

THE INTERNATIONAL CRIMINAL COURT AND INDIGENOUS PEOPLES: OPPORTUNITIES AND LIMITATIONS

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The International Criminal Court (ICC) is a permanent international criminal court that tries individuals for the most serious acts, namely genocide, crimes against humanity, and war crimes. It tries only individual persons, not governments or corporations. These persons are those with the ultimate responsibility for such atrocious crimes: they have made the decision to have the crimes committed and given the orders for them to be executed.

Thus, although the Court cannot try a company, it can try its officials who decided to commit crimes which would serve the company's interests.

The creators of the Court very much had crimes against Indigenous Peoples in mind, when drafting the Court's Rome Statute. Crimes against Indigenous Peoples were frequently mentioned in the negotiations that took place. Two aspects of the Statute and the Court are especially important for Indigenous Peoples.

First, no formal complaint or procedure is necessary to bring a crime to the attention of the Court. This can be done by any person or organization in a simple letter or statement directed to the Prosecutor of the Court. It should be clearly written, provide evidence or state precisely where evidence can be found and mention that the crime was committed on the territory of a country that has ratified the Rome Statute or by one of its citizens. Many countries where Indigenous Peoples live, especially in Latin America, belong to the Court's jurisdiction. A lawyer is not needed for such a statement or letter to be submitted to the Court. If possible, it should be in English or French, the two working languages of the Court, but it may also be in Russian, Chinese or Arabic. Since many Spanish-speaking people work at the Court, Spanish may also be used if absolutely necessary. Instructions

may be found on the Court's website at the page for the Office of the Prosecutor: www.icc-cpi.int.¹

Also, the Statute requires the Court to give special attention to crimes against women and children and to take particular care and have special facilities to help and support them and other victims and witnesses to participate in its work. Indigenous women should therefore feel confident that if they work with or come to the ICC, they will be treated with understanding and respect.

Of the three categories of crimes currently in the Court's jurisdiction, genocide and crimes against humanity will best cover atrocities against Indigenous Peoples. History and current events both lead informed world public opinion to think of such atrocities as genocide. Charges of genocide are thus most likely to draw global attention and understanding. However, genocide is very often quite hard to establish and prove because it requires that the perpetrator specifically intended to "destroy in whole or in part, a national, ethnical, racial or religious group, as such..." Besides physical destruction, the intended act of genocide includes measures to make the group die out or to destroy it by causing mental harm. The Statute's definition of genocide does not include attacks on the cultural identity of a group.

Fortunately, the Statute's provisions on crimes against humanity fill many of the gaps left by its definition of genocide. These include murder, extermination, enslavement, torture, sexual violence and persecution against any identifiable group on racial, national, ethnic, cultural, religious or gender grounds. These atrocities are exactly those committed against Indigenous Peoples in the past and now. The Statute does not require any particular reason for committing these crimes against humanity.

An important limitation on the usefulness of the ICC for Indigenous Peoples is that, as already noted, it can try only the most serious crimes and the most senior leaders. This high bar is known at the Court as the "gravity threshold." The drive to create the Court came from a powerful international reaction to the continuing impunity of

1 The website also includes information about victims' participation in the Court's proceedings as well as witness protection, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx

government and organizational leaders in committing vile crimes, combined with awareness that the temporary tribunals for Yugoslavia and Rwanda had shown that these leaders could effectively be tried by international tribunals. With the right evidence, a policy of deliberate indifference to atrocities, as well as direct orders to commit them, can support ICC charges against a leader.

Although the number of persons affected is often a factor in determining the seriousness of a crime, it need not always be. An act of genocide which with intent destroys all members of a small tribe or group could well be an ICC crime. The same could be true for the crime against humanity of persecution.

Within its limitations, the ICC can provide important opportunities to indigenous women to act against atrocities and at least to draw world attention to them. The Office of the Prosecutor will be receptive to communications from indigenous women since the Statute commands it to give special attention to the concerns of women, because it has a good system for vetting and responding to complaints coming to it, and because it is intent on expanding the nature and locations of the crimes it pursues.

If there is doubt about whether a crime is eligible for the Court, describe it in a letter to the Office of the Prosecutor and let it decide.