significance of reconciliation and restitution, highlighting the necessity of a formal apology from perpetrators. For instance, in 1988, the US government issued an apology alongside monetary compensation as part of the reparation for Japanese Americans affected by the government's incarceration and detention policies. For more details, see Hiroshi Fukurai and Alice Yang, "The History of Japanese Racism, Japanese American Redress, and the Danger Associated with Government Regulation of Hate Speech," *Hastings Constitutional Law Quarterly*, 45: 533-576 (2018).

harms, but also the long-term intergenerational effects of genocide, dispossession, and cultural erasure.

This NICT approach stands in stark contrast to that of the ICC, which is structurally confined to investigating and prosecuting the “actus reus” (the prohibited act itself), coupled with genocidal intent, often after atrocities have already occurred. While the ICC’s deterrent effect lies in post-facto criminal accountability, it lacks both the mandate and preventive mechanisms to intervene at the early stages of genocidal processes. In this way, the NICT’s model offers a more preventive, restorative, and community-empowering alternative to the ICC’s reactive, state-centered system.

The NICT charter also establishes several enforcement mechanisms, including: (1) member state cooperation so that the NICT relies on the nations and states that ratify the charter to enforce judgments through their own legal systems (Art. 4); (2) legislative actions so that charting nations and states must enact laws to waive immunities and implement tribunal decisions (Art. 3.8); and most importantly, (3) universal jurisdiction, in which nations and states must exercise jurisdiction over crimes committed outside their territories if they impact their own peoples and resources (Art. 3.1-3.2).

While both the NICT and the ICC face challenges and limitations regarding enforcement and recognition, the NICT Charter adopted different approaches to addressing atrocities. The NICT promotes a more comprehensive and proactive strategy for preventing genocide by acknowledging that such events do not occur

suddenly, but rather are the culmination of a long historical process involving discrimination, cultural destruction, and economic exploitation. By identifying early warning signs of genocide outlined in Article 8, the NICT aims to address the root causes of potential genocide before violence erupts. This approach fosters systemic changes in laws, policies, and social attitudes that perpetuate discrimination and marginalization of indigenous nations and peoples.

The NICT Charter embodies Dr. Rudolph Rýser’s vision of a mechanism to address the historical and ongoing impunity for crimes against indigenous peoples and other vulnerable groups.<sup>42</sup> Its primary goal was to establish a tribunal dedicated to holding individuals, states, militias, corporations, and predatory collective proxies accountable for crimes such as genocide, forced displacement, environmental destruction, and other human rights abuses that disproportionately affect indigenous nations. The NICT Charter was specifically designed to address and remediate gaps in existing international justice systems, particularly the limited scope and inefficiencies of institutions like the ICC. It critiques the ICC for its minimal, if not complete lack of, accountability regarding crimes against indigenous peoples, noting that only a small number of cases have been prosecuted despite the widespread occurrence of such crimes globally.

Additionally, the NICT charter aims to challenge the dominance of state-centric

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<sup>41</sup> Rýser, *supra note 6*.

frameworks in international law by providing a platform through which indigenous nations can seek justice beyond traditional state-based legal systems. Dr. Rýser envisioned this approach as a necessary and urgent response to historical injustices, genocidal violence, and dispossession inflicted on indigenous nations, lands, and ways of life under Euro-American colonialism and imperialism. The NICT Charter seeks to amplify distinct indigenous legal traditions, cultural varieties, and sovereignty of indigenous peoples, placing them at the center of accountability, reparations, and lasting justice.

The following section briefly examines various applications and developments of the NICT Charter, including the recent adoption by the Ezidikhan Nation in the Middle East, its relevance to ongoing anti-colonial struggles in West Africa, the refinement of its provisions, and the establishment of international tribunals modeled on its framework. It also considers the longstanding impacts of treaty erasure and historical amnesia in North America, which have perpetuated intergenerational trauma among indigenous nations and further underscore the necessity of tribunals like the NICT to correct historical injustices and demand reparations. Many of these efforts have involved active participation from the Center for World Indigenous Studies (CWIS) and affiliated initiatives, reflecting a growing global recognition of the urgent need for independent, indigenous-led tribunals to address colonial and structural violence across the globe.

### **III. Highlights and Thematic Insights of Contributing Articles to the FWJ Special Issue**

This section introduces six individual papers featured in this special issue. As stated earlier, they are authored by indigenous activists, academic scholars specialized in indigenous studies, political advocates, and socio-legal experts. They have dedicated their careers to addressing historical injustices faced by indigenous peoples globally, alongside CWIS allies who have collaborated on projects to establish international criminal tribunals for adjudicating crimes committed against indigenous nations and peoples worldwide.

The first paper, “An Introduction to the Nations International Criminal Tribunal” by Samuel Stoker, highlights the NICT’s role in delivering justice to indigenous nations. Stoker is a longtime CWIS director of projects, screenwriter, producer, and scholar. While the 2007 UNDRIP acknowledged indigenous rights, it lacked means of enforcement, thus leaving unpunished such crimes as genocide, land theft, and cultural destruction. In response to the 2014 Yezidi genocide, the Ezidikhan government, alongside Dr. Ryser and allies from the CWIS, helped create the NICT framework, i.e., the first international tribunal designed to prosecute states, corporations, and armed groups for crimes against indigenous nations and peoples. Unlike the ICC, the NICT blends international law with indigenous customary justice, prioritizing restorative measures such as land return, cultural restoration, and indigenous juries. Its charter

covers ecocide and culturicide and asserts universal jurisdiction, confronting both historical and ongoing atrocities and injustices. Stoker concludes that the NICT offers a path towards the decolonization of justice, transforming UNDRIP's promises into actionable steps, and empowering indigenous nations to hold powerful actors accountable on their own terms.

The second article, "Ezidikhan Customary Laws: A Blueprint for Indigenous Justice" by Patrick Harrigan, demonstrates the crucial utility of the NICT in the prosecution of genocide and the protection of marginalized communities beyond state borders. The article presents the Ezidikhan Court for International Crimes (ECIC) and explores how the NICT, as proposed by Dr. Ryser, the CWIS, and international allies, gained traction as a legal and moral framework in Kurdish regions, particularly in the autonomous Ezidikhan (Ezidistan) region, following the 2014 genocide perpetrated by ISIS and others against the Yezidi people. The systematic campaign of mass killings, sexual enslavement, and cultural erasure inflicted upon the Yezidis underscored the catastrophic failures of existing international legal mechanisms, prompting Kurdish authorities and indigenous rights advocates to adopt the NICT as a viable alternative for prosecuting crimes of ethnocide, femicide, and ecocide, which conventional tribunals had long neglected. The Ezidikhan regional government, asserting its sovereignty in the wake of ISIS's atrocities, positioned the NICT as both a judicial remedy and a political statement, rejecting the monopoly of state-centric institutions like the ICC, which had repeatedly marginalized indigenous communities and peoples. By invoking the NICT's expanded

jurisdiction, Kurdish and Yezidi leaders sought not only justice for historical crimes, but also a precedent to challenge the structural impunity that enabled ongoing violence against indigenous nations. At the same time, powerful opponents such as the U.S., the Iraqi government, and Kurdish authorities resisted the establishment of the NICT, fearing indigenous autonomy, while the tribunal seeks global recognition through alliances with nations like Armenia and the members of the U.N. The authors stress Yezidi peoples' resistance symbolizes a broader indigenous struggle. and suggest that the NICT's adoption could reshape the investigation and prosecution of genocidal violence and protect marginalized communities beyond the limits of state-centric judicial frameworks.

Andy Reid, a prominent legal scholar specialized in indigenous struggles, is the author of the third article, "The Slow Genocide of Indigenous Nations and Peoples: Hiding in Plain Sight." The author explores the concept of "slow genocide" as it pertains to indigenous nations and peoples, emphasizing the systemic and structural nature of genocidal violence built into settler colonial policies. Despite its genocidal nature, Reid argues that English settler colonialism and forced assimilation in its dominions have been largely excluded from international legal definitions of Raphael Lemkin's notion of genocide, due to the dominant role of Euro-American powers in shaping these laws. Lemkin emphasized that genocide targets groups as socio-cultural entities rather than individuals, with the aim of erasing collective identities such as nations or tribes. Reid emphasizes that English settler colonialism constitutes a form of "slow genocide"

that operates through forced assimilation and systemic practices embedded in laws and institutions, making it less visible but equally destructive over time. Finally, Reid critiques international law for failing to adequately address these processes, and advocates for recognizing their genocidal nature so as to ensure justice for indigenous nations. The NICT offers a viable alternative to existing international legal frameworks by confronting the persistent legacies of settler colonialism and prosecuting those responsible for maintaining policies of forced assimilation and genocidal practices against indigenous nations around the world.

The fourth article, “18 Broken Treaties,” is a poetic work by Toshina Boyer, an Indigenous scholar and activist from California’s Bay Area. Boyer traces violent U.S. policies, from the 1830 Indian Removal Act to the unratified California treaties of the 1850s, that dispossessed indigenous nations like the Mono people, forced children into abusive residential schools, and left generations homeless. She reflects on her own family history, in which her great-great-grandmother was taken to a residential school at age seven, had her hair cut, her language forbidden, and her cultural ties severed. Boyer highlights the U.S. government’s concealment of eighteen treaties signed with California tribes in the early 1850s, following the U.S.-Mexico War and the annexation of California, and the denial to indigenous nations of the reservations and rights promised to them. Through fragmented timelines, family photographs, and memories, her poetic narrative powerfully exposes systemic violence, while quietly affirming indigenous survival and resilience. The article makes a compelling case

for the NICT’s vital role in investigating the erasure of these treaties and addressing the long-unresolved crimes of genocidal violence against California’s indigenous nations.

The fifth article, “The International Criminal Court for Indigenous Women,” by Melissa Farley and Jeri Moomaw, examines the potential of the NICT to serve as an international court for prosecuting crimes against indigenous women. Jeri Moomaw is the executive director of “Innovations Human Trafficking Collaborative,” the indigenous-led nonprofit based in Olympia, Washington, dedicated to combating human trafficking in indigenous communities. Melissa Farley serves as the executive director of the San Francisco-based Prostitution Research and Education, focusing on the harms of prostitution and trafficking. Together they discuss the urgency of protecting the rights of indigenous women, situating their analysis within the long history of human rights violations indigenous women have faced due to the intersection of their individual and collective identities. The authors emphasize the inseparable connection between indigenous women, their land, and the survival of indigenous nations, arguing that an indigenous-centered tribunal is critical for addressing such crimes as ecocide and culturicide, i.e., harms that are central to indigenous women’s experiences. The paper calls for the establishment of a specialized international tribunal as a vital mechanism for achieving justice in the face of historical and ongoing genocidal policies, unfulfilled treaty obligations, and state violence. It concludes by underscoring the urgent need to ensure indigenous women’s full and equal access to such a tribunal.

The last article, “The Indigenous Oromo Nation: Victims of Natural Resources Theft under Abyssinian Imperialism and Colonialism in the Creation of Modern Ethiopia” is by Dr. Muhammad Al-Hashimi, a specialist in African indigenous struggles. Dr. Al-Hashimi traces the exploitation of Oromo resources to the 19th-century imperial expansion of Emperor Menelik II, which laid the foundations of modern Ethiopia through the colonization of non-Abyssinian lands. He challenges the myth of Ethiopia’s uncolonized history, noting both European interventions and the Oromo’s own efforts to secure sovereignty, including an attempted alliance with Japan in the 1930s.<sup>43</sup> Using the Lega Dembi Gold Mine as a case study, Dr. Al-Hashimi reveals how successive regimes have dispossessed the Gujii Oromo through resource extraction and environmental harm. He argues that the NICT could offer a vital forum for justice, especially if the Oromo Liberation Front (OLA) negotiates political recognition.<sup>44</sup> Finally, he calls for Oromo participation in the NICT’s indigenous rights frameworks so as to protect their land, people, and sovereignty.

#### IV. Conclusions

The establishment of the NICT, as envisioned and advanced by the CWIS and its Director Dr. Rudolph Rýser, marks a transformative step toward justice for indigenous nations and peoples worldwide. Rooted in indigenous legal traditions and participatory justice, the NICT responds directly to centuries of colonial violence, land dispossession, ecological devastation, and the persistent impunity enjoyed by states,

corporations, and their collective proxies. The tribunal’s unique framework, centering indigenous sovereignty, democratic jury panels, and mechanisms like the Prosecution Review Commission (PRC), addresses the profound limitations of existing international legal institutions, such as the ICC and ICJ, which have systematically marginalized indigenous voices and excluded them from meaningful legal recourse. Empirical evidence demonstrates that the vast majority of armed conflicts since World War II have involved indigenous nations and peoples defending their rights, lands, and ways of life against states, corporate entities, and other collective forces. This enduring pattern of resistance underscores the urgent need for a robust international legal mechanism capable of holding all perpetrators, such as states, corporations, militias, and other collective proxies, accountable for crimes such as ethnocide, ecocide, gendercide, and culturicide, which remain outside the jurisdiction of conventional international legal institutions such as the ICC and other U.N.-sponsored tribunals.

By foregrounding indigenous knowledge systems, environmental stewardship, and biocultural diversity, the six papers in this special issue substantiate that the NICT not

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<sup>43</sup> Andrew Laurence, “Marriage Between the Imperial Houses of Ethiopia and Japan,” *Egypt-Search Reloaded*, Dec. 16, 2014, available at <https://egyptsearchreloaded.proboards.com/thread/1826/marriage-imperial-houses-ethiopia-japan>.

<sup>44</sup> The Oromo Liberation Army (OLA) is an armed opposition group in Ethiopia, fighting for the rights, self-determination, and sovereignty of the Oromo peoples- the country’s largest indigenous nation. For its historical emergence, see Asafa Jalata, *Oromo Nationalism and the Ethiopian Discourse: The Search for Freedom and Democracy* (New Jersey: Red Sea Press, 1998).

only seeks to redress historical and ongoing injustices, but also to affirm the critical and necessary interdependence between the survival of indigenous nations and the maintenance of planetary ecological health. These articles further highlight the NICT's potential to provide fair and impartial adjudication for indigenous peoples, to protect the rights of indigenous women, and to advance anti-colonial futures rooted in justice, sovereignty, and ecological integrity.

The NICT stands as a vital and long-overdue innovation in international law, offering a critical path forward for indigenous nations to gain the means to assert their rights, seek reparations, and safeguard their lands and cultures against ongoing threats. The NICT's success will depend on continued advocacy, broad adoption, and the unwavering commitment of indigenous peoples and their allies to building a just, pluralistic, and sustainable world for generations to come.

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# An Introduction to the Nations International Criminal Tribunal

## The Case of the Yezidi People

By Samuel Stoker, MA

### ABSTRACT

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This article outlines the mechanisms of the Nations International Criminal Tribunal and the Yezidi nations' case from which it emerged as a legal framework. It underlines the channels created by the NICT and their potential to alter global approaches to justice by providing localized and culturally appropriate legal processes. Beginning with a critique of current international governance systems, the article uses the ISIS genocide of the Yezidi peoples to articulate the necessity of a system that foregrounds Indigenous sovereignty in achieving justice. Incorporating legal evidence and highlights from his personal interviews and correspondence with Dr. Rýser, the author explores the NICT's charter and the intentions behind its design. Ultimately, the NICT is a comprehensive organizational model for promoting Indigenous rights locally and globally.

**Keywords:** International Criminal Tribunal, Indigenous justice, Genocide, International law, Justice mechanisms, Global governance, Indigenous sovereignty, Human rights, Yezidi nation, Nations International Criminal Tribunal (NICT)

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### Figure 1

*Yezidis celebrating the New Year*



Note. Lalish, Nineveh Governorate, Iraq. (Photograph by Levi Clancy, 2018). Public Domain.

**Background:**  
**United Nations Declaration on the Rights of Indigenous People (UNDRIP)**

The most ubiquitous articulation of Indigenous rights worldwide is the United Nations Declaration on the Rights of Indigenous People (UNDRIP). Adopted by the United Nations General Assembly in 2007, the ratification of the UNDRIP was an immense victory for the bedrock nations of the world. Finally, there was a vehicle for the widespread international recognition of Indigenous peoples as human beings and a “guarantee” of their fundamental civil rights, among them the right to self-determination, the right to control their lands and resources, the right to protect and practice their cultural traditions and customs, and the right to protection against discrimination by states.

While not legally binding, the UNDRIP has functioned as a baseline in advocating for the rights of Indigenous people internationally and as an ideal model for nation-to-state government-to-government relations. Likewise, in the years since its UN adoption, some states have incorporated its principles into their national laws.

However, while the UNDRIP is undoubtedly an important policy achievement in the centuries-long struggle between Indigenous nations and the states that colonized their ancestral homelands, it is not enforceable. Instead, it serves more as a moral guideline than international law, and moral guidelines do not militate against the ongoing fights over land and resources between Indigenous nations, multinational corporations,

and states, where profit is favored with little regard to its effects on Indigenous nations.

No instrument in international law has consistently demonstrated its willingness and ability to convict organizations, groups, or states accused of crimes against Indigenous nations. This infrastructural deficiency makes the November 2025 ratification of the Nations International Criminal Tribunal (NICT) by 66 Indigenous nations and the Iraqi state all the more significant.

The NICT holds the potential to provide Indigenous nations around the world with an effective avenue to seek justice — to charge, try, and convict those responsible for historical injustices against Indigenous peoples and ongoing conflicts between nations and states, such as religious genocide, water supply contamination, extractive industrial practices, and land disputes.

Once established, according to the charter, the NICT will “have the power to exercise its jurisdiction over persons, organizations, and governments for the gravest offenses of concern to all peoples, as referred to in this charter, and its jurisdiction shall be complementary to criminal jurisdictions of nations and states.”

This will result in the NICT having the power to prosecute criminal charges in the jurisdictions of the nations and states that are party to the charter. While this is similar in function to that of the International Criminal Court (ICC), which also hears cases alleging genocide, crimes of aggression, and crimes against humanity,

the ICC primarily focuses on charging individuals, not groups or organizations. Since it was established in 2002, the ICC has only investigated a handful of cases advanced by Indigenous nations and has prosecuted none.

It is difficult to calculate the total number of ongoing conflicts between nations and states, particularly with extractive industries, because these hostilities are often localized incidents in remote locations and thus are underreported. However, to add some perspective, the number of current conflicts between nations and states (and multinational corporations) is estimated to be in the thousands. One study documented 1044 environmental conflicts involving Indigenous Peoples with at least 740 distinct Indigenous groups affected (Scheidel, Fernández-Llamazares, Bara, et al 2023). The study recognized the dearth of data from Central Asia, Russia, and the Pacific. Even if these cases are heard, they are generally in local or national courts, where historically, the odds of a fair trial are poor, even in UNDRIP signatory states.

The obstacles faced by the Yezidi underscore the shortcomings of international law, highlighting the urgent need to develop a mechanism that departs from the inequitable legal frameworks governing interstate relations. Thus while the NICT was conceived in response to the immediate and specific needs of the Yezidi, the NICT is iterative and adaptable to any Indigenous community seeking justice.

**Figure 2**

*Yezidi survivor of ISIL's attacks in Sinjar*



*Note. The man in the picture fled Sinjar with his family members. (Photograph by dumanyasin).*

## **The Yezidi Genocide and the Roots of the NICT**

In August 2014, the Islamic State of Iraq and Syria (ISIS), a Sunni- Muslim fundamentalist organization, raided the Yezidi city of Sinjar (Shingal) in northern Iraq. Its aim was to wipe out the Yezidi Nation, which had occupied the region for the past 6000 years. The catalyst for this genocidal act was ISIS's misinterpretation of the Yezidi name, which they believed to mean "of the devil," and thus, they considered the Yezidi to

be heretics and targets for extermination. In fact, the Yezidi name means “followers of the Peacock” or “followers of God,” and they have long been a peaceful nation of farmers and herders.<sup>1</sup>

The attack was barbaric in execution. During the raid, ISIS murdered an estimated 5000 Yezidis, raped and enslaved more than 6000 Yezidi women and young girls, and forcibly recruited countless Yezidi boys, who they later indoctrinated and forced to serve them. They destroyed homes and sites of cultural and religious significance to the Yezidi people. Those who survived were forced to run and hide while ISIS hunted them and blocked humanitarian aid to the region. The Yezidi were deeply traumatized and many died from exposure and starvation (Kizilhan, Berger, Sennhauser, & Wenzel, 2023). The attack was part of a targeted plan to eliminate the Yezidi people and their culture (Cetorelli, Sasson, Shabila & Burnham, 2017).

The genocide devastated the social structures of the Yezidi Nation and displaced thousands, with reports of abductions and enslavement continuing to the present.<sup>2</sup>

ISIS also targeted other Indigenous tribes, leveling entire villages and destroying cultural and sacred sites. Their shared grief led to an important bond when, in the future, the Yezidi sought justice.

Global institutions such as the United Nations, the European Parliament, and the US Congress widely condemned the Yezidi genocide; however, none attempted to prosecute those responsible. In the aftermath, the Yezidi survivors and diaspora began their own quest for justice, reaching out to international human rights organizations, the UN, and the International Criminal Court. In all cases, the responses were ineffectual. Although sympathetic, these organizations and institutions were unable to help in any tangible way (S. Stoker, personal communication, December 2023).

The International Criminal Court (ICC)—the international organization established to deal with the magnitude of genocidal crimes—was unable to make any substantial progress with the Yezidi case. The ICC Prosecutor stated that because ISIS was a fast-growing military and political organization primarily led by nationals of Iraq and Syria, neither of which were parties to the Rome Accord, the prospects of his office investigating and prosecuting those responsible were limited (Bensouda, 2015).

Most of the genocide occurred in Iraq, where the courts and the judicial system were too unstable, obscured, and compromised to provide meaningful reparative justice.

<sup>1</sup> According to Rob Leutheuser (BBC, 2015), “The ongoing persecution in their heartland of the Mt. Sinjar region West of Mosul is based on a misunderstanding of their name. Sunni extremists, such as ISIS, believe it derives from Yazid ibn Muawiyah (647-683), the deeply unpopular second caliph of the Umayyad dynasty. Modern research, however, has clarified that the name has nothing to do with the loose-living Yazid, or the Persian city of Yazd, but is taken from the modern Persian “ized,” which means angel or deity. The name Izidis simply means “worshippers of god,” which is how Yezidis describe themselves.”

<sup>2</sup> “The consequences of genocide have endured long after ISIS’ occupation of Sinjar. Genocide is not a singular event. It is a process of marginalization, violence, and resource deprivation. ISIS knew this; for they did not stop at destroying Yezidi lives. They also systematically dismantled agricultural lands and basic resources to prevent the community from ever returning home. While ISIS’ military occupation was defeated by an international coalition in 2019, their genocide against Yezidis has yet to be stopped” (from Nadia’s Initiative, The Genocide).

After exhausting numerous avenues, the Yezidi reached out to the Center for World Indigenous Studies (CWIS) and began consultations with Dr. Rudolph Rýser, who had spent his life working toward the cause of Indigenous self-determination and agreed to help them.

“I asked them to identify what they considered to be the two most important tasks before them and suggested that we start with those,” said Rýser. Their goals were to establish their own Yezidi government to represent them on the world stage and to find a way to hold ISIS accountable for the genocide (S. Stoker, personal communication, December 2023).

In 2016, the Yezidi began working with Dr. Rýser to establish the autonomous Government of Ezidikhan - the name given to their ancestral homelands. They established a provisional government, identified boundaries, and drafted a legal code. The development of Ezidikhan and its ministers was the first step in the process of seeking justice for the genocide. Ezidikhan Minister of Justice Nallein Sowilo asserts, “Ezidikhan provided us with a political base and a framework through which to exert our rights, manage our resources, and seek justice on our own terms” (S.Stoker, personal communication, August 21, 2023).

During the process of forming the Ezidikhan government and recognizing shared experiences among surrounding Indigenous communities, Rýser suggested that the provisional government reach out to other Indigenous nations in West Asia to form a coalition.

This led to the creation of the Confederation of Indigenous Nations of the Middle East and North Africa—a coalition of 57 bedrock tribes committed to advancing the rights of Indigenous nations in the region (Harrigan, 2022).

In 2020, the provisional government of Ezidikhan was formalized by a vote for independence, and in December of 2024—after years of discussions—Ezidikhan was formally recognized by Iraq with the ratification of the Republic of Iraq and the Government of Ezidikhan Intergovernmental Accord (Harrigan, 2024).

Throughout the process, a core part of the Yezidi’s work was building the NICT. The NICT fulfilled the second priority identified with Dr. Rýser: to hold ISIS accountable for the genocide. The sentiment was that if the current justice systems were unable to hold ISIS accountable for the Yezidi Genocide, they would build one that could — a new international mechanism that Indigenous peoples around the world could use to seek reparations for both historical and ongoing threats to their human rights.

The NICT is similar to the ICC in that its jurisdiction is derived from the member parties of its charter which currently includes 66 nations and the state of Iraq. However, unlike the ICC, which is built upon states, the NICT focuses on the needs of Indigenous nations, who have been historically excluded from the political and legal policy making process.

The focus on Indigenous nations alleviates the barriers to justice that the Yezidi experienced

in their appeals to national and international institutions like the ICC. According to Dr. Rýser, the issue extends beyond the obstacles posed by ICC requirements; it is frequently undermined by global political and strategic interests—particularly those affecting Indigenous nations—given the pivotal role of the state in the Rome Statute.<sup>3</sup>

Indigenous nations need a justice system that holds aggressors accountable and also recognizes the significance of their cultural traditions and values. Too often, the crimes perpetrated against Indigenous communities affect their identity and very existence through genocide, forced displacement from their homelands, and the destruction of their livelihoods, traditions, cultural values, and social structures. Indigenous justice must address all of these issues.

Rýser suggests that “For Indigenous communities, justice is more than a matter of punishment; it needs to be restorative.” The Yezidi seek justice that is reparative, and restorative where the guilty are held accountable, and the survivors have the opportunity to return to their ancestral homelands to rebuild their lives and society.

### The NICT Charter

The establishment of the NICT as an Indigenous-led international legal system can serve as a significant tool for Fourth World nations seeking justice from a system that has been historically biased toward states. Rýser asserted, “The NICT model calls for a more inclusive approach to international justice that

**Figure 3**  
*Yezidi Genocide Memorial Day*



Note. Diyarbakır, Turkey. (Photograph by Mahmut Bozarlan, 2015). Public Domain

acknowledges Indigenous sovereignty, the diversity of legal traditions, and the importance of cultural autonomy.” It is a response to the failures of existing systems and a framework for addressing historical injustices as well as preventing future ones. The NICT Charter Preamble summarizes these matters:

The Nation and State Parties to this Charter,

Understanding that all peoples share a common inheritance from Mother Earth,

Recognizing that for centuries the Nations of the world have suffered horrific acts in which millions of children, women, and men and whole peoples have been victims of horrific atrocities of invasions, religious oppression, colonization, trauma, ethnic

<sup>3</sup> The Rome Statute is the treaty that established the International Criminal Court (ICC), defining its jurisdiction over crimes like genocide, crimes against humanity, war crimes, and the crime of aggression.

cleaning, economic destruction, forced removal of children, sexual violence against women, starvation and food insecurity, occupations and forced settlements, forced denial of sexual orientation, forced assimilation, uprooting, mass murders, forced demographic change, expulsions, exploitation, apartheid, slavery, torture, and physical, ecological, and cultural genocide, denial of sovereignty, denial of self-determination of nations,

Accepting that the international agreements and treaties between States' governments and other legal instruments adopted to protect against and punish crimes carried out against peoples have failed to provide the Nations of the world with due process, redress, or remedy or criminal acts either by denying Nations' access to justice, denial of due process by granting immunity to officials and citizens of States or by politicizing judicial systems,

Guaranteeing that the international legal order recognizes that the Nations of the world and customary laws are fully entitled to the full recognition and dignity, political equality with States, basic rights, freedom from inhuman and degrading treatment,

Thoughtful that such grave crimes undermine sustainability and survival and peaceful relations, security, and health between nations and states,

Concerned that since the 1914 - 1925 genocide committed against Armenians,

Yezidi, Assyrians, Zoroastrians and Roma including men, women and children; and since 1945 more than 160 alleged crimes of genocide as understood under international state-based law have been committed against Nations in North America, Central America, South America, Asia, Melanesia, Oceania, Africa and Europe —acts committed by States, organizations, militias, or Nations remain unheard by judges or resolved by an objective judicial forum-- Justice was not achieved or the victims, and impunity for the perpetrators of these crimes was entrenched,

Ensuring comity between Nations and States and the rights of Nations to self-determination and self-government and controlling their natural resources not only to protect their people from abhorrent crimes and atrocities but also to prevent criminal offenses and punish those who commit criminal offenses against Nations in accordance with the punishments set out in the Universal Declaration of Mother Earth and in this charter,

Granting that every Nation or State may exercise international jurisdiction to try to repair through restorative justice any harms resulting from the commission of a crime under this Charter wherever located, (As set forth in ANNEX E)

Affirming that it is the duty of all Nations and States to exercise lawful jurisdiction over States or Nations, persons,

business organizations, government and non-government organizations, intergovernmental organizations, armed groups, and other entities responsible for internationally recognized crimes,

Confirming each Nation and State's commitment to uphold the purpose and principles of this Charter and the International Covenant on the Rights of Indigenous Nations (as set forth in ANNEX D of the Charter),

Resolute in the commitment to achieve these ends for all people, we do establish the Nations International Criminal Tribunal with jurisdiction over all crimes of concern to all peoples,

Affirming that the Nations' International Criminal Tribunal established by this charter shall be complementary to Nation and State criminal jurisdiction in accord with their sovereign and territorial integrity and consistent with the sovereignty of the Republic of Armenia and the sovereignty of the Nation of Ezidikhan as set forth in ANNEX A and ANNEX B of this Charter),

Resolved to guarantee lasting respect for and the enforcement of international accountability and justice.

The nearly 97-page NICT Charter, authored by the Ezidikhan Charter Panel of International Experts, is organized into thirteen sections grouped under six major categories: Foundational Principles and Framework; Tribunal Structure

and Administration; Investigation and Prosecution Process; Trial Process, Penalties, Appeals and Revisions; Judicial Assistance and Enforcement; and International Cooperation. These are followed by six annexes. The following section offers concise summaries of each category, with particular attention to the NICT's efforts to balance the roles of states and nations within its legal framework.

### **Foundational Principles and Framework**

The foundational principles of the NICT are laid out in *Section One: Establishment of the Tribunal* and *Section 2: Jurisdiction, Admissibility and Applicable Law*.

*Section 1* of the charter establishes the NICT as an instrument for addressing serious crimes that endanger global communities, including crimes against humanity, war crimes, and crimes against nature and culture. It defines terms of reference used throughout the NICT Charter, including aggression, apartheid, colonization, ecocide, and cultural genocide. It outlines the meaning of acts such as forced deportation, enslavement, gender-based violence, and persecution.

This section also explains key principles about the NICT's authority to hold individuals, organizations, and governments accountable for committing these crimes, abetting them, or failing to prevent them. It also includes the ability to prosecute offenses beyond national borders when applicable.

The tribunal complements existing national and international legal frameworks and can

collaborate with other international bodies through formal agreements as described in *Article 7: Legal Status and Powers of the Tribunal*:

The court shall have international legal personality exercising its functions and powers as provided in this charter on the territory of any State or Nation Party by formalized agreement on the territory of any other State or Nation. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

This article ensures it has the legal authority necessary to fulfill its mission globally, ensuring that no crime goes unpunished, regardless of political status or borders.

*Section 2* elaborates extensively on the types of crimes within the jurisdiction of the court such as colonization, aggression, genocide, military occupation, apartheid, war crimes, among other crimes against nature and humanity.

The section also contains *Article 16* and *Article 17* which identify key information concerning the exercise of jurisdiction that is particularly helpful for those unfamiliar with international law to understand the sources of NICT authority.

#### Article 16. Preconditions to the Exercise of Jurisdiction

1. A State or Nation which becomes a Party to this charter thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 7.

2. In the case of Article 17, Paragraph (a) or (c), the court may exercise its jurisdiction if one or more of the following States or Nations are Parties to this Charter or have accepted the jurisdiction of the court in accordance with Paragraph 3:

- a. The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the state of registration of that vessel or aircraft;
- b. The State of which the person accused of the crime is a national.

3. If the acceptance of a State or Nation which is not a Party to this charter is required under Paragraph 2, that State or Nation may, by declaration lodged with the Registry, accept the exercise of jurisdiction by the court with respect to the crime in question. The accepting state or Nation shall cooperate with the court without any delay or exception in accordance with Section 9.

#### Article 17. Exercise of Jurisdiction

The tribunal may exercise its jurisdiction with respect to a crime referred to in Article 7 in accordance with the provisions of this charter if:

1. A situation in which one or more of such crimes appears to have been committed is referred to the Principal by a State and or Nation Party in accord with Article 18;

2. A situation in which one or more of such crimes appears to have been committed is referred to the Principal by the Tribunal Commission; or
3. The Principal has initiated an investigation in respect of such a crime in accordance with Article 15.

The NICT's jurisdiction derives from the jurisdictions of the member parties, which include both states and nations. The more states and nations that ratify it, the larger its jurisdictional area becomes and the more legitimacy it gains on the international stage.

### **Tribunal Structure and Administration**

*Charter Section 3: Composition and Administration of the Tribunal and Section 4: General Principles of Criminal Law* comprise this section on tribunal structure and administration.

*Section 3* provides an overview of the NICT structure and details the roles and responsibilities of the key organs responsible for its governance and judicial functions. These include: the International Commission of Parties (the main body appointing judges and managing the budget); the Prosecution Review Commission (a lay advisory body that reviews prosecutorial decisions); the Judicial Principal; and divisions for trials, appeals, and pre-trial proceedings. Local judicial systems in the plaintiff's nation or state are also incorporated. Finally, the Office of the Principal handles investigations and prosecutions, and the Registry oversees administrative functions.

The section also discusses the guidelines for appointing judges based on moral character, experience, and geographic diversity. It explains how the NICT balances the representation of gender and legal systems, stressing judicial independence. Processes are also in place to disqualify judges when conflicts arise.

The tribunal also promotes transparency and integrity by setting clear rules for appointing judges, principals, deputy principals, and staff and detailing their required qualifications and terms of service.

The Principal oversees investigations and prosecutions with complete autonomy. Both the Principal and Registrar are responsible for appointing qualified staff. Special units like the Victims and Witnesses Unit protect vulnerable individuals involved in cases.

Tribunal members enjoy diplomatic privileges and immunities, ensuring the independence of their functions, though these can be waived under specific circumstances. The tribunal operates in multiple languages, including English, Spanish, French, Arabic, and national languages relevant to distinct cases, ensuring inclusivity and accessibility in its proceedings.

*Section 4: General Principles of Criminal Law* articulates the key principles of criminal law, stressing that no one can be held responsible for actions not defined as crimes under the charter. Penalties must align with established legal provisions. It holds individuals, including state officials and military commanders, accountable for crimes such as genocide and aggression,

regardless of official capacity or superior orders, and specifies that crimes under the charter are not subject to statutes of limitations.

This section describes the standards for criminal responsibility, focusing on factors like intent, knowledge, and reduced responsibility in cases of mental illness or self-defense. It clarifies that holding a government position or following orders does not provide immunity and declares that the tribunal has the power to prosecute anyone regardless of their position or status. Rules also guide the investigative process to ensure it aligns with the charter's goals and international law.

### **Investigation and Prosecution Process**

*Section 5: Legal Code, Investigation and Prosecution* outlines the investigative duties and powers of the Principal, who is responsible for investigating the facts and evidence to determine criminal responsibility. Investigations are initiated independently or based on petitions and include questioning suspects, victims, and witnesses, collecting evidence, and conducting fieldwork in line with human rights and customary laws. The Principal may seek cooperation from states, communities, or organizations and must maintain confidentiality when necessary.

*Article 57* in the section ensures that all individuals under investigation are presumed innocent, informed of their rights, and protected from arbitrary detention. They are entitled to legal representation, the right to remain silent, timely trials, and the opportunity to present

and cross-examine witnesses. Proceedings are conducted in accordance with international standards and local customs, including options for alternative dispute resolution.

### **Trial Process, Penalties, Appeals and Revisions**

*Sections 6: Trial Process, Section 7: Penalties, and Section 8: Appeals and Revisions* of the charter describe the procedures of the overarching tribunal trial process.

*Section 6* of the tribunal's charter outlines trial procedures, strongly emphasizing the respect and integration of Indigenous rights and customs. It states that trials are held at the tribunal's seat—Armenia in the Yezidi's case—unless another location is more appropriate to accommodate the Indigenous nation's or state's cultural and legal traditions. The tribunal acknowledges and incorporates Indigenous legal practices, such as using plaintiff juries (outlined in Annex C) and alternative dispute resolution methods like mediation or community-led decision-making. Indigenous leaders may also be consulted in cases involving admissions of guilt to ensure that traditional values guide the judicial process.

The rights of the accused are protected within both international legal frameworks and the customary laws of their Indigenous nation, provided these are consistent with human rights law. The presumption of innocence is upheld and guilt must be proven beyond a reasonable doubt, while the accused retains the right to defend themselves through culturally appropriate means. The tribunal also prioritizes the protection

of Indigenous victims and witnesses to ensure their safety and integrity. Additional measures can be put in place to protect witnesses during testimony if needed, and the tribunal may hold closed sessions when public hearings conflict with Indigenous customs or endanger community members.

In order to incorporate traditional practices, the court considers Indigenous forms of justice in cases involving reparations. Reparations may include compensation, restitution, and rehabilitation. The court also works diligently to ensure that the security concerns of states do not infringe on the sovereignty of Indigenous nations seeking justice.

*Section 7* of the tribunal's charter outlines penalties and sentencing, again emphasizing respect for Indigenous rights and customary legal practices. While the court may impose traditional penalties like imprisonment (up to 30 years or life for extreme crimes), it also integrates Indigenous approaches by allowing for fines, forfeitures, and other penalties rooted in the nation's customary laws. The court should consult traditional leaders, clans, families, and community bodies when determining penalties to ensure Indigenous perspectives and restorative justice measures such as reparations to victims are central to the sentencing process.

Sentencing decisions consider the nature and gravity of a crime, the circumstances of the convicted person, and the collective interests of affected communities. The court prioritizes reconciliation and reintegration over imprisonment. The charter also stipulates the

creation of a fund to support those harmed. Notably, the tribunal's procedures do not override penalties ordered under state or nation-based laws.

*Section 8* provides mechanisms for reviewing and contesting court decisions while paying particular attention to fairness and respect for Indigenous rights. It states that the Appeals Division can revise convictions and sentences based on errors in procedure or law. It declares that victims have the right to appeal on grounds affecting the fairness of proceedings and that the court ensures that any delays or suspensions during appeals do not prejudice victims' rights. When the Appeals Division reviews sentencing, it considers more than legal errors; it also considers the views of Indigenous leaders, acknowledging their role in the justice process.

*Article 79* articulates the process for revising convictions when new evidence emerges, or judges have acted improperly, providing a pathway to rectifying wrongful judgments. Compensation is available for the unlawful detention of individuals, families, and communities. The overarching framework ensures that the legal system remains sensitive to Indigenous customs and integrates traditional practices and perspectives into international legal proceedings.

### **Judicial Assistance and Enforcement**

*Section 9: International Cooperation and Judicial Assistance and Section 10: Enforcement* clarify questions of jurisdiction between the tribunal and its signatories, and answer basic questions concerning cooperation between the nation and state parties.

*Section 9* of the tribunal addresses procedures for cooperation between the states, nations, and the tribunal. *Article 81* grants the tribunal the authority to issue arrest warrants and request the surrender of individuals while emphasizing the need to respect the domestic legal systems of the charter signatories. Additionally, it provides direction for managing conflicts, such as double jeopardy claims, and how to ensure their resolution before proceeding.

*Article 82* addresses situations where multiple jurisdictions request the surrender of the same individual. In most cases, the tribunal's request takes precedence, particularly if the case has already been deemed admissible. Additional factors such as the severity, time, and/or location of a crime are considered in the decision-making process.

The following articles in the section provide additional details. *Article 84*, for instance, establishes arrest and surrender processes. The assertion that the tribunal treats people equitably and recognizes their rights is paramount to these processes. Also articulated is the importance of shielding all proceedings from political interference.

*Articles 85* and *86* address the management of competing extradition requests and articulate that while domestic laws play a role in these cases, states and nations must harmonize any conflicts with the tribunal's requirements.

*Articles 87* and *88* expand the tribunal's power to act in pressing situations. For example, *Article 87* permits provisional arrests in urgent

cases, and in *Article 88*, a broader range of cooperative actions that parties are obligated to assist with are outlined, such as safeguarding witnesses or facilitating the collection of evidence. However, if such cooperation were to conflict with fundamental aspects of a nation or country's law, or pose a threat to national security, nations and states are expected to consult with the tribunal to find a resolution.

*Section 10* describes how to implement sentences. Crucial to sentencing is its focus on respecting Indigenous rights and legal customs. Although prison sentences are generally served in charter-sanctioned facilities, provisions exist to allow for exceptions when necessary. If the crime involves Indigenous communities, those communities can request to handle the imprisonment themselves, as long as their facilities meet international human rights standards. The court will also consider alternative forms of justice like restorative measures, if they align with Indigenous traditions and benefit the community and the person sentenced.

The rules also address transferring sentenced individuals between states and/or nations. This can only happen with the defendant's consent when it supports their well-being and reintegration into society—values that many Indigenous justice systems prioritize. The court keeps a close eye on how sentences are enforced, ensuring proceedings align with international standards while also honoring Indigenous customs. The ultimate goal of enforcement is based on the collective justice of many Indigenous cultures and seeks to restore harmony within the

afflicted community. Indigenous communities work with the court to ensure cultural values are respected each step of the way.

## International Cooperation

*Section 11: International Commission of Parties and Section 12: Financial Support* outline the roles and responsibilities of state and nation parties in all aspects of the NICT.

*Section 11* establishes the International Commission of Parties (ICP), a governing body overseeing the court's functions. Its chief duty is to ensure fair representation of state and nation parties. Each party appoints a representative to the ICP assembly that makes decisions on critical issues like the court's budget and administration. The structure gives Indigenous nations an equal voice to states by requiring an Indigenous representative to hold one of the vice-president roles.

The ICP assembly has the authority to create additional bodies to ensure accountability and transparency in its processes. Another important feature is that individuals relevant to Indigenous governance may also participate in ICP assembly meetings besides official representatives.

The ICP assembly meets annually and strives for consensus in its decision-making, though a majority vote may be needed. To ensure accessibility, Indigenous languages should be included among the charter's official working languages.

*Section 12* explains financial requirements. Dues support the court's operations; however, mechanisms prevent disenfranchisement due to

financial hardship. This is important for nations or states that face systemic economic challenges.

The financial system also includes voluntary contributions; yet, it always emphasizes transparency to prevent favoritism, and annual audits ensure funds are managed responsibly. This structure seeks to prioritize fairness and equal representation.

## Closing Clauses

*Section 13: Closing Clauses* contains articles for resolving disputes, rules for amending the charter, and guidelines for managing membership. All emphasize equal participation for both states and nations. It describes how disputes related to the court's judicial functions should be settled internally while broader disagreements between parties escalate to the ICP. The ICP assembly plays a critical role in addressing conflicts.

This section is notable as it contains a clause specifying that no reservations to the charter are permitted. All signatories are equally bound by its provisions. After five years, amendments can be proposed by any state or national party. Special provisions allow Indigenous nations to accept or reject specific changes. The structure ensures that Indigenous voices remain central in future charter modifications.

The charter provides for regular reviews, and the ratification process explicitly acknowledges nations alongside states to grant Indigenous governments equal status. Withdrawing from the charter is allowed, but it clearly states that withdrawal does not absolve any party from obligations incurred while they were members.

**Figure 4**

Yezidi refugees



Note. Iraqi Kurdistan, 2014 (Photograph by Defend International). CC BY 2.0

## Conclusion

The Nations International Criminal Tribunal has the potential to introduce a revolutionary approach to justice to the modern international legal framework that can hold to account those

responsible for historical crimes against Fourth World Nations. It also aspires to provide a measure of closure for the centuries of harm inflicted upon them, often carried out with impunity by state authorities. The NICT promises to function as an instrument of justice for present and future crimes against the Indigenous nations of the world and all peoples affected by crimes against humanity and nature.

As of June 2025, 66 nations are parties to the NICT. Iraq was the first state to ratify the NICT. With Iraq's adoption of the charter (and its recognition of Ezidikhan), the possibility emerges that the world's Indigenous peoples will finally have an enforcement mechanism through which to assert their rights of self-determination, including the capacity to address genocide.

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# Nations International Criminal Tribunal

## Markup Working Draft 200823 – Open for Amendments by Principal Parties

Prepared by the International NICT Charter Panel

### ABSTRACT

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The Nations International Criminal Tribunal (NICT) Charter outlines a hybrid legal framework by which international crimes against Indigenous nations can be prosecuted. The Charter stems from Dr. Rudolph Rýser’s consultations with the Yezidi nation in northern Iraq following the 2014 genocide perpetrated by ISIS. Led by Rýser, the Center for World Indigenous Studies drafted an instrument through which Indigenous Nations worldwide could seek legal redress for the ongoing and historical atrocities committed against them. The charter is composed of 13 sections detailing the jurisdiction, administration, and mechanisms by which the court operates. Among others, the tribunal oversees crimes of genocide, aggression, colonization, ecocide, and gender-based violence. The charter provides a comprehensive set of codes guaranteeing just due process for all parties involved. Unlike preceding international legal institutions, the NICT maps specific channels for enforcing rulings based on reparative justice principles—ensuring self-determination and autonomy of Indigenous nations within the juridical process.

**Keywords:** Nations International Criminal Tribunal (NICT), NICT Charter, Indigenous justice, International law, Crimes against Indigenous peoples, Genocide, Ecocide, Indigenous human rights law, Crimes against humanity, Yezidi genocide

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### Table of Contents

Nations International Criminal Tribunal

#### PREAMBLE

#### SECTION 1. ESTABLISHMENT OF THE TRIBUNAL

Article 1. Purpose

Article 2. Definitions

- Article 3. Principles
- Article 4. The Tribunal
- Article 5. Jurisdictional Relationships
- Article 6. Seat of the Tribunal
- Article 7. Legal Status and Powers of the Tribunal

## **SECTION 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW**

- Article 8. Crimes within the Jurisdiction of the Tribunal
- Article 9. Crime of Aggression
- Article 10. Genocide
- Article 11. Crimes against Humanity
- Article 12. War Crimes
  - Armed Conflict
- Article 13. Elements of Crimes
- Article 14. Limitations on Rules of International Law
- Article 15. Jurisdictional (ratione temporis) Obligations over Time
- Article 16. Preconditions to the Exercise of Jurisdiction
- Article 17. Exercise of Jurisdiction
- Article 18. Referral of a situation by a Nation or State Party
- Article 19. Principal
- Article 20. Deferral of Investigation or Prosecution
- Article 21. Issues of Admissibility
- Article 22. Preliminary Rulings regarding Admissibility
- Article 23. Double Jeopardy
- Article 24. Challenges to the Jurisdiction or Admissibility of Evidence
- Article 25. Applicable Law

## **SECTION 3. COMPOSITION AND ADMINISTRATION OF THE TRIBUNAL**

- Article 26. Organs of the Tribunal
- Article 27. International Commission of Parties
- Article 28. Prosecution Review Commission
- Article 29. Justices
- Article 30. Service, Qualifications, nomination, and selection of judges
- Article 31. Judicial Seat Vacancies
- Article 32. Principal Justice
- Article 33. Chambers

Article 34. Judicial Independence  
Article 35. Excusing or disqualification of judges  
Article 36: Office of the Principal  
Article 37. Registry  
Article 38. Tribunal Staff  
Article 39. Solemn Undertaking  
Article 40. Removal from Office  
Article 41. Disciplinary Measures  
Article 42. Privileges and Immunities  
Article 43. Official and Working Languages  
Article 44. Rules of Procedure and Evidence

#### **SECTION 4: GENERAL PRINCIPLES OF CRIMINAL LAW**

Article 45. No Crime without Law  
Article 46: No Penalties without Law  
Article 47. Non-retroactivity by reason of Official Position  
Article 48 Criminal Responsibility  
Article 49. Irrelevance of Official Capacity  
Article 50. Responsibility of Commanders and Superiors  
Article 51. Non-applicability of Charter of Limitations  
Article 52. Mental Element  
Article 53. Mitigation of Criminal Responsibility  
Article 54. Superior Orders and Prescription of Domestic Law  
Article 55. Rules of the Court

#### **SECTION 5. LEGAL CODE, INVESTIGATION AND PROSECUTION**

Article 56. Investigative Duties and Powers of the Principal  
Article 57. Rights during an Investigation

#### **SECTION 6. TRIAL**

Article 58. Place of Trial  
Article 59. Trial in the Presence of the Accused  
Article 60. Functions and Powers of the Trial Division  
  
Article 61. Admissions of Guilt  
Article 62. Presumption of Innocence

- Article 63. Rights of the Accused
- Article 64. Protection of Victims and Witnesses
- Article 65. Evidence
- Article 66. Offenses against the Administration of Justice
- Article 67. Sanctions for Misconduct before the Court
- Article 68. Requirements for a Decision
- Article 69. Reparations
- Article 70. Sentencing
- Article 71. Protection of State or Nation Security

## **SECTION 7. PENALTIES**

- Article 72. Applicable Penalties
- Article 73. Sentencing
- Article 75. Non-prejudice to the application of penalties under State-based and Nation-based laws

## **SECTION 8. APPEAL AND REVISION**

- Article 76. Appeal against Acquittal or Conviction or Sentence
- Article 77. Appeals against other Decisions
- Article 78. Proceedings on Appeal
- Article 79. Revision of Conviction or Sentence
- Article 80. Unlawful Detention

## **SECTION 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE**

- Article 81. Commitment to Cooperation of Parties
- Article 82. Requests for Cooperation
- Article 83. Procedures under Domestic Law
- Article 84. Surrender of Defendants
- Article 85. Competing Requests
- Article 86. Requests for Arrest and Surrender
- Article 87. Provisional Arrest
- Article 88. Other Forms of Cooperation

## **SECTION 10. ENFORCEMENT**

- Article 89. Role of the State or Nation in the enforcement of sentences of imprisonment
- Article 90. Transfer after Sentencing
- Article 91. Enforcement and Supervision
- Article 92. Enforcement of fines and forfeiture measures

Article 93. Review by the Court concerning reduction of sentence.

Article 94. Escape

Article 95. Special assistance and collaboration agreements

## **SECTION 11. INTERNATIONAL COMMISSION OF PARTIES**

## **SECTION 12. FINANCIAL SUPPORT**

Article 96. Financial Regulations

Article 97. Payment of Expenses

Article 98. Funding

Article 99. Voluntary Contributions

Article 100. Assessment of Contributions

Article 101. Audits

## **SECTION 13. CLOSING CLAUSES**

Article 102. Settlement of Disputes

Article 103. Reservations

Article 104. Amendments

Article 105. Amendments to provisions of an institutional nature

Article 106. Review of the Charter

Article 107. Transitional Provision

Article 108. Signature, ratification, acceptance, approval, or accession

Article 109. Entry into Force

Article 110. Withdrawal

Article 111. Official Texts

Authorized Ratification

ANNEX A: Treaty of Sèvres, (August 10, 1920) per Armenia

ANNEX B: Establishment of the Provisional Government of Ezidikhan

ANNEX C: Trial By Jury

ANNEX D: International Covenant on the Rights of Indigenous Nations

ANNEX E: ALDMEM for Negotiated Consent and Restorative Justice

**PREAMBLE****The Nation and State Parties to this Charter,**

Understanding that all peoples share a common inheritance from Mother Earth,

Recognizing that for centuries the Nations of the world have suffered horrific acts in which millions of children, women, and men and whole peoples have been victims of horrific atrocities of invasions, religious oppression, colonization, trauma, ethnic cleaning, economic destruction, forced removal of children, sexual violence against women, starvation and food insecurity, occupations and forced settlements, forced denial of sexual orientation, forced assimilation, uprooting, mass murders, forced demographic change, expulsions, exploitation, apartheid, slavery, torture, and physical, ecological, and cultural genocide, denial of sovereignty, denial of self-determination of nations,

Accepting that the international agreements and treaties between States' governments and other legal instruments adopted to protect against and punish crimes carried out against peoples have failed to provide the Nations of the world with due process, redress, or remedy for criminal acts either by denying Nations' access to justice, denial of due process by granting immunity to officials and citizens of States or by politicizing judicial systems,

Guaranteeing that the international legal order recognizes that the Nations of the world and customary laws are fully entitled to the full recognition and dignity, political equality with States, basic rights, freedom from inhuman and degrading treatment,

Thoughtful that such grave crimes undermine sustainability and survival and peaceful relations, security, and health between nations and states,

Concerned that since \_\_\_\_\_; and since \_\_\_\_\_; and since 1945 more than 160 alleged crimes of genocide as understood under international state-based law have been committed against Nations in North America, Central America, South America, Asia, Melanesia, Oceania, Africa and Europe —acts committed by States, organizations, militias, or Nations remain unheard by judges or resolved by an objective judicial forum-- Justice was not achieved for the victims, and impunity for the perpetrators of these crimes was entrenched,

Ensuring comity between Nations and States and the rights of Nations to self-determination and self-government and controlling their natural resources not only to protect their people from abhorrent crimes and atrocities but also to prevent criminal offenses and punish those who commit criminal offenses against Nations in accordance with the punishments set out in the Universal Declaration of Mother Earth and in this Charter,

Granting that every Nation or State may exercise international jurisdiction to try to repair through restorative justice any harms resulting from the commission of a crime under this Charter wherever located, (As set forth in ANNEX E)

Affirming that it is the duty of all Nations and States to exercise lawful jurisdiction over States or Nations, persons, business organizations, government and non-government organizations,

intergovernmental organizations, armed groups, and other entities responsible for internationally recognized crimes,

Confirming each Nation and State's commitment to uphold the purpose and principles of this Charter and the International Covenant on the Rights of Indigenous Nations (as set forth in ANNEX D of the Charter),

Resolute in the commitment to achieve these ends for all people, we do establish the Nations' International Criminal Tribunal with jurisdiction over all crimes of concern to all peoples,

Affirming that the Nations' International Criminal Tribunal established by this Charter shall be complementary to Nation and State criminal jurisdiction in accord with their sovereign and territorial integrity and consistent with the sovereignty of the \_\_\_\_\_ and the sovereignty of the \_\_\_\_\_ as set forth in \_\_\_\_\_ of this Charter),

Resolved to guarantee lasting respect for and the enforcement of international accountability and justice.

## **SECTION 1. ESTABLISHMENT OF THE TRIBUNAL**

### **Article 1 – Purpose**

The purpose of this Charter is to establish the Nations' International Criminal Tribunal.

### **Article 2 – Definitions**

“Aggression” the action of a state or nation in violating by force the rights of another state

or nation, particularly its territorial rights, an unprovoked offensive, attack, or invasion.

“Apartheid” means inhuman acts including racial classification and segregation committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

“Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

“Colonization” includes invasion, settlement, apartheid, military, or administrative occupation, taking of lands and territories and resources, or national policies of assimilation by a dominant power, and includes the imposition of propaganda or others forms of public pronouncements designating a population in terms of separating ‘us’—the colonizer—and ‘them’ – the colonized as a threat, as primitive or backward; applying names and other symbols to classify the colonized such as ‘savages’, or ‘backward’ or to mark members of a group to stigmatize and humiliate; impose laws, customs and political power to deny human rights of a group; acts or public and private pronouncements dehumanizing members of a group by denying their humanity as ‘the other’ or similar expressions.

“Culturecide” or cultural genocide are willful acts and measures undertaken to destroy a nation's or ethnic group's culture

through spiritual, national, social, and cultural destruction including destruction of cultural artifacts such as books, artworks, and structures, forced reeducation of members of a group, forced male and or female sterilization, institution of laws to remove children from a target group and place in foreign homes.

“Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

“Disappearance” means the arrest, detention, or abduction of persons by, or with the authorization, support, or acquiescence of, a State or a political organization or private group, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

“Ecocide” is the willful destruction of the balance of ecological relationships and environment including destruction of foods and medicines on which a people depends.

“Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

“Extermination” includes the intentional infliction of diverse obstacles to survival,

*inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.

“Forced pregnancy” means the unlawful forcing, the rape of women and girls for the purpose of forcing a woman to become pregnant and bear a child, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

“Gendercide” is the killing of specific groups of people identified by their gender—usually girls and women—by way of feticide (sex-selective abortion), infanticide and gender-based violence.

“Indigenous” self-identifying peoples described as the historically original inhabitants of a territory or sea area, exercising treaty-making powers, described as possessing inherent rights as well as rights granted by states and international intergovernmental bodies.

“Maiming” means harsh deforming, removal of limbs, or any kind of permanent bodily damage.

“Nation” is defined by a common culture, common language, institution, spiritual beliefs and/or history, exercising treaty-making powers, exercising sovereignty or limited sovereignty, or under colonial occupation where sovereignty is denied by the occupying power, claiming and/or using an ancestral territory or sea, and possessing inherent rights, or peoples not connected to a specific territory because of traditional nomadic culture and traditions.

“Nation-based law” is the customary and statutory law authorized and approved by the governing body of individual nations. Similarly,

nation-based international law is the customary or authorized law established in agreements, covenants, treaties and compacts between nations and between nations and states.

“Nation-State” is a sovereign state ruled by a nation or confederation of nations sharing common or similar histories, languages, ethnicities, and culture with sovereignty and territory and ancestral territories.

“Peoples” are internationally recognized polities or societies making up a distinct group with a common culture, common language, shared institutions, common history and occupying lands or sea areas and possessing inherent rights.

“Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.

“Slavery” See “Enslavement” above.

“State” is an internationally recognized state that:

- claims authority over a defined territory with internationally recognized boundaries,
- has a population and instituted laws governing foreign and domestic trade,
- has the ability to issue legal tender recognized across boundaries,
- has an internationally recognized government that delivers public services and exercises police powers,

- asserts the authority to make treaties, wage war and take legal, political, and economic actions on behalf of its population and
- asserts sovereignty over its claimed territory.

“State-based law” is the customary and statutory law authorized and approved by the governing body of individual states. State-based international law is the customary or authorized law established in agreements, covenants, treaties, and compacts between states and between nations and states.

“Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.

For the purpose of this Charter, it is understood that the term “gender” refers to a person’s sexual identity.

### **Article 3 – Principles**

1. In accord with universal jurisdiction, a Nation or State exercises jurisdiction within its *asserted* territory. Such jurisdiction includes the power to make law, interpret or apply law, and to take action to enforce the law.
2. While enforcement jurisdiction is generally limited to national territory, international law recognizes that in certain circumstances a Nation or State may legislate for, or adjudicate on, events occurring outside its territory.
3. The non-applicability of statutory limitations applies to crimes against humanity, war crimes and crimes against nature and human culture.

4. No one may be convicted or punished for an act or omission that did not constitute a criminal offense, under nation-based or state-based domestic or international law, at the time it was committed. It further provides that no heavier penalty may be imposed than applicable at the time the criminal offense was committed.

5. No person should be tried or punished more than once for the same offense.

6. Individuals, organization, political polities may be held criminally responsible not only for committing war crimes, crimes against humanity and genocide, but also for attempting, assisting in, facilitating, or aiding and abetting the commission of such crimes. Individuals, organizations, or political polities may also be held criminally responsible for planning, instigating, or ordering the commission of such crimes.

7. Violations of nation-based and state-based international criminal law can also result from a failure to act. Armed forces or groups are generally placed under a command that is responsible for the conduct of its subordinates. As a result, to make the system effective, hierarchical superiors may be held to account when they fail to take proper measures to prevent their subordinates from committing serious violations of international humanitarian law.

8. This Charter specifically excludes the availability of functional immunities in cases of international crimes (Article 7(2) International

Criminal Tribunal for the former Yugoslavia Charter; Article 6(2) ICTR Charter; Article 27(1) International Criminal Court Charter) and requires Chartering Nations and States to remove immunities regarding the perpetration of international crimes by enacting appropriate legislation in their national law, and requests non-chartering Nations and States to waive immunities.

9. The nationality or active personality principle (acts committed by persons having the nationality of the Tribunal host Nation or State);

10. The passive personality principle (acts committed against nationals of the host Nation or State); or the protective principle (acts affecting the security of the State).

#### **Article 4. The Tribunal**

The Nations' International Criminal Tribunal is hereby established as an institution that shall have the power to exercise its jurisdiction over persons, organizations, and governments for the gravest offenses of concern to all peoples, as referred to in this Charter, and its jurisdiction shall be complementary to criminal jurisdictions of Nations and States. The functions and jurisdiction of the Tribunal shall be governed by the provisions of this Charter.

#### **Article 5. Jurisdictional Relationships**

The Tribunal shall be brought into relationship with other nation-based or state-based international bodies as appropriate through agreements approved by the International

Commission of Parties formalized in this Charter and finally concluded by the Judicial President of the Tribunal on its behalf.

### **Article 6. Seat of the Tribunal**

1. The seat of the Tribunal shall be established in the city of \_\_\_\_\_, within the borders of \_\_\_\_\_, unless otherwise determined.

2. A change of the seat's location may be determined:

(a) before the entry into force of the NICT Charter, by a simple majority of the existing ratifying parties, on the basis of valid legal, political, organizational and/or technical reasons, with the purpose of effectively facilitating the establishment, administration and functioning of the Court;

(b) after the establishment of the International Commission of Parties, each of the parties may address the matter to the Principal Justice of the Court, specifying the reasons for such a request. The Principal Justice shall decide the matter within two weeks from the date on which the request is received.

3. Pursuant to paragraph 2(b) of this Article:

(a) if the request is accepted, this decision shall be notified, within one week, to the International Commission of Parties, which shall choose the new seat by a simple majority within one month from the date of receipt of such a notification;

(b) if the request is rejected, this decision shall likewise be notified within one week

to the International Commission of Parties; nevertheless, if the concrete circumstances put in serious difficulty the fair and effective conduct of any legal proceeding in that location, the International Commission of Parties, by a simple majority, shall indicate the new seat within one month from the date of receipt of the rejection decision's notification.

### **Article 7. Legal Status and Powers of the Tribunal**

The Court shall have international legal personality exercising its functions and powers as provided in this Charter on the territory of any State or Nation Party by formalized agreement on the territory of any other State or Nation. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

## **SECTION 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW**

### **Article 8. Crimes within the Jurisdiction of the Tribunal**

1. The Tribunal shall recognize ten stages of genocide that are committed intentionally within its jurisdiction as follows:

(a) Social, economic, cultural, or political classification of a group distinguishing the dominating group from the dominated group as "us and them",

(b) Symbolization using names, or symbols to classify a group or a people,

(c) Discrimination where a dominant group uses state or community law, custom or

political power to deny the rights of a group or a people,

(d) Dehumanization employed to deny the humanity of the group or people as “the other”,

(e) Organization of mobs, militias, or other agents by the state, organization, or community to provide deniability of harms to a group or people,

(f) Polarization used as a distinct social method intended to separate people supported by hate groups and broadcast propaganda,

(g) Preparation of social, economic, cultural, or political plans intended to facilitate group killings, sexual predation including rape and forced removal of a group or people,

(h) Persecution of individuals or groups as victims identified and separated because of their ethnic, cultural, national, or religious identity,

(i) Extermination by means of mass killing of a group or people not considered to be fully human, and

(j) Denial as the final stage of genocide where perpetrators deny committing any crimes and blame victims, intentionally block investigations, and continue to dominate the group or people until forced from power.

2. The jurisdiction of the Tribunal shall be limited to the most serious crimes of concern to Indigenous communities, nations, peoples and states and the international community.

3. The Tribunal has jurisdiction in accord with this Charter with respect to the following crimes:

(a) The crime of colonization

(b) The crime of aggression

(c) The crime of genocide

(d) Crimes against humanity

(e) War crimes including intentional targeting of civilians and civil infrastructure

(f) Crimes against nature including ecocide and culturicide

(g) Crimes of terrorism

(h) Gender-based violence and femicide

(i) Violence against and forced removal of children

(j) Apartheid

(k) Military occupation

### **Article 9. Crime of Aggression**

The planning, preparation, initiation or execution, by a person or perpetrating agents in a position effectively to exercise control over or to direct the political or military action of a Nation or State, or the use of armed force or invasion, military occupation, and annexation by the use of force, blockade by the ports or coasts by a Nation or State against the sovereignty, territorial integrity or political independence of a Nation or State shall constitute the act of aggression which, by its character, gravity and scale, constitutes a manifest violation of international law under this Charter.

## Article 10. Genocide

For the purpose of this Charter, “genocide” means the act of colonization or forced occupation of peoples leading to any of the following acts committed with intent to dominate, replace, destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- (a) Culturecide
- (b) Ecocide including destruction of foods and medicines on which a people depends.
- (c) Gendercide
- (d) Slavery
- (e) Killing members of the group;
- (f) Crimes against humanity
- (g) Causing serious bodily or mental harm to members of the group;
- (h) Deliberately inflicting on the group conditions of life including destruction of traditional foods and medicines calculated to bring about its physical destruction in whole or in part;
- (i) Imposing measures intended to prevent births within the group;
- (j) Forcibly transferring children of the group to another group or people.
- (k) Refusing to properly recognize, in whole or in part, inherent self-determination powers, and so leading to a genocide by omission or denial.

## Article 11. Crimes against Humanity

1. For the purpose of this Charter, “crime against humanity” means genocide and any of the following acts when committed as part of a widespread or systematic attack or series of atrocities directed against any civilian population, with knowledge of the attack:

- (a) Murder
- (b) Maiming
- (c) Extermination
- (d) Enslavement
- (e) Deportation or forcible transfer of population
- (f) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
- (g) Torture, infliction of intense pain as in burning, crushing, or wounding to punish, coerce, or afford sadistic pleasure.
- (h) Rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, human trafficking, or any other form of sexual violence of comparable gravity.
- (i) Forcibly transferring children of the group to another group
- (j) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Article 2, or other grounds that are universally recognized as impermissible under international law, in connection with any act

referred to in this Paragraph or any crime within the jurisdiction of the Tribunal.

(k) Forced disappearance of persons

(l) Apartheid, the exercise of a policy of ethnic or racial superiority

(m) Colonization

(n) Other inhumane acts of a similar nature, including dehumanization, deprivation, destruction of group or individual dignity and causing spiritual, mental, and physical trauma or anguish, such as harsh deforming, removal of limbs or bodily disfigurement.

## Article 12. War Crimes

1. The Tribunal shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes, other serious violations of the laws and customs applicable in international armed conflict.

2. For the purpose of this Charter, “war crimes” means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

### Armed Conflict

1.a.i. Willful killing;

1.a.ii. Torture or inhuman treatment, including biological experiments;

1.a.iii. Willfully causing great suffering, or serious injury to body or health;

1.a.iv. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

1.a.v. Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;

1.a.vi. Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

1.a.vii. Unlawful deportation or transfer or unlawful confinement; or

1.a.viii. Taking of hostages.

2. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(c) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given

to civilians or civilian objects under the international law of armed conflict;

(d) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(e) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended, and which are not military objectives;

(f) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

(g) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(h) The transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(i) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the

sick and wounded are collected, provided they are not military objectives;

(j) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in individual's interest, and which cause death to or seriously endanger the health of such person or persons;

(k) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(l) Declaring that no quarter will be given;

(m) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(n) Declaring abolished, suspended or inadmissible in a Tribunal of law the rights and actions of the nationals of the hostile party;

(o) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerents' service before the commencement of the war;

(p) Pillaging a town or place, even when taken by assault;

(q) Employing poison or poisoned weapons;

(r) Employing asphyxiating, poisonous or other gasses, and all analogous liquids, materials or devices;

(s) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(t) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Charter, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123;

(u) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(v) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, Paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(w) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(x) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(y) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;

(z) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

B. In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed out of action or disabled by sickness, wounds, detention, or any other cause:

1.a.i. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

1.a.ii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

1.a.iii. Taking of hostages;

1.a.iv. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted Tribunal, affording all judicial guarantees which are generally recognized as indispensable.

C. Paragraph 2 (c) applies to armed conflicts not of an international character and thus does

not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

D. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- 1.a.i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- 1.a.ii. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- 1.a.iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- 1.a.iv. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- 1.a.v. Pillaging a town or place, even when taken by assault;

1.a.vi. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, Paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

1.a.vii. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

1.a.viii. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

1.a.ix. Killing or wounding treacherously a combatant adversary;

1.a.x. Declaring that no quarter will be given;

1.a.xi. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in the person's interest, and which cause death to or seriously endanger the health of such person or persons;

1.a.xii. Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

E. Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in Paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

### **Article 13. Elements of Crimes**

1. Elements of Crimes shall assist the Tribunal in the interpretation and application of Articles 8, 9, 10, 11, and 12. They shall be adopted by three-fifths majority of the members of the International Commission of Parties.

2. Amendments to the Elements of Crimes may be proposed by:

- (a) Any Nation or State party
- (b) The judges acting by an absolute majority
- (c) The Principal

Such amendments shall be adopted by a two-thirds majority of the members of the International Commission of Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Charter.

### **Article 14. Limitations on Rules of International Law**

Nothing in this Section shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Charter.

### **Article 15. Jurisdictional (ratione temporis) Obligations over Time**

In the absence of expressed provisions in treaties between nations and between nations and states the Tribunal will decide the issue by reference to customary state-based or nation-based international law.

### **Article 16. Preconditions to the Exercise of Jurisdiction**

1. A State or Nation which becomes a Party to this Charter thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 7.

2. In the case of Article 17, Paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States or Nations are Parties to this Charter or have accepted the jurisdiction of the Court in accordance with Paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State or Nation which is not a Party to this Charter is required under Paragraph 2, that State or Nation may, by declaration lodged with the Registry, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State or Nation shall cooperate with the Court without any delay or exception in accordance with Section 9.

### **Article 17. Exercise of Jurisdiction**

The Tribunal may exercise its jurisdiction with respect to a crime referred to in Article 7 in accordance with the provisions of this Charter if:

1. A situation in which one or more of such crimes appears to have been committed is referred to the Principal by a State and or Nation Party in accord with Article 18;

2. A situation in which one or more of such crimes appears to have been committed is referred to the Principal by the Tribunal Commission; or

3. The Principal has initiated an investigation in respect of such a crime in accordance with Article 15.

### **Article 18. Referral of a situation by a Nation or State Party**

1. A State or Nation party may refer to the Principal a situation in which one or more crimes within the jurisdiction of the Tribunal appear to have been committed, requesting the Principal to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral request specifies the relevant circumstances and shall be accompanied by supporting documents upon referral.

### **Article 19. Principal**

1. The Principal may initiate investigations upon personal initiative on the basis of information of crimes within the jurisdiction of the Tribunal where admissibility shall be determined by the Prosecution Review Commission which shall also have the power to monitor and approve the actions of the Principal.

### **Article 20. Deferral of Investigation or Prosecution**

The Principal may defer investigation or prosecution upon due consultation with the Prosecution Review Commission.

### **Article 21. Issues of Admissibility**

1. Having regard to Paragraph 10 of the Preamble and Article 1, the Tribunal shall determine that a case is inadmissible:

(a) The case is being investigated or prosecuted by a State or Nation which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State or Nation which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. To determine unwillingness in a particular case, the Tribunal shall consider, having regard to the principles of due process recognized by Nation and State international laws, whether one or more of the following exist, as applicable:

(a) The acts were or are being undertaken or the State or Nation decision was made for the purpose of shielding the defendant concerned from criminal responsibility for crimes within the jurisdiction of the Tribunal referred to in Article 7;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person (defendant) concerned to justice;

(c) The conduct of the party in the circumstances is inconsistent with an intent to bring the person concerned to justice.

### **Article 22. Preliminary Rulings regarding Admissibility**

Upon motion by any party or the court, the Tribunal shall make preliminary rulings on its personal and subject matter jurisdiction.

### **Article 23. Double Jeopardy**

No legal action may be undertaken twice for the same offense.

### **Article 24. Challenges to the Jurisdiction or Admissibility of Evidence**

The defendant in a proceeding may challenge the jurisdiction of the Tribunal or admissibility of evidence subject to the determination of the presiding Judge.

### **Article 25. Applicable Law**

1. The Tribunal shall apply:

(a) In the first place, this Charter, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of nation or state international law, including the established principles of nation and state international law for armed conflicts;

(c) Failing that, general principles of law derived by the Tribunal from nation or state legal systems of the world including, as appropriate, the domestic laws of Nations, customary laws, or laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Charter and with nation or state international law and internationally recognized norms and standards.

2. The Tribunal may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this Article must be consistent with evolving nation or state internationally recognized human rights and must stand without any adverse

distinction founded on grounds such as gender as defined in Article 2, Article 7 (2)h, age, race, color, language, religion, or belief, political or other opinion, national, ethnic, or social origin, wealth, birth, or other status.

### **SECTION 3. COMPOSITION AND ADMINISTRATION OF THE TRIBUNAL**

#### **Article 26. Organs of the Tribunal**

The Tribunal shall be composed of the following organs:

- (a) International Commission of Parties
- (b) Prosecution Review Commission
- (c) The Judicial Principal
- (d) Local jury system in plaintiff nation or state jurisdiction (as set forth in Annex C to the Charter)
- (e) An Appeals Division, a Trial Division, and a Pre-Trial Division
- (f) The Office of the Principal
- (g) The Registry

#### **Article 27. International Commission of Parties**

1. The International Commission of Parties is a formal body of the Tribunal composed of representatives designated by State and Nation ratifying governments that serves as the authorizing body appointing Chamber Justices, Principals and the Registrar and the authorizing body for the Tribunal Budget.

2. Membership in the International Commission of Parties shall rotate 1/3 members

every three years to permit newly ratifying parties to be seated at a rate of ten new members every three years.

3. Decisions of the International Commission of Parties shall be determined by consensus and where consensus is not achieved by a vote of 50% plus 1 member or more favoring an outcome.

#### **Article 28. Prosecution Review Commission**

The Prosecution Review Commission is a lay advisory body that reviews a Principal's exercise of discretion in decisions not to prosecute.

1. Commissions may begin the investigation process by either of two methods.

(a) First, a person "who has been injured by a crime," or who is authorized as a proxy may apply for a commission hearing.

1.a.i. The commission must investigate these requests.

(b) Second, a commission may, upon a majority vote, carry out an investigation on its own initiative.

2. A commission investigates the claim, summoning witnesses for examination, questioning the Principal, and asking for expert advice.

3. The commission may then submit one of two recommendations: non-indictment is proper, or indictment is proper.

4. For the final decision, a majority vote is necessary.

5. The commission delivers a written recommendation to the Principal.

## Article 29. Justices

### Qualifications, Nomination, and Election of Judges

- (a) Judicial Vacancies
- (b) The Judicial Presidency
- (c) Chambers
- (d) Independence of Judges
- (e) Excusing and Disqualification of Judges

## Article 30. Service, qualifications, nomination, and selection of judges

1. Subject to the provisions of paragraph 2, there shall be 15 judges of the Court.

- (a) The Principal, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States and Nations Parties members of the International Commission of Parties.
- (b) Any such proposal shall then be considered at a meeting of the Assembly of International Commission of Parties to be convened in accordance with Section 11, paragraphs 2 and 3. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the International Commission of Parties and shall enter into force at such time as decided by the International Commission of Parties.

- (i) Once a proposal for an increase in the number of judges has been adopted

under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of the International Commission of Parties in accord with paragraphs 3 to 8, and Article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

2. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States or Nations for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

- (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

(a) Nominations of candidates for election to the Court may be made by any State or Nation Party to this Charter, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State or Nation in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Charter of that Court. Nominations shall be accompanied by statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State or Nation Party may put forward one candidate for any given election who need not necessarily be a national of that State or Nation Party but shall in any case be a national of a State or Nation Party.

(c) The International Commission of Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the International Commission of Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii). A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the International Commission of Parties convened for that purpose. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the State and Nation Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No more than two judges may be nationals of the same State or Nation. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State or Nation shall be deemed to be a national of the State or Nation in which that person ordinarily exercises civil and political rights.

8. (a) The State and Nation Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- (i) The representation of the principal legal systems of the world;
- (ii) Equitable geographical representation; and
- (iii) A fair representation of female and male judges.

(b) State and Nation Parties shall also consider the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 31, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

### **Article 31. Judicial Seat Vacancies**

1. In the event of a judicial vacancy, a selection shall be held in accordance with Article 30 to fill the vacancy.

2. A judge selected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for selection for a full term under Article 30.

### **Article 32. Principal Justice**

1. The Principal and the First and Second Vice-Principals shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-Principal shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the Principal and the First Vice-President are unavailable or disqualified.

3. The Principal, together with the First and Second Vice-Principals, shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Principal; and

(b) The other functions conferred upon it in accordance with this Charter.

### **Article 33. Chambers**

1. Within a reasonable time after the official selection of judges, the Court shall organize

itself into the divisions set out in Article 26. The Appeals Division shall be organized to include the Principal and two other judges, the Trial Division shall include six judges and the Pre-Trial Division shall include no less than six judges. Judges shall be assigned to the divisions on the basis of their qualifications and experience to achieve a balance expertise in state-based and nation-based criminal law and procedures, and international law.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Charter and the Rules of Procedure and Evidence;

(b) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(a) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

#### **Article 34. Judicial Independence**

The Judges shall perform their functions independent of other justices.

#### **Article 35. Excusing or disqualification of judges**

1. The Principal Justice shall, at the request of a judge, excuse that judge from the exercise of a function under this Charter in accord with the Rules and Procedure of Evidence.

2. Judges shall not engage in any activity which may potentially interfere with their judicial functions or to negatively affect confidence in their independence.

3. Judge may not engage in any other occupation of a professional nature while serving under this Charter.

4. The Principal with an absolute majority of the judges shall decide the application of

paragraphs 2 and 3 where matters concerning an individual judge, and the judge concerned shall not participate in the decision.

5. a. No judge shall participate in any case where the judge may reasonably be held in doubt on any ground.

(b) A person being investigated or prosecuted by the Principal may request the disqualification of a judge under this clause.

(c) An absolute majority of the judges shall decide where a judge is disqualified pursuant to clause 5. b. The judge under challenge may not take part in the decision of disqualification but may respond.

### **Article 36. Office of the Principal**

1. The Office of the Principal shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Principal. The Principal shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Principal shall be assisted by one or more Deputy Principals, who shall be entitled to carry out any of the acts required of the Principal under this Charter. The Principal and the Deputy Principals shall be of different nationalities. They shall serve on a full-time basis.

3. The Principal and the Deputy Principals shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Principal shall be elected by secret ballot by an absolute majority of the members of the Assembly of International Commission of Parties. The Deputy Principals shall be elected in the same way from a list of candidates provided by the Principal. The Principal shall nominate three candidates for each position of Deputy Principal to be filled. Unless a shorter term is decided upon at the time of their election, the Principal and the Deputy Principals shall hold office for a term of nine years and shall not be eligible for reelection.

5. Neither the Principal nor a Deputy Principal shall engage in any activity which is likely to interfere with the Principal functions or to affect confidence in their independence. They shall not engage in any other occupation of a professional nature.

6. The Principal may excuse the Principal or a Deputy Principal, at their request, from acting in a particular case.

7. Neither the Principal nor a Deputy Principal shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal

case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Principal or a Deputy Principal shall be decided by the Appeals Chamber.

(a) The person, state, business organization, private militia being investigated or prosecuted may at any time request the disqualification of the Principal or a Deputy Principal on the grounds set out in this article;

(b) The Principal or the Deputy Principal, as appropriate, shall be entitled to present their comments on the matter.

9. The Principal shall appoint advisers with state-based or nation-based legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

### **Article 37. Registry**

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Principal in accordance with article 36.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise operational functions under the authority of the Principal of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, considering any recommendation by the International Commission of Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years, or such shorter term as may be decided upon by an absolute majority of the judges and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Principal, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

7. The Registrar shall designate a Head of Security who shall be responsible for establishing a security team with authority to protect Tribunal facilities, Judges and Chambers, Principal Office and the Registry and investigative capabilities to survey and analyze terror, or other violent threats to the tribunal

### **Article 38. Tribunal Staff**

1. The Principal and the Registrar shall appoint such qualified staff as may be required

to their respective offices. In the case of the Principal, this shall include the appointment of investigators.

2. In the employment of staff, the Principal and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 30, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Principal, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated, and dismissed. The Staff Regulations shall be approved by the International Commission of Parties.

4. The Court may, in exceptional circumstances, employ the expertise without cost personnel offered by State or Nation Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Principal may accept any such offer on behalf of the Office of the Principal. Such no cost personnel shall be employed in accordance with guidelines to be established by the International Commission of Parties.

### **Article 39. Solemn Undertaking**

Before taking up their respective duties under this Charter, the Judges, the Principal, the Deputy Principals, the Registrar, and the Deputy Registrar shall each make a solemn undertaking in open Tribunal to exercise each of their respective functions impartially and conscientiously.

### **Article 40. Removal from Office**

1. A judge, the Principal, a Deputy Principal, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with Paragraph 2, in cases where that person:

- (a) Is found to have committed serious misconduct or a serious breach of each person's duties under this Charter, as provided for in the Rules of Procedure and Evidence; or
- (b) Is unable to exercise the functions required by this Charter.

2. A decision as to the removal from office of a judge, the Principal or a Deputy Principal under Paragraph 1 shall be made by the International Commission of Parties, by secret ballot:

3. In the case of a judge, by a two-thirds majority of the International Commission of Parties upon a recommendation adopted by a two-thirds majority of the other judges;

4. In the case of the Principal, by an absolute majority of the State and Nation Parties;

5. In the case of a Deputy Principal, by an absolute majority of the International Commission of Parties upon the recommendation of the Principal.

6. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

7. A judge, Principal, Deputy Principal, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Charter is challenged under

this Article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

#### **Article 41. Disciplinary Measures**

A judge, Principal, Deputy Principal, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in Article 46, Paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

#### **Article 42. Privileges and Immunities**

1. The Court shall enjoy in the territory of each State or Nation Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accord with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses, or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accord with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

#### **Article 43. Official and Working Languages**

The official and working languages of the Assembly shall be English, Spanish, French, Arabic, and the national language, in the original or translated form, of the languages of the members of the Assembly and, if applicable, the languages of non-member States, nations, or peoples regarding any matter involving said non-member presented by State and Nations.

#### **Article 44. Rules of Procedure and Evidence**

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Principal, the Deputy Principals and the Registrar shall, when engaged

on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Principal and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Principal may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Principals and staff of the Office of the Principal may be waived by the Principal;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

## **SECTION 4: GENERAL PRINCIPLES OF CRIMINAL LAW**

### **Article 45. No Crime without Law**

1. No person shall be held criminally responsible under this Charter unless the conduct in question constitutes a crime under the provisions of the Charter, and such crime falls within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition of the crime shall be interpreted in a manner consistent with customary law of the nation and in accordance with internationally recognized human rights.

3. This Article shall not prejudice the characterization of any conduct as criminal under international law independently of this Charter. The Court shall interpret and apply the provisions of this Charter in a manner consistent with the principles and rules of international law, including the agreed international law between nations.

### **Article 46: No Penalties without Law**

1. The principle of 'no penalty without law' shall apply to all criminal proceedings under this Charter. A person convicted by the Court may be punished only in accordance with the provisions of this Charter and any penalties prescribed by the Court shall be proportionate to the gravity of the crime as recognized by each involved nation.

2. Any entity or natural person who commits a crime within the jurisdiction of the Court, as defined in this Charter, shall be individually responsible and liable for punishment in accordance with the provisions of this Charter.

3. In accordance with this Charter, an entity or natural person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that entity or natural person directly or through another person or entity:

- (a) Committed such a crime, whether acting alone, jointly with others or through another person or entity, regardless of whether that other person is criminally responsible;
- (b) Ordered, solicited, or induced the commission of such a crime, which in fact occurs or is attempted;
- (c) Aided, abetted, or otherwise assisted in the commission or attempted commission of such a crime, including providing the means for its commission;
- (d) Otherwise contributed intentionally to the commission or attempted commission of such a crime by a group or persons or entities acting with a common purpose;
- (e) In respect of the crime of genocide, directly and publicly incited others to commit genocide;
- (f) Attempted to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent

of the person's or entity's intentions. However, an individual or entity who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Charter for the attempt to commit that crime if the individual or entity completely and voluntarily gave up the criminal purpose.

4. In accordance with this Charter, the provisions of this Article shall apply to any entity or natural person who is in a position effectively to exercise control over or to direct the political or military action of a State or a Nation with respect to the crime of aggression.

5. No provision in this Charter relating to individual criminal responsibility shall prejudice or affect the responsibility of States or Nations under international law.

#### **Article 47. Non-retroactivity by reason of Official Position**

The principle of non-retroactivity *ratione personae* shall apply to all criminal proceedings under this charter. No person or entity shall be held criminally responsible for conduct that was not considered criminal at the time it was committed.

#### **Article 48 Criminal Responsibility**

##### 1. Adult criminal responsibility

(a) The fact that a person or entity acted pursuant to order of the State or Nation or of a superior does not relieve the person or entity from responsibility under the Charter.

##### 2. Minors

(a) The Court shall consider the special circumstances of any person under the age of 18 in determining the culpability and responsibility of that person for the crime.

#### **Article 49. Irrelevance of Official Capacity**

1. Official capacity of a person, such as a Head of State or Government, member of a Government or parliament, an elected representative, or a government official, shall not provide immunity or exemption from criminal responsibility under this Charter. All persons are subject to the provisions of this Charter, without any distinction based on official capacity, and holding an official position shall not constitute a basis for reduction of sentence.

2. The official capacity of a person shall not serve as a bar to the Court's jurisdiction over such a person, despite any immunities or special procedural rules that may apply under national or international law.

#### **Article 50. Responsibility of Commanders and Superiors**

In accordance with this Charter, an armed force or a person effectively acting as a commander of an armed force shall be held criminally responsible for crimes within the jurisdiction of the Court committed by forces under the armed force or person's effective command and control, or effective authority and control, because of the failure to properly exercise control over such forces. This shall apply in addition to other grounds of criminal responsibility for such crimes within the jurisdiction of the Court.

#### **Article 51. Non-applicability of Charter of Limitations**

The crimes committed under this Charter shall not be subject to any charter of limitations.

#### **Article 52. Mental Element**

1. Unless otherwise provided, a person shall bear criminal responsibility and be subject to punishment for a crime within the jurisdiction of the Court only if the crimes are committed with material elements of specific intent and knowledge.

2. For the purposes of this Article, a person shall be considered to have intent if:

(a) The person intends to engage in the conduct in question;

(b) The person intends to cause the result in question or is aware that it may occur in the ordinary course of events.

(c) Negligence or gross negligence by a state or nation.

3. For the purposes of this Article, "knowledge" means being aware that a circumstance exists or that a consequence may occur in the ordinary course of events. The terms "know" and "knowingly" shall be interpreted accordingly.

#### **Article 53. Mitigation of Criminal Responsibility**

1. Pursuant to this Charter, the criminal responsibility of a person may be mitigated on the following grounds in addition to other such grounds:

(a) If at the time of the conduct, the person suffers from a mental disease or defect that results in the destruction of their ability to appreciate the unlawful or wrongful nature of their conduct or to control their conduct to comply with the law's requirements;

(b) If the person is in a state of intoxication that results in the destruction of their ability to appreciate the unlawful or wrongful nature of their conduct or to control their conduct to comply with the law's requirements, except in situations where the person voluntarily consumed alcohol or drugs and knowingly disregarded the risks of engaging in criminal conduct;

(c) If the person acted reasonably in self-defense, defense of others, defense of essential property or military mission, against an unlawful use of force, in a manner that is proportionate to the degree of danger faced, provided that the person's involvement in a defensive operation conducted by the military does not automatically absolve them of criminal responsibility;

(d) If the conduct constituting a crime within the Court's jurisdiction is caused by duress that results from an imminent threat of death or serious bodily harm against the person or another person, and the person acts necessarily and reasonably to avoid the threat, provided that they do not intend to cause a greater harm than the one they seek to avoid. Such a threat may arise from other persons or other uncontrollable circumstances.

(e) Mistake of fact or mistake of law: A mistake of fact shall only be considered as a

ground for mitigating criminal responsibility if it negates the mental element required by the crime. A mistake of law regarding whether a particular type of conduct constitutes a crime within the jurisdiction of the Court shall not be considered as a ground for mitigating criminal responsibility. However, a mistake of law may be considered as a ground for mitigating criminal responsibility if it negates the mental element required by such a crime, or as provided for in Article 36.

2. It is the responsibility of the Court to determine the applicability of the grounds for mitigating criminal responsibility provided for in this Charter to each case.

#### **Article 54. Superior Orders and Prescription of Domestic Law**

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a government or of a superior, whether military or civilian, or under domestic law, shall not relieve that person of criminal responsibility. It may be taken into consideration as a mitigating factor at the time of sentencing.

2. For the purposes of this Article, orders to commit genocide or crimes against humanity are manifestly unlawful.

#### **Article 55. Rules of the Court**

1. Subject to Article 28 (Prosecution Review Commission), an investigation shall be initiated by the Principal after the evaluation of all available information if a reasonable basis to proceed is found according to the rules

established in the present Charter. Nation-based customary rules can be used as supplementary if not in conflict with the norms and principles defined in the Charter.

2. The Principal shall decide to proceed if:

(a) Available information indicates a reasonable basis to believe that a crime within the Court's jurisdiction has been or is being committed;

(b) Conditions stated in Article 21 are respected;

(c) In consideration of the alleged crime and its victim(s), an investigation is deemed necessary in order to fulfill the objectives outlined in the Charter.

3. Whether the Principal determines that a reasonable basis to proceed does not exist, he or she shall inform the Pre-Trial Division.

If, upon investigation, the Principal concludes that there is not a sufficient basis for a prosecution because of:

(1) lacking and/or insufficient legal or factual elements;

(2) inadmissibility according to Article 21;

(3) a prosecution does not move in the direction of fulfilling the Charter's objectives, considering the crime, the victim(s) and the alleged perpetrator(s).

The Principal shall inform the Pre-Trial Division, the Tribunal Commission under Article 17 Paragraph (b), or the Party making a referral under Article 18 about the petitioner's conclusions and related reasons for not proceeding.

4. The Pre-Trial Division may review a decision of the Principal not to proceed and may request the petitioner to reassess the case upon request of the Tribunal Commission under Article 17 Paragraph (b) or the party making a referral under Article 18.

5. At its own discretion, the Pre-Trial Division may review a decision of the Principal not to proceed if it is based exclusively on Paragraph 2 (c) or 3 (c). Consequently, the effectiveness of the Principal's decision shall depend on the Pre-Trial Division's confirmation.

6. When presented with new facts or information, the Principal may reconsider the decision to proceed with an investigation or prosecution. A time limit for reconsideration may exist if expected depending on the nature of the case, particularly whether systems of restorative justice apply. (As set forth in ANNEX E).

## **SECTION 5. LEGAL CODE, INVESTIGATION AND PROSECUTION**

### **Article 56. Investigative Duties and Powers of the Principal**

1. The Principal shall investigate all relevant facts and evidence to assess if there is criminal responsibility under this Charter.

2. Investigations shall be initiated ex-officio or based on information received by petitioners.

3. The Principal shall have the power to question suspects, victims and witnesses, to collect evidence, and carry out field investigations in accordance with general principles of human rights law and customary laws of the peoples involved, with the assistance of State or local authorities.

4. While ensuring the effective investigation and prosecution of crimes, the Principal shall take into account both the personal interests and conditions of victims and witnesses, and the collective rights and interests of petitioners, fully respecting the rights of all persons according to this Charter.

5. The Principal may conduct investigations pursuant to the provisions of Section 9 or upon authorization of the Pre-Trial Division, collecting and examining evidence. The Principal may request the presence of and question persons under investigation, victims, and witnesses.

6. He or she may seek the cooperation of any State, Nation, community, group, or organization, entering into agreements or arrangements to facilitate the named cooperation, provided that those instruments are consistent with this Charter.

7. The Principal may agree not to disclose, at any stage of the proceedings, confidential information obtained for investigative purposes without the provider's consent, taking all necessary measures to ensure the confidentiality of information and the preservation of evidence.

#### **Article 57. Rights during an Investigation**

1. In relation to an investigation under this Charter:

(a) The Court shall determine the credibility of the witness and testimony consistent with international and customary law;

(b) A person shall be presumed innocent until proven guilty according to the provisions of the present Charter;

(c) A person shall have the free assistance of a competent interpreter if questioned in a language other than a language the person fully understands and speaks;

(d) A person shall not be subjected to arbitrary arrest or detention and shall not be deprived of freedom except in accordance with the procedures established in the Charter.

2. If there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Principal or by other authorities pursuant to Section 9, before questioning the accused shall be informed of the nature of the charges against the defendant whose rights include the right:

(a) to remain silent, without such silence influencing the determination of guilt or innocence;

(b) to defend in person or through legal assistance of the person's choosing;

(c) to free legal assistance if the accused cannot afford legal assistance;

(d) to have adequate time and facilities for the preparation of the defense;

(e) to be tried without undue delay;

(f) to be questioned in the presence of counsel unless the person has voluntarily waived the right to counsel;

(g) to be informed of the maximum penalties of the offense;

(h) to present witnesses, to confront and cross-examine witnesses;

(i) to be publicly tried by judge, jury or through mechanisms of alternative dispute resolution, by means of mediation, arbitration or negotiation depending on the charge, context, persons involved and customary laws in place as determined by the court (As set forth in ANNEX C concerning the Jury).

## **SECTION 6. TRIAL**

### **Article 58. Place of Trial**

1. The place of the trial shall be the seat of the Court, except as provided in paragraph 2 of this Article.

2. In order to effectively facilitate and guarantee the conduct of court proceedings, non-local nodes and ancillary offices shall be created based on collaboration agreements between specific Nations and/or States, taking into account all relevant circumstances, upon approval of a simple majority of the ratifying parties. Remote legal proceedings shall always include a central coordination system.

### **Article 59. Trial in the Presence of the Accused**

Whenever the accused is present at the trial, and in the event of disruptions from the accused's part with the purpose of preventing the correct performance of the proceeding, the Trial Division may remove the accused and make arrangements for the defendant's participation from outside the courtroom, if other alternatives have resulted not to be feasible. Such arrangements shall be made only for a strictly required duration and in conformity with international legal standards and customary laws of the nation or state involved if

such laws are not in conflict with the named legal standards.

### **Article 60. Functions and Powers of the Trial Division**

1. The Trial Division shall guarantee a fair and speedy trial, fully respecting the rights of the accused and ensuring the protection of victims and witnesses. Prior to or during the trial, the Trial Division may perform any functions of the Pre-Trial Division.

2. The Trial Division dealing with the case shall:

(a) consult with the parties and adopt all necessary means to guarantee a fair and speedy proceeding;

(b) determine the language(s) to be used;

(c) provide for information disclosure, if not previously disclosed, sufficiently in advance to facilitate adequate preparation for the trial.

3. The Trial Division may refer preliminary issues to the Pre-Trial Division and, if suitable, it may decide to combine the trials into a single trial or to separate the trials in consideration of the charges against more than one accused, providing due notice to the parties.

4. In performing its functions, the Trial Division shall;

(a) require the attendance and testimony of witnesses and production of documents and other evidence, and order the production of further evidence;

(b) ensure the protection of confidential information;

(c) provide for the protection of the accused, witnesses, and victims, taking into account the traditions, values and principles of the community, group or nation involved.

5. The trial shall be public, and the Court shall recognize the plaintiff's jury (as set forth in ANNEX C), unless otherwise decided depending on the case and in application of local customary laws, if not in conflict with the principles defined in human rights legal instruments and international customary law. In addition, the Trial Division may decide that certain proceedings be conducted in closed session for special reasons, including the protection of confidential or sensitive information.

6. At the beginning of the trial:

(a) The Trial Division shall read to the accused the charges as previously confirmed by the Pre-Trial Division, making sure that the accused understands the nature of the charges. It shall afford the defendant(s) the opportunity to admit the guilt or to plead not guilty.

(b) The presiding judge may give indications for the conduct of the proceeding, also to ensure its fairness and impartiality.

7. The Trial Division shall have the power to:

(a) rule on the admissibility of evidence;

(b) take all necessary measures to maintain order during the trial.

8. A complete record of the trial is made and maintained by the Registrar.

### **Article 61. Admissions of Guilt**

1. In cases where the accused makes an admission of guilt in accordance with Article 6,

Paragraph (a) of this Charter, the Trial Division shall conduct a review to determine the following:

(a) Whether the accused fully understands the nature and consequences of the admission of guilt;

(b) Whether the admission of guilt was made voluntarily by the accused after adequate consultation with defense counsel or, if applicable, with an appropriate decision-making body.

(c) Whether the admission of guilt is supported by the facts of the case as set out in the charges brought by the Principal and admitted by the accused, any supplementary materials presented by the Principal that the accused accepts, and any other evidence submitted by either party.

2. Where the Trial-Division is satisfied that the matters referred to in Paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates and may convict the accused of that crime.

3. Where the Trial Division is not satisfied that the matters referred to in Paragraph 1 are established, it shall consider the admission of guilt as not having been made, ordering that the trial be continued under the ordinary trial procedures provided by this Charter. In this case, the presiding judge may refer to the Principal to organize a consultation with an appropriate decision-making body, such as a nation's community decision-making body, to clarify and

verify all relevant aspects in consideration of the charge, context, persons involved and customary law in place.

4. Where the Trial Division believes that a more complete presentation of the facts of the case is required, the Trial Division may:

5. Request the Principal to present additional evidence, including the testimony of witnesses and, if applicable, relevant opinions of elders, clan, family, and community members about the need to proceed considering the best interests of the Nations or States involved.

6. Order that the trial be continued under the trial procedures provided by this Charter, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Division. ( in ANNEX E)

7. The agreements between the Principal and the defense regarding the modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court. In addition, the Court may consult with a Nation's or a State's appropriate decision-making body dealing with criminal legal issues to better form its own belief about the case.

### **Article 62. Presumption of Innocence**

1. The accused shall be presumed innocent until proven guilty before the Court, the Jury or through any mechanism of alternative dispute resolution.

2. In order to obtain a conviction, guilt must be proved by the Principal beyond a reasonable doubt.

### **Article 63. Rights of the Accused**

1. In the determination of any charge, the accused shall be entitled to a public, fair, and impartial hearing, and to all guarantees as outlined in Article 57 and applicable during the trial.

2. Additionally, the accused shall have the right to make an unsworn oral or written statement in their defense and shall not have any reversal of the burden of proof imposed on them.

3. The Principal shall disclose to the defense any evidence in the Principal's possession or control which, in their belief, may demonstrate the innocence of the accused, mitigate their guilt, or affect the credibility of the prosecution's evidence. In case of doubt, the Court shall decide.

4. Any additional rights may be recognized based on customary law or special circumstances, provided they are not in conflict with recognized human rights law and internationally recognized norms of criminal procedure.

### **Article 64. Protection of Victims and Witnesses**

1. The Court shall ensure the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses, taking into account the rights, interests, well-being, and traditional values of the community involved. The Court shall consider all relevant factors to determine appropriate measures for protection.

2. The Principal shall take measures to protect victims and witnesses, particularly during investigation and prosecution. These measures shall not infringe upon the rights of the accused to a fair and impartial trial.

3. The Court may conduct closed proceedings or adopt special measures to protect the safety and well-being of victims, witnesses, or accused persons. In addition, the Court may avoid a public hearing if such a hearing would be inconsistent with traditional practices in place, or if it would be contrary to the interests of justice.

4. The Court shall allow the views and concerns of victims to be presented and considered at appropriate stages of the proceedings. Legal representatives of victims may present such views and concerns. The Court may also take into account the views and concerns of prominent representatives of the community involved, in accordance with customary law.

5. Protection of evidence and information in cases of grave endangerment:

(a) Pursuant to this Charter, where the disclosure of evidence or information may lead to the grave endangerment of the security of a witness, their family, or the community, the Principal may withhold such evidence or information.

(b) In such cases, the Principal shall instead submit a summary of the evidence or information, subject to the approval of the Court, and indicate that the full evidence or information is available for the exclusive use of the Court, the defense, or any other authorized persons or entities as determined by the Court.

(c) The decision to withhold evidence or information and submit a summary shall be made by the Principal in accordance with the procedures established by the Court and with

due consideration to the rights of the accused to a fair and impartial trial.

(d) The Court may order the disclosure of the withheld evidence or information where it is satisfied that the interests of justice so require and that adequate measures are in place to ensure the safety and security of the witness, their family, or the community.

### **Article 65. Evidence**

1. Prior to providing testimony, each witness shall provide a declaration regarding the accuracy of the testimony to be provided.

2. Testimony from a witness during the trial shall be given in person, unless the Court determines that special circumstances require otherwise, in which case the witness may provide testimony through other appropriate means.

3. The parties may submit evidence relevant to the case, and the Court shall have the power to request the submission of any evidence deemed necessary to ascertain the truth.

4. The Court may decide on the relevance or admissibility of any evidence, considering the credibility of the evidence and any potential for bias or prejudice.

5. The Court shall acknowledge and adhere to confidentiality privileges, and it may take judicial notice of commonly accepted facts without requiring further substantiation.

6. Evidence obtained in violation of this Charter, internationally recognized human rights, or domestic norms of the affected community shall be deemed inadmissible, if:

(a) such violation raises substantial doubt about the reliability of the evidence; or if

(b) the admission of the evidence would seriously undermine the integrity of the proceedings.

The Court shall have the authority to exclude any evidence that meets the criteria set forth in Paragraph 1, either on its own initiative or at the request of a party.

#### **Article 66. Offenses against the Administration of Justice**

1. The Court shall have jurisdiction over the following offenses against its administration of justice when committed intentionally:

(a) giving false testimony;

(b) presenting evidence that the party knows is false or forged;

(c) corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) impeding, intimidating or corruptly influencing an official of the Court in order to force or persuade such individuals not to perform, or to perform improperly, appropriate duties;

(e) retaliating against an official of the Court on account of duties performed by that or another official;

(f) soliciting or accepting a bribe as an official of the Court in connection with official duties.

2. In the event of conviction, the Court may impose a term of imprisonment not exceeding ten years, or a fine in accordance with the legal codes or customary laws of the State Party or Nation Party involved.

#### **Article 67. Sanctions for Misconduct before the Court**

1. The Court shall have the authority to impose administrative measures, other than imprisonment, on individuals who engage in misconduct during its proceedings or who deliberately refuse to comply with its directions. Such measures may include, but not be limited to, temporary or permanent removal from the courtroom, imposition of a fine, or any other similar measures deemed appropriate by the Court.

2. The procedures for imposing such measures shall be consistent with relevant legal norms and may take into consideration the traditional practices of the State or Nation involved.

#### **Article 68. Requirements for a Decision**

1. All members of the Trial Division shall be present during every stage of the trial and its deliberations. In case of absence, the President of Judicial Divisions may appoint one or more alternate judges to substitute a Trial Division member.

2. The Trial Division's decision shall be based on the assessment of the whole proceedings. The decision shall be confined to the facts and circumstances mentioned in the charges, and the Court shall adjudicate only on the evidence submitted and examined during the trial.

3. The Judges shall strive to achieve a unanimous decision. If not possible, the decision shall be made by a majority of the judges.

4. The judicial deliberations shall be confidential, except if otherwise decided considering the specific context and the overall interests of the affected Nation or community.

5. The decision shall be in writing and shall comprise a comprehensive and well-founded statement of the Trial Division's conclusions and findings on the evidence. If unanimity is not reached, the decision shall contain the views of the majority and the minority. The final decision shall be announced publicly unless a particular situation requires otherwise.

#### **Article 69. Reparations**

1. The Court shall establish principles relating to reparations to victims, including restitution, compensation, and rehabilitation, in accordance with the principles set out in this Charter and relevant international legal instruments. In determining such principles, the Court may take into consideration specific traditional values and alternative dispute resolution's determinations for the same or similar matters in the Nation, State or community involved.

2. Based on these principles, the Court may determine the scope and extent of any damage, loss, and injury to victims in its decision, either upon request or on its own motion in exceptional circumstances. The Court shall act in accordance with internationally recognized legal instruments, as well as both international and national customary law.

3. The Court may order directly against a convicted person to provide appropriate reparations to victims, including restitution, compensation, and rehabilitation, in accordance with the principles established under this Article.

4. This Article shall not prejudice the rights of victims under State-based, Nation-based, and international law.

#### **Article 70. Sentencing**

1. In the event of a conviction, the Trial Division shall consider the appropriate sentence to be imposed, taking into account the evidence presented, submissions and recommendations of the victims made during the trial that are relevant to the sentence.

2. Prior to the completion of the trial, except where Article 62 applies, the Trial Division may on its own motion, and shall upon request of the Principal or the accused hold a further hearing to hear any additional evidence or submissions relevant to the sentence.

3. The judgment shall be delivered in public and, to the extent possible, in the presence of the accused.

4. The judgment shall be in conformity with internationally recognized legal principles and rules. Furthermore, in determining the content of the judgment, Nation-based norms shall prevail over any other conflicting law provided that they are consistent with the international legal framework on human rights.

### **Article 71. Protection of State or Nation Security**

For the protection of a State or Nation's security, the Court may apply State-based or Nation-based laws if not in conflict with international law and internationally recognized legal principles.

## **SECTION 7. PENALTIES**

### **Article 72. Applicable Penalties**

1. The Court may impose one of the following penalties on a person convicted of a crime referred to in Article 8 of this Charter. The penalties shall be determined in accordance with the provisions of this Charter and the Rules of Procedure and Evidence of the Court:

- (a) imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
- (b) life imprisonment when justified by the extreme gravity of the crime, taken into account all the circumstances.

2. In addition to imprisonment, the Court may order:

- (a) a fine;
- (b) a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties;
- (c) any other penalty or measure according to the customary law of the State or Nation involved, including but not limited to reparations to the victims and other restorative

justice measures, as supplementary penalties or measures. In ordering that, the Court may take into consideration the opinions of traditional leaders, clan, family and community circles and any other relevant decision-making bodies. (As set forth in ANNEX E)

### **Article 73. Sentencing**

1. In determining the sentence, the Court shall take into account such factors as the gravity of the crime, the individual circumstances of the convicted person, the specific context and the collective interests of the Nation or community affected.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may also deduct any time otherwise spent in detention in connection with a conduct underlying the crime.

3. When a defendant has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. Such period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with Article 72, Paragraph 1 (b).

4. The Court shall also consider the use of alternative measures to imprisonment, such as rehabilitation, community service, restorative justice, and reparations to victims, where appropriate and consistent with the interests of justice (As set forth in ANNEX E).

5. The Court shall, where appropriate, consider alternative measures to imprisonment, such as community service, probation, or other measures that are consistent with the principles of restorative justice, and which promote the rehabilitation and reintegration of the convicted person into society.

6. The Court shall provide reasons for its sentencing decision in writing, setting out the factors taken into account and the rationale for the sentence imposed.

#### **Article 74. Trust Fund**

1. A Trust Fund for Victims shall be established by the International Commission of Parties for the purpose of providing financial support to victims of crimes and their families pursuant to this Charter.

2. The Trust Fund shall be funded by voluntary contributions from States, organizations, and individuals, as well as any money and property collected through fines or forfeiture ordered by the Court. The Commission shall determine the criteria for accepting contributions and managing the Fund, taking into account best practices and principles of transparency and accountability.

3. The Trust Fund shall prioritize providing assistance to victims who have suffered the most serious harm, including physical or psychological harm, economic loss, and violation of their rights. Assistance may include medical and psychological care, legal aid, and other forms of support necessary for the victim's recovery and rehabilitation.

4. The Trust Fund shall be accessible to all victims of crimes under this Charter, regardless of their nationality, gender, race, or any other characteristic. The Commission shall establish procedures for applying for and receiving assistance from the Fund, which shall be simple, accessible, and non-discriminatory.

5. The Fund management shall report on the management and use of the Trust Fund to the International Commission of Parties and to the public on an annual basis, providing information on the sources and amounts of contributions, the number and types of victims assisted, and the impact of the assistance provided.

#### **Article 75. Non-prejudice to the application of penalties under State-based and Nation-based laws**

1. Nothing in this Part shall affect the application of penalties prescribed under State-based or Nation-based laws.

### **SECTION 8. APPEAL AND REVISION**

#### **Article 76. Appeal against Acquittal or Conviction or Sentence**

1. The Appeals Division may affirm, reverse, or revise the decisions taken by the Trial Division.

2. A decision under Article 70 may be appealed as follows:

- (a) the Prosecutor may make an appeal on any of the following grounds: procedural error, error of fact, or error of law;
- (b) the convicted person, or the Prosecutor on that person's behalf, may make an appeal on

any of the following grounds: procedural error, error of fact, error of law, or any other ground that affects the fairness or reliability of the proceedings, decision, or sentence;

(c) victims of the offense may make an appeal on any ground that affects the fairness of the proceedings, decision, or sentence;

(d) in case of an acquittal, the accused shall be released immediately. However, under exceptional circumstances, and having regard to the concrete risk of flight, the seriousness of the offense charged, and the probability of success on appeal, the Trial Division, at the request of the principal, may maintain the detention of the defendant pending appeal. The Trial Division shall provide the reasons for its decision in writing and ensure that the accused is able to challenge the decision promptly and effectively.

(e) If a convicted defendant is released pending appeal, the Court may impose conditions, including reporting obligations, travel restrictions, and electronic monitoring, as necessary to ensure the person's appearance at trial, protect the public, or prevent further offenses. Any such conditions must be proportionate to the risk posed by the person's release and respect their human rights.

3. The Court shall take measures to ensure that the suspension of the execution of a decision or sentence during the period allowed for appeal and the duration of the appeal proceedings does not result in undue delay or prejudice to the rights of victims or their families.

4. The decision on the application for revision shall be final and not subject to further appeal, except as provided for in the Rules of Procedure and Evidence.

5. The execution of the decision or sentence may be suspended during the period allowed for appeal and, if so determined by the Court, for the duration of the appeal proceedings. Such suspension may be revoked by the Court considering the concrete needs and interests of the victims, their families and community, and to facilitate the restoration of harmony within the community involved.

#### **Article 77. Appeals against other Decisions**

1. Either party may appeal any of the following decisions:

(a) a decision with respect to jurisdiction or admissibility;

(b) a decision granting or denying release of the person being investigated or prosecuted;

(c) a decision of the Pre-Trial Division to act on its own initiative;

(d) a decision that involves a matter that would significantly affect the fair conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Division may significantly facilitate the proceedings.

A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order for reparations may appeal against it.

## Article 78. Proceedings on Appeal

1. For the purposes of proceedings under Article 76 and this Article, the Appeals Division shall have all the powers of the Trial Division.

2. If the Appeals Division finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) reverse or amend the decision or sentence;  
or

(b) order a new trial before a different Trial Division.

For these purposes, the Appeals Division may remand a factual issue to the original Trial Division so as to determine it and to report back accordingly or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Principal on that person's behalf, it cannot be amended to the person's detriment.

3. If in an appeal against sentence the Appeals Division finds that the sentence is disproportionate to the crime, it may vary the sentence. In doing so, it may take into account the opinions of customary leaders, circles, clans and other decision-making bodies of the Nation involved.

4. The Appeals Division may correct at any time a sentence that is found to be illegal or

imposed in an illegal manner before the sentence has been satisfied.

5. The judgment of the Appeals Division shall be taken by a majority of the judges and shall be delivered in open court, unless otherwise specified due to special circumstances. The judgment shall indicate the reasons on which it is based and, if unanimity is not reached, the judgment of the Appeals Division shall contain the views of the majority and the minority.

## Article 79. Revision of Conviction or Sentence

1. The convicted person or, after death, a family member, or any person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Division to revise the final judgment of conviction or sentence on the grounds that:

(a) new evidence has been discovered that:

1.a.i. was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

1.a.ii. if proved at trial, would have been likely to have resulted in a different verdict;

(b) it has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) one or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office.

2. The Appeals Division shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may reconvene the original Trial Division, constitute a new Trial Division, or retain jurisdiction and so decide if the judgment should be revised.

### **Article 80. Unlawful Detention**

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Family and community members may be compensated as well.

2. When a person has been convicted of a criminal offense by a final decision, and when subsequently the person's conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a unlawful arrest or detention, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation to a person who has been released

from detention following a final decision of acquittal or a termination of the proceedings for that reason.

4. The total amount of the compensation shall be determined by law, taking into account both international customary law and State-based and Nation-based internal rules and practices.

## **SECTION 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE**

### **Article 81. Commitment to Cooperation of Parties**

1. Parties to the Charter pledge to cooperate with the Court as it conducts investigations and prosecutions of crimes within its jurisdiction consistent with provisions in the Charter.

2. For the purposes of this Article, "cooperation" shall mean any necessary assistance and support that the Court may require, including but not limited to:

- (a) Providing access to relevant documents, records, and evidence;
- (b) Facilitating the appearance of witnesses and their protection;
- (c) Executing requests for arrest or surrender of suspects;
- (d) Providing for the enforcement of sentences and orders of the Court; and
- (e) Providing other forms of assistance as may be required by the Court.

2.a.i.3. Cooperation with the Court shall be carried out in accordance with the domestic legal system of the party concerned and shall respect the rights of suspects and accused persons.

2.a.i.4. Parties to the Charter shall take all necessary measures to ensure that their national laws provide for cooperation with the Court in accordance with this Article.

## **Article 82. Requests for Cooperation**

1. The Tribunal under the Charter has authority to request State and Nation Parties to cooperate. Such requests shall be sent through accepted diplomatic mechanisms designated by State or Nation parties at the time of ratification, acceptance, approval or accession to this Charter. Any changes to the designation shall be made by each Nation or State Party pursuant to the Rules of Procedure and Evidence. In special circumstances, requests may also be sent through other means established by the Parties according to domestic laws.

2. The requested State or Nation shall keep confidential a request for cooperation and any documents supporting the request, except if the disclosure is necessary to execute the request. In addition, a disclosure may be required in application of domestic customary law depending on the particular context, crime, persons and communities involved.

3. The Tribunal may take all necessary measures to protect information and to ensure the safety or physical and psychological well-

being of any victims, potential witnesses and their families, as well as the community affected.

4. The Tribunal may invite any State or Nation or other party to this Charter to provide assistance under this Section as deemed appropriate under the circumstances or necessary records, documents, or other information. The Tribunal may also ask for other forms of cooperation and assistance depending on the context and circumstances. If a State or Nation that is not a Party to this Charter fails to cooperate as requested, the Tribunal shall inform the Party referring the matter and the International Commission of Parties.

5. The Tribunal may ask any State, Nation or other legal entity to provide information or documents. The Tribunal may also ask for other forms of cooperation and assistance depending on the context and circumstances.

6. Where a State or Nation Party fails to comply with a request to cooperate by the Tribunal contrary to the provisions of this Charter, the Tribunal shall refer the matter to the Party referring the matter and the International Commission of Parties.

7. The Tribunal shall ensure that requests for cooperation are proportionate to the nature and gravity of the crime being investigated or prosecuted, and do not unduly interfere with the sovereignty of the State or Nation Party.

8. In the event of non-compliance by a State or Nation Party, the Tribunal shall first engage in a dialogue with the State or Nation Party concerned to seek a resolution of the issue. If the matter is

not resolved, the Tribunal shall consider whether to take further measures, including making a referral to the International Commission of Parties or another appropriate body. The Tribunal shall also consider the use of incentives to encourage cooperation, such as offering reduced sentences or other forms of leniency to individuals who provide substantial cooperation.

9. The Tribunal shall make every effort to ensure that its requests for cooperation do not compromise the safety or well-being of individuals, communities, or national security interests of the State or Nation Party concerned. The Tribunal shall consult with the State or Nation Party concerned on the appropriate measures to be taken to ensure such protection.

### **Article 83. Procedures under Domestic Law**

1. Each State and Nation Party shall ensure that it has in place adequate and effective procedures, in accordance with its domestic laws, to facilitate all forms of cooperation under this Charter.

2. Such procedures shall include, but not be limited to:

- (a) Designation of competent authorities responsible for receiving and processing requests for cooperation under this Charter;
- (b) Procedures for the execution of requests for cooperation, including any necessary legal and administrative measures;
- (c) Mechanisms for the protection of victims, witnesses, and other persons who cooperate

with the Court, including measures to safeguard their physical and psychological well-being;

(d) Procedures for the collection, preservation, and transmission of evidence, including provisions for the admissibility of evidence obtained through cooperation with the Court;

(e) Procedures for the enforcement of orders or requests issued by the Court under this Charter;

(f) Procedures for the handling of confidential or sensitive information provided to the Court in connection with requests for cooperation.

3. Each State and Nation Party shall periodically review its domestic laws and procedures to ensure that they remain adequate and effective for the purposes of this Charter.

4. Each State and Nation Party shall provide the Court with information on the procedures it has in place for cooperation under this Charter, including any changes thereto, and shall inform the Court of any difficulties it experiences in implementing such procedures.

5. If a State or Nation Party lacks adequate domestic laws or procedures to facilitate cooperation under this Charter, it shall make every effort to establish such laws and procedures as soon as possible, in consultation with the Court and other relevant parties.

6. The Court shall provide technical assistance and support to States and Nations in establishing or improving their domestic laws and procedures to facilitate cooperation under this Charter,

in accordance with its mandate and available resources.

7. The Court shall take into account the particular circumstances and needs of victims, witnesses, and other persons who cooperate with the Court when making requests for cooperation under this Charter. The Court shall also take into account any risks or negative consequences that such cooperation may pose to these people and shall ensure that appropriate measures are taken to protect their interests and well-being.

8. The Court shall engage in regular dialogue and consultation with States and Nations on issues related to cooperation under this Charter, including the adequacy and effectiveness of domestic laws and procedures, and the provision of technical assistance and support. The Court shall also establish and maintain effective channels of communication with competent authorities designated by States and Nations for the purposes of this Charter.

9. The Court shall prioritize the use of cooperative measures that are most effective, efficient, and respectful of the sovereignty and interests of States and Nations while ensuring that the rights of suspects and accused persons are protected in accordance with the Charter.

10. The Court shall take into account the financial and other resources that may be required for cooperation under this Charter and shall seek to ensure that such cooperation is carried out in a cost-effective and sustainable manner. The Court shall also explore opportunities for sharing costs and resources

among States and Nations for the purposes of this Charter.

#### **Article 84. Surrender of Defendants**

1. The Tribunal may request the arrest and surrender of an individual, transmitting the documents and information in support of such a request, to any State or Nation on the territory of which that individual may be found. The Tribunal may request the cooperation of such State/s or Nation/s in the arrest or surrender. State or Nation Parties shall comply with such requests in accordance with this Section and their domestic laws.

2. If the individual sought for arrest or surrender invokes the principle of *ne bis in idem* before a domestic court or through a mechanism of alternative dispute resolution, the requested State or Nation shall immediately consult with the Tribunal in regard to the admissibility ruling. If the case is admissible, the requested State or Nation shall proceed with the execution of the request, unless otherwise decided in conformity with domestic customary laws. If an admissibility ruling is pending, the execution of the request for arrest or surrender of an individual may be postponed until a ruling on admissibility is made.

3. If requested, a State or Nation Party shall authorize transit through its territory of an individual being arrested or surrendered to the Tribunal by another State or Nation, handling the transit in the most appropriate way considering the circumstances and with the purpose of facilitating it.

4. A request for transit made by the Tribunal shall contain: a description of the person being transported, a brief statement of the facts of the case, including their legal relevance, and the warrant for arrest and surrender.

5. If the individual sought is being proceeded against or is serving a sentence in the requested State or Nation for a crime different from that for which surrender to the Tribunal is sought, the requested State or Nation shall consult with the Tribunal to decide on such a request depending on the crime for which the surrender is sought. For the purpose of the named decision, domestic customary laws may prevail if not in conflict with the principles established in this Charter, international customary law and internationally recognized legal standards.

6. The court should ensure that the countries to which they are requesting the surrender of an accused person have appropriate safeguards in place to protect the human rights of the accused. The court should also ensure that any conditions for surrender are fair and reasonable and that the accused is treated humanely during the surrender process.

7. The Court shall ensure that the legal and procedural rights of the accused are respected throughout the surrender process and that the accused is provided with adequate opportunities to contest the request for surrender.

8. In cases where there is a conflict between the provisions of the court and the domestic legal systems of the requested state or nation, the court should take the necessary steps to resolve the

conflict in a manner that upholds the rights of the accused while ensuring the effectiveness of the court's mandate.

9. The court shall take measures to ensure that the arrest and surrender process is free from political interference and that the cooperation of States or Nations is not withheld for political reasons. Such measures may include monitoring the execution of requests and engaging in dialogue with States or Nations to address any concerns or issues that may arise.

10. The court shall ensure that the surrender process is fair, just, and effective in bringing to justice those who have committed international crimes. To this end, the court may provide guidance and assistance to States or Nations in relation to the execution of arrest and surrender requests and may take steps to address any obstacles or challenges that may arise.

11. In cases where a State Party refuses to cooperate with the Court in the surrender process, the Court may take appropriate measures to address the situation, including making a finding of non-cooperation and referring the matter to the Assembly of States Parties as appropriate.

### **Article 85. Competing Requests**

1. A State or Nation Party which receives a request from the Tribunal for the surrender of a person under this Section, if it also receives a request from any other State or Nation for the extradition of the same person for the same conduct which forms the basis of the crime for which the Tribunal seeks the person's surrender,

shall notify the Tribunal and the requesting State or Nation of that fact.

2. In cases where a State or Nation Party receives competing requests from the Tribunal and another State or Nation for the same person for the same conduct, the requested State or Nation shall give priority to the request from the Tribunal if the Tribunal has already made a ruling on the admissibility of the case, or the Tribunal shall decide based on the requested State or Nation's notification.

3. If the Tribunal has not made a ruling on admissibility yet, the requested State or Nation may proceed to handle the request for extradition, but it shall not extradite the person until the Tribunal has decided that the case is admissible.

4. If the requesting State or Nation is not Party to this Charter, the requested State or Nation shall give priority to the request for surrender from the Tribunal, if the Tribunal has ruled that the case is admissible and there is not any international obligation for the requested State or Nation to extradite the person to the requesting State or Nation.

5. If a case has not been determined to be admissible by the Tribunal, the requested State or Nation may proceed to handle the request for extradition from the requesting State or Nation.

6. If the requesting State or Nation is not a Party to this Charter and the requested State or Nation is under an existing international obligation to extradite the person to the requesting State or Nation not Party, the

requested State or Nation shall decide whether to surrender the person to the Tribunal or extradite him or her to the requesting State. In making its decision, the requested State or Nation shall consider all the factors deemed relevant, including the respective dates of requests, the interests of the requesting State or Nation, and the possibility of subsequent surrender between the Tribunal and the requesting State or Nation.

7. If a State or Nation Party receives a request from the Tribunal for the surrender of a person and it also receives a request from a State or Nation for the extradition of the same person for a conduct constituting a different crime in respect with the crime for which the Tribunal seeks the surrender, the requested State or Nation shall, if it is not under an existing international obligation to extradite the person to the requesting State or Nation, give priority to the request from the Tribunal. Otherwise, if there is an international obligation to extradite the person to the requesting State or Nation, the requested State or Nation shall determine whether to surrender him or her to the Tribunal or to extradite him or her to the requesting State or Nation. In order to decide, the requested State or Nation shall consider all the factors deemed relevant, including those indicated in Paragraph 6, taking into particular account the gravity of the crime and the consequences on the community affected.

8. If the Tribunal has ruled that a case is not admissible, and the extradition of a person to the requesting State or Nation is not allowed, the requested State or Nation shall notify its decision to the Tribunal.

9. The requested State or Nation to extradite the person shall maintain open and transparent communication with both the Tribunal and the requesting State or Nation throughout the process of competing requests to ensure transparency and prevent misunderstandings or miscommunications.

10. The requested State or Nation to extradite the person is obligated to prioritize the interests of justice above all else when deciding which request to honor. In making its decision, the State or Nation shall carefully consider all factors deemed relevant, including but not limited to, the gravity of the crime, the consequences on the community affected, and any existing international obligations.

11. If the requested State or Nation to extradite the person is unable to determine which request to prioritize, it may seek guidance from international legal bodies or other experts to ensure a fair and just decision is reached in line with international law and principles of justice.

### **Article 86. Requests for Arrest and Surrender**

1. A request for arrest and surrender shall be made in writing, unless otherwise decided depending on domestic customary laws or special circumstances. If the named request is not written, the possibility to obtain a record of that must be granted.

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Division,

the request shall contain: Information aimed at identifying the person sought, a copy of the warrant of arrest, and all documents and information necessary to the surrender process in the requested State or Nation, in the spirit of facilitating and expediting that process.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain: a copy of any warrant of arrest for that person, a copy of the judgment of conviction, information demonstrating that the person sought is the same as indicated in the judgment of conviction and, if the person sought has been sentenced, a copy of the sentence imposed, including the indication of the eventual time already spent in prison in the case of a sentence for imprisonment.

4. Additional State-based or Nation-based domestic customary laws may be applied to this Article if so decided on the basis of an appropriate consultation between the State or Nation involved and the Tribunal.

### **Article 87. Provisional Arrest**

1. In urgent cases, pending submission of the request for surrender, the Tribunal may request the provisional arrest of the person sought. The request for provisional arrest shall be made by any appropriate means capable of providing a written record and it shall contain: information sufficient to identify the person sought and possibly the person's location, a statement regarding the alleged crimes for which the person is sought, a statement of the existence of a warrant of arrest or a judgment of conviction

against the person sought, and a statement about the pending request for surrender.

2. The request for surrender following a provisional arrest shall be delivered to the requested State or Nation within the time limit specified by the Tribunal, taking into account all the circumstances. This time limit may also be specified in accordance with the domestic laws of the requested State or Nation, if appropriate given the circumstances.

3. The court shall ensure that the request for provisional arrest is made only in urgent cases and shall not be used as a substitute for a proper request for surrender.

4. The court shall provide the requested State or Nation with all necessary information on the reasons and circumstances of the provisional arrest, including a detailed explanation of the urgency of the situation.

5. The Tribunal shall provide the requested State or Nation with all necessary information regarding the person sought, including any medical conditions or special needs that may require attention during the provisional arrest.

6. The requested State or Nation shall ensure that the provisional arrest of the person is in compliance with international human rights law and its domestic laws.

7. The requested State or Nation shall have the right to review the reasons and circumstances of the provisional arrest, and to challenge the request if it does not meet the required legal standards or if it violates the human rights of the person sought.

8. The person arrested shall be informed without delay of the reasons for their arrest and shall be granted prompt access to legal counsel and a doctor or medical assistance and shall have the right to challenge the legality of the arrest, as well as to communicate with the consular authorities of their home State or Nation.

9. The requested State or Nation shall ensure that the provisional arrest does not result in prolonged detention or pretrial detention, without lawful justification. The provisional arrest shall not be used to circumvent the guarantees of fair trial, due process of law, or the right to liberty and security of person, as enshrined in international human rights law.

10. The requested State or Nation shall promptly communicate to the Tribunal the result of the provisional arrest and any measures taken in response to the request for provisional arrest.

11. The provisional arrest shall be subject to regular review by the Tribunal, which shall decide whether to continue or terminate it based on the information and evidence provided by the parties.

12. The requested State or Nation shall have the obligation to release the person sought if the request for surrender is not submitted within a reasonable time or if the provisional arrest is found to be unlawful.

### **Article 88. Other Forms of Cooperation**

1. State and Nation Parties shall comply with the requests from the Tribunal to provide assistance in relation to investigations or prosecutions. This assistance shall be provided in accordance with the provisions of this Section,

internationally recognized legal standards and domestic customary laws, and it shall include but shall not be limited to the:

- (a) identification and location of persons or items;
- (b) taking, production and preservation of evidence;
- (c) questioning of any person being investigated or prosecuted;
- (d) provision of documents, records and information;
- (e) protection of victims and witnesses;
- (f) facilitation of the voluntary appearance of witnesses and experts before the Tribunal;
- (g) temporary transfer of persons in custody for purposes of identification, testimony or other assistance;
- (h) examination of places, and the execution of searches and seizures;
- (i) any other kind of assistance which is allowed by the laws of the requested State or Nation, in accordance with internationally recognized legal standards.

2. If the execution of a particular measure of assistance is prohibited in the requested State or Nation, a consultation with the Tribunal shall take place to decide if the assistance can be provided differently but, if after the consultation the matter is not solved, the requested State or Nation shall provide the named assistance unless it is in conflict with any fundamental principles

recognized by its domestic laws. If the existence of such a conflict is proved, the Tribunal shall modify the request to make it acceptable by the requested State or Nation.

3. A State or Nation Party may deny a request for assistance only if it can demonstrate that the requested assistance would create a serious risk of harm to its national security, including the safety of its citizens or members. In case of refusal, the State or Nation Party shall follow the following procedures:

(a) Promptly inform the Tribunal in writing of its decision to deny the request for assistance and provide an explanation of the reasons for the denial.

(b) Provide evidence of the security risk that would result from the requested assistance to the extent that such evidence is reasonably available.

(c) Take all reasonable measures to mitigate any harm that might result from the denial of the request for assistance.

4. The denial of a request for assistance shall not preclude the Tribunal from seeking such assistance from other sources.

5. Depending on the circumstances, the requested State or Nation may consult with the Tribunal or the Principal in order to provide the named assistance in other ways or at a later date.

6. The Tribunal shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request. In addition, the requested State or Nation may, when necessary, transmit documents

or information to the Principal on a confidential basis.

7. Apart from requests for surrender or extradition, in the event of competing requests of other kind from the Tribunal or from another State or Nation pursuant to an international obligation, the requested State or Nation Party shall seek to meet such requests, otherwise the matter shall be solved in accordance with Article 85.

8. The Tribunal may provide voluntary assistance to any State or Nation in all criminal investigations and prosecutions relating to both the crimes indicated in the Charter and all serious crimes according to State-based or Nation-based domestic laws. The named assistance shall be provided in accordance with this Section.

## **SECTION 10. ENFORCEMENT**

### **Article 89. Role of the State or Nation in the enforcement of sentences of imprisonment**

1. Sentences of imprisonment shall ordinarily be served in the facilities established in accordance with this Charter.

2. Notwithstanding paragraph 1, in exceptional circumstances and depending on factors such as the nature of the crime, the context, the persons and community involved, the domestic customary laws of the Nation or State affected by the crime, and its intention to handle sentenced persons in accordance with this Charter, alternative places of imprisonment may be used, provided that such places do not violate the rights of the sentenced

persons or the obligations of the State or Nation to comply with international human rights standards.

3. A voluntary request of the State or Nation to handle such sentenced persons may be accepted if duly motivated and if the alternative places of imprisonment are in compliance with the applicable international legal standards for the treatment of prisoners, and this state or nation is committed to enabling civil society organizations, including those working on human rights and prisoners' rights, to work in monitoring and reporting on the implementation of the Charter's provisions on the enforcement of sentences.

4. The Tribunal shall indicate the conditions for accepting such a request based on all relevant circumstances and in conformity with this Charter. Additional conditions may be proposed by the State or Nation requesting enforcement, and consultations may be put in place to find an agreement.

5. If the sentence of imprisonment is not served in the facilities pursuant to this Charter, the final decision about the place of imprisonment shall be delivered by the court in the fastest possible way, taking into account the principles established in this Charter, applicable international legal standards, and the interests of the community involved. The decision should be based on a thorough assessment of the suitability of the alternative places of imprisonment to ensure that the rights and well-being of the sentenced persons are protected and ensure that the transfer of the sentenced person to a different facility does not result in undue hardship or suffering.

6. In case of impossibility to handle the imprisonment in the facilities established according to this Charter or any alternative places of imprisonment, the imprisonment shall take place in the territory of the State or Nation where the crime was committed or, if not possible, in the territory of the State or Nation whose offender is a national or community member, provided that this State or Nation can guarantee proper handling of the enforcement and its effectiveness in accordance with applicable international legal standards. In addition, the Tribunal shall closely monitor the treatment of the sentenced person and may revoke the transfer if it determines that the person is not being treated in accordance with these standards.

7. In the absence of adequate guarantees or the impossibility for the named State or Nation to handle the enforcement of the sentence, the Tribunal shall designate another State or Nation, taking into account its connection and proximity to the community affected by the crime, the opinions of the sentenced person, and all relevant circumstances. In case of no feasibility, the State or Nation in question shall be chosen by lot, respecting the principle of equitable distribution.

8. In deciding on the designation of a State or Nation to enforce the sentence, the Tribunal shall also consider the State or Nation's application of internationally recognized legal standards for the treatment of prisoners and shall monitor compliance with those standards. The Tribunal shall not designate a State or Nation that does not meet these standards, even if that State or Nation is otherwise willing and able to enforce the sentence.

9. Alternatives to imprisonment may be applied according to domestic customary law if such measures are previously recognized and accepted by the court. The nature of such alternatives to imprisonment can be custodial or non-custodial. The application of these alternatives should not violate the rights of the sentenced persons or the obligations of the State or Nation to comply with applicable international legal standards, and the Tribunal shall monitor compliance with those measures and standards and prevent the inappropriate use of alternative measures that do not serve the best interests of the sentenced person, the community, and the administration of justice.

#### **Article 90. Transfer after Sentencing**

1. During the enforcement of the sentence, the Tribunal may decide to transfer a sentenced person from the prison of a State or Nation to the prison of another State or Nation, provided that the sentenced person has given their consent to the transfer, and provided that the receiving State or Nation is able to ensure the safety and proper handling of the sentenced person.

2. When a sentenced person wishes to apply for a transfer from the State or Nation of enforcement to another State or Nation, they shall submit their request to the Tribunal. The Tribunal shall consider all the elements and circumstances indicated in Article 89, as well as the following guidelines:

(a) The transfer shall be granted if it is in the best interests of the sentenced person, taking into account factors such as their physical and

mental health, family ties, and ability to access rehabilitation programs.

(b) The transfer shall not be granted if it would pose a risk to public safety or if it would be contrary to the interests of justice.

(c) The transfer shall be granted if it would facilitate the reintegration of the sentenced person into society upon their release.

(d) The transfer shall not be granted if it would impose an unreasonable financial burden on the State or Nation of enforcement or the State or Nation of receiving.

3. The State or Nation of enforcement shall cooperate with the Tribunal in arranging the transfer, including providing all necessary information and documentation and facilitating the transportation of the person to the receiving State or Nation.

4. The costs of the transfer shall be borne by the State or Nation of enforcement unless otherwise agreed upon by the Tribunal and the receiving State or Nation. If the State or Nation of enforcement is unable to bear the costs of the transfer, the Tribunal may request financial assistance from other States or Nations.

5. The receiving State or Nation shall be responsible for the enforcement of the sentence and shall ensure that the sentenced person is treated in accordance with internationally recognized legal standards for the treatment of prisoners.

6. The Tribunal shall monitor the enforcement of the sentence in the receiving State or Nation

and may, at any time, request information and reports on the condition and treatment of the sentenced person.

7. The Tribunal may suspend or revoke the transfer if it determines that the receiving State or Nation is not fulfilling its obligations under this Charter or if it determines that the transfer would create a serious risk to the security or well-being of the sentenced person or others.

#### **Article 91. Enforcement and Supervision**

1. The sentence of imprisonment, or an equivalent decision, shall be binding on the States and Nations Parties, and any modification shall be invalid. The Tribunal alone shall have the right to decide any application for appeal and revision, and the State or Nation of enforcement shall not hinder the submission of such applications by a sentenced person.

2. The sentence of imprisonment, or an equivalent decision, shall be binding on the States and Nations Parties, and any modification shall be invalid. The Tribunal alone shall have the right to decide any application for appeal and revision, and the State or Nation of enforcement shall not hinder the submission of such applications by a sentenced person. The Tribunal shall establish clear guidelines and criteria for the consideration of appeals and revisions to ensure consistency and fairness in decision-making.

3. The State or Nation of enforcement shall provide regular reports to the Tribunal regarding the treatment and conditions of the sentenced person, including any changes in their circumstances or health status.

4. The enforcement of a sentence of imprisonment, or of any equivalent decision, shall be subject to the supervision of the Tribunal and shall be consistent with internationally recognized legal standards relating to the treatment of prisoners. The Tribunal shall establish specific guidelines and criteria for the enforcement of sentences and regularly monitor compliance with these standards. The same standards shall be applied no matter the place of enforcement.

5. The State or Nation of enforcement ensure that the Communications between a sentenced person and the Tribunal shall be guaranteed and kept confidential, and the Tribunal shall have the authority to investigate any allegations of mistreatment or abuse of the sentenced person during their imprisonment. Any interference with or retaliation against a sentenced person for communicating with the Tribunal shall be considered a violation of their rights and subject to appropriate sanctions.

6. The State or Nation of enforcement shall ensure that the sentenced person has access to legal representation, including the right to communicate with their legal representative and to receive legal advice and assistance in appealing or revising their sentence.

7. The Tribunal shall periodically review the conditions of enforcement of sentences of imprisonment, or of any equivalent decision, to ensure that they continue to meet internationally recognized legal standards and to address any concerns or complaints raised by sentenced persons or their representatives.

## **Article 92. Enforcement of fines and forfeiture measures**

1. States and Nation Parties shall give effect to fines or forfeitures ordered by the Court, without prejudice to the rights of bona fide third parties, in accordance with internationally recognized legal standards and the procedures established by State-based and Nation-based domestic laws.

2. If a State or Nation Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. If property or the proceeds of the sale of property are obtained by a Nation or State Party following the enforcement of a Court decision, they shall be transferred to and held by the Court pending disposition.

4. In applying this article, State-based and Nation-based customary laws are taken in special account to better ensure the restoration of the harmony in the community involved.

## **Article 93. Review by the Court concerning reduction of sentence.**

1. The Court alone shall have the right to decide any reduction of sentence and shall rule on the matter after having heard the sentenced person, the victims or any other person affected by the crime.

2. The Court may reduce the sentence if one or more of the following factors emerge:

(a) the concrete willingness of the sentenced person to cooperate with the Court;

(b) the voluntary assistance of the named person in enabling the enforcement of Court decisions in other cases;

(c) other reasons justifying a reduction of the sentence, considering all relevant circumstances relating to the community involved and specific context.

#### **Article 94. Escape**

If a sentenced person escapes from custody and flees, the Court shall take all necessary measures, in accordance with internationally recognized legal standards, to ensure capture and return. Depending on the place where the escaped person is located, State-based or Nation-based domestic procedures may be applied if able to facilitate the procedure and not in conflict with the named standards.

#### **Article 95. Special assistance and collaboration agreements**

1. If a State or Nation Party to the Charter is unable to cooperate and/or enforce Court decisions pursuant to Sections 9 and 10 of this Charter for objective reasons depending on the lack of sufficient means and suitable organization, it may request special assistance to the Court. Upon acceptance, the Court shall order the State or Nation Party in which the Nation affected by the crime or the victims are located or, if that State or Nation is involved in the crime, a neighboring State or Nation Party, to provide the required assistance in all possible ways according to internationally recognized legal standards and

domestic laws not in conflict with the named standards.

2. In case of impossibility to obtain the aid of a neighboring State or Nation Party, the Court shall request the assistance of another State or Nation Party. The choice shall be based on different criteria, including its proximity, political and legal system, policing and military organization, adequacy of infrastructural facilities, and voluntary willingness to provide the required assistance.

3. For the purpose of facilitating cooperation and enforcement, *ad hoc* prior agreements of collaboration, both bilateral and multilateral, may be made between Parties to this Charter to provide mutual emergency assistance. Such agreements shall be concluded in accordance with this Charter, internationally recognized legal standards and the domestic laws of the States or Nations involved.

#### **SECTION 11. INTERNATIONAL COMMISSION OF PARTIES**

1. An International Commission of Parties to this Charter is hereby established.

Each State and Nation Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States and Nations which have signed this Charter may be observers in the Assembly.

The Assembly may be convened both in presence and remotely.

2. The International Commission of Parties' Assembly shall:

- (a) consider and adopt, as appropriate, recommendations of the Preparatory Commission;
- (b) provide management oversight to the different organs of the Court regarding its administration.
- (c) decide the budget for the Court;
- (d) decide whether to change the number of judges;
- (e) consider any question relating to non-cooperation;
- (f) perform any other function consistent with this Charter or the Rules of Procedure and Evidence.

3. The International Commission shall appoint Lead Officials, a President, two Vice-Presidents (a State representative and a Nation representative) and twelve members elected by the Assembly for two-year terms constituting the Executive Commission. The Executive Commission shall meet as often as necessary, but at least once a year, and shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation, and investigation of the Court. Further subsidiary bodies may be established upon request of a State or Nation Party, on a temporary basis, if needed depending on particular issues and contexts.

5. The President of the Court, the Principal and the Registrar or their representatives may

participate, as appropriate, in meetings of the Assembly and of the Executive Commission. Depending on the topic, and with the purpose of better implementing the contents and principles of this Charter, additional individuals may be admitted participating in the named meetings on the basis of their relevance and roles, under domestic laws, in their respective States and Nations.

6. The Assembly of the International Commission of Parties shall convene annually at the Court's seat or at facilities provided by the Foreign Ministry of \_\_\_\_\_, or by the Foreign Ministry of another government designated to host the Court, and each State or Nation Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Executive Commission. If consensus cannot be reached, decisions on matters of substance must be approved by a three-fifths majority of those present and voting provided that an absolute majority of International Commission of Parties constitutes the quorum for voting; decisions on matters of procedure shall be taken by a simple majority of International Commission of Parties present and voting.

7. A State or Nation Party which is in arrears in the payment of its financial contributions or other material contributions towards the costs of the Court shall have no vote in the Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State or Nation Party to vote in the Assembly if it is satisfied that the

failure to pay is due to conditions beyond the control of the State or Nation Party.

8. The Assembly shall adopt its own rules of procedure.

9. The official and working languages of the Assembly shall be English, Spanish, French, Arabic, \_\_\_\_\_, and other translated languages presented by States and Nations.

## **SECTION 12. FINANCIAL SUPPORT**

### **Article 96. Financial Regulations**

1. Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the International Commission of Parties, including its Bureau and subsidiary bodies, shall be governed by this Charter and the Financial Regulations and Rules adopted by the Assembly of International Commission of Parties.

### **Article 97. Payment of Expenses**

Expenses of the Court and the Assembly of the International Commission of Parties, including its Bureau and subsidiary bodies, shall be paid from the funds and materials of the Court.

### **Article 98. Funding**

The expenses of the Court and the Assembly of International Commission of Parties, including its Executive Commission and subsidiary bodies, as provided for in the budget decided by the Assembly of International Commission of Parties, shall be provided by the following sources:

1. Assessed contributions made by States and Nations Parties and nonfinancial material supports;

2. Funds or material support provided by other international bodies, subject to the approval of the appropriate governing mechanisms.

### **Article 99. Voluntary Contributions**

Without prejudice to Article 92, the Court may receive and use, as additional funds, and material support, voluntary contributions from Governments, international organizations, individuals, corporations, and other entities, in accordance with relevant criteria adopted by the Assembly of the International Commission of Parties.

### **Article 100. Assessment of Contributions**

The contributions of International Commission of Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the International Commission of Parties for its regular budget and adjusted in accordance with the principles on which that scale is based.

### **Article 101. Audits**

The records, books, and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

## **SECTION 13. CLOSING CLAUSES**

### **Article 102. Settlement of Disputes**

Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

Any other dispute between two or more International Commission of Parties' members relating to the interpretation or application of this Charter which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of International Commission of Parties.

The Assembly of the International Commission of Parties may take the initiative to resolve the dispute directly or provide recommendations for additional methods of dispute settlement. This could include referring the matter to a Joint Court of the respective States and/or Nations involved, in conformity with the Charter of that Court.

### **Article 103. Reservations**

No reservations may be made to this Charter.

### **Article 104. Amendments**

1. After six months from the entry into force of this Charter, any State or Nation Party may propose amendments thereto. The text of any proposed amendment shall be submitted to all International Commission of Parties.

2. Within three months from the date of notification, the Assembly of International Commission of Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of International Commission

of Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of International Commission of Parties.

4. Except as provided in Paragraph 5, an amendment shall enter into force for all International Commission of Parties one month after instruments of ratification or acceptance have been deposited by seven-eighths of them.

5. Any amendment to Articles 5, 6, 7 and 8 of this Charter shall enter into force for those International Commission of Parties which have accepted the amendment six months after the deposit of their instruments of ratification or acceptance. In respect of a State or Nation Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State or Nation Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of State or Nation Parties in accordance with Paragraph 4, any State or Nation Party which has not accepted the amendment may withdraw from this Charter with immediate effect by giving notice no later than one year after the entry into force of such amendment.

7. The President of the International Commission of Parties shall circulate to all International Commission of Parties any amendment adopted at a meeting of the International Commission of Parties or at a Review Conference.

### **Article 105. Amendments to provisions of an institutional nature**

1. Amendments to provisions of this Charter which are of an exclusively institutional nature, namely, Article 26, Article 27, and Articles 6 and 58, may be proposed at any time by any State or Nation Party. The text of any proposed amendment shall be submitted to such person designated by the International Commission of Parties Assembly who shall promptly circulate it to all States and Nation Parties and to others participating in the International Commission of Parties' Assembly.

2. Amendments under this Article on which consensus cannot be reached shall be adopted by the Assembly of the International Commission of Parties or by a Review Conference, by a two-thirds majority of International Commission of Parties. Such amendments shall enter into force for all International Commission of Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

### **Article 106. Review of the Charter**

1. Seven years after the entry into force of this Charter the Principal shall convene a Review Conference of the International Commission of Parties to consider any amendments to this Charter. Such review may include, but is not limited to, the list of crimes contained in Article 8. The Conference shall be open to those participating in the Assembly of the International Commission of Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in Paragraph 1, shall upon approval by a majority of the Assembly of the International Commission of Parties, convene a Review Conference.

### **Article 107. Transitional Provision**

1. Notwithstanding Article 12, Paragraphs 1 and 2, a State or Nation, on becoming a party to this Charter, may declare that, for a period of five years after the entry into force of this Charter for the State or Nation concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this Article may be withdrawn at any time.

2. The provisions of this Article shall be reviewed at the Review Conference convened in accordance provisions for the International Commission of Parties.

### **Article 108. Signature, ratification, acceptance, approval, or accession**

1. This Charter shall be open for signature by all States and Nations presented as a physical declaration or transmitted as an official digital declaration at the Foreign Ministry of the designated host government until 30 May 2024. After that date, the Charter shall remain open for signature at the named Foreign Ministry until 31 May 2025.

2. This Charter is subject to ratification, acceptance, or approval by signatory States and Nations. Instruments of ratification, acceptance

or approval shall be deposited with the Foreign Minister of the host government.

3. This Charter shall be open to accession by all States and Nations. Instruments of accession shall be deposited with the Foreign Minister of the host government.

#### **Article 109. Entry into Force**

1. This Charter shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 4th State and 250th Nation instrument of ratification, acceptance, approval, or accession with the Foreign Minister of the host government.

2. For each State or Nation ratifying, accepting, approving, or acceding to this Charter subsequent to its initial entry into force, the Charter shall enter into force after the 60th day following the deposit by such State or Nation of its instrument of ratification, acceptance, approval or accession.

#### **Article 110. Withdrawal**

1. A State or Nation Party may, by written notification addressed to the Foreign Minister of the host government, withdraw from this Charter. The withdrawal shall take effect one year after the date of receipt of the notification unless the notification specifies a later date.

2. A State or Nation shall not be discharged, by reason of its withdrawal, from the obligations arising from this Charter while it was a Party to the Charter, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in

connection with criminal investigations and proceedings in relation to which the withdrawing State or Nation had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

#### **Article 111. Official Texts**

The original of this Charter written in English, of which the English, \_\_\_\_\_, Arabic, \_\_\_\_\_, French, and Spanish texts are equally authentic, shall be deposited with the Foreign Minister of the host government, who shall send certified copies thereof to all ratifying States and Nations.

#### **Authorized Ratification**

**IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Charter.**

DONE at \_\_\_\_\_,  
\_\_\_\_\_ this \_\_\_\_\_ day of  
\_\_\_\_\_.

#### **ANNEX A: Treaty of Sèvres, (August 10, 1920) per Armenia**

*Sections of the treaty relevant to Armenia and the Armenian Genocide are presented. The full text of the treaty is available at Brigham Young University's [World War I Document Archive](#).*

THE TREATY OF PEACE BETWEEN THE  
ALLIED AND ASSOCIATED POWERS

AND TURKEY SIGNED AT SEVRES

AUGUST 10, 1920

THE BRITISH EMPIRE, FRANCE, ITALY AND  
JAPAN,

These Powers being described in the present  
Treaty as the Principal Allied Powers;

ARMENIA, BELGIUM, GREECE, THE HEDJAZ,  
POLAND, PORTUGAL, ROUMANIA, THE  
SERB-CROAT-SLOVENE STATE AND CZECHO-  
SLOVAKIA,

These Powers constituting, with the Principal  
Powers mentioned above, the Allied Powers, of  
the one part;

AND TURKEY,

of the other part;

Whereas on the request of the Imperial Ottoman  
Government an Armistice was granted to Turkey  
on October 30, 1918, by the Principal Allied  
Powers in order that a Treaty of Peace might be  
concluded, and

Whereas the Allied Powers are equally desirous  
that the war in which certain among them were  
successively involved, directly or indirectly,  
against Turkey, and which originated in the  
declaration of war against Serbia on July 28,  
1914, by the former Imperial and Royal Austro-  
Hungarian Government, and in the hostilities  
opened by Turkey against the Allied Powers on  
October 29, 1914, and conducted by Germany  
in alliance with Turkey, should be replaced by a  
firm, just and durable Peace,

For this purpose the HIGH CONTRACTING  
PARTIES have appointed as their  
Plenipotentiaries:

HIS MAJESTY THE KING OF THE UNITED  
KINGDOM OF GREAT BRITAIN AND IRELAND  
AND OF THE BRITISH DOMINIONS BEYOND  
THE SEAS, EMPEROR OF INDIA:

Sir George Dixon GRAHAME, K. C. V. O.,  
Minister Plenipotentiary of His Britannic Majesty  
at Paris;

for the DOMINION of CANADA:

The Honourable Sir George Halsey PERLEY,  
K.C. M. G High Commissioner for Canada in the  
United Kingdom;

for the COMMONWEALTH of AUSTRALIA:

The Right Honourable Andrew FISHER, High  
Commissioner for Australia in the United  
Kingdom;

for the DOMINION of NEW ZEALAND:

Sir George Dixon GRAHAME, K. C. V. O.,  
Minister Plenipotentiary of His Britannic Majesty  
at Paris;

for the UNION of SOUTH AFRICA:

Mr. Reginald Andrew BLANKENBERG, O. B. E.,  
Acting High Commissioner for the Union of South  
Africa in the United Kingdom;

for INDIA:

Sir Arthur HIRTZEL, K. C. B., Assistant Under  
Secretary of State for India;

**THE PRESIDENT OF THE FRENCH REPUBLIC:**

Mr. Alexandre MILLERAND, President of the Council, Minister for Foreign Affairs;

Mr. Frederic FRANÇOIS-MARSAL, Minister of Finance;

Mr. Auguste Paul-Louis ISAAC, Minister of Commerce and Industry;

Mr. Jules CAMBON, Ambassador of France;

Mr. Georges Maurice PALÉOLOGUE, Ambassador of France, Secretary-General of the Ministry of Foreign Affairs;

**HIS MAJESTY THE KING OF ITALY:**

Count LELIO BONIN LONGARE, Senator of the Kingdom, Ambassador Extraordinary and Plenipotentiary of H. M. the King of Italy at Paris;

General Giovanni MARIETTI, Italian Military Representative on the Supreme War Council;

**HIS MAJESTY THE EMPEROR OF JAPAN:**

Viscount CHINDA, Ambassador Extraordinary and Plenipotentiary of H. M. the Emperor of Japan at London;

Mr. K. MATSUI, Ambassador Extraordinary and Plenipotentiary of H. M. the Emperor of Japan at Paris;

**ARMENIA:**

Mr. Avetis AHARONIAN, President of the Delegation of the Armenian Republic;

**HIS MAJESTY THE KING OF THE BELGIANS:**

Mr. Jules VAN DEN HEUVEL, Envoy Extraordinary and Minister Plenipotentiary, Minister of State;

Mr. ROLIN JAEQUEMYNS, Member of the Institute of Private International Law, Secretary-General of the Belgian Delegation;

**HIS MAJESTY THE KING OF THE HELLENES:**

Mr. Eleftherios K. VENIZELOS, President of the Council of Ministers;

Mr. Athos ROMANOS, Envoy Extraordinary and Minister Plenipotentiary of H. M. the King of the Hellenes at Paris;

**HIS MAJESTY THE KING OF THE HEDJAZ:****THE PRESIDENT OF THE POLISH REPUBLIC:**

Count Maurice ZAMOYSKI, Envoy Extraordinary and Minister Plenipotentiary of the Polish Republic at Paris;

Mr. Erasme PILTZ;

**THE PRESIDENT OF THE PORTUGUESE REPUBLIC:**

Dr. Affonso da COSTA, formerly President of the Council of Ministers;

**His MAJESTY THE KING OF ROUMANIA:**

Mr. Nicolae TITULESCU, Minister of Finance;

Prince DIMITRIE GHIKA, Envoy Extraordinary and Minister Plenipotentiary of H. M. the King of Roumania at Paris;

**HIS MAJESTY THE KING OF THE SERBS, THE CROATS AND THE SLOVENES:**

Mr. Nicolas P. PACHITCH, formerly President of the Council of Ministers;

Mr. Ante TRUMBIC, Minister for Foreign Affairs;

THE PRESIDENT OF THE CZECHO-SLOVAK  
REPUBLIC:

Mr. Edward BENES, Minister for Foreign Affairs;

Mr. Stephen OSUSKY, Envoy Extraordinary and  
Minister Plenipotentiary of the Czecho-Slovak  
Republic at London;

TURKEY:

General HAADI Pasha, Senator;

RIZA TEVFIK Bey, Senator;

RÉCHAD HALISS Bey, Envoy Extraordinary  
and Minister Plenipotentiary of Turkey at Berne;  
WHO, having communicated their full powers,  
found in good and due form, have AGREED AS  
FOLLOWS:

From the coming into force of the present Treaty  
the state of war will terminate.

From that moment and subject to the provisions  
of the present Treaty, official relations will exist  
between the Allied Powers and Turkey.

[Articles 1-87 omitted]

ARMENIA.

**ARTICLE 88.**

Turkey, in accordance with the action already  
taken by the Allied Powers, hereby recognises  
Armenia as a free and independent State.

**ARTICLE 89.**

Turkey and Armenia as well as the other  
High Contracting Parties agree to submit to the  
arbitration of the President of the United States

of America the question of the frontier to be fixed  
between Turkey and Armenia in the vilayets of  
Erzerum, Trebizond, Van and Bitlis, and to accept  
his decision thereupon, as well as any stipulations  
he may prescribe as to access for Armenia to the  
sea, and as to the demilitarisation of any portion  
of Turkish territory adjacent to the said frontier.

**ARTICLE 90.**

In the event of the determination of the  
frontier under Article 89 involving the transfer of  
the whole or any part of the territory of the said  
Vilayets to Armenia, Turkey hereby renounces as  
from the date of such decision all rights and title  
over the territory so transferred. The provisions of  
the present Treaty applicable to territory detached  
from Turkey shall thereupon become applicable  
to the said territory.

The proportion and nature of the financial  
obligations of Turkey which Armenia will have to  
assume, or of the rights which will pass to her, on  
account of the transfer of the said territory will  
be determined in accordance with Articles 241 to  
244, Part VIII (Financial Clauses) of the present  
Treaty.

Subsequent agreements will, if necessary,  
decide all questions which are not decided  
by the present Treaty and which may arise in  
consequence of the transfer of the said territory.

**ARTICLE 91.**

In the event of any portion of the territory  
referred to in Article 89 being transferred to  
Armenia, a Boundary Commission, whose  
composition will be determined subsequently,

will be constituted within three months from the delivery of the decision referred to in the said Article to trace on the spot the frontier between Armenia and Turkey as established by such decision.

#### **ARTICLE 92.**

The frontiers between Armenia and Azerbaijan and Georgia respectively will be determined by direct agreement between the States concerned.

If in either case the States concerned have failed to determine the frontier by agreement at the date of the decision referred to in Article 89, the frontier line in question will be determined by the Principal Allied Powers, who will also provide for its being traced on the spot.

#### **ARTICLE 93.**

Armenia accepts and agrees to embody in a Treaty with the Principal Allied Powers such provisions as may be deemed necessary by these Powers to protect the interests of inhabitants of that State who differ from the majority of the population in race, language, or religion.

Armenia further accepts and agrees to embody in a Treaty with the Principal Allied Powers such provisions as these Powers may deem necessary to protect freedom of transit and equitable treatment for the commerce of other nations.

[Articles 94-139 omitted]

#### **PROTECTION OF MINORITIES.**

#### **ARTICLE 140.**

Turkey undertakes that the stipulations contained in Articles 141, 145 and 147 shall be

recognised as fundamental laws, and that no civil or military law or regulation, no Imperial Iradeh nor official action shall conflict or interfere with these stipulations, nor shall any law, regulation, Imperial Iradeh nor official action prevail over them.

#### **ARTICLE 141.**

Turkey undertakes to assure full and complete protection of life and liberty to all inhabitants of Turkey without distinction of birth, nationality, language, race or religion. All inhabitants of Turkey shall be entitled to the free exercise, whether public or private, of any creed, religion or belief.

The penalties for any interference with the free exercise of the right referred to in the preceding Paragraph shall be the same whatever may be the creed concerned.

#### **ARTICLE 142.**

Whereas, in view of the terrorist regime which has existed in Turkey since November 1, 1914, conversions to Islam could not take place under normal conditions, no conversions since that date are recognised and all persons who were non-Moslems before November 1, 1914, will be considered as still remaining such, unless, after regaining their liberty, they voluntarily perform the necessary formalities for embracing the Islamic faith.

In order to repair so far as possible the wrongs inflicted on individuals in the course of the massacres perpetrated in Turkey during the war, the Turkish Government undertakes to afford all the assistance in its power or in that

of the Turkish authorities in the search for and deliverance of all persons, of whatever race or religion, who have disappeared, been carried off, interned or placed in captivity since November 1, 1914.

The Turkish Government undertakes to facilitate the operations of mixed commissions appointed by the Council of the League of Nations to receive the complaints of the victims themselves, their families or their relations, to make the necessary enquiries, and to order the liberation of the persons in question.

The Turkish Government undertakes to ensure the execution of the decisions of these commissions, and to assure the security and the liberty of the persons thus restored to the full enjoyment of their rights.

#### **ARTICLE 143**

Turkey undertakes to recognise such provisions as the Allied Powers may consider opportune with respect to the reciprocal and voluntary emigration of persons belonging to racial minorities.

Turkey renounces any right to avail herself of the provisions of Article 16 of the Convention between Greece and Bulgaria relating to reciprocal emigration, signed at Neuilly-sur-Seine on November 27, 1919. Within six months from the coming into force of the present Treaty, Greece and Turkey will enter into a special arrangement relating to the reciprocal and voluntary emigration of the populations of Turkish and Greek race in the territories transferred to Greece and remaining Turkish respectively.

In case agreement cannot be reached as to such arrangement, Greece and Turkey will be entitled to apply to the Council of the League of Nations, which will fix the terms of such arrangement.

#### **ARTICLE 144.**

The Turkish Government recognises the injustice of the law of 1915 relating to Abandoned Properties (Emval-i-Metroukeh), and of the supplementary provisions thereof, and declares them to be null and void, in the past as in the future.

The Turkish Government solemnly undertakes to facilitate to the greatest possible extent the return to their homes and re-establishment in their businesses of the Turkish subjects of non-Turkish race who have been forcibly driven from their homes by fear of massacre or any other form of pressure since January 1, 1914. It recognises that any immovable or movable property of the said Turkish subjects or of the communities to which they belong, which can be recovered, must be restored to them as soon as possible, in whatever hands it may be found. Such property shall be restored free of all charges or servitudes with which it may have been burdened and without compensation of any kind to the present owners or occupiers, subject to any action which they may be able to bring against the persons from whom they derived title.

The Turkish Government agrees that arbitral commissions shall be appointed by the Council of the League of Nations wherever found necessary. These commissions shall each be composed of one

representative of the Turkish Government, one representative of the community which claims that it or one of its members has been injured, and a chairman appointed by the Council of the League of Nations. These arbitral commissions shall hear all claims covered by this Article and decide them by summary procedure.

The arbitral commissions will have power to order:

(1) The provision by the Turkish Government of labour for any work of reconstruction or restoration deemed necessary. This labour shall be recruited from the races inhabiting the territory where the arbitral commission considers the execution of the said works to be necessary;

(2) The removal of any person who, after enquiry, shall be recognised as having taken an active part in massacres or deportations or as having provoked them; the measures to be taken with regard to such person's possessions will be indicated by the commission;

(3) The disposal of property belonging to members of a community who have died or disappeared since January 1, 1914, without leaving heirs; such property may be handed over to the community instead of to the State;

(4) The cancellation of all acts of sale or any acts creating rights over immovable property concluded after January 1, 1914. The indemnification of the holders will be a charge upon the Turkish Government, but must not serve as a pretext for delaying the restitution. The arbitral commission will, however have the power to impose equitable arrangements between the

interested parties, if any sum has been paid by the present holder of such property.

The Turkish Government undertakes to facilitate in the fullest possible measure the work of the commissions and to ensure the execution of their decisions, which will be final. No decision of the Turkish judicial or administrative authorities shall prevail over such decisions.

#### **ARTICLE 145.**

All Turkish nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language or religion.

Difference of religion, creed or confession shall not prejudice any Turkish national in matters relating to the enjoyment of civil or political rights, as for instance admission to public employments, functions and honours, or the exercise of professions and industries.

Within a period of two years from the coming into force of the present Treaty the Turkish Government will submit to the Allied Powers a scheme for the organisation of an electoral system based on the principle of proportional representation of racial minorities.

No restriction shall be imposed on the free use by any Turkish national of any language in private intercourse, in commerce, religion, in the press or in publications of any kind, or at public meetings. Adequate facilities shall be given to Turkish nationals of non-Turkish speech for the use of their language, either orally or in writing, before the courts.

**ARTICLE 146.**

The Turkish Government undertakes to recognize the validity of diplomas granted by recognised foreign universities and schools, and to admit the holders thereof to the free exercise of the professions and industries for which such diplomas qualify.

This provision will apply equally to nationals of Allied powers who are resident in Turkey.

**ARTICLE 147.**

Turkish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as other Turkish nationals. In particular they shall have an equal right to establish, manage and control at their own expense, and independently of and without interference by the Turkish authorities, any charitable, religious and social institutions, schools for primary, secondary and higher instruction and other educational establishments, with the right to use their own language and to exercise their own religion freely therein.

**ARTICLE 148.**

In towns and districts where there is a considerable proportion of Turkish nationals belonging to racial, linguistic or religious minorities, these minorities shall be assured an equitable share in the enjoyment and application of the sums which may be provided out of public funds under the State, municipal or other budgets for educational or charitable purposes.

The sums in question shall be paid to the qualified representatives of the communities concerned.

**ARTICLE 149.**

The Turkish Government undertakes to recognise and respect the ecclesiastical and scholastic autonomy of all racial minorities in Turkey. For this purpose, and subject to any provisions to the contrary in the present Treaty, the Turkish Government confirms and will uphold in their entirety the prerogatives and immunities of an ecclesiastical, scholastic or judicial nature granted by the Sultans to non-Moslem races in virtue of special orders or imperial decrees (firmans, hattis, berats, etc.) as well as by ministerial orders or orders of the Grand Vizier.

All laws, decrees, regulations and circulars issued by the Turkish Government and containing abrogations, restrictions or amendments of such prerogatives and immunities shall be considered to such extent null and void.

Any modification of the Turkish judicial system which may be introduced in accordance with the provisions of the present Treaty shall be held to override this Article, in so far as such modification may affect individuals belonging to racial minorities.

**ARTICLE 150.**

In towns and districts where there is resident a considerable proportion of Turkish nationals of the Christian or Jewish religions the Turkish Government undertakes that such Turkish nationals shall not be compelled to perform any act which constitutes a violation of their faith or religious observances, and shall not be placed under any disability by reason of their refusal to attend courts of law or to perform

any legal business on their weekly day of rest. This provision, however, shall not exempt such Turkish nationals (Christians or Jews) from such obligations as shall be imposed upon all other Turkish nationals for the preservation of public order.

**ARTICLE 151.**

The Principal Allied Powers, in consultation with the Council of the League of Nations, will decide what measures are necessary to guarantee the execution of the provisions of this PArticle The Turkish Government hereby accepts all decisions which may be taken on this subject.

[Articles 152-225 omitted]

**PENALTIES.**

**ARTICLE 226.**

The Turkish Government recognises the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Turkey or in the territory of her allies.

The Turkish Government shall hand over to the Allied Powers or to such one of them as shall so request all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the Turkish authorities.

**ARTICLE 227.**

Persons guilty of criminal acts against the nationals of one of the Allied Powers shall be brought before the military tribunals of that Power.

Persons guilty of criminal acts against the nationals of more than one of the Allied Powers shall be brought before military tribunals composed of members of the military tribunals of the Powers concerned.

In every case the accused shall be entitled to name his own counsel.

**ARTICLE 228.**

The Turkish Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the prosecution of offenders and the just appreciation of responsibility.

**ARTICLE 229.**

The provisions of Articles 226 to 228 apply similarly to the Governments of the States to which territory belonging to the former Turkish Empire has been or may be assigned, in so far as concerns persons accused of having committed acts contrary to the laws and customs of war who are in the territory or at the disposal of such States.

If the persons in question have acquired the nationality of one of the said States, the Government of such State undertakes to take, at the request of the Power concerned and in

agreement with it, or upon the joint request of all the Allied Powers, all the measures necessary to ensure the prosecution and punishment of such persons.

### **ARTICLE 230.**

The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.

The Allied Powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such a tribunal.

In the event of the League of Nations having created in sufficient time a tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertakes equally to recognise such tribunal.

The provisions of Article 228 apply to the cases dealt with in this Article.

[Articles 231-433 omitted]

The present Treaty, in French, in English, and in Italian, shall be ratified. In case of divergence the French text shall prevail, except in Parts I (Covenant of the League of Nations) and XII (Labour), where the French and English texts shall be of equal force. The deposit of ratifications shall be made at Paris as soon as possible.

Powers of which the seat of the Government is outside Europe will be entitled merely to inform the Government of the French Republic through their diplomatic representative at Paris that their ratification has been given; in that case they must transmit the instrument of ratification as soon as possible.

A first procès-verbal of the deposit of ratifications will be drawn up as soon as the Treaty has been ratified by Turkey on the one hand, and by three of the Principal Allied Powers on the other hand.

From the date of this first procès-verbal the Treaty will come into force between the High Contracting Parties who have ratified it.

For the determination of all periods of time provided for in the present Treaty this date will be the date of the coming into force of the Treaty.

In all other respects the Treaty will enter into force for each Power at the date of the deposit of its ratification.

The French Government will transmit to all the signatory Powers a certified copy of the procès-verbaux of the deposit of ratifications.

IN FAITH WHEREOF the above-named Plenipotentiaries have signed the present Treaty.

Done at Sèvres, the tenth day of August one thousand nine hundred and twenty, in a single copy which will remain deposited in the archives of the French Republic, and of which authenticated copies will be transmitted to each of the Signatory Powers.

(L. S.) GEORGE GRAHAME.  
 (L. S.) GEORGE H. PERLEY.  
 (L. S.) ANDREW FISHER.  
 (L. S.) GEORGE GRAHAME.  
 (L. S.) R. A. BLANKENBERG.  
 (L. S.) ARTHUR HIRTZEL.  
 (L. S.) A. MILLERAND.  
 (L. S.) F. FRANÇOIS-MARSAL.  
 (L. S.) JULES CAMBON. (L. S.) PALÉOLOGUE.  
 (L. S.) BONIN.  
 (L. S.) MARIETTI.  
 (L. S.) K.: MATSUI.  
 (L. S.) A. AHARONIAN.  
 (L. S.) J. VAN DEN HEUVEL.  
 (L. S.) ROLIN JAEQUEMYS.  
 (L. S.) E. K. VENIZELOS.  
 (L. S.) A. ROMANOS.  
 (L. S.) MAURICE ZAMOYSKI.  
 (L. S.) ERASME PILTZ.  
 (L. S.) AFFONSO COSTA.  
 (L. S.) D. J. GUIKA.  
 (L. S.) STEFAN OSUSKY.  
 (L. S.) HADI.  
 (I. S.) DR. RIZA TEWFIK.  
 (L. S.) RÉCHAD HALISS.

## **ANNEX B: Establishment of the Provisional Government of Ezidikhan**

### **PREAMBLE**

The Land of Ezidikhan is the homeland of the Yezidi people. Here our spiritual, religious, and political identity was shaped. The catastrophe that recently befell the Yezidi people – the massacre and abduction of thousands of Yezidis – calls for resolute action for our security and prosperity. Accordingly, we take this action to proclaim the inherent power of self-governance in Ezidikhan the Yezidi Nation.

Yezidi survivors of the Daesh holocaust across the Eastern Mediterranean region, as well as Yezidis from other parts of the world, will never cease to assert their right to a life of dignity, freedom and honest toil in their national homeland. This right is the natural right of the Yezidi people to be masters of their own fate, like all other nations.

### **PROCLAIM**

#### **Article I**

On behalf of the Yezidi people, we the Supreme Spiritual Leaders do hereby affirm in this proclamation the desires of the Yezidis and confederated peoples to freely choose our social, economic, political and economic future without external interference consistent with the internationally recognized principle of self-determination. We further affirm the free right of Yezidis and confederate peoples to govern themselves internally and in relations with other peoples in accord with customary and popularly

approved laws and international norms. We believe that these desires correspond with the peoples' desire for freedom, equality, liberty, security, prosperity and peaceful relations with all peoples. Accordingly, we hereby proclaim and fully affirm the self-governing and autonomous nation of Ezidikhan.

## **Article II**

In furtherance of this affirmed reality, we do solemnly declare by this proclamation the formal establishment of the Ezidikhan Provisional Government empowered to serve and represent the peoples of the autonomous nation until such time as the peoples of Ezidikhan conduct a nation-wide plebiscite to authorize the formation of a permanent Ezidikhan Regional Government established in accordance with the aforementioned principles and the principles of democratic confederation.

a) Accordingly the Ezidikhan Provisional Government is established with three branches of governance including the Supreme Spiritual Council as the Judiciary, Executive Ministry, and Governing Council serving as the Ezidikhan Provisional Government Parliament.

b) The Yezidis and allied nations endorse and approve formation of a democratic confederation as the basis for establishing the Ezidikhan Provisional Government and a future permanent government approved by the Yezidis as a result of a plebiscite organized by the Provisional Government in a timely fashion.

## **Article III**

The Yezidi leadership proclaims:

Free and open elections under the principle of one person one vote for all adult Yezidis, with women, men and third sex being eligible to vote and seek office through popular elections as equals; and

Laws and a system of justice based on equality, freedom of assembly, freedom of information and universal human rights.

a) Accordingly, we and representatives of the Yezidi Community of Ezidikhan, by virtue of our natural and historic right of self-government, hereby declare and affirm the reality of the Yezidi nation in Ezidikhan, to be known as the Nation of Ezidikhan.

b) We declare that effective from the instance of 25 July 2017 at 12:00pm until the establishment of the elected, permanent governing authorities in accordance with the Constitution of Ezidikhan which will be adopted by the Governing Council not later than 25 July 2020, the Supreme Leadership Council shall act as a Provisional Governing Council of Ezidikhan, and its executive organ, the Executive Administration, shall be the Provisional Government of Ezidikhan.

## **Article IV**

The structure of the Ezidikhan Provisional Government shall include, but not be limited to the founding Supreme Leadership Council that shall have juridical power, the Supreme Spiritual

Council, a parliament that shall be known as the Governing Council representing each popular Yezidi community, an Executive Administration that shall exercise ministerial powers to implement and enforce customary and popular laws. The Mirs and Baba caste shall hold rights and responsibilities to be decided by popular vote.

#### **Article V**

- The Autonomous Nation of Ezidikhan will:
- Actively promote Yezidi immigration and the return of the Yezidi Diaspora;
- Foster the economic, social and political prosperity and stability of the country for the benefit of all its inhabitants;
- Implement a charter and Constitution protecting individual and community freedom, justice and peace as envisaged in the traditions of Ezidikhan;
- Advance and establish customary and judicial laws to ensure equality of social, economic and political rights to all its inhabitants irrespective of religion, creed, ethnic identity or sex or political affiliations;
- Guarantee to the citizens of Ezidikhan freedom of press, religion, conscience, language, education, legal rights and culture;
- Affirm that Treaties concluded by the Executive Administration and approved by the Governing Council shall be the law of the land;
- Safeguard any nation that wishes to come under the protection of Ezidikhan in a manner consistent with an agreed bi-lateral treaty;

- Safeguard the Holy Places and sacred objects of all religions; and
- Be faithful to the principles of the Charter of the United Nations and international law.

We extend our hand to all bordering nations and states and their peoples in an offer of peace and good neighborliness, and appeal to them to establish bonds of cooperation and mutual help with the sovereign Yezidi Nation. The Autonomous Nation of Ezidikhan is prepared to do its share in a common effort to achieve freedom and stability for the advancement of the entire Middle East.

#### **Article VI**

We appeal to the Yezidi people throughout the world to rally round the Yezidis of Ezidikhan in the tasks of immigration and economic and prosperity by and between nations and peoples throughout the Eastern Mediterranean region.

We appeal to the Yezidi people throughout the world to join the Yezidis of Ezidikhan in the tasks of restoring our nation and to stand by all Yezidis in the great struggle for the realization of a renewed future rooted in the age-old dream of Ezidikhan.

Placing our trust in the Almighty, we affix our signatures to this proclamation at this session of the provisional National Council, on the soil of the Homeland, in the Sacred Village of Lalish, on this third day of Gelawej of the year 6767 by the Yezidi calendar (the twenty fifth of July of the year 2017 by the Gregorian calendar).

Baba Sheikh, Kurto Hajji Ismail

Baba Sheikh, Hadji Saado

Hajoyan Khdir

Baba Salem Daound

Hadji Aziz Anmar

**ANNEX C: Trial By Jury**  
**TRIAL BY INDIGENOUS NATION JURY**  
**TITLE I: GENERAL RULES**

**ARTICLE 1: OBJECT.** The purpose of this law is to establish the trial by a jury located in the jurisdiction or territory of the plaintiff, in compliance with this Charter.

**ARTICLE 2: CRIMES.** The following crimes must be tried by the juries, even in their tried form and together with the related crimes that they concur with:

- (a) The crime of colonization
- (b) The crime of aggression
- (c) The crime of genocide
- (d) Crimes against humanity
- (e) War crimes – including intentional targeting of civilians and civil infrastructure.
- (f) Crimes against nature including ecocide and culturicide.
- (g) Crimes of terrorism
- (h) Gender-based violence and femicide
- (i) Violence against and forced removal of children.
- (j) Apartheid
- (k) Military occupation

**ARTICLE 3: THE JURY COMPOSITION.**  
 The jury shall be made up of twelve (12) regular members and, at least, two (2) substitutes and shall be directed by a single criminal judge. The judge may order that there be more substitutes according to the seriousness and/or complexity of the case. The panel of regular and substitute jurors must always be made up of women and men in equal parts.

**ARTICLE 4: THE JURY COMPOSITION WITH INDIGENOUS PEOPLES.** When an act is tried where the defendant or the victim belong to the indigenous people, the panel of twelve regular and substitute jurors will be made up of half men and women from the same community they belong to.

**ARTICLE 5: EXTENSION OF JURISDICTION.** Trials by indigenous jury will be held in the judicial district in which the act was committed. When an event has shocked a community in such a way that an impartial jury cannot reasonably be obtained, the judge may order, only at the request of the defendant or victim and by means of a well-founded order, that the trial take place in another judicial jurisdiction. The determination of the constituency will be defined by public lottery.

**ARTICLE 6: FUNCTION OF THE JURY AND THE JUDGE.** The Jury deliberates on the evidence and determines the guilt or not guilt of the defendant in relation to the fact or facts and to the crime or degree thereof for which the defendant must answer. In order for the jury to perform and carry out this function, the members of the jury must be compulsorily instructed on the applicable substantive law by the magistrate

presiding over the process regarding the main crime charged and the minor crimes included in it.

**ARTICLE 7: VERDICT AND ROLE OF THE INSTRUCTIONS OF THE JUDGE.** The jury renders its verdict to the best of its knowledge and belief, based solely on the evidence produced in the trial and without expression of the reasons for the decision. The judge's instructions to the jury, the requirement for trial and the full and mandatory record of the trial in shorthand, audio and/or video constitute full and sufficient basis for broad control of the jury's decision.

**ARTICLE 8: PRESUMPTION OF INNOCENCE AND REASONABLE DOUBT.** The judge will compulsorily instruct the jury that, in all criminal proceedings, the defendant will be presumed innocent until proven otherwise, and if there is reasonable doubt about the guilt, the defendant will be acquitted. If the doubt is between degrees of a crime or between crimes of different severity, the defendant can only be sentenced for the lower degree or less serious crime.

**ARTICLE 9: FREEDOM OF CONSCIENCE OF THE JURY. NO RETALIATION.** The jury is independent, sovereign, and indisputably responsible for its verdict, free from any threat from the judge, the parties or any Power due to its decisions. The rule of secrecy of the deliberations and the unmotivated form of their verdict ensures the jurors the widest freedom of discussion and decision, without being subject to any penalty, unless it appears that they did so against their conscience, or who were corrupted by way of bribery. The textual content of this Article will

form a mandatory part of the judge's instructions to the jury.

## **TITLE II: THE CONDITIONS TO BE A JURY**

**ARTICLE 10: RIGHT. PUBLIC CHARGE.** The function of jury constitutes a right and a public charge of the peoples in conditions to provide it. The requirements to be so and the cases in which they may be excluded will only be those established exhaustively in this law.

**ARTICLE 11: REQUIREMENTS.** To be a juror it is required:

- a) Be a member of the state and/or indigenous nation and be at least 20 years of age.
- b) Have the full exercise of political rights.

**ARTICLE 12: LIST OF POTENTIAL JURORS.** The government will prepare the lists of peoples who meet the requirements established in this law. It will also raffle the lists of people, separated by sex and by their belonging to the indigenous communities, respectively.

**ARTICLE 13: CONTROLLER.** For the purposes of controlling the draw, invitations will be sent to the entire community to witness it, particularly to the bar associations of the different judicial districts, to the local government and to other entities linked to legal work and authorities of the indigenous nation.

**ARTICLE 14: LIST FOR EACH TRIAL. INTEGRATION.** The list of jurors for the trial will be integrated, in equal parts of women and men, with the first fourteen (14) that emerge from the draw, assuming the first twelve (12) as starters

and the last two (2) as substitutes. The rest of the drawn jurors will remain affected by the process until the stage of excuses and challenges with cause ends. When any of the main jurors summoned is removed due to excuse or challenge, the rest of the list will be designated successively, according to the order of the draw.

**ARTICLE 15: OATH OF THE JURY.** The main jurors and substitutes will take a solemn oath before the judge, under penalty of nullity. The jurors will stand up and the secretary will pronounce the following formula: “Do you promise, in your capacity as a jury, on behalf of the People, to examine and judge the case impartially and with the utmost attention, giving the verdict according to your best knowledge and belief, in accordance with the evidence produced and observing the Constitution of the Nation and the NICT Charter?”, to which the answer will be “Yes, I promise.”

Once the promise has been made, the trial will be declared open. Substitute jurors must be present throughout the development of the debate, until the time when the main juror leaves for the deliberations. When any of the main jurors is removed due to subsequent excuse, the alternate juror or jurors that follow in numerical order of the draw will replace them.

**ARTICLE 16: INITIAL INSTRUCTIONS.** Immediately after the oath of law, the judge will give the jury initial instructions, describing how a trial is conducted, what is evidence and what is not, how testimonial evidence is valued, for which crimes the defendant is tried and the principles

fundamental constitutional provisions that they must observe, especially the scope of the evidentiary standard of beyond a reasonable doubt. The judge will also warn them that, at the end of the debate, the judge will give them final instructions with the precise explanation of the crimes and the legal issues to be resolved.

**ARTICLE 17: CONTENT OF THE FINAL INSTRUCTIONS.** The judge will have the jury enter the courtroom to verbally give instructions. The judge will first explain to the jury the rules governing deliberation, give them a written copy of the rules along with the instructions, explain how the proposed verdict form(s) is made, and inform them that they must attempt to render a unanimous verdict in secret and continuous session. The judge will also tell them that, at some point in their deliberations, they will have to choose a spokesperson.

**ARTICLE 18: RENDERING OF THE VERDICT.** The jury, under the direction of its spokesperson, will agree on the best way to order the deliberations and carry out the voting. If they decide to vote with individual ballots, they will be destroyed immediately once the verdict is obtained, taking care that people outside the jury do not become aware of it. After the jury has agreed on the verdict, the final form(s) delivered by the judge will be completed, signed and dated by the spokesperson in the presence of the entire jury. Then the full jury will return to the session room under the custody of the official for its announcement.

## **ANNEX D: International Covenant on the Rights of Indigenous Nations**

### **International Covenant on the Rights of Indigenous Nations**

*Authorized Ratified Version*

Initialed July 28, 1994

Geneva, Switzerland

#### **PREAMBLE**

**AFFIRMING** that Indigenous Nations are peoples equal in dignity and rights to all other peoples, while recognizing the right of all individuals and peoples to be different, to consider themselves different, and to be respected as such,

**CONSIDERING** that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

**REAFFIRMING** that all doctrines, policies and practices based on or advocating superiority of peoples, groups or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, culturally repugnant, legally invalid, morally condemnable and socially unjust,

**REAFFIRMING ALSO** that Indigenous Nations, in the exercise of their rights, must be free from discrimination of any kind,

**CONCERNED** that many Indigenous Nations have been deprived of their human rights and fundamental freedoms, resulting, inter alia, in the dispossession of their lands, territories and resources, thus obstructing the free exercise,

in particular, of the right to development in accordance with each Nation's own needs and interests,

**RECOGNIZING** the urgent need to respect and promote the inherent rights and characteristics of Indigenous Nations, especially the right to lands, territories and resources, which derive from each Nation's culture; aspects of which include spiritual traditions, histories and philosophies, as well as political, economic and social customs and structures,

**WELCOMING** the fact that Indigenous Nations are organizing themselves in order to bring an end to all forms of discrimination and oppression wherever they occur,

**CONVINCED** that perfecting the control of Indigenous Nations over development decisions affecting them and their lands, territories and resources will enable each Nation to continue to strengthen its institutions, cultures and traditions, as well as to promote self-sustaining development in accordance with its aspirations and needs,

**RECOGNIZING ALSO** that respect for Indigenous Nations' cultures, knowledge and practices contributes to the sustainability of the natural environment and continuity of biological and cultural diversity,

**EMPHASIZING** the need for demilitarization of the lands and territories of Indigenous Nations, which will contribute to peace, economic and social balance, understanding and friendly relations among Nations and between Nations and States of the world,

**REAFFIRMING** that it is vital for indigenous families and communities to retain shared responsibility for the welfare, upbringing, training and education of their children,

**RECOGNIZING** that Nations have the right to determine their own affairs and freely determine their relations with other Nations and States in a spirit of coexistence, mutual benefit and full respect,

**CONSIDERING** that treaties, agreements, and other constructive arrangements between Nations and between Nations and States are matters of international concern and responsibility; and the peaceful resolution of conflicts and disputes between Nations and between Nations and States is essential to balanced and coexisting relations between peoples,

**NOTING** that the Charter of the United Nations, International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and resolutions and declarations of the World Council of Indigenous Peoples, the Inuit Circumpolar Conference, the International Indian Treaty Council and other international bodies related to these organs affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

**BEARING IN MIND** that nothing in this Convention may be used as a pretext to deny any peoples their right of self-determination,

**ENCOURAGING** Nations to comply and seek the compliance of States with the effective implementation of all international instruments, including this Convention, as they apply to Indigenous Nations, in consultation and cooperation with the peoples concerned,

**BELIEVING** that this Convention is an important development in the recognition, promotion and protection of the rights and freedoms of Indigenous Nations, the establishment of coexistence between Nations and between Nations and States, and in the development of relevant activities of the international institutions in this field,

SOLEMNLY AFFIRM AND RATIFY IN ACCORDANCE WITH EACH SIGNATORY

NATION'S CUSTOMARY PROCESSES the following Principles and Covenants:

## **ARTICLE I DECLARATION OF PURPOSE**

Nations signatory to this Covenant, exercising their inherent sovereign powers, declare their mutual respect and these covenants to promote peaceful cooperation to preserve, protect and guarantee the rights and responsibilities of nations and the inherent dignity and the equal and inalienable rights of individuals, and to promote freedom, justice and international peace.

## **ARTICLE II: PRINCIPLES OF THE CONDUCT OF NATIONS AND RELATIONS WITH STATES**

### **PART I: SELF-DETERMINATION OF NATIONS**

Para. 1 Indigenous Nations are peoples which have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations and in international human rights law;

Para. 2 Indigenous Nations are free and equal to all other human beings and peoples in dignity and rights, and have the right to be free from discrimination of any kind based on their origin or identity;

Para. 3 Indigenous Nations have the right of self-determination, in accordance with international law, and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development without external interference;

Para. 4 Indigenous Nations may freely choose to participate fully in the political, economic, social and cultural life of a State while maintaining their distinct political, economic, social and cultural characteristics, and not relinquishing the inherent right of sovereignty;

## **PART II: PEACE, SECURITY AND PROTECTION FROM GENOCIDE**

Para. 5 Each Indigenous Nation possesses the collective right to exist in peace and security as a distinct people and to be protected against any type of genocide.

In addition, the individuals of each Nation have rights to life, physical and mental integrity, liberty and security of person;

Para. 6 Each Indigenous Nation has the right to be protected against ethnocide and cultural

genocide, including the prevention of and redress for:

- (a) Removal of children from their families and communities under any pretext;
- (b) Any action which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities;
- (c) Any form of forced assimilation or integration by imposition of other cultures or ways of life by way of communications media, religious or educational institutions, governmental legislation, administration or other measures or means;
- (d) Dispossession of their lands, territories or resources;
- (e) Any propaganda directed against them;

Para. 7 Each Indigenous Nation has the inherent collective and individual right to maintain and develop its distinct characteristics and identities, including the right to identify or define itself;

Para. 8 The right of a person to belong to an Indigenous Nation or community is a matter of individual choice and the free right of an Indigenous Nation or community to define its membership, and no disadvantage of any kind may arise from the exercise of such a choice;

Para. 9 Indigenous Nations shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the peoples concerned and not until after agreement on just and fair

compensation and, where possible, with the option of return;

Para. 10 Indigenous Nations have the right to special protection and security in periods of armed conflict. Nations and States shall be encouraged to observe international standards for the protection of civilian populations (with special attention to the enforcement of relevant provisions of either Protocol I or Protocol II of the Geneva Conventions of 1949) in circumstances of emergency and armed conflict, and shall not:

- (a) Recruit individual members of Indigenous Nations against their will into the armed forces of, and in particular for use against, other Indigenous Nations;
- (b) Recruit children into the armed forces under any circumstances;
- (c) Force Indigenous Nations to abandon their lands and territories and means of subsistence and relocate them in special centres for military purposes;

### **PART III: THE CULTURAL RIGHTS OF NATIONS**

Para. 11 Indigenous Nations have the right to practice their cultural traditions and

evolve culture in relation to lands and territory without interference. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archeological and historical sites and structures, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution

of cultural, religious and spiritual property taken without their free and informed consent or in violation of their laws;

Para. 12 Indigenous peoples have the right to manifest, practice and teach spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains. Nations and States shall be encouraged to take effective measures to preserve, respect and protect the sacred places and cemeteries of each Indigenous Nation;

Para. 13 Indigenous Nations have the right to instill, use, develop and transmit to future generations their languages, oral traditions, writing systems and literature, and to designate and maintain their own names for communities, places and persons. Nations and States shall be encouraged to take effective measures to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means;

### **PART IV: THE RIGHT TO KNOWLEDGE AND INFORMATION**

Para. 14 Indigenous Nations have the right to all levels and forms of education, including access to education in their own languages, and the right to establish and control their educational systems and institutions according to their own customs and traditions;

Para. 15 Indigenous Nations have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations reflected in all forms of education and public information. Nations and States shall be encouraged to take effective measures, in consultation with each Indigenous Nation, to eliminate prejudice and to promote tolerance, understanding and good relations;

Para. 16 Indigenous Nations have the right to establish their own media in their own language and to exercise the right to equal access to all forms of communications media; Nations and States shall be encouraged to take effective measures to ensure that public media duly reflect the cultural diversity of affected Nations.

#### **PART V: THE RIGHT OF NATIONS TO DECIDE**

Para. 17 Indigenous Nations have the right to participate fully at all levels of decision-making in matters which may affect their rights, lives or destinies by direct popular participation or through representatives chosen by themselves in accordance with their own customs;

Para. 18 Indigenous Nations have the right to participate fully, through procedures determined in consultation with them, in devising legislative and administrative measures that may affect them. Nations and States shall be encouraged to obtain the free and informed consent of the peoples concerned before implementing such measures;

Para. 19 Indigenous Nations have the right to maintain and develop their economic and social

systems, to be secure in the enjoyment of their own means of subsistence, and to engage freely in their traditional and other economic activities, including hunting, fishing, herding, gathering, forestry and cultivation. Indigenous peoples who have been deprived of their means of subsistence are entitled to just and fair compensation;

Para. 20 Indigenous Nations have the right to extraordinary measures for the immediate, effective and continuing improvement of their economic and social conditions, including improvement in the areas of employment, vocational training and retraining, housing, health and social security.

Attention shall be paid to the special needs of the elders, women, youth, children and disabled of each Nation;

Para. 21 Indigenous Nations have the right to determine and develop priorities and strategies for their well-being. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions;

Para. 22 Indigenous Nations have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals, and minerals;

#### **PART VI: THE RIGHT TO LAND, TERRITORIES AND PLACE**

Para. 23 Indigenous Nations have the right to recognition and respect of their distinctive and profound relationship with their lands and

territories which is the essence of culture. The use of the phrase “lands, territories and Place” in this Convention means the total environment of the land space, soils, air, water, sky, sea, sea-ice, flora and fauna and other resources which indigenous peoples used historically and on which they continue to depend to sustain and evolve their culture;

Para. 24 Each Indigenous Nation has the collective and individual right to own, control and use its lands and territories according to its wants and needs. This includes the right to the full recognition by Nations and States of their laws and customs, land-tenure systems and institutions for the management of resources, and the right to expect effective measures by Nations and States to prevent any interference with or encroachment upon these rights;

Para. 25 Indigenous Nations have the right to restitution for lands and territories

which have been confiscated, occupied, used or damaged without their free and informed consent, the return of lands and territories and, where neither is acceptable to the Nation, to just and fair compensation. Unless otherwise freely agreed within balanced negotiations by the peoples concerned, compensation shall take the form of lands and territories at least equal in quality, size and legal status;

Para. 26 Indigenous Nations have the right to the recreation and protection of the total environment and the productive capacity of their lands and territories, as well as to assistance for this purpose from States and through

international cooperation. Military activities and the storage or disposal of nuclear or toxic materials or other hazardous materials shall not be permitted in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned;

Para. 27 Indigenous Nations have the right to special measures taken to protect, as intellectual property, their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs and visual and performing arts;

Para. 28 Each Indigenous Nation has the right to require that States and other Nations obtain its free and informed consent prior to the approval of any projects on its land and territory, particularly in connection with natural resource development or exploitation of soils, water, mineral or other subsurface resources. Pursuant to agreement freely negotiated with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact;

## **PART VII: POLITICAL RIGHTS OF NATIONS**

Para. 29 Indigenous Nations have the right to freely determine their own political status and to exercise self-government in accord with the principle of self-determination;

Para. 30 Indigenous Nations have the right to freely determine the structures and to select the membership of their autonomous or self-

governing institutions in accordance with their own customary laws;

Para. 31 Indigenous Nations have the right to retain and develop their customs, laws and legal systems, in accord with universally recognized human rights and fundamental freedoms, and to have these respected by other Nations and recognized in the legal system and political institutions of the States with which each Nation may have cooperative relations;

Para. 32 Each Indigenous Nation has the right to determine the responsibilities of individuals to its communities in a manner not incompatible with universally recognized human rights and fundamental freedoms;

Para. 33 Indigenous Nations wholly within States' borders and those Nations divided by the imposition of States' borders have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other Indigenous Nations across recognized State borders;

#### **PART VIII: TREATIES, AGREEMENTS AND DISPUTE RESOLUTION**

Para. 34 Each Indigenous Nation has the right to the observance and enforcement of treaties, compacts, agreements and other constructive arrangements concluded with other Nations and with States or their successors, according to their original intent. Conflicts and disputes which cannot otherwise be settled through direct negotiations or other peaceful means must be

submitted to competent international bodies agreed to by all parties concerned;

Para. 35 Indigenous Nations have the right to freely access and receive prompt decisions through mutually acceptable and fair procedures for the resolution of conflicts and disputes between Nations and between Nations and States, as well as to effective remedies for all infringements of their individual and collective rights;

#### **PART IX: INCORPORATION AND COMING INTO FORCE**

Para. 36 Nations signatory to this Convention shall encourage other Nations and States to take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Convention. Where appropriate and relevant signatory Nations shall incorporate in their own customary laws and institutions, and encourage States to promulgate legislation adopting the rights and principles contained herein;

Para. 37 Indigenous Nations have the right to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development, and for the enjoyment of the rights and freedoms contained in this Convention;

Para. 38 Signatory Nations and the organs and specialized agencies of the system of international Indigenous Nations' organizations and non-governmental organizations shall be

encouraged to contribute to the full realization of the provisions of this Convention through the mobilization, inter alia, of financial and technical cooperation;

Para. 39 A Council of Nine comprised of delegates from the first nine Signatory Nations, with rotating delegate membership drawn from subsequent Signatory Nations annually, shall monitor the implementation of this Convention and serve as the repository for accurate and authorized original copies of ratified instruments, which shall be recorded by the name of the ratifying nation, ratification date, reservations and/or understandings upon receipt, and the status of ratifications shall be reported to all Signatory Nations and to relevant States' institutions annually;

Para. 40 Upon applying the initials of duly authorized delegates, appointed by Indigenous National authorities, meeting in Geneva, Switzerland 24-29, 1994 at the Palaise de Nacion this Convention shall be provisionally accepted in principle by all initialing parties acting on behalf of the participating Nations for a term of 12 months after initialing or until formal ratification in accord with each Nation's customary laws, whichever is earlier. A decision not to ratify this Convention automatically renders it null-and-void in connection with the Nation declining to ratify;

Para. 41 This Convention shall come into force when thirty Nations shall have formally ratified its provisions according to their customary processes. The Convention shall be open for

ratification by Indigenous Nations for a period of 12 months after the date when four Nations shall have given their provisional authorization through delegates initialing on their behalf;

Para. 42 Each Nation which ratifies this Convention may place conditions on its participation through reservations and understandings. A Statement of Reservations shall indicate specific provisions of this Agreement which shall apply or not apply to the ratifying Nation under specified conditions. Each ratifying Nation may attach explanations or clarifications expressing different meanings associated with provisions through a Statement of Understandings. These Reservations and Understandings shall become a part of the Convention and receive full respect by other ratifying Nations;

Para. 43 This Convention may be modified or amended after coming into force by request of any ratifying party upon due consideration of all ratifying Nations at a special conference called for the purpose of modification or amendment. All amendments shall be subject to ratification by the customary processes of Signatory Nations. Unanimous Consent is required for modifications or amendments.

#### **ARTICLE IV: SAVINGS AND PROCEDURES**

Para. 44 The Inuit Circumpolar Conference shall serve as the provisional repository of the initialed and ratified instruments until other arrangements are made by agreement of ratifying Nations;

Para. 45 The rights contained herein constitute the minimum standards for the survival and well-being of the indigenous peoples of the world;

Para. 46 Nothing in this Convention may be interpreted as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

### **Delegate Initial**

**On Behalf of the Nation of: Initialing Date:**

**Ratification Date:**

**Initialing Parties in accord with**

**Article III, para. 40:**

**Mr. Nadir Bekir**, Political and Legal Affairs The Crimean Tatars (27-07-94)

**Mr. A-Bagi Kabeir**, On behalf of the Numba People of Sudan (28-07-94)

**Mr. Ron Lameman**, Confederacy of Treaty Six First Nations (28-07-94)

**Ms. Judy Sayer**, Opethesaht First Nation (28-07-94)

**Mr. Viktor Kaisiepo**, West Papua Peoples Front/OPM (28-07-94)

### **Ratifying Nations as of 2023**

1. Abābdah Nation of Egypt and Sudan
2. Adnanite Anazzah Tribe of Iraq
3. Afghan Hindu Congress
4. Ahwaz Nation of Iran
5. Al-Anbar-Al-Jolan
6. Al-Dulaimi Tribal Confederation of Iraq

7. Al-Qaddafi Tribe
8. Albu-Nasral-Tikriti
9. Amazigh Tribes of Libya
10. Amazigh Confederation of North Africa
11. Amazigh Kabyle of Algeria
12. Amazigh Tribes of Egypt
13. Amazigh Tribes of Mali
14. Amazigh Tribes of Morocco
15. Amazigh Tribes of Niger
16. Amazigh Tribes of Tunisia
17. Anazzah Tribal Confederation of Iraq
18. Bani Murra Romas of Jordan
19. Bidoon tribes of Iraq and Kuwait
20. Confederation of Roma Tribes of the Middle East
21. Domari Confederation of the Middle East
22. East Kurdistan
23. Ezidikhan Armenia
24. Ezidikhan Georgia
25. Ezidikhan Iraq
26. Ezidikhan Syria
27. Anatolian Ezidikhan
28. Fallujah Tribal Confederation
29. Ḥizb Al-Ba'aṭ Al-'Arabī Al-Ištīr Tribe of Iraq
30. Idlib Druze-Domari Alliance of Syria
31. Jahalin Bedouin Tribe of Palestine
32. Jews of Morocco
33. Kalash Chitral Indigenous Tribal Coalition
34. Kam Assembly of Turkey
35. Khuzestan

36. Kirkuk Bayat Tribe
37. Kurdish Republic
38. Laz Tribal Nation – 31 March 2022
39. Luristan - 20 February 2021 (CINMENA)
40. Ma'dān Nation of Iraq & Iran - 20 February 2021 (CINMENA)
41. Mandaeans of Iraq Iran & Syria - 20 February 2021 (CINMENA)
42. Marsh Arab Tribal Nation – 31 March 2022
43. Mullagori Tribes of Pakistan and Afghanistan – 19 August 2021
44. Nineveh Tribal Assembly of Iraq – 1 October 2021
45. Nubians of Upper Egypt – 24 November 2021
46. Pashtun Tribes of Afghanistan – 15 November 2021
47. Qashqai Tribes – 17 November 2020
48. Rashaida Tribe of Bedouin Arabs – 20 November 2021
49. Salahadin Tribe of Iraq - 20 November 2021
50. Shabaks of Iraq – 19 June 2021
51. Shammar Tribes of Iraq – 16 March 2021
52. Sulukule (Roma) of Turkey – 6 September 2021
53. Syrian Bedouin Confederation – 24 June 2021
54. Tafsut Amazigh of Morocco – 2 July 2021
55. Tuareg Tribes of North Africa – 29 March 2022
56. Turkmen Tribes of Afghanistan – 15 November 2021
57. Turkmen of Iran – 24 November 2020
58. Turkmen of Syria – 10 November 2020
59. Urugati Tribal Nation – 9 April 2021
60. World Amazigh Congress – 21 May 2021
61. Yarmouk Basin Nations – 27 June 2021
62. Yarsan Nation of Iraq & Iran – 20 February 2021 (CINMENA)
63. Yezidi Supreme Spiritual Council – 1 October 2021
64. Zargari Nation of Iran – 25 June 2021
65. Zagros Liberal Alliance of Iran – 1 February 2021
66. Zoroastrians of Iran, Iraq, Syria, Turkey, Afghanistan, Pakistan and India – 21 May 2021
67. Zuwayya Tribal Nation – 11 April, 2022

#### **ANNEX E: ALDMEM for Negotiated Consent and Restorative Justice**

ALDMEM is an international mechanism in process of formation for Indigenous nations and state' governments to formally mediate disputes and negotiate consent of parties according to a process referred to as FPIC or "free, prior and informed consent." Specifically, the process must be carried out when nations, states or any of their corporations, non-governmental organizations, or multi-lateral organizations wish to take actions that affect nations' interests: wellbeing, culture, economy, environment, or society or exercise of self-determination. When and if harm to a nation's interests is at risk of harm it is incumbent on a nation or state to seek mediated compromise

and reconciliation consistent with Restorative Justice. The internationally recognized process of free, prior and informed consent embraces the concept of compromise and reconciliation to affirm peace and comity.

States' governments acted in the World Conference on Indigenous Peoples high-level plenary meeting of the General Assembly 2014 Outcome Statement stating that UN member states commit to implementing FPIC. In their commitments, UN member states voted to (para 3) "cooperate in good faith with indigenous peoples ... through their ... representative institutions" and to secure "approval of any project affecting their lands or territories and other resources ... through their free, prior, and informed consent." These statements assert the intention of states to implement the UN Declaration on the Rights of Indigenous Peoples (2007), the ILO Convention 169 (1989), and other international instruments. In addition, Indigenous nations have adopted other international laws to implement FPIC, including the 1994 International Convention on the Rights of Indigenous Nations and the Alta Outcome Document of 2013. FPIC is a necessary concession by States' Governments and Indigenous Nations to freely negotiate the consent of indigenous nations based on the basis of "political equality." The laws agreed to by states and nations require that engagements are required to go beyond "consultations" which must be recognized as the first step in the process of FPIC and must directly involve negotiation of consent in the form of agreements between parties.

Negotiated Consent agreements may concern the introduction of state or nation-originated health programs, education institutions, economic policies, environmental policies, cultural practices, acts that violate cultural life and mass violence, and access to ancestral territories and the resources in those territories historically relied on by nations to sustain life. Important as the FPIC process is, the reality is that there is no authorized mechanism to implement the process to facilitate the identification of problems, negotiation of consent, and enforcement of agreements between contending nations or nations and states.

The United Nations and other state-based organizations cannot establish a mechanism to implement FPIC. The only means for implementing the process are "good faith measures exercised by individual states, corporations, and other entities" or internal state or corporate laws and practices defined by the state or corporation. While scores of indigenous nations have defined protocols, they wish to implement FPIC, nations, states, corporations, and other entities chose not to comply with them.

As political equals to states, Indigenous peoples must sit at the same table with states, corporations, and other entities to establish a new international mechanism to promote and carry out the FPIC process—a hybrid international body that serves as the only alternative to state-based organizations. The international mechanism achieving the goal of mediated negotiations between nations and states is ALDMMEM – Ancestral Lands decolonization, monitoring, and Enforcement Mechanism.

ALDMEM is organized under the supervision of the ALDMEM International Commission comprised of five indigenous nations, five corporations, five states and five non-governmental organizations serving as the charter ratifying entities. The ALDMEM International Commission exercises the following functions:

**Oversee operations of the organization that is carried out by the following personnel:**

- Secretary General
- Monitoring Staff: Responsible for documentation, evaluating and tracking nation, corporate, state and NGO activities in relation to the peaceful occupation and use of ancestral territories worldwide. Maintain and evaluate existing relations, and document circumstances of relations between affected parties.
- Diplomatic Staff: Engage, nation, state, corporate and NGO parties and multilateral parties to facilitate engagement. Facilitate Third Party Guarantors, observers and affected parties.
- Communications Staff: Develop and maintain language, cultural, environmental, and geographic information to facilitate communications between nations, nations and states, corporations, NGOs and to conduct research.
- Mediation Staff: Directly engage parties in conflict and facilitate mutual understanding, rules for negotiations and consent.
- Public Affairs Staff: Develop and produce public information about engagement between nations, state, corporations and NGOs.

**The Purpose, Mission and Goals of this preliminary plan is open for discussion and debate.**

**PURPOSE:**

Through a cooperative agreement between indigenous nations, non-governmental organizations, corporations, and states establish a mechanism funded by independent sources to facilitate monitoring, negotiations, agreements, and enforcement based on standards and procedures established in a ratified charter establishing ALDMEM.

**MISSION:**

To facilitate negotiation of agreements (compacts, treaties, etc.) between nations and parties seeking to establish policies, resolve conflicts, take actions affecting land and communities and which seek access to ancestral territories for the purpose of using or extracting resources for outside benefit.

**GOALS:**

- Register nation, state, corporate and purchaser parties seeking to socially, economically, environmentally, culturally engage in activities that affect indigenous communities and use lands or extract resources from ancestral territories.
- Monitor existing territorial occupations and respond to nation requests for mediation between the nation and other parties

- Facilitate Third Party Guarantor participation of negotiations as an active party with a mutually determined role as monitor and enforcer of the final agreements.
- Notify prospective parties of the mediation, arbitration, and Third-Party Guarantor and negotiation framework for establishing amicable relations between parties and offer venues for engagement.
- Facilitate communications about customary governance of nations, structure of corporate, state and purchaser systems.
- Facilitate communications, translation, and customary languages to maximize understanding of engagement between parties.
- Conduct Public Affairs communications in symposiums, public media releases, public conferences, and documentary releases.

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# Tribunal Penal Internacional de Naciones

## Borrador 200823 - abierto a modificaciones de las partes principales

Preparado por el Panel Internacional del Estatuto del NICT

Traducido por Yesenia Cortés

### RESUMEN

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El Estatuto del Tribunal Penal Internacional de Naciones (NICT, por sus siglas en inglés) describe un marco jurídico híbrido mediante el cual se pueden procesar crímenes internacionales contra las naciones indígenas. El Estatuto surge de las consultas del Dr. Rudolph Rýser con la nación yazidí en el norte de Irak tras el genocidio perpetrado por ISIS en 2014. Dirigido por Rýser, el Centro para los Estudios Indígenas del Mundo redactó un instrumento mediante el cual las naciones indígenas de todo el mundo pueden buscar reparación legal por las atrocidades históricas y actuales cometidas en su contra. El estatuto está compuesto por 13 secciones que detallan la jurisdicción, la administración y los mecanismos mediante los cuales opera el tribunal. Entre otros, el tribunal supervisa crímenes de genocidio, agresión, colonización, ecocidio y violencia de género. El estatuto proporciona un conjunto integral de códigos que garantizan el debido proceso para todas las partes involucradas. A diferencia de instituciones jurídicas internacionales anteriores, el NICT traza canales específicos para hacer cumplir sus resoluciones basándose en principios de justicia reparadora, garantizando la autodeterminación y autonomía de las naciones indígenas dentro del proceso jurídico.

**Palabras clave:** Tribunal Penal Internacional de Naciones (NICT), Estatuto del NICT, justicia indígena, derecho internacional, crímenes contra los pueblos indígenas, genocidio, ecocidio, derechos de los pueblos indígenas, crímenes de lesa humanidad, genocidio yazidí

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### Tabla de contenido

Tribunal Penal Internacional de Naciones

#### PREÁMBULO

#### SECCIÓN 1. ESTABLECIMIENTO DEL TRIBUNAL

Artículo 1. Propósito

Artículo 2. Definiciones

- Artículo 3. Principios
- Artículo 4. El Tribunal
- Artículo 5. Relaciones Jurisdiccionales
- Artículo 6. Sede del Tribunal
- Artículo 7. Condición Jurídica y Facultades del Tribunal

## **SECCIÓN 2. JURISDICCIÓN, ADMISIBILIDAD Y LEY APLICABLE**

- Artículo 8. Crímenes en la Jurisdicción del Tribunal
- Artículo 9. Crímenes de Agresión
- Artículo 10. Genocidio
- Artículo 11. Crímenes de Lesa Humanidad
- Artículo 12. Crímenes de Guerra
  - Conflicto armado
- Artículo 13. Elementos de los Crímenes
- Artículo 14. Limitaciones a las Normas de Derecho Internacional
- Artículo 15. Obligaciones Jurisdiccionales (ratione temporis) a Través del Tiempo
- Artículo 16. Condiciones Previas al Ejercicio de la Jurisdicción
- Artículo 17. Ejercicio de la Jurisdicción
- Artículo 18. Remisión de una Situación por una Nación o Estado Parte
- Artículo 19. Director
- Artículo 20. Aplazamiento de la Investigación o el Enjuiciamiento
- Artículo 21. Problemas de Admisibilidad
- Artículo 22. Decisiones Preliminares sobre Admisibilidad
- Artículo 23. Doble Incriminación
- Artículo 24. Impugnación de la Jurisdicción o Admisibilidad de la Evidencia
- Artículo 25. Ley aplicable

## **SECCIÓN 3. COMPOSICIÓN Y ADMINISTRACIÓN DEL TRIBUNAL**

- Artículo 26. Órganos del Tribunal
- Artículo 27. Comisión Internacional de Partes
- Artículo 28. Comisión de Revisión de Fiscalía
- Artículo 29. Magistrados
- Artículo 30. Servicio, Requisitos, Nombramiento y Selección de Jueces
- Artículo 31. Vacantes de Puestos Judiciales
- Artículo 32. Magistrado Principal
- Artículo 33. Salas

- Artículo 34. Independencia Judicial
- Artículo 35. Excusa o Descalificación de los Jueces
- Artículo 36. Oficina del Director
- Artículo 37. Registro
- Artículo 38. Personal del Tribunal
- Artículo 39. Compromiso Solemne
- Artículo 40. Destitución del Cargo
- Artículo 41. Medidas Disciplinarias
- Artículo 42. Privilegios e Inmunidades
- Artículo 43. Idiomas Oficiales y de Trabajo
- Artículo 44. Reglas de Procedimiento y Evidencia

#### **SECCIÓN 4: PRINCIPIOS GENERALES DEL DERECHO PENAL**

- Artículo 45. No Hay Crimen sin Ley
- Artículo 46. Sin Ley no Hay Condena
- Artículo 47. Irretroactividad por Razón de Cargo Oficial
- Artículo 48. Responsabilidad Penal
- Artículo 49. Irrelevancia del Cargo Oficial
- Artículo 50. Responsabilidad de los Comandantes y Superiores
- Artículo 51. Inaplicabilidad de la Carta de Limitaciones
- Artículo 52. Elemento Mental
- Artículo 53. Mitigación de la Responsabilidad Penal
- Artículo 54. Órdenes Superiores y Prescripción de la Ley Interna
- Artículo 55. Reglamento de la Corte

#### **SECCIÓN 5. CÓDIGO JURÍDICO, INVESTIGACIÓN Y PROCESAMIENTO**

- Artículo 56. Deberes y Facultades Investigativas del Director
- Artículo 57. Derechos Durante una Investigación

#### **SECCIÓN 6. JUICIO**

- Artículo 58. Lugar del Juicio
- Artículo 59. Juicio en presencia del Imputado
- Artículo 60. Funciones y Atribuciones de la Sala de Primera Instancia
- Artículo 61. Admisiones de Culpabilidad
- Artículo 62. Presunción de Inocencia

- Artículo 63. Derechos del Imputado
- Artículo 64. Protección de Víctimas y Testigos
- Artículo 65. Evidencia
- Artículo 66. Delitos contra la Administración de Justicia
- Artículo 67. Sanciones por Mala conducta Ante el Tribunal
- Artículo 68. Requisitos para una Decisión
- Artículo 69. Reparaciones
- Artículo 70. Sentencia
- Artículo 71. Protección de la Seguridad del Estado o de la Nación

## **SECCIÓN 7. SANCIONES**

- Artículo 72. Sanciones aplicables
- Artículo 73. Sentencia
- Artículo 75. No Perjuicio en la Aplicación de Sanciones Previstas en las Leyes Estatales y Nacionales

## **SECCIÓN 8. APELACIÓN Y REVISIÓN**

- Artículo 76. Recurso de Sentencia Absolutoria o Condenatoria
- Artículo 77. Recursos contra otras Decisiones
- Artículo 78. Procedimiento de Apelación
- Artículo 79. Revisión de la Condena o Sentencia
- Artículo 80. Detención Ilegal

## **SECCIÓN 9. COOPERACIÓN INTERNACIONAL Y ASISTENCIA JUDICIAL**

- Artículo 81. Compromiso de Cooperación de las Partes
- Artículo 82. Solicitudes de Cooperación
- Artículo 83. Procedimientos de Derecho Interno
- Artículo 84. Entrega de los imputados
- Artículo 85. Solicitudes en Competencia
- Artículo 86. Solicitudes de Arresto y Entrega
- Artículo 87. Arresto Provisional
- Artículo 88. Otras Formas de Cooperación

## **SECCIÓN 10. CUMPLIMIENTO**

- Artículo 89. Rol del Estado o Nación en la Ejecución de las Penas Privativas de Libertad
- Artículo 90. Traslado Después de la Sentencia
- Artículo 91. Ejecución y Supervisión
- Artículo 92. Ejecución de Multas y Medidas de Decomiso

Artículo 93. Revisión del Tribunal en Relación con la Reducción de la Pena.

Artículo 94. Fuga

Artículo 95. Acuerdos Especiales de Asistencia y Colaboración

## **SECCIÓN 11. COMISIÓN INTERNACIONAL DE LAS PARTES**

## **SECCIÓN 12. APOYO FINANCIERO**

Artículo 96. Reglamento Financiero

Artículo 97 Pago de Gastos

Artículo 98 Financiación

Artículo 99 Aportes Voluntarios

Artículo 100. Determinación de las Contribuciones

Artículo 101. Auditorías

## **SECCIÓN 13. CLÁUSULAS DE CIERRE**

Artículo 102. Solución de Controversias

Artículo 103. Reservas

Artículo 104. Modificaciones

Artículo 105. Modificaciones a Disposiciones de Carácter Institucional

Artículo 106. Revisión de la Carta

Artículo 107. Disposición Transitoria

Artículo 108. Firma, Ratificación, Aceptación, Aprobación o Adhesión

Artículo 109. Entrada en Vigor

Artículo 110. Retiro

Artículo 111. Textos Oficiales

Ratificación autorizada

ANEXO A: Tratado de Sèvres, (10 de agosto de 1920) por Armenia

ANEXO B: Establecimiento del Gobierno Provisional de Ezidikhan

ANEXO C: Juicio por jurado

ANEXO D: Pacto Internacional sobre los Derechos de las Naciones Indígenas

ANEXO E: ALDMEM para Consentimiento Negociado y Justicia Restaurativa

## PREÁMBULO

### La Nación y los Estados Partes en el presente Carta

Comprendiendo que todos los pueblos comparten una herencia común de la Madre Tierra,

reconociendo que durante siglos las Naciones del mundo han sufrido actos horribles en los que millones de niños, mujeres y hombres y pueblos enteros han sido víctimas de horribles atrocidades de invasiones, opresión religiosa, colonización, trauma, erradicación étnica, destrucción económica, traslado forzoso de niños, violencia sexual contra la mujer, hambre e inseguridad alimentaria, ocupaciones y asentamientos forzados, negación forzada de la orientación sexual, asimilación forzada, desarraigo, asesinatos en masa, cambio demográfico forzado, expulsiones, explotación, apartheid, esclavitud, tortura y genocidio físico, ecológico y cultural, negación de la soberanía, negación de la autodeterminación de las Naciones;

aceptando que los acuerdos y tratados internacionales entre los gobiernos de los Estados y otros instrumentos jurídicos adoptados para proteger y castigar los crímenes cometidos contra los pueblos no han proporcionado a las Naciones del mundo el debido proceso, reparación o remedio por actos criminales, ya sea negando a las Naciones acceso a la justicia, negación del debido proceso al otorgar inmunidad a los funcionarios y ciudadanos de los Estados o al politizar los sistemas judiciales;

garantizando que el orden jurídico internacional reconoce que las Naciones del

mundo y las leyes consuetudinarias tienen pleno derecho al pleno reconocimiento y dignidad, igualdad política con los Estados, derechos básicos, libertad de tratos inhumanos y degradantes;

considerado que crímenes tan graves socavan la sostenibilidad y la supervivencia y las relaciones pacíficas, la seguridad y la salud entre las Naciones y los Estados;

consternados por el hecho de que desde el genocidio de 1914 - 1925 cometido contra armenios, yezidíes, asirios, zoroastrianos y romaníes, incluidos hombres, mujeres y niños; y que desde 1945 se han cometido más de 160 presuntos delitos de genocidio, tal como se entiende en el derecho internacional de base estatal, contra Naciones de América del Norte, América Central, América del Sur, Asia, Melanesia, Oceanía, África y Europa —actos cometidos por Estados, organizaciones, milicias, o Naciones siguen sin ser escuchadas por los jueces o resueltas por un foro judicial objetivo—, no se logró justicia para las víctimas, y se afianzó la impunidad para los perpetradores de estos crímenes;

asegurando cortesía entre Naciones y Estados y los derechos de las Naciones a la autodeterminación, el autogobierno y el control de sus recursos naturales, no solo para proteger a su pueblo de crímenes abominables y atrocidades, sino también para prevenir delitos y castigar a quienes cometen delitos contra las Naciones de acuerdo con los castigos establecidos en la Declaración Universal de la Madre Tierra y en esta Carta;

concediendo que toda Nación o Estado puede ejercer jurisdicción internacional para tratar de reparar a través de la justicia restaurativa cualquier daño resultante de la comisión de un crimen bajo esta Carta dondequiera que se encuentre (como se establece en el ANEXO E);

afirmando que es deber de todas las Naciones y Estados ejercer jurisdicción legal sobre Estados o Naciones, personas, organizaciones comerciales, organizaciones gubernamentales y no gubernamentales, organizaciones intergubernamentales, grupos armados y otras entidades responsables de crímenes reconocidos internacionalmente;

confirmando el compromiso de cada Nación y Estado de defender el propósito y los principios de esta Carta y el Pacto Internacional sobre los Derechos de las Naciones Indígenas (como se establece en el ANEXO D de la Carta);

resuelto en el compromiso de lograr estos fines para todas las personas, establecer el Tribunal Penal Internacional de las Naciones con jurisdicción sobre todos los crímenes de interés para todos los pueblos;

afirmando que el Tribunal Penal Internacional de las Naciones establecido por esta Carta será complementario a la jurisdicción penal de la Nación y el Estado de acuerdo con su integridad soberana y territorial, y de acuerdo con la soberanía de la República de Armenia y la soberanía de la Nación Ezidikhan, como se establece en ANEXO A y ANEXO B de esta Carta);

resuelto para garantizar el respeto duradero y la aplicación de la rendición de cuentas y la justicia internacionales.

## **SECCIÓN 1. ESTABLECIMIENTO DEL TRIBUNAL**

### **Artículo 1 – Propósito**

El propósito de esta Carta es establecer el Tribunal Penal Internacional de las Naciones.

### **Artículo 2 – Definiciones**

“Agresión”, la acción de un Estado o Nación al violar por la fuerza los derechos de otro Estado o Nación, particularmente sus derechos territoriales, una ofensiva, ataque o invasión no provocada.

“Apartheid” significa actos inhumanos, incluida la clasificación y segregación racial, cometidos en el contexto de un régimen institucionalizado de opresión y dominación sistemáticas por parte de un grupo racial sobre cualquier otro grupo o grupos raciales, y cometidos con la intención de mantener ese régimen.

“Ataque dirigido contra cualquier población civil” significa un curso de conducta que implica la comisión múltiple de actos contra cualquier población civil, de conformidad con la política de un Estado o de una organización para cometer dicho ataque o para promoverlo.

La “colonización” incluye invasión, asentamiento, apartheid, ocupación militar o administrativa, toma de tierras, territorios y recursos, o políticas nacionales de asimilación por parte de una potencia dominante, e incluye la imposición de propaganda u otras formas de declaraciones públicas que designan a una población en términos de separar ‘nosotros’ -el colonizador- y ‘ellos’ -los colonizados- como una

amenaza, como primitivos o atrasados; aplicar nombres y otros símbolos para clasificar a los colonizados como ‘salvajes’ o ‘atrasados’ o para marcar a miembros de un grupo para estigmatizar y humillar; imponer leyes, costumbres y poder político para negar los derechos humanos de un grupo; actos o pronunciamientos públicos y privados que deshumanizan a los miembros de un grupo negando su humanidad como ‘el otro’ o expresiones similares.

El “culturicidio” o genocidio cultural son actos y medidas deliberadas que se llevan a cabo para destruir la cultura de una Nación o grupo étnico a través de la destrucción espiritual, nacional, social y cultural, incluida la destrucción de artefactos culturales como libros, obras de arte y estructuras, la reeducación forzada de miembros de un grupo, la esterilización forzada de hombres y mujeres, institución de leyes para sacar a los niños de un grupo y colocarlos en hogares extranjeros.

“Deportación o traslado forzoso de población” significa el desplazamiento forzado de las personas en cuestión mediante la expulsión u otros actos coercitivos en la zona en la que se encuentran legalmente, sin los motivos permitidos por el derecho internacional.

“Desaparición” significa el arresto, detención o secuestro de personas por, o con la autorización, apoyo o aquiescencia de un Estado o una organización política o grupo privado, seguido de una negativa a reconocer esa privación de libertad o a dar información sobre la suerte o el paradero de esas personas, con la intención de sustraerlas del amparo de la ley por un tiempo prolongado.

“Ecocidio” es la destrucción deliberada del equilibrio de las relaciones ecológicas y el medio ambiente, incluida la destrucción de alimentos y medicinas de los que depende un pueblo.

“Esclavización” significa el ejercicio de cualquiera o todos los poderes relacionados con el derecho de propiedad sobre una persona e incluye el ejercicio de tal poder en el curso de la trata de personas, en particular mujeres y niños.

El “exterminio” incluye la imposición intencional de diversos obstáculos a la supervivencia, inter alia la privación del acceso a alimentos y medicinas, calculada para provocar la destrucción de parte de una población.

“Embarazo forzado” significa el forzamiento ilegal, la violación de mujeres y niñas con el fin de obligar a una mujer a quedar embarazada y tener un hijo, con la intención de afectar la composición étnica de cualquier población o llevar a cabo otras violaciones graves del derecho internacional.

“Génerocidio” es el asesinato de grupos específicos de personas identificadas por su género, generalmente niñas y mujeres, mediante feticidio (aborto selectivo por sexo), infanticidio y violencia de género.

“Indígena” refiere a pueblos autoidentificados como tal, descritos como los habitantes históricamente originales de un territorio o área marítima, que ejercen poder para celebrar tratados, descritos como poseedores de derechos inherentes, así como derechos otorgados por Estados y organismos intergubernamentales internacionales.

“Mutilación” significa deformación severa, amputación de miembros o cualquier tipo de daño corporal permanente.

Una “Nación” se define por una cultura en común, idioma en común, institución, creencias espirituales y/o historia, ejerciendo poder para celebrar tratados, ejerciendo soberanía o soberanía limitada, o bajo ocupación colonial, donde la soberanía es negada por la potencia ocupante, reclamando y/o utilizando un territorio o mar ancestral, y poseyendo derechos inherentes, o pueblos no conectados a un territorio específico debido a la cultura y tradiciones tradicionales nómadas.

El “derecho nacional” es el derecho consuetudinario y estatutario autorizado y aprobado por el órgano Director de las Naciones individuales. De manera similar, el derecho internacional nacional es el derecho consuetudinario o autorizado establecido en acuerdos, convenios, tratados y pactos entre Naciones y entre Naciones y Estados.

“Estado-Nación” es un Estado soberano gobernado por una Nación o confederación de Naciones que comparten historias, idiomas, etnias y cultura comunes o similares con soberanía y territorio y territorios ancestrales.

Los “pueblos” son entidades políticas o sociedades reconocidas internacionalmente que forman un grupo diferenciado con una cultura en común, un idioma en común, instituciones compartidas, una historia en común y que ocupan tierras o zonas marítimas y que poseen derechos inherentes.

Por “persecución” se entiende la privación intencional y grave de los derechos fundamentales contraria al derecho internacional por razón de la identidad del grupo o colectividad.

“Esclavitud”, véase “Esclavización” arriba.

“Estado” es un Estado reconocido internacionalmente que:

- reclama autoridad sobre un territorio definido con fronteras internacionalmente reconocidas,
- tiene una población e instituyó leyes que rigen el comercio exterior e interior,
- tiene la capacidad de emitir moneda de curso legal reconocida a través de las fronteras,
- tiene un gobierno reconocido internacionalmente que presta servicios públicos y ejerce poderes de policía,
- afirma la autoridad para hacer tratados, hacer la guerra y tomar acciones legales, políticas y económicas en nombre de su población y
- afirma la soberanía sobre su territorio reclamado.

La “ley estatal” es la ley consuetudinaria y estatutaria autorizada y aprobada por el órgano Director de los Estados individuales. El derecho internacional estatal es el derecho consuetudinario o autorizado establecido en acuerdos, pactos, tratados y pactos entre Estados y entre Naciones y Estados.

“Tortura” significa la imposición intencional de dolor o sufrimiento intenso, ya sea físico o mental, a una persona bajo la custodia o el control del acusado.

A los efectos de esta Carta, se entiende que el término “género” se refiere a la identidad sexual de una persona.

### **Artículo 3 – Principios**

1. De acuerdo con la jurisdicción universal, una Nación o Estado ejerce jurisdicción dentro de su territorio confirmado. Dicha jurisdicción incluye el poder de crear leyes, interpretar o aplicar leyes y de tomar medidas para hacer cumplir la ley.

2. Si bien la jurisdicción de ejecución generalmente se limita al territorio nacional, el derecho internacional reconoce que, en determinadas circunstancias, una Nación o un Estado puede legislar o fallar sobre hechos que ocurran fuera de su territorio.

3. La no aplicabilidad de las limitaciones legales se aplica a los crímenes contra la humanidad, los crímenes de guerra y los crímenes contra la naturaleza y la cultura humana.

4. Nadie puede ser condenado o castigado por un acto u omisión que no constituya un delito según el derecho nacional o internacional, nacional o estatal, en el momento en que se cometió. Además, establece que no se podrá imponer una pena más grave que la aplicable en el momento en que se cometió el delito.

5. Ninguna persona debe ser juzgada o castigada más de una vez por el mismo delito.

6. Los individuos, las organizaciones y las entidades políticas pueden ser considerados penalmente responsables no solo por cometer crímenes de guerra, crímenes de lesa humanidad y genocidio, sino también por intentar, asistir, facilitar o ayudar e incitar a la comisión de tales crímenes. Las personas, organizaciones o entidades políticas también pueden ser responsables penalmente por planificar, instigar u ordenar la comisión de tales delitos.

7. Las violaciones del derecho penal internacional basado en la Nación y el Estado también pueden resultar de la falta de acción. Las fuerzas o grupos armados generalmente están bajo un mando que es responsable de la conducta de sus subordinados. Como resultado, para que el sistema sea efectivo, los superiores jerárquicos pueden ser obligados a rendir cuentas cuando no toman las medidas adecuadas para evitar que sus subordinados cometan violaciones graves del derecho internacional humanitario.

8. Esta Carta excluye específicamente la disponibilidad de inmunidades funcionales en casos de crímenes internacionales (Artículo 7(2) Carta del Tribunal Penal Internacional para la anterior Carta de Yugoslavia; Artículo 6(2) Carta del TPIR; Artículo 27(1) Carta de la Corte Penal Internacional) y requiere que Cartas Naciones y Estados eliminen las

inmidades con respecto a la perpetración de crímenes internacionales mediante la promulgación de la legislación apropiada en su legislación nacional, y solicita a las Naciones y Estados que no tienen estatutos que renuncien a las inmidades.

10. El principio de nacionalidad o personalidad activa (actos cometidos por personas que tengan la nacionalidad de la Nación o Estado anfitrión del Tribunal);

11. El principio de personalidad pasiva (actos cometidos contra nacionales de la Nación o Estado receptor); o el principio protector (actos que afectan la seguridad del Estado).

#### **Artículo 4. El Tribunal**

Se establece el Tribunal Penal Internacional de las Naciones como una institución que tendrá la facultad de ejercer su jurisdicción sobre personas, organizaciones y gobiernos por los delitos más graves que atañen a todos los pueblos, según lo referido en esta Carta, y su jurisdicción será complementaria a las jurisdicciones penales de las Naciones y los Estados. Las funciones y jurisdicción del Tribunal se regirán por las disposiciones de esta Carta.

#### **Artículo 5. Relaciones Jurisdiccionales**

El Tribunal se pondrá en relación con otros organismos internacionales con base en una Nación o en un Estado, según corresponda, a través de acuerdos aprobados por la Comisión Internacional de Partes, formalizados en esta Carta Constitutiva y finalmente concluidos por el Presidente Judicial del Tribunal en su nombre.

#### **Artículo 6. Sede del Tribunal**

La sede del Tribunal se establecerá en la ciudad de Ereván, capital de la República de Armenia dentro de los límites estatales de la República de Armenia copatrocinados por los gobiernos de la Nación Ezidikhan y la República de Armenia.

#### **Artículo 7. Condición Jurídica y Facultades del Tribunal**

La Corte tendrá personalidad jurídica internacional y ejercerá sus funciones y facultades conforme a lo dispuesto en esta Carta en el territorio de cualquier Estado o Nación Parte mediante acuerdo formalizado en el territorio de cualquier otro Estado o Nación. Tendrá, además, la capacidad jurídica que sea necesaria para el ejercicio de sus funciones y el cumplimiento de sus fines.

### **SECCIÓN 2. JURISDICCIÓN, ADMISIBILIDAD Y LEY APLICABLE**

#### **Artículo 8. Crímenes en la Jurisdicción del Tribunal**

1. El Tribunal reconocerá diez etapas de genocidio que se cometen intencionalmente dentro de su jurisdicción de la siguiente manera:

- a) Clasificación social, económica, cultural o política de un grupo que distingue al grupo dominante del grupo dominado como “nosotros y ellos”,
- b) Simbolización mediante nombres, o símbolos para clasificar un grupo o un pueblo,

- c) Discriminación cuando un grupo dominante utiliza la ley estatal o comunitaria, la costumbre o el poder político para negar los derechos de un grupo o pueblo,
- d) Deshumanización empleada para negar la humanidad del grupo o de las personas como “el otro”,
- e) Organización de turbas, milicias u otros agentes por parte del Estado, organización o comunidad para proporcionar la negación de daños a un grupo o personas,
- f) La polarización utilizada como un método social distinto destinado a separar a las personas apoyadas por grupos de odio y difundir propaganda,
- g) Elaboración de planes sociales, económicos, culturales o políticos destinados a facilitar los asesinatos en grupo, la depredación sexual, incluida la violación y la expulsión forzosa de un grupo o personas,
- h) Persecución de personas o grupos como víctimas, identificadas y separadas por su identidad étnica, cultural, nacional o religiosa,
- i) El exterminio por medio de la matanza masiva de un grupo o de personas que no se consideren plenamente humanas, y
- j) La negación como la etapa final del genocidio donde los perpetradores niegan haber cometido algún delito y culpan a las víctimas, bloquean

intencionalmente las investigaciones y continúan dominando al grupo o a las personas hasta que se les obliga a dejar el poder.

2. La jurisdicción del Tribunal se limitará a los delitos más graves que afecten a las comunidades, Naciones, pueblos y Estados indígenas y a la comunidad internacional.

3. El Tribunal tiene jurisdicción de conformidad con esta Carta con respecto a los siguientes crímenes:

- a) El crimen de colonización
- b) El crimen de agresión
- c) El crimen de genocidio
- d) Crímenes de lesa humanidad
- e) Crímenes de guerra, incluidos los ataques intencionales contra civiles e infraestructura civil
- f) Crímenes contra la naturaleza, incluidos el ecocidio y el culturicidio
- g) Crímenes de terrorismo
- h) Violencia de género y feminicidio
- i) Violencia y traslado forzoso de niños
- j) Segregación racial
- k) Ocupación militar

### **Artículo 9. Crímenes de Agresión**

La planificación, preparación, iniciación o ejecución, por parte de una persona o agentes perpetradores en posición de ejercer efectivamente el control o dirigir la acción política

o militar de una Nación o Estado, o el uso de la fuerza armada o la invasión, ocupación militar y la anexión por el uso de la fuerza, el bloqueo por los puertos o costas por una Nación o Estado contra la soberanía, la integridad territorial o la independencia política de una Nación o Estado constituirá acto de agresión que, por su carácter, gravedad y escala, constituye una violación manifiesta del derecho internacional en virtud de esta Carta.

### **Artículo 10. Genocidio**

Para los efectos de esta Carta, “genocidio” significa el acto de colonización u ocupación forzosa de pueblos que conduce a cualquiera de los siguientes actos cometidos con la intención de dominar, reemplazar, destruir, en todo o en parte, un grupo nacional, étnico, racial, o religioso, tal como:

- a) Culturicidio
- b) Ecocidio, incluyendo la destrucción de alimentos y medicamentos de los que depende un pueblo.
- c) Genocidio
- d) Esclavitud
- e) Asesinato de miembros del grupo;
- f) Crímenes de lesa humanidad
- g) Causar daño físico o mental grave a los miembros del grupo;
- h) Someter deliberadamente al grupo a ciertas condiciones de vida, incluyendo la destrucción de alimentos y medicinas tradicionales calculadas para provocar su destrucción física total o parcial;

- i) Imponer medidas destinadas a impedir nacimientos dentro del grupo;
- j) Transferir por la fuerza a los niños del grupo a otro grupo o pueblo,
- k) Negarse a reconocer adecuadamente, en su totalidad o en parte, los poderes de autodeterminación inherentes, y así conducir a un genocidio por omisión o negación.

### **Artículo 11. Crímenes de Lesa Humanidad**

1. A los efectos de esta Carta, “crimen de lesa humanidad” significa genocidio y cualquiera de los siguientes actos cuando se cometan como parte de un ataque generalizado o sistemático o una serie de atrocidades dirigidas contra cualquier población civil, con conocimiento del ataque:

- a) Asesinato
- b) Mutilación
- c) Exterminio
- d) Esclavitud
- e) Deportación o traslado forzoso de población
- f) Encarcelamiento u otra privación grave de la libertad física en violación de las normas fundamentales del derecho internacional
- g) Tortura, infringir dolor intenso como quemar, aplastar o herir para castigar, coaccionar o proporcionar placer sádico
- h) Violación, esclavitud sexual, prostitución forzada, embarazo forzado, esterilización forzada, trata de personas o cualquier otra forma de violencia sexual de gravedad comparable

- i) Transferir por la fuerza a niños del grupo a otro grupo
- j) Persecución contra cualquier grupo o colectividad identificable por motivos políticos, raciales, nacionales, étnicos, culturales, religiosos, de género, tal como se define en el Artículo 2, u otros motivos universalmente reconocidos como inadmisibles en virtud del derecho internacional, en relación con cualquier acto mencionado en este Párrafo o cualquier delito dentro de la jurisdicción del Tribunal
- k) Desaparición forzada de personas
- l) Apartheid, el ejercicio de una política de superioridad étnica o racial
- m) Colonización
- n) Otros actos inhumanos de naturaleza similar, incluida la deshumanización, la privación, la destrucción de la dignidad grupal o individual y que causen trauma o angustia espiritual, mental y física, así como deformaciones severas, amputación de extremidades o desfiguración corporal

### **Artículo 12. Crímenes de Guerra**

1. El Tribunal tendrá jurisdicción con respecto a los crímenes de guerra, en particular cuando se cometan como parte de un plan o política o como parte de la comisión en gran escala de tales crímenes, otras violaciones graves de las leyes y costumbres aplicables en los conflictos armados internacionales.

2. A los efectos de esta Carta, “crímenes de guerra” significa:

a) Infracciones graves de los Convenios de Ginebra del 12 de agosto de 1949, a saber, cualquiera de los siguientes actos contra personas o bienes protegidos por las disposiciones del Convenio de Ginebra pertinente:

### **Conflicto armado**

- i. Asesinato intencional;
  - ii. Tortura o trato inhumano, incluidos los experimentos biológicos;
  - iii. Causar deliberadamente un gran sufrimiento o lesiones graves al cuerpo o la salud;
  - iv. Destrucción extensiva y apropiación de bienes, no justificada por necesidad militar y llevada a cabo de manera ilegal y gratuita;
  - v. Obligar a un prisionero de guerra u otra persona protegida a servir en las fuerzas de una potencia hostil;
  - vi. Privar deliberadamente a un prisionero de guerra u otra persona protegida del derecho a un juicio justo y regular;
  - vii. Deportación o traslado ilegal o confinamiento ilegal; o
  - viii. Toma de rehenes
2. Las demás violaciones graves de las leyes y usos aplicables en los conflictos armados internacionales, dentro del marco establecido por el derecho internacional, a saber, cualquiera de los siguientes actos:
- a) Dirigir intencionalmente ataques contra la población civil como tal o contra civiles

individuales que no participen directamente en las hostilidades;

b) Dirigir intencionalmente ataques contra bienes de carácter civil, es decir, bienes que no sean objetivos militares;

c) Dirigir intencionalmente ataques contra personal, instalaciones, material, unidades o vehículos que participen en una misión de mantenimiento de la paz o de asistencia humanitaria de conformidad con la Carta de las Naciones Unidas, siempre que tengan derecho a la protección otorgada a civiles o bienes de carácter civil en virtud del derecho internacional de conflicto armado;

d) Lanzar intencionalmente un ataque a sabiendas de que dicho ataque causará incidentalmente muertos o heridos entre la población civil o daños a bienes de carácter civil o daños generalizados, prolongados y graves al medio ambiente natural que serían claramente excesivos en relación con las consecuencias concretas y directas ventaja militar general anticipada;

e) Atacar o bombardear, por cualquier medio, pueblos, aldeas, viviendas o edificios que se encuentren indefensos y que no sean objetivos militares;

f) Matar o herir a un combatiente que, habiendo depuesto las armas o careciendo ya de medios de defensa, se ha rendido discrecionalmente;

g) Hacer uso indebido de una bandera de tregua, de la bandera o de las insignias y uniformes militares del enemigo o de las

Naciones Unidas, así como de los signos distintivos de los Convenios de Ginebra, con resultado de muerte o lesiones personales graves;

h) El traslado, directo o indirecto, por parte de la potencia ocupante de partes de su propia población civil al territorio que ocupa, o la deportación o traslado de la totalidad o parte de la población del territorio ocupado dentro o fuera de este territorio;

i) Dirigir intencionalmente ataques contra edificios dedicados a la religión, la educación, el arte, la ciencia o fines benéficos, monumentos históricos, hospitales y lugares de reunión de enfermos y heridos, siempre que no sean objetivos militares;

j) Someter a personas que están en poder de una parte adversa a la mutilación física o a experimentos médicos o científicos de cualquier tipo que no estén justificados por el tratamiento médico, dental u hospitalario de la persona en cuestión ni se realicen en interés de la persona, y que causen la muerte poner en grave peligro la salud de dicha persona o personas;

k) Matar o herir a traición a personas pertenecientes a la Nación o ejército hostil;

l) Declarar que no se dará cuartel;

m) Destruir o apoderarse de los bienes del enemigo a menos que tal destrucción o apoderamiento sea imperativamente exigido por las necesidades de la guerra;

n) Declarar abolidos, suspendidos o inadmisibles ante un tribunal de justicia los

derechos y acciones de los nacionales de la parte hostil;

o) Obligar a los nacionales de la parte hostil a tomar parte en las operaciones de guerra dirigidas contra su propio país, aunque estuvieran al servicio de los beligerantes antes del comienzo de la guerra;

p) Saquear una ciudad o lugar, incluso cuando se toman por asalto;

q) Emplear veneno o armas envenenadas;

r) Emplear gases asfixiantes, venenosos u otros, y todos los líquidos, materiales o dispositivos análogos;

s) Emplear balas que se expanden o aplanan fácilmente en el cuerpo humano, como balas con una envoltura dura que no cubre completamente el núcleo o está perforada con incisiones;

t) Emplear armas, proyectiles y materiales y métodos de guerra que puedan causar daños superfluos o sufrimientos innecesarios o que sean intrínsecamente indiscriminados en violación del derecho internacional de los conflictos armados, siempre que tales armas, proyectiles, materiales y métodos de guerra sean objeto de una prohibición total y se incluyen en un anexo a esta Carta, mediante una modificación de conformidad con las disposiciones pertinentes establecidas en los artículos 121 y 123;

u) Cometer atentados contra la dignidad personal, en particular tratos humillantes y degradantes;

v) Cometer violaciones, esclavitud sexual, prostitución forzada, embarazo forzado, tal como se define en el artículo 7, párrafo 2 (f), esterilización forzada o cualquier otra forma de violencia sexual que también constituya una infracción grave de los Convenios de Ginebra;

w) Utilizar la presencia de un civil u otra persona protegida para hacer que ciertos puntos, áreas o fuerzas militares sean inmunes a las operaciones militares;

x) Dirigir intencionalmente ataques contra edificios, materiales, unidades y transportes médicos y personal utilizando los signos distintivos de los Convenios de Ginebra de conformidad con el derecho internacional;

y) Utilizar intencionalmente el hambre de civiles como método de guerra privándolos de objetos indispensables para su supervivencia, incluso impidiendo deliberadamente los suministros de socorro según lo dispuesto en los Convenios de Ginebra;

z) Reclutar o alistar niños menores de quince años en las fuerzas armadas nacionales o utilizarlos para participar activamente en las hostilidades.

c) En el caso de un conflicto armado que no sea de carácter internacional, las violaciones graves del artículo 3 común a los cuatro Convenios de Ginebra de 12 de agosto de 1949, a saber, cualquiera de los siguientes actos cometidos contra personas que no toman parte activa en las hostilidades, incluidos los miembros de las fuerzas armadas las fuerzas que hayan depuesto las armas y las que hayan sido puestas fuera de

combate o incapacitadas por enfermedad, herida, detención o cualquier otra causa:

- i. Violencia contra la vida y la persona, en particular el asesinato de todo tipo, la mutilación, los tratos crueles y la tortura;
- ii. Cometer atentados contra la dignidad personal, en particular tratos humillantes y degradantes;
- iii. Toma de rehenes;
- iv. El dictado de sentencias y la realización de ejecuciones sin sentencia previa pronunciada por un Tribunal regularmente constituido, con todas las garantías judiciales que generalmente se reconocen como indispensables.

d) El párrafo 2 (c) se aplica a los conflictos armados que no son de carácter internacional y, por lo tanto, no se aplica a situaciones de disturbios y tensiones internas, tales como disturbios, actos de violencia aislados y esporádicos u otros actos de naturaleza similar.

e) Las demás infracciones graves de las leyes y usos aplicables en los conflictos armados que no tengan carácter internacional, en el marco establecido del derecho internacional, a saber, cualquiera de los siguientes actos:

- i. Dirigir intencionalmente ataques contra la población civil como tal o contra civiles individuales que no participen directamente en las hostilidades;
- ii. Dirigir intencionalmente ataques contra edificios, materiales, unidades y transportes médicos y personal utilizando los signos

distintivos de los Convenios de Ginebra de conformidad con el derecho internacional;

iii. Dirigir intencionalmente ataques contra personal, instalaciones, material, unidades o vehículos que participen en una misión de mantenimiento de la paz o de asistencia humanitaria de conformidad con la Carta de las Naciones Unidas, siempre que tengan derecho a la protección otorgada a civiles o bienes de carácter civil en virtud del derecho internacional de conflicto armado;

iv. Dirigir intencionalmente ataques contra edificios dedicados a la religión, la educación, el arte, la ciencia o fines benéficos, monumentos históricos, hospitales y lugares de reunión de enfermos y heridos, siempre que no sean objetivos militares;

v. Saquear una ciudad o lugar, incluso cuando se toman por asalto;

vi. Cometer violación, esclavitud sexual, prostitución forzada, embarazo forzado, como se define en el artículo 7, párrafo 2 (f), la esterilización forzada y cualquier otra forma de violencia sexual que constituya también una violación grave del artículo 3 común a los cuatro Convenios de Ginebra;

vii. Reclutar o alistar a niños menores de quince años en fuerzas o grupos armados o utilizarlos para participar activamente en las hostilidades;

viii. Ordenar el desplazamiento de la población civil por motivos relacionados con el conflicto, a menos que la seguridad de los civiles

involucrados o razones militares imperiosas así lo exijan;

ix. Matar o herir a traición un adversario combatiente;

x. Declarar que no se dará cuartel;

xi. Someter a personas que estén en poder de una parte adversa del conflicto a mutilaciones físicas o a experimentos médicos o científicos de cualquier tipo que no estén justificados por el tratamiento médico, dental u hospitalario de la persona en cuestión ni se lleven a cabo en interés de la persona, y que causen la muerte o pongan gravemente en peligro la salud de tal persona o personas;

xii. Destruir o apoderarse de los bienes de un adversario, a menos que tal destrucción o apoderamiento sea imperativamente exigido por las necesidades del conflicto;

f) El párrafo 2 (e) se aplica a los conflictos armados que no son de carácter internacional y, por lo tanto, no se aplica a situaciones de disturbios y tensiones internas, tales como disturbios, actos de violencia aislados y esporádicos u otros actos de naturaleza similar. Se aplica a los conflictos armados que tienen lugar en el territorio de un Estado cuando existe un conflicto armado prolongado entre autoridades gubernamentales y grupos armados organizados o entre dichos grupos.

3. Nada en el Párrafo 2 (c) y (e) afectará la responsabilidad de un Gobierno de mantener o restablecer la ley y el orden en el Estado o de defender la unidad e integridad territorial del Estado, por todos los medios legítimos.

### **Artículo 13. Elementos de los Crímenes**

1. Los Elementos de los Crímenes asistirán al Tribunal en la interpretación y aplicación de los Artículos 8, 9, 10, 11 y 12. Serán adoptados por mayoría de tres quintos de los miembros de la Comisión Internacional de Partes.

2. Las enmiendas a los Elementos de los Crímenes pueden ser propuestas por:

- a) Cualquier Nación o Estado parte
- b) Los jueces actuando por mayoría absoluta
- c) El director

Dichas enmiendas serán adoptadas por una mayoría de dos tercios de los miembros de la Comisión Internacional de las Partes.

3. Los Elementos de los Crímenes y sus enmiendas serán consistentes con esta Carta.

### **Artículo 14. Limitaciones a las Normas de Derecho Internacional**

Nada de lo dispuesto en esta Sección se interpretará como una limitación o perjuicio de ninguna manera de las normas existentes o en desarrollo del derecho internacional para fines distintos a los de esta Carta.

### **Artículo 15. Obligaciones Jurisdiccionales (ratione temporis) a Través del Tiempo**

A falta de disposiciones expresas en los tratados entre Naciones y entre Naciones y Estados el Tribunal decidirá la cuestión por referencia al derecho internacional consuetudinario basado en el Estado o en la Nación.

## **Artículo 16. Condiciones Previas al Ejercicio de la Jurisdicción**

1. Un Estado o Nación que se convierte en Parte de esta Carta acepta la jurisdicción de la Corte con respecto a los crímenes a que se refiere el Artículo 7.

2. En el caso del Artículo 17, Párrafos (a) o (c), la Corte podrá ejercer su jurisdicción si uno o más de los siguientes Estados o Naciones son Partes de esta Carta o han aceptado la jurisdicción de la Corte de conformidad con el Párrafo 3 :

a) El Estado en cuyo territorio ocurrió la conducta de que se trate o, si el delito se cometió a bordo de una embarcación o aeronave, el Estado de matrícula de esa embarcación o aeronave;

b) El Estado del que es nacional la persona acusada del delito.

3. Si se requiere la aceptación de un Estado o Nación que no sea Parte de esta Carta en virtud del párrafo 2, ese Estado o Nación podrá, mediante declaración presentada ante la Secretaría, aceptar el ejercicio de la jurisdicción de la Corte con respecto al crimen en cuestión. El Estado o Nación receptora cooperará con la Corte sin demora ni excepción de conformidad con la Sección 9.

## **Artículo 17. Ejercicio de la Jurisdicción**

El Tribunal podrá ejercer su jurisdicción con respecto a un crimen a que se refiere el Artículo 7 de acuerdo con las disposiciones de esta Carta si:

1. Una situación en la que parece haberse cometido uno o más de tales delitos es remitida al Director por un Estado o Nación Parte de conformidad con el Artículo 18;

2. Una situación en la que uno o más de tales crímenes parecen haber sido cometidos es referida al Principal por la Comisión del Tribunal; o

3. El Principal ha iniciado una investigación con respecto a dicho delito de conformidad con el Artículo 15.

## **Artículo 18. Remisión de una Situación por una Nación o Estado Parte**

1. Un Estado o Nación parte puede remitir al Director una situación en la que parezca haberse cometido uno o más crímenes de la competencia del Tribunal, solicitándole al Director que investigue la situación con el fin de determinar si una o más personas específicas deben ser acusados de la comisión de tales delitos.

2. En la medida de lo posible, una solicitud de remisión especifica las circunstancias pertinentes y deberá ir acompañada de los documentos justificativos de la remisión.

## **Artículo 19. Director**

1. El Director puede iniciar investigaciones por iniciativa personal sobre la base de información de crímenes dentro de la jurisdicción del Tribunal, cuya admisibilidad será determinada por la Comisión de Revisión de la Fiscalía, que también tendrá el poder de monitorear y aprobar las acciones del Principal.

## **Artículo 20. Aplazamiento de la Investigación o el Enjuiciamiento**

El Director puede diferir la investigación o el enjuiciamiento previa consulta con la Comisión de Revisión de Enjuiciamiento.

## **Artículo 21. Problemas de Admisibilidad**

1. Teniendo en cuenta el Párrafo 10 del Preámbulo y el Artículo 1, el Tribunal determinará que un caso es inadmisibles:

- a) El caso está siendo investigado o enjuiciado por un Estado o Nación que tiene jurisdicción sobre él, a menos que el Estado no esté dispuesto o realmente no pueda llevar a cabo la investigación o el enjuiciamiento;
- b) El caso ha sido investigado por un Estado o Nación que tiene jurisdicción sobre él y el Estado ha decidido no enjuiciar a la persona en cuestión, a menos que la decisión resulte de la falta de voluntad o incapacidad del Estado para enjuiciar genuinamente;
- c) La persona en cuestión ya ha sido juzgada por la conducta que es objeto de la denuncia, y no se permite un juicio ante la Corte en virtud del artículo 20, párrafo 3;
- d) El caso no tiene suficiente gravedad para justificar una acción adicional por parte de la Corte.

2. Para determinar la indisposición en un caso particular, el Tribunal considerará, teniendo en cuenta los principios del debido proceso reconocidos por el derecho internacional de la Nación y de los Estados, si concurren, según corresponda, uno o más de los siguientes:

a) Los actos fueron, o están siendo realizados, o la decisión del Estado o Nación fue tomada con el propósito de sustraer al imputado de responsabilidad penal por los delitos de competencia del Tribunal a que se refiere el artículo 7;

b) Ha habido un retraso injustificado en el proceso que, dadas las circunstancias, es incompatible con la intención de llevar a la persona (acusado) en cuestión ante la justicia;

c) La conducta de la parte en las circunstancias es incompatible con la intención de llevar a la persona en cuestión ante la justicia.

## **Artículo 22. Decisiones Preliminares sobre Admisibilidad**

A petición de cualquiera de las partes o de la corte, el Tribunal tomará decisiones preliminares sobre su jurisdicción personal y material.

## **Artículo 23. Doble Incriminación**

Ninguna acción judicial puede emprenderse dos veces por el mismo delito.

## **Artículo 24. Impugnación de la Jurisdicción o Admisibilidad de la Evidencia**

El demandado en un procedimiento puede impugnar la jurisdicción del Tribunal o la admisibilidad de las pruebas, sujeto a la determinación del Juez presidente.

## **Artículo 25. Ley aplicable**

1. El Tribunal aplicará:

a) En primer lugar, esta Carta, Elementos de

los Crímenes y sus Reglas de Procedimiento y Evidencia;

b) En segundo lugar, en su caso, los tratados aplicables y los principios y normas del derecho internacional nacional o estatal, incluidos los principios establecidos del derecho internacional nacional y estatal para los conflictos armados;

c) En su defecto, los principios generales del derecho derivados por el Tribunal de los sistemas jurídicos nacionales o estatales del mundo, incluidas, según corresponda, las leyes internas de las Naciones, las leyes consuetudinarias o las leyes de los Estados que normalmente ejercerían jurisdicción sobre el crimen, siempre que esos principios no son incompatibles con esta Carta ni con el derecho internacional nacional o estatal y las normas y estándares internacionalmente reconocidos.

2) El Tribunal podrá aplicar los principios y normas de derecho interpretados en sus decisiones anteriores.

3. La aplicación e interpretación de la ley de conformidad con este artículo debe ser compatible con la evolución de los derechos humanos reconocidos internacionalmente por la Nación o el Estado y debe prevalecer sin ninguna distinción adversa basada en motivos tales como el género tal como se define en el artículo 2, el artículo 7 (2) h, la edad, raza, color, idioma, religión o creencia, opinión política o de otro tipo, origen nacional, étnico o social, riqueza, nacimiento u otra condición.

### **SECCIÓN 3. COMPOSICIÓN Y ADMINISTRACIÓN DEL TRIBUNAL**

#### **Artículo 26. Órganos del Tribunal**

El Tribunal estará integrado por los siguientes órganos:

- a) Comisión Internacional de Partes
- b) Comisión de Revisión de Enjuiciamiento
- c) El director judicial
- d) Sistema de jurado local en la Nación demandante o jurisdicción estatal (como se establece en el Anexo C de la Carta)
- e) Una División de Apelaciones, una División de Primera Instancia y una División de Cuestiones Preliminares
- f) La oficina del director
- g) El Registro

#### **Artículo 27. Comisión Internacional de Partes**

1. La Comisión Internacional de Partes es un organismo formal del Tribunal compuesto por representantes designados por los gobiernos ratificantes del Estado y la Nación que sirve como organismo autorizador que nombra a los Jueces de Cámara, Principales y el Secretario y el organismo autorizador para el Presupuesto del Tribunal.

2. La membresía en la Comisión Internacional de Partes rotará 1/3 de los miembros cada tres años para permitir que las nuevas partes que la ratifiquen se asienten a razón de diez nuevos miembros cada tres años.

3. Las decisiones de la Comisión Internacional de Partes se determinarán por consenso y, cuando no se logre el consenso, con un voto del 50 % más 1 miembro o más a favor de un resultado.

### **Artículo 28. Comisión de Revisión de Fiscalía**

La Comisión de Revisión de Fiscalía es un organismo asesor laico que revisa el ejercicio de la discreción del director en las decisiones de no procesar.

1. Las comisiones pueden comenzar el proceso de investigación por cualquiera de dos métodos.

a) Primero, una persona “que ha sido afectada por un delito” o que está autorizada como representante puede solicitar una audiencia de comisión.

i. La comisión debe investigar estas solicitudes.

b) En segundo lugar, una comisión puede, por mayoría de votos, llevar a cabo una investigación por iniciativa propia.

2. Una comisión investiga el reclamo, convoca a testigos para interrogarlos, interroga al director y solicita el asesoramiento de expertos.

3. Luego, la comisión puede presentar una de dos recomendaciones: la no acusación es adecuada o la acusación es adecuada.

4. Para la decisión final es necesario el voto de la mayoría.

5. La comisión entrega una recomendación por escrito al Director.

### **Artículo 29. Magistrados**

Calificaciones, nominación y elección de jueces

a) Vacantes Judiciales

b) La Presidencia Judicial

c) Cámaras

d) Independencia de los jueces

e) Excusa y Descalificación de Jueces

### **Artículo 30. Servicio, Requisitos, Nombramiento y Selección de Jueces**

1. Sin perjuicio de lo dispuesto en el párrafo 2, habrá 15 jueces de la Corte.

(a) El Principal, actuando en nombre de la Corte, puede proponer un aumento en el número de jueces especificado en el párrafo 1, indicando las razones por las cuales lo considera necesario y apropiado. El Secretario circulará con prontitud cualquier propuesta de este tipo a todos los Estados y Naciones Partes miembros de la Comisión Internacional de las Partes.

(b) Cualquier propuesta de este tipo se considerará luego en una reunión de la Asamblea de la Comisión Internacional de las Partes que se convocará de conformidad con la Sección 11, párrafos 2 y 3. La propuesta se considerará adoptada si se aprueba en la reunión por voto de dos tercios de los miembros de la Comisión Internacional de las Partes y entrará en vigor en el momento en que lo decida la Comisión Internacional de las Partes.

(i) Una vez que se haya adoptado una propuesta para aumentar el número de jueces conforme al subpárrafo (b), la elección de los jueces adicionales tendrá lugar en la siguiente sesión de la Asamblea de la Comisión Internacional de las Partes, de acuerdo con los párrafos 3 a 8, y el artículo 37, párrafo 2;

(ii) Una vez que una propuesta para un aumento en el número de jueces haya sido adoptada y puesta en vigencia conforme a los subpárrafos (b) y (c) (i), estará abierta a la Presidencia en cualquier momento posterior, si la carga de trabajo de la Corte lo justifique, para proponer una reducción en el número de jueces, siempre que el número de jueces no se reduzca por debajo del especificado en el párrafo 1. La propuesta se tramitará de conformidad con el procedimiento establecido en los incisos (a) y B). En caso de adoptarse la propuesta, el número de jueces se reducirá progresivamente a medida que expire el mandato de los jueces en ejercicio, hasta alcanzar el número necesario.

2. Los jueces serán elegidos entre personas de alta consideración moral, imparcialidad e integridad que posean las calificaciones requeridas en sus respectivos Estados o Nación para el nombramiento de los más altos cargos judiciales.

(b) Todo candidato a la elección de la Corte deberá:

(i) Haber establecido competencia en derecho y procedimiento penales, y la

experiencia relevante necesaria, ya sea como juez, fiscal, abogado o en otra capacidad similar, en procesos penales; o

(ii) Haber establecido competencia en áreas relevantes del derecho internacional como el derecho internacional humanitario y el derecho de los derechos humanos, y amplia experiencia en una capacidad legal profesional que sea relevante para el trabajo judicial de la Corte;

(c) Todo candidato a la elección para la Corte deberá tener un excelente conocimiento y dominio de al menos uno de los idiomas de trabajo de la Corte.

4. (a) Las nominaciones de candidatos para la elección de la Corte pueden ser hechas por cualquier Estado o Nación Parte de esta Carta, y se harán ya sea:

(i) Por el procedimiento para la presentación de candidatos para el nombramiento de los más altos cargos judiciales en el Estado de que se trate; o

(ii) Por el procedimiento previsto para la nominación de candidatos a la Corte Internacional de Justicia en la Carta de esa Corte. Las candidaturas irán acompañadas de una declaración con el detalle necesario que especifique cómo el candidato cumple los requisitos del apartado 3.

(b) Cada Estado Parte podrá presentar un candidato para cualquier elección dada que no necesariamente tiene que ser nacional de ese país Estado Parte, pero en todo caso será nacional de un Estado Parte.

(c) La Asamblea de los Estados Partes podrá decidir establecer, si corresponde, un Comité Asesor de Candidaturas. En ese caso, la composición y el mandato del Comité serán establecidos por la Asamblea de los Estados Partes.

5. A los efectos de la elección, habrá dos listas de candidatos: Lista A que contiene los nombres de los candidatos con las calificaciones especificadas en el párrafo 3 (b) (i); y la Lista B que contiene los nombres de los candidatos con las calificaciones especificadas en el párrafo 3 (b) (ii). Un candidato con calificaciones suficientes para ambas listas puede elegir en qué lista figurar. En la primera elección del Tribunal, se elegirán al menos nueve jueces de la lista A y al menos cinco jueces de la lista B. Las elecciones posteriores se organizarán de modo que se mantenga la proporción equivalente en el Tribunal de jueces calificados en las dos listas.

6. Los jueces serán elegidos por votación secreta en una reunión de la Asamblea de los Estados Partes convocada al efecto. En virtud del artículo 112. Sin perjuicio de lo dispuesto en el párrafo 7, las personas elegidas para la Corte serán los 18 candidatos que obtengan el mayor número de votos y una mayoría de dos tercios de los Estados Partes presentes y votantes.

(b) En caso de que no se elija un número suficiente de jueces en la primera votación, las votaciones sucesivas se llevarán a cabo de acuerdo con los procedimientos establecidos en el subpárrafo (a) hasta que se llenen los lugares restantes.

7. No pueden ser nacionales de un mismo Estado dos jueces. Una persona que, a los efectos de la composición de la Corte, pueda ser considerada nacional de más de un Estado, se considerará nacional del Estado en el que ejerza habitualmente sus derechos civiles y políticos.

8. Los Estados Partes, en la selección de jueces, tendrán en cuenta la necesidad, entre los miembros de la Corte, de:

- (i) La representación de los principales sistemas legales del mundo;
- (ii) Representación geográfica equitativa; y
- (iii) Una representación justa de jueces mujeres y hombres.

(b) Los Estados Partes también considerarán la necesidad de incluir jueces con experiencia legal en temas específicos, incluidos, entre otros, la violencia contra las mujeres o los niños.

9. Sujeto al subpárrafo (b), los jueces ejercerán su cargo por un término de nueve años y, sujeto al subpárrafo (c) y al artículo 31, párrafo 2, no podrán ser reelegidos.

(b) En la primera elección, un tercio de los jueces elegidos serán seleccionados por sorteo para servir por un término de tres años; una tercera parte de los jueces electos serán elegidos por sorteo por un período de seis años; y el resto servirá por un término de nueve años.

(c) Un juez que sea seleccionado para servir por un término de tres años bajo el subpárrafo

(b) será elegible para reelección por un término completo.

10. No obstante lo dispuesto en el párrafo 9, un magistrado asignado a una Sala de Primera Instancia o de Apelaciones de conformidad con el artículo 39 continuará en oficina para concluir cualquier juicio o apelación cuya audiencia ya haya comenzado ante esa Sala.

### **Artículo 31. Vacantes de Puestos Judiciales**

1. En caso de vacante judicial, se procederá a la selección de conformidad con el artículo 30 para cubrir la vacante.

2. Un juez seleccionado para llenar una vacante servirá por el resto del mandato del predecesor y, si ese período es de tres años o menos, será elegible para ser seleccionado por un mandato completo de conformidad con el artículo 30.

### **Artículo 32. Magistrado Principal**

1. El Director y los Subdirectores Primero y Segundo serán elegidos por mayoría absoluta de los jueces. Cada uno de ellos servirá por un término de tres años o hasta el final de sus respectivos mandatos como jueces, lo que expire primero. Podrán ser reelegidos por una sola vez.

2. El Primer Subdirector actuará en lugar del Presidente en caso de indisponibilidad o descalificación del Presidente. El Segundo Subdirector actuará en lugar del Presidente en caso de que tanto el Director como el Primer Subdirector no estén disponibles o estén inhabilitados.

3. El Director, junto con los Subdirectores Primero y Segundo, constituirán el Directo, al que corresponderá:

(a) La adecuada administración del Tribunal, con excepción de la Oficina del Director; y

(b) Las demás funciones que le sean conferidas de conformidad con esta Carta.

4. En el desempeño de su responsabilidad en virtud del párrafo 3 (a), el Director coordinará y buscará el acuerdo del Director en todos los asuntos de interés mutuo.

### **Artículo 33. Salas**

1. Dentro de un tiempo razonable después de la selección oficial de los jueces, la Corte se organizará en las salas del Artículo 26. La División de Apelaciones se organizará para incluir al Principal y otros dos jueces, la División de Primera Instancia incluirá a seis jueces y la Sección Preliminar -La Sala de Primera Instancia incluirá no menos de seis jueces. Los jueces serán asignados a las divisiones sobre la base de las calificaciones y la experiencia de los jueces seleccionados para la Corte a fin de lograr un equilibrio entre la experiencia en los procedimientos de derecho penal estatal y nacional y el derecho internacional. Las Divisiones de Primera Instancia y de Cuestiones Preliminares se organizarán principalmente con jueces con una combinación de derecho penal estatal y procedimientos de derecho nacional y derecho internacional.

2. (a) Las funciones judiciales de la Corte se llevarán a cabo en cada división por Salas.

(b) (i) La Sala de Apelaciones estará compuesta por todos los jueces de la División de Apelaciones;

(ii) Las funciones de la Sala de Primera Instancia serán desempeñadas por tres magistrados de la División de Primera Instancia;

(iii) Las funciones de la Sala de Cuestiones Preliminares serán desempeñadas por tres jueces de la División de Cuestiones Preliminares o por un solo juez de esa división de conformidad con esta Carta y las Reglas de Procedimiento y Evidencia;

(c) Nada de lo dispuesto en este párrafo impedirá la constitución simultánea de más de una Sala de Primera Instancia o Sala de Cuestiones Preliminares cuando así lo requiera la gestión eficiente del volumen de trabajo de la Corte.

3. (a) Los jueces asignados a las Divisiones de Primera Instancia y de Cuestiones Preliminares servirán en esas divisiones por un período de tres años y, posteriormente, hasta la finalización de cualquier caso cuya audiencia ya haya comenzado en la división en cuestión.

(b) Los jueces asignados a la División de Apelaciones servirán en esa división durante todo su mandato.

4. Los jueces asignados a la División de Apelaciones servirán únicamente en esa división. Sin embargo, nada de lo dispuesto en este artículo impedirá la adscripción temporal de jueces de la Sala de Primera Instancia a la Sala de Cuestiones Preliminares o viceversa, si la Presidencia considera que la gestión eficiente del volumen de

trabajo de la Corte así lo requiere, sin perjuicio de que en ningún caso juez que haya participado en la fase previa al juicio de una causa sea elegible para formar parte de la Sala de Primera Instancia que conozca de esa causa.

### **Artículo 34. Independencia Judicial**

Los Jueces ejercerán sus funciones con independencia de los demás magistrados.

### **Artículo 35. Excusa o Descalificación de los Jueces**

1. El Juez Principal, a solicitud de un juez, excusará a ese juez del ejercicio de una función conforme a esta Carta Constitutiva de acuerdo con las Reglas y Procedimiento de Evidencia.

2. Los jueces no realizarán ninguna actividad que pueda interferir en sus funciones judiciales o afectar negativamente a la confianza en su independencia.

3. El juez no puede dedicarse a ninguna otra ocupación de carácter profesional mientras se desempeñe en virtud de esta Carta.

4. El Principal con la mayoría absoluta de los jueces decidirá la aplicación de los párrafos 2 y 3 cuando se trate de asuntos relacionados con un juez individual, y el juez en cuestión no participará en la decisión.

5. a. Ningún juez participará en ningún caso en el que el juez pueda razonablemente tener dudas sobre cualquier motivo.

b) Una persona que esté siendo investigada o procesada por el Director podrá solicitar la recusación de un juez en virtud de esta cláusula.

c) La mayoría absoluta de los jueces decidirá si un juez es descalificado conforme a la cláusula 5. b. El juez recusado no podrá tomar parte en la decisión de descalificación, pero podrá responder.

### **Artículo 36: Oficina del Director**

1. La Oficina del Director actuará con independencia como órgano separado de la Corte. Será responsable de recibir las referencias y cualquier información fundamentada sobre los delitos de la competencia de la Corte, examinarlos y realizar las investigaciones y procesos ante la Corte. Un miembro de la Oficina no buscará ni actuará bajo instrucciones de ninguna fuente externa.

2. La Oficina estará dirigida por el Director. El Director tendrá plena autoridad sobre la gestión y administración de la Oficina, incluido el personal, las instalaciones y otros recursos de la misma. El Director será asistido por uno o más Subdirectores, quienes tendrán derecho a realizar cualquiera de los actos requeridos del Director bajo esta Carta. El Director y los Subdirectores deberán ser de nacionalidades diferentes. Servirán a tiempo completo.

3. El Director y los Subdirectores deberán ser personas de alta consideración moral, altamente competentes y con amplia experiencia práctica en la acusación o juicio de causas penales. Tendrán un excelente conocimiento y dominio de al menos uno de los idiomas de trabajo de la Corte.

4. El Principal será elegido por voto secreto por mayoría absoluta de los miembros de la Asamblea de la Comisión Internacional de Partidos. Los

Subdirectores serán elegidos en la misma forma de una lista de candidatos proporcionada por el Rector. El director deberá nominar tres candidatos para cada cargo de subdirector a cubrir. A menos que se decida un término menor al momento de su elección, el Director y los Subdirectores ocuparán sus cargos por un término de nueve años y no podrán ser reelegidos.

5. Ni el director ni el subdirector participarán en ninguna actividad que pueda interferir con las funciones del director o afectar la confianza en su independencia. No podrán ejercer ninguna otra ocupación de carácter profesional.

6. El Director podrá dispensar al Director o a un Subdirector, a petición de estos, de actuar en un caso particular.

7. Ni el director ni el subdirector participarán en ningún asunto en el que se pueda dudar razonablemente de su imparcialidad por cualquier motivo. Serán descalificados de un caso de conformidad con este párrafo si, entre otras cosas, han estado involucrados previamente en cualquier capacidad en ese caso ante la Corte o en un caso penal relacionado a nivel nacional que involucre a la persona que está siendo investigada o procesada.

8. La Cámara de Apelaciones decidirá cualquier cuestión relativa a la recusación del Director o del Director Adjunto.

(a) La persona, Estado, organización empresarial, milicia privada investigada o enjuiciada podrá en cualquier momento solicitar la descalificación del Principal o de un Subdirector por las causales establecidas en este artículo;

(b) El Director o el Subdirector, según corresponda, tendrán derecho a presentar sus comentarios sobre el asunto;

9. El Director designará asesores con experiencia legal, estatal o nacional en temas específicos, incluidos, entre otros, violencia sexual y de género y violencia contra los niños.

### **Artículo 37. Registro**

1. Corresponderá a la Secretaría los aspectos no judiciales de la administración y prestación de servicios del Tribunal, sin perjuicio de las funciones y atribuciones del Director, de conformidad con el artículo 36.

2. La Secretaría estará a cargo del Secretario, quien será el principal funcionario administrativo de la Corte. El Secretario ejercerá funciones operativas bajo la autoridad del Principal de la Corte.

3. El Secretario y el Secretario Adjunto deberán ser personas de alta consideración moral, ser altamente competentes y tener un excelente conocimiento y dominio de al menos uno de los idiomas de trabajo de la Corte.

4. Los jueces elegirán al Secretario por mayoría absoluta en votación secreta, considerando cualquier recomendación de la Comisión Internacional de Partidos. De ser necesario y previa recomendación del Secretario, los jueces elegirán, en la misma forma, un Secretario Suplente.

5. El Registrador ejercerá su cargo por un período de cinco años, podrá ser reelegido una vez y ejercerá su cargo a tiempo completo. El Secretario Adjunto desempeñará su cargo por un

período de cinco años, o el período más breve que decida la mayoría absoluta de los magistrados y podrá ser elegido sobre la base de que el Secretario Adjunto será llamado a desempeñar los servicios que se requieran.

6. El Registrador creará una Unidad de Víctimas y Testigos dentro del Registro. Esta Unidad proveerá, en consulta con la Oficina del Principal, medidas de protección y arreglos de seguridad, consejería y otra asistencia adecuada para los testigos, las víctimas que comparecen ante el Tribunal y otras personas que estén en riesgo debido al testimonio prestado por dichos testigos. La Unidad incluirá personal con experiencia en trauma, incluido el trauma relacionado con delitos de violencia sexual.

7. El Secretario designará un Jefe de Seguridad que será responsable de establecer un equipo de seguridad con autoridad para proteger las instalaciones del Tribunal, los Jueces y las Salas, la Oficina Principal y la Secretaría y capacidades de investigación para inspeccionar y analizar el terrorismo u otras amenazas violentas al tribunal

### **Artículo 38. Personal del Tribunal**

1. El Director y el Registrador nombrarán el personal calificado que sea necesario para sus respectivas oficinas. En el caso del Principal, este incluirá el nombramiento de investigadores.

2. En el empleo del personal, el Director y el Registrador garantizarán los más altos estándares de eficiencia, competencia e integridad y tendrán en cuenta, *mutatis mutandis*, los criterios establecidos en el artículo 30, párrafo 8.

3. El Secretario, con el acuerdo de la Presidencia y el Principal, propondrá un

Estatuto del Personal que incluya los términos y condiciones en que se nombrará, remunerará y despedirá al personal de la Corte. El Estatuto del Personal será aprobado por la Comisión Internacional de las Partes.

4. La Corte podrá, en circunstancias excepcionales, emplear la pericia sin costo del personal ofrecido por Estados o Naciones Partes, organizaciones intergubernamentales u organizaciones no gubernamentales para ayudar con el trabajo de cualquiera de los órganos de la Corte. El Director puede aceptar cualquier oferta de este tipo en nombre de la Oficina del Director. Dicho personal gratuito se empleará de acuerdo con las pautas que establezca la Comisión Internacional de las Partes.

### **Artículo 39. Compromiso Solemne**

Antes de asumir sus respectivos deberes conforme a esta Carta Constitutiva, los Jueces, el Director Principal, los Subdirectores, el Secretario y el Subsecretario se comprometerán solemnemente en audiencia pública a ejercer cada una de sus funciones respectivas de manera imparcial y consciente.

### **Artículo 40. Destitución del Cargo**

1. Un juez, el director, el subdirector, el secretario o el subsecretario serán destituidos de su cargo si se toma una decisión a tal efecto de conformidad con el párrafo 2, en los casos en que esa persona:

a) Se determine que ha cometido una falta grave o un incumplimiento grave de los deberes de cada persona en virtud de esta Carta, según lo dispuesto en las Reglas de Procedimiento y Evidencia; o

b) Es incapaz de ejercer las funciones requeridas por esta Carta.

2. La decisión sobre la destitución de un juez, el director o un subdirector en virtud del párrafo 1 será tomada por la Comisión Internacional de Partes, por votación secreta:

3. En el caso de un juez, por una mayoría de dos tercios de la Comisión Internacional de Partes sobre una recomendación adoptada por una mayoría de dos tercios de los demás jueces;

4. En el caso del Director, por la mayoría absoluta de los Estados y Naciones Partes;

5. En el caso de un Subdirector, por mayoría absoluta de la Comisión Internacional de Partes por recomendación del Director.

6. La decisión sobre la remoción del Secretario o del Subsecretario se tomará por mayoría absoluta de los jueces.

7. Un juez, director, subdirector, secretario o subsecretario cuya conducta o capacidad para ejercer las funciones del cargo según lo dispuesto en esta Carta Constitutiva sea cuestionada en virtud de este artículo, tendrá plena oportunidad de presentar y recibir pruebas y hacer presentaciones de conformidad con las Reglas de Procedimiento y Evidencia. La persona en cuestión no participará de otra manera en la consideración del asunto.

### **Artículo 41. Medidas Disciplinarias**

El juez, director, subdirector, secretario o subsecretario que haya cometido una falta de carácter menos grave que la prevista en el artículo 46, párrafo 1, estará sujeto a medidas

disciplinarias, de conformidad con las Reglas de Procedimiento y Evidencia.

#### **Artículo 42. Privilegios e Inmunities**

1. La Corte gozará en el territorio de cada Estado o Nación Parte de los privilegios e inmunities que sean necesarios para el cumplimiento de sus propósitos.

2. Los magistrados, el Fiscal, los Fiscales Adjuntos y el Secretario gozarán, cuando se desempeñen en los asuntos de la Corte o en relación con ellos, de los mismos privilegios e inmunities que se otorgan a los jefes de misiones diplomáticas y, después de la expiración del mandato sus mandatos, seguirán gozando de inmunidad de jurisdicción de todo tipo con respecto a las palabras habladas o escritas y los actos realizados en el ejercicio de sus funciones oficiales.

3. El Subsecretario, el personal de la Oficina del Fiscal y el personal de la Secretaría gozarán de los privilegios e inmunities y facilidades necesarios para el desempeño de sus funciones, de conformidad con el acuerdo sobre los privilegios e inmunities de la Corte.

4. Los abogados, peritos, testigos o cualquier otra persona que deba estar presente en la sede de la Corte recibirán el tratamiento que sea necesario para el debido funcionamiento de la Corte, de conformidad con el acuerdo sobre los privilegios e inmunities de la Corte.

5. Los privilegios e inmunities de:

(a) Un juez o el Fiscal solo pueden ser destituidos por la mayoría absoluta de los jueces;

(b) El Secretario puede ser destituido por la Presidencia;

c) El Fiscal podrá destituir a los Fiscales Adjuntos y al personal de la Oficina del Fiscal;

(d) El Registrador Adjunto y el personal del Registro pueden ser destituidos por el Registrador.

#### **Artículo 43. Idiomas Oficiales y de Trabajo**

Los idiomas oficiales y de trabajo de la Asamblea serán el inglés, el español, el francés, el árabe y el idioma nacional, en su forma original o traducida, de los idiomas de los miembros de la Asamblea y, en su caso, de los idiomas de los no miembros. Estados, Naciones o pueblos sobre cualquier asunto que involucre a dicho no miembro presentado por Estado y Naciones.

#### **Artículo 44. Reglas de Procedimiento y Evidencia**

1. La Corte gozará en el territorio de cada Estado-Parte de los privilegios e inmunities que sean necesarios para el cumplimiento de sus propósitos.

2. Los magistrados, el director, los subdirectores y el secretario gozarán, cuando se desempeñen en los asuntos de la Corte o en relación con ellos, de los mismos privilegios e inmunities que se conceden a los jefes de misiones diplomáticas y, después de la expiración del mandato sus mandatos, seguirán gozando de inmunidad de jurisdicción de todo tipo con respecto a las palabras habladas o escritas y los actos realizados en el ejercicio de sus funciones oficiales.

3. El Subsecretario, el personal de la Oficina del Director y el personal de la Secretaría gozarán de los privilegios e inmunidades y facilidades necesarios para el desempeño de sus funciones, de conformidad con el acuerdo sobre los privilegios e inmunidades de la Corte.

4. Los abogados, peritos, testigos o cualquier otra persona que deba estar presente en la sede de la Corte recibirán el trato necesario para el debido funcionamiento de la Corte, de conformidad con el acuerdo sobre los privilegios e inmunidades de la Corte.

5. Los privilegios e inmunidades de:

(a) Un juez o el Director solo pueden ser destituidos por una mayoría absoluta de los jueces;

(b) El Secretario puede ser destituido por la Presidencia;

(c) Los Subdirectores y el personal de la Oficina del Director pueden ser destituidos por el Director;

(d) El Registrador Adjunto y el personal del Registro pueden ser destituidos por el Registrador.

## **SECCIÓN 4: PRINCIPIOS GENERALES DEL DERECHO PENAL**

### **Artículo 45. No Hay Crimen sin Ley**

1. Ninguna persona será penalmente responsable en virtud de esta Carta a menos que la conducta en cuestión constituya un delito en virtud de las disposiciones de la Carta y dicho delito sea competencia de la Corte.

2. La definición de delito se interpretará estrictamente y no se extenderá por analogía. En caso de ambigüedad, la definición del delito se interpretará de manera compatible con el derecho consuetudinario de la Nación y de conformidad con los derechos humanos internacionalmente reconocidos.

3. Este Artículo no afectará la caracterización de cualquier conducta como criminal bajo el derecho internacional independientemente de esta Carta. La Corte interpretará y aplicará las disposiciones de esta Carta de manera compatible con los principios y normas del derecho internacional, incluido el derecho internacional convenido entre las Naciones.

### **Artículo 46: Sin Ley no Hay Condena**

1. El principio de “Sin Ley no Hay Condena” se aplicará a todos los procesos penales en virtud de esta Carta. Una persona condenada por la Corte podrá ser castigada únicamente de conformidad con las disposiciones de esta Carta y las penas prescritas por la Corte serán proporcionales a la gravedad del delito reconocida por cada Nación involucrada.

2. Cualquier entidad o persona natural que cometa un crimen dentro de la jurisdicción de la Corte, como se define en esta Carta, será individualmente responsable y sujeto a castigo de acuerdo con las disposiciones de esta Carta.

3. De conformidad con esta Carta, una entidad o persona física será penalmente responsable y estará sujeta a la pena por un delito de la competencia de la Corte si esa entidad o persona física, directamente o a través de otra persona o entidad:

(a) Cometió tal delito, ya sea actuando solo, junto con otros o por medio de otra persona o entidad, independientemente de que esa otra persona sea penalmente responsable;

(b) Ordenó, solicitó o indujo la comisión de tal delito, que de hecho ocurra o se intente;

(c) Haya ayudado, instigado o asistido de otro modo en la comisión o tentativa de comisión de dicho delito, incluido el suministro de los medios para su comisión;

(d) Haya contribuido intencionalmente de otro modo a la comisión o tentativa de comisión de dicho delito por un grupo o personas o entidades que actúen con un propósito común;

(e) Con respecto al crimen de genocidio, incitar directa y públicamente a otros a cometer genocidio;

(f) Intentó cometer tal delito realizando una acción que comienza su ejecución por medio de un paso sustancial, pero el delito no ocurre debido a circunstancias independientes de las intenciones de la persona o entidad. Sin embargo, una persona o entidad que abandone el intento de cometer el delito o de otra manera impida la realización del delito no estará sujeta a castigo en virtud de esta Carta por el intento de cometer ese delito, si la persona o entidad abandonó total y voluntariamente la intención delictiva.

4. De conformidad con esta Carta, las disposiciones de este Artículo se aplicarán a cualquier entidad o persona física que esté en condiciones de ejercer efectivamente el control o dirigir la acción política o militar de un Estado o

una Nación con respecto al crimen de agresión. .

5. Ninguna disposición de esta Carta relativa a la responsabilidad penal individual perjudicará o afectará la responsabilidad de los Estados o Naciones en virtud del derecho internacional.

#### **Artículo 47. Irretroactividad por Razón de Cargo Oficial**

El principio de irretroactividad *ratione personae* se aplicará a todos los procedimientos penales en virtud de esta carta. Ninguna persona o entidad será penalmente responsable por una conducta que no fue considerada delictiva en el momento en que se cometió.

#### **Artículo 48 Responsabilidad Penal**

##### 1. Responsabilidad penal de los adultos

a) El hecho de que una persona o entidad haya actuado en cumplimiento de una orden del Estado o Nación o de un superior no exime a la persona o entidad de su responsabilidad en virtud de la Carta.

##### 2. Menores

a) El Tribunal considerará las circunstancias especiales de cualquier persona menor de 18 años para determinar la culpabilidad y responsabilidad de esa persona por el delito.

#### **Artículo 49. Irrelevancia del Cargo Oficial**

1. El cargo oficial de una persona, como Jefe de Estado o de Gobierno, miembro de un Gobierno o parlamento, representante electo o funcionario del gobierno, no proporcionará inmunidad ni exención de responsabilidad penal en virtud de esta Carta. Todas las personas están sujetas a las

disposiciones de esta Carta, sin distinción alguna basada en el cargo oficial, y el hecho de ocupar un cargo oficial no constituirá una base para la reducción de la pena.

2. El carácter oficial de una persona no impedirá la competencia de la Corte sobre tal persona, a pesar de las inmunidades o normas procesales especiales que puedan aplicarse en virtud del derecho nacional o internacional.

### **Artículo 50. Responsabilidad de los Comandantes y Superiores**

De conformidad con esta Carta, una fuerza armada o una persona que actúe efectivamente como comandante de una fuerza armada será penalmente responsable de los crímenes de la competencia de la Corte cometidos por fuerzas bajo el mando y control efectivo de la fuerza armada, o una persona, o autoridad y control, debido a la falta de ejercer adecuadamente el control sobre tales fuerzas. Esto se aplicará además de otros motivos de responsabilidad penal por tales crímenes dentro de la jurisdicción de la Corte.

### **Artículo 51. Inaplicabilidad de la Carta de Limitaciones**

Los delitos cometidos en virtud de esta Carta no estarán sujetos a ninguna carta de prescripción.

### **Artículo 52. Elemento Mental**

1. A menos que se disponga lo contrario, una persona incurrirá en responsabilidad penal y estará sujeta a castigo por un delito de la competencia de la Corte solo si los delitos se cometen con elementos materiales de intención y

conocimiento específicos.

2. A los efectos de este artículo, se considerará que una persona tiene dolo si:

- a) La persona tiene la intención de realizar la conducta en cuestión;
- b) La persona tiene la intención de causar el resultado en cuestión o es consciente de que puede ocurrir en el curso ordinario de los acontecimientos.
- c) Negligencia o negligencia grave por parte de un Estado o Nación.

3. Para los efectos de este artículo, “conocimiento” significa ser consciente de que existe una circunstancia o que una consecuencia puede ocurrir en el curso ordinario de los acontecimientos. Los términos “saber” y “a sabiendas” se interpretarán en consecuencia.

### **Artículo 53. Mitigación de la Responsabilidad Penal**

1. De conformidad con esta Carta, la responsabilidad penal de una persona puede mitigarse por los siguientes motivos, además de otros motivos similares:

- (a) Si al momento de la conducta, la persona sufre de una enfermedad o defecto mental que resulte en la destrucción de su capacidad para apreciar la naturaleza ilícita o ilícita de su conducta o para controlar su conducta para cumplir con los requisitos de la ley;
- (b) Si la persona se encuentra en un Estado de embriaguez que resulte en la destrucción de su capacidad para apreciar la naturaleza ilícita o ilícita de su conducta o para controlar

su conducta para cumplir con los requisitos de la ley, excepto en situaciones en las que la persona consumió voluntariamente alcohol o drogas y, a sabiendas, hizo caso omiso de los riesgos de participar en una conducta delictiva;

(c) Si la persona actuó razonablemente en defensa propia, defensa de otros, defensa de la propiedad esencial o de la misión militar, contra un uso ilegal de la fuerza, de manera proporcional al grado de peligro que enfrenta, siempre que la participación de la persona en una operación defensiva realizada por militares no los exime automáticamente de responsabilidad penal;

(d) Si la conducta constitutiva de un crimen de la competencia de la Corte es causada por coacción que resulta de una amenaza inminente de muerte o lesiones corporales graves contra la persona u otra persona, y la persona actúa necesaria y razonablemente para evitar la amenaza, siempre que no pretenden causar un daño mayor que el que buscan evitar. Tal amenaza puede surgir de otras personas o de otras circunstancias incontrolables.

(e) Error de hecho o error de derecho: Sólo se considerará un error de hecho como causal para atenuar la responsabilidad penal si niega el elemento intencional requerido por el delito. No se considerará como causal para atenuar la responsabilidad penal el error de derecho en cuanto a si un determinado tipo de conducta constituye un delito de la competencia de la Corte. Sin embargo, el error de derecho puede ser considerado como causal atenuante de la responsabilidad penal si niega el elemento

doloso exigido por tal delito, o lo dispuesto en el artículo 36.

2. Corresponde a la Corte determinar la aplicabilidad de las causales de atenuación de la responsabilidad penal previstas en esta Carta a cada caso.

#### **Artículo 54. Órdenes Superiores y Prescripción de la Ley Interna**

1. El hecho de que un crimen de la competencia de la Corte haya sido cometido por una persona en cumplimiento de una orden de un gobierno o de un superior, ya sea militar o civil, o de conformidad con el derecho interno, no la eximirá de responsabilidad penal. Puede tomarse en consideración como un factor atenuante al momento de dictar sentencia.

2. Para los efectos de este artículo, las órdenes para cometer genocidio o crímenes de lesa humanidad son manifiestamente ilegales.

#### **Artículo 55. Reglamento de la Corte**

1. Sujeto al Artículo 28 (Comisión de Revisión de Enjuiciamiento), el Director iniciará una investigación después de la evaluación de toda la información disponible si se encuentra una base razonable para proceder de acuerdo con las reglas establecidas en el presente Estatuto. Las normas consuetudinarias basadas en la Nación pueden usarse como complemento si no están en conflicto con las normas y principios definidos en la Carta.

2. El Director decidirá proceder si:

a) La información disponible indica una base razonable para creer que se ha cometido o se está cometiendo un delito dentro de la jurisdicción de la Corte;

b) Se respetan las condiciones establecidas en el artículo 21;

c) Teniendo en cuenta el presunto delito y su(s) víctima(s), se considera necesaria una investigación para cumplir con los objetivos señalados en la Carta.

3. Si el Director determina que no existe una base razonable para proceder, deberá informar a la División de Cuestiones Preliminares.

Si, tras la investigación, el director concluye que no hay base suficiente para un enjuiciamiento debido a:

- 1) carentes y/o insuficientes de elementos de hecho o de derecho;
- 2) inadmisibilidad según el artículo 21;
- 3) un enjuiciamiento no avanza en la dirección de cumplir con los objetivos de la Carta, considerando el crimen, la(s) víctima(s) y el(los) presunto(s) perpetrador(es).

El Director informará a la División de Cuestiones Preliminares, a la Comisión del Tribunal en virtud del Artículo 17, Párrafo (b), o a la Parte que hace una remisión en virtud del Artículo 18 sobre las conclusiones del peticionario y las razones relacionadas para no proceder.

4. La División de Cuestiones Preliminares puede revisar una decisión del Director de no proceder y puede solicitar al peticionario para reevaluar el caso a solicitud de la Comisión del Tribunal en virtud del Artículo 17 Párrafo (b) o de la parte que hace una remisión en virtud del Artículo 18.

5. A su discreción, la División de Cuestiones Preliminares puede revisar una decisión del Director de no proceder si se basa exclusivamente en el Párrafo 2 (c) o 3 (c). En consecuencia, la efectividad de la decisión del Director dependerá de la confirmación de la División de Cuestiones Preliminares.

6. Cuando se le presentan nuevos hechos o información, el director puede reconsiderar la decisión de proceder con una investigación o enjuiciamiento. Si se espera que exista un límite de tiempo para la reconsideración, dependiendo de la naturaleza del caso, particularmente si se aplican sistemas de justicia restaurativa. (Como se establece en el ANEXO E)

## **SECCIÓN 5. CÓDIGO JURÍDICO, INVESTIGACIÓN Y PROCESAMIENTO**

### **Artículo 56. Deberes y Facultades Investigativas del Director**

1. El Director investigará todos los hechos y pruebas pertinentes para evaluar si existe responsabilidad penal en virtud de esta Carta.

2. Las investigaciones se iniciarán de oficio o con base en la información recibida por los peticionarios.

3. El Director tendrá la facultad de interrogar a los sospechosos, las víctimas y los testigos, recopilar pruebas y realizar investigaciones sobre el terreno de conformidad con los principios generales del derecho de los derechos humanos y las leyes consuetudinarias de los pueblos involucrados, con la asistencia de las autoridades estatales o locales.

4. Al garantizar la investigación y el enjuiciamiento efectivos de los delitos, el Director tendrá en cuenta tanto los intereses personales y las condiciones de las víctimas y los testigos, como los derechos e intereses colectivos de los peticionarios, respetando plenamente los derechos de todas las personas conforme a esta Carta.

5. El Director podrá realizar investigaciones de conformidad con lo dispuesto en el Artículo 9 o previa autorización de la División de Cuestiones Preliminares, recogiendo y examinando pruebas. El Director podrá solicitar la presencia e interrogar a los investigados, víctimas y testigos.

6. Podrá solicitar la cooperación de cualquier Estado, Nación, comunidad, grupo u organización, celebrando acuerdos o arreglos para facilitar la mencionada cooperación, siempre que dichos instrumentos sean compatibles con esta Carta.

7. El Director podrá acordar no divulgar, en ninguna etapa del procedimiento, información confidencial obtenida con fines investigativos sin el consentimiento del proveedor, tomando todas las medidas necesarias para asegurar la confidencialidad de la información y la preservación de la prueba.

### **Artículo 57. Derechos Durante una Investigación**

1. En relación con una investigación en virtud de esta Carta:

a) La Corte determinará la credibilidad del testigo y del testimonio de conformidad con el derecho internacional y consuetudinario;

b) Se presumirá la inocencia de una persona hasta que se pruebe su culpabilidad de acuerdo con las disposiciones de la presente Carta;

c) Una persona tendrá la asistencia gratuita de un intérprete competente si se le pregunta en un idioma que la persona entienda y ni hable completamente;

d) Una persona no será sometida a arresto o prisión arbitrarios y no será privada de su libertad excepto de conformidad con los procedimientos establecidos en la Carta.

2. Si hay motivos para creer que una persona ha cometido un delito dentro de la jurisdicción de la Corte y esa persona está a punto de ser interrogada por el Director o por otras autoridades de conformidad con la Sección 9, antes de interrogar al acusado se le informará de la naturaleza de los cargos contra el acusado cuyos derechos incluyen el derecho:

a) guardar silencio, sin que dicho silencio influya en la determinación de culpabilidad o inocencia;

b) defenderse personalmente o mediante la asistencia letrada de su elección;

c) a la asistencia letrada gratuita si el acusado no puede pagarla;

d) disponer de tiempo e instalaciones adecuados para la preparación de la defensa;

e) ser juzgado sin dilaciones indebidas;

f) ser interrogado en presencia de un abogado a menos que la persona haya renunciado voluntariamente al derecho a un abogado;

g) ser informado de las penas máximas de la infracción;

h) presentar testigos, confrontar e interrogar a los testigos;

i) para ser juzgado públicamente por juez, jurado o a través de mecanismos alternativos de resolución de disputas, por medio de mediación, arbitraje o negociación según el cargo, el contexto, las personas involucradas y las leyes consuetudinarias vigentes según lo determine el tribunal (como se establece en el ANEXO C sobre el Jurado).

## SECCIÓN 6. JUICIO

### Artículo 58. Lugar del Juicio

El lugar del juicio será la sede de la Corte, dentro de los límites de la República de Armenia, a menos que se determine lo contrario.

### Artículo 59. Juicio en presencia del Imputado

Siempre que el imputado esté presente en el juicio, y en caso de perturbaciones por parte del imputado con el objeto de impedir la correcta realización del proceso, la Sala de Primera Instancia podrá desalojar al imputado y disponer la participación del imputado desde fuera de la sala, si otras alternativas han resultado no ser factibles. Dichos arreglos se realizarán únicamente por la duración estrictamente necesaria y de conformidad con las normas jurídicas internacionales y las leyes consuetudinarias de la Nación o el Estado en cuestión, si dichas leyes no están en conflicto con las normas jurídicas mencionadas.

### Artículo 60. Funciones y Atribuciones de la Sala de Primera Instancia

1. La Sala de Primera Instancia garantizará un juicio justo y rápido, respetando plenamente los derechos de los acusados y asegurando la protección de víctimas y testigos. Antes o durante el juicio, la División de Primera Instancia puede desempeñar cualquier función de la División de Cuestiones Preliminares.

2. La División de Primera Instancia que conozca del caso deberá:

a) consultar con las partes y adoptar todos los medios necesarios para garantizar un proceso justo y rápido;

b) determinar el o los idiomas que se utilizarán;

c) prever la divulgación de información, si no se ha divulgado previamente, con suficiente antelación para facilitar la preparación adecuada para el juicio.

3) La División de Primera Instancia puede remitir cuestiones preliminares a la División de Cuestiones Preliminares y, si procede, puede decidir combinar los juicios en un solo juicio o separar los juicios en consideración de los cargos contra más de un acusado, notificando debidamente a las partes.

4. En el desempeño de sus funciones, la División de Primera Instancia deberá:

a) requerir la comparecencia y testimonio de testigos y la producción de documentos y otras pruebas, y ordenar la producción de pruebas adicionales;

b) garantizar la protección de la información confidencial;

c) disponer la protección de los acusados, testigos y víctimas, teniendo en cuenta las tradiciones, valores y principios de la comunidad, grupo o Nación de que se trate.

5. El juicio será público y el Tribunal reconocerá al jurado del demandante (como se establece en el ANEXO C), a menos que se decida lo contrario según el caso y en aplicación de las leyes consuetudinarias locales, siempre que no esté en conflicto con los principios definidos en los derechos humanos, los instrumentos legales y el derecho consuetudinario internacional. Además, la División de Primera Instancia puede decidir que determinados procedimientos se lleven a cabo a puerta cerrada por razones especiales, incluida la protección de información confidencial o delicada.

6. Al comienzo del juicio:

a) La División de Primera Instancia le leerá al acusado los cargos previamente confirmados por la División de Cuestiones Preliminares, asegurándose de que el acusado comprenda la naturaleza de los cargos. Le dará al acusado(s) la oportunidad de admitir la culpabilidad o declararse inocente.

b) El juez presidente puede dar indicaciones para la conducción del procedimiento, también para asegurar su equidad e imparcialidad.

7. La Sala de Primera Instancia tendrá facultades para:

a) pronunciarse sobre la admisibilidad de la prueba;

b) tomar todas las medidas necesarias para mantener el orden durante el juicio.

c) El Registrador elabora y mantiene un registro completo del juicio.

### **Artículo 61. Admisiones de Culpabilidad**

1. En los casos en que el acusado admita su culpabilidad de conformidad con el Artículo 6, Párrafo (a) de esta Carta Constitutiva, la División de Primera Instancia realizará una revisión para determinar lo siguiente:

a) Si el acusado entiende completamente la naturaleza y las consecuencias de la admisión de culpabilidad;

b) Si la admisión de culpabilidad fue hecha voluntariamente por el acusado después de consultar adecuadamente con el abogado defensor o, en su caso, con un órgano decisorio apropiado.

c) Si la admisión de culpabilidad está respaldada por los hechos del caso establecidos en los cargos presentados por el Director y admitidos por el acusado, cualquier material complementario presentado por el Director que el acusado acepte y cualquier otra evidencia presentada por cualquiera de las partes.

2. Cuando la Sala de Primera Instancia esté convencida de que se han establecido las cuestiones a que se refiere el Párrafo 1, considerará que la admisión de culpabilidad, junto con cualquier prueba adicional presentada, establece todos los hechos esenciales que se requieren para probar el delito al que se refiere la

admisión de culpa se relaciona y puede condenar al imputado por ese delito.

3. Cuando la Sala de Primera Instancia no esté satisfecha de que los hechos a que se refiere el Párrafo 1 están establecidos, considerará que no se ha hecho la admisión de culpabilidad, ordenando que el juicio continúe bajo los procedimientos ordinarios de juicio previstos en esta Carta. En este caso, el juez presidente puede solicitar al Director que organice una consulta con un órgano decisorio apropiado, como el órgano decisorio comunitario de una nación, para aclarar y verificar todos los aspectos relevantes en consideración del cargo, el contexto, las personas involucrados y el derecho consuetudinario vigente.

4. Cuando la División de Primera Instancia crea que se requiere una presentación más completa de los hechos del caso, la División de Primera Instancia podrá:

5. Solicitar al Director que presente pruebas adicionales, incluido el testimonio de testigos y, si corresponde, las opiniones pertinentes de los ancianos, miembros del clan, la familia y la comunidad sobre la necesidad de proceder, considerando los mejores intereses de las Naciones o Estados involucrados.

6. Ordenar que el juicio continúe bajo los procedimientos de juicio previstos en esta Carta, en cuyo caso tendrá por no hecha la admisión de culpabilidad y podrá remitir el caso a otra Sala de Primera Instancia. (en el ANEXO E)

7. Los acuerdos entre el Director y la defensa sobre la modificación de los cargos, la admisión

de culpabilidad o la pena a imponer no serán vinculantes para el Tribunal. Además, la Corte puede consultar con el organismo de toma de decisiones correspondiente de una Nación o un Estado que se ocupe de cuestiones jurídicas penales para formarse mejor su propia opinión sobre el caso.

### **Artículo 62. Presunción de Inocencia**

1. El imputado se presumirá inocente mientras no se pruebe su culpabilidad ante el Tribunal, el Jurado o mediante cualquier mecanismo de solución alternativa de controversias.

2. Para obtener una condena, el Director debe probar la culpabilidad más allá de toda duda razonable.

### **Artículo 63. Derechos del Imputado**

1. En la determinación de cualquier cargo, el acusado tendrá derecho a una audiencia pública, justa e imparcial, ya todas las garantías previstas en el artículo 52 y aplicables durante el juicio.

2. Además, los imputados tendrán derecho a hacer una declaración no jurada oral o escrita en su defensa y no tendrán inversión de la carga de la prueba que se les imponga.

3. El Director revelará a la defensa cualquier evidencia en posesión o control del Director que, en su opinión, pueda demostrar la inocencia del acusado, mitigar su culpabilidad o afectar la credibilidad de la evidencia de la fiscalía. En caso de duda, el Tribunal decidirá.

4. Cualquier derecho adicional puede ser reconocido sobre la base del derecho consuetudinario o circunstancias especiales,

siempre que no esté en conflicto con el derecho reconocido de los derechos humanos y las normas de procedimiento penal internacionalmente reconocidas.

#### **Artículo 64. Protección de Víctimas y Testigos**

1. La Corte garantizará la seguridad, el bienestar físico y psicológico, la dignidad y la privacidad de las víctimas y testigos, teniendo en cuenta los derechos, intereses, bienestar y valores tradicionales de la comunidad involucrada. La Corte considerará todos los factores pertinentes para determinar las medidas de protección apropiadas.

2. El Director tomará medidas para proteger a las víctimas y testigos, particularmente durante la investigación y el enjuiciamiento. Estas medidas no infringirán los derechos del acusado a un juicio justo e imparcial.

3. La Corte puede llevar a cabo procedimientos cerrados o adoptar medidas especiales para proteger la seguridad y el bienestar de las víctimas, testigos o acusados. Además, el Tribunal puede evitar una audiencia pública si dicha audiencia no fuera compatible con las prácticas tradicionales vigentes o si fuera contraria a los intereses de la justicia.

4. La Corte permitirá que las opiniones y preocupaciones de las víctimas sean presentadas y consideradas en las etapas apropiadas del proceso. Los representantes legales de las víctimas pueden presentar dichos puntos de vista y preocupaciones. La Corte también puede tener en cuenta las opiniones y preocupaciones

de destacados representantes de la comunidad involucrada, de conformidad con el derecho consuetudinario.

5. Protección de pruebas e información en casos de grave peligro:

a) De conformidad con esta Carta Constitutiva, cuando la divulgación de pruebas o información pueda poner en grave peligro la seguridad de un testigo, su familia o la comunidad, el Director puede retener dichas pruebas o información.

b) En tales casos, el Director presentará en su lugar un resumen de la evidencia o información, sujeto a la aprobación del Tribunal, e indicará que la evidencia o información completa está disponible para el uso exclusivo del Tribunal, la defensa o cualquier otra persona autorizada o entidades que determine el Tribunal.

c) La decisión de retener pruebas o información y presentar un resumen la tomará el Director de conformidad con los procedimientos establecidos por el Tribunal y con la debida consideración de los derechos del acusado a un juicio justo e imparcial.

d) El Tribunal podrá ordenar la divulgación de las pruebas o información retenida cuando considere que los intereses de la justicia así lo exigen y que existen medidas adecuadas para garantizar la seguridad del testigo, su familia o la comunidad.

#### **Artículo 65. Evidencia**

1. Antes de brindar testimonio, cada testigo

deberá brindar una declaración sobre la exactitud del testimonio que se brindará.

2. El testimonio de un testigo durante el juicio se dará en persona, a menos que el Tribunal determine que circunstancias especiales requieren lo contrario, en cuyo caso el testigo podrá prestar testimonio a través de otros medios apropiados.

3. Las partes podrán presentar las pruebas pertinentes al caso, y el Tribunal tendrá la facultad de solicitar la presentación de las pruebas que considere necesarias para determinar la verdad.

4. El Tribunal puede decidir sobre la pertinencia o admisibilidad de cualquier prueba, teniendo en cuenta la credibilidad de la prueba y cualquier posible sesgo o prejuicio.

5. El Tribunal reconocerá y observará los privilegios de confidencialidad, y podrá tomar conocimiento judicial de los hechos comúnmente aceptados sin necesidad de mayor sustanciación.

6. Las pruebas obtenidas en violación de esta Carta, de los derechos humanos reconocidos internacionalmente o de las normas internas de la comunidad afectada se considerarán inadmisibles si:

- a) dicha violación genera dudas sustanciales sobre la confiabilidad de la evidencia; o si
- b) la admisión de la prueba socavaría gravemente la integridad del proceso.

El Tribunal tendrá la autoridad para excluir cualquier prueba que cumpla con los criterios

establecidos en el párrafo 1, ya sea por iniciativa propia o a petición de parte.

### **Artículo 66. Delitos contra la Administración de Justicia**

1. La Corte tendrá competencia sobre los siguientes delitos contra su administración de justicia cuando sean cometidos intencionalmente:

- a) dar falso testimonio;
- b) presentar pruebas que la parte sepa que son falsas o falsificadas;
- c) influir corruptamente en un testigo, obstruir o interferir con la asistencia o el testimonio de un testigo, tomar represalias contra un testigo por dar testimonio o destruir, manipular o interferir con la recopilación de pruebas;
- d) obstaculizar, intimidar o influir corruptamente en un funcionario de la Corte para forzar o persuadir a dichas personas a no desempeñar, o a realizar indebidamente, las funciones apropiadas;
- e) tomar represalias contra un funcionario de la Corte por razón de las funciones desempeñadas por ese u otro funcionario;
- f) solicitar o aceptar un soborno como funcionario de la Corte en relación con funciones oficiales.

2. En caso de condena, la Corte podrá imponer una pena de prisión que no exceda de diez años, o una multa de conformidad con los códigos legales o las leyes consuetudinarias del Estado Parte o Nación Parte involucrada.

### **Artículo 67. Sanciones por Mala conducta Ante el Tribunal**

1. El Tribunal tendrá autoridad para imponer medidas administrativas, distintas de la prisión, a las personas que cometan mala conducta durante sus procedimientos o que deliberadamente se nieguen a cumplir sus instrucciones. Tales medidas pueden incluir, pero no limitarse a, la remoción temporal o permanente de la sala del tribunal, la imposición de una multa o cualquier otra medida similar que el Tribunal considere apropiada.

2. Los procedimientos para imponer tales medidas deberán ser consistentes con las normas legales pertinentes y podrán tomar en consideración las prácticas tradicionales del Estado o Nación involucrados.

### **Artículo 68. Requisitos para una Decisión**

1. Todos los miembros de la Sala de Primera Instancia estarán presentes en todas las etapas del juicio y sus deliberaciones. En caso de ausencia, el Presidente de las Salas Judiciales podrá designar uno o más jueces suplentes para sustituir a un miembro de la Sala de Primera Instancia.

2. La decisión de la División de Primera Instancia se basará en la evaluación de todo el proceso. La decisión se circunscribirá a los hechos y circunstancias a que se refieren los cargos, y el Tribunal se pronunciará únicamente sobre las pruebas presentadas y examinadas en el juicio.

3. Los Jueces se esforzarán por lograr una decisión unánime. Si no fuere posible, la decisión se tomará por mayoría de los jueces.

4. Las deliberaciones judiciales serán confidenciales, salvo decisión en contrario, considerando el contexto específico y los intereses generales de la Nación o comunidad afectada.

5. La decisión se hará por escrito y comprenderá una declaración completa y bien fundamentada de las conclusiones y hallazgos de la División de Primera Instancia sobre las pruebas. Si no se alcanza la unanimidad, la decisión deberá contener las opiniones de la mayoría y la minoría. La decisión final se anunciará públicamente a menos que una situación particular requiera lo contrario.

### **Artículo 69. Reparaciones**

1. La Corte establecerá principios relacionados con la reparación a las víctimas, incluyendo la restitución, compensación y rehabilitación, de conformidad con los principios establecidos en esta Carta y los instrumentos jurídicos internacionales pertinentes. Al determinar tales principios, la Corte puede tomar en consideración valores tradicionales específicos y determinaciones alternativas de solución de controversias para los mismos o similares asuntos en la Nación, Estado o comunidad involucrada.

2. Sobre la base de estos principios, la Corte puede determinar el alcance y la extensión de cualquier daño, pérdida y perjuicio a las víctimas en su decisión, ya sea a solicitud o de oficio en circunstancias excepcionales. La Corte actuará de conformidad con los instrumentos jurídicos internacionalmente reconocidos, así como con el derecho consuetudinario tanto internacional como nacional.

3. La Corte podrá ordenar directamente contra una persona condenada que proporcione las reparaciones adecuadas a las víctimas, incluyendo la restitución, compensación y rehabilitación, de conformidad con los principios establecidos en este artículo.

4. Este artículo no afectará los derechos de las víctimas en virtud del derecho estatal, nacional e internacional.

### **Artículo 70. Sentencia**

1. En caso de condena, la Sala de Primera Instancia considerará la pena que corresponda imponer, teniendo en cuenta las pruebas presentadas, los alegatos y las recomendaciones de las víctimas realizadas durante el juicio que sean pertinentes para la pena.

2. Antes de la finalización del juicio, excepto cuando se aplique el artículo 56, la División de Primera Instancia podrá, de oficio, y previa solicitud del director o del acusado, celebrar una nueva audiencia para escuchar cualquier prueba o presentación adicional relacionada con la sentencia.

3. La sentencia se pronunciará en público y, en lo posible, en presencia del imputado.

4. La sentencia se ajustará a los principios y normas jurídicas reconocidos internacionalmente. Asimismo, para determinar el contenido de la sentencia, las normas nacionales prevalecerán sobre cualquier otra ley en conflicto, siempre que sean compatibles con el marco jurídico internacional de los derechos humanos.

### **Artículo 71. Protección de la Seguridad del Estado o de la Nación**

1. Este artículo se aplica en cualquier caso en que la divulgación de información o documentos de un Estado o Nación, en opinión de ese Estado o Nación, perjudique sus intereses de seguridad. Dichos casos incluyen los que caen dentro del alcance del artículo 54, así como los casos que surjan en cualquier otra etapa del procedimiento en los que pueda cuestionarse dicha divulgación.

2. Este artículo también se aplicará cuando una persona a la que se le haya pedido que proporcione información o pruebas se haya negado a hacerlo o haya remitido el asunto al Estado o Nación con el argumento de que la divulgación perjudicaría los intereses de seguridad nacional de un Estado o Nación y el Estado o Nación en cuestión confirma que es de la opinión de que la divulgación perjudicaría sus intereses de seguridad nacional.

3. Nada de lo dispuesto en este artículo perjudicará las exigencias de confidencialidad aplicables en virtud del artículo 5°.

4. Si un Estado o Nación se entera de que cierta información o documentos del Estado o Nación están siendo o es probable que sean divulgados en cualquier etapa del procedimiento, y es de la opinión de que la divulgación perjudicaría sus intereses de seguridad nacional, que El Estado o la Nación tendrá derecho a intervenir para obtener la resolución del asunto de conformidad con este artículo.

5. Si, a juicio de un Estado o Nación, la divulgación de información perjudicaría sus

intereses de seguridad nacional, el Estado tomará todas las medidas razonables, actuando en conjunto con el Fiscal, la defensa o la Sala de Cuestiones Preliminares o de Sala de Primera Instancia, en su caso, para tratar de resolver el asunto por la vía cooperativa. Tales pasos pueden incluir:

- (a) Modificación o aclaración de la solicitud;
- (b) Una determinación de la Corte con respecto a la pertinencia de la información o las pruebas buscadas, o una determinación de si las pruebas, aunque pertinentes, pueden obtenerse o se han obtenido de una fuente distinta del Estado requerido;
- (c) Obtener la información o evidencia de una fuente diferente o en una forma diferente; o
- (d) Acuerdo sobre las condiciones bajo las cuales se podría brindar la asistencia, lo que incluye, entre otras cosas, proporcionar resúmenes o redacciones, limitaciones a la divulgación, uso de cámaras o procedimientos ex parte u otras medidas de protección permitidas por el Estatuto y las Reglas de Procedimiento y Evidencia.

6. Una vez que se hayan tomado todas las medidas razonables para resolver el asunto por la vía cooperativa, y si el Estado considera que no existen medios o condiciones bajo los cuales la información o los documentos puedan ser proporcionados o divulgados sin perjuicio de sus intereses de seguridad nacional, así lo notificará al Fiscal o al Tribunal de las razones específicas de su decisión, a menos que una descripción específica de las razones en sí misma

necesariamente resulte en tal perjuicio a los intereses de seguridad nacional del Estado.

7. Posteriormente, si el Tribunal determina que la prueba es pertinente y necesaria para establecer la culpabilidad o inocencia del acusado, el Tribunal podrá emprender las siguientes acciones:

(a) Cuando se solicita la divulgación de la información o el documento en virtud de una solicitud de cooperación conforme a la Parte 9 o las circunstancias descritas en el párrafo 2, y el Estado ha invocado el motivo de la denegación:

i) La Corte podrá, antes de llegar a cualquier conclusión a que se refiere el subpárrafo 7 (a) (ii), solicitar consultas adicionales con el fin de considerar las representaciones del Estado, que pueden incluir, según corresponda, audiencias a puerta cerrada y ex parte;

ii) Si la Corte llega a la conclusión de que, al invocar el motivo de denegación previsto en el párrafo 4 del artículo 93, en las circunstancias del caso, el Estado requerido no está actuando de conformidad con las obligaciones que le impone el presente Estatuto, la Corte podrá remitir el asunto de conformidad con el artículo 87, párrafo 7, especificando las razones de su celebración; y

(iii) La Corte puede hacer la inferencia en el juicio del acusado en cuanto a la existencia o inexistencia de un hecho, según sea apropiado en las circunstancias; o

(b) En todas las demás circunstancias:

(i) ordenar la divulgación; o

(ii) En la medida en que no ordene la divulgación, hacer la inferencia en el juicio del acusado en cuanto a la existencia o inexistencia de un hecho, según sea apropiado en las circunstancias.

## SECCIÓN 7. SANCIONES

### Artículo 72. Sanciones aplicables

1. El Tribunal podrá imponer una de las penas siguientes a una persona condenada por un delito a que se refiere el artículo 8 de esta Carta. Las penas se determinarán de conformidad con las disposiciones de esta Carta Constitutiva y las Reglas de Procedimiento y Evidencia de la Corte:

(a) prisión por un número determinado de años, que no puede exceder un máximo de 30 años; o

b) La cadena perpetua cuando la extrema gravedad del delito la justifique, teniendo en cuenta todas las circunstancias.

2. Además de la pena de prisión, el tribunal podrá ordenar:

(a) una multa;

(b) el decomiso de los productos, bienes y activos derivados directa o indirectamente de ese delito, sin perjuicio de los derechos de terceros de buena fe;

(c) cualquier otra pena o medida conforme al derecho consuetudinario del Estado o

Nación de que se trate, incluyendo pero sin limitarse a la reparación a las víctimas y otras medidas de justicia restaurativa, como penas o medidas complementarias. Al ordenar eso, la Corte puede tomar en consideración las opiniones de los líderes tradicionales, clanes, círculos familiares y comunitarios y cualquier otro órgano decisorio pertinente. (Como se establece en el ANEXO E)

### Artículo 73. Sentencia

1. Para la determinación de la pena, la Corte tendrá en cuenta factores tales como la gravedad del delito, las circunstancias individuales del condenado, el contexto específico y los intereses colectivos de la Nación o comunidad afectada.

2. Al imponer una pena de prisión, el Tribunal deducirá el tiempo, si lo hubiere, pasado previamente en detención de conformidad con una orden del Tribunal. El Tribunal también puede deducir cualquier tiempo pasado en detención en relación con una conducta subyacente al delito.

3. Cuando un imputado hubiere sido condenado por más de un delito, el Tribunal dictará sentencia por cada delito y sentencia conjunta en la que se especificará el tiempo total de prisión. Dicho período no será inferior a la sentencia individual más alta pronunciada y no excederá de 30 años de prisión o una sentencia de cadena perpetua, de conformidad con el Artículo 66, Párrafo 1 (b).

4. La Corte también considerará el uso de medidas alternativas a la prisión, tales como

rehabilitación, servicio comunitario, justicia restaurativa y reparación a las víctimas, cuando corresponda y sea compatible con los intereses de la justicia (Conforme a lo establecido en el ANEXO E).

5. El Tribunal considerará, en su caso, medidas alternativas a la prisión, tales como servicio comunitario, libertad condicional u otras medidas que sean compatibles con los principios de la justicia restaurativa, y que promuevan la rehabilitación y reinserción social del condenado.

6. El Tribunal motivará su decisión de sentencia por escrito, exponiendo los factores tomados en cuenta y la justificación de la sentencia impuesta.

#### **Artículo 74. Fondo Fiduciario**

1. La Comisión Internacional de las Partes establecerá un Fondo Fiduciario para las Víctimas con el fin de brindar apoyo financiero a las víctimas de delitos y sus familias de conformidad con esta Carta.

2. El Fondo Fiduciario se financiará con contribuciones voluntarias de los Estados, organizaciones e individuos, así como con cualquier dinero y bienes recaudados mediante multas o decomisos ordenados por la Corte. La Comisión determinará los criterios para la aceptación de contribuciones y la gestión del Fondo, teniendo en cuenta las mejores prácticas y los principios de transparencia y rendición de cuentas.

3. El Fondo Fiduciario dará prioridad a la prestación de asistencia a las víctimas que hayan

sufrido los daños más graves, incluidos los daños físicos o psicológicos, las pérdidas económicas y la violación de sus derechos. La asistencia puede incluir atención médica y psicológica, asistencia jurídica y otras formas de apoyo necesarias para la recuperación y rehabilitación de la víctima.

4. El Fondo Fiduciario será accesible a todas las víctimas de los delitos previstos en esta Carta, independientemente de su nacionalidad, género, raza o cualquier otra característica. La Comisión establecerá procedimientos para solicitar y recibir ayuda del Fondo, los cuales serán sencillos, accesibles y no discriminatorios.

5. La administración del Fondo informará sobre la administración y el uso del Fondo Fiduciario a la Asamblea de las Partes y al público anualmente, brindando información sobre las fuentes y montos de las contribuciones, el número y tipos de víctimas asistidas y el impacto de la asistencia prestada.

#### **Artículo 75. No Perjuicio en la Aplicación de Sanciones Previstas en las Leyes Estatales y Nacionales.**

Nada de lo dispuesto en esta Parte afectará la aplicación de las sanciones previstas en las leyes estatales o nacionales.

### **SECCIÓN 8. APELACIÓN Y REVISIÓN**

#### **Artículo 76. Recurso de Sentencia Absolutoria o Condenatoria.**

1. La División de Apelaciones puede afirmar, revocar o revisar las decisiones tomadas por la División de Primera Instancia.

2. Una decisión en virtud del artículo 63 puede ser apelada de la siguiente manera:

(a) el Fiscal puede apelar por cualquiera de los siguientes motivos: error de procedimiento, error de hecho o error de derecho;

(b) la persona condenada, o el Fiscal en nombre de esa persona, puede presentar una apelación por cualquiera de los siguientes motivos: error de procedimiento, error de hecho, error de derecho o cualquier otro motivo que afecte la imparcialidad o confiabilidad del proceso, decisión o sentencia;

(c) las víctimas del delito pueden apelar por cualquier motivo que afecte la equidad del proceso, la decisión o la sentencia.

(d) En caso de absolución, el acusado será puesto en libertad inmediatamente. Sin embargo, en circunstancias excepcionales, y teniendo en cuenta el riesgo concreto de fuga, la gravedad del delito imputado y la probabilidad de éxito de la apelación, la Sala de Primera Instancia, a petición del Director, podrá mantener la detención del acusado pendiente de apelar. La División de Primera Instancia proporcionará los motivos de su decisión por escrito y se asegurará de que el acusado pueda impugnar la decisión con prontitud y eficacia.

(e) Si un acusado condenado es puesto en libertad pendiente de apelación, el tribunal puede imponer condiciones, incluidas obligaciones de informar, restricciones de viaje y monitoreo electrónico, según sea necesario

para garantizar la comparecencia de la persona en el juicio, proteger al público o prevenir nuevos delitos. Tales condiciones deben ser proporcionales al riesgo que representa la liberación de la persona y respetar sus derechos humanos.

3. El Tribunal tomará medidas para garantizar que la suspensión de la ejecución de una decisión o sentencia durante el plazo concedido para la apelación y la duración del procedimiento de apelación no produzca demoras indebidas o menoscabe los derechos de las víctimas o sus familias.

4. La decisión sobre la solicitud de revisión será definitiva e inapelable, salvo lo previsto en las Reglas de Procedimiento y Evidencia.

5. La ejecución de la resolución o sentencia podrá suspenderse durante el plazo concedido para la apelación y, si así lo determina el Tribunal, mientras dure la tramitación del recurso. Dicha suspensión podrá ser revocada por la Corte considerando las necesidades e intereses concretos de las víctimas, sus familias y la comunidad, y para facilitar el restablecimiento de la armonía dentro de la comunidad involucrada.

#### **Artículo 77. Recursos contra otras Decisiones**

1. Cualquiera de las partes puede apelar cualquiera de las siguientes decisiones:

a) una decisión con respecto a la jurisdicción o admisibilidad;

b) una decisión que conceda o deniegue la libertad de la persona investigada o procesada;

- c) una decisión de la División de Cuestiones Preliminares de actuar por iniciativa propia;
- d) una decisión que involucre un asunto que afectaría significativamente la conducta justa del proceso o el resultado del juicio, y para el cual una resolución inmediata por parte de la División de Apelaciones puede facilitar significativamente el proceso.

2. El representante legal de las víctimas, el condenado o el propietario de buena fe de los bienes perjudicados por una orden de reparación podrá interponer recurso contra ella.

### **Artículo 78. Procedimiento de Apelación**

1. A los efectos de los procedimientos previstos en el artículo 70 y en este artículo, la Sala de Apelaciones tendrá todas las facultades de la Sala de Primera Instancia.

2. Si la División de Apelaciones determina que los procedimientos apelados fueron injustos de una manera que afectó la confiabilidad de la decisión o sentencia, o que la decisión o sentencia apelada se vio sustancialmente afectada por un error de hecho o de derecho o un error procesal, puede:

- a) revocar o modificar la decisión o sentencia;  
o
- b) ordenar un nuevo juicio ante una División de Juicio diferente.

A estos efectos, la División de Apelaciones puede devolver una cuestión de hecho a la División de Primera Instancia original para que la determine y le informe en consecuencia, o puede

llamar ella misma a las pruebas para determinar la cuestión. Cuando la decisión o sentencia haya sido apelada únicamente por el condenado, o el Director en su nombre, no podrá ser modificada en perjuicio de este.

3. Si en una apelación contra la sentencia, la División de Apelaciones encuentra que la sentencia es desproporcionada con respecto al delito, puede variar la sentencia. Al hacerlo, podrá tomar en cuenta las opiniones de los líderes consuetudinarios, círculos, clanes y otros órganos decisorios de la Nación involucrada.

4. La División de Apelaciones puede corregir en cualquier momento una sentencia que se determine que es ilegal o que se haya impuesto de manera ilegal antes de que se haya cumplido la sentencia.

5. El fallo de la División de Apelaciones se tomará por mayoría de los jueces y se pronunciará en audiencia pública, a menos que se especifique lo contrario debido a circunstancias especiales. La sentencia indicará las razones en que se funda y, si no se alcanza la unanimidad, la sentencia de la Sala de Apelaciones contendrá las opiniones de la mayoría y de la minoría.

### **Artículo 79. Revisión de la Condena o Sentencia**

1. La persona condenada o, después de su muerte, un miembro de la familia, o cualquier persona viva en el momento de la muerte del acusado que haya recibido instrucciones expresas por escrito del acusado para presentar tal demanda, o el Fiscal en nombre de la persona, puede solicitar a la Sala de Apelaciones para

revisar la sentencia firme de condena o sentencia con fundamento en que:

- a) se ha descubierto nueva evidencia de que:
  - i. no estaba disponible en el momento del juicio, y tal falta de disponibilidad no era total o parcialmente atribuible a la parte que presentó la solicitud; y
  - ii. si se probara en el juicio, probablemente habría resultado en un veredicto diferente;
- b) se ha descubierto recientemente que las pruebas decisivas, tenidas en cuenta en el juicio y de las que depende la condena, eran falsas, falsificadas o falsificadas;
- c) uno o más de los jueces que intervinieron en la condena o confirmación de los cargos hubiere cometido, en ese caso, una falta grave o un incumplimiento grave del deber de gravedad suficiente para justificar la destitución de ese juez o jueces de su cargo.

2. La División de Apelaciones rechazará la solicitud si la considera infundada. Si determina que la solicitud es meritoria, puede volver a convocar a la Sala de Primera Instancia original, constituir una nueva Sala de Primera Instancia o conservar la jurisdicción y así decidir si la sentencia debe ser revisada.

### **Artículo 80. Detención Ilegal**

1. Toda persona que haya sido víctima de arresto o detención ilegal tendrá derecho exigible a una indemnización. Los miembros de la familia y la comunidad también pueden ser compensados.

2. Cuando una persona ha sido condenada por un delito penal mediante sentencia firme, y cuando posteriormente la condena de esa persona ha sido revocada sobre la base de que un hecho nuevo o recién descubierto demuestra de manera concluyente que ha habido un arresto o detención ilegal, la persona que haya sufrido como consecuencia de tal condena será indemnizada conforme a la ley, a menos que se pruebe que la falta de divulgación del hecho desconocido en tiempo le es imputable en todo o en parte.

3. En circunstancias excepcionales, cuando la Corte encuentre hechos concluyentes que demuestren que ha habido un error judicial grave y manifiesto, podrá, a su discreción, otorgar una indemnización a una persona que haya sido puesta en libertad tras una sentencia firme de absolución o la terminación del proceso por ese motivo.

4. El monto total de la compensación será determinado por la ley, teniendo en cuenta tanto el derecho internacional consuetudinario como las normas y prácticas internas de los Estados y de las Naciones.

## **ARTÍCULO 9. COOPERACIÓN INTERNACIONAL Y ASISTENCIA JUDICIAL**

### **Artículo 81. Compromiso de Cooperación de las Partes**

1. Las partes de la Carta se comprometen a cooperar con la Corte mientras lleva a cabo investigaciones y enjuiciamientos de crímenes dentro de su jurisdicción de conformidad con las disposiciones de la Carta.

2. Para los efectos de este artículo, se entenderá por “cooperación” cualquier asistencia y apoyo necesarios que la Corte pueda requerir, incluyendo, pero sin limitarse a:

- a) Proporcionar acceso a documentos, registros y pruebas pertinentes;
- b) Facilitar la comparecencia de testigos y su protección;
- c) Ejecutar solicitudes de arresto o entrega de sospechosos;
- d) Proveer para la ejecución de sentencias y órdenes de la Corte; y
- e) Proporcionar otras formas de asistencia que pueda ser requerida por el Tribunal.

3. La cooperación con la Corte se llevará a cabo de conformidad con el ordenamiento jurídico interno de la parte interesada y respetará los derechos de los sospechosos y acusados.

4. Las partes de la Carta tomarán todas las medidas necesarias para asegurar que sus leyes nacionales prevean la cooperación con la Corte de conformidad con este Artículo.

### **Artículo 82. Solicitudes de Cooperación**

1. El Tribunal, conforme a la Carta, tiene autoridad para solicitar la cooperación de los Estados y las Naciones Partes. Dichas solicitudes se enviarán a través de los mecanismos diplomáticos aceptados designados por los Estados o Naciones partes en el momento de la ratificación, aceptación, aprobación o adhesión a esta Carta. Cualquier cambio en la designación será realizado por cada Nación o Estado Parte

de conformidad con las Reglas de Procedimiento y Evidencia. En circunstancias especiales, las solicitudes también podrán ser enviadas a través de otros medios establecidos por las Partes de acuerdo con las leyes internas.

2. El Estado o la Nación requeridos mantendrán la confidencialidad de una solicitud de cooperación y de cualquier documento que sustente la solicitud, excepto si la divulgación es necesaria para ejecutar la solicitud. Además, es posible que se requiera una divulgación en aplicación del derecho consuetudinario interno según el contexto particular, el delito, las personas y las comunidades involucradas.

3. El Tribunal podrá tomar todas las medidas necesarias para proteger la información y garantizar la seguridad o el bienestar físico y psicológico de las víctimas, los posibles testigos y sus familias, así como de la comunidad afectada.

4. El Tribunal podrá invitar a cualquier Estado o Nación u otra parte de esta Carta a brindar asistencia en virtud de esta Sección, según lo considere apropiado, según las circunstancias o los registros, documentos u otra información necesarios. El Tribunal también puede solicitar otras formas de cooperación y asistencia según el contexto y las circunstancias. Si un Estado o Nación que no es Parte de esta Carta no coopera según lo solicitado, el Tribunal informará a la Parte que remite el asunto y a la Comisión Internacional de Partes.

5. El Tribunal podrá solicitar a cualquier Estado, Nación u otra entidad legal que proporcione información o documentos. El

Tribunal también puede solicitar otras formas de cooperación y asistencia según el contexto y las circunstancias.

6. Cuando un Estado o una Nación Parte no cumpla con una solicitud de cooperación del Tribunal contraria a las disposiciones de esta Carta, el Tribunal remitirá el asunto a la Parte que remitió el asunto y a la Comisión Internacional de Partes.

7. El Tribunal se asegurará de que las solicitudes de cooperación sean proporcionales a la naturaleza y gravedad del delito investigado o juzgado, y no interfieran indebidamente con la soberanía del Estado o Nación Parte.

8. En caso de incumplimiento por parte de un Estado o Nación Parte, el Tribunal primero entablará un diálogo con el Estado o Nación Parte en cuestión para buscar una solución al problema. Si el asunto no se resuelve, el Tribunal considerará la posibilidad de tomar medidas adicionales, incluida la remisión a la Asamblea de los Estados Partes u otro órgano apropiado. El Tribunal también considerará el uso de incentivos para fomentar la cooperación, como ofrecer sentencias reducidas u otras formas de indulgencia a las personas que brinden una cooperación sustancial.

9. El Tribunal hará todo lo posible para garantizar que sus solicitudes de cooperación no comprometan la seguridad o el bienestar de las personas, las comunidades o los intereses de seguridad nacional del Estado o Nación Parte en cuestión. El Tribunal consultará con el Estado o Nación Parte interesado sobre las medidas

apropiadas a ser tomadas para asegurar tal protección.

### **Artículo 83. Procedimientos de Derecho Interno**

1. Cada Estado y Nación Parte se asegurará de contar con procedimientos adecuados y efectivos, de conformidad con sus leyes internas, para facilitar todas las formas de cooperación en virtud de esta Carta.

2. Dichos procedimientos incluirán, pero no se limitarán a:

- a) Designación de las autoridades competentes responsables de recibir y procesar las solicitudes de cooperación en virtud de esta Carta;
- b) Procedimientos para la ejecución de solicitudes de cooperación, incluidas las medidas legales y administrativas necesarias;
- c) Mecanismos para la protección de víctimas, testigos y demás personas que cooperen con la Corte, incluyendo medidas para salvaguardar su bienestar físico y psicológico;
- d) Procedimientos para la recopilación, conservación y transmisión de pruebas, incluidas las disposiciones sobre la admisibilidad de las pruebas obtenidas mediante la cooperación con la Corte;
- e) Procedimientos para la ejecución de órdenes o solicitudes emitidas por la Corte en virtud de esta Carta;
- f) Procedimientos para el tratamiento de

información confidencial o sensible que se le proporcione a la Corte en relación con solicitudes de cooperación.

3. Cada Estado y Nación Parte revisará periódicamente sus leyes y procedimientos internos para asegurar que sigan siendo adecuados y efectivos para los propósitos de esta Carta.

4. Cada Estado y Nación Parte proporcionará a la Corte información sobre los procedimientos que tiene establecidos para la cooperación en virtud de esta Carta, incluidos los cambios a los mismos, e informará a la Corte de cualquier dificultad que experimente en la implementación de dichos procedimientos.

5. Si un Estado o Nación Parte carece de leyes o procedimientos internos adecuados para facilitar la cooperación en virtud de esta Carta, hará todo lo posible para establecer dichas leyes y procedimientos lo antes posible, en consulta con la Corte y otras partes pertinentes.

6. La Corte proporcionará asistencia técnica y apoyo a los Estados y Naciones para establecer o mejorar sus leyes y procedimientos internos para facilitar la cooperación en virtud de esta Carta, de conformidad con su mandato y los recursos disponibles.

7. La Corte tendrá en cuenta las circunstancias y necesidades particulares de las víctimas, los testigos y otras personas que cooperen con la Corte cuando presenten solicitudes de cooperación en virtud de esta Carta. La Corte también tendrá en cuenta los riesgos o

consecuencias negativas que dicha cooperación pueda entrañar para estas personas y velará por que se tomen las medidas adecuadas para proteger sus intereses y bienestar.

8. La Corte entablará un diálogo y una consulta regulares con los Estados y las Naciones sobre cuestiones relacionadas con la cooperación en virtud de esta Carta, incluida la idoneidad y eficacia de las leyes y los procedimientos nacionales, y la prestación de asistencia y apoyo técnicos. La Corte también establecerá y mantendrá canales efectivos de comunicación con las autoridades competentes designadas por los Estados y Naciones a los efectos de esta Carta.

9. La Corte priorizará el uso de las medidas de cooperación que sean más efectivas, eficientes y respetuosas de la soberanía y los intereses de los Estados y las Naciones, asegurando al mismo tiempo que los derechos de los sospechosos y acusados estén protegidos de conformidad con la Carta.

La Corte tendrá en cuenta los recursos financieros y de otro tipo que puedan ser necesarios para la cooperación en virtud de esta Carta y procurará garantizar que dicha cooperación se lleve a cabo de manera rentable y sostenible. La Corte también explorará oportunidades para compartir costos y recursos entre Estados y Naciones a los efectos de esta Carta.

#### **Artículo 84. Entrega de los imputados**

1. El Tribunal podrá solicitar el arresto y la entrega de una persona, transmitiendo los

documentos e información en apoyo de tal solicitud, a cualquier Estado o Nación en cuyo territorio se encuentre esa persona. El Tribunal podrá solicitar la cooperación de dicho Estado/s o Nación/es en el arresto o entrega. Los Estados o Naciones Partes cumplirán con dichas solicitudes de conformidad con esta Sección y sus leyes internas.

2. Si la persona cuya detención o entrega se solicita invoca el principio de *ne bis in idem* ante un tribunal interno o a través de un mecanismo de solución alternativa de controversias, el Estado o Nación requerido consultará inmediatamente con el Tribunal respecto de la decisión de admisibilidad. Si el caso es admisible, el Estado o Nación requerido procederá a la ejecución de la solicitud, a menos que se decida otra cosa de conformidad con las leyes consuetudinarias internas. Si está pendiente una decisión de admisibilidad, la ejecución de la solicitud de arresto o entrega de una persona puede posponerse hasta que se dicte una decisión sobre la admisibilidad.

3. Si así lo solicita, un Estado o Nación Parte autorizará el tránsito por su territorio de una persona que esté siendo detenida o entregada al Tribunal por otro Estado o Nación, tramitando el tránsito en la forma más apropiada, atendiendo a las circunstancias y con el objeto de facilitarlos.

4. La solicitud de tránsito hecha por el Tribunal deberá contener: una descripción de la persona que se transporta, una breve exposición de los hechos del caso, incluida su relevancia jurídica, y la orden de arresto y entrega.

5. Si la persona reclamada está siendo

procesada o cumple condena en el Estado o Nación requeridos por un delito distinto de aquel por el cual se solicita la entrega al Tribunal, el Estado o Nación requerido consultará con el Tribunal para decidir sobre tal solicitud dependiendo del delito por el cual se solicita la entrega. A los efectos de la decisión mencionada, pueden prevalecer las leyes consuetudinarias internas si no están en conflicto con los principios establecidos en esta Carta, el derecho consuetudinario internacional y las normas jurídicas internacionalmente reconocidas.

6. El tribunal debe asegurarse de que los países a los que solicita la entrega de un acusado cuenten con salvaguardias adecuadas para proteger los derechos humanos del acusado. El tribunal también debe garantizar que todas las condiciones para la entrega sean justas y razonables y que el acusado sea tratado con humanidad durante el proceso de entrega.

7. El Tribunal se asegurará de que se respeten los derechos legales y procesales del acusado durante todo el proceso de entrega y de que el acusado tenga oportunidades adecuadas para impugnar la solicitud de entrega.

8. En los casos en que exista un conflicto entre las disposiciones del tribunal y los ordenamientos jurídicos internos del Estado o Nación requerido, el tribunal debe tomar las medidas necesarias para resolver el conflicto de manera que respete los derechos del acusado y garantice la eficacia del mandato del tribunal.

9. El tribunal tomará medidas para asegurar que el proceso de arresto y entrega esté libre de interferencias políticas y que la cooperación

de los Estados o Naciones no se niegue por razones políticas. Dichas medidas pueden incluir monitorear la ejecución de las solicitudes y entablar un diálogo con los Estados o Naciones para abordar cualquier inquietud o problema que pueda surgir.

10. El tribunal se asegurará de que el proceso de entrega sea imparcial, equitativo y eficaz para llevar ante la justicia a quienes hayan cometido crímenes internacionales. Con este fin, el tribunal puede brindar orientación y asistencia a los Estados o Naciones en relación con la ejecución de las solicitudes de arresto y entrega y puede tomar medidas para abordar cualquier obstáculo o desafío que pueda surgir.

11. En los casos en que un Estado Parte se niegue a cooperar con la Corte en el proceso de entrega, la Corte podrá tomar las medidas apropiadas para abordar la situación, incluida la determinación de falta de cooperación y la remisión del asunto a la Asamblea de los Estados Partes, según corresponda.

### **Artículo 85. Solicitudes en Competencia**

1. Un Estado o Nación Parte que reciba una solicitud del Tribunal para la entrega de una persona conforme a esta Sección, si también recibe una solicitud de cualquier otro Estado o Nación para la extradición de la misma persona por la misma conducta que constituye la base de la el delito por el cual el Tribunal solicita la entrega de la persona, deberá notificar tal hecho al Tribunal y al Estado o Nación requirente.

2. En los casos en que un Estado o Nación Parte reciba solicitudes contrapuestas del

Tribunal y otro Estado o Nación para la misma persona por la misma conducta, el Estado o Nación requerido dará prioridad a la solicitud del Tribunal si el Tribunal ya se ha pronunciado sobre la admisibilidad del caso, o el Tribunal decidirá con base en la notificación del Estado o Nación requeridos.

3. Si el Tribunal aún no se ha pronunciado sobre la admisibilidad, el Estado o Nación requerido podrá proceder a tramitar la solicitud de extradición, pero no procederá a la extradición de la persona hasta que el Tribunal haya decidido que el caso es admisible.

4. Si el Estado o Nación requirente no es Parte de esta Carta, el Estado o Nación requerido dará prioridad a la solicitud de entrega del Tribunal, si el Tribunal ha decidido que el caso es admisible y no existe ninguna obligación internacional para el requerido Estado o Nación para extraditar a la persona al Estado o Nación requirente.

5. Si el Tribunal no ha determinado que un caso es admisible, el Estado o Nación requerido puede proceder a tramitar la solicitud de extradición del Estado o Nación requirente.

6. Si el Estado o Nación requirente no es Parte de esta Carta y el Estado o Nación requerido tiene una obligación internacional existente de extraditar a la persona al Estado o Nación requirente que no es Parte, el Estado o Nación requerido decidirá si entrega a la persona al Tribunal o extraditarlo al Estado requirente. Al tomar su decisión, el Estado o Nación requerido considerará todos los factores que considere pertinentes, incluidas las fechas respectivas de

las solicitudes, los intereses del Estado o Nación requirente y la posibilidad de una entrega posterior entre el Tribunal y el Estado o Nación requirente.

7. Si un Estado o Nación Parte recibe una solicitud del Tribunal para la entrega de una persona y también recibe una solicitud de un Estado o Nación para la extradición de la misma persona por una conducta que constituya un delito diferente respecto del delito por el cual el Tribunal solicita la entrega, el Estado o la Nación requeridos, si no está bajo una obligación internacional existente de extraditar a la persona al Estado o la Nación requirente, dará prioridad a la solicitud del Tribunal. De lo contrario, si existe una obligación internacional de extraditar a la persona al Estado o Nación requirente, el Estado o Nación requerido determinará si la entrega al Tribunal o la extradita al Estado o Nación requirente. Para decidir, el Estado o Nación requerido considerará todos los factores que estime pertinentes, incluidos los señalados en el numeral 6, teniendo especialmente en cuenta la gravedad del delito y las consecuencias para la comunidad afectada.

8. Si el Tribunal ha decidido que un caso no es admisible y no se permite la extradición de una persona al Estado o Nación requirente, el Estado o Nación requerido notificará su decisión al Tribunal.

9. El Estado o Nación requerido para extraditar a la persona deberá mantener una comunicación abierta y transparente tanto con el Tribunal como con el Estado o Nación requirente durante todo el proceso de solicitudes

contrapuestas para garantizar la transparencia y evitar malentendidos o errores de comunicación.

10. El Estado o Nación requerido para extraditar a la persona está obligado a priorizar los intereses de la justicia por encima de todo al decidir qué solicitud cumplir. Al tomar su decisión, el Estado o Nación considerará cuidadosamente todos los factores que se consideren relevantes, incluidos, entre otros, la gravedad del delito, las consecuencias para la comunidad afectada y cualquier obligación internacional existente.

11. Si el Estado o la Nación a la que se solicita la extradición de la persona no puede determinar qué solicitud priorizar, puede buscar orientación de organismos legales internacionales u otros expertos para garantizar que se llegue a una decisión justa y justa de conformidad con el derecho internacional y los principios de justicia.

### **Artículo 86. Solicitudes de Arresto y Entrega**

1. La solicitud de detención y entrega se hará por escrito, a menos que se decida lo contrario en función de las leyes consuetudinarias internas o de circunstancias especiales. Si la solicitud nombrada no se encuentra por escrito, deberá concederse la posibilidad de obtener constancia de la misma.

2. En el caso de una solicitud de arresto y entrega de una persona para la cual la Sala de Instrucción haya emitido una orden de arresto, la solicitud deberá contener: Información destinada a identificar a la persona buscada, una copia de la orden de arresto, y todos los documentos

e información necesarios para el proceso de entrega en el Estado o Nación requeridos, con el ánimo de facilitar y agilizar dicho proceso.

3. En el caso de una solicitud de arresto y entrega de una persona ya condenada, la solicitud deberá contener: una copia de cualquier orden de arresto para esa persona, una copia de la sentencia de condena, información que demuestre que la persona buscada es la misma según se indique en la sentencia condenatoria y, si la persona reclamada hubiere sido condenada, copia de la pena impuesta, con indicación del eventual tiempo ya cumplido en prisión en caso de pena privativa de libertad.

4. Las leyes consuetudinarias internas adicionales basadas en el Estado o en la Nación pueden aplicarse a este Artículo si así se decide sobre la base de una consulta adecuada entre el Estado o la Nación involucrados y el Tribunal.

### **Artículo 87. Arresto Provisional**

1. En los casos de urgencia, mientras no se presente la solicitud de entrega, el Tribunal podrá solicitar la detención provisional de la persona reclamada. La solicitud de arresto provisional se hará por cualquier medio apropiado capaz de dejar constancia escrita y contendrá: información suficiente para identificar a la persona buscada y posiblemente su ubicación, una declaración sobre los presuntos delitos por los que se busca a la persona, una declaración de la existencia de orden de aprehensión o sentencia condenatoria en contra de la persona buscada, y declaración de la solicitud de entrega pendiente.

2. La solicitud de entrega posterior a un arresto provisional deberá ser entregada al Estado o Nación requerido dentro del plazo que fije el Tribunal, teniendo en cuenta todas las circunstancias. Este plazo también podrá especificarse de conformidad con las leyes internas del Estado o la Nación requeridos, si las circunstancias lo permiten.

3. El tribunal se asegurará de que la solicitud de detención provisional se presente únicamente en casos urgentes y no se utilice como sustituto de una solicitud de entrega adecuada.

4. El tribunal proporcionará al Estado o Nación requerido toda la información necesaria sobre las razones y circunstancias de la detención provisional, incluida una explicación detallada de la urgencia de la situación.

5. El Tribunal proporcionará al Estado o Nación requerido toda la información necesaria sobre la persona buscada, incluyendo las condiciones médicas o necesidades especiales que requieran atención durante el arresto provisional.

6. El Estado o Nación requerido se asegurará de que la detención provisional de la persona se realice de conformidad con el derecho internacional de los derechos humanos y sus leyes internas.

7. El Estado o Nación requerido tendrá derecho a revisar las razones y circunstancias de la detención provisional, y a impugnar la solicitud si no cumple con los estándares legales requeridos o si viola los derechos humanos de la persona buscada.

8. La persona detenida será informada sin demora de los motivos de su detención y se le concederá acceso sin demora a un abogado y a un médico o asistencia médica y tendrá derecho a impugnar la legalidad de la detención, así como a comunicarse con las autoridades consulares de su Estado o Nación de origen.

9. El Estado o la Nación requeridos velarán porque la detención provisional no tenga como consecuencia la detención prolongada o la prisión preventiva, sin justificación legal. El arresto provisional no podrá ser utilizado para eludir las garantías de un juicio justo, el debido proceso legal o el derecho a la libertad y seguridad de la persona, consagrados en el derecho internacional de los derechos humanos.

10. El Estado o Nación requerido comunicará sin demora al Tribunal el resultado de la detención provisional y las medidas adoptadas en respuesta a la solicitud de detención provisional.

11. El arresto provisional estará sujeto a revisión periódica por el Tribunal, el cual decidirá su continuación o terminación con base en la información y pruebas aportadas por las partes.

12. El Estado o la Nación requeridos tendrán la obligación de poner en libertad a la persona buscada si la solicitud de entrega no se presenta dentro de un plazo razonable o si la detención provisional es declarada ilegal.

### **Artículo 88. Otras Formas de Cooperación**

1. Los Estados y las Naciones Partes deberán cumplir con las solicitudes del Tribunal para brindar asistencia en relación con las

investigaciones o los enjuiciamientos. Esta asistencia se prestará de conformidad con las disposiciones de esta Sección, las normas jurídicas reconocidas internacionalmente y las leyes consuetudinarias internas, y comprenderá, entre otros:

- a) identificación y ubicación de personas o artículos;
- b) obtención, producción y conservación de pruebas;
- c) interrogatorio de cualquier persona que esté siendo investigada o procesada;
- d) suministro de documentos, registros e información;
- e) protección de víctimas y testigos;
- f) facilitación de la comparecencia voluntaria de testigos y peritos ante el Tribunal;
- g) traslado temporal de personas bajo custodia con fines de identificación, testimonio u otra asistencia;
- h) reconocimiento de lugares, y la ejecución de allanamientos y allanamientos;
- i) cualquier otro tipo de asistencia que esté permitida por las leyes del Estado o Nación requerida, de conformidad con las normas jurídicas internacionalmente reconocidas.

2. Si la ejecución de una determinada medida de asistencia está prohibida en el Estado o Nación requeridos, se realizará una consulta con el Tribunal para decidir si la asistencia puede prestarse de otra manera, pero, si después de

la consulta no se resuelve el asunto, el Estado requerido o Nación proporcionará la asistencia mencionada a menos que esté en conflicto con cualquier principio fundamental reconocido por sus leyes internas. Si se prueba la existencia de tal conflicto, el Tribunal modificará la solicitud para que sea aceptable para el Estado o la Nación requeridos.

3. Un Estado o Nación Parte puede denegar una solicitud de asistencia solo si puede demostrar que la asistencia solicitada crearía un riesgo grave de daño a su seguridad nacional, incluida la seguridad de sus ciudadanos o miembros. En caso de negativa, el Estado o Nación Parte deberá seguir los siguientes procedimientos:

- a) Informar sin demora al Tribunal por escrito de su decisión de denegar la solicitud de asistencia y proporcionar una explicación de los motivos de la denegación.
- b) Proporcionar evidencia del riesgo de seguridad que resultaría de la asistencia solicitada en la medida en que dicha evidencia esté razonablemente disponible.
- c) Tomar todas las medidas razonables para mitigar cualquier daño que pudiera resultar de la denegación de la solicitud de asistencia.

4. La denegación de una solicitud de asistencia no impedirá que el Tribunal busque dicha asistencia de otras fuentes.

5. Dependiendo de las circunstancias, el Estado o Nación requerido podrá consultar con el Tribunal o el Director a fin de prestar la asistencia

mencionada de otras formas o en una fecha posterior.

6. El Tribunal garantizará la confidencialidad de los documentos e información, salvo lo requerido para la investigación y diligencias descritas en la solicitud. Además, el Estado o la Nación requeridos podrán, cuando sea necesario, transmitir documentos o información al Director en forma confidencial.

7. Aparte de las solicitudes de entrega o extradición, en el caso de solicitudes concurrentes de otro tipo del Tribunal o de otro Estado o Nación en virtud de una obligación internacional, el Estado o Nación Parte requerido procurará satisfacer tales solicitudes, de lo contrario el asunto se resolverá de conformidad con el artículo 79.

8. El Tribunal podrá prestar asistencia voluntaria a cualquier Estado o Nación en todas las investigaciones y procesos penales relacionados tanto con los delitos señalados en la Carta como con todos los delitos graves de conformidad con las leyes internas estatales o nacionales. La asistencia mencionada se prestará de conformidad con el artículo 82 y los principios generales establecidos en esta Sección.

## **SECCIÓN 10. CUMPLIMIENTO**

### **Artículo 89. Rol del Estado o Nación en la Ejecución de las Penas Privativas de Libertad**

1. Las penas de prisión se cumplirán ordinariamente en las instalaciones establecidas de conformidad con esta Carta.

2. No obstante lo dispuesto en el párrafo 1, en circunstancias excepcionales y dependiendo de factores tales como la naturaleza del delito, el contexto, las personas y la comunidad involucrada, las leyes consuetudinarias internas de la Nación o Estado afectado por el delito, y su intención de tratar a las personas sentenciadas en de conformidad con esta Carta, podrán utilizarse lugares alternativos de reclusión, siempre que dichos lugares no violen los derechos de las personas condenadas ni las obligaciones del Estado o Nación de cumplir con los estándares internacionales de derechos humanos.

3. Una solicitud voluntaria del Estado o Nación para manejar a tales personas sentenciadas puede ser aceptada si está debidamente motivada y si los lugares alternativos de encarcelamiento cumplen con los estándares legales internacionales aplicables para el tratamiento de los reclusos, y este Estado o Nación se compromete a permitir organizaciones de la sociedad civil, incluidas aquellas que trabajan en derechos humanos y derechos de los presos, para trabajar en el seguimiento y la presentación de informes sobre la aplicación de las disposiciones de la Carta sobre la ejecución de sentencias.

4. El Tribunal indicará las condiciones para aceptar dicha solicitud en función de todas las circunstancias pertinentes y de conformidad con esta Carta. El Estado o la Nación que solicita la ejecución puede proponer condiciones adicionales y se pueden realizar consultas para llegar a un acuerdo.

5. Si la pena privativa de libertad no se cumple en los establecimientos previstos en esta Carta,

la decisión final sobre el lugar de la prisión será dictada por el tribunal en la forma más rápida posible, teniendo en cuenta los principios establecidos en esta Carta, las normas jurídicas internacionales aplicables y los intereses de la comunidad involucrada. La decisión debe basarse en una evaluación exhaustiva de la idoneidad de los lugares alternativos de encarcelamiento para garantizar que los derechos y el bienestar de las personas condenadas estén protegidos y garantizar que el traslado de la persona condenada a un centro diferente no resulte en dificultades o sufrimientos indebidos.

6. En caso de imposibilidad de tramitar la reclusión en los establecimientos establecidos conforme a esta Carta o en los lugares alternativos de reclusión, la reclusión tendrá lugar en el territorio del Estado o Nación donde se cometió el delito o, en su defecto, en el territorio del Estado o Nación cuyo infractor sea nacional o comunitario, siempre que dicho Estado o Nación pueda garantizar la adecuada tramitación de la ejecución y su eficacia de conformidad con los estándares jurídicos internacionales aplicables. Además, el Tribunal vigilará de cerca el tratamiento a la persona sentenciada y podrá revocar el traslado si determina que la persona no está siendo tratada de acuerdo con estas normas.

7. A falta de garantías adecuadas o imposibilidad de que el Estado o Nación designado se ocupe de la ejecución de la pena, el Tribunal designará otro Estado o Nación, teniendo en cuenta su conexión y proximidad con la comunidad afectada por el delito, las opiniones de la persona condenada, y todas las circunstancias pertinentes. En caso de no ser

factible, se elegirá por sorteo el Estado o Nación de que se trate, respetando el principio de la distribución equitativa.

8. Al decidir sobre la designación de un Estado o Nación para hacer cumplir la sentencia, el Tribunal también considerará la aplicación por parte del Estado o Nación de las normas jurídicas internacionalmente reconocidas para el tratamiento de los reclusos y vigilará el cumplimiento de dichas normas. El Tribunal no designará un Estado o Nación que no cumpla con estos estándares, incluso si ese Estado o Nación está dispuesto y es capaz de hacer cumplir la sentencia.

8. Se pueden aplicar medidas alternativas al encarcelamiento de acuerdo con el derecho consuetudinario interno si tales medidas son previamente reconocidas y aceptadas por el tribunal. La naturaleza de tales alternativas al encarcelamiento puede ser privativa de libertad o no privativa de libertad. La aplicación de estas alternativas no debe violar los derechos de las personas sentenciadas ni las obligaciones del Estado o Nación de cumplir con los estándares de derecho internacional aplicables, y el Tribunal deberá vigilar el cumplimiento de dichas medidas y estándares y prevenir el uso indebido de medidas alternativas que no sirvan a los mejores intereses del condenado, de la comunidad y de la administración de justicia.

### **Artículo 90. Traslado Después de la Sentencia**

1. Durante la ejecución de la sentencia, el Tribunal podrá decidir el traslado de una persona sentenciada de la prisión de un Estado o Nación a

la prisión de otro Estado o Nación, siempre que la persona sentenciada haya dado su consentimiento para el traslado, y siempre que el Estado o Nación receptora puede garantizar la seguridad y el trato adecuado de la persona condenada.

2. Cuando una persona sentenciada desee solicitar un traslado del Estado o Nación de ejecución a otro Estado o Nación, deberá presentar su solicitud al Tribunal. El Tribunal considerará todos los elementos y circunstancias señalados en el artículo 83, así como los siguientes lineamientos:

- a) El traslado se otorgará si redunda en el interés superior del condenado, teniendo en cuenta factores tales como su salud física y mental, los vínculos familiares y la posibilidad de acceder a programas de rehabilitación.
- b) No se concederá el traslado si supusiere un riesgo para la seguridad pública o si fuera contrario a los intereses de la justicia.
- c) El traslado se concederá si facilitare la reinserción social del condenado al ser puesto en libertad.
- d) La transferencia no se otorgará si impondría una carga financiera irrazonable sobre el Estado o la Nación de ejecución o el Estado o la Nación de recepción.

3. El Estado o Nación de ejecución cooperará con el Tribunal en la organización del traslado, incluido el suministro de toda la información y documentación necesarias y la facilitación del transporte de la persona al Estado o Nación receptora.

4. Los costos de la transferencia correrán a cargo del Estado o Nación de ejecución, a menos que el Tribunal y el Estado o Nación receptores acuerden otra cosa. Si el Estado o Nación de ejecución no puede sufragar los costos de la transferencia, el Tribunal podrá solicitar asistencia financiera de otros Estados o Naciones.

5. El Estado o Nación receptor será responsable de la ejecución de la pena y garantizará que la persona condenada sea tratada de conformidad con las normas jurídicas internacionalmente reconocidas para el tratamiento de los reclusos.

6. El Tribunal vigilará la ejecución de la pena en el Estado o Nación receptor y podrá, en cualquier momento, solicitar información e informes sobre la condición y trato de la persona condenada.

7. El Tribunal podrá suspender o revocar el traslado si determina que el Estado o la Nación receptora no está cumpliendo con sus obligaciones en virtud de esta Carta o si determina que el traslado crearía un riesgo grave para la seguridad o el bienestar de la persona sentenciada o de otras personas. .

### **Artículo 91. Ejecución y Supervisión**

1. La pena de prisión, o sentencia equivalente, obligará a los Estados y Naciones Partes, y cualquier modificación será nula. Sólo el Tribunal tendrá derecho a decidir cualquier recurso de apelación y revisión, y el Estado o la Nación de ejecución no impedirá la presentación de tales solicitudes por parte de una persona condenada.

2. La pena de prisión, o sentencia equivalente, obligará a los Estados y Naciones Partes, y cualquier modificación será nula. Sólo el Tribunal tendrá derecho a decidir cualquier recurso de apelación y revisión, y el Estado o la Nación de ejecución no impedirá la presentación de tales solicitudes por parte de una persona condenada. El Tribunal establecerá pautas y criterios claros para la consideración de apelaciones y revisiones para garantizar la coherencia y la equidad en la toma de decisiones.

3. El Estado o Nación de ejecución proporcionará informes periódicos al Tribunal sobre el trato y las condiciones de la persona condenada, incluidos los cambios en sus circunstancias o Estado de salud.

4. La ejecución de una sentencia de prisión, o de cualquier decisión equivalente, estará sujeta a la supervisión del Tribunal y será compatible con las normas jurídicas internacionalmente reconocidas relativas al trato de los reclusos. El Tribunal establecerá lineamientos y criterios específicos para la ejecución de las sentencias y vigilará periódicamente el cumplimiento de dichas normas. Las mismas normas se aplicarán cualquiera que sea el lugar de ejecución.

5. El Estado o Nación de ejecución garantizará que las comunicaciones entre una persona sentenciada y el Tribunal se garanticen y se mantengan confidenciales, y el Tribunal tendrá la autoridad para investigar cualquier denuncia de maltrato o abuso de la persona sentenciada durante su encarcelamiento. Cualquier injerencia o represalia contra una persona condenada por comunicarse con el Tribunal se considerará una

violación de sus derechos y estará sujeta a las sanciones correspondientes.

6. El Estado o Nación de ejecución garantizará que la persona sentenciada tenga acceso a representación legal, incluido el derecho a comunicarse con su representante legal y a recibir asesoramiento y asistencia legal para apelar o revisar su sentencia.

7. El Tribunal revisará periódicamente las condiciones de ejecución de las penas privativas de libertad, o de cualquier decisión equivalente, para asegurar que continúen cumpliendo con los estándares jurídicos reconocidos internacionalmente y para atender las inquietudes o denuncias planteadas por las personas condenadas o sus representantes.

### **Artículo 92. Ejecución de Multas y Medidas de Decomiso**

1. Los Estados y las Naciones Partes harán efectivas las multas o decomisos que ordene la Corte, sin perjuicio de los derechos de los terceros de buena fe, de conformidad con las normas jurídicas internacionalmente reconocidas y los procedimientos establecidos por las leyes internas estatales y nacionales.

2. Si un Estado o Nación Parte no puede dar efecto a una orden de decomiso, tomará medidas para recuperar el valor de los productos, bienes o activos ordenados por la Corte para ser decomisados, sin perjuicio de los derechos de buena fe terceros.

3. Si una Nación o Estado Parte obtiene bienes o el producto de la venta de bienes después

de la ejecución de una decisión judicial, serán transferidos y retenidos por el Tribunal en espera de su disposición.

4. Al aplicar este artículo, las leyes consuetudinarias basadas en el Estado y en la Nación se tienen especialmente en cuenta para garantizar mejor la restauración de la armonía en la comunidad involucrada.

### **Artículo 93. Revisión del Tribunal en Relación con la Reducción de la Pena.**

1. Sólo el Tribunal tendrá competencia para decidir cualquier reducción de la pena y se pronunciará sobre el asunto después de haber oído al condenado, a las víctimas o a cualquier otra persona afectada por el delito.

2. El tribunal podrá reducir la pena si concurren uno o más de los siguientes factores:

- a) la voluntad concreta del condenado de cooperar con la Corte;
- (b) la asistencia voluntaria de la persona nombrada para permitir la ejecución de decisiones judiciales en otros casos;
- (c) otras razones que justifiquen una reducción de la pena, considerando todas las circunstancias relevantes relacionadas con la comunidad involucrada y el contexto específico.

### **Artículo 94. Fuga**

Si una persona condenada se fuga y se da a la fuga, la Corte tomará todas las medidas necesarias, de conformidad con las normas

jurídicas reconocidas internacionalmente, para asegurar su captura y devolución. Según el lugar donde se encuentre la persona fugada, se podrán aplicar procedimientos internos de ámbito estatal o nacional, siempre que puedan facilitar el procedimiento y no contraríen las normas citadas.

### **Artículo 95. Acuerdos Especiales de Asistencia y Colaboración.**

1. Si un Estado o Nación Parte de la Carta no puede cooperar y/o hacer cumplir las decisiones de la Corte de conformidad con las Secciones 9 y 10 de esta Carta por razones objetivas que dependen de la falta de medios suficientes y una organización adecuada, puede solicitar asistencia especial para La corte. Recibida la aceptación, la Corte ordenará al Estado o Nación Parte en que se encuentre la Nación afectada por el delito o las víctimas o, si dicho Estado o Nación estuviera involucrado en el delito, al Estado o Nación Parte vecino, que preste la asistencia requerida en todas las formas posibles de acuerdo con las normas legales reconocidas internacionalmente y las leyes nacionales que no entren en conflicto con las normas mencionadas.

2. En caso de imposibilidad de obtener el auxilio de un Estado o Nación Parte vecino, la Corte solicitará el auxilio de otro Estado o Nación Parte. La elección se basará en diferentes criterios, incluida su proximidad, el sistema político y legal, la organización policial y militar, la adecuación de las instalaciones de infraestructura y la voluntad voluntaria de proporcionar la asistencia requerida.

3. Con el fin de facilitar la cooperación y el cumplimiento, ad hoc previos acuerdos

de colaboración, tanto bilaterales como multilaterales, se pueden hacer entre las Partes de esta Carta para proporcionar asistencia de emergencia mutua. Dichos acuerdos se concertarán de conformidad con esta Carta, las normas jurídicas reconocidas internacionalmente y las leyes internas de los Estados o Naciones involucrados.

### **SECCIÓN 11. COMISIÓN INTERNACIONAL DE LAS PARTES**

1. Por la presente se establece una Comisión Internacional de Partes de esta Carta. Cada Estado y Nación Parte tendrá un representante en la Asamblea, quien podrá estar acompañado de suplentes y asesores. Otros Estados y Naciones que hayan firmado esta Carta podrán ser observadores en la Asamblea. La Asamblea podrá ser convocada tanto presencial como a distancia.

2. La Asamblea de la Comisión Internacional de Partes:

(a) considerar y adoptar, según corresponda, las recomendaciones de la Comisión Preparatoria;

(b) supervisar la gestión de los diferentes órganos de la Corte con respecto a su administración.

(c) decidir el presupuesto de la Corte;

(d) decidir si cambia el número de jueces;

(e) considerar cualquier cuestión relacionada con la falta de cooperación;

(f) realizar cualquier otra función consistente con esta Carta Constitutiva o las Reglas de Procedimiento y Evidencia.

3. La Comisión Internacional nombrará Directores Oficiales, un Presidente, dos Vicepresidentes (un representante del Estado y un representante de la Nación) y doce miembros elegidos por la Asamblea por períodos de dos años que constituyen la Comisión Ejecutiva. La Comisión Ejecutiva se reunirá cuantas veces sea necesario, pero al menos una vez al año, y asistirá a la Asamblea en el desempeño de sus funciones.

4. La Asamblea podrá establecer los órganos subsidiarios que sean necesarios, incluido un mecanismo de supervisión independiente para la inspección, evaluación e investigación de la Corte. Se pueden establecer otros órganos subsidiarios a pedido de un Estado o Nación Parte, de manera temporal, si es necesario, según los problemas y contextos particulares.

5. El Presidente del Tribunal, el Director y el Secretario o sus representantes podrán participar, según corresponda, en las reuniones de la Asamblea y de la Comisión Ejecutiva. Dependiendo del tema, y con el propósito de implementar mejor los contenidos y principios de esta Carta, se podrán admitir personas adicionales a participar en las reuniones designadas en función de su relevancia y funciones, conforme a las leyes internas, en sus respectivos Estados y Naciones.

6. La Asamblea se reunirá en la sede de la Corte o en las instalaciones proporcionadas por el Ministerio de Relaciones Exteriores de la República de Armenia o el Ministerio de Relaciones Exteriores de la Nación Euzkide una vez al año, y cada Estado o Nación Parte tendrá un voto. Se hará todo lo posible para

llegar a decisiones por consenso en la Asamblea y en la Comisión Ejecutiva. Si no se puede llegar a un consenso, las decisiones sobre cuestiones de fondo deben ser aprobadas por una mayoría de tres quintos de los presentes y votantes, siempre que una mayoría absoluta de la Comisión Internacional de Partes constituya el quórum para votar; las decisiones sobre cuestiones de procedimiento se tomarán por mayoría simple de la Comisión Internacional de las Partes presentes y votantes.

7. Un Estado o Nación Parte que esté en mora en el pago de sus contribuciones financieras u otras contribuciones materiales para los costos de la Corte no tendrá derecho a voto en la Asamblea si el monto de sus atrasos es igual o superior al monto de las contribuciones adeudadas durante los dos años anteriores completos. No obstante, la Asamblea podrá permitir que dicho Estado o Nación Parte vote en la Asamblea si está convencida de que la falta de pago se debe a condiciones que escapan al control del Estado o Nación Parte.

8. La Asamblea adoptará su propio reglamento.

9. Los idiomas oficiales y de trabajo de la Asamblea serán inglés, español, francés, árabe, kurmanyi, armenio y otros idiomas traducidos presentados por un Estado y Naciones.

## **SECCIÓN 12. APOYO FINANCIERO**

### **Artículo 96. Reglamento Financiero**

1. Salvo que se disponga específicamente lo contrario, todos los asuntos financieros

relacionados con la Corte y las reuniones de la Comisión Internacional de las Partes, incluidos su Mesa y órganos subsidiarios, se regirán por esta Carta y el Reglamento Financiero y las Reglas adoptadas por la Asamblea de la Comisión Internacional de las Partes. Fiestas.

### **Artículo 97 Pago de Gastos**

Los gastos de la Corte y de la Asamblea de la Comisión Internacional de las Partes, incluidos su Mesa y órganos subsidiarios, se pagarán con los fondos y materiales de la Corte.

### **Artículo 98 Financiación**

Los gastos de la Corte y de la Asamblea de la Comisión Internacional de las Partes, incluida su Comisión Ejecutiva y órganos subsidiarios, según lo dispuesto en el presupuesto decidido por la Asamblea de la Comisión Internacional de las Partes, serán sufragados por las siguientes fuentes:

- 1) Contribuciones señaladas hechas por Estados y Naciones Partes y apoyos materiales no financieros;
- 2) Fondos o apoyo material proporcionado por otros organismos internacionales, sujeto a la aprobación de los mecanismos rectores apropiados.

### **Artículo 99 Aportes Voluntarios**

Sin perjuicio del artículo 86, la Corte podrá recibir y utilizar, como fondos adicionales y apoyo material, contribuciones voluntarias de gobiernos, organizaciones internacionales, personas físicas, empresas y otras entidades, de conformidad con los criterios pertinentes adoptados por la

Asamblea de la Comisión Internacional de Partes.

### **Artículo 100. Determinación de las Contribuciones**

Las contribuciones de la Comisión Internacional de las Partes se evaluarán de conformidad con una escala de cuotas acordada, basada en la escala adoptada por la Comisión Internacional de las Partes para su presupuesto ordinario y ajustada de conformidad con los principios en los que se basa esa escala.

### **Artículo 101. Auditorías**

Los registros, libros y cuentas del Tribunal, incluidos sus Estados financieros anuales, serán auditados anualmente por un auditor independiente.

## **SECCIÓN 13. CLÁUSULAS DE CIERRE**

### **Artículo 102. Solución de Controversias**

1. Cualquier controversia relativa a las funciones judiciales de la Corte será resuelta por decisión de la Corte.
2. Cualquier otra disputa entre dos o más miembros de la Comisión Internacional de las Partes en relación con la interpretación o aplicación de esta Carta que no se resuelva mediante negociaciones dentro de los tres meses posteriores a su inicio, se remitirá a la Asamblea de la Comisión Internacional de las Partes.
3. La Asamblea de la Comisión Internacional de Partes puede tratar de resolver la disputa por sí misma o puede hacer recomendaciones sobre otros medios de solución de la disputa, incluida la remisión a un Tribunal Conjunto de la

República de Armenia y la Nación Ezidikhan de conformidad con la Carta de ese Tribunal. .

### **Artículo 103. Reservas**

No se pueden hacer reservas a esta Carta.

### **Artículo 104. Modificaciones**

1. Después de la expiración de cinco años a partir de la entrada en vigor de esta Carta, cualquier Estado o Nación Parte podrá proponer enmiendas a la misma. El texto de cualquier enmienda propuesta se presentará al Ministro de Relaciones Exteriores de la República de Armenia o al Ministro de Relaciones Exteriores de la Nación Ezidikhan, quien lo distribuirá de inmediato a todas las Comisiones Internacionales de las Partes.

2. No antes de tres meses a partir de la fecha de la notificación, la Asamblea de la Comisión Internacional de las Partes, en su próxima reunión, decidirá, por mayoría de los presentes y votantes, si acepta la propuesta. La Asamblea podrá tratar la propuesta directamente o convocar una Conferencia de Revisión si el asunto en cuestión así lo amerita.

3. La adopción de una enmienda en una reunión de la Asamblea de la Comisión Internacional de las Partes o en una Conferencia de Revisión en la que no se pueda llegar a un consenso requerirá una mayoría de dos tercios de la Comisión Internacional de las Partes.

4. Salvo lo dispuesto en el Párrafo 5, una enmienda entrará en vigor para todas las Comisiones Internacionales de las Partes un año después de que se hayan depositado los

instrumentos de ratificación o aceptación ante el Ministro de Relaciones Exteriores de la República de Armenia o el Ministro de Relaciones Exteriores de la Nación Ezidikhan por siete octavos de ellos.

5. Cualquier enmienda a los Artículos 5, 6, 7 y 8 de esta Carta entrará en vigor para aquellas Comisiones Internacionales de Partes que hayan aceptado la enmienda un año después del depósito de sus instrumentos de ratificación o aceptación. Respecto de un Estado Parte que no haya aceptado la reforma, la Corte no ejercerá su competencia respecto de un crimen comprendido en la reforma cuando sea cometido por los nacionales de ese Estado o Nación Parte o en su territorio.

6. Si una enmienda ha sido aceptada por siete octavos de los Estados o Naciones Partes de conformidad con el Párrafo 4, cualquier Estado o Nación Parte que no haya aceptado la enmienda podrá retirarse de esta Carta con efecto inmediato, no obstante lo dispuesto en el Artículo 89, pero sujeto al Artículo 89, Párrafo 2, mediante notificación a más tardar un año después de la entrada en vigor de dicha modificación.

7. El Presidente de la Comisión Internacional de las Partes circulará a todas las Comisiones Internacionales de las Partes cualquier enmienda adoptada en una reunión de la Comisión Internacional de las Partes o en una Conferencia de Revisión.

### **Artículo 105. Modificaciones a Disposiciones de Carácter Institucional**

1. Las enmiendas a las disposiciones de esta Carta, que sean de carácter exclusivamente

institucional, a saber, el Artículo 26, el Artículo 27, podrán ser propuestas en cualquier momento, sin perjuicio del Artículo 91, por cualquier Estado o Nación Parte. El texto de cualquier enmienda propuesta se presentará a la persona designada por la Asamblea de la Comisión Internacional de Partes, quien lo distribuirá de inmediato a todos los Estados y Naciones Partes y a otros participantes en la Asamblea de la Comisión Internacional de Partes.

2. Las enmiendas en virtud de este Artículo sobre las que no se pueda llegar a un consenso serán adoptadas por la Asamblea de la Comisión Internacional de las Partes o por una Conferencia de Revisión, por una mayoría de dos tercios de la Comisión Internacional de las Partes. Dichas enmiendas entrarán en vigor para todas las Comisiones Internacionales de las Partes seis meses después de su adopción por la Asamblea o, según el caso, por la Conferencia.

#### **Artículo 106. Revisión de la Carta**

1. Siete años después de la entrada en vigor de esta Carta, el Director convocará una Conferencia de Revisión de la Comisión Internacional de las Partes para considerar cualquier enmienda a esta Carta. Dicha revisión podrá incluir, pero no se limitará a, la lista de crímenes contenida en el Artículo 8. La Conferencia estará abierta a los participantes en la Asamblea de la Comisión Internacional de las Partes y en las mismas condiciones.

2. En cualquier momento posterior, a solicitud de un Estado Parte y para los fines establecidos en el Párrafo 1, previa aprobación de la mayoría de

la Asamblea de la Comisión Internacional de las Partes, convocará una Conferencia de Revisión.

3. Las disposiciones del Artículo 93 Enmiendas se aplicarán a la adopción y entrada en vigor de cualquier enmienda a la Carta considerada en una Conferencia de Revisión de la Comisión Internacional de las Partes.

#### **Artículo 107. Disposición Transitoria**

1. No obstante lo dispuesto en el Artículo 12, Párrafos 1 y 2, un Estado o Nación, al convertirse en parte de esta Carta, podrá declarar que, durante un período de cinco años a partir de la entrada en vigor de esta Carta para el Estado o Nación en cuestión, no aceptar la competencia de la Corte con respecto a la categoría de crímenes a que se refiere el artículo 8 cuando se alegue que un crimen ha sido cometido por sus nacionales o en su territorio. Una declaración bajo este Artículo puede ser retirada en cualquier momento.

2. Las disposiciones de este Artículo serán revisadas en la Conferencia de Revisión convocada de conformidad con las disposiciones de la Comisión Internacional de las Partes.

#### **Artículo 108. Firma, Ratificación, Aceptación, Aprobación o Adhesión**

1. Esta Carta estará abierta a la firma de todos los Estados y Naciones, presentada como declaración física o transmitida como declaración digital oficial en Ereván en el Ministerio de Relaciones Exteriores de la República de Armenia hasta el 30 de mayo de 2024. Después de esa fecha, la Carta permanecerá abierto a la firma en

Ereván, en el Ministerio de Relaciones Exteriores de la República de Armenia, hasta el 31 de mayo de 2025.

2. Esta Carta está sujeta a ratificación, aceptación o aprobación por parte de los Estados y Naciones signatarios. Los instrumentos de ratificación, aceptación o aprobación se depositarán ante el Ministro de Relaciones Exteriores de la República de Armenia.

3. Esta Carta estará abierta a la adhesión de todos los Estados y Naciones. Los instrumentos de adhesión se depositarán ante el Ministro de Relaciones Exteriores de la República de Armenia.

#### **Artículo 109. Entrada en Vigor**

1. Esta Carta entrará en vigor el primer día del mes siguiente al sexagésimo día siguiente a la fecha del depósito de los 4to Estado y 250vo Instrumento nacional de ratificación, aceptación, aprobación o adhesión con el Ministro de Relaciones Exteriores de la República de Armenia, quien notificará la entrada en vigor al Ministro de Relaciones Exteriores de la Nación Ezidikhan.

2. Para cada Estado o Nación que ratifique, acepte, apruebe o se adhiera a esta Carta después del depósito del quincuagésimo instrumento de ratificación, aceptación, aprobación o adhesión, la Carta entrará en vigor el primer día del mes siguiente al sexagésimo día siguiente el depósito por tal Estado o Nación deposita su instrumento de ratificación, aceptación, aprobación o adhesión.

#### **Artículo 110. Retiro**

1. Un Estado o Nación Parte puede, mediante notificación por escrito dirigida al Ministro de Relaciones Exteriores de la República de Armenia o al Ministro de Relaciones Exteriores de la Nación Ezidikhan, retirarse de esta Carta. El retiro surtirá efecto un año después de la fecha de recepción de la notificación, a menos que la notificación especifique una fecha posterior.

2. Un Estado o una Nación no quedará liberado, por razón de su retiro, de las obligaciones derivadas de esta Carta mientras fuera Parte de la Carta, incluidas las obligaciones financieras que se hayan podido acumular. Su retiro no afectará ninguna cooperación con la Corte en relación con investigaciones y procedimientos penales en relación con los cuales el Estado o la Nación que se retira tenía el deber de cooperar y que se iniciaron antes de la fecha en que el retiro se hizo efectivo, ni afectará en modo alguno la continuación de la consideración de cualquier asunto que ya estuviera bajo consideración de la Corte con anterioridad a la fecha en que surtiera efecto el retiro.

#### **Artículo 111. Textos Oficiales**

El original de esta Carta escrita en inglés, de la cual los textos en armenio, kurmanyi, árabe, inglés, francés y español son igualmente auténticos, se depositará en poder del Ministro de Relaciones Exteriores de la República de Armenia, quien enviará copias certificadas de la misma a todos Estados y Naciones.

## Ratificación autorizada

**EN TESTIMONIO DE LO CUAL, los infrascritos, debidamente autorizados por sus respectivos Gobiernos, firman la presente Carta.**

HECHO en Ereván, República de Armenia y Lalish, Nación Ezidikhan el día 18 de mayo de 2023.

### **ANEXO A: Tratado de Sèvres, (10 de agosto de 1920) por Armenia**

*Se presentan secciones del tratado relacionadas con Armenia y el Genocidio Armenio. El texto completo del tratado está disponible en la Universidad Brigham Young Archivo de documentos de la Primera Guerra Mundial.*

EL TRATADO DE PAZ ENTRE LAS POTENCIAS ALIADAS Y ASOCIADAS

Y TURQUÍA FIRMAN EN SÈVRES

10 DE AGOSTO DE 1920

EL IMPERIO BRITÁNICO, FRANCIA, ITALIA Y JAPÓN,

Estas Potencias se describen en el presente Tratado como las Principales Potencias Aliadas;

ARMENIA, BÉLGICA, GRECIA, HIYAZ, POLONIA, PORTUGAL, RUMANIA, EL ESTADO SERBOCROATA-ESLOVENO Y CHECOSLOVAQUIA,

Estos Poderes constituyen, con los Poderes Principales mencionados anteriormente, los

Poderes Aliados, de una parte;

Y TURQUÍA,

de la otra parte;

Considerando que, a pedido del Gobierno Imperial Otomano, las principales potencias aliadas otorgaron un armisticio a Turquía el 30 de octubre de 1918 para que se pudiera concluir un tratado de paz, y

Considerando que las Potencias Aliadas están igualmente deseosas de que la guerra en la que algunas de ellas estuvieron involucradas sucesivamente, directa o indirectamente, contra Turquía, y que se originó en la declaración de guerra contra Serbia el 28 de julio de 1914, por parte de los ex Imperio y Real Estado Austro-Austro- Gobierno húngaro, y en las hostilidades abiertas por Turquía contra las Potencias Aliadas el 29 de octubre de 1914, y conducidas por Alemania en alianza con Turquía, debe ser reemplazada por una Paz firme, justa y duradera,

A tal fin, las ALTAS PARTES CONTRATANTES han designado como sus Plenipotenciarios:

SU MAJESTAD EL REY DEL REINO UNIDO DE GRAN BRETAÑA E IRLANDA Y DE LOS DOMINIOS BRITÁNICOS MÁS ALLÁ DE LOS MARES, EMPERADOR DE LA INDIA:

Sir George Dixon GRAHAME, K. C. V. O., Ministro Plenipotenciario de Su Majestad Británica en París;

por el DOMINIO de CANADÁ:

El Honorable Sir George Halsey PERLEY, K.C. M. G Alto Comisionado para Canadá en el Reino

Unido;

por la COMMONWEALTH de AUSTRALIA:

el Muy Honorable Andrew FISHER, Alto Comisionado para Australia en el Reino Unido;

por el DOMINIO de NUEVA ZELANDA:

Sir George Dixon GRAHAME, K. C. V. O., Ministro Plenipotenciario de Su Majestad Británica en París;

por la UNIÓN de SUDÁFRICA:

el Sr. Reginald Andrew BLANKENBERG, O. B. E., Alto Comisionado Interino para la Unión Sudafricana en el Reino Unido;

para la INDIA:

Sir Arthur HIRTZEL, K. C. B., Subsecretario de Estado Adjunto para la India;

EL PRESIDENTE DE LA REPÚBLICA FRANCESA:

Sr. Alexandre MILLERAND, Presidente del Consejo, Ministro de Relaciones Exteriores;

señor. Frederic FRANÇOIS-MARSAL, Ministro de Hacienda;

el Sr. Auguste Paul-Louis ISAAC, Ministro de Comercio e Industria;

Sr. Jules CAMBON, Embajador de Francia;

Sr. Georges Maurice PALÉOLOGUE, Embajador de Francia, Secretario General del Ministerio de Relaciones Exteriores;

SU MAJESTAD EL REY DE ITALIA:

el Conde LELIO BONIN LONGARE, Senador del Reino, Embajador Extraordinario y Plenipotenciario de S. M. el Rey de Italia en París;

el General Giovanni MARIETTI, Representante Militar Italiano en el Consejo Supremo de Guerra;

SU MAJESTAD EL EMPERADOR DE JAPÓN:

Vizconde CHINDA, Embajador Extraordinario y Plenipotenciario de S. M. el Emperador de Japón en Londres;

Sr. K. MATSUI, Embajador Extraordinario y Plenipotenciario de S. M. el Emperador de Japón en París;

ARMENIA:

Sr. Avetis AHARONIAN, Presidente de la Delegación de la República de Armenia;

SU MAJESTAD EL REY DE LOS BELGAS:

Sr. Jules VAN DEN HEUVEL, Enviado Extraordinario y Ministro Plenipotenciario, Ministro de Estado;

Sr. ROLIN JAEQUEMYNS, Miembro del Instituto de Derecho Internacional Privado, Secretario General de la Delegación de Bélgica;

SU MAJESTAD EL REY DE LOS HELENOS:

Sr. Eleftherios K. VENIZELOS, Presidente del Consejo de Ministros;

Sr. Athos ROMANOS, Enviado Extraordinario y Ministro Plenipotenciario de S. M. el Rey de los Helenos en París;

SU MAJESTAD EL REY DE LOS HEDJAZ:

EL PRESIDENTE DE LA REPÚBLICA DE  
POLONIA:

el Conde Maurice ZAMOYSKI, Enviado  
Extraordinario y Ministro Plenipotenciario de la  
República de Polonia en París;

Mr. Erasmo PILTZ;

EL PRESIDENTE DE LA REPÚBLICA  
PORTUGUESA:

el Dr. Affonso da COSTA, ex Presidente del  
Consejo de Ministros;

Su MAJESTAD EL REY DE RUMANIA:

Sr. Nicolae TITULESCU, Ministerio de  
Hacienda;

Príncipe DIMITRIE GHIKA, Enviado  
Extraordinario y Ministro Plenipotenciario de  
S.M. el Rey de Rumania en París;

Su Majestad el Rey de los Serbios, Croatas y  
Eslovenos:

el Sr. Nicolás P. PACHITCH, ex Presidente del  
Consejo de Ministros;

Sr. Ante TRUMBIC, Ministro de Relaciones  
Exteriores;

EL PRESIDENTE DE LA REPÚBLICA  
CHECOSLOVAQUIA:

Sr. Edward BENES, Ministro de Relaciones  
Exteriores;

el Sr. Stephen OSUSKY, Enviado Extraordinario  
y Ministro Plenipotenciario de la República

Checo-Eslovaca en Londres;

PAVO:

General HAADI Pasha, Senador;

Sr. RIZA TEVFIK, Senador;

RÉCHAD HALISS Bey, Enviado Extraordinario y  
Ministro Plenipotenciario de Turquía en Berna;  
QUIENES, habiéndose comunicado sus plenos  
poderes, hallados en buena y debida forma, HAN  
CONVENIDO EN LO SIGUIENTE:

A partir de la entrada en vigor del presente  
Tratado cesará el Estado de guerra.

A partir de ese momento y sujeto a las  
disposiciones del presente Tratado, existirán  
relaciones oficiales entre las Potencias Aliadas y  
Turquía.

[Artículos 1-87 omitidos]

ARMENIA.

### **ARTÍCULO 88.**

Turquía, de acuerdo con la acción ya tomada  
por las Potencias Aliadas, por la presente  
reconoce a Armenia como un Estado libre e  
independiente.

### **ARTÍCULO 89.**

Turquía y Armenia, así como las demás  
Altas Partes Contratantes, acuerdan someter al  
arbitraje del Presidente de los Estados Unidos  
de América la cuestión de la frontera que ha de  
fijarse entre Turquía y Armenia en los vialatos  
de Erzurum, Trebisonda, Van y Bitlis, y aceptar  
su decisión al respecto, así como cualquier

estipulación que pueda prescribir en cuanto al acceso de Armenia al mar, y en cuanto a la desmilitarización de cualquier parte del territorio turco adyacente a dicha frontera.

#### **ARTÍCULO 90.**

En caso de que la determinación de la frontera en virtud del artículo 89 implique la transferencia de la totalidad o parte del territorio de dichos vialatos a Armenia, Turquía renuncia a partir de la fecha de tal decisión a todos los derechos y títulos sobre el territorio así transferido. Las disposiciones del presente Tratado aplicables al territorio separado de Turquía serán aplicables a dicho territorio.

La proporción y naturaleza de las obligaciones financieras de Turquía que Armenia tendrá que asumir, o de los derechos que le pasarán, a causa de la transferencia de dicho territorio, se determinará de conformidad con los artículos 241 a 244, Parte VIII (Cláusulas Financieras) del presente Tratado.

Los acuerdos posteriores decidirán, en su caso, todas las cuestiones no resueltas por el presente Tratado y que puedan surgir como consecuencia de la transferencia de dicho territorio.

#### **ARTÍCULO 91.**

En caso de transferencia a Armenia de cualquier parte del territorio a que se refiere el artículo 89, dentro de los tres meses siguientes a la emisión de la decisión a que se refiere dicho artículo, se constituirá una Comisión de Límites, cuya composición se determinará posteriormente, para rastrear en el acto la frontera entre Armenia y Turquía establecida por dicha decisión.

#### **ARTÍCULO 92.**

Las fronteras entre Armenia y Azerbaiyán y Georgia, respectivamente, se determinarán por acuerdo directo entre los Estados interesados.

Si en cualquiera de los dos casos los Estados interesados no han determinado la frontera por acuerdo en la fecha de la decisión a que se refiere el artículo 89, la línea fronteriza en cuestión será determinada por las Principales Potencias Aliadas, quienes también dispondrán que sea trazada en el punto.

#### **ARTÍCULO 93.**

Armenia acepta y acuerda incorporar en un Tratado con las Principales Potencias Aliadas las disposiciones que estas Potencias consideren necesarias para proteger los intereses de los habitantes de ese Estado que difieren de la mayoría de la población en raza, idioma o religión.

Armenia además acepta y acuerda incorporar en un Tratado con las Principales Potencias Aliadas las disposiciones que estas Potencias consideren necesarias para proteger la libertad de tránsito y el trato equitativo para el comercio de otras Naciones.

[Artículos 94-139 omitidos]

#### **PROTECCIÓN DE LAS MINORÍAS.**

#### **ARTÍCULO 140.**

Turquía se compromete a que las estipulaciones contenidas en los artículos

141, 145 y 147 se reconozcan como leyes fundamentales, y que ninguna ley o reglamento civil o militar, ningún Iradeh imperial o acción oficial entre en conflicto o interfiera con estas estipulaciones, ni ninguna ley, reglamento, Imperial Iradeh ni la acción oficial prevalecen sobre ellos.

#### **ARTÍCULO 141.**

Turquía se compromete a garantizar la protección plena y completa de la vida y la libertad de todos los habitantes de Turquía, sin distinción de nacimiento, nacionalidad, idioma, raza o religión. Todos los habitantes de Turquía tendrán derecho al libre ejercicio, ya sea público o privado, de cualquier credo, religión o creencia.

Las penas por cualquier injerencia en el libre ejercicio del derecho a que se refiere el párrafo anterior serán las mismas, cualquiera que sea el credo de que se trate.

#### **ARTÍCULO 142.**

Considerando que, en vista del régimen terrorista que existe en Turquía desde el 1 de noviembre de 1914, las conversiones al Islam no pueden tener lugar en condiciones normales, no se reconocen conversiones desde esa fecha y todas las personas que no eran musulmanas antes del 1 de noviembre de 1914, se considerará que lo sigue siendo, a menos que, después de recobrar su libertad, realice voluntariamente las formalidades necesarias para abrazar la fe islámica.

Con el fin de reparar en la medida de lo posible los daños infligidos a las personas en el curso de las matanzas perpetradas en Turquía durante la guerra, el Gobierno turco se compromete a

prestar toda la asistencia a su alcance o a la de las autoridades turcas en la búsqueda y liberación de todas las personas, de cualquier raza o religión, desaparecidas, secuestradas, internadas o puestas en cautiverio desde el 1 de noviembre de 1914.

El Gobierno turco se compromete a facilitar el funcionamiento de las comisiones mixtas nombradas por el Consejo de la Sociedad de las Naciones para recibir las quejas de las propias víctimas, sus familias o sus parientes, realizar las investigaciones necesarias y ordenar la liberación de las personas en pregunta.

El Gobierno turco se compromete a asegurar la ejecución de las decisiones de estas comisiones, ya garantizar la seguridad y la libertad de las personas así restauradas en el pleno goce de sus derechos.

#### **ARTÍCULO 143**

Turquía se compromete a reconocer las disposiciones que las Potencias Aliadas consideren oportunas con respecto a la emigración recíproca y voluntaria de personas pertenecientes a minorías raciales.

Turquía renuncia a todo derecho a acogerse a las disposiciones del artículo 16 del Convenio entre Grecia y Bulgaria relativo a la emigración recíproca, firmado en Neuilly-sur-Seine el 27 de noviembre de 1919.

Dentro de los seis meses siguientes a la entrada en vigor del presente Tratado, Grecia y Turquía celebrarán un acuerdo especial relativo a la emigración recíproca y voluntaria de las poblaciones de raza turca y griega en los

territorios transferidos a Grecia y restantes turcos, respectivamente.

En caso de que no se pueda llegar a un acuerdo sobre dicho arreglo, Grecia y Turquía tendrán derecho a solicitarlo al Consejo de la Sociedad de Naciones, que fijará los términos de dicho arreglo.

#### **ARTÍCULO 144.**

El Gobierno turco reconoce la injusticia de la ley de 1915 relativa a las Propiedades Abandonadas (Emval-i-Metroukeh), y de las disposiciones complementarias de la misma, y las declara nulas y sin valor, tanto en el pasado como en el futuro.

El Gobierno turco se compromete solemnemente a facilitar en la mayor medida posible el regreso a sus hogares y el restablecimiento en sus negocios de los súbditos turcos de raza no turca que hayan sido expulsados por la fuerza de sus hogares por temor a una masacre o cualquier otra forma de presión desde el 1 de enero de 1914. Reconoce que todos los bienes muebles o inmuebles de dichos súbditos turcos o de las comunidades a que pertenecen, que puedan ser recuperados, deben serles restituidos a la mayor brevedad, en cualquier mano que fuesen encontrados. Dichos bienes serán restituidos libres de toda carga o servidumbre con que hubieren sido gravados y sin compensación de ninguna especie a los actuales dueños u ocupantes, salvo cualquier acción que puedan ejercitar contra las personas de quienes derivaron el título.

El Gobierno turco conviene en que el Consejo de la Liga de las Naciones nombrará comisiones arbitrales siempre que sea necesario. Cada una de estas comisiones estará compuesta por un representante del Gobierno turco, un representante de la comunidad que alega que ella o uno de sus miembros ha sido lesionado, y un presidente designado por el Consejo de la Sociedad de Naciones. Estas comisiones arbitrales conocerán de todas las reclamaciones a que se refiere este artículo y decidirán por procedimiento sumario.

Las comisiones arbitrales tendrán facultad para ordenar:

(1) La provisión por parte del Gobierno turco de mano de obra para cualquier trabajo de reconstrucción o restauración que se considere necesario. Esta mano de obra se reclutará de las razas que habitan el territorio donde la comisión arbitral juzgue necesaria la ejecución de dichas obras;

(2) La remoción de cualquier persona que, previa investigación, sea reconocida por haber tomado parte activa en las matanzas o deportaciones o por haberlas provocado; las medidas a tomar respecto de los bienes de tal persona serán indicadas por la comisión;

(3) La enajenación de bienes pertenecientes a miembros de una comunidad muertos o desaparecidos desde el 1 de enero de 1914, sin dejar herederos; dichos bienes pueden ser entregados a la comunidad en lugar de al Estado;

(4) La cancelación de todos los actos de venta o cualquier acto que cree derechos sobre bienes inmuebles celebrados después del 1 de enero de 1914. La indemnización de los tenedores estará a cargo del Gobierno turco, pero no debe servir como pretexto para retrasar la restitución. . La comisión arbitral tendrá, sin embargo, la facultad de imponer arreglos equitativos entre las partes interesadas, si el actual poseedor de tales bienes ha pagado alguna suma.

El Gobierno turco se compromete a facilitar en la mayor medida posible el trabajo de las comisiones y garantizar la ejecución de sus decisiones, que serán definitivas. Ninguna decisión de las autoridades judiciales o administrativas turcas prevalecerá sobre tales decisiones.

#### **ARTÍCULO 145.**

Todos los ciudadanos turcos serán iguales ante la ley y gozarán de los mismos derechos civiles y políticos sin distinción de raza, idioma o religión.

La diferencia de religión, credo o confesión no perjudicará a ningún nacional turco en asuntos relacionados con el disfrute de los derechos civiles o políticos, como por ejemplo la admisión a empleos públicos, funciones y honores, o el ejercicio de profesiones e industrias.

En un plazo de dos años a partir de la entrada en vigor del presente Tratado, el Gobierno turco presentará a las Potencias Aliadas un plan para la organización de un sistema electoral basado en el principio de representación proporcional de las minorías raciales.

No se impondrá ninguna restricción al libre uso por parte de cualquier nacional turco de cualquier idioma en las relaciones privadas, en el comercio, la religión, en la prensa o en publicaciones de cualquier tipo, o en reuniones públicas. Se darán facilidades adecuadas a los ciudadanos turcos de habla no turca para el uso de su idioma, ya sea oralmente o por escrito, ante los tribunales.

#### **ARTÍCULO 146.**

El Gobierno turco se compromete a reconocer la validez de los diplomas otorgados por universidades y escuelas extranjeras reconocidas, y a admitir a sus titulares al libre ejercicio de las profesiones e industrias para las que califican dichos diplomas.

Esta disposición se aplicará por igual a los nacionales de las potencias aliadas que residan en Turquía.

#### **ARTÍCULO 147.**

Los nacionales turcos que pertenezcan a minorías raciales, religiosas o lingüísticas gozarán del mismo trato y seguridad de hecho y de derecho que los demás nacionales turcos. En particular, tendrán el mismo derecho a establecer, administrar y controlar a sus expensas, con independencia y sin interferencia de las autoridades turcas, cualquier institución benéfica, religiosa y social, escuelas de instrucción primaria, secundaria y superior y otros establecimientos educativos. , con derecho a utilizar su propio idioma y a ejercer libremente en él su propia religión.

**ARTÍCULO 148.**

En las ciudades y distritos en los que haya una proporción considerable de ciudadanos turcos pertenecientes a minorías raciales, lingüísticas o religiosas, se asegurará a estas minorías una participación equitativa en el disfrute y aplicación de las sumas que puedan proporcionarse con cargo a los fondos públicos del Estado, presupuestos municipales o de otro tipo con fines educativos o benéficos.

Las sumas en cuestión se pagarán a los representantes calificados de las comunidades interesadas.

**ARTÍCULO 149.**

El Gobierno turco se compromete a reconocer y respetar la autonomía eclesiástica y escolar de todas las minorías raciales en Turquía. A tal fin, y salvo disposición en contrario del presente Tratado, el Gobierno turco confirma y mantendrá en su totalidad las prerrogativas e inmunidades de carácter eclesiástico, escolástico o judicial concedidas por los sultanes a las razas no musulmanas en virtud de órdenes especiales o decretos imperiales (firmans, hattis, berats, etc.) así como por órdenes ministeriales u órdenes del Gran Visir.

Todas las leyes, decretos, reglamentos y circulares emitidos por el Gobierno de Turquía y que contengan abrogaciones, restricciones o modificaciones de dichas prerrogativas e inmunidades se considerarán nulas y sin efecto en tal medida.

Cualquier modificación del sistema judicial turco que pueda introducirse de conformidad

con las disposiciones del presente Tratado anulará este artículo, en la medida en que dicha modificación pueda afectar a individuos pertenecientes a minorías raciales.

**ARTÍCULO 150.**

En las ciudades y distritos en los que reside una proporción considerable de nacionales turcos de religión cristiana o judía, el Gobierno turco se compromete a que dichos nacionales turcos no sean obligados a realizar ningún acto que constituya una violación de su fe o de sus prácticas religiosas, y no quedar incapacitado por negarse a asistir a los tribunales de justicia o a realizar cualquier negocio legal en su día de descanso semanal. Esta disposición, sin embargo, no eximirá a los nacionales turcos (cristianos o judíos) de las obligaciones que se impongan a todos los demás nacionales turcos para la preservación del orden público.

**ARTÍCULO 151.**

Las principales potencias aliadas, en consulta con el Consejo de la Sociedad de las Naciones, decidirán qué medidas son necesarias para garantizar la ejecución de las disposiciones de este artículo. El Gobierno turco acepta por la presente todas las decisiones que puedan tomarse sobre este tema.

[Artículos 152-225 omitidos]

**PENALIZACIONES.****ARTÍCULO 226.**

El Gobierno turco reconoce el derecho de las Potencias Aliadas a llevar ante los tribunales militares a las personas acusadas de haber

cometido actos en violación de las leyes y costumbres de la guerra. Tales personas, si son declaradas culpables, serán condenadas a las penas establecidas por la ley. Esta disposición se aplicará independientemente de cualquier procedimiento o enjuiciamiento ante un tribunal en Turquía o en el territorio de sus aliados.

El Gobierno turco entregará a las Potencias Aliadas o a una de ellas que así lo solicite a todas las personas acusadas de haber cometido un acto en violación de las leyes y costumbres de la guerra, que se especifican por su nombre o por el rango, cargo o empleo que tenían bajo las autoridades turcas.

#### **ARTÍCULO 227.**

Las personas culpables de actos criminales contra los nacionales de una de las Potencias Aliadas serán llevadas ante los tribunales militares de esa Potencia.

Las personas culpables de actos delictivos contra los nacionales de más de una de las Potencias Aliadas serán llevadas ante tribunales militares integrados por miembros de los tribunales militares de las Potencias interesadas.

En todo caso, el imputado tendrá derecho a nombrar su propio defensor.

#### **ARTÍCULO 228.**

El Gobierno turco se compromete a proporcionar todos los documentos e información de todo tipo, cuya producción se considere necesaria para garantizar el pleno conocimiento de los hechos inculpativos, el enjuiciamiento de los infractores y la justa apreciación de la responsabilidad.

#### **ARTÍCULO 229.**

Las disposiciones de los artículos 226 a 228 se aplican igualmente a los gobiernos de los Estados a los que se haya asignado o pueda asignarse territorio perteneciente al antiguo Imperio turco, en lo que se refiere a las personas acusadas de haber cometido actos contrarios a las leyes y usos de la guerra, que se encuentren en el territorio o a disposición de dichos Estados.

Si las personas en cuestión han adquirido la nacionalidad de uno de dichos Estados, el Gobierno de tal Estado se compromete a tomar, a petición de la Potencia interesada y de acuerdo con ella, o a petición conjunta de todas las Potencias Aliadas, todas las medidas necesarias para asegurar el enjuiciamiento y castigo de tales personas.

#### **ARTÍCULO 230.**

El Gobierno turco se compromete a entregar a las Potencias Aliadas a las personas cuya entrega pueda ser requerida por estas últimas como responsables de las masacres cometidas durante la continuación del Estado de guerra en el territorio que formaba parte del Imperio Turco el 1 de agosto de 1914. .

Las Potencias Aliadas se reservan el derecho de designar el tribunal que juzgará a las personas así acusadas, y el Gobierno turco se compromete a reconocer tal tribunal.

En caso de que la Sociedad de las Naciones haya creado con tiempo suficiente un tribunal competente para conocer de dichas masacres, las Potencias Aliadas se reservan el derecho de llevar a los acusados antes mencionados ante dicho

tribunal, y el Gobierno turco se compromete igualmente a reconocer tal tribunal.

Lo dispuesto en el artículo 228 se aplica a los casos de que trata este artículo.

[Artículos 231-433 omitidos]

El presente Tratado, en francés, inglés e italiano, será ratificado. En caso de divergencia, prevalecerá el texto francés, excepto en las Partes I (Pacto de la Sociedad de Naciones) y XII (Trabajo), donde los textos francés e inglés tendrán la misma fuerza. El depósito de las ratificaciones se hará en París lo antes posible.

Las potencias cuya sede del Gobierno se encuentre fuera de Europa sólo tendrán derecho a informar al Gobierno de la República Francesa, por medio de su representante diplomático en París, de que se les ha otorgado su ratificación; en tal caso, deberán transmitir el instrumento de ratificación lo antes posible.

Se redactará una primera acta de depósito de ratificaciones tan pronto como el Tratado haya sido ratificado por Turquía, por un lado, y por tres de las Principales Potencias Aliadas, por el otro.

A partir de la fecha de esta primera acta, el Tratado entrará en vigor entre las Altas Partes Contratantes que lo hayan ratificado.

Para la determinación de todos los plazos previstos en el presente Tratado, esta fecha será la fecha de entrada en vigor del Tratado.

En todo lo demás, el Tratado entrará en vigor para cada Potencia en la fecha del depósito de su ratificación.

El Gobierno francés transmitirá a todas las Potencias signatarias una copia certificada conforme del acta de depósito de las ratificaciones.

EN FE DE LO CUAL, los Plenipotenciarios antes mencionados han firmado el presente Tratado.

Hecho en Sèvres, el diez de agosto de mil novecientos veinte, en un solo ejemplar que quedará depositado en los archivos de la República Francesa, y del cual se transmitirán copias autenticadas a cada una de las Potencias signatarias.

(LS) GEORGE GRAHAME.

(LS) GEORGE H. PERLEY.

(L.S.) ANDREW FISHER.

(LS) GEORGE GRAHAME.

(L. S.) R. A. BLANKENBERG.

(L. S.) ARTHUR HIRTZEL

(LS) A. MILLERAND.

(L. S.) F. FRANÇOIS-MARSAL.

(LS) JULES CAMBON. (L. S.) PALEOLOGO.

(L. S.) BONIN.

(LS) MARIETTI.

(LS) K.: MATSUI.

(LS) A. AHARONIAN.

(LS) J. VAN DEN HEUVEL.

(L. S.) ROLIN JAEQUEMINES.

(L. S.) E. K. VENIZELOS.

(L. S.) A. ROMANOS.

(LS) MAURICE ZAMOYSKI.

(LS) ERASME PILTZ.

(L. S.) AFFONSO COSTA.

(L. S.) D. J. GUIKA.

(L. S.) STEFAN OSUSKY.

(LS) Hadi.

(I..S.) DR. RIZA TEWFIK.

(LS) RÉCHAD HALISS.

## **ANEXO B: Establecimiento del Gobierno Provisional de Ezidikhan**

### **PREÁMBULO**

La Tierra de Ezidikhan es la patria del pueblo yezidí. Aquí se formó nuestra identidad espiritual, religiosa y política. La catástrofe que recientemente cayó sobre el pueblo yezidí, la masacre y el secuestro de miles de yezidíes, exige una acción decidida para nuestra seguridad y prosperidad. En consecuencia, tomamos esta acción para proclamar el poder inherente del autogobierno en Ezidikhan, la Nación yezidí.

Los sobrevivientes yezidíes del holocausto de Daesh en la región del Mediterráneo oriental, así como los yezidíes de otras partes del mundo, nunca dejarán de hacer valer su derecho a una vida digna, libre y honesta en su patria nacional. Este derecho es el derecho natural del pueblo yezidí a ser dueño de su propio destino, como todas las demás Naciones.

## **PROCLAMACIÓN**

### **Artículo I**

En nombre del pueblo yezidí, nosotros, los Líderes Espirituales Supremos, afirmamos en esta proclamación los deseos de los yezidíes y los pueblos confederados de elegir libremente nuestro futuro social, económico, político y económico, sin interferencias externas de conformidad con el principio internacionalmente reconocido de autodeterminación. Afirmamos además el libre derecho de los pueblos yezidíes y confederados a gobernarse a sí mismos internamente y en las relaciones con otros pueblos, de acuerdo con las leyes consuetudinarias y popularmente aprobadas y las normas internacionales. Creemos que estos deseos se corresponden con el deseo de los pueblos de libertad, igualdad, libertad, seguridad, prosperidad y relaciones pacíficas con todos los pueblos. En consecuencia, por la presente proclamamos y afirmamos plenamente la Nación autónoma y de autogobierno de Ezidikhan.

### **Artículo II**

En cumplimiento de esta realidad afirmada, declaramos solemnemente mediante esta proclamación el establecimiento formal del Gobierno Provisional de Ezidikhan facultado para servir y representar a los pueblos de la Nación autónoma hasta el momento en que los pueblos de Ezidikhan realicen un plebiscito nacional para autorizar la formación de un gobierno regional permanente de Ezidikhan establecido de acuerdo con los principios antes mencionados y los principios de la confederación democrática.

a): En consecuencia, el Gobierno Provisional de Ezidikhan se establece con tres ramas de gobierno, incluido el Consejo Espiritual Supremo, como el Poder Judicial, el Ministerio Ejecutivo y el Consejo de Gobierno, que actúa como el Parlamento del Gobierno Provisional de Ezidikhan.

b): Los yezidís y las Naciones aliadas respaldan y aprueban la formación de una confederación democrática como base para establecer el Gobierno Provisional de Ezidikhan y un futuro gobierno permanente aprobado por los yezidís como resultado de un plebiscito organizado por el Gobierno Provisional en el momento oportuno.

### **Artículo III**

El liderazgo yezidí proclama:

Elecciones libres y abiertas bajo el principio de una persona, un voto para todos los yezidíes adultos, con mujeres, hombres y terceros sexos elegibles para votar y buscar cargos a través de elecciones populares como iguales; y

Leyes y un sistema de justicia basado en la igualdad, la libertad de reunión, la libertad de información y los derechos humanos universales.

a) En consecuencia, nosotros y los representantes de la Comunidad yezidí de Ezidikhan, en virtud de nuestro derecho natural e histórico de autogobierno, por la presente declaramos y afirmamos la realidad de la Nación yezidí en Ezidikhan, que se conocerá como la Nación Ezidikhan.

b) Declaramos que a partir del 25 de

julio de 2017 a las 12:00 p. m. hasta el establecimiento de las autoridades de gobierno permanentes y electas de conformidad con la Constitución de Ezidikhan que será adoptada por el Consejo de Gobierno a más tardar el 25 de julio de 2020, el Consejo de Liderazgo Supremo actuará como un Consejo de Gobierno Provisional de Ezidikhan, y su órgano ejecutivo, la Administración Ejecutiva, será el Gobierno Provisional de Ezidikhan.

### **Artículo IV**

La estructura del Gobierno Provisional de Ezidikhan incluirá, entre otros, el Consejo de Liderazgo Supremo fundador que tendrá poder jurídico, el Consejo Espiritual Supremo, un parlamento que se conocerá como el Consejo de Gobierno que representa a cada comunidad popular yezidí, una Administración Ejecutiva que ejercerá facultades ministeriales para aplicar y hacer cumplir las leyes consuetudinarias y populares. La casta Mîrs y Baba tendrá derechos y responsabilidades que se decidirán por voto popular.

### **Artículo V**

La Nación Autónoma de Ezidikhan:

- Promover activamente la inmigración yezidí y el regreso de la diáspora yezidí;
- Fomentar la prosperidad y estabilidad económica, social y política del país en beneficio de todos sus habitantes;
- Implementar una carta y una Constitución que protejan la libertad, la justicia y la paz

individuales y comunitarias, tal como se prevé en las tradiciones de Ezidikhan;

- Avanzar y establecer leyes consuetudinarias y judiciales para garantizar la igualdad de derechos sociales, económicos y políticos a todos sus habitantes, independientemente de su religión, credo, identidad étnica o sexo o afiliaciones políticas;
- Garantizar a los ciudadanos de Ezidikhan la libertad de prensa, religión, conciencia, idioma, educación, derechos legales y cultura;
- Afirmar que los Tratados celebrados por la Administración Ejecutiva y aprobados por el Consejo de Gobierno serán la ley del país;
- Salvaguardar a cualquier Nación que desee estar bajo la protección de Ezidikhan de manera consistente con un tratado bilateral acordado;
- Salvaguardar los Santos Lugares y objetos sagrados de todas las religiones; y
- Ser fiel a los principios de la Carta de las Naciones Unidas y del derecho internacional.

Extendemos nuestra mano a todas las Naciones y Estados limítrofes y sus pueblos en una oferta de paz y buena vecindad, y les hacemos un llamado a establecer lazos de cooperación y ayuda mutua con la Nación soberana yezidí. La Nación Autónoma de Ezidikhan está preparada

para hacer su parte en un esfuerzo común para lograr la libertad y la estabilidad para el avance de todo el Medio Oriente.

## Artículo VI

Hacemos un llamamiento al pueblo yezidí de todo el mundo para que se una alrededor de los yezidíes de Ezidikhan en las tareas de inmigración y prosperidad económica y entre las Naciones y los pueblos de toda la región del Mediterráneo oriental.

Hacemos un llamado al pueblo yezidí de todo el mundo para que se una a los yezidíes de Ezidikhan en las tareas de restauración de nuestra Nación y para que apoye a todos los yezidíes en la gran lucha por la realización de un futuro renovado arraigado en el antiguo sueño de Ezidikhan.

Depositando nuestra confianza en el Todopoderoso, estampamos nuestras firmas en esta proclamación, en esta sesión del Consejo Nacional provisional, en el suelo de la Patria, en la Aldea Sagrada de Lalish, en este tercer día de Gelawej del año 6767 por el yezidí calendario (el veinticinco de julio del año 2017 según el calendario gregoriano).

Baba Jeque, Kurto Hajji Ismail

Baba Jeque, Hadji Saado

Hajoyan Khdir

Baba Salem Daound

Hadyi Aziz Anmar

## **ANEXO C: Juicio por jurado**

### **JUICIO POR JURADO DE Nación INDÍGENA**

#### **TÍTULO I**

#### **REGLAS GENERALES**

**ARTÍCULO 1: OBJETO.** El objeto de esta ley es establecer el juicio por un jurado ubicado en la jurisdicción o territorio del demandante, de conformidad con esta Carta.

**ARTÍCULO 2: DELITOS.** Los siguientes delitos deben ser juzgados por los jurados, aun en su forma juzgada y junto con los delitos conexos con los que concurren:

- a) Crímenes de la colonización
- b) Crímenes de agresión
- c) Crímenes de genocidio
- d) Crímenes de lesa humanidad
- e) Crímenes de guerra, incluidos los ataques intencionales contra civiles e infraestructura civil.
- f) Crímenes contra la naturaleza, incluidos el ecocidio y el culturicidio.
- g) Crímenes de terrorismo
- h) Violencia de género y feminicidio
- i) Violencia contra y traslado forzoso de niños.
- j) Segregación racial
- k) Ocupación militar

**ARTÍCULO 3: COMPOSICIÓN DEL JURADO.** El jurado estará integrado por doce (12) miembros titulares y, por lo menos, dos (2) suplentes y será dirigido por un solo juez penal. El juez podrá ordenar que haya más sustitutos de acuerdo a la gravedad y/o complejidad del caso. El panel de jurados titulares y suplentes deberá estar integrado siempre por mujeres y hombres en partes iguales.

**ARTÍCULO 4: LA COMPOSICIÓN DEL JURADO CON PUEBLOS INDÍGENAS.** Cuando se juzgue un hecho en que el imputado o la víctima pertenezcan a indígenas, el panel de doce jurados titulares y suplentes estará integrado por mitades hombres y mujeres de la misma comunidad a la que pertenezcan.

**ARTÍCULO 5: EXTENSIÓN DE JURISDICCIÓN.** Los juicios por jurado indígena se realizarán en el partido judicial en que se haya cometido el hecho. Cuando un hecho haya conmocionado a una comunidad de tal manera que no se pueda obtener razonablemente un jurado imparcial, el juez podrá ordenar, sólo a petición del acusado o víctima y mediante una orden fundada, que el juicio se celebre en otra jurisdicción judicial. La determinación de la circunscripción se definirá por sorteo público.

**ARTÍCULO 6: FUNCIÓN DEL JURADO Y DEL JUEZ.** El Jurado delibera sobre las pruebas y determina la culpabilidad o no del imputado en relación con el hecho o hechos y con el delito o grado del mismo por el que debe responder el imputado. Para que el jurado desempeñe y lleve a cabo esta función, los miembros del jurado

deberán ser obligatoriamente instruidos sobre el derecho sustantivo aplicable por el magistrado que presida el proceso sobre el delito principal imputado y los delitos menores comprendidos en él.

**ARTÍCULO 7: VEREDICTO Y FUNCIÓN DE LAS INSTRUCCIONES DEL JUEZ.** El jurado emite su veredicto a su leal saber y entender, basándose únicamente en las pruebas producidas en el juicio y sin expresión de las razones de la decisión. Las instrucciones del juez al jurado, la exigencia de juicio y el registro completo y obligatorio del juicio en taquigrafía, audio y/o video constituyen base plena y suficiente para un control amplio de la decisión del jurado.

**ARTÍCULO 8: PRESUNCIÓN DE INOCENCIA Y DUDA RAZONABLE.** El juez instruirá obligatoriamente al jurado que, en todo proceso penal, se presumirá la inocencia del imputado mientras no se demuestre lo contrario, y si existiere duda razonable sobre la culpabilidad, se abstendrá al imputado. Si la duda es entre grados de un delito o entre delitos de diferente gravedad, el imputado sólo puede ser condenado por el delito de menor grado o menos grave.

**ARTÍCULO 9: LIBERTAD DE CONCIENCIA DEL JURADO. SIN REPRESALIAS.** El jurado es independiente, soberano e indiscutiblemente responsable de su veredicto, libre de toda amenaza del juez, de las partes o de cualquier Poder por sus decisiones. La regla del secreto de las deliberaciones y la forma inmotivada de su veredicto asegura a los jurados la más amplia libertad de discusión y decisión, sin estar sujetos a sanción alguna, a menos que parezca

que lo hicieron contra su conciencia, o que se corrompieron por medio de soborno. El contenido textual de este artículo formará parte obligatoria de las instrucciones del juez al jurado.

## **TÍTULO II**

### **LAS CONDICIONES PARA SER JURADO**

**ARTÍCULO 10: DERECHO. CARGO PÚBLICO.** La función de jurado constituye un derecho y una carga pública de los pueblos en condiciones de ejercerla. Los requisitos para serlo y los casos en que podrán ser excluidos serán únicamente los establecidos taxativamente en esta ley.

**ARTÍCULO 11: REQUISITOS.** Para ser jurado se requiere:

- a) Ser miembro del Estado y/o Nación indígena y tener por lo menos 20 años de edad.
- b) Tener el pleno ejercicio de los derechos políticos.

**ARTÍCULO 12: LISTA DE POTENCIALES JURADOS.** El Gobierno elaborará las listas de los pueblos que cumplan con los requisitos establecidos en esta ley. También sorteará las listas de personas, separadas por sexo y por su pertenencia a las comunidades indígenas, respectivamente.

**ARTÍCULO 13: RESPONSABLE.** A los efectos de controlar el sorteo, se invitará a toda la comunidad a presenciarlo, en particular a los colegios de abogados de los diferentes partidos judiciales, al gobierno local y a otras entidades vinculadas a la labor judicial y autoridades de la Nación indígena.

**ARTÍCULO 14: LISTA PARA CADA ENSAYO. INTEGRACIÓN.** La lista de jurados para el juicio estará integrada, a partes iguales de mujeres y hombres, con los catorce (14) primeros que surjan del sorteo, asumiendo los doce (12) primeros como titulares y los dos (2) últimos como suplentes. . El resto de los jurados sorteados permanecerán afectados por el proceso hasta que finalice la etapa de excusas e impugnaciones con causa. Cuando alguno de los jurados principales convocados sea removido por excusa o recusación, el resto de la lista se designará sucesivamente, de acuerdo con el orden del sorteo.

**ARTÍCULO 15: JURAMENTO DEL JURADO.** Los jurados principales y suplentes prestarán juramento solemne ante el juez, bajo pena de nulidad. Los jurados se pondrán de pie y el secretario pronunciará la siguiente fórmula: “Prometes, en tu calidad de jurado, en nombre del Pueblo, examinar y juzgar el caso imparcialmente y con la mayor atención, dando el veredicto de acuerdo con su mejor conocimiento y creencia, de acuerdo con la prueba producida y observando la Constitución de la Nación y la Carta del TPIN?”, a lo que la respuesta será “Sí, lo prometo”.

Hecha la promesa, se declarará abierto el juicio. Los jurados suplentes deberán estar presentes durante todo el desarrollo del debate, hasta el momento en que el jurado principal se retire a deliberar. Cuando alguno de los jurados principales sea removido por excusa posterior, lo sustituirá el jurado o jurados suplentes que le sigan en orden numérico del sorteo.

**ARTÍCULO 16: INSTRUCCIONES INICIALES.** Inmediatamente después del juramento de ley, el juez dará instrucciones iniciales al jurado, describiendo cómo se lleva a cabo un juicio, qué es prueba y qué no, cómo se valora la prueba testimonial, por qué delitos se juzga al acusado y los principios fundamentales disposiciones constitucionales que deben observar, especialmente el alcance del estándar probatorio de más allá de una duda razonable. El juez también les advertirá que, al final del debate, el juez les dará instrucciones finales con la explicación precisa de los delitos y las cuestiones jurídicas a resolver.

**ARTÍCULO 17: CONTENIDO DE LAS INSTRUCCIONES FINALES.** El juez hará que el jurado ingrese a la sala del tribunal para dar instrucciones verbalmente. El juez primero explicará al jurado las reglas que rigen la deliberación, les entregará una copia escrita de las reglas junto con las instrucciones, explicará cómo se elaboran los formularios de veredicto propuestos y les informará que deben intentar emitir un veredicto unánime en sesión secreta y continua. El juez también les dirá que, en algún momento de sus deliberaciones, tendrán que elegir un vocero.

**ARTÍCULO 18: DICCIÓN DEL VEREDICTO.** El jurado, bajo la dirección de su portavoz, acordará la mejor manera de ordenar las deliberaciones y realizar las votaciones. Si deciden votar con papeletas individuales, serán destruidas inmediatamente una vez obtenido el veredicto, cuidando que personas ajenas al jurado no tengan conocimiento de ello. Después de

que el jurado haya llegado a un acuerdo sobre el veredicto, los formularios finales entregados por el juez serán completados, firmados y fechados por el vocero en presencia de todo el jurado. Luego el jurado en pleno regresará a la sala de sesiones bajo la custodia del funcionario para su pronunciamiento.

## **ANEXO D: Pacto Internacional sobre los Derechos de las Naciones Indígenas**

### **Pacto Internacional sobre los Derechos de las Naciones Indígenas**

*Versión ratificada autorizada*

Iniciado el 28 de julio de 1994

Ginebra, Suiza

#### **PREÁMBULO**

**AFIRMANDO** que las Naciones Indígenas son pueblos iguales en dignidad y derechos a todos los demás pueblos, reconociendo el derecho de todas las personas y pueblos a ser diferentes, a considerarse diferentes y a ser respetados como tales,

**CONSIDERANDO** que todos los pueblos contribuyan a la diversidad y riqueza de las civilizaciones y culturas, que constituyen el patrimonio común de la humanidad,

**REAFIRMANTE** que todas las doctrinas, políticas y prácticas que se basan en la superioridad de los pueblos, grupos o individuos, o que la defienden, sobre la base del origen nacional, las diferencias raciales, religiosas, étnicas o culturales son racistas, científicamente falsas, culturalmente repugnantes, legalmente

inválidas, moralmente condenables y socialmente injustas ,

**REAFIRMANDO TAMBIÉN** que las Naciones Indígenas, en el ejercicio de sus derechos, deben estar libres de discriminación de cualquier tipo,

**CONSTERNADOS** por el hecho de que muchas Naciones Indígenas han sido privadas de sus derechos humanos y libertades fundamentales, resultando, inter alia, en el despojo de sus tierras, territorios y recursos, obstruyendo así el libre ejercicio, en particular, del derecho al desarrollo de acuerdo con las necesidades e intereses propios de cada Nación,

**RECONOCIENDO** la urgente necesidad de respetar y promover los derechos y características inherentes a las Naciones Indígenas, en especial el derecho a las tierras, territorios y recursos, que derivan de la cultura de cada Nación; cuyos aspectos incluyen tradiciones espirituales, historias y filosofías, así como costumbres y estructuras políticas, económicas y sociales,

**RECIBIENDO** el hecho de que las Naciones Indígenas se están organizando para poner fin a todas las formas de discriminación y opresión dondequiera que ocurran,

**CONVENCIDOS** de que perfeccionar el control de las Naciones Indígenas sobre las decisiones de desarrollo que las afectan a ellas y a sus tierras, territorios y recursos permitirá a cada Nación continuar fortaleciendo sus instituciones, culturas y tradiciones, así como promover el desarrollo autosostenible de acuerdo con sus aspiraciones y necesidades ,

**RECONOCIENDO TAMBIÉN** que el respeto por las culturas, conocimientos y prácticas de los Pueblos Indígenas contribuye a la sostenibilidad del medio ambiente natural y la continuidad de la diversidad biológica y cultural,

**ENFATIZANDO** la necesidad de la desmilitarización de las tierras y territorios de las Naciones Indígenas, lo que contribuirá a la paz, el equilibrio económico y social, el entendimiento y las relaciones amistosas entre las Naciones y entre las Naciones y los Estados del mundo,

**REAFIRMANDO** que es vital que las familias y comunidades indígenas mantengan la responsabilidad compartida por el bienestar, crianza, formación y educación de sus hijos,

**RECONOCIENDO** que las Naciones tienen derecho a determinar sus propios asuntos y determinar libremente sus relaciones con otras Naciones y Estados en un espíritu de convivencia, mutuo beneficio y pleno respeto,

**CONSIDERANDO** que los tratados, acuerdos y otros arreglos constructivos entre Naciones y entre Naciones y Estados son asuntos de interés y responsabilidad internacional; y la resolución pacífica de conflictos y controversias entre Naciones y entre Naciones y Estados es esencial para las relaciones equilibradas y coexistentes entre los pueblos,

**OBSERVANDO** que la Carta de las Naciones Unidas, el Pacto Internacional de Derechos Económicos, Sociales y Culturales,

el Pacto Internacional de Derechos Civiles y Políticos y las resoluciones y declaraciones del Consejo Mundial de Pueblos Indígenas, la Conferencia Circumpolar Inuit, el Consejo Internacional de Tratados Indios y otros los organismos internacionales afines a estos órganos afirman la importancia fundamental del derecho a la libre determinación de todos los pueblos, en virtud del cual estos determinan libremente su condición política y persiguen libremente su desarrollo económico, social y cultural,

**TENIENDO EN CUENTA** que nada de lo dispuesto en la presente Convención podrá utilizarse como pretexto para negar a ningún pueblo su derecho a la libre determinación,

**ALENTANDO** a las Naciones a cumplir y buscar el cumplimiento de los Estados con la implementación efectiva de todos los instrumentos internacionales, incluido este Convenio, en la medida en que se aplican a las Naciones Indígenas, en consulta y cooperación con los pueblos interesados,

**CREEYENDO** que el presente Convenio es un avance importante en el reconocimiento, promoción y protección de los derechos y libertades de las Naciones Indígenas, el establecimiento de la convivencia entre Naciones y entre Naciones y Estados, y en el desarrollo de las actividades relevantes de las instituciones internacionales en este campo,

**AFIRMA Y RATIFICA SOLEMNEMENTE DE CONFORMIDAD CON CADA SIGNATARIO**

**PROCESOS COSTUMBRES DE LA Nación los siguientes Principios y Convenios:**

## ARTÍCULO I

### DECLARACIÓN DE PROPÓSITO

Las Naciones firmantes de este Pacto, en ejercicio de sus poderes soberanos inherentes, declaran su respeto mutuo y estos pactos para promover la cooperación pacífica para preservar, proteger y garantizar los derechos y responsabilidades de las Naciones y la dignidad inherente y los derechos iguales e inalienables de los individuos, y para promover la libertad, la justicia y la paz internacional.

### ARTÍCULO II: PRINCIPIOS DE LA CONDUCTA DE LAS Naciones Y RELACIONES CON LOS Estados

#### PARTE I: AUTODETERMINACIÓN DE LAS NACIONES

Para. 1 Las Naciones Indígenas son pueblos que tienen derecho al goce pleno y efectivo de todos los derechos humanos y libertades fundamentales reconocidos en la Carta de las Naciones Unidas y en el derecho internacional de los derechos humanos;

Para. 2 Las Naciones Indígenas son libres e iguales a todos los demás seres humanos y pueblos en dignidad y derechos, y tienen derecho a no sufrir discriminación de ningún tipo por su origen o identidad;

Para. 3 Las Naciones Indígenas tienen derecho a la libre determinación, de conformidad con el derecho internacional, y en virtud de ese derecho determinan libremente su condición política y persiguen libremente su desarrollo económico, social y cultural sin injerencias externas;

Para. 4 Las Naciones Indígenas pueden elegir libremente participar plenamente en la vida política, económica, social y cultural de un Estado, manteniendo sus características políticas, económicas, sociales y culturales distintivas, y sin renunciar al derecho inherente a la soberanía;

#### PARTE II: PAZ, SEGURIDAD Y PROTECCIÓN CONTRA EL GENOCIDIO

Para. 5 Cada Nación Indígena posee el derecho colectivo a existir en paz y seguridad como pueblo diferenciado, ya ser protegido contra cualquier tipo de genocidio.

Además, los individuos de cada Nación tienen derecho a la vida, a la integridad física y mental, libertad y seguridad de la persona;

Para. 6 Cada Nación Indígena tiene derecho a ser protegida contra el etnocidio y el genocidio cultural, incluida la prevención y reparación de:

- a) Separación de niños de sus familias y comunidades bajo cualquier pretexto;
- b) Todo acto que tenga por objeto o efecto privarles de su integridad como sociedades distintas, o de sus características o identidades culturales o étnicas;
- c) Cualquier forma de asimilación o integración forzada por imposición de otras culturas o formas de vida por medio de medios de comunicación, instituciones religiosas o educativas, legislación gubernamental, administración u otras medidas o medios;

d) Despojo de sus tierras, territorios o recursos;

e) Cualquier propaganda dirigida contra ellos;

Para. 7 Cada Nación Indígena tiene el derecho colectivo e individual inherente a mantener y desarrollar sus características e identidades distintas, incluido el derecho a identificarse o definirse a sí misma;

Para. 8 El derecho de una persona a pertenecer a una Nación o comunidad indígena es una cuestión de elección individual y el libre derecho de una Nación o comunidad indígena a definir su pertenencia, y del ejercicio de tal elección no puede derivarse perjuicio alguno;

Para. 9 Las Naciones Indígenas no serán desalojadas por la fuerza de sus tierras o territorios. No se llevará a cabo ninguna reubicación sin el consentimiento libre e informado de los pueblos interesados y hasta después de un acuerdo sobre una compensación justa y equitativa y, cuando sea posible, con la opción de retorno;

Para. 10 Las Naciones Indígenas tienen derecho a protección y seguridad especiales en periodos de conflicto armado. Se alentará a las Naciones y los Estados a observar las normas internacionales para la protección de las poblaciones civiles (con especial atención a la aplicación de las disposiciones pertinentes del Protocolo I o el Protocolo II de los Convenios de Ginebra de 1949) en circunstancias de emergencia y conflicto armado, y no:

a) Reclutar a miembros individuales de Naciones Indígenas en contra de su voluntad en las fuerzas armadas de otras Naciones Indígenas y, en particular, para usarlos contra ellas;

b) Reclutar niños en las fuerzas armadas bajo cualquier circunstancia;

c) Obligar a los Pueblos Indígenas a abandonar sus tierras y territorios y medios de subsistencia y reubicarlos en centros especiales para fines militares;

### **PARTE III: LOS DERECHOS CULTURALES DE LAS NACIONES**

Para. 11 Las Naciones indígenas tienen derecho a practicar sus tradiciones culturales y

evolucionar la cultura en relación con las tierras y el territorio sin interferencias. Esto incluye el derecho a mantener, proteger y desarrollar las manifestaciones pasadas, presentes y futuras de sus culturas, tales como sitios y estructuras arqueológicas e históricas, artefactos, diseños, ceremonias, tecnologías y artes visuales y escénicas y literatura, así como el derecho a la restitución de los bienes culturales, religiosos y espirituales tomados sin su consentimiento libre e informado o en violación de sus leyes;

Para. 12 Los pueblos indígenas tienen derecho a manifestar, practicar y enseñar tradiciones, costumbres y ceremonias espirituales y religiosas; el derecho a mantener, proteger y acceder en privado a los sitios religiosos y culturales; el derecho al uso y control de los objetos ceremoniales; y el derecho a la repatriación de

restos humanos. Se alentará a las Naciones y Estados a tomar medidas efectivas para preservar, respetar y proteger los lugares sagrados y cementerios de cada Nación Indígena;

Para. 13 Las Naciones Indígenas tienen derecho a inculcar, usar, desarrollar y transmitir a las generaciones futuras sus lenguas, tradiciones orales, sistemas de escritura y literatura, y a designar y mantener sus propios nombres para comunidades, lugares y personas. Se alentará a las Naciones y los Estados a que tomen medidas efectivas para garantizar que los pueblos indígenas puedan entender y ser entendidos en los procedimientos políticos, legales y administrativos, cuando sea necesario, mediante la prestación de servicios de interpretación o por otros medios apropiados;

#### **PARTE IV: EL DERECHO AL CONOCIMIENTO Y LA INFORMACIÓN**

Para. 14 Las Naciones Indígenas tienen derecho a todos los niveles y formas de educación, incluido el acceso a la educación en sus propios idiomas, y el derecho a establecer y controlar sus sistemas e instituciones educativas de acuerdo con sus propias costumbres y tradiciones;

Para. 15 Las Naciones Indígenas tienen derecho a que la dignidad y diversidad de sus culturas, tradiciones, historias y aspiraciones se reflejen en todas las formas de educación e información pública. Se alentará a las Naciones y Estados a tomar medidas efectivas, en consulta con cada Nación Indígena, para eliminar los prejuicios y promover la tolerancia, la comprensión y las buenas relaciones;

Para. 16 Las Naciones Indígenas tienen derecho a establecer sus propios medios de comunicación en su propio idioma y a ejercer el derecho a la igualdad de acceso a todas las formas de medios de comunicación; Se alentará a las Naciones y los Estados a tomar medidas efectivas para garantizar que los medios de comunicación públicos reflejen debidamente la diversidad cultural de las Naciones afectadas.

#### **PARTE V: EL DERECHO DE LAS NACIONES A DECIDIR**

Para. 17 Los Pueblos Indígenas tienen derecho a participar plenamente en todos los niveles de la toma de decisiones en asuntos que puedan afectar sus derechos, vidas o destinos, mediante la participación popular directa o por medio de representantes elegidos por ellos mismos de acuerdo con sus propias costumbres;

Para. 18 Las Naciones Indígenas tienen derecho a participar plenamente, a través de procedimientos determinados en consulta con ellas, en la elaboración de medidas legislativas y administrativas que puedan afectarlas. Se alentará a las Naciones y los Estados a obtener el consentimiento libre e informado de los pueblos interesados antes de aplicar tales medidas;

Para. 19 Las Naciones indígenas tienen derecho a mantener y desarrollar sus sistemas económicos y sociales, a estar seguros en el disfrute de sus propios medios de subsistencia y a participar libremente en sus actividades económicas tradicionales y de otro tipo, incluidas la caza, la pesca, el pastoreo, la recolección, la silvicultura y el cultivo. Los pueblos indígenas

que hayan sido privados de sus medios de subsistencia tienen derecho a una justa y equitativa indemnización;

Para. 20 Las Naciones Indígenas tienen derecho a medidas extraordinarias para el mejoramiento inmediato, efectivo y continuo de sus condiciones económicas y sociales, incluyendo el mejoramiento en las áreas de empleo, formación y reciclaje profesional, vivienda, salud y seguridad social.

Se prestará atención a las necesidades especiales de los ancianos, mujeres, jóvenes, niños y discapacitados de cada Nación;

Para. 21 Las Naciones Indígenas tienen derecho a determinar y desarrollar prioridades y estrategias para su bienestar. En particular, los pueblos indígenas tienen derecho a determinar y desarrollar todos los programas de salud, vivienda y otros programas económicos y sociales que les afecten y, en la medida de lo posible, administrar dichos programas a través de sus propias instituciones;

Para. 22 Las Naciones Indígenas tienen derecho a sus medicinas tradicionales y prácticas de salud, incluido el derecho a la protección de plantas, animales y minerales medicinales vitales;

## **PARTE VI: EL DERECHO A LA TIERRA, TERRITORIOS Y LUGAR**

Para. 23 Las Naciones Indígenas tienen derecho al reconocimiento y respeto de su peculiar y profunda relación con sus tierras y territorios que es la esencia de la cultura. El uso de la frase “tierras, territorios y lugares” en esta

Convención significa el medio ambiente total del espacio terrestre, suelos, aire, agua, cielo, mar, hielo marino, flora y fauna y otros recursos que los pueblos indígenas utilizaron histórica y de la que siguen dependiendo para sostener y hacer evolucionar su cultura;

Para. 24 Cada Nación Indígena tiene el derecho colectivo e individual de poseer, controlar y usar sus tierras y territorios de acuerdo a sus deseos y necesidades. Esto incluye el derecho al pleno reconocimiento por parte de las Naciones y los Estados de sus leyes y costumbres, sistemas de tenencia de la tierra e instituciones para el manejo de los recursos, y el derecho a esperar medidas efectivas por parte de las Naciones y los Estados para prevenir cualquier interferencia o usurpación de estos derechos;

Para. 25 Las Naciones indígenas tienen derecho a la restitución de tierras y territorios

que hayan sido confiscados, ocupados, utilizados o dañados sin su consentimiento libre e informado, la devolución de las tierras y territorios y, cuando ninguno de ellos sea aceptable para la Nación, una justa y justa indemnización. A menos que los pueblos interesados acuerden libremente otra cosa en el marco de negociaciones equilibradas, la compensación adoptará la forma de tierras y territorios, por lo menos iguales en calidad, extensión y condición jurídica;

Para. 26 Las Naciones Indígenas tienen derecho a la recreación y protección del medio ambiente total y de la capacidad productiva de sus tierras y territorios, así como a la asistencia

para este fin de los Estados y de la cooperación internacional. No se permitirán las actividades militares y el almacenamiento o disposición de materiales nucleares, tóxicos u otros materiales peligrosos en las tierras y territorios de los pueblos indígenas, salvo acuerdo libre de los pueblos interesados;

Para. 27 Las Naciones Indígenas tienen derecho a que se adopten medidas especiales para proteger, como propiedad intelectual, sus ciencias, tecnologías y manifestaciones culturales, incluidos los recursos humanos y otros recursos genéticos, las semillas, las medicinas, el conocimiento de las propiedades de la fauna y la flora, las tradiciones orales, la literatura, los diseños y artes visuales y escénicas;

Para. 28 Cada Nación Indígena tiene derecho a exigir que los Estados y otras Naciones obtengan su consentimiento libre e informado antes de la aprobación de cualquier proyecto en su tierra y territorio, particularmente en relación con el desarrollo de recursos naturales o la explotación de suelos, agua, minerales u otros recursos del subsuelo. De conformidad con un acuerdo negociado libremente con los pueblos indígenas interesados, se proporcionará una compensación justa y justa por tales actividades y medidas adoptadas para mitigar el impacto ambiental, económico, social, cultural o espiritual adverso;

## **PARTE VII: DERECHOS POLÍTICOS DE LAS Naciones**

Para. 29 Las Naciones Indígenas tienen derecho a determinar libremente su propio estatus político y a ejercer el autogobierno de acuerdo con el principio de libre determinación;

Para. 30 Las Naciones Indígenas tienen derecho a determinar libremente las estructuras y seleccionar la composición de sus instituciones autónomas o de autogobierno, de conformidad con sus propias leyes consuetudinarias;

Para. 31 Las Naciones Indígenas tienen derecho a conservar y desarrollar sus costumbres, leyes y ordenamientos jurídicos, de conformidad con los derechos humanos y las libertades fundamentales universalmente reconocidos, y a que estos sean respetados por otras Naciones y reconocidos en el ordenamiento jurídico y las instituciones políticas de los Estados con los que cada Nación podrá tener relaciones de cooperación;

Para. 32 Cada Nación Indígena tiene derecho a determinar las responsabilidades de los individuos hacia sus comunidades, de una manera que no sea incompatible con los derechos humanos y las libertades fundamentales universalmente reconocidos;

Para. 33 Las Naciones Indígenas, totalmente dentro de las fronteras de los Estados y aquellas Naciones divididas por la imposición de las fronteras de los Estados, tienen derecho a mantener y desarrollar contactos, relaciones y cooperación, incluidas actividades con fines espirituales, culturales, políticos, económicos y sociales, con otras Naciones Indígenas a lo largo de fronteras estatales reconocidas;

## **PARTE VIII: TRATADOS, ACUERDOS Y RESOLUCIÓN DE CONTROVERSIAS**

Para. 34 Cada Nación Indígena tiene derecho a la observancia y cumplimiento de los tratados,

pactos, acuerdos y demás arreglos constructivos celebrados con otras Naciones y con los Estados o sus sucesores, según su intención original. Los conflictos y disputas que no puedan resolverse de otro modo a través de negociaciones directas u otros medios pacíficos deben someterse a organismos internacionales competentes acordados por todas las partes involucradas;

Para. 35 Las Naciones Indígenas tienen derecho a acceder libremente y recibir decisiones rápidas a través de procedimientos justos y mutuamente aceptables para la resolución de conflictos y disputas entre Naciones y entre Naciones y Estados, así como a recursos efectivos para todas las violaciones de sus derechos individuales y colectivos;

#### **PARTE IX: CONSTITUCIÓN Y ENTRADA EN VIGOR**

Para. 36 Las Naciones signatarias de este Convenio alentarán a otras Naciones y Estados a tomar medidas efectivas y apropiadas, en consulta con los pueblos indígenas interesados, para dar pleno efecto a las disposiciones de este Convenio. Cuando corresponda, los Estados signatarios relevantes incorporarán en sus propias leyes e instituciones consuetudinarias, y alentarán a los Estados a promulgar legislación que adopte los derechos y principios aquí contenidos;

Para. 37 Las Naciones Indígenas tienen derecho a una adecuada asistencia financiera y técnica, de los Estados, y a través de la cooperación internacional, para perseguir libremente su desarrollo político, económico, social, cultural y espiritual, y para el goce de

los derechos y libertades contenidos en esta Convención;

Para. 38 Se alentarán a las Naciones signatarias y a los órganos y organismos especializados del sistema de organizaciones internacionales de Naciones Indígenas y organizaciones no gubernamentales a que contribuyan a la plena realización de las disposiciones del presente Convenio mediante la movilización, inter alia, de cooperación financiera y técnica;

Para. 39 Un Consejo de Nueve, compuesto por delegados de las primeras nueve Naciones Signatarias, con membresía rotatoria de delegados de las siguientes Naciones Signatarias anualmente, monitoreará la implementación de esta Convención y servirá como depositario de las copias originales precisas y autorizadas de los instrumentos ratificados, que deberán ser registrados por el nombre de la Nación ratificante, la fecha de ratificación, las reservas y/o los entendimientos al momento de la recepción, y el Estado de las ratificaciones se informará anualmente a todas las Naciones signatarias y a las instituciones de los Estados pertinentes;

Para. 40 Al aplicar las iniciales de los delegados debidamente autorizados, designados por las autoridades nacionales indígenas, reunidas en Ginebra, Suiza, del 24 al 29 de enero de 1994 en el Palaise de Nacion, esta Convención será aceptada provisionalmente en principio por todas las partes que firman actuando en nombre de las Naciones participantes para un plazo de 12 meses desde la firma o hasta la ratificación formal de acuerdo con las leyes consuetudinarias de cada Nación, lo que ocurra primero. La decisión de no

ratificar este Convenio lo deja automáticamente sin efecto en relación con la Nación que se niega a ratificarlo;

Para. 41 Esta Convención entrará en vigor cuando treinta Naciones hayan ratificado formalmente sus disposiciones de acuerdo con sus procedimientos consuetudinarios. El Convenio estará abierto a la ratificación de las Naciones Indígenas por un período de 12 meses a partir de la fecha en que cuatro Naciones hayan dado su autorización provisional a través de delegados que actúen en su nombre;

Para. 42 Cada Estado que ratifique esta Convención podrá condicionar su participación mediante reservas y entendimientos. Una Declaración de Reservas indicará las disposiciones específicas de este Acuerdo que se aplicarán o no a la Nación ratificante bajo condiciones específicas. Cada Estado ratificante puede adjuntar explicaciones o aclaraciones que expresen diferentes significados asociados con las disposiciones a través de una Declaración de Entendimiento. Estas Reservas y Entendimientos se convertirán en parte de la Convención y recibirán pleno respeto por parte de otras Naciones ratificantes;

Para. 43 El presente Convenio podrá ser modificado o enmendado después de su entrada en vigor a petición de cualquier parte ratificante tras la debida consideración de todas las Naciones ratificantes en una conferencia especial convocada con el fin de modificar o enmendar. Todas las enmiendas estarán sujetas a ratificación por los procesos habituales de las Naciones Signatarias. Se requiere

consentimiento unánime para modificaciones o enmiendas.

#### **ARTÍCULO IV: AHORROS Y TRÁMITES**

Para. 44 La Conferencia Circumpolar Inuit servirá como depósito provisional de los instrumentos rubricados y ratificados hasta que se hagan otros arreglos por acuerdo de las Naciones ratificantes;

Para. 45 Los derechos aquí contenidos constituyen los estándares mínimos para la supervivencia y el bienestar de los pueblos indígenas del mundo;

Para. 46 Nada en este Convenio podrá interpretarse como una disminución o extinción de los derechos existentes o futuros que los pueblos indígenas puedan tener o adquirir.

#### **Inicial del delegado**

**En Nombre de la Nación de:**

**Fecha de Inicialización:**

**Fecha de ratificación:**

**Iniciales Partes de acuerdo con el Artículo III, párr. 40:**

**Señor. Nadir Bekir,**

Asuntos políticos y legales Los tártaros de Crimea  
(27-07-94)

**Señor. A-Share Kabeir,**

En nombre del Pueblo Numba de Sudán  
(28-07-94)

**Sr. Ron Lameman,**

Confederación del Tratado Seis Primeras Naciones (28-07-94)

**Sra. Judy Sayer,**

Primera Nación Opethesaht (28-07-94)

**Señor. Víctor Kaisiepo,**Frente de Pueblos de Papúa Occidental/OPM  
(28-07-94)

1. Naciones ratificantes a partir de 2023
2. Nación Abābdah de Egipto y Sudán
3. Tribu Adnanite Anazzah de Irak
4. Congreso hindú afgano
5. Nación Ahwaz de Irán
6. Al-Anbar-Al-Jolan
7. Confederación Tribal Al-Dulaimi de Irak
8. Tribu Al-Qaddafa
9. Albu-Nasral-Tikriti
10. Tribus Amazigh de Libia
11. Confederación Amazigh del Norte de África
12. Cabila amazigh de Argelia
13. Tribus Amazigh de Egipto
14. Tribus amazigh de Malí
15. Tribus Amazigh de Marruecos
16. Tribus Amazigh de Níger
17. Tribus Amazigh de Túnez
18. Confederación Tribal Anazzah de Irak
19. Bani Murra Romas de Jordania
20. Tribus bidoon de Irak y Kuwait
21. Confederación de Tribus Roma de Oriente Medio
22. Confederación Domari de Oriente Medio
23. Kurdistán Oriental
24. Ezidikhan Armenia
25. Ezidikhan Georgia
26. Ezidikhan Irak
27. Ezidikhan Siria
28. Ezidikhan de Anatolia
29. Confederación Tribal de Faluya
30. Ḥizb Al-Ba'at Al-'Arabī Al-Ištir Tribu de Irak
31. Alianza Drusa-Domari de Idlib de Siria
32. Tribu beduina Jahalin de Palestina
33. Jjudios de marruecos
34. Coalición Tribal Indígena Kalash Chitral
35. Asamblea Kam de Turquía
36. Juzestán
37. Tribu Kirkuk Bayat
38. República kurda
39. Nación Tribal Laz - 31 de marzo de 2022
40. Luristán - 20 febrero 2021 (CINMENA)
41. Nación Ma'dān de Irak e Irán - 20 de febrero de 2021 (CINMENA)
42. Mandeos de Irak, Irán y Siria - 20 de febrero de 2021 (CINMENA)

43. Marsh Arab Tribal Nation - 31 de marzo de 2022
44. Tribus Mullagori de Pakistán y Afganistán - 19 de agosto de 2021
45. Asamblea Tribal de Nínive de Irak - 1 de octubre de 2021
46. Nubios del Alto Egipto - 24 de noviembre de 2021
47. Tribus Pashtun de Afganistán - 15 de noviembre de 2021
48. Tribus Qashqai – 17 de noviembre de 2020
49. Tribu Rashaida de árabes beduinos - 20 de noviembre de 2021
50. Tribu Salahadin de Irak - 20 de noviembre de 2021
51. Shabaks de Irak - 19 de junio de 2021
52. Tribus Shammar de Irak - 16 de marzo de 2021
53. Sulukule (Roma) de Turquía – 6 de septiembre de 2021
54. Confederación Beduina Siria - 24 de junio de 2021
55. Tafsut Amazigh de Marruecos – 2 de julio de 2021
56. Tribus Tuareg del Norte de África – 29 de marzo de 2022
57. Tribus turcomanas de Afganistán - 15 de noviembre de 2021
58. Turkmenistán de Irán - 24 de noviembre de 2020
59. Turcomanos de Siria - 10 de noviembre de 2020
60. Nación Tribal Urugati – 9 de abril de 2021
61. Congreso Mundial Amazigh – 21 de mayo de 2021
62. Naciones de la cuenca de Yarmouk – 27 de junio de 2021
63. Nación Yarsan de Irak e Irán – 20 de febrero de 2021 (CINMENA)
64. Consejo Espiritual Supremo yezidí – 1 de octubre de 2021
65. Nación Zargari de Irán – 25 de junio
66. Alianza Liberal Zagros de Irán - 1 de febrero de 2021
67. Zoroastrianos de Irán, Irak, Siria, Turquía, Afganistán, Pakistán e India – 21 de mayo de 2021
68. Nación Tribal Zuwayya – 11 de abril de 2022

### **ANEXO E: ALDMEM para Consentimiento Negociado y Justicia Restaurativa**

ALDMEM es un mecanismo internacional en proceso de formación para las Naciones indígenas y los gobiernos estatales para mediar formalmente en disputas y negociar el consentimiento de las partes de acuerdo con un proceso denominado CLPI o “consentimiento libre, previo e informado”. Específicamente, el proceso debe realizarse cuando las Naciones, Estados o cualquiera de sus corporaciones, organizaciones no gubernamentales u organismos

multilaterales deseen realizar acciones que afecten los intereses de las Naciones: el bienestar, la cultura, la economía, el medio ambiente o la sociedad o ejercer de autodeterminación. Cuando y si el daño a los intereses de una Nación está en riesgo de daño, corresponde a una Nación o Estado buscar un compromiso mediado y una reconciliación consistente con la Justicia Restaurativa. El proceso internacionalmente reconocido de consentimiento libre, previo e informado abarca el concepto de compromiso y reconciliación para afirmar la paz y la cortesía.

Los gobiernos de los Estados actuaron en la reunión plenaria de alto nivel de la Asamblea General de 2014 de la Conferencia Mundial sobre Pueblos Indígenas declarando que los Estados miembros de la ONU se comprometen a implementar el CLPI. En sus compromisos, los Estados miembros de la ONU votaron a favor (párrafo 3) *“cooperar de buena fe con los pueblos indígenas... a través de sus... instituciones representativas”* y *“asegurar la “aprobación de cualquier proyecto que afecte sus tierras o territorios y otros recursos... mediante su consentimiento libre, previo e informado”*. Estas declaraciones afirman la intención de los Estados de implementar la Declaración de la ONU sobre los Derechos de los Pueblos Indígenas (2007), el Convenio 169 de la OIT (1989) y otros instrumentos internacionales. Además, las Naciones indígenas han adoptado otras leyes internacionales para implementar el CLPI, incluida la Convención Internacional sobre los Derechos de las Naciones Indígenas de 1994 y el Documento Final de Alta de 2013. El CLPI es una

concesión necesaria por parte de los gobiernos de los Estados y las Naciones indígenas para negociar libremente el consentimiento de las Naciones indígenas sobre la base de la “igualdad política”. Las leyes acordadas por los Estados y las Naciones exigen que los compromisos vayan más allá de las “consultas”, que deben reconocerse como el primer paso en el proceso de CLPI y deben implicar directamente la negociación del consentimiento en forma de acuerdos entre las partes.

Los acuerdos de consentimiento negociados pueden referirse a la introducción de programas de salud originados por el Estado o la nación, instituciones educativas, políticas económicas, políticas ambientales, prácticas culturales, actos que violan la vida cultural y la violencia masiva, y el acceso a los territorios ancestrales y los recursos en esos territorios históricamente confiados por las Naciones para sustentar la vida. Por importante que sea el proceso de CLPI, la realidad es que no existe un mecanismo autorizado para implementar el proceso para facilitar la identificación de problemas, la negociación del consentimiento y el cumplimiento de acuerdos entre Naciones contendientes o Naciones y Estados.

Las Naciones Unidas y otras organizaciones estatales no pueden establecer un mecanismo para implementar el CLPI. Los únicos medios para implementar el proceso son “medidas de buena fe ejercidas por Estados individuales, corporaciones y otras entidades” o leyes y prácticas estatales o corporativas internas definidas por el Estado o la corporación. Si bien

decenas de Naciones indígenas han definido protocolos, desean implementar el CLPI, las Naciones, los Estados, las corporaciones y otras entidades optaron por no cumplirlos.

Como iguales políticos a los Estados, los pueblos indígenas deben sentarse en la misma mesa con los Estados, corporaciones y otras entidades para establecer un nuevo mecanismo internacional para promover y llevar a cabo el proceso de CLPI, un organismo internacional híbrido que sirva como la única alternativa a las organizaciones basadas en el Estado. El mecanismo internacional que logra el objetivo de negociaciones mediadas entre Naciones y Estados es ALDMEM – Mecanismo de descolonización, monitoreo y aplicación de las Tierras Ancestrales.

ALDMEM está organizada bajo la supervisión de la Comisión Internacional ALDMEM compuesta por cinco Naciones indígenas, cinco corporaciones, cinco Estados y cinco organizaciones no gubernamentales que actúan como entidades ratificadoras de la carta. La Comisión Internacional ALDMEM ejerce las siguientes funciones:

**Supervisar las operaciones de la organización que lleva a cabo el siguiente personal:**

- Secretario general
- Personal de Vigilancia: Responsable de documentar, evaluar y dar seguimiento a las actividades nacionales, corporativas, estatales y de ONGs en relación con la ocupación y uso pacífico de territorios ancestrales a nivel mundial. Mantener y evaluar las relaciones

existentes y documentar las circunstancias de las relaciones entre las partes afectadas.

- Personal diplomático: Involucrar a la nación, el Estado, las empresas, las ONG y las partes multilaterales para facilitar la participación. Facilitar Terceros Garantes, observadores y afectados.
- Personal de Comunicaciones: Desarrollar y mantener información lingüística, cultural, ambiental y geográfica para facilitar las comunicaciones entre Naciones, Naciones y Estados, corporaciones, ONG y para realizar investigaciones.
- Personal de mediación: Involucrar directamente a las partes en conflicto y facilitar el entendimiento mutuo, las reglas para las negociaciones y el consentimiento.
- Personal de Asuntos Públicos: Desarrollar y producir información pública sobre el compromiso entre Naciones, Estados, corporaciones y ONG.

**El Propósito, Misión y Metas de este plan preliminar está abierto a discusión y debate.**

**OBJETIVO:**

A través de un acuerdo de cooperación entre Naciones indígenas, organizaciones no gubernamentales, corporaciones y Estados, establecer un mecanismo financiado por fuentes independientes para facilitar el monitoreo, las negociaciones, los acuerdos y el cumplimiento con base en los estándares y procedimientos establecidos en una carta ratificada que establece ALDMEM.

**MISIÓN:**

Facilitar la negociación de acuerdos (pactos, tratados, etc.) entre Naciones y partes que busquen establecer políticas, resolver conflictos, realizar acciones que afecten la tierra y las comunidades y que busquen el acceso a territorios ancestrales con el fin de utilizar o extraer recursos para beneficio externo.

**OBJETIVOS:**

Registrar personas nacionales, estatales, societarias y adquirentes que pretendan participar social, económica, ambiental y culturalmente en actividades que afecten a las comunidades indígenas y utilicen las tierras o extraigan recursos de los territorios ancestrales.

·Supervisar las ocupaciones territoriales existentes y responder a las solicitudes de mediación de la Nación entre la Nación y otras partes

- Facilitar la participación del Tercero Garante en las negociaciones como parte activa, con un rol mutuamente determinado como monitor y ejecutor de los acuerdos finales.
- Notificar a las posibles partes sobre la mediación, el arbitraje y el Tercer Garante y el marco de negociación para establecer relaciones amistosas entre las partes y ofrecer lugares para el compromiso.
- Facilitar las comunicaciones sobre la gobernanza consuetudinaria de las Naciones, la estructura de los sistemas corporativo, estatal y adquisitivo.
- Facilitar las comunicaciones, la traducción y los idiomas habituales para maximizar la comprensión del compromiso entre las partes.
- Conducir comunicaciones de Asuntos Públicos en simposios, comunicados de prensa públicos, conferencias públicas y lanzamientos de documentales.

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# Ezidikhan Customary Laws

## A Blueprint for Indigenous Justice

By Patrick Harrigan, MA

### ABSTRACT

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Drawing from interviews with Nallein Sowilo, Justice Minister of Ezidikhan, this article explores the philosophical and historical underpinnings of the NICT as well as its potential to reshape the international legal system. The Yezidi tradition of reparative justice composes the core philosophy by which the NICT addresses humanitarian crimes and safeguards Indigenous sovereignty. Improving on existing institutions like the International Criminal Court (ICC) and the Permanent Court of Arbitration (PCA), the NICT prioritizes culturally specific and community-based solutions. Case studies, including Barbados, Germany, and Armenia, illustrate the court's ability to promote solidarity and foster knowledge exchange among ally nations. The NICT is also proven to encourage a more expansive understanding of human rights violations, including genocide, ecocide, culturicide, and gender-based violence—thus accounting for transgressions previously overlooked and ignored among the international community. Serving as a blueprint for nations enduring ongoing oppression, the NICT provides a vision of a value-driven global order based on dignity, accountability, and collective justice.

**Keywords:** Reparative Justice, Indigenous Sovereignty, Humanitarian Crimes, International Legal System, Nations International Criminal Tribunal (NICT), Genocide, Ecocide, Culturicide, International Criminal Court (ICC), United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

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### Executive Summary

This article explores the groundbreaking integration of Yezidi customary laws into the framework of the Ezidikhan Court for International Crimes (ECIC), presenting a unique model for indigenous justice. It highlights the philosophical underpinnings, jurisdictional scope, and practical applications of this innovative legal system, which aims to address historical grievances and promote accountability

for atrocities committed against indigenous peoples.

The ECIC Code, a central element of this legal framework, blends traditional Yezidi practices with international standards, prioritizing restorative justice, cultural preservation, and community healing. Unlike conventional Western legal systems, the ECIC emphasizes reconciliation and atonement over punitive measures, reflecting the communal

and spiritual values of the Yezidi people. Key features include mediation by councils of elders, culturally specific penalties, and the incorporation of ecocide and culturicide into its jurisdiction.

The article further examines the tribunal's assertion of universal jurisdiction, which enables it to prosecute crimes such as genocide, war crimes, and gender-based violence that transcend national boundaries. This expansive approach addresses gaps left by state-centric systems and provides a platform for indigenous nations to assert their rights in the global legal landscape.

In addition to its legal innovations, the ECIC serves as a beacon of self-determination for Ezidikhan, reinforcing its autonomy and sovereignty. Its integration of traditional Yezidi justice mechanisms challenges existing norms, offering a model for addressing systemic injustices faced by indigenous communities worldwide.

The article concludes by emphasizing the global significance of Ezidikhan's efforts. The ECIC exemplifies how indigenous legal systems can complement international frameworks, providing innovative solutions for justice and accountability. As a precedent-setting initiative, it underscores the importance of cultural context in the pursuit of global justice, calling on international institutions to recognize and support the transformative potential of indigenous-led tribunals.

## Introduction

Ezidikhan, the historic homeland of the Yezidi people, stands as a testament to resilience and cultural richness amidst centuries of adversity. Rooted in the heart of Mesopotamia, the

Yezidis' indigenous heritage traces back to the ancient Sumerians, thus blending deep spiritual traditions with a distinct legal framework. This unique cultural identity has endured, even as the community faced waves of persecution and displacement, culminating in the catastrophic genocide of 2014.

The Yezidis' struggle for self-determination is inextricably tied to their survival. For centuries, they have navigated the challenges of systematic marginalization, often operating in the shadows of dominant political and cultural systems. The 2014 genocide, orchestrated by ISIS, marked one of the darkest chapters in their history. Thousands of Yezidis were killed, women and children enslaved, and sacred sites destroyed. This atrocity exposed not only the brutality of extremist ideologies but also the failures of state and international systems to protect vulnerable communities. The genocide galvanized the Yezidis to assert their rights and demand justice, laying the groundwork for the establishment of the Ezidikhan government.

At the heart of Ezidikhan's vision for the future lies the Nations' International Criminal Tribunal (NICT). This indigenous-led tribunal is a direct response to the systemic injustices faced by the Yezidi people and other marginalized communities. Recognizing the limitations of existing international legal systems, the NICT seeks to provide a framework for accountability that respects and incorporates indigenous sovereignty, customary law, and restorative justice. It is not merely a court but a transformative approach to justice—one that integrates the Yezidi community's values and traditions with global human rights standards.

Ezidikhan's journey toward autonomy and justice serves as a powerful example of how indigenous communities can reclaim agency in the face of historical oppression. The NICT is a cornerstone of this effort, representing both a call for accountability and a vision for a more inclusive and equitable international legal order. As Ezidikhan advances its mission, it sets a precedent for indigenous nations worldwide, affirming that justice can be shaped by those who have suffered the most in its absence.

### **The Roots of Ezidikhan's Legal Traditions**

Ezidikhan's legal system is deeply rooted in the traditions of its ancestors, drawing from Sumerian law and oral systems that date back thousands of years. As one of the oldest legal traditions in Mesopotamia, Yezidi customary laws have been preserved through generations, transmitted orally by elders and religious leaders. These laws are not merely a set of rules but a reflection of the community's spiritual beliefs, cultural values, and social structures.

Historically, Yezidi legal traditions emphasized communal harmony and conflict resolution, prioritizing the well-being of the group over individual interests. This system was integral to maintaining social cohesion in a region often marked by external pressures and conflicts. By retaining their oral legal traditions, the Yezidis have safeguarded their cultural identity against centuries of marginalization and persecution.

### **Restorative Justice as the Core Philosophy**

Central to Ezidikhan's customary law is the principle of restorative justice. Unlike punitive

justice systems that focus on retribution, restorative justice seeks to repair the harm caused by wrongdoing and rebuild community trust. This approach aligns with Yezidi spiritual teachings, which emphasize forgiveness, reconciliation, and the reintegration of offenders into society. This approach reflects the values of Ezidikhan's customary law, where justice is understood as a process of restoring balance within the community. Restorative mechanisms employed by the NICT include:

- Victim-led processes that allow survivors to voice their experiences and influence reparative measures.
- Community-based resolutions that focus on rebuilding relationships and addressing the root causes of harm.
- A focus on cultural restoration, which ensures that the impacted community's traditions, heritage, and spiritual practices are preserved and revitalized.

Restorative practices in Ezidikhan often involve mediations led by elders or religious leaders, where victims and perpetrators come together to address the impact of the offense. These processes aim to heal relationships, provide restitution to victims, and foster a sense of accountability within the community. By prioritizing healing over punishment, Ezidikhan's legal system offers an alternative model that challenges the adversarial nature of many Western justice systems.

As Ezidikhan transitioned toward establishing its own government, it sought to integrate traditional Yezidi values with contemporary legal frameworks. This fusion ensures that governance

in Ezidikhan remains culturally authentic while meeting international legal standards.

The Ezidikhan government's constitution reflects this balance, codifying the sovereignty of the Yezidi people and the principles of customary law. Tribal councils and elders continue to play a vital role in decision-making processes, while modern institutions provide administrative and judicial support. This hybrid system not only preserves Yezidi traditions but also guarantees that governance structures are equipped to address the challenges of the modern era.

### **Autonomy in Land and Resource Rights**

Land and resource rights are fundamental to Ezidikhan's pursuit of self-determination. For centuries, the Yezidis' connection to their ancestral lands has been central to their identity and survival. However, colonial and state-centric policies have stripped indigenous communities of these rights, leaving them vulnerable to exploitation.

In response, the Ezidikhan government has taken bold steps to assert control over its resources. A landmark example is the 2018 resolution on seed sovereignty. Recognizing the importance of agricultural self-sufficiency, this resolution established the right of Ezidikhan farmers to retain and reuse traditional seed varieties, countering international patent laws that favor corporate monopolies. This policy not only protects the community's food security but also reaffirms their autonomy over natural resources.

By foregrounding land and resource rights, Ezidikhan underscores its commitment to

sustainability and resilience. These efforts serve as a powerful example of how indigenous governance can challenge global systems that prioritize profit over people and the environment.

Through its customary laws, Ezidikhan has crafted a framework that honors its rich heritage while addressing the realities of contemporary governance. The integration of restorative justice, traditional values, and resource autonomy demonstrates Ezidikhan's determination to build a society that reflects the aspirations and needs of its people. This legal legacy not only empowers the Yezidi community but also offers a model for other indigenous nations seeking to reclaim their sovereignty in the face of systemic oppression.

### **The Need for an Indigenous-Led Tribunal**

For decades, indigenous communities worldwide have faced systematic marginalization within traditional justice systems. Crimes against indigenous peoples, such as genocide, cultural erasure, and resource exploitation, are often overlooked or inadequately addressed by state-centric and international institutions. The Yezidi genocide of 2014 is a tragic example of this failure. Despite global condemnation, international courts struggled to hold perpetrators accountable, leaving survivors without meaningful recourse to justice.

In this context, the Ezidikhan Government recognized the urgent need for an indigenous-led tribunal to address the unique challenges faced by marginalized communities. Such a tribunal would prioritize indigenous sovereignty, incorporate customary laws, and provide a platform for prosecuting crimes that existing institutions

either ignored or inadequately addressed. The Nations' International Criminal Tribunal (NICT) emerged as a direct response to these systemic shortcomings, offering a transformative approach to justice rooted in indigenous values and international legal standards.

### **The Role of the Ezidikhan Government and International Advocates**

The establishment of the NICT was made possible through the combined efforts of the Ezidikhan Government and a coalition of international advocates. Dr. Rudolph C. Rýser, Founding Director of the Center for World Indigenous Studies (CWIS), played a pivotal role in conceptualizing the tribunal. A lifelong champion of indigenous rights, Dr. Rýser's vision for the NICT was deeply informed by his work with indigenous communities across the globe. He emphasized the importance of blending traditional legal systems with contemporary frameworks to create a justice mechanism that truly serves the needs of marginalized peoples.

Daymon Gerard Corrie, Faith Keeper and Chief of the Eagle Clan of the Lokono-Arawak Tribe, also contributed significantly to the NICT's creation. Appointed Ezidikhan's ambassador-at-large in 2017, Corrie facilitated international dialogues and built critical partnerships to advance the tribunal's mission. His advocacy underscored the universal right to self-determination and the necessity of indigenous leadership in addressing historical and ongoing injustices.

The Ezidikhan Government provided the institutional backbone for the NICT, embedding it within its broader vision for self-governance

and justice. By leveraging its unique position as a sovereign entity, Ezidikhan established the tribunal as a cornerstone of its commitment to accountability and the restoration of dignity for the Yezidi people and other indigenous communities.

### **Complementing and Challenging Traditional Frameworks**

The NICT operates at the intersection of indigenous sovereignty and international law, complementing and challenging traditional justice frameworks such as the International Criminal Court (ICC) and the Permanent Court of Arbitration (PCA). While these institutions have made significant contributions to global justice, their limitations are evident. The ICC, for example, relies heavily on state cooperation and jurisdictional referrals, often excluding non-state actors and marginalized groups. Similarly, the PCA's arbitration-focused model, while flexible, lacks the cultural specificity needed to address crimes rooted in the erasure of indigenous identity.

The NICT addresses these gaps by asserting universal jurisdiction over crimes of genocide, culturicide, ecocide, and other atrocities disproportionately affecting indigenous peoples. Its hybrid legal framework integrates customary laws with international human rights standards, creating a tribunal that respects cultural traditions while maintaining global legitimacy. Unlike state-centric models, the NICT empowers indigenous communities to lead their own justice processes, ensuring that their voices are central to the pursuit of accountability.

At the same time, the NICT challenges the

dominance of Western legal paradigms in international justice. By prioritizing restorative justice and community-led solutions, the tribunal offers a compelling alternative to retributive systems that often fail to address the root causes of violence and inequality. This approach not only disrupts the status quo but also sets a precedent for how indigenous nations can reclaim agency within global governance.

The NICT represents more than a tribunal; it is a vision for a more equitable and inclusive legal order. By addressing systemic failures and championing indigenous leadership, the tribunal seeks to transform the way justice is conceived and delivered. As it continues to develop, the NICT stands as a beacon of hope for marginalized communities worldwide, demonstrating that justice can be reimaged to serve those who have historically been denied its protections.

### **The NICT's Jurisdiction**

The Nations' International Criminal Tribunal (NICT) is defined by its broad and inclusive jurisdiction, encompassing crimes that have historically devastated indigenous communities and marginalized groups. The tribunal's mandate includes genocide, ecocide, culturicide, and gender-based violence, each of which has unique and far-reaching consequences for the societies targeted.

- **Genocide:** The systematic eradication of a people's physical, cultural, and spiritual existence. For the Yezidis and other indigenous nations, genocide often manifests through mass killings, forced displacement, and the destruction of sacred sites, all of which the NICT is designed to address.

- **Ecocide:** Recognizing the deep interconnection between indigenous communities and their environment, the NICT prosecutes deliberate acts of environmental destruction that threaten a community's survival. This includes deforestation, pollution, and the exploitation of natural resources without consent.

- **Culturicide:** The deliberate erasure of a peoples' cultural identity through the destruction of traditions, languages, and heritage. The NICT acknowledges this as a distinct crime, emphasizing the importance of preserving the cultural fabric of indigenous societies.

- **Gender-Based Violence:** Crimes such as sexual slavery, forced marriages, and systematic rape have been tools of oppression and control, especially during conflicts. The NICT's jurisdiction ensures that these atrocities are prosecuted with the gravity they warrant, providing justice for survivors and communities.

By addressing these interconnected crimes, the NICT takes a holistic approach to justice, guaranteeing that the full scope of harm inflicted is recognized and redressed.

### **Customary Law in NICT Operations**

A cornerstone of the NICT's framework is its integration of Ezidikhan's customary laws. These traditions, rooted in Sumerian legal systems and oral practices, emphasize collective well-being and the interconnectedness of justice and cultural identity. By incorporating these principles, the NICT ensures that its operations resonate deeply with the communities it serves.

Key ways Ezidikhan customary laws shape the NICT include:

- **Cultural Sensitivity:** Trials and hearings are conducted with respect for indigenous traditions, including the use of native languages and culturally significant rituals. This approach fosters trust and engagement from affected communities.
- **Restorative Practices:** Drawing on Ezidikhan's emphasis on reconciliation, the tribunal facilitates truth-telling and reparative processes that prioritize community healing over adversarial proceedings.
- **Inclusivity in Governance:** Indigenous leaders and elders play a central role in shaping the NICT's policies and practices, ensuring that the tribunal's work aligns with the cultural and spiritual values of its constituents.

The NICT's legal framework offers a transformative model that bridges the gap between international legal standards and indigenous customary law. By recognizing and addressing the unique dimensions of crimes against indigenous peoples, the tribunal sets a precedent for justice systems worldwide. Its commitment to cultural resonance, universal jurisdiction, and restorative justice exemplifies how legal systems can be reimagined to serve the needs of marginalized communities while upholding global human rights principles.

### **Case Studies: Addressing the Yezidi Genocide and Beyond**

The Nations' International Criminal Tribunal (NICT) was founded with a commitment to

prosecute the gravest crimes against indigenous and marginalized communities. Among its priority cases are those stemming from the 2014 Yezidi genocide, a catastrophic event that exposed systemic failures in international justice.

The genocide perpetrated by ISIS involved mass killings, forced conversions, sexual slavery, and the destruction of sacred sites. Thousands of Yezidis were murdered, while over 6,000 women and children were abducted and enslaved. While these atrocities have been globally recognized as genocide, justice for the victims has remained elusive. The NICT seeks to address these crimes comprehensively by prosecuting individuals, organizations, and state actors complicit in the genocide. The tribunal's holistic approach includes examining cultural erasure, systemic violence, and the long-term impacts of displacement, ensuring that justice is not only punitive but also restorative.

In addition to addressing the Yezidi genocide, the NICT plans to tackle cases of ecocide and culturicide that threaten indigenous communities worldwide. By prosecuting crimes such as resource exploitation, environmental destruction, and the suppression of indigenous languages and traditions, the tribunal underscores its commitment to preserving cultural heritage and ensuring sustainable futures for affected communities.

### **International Collaboration**

As part of its mission to establish a robust legal framework, the NICT has engaged in ongoing negotiations with Barbados for treaty ratification. This partnership reflects the tribunal's commitment to building global alliances that

support indigenous sovereignty and justice. Barbados, with its history of advocating for marginalized communities, represents an ideal partner in advancing the NICT's goals.

In 2024, Daymon Gerard Corrie, Ezidikhan's ambassador-at-large, facilitated discussions with the Barbadian government, delivering the NICT Charter for review. These negotiations included proposals for Barbados to host the tribunal's proceedings, providing a neutral and supportive venue for international cases. Additionally, plans are underway for Tunisian judges from the Permanent Court of Arbitration (PCA) to contribute their expertise under the tribunal's framework. This collaboration underscores the NICT's commitment to integrating diverse judicial perspectives while maintaining its focus on indigenous leadership and customary law.

### **Ezidikhan: A Model for Indigenous Legal Systems**

The NICT's establishment positions Ezidikhan as a global leader in reimagining justice for indigenous communities. By prioritizing cultural resonance, restorative justice, and universal jurisdiction, Ezidikhan's legal framework offers a transformative model for addressing historical and ongoing atrocities. This approach challenges the dominance of state-centric legal systems, demonstrating that indigenous nations can lead the way in prosecuting crimes against humanity, genocide, and ecocide.

Ezidikhan's innovative use of customary law within a modern tribunal framework sets a powerful precedent for other indigenous nations. By blending traditional practices with international standards, the NICT creates a legal system that is both culturally authentic and

globally relevant. This model inspires indigenous communities worldwide to reclaim their sovereignty, assert their rights, and seek justice on their own terms.

### **The Future of the NICT**

As the NICT continues to grow, its potential impact extends far beyond Ezidikhan. The tribunal aims to:

- Expand its jurisdiction to include additional cases of genocide, ecocide, and culturicide impacting indigenous peoples globally.
- Strengthen international partnerships to enhance its capacity and legitimacy.
- Advocate for the recognition of indigenous-led justice systems within international legal frameworks.

By addressing systemic injustices and amplifying indigenous voices, the NICT represents a bold vision for the future of justice. Its work seeks not only to heal past wounds but to build a foundation for a more equitable and inclusive global legal order. Through its efforts, Ezidikhan and the NICT are paving the way for a world where justice truly serves all communities.

### **Building Alliances with Key Nations**

International partnerships are at the heart of the Nations' International Criminal Tribunal (NICT), enhancing its ability to address complex crimes and ensuring global recognition of its mission. Key collaborations with nations such as Barbados, Germany, and Armenia have bolstered the tribunal's operational capacity and legitimacy.

- Barbados: As a prominent advocate for justice and human rights, Barbados has

emerged as a pivotal ally in advancing the NICT's goals. Ongoing negotiations for treaty ratification underscore Barbados' commitment to supporting indigenous-led initiatives. Plans for the country to host tribunal proceedings further highlight its dedication to providing a neutral platform for international cases, particularly those addressing crimes against indigenous communities.

- **Germany:** Germany's track record in prosecuting crimes against humanity and its leadership in global justice initiatives make it an invaluable partner for the NICT. German courts have already demonstrated their commitment to addressing the Yazidi genocide by prosecuting ISIS members under universal jurisdiction. This alignment with the NICT's principles strengthens the tribunal's foundation and provides opportunities for collaboration on legal expertise and case management.

- **Armenia:** With its historical experience of genocide and tradition of advocating for marginalized groups, Armenia has been a steadfast supporter of the NICT. The country's recognition of the importance of cultural preservation and justice for oppressed communities aligns closely with the tribunal's mission. Armenia's involvement lends credibility to the NICT and reinforces its emphasis on addressing systemic crimes against indigenous peoples.

### **Engaging with Global Institutions**

The NICT's engagement with international organizations such as the United Nations (UN) and the International Commission of Jurists (ICJ)

has amplified its reach and influence, ensuring that its work resonates within the broader global justice framework.

- **United Nations:** The UN's support is critical to legitimizing the NICT and its mission. Ezidikhan's leadership has actively lobbied for recognition of the tribunal, emphasizing its alignment with international human rights standards and its role in addressing crimes often overlooked by traditional systems. UN endorsement not only enhances the NICT's credibility but also fosters international collaboration on pressing issues like genocide, ecocide, and culturicide.

- **International Commission of Jurists:** The ICJ has provided invaluable technical expertise and advocacy support for the NICT. Its involvement underscores the tribunal's adherence to international legal norms and its commitment to delivering justice in a manner that respects the rights and sovereignty of indigenous communities. By working with the ICJ, the NICT gains access to a global network of legal professionals and resources, enhancing its capacity to address complex cases.

### **Amplifying Legitimacy and Capacity Through Partnerships**

These partnerships are more than symbolic; they are instrumental in strengthening the NICT's operational framework and ensuring its long-term viability. By collaborating with supportive nations and global institutions, the tribunal can:

- **Enhance Resources:** Access to financial, technical, and logistical support from partner nations and organizations ensures the tribunal's

ability to manage high-profile cases and conduct thorough investigations.

**Build Credibility:** Endorsements from respected international entities and nations lend legitimacy to the NICT, making it a recognized authority in addressing crimes against indigenous peoples.

**Foster Knowledge Exchange:** Partnerships facilitate the sharing of best practices and legal expertise, enabling the NICT to adopt innovative approaches to justice and governance.

The NICT's success in building international partnerships highlights the power of collaboration in achieving justice for marginalized communities. By uniting nations, institutions, and indigenous leaders, the tribunal sets a precedent for global cooperation that amplifies the voices of those historically silenced. Through these alliances, the NICT not only addresses past atrocities but paves the way for a more diverse and equitable future in international justice.

### **A Precedent for Indigenous-Led Justice Systems**

The Nations' International Criminal Tribunal (NICT) represents a transformative shift in the pursuit of justice for marginalized and indigenous communities. By placing indigenous leadership and customary laws at its core, the NICT establishes a powerful precedent for justice systems worldwide. This model demonstrates that indigenous nations can lead in addressing systemic inequalities and crimes against humanity, challenging the dominance of state-centric frameworks that often exclude or marginalize them.

Through its hybrid approach, which integrates indigenous traditions with global legal standards, the NICT redefines the role of indigenous nations in the international legal landscape. It validates their sovereignty and the legitimacy of their justice systems while offering an alternative to mechanisms that have historically failed to address the unique harms experienced by indigenous peoples.

### **Inspiration for Post-Conflict Societies**

The NICT's framework offers valuable lessons for post-conflict societies seeking to rebuild and heal. Traditional state-led justice mechanisms often fall short in addressing the cultural and societal dimensions of violence. By contrast, the NICT's focus on restorative justice, cultural preservation, and community-led processes provides a blueprint for hybrid legal frameworks that resonate deeply with affected populations.

Post-conflict societies can draw inspiration from the NICT's emphasis on:

- **Restorative Practices:** Rebuilding social harmony through reconciliation and community-driven solutions rather than purely punitive measures.
- **Cultural Integration:** Protecting and revitalizing cultural traditions and heritage as an integral part of justice.
- **Inclusive Governance:** Empowering local leaders and affected communities to play an active role in shaping justice mechanisms.

The success of the NICT underscores the potential of these practices to foster sustainable peace and justice, making it a model for nations emerging from conflict and systemic oppression.

## Reshaping International Legal Norms

The establishment of the NICT challenges paradigms entrenched within international law, advocating for a more inclusive and equitable system that prioritizes the voices of marginalized communities. Traditional international legal institutions, while instrumental, often overlook the specific needs of indigenous populations and fail to adequately address crimes like culturicide and ecocide. The NICT's recognition of these crimes as central to justice sets a new standard for how global systems can evolve to address the complexities of modern atrocities.

By asserting universal jurisdiction and integrating indigenous legal principles, the NICT pushes the boundaries of international norms, advocating to:

- **Broaden Legal Definitions:** Expand the scope of recognized crimes to include those that target cultural and environmental heritage.
- **Decentralize Authority:** Empower indigenous nations and non-state actors to lead in prosecuting crimes that affect their communities.
- **Promote Equity:** Ensure that the most vulnerable voices are not only heard but are central to the pursuit of justice.

The NICT's innovative framework invites international institutions and governments to rethink their approaches to justice, fostering a legal order that is more reflective of the diverse realities and histories of the global community.

As the NICT continues to develop, its influence extends far beyond Ezidikhan. It is not only a

response to historical injustices but also a vision for a future where justice systems are inclusive, culturally resonant, and accessible to all. By challenging systemic inequities and amplifying marginalized voices, the NICT positions itself as a catalyst for change in the international legal landscape, inspiring others to follow its lead.

## Conclusion

The Nations' International Criminal Tribunal (NICT) stands as a profound symbol of Ezidikhan's resilience and unwavering commitment to justice. Born from the ashes of historical atrocities and systemic neglect, the NICT embodies the Yezidi people's determination to reclaim their sovereignty, preserve their cultural heritage, and ensure accountability for crimes that have long gone unpunished. It is a testament to the power of indigenous leadership in shaping a more equitable world.

As the NICT continues to grow, it serves as a rallying call for global support in empowering indigenous communities to seek justice on their own terms. The tribunal's innovative approach—blending customary law with international legal standards—offers a blueprint for addressing the unique challenges faced by marginalized groups. By amplifying the voices of those historically excluded from justice systems, the NICT paves the way for a more inclusive and restorative global legal order.

Looking to the future, Ezidikhan is poised to lead the charge in redefining justice for oppressed and vulnerable populations worldwide. The NICT is more than an institution; it is a movement that challenges the status quo,

demands accountability, and fosters healing for communities ravaged by violence and exploitation. Through its vision and actions, Ezidikhan demonstrates that justice can be reimagined to reflect the values of equity, cultural integrity, and collective healing.

The NICT invites the world to join this journey. It calls upon nations, organizations,

and individuals to support the tribunal's mission and stand in solidarity with indigenous peoples seeking justice. Together, we can build a future where justice knows no boundaries and the dignity of all communities is upheld. The work of the NICT is not only a beacon of hope for Ezidikhan; it is a light guiding the world toward a more just and compassionate future.

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# The Slow Genocide of Indigenous Nations and Peoples

## Hiding in Plain Sight

By Andrew B. Reid, JD<sup>1</sup>

### ABSTRACT

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British historian Patrick Wolfe opined that settler colonialism is not just an event in history but is structural and, by definition, eliminates to replace over time.<sup>2</sup> Colonial rule and domination often seek the extermination of occupied nations and peoples through forced assimilation and attrition. Despite the fact that colonialism is at its core ethnic cleansing, forced assimilation, and slow genocide, the protracted colonial elimination of original nations and peoples has been largely excluded from the “crime of crimes” by international institutions, the developing law of genocide, and genocide scholars. This article seeks to address that deficiency.

**Keywords:** Settler colonialism, Structural genocide, Ethnic cleansing, Forced assimilation, Slow genocide, Nations International Criminal Tribunal (NICT), Genocide terminology, Decolonizing genocide, Genocide studies, International Law

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### Introduction

Genocide has been described as the “crime of all crimes”,<sup>3</sup> as the worst of the evils of man. It is the murder of an entire society of people, the en masse extermination in whole or part of a national, ethnical, racial, or religious group.<sup>4</sup> It is so heinous that it differs in essence from

other crimes not just in severity or degree but in kind. For Indigenous peoples, it is the supreme and tragic expression and often the end goal of colonial invasion, domination, occupation, settlement, and rule.

British historian Patrick Wolfe opined in his important work, “Settler Colonialism and the

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<sup>2</sup> Wolfe 2006.

<sup>3</sup> Rafter 2016.

<sup>4</sup> Convention on the Prevention and Punishment of the Crime of Genocide 1948.

Elimination of the Native”, that settler colonial invasions are not just events in history but are structural and, by definition, they “destroy to replace”.<sup>5</sup> As original or First Nations and peoples and the targets and victims of the Age of Empires and the spread of Christianity, colonial domination and occupation is an almost universally shared experience of Indigenous peoples.<sup>6</sup> The Indigenous survivors of colonialism have endured many generations of protracted, systemic, institutionalized forced assimilation and genocide by imperial powers and their successor colonial States.

Genocide scholars such as Wolfe, Dirk Moses, and others have noted the very close link between colonialism and genocide due to the inherent nature of settler colonialism to “eliminate to replace” and that of colonial rule to eliminate through forced assimilation. This does not mean that colonialism is always genocidal. Imperial powers, as with the British colonial rule over India, may be more interested in the exploitation of the resources and wealth of the colonized nation than in settling its land or destroying its culture and assimilating its people. Likewise, genocide is not always colonial, as with Cambodia’s, or even when it involves only Indigenous peoples, as occurred in Rwanda. Yet, both settler colonialism and assimilation are driven by the colonial relationship and the colonizer’s intentional eliminatory goal and are, therefore, genocidal. As Lemkin described it:

Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This

imposition, in turn, may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the populations and the colonization of the area by the oppressors’ own nationals.<sup>7</sup>

Genocide and colonialism are also violations of the fundamental (“inalienable”) rights of peoples and nations<sup>8</sup> to life (i.e., genocide, ethnocide, right to collective existence),<sup>9</sup> liberty (i.e., freedom from alien domination or rule),<sup>10</sup> security (i.e., freedom from territorial invasion, theft of lands and resources, alien rule),<sup>11</sup> dignity (i.e., denial of sovereignty and nationality, culturecide),<sup>12</sup> and (collective) equality.<sup>13</sup> Genocide and colonialism are also violations of jus cogens norms. Jus cogens norms refer to concepts of a “superior order of legal norms, which laws of man or nation may not contravene” and which are “necessary to protect the public morality recognized by them.”<sup>14</sup>

<sup>5</sup> Wolfe 2006, 388.

<sup>6</sup> Niezen 2003, 23; Anaya 2004, 3-4.

<sup>7</sup> Lemkin 1944, 79. See also, Docker 2008, 81-101.

<sup>8</sup> The existential “essential rights of man” referred to in the American Declaration as its purpose and goal. American Declaration, Whereas paras. 1-5.

<sup>9</sup> UDHR, art. 3; ICCPR, art. 6(1).

<sup>10</sup> Vienna Declaration, art. 2, paras. 1 and 2; UDHR, art. 3; UNGA Res. 1514, Preamble, para. 11 (“complete freedom”); ICCPR, Preamble paras. 3, art. 9(1).

<sup>11</sup> ICERD, art. 5(b); ICCPR, Preamble paras. 1 and 2 (the “inalienable rights of all members of the human family” “derive from the inherent dignity of the human person”), art. 9(1).

<sup>12</sup> UDHR, arts. 5 and 6; ICERD, Preamble paras. 1-2; ICCPR, arts. 7 and 10; ICESCR, Preamble paras. 1 and 2.

<sup>13</sup> UN Charter, Preamble, para. 1, art. 1(2); UNGA Res. 1514, preamble, paras. 1 and 11; UDHR, arts. 1, 2, and 7; ICERD, Preamble paras. 1-4, art. 5(a); ICCPR, arts. 3, 14(1), and 26; Kuna, para. 288.

<sup>14</sup> Domingues v. United States, 12 285 2002 paras. 49, 50 (recognized over the objections of the United States).

The rights of Indigenous peoples to life<sup>15</sup> and self-determination (which incorporates other rights such as to sovereignty, nationality, territory, lands and natural resources, dignity, etc.) have been recognized as *jus cogens*<sup>16</sup> norms. A “systemic practice of human rights violations” such as that which occurs, as here, under institutionalized colonialism and racism may be said to violate international *jus cogens* norms.<sup>17</sup>

Settler colonialism and *protracted* forced assimilation have been largely excluded from the crime of crimes by both international institutions and genocide scholars. This is understandable given that the Law of Nations pertaining to the crime of genocide, crimes against humanity, and collective human rights were debated and promulgated under the global political dominance of the same imperial and colonial powers that had committed, continued, and greatly benefitted over the past half millennium from such atrocities.<sup>18</sup>

## II. GENOCIDE: WHAT’S IN A NAME?

The term “genocide” was first coined during the Second World War by lawyer Raphaël Lemkin to describe an international crime in response to the mass race and ethnic exterminations of Jews, Romani, and others by the Nazis.<sup>19</sup> The term consists of the Greek prefix *genos*, meaning race or tribe, and the Latin suffix *cide*, meaning killing.<sup>20</sup> During the War, Lemkin heard a radio address by British Prime Minister Winston Churchill in which he described mass killings in the horrors of the war as “in the presence of a crime without a name.”<sup>21</sup> Lemkin was inspired to coin the term not only by the Holocaust of World War II but after learning about how the Ottoman

Empire’s mass elimination of the Armenian peoples during World War I went unpunished. Lemkin remarked that, while the killing of one person was recognized as a crime, the crime of genocide is concealed by its own immensity.

Genocide has also been concealed, if not legitimized, by the “sovereign” status of the perpetrator, that it was committed not by an individual but by a State as an unavoidable and almost expected consequence of war,<sup>22</sup> empire, or modernity (the expansion of “civilization”).<sup>23</sup> Not only does genocide involve the physical erasure of peoples, but often the perpetrator will also engage in efforts to deny and erase the memory of its own genocidal conduct.<sup>24</sup> The discussion here concerns another hidden form of genocide, “slow genocide”—no less atrocious or complete—that is concealed by the rate and nature of the extermination<sup>25</sup> and obfuscated by time. It is often

<sup>15</sup> *Ibid.* para 85.

<sup>16</sup> Chagos Archipelago (Separate Opinion of Judge Robinson, Separate Opinion of Judge Cancado Trindade (paras. 118-174), Separate Opinion of Judge Sebutinde (paras. 11, 13, 25, 47)); Mornah 2022, para. 298; Espiell 1978; Naldi 1999. See also, Gaeta 2007, 642.

<sup>17</sup> Gomez-Paquiyaui Brothers v. Peru, para. 76.

<sup>18</sup> Schabas 2000, 51-101; Moses 2007, vii; Jones 2006, 14. Also, Lauren 2003, 124, 154-165, 168-169, 173-174, 184-185, 192-193 (“Although the language of the preamble spoke of ‘We the Peoples,’ the fact of the matter was that the governments and not peoples conducted the negotiations” over the language of the UN Charter.).

<sup>19</sup> Lemkin 1944, 79. Lemkin had fled Poland to the United States after losing much of his family, including his parents, in the Holocaust. United States Holocaust Memorial Museum 2023. Martin 1984 (biography).

<sup>20</sup> Lemkin 1944, 79.

<sup>21</sup> Power 2003, 29.

<sup>22</sup> Jones 2006, 48-54.

<sup>23</sup> Moses 2010; Hinton 2002, 1-40.

<sup>24</sup> See Logan 2014; Jones 2006, 345-361; Tatz 2003, 122-170; Lorey 2002; Cohen 2001.

<sup>25</sup> Totten 2011, 13; Watson 2015, 112.

systemic, hidden within the laws and institutions of the perpetrator. Until slow genocide as a settled matter of law is recognized as a form of genocide, it will remain essentially a crime of crimes in search of an adequate remedy.

After the War, Lemkin lobbied and eventually convinced diplomats at the United Nations to adopt the “Convention on the Prevention and Punishment of the Crime of Genocide”<sup>26</sup> which, to a very great extent, incorporated his definition of the crime.<sup>27</sup> Article 2 of the Convention defines the term “genocide” as a matter of law as meaning “...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

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

Article 3 extends the coverage of the Convention to the following acts:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article 4 further extends the prohibitions in the Convention to “rulers, public officials or private individuals.”

The language and wording of the Convention have generated much discussion, analysis, and interpretation—and significant confusion—among genocide scholars and tribunals.<sup>28</sup> Perhaps the greatest confusion has arisen out of the distinction between the mass killing of individuals and the killing or destruction of certain specific “groups”. A “group”,<sup>29</sup> particularly in this context, is a collective of individuals that share

<sup>26</sup> Genocide Convention 1948.

<sup>27</sup> The only major difference between the Convention and Lemkin’s definition appears to be the omission of an express inclusion of the destruction of a group’s “culture” – culturecide – in the Convention’s definition. The omission followed a rather heated debate at the UN. See Schabas 2000, 53, 57, 63; Krieken 2010, 128-132; Short 2016, 25; Moses 2008, 12-13. Even so, as shown in this examination of the nature of the other terms that were included, the destruction of culture remains a common theme of the Convention inherent throughout the conceptual definitions of the included terms of national, ethnical, racial, and religious groups. Lemkin’s invention of the term “genocide” grew out of his initial proposal that “barbarity” be used for the crime of mass killing and “vandalism” for cultural destruction. Lemkin 1933. See discussion, Schabas 2000, 25-26; Shaw 2007, 18. In settling on “genos,” Lemkin in essence combined the two terms such that the destruction of “culture” is included in its meaning which obviates the need to separately list it as a method of genocide in the Convention. This is further implied in Lemkin’s choices of “nation,” an organic concept housing a peoples’ culture, rather than State, “ethnic,” which is largely defined by a distinctive culture, and “religion,” which in turn is often part of a peoples’ culture. Lemkin was quite emphatic that it was the loss to the world of a peoples’ culture that was the essential crime he always had in mind. Short 2016, 3, 19-20 (citing to Moses 2008).

<sup>28</sup> See discussion, e.g., Shaw 2007, 20-36; Moses 2007, 149-180; Jones 2006, 14-18; Schabas 2000, 51-81; Horowitz 1976; also, Hinton 2014, 325-26; Rensink 2011.

<sup>29</sup> Goldhagen 2009; Shaw 2007, 8, 106.

in and thereby create a distinctive, common, identity greater than the assemblage or any of the individual members of the group.<sup>30</sup> “Genos” after all refers to a race or a tribe, a societal entity, rather than to individual humans or even a group of human beings. In contrast to the killing of individual people as homicide, or even mass homicide, genocide is a sociological crime,<sup>31</sup> the destruction of “peoples.” Even though dependent collectively upon its individual members for its creation and existence, a “group” is a separate entity and the center of the Convention’s remedial attention. Lemkin and the drafters intentionally emphasized this distinction and then clearly expressed the focus of the Convention by including in its language the simple modifier “as such” to the term “group” in Article 2. “As such” is not a throw-away phrase. It expressly directs the Convention’s attention and coverage to the destruction of certain groups rather than individuals.<sup>32</sup>

While individual members of the group can be killed or eliminated, the group itself survives so long as other members survive and continue the group’s existence and identity. The survival of members of a group has been not infrequently raised as an argument against genocide.<sup>33</sup> While this properly focuses on the survival of the group rather than individual, the argument ignores qualifying language in Article 2 of the Convention that includes within the definition of genocide the destruction of a group “in whole or in part”. Under Convention Article 2(a), the absolute and complete extermination of group members would certainly qualify as genocide, but does

not function as a requirement. The Convention’s definition of genocide is focused on prohibiting certain eliminatory intent and conduct rather than the end result.

Additional discussion has been generated over the Convention’s Article 2 limitation of its coverage to specific groups, a “national, ethnical, racial, or religious group,” and its omission of others. Significantly, it does not refer to the destruction of political groups such as “States”, political organizations, economic and social classes, or gender categories. An examination of the nature of the groups listed in the Convention demonstrates Lemkin’s and the Convention’s intended scope and purpose as well as its application to the experiences of Indigenous peoples.<sup>34</sup>

## A. KILLING A NATION

[N]ations are essential elements of the world community. The world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well-developed national psychology. The

<sup>30</sup> Online Etymology Dictionary, “group,” refers to “any assemblage, a number of individuals *related in some way*” (emphasis provided). Wolfe 2006,” 398.

<sup>31</sup> Shaw 2007, 9-11.

<sup>32</sup> Schabas 2000, 73; Ratner 2001, 38.

<sup>33</sup> Shaw 2007, 106-08.

<sup>34</sup> Shaw 2007, 27, 63-78; Schabas 2000, 113-114, 134-150.

destruction of a nation, therefore, results in the loss of its future contributions to the world.

Raphael Lemkin<sup>35</sup>

A “national group” refers to the collection of individuals that compose a “nation.” A nation has been defined as a “cultural territory made up of communities who see themselves as one people on the basis of common ancestry, history, society, institutions, ideology, and language.”<sup>36</sup> It is the social entity that provides a group identity to its members. Thus, there are familial and cultural elements associated with the term that directly correspond to the Greek prefix of the word genocide, *genos*, meaning race or tribe. The word “tribe” similarly originates from the Greek, *phylē*, meaning “race or tribe of men, body of men united by ties of blood and descent, a clan.”<sup>37</sup>

Contrast this with the concept of a “State” under international law, which, while a social construct, is a purely political creation defined as an entity that has “(a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states.”<sup>38</sup> Whereas a “State” is an artificial entity,

a “nation” is an organic one. It is a difference with great significance. As a political organization, States can be used as instruments of imperial and colonial rule over pre-existing nations and peoples. While membership in the United Nations under Articles 3 and 4 of its Charter<sup>39</sup> is restricted to “States”, the organization, as its name suggests and as stated in Articles 1 and 55, is focused on the development of “friendly relations among *nations* based on the respect for the principle of equal rights and self-determination of *peoples*”. (emphasis supplied) By restricting the control over the political process and *power* of the international congress to States alone, the imperial and colonial relationship and rule over and exploitation of nations and peoples and their resources is maintained.

Chapters XI and XII of the UN Charter establish a process for the decolonization and self-determination of “peoples” who “have not yet attained a full measure of self-government”. UN instruments on human rights and decolonization also refer to the rights of “peoples” rather than nations or tribes.<sup>40</sup> The term “peoples” has been understood to mean “an ethnic group or cultural

<sup>35</sup> Lemkin 1944, Section III, 79-95. Lemkin surely studied the writing of the prominent early 20th Century fellow German philosopher Edith Stein who opined on the nature of nations as the bearer of the culture of the people that make up the nation. “Culture may be described as the creative activity of the human spirit in which all essential functions of human life have found their expression (economy, law / legislation and government, morals, science, technology, art, religion). The nation is a community which can create such a ‘cosmos.’ Neither the individual nor a smaller community are able to create it alone.” Stein 2004, 147.

<sup>36</sup> Nietschmann 1994, 225-242, 261. The International Court of Justice following up from Lemkin’s definition opted for a broad approach in the case of Bosnia and Herzegovina v. Serbia and Montenegro (Judgement of February 26, 2007, para. 296).

<sup>37</sup> Online Etymology Dictionary, “tribe.”

<sup>38</sup> The World Conference of Human Rights in Vienna, Vienna Declaration and Program of Action, (June 25, 1993), Vienna Declaration, art. 2, paras. 1 and 2 Montevideo Convention (note that while recognizing treaty making only between States, the Convention affirms the right of self-determination of peoples). Also, Restatement, 1987. *See generally*, Crawford 2007.

<sup>39</sup> UN Charter 1945.

<sup>40</sup> *See* Lauren 2003, 188 (“The very first sentence of the Charter, for example, announced the departure immediately. Rather than traditional language about the plenipotentiaries of nation-states, yet entirely consistent with their recent experience and their visions of a ‘people’s peace,’ the signatories declared: WE THE PEOPLES OF THE UNITED NATIONS...”); ICCPR; ICESCR; UN Res. 1514.

community” possessed of a collective identity from which they are possessed of a right of self-determination<sup>41</sup>—the “s” added to the concept of a people.<sup>42</sup>

The International Labor Organization’s Convention 169 also refers to the rights of “Indigenous and Tribal Peoples”.<sup>43</sup> The word “tribe” in the Convention 169 refers to peoples “whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions.”<sup>44</sup> The concept of a “tribe” of people contained in the meaning of *genos* in genocide reappears in Convention 169. While a “tribe” of peoples may not necessarily have sufficiently organized as a “nation” possessing an international persona,<sup>45</sup> tribes have been recognized as qualifying as nations under law. US Supreme Court Chief Justice John Marshall

remarked on this early on in *Worcester v. Georgia*: “Indian nations had always been considered as distinct, independent political communities, retaining their natural rights, as the undisputed possessors of the soil ... The very term nation so generally applied to them, means ‘a people distinct from others.’”<sup>46</sup>

The late Indigenous scholar Rudolph Rýser emphasized a fundamental and almost universally overlooked distinction between “nations” and “States”.<sup>47</sup> Within the context of nations, particularly Indigenous nations, the common reference to “nation-states” is historically inaccurate and misleading. “States” in fact are purely political rather than national constructs often composed of more than one “nation” or peoples. There are actually few true “nation-states”,—States composed entirely of one nation. The two terms are widely and improperly conflated.<sup>48</sup>

<sup>41</sup> Lâm 1992, 605, note 5; Keal 2003, 53-54.

<sup>42</sup> Watson 2015, 95-96. This definition is quite different in substance from that suggested by John Rawls for a “liberal peoples” which revolves upon a democratic order and a reasonably just political process – as possessed of “a reasonably constituted constitutional democratic government, that serves their fundamental interests, a unity of common sympathies, and a moral nature.” Rawls 1999, 17-19, 21 (the “liberal” part of the term). Rawls distinguishes his definition from that for a “State” which is “an autonomous agency pursuing its own bureaucratic ambitions” and “directed by the interests of large corporations of private economic and corporate power veiled from public knowledge and almost entirely free from accountability.” *Ibid.*, 24. In contrast, the definition of “peoples” employed in this commentary refers to the social evolution of the collective expression of identity and sovereignty by people - from individuals, to people, to tribes, to peoples, to nations, to States, and refers to when the collective right of self-determination arises. This somewhat follows the thinking of German philosopher Edith Stein. *See* Lawton, 2024. In further contrast to Rawls, the definition used here preserves Lemkin’s “organic,” “living,” nature of peoples and nations expressed in the common identity and culture, and permanence, of the group, as against “States” which are artificial, inorganic and impermanent, political constructs. Shaw 2007, 99. James Scott in *Seeing Like a State* commented on this loss of the organic process in State creation as losing sight of the forest while managing the trees. Scott 2020, 11-22.

<sup>43</sup> ILO 1989, 169.

<sup>44</sup> *Ibid.*, art. 1, sec. 1.

<sup>45</sup> *Cayuga Indians*, RIAA 179.

<sup>46</sup> *Worcester v. Georgia* 1832, 561 (emphasis supplied).

<sup>47</sup> Rýser 2012; Rýser 2020; Rýser 1996, 7. Also, Fukurai 2023; Watson 2015, 96.

<sup>48</sup> *Ibid.*; Whitt 2019, 78 (“The members of a nation may live within the border of many different states. Moreover, while ‘nation-state’ originally embraced the idea of one nation living within the borders of one state, contemporary usage of the term allows that a nation-state may contain different nations within its borders.”).

As no nation deliberately cedes its territory, resources, or identity, “a nation is the world’s most enduring, persistent, and resistant organisation of people and territory.”<sup>49</sup> States, on the other hand, depend on the political environment of the time and come and go. A State is an artificial political entity tied to territory, not peoples, which usually is comprised of more than one nation.<sup>50</sup> Only 193 “States” are recognized by the ironically entitled United “Nations”<sup>51</sup> The UN Charter, while declaring the rights of *nations*, excludes them from membership.<sup>52</sup> In comparison, it has been estimated that there are some 6,000 to 9,000 nations that make up what has been labeled the “Fourth World”.<sup>53</sup>

Many of the “newer” States are continuations or direct successors of imperial and colonial empires created in so-called “national” liberation and decolonization movements following the Second World War. Their territorial boundaries generally followed that of the previous colonial power and paid little attention to the nations and peoples under imperial and colonial occupation and rule. They often divided existing pre-colonial peoples and nations, with their territories, between colonial States.<sup>54</sup> From the perspective of those nations and peoples, their imperial or colonial ruler was merely replaced by a more local one. They remained, and still remain, under colonial occupation and domination.

Upon “liberation,” successor colonial States succeeded to the territorial claims of their imperial and colonial predecessors. The United States succeeded the English, French, Spanish, and Dutch empires that encompassed over 600 surviving First Nations occupying the territory

now claimed by the United States in North America.<sup>55</sup> Evidence of the independent existence and colonial relationship of these First Nations is found in the over 400 treaties signed by the United States with First Nations,<sup>56</sup> the US’s formal recognition of these colonized nations,<sup>57</sup> the creation of a body of law (“federal Indian law”)<sup>58</sup> and the establishment of institutions<sup>59</sup> to impose, maintain, and continue colonial domination to the present day. The primary colonial institution in the United States is and has been the Bureau of Indian Affairs which, by its own description, “involves 150 years of federal policies designed to [forcibly] terminate, relocate, and assimilate American Indians and Tribal Nations.”<sup>60</sup> Similar histories and transfers of colonial domination over Indigenous first peoples and nations to successor colonial States are seen in Canada (more than 600 recognized First Nations subject to colonization under Canada’s “Indian Act” and

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<sup>49</sup> Nietschmann 1994, 226; Griggs 1999.

<sup>50</sup> Nietschmann 1994, *ibid.*

<sup>51</sup> United Nations, “Member States.”

<sup>52</sup> UN Charter 1945, chap. II.

<sup>53</sup> Rýser 1996, 7.

<sup>54</sup> Maddison 2014, 153-176; Expert Mechanism on the Rights of Indigenous Peoples, 2019; Krauzman 2022; Bolt 2016.

<sup>55</sup> USAGOV.

<sup>56</sup> National Museum of the American Indian.

<sup>57</sup> USAGOV.

<sup>58</sup> *See generally*, USDOJ, “Federal Law”; Executive Board of Authors and Editors, 2012.

<sup>59</sup> Bureau of Indian Affairs.

<sup>60</sup> USDOJ, “Bureau of Indian Affairs.” The BIA’s assertion at its webpage that it no longer pursues such destructive policies is both false and misleading. While perhaps not quite as overt and harsh, it continues to implement and enforce US occupation, rule, and domination over Native nations and peoples embodied in federal Indian law, including the current law imposing what are known as the doctrines of discovery (imperial theft), trust (colonial domination), and plenary authority (absolute power).

Constitution),<sup>61</sup> Australia (over 400 aboriginal nations governed by various colonial laws),<sup>62</sup> India (over 700 recognized aboriginal peoples)<sup>63</sup>, Brazil (some 279 distinct Indigenous peoples),<sup>64</sup> China (55 recognized “minority” nationalities),<sup>65</sup> Democratic Republic of Congo (the Mbuti, Baka and Batwa peoples),<sup>66</sup> Mexico (68 Indigenous peoples),<sup>67</sup> Russia (over 180 Indigenous peoples, 40 recognized by the colonial State),<sup>68</sup> and throughout the Fourth World.

Within this context, how does one go about “killing,” or “physically” destroying, a nation?<sup>69</sup> Convention Article 2(c) provides that genocide includes “deliberately inflicting on the [national] group conditions of life calculated to bring about its physical destruction in whole or in part.” A nation is in a sense a living biological entity,<sup>70</sup> physically defined by its members (its peoples), its territory, and its governance (its “domain” and government officials and institutions) such that the elimination of any one of these results, by definition, in the destruction in whole or part of the nation itself. Lemkin elaborated at some length that the destruction of nations was accomplished through “a synchronized attack on different aspects of life of the captive peoples” including in the political, social, cultural, educational, economic, religious, moral, and biological fields, along with the physical existence of its members.<sup>71</sup>

### **1. Convention Article 2(a): Killing a National (Or Ethnical, Racial, or Religious) Group By Killing Its Members**

“Kill and scalp all Indians, little and big ...nits make lice”

Colonel Reverend John Chivington, Methodist Minister and US Army commander, instructing his troops to slaughter Cheyenne and Arapaho babies and children at the Sand Creek Massacre<sup>72</sup>

Article 2(a) of the Convention declares the intentional killing of members of a group to be genocidal conduct. Clearly the targeting and killing of a significant number of the members of not only a national group, but also the other listed groups, ethnical, racial, and religious, results in the physical destruction of the group in whole or part as, without its members, it by definition cannot remain a group. In the slow genocide of Indigenous peoples, hundreds, if not thousands, of massacres by the invading imperial militaries, militias, and settler colonialists have been well documented over a period of hundreds of years in the Americas,

<sup>61</sup> IWGIA Canada.

<sup>62</sup> Aboriginal Heritage Office; Parliament of Australia.

<sup>63</sup> IWGIA India.

<sup>64</sup> Povos Indígenas.

<sup>65</sup> IWGIA China.

<sup>66</sup> IWGIA Democratic Republic of the Congo.

<sup>67</sup> IWGIA Mexico.

<sup>68</sup> IWGIA Russia.

<sup>69</sup> See *discussion*, Shaw 2007, 28-33. In this discussion, “nation” and “peoples” are construed interchangeably to the extent that “peoples” are distinguished in character from “people” by the possession of the collective right to self-determination, the right to form a “nation”, that a nation is a manifestation of peoples. See, discussion at note 42, *supra*.

<sup>70</sup> Short 2016, 19; Lemkin 1944, 79 (referred to the “life” of national groups).

<sup>71</sup> Lemkin 1944, xi-xii.

<sup>72</sup> Brown 1970, 90.

Australia, Africa, Asia, and elsewhere.<sup>73</sup> It has been estimated that 50 to 100 million Indigenous peoples (over 95%) in the Americas alone perished in what is called the “Great Dying” following the colonial invasions from Europe.<sup>74</sup> So many Indigenous people perished in the Great Dying that it led to the abandonment of enough cleared land in the Americas to cause global climate change known as “The Little Ice Age.”<sup>75</sup>

Disease has often been blamed for the bulk of these deaths.<sup>76</sup> To this, historian David Stannard says that by “focusing almost entirely on disease ... contemporary authors increasingly have created the impression that the eradication of those tens of millions of people was inadvertent—a sad, but both inevitable and ‘unintended consequence’ of human migration and progress,” and asserts that their destruction “was neither inadvertent nor inevitable,” but the result of microbial pestilence and purposeful genocide working in tandem.<sup>77</sup> After the initial mass deaths from exposures to previously unknown diseases from Europe, the colonizers became well aware of the eliminatory power, the bioweapon, settlers carried with them. The colonial powers aggressively encouraged and abetted settlement of Indigenous lands while intentionally turning a blind eye to the theft of Indigenous territory and the mass deaths they facilitated.<sup>78</sup> The term “pioneers,” used for the early settlers, is derived from the word, “pionnier,” a military term meaning the “foot soldiers” who prepared the way for the advancing army.<sup>79</sup> The pioneers were an early weapon of mass destruction, the disease-carrying shock troops of an advancing, incremental, genocide.

The colonial power’s intentional looking the other way while widely promoting settlement of Indigenous lands and the spread of deadly diseases may be violations of Sections 3 (b) and (c) of the Genocide Convention for conspiracy and complicity. Intent may be expressed as a knowing omission.

There are other ways to kill members of a group than bullets and disease. In the centuries of colonial domination following the Great Dying, the mass killing and attrition of national, ethnical, racial, and religious groups continued systemically through slavery, starvation, poverty, and illness.<sup>80</sup> Dominican priest Bartolomé de las Casas who accompanied Columbus on his second voyage to the “New World” personally witnessed and documented the deaths by enslavement of millions of Indigenous peoples by the Spanish in the Caribbean and Central America.<sup>81</sup> Additionally, from 1525 to the second-half of the

<sup>73</sup> See, e.g., List of Indian Massacres (partial); Casas 1552 (Central America); Brown 1970 (United States); Thornton 1987 (United States); Cowles 2003 (Biblical Canaan); Jones 2023; Kévorkian 2011 (Armenia); Khalidi 2020 (Palestine); Kiernan 2007; Lindqvist 2014 (East Africa); Madley 2016; Moses 2008; Power 2003 (oddly while themed with the topic of America and genocide, Power omits discussion of America’s domestic genocidal past or present); Short 2016 (ecocide as genocide); Stannard 1992; Stone 2010; Totten 2011 (Indigenous peoples).

<sup>74</sup> Thornton 1987, 22-25, 47-51, 90, 133; Koch 2019, 20-22.

<sup>75</sup> Koch 2019, 14, 27, 30.

<sup>76</sup> Thornton 1987.

<sup>77</sup> Stannard 1992, xii.

<sup>78</sup> See, e.g., Watson 2015, 110-111 (“biological warfare”); Drinnon 1980; Limerick 1987; Shaw 2007, 67. Also, e.g., General Allotment Act 1887; Dann v. United States 2002; United States v. Sioux Nation of Indians 1980; Hughes 1986 (Australia).

<sup>79</sup> Kelly 2017. See also, Khalidi 2020, 241.

<sup>80</sup> Short 2016, 28.

<sup>81</sup> Casas, 1552.

19th century, it is estimated that between thirty and forty million Indigenous Africans perished in the diaspora and slave trade.<sup>82</sup>

Murder by starvation also has a long history as a weapon of genocide.<sup>83</sup> As historian Daniel Goldhagen observed: “Regimes willfully withholding food from people has been one of the recurring features of our time’s eliminationist and annihilationist assaults, often employed as an adjunct to other eliminationist measures. ...Mass elimination is always preventable and always results from conscious political choice.”<sup>84</sup> In February and March 2024, the International Court of Justice ordered the State of Israel to take provisional measures to prevent genocide under the Convention in its siege of Gaza including “widespread starvation.”<sup>85</sup> In November of 2024, the International Criminal Court issued arrest warrants for Israeli President Benjamin Netanyahu and former Minister of Defense Yoav Gallant for crimes against humanity, including the use of starvation as a weapon of war in the genocide of Gaza.<sup>86</sup> Russia is also well known to have employed starvation in the murders of millions of Ukrainian people in the Holodomor of 1932-33.<sup>87</sup> Notoriously, when the Great Dying reached the Great Plains of North America, it was accelerated under a government and military program of starvation genocide by the extermination in just a few decades of the primary food source of the Indigenous peoples that lived there, some 10-50 million buffalo.<sup>88</sup> Prominent military commander Colonel Richard Dodge famously declared at the time: “Every buffalo dead is an Indian gone.”<sup>89</sup>

Large percentages of the members of nations and peoples have also died when they were forcibly removed from their homelands by colonial powers.<sup>90</sup> The military hired the notorious Indian killer, Kit Carson, to follow and murder stragglers of the Apache and Diné (Navajo) peoples during the “Long Walk” in their forced removal from their ancestral lands.<sup>91</sup> Additionally, thousands of Indigenous children who were shipped to boarding schools operated by the United States, Canada, and Australia perished and were buried at these schools, often in unmarked graves, never making it back home to their people.<sup>92</sup>

Mass murder, widespread disease, starvation, and forced or coerced removal by colonial powers all contributed to the impoverishment of the survivors both economically and in physical and psychological health. In an attrition genocide,

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<sup>82</sup> Mannix 1962.

<sup>83</sup> Shaw 2007, 67; Goldhagen 2009, 299-300; Thornton 1987, 118, 203, 243; Weisz 2022; Kulamadayil 2024 (ICJ); Smith 2024 (Ukraine); Olusoga 2010 (Namibia).

<sup>84</sup> Goldhagen 2009, 299-300 (emphasis by Goldhagen).

<sup>85</sup> South Africa v. Israel 2023, Order 2024.

<sup>86</sup> United Nations 2024.

<sup>87</sup> Smith 2024. Allegations have again been made that Russia used starvation as a weapon in its current war against Ukraine not only in Ukraine but as a global strategy. WFP 2023.

<sup>88</sup> Hubbard 2014, 292-305; Thornton 1987, 52-53, 124, 146; Echo-Hawk 2010, 113; Jawort 2018.

<sup>89</sup> Jawort 2018.

<sup>90</sup> Akers 2004 (Choctaw); Ehle 2011 (Cherokee); Wishart 1994 (Nebraska Tribes); Denetdale 2009 (Diné); Olusoga 2010 (Namibia); Derderian 2008 (Armenia); Williams 2015 (Crimean Tartars).

<sup>91</sup> Roberts 2001, 260-281.

<sup>92</sup> Newland 2024, 16, 41-43, Appendix I; Newland 2022, 85-86; Indep. Special Interlocutor 2023, 9-11 (showing thousands of graves, including mass graves, of Native children identified at Canadian residential schools).

sometimes over hundreds of years, Indigenous peoples and nations experienced further loss of life from past and continuing colonial domination expanding in space and time as ripples of death. Genocide did not stop at the Great Dying, the massacres, or the removals. These acts destroyed Indigenous economies through deliberate impoverishment and colonial exploitation<sup>93</sup> and destroyed the physical and mental health of Indigenous peoples, leading to still more premature deaths.<sup>94</sup> Denying Indigenous peoples traditional food sources also contributed to disease and shorter lifespans.<sup>95</sup> According to the UN, Indigenous peoples today have a life expectancy of up to 20 years less than that of non-Indigenous peoples.<sup>96</sup> State-facilitated ecocide of Indigenous environments have resulted in the further loss of life.<sup>97</sup> On the shortening of Indigenous lifespans, Professor Wolfe remarked: “What species of sophistry does it take to separate a quarter ‘part’ of the life of a group from the history of their elimination?”<sup>98</sup>

## **2. Convention Articles 2(b)-(e): Killing a National Group [Or Other Listed Group] By Other Means**

As previously noted, a nation is physically defined by its members, territory, and its governance such that the elimination of any one of these results in the destruction of the nation itself. The listed groups can also be “killed” in whole or part through decimation by the sterilization of female members<sup>99</sup> (Convention Article 2(d)), and by the forced transfer of children of the group to another group (Convention Article 2(e)). Like the killing of members, the sterilization of women and the

transfer of children effectively reduce the group’s population and eliminate future generations of group members.<sup>100</sup> Many of these “assimilationist” policies are purported to be for the benefit of Indigenous peoples and nations while, in fact, are acts of “benevolent” genocide. Together and alongside other means, they “caus[e] serious bodily or mental harm to members of the [national (or ethical, religious, or racial)] group” (Convention Article 2(b)) that “deliberately inflict[s] on the group conditions of life calculated to bring about its physical destruction in whole or in part.” (Convention Article 2(c)). As Lemkin clearly opined, these genocidal acts do not occur in isolation but are integrated in the effort to physically destroy a nation, an ethnicity, a religion, or a race.

Concerned about the “contamination” of Aryan blood, Germany sterilized mixed-race Indigenous children from Namibia in the late 1930s. Hitler had warned in *Mein Kampf* that the Nazis would “not allow ourselves to be turned into niggers as the French tried to do after 1918.”<sup>101</sup>

<sup>93</sup> See, e.g., generally, Galeano 1997.

<sup>94</sup> UN IASG 2014; UN DESA; Thornton 1987, 50, 85, 118, 124, 127, 203, 243; Short 2016, 76-79; Fein 1997.

<sup>95</sup> LaDuke 1999, 191-210; Thornton 1987, 85; Chino 2009; Watson 2015, 134 (Indigenous people of Australia).

<sup>96</sup> UN IASG 2014.

<sup>97</sup> Short 2016; Kimerling 1991 (Huaorani of Ecuador); Koenning-Rutherford 2023 (Ogoni of Nigeria). Also, *Kiobel v. Royal Dutch Petroleum Company* 2013.

<sup>98</sup> Wolfe 2006, 399.

<sup>99</sup> Shaw 2007, 67-69 (“gendercide”); Smith 2007; Cultural Survival, 5-6 (Mexico).

<sup>100</sup> See generally, Jacobs 2009.

<sup>101</sup> Olusoga 2010, 243-251, 307 (the Nazis had “Genetic Courts” – Olusoga 2010, 285).

From 1996 until 2000, under the pretense of upholding women's rights and expanding access to family planning resources, almost 300,000 Indigenous women were sterilized by the Peruvian government.<sup>102</sup> An investigation in Mexico revealed the non-consensual sterilizations of 27 percent of Indigenous women seeking public health services.<sup>103</sup> Norway practiced forced sterilizations of Indigenous Romani after the passage of its Sterilization Act in 1934.<sup>104</sup> Forced or coerced sterilizations of Indigenous women were also widespread in Canada.<sup>105</sup> The practice even included Indigenous residential school children. The Sexual Sterilization Act of British Columbia allowed a school principal to permit the sterilization of any Indigenous person under his charge. As their legal guardian, the principal could thus have any child sterilized. Frequently, these sterilizations occurred to whole groups of children when they reached puberty in institutions like the Provincial training School in Red Deer, Alberta, and the Ponoka Mental Hospital.<sup>106</sup>

In the 1960s and 1970s, the United States Indian Health Service and collaborating physicians sustained a widespread practice of performing sterilization procedures on Indigenous women, often without their consent or by misleading women into believing that the sterilization procedure was reversible.<sup>107</sup> Sterilization procedures were performed on an estimated 25%–40% of women in some communities, which, if accurate, would be the sterilization of some 70,000 Indigenous women and girls during this period.<sup>108</sup> The sterilizations were subsidized by federal dollars.<sup>109</sup> From 1970

until 1980, partially due to sterilization practices, the birth rate fell from 3.7 to 1.8 births per Indigenous mother.<sup>110</sup> Marie Sanchez, Northern Cheyenne Chief Tribal Judge, equated the mass sterilization of Indigenous women to a modern form of genocide.<sup>111</sup>

While this overt sterilization program has been discontinued in the United States, the government continues a policy of population suppression by encouraging the use of long-acting hormonal contraceptives by Indigenous women and other women of color.<sup>112</sup> Past and continuing systemic genocidal practices have been documented to have decreased the fertility of Indigenous women further taxing the survival of Indigenous nations and peoples.<sup>113</sup> In the 1960s and 1970s, Denmark reportedly engaged in a program of “involuntary” contraception to limit population growth during which as many as half of the fertile Indigenous women in Greenland received coil implants.<sup>114</sup> Rape has

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<sup>102</sup> Nusta 2003.

<sup>103</sup> Survival International 2018, 5.

<sup>104</sup> Daly 2023, 24-25.

<sup>105</sup> Standing Senate Committee, 2022, 10-11.

<sup>106</sup> Annett 2001, 14.

<sup>107</sup> Smith 2007, 79-107 (reproductive abuse); Volscho 2010, 17; Ralstin-Lewis 2005, 71–72.

<sup>108</sup> Lawrence 2000, 410; Ralstin-Lewis 2005, 71. See Theobald 2019.

<sup>109</sup> Family Planning Services and Population Research Act; Theobald 2019.

<sup>110</sup> Lawrence 2000, 402.

<sup>111</sup> Theobald 2019.

<sup>112</sup> Smith 2007, 88-96.

<sup>113</sup> Thornton 1987, 54, 85.

<sup>114</sup> Isen 2024.

also been used as a tool to prevent future births in Indigenous communities by branding victims as social outcasts.<sup>115</sup> These acts clearly fall under Convention Article 2(d) as “imposing measures intended to prevent births within a group.”

From the time of Columbus,<sup>116</sup> children have been a target of colonial domination. In what Margaret Jacobs calls “maternal colonialism”, the removal of Indigenous children from their families and communities, has been a common practice.<sup>117</sup> Prior to the passage of the Indian Child Welfare Act in 1978, surveys indicated that some 25%–35% of all Indigenous children in the United States were separated from their families and placed in foster homes, adoptive homes, or institutions - a rate of up to nineteen times greater than that of non-Indigenous children.<sup>118</sup> The surveys found that 75%–93% of the placements were with non-Indigenous families;<sup>119</sup> the result of State “fail[ure] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”<sup>120</sup>

Canada engaged in a similar practice, referred to as the “Sixties Scoop”, between 1951 and 1984 when an estimated 20,000 First Nations, Métis, and Inuit children were taken by child welfare authorities and placed for adoption in mostly non-Indigenous households.<sup>121</sup> As in the United States, this practice in Canada was supported by a series of government policies. For some, like Lil’Wat First Nation’s member Loni Edmonds, the institutionalized taking of Indigenous children is not a thing of the past. In 2007, social services removed all six of Ms. Edmonds’s children from her care.<sup>122</sup> She herself had been removed as a

child from her own mother’s care by Canadian authorities, as was her mother from that of her grandmother.<sup>123</sup> In 2013, six years after the children were taken from their mother, the Inter-American Commission on Human Rights ruled the allegations in her petition stated violations by Canada of the human rights of Ms. Edmonds and her children.<sup>124</sup> After over 17 years, Ms. Edmonds is still waiting for the return of her six children.<sup>125</sup>

The removal by adoption of Indigenous children into white families was also common in Australia. A National Inquiry of Australia estimated that between 1910 and 1970 up to one-third of Indigenous children had been forcibly removed from their homes in what is known among Aboriginal peoples there as “the Stolen Generation”.<sup>126</sup> Often removed by reason of mere poverty, approximately 17 percent of the children were forcibly removed by social services through adoption into white families.<sup>127</sup> Denmark also has a history of its social services agencies taking Indigenous Inuit children from their families in

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<sup>115</sup> Totten 2011, 128; Schabas 2000, 170; San José 2020 (Yazidi); Ibrahim 2018 (Yazidi); Cameron 2023 (Ndebele).

<sup>116</sup> The Leys of Burgos, 26-27.

<sup>117</sup> Jacobs 2009.

<sup>118</sup> 1974 Hearings; Byler 1977, 1; Barsh 1980, 1288-90; Miss. Band of Choctaw Indians v. Holyfield 1989, 32.

<sup>119</sup> 1974 Hearings, 17; Barsh 1980, 1287 n.3, 1290 n.16.

<sup>120</sup> 25 U.S.C. § 1901(5).

<sup>121</sup> Jacobs 2014; Baswan 2024.

<sup>122</sup> Jones 2010

<sup>123</sup> Edmonds, 2013.

<sup>124</sup> *Ibid.*, para.72.

<sup>125</sup> See Jacobs 2009.

<sup>126</sup> Australian Human Rights Commission, 31, chap. 22.

<sup>127</sup> *Ibid.*

Greenland and removing them to Denmark where they suffer forced assimilation.<sup>128</sup>

The institutionalized and non-institutionalized theft of children has been a major tool used to promote slavery, colonialism, forced assimilation, and Christian conversion for over 430 years.<sup>129</sup> The use of children as weapons of war and colonial occupation continues. During its invasion of Ukraine, Russia removed hundreds of thousands of children from Ukraine and placed them in Russian homes and schools.<sup>130</sup> On March 17, 2023, the International Criminal Court issued arrest warrants for Russian President Vladimir Putin and his Commissioner for Children's Rights for the war crime of unlawful deportation of children from occupied Ukraine.<sup>131</sup> "Forcibly transferring children of the [national, ethnic, religious, or religious] group to another group" works to destroy the group and is therefore genocide under Convention Article 2(e). The sterilization of women and the theft of children work to destroy nations by depriving nations of future generations and historic continuity and "causing serious bodily or mental harm to members of the group." They operate as genocide under Convention Article 2(b), in inflicting upon the group "conditions of life calculated to bring about its physical destruction in whole or in part."<sup>132</sup>

Certainly as elements of the group's life and as targets of genocidal conduct, tribes and nations possess a territory or domain, a collective right of self-determination or governance, and, with peoples, possess a distinct cultural and social identity among their members.<sup>133</sup> Indeed, the attachment to a specific territory, to ancestral

lands,<sup>134</sup> or to a specific natural "relative,"<sup>135</sup> may be inseparable from the collective identity of the national group, making the removal of the group from their territory, or the destruction of their familial relative, a killing, at least in part, of their national identity.

Since nations are defined by their possession and governance of a territory or domain, the extinguishment of that territory or domain—the target of settler colonialism<sup>136</sup>—would destroy the national character of Native peoples. This goal was accomplished by the so-called "Doctrine of Discovery", the first of the three fundamental genocidal doctrines concocted and invoked by US Supreme Court Chief Justice John Marshall when he formally created federal (colonial) Indian (racist) law in a trilogy of decisions from 1823 to 1834. Those doctrines of the slow genocide

<sup>128</sup> Cali Tzay 2023; Bryant 2025.

<sup>129</sup> See, e.g., Castillo 2017; Costo 1987, 3; Newcomb 2008, 45-46. See generally, Tinker 1993. Also, Australian Human Rights Commission, 22.

<sup>130</sup> Humanitarian Research Lab 2024; Kelly 2023. Russia was assisted in this by Belarus; Khoshnood 2023.

<sup>131</sup> ICC Press Release 2023.

<sup>132</sup> Genocide Convention 1948, art. 2(c).

<sup>133</sup> ICCPR, art. 1; ICESCR, art. 1; UNGA Res. 1514; UNDRIP, arts. 1-7, 9-16, 25-26, 31, 33.

<sup>134</sup> Short 2016, 29, 36, 50-54 (removal); Dann v. United States 2002, para. 129, 131, n. 93 (spiritual connection to ancestral lands); Whanganui River Claims Settlement 2017, 14-15; Whitt 2007; Moreton-Robinson, 2020; Watson 2015, 114; Lyng v. Northwest Indian Cemetery Protective Ass'n (1988,) 459-462 (J. Brennan, dissent).

<sup>135</sup> See, Hubbard, 2014, 294 (familial attachment to buffalo). For example, the Oceti Sakowin Oyate ("Sioux,") are known as the "Buffalo people," the Nez Perce are known as the "Horse Nation," the Menominee are tied to the sturgeon, and the Makah to the whale. The Indigenous peoples of the southwest and Mexico are spiritually tied to corn such that the allowance of GMO patented corn into Mexico to supplant traditional varieties threatens their existence; Villafaña 2018.

<sup>136</sup> Wolfe 2006; Short 2016, 24 (quoting Jürgen Zimmerer).

of Indigenous peoples and First Nations then spread to other colonial and successor colonial States.<sup>137</sup> They remain the domestic law of those States and the United States today.<sup>138</sup> In *Johnson v. M'Intosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1834), Chief Justice Marshall invoked and distorted a doctrine of the Law of Nations that allowed a nation to take possession of a "desert" territory, meaning territory that was not in the possession of any "person."<sup>139</sup> The Law of Nations at the time (and now) did not allow one nation to invade the territory of another nation<sup>140</sup> that was already occupied, let alone take possession, occupy, and assert ownership of it.<sup>141</sup> Chief Justice Marshall was well-versed in the international law of the time.<sup>142</sup> In its three opinions, the colonial high court<sup>143</sup> bent these recognized principles of international law out of a purported colonial "necessity"<sup>144</sup> to concoct a doctrine of international and property law that applied "*sui generis*" (only) to Indigenous nations and peoples.<sup>145</sup> Marshall reasoned that their race (Indian),<sup>146</sup> religion (non-Christian),<sup>147</sup> and ethnicity ("uncivilized" / non-European)<sup>148</sup> justified the court's overlooking of their pre-invasion existence, possession, and occupation of their territories and lands since "time immemorial."<sup>149</sup> According to Chief Justice Marshall: "So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the King ...."<sup>150</sup>

The *M'Intosh* decision was closely followed by the colonial high court's decision in *Cherokee*

*Nation v. Georgia* (1831). In *Cherokee Nation*, the state of Georgia, through legislation, sought to "annihilate the Cherokees as a political society and to seize, for the use of Georgia, the lands of the Nation."<sup>151</sup> Chief Justice Marshall ruled that Indigenous nations were not "foreign" nations, but uncivilized nations under the "protection" of the United States as "domestic dependent nations...in a state of pupillage" which "resembles that of a ward to his guardian."<sup>152</sup> "They and their country are considered ...as being so completely under the sovereignty and dominion of the United States that any attempt [by foreign nations]

<sup>137</sup> See, Watson 2011; Miller 2021.

<sup>138</sup> Watson 2015, 19; *City of Sherrill v. Oneida Indian Nation* 2005, fn 1 (doctrine of discovery); *United States v. Jicarilla Apache Nation* 2011 (trust doctrine); *Haaland v. Brackeen* 2023 (plenary power doctrine).

<sup>139</sup> *Vattel* 1758, Bk I, secs. 205, 207; *ibid.*, Bk II, secs. 86, 88.

<sup>140</sup> *Ibid.*, Bk I, secs. 9, 15, 207; Bk II, secs. 18, 54, 64, 92-94.

<sup>141</sup> *Ibid.*, Bk II, secs. 18, 90-94, 97-98; *Johnson v. M'Intosh* 1823, (C.J. Marshall, "a principle of universal law").

<sup>142</sup> *Johnson v. M'Intosh* 1823, 567-517, 574; *Worcester v. Georgia*, 31 U.S., 561 (citing *Vattel* on the Law of Nations and treaties of protection). Rudko 1991, 3-5 (prior to becoming a justice of the US Supreme Court, Marshall had also served as the fourth US Secretary of State under President John Adams; Paul 2018, 193-214..

<sup>143</sup> This alone was a violation of the Law of Nations as no nation had the right or jurisdiction to rule upon the rights of another nation. *Vattel* 1758, Bk II, secs. 55, 84, 103, 265.

<sup>144</sup> *Ibid.*, 590.

<sup>145</sup> *Cherokee Nation v. Georgia* 1831, 16-17; Paul 2018, 402-406, 414-416, 321-422.

<sup>146</sup> *Johnson v. M'Intosh* 1823, 591.

<sup>147</sup> *Ibid.*, 573, 576-577.

<sup>148</sup> *Ibid.*, 573, 590.

<sup>149</sup> *Ibid.*, 573-574, 579, 583-585, 587-588, 591 ("extravagant pretension,") 592; *Cherokee Nation v. Georgia* 1831 (since "time immemorial.")

<sup>150</sup> *Johnson v. M'Intosh* 1823, 596; also, 603.

<sup>151</sup> *Cherokee Nation v. Georgia* 1831 3, 15.

<sup>152</sup> *Ibid.*, 17.

to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory and an act of hostility.”<sup>153</sup> Thus, the Marshall Trilogy by judicial fiat severed all Indigenous peoples from the ultimate ownership of and sovereignty over their territories, lands, and resources - an act of genocide that attempts to extinguish the “national” character of Indigenous peoples and render them unequal to that of all other nations.

The relationship pronounced in *Cherokee Nation* between the State and the Indigenous nations as well as peoples found within its claimed territory describes a classic colonial relationship, unlawful then and today under international law.<sup>154</sup> The Law of Nations at the time of the decision imposed upon a nation occupying another a duty of reasonable care of the occupied nation and its people.<sup>155</sup> The relegation of Indigenous nations and peoples in *Cherokee Nation* to an incompetent, childlike status in need of care and upbringing by the colonial power, extended the colonial relationship not only to occupation but to absolute control, “plenary” authority, over its dependent wards modeled after a common law trust relationship. This incompetent status ultimately deprives the Indigenous national ward of its sovereignty, of a legal personality, and even, as Hannah Arendt put it, the right to have rights.<sup>156</sup> As the “guardian” exercising its trust authority, the colonial State has total (plenary) power over its incompetent ward.<sup>157</sup> It is an extinguishment by colonial law of the right of Indigenous nations to have rights, an act of judicial genocide. Even today, the United States as the colonial guardian holds and (mis)

manages virtually all remaining common and most private Indigenous lands in “trust” for its Indigenous wards.<sup>158</sup>

The targeting and theft of Indigenous territories and lands has been the primary policy of the United States exercising its “trust” authority and assumed plenary power over Indigenous nations through various allotment, assimilation, termination, treaties and agreements, Congressional acts, and by rulings of the colonizer’s courts imposed on Indigenous peoples from 1823 to the present day. Treaty-making and allotment has reduced ancestral Native territories by 99%.<sup>159</sup> In only the last few years, the courts have ruled that the territories of the Southern Cheyenne and Arapaho Nation<sup>160</sup> and the Osage Nation<sup>161</sup> were extinguished in this manner. Colonial rule then continued to break up the small percent that remained of Indigenous lands by imposing an alien form of private property on lands formerly held by Indigenous

<sup>153</sup> *Ibid.*, 17-18. Watson 2015, 96 (Australian First Nations).

<sup>154</sup> *Supra* notes 141 and 142; also, Vattel 1758, Bk II, secs. 7 (forbids one nation’s imposition of its culture upon another), 59 (forbids the imposition of one nation’s religion upon another), 93-94, 97.

<sup>155</sup> Vattel 1758, Bk III, sec. 201.

<sup>156</sup> Arendt 1994, 299-300. Watson 2015, 97. Under federal (colonial) Indian law, an Indigenous nation even outside the trust relationship only has rights if it has been “recognized” to exist by the United States. See, *Tee-Hit-Ton v. United States* 1955.

<sup>157</sup> See *Cherokee Nation v. Georgia* 1831., 25; *Seminole Nation v. United States* 1942, 296; *United States v. Jicarilla Apache Nation*, 2011., 174; *Merrion v. Jicarilla Apache Nation* 1982.

<sup>158</sup> Cong. Res. Serv., Cobell 2012. See also, US Sec. of Interior, Trust Responsibility Memo.

<sup>159</sup> Wade 2021; Wolfe 2006, 400; Watson 2015, 112 (“The extinguishment of native title is another example of a covert form of genocide, so covert that it is dressed up as a form of recognition.”).

<sup>160</sup> *Whitebuffalo v. Oklahoma* 2022.

<sup>161</sup> *McCauley v. Oklahoma* 2024 para.4.

nations and peoples in common. By privatizing Indigenous lands, the colonial power opened them up to eventual alienation from Indigenous ownership with devastating impacts on their economies.<sup>162</sup>

The United States was not alone in this. Sartre remarked on the impacts of the imposition by the French of its Civil Code (Napoleon law) of private property on the communally held lands of the Indigenous peoples of Algeria. “Thus, they systematically destroyed the infrastructure of the country, and tribes of peasants soon saw their lands fall into the hands of French speculators.”<sup>163</sup> Treaties between European States, Indigenous nations and peoples of Africa were used to take Indigenous lands and territories.<sup>164</sup> The private ownership of land, alien to Indigenous nations and peoples, was, and is, fundamental to Western thought.<sup>165</sup> According to Martin Luther, “the possession of private property was an essential difference between man and beast.”<sup>166</sup> The fundamental and alien concept of Western property law was used by Chief Justice Marshall as primary support for the ruling that Indigenous nations and peoples did not own their lands because they had not “seized” them, leaving all of their lands *terra nullius* (“empty”) and open to the claims of the invading empires of Europe under their Doctrine of Discovery.<sup>167</sup>

Largely through its exercise of forced or coerced agreements, the United States has also physically destroyed the traditional governance of Native nations. Under the Indian Reorganization Act of 1934 and similar laws governing Native nations, “tribal” constitutions, laws, governments, and courts are created by, act under the authority

of, and are subject to, the continuing authority of the colonial power, the United States. The court in *Harjo v. Kleppe* characterized the Presidential appointment of tribal chiefs in place of the Creek Nation’s traditional governing body as “bureaucratic imperialism.”<sup>168</sup> The destruction in whole or in part of a nation’s territory, the wholesale theft of a nation’s lands and natural resources, and the destruction of its governing institutions, of its sovereignty, work together as an intentional and integrated effort to inflict “on the group conditions of life calculated to bring about its physical destruction” and constitute further acts of genocide under Convention Article 2(c).

## B. KILLING AN ETHNICITY

Article 2 of the Convention also refers to the killing, in whole or part, of an ethnical group. While there are some 6-9,000 nations, it has been estimated that there are as many as 24,000 ethnicities.<sup>169</sup> “Ethnical” has been defined as “relating or belonging to a group of people who can be seen as distinct because they have a shared culture, tradition, language, history, etc.”<sup>170</sup> In that sense, a nation, tribe, or people is an ethnical

<sup>162</sup> See, e.g., Cobell v. Salazar 1996. Also, Crepelle 2023.

<sup>163</sup> Sartre 1968, 63.

<sup>164</sup> Olusoga 2010, 42, 64, 85.

<sup>165</sup> Locke 1690, chap. 5; Vattel 1758, chap. 7; Stannard 1992, 233-236.

<sup>166</sup> Quoted in Stannard 1992, 233.

<sup>167</sup> Johnson v. M’Intosh 1823, 568-69.

<sup>168</sup> Harjo v. Kleppe 1976, 1130. Lemkin, in a footnote to his seminal book on genocide, remarked on the term “ethnocide” as conceptually similar to genocide; Lemkin 1944, 79n.

<sup>169</sup> Joshua Project.

<sup>170</sup> Cambridge Dictionary, “ethnical.” See Baumann 2004.

subgroup possessed of a common territory and a collective identity expressed in the right to self-determination or governance. While the killing of a national group is focused on the destruction of the collective social or political identity, the killing of an ethnical group relates to the destruction of the group's shared cultural identity.

If members composing an ethnical group are intentionally targeted because of their ethnicity and killed in mass,<sup>171</sup> the group itself suffers a “physical” destruction. However, the destruction of a group's ethnical identity does not necessarily require physical destruction by the mass killing of the individual members of the group. The physical destruction of an ethnical group may instead be accomplished with the destruction of the physical ethnical manifestations of the group such as its connection to its territories and lands,<sup>172</sup> its literature and media, its educational institutions and programs, its museums and centers of history, its sacred sites and places of worship, its cultural centers and practices,<sup>173</sup> its traditional familial structures, its culturally-centered economies, etc. The physical destruction of an ethnical group is the very goal, for example, of the forced assimilation of members of the group, or the group as a whole, by and into a dominant and more powerful social, ethnical, or political entity.<sup>174</sup>

The intentional, physical, destruction of a group's ethnicity is genocide under Convention Article 2(c). As Professor Wolfe concluded on settler colonialism, it eliminates to replace. Like settler colonialism, “assimilation” is, by definition, the elimination of one ethnic identity for the replacement of the colonizer's ethnic identity. A

colonial power through its rule may intentionally accomplish the elimination of an ethnic group in place through an imposed social, cultural, or religious assimilation, or an overwhelming ethnic dilution, without killing or removing the members of the group. Jean-Paul Sartre remarked on this: “Indeed, colonization is not a matter of mere conquest ...it is by its very nature an act of cultural genocide. Colonization cannot take place without systematically liquidating all the characteristics of the native society.”<sup>175</sup> And later, “it is not true that the choice is between death or submission. For submission, in those circumstances, is submission to genocide.”<sup>176</sup>

The very first laws in the Americas were the Leys (Laws) of Burgos of 1512 by which the Spanish imperialists regulated the slavery of Indigenous peoples, destroying their traditional communities and ways under the guise of exposing them to a superior civilization and Christianity. For example, it required the taking of the eldest sons of Indigenous leaders and the placement of them with Dominican priests to learn Spanish and be indoctrinated with the Christian faith before sending them back to their communities to do the same to their own peoples.<sup>177</sup> Even slavery was seen as benefitting the slave because it exposed him or her to a

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<sup>172</sup> Genocide Convention 1948, art.2 (a).

<sup>173</sup> Shaw 2007, 50-62 (expulsion and forced removal).

<sup>174</sup> See, e.g., Zarandona 2023; Strecker 2023; Marsoobian 2023 (Armenian).

<sup>175</sup> Watson 2015, 117-118.

<sup>176</sup> Sartre 1968, 63.

<sup>177</sup> *Ibid.*, 75.

civilized life and Christianity.<sup>178</sup> On this, some three hundred years later, US Supreme Court Chief Justice John Marshall (in)famously declared in *Johnson v. M'Intosh*:

...the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.<sup>179</sup>

This colonial policy and practice on the destruction of the ethnic identity of Indigenous peoples through forced assimilation was continued by Christian churches and the United States and other successor colonial States for over 400 years in violation of Convention Articles 2(b) and (c).<sup>180 181</sup> Working in concert, the colonial State became the institutional and coercive instrument of the religious entities in the

destruction of Indigenous spirituality (religicide) and forcible replacement with that of the dominant religious entity. Likewise, the religious entity provided moral cover and the institutions of conversion to colonial States in the destruction of Indigenous nations and peoples. All of the later treaties with Native nations drafted by the United States included assimilationist provisions such as the transition to farming through allotments, the privatization of communally-held land, the provision of a Westernized education, etc.<sup>183</sup> These policies were continued through the growth of a large body of statutory and case law by the Congress and courts of the colonizer, known as federal Indian law, imposing and implementing colonial and assimilationist doctrines and rule.

One particular decision, *Standing Bear v. Crook*,<sup>183</sup> lauded in federal Indian law<sup>184</sup> as establishing Indians as “humans”, exemplifies such judicial assimilation. In 1879, Ponca chief Ma-chú-nu-zhe (Standing Bear) and his tribe were forcibly removed in the dead of winter to Oklahoma from their ancestral territory in the

<sup>178</sup> Byun 2011; Hernandez 2001.

<sup>179</sup> *Johnson v M'Intosh* 1823, 572.

<sup>180</sup> THEFT OF INDIGENOUS CHILDREN - Characterizing Indian education as “400 years of failure,” a report of the US Senate’s Special Subcommittee on Indian Education concluded that “[t]he goal, from the beginning of attempts at formal education of the American Indian, has been not so much to educate him as to change him.” Special Subcomm. on Indian Educ., 1969, 3, 8, 10. Secretary of the Interior (1891), 66-67; The National Native American Boarding Schools Healing Coalition (2020); The Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission (2015). Both Canada and Australia also engaged in widespread forced removal of Indigenous children to Christian boarding schools far from their communities and homes. Truth & Reconciliation Commission (2015); Australian Human Rights Commission (1997); Watson 2015, 119-120. See also, Kreiken 2010, Jacobs 2009.

<sup>181</sup> INDIGENOUS ENSLAVEMENT – Reséndez 2016, 4; Nixon 2011, 6; Piatt 2019, 32; Castillo 2015; Costo 1987, 3; Newcomb 2008, 45-46. See generally, Tinker 1993. The US Supreme Court affirmed the legality of Indigenous slavery as late as 1838. *Choteau v. Marguerite* 1838. See also, Lemkin’s discussion of the theft and enslavement of Indigenous children in Tasmania. Curthoys in Moses 2007, 88-89.

<sup>182</sup> See, e.g., Ft. Laramie Treaty of 1868, articles 3, 6, 8 (land allotments for farming), article 7 (“civilizing” through education); Otis 1973; Anderson 2014, 330.

<sup>183</sup> *Standing Bear v. Crook*.

<sup>184</sup> See, e.g., Starita 2009; USCourts 2020.

Dakota Territory. His son, Bear Shield, along with about one-third of the tribe died on the way. When Standing Bear turned back to bury his son on their ancestral lands, he was arrested.<sup>185</sup> An issue arose when he petitioned the court for his release because only human beings had standing to file a petition with the court.<sup>186</sup> The judge opined that he was a person and allowed him to return to his ancestral lands because he had left his tribe and his “wasted race” and “adopted the general habits of the whites.”<sup>187</sup> Standing Bear’s brother, Big Snake, who had not left his tribe or assimilated, upon hearing of his brother’s authorization to return to their ancestral lands, also attempted to return but was restrained and murdered by the US military.<sup>188</sup> In other words, the Native person (a “good Indian”) who had left his tribe and fully assimilated was a “human being” while his brother who retained his ethnicity (a “bad Indian”), was not. Or, as put by Frederick Hoxie: “Assimilated natives would be proof positive that America was an open society, where obedience and accommodation to the wishes of the majority would be rewarded with social equality.”<sup>189</sup> Tragically, Standing Bear suffered through two types of ethnical destruction, the ethnic cleansing of his peoples’ homelands through their removal to Oklahoma and the loss of his ethnicity through coerced assimilation into the colonizer’s culture.

Colonial rule was institutionalized in the United States through its creation of domestic laws “legalizing” (forcing) assimilation and slow genocide, including prominently: the establishment of the Bureau of Indian Affairs in 1832 to oversee all matters involving Native nations and peoples both on and off their

reservations,<sup>190</sup> the Indian Removal Act of 1830, the end of treaty-making with Native nations in 1871, the Major Crimes Act of 1885, the allotment acts of the late 1800s,<sup>191</sup> the Indian Citizenship Act of 1924, the Indian Reorganization Act of 1934, the Termination Acts of the 1950s,<sup>192</sup> the annual Indian Appropriations Acts particularly regarding education, health, Native economies, and so forth.

A key method of assimilation was through the education of Indigenous children. At the urging of several Christian denominations, the United States formally adopted an Indian Boarding School Policy beginning with the Indian Civilization Act Fund of 1819. The express intent behind this policy was to destroy the Indigenous culture and identity of Indigenous people and replace it with a Euro-American one.<sup>193</sup> As the founder of the first off-reservation boarding school, Brigadier General Richard Henry Pratt, (in)famously remarked that the goal of the policy was to “[k]ill the Indian in him, and save the man.”<sup>194</sup> Historian David Wallace Adams referred

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<sup>185</sup> Sarita 2009, 698-99.

<sup>186</sup> *Ibid.*, 697, 700-01..

<sup>187</sup> *Ibid.*, 695, 701. Five years later, the US Supreme Court in *Elk v. Wilkins*, citing *Standing Bear and Dred Scott v. Sanford*, ruled that a Native man who had left his tribe and become civilized was a U.S. citizen. In 1870, the US Congress passed an act providing that a member of the Winnebago tribe of Minnesota could become a citizen if possessed of “sufficient intelligence” and had “adopted the habits of civilized life.” Act of 1870, chap. 296, sec. 10.

<sup>188</sup> Brown 1970, chap. 15; Bear 1999.

<sup>189</sup> Hoxie 1989, 34.

<sup>190</sup> 4 Stat. 564.

<sup>191</sup> *E.g.*, General Allotment Act 1887.

<sup>192</sup> *E.g.*, Termination Act 1953; Pub. L. 280.

<sup>193</sup> Frye 2021.

<sup>194</sup> Pratt 1892, 46.

to it as “education for extinction.”<sup>195</sup> From 1858 to 1871, in many treaties between the United States and the Indigenous nations, the United States included provisions making attendance at on-reservation schools, established and run by the government, compulsory for Indigenous children with the goal of “civilizing” them through a Euro-American and Christian education.<sup>196</sup> In 1891, a compulsory attendance law enabled federal officers to forcibly take Indigenous children as young as four-years-old from their homes and send them off for assimilation in boarding schools largely operated by Christian missionaries, Christian churches, and military personnel with federal funding.<sup>197</sup> The Christian churches were complicit and co-conspirators with the colonial State in committing genocide. From 1891 until the 1970s, the United States forcibly reeducated, indoctrinated, and Christianized hundreds of thousands of Native children in 367 boarding schools, as much as 83% of Native school-age children.<sup>198</sup>

As with the Chief’s son under the Leys of Burgos, these “graduates” of Indian boarding schools, having lost their language, culture, and Indigenous identities, became unwitting agents of colonial dominance and destruction of Indigenous spirituality (religicide), culture (culturecide), history (erasure), language (linguicide),<sup>199</sup> economies (impoverishment), communities, peoples, and nations.<sup>200</sup> Similar education genocide efforts have been employed by Australia,<sup>201</sup> Canada,<sup>202</sup> New Zealand,<sup>203</sup> Denmark in Greenland (Inuit),<sup>204</sup> Sweden (Sami or Sápmi),<sup>205</sup> China in Tibet<sup>206</sup> and Xinjiang,<sup>207</sup> India in Attapadi,<sup>208</sup> and Russia in the Ukraine.<sup>209</sup>

In November 2022, United Nations experts issued a letter to China expressing their concerns over China’s large-scale campaign to assimilate Tibetan children.<sup>210</sup> Patrick Wolfe noted that frontier Indian-killer Phillip Sheridan and boarding school policy founder Richard Pratt “were both practitioners of genocide. The question of the degree of the genocidal practice is not the definitional issue.”<sup>211</sup>

The destruction of ethnic groups was also accomplished through State-sanctioned ethnogenesis. Slavery and the rape and taking of Indigenous women by colonizers was a common occurrence during imperial domination and colonization.<sup>212</sup> It resulted in the destruction,

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<sup>195</sup> Adams 2020.

<sup>196</sup> *See generally*, Laurence 1977.

<sup>197</sup> Running Bear 2019.

<sup>198</sup> Frye 2021.

<sup>199</sup> Indigenous languages are more than just words. They are direct links to a peoples’ ancestors and carry their history, their culture and ways of life, and their spiritual and familial relationship to the world around them.

<sup>200</sup> *See* Adams 2020, 276–83; Willinsky 1998, 24 (Professor John Willinsky described this as “intellectually staged” conquest alongside imperialism’s other exploits).

<sup>201</sup> Australian Human Rights Commission (1997); Watson 2015, 119-121, 133-134; Minton 2020, 66-94.

<sup>202</sup> Truth & Reconciliation Commission (2015).

<sup>203</sup> Minton 2020, 48-65.

<sup>204</sup> *Ibid.*, 95-112.

<sup>205</sup> *Ibid.*, 113-140.

<sup>206</sup> McGranahan 2019.

<sup>207</sup> Zenz 2019 (Uyghurs).

<sup>208</sup> George 2024, 2-3.

<sup>209</sup> Uehling 2024.

<sup>210</sup> Varennes 2022; Buckley 2025 (Chinese boarding schools).

<sup>211</sup> Wolfe, 2006, 398.

<sup>212</sup> Lemkin 2007, 83-85; Thornton 1987; Smith 2005; Galeano 2007.

at least in part, of existing Indigenous ethnic identities and the creation of new groups and new ethnicities, such as the Metis in Canada, the Genizaro in Mexico and the Southwestern United States, the Creoles of the Caribbean, and the Mestizo throughout Latin America, as well as the Maroons of the Americas, descendants of the African Diaspora.<sup>213</sup>

Another method of ethnocide employed by some colonial States was and is to force assimilation by overwhelming the Indigenous population through the intentional mass movement of members of the dominant ethnicity into Indigenous territories. As previously discussed, the United States and Canada were established and built upon such governmental mass European Christian resettlement policies known as “Manifest Destiny.”<sup>214</sup> More recently, China, for example, has implemented a program of Sinicization through the movement of millions of Han Chinese into Tibet.<sup>215</sup> The government of Russia also forcibly moved large numbers of ethnic Russians into territories it controlled, including Crimea<sup>216</sup> and the Baltic States,<sup>217</sup> in an effort to destroy and replace the ethnicity of the Indigenous populations there.

The killing of an ethnical group in whole or part, particularly under the colonial rule and occupation experienced by Indigenous peoples, was and is accomplished by the killing of members of the group, by reducing group membership through rape, forced intermarriage, and sterilization of women members, by the theft of member children, through removal from their lands, and through forced or coerced assimilation under colonial domination. They were and are

acts of genocide under Convention Articles 2(b) and (c). According to Patrick Wolfe, repeating an observation made by French social philosopher Alexis de Tocqueville some 100 years earlier, “[i]n indeed, depending on the historical conjuncture, assimilation can be a more effective mode of elimination than conventional forms of killing, since it does not involve such a disruptive affront to the rule of law that is ideologically central to the cohesion of settler society.”<sup>218</sup>

### C. KILLING A RELIGION

While usually broader than a group’s ethnicity, the group’s spiritual or religious beliefs are part of and, for Indigenous peoples, often the core of its ethnicity. The Organization of American States provided in its 1948 Declaration on the Rights and Duties of Man:<sup>219</sup>

Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of many to serve that end with all his strength and resources.

Since culture is the highest social and historical expression of that development, it is the duty of man to preserve and foster culture by every means within his power.

<sup>213</sup> See Sidbury 2011.

<sup>214</sup> *Infra*, note 237.

<sup>215</sup> McGranahan 2019; Domingo 2019.

<sup>216</sup> Williams 2015.

<sup>217</sup> Idzelis 1985, 79.

<sup>218</sup> Wolfe 2005, 402. *Infra*, note 341. (de Tocqueville).

<sup>219</sup> IACHR, Preamble.

The term “indigenous” is defined as “born or originating in a particular place.” It is derived from the Latin *indigena*, meaning “sprung from the land.”<sup>220</sup> Indigenous peoples have been described as “autochthonic”, meaning “native, sprung from the soil.” In Sanskrit, Greek, and Latin it is derivative of “earth” (as opposed to “sky”).<sup>221</sup> What these definitions have in common is that they refer to people who have “sprung from the land”, whose origins are from the Earth, literally “Earth people”. Chthonos was the Greek god of the Earth and chthonic people are those who revere the Earth as Mother. “Chthonic” is used to refer to people who live in or in close harmony with Mother Earth.<sup>222</sup>

All “peoples” have geographic spaces they occupy and use. But, speaking generally, an Indigenous link to their lands and natural relatives is literally opposite from that of Western and other non-Indigenous peoples.<sup>223</sup> They are entirely different ontologies. This distinctive and defining spiritual characteristic of Indigenous peoples has been acknowledged and invoked numerous times by international tribunals.<sup>224</sup> It is this spiritual link to their lands shared with their natural relatives that makes the removal of Indigenous peoples from the lands that define them, and the destruction of their natural relatives<sup>225</sup> that also define them, genocide under Convention Articles 2(b) and (c). Colonial States engage in the destruction of Indigenous spirituality by harming and preventing access to the sacred places of Indigenous peoples. Notable examples are the separation of the peoples of the Očhéthi Šakówiŋ Oyáte (the Great Sioux Nation) from their sacred Ĥe Sápa (Black Hills),<sup>226</sup> the

contamination of the San Francisco Peaks sacred to the Navajo and 19 other Native peoples,<sup>227</sup> injury to Mt. Graham a spiritual center of the Apache peoples,<sup>228</sup> and harm to Mauna Kea sacred to Native Hawaiians.<sup>229</sup>

It has been estimated that there are over 10,000 religions in the world.<sup>230</sup> How does one go about killing a religion? Since the time of the Crusades, the Catholic Church has used the power of European kingdoms and nations to extend its reach as the “Universal” Church to “infidels” and “heathens”.<sup>231</sup> During the so-called Age of Discovery, the Catholic Popes issued three decrees globally sanctifying the invasions of Indigenous territories by European empires purportedly for the coerced or forced conversion of Indigenous peoples to Christianity. In 1452, the Pope issued the *Dum Diversas*:

<sup>220</sup> Online Etymology Dictionary, Indigenous.

<sup>221</sup> Online Etymology Dictionary, autochthonic.

<sup>222</sup> Glenn 2004, 59-68, 78-91. The Lakota, for example, revere the earth as “Unci Maka” or “grandmother earth.” Win 1994, 205; King 1994, 205; Indigenous peoples of Abla Yala also refer to her as “Pachamama” (Mother Earth). On Earth Day, 2010, the World People’s Conference on Climate Change and the Rights of Mother Earth convened in Cochabamba, Bolivia, by then Bolivian President Evo Morales formally adopted the “Universal Declaration of the Rights of Mother Earth.” Ayma 2011.

<sup>223</sup> See *Lyng v. Northwest Indian Cemetery Protective Ass’n* 1988, 459-462 (J. Brennan, dissent).

<sup>224</sup> See Dann 2002, paras. 131, 132, 133, 171, 172; *Awas Tingni* 2001, para. 149; *Yakye* 2005, para. 131; *Endorois* 2010, paras. 78-80; *Ogiek* 2017, paras. 105, 107-108.

<sup>225</sup> *Mitákuye Oyás’ij*.

<sup>226</sup> *United States v. Sioux Nation of Indians* 1980.

<sup>227</sup> *United States v. Navajo Nation* 2003; *Navajo Nation v. United States*, IACHR, Petition.

<sup>228</sup> *LaDuke* 1999, 19-32.

<sup>229</sup> *Medeiros* 2021.

<sup>230</sup> *Wasserman* 2024.

<sup>231</sup> *Williams* 1990.

We grant you by these present documents, with our Apostolic Authority, full and free permission to invade, search out, capture, and subjugate the Saracens [Muslims] and pagans and any other unbelievers and enemies of Christ wherever they may be, as well as their kingdoms, duchies, counties, principalities, and other property ...and to reduce their persons into perpetual servitude.<sup>232</sup>

and the Romanus Pontifex in 1455 to cover the invasion of Africa. Following Columbus's stumbling upon the islands of the Caribbean, the Catholic Pope issued the *Inter Caetera* of 1493 to sanctify the imperial and colonial invasions of the Americas.<sup>233</sup> While the expressed purpose of these declarations was to extend Christianity and the rule of the Universal Church to all of the known world, it provided moral and purported legal cover over the next 500 years for the pillage and destruction of Indigenous nations, peoples, and their natural wealth, as well as the theft and settlement of their territories and lands.<sup>234</sup> Such conduct violates the Genocide Convention's prohibitions under Article 2 (a) and (b) of the "killing" of or "causing serious bodily or mental harm" to members of the religious group. The "physical" manifestations of a religious group are its members (Article 2 (a)) and its sacred places, items, and practices of ceremony. The destruction of a religious group's sacred places and items and the banning of ceremony satisfies the conduct prohibited by Article 2 (c) of "deliberately inflicting on the group conditions of life calculated to bring about its [the group's] physical destruction in whole or part."

Three hundred years after the Leys of Burgos, Chief Justice Marshall attempted to justify the Doctrine of Discovery partly on the benefits of forced conversion to Christianity: "The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence."<sup>235</sup> The belief of the white Christian nations and people of Europe that they were the chosen people of god drove both white and religious superiority in the colonization and destruction of Indigenous nations and peoples under the religious concept of "Manifest Destiny."<sup>236</sup> The first US laws regarding Indigenous peoples, known as the 1883 Code of Indian Offenses, were designed to foster their assimilation by criminalizing Indigenous religious ceremony, practices, and practitioners.<sup>237</sup> The legal prohibition of Indigenous religion by the United States remained in effect until 1978.<sup>238</sup>

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<sup>232</sup> Boniface.

<sup>233</sup> Generally, Newcomb 2008; Williams 1990, 71-81.

<sup>234</sup> Casas 1552 ("The reader may ask himself if this is not cruelty and injustice of a kind so terrible that I beggars the imagination and whether these poor people would not fare far better if they were entrusted to the devils in Hell than they do at the hands of the devils of the New World who masquerade as Christians."); Williams 1990, 185 (quoting Sir Francis Bacon: "It cannot be affirmed if we speak ingeniously that it was the propagation of the Christian faith that was the [motive] ...of the discovery, entry, and plantation of the New World; but gold and silver, and temporal profit and glory."); Stannard 1992, 206; Newcomb 2008; Williams 1990; Tinker 1993; Jennings 1976, 6-8. Also, Nunpa 2020.

<sup>235</sup> Johnson v. M'Intosh 1823, 572.

<sup>236</sup> Tinker 1993, viii, 10, 16-17, 69-94; Davidson 2005; Scott 2020; Nunpa 2020.

<sup>237</sup> Price 1883; Nupa 2020. Canada also banned Indigenous religious practices. Tovas 2008.

<sup>238</sup> AIRFA 1978.

Indigenous religions were also banned by law in the Caribbean<sup>239</sup> and other parts of the colonized world, and continues even to the present day.<sup>240</sup> This conduct clearly violated Convention Articles 2 (b) and (c).

As previously discussed, between 1819 through the 1970s Christian Churches operated Indian boarding schools in the United States (and Canada and Australia) pursuant to federal law and with federal funding under an express mandate to assimilate hundreds of thousands of Indigenous children by forcibly suppressing their traditional ways and spirituality and converting them to Western civilization and Christianity.<sup>241</sup> The legality of federal funding of Christian churches in educating Native children and converting them to Christianity was upheld by the US Supreme Court.<sup>242</sup> The forced conversions of Indigenous children by the Christian entities and the colonial State acting in concert were in violation of Convention Article 2 (b), (c), and (e) (forcibly transferring children of Indigenous spiritual beliefs and ways to those of the Christian groups).

During the 19th century, Mormons purchased hundreds of enslaved Indigenous children from the Spanish under the belief that Indigenous peoples of the Americas were the fallen Lamanites of the Book of Mormon that should be brought back to the Mormon Church.<sup>243</sup> In 1852, at the urging of the Mormon Church, Congress passed an “Act for the Relief of Indian Slaves and Prisoners” which provided that Indian children could be indentured to Mormon families in return for the purchase price<sup>244</sup> - again, in violation of Convention Articles 2 (b), (c), (d) (by removing

future generations of Indigenous believers), and (e). Over the past few decades, the conservative, largely white, Christian nationalist movement has orchestrated attacks on the separate status and sovereignty of Indigenous nations and peoples as legal barriers to their ability to fulfill the biblical command to “make disciples of all nations” by adopting and Christianizing Indigenous children<sup>245</sup> In other words, some Christian nationalists believe that they are compelled by their God to commit religicide. Christian nationalism was also behind the destruction of the Jewish religion during the Holocaust of the Second World War.<sup>246</sup> Such movements combined with the power of the State not only act to destroy national groups and ethnical groups but religious groups as well.

Of course, Christian entities and States are not the only ones to engage in the destruction of another group’s religion.<sup>247</sup> The Armenian genocide of World War I has been viewed as being driven by a desire to eliminate the Christian communities in the Ottoman Empire and Turkey.<sup>248</sup> A second genocide of Indigenous Armenians by Azerbaijan may be taking place

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<sup>239</sup> McKee 2018.

<sup>240</sup> Pew Research Center 2024.

<sup>241</sup> Adams 2020; Laurence 1977.

<sup>242</sup> Quick Bear v. Leupp 1908.

<sup>243</sup> Bennion 2012, 1-3.

<sup>244</sup> Jacobs 2009, 53.

<sup>245</sup> Talbot 2022; Nightlight; Joyce 2014.

<sup>246</sup> Hoover 1989.

<sup>247</sup> See discussion, Bartov 2001; Bergen 2010.

<sup>248</sup> See Morris 2021.

in Nagorno-Karabakh.<sup>249</sup> In 2010, leaders of the Khmer Rouge regime were convicted by a special criminal tribunal of the genocide of an Indigenous group in Cambodia, the Cham, who were targeted due to their Islamic religious belief.<sup>250</sup> In Myanmar, after an investigation, the UN Special Rapporteur concluded that the nationalist Buddhists' and government's 50-year persecution of the Rohingya Muslims "bear the hallmarks of genocide."<sup>251</sup> Following its takeover of Iraq in 2014, the Islamic State / Daesh in Iraq and Syria (ISIS) engaged in a campaign to destroy the Yazidi and other religious groups in the region which included mass murders, torture, enslavement, sexual violence, forcible conversions, human trafficking, and other crimes.<sup>252</sup> In a strong joint resolution two years later the European Parliament condemned that conduct as systematic mass murder and genocide and urged action in the International Criminal Court.<sup>253</sup>

At the time of Columbus, the Universal (Catholic) Church issued "convert-or-die" or be enslaved edicts to the Indigenous peoples they found in Africa and the Americas.<sup>254</sup> Edmond Paris documented a more recent convert-or-die effort involving the Vatican to forcibly convert Serbs, Gypsies, and Jews of Croatia to Christianity during the Second World War.<sup>255</sup> In 2014, the Islamic State group (ISIS) gave the Yazidi peoples the same ultimatum in that genocide.<sup>256</sup> No religious group has ever been prosecuted for genocide despite being complicit with States in the commission of genocides of other religious groups. The liability, criminal and civil, of religious entities should not be overlooked

given the histories of States or dominant religions acting together or in complicity in the occurrence of many genocides.

These genocides of religious groups, each of them, have in common all of the conduct listed in Convention Article 2(a)-(e). As recognized in the American Declaration, spiritual development is the "supreme end" and "highest expression" of human existence. The destruction of a group's religion tears at the core of the group's identity, existence, culture, and future. It leaves a body without a soul. The death of that body's spirituality is genocide. The chthonic nature of Indigenous spiritually makes Indigenous groups particularly vulnerable to forced assimilation and other destructive and genocidal acts by colonial powers.

#### D. KILLING A RACE

Convention Article 2 includes as genocidal conduct the intentional killing, in whole or part, of a "racial" group. An analysis of the Marshall Trilogy of decisions that concocted domestic legal justification for the destruction of Indigenous nations and peoples by the United States reveals that "race" was the primary characteristic underlying the genocidal policies and conduct.

<sup>249</sup> Tatikyan 2024; Ocampo 2023.

<sup>250</sup> ECCC, Closing Order, paras. 745-770, 1336-1342.

<sup>251</sup> Rohingya 2019, 8.

<sup>252</sup> Bishai 2024.

<sup>253</sup> European Parliament 2016.

<sup>254</sup> See supra notes 233-234; Requerimiento.

<sup>255</sup> Paris 1990.

<sup>256</sup> Abouzeid 2018, 6.

The second and third cases in the Trilogy, *Cherokee Nation v. Georgia*<sup>257</sup> and *Worcester v. Georgia*,<sup>258</sup> applied the first decision, *Johnson v. M'Intosh*,<sup>259</sup> in ruling that "Indians" were uncivilized, incompetent, "savages" and "heathens" in need of the "protection" (domination) of the colonial parent. However, the actual facts underlying those decisions expose the deception in Marshall's rationale invoked to justify and legalize colonial domination and rule. At the time of these decisions, the Cherokees were known as the largest of the "Five Civilized Tribes" and possessed a constitution and government modeled after that of the United States, had leaders educated in prominent US universities, had their own alphabet and media, were owners of private estates, plantations, and even slaves, and had accepted and converted to Christianity.<sup>260</sup> The *only* remaining characteristics that differentiated them from the dominant white society were their pre-colonial existence and their denominated race. They were pre-existing nations in the way of colonial expansion, and they were "Indians."<sup>261</sup>

The United Nations General Assembly has recognized this link between colonialism and racism. A large part of the UN Charter is focused on the liberation of "non-self-governing territories" from colonial occupation and rule.<sup>262</sup> Shortly after its creation in 1948, the UN General Assembly began regularly issuing resolutions calling for the immediate "eradication" of colonialism from the world.<sup>263</sup> We are now in the "Fourth International Decade for the Eradication of Colonialism"<sup>264</sup> in which the UN once again renewed its initial call for the "speedy and

unconditional end [to] colonialism in all its forms and manifestations."<sup>265</sup>

In 1965, the United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), a binding treaty condemning racial discrimination.<sup>266</sup> The Treaty has been acceded to or ratified by nearly all of the UN member States. It includes within the term "racial," referring to "race, colour, descent, or national or ethnic origin."<sup>267</sup> Relevant to this discussion, the ICERD declares without any reservation "that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination in theory or in practice, anywhere."<sup>268</sup> It expressly "affirms the necessity

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<sup>257</sup> 39 U.S. 1.

<sup>258</sup> 31 U.S. 515.

<sup>259</sup> 21 U.S. 543.

<sup>260</sup> Perdue 2007, 20-41; Echo-Hawk 2010, 89-90; Wolfe 2006, 396-397.

<sup>261</sup> As Mi'kmaq writer Pamela Palmater put it, the racializing of Indigenous people redefined them, and their rights, from collective, sovereign nations to less civilized and less human individuals – "From Peoples to Indians." Palmater 2011, 37-43. Also, Wolfe, 2006, 388 ("Indigenous North Americans were not killed, driven away, romanticized, assimilated, fenced in, bred White, and otherwise eliminated as the original owners of the land but as *Indians*." (emphasis by Wolfe)).

<sup>262</sup> UN Charter, chaps. XI, XII, and XIII.

<sup>263</sup> See UNGA Res. 1514; see UN Dag Hammarskjöld Library (this UN website provides a full list of UN resolutions and other UN documents relating to decolonization). For a history of the promulgation of the UNGA Res 1514, see Burke (2010), chap. 2.

<sup>264</sup> UNGA Res. 75/123.

<sup>265</sup> UNGA Res. 1514.

<sup>266</sup> ICERD.

<sup>267</sup> *Ibid.*, art. 1, sec. 1 (emphasis provided).

<sup>268</sup> *Ibid.*, Preamble, para. 5; see also, UNESCO.

of speedily eliminating racial discrimination throughout the world in all its forms and manifestations” and reaffirmed the 1960 UN resolution on immediate global decolonization.<sup>269</sup> By linking colonization with doctrines of racial superiority and the UN decolonization resolution with the elimination of all forms of racism, the Treaty expressly recognized colonialism as a manifestation of racism. The ICERD was enforced by the High Court of Australia in its 1988 *Mabo* decision which held that Australian property law discriminated against an Indigenous group’s rights to its own Indigenous concept of land tenure.<sup>270</sup> In 2006, the UN Committee charged with enforcement of the Treaty issued a decision finding that US federal Indian law racially discriminated against the Western Shoshone Nation.<sup>271</sup> Racism, colonialism, imperialism, religion, and modernity form links on a chain of oppression and destruction of Indigenous peoples.

The modern concept of “race” did not exist prior to the colonial period, the Age of Empires. It was concocted by the imperial powers as the purported moral and legal justification for the enslavement, colonial domination and exploitation of Indigenous peoples and nations.<sup>272</sup> Tony Barta surmised that genocide was more the result of historical processes than the Darwinian natural condition of its victims asserted by colonial powers.<sup>273</sup> “Early racist discourses formed the necessary preconditions for two centuries of discrimination, dissolution and genocide of Indigenous peoples in the absence of scientific racism.”<sup>274</sup> Nationalism was racialized just as racism was nationalized.<sup>275</sup>

In essence, the prohibition on the killing of a race found in Genocide Convention Article 2 is not for the protection of a race but is in response to the racializing, the racial targeting, of a group of people for destruction by reason of certain common physical characteristics or histories.<sup>276</sup> In contrast to national and ethnical groups, a racial group is defined by its supposed biological rather than social character. So, how does one go about “killing a racial[ized] group” in whole or in part? Obviously, that can occur in a number of different ways. The racial group can be identified and targeted for extermination through mass murder as occurred in the United States,<sup>277</sup> Namibia,<sup>278</sup> Germany,<sup>279</sup> and Haiti,<sup>280</sup> in violation of Convention Article 2(a).

The destruction of a racial group can also occur by “race branding” through the use by colonial powers of the quantum (percentage) of Indigenous blood and other biological determinants such as skin, eye, and hair color and facial features to define members of an

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<sup>269</sup> Ibid., Preamble, paras. 4 and 5.

<sup>270</sup> *Mabo* 1988.

<sup>271</sup> *Western Shoshone v. United States*, UN CERD.

<sup>272</sup> Guillaumin 1995, 61-98; Hannaford 1996; Weitz 2003, 16-32; Finzsch 2007, 2; Lingaas 2018. See also, López 2006.

<sup>273</sup> Barta 2007, 32. Also, Gigoux 2020.

<sup>274</sup> Finzsch 2007, 19; Weitz 2003, 32-42.

<sup>275</sup> Finzsch 2007, 2 (citing Etienne Balibar). See also, Kakel 2013.

<sup>276</sup> Lingaas 2018; Kakel 2013.

<sup>277</sup> Stannard 1992, 126-131, 145, 204-221, 232, 240-246.

<sup>278</sup> Lindqvist 2014.

<sup>279</sup> Schafft 2002.

<sup>280</sup> Robins 2009, 3 (“subaltern” genocide).

Indigenous group.<sup>281</sup> Blood quantum has been used to remove lands from Indigenous nations and decimate membership in a “statistical elimination.”<sup>282</sup> As Professor Wolfe noted: “In this way, the restrictive racial classification of Indians straightforwardly furthered the logic of elimination.”<sup>283</sup> Colonial States, including the United States, Canada, and Australia, engaged in “benevolent genocide” using such race-based determinants in their laws and institutions to facilitate the transfer of Indigenous children into Caucasian families through the late 20th Century, at least in part, to “breed out” Indigenous blood over generations, becoming white by absorption through a “biological assimilation.”<sup>284</sup>

Programs sterilizing thousands of Indigenous women diminished the membership of the racial group.<sup>285</sup> Rape, the enslavement of Indigenous women, and racial intermarriage, a common occurrence during imperial domination and colonization of North America<sup>286</sup> and Australia, also resulted in reducing group membership.<sup>287</sup> As Norbert Finzsch observed, “the colonial gaze and a desire for indigenous women shaped gender relations of the male colonialists with Aboriginal women. The latter represented not only sexual gratification but also symbolized Australian land and its conquest.”<sup>288</sup> Prominent Latin historian Eduardo Galeano related the story of when the Spanish fortress of Arauco in present day Chile was under siege by the Mapuche in 1563. To demands to surrender or die, the Spanish Captain responded that if they died, they would still win the war by making children from Mapuche women “who’ll be your masters!”<sup>289</sup> The “race” of the group is destroyed in whole or part under

Convention Article 2(a) by killing members of the group through mass murder or by destroying the group itself, slowly, through the imposition of race-based biological identifiers and attrition genocide under Articles 2 (b) and (c).

The assimilationist policies, laws, and programs that caused the destruction of Indigenous nations and ethnicities and the attrition of Indigenous peoples through colonial domination, poverty, and illness were not directed at a specific nation or peoples, but were instead targeted at a “race” of Indigenous people such as the “Indians” of the Americas, the “aborigines” of Australia or Canada, or the “blacks” of Africa and Australia, who were often described, at least initially, as “savages,” “less civilized,” or less human than the white peoples of the European “race”.<sup>290</sup>

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<sup>281</sup> *Supra* note 277.

<sup>282</sup> Jaimes 1992, 137; Limerick 1987, 338; Unrau 1989; Nielson 1982 (Utes); Palmater 2011 (Canada). *See also*, Wolfe, 2006,” 388, 400.

<sup>283</sup> Wolfe 2006, 388.

<sup>284</sup> Jacobs 2009, 66, 69, 70, 73, 139-140, 383, 420; Watson 2015, 118-119, 146-147.

<sup>285</sup> *Supra* notes 101-112.

<sup>286</sup> Mawani 2002, 49-54; Thornton 1987; Smith 2005; Galeano 2007.

<sup>287</sup> Totten 2011, 128; Schabas 2000, 170; San José 2020 (Yazidi); Ibrahim 2018 (Yazidi).

<sup>288</sup> Finzsch 2007, 17. Also, Smith 2005, 55. Even today, a common means of acquiring and alienating Indigenous lands by non-Indigenous persons is through the marriage of Indigenous persons.

<sup>289</sup> Galeano 1982, 130.

<sup>290</sup> Like Germany’s reference to US law as authority legalizing euthanasia, white supremacy, lebensraum (Manifest Destiny), and “reservations,” US Supreme Court Chief Justice Marshall’s *M’Intosh* decision (and suspect and internally contradictory reasoning) has been cited to as authority by other colonial States in justifying their exercise of colonial domination of Indigenous nations and peoples. Watson 2011; Miller 2021.

In one sense, as with ethnocide, these colonial policies and laws are less about the destruction of an Indigenous “race” than the domination, protection, and growth of an assumed superior or privileged race. This is reflected in Israel’s “chosen” Jewish race,<sup>291</sup> pre-revolutionary South Africa’s white race,<sup>292</sup> Nazi Germany’s Aryan race,<sup>293</sup> Japan’s Yamato race,<sup>294</sup> and China’s Han race.<sup>295</sup> In other words, Indigenous peoples are not targeted for destruction because of their “race,” but because they are in the way of the expansion of another more powerful and assumed superior “race” of peoples.<sup>296</sup> As professors Ronald Niezen<sup>297</sup> and James Anaya<sup>298</sup> have suggested, Indigenous peoples may be defined not by their “race” but by their victimization by the (white) imperial powers of Europe. Restated, a group is not “scientifically” identified and does not self-identify as a “race,” but instead is so-defined and targeted as a race by the group’s oppressor.<sup>299</sup> Recent attacks in US courts on Indian peoples, for example, are actually not focused on the Indian race but on preserving and enforcing white privilege, targeting the so-called federally “exclusive Indian benefits” as supposed discrimination against the rights of white people.<sup>300</sup>

This dynamic highlights the apartheid roots of the domestic policies, laws, and institutions of colonial States such as the United States,<sup>301</sup> Canada,<sup>302</sup> Australia,<sup>303</sup> and Israel.<sup>304</sup> Like genocide and colonialism, apartheid has been condemned globally by the large majority of the UN General Assembly Member States in the adoption of the International Convention on the Suppression and Punishment of the

Crime of Apartheid in 1973. In the Convention, “apartheid” is described as a list of “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”<sup>305</sup> The listed acts committed against the race, in relevant part, include acts that could fall under the Genocide Convention as well: (a) denial of the right to life and liberty by (i) murder, (ii) infliction of serious bodily or mental harm, or the infringement of [the victimized race’s] freedom or dignity; (b) deliberate imposition of living conditions calculated to cause its or their physical destruction in whole or in part; (c) any measures calculated to prevent a racial group from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions prevent full development of such a group; and (d) any measures designed to divide the population along racial lines by

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<sup>291</sup> Lentin 2020, Khalidi 2020, 10.

<sup>292</sup> Dubow 2014.

<sup>293</sup> Olusoga 2010; Kakek 2013.

<sup>294</sup> Kiernan 2007, 478, 483-484.

<sup>295</sup> Miao 2024; Brett 2012; Domingo 2019.

<sup>296</sup> Wolfe 2006, 388.

<sup>297</sup> Niezen 2003, 4-5, 9-14, Chap. 3.

<sup>298</sup> Anaya 2004, 4. Also, Daes, para. 69.

<sup>299</sup> Lingaas 2018.

<sup>300</sup> Reid 2024, 362-366.

<sup>301</sup> *For example.*, Federal Indian Law.

<sup>302</sup> *For example.*, The Indian Act.

<sup>303</sup> Watson 2015, 116 notes 36-38 (Aboriginal Acts), 118.

<sup>304</sup> Dugard 2013.

<sup>305</sup> Apartheid Convention, art. II.

the creation of separate reserves for members of the racial group, the expropriation of landed property belonging to a racial group.<sup>306</sup> Of the almost 200 UN Member States, only four voted against the Apartheid Convention, including the colonial States of Great Britain and Portugal and the successor colonial States of South Africa and, quite understandably, the United States. Under international law, the “sui generis” federal “Indian” law of the United States is apartheid law. While the Apartheid Convention is not focused on the “killing” of a race, the destruction of a race in whole or in part may be a goal of apartheid laws and the “inhuman” “crime” of apartheid and thus be in violation of Genocide Convention Articles 2 (b) and (c).

The Indians of the Americas, the Aboriginals of Australia and Canada, and other colonized peoples of color are the only “race” (and thereby the only ethnicity, peoples, and nations) still subject by reason thereof to denial of collective human rights, of full equality of the rights of nations and peoples, and often, as Hannah Arendt put it, of even the right to have rights. While refusing to dispense with colonial rule, the High Court of the United States has acknowledged the “offensiveness” of a race-based colonial relationship to the US Constitution’s guarantees of racial equality.<sup>307</sup>

Most colonial policies, laws, and institutions pertaining to Indigenous nations and peoples are directed at the incremental destruction of Indigenous nations and peoples through forced assimilation over generations by targeting them as a “race”. While such conduct, like slavery, has been euphemistically rebranded by the

perpetrators as “beneficial”, the motivations for such domination and forced assimilation are not relevant. If the intent to engage in the prohibited conduct is present, it matters not if it was malicious or benevolent. The true motivation is the State’s interest in the continuation of colonial domination and exploitation. Racial domination is still white supremacy. “Benevolent” genocide is still genocide.

### III. EVIDENCING GENOCIDAL INTENT THROUGH STRUCTURE

No one colonizes innocently ... no one colonizes with impunity either.

Aimé Césaire<sup>308</sup>

Genocidal intent may be express or implied from conduct. On intent, Schabas opined that “it is inconceivable that an infraction of such magnitude could be committed unintentionally.”<sup>309</sup> Shaw has described “intent” as “a logical deduction that flows from evidence of the material acts.”<sup>310</sup> The Rome Statute of the International Criminal Court (ICC), which was established in 1998 to hear certain international crimes including genocide, states that intent exists where the “person means to engage in the

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<sup>306</sup> *Ibid.*

<sup>307</sup> *Washington v. Confederated Bands and Tribes* 1979, 500-01. *See also*, *Johnson v. M’Intosh* 1823, 590 (“fiction”), 591 (factual “pretense”); *Worcester v. Georgia* 1823, 543 (“difficult to comprehend”), 544 (“extravagant and absurd idea”). Similarly, the High Court of Australia in its *Mabo II* decision while purportedly tossing the doctrine of discovery then supplanted it with an imperial doctrine, the King’s “radical title,” to maintain its colonial rule over the Indigenous peoples found there.

<sup>308</sup> Césaire 1950, 39.

<sup>309</sup> *Ibid.*, 213-214.

<sup>310</sup> Shaw 2007, 83.

conduct” and “means to cause that consequence or is aware that it will occur in the ordinary course of events.”<sup>311</sup> The material acts evidencing genocidal intent may be incremental in nature, the result of decision-making over time and adaptations to changing circumstances<sup>312</sup>. Like Professor Wolfe’s observation that colonization is not an event but a structure, genocide may also not occur as an event in time but as a structure over time. The structure imbeds, organizes, and makes the conduct pervasive and permanent. Lemkin described genocide as “synchronized attacks on all aspects of life of the captive peoples.”<sup>313</sup> It may be systemic and institutionalized, integrated and embedded in colonial institutions. Genocide structured by colonial institutions occurs incrementally over the entire period of colonization in the gradual destruction—in whole or part—of the nation, ethnic identity, religion, and / or race of the colonized peoples. As set forth in the Genocide Convention, the required specific intent does not have to encompass the destruction of the entire group, but only the intent to destroy part of the group.<sup>314</sup>

The “evidence” and proof of genocidal intent may then be found in the colonial structure, the policies, laws, and institutions of the colonial power itself.<sup>315</sup> At the time of the Holocaust of World War II, the genocidal intent of the Nazi government was expressed in Germany’s own domestic law, known as the Nuremberg Laws, which “legalized” eugenics and the persecution and destruction of Jews, Gypsies, and others.<sup>316</sup> Apartheid was legalized by the domestic laws of South Africa.<sup>317</sup> As such, the assimilationist

federal Indian law of the United States,<sup>318</sup> the Indian Act of Canada,<sup>319</sup> or the Israeli laws pertaining to Palestinians,<sup>320</sup> are expressions of genocidal intent which are then fulfilled by their governing colonial institutions including their executive and administrative agencies, militaries and law enforcement agencies, judiciaries and legislatures.<sup>321</sup> As put by Kiera Ladner, nations and peoples can be “killed” “through legislation and slow-moving poison.”<sup>322</sup>

The existence of a plan, of a genocidal structure, by its nature obviates the need to search for intent. To have intent, the perpetrator must have knowledge. The Rome Statute defines “knowledge” as “awareness that a circumstance exists or a consequence will occur in the ordinary

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<sup>311</sup> Rome Statute, art. 30(2).

<sup>312</sup> *Ibid.*, 84.

<sup>313</sup> Lemkin 1944, 22, note 52.

<sup>314</sup> Travis 2012.

<sup>315</sup> See *Prosecutor v. Goran Jelisić* 2001, para. 48 (“The existence of a plan or policy . . . may facilitate proof of the crime.”).

<sup>316</sup> Law and the Holocaust; Law, Justice, and the Holocaust. The Nazis “legalized” genocide as a matter of domestic law using the US Supreme Court’s eugenics decision affirming forced sterilization in *Buck v. Bell*, 274 U.S. 200 (1927) (which is still the law of the United States) as their starting point. See Nuremberg Documents 2009; Olusoga 2010, 285, 302; also, US Holocaust Memorial Museum (listing series of laws passed to legalize genocide). The US policies and law designating “Indians” as inferior peoples and establishing the internment camps known as reservations were also used by the Germans first as legal precedence for the pre-World War I genocide of the Herero and Nama Indigenous peoples of Namibia and later the Holocaust of World War II. Guettel 2010; Kakeel 2013, 8-24; Olusoga 2010, 106-114, 133, 304, 340.

<sup>317</sup> Apartheid Laws & Regulations; Apartheid Legislation.

<sup>318</sup> USDOJ, Federal Law and Indian Policy Overview.

<sup>319</sup> Annett 2001; Coast 2013; Ladner 2014.

<sup>320</sup> Dugard 2013.

<sup>321</sup> See discussion, Goldhagen 2009, 102.

<sup>322</sup> Ladner 2014.

course of events.”<sup>323</sup> The plan evidences the perpetrator’s “knowledge”, particularly where the perpetrator devised the plan and/or executed it. The International Criminal Tribunal found the existence of a plan as evidence of knowledge of genocidal circumstances in the trial of former Yugoslavian leaders Karadzic and Mladic.<sup>324</sup> Certainly, colonial legislation and law setting forth the plan and establishing the institutions for dominating, destroying, and forcibly assimilating Indigenous nations and peoples satisfies this element.

Under the language of the Genocide Convention, the intent also must be “specific”, meaning that it must be an intent “to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.”<sup>325</sup> Again, as here, where genocide has been institutionalized in the law of the perpetrator, that law is itself an expression of the perpetrator’s specific knowledge and intent. Laws authorizing the mass killing of Indigenous peoples; the theft of Indigenous children for re-education (destruction of ethnic identity for assimilation); the theft of Indigenous children for adoption into white families; the sterilization of Indigenous women; the forcible conversion of Indigenous peoples to another religion; the outlawing the practice of Indigenous spirituality and culture; the destruction of Indigenous economic, physical, and psychological well-being; the destruction of Indigenous national independence and sovereignty; the destruction of Indigenous traditional institutions of governance and law; the destruction of Indigenous territories, lands, and natural resources; the forced or coerced removal of Indigenous peoples from the

homelands; and so forth, are certainly clear and unequivocal declarations of a State’s specific intent.

Conversely, to perpetuate continuing colonial rule and slow genocide, the colonial State’s domestic judicial decisions, legislation, and executive actions in one way or another must refuse to recognize the current independent sovereign equality of pre-colonial Indigenous nations.

Indigenous peoples have a 500-year history of resistance to colonialization and genocide.<sup>326</sup> International and some domestic tribunals have issued many decisions finding that individuals have committed genocide while acting in an official capacity for a State.<sup>327</sup> Surely the conviction of a State’s high officials of the crime of genocide when acting for the State would evidence knowledge and specific intent on the

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<sup>323</sup> Rome Statute, art. 30(3).

<sup>324</sup> Schabas 2000, 208 (see discussion of this question by Professor Schabas at 207-213).

<sup>325</sup> Genocide Convention 1948, art. 2.

<sup>326</sup> See, e.g., Mander 2006 (global); Hall 2009 (global); Schroder 1998 (Mexico); Olusoga 2010 (Namibia); Khalidi 2020 (Palestine); Na’Allah 1998 (Nigeria - Ogoni); Taylor 2016 (St. Vincent - Garifuna); Meyer 2010 (Americas); James 1992 (North America); Brown 1970 (United States); LaDuke 1999 (North America); Churchill 2002 (North America); Steiner 1968 (United States); Josephy 1971 (United States); Coast 2011 (Canada).

<sup>327</sup> See International Criminal Court, Cases. The Genocide Convention, Article IV, refers to the punishment of “persons,” including “rulers, public officials or private individuals,” but not States, nations, or groups. See Gaeta 2007; Professor Schabas has opined that while the Convention does not explicitly provide that States themselves may be responsible for genocide, Article IX may bootstrap State responsibility, but not criminality, through its reference to “disputes” “relating to the responsibility of a State for genocide...shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.” Schabas 2009, 418-446. Several cases have been filed with the International Court of Justice pursuant to this provision. *Ibid.*, 425-446.

part of the State itself in the commission of the crime. Colonial States cannot reasonably deny knowledge and specific intent when their colonial and genocidal acts are exposed or directly challenged by Indigenous peoples in wars, occupations, demonstrations, protests, domestic and international petitions and lawsuits, investigations and reports, the press and media, publications, and other avenues of resistance. The State's intentional refusal to decolonize when confronted with its wrongful conduct is an expression of specific intent. Over the past 60+ years, the United States appears to be the *only* State out of some 180 voting UN Member States that has voted against all of the hundreds of decolonization instruments adopted by the UN General Assembly.<sup>328</sup> A State's knowledge and specific intent to commit slow genocide are inherent in the definition and nature of its colonial rule.<sup>329</sup>

Explicit admissions of knowledge and intent to commit wrongful conduct, including genocide, are also contained in the "apologies"<sup>330</sup> and the express avoidance and denial<sup>331</sup> of colonial States and their institutions. There have been some 25 apologies by States to Indigenous peoples from about 14 States in addition to several churches that were involved in colonialism and genocide.<sup>332</sup> Denial is considered the last stage of Professor Gregory Stanton's "ten stages of genocide."<sup>333</sup> Approximately 21 countries have criminalized genocidal denial.<sup>334</sup> In order to apologize for, or deny genocide, the colonial State must have knowledge of the facts and its own specific intent regarding its own conduct.

Due to the nature of colonial rule and occupation as a structure imposed on subservient nations and peoples through the colonizer's laws and institutions over time, there should be very little room for any evidentiary dispute over a State perpetrator's knowledge and specific intent in a colonial genocide.

## V. PROTRACTED, SLOW, GENOCIDE OF INDIGENOUS PEOPLES

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups themselves.

Raphäel Lemkin<sup>335</sup>

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<sup>328</sup> The UN General Assembly condemned colonialism and has made calls for decolonization every year since UNGA Resolution 1514 in 1960, approximately 150 times over 63 years. Each year the member States of the General Assembly with near unanimity have endorsed the call while the United States stands alone as the only State to have voted against every single one. The great global call to immediately end and eradicate all forms and manifestations of colonialism and racism threatens the continuing colonial rule, domination, and exploitation by the United States over Indigenous peoples and nations. *See* UNGA decolonization resolutions for the following sessions (United Nations Digital Library, "Voting Data" word search – "colonial").

<sup>329</sup> Wolfe 2006; *generally*, Moses 2007.

<sup>330</sup> *See* Apologies to Indigenous peoples, List. *See generally*, Gibney 2008; Brooks 1999.

<sup>331</sup> *See* Denials of genocides of Indigenous peoples; Cohen 2001.

<sup>332</sup> *See* Apologies to Indigenous peoples, List; *generally*, Gibney 2008.

<sup>333</sup> Stanton 1996.

<sup>334</sup> Pruitt 2017, 271.

<sup>335</sup> Lemkin 1944, 79.

The power of coloniality is the relentless, systematic, institutionalized process of creeping genocide proceeding deliberately—and often covertly—hidden by the semantics of the colonizer<sup>336</sup> over such a great period of time that it acquires a veneer of being lawful and an acceptable,<sup>337</sup> if not even a beneficial, fated relationship.<sup>338</sup> In 1831, while visiting the United States as a young scholar to study America’s early experiment in democracy, French historian Alexis de Tocqueville witnessed firsthand the removal (ethnic cleansing) of Indigenous peoples from their ancestral homelands in the southern United States during what has become known as the “Trail of Tears” under the Indian Removal Act of 1830.<sup>339</sup> On this de Tocqueville commented:

The Spaniards were unable to exterminate the Indian race by those unparalleled atrocities which brand them with indelible shame, nor did they succeed even in wholly

depriving it of its rights; but the Americans of the United States have accomplished this twofold purpose with singular felicity, tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.<sup>340</sup>

Sauk Chief Ma-ka-tai-me-she-kia-kiak (Black Hawk) has observed: “How smooth must be the language of the whites, when they can make right look like wrong and wrong look like right.”<sup>341</sup> Linguists understand that a crucial part of colonialism is the linguistic relations of power and the use of semantics to colonize the minds of both the colonizers and the colonized.<sup>342</sup> A colonized mind can facilitate or even promote their own continuing oppression and exploitation by accepting the legitimacy of—and even utilizing

<sup>336</sup> South African anti-apartheid martyr Steven Biko declared: “The most potent weapon in the hands of the oppressor is the mind of the oppressed.”; Biko 1978. George Orwell made the central theme of his dystopian masterpiece, 1984, an oppressor State which controls the oppressed by controlling their minds through semantics, what he termed “doublethink.”; Orwell 1949, 44. Doublethink, or doublespeak, is language that deliberately obscures, disguises, distorts, or reverses the meaning of words. It disguises the nature of the truth for political purposes; Orwell 1946. According to Orwell, political language “is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind”; *Ibid.* Orwell further exposed the purpose of political language: “Who controls the past controls the future: who controls the present controls the past”; *Ibid.* Words themselves can act as pervasive “monuments” to white supremacy and the perpetuation of colonial mythologies; McGill 2022.

<sup>337</sup> Professor Leigh Patel noted: “Settler colonialism has been such a long-standing structure in the Westernized world that its ability to absorb, contain, and dilute demands for liberation and abolition should never be underestimated.” Patel 2021, 137. *Also*, Tee-Hit-Ton Indians v. United States 1955, 289-290 (J. Reed) (“Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.”).

<sup>338</sup> When it is called out by the international community for violations of human rights of Indigenous peoples, the United States even today routinely and disingenuously responds that its domestic law guarantees the rights of Indigenous peoples. See United States of America 2020, 12; United States of America 2015; United States of America 2010 (declaring that the United will interpret the UN DRIP as consistent with federal [colonial] Indian law); United States of America 2001; International Indian Treaty Council 2014.

<sup>339</sup> Indian Removal Act 1830; Tocqueville 1835, *Future Condition of Three Races - Part III*, chapter XVIII, a-b.

<sup>340</sup> Tocqueville 1835, *ibid.*

<sup>341</sup> Black Hawk 1833, 97.

<sup>342</sup> Veronelli 2013; Tirrell 2012.

themselves—colonial law in the determination of their rights.<sup>343</sup> This has been referred to as “dysconscious racism”, an uncritical habit of mind that justifies inequity and exploitation by accepting the existing order of things as given.<sup>344</sup> As Professor Joyce King remarked: “It is not the *absence* of consciousness (that is, not unconsciousness or a lack of knowledge) but an *impaired* consciousness or distorted way of thinking about race as compared to, for example, critical consciousness.”<sup>345</sup> The colonized mind has been described as a “conceptual and social prison of modernity/coloniality” that traps Indigenous peoples under colonial rule even while they exercise limited permitted independence under a veneer of decolonization.<sup>346</sup> Such colonial language was, and is, a protracted program of propaganda and education, the “dangerous speech and dangerous ideology” of the masses of Americans by colonial institutions habitually excusing those who have participated or benefited.<sup>347</sup> The US Holocaust Museum acknowledged the key role of semantics in genocide: “The Holocaust did not begin with killing; it began with words.”<sup>348</sup>

Law is expressed in the words and deeds of an institution implementing a sovereign’s system and policies of governance over its domain and people. Federal Indian law, and the domestic law regarding Indigenous peoples of other colonial and successor States, is the institutionalized and systemic colonial policies of domination, exploitation, assimilation, and annihilation of Native nations, peoples, and resources by the colonial power. Accordingly, and contrary to popular understanding even among scholars,

genocide may be protracted with the destruction of a peoples’ identity occurring over a long period of time, over even hundreds of years as with the Indigenous peoples of the Americas.<sup>349</sup> This “slow genocide” has been defined as “the emotional and physical harm done to survivors of violence over time. . .[and] emotional and physical harm resulting from witnessing or participating in violence and the continuing experiences of living in unsafe and violent communities.”<sup>350</sup>

Some have labeled this process as “genocide by attrition.”<sup>351</sup> Historian Mark Levene has referred to this incremental destructive process as “creeping genocide.”<sup>352</sup> “It is this state-community dynamic which has led, in each instance [referring to the Maya Indians of Guatemala, the Kurds of Turkey and Iraq, the Tibetan peoples, and the peoples of East

<sup>343</sup> See, e.g., Coulter 1982, 51-60 (examining the unqualified use by tribal lawyers of colonial doctrines in arguments to the United States Supreme Court).

<sup>344</sup> King 1991, 135; Okhremtchouk 2018.

<sup>345</sup> See King, *ibid.* This definition highlights the significance and importance of Critical Theory, Critical Race Theory, and TribalCrit in the liberation of the minds of both the colonized and the colonizer.

<sup>346</sup> See Veronelli 2023, 120.

<sup>347</sup> Maynard 2016; Waller 2002.

<sup>348</sup> US National Holocaust Museum 2016. Also, Tirrell 2012.

<sup>349</sup> See Whitt 2019 (examining the extermination of the Beothuk Nation and the Powhatan Confederacy over three centuries by the England and the United States and settler colonialism as genocide); Ostler 2010 (the 150-year history of the Lakota struggle for the Black Hills); Flood 2019 (250-year history of the colonization of the Indigenous peoples of Australia); Rohingya 2019 (50-year history of genocide by Myanmar); Kahalidi 2020 (detailing the 100-year colonization and genocide in Palestine); Onondaga Nation 2023 (Onondaga challenge to 200-year colonial rule of the United States).

<sup>350</sup> Cottam 2006; also Steele 2018.

<sup>351</sup> Rosenberg 2012;

<sup>352</sup> Levene 1999.

Timor and Irian Jaya], through a series of State strategies characterized here as a ‘genocidal process,’ to their culmination, at some stage, in the actuality of genocide.”<sup>353</sup> The Rohingya<sup>354</sup> and the Indigenous Kachin peoples have been resisting ethnic cleansing by Myanmar for some 60 years.<sup>355</sup> The Indigenous peoples of West Papua New Guinea have also been struggling against Indonesian rule for six decades.<sup>356</sup> All have been described as “slow genocides”.<sup>357</sup> Slow genocide has also been suggested to describe the slow-moving persecutions of the Indigenous Banyamulenge in the DRC<sup>358</sup> and the Indigenous peoples of Darfur.<sup>359</sup> The Canadian Indian Residential Schools program has been characterized as intergenerational “slow genocide”.<sup>360</sup> The Indigenous peoples of the Omo Valley of Ethiopia have been described as enduring a slow genocide as a result of their removal from their lands and deprivation of water resources.<sup>361</sup> In response to the Genocide Convention’s limitation to pre-adoption offenses, an argument can be made that because “its effects are still palpable after it came into force, then it may be prosecutable.”<sup>362</sup> Francesca Albanese, the UN Special Rapporteur on the situation of human rights in the Palestinian territory concluded: “Settler-colonialism is a dynamic, structural process and a confluence of acts aimed at displacing and eliminating Indigenous groups, of which *genocidal extermination / annihilation* represents the peak.”<sup>363</sup>

The world has recently witnessed in real-time the genocide in Gaza <sup>364</sup> as the very tragic end result of over 100 years of Israel’s Zionist policies and colonial invasions and rule over Palestinian

peoples.<sup>365</sup> In March 2022, the Prosecutor of the International Criminal Court announced the opening of an investigation into the situation in Palestine.<sup>366</sup> In December 2022, the UN General Assembly requested an advisory opinion from the International Court of Justice on the legal consequences of Israel’s occupation of Palestinian territory.<sup>367</sup> On December 29, 2023, following Israel’s invasion of Gaza in response to the October 7, 2023 Hamas attacks in Israel, the Republic of South Africa instituted proceedings on behalf of the Palestinian people (“a distinct national, racial and ethnic group”) against the State of Israel, asserting breaches of the Genocide Convention.<sup>368</sup> On May 20, 2024, the ICC Prosecutor announced his request for arrest warrants for three Hamas leaders and for Israel’s

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<sup>353</sup> *Ibid.*, 363.

<sup>354</sup> Rohingya 2019, 8; Urahman 2022; Green 2015.

<sup>355</sup> Hogan 2018.

<sup>356</sup> Tatchell 2020.

<sup>357</sup> *Supra* notes 354-357.

<sup>358</sup> Ntanyoma 2022.

<sup>359</sup> ICG 2004.

<sup>360</sup> Kazan 2022.

<sup>361</sup> Human Rights Watch 2014.

<sup>362</sup> *Ibid.*

<sup>363</sup> Albanese 2024, 3 (citing Lemkin 1944 at 92 and Wakeman 2022) (emphasis by Albanese).

<sup>364</sup> UN Special Committee 2024; Albanese 2024; Amnesty International 2024; Human Rights Watch 2024.

<sup>365</sup> *Ibid.*; also, Kahalidi 2020; Cook 2010; Wolfe, 2006, 388-390, 393; Short 2016, 68-92.

<sup>366</sup> ICC Press Release, Prosecutor 2021.

<sup>367</sup> UNGA ICJ Request on Palestine.

<sup>368</sup> South Africa v. Israel, Application 2023, 1.

Prime Minister, Benjamin Netanyahu, and former Minister of Defense, Yoav Gallant, asserting a long list of “war crimes and crimes against humanity” committed in Gaza including use of starvation, murder, extermination, persecution, and other inhumane acts.<sup>369</sup> Then, on September 20, 2024, the UN Special Committee established to investigate Israeli conduct in the Occupied Territories issued its formal report finding serious concerns of breaches of international humanitarian and human rights laws, “including starvation as a weapon of war, the possibility of genocide in Gaza and an apartheid system in the West Bank...”<sup>370</sup>

Israel and its close allies, including the United States, which in complicity has been supplying Israel with the bombs and other weapons used in the destruction of Gaza,<sup>371</sup> have portrayed Israel’s action as defensive and permitted under the laws of war.<sup>372</sup> Their characterizations self-servingly ignore and avoid the context of Israel’s 100+ year colonial domination and destruction of Palestinian territories and peoples. The United Nations has been engaged in this conflict since 1947 when it recommended the partition of Palestine to create a Jewish State.<sup>373</sup> Since 1967, there have been 131 UN Security Council resolutions on the Arab-Israeli conflict, mostly condemning Israel’s colonial conduct.<sup>374</sup> South Africa’s application to the International Criminal Court asserts a slow genocide:

South Africa is also aware that acts of genocide inevitably form part of a continuum — as Raphaël Lemkin who coined the term ‘genocide’ himself recognised. For this reason it is important

to place the acts of genocide in the broader context of Israel’s conduct towards Palestinians during its 75-year-long apartheid, its 56-year-long belligerent occupation of Palestinian territory and its 16-year-long blockade of Gaza .... [W]hen referring in this Application to acts and omissions by Israel which are capable of amounting to other violations of international law, South Africa’s case is that those acts and omissions are genocidal in character, as they are committed with the requisite specific intent (*dolus specialis*) to destroy Palestinians in Gaza as a part of the broader Palestinian national, racial and ethnical group.

The application places Gaza within the context of the 1948 Nakba,<sup>375</sup> Israel’s occupations of the West Bank since 1967,<sup>376</sup> its institutionalization of apartheid through a “regime of discriminatory laws,<sup>377</sup> its routine persecutions of Palestinians,<sup>378</sup>

<sup>369</sup> CC Press Release, Prosecutor 2024.

<sup>370</sup> UN Special Committee on Palestine 2024.

<sup>371</sup> See *Donnelly v. Thompson* 2024 (claims against US officials for authorizing complicity in genocide).

<sup>372</sup> US State Dept. 2024; Executive Order of Feb. 6, 2025; Holligan 2024.

<sup>373</sup> List of UN Resolutions Concerning Palestine.

<sup>374</sup> *Ibid.*

<sup>375</sup> *South Africa v. Israel*, Application 2023, para. 22. A previous application in 2019 to the ICJ by Gambia against Myanmar regarding the Rohingya also argued that Myanmar’s genocidal conduct was part of a continuum beginning over 30 years ago and involving various criminal behavior and apartheid. *Gambia v. Myanmar* 2019.

<sup>376</sup> *Ibid.*, paras. 33-34.

<sup>377</sup> *Ibid.*, para. 35.

<sup>378</sup> *Ibid.*, para. 36-39.

and its devastation, war crimes, and genocide in Gaza.<sup>379</sup> The arguments of South Africa to the ICJ in January of 2024 put the crime of genocide in the Gaza Strip within the context of Israel's colonization of Palestine since 1948 as an "ongoing Nakba [ethnic cleansing] of the Palestinian people" which "inevitably form part of a continuum of illegal acts."<sup>380</sup>

Whether nations, ethnicities, religions, or races of peoples are destroyed quickly, slowly, physically, or through the loss of that which identifies and defines them by mass killing over time, by the extinguishment of their future generations, by the theft of their territories, lands, and natural resources, by the elimination of their sovereignties and governance, or by the extermination of their spiritualities and cultures, is irrelevant to the fact that they are still destroyed in whole or in part—and are thus victims of genocide. In Chinese culture, the power of Chinese law is expressed in *lingchi*, a death by a thousand cuts, as the most severe method of capital punishment.<sup>381</sup> This slow, incremental, destruction has been described as the "chipping" or "whittling" away of Indigenous identity.<sup>382</sup> As Sartre remarked: "Let us say that a choice must be made between a violent and immediate death and a slow death from mental and physical degradation. Or, if you prefer,

*there is no choice at all.*"<sup>383</sup> A slow genocide is still genocide.

#### IV. CONCLUSION - SEEKING AN EFFECTIVE REMEDY

Initially subjective, the breaches made in colonialism are the result of victory of the colonized over their old fear and over the atmosphere of despair distilled day after day by a colonialism that has incrustated itself with the prospect of enduring forever.

Franz Fanon, *A Dying Colonialism*<sup>384</sup>

By the very first article of the Genocide Convention, the signatory States commit to "undertake to prevent and to punish" crimes of genocide. The punishable conduct under Article 3 includes genocide, conspiracy, public incitement, attempt, and complicity. Article 4 lists the "persons" subject to punishment as including

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<sup>379</sup> *Ibid.*, paras. 18-19, 27-29, 40-107.

<sup>380</sup> *Ibid.*, Transcript of 11 Jan. 2024, 17. See also, Lindman 2010; Barghouti 2010.

<sup>381</sup> Brook 2008.

<sup>382</sup> See *discussion*, Rolnick 2011; Royster 1995); Otis 1973 (the 1887 Allotment Act broke up communal Indigenous land holdings into private ownership and reduced the lands in Native hands from some 150 million acres to 78 million by 1900. Much of the lands in private Native hands were then subsequently transferred to non-native owners.)

<sup>383</sup> Sartre 1968, 75 (emphasis by Sartre).

<sup>384</sup> Fanon 1959, 53 (emphasis in original).

“constitutionally responsible rulers, public officials or private individuals.” Notably, the Convention is limited to individual “persons” and does not expressly list nations, States, or corporations.

Convention Article 5 places the initial responsibility for enforcement upon the signatory States (“the Contracting Parties”) through domestic legislation giving effect to the provisions of the Convention and providing “effective penalties for persons guilty of genocide or any of the acts enumerated in Article 3.” Under Article 6, the persons charged are to be “tried by a competent tribunal of the State in the territory of which the act was committed.” Of the 153 countries that have ratified or acceded to the Genocide Convention, over 80 have implemented the Convention by enacting domestic laws criminalizing genocide.<sup>385</sup> In the United States, for example, the crime of genocide committed within the United States or by a national of the United States is punishable by death or life imprisonment and a fine of not more than \$1,000,000.<sup>386</sup> Guatemala is well known for having enforced its own penal code against its former president and high government officials for the genocide of Indigenous people.<sup>387</sup> The colonial States of Israel,<sup>388</sup> Australia,<sup>389</sup> Canada,<sup>390</sup> and Russia,<sup>391</sup> all accused of genocide, also have domestic laws penalizing genocide. Like the Genocide Convention, none of the domestic laws criminalize conduct by States, corporations, or organizations, just individuals.

## 1. Hiding Behind the Trees, the International Criminal Court

Under Article 6 of the Genocide Convention, if the relevant State fails to act, the persons charged can be tried by an “international penal tribunal,” having jurisdiction with respect to the signatory States that have accepted the Tribunal’s jurisdiction. Article 9 also provides that any signatory State may call upon the United Nations to take appropriate action to prevent or suppress the conduct criminalized under Article 3. In 1998, the UN General Assembly convened a diplomatic conference in Rome which finalized and adopted a convention known as the Rome Statute, establishing the International Criminal Court (ICC) as an independent tribunal to prosecute “individuals” (but not States, organizations, or corporations)<sup>392</sup> for genocide, crimes against humanity, war crimes, and crimes against aggression.<sup>393</sup> The ICC obtained jurisdiction over crimes that took place in a State party’s territory or were committed by a State party’s national and were referred to the Prosecutor by the UN Security Council, by a State party requesting an investigation, or *proprio*

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<sup>385</sup> Prevent Genocide International.

<sup>386</sup> 50A U.S.C. Sec. 1091.

<sup>387</sup> Artículo 376 of the Código Penal of Guatemala; Kemp 2014.

<sup>388</sup> The Crime of Genocide (Prevention and Punishment) Law, 5710-1950, 11th Nisan, 5709, 1950 (the law is not limited to Israeli nationals and gives Israeli courts jurisdiction for genocide committed outside Israel the same as that committed within Israel.)

<sup>389</sup> Genocide Convention Act, Act No. 27, 1949.

<sup>390</sup> Criminal Code – R.S.C., 1985, c. C-46 (Section 318.)

<sup>391</sup> Russian Federal Criminal Code, Article 357: Genocide.

*motu* (on the Prosecutor's own motion) after receiving information from States, organs of the UN, intergovernmental or non-governmental organizations, or other reliable sources.<sup>394</sup> The Treaty does not recognize any immunity nor have any statute of limitations,<sup>395</sup> but is limited to conduct that occurred *ratione temporis*, after the Treaty took effect.<sup>396</sup> The Rome Statute obtained enough State ratifications and accessions to come into effect on July 1, 2002. One hundred and twenty-five States are parties to the Statute with another twenty-nine having signed but not ratified the Treaty. Four signatory colonial States, Israel, the United States,<sup>397</sup> and Russia, who all have domestic laws against genocide, have formally withdrawn their signatures from the Rome Statute and the jurisdiction of the International Criminal Court.

With respect to genocide by colonization as discussed above in this commentary, the domestic and international criminal laws against genocide possess a number of fatal flaws, including: (1) failure to include the liability of States, nations, and governments as well as organizations and corporations that are collectively, politically, or institutionally responsible for acts of genocide; (2) failure to extend coverage retroactively to genocidal acts committed prior to the adoption of the respective genocide law; and (3) failure to provide for fully adequate and appropriate remedies to victims of prolonged colonial genocide.<sup>398</sup>

The domestic laws of genocide leave the victims under the fiction that the offending colonial power would bring genocide charges against its own current or former officials. While

the more powerful States remain in control of the tribunal, Indigenous nations and peoples are rendered beggars at the mercy of the State, the parties to the Genocide Convention in an international arena dominated by the same colonial powers guilty or having histories of genocide.

As a crime against "groups," against nations, ethnicities, religions, and races, genocide cannot be committed by "natural persons" acting alone. Individual prosecutions of "former" or even sitting government officials, regime leaders, militant groups, or warlords for genocide seldom result in convictions and, even when successful, provide no relief at all to the victimized group. As a true response to colonial genocide, the process established by the Genocide Convention<sup>399</sup> and Rome Statute to address this crime of crimes is, in its essence and effectiveness, impotent

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<sup>392</sup> Rome Statute, arts. 25 ("The Court shall have jurisdiction over *natural persons* pursuant to this Statute." (emphasis supplied)), 27, 28. *Compare* Bosnia and Herzegovina v. Serbia and Montenegro, Judgment, 26 Feb. 2007, paras. 162-171 (finding jurisdiction over the offending State under the ICTY); Gaeta 2007.

<sup>393</sup> Rome Statute, arts. 1 (complementary to domestic jurisdictions), 5 (crimes), 6 (genocide – defined in accordance with the Genocide Convention.)

<sup>394</sup> *Ibid.*, arts. 12, 13, 14, 15.

<sup>395</sup> *Ibid.*, art. 29.

<sup>396</sup> *Ibid.*, arts. 11, 24.

<sup>397</sup> Bolton 2002. Most recently, US President Donald Trump issued an "emergency" executive order accusing the ICC of engaging in "illegitimate and baseless actions targeting America and our close ally Israel" and imposed sanctions on the Court and its officials and staff, including family members. EO of Feb. 6, 2025. In response, 79 States defended the ICC Gaza actions by condemning the US sanctions. Joint Statement 2025.

<sup>398</sup> For reparations for injuries suffered by Indigenous peoples from colonialism, see Lenzerini 2008.

<sup>399</sup> International Criminal Court, Cases; International Criminal Court, Wikipedia (this website charts the process and results of all ICC investigations and prosecutions.)

and meaningless. Of the sixty-six investigations conducted by the ICC, only twenty-nine individuals, mostly from Africa, have been indicted and just eleven convicted who received sentences from fines to thirty years (the greatest imprisonment to date)—with no reparations to any victimized group<sup>400</sup>. Despite all of the past and ongoing colonial genocides, not even *one* of the ICC investigations or indictments has resulted in a conviction of any current or former government official or ruler.<sup>401</sup> Those same criminal States and governments that largely wrote the laws on genocide imbued within them a shield against their own criminal liability by limiting the scope of the genocide criminal laws to individuals and by depriving the victims of an appropriate or adequate remedy. Genocide Convention Article 5 places “responsibility” of enforcement upon the signatory States while providing no responsibility upon any State for the crime itself.<sup>402</sup> Disingenuously, State responsibility under the Convention does not include State accountability or liability.<sup>403</sup> In finding a remedy to genocide, the loss of organic groups such as nations and peoples within the arbitrary territories and artificial identities and standing of States, and to the individual scapegoats of collective State accountability, is what James Scott in *Seeing Like a State* has analogized to hiding sight of the forest while managing the individual trees.<sup>404</sup>

## 2. The International Court of (In) Justice

While the International Criminal Court was established as a criminal tribunal independent

of the United Nations, Article 7 and Chapter XIV of the 1945 Charter of the United Nations established a judicial body, the International Court of Justice (ICJ), to hear and settle disputes between UN Member States. The ICJ is the successor to the Permanent Court of International Justice established in 1920 after the First World War under Article 14 of the Covenant of the League of Nations (the Treaty of Versailles) and the Statute of the Permanent Court of International Justice (PCIJ).<sup>405</sup> The PCIJ had jurisdiction over all cases referred by the parties, where provided for in treaties or conventions, and when needed, to decide issues of international law and obligations.<sup>406</sup> Only States or members of the League could be parties in cases before the PCIJ.<sup>407</sup> Like the United “Nations”, the League of “Nations” was a misnomer as only “States” could

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<sup>400</sup> *Ibid.*

<sup>401</sup> *Ibid.* This is distinguished from the special tribunals, such as those following World War II, Rwanda, and the Balkans War, established to hear war crimes and crimes against humanity through which a few former government officials, but not States, nations, or regimes, were convicted of crimes. The one notable exception would be the questionable dicta in *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, 26 Feb. 2007, paras. 162-171 (finding jurisdiction over the offending State under the ICTY); Gaeta 2007.

<sup>402</sup> Gaeta 2007.

<sup>403</sup> *Ibid.*

<sup>404</sup> Scott 2020, 11-22. Also, Watson 2015, 96.

<sup>405</sup> Covenant of the League of Nations; Statute of the Permanent Court. An international court had been proposed since at least 1305 by Pierre Dubois and 1623 by Émeric Crucé. Hudson 1922, 245. The PCIJ was preceded by the Permanent Court of Arbitration established by the 1899 Hague Convention for the Pacific Settlement of International Disputes.

<sup>406</sup> Statute of the Permanent Court, arts. 36 and 37.

<sup>407</sup> *Ibid.*, art. 34.

be members.<sup>408</sup> There is nothing “national” in the composition of these inter-“national” bodies. The State-only membership and jurisdiction provisions of the PCIJ were carried over to the International Court of Justice.<sup>409</sup> The ICJ can also issue advisory opinions on any legal question referred to it by a State or the UN itself.<sup>410</sup> The rulings of the ICJ are binding only on the parties before it<sup>411</sup> and are not appealable.<sup>412</sup> By UN Charter Article 94, “[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.” If a party failed to perform its obligations under an ICJ judgment, the other party could seek recourse to the UN’s Security Council to take measures to give effect to the judgment.<sup>413</sup>

Under UN Charter Article 93(1), all UN Member States are automatically parties to the Court’s Statute. Article 93(2) does allow the UN General Assembly to permit non-UN Members to be parties in a case before the ICJ, but it is still limited to non-UN Member “States”. Non-State groups like those listed for protection in the Genocide Convention, including nations and peoples, lack standing under the UN Charter to be parties in any matter involving genocide, colonial rule, and their own survival. While the ICJ may bring before it a State party liable for a collective offense under the Genocide Convention, nations, ethnicities and members of religions and races have to find a “responsible” UN Member State willing to step forward to enforce the Convention against another member State.

Since its establishment in 1945, the ICJ has entertained almost 200 cases. Six have pursued

allegations of genocide under Article VIII of the Genocide Convention: Bosnia and Herzegovina v. Serbia and Montenegro (1993 / 2007); Croatia v. Serbia (1999 / 2015); Democratic Republic of the Congo v. Rwanda (2002); Gambia (Rohingya) v. Myanmar (2019) (pending); Ukraine v. Russian Federation (2022) (pending); South Africa (Palestine/Gaza) v. Israel (2023) (pending).<sup>414</sup> Only two, Gambia (Rohingya) v. Myanmar and South Africa (Palestine/Gaza) v. Israel, were brought by States, on behalf of Indigenous peoples, complying with their Article 1 obligation under the Genocide Convention to prevent acts of genocide anywhere. Both cases are very recent and are still pending before the ICJ.<sup>415</sup> Only one, the most recent action merely requesting an *advisory opinion*, South Africa (Palestine/Gaza) v. Israel, alleged the destruction of a nation, ethnicity, religion, and race by colonial genocide.<sup>416</sup> The statutory structure of the ICJ suffers from the same inherent failings as the ICC. While in contrast to the ICC, the ICJ does

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<sup>408</sup> Covenant of the League of Nations, art. 1. Article 1, paragraph 2 of the Covenant, in contrast to the UN Charter, did allow “[a]ny fully self-governing State, Dominion or Colony” to become a member if approved by two-thirds of the Assembly. However, of the 63 members of the League, none of them appear to be a non-State dominion (a nation), or a colony. See, “The Green Papers Worldwide: Roster of the League of Nations[1920 thru 1946], Notably the colonial “empires” of Great Britain and Japan were members.

<sup>409</sup> Statute of the ICJ, arts. 34(1) (parties), 35(1) (parties), 36 (jurisdiction), 37 (treaty jurisdiction)

<sup>410</sup> *Ibid.*, chap. IV.

<sup>411</sup> *Ibid.*, art. 59.

<sup>412</sup> *Ibid.*, art. 60.

<sup>413</sup> UN Charter, art. 94(2).

<sup>414</sup> International Court of Justice, Cases.

<sup>415</sup> *Ibid.*, Gambia v. Myanmar 2019 and South Africa v. Israel 2023.

<sup>416</sup> *Ibid.*, South Africa v. Israel 2023.

cover States as collective offenders, it omits non-state collective offenders such as nations, militias, organizations, and corporations. The ICJ is further limited to States as party petitioners as well, depriving victimized nations and peoples of standing to bring claims against genocidal States. The omission of the victims of genocide as parties to a matter before the ICC may work to limit the remedies the Court awards, even though it is provided broad authority under Article 36(2) (d) of its Statute. Finally, like the ICC, the ICJ is not retroactive and therefore does not cover acts committed by a State before that State's accession to, or ratification of, the UN Charter. While the States of the world assigned the ICJ with the task of remedying international disputes and bringing a sense of "justice" to the world, it has instead provided false hope and failed colonized nations and Indigenous peoples as a high court of injustice.

### 3. Inherent Judicial Bias Against Fourth World Nations

The International Court of Justice and the International Criminal Court have come under severe criticism and have been accused of bias and as tools of Western imperialism, only punishing small, weak, largely African States and their leaders while ignoring crimes committed by richer and more powerful Western States.<sup>417</sup> The judges for the ICJ are elected by the UN General Assembly and the UN Security Council from a list provided by the Permanent Court of Arbitration.<sup>418</sup> Those for the ICC are nominated and elected by the State parties to the Rome Statute.<sup>419</sup> None of the 6-9,000 nations or some 24,000 ethnicities (peoples) of the world intended

to be protected from genocide have any role in the selection of the judges that will investigate, sit on, and decide on the matters of survival involving them. Several studies of the decisions from these tribunals have shown that the direct and indirect control by the member States of the UN over the selection of judges has resulted in an inherent Western-Euro cultural, linguistic, political, and economic bias.<sup>420</sup>

### 4. Fulfilling a Mission, Reforming the Law and the Courts

Given the 500+ years of resistance of Indigenous peoples to imperial invasions and colonial domination, the hundreds if not thousands of well-documented instances of colonial genocide continuing to this day, the 80-year global condemnation of colonialism and racism in all their forms and manifestations, the 80-year existence of the International Court of Justice, the 75-years that have passed since the promulgation of the Genocide Convention by the UN General Assembly, the long-settled international law that outside of any international treaty colonialism, racism, and genocide are prohibited as violations of *jus cogens* norms and the collective fundamental rights of all

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<sup>417</sup> Brett 2020; Vihinen 2023; McDonald 2019.

<sup>418</sup> Statute of the International Court of Justice, art. 4.

<sup>419</sup> Statute of the International Criminal Court, art. 36.

<sup>420</sup> Posner 2004; Ma 2017; Hernández 2012

nations and peoples—and given the mandatory *erga omnes* obligations<sup>421</sup> and the declarations of State responsibility / obligations contained in customary international law and in every international instrument regarding the rights of nations and peoples, colonialism, racism, crimes against nature, and genocide—the near complete and abject failure of the member States of the UN, of these international tribunals, and of the United Nations itself, to come to the aid of Indigenous nations and peoples under the unrelenting thumb of slow genocide is wholly immoral and inexcusable. In the shadow of Srebrenica and Rwanda, Adam Lebor characterized this systemic UN failure of “command responsibility” in the face of genocide as “complicity with evil”.<sup>422</sup>

The failures of the ICC and the ICJ to provide or share control over the remedial process with the specific victimized groups identified in the Genocide Convention can be fairly easily corrected through simple limited amendments to their Statutes fulfilling the purpose of the Convention to protect these groups from the crime of crimes. Other international human rights tribunals, such as the Inter-American Commission on Human Rights, provide direct access to victims, including nations and groups.<sup>423</sup> For example, the Commission recently admitted claims by the Onondaga Nation challenging the United States’ continuing colonial domination involving the loss of the Nation’s territory and lands.<sup>424</sup> Many other collective human rights actions have been brought and resolved in those tribunals by nations, peoples, and Indigenous groups against the States of the Americas.<sup>425</sup> Upon referral by the Commission, non-State parties

may also appear before the Inter-American Court of Human Rights in actions against states.<sup>426</sup>

Article 14 of the Rome Statute for the ICC could be amended to allow for prosecution investigation referrals from a State *or Nation* Party, or a Genocide Convention Article 2 group. Similarly, Articles 34(1) and 35(1) of the Statute of the International Court of Justice can be amended to provide that “*States, nations, and peoples*” may be parties and appear in cases before the Court.

The collective liability of States and other collective entities can be addressed through the amendment of Article 25 of the Rome Statute by merely deleting references to “individual” liability and “natural” persons and adding a definition of “persons” as including collective entities such as States, nations, groups, organizations, and corporations. After all, the fathers of modern international law analogized from the rights and obligations of natural persons to develop the Law of Nations.<sup>427</sup> The law of the United States on the rights of persons, for example, recognizes corporations, including public corporations such as municipalities, as “persons.”<sup>428</sup> The

<sup>421</sup> Chow 2021.

<sup>422</sup> Lebor 2006, x, chap. IX (quoting from Brahimi Report, ix.).

<sup>423</sup> See, e.g., Inter-American Commission on Human Rights, Rules and Procedures, art. 23.

<sup>424</sup> Onondaga Nation v. United States 2023.

<sup>425</sup> See generally, Inter-American Commission on Human Rights, Cases, Merits.

<sup>426</sup> American Convention on Human Rights, art. 61; see, e.g., Case of the Saramaka People v. Suriname 2007, Merits Decision, Inter-American Court on Human Rights, Ser. C, No. 185, IHRL 3058 (12 August 2008); Anaya 2002.

<sup>427</sup> Dickinson 1917.

<sup>428</sup> See, e.g., Citizens United v. F.E.C. 2010; Monell v. Dept. of Soc. Servs. of the City of New York 1978.

addition of collective liability would correspond to Article 27's dispensing of the official capacity defense and would extend to collective entities as persons having indirect liability of commanders and supervisors found in Article 28. Certainly, the ultimate commander or supervisor of a public official is the government itself. As for the International Court of Justice, the inclusion of "nations and peoples" within the definition of parties found in Articles 34(1) and 35(1) would extend the jurisdiction of the Court beyond States to nations and peoples under Article 36(1) of the Court's Statute. On the real and perceived bias of judges, that issue could be addressed, at least in part, simply by amending ICC Article 36(4) and ICJ Article 4 to include the victimized nations, peoples, and groups in the selection of jurists.

Regarding the non-retroactivity of the ICC<sup>429</sup> and ICJ, *ratione temporis*, the crimes against humanity including the crime of genocide were not created by the Genocide Convention and the other treaties of the 20th century. As previously noted, they have existed for hundreds of years as fundamental (inalienable) rights and *jus cogens* norms of customary international law not needing any positive law or treaty to be enforceable.<sup>430</sup> They are the "inalienable"<sup>431</sup> and "unenumerated"<sup>432</sup> rights referred to in the US Declaration of Independence and Constitution and the Universal Declaration of Human Rights. Crimes against humanity were also part of both the common and positive law (the Law of Nations) during the growth of empires, colonialism, and the birth of slow genocide. One of the founders of international law, Emer de Vattel, who was known to US Supreme Court

Chief Justice John Marshall when he concocted the current colonial law of Indigenous peoples, opined on this in his seminal treatise of 1758, the Law of Nations. Vattel recited the natural law on the equality of nations:

Nations ...are naturally equal, and *inherent from nature* the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much as a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.<sup>433</sup>

Many of the treaties between European nations and Indigenous nations were known as "treaties of protection." They did not establish a colonial relationship or authorize colonial rule. On this, Vattel posits that a simple treaty of protection "does not at all derogate from [a nation's] sovereignty" and that if the more powerful nation "does not effectually protect the other in case of need, ...it loses all the rights it had acquired ... and the other ...re-enters into the possession of all its rights, and recovers its independence, or its liberty."<sup>434</sup> He declared that no nation was entitled to impose their culture or religion upon another<sup>435</sup> and that "[n]o nation therefore

<sup>429</sup> Rome Statute, arts. 11 and 24.

<sup>430</sup> See also, Gaeta 2007, 642.

<sup>431</sup> United States Declaration of Independence, para. 2.

<sup>432</sup> United States Constitution, amend. IX; Black 1997.

<sup>433</sup> Vattel 1758, 75, also 281.

<sup>434</sup> *Ibid.*, 207.

<sup>435</sup> *Ibid.*, 265 (referring to the "ambitious Europeans who attacked the American nations, and subjected them to their greedy dominion, in order, as they pretended, to civilize the, and cause them to be instructed in the true religion – those usurpers, I say, grounded themselves on a pretext equally unjust and ridiculous.")

ought to commit any actions tending to impair the perfection of other nations, and that of their condition, or to impede their progress ....”<sup>436</sup>

Vattel also recited the Law of Nations governing occupation pursuant to unjust wars:

Whoever therefore takes up arms without a lawful cause, can absolutely have no right whatever .... He is chargeable with all the evils ...he is guilty of a crime against mankind in general. ...He who does an injury is bound to repair the damage, or to make adequate satisfaction if the evil be irreparable, and even to submit to punishment ....The nation in her aggregate capacity, and each individual particularly concerned, being convinced of the injustice of their possession, are bound to relinquish it, and to restore every thing which they have wrongfully acquired.<sup>437</sup>

On State responsibility, Vattel remarked: “Every nation ought, on occasion, to labour for the preservation of others, and for securing them from ruin and destruction, as far as it can do this ....”<sup>438</sup> Thus, there is a historical basis for the retroactive extension of the jurisdictions of the ICC and the ICJ over offenses of colonial and successor colonial States that were unlawful under the Law of Nations as it existed at the time. Since a State’s benefits, its wealth, that were unlawfully obtained through acts of genocide continues and multiplies over time, equity demands that State liability also not be restricted by time, but extend back to the initiation of the crime and cover all spoils of its wrongful conduct. Providing a temporal excuse or immunity to a genocide offender is contrary to the equity and

remedial purpose of the Genocide Convention and principles against impunity for serious violations of international criminal law.<sup>439</sup>

Even if States cannot be held accountable for genocides that occurred prior to the Genocide Convention, colonial genocide is institutionalized and occurs over time which, if initiated prior to the effective date of the instrument, flows through that date. It is a “continuing” offense which extends in substance or effect past the effective date of the Convention or relevant treaty.<sup>440</sup> For example, the destruction of a nation through the theft of its territory, lands, and resources by a colonial State is a continuing crime that extends until it is returned, with restitution and reparations for lost income and the destruction of the nation’s economy. In the case of Mary and Carrie Dann against the United States, for example, the Inter-American Commission on Human Rights took up this issue and held that taking of their nation’s (Western Shoshone) land and territory in 1872 were continuing offenses that extended past the 1951 ratification of the treaty that made the United States subject the laws of the tribunal.<sup>441</sup> The destruction of an ethnicity or religion by the theft of an Indigenous peoples’ children through adoptions or boarding schools is transgenerational, as is the sterilization of Indigenous women and colonially imposed

<sup>436</sup> *Ibid.*, 271.

<sup>437</sup> *Ibid.*, 586-87, 593-94, 603-07.

<sup>438</sup> *Ibid.*, 262. On state responsibility *see* Bastaki 2024.

<sup>439</sup> *See* Ahmed and Quayle 2009.

<sup>440</sup> Nissel 2004; St. Charles 2020.

<sup>441</sup> *Dann v. United States* 2002, paras. 2, 3, 39-42, 166-67.

poverty with the resultant loss or shortness of life. In another case before the Inter-American Commission, the tribunal held that pre-treaty contaminations by the US military of a Puerto Rican island were continuing human rights violations that provided the tribunal with present jurisdiction *ratione temporis*.<sup>442</sup> These and the other trappings of colonial domination and slow genocide continued, and still continue, long past the UN General Assembly's adoption of the Genocide Convention or its creation of the international courts empowered to hear such crimes of survival. As long as colonial domination exists, the claims of Indigenous peoples against their colonizers, including claims of slow genocide, remain alive.

## **B. ON FINDING AN EFFECTIVE AND ADEQUATE REMEDY**

### **Hiding the Remedial Ball**

The States of the world collected in the General Assembly of the United Nations have had over seventy-five years to provide real protections and effective remedies from slow genocide to colonized nations and peoples—and have wholly failed to do so. Modern international law and institutions, including the United Nations and its organs, are the creation and domain of “States” to the detriment of nations and peoples. States and their institutions are artificial, political, self-empowered, creations subject to the “positive” laws they themselves devise. In contrast, nations and peoples, particularly Indigenous nations and peoples, are organic and subject to natural law. Under Article 1 of its 1920 Convention, membership in the League of Nations was open

to “[a]ny fully self-governing State, Dominion or Colony.” Subsequently, while pompously declaring the “equality” of all nations and peoples, large and small,<sup>443</sup> the largely Western colonial powers that drafted the UN Charter expressly revised the League's membership to exclude all nations and peoples.<sup>444</sup> In so doing and making its membership exclusive to States, the Charter itself relegated all nations and peoples to an *unequal* status under the Charter and under the international laws and bodies its “General Assembly” of States would go on to promulgate and create, including the ICC and the ICJ. It has rot at its core. This is compounded by the domination and control colonial and genocidal States have exercised over the UN and its laws since its founding. Genocide scholar Adam Jones noted the UN's “abysmal record in confronting and forestalling genocide” and concluded that, because of concessions made to placate the United States, the International Criminal Court might become “just another toothless legal body.”<sup>445</sup> Daniel Goldhagen observed that vetoes by the Soviet Union (now Russia), China, and the United States have “eviscerated” the Genocide Convention so it could not stop their own and their client States' elimination practices.<sup>446</sup> The ineffectiveness of the United Nations was a “foregone conclusion”.<sup>447</sup>

<sup>442</sup> Torres v. United States 2022, paras. 2-21, 46.

<sup>443</sup> UN Charter, Preamble para.1, art. I(2).

<sup>444</sup> UN Charter, arts. 3 and 4 (UN membership limited to “States”).

<sup>445</sup> Jones 2024, 394, 375.

<sup>446</sup> Goldhagen 2009, 536.

<sup>447</sup> *Ibid.*

For virtually all its history, the UN membership has been overwhelmingly dictatorships. As recently as 1987, 60 percent of the member countries were dictatorships .... Dictatorships dominated the General Assembly. ...Throughout its history, the United Nations culture and bureaucracy has been greatly comprised of representatives of regimes wanting most of all a free hand to maintain their illegitimate rule ....<sup>448</sup>

After analyzing the political nature of the State and the occurrences of genocides since 1900, Rudolph Rummel contended that the more authoritarian a State, the more likely it is to commit genocide.<sup>449</sup> “It is empirical that true Power kills, absolute Power kills absolutely.”<sup>450</sup> In response to Rummel, sociologist Michael Mann noted that there is a “dark side” to democracy as well.<sup>451</sup> Mann posits that democracies are based on an ideology of equality which moves towards the dominant ethnic group in the creation of mono-ethnic populations, an evitable ethnic cleansing through assimilation.<sup>452</sup> The States that dominate the UN cannot be expected to turn upon themselves in the eradication of colonial rule and genocide.

This internal corruption is repeated in the laws emanating from the UN that are meant to abolish colonialism and State racism “wherever found.” The primary anti-colonial declaration is the UN General Assembly’s 1960 Resolution 1514 which condemns colonialism in “all its forms and manifestations” as “a denial of fundamental human rights” and contrary to the UN Charter. The Resolution calls for the end of all “repressive

measures of all kinds directed against dependent peoples,” for the “respect” of the rights of dependent peoples “to complete independence, and the integrity of their national territory,” and for immediate transfer of “all powers to the peoples” of colonized territories “without any conditions or reservation.”<sup>453</sup>

To this grand resolution, the colonial powers inserted a qualifier that provides: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”<sup>454</sup> The provision purportedly prohibiting decolonization when it would “dismember or impair” the territorial integrity of a colonial State was repeated in subsequent UN decolonization resolutions.<sup>455</sup> This became known as the “Blue Water” or “Salt Water” thesis concocted by colonial States as a geographical excuse from their *erga omnes*, statutory, and legal decolonization obligations as to any nation or peoples found within their claimed colonial boundaries.<sup>456</sup> Even in the seminal 2007 UN Declaration on the Rights of Indigenous Peoples after proclaiming that “indigenous peoples are

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<sup>448</sup> *Ibid.*, 536-537.

<sup>449</sup> Rummel 1998.

<sup>450</sup> *Ibid.*

<sup>451</sup> Mann 2005.

<sup>452</sup> *Ibid.*

<sup>453</sup> UNGA Res. 1514, Preamble, Declarations 1, 4, 5.

<sup>454</sup> *Ibid.*, Declaration 6.

<sup>455</sup> See UNGA Res. 2625, 124.

<sup>456</sup> Robbins 2015; Lightfoot 2020; Wolfe 2008, 122.

equal to all other peoples,” the colonial powers insisted again on inserting an out in Article 46 to protect and continue their domination over Indigenous nations and peoples: “Nothing in this Declaration may be interpreted as ... authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.” This self-serving contention has no basis in law, history, or fact. As Professor Moses remarked: “Nothing I have said about settler colonialism requires there to be a spatial hiatus (or ‘blue water’) between metropole and colony.”<sup>457</sup>

This colonial thesis directly contradicts the UN Charter’s and the Law of Nations’ fundamental principle of the equality of nations and peoples. It ingenuously distorts the fact that *it is the colonial powers and their successors, by definition, who are the invaders and violators of the territorial integrity of the pre-existing nations and peoples*, not the other way around. It is self-serving political doublespeak. Yet, despite that, the political reality is that the colonial States and their successors continue to control the process and the institutions of international law and perpetuate their colonial rule over and exploitation of Indigenous nations and peoples.

## 2. Inventing an Effective Remedy for the Crime of Crimes

Following the Holocaust of the Second World War and the deficiencies in the law Lemkin identified during the Nuremberg trials, he out of necessity invented the “new” international crime of genocide. It has yet to develop into the global

remedy Lemkin intended. Genocides continue largely unabated and states while in control of the rules and the process routinely avoid punishment and accountability. Many States, particularly the ones with colonial character or histories, when they sign on to the Genocide Convention do so with “reservations” that effectively render their acceptance at least in part a nullity.<sup>458</sup> The UN as a force against genocide is an institutional and systemic failure.<sup>459</sup> The high-level panel of experts convened by the UN concluded on the UN’s response to the genocides in Srebrenica and Rwanda: The impartiality of the UN in the face of genocide “can in the best case result in ineffectiveness and in the worst may amount to complicity with evil.”<sup>460</sup> For Indigenous nations and peoples, colonial domination and slow genocide in the plain view of the UN and the world is a daily and intergenerational reality.

An effective remedy to colonialism and genocide cannot be expected from an institution that is controlled by or is complicit with the offenders. Lemkin invented the crime but failed to incorporate an appropriate and effective remedy. The denial of an effective remedy is itself a human rights violation.<sup>461</sup> *Ubi ius ibi remedium*—“where there is a right, there is a remedy” is a basic

<sup>457</sup> Wolfe 2008, 122.

<sup>458</sup> See Declarations and Reservations to the Genocide Convention; Schabas 2000, 521-538; ICJ Advisory Opinion 1951.

<sup>459</sup> Goldhagen 2009, 534-538.

<sup>460</sup> Brahimi Report, ix. See also Goldhagen 2009, 535 (do-nothing practice of the UN).

<sup>461</sup> See e.g., Dann v. United States 2002, paras. 67-75, 173; Onondaga Nation v. United States 2023, paras. 46-49.

principle of international law.<sup>462</sup> Understanding this, the Center for World Indigenous Studies (CWIS), a leading Indigenous peoples' think tank led by the late Cree / Oneida scholar Rudolph C. Rýser, Ph.D., in collaboration with the Ezidi Nation and in consultation with other Fourth World Nations and several States' governments, facilitated the development of an independent criminal tribunal controlled by nations rather than States, the Nations International Criminal Tribunal (NICT).<sup>463</sup> According to Dr. Rýser: "The Nations International Criminal Tribunal is founded on the idea that indigenous peoples should take responsibility for legally and politically holding accountable States, other entities created by States and individuals for crimes of genocide, crimes against humanity, aggression, and all the other gravest crimes committed against indigenous nations and communities, including the crimes of culturecide and ecocide."<sup>464</sup>

The NICT Preamble recognized that:

the international agreements and treaties between States' governments and other legal instruments adopted to protect against and punish crimes carried out against peoples have failed to provide the Nations of the world with due process, redress, or remedy for criminal acts either by denying Nations' access to justice, denial of due process by granting immunity to officials and citizens of States or by politicizing judicial systems ...,<sup>465</sup>

and affirmed that:

it is the duty of all Nations and States to

exercise lawful jurisdiction over States or Nations, persons, business organizations, government and non-government organizations, intergovernmental organizations, armed groups, and other entities responsible for internationally recognized crimes ....<sup>466</sup>

The NICT was established as a tribunal fully independent and complementary to the existing international and domestic tribunals that hear crimes of genocide and other crimes against humanity.<sup>467</sup> There is precedence for this in that the International Criminal Court was established by treaty as an independent tribunal separate from the United Nations.<sup>468</sup> In the aftermath of genocides and other atrocity crimes of the 20th century, other *ad hoc* or temporary international criminal tribunals have been created by the UN to investigate and prosecute the perpetrators of genocide and other crimes against humanity. In 1993, following the Balkan War, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia,<sup>469</sup> and, the next year after the genocide in Rwanda, established the International Criminal Tribunal

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<sup>462</sup> See Greve 2017; also, Chorzów Factory, 20 ("[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.").

<sup>463</sup> Rýser 2024; Rýser 2023.

<sup>464</sup> Rýser 2024.

<sup>465</sup> NICT, Preamble, para. 3.

<sup>466</sup> *Ibid.*, para. 9.

<sup>467</sup> *Ibid.*, art. 4.

<sup>468</sup> Rome Statute, generally.

<sup>469</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, 1 (history of the ICTY).

for Rwanda.<sup>470</sup> In 2010, the UN established a stand-alone body, the International Residual Mechanism for Criminal Tribunals,<sup>471</sup> to carry out the functions of the Yugoslavia and Rwanda Tribunals and any future such international criminal tribunals. The UN Security Council also established two criminal tribunals by agreement with Sierra Leone, the Special Court for Sierra Leone (now the Residual Special Court for Sierra Leone) in 2002 following the Sierra Leone Civil War<sup>472</sup> and, by agreement with Cambodia, the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2003 following the Cambodian genocide as a hybrid tribunal.<sup>473</sup> However, these criminal tribunals were structured after the ICC and, like the ICC, were limited to the prosecution of individual offenders. An independent internationalized war crimes court has also been proposed for the conflict between Ukraine and Russia.<sup>474</sup>

Particularly relevant to this discussion are the initial prosecutions of the ECCC for the genocide of an Indigenous group in Cambodia, the Cham, who were systemically killed (some 36% died), removed from their territory, and prohibited from practicing their culture or Islamic religion under the policy of the Khmer Rouge government.<sup>475</sup> Eight persons were charged and three convicted by the ECCC of genocide and crimes against humanity.<sup>476</sup> The “hybrid” structure of the ECCC Tribunal is highly significant as a method that could be used to remedy some of the problems inherent in the ICC and other international tribunals hearing matters involving Indigenous nations and peoples. Article 3 of the ECCC Agreement provided for the Trial Chambers to

be composed of three Cambodian judges and two international judges, and the appellate Chamber to be composed of four Cambodian judges and three international judges.<sup>477</sup> The investigating judges and the prosecutors were composed of one Cambodian and one international person under the Agreement.<sup>478</sup>

The crimes within the jurisdiction of the NICT are set forth in Article 8 of the Treaty and include the crimes of colonization, aggression, genocide, against humanity, war, against nature, terrorism, gender-based violence and femicide, forced removal of children, apartheid, and military occupation.<sup>479</sup> The Treaty provides that there is no statute of limitations and that jurisdiction *ratione temporis* is to be determined according to the customary international law of the parties.<sup>480</sup> The NICT also provides for the application of the customary laws of nations and peoples in addition to State international law.<sup>481</sup> On the selection of

<sup>470</sup> See Greve 2017; also, Chorzów Factory, 20 (“[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”).

<sup>471</sup> UNGA Resolution 1966.

<sup>472</sup> Agreement Between the UN and Sierra Leone 2002.

<sup>473</sup> Agreement Between the UN and Cambodia 2003.

<sup>474</sup> Case Western Reserve Univ. 2023. *Also*, Glusman 2024.

<sup>475</sup> ECCC, Closing Order, paras. 745-770, 1336-1342.

<sup>476</sup> ECCC, cases; ECCC, Closing Order.

<sup>477</sup> Agreement Between the UN and Cambodia 2003, art. 3(2).

<sup>478</sup> *Ibid.*, arts. 5 and 6.

<sup>479</sup> NICT, sec. 2.

<sup>480</sup> *Ibid.*, arts. 14 and 15, 47. Jurisdiction is not set by the date of a party’s ratification or accession to the Treaty but by whether or not the act was recognized internationally as a crime at the time it was committed.

<sup>481</sup> *Ibid.*, art. 25.

members and tribunal judges, the Treaty includes signatory States and nations as equals in this process thereby minimizing Western judicial bias.<sup>482</sup> The NICT is structured to engage, honor, and address Indigenous realities.<sup>483</sup> Finally, in contrast to the ICC and ICJ, the Treaty provides for appropriate open-ended relief in addition to penal remedies. Under Article 69, the goal of the sentence is full “reparations” to victims “in accordance with the principles set out in this Charter and relevant international legal instruments.” For example, particularly regarding a State, corporate, or organizational offender, the sentence could include any of those restorative justice remedies set forth in the UN Guidelines on Reparations.<sup>484</sup>

“Restorative Justice” which seeks harmony in response to social conflict and injury, is at the core of Indigenous conflict resolution. This contrasts with the punitive nature of Christian retributive justice.<sup>485</sup> In the international law of restorative justice:

The essential principle ... is that reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. [It must consist of r] estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.”<sup>486</sup>

This full-reparations rule has been followed by the ICJ in issuing relief against a State in several cases. It held that Uganda had an obligation to

make full reparations to the Democratic Republic of the Congo (DRC) after it had invaded and occupied part of the DRC.<sup>487</sup> In a dispute between Hungary and Slovakia over the Gabčíkovo-Nagymaros Project, the ICJ ruled that both nations were at fault and ordered compensation by each.<sup>488</sup>

In December 2005, the United Nations General Assembly adopted a resolution establishing “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.”<sup>489</sup> The UN Guidelines set forth a structure and a process for providing a remedy for victims of ethnic cleansing and genocide as well as other gross human rights violations that could apply here. Although directed at immediate victims,<sup>490</sup> it does provide for “collective” remedies. To the extent that the violations are continuing through generations, it may address the slow genocide of Indigenous peoples. Section IX sets forth the scope and requirements for reparations. It requires “proportionality” to the gravity of the violations

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<sup>482</sup> *Ibid.*, sec. 3.

<sup>483</sup> Regarding Indigenous realities, *see* Woolford 2011, 74-75.

<sup>484</sup> UN Basic Principles and Guidelines, *generally*.

<sup>485</sup> *See e.g.*, Yazzie 1994; Austin 2009.

<sup>486</sup> Chorzów Factory, 47; Vattel 1758, Bk II, secs.51, 141, 338; Bk III, chap. XIV (the right of postliminium). *See also*, ILO 169, art. 16.

<sup>487</sup> Dem. Rep. Congo v. Uganda 2005.

<sup>488</sup> Gabčíkovo-Nagymaros Project.

<sup>489</sup> *See* UN Basic Principles and Guidelines.

<sup>490</sup> *Id.* at sec. V.

and harm suffered, the establishment of programs for reparation, restitution whenever possible (including the right of return and the return of property wrongfully taken), and compensation for physical or mental harm and “moral damage,” among other actions.<sup>491</sup> It requires “full and public disclosure of the truth,” an official declaration restoring the dignity, the reputation, and the rights of the victims as well as persons closely connected with the victims, “a public apology, including acknowledgement of the facts and acceptance of responsibility,” commemorations and tributes to the victims, and inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.<sup>492</sup> The nature and scope of appropriate reparations should be determined by the victims and not by the violator of rights.<sup>493</sup>

Many genocide scholars have opined on how to go about ending genocide. Most seem to rely on continuing to hold individuals criminally accountable<sup>494</sup> even though this has proven to be wholly ineffective in stemming future genocides. Prosecuting individuals for genocide has no more effect on future genocides than the death penalty has on dissuading individuals from committing homicide.<sup>495</sup> Daniel Goldhagen argued for the need of a “powerful anti-eliminationist discourse” among not only political entities but also the media and ordinary citizens, a consciousness raising that would fully inform and mobilize a quick response to the early stages of genocide.<sup>496</sup> Adam Jones and others have suggested looking out for “early warning signs” and then engaging in humanitarian interventions to stop genocide

before it begins.<sup>497</sup> Israel Charny proposed the establishment of a standing “International Peace Army” as an arm of the UN ready to quickly respond to eruptions of genocide anywhere in the world.<sup>498</sup> Professor Schabas proposes reliance upon the various organs and institutions of the United Nations despite their “abysmal record” to date.<sup>499</sup>

The previous discussion suggests that, at least as experienced by nations and peoples and as related by both Lemkin and Wolfe, genocide is, at its roots, a collective rather than an individual crime. The victims, by definition, have a collective character as “groups,” and the perpetrators rarely, if ever, act or even can act alone. Mark Levene has contended that “genocide, instead of being treated as a series of unrelated aberrations ...needs to be viewed as one critical by-product ...of what is actually a very seriously dysfunctional modern international system.”<sup>500</sup> Tony Barta follows up from Sartre’s reference to a State’s “living out a relationship of genocide” in recognizing that “[s]uch a relationship is systemic, fundamental to the type of society rather than the type of state, and

<sup>491</sup> See UN Basic Principles and Guidelines, sec. IX, paras. 15, 16, 19, 20.

<sup>492</sup> Id. at para. 22. For a more in-depth discussion see Lenzerini 2009.

<sup>493</sup> See Lenzerini, *ibid.*, 15; also, Grey 2017.

<sup>494</sup> Ratner 2001; Stone 2010.

<sup>495</sup> Shaw 2007, 161.

<sup>496</sup> Goldhagen 2009, 517-532.

<sup>497</sup> Jones 2024, 389-398.

<sup>498</sup> Charny 1999.

<sup>499</sup> Schabas 2000, 453-479.

<sup>500</sup> Levene 2004, 153, 162.

has historical ramifications extending far beyond any political regime.”<sup>501</sup> He points to the colonial nature of such relationships which put the land at the center<sup>502</sup> and argues that the analytical focus should be on “genocidal societies,” not States.<sup>503</sup> Genocide too often becomes the inevitable consequence of a colonial relationship. As Dirk Moses observed, “the two phenomena are profoundly connected.”<sup>504</sup> “In that sense the relations of genocide are alive, and every negotiation will continue to be witnessed by the Aboriginal dead.”<sup>505</sup>

As Vattel opined on colonial occupation in the Law of Nations, “[i]f the people do not voluntarily submit, the state of war still subsists.”<sup>506</sup> In other words, resistant colonized nations and peoples remain in a state of perpetual war against the colonizer. As long as colonial relationships exist in multi-ethnic States, genocide—including slow genocide—of occupied nations and peoples remains an inherent and constant risk to their survival. The prevention of genocide in multinational and multi-ethnic States then requires an approach that ends the colonial relationship, perhaps in the manner set forth in the UN declarations on decolonization and restorative justice. UN General Assembly Resolution 1541(XV), for example, declares that liberation of colonized peoples can occur through (a) emergence as a sovereign independent State; (b) *free* association with an independent State; or (c) integration with an independent State.<sup>507</sup> This requires that occupied nations and peoples “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>508</sup> For example, beginning in

1960, numerous Indigenous nations held as “trust territories” by Western empires were liberated as independent nation-states.<sup>509</sup> In 2009, Bolivia, itself a successor to part of the Spanish Empire, transitioned from an entrenched dictatorship to a multinational democracy which at least in theory shares power in free association with seven Indigenous nations as a “plurinational” State.<sup>510</sup> Through treaty negotiations with the Queen of England, in 1999 the Nunavut peoples freely associated with Canada as a largely autonomous territory and nation.<sup>511</sup> In 2015, Indigenous peoples in the Peruvian Amazon united to create the Wampís Nation as an autonomous territory and nation in free association with the State of Peru.<sup>512</sup> Michael Mann has suggested that in some cases a solution may be found in the *voluntary* relocation of ethnic populations to avoid future conflict.<sup>513</sup>

However, this resolution of the political status of some nations represents only a small fraction of the 6,000 to 9,000 nations under colonial rule

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<sup>501</sup> Barta 2000, 239.

<sup>502</sup> *Ibid.*, 247-248.

<sup>503</sup> *Ibid.*, 240.

<sup>504</sup> Moses 2007, viii.

<sup>505</sup> *Ibid.*, 249.

<sup>506</sup> Vattel, Bk III, sec. 201.

<sup>507</sup> UNGA Res 1541, Principle VI (emphasis supplied). *See also*, Vattel, Bk III, secs. 213-214.

<sup>508</sup> ICCPR, art. 1(1).

<sup>509</sup> See List of former Trust Territories.

<sup>510</sup> Constitution of Bolivia, art. 1.

<sup>511</sup> Nunavut Agreement 1993.

<sup>512</sup> Wampís Nation.

<sup>513</sup> Mann 2005, 525. *See also*, Ignatieff 1993.

and occupation and faced with slow genocide. Solutions to past or current genocides, whether through the ICJ, the NICT, or another tribunal, must include efforts to resolve the underlying power dynamics between the victimized group and the offending State or other collective entity. Genocide is the method, the means to an imperial or colonial end which is the taking of the wealth of another nation or peoples. State responsibility without State liability regarding imperial or colonial genocide is meaningless because it is a collective crime or offense. It requires a collective remedy, an offending State's obligation to fully repair or compensate for any and all injuries it caused to a victimized nation or peoples unrestricted by time. This means that the remedy is not merely the termination of imperial or colonial rule, but the full restoration of a nation's and peoples' future contained in its identity and domestic and international persona, truth and history, right to self-determination (status, sovereignty, and governance), domain and territorial integrity, lands and resources, culture

and language, customary law and institutions, economy and wealth, and all that was destroyed or taken from them by the offending State. This will only occur once the criminal, civil, and moral liability of States for genocide, imperialism, colonialism, racism, and other crimes against humanity (in all their forms and manifestations) are fully, effectively, and adequately secured and enforced by international tribunals and institutions available to all nations and peoples; *and*, once the recognition and equality of all nations and peoples, large and small, equal to that of "States," and Indigenous realities are fully embraced in international tribunals and institutions as settled matters of international law.<sup>514</sup> Until then, colonial genocide will not end and will remain a crime without a remedy.<sup>515</sup>

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<sup>514</sup> See Lam 1992.

<sup>515</sup> Woolford 2011, 75 ("We expect [colonized Indigenous peoples] feel that the genocide has not yet ended and will not end until they decolonize their communities and reclaim self-determination."); Watson 2015, 88 (the "myth of postcolonialism"). Also, Tuck 2012 (decolonization as not an "end" but an "elsewhere.")

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# El lento genocidio de las naciones y pueblos indígenas

## Oculto a plena vista

Por Andrew B. Reid, JD<sup>1</sup>

### RESUMEN

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El historiador británico Patrick Wolfe opinaba que el colonialismo de asentamiento no es sólo un acontecimiento de la historia, sino que es estructural y, por definición, se elimina con el tiempo.<sup>2</sup> El régimen y la dominación coloniales suelen buscar el exterminio de las naciones y pueblos ocupados mediante la asimilación forzosa y el desgaste. A pesar de que el colonialismo es en esencia limpieza étnica, asimilación forzosa y genocidio lento, la eliminación colonial prolongada de las naciones y pueblos originarios ha sido excluida en gran medida del “crimen de crímenes” por las instituciones internacionales, el derecho en desarrollo del genocidio y los estudiosos del genocidio. Este artículo pretende subsanar esa deficiencia.

**Palabras clave:** Colonialismo de asentamiento, Genocidio estructural, Limpieza étnica, Asimilación forzada, Genocidio lento, Tribunal Penal Internacional de Naciones (NICT), Terminología del genocidio, Descolonización del genocidio, Estudios sobre genocidio, Derecho internacional

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### I. INTRODUCCIÓN

El genocidio ha sido descrito como el “crimen de todos los crímenes”,<sup>3</sup> como el peor de los males del hombre. Es el asesinato de toda una sociedad de personas, el exterminio *masivo* total o parcial de un grupo nacional, étnico, racial o religioso.<sup>4</sup> Es tan atroz que difiere en esencia

de otros crímenes no sólo en gravedad o grado sino en especie. Para los pueblos indígenas, es la expresión suprema y trágica, y a menudo el objetivo final, de la invasión, dominación, ocupación, asentamiento y dominio coloniales.

El historiador británico Patrick Wolfe opinaba en su importante obra “Settler Colonialism and

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Andrew Reid lleva más de 50 años ejerciendo y enseñando derecho internacional y de derechos humanos de los pueblos indígenas y derecho indígena federal (colonial). Trabaja con muchas naciones nativas y pueblos indígenas de Estados Unidos, Canadá, el Caribe y otras partes del mundo. Es profesor adjunto de la Facultad de Derecho Sturm de la Universidad de Denver, asociado al Centro Ved Nanda de Derecho Internacional y Comparado, y juez de primera instancia del Tribunal Ezidikhan de Crímenes Internacionales. Este artículo está dedicado a su amigo, colega y pensador revolucionario, el difunto Rudy Rýser.

<sup>2</sup> Wolfe 2006.

<sup>3</sup> Rafter 2016.

<sup>4</sup> Convención para la Prevención y la Sanción del Delito de Genocidio de 1948.

the Elimination of the Native” que las invasiones coloniales no son sólo acontecimientos de la historia, sino que son estructurales y, por definición, “destruyen para reemplazar”.<sup>5</sup> Como pueblos originarios o Primeras Naciones y objetivos y víctimas de la Era de los Imperios y de la expansión del cristianismo, la dominación y la ocupación coloniales son una experiencia casi universalmente compartida por los pueblos indígenas.<sup>6</sup> Los supervivientes indígenas del colonialismo han soportado muchas generaciones de asimilación forzada prolongada, sistémica e institucionalizada y de genocidio por parte de las potencias imperiales y sus Estados coloniales sucesores.

Estudiosos del genocidio como Wolfe, Dirk Moses y otros han señalado la estrecha relación entre colonialismo y genocidio debido a la naturaleza inherente del colonialismo de colonos de “eliminar para reemplazar” y de la dominación colonial de eliminar mediante la asimilación forzosa. Esto no significa que el colonialismo sea siempre genocida. Las potencias imperiales, como en el caso del dominio colonial británico sobre la India, pueden estar más interesadas en la explotación de los recursos y la riqueza de la nación colonizada que en colonizar sus tierras o destruir su cultura y asimilar a su pueblo. Del mismo modo, el genocidio no siempre es colonial, como el de Camboya, o incluso cuando afecta sólo a pueblos indígenas, como ocurrió en Ruanda. Sin embargo, tanto el colonialismo de colonos como la asimilación están impulsados por la relación colonial y el objetivo eliminatorio intencionado del colonizador y son, por tanto, genocidas. Como lo describió Lemkin:

El genocidio tiene dos fases: una, la destrucción del patrón nacional del grupo oprimido; la otra, la imposición del patrón nacional del opresor. Esta imposición, a su vez, puede realizarse sobre la población oprimida a la que se permite permanecer, o sobre el territorio únicamente, tras la expulsión de las poblaciones y la colonización de la zona por los propios nacionales de los opresores.<sup>7</sup>

El genocidio y el colonialismo son también violaciones de los derechos fundamentales (“inalienables”) de los pueblos y las naciones<sup>8</sup> a la vida (es decir, genocidio, etnocidio, derecho a la existencia colectiva),<sup>9</sup> libertad (es decir, libertad (es decir, ausencia de dominación o dominio extranjero),<sup>10</sup> seguridad (es decir, ausencia de invasión territorial, robo de tierras y recursos, dominio extranjero),<sup>11</sup> dignidad (es decir, negación de la soberanía y la nacionalidad, culturicidio),<sup>12</sup> e igualdad (colectiva).<sup>13</sup> El genocidio y el colonialismo son también

<sup>5</sup> Wolfe 2006, 388.

<sup>6</sup> Niezen 2003, 23; Anaya 2004, 3-4.

<sup>7</sup> Lemkin 1944, 79. Véase también, Docker 2008, 81-101.

<sup>8</sup> Los “derechos esenciales del hombre” existenciales a los que se refiere la Declaración Americana como su propósito y objetivo. Declaración Americana, Considerando párrs. 1-5.

<sup>9</sup> DUDH, art. 3; PIDCP, art. 6(1).

<sup>10</sup> Declaración de Viena, art. 2, párrs. 1 y 2; DUDH, art. 3; UNGA Res. 1514, Preámbulo, párr. 11 (“libertad completa”); PIDCP, Preámbulo, párrs. 3, art. 9(1).

<sup>11</sup> ICERD, art. 5(b); PIDCP, Preámbulo párrs. 1 y 2 (los “derechos inalienables de todos los miembros de la familia humana” “derivan de la dignidad inherente a la persona humana”), art. 9(1).

<sup>12</sup> DUDH, arts. 5 y 6; ICERD, Preámbulo párrs. 1-2; PIDCP, arts. 7 y 10; PIDESC, Preámbulo, párrs. 1 y 2.

<sup>13</sup> Carta de las Naciones Unidas, Preámbulo, párr. 1, art. 1(2); UNGA Res. 1514, preámbulo, paras. 1 y 11; DUDH, arts. 1, 2 y 7; ICERD, preámbulo, párrs. 1-4, art. 5(a); PIDCP, arts. 3, 14(1) y 26; Kuna, párr. 288.

violaciones de las normas de *jus cogens*. Las normas de *jus cogens* se refieren a conceptos de un “orden superior de normas jurídicas, que las leyes del hombre o de la nación no pueden contravenir” y que son “necesarias para proteger la moralidad pública por ellas reconocida”.<sup>14</sup> Los derechos de los pueblos indígenas a la vida<sup>15</sup> y a la libre determinación (que incorpora otros derechos como a la soberanía, la nacionalidad, el territorio, las tierras y los recursos naturales, la dignidad, etc.) han sido reconocidos como normas de *jus cogens*.<sup>16</sup> Puede decirse que una “práctica sistémica de violaciones de los derechos humanos” como la que se produce, como en este caso, bajo el colonialismo y el racismo institucionalizados viola las normas internacionales de *jus cogens*.<sup>17</sup>

Tanto las instituciones internacionales como los estudiosos del genocidio han excluido en gran medida el colonialismo de colonos y la asimilación forzosa prolongada del crimen de crímenes. Esto es comprensible dado que el Derecho de las Naciones relativo al crimen de genocidio, los crímenes contra la humanidad y los derechos humanos colectivos se debatió y promulgó bajo el dominio político mundial de las mismas potencias imperiales y coloniales que habían cometido, continuado y se habían beneficiado enormemente durante el último medio milenio de tales atrocidades.<sup>18</sup>

## II. GENOCIDIO: ¿QUÉ HAY EN UN NOMBRE?

El término “genocidio” fue acuñado por primera vez durante la Segunda Guerra Mundial por el abogado Raphaël Lemkin para describir

un crimen internacional en respuesta a los exterminios masivos de judíos, romaníes y otros grupos étnicos por parte de los nazis.<sup>19</sup> El término está formado por el prefijo griego *genos*, que significa raza o tribu, y el sufijo latino *cide*, que significa matar.<sup>20</sup> Durante la guerra, Lemkin escuchó un discurso radiofónico del Primer Ministro británico Winston Churchill en el que describía los asesinatos masivos en los horrores de la guerra como “ante un crimen sin nombre”.<sup>21</sup> Lemkin se inspiró para acuñar el término no sólo en el Holocausto de la Segunda Guerra Mundial, sino después de conocer cómo la eliminación masiva del pueblo armenio por parte del Imperio Otomano durante la Primera Guerra Mundial quedó impune. Lemkin señaló que, mientras que el asesinato de una persona se reconocía como un crimen, el crimen de genocidio queda oculto por su propia inmensidad.

El genocidio también se ha ocultado, si no legitimado, por la condición “soberana” del

<sup>14</sup> Domingues c. Estados Unidos, 12 285 2002 párrs. 49, 50 (reconocido a pesar de las objeciones de Estados Unidos).

<sup>15</sup> *Ibid.* párrafo 85.

<sup>16</sup> Archipiélago de Chagos (voto particular del juez Robinson, voto particular del juez Cancado Trindade (párrs. 118-174), voto particular del juez Sebutinde (párrs. 11, 13, 25, 47)); Mornah 2022, párr. 298; Espiell 1978; Naldi 1999. Véase también, Gaeta 2007, 642.

<sup>17</sup> Hermanos Gómez-Paquiyaauri c. Perú, párr. 76.

<sup>18</sup> Schabas 2000, 51-101; Moses 2007, vii; Jones 2006, 14. También, Lauren 2003, 124, 154-165, 168-169, 173-174, 184-185, 192-193 (“Aunque el lenguaje del preámbulo hablaba de ‘Nosotros los pueblos’, el hecho es que fueron los gobiernos y no los pueblos quienes llevaron a cabo las negociaciones” sobre el lenguaje de la Carta de la ONU).

<sup>19</sup> Lemkin 1944, 79. Lemkin había huido de Polonia a Estados Unidos tras perder a gran parte de su familia, incluidos sus padres, en el Holocausto. Museo Conmemorativo del Holocausto de Estados Unidos 2023. Martin 1984 (biografía).

<sup>20</sup> Lemkin 1944, 79.

<sup>21</sup> Power 2003, 29.

perpetrador, que no lo cometió un individuo sino un Estado como consecuencia inevitable y casi esperada de la guerra,<sup>22</sup> imperio o modernidad (la expansión de la “civilización”).<sup>23</sup> El genocidio no sólo implica la eliminación física de los pueblos, sino que a menudo el perpetrador también se esfuerza por negar y borrar la memoria de su propia conducta genocida.<sup>24</sup> El debate que nos ocupa se refiere a otra forma oculta de genocidio, el “genocidio lento” -no menos atroz o completo- que queda oculto por el ritmo y la naturaleza del exterminio<sup>25</sup> y ofuscado por el tiempo. A menudo es sistémico, oculto dentro de las leyes e instituciones del perpetrador. Hasta que el genocidio lento no se reconozca como una forma de genocidio, seguirá siendo esencialmente un crimen de crímenes en busca de un remedio adecuado.

Después de la guerra, Lemkin presionó y finalmente convenció a los diplomáticos de las Naciones Unidas para que adoptaran la “Convención para la Prevención y la Sanción del Delito de Genocidio”<sup>26</sup> que, en gran medida,

incorporaba su definición del delito.<sup>27</sup> El artículo 2 de la Convención define el término “genocidio” como “...cualquiera de los actos siguientes cometidos con la intención de destruir, total o parcialmente, a un grupo nacional, étnico, racial o religioso, como tal”:

- (a) Matar a miembros del grupo;
- (b) Causar daños corporales o mentales graves a los miembros del grupo;
- (c) Infligir deliberadamente al grupo condiciones de vida calculadas para provocar su destrucción física total o parcial;
- (d) Imponer medidas destinadas a evitar los nacimientos dentro del grupo;
- (e) Trasladar por la fuerza a los niños del grupo a otro grupo.

El artículo 3 amplía la cobertura del Convenio a los siguientes actos:

- (a) Genocidio;
- (b) Conspiración para cometer genocidio;

<sup>22</sup> Jones 2006, 48-54.

<sup>23</sup> Moses 2010; Hinton 2002, 1-40.

<sup>24</sup> Véase Logan 2014; Jones 2006, 345-361; Tatz 2003, 122-170; Lorey 2002; Cohen 2001.

<sup>25</sup> Totten 2011, 13; Watson 2015, 112.

<sup>26</sup> Convención sobre el Genocidio de 1948.

<sup>27</sup> La única diferencia importante entre la Convención y la definición de Lemkin parece ser la omisión de una inclusión expresa de la destrucción de la “cultura” de un grupo -culturicidio- en la definición de la Convención. La omisión se produjo tras un debate bastante acalorado en la ONU. Véase Schabas 2000, 53, 57, 63; Krieken 2010, 128-132; Short 2016, 25; Moses 2008, 12-13. Aun así, como se muestra en este examen de la naturaleza de los otros términos que se incluyeron, la destrucción de la cultura sigue siendo un tema común de la Convención inherente a lo largo de las definiciones conceptuales de los términos incluidos de grupos nacionales, étnicos, raciales y religiosos. La invención del término “genocidio” por parte de Lemkin surgió de su propuesta inicial de utilizar “barbarie” para el delito de asesinato en masa y “vandalismo” para la destrucción cultural. Lemkin 1933. Véase el debate en Schabas 2000, 25-26; Shaw 2007, 18. Al decantarse por “genos”, Lemkin combinó en esencia los dos términos de manera que la destrucción de la “cultura” se incluye en su significado, lo que obvia la necesidad de enumerarla por separado como método de genocidio en la Convención. Esto queda implícito en las opciones de Lemkin de “nación”, un concepto orgánico que alberga la cultura de un pueblo, en lugar de Estado, “étnico”, que se define en gran medida por una cultura distintiva, y “religión”, que a su vez suele formar parte de la cultura de un pueblo. Lemkin fue bastante enfático al afirmar que la pérdida para el mundo de la cultura de un pueblo era el crimen esencial que siempre tuvo en mente. Short 2016, 3, 19-20 (cita a Moses 2008).

- (c) Incitación directa y pública a cometer genocidio;
- (d) Tentativa de genocidio;
- (e) Complicidad en genocidio.

El artículo 4 amplía las prohibiciones del Convenio a “gobernantes, funcionarios públicos o particulares”.

El lenguaje y la redacción de la Convención han generado mucho debate, análisis e interpretación -y una gran confusión- entre los académicos y los tribunales especializados en genocidio.<sup>28</sup> Tal vez la mayor confusión haya surgido de la distinción entre la matanza masiva de individuos y la matanza o destrucción de determinados “grupos” específicos.<sup>29</sup> Un “grupo”, especialmente en este contexto, es un colectivo de individuos que comparten y, por lo tanto, crean una identidad distintiva, común, mayor que el conjunto o cualquiera de los miembros individuales del grupo.<sup>30</sup> Al fin y al cabo, “genos” se refiere a una raza o una tribu, una entidad social, más que a seres humanos individuales o incluso a un grupo de seres humanos. En contraste con el asesinato de personas individuales como homicidio, o incluso homicidio en masa, el genocidio es un crimen sociológico,<sup>31</sup> la destrucción de “pueblos”. Aunque dependa colectivamente de sus miembros individuales para su creación y existencia, un “grupo” es una entidad separada y el centro de la atención correctiva de la Convención. Lemkin y los redactores subrayaron intencionadamente esta distinción y luego expresaron claramente el enfoque de la Convención al incluir en su lenguaje el simple modificador “como tal” al término

“grupo” en el Artículo 2. “Como tal” no es una expresión arrojada. “Como tal” no es una frase desechable. Dirige expresamente la atención y la cobertura de la Convención a la destrucción de determinados grupos y no de individuos.<sup>32</sup>

Si bien los miembros individuales del grupo pueden ser asesinados o eliminados, el grupo en sí sobrevive mientras otros miembros sobrevivan y continúen la existencia y la identidad del grupo. La supervivencia de los miembros de un grupo se ha esgrimido no pocas veces como argumento contra el genocidio.<sup>33</sup> Aunque esto se centra correctamente en la supervivencia del grupo y no del individuo, el argumento ignora el lenguaje calificativo del artículo 2 del Convenio que incluye dentro de la definición de genocidio la destrucción de un grupo “en su totalidad o en parte”. En virtud del artículo 2 a) del Convenio, el exterminio absoluto y completo de los miembros de un grupo se calificaría ciertamente de genocidio, pero no funciona como requisito. La definición de genocidio del Convenio se centra en la prohibición de determinadas intenciones y conductas eliminatorias más que en el resultado final.

<sup>28</sup> Véase la discusión, por ejemplo, Shaw 2007, 20-36; Moses 2007, 149-180; Jones 2006, 14-18; Schabas 2000, 51-81; Horowitz 1976; también, Hinton 2014, 325-26; Rensink 2011.

<sup>29</sup> Goldhagen 2009; Shaw 2007, 8, 106.

<sup>30</sup> Online Etymology Dictionary, “group”, se refiere a “any assemblage, a number of individuals related in some way” (énfasis añadido). Wolfe 2006”, 398.

<sup>31</sup> Shaw 2007, 9-11.

<sup>32</sup> Schabas 2000, 73; Ratner 2001, 38.

<sup>33</sup> Shaw 2007, 106-08.

Se ha generado un debate adicional sobre la limitación del Artículo 2 de la Convención de su cobertura a grupos específicos, un “grupo nacional, étnico, racial o religioso”, y su omisión de otros. Es significativo que no se refiera a la destrucción de grupos políticos como “Estados”, organizaciones políticas, clases económicas y sociales o categorías de género. Un examen de la naturaleza de los grupos enumerados en el Convenio demuestra el alcance y el propósito de Lemkin y del Convenio, así como su aplicación a las experiencias de los pueblos indígenas.<sup>34</sup>

### A. MATAR A UNA NACIÓN

Las naciones son elementos esenciales de la comunidad mundial. El mundo sólo representa tanta cultura y vigor intelectual como la que crean los grupos nacionales que lo componen. Esencialmente, la idea de una nación significa cooperación constructiva y contribuciones originales, basadas en tradiciones genuinas, cultura genuina y una psicología nacional bien desarrollada. Por lo tanto, la destrucción de una nación supone la pérdida de sus futuras contribuciones al mundo.

Rafael Lemkin<sup>35</sup>

Un “grupo nacional” se refiere al conjunto de individuos que componen una “nación”. Una nación se ha definido como un “territorio cultural formado por comunidades que se consideran a sí mismas como un solo pueblo sobre la base de una ascendencia, una historia, una sociedad, unas instituciones, una ideología y una lengua comunes.”<sup>36</sup> Es la entidad social que proporciona una identidad de grupo a sus miembros. Así pues, hay elementos familiares y culturales asociados al término que se corresponden directamente con el prefijo griego de la palabra genocidio, *genos*, que significa raza o tribu. La palabra “tribu” procede igualmente del griego, *phylē*, que significa “raza o tribu de hombres, cuerpo de hombres unidos por lazos de sangre y descendencia, un clan”.<sup>37</sup>

Contrasta con el concepto de “Estado” del derecho internacional, que, aunque es una construcción social, es una creación puramente política definida como una entidad que tiene “(a) una población permanente; (b) un territorio definido; (c) un gobierno; y (d) la capacidad de entablar relaciones con otros Estados”.<sup>38</sup> Mientras que un “Estado” es una entidad artificial, una “nación” es orgánica. Se trata de una diferencia de

<sup>34</sup> Shaw 2007, 27, 63-78; Schabas 2000, 113-114, 134-150.

<sup>35</sup> Lemkin 1944, Sección III, 79-95. Lemkin seguramente estudió los escritos de la destacada filósofa alemana de principios del siglo XX Edith Stein, que opinaba sobre la naturaleza de las naciones como portadoras de la cultura de los pueblos que las componen. “La cultura puede describirse como la actividad creadora del espíritu humano en la que han encontrado su expresión todas las funciones esenciales de la vida humana (economía, derecho / legislación y gobierno, moral, ciencia, tecnología, arte, religión). La nación es una comunidad que puede crear ese “cosmos”. Ni el individuo ni una comunidad más pequeña son capaces de crearlo por sí solos”. Stein 2004, 147.

<sup>36</sup> Nietschmann 1994, 225-242, 261. La Corte Internacional de Justicia, siguiendo la definición de Lemkin, optó por un enfoque amplio en el caso de Bosnia y Herzegovina contra Serbia y Montenegro (Sentencia de 26 de febrero de 2007, párrafo 296).

<sup>37</sup> Diccionario Etimológico Online, “tribu”.

<sup>38</sup> Conferencia Mundial de Derechos Humanos de Viena, Declaración y Programa de Acción de Viena, (25 de junio de 1993), Declaración de Viena, art. 2, párrs. 1 y 2 Convención de Montevideo (nótese que si bien reconoce la celebración de tratados sólo entre Estados, la Convención afirma el derecho de autodeterminación de los pueblos). *También*, Restatement, 1987. *Véase en general*, Crawford 2007.

gran trascendencia. Como organización política, los Estados pueden utilizarse como instrumentos de dominio imperial y colonial sobre naciones y pueblos preexistentes. Mientras que la pertenencia a las Naciones Unidas, en virtud de los Artículos 3 y 4 de su Carta<sup>39</sup>, está restringida a los “Estados”, la organización, como su nombre indica y tal y como se establece en los Artículos 1 y 55, se centra en el desarrollo de “relaciones de amistad entre *las naciones*, basadas en el respeto al principio de la igualdad de derechos y al de la libre determinación de *los pueblos*”. (énfasis añadido) Al restringir el control sobre el proceso político y el *poder* del congreso internacional únicamente a los Estados, se mantiene la relación imperial y colonial y el dominio y la explotación de naciones y pueblos y de sus recursos.

Los capítulos XI y XII de la Carta de la ONU establecen un proceso para la descolonización y la autodeterminación de los “pueblos” que “no hayan alcanzado todavía la plenitud del gobierno

propio”. Los instrumentos de la ONU sobre derechos humanos y descolonización también hacen referencia a los derechos de los “pueblos” en lugar de naciones o tribus.<sup>40</sup> El término “pueblos” se ha entendido como “un grupo étnico o una comunidad cultural” dotados de una identidad colectiva de la que son titulares de un derecho de autodeterminación<sup>41</sup> -la “s” añadida al concepto de pueblo.<sup>42</sup>

El Convenio 169 de la Organización Internacional del Trabajo también se refiere a los derechos de los “pueblos indígenas y tribales”.<sup>43</sup> La palabra “tribu” en el Convenio 169 se refiere a los pueblos “cuyas condiciones sociales, culturales y económicas los distinguen de otros sectores de la colectividad nacional y cuyo estatuto está regido total o parcialmente por sus propias costumbres o tradiciones.”<sup>44</sup> El concepto de “tribu” de pueblos contenido en el significado de *genos* en genocidio reaparece en el Convenio 169. Aunque una “tribu” de pueblos no tiene por

<sup>39</sup> Carta de las Naciones Unidas de 1945.

<sup>40</sup> Véase Lauren 2003, 188 (“La primera frase de la Carta, por ejemplo, anunciaba la partida de inmediato. En lugar del lenguaje tradicional sobre los plenipotenciarios de los Estados-nación, pero totalmente coherente con su experiencia reciente y sus visiones de una ‘paz de los pueblos’, los signatarios declararon: NOSOTROS LOS PUEBLOS DE LAS NACIONES UNIDAS...”); ICCPR; ICESCR; UN Res. 1514.

<sup>41</sup> Lâm 1992, 605, nota 5; Keal 2003, 53-54.

<sup>42</sup> Watson 2015, 95-96. Esta definición es bastante diferente en esencia de la sugerida por John Rawls para un “pueblo liberal”, que gira en torno a un orden democrático y un proceso político razonablemente justo -como poseedor de “un gobierno democrático constitucional razonablemente constituido, que sirve a sus intereses fundamentales, una unidad de simpatías comunes y una naturaleza moral.” Rawls 1999, 17-19, 21 (la parte “liberal” del término). Rawls distingue su definición de la de un “Estado” que es “una agencia autónoma que persigue sus propias ambiciones burocráticas” y “dirigido por los intereses de grandes corporaciones de poder económico y corporativo privado velado del conocimiento público y casi totalmente libre de rendición de cuentas.” *Ibidem*, 24. Por el contrario, la definición de “pueblos” empleada en este comentario se refiere a la evolución social de la expresión colectiva de identidad y soberanía por parte de las personas -de individuos, a pueblos, a tribus, a pueblos, a naciones, a Estados, y se refiere a cuándo surge el derecho colectivo de autodeterminación. Esto sigue en cierto modo el pensamiento de la filósofa alemana Edith Stein. Véase Lawton, 2024. En mayor contraste con Rawls, la definición utilizada aquí preserva la naturaleza “orgánica”, “viva” de Lemkin de los pueblos y naciones expresada en la identidad y cultura comunes, y la permanencia, del grupo, frente a los “Estados” que son construcciones políticas artificiales, inorgánicas e impermanentes. Shaw 2007, 99. James Scott en *Seeing Like a State* comentó esta pérdida del proceso orgánico en la creación del Estado como perder de vista el bosque mientras se gestionan los árboles. Scott 2020, 11-22.

<sup>43</sup> OIT 1989, 169.

<sup>44</sup> *Ibidem*, art. 1, sec. 1.

qué estar suficientemente organizada como una “nación” dotada de personalidad internacional, se ha reconocido a las tribus de<sup>45</sup> la condición de naciones ante la ley. El Presidente del Tribunal Supremo de EE.UU., John Marshall, ya lo señaló en *Worcester contra Georgia*: “Las naciones indias siempre han sido consideradas como comunidades políticas distintas e independientes, que conservan sus derechos naturales como poseedores indiscutibles del suelo... El propio término *nación* que se les aplica generalmente significa ‘un pueblo distinto de los demás’”.<sup>46</sup>

El difunto investigador indígena Rudolph Rýser hizo hincapié en una distinción fundamental y casi universalmente ignorada entre “naciones” y “Estados”.<sup>47</sup> En el contexto de las naciones, en particular de las naciones indígenas, la referencia común a los “Estados-nación” es históricamente inexacta y engañosa. De hecho, los “Estados” son construcciones puramente políticas y no nacionales, a menudo compuestas por más de una “nación” o pueblo. En realidad, existen pocos “Estados-nación” verdaderos, es decir, Estados compuestos exclusivamente por una nación. Ambos términos se confunden de forma generalizada e incorrecta.<sup>48</sup>

Como ninguna nación cede deliberadamente su territorio, sus recursos o su identidad, “una nación es la organización de personas y territorios más duradera, persistente y resistente del mundo”.<sup>49</sup> Los Estados, en cambio, dependen del entorno político del momento y van y vienen.

Un Estado es una entidad política artificial ligada a un territorio, no a un pueblo, que suele estar compuesto por más de una nación.<sup>50</sup>

Sólo 193 “Estados” están reconocidos por las irónicamente denominadas “Naciones” Unidas.<sup>51</sup> La Carta de la ONU, si bien declara los derechos de las naciones, las excluye como miembros.<sup>52</sup> En comparación, se calcula que hay entre 6.000 y 9.000 naciones que componen lo que se ha dado en llamar el “Cuarto Mundo”.<sup>53</sup>

Muchos de los Estados “más recientes” son continuaciones o sucesores directos de imperios imperiales y coloniales creados en los llamados movimientos “nacionales” de liberación y descolonización tras la Segunda Guerra Mundial. Sus fronteras territoriales generalmente seguían las de la potencia colonial anterior y prestaban poca atención a las naciones y pueblos bajo ocupación y dominio imperial y colonial. A menudo dividieron a los pueblos y naciones precoloniales existentes, con sus territorios, entre los Estados coloniales.<sup>54</sup> Desde la perspectiva de esas naciones y pueblos, su gobernante imperial o colonial fue simplemente sustituido por otro más

<sup>45</sup> Indios Cayuga, RIAA 179.

<sup>46</sup> *Worcester v. Georgia* 1832, 561 (énfasis añadido).

<sup>47</sup> Rýser 2012; Rýser 2020; Rýser 1996, 7. También, Fukurai 2023; Watson 2015, 96.

<sup>48</sup> *Ibidem*; Whitt 2019, 78 (“Los miembros de una nación pueden vivir dentro de las fronteras de muchos Estados diferentes. Además, mientras que ‘Estado-nación’ originalmente abarcaba la idea de una nación que vivía dentro de las fronteras de un Estado, el uso contemporáneo del término permite que un Estado-nación pueda contener diferentes naciones dentro de sus fronteras”).

<sup>49</sup> Nietschmann 1994, 226; Griggs 1999.

<sup>50</sup> Nietschmann 1994, *ibid.*

<sup>51</sup> Naciones Unidas, “Estados miembros”.

<sup>52</sup> Carta de las Naciones Unidas de 1945, cap. II. II.

<sup>53</sup> Rýser 1996, 7.

<sup>54</sup> Maddison 2014, 153-176; Mecanismo de expertos sobre los derechos de los pueblos indígenas, 2019; Krauzman 2022; Bolt 2016.

local. Permanecieron, y aún permanecen, bajo la ocupación y dominación coloniales.

Tras la “liberación”, los Estados coloniales sucesores sucedieron a las reivindicaciones territoriales de sus predecesores imperiales y coloniales. Estados Unidos sucedió a los imperios inglés, francés, español y holandés que englobaban a más de 600 Primeras Naciones supervivientes que ocupaban el territorio que ahora reclama Estados Unidos en Norteamérica.<sup>55</sup> Las pruebas de la existencia independiente y de la relación colonial de estas Primeras Naciones se encuentran en los más de 400 tratados firmados por Estados Unidos con las Primeras Naciones,<sup>56</sup> el reconocimiento formal por parte de Estados Unidos de estas naciones colonizadas,<sup>57</sup> la creación de un cuerpo de leyes (“ley federal india”)<sup>58</sup> y el establecimiento de instituciones<sup>59</sup> para imponer, mantener y continuar la dominación colonial hasta nuestros días. La principal institución colonial en Estados Unidos es y ha sido la Oficina de Asuntos Indios que, según su propia descripción, “implica 150 años de políticas federales diseñadas para acabar [por la fuerza], reubicar y asimilar a los indios americanos y a las naciones tribales”.<sup>60</sup> Historias y transferencias similares de dominación colonial sobre los primeros pueblos y naciones indígenas a los Estados coloniales sucesores se observan en Canadá (más de 600 Primeras Naciones reconocidas sujetas a colonización en virtud de la “Ley india” y la Constitución de Canadá),<sup>61</sup> Australia (más de 400 naciones aborígenes regidas por diversas leyes coloniales),<sup>62</sup> India (más de 700 pueblos aborígenes reconocidos),<sup>63</sup> Brasil (unos 279 pueblos indígenas distintos),<sup>64</sup>

China (55 nacionalidades “minoritarias” reconocidas),<sup>65</sup> República Democrática del Congo (los pueblos mbuti, baka y batwa),<sup>66</sup> México (68 pueblos indígenas),<sup>67</sup> Rusia (más de 180 pueblos indígenas, 40 reconocidos por el Estado colonial),<sup>68</sup> y en todo el Cuarto Mundo.

En este contexto, ¿cómo se “mata” o se destruye “físicamente” una nación?<sup>69</sup> El Artículo 2(c) de la Convención establece que el genocidio incluye “infligir deliberadamente al grupo [nacional] condiciones de existencia que hayan de acarrear su destrucción física, total o parcial”. Una nación es, en cierto sentido, una

<sup>55</sup> USAGOV.

<sup>56</sup> Museo Nacional del Indígena Americano.

<sup>57</sup> USAGOV.

<sup>58</sup> Véase en general, USDOJ, “Federal Law”; Executive Board of Authors and Editors, 2012.

<sup>59</sup> Oficina de Asuntos Indígenas.

<sup>60</sup> USDOJ, “Oficina de Asuntos Indígenas”. La afirmación de la BIA en su página web de que ya no persigue políticas tan destructivas es falsa y engañosa. Aunque tal vez no sea tan abierta y dura, sigue aplicando y haciendo cumplir la ocupación, el dominio y la dominación de Estados Unidos sobre las naciones y los pueblos nativos plasmados en la ley federal india, incluida la ley actual que impone lo que se conoce como las doctrinas del descubrimiento (robo imperial), del fideicomiso (dominación colonial) y de la autoridad plenaria (poder absoluto).

<sup>61</sup> IWGIA Canadá.

<sup>62</sup> Oficina del Patrimonio Aborigen; Parlamento de Australia.

<sup>63</sup> IWGIA India.

<sup>64</sup> Povos Indígenas.

<sup>65</sup> IWGIA China.

<sup>66</sup> IWGIA República Democrática del Congo.

<sup>67</sup> IWGIA México.

<sup>68</sup> IWGIA Rusia.

<sup>69</sup> Véase la discusión, Shaw 2007, 28-33. En esta discusión, “nación” y “pueblos” se interpretan indistintamente en la medida en que los “pueblos” se distinguen en carácter de “gente” por la posesión del derecho colectivo a la autodeterminación, el derecho a formar una “nación”, que una nación es una manifestación de pueblos. Véase la discusión en la nota 42, *supra*.

entidad biológica viva,<sup>70</sup> definida físicamente por sus miembros (sus pueblos), su territorio y su gobernanza (su “dominio” y sus funcionarios e instituciones gubernamentales), de modo que la eliminación de cualquiera de ellos tiene como resultado, por definición, la destrucción total o parcial de la propia nación. Lemkin explicó detalladamente que la destrucción de las naciones se lograba mediante “un ataque sincronizado a los diferentes aspectos de la vida de los pueblos cautivos”, incluidos los ámbitos político, social, cultural, educativo, económico, religioso, moral y biológico, junto con la existencia física de sus miembros.<sup>71</sup>

### **1. Artículo 2(a) del Convenio: Matar a un grupo nacional (o étnico, racial o religioso) matando a sus miembros**

“Matar y arrancar el cuero cabelludo a todos los indios, pequeños y grandes ...las liendres hacen piojos”

Coronel Reverendo John Chivington,  
Ministro Metodista y comandante del  
ejército de EE.UU., instruyendo a sus tropas  
para masacrar Cheyenne y Arapaho bebés y  
niños en la masacre de Sand Creek<sup>72</sup>

El Artículo 2(a) de la Convención declara que el asesinato intencional de miembros de un grupo es una conducta genocida. Es evidente que el hecho de tomar como objetivo y matar a un número significativo de miembros no sólo de un grupo nacional, sino también de los demás grupos enumerados, étnicos, raciales y religiosos, tiene como resultado la destrucción física del grupo en su totalidad o en parte, ya que, sin sus miembros, por definición no puede

seguir siendo un grupo. En el lento genocidio de los pueblos indígenas, cientos, si no miles, de masacres perpetradas por los ejércitos imperiales invasores, las milicias y los colonos colonialistas han sido bien documentadas durante un periodo de cientos de años en América, Australia, África, Asia y otros lugares.<sup>73</sup> Se calcula que entre 50 y 100 millones de indígenas (más del 95%) sólo en América perecieron en lo que se denomina la “Gran Mortandad” tras las invasiones coloniales procedentes de Europa.<sup>74</sup> Tantos indígenas perecieron en la Gran Mortandad que provocó el abandono de suficientes tierras despejadas en las Américas como para causar un cambio climático global conocido como “La Pequeña Edad de Hielo.”<sup>75</sup>

A menudo se ha culpado a las enfermedades de la mayor parte de estas muertes.<sup>76</sup> A este respecto, David Stannard historiador afirma que “al centrarse casi exclusivamente en la enfermedad... los autores contemporáneos han creado cada vez más la impresión de que la erradicación de esas decenas de millones de personas fue inadvertida

<sup>70</sup> Short 2016, 19; Lemkin 1944, 79 (se refiere a la “vida” de los grupos nacionales).

<sup>71</sup> Lemkin 1944, xi-xii.

<sup>72</sup> Brown 1970, 90.

<sup>73</sup> Véase, por ejemplo List of Indian Massacres (parcial); Casas 1552 (América Central); Brown 1970 (Estados Unidos); Thornton 1987 (Estados Unidos); Cowles 2003 (Biblica Canaan); Jones 2023; Kévorkian 2011 (Armenia); Khalidi 2020 (Palestina); Kiernan 2007; Lindqvist 2014 (África Oriental); Madley 2016; Moses 2008; Power 2003 (curiosamente, aunque aborda el tema de Estados Unidos y el genocidio, Power omite el debate sobre el pasado o el presente genocida de Estados Unidos); Short 2016 (el ecocidio como genocidio); Stannard 1992; Stone 2010; Totten 2011 (pueblos indígenas).

<sup>74</sup> Thornton 1987, 22-25, 47-51, 90, 133; Koch 2019, 20-22.

<sup>75</sup> Koch 2019, 14, 27, 30.

<sup>76</sup> Thornton 1987.

-una triste, pero a la vez inevitable e ‘involuntaria consecuencia’ de la migración y el progreso humanos”, y afirma que su destrucción “no fue ni inadvertida ni inevitable”, sino el resultado de una peste microbiana y un genocidio intencionado que trabajaron conjuntamente.<sup>77</sup> Tras las muertes masivas iniciales debidas a la exposición a enfermedades desconocidas hasta entonces procedentes de Europa, los colonizadores fueron muy conscientes del poder eliminatorio, el arma biológica, que los colonos llevaban consigo. Las potencias coloniales fomentaron e instigaron agresivamente el asentamiento en tierras indígenas mientras hacían la vista gorda intencionadamente ante el robo de territorio indígena y las muertes masivas que facilitaban.<sup>78</sup> El término “pioneros”, utilizado para referirse a los primeros colonos, deriva de la palabra “pionnier”, un término militar que significa “soldados de a pie” que preparaban el camino para el avance del ejército.<sup>79</sup> Los pioneros fueron una de las primeras armas de destrucción masiva, las tropas de choque portadoras de enfermedades de un genocidio progresivo. El hecho de que la potencia colonial mirara intencionadamente hacia otro lado mientras promovía ampliamente el asentamiento en tierras indígenas y la propagación de enfermedades mortales puede constituir una violación de las Secciones 3 (b) y (c) de la Convención sobre el Genocidio por conspiración y complicidad. La intención puede expresarse como una omisión consciente.

Hay otras formas de matar a los miembros de un grupo además de las balas y las enfermedades. En los siglos de dominación colonial que siguieron a la Gran Mortandad, la matanza masiva y el desgaste de grupos nacionales,

étnicos, raciales y religiosos continuaron sistemáticamente a través de la esclavitud, el hambre, la pobreza y la enfermedad.<sup>80</sup> El sacerdote dominico Bartolomé de las Casas, que acompañó a Colón en su segundo viaje al “Nuevo Mundo”, presencié y documentó personalmente la muerte por esclavitud de millones de indígenas a manos de los españoles en el Caribe y América Central.<sup>81</sup> Además, desde 1525 hasta la segunda mitad del siglo XIX, se calcula que entre treinta y cuarenta millones de indígenas africanos perecieron en la diáspora y el comercio de esclavos.<sup>82</sup>

El asesinato por inanición también tiene una larga historia como arma de genocidio.<sup>83</sup> Como observó el historiador Daniel Goldhagen “Los regímenes que privan voluntariamente de alimentos a la población han sido una de las características recurrentes de los ataques eliminacionistas y aniquiladores de nuestro tiempo, a menudo empleados como complemento de otras medidas eliminacionistas. ...La eliminación masiva *siempre* se puede prevenir y *siempre es* el resultado de una elección política consciente”.<sup>84</sup> En febrero y marzo de 2024, la Corte Internacional de Justicia ordenó al Estado

<sup>77</sup> Stannard 1992, xii.

<sup>78</sup> Véase, por ejemplo, Watson 2015, 110-111 (“guerra biológica”); Drinnon 1980; Limerick 1987; Shaw 2007, 67. También, por ejemplo, General Allotment Act 1887; Dann v. United States 2002; United States v. Sioux Nation of Indians 1980; Hughes 1986 (Australia).

<sup>79</sup> Kelly 2017. Véase también Khalidi 2020, 241.

<sup>80</sup> Short 2016, 28.

<sup>81</sup> Casas, 1552.

<sup>82</sup> Mannix 1962.

<sup>83</sup> Shaw 2007, 67; Goldhagen 2009, 299-300; Thornton 1987, 118, 203, 243; Weisz 2022; Kulamadayil 2024 (CIJ); Smith 2024 (Ucrania); Olusoga 2010 (Namibia).

Goldhagen 2009, 299-300 (énfasis de Goldhagen).

de Israel que adoptara medidas provisionales para impedir el genocidio en virtud de la Convención en su asedio a Gaza, incluida la “inanición generalizada”.<sup>85</sup> En noviembre de 2024, la Corte Penal Internacional emitió órdenes de detención contra el presidente israelí Benjamin Netanyahu y el ex ministro de Defensa Yoav Gallant por crímenes contra la humanidad, incluido el uso de la inanición como arma de guerra en el genocidio de Gaza.<sup>86</sup> Rusia también es bien conocida por haber empleado el hambre en los asesinatos de millones de ucranianos en el Holodomor de 1932-33.<sup>87</sup> Notoriamente, cuando la Gran Mortandad llegó a las Grandes Llanuras de Norteamérica, se aceleró bajo un programa gubernamental y militar de genocidio por inanición mediante el exterminio en sólo unas décadas de la principal fuente de alimento de los pueblos indígenas que vivían allí, unos 10-50 millones de búfalos.<sup>88</sup> El coronel Richard Dodge, destacado comandante militar, declaró en aquella época: “Cada búfalo muerto es un indio muerto.”<sup>89</sup>

Grandes porcentajes de miembros de naciones y pueblos también han muerto al ser expulsados a la fuerza de sus tierras natales por las potencias coloniales.<sup>90</sup> Los militares contrataron al célebre asesino de indios Kit Carson para que siguiera y asesinara a los rezagados de los pueblos Apache y Diné (Navajo) durante la “Larga Marcha” en su expulsión forzosa de sus tierras ancestrales.<sup>91</sup> Además, miles de niños indígenas que fueron enviados a internados gestionados por Estados Unidos, Canadá y Australia perecieron y fueron enterrados en estas escuelas, a menudo en tumbas sin nombre, y nunca regresaron a casa con su pueblo.<sup>92</sup>

Los asesinatos en masa, las enfermedades generalizadas, el hambre y el traslado forzoso o bajo coacción por parte de las potencias coloniales contribuyeron al empobrecimiento de los supervivientes, tanto en términos económicos como de salud física y psicológica. En un genocidio de desgaste, a veces a lo largo de cientos de años, los pueblos y naciones indígenas experimentaron una mayor pérdida de vidas a causa de la dominación colonial pasada y continuada, que se expandió en el espacio y en el tiempo como ondas de muerte. El genocidio no se detuvo en la Gran Mortandad, las masacres o las expulsiones. Estos actos destruyeron las economías indígenas mediante el empobrecimiento deliberado y la explotación colonial<sup>93</sup> y destruyeron la salud física y mental de los pueblos indígenas, provocando aún más muertes prematuras.<sup>94</sup> La negación a los pueblos indígenas de sus fuentes tradicionales de alimentos también contribuyó a las enfermedades

<sup>85</sup> Sudáfrica contra Israel 2023, Orden 2024.

<sup>86</sup> Naciones Unidas 2024.

<sup>87</sup> Smith 2024. Se han vuelto a hacer acusaciones de que Rusia utilizó el hambre como arma en su actual guerra contra Ucrania, no sólo en Ucrania sino como estrategia global. PMA 2023.

<sup>88</sup> Hubbard 2014, 292-305; Thornton 1987, 52-53, 124, 146; Echo-Hawk 2010, 113; Jawort 2018.

<sup>89</sup> Jawort 2018.

<sup>90</sup> Akers 2004 (choctaw); Ehle 2011 (cherokee); Wishart 1994 (tribus de Nebraska); Denetdale 2009 (diné); Olusoga 2010 (Namibia); Derderian 2008 (Armenia); Williams 2015 (tártaros de Crimea).

<sup>91</sup> Roberts 2001, 260-281.

<sup>92</sup> Newland 2024, 16, 41-43, Apéndice I; Newland 2022, 85-86; Indep. Special Interlocutor 2023, 9-11 (muestra miles de fosas, incluidas fosas comunes, de niños nativos identificados en internados canadienses).

<sup>93</sup> Véase, por ejemplo, Galeano 1997.

<sup>94</sup> UN IASG 2014; UN DESA; Thornton 1987, 50, 85, 118, 124, 127, 203, 243; Short 2016, 76-79; Fein 1997.

y al acortamiento de la esperanza de vida.<sup>95</sup> Según la ONU, la esperanza de vida de los pueblos indígenas es hoy hasta 20 años inferior a la de los no indígenas.<sup>96</sup> El ecocidio de los entornos indígenas facilitado por el Estado ha provocado una mayor pérdida de vidas.<sup>97</sup> Sobre el acortamiento de la esperanza de vida de los indígenas, el profesor Wolfe comentó: “¿Qué especie de sofisma hace falta para separar un cuarto de ‘parte’ de la vida de un grupo de la historia de su eliminación?”<sup>98</sup>

## **2. Artículos 2(b)-(e) del Convenio: Matanza de un grupo nacional [U Otro Grupo Enumerado] Por Otros Medios**

Como se ha señalado anteriormente, una nación se define físicamente por sus miembros, su territorio y su gobierno, de modo que la eliminación de cualquiera de estos elementos supone la destrucción de la propia nación. Los grupos enumerados también pueden ser “asesinados” en su totalidad o en parte mediante su diezmación por la esterilización de sus miembros femeninos<sup>99</sup> (Artículo 2((d)) del Convenio), y por el traslado forzoso de los niños del grupo a otro grupo (Artículo 2((e)) del Convenio). Al igual que el asesinato de miembros, la esterilización de mujeres y el traslado de niños reducen efectivamente la población del grupo y eliminan las futuras generaciones de miembros del grupo.<sup>100</sup> Muchas de estas políticas “asimilacionistas” pretenden ser en beneficio de los pueblos y naciones indígenas, mientras que, de hecho, son actos de genocidio “benévolo”. Juntas y junto con otros medios, “causan graves daños físicos o mentales a los miembros del grupo

[nacional (o ético, religioso o racial)]” (Artículo 2(b) del Convenio) que “infligen deliberadamente al grupo condiciones de existencia que hayan de acarrear su destrucción física total o parcial”. (Artículo 2 ((c)) de la Convención). Como opinaba claramente Lemkin, estos actos genocidas no se producen de forma aislada, sino que se integran en el esfuerzo por destruir físicamente una nación, una etnia, una religión o una raza.

Preocupada por la “contaminación” de la sangre aria, Alemania esterilizó a los niños indígenas mestizos de Namibia a finales de la década de 1930. Hitler había advertido en *Mein Kampf* que los nazis “no permitiríamos que nos convirtieran en negros como intentaron hacer los franceses después de 1918”.<sup>101</sup> Entre 1996 y 2000, con el pretexto de defender los derechos de la mujer y ampliar el acceso a los recursos de planificación familiar, el gobierno peruano esterilizó a casi 300.000 mujeres indígenas.<sup>102</sup> Una investigación realizada en México reveló las esterilizaciones no consentidas del 27 por ciento de las mujeres indígenas que acudían a los servicios de salud pública.<sup>103</sup> Noruega practicó

<sup>95</sup> LaDuke 1999, 191-210; Thornton 1987, 85; Chino 2009; Watson 2015, 134 (pueblos indígenas de Australia).

<sup>96</sup> IASG DE LA ONU 2014.

<sup>97</sup> Short 2016; Kimerling 1991 (Huaorani de Ecuador); Koenning-Rutherford 2023 (Ogoni de Nigeria). *También*, Kiobel contra Royal Dutch Petroleum Company 2013.

<sup>98</sup> Wolfe 2006, 399.

<sup>99</sup> Shaw 2007, 67-69 (“gendercide”); Smith 2007; Cultural Survival, 5-6 (México).

<sup>100</sup> Véase, en general, Jacobs 2009.

<sup>101</sup> Olusoga 2010, 243-251, 307 (los nazis tenían “tribunales genéticos” - Olusoga 2010, 285).

<sup>102</sup> Ñusta 2003.

<sup>103</sup> Survival International 2018, 5.

esterilizaciones forzadas de indígenas romaníes tras la aprobación de su Ley de Esterilización en 1934.<sup>104</sup> Las esterilizaciones forzadas o bajo coacción de mujeres indígenas también estaban muy extendidas en Canadá.<sup>105</sup> La práctica incluía incluso a los niños indígenas de los internados. La Ley de Esterilización Sexual de Columbia Británica permitía al director de una escuela autorizar la esterilización de cualquier persona indígena a su cargo. Como tutor legal, el director podía esterilizar a cualquier niño. Con frecuencia, estas esterilizaciones afectaban a grupos enteros de niños cuando llegaban a la pubertad en instituciones como la Escuela Provincial de Formación de Red Deer, Alberta, y el Hospital Mental de Ponoka.<sup>106</sup>

En las décadas de 1960 y 1970, el Servicio de Salud Indígena de Estados Unidos y médicos colaboradores mantuvieron una práctica generalizada de realizar procedimientos de esterilización a mujeres indígenas, a menudo sin su consentimiento o engañándolas haciéndoles creer que el procedimiento de esterilización era reversible.<sup>107</sup> Se calcula que entre el 25% y el 40% de las mujeres de algunas comunidades se sometieron a procedimientos de esterilización, lo que, de ser exacto, supondría la esterilización de unas 70.000 mujeres y niñas indígenas durante este periodo.<sup>108</sup> Las esterilizaciones fueron subvencionadas con dinero federal.<sup>109</sup> De 1970 a 1980, debido en parte a las prácticas de esterilización, la tasa de natalidad descendió de 3,7 a 1,8 nacimientos por madre indígena.<sup>110</sup> Marie Sanchez, jueza jefe de la tribu cheyenne del norte, equiparó la esterilización masiva de

mujeres indígenas a una forma moderna de genocidio.<sup>111</sup>

Aunque este programa de esterilización abierta se ha interrumpido en Estados Unidos, el gobierno continúa con una política de supresión de la población fomentando el uso de anticonceptivos hormonales de acción prolongada por parte de las mujeres indígenas y otras mujeres de color.<sup>112</sup> Se ha documentado que las prácticas genocidas sistémicas pasadas y presentes han disminuido la fertilidad de las mujeres indígenas, gravando aún más la supervivencia de las naciones y pueblos indígenas.<sup>113</sup> Según los informes, en los años 60 y 70 Dinamarca llevó a cabo un programa de anticoncepción “involuntaria” para limitar el crecimiento de la población, durante el cual hasta la mitad de las mujeres indígenas fértiles de Groenlandia recibieron implantes de espirales.<sup>114</sup> La violación también se ha utilizado como herramienta para evitar futuros nacimientos en las comunidades indígenas, tachando a las víctimas de marginadas

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<sup>104</sup> Daly 2023, 24-25.

<sup>105</sup> Comisión Permanente del Senado, 2022, 10-11.

<sup>106</sup> Annett 2001, 14.

<sup>107</sup> Smith 2007, 79-107 (abuso reproductivo); Volscho 2010, 17; Ralstin-Lewis 2005, 71-72.

<sup>108</sup> Lawrence 2000, 410; Ralstin-Lewis 2005, 71. Véase Theobald 2019.

<sup>109</sup> Ley de servicios de planificación familiar e investigación demográfica; Theobald 2019.

<sup>110</sup> Lawrence 2000, 402.

<sup>111</sup> Theobald 2019.

<sup>112</sup> Smith 2007, 88-96.

<sup>113</sup> Thornton 1987, 54, 85.

<sup>114</sup> Olsen 2024.

sociales.<sup>115</sup> Estos actos entran claramente en el ámbito del Artículo 2(d) del Convenio como “imposición de medidas destinadas a evitar nacimientos dentro de un grupo”.

Desde los tiempos de Colón,<sup>116</sup> los niños han sido blanco de la dominación colonial. En lo que Margaret Jacobs denomina “colonialismo maternal”, la separación de los niños indígenas de sus familias y comunidades ha sido una práctica habitual.<sup>117</sup> Antes de la aprobación de la Ley de Bienestar del Niño Indígena en 1978, las encuestas indicaban que entre el 25% y el 35% de todos los niños indígenas de Estados Unidos eran separados de sus familias y colocados en hogares de acogida, hogares adoptivos o instituciones, una tasa hasta diecinueve veces superior a la de los niños no indígenas.<sup>118</sup> Las encuestas revelaron que entre el 75% y el 93% de las colocaciones se realizaban con familias no indígenas;<sup>119</sup> el resultado de la falta de reconocimiento del Estado hacia las relaciones tribales esenciales de los pueblos indígenas y las normas culturales y sociales que prevalecen en las comunidades y familias indígenas.<sup>120</sup>

Canadá llevó a cabo una práctica similar, denominada “Sixties Scoop”, entre 1951 y 1984, cuando se calcula que 20.000 niños de las Primeras Naciones, Métis e Inuit fueron recogidos por las autoridades de bienestar infantil y entregados en adopción a hogares en su mayoría no indígenas.<sup>121</sup> Al igual que en Estados Unidos, en Canadá esta práctica estuvo respaldada por una serie de políticas gubernamentales. Para algunos, como Loni Edmonds, miembro de la Primera Nación Lil’Wat, la sustracción institucionalizada de niños indígenas no es

cosa del pasado. En 2007, los servicios sociales retiraron a los seis hijos de la Sra. Edmonds.<sup>122</sup> Ella misma había sido retirada de niña del cuidado de su propia madre por las autoridades canadienses, al igual que su madre del de su abuela.<sup>123</sup> En 2013, seis años después de que los niños fueran separados de su madre, la Comisión Interamericana de Derechos Humanos dictaminó que las alegaciones de su petición declaraban violaciones por parte de Canadá de los derechos humanos de la Sra. Edmonds y sus hijos.<sup>124</sup> Después de más de 17 años, la Sra. Edmonds sigue esperando el regreso de sus seis hijos.<sup>125</sup>

El traslado por adopción de niños indígenas a familias blancas también era habitual en Australia. Una Investigación Nacional de Australia calculó que entre 1910 y 1970 hasta un tercio de los niños indígenas habían sido apartados a la fuerza de sus hogares en lo que allí se conoce entre los pueblos aborígenes como “la Generación Robada”.<sup>126</sup> A menudo retirados por razones de mera pobreza, aproximadamente el 17% de los niños fueron retirados a la fuerza

<sup>115</sup> Totten 2011, 128; Schabas 2000, 170; San José 2020 (yazidí); Ibrahim 2018 (yazidí); Cameron 2023 (ndebele).

<sup>116</sup> Leyes de Burgos, 26-27.

<sup>117</sup> Jacobs 2009.

<sup>118</sup> 1974 Hearings; Byler 1977, 1; Barsh 1980, 1288-90; Miss. Band of Choctaw Indians v. Holyfield 1989, 32.

<sup>119</sup> Audiencias de 1974, 17; Barsh 1980, 1287 n.3, 1290 n.16.

<sup>120</sup> 25 U.S.C. § 1901(5).

<sup>121</sup> Jacobs 2014; Baswan 2024.

<sup>122</sup> Jones 2010.

<sup>123</sup> Edmonds, 2013.

<sup>124</sup> *Ibidem*, párrafo 72.

<sup>125</sup> Véase Jacobs 2009.

<sup>126</sup> Comisión Australiana de Derechos Humanos, 31, cap. 22.

por los servicios sociales mediante su adopción por familias blancas.<sup>127</sup> Dinamarca también tiene antecedentes de que sus organismos de servicios sociales separan a los niños indígenas inuit de sus familias en Groenlandia y los trasladan a Dinamarca, donde sufren una asimilación forzosa.<sup>128</sup>

El robo institucionalizado y no institucionalizado de niños ha sido una de las principales herramientas utilizadas para promover la esclavitud, el colonialismo, la asimilación forzada y la conversión cristiana durante más de 430 años.<sup>129</sup> El uso de niños como armas de guerra y ocupación colonial continúa. Durante su invasión de Ucrania, Rusia sacó a cientos de miles de niños de Ucrania y los colocó en hogares y escuelas rusas.<sup>130</sup> El 17 de marzo de 2023, la Corte Penal Internacional dictó órdenes de detención contra el presidente ruso Vladimir Putin y su Comisionado para los Derechos del Niño por el crimen de guerra de deportación ilegal de niños de la Ucrania ocupada.<sup>131</sup> “Trasladar por la fuerza a los niños del grupo [nacional, ético, religioso o de culto] a otro grupo” tiene como objetivo la destrucción del grupo y, por tanto, constituye genocidio en virtud del Artículo 2(e) de la Convención. La esterilización de mujeres y el robo de niños funcionan para destruir naciones al privar a las naciones de las generaciones futuras y de la continuidad histórica y “causar graves daños físicos o mentales a los miembros del grupo”. Funcionan como genocidio en virtud del Artículo 2(b) de la Convención, al infligir al grupo “condiciones de existencia que hayan de acarrear su destrucción física, total o parcial.”<sup>132</sup>

Ciertamente, como elementos de la vida del grupo y como objetivos de la conducta genocida, las tribus y las naciones poseen un territorio o dominio, un derecho colectivo de autodeterminación o gobierno y, con los pueblos, poseen una identidad cultural y social distinta entre sus miembros.<sup>133</sup> De hecho, el apego a un territorio específico, a tierras ancestrales,<sup>134</sup> o a un “pariente” natural específico,<sup>135</sup> puede ser inseparable de la identidad colectiva del grupo nacional, haciendo que la expulsión del grupo de su territorio, o la destrucción de su pariente familiar, sea un asesinato, al menos en parte, de su identidad nacional.

Dado que las naciones se definen por su posesión y gobierno de un territorio o dominio, la extinción de ese territorio o dominio -objetivo del colonialismo de colonos<sup>136</sup> - destruiría el carácter

<sup>127</sup> *Ibid.*

<sup>128</sup> Cali Tzay 2023; Bryant 2025.

<sup>129</sup> Véase, por ejemplo, Castillo 2017; Costo 1987, 3; Newcomb 2008, 45-46. Véase, en general, Tinker 1993. También, Comisión Australiana de Derechos Humanos, 22.

<sup>130</sup> Laboratorio de Investigación Humanitaria 2024; Kelly 2023. Rusia contó con la ayuda de Bielorrusia; Khoshnood 2023.

<sup>131</sup> Comunicado de prensa de la CCI 2023.

<sup>132</sup> Convención sobre el genocidio de 1948, art. 2(c).

<sup>133</sup> PIDCP, art. 1; PIDESC, art. 1; UNGA Res. 1514; UNDRIP, arts. 1-7, 9-16, 25-26, 31, 33.

<sup>134</sup> Short 2016, 29, 36, 50-54 (traslado); Dann c. Estados Unidos 2002, párr. 129, 131, n. 93 (conexión espiritual con las tierras ancestrales); Whanganui River Claims Settlement 2017, 14-15; Whitt 2007; Moreton-Robinson, 2020; Watson 2015, 114; Lyng v. Northwest Indian Cemetery Protective Ass'n (1988,) 459-462 (J. Brennan, disidente).

<sup>135</sup> Véase Hubbard, 2014, 294 (apego familiar al búfalo). Por ejemplo, los Oceti Sakowin Oyate (“Sioux”) son conocidos como el “pueblo del búfalo”, los Nez Perce son conocidos como la “nación del caballo”, los Menominee están vinculados al esturión y los Makah a la ballena. Los pueblos indígenas del suroeste y de México están espiritualmente ligados al maíz, de tal manera que la autorización de la entrada de maíz patentado OGM en México para suplantar las variedades tradicionales amenaza su existencia;. Villafaña 2018.

<sup>136</sup> Wolfe 2006; Short 2016, 24 (cita a Jürgen Zimmerer).

nacional de los pueblos nativos. Este objetivo se logró mediante la llamada “Doctrina del Descubrimiento”, la primera de las tres doctrinas genocidas fundamentales urdidas e invocadas por el presidente del Tribunal Supremo de EEUU, John Marshall, cuando creó formalmente la ley federal (colonial) India (racista) en una trilogía de decisiones entre 1823 y 1834. Esas doctrinas del lento genocidio de los Pueblos Indígenas y las Primeras Naciones se extendieron después a otros Estados coloniales y a los Estados coloniales sucesores.<sup>137</sup> Hoy en día siguen siendo el derecho interno de esos Estados y de Estados Unidos.<sup>138</sup> En *Johnson v. M’Intosh* (1823), *Cherokee Nation v. Georgia* (1831) y *Worcester v. Georgia* (1834), el presidente del Tribunal Supremo Marshall invocó y distorsionó una doctrina del Derecho de Gentes que permitía a una nación tomar posesión de un territorio “desierto”, es decir, un territorio que no estaba en posesión de ninguna “persona”.<sup>139</sup> El Derecho de Gentes de entonces (y de ahora) no permitía a una nación invadir el territorio de otra nación<sup>140</sup> que ya estuviera ocupado, y mucho menos tomar posesión de él, ocuparlo y afirmar su propiedad.<sup>141</sup> El presidente del Tribunal Supremo Marshall conocía bien el derecho internacional de la época.<sup>142</sup> En sus tres opiniones, el alto tribunal colonial<sup>133</sup> torció estos principios reconocidos del derecho internacional por una supuesta “necesidad” colonial<sup>144</sup> para inventar una doctrina del derecho internacional y de propiedad que se aplicaba “*sui generis*” (únicamente) a las naciones y pueblos indígenas.<sup>145</sup> Marshall razonó que su raza (india),<sup>146</sup> religión (no cristiana),<sup>147</sup> y etnia (“no civilizada” / no europea)<sup>148</sup> justificaban que el tribunal pasara por alto su existencia, posesión y

ocupación de sus territorios y tierras antes de la invasión desde “tiempos inmemoriales”.<sup>149</sup> Según el presidente del Tribunal Supremo Marshall “En la medida en que se respetaba la autoridad de la corona, no se hacía distinción alguna entre las tierras baldías y las ocupadas por los indios. Se admitió que el título, sujeto únicamente al derecho de ocupación por parte de los indios, pertenecía al Rey ....”<sup>150</sup>

La decisión de *M’Intosh* fue seguida de cerca por la decisión del alto tribunal colonial en el caso *Nación Cherokee contra Georgia* (1831). En *Cherokee Nation*, el estado de Georgia, mediante legislación, pretendía “aniquilar a los cherokees

<sup>137</sup> Véase, Watson 2011; Miller 2021.

<sup>138</sup> Watson 2015, 19; *City of Sherrill v. Oneida Indian Nation* 2005, nota 1 (doctrina del descubrimiento); *United States v. Jicarilla Apache Nation* 2011 (doctrina del fideicomiso); *Haaland v. Brackeen* 2023 (doctrina del poder plenario).

<sup>139</sup> *Vattel* 1758, Bk I, secs. 205, 207; *ibidem*, Bk II, secs. 86, 88.

<sup>140</sup> *Ibidem*, tomo I, secs. 9, 15, 207; Bk II, secs. 18, 54, 64, 92-94.

<sup>141</sup> *Ibidem*, Bk II, secs. 18, 90-94, 97-98; *Johnson v. M’Intosh* 1823, (C.J. Marshall, “a principle of universal law”).

<sup>142</sup> *Johnson v. M’Intosh* 1823, 567-517, 574; *Worcester v. Georgia*, 31 U.S., 561 (cita *Vattel* sobre el Derecho de gentes y los tratados de protección). Rudko 1991, 3-5 (antes de convertirse en juez del Tribunal Supremo de EE.UU., Marshall también había sido el cuarto Secretario de Estado de EE.UU. bajo la presidencia de John Adams; Paul 2018, 193-214).

<sup>143</sup> Esto constituía por sí solo una violación del Derecho de gentes, ya que ninguna nación tenía derecho ni jurisdicción para decidir sobre los derechos de otra nación. *Vattel* 1758, Bk II, secs. 55, 84, 103, 265.

<sup>144</sup> *Ibidem*, 590.

<sup>145</sup> *Cherokee Nation v. Georgia* 1831, 16-17; Paul 2018, 402-406, 414-416, 321-422.

<sup>146</sup> *Johnson contra M’Intosh* 1823, 591.

<sup>147</sup> *Ibidem*, 573, 576-577.

<sup>148</sup> *Ibidem*, 573, 590.

<sup>149</sup> *Ibidem*, 573-574, 579, 583-585, 587-588, 591 (“pretensión extravagante”) 592; *Nación Cherokee contra Georgia* 1831 (desde “tiempos inmemoriales”).

<sup>150</sup> *Johnson v. M’Intosh* 1823, 596; *también*, 603.

como sociedad política y apoderarse, para uso de Georgia, de las tierras de la Nación”.<sup>151</sup> El presidente de la Corte Suprema Marshall dictaminó que las naciones indígenas no eran naciones “extranjeras”, sino naciones incivilizadas bajo la “protección” de los Estados Unidos como “naciones domésticas dependientes... en un estado de pupilaje “ que se asemeja al de un pupilo respecto a su tutor”.<sup>152</sup> “Ellos y su país son considerados...como estando tan completamente bajo la soberanía y dominio de los Estados Unidos que cualquier intento [por naciones extranjeras] de adquirir sus tierras, o de formar una conexión política con ellos, sería considerado por todos como una invasión de nuestro territorio y un acto de hostilidad”.<sup>153</sup> Así, la Trilogía Marshall, por decreto judicial, separó a todos los pueblos indígenas de la propiedad última y la soberanía sobre sus territorios, tierras y recursos, un acto de genocidio que intenta extinguir el carácter “nacional” de los pueblos indígenas y hacerlos desiguales al de todas las demás naciones.

La relación pronunciada en *Cherokee Nation* entre el Estado y las naciones indígenas, así como los pueblos que se encuentran dentro de su territorio reclamado, describe una relación colonial clásica, ilegal entonces y hoy según el derecho internacional.<sup>154</sup> El Derecho de las Naciones en el momento de la decisión imponía a una nación que ocupaba a otra el deber de cuidar razonablemente de la nación ocupada y de su pueblo.<sup>155</sup> La relegación de las naciones y pueblos indígenas en la *Nación Cherokee* a un estatus incompetente, infantil, necesitado de cuidados y educación por parte de la potencia colonial, amplió la relación colonial no sólo a la ocupación,

sino al control absoluto, la autoridad “plenaria”, sobre sus pupilos dependientes, siguiendo el modelo de una relación fiduciaria del common law. Este estatus incompetente priva en última instancia al indígena nacional bajo tutela de su soberanía, de personalidad jurídica e incluso, como dijo Hannah Arendt, del derecho a tener derechos.<sup>156</sup> Como “tutor” que ejerce su autoridad fiduciaria, el Estado colonial tiene poder total (pleno) sobre su incompetente pupilo.<sup>157</sup> Es una extinción por ley colonial del derecho de las naciones indígenas a tener derechos, un acto de genocidio judicial. Incluso hoy en día, Estados Unidos, como tutor colonial, mantiene y (mal) administra prácticamente todas las tierras indígenas comunes restantes y la mayoría de las privadas en “fideicomiso” para sus pupilos indígenas.<sup>158</sup>

La persecución y el robo de territorios y tierras indígenas ha sido la política principal de los Estados Unidos en el ejercicio de su autoridad “fiduciaria” y el poder plenario que ha asumido

<sup>151</sup> Nación Cherokee contra Georgia 1831 3, 15.

<sup>152</sup> *Ibidem*, 17.

<sup>153</sup> *Ibidem*, 17-18. Watson 2015, 96 (Primeras Naciones de Australia).

<sup>154</sup> *Supra notas* 141 y 142; también, Vattel 1758, Bk II, secs. 7 (prohibe la imposición de la cultura de una nación a otra), 59 (prohibe la imposición de la religión de una nación a otra), 93-94, 97.

<sup>155</sup> Vattel 1758, Bk III, sec. 201.

<sup>156</sup> Arendt 1994, 299-300. Watson 2015, 97. En virtud de la legislación india federal (colonial), una nación indígena, incluso fuera de la relación de fideicomiso, sólo tiene derechos si los Estados Unidos han “reconocido” su existencia. Véase, Tee-Hit-Ton v. United States 1955.

<sup>157</sup> Véase Cherokee Nation contra Georgia 1831., 25; Seminole Nation contra Estados Unidos 1942, 296; Estados Unidos contra Jicarilla Apache Nation, 2011., 174; Merrión contra Jicarilla Apache Nation 1982.

<sup>158</sup> Cong. Res. Serv., Cobell 2012. Véase también US Sec. of Interior, Trust Responsibility Memo.

sobre las naciones indígenas a través de diversos tratados y acuerdos de adjudicación, asimilación, terminación, leyes del Congreso y sentencias de los tribunales de los colonizadores impuestas a los pueblos indígenas desde 1823 hasta la actualidad. La elaboración de tratados y la adjudicación han reducido los territorios ancestrales de los indígenas en un 99%.<sup>159</sup> Sólo en los últimos años, los tribunales han dictaminado que los territorios de la Nación Cheyenne y Arapaho del Sur<sup>160</sup> y de la Nación Osage<sup>161</sup> se extinguieron de esta manera. La dominación colonial continuó desintegrando el pequeño porcentaje que quedaba de tierras indígenas mediante la imposición de una forma ajena de propiedad privada en tierras que antes pertenecían a naciones y pueblos indígenas en común. Al privatizar las tierras indígenas, el poder colonial las abrió a una eventual enajenación de la propiedad indígena con efectos devastadores en sus economías.<sup>162</sup>

Estados Unidos no fue el único. Sartre comentó las repercusiones de la imposición por los franceses de su Código Civil (ley Napoleón) de la propiedad privada sobre las tierras comunales de los pueblos indígenas de Argelia. “Así, destruyeron sistemáticamente la infraestructura del país, y las tribus de campesinos pronto vieron cómo sus tierras caían en manos de los especuladores franceses”.<sup>163</sup> Los tratados entre los Estados europeos, las naciones indígenas y los pueblos de África se utilizaron para apoderarse de las tierras y territorios indígenas.<sup>164</sup> La propiedad privada de la tierra, ajena a las naciones y pueblos indígenas, era, y es, fundamental para el pensamiento occidental.<sup>165</sup> Según Martín Lutero, “la posesión de la propiedad privada

era una diferencia esencial entre el hombre y la bestia”.<sup>166</sup> El concepto fundamental y ajeno a la ley de propiedad occidental fue utilizado por el presidente de la Corte Suprema Marshall como apoyo principal para la sentencia de que las naciones y pueblos indígenas no eran propietarios de sus tierras porque no se habían “apoderado” de ellas, dejando todas sus tierras *terra nullius* (“vacías”) y abiertas a las reclamaciones de los imperios invasores de Europa en virtud de su Doctrina del Descubrimiento.<sup>167</sup>

En gran medida mediante el ejercicio de acuerdos forzados o coaccionados, Estados Unidos también ha destruido físicamente el gobierno tradicional de las naciones nativas. En virtud de la Ley de Reorganización Indígena de 1934 y otras leyes similares que rigen las naciones nativas, las constituciones, leyes, gobiernos y tribunales “tribales” son creados por, actúan bajo la autoridad de y están sujetos a la autoridad permanente de la potencia colonial, Estados Unidos. El tribunal del caso *Harjo c. Kleppe* calificó de “imperialismo burocrático” el nombramiento presidencial de jefes tribales en

<sup>159</sup> Wade 2021; Wolfe 2006, 400; Watson 2015, 112 (“La extinción del título nativo es otro ejemplo de una forma encubierta de genocidio, tan encubierta que se disfraza de forma de reconocimiento”).

<sup>160</sup> Whitebuffalo contra Oklahoma 2022.

<sup>161</sup> McCauley v. Oklahoma 2024 párrafo 4.

<sup>162</sup> Véase, por ejemplo, Cobell v. Salazar 1996. También, Crepelle 2023.

<sup>163</sup> Sartre 1968, 63.

<sup>164</sup> Olusoga 2010, 42, 64, 85.

<sup>165</sup> Locke 1690, cap. 5; Vattel 1758, chap. 7; Stannard 1992, 233-236.

<sup>166</sup> Citado en Stannard 1992, 233.

<sup>167</sup> Johnson contra M'Intosh 1823, 568-69.

lugar del órgano de gobierno tradicional de la Nación Creek.<sup>168</sup> La destrucción total o parcial del territorio de una nación, el robo masivo de las tierras y los recursos naturales de una nación, y la destrucción de sus instituciones de gobierno, de su soberanía, actúan conjuntamente como un esfuerzo intencionado e integrado para infligir “al grupo condiciones de vida que hayan de acarrear su destrucción física” y constituyen otros actos de genocidio en virtud del Artículo 2(c) de la Convención.

## B. MATAR A UNA ETNIA

El Artículo 2 del Convenio también se refiere a la matanza, total o parcial, de un grupo étnico. Aunque existen entre 6.000 y 9.000 naciones, se calcula que hay hasta 24.000 etnias.<sup>169</sup>

”Étnico” se ha definido como “relativo o perteneciente a un grupo de personas que pueden considerarse distintas porque comparten una cultura, tradición, lengua, historia, etc.”.<sup>170</sup> En ese sentido, una nación, tribu o pueblo es un subgrupo étnico que posee un territorio común y una identidad colectiva expresada en el derecho a la autodeterminación o la gobernanza. Mientras que el asesinato de un grupo nacional se centra en la destrucción de la identidad social o política colectiva, el asesinato de un grupo étnico se refiere a la destrucción de la identidad cultural compartida del grupo.

Si los miembros que componen un grupo étnico son atacados intencionadamente a causa de su etnia y asesinados en masa,<sup>171</sup> el propio grupo sufre una destrucción “física”. Sin embargo, la destrucción de la identidad étnica de un grupo

no requiere necesariamente la destrucción física mediante el asesinato en masa de los miembros individuales del grupo. La destrucción física de un grupo étnico puede llevarse a cabo con la destrucción de las manifestaciones étnicas físicas del grupo, como su conexión con sus territorios y tierras,<sup>172</sup> su literatura y medios de comunicación, sus instituciones y programas educativos, sus museos y centros históricos, sus lugares sagrados y lugares de culto, sus centros y prácticas culturales,<sup>173</sup> sus estructuras familiares tradicionales, sus economías centradas en la cultura, etc. La destrucción física de un grupo étnico es el objetivo mismo, por ejemplo, de la asimilación forzosa de los miembros del grupo, o del grupo en su conjunto, por y en una entidad social, étnica o política dominante y más poderosa.<sup>174</sup>

La destrucción intencionada, física, de la etnia de un grupo es genocidio según el Artículo 2(c) de la Convención. Como concluyó el profesor Wolfe sobre el colonialismo de colonos,

elimina para sustituir. Al igual que el colonialismo de colonos, la “asimilación” es, por definición, la eliminación de una identidad étnica para sustituirla por la identidad étnica del

<sup>168</sup> Harjo contra Kleppe 1976, 1130. Lemkin, en una nota a pie de página de su libro fundamental sobre el genocidio, señaló que el término “etnocidio” era conceptualmente similar al de genocidio; Lemkin 1944, 79n.

<sup>169</sup> Proyecto Joshua.

<sup>170</sup> Diccionario de Cambridge, “étnico”. Véase Baumann 2004.

<sup>171</sup> Convención sobre el Genocidio de 1948, art.2 (a).

<sup>172</sup> Shaw 2007, 50-62 (expulsión y traslado forzoso).

<sup>173</sup> Véanse, por ejemplo, Zarandona 2023; Strecker 2023; Marsoobian 2023 (armenio).

<sup>174</sup> Watson 2015, 117-118.

colonizador. A través de su dominio, una potencia colonial puede lograr intencionadamente la eliminación de un grupo étnico mediante una asimilación social, cultural o religiosa impuesta, o una dilución étnica abrumadora, sin matar o eliminar a los miembros del grupo. Jean-Paul Sartre comentó al respecto: “En efecto, la colonización no es una mera conquista... es, por su propia naturaleza, un acto de genocidio cultural. La colonización no puede tener lugar sin liquidar sistemáticamente todas las características de la sociedad nativa”.<sup>175</sup> Y más adelante, “no es cierto que haya que elegir entre la muerte o la sumisión. Porque la sumisión, en esas circunstancias, es sumisión al genocidio”.<sup>176</sup>

Las primeras leyes de América fueron las Leyes de Burgos de 1512, por las que los imperialistas españoles regulaban la esclavitud de los pueblos indígenas, destruyendo sus comunidades y costumbres tradicionales con el pretexto de exponerlos a una civilización superior y al cristianismo. Por ejemplo, obligaba a llevarse a los hijos mayores de los líderes indígenas y a colocarlos con sacerdotes dominicos para que aprendieran español y fueran adoctrinados en la fe cristiana antes de enviarlos de vuelta a sus comunidades para que hicieran lo mismo con sus propios pueblos.<sup>177</sup> Incluso se consideraba que la esclavitud beneficiaba al esclavo porque le exponía a una vida civilizada y al cristianismo.<sup>178</sup> En este sentido, unos trescientos años más tarde, el presidente del Tribunal Supremo de Estados Unidos, John Marshall, declaró para su (triste) “fama” en *Johnson v. M’Intosh*:

...el carácter y la religión de sus habitantes ofrecían una disculpa para considerarlos

un pueblo sobre el que el genio superior de Europa podía reclamar ascendencia. Los potentados del viejo mundo no tuvieron dificultad en convencerse de que compensaban ampliamente a los habitantes del nuevo, otorgándoles civilización y cristianismo a cambio de una independencia ilimitada.<sup>179</sup>

Esta política y práctica colonial de destrucción de la identidad étnica de los pueblos indígenas mediante la asimilación forzosa fue continuada por las iglesias cristianas y los Estados Unidos y otros Estados coloniales sucesores durante más de 400 años, en violación de los Artículos 2(b) y (c) del Convenio.<sup>180 181</sup> Trabajando de forma concertada, el Estado colonial se convirtió en el instrumento institucional y coercitivo de las entidades religiosas en la destrucción

<sup>175</sup> Sartre 1968, 63.

<sup>176</sup> *Ibidem*, 75.

<sup>177</sup> Los Leys de Burgos, 26-27. Williams 1990, 86-88.

<sup>178</sup> Byun 2011; Hernández 2001.

<sup>179</sup> Johnson contra M’Intosh 1823, 572.

<sup>180</sup> ROBO DE NIÑOS INDÍGENAS - Al caracterizar la educación india como “400 años de fracaso”, un informe del Subcomité Especial sobre Educación India del Senado de EE.UU. concluía que “[e]l objetivo, desde el principio de los intentos de educación formal del indio americano, no ha sido tanto educarlo como cambiarlo.” Subcomité Especial de Educación Indígena, 1969, 3, 8, 10. Secretary of the Interior (1891), 66-67; The National Native American Boarding Schools Healing Coalition (2020); The Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission (2015). Tanto Canadá como Australia también practicaron el traslado forzoso generalizado de niños indígenas a internados cristianos lejos de sus comunidades y hogares. Comisión de la Verdad y la Reconciliación (2015); Comisión Australiana de Derechos Humanos (1997); Watson 2015, 119-120. Véase también Kreiken 2010, Jacobs 2009.

<sup>181</sup> ENSLAVAMIENTO INDÍGENA - Reséndez 2016, 4; Nixon 2011, 6; Piatt 2019, 32; Castillo 2015; Costo 1987, 3; Newcomb 2008, 45-46. Véase en general, Tinker 1993. El Tribunal Supremo de los Estados Unidos afirmó la legalidad de la esclavitud indígena ya en 1838. Choteau v. Marguerite 1838. Véase también la discusión de Lemkin sobre el robo y la esclavitud de niños indígenas en Tasmania. Curthoys en Moses 2007, 88-89.

de la espiritualidad indígena (religicidio) y su sustitución forzosa por la de la entidad religiosa dominante. Del mismo modo, la entidad religiosa proporcionó cobertura moral y las instituciones de conversión a los Estados coloniales en la destrucción de las naciones y pueblos indígenas. Todos los tratados posteriores con naciones nativas redactados por Estados Unidos incluían disposiciones asimilacionistas como la transición a la agricultura mediante adjudicaciones, la privatización de las tierras comunales, la provisión de una educación occidentalizada, etc.<sup>182</sup> Estas políticas continuaron con el desarrollo de un amplio cuerpo de leyes y jurisprudencia por parte del Congreso y los tribunales del colonizador, conocido como ley federal india, que imponía y aplicaba doctrinas y normas coloniales y asimilacionistas.

Una decisión concreta, el caso de *Standing Bear contra Crook*,<sup>183</sup> alabada en la legislación federal sobre indios<sup>184</sup> por establecer que los indios son “humanos”, ejemplifica esa asimilación judicial. En 1879, el Jefe Ponca Ma-chú-nu-zhe (Oso Erguido) y su tribu fueron trasladados a la fuerza en pleno invierno a Oklahoma desde su territorio ancestral en el territorio de Dakota. Su hijo, Escudo de Oso, y un tercio de la tribu murieron en el camino. Cuando Oso Erguido regresó para enterrar a su hijo en sus tierras ancestrales, fue detenido.<sup>185</sup> Se planteó un problema cuando solicitó al tribunal su puesta en libertad, porque sólo los seres humanos estaban legitimados para presentar una petición ante el tribunal.<sup>186</sup> El juez opinó que era una persona y le permitió regresar a sus tierras ancestrales porque había abandonado su tribu y su “raza perdida” y “adoptado los hábitos generales de los blancos”.<sup>187</sup>

El hermano de Oso Erguido, Serpiente Grande, que no había abandonado su tribu ni se había asimilado, al enterarse de la autorización de su hermano para regresar a sus tierras ancestrales, también intentó regresar pero fue retenido y asesinado por el ejército estadounidense.<sup>188</sup> En otras palabras, el nativo (un “indio bueno”) que había abandonado su tribu y se había asimilado plenamente era un “ser humano”, mientras que su hermano, que conservaba su etnia (un “indio malo”), no lo era. O, como dijo Frederick Hoxie: “Los nativos asimilados serían la prueba positiva de que América era una sociedad abierta, donde la obediencia y la acomodación a los deseos de la mayoría se recompensarían con la igualdad social”.<sup>189</sup> Trágicamente, Standing Bear sufrió dos tipos de destrucción étnica, la limpieza étnica de las tierras natales de su pueblo mediante su traslado a Oklahoma y la pérdida de su etnia mediante la asimilación coaccionada a la cultura del colonizador.

El dominio colonial se institucionalizó en Estados Unidos mediante la creación de leyes

<sup>182</sup> Véase, por ejemplo, el Tratado de Ft. Laramie de 1868, Artículos 3, 6, 8 (asignaciones de tierras para la agricultura), Artículo 7 (“civilización” a través de la educación); Otis 1973; Anderson 2014, 330.

<sup>183</sup> *Standing Bear contra Crook*.

<sup>184</sup> Véase, por ejemplo, Sarita 2009; USCourts 2020.

<sup>185</sup> Sarita 2009, 698-99.

<sup>186</sup> *Ibidem*, 697, 700-01.

<sup>187</sup> *Ibidem*, 695, 701. Cinco años más tarde, el Tribunal Supremo de EE.UU. en *Elk v. Wilkins*, citando a *Standing Bear y Dred Scott v. Sanford*, dictaminó que un nativo que había abandonado su tribu y se había civilizado era ciudadano estadounidense. En 1870, el Congreso estadounidense aprobó una ley que establecía que un miembro de la tribu Winnebago de Minnesota podía convertirse en ciudadano si poseía “inteligencia suficiente” y había “adoptado los hábitos de la vida civilizada”. Ley de 1870, cap. 296, sec. 10.

<sup>188</sup> Brown 1970, cap. 15; Bear 1999.

<sup>189</sup> Hoxie 1989, 34.

nacionales que “legalizaban” (forzaban) la asimilación y el lento genocidio, entre las que destacan: la creación de la Oficina de Asuntos Indios en 1832 para supervisar todos los asuntos relacionados con las naciones y pueblos nativos tanto dentro como fuera de sus reservas,<sup>190</sup> la Ley de Traslado de Indios de 1830, el fin de la elaboración de tratados con las naciones nativas en 1871, la Ley de Delitos Mayores de 1885, las leyes de adjudicación de finales del siglo XIX,<sup>191</sup> la Ley de Ciudadanía India de 1924, la Ley de Reorganización India de 1934, las Leyes de Extinción de la década de 1950,<sup>192</sup> las Leyes de Asignaciones Indígenas anuales, especialmente en materia de educación, sanidad, economías nativas, etc.

Un método clave de asimilación fue la educación de los niños indígenas. A instancias de varias confesiones cristianas, Estados Unidos adoptó formalmente una política de internados indios a partir del Fondo de la Ley de Civilización India de 1819. La intención expresa de esta política era destruir la cultura y la identidad indígenas y sustituirlas por una euroamericana.<sup>193</sup> Como el fundador del primer internado fuera de la reserva, el general de brigada Richard Henry Pratt, (in)famosamente comentó que el objetivo de la política era “[k]ill el indio en él, y salvar al hombre”.<sup>194</sup> El historiador David Wallace Adams se refirió a ella como “educación para la extinción”.<sup>195</sup> De 1858 a 1871, en muchos tratados entre Estados Unidos y las naciones indígenas, Estados Unidos incluyó disposiciones que hacían obligatoria la asistencia de los niños indígenas a las escuelas de las reservas, establecidas y gestionadas por el gobierno,

con el objetivo de “civilizarlos” mediante una educación euroamericana y cristiana.<sup>196</sup> En 1891, una ley de asistencia obligatoria permitió a los funcionarios federales sacar por la fuerza de sus casas a niños indígenas de tan sólo cuatro años y enviarlos a internados gestionados en gran parte por misioneros cristianos, iglesias cristianas y personal militar con financiación federal para que fueran asimilados.<sup>197</sup> Las iglesias cristianas fueron cómplices y conspiradoras con el Estado colonial en la comisión del genocidio. Desde 1891 hasta la década de 1970, Estados Unidos reeducó, adoctrinó y cristianizó a la fuerza a cientos de miles de niños nativos en 367 internados, hasta el 83% de los niños nativos en edad escolar.<sup>198</sup>

Al igual que el hijo del jefe bajo las Leyes de Burgos, estos “graduados” de los internados indios, habiendo perdido su lengua, cultura e identidad indígena, se convirtieron en agentes involuntarios de la dominación colonial y de la destrucción de la espiritualidad indígena (religicidio), la cultura (culturicidio), la historia (borrado), la lengua (lingüicidio), las economías<sup>199</sup> (empobrecimiento), las comunidades, los pueblos

<sup>190</sup> 4 Stat. 564.

<sup>191</sup> *Por ejemplo*, General Allotment Act 1887.

<sup>192</sup> *Por ejemplo*, Termination Act 1953; Pub. L. 280.

<sup>193</sup> Frye 2021.

<sup>194</sup> Pratt 1892, 46.

<sup>195</sup> Adams 2020.

<sup>196</sup> Véase, en general, Laurence 1977.

<sup>197</sup> Oso corredor 2019.

<sup>198</sup> Frye 2021.

<sup>199</sup> Las lenguas indígenas son algo más que palabras. Son vínculos directos con los antepasados de un pueblo y son portadoras de su historia, su cultura y sus formas de vida, así como de su relación espiritual y familiar con el mundo que les rodea.

y las naciones.<sup>200</sup> Australia,<sup>201</sup> Canadá,<sup>202</sup> Nueva Zelanda,<sup>203</sup> Dinamarca en Groenlandia (Inuit),<sup>204</sup> Suecia (Sami o Sápmi),<sup>205</sup> China en el Tíbet<sup>206</sup> y Xinjiang,<sup>207</sup> India en Attapadi,<sup>208</sup> y Rusia en Ucrania han emprendido iniciativas similares de genocidio educativo.<sup>209</sup> En noviembre de 2022, expertos de las Naciones Unidas enviaron una carta a China expresando su preocupación por la campaña a gran escala de China para asimilar a los niños tibetanos.<sup>210</sup> Patrick Wolfe señaló que el asesino de indios en la frontera Phillip Sheridan y el fundador de la política de internados Richard Pratt “fueron ambos practicantes del genocidio”. La cuestión del grado de la práctica genocida no es la cuestión definitoria”.<sup>211</sup>

La destrucción de los grupos étnicos también se llevó a cabo mediante la etnogénesis sancionada por el Estado. La esclavitud y la violación y apropiación de mujeres indígenas por parte de los colonizadores fue un hecho habitual durante la dominación imperial y la colonización.<sup>212</sup> El resultado fue la destrucción, al menos en parte, de las identidades étnicas indígenas existentes y la creación de nuevos grupos y nuevas etnias, como los metis en Canadá, los genizaros en México y el suroeste de Estados Unidos, los criollos del Caribe y los mestizos en toda América Latina, así como los cimarrones de las Américas, descendientes de la diáspora africana.<sup>213</sup>

Otro método de etnocidio empleado por algunos Estados coloniales fue y es forzar la asimilación abrumando a la población indígena mediante el traslado masivo intencionado de miembros de la etnia dominante a los territorios indígenas. Como ya se ha comentado, Estados

Unidos y Canadá se establecieron y construyeron sobre la base de esas políticas gubernamentales de reasentamiento masivo de cristianos europeos conocidas como “Destino Manifiesto”.<sup>214</sup> Más recientemente, China, por ejemplo, ha puesto en marcha un programa de sinización mediante el traslado de millones de chinos han al Tíbet.<sup>215</sup> El gobierno de Rusia también trasladó por la fuerza a un gran número de personas de etnia rusa a los territorios que controlaba, como Crimea<sup>216</sup> y los Estados bálticos,<sup>217</sup> en un esfuerzo por destruir y reemplazar la etnia de las poblaciones indígenas de la zona.

La matanza de un grupo étnico en su totalidad o en parte, particularmente bajo el dominio colonial y la ocupación experimentada por los pueblos indígenas, se llevó y se lleva a cabo

<sup>200</sup> Véase Adams 2020, 276-83; Willinsky 1998, 24 (el profesor John Willinsky describió esto como una conquista “intelectualmente escenificada” junto con otras hazañas del imperialismo).

<sup>201</sup> Comisión Australiana de Derechos Humanos (1997); Watson 2015, 119-121, 133-134; Minton 2020, 66-94.

<sup>202</sup> Comisión de la Verdad y la Reconciliación (2015).

<sup>203</sup> Minton 2020, 48-65.

<sup>204</sup> *Ibid.* 95-112.

<sup>205</sup> *Ibidem*, 113-140.

<sup>206</sup> McGranahan 2019.

<sup>207</sup> Zenz 2019 (uigures).

<sup>208</sup> George 2024, 2-3.

<sup>209</sup> Uehling 2024.

<sup>210</sup> Varennes 2022; Buckley 2025 (internados chinos).

<sup>211</sup> Wolfe, 2006, 398.

<sup>212</sup> Lemkin 2007, 83-85; Thornton 1987; Smith 2005; Galeano 2007.

<sup>213</sup> Véase Sidbury 2011.

<sup>214</sup> *Infra*, nota 237.

<sup>215</sup> McGranahan 2019; Domingo 2019.

<sup>216</sup> Williams 2015.

<sup>217</sup> Idzelis 1985, 79.

matando a los miembros del grupo, reduciendo la pertenencia al grupo mediante la violación, el matrimonio mixto forzado y la esterilización de las mujeres miembros, mediante el robo de los hijos de los miembros, mediante la expulsión de sus tierras y mediante la asimilación forzada o coaccionada bajo la dominación colonial. Fueron y son actos de genocidio en virtud de los Artículos 2(b) y (c) de la Convención. Según Patrick Wolfe, repitiendo una observación realizada por el filósofo social francés Alexis de Tocqueville unos 100 años antes, “[d]e hecho, dependiendo de la coyuntura histórica, la asimilación puede ser un modo de eliminación más eficaz que las formas convencionales de asesinato, ya que no implica una afrenta tan perturbadora al Estado de derecho que es ideológicamente central para la cohesión de la sociedad de colonos”.<sup>218</sup>

### C. MATAR UNA RELIGIÓN

Aunque suelen ser más amplias que la etnia de un grupo, sus creencias espirituales o religiosas forman parte de su etnia y, en el caso de los pueblos indígenas, a menudo constituyen su núcleo. La Organización de Estados Americanos estableció en su Declaración de los Derechos y Deberes del Hombre de 1948:<sup>219</sup>

En la medida en que el desarrollo espiritual es el fin supremo de la existencia humana y su expresión más elevada, es deber de muchos servir a ese fin con todas sus fuerzas y recursos.

Puesto que la cultura es la máxima expresión social e histórica de ese desarrollo, el hombre tiene el deber de preservarla y fomentarla por todos los

medios a su alcance.

El término “*indígena*” se define como “nacido u originario de un lugar determinado”. Deriva del latín *indigena*, que significa “surgido de la tierra”.<sup>220</sup> Los pueblos indígenas han sido descritos como “autóctonos”, que significa “nativo, surgido de la tierra”. En sánscrito, griego y latín es un derivado de “tierra” (en contraposición a “cielo”).<sup>221</sup> Lo que tienen en común estas definiciones es que se refieren a personas que han “brotado de la tierra”, cuyos orígenes proceden de la Tierra, literalmente “gente de la Tierra”. Chthonos era el dios griego de la Tierra y los chthónicos son aquellos que veneran a la Tierra como Madre. “Chthonic” se utiliza para referirse a las personas que viven en estrecha armonía con la Madre Tierra.<sup>222</sup>

Todos los “pueblos” tienen espacios geográficos que ocupan y utilizan. Pero, hablando en general, el vínculo indígena con sus tierras y parientes naturales es literalmente opuesto al de los pueblos occidentales y otros pueblos no indígenas.<sup>223</sup> Son ontologías totalmente diferentes. Esta característica espiritual distintiva

<sup>218</sup> Wolfe 2005, 402. *Infra*, nota 341. (de Tocqueville)

<sup>219</sup> CIDH, Preámbulo.

<sup>220</sup> Diccionario Etimológico Online, *Indígena*.

<sup>221</sup> Diccionario Etimológico Online, *autochthonic*.

<sup>222</sup> Glenn 2004, 59-68, 78-91. Los Lakota, por ejemplo, veneran la tierra como “Unci Maka” o “abuela tierra”. Win 1994, 205; King 1994, 205; los pueblos indígenas de Abla Yala también se refieren a ella como “Pachamama” (Madre Tierra). El Día de la Tierra de 2010, la Conferencia Mundial de los Pueblos sobre el Cambio Climático y los Derechos de la Madre Tierra convocada en Cochabamba, Bolivia, por el entonces presidente boliviano Evo Morales adoptó formalmente la “Declaración Universal de los Derechos de la Madre Tierra”. Ayma 2011.

<sup>223</sup> Véase *Lyng v. Northwest Indian Cemetery Protective Ass’n* 1988, 459-462 (J. Brennan, disidente).

y definitoria de los pueblos indígenas ha sido reconocida e invocada en numerosas ocasiones por los tribunales internacionales.<sup>224</sup> Es este vínculo espiritual con sus tierras compartido con sus parientes naturales<sup>225</sup> lo que hace que la expulsión de los pueblos indígenas de las tierras que los definen, y la destrucción de sus parientes naturales que también los definen, sea genocidio en virtud de los Artículos 2(b) y (c) del Convenio. Los Estados coloniales participan en la destrucción de la espiritualidad indígena dañando e impidiendo el acceso a los lugares sagrados de los pueblos indígenas. Ejemplos notables son la separación de los pueblos de la Očhéthi Šakówiŋ Oyáte (la Gran Nación Sioux) de su sagrada Ĥe Sápa (Colinas Negras),<sup>226</sup> la contaminación de los Picos de San Francisco sagrados para los navajo y otros 19 pueblos nativos,<sup>227</sup> el daño al Monte Graham un centro espiritual de los pueblos apache,<sup>228</sup> y el daño a Mauna Kea sagrado para los nativos hawaianos.<sup>229</sup>

Se calcula que hay más de 10.000 religiones en el mundo.<sup>230</sup> ¿Cómo se mata a una religión? Desde la época de las Cruzadas, la Iglesia Católica ha utilizado el poder de los reinos y naciones europeos para extender su alcance como Iglesia “Universal” a los “infeles” y “paganos”.<sup>231</sup> Durante la llamada Era de los Descubrimientos, los Papas católicos emitieron tres decretos santificando globalmente las invasiones de territorios indígenas por parte de los imperios europeos supuestamente para la conversión coaccionada o forzada de los pueblos indígenas al cristianismo. En 1452, el Papa promulgó el *Dum Diversas*:

Os concedemos por los presentes documentos, con nuestra Autoridad Apostólica, pleno y libre permiso para invadir, buscar, capturar y subyugar a los sarracenos [musulmanes] y paganos y a cualesquiera otros infieles y enemigos de Cristo dondequiera que se encuentren, así como sus reinos, ducados, condados, principados y otras propiedades... y para reducir a sus personas a servidumbre perpetua.<sup>232</sup>

y el *Romanus Pontifex* en 1455 para cubrir la invasión de África. Tras el tropiezo de Colón con las islas del Caribe, el Papa católico promulgó el *Inter Caetera* de 1493 para santificar las invasiones imperiales y coloniales de las Américas.<sup>233</sup> Aunque el propósito expreso de estas declaraciones era extender el cristianismo y el dominio de la Iglesia Universal a todo el mundo conocido, proporcionaron cobertura moral y supuestamente legal durante los 500 años siguientes para el saqueo y la destrucción de las naciones y pueblos indígenas y de sus riquezas naturales, así como para el robo y

<sup>224</sup> Véase Dann 2002, párrs. 131, 132, 133, 171, 172; Awas Tingni 2001, párr. 149; Yakye 2005, párr. 131; Endorois 2010, párrs. 78-80; Ogiek 2017, párrs. 105, 107-108.

<sup>225</sup> *Mitákuye Oyás’ij*.

<sup>226</sup> Estados Unidos contra Sioux Nation of Indians 1980.

<sup>227</sup> Estados Unidos c. Nación Navajo 2003; Nación Navajo c. Estados Unidos, CIDH, Petición.

<sup>228</sup> LaDuke 1999, 19-32.

<sup>229</sup> Medeiros 2021.

<sup>230</sup> Wasserman 2024.

<sup>231</sup> Williams 1990.

<sup>232</sup> Boniface.

<sup>233</sup> En general, Newcomb 2008; Williams 1990, 71-81.

asentamiento en sus territorios y tierras.<sup>234</sup> Dicha conducta viola las prohibiciones de la Convención sobre el Genocidio en virtud del Artículo 2 (a) y (b) de “matar” o “causar graves daños físicos o mentales” a los miembros del grupo religioso. Las manifestaciones “físicas” de un grupo religioso son sus miembros (apartado(a)) del Artículo 2) y sus lugares sagrados, objetos y prácticas ceremoniales. La destrucción de los lugares y objetos sagrados de un grupo religioso y la prohibición de ceremonias satisface la conducta prohibida por el Artículo 2 (c) de “infligir deliberadamente al grupo condiciones de vida calculadas para provocar su destrucción física [del grupo] total o parcial”.

Trescientos años después de las Leyes de Burgos, el presidente del Tribunal Supremo Marshall intentó justificar la doctrina del descubrimiento en parte por los beneficios de la conversión forzosa al cristianismo: “Los potentados del viejo mundo no encontraron dificultad en convencerse de que compensaban ampliamente a los habitantes del nuevo, otorgándoles civilización y cristianismo, a cambio de una independencia ilimitada”.<sup>235</sup> La creencia de las naciones y pueblos cristianos blancos de Europa de que eran el pueblo elegido de dios impulsó la superioridad blanca y religiosa en la colonización y destrucción de las naciones y pueblos indígenas bajo el concepto religioso del “Destino Manifiesto.”<sup>236</sup> Las primeras leyes estadounidenses relativas a los pueblos indígenas, conocidas como el Código de Delitos Indígenas de 1883, se diseñaron para fomentar su asimilación criminalizando las ceremonias, prácticas y practicantes religiosos indígenas.<sup>237</sup>

La prohibición legal de la religión indígena por parte de Estados Unidos estuvo en vigor hasta 1978.<sup>238</sup> Las religiones indígenas también fueron prohibidas por ley en el Caribe<sup>239</sup> y en otras partes del mundo colonizado, y continúa vigente incluso en la actualidad.<sup>240</sup> Esta conducta viola claramente los Artículos 2 (b) y (c) del Convenio.

Como ya se ha comentado, entre 1819 y la década de 1970, las iglesias cristianas gestionaron internados indígenas en Estados Unidos (y Canadá y Australia) en virtud de la legislación federal y con financiación federal, con el mandato expreso de asimilar a cientos de miles de niños indígenas suprimiendo por la fuerza sus costumbres y espiritualidad tradicionales y convirtiéndolos a la civilización occidental y al cristianismo.<sup>241</sup> La legalidad de la financiación federal de las iglesias cristianas para educar a los niños indígenas y convertirlos al cristianismo fue confirmada por el Tribunal Supremo de Estados

<sup>234</sup> Casas 1552 (“El lector puede preguntarse si esto no es crueldad e injusticia de un tipo tan terrible que mendiga la imaginación y si a esta pobre gente no le iría mucho mejor si se la confiara a los demonios del Infierno que a manos de los demonios del Nuevo Mundo que se hacen pasar por cristianos”); Williams 1990, 185 (citando a Sir Francis Bacon: “No se puede afirmar si hablamos ingeniosamente que fue la propagación de la fe cristiana el [motivo] ...del descubrimiento, entrada y plantación del Nuevo Mundo; sino el oro y la plata, y el beneficio temporal y la gloria”); Stannard 1992, 206; Newcomb 2008; Williams 1990; Tinker 1993; Jennings 1976, 6-8. También, Nunpa 2020.

<sup>235</sup> Johnson contra M’Intosh 1823, 572.

<sup>236</sup> Tinker 1993, viii, 10, 16-17, 69-94; Davidson 2005; Scott 2020; Nunpa 2020.

<sup>237</sup> Price 1883; Nupa 2020. Canadá también prohibió las prácticas religiosas indígenas. Tovias 2008.

<sup>238</sup> AIRFA 1978.

<sup>239</sup> McKee 2018.

<sup>240</sup> Centro de Investigación Pew 2024.

<sup>241</sup> Adams 2020; Laurence 1977.

Unidos.<sup>242</sup> Las conversiones forzosas de niños indígenas por parte de las entidades cristianas y el Estado colonial actuando de forma concertada constituyeron una violación del Artículo 2 (b), (c) y (e) del Convenio (traslado forzoso de niños de creencias y modos espirituales indígenas a los de los grupos cristianos).

Durante el siglo XIX, los mormones compraron a los españoles cientos de niños indígenas esclavizados bajo la creencia de que los pueblos indígenas de América eran los lamanitas caídos del Libro de Mormón que debían ser devueltos a la Iglesia mormona.<sup>243</sup> En 1852, a instancias de la Iglesia mormona, el Congreso aprobó una “Ley para el alivio de los esclavos y prisioneros indios” que establecía que los niños indios podían ser entregados en régimen de servidumbre a familias mormonas a cambio del precio de compra,<sup>244</sup> de nuevo, en violación de los Artículos 2 (b), (c), (d) (al eliminar a las futuras generaciones de creyentes indígenas) y (e) de la Convención. Durante las últimas décadas, el movimiento nacionalista cristiano, conservador y mayoritariamente blanco, ha orquestado ataques contra el estatus separado y la soberanía de las naciones y pueblos indígenas como barreras legales a su capacidad para cumplir el mandato bíblico de “hacer discípulos de todas las naciones” adoptando y cristianizando a los niños indígenas.<sup>245</sup> En otras palabras, algunos nacionalistas cristianos creen que están obligados por su Dios a cometer religicidio. El nacionalismo cristiano también estuvo detrás de la destrucción de la religión judía durante el Holocausto de la Segunda Guerra Mundial.<sup>246</sup> Estos movimientos, combinados con el poder del Estado, no sólo

actúan para destruir grupos nacionales y étnicos, sino también grupos religiosos.

Por supuesto, las entidades y los Estados cristianos no son los únicos que se dedican a destruir la religión de otro grupo.<sup>247</sup> Se ha considerado que el genocidio armenio de la Primera Guerra Mundial estuvo impulsado por el deseo de eliminar a las comunidades cristianas del Imperio Otomano y Turquía.<sup>248</sup> Un segundo genocidio de armenios indígenas por parte de Azerbaiyán podría estar teniendo lugar en Nagorno-Karabaj.<sup>249</sup> En 2010, dirigentes del régimen de los Jemeres Rojos fueron condenados por un tribunal penal especial por el genocidio de un grupo indígena de Camboya, los cham, contra los que se atentó debido a sus creencias religiosas islámicas.<sup>250</sup> En Myanmar, tras una investigación, el relator especial de la ONU concluyó que la persecución de los musulmanes rohingya durante 50 años por parte de los budistas nacionalistas y del gobierno “lleva el sello del genocidio.”<sup>251</sup> Tras su toma de Irak en 2014, el Estado Islámico / Daesh en Irak y Siria (ISIS) emprendió una campaña para destruir a los yazidíes y otros grupos religiosos de la región que incluyó

<sup>242</sup> Quick Bear contra Leupp 1908.

<sup>243</sup> Bennion 2012, 1-3.

<sup>244</sup> Jacobs 2009, 53.

<sup>245</sup> Talbot 2022; Nightlight; Joyce 2014.

<sup>246</sup> Hoover 1989.

<sup>247</sup> Véase *el debate*, Bartov 2001; Bergen 2010.

<sup>248</sup> Véase Morris 2021.

<sup>249</sup> Tatikyan 2024; Ocampo 2023.

<sup>250</sup> ECCC, Orden de clausura, párrs. 745-770, 1336-1342.

<sup>251</sup> Rohingya 2019, 8.

asesinatos en masa, tortura, esclavitud, violencia sexual, conversiones forzosas, trata de personas y otros crímenes.<sup>252</sup> En una enérgica resolución conjunta, dos años después, el Parlamento Europeo condenó esa conducta como asesinato masivo sistemático y genocidio e instó a actuar ante la Corte Penal Internacional.<sup>253</sup>

En la época de Colón, la Iglesia (católica) Universal promulgó edictos de “conversión o muerte” o esclavitud para los pueblos indígenas que encontraron en África y América.<sup>254</sup> Edmond Paris documentó un esfuerzo de conversión o muerte más reciente en el que participó el Vaticano para convertir por la fuerza a serbios, gitanos y judíos de Croacia al cristianismo durante la Segunda Guerra Mundial.<sup>255</sup> En 2014, el grupo Estado Islámico (ISIS) dio al pueblo yazidí el mismo ultimátum en ese genocidio. Ningún grupo religioso ha sido nunca procesado por genocidio a pesar de ser cómplice con los Estados en la comisión de genocidios de otros grupos religiosos.<sup>256</sup> La responsabilidad, penal y civil, de las entidades religiosas no debe pasarse por alto dados los antecedentes de Estados o religiones dominantes que actuaron juntos o en complicidad en la comisión de muchos genocidios.

Estos genocidios de grupos religiosos, cada uno de ellos, tienen en común todas las conductas enumeradas en el Artículo 2(a)-(e) de la Convención. Como se reconoce en la Declaración Americana, el desarrollo espiritual es el “fin supremo” y la “expresión más elevada” de la existencia humana. La destrucción de la religión de un grupo desgarró el núcleo de la identidad, la existencia, la cultura y el futuro del

grupo. Deja un cuerpo sin alma. La muerte de la espiritualidad de ese cuerpo es un genocidio. La naturaleza ctónica de la espiritualidad indígena hace que los grupos indígenas sean especialmente vulnerables a la asimilación forzosa y a otros actos destructivos y genocidas por parte de las potencias coloniales.

#### D. MATAR UNA RAZA

El Artículo 2 del Convenio incluye como conducta genocida la matanza intencionada, total o parcial, de un grupo “racial”. Un análisis de la Trilogía Marshall de decisiones que inventaron la justificación legal nacional para la destrucción de las naciones y pueblos indígenas por parte de Estados Unidos revela que la “raza” fue la característica principal subyacente a las políticas y conductas genocidas. Los casos segundo y tercero de la Trilogía, *Nación Cherokee contra Georgia*<sup>257</sup> y *Worcester contra Georgia*,<sup>258</sup> aplicaron la primera decisión, *Johnson contra M'Intosh*,<sup>259</sup> al dictaminar que los “indios” eran incivilizados, incompetentes, “salvajes” y “paganos” que necesitaban la “protección” (dominación) del padre colonial. Sin embargo, los hechos reales que subyacen a esas decisiones exponen el engaño en el razonamiento de Marshall invocado para justificar y legalizar la

<sup>252</sup> Bishai 2024.

<sup>253</sup> Parlamento Europeo 2016.

<sup>254</sup> Véanse las notas 233-234 *supra*; Requerimiento.

<sup>255</sup> París 1990.

<sup>256</sup> Abouzeid 2018, 6.

<sup>257</sup> 39 U.S. 1.

<sup>258</sup> 31 U.S. 515.

<sup>259</sup> 21 U.S. 543.

dominación y el dominio coloniales. En la época de esas decisiones, los cherokees eran conocidos como la mayor de las “Cinco Tribus *Civilizadas*” y poseían una constitución y un gobierno calcados de los de Estados Unidos, tenían líderes educados en destacadas universidades estadounidenses, disponían de alfabeto y medios de comunicación propios, eran propietarios de fincas privadas, plantaciones e incluso esclavos, y habían aceptado y se habían convertido al cristianismo.<sup>260</sup> *Las únicas* características que les diferenciaban de la sociedad blanca dominante eran su existencia precolonial y su denominada raza. Eran naciones preexistentes en el camino de la expansión colonial, y eran “indios”.<sup>261</sup>

La Asamblea General de las Naciones Unidas ha reconocido este vínculo entre colonialismo y racismo. Gran parte de la Carta de la ONU se centra en la liberación de los “territorios no autónomos” de la ocupación y el dominio coloniales.<sup>262</sup> Poco después de su creación en 1948, la Asamblea General de las Naciones Unidas empezó a emitir regularmente resoluciones que pedían la “erradicación” inmediata del colonialismo en el mundo.<sup>263</sup> Ahora nos encontramos en el “Cuarto Decenio Internacional para la Eliminación del Colonialismo”<sup>264</sup> en el que la ONU renovó una vez más su llamamiento inicial al “fin rápido e incondicional [del] colonialismo en todas sus formas y manifestaciones”.<sup>265</sup>

En 1965, las Naciones Unidas adoptaron la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial (ICERD por sus siglas en inglés), un tratado

vinculante que condena la discriminación racial.<sup>266</sup> Casi todos los Estados miembros de la ONU se han adherido al Tratado o lo han ratificado. Incluye dentro del término “racial”, referido a “raza, color, linaje *u origen nacional o étnico*”.<sup>267</sup> Relevante para esta discusión, la ICERD declara sin ninguna reserva “que cualquier doctrina de superioridad basada en la diferenciación racial es científicamente falsa, moralmente condenable, socialmente injusta y peligrosa, y que no hay justificación para la discriminación racial en la teoría o en la práctica, en ningún lugar”.<sup>268</sup> Afirmaba expresamente “la necesidad de eliminar rápidamente la discriminación racial en todo el mundo en todas sus formas y manifestaciones” y reafirmaba la resolución de la ONU de 1960 sobre la

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<sup>260</sup> 21 U.S. 543.

<sup>261</sup> Como dijo la escritora mi'kmaq Pamela Palmater, la racialización de los pueblos indígenas los redefinió, a ellos y a sus derechos, de naciones colectivas y soberanas a individuos menos civilizados y menos humanos: “De pueblos a indios”. Palmater 2011, 37-43. También, Wolfe, 2006, 388 (“Los indígenas norteamericanos no fueron asesinados, expulsados, romantizados, asimilados, cercados, criados como blancos y eliminados de otro modo como propietarios originales de la tierra, sino *como indios*.” (énfasis de Wolfe)).

<sup>262</sup> Carta de las Naciones Unidas, caps. XI, XII y XIII.

<sup>263</sup> Véase la Res. 1514 de la AGNU; véase la Biblioteca Dag Hammarskjöld de la ONU (este sitio web de la ONU ofrece una lista completa de las resoluciones y otros documentos de la ONU relacionados con la descolonización). Para una historia de la promulgación de la Res 1514 de la AGNU, véase Burke (2010), cap. 2.

<sup>264</sup> Resolución 75/123 de la AGNU.

<sup>265</sup> Resolución 1514 de la AGNU.

<sup>266</sup> ICERD.

<sup>267</sup> *Ibidem*, art. 1, sec. 1 (énfasis añadido).

<sup>268</sup> *Ibidem*, Preámbulo, párr. 5; véase también, UNESCO.

descolonización mundial inmediata.<sup>269</sup> Al vincular la colonización con doctrinas de superioridad racial y la resolución de descolonización de la ONU con la eliminación de todas las formas de racismo, el Tratado reconocía expresamente el colonialismo como manifestación de racismo. La Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial fue aplicada por el Tribunal Superior de Australia en su sentencia *Mabo* de 1988, que sostenía que la legislación australiana sobre la propiedad discriminaba los derechos de un grupo indígena a su propio concepto indígena de tenencia de la tierra.<sup>270</sup> En 2006, el Comité de la ONU encargado de velar por el cumplimiento del Tratado emitió una decisión en la que declaraba que la legislación federal indígena estadounidense discriminaba racialmente a la Nación Shoshone Occidental.<sup>271</sup> Racismo, colonialismo, imperialismo, religiosidad y modernidad forman eslabones de una cadena de opresión y destrucción de los pueblos indígenas.

El concepto moderno de “raza” no existía antes del periodo colonial, la Era de los Imperios. Fue inventado por las potencias imperiales como supuesta justificación moral y legal de la esclavitud, la dominación colonial y la explotación de los pueblos y naciones indígenas.<sup>272</sup> Tony Barta conjeturó que el genocidio fue más el resultado de procesos históricos que la condición natural darwiniana de sus víctimas afirmada por las potencias coloniales.<sup>273</sup> “Los primeros discursos racistas formaron las condiciones previas necesarias para dos siglos de discriminación, disolución y genocidio de los pueblos indígenas en ausencia de un racismo científico”.<sup>274</sup> El nacionalismo se racializó al igual que se

nacionalizó el racismo.<sup>275</sup>

En esencia, la prohibición de matar a una raza que figura en el Artículo 2 de la Convención sobre el Genocidio no tiene por objeto la protección de una raza, sino que responde a la racialización, la selección racial, de un grupo de personas para su destrucción en razón de ciertas características físicas o historias comunes.<sup>276</sup> A diferencia de los grupos nacionales y étnicos, un grupo racial se define por su supuesto carácter biológico y no social. Entonces, ¿cómo se hace para “matar a un grupo [racializado]” en su totalidad o en parte? Obviamente, eso puede ocurrir de varias maneras diferentes. Se puede identificar al grupo racial y convertirlo en objetivo de exterminio mediante asesinatos en masa, como ocurrió en Estados Unidos,<sup>277</sup> Namibia,<sup>278</sup> Alemania,<sup>279</sup> y Haití,<sup>280</sup> en violación del Artículo 2(a) de la Convención.

La destrucción de un grupo racial también puede producirse mediante el “marcaje racial” a través del uso por parte de las potencias coloniales del quantum (porcentaje) de sangre indígena y otros determinantes biológicos como

<sup>269</sup> *Ibidem*, Preámbulo, párrs. 4 y 5.

<sup>270</sup> *Mabo* 1988.

<sup>271</sup> Western Shoshone contra Estados Unidos, UN CERD.

<sup>272</sup> Guillaumin 1995, 61-98; Hannaford 1996; Weitz 2003, 16-32; Finzsch 2007, 2; Lingaas 2018. Véase también López 2006.

<sup>273</sup> Barta 2007, 32. También, Gigoux 2020.

<sup>274</sup> Finzsch 2007, 19; Weitz 2003, 32-42.

<sup>275</sup> Finzsch 2007, 2 (cita a Etienne Balibar). Véase también Kakel 2013.

<sup>276</sup> Lingaas 2018; Kakel 2013.

<sup>277</sup> Stannard 1992, 126-131, 145, 204-221, 232, 240-246.

<sup>278</sup> Lindqvist 2014.

<sup>279</sup> Schafft 2002.

<sup>280</sup> Robins 2009, 3 (genocidio “subalterno”).

el color de la piel, los ojos y el cabello y los rasgos faciales para definir a los miembros de un grupo indígena.<sup>281</sup> El quantum de sangre se ha utilizado para quitar tierras a las naciones indígenas y diezmar a sus miembros en una “eliminación estadística”.<sup>282</sup> Como señaló el profesor Wolfe “De este modo, la clasificación racial restrictiva de los indios fomentaba directamente la lógica de la eliminación”.<sup>283</sup> Los Estados coloniales, incluidos Estados Unidos, Canadá y Australia, participaron en un “genocidio benévolo” utilizando estos determinantes basados en la raza en sus leyes e instituciones para facilitar la transferencia de niños indígenas a familias caucásicas hasta finales del siglo XX, al menos en parte, para “criar” la sangre indígena durante generaciones, convirtiéndose en blancos por absorción a través de una “asimilación biológica”.<sup>284</sup>

Los programas de esterilización de miles de mujeres indígenas redujeron el número de miembros del grupo racial.<sup>285</sup> Las violaciones, la esclavitud de las mujeres indígenas y los matrimonios raciales mixtos, algo habitual durante la dominación imperial y la colonización de Norteamérica<sup>286</sup> y Australia, también redujeron la pertenencia al grupo.<sup>287</sup> Como observó Norbert Finzsch, “la mirada colonial y el deseo de las mujeres indígenas configuraron las relaciones de género de los hombres colonialistas con las mujeres aborígenes. Estas últimas no sólo representaban la gratificación sexual, sino que también simbolizaban la tierra australiana y su conquista”.<sup>288</sup> El destacado historiador latino

Eduardo Galeano relató la historia de cuando la fortaleza española de Arauco, en el actual Chile, fue asediada por los mapuches en 1563. A las demandas de rendirse o morir, el capitán español respondió que, si morían, aún ganarían la guerra haciendo hijos de mujeres mapuches “¡que serán vuestros amos!”.<sup>289</sup> La “raza” del grupo se destruye total o parcialmente en virtud del Artículo 2 (a) de la Convención matando a los miembros del grupo mediante asesinatos en masa o destruyendo al propio grupo, lentamente, mediante la imposición de identificadores biológicos basados en la raza y el genocidio por desgaste en virtud de los Artículos 2 (b) y (c).

Las políticas, leyes y programas asimilacionistas que causaron la destrucción de las naciones y etnias indígenas y el desgaste de los pueblos indígenas a través de la dominación colonial, la pobreza y la enfermedad no estaban dirigidos a una nación o pueblos específicos, sino que se dirigían a una “raza” de pueblos indígenas como los “indios” de América, los “aborígenes” de Australia o Canadá, o los “negros” de África y

<sup>281</sup> *Supra* nota 277.

<sup>282</sup> Jaimes 1992, 137; Limerick 1987, 338; Unrau 1989; Nielson 1982 (Utes); Palmater 2011 (Canadá). *Véase también*, Wolfe, 2006, 388, 400.

<sup>283</sup> Wolfe 2006, 388.

<sup>284</sup> Jacobs 2009, 66, 69, 70, 73, 139-140, 383, 420; Watson 2015, 118-119, 146-147.

<sup>285</sup> Notas 101-112 *supra*.

<sup>286</sup> Mawani 2002, 49-54; Thornton 1987; Smith 2005; Galeano 2007.

<sup>287</sup> Totten 2011, 128; Schabas 2000, 170; San José 2020 (yazidí); Ibrahim 2018 (yazidí).

<sup>288</sup> Finzsch 2007, 17. *También*, Smith 2005, 55. Incluso hoy en día, un medio habitual de adquisición y enajenación de tierras indígenas por parte de personas no indígenas es el matrimonio de indígenas.

<sup>289</sup> Galeano 1982, 130.

Australia, que a menudo eran descritos, al menos inicialmente, como “salvajes”, “menos civilizados” o menos humanos que los pueblos blancos de la “raza” europea.<sup>290</sup>

En cierto sentido, al igual que ocurre con el etnocidio, estas políticas y leyes coloniales tienen menos que ver con la destrucción de una “raza” indígena que con la dominación, protección y crecimiento de una supuesta raza superior o privilegiada. Esto se refleja en la raza judía “elegida” de Israel,<sup>291</sup> la raza blanca de la Sudáfrica prerrevolucionaria,<sup>292</sup> la raza aria de la Alemania nazi,<sup>293</sup> la raza Yamato de Japón,<sup>294</sup> y la raza Han de China.<sup>295</sup> En otras palabras, los pueblos indígenas no son objeto de destrucción debido a su “raza”, sino porque se interponen en el camino de la expansión de otra “raza” de pueblos más poderosa y supuestamente superior.<sup>296</sup> Como han sugerido los profesores Ronald Niezen<sup>297</sup> y James Anaya,<sup>298</sup> es posible que los pueblos indígenas no se definan por su “raza”, sino por su victimización a manos de las potencias imperiales (blancas) de Europa. Dicho de otro modo, un grupo no se identifica “científicamente” ni se autoidentifica como “raza”, sino que el opresor del grupo lo define y lo considera una raza.<sup>299</sup> Los recientes ataques de los tribunales estadounidenses contra los pueblos indígenas, por ejemplo, en realidad no se centran en la raza indígena, sino en preservar e imponer el privilegio blanco, apuntando a los llamados “beneficios exclusivos para los indígenas” a nivel federal como una supuesta discriminación contra los derechos de los blancos.<sup>300</sup>

Esta dinámica pone de relieve las raíces apartheid de las políticas, leyes e instituciones

nacionales de Estados coloniales como Estados Unidos,<sup>301</sup> Canadá,<sup>302</sup> Australia,<sup>303</sup> e Israel.<sup>304</sup>

Al igual que el genocidio y el colonialismo, el apartheid ha sido condenado globalmente por la gran mayoría de los Estados miembros de la Asamblea General de la ONU en la adopción de la Convención Internacional sobre la Represión y el Castigo del Crimen de Apartheid en 1973. En la Convención, el “apartheid” se describe como una lista de “actos inhumanos cometidos con el fin de establecer y mantener la dominación de un grupo racial de personas sobre cualquier otro grupo racial de personas y de oprimirlas sistemáticamente”.<sup>305</sup> Los actos enumerados cometidos contra la raza, en la parte pertinente,

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<sup>290</sup> Al igual que la referencia de Alemania a la ley estadounidense como autoridad para legalizar la eutanasia, la supremacía blanca, el lebensraum (Destino Manifiesto) y las “reservas”, la decisión *M'Intosh* del presidente del Tribunal Supremo estadounidense Marshall (y su razonamiento sospechoso e internamente contradictorio) ha sido citada como autoridad por otros Estados coloniales para justificar su ejercicio de dominación colonial de las naciones y pueblos indígenas. Watson 2011; Miller 2021.

<sup>291</sup> Lentin 2020, Khalidi 2020, 10.

<sup>292</sup> Dubow 2014.

<sup>293</sup> Olusoga 2010; Kakel 2013.

<sup>294</sup> Kiernan 2007, 478, 483-484.

<sup>295</sup> Miao 2024; Brett 2012; Domingo 2019.

<sup>296</sup> Wolfe 2006, 388.

<sup>297</sup> Niezen 2003, 4-5, 9-14, Cap. 3.

<sup>298</sup> Anaya 2004, 4. *También*, Daes, párr. 69.

<sup>299</sup> Lingaas 2018.

<sup>300</sup> Reid 2024, 362-366.

<sup>301</sup> *Por ejemplo*, Derecho Indígena Federal.

<sup>302</sup> *Por ejemplo*, la Ley india.

<sup>303</sup> Watson 2015, 116 notas 36-38 (Leyes aborígenes), 118.

<sup>304</sup> Dugard 2013.

<sup>305</sup> Convención sobre el Apartheid, art. II.

incluyen actos que también podrían entrar en el ámbito de la Convención sobre el Genocidio: (a) la denegación del derecho a la vida y a la libertad mediante (i) el asesinato, (ii) la imposición de lesiones corporales o mentales graves, o la violación de la libertad o la dignidad [de la raza victimizada]; (b) la imposición deliberada de condiciones de vida calculadas para causar su destrucción física total o parcial; (c) cualquier medida calculada para impedir que un grupo racial participe en la vida política, social, económica y cultural del país y la creación deliberada de condiciones que impidan el pleno desarrollo de dicho grupo; y (d) cualquier medida destinada a dividir a la población según criterios raciales mediante la creación de reservas separadas para los miembros del grupo racial, la expropiación de bienes raíces pertenecientes a un grupo racial.<sup>306</sup> De los casi 200 Estados miembros de la ONU, sólo cuatro votaron en contra de la Convención del Apartheid, entre ellos los Estados coloniales de Gran Bretaña y Portugal y los Estados coloniales sucesores de Sudáfrica y, como es lógico, Estados Unidos. Según el derecho internacional, la ley federal “indígena” *“sui generis”* de Estados Unidos es la ley del apartheid. Aunque la Convención sobre el Apartheid no se centra en la “matanza” de una raza, la destrucción total o parcial de una raza puede ser un objetivo de las leyes del apartheid y el “crimen” “inhumano” del apartheid y, por tanto, constituir una violación de los Artículos 2 (b) y (c) de la Convención sobre el Genocidio.

Los indios de América, los aborígenes de Australia y Canadá y otros pueblos de color colonizados son la única “raza” (y, por tanto, la

única etnia, pueblos y naciones) que sigue estando sujeta por ello a la negación de los derechos humanos colectivos, de la plena igualdad de los derechos de las naciones y los pueblos y, a menudo, como dijo Hannah Arendt, incluso del derecho a tener derechos. Aunque se niega a prescindir de la dominación colonial, el Tribunal Supremo de los Estados Unidos ha reconocido el “carácter ofensivo” de una relación colonial basada en la raza para las garantías de igualdad racial de la Constitución estadounidense.<sup>307</sup>

La mayoría de las políticas, leyes e instituciones coloniales relativas a las naciones y pueblos indígenas están dirigidas a la destrucción progresiva de las naciones y pueblos indígenas mediante la asimilación forzosa a lo largo de generaciones, considerándolos una “raza”. Aunque esta conducta, al igual que la esclavitud, ha sido eufemísticamente rebautizada por sus autores como “beneficiosa”, las motivaciones de dicha dominación y asimilación forzosa no son relevantes. Si existe la intención de llevar a cabo la conducta prohibida, no importa si fue maliciosa o benévola. La verdadera motivación es el interés del Estado en la continuación de la dominación y la explotación coloniales. La dominación racial sigue siendo supremacía blanca. El genocidio “benévolo” sigue siendo genocidio.

<sup>306</sup> *Ibid.*

<sup>307</sup> *Washington v. Confederated Bands and Tribes* 1979, 500-01. Véase también, *Johnson v. McIntosh* 1823, 590 (“ficción”), 591 (“pretensión” de hecho); *Worcester v. Georgia* 1823, 543 (“difícil de comprender”), 544 (“idea extravagante y absurda”). Del mismo modo, el Tribunal Supremo de Australia, en su decisión *Mabo II*, aunque supuestamente desechó la doctrina del descubrimiento, la sustituyó por una doctrina imperial, el “título radical” del Rey, para mantener su dominio colonial sobre los pueblos indígenas que allí se encontraban.

### III. PRUEBAS DE LA INTENCIÓN GENOCIDA A TRAVÉS DE LA ESTRUCTURA

Nadie coloniza inocentemente... nadie coloniza impunemente tampoco.

Aimé Césaire<sup>308</sup>

La intención genocida puede ser expresa o estar implícita en la conducta. Sobre la intención, Schabas opinó que “es inconcebible que una infracción de tal magnitud pudiera cometerse sin intención”.<sup>309</sup> Shaw ha descrito la “intención” como “una deducción lógica que fluye de la evidencia de los actos materiales”.<sup>310</sup> El Estatuto de Roma de la Corte Penal Internacional (CPI), creada en 1998 para conocer de determinados crímenes internacionales, incluido el genocidio, establece que existe intencionalidad cuando la “persona tiene la intención de realizar la conducta” y “tiene la intención de causar esa consecuencia o es consciente de que se producirá en el curso normal de los acontecimientos.”<sup>311</sup> Los actos materiales que evidencian la intención genocida pueden ser de naturaleza incremental, resultado de la toma de decisiones a lo largo del tiempo y de la adaptación a circunstancias cambiantes.<sup>312</sup> Al igual que la observación del profesor Wolfe de que la colonización no es un acontecimiento sino una estructura, el genocidio tampoco puede producirse como un acontecimiento en el tiempo sino como una estructura a lo largo del tiempo. La estructura impregna, organiza y hace que la conducta sea omnipresente y permanente. Lemkin describió el genocidio como “ataques sincronizados

contra todos los aspectos de la vida de los pueblos cautivos”.<sup>313</sup> Puede ser sistémico e institucionalizado, integrado e incrustado en las instituciones coloniales. El genocidio estructurado por las instituciones coloniales se produce de forma incremental a lo largo de todo el periodo de colonización en la destrucción gradual -total o parcial- de la nación, la identidad étnica, la religión y/o la raza de los pueblos colonizados. Como se establece en la Convención sobre el Genocidio, la intención específica requerida no tiene que abarcar la destrucción de todo el grupo, sino sólo la intención de destruir parte del grupo.<sup>314</sup>

La “evidencia” y la prueba de la intención genocida pueden encontrarse entonces en la estructura colonial, las políticas, las leyes y las instituciones de la propia potencia colonial.<sup>315</sup> En la época del Holocausto de la Segunda Guerra Mundial, la intención genocida del gobierno nazi se expresó en la propia legislación nacional de Alemania, conocida como las Leyes de Nuremberg, que “legalizaron” la eugenesia y la persecución y destrucción de judíos, gitanos

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<sup>308</sup> Césaire 1950, 39.

<sup>309</sup> *Ibidem*, 213-214.

<sup>310</sup> Shaw 2007, 83.

<sup>311</sup> Estatuto de Roma, art. 30(2).

<sup>312</sup> *Ibidem*, 84.

<sup>313</sup> Lemkin 1944, 22, nota 52.

<sup>314</sup> Travis 2012.

<sup>315</sup> *Véase* Fiscal c. Goran Jelisić 2001, párr. 48 (“La existencia de un plan o política...puede facilitar la prueba del delito”).

y otros.<sup>316</sup> El apartheid fue legalizado por las leyes internas de Sudáfrica.<sup>317</sup> Como tal, la asimilacionista ley federal india de Estados Unidos,<sup>318</sup> la Ley india de Canadá,<sup>319</sup> o las leyes israelíes relativas a los palestinos,<sup>320</sup> son expresiones de intención genocida que luego son cumplidas por sus instituciones coloniales gobernantes, incluidos sus organismos ejecutivos y administrativos, militares y policiales, judiciales y legislativos.<sup>321</sup> En palabras de Kiera Ladner, las naciones y los pueblos pueden ser “asesinados” “a través de la legislación y el veneno lento.”<sup>322</sup>

La existencia de un plan, de una estructura genocida, obvia por su propia naturaleza la necesidad de buscar la intencionalidad. Para tener intención, el autor debe tener conocimiento. El Estatuto de Roma define el “conocimiento” como “la conciencia de que existe una circunstancia o de que se producirá una consecuencia en el curso normal de los acontecimientos”.<sup>323</sup> El plan evidencia el “conocimiento” del autor, especialmente cuando éste ideó el plan y/o lo ejecutó. El Tribunal Penal Internacional consideró la existencia de un plan como prueba del conocimiento de circunstancias genocidas en el juicio de los antiguos líderes yugoslavos Karadzic y Mladic.<sup>324</sup> Ciertamente, la legislación y las leyes coloniales que exponen el plan y establecen las instituciones para dominar, destruir y asimilar por la fuerza a las naciones y pueblos indígenas satisfacen este elemento.

Según el lenguaje de la Convención sobre el Genocidio, la intención también debe ser “específica”, lo que significa que debe ser una intención de “destruir, total o parcialmente, a un grupo nacional, étnico, racial o religioso,

como tal”.<sup>325</sup> Una vez más, como en este caso, cuando el genocidio se ha institucionalizado en la legislación del perpetrador, esa legislación es en sí misma una expresión del conocimiento y la intención específicos del perpetrador. Leyes que autorizan el asesinato en masa de pueblos indígenas; el robo de niños indígenas para su reeducación (destrucción de la identidad étnica para la asimilación); el robo de niños indígenas para su adopción por familias blancas; la esterilización de mujeres indígenas; la conversión forzosa de pueblos indígenas a otra religión; la proscripción de la práctica de la espiritualidad y la cultura indígenas; la destrucción del bienestar económico, físico y psicológico de los indígenas; la destrucción de la independencia y

<sup>316</sup> El derecho y el Holocausto; El derecho, la justicia y el Holocausto. Los nazis “legalizaron” el genocidio como una cuestión de derecho interno utilizando como punto de partida la decisión sobre eugenesia del Tribunal Supremo de Estados Unidos que afirmaba la esterilización forzosa en *Buck v. Bell*, 274 U.S. 200 (1927) (que sigue siendo la ley de Estados Unidos). Véase Documentos de Nuremberg 2009; Olusoga 2010, 285, 302; también, US Holocaust Memorial Museum (donde se enumeran una serie de leyes aprobadas para legalizar el genocidio). Las políticas y leyes estadounidenses que designaban a los “indios” como pueblos inferiores y establecían los campos de internamiento conocidos como reservas también fueron utilizadas por los alemanes primero como precedente legal para el genocidio de los pueblos indígenas herero y nama de Namibia antes de la Primera Guerra Mundial y, más tarde, para el Holocausto de la Segunda Guerra Mundial. Guettel 2010; Kakel 2013, 8-24; Olusoga 2010, 106-114, 133, 304, 340.

<sup>317</sup> Leyes y normativas sobre el apartheid; Legislación sobre el apartheid.

<sup>318</sup> USDOJ, Panorama de la legislación federal y la política india.

<sup>319</sup> Annett 2001; Coast 2013; Ladner 2014.

<sup>320</sup> Dugard 2013.

<sup>321</sup> Véase el debate en Goldhagen 2009, 102.

<sup>322</sup> Ladner 2014.

<sup>323</sup> Estatuto de Roma, art. 30(3).

<sup>324</sup> Schabas 2000, 208 (véase el análisis de esta cuestión por el profesor Schabas en 207-213).

<sup>325</sup> Convención sobre el genocidio de 1948, art. 2.

soberanía nacional indígena; la destrucción de las instituciones tradicionales indígenas de gobierno y derecho; la destrucción de los territorios, tierras y recursos naturales indígenas; el traslado forzoso o bajo coacción de los pueblos indígenas de sus tierras natales; etc., son ciertamente declaraciones claras e inequívocas de la intención específica de un Estado.

Por el contrario, para perpetuar la continuación del dominio colonial y el lento genocidio, las decisiones judiciales, la legislación y las acciones ejecutivas internas del Estado colonial deben negarse, de un modo u otro, a reconocer la actual igualdad soberana independiente de las naciones indígenas precoloniales. Los pueblos indígenas tienen una historia de 500 años de resistencia a la colonización y al genocidio.<sup>326</sup> Los tribunales internacionales y algunos nacionales han dictado muchas sentencias en las que se declara que individuos han cometido genocidio mientras actuaban en calidad oficial para un Estado.<sup>327</sup> Sin duda, la condena de los altos funcionarios de un Estado por el delito de genocidio

cuando actuaban para el Estado demostraría el conocimiento y la intención específica por parte del propio Estado en la comisión del delito. Los Estados coloniales no pueden negar razonablemente el conocimiento y la intención específica cuando sus actos coloniales y genocidas son expuestos o desafiados directamente por los pueblos indígenas en guerras, ocupaciones, manifestaciones, protestas, peticiones y demandas nacionales e internacionales, investigaciones e informes, la prensa y los medios de comunicación, publicaciones y otras vías de resistencia. La negativa intencionada del Estado a descolonizarse cuando se enfrenta a su conducta ilícita es una expresión de intención específica. En los últimos más de 60 años, Estados Unidos parece ser el *único* Estado de los 180 Estados miembros de la ONU con derecho a voto que ha votado en contra de *todos los* cientos de instrumentos de descolonización adoptados por la Asamblea General de la ONU.<sup>328</sup> El conocimiento y la intención específica de un Estado de cometer genocidio lento son inherentes a la definición y la naturaleza de su dominio colonial.<sup>329</sup>

<sup>326</sup> Véanse, por ejemplo, Mander 2006 (mundial); Hall 2009 (mundial); Schroder 1998 (México); Olusoga 2010 (Namibia); Khalidi 2020 (Palestina); Na'Allah 1998 (Nigeria - Ogoni); Taylor 2016 (San Vicente - Garifuna); Meyer 2010 (América); James 1992 (América del Norte); Brown 1970 (Estados Unidos); LaDuke 1999 (América del Norte); Churchill 2002 (América del Norte); Steiner 1968 (Estados Unidos); Josephy 1971 (Estados Unidos); Coast 2011 (Canadá).

<sup>327</sup> Véase Corte Penal Internacional, Casos. El Artículo IV de la Convención sobre el Genocidio se refiere al castigo de "personas", incluidos "gobernantes, funcionarios públicos o particulares", pero no de Estados, naciones o grupos. Véase Gaeta 2007; el profesor Schabas ha opinado que, si bien la Convención no establece explícitamente que los propios Estados puedan ser responsables de genocidio, el artículo IX puede arrancar la responsabilidad del Estado, pero no la criminalidad, a través de su referencia a las "controversias" "relativas a la responsabilidad de un Estado por genocidio... se someterán a la Corte Internacional de Justicia a petición de cualquiera de las partes en la controversia". Schabas 2009, 418-446. Se han presentado varios casos ante la Corte Internacional de Justicia en virtud de esta disposición. *Ibidem*, 425-446.

<sup>329</sup> La Asamblea General de la ONU condenó el colonialismo y ha hecho llamamientos a la descolonización cada año desde la Resolución 1514 de la AGNU en 1960, aproximadamente 150 veces a lo largo de 63 años. Cada año, los Estados miembros de la Asamblea General han respaldado el llamamiento casi por unanimidad, mientras que Estados Unidos es el único Estado que ha votado en contra de todos ellos. El gran llamamiento mundial para poner fin y erradicar inmediatamente todas las formas y manifestaciones de colonialismo y racismo amenaza el continuo dominio, dominación y explotación colonial de Estados Unidos sobre los pueblos y naciones indígenas. Véanse las resoluciones sobre descolonización de la AGNU de las siguientes sesiones (Biblioteca Digital de las Naciones Unidas, "Voting Data" word search - "colonial").

<sup>329</sup> Wolfe 2006; *en general*, Moses 2007.

Las “disculpas”<sup>330</sup> y la evasión y negación expresas<sup>331</sup> de los Estados coloniales y sus instituciones también contienen admisiones explícitas de conocimiento e intención de cometer conductas ilícitas, incluido el genocidio. Ha habido unas 25 disculpas de Estados a pueblos indígenas de unos 14 Estados, además de varias iglesias que estuvieron implicadas en el colonialismo y el genocidio.<sup>332</sup> La negación se considera la última etapa de las “diez etapas del genocidio” del profesor Gregory Stanton.<sup>333</sup> Aproximadamente 21 países han tipificado como delito la negación del genocidio.<sup>334</sup> Para disculparse o negar el genocidio, el Estado colonial debe tener conocimiento de los hechos y su propia intención específica en relación con su propia conducta.

Debido a la naturaleza del dominio y la ocupación coloniales como estructura impuesta a las naciones y pueblos sometidos a través de las leyes e instituciones del colonizador a lo largo del tiempo, debería haber muy poco margen para cualquier disputa probatoria sobre

el conocimiento y la intención específica de un Estado perpetrador en un genocidio colonial.

## V. GENOCIDIO PROLONGADO Y LENTO DE LOS PUEBLOS INDÍGENAS

En términos generales, genocidio no significa necesariamente la destrucción inmediata de una nación, excepto cuando se lleva a cabo mediante asesinatos en masa de todos sus miembros. Significa más bien un plan coordinado de diferentes acciones encaminadas a la destrucción de los fundamentos esenciales de la vida de los propios grupos nacionales.

Raphäel Lemkin<sup>335</sup>

El poder de la colonialidad es el proceso implacable, sistemático e institucionalizado de genocidio sigiloso que se produce de forma deliberada -y a menudo encubierta- oculto por la semántica del colonizador<sup>336</sup> durante un periodo de tiempo tan largo que adquiere un barniz de legalidad y una relación aceptable,<sup>337</sup> si no incluso

<sup>330</sup> Véase Apologies to Indigenous peoples, List. Véase, en general, Gibney 2008; Brooks 1999.

<sup>331</sup> Véase Negación de genocidios de pueblos indígenas; Cohen 2001.

<sup>332</sup> Véase Apologies to Indigenous peoples, List; en general, Gibney 2008.

<sup>333</sup> Stanton 1996.

<sup>334</sup> Pruitt 2017, 271.

<sup>335</sup> Lemkin 1944, 79.

<sup>336</sup> El mártir sudafricano de la lucha contra el apartheid Steven Biko declaró: “El arma más potente en manos del opresor es la mente del oprimido”; Biko 1978. George Orwell hizo del tema central de su obra maestra distópica, 1984, un Estado opresor que controla a los oprimidos controlando sus mentes mediante la semántica, lo que él denominó “doblepensar”; Orwell 1949, 44. El doblepensar, o doble lenguaje, es el lenguaje que deliberadamente oscurece, disfraza, distorsiona o invierte el significado de las palabras. Disfraza la naturaleza de la verdad con fines políticos; Orwell 1946. Según Orwell, el lenguaje político “está diseñado para hacer que las mentiras suenen verdaderas y los asesinatos respetables, y para dar una apariencia de solidez al puro viento”; *Ibid.* Orwell expuso además el propósito del lenguaje político: “Quien controla el pasado controla el futuro: quien controla el presente controla el pasado”; *Ibid.* Las propias palabras pueden actuar como “monumentos” omnipresentes de la supremacía blanca y la perpetuación de mitologías coloniales; McGill 2022.

<sup>337</sup> El profesor Leigh Patel señaló: “El colonialismo de los colonos ha sido una estructura tan arraigada en el mundo occidentalizado que nunca debe subestimarse su capacidad para absorber, contener y diluir las demandas de liberación y abolición.” Patel 2021, 137. *También*, Tee-Hit-Ton Indians v. United States 1955, 289-290 (J. Reed) (“Todo escolar estadounidense sabe que las tribus salvajes de este continente fueron privadas de sus rangos ancestrales por la fuerza y que, incluso cuando los indios cedieron millones de acres por tratado a cambio de mantas, comida y baratijas, no fue una venta sino la voluntad de los conquistadores lo que les privó de sus tierras”).

beneficiosa, predestinada.<sup>338</sup> En 1831, mientras visitaba Estados Unidos como joven erudito para estudiar el primer experimento de democracia estadounidense, el historiador francés Alexis de Tocqueville fue testigo directo de la expulsión (limpieza étnica) de los pueblos indígenas de sus tierras ancestrales en el sur de Estados Unidos durante lo que se conoce como el “Camino de las Lágrimas”, en virtud de la Ley de Expulsión de Indios de 1830.<sup>339</sup> De Tocqueville comentó lo siguiente:

Los españoles no pudieron exterminar a la raza india con esas atrocidades sin par que los marcan con una vergüenza indeleble, ni lograron siquiera privarla totalmente de sus derechos; pero los americanos de los Estados Unidos han cumplido este doble propósito con singular felicidad, tranquilamente, legalmente, filantrópicamente, sin derramar sangre y sin violar un solo gran principio de moralidad a los ojos del mundo. Es imposible destruir a los hombres con más respeto por las leyes de la humanidad.<sup>340</sup>

El jefe sauk Ma-ka-tai-me-she-kia-kiak (Halcón Negro) ha observado: “Qué suave debe ser el lenguaje de los blancos, cuando pueden hacer que lo correcto parezca incorrecto y lo incorrecto parezca correcto”.<sup>341</sup> Los lingüistas entienden que una parte crucial del colonialismo son las relaciones lingüísticas de poder y el uso de la semántica para colonizar las mentes tanto de los colonizadores como de los colonizados.<sup>342</sup> Una mente colonizada puede facilitar o incluso promover su propia opresión y explotación continuas aceptando la legitimidad -e incluso utilizando ella misma- del derecho colonial en la determinación de sus derechos.<sup>343</sup> Esto se ha denominado “racismo inconsciente”, un hábito mental acrítico que justifica la desigualdad y la explotación aceptando el orden de cosas existente como algo dado.<sup>344</sup> Como señaló la profesora Joyce King: “No es la *ausencia* de conciencia (es decir, no es inconsciencia o falta de conocimiento) sino una conciencia *deteriorada* o una forma distorsionada de pensar sobre la raza en comparación con, por ejemplo, la conciencia crítica”.<sup>345</sup> La mente colonizada

<sup>338</sup> Cuando la comunidad internacional le reprocha las violaciones de los derechos humanos de los pueblos indígenas, Estados Unidos responde, incluso hoy en día, de forma rutinaria y poco sincera, que su legislación nacional garantiza los derechos de los pueblos indígenas. Véase Estados Unidos de América 2020, 12; Estados Unidos de América 2015; Estados Unidos de América 2010 (declarando que Estados Unidos interpretará la DDPI de la ONU como coherente con la ley federal [colonial] india); Estados Unidos de América 2001; Consejo Internacional de Tratados Indios 2014..

<sup>339</sup> Indian Removal Act 1830; Tocqueville 1835, *Future Condition of Three Races - Part III*, chapter XVIII, a-b.

<sup>340</sup> Tocqueville 1835, *ibid.*

<sup>341</sup> Black Hawk 1833, 97.

<sup>342</sup> Veronelli 2013; Tirrell 2012.

<sup>343</sup> Véase, por ejemplo, Coulter 1982, 51-60 (examina el uso sin reservas por parte de abogados tribales de doctrinas coloniales en argumentos ante el Tribunal Supremo de los Estados Unidos).

<sup>344</sup> King 1991, 135; Okhremtchouk 2018.

<sup>345</sup> Véase King, *ibid.* Esta definición pone de relieve el significado y la importancia de la Teoría Crítica, la Teoría Crítica de la Raza y TribalCrit en la liberación de las mentes tanto de los colonizados como de los colonizadores.

se ha descrito como una “prisión conceptual y social de la modernidad/colonialidad” que atrapa a los pueblos indígenas bajo el dominio colonial incluso cuando ejercen una independencia limitada permitida bajo un barniz de descolonización.<sup>346</sup> Ese lenguaje colonial fue, y es, un prolongado programa de propaganda y educación, el “discurso peligroso y la ideología peligrosa” de las masas de estadounidenses por parte de instituciones coloniales que habitualmente excusan a quienes han participado o se han beneficiado.<sup>347</sup> El Museo del Holocausto de Estados Unidos reconoció el papel clave de la semántica en el genocidio: “El Holocausto no empezó matando; empezó con palabras”.<sup>348</sup>

El derecho se expresa en las palabras y los hechos de una institución que aplica el sistema y las políticas de gobierno de un soberano sobre su dominio y su pueblo. La legislación india federal, y la legislación nacional relativa a los pueblos indígenas de otros Estados coloniales y sucesores, son las políticas coloniales institucionalizadas y sistémicas de dominación, explotación, asimilación y aniquilación de las naciones, pueblos y recursos nativos por parte de la potencia colonial. En consecuencia, y contrariamente a la opinión popular, incluso entre los académicos, el genocidio puede ser prolongado y la destrucción de la identidad de un pueblo puede producirse durante un largo período de tiempo, incluso durante cientos de años, como en el caso de los pueblos indígenas de las Américas.<sup>349</sup> Este “genocidio lento” se ha definido como “el daño emocional y físico causado a los supervivientes de la violencia a lo largo del tiempo. .[y] el daño emocional y físico resultante

de presenciar o participar en la violencia y las continuas experiencias de vivir en comunidades inseguras y violentas”.<sup>350</sup>

Algunos han etiquetado este proceso como “genocidio por desgaste”.<sup>351</sup> El historiador Mark Levene se ha referido a este proceso destructivo incremental como “genocidio progresivo”.<sup>352</sup> “Es esta dinámica Estado-comunidad la que ha conducido, en cada caso [se refiere a los indios mayas de Guatemala, los kurdos de Turquía e Irak, los pueblos tibetanos y los pueblos de Timor Oriental e Irian Jaya], a través de una serie de estrategias estatales caracterizadas aquí como “proceso genocida”, a su culminación, en algún momento, en la realidad del genocidio.”<sup>353</sup> Los rohingya<sup>355</sup> y los pueblos indígenas kachin llevan unos 60 años resistiendo a la limpieza étnica de Myanmar. Los pueblos indígenas de Papúa Nueva Guinea Occidental también llevan seis

<sup>346</sup> Véase Veronelli 2023, 120.

<sup>347</sup> Maynard 2016; Waller 2002.

<sup>348</sup> Museo Nacional del Holocausto de Estados Unidos 2016. *También*, Tirrell 2012.

<sup>349</sup> Véase Whitt 2019 (examina el exterminio de la Nación Beothuk y la Confederación Powhatan a lo largo de tres siglos por parte de Inglaterra y Estados Unidos y el colonialismo de colonos como genocidio); Ostler 2010 (la historia de 150 años de lucha de los Lakota por las Colinas Negras); Flood 2019 (250 años de historia de la colonización de los pueblos indígenas de Australia); Rohingya 2019 (50 años de historia del genocidio de Myanmar); Kahlidi 2020 (sobre los 100 años de colonización y genocidio en Palestina); Onondaga Nation 2023 (desafío onondaga a los 200 años de dominio colonial de Estados Unidos).

<sup>350</sup> Cottam 2006; *también* Steele 2018.

<sup>351</sup> Rosenberg 2012.

<sup>352</sup> Levene 1999.

<sup>353</sup> *Ibidem*, 363.

<sup>354</sup> Rohingya 2019, 8; Urahman 2022; Green 2015.

<sup>355</sup> Hogan 2018.

décadas luchando contra el dominio indonesio.<sup>356</sup> Todos ellos han sido descritos como “genocidios lentos”.<sup>357</sup> También se ha sugerido el genocidio lento para describir las persecuciones lentas de los indígenas banyamulenge en la RDC<sup>358</sup> y de los pueblos indígenas de Darfur.<sup>359</sup> El programa canadiense de internados indios se ha calificado de “genocidio lento” intergeneracional.<sup>360</sup> Los pueblos indígenas del valle del Omo, en Etiopía, han sido descritos como víctimas de un genocidio lento como consecuencia de la expulsión de sus tierras y la privación de los recursos hídricos.<sup>361</sup> En respuesta a la limitación de la Convención sobre el Genocidio a los delitos anteriores a su entrada en vigor, se puede argumentar que, dado que “sus efectos siguen siendo palpables después de su entrada en vigor, entonces puede ser perseguible”.<sup>362</sup> Francesca Albanese, relatora especial de la ONU sobre la situación de los derechos humanos en el territorio palestino, concluyó: “El colonialismo de colonos es un proceso dinámico y estructural y una confluencia de actos dirigidos a desplazar y eliminar a los grupos indígenas, de los cuales *el exterminio/ aniquilación genocida* representa la cima.”<sup>363</sup>

Recientemente, el mundo ha sido testigo en tiempo real del genocidio de Gaza<sup>364</sup> como trágico resultado final de más de 100 años de políticas sionistas e invasiones coloniales de Israel y de dominio sobre los pueblos palestinos.<sup>365</sup> En marzo de 2022, el fiscal de la Corte Penal Internacional anunció la apertura de una investigación sobre la situación en Palestina.<sup>366</sup> En diciembre de 2022, la Asamblea General de la ONU solicitó a la Corte Internacional de Justicia una opinión consultiva sobre las

consecuencias jurídicas de la ocupación israelí de territorio palestino.<sup>367</sup> El 29 de diciembre de 2023, tras la invasión israelí de Gaza en respuesta a los atentados perpetrados por Hamás en Israel el 7 de octubre de 2023, la República de Sudáfrica interpuso una demanda en nombre del pueblo palestino (“un grupo nacional, racial y étnico diferenciado”) contra el Estado de Israel, alegando violaciones de la Convención sobre el Genocidio.<sup>368</sup> El 20 de mayo de 2024, el fiscal de la CPI anunció su solicitud de órdenes de detención contra tres dirigentes de Hamás y contra el primer ministro de Israel, Benjamin Netanyahu, y el ex ministro de Defensa, Yoav Gallant, alegando una larga lista de “crímenes de guerra y crímenes contra la humanidad” cometidos en Gaza, entre ellos el uso de la inanición, el asesinato, el exterminio, la persecución y otros actos inhumanos.<sup>369</sup>

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<sup>356</sup> Tatchell 2020.

<sup>357</sup> *Supra* notas 354-357.

<sup>358</sup> Ntanyoma 2022.

<sup>359</sup> ICG 2004.

<sup>360</sup> Kazán 2022.

<sup>361</sup> Human Rights Watch 2014.

<sup>362</sup> *Ibid.*

<sup>363</sup> Albanese 2024, 3 (*cita* a Lemkin 1944 en 92 y Wakeman 2022) (énfasis de Albanese).

<sup>364</sup> Comité Especial de la ONU 2024; Albanese 2024; Amnistía Internacional 2024; Human Rights Watch 2024.

<sup>365</sup> *Ibidem*; *también*, Kahalidi 2020; Cook 2010; Wolfe, 2006, 388-390, 393; Short 2016, 68-92.

<sup>366</sup> Comunicado de prensa de la CPI, Fiscal 2021.

<sup>367</sup> Petición de la AGNU a la CIJ sobre Palestina.

<sup>368</sup> Sudáfrica contra Israel, Aplicación 2023, 1.

<sup>369</sup> Comunicado de prensa de la CPI, Fiscal 2024.

Posteriormente, el 20 de septiembre de 2024, el Comité Especial de la ONU creado para investigar la conducta israelí en los Territorios Ocupados emitió su informe oficial en el que constataba graves violaciones del derecho internacional humanitario y de los derechos humanos, “incluida la inanición como arma de guerra, la posibilidad de genocidio en Gaza y un sistema de apartheid en Cisjordania....”<sup>370</sup>

Israel y sus aliados cercanos, incluido Estados Unidos, que en complicidad ha estado suministrando a Israel las bombas y otras armas utilizadas en la destrucción de Gaza,<sup>371</sup> han descrito la acción de Israel como defensiva y permitida por las leyes de la guerra.<sup>372</sup> Sus caracterizaciones ignoran y evitan interesadamente el contexto de los más de 100 años de dominación colonial y destrucción de los territorios y pueblos palestinos por parte de Israel. Las Naciones Unidas llevan implicadas en este conflicto desde 1947, cuando recomendaron la partición de Palestina para crear un Estado judío.<sup>373</sup> Desde 1967, ha habido 131 resoluciones del Consejo de Seguridad de la ONU sobre el conflicto árabe-israelí, la mayoría condenando la conducta colonial de Israel.<sup>374</sup> La solicitud de Sudáfrica ante el Tribunal Penal Internacional afirma que se trata de un genocidio lento:

Sudáfrica también es consciente de que los actos de genocidio forman parte inevitablemente de un continuo, como reconoció el propio Raphaël Lemkin, que acuñó el término “genocidio”. Por esta razón es importante situar los actos de genocidio en el contexto más amplio de

la conducta de Israel hacia los palestinos durante sus 75 años de apartheid, sus 56 años de ocupación beligerante del territorio palestino y sus 16 años de bloqueo de Gaza .... [Al referirse en esta solicitud a los actos y omisiones de Israel que pueden constituir otras violaciones del derecho internacional, Sudáfrica sostiene que esos actos y omisiones son de carácter genocida, ya que se cometen con la intención específica requerida (*dolus specialis*) de destruir a los palestinos de Gaza como parte del grupo nacional, racial y étnico palestino más amplio.

La solicitud sitúa a Gaza en el contexto de la Nakba de 1948,<sup>375</sup> las ocupaciones israelíes de Cisjordania desde 1967,<sup>376</sup> su institucionalización del apartheid a través de un “régimen de leyes discriminatorias,<sup>377</sup> sus persecuciones rutinarias de palestinos,<sup>378</sup> y su devastación, crímenes de guerra y genocidio en Gaza.<sup>379</sup> Los argumentos

<sup>370</sup> Comité Especial de la ONU sobre Palestina 2024.

<sup>371</sup> Véase *Donnelly v. Thompson* 2024 (demandas contra funcionarios estadounidenses por autorizar la complicidad en un genocidio).

<sup>372</sup> US State Dept. 2024; Orden Ejecutiva de 6 de febrero de 2025; Holligan 2024.

<sup>373</sup> Lista de resoluciones de la ONU relativas a Palestina.

<sup>374</sup> *Ibid.*

<sup>375</sup> Sudáfrica contra Israel, solicitud 2023, párr. 22. Una solicitud anterior presentada en 2019 ante la CIJ por Gambia contra Myanmar en relación con los rohingya también argumentó que la conducta genocida de Myanmar era parte de un continuo que comenzó hace más de 30 años y que implicaba diversos comportamientos criminales y apartheid. Gambia contra Myanmar 2019.

<sup>376</sup> *Ibidem*, párrs. 33-34.

<sup>377</sup> *Ibidem*, párr. 35.

<sup>378</sup> *Ibidem*, párr. 36-39.

<sup>379</sup> *Ibidem*, párrs. 18-19, 27-29, 40-107.

de Sudáfrica ante la CIJ en enero de 2024 sitúan el crimen de genocidio en la Franja de Gaza en el contexto de la colonización israelí de Palestina desde 1948 como una “Nakba [limpieza étnica] en curso del pueblo palestino” que “inevitablemente forma parte de un continuo de actos ilegales.”<sup>380</sup>

El hecho de que las naciones, etnias, religiones o razas de los pueblos sean destruidas rápida, lenta o físicamente, o a través de la pérdida de aquello que las identifica y define, mediante matanzas masivas a lo largo del tiempo, mediante la extinción de sus generaciones futuras, mediante el robo de sus territorios, tierras y recursos naturales, mediante la eliminación de su soberanía y gobierno, o mediante el exterminio de sus espiritualidades y culturas, es irrelevante para el hecho de que sigan siendo destruidas en su totalidad o en parte y, por lo tanto, sean víctimas de genocidio. En la cultura china, el poder de la ley china se expresa en *lingchi*, una muerte por mil cortes, como el método más severo de pena capital.<sup>381</sup> Esta destrucción lenta y progresiva se ha descrito como el “desmenuzamiento” de la identidad indígena.<sup>382</sup> Como señaló Sartre: “Digamos que hay que elegir entre una muerte violenta e inmediata y una muerte lenta por degradación mental y física. O, si se prefiere, *no hay elección en absoluto*”.<sup>383</sup> Un genocidio lento sigue siendo un genocidio.

#### IV. CONCLUSIÓN - BÚSQUEDA DE UN RECURSO EFECTIVO

Inicialmente subjetivas, las brechas abiertas en el colonialismo son el resultado de la victoria de los colonizados sobre su antiguo miedo y sobre la atmósfera de

desesperación que destila día tras día un colonialismo que se ha incrustado en la *perspectiva de perdurar para siempre*. Franz Fanon, *Un colonialismo moribundo*<sup>384</sup>

#### REMEDIOS HUECOS

En el primer Artículo de la Convención sobre el Genocidio, los Estados firmantes se comprometen a “prevenir y sancionar” los crímenes de genocidio. Las conductas punibles en virtud del Artículo 3 incluyen el genocidio, la conspiración, la instigación pública, la tentativa y la complicidad. El Artículo 4 enumera las “personas” sujetas a castigo, entre las que se incluyen “los gobernantes constitucionalmente responsables, los funcionarios públicos o los particulares”. En particular, el Convenio se limita a “personas” individuales y no enumera expresamente naciones, Estados o empresas.

El Artículo 5 del Convenio atribuye la responsabilidad inicial de su aplicación a los Estados signatarios (“las Partes Contratantes”) mediante una legislación nacional que dé efecto a las disposiciones del Convenio y establezca “penas efectivas para las personas culpables de genocidio

<sup>380</sup> *Ibidem*, Transcripción del 11 de enero de 2024, 17. Véase también Lindman 2010; Barghouti 2010.

<sup>381</sup> Brook 2008.

<sup>382</sup> Véase el debate en Rolnick 2011; Royster 1995); Otis 1973 (la Ley de Adjudicación de 1887 dividió las tierras comunales indígenas en propiedad privada y redujo las tierras en manos nativas de unos 150 millones de acres a 78 millones en 1900. Gran parte de las tierras en manos privadas nativas fueron posteriormente transferidas a propietarios no nativos).

<sup>383</sup> Sartre 1968, 75 (énfasis de Sartre).

<sup>384</sup> Fanon 1959, 53 (énfasis en el original).

o de cualquiera de los actos enumerados en el Artículo 3”. En virtud del Artículo 6, las personas acusadas serán “juzgadas por un tribunal competente del Estado en cuyo territorio se cometió el acto”. De los 153 países que han ratificado la Convención sobre el Genocidio o se han adherido a ella, más de 80 la han aplicado promulgando leyes nacionales que tipifican como delito el genocidio.<sup>385</sup> En Estados Unidos, por ejemplo, el delito de genocidio cometido dentro del país o por un nacional de Estados Unidos se castiga con la pena de muerte o cadena perpetua y una multa no superior a 1.000.000 de dólares.<sup>386</sup> Guatemala es bien conocida por haber aplicado su propio código penal contra su ex presidente y altos cargos del gobierno por el genocidio de indígenas.<sup>387</sup> Los Estados coloniales de Israel,<sup>388</sup> Australia,<sup>389</sup> Canadá,<sup>390</sup> y Rusia,<sup>391</sup> todos ellos acusados de genocidio, también tienen leyes nacionales que penalizan el genocidio. Al igual que la Convención sobre el Genocidio, ninguna de las leyes nacionales penaliza la conducta de Estados, empresas u organizaciones, sólo de individuos.

### **Escondida tras los árboles, la Corte Penal Internacional**

En virtud del Artículo 6 de la Convención sobre el Genocidio, si el Estado pertinente no actúa, las personas acusadas pueden ser juzgadas por un “tribunal penal internacional”, competente con respecto a los Estados signatarios que hayan aceptado la jurisdicción del Tribunal. El Artículo 9 también establece que cualquier Estado signatario puede pedir a las Naciones Unidas que adopte las medidas apropiadas para prevenir o

reprimir las conductas tipificadas como delito en el Artículo 3. En 1998, la Asamblea General de la ONU convocó una conferencia diplomática en Roma que finalizó y adoptó una convención conocida como el Estatuto de Roma, por el que se establecía la Corte Penal Internacional (CPI) como tribunal independiente para procesar a “individuos” (pero no a Estados, organizaciones o empresas)<sup>392</sup> por genocidio, crímenes de lesa humanidad, crímenes de guerra y crímenes de agresión.<sup>393</sup> La CPI obtuvo jurisdicción sobre los crímenes que tuvieron lugar en el territorio de un Estado parte o que fueron cometidos por un nacional de un Estado parte y que fueron remitidos al Fiscal por el Consejo de Seguridad de la ONU, por un Estado parte que solicitó una investigación o de *oficio* tras recibir información de Estados, órganos de la ONU, organizaciones intergubernamentales o no gubernamentales u otras fuentes fiables.<sup>394</sup> El Tratado no reconoce

<sup>385</sup> Prevenir el Genocidio Internacional.

<sup>386</sup> 50A U.S.C. Sec. 1091.

<sup>387</sup> Artículo 376 del Código Penal de Guatemala; Kemp 2014.

<sup>388</sup> Ley sobre el delito de genocidio (prevención y castigo), 5710-1950, 11th Nisan, 5709, 1950 (la ley no se limita a los nacionales israelíes y otorga a los tribunales israelíes la misma jurisdicción para el genocidio cometido fuera de Israel que para el cometido dentro de Israel).

<sup>389</sup> Ley sobre la Convención contra el Genocidio, Ley n° 27 de 1949.

<sup>390</sup> Código Penal - R.S.C., 1985, c. C-46 (Sección 318.)

<sup>391</sup> Código Penal Federal Ruso, Artículo 357: Genocidio.

<sup>392</sup> Estatuto de Roma, arts. 25 (“La Corte tendrá competencia sobre las *personas físicas* de conformidad con el presente Estatuto”). (énfasis añadido), 27, 28. *Compárese* Bosnia y Herzegovina v. Serbia y Montenegro, Sentencia, 26 Feb. 2007, paras. 162-171 (declara la jurisdicción n sobre el Estado infractor en virtud del TPIY); Gaeta 2007.

<sup>393</sup> Estatuto de Roma, arts. 1 (complementario de las jurisdicciones nacionales), 5 (crímenes), 6 (genocidio - definido de conformidad con la Convención sobre el Genocidio).

<sup>394</sup> *Ibidem*, arts. 12, 13, 14, 15.

inmunidad alguna ni prescribe,<sup>395</sup> sino que se limita a conductas ocurridas *ratione temporis*, tras la entrada en vigor del Tratado.<sup>396</sup> El Estatuto de Roma obtuvo suficientes ratificaciones y adhesiones de Estados para entrar en vigor el 1 de julio de 2002. Ciento veinticinco Estados son partes en el Estatuto y otros veintinueve han firmado el Tratado pero no lo han ratificado. Cuatro Estados coloniales signatarios, Israel, Estados Unidos,<sup>397</sup> y Rusia, todos ellos con leyes nacionales contra el genocidio, han retirado formalmente su firma del Estatuto de Roma y de la jurisdicción de la Corte Penal Internacional.

Con respecto al genocidio por colonización, como se ha expuesto anteriormente en este comentario, las leyes penales nacionales e internacionales contra el genocidio poseen una serie de defectos fatales, entre ellos (1) la falta de inclusión de la responsabilidad de los Estados, naciones y gobiernos, así como de las organizaciones y empresas que son colectiva, política o institucionalmente responsables de actos de genocidio; (2) la falta de extensión retroactiva de la cobertura a los actos genocidas cometidos antes de la adopción de la respectiva ley de genocidio; y (3) la falta de previsión de recursos plenamente adecuados y apropiados para las víctimas del genocidio colonial prolongado.<sup>398</sup>

Las leyes nacionales de genocidio dejan a las víctimas bajo la ficción de que la potencia colonial infractora presentaría cargos de genocidio contra sus propios funcionarios actuales o anteriores. Mientras los Estados más poderosos siguen controlando el tribunal, las naciones y pueblos

indígenas se convierten en mendigos a merced del Estado, las partes de la Convención sobre el Genocidio en un escenario internacional dominado por las mismas potencias coloniales culpables o con antecedentes de genocidio.

Como crimen contra “grupos”, contra naciones, etnias, religiones y razas, el genocidio no puede ser cometido por “personas físicas” que actúen solas. Los procesamientos individuales por genocidio de “antiguos” o incluso actuales funcionarios del gobierno, líderes de regímenes, grupos militantes o señores de la guerra rara vez dan lugar a condenas<sup>399</sup> e, incluso cuando tienen éxito, no proporcionan ningún alivio al grupo victimizado. Como verdadera respuesta al genocidio colonial, el proceso establecido por la Convención sobre el Genocidio y el Estatuto de Roma para abordar este crimen de crímenes es, en su esencia y eficacia, impotente y carente de sentido. De las sesenta y seis investigaciones llevadas a cabo por la CPI, sólo se ha acusado a veintinueve personas, en su mayoría procedentes de África, y sólo se ha condenado a once, que

<sup>395</sup> *Ibidem*, art. 29.

<sup>396</sup> *Ibidem*, arts. 11, 24.

<sup>397</sup> Bolton 2002. Más recientemente, el presidente de Estados Unidos, Donald Trump, emitió una orden ejecutiva “de emergencia” en la que acusaba a la CPI de participar en “acciones ilegítimas e infundadas dirigidas contra Estados Unidos y nuestro estrecho aliado Israel” e impuso sanciones a la Corte y a sus funcionarios y personal, incluidos sus familiares. OE del 6 de febrero de 2025. En respuesta, 79 Estados defendieron las acciones de la CPI en Gaza condenando las sanciones estadounidenses. Declaración conjunta de 2025.

<sup>398</sup> Sobre la reparación de los daños sufridos por los pueblos indígenas a causa del colonialismo, véase Lenzerini 2008.

<sup>399</sup> Corte Penal Internacional, Casos; Corte Penal Internacional, Wikipedia (este sitio web traza el proceso y los resultados de todas las investigaciones y procesamientos de la CPI).

han recibido penas que van desde multas hasta treinta años (el mayor encarcelamiento hasta la fecha), sin que se haya reparado a ningún grupo victimizado.<sup>400</sup> A pesar de todos los genocidios coloniales pasados y presentes, ni siquiera una de las investigaciones o acusaciones de la CPI ha dado lugar a una condena de ningún funcionario o gobernante actual o anterior.<sup>401</sup> Esos mismos Estados y gobiernos criminales que redactaron en gran medida las leyes sobre genocidio imbuyeron en ellas un escudo contra su propia responsabilidad penal al limitar el alcance de las leyes penales sobre genocidio a los individuos y privar a las víctimas de un recurso apropiado o adecuado. El Artículo 5 de la Convención sobre el genocidio atribuye la “responsabilidad” de la aplicación a los Estados signatarios, mientras que no atribuye responsabilidad alguna a ningún Estado por el delito en sí.<sup>402</sup> De manera poco sincera, la responsabilidad del Estado en virtud del Convenio no incluye la rendición de cuentas o la responsabilidad del Estado.<sup>403</sup> En la búsqueda de un remedio al genocidio, la pérdida de grupos orgánicos como las naciones y los pueblos dentro de los territorios arbitrarios y las identidades artificiales y la posición de los Estados, y a los chivos expiatorios individuales de la responsabilidad colectiva del Estado, es lo que James Scott en *Seeing Like a State* ha analogado a ocultar la vista del bosque mientras se gestionan los árboles individuales.<sup>404</sup>

### **El Tribunal Internacional de (In)Justicia**

Mientras que la Corte Penal Internacional se creó como tribunal penal independiente de las Naciones Unidas, el Artículo 7 y el Capítulo

XIV de la Carta de las Naciones Unidas de 1945 establecieron un órgano judicial, la Corte Internacional de Justicia (CIJ), para conocer y resolver las controversias entre los Estados miembros de la ONU. La CIJ es la sucesora de la Corte Permanente de Justicia Internacional creada en 1920 tras la Primera Guerra Mundial en virtud del Artículo 14 del Pacto de la Sociedad de Naciones (el Tratado de Versalles) y del Estatuto de la Corte Permanente de Justicia Internacional (CPJI).<sup>405</sup> El TJPI tenía jurisdicción sobre todos los casos remitidos por las partes, cuando así lo dispusieran los tratados o convenciones, y cuando fuera necesario, para decidir cuestiones de derecho y obligaciones internacionales.<sup>406</sup> Sólo los Estados o los miembros de la Liga podían ser partes en los asuntos sometidos al CPJI.<sup>407</sup> Al igual que las “Naciones” Unidas, la Sociedad de “Naciones” era una denominación errónea, ya

<sup>400</sup> *Ibid.*

<sup>401</sup> *Ibid.* Esto se distingue de los tribunales especiales, como los que siguieron a la Segunda Guerra Mundial, Ruanda y la Guerra de los Balcanes, establecidos para juzgar crímenes de guerra y crímenes contra la humanidad, a través de los cuales se condenó por crímenes a unos pocos ex funcionarios gubernamentales, pero no a Estados, naciones o regímenes. La única excepción notable sería el cuestionable obiter dictum en *Bosnia y Herzegovina v. Serbia y Montenegro*, Sentencia, 26 Feb. 2007, paras. 162-171 (declarando la jurisdicción sobre el Estado infractor bajo el TPIY); Gaeta 2007.

<sup>402</sup> Gaeta 2007.

<sup>403</sup> *Ibid.*

<sup>404</sup> Scott 2020, 11-22. *También*, Watson 2015, 96.

<sup>405</sup> Pacto de la Sociedad de Naciones; Estatuto del Tribunal Permanente. Un tribunal internacional había sido propuesto al menos desde 1305 por Pierre Dubois y desde 1623 por Émeric Crucé. Hudson 1922, 245. La CPJI fue precedida por la Corte Permanente de Arbitraje establecida por la Convención de La Haya de 1899 para el arreglo pacífico de controversias internacionales.

<sup>406</sup> Estatuto del Tribunal Permanente, arts. 36 y 37.

<sup>407</sup> *Ibidem*, art. 34.

que sólo los “Estados” podían ser miembros.<sup>408</sup> No hay nada “nacional” en la composición de estos órganos inter-“nacionales”. Las disposiciones de la CIJP relativas a la pertenencia y competencia de los Estados se trasladaron a la Corte Internacional de Justicia.<sup>409</sup> La CIJ también puede emitir opiniones consultivas sobre cualquier cuestión jurídica que le remita un Estado o la propia ONU.<sup>410</sup> Las sentencias de la CIJ sólo son vinculantes para las partes ante ella<sup>411</sup> y no son recurribles.<sup>412</sup> Según el Artículo 94 de la Carta de la ONU, “cada Miembro de las Naciones Unidas se compromete a acatar la decisión de la Corte Internacional de Justicia en cualquier caso en que sea parte”. Si una parte incumple sus obligaciones en virtud de una sentencia de la CIJ, la otra parte puede recurrir al Consejo de Seguridad de la ONU para que adopte medidas que den efecto a la sentencia.<sup>413</sup>

En virtud del Artículo 93(1) de la Carta de las Naciones Unidas, todos los Estados miembros de la ONU son automáticamente partes en el Estatuto de la Corte. El Artículo 93(2) permite a la Asamblea General de la ONU autorizar a Estados no miembros de la ONU a ser partes en un caso ante la CIJ, pero sigue estando limitado a “Estados” no miembros de la ONU. Los grupos no estatales, como los enumerados para su protección en la Convención sobre el Genocidio, incluidas las naciones y los pueblos, carecen de legitimación en virtud de la Carta de las Naciones Unidas para ser partes en cualquier asunto relacionado con el genocidio, el dominio colonial y su propia supervivencia. Mientras que la CIJ puede llevar ante ella a un Estado parte

responsable de un delito colectivo en virtud de la Convención sobre el Genocidio, las naciones, etnias y miembros de religiones y razas tienen que encontrar un Estado miembro de la ONU “responsable” dispuesto a dar un paso al frente para hacer cumplir la Convención contra otro Estado miembro.

Desde su creación en 1945, la CIJ ha examinado casi 200 casos. Seis de ellos han perseguido acusaciones de genocidio en virtud del Artículo VIII de la Convención sobre el Genocidio: Bosnia y Herzegovina c. Serbia y Montenegro (1993 / 2007); Croacia c. Serbia (1999 / 2015); República Democrática del Congo c. Ruanda (2002); Gambia (Rohingya) c. Myanmar (2019) (pendiente); Ucrania c. Federación Rusa (2022) (pendiente); Sudáfrica (Palestina/Gaza) c. Israel (2023) (pendiente).<sup>414</sup> Sólo dos, Gambia (Rohingya) c. Myanmar y Sudáfrica (Palestina/Gaza) c. Israel, fueron interpuestos por Estados, en nombre de pueblos indígenas, en cumplimiento de la obligación que les impone el

<sup>408</sup> Pacto de la Sociedad de Naciones, art. 1. El párrafo 2 del Artículo 1 del Pacto, a diferencia de la Carta de la ONU, permitía que “cualquier Estado, Dominio o Colonia plenamente autónomo” se convirtiera en miembro si lo aprobaban dos tercios de la Asamblea. Sin embargo, de los 63 miembros de la Liga, ninguno parece ser un dominio no estatal (una nación), ni una colonia. Véase Roster of the League of Nations [1920 thru 1946], Notably the colonial “empires” of Great Britain and Japan were members.

<sup>409</sup> Estatuto de la CIJ, arts. 34(1) (partes), 35(1) (partes), 36 (competencia), 37 (competencia convencional)

<sup>410</sup> *Ibidem*, cap. IV. IV.

<sup>411</sup> *Ibidem*, art. 59.

<sup>412</sup> *Ibidem*, art. 60.

<sup>413</sup> Carta de las Naciones Unidas, art. 94(2).

<sup>414</sup> Corte Internacional de Justicia, Casos.

Artículo 1 de la Convención sobre el Genocidio de prevenir los actos de genocidio en cualquier lugar. Ambos casos son muy recientes y siguen pendientes ante la CIJ.<sup>415</sup> Sólo en uno de ellos, la acción más reciente en la que simplemente se solicitaba *una opinión consultiva*, Sudáfrica (Palestina/Gaza) contra Israel, se alegaba la destrucción de una nación, etnia, religión y raza mediante genocidio colonial.<sup>416</sup> La estructura estatutaria de la CIJ adolece de los mismos fallos inherentes que la CPI. Aunque, a diferencia de la CPI, la CIJ abarca a los Estados como perpetradores colectivos, omite a los perpetradores colectivos no estatales, como las naciones, las milicias, las organizaciones y las empresas. Además, la CIJ se limita a los Estados como partes demandantes, lo que priva a las naciones y pueblos victimizados de legitimación para presentar demandas contra Estados genocidas. La omisión de las víctimas de genocidio como partes en un asunto ante la CPI puede contribuir a limitar los recursos que concede la Corte, a pesar de que el Artículo 36.2.d de su Estatuto le confiere amplias facultades. Por último, al igual que la CPI, la CIJ no es retroactiva y, por lo tanto, no abarca los actos cometidos por un Estado antes de su adhesión a la Carta de las Naciones Unidas o de su ratificación. Aunque los Estados del mundo asignaron a la CIJ la tarea de remediar las disputas internacionales y aportar un sentido de “justicia” al mundo, en lugar de ello ha proporcionado falsas esperanzas y ha fallado a las naciones colonizadas y a los pueblos indígenas como alto tribunal de la injusticia.

### Sesgo judicial inherente contra las naciones del Cuarto Mundo

La Corte Internacional de Justicia y el Tribunal Penal Internacional han sido objeto de duras críticas y se les ha acusado de parcialidad y de ser herramientas del imperialismo occidental, ya que sólo castigan a los Estados pequeños, débiles y en su mayoría africanos y a sus dirigentes, mientras que ignoran los crímenes cometidos por los Estados occidentales más ricos y poderosos.<sup>417</sup> Los jueces de la CIJ son elegidos por la Asamblea General y el Consejo de Seguridad de la ONU a partir de una lista proporcionada por la Corte Permanente de Arbitraje.<sup>418</sup> Los de la CPI son propuestos y elegidos por los Estados parte del Estatuto de Roma.<sup>419</sup> Ninguna de las 6.000-9.000 naciones o unas 24.000 etnias (pueblos) del mundo a las que se pretende proteger del genocidio tiene papel alguno en la selección de los jueces que investigarán, juzgarán y decidirán sobre los asuntos de supervivencia que les afectan. Varios estudios sobre las decisiones de estos tribunales han demostrado que el control directo e indirecto de los Estados miembros de la ONU sobre la selección de los jueces ha dado lugar a un sesgo cultural, lingüístico, político y económico inherente a Occidente y Europa.<sup>420</sup>

<sup>415</sup> *Ibidem*, Gambia contra Myanmar 2019 y Sudáfrica contra Israel 2023.

<sup>416</sup> *Ibidem*, Sudáfrica contra Israel 2023.

<sup>417</sup> Brett 2020; Vihinen 2023; McDonald 2019.

<sup>418</sup> Estatuto de la Corte Internacional de Justicia, art. 4.

<sup>419</sup> Estatuto de la Corte Penal Internacional, art. 36.

<sup>420</sup> Posner 2004; Ma 2017; Hernández 2012

## Cumplir una misión, reformar la ley y los tribunales

Teniendo en cuenta los más de 500 años de resistencia de los pueblos indígenas a las invasiones imperiales y a la dominación colonial, los cientos, si no miles, de casos bien documentados de genocidio colonial que continúan hasta el día de hoy, los 80 años de condena mundial del colonialismo y el racismo en todas sus formas y manifestaciones, los 80 años de existencia de la Corte Internacional de Justicia, los 75 años que han transcurrido desde la promulgación de la Convención sobre el Genocidio por la Asamblea General de la ONU, el derecho internacional establecido desde hace mucho tiempo de que fuera de cualquier tratado internacional el colonialismo, el racismo y el genocidio están prohibidos como violaciones de las normas de *jus cogens* y de los derechos fundamentales colectivos de todas las naciones y pueblos, y dadas las obligaciones *erga omnes* obligatorias<sup>421</sup> y las declaraciones de responsabilidad / obligaciones de los Estados contenidas en el derecho internacional consuetudinario y en todos los instrumentos internacionales relativos a los derechos de las naciones y los pueblos, el colonialismo, el racismo, los crímenes contra la naturaleza y el genocidio, el fracaso casi total y abyecto de los Estados miembros de la ONU, de estos tribunales internacionales y de las propias Naciones Unidas a la hora de acudir en ayuda de las naciones y pueblos indígenas sometidos al implacable pulgar del genocidio lento es totalmente inmoral e inexcusable. A la sombra de Srebrenica y Ruanda, Adam Lebor caracterizó este fracaso sistémico de

la ONU de la “responsabilidad de mando” ante el genocidio como “complicidad con el mal”.<sup>422</sup>

Los fallos de la CPI y la CIJ a la hora de proporcionar o compartir el control sobre el proceso de reparación con los grupos victimizados específicos identificados en la Convención sobre Genocidio pueden corregirse con bastante facilidad mediante simples enmiendas limitadas a sus Estatutos que cumplan el propósito de la Convención de proteger a estos grupos del crimen de crímenes. Otros tribunales internacionales de derechos humanos, como la Comisión Interamericana de Derechos Humanos, ofrecen acceso directo a las víctimas, incluidas naciones y grupos.<sup>423</sup> Por ejemplo, la Comisión admitió recientemente las demandas de la Nación Onondaga que impugnaban la continua dominación colonial de Estados Unidos, que implicaba la pérdida del territorio y las tierras de la Nación.<sup>424</sup> Muchas otras acciones colectivas de derechos humanos han sido presentadas y resueltas en estos tribunales por naciones, pueblos y grupos indígenas contra los Estados de las Américas.<sup>425</sup> Previa remisión de la Comisión, las partes no estatales también pueden comparecer ante la Corte Interamericana de Derechos Humanos

<sup>420</sup> Posner 2004; Ma 2017; Hernández 2012

<sup>421</sup> Chow 2021.

<sup>422</sup> Lebor 2006, x, cap. IX (cita del Informe Brahimi, ix.).

<sup>423</sup> Véase, por ejemplo, Comisión Interamericana de Derechos Humanos, Reglamento, art. 23. 23.

<sup>424</sup> Nación Onondaga contra Estados Unidos 2023.

<sup>425</sup> Véase *en general*, Comisión Interamericana de Derechos Humanos, Casos, Fondo.

en acciones contra Estados.<sup>426</sup> El Artículo 14 del Estatuto de Roma para la CPI podrá ser enmendado para permitir las remisiones de investigación judicial de un Estado o nación parte, o de un grupo del Artículo 2 de la Convención sobre Genocidio. Del mismo modo, los Artículos 34(1) y 35(1) del Estatuto de la Corte Internacional de Justicia pueden modificarse para establecer que “los Estados, las naciones y los pueblos” pueden ser partes y comparecer en causas ante la Corte.

La responsabilidad colectiva de los Estados y otras entidades colectivas puede abordarse mediante la modificación del Artículo 25 del Estatuto de Roma, simplemente eliminando las referencias a la responsabilidad “individual” y a las personas “físicas” y añadiendo una definición de “personas” que incluya entidades colectivas como Estados, naciones, grupos, organizaciones y corporaciones. Al fin y al cabo, los padres del Derecho internacional moderno establecieron analogías a partir de los derechos y obligaciones de las personas físicas para desarrollar el Derecho de gentes.<sup>427</sup> La ley de Estados Unidos sobre los derechos de las personas, por ejemplo, reconoce a las corporaciones, incluidas las públicas como los municipios, como “personas”.<sup>428</sup> La adición de la responsabilidad colectiva se correspondería con la dispensa del Artículo 27 de la defensa de la capacidad oficial y se extendería a las entidades colectivas como personas que tienen la responsabilidad indirecta de los comandantes y supervisores que se encuentra en el Artículo 28. Ciertamente, el comandante o supervisor último de un funcionario público es el propio gobierno. En cuanto a la Corte Internacional de Justicia, la

inclusión de “naciones y pueblos” en la definición de partes que figura en los Artículos 34(1) y 35(1) ampliaría la jurisdicción de la Corte más allá de los Estados a las naciones y pueblos en virtud del Artículo 36(1) del Estatuto de la Corte. En cuanto a la parcialidad real y percibida de los jueces, esta cuestión podría abordarse, al menos en parte, simplemente modificando el Artículo 36(4) de la CPI y el Artículo 4 de la CIJ para incluir a las naciones, pueblos y grupos victimizados en la selección de juristas.

En cuanto a la irretroactividad de la CPI<sup>429</sup> y la CIJ, *ratione temporis*, los crímenes de lesa humanidad, incluido el crimen de genocidio, no fueron creados por la Convención sobre el Genocidio y los demás tratados del siglo XX. Como se ha señalado anteriormente, han existido durante cientos de años como derechos fundamentales (inalienables) y normas de jus cogens de derecho internacional consuetudinario que no necesitan ningún derecho positivo o tratado para ser exigibles<sup>430</sup> Son los derechos “inalienables”<sup>431</sup> y “no enumerados”<sup>432</sup> a los que se refieren la Declaración de Independencia y la Constitución de Estados Unidos y la Declaración

<sup>426</sup> Convención Americana sobre Derechos Humanos, art. 61; véase, por ejemplo, el Caso del Pueblo Saramaka c. Suriname 2007, Decisión sobre el fondo, Corte Interamericana de Derechos Humanos, Ser. C, No. 185, IHRIL 3058 (12 de agosto de 2008); Anaya 2002.

<sup>427</sup> Dickinson 1917.

<sup>428</sup> Véase, por ejemplo, Citizens United v. F.E.C. 2010; Monell v. Dept. of Soc. Servs. of the City of New York 1978.

<sup>429</sup> Estatuto de Roma, arts. 11 y 24.

<sup>430</sup> Véase también Gaeta 2007, 642.

<sup>431</sup> Declaración de Independencia de los Estados Unidos, párrafo 2.

<sup>432</sup> Constitución de los Estados Unidos, enmienda. IX; Black 1997.

Universal de Derechos Humanos. Los crímenes contra la humanidad también formaron parte del derecho común y positivo (el Derecho de Gentes) durante el crecimiento de los imperios, el colonialismo y el nacimiento del genocidio lento. Uno de los fundadores del derecho internacional, Emer de Vattel, a quien conocía el Presidente del Tribunal Supremo de EE.UU., John Marshall, cuando ideó el actual derecho colonial de los pueblos indígenas, opinó sobre esto en su tratado seminal de 1758, el Derecho de Gentes. Vattel recitó la ley natural sobre la igualdad de las naciones:

Las naciones... son naturalmente iguales e *inherentes por naturaleza* a las mismas obligaciones y derechos. El poder o la debilidad no producen a este respecto ninguna diferencia. Un enano es tan hombre como un gigante; una pequeña república no es menos Estado soberano que el reino más poderoso.<sup>433</sup>

Muchos de los tratados entre naciones europeas y naciones indígenas se conocían como “tratados de protección”. No establecían una relación colonial ni autorizaban el dominio colonial. Sobre esto, Vattel postula que un simple tratado de protección “no deroga en absoluto la soberanía [de una nación]” y que si la nación más poderosa “no protege eficazmente a la otra en caso de necesidad, ...pierde todos los derechos que había adquirido ...y la otra ...vuelve a entrar en posesión de todos sus derechos, y recupera su independencia, o su libertad”.<sup>434</sup> Declaró que ninguna nación tenía derecho a imponer su cultura o religión a otra” y que “[n]inguna nación

debería, por tanto, cometer acciones tendentes a perjudicar la perfección de otras naciones, y la de su condición, o a impedir su progreso ....”<sup>435</sup> Vattel también recitó la Ley de las Naciones que rige la ocupación en virtud de guerras injustas:

Por lo tanto, quienquiera que tome las armas sin una causa legítima, no puede tener absolutamente ningún derecho .... Es responsable de todos los males ...es culpable de un crimen contra la humanidad en general. ...El que hace un daño está obligado a reparar el daño, o a hacer una satisfacción adecuada si el mal es irreparable, e incluso a someterse al castigo ....La nación en su capacidad agregada, y cada individuo en particular, convencidos de la injusticia de su posesión, están obligados a renunciar a ella, y a restaurar todo lo que han adquirido injustamente.<sup>437</sup>

Sobre la responsabilidad del Estado, Vattel señaló: “Cada nación debe, en ocasiones, trabajar para la preservación de otras, y para asegurarlas de la ruina y la destrucción, en la medida en que pueda hacerlo ....”<sup>438</sup> Por lo tanto, existe una base histórica para la extensión retroactiva de

<sup>433</sup> Vattel 1758, 75, también 281.

<sup>434</sup> *Ibidem*, 207.

<sup>435</sup> *Ibidem*, 265 (refiriéndose a los “ambiciosos europeos que atacaron a las naciones americanas, y las sometieron a su codicioso dominio, con el fin, como pretendían, de civilizarlas, y hacer que fueran instruidas en la verdadera religión - esos usurpadores, digo, se basaron en un pretexto igualmente injusto y ridículo”).

<sup>436</sup> *Ibidem*, 271.

<sup>437</sup> *Ibidem*, 586-87, 593-94, 603-07.

<sup>438</sup> *Ibidem*, 262. Sobre la responsabilidad del Estado, véase Bastaki 2024.

las jurisdicciones de la CPI y la CIJ sobre los delitos de los Estados coloniales y los Estados coloniales sucesores que eran ilegales en virtud del Derecho de gentes tal y como existía en ese momento. Dado que los beneficios de un Estado, su riqueza, que se obtuvieron ilícitamente mediante actos de genocidio continúan y se multiplican con el tiempo, la equidad exige que la responsabilidad del Estado tampoco esté restringida por el tiempo, sino que se extienda hasta el inicio del delito y abarque todo el botín de su conducta ilícita. Proporcionar una excusa temporal o inmunidad a un autor de genocidio es contrario a la equidad y a la finalidad reparadora de la Convención sobre el genocidio y a los principios contra la impunidad de las violaciones graves del derecho penal internacional.<sup>439</sup>

Aunque no se pueda responsabilizar a los Estados de genocidios ocurridos antes de la Convención sobre el genocidio, el genocidio colonial está institucionalizado y se produce a lo largo del tiempo que, si se inicia antes de la fecha de entrada en vigor del instrumento, se prolonga hasta esa fecha. Se trata de un delito “continuado” que se extiende en sustancia o efecto más allá de la fecha de entrada en vigor de la Convención o del tratado pertinente.<sup>440</sup> Por ejemplo, la destrucción de una nación mediante el robo de su territorio, tierras y recursos por parte de un Estado colonial es un delito continuado que se extiende hasta su devolución, con restitución y reparación por los ingresos perdidos y la destrucción de la economía de la nación. En el caso de Mary y Carrie Dann contra Estados Unidos,

por ejemplo, la Comisión Interamericana de Derechos Humanos se ocupó de esta cuestión y sostuvo que la apropiación de la tierra y el territorio de su nación (los shoshone occidentales) en 1872 eran delitos continuados que se extendían más allá de la ratificación en 1951 del tratado que sometía a Estados Unidos a las leyes del tribunal.<sup>441</sup> La destrucción de una etnia o religión mediante el robo de los hijos de un pueblo indígena a través de adopciones o internados es transgeneracional, al igual que la esterilización de las mujeres indígenas y la pobreza impuesta colonialmente con la consiguiente pérdida o acortamiento de la vida. En otro caso ante la Comisión Interamericana, el tribunal sostuvo que la contaminación de una isla puertorriqueña por parte del ejército estadounidense antes del tratado constituía una violación continuada de los derechos humanos que otorgaba al tribunal jurisdicción *ratione temporis*.<sup>442</sup> Estos y otros rasgos de dominación colonial y genocidio lento continuaron, y continúan, mucho después de que la Asamblea General de la ONU adoptara la Convención sobre el Genocidio o creara los tribunales internacionales facultados para juzgar estos crímenes de supervivencia. Mientras exista la dominación colonial, las reclamaciones de los pueblos indígenas contra sus colonizadores, incluidas las reclamaciones de genocidio lento, seguirán vivas.

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<sup>439</sup> Véase Ahmed y Quayle 2009.

<sup>440</sup> Nissel 2004; St. Charles 2020.

<sup>441</sup> Dann c. Estados Unidos 2002, párrs. 2, 3, 39-42, 166-67.

<sup>442</sup> Torres c. Estados Unidos 2022, párrs. 2-21, 46.

## EN LA BÚSQUEDA DE UNA SOLUCIÓN EFICAZ Y ADECUADA

### Ocultando la Solución

Los Estados del mundo reunidos en la Asamblea General de las Naciones Unidas han tenido más de setenta y cinco años para proporcionar protecciones reales y remedios eficaces contra el lento genocidio a las naciones y pueblos colonizados, y han fracasado rotundamente en hacerlo. El derecho y las instituciones internacionales modernas, incluidas las Naciones Unidas y sus órganos, son creación y dominio de los “Estados” en detrimento de las naciones y los pueblos. Los Estados y sus instituciones son creaciones artificiales, políticas, con poder propio, sujetas a las leyes “positivas” que ellos mismos conciben. Por el contrario, las naciones y los pueblos, en particular las naciones y los pueblos indígenas, son orgánicos y están sujetos al derecho natural. En virtud del Artículo 1 de su Convención de 1920, podían ser miembros de la Sociedad de Naciones “todos los Estados, Dominios o Colonias que se gobiernen plenamente a sí mismos”. Posteriormente, al tiempo que declaraban pomposamente la “igualdad” de todas las naciones y pueblos, grandes y pequeños,<sup>443</sup> las potencias coloniales, en su mayoría occidentales, que redactaron la Carta de la ONU revisaron expresamente la composición de la Sociedad para excluir a todas las naciones y pueblos.<sup>444</sup> De este modo, y al hacer que su composición fuera exclusiva de los Estados, la propia Carta relegó a todas las naciones y pueblos a una situación de *desigualdad* en virtud de la Carta

y de las leyes y organismos internacionales que su “Asamblea General” de Estados promulgaría y crearía, incluidas la CPI y la CIJ. Su núcleo es la podredumbre. Esto se ve agravado por la dominación y el control que los Estados coloniales y genocidas han ejercido sobre la ONU y sus leyes desde su fundación. El estudioso del genocidio Adam Jones señaló el “pésimo historial de la ONU a la hora de afrontar y prevenir el genocidio” y concluyó que, debido a las concesiones hechas para aplacar a Estados Unidos, la Corte Penal Internacional podría convertirse en “otro órgano jurídico sin dientes”.<sup>445</sup> Daniel Goldhagen observó que los vetos de la Unión Soviética (ahora Rusia), China y Estados Unidos han “eviscerado” la Convención sobre el Genocidio para que no pudiera detener sus propias prácticas de eliminación y las de sus Estados clientes.<sup>446</sup> La ineficacia de las Naciones Unidas era una “conclusión inevitable”<sup>447</sup>

Durante prácticamente toda su historia, los miembros de la ONU han sido en su inmensa mayoría dictaduras. En 1987, el 60% de los países miembros eran dictaduras .... Las dictaduras dominaban la Asamblea General. ...A lo largo de su historia, la cultura y la burocracia de las Naciones Unidas han estado compuestas en gran medida por representantes de

<sup>443</sup> Carta de las Naciones Unidas, Preámbulo párrafo 1, art. I(2).

<sup>444</sup> Carta de las Naciones Unidas, arts. 3 y 4 (composición de la ONU limitada a los “Estados”).

<sup>445</sup> Jones 2024, 394, 375.

<sup>446</sup> Goldhagen 2009, 536.

<sup>447</sup> *Ibid.*

regímenes que lo que más desean es tener vía libre para mantener su gobierno ilegítimo....<sup>448</sup>

Tras analizar la naturaleza política del Estado y los genocidios ocurridos desde 1900, Rudolph Rummel sostuvo que cuanto más autoritario es un Estado, más probable es que cometa un genocidio.<sup>449</sup> “Es empírico que el verdadero Poder mata, el Poder absoluto mata absolutamente”.<sup>450</sup> En respuesta a Rummel, el sociólogo Michael Mann señaló que la democracia también tiene un “lado oscuro”.<sup>451</sup> Mann postula que las democracias se basan en una ideología de igualdad que avanza hacia el grupo étnico dominante en la creación de poblaciones monoétnicas, una evitable limpieza étnica por asimilación.<sup>452</sup> No se puede esperar que los Estados que dominan la ONU se vuelvan sobre sí mismos para erradicar el dominio colonial y el genocidio.

Esta corrupción interna se repite en las leyes emanadas de la ONU que pretenden abolir el colonialismo y el racismo de Estado “dondequiera que se encuentren”. La principal declaración anticolonial es la Resolución 1514 de la Asamblea General de la ONU de 1960, que condena el colonialismo en “todas sus formas y manifestaciones” como “una negación de los derechos humanos fundamentales” y contrario a la Carta de la ONU. La Resolución pide el fin de todas las “medidas represivas de todo tipo dirigidas contra los pueblos dependientes”, el “respeto” de los derechos de los pueblos dependientes “a la independencia completa y a la integridad de su territorio nacional” y la transferencia inmediata de “todos los poderes a

los pueblos” de los territorios colonizados “sin condiciones ni reservas”.<sup>453</sup>

A esta gran resolución, las potencias coloniales insertaron un calificativo que establece: “Todo intento encaminado a quebrantar total o parcialmente la unidad nacional y la integridad territorial de un país es incompatible con los propósitos y principios de la Carta de las Naciones Unidas”.<sup>454</sup> La disposición que supuestamente prohíbe la descolonización cuando ésta “desmembraría o menoscabaría” la integridad territorial de un Estado colonial se repitió en posteriores resoluciones de descolonización de la ONU.<sup>455</sup> Esto se conoció como la tesis del “agua azul” o del “agua salada”, inventada por los Estados coloniales como excusa geográfica para eludir sus obligaciones de descolonización *erga omnes*, estatutarias y legales con respecto a cualquier nación o pueblo que se encontrara dentro de sus pretendidas fronteras coloniales.<sup>456</sup> Incluso en la seminal Declaración de la ONU sobre los Derechos de los Pueblos Indígenas de 2007, después de proclamar que “los pueblos indígenas son iguales a todos los demás pueblos”, las potencias coloniales insistieron de nuevo en insertar una exclusión en el Artículo 46

<sup>448</sup> *Ibidem*, 536-537.

<sup>449</sup> Rummel 1998.

<sup>450</sup> *Ibid.*

<sup>451</sup> Mann 2005.

<sup>452</sup> *Ibid.*

<sup>453</sup> Resolución 1514 de la AGNU, Preámbulo, Declaraciones 1, 4, 5.

<sup>454</sup> *Ibidem*, Declaración 6.

<sup>455</sup> Véase UNGA Res. 2625, 124.

<sup>456</sup> Robbins 2015; Lightfoot 2020; Wolfe 2008, 122.

para proteger y continuar su dominación sobre las naciones y pueblos indígenas: “Ninguna disposición de la presente Declaración podrá interpretarse en el sentido de que ... autoriza o fomenta acción alguna encaminada a quebrantar o menoscabar, total o parcialmente, la integridad territorial o la unidad política de Estados soberanos e independientes”. Esta afirmación interesada carece de fundamento jurídico, histórico o fáctico. Como señaló el profesor Moses: “Nada de lo que he dicho sobre el colonialismo de colonos exige que haya un hiato espacial (o ‘agua azul’) entre la metrópoli y la colonia.”<sup>457</sup>

Esta tesis colonial contradice directamente el principio fundamental de la Carta de las Naciones Unidas y del Derecho de gentes de la igualdad de las naciones y los pueblos. Distorsiona ingenuamente el hecho de *que son las potencias coloniales y sus sucesores, por definición, los invasores y violadores de la integridad territorial de las naciones y pueblos preexistentes*, y no al revés. Es un doble lenguaje político interesado. Sin embargo, a pesar de ello, la realidad política es que los Estados coloniales y sus sucesores siguen controlando el proceso y las instituciones del derecho internacional y perpetúan su dominio colonial y la explotación de las naciones y pueblos indígenas.

## 2. Inventar un remedio eficaz para el delito de delitos

Tras el Holocausto de la Segunda Guerra Mundial y las deficiencias de la ley que Lemkin identificó durante los juicios de Núremberg,

inventó por necesidad el “nuevo” crimen internacional de genocidio. Aún no se ha convertido en el remedio global que Lemkin pretendía. Los genocidios continúan en gran medida sin disminuir y los Estados, aunque controlan las normas y el proceso, evitan sistemáticamente el castigo y la rendición de cuentas. Muchos Estados, especialmente los de carácter o historia colonial, cuando firman la Convención sobre el Genocidio lo hacen con “reservas” que en la práctica hacen que su aceptación sea, al menos en parte, nula.<sup>458</sup> La ONU como fuerza contra el genocidio es un fracaso institucional y sistémico.<sup>459</sup> El grupo de expertos de alto nivel convocado por la ONU llegó a una conclusión sobre la respuesta de la ONU a los genocidios de Srebrenica y Ruanda: La imparcialidad de la ONU ante el genocidio “puede, en el mejor de los casos, resultar ineficaz y, en el peor, puede equivaler a complicidad con el mal”.<sup>460</sup> Para las naciones y pueblos indígenas, la dominación colonial y el lento genocidio a la vista de la ONU y del mundo es una realidad cotidiana e intergeneracional.

No se puede esperar un remedio eficaz contra el colonialismo y el genocidio de una institución que está controlada por los infractores o es cómplice de ellos. Lemkin inventó el delito pero

<sup>457</sup> Wolfe 2008, 122.

<sup>458</sup> Véanse las Declaraciones y Reservas a la Convención sobre el Genocidio; Schabas 2000, 521-538; Opinión Consultiva de la CIJ 1951.

<sup>459</sup> Goldhagen 2009, 534-538.

<sup>460</sup> Informe Brahimi, ix. Véase también Goldhagen 2009, 535 (práctica de la ONU de no hacer nada).

no incorporó un remedio apropiado y eficaz. La negación de un remedio efectivo es en sí misma una violación de los derechos humanos.<sup>461</sup> *Ubi ius ibi remedium* - “donde hay un derecho, hay un remedio”- es un principio básico del derecho internacional.<sup>462</sup> Consciente de ello, el Centro de Estudios Indígenas Mundiales (CWIS, por sus siglas en inglés), uno de los principales grupos de reflexión de los pueblos indígenas, dirigido por Rudolph C. Rýser, Doctor en Filosofía y fallecido erudito Cree / Oneida, en colaboración con la Nación Ezidi y en consulta con otras naciones del Cuarto Mundo y con los gobiernos de varios Estados, facilitó el desarrollo de un tribunal penal independiente controlado por naciones y no por Estados, el Tribunal Penal Internacional de las Naciones (NICT, por sus siglas en inglés).<sup>463</sup> Según el Dr. Rýser “El Tribunal Penal Internacional de las Naciones se basa en la idea de que los pueblos indígenas deben asumir la responsabilidad de responsabilizar jurídica y políticamente a los Estados, a otras entidades creadas por los Estados y a los particulares de los crímenes de genocidio, crímenes contra la humanidad, agresión y todos los demás crímenes más graves cometidos contra las naciones y comunidades indígenas, incluidos los crímenes de culturecidio y ecocidio.”<sup>464</sup>

El preámbulo de la NTIC reconocía que:

los acuerdos y tratados internacionales entre los gobiernos de los Estados y otros instrumentos jurídicos adoptados para proteger y castigar los crímenes perpetrados contra los pueblos no han proporcionado a las Naciones del mundo el

debido proceso, reparación o remedio por los actos criminales, ya sea negando a las Naciones el acceso a la justicia, denegando el debido proceso al conceder inmunidad a funcionarios y ciudadanos de los Estados o politizando los sistemas judiciales...,<sup>465</sup>

y afirmó que:

es deber de todas las Naciones y Estados ejercer la jurisdicción legítima sobre los Estados o Naciones, personas, organizaciones empresariales, organizaciones gubernamentales y no gubernamentales, organizaciones intergubernamentales, grupos armados y otras entidades responsables de crímenes internacionalmente reconocidos ....<sup>466</sup>

La NICT se estableció como un tribunal totalmente independiente y complementario de los tribunales internacionales y nacionales existentes que juzgan crímenes de genocidio y otros crímenes contra la humanidad.<sup>467</sup> Existe un precedente en este sentido: la Corte Penal Internacional fue creada por tratado como tribunal independiente y separado de las

<sup>461</sup> Véase, por ejemplo, Dann c. Estados Unidos 2002, párrs. 67-75, 173; Onondaga Nation v. United States 2023, párrs. 46-49.

<sup>462</sup> Véase Greve 2017; también, Chorzów Factory, 20 (“[E]s un principio del derecho internacional, e incluso una concepción general del derecho, que cualquier incumplimiento de un compromiso implica la obligación de reparar”).

<sup>463</sup> Rýser 2024; Rýser 2023.

<sup>464</sup> Rýser 2024.

<sup>465</sup> NICT, Preámbulo, párr. 3.

<sup>466</sup> *Ibidem*, párr. 9.

<sup>467</sup> *Ibidem*, art. 4.

Naciones Unidas.<sup>468</sup> Tras los genocidios y otros crímenes atroces del siglo XX, la ONU ha creado otros tribunales penales internacionales *ad hoc* o temporales para investigar y procesar a los autores de genocidios y otros crímenes contra la humanidad. En 1993, tras la Guerra de los Balcanes, el Consejo de Seguridad de la ONU estableció el Tribunal Penal Internacional para la ex Yugoslavia,<sup>469</sup> y, al año siguiente, tras el genocidio de Ruanda, estableció el Tribunal Penal Internacional para Ruanda.<sup>470</sup> En 2010, la ONU creó un organismo independiente, el Mecanismo Residual Internacional para los Tribunales Penales, para desempeñar las funciones de los Tribunales para Yugoslavia y Ruanda y de cualquier futuro tribunal penal internacional de este tipo.<sup>471</sup> El Consejo de Seguridad de la ONU también estableció dos tribunales penales por acuerdo con Sierra Leona, el Tribunal Especial para Sierra Leona (ahora Tribunal Especial

Residual para Sierra Leona) en 2002 tras la Guerra Civil de Sierra Leona<sup>472</sup> y, por acuerdo con Camboya, las Cámaras Extraordinarias en los Tribunales de Camboya (CECC) en 2003 tras el genocidio camboyano como tribunal híbrido.<sup>473</sup> Sin embargo, estos tribunales penales se estructuraron después de la CPI y, al igual que ésta, se limitaron al enjuiciamiento de delincuentes individuales. También se ha propuesto la creación de un tribunal independiente internacionalizado de crímenes de guerra para el conflicto entre Ucrania y Rusia.<sup>474</sup>

Especialmente relevantes para este debate son los procesamientos iniciales de las ECCC por el genocidio de un grupo indígena de Camboya, los

Cham, que fueron sistemáticamente asesinados (alrededor del 36% murieron), expulsados de su territorio y a los que se prohibió practicar su cultura o religión islámica bajo la política del gobierno de los Jemeres Rojos.<sup>475</sup> Ocho personas fueron acusadas y tres condenadas por las ECCC por genocidio y crímenes contra la humanidad.<sup>476</sup> La estructura “híbrida” del Tribunal de las ECCC es muy significativa como método que podría utilizarse para remediar algunos de los problemas inherentes a la CPI y a otros tribunales internacionales que conocen de asuntos que afectan a naciones y pueblos indígenas. El Artículo 3 del Acuerdo de las ECCC establecía que las Salas de Primera Instancia estarían compuestas por tres jueces camboyanos y dos jueces internacionales, y que la Sala de Apelaciones estaría compuesta por cuatro jueces camboyanos y tres jueces internacionales.<sup>477</sup> En virtud del Acuerdo, los jueces de instrucción y los fiscales estaban compuestos por una persona camboyana y otra internacional.<sup>478</sup>

<sup>468</sup> Estatuto de Roma, en general.

<sup>469</sup> Estatuto del Tribunal Penal Internacional para la ex Yugoslavia, 1 (historia del TPIY).

<sup>470</sup> Estatuto del Tribunal Penal Internacional para Ruanda, i (historia del TPIR).

<sup>471</sup> Resolución 1966 de la AGNU.

<sup>472</sup> Acuerdo entre la ONU y Sierra Leona 2002.

<sup>473</sup> Acuerdo entre la ONU y Camboya 2003.

<sup>474</sup> Case Western Reserve Univ. 2023. *También*, Glusman 2024.

<sup>475</sup> ECCC, Orden de clausura, párrs. 745-770, 1336-1342.

<sup>476</sup> ECCC, casos; ECCC, orden de clausura.

<sup>477</sup> Acuerdo entre la ONU y Camboya 2003, art. 3(2).

<sup>478</sup> *Ibidem*, arts. 5 y 6.

Los crímenes que entran dentro de la jurisdicción de la NICT se establecen en el Artículo 8 del Tratado e incluyen los crímenes de colonización, agresión, genocidio, contra la humanidad, guerra, contra la naturaleza, terrorismo, violencia de género y feminicidio, traslado forzoso de niños, apartheid y ocupación militar.<sup>479</sup> El Tratado establece que no hay prescripción y que la jurisdicción *ratione temporis* se determinará según el derecho internacional consuetudinario de las partes.<sup>480</sup> El TNEIC también prevé la aplicación del derecho consuetudinario de las naciones y los pueblos, además del derecho internacional de los Estados.<sup>481</sup> En cuanto a la selección de los miembros y jueces del tribunal, el Tratado incluye a los Estados y naciones signatarios como iguales en este proceso, minimizando así el sesgo judicial occidental.<sup>482</sup> El NICT está estructurado para comprometer, honrar y abordar las realidades indígenas.<sup>483</sup> Por último, a diferencia de la CPI y la CIJ, el Tratado prevé medidas de reparación apropiadas y de duración indefinida, además de recursos penales. En virtud del Artículo 69, el objetivo de la sentencia es la “reparación” íntegra a las víctimas “de conformidad con los principios establecidos en esta Carta y en los instrumentos jurídicos internacionales pertinentes”. Por ejemplo, en el caso concreto de un delincuente estatal, corporativo u organizativo, la sentencia podría incluir cualquiera de las medidas de justicia reparadora establecidas en las Directrices de la ONU sobre Reparaciones.<sup>484</sup>

La “justicia reparadora”, que busca la armonía en respuesta al conflicto social y al daño, es el

núcleo de la resolución de conflictos indígenas. Esto contrasta con la naturaleza punitiva de la justicia retributiva cristiana.<sup>485</sup> En el derecho internacional de la justicia restaurativa:

El principio esencial ... es que la reparación debe, en la medida de lo posible, borrar todas las consecuencias del acto ilícito y restablecer la situación que, con toda probabilidad, habría existido si dicho acto no se hubiera cometido. Debe consistir en una restitución en especie o, si esto no es posible, en el pago de una suma correspondiente al valor que tendría una restitución en especie”.<sup>486</sup>

La CIJ ha seguido esta regla de la reparación íntegra al dictar medidas de reparación contra un Estado en varios casos. Así, sostuvo que Uganda tenía la obligación de reparar íntegramente a la República Democrática del Congo (RDC) tras haber invadido y ocupado parte de este país.<sup>487</sup> En un litigio entre Hungría y Eslovaquia sobre el proyecto Gabčíkovo-

<sup>479</sup> NICT, sec. 2.

<sup>480</sup> *Ibidem*, arts. 14 y 15, 47. La competencia no viene determinada por la fecha de ratificación o adhesión de una parte al Tratado, sino por el hecho de que el acto estuviera o no reconocido internacionalmente como delito en el momento en que se cometió.

<sup>481</sup> *Ibidem*, art. 25.

<sup>482</sup> *Ibidem*, sec. 3.

<sup>483</sup> Sobre las realidades indígenas, véase Woolford 2011, 74-75.

<sup>484</sup> Principios y directrices básicos de la ONU, *en general*.

<sup>485</sup> Véase, por ejemplo, Yazzie 1994; Austin 2009.

<sup>486</sup> Chorzów Factory, 47; Vattel 1758, Bk II, secs.51, 141, 338; Bk III, chap. XIV (el derecho de postliminium). Véase también, OIT 169, art. 16.

<sup>487</sup> Rep. Dem. Rep. Congo v. Uganda 2005.

Nagymaros, la CIJ dictaminó que ambas naciones eran culpables y ordenó una indemnización por cada una de ellas.<sup>488</sup>

En diciembre de 2005, la Asamblea General de las Naciones Unidas adoptó una resolución que establecía los “Principios y directrices básicos sobre el derecho de las víctimas de violaciones manifiestas de las normas internacionales de derechos humanos y de violaciones graves del derecho internacional humanitario a interponer recursos y obtener reparaciones”.<sup>489</sup> Las Directrices de la ONU establecen una estructura y un proceso para proporcionar un recurso a las víctimas de la limpieza étnica y el genocidio, así como de otras violaciones graves de los derechos humanos que podrían aplicarse en este caso. Aunque se dirige a las víctimas inmediatas,<sup>490</sup> prevé recursos “colectivos”. En la medida en que las violaciones continúen a lo largo de generaciones, puede abordar el lento genocidio de los pueblos indígenas. La Sección IX establece el alcance y los requisitos de las reparaciones. Exige “proporcionalidad” a la gravedad de las violaciones y los daños sufridos, el establecimiento de programas de reparación, la restitución siempre que sea posible (incluido el derecho al retorno y la devolución de los bienes tomados indebidamente) y la indemnización por daños físicos o mentales y “daños morales”, entre otras acciones.<sup>491</sup> Exige “la revelación plena y pública de la verdad”, una declaración oficial que restablezca la dignidad, la reputación y los derechos de las víctimas, así como de las personas estrechamente vinculadas a ellas, “una disculpa pública, que incluya el reconocimiento de los hechos y la aceptación de la responsabilidad”,

conmemoraciones y homenajes a las víctimas, y la inclusión de un relato preciso de las violaciones ocurridas en la formación sobre derecho internacional de los derechos humanos y derecho internacional humanitario y en el material educativo a todos los niveles.<sup>492</sup> La naturaleza y el alcance de las reparaciones apropiadas deben ser determinados por las víctimas y no por el violador de los derechos.<sup>493</sup>

Muchos estudiosos del genocidio han opinado sobre cómo poner fin al genocidio. La mayoría parece confiar en seguir responsabilizando penalmente a los individuos,<sup>494</sup> aunque se ha demostrado que esto es totalmente ineficaz para detener futuros genocidios. Enjuiciar a personas por genocidio no tiene más efecto sobre futuros genocidios que la pena de muerte para disuadir a las personas de cometer homicidios.<sup>495</sup> Daniel Goldhagen ha defendido la necesidad de un “poderoso discurso antieliminacionista” no sólo entre las entidades políticas, sino también entre los medios de comunicación y los ciudadanos de a pie, una concienciación que informe plenamente y movilice una respuesta rápida a las primeras fases del genocidio.<sup>496</sup> Adam Jones y otros han sugerido

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<sup>488</sup> Proyecto Gabčíkovo-Nagymaros.

<sup>489</sup> Véanse los Principios y Directrices Básicos de la ONU.

<sup>490</sup> Id. en sec. V.

<sup>491</sup> Véase Principios y directrices básicos de las Naciones Unidas, sec. IX, párrs. 15, 16, 19, 20.

<sup>492</sup> Id. en párr. 22. Para un análisis más detallado, véase Lenzerini 2009.

<sup>493</sup> Véase Lenzerini, *ibíd.*, 15; también, Grey 2017.

<sup>494</sup> Ratner 2001; Stone 2010.

<sup>495</sup> Shaw 2007, 161.

<sup>496</sup> Goldhagen 2009, 517-532.

estar atentos a las “señales de alerta temprana” y, a continuación, realizar intervenciones humanitarias para detener el genocidio antes de que comience.<sup>497</sup> Israel Charny propuso la creación de un “Ejército Internacional de Paz” permanente como brazo de la ONU preparado para responder rápidamente a los brotes de genocidio en cualquier parte del mundo.<sup>498</sup> El profesor Schabas propone confiar en los diversos órganos e instituciones de las Naciones Unidas a pesar de su “pésimo historial” hasta la fecha.<sup>499</sup>

El análisis anterior sugiere que, al menos tal como lo experimentan las naciones y los pueblos y tal como lo relatan tanto Lemkin como Wolfe, el genocidio es, en sus raíces, un crimen colectivo más que individual. Las víctimas, por definición, tienen un carácter colectivo como “grupos”, y los autores rara vez, o nunca, actúan o pueden actuar solos. Mark Levene ha afirmado que “el genocidio, en lugar de tratarse como una serie de aberraciones sin relación entre sí... debe considerarse como un subproducto crítico... de lo que en realidad es un sistema internacional moderno gravemente disfuncional”.<sup>500</sup> Tony Barta parte de la referencia de Sartre a que un Estado “vive una relación de genocidio” para reconocer que “dicha relación es sistémica, fundamental para el tipo de sociedad más que para el tipo de Estado, y tiene ramificaciones históricas que se extienden mucho más allá de cualquier régimen político”.<sup>501</sup> Señala la naturaleza colonial de tales relaciones, que sitúan la tierra en el centro<sup>502</sup> y argumenta que el enfoque analítico debería centrarse en las “sociedades genocidas”, no en los Estados.<sup>503</sup> El genocidio se convierte con demasiada frecuencia en la consecuencia

inevitable de una relación colonial. Como observó Dirk Moses, “los dos fenómenos están profundamente conectados”.<sup>504</sup>

“En ese sentido, las relaciones de genocidio están vivas, y cada negociación seguirá siendo presenciada por los aborígenes muertos.”<sup>505</sup>

Como opinaba Vattel sobre la ocupación colonial en el Derecho de gentes, “[s]i el pueblo no se somete voluntariamente, el estado de guerra subsiste”.<sup>506</sup> En otras palabras, las naciones y pueblos colonizados resistentes permanecen en un estado de guerra perpetua contra el colonizador. Mientras existan relaciones coloniales en los Estados multiétnicos, el genocidio, incluido el genocidio lento, de las naciones y pueblos ocupados sigue siendo un riesgo inherente y constante para su supervivencia. La prevención del genocidio en los Estados multinacionales y multiétnicos requiere, por tanto, un enfoque que ponga fin a la relación colonial, tal vez del modo establecido en las declaraciones de la ONU sobre descolonización y justicia reparadora. La Resolución 1541(XV) de la Asamblea

<sup>497</sup> Jones 2024, 389-398.

<sup>498</sup> Charny 1999.

<sup>499</sup> Schabas 2000, 453-479.

<sup>500</sup> Levene 2004, 153, 162.

<sup>501</sup> Barta 2000, 239.

<sup>502</sup> *Ibidem*, 247-248.

<sup>503</sup> *Ibidem*, 240.

<sup>504</sup> Moisés 2007, viii.

<sup>505</sup> *Ibidem*, 249.

<sup>506</sup> Vattel, Bk III, sec. 201.

General de la ONU, por ejemplo, declara que la liberación de los pueblos colonizados puede producirse mediante (a) el surgimiento como Estado soberano independiente; (b) la libre asociación con un Estado independiente; o (c) la integración con un Estado independiente.<sup>507</sup> Esto requiere que las naciones y pueblos ocupados “determinen libremente su condición política y persigan libremente su desarrollo económico, social y cultural”.<sup>508</sup> Por ejemplo, a partir de 1960, numerosas naciones indígenas mantenidas como “territorios en fideicomiso” por imperios occidentales fueron liberadas como Estados-nación independientes.<sup>509</sup> En 2009, Bolivia, sucesora a su vez de parte del Imperio español, pasó de una dictadura atrincherada a una democracia multinacional que, al menos en teoría, comparte el poder en libre asociación con siete naciones indígenas como Estado “plurinacional”.<sup>510</sup> Mediante la negociación de un tratado con la Reina de Inglaterra, en 1999 los pueblos de Nunavut se asociaron libremente con Canadá como territorio y nación en gran medida autónomos.<sup>511</sup> En 2015, los pueblos indígenas de la Amazonia peruana se unieron para crear la Nación Wampís como territorio y nación autónomos en libre asociación con el Estado de Perú.<sup>512</sup> Michael Mann ha sugerido que en algunos casos puede encontrarse una solución en la reubicación voluntaria de las poblaciones étnicas para evitar futuros conflictos.<sup>513</sup>

Sin embargo, esta resolución del estatus político de algunas naciones representa sólo una pequeña fracción de las 6.000 a 9.000 naciones bajo dominio y ocupación colonial y que se enfrentan a un lento genocidio. Las soluciones a

los genocidios pasados o actuales, ya sea a través de la CIJ, el TGNI u otro tribunal, deben incluir esfuerzos para resolver la dinámica de poder subyacente entre el grupo victimizado y el Estado infractor u otra entidad colectiva. El genocidio es el método, el medio para un fin imperial o colonial que es la apropiación de la riqueza de otra nación o pueblos. La responsabilidad del Estado sin la responsabilidad del Estado en relación con el genocidio imperial o colonial carece de sentido porque se trata de un crimen o delito colectivo. Requiere un remedio colectivo, la obligación de un Estado infractor de reparar o compensar plenamente todos y cada uno de los daños que causó a una nación o pueblos victimizados sin restricción temporal. Esto significa que el remedio no consiste simplemente en poner fin a la dominación imperial o colonial, sino en restaurar plenamente el futuro de una nación y de un pueblo contenido en su identidad y su persona nacional e internacional, su verdad y su historia, su derecho a la autodeterminación (estatus, soberanía y gobernanza), su dominio e integridad territorial, sus tierras y recursos, su cultura y su lengua, su derecho consuetudinario y sus instituciones, su economía y su riqueza, y todo lo que les fue destruido o arrebatado por el Estado infractor. Esto sólo ocurrirá una vez que la

<sup>507</sup> UNGA Res 1541, Principio VI (énfasis añadido). Véase también, Vattel, Bk III, secs. 213-214.

<sup>508</sup> PIDCP, art. 1(1).

<sup>509</sup> Véase Lista de antiguos territorios en fideicomiso.

<sup>510</sup> Constitución de Bolivia, art. 1.

<sup>511</sup> Acuerdo de Nunavut de 1993.

<sup>512</sup> Nación Wampís.

<sup>513</sup> Mann 2005, 525. Véase también Ignatieff 1993.

responsabilidad penal, civil y moral de los Estados por genocidio, imperialismo, colonialismo, racismo y otros crímenes contra la humanidad (en todas sus formas y manifestaciones) esté plena, efectiva y adecuadamente garantizada y aplicada por tribunales e instituciones internacionales a disposición de todas las naciones y pueblos; y, una vez que el reconocimiento y la igualdad de todas las naciones y pueblos, grandes y pequeños, igual a la de los “Estados”, y las realidades indígenas estén plenamente acogidos en los

tribunales e instituciones internacionales como asuntos resueltos de derecho internacional.<sup>514</sup>

Hasta entonces, el genocidio colonial no terminará y seguirá siendo un crimen sin remedio.<sup>515</sup>

<sup>514</sup> Véase Lam 1992.

<sup>515</sup> Woolford 2011, 75 (“Esperamos que [los pueblos indígenas colonizados] sientan que el genocidio aún no ha terminado y no terminará hasta que descolonicen sus comunidades y reclamen la autodeterminación”); Watson 2015, 88 (el “mito del poscolonialismo”). *También*, Tuck 2012 (la descolonización no es un “fin” sino un “en otro lugar”).

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Andrew Reid es un defensor de la justicia social y ecológica que lleva toda la vida dedicado a la liberación de las naciones y pueblos del Cuarto Mundo de la continua dominación imperial y colonial. Durante los últimos 50 años, ha trabajado y asesorado jurídicamente a muchas organizaciones medioambientales e indígenas, incluidas naciones y pueblos indígenas de las Américas y el Caribe. El profesor Reid imparte cursos sobre derecho internacional y derechos humanos de los pueblos indígenas, derecho indígena federal y ética y justicia medioambientales, es autor de numerosas publicaciones y participa con frecuencia en foros nacionales e internacionales sobre estos temas.

# 18 Broken Treaties

By Tashina Boyer

## Introduction

“18 Broken Treaties” is a piece that explores the lasting effects of the 18 treaties that were signed by 122 California Native American tribes between 1851 and 1852. These treaties were never ratified by Congress and never signed by the President. California has not made amends for this, which left many tribes without land or protection. California representatives influenced the U.S. Senate’s decision and ordered that the broken treaties be hidden for 50 years. My erasure-style poem is designed to bring these broken treaties to the front and center while adding my voice and my experience to the discussion. As a California Native, my goal for this piece is to show my readers the ways that broken treaties have negatively affected Native people and their communities not only in California but throughout the U.S. Although this short piece doesn’t analyze each treaty, it does add a level of visibility and awareness about the ways that the Mono people were forced to get creative and continue to be resilient.

**Keywords:** Broken treaties, Indigenous resilience, California Native history, Mono people, erasure poetry, tribal sovereignty, historical erasure, U.S. colonialism

## 18 Broken Treaties

### 1830

**May 28, 1830-** President Andrew Jackson signs the **Indian Removal Act** into law. Many Indigenous tribes are **displaced**, including **the** Cherokee, Creek, Choctaw, **Seminole**, and **Chickasaw**, resulting **in** the “Trail of Tears.”

-By the end of **Jackson’s** presidency, **his** **administration** had **negotiated** almost **70** **removal** **treaties**.

(www.archives.gov)

### 1840

Nearly all Indian tribes ~~had been driven West~~. Are forced to leave their land.

### 1850

California passes the Act for the government ~~and protection of Indians~~, ~~also~~ known as the California Slave Act (making it legal for Whites to own Native people. Native

people were then removed from their land and our children were taken from their homes and placed into boarding schools; many never make it back home).

*Great, Great, Grandma Mauda was taken from her land at the age of 7.*

*They cut her hair and punished her for speaking her Mono language.*

(Northforkrancheria-nsn.gov) (<https://www.gov.ca.gov>)

### **1851-1852**

The Federal Commissioner signs

18 treaties with California Tribes that relinquished TAKE each Tribe's rights to their traditional lands in exchange for reservations dry slanted hills.

This sets aside 8.5 million acres for reservations, [...] (Which never happened)

However, the United States Senate refuses to ratify the treaties based on objections from the California Legislature.

"Lost Treaties" are placed under an injunction of secrecy until 1909.

(northforkrancheria-nsn.org)."

*Maude doesn't have a home to go back to.*



### **1853**

California Tribes are rendered landless.

*My Mono People are left homeless.*

**1862**

Abraham Lincoln- Indian removal “Free Soil” meaning cheap land free of slavery- Homestead Act 1862- Land grabs broke treaties

**1860’s-1900-** Tribes are pushed further into the foothills  
*My Ancestors are left to create homes on unstable ground.*

**1916**

Eighty acres of land are placed in trust for the use of the North Fork Band of landless Indians. Like the prior allotments, the rocky soil, precipitous landscape made the ground unsuitable for farming, and only suitable for a few families No one.

Nobody.

(northforkrancheria-nsn.org).

**1988**

*I am a child visiting my Great Grandma.  
Her home sits on a slanted hill.  
She has an outhouse that I refuse to use.  
She collects fallen acorn  
and pounds them into a fine powder.  
She makes my grandfather, (her son)  
Acorn mush.  
I refuse to eat it,  
Because it tastes like wet dirt.*

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**Tashina Boyer**

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# An International Criminal Court for Indigenous Women

By Melissa Farley, Ph.D. and Jeri Moomaw

## ABSTRACT

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Indigenous women sit at the crux of state violence, disproportionately subjected to legal disempowerment, human rights violations, economic disenfranchisement, and environmental destruction. Existing international legal systems do not account for this gender disparity, nor do they recognize cases of ecocide, culturicide, or state-reinforced domestic violence. Studies in sexual violence prove that human trafficking and forced sterilization contribute to the racialized criminalization of Indigenous women and inflict cycles of intergenerational harm. In addition, so-called “sacrifice zones”—regions disrupted by climate catastrophe—exacerbate existing traumas. Lack of secure healthcare, land access, and education further increase the vulnerability of Indigenous women to systemic patterns of abuse. Cases brought forth by the Cinta Larga, Sami, and Kikuyu Nations across the globe highlight the necessity of a forum like the NICT to mediate between victim and perpetrator in these circumstances. The NICT presents an avenue through which these women can confront the perpetrators of these genocidal practices and seek meaningful recourse.

**Keywords:** Indigenous Women, Gender-Based Violence, Forced Sterilization, Human Trafficking, Sexual Violence, Legal Disempowerment, State Violence Against Women, Intergenerational Trauma, Murdered and Missing Indigenous Women and Girls (MMIWG), Indigenous Feminism

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The proposal for an international criminal tribunal for nations is an important element of Rudolph Rýser’s legacy at the Center for World Indigenous Studies (Rýser, 2012). The Nations International Criminal Tribunal (NICT) would offer nations the opportunity to document, publicize, and challenge states’ and other nations’ criminal acts against them, with the hope of justice, similar to the International Criminal Court (ICC). In the face of states’ propaganda

and continued colonization of humans, of other living beings and of land, it is important that nations’ voices are heard and their testimony is documented. The inseparable connection between women, land, and the survival of nations requires Indigenous women’s full access to the NICT. There is a lack of recognition of the ways in which “Indigenous women commonly experience human rights violations at the crossroads of their individual and collective identities.” (Raya, 2006).

United States' colonial policies toward Tribal nations are marked by systemic violence, displacement, and legal neglect. These policies have had severe consequences for Indigenous women, who have endured harms as a result of broken treaties, legal disempowerment and removal of their human rights, economic disenfranchisement, colonial sexism that merged with Indigenous sexism, and environmental violence. Truth be told, "settler colonialism is inherently genocidal, and Indigenous women have borne the brunt of this destruction" (Dunbar-Ortiz, 2014). In this article, we discuss how historical and contemporary USA and other states' colonial policies have harmed Indigenous women, causing sexual violence, including prostitution, economic instability, environmental degradation, and cultural erosion. We strongly favor the establishment of an international court where Indigenous women can seek justice for the genocides resulting from failed policies and unfulfilled treaties. The NICT would adjudicate specific charges of ecocide and culturicide, that is, crimes against nature and culture, especially matriarchal traditions and historical memories. At this time, the International Criminal Court (ICC) charter does not include ecocide and culturicide in its adjudicable categories. And the Universal Declaration of Human Rights does not include ecocide in its definition of genocide, which includes only lethal violence against humans. But the destruction of Indigenous lands, water, and other nonhuman

living beings—ecocide—is inseparable from the genocide of Indigenous people (Eichler, 2020). Our resistance to colonization, genocide, and ecocide depends on recognition of the connection between women and the earth. "Women carry the babies of nations and those babies are the ones who hold the land for the next generation. If you [colonizers] destroy the women, you destroy the nations, and then you get access to the land." (Lako'tsira:reh Amanda Lickers Turtle Clan, Seneca, as cited in Konsmo & Pacheco, 2016).

Many cultural teachings emphasize that land is not something to be owned but rather something to be cared for and preserved for future generations. This concept, often expressed through the "Seven Generations" philosophy, teaches that decisions made today must consider the impact on

our descendants. As Lakota leader Crazy Horse said, "One does not sell the earth upon which the people walk." To Indigenous nations, land is not just property—it is the foundation of existence, tied to spirituality, identity, sustenance, governance, and future survival. Losing land is not just about displacement; it is about cultural erasure, making the ongoing fight for land rights an urgent matter of justice and survival.

Below, we describe human rights violations and other harms that we view as adjudicable complaints that could be brought on behalf of Indigenous women to an Indigenous international criminal court.

**Humans have a right to food and shelter. The denial of these basic rights justifies a complaint to NICT on behalf of Indigenous women.**

The denial of the right to housing is a cause for international condemnation. Indigenous women's lack of housing should be condemned and reversed. The human right to housing has been acknowledged in the Universal Declaration of Human Rights, which specifies the right to a standard of living that includes food, clothing, housing, medical care, and necessary social services (United Nations, 1948). In a similar document, the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR) states that some people "cannot threaten other peoples' health or their right to life" (Caney, 2010).

There is much evidence that Indigenous people, through the theft of their land, have been driven into homelessness. For example, although Indigenous Americans in Minnesota constitute only 1% of adults and 2% of youth in the general population, they constitute 11% of homeless adults and 20% of homeless youth (Minnesota Coalition for the Homeless, 2008; Wilder Research, 2010). Minnesota Native youth are noticeably over-represented among the homeless (Koeplinger, 2009).

Indigenous women's attempts to obtain food and shelter sometimes result in their prostitution to meet basic needs. Until we better understand poverty, there will be an inevitable failure to understand what leads women "to take an active

part in exposing themselves to the violation of their basic human rights," as in poverty-generated prostitution, which includes displaced women (Lavee & Benjamin, 2017; McAdam, 2016). Poverty researchers and governments have not yet defined coerced sex resulting from material scarcity as a violation of women's human rights. The myth of freely chosen prostitution allows even human rights advocates to dismiss the most frequent reason for women's prostitution: a poverty-driven need for food and shelter that results in tolerating sexual assault in exchange for survival needs. Prostitution has been erroneously framed as an institution that benefits poor or unhoused women, rather than one that harms them.

**Failure to protect Indigenous women from prostitution and other forms of male violence are crimes against Indigenous women.**

Reflecting lethal contempt against a prostituted Ojibwe woman, a sex buyer said, "I thought we killed all of you." (Farley, Matthews, Deer, et al., 2011)

The intersection of colonial policies with the exploitation of Native women in prostitution and human trafficking reflects the systemic cruelty of the harm inflicted on them. Indigenous women and girls are disproportionately targeted by pimps and traffickers due to a combination of historical marginalization, Native and non-Native sexism, legal loopholes, and the ongoing economic and social disenfranchisement of Indigenous communities. Native women in the USA are 2.5

times more likely to experience sexual violence than non-Native women (Amnesty International, 2021). Women and girls are 40% of sex trafficking victims in some USA regions, despite comprising only 2% of the population (Urban Indian Health Institute [UIHI], 2020).

Native women are disproportionately represented in prostitution and sex trafficking. Studies indicate that Indigenous women and girls are targeted at much higher rates than other demographics, particularly in urban centers and areas with a high presence of extractive industries (Farley et al., 2011). The historical marginalization of Native women, coupled with legal loopholes and jurisdictional confusion, makes them particularly vulnerable to exploitation.

Traffickers often exploit the legal gaps created by federal policies to prey on Native women and girls, moving them between jurisdictions to avoid prosecution (National Congress of American Indians [NCAI], 2016). “Human trafficking in Native communities is not a new issue—it is an extension of the historical exploitation of Indigenous women” (Lucchesi & Echo-Hawk, 2018).

Recent data shows that Native women are ten times more likely to be victims of human trafficking than other racial groups (UIHI, 2020).

In Canada, Indigenous women are seven times more likely to be killed than non-Indigenous women (Amnesty International Canada, 2014). The North American campaign to publicize and condemn the deaths of Murdered and Missing

Indigenous Women and Girls (MMIWG) has been declared a human rights crisis, stemming from racism and sexism, unequal human rights of Indigenous women, the historic and ongoing mass removal of Indigenous children, the many Indigenous women in Canadian prisons, and the inadequacy of police responses to violence against Indigenous women (Amnesty International, 2007, 2014).

Prostitution is a sexually exploitive, often violent economic option most often entered into by those with a lengthy history of sexual, racialized/colonial, and economic victimization. Prostitution has rarely been included in discussions of sexual violence against Native women. It is crucial to understand the sexual exploitation of Native women in prostitution today in its historical context of colonial violence against nations. In a research study of 105 Native women who were prostituted in Minnesota, 98% had been homeless and 62% saw a connection between prostitution and colonization, explaining to interviewers that the devaluation of women in prostitution was identical to the colonizing devaluation of Native people. A third of the women felt that cultural or spiritual practices were important for their identity, and often, for their healing from prostitution (Farley, Matthews, Deer, et al., 2011).

The Minnesota Native women who had been prostituted were in an almost constant state of revictimization. The assaults against them were part of a lifetime surround of exploitation and abuse. 79% of the women had been sexually abused as children by an average of four men.

More than 33% of the women had mothers or grandmothers who were placed in boarding schools, and 25% of their grandfathers had been in boarding schools. The violent assault on children, their families, cultures, traditions and languages which was suffered by Indigenous people in boarding schools has had a devastating effect on all aspects of women's existence. Like poverty, prostitution is intergenerational. 57% of 105 Indigenous women in one research study had family members also involved in prostitution. These included cousins, sisters, mothers, aunts, nieces, grandmothers, and daughters (Farley, Matthews, Deer, et al., 2011).

Indigenous women in colonized regions are more likely to be victims of prostitution and trafficking than non-Indigenous women (Deer, 2010). Experts acknowledge that Native women and girls are disproportionately impacted by prostitution. The Anchorage Police Department and the Federal Bureau of Investigation found that Alaska Native women and girls are approximately 33% of all prostituted and trafficked women in Anchorage (DeMarban, 2010). Yet Alaska Native people make up slightly less than 8% of the population in that city (U.S. Census Bureau, 2010). And 52% of women in a study of Vancouver prostitution were First Nations women (Farley, Lynne, & Cotton, 2005) compared to population estimates reporting that only 7% of Vancouver's people are First Nations (Vancouver/Richmond Health Board, 1999). In New Zealand, 7% of the Christchurch population was Maori women but 19% of those in Christchurch prostitution were Maori (Plumridge & Abel, 2001). Maori women in prostitution were

significantly more likely than European-ancestry New Zealanders to have been re-victimized. The authors interpret this to reflect the vulnerability of Aboriginal women resulting from their poverty and lack of access to other opportunities because of racism (Nixon, Tuttle, Down, et al., 2002). In the 1990s, Atayal and other Indigenous girls comprised 70% of those in Taiwanese debt-bondage prostitution, although they were fewer than 2% of the total population (Hwang & Bedford, 2003).

Feminist prostitution survivor Alike Kinan sued the Argentinian city she lived in for failing to protect her from pimps. She won. This is cause for hope for similar complaints that could be brought on behalf of Indigenous women who have been prostituted and trafficked, with no protection from either nations or states. Kinan noted that in prostitution, sex buyers paid money to conceal the sexual attack inflicted on her and others. Prostitution was male domination over women, with added humiliation. She noted that while it's easy to enter prostitution, surviving the system is complicated, and exiting prostitution requires a "titanic commitment." The state's failure to hire trained civil servants resulted in additional stigma and harms to the victim of prostitution, which Kinan described as "abandonment by the state" (Kohan, 2022).

The failure of both Indigenous and non-Indigenous people to focus on Indigenous women's lives and the violence perpetrated against them as women, sets the foundation for the violence of prostitution. The reality of male violence against Indigenous women is that Indigenous men, like other men, commit violence

against Indigenous women (Smiley, 2022). When prostituted Native women described the ethnicity of their sex buyers in the USA, a majority were White European-American (78%) or African American (65%) but also Latino (44%), Native American (24%), or less frequently Asian (9%) (Farley, Matthews, Deer, et al., 2011).

“The reminders about how unfair the world is to *him* due to racism and classism sends a message, loud and clear, to Indigenous women: the reputation of Indigenous men is more important than your bodily autonomy, safety, and well-being (Bell & Nelson, 1989, as cited by Smiley, 2022). As a result, Indigenous women are discouraged from speaking out against male violence in their families, communities, and nations. Indigenous men have colluded with white men to institutionalize male domination to their benefit. A decolonizing feminist methodology acknowledges the connections between male violence against Indigenous women and male violence against non-Indigenous women (Smiley, 2022).

**Criminalizing their victimization is a harm perpetrated against Indigenous women in prostitution and should be adjudicated at NICT.**

Of 105 North American Indigenous women who were prostituted, 88% had been arrested as adults. The arrest and prosecution of victims is counter-productive and exacerbates their problems. Once a woman has an arrest on her record, especially if she is older than age 18, a criminal record is a barrier to obtaining affordable housing, employment, and frequently

even essential social services. As an Indigenous woman in Minnesota said, “We need people with hearts.”

In one Minneapolis neighborhood, Native women accounted for 24% of the women on probation for prostitution even though they comprised only 2% of the overall Minneapolis population (Bortel, Ellingen, et al., 2008).

A research study found that 52% of 105 Indigenous women in Minnesota had been arrested as children an average of 8 times. Several had been arrested for prostitution as children. Their prostitution was seen as a crime rather than being understood by the police or social services staff as sexual assault on a child.

**Attempted genocide via restricting birth rates is an actionable crime against nations.**

Among the acts of genocide in Article II (d) of the UN Convention on Genocide are measures that are intended to prevent births within the group. These acts are committed with the intent to destroy a target group in whole or in part (Wolfe, 2006). Genocide includes the imposition of measures intended to prevent births within a targeted group. Wolfe (2006) documented birth prevention measures that were perpetrated against Australian Aboriginal nations, a fact that has often been ignored in Australia.

In the 1960s and 1970s, between 3400 and 70,000 Native women in the USA—out of only 100,000 to 150,000 women of childbearing age – were coercively or unknowingly sterilized

permanently by tubal ligation or hysterectomy. Seeking treatment in Indian Health Service hospitals, the Native women were lied to by physicians and were not given informed consent or the right of refusal, prior to sterilization (Ralstin-Lewis, 2005).

This genocidal practice against Native women has also occurred and has been hidden in Canada (Stote, 2015; Clarke, 2021). Forced sterilization has been practiced by Peruvian state policy against Indigenous nations, a practice which has been characterized as sexual violence against Indigenous women, a violation of Indigenous peoples' rights and a crime against humanity (Carranza Ko, 2020; Labrin, 2008). Forced sterilization of Indigenous women has been practiced in Mexico (Zepeda & Marin, 2017; Carranza Ko, 2020). The British castrated

Indigenous men and killed children of the Kikuyu and Maasai nations (Balint, 2016). Argentinian military agencies imposed the separation of Indigenous men, women, and children as a “tactical means of dissuasion and repression.” It was expected that, once separated, Indigenous women would no longer be able to give birth to a future generation of Indigenous children and thereby slowly diminish the numbers of the group (Delrio, Lenton, Musante, et al., 2010)

### **The zoning of so-called ‘sacrifice zones’ poses a lethal threat to Indigenous women.**

States' extraction projects that zoned poisons into the lands and neighborhoods of Indigenous women have facilitated genocide. In Canada, for example, “your postal code determines your health.” (Waldron, 2018).

## **Links Between Broken Treaties, Environmental Violence, and Indigenous Women's Vulnerabilities**

<b>Environmental Violence</b>	<b>Outcomes for Native Women</b>
Industrial pollution and toxic exposure	Increased rates of birth defects, infertility, cancer, and respiratory diseases
Resource extraction sites & “man camps”	Higher incidence of Murdered and Missing Indigenous Women and Girls (MMIWG)
Economic instability from land loss	Increased poverty, crime rates, and substance abuse
Environmental displacement	Heightened mental health crises, suicide rates, and cultural erosion
Criminalization of Native people	Mass incarceration, particularly of Native women
Cultural assault	Severance from land, traditions, and identity, leading to intergenerational trauma

Ecosystem disruption and destruction are paralleled by social disruption and destruction (Morgan, 2019). Entire social systems are harmed, leading to high rates of childhood sexual abuse and neglect, domestic violence, and other indicators of damage to individuals and cultures (Poupart, 2003; Pretty Sounding Flute, 2000; Smith, 2015, 2003). The long-term impact of colonial resource extraction is evident in Zambia. The British mining of copper and aluminum poisoned the land and destroyed traditional agricultural practices. After the colonists abandoned Zambia, illegal mining continued along with massive environmental degradation, government corruption and human rights violations (Vidal, 2015).

It has been predicted that by 2050, there will be one billion environmental migrants who seek to escape droughts, fires, desertification/dust storms, crop failure, sea-level rise, hurricanes, and floods (Bassetti, 2019). Climate crises increase Indigenous women's vulnerability to sexual assault and sexual coercion including prostitution (Deer & Kronk Warner, 2019; Farley, 2021).

The increasing frequency of ecosystem damage destabilizes nations and entire regions, leading to large-scale involuntary migration, civil and cross-border conflict, and the collapse of social and economic systems. Ecosystem destruction in Thailand, for example, has been linked to trafficking. Corporations that obtain Thai land for industrial shrimp farms have displaced Indigenous people from their homelands, causing deforestation, flooding, and a lack of

local food. Because of the corporate emphasis on monoculture, Indigenous Thai people were fined if they grew fruit trees for their families (O'Brien, 2008). Prostitution, trafficking, and other human rights violations increase as climate refugees are impoverished, displaced, and as they migrate. (Hall, Margaux, & Weiss, 2012).

To decolonize environmental justice, it is necessary to focus first on the material reality of harm to victims and then to also expose the foundational structures of colonization (Álvarez & Coolsaet, 2020). Environmental pollution and the destruction of ecosystems cause contamination, displacement, health problems, and increased violence, all of which undermine Indigenous women's ability to survive and to care for their children (Kuokkanen, 2015). Walters (2022) named the ecocidal political leaders in Australia "climate criminals" who failed to protect the continent from devastating wildfires. Whyte (2022) proposed an approach named 'Kill the Corporation Before It Kills Us.'

**Hate crimes against Indigenous women that objectify, dehumanize, and harm them could be brought before NICT. It is necessary to clarify *the profound impact of sexism on colonial racism, on colonial attitudes toward land and Indigenous religions.***

To achieve Indigenous self-determination, Indigenous women's social, economic, civil, and political rights must be addressed (Kuokkanen, 2012). Colonization and sexism are inseparable. Colonial racialized sexism

insisted that Indigenous women were deviant, dirty, and hypersexual. This has had devastating consequences, including the normalization and justification of male violence (Smiley, 2022). Colonialism also promoted stereotyped sex roles, which relegated women to the domestic sphere and reinforced Indigenous men's sexism. Colonial settlers take/ kidnap/purchase/rape "colonial wives," that is, Indigenous women, who were forced to give in to colonists' exploitive demands for food, cleaning, sex, and local knowledge.

Amnesty International (2009) noted five roots of violence against Indigenous women in Canada: racism and misogyny - the foundation for inequality, the mass removal of Indigenous children from their families, the high numbers of incarcerated Indigenous women, and the inadequate police response to violence against Indigenous women. For example, Coos women who were starving in Oregon (because of land theft) prostituted in order to feed their families; Maasai and Kikuyu elders begged the British to return their daughters in Nairobi, strongly rejecting their children's prostitution (White, 1990); French fur trappers in Canada used their Indigenous "wives" as servants, translators, guides, cultural mediators, and objects for sexual use.

The International Indian Treaty Council (IITC) has worked to broaden the understanding of *sex-based environmental violence* so that expression becomes just as accepted as the term *environmental racism*. Sexual violence is crucial to understanding environmental violence; it includes resource extraction's impact on both

Indigenous biology and culture. Previous research on environmental violence separated sexual violence harms from other adverse physical health impacts of environmental violence. Both types of impacts must be taken into account and their connections to land rights should also be acknowledged (Konsmo & Pacheco, 2016).

Women's rights are defined as human rights in CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women, 1980). Indigenous peoples' human rights have been codified in the United Nations Declaration on the Rights of Indigenous Peoples. Like CEDAW, the development of the Declaration on the Rights of Indigenous Peoples was driven by a recognition that previous approaches to human rights had failed to adequately protect Indigenous peoples (Kuokkanen, 2012).

### **Religious and cultural assault that threatens existence of Indigenous women, nations and land**

Colonization's violence against Indigenous communities operates "through the reservation system, housing segregation that restricts racialized peoples to neighborhoods with substandard housing, poorly resourced schools and barriers to accessing jobs (Waldron, 2018). In many countries, the boarding school system was a cultural assault on nations via forced assimilation, kidnapping, and the abuse of children and adults. Boarding schools were used as a Christianizing and subordinating strategy to control Indigenous people through heinous crimes. Although the boarding schools in North

America are most familiar to some of us, this method of subordination, assimilation, and cultural genocide of Indigenous nations under the guise of education was also used in Peru, Mexico, Venezuela, Brazil, Australia, New Zealand, Finland, Norway, Sweden, Russia, Vietnam, China (especially during the Cultural Revolution), Palestine, Saudi Arabia, Oman, Iran, Kenya, Djibouti, Eritrea, Botswana, Sierra Leone, and Ghana (Smith, 2009).

To better understand the harms done to Indigenous culture, family, and religion by USA boarding schools, we quote from child welfare experts:

Beginning in the late 1800s, U.S. government policy toward Native American people emphasized forced assimilation into the world of the white man. The Indian boarding school was designed to remove children from the influence of their parents and Tribe and create a new social environment where they could be civilized. Discipline in these schools was harsh and the daily routine rigid. Children were required to speak only English and were punished for using their native language. Their hair, an important cultural symbol, was cut short. Uniforms replaced individually created and uniquely decorated native clothes. Visits home were few and far between. Clearly, the boarding school was an effort to destroy cultural identity; unfortunately, it was quite successful. Many who attended these schools lost touch with their tribal language, religious beliefs, customs, and social norms.

The boarding school experience has had a far-reaching effect on Native American culture and family structure. Those people who spent much of their childhood in boarding schools were deprived of an opportunity to experience family life, and many reached their adulthood with no clear concept of parenting behavior and family functioning. The boarding school effectively destroyed the intergenerational transmission of family and parenting knowledge and behaviors. Now, one or more generations after the boarding school era, many Native Americans are ill-prepared for the parent role.

The boarding schools not only destroyed or distorted the intergenerational (cultural) transmission of family and parenting knowledge and behavior, but they also introduced new and dysfunctional behaviors, such as the use of severe punishment in child rearing. Parents who had as children been spanked and hit while attending boarding school responded similarly to their own children. Before the boarding school era, the use of physical discipline was uncommon in most Tribes.

Even worse, a report published by the National Resource Center on Child Sexual Abuse [1990] cites evidence that many Native American children were sexually abused while attending boarding schools. The introduction of child sexual abuse into tribal communities, where it had not existed before, is especially troublesome:

Native American people tend not to talk openly about sex because sexual matters are highly private matters. This cultural taboo prevents sexually abused children from reporting the offense. For the same reason, adults troubled by childhood sexual abuse avoid using professional services to cope with unresolved issues.

The boarding schools also disrupted the cultural transmission of parent-child attachment behaviors, which has created personal and family problems that have persisted over as many as three generations. As a sad aftereffect of these disruptions, we now see many Native American children being raised by biological parents with few parenting skills; some children are being raised by grandparents who lack real attachment to their own children, the parents of their grandchildren. The lack of parenting skills and the problems in attachment place children at risk of abuse or neglect. (Horejsi, Craig, & Pablo, 1992).

While mandatory boarding school attendance in the USA was discontinued by the late 1960s, many Indigenous people still suffer from the intergenerational impact of systemic abuse and forced assimilation (Yellow Horse Brave Heart & DeBruyn, 1998). Since then, victims of boarding school abuse have filed civil lawsuits in U.S. courts seeking remedies for the violence they experienced in the 1950s and 1960s (Woodard, 2011). These lawsuits would be appropriate for NICT cases of Indigenous women who have been impacted by their own or their relatives' boarding school abuse.

The Christianizing or "civilizing" practice of assimilation in residential schools was a genocidal attack on Indigenous nations. Christianization resulted in a twisted metaphysics that sometimes combined token elements of Indigenous religions but which dismantled women's power, eliminated ceremonies, increased homophobia and resulted in violence to Indigenous people who were seen as primitive or savage and deserving of abuse. The neoliberal/free market agenda of states replaced women's leadership roles with new and subordinate roles, which disrupted the Indigenous cultures, resulting in Indigenous women's increased marginalization, ill-health, sexual exploitation and abuse (Suzack, 2016).

"A nation is not conquered until the hearts of its women are on the ground. Then, it is done, no matter how brave its warriors nor how strong its weapons" (Cheyenne) (Ralstin-Lewis, 2005)

The devaluation of Indigenous women was essential to the ongoing processes of colonization because women were traditionally understood to be life-givers in the metaphysics of many nations. By targeting the social and political status of Indigenous women, white male colonizers interfered with matriarchal cultural transmission from grandmother to mother to daughter (McIvor, 2004; Brodsky, 2016).

Strang (2014) described the transition from egalitarian animism or nature religions to male-dominated and hierarchical belief systems. For example, water, which embodied female energy, became a gift of male gods as agricultural irrigation channeled water for human interests. From being a common good, water became

subject to male property rights under the cosmology of colonial religious cults. Previously understood as the substance of social and spiritual regeneration, water was reframed as an economic asset.

A common metaphysics among Indigenous nations is the personhood of nature. An understanding of the profound connectedness between humans and nonhuman beings provides a foundation for bringing charges against states of genocide as well as culturicide and ecocide. (Eichler, 2020). The settler's ecological systems are unsustainable for Indigenous nations. Evidence for ecocide is in the colonist's way of life, which involves deforestation, extraction, water and land pollution, commodity agriculture, urban sprawl, and automobile use. Forests are cleared for agriculture, mountainsides are stripped for mining, and places of beauty are separated from human non-recreational activities such as Indigenous ceremonies (Whyte, 2016).

Environmental devastation like that of the Energy Transfer Pipeline in North America that drills, fracks, and destroys forests and waterways - functions like a slow genocide, eroding the health of the people, their sovereignty as a nation, and the land, all of which are integral to their national identity. (Eichler, 2020). In Indigenous cosmology, the land has personhood and if the land is a living being possessing power, personality, and agency, then the land is a *member of the community*, not just a landscape. Thus, destruction of the land is not only ecocidal, but also genocidal (Eichler, 2020).

Colonization interferes with the social and ecological contexts that are necessary for Indigenous nations to experience the world "as a place infused with responsibilities to humans, nonhumans and ecosystems" (Whyte, 2018). Indigenous social, religious and ecological metaphysics resist and challenge the colonist's claim to universal property rights, cultural sovereignty, or an honorable religion (Whyte, 2018).

Resource extraction industries result in a loss of traditional practices because the transfer of cultural knowledge is damaged when community members are away from the community for extended periods of time to work for the corporation, or when certain practices, such as fishing, are no longer possible because of pollution, or when Indigenous communities' sense of place is disrupted due to destructive industrial projects (Manning et al., 2018; Nightingale et al., 2017; Vandekerckhove, 2022).

### **Colonization and the doctrine of discovery**

The Doctrine of Discovery was a 15th-century Catholic church policy that justified European colonization by proclaiming the right of Christian states to take possession of non-Christian lands under the pretense of "saving souls." Non-Christians were denied ownership of land, and any territory "discovered" by Christian colonists was claimed by their state. Established through a series of Catholic proclamations, the Doctrine of Discovery justified colonization and forced conversion in Africa, Asia, Australia, New Zealand, and North and South America

by Catholic states such as Spain and Portugal. European settlers stole land from Indigenous nations and then blamed it on the inevitability of “progress” or “civilization.” (Wolfe, 2006; Vandekerckhove, 2022). This colonial ideology was embedded in USA law through *Johnson v. McIntosh* (1823), which ruled that European discovery granted exclusive land rights, stripping Indigenous peoples of ownership. The doctrine’s legacy continues to fuel land dispossession, legal marginalization, and systemic injustices against Indigenous nations worldwide.

### **Broken treaties and land theft in Canada**

Treaties between colonists and Indigenous nations were almost never upheld; the main reasons were that Indigenous claims to land rights and self-determination interfered with colonization and profit making. Since acquiring territory is the core element of settler colonization, then “to get in the way of settler colonization, all the Native has to do is stay at home” (Rose, 1991).

Throughout Canada’s history, the state has violated treaties with Indigenous nations. Land theft has resulted in legal resistance. Between 1871 and 1921, Canada signed 11 treaties guaranteeing limited land access and education, healthcare, and financial support in exchange for Indigenous land. These treaties were usually ignored or misinterpreted in the direction of Canadian settler interests (Royal Commission on Aboriginal Peoples, 1996). The result was intergenerational poverty, which has disproportionately impacted Indigenous women (NWAC, 2021). Canada failed to uphold

the Medicine Chest Clause in Treaty 6, which guaranteed lifelong healthcare. Canada provided inadequate care, contributing to traumatic stress, high rates of addiction and chronic illness (Lux, 2001). These conditions have led to increased vulnerability to the prostitution of Indigenous women (Farley et al., 2011).

The Indian Act of 1876 further restricted Indigenous nations from access to their land. This led to urban migration with little or no cultural support. As a result, Indigenous women make up a disproportionate percentage of Canada’s sex trade (MMIWG, 2019; Truth and Reconciliation Commission, 2015). Legal demands by First Nations in Canada for reparations were estimated at more than \$126 billion (*Restoule v. Canada*, 2018) but the lack of response has left Indigenous women increasingly vulnerable.

### **The Indian Protection Service (IPS), a problematic agreement between the Cinta Larga nation and Brazil**

The Indian Protection Service (IPS) was an agreement between the Cinta Larga nation and the Brazilian state. The Cinta Larga wanted to overthrow the Indian Protection Service (IPS) because an assimilationist philosophy was embedded in the IPS: the assumption that Indigenous nations must be assimilated into state society, made into workers, imitating white people – “a policy that classed them as primitives from an archaic phase of human development rather than as adults capable of choosing their destiny.” Journalist Alex Caudros also wondered why, “in this age of climate crisis, rich countries couldn’t simply pay the Indigenous nations

now preserving the Amazon for free, easing the pressure on them to resort to logging and mining.” This would cover, in Brazil alone, vast areas of rainforest that benefit every nation and state on the planet. Furthermore, he noted that the payments could serve as reparations for the crimes of contact, which were partly financed by the World Bank and USAID (Cuadros, 2024).

### **Domestic violence against Sami women in Sweden and Norway and violations of Sami land rights**

Sami women suffer more physical, sexual, and psychological violence, including intimate partner violence, than non-Sami women (Eriksen et al., 2015; Eriksen et al., 2022). But domestic violence against Indigenous women is less likely to be reported than domestic violence against non-Indigenous women. A mistrust of non-Indigenous authorities, a fear of shaming the Sami community, and the devalued status of women in Sami culture itself – are barriers to Sami women who need protection from domestic violence. (Willis 2011; Barkaskas & Hunt 2017). A Sami woman explained:

They have taken our Sami children to boarding school once. And there is the fear that they will take the children again. And then it becomes a bit more difficult against the authorities. And researchers have come and measured our skulls and noses ...We can go to the doctor with a wound but they have that inherited distrust, in a way. We don't like to talk about our culture because they burned us at the stake in the 17th century because we had a different faith.”

(Brandén, Nilsson, Burman, et al., 2024).

The Sami are a nomadic hunting culture, which has led to their nation's struggles with Norwegian and Swedish control of Sami traditional lands. Sami women, furthermore, describe the reindeer herding culture as sexist. The exploitation of traditional Sami lands, racism against the Sami, and the difficulty of maintaining Sami culture, tradition, and language are the foundation of Sami women's experiences of violence and vulnerability. Sami women fear a loss of culture if they leave a violent relationship. From an Indigenous feminist perspective, this legitimate fear stems from both the sex inequality in Sami culture and the vastly unequal colonial power relations between the Sami and the Swedish and Norwegian states. (Brandén et al., 2024)

### **The British Empire's crimes against the Kikuyu nation**

As the British Empire stole Indigenous traditional lands in British Kenya, the British categorized Kikuyu people as “squatters” who were then forced into wage labor in order to live on their own lands (Anderson, 2004; Kanogo, 1987). In addition to Kikuyu lands, women and girls were also stolen by the British. Kikuyu elders in Nairobi begged British colonists to stop kidnapping and prostituting their daughters (White, 1990). In response to fierce anticolonial rebellion by the Kikuyu and their allies, in 1952, the British detained nearly the entire population of the Kikuyu nation - approximately 1.5 million people. Torture and terror were used to control people in the detention camps (Elkins, 2005). Years later, in 2013, a case was brought and won

against the British colonial government on behalf of more than 5000 claimants—who each won a monetary settlement. The claims documented the colonial crime of torture during British detention of the Kikuyu between 1952 and 1960 (Balint, 2016).

As one of the Kikuyu experts explained to the British court, “Cases of colonial era harm have generally failed to be heard in law. They have either fallen outside dominant understandings of state crime, or outside the abilities of law as an institution to address them. Claims for colonial era reparations have had no hearing.” (Balint, 2016) Records from 37 other Indigenous nations controlled by the British imperial state have been discovered in London. The case of the Kikuyu and many others like it highlight the need for a Nations International Criminal Tribunal.

The obvious solution to a history of broken treaties is to honor the treaties starting now. States should cease subsidizing and incentivizing fossil fuel production. According to the principle of free, prior and informed consent, the UN Declaration on the Rights of Indigenous Peoples, and the Nations International Criminal Tribunal proposed here, states are obligated to respect the rights of Indigenous people to say no to development on their traditional territories.

Earth’s survival is at stake, and “Sustainability includes the traditional practices and knowledge of Indigenous people, and requires rethinking alternatives to the dominant capitalist paradigm based on non-renewable resource dependency as a source of infinite growth” (Mantyka-Pringle, Westman, et al., 2015). A proposal from the

Mi’kmaq nation would ensure Indigenous rights to fishing waters in Nova Scotia. The Moderate Livelihood Fishery is an act of resistance to Canadian water, fishing, and environmental policies and would ensure the implementation of the Indigenous fishers’ rights to Nova Scotian waters (Assembly of Nova Scotia Mi’kmaw Chiefs, 2021; Draus, 2020).

The case for Indigenous feminism and a Nations International Criminal Tribunal (NICT) to adjudicate violations of Indigenous women’s human rights

The violence inflicted upon Indigenous women is not a series of isolated events but a manifestation of systemic and historical oppression. Colonization, broken treaties, forced removals, and state-sponsored violence have created a legacy of harm that continues to impact Indigenous women disproportionately. Indigenous women have long been subjected to human rights violations that include sexual violence, forced sterilization, land dispossession, and trafficking. These crimes are often ignored or inadequately addressed within the legal systems of both states and nations, which fail to provide sufficient protections or recourse for Indigenous women. The creation of an international tribunal dedicated to adjudicating these violations would fill a crucial legal void. The NICT would provide a formal venue for Indigenous women to seek justice, ensuring that their cases are heard and that systemic patterns of abuse are confronted.

The legal precedent for such a tribunal can be found in existing international human rights law. The United Nations Declaration on the Rights

of Indigenous Peoples (UNDRIP) affirms that Indigenous peoples have the right to maintain and strengthen their legal institutions and to receive effective remedies for violations of their rights (UN General Assembly, 2007). However, in practice, the enforcement mechanisms for these protections are weak, particularly in settler-colonial states that continue to deny Indigenous sovereignty. “The justice system has failed Indigenous women. It is time for Indigenous women to reclaim our own systems of justice and accountability” (Jacobs, 2020). The NICT would help bridge this gap by providing an international legal forum where Indigenous women’s rights could be adjudicated.

According to the National Institute of Justice in the USA, more than 84% of Indigenous women experience violence in their lifetimes, often at the hands of non-Native perpetrators who face little to no legal consequences (Rosay, 2016). We note that Indigenous men also perpetrate violence against Indigenous women, as reported, for example, by Anishinaabe women (2011) and Sami women (2024).

The ongoing crisis is a direct result of the legal and political erasure of Indigenous nations and their rights. “The rape of an Indigenous woman has been an expected and tolerated part of colonialism, and as long as tribal governments lack the full authority to prosecute non-Natives who commit these crimes, this epidemic will continue” (Deer, 2015). This systematic lack of legal accountability contributes to intergenerational trauma, as Indigenous women must navigate not only the immediate

consequences of violence but also the long-term impacts of colonial policies that continue to dispossess and marginalize them.

The lack of protection and justice provided by settler governments reveals a fundamental failure to uphold human rights, demonstrating the urgent need for an independent international tribunal that prioritizes Indigenous women’s safety and dignity. The establishment of a Nations International Criminal Tribunal (NICT) would mark a historic step toward justice, holding governments and institutions accountable for these violations.

The displacement of Indigenous communities has particularly devastating consequences for Indigenous women. Land is more than a resource; it is the foundation of cultural identity, economic stability, and spiritual well-being. The Doctrine of Discovery and subsequent land theft have not only stripped Indigenous nations of their territories but have also created conditions where Indigenous women are disproportionately vulnerable to violence and exploitation.

The link between resource extraction and violence against Indigenous women is well-documented. A report by Amnesty International (2016) found that Indigenous women living near oil, gas, and mining projects face increased rates of sexual violence and trafficking. These industries operate in areas where law enforcement is often minimal, creating “man camps”—temporary housing for workers—that have been linked to the targeting of Indigenous women for exploitation. As the Native Women’s Association of Canada (2021) noted, “The theft of our lands is directly

“tied to the theft of our bodies. When our lands are violated, so are we.”

This connection between land theft and sex-based violence underscores the need for an international tribunal that can address the full spectrum of colonial harm, from environmental destruction to the exploitation, prostitution, and trafficking of Indigenous women. The NICT would provide legal mechanisms to hold corporations and governments accountable for their role in these abuses, ensuring that Indigenous women are no longer treated as collateral damage in the pursuit of economic gain.

The establishment of an international criminal tribunal (NICT) is not just about prosecuting crimes against nations; it is about educating the public, teaching truthful history, and creating systemic change that acknowledges the injustices

suffered by Indigenous women with the hope that they will not be repeated. The Seven Generations philosophy of the Haudenosaunee reminds us that our actions today must serve the well-being of future generations. “In every deliberation, we must consider the impact on the seventh generation to come” (Lyons, 1992). The NICT would uphold this tradition by creating legal structures that protect Indigenous women now and in the future.

By creating an international legal body that gives voice to Indigenous women, the NICT would contribute to a future where Indigenous nations and their women thrive in dignity, safety, and sovereignty. Indigenous women have survived centuries of oppression, and it is time to recognize their right to seek justice on their own terms. The fight for Indigenous women’s rights is a fight for the future of Indigenous nations.

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# The Indigenous Oromo Nation

## Victims of Natural Resource Theft under Abyssinian Imperialism and Colonialism in the Creation of Modern Ethiopia

By Muhammad Al-Hashimi, Ph.D.

**Figure 1**

*Oromo Woman*



Note. Borana, Ethiopia. From *Portraits: People* [Photograph], by ILRI, 2013, *Flickr* (<https://flic.kr/p/fTnkZw>). CC BY-NC-ND 2.0.

### ABSTRACT

This paper examines the exploitation of the Indigenous Oromo people's natural resources without Free, Prior, and Informed Consent (FPIC), beginning with the historical subjection and oppression

of the Oromo by imperial and colonial forces. It challenges the prevailing narrative of Ethiopia's 3,000-year independence by showing that its current geopolitical boundaries—formed no more than 175 years ago—resulted from African imperial expansion. Focusing on the Lega Dembi gold mines in southern Oromia, the analysis demonstrates how successive Ethiopian regimes have violated Gujii Oromo human and Indigenous rights through forced gold and silver extraction, precipitating severe environmental harm. Finally, it argues for the Oromo Nation's accession to the International Covenant on the Rights of Indigenous Nations (ICRIN) and recognition by the Nations Indigenous Court Tribunal (NICT), thereby securing a legal forum to address ongoing FPIC infringements and seek redress for resource-extraction abuses.

**Keywords:** Emperor Menelik II, Gujii Oromo, Lega Dembi Mine, ICRIN (International Covenant on the Rights of Indigenous Nations), “NICT” (Nations Indigenous Court Tribunal), Free, Prior, and Informed Consent (FPIC), Indigenous rights in East Africa, Ethiopian Constitution, Tigrayan People's Liberation Front (TPLF), Haile Selassie

## The Imperial Abyssinian Expansion of Menelik II creates Modern Ethiopia

Before the middle of the 19th century, the area of the northern highlands of present-day Ethiopia was known to the outside world as Abyssinia. Due to largely Biblical influences among others, Abyssinia was also called Ethiopia by some writers. Thus, Abyssinia was also known as the Ethiopian Empire. This geographical area of Abyssinia was composed of four major kingdoms—the Kingdoms of Tigray (Axum), Gondar (Begemder), Gojjam, and Manz (Showa) (Holcomb & Ibssaa, 1990, Map 3). Roughly speaking, the present regional divisions of Tigray, Amhara, and the northern

tip of Oromia down to the capital of Addis Ababa are the lands of Abyssinia, the Ethiopian Empire, before 1860.

For several decades prior to the mid-19th century, the kings of these kingdoms had been locked in an incessant struggle over who would be crowned emperor of the whole of Abyssinia, the emperor being “The King of Kings.” This period from the mid-18th century to the mid-19th century was one of devastating strife and struggle over competition for supreme rulership of Abyssinia where, for a while, an Oromo dynasty was able to gain de facto power over the imperial court. This period in Abyssinian literature is known as *Zemene Mesafint*, translated as the “Era of Judges” or “Era of the Princes” as taken from

the Biblical Book of Judges. It lasted from 1769 to 1855 (Mennasemay, 2012). During this period, a young prince would be born in the Abyssinian province of Showa, a young prince who would rise to become an emperor who would expand the borders of the original Abyssinia by force of arms, brutally and mercilessly subjugating millions of indigenous, non-Abyssinian peoples in the process, and by so doing, create a new geopolitical structure that would ultimately become known today as the Federal Democratic Republic of Ethiopia. This emperor is none other than Menelik II.

Menelik II began his life as Sahle Maryam on 17 August 1844 in the Kingdom of Showa. By 1866, he had risen to become King Sahle Maryam of Showa. On 3 November 1889, King Sahle Maryam was crowned Emperor Menelik II upon the death of Emperor Yohannes IV (Zewde, 2002).

Now, what is important here are the activities of King Sahle before his coronation as Emperor Menelik II between the years 1866 and 1889. It would be this period of 23 years that King Sahle assembled an army of several thousand Shewans, who, like himself, were mostly ethnically Amhara, and launched an expansionist movement of imperial conquest that would see the forced annexation of several non-Abyssinian peoples into what would become the expanded Ethiopian Empire, the area we know today as Ethiopia. In other words, King Sahle, the eventual Emperor Menelik II, was responsible for a period of African imperialism and expansionism no less egregious, destructive, and oppressive than the European imperialism and expansionism that was

going on at roughly the same time in the rest of Africa, the so-called “Scramble for Africa.”

### **The Forced Annexation of non-Amhara, non-Abyssinian, Indigenous Nations and Peoples**

Between 1866-1889, King Sahle Maryam moved out of his base of Showa, also known as the Kingdom of Manz, with an army equipped with modern weapons of the time. Being equipped with modern European weapons gave King Sahle a decided military advantage over any armed force he faced which was not similarly equipped. The Kingdom of Showa, being the southernmost of the Abyssinian kingdoms, was strategically located as a region from which invading armies could be launched towards the east, south, and west on non-Abyssinian lands composed of many independent polities. During this period, the lands of Hadiya and Welega in the southwest and west respectively, Oromo in the south, and Harar in the east, and so many others would come under the imperial and colonial control of King Sahle Maryam.

### **The Indigenous Oromo Nation of Ethiopia**

The imperial drive by the Amhara military machine equipped with modern European weapons under King Sahle Maryam, the eventual Emperor Menelik II of Abyssinia, subjugated many non-Amhara, non-Abyssinian peoples beginning in the middle of the 19th century. The largest of these subjugated Indigenous peoples were the Oromo. In today's Ethiopia, the Oromo remain the most populous Indigenous community. It is now estimated that the population has reached a total of

45,000,000 individuals, or 35.8% of the total estimated population for Ethiopia of 116,000,000 inhabitants (“Ethiopia,” 2022). The Oromo are composed of several subgroups—in this paper, I discuss the Arsi Oromo, Haraghie Oromo, and the Gujii (also Guji) Oromo. The first two, the Arsi and the Hararghie are referred to in historical terms as examples of the tremendously horrific suffering the Oromo people endured under Abyssinian imperial rule that officially ended with the overthrow of Emperor Haile Selassie in 1974. The Gujii Oromo are examined as an example of forced population displacement for the purpose of natural resource extraction conducted by the modern Ethiopian State that still operates in its governance style as an imperial regime regardless of its façade as a modern democracy.

### **The Subjugation of Indigenous Arsi Oromo**

The invasion of the independent Oromo polities was particularly egregious. One case in point: the invasion of the lands of the Arsi Oromo south of Showa. Beginning in 1879, King Sahle Maryam launched several invasion campaigns against the Arsi. The Arsi fought back so valiantly such that for the next seven years, King Sahle was unable to completely subdue the Arsi in spite of having superior imported European weaponry. Nevertheless, during this seven-year period, the incursions “provided him [King Sahle, the eventual Emperor Menelik,] with a huge booty of cattle, slaves, and other goods...” (Hassen, 2009, p. 96). Also, according to Dr. Mohammed Hassen, a renowned Oromo historian and academic,

Menelik conquered the Arsi Oromo only after killing thousands of their warriors. His soldiers slaughtered, systematically mutilated, and sold survivors into slavery....Massive mutilation was used to psychologically destroy the people’s resistance. The worst mutilation[s] took place in September 1886 at Azule and Anole. At Azule,...[there were] 12,000 Arsi Oromo [were massacred], while in Anole thousands of mutilated hands and breasts were tied around the necks of victims who were sent back to their villages. Other mutilated hands were hung on a tree under which the Shoan soldiers [from Showa] sang and danced in celebration of this exploit (Hassen, 2009, p. 97).

Mohammed Ademo, an Oromo journalist and historian, sheds additional light on this horrific chapter in Arsi Oromo history:

In [the] late 19th century, at the same time as the scramble for Africa, emperor Menelik II set out to forcibly incorporate independent Oromo territories into his “nascent empire”... Menelik faced a fierce resistance from the Arsi.... When Menelik’s army of conquest, equipped with modern firearms acquired from western powers, arrived in early 1880s, the Arsi...[were] in for a rude surprise. However, buoyed by a tradition that bestowed *Wayyooma* (an almost sacred high honor) accorded to those distinguished in war as in peace, the Arsi waged a valiant war of resistance. The Arsi repeatedly ambushed and kept Menelik’s forces at bay for six years between

1880-86—winning all 38 running battles....On Sep[tember] 6, 1886, the ferocious Arsi fighters [finally] succumbed to Menelik’s state of the art armaments with their spears and shields outmatched. An armistice was declared after an estimated 12,000 Oromo fighters...perished in a single day battle....But the suspension of open hostility did not end Menelik’s appetite to crush and humiliate the Arsi....In 1887, Menelik’s forces came back to...terrorize the remaining populace into total submission....A meeting to “make peace” with the Arsi and “deliberate” on future administrative matters [was called]. Thousands gathered at Aanolee (Anole)....Menelik himself then arrived to deliver the ultimatum that they [the Arsi Oromo] would be annihilated if they [didn’t] accept his rule....The Arsi insisted on maintaining their [indigenous] Gadaa [system of sociopolitical organization] while accepting, even begrudgingly, Menelik as a king.... [Then,] Menelik’s army ordered those [Arsi] in attendance...to enter a narrow pass one by one. The right hands of all male[s] that entered were cut off....The Shoans tied the hand they cut to the neck of the victim. In the same manner, the right breasts of the women were also cut and tied to their neck....As a further form of humiliation, fear and terror, the mutilated breasts and hands were tied around the necks of the victims who were then sent back home (Ademo, 2014).

To commemorate this horrific event that remains permanently etched in the collective memory of the Arsi Oromo, the Aanolee Cultural Center was erected in the Arsi town of Hetosa. On 6 April 2014, hundreds of thousands of Oromo

gathered at Hetosa for the unveiling of the Center:

The cultural center houses the Oromo Martyrs’ memorial monument, an ethnographic museum and a mural. Standing several inches on top of a tomb, the monument shows a severed hand stretched upward holding a woman’s breast, also severed. It is erected as a tribute to the Arsi Oromo whose hands and breasts were mutilated by 19th century Ethiopian emperor Menelik II (Ademo, 2014).

By 1887, the Arsi Oromo were brought under the complete control of the Showan Amhara forces of King Sahle Maryam, just two years before his coronation as Emperor Menelik II of Abyssinia (Lewis, 1983).

### **Invasion of the Holy Muslim City of Harar and Subjugation of the Oromo of Haraghie**

Another tragic story is the invasion of Harar, which is located in the far eastern highlands of Ethiopia. Harar is an ancient Muslim city with founding roots that appear to go back as early as the 7th century C.E. (Insoll, 2003). At some point in 1886, Sahle Maryam, the King of Shewa—who was to be crowned Emperor Menelik II of Ethiopia in 1889—was preparing to invade the independent Emirate of Harar under its last independent leader, Amir Hajji Abdullahi ibn Ali Abdus-Shakur. King Sahle Maryam sent Amir Abdullahi a letter demanding that he, Amir Abdullahi, submit to him in the name of *Medhani Alem*, Amharic for “Medicine (or Savior) of the World,” an epithet for Jesus Christ. After reading the letter, Amir Abdullahi wrote back to King

Sahle saying that he would submit to the King only under the Islamic declaration *La illaha illa Allah Muhammadar Rasul-Allah*, Arabic for “There is no god but Allah and Muhammad is The Prophet of Allah.” The implication would be that if King Sahle wrote back to Amir Abdullahi in this fashion, it would indicate that he had become a Muslim. Of course, King Sahle was not about to make such a declaration. In fact, King Sahle was so angered by the suggestion that he become a Muslim that he wrote back to Amir Abdullahi saying that he would meet him, Amir Abdullahi, with his Shewan army, defeat him, and then march into the walled Muslim city of Harar, find the *jami* mosque—i.e., the main Friday congregational mosque of the city—and desecrate it by urinating in it (Al-Hashimi, 2020)!

Not long after this letter was sent to Amir Abdullahi, King Sahle marched his army to a place known as Chelenqo on 6 January 1887 and encountered the forces of the Amir. Due to King Sahle’s superiority in armaments, the Shewan army easily defeated the Amir’s forces. True to his word, King Sahle Maryam, the future Emperor Menelik II, entered the walled Muslim city of Harar, found the *jami* mosque—actually, the Egyptian *jami* mosque—and urinated in it! (Fortunately, the original Grand *Jami* Mosque built by the Hararis escaped the wrath of King Sahle). Subsequently, King Sahle had the mosque torn down and had an Ethiopian Orthodox Christian Church built on the same spot, naming it the Medhane Alem Church. This church still stands today inside the wall of Harar as a reminder to the Muslims of Emperor Menelik II’s abominable insult to the Muslims of

Harar, Ethiopia, and, indeed, the Muslims of the world! Thus, Harar became a part of Menelik’s imperialist expansion and colonial subjugation project (Al-Hashimi, 2020).

The defeat of Harar opened the door to the conquest of the surrounding Oromo region of Hararghie. Dr. Mohammed Hassen, a native of the Hararghie region of which Harar is a part, offers additional insight into the conquest of Harar and the surrounding region of Hararghie:

Menelik invaded Harar and defeated the Muslim force on 7 January 1887. With a single victory, he gained a rich and vast [surrounding] region of Hararghie that brought him closer to the sea [i.e., The Red Sea] from where he imported the weapons that made his famous 1896 Adwa victory [against the Italians] possible....The heavy yoke of supporting Menelik’s large army fell on the conquered peasantry of [Hararghie]. His unpaid soldiery, known [in the Amharic language] as *neftanya* (gun bearers), raided the conquered people for cattle and slaves on the slightest pretext. Atrocities occurred as...troops slayed adult men and women and dispatched their children into slavery.... Herded into groups by their captors, enchained survivors marched with other prisoners toward Harar. The soldiers sold their surplus slaves in the markets in and around the city (Hassen, 2009, p. 99).

Dr. Mohammed goes on to explain how the once freedom loving and proud Oromo of Hararghie were reduced to virtual serfdom:

After the conquest and occupation, Menelik distributed two-thirds of the conquered land among the armed [Showan] settlers, the [Abyssinian Orthodox] church, and the [Abyssinian] crown “while he allowed one-third for the indigenous [Oromo] people on the condition they supply forced labour for the settlers and various taxes, dues, and tithes for his court and the church.” In their own land, the Oromo and other conquered people became landless gabar (serfs) (Hassen, 2009, p. 99).

With the conquest of Harar and Hararghie, the imperialist expansion of King Sahle was growing ever larger. Thus, these forced annexations would greatly expand the size of the original Abyssinia. By 1889, King Sahle Maryam was crowned Emperor Menelik II upon the death of Emperor Yohannes IV. His military invasions continued further east, south, and west. After 1889, Menelik’s project of imperial expansion continued further east, south, and west, creating an imperial realm more than three times the size of the original land mass of Abyssinia. Geographically this imperial realm comprises most of the Ethiopia we know today. By 1904, Emperor Menelik’s imperial and colonial expansion had been largely completed.

The Ethiopian Empire would reach its greatest extent when Emperor Haile Selassie, the successor to Emperor Menelik, took control of Eritrea with the help of the United Nations in September of 1952. By September of 1961, the Eritreans launched an organized armed rebellion against the Ethiopian crown (Fessehazion, 1983).

The rebellion would last nearly 30 years until 24 May 1991, when Eritrea declared independence from Ethiopia (“Eritrea,” 2025). Thus, one can safely say that the Ethiopian Empire began its journey on the road to breaking up as a geopolitical entity when Eritrea declared its independence on 24 May 1991.

### **The Ethiopian State Today is the Former Ethiopian Empire**

In 1974, Emperor Haile Selassie would be overthrown by a military coup led by Mengistu Haile Mariam, a colonel in the Ethiopian army. This military overthrow officially ended imperial rule. From that point in time, Ethiopia would experience the authoritarian dictatorship of the Marxist-Leninist regime led by strongman Colonel Mengistu Haile Mariam for the next 17 years, from 1974 until 1991. In 1991, the socialist regime was overthrown by the Tigrayan People’s Liberation Front, the TPLF, that had been fighting against the socialist regime for some 15 years. The TPLF was joined in its struggle against the Marxist-Leninist regime with the help of the Eritreans of the Eritrean People’s Liberation Front, the EPLF, and Oromos of the Oromo Liberation Front, the OLF. The TPLF led by Meles Zenawi would establish a coalition group called The Ethiopian People’s Revolutionary Democratic Front, the EPRDF, consisting of four political parties representing Indigenous peoples in Ethiopia of which the TPLF was the most dominant. The EPRDF would govern for the next four years—1991 until 1995—under what was called the Transitional Government of Ethiopia, the TGE, with Meles Zenawi as the President of

Ethiopia (Maasha, 2012). However, by 1992, the OLF would part ways with the EPRDF for various political reasons and take an adversarial position toward the government (Shinn, 2011).

Under the auspices of the TGE, a new Constitution would be drafted. By 1994, the new constitution would be ratified, published, and officially called The Constitution of the Federal Democratic Republic of Ethiopia. The new Constitution would radically shift, at least on paper, the political identity of Ethiopia away from its imperial and socialist past. This Constitution would come into force on 21 August 1995 (Federal Democratic Republic of Ethiopia, 1995). One of the key features—and perhaps most controversial—of the new Constitution would become Article 39 which “deals with the rights of the nations, nationalities, and peoples of Ethiopia, including the provision that ‘Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession’” (Federal Democratic Republic of Ethiopia, 1995). The EPRDF would eventually emerge as the dominant political party in Ethiopia, with Meles Zenawi as its leader and Prime Minister of Ethiopia from 1995 until 2012 (Meles Zenawi Foundation, 2012). Unfortunately, however progressive and democratic the Constitution of Ethiopia may be, many of the oppressive practices of the imperial regime still continued to linger in the political practices of the Federal Democratic Republic of Ethiopia under Meles Zenawi. According to the Oromo scholar and academic, Dr. Mohammed Hassen,

Oromo men, women, children, animals, and even the Oromo environment are still targets of the TPLF’s tyranny. In cases where Oromo pastoralists were suspected of harboring OLF [Oromo Liberation Front] guerrilla fighters, TPLF soldiers punished them by destroying or confiscating their cattle or by poisoning the wells from which the cattle drank. On many occasions Oromo farmers, suspected of feeding OLF fighters, saw their farms burned to the ground and the defenseless members of their households brutally murdered. In 2000, when the TPLF government suspected OLF guerrillas of hiding in the forests of Oromia, its agents set fires that caused catastrophic environmental destruction in Oromia and other [non-Abyssinian] states in southern Ethiopia (Hassen, 2002, pp. 37-38).

By 2018, Abi Ahmed Ali would ascend to power as prime minister of Ethiopia as a result of a great deal of civil unrest. The unrest, an ongoing street protest against the many oppressive measures of the TPLF/EPRDF government, was led by the Oromo youth movement officially known as the Oromo National Youth Movement for Freedom and Democracy (NYMFD) and popularly known as Qeerroo, the Afan Oromo word for “youth.” (BBC, 2019). Prime Minister Abi Ahmed would eventually abolish the EPRDF and establish his own Prosperity Party (PP). Prime Minister Abi remains in power to this day. However, Prime Minister Abi would soon fall into the same authoritarian rule as his predecessors, from Emperor Menelik II to Prime Minister Meles Zenawi. Indeed, many pundits refer to Ethiopia

as the “Empire State” where little has changed in the way of socio-political justice. One of the practices originating in the imperial era would be the continued exploitation of the regions originally conquered and colonized by Emperor Menelik for the extraction of natural resources such as gold.

### **The Lega Dembi Gold Mine in the Guji Zone of Oromia, Ethiopia**

Near the town of Shakiso in the Oromia Region of Ethiopia is located the Lega Dembi Mine, the largest gold mine in Ethiopia (Billay, 1997). Lega Dembi has a yearly production of around 4,500 kg of gold (including some silver) and is owned by the Mohammed International Development and Organization Companies, or MIDROC Ethiopia, an Ethiopian oil and mining group (Good Returns, 2025). The founder and CEO of MIDROC Ethiopia is Ethiopian-Saudi billionaire Mohammed Hussein Al-Amoudi (Good Returns, 2025). As shall be shown, the Lega Dembi Gold Mine is the center of a great deal of environmental devastation in the Oromia Region of Ethiopia.

#### **Background**

Lega Dembi mine is located in Oromia Regional State, Gujii Zone, about 500 km due south of Addis Ababa, the capital of Ethiopia. The Gujii Zone is the land of the Gujii Oromo, a historically agro-pastoralist people (Regassa & Abebe, 2023, p. 12). Furthermore,

The Guji Oromo were incorporated into the Ethiopian state in the late nineteenth century and have since remained marginal

in terms of socio-economic development and political representation. Despite this, the area has long formed part of the central state’s economic interests, making its people vulnerable to what scholars in the field of resource-based conflicts call the ‘resource curse’ (Regassa & Abebe, 2023, p. 12).

Lega Dembi is part of the Adola gold deposit and was discovered in the 1930s. The mine was developed by the Ethiopian Empire during the reign of its last emperor, Haile Selassie (1892-1975). The mine was initially developed under the imperial regime’s forced labor and penal servitude mandates. Security for the mining operations was provided by a garrison of 900 soldiers from the imperial army. During the imperial regime,

control over Ethiopia’s gold mining was—in addition to its economic value to the imperial treasury—a symbol of the sovereign’s claim over the peripheries.... Gold mining in Guji was thus brought under the absolute control of the crown, with provincial administrators submitting the gold directly to the emperor (Regassa & Abebe, 2023, p. 13).

Local Indigenous Gujii Oromos, who were forcibly removed from their land as agro-pastoralists, were either killed or tortured if they engaged in artisanal mining in the area or even collected coffee near the mine for survival (“Lega Dembi Mine,” 2024). Furthermore, the “negative consequences suffered by the Guji [Oromo] people include land dispossessions, population displacement, toxic chemicals from mining sites,

conflicts, disease and the destruction of sacred spaces” (Regassa & Abebe, 2023, p. 12).

MIDROC Ethiopia acquired the mine from the Ethiopian government for \$172 million in 1997. The mine was initially an open-pit mine with a large, open tailings pond, producing gold and silver beginning in 1998. MIDROC Ethiopia expanded and converted it into an underground mine. The mine generated more than \$60 million per year before the permit was cancelled in 2018. Later in 2018, a ten-year renewal for the mining permit was briefly granted with a provision allocating 2 percent of the mine’s profit for the local community, but it was quickly cancelled due to local outrage about pollution from the mine, before being reinstated in 2021 (Manek, 2018).

### **The Lega Dembi Mine: A Devastating Sacrifice Zone**

The area in and around the Lega Dembi mine has been classified as a “sacrifice zone” by David R. Boyd, the United Nations Special Rapporteur for Human Rights and the Environment (Boyd, 2022). Special Rapporteur Boyd defines a sacrifice zone as

a place whose residents suffer devastating physical and mental health consequences and human rights violations as a result of living in pollution hotspots and heavily contaminated areas. The climate crisis is creating a new category of sacrifice zones as a result of unabated greenhouse gas emissions, as communities have become, and are becoming, uninhabitable because of extreme weather events or slow-onset disasters, including drought and rising sea levels.

In reporting further on the situation at the Lega Dembi mine, Boyd points out that

pollution from the Lega Dembi gold mine in Ethiopia has harmed the health of thousands of people by exposing them to dangerous levels of cyanide, arsenic and mercury. For example, mercury levels in the mine’s tailings ponds were nearly 500 times WHO [the World Health Organization,] guidelines. Mothers and children are particularly affected by high rates of miscarriage, stillbirth, infant mortality, birth defects, and childhood disabilities. Many people are afflicted with other chronic and debilitating illnesses. It was reported that mine employees “do not buy livestock products from the community in suspicion of the safety of the livestock in the vicinity of the company as the area is environmentally polluted with toxic waste from the mine.” For the Indigenous Guji Oromo peoples of Ethiopia, whose way of life has been agro-pastoral for centuries, water pollution from the mine has harmed and killed livestock and reduced crop yields. An elder said that because of the mine, “we faced many problems, our cattle died after drinking water from the tailing dams, women lost pregnancy [through miscarriage] and children have been disabled” (Boyd, 2022).

As a result, the community’s food security has clearly been threatened by the mine’s pollution. Just as importantly, the livelihood of the Indigenous Gujii Oromo community has been significantly harmed by the mining activity.

As shall be seen, the community would strongly protest these dire conditions.

### **No Free, Prior and Informed Consent for the Guji Oromo**

Between 1997 and 2009, MIDROC's expansion of the mine caused deforestation and displaced Indigenous Gujii people from their ancestral land, denying their right to free, prior, and informed consent (CIHR, 2019). Local community members have reported that the mine security police shoot at people if they get near the mine and that employment opportunities have systematically excluded local people. A 2022 study found that exploitation of the area replicated a pattern in which successive Ethiopian regimes have justified land appropriation for resource extraction with narratives about civilizing 'backward' societies (Regassa, 2022). This level of contempt for the Indigenous Gujii Oromo by the successive governments of Ethiopia clearly indicates at least one justification for there has been no free and prior consultation with the community members. Quite simply, the Ethiopian government, in taking a paternalistic attitude, claims to know what is best for 'backward' Indigenous societies! But what we are learning is that Indigenous societies around the world who are deemed to be backward communities by the arrogance of the ruling classes of the states across the globe are, in fact, Indigenous communities who possess the knowledge that may save the planet from environmental disaster if but listened to and learned from!

Clearly, MIDROC's activities have caused severe suffering among the local Gujii Oromo and significant environmental degradation to their lands. Furthermore, it is also clear that free, prior, and informed consent by the local community in consultation with the MIDROC group has been entirely lacking.

### **The Gujii Oromo Rise in Protest**

By 2009, the situation had become so dire that the local people decided to organize a protest movement against the mining efforts at Lega Dembi. The response by the security forces was to physically attack the peaceful protesters and make massive arrests. Then, from 2014 onwards, there was a series of protests against the MIDROC mining activities at Lega Dembi mine that blended in with nationwide protests against the federal government. In April of 2018, the MIDROC mining license was renewed, thus re-energizing anti-MIDROC protests. By May, government security forces killed 12 protestors in the process of trying to quell the demonstrations. Nevertheless, the protest intensified to the point that the government suspended MIDROC's license until an independent, scientific study could be conducted regarding the negative impacts of MIDROC's mining activity (Regassa, 2022).

Following protests in 2018, the Ministry of Mines and Petroleum agreed to do an environmental impact analysis and statement for the mine. The Canadian embassy got involved and agreed to fund the environmental study. In February of 2021, the Ministry allowed MIDROC to reopen the mine (Regassa, 2022).

Unfortunately, the Oromo Bureau of Mining in early 2021 made the following arrogant, oppressive statement a few weeks before the official reopening of the Lega Dembi Mine:

There is nowhere in the world where a sovereign nation[-state] asks any group—so called human rights groups—whether it can utilize its mineral resources for the development of the country. Now, whether we like it or not, the government [of Ethiopia] is going to open the mine and will give other licences to new companies,... Any unlawful resistance that obstructs the operation of the mine will be seriously punished (Regasa & Abebe, 2023).

The foregoing tone is clearly authoritarian and uncompromising, clearly hostile to any input from community members on whose land the Lega Dembi Mine is located.

### **Lega Dembi Mine: An Example of a Violation of Human Rights, Environmental Rights, and Indigenous Rights under the Ethiopian Constitution**

The Constitution of the Federal Democratic Republic of Ethiopia (1995) is a fine piece of work, a clearly written document based on social justice built around a clear recognition of human, environmental, and Indigenous rights. It is by far the most progressive constitution Ethiopia has ever had.

#### **Human Rights**

To begin with, The Constitution of the Federal Democratic Republic of Ethiopia (1995)

under Article 10, titled “Human and Democratic Rights,” the following can be read in Sections 1 and 2:

1. Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable.
2. Human and democratic rights of citizens and peoples shall be respected (“Constitution,” 1995).

The Constitution of the Federal Democratic Republic of Ethiopia specifically states that with regard to human rights, Ethiopia shall be governed by globally accepted international treaties and covenants. Under Article 13, Section 2, under “Chapter Three: Fundamental Rights and Freedoms,” the following can be read:

2. The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia (“Constitution,” 1995).

Articles 14 through 28 of Chapter Three go on to spell out specific human rights, ranging from rights to life, security, and liberty (Article 14) to crimes against humanity (Article 28) (“Constitution,” 1995).

#### **Environmental Rights**

The Constitution of the Federal Democratic Republic of Ethiopia specifically addresses environmental rights. Under Article 44, Sections 1 and 2, titled “Environmental Rights, the following can be read:

1. All persons have the right to a clean and healthy environment.
2. All persons who have been displaced or whose livelihoods have been adversely affected as a result of State programmes have the right to commensurate monetary or alternative means of compensation, including relocation with adequate State assistance (“Constitution,” 1995).

According to the information in this paper, the Ethiopian State is clearly in violation of the foregoing Article of The Constitution. The land around the Lega Dembi mine has been severely contaminated, thus eliminating the “clean and healthy environment” that once existed. Furthermore, there have been no programs from the State sufficiently addressing the issue of “monetary or alternative means of compensation, including relocation with adequate State assistance.” What has happened instead is the ongoing attempt to co-opt the community by various means in the hope of quelling justified anger.

### **Indigenous Rights**

While Ethiopia is not a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it is clear from several articles in the Ethiopian Constitution that there is an implicit recognition of indigeneity among Ethiopia’s peoples in the Ethiopian Constitution. This implicitness can be seen in several articles in The Constitution including Articles 5, 8, and 39.

Under Article 5, Section 1, it is written that “All Ethiopian *languages* [emphasis added] shall

enjoy equal state recognition” (“Constitution,” 1995). This, of course, implies that there are multiple Indigenous languages above and beyond the official Ethiopian state language of Amharic, the language of the Abyssinian imperialists and colonialists who launched their expansionist move beginning in the mid-19th century.

In Article 8, Section 1, it is written that “*All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia*” [emphasis added], clearly stating that Ethiopia is composed of Indigenous nations (“Constitution,” 1995)

In Article 39, Sections 1-5, under the title “Rights of Nations, Nationalities, and Peoples,” it has been established beyond doubt that Ethiopia is composed of previously independent Indigenous Peoples that have, under The Ethiopian Constitution, the right of secession from Ethiopia to enjoy their previous independent status before being forcibly incorporated into The Ethiopian Empire:

1. Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.
2. Every Nation, Nationality and People in Ethiopia has the right to speak, to write, and develop its own language; to express, to develop and to promote its culture; and to preserve its history.
3. Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable

representation in state and Federal governments.

4. The right to self-determination, including secession, of every Nation, Nationality and People shall come into effect:

(a) When a demand for secession has been approved by a two-thirds majority of the members of the Legislative Council of the Nation, Nationality or People concerned;

(b) When the Federal Government has organized a referendum which must take place within three years from the time it received the concerned council's decision for secession;

(c) When the demand for secession is supported by majority vote in the referendum;

(d) When the Federal Government will have transferred its powers to the council of the Nation, Nationality or People who has voted to secede; and

(e) When the division of the assets is effected in a manner prescribed by law.

5. A "Nation, Nationality or People" for the purpose of this Constitution, is a group of people who have or share large measure of a common culture or related identities, common psychological make-up, and who inhabit an identifiable, predominately contiguous territory ("Constitution," 1995).

Article 39 is the most controversial Article in and beyond the Federal Democratic Republic

of Ethiopia. Those who want to continue a geopolitical "unity" of Ethiopia based on the ill-gotten imperial and colonial gains of Emperor Menelik II, maintained under Emperor Haile Selassie until his overthrow in 1974 and under subsequent nominal socialist and democratic veneers are diametrically opposed to Article 39 in particular and the 1995 Ethiopian Constitution in general. In opposing Article 39, there is an implicit refusal to recognize the right of Indigenous nations and peoples in Ethiopia to self-determination. Such an opposition negatively impacts human, environmental, Indigenous rights.

It has been shown that the MIDROC mining effort at Lega Dembi has violated the Ethiopian Constitution. The human, environmental, and Indigenous rights are in shambles with regard to the Gujii Oromo. However, this situation regarding the violation of Constitutional rights continues in Oromia as a whole, for Regassa & Abeba point out in their study that "the government is failing to adhere to principles of participation and prior and informed consent of local communities when prospecting for and extracting gold. Rather, it deploys a combination of co-optation and coercion" (2023).

It may be that the Oromo Nation has to look beyond the borders of Ethiopia for help in establishing a framework through which to establish their rights as Indigenous people. The International Covenant on the Rights of Indigenous Nations (ICRIN) and The Nations International Criminal Tribunal (NICT) offer such a framework.

## Toward the Establishment of The Nations International Criminal Tribunal (NICT)

In 2002, The International Criminal Court (ICC) was formed as an independent judicial body to prosecute crimes under the 1948 Genocide Convention. Thus, the ICC was charged with the responsibility to investigate and try individuals charged with serious crimes, including genocide, crimes against humanity, war crimes, and crimes of aggression. The ICC became the world's first permanent international criminal court. The ICC is a court of last resort that seeks to complement national courts, not replace them. Over time, it became clear that while the 1948 Genocide Convention made genocide an international crime,

*it was limited in scope, avoiding terms that would hold accountable the commission of crimes against Indigenous peoples [emphasis added]. The International Criminal Court (ICC), established in 2002, was authorized to prosecute crimes under the 1948 Genocide Convention. As an institution based on state-based law that does not recognize cultural genocide, the ICC has proved powerless to prosecute crimes of colonization, cultural destruction, and mass violence experienced by Indigenous peoples [emphasis added] (Ryser, 2024).*

The Nations International Criminal Tribunal (NICT) is a proposed court that would, in fact, hold accountable those responsible for cultural and mass violence crimes against Indigenous peoples.

The process of drafting the NICT's charter began in 2018. It was initiated by the Ezidikhan government and Indigenous Armenians under the auspices of the Center for World Indigenous Studies (CWIS). The process to draft the NICT's charter was completed in April of 2023. Thus far, more than 80 Indigenous Nations have already ratified the NICT Charter. The NICT will go into full effect

when the Charter is ratified by 250 Indigenous nations and 4 states acting through their established governing bodies and their domestic laws, the Nations International Criminal Tribunal will become a permanent international body conducting legal proceedings according to [Indigenous] nation-based laws, able to hear and prosecute claims in regard to the named crimes, both through punitive and restorative justice processes. In particular, Indigenous traditional law will be promoted and applied....Significantly, the NICT provides for Victim Nation Juries as part of judicial proceedings, indictments, and restorative justice remedies applying the principle of free, prior, and informed consent (FPIC) (Ryser, 2024).

The specific provisions concerning free, prior, and informed consent (FPIC) are found in the language of the International Covenant on the Rights of Indigenous Nations (ICRIN), an important part of the NICT. They are found in Paragraphs (Para) 9, 11, 18, 25, and 28, of The Covenant. A close examination of Paragraphs 9, 25, and 28 particularly addresses the issues that have been raised with regard to the Gujii Oromo:

Para. 9 Indigenous Nations shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, [prior], and informed consent [emphasis added] of the peoples concerned and not until after agreement on just and fair compensation and, where possible, with the option of return.

Para. 25 Indigenous Nations have the right to restitution for lands and territories which have been confiscated, occupied, used, and damaged without their free, [prior,], and informed consent [emphasis added], the return of lands and territories and, where neither is acceptable to the Nation, to just and fair compensation. Unless otherwise freely agreed within balanced negotiations by the peoples concerned, compensation shall take the form of lands and territories at least equal in quality, size and legal status.

Para. 28 Each Indigenous Nation has the right to require that States and other Nations obtain its free and informed consent prior [emphasis added] to the approval of any projects on its land and territory, particularly in connection with natural resource development or exploitation of soils, water, mineral or other subsurface resources. Pursuant to agreement freely negotiated with the Indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact (“International Covenant,” 1994).

It is important to note that while NICT is still in the process of being ratified up to a point where it can go into effect and become a part of international law, ICRIN is already a recognized international treaty.

### **More on The International Covenant on the Rights of Indigenous Nations (ICRIN)**

ICRIN “is the first comprehensive [Indigenous] nation-based international law ratified and acceded to by Indigenous nations up to May 2022 to affirm the inherent rights and long-term social, economic, and political interests of Indigenous nations” (“International Covenant (ICRIN),” 2022). The original signatories of ICRIN included the representatives of five Indigenous Nations which are the Crimean Tatars, the Nuba People of Sudan, the Confederacy of Treaty Six First Nations, the Opethesaht First Nation, and the West Papua Peoples Front who met for the signing in Geneva, Switzerland in July of 1994 (“International Covenant,” 1994).

Since then, there has arisen The Confederation of Indigenous Nations of the Middle East and North Africa, or CINMENA. In 2014, CINMENA began to form and eventually attracted up to 66 nations to join its confederation (“66 Indigenous Nations,” 2022). Furthermore, “all 66 CINMENA nations have ratified... ICRIN as a condition for membership [to the Confederation]” (“66 Indigenous Nations,” 2022). According to Para. 41 of ICRIN, “this [ICRIN] document shall come into force when thirty nations shall have formerly ratified its provisions according to their customary processes” (International Covenant,” 1994). Given that more

than twice the number of 30 Indigenous nations have ratified ICRIN than was needed to bring ICRIN into force, ICRIN is now a fully established treaty within the international legal system.

Once an Indigenous nation has ratified ICRIN, the door is opened to work out an agreement between the nation and the state government under which the Indigenous nation operates for the purpose of acquiring state recognition of the provisions of ICRIN. Para. 34 of ICRIN makes this clear:

Each Indigenous Nation has the right to the observance and enforcement of treaties, compacts, agreements and other constructive arrangements concluded with other Nations and with States [emphasis added] or their successors, according to their original intent. Conflicts and disputes which cannot otherwise be settled through direct negotiations or other peaceful means must be submitted to competent international bodies agreed to by all parties concerned (“International Covenant,” 1994).

In the final analysis, the Indigenous Oromo Nation and the Indigenous peoples within that nation such as the Gujii Oromo, can join an international treaty structure—ICRIN—that has within it the necessary provisions to mandate that the Ethiopian State apparatus recognize FPIC. And once the NICT has been put into force, there will be an international court of justice to work out grievances that may arise between the Indigenous Nation and the State. However, all of this takes the political will of all parties concerned for it all to come into reality.

## Conclusion

### No Official Recognition by Ethiopia of FPIC

The Ethiopian Constitution recognizes the sovereignty of the Nations, Nationalities, and Peoples of Ethiopia who are all, in fact, indigenous to the present geopolitical construct of the Ethiopian State. Of course, this includes the people of the Oromo Nation, by far the largest Indigenous community in The Ethiopian State. This recognition of sovereignty already in The Constitution may have been one reason why the Ethiopian government never felt it necessary to sign the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP) that was promulgated in 2007, 12 years after the promulgation of the Ethiopian Constitution. Perhaps an even more significant reason why the Ethiopian government did not sign UNDRIP is due to the necessity of signatory states to recognize the clear, explicitly stated right in UNDRIP of free, prior, and informed consent—FPIC—that states are required to advance to Indigenous communities within its borders. As a result, there is no explicit recognition by the Ethiopian State of FPIC. Thus, if the current Oromo Regional Government should decide to exercise its sovereign rights guaranteed to it in the Ethiopian Constitution and embark upon an effort to sign the NICT/ICRIN document, what political obstacles would it encounter?

### Ongoing Controversy Surrounding the Ethiopian Constitution

The attention that the Ethiopian Constitution gives to Indigenous Nations,

Nationalities, and Peoples is a major reason why The Constitution has been controversial. It is not viewed as being conducive to building a unified Ethiopian State because it gives clear legal opportunities for Indigenous peoples to opt out of The Ethiopian State as it currently exists as was seen above in Article 39. This is clear to many academics and intellectuals. For example, Dr. Tony Magaña, the Head of the Neurosurgery Department, School of Medicine, at Mekelle University College of Health Sciences, Tigray, Ethiopia, says that Dr. Messay Kebede, a pro-Amhara Ethiopian professor,

continues the elitist view that authoritarian means are allowable to reach the goal of Ethiopian nationhood by eliminating non-Amharic ethnicity [emphasis added]. For many years this academic has been a source of building a sense of Amharic elitism under the false pretense of Ethiopian national identity [emphasis added] (Magaña, 2021).

Indeed, Dr. Messay Kebede himself has written an article titled “The Toxicity of Article 39 of the Ethiopian Constitution.” Dr. Kebede is hostile to Article 39 of the constitution because it

grants “an unconditional right to self-determination, including the right to secession” to every ethnic group. The unconditionality of the right attests that there is no reciprocity between the larger national community and the sovereign ethnic entities. The fact that ethnic groups can secede without the consent of the union means that the union is a mere gathering of distinct entities, and not an organic unity in

which parts and whole benefit one another because they are tied by mutual obligations (Kebede, 2021).

Interestingly enough, Dr. Kebede is correct in his analysis if, and only if, there had been, as he puts it, “organic unity” between the ethnic polities that make up Ethiopia today. But that “unity” was never “organic” in the first place; it was a unity forced upon the previously independent non-Amhara ethnic polities as I have shown. Article 39 recognizes this fact of an inorganic union; Dr Kebede would prefer to maintain the fiction of an organic Ethiopian unity up to the point of the “elimination of non-Amharic ethnicity” as Dr. Magaña has pointed out. The point here is that there are many pro-Amhara ideologues like Dr. Kebede who want to maintain the original imperial structure of the Ethiopian State under the guise of a false organic unity through eliminating non-Amhara ethnicity by authoritarian force, if necessary. This fact is one of the primary reasons why there is so much armed ethnic conflict in Ethiopia today.

The current Prosperity Party (PP) of Prime Minister Abiy Ahmed replaced the EPRDF government under which the Ethiopian Constitution was written. Under the testimony of Dr. Mohamed Hassen which I quoted earlier, it was shown how the TPLF/EPRDF government under Meles Zenawi disregarded the Ethiopian Constitution and oppressed the Oromo people by maintaining the authoritarian structure of the former imperial regime. Similarly, the PP, the creation of Prime Minister Abiy, has, at its ideological core, a position that maintains Ethiopia as a state based on the original forced

union resulting from Emperor Menelik II's original imperial expansion and continues the oppression of the Oromo people. Dr. Asafa Jalata, an Oromo academic, points this fact out in his article titled "Abiy's Regime is a Modern Version of the Ethiopian Empire" as follows:

The perception among Oromo nationalists is that Abiy, like many of his predecessors, is running...[a state]...administration that exalts the glories of Ethiopia's imperial history and seeks to continue its oppressive, brutal, and exploitative practices (Jalata, 2022).

Thus, the Ethiopian Constitution has remained, since it was written and ratified nearly 30 years ago, words on paper. All Ethiopian regimes over that same period of time have maintained an authoritarian, imperial-like grip on the Ethiopian State. Indeed, Abiy has openly articulated his respect for the nefarious exploits of Emperor Menelik II by authorizing the creation of a life-like statue which he placed in his multi-million dollar Unity Park. Thus, when one looks at the administration of the Oromo Regional Government, one finds that a PP member is the top administrator of the region. This implies that the Oromo Regional Government is tied to the administration of the Ethiopian State. At this point, one has to determine to what degree this top administrator and his administration is tied to PP which determines the level to which he can act independently, if at all. If that tie of the regional administration is absolute, the NICT/ICRIN has little chance of being accepted.

### **Enter The Oromo Liberation Army**

However, there is pronounced military activity in the Oromo region being carried out against the Ethiopian government by the Oromo Liberation Army (OLA), the former military wing of the OLF now acting independently. The OLA can be considered to be a proponent of the 1995 Ethiopian Constitution. This is because in January 2023, the OLA released a political manifesto in which it laid out its aims:

We, the Oromo Liberation Army (OLA), fight for the Oromo people's right to self-determination. We fight for the freedom of the Oromo people from political exclusion, economic exploitation, and socio-cultural marginalization.

a) We fight to realize the Oromo people's right to freely determine their political status. For the right of our people to determine their political destiny and establish a responsive government through freely elected representatives.

b) We fight to secure the Oromo people's economic sovereignty. To stop the exploitation of our people's natural and human resources. To develop these resources for the benefit of all.

c) We fight to realize the socio-cultural rights of our people. We demand respect for and full recognition of the Oromo language, culture, and history" ("A Brief Political Manifesto," 2023).

Given what I have discussed above about the Ethiopian Constitution, it is easy to see that the political manifesto of the OLA converges with the progressive and democratic principles of the Ethiopian Constitution, the same constitution which Prime Minister Abiy Ahmed is opposed to, for it is clear that he is determined to maintain an authoritarian grip on power through his Prosperity Party.

It takes political will to sign and adhere to an international treaty of any kind, whether it be ICRIN or any other treaty. In my personal interaction with the Oromo community which includes Oromo human rights activists, I know that there is an interest in ICRIN. However, the repressive conditions in Ethiopia, even as these conditions affect certain members of the Ethiopian diaspora, are tremendous. If the present government is violating its own constitution, clearly it is not predisposed to negotiate a treaty like ICRIN, which as I have shown, has a lot in common with the Ethiopian Constitution.

### **Hope Lies in the OLA**

As I see it, in the present political climate in Ethiopia, the only Oromo institutional

entity that has the potential to challenge the authoritarian rule of the current government is the OLA. Should the OLA be successful in eventually forcing a political accommodation from the current Ethiopian State government, then a political situation could possibly be created wherein the Ethiopian government would be obliged to officially recognize The Oromo Nation's ascension to ICRIN and NICT. *In my opinion, a negotiated settlement between OLA, on behalf of the Oromo Nation, and the Ethiopian State that would include the signing of ICRIN and NICT by both parties would not only open the door to official recognition of FPIC but also open the door to official recognition of an international court for dispute settlements—the NICT—that would be far more fair and impartial in settling disputes than the adjudication of disputes by the court system of the present Ethiopian State. For example, disputes such as those directly related to and otherwise similar to natural resource extraction of gold and silver from the Lega Dembi Mine in the Gujii Oromo Zone, Oromia, would get a fair and impartial hearing under NICT not attainable in the current court system of Ethiopia.*

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THE HIDDEN  
ROOTS *of*  
WHITE  
SUPREMACY

*and the*  
PATH *to a* SHARED  
AMERICAN  
FUTURE

Robert P. Jones

Author of *White Too Long*

## BOOK REVIEW

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By Dina Gilio-Whitaker, MA (Colville Confederated Tribes)

## ABSTRACT

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This review of Robert P. Jones' 2023 book, *The Hidden Roots of White Supremacy and the Path to a Shared American Future*, examines Jones' analytical approach to the origins of white Christian supremacy in the U.S. Jones' work resonates deeply with the current Trumpian moment of white conservative backlash and anti-Blackness, tracing the roots of institutionalized racism to the early Atlantic slave trade. A key point is his discussion of the Doctrine of Discovery (DoD)—a papal verdict that enshrined the dispossession of Indigenous land into Indian law. However, the author raises concerns about portraying the DoD as a race-based phenomenon, arguing that this characterization obscures critical distinctions between white supremacy and settler colonialism. As such, the right to self-determination under tribal law merits further discussion, particularly as Indian nationhood faces increasing endangerment under current U.S. authorities.

**Keywords:** White Christian Supremacy, Settler Colonialism, Doctrine of Discovery (DoD), Tribal Sovereignty, Self-Determination, Institutionalized Racism, Atlantic Slave Trade, Indian Nationhood, Theological Foundations of White Supremacy, Black and Indigenous Rights

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In his third book, bestselling author and religious studies scholar Dr. Robert Jones expands on the theme of his last two books examining white supremacy in American Christianity. As the founder of the Public Religion

Research Institute (PRRI) much of Jones's work is drawn from years of public opinion surveys as well as his background in theology and his lived experience growing up white and Christian in Mississippi. With increasing demographic

shifts as the country becomes less white, Jones perceives trends in the loss of primacy of white Christians in the U.S. (white Christian America, aka WCA as he calls it). The rise of the Tea Party, for example, Jones sees as a conservative backlash to eight years of a Black president, as well as the hard-won rights to same-sex marriage. This has led to what Jones calls the “new identity politics” of white Christian nationalism.

What distinguishes this book from his other studies is his attention to the role of the Doctrine of Discovery (aka the doctrine of Christian discovery) as the foundation of WCN. Scholars of American Indian and other Indigenous studies fields are intimately familiar with the DoD as the founding principle of federal Indian law in the United States, but also as an ideology at the core of colonialism itself. The DoD originated in fifteenth-century Roman Catholic Church edicts known as papal bulls which laid out the justification for the slavery of non-Christian people and the taking of their lands in the name of salvation. The U.S. Supreme Court drew on that history to enshrine the DoD in the first Indian rights case ever argued, *Johnson v. M'Intosh*, in 1823. Asked to settle a land dispute between two white men, the court undertook questions about legitimate land title, which led to questions about the nature of Indian land ownership. The Court made the case that Indians did not hold title to lands in the ways Europeans did and that “discovery” by a culturally and religiously superior people meant that they only possessed a right of occupancy, not title.

The DoD institutionalized hegemony and domination as structural, legal realities that govern the lives and lands of American Indians to this day. Jones frames the DoD in a way that is both unusual and provocative to explain not just how American Indians have been subjugated unconsentingly to U.S. authority, but also the roots of white supremacy more broadly. In this framing, the ideologies underpinning U.S. slavery and anti-Black racism are connected to the colonization of American Indians. One way that Jones makes these linkages is to challenge the “original sin” narrative of the New York Times’ *1619 Project* published in 2019, in which slavery is the U.S.’ original sin. For Jones, slavery’s roots in the U.S. are more likely in 1493 when Columbus arrived back to Europe with Indigenous captives and to a hero’s welcome. “The Doctrine of Discovery, in short, merged the interests of European imperialism, including the African slave trade, with Christian missionary zeal,” Jones writes (p. 15).

To build the case that white supremacy in the U.S. is more a product of colonialism than the African slave trade, the book compares particular historical moments and places of anti-Black racism and American Indian oppression in three sections. These chapter sections tell of the murder of Emmett Till in Mississippi, lynchings in Duluth, Minnesota, and the Tulsa Race Massacre. Each section begins with “before” Mississippi, “before” Minnesota, and “before” Oklahoma to highlight Indigenous histories and to tell stories of atrocities which include the

Trail of Tears, the mass hanging of the 38+2 Lakota warriors ordered by President Abraham Lincoln in 1862, and the Osage Reign of Terror in the early twentieth century. The sections include discussions of how racial reconciliation is commemorated in these places as truth-telling and repair in partnership with white people.

*The Hidden Roots of White Supremacy* is a compelling intervention into cultural studies, Black studies, Indigenous studies, Ethnic studies and related fields. The Doctrine of Discovery, with its foundation in medieval Euro-Christianity that sees humans in hierarchical terms where some human groups are more deserving of society's benefits than others, is an extraordinary legal principle in a country that touts the virtues of liberty and justice for all and prides itself (at least theoretically) on the idea of the separation between church and state. In our current Trumpian historical moment, characterized by authoritarian white Christian nationalism and thinly veiled contempt for the civil rights of non-white others weaponized in anti-DEI (diversity, equity, and inclusion) rhetoric and legal action, a serious grappling with the DoD is more necessary now than ever. Jones's thesis, however, treads dangerously close to critical race theory at a time when educators are threatened with a wide array of consequences for teaching "anti-American" material. But it's not the alleged anti-Americanness that is the problem.

For American Indians there are serious risks to framing the Doctrine of Discovery as a race-based phenomenon, if this is what Jones is gesturing toward. This is especially true now when attacks on tribal sovereignty are ramping up based on arguments that American Indians enjoy special rights in violation of the equal protection clause of the Constitution's Fourteenth Amendment, as we've seen with the 2023 *Brackeen* case and in 2013 with the *Baby Veronica* case in the Supreme Court. These challenges to the Indian Child Welfare Act strike at the core of tribes' capacity for self-determination. The counterargument that must be maintained is that tribal sovereignty in American law is based not on race but on tribes' political status and the treaty relationships that uphold their nationhood.

As I have argued [elsewhere](#), federal Indian law via the Doctrine of Discovery in the 1823 *Johnson* decision does not originate from racialization or racial thinking; it emanates from ideologies rooted explicitly in religious and cultural supremacy. This is a critical distinction for Native peoples. As interesting as it is to link the DoD to white supremacy, it treads too close to conflating American Indians' experience of settler colonialism and genocide to Black Americans' experience of race-based oppression. I would like to see Dr. Jones think through these distinctions and comment.

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Dina Gilio-Whitaker is a Native American studies scholar and journalist, focusing on the topics of environmental justice, Indigenous knowledge, and identity. She is a lecturer faculty in American Indian Studies at California State University San Marcos and co-founder of the Indigenous Climate and Environmental Collaborative at CSUSM, advising researchers, conservation and other organizations on Indigenous engagement and policy-based protocols. Her most recent book is the award-winning *As Long As Grass Grows: The Indigenous Fight for Environmental Justice, from Colonization to Standing Rock*, released in 2019 and her forthcoming book *Who Gets to be Indian: Ethnic Fraud and Other Difficult Conversations about Native American Identity* is scheduled for release in fall 2025 from Beacon Press.