

*Judicial Findings From the Inter-Tribal Tribunal on Residential Schools in Canada
(Held June 12-14, 1998 in Vancouver, B.C.)
Submitted by James M. Craven, Tribunal Judge
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On the Issue of Ethnocide Versus Genocide (Part 3)

During the Tribunal, some of us were aware and all of us were made aware of the distinction between “ethnocide” and “genocide” in Law and convention. Consistent with the importance of “mens rea” (state of mind and intent) in Tort and Criminal Law as well as Common Law where degree of intent and calculation is critical in classifying the level of criminality or liability (e.g. First-degree versus Second-degree murder versus Manslaughter), so ethnocide (unintended and non-coerced assimilation of a minority group into a broader group leading to the progressive destruction of the national minority group as a separate and identifiable minority group) is distinguished from genocide (intended and coerced assimilation and/or outright extermination of a national minority as a separate and identifiable group).

It is recognized in conventional economic theory that especially under national capitalism and capitalist-driven globalization, that processes of homogenization and equalization through mobility of capital and labor (equalization of wage rates and salaries, rents, interest rates and profits) take place daily. Labor migrates from areas of relatively low wage rates and high unemployment to areas of relatively low unemployment and expected higher relative wage rates, thus driving down some and raising other wage rates. Capital migrates from areas of high risk and/or relatively low rates of expected profitability to areas of lower risk and/or relatively higher rates of expected profitability thus driving down some and raising other rates of profitability. Financial capital migrates from areas of relatively high risk and/or low real interest rates to areas of relatively low estimated risk and/or higher real interest rates thus driving down some and raising other real interest rates. Further, not only people, capital and financial capital migrate, so do value systems, paradigms, power relations and structures, religious creeds and core principles of whole systems.

Creating and expanding global markets or markets in other regions of a nation, and expanded reproduction of whole systems (power structures and relations, defining institutions, capital-labor relations, value systems, laws, rights, responsibilities, practices etc.) require conditioning and assimilating--through increasingly sophisticated technologies of mind control, persuasion and social systems engineering--minority nations and cultures to new values, tastes and preferences, lifestyles, religions and paradigms of the dominant and dominating classes and the systems they dominate. In other words, the core, inner and defining imperatives, institutions, power relations and structures, values and practices of capitalism, which make up the inner “logic” and shape the dynamics and trajectories of capitalism on the “micro” and “macro” levels, lead inexorably to more and more homogenization, assimilation and destruction of national groups as separate and identifiable national groups--one form of “Ethnocide.”

Personally, I feel that the reality of the inner and defining logic and dynamics of capitalism leading inexorably to increasing homogenization, assimilation and destruction of

national groups and cultures as separate and identifiable groups and cultures is perhaps a major reason for the distinction between “ethnocide” and “genocide.” When people “choose” or are “induced”--as opposed to having been clearly forced-- to opt into a new and dominating culture, even on the margins of that new dominating culture for career or other reasons, free of having been forced to assimilate, or when combatants are killed without the “intent” to kill them because they are members of a national group targeted for extermination but rather because they are combatants on the “other side” of a conflict, this is considered “ethnocide”. Who wants to say that the inner “logic” and derivative/inexorable dynamics and trajectories of capitalism lead to genocide?

I found it amazing that no one from the Canadian Government or any of the Churches bothered to challenge or repudiate the assertion that the practices and policies of the Residential Schools in Canada collectively and cumulatively constituted one of the instruments of Genocide against First Nations Peoples in Canada. I doubt, however, that this represents on their part, a fundamental stipulation to overwhelming and irrefutable evidence. In fact, in other forums and other periods of history, there have been clear attempts to spin various versions of the history of Residential Schools in Canada even to the point of asserting that assimilation, even if shown to be forced, would fall short constituting Genocide under the UN Convention on Genocide, International Law or other principles of Common Law of Nations.

Both Canada and the United States (also in need of many Tribunals on Boarding Schools and other instruments of genocide) have consistently in the past and to this day resisted a full definition, examination and adjudication of the myriad dimensions, forms, crimes and effects of genocide. According to Chrisjohn et al.:

“The draft Genocide Convention proposals included an explicit statement proscribing cultural genocide (destruction of the specific characteristics of a group) as well as biological genocide (restricting births, sterilisation) and physical genocide (killing, whether quickly as by mass murder, or slowly as by economic strangulation). This proposal was immediately resisted by the United States (whose politicians were concerned that U.S. treatment of minorities would be in violation of such injunctions), and their efforts to derail those provisions were supported by Canada. As a result, the present version of the Convention is often taken as not dealing with cultural genocide.” (Chrisjohn et. al, 1997, p 43)

Chrisjohn et al. quoting from “Minorities and Human Rights Law” by Patrick Thornberry (London: The Minority Rights Group, 1991, pp. 13-14) note:

“The classification of genocide here included physical and biological genocide;

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...cultural genocide is not included ‘except partially in the case of forced transfer of children’ [our emphasis]. ‘Existence’ is a somewhat circumscribed notion in this context. It is not genocide if a culture is destroyed but the carriers of culture are spared. A forcible assimilation is therefore not proscribed by this Convention: there is no such offense in international law.”

(Quoted in Chrisjohn, et al. Ibid. pp43-44)

This interpretation of the UN Convention (which Thornberry does not endorse but merely reports), that there is no such thing as ‘cultural’ genocide is absurd on the face of it. How can it be possible to forcibly remove children from their families and place and indoctrinate them into strange, isolated and foreign places without “*inflicting serious mental harm on the members of a group*.” (violation of Article II of the UN Convention on Genocide) even if not accompanied by sexual and physical torture, starvation, medical experimentation, vilification of the culture and families of those being abducted etc.? And what kind of simplistic reductionism separates the importance of physical and cultural dimensions of persons--“carriers of a culture”--such that total or even essential personhood or total or essential existence of an identifiable group is seen in terms of physical existence only? The originator of the term “genocide”, Raphael Lemkin railed against this kind of reductionism in his original definition:

“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 the 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 the 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.”

(Raphael Lemkin, “Axis Rule in Occupied Europe”, Concord, NH: Carnegie Endowment for International Peace/Rumford Press, 1944, p. 79 quoted in Churchill, 1994, pp.12-13)

Lemkin observed two fundamental phases of genocide:

“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.” (Lemkin, Ibid. p 79 quoted in Churchill, 1994, p. 14)

How could phase two commence if genocide means only the destruction of the physical existence of members of the oppressed group as a means of destroying the physical existence of the whole group? Yet even part c of Article II of the UN Convention on Genocide--"Deliberately inflicting on the group conditions of life calculated [the "mens rea" issue] to bring about its 'physical' destruction in whole or in part"--is but one of the means--and criteria--for determining if genocide is going on.

Commenting on the lessons and implications of the nazi Holocaust, Zygmunt Bauman wrote in "Modernity and the Holocaust" (p. 27):

" 'Ordinarily' genocide is rarely if at all, aimed at the total annihilation of the group; the purpose of the violence (if the violence is purposeful and planned) is to destroy the marked category (a nation, a tribe, a religious sect) as a viable community capable of self-perpetuation and defense of its own self-identity. If this is the case, the objective of the genocide is met once 1) the volume of violence has been large enough to undermine the will and resilience of the sufferers, and to terrorize them into surrender to the superior power and into acceptance of the order it imposed; and 2) the marked group has been deprived of resources necessary for the continuation of the struggle. With these two conditions fulfilled, the victims are at the mercy of their tormentors. They may be forced into protracted slavery, or offered a place in the new order on terms set by the victors--but which sequel is chosen depends fully on the conquerors whim. Whichever option has been selected, the perpetrators of genocide benefit. They extend and solidify their power and eradicate the roots of the opposition." (quoted in Chrisjohn et. al, pp. 45-46)

In 1947, the Lebanese delegate to the U.N. committee that produced the Draft Convention on Punishment and Prevention of the Crime of Genocide noted:

"..what is at issue is the 'destruction of a [recognizably distinct] human group, even though the individual members survive.'" (UN Doc. E/A.C. 25/S.R. 1-28)
(Quoted in Churchill, 1994, p. 13)

This led to a formulation in the initial U.N. Draft Convention on Genocide which focused not only upon mass murder or calculated extermination campaigns, but upon actions and policies which brought about: 'disintegration of the political, social or economic structures of a group or nation' and the 'systematic moral debasement of a group, people or nation.' (Report of the United Nations Economic and Social Council, 1947, Part VI quoted by Churchill, 1994, pp. 13-14 from Robert Davis and Mark Zannis, "The Genocide Machine in Canada: The Pacification of the North, Montral, Black Rose Books, 1973, p. 19)

All of this led to the 1948 “IV Convention On The Prevention And Punishment Of The Crime Of Genocide which specified:

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a) Article I: Genocide is a crime under International Law whether committed during times of peace or war;

b) Article II: Killing or causing serious bodily or mental harm or inflicting conditions calculated to bring about physical destruction or imposing measures to prevent births or forcibly transferring children--of an identifiable group targeted for elimination-- is genocide;

c) Article III: That shall be punishable under the Convention would not only be genocide per se, but also conspiracy to commit, direct and public incitement of , attempt to commit, or complicity in, genocide;

d) Article IV: anyone committing genocide (acts under Article II) or any of the acts under Article III, whether constitutionally responsible rulers, public officials or private individuals shall be punished;

e) Article V: Contracting parties undertake to enact, *in accordance with their respective Constitutions*, necessary legislation to give effect to the provisions of the Convention and provide effective penalties against persons guilty of genocide or Article III acts [*note: does this mean that if the Constitution of a given country sanctions genocide or acts considered genocidal, that the Country would be unable to comply or reserve the right not to comply with Article V or other articles of the Convention, as it would not be consistent with that country’s Constitution? Does this mean that genocidal acts or policies--a crime under International Law--might be seen as a matter of sovereign “internal affairs” of a given country and that domestic law would trump international law? This is the so-called “sovereignty” exception” position taken by the United States Government when finally signing the UN Convention in 1988--40 years after it was drafted--and at present (and was and is the position of the nazis and a whole host of other genocidal forces];*

f) Article VI: Persons charged with genocide or Article III acts shall be tried by a “competent tribunal” of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction. [*Questions: What happens when one of those “Contracting Parties whose “competent State tribunals or acceptance of jurisdiction of an international penal tribunal is one of the entities against which allegations of genocide or Article III acts is being made?; Which State, even a signatory to the Convention, allegedly guilty of genocide or acts under Article III, will likely provide its own Courts or accept the jurisdiction of other Courts to hear allegations of genocide against itself?]*

g) Article VII: Genocide and Article III crimes shall not be considered as “political crimes” for purposes of extradition and Contracting Parties pledge themselves to grant

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extradition in accordance with *their laws and treaties in force*. *[Questions: What if the forces committing genocide are themselves “Contracting Parties” and effectively constitute a large section of whole State apparatus?; And in which case, how and to where or what venue will they be extradited?; What if domestic laws and treaties in force prevent extradition of parties who refuse to accept or define genocide as an international crime or if those domestic laws and treaties fail to include specific language allowing definition of genocide and Article III extraditable acts?; What if the demand is made to extradite from one Contracting Party engaging in genocide to the jurisdiction of another Contracting Party engaging in similar and even coordinated practices--e.g. U.S. and Canada?]*

h) Article VIII: “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.” *[Questions: Again, what if the forces directing and carrying out genocide or any Article III acts represent a large section of the State of a Contracting Party Country?; Can the victims of genocide call upon the UN to intervene against the domestic State which may even be one of the “Contracting Parties”?; And if the victims can call for action against one of the Contracting Parties alleged to be conducting genocide or Article III acts, what mechanisms and venues exist for such allegations to be tried?;*

I) Article IX: Disputes between Contracting Parties relating to the interpretation, application or fulfillment of the Convention, including responsibility of a State for genocide or for any of the other Article III acts to be submitted to the International Court of Justice. *[Question: What if the State and Contracting party, alleged to be guilty of genocide or article III acts, summarily refuses, as does the United States on any matters other than commercial matters, to accept the authority and jurisdiction of the ICE?]*

j) Article XV: “If as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.” *[Question: What if one of the Contracting Parties is not only a genocidal State, but also a superpower powerful enough to apply political, economic, military and other sanctions to obtain enough denunciations to cause the Convention to cease to be in force? If genocide or Article III acts are crimes under International Law and Common Law of Nations, why should it take a minimum number of Contracting Parties to recognize that fact and to keep the Convention in force?]*

The point is that even in the UN Convention all sorts of dodges, tricks with language, procedural games, summary non-compliance--even by a “Contracting Party”--and other escapes from scrutiny and accountability are possible. This is especially true when

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considers the extent of personal and systemic interests, mystifications, future interests and possibilities associated with genocide, past and present.

The United States and Canada--said to be “Children of a Common Mother”--have striking parallels in their own histories in many ways including in the operations, crimes, policies, intentions and effects of their Boarding Schools and Residential Schools respectively. It is interesting to note that the United States, the leading force in the establishment and execution of the Nuremberg Tribunals and other War Crimes and Genocide Tribunals that were instrumental in the development of the UN Convention, declined to sign on to the Convention for 40 years after it had been established; Canada finally signed on in 1952. According to Ward Churchill’s examination:

“The reason for this extensive delay resides primarily, as is revealed in the records of Senate debates on the Genocide Convention since it was referred to that body by President Truman in 1950, in congressional concern that a broad range of federal policies vis-à-vis minority populations in the U.S. might be viewed as genocidally criminal under international law.” (Lawrence J. LeBlanc, “The United States and the Genocide Convention”, Durham, NC: Duke, University Press, 1991 cited in Churchill, 1994, p. 16)

Finally in 1988, in the closing days of the 100th Congress, based on the growing disconnect or contradiction between presuming to lecture other countries all around the world about basic human rights on the one hand and not having ratified participation in the UN Convention on the other hand, the U.S. Government enacted the “Genocide Convention Implementation Act of 1988” (Title 18, Part I, USC) which contained language designed from its inception to provide language that would narrow the applicability of the Convention to the United States. Deposited with the U.N. Secretary General in 1988 along with the instrument of treaty ratification was a summarily asserted amendment called a “Resolution of Ratification” or the “Lugar-Helms-Hatch Sovereignty Package” which contained the following reservation Article I (2):

[N]othing 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.” (Quoted in Churchill, 1994, p. 17)

Of course that is exactly the argument that the nazis made at Nuremberg. “Nothing genocidal we did and no orders we followed were prohibited by our legal authorities as we interpreted them and we ruthlessly guarded the sovereignty of and compliance with our own legal authorities.” In the U.S. Supreme Court decision in “Reid v Covert’ (354, U.S. 1, 1957) ruled that ‘any treaty provision that is inconsistent with the United States

Constitution would simply be invalid under national law' (Quoted in Churchill, 1994, p. 19) which was one of the authorities used in the so-called "Sovereignty Resolution".

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There is however, the matter of Article VI Section 2 of the U.S. Constitution that states that treaties are "the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Further, there is the matter of Article 27 of the 1969 Vienna Convention on the Law of Treaties (to which the United States is not a signatory but has recognized as the 'definitive promulgation of the Laws of Nations with regard to treaty relations'--see Churchill, 1994, p.19 and 49) which notes that no country may invoke provisions of its domestic law as a reason for not abiding by its treaty obligations.

I raise U.S. issues and laws not only because of the common sources of U.S. and Canadian law, or because of the parallels between the U.S. Boarding Schools and the Canadian Residential Schools, but also because some of the same summary exceptions and assertions of "right of non-interference in 'internal affairs'"--including Genocide and Article III offenses have been raised by Canadian authorities as well by U.S. authorities. Through summary language, the intent, content and scope of the Convention can be circumvented. Effectively countries like the U.S. and Canada, under the banners of "sovereignty" and "right of non-interference in internal affairs." can seek:

"to retain prerogatives to engage in or sanction policies and activities commonly understood as being genocidal, even while professing to condemn genocide." (Churchill, Ibid. p. 18)

During the setting up of the Nuremberg Tribunal, when the U.S. and other allies were accused of applying "ex post facto" law (*nullem crimen sine lege* or *nulla poena sine lege previa*) and uncodified international legal principles to the Nazis, noted that although much of what needed to be examined at trial had never been formally codified in international law or officially accepted by Germany, nonetheless:

"International law shall be taken to include the principles of the law of nations as they result from the usages established among civilized people, from the laws of humanity, and the dictates of public conscience." (Quoted in Churchill, 1994, p.22)

Finally, there is the U.N. Charter to which the U.S. and Canada are signatories which asserts and is generally recognized that the U.N. may declare principles of international law binding on even non-member nations. Further:

"The concept of offenses against the [customary] law of nations (*delicti juris gentium*) was recognized by the classical text writers on international law and has been employed in national constitutions and statutes. It was regarded

as sufficiently tangible in the eighteenth century so that United States Federal Courts sustained indictments charging acts as an offense against the law of...

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...nations, even if there were no statutes defining the offense. Early in the nineteenth century it was held that criminal jurisdiction of federal courts rested only on statutes though the definition of crimes denounced by statutes might be left largely to international law. Thus 'piracy' as defined by the law of nations is an indictable offense in federal courts and all offenses against the law of nations are indictable at common law in state courts." (Quincy Wright, "The Law of the Nuremberg Trial" in Jay w. Baird, ed. "From Nuremberg to My Lai, Lexington, MA. DC Heath and Co., 1972, p. 37, quoted in Churchill, 1994, p. 21)

And yet as I write this, with one day left for the deadline for agreement of nations to form a standing World Court to deal with war crimes and genocide, the United States and some allies resist formation of such a court on the basis of summary assertions of "sovereignty" leaving the impression that war crimes and genocide might be a matter of "internal affairs" about which they have the "right" to demand non-interference from other nations, the U.N. and presumably from the victims themselves.

On the question of "mens rea" or the requisite intent to forcibly assimilate and/or extinguish a whole people all sorts of deceptive arguments are made. One argument may be called the "Zeitgeist" argument which goes something like this: as all forms of life are in process and development, so it is with people and nations; we cannot judge the commonly-accepted standards, moral codes and practices of past periods of history, through the prism of today's standards, moral codes and acceptable practices. To this we have to ask by whom were these past standards, moral codes and practices accepted? Whose perspective are we adopting with this line of argument? In Nazi Germany, there were indeed large groups of people who did not "commonly accept" the prevailing moral codes, standards and practices: Jews, Gypsies, Homosexuals, Communists, Trade-Unionists, Peoples of Conquered Territories, Prisoners of War, etc. And does this then mean that all standards, morality and practices are essentially subjective--you like genocide and I don't, just like you like to have a blue car and I prefer red?

Then there is the "perhaps-we-were-misguided-but-we-had-honest--as-opposed-to-criminal-intent" argument. This is referred to as the "Standard Account" by Chrisjohn et al.:

"Residential Schools were created out of the largesse of the federal government and the missionary imperatives of the major churches as a means of bringing the advantages of Christian civilisation to Aboriginal populations. With the benefit of late-20th century hindsight, some of the means with which this task was undertaken may be seen to have been unfortunate, but it is important to

understand that this work was undertaken with the best of humanitarian intentions. Now, in any large organization, isolated incidence of abuse may occur, and such abuses *may* have occurred in *some* Indian Residential Schools...

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...In any event, individuals who attended Residential Schools now appear to be suffering low self-esteem, alcoholism, somatic disorders, violent tendencies, and other symptoms of psychological distress (called 'Residential School Syndrome'.) While these symptoms seem endemic to Aboriginal Peoples in general (and not limited to those who attended Residential School), this is likely to have come about because successive generations of attendees passed along, as it were, their personal psychological problems to their home communities and, through factors such as inadequacy of parenting skills, perpetuated the symptomology, if not the syndrome. In order to heal the rift the Residential School experience may have created between Aboriginal Peoples and Canadian society at large, and in order to heal those individuals who still suffer the consequences of their school experiences, it is necessary and appropriate to establish formally the nature of Residential School Syndrome, causally link the condition to Residential School abuses (physical, sexual or emotional) determine the extent of its influence in Aboriginal populations, and suggest appropriate individual and community interventions that will bring about psychological and social health." (Chrisjohn et al, 1997, pp. 1-2)

This "Standard Account" was found in many of the testimonies about Residential Schools in Canada (not part of the Royal Commission on Aboriginal Peoples) and in the "apologies" presented by some of the Churches and the Government of Canada. For some, myself included, this appears to be another crime rather than any substantive act of contrition. Without full and competent inquiry, full discovery and accountability, willingness to disclose all, commitment to change and removal of systemic imperatives and interests that produced the Residential School experience and other horrors for Indigenous People, no real Truth, Justice, Healing, Reconciliation or Prevention of Future Abuses is possible.

Chrisjohn, et al. (whose competent report was not included in the RCAP) give a "Non-Standard Account which goes like this:

"Residential Schools were one of many attempts at the genocide of the Aboriginal Peoples inhabiting the area now commonly called Canada. Initially, the goal of obliterating these peoples was connected with stealing what they owned (the land, the sky, the waters, and their lives, and all that these encompassed); and although this connection persists, present-day acts and policies of genocide are also connected with the hypocritical, legal and self-delusion need on the part of the perpetrators

to conceal what they did and what they continue to do. A variety of rationalizations (social, legal, religious, political, and economic) arose to engage (in one way or another) all segments of Eurocanadian society in the task of genocide. For example,

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some were told (and told themselves) that their actions arose out of a Missionary Imperative to bring the benefits of the One True Belief to savage pagans; others considered themselves justified in land theft by declaring that the Aboriginal Peoples were not putting the land to “proper” use; and so on. The creation of the Indian Residential Schools followed a time-tested method of obliterating indigenous cultures, and the psychosocial consequences these schools would have on Aboriginal Peoples were well understood at the time of their formation. Present-day symptomology found in Aboriginal Peoples and societies does not constitute a distinct psychological condition, but is the well-known and long-studied response of human beings living under conditions of severe and prolonged oppression. Although there is no doubt that individuals who attended Residential Schools suffered, and continue to suffer, from the effects of their experiences, the tactic of pathologizing these individuals, studying their condition, and offering ‘therapy’ to them and their communities must be seen as another rhetorical maneuver designed to obscure (to the world at large, to Aboriginal Peoples, and to Canadians themselves) the moral and financial accountability of Eurocanadian society in a continuing record of Crimes Against Humanity.” (Chrisjohn, et. al, 1997, pp. 3-4)

These are some future lines of inquiry I would propose for future Tribunals in other places. Out of the deepest and most profound respect for the victims I heard and all of those I did not get to hear, and out of respect for their anguish, pain and suffering, I beg that future Tribunals be thoroughly and competently designed, constructed, set-up, executed and followed-up upon. There is simply too much at stake. Out of respect for the victims and what is at stake, I cannot and will not endorse “fruits of an essentially poisoned tree”--which only seve those who wish to compound the past and present crimes with the further crimes of cover-up and false contrition.

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