Lemkin Institute Statement on the US Supreme Court's Hearing of Haaland v. Brackeen

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The Lemkin Institute for Genocide Prevention is carefully monitoring the United States Supreme Court case Haaland v. Brackeen, a case which will determine the constitutionality of the landmark Indian Child Welfare Act (ICWA) of 1978, which sought to ensure that Native American children were not placed in foster care outside of their families and communities. Halland v. Brackeen challenges the constitutionality of ICWA, arguing that the bill provides an unfair race-preference in favor of Indigenous adoptive parents over non-Indigenous parents. However, supporters have identified the historical destruction of the Indigenous family structure as the root of ICWA's passage and view ICWA as a crucial part of efforts to address the intergenerational harm caused by the genocidal policies of child removal in the United States.

ICWA was a necessary step to mitigate decades of state-sanctioned cultural genocide via family separation. Hundreds of thousands of Indigenous children in the United States and Canada were held in government-run "Indian boarding schools" between 1869 and 1960s. The last school in operation closed in Canada in 1996. The exact number of children held in these schools is unknown due to the loss and destruction of records. The mission of these schools was to "kill the Indian, save the man," through genocidal identity destruction and forcible re-education. Children at the schools were banned from speaking their native languages, dressing in their native styles, practicing their native religions, maintaining contact with their families and home tribes, and using their native birth names. Many of them never returned home due to trauma and identity shame sustained from their time in the schools. The discovery of 215 unmarked graves on the site of the former residential school in Kamloops, British Columbia (Canada) in 2021 opened a new conversation on the tragic deaths of children at residential schools that had been covered up by the administrators of the schools for decades.

Before the passage of ICWA in 1978, 25 to 35 percent of Indigenous children in the 1960s were removed from their homes and placed in the care of White adoptive parents. In Canada at least 20,000 Indigenous children were forcibly taken from their families and adopted to non-Indigenous families in an era of genocidal violence known colloquially as the "Sixties

Scoop." Statistics in the United States are similar. These removals were often done without the consent or knowledge of the children's parents and families, and there was no requirement for social workers and adoptive families to understand the intricacies of Indigenous and tribal identity. Survivors of this period of removal have recognized the internal feelings of loss on multiple fronts, including the loss of their loved ones and the absence of belonging in their adoptive homes.

Indigenous children, like other ethnic and racial minorities, disproportionately represent the current population of the child welfare system in the United States. In Oklahoma, the state with the highest Indigenous population proportional to the total state population, Indigenous children are separated from their families at a rate of 4 to 1 with respect to non-Indigenous counterparts. In South Dakota, Indigenous children are eleven times more likely to be removed from their homes than white children. Native children in South Dakota make up 9 percent of the child population, but comprise more than half the children in foster care. About 90 percent of Native children in South Dakota are placed in non-Native homes in violation of ICWA. The reasons for child removal are often unclear.: removal hearings often last only 60 seconds and families are not provided adequate counsel or informed of the reasons for removal. In many cases, removal decisions are based on poverty and racism plays a major role in determining why poor Native children are removed at strikingly higher rates than poor white children. High rates of addiction, mental illness, inadequate housing, and crime in Indigenous communities also affect the Indigenous child removal rates, yet these social issues are also represented in non-Native communities and have been perpetuated in part by unrecognized trauma caused by generations of genocide.

Judd E. Stone II, the representative of the Texas Attorney General's Office joining the suit on the side of the petitioners, argued in his brief that the return of Indigenous children to their home communities returns them to an unhealthy environment plagued by these social ills. However, Stone's argument ignores the history that embedded these ills into the fabric of Indigenous communities in the first place. The widespread permanent removal of Indigenous children from their home communities does nothing to heal these harms and creates a new cycle of identity trauma caused by adoption-based genocide. In the absence of national Truth and Reconciliation processes, it has been impossible for Indigenous people to even begin to heal from these historical harms.

The Lemkin Institute believes that overturning ICWA will remove one of the most important tools in US efforts to overcome the historical genocidal structure of US-indigenous relationships, a structure in which indigenous life is consistently both directly and indirectly threatened by state and society pressures. Even now ICWA lacks proper enforcement and should be seen as the bare legal minimum to protect indigenous life and identity in the country. The United Nations' 1948 Convention on the Prevention and Punishment of the Crime of Genocide recognizes "forcible transferring children of the group to another group" as an act of genocide, an act that ICWA seeks to prevent. While the US has ratified the 1948 Genocide Convention, it remains *the only*

non-signatory of the 1989 Convention on the Rights of the Child (CRC), affecting the government's international adherence to the protection of children in the welfare system. This refusal to ratify the CRC is unacceptable and perpetuates the non-recognition of the individual basic human rights of children.

The United States first voted against the United Nations Declaration on the Rights of Indigenous Peoples in 2007, but the dissenting vote was later reversed under the presidential administration of Barack Obama. Although the Declaration is not a binding instrument, it reflects the will and commitment of supporting states to fulfill its provisions. Article 8 of the Declaration states that, "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture" and that nations should provide a mechanism for redress for identity denial, forced assimilation, forced population transfers, dispossession of land and property, and violent racial propaganda against their existence. ICWA provides just one of the many legal protections necessary to address ongoing, long-term state violence against Indigenous communities.

Reunion of families should be the first priority of any child welfare system. This is especially true in settler societies, like the USA, where Indigenous children are concerned. The first step would be to strengthen indigenous sovereignty, especially over child removal decisions. States should also dedicate more funding and more resources to address the causes of children's removal from their homes. Finally, the United States should commit to protecting indigenous identity through increased support for the enforcement of ICWA nationwide. The validation of Indigenous children's identities within their families and home communities creates a healthier sense of self-esteem, which in turn positively affects their individual outcomes in life and supports communal cohesion and identity preservation. *Centuries of genocidal violence have destroyed the well-being of Indigenous communities. ICWA was meant to address that harm. The USA should ensure that it can continue to do so.*

In the event that ICWA is found unconstitutional by the right-wing US Supreme Court, the Lemkin Institute for Genocide Prevention, in soldiarity with Native human rights advocates, calls on US President Joe Biden to protect indigenous children with all the powers invested in his office, including executive orders.