TTHOWGWELTH, TOANUNCK AND RO:RI:WI:IO
P.O. Box 215, 18400 King's Road, Martintown ON Canada k0c 1s0
(613) 528-1433 Fax 528-1333 Email <mightisnotright@gmail.com>

August 22, 2006

Louise Arbour, UNHCHR
c/o Petitions Team
Office of the United Nations High Commissioner for Human Rights
UNOG-OHCHR
1211 Geneva 10, Switzerland

Re: *Tthowgwelth, Toanunck and Ro:ri:wi:io v. Supreme Court of Canada and Supreme Court of the United States.* Complaint No. (to be assigned)

Dear Louise Arbour:

Enclosed for filing and expedited action to prevent genocide-in-progress please find a complaint bound as Tthowgwelth and others, *Might Is Not Right: The prevention of genocide within Canada and the United States of America* (2006) including VOLUME II APPENDIX *Exhaustion of Domestic Remedies* and affirmation of service. Volume II will be up-dated and a revised Table of Contents supplied from time to time as factual events develop.

As a former Judge yourself of the Supreme Court that has been and is committing the genocide, you labour under a profound conflict of interest. Correspondingly if you are not ready and willing to act with expedited dispatch please advise whether you will consent, or would object, to an alternative or supplementary application to any other UN Organ with concurrent jurisdiction to requisition the advisory opinion from the International Court of Justice that is the complaint's prayer for relief.

Sincerely

/s/
Bruce Clark, LL.B., M.A., Ph.D.
Agent/Counsel

Encl.: Complaint and Affirmation of Service

Complaint Number:

Before The

HIGH COMMISSIONER FOR HUMAN RIGHTS

Tthowgwelth, Toanunck and Ro:ri:wi:io

vs

Supreme Court of Canada and Supreme Court of the United States

---

IN THE MATTER OF an application for a recommendation by the High Commissioner for Human Rights to be made for the purpose of preventing genocide-in-progress, that the Commission for Human Rights, the Economic and Social Council, the incoming Human Rights Council and the General Assembly, or any of them, immediately should requisition an advisory opinion from the International Court of Justice on an emergency basis, on the constitutional question of jurisdictional law alone whether, by breaching the rule of law's constitutive principle of equal application in relation to the universal human right not to be made a victim of genocide, the several human rights organs and agencies of the United Nations inclusive of the International Criminal Court presumptively intend to commit complicity in the genocide of the indigenous national constitutional governments and their constituents within Canada and the United States, which genocide is being committed by the intentional judicial inactivity of the Supreme Court of Canada and the Supreme Court of the United States in relation to the addressing of Section 109 of the Canadian *Constitution Act, 1867,* and Article II, Section 2, Paragraph 2, Clause 1 of the United States' *Constitution, 1789*;

AND IN THE MATTER OF an application for a further recommendation by the High Commissioner for Human Rights and those other UN Organs and Agencies, that the said Supreme Courts should address the said constitutional legislation and the precedents settling their meaning, the ignoring of which existing law is the reasonably foreseeable, probable and actual cause of the alleged genocide-in-progress due to the negation both of the rule of law and of justice as the application of truth to affairs.

Affidavit of Service

I, Khristy Rowe, Onkwehonwe of Akwesasne, AFFIRM:

1. On August 22, 2006, I personally served the accompanying complaint in 2 volumes by UPS Courier (confirmations annexed) addressed to the legal representatives of the Supreme Courts of Canada and the United States of America, as follows:

AG USA
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

AG Canada
284 Wellington Street
St. Andrew's Tower, SAT-6053
Ottawa, ON K1A 0H8

AFFIRMED at Cornwall, Ontario, August 22, 2006:

/s/ _____
Commissioner

/s/ _____
Khristy Rowe

UNITED NATIONS
HIGH COMMISSIONER
FOR HUMAN RIGHTS

AFFIRMATION OF SERVICE

Tthowgwelth and others
c/o Bruce Clark, Agent and Counsel
18400 King's Road
P.O. Box 215
Martintown, Ontario
Canada K0C 1S0
Phone (613) 528-1433
Fax (613) 528-1333
Email <mightisnotright@gmail.com>

VOLUME I
Complaint

MIGHT IS NOT RIGHT:
Preventing genocide within Canada and the United States of America

BY

Tthowgwelth and others

AUTHORS' CONTACT INFORMATION:
18400 King's Road
P.O. Box 215
Martintown, Ontario
Canada K0C 1S0
Email mightisnotright@gmail.com

Phone +1 (613) 528-1433
Fax +1 (613) 528-1333

Dedication

TO the generations of indigenous people who resisted conversion, abided in truth alone, and remained loyal to beloved creation, against unstoppable despoliation and unremitting genocide.

Dying Declaration and Preface

I, Tthowgwelth (Sound of Many Copper Shields), also known as Lavina White, of Haida Gwaii (also known as the Queen Charlotte Islands) in the Pacific Ocean, MAKE OATH AND SAY:

(1). I am dying and have no hope of recovery. I need to shift to a stronger back the burden my naming at birth assigned me. I am the sound of many copper shields, and they are massed against the genocide of my community, nation and race of people by the Supreme Court of Canada's cruel and intentional ignoring of the constitutional guarantee of the existing aboriginal rights of jurisdiction, possession and self-determination confirmed by Section 109 of the *Constitution Act, 1867*. At the time of my death there are legal proceedings in my name that need to be completed:—if not by me, then for me, and for the principle of the rule of law and the prevention of genocide in the service of which my life has been expended. For this purpose, with the consent of Ro:ri:wi:io ("he brings a good message") and Bruce Clark, PH.D., I assign to them my burden, one that Bruce has helped me to carry for many years. My dying wish is that they shall complete the task in which we are engaged together, and I give permission to my aboriginal colleague Ro:ri:wi:io to sign such legal documents as Bruce prepares and he considers just, "Tthowgwelth per Ro:ri:wi:io." My body dies. My spirit lives. The truth sets it free.

(2). I am a woman and as such have a dying request for Chief Justice of Canada Beverly McLaughlin and for former Associate Justice of the Supreme Court of Canada Louise Arbour, now the United Nations High Commissioner for Human Rights. To them I write woman-to-woman because our mother earth needs rescuing by her own kind, for all her own children, and we women know and understand how the death of a child of the womb ravages the soul of the mother that bore the child. The genocide that has laid low the indigenous people of the Americas was and is the ecocidal ravishment by the mighty of the great mother, in pursuit of unconstrained and unlimited profit. If the great law of respect that is bred in the bone of every human child, and which flourished here in the Americas before the European invasion, were itself to be respected, it is at least conceivable the great Mother may herself regenerate her strength, and flourish again. All the children of the great Mother are indigenous to the lands and waters she constitutes. And her great law of respect already subsumes the *Universal Declaration of Human Rights* and the *Convention for the Prevention and Punishment of the Crime of Genocide*, 1948. The female force is in you, surrounds you and will never stop nurturing you for so long as you shall live on the surface of the great mother. You are not alone. You alone can do this. You are loved. The great mother needs this reciprocation of your love as a mother yourself.

THEREFORE with all my heart and soul I swear, on August 2nd 2006, that the content of the litigation papers I have directed, authorized and signed in relation to Section 109 of the *Constitution Act, 1867*, and the above, is true.

/s/ "Sylvia S. Shelton" /s/ "Tthowgwelth"

BARRISTER & SOLICITOR
Vancouver, BC V5N 4E8

Tthowgwelth also known as Lavina White

Introduction

The first of the British immigrants entered into a political compact with the indigenous North Americans they encountered, to share the land for mutual advantage and security, which permitted the newcomers first to survive the trauma of transplantation and then eventually to flourish. The two founding races of what is now Canada and the United States of America agreed to live side-by-side as adjacent nations, each master in its own land. The Indian practice of gift diplomacy and the British concept of the sale of land coalesced. The Indians remained in power in relation to lands not granted by them to the immigrants. The terms and conditions of this agreeable common law relationship in due course were consolidated and confirmed by an act of state known as the *Royal Proclamation of 1763,* the first written constitution of general application to all of British North America. The proclamation guaranteed the continuity of the Indians' previously existing aboriginal right of self determination, exclusive jurisdiction and sole possession pending a treaty of purchase, by which means the share of the land reserved for newcomer society might grow in size relative to the remainder reserved by the natives for themselves by the act of not granting to others. Under the constitutional legislation the Indian, Federal and Provincial or State governments each acquired a *stipulated constitutional jurisdiction* over its own territory.

The enactment of this constitutional legislation precludes acts of state as expressions of sovereign power, by either race of people over the other. The sovereign power to modify this constitutional balance of acknowledged jurisdictions henceforward was restricted to the sovereign peoples acting pursuant to the legislative amendment formula stipulated in the constitution.

Nevertheless, in the 1870s the federal governments of both the United States and Canada enacted domestic legislation (*Appropriations Act, 1871,* and *Indian Act, 1876*) upon the basis of a manifestly unconstitutional assumption of the oxymoron "*federal sovereignty"* over the Indian territory and the Indian persons thereon. That jurisdictional invasion is a legal impossibility under the rule of law under which constitutional law trumps domestic law, not the other way round. A code of legislation supplemented by federal common law decisions by the newcomers' courts completely occupied the jurisdictional field constitutionally guaranteed to Indians.

Genocide resulted and continues in consequence of this gross abrogation of the rule of law by the governments and courts of Canada and the United States of America.

This document is an attempt to stop it.

Complaint Number:

Before The

HIGH COMMISSIONER FOR HUMAN RIGHTS

Tthowgwelth, Toanunck and Ro:ri:wi:io

vs

Supreme Court of Canada and Supreme Court of the United States

---

IN THE MATTER OF an application for a recommendation by the High Commissioner for Human Rights to be made for the purpose of preventing genocide-in-progress, that the Commission for Human Rights, the Economic and Social Council, the incoming Human Rights Council and the General Assembly, or any of them, immediately should requisition an advisory opinion from the International Court of Justice on an emergency basis, on the constitutional question of jurisdictional law alone whether, by breaching the rule of law's constitutive principle of equal application in relation to the universal human right not to be made a victim of genocide, the several human rights organs and agencies of the United Nations inclusive of the International Criminal Court presumptively intend to commit complicity in the genocide of the indigenous national constitutional governments and their constituents within Canada and the United States, which genocide is being committed by the intentional judicial inactivity of the Supreme Court of Canada and the Supreme Court of the United States in relation to the addressing of Section 109 of the Canadian *Constitution Act, 1867,* and Article II, Section 2, Paragraph 2, Clause 1 of the United States' *Constitution, 1789*;

AND IN THE MATTER OF an application for a further recommendation by the High Commissioner for Human Rights and those other UN Organs and Agencies, that the said Supreme Courts should address the said constitutional legislation and the precedents settling their meaning, the ignoring of which existing law is the reasonably foreseeable, probable and actual cause of the alleged genocide-in-progress due to the negation both of the rule of law and of justice as the application of truth to affairs.

Complaint and Appointment of Agent and Counsel

We, Tthowgwelth and Toanunck, the complainants, respectively of Masset, BC, and North Granville, NY, COMPLAIN AND APPOINT:

(1) THE FACTS AND LAW attested in the appendices are true.

(2) ALTERNATIVE REMEDIES have been exhausted but nevertheless genocide remains real, global, inflicted by mighty nations' unconstitutional taking of the natural resources of the occupied territories of weak indigenous nations and, most importantly, is not prevented by the world's rule of law remedy-providers because they are not independent of and impartial to the mighty nations but rather are in their thrall.

(3) THE ERADICATION OF GENOCIDE must begin by establishing the law's rule over the mighty nations, to whose economically-motivated ecocide of the planet global genocide is culpable collateral damage.

(4) WE APPOINT Dr. Bruce Clark as our agent and counsel.

STATED AND CONFIRMED at Masset, British Columbia, April 20, 2006.

/s/ "Kim Mushynsky
Kim Mushynsky, NOTARY PUBLIC
PROVINCE OF BRITISH COLUMBIA

/s/ "Lavina White Tthowgwelth"
Applicant/Affiant Tthowgwelth

STATED AND CONFIRMED at North Granville, New York, May 23, 2006.

/s/ "Jenny Linda Martelle"
Jenny Linda Martelle – 01MA6068020
NOTARY PUBLIC, STATE OF NEW YORK

/s/ "Rick VanGuilder"
Complainant

And I, Ro:ri:wi:io, Akwesasne Onkwehonwe of the Upper St. Lawrence River drainage basin as more particularly described in Volume II of this UNHCHR Application AFFIRM:

(1) I am party to this attested complaint and application for the requisitioning of a jurisdictional advisory opinion and I affirm the truth of its content and the fact I am bound by my word and my interest to respect and implement the trust placed in me by Tthowgwelth's (annexed) declaration and preface dated August 2nd 2006.

(2) The said Volume II consists in the application of the principles herein in the politically-charged and historically-crucial Six Nations context, which itself presents a fresh opportunity to end the "judicial inactivity" in the genocide host country within the meaning of *Menchu v. Montt* (Tab D).

AFFIRMED at Cornwall, Ontario, August 11, 2006

/s/ "Aleshia Anne Maley"
Aleshia Anne Maley, Commissioner, etc.
United Counties of Stormont, Dundas &
Glengarry. Expires August 29, 2008.

/s/ "Ro:ri:wi:io"
Applicant/Affiant Ro:ri:wi:io

Bruce Clark, LLB, MA, PhD
Applicants' Agent/Counsel
18400 King's Road
P.O. Box 215
Martintown, ON K0C 1S0
+1 (613) 528-1433
Fax +1 (613) 528-1333
mightisnotright@gmail.com

AG USA
L'Enfant Plaza Station
P.O. Box 443778
Washington, DC 20026-4378

AG Canada
284 Wellington Street
St. Andrew's Tower, SAT-6053
Ottawa, ON K1A 0H

Constitutional Question

Does the High Commissioner for Human Rights share[1] the universal extraterritorial jurisdiction to prevent genocide arguably being caused by the intentional judicial inactivity of foreign[2] national court systems and, if so, will she exercise such jurisdiction by respectfully and in comity recommending the obtaining of an advisory opinion from the International Court of Justice and, correspondingly, recommending the respondent Courts forthwith should address the constitutional law of North America inaugurated in equity by the papal bull *Sublimus Dei, 1537,* and confirmed at law by the *Constitution of Canada, 1867*, Section 109, as settled by *Attorney General of Ontario v. Attorney General of Canada,* [1897] AC 199, 205, 210-11 (JCPC), and by the *Constitution of the United States, 1789,* Article II, §2, ¶2, clause 1, Article V and Amendment X, as settled by *Fletcher v. Peck,* 6 Cranch's 87, 121 (SC 1810), in the light of *Lara v. US,* 541 US 197, 214-227 (2004)(Thomas, J) and *R. v. Marshall; R. v. Barnard,* 2005 SCC 43, ¶¶48, 107?

A Note Regarding Headings and Organization: for ease of intelligibility both to the respondents and to the international community of national courts, this document is formatted as for applications for *certiorari* in the USSC. The submission is, as settled by *Menchu v. Montt* the substantive issue of preventing and punishing genocide caused by intentional judicial inactivity supersedes the procedural issue of compliance in matters of form when such compliance defeats substance.

---

[1] *Menchu v. Montt,* 2005, Constitutional Court of Spain, *infra,* page *27(mt)-42(mt).* Appendix A: *Tthowgwelth v. Supreme Courts,* Malta Constitutional Court.

[2] The adjective "foreign" *a fortiori* subsumes one's own domestic court system if and when it has placed itself outside the rule of law by committing genocide.

VOLUME I (The Complaint)

Table of Contents

VOLUME II (The Exhaustion of Domestic Remedies)

Separate Table of Contents, *q.v.*

Table of Authorities

Jurisdiction

(1) For the purpose of addressing the threshold constitutional question of jurisdiction to entertain a cause and the facts alleged to give rise to it, the cause and facts are presumed to be true as pleaded and attested.

(2) The legislation bearing upon the High Commissioner's jurisdiction to address the pleaded and attested cause of preventing genocide resulting from the fact of judicial willful blindness to existing constitutional law is:

> ***High Commissioner for the promotion and protection of all human rights, 1993,*** A/RES/48/141
>
> [Preamble]…Considering that the promotion and the protection of all human rights is one of the priorities of the international community,… Emphasizing the need for the promotion and protection of all human rights to be guided by the principles of impartiality, objectivity and non-selectivity, in the spirit of constructive international dialogue and cooperation,…Aware that all human rights are universal, indivisible, interdependent and interrelated and that as such they should be given the same emphasis,…Recognizing that the activities of the United Nations in the field of human rights should be rationalized and enhanced in order to strengthen the United Nations machinery in this field and to further the objectives of universal respect for observance of international human rights standards,…Reaffirming that the General Assembly, the Economic and Social Council and the Commission on Human Rights are the responsible organs for decision- and policy-making for the promotion and protection of all human rights,
>
> Article 4. Decides that the High Commissioner for Human Rights shall be the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General; within the framework of the overall competence, authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights, the High Commissioner's responsibilities shall be:
>
> (a) To promote and protect the effective enjoyment by all of all civil…rights;
>
> (b) To…make recommendations to them [Secretary-General, General Assembly, Economic and Social Council, Commission on Human Rights] with a view to improving the promotion and protection of all human rights;

(f) To play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world,…;

(i) To coordinate the human rights promotion and protection activities throughout the United Nations system;…

Article 5. Requests the High Commissioner for Human Rights to report annually on his/her activities, in accordance with his/her mandate, to the Commission on Human Rights and, through the Economic and Social Council, to the General Assembly.

Statute of the International Court of Justice

Article 65(1). The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

(2). Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article 66(1). The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

Article 67. The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

Rules of Court

Article 103. When the body authorized by or in accordance with the Charter of the United Nations to request an advisory opinion informs the Court that its request necessitates an urgent answer, or the Court finds that an early answer would be desirable, the Court shall take all necessary steps to accelerate the procedure, and it shall convene as early as possible for the purpose of proceeding to a hearing and deliberation on the request.

Article 104. All requests for advisory opinions shall be transmitted to the Court by the Secretary-General of the United Nations or, as the case may be, the chief administrative officer of the body authorized to make the request. The documents referred to in Article 65, paragraph 2, of the Statute shall be transmitted to the Court at the same time as the request or as soon as possible thereafter, in the number of copies required by the Registry.

(3) Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* precludes imposing "serious bodily or mental harm" upon groups such as the applicants' herein.

Statement of the Case

(4) The applicants have exhausted domestic and international legal remedies without either of the two constitutional enactments, upon which reliance has at all material times been based, ever being addressed.

(5) This willful blindness by the legal establishment of the world is causing the serious bodily and mental harm that is the subject matter of the complaint herein.

(6) In every case the domestic and international adjudicators fully have been informed of the genocidal consequence of ignoring the law.

(7) Toanunck's personal interest as applicant arises from occupancy of the Hudson River drainage basin of New York State, formerly the Mahican River prior to its discovery by Henry Hudson in 1610 on behalf of the Netherlands.

(8) The personal interest of Tthowgwelth derives from occupation of the Haida national territory, today called the Queen Charlotte Islands, which rest in the Pacific Ocean and are identified as part of the Province of British Columbia, Canada.

Argument

(9) Appendix A is the pleading commencing a recent set of cases, each separately and all collectively directed toward the single objective of persuading the Supreme Courts of Canada and the USA to address the constitutional law, their intentional ignoring of which enables ecogenocide in North America to occur outside the rule of law and, by extension of the principle of might is right, throughout the world.

(10) The constitutional law went into remission in North America in the 1870s when the Canadian and American national governments decided to back the local governments' unilateral occupation and disposition of the national territories formerly controlled by the indigenous governments, in spite of the constitutional legislation and precedents stipulating for indigenous consent as the precondition to such occupation and disposition.

(11) The first wave of unconstitutional occupiers was the legal establishment which prepared the way for an orderly and secure flood of the second wave: the land developers and settlers. The first buildings in the occupied territories were law offices, land registry offices, police stations and court houses. The lawyers drew up the land grants for signing by the local governments; the registry officers recorded the private titles; the police officers arrested the indigenous peoples who physically attempted to resist the unconstitutional invasion; the judges upheld the private titles and

imprisoned the constitutional objectors upon the basis of ignoring the constitutional question of the manifest conflict of laws between the constitutional law precluding the invasion and the local law under the auspices of which the invasion was occurring.

(12) Generation after generation of constitutional objectors went and continue to go to the grave in despair at the fraud pursuant to which the ostensible guardians of the rule of law—the lawyers, bureaucrats, police and judges—exceed their constitutional jurisdiction with the intention of exploiting the land with culpable indifference to the reasonably foreseeable, probable, open, notorious and visible genocide of the indigenous national governments and their constitutional constituents.

(13) As has been the norm in every imperial occupation since the beginning of recorded history the occupying power unconstitutionally constituted puppet governments of indigenous people who, for hope of advantage and fear of prejudice, collaborated and still do collaborate with the occupying power's lawyers, bureaucrats, police and judges in the genocide of the part of the indigenous nations that persists in resisting.

(14) The legacy of the collaboration is the multi-billion dollar network of what today euphemistically and misleadingly are termed "First Nations" in North America.

(15) These puppet-government agents of the genocide are the only "Indians" to whom the occupying power concedes legal standing.

(16) In summary the reason the constitutional law went into remission in the 1870s is, chicanery with intent unconstitutionally to steal the land, for profit, with indifference to the genocidal consequence.

(17) Even though in every generation since the 1870s the legal remedies systematically and systemically have been blocked by the complicity of the domestic legal establishment in North America, and by its influence in the framing of the terms of reference and thinking patterns of the international tribunals, two recent events signify a sea change. Their conjunction provides the basis for the renewed legal initiative to prevent the genocide that is recorded by Appendix A. In 2004 a Supreme Court Judge in *Lara v. US,* 541 US 193, 214-27, *infra* page *60(mt),* publicly told the truth about the judicial ignoring of the governing constitutional law. And in 2005 the Constitutional Court of Spain in *Menchu v. Montt* broke ranks with the conspiracy of silence heretofore seamlessly maintained by the world's legal establishment. The result has been the regeneration of the hope that as Ralph Waldo Emerson said in his *Essay on Character* (New York, Crowell Company, 1926, p. 329):

> Truth is the summit of being: justice is the application of it to affairs. All individual natures stand in a scale, according to the purity of this element in them. The will of the pure runs down from them into other natures, as water runs down from a higher into a lower vessel. This natural force is no more to be withstood, than any other natural force. We can drive a stone upward for a moment into the air, but it is yet true that all stones will forever fall; and whatever instances of can be quoted of unpunished theft, or of a lie which somebody has credited, justice must prevail, and it is the privilege of truth to make itself believed.

(18) Appendix A attempts to duplicate the precedent set by the Constitutional Court of Spain in *Menchu v. Montt* in 2005 in relation to the "universal extraterritorial jurisdiction" to prevent and punish genocide that is being enabled by "judicial inactivity" in the nation in which the genocide is taking place. The difference between Appendix A which hails from the Constitutional Court of Malta and *Menchu v. Montt* is the latter concerned genocide in the weak nation of Guatemala, whereas the case in Malta *Tthowgwelth and Toanunck v. Supreme Court of Canada and Supreme Court of the United States* concerns genocide within mighty nations. The principle of law and the reasoning, are identical to that of the Constitutional Court of Spain in relation to the imperative of ending the era when procedural law obstructionism and equivocation is employed by courts to evade the overriding jurisdiction to uphold the rule of law in relation to the substantive law preventing and punishing genocide.

(19) Appendix A identifies in the Maltese context the civil and criminal law, both substantive and procedural, that is common to all rule of law nations of the international community. It requires each judicially to act if and when the opportunity is presented to prevent genocide that demonstrably is occurring in consequence of the "judicial inactivity" in relation to it, in whatever nation it may arguably be occurring. Appendix A further identifies the universal sources of law that constitute the root of the North American constitutional law preventing genocide, which itself has

been reiterated severally by the constitutional law of all rule of law nations and collectively on behalf of all by the United Nations. Finally Appendix A identifies the particular expression of prohibition against genocide as manifested in the constitutional legislation of Canada and the United States and their original and authoritative precedents.

(20) The venue of Appendix B is the Supreme Court of New York. The parties are the same as in Appendix A. The facts and law identified in Appendix A have been repeated and relied upon by incorporation by reference. The purpose and utility of Appendix B is to give the court system of the United States another opportunity to stop ignoring the law, without having to be told to do so by any foreign court system. Based upon historical experience it is almost certain that the Supreme Court of New York will evade addressing the constitutional question upon one pretext or another or, if the question is addressed, will ignore the U.S. constitution's treaty clause and address only its commerce clause. The New York Court of Appeals equally certainly will ratify the chicanery below. The issue then will be whether the Supreme Court of the United States will grant *certiorari* to appeal.

(21) Since no power on earth is capable of forcing the United States to obey its own constitution, the only hope for the prevention of the genocide in question is that the Supreme Court of the United States will desist from its historical pattern of denying *certiorari* to applicants who ask

it to read the commerce clause *in pari materia* with the treaty clause, instead of blindsiding the latter in favour of dealing with the commerce clause in isolation.

(22) It is at this rapidly-approaching and crucial juncture that the recommendations of the set of courts involved in the set of Appendices, and of the High Commissioner of Human Rights, Secretary-General, Economic and Social Council, Human Rights Council, General Assembly, International Criminal Court and International Court of Justice urgently are needed. The present applicants Tthowgwelth and Toanunck need to include the recommendations in their application in the Supreme Court of the United States for *certiorari* to the New York Court of Appeals.

(23) In terms of content, purpose and utility Appendix C is identical to Appendix B, except for the substitution of British Columbia for New York as the originating venue and the Supreme Court of Canada for the Supreme Court of the United States as the destination tribunal.

(24) Appendix D is an application for a stay of proceedings in the National Energy Board of Canada upon the ground it *prima facie* has no jurisdiction in the unceded Indian territory to authorize the harvesting of oil and gas and its distribution throughout North America and abroad.

(25) Appendix E is before the International Criminal Court. Tthowgwelth and Toanunck have objected therein to the manifestly unequal application of the law represented by that court's first indictment.

Unless and until the structural flaw of indicting only the weak but never the mighty is addressed it can not be anything other than a fraudulent theater in which the mighty nations punish genocide and war crimes by the weak while reserving the right themselves to commit those crimes with impunity.

(26) Appendix F is Tthowgwelth's motion record for leave to appeal to Canada's Federal Court of Appeal from the arbitrary refusal of the National Energy Board to address the constitutional question (raised in Appendix D) of the genocide it is *prima facie* inflicting by proceeding with hearings without satisfying itself and justifying to the applicants that it has jurisdiction, with culpable indifference to the attested fact of the genocidal consequence of its assumption.

(27) More than any other single issue, the global extraction and distribution of the oil and gas resource required to continue the ecocide of the planet with indifference to the collateral damage of genocide, is the testing ground for proving the paramountcy of the rule of law in refutation of the abrogation by the present global reality that might is right. The method of evading the law that historically was perfected in the unconstitutional occupation of the indigenous national territories of North America is the mortal virus that is responsible for the pandemic of genocide that washes in waves upon every shore the interior of which has natural resources needed to fuel the holocaust engines of the global economy. Big oil runs the military-industrial complex that runs the governments that run

the courts that pervert the rule of law by exercising the jurisdiction to prevent and punish genocide when committed by the weak but not when committed by the mighty.

(28) The *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* further stipulates:

> Article 4. Persons committing genocide or any of the other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

(29) If in response to the requested recommendations by the High Commissioner of Human Rights the North American courts persist in ignoring the constitutional question and the consequent genocide, then the last presently available remedy to prevent the genocide will have been exhausted and the applicants may apply to the international community of the rule of law nations for criminal law sanctions to punish the judicial crime of genocide by the judicial chicanery of intentional inactivity.

(30) If the rule of law is to provide a remedy against genocide as an alternative to physical self-defense by violence, the rule of law itself must first be established. Its constitutive principles are constitutional supremacy, *stare decisis,* equal application, third-party adjudication and a correspondence between rights and remedies, not one of which currently exists in relation to the applicants' complaint of genocide.

(31) US Supreme Court Justice Clarence Thomas reportedly predicted he would go to his grave brokenhearted about the dishonesty on

race,[3] but the dishonesty that prevents the rule of law from preventing genocide, as culpable collateral damage to the ecocide of the planet, is by no means restricted to race. Racial dishonesty is but one avatar of the multi-headed beast that prevents the good and true law preventing ecogenocide from ruling. The heart is the opportunism of the subset of humankind that is charged with jurisdiction and duty of implementing the law. For this reason the world does not need and there is no point in the United Nations troubling itself to draft and promulgate any more human rights laws. The time spent crafting new lamps is time taken away from regulating human affairs in the perfectly adequate light of the existing lamps.

(32) The basket under which the old lamps shine must be lifted, and the only one who can lift it is the one who put it there and maintains it—the legal profession and the judiciary drawn from the legal profession—at the human rights pinnacle of which is the High Commissioner of Human Rights. The lie, allegiance to which in perpetuity postpones the triumph of truth on earth, is the intentional refusal of the guardians of the rule of law to permit the law to rule. *Justitia* and *Vertitas* are one and the same. When truth rules, justice will rule, through good and true law.

(33) Big oil is not *per se* the problem. The genocide-in-progress of which Tthowgwelth and Toanunck complain and that they seek hereby to

[3] *Infra,* Appendix A, page *15(mt).*

prevent from continuing began with European invasion, and the ensuing enforced substitution of the value of more is better instead of enough is enough. The fur and timber trade depopulated and despoiled the environment, and destroyed the aboriginal economy that formerly existed in sustainable harmony with it, long before big oil came into power. The smallpox blankets, the police terrorism, the imprisonments that broke the free spirits, the starvation induced by the damming of the rivers to interrupt the fish runs and by eradication of the plains bison food-resource by wanton slaughter, all preceded big oil, and all took place under the ostensibly benevolent gaze of the religious orders and the new priest class that emerged with the so-called age of reason and enlightenment—the legal profession—the administrator of that era's greatest boast though not its actual achievement: the rule of law. Big oil is merely the current champion for the big lie that the rule of law is real, the latest champion leading the charge for the so-called progress of civilization. Nevertheless, if the big lie that precludes justice as applied truth in modern times can be disarmed it can only be done by bringing its present champion big oil into the rule of law fold.

(34) The legislative intent of the enactment *High Commissioner for the promotion and protection of all human rights, 1993,* A/RES/48/141, was for "human rights to be guided by the principles of impartiality, objectivity and non-selectivity," formulated under the avowed awareness

"that all human rights are universal, indivisible, interdependent and interrelated and that as such they should be given the same emphasis."

(35) It was for the purpose of implementing the legislative intent of establishing the rule of law as equal application, and justice as the application of truth to affairs, without quarter given to the might is right abrogation of those high and true objectives, that the enactment *High Commissioner for the promotion and protection of all human rights, 1993,* A/RES/48/141, expressly and explicitly decided and stipulated:

> that the High Commissioner for Human Rights shall be the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General; within the framework of the overall competence, authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights, the High Commissioner's responsibilities shall be:
>
> (a) To promote and protect the effective enjoyment by all of all civil…rights;
>
> (b) To…make recommendations to them [Secretary-General, General Assembly, Economic and Social Council, Commission on Human Rights] with a view to improving the promotion and protection of all human rights;
>
> (f) To play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world,…;
>
> (i) To coordinate the human rights promotion and protection activities throughout the United Nations system;

(36) Precisely because the said legislative intent of *High Commissioner for the promotion and protection of all human rights, 1993,* A/RES/48/141, was not in fact historically implemented by the High Commissioner for Human Rights in the years 1993 through 2006, on March

15th the General Assembly of the United Nations enacted *Human Rights Council, 2006,* A/RES/60/251.

(37). Its preamble reiterates in the same words the aforesaid legislative intent proclaimed by its predecessor and then, citing as cause the need to "redress the shortcomings" of the Commission on Human Rights, enacts that the General Assembly:

> Article 1. *Decides* to establish the Human Rights Council…in replacement of the Commission on Human Rights, as a subsidiary of the General Assembly;…
>
> Article 2. *Decides* that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner;
>
> Article 3. *Decides also* that the Council should address situations of violations of human rights, including gross and systemic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system;
>
> Article 4. *Decides further* that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity,…;
>
> Article 5. *Decides* that the Council shall, inter alia:
>
> (*c*) Make recommendations to the General Assembly for the further development of international law in the field of human rights;
>
> (*d*) Promote the full implementation of human rights obligations undertaken by the States…;
>
> (*e*) Undertake a universal periodic review based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States…;
>
> (f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;
>
> (*g*) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner of Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993;
>
> (*i*) Make recommendations with regard to the promotion and protection of human rights;…

Conclusion

(38). THEREFORE THE RELIEF SOUGHT should be granted. The High Commissioner for Human Rights should issue an emergency report pursuant to *High Commissioner for the promotion and protection of all human rights, 1993,* Article 5, A/RES/48/141, and *Human Rights Council, 2006,* A/RES/60/251, Articles 1-5. That report should recommend to the outgoing Commission on Human Rights and the incoming Human Rights Council, to the Economic and Social Council, and to the General Assembly, that they, or any of them, forthwith requisition an advisory opinion from the International Court of Justice pursuant to the *Statute of the International Court of Justice,* Article 65(1), accelerated pursuant to the *Rules of Court,* Article 103. The question is, whether the Organs and Agencies of the United Nations have jurisdiction to continue applying human rights law to weak nations while turning a blind eye to the genocide-in-progress caused by "judicial inactivity" within Canada and the United States. Secondly, the Supreme Courts of Canada and the United States should be asked to address Section 109 and Article II, §2, ¶2, clause 1, respectively.

August 22, 2006.

Bruce Clark, LL.B., M.A., Ph.D.
AGENT/COUNSEL
18400 King's Road, P.O. Box 215
Martintown, ON Canada K0C 1S0
Email: <mightisnotright@gmail.com>
Phone:+1 (613) 528-1433
Fax: +1 (613) 528-1333

APPENDIX A
No. 18/2006

IN THE
Civil Court First Hall, Constitutional Sitting

NOTICE TO RESPONDENTS
Code of Organization and Civil Procedure, §156(1)(d)

Whosoever is in receipt of this sworn application in his regard shall file a sworn reply within twenty (20) days from the date of service thereof, which is the date of receipt. Should no written sworn reply be filed in terms of the law within the prescribed time, the Court shall proceed to adjudicate the matter according to law.

It is for this reason in the interest of whosoever receives this sworn application to consult an advocate without delay that he may make his submissions during the hearing of the case.

Tthowgwelth and Toanunck,

Applicants,

v.

Supreme Court of Canada and Supreme Court of the United States,

Respondents.

APPLICATION PURSUANT TO THE *CONSTITUTION,* ARTICLE 46(2), FOR A CONSTITUTIONAL DECLARATION OF JURISDICTIONAL LAW ALONE

To prevent the genocide-in-progress in North America from continuing contrary to Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* in virtue of the Respondents' judicial inactivity refusing to address the *Constitution Act, 1867,* §109 and the *Constitution, 1789,* Article II, §2,¶2, clause 1.

DECLARATION OF APPLICANTS

We, Tthowgwelth and Toanunck, the applicants, respectively of Masset, British Columbia, and North Granville, New York, MAKE OATH AND SAY AS FOLLOWS:

(1) All of the parties speak English but not Maltese and accordingly this document is in English pursuant to the *Judicial Proceedings (Use of English Language) Act,* §2(a).

(2) The information stipulated by the *Code of Organization and Civil Procedure,* §156(1)(a), (b) and (c) is particularized and enumerated hereinafter and is true.

(3) Since this application is restricted to a constitutional question of jurisdictional law alone the attested facts are presumed true and, correspondingly, no *viva voce* witnesses need (or indeed may without leave) be called pursuant to the said *Code,* §156(4).

SWORN at Vancouver, British Columbia, Canada, March 1, 2006.

/s/ "Jeffrey S. Witten"
JEFFREY S. WITTEN
Notary Public, British Columbia

/s/ "TTHOWGWELTH aka Lavina White"
Applicant/Affiant Tthowgwelth

SWORN at Granville, New York, United States of America, March 1, 2006.

/s/ "Jenny Linda Martelle"
JENNY LINDA MARTELLE 01MA6068020
Notary Public, State of New York
Qualified in Washington County
My Commission Expires 12/24/2009

/s/ "TOANUNCK X aka Edward VanGuilder"
Applicant/Affiant Toanunck

Applicants *Pro Se*
ADDRESS FOR SERVICE:
Bruce Clark, LL.B., M.A., Ph.D.
Flat 10
Zodiac Flats
63, Victory Street
Gzira GZR02
Malta
Tel. +1 613 528-1433
Email mightisnotright@gmail.com

Attorney General Canada
Counsel for Respondent
c/o Consulate of Canada
103, Triq l'Arcisqof
Valletta VLT04

Attorney General USA
Counsel for Respondent
c/o Embassy of the USA
Flr. 3, Dev. House, Sant' Anna
Floriana VLT10

Constitutional Question

Does this Court share[1] the universal extraterritorial jurisdiction to prevent genocide arguably being caused by the intentional judicial inactivity of foreign national court systems and, if so, will this Court exercise such jurisdiction by respectfully and in comity declaring the respondent Courts forthwith should address the constitutional law of North America inaugurated in equity by the papal bull *Sublimus Dei, 1537,* and confirmed at law by the *Constitution of Canada, 1867*, Section 109, as settled by *Attorney General of Ontario v. Attorney General of Canada,* [1897] AC 199, 205, 210-11 (JCPC), and by the *Constitution of the United States, 1789,* Article II, §2, ¶2, clause 1, Article V and Amendment X, as settled by *Fletcher v. Peck,* 6 Cranch's 87, 121 (SC 1810), in the light of *Lara v. US,* 541 US 197, 214-227 (2004)(Thomas, J) and *R. v. Marshall; R. v. Barnard,* 2005 SCC 43, ¶¶48, 107?

A Note Regarding Headings and Organization: For ease of intelligibility to the respondents and the international community of national courts, this document is formatted as for applications for *certiorari* in the USSC. The submission is, the Civil and Constitutional Courts of Malta jurisprudentially are multi-lingual due to their special legal and cultural history as semitic-speakers versed in both the Euro-Continental and Anglo-American rule of law legal traditions. Aside from this minor accommodation as to form all of the information required for the addressing of the substantive issue is contained herein *mutatis mutandis.*

[1] Appendix A: *Menchu v. Montt*, *2005,* page *27(mt)*.

Table of Contents

Table of Authorities

UNIVERSAL

MALTESE

AMERICAN

CANADIAN

Jurisdiction

(1). For the purpose of addressing the threshold question of a court's jurisdiction to entertain a cause and the facts alleged to give rise to it, the cause and facts are presumed to be true as pleaded and attested. The law bearing upon this Honourable Court's particular jurisdiction to address the pleaded and attested cause of preventing genocide resulting from the fact of judicial willful blindness to existing constitutional law are the articles of the *Constitution* and the sections of the *Criminal Code* which enact and confirm that Malta subscribes to the rule of law and the fundamental human right not be made a victim of genocide and, furthermore, is an independent and impartial third-party relative to the constitutional question of jurisdiction herein raised.

> Article 1(1). Malta is a democratic republic founded on work and on respect for the fundamental rights and freedoms of the individual.
>
> Article 1(3). Malta is a neutral state actively pursuing peace, security and social progress among all nations by adhering to a policy of non-alignment and refusing to participate in any military alliance.
>
> Article 36(1). No person shall be subjected to inhuman or degrading punishment or treatment.
>
> Article 37(1). No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition.
>
> Article 39(2). Any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial;…
>
> Article 65(1). Subject to the provisions of this Constitution, Parliament may make laws for the peace order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's regional obligations in

> particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003.
>
> Section 54A(1). It is a crime for a person to commit genocide, a crime against humanity or a war crime.
>
> Section 54B(1). Genocide is committed where any of the following acts is committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such –
>
> 16. causing serious bodily or mental harm to members of the group.
>
> Section 54B(2). Whosoever directly and publicly incites others to commit genocide shall be guilty of a crime.

(2). The universal extraterritorial criminal law jurisdiction identified by the Constitutional Court of Spain in *Menchu v. Montt* on September 26, 2005,[5]—to punish genocide occurring in consequence of the Guatemalan courts' apparent judicial inactivity in relation to preventing it—*a fortiori* applies to the Maltese courts' civil law jurisdiction to prevent the same crime occurring in consequence of the counterpart judicial inactivity of the national courts of Canada and the USA.

(3). The universal jurisdiction to prevent genocide in the Americas was settled, in equity, by the Roman Catholic Apostolic Religion's Church's legislative declaration *Sublimus Dei, 1537*:

> The sublime God so loved the human race that He created man in such wise that he might participate, not only in the good that other creatures enjoy, but endowed him with capacity to attain to the inaccessible and invisible Supreme Good and behold it face to face; and since man, according to the testimony of the sacred scriptures, has been created to enjoy eternal life and happiness, which none may obtain save through faith in our Lord Jesus Christ, it is necessary that he should possess the

[5] *Supra,* p. i, n. 1.

> nature and faculties enabling him to receive that faith; and that whoever is thus endowed should be capable of receiving that same faith. Nor is it credible that any one should possess so little understanding as to desire the faith and yet be destitute of the most necessary faculty to enable him to receive it. Hence Christ, who is the Truth itself, that has never failed and can never fail, said to the preachers of the faith whom He chose for that office 'Go ye and teach all nations.' He said all, without exception, for all are capable of receiving the doctrines of the faith.
>
> The enemy of the human race, who opposes all good deeds in order to bring men to destruction, beholding and envying this, invented a means never before heard of, by which he might hinder the preaching of God's word of Salvation to the people: he inspired his satellites who, to please him, have not hesitated to publish abroad that the Indians of the West and the South, and other people of whom We have recent knowledge should be treated as dumb brutes created for our service, pretending that they are incapable of receiving the Catholic Faith.
>
> We, who, though unworthy, exercise on earth the power of our Lord and seek with all our might to bring those sheep of His flock who are outside into the fold committed to our charge, consider, however, that the Indians are truly men and that they are not only capable of understanding the Catholic Faith but, according to our information, they desire exceedingly to receive it. Desiring to provide ample remedy for these evils, We define and declare by these Our letters, or by any translation thereof signed by any notary public and sealed with the seal of any ecclesiastical dignitary, to which the same credit shall be given as to the originals, that, notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and have no effect.
>
> By virtue of Our apostolic authority We define and declare by these present letters, or by any translation thereof signed by any notary public and sealed with the seal of any ecclesiastical dignitary, which shall thus command the same obedience as the originals, that the said Indians and other peoples should be converted to the faith of Jesus Christ by preaching the word of God and by the example of good and holy living.

(4). The equitable and legal principle of *Sublimus Dei* was incorporated into the constitutional law of Malta by necessary implication of law alone when Article 2(1) the *Constitution* enacted, "The religion of Malta is the Roman Catholic Apostolic Religion."

(5). *Sublimus Dei* was incorporated into the constitutional law of the United Sates by the *Constitution* (USA), Article II, §2, ¶2, clause 1, enactment, "He [the president] shall have power, by and with the advice and consent of the senate, to make treaties." Thus in the constitutive interpretation precedent *Fletcher v. Peck,* 6 Cranch's 87, 121 (1807) the Supreme Court of the United States settled the Indian interest, "is certainly to be respected by all courts," to which the same court added in *Worcester v. Georgia,* 6 Peter's 515, 560, 581 (1832), "Except by compact we have not even claimed a right of way through Indian lands…What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self government."

(6). This was reiterated by the Canadian *Constitution Act, 1867,* Section 109 as follows:

> All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

The crucial paramountcy phrase therein, "subject to," constitutively was settled by the Judicial Committee of the Privy Council in *Attorney General of Ontario v. Attorney General of Canada: In re Indian Claims,* [1897] AC 199, 205, 210-211, to signify:

> The beneficial interest in the territories ceded by the Indians under the treaties became vested, by virtue of s. 109, in the Province of Ontario…The effect of the treaties was, that, whilst the title to the lands

> ceded continued to vested in the crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds, passed to the Government of the Province.…An interest other than that of the province in the same [within the meaning of section 109 of the constitution] appears to them [their Lordships] to denote some right or interest in a third-party, independent of and capable of being vindicated in competition with the beneficial interest of the old province.

(7). Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* precludes imposing "serious bodily or mental harm" upon a groups such as the applicants'.

(8). Where there is a right there is a remedy and, correspondingly, where there is a universal right there is a universal remedy, from which perspective the convention merely reiterates what has been the law governing the Americas since *Sublimus Dei, 1537*. It identifies the universal right that has always existed, in relation to which the universal remedy identified by the Constitutional Court of Spain also has always existed, albeit only recently declared, a jurisdiction and burden by necessary implication of law alone fully shared by the Civil Court First Hall and the Constitutional Court of Malta.

Statement of the Case

(9). The applicants have exhausted both domestic criminal and civil court, and international tribunal, remedies without any such court or tribunal accepting jurisdiction to address the aforesaid constitutional law, the continuing non-addressing of which causes the North American indigenous nations "serious bodily and mental harm" of mortal

consequence within the meaning of the said Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* which itself substantively has been incorporated by reference into the domestic law legal systems of Canada and the USA.

(10). In every case the domestic courts and international tribunals fully have been informed of the genocidal[6] consequence of failing to

---

[6] *Law Society of Upper Canada v. Bruce Clark,* June 19, 1996, unreported Decision on Appeal, cited in Bruce Clark, *Justice in Paradise,* McGill-Queens University Press, Montreal and Kingston, 1999, p. 211: "It would be difficult to disagree with Mr. Clark's assertion that the issue that his argument raises is 'constitutionally critical'. Again, the discipline hearing panel found that Mr. Clark honestly believes that the comments and conduct particularized in the complaint—which are an outgrowth of his argument—were intended to advance the cause of justice and the rule of law. The 'genocide' of which Mr. Clark speaks is real, and has very nearly succeeded in destroying the Native Canadian community that flourished here when European settlers arrived. No one who has seen many of our modern First Nation communities can remain untouched by this reality.…The issue Mr. Clark raises is one of great significance for the entire people—and for all of us. His commitment to the argument and his conviction respecting its correctness cannot be questioned…The nature of Mr. Clark's argument is such that the persistent refusal of the courts—he states, without contradiction, that he has attempted to raise this argument some forty-one times—itself in part engenders his fixed and firm conclusion that his argument is correct. The issue has not been determined by any Court…Convocation considers the panel's finding of ungovernability to be unsustainable in this case." *c.f.*: *Delgamuukw v. Attorney General of British Columbia,* Supreme Court of Canada Case File 23779, unreported Reasons for Judgment on a Motion to State a Constitutional Question, September 12, 1995, cited in *Justice in Paradise,* p. 364, per CHIEF JUSTICE LAMER speaking *viva voce* from the bench and addressing Counsel Bruce Clark, "If you had decided to initiate or if you decide tomorrow morning to initiate in the Supreme Court of British Columbia an action for declaratory relief saying that the British Columbia courts have no jurisdiction, that is a different matter and you could be arguing to the judge that, well, this is an issue that has never been tried and I want a declaratory [judgment], but we are talking about doing this within the four corners of this appeal. And what you have going against you is that, while you might have a good point to argue in the British Columbia Court of Appeal, this is not the place to start the thing…MR. BRUCE CLARK: On July 6 [1995], your Lordship refused leave to appeal on the same point of law pursuant to s. 40(1) of the *Supreme Court Act,* the sole test for which is the issue of importance. You, my Lord, have already decided this issue is not of sufficient importance to occupy the Court's time. For you now to say that it is realistically open to Xsgogimlahxa to commence a separate action and to work his way through the court system, as was done on those eleven other applications is blatant chicanery. CHIEF JUSTICE LAMER: I must remind you, Mr. Clark, that I do not intend to tolerate such language on the part of any counsel including yourself. MR. BRUCE CLARK: Nor, sir, do I

address the constitutional law. In addition to their own direct involvement as parties before the several courts and tribunals the applicants have been members of an association of like-minded indigenous nations all attempting, through Counsel Bruce Clark over the past 35 years to have the same law addressed. Though the law has never been addressed the said Counsel was convicted of criminal contempt of court and correspondingly disbarred upon the basis of the unsupported and insupportable fiction that on at least 40 occasions when previously raised by Clark the law relied upon had been addressed and discounted on its merits by the domestic judiciary,[7] and that he was "hectoring" by persisting with a scandalous *res judicata* issue.

---

intend to tolerate treason, fraud and complicity in genocide against our *Constitution* and against the aboriginal peoples of this country…CHIEF JUSTICE LAMER: Proceed, proceed."

[7] *R. v. Bruce Clark,* September 15, 1995, unreported citation of Clark for criminal contempt in the face of the court in British Columbia 3 days after Chief Justice Lamer in *Delgamuukw, supra,* recommended to Clark that he return to British Columbia to raise the jurisdiction/genocide issue at the trial level as a constitutional question of first instance (*supra*). The citing judge refused to defer to a third-party judge and instead confirmed his own citation on February 21, 1997, on the ground, "Surprisingly, and regrettably, the Law Society of Upper Canada seemed to condone much of Clark's hectoring as 'zealous' advocacy—necessary because judges did not give him a proper audience, or consider his argument. *That is a false premise.* Judges have listened patiently and carefully to his argument. Must a court listen to the same legal argument for the 41st time when that argument has been heard, considered and rejected 40 consecutive times at all levels in Canada?" Since that finding of fact was unsupported and is insupportable Clark appealed but the Supreme Court of Canada again denied leave to appeal on the ground of no public importance and, correspondingly, Clark was then disbarred as a convicted criminal, again without the constitutional question and the law speaking to it being addressed. *See also*, *United States v. Pitawanakwat,* [2001] 1 CNLR 340, 358-9, in which the United States Magistrate Judge of the US District Court for the District of Oregon refused Canada's application to extradite one of Clark's native clients to serve the balance of his prison sentence for conviction of the crime of defending the unceded Indian territory during the same historical insurrection as that in relation to which Clark himself was convicted and disbarred, on the ground the Canadian court conviction had

(11). Toanunck's personal interest as applicant arises from occupancy of the Hudson River drainage basin of New York State, formerly the Mahican River prior to its discovery by Henry Hudson in 1610 on behalf of the Netherlands. The nation-to-nation relationship between the British crown and the whole Mahican nation (as opposed to between the crown and any particular local band government of the said nation), formally was recognized for the first and last time by a treaty contracted in western Massachusetts on April 25, 1724. The 29 signatory chiefs and headmen of the several local bands then surviving included one John VanGuilder whose Indian name was Toanunck. The applicant herein is Edward VanGuilder who inherited the name and the interest of Toanunck both by right of succession and of continued occupancy of the ancestral Mahican national territory. The treaty surrendered a portion of the Mahican national territory and reserved the remainder. By registered Indian deeds dated October 24, 1737, and June 1, 1756, the said remainder was transferred from the nation to Toanunck's particular local band, which at the time remained pagan. The balance of the Mahican bands comprising the nation dissolved in favour of being reorganized as a Christian mission community, which then was transported from the Mahican national territory on the Atlantic coast to a new reservation west of the Mississippi River. The Mahican nation still in occupation was and remains

---

been political not legal and in consequence was non-extraditable under United States law; as to which *c.f.* the *Constitution* (Malta), Article 43(2): "No person shall be convicted of an offence of a political character."

Toanunck's local band of the nation. Subsequently, in order to evade deportation which had become an integral part of the newly inaugurated American policy of ethnic cleansing of lands being settled by force rather than by treaty, it relocated itself to a remote corner of the territory and went underground, concealing its political identity while nevertheless continuing to reside together, to inbreed and to maintain its political and cultural integrity and segregation. Periodic references to the continuing existence of the nation in New York occur in the written historical with infrequency. For example, a pseudo-scientific eugenics report was published in 1912 with the financial support of Mr. John D. Rockefeller and Mrs. E.H. Harriman. It recounted the history of the exodus of the Toanunck community from its traditional hunting grounds in the middle of Hudson River drainage basin to its present location in the northern hinterland thereof, by the town of Granville, New York, the address of the applicant herein. On the ground the group incorrigibly was inbreeding and persisting in its base Indian life-style rather than assimilating upwards into the more civilized mainstream American culture surrounding it, the study recommended genocide by means of compulsory sterilization and forced disbanding of the contiguous residence pattern of the community. The federal government of the United States refuses to recognize and deal with this remnant of the Mahican nation upon the basis of the constitutional law and the treaty, on the ground the constitutional national status of all the remaining indigenous nations within America was repealed by federal statute 16 Stat. 566

(1871), and maintains the group does not comply with the regime of federal law unilaterally enforced in lieu of the constitutional law which is premised upon Indian consent. The domestic courts refuse to allow Toanunck to present the constitutional law precluding the said territorial application of federal law, on the ground he does not have federal law standing to sue in the American courts. The fact he manifestly has constitutional law standing preemptively is held not to be arguable, on the ground the said Act of Congress 16 Stat. 566 (1871), codified at 25 USC §71, supposedly repealed the previously established national status of the Indian nations by precluding future treaties with them, as if a domestic statute genuinely could repeal a constitutional enactment. International tribunals will not address the same constitutional law, on the ground that it is an issue exclusively reserved to the national courts of the USA. The reasonably foreseeable, probable, actual and attested consequence of this institutionalized chicanery in abrogation of the rule of law is "serious bodily and mental harm" to the applicant and the Mahican nation he represents, contrary to Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948.*

(12). The personal interest of Tthowgwelth[8] derives from occupation of the Haida national territory, today called the Queen

[8] *Justice in Paradise, supra,* p. 5 n.4: "I once asked a highly respected Haida elder named 'Sound-of-Many-Copper-Shields,' a princess of the royal line in the Queen Charlotte Islands: 'What is Indian law?' Without a moment's hesitation she replied: 'Respect.' She made it seem so simple. I believed her, and know that she is right. All else that is worthy of the name of law flows from that jurisprudential spring. As Ralph Waldo Emerson

Charlotte Islands, which rest in the Pacific Ocean and are identified as part of the Province of British Columbia, Canada. She is a member of the hereditary caste that exists to serve and implement the political consensus of all the families and totems constituting the nation. Her territory has not been the subject of any treaty and therefore the Canadian crown's "Interest" in it remains "subject to" her indigenous "Interest" within the meaning of §109 of the Canadian *Constitution Act, 1867.* The difficulty is, the Canadian *Indian Act, 1876,* enacted as a matter of federal law the same thing as did the 1871 federal legislation in the United States. In the result the Canadian courts and the international tribunals will not hear her complaint of genocide-in-progress either.

(13). Only one judge in North America since the 1870's has been ready and willing to address the conflict of laws that exists between the

---

defined 'justice' as the application of truth to affairs, she defined 'law' as the application of respect to affairs. Justice and law represent the juristic dimension of truth and respect." (See also, *ibid*, p. 39, photograph of "Tthowgwelth (Sound-of-Many-Copper-Shields) or Lavina White, Haida princess, and her grandson Anthony, taken in British Columbia.") *c.f.*: E.B. O'Callaghan et al, eds., *Documents Relative to the Constitutional History of New York,* 15 Vols., (Albany 1856-1883) 7:634, quoting the Direction from the Lords of Trade and Plantations on behalf of George III to Sir William Johnson, Superintendent of Indian Affairs for the Northern District of North America, dated at Whitehall, 10 July 1764: "a steady and uniform attachment to and love of Justice and Equity is one of their [the Indians] first principles of Government." *c.f.*: Rosanne Zammit, "New Gozo Bishop…," *The Times,* January 7, 2006, p. 40: "…the Episcopal motto of [new Bishop] Mgr Grech is: "In the breaking of the bread." The Eucharist, the taking of God into the body expresses and confirms the Unity, the Way, the Truth, the Life; the same as does the sacrament of the indigenous people of North America of singing their invitation to the plant and animal people, their benediction to "All Our Relations," to gift their life force; the same as the Bahgavadgita's, "True knowledge is seeing the unchanging Life in all the lives and in the separate, One Inseparable"; the same as the Encyclical *Dei Caritas Est* affirms all these are Love; the same as *Sublimus Dei, 1537,* conceded the Truth and Justice of their Possession and their Liberty to the indigenous peoples of the Americas.

previously established constitutional law, and the federal legislation and judge-made common law unconstitutionally supplanting it. Of his own motion, since the Supreme Courts in North America will not concede legal standing to any indigenous person to make the point, Mr. Justice Clarence Thomas on July 20, 2004, made the same point as that for the making of which the applicant's counsel Bruce Clark was criminalized and disbarred for making earlier. In a concurring judgment otherwise applying federal law without questioning its constitutionality, he held in *United States v. Lara,* 541 US 193, 214-227 (2004):

> In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously.…
>
> In 1871, Congress enacted a statute that purported to prohibit entering into treaties with the "Indian nation[s] or tribe[s]." 16 Stat. 566, codified at 25 USC §71. Although this Act is constitutionally suspect (the Constitution vests in the President both the power to make treaties, Art. II, §2, cl. 2, and to recognize foreign governments, Art. II, §3; see, *e.g., United States v. Pink,* 315 US 203, 228-230 (1942)), it nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter. To be sure, this does not quite suffice to demonstrate that the tribes lost their sovereignty. …Federal Indian policy is, to say the least, schizophrenic.
>
> And this confusion continues to infuse federal Indian law and our cases. ((note 4):…this is precisely the confusion that I have identified and that I hope the Court begins to resolve.)
>
> …I believe we must examine more critically our tribal sovereignty case law. Both the Court and the dissent, however, compound the confusion by failing to undertake the necessary rigorous constitutional analysis. I would begin by carefully following our assumptions to their logical conclusions and by identifying the potential sources of federal power to modify tribal sovereignty.…
>
> I do, however, agree that this case raises important constitutional questions that the Court does not begin to answer. The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty…and I would be willing to revisit the question.…

> The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain the tribes possess anything resembling "sovereignty." The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgement might allow the Court to ask the logically antecedent question *whether* Congress (as opposed to the President) has this power. A cogent answer would serve as the foundation for the analysis of the sovereignty issues posed by this case. We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.

(14). In response to Justice Thomas' requisition the applicants themselves and by means of other indigenous nations with which they are associated, *pro se* (in consequence of denial of counsel since the only lawyer ready, willing and able to raise and defend the law upon they rely has been criminalized and disbarred for doing so[9]) delivered the invited legal research in the form of the legislation and precedents[10] herein. This judicially-requisitioned research previously had been carried out by Clark as his successfully-defended doctoral thesis in fundamental human rights comparative law in the Department of Jurisprudence, Faculty of Law, University of Aberdeen, Scotland.

(15). Even in the glare of the fresh light cast by Justice Thomas, the domestic courts of Canada and the USA continued to refuse to address the (constitutional versus federal) conflict of laws constitutional question. Blatantly to the contrary the Supreme Court of Canada instead signaled that

---

[9] *Supra*, p. 5 n.4 and p. 6 n.5.
[10] Appendix B: North American Constitutional Law

henceforth aboriginal rights were to be entirely and exclusively a matter of judicial discretion in relation to the art of balancing the political fairness of the competing racial/political aspirations. Specifically, the previously settled law defining the aboriginal right as exclusive territorial possession and jurisdiction as constitutionally affirmed by Section 109 of the *Constitution Act, 1867,* knowingly and willfully has been precluded from future consideration. *R. v. Marshall; R. v. Bernard,* 2005 SCC 43, ¶¶43,107, held:

> The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right.

(16). The Supreme Court of the United States achieves the same reading-out of the constitutional law the treaty clause by the perversely willful expedient of addressing the *Constitution's* commerce clause, in isolation, rather than *in pari materia* as required by the rule of construction for all statutory instruments. The complementary rule of construction governing *in pari materia* statutory readings is, the later overrides the former and the specific overrides the general. The treaty clause appears in the *Constitution* following the commerce clause, and is specific concerning territorial possession and jurisdiction pending treaty. When the two are read in *pari materia* the net result therefore can only be, Congress has unilateral jurisdiction to regulate America's commercial trade relationship with the Indian tribes but not to take possession of or jurisdiction over their land except by treaty made with them, contracted by the President and ratified

by the Senate. In sum, the commerce clause must be read "subject to" the treaty clause. The way the US Supreme Court (except for Thomas, J) converts the commerce clause into a delegation of plenary Congressional jurisdiction to take the land is never to read the two clauses *in pari materia*. It simply addresses the commerce clause and willfully blindsides the treaty clause, and then obscures this chicanery behind the smokescreen of the unconstitutional, irrelevant, voluminous and internally inconsistent edifice known as "federal Indian law." As Justice Thomas is quoted as saying in his biography, "I will go to my grave brokenhearted about the dishonesty on race."[11]

(17). Thus the rest of the Court in willful blindness to the treaty clause identified by Thomas, J, held in *U.S. v. Lara,* 541 US 193, 200 (2004):

> …the central function of the Indian Commerce Clause, as we have said, is to provide Congress with plenary power to legislate in the field of Indian affairs.

(18). The said "Indian Commerce Clause" is Article I, §8, ¶3, which enacts, "The Congress shall have power To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The US *Constitution* not only expressly requires bi-lateral treaties but explicitly precludes the assumption of plenary jurisdiction by the 10th Amendment which enacts, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the

[11] Ken Foskett, *Judging Thomas: The life and times of Clarence Thomas,* William Morrow Harper Collins Publishers, New York, 2004.

States respectively, or to the people." Thus, far from expressing a legislative intent to invest in Congress a unilateral "plenary" jurisdiction, in the interest of commerce, to occupy and govern by US federal law force the national territories of "foreign nations" and "Indian tribes," the express and explicit legislative intent is to preclude the assumption of plenary jurisdiction.

(19). In relation to the African and Indigenous races in particular, the binding and authoritative precedent precluding plenary jurisdiction in the absence of a formal constitutional amendment is *Scott v. Sandford,* 19 How. 393 (1857), which settled there is no federal plenary jurisdiction to modify either's constitutionally-fixed status.[12]

Argument

PART A. AS TO THE COURT'S SUBSTANTIVE LAW JURISDICTION

(20). For the purpose of assessing the constitutional jurisdiction of this Civil Court First Hall in relation to the contended for universal extraterritorial genocide jurisdiction, the facts and mixed fact and law as pleaded above procedurally are presumed true.

(21). The Civil Court First Hall is not being asked to adjudicate the truth of those facts and mixed fact and law, but rather to declare in comity that North American courts should address the *prima facie* conflict of laws the resolution of which is the precondition to the ascertaining of the

[12] Appendix B. The relevant excerpts from the famous (from the perspective of constitutional integrity) or infamous (from the perspective of sovereign federal power) as the case may be, appear hereinafter in chronological sequence in the appendix.

relevancy and sufficiency of those facts and mixed fact and law in terms of pleading.

(22). If in response to the declaration of this Court the North American courts persist in ignoring the said conflict of laws and, correspondingly, in continuing to fail to address the legitimacy of the allegation of the consequent genocide, then the last presently available remedy to prevent the genocide will have been exhausted and the applicants may apply to the international community of the rule of law nations for criminal law sanctions to punish the judicial crime of genocide by the judicial chicanery of intentional inactivity.

(23). If the rule of law is to provide a remedy against genocide as an alternative to physical self-defense by violence, the rule of law itself must first be established. Its constitutive principles are constitutional supremacy, *stare decisis,* equal application, third-party adjudication and a correspondence between rights and remedies, not one of which currently exists in relation to the applicants' complaint of genocide in North America.

(24). Constitutional supremacy is in abeyance because the North American legal profession and judiciary willfully-knowingly are blindsiding Section 109 of the Canadian *Constitution Act, 1867,* and Article II, §2, ¶2, clause 1 of the US *Constitution*. The reason they do this is, the legal profession and judiciary literally and physically themselves invaded

and occupied the yet-unceded Indian territories under the auspices of the manifestly unconstitutional federal law enacted in 1870s. They themselves implemented the system of real estate conveyancing that dispossessed the indigenous nations and turned them into criminal trespassers in their own unceded homelands. In the result the legal profession and judiciary labour under the profound conflict of interest consequent upon being at the same time the perpetrators of genocide and the supposed remedy providers for relief against that crime.

(25). *Stare decisis* is in abeyance because the legal profession, judiciary and academia look to the most recent court decisions based upon judge-made interpretations and applications of the federal legislation and federal common law, rather than go behind them to the constitutive constitutional legislation and precedents of 1537-1870, the blindsiding of which renders the entire edifice of contrary federal law 1870-present *per incuriam* non-law. There is even an ersatz jurisprudential philosophy in an attempt to clothe this abrogation of *stare decisis* with credibility—the so-called "living tree" rule of construction—pursuant to which the judiciary prunes the *Constitution* of what it emotionally feels is deadwood, rather than leaving that task to the sovereign people of the constitutional democracy to achieve by their constitutionally-stipulated amendment formulas. The North American judiciary (Thomas, J, excluded) habitually

does precisely what E.V. Dicey[13] correctly explained is *ultra vires* the judicial power:

> Judge-made law is subject to certain limitations. It can not openly declare a new principle of law: it must always take the form of a deduction from some legal principle whereof the legal validity is admitted, or the application or interpretation of some statutory enactment. It can not override statutory law. The courts may, by a process of interpretation, indirectly limit or possibly extend the operation of a statute, but they cannot set a statute aside. Nor have they in England ever adopted the doctrine which exists, one is told, in Scotland, that a statute may be obsolete by disuse. It can not from its very nature override any established principle of judge-made law.

(26). Equal application is in abeyance because while the judiciary respected the constitutional disadvantage under which the African race in America suffered prior to the 13th Amendment, it blindsides the constitutional advantage of the indigenous race, modification of which similarly requires recourse to the constitutional amendment formula. The Supreme Court of the United States in the 1857 *Dred Scott* case was true to the rule of law and its inherent principle of limiting the judicial power to create or change law. But when it comes to the constitutional advantage of the indigenous race identified and affirmed in the same *Dred Scott* case, the judiciary embraces the untenable assumption of federal plenary jurisdiction to negate the advantage.

(27). Third-party adjudication is in abeyance because the non-indigenous North American judiciary historically made a conscious decision institutionally to invade and occupy the yet-unceded Indian

---

[13] *Lectures on the Relation between Law and Public Opinion in England in the Nineteenth Century,* London, Macmillan, 1920, 483.

territories. By so doing, it placed itself in direct competition with the dispute resolution institutions of the indigenous nations in place since time immemorial. When the Indian tribunals exercised their constitutionally guaranteed adjudicative jurisdiction the non-indigenous judiciary treated them as criminals. At the time the fateful decision to usurp and to monopolize the judicial power was taken and implemented, the constitutional law precluding it was common knowledge. One has only to read the legal historical record (Appendix C hereto) to comprehend how overwhelmingly the constitutional law was settled and understood, to realize there is no possibility of honest judicial mistake. Once the decision to usurp was acted upon, the non-indigenous judiciary made of itself a conflicted party as opposed to an independent and impartial third-party as required by the rule of law. Correspondingly it cannot let the constitutional law resurface today without implicitly indicting itself for its misuse of the rule of law as a criminal weapon. The choice is between integrity and interest. To date the judiciary has preferred interest, and in consequence the rule of law's objective of justice as the application of truth to affairs intractably has been supplanted by the political objective of law as the art of the possible. That is not going to change without outside independent and impartial third-party intervention to prompt the change.

(28). Finally, there is no correspondence between rights and remedies because of the conjunction of the abrogation of the other

constitutive principles of constitutional supremacy, *stare decisis,* equal application and third-party adjudication. There are no international remedies since the rule of law does not exist internationally, and never will, unless and until it is first brought into existence domestically. The USA and Canada cannot and do not lay themselves open to prosecution internationally for the genocide they knowingly are committing at home. They are exporters of the rule of law as a means of binding others, while ensuring an exception for themselves in virtue of their political influence over the drafting of the terms of reference governing jurisdiction for all of the international tribunals presently in existence or likely to come into existence in the foreseeable future.

(29). Unless and until some other national court jump-starts the still heart of justice in North America, genocide and self-defense against it will remain a sad fact throughout the world.

PART B. AS TO THE APPLICANTS' PROCEDURAL LAW *LOCUS STANDI*

(30). Since the applicants have complied with the mandatory provision of the *Code of Organization and Civil Procedure,* Article 156, they are entitled as of right to have the Registrar file their application:

> 156(1). The sworn application shall be prepared by the plaintiff and shall contain—
>
> (a) a statement which gives in a clear and explicit manner the subject of the cause in separate numbered paragraphs, in order to emphasise his claim and also declare which facts he was personally aware of;
> (b) the cause of the claim;
> (c) the claim or claims, which shall be numbered; and

> (d) in every sworn application, the following notice shall be printed in clear and legible letters immediately under the Court heading: [see, Court Heading, *supra*.]
>
> (7). The registrar shall not receive any application which does not satisfy the elements of subarticle (1)…

(31). Upon the basis of the rule of construction *expressio unius personae vel rei, est exclusio alterius* [the express mention of one person or thing is the exclusion of another], the express stipulation in subarticle (7) that subarticle (1) is mandatory signifies the other subarticles of Article 156 are directory. As to directory procedural stipulations a responding party may move the Court to strike for non-compliance, in which contingent event the motion shall be disposed of upon the basis of the rule of construction that form exists to serve substance but not to frustrate substance, subject to directions by the Court as to further and better compliance if any at the Court's discretion.

(32). Article 154(1) correspondingly requires the Registrar to obtain from the Court a date for the Order to the Respondents to Show Cause which, "in urgent cases," may be on short notice. Since the application's cause is the prevention of genocide, the cause self-evidently is urgent. Furthermore, since the issue upon which the cause turns is a constitutional question of jurisdictional law alone, in relation to which the facts as pleaded are by operation of law presumed true until the Court has decided the threshold question of its own jurisdiction, there is no requirement for a trial date to hear evidence. A question of pure law can

and should be decided upon written representations alone without attendances, unless a party wishes in addition to argue *viva voce* and so applies to the Court for a date for that purpose.

> 154(1). The procedure by sworn application is considered to institute a cause, when the court issues or gives an order to a party to appear before it on the day and at the hour appointed, in order to show cause why the claim contained in the sworn application should not be allowed.
> (2). In the appointment of such day allowance shall be made for the time required for the preliminary written procedures of the case to be closed, provided that in urgent cases the court may appoint a day for the trial of the case before the close of the preliminary written procedures.

(33). Although it is novel to address *locus standi* in an application before a respondent moves to strike for lack thereof, whereas herein delay *prima facie* prolongs the attested genocide the prevention of which is the cause of the application *locus standi* may and should be addressed at first opportunity in the application. The governing procedural legislation is the *Code of Organization and Civil Procedure,* Article 742:

> 742(1). Save as otherwise expressly provided by law, the civil courts of Malta shall have jurisdiction to try and determine all actions, without any distinction or privilege, concerning the persons hereinafter mentioned:
>
> (g) any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.
>
> (2). The jurisdiction of the courts of civil jurisdiction is not excluded by the fact that a foreign court is seized of the same cause or with a cause connected with it. Where a foreign court has a concurrent jurisdiction, the courts may in their discretion, declare defendant [sic] to be non-suited or stay proceedings on the ground that if an action were to continue in Malta it would be vexatious, oppressive or unjust to the defendant.
>
> (6). Where provision is made under any other law, or, in any regulation of the European Union making provision different from that contained in this article, the provisions of this article shall not apply with regard to the matters covered by such other provision and shall apply only to matters to which such other provision does not apply.

(34). The applicants do not purport to have a Maltese status[14] such as is the basis for *locus standi* under subarticles (a) through (f) inclusive of Article 742 which have not been cited and quoted, but rather bases their *locus standi* upon the cited and quoted Article 742(1)(g), 742(2) and 742(6) for the following reasons.

(35). The introductory clause of Article 742(1) is, "Save as otherwise provided expressly by law." Applicants submit that *Menchu v. Montt* (Appendix A) is now a "law" within the meaning of that subarticle. Specifically, it is an original and authoritative precedent which until overruled by a higher constitutional court or repealed by a constitutional amendment is binding within the meaning of the rule of law's constitutive doctrine of *stare decisis.* More specifically, it is a "provision" of a law of the European Union within the meaning of Article 742(6). In consequence, it is paramount over the other subarticles of Article 742 which restrict Maltese civil court jurisdiction to applicants having a Maltese status. This is the clear and plain significance of the express and explicit enactment, "the provisions of this article shall not apply with regard to the matters covered by such other provision and shall apply only to matters to which such other provision does not apply."

---

[14] This is not to say that Maltese persons are not involved in the genocide. There are many Maltese citizens with dual citizenship in Canada and the USA. They are not the target group of the genocide being inflicted by the respondents. Like all persons of non-indigenous descent in North America they are the beneficiaries not the victims of the genocide, since they live for the most part upon territory stolen from the Indians due to judicial willful blindness to the constitutional law precluding the theft.

(36). Article 742(2) precludes the counter-argument that the jurisdiction of the respondents over occupants of North America preempts the jurisdiction of the Civil Court First Hall based upon Article 742(1)(g) and 742(6) read *in pari materia.* Article 742(2) confers a discretion upon the Civil Court First Hall to exercise or to decline to exercise the *Menchu v. Montt* universal jurisdiction to prevent genocide arguably attributable to intentional judicial inactivity in relation to governing extraterritorial constitutional enactments, herein of the US *Constitution,* Article II, §2, ¶2, clause 1, and the Canadian *Constitution Act, 1867,* Section 109.

(37) All said, then, the jurisdiction issue upon which the case rests boils down to a discretionary *forum conveniens* decision for the Court. Which is the more convenient court for dealing with the genocide within North America: the conflicted Courts that are committing the genocide or the independent and impartial Civil Court First Hall?

Conclusion

(38). There is no longer, if ever there was, judicial immunity from suit for aiding and abetting genocide.

(39). The *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* to which Malta has attorned all of her courts stipulates in its Article IV that:

> Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

(40). The said Article III stipulates:

> The following acts shall be punishable:
> (a) Genocide;
> (b) Conspiracy to commit genocide;
> I Direct and public incitement to commit genocide;
> (d) Attempt to commit genocide;
> (e) Complicity in genocide.

(41). The respondents are engaged in each and every of those crimes by their intentional and fully informed willful blindness to the constitutional law governing them.

(42). The *Constitution, Criminal Code* and *Code of Organization and Civil Procedure* of Malta invest in this Honourable Court the jurisdiction, duty and burden to act to prevent the genocide by declaring that the U.S. and Canadian Supreme Courts should address their own constitutional law.

DATED AS AT THE DATE OF THE APPLICANTS' OATH ABOVE.

APPENDIX A: *MENCHU V. MONTT*

Sentence 237/2005 dated September 26, delivered by the

Spanish Constitutional Court

BOE Number 258 supplement

Friday October 28, 2005

[Page 45 … …]

17753 Second Chamber. Sentence 237/2005, dated September 26. Appeals for legal protection 1744-2003, 1755-2003 and 1773-2003 (accumulated). Brought by Ms Rigoberta Menchú Tumn and others against the Sentence and Decision of the Criminal Chambers of the Supreme Court and of the "Audiencia Nacional", in the case for crimes of genocide, terrorism and torture in Guatemala.
Violation of the right to effective legal protection (access to criminal justice): universal jurisdiction of the Spanish Law Courts in criminal matters.

The Second Chamber of the Constitutional Court, constituted by Judge Guillermo Jiménez Sánchez, President, Judge Vicente Conde Martín de Hijas, Judge Elisa Pérez Vera, Judge Ramón Rodríguez Arribas and Judge Pascual Sala Sánchez, has delivered,

IN THE NAME OF THE KING

the following

SENTENCE

In the appeals for legal protection numbers 1744-2003, 1755-2003 and 1773-2003, the first of which brought by Ms Rigoberta Menchú Tumn, Ms Silvia Solórzano Foppa, Ms Silvia Julieta Solórzano Foppa, Santiago Solórzano Ureta, Julio Alfonso Solórzano Foppa, Lorenzo Villanueva Villanueva, Ms Juliana Villanueva Villanueva, Lorenzo Jesús Villanueva Imizocz, Ms Ana María Gran Cirera, Ms Montserrat Gibert Grant, Ms Ana María Gibert Gran, Ms Concepción Gran Cirera, José Narciso Picas Vila, Ms Aura Elena Farfán, Ms Rosario Pu Gómez, C. I. Est. Prom. Derechos Humanos, Arcadio Alonzo Fernández, Conavigua, Famdegua and Ms Ana Lucrecia Molina Theissen, represented by Court Attorney Ms Gloria Rincón Mayoral and aided by Lawyer Carlos Vila Calvo, and by the "Confederación Sindical de Comisiones Obreras" (Confederation of Trade Unions) represented by Court Attorney Ms Isabel Cañedo Vega and aided by Lawyer Antonio García Martín, Number 1755-2003, brought by the Association of Human Rights of Spain, represented by the Court Attorney Ms Irene Gutiérrez Carrillo and aided by Lawyer Victor Hortal Fernández, and number 1773-2003, brought by the free Association of Lawyers,

the Association against Torture, the "Associació d'Amistat amb el Poble" of Guatemala, the Association of the Center for Documentation and Solidarity with Latin America and Africa, the Comité Solidariedad Internacionalista de Zaragoza, represented by Court Attorney Ms Isabel Calvo Villoría and aided by Lawyer Antonio Segura Hernández, and by the Argentine Association for Human Rights of Madrid, represented by Court Attorney Ms Isabel Cañedo Vega and aided by Lawyer Carlos Slepoy Prada, against the Sentence of the Supreme Court No. 327/2003, dated February 25, dismissed in the appeal for annulment No. 803-2001 that it estimates the intervening appeal for partial annulment against the Decision of the Plenary Session of the Criminal Court of the "Audiencia Nacional" dated December 13, 2000, dismissed in Appeal No. 115-2000. The Attorney General has intervened. The final Judge was Judge Guillermo Jiménez Sánchez who expressed the view of the Court.

Prior History *[pages 46 – 50: Omitted]*

[Page 51 … …]

II. Basis in Law

The matters before the constitutional jurisdiction are various requests for protection directed against the Decision of the Second Chamber of the Supreme Court of February 25 2003 that estimated partially the intervening appeal for annulment against the Decision of the Plenary Session of the Criminal Court of the "Audiencia Nacional" of December 13, 2000, as well as against this last decision. The nucleus of the raised controversy is focused on the limited interpretation that, although by virtue of diverse arguments, both judicial organs make on art. 23.4 of the Judicial Power Organization Act (LOPJ) and the criteria of criminal jurisdictional competence there established, referred to as the so-called principle of universal jurisdiction, with the consequence of denying, totally or partly, the competence of the Spanish Courts for the prosecution and judgment of the facts object of the accusations that have given rise to this present procedure, facts qualified in the mentioned accusations as genocide, terrorism and torture, carried out in Guatemala during the seventies and the eighties. The three lawsuits for protection coincide in denouncing that the contested decisions have proceeded groundlessly to a restrictive interpretation and "contra legem" of the mentioned precept by starting from the demand for a series of requirements not contemplated in the judicial Act, resulting in a violation of their fundamental rights.

Concretely, they estimate the right to effective judicial protection consecrated in art. 24.1 CE violated, both in the aspect to obtain a legally founded decision and in connection with the right to access the jurisdiction. They also coincide in the relative accusation to the violation of art. 24.1 CE allegedly committed by the Sentence of the Supreme Court by ending in a "reformatio in peius" by which, while the "Audiencia Nacional", on the basis of the principle of subsidiarity, discarded the competence of Spanish Courts "for the time being", leaving open such a possibility in the future, the Sentence of the High Court, rejecting such a principle but accepting the need of a connection with Spanish

interests, denied in a definitive way the jurisdiction of our State, leaving, in consequence, a worse situation for the appellants in the high court appeal.

Besides the mentioned reasons for protection, both the appeal registered as No. 1744-2003, and that *[Page 52]* registered as No. 1773-2003 also allege the violation of the right for the ordinary Judge as predetermined by law (art. 24.2 CE), derived equally groundlessly by this restrictive interpretation, as well as (in the last mentioned appeal) the violation of the right to proceedings without undue delays. Lastly the appeal registered as No. 1755-2003 includes the violation of the right to proceedings with all the guarantees given by art. 24.2 CE, together with the right to equality in the application of legislation, since the concrete competence of the Spanish Courts is established by starting from discrimination of the victims based on their nationality.

The Public Prosecutor, on the other hand, is interested in the granting of protection in consideration of the violation of the right to effective judicial protection (art. 24.1 CE) in which both the Decision of the "Audiencia Nacional" and the Sentence of the Supreme Court allegedly incurred when restricting access to the proceedings with an excessively rigid and unfounded interpretation of art. 23.4 LOPJ, based on restrictive criteria or elements of the competence of the Spanish Courts which are neither included in the law nor reasonably derived from it.

Being several the formulated complaints, we must begin, according to our reiterated doctrine, with the examination of those from which back-dated activities can be derived with the purpose of safeguarding the subsidiary character of the process of protection (for all, SSTC 229/2003, of December 18, FJ 2; 100/2004, of June 2, FJ 4; and 53/2005, of March 14, FJ 2). More concretely, and keeping in mind that this is the reason of central protection in all the lawsuits, we will begin with the alleged violation concerning the right to effective judicial protection regulated by art. 24.1 CE in the aspect at law to obtain a legally founded decision and the right to access jurisdiction.

Both mentioned aspects at law quoted included in art. 24.1 CE, in spite of each having its own field of application, must be focused in a combined way in the present case, and this because the nuclear content of the complaint is calculated by the fact that, by means of a unfounded legal decision, it deprives the appellants from the right to access the proceedings. This combined or double tackling of the complaints performs, in consequence, a double standard or test for judgment. This is so because the right to access jurisdiction, constituting, as we have affirmed, "the medullar substance" (STC 37/1995, of February 5, FJ 5), the "proper and primary content" (STC 133/2005, of May 23, FJ 2), of the right to effective judicial protection, is important, together with the common standards of the right to effective judicial protection in its aspect of obtaining a decision founded at law, such as the requirement of sufficient motivation, and the absence of an arbitrary aspect, of apparent unreasonableness and of patent error, a further and potentially more intense requirement of proportionality, derived from the principle "pro actione". We have taken this stand, ever since STC 35/1995, dated February 7, FJ 5, that the constitutional control of decisions for non-admissibility or for non-pronouncement on the core of the matter must be verified very

thoroughly, given that these cases are still valid (as well as in the denial of jurisdiction when access to the proceedings is closed) according to the mentioned principle "pro actione" (SSTC 203/2004, of November 16, FJ 2; 44/2005, of February 28, FJ 3; 133/2005, of May 23, FJ 2, among many others). A principle "that must be observed by the Judges and Law-Courts in a way to impede that certain interpretations and applications of the legally established requirements to consent to the proceedings, block the right for a judicial organ to recognize or resolve at Law an expectation submitted to it" (SSTC 133/2005, of May 23, FJ 2; 168/2003, of September 29, FJ 2).

As we have stated on several occasions, access to the jurisdiction constitutes a right of services of legal configuration, the exercise and provision of which are subordinated to the concurrence of the prerequisites and requirements that the legislator has established, so that it would not violate the right to effective judicial protection by a decision of non-admission or by a mere procedure that reasonably takes note of existence of an obstacle founded on an expressed precept of the Law that, in turn, fully respects the essential contents of the fundamental right (SSTC 172/2002, of September 30, FJ 3; 79/2005, of April 4, FJ 2). We have also shown that the principle "pro actione" cannot be understood as the mandatory selection of the most favorable interpretation for its admission or of the decision of the core problem from among all the possible norms that regulate it, since this requirement would make the Constitutional Court enter in questions of procedural legality that correspond to the ordinary Courts to resolve (STC 133/2005, of May 23, FJ 2). On the contrary the duty that this principle imposes only consists in forcing the judicial organs to interpret the requirements for proceedings in a proportionate way, "impeding that determined interpretations and applications of the same requirements eliminate or block in a disproportionate manner the right for a judicial organ to recognize and solve according to Law what is subjected to it" (for all, STC 122/1999, of June 28, FJ 2).

As stated by STC 73/2004, of April 23, FJ 3, "the appreciation of the legal causes that impede a pronouncement on the core matters of the expected conclusions corresponds, generally, to the Judges and Courts in the exercise of their proper functions as per art. 117.3 CE, not being, in principle, the function of this Constitutional Court to revise the applied legality. However it corresponds to this Court, as supreme guarantor of the fundamental right to obtain effective judicial protection (provided) by the Judges and the Courts, to examine the motives and arguments on which the judicial decision that does not admit the lawsuit, are founded, or which in an equivalent way, avoid to give a pronouncement on the core of the matter discussed. And this, obviously, not to supplant the function proper of Judges and Courts to interpret the juridical norms in controversial concrete cases, but to check if the appreciated reason is justified constitutionally and in proportion with the intended aim according to the norm on which it is founded. This examination permits, accordingly, to follow this line of protection, by taking in consideration not only a case without legal guarantees, but also, even if these exist, the application or interpretation that is arbitrary, groundless, or resulting from a patent error with constitutional relevance or which does not satisfy the inherent demands of proportionality when restricting

fundamental rights (SSTC 321/1993, of November 8, FJ 3; 48/1998, of March 2, FJ 3; 35/1999, of March 22, FJ 4, among many others)".

That is to say, even when the verification of the concurrence of the procedural pre-requisites and requirements constitute, in principle, a question of strictly ordinary legality, it will correspond to this Court to revise those judicial decisions in which such procedural pre-requisites have been interpreted in an arbitrary or professedly unreasonable manner or incurring in a patent error. And, besides, when dealing with access to jurisdiction, this revision will also be appropriate in cases in which the procedural regulations have been interpreted in a too rigorous or excessively formalist manner or in a way which is disproportionate with its declared aims and the interests that are sacrificed (SSTC 122/1999, of June 28, FJ 2; 179/2003, *[Page 53]* of October 13, FJ 2; 3/2004, January 14, FJ 3; 79/2005, of April 2, FJ 2). Expressed in the terms of the recent STC 133/2005, of May 23, FJ 2, "what in fact this principle implies is the interdiction of those decisions of non-admission (or of non-pronouncement) which, through their extreme rigor, their excessive formalism or for any other reason, reveal a clear lack of proportion between the aims that these causes for non-admission – or non-pronouncement on the core matters – preserve and the interests they sacrifice".

For an exact understanding of the scope and roots of this mentioned principle "pro actione" under the protective aegis of art. 24.1 CE, it is right to emphasize the more incisive character that the norm for access to proceedings has, in the sense that judicial interpretations of the procedural legality that satisfy the test of reasonableness and for which "their correction from a theoretical perspective" was also predictable, can carry with them "a denial of the access to jurisdiction by starting from an excessively rigorous consideration of the applicable regulations" STC 157/1999, of September 14, FJ 3) and in this way violating the right to effective judicial protection in the mentioned situation.

Having explained the framework of the judgment that will be applied to the present case, it is now time to go into further detail. As has been clarified in the prior history, the nucleus of the controversy resides in the openly restrictive interpretation, given both by the "Audiencia Nacional" and by the Supreme Court on the rule of attribution of competence included in art. 23.4 LOPJ, with the consequence of denying the jurisdiction of Spanish Courts for the judgment of presumably qualified facts as genocide, terrorism and torture. Since the lawsuit goes against both decisions (the Decision of the "Audiencia Nacional" of December 13, 2000 and the Sentence of the Supreme Court of February 25, 2003), and since these based their respective pronouncements on different arguments, it is convenient to analyze them separately.

Now then, before entering in the analysis of these arguments, it is important to remember that, even when referring to another crime included in the catalog of art. 23.4 LOPJ, the legal precept, object of the controversy, has been the object of previous pronouncements on the part of this Court, from which some implications can be extracted for the judgment of the contested decisions. Concretely the STC 21/1997, of February 10, FJ 3, showed that "when establishing the extension and limits of the jurisdiction of the Spanish Courts, art.

23.4 of the Judicial Power Organization Act 6/1985, of July 1, attributes the recognition by our judicial organs of acts made by Spaniards and foreigners outside the national territory when these same acts are susceptible to be classified as crimes according to Spanish criminal Law, in certain suppositions... What this involves is that the legislator has attributed a universal reach to Spanish jurisdiction to take cognizance of these concrete crimes, both as regards their gravity and as regards their international dimension". At the same time, in the STC 87/2000, of March 27, FJ 4, we state that "the last foundation of this attributive norm of competence resides in the universalization of the jurisdictional competence of the States and their organs for the cognizance of certain acts, the prosecution and judgment of which interests all States, so that its logical consequence is the concurrence of competences, or said otherwise, the concurrence of competent States".

This consideration concerning the basis of universal jurisdiction allows the direct consideration of the constitutional dimension, from the multi-faceted Law concerning effective judicial protection, of the Decision of the "Audiencia Nacional", whereas the theoretical pre-requisite it starts from to base the absence of jurisdiction, the principle of subsidiarity, does not seem to coincide "prima facie" with the principle of concurrence that this Court has considered preferable. In the interests of showing the relevance that this different theoretical perspective could have from the perspective of the constitutional analysis, we must first deepen the arguments by which the "Audiencia Nacional" supports its reasoning, to follow up later with a study of what have been the concrete criteria of application of such a principle that have led to the denial of Spanish jurisdiction and, with it, to the denounced violation of the right of access to proceedings.

In any event, prior to anything, we must highlight, and this both in connection with the Decision of the "Audiencia Nacional" as with the Sentence of the Supreme Court, that art. 23.4 LOPJ grants, in principle, a very wide scope to the principle of universal justice, since the only expressed limitation it introduces regarding this principle is that of the judged thing; that is, that the criminal has not been acquitted, pardoned or punished abroad. In other words, from an interpretation attached to the literal sense of the precept, as well as from the "voluntas legislatoris", we must conclude that the Judicial Power Organization Act establishes an absolute principle of universal jurisdiction, that is to say, without subjection to restrictive criteria of correction or procedure, and without any hierarchical order with regard to the other rules of attribution of competence, since, contrary to other criteria, that of universal justice is configured from the particular nature of the crimes object of prosecution. What has just been stated does not imply, certainly, that such must be the only norm of interpretation of the precept, and that its exegesis cannot be preceded by further regulating criteria that may even restrict its scope of application. Now then, in such an exegesis, mostly when that restriction brings with it also a restriction for access to jurisdiction, the limits that define a strict or restrictive interpretation of that which, by inverse analogy, must already be conceived as a teleological reduction of the law, characterized by the exclusion of definite suppositions in its semantic nucleus from the framework of application of the precept, must be kept very much in mind. From the multi-faceted point of view of the right of access to jurisdiction,

such a teleological reduction would move away from the hermeneutic principle "pro actione" and would lead to an extremely rigorous and disproportionate application of Law contrary to the principle consecrated in art. 24.1 CE. This is the analytic path we must follow.

As has already been anticipated, the Decision of the "Audiencia Nacional" object of the appeal, basing itself on previous decisions of the same judicial organ, starts from the Convention on genocide, and, more concretely, from its art. VI, to conclude by affirming the validity of a relationship of subsidiarity of Spanish jurisdiction over the territorial one. The mentioned precept states:

"Persons accused of genocide or of any one of the acts enumerated in article III will be judged by a competent Court of the State in whose territory the act was committed, or by the competent international criminal court from those whose jurisdiction has been recognized by the Contracting Parties".

The "Audiencia Nacional" starts off from the consideration that the mentioned precept which establishes the obligation of the States in whose territory the acts take place to take legal steps, does not in any way carry with it a prohibition for the rest of the signatory Parties to establish *[Page 54]* extraterritorial criteria of jurisdiction for genocide; as it eloquently shows, by mentioning previous decisions, such a limitation would be contrary "to the spirit of the Convention that looks for a commitment of the contracting parties, by means of the use of their respective criminal norms, to prosecute genocide as a crime of international law and to avoid impunity of such a serious crime". Nevertheless, immediately afterwards, it concludes that article VI of the mentioned Convention imposes subsidiarity of performance of jurisdictions different to those contemplated in it.

Saving the fact that in the controversial decision no explanation of the reasons which led to this conclusion are given, but rather such a relationship of subsidiary is inferred by the single mention of the criterion of territoriality (or of that related to an international criminal court), we should begin by stating that it is certain that there are weighty procedural as well as political-criminal reasons which serve to endorse the priority of the "locus delicti", and that these form part of the classic wealth of international criminal Law. Starting from this fact, and returning to the pending matter, what is certain is that, from the point of view of its theoretical formulation, the principle of subsidiarity should not be understood as a rule opposed to or divergent with the so-called principle of concurrence, and this because, with the concurrence of jurisdictions, and for the sake of avoiding an eventual duplicity of proceedings and the violation of the interdiction of the principle "ne bis in idem", it is indispensable to introduce some rule of priority. Being a common commitment (at least at the level of principles) of all the States to prosecute such atrocious crimes because of their effect on the international community, an elementary procedural and political-criminal reasonableness must give priority to the jurisdiction of the State where the crime was committed.

Having said this, it should be subsequently noticed that the proposed topic does have constitutional relevance since what is ultimately discussed, both by the plaintiffs asking for protection and the Public Prosecutor, and by the Sentence of the Supreme Court that differs from the criteria applied by the "Audiencia

Nacional" of affirming the priority of the principle of subsidiarity, are the terms under which such a rule or principle has been applied; more concretely, the greater or smaller number of requirements expected in connection with the inactivity of the State where the facts took place. The Decision of the "Audiencia Nacional" object of appeal, reproducing the doctrine established by Decisions 4 and 5 of November 1998, defines the terms of application of the rule of subsidiarity in the following way: "the jurisdiction of a State should abstain from exercising jurisdiction on acts constituent of genocide that are being judged by the Courts of the country where they took place or by an international Court". By accepting such an assertion literally, the abstention of the Courts of a third State must only happen when a procedure had already begun in the territorial jurisdiction or in the international Court; or, in any event, a reasonable modulation of the rule of subsidiarity must also include the abstention of extraterritorial jurisdiction when the effective prosecution of the crimes in the near future is foreseen. "A sensu contrario", for the activation of the extraterritorial universal jurisdiction it must be then enough to provide, either "ex ufficio" or by the plaintiff, serious and reasonable indications of the judicial inactivity that indicate a lack, either of will or of capacity to prosecute effectively such crimes. Nevertheless the Decision of December 2003, accepting an extremely restrictive interpretation of the rule of subsidiarity which the same "Audiencia Nacional" had limited, goes further and requires from the plaintiff full accreditation of the legal impossibility or of the prolonged judicial inactivity, up to the point of demanding proof of the effective rejection of the accusation by the Guatemalan Courts.

Such a restrictive assumption of the international competence of jurisdiction of Spanish Courts established in art. 23.4 LOPJ carries with it a violation of the right to accede to jurisdiction recognized in art. 24.1 CE as a first expression of the right to effective protection (provided) by Judges and Courts. On the one hand, and just as complained by the Public Prosecutor in his report of allegations, with the requirement of proof of negative facts, the actor faces the need to undertake a task of impossible execution, to carry out a "probatio diabolica". On the other hand, this also frustrates its own purpose of universal jurisdiction consecrated in art. 23.4 LOPJ and in the Convention on genocide, precisely because the judicial inactivity of the State where the acts took place, by not reacting to a request for a complaint and thus impeding the proof required by the "Audiencia Nacional", would in fact block the international jurisdiction of a third State and lead to the impunity of genocide. In summary, such a rigorist restriction of universal jurisdiction, in open contradiction with the hermeneutic rule "pro actione", becomes worthy of constitutional reproach for violation of art. 24.1 CE.

Just as has been explained in detail in the case history, the Supreme Court bases the denial of the Spanish jurisdictional competence on different arguments from those of the "Audiencia Nacional", keeping especially to the intrinsic application limits to the rule of universal jurisdiction included in art. 23.4 LOPJ. In the first place, the queried Decision gives dependence of the applicability of the mentioned precept on the fact that an international agreement of which Spain is

part endorses such an extension of jurisdictional competence. Regarding the crime of genocide (on which its whole argument is centered), in spite of manifesting at first that the Convention, vis a vis the criteria of the plaintiffs, "neither establishes universal jurisdiction expressly, nor prohibits it", ends up by affirming the opposite, considering that its article VIII "does not authorize each State to institute its jurisdiction under the principle of universal jurisdiction but rather contemplates a different form of reacting when faced with the carrying out of this crime outside its territory, establishing expressly an appeal to the competent organs of the UN for them to adopt the pertinent measures in each case" (legal reason seven).

In this way the conclusion arrived at by the Supreme Court would be that, only when the appeal to unilateral universal jurisdiction is specifically authorized in conventional Law, would it be legitimate and applicable on the basis of art. 96 CE as well as of art. 27 of the Convention on the Law of Treaties, according to which what is agreed in international treaties, cannot be unfulfilled by the internal legislation of each State.

This results in an extremely rigorous interpretation, as well as, besides, one lacking argumentational support, to conclude that, by mentioning only some of the possible mechanisms of prosecution of genocide, and of the consequent silence of the Convention in connection with extraterritorial international jurisdiction, a prohibition has to be inferred directed towards the States Parties to the Convention (which, paradoxically, would not effect those which are not) which in their national legislation introduce, as established by mandate in art. I, other tools for the prosecution of the crime. From the unilateral point of view of the States, and with the exception of the mention of international Courts, what art. VI of the Convention determines is an *[Page 55]* obligation of minimal requirements which gives them a commitment to pursue the crime of international Law inside their territory. In such terms, namely once it is assumed that the so-often mentioned Convention does not incorporate a prohibition, but rather leaves open to the signatory States the possibility to establish ulterior mechanisms of prosecution of genocide, no obstacle can be expected from art. 27 of the Convention on the Law of the Treaties for assumption by the Spanish Courts of jurisdiction on the acts presumably carried out in Guatemala; more so when, from the purpose that inspires the Convention on genocide, an obligation rather than a prohibition for intervening can be deduced.

Indeed, this lack of authorization that the Supreme Court finds in the Convention on genocide for the activation of international jurisdiction in a unilateral way by a State does not agree with the principle of universal prosecution and of avoidance of impunity of such a crime of international Law which, as has been stated, pervades the spirit of the Convention and is part of the international Common Law (and even of the "ius cogens" as been expressed by the best doctrine) rather than going in direct conflict against it. Indeed, it is contradictory with the very existence of the Convention on genocide, and with the objective and aim that inspire it, that the signatory parties make a pact to renounce a mechanism of prosecution of the crime, especially keeping in mind that the high-priority criterion of competence (the territorial) will be diminished on a multitude of occasions in its possibilities of effective exercise by the

circumstances that can play a part in the different cases. Just as it must be contradictory with the spirit of the Convention that to be part of it carries with it a limitation in the possibilities of combating the crime that States which have not signed it would not have, in the same manner they should not be constrained by this supposed and questionable prohibition.

Universal jurisdiction not being recognized, in the opinion of the Supreme Court, by the Convention on genocide, the Second Chamber of this High Court sustains that its unilateral assumption by internal Law should, then, be limited by other principles, by virtue of what becomes the rule in international custom. From this is derived a restriction of the scope of application of art. 23.4 LOPJ, requiring for its consideration determined "connection links", such as that the presumed author of the crime is on Spanish territory, that the victims are of Spanish nationality, or that another direct connection point exists with national interests. The use of such corrective criteria is based on the Decision object of our analysis in international custom, reaching the conclusion that, since it does not correspond to each particular State to be unilaterally in charge of stabilizing order, the exercise of universal competence will only be legitimate when the mentioned connection point exists; this, points out the contested decision, must have a significance equivalent to the criteria, recognized in the national Law or the Treaties, that allow the extraterritorial extension of competence.

In support of the point of departure, namely that according to international custom, the scope of the principle of universal justice has been restricted, the Supreme Court invokes certain decisions of jurisprudence by Courts of third States or international Courts; it mentions in particular diverse decisions by the Federal Supreme Court of Germany, the decision of the Supreme Court of Belgium on the "Sharon" case, as well as the decision of the International Court of Justice at The Hague, of February 14, 2002 (the "Yerodia" case), in which Belgium was condemned for the issuing of an international arrest order against the Minister of Foreign Affairs of the Democratic Republic of Congo.

Well, the first thing that we must clearly state is that it is fully debatable that such is the rule in international custom, and this especially because the selection of references of jurisprudence carried out by the Supreme Court in support of this thesis does not come to such a conclusion, but rather the contrary. In this respect, a wide argumentative development is not necessary, given the fact that the Vote peculiar to the contested Decision signed by seven Magistrates (the transcendence of which must be emphasized), has convincingly arrived to refute the expected validity of the decisions mentioned as theoretical support for the approach followed by the Second Chamber, contributing other references which give a sign to the contrary. As affirmed by the Magistrates who dissent from the majority, the mentioned German decisions do not represent the "status question is" in that country, since decisions taken by the German Constitutional Court taken after the decisions mentioned by the contested Decision have endorsed a principle of universal jurisdiction without the need of links with national interests (quoting, as an example, the Decision of December 12, 2000, which confirmed the condemnation for genocide delivered by the German Courts for crimes committed by Serbs in Bosnia-Herzegovina against Bosnian victims). Regarding

the Decision of the International Court of The Hague in the "Yerodia" case, it must be concluded that this cannot be used as a precedent from the sought restrictions to universal competence, because it limited itself to the question of whether or not the international norms of personal immunity had been damaged, without pronouncing itself on universal jurisdiction as regards genocide, since this was the way it was expressly requested by the Democratic Republic of Congo in its lawsuit. And the same must be said in relation to the Sentence of the Supreme Court of Belgium of February 12, 2003, the contents of which are quoted by the Supreme Court only to mention the aspects related with the immunity of the state representatives in the exercise of their duties, and on the other hand omits all mention of the expressed recognition included in this decision concerning universal jurisdiction established in Belgian legislation.

If to what we have just stated, we add that there is a multitude of precedents in international Law that endorse the position contrary to that followed by the Supreme Court in the matter, the prerequisite that the Decision of the mentioned High Court sustains its restrictive interpretation of art. 23.4 LOPJ (the existence of widespread limitation of the principle of universal justice in common international Law), this loses much of its support, keeping in mind, particularly, that the selection of references is not exhaustive and it does not include some significantly contrary to the approach taken. In this respect, it is debatable that the Decision omits to mention that, faced with what could be deduced by its reading, the Spanish Law is not the only national legislation that incorporates a principle of universal jurisdiction without linking it to national interests, and we may mention that of countries like Belgium (art. 7 of the Law of July 16, 1993, reformed by the Law of February 10, 1999, that extends universal jurisdiction to genocide), Denmark (art. 8.6 of its criminal Code), Sweden (the Law concerning the Convention on genocide of 1964), Italy (art. 7.5 CP) or Germany, States that include, to a greater or lesser extent, the repression of various crimes against the international community within the scope of their jurisdiction, without restrictions motivated by national links. As a significant example *[Page 56]*, it is enough to indicate that the Sentence of the Supreme Court quotes the decision of the Federal Supreme Court of Germany dated February 13, 1994 but however it does not make any reference to the German art. 6 CP nor to the Code of crimes against international Law dated June 26, 2002 (Law promulgated with the purpose of adapting German criminal law to the Statute of the International Criminal Court), the first article of which states that its precepts will be applied to the crimes contemplated in it (genocide, crimes against humanity and war crimes included in the Statute of the Court) "even when the crime is committed abroad and does not have any relationship with Germany".

The Sentence of the Supreme Court also includes a listing of international treaties concerning the prosecution of outstanding crimes for the international community subscribed by Spain with the purpose of showing that, on one side, in none of those treaties is universal jurisdiction established expressly, and that, on the other, in them the classic formula of collaboration "aut dedere aut iudicare" is established; that is to say, the States will have the obligation of judging those responsible for crimes included in the treaties when they are in their territory and

the extradition requested by some other State with obligatory competence, according to the dispositions of the respective treaty, is not consented to. By analyzing this sector of the common international Law, the Supreme Court infers the necessity and the legitimacy of restricting the scope of application of art. 23.4 LOPJ to the cases in which the presumed responsible person is on Spanish territory, as established in art. 96 CE, para. G) of art. 23.4 LOPJ, and of the already mentioned art. 27 of the Convention on the Law of the Treaties, according to which the parties of a treaty will not be able to invoke their internal Law to justify the non-fulfillment of a treaty.

Independently of what we shall later affirm, the interpretation followed by the Supreme Court to justify such a criterion of restriction of the Law should already be rejected for reasons of a methodological nature. To begin with, the sought systematic reference to para. G) of art. 23.4 LOPJ cannot serve to extend the summations the High Court arrives at to the rest of the crimes contained in the preceding sections of the mentioned precept. And this is because the closing clause introduced in para. G) extends universal jurisdiction to other crimes, not included in the sections prior to art. 23.4 LOPJ which, according to the international treaties or agreements, should be followed in Spain. In other words, while sections a) to f) of art. 23.4 LOPJ establish a catalog of crimes that can be prosecuted "ex lege" in Spain in spite of having been committed abroad and by foreigners, para. G) in fact determines precisely the possibility, if it is so agreed in an international treaty, for Spain to pursue other crimes different to those included expressly in the precept. It is, consequently, by no means evident that the limitations or conditions that, by way of the interpretation of the various international Treaties are mentioned in the Decision, are applicable in an analogous way to the first ones. An analogical procedure which, besides being contrary to the principle "pro actione" by reducing in an ostensible way the access to jurisdiction of the plaintiffs, is not supported by an identifiable enough reason, as has just been affirmed.

In the same way, it is very debatable to appeal to art. 27 of the Convention on the Law of the Treaties as support of such argumentative procedure. This is because, neither in the Convention on genocide, as has already been stated, nor in the Treaties that the contested Decision mentions, is there contemplated any prohibition of the exercise of universal unilateral jurisdiction which could be considered unfulfilled by what is established in Spanish Law.

Undoubtedly, the presence of the presumed author in Spanish territory is an unavoidable requirement for judgment and eventual condemnation, given the inexistence of trials "in absentia" in our legislation (with exceptions which are not relevant in this case). Because of this, juridical institutions such as extradition constitute fundamental aspects for the effective attainment of the purpose of universal jurisdiction: the prosecution and sanction of crimes that, because of their characteristics, affect the whole international community. But such a conclusion cannot lead to change this circumstance into a requirement "sine qua non" for the exercise of judicial competence and the opening of the proceedings, especially when following this procedure would mean subjecting access to universal jurisdiction to a restriction not contemplated in the law; a restriction besides, that would be contradictory with the foundation and aims inherent to the institution.

Together with the presence of the presumed author on national territory, the contested Decision introduces another two connection links: that of passive personality, making universal competence depend on the Spanish nationality of the victims, and that of linking the crimes made with other relevant Spanish interests, which results in nothing except a generic reformulation of the so-called real principle of protection or of defense. Such restrictions seem to be again obtained from international custom, appealing, without being more concrete, to the fact that "an important part of the doctrine and some national Courts" were inclined to recognize the relevance of certain connection links.

Well, in this respect we should affirm that such an interpretation, radically restrictive of the principle of universal jurisdiction established in art. 23.4 LOPJ, which should rather be qualified as a teleological reduction (for going beyond the grammatical sense of the precept), goes beyond the limits of what is constitutionally acceptable from the framework that establishes the right to effective judicial protection consecrated in art. 24.1 CE, as much as it supposes a reduction "contra legem" to start from corrective criteria that not even implicitly can be considered present in the law and which, besides, are obviously contrary to the purpose of the institution which is so altered that it cannot be recognized as the principle of universal jurisdiction as conceived in international Law, and that has the effect of reducing the scope of application of the precept until it almost appears to be a "de facto" abolition of art. 23.4 LOPJ.

Indeed, the right to effective judicial protection, in its aspect concerning access to jurisdiction, has been undermined in this present case because an interpretation in agreement with the "telos" of the precept would bring with it the satisfaction of exercising a fundamental right of access to the proceedings and it would be therefore be totally in accordance with the principle "pro actione", and because the literal sense of the precept analyzed, without any interpretive forcing of any type, complies with the execution of such a purpose and, with it, with the safeguard of the right consecrated in art. 24.1 CE. Therefore the forced and groundless exegesis to which the Supreme Court subjects the precept supposes an illegitimate restriction of the mentioned fundamental right, inasmuch as it violates the demand that "the judicial organs, when interpreting the legally foreseen procedural requirements, have to keep in mind the "ratio" of the norm with the purpose of avoiding that mere formalisms or unreasonable understandings of the procedural norms impede judgment of the core of the matter, violating the requirements of the principle *[Page 57]* of proportionality" (STC 220/2003, of December 15, FJ 3), by constituting a "denial to access to jurisdiction by departing from an excessively rigorous consideration of the applicable regulations" (STC 157/1999, of September 14, FJ 3).

The restriction based on the nationality of the victims incorporates an added requirement not contemplated in the law, which, besides, cannot be teleologically founded since, particularly in relation to genocide, it contradicts the very nature of the crime and the shared aspiration of its universal prosecution, which is practically reduced by its basis. As established in art. 607 of the Criminal Code (CP) the legal type of genocide is characterized by the victim or

victims belonging to a national, ethnic, racial or religious group, as well as because the acts carried out have the specific purpose of the destruction of such a group, precisely because of their links of belonging. The exegesis put forward by the Decision of the Supreme Court would consequently imply that the crime of genocide would be relevant for the Spanish Courts only when the victim were of Spanish nationality and, besides, when the behavior was motivated by the purpose of destroying the Spanish national group. The unlikelihood of such a possibility must be enough to show that this was not the purpose of the Legislator with the introduction of universal jurisdiction in art. 23.4 LOPJ, and that it cannot be an interpretation in agreement with the objective aims of the institution.

And the same conclusion must be reached in connection with the criterion of the national interest. Besides the fact, highlighted by the Public Prosecutor in his report, that the reference to this in the contested decision is practically nominal, without a minimum development that allows to detail its contents, it is certain that with its inclusion, number 4 of art. 23 LOPJ is practically devoid of content, by being referred to the rule of jurisdictional competence contemplated in the previous number. As has already been affirmed, the determining question is that the subjecting of competence to prosecute international crimes like genocide or terrorism to the concurrence of national interests, in the terms outlined by the Decision, cannot in any way be reconciled with the foundation of universal jurisdiction. The international and cross-border prosecution that seeks to impose the principle of universal justice is based exclusively on the characteristics of the crimes included therein the damages of which (paradigmatically in the case of genocide) transcend beyond those of the concrete victims and reach the international community as a whole. Consequently, their prosecution and sanction constitute not only a commitment, but also an interest shared by all the States (as we had occasion of affirming in the STC 87/2000, of March 27, FJ 4) the legitimacy of which, in consequence, does not depend on ulterior interests peculiar to each one of them. In the same way the concept of universal jurisdiction in the international Law in force now is not configured around connection links based on the interests of a particular state, just as is shown by the same art. 23.4 LOPJ, the mentioned German Law of 2002 or, to provide several examples, the Decision adopted by the Institute of International Law in Krakow on August 26 2005, in which, after clearly showing the aforementioned commitment of all the States, universal jurisdiction in criminal matters is defined as "the competence of a State to pursue and, in the event of being declared guilty, to punish presumed criminals, independently of the place where the crime was committed, and irrespective of any link of active or passive nationality or other criteria of jurisdiction recognized by international Law".

Faced by the concept of the Supreme Court on universal jurisdiction, inasmuch as it aspires to unite "the common interest to avoid impunity of crimes against Humanity with a concrete interest of the State in the protection of certain goods" (legal reason ten), it is sustained on ends which can with difficulty be reconciled with the basis of the same institution, which, as already stated, results in a practical "de facto" abrogation of art. 23.4 LOPJ. Besides, the exacerbated rigorous interpretation with which such criteria are applied by the High Court results in the incompatibility of its Decisions with the right to effective judicial

protection in the aspect of access to jurisdiction, since it demands that the connection with national interests must be appreciated in direct relationship with the crime that is taken as a basis to affirm the attribution of jurisdiction, expressly excluding the possibility of less rigid interpretations of this criterion (and, in so doing, being more in agreement with the principle "pro actione"), such as that linking the connection of national interests with other crimes connected to it, or more generically, with the context that surrounds them.

From all the above-mentioned, it results that both the Decision of the "Audiencia Nacional" of December 13, 2000 and the Sentence of the Supreme Court of February 25, 2003 have violated the right to effective judicial protection (art. 24.1 CE) of the plaintiffs in its aspect of access to jurisdiction, for which reason it proceeds to grant the protection and, in consequence, to annul the mentioned decisions and return retroactively to the acts at the moment immediately prior to when the annulled Decision of the "Audiencia Nacional" was dictated, without the need, in the interests of preserving the subsidiary character of the appeal for protection, to analyze the accusations of violation of other fundamental rights that are made in the lawsuit.

SENTENCE

In attention to all the afore-mentioned, the Constitutional Court, BY THE AUTHORITY CONFERRED ON IT BY THE CONSTITUTION OF THE SPANISH NATION,

has decided

To grant the protection requested by Ms Rigoberta Menchú Tumn and others, by the Association of Human Rights of Spain and by the free Association of Lawyers and others, and consequently:

1. Declares that the right to effective judicial protection has been violated, in its aspect of access to jurisdiction (art. 24.1 CE), for the appellants.

2. Re-establishes their right in full to these (appellants) and, to such an end, annuls the Decision of the Plenary Session of the "Audiencia Nacional" of December 13, 2000 and the Sentence of the Supreme Court of February 25, 2003, going back retroactively to the actions at the moment immediately prior to the delivery of the Decision of the "Audiencia Nacional" so that a new decision be dictated which is respectful of the violated fundamental right.

This Sentence is to be published in the "Boletín Oficial del Estado".

Delivered in Madrid, on September twenty-six, two thousand five. – Guillermo Jiménez Sánchez. – Vicente Conde Martín de Hijas. – Elisa Pérez Vera.- Ramón Rodríguez Arribas. – Pascual Sala Sánchez. – Signed and initialed.

S.I.T.S
Spanish Interpreter and Translation Services
157, Hilltop, Triq tal-Franciz, Swieqi STJ 11, MALTA

Our Ref.: MenchuCert.doc

TO WHOM IT MAY CONCERN

This is to certify that the preceding pages, each duly numbered from page 27 to page 41, contain a faithful and literal translation into English from the original official document in Spanish, published in the BOE (Spanish official Government Gazette) in supplement on October 28, 2005, concerning Sentence 237/2005 dated September 26, delivered by the Second Chamber of the Spanish Constitutional Court, which was shown to me for me this purpose. ----------

Issued at the request of the interested party for the purposes as may be required, on this twenty-fourth day of February, two thousand and six. ---

(signed) Alfred A. Cauchi
Official Translator

Alfred A. Cauchi, Ph.Lic., M.A. Paed., FinstCM(UK)
AUXILARY CONFERENCE INTEPRETER (ACI)
DG SCIC, European Union Institutions, Brussels, BELGIUM

APPENDIX B: NORTH AMERICAN CONSTITUTIONAL LAW

An Act concerning purchases of lands from the Indians, Stat. Prov. NY 1684, c. 9. Bee itt Enacted by this Gen'll Assembly and by the authority of the same that from henceforward noe Purchase of Lands from the Indians shall be deemed a good Title without Leave first had and obtaineid from the Governor signified by a Warrant under his hand and Seale and entered on Record in the Secretaries office att New Yorke and Satisfaction for the said Purchase acknowlidged by the Indians from whome the Purchase was made is to bee Recorded likewise which Purchase soe made and prosecuted and entered on Record in the office aforesaid shall from that time be Vallid to all intents and purposes.

An Act to prevent and make void clandestine and illegal purchases of lands from the Indians, Stat. Prov. Mass. Bay 1701-02, c. 11. WHEREAS the government of the late colonys of the Massachusetts Bay and New Plymouth, to the intent the native Indians might not be injured or defeated of their just rights and possessions, or be imposed on and abused in selling and disposing of their lands, and thereby deprive themselves of such places as were suitable for their settlement and improvements, did, by an act and law named in the said colonys respectively many years since, inhibit and forbid all persons purchasing any land of the Indians without the licence and approbation of the general court, notwithstanding which, sundry persons for private lucre have presumed to make purchases of lands from the Indians, not having any license or approbation as aforesaid for the same, to the injury of the natives, and great disquiet and disturbance of many of the inhabitants of this province in the peaceable possession of their lands and inheritances lawfully acquired; therefore, for the vacating of such illegal purchases, and preventing of the like for the future,—*Be it enacted and declared by the Lieutenant-Governor, Council and Representatives in General Court assembled, and by the authority of the same,*

[SECT. 1.] That all deeds of bargain, sale, lease, release or quit-claim, titles and conveyances whatsoever, of any lands, tenements or hereditaments within this province, as well for term of years as forever, had, made, gotten, procured or obtained from any Indian or Indians by any person or persons whatsoever, at any time or times since the year of our Lord one thousand six hundred thirty-three, without the license or approbation of the respective general courts of the said late colonys in which such lands, tenements or hereditaments lay, and all deeds of bargain and sale, titles and conveyances whatsoever, of any lands, tenements or hereditaments within this province, that since the establishment of the present government have been or shall hereafter be had, made, gotten, obtained or procured from any Indian or Indians, by any person or persons whatsoever, without the licence, approbation and allowance of the great and general court or assembly of this province for the same, shall be deemed and adjudged in the law to be null, void and of none effect: *provided, nevertheless,*—…

And be it further enacted by the authority aforesaid,

[SECT. 4.] That if any person or persons whatsoever shall, after the publication of this act, presume to make any purchase or obtain any title from any Indian or Indians for any lands, tenements or hereditaments within this province, contrary to the true intent and meaning of this act, such person or persons so offending, and being thereof duly convicted in any of his majestie's courts of record within

this province, shall be punished by fine and imprisonment, at the discretion of the court where the conviction shall be, not exceeding double the value of the land so purchased, nor exceeding six months' imprisonment.

[SECT. 5] That all leases of land that shall at any time hereafter be made by any Indian or Indians for any term of years, shall be utterly void and of none effect, unless the same shall be made by and with licence first had and obtained from the court of general sessions of the peace in the county where such lands lye: *provided nevertheless*, that nothing in this act shall be taken, held or deemed in any wise to hinder, defeat or make void any bargain, sale or lease of land made by one Indian to another Indian or Indians.

Royal Proclamation of 1763. The several Nations or Tribes of Indians with whom We are connected and who live under our Protection should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as not having been ceded to or purchased by Us are reserved to them as their Hunting Grounds.

Campbell v. Hall, (1774), 98 ER 848, 898 (JCPC). If the King has power (and when I say the King, I mean in this case to be understood "without the concurrence of Parliament") to make laws for a conquered country, this being a power subordinate to his own authority, as a part of the supreme Legislature in Parliament, he can make none which are contrary to fundamental principles.

Constitution of the United States of America, *1789.* Art. I, §2, para. 3, cl. 5 as amended by the IVth Amendment: Representatives shall be apportioned among the several States according to their respective numbers, excluding Indians not taxed. Art. I, §8, para. 3: The Congress shall have Power…To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes. Art. I, §9, para. 3: No…ex post facto Law shall be passed. Art. I, §10, para. 1, cl. 1: No State shall enter into any Treaty. Art. I, §10, para. 1, cl. 5: No State shall pass any…ex post facto Law, or Law impairing the Obligation of Contracts. Art. II, §1, para. 1, cl. 1: The executive Power shall be vested in a President of the United States of America. Art. II, §2, para. 2, cl. 1: He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. Art. III, §1, cl. 1: The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. Art. III, §2, para. 1, cl. 5 as amended by the 11th Amendment: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—…to Controversies between two or more States…and between a State, and foreign States. Art. III, §2, para. 2, cl. 1. In all Cases…in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction., both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. Art. V: The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of two thirds of the several States, shall call a Convention for proposing Amendments, which, in

either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;… 10th Am. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Marshall v. Clark, 1 Kentucky R. 77, 80-81 (1791). The old claim of the crown, by the treaty of 1763, extended to, and was limited by the Mississippi including the land in dispute, which gave a right to the crown as against other European nations, and fixed the limits of titles to be derived from that source to the citizens of Virginia. The dormant title of the Indian tribes remained to be extinguished by government, either by purchase or conquest, and when that was done, it inured to the benefit of the citizens who had previously acquired a title from the crown, and did not authorize a new grant of the lands as waste and unappropriated. This being the case at the time of revolution, when the commonwealth succeed[ed] to the royal rights…in the opinion of the court, the Indian title did not impede either the power of the legislature to grant the land to officers and soldiers, or to the location of the lands on treasury warrants, the grantee in either case must risk the event of the Indian claim, and yield to it if finally established, or have the benefit of a former or future extinction thereof.

Weiser v. Moody, 2 Yeat's 127, 127-8 (Penn. SC) (1796). We are no enemies to bona fide improvements, restricted within rational limits. But these were never deemed to extend beyond the lands purchased from the Indians. Such a system would be wild, as well as highly impolitic, and would tend to deluge the country in blood, by provoking the savage nations to hostilities.…The court declared their opinion to the jury, that if the late proprietaries, or their officers, knew that the lands surveyed for Conrad Weiser, lay out of the then Indian purchases, and granted them under full knowledge thereof, the patent would enure for the benefit of the grantee, when the lands came afterwards to be purchased from the Indians; and the proprietaries could not pass the title to a stranger.…[But] it cannot be presumed that the proprietary officers knew the lands surveyed for Conrad Weiser to be without the limits of their purchases [from the Indians].…If the King is deceived in his grant, it will be avoided. Any contract or deed will be vitiated by a *legatio falsi sive suppressio veri.*

Sherer v. McFarland, 2 Yeat's 124, 225, 226 (Penn. SCR) (1797). We are no enemies to *bona fide* improvements, restricted within rational limits. But these were never deemed to extend beyond land purchased from the Indians. Such as system would be wild, as well as highly impolitic, and would tend to deluge the country in blood, by provoking the savage nations to hostilities.…It must be admitted, that the lords of the soil had the exclusive right of disposing of their lands in their own mode.

John Elmsley, Chief Justice of Upper Canada, "Report to the Executive Council of Upper Canada dated October 22, 1798, PAC, RG1, E1, V46, State Book 'B', pp. 210-14. It is no secret to any person at all acquainted with the present state of Indian Affairs that the aborigines of this Part of His Majesty's American Dominions are beginning to appreciate their lands not so much by the use which

they themselves, as by the value at which they are estimated by those who purchase them, and either cultivate them, or dispose of them in their natural state. It is equally notorious, that if the Indians wanted penetration to make the discovery, there are a great many persons of European origin who have attached themselves to the several Tribes which surround us, and will not fail to inform them that the value of any article depends as much upon its importance to the purchaser, as on its usefulness to the present possessors.

But if this were doubtful now, when the lands purchased from the Indians are distributed among His Majesty's Subjects at a Fee hardly exceeding the prime cost of them, it cannot possibly remain so when the Indians discover as they unquestionably will, that the purchases made from them are to be converted into a source of Revenue to ourselves—slow as their progress is towards civilization they are perfectly apprised of the value of money and of its use in maintaining them in those habits of indolence and intemperance to which most of them are more or less inclined.

In order to therefore to exercise that foresight which our Indian neighbours are beginning to learn, and in which it certainly cannot be our interest to promote their improvement, we submit for your Honour's consideration the propriety of suspending the promulgation of the plan which has been laid down for us until we can make a purchase sufficiently large to secure for us the means of extending the population and encreasing the strength of the Provinces so far as to enable us before our stock is exhausted to dictate instead of soliciting the terms on which future acquisitions are to be made.

Fletcher v. Peck, 6 Cranch's 87, 142-3 (1810). The majority of the Court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it has been legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.

Johnson v. McIntosh, 8 Wheat. 543, 574, 585, 588, 591, 592, 596 (1823). [The different nations of Europe] claimed and exercised, as a consequence of their ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.…They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, according to their own discretion.… While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been well understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.…It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.…All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy.…[T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession

their lands, but to be incapable of transferring the absolute fee to others.…[T]he Indian title, which, although entitled to the respect of all Courts until it should be extinguished, was declared not to be absolutely repugnant to a seisin in fee on the part of the State. …The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to that title. The lands, then, to which this proclamation referred, were lands which the king had had a right to grant, or to reserve for the Indians.

Danforth v. Wear, 9 Wheat. 673, 675, 677 (1824). As to lands surveyed within the Indian boundary, this Court has never, hesitated to consider all such surveys and grants as wholly void…[although it was argued that the State grant] was only suspended by the Indian title, and attached legally and effectually to the soil, as soon as the interposing title of the Indians was removed…the inviolability of the Indian territory is fully recognized.

Cornet v. Winton, 2 Yerger Tenn. CA 129, 149 (1826). …the Indian nation was no party to this grant; its usufructory title was not thereby affected. North Carolina had no right to take it from the Indians for Stuart's benefit, without their consent; this consent they have not given, and therefore no right to prosecute this action to recover the possession of the land has ever vested in Stuart; hence he must fail upon the weakness of his own title.

Cherokee Nation v. State of Georgia, 5 Pet. 1, 17, 49, 76 (1831). Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.…While the different nations of Europe respected the rights of the natives as occupants they asserted the ultimate dominion to be in themselves; and claimed and exercised as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.…They have not stipulated to part with that right (of occupancy); and until they do, their right to the mines stands upon the same footing as the use and enjoyment of any other part of their territory.

Worcester v. Georgia, 6 Pet. 515, 542, 544, 545, 546, 552, 553, 559, 560, 583 (1832).…discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments.…This principle…gave…the sole right of acquiring the soil and making settlements on it…It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a

denial of the right of the possessor to sell. The relation between Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them.…So with respect to the word "hunting grounds." Hunting was at that time the principle occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved. To the United States, it could be matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village, an occasional corn field, interrupted and gave some variety to the scene. These terms had been used in their treaties with Great Britain and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government…This was the exclusive right of the purchasing such lands as the natives were willing to sell.…These grants asserted a title against Europeans only, and were considered as blank pieces of paper so far as the rights of the natives were concerned.…The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians…the Indian nations possessed a full right to the lands they occupied…Except by compact we have not even claimed a right of way through the Indian lands.

Mitchell v. United States, 9 Peter's 711, 745, 746, 749, 755 (1835). We come now to consider the nature and extent of the Indian title…Indian possession or occupation was considered with the reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their right to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals…One uniform rule seems to have prevailed…by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in the possession of the Indians, though possession could not be taken without their consent. Individuals could not purchase Indian lands without permission or licence from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such licence, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the licence, the title of the purchaser became

complete.…The King waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property they could cede or reserve, and that the boundaries of his territorial rights should be such, and such only, as were stipulated by these treaties. This brings into practical operation another principle of law settled and declared in the case of *Campbell v. Hall*, that the proclamation of 1763, which was the law of the provinces ceded by treaty of 1763, was binding on the king himself, and that a right once granted by a proclamation could not be annulled by a subsequent.…[L]and were of two descriptions: such as had been ceded to the king by the Indians, in which he had full property and dominion, and passed in full property to the grantee; and those reserved and secured to the Indians, in which their right was perpetual possession, and his the ultimate reversion in fee, which passed by the grant, subject to the possessory right… This proclamation was also the law of all the North American colonies in relation to crown lands.

New Orleans v. Armas, 9 Pet. 224, 236 (1835). [I]t is a principle applicable to every grant, that it cannot affect pre-existing title.

Cameron v. Kyte, (1835), 12 ER 678, 682 (JCPC). If a Governor had, by virtue of that appointment, the whole sovereignty of the Colony delegated to him as a Viceroy, and represented the King in the government of that Colony, there would be good reason to content that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the Sovereign himself…But if the Governor be an officer, merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void, and the Courts of the Colony over which he presided could not give it any legal effect. We think the office of the Governor is of the latter description, for no authority or dictum has been cited before us to show that a Governor can be considered as having the delegation of the whole Royal power, in any colony, as between him and the subject, when it is not expressly given by his commission. And we are not aware that any commission to colonial governors conveys such an extensive authority…

New Orleans v. United States, 35 US 662, 730 (1836). It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee.

United States v. Fernandez, 35 US 303, 305 (1836). Nor does there appear to have been any restriction on the powers of the governor to make grants of land under Spain, other than those imposed upon the governors of Great Britain: both made grants without regard to the land being in the possession of the Indians: they were valid to pass the right of the crown, subject to their right of occupancy:…

Clark v. Williams, 36 Mass. R. 499, 500, 501 (1837). The object of this statute manifestly was, to secure the Indians from being deceived and imposed upon, and to enable the government to avail themselves of the full benefit of the crown grant of the lands to themselves and their grantees, by giving them the exclusive

privilege of extinguishing and acquiring the Indians' right of occupancy…[W]e think it manifest, that this law was made for the personal relief and protection of the Indians, and it is to be limited in its operation. It is to be used as a shield, not as a sword.

Godfrey v. Beardsley, 2 McLean 412, 416 (Ind.) (1841). The Indian right is that of occupancy; and, until this right shall be extinguished by purchase, no possession can be taken. It is also admitted, that a mere reservation of the Indian right to a certain part, within the described boundaries, leaves the right reserved, as it stood before the cession.

Balliot v. Bauman, 5 Penn. 150, 154, 155 (1843). A patent is not operative against the rights of a third person existing before the issuing of the patent. He may show that his right is better than the one who obtained the patent and for that purpose may inquire into the prior title of the patentee.…[and] show his own equitable title is better. The patent conveys the full legal title of the state.

Brown v. Wenham, 10 Metcalf 496, 498 (Mass. SC)(1843). The provincial St.13 Wm 3, (1701,) entitled "an act to prevent and make void clandestine and illegal purchases of lands from the Indians," rendered void, as the foundation of title, all deeds made by Indians, without the license or approbation of the legislature, after the year 1633. ["St.13 Wm 3, (1701,)" is an alternative citation for *An Act to prevent and make void clandestine and illegal purchases of lands from the Indians*, Stat. Prov. Mass. Bay 1701-02, c. 11.]

Coleman v. Tish-Ho-Mah, Smedes & M. 40, 48 (Miss. HCEA) (1844). Theirs was a right to retain possession, and to use it according to their own discretion, though not to dispose of the soil except to the government. That claimed the ultimate dominion, and the exclusive right to grant the soil, subject to the Indian right of occupancy.

Ogden v. Lee, 6 Hill's 546, 548, 549 (NYSC) (1844). The European governments whose people discovered and made settlements in North America, claimed the sovereignty of the country, and the ultimate title, but not the immediate right of possession, to all lands within their respective limits. Upon the principle laid down by Vattel, (B. 1, & 81, 209,) they might have asserted a larger right; for the natives lived by fishing and hunting, without converting to the purposes of agriculture any considerable portion of the of the vast tracts of the country over which they wandered. But the Europeans pursued the more just and politic course of acquiring the Indian title by purchase. The claim which they set up and asserted amounted to little more than a right of preemption, or the right of purchasing from the Indians all the lands within the bounds of their respective discoveries, to the exclusion of all other nations. It is true that the British crown granted charters and issued patents for large tracts of land before the Indian right had been extinguished; and these instruments purported to convey the property in fee. It was so of the grant made by Charles the second to his brother the duke of York in 1664, which included all the territory now constituting the states of New-York and New-Jersey. But these grants were not intended to convey, and the grantees never pretended that they has acquired an absolute fee in the land. They neither

took nor claimed any thing more than the ultimate fee, or the right of dominion after the Indian title should be extinguished. And so far as the state of New-York is concerned, I am happy to say, that beyond what may have been acquired by conquest in lawful war, the Indians have never been deprived of a single foot of land without their voluntary consent. Their title by occupancy has been uniformly acknowledged, both by the colonial and state governments, from the first settlement of the country down to the present day; and it cannot now be successfully questioned in the judicial tribunals.

Stockton v. Williams, 1 Mich. R. 546, 560 (SC) (1845). The power of the government to grant the soil while in the possession of the Indians, and subject to their right of occupancy, is a proposition which has long since been settled by a series of decisions of authority.

Fellows v. Lee, 5 Denio 628 (NYCE) (1846).…the Indian title to lands is an absolute fee, and that the pre-emption right conceded to Massachusetts, was simply a right to acquire by purchase from the Indians their ownership of the soil, whenever they should chose to sell it.

Bown v. West, (1846), 1 E&A 117, 118 (Upper Canada). The government, we know, always made it their care to protect the Indians, so far as they could, in the enjoyment of their property, and to guard them against being imposed upon and dispossessed by the white inhabitants…we cannot be supposed to be ignorant of the general policy of the government, in regard to the Indians, so far as has been manifest from time by orders of council and proclamations, of which all people were expected and required to take notice.

Montgomery v. Ives, 13 Smedes & M. 161, 174-5 (Miss. HCEA) (1849). Let us refer to the proclamation of George III… "that it is just, and reasonable, and essential to our interest and the security of our colonies, that the several nations or tribes of Indians, with whom we are connected, and who live under our protection, should not be disturbed in the possession of such parts of our dominions and territories, as not having been ceded to, or purchased by us, are reserved to them, or any of them, as their hunting grounds." It then goes on to declare, that no governor, in any of the said provinces, shall presume, "upon any pretence whatever, to grant warrants of survey, or pass any patents for lands, beyond the bounds of their respective governments, as described by their commissions." It farther declares, "that, for the present, all the lands not included within the limits of said new governments, shall be reserved to under the sovereignty, protection and dominion of the crown, and forbids all purchases and settlements beyond those limits without special leave and license first obtained." It goes on still farther to declare a principle which seems to have been adhered to ever since, "that no private person do make purchase of any land from any Indians, but that the same shall be purchased only for the government, in the name of the sovereign, at some public meeting of the Indians." This principle, the offspring of a just and enlightened policy, became incorporated into the intercourse of England, with the Indian tribes, and has been adopted and pursued by our own government, in all its transactions with them.…On this part of the proclamation of 1763, the Supreme Court of the United States say, "This reservation is a suspension of the powers of the royal governor, within the territory reserved." *Fletcher v. Peck,* 6 Cranch, 142. It is

because of this suspension, which existed at the date of this grant, that we think it has no intrinsic validity. It is an established principle in our jurisprudence, that a grant of land on which the Indian title has not been extinguished, is void. *Danforth v. Wear,* 9 Wheat. 676.

Breaux v. Johns, 4 Louisiana R. 141, 143 (1849). These grants convey a title to the grantees, subject only to the Indian right of occupancy.

Gaines v. Nicholson, 9 How. 356, 365 (1850). No previous grant of Congress could be paramount, according to the rights of occupancy which this government has always conceded to the Indian tribes within her jurisdiction. [The reservation] was so much carved out of the Territory ceded, and remained to the Indian occupant, as he never parted with it. He holds, strictly speaking, not under the treaty of cession, but under his original title, confirmed by the government in the act of agreeing to the reservation.

Marsh v. Brooks, 49 US 223, 232 (1850).…Indian title consisted of the usufruct and right of occupancy and enjoyment; and, so long as it continued, was superior to and excluded those claiming the reserved lands by patents made subsequent to the ratification of the treaty; they could not disturb the occupants under the Indian title. That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question.

People v. Dibble, 18 Barbour's NYSCR 412, 418 (1854). The object of the law, with various other laws of the state, was to protect the indians to quiet them and render them secure.

Scott v. Sandford, 19 How. 393, 403, 404, 405, 407, 420, 426, 432, 435, 449, 450, 452, 460, 483, 484, 485, 501, 506, 508, 509, 513, 520 (1857). The question is simply this: can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such entitled to all the rights and privileges, and immunities guaranteed by that instrument to the citizen?…The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be [404] subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign Governments as much as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first immigrants to the English colonies to the present day, by the different Governments which succeeded to each other. Treaties have been negotiated with them, and these

Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under the subjection of the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over the territory they occupy. But they may, without doubt, like the subjects of any foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up abode among the white population, he would be entitled to all the rights and privileges which would belong to any emigrant from any other foreign people…[405] It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed this sovereignty and framed the Constitution. The duty of the Court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.…[407] It is difficult at this day to realize the state of public opinion in relation to that unfortunate race [Africans], which prevailed in the civilized and enlightened portions or the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nations displays it in a manner too plain to be mistaken. They had for more than a century before been regarded as beings of an inferior order, and altogether unfit with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect:…[420] Congress might…have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they have recently committed, when they were allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even guarding themselves against the threatened renewal of Indian hostilities. No one would have supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word was not used with any particular reference to them. Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore no there was no necessity for using particular words to exclude them.…[426] No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race [African slaves], in the civilized nations of Europe or in this country, should induce this court to give to the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called upon to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.…Any other rule would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the

Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.…And upon a careful consideration of the subject, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts;…[432] The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except for punishment for crime, shall be forever prohibited in all the part of the territory ceded by France, under the name Louisiana,…and the difficulty which meets us at the threshold of this part of the enquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority was not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under any one of the United States…[435]…this Government was to be carefully limited in its powers, to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from the language of the instrument, and the objects it was intended to accomplish;…[449] It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers, which the Constitution denied to it…[450]…and the Federal Government can exercise no right power over his person or property beyond what the instrument confers, nor lawfully deny any right which it has reserved…And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. [452] Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding or owning property of this kind in the territory of the United States north of the line mentioned, is not warranted by the Constitution, and is therefore void;…[460] Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it…And it is equally true, that no State or nation can affect or bind out of its territory, or persons not residing within it.…[480]…to change or to abolish a fundamental principle of the society, must be the act of the society itself—of the *sovereignty*; and that none other can admit to the participation of that high attribute. [483]…each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature…power or weakness does not make any difference. A small republic is no less sovereign than the most powerful kingdom…[484]and no one nation is entitled to dictate a form of government or religion, or a course of internal policy, to another. [485] Sovereignty, independence, and a perfect right of self-government, can signify nothing less than a superiority to and exemption from all claims of extraneous power, however expressly they may be asserted, and render all attempts to enforce such claims merely attempts at usurpation. [501] But the recognition of a plenary power in Congress to dispose of the public domain, or to organize a Government over it, does not imply a corresponding authority to determine the internal policy, or to adjust the domestic relations, or the persons who may lawfully inhabit the territory in which it is situated.…[506] This [the inflation of federal plenary jurisdiction] proceeds from a radical error, which lies at the foundation of much of this discussion. It is, that the Federal

Government may lawfully do whatever is not directly prohibited by the Constitution. This would have been a fundamental error, if not amendments to the Constitution had been made. But the final expression of the will of the people of the States, in the 10th amendment, is, that the powers of the Federal Government are limited to grants of the Constitution. [508] In Pollard's Lessee v. Hagan, (3 How., 212,) the court say; "The United States have no constitutional capacity to exercise municipal [509] jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact." [513]…a power to make rules and regulations respecting the public domain does not confer a municipal sovereignty over persons and things upon it. [520] The King of Great Britain, by his proclamation of 1763, virtually claimed that the country west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the treaty of Paris of that year, and he says: "We reserve it under our sovereignty, protection and dominion, for the use of the Indians." This country was conquered from the Crown of Great Britain, and surrendered to the United States by the treaty of peace of 1783.

Fellows v. Denniston, 23 NY 420, 423, 428, 431 (CA)(1861). The nature of the aboriginal title, and that of the State within which the lands lie, has been so often defined by judicial determination that no time need now be spent on it. (*Johnson v. McIntosh,* 8 Wheat., 543; *Fellows v. Ellsworth,* 6 Hill, 546; S.C., 5 Denio, 528.) The Indian nation, in a collective or national capacity, has the right of occupancy of the land, but no power to sell or in any way dispose of it to others, except to the State, or to persons authorized by it to purchase; and the government of the State has the ultimate right of the soil, or title in fee simple, subject to the Indian right of occupancy. The right to purchase the Indian claim, or, in the language usually employed, to extinguish the Indian title, thus existing in the State or in its grantees, is usually called the right of preemption.…If the purchaser acquires no right to interfere with the Indian occupancy, the subject of his purchase is limited to the title of the grantees under the State of Massachusetts; and he acquires nothing more. This, we have seen, is the right of preemption, and perhaps it embraces also a technical fee; but, as it does not embrace the Indian right of occupancy, but expressly excludes it, and that is the only right which the Indians had, it is clear that they are not prejudiced by the tax or by any sale which may take place pursuant to it. The title of the grantees under Massachusetts to these lands, before the extinguishment of the Indian title, subject as it was to the right of possession remaining in the Indians for an indefinite period, was not liable to taxation and sale under the general laws of the State relative to the assessment of taxes.… Each of the three Constitutions successively adopted by the people of the State has contained a provision like that in the first Constitution, which was in these words: "No contracts or purchases for the sale of lands made since the 14th day of October, A.D. 1775, or which may be hereafter made with or of the said Indians, within the limits of this State, shall be binding on the said Indians, or be deemed valid, unless made either under the authority and with the consent of the Legislature of this State."

Constitution Act (Canada), 1867, s. 90.…Disallowance of Acts,…shall extend and apply to the Legislatures of the several Provinces…s. 91(24)…the exclusive Legislative authority of the Parliament of Canada extends to…Indians, and lands reserved for the Indians. S. 92(13). In each Province the Legislature may exclusively make Laws in relation to Property and Civil Rights within the Province. S. 109. All Lands…shall belong to the several Provinces…subject to…any Interest other than that of the Province in the same. S. 129. Except as otherwise provided by this Act, all Laws in force…at the Union, shall continue in Ontario…as if the Union had not been made. S. 132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

Connelly v. Woolrich, (1867), 11 LCJ 197, 205-07 (SC Quebec), affirmed (1869), RLOS 356-7 (CA Quebec).…will it be contended that the territorial rights, political organization such as it was, or the laws of the Indian tribes, were abrogated—that they ceased to exist when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not—that so far from being abolished, they were not even modified in the slightest degree in regard to the civil rights of the natives. As bearing upon this point, I cannot do better than to cite the decision of learned and august tribunal—the Supreme Court of the United States. In the celebrated case of *Worcester against the State of Georgia*, (6th Peters Reports, pages 515-542), Chief Justice Marshall—perhaps one of the greatest lawyers of our times—in delivering the judgment of the Court, said:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in the possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing.

Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the Creator of all things, conferred these rights over hunters and fishermen, on agriculturalists and manufacturers?

But power, war, conquest give rights, which after possession, are conceded by the world; and that can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions.

The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any of them to grasp the whole; and the claimants too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously for all,

it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession." Johnson vs. McIntosh, 8 Wheaton's Rep., 543.

This principle, acknowledged by all Europeans, because it was in the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one that could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all, the claims of Great Britain, both territorial and political; but no attempt so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist; are asserted by the one, and admitted by the other.

Soon after Great Britain determined upon planting colonies in America, the king granted charters to companies of his subjects who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect claim; nor was it so understood.********

Certainly it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.

Though speaking more particularly of Indian lands and territories, yet the opinion of the Court as to the maintenance of the laws of the Aborigines, is manifest throughout. The principles laid down in this judgment, (and Mr. Justice Story as a Member of the Court concurred in this decision), admit of no doubt.

Connelly v. Woolrich, (1869), RLOS 356-7 (CA Quebec). Even the United States are careful to acquire the Indian title, either by purchase or by other conventional means, before occupancy can be allowed, or public grants made.

United States v. Foster, 2 Bissell's 377, 377 (Wisc. Cir. Ct.) (1870). It may be doubted whether this reservation can be sold by the United States in the present

condition of the title, even by act of Congress, without the consent of the Indians themselves, but it is certain that it cannot be without an express law; and if the precedents which have always existed in such cases should be followed, it cannot, and ought not to be sold by the Government, until the rights of the Indians are purchased, and with their free consent.

Minter v. Shirley, 3 Miss. 376, 381, 382 (1871). The right to acquire and extinguish their title pertained exclusively to the United States, therefore purchases, made from them separately, or as tribes, were null and void.…The several acts of congress, in reference to the survey and sale of the public lands, distinctly keep in view the fact "that the Indian title must first have been extinguished, and acquired by the United States, before individual right to any part of the soil can be derived and vested."

Holden v. Joy, 84 US 211, 244 (1872). Obviously this principle regulated the right conceded by discovery among the discoverers, but it did not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a more ancient discovery. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.…Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs.

Order in Council (Canada) of 23 January 1875. The 40th article of the treaty of Capitulation of Montreal, dated 8th September 1760, is to the effect that:
The Savages or Indian allies of His Most Christian Majesty shall be maintained in the lands they inhabit if they choose to remain there.

The Proclamation of King George III 1763…*such parts of our dominions and territories*, as not having been purchased by Us, are reserved to them, or any of them as their hunting grounds;…*or upon* any lands whatever, which not having been ceded to or purchased by us, as aforesaid, are reserved to the said Indians, or any of them…*And we do further strictly enjoin and require all persons whatsoever, who may have either wilfully or inadvertently seated themselves upon any lands within the Countries above described, or upon any other lands,* which not having been ceded to or purchased by us, are reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements…

The Undersigned would also refer to the BNA Act 1867 Sec. 109, applicable to British Columbia, which enacts that, all lands belonging to the Province shall, belong to the Province "subject to any trust existing in respect thereof, and to any interest other than the Province in the same."…

The Undersigned, therefore, feels it incumbent upon him to recommend that this Act be disallowed.

St. Catherines Milling and Lumber Company Ltd. v. The Queen, (1888), 14 AC 46, 53-55, 60 (JCPC). Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest surrendered by the treaty. The ceded territory was at the time of the Union land

vested in the Crown, subject to "an interest other than that of the Province in the same" within the meaning of sect. 109;…the [treaty's] legal consequences …opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit…there has been all along vested in the Crown a substantial and paramount estate underlying the Indian title, which became a *plenum dominium* [plenary jurisdiction] whenever that title was surrendered or otherwise extinguished.

AG *Ontario v.* AG *Canada: In re Indian Claims,* [1897] AC 199, 210-11 (JCPC). The beneficial interest in the territories ceded by the Indians under the treaties became vested, by virtue of s. 109, in the Province of Ontario.…The effect of the treaties was, that, whilst the title to the lands continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds, passed to the Government of the Province.
"An interest other than that of the province in the same" appears to them [their Lordships] to denote some right or interest in a third-party, independent of and capable of being vindicated when in competition with the beneficial interest of the old province.

Lara v. US, 541 US 193, 214-27 (2004)(Thomas, J.) In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously.… In 1871, Congress enacted a statute that purported to prohibit entering into treaties with the "Indian nation[s] or tribe[s]." 16 Stat. 566, codified at 25 USC §71. Although this Act is constitutionally suspect (the Constitution vests in the President both the power to make treaties, Art. II, §2, cl. 2, and to recognize foreign governments, Art. II, §3; see, *e.g., United States v. Pink,* 315 US 203, 228-230 (1942)), it nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter. To be sure, this does not quite suffice to demonstrate that the tribes lost their sovereignty. …Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases. ((note 4)…this is precisely the confusion that I have identified and that I hope the Court begins to resolve.) …I believe we must examine more critically our tribal sovereignty case law. Both the Court and the dissent, however, compound the confusion by failing to undertake the necessary rigorous constitutional analysis. I would begin by carefully following our assumptions to their logical conclusions and by identifying the potential sources of federal power to modify tribal sovereignty.…I do, however, agree that this case raises important constitutional questions that the Court does not begin to answer. The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty…and I would be willing to revisit the question.…The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain the tribes possess anything resembling "sovereignty." The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgement might allow the Court to ask the logically antecedent question *whether* Congress (as opposed to the President) has this power. A cogent answer would serve as the foundation for the analysis of the

sovereignty issues posed by this case. We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.

APPENDIX B

No. 8575

IN THE

Supreme Court of New York

NOTICE TO RESPONDENTS

Whosoever is in receipt of this sworn application in his regard shall file a sworn reply within twenty (20) days from the date of service thereof, which is the date of receipt. Should no written sworn reply be filed in terms of the law within the prescribed time, the Court shall proceed to adjudicate the matter according to law.

It is for this reason in the interest of whosoever receives this sworn application to consult an advocate without delay that he may make his submissions during the hearing of the case.

Tthowgwelth and Toanunck,

Applicants,

v.

Supreme Court of Canada and Supreme Court of the United States,

Respondents.

APPLICATION FOR A CONSTITUTIONAL DECLARATION OF JURISDICTIONAL LAW ALONE

To prevent the genocide-in-progress in North America from continuing contrary to Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* in virtue of the Respondents' judicial inactivity refusing to address the *Constitution Act, 1867,* §109 and the *Constitution, 1789,* Article II, §2,¶2, clause 1.

DECLARATION OF APPLICANTS

We, Tthowgwelth and Toanunck, the applicants, respectively of Masset, British Columbia, and North Granville, New York, MAKE OATH AND SAY AS FOLLOWS:

(1) The facts enumerated hereinafter are true.

(2) Since this application is restricted to a constitutional question of jurisdictional law alone those facts are presumed true and, correspondingly, no *viva voce* witnesses need (or indeed may without leave) be called.

SWORN at Vancouver, British Columbia, Canada, March 1, 2006.

/s/ "Jeffrey S. Witten"
Commissioner of Oaths
JEFFREY S. WITTEN
Notary Public, British Columbia

/s/ "TTHOWGWELTH aka Lavina White"
Applicant/Affiant Tthowgwelth

SWORN at Granville, New York, United States of America, March 1, 2006.

/s/ "Jenny Linda Martelle"
Commissioner of Oaths
JENNY LINDA MARTELLE 01MA6068020
Notary Public, State of New York
Qualified in Washington County
My Commission Expires 12/24/2009

/s/ "TOANUNCK X aka Edward VanGuilder"
Applicant/Affiant Toanunck

Applicants *Pro Se*
ADDRESS FOR SERVICE:
Rick VanGuilder
Assistant Chief
Truthville Road
P.O. Box 18
N. Granville
New York 12854
(518) 642-1198
jvngld@aol.com

Attorney General Canada
COUNSEL FOR RESPONDENT
c/o Canadian Embassy
501 Pennsylvania Ave., NW
Washington, DC 20001

Attorney General USA
COUNSEL FOR RESPONDENT
c/o James B. Cooney
U.S. Department of Justice
L'Enfant Plaza Station
P.O. Box 443778
Washington, DC 20026-4378

Constitutional Question

Does this Court share[1] the universal extraterritorial jurisdiction to prevent genocide arguably being caused by the intentional judicial inactivity of foreign[2] national court systems and, if so, will this Court exercise such jurisdiction by respectfully and in comity declaring the respondent Courts forthwith should address the constitutional law of North America inaugurated in equity by the papal bull *Sublimus Dei, 1537,* and confirmed at law by the *Constitution of Canada, 1867*, Section 109, as settled by *Attorney General of Ontario v. Attorney General of Canada,* [1897] AC 199, 205, 210-11 (JCPC), and by the *Constitution of the United States, 1789,* Article II, §2, ¶2, clause 1, Article V and Amendment X, as settled by *Fletcher v. Peck,* 6 Cranch's 87, 121 (SC 1810), in the light of *Lara v. US,* 541 US 197, 214-227 (2004)(Thomas, J) and *R. v. Marshall; R. v. Barnard,* 2005 SCC 43, ¶¶48, 107?

A Note Regarding Headings and Organization: For ease of intelligibility both to the respondents and the international community of national courts, this document is formatted as for applications for *certiorari* in the USSC. The submission is, as settled by *Menchu v. Montt* the substantive issue of preventing and punishing genocide caused by intentional judicial inactivity supersedes the procedural issue of compliance in matters of form when such compliance defeats substance.

---

[1] Appendix: APPLICATION IN THE MALTA CONSTITUTIONAL COURT [*supra*].

[2] The adjective "foreign" *a fortiorti* subsumes one's own domestic court system if and when it has placed itself outside the rule of law by committing genocide.

Table of Contents

Table of Authorities (Contained in Malta Appendix [*supra*])

UNIVERSAL

MALTESE

AMERICAN

CANADIAN

Jurisdiction

(1). For the purpose of addressing the threshold question of a court's jurisdiction to entertain a cause and the facts alleged to give rise to it, the cause and facts are presumed to be true as pleaded and attested.

(2). Canada and the United States of America are rule of law nations in which by definition of terms genocide is impossible unless and until the courts sworn to uphold the rule of law for political reasons intentionally are engaged in "judicial inactivity" in relation to the prevention of that crime.

(3). Procedure and form must serve rather defeat the exercise of court jurisdiction to prevent genocide from occurring in consequence of judicial willful blindness to written *Constitutions.*

(4). In consequence this Court must have and therefore does have the jurisdiction—in the substantive interest of the prevention of genocide—by declaration to ask the courts above it and beside it to address the constitutional question hereinbefore defined, on the ground that the continuing judicial inactivity in relation to doing so *prima facie* results in genocide in North America.

(5). The universal extraterritorial criminal law jurisdiction identified by the Constitutional Court of Spain in *Menchu v. Montt* on September 26, 2005—to punish genocide occurring in consequence of the Guatemalan courts' apparent judicial inactivity in relation to preventing

it—*a fortiori* applies to this Court's civil law jurisdiction to prevent the same crime occurring in consequence of the counterpart judicial inactivity of the national courts of Canada and the USA.

Statement of the Case

(6). The facts and mixed facts and law identified in the Appendix are repeated and relied upon *mutatis mutandis.*

Argument

(7). The arguments identified in the Appendix are repeated and relied upon *mutatis mutandis.*

Conclusion

(8). The conclusion identified in the Appendix is repeated and relied upon *mutatis mutandis.*

DATED AS AT THE DATE OF THE APPLICANTS' OATH ABOVE.

APPENDIX C

No. S-061667

IN THE

Supreme Court of British Columbia

NOTICE TO RESPONDENTS

Whosoever is in receipt of this sworn application in his regard shall file a sworn reply within twenty (20) days from the date of service thereof, which is the date of receipt. Should no written sworn reply be filed in terms of the law within the prescribed time, the Court shall proceed to adjudicate the matter according to law.

It is for this reason in the interest of whosoever receives this sworn application to consult an advocate without delay that he may make his submissions during the hearing of the case.

Tthowgwelth and Toanunck,

Applicants,

v.

Supreme Court of Canada and Supreme Court of the United States,

Respondents.

APPLICATION FOR A CONSTITUTIONAL DECLARATION OF JURISDICTIONAL LAW ALONE

To prevent the genocide-in-progress in North America from continuing contrary to Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* in virtue of the Respondents' judicial inactivity refusing to address the *Constitution Act, 1867,* §109 and the *Constitution, 1789,* Article II, §2,¶2, clause 1.

DECLARATION OF APPLICANTS

We, Tthowgwelth and Toanunck, the applicants, respectively of Masset, British Columbia, and North Granville, New York, MAKE OATH AND SAY AS FOLLOWS:

(1) The facts enumerated hereinafter are true.

(2) Since this application is restricted to a constitutional question of jurisdictional law alone those facts are presumed true and, correspondingly, no *viva voce* witnesses need (or indeed may without leave) be called.

SWORN at Vancouver, British Columbia, Canada, March 1, 2006.

/s/ "Jeffrey S. Witten"
Commissioner of Oaths
JEFFREY S. WITTEN
Notary Public, British Columbia

/s/ "TTHOWGWELTH aka Lavina White"
Applicant/Affiant Tthowgwelth

SWORN at Granville, New York, United States of America, March 1, 2006.

/s/ "Jenny Linda Martelle"
Commissioner of Oaths
JENNY LINDA MARTELLE 01MA6068020
Notary Public, State of New York
Qualified in Washington County
My Commission Expires 12/24/2009

/s/ "TOANUNCK X aka Edward VanGuilder"
Applicant/Affiant Toanunck

Applicants *Pro Se*
ADDRESS FOR SERVICE:
Sue Cameron
8590 Bedora Place
West Vancouver, British Columbia
Canada V7W 2W4
(604) 921-9300
susanecameron@hotmail.com

Attorney General USA
COUNSEL FOR RESPONDENT
c/o Embassy of the USA
490 Sussex Drive
Ottawa, Ontario K1N 1G8

Attorney General Canada
COUNSEL FOR RESPONDENT
c/o Brian Evernden
Lead Counsel
Department of Justice, Canada
234 Wellington Street
Room 1213
Ottawa, Ontario K1A 0H8

Constitutional Question

Does this Court share[1] the universal extraterritorial jurisdiction to prevent genocide arguably being caused by the intentional judicial inactivity of foreign[2] national court systems and, if so, will this Court exercise such jurisdiction by respectfully and in comity declaring the respondent Courts forthwith should address the constitutional law of North America inaugurated in equity by the papal bull *Sublimus Dei, 1537,* and confirmed at law by the *Constitution of Canada, 1867*, Section 109, as settled by *Attorney General of Ontario v. Attorney General of Canada,* [1897] AC 199, 205, 210-11 (JCPC), and by the *Constitution of the United States, 1789,* Article II, §2, ¶2, clause 1, Article V and Amendment X, as settled by *Fletcher v. Peck,* 6 Cranch's 87, 121 (SC 1810), in the light of *Lara v. US,* 541 US 197, 214-227 (2004)(Thomas, J) and *R. v. Marshall; R. v. Barnard,* 2005 SCC 43, ¶¶48, 107?

A Note Regarding Headings and Organization: For ease of intelligibility both to the respondents and the international community of national courts, this document is formatted as for applications for *certiorari* in the USSC. The submission is, as settled by *Menchu v. Montt* the substantive issue of preventing and punishing genocide caused by intentional judicial inactivity supersedes the procedural issue of compliance in matters of form when such compliance defeats substance.

---

[1] Appendix: APPLICATION IN THE MALTA CONSTITUTIONAL COURT [*supra*].

[2] The adjective "foreign" *a fortiori* subsumes one's own domestic court system if and when it has placed itself outside the rule of law by committing genocide.

Table of Contents

Table of Authorities (Contained in Appendix)

UNIVERSAL

MALTESE

AMERICAN

CANADIAN

Jurisdiction

(1). For the purpose of addressing the threshold question of a court's jurisdiction to entertain a cause and the facts alleged to give rise to it, the cause and facts are presumed to be true as pleaded and attested.

(2). Canada and the United States of America are rule of law nations in which by definition of terms genocide is impossible unless and until the courts sworn to uphold the rule of law for political reasons intentionally are engaged in "judicial inactivity" in relation to the prevention of that crime.

(3). Procedure and form must serve rather defeat the exercise of court jurisdiction to prevent genocide from occurring in consequence of judicial willful blindness to written *Constitutions.*

(4). In consequence this Court must have and therefore does have the jurisdiction—in the substantive interest of the prevention of genocide—by declaration to ask the courts above it and beside it to address the constitutional question hereinbefore defined, on the ground that the continuing judicial inactivity in relation to doing so *prima facie* results in genocide in North America.

(5). The universal extraterritorial criminal law jurisdiction identified by the Constitutional Court of Spain in *Menchu v. Montt* on September 26, 2005—to punish genocide occurring in consequence of the Guatemalan courts' apparent judicial inactivity in relation to preventing

it—*a fortiori* applies to this Court's civil law jurisdiction to prevent the same crime occurring in consequence of the counterpart judicial inactivity of the national courts of Canada and the USA.

Statement of the Case

(6). The facts and mixed facts and law identified in the Appendix are repeated and relied upon *mutatis mutandis.*

Argument

(7). The arguments identified in the Appendix are repeated and relied upon *mutatis mutandis.*

Conclusion

(8). The conclusion identified in the Appendix is repeated and relied upon *mutatis mutandis.*

DATED AS AT THE DATE OF THE APPLICANTS' OATH ABOVE.

APPENDIX D

In The
NATIONAL ENERGY BOARD

Between:

TTHOWGWELTH
c/o Sue Cameron
8590 Bedora Place
West Vancouver, B.C.
V7W 2W4

Applicant,

And:

NATIONAL ENERGY BOARD
c/o Michel Mantha
Secretary of the Board
444 Seventh Avenue SW
Calgary, Alberta
T2P 0X8

Respondent.

IN THE MATTER OF the Enbridge Gateway Project and the Mackenzie Gas Project;

AND IN THE MATTER OF this Notice of Constitutional Objection to Jurisdiction;

AND IN THE MATTER OF preventing the genocide-in-progress in North America from continuing contrary to Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* in virtue of the Respondent's judicial inactivity refusing to address the *Constitution Act, 1867,* §109.

NOTICE OF CONSTITUTIONAL QUESTION BY AFFIDAVIT OF INTEREST OF AFFECTED PARTY

I, Tthowgwelth, hereditary indigenous representative of the indigenous-government of Haida Gwaii, resident in the concentration camp or Indian reservation of Masset, in the Province of British Columbia, the applicant herein, MAKE OATH AND SAY AS FOLLOWS:

(1). The respondent's extraterritorial assumption of jurisdiction in the unceded Indian territories in Canada, including the Mackenzie Valley and Haida Gwaii (Queen Charlotte Islands) and the intervening and surrounding territories of North America to which and through which the proposed pipeline projects will transmit energy resources for distribution, intentionally or with culpable indifference to the *Constitution Act, 1867,* §109, commits genocide contrary to the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* article 2(b), which directly interests and affects me.

(2). The jurisprudential statement of the basis for the aforesaid objection and accusation of complicity in genocide-in-progress against the respondent is set forth in the ACCOMPANYING SUPREME COURT OF BRITISH COLUMBIA ACTION S-061667 and is true, complete and sufficient for disposition of the constitutional question by operation of jurisdictional law alone.

(3). The Council of the Haida Nation (CHN) and the Aboriginal Pipeline Group (APG) appearing before the National Energy Board in

relation to the Enbridge Gateway Project and the Mackenzie Gas Project respectively are not constitutionally-vested with indigenous-government jurisdiction, but rather each is a recent-invention for the purpose of some indigenous persons' collaboration for profit in the said genocide, as part parcel of what I shall term the Indian Collaborating Movement (ICM) created in historical consequence of the unconstitutional jurisdictional invasion of the Indian territories implemented by the manifestly unconstitutional *Indian Act, 1876*.

(4). The *National Energy Board Act* inclusive of the following specifically jurisdictional sections is by operation of law alone *ultra vires* in virtue of *prima facie* territorial conflict with the aforesaid Section 109 and Article 2(b):

§3. (1) There is hereby established a Board, to be called the National Energy Board, consisting of not more than nine members to be appointed by the Governor in Council.

§11. (1) The Board is a court of record.

§12. (2) For the purposes of this Act, the Board has full jurisdiction to hear and determine all matters, whether of law or of fact.

§17. (1) Any decision or order made by the Board may, for the purpose of enforcement thereof, be made a rule, order or decree of the Federal Court or of a superior court of a province and shall be enforced in like manner as a rule, order or decree of that court.

§22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.

§23. (1) Except as provided in this Act, every decision or order of the Board is final and conclusive.

(2) Any minute or other record of the Board or any document issued by the Board, in the form of a decision or order, shall for the purposes of this section be deemed to be a decision or order of the Board.

§28.7 (1) Every person who fails to comply with an order of the Board under section 28.4 or 28.5 is guilty of an offence and is liable

(*a*) on summary conviction, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year or to both; or

(*b*) on conviction on indictment, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years or to both

§31. Except as otherwise provided in this Act, no company shall begin the construction of a section or part of a pipeline unless

(*a*) the Board has by the issue of a certificate granted the company leave to construct the line;…

§52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:

(*a*) the availability of oil, gas or any other commodity to the pipeline;

(*b*) the existence of markets, actual or potential;

I the economic feasibility of the pipeline;

(*d*) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the pipeline; and

(*e*) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

§53. On an application for a certificate, the Board shall consider the objections of any interested person, and the decision of the Board as to whether a person is or is not an interested person for the purpose of this section is conclusive.

SWORN at West Vancouver, British Columbia, Canada, March 16, 2006.

/s/ "Kate Manvell"
Kate Manvell, Notary Public
Province of British Columbia
West Vancouver, B.C. V7T 1C5

/s/ "TTHOWGWELTH aka Lavina White"
Applicant/Affiant Tthowgwelth

APPENDIX E

In The
INTERNATIONAL CRIMINAL COURT

Between:

TTHOWGWELTH
c/o Sue Cameron
8590 Bedora Place
West Vancouver, B.C.
v7w 2w4

Applicant,

And:

INTERNATIONAL CRIMINAL COURT
c/o Pre Trial Chamber I
PO Box 19519
2500 CM, The Hague
The Netherlands

Respondent.

IN THE MATTER OF preventing the genocide-in-progress in North America from continuing contrary to Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* in virtue of the Respondent's complicity committed by means of its manifestly unequal application of the convention to the weak but not the strong in abrogation of the rule of law's constitutive principle of equal application;

AND IN THE MATTER OF staying proceedings against Thomas Lubanga Dyilo under the *Rome Statute of the International Criminal Court,* Article 8(2)(b)(xxvi) on the ground of a Constitutional Objection going to the Jurisdiction of the Respondent.

NOTICE OF CONSTITUTIONAL QUESTION BY AFFIDAVIT OF INTEREST OF AFFECTED PARTY

I, Tthowgwelth, hereditary indigenous representative of the indigenous-government of Haida Gwaii, resident in the concentration camp or Indian reservation of Masset, in the Province of British Columbia, the applicant herein, MAKE OATH AND SAY AS FOLLOWS:

(1). As appears from the accompanying complementary application in the National Energy Board *Tthowgwelth v. National Energy Board,* the mighty nation of Canada, a State Party to the *Rome Statute of the International Criminal Court,* by its national courts and tribunals unconstitutionally exercises jurisdiction in the indigenous nations' unceded territories in Canada, including the Mackenzie Valley and Haida Gwaii (Queen Charlotte Islands) and the intervening and surrounding territories of North America to which and through which the proposed pipeline projects will transmit energy resources for distribution, with intent to commit or culpable indifference to the reasonably foreseeable, probable, actual and attested consequence of genocide contrary to the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* Article 2(b).

(2). Canada by means of Louise Arbour, former Justice of the Supreme Court of Canada and present United Nations High Commissioner for Human Rights, instrumentally crafted the *Rome Statute of the International Criminal Court* so as fraudulently to convey the political impression of the existence of an international court invested with universal

extraterritorial jurisdiction to punish crimes against humanity, while at the same time intentionally precluding the application of that ostensible jurisdiction to the Canadian legal establishment's ongoing genocide of the indigenous nations within the borders claimed by Canada. The *Rome Statute of the International Criminal Court* ostensibly is implemented as to Canada by its *Crimes Against Humanity and War Crimes Act,* which in truth contains the following exculpatory clauses reserving to Canada's legal establishment the privilege to continue committing its genocide-in-progress against the indigenous nations:

> §4. (1) Every person is guilty of an indictable offence who commits
> *(a)* genocide.
>
> §9(3). No proceedings for an offence under any of section[s] 4…of this Act,…may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and those proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf.

(3). The truth, the whole truth and nothing but the truth is that the legal establishment of Canada suborns the International Criminal Court into "complicity in genocide" contrary to convention Article 3(e) by means of the unequal application of the convention, in abrogation of the rule of law's constitutive principle of equal application. The *Rome Statute of the International Criminal Court,* Article 1, invests in the Court "the power to exercise its jurisdiction over persons for the most serious crimes of international concern." In terms of the legislative intent of the *Rome*

Statute—to establish the rule of law as the universal antidote to genocide on earth—the ongoing "genocide" by the Canadian legal establishment contrary to the *Statute* Article 5(1)(a) is of overwhelmingly greater "international concern" and significance to the Court's high aspiration and hopefully destiny, than is Thomas Lubanga Dyilo's alleged conscription or impressment of underage combattents in Ituri contrary to *Statute* Article 8(2)(b)(xxvi). The spectacle of the mighty nation of Canada continuing to commit genocide with impunity at home while at the same fraudulently posturing as a human rights paragon on the global stage exacerbates Canada's intentional infliction of "serious bodily and mental" contrary to convention Article 2(b), against me and so many other victims of the Canadian legal establishment's illegal hypocrisy.

(4). The Articles of the *Rome Statue of the International Criminal Court* that by operation of law alone bear upon this threshold question going to the constitution of the Court's jurisdiction as a rule of law institution inherently governed, as such, by the rule of law's constitutive principle of equal application are:

> Article 1. An International Criminal Court (the "Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 4(1). The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
(2). The Court may exercise its functions and powers, as provided by this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

Article 5(1). The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide.

Article 6. For the purposes of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(b) Causing serious bodily or mental harm to members of the group.

Article 8 (1). The Court 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.
(2). For the purposes of this Statute, "war crimes" means:

(b) Other serious violations of the laws and customs applicable international armed conflict, within the established framework of international law, namely, any of the following acts:

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

Article 10. Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 12(1). A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

> Article 13. The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
>
> I The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.
>
> Article 15(1). The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
> (2). The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
> (3). If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

SWORN at West Vancouver, British Columbia, Canada, March 24, 2006.

/s/ "Kate Manvell"
Kate Manvell, Notary Public
Province of British Columbia
West Vancouver, B.C. V7T 1C5

/s/ "TTHOWGWELTH aka Lavina White"
Applicant/Affiant Tthowgwelth

APPENDIX F

Court file no. A- -06

FEDERAL COURT OF APPEAL

Between:

Tthowgwelth,

Moving Party,

and:

National Energy Board,

Responding Party.

MOTION RECORD for LEAVE TO APPEAL

FROM:

Tthowgwelth c/o Sue Cameron
8590 Bedora Place
West Vancouver, BC V7W 2W4

TO:

Federal Court of Appeal
Pacific Center, P.O. Box 10065
701 West Georgia Street
Vancouver, BC V7Y 1B6

AND TO:

National Energy Board
444 Seventh Avenue SW
Calgary, AB T2P 0X8

AG Canada
284 Wellington Street
St. Andrew's Tower, SAT-6053
Ottawa, ON K1A 0H8

AG Ontario
720 Bay Street, 4th Floor
Toronto, ON M5G 2K1

AG Alberta
208 Legislature Building
10800-97 Avenue
Edmonton, AB T5K 2B6

AG British Columbia
PO Box 9044, Stn Prov Govt
Victoria, BC V8W 9E2

AG Manitoba
450 Broadway
Winnipeg, MB R3C 0V8

AG New Brunswick
PO Box 6000
Fredericton, NB E3B 5H1

AG Newfoundland
4th Floor, East Block
Confederation Building
PO Box 8700
St. John's, NL AB1 4J6

AG Northwest Territory
PO Box 1320
Yellowknife, NT X1A 2L9

AG Nova Scotia
5151 Terminal Road, 4th Floor
Halifax, NS B3J 2L9

AG Maligaliqiyikkut
PO Box 1000, Station 520
Iqaluit, NU X0A 0H0

AG Prince Edward Island
PO Box 2000
Charlottetown, PE C0A 7N8

AG Quebec
1200 rue de l'Église, 9th Floor
Ste-Foy, QC G1V 4M1

AG Saskatchewan
Room 355, Legislative Building
Regina, SK S4S 0B3

AG Yukon Territory
PO Box 2703
Whitehorse, YT Y1A 2C6

TABLE OF CONTENTS

NOTICE OF MOTION

TAKE NOTICE Tthowgwelth will make both a motion pursuant to the *National Energy Board Act,* Section 22(1), and the *Federal Court Rules,* Rule 352(1), for leave to appeal on a constitutional question of jurisdictional law alone of genocidal consequence, from the decision of the NEB dated March 30, 2006, not to stay the proceedings before it in relation to the Mackenzie Gas Project and the Enbridge Gateway Project pending constitutional justification of its assumption of jurisdiction, which is made in *prima facie* breach of the *Constitution Act, 1867,* Sections 91(24) and 109, and the *Constitution Act, 1982,* Section 35(1).

THE GROUND is the axiom that constitutional jurisdiction must be justified upon the basis of the rule of law's constitutive principles of constitutional supremacy and *stare decisis,* rather than assumed.

THE RELIEF SOUGHT is leave to appeal so this Court can either justify or, failing that, enjoin the said assumption of jurisdiction.

THE DOCUMENTATION hereinafter includes the Notice of Constitutional Question delimited in the pleading below.

Date: April 15, 2006.

/s/ "TTHOWGWELTH aka Lavina White"
Tthowgwelth, Moving Party

DECISION UNDER APPEAL

[By Letter]

In The

NATIONAL ENERGY BOARD

File (PA-GPI-2005-001)(PA-IOR 2004-001)

30 March 2006

Documents entitled Notice of Constitutional Question by Affidavit of Interest of Affected Party

TO: Tthowgwelth c/o Sue Cameron

The National Energy Board acknowledges receipt of your documents in respect of the Enbridge Gateway Project and the Mackenzie Gas Project.

It appears from the documents that declaratory relief is being sought from other courts. The Board is of the view that it is not the appropriate authority to deal with the issues raised and will not be addressing them further.

/s/ "Michel Mantha"
Michel Mantha
Secretary

NEB APPLICATION

In The
NATIONAL ENERGY BOARD

Between:

TTHOWGWELTH
c/o Sue Cameron
8590 Bedora Place
West Vancouver, B.C.
V7W 2W4

Applicant,

And:

NATIONAL ENERGY BOARD
c/o Michel Mantha
Secretary of the Board
444 Seventh Avenue SW
Calgary, Alberta
T2P 0X8

Respondent.

IN THE MATTER OF the Enbridge Gateway Project and the Mackenzie Gas Project;

AND IN THE MATTER OF this Notice of Constitutional Objection to Jurisdiction;

AND IN THE MATTER OF preventing the genocide-in-progress in North America from continuing contrary to Article 2(b) of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* in virtue of the Respondent's judicial inactivity refusing to address the *Constitution Act, 1867,* §109.

NOTICE OF CONSTITUTIONAL QUESTION BY AFFIDAVIT OF INTEREST OF AFFECTED PARTY

I, Tthowgwelth, hereditary indigenous representative of the indigenous-government of Haida Gwaii, resident in the concentration camp or Indian reservation of Masset, in the Province of British Columbia, the applicant herein, MAKE OATH AND SAY AS FOLLOWS:

(1). The respondent's extraterritorial assumption of jurisdiction in the unceded Indian territories in Canada, including the Mackenzie Valley and Haida Gwaii (Queen Charlotte Islands) and the intervening and surrounding territories of North America to which and through which the proposed pipeline projects will transmit energy resources for distribution, intentionally or with culpable indifference to the *Constitution Act, 1867,* §109, commits genocide contrary to the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948,* article 2(b), which directly interests and affects me.

(2). The jurisprudential statement of the basis for the aforesaid objection and accusation of complicity in genocide-in-progress against the respondent is set forth in the ACCOMPANYING SUPREME COURT OF BRITISH COLUMBIA ACTION S-061667 and is true, complete and sufficient for disposition of the constitutional question by operation of jurisdictional law alone.

(3). The Council of the Haida Nation (CHN) and the Aboriginal Pipeline Group (APG) appearing before the National Energy Board in

relation to the Enbridge Gateway Project and the Mackenzie Gas Project respectively are not constitutionally-vested with indigenous-government jurisdiction, but rather each is a recent-invention for the purpose of some indigenous persons' collaboration for profit in the said genocide, as part parcel of what I shall term the Indian Collaborating Movement (ICM) created in historical consequence of the unconstitutional jurisdictional invasion of the Indian territories implemented by the manifestly unconstitutional *Indian Act, 1876*.

(4). The *National Energy Board Act* inclusive of the following specifically jurisdictional sections is by operation of law alone *ultra vires* in virtue of *prima facie* territorial conflict with the aforesaid Section 109 and Article 2(b):

§3. (1) There is hereby established a Board, to be called the National Energy Board, consisting of not more than nine members to be appointed by the Governor in Council.

§11. (1) The Board is a court of record.

§12. (2) For the purposes of this Act, the Board has full jurisdiction to hear and determine all matters, whether of law or of fact.

§17. (1) Any decision or order made by the Board may, for the purpose of enforcement thereof, be made a rule, order or decree of the Federal Court or of a superior court of a province and shall be enforced in like manner as a rule, order or decree of that court.

§22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.

§23. (1) Except as provided in this Act, every decision or order of the Board is final and conclusive.

(2) Any minute or other record of the Board or any document issued by the Board, in the form of a decision or order, shall for the purposes of this section be deemed to be a decision or order of the Board.

§28.7 (1) Every person who fails to comply with an order of the Board under section 28.4 or 28.5 is guilty of an offence and is liable

(*a*) on summary conviction, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year or to both; or

(*b*) on conviction on indictment, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years or to both

§31. Except as otherwise provided in this Act, no company shall begin the construction of a section or part of a pipeline unless

(*a*) the Board has by the issue of a certificate granted the company leave to construct the line;…

§52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:

(*a*) the availability of oil, gas or any other commodity to the pipeline;

(*b*) the existence of markets, actual or potential;

I the economic feasibility of the pipeline;

(*d*) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the pipeline; and

(*e*) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

§53. On an application for a certificate, the Board shall consider the objections of any interested person, and the decision of the Board as to whether a person is or is not an interested person for the purpose of this section is conclusive.

SWORN at West Vancouver, British Columbia, Canada, March 16, 2006.

/s/ "Kate Manvell"	/s/ "TTHOWGWELTH aka Lavina White"
Kate Manvell, Notary Public	Applicant/Affiant Tthowgwelth
Province of British Columbia	
West Vancouver, B.C. V7T 1C5	

MEMORANDUM OF FACT AND LAW

I. FACTS:

(1). The facts are as attested in the pleading below and heretofore not contested, being: genocide-in-progress attributable to jurisdictional willful blindness to the *Constitution Act, 1867,* Section 109.

II. LAW:

(2). The law is as identified in the Notice of Motion as elaborated in the pleading below, and heretofore not disputed on the merits.

III. ISSUE:

(3). The issue is whether the ostensible guardians of the rule of law are themselves subject to it or, alternatively, with impunity can commit genocide in willful blindness to the law because they exercise a monopoly over its administration.

IV. ARGUMENT:

(4). Pursuant to Section 11(1) of the *National Energy Board Act* the Board expressly and explicitly is constituted as a "court" signifying, by operation of law alone, that like all other courts it may not presume to exercise a constitutionally-questioned jurisdiction without first ruling upon the merits of the objection, which it arbitrarily and with presumptively intended genocidal consequence has refused to attempt.

(5). Section 109 of the *Constitution Act, 1867,* signifies the crown's territorial jurisdiction is derivative as opposed to original which, by necessary implication of law alone, means that the crown-delegated jurisdiction of the National Energy Board is derivative.

(6). Section 91(24) of the *Constitution Act, 1867,* signifies the sole mode of derivation is a treaty of cession or purchase contracted

between the crown constitutionally represented by the federal Parliament, and the particular indigenous "Nation or Tribe of Indians" in aboriginal territorial occupation within the meaning of the *Royal Proclamation of 1763* represented by its indigenous constitutional government.

(7). No proof of derivation under Section 109 pursuant to Section 91(24) is in evidence and no other proof of derivation constitutionally is admissible in the absence of a constitutional amendment.

(8). The attested fact of genocide is by operation of law presumed true for the purpose of addressing the threshold constitutional question of jurisdiction alone.

(9). The continuing unjustified exercise of jurisdiction by the National Energy Board intentionally or with culpable indifference evidences its intent to commit genocide regardless of the outcome of the threshold constitutional question of jurisdictional law alone.

(10). The "Pretence" and the "Fraud or Abuse" by which the crown governments and courts (including the National Energy Board) within Canada commit "Misprision of Treason" within the meaning of the *Royal Proclamation of 1763* by breaching the proclamation's injunction that the

> several Nations or Tribes of Indians with whom We are connected and who live under our Protection should not be molested or disturbed in the Possession of such parts of Our Dominions and Territories as not having been ceded to or purchased by Us are reserved to them or any or them as their Hunting Grounds [emphasis added]

is the chicanery of denying legal standing to defend that indigenous "Interest" within the meaning of Section 109 the *Constitution Act, 1867,* to any persons other than "Indians" restrictively defined by the *Indian Act* subsequent to 1876 as persons registered by the federal government as interested in a "reserve" defined as "land set apart for a particular band," which definition excludes from its geographical frame of reference the yet-

unceded "Hunting Grounds" reserved not for any municipal law *Indian Act* "particular band" but rather for the constitutional law category of "Nations or Tribes."

(11). There is nothing wrong with the federal government legislating in relation to Indians in relation to lands "set apart for a particular band" in the course of a national or tribal cession of a given region's constitutional Hunting Ground status. In that event there is no conflict between municipal law and the constitutional law, precisely because the indigenous constitutional "Interest" within the meaning of Section 109 of the *Constitution Act, 1867,* voluntarily has been exchanged for the municipal law interest and other good and valuable consideration.

(12). As Lord Watson speaking on behalf of the Judicial Committee of the Privy Council said in *St. Catherines Milling and Lumber Company Ltd. v. The Queen,* (1888), 14 AC 46, 53-55, 60 (JCPC):

> The ceded territory was at the time of the Union land vested in the Crown, subject to "an interest other than that of the Province in the same" within the meaning of sect. 109;…the [treaty's] legal consequences…opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit…there has been all along vested in the Crown a substantial and paramount estate underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished.

(13). The "Pretence" since 1876 has been that crown title does not become *plenum dominium* in consequence of the Indian treaty but rather at all material times has been *plenum dominium* regardless of treaty. The pretence contradicts all the constitutional legislation and precedents and is maintained only by the fully-informed and intentional refusal of the Canadian legal establishment to address the constitutional legislation and precedents. It is not like the lawyers and judges do not know they are operating outside the rule of law and that the consequence is genocide. The

constitutional question is, and the legislation and precedents resolving it are too simple, clear and plain to admit of the possibility of an honest or innocent mistake of law. The legal establishment of Canada does not deal with the law but rather ignores it and then uses the criminal law as a criminal weapon to persecute Indians and their supporters who act upon the basis of the wilfully blindsided constitutional law.

(14). The "Fraud or Abuse" is the "Pretence" inaugurated with the 1876 *Indian Act* that contrary to the 1875 Disallowance Order in Council the former off-limits Hunting Grounds have all become "Public Lands" available for disposition as such under the *Public Lands Act* of whatever Province in which they may lie, regardless of the fact the indigenous national "Interest" within the meaning of Section 109 "has not been ceded to or purchased by" the crown pursuant to treaty made between Canada's national government and its indigenous counterpart national government pursuant Section 91(24) of the *Constitution Act, 1867.*

(15). The Canadian legal profession and judiciary labour under a profound conflict of interest because since 1876 they systemically have certified and upheld private titles as being "good and marketable" under the *Public Lands Acts* even though they negate the constitutionally-paramount indigenous national "Interest" within the meaning of Section 109.

V. DECLARATION SOUGHT:

(16). THAT Section 109 precludes the jurisdiction in question.

Date: April 15, 2006.

/s/ "TTHOWGWELTH aka Lavina White"
Tthowgwelth, Moving Party

MIGHT IS NOT RIGHT:

Preventing genocide within Canada and the United States of America

By Tthowgwelth and others

Dedication

To the generations of indigenous people who resisted conversion, abided in truth alone, and remained loyal to beloved creation, against unstoppable despoliation and unremitting genocide.

VOLUME II APPENDIX
Exhaustion of Domestic Remedies

to

Might Is Not Right: The prevention of genocide within Canada and the United States of America (2006)

by

Tthowgwelth and others

Complaint No.

Before The

HIGH COMMISSIONER FOR HUMAN RIGHTS

Tthowgwelth, Toanunck and Ro:ri:wi:io

vs

Supreme Court of Canada and Supreme Court of the United States

IN THE MATTER OF an application for a recommendation by the High Commissioner for Human Rights to be made for the purpose of preventing genocide-in-progress, that the Commission for Human Rights, the Economic and Social Council, the incoming Human Rights Council and the General Assembly, or any of them, immediately should requisition an advisory opinion from the International Court of Justice on an emergency basis, on the constitutional question of jurisdictional law alone whether, by breaching the rule of law's constitutive principle of equal application in relation to the universal human right not to be made a victim of genocide, the several human rights organs and agencies of the United Nations inclusive of the International Criminal Court presumptively intend to commit complicity in the genocide of the indigenous national constitutional governments and their constituents within Canada and the United States, which genocide is being committed by the intentional judicial inactivity of the Supreme Court of Canada and the Supreme Court of the United States in relation to the addressing of Section 109 of the Canadian *Constitution Act, 1867,* and Article II, Section 2, Paragraph 2, Clause 1 of the United States' *Constitution, 1789*;

AND IN THE MATTER OF an application for a further recommendation by the High Commissioner for Human Rights and those other UN Organs and Agencies, that the said Supreme Courts should address the said constitutional legislation and the precedents settling their meaning, the ignoring of which existing law is the reasonably foreseeable, probable and actual cause of the alleged genocide-in-progress due to the negation both of the rule of law and of justice as the application of truth to affairs.

TABLE OF CONTENTS

R*evised to* August 22, 2006

Part I

Part II

- *Tthowgwelth and Ro:ri:wi:io v. Henco Industries v. Haudenosaunee.* Superior Court of Justice File 06-48. Application for Leave to Intervene.

- *Tthowgwelth and Ro:ri:wi:io v. Henco Industries v. Haudenosaunee.* Superior Court of Justice File 06-48. Objection of Railink Canada Ltd. to Application for said Leave to Intervention.

- *Tthowgwelth and Ro:ri:wi:io v. Henco Industries v. Haudenosaunee.* Superior Court of Justice File 06-48. Reply to Objection of Railink Canada Ltd. to said Application for Leave to Intervention.

- *Tthowgwelth v. National Energy Board.* Court File No. (*to be assigned*). Application for Leave to Appeal to Supreme Court of Canada

Exhibits of Complainant evidencing exhaustion of domestic remedies:

Tab A APPENDIX: Motion Record for Leave to Appeal to Federal Court of Appeal

Tab B APPENDIX TO APPENDIX: Supreme Court of British Columbia File S-061667

Tab C APPENDIX TO APPENDIX TO APPENDIX: Constitutional Court of Malta File 18/2006

Tab D APPENDIX "A" *Menchu v. Montt*

Tab E APPENDIX "B" North American Constitutional Law

Tab F Related Application for Leave to Appeal in *Ro:ri:wi:io v. R.* Supreme Court File 31479 May 10, 2006

Motion for Extension of Time. May 10, 2006

Responses June 5, 2006

Reply June 16, 2006

Tab G Related Application for Leave to Appeal to Supreme Court of Canada in *Ro:ri:wi:io v. Attorneys General* July 12, 2006

PART II