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# **Self-Determination for the Sikh Peoples: An Overview of the International Law**



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## TABLE OF CONTENTS

<b>I. Overview .....</b>	<b>3</b>
<b>II. The Right to Self-Determination: The International Law .....</b>	<b>4</b>
<b>A. Sikhs Have the Right to Self-determination Under International Law.....</b>	<b>4</b>
a. International law guarantees the right to self-determination .....	4
b. India's attempt to restrict the right is invalid .....	7
c. Sikhs are 'Peoples' under international law.....	8
<b>B. External Self-Determination is Permitted When Internal Self-Determination Fails .....</b>	<b>9</b>
<b>C. Lawfulness of Unilateral Declarations of Independence .....</b>	<b>11</b>
<b>III. The Right to Self-Determination: The Case for a Sikh Homeland .....</b>	<b>12</b>
<b>A. Overview .....</b>	<b>12</b>
<b>B. The Self-Governing Sikh State was Occupied and Subjugated .....</b>	<b>13</b>
a. The Sikh Empire.....	13
b. The Punjab under the British East Indian Company and the British Raj.....	14
c. Decolonisation: Partition and assurances by India.....	15
d. Broken promises: further breakup of Punjab and attrition of national identity	16
e. Conclusion (Sub-section B):.....	18
<b>C. India has Oppressed the Sikh People and Blocked Any Meaningful Exercise of Their Self-Determination .....</b>	<b>19</b>
a. Violent attacks against Sikhs and Sikh temples.....	19
b. Systematic attacks on Punjabi economic resources.....	21
c. Systematic attacks on Sikh religious freedoms.....	21
d. Systematic attacks on Sikhs' freedoms of speech, assembly and association....	22
e. Systematic denial of justice to Sikh victims .....	23
f. India's blockage of self-determination efforts .....	24
g. Conclusion (Sub-section C) .....	26
<b>IV. Overall Conclusion:.....</b>	<b>26</b>

## I. OVERVIEW

1. *Sikhs For Justice*, a human rights advocacy group (hereinafter “SFJ”), has engaged Global Diligence LLP to provide legal advice on the right to ‘self-determination’ under international law.<sup>1</sup> SFJ plans to hold a referendum in 2020, inviting Sikhs in India and abroad to vote for or against the establishment of a sovereign, independent, self-governing Sikh homeland, within the current Punjab region of India (to be named Khalistan).
2. Whilst there are many unknowns for any ‘peoples’ exploring secession and independence, one thing is certain: to enhance its chance of success, a secession movement should start with solid legal and democratic foundations. This Brief covers the law. The democratic footing may be provided through a credible referendum.
3. *Self-Determination for the Sikh Peoples: An Overview of the International Law* (hereinafter “Brief”) provides a concise overview of the legal position and the key factual considerations under international law. It must be read with two caveats in mind: First, this Brief is not an exhaustive examination of all the relevant facts and case law.<sup>2</sup> Second, it only addresses the issues relevant to international law. But the question of secession is not only about law – it is also very much about politics. The multiple political considerations that may flow from a secession campaign are beyond the scope of this Brief.
4. International law provides all ‘peoples’ with a right to self-determination. As a general rule ‘peoples’ should exercise their right to self-determination *within* the territory of their sovereign state, thus maintaining the existing territorial integrity. However, there are exceptions to this rule. Where a state is occupied, subjugated and exploited by a foreign power, a right of secession may arise. Additionally, where peoples are blocked from any meaningful exercise of their right to internal self-determination, a right of secession may arise, as a last resort. This is because, in both these situations, restoring or establishing an independent state becomes the only way of guaranteeing the right to self-determination.
5. At this stage, the key legal question is whether ‘Indian’ Sikhs fall under the exceptions to the rule.<sup>3</sup> Having examined the facts and circumstances

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<sup>1</sup> Annex 1 provides information on Global Diligence LLP and the signatories to this Brief.

<sup>2</sup> A full submission before a court or commission would require several hundred pages of argumentation. The aim of this Brief is to provide an overview, accessible to a wide audience of interested persons, including non-lawyers.

<sup>3</sup> Reference to ‘Sikhs’ within this Brief generally refers to Sikh people who are citizens of, or residing in, the Republic of India. Whilst Sikhs throughout the world may have a legitimate

relating to (i) the occupation and subjugation of the self-governing Sikh state, and (ii) the mistreatment of Sikhs by India, it is not unreasonable to conclude that Sikhs may fall under one or both of the above-stated exceptions. Accordingly, Sikhs may present a good arguable case that secession is lawful because it is the only possible avenue to achieve meaningful self-determination.

## II. THE RIGHT TO SELF-DETERMINATION: THE INTERNATIONAL LAW

6. So far as international law is concerned, there are two key questions for SFJ:
  - (a) Do Sikhs have a right to self-determination under international law?
  - (b) If so, under what circumstances is it lawful for Sikhs to secede from India and create an independent state?
7. Self-determination is the right of peoples to freely determine political status and freely pursue economic, social, and cultural development. There are two main avenues for peoples to pursue self-determination: First, within the (current) territory of the parent state – known as internal self-determination; second, outside the (current) territory of the parent state, via secession and independence – known as external self-determination.
8. This section will consider whether Sikhs, as a group of peoples, have a right to self-determination under international law. It will then discuss under what circumstances, if any, would it be lawful for Sikhs to secede from India and form an independent homeland.

### A. SIKHS HAVE THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW

#### a. International law guarantees the right to self-determination

9. The right to self-determination was cemented in Article 1 of the *Charter of the United Nations* of 1948 as one of the four founding purposes of the United Nations (hereinafter “UN”). Article 73 of the UN Charter requires member states:

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interest in pursuing an independent Sikh homeland within the Punjab, the analysis of self-determination under international law must be focused on those Sikhs who are expected to pursue their political, economic, social and cultural development within India.

To ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses [...] and to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.<sup>4</sup>

10. Since the adoption of the UN Charter, the right to self-determination has been confirmed through international treaties and declarations.<sup>5</sup> Most significant are the *International Covenant on Civil and Political Rights (the 'ICCPR')* and the *International Covenant on Economic, Social, and Cultural Rights (the 'ICESCR')* of 1966 (in force from 1976). Together referred to as the Bill of Rights, these two treaties are considered to be the cornerstone of international human rights law. Article 1 of both treaties states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.<sup>6</sup>

11. On 25 March 2015, the UN Human Rights Council—in the context of reaffirming the right of the Palestinian people to self-determination—

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<sup>4</sup> UN Charter, Article 73.

<sup>5</sup> See, for example, *UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960*: This Declaration states that: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." UNGA Resolution 1514 (XV), 14 December 1960, Article 2. See also, *UN General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970*: This Declaration states that: "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter." And: "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter [...]." UNGA Resolution 2625 (XXV), 24 October 1970, Annex, Principle 5.

<sup>6</sup> ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 1; ICESCR (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Article 1.

emphasized that the right has the status of a “*jus cogens* norm of international law.”<sup>7</sup>

12. The International Court of Justice (“ICJ”) has also confirmed the right to self-determination.<sup>8</sup> The ICJ first addressed the issue of self-determination in 1971 and praised the achievement of “self-determination and independence of the peoples concerned.”<sup>9</sup> In 1995, the ICJ revisited self-determination in connection with a dispute between Portugal and Australia over the continental shelf adjacent to East Timor.<sup>10</sup> In that case, the court found that: (i) the “assertion that the right of peoples to self-determination, as it evolved from the [UN] Charter and from United Nations practice, has an *erga omnes* character, is irreproachable”;<sup>11</sup> and (ii) the “principle of self-determination of peoples [...] is one of the essential principles of contemporary international law.”<sup>12</sup>
13. In conclusion, it is beyond argument that the right to self-determination is a fundamental principle of international law that has attained the status of a ‘peremptory norm’ or *jus cogens*, with an *erga omnes* character. Peremptory norms have a “higher rank in the international hierarchy than treaty law and even customary rules.”<sup>13</sup> Importantly, it is not permissible to derogate from a *jus cogens* principle.

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<sup>7</sup> UN Human Rights Council, 28th Session, Agenda Item 7, Human rights situation in Palestine and other occupied Arab territories, A/HRC/28/L.32, 25 March 2015.

<sup>8</sup> Also known as The World Court, the ICJ is the principal judicial organ of the UN with the mandate to settle legal disputes between member states, and to issue advisory opinions.

<sup>9</sup> See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports 1971, para 53, p 19,

<sup>10</sup> *East Timor (Portugal v Australia)*, Judgment, 30 June 1995, ICJ Reports 1995, p 90 (hereinafter, the ‘East Timor Judgment’).

<sup>11</sup> East Timor Judgment, para 29. Obligations *erga omnes* are obligations a state owes to the international community as a whole. *Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, ICJ Reports 1970, p 3: “By their very nature and importance, such obligations are the concern of all states and all states have a legal interest in their protection.”

<sup>12</sup> East Timor Judgment, para 29 (citing Namibia and Western Sahara Advisory Opinions). In 2004, the ICJ was required to determine “the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory.” Recalling the UN Charter, Resolution 2625, the International Covenants, and its own prior jurisprudence, the Court reaffirmed the right to self-determination, its *erga omnes* character and the duty of all states to promote the realization of the right. The ICJ ultimately held that the wall was contrary to international law as it amounted to a violation of the Palestinian people’s right to self-determination. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p 136.

<sup>13</sup> *Prosecutor v Anto Furundzija* (Judgment) IT-95-17/1-T, para 153 (10 December 1998)

b. India's attempt to restrict the right is invalid

14. India has been a party to the ICCPR and ICESCR since 1979. However, India registered the following 'reservation' with respect to Article 1 of both Covenants:

With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words 'the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation--which is the essence of national integrity.<sup>14</sup>

15. No doubt concerned with secessionist movements (notably, Khalistan and Kashmir), India demanded a 'restricted interpretation' of self-determination. In other words, when it came to peoples within its territory, India sought to limit the right of self-determination to internal (rather than external) self-determination, no matter what the circumstances.
16. However, the Indian reservation to Article(s) 1 would likely be considered invalid under international law. As mentioned above, the right to self-determination has attained the 'status' of *jus cogens*. This means that (i) the right to self-determination exists above and beyond the ICCPR and ICESCR and (ii) any attempted derogation (either via ICCPR or ICESCR reservations, or otherwise) is invalid.<sup>15</sup>
17. Furthermore, the ICJ has ruled that a reservation to a treaty that is contrary to its object and purpose is not permitted.<sup>16</sup> In March 1984, when providing guidance on the ICCPR and ICESCR, the UN Human Rights Committee observed that:

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<sup>14</sup> International Covenant on Economic, Social and Cultural Rights, New York, (16 December 1966): Reservations, India. Available at:

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en#EndDec) (Last Accessed at 24 July 2018)

<sup>15</sup> The HRC has confirmed that reservations to human rights treaties that seek to restrict a peremptory norm are not permitted. See para 1, Human Rights Committee General Comment 12, Article 1 (Twenty-first session, 1984). Further, the International Law Commission attached to a *jus cogens* obligation a 'duty of abstention', which encompasses two different obligations: First, the duty not to recognize the unlawful situation; and second, not to render aid or assistance in maintaining the unlawful situation. See Report of the International Law Commission on the work of its fifty-third session: Commentaries to the draft articles on responsibility of states for internationally wrongful acts', 23 April-1 June and 2 July-10 August 2001, UN Doc A/56/10, commentary to Article 41, [1].

<sup>16</sup> In the landmark case, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ found that reservations are impermissible if they are against the object and purpose of the treaty. *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice (ICJ), 28 May 1951 pp. 24.

States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as Article 1 **apart from and before all of the other rights** in the two Covenants.<sup>17</sup>

The UN Human Rights Committee described the right as ‘inalienable’ and noted that the “corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law.”<sup>18</sup>

18. In other words, the right of self-determination should be considered fundamental to the object and purpose of the ICCPR and ICESCR. Accordingly, any state that has committed to these conventions must also be fully committed to allowing (and promoting) the right of self-determination, without exception. Therefore, the Indian reservation to Article 1 should be considered invalid; peoples within India may pursue the right to self-determination to the full extent permitted under international law.

c. Sikhs are ‘Peoples’ under international law

19. The right to self-determination applies to a group of ‘peoples.’ Can Sikhs be classified as ‘peoples’ for the purposes of international law? Although the ICJ has not settled upon a definition, in 1989 the UN Educational, Social, and Cultural Organization (UNESCO), commissioned a group of international law experts to refine “the concept of the rights of peoples.” The experts described ‘peoples’ as groups of individuals who enjoy some or all of the following common features: (a) common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; and (g) common economic life.<sup>19</sup>
20. Applying this formulation to Sikhs, there can be little doubt that they must be considered a group of ‘peoples’ for the purposes of international law. Sikhs share a common history, religion, language, culture, and (historically) territory. Furthermore, Sikhs consider themselves to have a distinct identify (namely, they self-identify as a people).

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<sup>17</sup> See para 1, Human Rights Committee General Comment 12, Article 1 (Twenty-first session, 1984) (emphasis added).

<sup>18</sup> *Ibid*, para 2.

<sup>19</sup> UN Educational, Scientific, and Cultural Organization (UNESCO), International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Paris, 27-30 November 1989, ‘Final Report and Recommendations’, Document No SHS-89/CONF.602/7 (hereinafter, the ‘UNESCO Report’), 22 February 1990. The UNESCO formulation was cited favorably by the African Commission, *see* para 170, *Kevin Mgwanga Gunme et al v Cameroon*, African Commission on Human and Peoples’ Rights, Communication No 266/03 (2009).



## B. EXTERNAL SELF-DETERMINATION IS PERMITTED WHEN INTERNAL SELF-DETERMINATION FAILS

21. On 25 June 1993, the UN World Conference on Human Rights considered the balance between self-determination and existing territorial integrity with respect to “the particular situation of peoples under colonial or other forms of alien domination or foreign occupation.”<sup>20</sup> The World Conference recognized “the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination” and pointed out:

[...] this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States **conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.**<sup>21</sup>

22. On 24 October 1995, the UN General Assembly’s *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* affirmed that peoples possessed of a representative, non-discriminatory government, should pursue internal self-determination.<sup>22</sup> Therefore, like the UN World Conference on Human Rights, the UN General Assembly implicitly recognised that peoples who face serious discrimination or persecution within their parent state may, in exceptional cases, pursue external self-determination.

23. One leading academic summed up the position in this way:

Only where such guarantees [of internal self-determination] are absent or gravely limited can the right to self-determination be specified as the right to secede; in other words, where a people is subjugated in violation of international law, it must be able to regain freedom by constituting itself as an independent and sovereign state. **The right of secession is, in the last analysis, attributable to peoples who are suffering from discrimination, from the denial of a government that is representative, and only where the discriminatory behavior is so penetrating, ramified, and**

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<sup>20</sup> Vienna Declaration and Programme of Action, A/CONF.157/24, 25 June 1993, para 2, (under 2, Section I)

<sup>21</sup> *Ibid*, para 2 (emphasis added)

<sup>22</sup> See UN General Assembly *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* A/RES/50/6, 24 October 1995, para 1: Self-determination “shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind [...]”

systematic as to threaten, concretely, their very existence and where there is no strong likelihood of the discrimination coming to an end.<sup>23</sup>

24. The Supreme Court of Canada (“Supreme Court”) has provided the most comprehensive judicial discussion from any senior court on the issue of self-determination.<sup>24</sup> The Supreme Court considered “whether there is a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?”<sup>25</sup> The Supreme Court found that while “international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their ‘parent’ state”, such a right may arise exceptionally in the context of an oppressed or colonial people.<sup>26</sup>
25. The court noted three groups for whom the right to self-determination may be exercised externally (via secession): (i) those under colonial rule;<sup>27</sup> (ii) those under some type of foreign occupation;<sup>28</sup> and (iii) exceptionally, those denied the meaningful exercise of the right to self-determination internally.<sup>29</sup> With respect to this last category, the Supreme Court noted:

Although this third circumstance has been described in several ways, the underlying proposition is that, **when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.** The *Vienna Declaration* requirement that governments represent “the whole people belonging to the territory without distinction of any kind” adds credence to the assertion that such a **complete blockage may potentially give rise to a right of secession.**

26. In all three situations, the peoples in question are entitled to a right to external self-determination because they have been denied the ability to

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<sup>23</sup> Susanna Mancini, Symposium, *Rethinking the boundaries of democratic secession: Liberalism, nationalism, and the right of minorities to self-determination*, Oxford University Press and New York University School of Law, Volume 6, Number 3 & 4, 2008, pp. 553–584, Advance Access publication 11 September 2008, at 557.

<sup>24</sup> *Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada*, 20 August 1998, 2 *Supreme Court Reporter (SCR)* 217; 161 *Dominion Law Reports (DLR)* (4th) 385; 115 *International Law Reports (ILR)* 536 (hereinafter, the ‘Quebec Secession Decision’).

<sup>25</sup> Quebec Secession Decision, para 2.

<sup>26</sup> *Ibid*, paras 111, 112 “International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below.”

<sup>27</sup> *Ibid*, para 132 (“The right of colonial peoples to exercise their right to self-determination by breaking away from the “imperial” power is now undisputed [...].”)

<sup>28</sup> *Ibid*, para 133 (“The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination, or exploitation outside a colonial context.”)

<sup>29</sup> *Ibid*, para 134

exert their right to self-determination within their parent state.<sup>30</sup> Notably, the Supreme Court observed that where a people's 'territorial integrity' has been "all but destroyed by the colonialist or occupying Power, [it] should be fully restored [...]".<sup>31</sup>

27. In the case of Quebec, the Supreme Court found that, in the specific circumstances of Canada, secession was not warranted because Quebecers had **not been denied** internal self-determination.<sup>32</sup>
28. To summarise, international law requires Sikhs to make every effort to exercise their right to self-determination within the territory of India. However, where this becomes impossible, a right of secession may arise.

### C. LAWFULNESS OF UNILATERAL DECLARATIONS OF INDEPENDENCE

29. In 2010, in its latest case to deal with the issue of self-determination, the ICJ was confronted with the issue of whether 'the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [was] in accordance with international law' and the Constitutional Framework of Kosovo created by Security Council Resolution 1244 (1999).<sup>33</sup> The ICJ noted the creation of many new states by oppressed peoples (outside the colonial context):

During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation. A great many new states have come into existence as a result of the exercise of this right.<sup>34</sup>

The ICJ went on to find that international law, in general, contains no prohibition on unilateral declarations of independence, even if these are

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<sup>30</sup> *Ibid*, para 138.

<sup>31</sup> *Ibid*, para 131 (citing A Cassese, *Self-determination of peoples: A legal reappraisal* (1995), p 334).

<sup>32</sup> *Ibid*, para 136: "Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social, and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive, and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a 'sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction.'"

<sup>33</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports 2010, p 403 (hereinafter, the 'Kosovo Advisory Opinion').

<sup>34</sup> Kosovo Advisory Opinion Para 79.

contrary to the wishes of the parent state.<sup>35</sup> The ICJ thus upheld the lawfulness of Kosovo's 2008 declaration of independence.

30. This is not the only time in which the act of self-determination has been internationally recognised. The case of Western Sahara highlights a case in which both the ICJ and the UN General Assembly made explicit reference to the need to have due regard to the freely expressed will of peoples.<sup>36</sup> Further examples include East Timor, where the UN-supervised popular referendum of 30 August 1999 resulted in the country's later secession from Indonesia,<sup>37</sup> and Montenegro, which declared independence through referendum in May 2006, before being given UN membership one month later.<sup>38</sup> External self-determination is therefore an internationally accepted practice in certain circumstances, and its pursuit through referenda is recognised as a legitimate (and democratic) means to pursue this end.

### III. THE RIGHT TO SELF-DETERMINATION: THE CASE FOR A SIKH HOMELAND

#### A. OVERVIEW

31. In this section we set out the facts supporting the Sikh's case for external self-determination:
- Sub-section B (*The Self-Governing Sikh State was Occupied and Subjugated*) outlines the facts demonstrating that Sikhs fall under a recognised category of peoples entitled to external self-determination, namely, "those under some type of foreign occupation" who are "subject to alien subjugation, domination, or exploitation."<sup>39</sup>
  - Sub-section C (*India has Oppressed the Sikh People and Blocked Their Self-Determination*) outlines the facts demonstrating that Sikhs fall under another category of peoples entitled to external self-determination, namely, "those denied the meaningful exercise of the right to self-determination internally."<sup>40</sup> This second category applies to peoples

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<sup>35</sup> *Ibid*, Para 84 ("For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law.")

<sup>36</sup> ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports 1975, p. 33, par. 59; See also General Assembly Res. 3292 (XXIX) of 13 December 1974

<sup>37</sup> After the referendum the transitional government was entrusted to the United Nations Transitional Administration of East Timor (UNTAET) until 20 May 2002 when East Timor became officially independent.

<sup>38</sup> General Assembly Res. 60/264, 12 July 2006

<sup>39</sup> *Quebec Secession Decision* para 133 and Brief para 25.

<sup>40</sup> *Ibid*, para 134 and Brief para 25.

who are not colonised or occupied, but who face discrimination within their parent state.

32. For the avoidance of doubt, these two categories are not 'cumulative'. The Sikhs need only satisfy one of the two to qualify for external self-determination.

#### B. THE SELF-GOVERNING SIKH STATE WAS OCCUPIED AND SUBJUGATED

33. Between 1799 and 1849, the Sikh Empire enjoyed all the vestiges of sovereign statehood over the Punjab and surrounding territories. It was, for all intents and purposes, a 'Sikh state.' British colonial dominion brought Sikh sovereignty to an end, but largely retained the territorial integrity of the defunct Sikh Empire, along with traditional Punjabi power structures.
34. Partition<sup>41</sup> split the Punjab between India and Pakistan and resulted in unimaginable pain and suffering for millions of Sikhs, Hindus and Muslims caught on the wrong side of the border. Despite paying a disproportionately high price in the struggle for independence, and notwithstanding clear promises of self-governance by leaders of the Indian Congress Party, Sikh interests were ignored at the point of (and after) independence. Following independence, the government of India reneged on its promises to grant Sikhs their political, religious and cultural autonomy. Punjabi territory was carved up in a series of constitutional reforms. Sikhs are denied the constitutional recognition of their religion and subjected to other forms of discrimination, as well as sectarian and economic violence. Sikh national identity appears to hold no place in independent India.

##### a. The Sikh Empire

35. The Sikh Empire (also referred to as *Sikh Khalsa Raj*, *Sarkar-i-Khalsa* or the Punjab Empire) was a federal monarchy, established in 1799 by Maharaja Ranjit Singh, as a union of twelve previously independent sovereign states (or *Misls*) of the Sikh Confederacy.<sup>42</sup> At its peak in the mid 1830s, it covered an estimated 500,000 km<sup>2</sup>, and was home to 3.5 million people; its territory spanning from the Khyber Pass to the western Tibet along its west-east axis, and from Kashmir to Mithankot along its north-south axis.<sup>43</sup> Punjab (Persian for 'land of five rivers') was

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<sup>41</sup> The term Partition hereinafter refers to the division of British India into two independent dominions of India and Pakistan in 1947.

<sup>42</sup> Grewal, J., *The Sikh empire (1799-1849)*. In *The Sikhs of the Punjab The New Cambridge History of India*, Cambridge: Cambridge University Press, pp. 99

<sup>43</sup> *Ibid.* pp. 105

the Empire's heartland, with Lahore as its capital.<sup>44</sup> Numerous contemporaneous accounts and artefacts confirm that the Sikh Empire minted its own money<sup>45</sup> and maintained diplomatic relations and trade links with the British and French empires amongst others.<sup>46</sup> As such, prior to its annexation by the British, the Sikh Empire attained all four internationally accepted criteria of sovereign statehood, namely: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.<sup>47</sup>

## b. The Punjab under the British East Indian Company and the British Raj

36. The Sikh Empire was one of the last territories on the Indian subcontinent to lose its sovereignty and be annexed by the British East India Company. The British assumed full control of its territories in 1849 as a result of the Second Anglo-Sikh War. Punjab (as the whole territory became known) came under the direct rule of the British crown following the Queen's Proclamation of 1858.<sup>48</sup> The Crown largely transposed the external borders of the dissolved Sikh Empire into regional borders of Punjab Province of the British Raj. Retaining the Sikh nobility as vassal leaders, the territory was divided into five administrative Divisions and 43 Princely states.<sup>49</sup> The British invested heavily in a system of canals that created 11 million acres of arable land, spurring an agro-industrial revolution in the region, but keeping millions in abject poverty. After World War I, protest, civil disobedience

<sup>44</sup> Prinsep HT, 'Origin of the Sikh Power in the Punjab, and Political Life of Muha-Raja Runjeet Singh: With an Account of the Present Condition, Religion, Laws and Customs of the Sikhs.' 1834, Cambridge: Cambridge University Press.

<sup>45</sup> British Museum, 'Catalogue of Sikh Coins in the British Museum', December 2011, available at: [https://www.britishmuseum.org/pdf/Sikh%20coins%20book\\_03082015.pdf](https://www.britishmuseum.org/pdf/Sikh%20coins%20book_03082015.pdf) (last accessed: 18/07/2018).

<sup>46</sup> Victoria and Albert Museum, 'The court of Maharaja Ranjit Singh', available at: <http://www.vam.ac.uk/content/articles/t/the-court-of-maharaja-ranjit-singh/> (last accessed: 18/07/2018).);

Treaty of Amritsar 1846, available at:

<https://web.archive.org/web/20090105164806/http://www.kashmir-information.com/LegalDocs/TreatyofAmritsar.html> (last accessed: 19/07/2018);

Treaty of Lahore 1846, available at:

[http://www.centralexcisehyderabad4.gov.in/documents/history/1846\\_3.PDF](http://www.centralexcisehyderabad4.gov.in/documents/history/1846_3.PDF) (last accessed: 19/07/2018); Singh, P, 'Empire of the Sikhs: The Life and Times of Maharaja Ranjit Singh.', 2008, pp. 113-124

<sup>47</sup> UiO Faculty of Law, 'Montevideo Convention on the Rights and Duties of States of 1934', *Article 1*, available at: <https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml> (last accessed: 18/07/2018).

<sup>48</sup> Proclamation of Queen Victoria, 1858, available at:

<http://www.csas.ed.ac.uk/mutiny/confpapers/Queen%27sProclamation.pdf> (last accessed: 19/07/2018)

<sup>49</sup> Imperial Gazetteer of India, Volume 20, pp 333 available at:

[http://dsal.uchicago.edu/reference/gazetteer/pager.html?objectid=DS405.1.I34\\_V20\\_339.gif](http://dsal.uchicago.edu/reference/gazetteer/pager.html?objectid=DS405.1.I34_V20_339.gif)

and the brutal response of colonial authorities (most notably the Jallianwala Bagh massacre in Amritsar where up to 1000 civilians were killed) led to a gradual transition to self-governance in the Punjab.<sup>50</sup> The Government of India Act 1919 transferred responsibilities for agriculture, health, education and local government to elected ministers of the Punjab Legislative Council.<sup>51</sup> The Punjab Legislative Assembly and first autonomous provincial government took power in 1937.<sup>52</sup> The Assembly and government were controlled by the secular Unionist Party, representing the interests of the Punjab landed gentry. Thus, although subsumed into the British Raj, the territory, population and power structures of the Sikh Empire persisted throughout the colonial period, representing a form of Punjabi national identity and self-governance.

c. Decolonisation: Partition and assurances by India

37. Punjabi Sikhs made a major contribution to - and consequently paid a heavy price for - India's independence struggle. By the end of the colonial period, approximately 70% of Indians martyred for freedom, 70% of those hung and 80% of those sentenced to life imprisonment by the British Raj were Sikhs.<sup>53</sup> In exchange, Mohandas K. Gandhi declared that, "in the future, the Congress shall accept no constitution which does not meet with the satisfaction of the Sikhs".<sup>54</sup> Congress Party leader and first Prime Minister of India - Jawaharlal Nehru - assured the Sikhs that:

"The brave Sikhs of Punjab are entitled to special consideration. I see nothing wrong in an area set up in the north of India wherein the Sikhs can also experience the glow of freedom."<sup>55</sup>

38. During ensuing negotiations, Sikh representatives called for an independent Sikh State, or failing that, a Sikh-controlled federal province within an Indian Union.<sup>56</sup> The plan for a decentralised federal successor to the entire British Raj was rejected by Congress leader Nehru, whilst the Muslim League demanded independence for Muslim-majority areas. Lending their support to Congress (to prevent becoming a minority within Pakistani-controlled Punjab), Sikh representatives

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<sup>50</sup> Lapping, B. *End of Empire*, 1985, pp. 38

<sup>51</sup> The Government of India Act 1919, available at:

[https://archive.org/stream/govtofindiaact19029669mbp/govtofindiaact19029669mbp\\_djvu.txt](https://archive.org/stream/govtofindiaact19029669mbp/govtofindiaact19029669mbp_djvu.txt)

<sup>52</sup> Grewal, J., *The Sikh empire (1799-1849)*. In *The Sikhs of the Punjab*, The New Cambridge History of India, Cambridge: Cambridge University Press, pp. 170

<sup>53</sup> Pav Singh, '1984: India's Guilty Secret', Kashi House, 2017, pp.. 63.

<sup>54</sup> The Lahore session of the Congress Party. December 31, 1929.

<sup>55</sup> Jawahar Lal Nehru, *Lahore Bulletin*, January 9, 1930, in 'South Asia: fourth report of session 2006-07, report, together with formal minutes, oral and written evidence Great Britain: Parliament: House of Commons: Foreign Affairs Committee', 2007, pp. 113

<sup>56</sup> Jeffrey M Shaw, Timothy J Demmy, *War and Religion: An Encyclopedia of Faith and Conflict* [3 Volumes], pp. 375

relied on Congress leaders' assurances of Sikh autonomy within the new Indian state.<sup>57</sup> The Raj was partitioned along a line drawn by Sir Cyril Radcliffe<sup>58</sup> that ran right through the Punjab, based on "ascertaining the contiguous majority areas of Muslims and non-Muslims (taking other factors such as natural boundaries, communications, watercourses, irrigation systems and socio-political considerations into account)".<sup>59</sup> Parts of the Punjab where no single religion enjoyed an absolute majority was partitioned between India and Pakistan through compromise and gerrymandering – its capital and arguably the majority of fertile territory falling on the Pakistani side of the border in exchange for an Indian route to Kashmir.<sup>60</sup> The outcome left millions of people on the wrong side of the religious divide. The ensuing violence and mass population movement resulted in up to two million deaths and an estimated 100,000 victims of rape – one of the worst crimes against humanity in modern history - a tragedy that could have arguably been avoided if the secular and multicultural Punjab had been granted self-governance.

d. Broken promises: further breakup of Punjab and attrition of national identity

39. Following the horrors of Partition, the bulk of the Sikh population was now concentrated in what became East Punjab State (with Patiala and East Punjab States Union) of India.<sup>61</sup> Thereafter, the Congress-led government of India began to renege on assurances given to the Sikhs throughout the decolonisation period, steadily breaking up Punjabi territory, economic resources, political autonomy and national identity. Contrary to Gandhi's promise, the 1950 Constitution of India was neither signed by nor ascertained the satisfaction of Sikh representatives.<sup>62</sup>

➤ Carving up the Punjab

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<sup>57</sup> James Minahan, *Ethnic Group's of South Asia and the Pacific: An Encyclopedia*, pp. 292.

<sup>58</sup> The Muslim League and Congress representatives on the Boundary Commission remaining in deadlock, the decisions were essentially taken by Radcliffe. The drawbacks of Radcliffe's process was succinctly described by WH Auden in his poem - 'Partition', available at: [https://www.poemhunter.com/poem/partition-2/..](https://www.poemhunter.com/poem/partition-2/)

<sup>59</sup> Read & Fisher, *The Proudest Day 1998*, p. 483; *Making Borders Irrelevant*, PR Chari, in 'Building Bridges: Strengthening Physical, Emotional and Economic Linkages in South Asia', IPCS Conference Report 2012, available at: [http://www.ipcs.org/issue\\_briefs/issue\\_brief\\_pdf/ConferenceReport42-COSATT2012.pdf](http://www.ipcs.org/issue_briefs/issue_brief_pdf/ConferenceReport42-COSATT2012.pdf)

<sup>60</sup> Roberts, A. *Eminent Churchillians*, 2010, Orion. pp. 128.

<sup>61</sup> Copland I. 'The Master and the Maharajas: The Sikh Princes and the East Punjab Massacres of 1947'. *Modern Asian Studies*. 2002 Jul;36(3):657-704.

<sup>62</sup> Grewal, J. 'The Sikh empire (1799-1849)'. In 'The Sikhs of the Punjab', 1990, *The New Cambridge History of India*, , Cambridge: Cambridge University Press, pp. 183



40. In 1948, the Province of Himachal Pradesh was created out of 28 princely states controlling the foothills of the western Himalayas, with a further four southern hill states carved out of East Punjab.<sup>63</sup> Further territory was reallocated from Punjab to Himachal Pradesh in November 1956, when the latter became union territory under the 1956 States Reorganisation Act.<sup>64</sup>
41. In 1966, approximately 44,000 km<sup>2</sup> were carved out of Punjab under the Punjab Reorganisation Act to create the State of Haryana.<sup>65</sup> Under the same legislation, Chandigarh – the new capital of Punjab – became the shared capital of Punjab and Haryana States, and was transferred under New Delhi’s control as union territory.
42. Aside from the loss of over half of its territory, Punjab lost access to over two-thirds of its most important economic resource – the waterways that irrigated its agricultural production (see attack on economic resources section below).<sup>66</sup>

➤ Denial of religious freedom

43. Sikh identity is inextricably linked to Sikhism – a monotheistic religion that originated in Punjab in the 15<sup>th</sup> century, and is practiced by 28 million followers globally.<sup>67</sup> Article 25 of the Constitution of India appears to subsume Sikhism as a sect of Hinduism, as opposed to recognising it as a separate religion in its own right. According to Explanation II to this constitutional provision, “the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion and the reference to Hindu religious institutions shall be construed accordingly”.<sup>68</sup> Sikhs view this as an explicit denial of their separate religious (and therefore also cultural and national) identity, etched into the foundations of the Indian Republic.<sup>69</sup>
44. The practical effect of this Constitutional article is to deny to the Sikh community the right to enact and be regulated by Sikh religious cannon and customary Personal Law. Indian Personal Law governs matters

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<sup>63</sup> See Himachal Pradesh (Administration) Order, 1948 under Sections 3 and 4 of the Extra-Provincial Jurisdiction Act, 1947.

<sup>64</sup> See States Reorganisation Act, 1956, under part II, section 15, available at: <https://indiacode.nic.in/bitstream/123456789/1680/1/195637.pdf> (last accessed 19/07/18)

<sup>65</sup> The Punjab Reorganisation Act, 1966, available at: <https://indiankanoon.org/doc/933499/>

<sup>66</sup> Kaur, M. "The Paradox of India's Bread Basket: Farmer Suicides in Punjab" 20 July 2011.

<sup>67</sup> Mcleod, William H., 'Exploring Sikhism' (New Delhi: Oxford University Press, 2000)

<sup>68</sup> Indian Constitution, Article 25 sub-clause 2(B), available at: <https://indiankanoon.org/doc/631708/>

<sup>69</sup> United Nations (UN). 26 January 2009. Human Rights Council. Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir: Addendum, Mission to India. (A/HRC/10/8/Add.3)

such as marriage, inheritance, adoption and guardianship.<sup>70</sup> In the absence of a constitutional recognition of Sikhism as a separate religion, Sikhs are subject to Personal Law enacted in accordance with the customs and beliefs of the Hindu community.<sup>71</sup>

45. Furthermore, Sikh religious leaders and their followers have come under periodic violence and deprivation of liberty by officials and agents of India (see attacks on Sikh religious freedoms section below). In the course of the widespread violent attacks on Sikhs in November 1984, thousands of *gurdwaras* were deliberately targeted and destroyed by Hindu mobs (see violent attacks against Sikhs section below).<sup>72</sup>

➤ The erosion of Punjabi political autonomy

46. The Punjab Legislative Assembly (*Punjab Vidhan Sabha*) is a unicameral legislature with competence over 59 legislative areas including public order (not including use of armed forces), police, prisons, local governance, public health, agriculture, certain fiscal matters and incorporation. The legislature's powers are not entirely exclusive in these matters, as the Union legislature may override it by a two-thirds majority. Moreover, Article 3 of the Constitution of India grants the central government the power to break a state up, carve parts of it out or integrate it into another state. As described above, these powers have been used to dispossess Punjab of more than half of its historic territory. Crucially, under Article 356 of the Constitution, the Punjab government and legislature may be suspended and superseded by direct rule of the central government for an undetermined amount of time – a process known as President's rule.<sup>73</sup> Since independence, President's rule has been applied to the Punjab on eight occasions for a total period of 3510 days. Under such circumstances, there is little prospect for meaningful self-governance within the current constitutional framework.

e. Conclusion (Sub-section B):

47. The independent Sikh Empire attained all the internationally accepted criteria of sovereign statehood – it was a Sikh state. It was attacked, occupied and subjugated by foreign powers, initially the East India Company, then the British Raj, before being handed over to India.

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<sup>70</sup> Austin G. 'Religion, personal law, and identity in India. Religion and personal law in secular India: A call to judgment.' 2001 Nov 28:15-23.

<sup>71</sup> Hindu Marriage Act 1955, Hindu Succession Act 1956, Hindu Minority and Guardianship Act 1956, Hindu Adoption and Maintenance Act 1956.

<sup>72</sup> Grewal, J., 'The Sikh empire (1799–1849)'. In 'The Sikhs of the Punjab' (The New Cambridge History of India, pp. 224, Cambridge: Cambridge University Press

<sup>73</sup> Powers under the President's rule doctrine have been somewhat limited but not abolished by the Supreme Court in *S. R. Bommai v. Union of India* ([\[1994\] 2 SCR 644 : AIR 1994 SC 1918 : \(1994\)3 SCC1](#)).

Promises of self-governance and autonomy made by leaders of the Indian Congress Party during the struggle for independence have been broken. A process of annihilation of Sikh national identity that began with British colonisation has been accelerated under the Republic of India. The Sikh state effectively swapped subjugation at the hands of one foreign power for domination and exploitation by another.

C. INDIA HAS OPPRESSED THE SIKH PEOPLE AND BLOCKED ANY MEANINGFUL EXERCISE OF THEIR SELF-DETERMINATION

48. In addition to the gradual destruction of the Sikh state's territorial integrity and Sikh national identity, the Sikh peoples have been subjected to systematic attacks and discrimination by Indian State actors. Since India's independence, Sikh communities have experienced regular acts of violence and attacks on their economic resources, religious rights and the freedoms of speech, assembly and association. The victims of these attacks have been consistently denied their constitutionally protected access to justice. The cumulative effect of such treatment amounts to a serious and systematic oppression or subjugation of the Sikh minority in India. In this context, no meaningful exercise of internal self-determination is possible.

a. Violent attacks against Sikhs and Sikh temples

49. One of the key events that spurred the wave of civil disobedience and accelerated the process of decolonisation of the British Raj was the Jallianwala Bagh massacre in Amritsar (Punjab) on 13 April 1919. According to the British officer in charge of the massacre, the attack was intended to strike terror throughout the Punjab and suppress any desire for independence.<sup>74</sup> Sixty-five years later (in June 1984), the Indian Government's Operation Blue Star led to the deaths of between 700 and 4000 Sikhs at the Golden Temple complex in Amritsar.<sup>75</sup> Once again, the objective of the powers that be was to quash and deter Sikh separatism. In a haunting echo of the Jallianwala Bagh massacre, the Indian Army deployed clearly excessive force (including battle tanks, 10,000 soldiers

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<sup>74</sup> Fein H. *Imperial crime and punishment: the massacre at Jallianwala Bagh and British judgment, 1919-1920*. Honolulu: University Press of Hawaii; 1977. Up to 1000 unarmed Punjabis (Sikhs, Muslims and Hindus) were slaughtered in a deliberate attack. See also, Collett, N. 'The Butcher of Amritsar: General Reginald Dyer'. 2006, Amritsar (India): Continuum International Publishing Group. pp 333-334; 'Disorders Inquiry Committee, Volume III: Amritsar', 1920, available at: [https://archive.org/stream/ape9901.0001.001.umich.edu/ape9901.0001.001.umich.edu\\_djvu.txt](https://archive.org/stream/ape9901.0001.001.umich.edu/ape9901.0001.001.umich.edu_djvu.txt)

<sup>75</sup> Hussain H. 'Operation Blue Star'. *Defence Journal*. 2014 Jun 1;17(11):47.

and British-trained paratroopers) against an alleged force of 200 separatists and thousands of civilian pilgrims at Sikhism's holiest site.<sup>76</sup>

50. Just months later, in November 1984, following the assassination of Prime Minister Indira Gandhi by her Sikh bodyguards, Sikhs across India were subjected to brutal violence, rape and murder.<sup>77</sup> The four days of attacks appear to have been planned, facilitated and coordinated by members of the ruling Congress Party, with the collusion and assistance of the police.<sup>78</sup> Chanting 'blood for blood' (a slogan first introduced on national television), Hindu mobs targeted Sikh communities, dwellings and temples for destruction.<sup>79</sup> Male and female victims were scalped and immolated in the streets or inside their homes.<sup>80</sup> Thousands of female victims were gang raped in front of their families and children.<sup>81</sup> Victims' bodies were burned and buried in anonymous mass graves by the police, which made no records of reported incidents.<sup>82</sup> Several estimates put the death toll at around 8,000 victims; the Sikh community alleges that up to 30,000 had been killed.<sup>83</sup> It is apparent that the target of the attacks was Sikh people, as an ethnic or religious group, and that the perpetrators had the specific intent to destroy part of the Sikh group. There is also evidence that the attacks were planned and coordinated at the highest level to 'teach the Sikhs a lesson'.<sup>84</sup> On the face of it, the events of November 1984 appear to satisfy the elements of crimes against humanity and of genocide.<sup>85</sup>

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<sup>76</sup> Kundu A. 'The Indian armed forces' Sikh and non-Sikh officers' opinions of Operation Blue Star. *Pacific Affairs*'. 1994 Apr 1:46-69.

<sup>77</sup> Pav Singh, '1984: India's Guilty Secret', Kashi House, 2017.

<sup>78</sup> *Ibid.*

<sup>79</sup> YouTube, 'Amitabh Bachchan's Deadly Call for Blood', 2 Aug. 2012, available at:

<https://www.youtube.com/watch?v=aZ9zux3pK8g>.

<sup>80</sup> Baixas L. 'The Anti-Sikh Pogrom of October 31 to November 4, 1984', in New Delhi.

Online Encyclopedia of Mass Violence, Paris, Sciences Po, CERI, available at:

<http://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/anti-sikh-pogrom-october-31-november-4-1984-new-delhi>

<sup>81</sup> *Ibid.*

<sup>82</sup> Dhillon S. 'The Sikh Diaspora and the Quest for Khalistan: A Search for Statehood or for Self-preservation'. New Delhi: Institute of Peace and Conflict Studies. 2007.

<sup>83</sup> *Ibid.* pp. 4; Human Rights Watch. 'Dead Silence - Human Rights Watch'. 1994. Retrieved July 23, 2018, available at

<http://www.hrw.org/sites/default/files/reports/India0594.pdf>; Amnesty International, "Human Rights Violations in Punjab: Use and Abuse of the Law". 1991, London: Amnesty International. Retrieved July 23, 2018, available at:

<http://www.amnesty.org/%20en/library/asset/ASA20/011/1991/ru/d0c5a939-f944-11dd-92e7-c59f81373cf2/asa200111991ar.html>

<sup>84</sup> Ballard, R., 'Punjab's Uneasy Calm.' 1985.

<sup>85</sup> A detailed examination to assess with greater certainty whether crimes against humanity and genocide took place, and to what extent, is beyond the scope of this Brief. Our preliminary conclusion is based on a *prima facie* analysis of public source documents. The elements of the crime of genocide are 'killing, causing serious bodily or mental harm and deliberately inflicting conditions of life calculated to bring about physical destruction against persons belonging to a particular national, ethnical, racial or religious group with the **intent to destroy, in whole or in part, that national, ethnical, racial or religious**

51. Other forms of physical violence, arbitrary detention and ill treatment perpetrated against Sikhs for raising their right to self-determination is described below.

b. Systematic attacks on Punjabi economic resources

52. Partition and subsequent territorial re-configurations of the Punjab by the Republic of India have resulted in a dramatic loss of vital economic resources. The primary economic activity in Punjab is agriculture, which is entirely dependent on the five rivers and irrigation waterways constructed during the Raj.<sup>86</sup> Partition ceded the majority of Punjab's fertile land to Pakistan. The subsequent creation of Himachal Pradesh and Haryana States diverted 75% of Punjab's irrigation waterways away from Punjab.<sup>87</sup> Approximately 12 million acre feet of water are currently being diverted each year to the neighbouring states.<sup>88</sup> The Indian government is now in total control of the waterways that do flow into Punjab and is able to dam and divert them away from the region. Consequently, Punjab – a land locked region with no known natural resources – has seen a sustained attack on its primary economic resources. The attack has led to the deterioration of living standards, suicides, drought and scarcity of clean drinking water.<sup>89</sup> This has led to emigration by the Sikh community and a shift in Punjabi demographics.<sup>90</sup> Economic violence leading to poverty and starvation is arguably as oppressive as physical violence. In the absence of sovereignty and self-governance, the Sikhs of Punjab lack standing to challenge these attacks in international fora.

c. Systematic attacks on Sikh religious freedoms

53. As discussed above, Article 25 of the Constitution of India appears to label Sikhism as a sect of Hinduism. The practical effect of this Constitutional article is to deny to the Sikh community the right to enact and be regulated by Sikh religious cannon and customary Personal Law.

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**group**, as such' – see Convention on the Prevention and Punishment of the Crime of Genocide of 1948.

<sup>86</sup> Kaur, M. "The Paradox of India's Bread Basket: Farmer Suicides in Punjab" 20 July 2011. Available at:

<http://fletcher.tufts.edu/Praxis/Archives/~//media/DD8E2%20DF1EA6C47028E%20B789%20DCD7ED5D37.pdf>

<sup>87</sup> Shiva, V. "The Green Revolution in the Punjab", *The Ecologist*, Vol. 21, No. 2: 150-169.

<sup>88</sup> *Ibid.* pp. 155

<sup>89</sup> Kaur, M, "The Paradox of India's Bread Basket: Farmer Suicides in Punjab" 20 July 2011.

<sup>90</sup> Manmohan Singh, S. K. "Population Pressure and Labour Absorbability in Agriculture: Analysis and Suggestions Based on Field Studies Conducted in Punjab," in R. S. Johar and J. S. Khanna (eds.), *Studies in Punjab Economy*, Amritsar: Guru Nanak Dev University, 1983. pp. 400-402.

Sikhs are therefore subject to Personal Law enacted in accordance with the customs and beliefs of the Hindu community.

54. Moreover, Sikh temples have come under attack during flare-ups of violence. The Golden Temple complex has been identified by the government of India as the epicentre of Sikh separatism and has been subject to several military operations.<sup>91</sup> During the 1984 massacres, hundreds of *gurdwaras* were destroyed by Hindu mobs.
55. Sikh religious leaders have been targeted by the government of India for their potential to unite and give a voice to the Sikh community. Operation Blue Star was specifically designed to eliminate Jarnail Singh Bhindranwale – a leader of an orthodox Sikh religious school and proponent of the Anandpur Resolution (see below). In November 2015, Jagtar Singh Hawara (who has been incarcerated in India since 1995) was elected the Jathedar of Sri Akal Takhal Sahib (the supreme spiritual Sikh leader). It has been alleged that since his elevation, he has undergone severe torture in custody, including the denial of medical treatment for his wounds and medical conditions, which include dislocation of a spinal disk, bullet wounds and dislocated joints.<sup>92</sup>
56. Sikh national and cultural identity is inextricably linked to their religion. An attack on religious rights, leaders and places of worship amounts to a serious attack on the very fabric of Sikh society.

d. Systematic attacks on Sikhs' freedoms of speech, assembly and association

57. Through concerted attacks on Sikh speech, assembly and association, the government of India has demonstrated that it does not afford to Sikhs the fundamental guarantees granted to all citizens by the Indian constitution.<sup>93</sup> As set forth below, attempts to express the desire for self-determination by peaceful means and within the constitutional framework has been met with violence and suppression. Those arguing for self-determination have been labelled as terrorists, gagged and jailed.

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<sup>91</sup> See 'Operation Blue Star' Swami, Praveen "RAW chief consulted MI6 in build-up to Operation Bluestar". 16 January 2014, Chennai, India. Available at: <http://www.thehindu.com/news/national/raw-chief-consulted-mi6-in-buildup-to-operation-bluestar/article5579516.ece> Retrieved 23 July 2018; See 'Operation Black Thunder I' Weishan, Steven R. "Indian policemen raid Sikh temple". New York Times. 1 May 1986. Available at: <https://www.nytimes.com/1986/05/01/world/indian-policemen-raid-sikh-temple.html> Retrieved 23 July 2018; See 'Operation Black Thunder II' 'Gandhi Under Pressure to Oust Sikhs From Temple' 5 November 1988, The New York Times. Available at: <https://www.nytimes.com/1988/05/11/world/gandhi-under-pressure-to-oust-sikhs-from-temple.html> Retrieved 23 July 2018.

<sup>92</sup> Complaint to UN Special Rapporteur on Freedom of Religion of Belief, 15 January 2018.

<sup>93</sup> Constitution of India, Article 19.

The Union government regularly imposes media blackouts and repressive censorship over 'sensitive' issues such as the 1984 Sikh massacres. In 2018, India came 138<sup>th</sup> (out of 180) in the World Press Freedom Index,<sup>94</sup> and was labelled as the fourth most dangerous country for journalists in the world.<sup>95</sup> In the 1950s and 60s, tens of thousands of Sikhs were detained on this basis. Detention and ill treatment escalated in the 1980s and continues to present day. According to Human Rights Watch:

The Indian government has escalated pressure on civil society groups critical of its policies, using harassment, intimidation, and restriction on foreign funding. Free speech has come under attack from both the state and interest groups, and critics of the government often face charges of sedition and criminal defamation, and are labeled 'anti-national'.

58. On 12 July 2018, the government of India issued a *demarche* urging the UK authorities to ban a peaceful gathering by the Sikh diaspora in Trafalgar Square in London. In so doing, the government of India has demonstrated that not only does it limit its citizens' freedoms at home; it also seeks to extend its censorship internationally. A people who are prevented from exercising these basic freedoms on behalf of their community cannot be regarded as equal citizens of India.

e. Systematic denial of justice to Sikh victims

59. Successive governments have failed to prosecute those responsible for the killings and human rights abuses of 1984. Two government-appointed commissions and a further eight 'committees' were given the mandate to investigate the attacks on the Sikh population. The results ranged from a complete and unapologetic whitewash (Misra Commission) to a more sophisticated exoneration of implicated Congress leaders (Nanavati Commission). Of 3,163 arrested suspects, a mere 30 were convicted. Charges against all implicated members of the Congress Party and police officers were blocked and dropped through blatant political interference and corruption.<sup>96</sup> There have been no prosecutions for rape. This highlights a comprehensive failure of the Indian legal system to provide Sikh victims with a semblance of justice.<sup>97</sup>
60. International human rights organisations and global civil society appealed to international leaders and the Indian government to bring

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<sup>94</sup> Reporters Without Borders, 'India', available at: <https://rsf.org/en/india>.

<sup>95</sup> International News Safety Institute, 'Casualties Database: 2018', available at: <https://newssafety.org/casualties/2018/>.

<sup>96</sup> Pav Singh, '1984: India's Guilty Secret', Kashi House, 2017, pp. 127-151.

<sup>97</sup> Human Rights Watch 'India: No Justice for 1984 Anti-Sikh Bloodshed' 29 October 2014, available at: <https://www.hrw.org/news/2014/10/29/india-no-justice-1984-anti-sikh-bloodshed>

justice to the victims of the human rights abuses of 1984, to no avail.<sup>98</sup> Many of those implicated have served in government positions and are being shielded from prosecution.<sup>99</sup> Notwithstanding Dr Manmohan Singh's (former Prime Minister of India) apology for the massacres of 1984, there has been a continued refusal to accept state responsibility or commit to justice.<sup>100</sup> According to Judge Dhingra who presided over one of the cases associated with the 1984 massacres:

A system which permits the legitimised violence and criminals through the instrumentalities of the state to stifle the investigation cannot be relied upon to dispense basic justice uniformly to the people.<sup>101</sup>

f. India's blockage of self-determination efforts

61. Since their loss of sovereignty over the Punjab to the British in 1849, the Sikhs have made several concerted efforts to regain some measure of self-governance within the constitutional framework of the Republic of India. All such efforts have been ignored, or met with violence and oppression. Peaceful expressions of self-determination have been labelled as separatism and/or terrorism, precluding any hope of achieving internal self-determination within the current context.<sup>102</sup>
62. As set out above, Punjabi efforts to secure a form of self-governance during decolonisation were frustrated by the clash between Nehru's desire for the centralisation of power and Jinnah's stance on Muslim self-determination. Following independence, the ruling Congress Party reneged on its assurances of Punjabi autonomy.
63. In 1955, calls for the creation of an autonomous Punjabi State based on the predominance of the Punjabi language were ignored.<sup>103</sup> The freedom to publicly call for such a State was outlawed, and those who did were

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<sup>98</sup> Amnesty International 'India: Punjab- Twenty years on Impunity continues' 2004, available at: <https://www.amnesty.org/download/Documents/96000/asa200992004en.pdf> ; Human Rights Watch, 'India: Prosecute those responsible for 1984 Massacre of Sikhs' November 2, 2009, available at: <https://www.hrw.org/news/2009/11/02/india-prosecute-those-responsible-1984-massacre-sikhs>

<sup>99</sup> Prominent members of parliament at the time of the massacres, such as Jagdish Tytler, have not been prosecuted after the cases were taken to court - Amnesty International 'India: Government has failed victims of 1984 Sikh massacre' 15 April 2009.

<sup>100</sup> Human Rights Watch 'Joint letter to President Obama Re: the 30th Anniversary of Anti-Sikh Attacks in India' 4 November 2014

<sup>101</sup> Human Rights Watch 'India: No Justice for 1984 Anti-Sikh Bloodshed' 29 October 2014, available at: <https://www.hrw.org/news/2014/10/29/india-no-justice-1984-anti-sikh-bloodshed>

<sup>102</sup> See Giorgio S. Sikh nationalism and identity in a global age. 2008. Routledge. pp. 51-60.

<sup>103</sup> Grewal, J Towards the 'Punjabi Province'. In 'The Sikhs of the Punjab The New Cambridge History of India', 1990 Cambridge: Cambridge University Press pp. 189



arrested. It is estimated that, by 1960, up to 25,000 Sikhs had been detained for their expression of self-determination.<sup>104</sup> Representations by Sikh leaders to the Indian government were met with unequivocal rejection.<sup>105</sup> Violence and repressive measures towards Sikhs continued until the Indo-Pakistani war of 1965.

64. In October 1978, the Shiromani Akali Dal Party of Punjab adopted its Anandpur Sahib Resolution, demanding a change to the Indian constitution that would allow for the decentralisation of powers and greater Punjabi autonomy within a federalised India.<sup>106</sup> Amongst other demands and proclamations, the Resolution called for the return of Chandigarh under Punjab's exclusive jurisdiction, and the revision of the Ravi-Beas waterway redistribution, which deprived Punjab of the bulk of its irrigation waters.<sup>107</sup> The Resolution, was a clear expression of Punjabi desire for self-determination and a proposal of concrete measures to safeguard Punjabi national, cultural and religious identity.<sup>108</sup> The President of Akali Dal was clear that the Resolution did not call for Punjab's secession from India.<sup>109</sup> Nevertheless, the Resolution was interpreted by the Indian government as a call for independence leading to spiral of hostility that ultimately resulted in Operation Blue Star, Indira Gandhi's assassination and the November 1984 attacks described above.
65. The Sikh community was shocked and enraged by the events of 1984. Support for self-determination grew amongst the Sikhs in Punjab throughout the 80s and 90s. In response, the Punjab Police was placed under Delhi's control leading to arbitrary arrests, disappearances and claims of torture perpetrated against alleged separatists. According to Amnesty International:

“Thousands of disappearances or extrajudicial executions were allegedly carried out by the police as part of a deliberate policy to eliminate armed opposition groups as

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<sup>104</sup> Rai SM. 'Partition of the Punjab: A Study of Its Effects on the Politics and Administration of the Punjab (I) 1947-56'. 1965, Asia Pub. House;

<sup>105</sup> Prime Minister Nehru is believed to have told Sikh leaders: "Creating a Punjabi State is against the prosperity of the Hindus and would put Sikhs in other states in a grave danger." (Sikh Politics of 20th Century, Ajmer Singh, pp. 177).

<sup>106</sup> 'Anandpur Sahib Resolution' in 'The Encyclopedia of Sikhism', Vol. 1, 1995, ed., Harbans Singh, pp. 134

<sup>107</sup> Political Goal 1, Anandpur Sahib Resolution. 1978

<sup>108</sup> Purposes B. 1. Anandpur Sahib Resolution. 1978

<sup>109</sup> "Let us make it clear once and for all that the Sikhs have no designs to get away from India in any manner. What they simply want is that they should be allowed to live within India as Sikhs, free from all direct and indirect interference and tampering with their religious way of life. Undoubtedly, the Sikhs have the same nationality as other Indians." – *Harcharan Singh Longowal, President of Akali Dal in The Burning Elephant*, Raja C. 2015, Giramondo Publishing pp. 105

well as their supporters. The unchecked use of torture eroded police professional and investigative skills.”<sup>110</sup>

66. More recently, in November 2015, Sikh political activists were detained and charged with sedition before and after the Sarbat Khalsa (Global Sikh Assembly).<sup>111</sup> In 2016, a group of Sikh referendum campaigners were arbitrarily arrested for distributing referendum related material, which was branded by the police as ‘planning to carry out some terror activity’.<sup>112</sup> As recently as 2017, 22 Sikh activists were arrested in Punjab for peacefully campaigning for independence.

g. Conclusion (Sub-section C)

67. Sikh communities have been subjected to regular acts of violence and attacks on their economic resources, religious rights and freedom of expression. Political powers are usurped by the central government in Delhi. Worst still, the attacks on Sikhs in November 1984 had all the hallmarks of crimes against humanity and even genocide. There is strong evidence that Indian state actors, including key figures within the ruling Congress Party, perpetrated these mass crimes. Notwithstanding the strength of the evidence, victims of violence have been consistently denied genuine access to justice. Consequently, it may be concluded that all attempts to exercise the right to meaningful internal self-determination have been ‘blocked’ and many have been met with state-backed violence.

IV. OVERALL CONCLUSION:

68. *Sikhs Have the Right to Self-Determination Under International Law*: With respect to the right to self-determination for Sikhs, international law provides a solid foundation for the following: First, Sikhs are ‘peoples’ who enjoy the fundamental right to self-determination. Second, the right to self-determination is a peremptory norm of international law (or *jus cogens*) that may not lawfully be restricted or derogated from by the government of India. Third, whilst Sikhs (who are resident in

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<sup>110</sup> Amnesty International ‘India: Break the cycle of impunity and torture in Punjab’ 20 January 2003.

<sup>111</sup> Cheema, I. Constitutional and Legal Challenges Faced by Religious Minorities in India. [ebook] 2016. U.S. Commission on International Religious Freedom. Available at: <https://www.uscirf.gov/sites/default/files/Constitutional%20and%20Legal%20Challenges%20Faced%20by%20Religious%20Minorities%20in%20India.pdf> [Accessed 16 Jul. 2018].

<sup>112</sup> News, C. and News, C. ‘SFJ claims campaigners are activists not terrorists - Times of India’. [online] The Times of India. 2016. Available at: <https://timesofindia.indiatimes.com/city/chandigarh/SFJ-claims-campaigners-are-activists-not-terrorists/articleshow/53661413.cms> [Accessed 23 Jul. 2018].

India) should make every reasonable effort to exercise their right to self-determination *within* the territory of India, a right to secession may arise in certain exceptional circumstances. Fourth, international law does not prohibit referendums or unilateral declarations of independence.

69. With respect to the exceptional circumstances, international law recognises (limited) categories of peoples who may be entitled to seek external self-determination, for example, through secession and independence. There is a good arguable case that Sikhs fall into two such categories, namely:
  - a. Those peoples under some type of foreign occupation who are subject to alien subjugation, domination, or exploitation.<sup>113</sup>
  - b. Those peoples denied the meaningful exercise of the right to self-determination internally (i.e. within India)<sup>114</sup>
70. The Sikhs need only fall into one of these categories to qualify for external self-determination.
71. *The Self-Governing Sikh State was Occupied and Subjugated*: Section II(B) outlines how a sovereign, self-governing Sikh Empire (a Sikh state) was attacked and occupied by foreign powers, namely, the East India Company and then the British Raj. It was then handed over to the newly independent India. Promises of self-governance and autonomy made by leaders of the Indian Congress Party during the struggle for independence have been broken. The Sikh state remains occupied to this day.
72. A process of alien subjugation, domination and exploitation of the Sikh state began with British colonisation and continues under the Republic of India. Despite assurances from Indian leaders that Sikhs would enjoy political, cultural and religious autonomy within India, in practice India took Sikh land and resources for itself, and then proceeded to destroy Sikh national, religious and cultural identity. The carving up of Sikh territory, diversion of its key economic resources, denial of religious freedoms, violation of fundamental civil and political rights, and regular pogroms on Sikh communities and holy sites across India, demonstrates Sikh subjugation, domination and/or exploitation by India. The Sikhs effectively swapped occupation and subjugation at the hands of the British for occupation and subjugation by India.
73. *India has Oppressed the Sikh People and Blocked Their Self-Determination*: Since India's independence, Sikh communities have been subjected to

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<sup>113</sup> Quebec Secession Decision para 133 and Brief para 25.

<sup>114</sup> *Ibid*, para 134 and Brief para 25.

regular acts of violence and attacks on their economic resources, religious rights and freedom of expression. The powers of Punjabi representatives have been routinely superseded by those of the central government, particularly in response to calls for more autonomy and self-governance. On at least one occasion, the Sikhs have been victims of mass crimes bearing all the hallmarks of crimes against humanity and even genocide, perpetrated by Indian state actors and planned or encouraged by key figures within the ruling Congress Party. Victims of violence have been denied genuine justice and accountability.

74. All attempts to exercise the right to internal self-determination have effectively been blocked. They are met with state-backed violence and conveniently labelled as 'terrorism'.
75. *India's Right to Territorial Integrity is not Absolute*: The facts and analysis demonstrate that India, as a State, does not conduct itself "in compliance with the principle of equal rights and self-determination of peoples" and cannot claim to have "a Government representing the whole people belonging to the territory without distinction of any kind." On the contrary, Indian state actors may have perpetrated against Sikhs the single most serious form of 'distinction' possible, namely, acts of genocide. Accordingly, the presumption in favour of territorial integrity does not apply with respect to the Sikh people.
76. For all the above reasons, there is a good arguable case that Sikhs may lawfully pursue external self-determination (for example, through secession and independence) as the only avenue available to them to achieve meaningful self-determination.



Richard J Rogers



Alexandre Prezanti



Andrew Ianuzzi

Done in London, UK  
12 August 2018

## Annex 1

### *Global Diligence LLP*

Global Diligence LLP (“GD”) is an international legal advisory firm engaged in public interest work. GD specialises in international human rights and international criminal law, with a particular emphasis on addressing mass human rights violations committed by a state against its own citizens. GD has been at the forefront of several groundbreaking cases, including a Communication filed before the ICC on behalf of Cambodian victims, alleging crimes against humanity committed by Cambodian state actors. GD has provided advice and training on complex human rights challenges throughout Africa, Asia, and Europe.

### *Richard J Rogers: Partner, Global Diligence LLP*

Richard is a qualified lawyer in California (active attorney) and England and Wales (non-practicing barrister). He was the OSCE’s Chief legal system monitor in post-conflict Kosovo - prior to the independence referendum and declaration - and has assisted the development of criminal justice systems in several newly independent states, including in Bosnia and Herzegovina and Croatia. Richard has represented several ‘peoples’ seeking secession who have been victims of persecution or mass crimes at the hands of their ‘parent’ state, including the National Movement for the Liberation of Azawad (Mali) and the Transitional Government of Tamil Eelam (Sri Lanka). He has also worked on mass atrocities in several countries, for example, as the Principal Defender at the ECCC (Cambodia) and the UN’s International Criminal Tribunal for former Yugoslavia. Richard has testified before the US Congress House Committee on Foreign Affairs, and spoken to human rights issues before the EU Parliament and the Parliament of Bosnia and Herzegovina. He is an Expert for the World Bank Inspection Panel and the UK Stabilisation Unit.

### *Alexandre Prezanti: Partner, Global Diligence LLP*

Alexandre is an international legal advisor and human rights lawyer called to the Bar of England and Wales. He specialises in investigating, analysing and preparing large, complex international cases. He regularly advises governments and non-state actors on issues of public international law. Since 2014, he has advised a broad range of Ukrainian actors on legal issues pertaining to Russia's annexation of Crimea and the separatist conflict in Eastern Ukraine, including testifying before the Human Rights Committee of the Parliament of Ukraine. He is regularly retained as an expert by international organisations such as the Organisation for Security and

Cooperation in Europe, the UN, Transparency International and the International Law Development Organisation. Alexandre has also advised, trained and mentored government and civil society actors in Croatia, Georgia, Ukraine, Vietnam, France, Italy, UK and Myanmar on criminal justice reform, investigative techniques and litigation strategy.

*Andrew Ianuzzi: Of Counsel, Global Diligence LLP*

Andy began his legal career as a bankruptcy and intellectual-property litigator at a prominent New York commercial firm. After transitioning to the field of international criminal law, he defended clients in complex cases before UN-backed tribunals in Sierra Leone and Cambodia, addressing mass atrocities such as war crimes, crimes against humanity, and genocide. He has advised individual and institutional clients on a number of human rights issues, including the right to self-determination. In representing the peoples of West Papua who sought independence from Indonesia after decades of persecution, Andy co-authored and filed a legal brief before the UN Human Rights Committee. Andy has conducted human rights investigations in a number of countries around the world – particularly in Africa and Asia.