

*JOHNSON V. M'INTOSH*: CHRISTIANITY, GENOCIDE, AND THE  
DISPOSSESSION OF INDIGENOUS PEOPLES

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## ABSTRACT

### *JOHNSON V. M'INTOSH*: CHRISTIANITY, GENOCIDE, AND THE DISPOSSESSION OF INDIGENOUS PEOPLES

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Using hermeneutical methodology, this paper examines some of the legal fictions that form the foundation of Federal Indian Law. The text of the U.S. Supreme Court's 1823 *Johnson v. M'Intosh* opinion is evaluated through the lens of the Convention on the Prevention and Punishment of the Crime of Genocide to determine the extent to which the Supreme Court incorporated genocidal principles into United States common law. The genealogy of *M'Intosh* is examined to identify influences that are not fully apparent on the face of the case. International jurisprudential interpretations of the legal definition of genocide are summarized and used as a basis for constructing an analytical framework. The framework is then applied to the reasoning in the *M'Intosh* case to evaluate the extent to which principles of Christian Discovery shaped the *M'Intosh* Court's reasoning and, by extension, are the basis of dispossessing Native peoples of their lands, autonomy, and lives.

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## INTRODUCTION

fic·tion | 'fikSH(ə)n | noun. 1) Literature in the form of prose, especially short stories and novels, that describes imaginary events and people; 2) Invention or fabrication as opposed to fact: he dismissed the allegation as absolute fiction; 3) [in singular] **a belief or statement that is false, but that is often held to be true because it is expedient to do so: *the notion of that country being a democracy is a polite fiction.***

– New Oxford American Dictionary (emphasis added)

This paper is about fiction – an elaborate set of false beliefs and statements that are held to be true – perpetrated by Christian nations. These falsehoods are held to be true by judicial institutions because doing so expedites the erasure of Native peoples and obscures profits flowing from the exploitation of Native homelands.

The Court that bears the greatest responsibility for institutionalizing these lies is the United States Supreme Court, when it handed down the 1823 *Johnson v. M'Intosh* case (hereinafter, “*M'Intosh*”). *M'Intosh* served the United States’ purpose of stripping the property, livelihoods, identity, and ultimately the life from Native peoples and legitimize the massive genocide that occurred both before and after 1823. Native peoples—the survivors of genocide—have yet to witness the genocide acknowledged, much less receive justice.

Genocide scholars continue to debate whether the destruction of 98% of North America’s Native population meets the legal definition of genocide. This paper does not

add energy into that debate. Instead, this paper fills a gap in the scholarship by performing an analysis of existing case law. Using the legal definition of genocide, the paper constructs a model legal framework for analyzing the *M'Intosh* opinion, to determine whether the Supreme Court institutionalized genocide when it relied on the principles of Christian Discovery to justify dispossessing Indians of their homelands.

U.S. Supreme Court Chief Justice John Marshall authored the *M'Intosh* opinion and was the primary proponent of the position taken by the Court (Echo-Hawk, 2012). Chief Justice, Marshall wielded a great deal of influence over the Court. Marshall, who served in the Revolutionary War, had a personal interest in removing the obstacle that prevented war veterans from claiming fee simple title to lands that the U.S. had promised in exchange for their service (Robertson, 2005, pp. xi; 95-96). Researcher Lindsey G. Robertson, who discovered that the *M'Intosh* case was a collusion between the plaintiff and defendant in the case, suggests that although Marshall realized the *M'Intosh* opinion was a mistake, and even attempted to repudiate it in the later *Worcester v. Georgia* (decided March 3, 1832), Andrew Jackson's packed Supreme Court prevented Marshall's reversal (Robertson, 2005, p. xii). Whether or not Marshall's original intention was for the *M'Intosh* case to become precedent for the entire body of Indian law in the U.S., Canada, Australia, and New Zealand, *M'Intosh* continues to be the foundation for both Indian and property law in the United States. If, as Robertson suggests, dispossession and removal of Indians would have been accomplished with or without the Supreme Court's cooperation, (Robertson, 2005, p. 183, n. 4), the *M'Intosh* case expedited the inevitable destruction of Native peoples. However, the troubling fact remains that the *M'Intosh* case

reinforced and validated a genocide that was in progress and provided fertile ground for the law and policy of Indian genocide to take root and flourish.

*M'Intosh* was a case that addressed the capacity of Indian Tribes to control and dispose of their property as they wished (Robertson, 2005, p. ix). To bring this question before the Court, two parties: Johnson and Graham's Lessee and William M'Intosh brought before the Court, a false dispute over what they purported to be the same plot of land (Kades, 2001, p. 99). Landowner Johnson claimed that he purchased title from the Wabash Land Company, who directly purchased from the Illinois and Piankeshaw Tribe (Kades, 2001, p. 84). William M'Intosh claimed that he purchased a federal government patent to the same parcel of land. The Court accepted that the claims overlapped because both parties stipulated to all that fact in their filings even though the plots, when mapped, are distinct and separate (*M'Intosh*, 1823, p. 562-563; Kades, 2001, p. 68). When asked which title was superior: Indian title or U.S. title, the Court ruled in favor of federal title and William M'Intosh. The Court relied, not on U.S. law, but on Christian custom that forbade private parties to purchase Indian land (Story, 1833, p. 139).

The consequence of using Christian discovery as the legal basis for land title meant that the U. S. government has a "superior," exclusive, unchallenged right to claim and dispose of Indian lands across the entire continent, including those not actually within the borders of the United States (*M'Intosh*, 1823, pp. 574; 584-585; 587-588; Robertson, 2005, pp. 98-100).

The Court relied on Christian discovery principles developed and refined over a millennium by the Medieval Roman Catholic Church, Christian monarchs, and the

nations of “Christendom” during the Crusades, the Inquisitions, and “New World” domination. Because the principles of Christian discovery had been used for centuries to justify dispossessing Native peoples worldwide, the *M’Intosh* Court characterized Christendom’s subjugation and control of non-Christian peoples as an “unquestioned” right (*M’Intosh*, 1823, pp. 572-573; 587-593). Two centuries have passed since *M’Intosh* legitimized Christian Discovery. Reading the case, it is quite obvious that its dicta and ruling conflict with modern international legal opinions and practices that prohibit genocide. While Native peoples were left with the right to “occupy” their homelands, occupancy was a transitory common law right that permanently vanished when a group vacated their homeland for any reason (*City of Sherrill v. Oneida Indian Nation of N.Y.*, 2005, pp. 1489-1490; 1495). This scheme presumes the eventual extinction of Indians.

The need for a legal analysis of *M’Intosh* through a framework of genocide is long overdue. While there is no shortage of scholarship denouncing *M’Intosh* and its continued application as genocidal, there is, yet, nothing that analyzes *M’Intosh* through the legal framework that is presented in this paper. There is a strategic reason for choosing the legal definition of genocide as an analytical framework. The United States has signed very few human rights treaties, and it does not consider economic, social and cultural rights as human rights (Cassel, 2015). One international treaty that the United States *has* signed is the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, “Convention”) (see Appendix A). Although the U.S. attached numerous reservations to its signing statement, it is still obligated to uphold its

commitment (Cassel, 2015). Thus, the Genocide Convention is the best legal instrument available for the International community to address the genocide of Native peoples.

This paper addresses four major elements that are required to meet the legal definition of genocide: Identity of the **perpetrator**; identity of the **victim**; the *actus reus*, or act committed; and the *mens rea*, or the specific intent to commit genocide. These elements suggest a framework that can be used to evaluate whether the United States as an abstract entity, institutionalized a framework of genocide to dispossess American Indians of their homelands. Because the *M'Intosh* case relies on and incorporates the history of Christian discovery, Part One of the Literature Review examines the genealogy of *M'Intosh* to understand the evolution of Christian discovery fiction and how these falsehoods continue to destroy Native peoples in the present. Part Two surveys the genocide scholarship and legal judgements to understand how authoritative sources interpret provisions of the Genocide Convention. A description of the analytical methodology and framework used herein provides a segue between the Literature Review and the Analysis sections. In the Analysis section, each of the four major elements of genocide is applied to the *M'Intosh* case to evaluate whether the case law meets the legal threshold of genocide.

## LITERATURE REVIEW

### Part One: Christian Discovery

#### Popes, Monarchs, and the Church

*We trust in Him from whom empires and governments and all good things proceed.*

- Alexander VI, Inter Caetera, 1493

The Doctrine of Christian Discovery is a legal fiction; a collection of ideologies that are used to create and reinforce the myth that Christian destruction of non-European, non-Christian peoples is reasonable. Christian European States developed policies of discovery to expedite economic and territorial expansion. It is no secret that discovery is a myth. The law is filled with legal fictions, or metaphors, to justify conclusions of law. The Doctrine of Discovery happens to be a legal fiction that permanently changed the reality of all Native peoples living on Turtle Island.

Although Christian monarchs both invented and implemented discovery policies, the Roman Catholic Church instigated and advocated for the principles that comprise the discovery doctrine, so the Church must also shoulder the responsibility for the consequences. Vine Deloria, Jr. states:

It is said that one cannot judge Christianity by the actions of secular western man. But such a contention judges Westerners much too harshly. Where did Westerners get their idea of divine right to conquest, of manifest destiny, of themselves as the

vanguard of true civilization, if not from Christianity? Having tied itself to history and maintained that its god controlled that history, Christianity must accept the consequences of its past. Secular history is now out of control and its influence has become rather demoniac, disruptive force among nations – this is part and parcel of the Christian religion.

(Deloria, 1994, p. 111). What Deloria is referencing is the Christian reasoning that its followers are superior because its God is the “one true god.”

The legitimacy of the Doctrine of Discovery is premised in Christian Church epistemology on human nature: that God organized humanity in a hierarchy of superior and inferior peoples. The Pope, as the physical manifestation of God, occupied the pinnacle: He was (and is) sovereign. Christian monarchs were delegated sovereignty and occupied the place directly beneath the Pope. The subjects of Christian monarchs – Christian peoples – occupied the level beneath Christian monarchs. Pagans occupied the lowest level of the human pyramid. Christian nations, enlightened and serving Christ, believed that by virtue of their association with the Church they were inherently superior. This fiction justified confiscation of pagan lordship and property by Christian armies, tasked with enforcing Papal law (Williams, 1993, p. 49). This notion serves as the foundation for the Christian crusades, Christian discovery, and the dispossession of Indian tribes in the United States, legalized by *Johnson v. M’Intosh*.

In 1095, Pope Urban II urged Frankish Christians to march to Jerusalem to destroy Saracens, Muslims, Arabs, and “other infidels”, stating that “the Holy Church has reserved a soldiery for herself to help her people.” The “knights of Christ ... led by Jesus

Christ” to serve the Church is a recurrent theme throughout the early history of discovery (Krey, 1921a, p. 33-36). In the Papal Bull *Romanus Pontifex*, which donated to the Portuguese all lands not inhabited by Christians, Pope Nicholas V recognized and praised King Henry of Portugal’s dedication to Christian conquest:

[G]reatly inflamed with zeal for the salvation of souls and with fervor of faith, as a Catholic and true soldier of Christ, the Creator of all things, and a most active and courageous defender and intrepid champion of the faith in Him, has aspired from his early youth with his utmost might to cause the most glorious name of the said Creator to be published, extolled, and revered throughout the whole world, even in the most remote and undiscovered places.

(Nicholas, 1455). Pope Alexander VI encouraged the Spaniards’ to follow suit, promising, “should you, with the Lord’s guidance, pursue this holy and praiseworthy undertaking, in a short while your hardships and endeavors will attain the most felicitous result, to the happiness and glory of all Christendom” (Alexander, 1493b).

Alexander claimed the authority “to make, appoint, and depute you and your said heirs and successors lords of them with full and free power, authority, and jurisdiction of every kind” (Alexander, 1493b). The legal analysis of Spanish lawyer Franciscus de Victoria further stated that Spanish explorers represented Christianity to pagan peoples: “Everything said above receives confirmation from the fact that ambassadors are by the law of nations inviolable and the Spaniards are the ambassadors of Christian peoples” (Victoria, 1917, p. 156).

In the early Sixteenth Century, King Henry VII proclaimed the British monarch “Defender of the Faith and Supreme Governor of the Church of England” (The Royal Family, n.d.) – the supreme Christian warrior and equal in status to the Catholic Pope. His successors exercised authority to issue charters and letters patent for their agents to claim the lands of Indigenous Peoples. The Charter issued to Sir Thomas Gates in 1606 began with the introduction: “James, by the Grace of God, King of England, Scotland, France and Ireland, Defender of the Faith” (James I, 1620, as cited in Hening, 1809, vol. 1, pp. 57). The Church and Christian monarchs claimed Indigenous peoples and their property relying on the proposition that both the rules and the practices of Christian discovery were expressly approved by the Christian God. Popes and Monarchs claimed positions of highest authority due to the divine will of the Christian God. This sovereignty was supposedly a delegation of God’s authority which could not be questioned and gave Christian leaders the right to govern, establish laws, and ensure the values of society aligned with Christianity (Newcomb, 2008, p. 52).

Discovery was a State endeavor – a planned strategy that the nations of Christendom adopted as policy to expand their empires and increase their wealth. Christians had the duty to remove Non-Christians through conversion or destruction to claim the land and natural resources that, in the Christian worldview, God had allegedly given to them by allowing them to make the discoveries. Discovery was not a clandestine operation that was conducted in secret by a few conspirators. Popes encouraged and rewarded discovery and Monarchs competed with one another openly, over a long time span. The law and practices of discovery were debated openly. De las Casas published

journals that chronicled the scandalous acts of Columbus and his soldiers and publicly debated Juan Sepulveda about whether Indians had any rights (Williams, 1993, pp. 186-187); Victoria lectured on discovery principles and drafted what became the foundation of the international laws of discovery that were adopted by virtually all the nations of Christendom (Williams, 1993, pp. 96-97, 106-108; Frichner, 2010, pp. 6-7). The legitimacy of Christian land claims in the Americas depended on the religious foundations of sovereignty that radiated from the Christian God's supremacy. Discovery was a widespread, thoroughly accepted justification for converting the lands and resources of non-Christian peoples into wealth and property of the crown.

From Pope Urban II's Speech at Clermont through the disposition of the *M'Intosh* case, the records consistently include references to the increase in wealth that could be anticipated. Pope Urban II declared:

The possessions of the enemy, too, will be yours, since you will make spoil of their treasures and return victorious to your own; or empurpled with your own blood, you will have gained everlasting glory. For such a Commander you ought to fight, for One who lacks neither might nor wealth with which to reward you.

(Krey, 1921a: 33-36). Pope Nicholas V encouraged the Portuguese to establish trade and commerce to increase their own wealth as well as the wealth of the Church, which received tribute from Portugal's ventures (Nicholas, 1455); Pope Alexander VI followed suit (Alexander, 1493b). Columbus was driven by the promise of wealth, having been commanded by King Ferdinand to return with "merchandise" and promised ten percent, plus expenses, of all that he brought to Spain (Thatcher, 1903-1904, pp. 442-451).

Victoria's lectures on discovery were infused with economic considerations.

Victoria justified war on Native peoples if they denied the Spaniards' entrance on their lands and efforts to extract resources for trade (Victoria, 1917, pp. 90; 161-162). The British also zealously pursued wealth. Henry VII, Elizabeth I, James I, and Charles I all required 20% tribute of any profits, gains, or commodities that discoveries produced (Thorpe, 1909, pp. 47; 50; 54; 70). Church and State sovereigns did more than encourage discovery. They were responsible for creating and driving the policies on which Chief Justice Marshall relied in authoring the *M'Intosh* case (*M'Intosh*, 1823, pp. 572-586).

#### Savages, Pagans and Non-Christians

In contemporary U.S. jurisprudence, "Indian" or "American Indian" is a term of art that specifically refers to an enrolled member of a federally recognized Tribe (Wex, n.d.). Although American Indian is technical term of law, it is impossible to separate from its genealogy. In the history of Christian discovery, "Indian" is a construct for a fictitious group and a rhetorical symbol that carries the badge of transgression of Christian taboos. Indians in literature are savage, inferior, subhuman, servants of the devil, and enemies of the Church (Williams, 2012, p. 135 et. seq.; Newcomb, 2008, p. 18). Exploring the lineage of "Indian" is a journey through Old World epistemologies of Greco-Roman and Medieval Catholic Church Empires, European Christian Humanism, British Protestant Empire, Puritan Colonial America, and the jurisprudence of the United States Supreme Court. Because the savage stereotype shaped discovery–Indian Law in particular—it is essential to unpack the lineage of the terminology (Frichner, 2010, p. 6).

Williams (2012) traces the concept of “savage” to the earliest written stories of European peoples: Homer’s *The Odyssey* (Williams 2012, p. 11). Homer immortalized three archetypes: barbarians, savages, and noble savages. Barbarians were non-Greek speakers, especially distant, exotic tribes who resided in chaotic, wild lands. Barbarian customs and rituals were shocking in their deviance (Williams, 2012, pp. 49-50; 63-64). Savages were abominable monsters whose nature, character and habits were unforgivable violations of Xenia’s universally binding law that defined civilized society (Williams, 2012, pp. 18-19). Noble savages lived a simple existence in a utopia of abundance, unrestrained by labor or government (Williams, 2012, pp. 39-40). Homeric themes of lawlessness, remoteness, habitual intemperance, primitive bestiality, sexual perversion, indolence, and simplicity traverse Western time and cultures and are the basis for Western disdain of nonconforming peoples (Williams, 2012, pp. 20).

The Romans appropriated the Greek savage stereotype, emphasizing ferocity. Two examples are the Germans and Scandinavians. Germans were characterized as fierce, warring, impoverished, and without a concept of private property. Scandinavians were described as noble but “disgustingly poor,” lacking property and shelter, surviving off wild animals and plants, and lacking concepts of employment and religion (Williams, 2012, p. 99). Cicero opined that the Romans owed their advancements to the rule of law and urbanization, so were duty-bound to subjugate savage tribes, who “no one who has ever lived would not wish to see crushed and subdued.” (Williams, 2012, pp. 110–111).

The savage had little connection to religious thought until the Medieval Roman Catholic Church began defining cultural norms for the nations under its sway. Church

scholars began to add religious taboos to the savage stereotype. (Williams, 2012, pp. 148-153). The Biblical Old Testament “wild man,” a perfect receptacle for savagery, was recast as the religious-deviant pagan. Church scholars added attributes of demon possession, devil worship, and enemy of God (Williams, 2012, pp. 139, 142-148).

The pagan savage was employed by Urban II to instigate holy war. To end the “barbaric fury” that had “deplorably afflicted and laid waste the churches of God,” Urban commanded the Christian faithful to destroy “a despised and base race,” “unclean peoples,” and “barbarous” nations: Saracens, Muslims, Arabs, Pagans, Jews, Antichristians, Gentiles, enemies of Christ, and the Antichrist. This fiction launched the first of centuries of holy wars (i.e., Crusades) (Krey, 1921c, 42-43; Munro, 1906, p. 231). By fictionalizing target groups as savages, pagans and infidels, the Christian belief system could be weaponized to inflame animus against outsiders and expand Church influence. Urban’s rhetoric proved so useful to future Popes that barbarians, savages, infidels, and ‘perfidious enemies’ became ubiquitous in Christian discovery literature (Nicholas, 1455; Alexander, 1493a; Alexander, 1493b).

Spaniards expanded the concept of pagans to include slaves; sinners; unbelievers; witless; irrational; transgressors of His commandments; rebels; disobedient; heretic; mental irrationality or instability; insensible; and brute animals. The Spaniards coined and used the term “Indian,” which was used interchangeably with other descriptors (Williams, 2012). While all these terms imply various degrees of religious animus, the symbol of “Indian” also includes geographic, racial, and ethnic aspects.

The noble savage stereotype was favored by legal scholars of the Humanist Enlightenment. Despite a facially more charitable view, the fictitious “noble savage” of the Americas was no less dehumanizing. It was used by both Spanish and Portuguese to justify continued aggression toward Native peoples. (Williams, 2012, pp. 153-157). Primitive Indians were fictionalized as living hundreds of years surrounded by unlimited resources, and relying on herbs and wild food sources (hunting, fishing, and gathering) for medicine and food rather than deliberately developing medical arts and agriculture. (Williams, 2012, p. 153 et. seq.). Importantly, because these fictional noble Indians had neither civil government nor employment, they violated Christian natural law, as defined by the Christian deity. This transgression provided the basis for waging just war on Indians (Williams, 2012, pp. 175-187; Nicholas, 1455; Alexander, 1493a; See generally, Victoria, 1917, p. 142, et. seq.).

As other Christian European nations, including Britain, joined the rush to claim the riches held by undeserving pagans, the savage stereotype continued to be a convenient pretext for expansion of Christendom. Both King Henry VII and Queen Elizabeth I used the terms “heathen” and “barbarian” (Thorpe, 1909, pp. 46; 49; 53); King James I favored “savage” and “savage Indians” (Thorpe, 1909, pp. 3783). These terms were used interchangeably throughout the Crusades and discovery to dehumanize target groups and unite Christians around the idea of religious wars of aggression.

The British American colonials continued to expand the savage fiction, emphasizing traits of ferocity, bestiality, and religion. To the British, Indians were beings of contradiction, at once noble, monstrous, and satanic. Although Indians were comely

and simple, they were also hopeless pagan brutes, trapped in crude, miserable darkness and ignorance while they worshipped idols, consorted with the devil, and practiced dark magic, cannibalism, and all forms of lying, treachery, envy, dissimulation, and avarice. (Williams, 2012, pp. 187-189). While most colonists viewed Indians as perpetual enemies of Christianity, unredeemable violators of the Christian God's natural law, and incapable of ever achieving a true Christian existence (Williams, 2012, p. 189; Coke, 1867, p. 220), colonists also tasked themselves with the responsibility for elevating Indian souls from their damned, uncivilized, unsettled, and lawless state (Williams, 2012, pp.190-191). The common British sentiment was that, at best, Indians were forever relegated to second class citizens, with no English common law rights or capacity to petition courts for redress. (Williams, 2012, pp. 189-190). This contradictory stereotype reinforced British determination to eliminate Indian tribes from the colonies.

Interestingly, British monarchs also applied the pagan savage stereotype to the land. Charters issued to the Cabots, Raleigh, and Gylberte describe "remote, heathen and barbarous *lands, countries and territories not actually possessed of any Christian prince or people*" (Thorpe, 1909, pp. 46; 49; 53; emphasis added). In such a paradigm, the land is attributed a quasi-animate personality with the capacity for salvation through the intervention of Christians (Stephanson, 1995, p. 6). This concept seems to coincide with holy land metaphors concocted by British Puritans. Relying on Old Testament tales of the Children of Israel in Canaan, Puritans viewed themselves as the Chosen People engaged in a conquest of the "land of milk and honey." This fiction justified perpetual state of warfare with various tribes as the British colonists reenacted the conquest of their

“Promised Land,” and supported the British legal concept of terra nullius, that the land was vacant (Newcomb, 2008, pp. 37-50).

The savage stereotype in the British American colonies evolved as rapidly as immigrants poured into the colonies. Indians were characterized as eloquent in speech, brave in war, and fervent in liberty, but doomed to necessary disappearance (Williams, 2012, pp. 213-214; 216-217). The exploding immigrant population embraced the opinion that they would rapidly and inevitably drive Indians from their homelands, leaving incredibly valuable land and resources free for the superior, agrarian Christians to claim (Williams, 2012, p. 212).

#### Intent of Christian Discovery

*Kill every buffalo you can. Every buffalo dead is an Indian gone.*

– Colonel Richard Irving Dodge, 1867.

The dominant narrative in the United States is that the intent of colonizers in North America was to “make money” (National Geographic Society, 2020). The dominant narrative sounds fairly innocuous, and contains no suggestion of intent to destroy a group. However, primary sources expose a bright thread of intent to destroy non-Christian groups, as such, running prominently through history. The resulting tapestry painted a picture of Jerusalem as the Christian land of milk and honey awaiting salvation from the abominations that were forced on it. This was a strong inducement to the Frankish masses who lived in poverty, violence and internal conflict, were confined within a relatively small space, and who feared that the Turkish wars would reach their territory. (Krey, 1921a, pp. 33-36; Krey, 1921b, pp. 36-40; Munro, 1895, pp. 5-8;

Thatcher & McNeal, 1905, pp. 514-516). Urban's message preyed on these insecurities as he urged the Franks: "I, or rather the Lord, beseech you ... to carry aid promptly to those Christians and to destroy that vile race from the lands of our friends... Moreover, Christ commands it." (Thatcher & McNeal, 1905, p. 517). Urban spawned the battle cry of the Crusades with his utterance, "God wills it." (Hamilton, 2016, pp. 88-89).

The First Crusade had both short-and long-term goals. The immediate goal was to defend churches in the Near East from Muslim aggression. The long term goal was to prepare for the second coming of Christ. Urban reasoned that unless Jerusalem contained sufficient Christian population to resist the Anti-Christ, the prophecy of Armageddon could not be fulfilled. Urban urged holy war on "Anti-Christians" in Jerusalem, who he dubbed "that vile race," to hasten the Anti-Christ's ascension to his throne and the return of Christ (Thatcher & McNeal, 1905, p. 517; Krey, 1921b, pp. 38-39). This is a direct statement of intent by the Roman Catholic Church to destroy non-Christians, "as such."

Pope Urban's message was not an anomaly. The idea of religious war against unbelievers persists through centuries of the Papal writings, targeting distinct groups that the Church opposed because of a difference in belief systems. During the Fifteenth Century, the Papal Bulls authorized Portuguese and Spanish to destroy non-Christian peoples. *Romanus Pontifex*, on which Portugal based its claim to the west coast of Africa, chronicles the Portuguese "lawful" abduction, enslavement and conversion of "Guineamen and other negroes," and encouraged the Portuguese monarch to "*invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ,*" "reduce" them to "*perpetual slavery,*" and to *appropriate*

*their property* to the Crown's "use and profit" (Nicholas, 1455, emphasis added). On its face the document shows clear intent to target individuals based on their status as Saracens and pagans and enemies of Christ. *Inter Caetera*, issued by Pope Alexander IV, restricted Spanish conquest to "discovered" non-Christian land (Alexander, 1493b). This means that when searching for new lands to claim, the agents of monarchs were to ascertain whether a newly "discovered" land was claimed previously by a Christian monarch. If it was not, the Spanish could claim it. Embedded in discovery was the construct of "non-Christian" – a fictitious group hostile to Christianity. Simply stated, hostility was the assumed default position for all non-Christians.

The Spaniards zealously pursued the destruction of Indigenous groups in newly discovered territories. Targeting these groups was only possible because of their "non-Christian" status. The *Requerimiento* was statement of Spanish intention to destroy any non-Christians who refused to "acknowledge the Church as the ruler and superior of the whole world" (Williams, 1990, pp. 90-93; Fonseca, 2010, p. 196). The purpose of *Requerimiento* was to place a sheen of legitimacy on the mass destruction of Indigenous groups. On its face, the document proclaims that

with the help of God, we shall powerfully enter into your country, and shall make war against you in all ways and manners that we can and shall subject you to the yoke and obedience of the Church and of their highnesses ... we shall take you, and your wives, and your children, and shall make slaves of them, and as such shall sell and dispose of them... take away your goods... do you all the mischief and damage that we can... and we protest that the deaths and losses which shall

accrue from this are your fault, and not that of their highnesses, or ours, nor of these cavaliers who come with us.

(Newcomb, 2008, pp. 32-36; Williams, 1990, pp. 90-93; Schneider, 2006). Here also, the document facially evidences intent to destroy a group based on religious association, since it was reserved for and applied to non-Christian groups only.

The legal theories developed by the Spanish also were intended specifically for application to non-Christian groups. The primary principles formulated by Franciscus de Victoria established the Christian secular legal justification for declaring war against non-Christian groups. As mentioned previously, the non-Christian status of Indians was sufficient justification under Spanish law for war (Victoria, 1917, pp. 161-162). Victoria constructed the just war principles specifically for application to the non-Christian Indigenous peoples who owned the resources that the Spaniards so passionately coveted.

The United States directly inherited the efforts of British discovery expeditions, so a key question is whether the British followed the discovery principles established by other Christian nations. Of course, the British had their own laws and policies and were staunchly anti-Catholic. However, in terms of discovery, the Papal origin of the doctrine did not give the British pause. It wholeheartedly adopted the practices of the other nations of Christendom – the family of Christian nations – as acknowledged by the Court:

No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete... we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by [the Cabot] commission, is confined

to countries 'then unknown to all Christian people;' and of these countries Cabot was empowered to take possession in the name of the king of England.

(*M'Intosh*, 1823, p. 576).

But, even though Britain adopted the policy of Christian discovery, did the British intend to destroy a group of non-Christians in its quest to seize North America? Are there any indications that the status of Indians as non-Christians was material to depriving them of their homelands? A conflict that is solely about land that is between two groups whose belief systems are coincidentally different cannot be construed as a conflict based on religion.

Official written documents of Great Britain give insight into the lens through which the British Monarchs viewed native people. In one such document, the 1620 Charter of New England, King James I voiced the intent of the Crown:

there hath by **God's Visitation** reigned a wonder traffic Plague, together with many horrible Slaughters, and Murders, committed amongst the Savages and brutish People there, heretofore inhabiting, in a Manner to the utter Destruction, Devastation, and Depopulation of that whole Territory, so that there is not left for many Leagues together in a Manner, any that doe claim or challenge any Kind of Interests therein.

(Thorpe, 1909, pp. 1830-1831, emphasis added). In this official document, the King applauds British colonial violence against Native peoples as religiously-based, divinely-willed destruction. This included a range of activities from massacres to self-defense. Like the Crusading Franks and Spaniards, King James I justified destruction of Native

peoples as the “will of God” against enemies of Christianity: Indians, barbarians, devils, heathens, and so forth. These terms were used interchangeably. The benefit to the British was prospering settlements and booming trade. (Mason, 1736, pp. 9-10; 20-21; Mather, 1676, pp. 74-78; Mather & Parkhurst, 1702, p. 117; Laskey, 2021, pp. 111-114).

Sentiments of Indian destruction were ubiquitous in British discovery literature. Influential Puritan minister, Cotton Mather, promoted the millennialist views of Joseph Mede that Natives of America were in league with the devil to bring about the end of the world Armageddon (Wise, 2005, pp. 51-52; Smolinski, 2009, p. 41). In other words, Native people were the ultimate enemy of the English Christians in America with whom the Biblical Armageddon was prophesied and inevitable. (Lasky, 2021, pp. 157-158).

An infamous writing of British General Jeffery Amherst expressed his desire to exterminate the Indians. Amherst’s excessively harsh Indian policies, caused food shortages and smallpox epidemics, and resulted in the 1763 Pontiac’s Rebellion. Throughout that summer, Amherst and his subordinate, Colonel Henry Bouquet schemed via correspondence to destroy Indians using smallpox and dogs (Bouquet, 1763a; 1763b; 1763c; Amherst, 1763). The letters unequivocally reveal a conspiracy to engage in biological warfare to completely destroy Indians. In one letter, Amherst wrote:

You will do well to try to inoculate the Indians by means of blankets, as well as to try every other method that can serve to extirpate this execrable race. I should be very glad you scheme for hunting them down by dogs could take effect, but England is at too great a distance to think of that at present.

(Amherst, 1763; Parkman, 1879, pp. 303-304.) While inoculate means to immunize, vaccinate, or take measures to protect against disease, Amherst's phrase, "try every other method that can serve to extirpate this execrable race" makes clear that through inoculation he intended to destroy, not protect.

Most relevant to the discussion of intent is whether Amherst's correspondence evidences the intent to destroy a *protected* group. Although Amherst's letters do not contain explicit references to religion, by this time the term "Indian" was so laden with religious, racial, ethnic, and national animosity, it is difficult to conceive of a context in which the term could have been applied neutrally. A smallpox poisoning was carried out at Fort Pitt, prior to the exchange between Amherst and Bouquet (Ranlet, 2000, pp. 427–441; Trent, 1924, p. 400). Weaponizing smallpox against Indians reveals a sadistic inclination on the part of the British to not merely exterminate the entire Indian population, but ensure prolonged suffering.

#### Carrying Out Christian Discovery

*To a foreigner the American policy towards the Indians appears most cruel and inhuman, every possible advantage being taken to dispossess the rightful owners of the soil of their property.*

– Edward Coke, 1867

Whether Crusade or Discovery, the logic of Christian expansion was the elimination of non-Christian peoples. Benignly expressed as "conversion," the deeds of Christianity's agents exposes the ruthless depths to which Christendom was willing to descend to realize its objectives. Conversion was not a high priority for Christian

crusaders, who the Church had commanded to eliminate its “enemies” (Krey, 1921a, p. 30; Munro, 1895, pp. 5-8). Pope Nicholas encouraged the Portuguese to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ along with their kingdoms and all movable and immovable goods, to “reduce their persons to perpetual slavery” (Nicholas, 1455; Alexander, 1493b). Nicholas applauded this “pious and noble work... since the salvation of souls, increase of the faith, and overthrow of [the Church’s] enemies may be procured thereby.” Alexander was less explicit in the Bulls for the Spanish, granting

full and free power through your own authority, exercised through yourselves or through another or others, freely to take corporal possession of the said islands and countries and to hold them forever, and to defend them against whosoever may oppose.”

(Paullin, 1917, p. 82).

A famous quote attributed to King Ferdinand of Spain, “get gold, humanely if possible, but at all hazards – get gold” coincides with the 1513 *Requerimiento* (Angrist, 2000). Whether Ferdinand actually issued this admonition is unclear, but there is no doubt the Spanish were obsessed with gold (Stannard, 1992, pp. 61; 202). The diary of Bartolomé de las Casas records details of tortures, gruesome deaths, excessive work, starvation, and the resulting population decline of Indians of the Caribbean subjected to Columbus’ quest for gold (Stannard, 2006, pp. 67-72). By contrast to the intensive, feverish Spanish destruction, the British employed a longer-term methodical approach to achieve elimination. Perpetual conflict, use of germ warfare, encroachment, and resource

extraction was no less destructive and is well-documented in colonial archives (Stannard, 2006, pp. 222-223).

After the Revolutionary War, the formally organized United States continued to engage in the long tradition of elimination by both direct and indirect means. The destruction of Mvscogee by trade illustrates how the United States benefitted from centuries of colonization that came before it. The 1540-1542 intrusion of Hernando DeSoto introduced guns and other metal weapons. As Europeans began appearing on the edges of Mvscogee territory, foreign trade goods were introduced and initially welcomed, Cloth, rum, brass ornaments and bells, hoes, razors, pots, duffel blankets and glass beads were also coveted because they reduced the labor required to produce necessary items and proved uniquely useful. But none of these outranked demand for guns and ammunition (Braund, 2008, pp. 26-28).

Trade with Spanish, French, and British was fundamentally different than trade with tribes of Turtle Island. Europeans demanded deerskins and slaves, causing a shift in Mvscogee relationships to the environment, neighboring nations, and with one another (Braund, 2008, pp. 28-29). Even prior to the withdrawal of the British from North America, the value of Mvscogee imports were greater than the value of their exports. Deerskin demand resulted in unsustainable hunting. It is estimated that 45,000-50,000 deer hides were traded by the Mvscogee nation **each year**. In the 1744-45 season alone, Mvscogee hunters supplied the bulk of the 305,717 pounds of deerskins through the Carolina colony (Braund, 2008, p. 36).

By 1799, the pressures of over-hunting to settle debt and meet foreign demand, encroachment of European settlers on hunting grounds, and free-roaming livestock practices of the Georgia settlers had diminished game availability to the point most Mvscogee hunters returned, empty-handed, to their *talwas* (Braund, 2008, p. 178; Chadhuri, 2001, pp 142-143). The resulting trade deficit meant that Mvscogee were in debt, would remain in debt, and would sink deeper into debt each year (Braund, 2008, p. 178). Under Jefferson's guidance, the US developed a predatory trade policy by extending credit. This weaponized Mvscogee debt to further dispossession. When the U.S. demanded land cessions to satisfy the debt, the Mvscogee were forced to comply. The land was coercively taken for less than its value, to pay off debt on goods whose purchase price was inflated (Braund, 2008, pp. 53; 177; Chadhuri, 2001, pp. 143).

*Talwa* is a Mvscogee expression that superficially translates to English as *town*; the deeper meaning is more expansive. *Talwa* is more than a mere group of buildings; it is the heart of Mvscogee society. For Mvscogee, the heart is the container of one's spirit. If a person's heart is lost, their spirit is lost. The *talwa* is perceived as the heart of the community; it holds the community's spirit. If the *talwa* is lost, the community's spirit is lost also (Chaudhuri, 2001, pp. 123). The degrading effect of commerce caused a fundamental shift in how Mvscogee related to their homelands and to one another (Braund, 2008, p. 58; Chaudhuri, 2001, pp. 143). Changes occurred in language, culture, ceremonial life, perception of origins, socialization, family structure, clan lineage and descendancy, gender roles and relations, land base, agriculture/horticulture, wildlife and ecology, diet, internal leadership and governance, autonomy, internal politics and

jurisprudence, militarism, regional alliances, education, morale, and tolerance (Braund, 2008, pp. 13-24, 32-33, 53, 180-184; Chaduri, 2001, pp. 134, 138-144). Unsurprisingly, these changes created internal dissent and discord for the Mvscogee. Tensions between assimilated mixed-bloods and traditionalists ultimately led to a bloody civil war that tore families apart (Braund, 2008, p. 186).

On a personal note, my own family experienced divided allegiances as a result of the changes brought about by discovery. Family members slaughtered family members in the 1813 Battle of Fort Mims. Although this was an internal affair of a sovereign nation, the U.S. government opportunistically chose to interfere, sending General Andrew Jackson to massacre Mvscogee under the guise of retaliating for the deaths of "friendly" Indians (Waselkov, 2006, p. 195). The resulting surrender of the survivors effectively cut the Mvscogee land base in half, ensured permanent Mvscogee dependency on the US economic system, and was later leveraged by President Jackson to achieve Indian removal (Waselkov, 2006, p. 212). The Mvscogee disintegration is not unique. Without exception, the social structure of all Tribes collapsed due to direct and indirect pressures that intentional plunder inflicted for the express purpose of destruction. The *M'Intosh* Court recognized that encroachment and settlement were technologies of elimination when it stated:

As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by

its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

(*M'Intosh*, 1823, pp. 590-591).

## Part Two: International Law of Genocide

### State Responsibility for Genocide

*A state that plans and implements a “final solution” cannot be treated as par in parem, but only as a gang of criminals.*

– Israel District Court, 1961.

States as abstract entities can be held responsible for genocide committed during war and during times of peace. In international criminal law, the perpetrator is often the person who orders, masterminds, or participates in high level planning (Cryer, Robinson, & Vasiliev, 2019, p. 341). This may be constitutionally responsible rulers, public officials, or private individuals identified in Article IV. But when a State as an entity permits genocide, fails to prevent genocide, or adopts practices of genocide, the State itself fails to uphold its obligation and may be held accountable for breaching its responsibility under general international law (Cryer, Robinson, & Vasiliev, 2019, p. 206). Article III lists punishable acts: Genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide. Article IX places a responsibility to prevent genocide on signatories to the Convention. The *Bosnia* Court interprets prevention to include the obligation to refrain

from committing genocide (*Bosnia*, 2007, para. 166). By the text of the Convention and the interpretation of the International Court of Justice (ICJ), a State can be held responsible for direct commission of genocide, for the acts of persons or groups when their acts are attributable to the State, and for turning a blind eye to genocide – an act of omission (*Bosnia*, 2007, para. 181).

Because international agreements regulate relations between State sovereigns rather than individuals, it may seem unnecessary to address prosecution of a State for genocide. However, debate has arisen about whether a State can be directly prosecuted for genocide. State immunity, the difficulties posed by criminalizing a State, and the enduring global stigma that arises from a genocide accusation are three such objections. Immunity is not a total bar to legal action against States, since signatories agree to be bound by the Convention upon ratification. Further, although criminal penalties against States are unlikely, civil penalties in the form of truth commissions, lustration, and reparations are typical ways for international law to address State breaches (Cryer, Robinson, & Vasiliev, 2019, pp. 542-547; Schabas, 2000, pp. 421-423).

*Bosnia and Herzegovina v. Serbia and Montenegro* was a milestone for the international law of genocide (Milanović, 2006, p. 553). While the text of Article IX suggests that a State may be held responsible for the actions enumerated in Article III, prior to the *Bosnia* case, bringing genocide charges against a State first required an underlying conviction of an individual (Milanović, 2006, p. 554). The *Bosnia* case was the first instance that the ICC considered a genocide case against a State without requiring an underlying conviction. The Tribunal evaluated each Article III provision,

determining that for a State to be charged with Article I failure to prevent genocide, Article III (b) conspiracy, and III (e) complicity, the prosecution must still obtain an underlying conviction of an individual or group acting under color of State authority (*Bosnia*, 2007, para. 180).

However, when the *Bosnia* Court turned its attention to the crimes of Article III(a) genocide; III (c) direct and public incitement to commit genocide; and III (d) attempt to commit genocide, it held that these crimes **do not** require an underlying conviction before a State can be charged. The ICJ reasoned that to hold otherwise would mean that in some “readily conceivable circumstances,” such as when leaders of a State are allegedly actively committing genocide, no legal recourse would be available (*Bosnia*, 2007, para. 181-182). This supports the Convention’s goal to prevent genocide and end the notion that genocide can be committed with impunity (Paust, 2009, p. 718).

The *Bosnia* Court held that genocide is “attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control” (*Bosnia*, 2007, para. 401). The Court found the Republic of Bosnia breached the Convention when it failed to act on its obligation to prevent genocide, which was triggered when Bosnia became aware that “a serious risk of genocide” existed. (SáCouto, 2007, p. 3).

The *Bosnia* judgment opened the door for other genocide cases against States. In 2019 the Republic of The Gambia filed *The Gambia v. Myanmar* alleging that Myanmar breached its obligations under the Convention when it “adopted, taken and condoned”

acts against the Rohingya Muslim population (*Gambia*, 2019, p. 4). The Republic of The Gambia relied on Article IX as the authority for submitting the Application to the ICJ, and the ICJ agreed that under Article IX it could exercise jurisdiction over the dispute, (*Gambia*, 2020, pp. 1-3). Subsequently, the ICJ ordered Myanmar to take all necessary measures to prevent genocide of the Rohingyas (*Gambia*, 2020, pp. 7-8).

In both *Bosnia* and *Gambia*, the ICJ has found jurisdiction to pass judgment on States who are signatory parties to the Convention (*Bosnia*, 2007, para. 180-182; *Gambia*, 2020, pp. 1-3). These cases confirm that the International Court of Justice can exercise Article IX jurisdiction over an accused State and determine whether an Article III breach of the Convention has occurred through a State's institutions, administrative agencies, governing bodies, or other organs (Sarkin, 2009, p. 102).

When structural and institutional violence cause genocide, it may be impossible to identify single individuals who should be held accountable. The mechanisms deployed in the accomplishment of genocide may be diffuse or deeply embedded in institutions that implement practices resulting in death, worsening conditions, and ongoing victimization. When a State is aware that systemic conditions are causing genocide, but fails to take corrective or preventative action, the State can be held directly responsible for genocide. This type of genocide is associated with "repetitive and enduring processes," such as colonialism, rather than intensive, chronologically short-term events, such as the Nazi extermination of Jews (Jones, 2011, 67; Finzsch, 2008, p. 253).

### Victims of Genocide

Religious groups are one of several protected populations under the Convention. The Convention specifies four distinct protected groups: national, ethnical (ethnic), racial, and religious. Here, too, the Convention does not indicate any objective criteria for defining these groups. This is not likely an oversight, since animus against a group is typically based on arbitrary definitions by the perpetrator of genocide, who has the power to determine the identity of the target without much regard for fact and reality (Schabus, 2008, p. 164-165; Jones, 2011, 34-36; *Brdanin*, 2004, para 683; *Musema*, 2000, para. 161-163).

By limiting the scope of coverage to select groups, Courts are limited in their application of the Convention. If a Court finds clear, unequivocal evidence that demonstrates all the elements of genocide *except* for group identity, the Court cannot convict a perpetrator for genocide because the group is not protected. Specific Convention protections for racial, religious, ethnic, and national groups does not mean that other groups cannot be targets of mass extermination. Protection of these specific groups means that, as a matter of legal consequence, genocidal actions against other groups need to be prosecuted under a different law. In contrast to the desire to cast a broad net in the perpetrator category, the Convention narrows the victim element.

This paper focuses on the construct of “Indian” as a religious group, since Christendom justified the Doctrine of Discovery as a religious war between the servants of Christianity and the Antichrist. Scholars debate whether the Convention protects groups that negatively identify with a religion (such as atheists), but the Convention

makes express provisions for groups that are positively defined by religion (Lingaas, 2015, p. 7). Determining whether a group is under the umbrella of the Convention's protection is determined on a case-by case basis, using both objective and subjective criteria. In the matter of religion, objective criteria show that the group does, in fact, embrace a distinct belief system. Additionally, since a perpetrator often perceives the victim group in subjective terms, determining how the perpetrator has defined the group can also reveal whether the group is being targeted for religious reasons. The definition may or may not coincide with objective group characteristics (*Prosecutor v. Semanza*, 2003, para. 317; *Prosecutor v. Kajelijeli*, 2003, para. 811; Schabas, 2000, pp. 123-124; Burbidge, 2011, pp. 763-764; Lingaas, 2015, p. 9-13). A religious group may be defined in a positive manner using specific characteristics, such as one religious sect against another, or may be defined in the negative, to include anyone who is not an adherent of a particular religion (Lippman, 1994, p. 29; Lingaas, 2015, p. 14-15). Constructing in- and out-groups is essential for targeting groups for genocide (Gorur, 2021, p. 5).

During the combined Chilean and Argentinian cases, Judge Garzon of Spain held that the destruction of a group based on religious motivations is *equivalent* to the destruction of a religious group. Garzon wrote:

To destroy a group because of its atheism or its common non-acceptance of the Christian religious ideology is . . . the destruction of a religious group, inasmuch as, in addition, the group to be destroyed also technically behaves as the object of identification of the motivation or subjective element of the genocidal conduct. It seems, in effect, that the genocidal conduct can be defined both in a positive

manner, vis a vis the identity of the group to be destroyed (Muslims, for example), as in a negative matter, and, indeed, of greater genocidal pretensions (all non-Christians, or all atheists, for example). This idea concludes, thus, that the total or partial, systematic and organized destruction of a group due to its atheist or non-Christian ideology, that is to say, so as to impose a Christian religious ideology, constitutes genocide.

(Lacabe, 1998). Thus, groups that the perpetrator imagines to be religious enemies may be protected under the Convention, as long as the finding is consistent with the purposes of the Convention (*Prosecutor v. Semanza*, 2003, para. 317;). Further, “pagan” is a deviation from a widely adopted religion, not atheist. Indian as a pagan savage refers to “non-acceptance of the Christian religious ideology.”

The United States’ domestic codification of genocide modifies the international definition of genocide. One difference is that U.S. code attempts to define what constitutes a religious group: “a set of individuals whose identity as such is distinctive in terms of common religious creed, beliefs, doctrines, practices, or rituals,” (Genocide Convention Implementation Act, 1988, §1093). The United States’ definition appears to require an objective, positive group identification.

In summary, a religious group is defined by the perpetrator in either affirmative terms by assigning positive characteristics to the group, or in negative terms, by assigning positive characteristics to the “in group” and targeting those that do not conform to the perpetrator’s desired characteristics.

Mens Rea of Genocide

*In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part...as such.*

– Convention on the Prevention and Punishment of the Crime of Genocide, 1951

The *mens rea* of genocide is the mental state of the perpetrator, or the intent. In criminal law, there are two types of intent: general and specific. General intent means that a perpetrator acted negligently or recklessly to commit an unlawful act. Vehicular involuntary manslaughter is an example of a general intent crime because, while a reckless driver may not have intended to kill a person, their recklessness implies disregard for the safety of others. Because of the seriousness of genocide, it is a specific intent crime. The specific intent required is the premeditation to destroy the protected target group; the deliberate nature of the crime is an inherent characteristic of intent (Schabas, 2000, p. 206).

Specific intent, or *dolus specialus*, requires the prosecution to show that when the perpetrator committed one or more of the Article II acts, the intent was to at least partially physically destroy a protected group, as a group (United Nations, 1951, Art II). When a perpetrator who has committed a crime against an individual is charged with genocide, the prosecution must show that the perpetrator engaged in the act because the individual victim was a member of a protected group.

The *Akayesu* Court relied on the concept of *dolus specialus* when determining whether the Hutu-Tutsi conflict in Rwanda would be classified as a genocide. In its judgment, the Tribunal stated:

Genocide is distinct from other crimes because it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."

(*Akayesu*, 1998, Para. 691). The Court interpreted the phrase "as such" to require a showing that the perpetrators had the intent to destroy the Tutsi when they committed their crimes. The phrase "acts committed with intent to destroy ... a [protected] group, as such" is now interpreted to require evidence of specific intent to destroy a group (Goldsmith, 2010, pp. 240-243).

The current interpretation of *dolus specialis* is stated in *Brdanin* relying on precedential judgments and ILC drafting commentary: "The group itself is the ultimate target or intended victim of this type of massive criminal conduct [...] the intention must be to destroy the group 'as such', meaning as a separate and distinct entity," (Draft Code of Crimes, 1996, p. 45; *Brdanin*, 2004, note 1717). To prosecute a crime as genocide, *Brdanin* required that both an Article 2(2) act is committed; and the act was committed against a "specifically targeted group" identified in Article II. When the State is the accused of genocide, evidence of a plan, strategy, or policy creates an inference of the State's specific intent to destroy the group. Because genocide cannot exist without an organized plan, the intent to engage in the conduct, the knowledge that a consequence is

likely to occur in the ordinary course of events, and the intent to cause the consequence are all present (Abass, 2007, pp. 900-901; Schabas, 2000, p. 207).

The *mens rea* of the perpetrator – the intent to destroy a group – is the most difficult element to prove because there is often insufficient evidence showing the perpetrator’s intent. International Tribunals have overcome this obstacle by allowing circumstantial evidence, using facts to deduce intent. (Cryer, Robinson, & Vasiliev, 2019, p. 221; Abass, 2007, pp. 899-901). For example, showing the existence of a massive, widespread, or systematic plan or policy to destroy a group may suffice. Showing that a systemic policy has been constructed intentionally with bias against a group, that the State is aware that the purpose of the policy is to destroy a group, that the group is actually being harmed, and that the State has failed to be effective in correcting the policy is more likely to be convincing evidence. The longer the policy or plan has been in effect, the more likely it is that intent will be imputed to the State (Schabas, 2000, p. 264-266).

The cumulative impact of evidence must also be considered, as opposed to considering each piece of evidence individually. The type of attacks, discriminatory animus, derogatory slurs, targeting of leaders for death or reputational harm, and attacks on sacred sites should be considered as a whole to assess genocidal intent (Cryer, Robinson, & Vasiliev, 2019, p. 221; *Akayesu*, 1998, para 523).

In summary, to prove a State has the *mens rea* required to commit genocide, the prosecution must show that: 1) an Article 2(2) act has been committed; 2) the act was committed against a “specifically targeted group” identified in Article II; and 3) the State intended to destroy the specifically targeted group, at least partially.

### Actus Reus of Genocide

The Convention defines five distinct acts, or *actus reus* in legal terminology, that constitute genocide: killing members of the group; causing serious bodily or mental harm to members of the group; inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part; imposing measures intended to prevent birth within the group; and forcibly transferring children of the group to another group (United Nations, 1951, Art. III). Since the *Johnson v. M'Intosh* case addresses the right of Indians to their ancestral homelands, this analysis focuses on deliberately inflicting conditions of life on the group that are calculated to bring about its physical destruction, in whole or in part. This analysis does not address the crimes of killing, harming, limiting births, or forcibly transferring children out of the group, all which deserve their own separate analysis.

The Convention itself does not provide clues to interpreting Article II(c), so on its face, the provision appears quite broad. This may be due to the difficulty with anticipating in advance the inventiveness of *génocidaires*, motivated by hate and opportunity. Nehemiah Robinson observes, “It is impossible to enumerate in advance the ‘conditions of life’ that would come within the prohibition of Article II; the intent and probability of the final aim alone can determine in each separate case whether an act of Genocide has been committed (or attempted) or not.” (Robinson, 1960, p. 64). Three major sources can offer clarity: Drafting convention records, International Criminal Court (ICC) opinions, and the writings of respected legal scholars.

Drafting convention records reveal various State proposals for Article II(c). Proposed language included destroying “essential potentialities of life;” “intentional deprivation of elementary necessities for the preservation of health or existence,” (United Nations, 1946, p. 1); a lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion that would likely result in the debilitation or death of the individuals; “depriving all means of livelihood by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned” (United Nations, 1948a, p. 9); systematic denial of “the elementary means of existence enjoyed by other sections of the population;” condemning a group to a “wretched existence maintained by illicit or clandestine activities and public charity, and in fact condemns them to death at the end of a medium period instead of to a quick death in concentration camps,” (United Nations, 1947, p. 26); and an element of intent, expressed as premeditation (United Nations, 1948c, p. 1). While the drafting record shows the concerns of States during discussion of Article II(c), it does not establish the majority view.

Genocide scholarship predominantly favors limiting physical destruction to mass killing. Killings, mass murder, and lethal violence that physically eliminates a group is generally, but not unanimously accepted (Jones, 2011, pp. 16-21; Meiches, 2019, pp. 109-110). Despite the majority of scholars favoring large scale death, others support inclusion of physical dismemberment, starvation, forced deportation, political, economic, or biological subjugation, and systematic rape, elimination of national (racial, ethnic) culture and religious life, and enslavement (Jones, 2011, pp. 21-22).

Schabas explains that inflicting conditions that cause slow death enables the perpetrator to distance itself as the cause of death since the killing is not immediate (Schabas, 2000, p. 191). Echoing judgments of the Court, predominant legal scholars support inclusion of acts that subject a group to a subsistence diet; “systematic expulsion from homes;” depriving sufficient living accommodations for a reasonable period; reducing essential medical services below a minimum requirement; and crimes of sexual violence when done deliberately to prevent group procreation. (Robinson, 1960, pp. 60; 63-64; Bassiouni & Manikas, 1996, pp. 587-8.) Bassiouni and Manikas provide an example in which the Bosnia Court found that sexualized violence was deliberately inflicted to make Muslim women unfit for marriage to Muslim men. This separated Muslim men and women, leading to physical destruction of the group. (Bassiouni and Peter Manikas, 1996, pp. 587-588).

Limiting Article II(c) physical destruction to mass killing supports the hegemonic definition advocated by settler colonial states, preferences death over life, ignores government engagement in necropolitics, and dismisses the gravity of premeditated, deliberate group erasure. (Meiches, 2019, pp. 109, 116). A “wretched existence” forced on a target group is not considered spectacular enough to qualify as genocide and allows the perpetrator to deny it has committed genocide (Meiches, 2019, pp. 137-138). Requiring mass death to occur makes both prosecution *and* prevention of genocide problematic, since destruction of a group by assimilation, prohibition of language and cultural practices, or the destruction of a group’s significant artifacts or monuments does not cross the threshold required for biological destruction of the group (Cryer, Robinson,

& Vasiliev, 2019, p. 223) Also, mass death focuses on a *successful result* rather than reasonably expected consequences and leaves a large gap through which perpetrators can slip. It is unlikely the drafters intended to encourage *genocidaire* success.

Court interpretations of Article II(c) are the most reliable. In 1998, the Trial Chamber of the International Criminal Tribunal for Rwanda adopted the following interpretation:

the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction...include, inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.

(*Akayesu*, 1998, p. 208; *Rutaganda*, 1989, p. 26). Recent ICC judgments show a trend toward including additional forms of destruction within the scope of Article II(c). In 1999, the International Criminal Court recognized sexualized violence, including rape, as a form of physical destruction (*Kayishema and Ruzindana*, 1999, p. 49). *Prosecutor v. Brdanin* held: "the term 'conditions of life' may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes" (*Brdanin*, 2004, para. 691). Ultimately, it is the Tribunal's job to evaluate the specific facts of each case. When there are a number of factors that contribute to the crime, a Tribunal should be presented with cumulative impacts that demonstrate both the perpetrator's deviousness and seriousness of the consequences.

The Article II(c) *conditions of life* clause contains its own intent elements: *deliberately* inflicting on the group conditions of life, and the *calculation* or premeditation, to bring about physical destruction. Deliberation is an intent component that requires showing a person meant to engage in the conduct or meant to cause a consequence by their actions. Lemkin described deliberate acts as a coordinated plan (Lemkin, 1946, p. 229). Destructive conditions must be inflicted intentionally. Conditions that are an unintentional by-product of a law or regulation do not satisfy the deliberation requirement (Schabas, 2000, pp. 292-293). Calculation is the knowledge component that combines planning with a particularly devious intent. A calculated action is one that is done with knowledge that consequences are the likely result of the act, and involves planning, premeditating, or purposing to destroy life by inflicting the conditions. The conditions imposed on the group must be premeditated, rather than merely negligent or reckless (Schabas, 2000, pp. 188-196). Both of the elements of intent and premeditation should be included in a legal analysis.

For the Article II(c) *actus reus*, the key elements are deliberate action, a premeditated consequences of the action, and the infliction of one or more destructive conditions (United Nations, 1951, Art. II). Each element of the conditions of life provision must be fully addressed in order to convince a Tribunal that the State itself should bear responsibility. The combination of all three requirements is a high bar for a prosecutor to meet. Inflicting conditions of life calculated to bring about the destruction of a group is a broad category of crimes that, if inflicted deliberately and premeditated to

bring biological destruction to members of a group, will be considered acts of genocide even if the conditions do not destroy members of the group.

## METHOD AND FRAMEWORK

### Discursive Legal Analysis Method

Through a lens of postcolonial legal theory, legal exegesis and hermeneutics methodology is used to engage in a comparative law discursive analysis of the *Johnson v. M'Intosh* case. Comparative legal theory uses description and analysis to compare and contrast similarities in and differences between different legal systems (Eberle, 2009, p. 452). Postcolonial legal theory analyzes the effects of colonization and imperialism on contemporary society and is a useful approach for analyzing the perpetuation of racism, slavery and genocide in law (European Center for Constitutional and Human Rights, n.d.). Legal exegesis is the actual interpretation of the text of the law (Bhattacharjee, 2012, p. 117), while hermeneutics focuses on the principles applied during interpretation (Zalta, 2021; Dyer, J., 2010). Hermeneutics and exegesis are frequently combined as scholars attempt to understand religious and legal texts. Because this analysis involves both religious and legal texts, hermeneutics and exegesis are particularly useful in this study, particularly because the legal principles examined herein are embraced by the legal community with the fervor of religious fanaticism.

Herein, a comparative law approach is used to develop an analytical framework from the international definition of the law of genocide. Using postcolonial legal theory, the framework is applied to the text of *Johnson v. M'Intosh* to determine to what extent the *M'Intosh* case deviates from the international norm of genocide prevention and

prohibition. During application of the framework, interpretation of the text of the case and precedential documents are necessary. This is where hermeneutical principles and exegesis, or interpretative practices make a contribution.

### Assembling a Framework

#### State Responsibility

Because genocide is a crime under customary, or *jus cogens*, law all States, even those who are not signatories to the Convention, have the responsibility to refrain from committing genocide. Even if reservations are attached, the signing State is not excused from the prohibition on genocide. Because the States as an abstract entity can be held responsible for genocide, if a State is accused, the question becomes a matter of whether the State had knowledge that its organs, or institutions, were implementing policies, practices, rules, and promulgating laws that trigger its responsibility to prevent genocide.

The framework derived from this rule is:

1. A State's plan, policy, practice, or pattern is identified as potentially genocidal
2. A State's institutions, administrative agencies, governing bodies, agents, or other organs of the State are actively implementing policy, law or practices that could be perceived as genocide;
3. The State encourages, furthers, ignores, or fails to prevent the continued implementation of the questionable policies, laws, or practices.

### Victim groups

Animus is evident on its face when an individual is referred to in terms of their association with a religion, or non-conformance to the perpetrator's preferred religion.

When animus is facially explicit, then this element is satisfied.

Animus can be implied by evaluating how the perpetrator defines the group and whether the perpetrator evidences bias against the group.

#### How the perpetrator defines the group

1. The perpetrator defines the target group in a positive manner by ascribing religious characteristics may include beliefs, values, practices, rituals, etc. or
2. The perpetrator defines the target group in a negative manner based on its non-acceptance or lack of adherence to the perpetrator's religious ideology
3. The perpetrator may assign characteristics to the group arbitrarily based on the perpetrator's biases or own religious beliefs about others.

To analyze whether the perpetrator evidences biases against the target group, each of the following elements must be satisfied:

1. The perpetrator treats the group differently than other groups who are not ascribed the characteristics identified by the perpetrator. This may include denying to members of the group the rights, benefits, entitlements, access to resources, and necessities for survival that others can access.
2. The victim is a member of the target group, "as such."
3. Individual victims are targeted because the perpetrator identifies the victim as a member of the group. Although in reality, the victim may or may not be a

member of the group, it is the perpetrator's belief, *not* the victim's actual identity that is used to make the determination.

### Specific Intent

The framework for special intent analysis consists of three primary elements:

1. An Article 2(2) act has been committed;
2. An Article II group was specifically targeted; and
3. The State intended at least partial destruction of the targeted group.

Specific intent can be either express (explicit) or implied. "Express intent" means that on its face, a plan, policy, pattern or strategy states that destroying the group is its purpose. If such exists, then the special intent is satisfied. If there is no express intent, intent may be implied if the following elements are met:

1. The State has a massive, widespread, or systemic plan, policy, pattern, or strategy that is deliberately biased against a group;
2. The State is aware that the purpose of the policy is to destroy a group;
3. The target group is actually being harmed; and
4. That the State has not been effective in correcting the plan, policy, pattern, or strategy.

For implied intent, consider the context and cumulative impacts of State acts, *inter alia*, "discriminatory animus, derogatory slurs, targeting of leaders for death or reputational harm, attacks on sacred sites" (Cryer, Robinson, & Vasiliev, 2019, p. 223).

### Acts Committed

The framework used in this analysis relies on recent rulings by the ICC to determine whether severing the Indian relationship with ancestral homelands fits the *actus reus* of the crime. The following three elements must be shown for an act to be defined as genocide by international law:

1. Inflicting one or more conditions that does not cause immediate physical destruction of a group, but ultimately seeks their biological death
2. The conditions are inflicted with the intent to physically destroy the group; and
3. The perpetrator planned or could reasonably have anticipated that physical destruction would occur as a consequence of the conditions

Factors to be considered include: a subsistence diet; systematic expulsion from homes; sub-minimum level of essential medical services; insufficient living accommodations; lack of proper housing, clothing, food, or proper sanitation; excessive work or physical exertion; sexualized violence; confiscation of property, looting, or curtailment of work that deprives victims of all means of livelihood; systematic denial of supplies or “the elementary means of existence” that are available to other sections of the population; condemning a group to a “wretched existence maintained by illicit or clandestine activities and public charity” (United Nations, 1947, p. 25).

## ANALYSIS AND DISCUSSION

## Determining the Responsibility of the United States

*The lady doth protest too much, methinks.*

– William Shakespeare, 1603

When a State is aware that plans, policies, or practices are potentially genocidal, or becomes aware of a potentially genocidal pattern, it has an obligation to intervene to prevent genocide. The *M'Intosh* Court took pains to elaborate the similarities between the discovery practices of the French, Dutch, British, Spanish, and Portuguese. Although the Court identified the pattern of dispossession, it embraced the practices and incorporated them into common law:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

(*M'Intosh*, 1823, p. 582).

The Court's failure to analyze the dispossession practices of Christian nations has enabled the continuation of destruction of Native peoples through the institutions, administrative agencies, governing bodies, and other organs of the United States. We find rapid loss of Indigenous presence within their homelands; rapid population decline; and

an increase in mental and physical instabilities. Furthermore, in its analysis of Christian European practices, the Court evidenced its knowledge of the effects on Native peoples when it stated:

However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

(*M'Intosh*, 1823, p. 592).

Regarding the legitimacy of the United States' claims in North America, the *M'Intosh* Court cited Queen Elizabeth I's grant to the Cabots as the root from which the United States' claim had sprung (*M'Intosh*, 1823, p. 576). The Court found that the United States followed the discovery practices of other nations of Christendom through its unequivocal acceptance of "that great and broad rule by which its civilized inhabitants now hold this country." *M'Intosh* directly states that the United States "hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest. (*M'Intosh*, 1823, 587). In the eyes of the Court, this acceptance and implementation of Christian discovery sufficiently legitimized the United States' claim to superior title.

By perpetuating the practices of discovery, the United States maintained the same conditions for destruction that served other nations of Christendom for hundreds of years:

“The whole theory of their titles to lands in America, rests upon the hypothesis, that the Indians had no right of soil as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives.” (*M’Intosh*, 1823, 567-568). Marshall cited both *Smith’s Wealth of Nations*, which promotes capitalist free market economies, and Locke’s *Two Treatises on Government*, which argues for private property, to support his position that Indians’ ancestral homelands could not possibly be construed as a legal title that the Court would recognize. From Marshall’s discussion of this topic, it is obvious that the Court knew about the history of Indian dispossession and that its affect and purpose was destabilization and dispossession of Native peoples.

A State as an entity may breach its obligations to prevent genocide if its institutions, administrative agencies, governing bodies, agents, or other organs actively implement genocidal policy, law or practices. The *Johnson v. M’Intosh* case is more than an isolated Court opinion that provides legal validation for Christian Discovery. After the Court refused to question whether dispossession of Native people was compatible with democratic government, the Court readily adopted the practices of dispossession into US common law, where it began to be implemented by the organs of the United States. Supreme Court cases that followed *M’Intosh* expanded on the principles of discovery. *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832), along with *M’Intosh*, provided a legal structure that U.S. legal institutions would use to strip Native peoples of their independence, homelands, prosperity, and humanity (Fletcher, 2006, 627-628; 693-694).

When a State encourages, furthers, ignores, or fails to prevent the continued implementation of policies, laws, or practices that may be genocidal, it breaches its obligation to prevent genocide. The job of a court, and especially the highest court, is to examine hard questions, consider the future implications of possible decisions, and take the course that is most reasonable and creates the least disruption. However, rather than ask questions about whether the underlying principles and practices of discovery were consistent with democracy and justice, the Court stated: “It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it” (*M’Intosh*, 1823, p. 589), and “Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted” (*M’Intosh*, 1823, p. 588). The Court protested no less than ten times in the *M’Intosh* case that it is not the Court’s place to question the validity of title by discovery, and refused to consider whether the ideologies of domination and Christian superiority it applied were valid. Instead, it accepted Christian discovery as legitimate on its face. In a very real and direct sense, the Court instituted Christian theology as the source of the United States’ governing authority.

The Supreme Court continues to implement Christian discovery principles in US federal Indian law, and has built an entire body of non-Constitutional law on Christian discovery . As of March 2022, Westlaw reports that, over the course of 199 years since the *M’Intosh* opinion became law, the case has been cited as precedent in 853 court documents and administrative decisions and in 2,215 secondary sources: primarily law

review articles. Focusing only on the precedential use of *M'Intosh* in court cases, Westlaw reports a mere three lower court cases in which *M'Intosh* is distinguished; there are no reported cases in which *M'Intosh* has been reversed, vacated, or overturned (Westlaw Campus Research, 2022, March 29).

Further, Congress, the President, and the US government's administrative agencies also adhere to the Court's institutionalization of Christian discovery, continuing to apply separate, extra-Constitutional legal principles to Indians alone (Williams, 1993, pp. 312-317). When considered in light of the United States' obligation to prevent genocide, the frequent, continued reliance on *M'Intosh* by all branches of government may constitute a breach of the United States' obligation to prevent genocide, if a case can be made that *M'Intosh* institutionalized genocide.

#### Whether "Indian" Constitutes A Religious Group

Applying the framework derived from the Convention, above, the first part of the analysis is two pronged: 1) determine whether the perpetrator has used arbitrary method to define a group and 2) determine whether group's identity is based on religious animus. The first step in this analysis is to determine whether "American Indian" constitutes a religious group that is protected by the Convention. "American Indian" is a term of legal art that combines racial, national, ethnic, and religious characteristics. In reality, "Indian" is a non-existent, fictitious group that originates in the Christian worldview that all non-Christian peoples are enemies. "Indian" has no meaning outside of the context of discovery. It is a shorthand term that Christian colonizers used and continue to use to

refer to the non-Christian peoples in the North America landscape that were destined for destruction. “Indian” was a catchall term, used interchangeably with others to evoke the imagery of monsters, savage, infidel, pagan, barbarians and so forth, and to dehumanize Native groups.

These terms had specific, religious meanings. Webster’s 1828 Dictionary defines “pagan” as “A heathen; a Gentile; an idolater; one who worships false gods” (Webster’s Dictionary, 1828, Pagan). “Savage” is defined as “Uncivilized; untaught; unpolished; rude; as savage life; savage manners.” In 1828, Webster’s supplied the following example of “savage” used in a sentence: “What nation since the commencement of the Christian era, ever rose from savage to civilized without Christianity?” (Webster’s Dictionary, 1828, Savage). Since standards of manners and social life were set by Christian colonizers, targeting Indian savages for civilization was to target a group (Indians) based on religious motivations. To civilize pagan savages was to convert non-Christians to Christianity and train non-Christian peoples in Christian culture. The common thread woven through these terms is the worldview that deviation from Christian religion and culture is a danger to social norms. This stereotyping enabled the U.S. to bypass the inconvenient truth that each Tribal group is unique, thus expediting the targeting of Native peoples for destruction.

The *M’Intosh* Court’s adoption of the savage construct perpetuated the hierarchy of inequality in which White, European, Christian nations occupied the highest position in the hierarchy while Dark, Savage, Anti-Christian Tribal people occupied the lowest position. John Marshall relied heavily on a long, literary and political tradition when he

enshrined the savage Indian “enemies of Christian civilization” stereotype into United States common law, writing,

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

(*M’Intosh*, 1823, pp. 589-590). If, as argued herein, Indian was a religious construct used to define victims targeted for destruction by Christians, was Chief Justice Marshall using Indian in a religious or secular context? In *M’Intosh*, the Court repeatedly contrasts “natives, who were heathens” with “Christian people,” using the classic language of savagery to support the opinion that Indians were godless, inferior, bloodthirsty, war-loving, unpredictable monsters (*M’Intosh*, 1823, pp. 563; 573; 577; 590).

Speaking about the British, *M’Intosh* states:

Thus asserting a right to take possession, notwithstanding the occupancy of the natives, *who were heathens*, and, at the same time, admitting the prior title of any *Christian people* who may have made a previous discovery ... The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, *heathen, and barbarous lands*, as were not actually possessed by any *Christian prince or people*. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms.

(*M'Intosh*, 1823, 576-577, emphasis added). This discourse illustrates Marshall's knowledge about how the stereotype was applied to non-Christian people. In the previous quote, at 589-590, Marshall's detailed description of the unchristian nature of Indians laid *blame on the victims* to justify Christian violence.

The Chief Justice deliberately chose the term "Indian" rather than naming specific tribes who he thought were blameworthy. Grouping all Indians, "friendly," "hostile," "assimilated," "traditionalists," is arbitrary on its face, since the term assigns religious hostility to all Native peoples, regardless of their relationship with the United States. Also, we can peek into Marshall's positionality through his personal correspondence. Just one year after the *M'Intosh* case, Marshall responded to a sermon by Reverend Jasper Adams which advocated for retention of the Christian religion as the foundation of the United States' institutions:

It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity, & did not often refer to it, & exhibit relations with it. Legislation on the subject is admitted to require great delicacy, because freedom [sic] of conscience & respect for our religion both claim our most serious regard (Adams, 1833, as cited in *The Constitutional Principle*). (See entire text of this letter in Appendix 2). Marshall's knowledge and approval of national laws that follow Christian principles reinforces the assertion that Indians were perceived and managed as a non-Christian religious group.

The *M'Intosh* case uses the term "Indian" in the same sense that it had been used since the Spaniards coined the term. The widely-accepted fiction of savagery originating

in ancient Greek fables and infused with Christian taboos, became a basis for defining Indians as enemies of Christian civilization. Given the use of biased, religiously-based terminology in the *M'Intosh* case, it is apparent that, as used by the nations of Christendom and in *M'Intosh*, the term "Indian" is used to describe a religious group that is defined by its non-adherence to Christianity. Therefore, "Indian" is a group protected under Article II.

### Specific Intent to Destroy Indians, As Such

Specific intent requires a showing of animus against the group, as such. In the context of *M'Intosh*, this means showing animus against the Piankeshaw Tribe, as part of the victim group: Indians. To determine whether the United States through its Supreme Court had the requisite intent to destroy Indians, we must determine if the Court's opinion targeted the Piankeshaw Tribe as an individual group or as part of the target group of "Indians."

While *M'Intosh* was about the Piankeshaw's capacity to dispose of its land as it pleased, the Court referred to the Tribe as "Indians" and broadly applied its ruling to all Indians in North America. The Court did not narrowly address the Piankeshaw Tribe. Rather, it applied its ruling to the Piankeshaw as part of the larger group of Indians - the victim group. Had the case applied only to the Piankeshaw, intent would be somewhat less clear. The fact that the Piankeshaw Tribe was willing to sell a parcel of its land to a settler may indicate that the Tribe was on good terms with its neighbors. The Court did not discuss the Piankeshaw in relation to the broad stereotypes about all Indians. Instead,

it constructed an arbitrary stereotype that it applied to all Indians in North America, including the Piankeshaw.

Specific intent requires the objective to destroy a protected group, *as such*, in whole or in part. Specific intent is explicit throughout the development of Christian discovery, from Urban II to the United States. Urban commanded Franks to “destroy that vile race” of Saracens and pagans; Popes Nicholas V and Alexander VI authorized enslavement, dispossession, and destruction of Saracens, pagans and Church enemies; Victoria provided legal justification for warfare against non-Christians who were hostile by definition. The British monarch rejoiced in the destruction caused by smallpox, and colonial military and civilian personnel openly voiced intent to weaponize smallpox to destroy Indians. If Indians survived these onslaughts, common law jurisprudence legitimized forcible removal, encroachment, resource theft, and outright warfare. Aligned with the history of discovery that applied a different set of rules solely to Native peoples, *M’Intosh* created a separate set of common law rules for Indians only.

The parties in *M’Intosh* asked the Court to rule on a narrow question: validity of a title received directly from the “Piankeshaw Indians,” but the Court’s opinion applied broadly to all Indian lands, even those outside the political borders of the United States as they existed at the time. It is apparent throughout the case that *M’Intosh* is speaking about Indians, as Indians, so there is little question that Indians as a group were the target of the *M’Intosh* case. Without Indians, the case would have been pointless.

### Strategic, Arms-Length Destruction

*Past occurrences of genocide do not belong to the past but are, on the contrary, extremely current. They have shaped our societies into post-genocidal societies in which the trauma of these genocides is very much present.*

– Caroline Fournet, 2007.

The *M'Intosh* case validated the pre-existing, strategic, slow destruction of Indians. Although from its beginning, the United States used coercive plans and strategies to induce Indians to abandon their lands, the *M'Intosh* case cemented the practices of Christian Discovery into United States domestic common law, legitimizing the practice of pushing Indians off their homelands and setting the stage for physical destruction of Indians (Fletcher, 2006, pp. 631-634). Despite the *M'Intosh* Court's observance that Indians could retain "the soil" as long as they actively occupied it, this was disingenuous since politicians had already planned to dispossess and destroy Indians long before the *M'Intosh* case ever came before the Court. George Washington was cognizant, and the Continental Congress concurred, that settlement of the West was wholly dependent on peace with the Indians, so Indian pacification should be achieved by purchase rather than warfare (Prucha, 1975, 1-3). *M'Intosh* was the legal device necessary to secure the international practices of discovery within domestic law. The benefit to the United States was that once Indians vacated the land for whatever reason, the United States could claim it without the expense of purchase (Kades, 2000, pp. 1104).

Thomas Jefferson envisioned three potential options for Indians: Coercing Indians into debt to induce sales of their lands, then incorporating them within the United States; Indians voluntarily removing beyond the Mississippi to escape increasing competition for resources; and, if Indians resisted the first two options, the United States military would physically remove them beyond the Mississippi. Jeffersonian policy did not envision a United States in which Indians continued to be independent within their ancestral homelands. Instead, the policy presumed inevitable Indian disappearance to conveniently remove all obstacles to the United States' exercise of "absolute title" (Jefferson, 1803, p. 369-71). James Monroe adopted and expanded Jefferson's presumption, when he advocated to Congress for Cherokee removal in 1825: "without a timely anticipation of and provision against the dangers to which [the Cherokee Tribe] are exposed...their degradation and extermination will be inevitable" (Prucha, 2000, pp. 39-40).

The United States was not ignorant of the potential consequences of its absolute control over Indian lands. Congress, the President, and the Supreme Court worked together to implement destructive policy. Reducing Indian land ownership to mere "occupancy" incentivized encroachment by setting off a chain of events that required Indians to survive by assimilation or die from starvation (Prucha, 2000, pp.47-48; Heat-Moon, 2013). Not only could the government have reasonably anticipated a number of outcomes, the government strategy was to put the law and policy in place that would effect these outcomes. Agents of the United States and land-hungry settlers were already engaged in aggressive action to push Indians off their lands. Jefferson and Monroe both also admitted to this, and the *M'Intosh* Court acknowledged this was actually the case. As

settlement moved into Indian homelands, the game were driven out and the Indians were forced to follow in order to feed and clothe themselves (*M'Intosh*, 1823, pp. 590-591; Barsness, 1985, p. 126).

Additional elimination methods included bounties for Indian scalps; imprisonment in small enclaves far from their homelands; denial of legal capacity; introducing insufficient, spoiled, and unfamiliar foods; use of alcohol to impair decision-making, especially during treaty negotiations; creation of a predatory credit scheme requiring land forfeiture in lieu of debt repayment; and outright military removal (Madley, 2015, p. 114; Prucha, 1975, pp. 58-59, 81-82, 92-93; Indian Appropriations Act, 1851; Indian Appropriations Act, 1871; Least Heat-Moon, 2013; Wallace & Powell, 2015, pp. 268-269; Jefferson, 1803, pp. 369-71). The primary policy goals of these actions were to erase the presence of Indians from their ancestral homelands and confine them within lands considered the most barren, where they could complete their inevitable journey to extinction (Jefferson, 1803, pp. 369-71).

The *M'Intosh* Court made several statements that show calculation (knowledge of a consequence) and deliberation (premeditation). In other words, the Court knew that the Indian population decline was the likely result if Tribes were stripped of their ability to make independent decisions about their lands, and despite that knowledge, the Court made the decision to strip Indians of this ability.

#### Knowledge and Premeditation

Aware of the impact of encroachment on Tribal survival, the Court wrote,

As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out.

(*M'Intosh*, 1823, pp. 590-591). Despite knowing the consequences of land loss, the Court held that Indians would be permitted to live on their ancestral homelands only until the US government extinguished the occupancy right, since Indians were stripped of their independence at the moment Christians became aware of the Americas. The Court claimed it was not its place to question the long tradition of land theft, writing, "Conquest gives a title which the Courts of the conqueror cannot deny" (*M'Intosh*, 1823, p. 588).

#### Imposed conditions

The conditions imposed as a result of the Court's deliberate, calculated action, was that Indians would be dispossessed of their land whenever the US government decided it was time to do so. The conditions imposed have led to chaos, diminished physical and mental health, family separations, forcible removals, kidnapped children, involuntarily sterilized women, to name just a few of the outcomes of this policy. These outcomes have been known by the government for at least 150 years.

Prevention of precipitous decline in "Indian" population between 1840 and 1920 could have been halted by reversing U.S. implementation of Christian discovery policy. Negative physical and mental health outcomes in which Native people are vastly overrepresented is a direct result of the loss of access to traditional resources. The

massive kidnapping and disappearance of Indian children due to the policy of mandatory boarding school attendance – resulting in abuse, sickness and death for so many children— is another direct outcome of this policy. Since Indians were confined on reservations and could not control their property, they had no ability to prevent Indian agents from trespassing and stealing their children. The brutal removals of Indian people, without warning, and the abusive treatment as they walked on foot for hundreds of miles is another direct result of the Supreme Court’s *M’Intosh* decision (Chadhuri, 2001, 152-153; Montiero, 2000). The Indian policies developed by the United States were a direct result of the *M’Intosh* decision, with foreseeable consequences.

Even if one accepts the strained argument that these results were not foreseeable, the consequences of the policy were evident long before these policies were terminated. The Court’s deliberate imposition of physically destructive conditions via *M’Intosh* were done with the Court’s knowledge of the potential outcomes. Given that the *M’Intosh* case continues to be the foundation of Indian law and policy, the failure to reverse *M’Intosh* and return homelands to the survivors is a continued, calculated, deliberate imposition of destructive conditions on Indians.

#### Cumulative Impact of Trauma

*Exposure to trauma and prolonged stress not only may increase the risk of serious mental health problems but are also cardiotoxic.*

– Kubzansky, Koenen, Spiro, Vokonas, & Sparrow, 2007.

Alexander C. McFarlane reports that PTSD is a long-term cost of traumatic stress and is one of the outcomes associated with trauma exposure (McFarlane, 2010, p. 3). A

wide range of chronic illnesses are associated with PTSD including fibromyalgia, high cholesterol, irritable bowel, chronic fatigue, medically unexplained musculoskeletal pain, hypertension, cardiovascular disease, increased blood pressure and heart rate, sweating in the hands, increased activity of the sympathetic nervous system, obesity, abnormally high concentration of fats or lipids in the blood (hyperlipidemia), and increased risk of early age heart disease, arteriosclerosis, coronary heart disease, and chronic ischemic heart disease. PTSD can also disrupt the glucocorticoid system, which maintains physiological equilibrium; helps reduce inflammation and metabolize fats, proteins, and carbohydrates; and relates to fear conditioning (McFarlane, 2010, pp. 4-7; Kubzansky et al, 2007, p.7).

If a person experiences multiple traumas, the likelihood of PTSD increases. More than one trauma can have a cumulative effect on a person's physical health. McFarlane explains that death can result from "allostatic load," defined as "wear and tear on the body in response to repeated cycles of stress, primarily affecting the endocrine and nervous systems" (McFarlane, 2010, p. 5). PTSD studies conducted with individuals who experienced warfare, childhood trauma, incarceration, domestic violence, natural disasters, and substance abuse also report increased suicide risk (Knox, 2008, pp. 1-2).

Based on his work with Aboriginal Australians, Richard Trugden has identified a number of traumas resulting from colonization. Among those that can be linked to the implementation of *M'Intosh* include: destruction of tribal and family order; assignment of demeaning identity markers (ie, naming and imagery); dominant society's denial of that harm was done; destruction of resources that are key to cultural reproduction; introduction of many previously unknown diseases in rapid succession; destruction of

tribal economy and trade system; loss and desecration of sacred and traditional places; unacknowledged or dismissive treatment of massacres and slaughters; institutionalization in boarding schools and mental wards; unconsented sterilization; institution of rations and welfare system; deprivation of traditional medicines and healing systems; loss of traditional healers; forced dependency and helplessness; forced acculturation; forced religious conversion; enforcement of alien jurisprudence system; forced education in alien technologies; alien foods and production methods; influx and encroachment of immigrants into homelands and subsequently assigned reservations; inability to transmit cultural and traditional knowledge; alien language and world view; introduction of alcohol and drugs; loss of traditional forms of employment; relocation to alien environment; and loss of definite purpose in life. (Trugden, 2000, pp. 221-222). The after-effects of historical trauma can “manifest as anxiety, depression, feelings of marginality and alienation, heightened psychosomatic symptoms, and identity confusion” (Duran, Duran, Heart, & Horse-Davis, 1998, pp. 343-345). When trauma is unresolved, it can accumulate across the life span of an individual and across generations (Duran, Duran, Heart, & Horse-Davis, 1998, pp. 342).

If we accept the findings of medical research: That any one of these factors is potentially traumatizing, and that multiple factors increases the likelihood of trauma, then experiencing a significant number of the 28 impacts listed above, either simultaneously or in rapid succession, is likely to be deeply traumatizing for many who survived outright killings. Intergenerational Post-Traumatic Stress Disorder (IPTSD) is one of many outcomes resulting from Native groups’ total loss of control and security. Stannard

applies the term, “American Indian Holocaust” (Stannard, 1992). Duran et al refer to this as the “soul wound” (Duran, Duran, Heart, & Horse-Davis, 1998, p. 341). Systematic, unacknowledged genocide of Native peoples has been identified as a major cause of chronic physical and mental morbidity leading to premature death for Native people (McFarlane, 2010, p. 3). The Indian Health Service reports significantly higher ratio of IPTSD-related disease and morbidity for American Indians compared to all other populations. This includes cardiovascular diseases (1:1.1), chronic liver disease and cirrhosis (1:4.4), pneumonia and influenza (1:1.6), diabetes mellitus (1:3.3), suicide (1:1.7), homicide (1:1.4), tuberculosis (1:5.3), and motor vehicle accidents (1:3.3) (Brenneman, Handler, Kaufman, & Rhoades, 2000, pp.106).

Mainstream approaches for treating IPTSD are not equipped to recognize the serious traumas resulting from the U.S. policy of Indian land loss, nor are mainstream methods culturally appropriate for treating intergenerational traumas experienced by Native survivors of genocide. Often traditional Indigenous grief interventions are centered around ceremony and ritual, and require a knowledgeable medicine person or spiritual leader (Duran & Duran, 1995, p. 181). The 1877 Dawes Act stripped Indians of 90 million acres and the liberty to continue religious practice which often include traditional healing and wellness ceremonies (Zotigh, 2018). Forced assimilation was a trauma that compounded past losses, making it impossible for Native peoples to counteract the ever-present devastation (Duran, Duran, Heart, & Horse-Davis, 1998, pp. 341-342). Relevant to present conditions arising from *M’Intosh*, the connection between land loss and chronic disease has never been officially recognized or actions taken to

address the underlying causes of these diseases. There are, of course, an abundance of *Western* medical and political “solutions” that address *symptoms*. The United States has established (and underfunded) an entire Bureau of Indian Affairs to address Indian matters (Deloria, 1969, pp. 125-145). Relying on a genocidal system to suppress symptoms caused by institutionalized genocide is no solution. In the face of overwhelming changes such as those described in this analysis, coupled with the inability to grieve and heal, it is no wonder that the Native population decline correlates so closely with the loss of homelands.

The chronic physical and mental conditions that Native people suffer today are the intergenerational consequences of the genocide that the Supreme Court legalized. The legacy of *M’Intosh* and the Christian Doctrine of Discovery have caused the destruction of countless Indian lives. While Indian policy has been through a range of phases from extermination to self-governance, the *M’Intosh* case has never been repealed and it continues to be used in courts of law in the United States to physically eliminate Indians by a slow, arms-length process.

## CONCLUSION

The analysis provided herein is not an exhaustive examination of the genocidal principles contained in the *Johnson v. M'Intosh* case. The construction and application of the limited scope framework to analyze the Supreme Court's *M'Intosh* case is intended to be a model for identifying laws and policies that implement an agenda of genocide. Understanding how the *M'Intosh* case is genocidal is key to understanding how the body of Indian Law is genocidal. Because *M'Intosh* is the foundation of Federal Indian Law in the United States, its poison flows through the *entire body* of Indian Law. However, *M'Intosh* does not stand alone. It is the first case in the Marshall Trilogy that established an institutionalized, systematic genocide. The framework developed herein can be expanded to include other elements of the international law on genocide and can provide a more thorough analysis of the *M'Intosh* case, as well as other key Indian law cases, including the entire Marshall Trilogy.

*Johnson v. M'Intosh* was an important legal gloss for the United States to create conditions that could be reasonably expected to result in the physical destruction of Indians. By laying a domestic common law foundation for conversion of Indian homelands to settler ownership, the Supreme Court institutionalized a system of Indian elimination that could, would, and continues to be slowly carried out by all branches of government.

Because this thesis is an attempt to model a framework for analyzing case law, the only recommendation that can be suggested at this time is to expand the framework and

continue using it to analyze key Indian laws. A disciplined, methodical analysis of *M'Intosh* and other key cases can show that genocide continues to be the foundation for the body of Indian Law and that the United States engages in genocide when it applies these genocidal precedents. The purpose for such a project is not merely academic. A careful analysis could build a case for overturning genocidal law and policy in the U.S., or for an appeal to an international tribunal. The overarching goal of such a project should be to purge the ideology of Christian discovery from the laws of the United States and to create the conditions in which future generations of Native people can choose whether to be restored to their homelands.



*They came to me with talking papers after they gave me 160 acres of allotment land. Then with papers they said that if I gave the land I would have food for my relatives and myself. I signed over three-fourths of my land in exchange for a guarantee for food. I got tricked again. I had become Christian and I had forgotten how deceptive they can be. I thought they were friends. But I lost—we don't have any beans or flour. Whatever little land you have, hold onto it. If it takes the rest of your life, learn about talking papers. It's full of trickery.*

– James Scott, Mvscogee Storyteller and Trail of Tears Survivor.

*The Hopi and all original native people hold the land in balance by prayer, fasting and performing ceremonies. Our spiritual Elders still hold the land in the Western Hemisphere in balance for all living beings, including humans. No one should be relocated from their sacred homelands in this Western Hemisphere or anywhere in the world. Acts of forced relocation, such as Public Law 93-531 in the United States, must be repealed.*

– Thomas Banycaya, Hopi messenger to the United Nations

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## APPENDICES

**Appendix A: Convention on the Prevention and Punishment of the Crime of Genocide****Convention on the Prevention and Punishment of the Crime of Genocide**

Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948  
Entry into force: 12 January 1951, in accordance with article XIII

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

**Article I**

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

**Article II**

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

### **Article III**

The following acts shall be punishable:

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

### **Article IV**

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

### **Article V**

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

### **Article VI**

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

### **Article VII**

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

**Article VIII**

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

**Article IX**

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

**Article X**

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

**Article XI**

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

**Article XII**

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

**Article XIII**

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a procès-verbal and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

**Article XIV**

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

**Article XV**

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

**Article XVI**

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

**Article XVII**

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

- (a) Signatures, ratifications and accessions received in accordance with article XI;
- (b) Notifications received in accordance with article XII;
- (c) The date upon which the present Convention comes into force in accordance with article XIII;
- (d) Denunciations received in accordance with article XIV;
- (e) The abrogation of the Convention in accordance with article XV;
- (f) Notifications received in accordance with article XVI.

### **Article XVIII**

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

### **Article XIX**

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

Source: United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1951.

## Appendix B: Excerpt from *Johnson v. M'Intosh*

Pages 587-592

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never \*588 been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title \*589 to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the

government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, \*590 or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled \*591 into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the

absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be **\*592** adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

### Appendix C: John Marshall letter to Jasper Adams

According to the source, the text of the following letter is included in Jasper Adams' handwritten notes that are in the repository of the William L. Clements Library of the University of Michigan. The notes are included with the printed copies of the sermon, "The Relation of Christianity to Civil Government in the United States: Sermon preached in St. Michael's Church." I have been unable to obtain copies of the original.

May 9, 1833

Chief Justice Marshall to the Author

Richmond May 9th , 1833.

Reverend Sir,

I am much indebted to you for the copy of your valuable sermon on the relation of Christianity to civil government preached before the convention of the Protestant Episcopal Church in Charleston, on the 13th of Feby. last. I have read it with great attention & advantage.

The documents annexed to the sermon certainly go far in sustaining the proposition which it is your purpose to establish. One great object of the colonial charters was avowedly the propagation of the Christian faith. Means have been employed to accomplish this object, & those means have been used by government.

No person, I believe, questions the importance of religion to the happiness of man even during his existence in this world. It has at all times employed his most serious meditation, & had a decided influence on his conduct. The American population is entirely Christian, & with us, Christianity & Religion are identified. It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity, & did not often refer to it, & exhibit relations with it. Legislation on the subject is admitted to require great delicacy, because freedom [sic] of conscience & respect for our religion both claim our most serious regard. You have allowed their full influence to both.

With very great respect,

I am Sir, your Obedt.,

J. Marshall.

## **Appendix D: Scholarly definitions of genocide**

Source (unless otherwise noted): Jones, 2011, pp. 16-20.

### **Lemkin 1944**

By "genocide" we mean the destruction of a nation or an ethnic group ... Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group... Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals (Lemkin, 2005, p. 79).

### **Drost 1959**

Genocide is the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such (p. 16)

### **Dadrian 1975**

Genocide is the successful attempt by a dominant group, vested with formal authority and or with preponderant access to the overall resources of power, to reduce by coercion or lethal violence the number of a minority group whose ultimate extermination is held desirable and useful and whose respective vulnerability is a major factor contributing to the decision for genocide (p. 16).

### **Horowitz 1976**

Genocide is a structural and systematic destruction of innocent people by a state bureaucratic apparatus... Genocide represents a systematic effort overtime to liquidate a national population, usually a minority... And functions as a fundamental political policy to assure conformity and participation of the citizenry (p. 16).

**Kuper 1981**

I shall follow the definition of genocide given in the UN convention. This is not to say that I agree with the definition. On the contrary I believe a major omission to be in the exclusion of political groups from the list of groups protected. In the contemporary world, political differences are at the very least as significant a basis for massacre and annihilation as racial, national, ethnic or religious differences.

Then too, the genocides against racial, national, ethnic or religious groups are generally a consequence of, or intimately related to, political conflict. However, I do not think it helpful to create new definitions of genocide, when there is an internationally recognized definition and a genocide convention which might become the basis for some effective action, however limited the underlying conception. But since it would vitiate the analysis to exclude political groups, I should refer freely ... To liquidating or exterminatory actions against them (pp. 16-17).

**Porter 1982**

Genocide is the deliberate destruction, in whole or in part, by a government or its agents, of a racial, sexual, religious, tribal or political minority. It can involve not only mass murder, but also starvation, force deportation, and political, economic and biological subjugation. Genocide involves three major components: ideology, technology, and bureaucracy/organization (p. 17).

**Bauer 1984**

Genocide is the planned destruction, since the mid 19th century, of a racial, national, or ethnic group as such, by the following means: (a) selective mass murder of elites or parts of the population; (b) Elimination of national (racial, ethnic) culture and religious life with the intent of "denationalization"; (C) enslavement, with the same intent; (D) destruction of national (racial, ethnic) economic life, with the same intent; (E) biological decimation through the kidnapping of children, or the prevention of normal family life, with the same intent... Holocaust is the planned physical annihilation, for ideal logical or pseudoreligious reasons, of all the members of a national, ethnic, or racial group (p. 17).

**Thompson and Quets 1987**

Genocide is the extent of destruction of a social collectivity by whatever agents, with whatever intentions, by purposive actions which fall outside the recognized conventions of legitimate warfare (p. 17).

**Wallimann and Dobkowski 1987**

Genocide is a deliberate, organized destruction, in whole or in part, of racial or ethnic groups by a government or its agents. It can involve not only mass murder, but also

forced deportation (ethnic cleansing), systematic rape, and economic and biological subjugation (p. 17-18).

**Huttenbach 1988**

Genocide is any act that puts the very existence of a group in jeopardy (p. 18).

**Fein 1988**

Genocide is a series of purposeful action by a perpetrator(s) to destroy a collectivity through mass or selective murders of group members and suppressing the biological and social reproduction of the collectivity. This can be accomplished through the imposed proscription or restriction of reproduction of group members, increasing infant mortality, and breaking the linkage between reproduction and socialization of children in the family or group of origin. The perpetrator may represent the state of the victim, another state, or another collectivity (p. 18).

**Chalk and Jonassohn 1990**

Genocide is a form of one – sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator (p. 18).

**Fein 1993**

Genocide is sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through introduction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim (p. 18).

**Katz 1994**

Genocide is the actualization of the intent, however successfully carried out, to murder in its totality any national, ethnic, racial, religious, political, social, gender or economic group, as these groups are defined by the perpetrator, by whatever means (p. 18).

**Charney 1994**

Genocide in the generic sense means the mass killing of substantial numbers of human beings when not in the course of military action against the military forces of an avowed enemy, under conditions of the essential defenselessness of the victim (p. 19).

**Horowitz 1996**

Genocide is herein defined as a structural and systematic destruction of innocent people

by a state bureaucratic apparatus... Genocide means the physical dismemberment and liquidation of people on large scales, and attempt by those who rule to achieve the total elimination of a subject people (p. 19).

### **Harff 2003**

Genocides and politicides are the promotion, execution, and/or implied consent of sustained policies by governing elites or their agents – or, in the case of Civil War, either of the contending authorities – that are intended to destroy, in whole or part, a communal, political, or politicized ethnic group (p. 19).

### **Midlarsky 2005**

Genocide is understood to be the state - sponsored systematic mass murder of innocent and helpless men, women, and children to noted by a particular ethnoreligious identity, having the purpose of eradicating this group from a particular territory (p. 19).

### **Leavene 2005**

Genocide occurs when a state, perceiving the integrity of its agenda to be threatened by an aggregate population - defined by the state as an organic collectivity, or series of collectivities - seeks to remedy the situation by the systematic, en masse physical elimination of the aggregate, in toto, or until it is no longer perceived to represent a threat (p. 19).

### **Sémelin 2005**

I will define genocide as that particular process of civilian destruction that is directed at the total eradication of a group, the criteria by which it is identified being determined by the perpetrator (p. 20).

### **Chirot and McCauley 2006**

Genocidal mass murder is politically motivated violence that directly or indirectly kills a substantial proportion of a targeted population, combatants and noncombatants alike, regardless of their age or gender (p. 20).

### **Shaw 2007**

Genocide is a form of violence social conflict, or war, between armed power organization that aim to destroy civilian social groups and those groups and other actors who resist this destruction (p. 20).

**Bloxham 2009**

Genocide is the physical destruction of a large portion of a group in a limited or unlimited territory with the intention of destroying that groups collective existence (p. 20).