County Court, City and County of Denver, Colorado 1437 Bannock Street Denver, CO 80202	
People of the State of Colorado vs. Defendants: David Baird; Paul Bame; Sharon Braun; Jordon Garcia; Ellen Klaver; Elizabieta Kosmicki; Hanne Leschly; Mackenzie Liman; Paul D. Lopez; Alicia Lucero; Judith Lujan; Ciam Mail; Anna Mansouri; Ruba Mansouri; Martinique Marron; Stephanie Martinez; Magalina Martinez; Jennifer Martinez-Moore; Morgan Matter; Kasey McQueen; Mary Kay Meintzer; Inocencio Mendoza; Brianna Mestas; Allison Miller; Ross Miller; Timothy Moen; Henrika Monnet; Zeke Moreland; Jennifer Murphy; Laura Naranjo; Christopher Nelson; Lindsay Nerad; Victoria Nevarez; Erin Odonnell; Dennis Ortega; Jay Ottenstein; Mae Pagett; Theresa Panian; Lauren Parks; Val Phillips; Sabin Portillo; Robert Prior; Stacey Proctor; Devin Razavi-Shearer; Junior Reinatoc; Chris Riederer; Ruby Sanchez; Yvonne Sandoval; Mark Sass; Mark Schneider; Andrew Scott; Eileen Shendo; Danielle Short; Kristina Sickles; Maxine Sigala; Scott Silber; Elizabeth Simmons; Sarah Slater; Ashley Spicer; Mathew Thompson; Peter Tierney; Adam Tinnel; Patricia Torres; Adrienne Tsikewa; Kevin Tucker; Trevor Uberuaga; Chris Ulrich; Aubrey Valencia; Carla Vialpondo; Deborah Watt; Rena Weber; Jessica Weirich; Karyn Wells; Benjamin Whitmer; Tanya Wollerman; Shirley Worthel; Amber Zamora	▲ COURT USE ONLY ▲

David A. Lane, #16422 Marcel Krzystek, #33285 Julie Sheker, #35746 **KILLMER, LANE & NEWMAN, LLP** 1543 Champa St., Suite 400 Denver, Colorado 80202 Telephone Number: (303) 571-1000 FAX Number: (303) 571-1001 E-mail: dlane@killmerlane.com	Case Numbers: 04GS441286; 04GS441294; 04GS789923; 04GS441593; 04GS441280; 04GS769914; 04GS441552; 04GS441256; 04GS789918; 04GS789917; 04GS771342; 04GS471296; 04GS441527; 04GS441528; 04GS441504; 04GS441270; 04GS441575; 04GS441558; 04GS441278; 04GS441282; 04GS441553; 04GS441573; 04GS441560; 04GS441265; 04GS441283; 04GS441250; 04GS789919; 04GS441258; 04GS441253; 04GS769912; 04GS441279; 04GS441257; 04GS441584; 04GS789921; 04GS441583; 04GS441547; 04GS441269; 04GS441281; 04GS441273; 04GS441255; 04GS441299; 04GS769907; 04GS441512; 04GS441538; 04GS441550; 04GS441266; 04GS441557; 04GS789924; 04GS769906; 04GS441263; 04GS441531; 04GS441580; 04GS441276; 04GS441551; 04GS441571; 04GS441511; 04GS441271; 04GS441272; 04GS441525; 04GS441521; 04GS441293; 04GS441292; 04GS441568; 04GS441588; 04GS441555; 04GS441519; 04GS441534; 04GS789914; 04GS441592; 04GS441264; 04GS441515; 04GS441522; 04GS441585; 04GS441518; 04GS441563; 04GS441556; 04GS441251 Ctrm: **117M**

DEFENDANTS' MOTION TO DISMISS ALL CHARGES

I. INTRODUCTION

1. Undersigned counsel is authorized to state that this MOTION TO DISMISS is filed on behalf of all Defendants captioned *supra.*

2. All Defendants were arrested while protesting Denver's Columbus Day Parade. No one was injured during this peaceful protest, and no property was damaged.

3. The Defendants contend that they were engaged in entirely lawful conduct on October 9, 2004, and that such charges as are presently lodged against them as a result of their actions on that date are invalid. The Defendants anchor this contention in the United States Constitution and various elements of international law and legal doctrine, including the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and customary international law.

II. FACTUAL BACKGROUND

4. Defendants were arrested for attempting to prevent the celebration of Christopher Columbus, his so-called discovery of this hemisphere in 1492, the subsequent history of colonization, slavery and genocide, and the ongoing genocide being perpetrated against indigenous peoples.

Columbus and the Beginning of Genocide in the "New World"

5. Those who celebrate Columbus contend that accusations concerning his perpetration of genocide are distortive revisions of history. Whatever processes were unleashed by his "discovery of the 'New World,'" it is said, the discoverer himself cannot be blamed; however "tragic" or "unfortunate" certain dimensions of his legacy may be they are more than offset by the benefits – even for the victims – of the resulting blossoming of a "superior civilization" in the Americas. Essentially the same arguments might be advanced regarding Hitler: after all, Hitler caused the Volkswagon and the autobahn to be created, his leadership of Germany led to jet propulsion, significant advances in rocket telemetry, and laid the foundation for genetic engineering. Why not celebrate his bona fide accomplishments on behalf of humanity rather than "dwelling" on the genocidal products of his accomplishments?

6. To be fair, Columbus was never a head of state, so comparing him to Nazi leader SS Heinrich Himmler, rather than Hitler, is more accurate. The Defendants assert that Columbus and Himmler, Nazi *lebenraumpolitik* (conquest of "living space" in

Eastern Europe) and the "settlement of the 'New World'" bear more than casual resemblance to one another. "Discovery" is not the issue. Columbus did not sally forth across the Atlantic for reasons of science or altruism but, as his diaries, reports and letters make clear, to encounter wealth belonging to others. It was his stated purpose to seize this wealth, by any means necessary, to enrich his sponsors and himself.[1] He prefigured, both in design and by intent, what came next and, to this extent, he not only symbolizes the process of conquest and genocide that eventually consumed the indigenous peoples of America, but bears personal responsibility for having participated in it. Nonetheless, if this were the extent of his relevance, Defendants would be inclined to dismiss Columbus as a mere thug along the line of an Al Capone, rather than viewing him as a counterpart to Himmler.

7. In 1493 Columbus returned with an invasion force of seventeen ships, the Spanish Crown having granted his request to be installed as "viceroy and governor of [the Caribbean islands] and the mainland" of America, a position he held until 1500. Establishing himself on Española (today Haiti and the Dominical Republic), he promptly instituted policies of slavery and systematic extermination against the native Taino population, reducing the Taino from as many as eight million to about three million by 1496.[2] Perhaps 100,000 were left by his departure. His policies continued, with the result that by 1514 the Spanish census of the island showed barely 22,000 Indians remaining alive, and by 1542 only 200 were recorded.[3] Thereafter, the Taino were considered extinct, as were Indians throughout the Caribbean Basin, peoples that had totaled more than 15 million upon their first contact with the "Admiral of the Ocean Sea."[4]

8. In real numbers this constitutes a population attrition as great as the toll of twelve to fifteen million (about half of them Jewish) commonly attributed to Himmler. Moreover, the proportion of the indigenous Caribbean population destroyed in a single generation is far greater than the seventy-five percent of European Jews said to have been exterminated by the Nazis.[5] And this data applies *only* to the Caribbean Basin: the process of genocide in the Americas was just beginning. All told, it is probable that more than 100 million native people were "eliminated" in the course of Europe's ongoing "civilization" of the Western Hemisphere.[6]

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[1] See Samuel Eliot Morison, *Journals and Other Documents on the Life and Voyages of Christopher Columbus* (1963).

[2] See Troy Floyd, *The Columbus Dynasty in the Caribbean, 1492-1526* (1973); Stuart B. Schwartz, *The Iberian Mediterranean and Atlantic Traditions in the Formation of Columbus as a Colonizer* (1986). For population figures, see Sherburn F. Cook and Woodrow Borah, *Essays in Population History, Vol. 1* (1971), Ch. VI; J.B. Thatcher, *Christopher Columbus, Vol. 2* (1903-04), 348 *et seq.*

[3] See Lewis Hanke, *The Spanish Struggle for Justice in the Conquest of America* (1947), 200 *et seq.*; Salvadore de Madariaga, *The Rise of the Spanish Empire* (1947).

[4] See William Denevan, *The Native Population of the Americas in 1492* (1976); Henry F. Dobyns, *Their Numbers Become Thinned: Native American Population Dynamics in Eastern North America* (1983); Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* (1987).

[5] See Leo Kuper, *Genocide: Its Political Uses I the Twentieth Century* (1981).

[6] See Henry F. Dobyns, "Estimating American Aboriginal Population: An Appraisal of Techniques with a New Hemispheric Estimate," *Current Anthropology*, No. VII (1966), 395-416.

9. It has long been asserted that this decimation of American Indians that accompanied the European invasion resulted primarily from disease, rather than direct killing or conscious policy. While disease and starvation played a prominent and lethal role, it must be borne in mind that a considerable portion of those who perished in the Nazi death camps died not from bullets and gas, but from starvation and epidemics of typhus, dysentery, and other diseases. Their keepers were nonetheless found culpable for deliberately imposing the conditions that led to these results.[7] Certainly the same must be said for Columbus' regime, which permanently dispossessed the native peoples of their abundant cultivated fields and converted them into chattel ultimately worked to death for the wealth and "glory" of Spain.[8]

10. More direct means of extermination cannot be relegated to incidental status. As put by Kirkpatrick Sale in *The Conquest of Paradise*:

> The tribute system, instituted by the Governor [Columbus] sometime in 1495, was a simple and brutal way of fulfilling the Spanish lust for gold while acknowledging the Spanish distaste for labor. Every Taino over the age of fourteen had to supply the rulers with a hawk's bell of gold every three months . . . . those who did not were, as [Columbus' brother] Fernando says discreetly, "punished" – by having their hands cut off, as [the priest Bartolomé de] las Casas says less discreetly, and left to bleed to death.[9]

11. It is likely that more than 10,000 Indians on Española were killed in this manner alone, as a matter of policy, during Columbus' tenure as governor. Las Casas' *Brevisima relación,* among other contemporaneous sources, is replete with accounts of Spanish colonists hanging Tainos *en masse*, roasting them on spits or burning them at the stake, hacking their children into pieces to be used a dog feed, to instill in the natives a "proper attitude of respect" to their Spanish "superiors." No SS trooper could be expected to comport himself with a more unrelenting viciousness. Wholesale and persistent massacres are recounted, leading las Casas to conclude:

> [I]n this time, the greatest outrages and slaughterings of people were perpetrated, whole villages being depopulated. . . . The Indians saw that without any offense on their part they were despoiled of their kingdoms, their lands and liberties and of their lives, their wives, and homes. As they saw themselves each day, perishing by the cruel and inhuman treatment of the Spaniards, crushed to earth by the horses, cut in pieces by swords, eaten and torn by dogs, many buried alive and suffering all kinds of exquisite tortures. . . . [10]

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[7] See Bradley F. Smith, *Reaching Judgment at Nuremberg* (1977).
[8] See Tzvetan Todorov, *The Conquest of America* (1984).
[9] Kirkpatrick Sale, *The Conquest of Paradise: Christopher Columbus and the Columbian Legacy* (1990), 155.
[10] Quoted in Thatcher, *Christopher Columbus*, at 348 *et seq.*

Such descriptions directly parallel those of systematic Nazi atrocities in the western USSR described by William Shirer in *The Rise and Fall of the Third Reich*[11] but, unlike the Nazi extermination campaigns, the Columbian butchery on Española continued until there were no Tainos left to exterminate.

Evolution of the Columbian Legacy

12. The genocidal model for conquest and colonization established by Columbus was to a large extent replicated by others such as Cortez in Mexico and Pizarro in Peru during the following half-century. Expeditions such as those of Ponce de Leon in 1513, Coronado in 1540, and de Soto in the same year were launched with the intent of effecting the same pattern on the North American continent proper.[12] There, the Spanish example was followed and in some ways intensified by the British, beginning at Roanoke in 1607 and Plymouth in 1620. Overall, English colonization along the Atlantic Coast was marked by a series of massacres of native peoples as relentless and devastating as any perpetrated by the Spaniards. One of the best known illustrations – drawn from among hundreds – was the slaughter of some 800 Pequots at present-day Mystic, Connecticut, on the night of May 26, 1637.[13]

13. The "French and Indian Wars" of the late seventeenth and eighteenth centuries accelerated the liquidation of indigenous peoples as far west as the Ohio River Valley. History's first documentable case of biological warfare occurred in 1763 in an attempt to undermine Pontiac's powerful confederacy which was aligned with the French.

> Sir Jeffrey Amherst, commander-in-chief of the British forces . . . wrote in a postscript of a letter to [his subordinate] Bouquet that smallpox be sent among the disaffected tribes. Bouquet replied, also in a postscript, "I will try to [contaminate] them . . . with some blankets . . . and take care not to get the disease myself." To Bouquet's postscript Amherst replied, "You will do well to [infect] the Indians by means of blankets as well as to try every other method that can serve to extirpate this execrable race." On June 24, Captain Ecuyer, of the Royal Americans, noted in his journal . . . "[W]e gave them two blankets and a handkerchief out of the smallpox hospital. I hope it will have the desired effect."[14]

It did. Over the next few months the disease spread rapidly among the Mingo, Delaware, Shawnee and other Ohio River nations, killing perhaps 100,000 people.

14. Amherst's directive does much to dispel the myth that post-contact attrition of Indian peoples through disease was unintentional and unavoidable. As early as 1675 the Wampanoag and Narrangasett nations fought the so-called King Philip's War because

[11] William Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (1960), Chap. 27.
[12] See Todorov, *The Conquest of America*; Charles Gibson, ed., *The Spanish Tradition in America* (1968).
[13] See Robert . Utley and Wilcomb E. Washburn, *Indian Wars* (1977), 42.
[14] E. Wagner and Allen E. Stearn, *The Effects of Smallpox on the Destiny of the Amerindian* (1945), 44-45.

they believed English traders had deliberately contaminated their villages with smallpox.[15] And such tactics were continued by the United States after the American Revolution. At Fort Clark the United States Army distributed smallpox-laden blankets from a military infirmary where infected troops were quarantined as "gifts" to the Mandan. In direct contradiction of medical practice at the time, Army doctors advised the Mandans who showed signs of infection to disperse and seek refuge among their healthy relatives. The result was a pandemic among the Plains Indian nations which claimed at least 125,000 lives, perhaps several times that number.[16]

15. At the same time, the United States was engaged in a policy of wholesale "removal" of indigenous nations east of the Mississippi River, "clearing" the land of its native population so that it might be "settled" by "racially superior" Anglo-Saxon "pioneers."[17] This resulted in a series of forced marches, some more than a thousand miles long, in which entire peoples were walked at bayonet point to locations west of the Mississippi. Rations and medical attention were poor, shelter all but nonexistent, and attrition correspondingly high. About fifty-five percent of all Cherokees died as a result of their "Trail of Tears"; the Creeks and Seminoles also lost about half their populations.[18] It was this example of nineteenth century U.S. Indian removal policy upon which Hitler relied for a practical model when articulating and implementing his *lebensraumpolitik* during the 1930s and '40s.[19]

16. By the 1850s U.S. policymakers had adopted the philosophy of "Manifest Destiny" under which they believed themselves possessed of a divinely ordained right to possess *all* native property, including everything west of the Mississippi. Governmental and corporate leaders utilized a "rhetoric of extermination," shaping public sentiment to embrace the eradication of American Indians. Their express goal was to reduce "inferior" populations in order to open up land for "superior" Euroamerican "pioneers."[20] One outcome was a series of general massacres perpetrated by the United States military:

> A bare sampling of some of the worst must include the 1854 massacre of perhaps 150 Lakotas at Blue River [Nebraska], the 1863 Bear River [Idaho] Massacre of some 50 Western Shoshones, the 1864 Sand Creek [Colorado] Massacre of as many as 250 Cheyennes and Arapahoes, the 1868 massacre of another 300 Cheyennes at the Washita River [Oklahoma], the 1875 massacre of abut 75 Cheyennes along the Sappa Creek [Kansas], the 1878 massacre of still another 100

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[15] Sherburn F. Cook, "The Significance of Disease in the Extinction of the New England Indians," *Human Biology*, No. 45 (1973), 485-508.
[16] Thornton, *American Indian Holocaust*, 94-96.
[17] See Donald E. Green, *The Politics of Indian Removal: Creek Government and Society in Crisis* (1977); Grant Foreman, *Indian Removal; The Immigration of the Five Civilized Tribes* (1953).
[18] See Russell Thornton, "Cherokee Population Losses During the Trail of Tears: A New Perspective and a New Estimate," *Ethnohistory*, No. 31 (1984), 289-300.
[19] See International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal,* 42 Vols. (Blue Series), Nuremberg 1949 at 386-PS, 25:402 *et seq.* (lengthy memorandum by Colonel Friedrich Hossback on a Führer Conference of Nov. 5, 1937).
[20] See Reginald S. Horsman, *Race and Manifest Destiny: The Origins of Racial Anglo-Saxonism* (1981); Reginald S. Horsman, *The Metaphysics of Indian Hating and Empire Building* (1990); David Svaldi, *SandCreek and the Rhetoric of Extermination: A Case Study in Indian-White Relations* (1989).

Cheyennes at Camp Robinson [Nebraska], and the 1890 massacres of more than 300 Lakotas at Wounded Knee [South Dakota].[21]

17. Even worse in some ways was the unleashing of Euroamerican civilians to kill Indians at whim and for profit. In Texas, for example, an official bounty on *any* native scalp was maintained until well into the 1870s, with the result that its indigenous population, once the densest in all of North America, was reduced to nearly zero by 1880. Similarly, in California, "the enormous decrease [in indigenous population] from about a quarter-million [in 1880] to less than 20,000 is due chiefly to the cruelties and wholesale massacres perpetrated by miners and early settlers."[22] In California and the southern Oregon Territory "[i]t was not uncommon for small groups of villages to be attacked [by miners and settlers] and virtually wiped out overnight."[23]

18. All told, the North American Indian population within what became the forty-eight contiguous states of the U.S., probably numbering in excess of twelve million in 1500, was diminished by official estimates to just over 237,000 four centuries later – a reduction of approximately 98%.[24] This vast genocide is historically paralleled in magnitude and degree only by that which occurred in the Caribbean Basin. Corresponding almost perfectly with this indigenous population erosion was the expropriation of about 97.5% of native land by 1920.[25] The situation in Canada is entirely comparable. The Nazi-esque dynamics set in motion by Columbus in 1492 continued and were not ultimately consummated until the twentieth century.

The Columbian Legacy Today

19. While the most obvious of the genocidal programs directed at Native North America had accomplished their purpose by the twentieth century, several continue into the present. One example is the massive compulsory transfer of American Indian children from their families, communities and societies to Euroamerican families and institutions, a practice explicitly prohibited by the Genocide Convention (Art. II(e)).[26] For several generations more than three-quarters of all indigenous youth have been subjected to the U.S. Bureau of Indian Affairs (BIA) boarding school system or its pervasive policy of placing Indian children for adoption with non-Indians -- including blind adoptions in which records are sealed.[27] The stated goal of these policies has been to "assimilate"

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[21] Lenore Stiffarm and Phil Lane, Jr., "The Demography of Native North America; A Question of American Indian Survival," in M. Annette Jaimes, ed., *The State of Native America: Genocide, Colonization, and Resistance* (1992), 34.

[22] James M. Mooney, "Population" in Frederick W. Dodge, ed., *Handbook of the Indians North of Mexico*, Vol. 2 (1910) 28-87; see also W.W. Newsome, Jr., *The Indians of Texas* (1961), 334.

[23] Thornton, *American Indian Holocaust*, 107; see also Robert F. Heizer, ed., *The Destruction of the California Indians* (1974).

[24] U.S. Bureau of the Census, *Fifteenth Census of the United States, 1930: The Indian Population of the United States and Alaska,* Table II: "Indian Population by Divisions and States, 1890-1930" (1937), 3.

[25] See Charles C. Royce, *Indian Land Cessions in the United States: 18th Annual Report, 1896-1987* (1899); Janet A. McDonnell, *The Dispossession of the American Indian, 1887-1934* (1991).

[26] See Section III *infra*.

[27] See Jorgé Noriega, "American Indian Education in the United States: Indoctrination for Subordination to Colonialism," in Jaimes, *State of Native America*, 371-402; Tille Blackbear, "American Indian Children:

native people into the value and belief systems of their conquerors.[28] In other words, the objective has been to bring about the disappearance of indigenous societies as such, again a patent violation of the Genocide Convention (Art. II(c)).

20. An even starker example is the involuntary sterilization of as many as forty-two percent of all native women of childbearing age in the United States by the BIA's Indian Health Service during the 1970s.[29] This, too, is a recent and very direct violation of the Genocide Convention (Art. II(d)).

21. More broadly, implications of genocide are apparent in the federal government's exercise of its self-assigned "plenary power" and concomitant "trust" prerogatives over the remaining Indian land base, a power articulated in *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903). Predictably, this has worked to systematically deny native peoples the benefit of their remaining material assets. At present, the approximately 1.8 million American Indians recognized by the government should be, as a group and on a per capita basis, the continent's largest landholders for they nominally own approximately fifty million acres of land.[30] These lands are extraordinarily resource rich, holding approximately two-thirds of all "domestic" uranium reserves, about one quarter of the readily accessible low-sulfur coal, as much as a fifth of the oil and natural gas, and substantial deposits of copper, iron, gold, and zeolites.[31] By any rational definition, the U.S. Indian population should be one of the wealthiest sectors of the North American population.

22. Instead, by the federal government's own statistics, they comprise the poorest. As of 1980 American Indians had, by a decided margin, the lowest annual and lifetime incomes on a per capita basis of any ethnic or racial group on the continent. Correlated to this are all the standard indices of extreme poverty: the highest rates of infant mortality, death by exposure and malnutrition, and tuberculosis and other plague diseases. Indians experience the highest rates of unemployment, year after year, and the lowest level of educational attainment. The overall quality of life is so dismal that alcoholism and other forms of substance abuse are endemic, and the rate of teen suicide several times that of the nation as a whole. The average life expectancy of a reservation-

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Foster Care and Adoptions," in Office of Educational Research and Development, National Institute of Education, *Conference on Educational and Occupational Needs of American Indian Women* (1980), 185-210.

[28] See [Indian Commissioner] Francis Leupp, *The Indian and His Problem* (1910), 93; Henry E. Fritz, *The Movement for Indian Assimilation, 1860-1890* (1963); Francis Paul Prucha, ed., *Americanizing the American Indian: Writings by the "Friends of the Indian,"* (1973).

[29] See Brent Dillingham, "Indian Women and HIS Sterilization Practice," *American Indian Journal,* Vol. 3, No. 1 (1977), 27-28; Janet Larson, "And Then There Were None: IHS Sterilization Practice," *Christian Century* NO. 94 (Jan. 26, 1974). See also *Women Under Attack: Abortion, Sterilization Abuse, and Reproductive Freedom* (New York, Comm. For Abortion Rights and Against Sterilization Abuse, 1979) (describing comparable programs against Puerto Rican women and, to a lesser extent, African American women).

[30] U.S. Bureau of the Census, *1990 Census of the Population, Supplementary Report; American Indian Areas and Alaska Native Villages* (1996).

[31] See Joseph G. Jorgensen, ed., *American Indians and Energy Development* (1984).

based Native American man is less than 50 years and that of a reservation-based woman is barely three years longer.[32]

23. It is not that reservation resources are not being exploited or profits accrued. To the contrary, virtually all uranium mining and milling occurred on or immediately adjacent to reservation land during the Atomic Energy Commission's ore-buying program (1952-1981).[33] The largest remaining enclave of traditional Indians in North America recently underwent forcible relocation so that coal could be mined on the Navajo Reservation. Alaska native peoples were converted into landless "village corporations" so that the oil under their territories could be tapped.[34] The BIA has used its plenary and trust capacities to negotiate contracts with major mining corporations "in behalf of" its "Indian wards" which pay pennies on the dollar of conventional mineral royalty rates. Further, the BIA has typically exempted such corporations from their obligation to reclaim lands mined or even to perform basic environmental cleanup of nuclear or other waste.[35] One result as been that the National Institute for Science recommended that the two locales most heavily populated by native people – the Four Corners Region and the Black Hills – be designated as "National Sacrifice Areas." Indians understand that this means, in fact, their conversion into "National Sacrifice *Peoples*."[36]

24. Even such seemingly innocuous federal policies as those of Indian identification criteria contain genocidal potential. By insisting on a eugenics formulation known as "blood quantum" introduced by the 1887 General Allotment Act and implementing programs such as the urban relocation program from 1956 to 1986, the government has set the stage for a "statistical extermination" of the indigenous population within its borders.[37] As noted western historian Patricia Nelson Limerick has observed, "Set the blood-quantum at one-quarter, hold to it as a rigid definition of Indians, let intermarriage proceed . . . and eventually Indians will be defined out of existence. When that happens the federal government will finally be freed from its persistent 'Indian

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[32] See U.S. Sen., Comm. On Labor and Human Resources, Subcomm. On Employment and Productivity, *Guaranteed Job Opportunity Act: Hearing on S.777* (1980); U.S. Congress, Office of Technology Assessment, Indian Heal Care, Ser. No. OTA-H-290 (1986); U.S. Dept. of Health and Human Services, Chart Series Book (Public Health Service Rep. No HE20, 9409, 988 (1988); *Conference on Educational and Occupational Needs of American Indian Women.*

[33] Ward Churchill and Winona LaDuke, "Native America: The Political Economy of Radioactive Colonization," in Jaimes, *State of Native America*, 241-266.

[34] See Jerry Kammer, *The Second Long Walk: The Navajo-Hopi Land Dispute* (1980); Anita Parlow, *Cry Sacred Ground: Big Mountain, USA* (1988); M.C. Barry, *The Alaska Pipeline: The Politics of Oil and Native Land Claims* (1975).

[35] See Michael Garitty, "The US. Colonial Empire is as Near as the Nearest Reservation," in Holly Sklar, ed., *Trilaterialism: The Trilateral Commission and Elite World Planning for World Management* (1980), 238-268.

[36] The Los Alamos Scientific Laboratories stated in their Feb. 1978 *Mine Report,* "Perhaps the solution to the radon emission problem is to zone the land into uranium mining and milling districts so as to forbid human habitation." See Russell Means, "The Same Old Song," in Ward Churchill, ed., *Marxism and Native Americans* (1983) 251.

[37] See M. Annette Jaimes, "Federal Indian Identification Policy," in Jaimes, ed., *State of Native America,* 137; Donald L Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960* (1986).

problem.'"[38] Ultimately, there is precious little difference, aside from style, between this and what was once called the "Final Solution of the Jewish Problem." It is the celebration of this threat, persisting throughout United States history, which the Defendants oppose.

III. THE UNITED STATES AND ITS POLITICAL SUBDIVISIONS ARE BOUND TO COMPLY WITH INTERNATIONAL LAW

25. In opposing any celebration of this history of extermination and forced "assimilation," thereby attempting to prevent its perpetuation, Defendants are well within their rights, indeed their obligations, under international law. And the United States government and all of its political subdivisions are bound to enforce that law. The framers of the Constitution recognized that the United States must comply with international law. Jordan Paust, *International Law as Law of the United States* (2nd ed. 2003) at 7, 67-70 [hereinafter Paust]. This has been acknowledged by the Supreme Court since 1793 when Chief Justice Jay stated that the "law of nations is part of the law of the United States." *United States v. Ravara,* 2 U.S. (2 Dall.) 297, 299n. (1793). In the case of a conflict with not only federal but state law or action, the Supremacy Clause of the Constitution mandates that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const., art. VI, cl.2; *United States v. Pink,* 315 U.S. at 230-31 (noting that state law must be overturned when it is inconsistent with, or impairs the policy or provisions of a treaty). As summarized by the Restatement (Third) of the Foreign Relations Law of the United States, "International law. . . . is part of the law of the United States, respected by Presidents and Congresses, and by the States, and given effect by the courts." (pt. I, ch. 1 (1987)).

26. As articulated in the Statute of the International Court of Justice, international law is found in treaties, international custom, the general principles of law "recognized by civilized nations," and in "the judicial decisions and the teachings of the most highly qualified publicists of the various nations." (Statute of the International Court of Justice, art. 38.) The Statute of the ICJ is an integral part of the United Nations Charter and, as such, is binding on the United States.

27. The United States has been instrumental in the post-World War II articulation of human rights, but this is not a new development. The founders understood human rights, often referred to as the "rights of man" as "those natural, unalienable rights of all persons that no government on earth could deny – rights that are a part of law, whether written or unwritten, and that free and democratic governments are formed to further and to protect." (Paust at 193.) Human rights are protected not only by Article VI of the Constitution which explicitly recognizes international law as part of the Supreme Law of the land, but also by the Ninth Amendment, which states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (U.S. Const., amend. IX; *see also* Paust at 324-335.) Without integrating international human rights principles into domestic courts, international human rights law will remain impotent during a critical time in which we must vigilantly protect

[38] Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (1987), 338.

these rights. Circumstances invoking international but not domestic law deserve special attention, as utilizing international treaties and customary norms allows our citizenry to enjoy the human rights protections guaranteed to all persons.

28. There are three ways in which domestic courts are obligated to use international law when dealing with human rights violations: First, by directly enforcing ratified international treaties; second, via customary international law; and third by using international standards for interpretive guidance in applying national or local law. (Hurst Hannum, *Guide to International Human Rights Practice,* (3d ed. 1999) at 248.) Each is applicable in this case.

Treaties

29. The United States Constitution Article VI, Clause 2 states, "All treaties made, or which shall be made, under the Authority of The United States, shall be supreme Law of the Land." U.S. Const., art 6(2). This means that treaty law takes precedence over domestic law. As articulated in Article 27 of the Vienna Convention on the Law of Treaties, recognized by the United States as reflecting binding customary law, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This preempts the so-called "last in time rule" under which U.S. courts have enforced federal statutes which conflict with treaties; a rule which, in any case, is irrelevant in the present instance as it does not apply to state or local laws.

30. The United States has ratified, thereby binding itself to comply with, four of the human rights treaties set forth by the international community since World War II: 1. The International Covenant on Civil and Political Rights (ICCPR), 6 I.L.M 368 (1967) (entered into force 1976; ratified by the U.S. 1992); 2. The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 78 U.N.T.S. 277 (entered into force 1951; ratified by the U.S.1988); 3. The International Convention on the Elimination All Forms of Racial Discrimination (CERD), 660 U.N.T.S. 195 (1966) (entered into force 1969, ratified by the U.S. 1994); and 4. The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984) (entered into force 1987, ratified by the U.S. 1994). The first three of these conventions apply in the case of the Columbus Day Protestors.

31. While the United States has, on occasion, attempted to circumvent the application of these treaties to its conduct by attaching reservations, declarations and "understandings" to its ratification which purport to "trump" the treaty provisions, such attempts violate the Constitution itself as well as well-established treaty and customary law, and have been rejected by the international community as a whole. See the ICCPR Human Rights Committee's General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols (Nov. 2, 1994), U.N. Doc. CCPR/C/21/REV.1/Add.6, 34 I.L.M 839 (1995) (noting that unacceptable reservations are severable, and the Covenant is operative for the reserving party without benefit of the reservation). In any case, where treaties embody customary international law, that law is binding on all states, regardless of whether they have become parties to

the treaty or have done so with reservations. (Vienna Convention on the Law of Treaties, art. 43.) It was this principle which was recognized by the Nuremberg Tribunal when it confirmed that it was not applying the law in an *ex post facto* manner to the Third Reich. (See Quincy Wright, "The Law of the Nuremberg Tribunal, Part II" in Jay W. Baird, ed., *From Nuremberg to My Lai* (1972) 37-40.)

Customary International Law

32. Customary international law constitutes norms established through the widespread practice among nations due to a sense of legal obligation or *opinio juris*. (Ian Brownlie, *Principles of Public International Law*, 6-7 (3d ed. 1979); Restatement (Third) of the Foreign Relations Law of the United States.) Customary norms bind all governments, including those that have not recognized the norm, as long as those governments have not expressly and persistently objected to its development. (Restatement (Third) of the Foreign Relations Law of the United States § 102 comment d (1987); *North Sea Continental Shelf Cases*, 1969 I.C.J.) To the extent that customary law embodies *jus cogens* or preemptory norms, such norms are binding on all states regardless of any objections they may register; they are norms from which no derogation is permitted. (Restatement (Third) s 102 comment k.)

33. Customary international law "[m]ay be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. 153, 160-61, 5 L. Ed. 57 (1820); *Kadic v. Karadzic,* 70 F.3d 232, 238 (1995). As recognized by the U.S. Supreme Court in *The Paquete Habana,* customary international law violations should be determined by the evolution of customary international law through time and its existence among nations of the world today.[39] Thus, customary international law is not stagnant, but continually developing to reflect current global norms. Among other things, customary international law presently prohibits genocide, slavery, arbitrary

[39] *The Paquete Habana*, 175 U.S. 677 (1900). (Customary international dictates that two fishing boats flying under the Spanish flag captured by the U.S. during the Spanish American War cannot be confiscated by the U.S. when the boats are used only for fishing purposes and are not carrying arms or ammunition).
[40] 22 U.S.C § 7101(b)(1); Report of the Working Group on Contemporary Forms of Slavery, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Commission on the Promotion & Protection of Hum. Rts., 53rd Sess., p. 133, U.N. Doc. E/CN/4/Sub.2/2001/30 (2001) (finding trafficking of persons to be a new "insidious" form of slavery); A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 Va. J. Int'l L. 303, 309 (1999) (stating that the term "slavery" has evolved through international opinio juris has evolved to include trafficking); Activities of the Advancement of Women: Equality Development and Peace, U.N, Dep't of Int'l Economic & Social Affairs, at 6, U.N. Doc. ST/ESA/174 (1985); Special Rapporteur Report of the Sub-Commission on Prevention of Discrimination and protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1982/20/Rev.1.; Nora V. Demleitner, *Fifth Annual Philip D. Reed Memorial Issue: Article: Forced Prostitution: Naming an International Offense,* 18 Fordham Int'l L.J. 163 (1994) (citing Updating of the Report on Slavery by Benjamin Whitaker, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4Sub.2/1982/20/Rev.1; U.N. Dep't of Int'l Economic & Social Affairs, Activities for the Advancement of Women: Equality, Development and Peace at 12-13, U.N. Doc. ST/ESA/174 (1985); Anne Tierney Goldstein, The Center for Reproductive Law & Policy, Recognizing Forced Impregnation as a War Crime Under International Law 11 (1993)); Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 Am. J. Int'l L. 1, 30 (1992).

detention, and invidious discrimination. (Hurst Hannum, *Guide to Human Rights Practice*, (3d ed. 1999) at 252.)

34. As early as 1793 then Supreme Court Chief Justice Jay recognized that "the laws of the United States," the phrase found in Article II, section 2, clause 1 as well as Article VI, clause 2 of the Constitution, includes the customary "law of nations" and that such law was directly incorporable for purposes of criminal sanctions. (*Henfield's* Case, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793); see also Paust at 7-11; Louis Henkin, *International Law as Law in the United States,* 8 Mich. L. Rev. 1555, 1566 (1984).) Similarly, Article I gives Congress the power to punish international crimes under the "Law of Nations." Federal case law and legal scholarship have long recognized that, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

35. Early on, the Supreme Court envisioned the judicial branch as an avenue by which to make customary international law part of U.S. law.[41] When "there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them." *Hilton v. Guyot,* 159 U.S. 113,163.

IV. GENOCIDE AND THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

Defining Genocide

36. The crime of genocide is usually understood in the United States as almost exclusively associated with Nazi Germany and it its drive to exterminate *untermensche* ("subhuman peoples"), a Nazi reference to Poles, Slaves, Gypsies, homosexuals and, especially, Jews.

37. This understanding of genocide is entirely erroneous. The meaning of the term, coined by Polish jurist Raphael Lemkin in 1944, is much broader, both in its temporal scope and the techniques employed. Although the word was constructed by combining the Greek *genos* ("race" or "tribe") with the Latin *cide* ("killing"), according to Lemkin it describes a process much more multifaceted and sophisticated than simple mass

[41] Harold Honju Koh, *The United States Constitution and International Law: International Law as Part of Our Law*, 98 A.J.I.L 43 at 44 (citing Restatement (Third) of the Foreign Relations Law of the United States § 111 introductory note (1987) ("From the beginning, the law of nations, later referred to as international law, was considered to be incorporated into the law of the United States without the need for any action by Congress or the President, and the courts, state and federal have applied it and given it effect as the courts of England had done."); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny,* 100 Harv. L. Rev. 843, 868 (1987) ("Early United States courts and legislators regarded customary international law and treaty obligations as part of the domestic legal system. International law *was* domestic law.))

murder. Indeed, mass murder may or may not be present in a genocidal context. According to Lemkin:

> Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, *except when* accomplished by mass killing of all the members of a nation. It is intended rather to signify a coordinated plan of different actions aimed at destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion and the economic existence of national groups, and the destruction of personal security, liberty, health, dignity, and the lives of individuals belonging to such groups. Genocide is the destruction of the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity but as members of the national group.[42]

38. Lemkin observes, "Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor." Clearly, the latter imposition could not occur if all or even most members of the oppressed group must be killed for a defined "genocide" to occur. To the contrary, as expressed by a member of the committee drafting the Genocide Convention, what is at issue is the "destruction of a [recognizably distinct] human group, *even though the individual members survive*." (U.N. Doc E/A.C. 25/S.R. I-28 (emphasis added).)

39. The UN committee drafting the Convention focused not only on mass killing, but upon actions and policies that bring abut the "disintegration of the political social or economic structure of a group or nation" and the "systematic moral debasement of a group or people, or nation." (Report of the UN Economic and Social Council, 947, the Part, quoted in Robert Davis and Mark Zannis, *The Genocide Machine in Canada: The Pacification of the North* (1973), 19.)

40. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article II, thus prohibits as genocidal five categories of activity directed an identified "national, ethnical, racial, or religious group":

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

41. Under Article III, the following acts are punishable under the Convention:

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[42] Raphael Lemkin, *Axis Rule in Occupied Europe* (1944), 79 (emphasis added). See also Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law*, 26-27 (2d ed. 2001).

a) Genocide;
b) Conspiracy to commit genocide;
c) Direct and public incitement to commit genocide;
d) Attempt to commit genocide;
e) Complicity in genocide.

42. Article IV states that all persons shall be held accountable for acts committed under Article III, "whether they are constitutionally responsible rulers, public officials, or private individuals." Article V calls upon all governments to enact "the necessary legislation to give effect to the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III."

43. Because the Convention was intended to prevent as well as punish the commission of genocide, broad interpretation centering on the notion of "advocacy" has been associated with "incitement" (Art. III (c)), "complicity" (Art. III (e), and genocidal processes. Where there is disagreement as to the meaning of terms, or a professed confusion concerning the substance of the law, Article IX provides for interpretation and adjudication by the International Court of Justice.

United States' Response to the Genocide Convention

44. Although most nations quickly ratified the Genocide Convention, the United States refused to do so for forty years. The records of the Senate debates on the Convention reveal that this delay was based on congressional concern that a broad range of federal policies vis-à-vis minority populations in the United States might be viewed as genocidally criminal under international law.[43]

45. When the United States Senate finally ratified the Genocide Convention in 1986, it attached several "reservations" and "understandings," including a statement that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." (*Resolution of Ratification*, S. Exec. Rep. 2, 99th Cong., 1st Sess. 26-27 (1985), adopted Feb. 19, 1986, known as the "Lugar-Helms-Hatch Sovereignty Package".) A subsequent Senate report pointed out that "a question arises as to what the United States is really seeking to accomplish by attaching this understanding. . . . The language suggests that the United States fears it has something to hide." (S. Exec. Rep. No. 2, 99th Cong., 1st Sess. 1987 at 32.)

46. While the "Sovereignty Package" purports to subordinate the Genocide Convention to the United States Constitution, it is evident that the attempt violates the requirements of Article VI of the Constitution itself. A UN Economic and Social Council rapporteur has pointed out that the Senate's attempts to limit application of the treaty are invalid under the terms of the Vienna Convention on the Law of Treaties. (*Study of the Question of the Prevention and Punishment of the rime of Genocide*, UN Doc.

[43] See Lawrence J. LeBlanc, *The United States and the Genocide Convention* (1991).

E/CN.4/Sub.2/416 (1978), n.9 at 4-47.) By December 1989, nine European allies of the United States – Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Spain, Sweden, and the United Kingdom – had entered formal objections to the U.S. reservations. (UN Secretariat, *Multilateral Treaties Deposited with the Secretary-General,* St/Leg/Ser. E/8, 1990 at 102-04, n.2.)

47. Nonetheless, regardless of the status of the United States' ratification of the Genocide Convention, genocide has come to be seen as a crime under customary international law and the basic provisions of the Convention are therefore binding upon the United States whether or not it chooses to formally acknowledge the fact. This is at least tacitly recognized by the U.S. government, as reflected in the fact that §701 of the *Restatement (Third) of the Foreign Relations Law of the United States* notes that the United States is bound by customary international law and §702 that genocide is a violation of customary law.

The Nuremberg Precedent

48. The clearest recognition of this principle by the United States may have come during the preparation for the trial of the major Nazi criminals at Nuremberg, a process initiated and subsequently spearheaded by the United States. A U.S. legal task force headed by Supreme Court Justice Robert H. Jackson determined that the German leadership should be held accountable to the "full measure of international law," despite the fact that much of what was at issue had never been formally codified, much less officially accepted by Germans.[44] Following loosely from a passage of the 1907 Hague (IV) Convention, the task force stipulated:

> International law shall be taken to include the principles of law of nations as they result from usages established among civilized people, from the laws of humanity, and the dictates of public conscience.

(Smith, *Road to Nuremberg*, 241.)

49. This precedent-setting formulation of customary international law was "laid before the representatives of Britain, France, and Soviet Russia at the London Conference in June 1945 and served as the foundation of the London Charter," the agreement establishing the legal foundation for the Nazi trials.[45] Justice Jackson served as Chief U.S. Prosecutor in the primary Nuremberg Trial of 1946-47, while Attorney General Francis Biddle served as senior U.S. Tribunal Judge. Jackson was thus mandated to articulate U.S. formal international legal positions and Biddle was charged with validating and implementing these articulations through his rulings of law, votes as to guilt or

[44] See Henry L. Stimson, "The Nuremberg Trial, Landmark in Law," *Foreign Affairs*, Vol. XXV (Jan. 1947), 179-89; UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948); Bradley F. Smith, *The Road to Nuremberg* (1981).
[45] Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials (Dept. of State Publication 3080 1949);

innocence on specific charges, and votes concerning the imposition of sentence on those convicted.[46]

50. Both Jackson and Biddle consistently went on record during the proceedings to articulate the U.S. position that customary international law was binding upon all governments and rejecting the defendant's claims that the tribunal was attempting to enforce *ex post facto* law. Neither this posture, nor any other adopted by its representatives during the trial, has ever been renounced by the United States. Justice Jackson, in his role as Chief Prosecutor, assured the world that this was not simply "victor's justice" saying, "If certain acts and violations of treaties are crimes, they are crimes whether the United States does them or whether Germany does them. We are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."[47] This position has seen continuous and approving reiteration by U.S. jurists and officials.

51. The implication is obvious: having articulated international legal doctrine upon which others were tried, convicted, sentenced and even executed, the United States is both legally and morally bound to comply with its own strictures. To do otherwise is to compound the impression abroad, engendered by, among other things, the U.S. 1986 disavowal of the compulsory jurisdiction of the International Court of Justice, that the United States is becoming an "outlaw nation."[48] It is, of course incumbent upon the courts at every level to constrain the government to adhere to the rule of law, international no less than any other, rather than to seek unrestricted prerogatives of power. This, too, was established in a subsequent Nuremberg trial in which German judges were held liable for crimes against humanity, among other things, and given sentences up to life imprisonment for failing to uphold such basic principles of international law.[49] Moreover, any other course of conduct on the part of the judiciary would be repugnant to both the letter and spirit of United States jurisprudence.

The Genocidal Nature of the Celebration of Columbus Day

52. The celebration of "Columbus Day" in Denver, Colorado on October 9, 2004, like similar observances since Columbus Day was first established, also in Denver, in 1905, constituted a promotion and celebration of the genocide which has been perpetrated against American Indians since the Columbian landfall on October 12, 1492. As such, it constitutes advocacy and incitement of genocide within the meaning of Article III(c) of the Convention on the Prevention and Punishment of the Crime of Genocide. Further, to the extent that at least some of the elements of the genocidal process initiated by Columbus remain in evidence, the celebration constitutes complicity in genocide within the meaning of Article III(e). As such, not only did the participants in the

[46] See Eugene C. Gerhart, *America's Advocate: Robert H. Jackson* (1958); Bradley F. Smith, *Reaching Judgment at Nuremberg* (1977).
[47] *Quoted in* Bertrand Russell, War Crimes in Vietnam 125 (1967); *see also* Robert H. Jackson, The Nurnberg Case (1947).
[48] See U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction, Dept. of State Bulletin 86 (Jan. 1986).
[49] Case No. 3, Nuremberg Docket (*The Justice Case*); *see* John Alan Appleman, Military Tribunals and International Crimes (1954, reprinted 1971), at 157-162.

Columbus Day celebration lack a lawful right to engage in the activities at issue, but the City of Denver was prohibited by law from granting them a permit for this purpose.

53. Precedents from the first Nuremberg Trial, binding on U.S. courts at every level, reveal the United States' doctrinal position with respect to the specific offenses alleged here. To give a few examples:

* In the case brought by the United States against Nazi Party ideologist Alfred Rosenberg, Justice Jackson argued at length that the defendant was guilty of "Crimes Against Humanity" on the basis of his articulation during the 1930s of philosophical positions that "laid the theoretical foundation for" and helped "shape public opinion to accept" the policy of genocide that emerged during the following decade. On this count Francis Biddle entered a guilty verdict on behalf of his government. Rosenberg was convicted and hanged for his subsequent role in implementing criminal policies during the Nazi occupation of the Soviet Union.[50]

* A similar case was brought by Justice Jackson against prewar Hitler Youth Leader Baldur von Schirach for his role in indoctrinating German young people to accept the premises that led to genocide and aggressive war. "Ideological and emotional preparation . . . was the central issue" of the case. In this Biddle voted to acquit, but only because he believed that the case had not been made, not because the charges were misguided. Von Schirach was ultimately sentenced to twenty years' imprisonment for his role in deporting Jews to extermination facilities.[51]

* Justice Jackson made an almost identical Crimes Against Humanity case against propagandist Julius Streicher despite his recognition that Streicher "was never a member of the inner ring of Nazis, and had nothing to do with formulation of Nazi policy." The accusations consisted solely of Streicher having penned and published virulently anti-Jewish materials. Despite its finding that Streicher participated directly in no aspect of the physical extermination of the Jews, all four Tribunal members voted to convict him for having participated in the "psychological conditioning of the German public" which led to a genocidal outcome. On this basis he was hanged.[52]

54. The United States thus committed itself firmly to both a conception of genocide which applies even when the immediate physical implementation of a genocidal policy is absent. As explained by Justice Jackson, this arose from a desire not simply to punish those guilty of certain offenses, but to establish an internal legal "groundwork barring revival of such power" as led to the Nazi genocide. In this context, matters of

[50] International Military Tribunal, Trial of the Major War Criminals, Vols. 4-5; Smith, *Reaching Judgment at Nuremberg*, 192.
[51] Smith, *Reaching Judgment at Nuremberg*, 236.
[52] 22 Trial of the Major War Criminals Before the International Military Tribunal 547, 547 (1948).

advocacy became a central consideration and the U.S., along with the other allied powers, complemented the Nuremberg proceedings with occupation regulations, subsequently incorporated into German domestic law, completely prohibiting all celebratory demonstrations of Nazism (including most prominently parades and speeches), the display of Nazi symbols or regalia, or portraits of Adolf Hitler and other Nazi leaders.[53]

55. The United States has maintained this position in its immigration statutes mandating deportation for aliens who assisted the Nazis or participated in genocidal activities. INA §237(a)(4)(D); INA §212(a)(3)(E)(j). Assistance in persecution is an independent ground for deportation and, as established in *Kaleja v. INS*, 10 F.3d 441 (7th Cir.), *cert. den.*, 510 U.S. 1196, 114 S.Ct. 1305, 127 L.Ed. 2d 656 (1993), responsibility for atrocities committed by a group may be apportioned on the basis of an individual's membership and participation in the persecution.

56. This has recently been reaffirmed by the International Criminal Tribunal for Rwanda (ICTR), established by the United Nations in 1994 to hold accountable those most responsible for the genocidal murders of an estimated 800,000 Rwandans. On December 3, 2003, the ICTR, in *Prosecutor v. Nahimana, Barayagwiza, and Ngeze (The Media Case)*, Case No. ICTR99-52-T, convicted three media executives whose newspaper and radio station promoted ethnic hatred. They were found guilty of genocide, direct and public incitement to genocide, conspiracy to commit genocide, and two crimes against humanity – persecution and extermination.[54]

57. With respect to the Denver Columbus Day protests, it is thus the organizers of the celebration who are in violation of the most fundamental of laws. Rather than prosecuting these criminals, however, the City of Denver has licensed their "right" to celebrate, and therefore advocate, genocide in the Americas. The Defendants in this case were doing anything but loitering, which is generally interpreted to mean remaining in an area without purpose, and they were not disobeying a lawful order, for the order itself was in direct contravention of Article III of the Genocide Convention. Rather, Defendants were exercising their legal duty to prevent a fundamentally unlawful activity.

V. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

58. The prohibition on genocide is not the only fundamental norm of international human rights law violated by the City of Denver's licensing of the Columbus Day parade and its current prosecution of the Defendants. These actions also violate the

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[53] Smith, *Reaching Judgment at Nuremberg*, 47.

[54] See Statute for the International Tribunal for Rwanda, 33 I.L.M. 1602, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1600; *Recent Cases: International Law – Genocide – U.N. Tribunal Finds That Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity,* 117 Harv. L. Rev. 2769 (2004).

[55] It should be noted that the same principles pertain to the prosecution of major Japanese criminals following World War II. *See* Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (Quill/William Morrow Pubs. 1987) and Philip Piccagallo, *The Japanese on Trial* Univ. of Texas Press 1979); see also Jarritus Wolfinger, Preliminary Inventory of the Record of the International Military Tribunal for the Far East (Nat'l Archives and Record Service Doc. No. Pl 180/RG 238).

International Covenant on Civil and Political Rights (ICCPR), drafted in large measure by the United States, and ratified by it in 1992.

59. Part II, Article I of the ICCPR requires each state party to ensure that all individuals within its jurisdiction enjoy the rights conferred by the Convention, without distinction as to race, color, or national or social origin. Here, the City of Denver violated its obligations under the ICCPR by issuing formal permits to the Columbus Day organizers, thereby licensing blatantly discriminatory activity, and then unlawfully using force to prevent the Defendants from meeting their legal obligations to prevent such activity.

60. ICCPR Article 9 prohibits arbitrary arrest and detention and requires arrestees to be informed, at the time of arrest, of the reasons for and charges constituting the arrest. The arrests at issue were arbitrary because the Defendants were engaged in entirely lawful, indeed legally required conduct. This fact was recognized by the City in 1992 when, following similar protests, a jury acquitted the Defendants and issued a statement condemning the City for issuing the permits, after which the protestors received a human rights award and then-Mayor Wellington Webb publicly acknowledged that the City had been wrong and congratulated the protestors for having "taken the moral high ground."

61. Furthermore, the City of Denver violated Article 9 by allowing persons to be prosecuted for offenses that were not listed on the citations issued to them by the Denver Police Department. In a few cases, the citations issued were blank, and the city has allowed prosecution to go forward, assuming charges of which the defendants were never informed.

62. ICCPR Article 20 prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, while Article 21 confers the right to peacefully assemble. Article 26 pronounces all persons equal before the law and entitles all persons to the equal protection of the law. Defendants were acting pursuant to Articles 20 and 21 in attempting to peacefully halt the promotion of the genocidal ideology that the Columbus Day Parade presents. In stifling the Defendants' action, which advocated for compliance with international law, the City of Denver violated Defendants' rights under both Articles 20 and 21 of the ICCPR. In issuing permits for the Columbus Day parade, the City of Denver violated Article 20 and in stifling Defendants' resulting action, violated their rights under Article 21. The present attempt to prosecute represents a violation of Article 26, for the Defendants are being treated unequally under the law.

VI. THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

63. The City of Denver has violated, and continues to violate the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), a treaty drafted, again with significant input from the United States, and ratified in 1994.

64. ICERD Part I, Article 1, section 1 defines "racial discrimination" as any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The purpose of the Convention is to ensure that states parties do not restrict human and fundamental rights on the basis of race, color, descent, or national or ethnic origin.

65. Article 2, section 1(a) requires all parties to "ensure that all public authorities and public institutions, national and local, shall act in conformity" with the obligation to eliminate racial discrimination in all forms. Section 1(b) prohibits parties from sponsoring, defending or supporting racial discrimination by any persons or organizations; and 1(c) requires each party to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."

66. The City of Denver has violated ICERD every time it has issued a permit to the Columbus Day parade organizers and the Denver Police Department, a public authority, has acted in a discriminatory fashion when the officers restricted the rights of those protesting the parade by preventing them not only from exercising their rights to peacefully assemble and freely express their opinions, but their legal obligation to prevent activity prohibited by international law. It is this Court's obligation under Article 2, section (1)(c) of the Convention to ensure that the laws and regulations allowing this perpetuation of racism and genocide are rescinded or nullified.

67. Article 4 of ICERD mandates that states parties must condemn and declare illegal all propaganda and organizations which base their ideology on the superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form. This article also requires parties to eradicate all incitement to or acts of discrimination by declaring an offense punishable by law for the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination. Finally, this article prohibits public authorities or institutions from promoting or inciting racial discrimination.

68. Columbus Day Parade organizers and the City of Denver are acting in direct violation of Article 4 of the ICERD in issuing permits for the specific purpose of celebrating the actions and legacy of a man who perpetrated slavery and genocide against indigenous peoples. Such actions directly promote the idea of the "inherent superiority" of non-indigenous cultures. The City of Denver is legally bound to act in accordance with the ICERD and prohibit a parade glorifying the ongoing legacy of Columbus. .

69. Article 5, section (d)(vii) requires parties to allow its citizens to

participate in the freedom of thought, conscience and religion; (d)(viii) requires state parties to allow their citizens to enjoy the right to freedom of opinion and expression; (d)(ix) mandates parties to allow citizens to exercise their rights to peaceful assembly and association and section (e)(vi) requires party states to allow their citizens to enjoy the right to equal participation in cultural activities.

70. Clearly here, the Defendants were denied their rights to freely express their thoughts and opinions, peaceful assembly and equal participation in cultural activities. While a parade celebrating Italian pride would be legal and should be protected, one venerating a perpetrator of genocide and his legacy is not. In preventing the protestors from meeting their legal obligations to ensure that the government complies with Article 4, the City and the Denver Police Department promoted disparate treatment among various cultures and races contrary to ICERD – as well as the 14th Amendment -- by allowing the parade promoting racist ideology to continue.

VII. DEFENDANTS WERE COMPLYING WITH THEIR LEGAL OBLIGATION TO PREVENT THE COLUMBUS DAY "CELEBRATION"

71. Even if the genocide of American Indians initiated by Christopher Columbus and carried on with increasing ferocity by his successors were a matter of only historical significance, as the Nazi extermination campaigns now are, it would be utterly inappropriate and unlawful to celebrate it. Insofar as aspects of the genocide at issue are demonstrably ongoing, not just in the United States but in Canada and Central and South America as well, this becomes all the more true. The indigenous peoples of the Americas have an absolute and vitally urgent need to alter the physical and political circumstances that have been and continue to be imposed upon them; their only alternative is their final eradication.

72. In light of contemporary demographic disparities between indigenous and non-indigenous populations in the Americas, and the attendant power relations, it seems self-evident that a crucial aspect of native survival must go to altering the non-Indian sensibilities that contribute to the continuing genocide, either by affirming or acquiescing in it. Very high on any list of those expressions of non-indigenous sensibility contributing to the perpetuation of genocidal policies against American Indians are the annual "Columbus Day" celebrations, events in which it is baldly asserted that the process, events, and circumstances described herein are, at best, either acceptable or inconsequential. More often the sentiments expressed by participants are that the fate of Native America embodied in Columbus and the Columbia legacy is to be openly and enthusiastically applauded as, to quote a 1991 letter published in the *Rocky Mountain News*, an unrivaled "boon to all mankind."[56] The situation of American Indians will not, indeed *cannot*, change for the better so long as such attitudes are deemed socially acceptable by the mainstream populace. Hence such celebrations as "Columbus Day" must be stopped.

[56] Letter to the Editor, *Rocky Mountain News*, Oct. 13, 1991.

73. Under international law and, therefore, under the United States Constitution, it is one of the most fundamental responsibilities of the U.S. government and all of its political subdivisions to prevent genocide and incitement to or advocacy of genocide, as well as to prohibit any activity which promotes racial hatred or discrimination. The Nuremberg Tribunals confirmed that this principle was established in customary international law well before World War II; since then it has been explicitly articulated in both the ICCPR and ICERD, treaties ratified by and binding upon the United States.

74. Within the scope of the Genocide Convention and other elements of international law, both conventional and customary, American Indians have a right to expect the support of all levels of government in the United States, from the federal executive to local mayors, in stopping the celebration, advocacy and incitement of Native American destruction. It follows that the Defendants have the same right to expect support from the judiciary, from the United States Supreme Court to county and municipal courts, and from the various law enforcement agencies in this country, from the Federal Bureau of Investigation and the United States Marshalls Service to the Denver Police Department.

75. Thus, under the most fundamental of laws, the City and County of Denver should under *no* circumstances have allowed the October 9, 2004 parade to go forward. And if it did, the parade organizers, not the Defendants, should have been arrested. Of course, none of these official actions occurred. The executive branch of government and the police all defaulted on their legal responsibilities, with the result that the illegal activities of the parade organizers in publicly celebrating Columbus were not only allowed but, to all appearances, endorsed by those very persons mandated to prevent them.

76. The rights and responsibilities of individual citizens in such situations are not mysterious. During the course of the Nuremberg proceedings, Justice Jackson and his associates repeatedly asked how it was that "average Germans" had simply "stood by" while their government engaged in Crimes Against Humanity.[57] Given the legitimation of precisely those crimes under then-prevailing German law, one can only conclude that Justice Jackson meant that individual German citizens had shirked a binding obligation under a higher law – international law – to physically prevent such crimes from occurring. Such a principle is not inconsistent with domestic laws concerning the right to effect "citizens' arrests" or to otherwise intervene to prevent unlawful conduct.[58] Moreover, it is now universally embodied in doctrines relieving all persons, including active-duty soldiers and police, of any "responsibility" to comply with unlawful orders, regulations, or statutes. Indeed, it is arguable that, after Nuremberg, each individual citizen is legally required to vigorously – and, when necessary, *physically* –oppose the commission of a

[57] See Smith, *Judgment at Nuremberg*; Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970).

[58] See Peter Nabakov, *Tijerina and the Courthous Raid* (1969), 246 (quoting Judge Paul F. Larrazolo's jury instruction that "anyone, including a state police officer, who intentionally interferes with a citizen's arrest does so at his own peril").

Crime Against Humanity by *any* party official or otherwise. As Ben Whitaker, senior American diplomat, framed the matter before the United Nations in 1985:

> [S]ince wider public education about this doctrine is highly crucial for the aversion of future genocide . . . explicit wording should be added to the Convention, perhaps at the end of Art. III, that 'In judging culpability, a plea of superior orders is not an excusing defense.' Similarly, wider publicity should be given to the principle in national codes governing armed forces, prison staffs, police officers, doctors, and others, to advise and warn them that it is not only their right to disobey orders violating human rights, such as to carry out genocide or torture, but their legal duty to disobey. Such precepts should be taught in the schools, and the United Nations Educational, Scientific and Cultural Organization might be asked to encourage this internationally.[59]

77. U.S. courts have upheld the principle that in instances of governmental default on legal responsibilities it is necessary for the citizens to conduct themselves in a manner entirely similar to that undertaken by Defendants in the present case. (*United States v. Bailey,* 585 F.2d 1087 (D.C. Cir. 1978), *cert. granted*, 99 S.Ct. 1497 (1979), *cert. den.* 99 S.Ct. 1509 (1979).) No less can be expected of Colorado courts.

78. The fundamental lesson of Nuremberg is that when the government fails to comply with international law, thereby engaging in violations of fundamental human rights, it is the responsibility of the citizenry to ensure compliance. As the judgment of the International Military Tribunal stated, "the very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State." The judgment went on to hold that "the fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility. . . . The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."[60] In this case, a moral choice was possible and the Defendants exercised it as required by law.

VIII. CONCLUSION

79. Defendants cannot be convicted of any crime in the instant case as they comported themselves in an entirely lawful manner. The Defendants could not have refused to obey a lawful order by a police official insofar as the order in question -- to allow an illegal activity to proceed unhampered -- was not only unlawful but a violation of the most fundamental of human rights. It was therefore, the protestors' legal duty to disobey it. Defendants were not "loitering" and they did not disobey a lawful

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[59] UN Economic and Social Council, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker, 25-26 UN Doc. E/CN.4/Sub.2/1985/6 (1985), 26; see also John Duffet, ed., *Against the Crime of Silence: Proceedings of the International War Crimes Tribunal* (1970).

[60] Judgment of the International Military Tribunal for the Trial of German Major War Criminals, reproduced in Edgar M. Wise and Ellen S. Podgor, International Criminal Law: Cases and Materials (2000) at 516, 522.

order. They were simply meeting their legal duty to attempt to halt the commission of a Crime Against Humanity, as well as the violation of numerous other provisions of international human rights law and Constitutional law. The Defendants were engaged in a form of the very "educational" activity vis-à-vis the Genocide Convention called for by Mr. Whitaker.

WHEREFORE, Defendants respectfully move the court to enter an order dismissing the charges for all Defendants, as they are irrelevant and run contrary to both domestic and international law and for any other relief which is just and proper under the circumstances.

Respectfully submitted this 2nd day of December, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Motion to Dismiss** was sent via U.S. Mail, postage prepaid this 2nd day of December 2004, addressed to the following:

Denver City Attorney's Office
1437 Bannock Street, Room 393
Denver, CO 80202

This 2nd day of December 18, 2004.

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