

THE DOCTRINE OF DISCOVERY:

The International Law of Colonialism



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Indigenous Peoples around the world have been seriously and negatively impacted by the international law of colonialism, which is known today as the Doctrine of Discovery.¹ The Doctrine was developed primarily in the fifteenth century by Spain, Portugal, England, and the Church.² The Doctrine is not just an interesting relic of world history but instead remains an applicable principle in many countries and also continues to limit the human, sovereign, commercial, and property rights of Indigenous Peoples and their governments. The Doctrine was used by European nations to justify their desires to acquire riches and empires around the world. The European powers primarily justified these acquisitions and their ambitions by ethnocentric allegations of cultural, racial, governmental, and religious superiority over the rest of the world.

Indigenous Nations and Peoples, and everyone for that matter, need to understand how this international law of colonialism was developed, how it was justified, how it was used to subjugate Indigenous Peoples, how it was used to steal Indigenous lands, assets, and rights, and how it has impacted Indigenous Peoples from the onset of colonization to the present day.

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¹ See Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847 (2011); Robert J. Miller & Micheline D'Angelis, *Brazil, Indigenous Peoples, and the International Law of Discovery*, 37 BROOK. J. INT'L L. 1 (2011); Robert J. Miller, Lisa LeSage & Sebastián López Escarcena, *The International Law of Discovery, Indigenous Peoples, and Chile*, 89 NEB. L. REV. 819 (2011); ROBERT J. MILLER, JACINTA RURU, LARISSA BEHRENDT & TRACEY LINDBERG, *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES* (2010).

² ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED*; THOMAS JEFFERSON, *LEWIS & CLARK, AND MANIFEST DESTINY* 9–33 (2006).

Similarly, one must understand another principle of international law to fully appreciate the modern-day importance of the fifteenth century Doctrine of Discovery. According to the principle of “intertemporal” law, modern-day territorial boundaries and land titles “are to be judged by the law in force at the time the title was first asserted and not by the law of today.”³ Consequently, how European countries and their colonies divided up the lands and assets of Indigenous Peoples and Nations in the distant past still determines national boundaries today and thus is highly relevant to Indigenous Peoples.

The international law that regulated nearly six hundred years of European colonization can be traced in church law and world history to at least the Crusades to reclaim the Holy Lands in 1096–1271.⁴ The modern day version of this legal principle started to emerge in the 1430s due to Spanish and Portuguese claims to control and colonize the Canary Islands.⁵ In 1436, Portugal finally convinced Pope Eugenius IV to issue a papal bull granting Portugal exclusive control of the Islands to civilize and convert the Canary Islanders to the “one true religion” and “for the salvation of the souls of the pagans of the islands.”⁶ As Portugal expanded its explorations and claims down the west coast of Africa, it convinced Pope Nicholas to issue another bull. On January 8, 1455, the Pope granted Portugal the power:

to invade, search out, capture, vanquish, and subdue all Saracens [Muslims] and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and to convert them to his . . . use and profit . . . [and to] possess, these islands, lands, harbors, and seas, and they do of right belong and pertain to the said King Alfonso and his successors”⁷

Not surprisingly, in 1493 Spain also sought papal approval for the discoveries Columbus made in the New World. According to the developing international law, Pope Alexander VI issued three bulls and ordered that the lands Columbus discovered, which were “not hitherto discovered

³ JOHN DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 113–14 (2d ed. 2000).

⁴ See, e.g., ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 14 (1990); *THE EXPANSION OF EUROPE: THE FIRST PHASE* (James Muldoon ed., 1977); CARL ERDMANN, *THE ORIGIN OF THE IDEA OF CRUSADE* (Marshall W. Baldwin & Walter Goffart trans., Princeton Univ. Press 1977) (1935).

⁵ MILLER, *NATIVE AMERICA*, *supra* note 2, at 13–14.

⁶ WILLIAMS, *supra* note 4, at 71.

⁷ *EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648* 23 (Frances Gardiner Davenport ed., 1917).

by others,” belonged to Spain.⁸ The Pope further granted Spain lands it would discover in the future if they were not “in the actual possession of any Christian king.”⁹ The Pope then drew a line of demarcation from the North to the South Poles, 300 miles west of the Azores Islands, granting Spain title to the lands “discovered and to be discovered” west of that line, and granting Portugal the same rights east of the line.¹⁰ In 1494, Spain and Portugal signed the treaty of Tordesillas moving the line further west to give Portugal part of the New World, today’s Brazil.¹¹ In 1529, in the Treaty of Zaragoza, the countries extended the line around the globe and divided up the Pacific Ocean and its islands and lands.¹²

Thereafter, Spain and Portugal applied the Doctrine of Discovery in Africa, Asia, and the Americas.¹³ Jealous to acquire empires and riches themselves, England, Holland, and France also used this international law to claim rights in North America and elsewhere.¹⁴ The colonial-settler societies that resulted from European colonization of much of the world, including the United States, continue to apply the Doctrine of Discovery against Indigenous Nations today.¹⁵

A correct understanding of the Doctrine of Discovery and its worldwide application can be gained by studying the world’s leading court

⁸ *Id.* at 9–13, 23, 53–56.

⁹ *Id.*

¹⁰ THE SPANISH TRADITION IN AMERICA 38 (Charles Gibson ed., 1968); CHURCH AND STATE THROUGH THE CENTURIES 156 (Sidney Z. Ehler & John B. Morrall trans. & eds., 1967); SAMUEL ELIOT MORISON, ADMIRAL OF THE OCEAN SEA: A LIFE OF CHRISTOPHER COLUMBUS 368–73 (1942).

¹¹ FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 1684 (W. Keith Kavenagh ed., 1973); THE SPANISH TRADITION, *supra* note 10, at 42–51.

¹² SAMUEL ELIOT MORISON, THE EUROPEAN DISCOVERY OF AMERICA: THE SOUTHERN VOYAGES A.D. 1492–1616 476–77, 490–91, 498 (1974).

¹³ MILLER, NATIVE AMERICA, *supra* note 2, at 13–17; Robert J. Miller, *The International Law of Discovery: Acts of Possession on the Northwest Coast of North America*, in ARCTIC AMBITIONS: CAPTAIN COOK AND THE NORTHWEST PASSAGE (James K. Barnett & David L. Nicandri eds., 2015); Manuel Servin, *Religious Aspects of Symbolic Acts of Sovereignty*, 13 THE AMERICAS 255 (Jan. 1957); Manuel Servin, *The Act of Sovereignty in the Age of Discovery* (Jan. 1959) (unpublished Ph.D. dissertation, University of Southern California).

¹⁴ MILLER, RURU, BEHRENDT & LINDBERG, *supra* note 1; MILLER, NATIVE AMERICA, *supra* note 2, at 17–21, 25–33; Miller, *The International Law of Discovery*, *supra* note 13; Servin, *The Act of Sovereignty*, *supra* note 13.

¹⁵ See *supra* notes 13–14. Scandinavian countries have also applied aspects of the Doctrine of Discovery against the Sami people. See Landowners and right-holders in Manndalen, et al v. The Norwegian State, Serial No. 5B/2001, No. 340/1999 (2001) (Supreme Court of Norway); Riast/Hylling Sami v. Kjell Bendixvold et al, Frostating Lagmannsrett LF-1995-00034 A, Supreme Court HR-1997-00061 A, No. 96/1996 (1997) (Norway); North Frostviken Sami Village v. State, S.Ct. Decision No. DT 2, Case No. 324/76 (1981) (Supreme Court of Sweden); Veli-Pekka Lehtola, *The Sami Siida and the Nordic States From the Middle Ages to the Beginning of the 1900s*, in CONFLICT AND COOPERATION IN THE NORTH 183–94 (Kristina Karppi & Johan Eriksson eds., 2000). European countries also used aspects of the Doctrine to claim and divide Africa in 1885. See M.E. CHAMBERLAIN, THE SCRAMBLE FOR AFRICA 28–83 (2d ed. 1999); S.E. CROWE, THE BERLIN WEST AFRICAN CONFERENCE 1884–1885 3, 95–191 (1942).

case on Discovery: the United States Supreme Court case of *Johnson v. McIntosh*.¹⁶ The *Johnson* case has heavily influenced how colonial-settler societies have defined Discovery and their “rights,” and how they have diminished the rights of Indigenous Nations and Peoples. *Johnson* has been relied on by many countries to decide issues regarding colonization and the rights of Indigenous Nations. The case has been cited scores of times by courts in Australia,¹⁷ Canada,¹⁸ New Zealand,¹⁹ and the United States.²⁰ The English Privy Council cited *Johnson* three times in cases regarding colonization in Africa and Canada.²¹

In *Johnson v. McIntosh*, non-Indians sued each other over who was the legal owner of lands formerly owned by Indian Nations in what is now the state of Illinois. The plaintiffs claimed their rights through corporations that had allegedly bought the lands in question from Indians in 1773 and 1775.²² In contrast, the defendant, McIntosh, had purchased his land in 1818 from the United States, which had acquired it via treaties with the Piankeshaw and Illinois Indian Nations.²³ The U.S. Supreme Court decided that McIntosh was the owner because Indian Nations were not considered to be the full owners of their lands after Euro-Americans arrived and claimed a property interest in Indian lands.²⁴ Thus, the Court held that, under the Doctrine, Indian Nations could only sell their lands to the Euro-American government that claimed the Discovery power over them, and therefore that the purported sales to the corporations were invalid.²⁵

The U.S. Supreme Court repeatedly stated in *Johnson* that the Doctrine and the loss of rights suffered by Indian Nations were based on the justifications of Christianity and civilization. The Court stated for example: “the *character and religion* of its inhabitants afforded an

¹⁶ 21 U.S. (8 Wheat.) 543 (1823). For a brief description of the case see MILLER, NATIVE AMERICA, *supra* note 2, at 50–56.

¹⁷ Ten or more Australian cases have cited *Johnson*. See, e.g., *Western Australia v Ward* (2000) 99 FCR 316, 170 ALR 159; *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 107 ALR 1.

¹⁸ At least forty-four Canadian cases have cited *Johnson*. See, e.g., *R. v. Sparrow*, [1990] 70 D.L.R. (4th) 385, 1 S.C.R. 1075 (Supreme Court of Canada); *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia*, [2011] 55 C.E.L.R. (3d) 165, 15 B.C.L.R. (5th) 322 (British Columbia Supreme Court).

¹⁹ See, e.g., *Attorney-General v. Ngati Apa* [2003] 3 NZLR 643; *Wi Parata v. Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC); *R. v. Symonds* (1847) NZPCC 387.

²⁰ *Johnson* has been cited hundreds of times by federal and state courts in the United States. See, e.g., *Attorney’s Process v. Sac & Fox Tribe*, 609 F.3d 927 (8th Cir. 2010). See also *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203 n.1 (2005).

²¹ *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (Privy Council); *In re Southern Rhodesia*, [1919] A.C. 211 (Privy Council); *Canada v. Ontario*, [1910] A.C. 637 (Privy Council); *St. Catherine’s Milling and Lumber Co. v. The Queen*, (1889) L.R. 14 App. Cas. 46 (Privy Council).

²² *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 550–51, 555, 571 (1823).

²³ *Id.* at 560; MILLER, NATIVE AMERICA, *supra* note 2, at 51.

²⁴ *Johnson*, 21 U.S. at 604–05.

²⁵ *Id.* at 574, 587.

apology for considering them as a people over whom the *superior genius of Europe* might claim an ascendancy. . . . [A]mple compensation [was made] . . . by bestowing on them *civilization and Christianity*, in exchange for unlimited independence.”²⁶ The Court also claimed “some excuse, if not justification, [for the loss of Indigenous rights] in the *character and habits of the people* whose rights have been wrested from them.”²⁷

The international law principle that Indigenous Peoples and Nations around the world did not and do not own the full title to their lands is still the law in most countries today.²⁸

An effective method to understand and analyze the Doctrine, and to compare how Euro-Americans applied it throughout the world, is to delineate the constituent elements that make up Discovery. These elements are easy to discern from a close reading of *Johnson v. McIntosh*. The elements are clearly reflected in the laws, treaties, court cases, policies, and histories of almost all European settler societies around the world. I define the ten elements of Discovery in the following manner.²⁹

1. Christianity. Religion was a very significant aspect of Discovery. Starting with the Crusades and then the papal bulls of the 1400s, Christians claimed that Indigenous Nations and Peoples did not have the same rights to land, sovereignty, self-determination, and human rights as did Christians. Furthermore, Europeans claimed a right and duty to convert non-Christians.

2. Civilization. European cultures and civilizations were presumed to be superior to Indigenous Peoples and their civilizations. European countries claimed that the Christian God had directed them to civilize Indigenous Peoples and to exercise paternal and guardian powers over them.

3. First discovery. The first European country that discovered lands unknown to other Europeans claimed property, commercial, and sovereign rights over the lands and the Indigenous Nations and Peoples. Consequently, the Doctrine created a race among European powers to discover and claim the non-European world.

4. Actual occupancy and possession. To turn a first discovery into a full title of ownership that would be recognized by other European countries, England developed in the 1570s the element that a European country had to actually occupy and possess the lands it claimed via a first discovery. Occupancy was usually proved by building forts or settlements. The physical occupancy and possession had to be accomplished within a reasonable amount of time after making a first discovery.³⁰

²⁶ *Id.* at 573 (emphasis added).

²⁷ *Id.* at 589 (emphasis added).

²⁸ See, e.g., Miller, *The International Law of Colonialism*, *supra* note 1; Miller & D'Angelis, *supra* note 1; Miller, LeSage & Escarcena, *supra* note 1; MILLER, RURU, BEHRENDT & LINDBERG, *supra* note 1.

²⁹ MILLER, NATIVE AMERICA, *supra* note 2, at 3–5.

³⁰ Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, 845 (Perm. Ct. Arb. 1928)

5. Preemption. Euro-American countries that claimed the rights of first discovery also claimed the power of preemption, that is, an exclusive right to buy the lands of Indigenous Nations and Peoples. This is a valuable property right similar to the modern-day real estate principle called a right of first refusal, which is the right to be the first person allowed to purchase another's land when they choose to sell. Under Discovery, the Euro-American government that held the preemption right could prevent, or preempt, any other Euro-American government or individual from buying land from Native Nations. Most colonial-settler societies still claim this property right over Indigenous Nations and Peoples today.

6. Indian/Native title. After a first discovery, Euro-American legal systems claimed that Indigenous Nations automatically lost the full ownership of their lands and only retained what is called the "Indian title" or "native title," a property right to occupy and use the lands. These rights could last forever if Indigenous Nations never consented to sell to the Euro-American country that claimed first discovery and preemption. But if Indigenous Nations did choose to sell, they were to sell only to the Euro-American government that held the preemption right.

7. Limited Indigenous sovereign and commercial rights. Euro-Americans claimed that Indigenous Nations and Peoples lost other aspects of their sovereignty and their rights to engage in international trade and treaty-making after a first discovery. Euro-Americans claimed that Indigenous Nations could only interact politically and commercially with the Euro-American government that had discovered them.

8. Contiguity. Euro-Americans claimed a significant amount of land contiguous to and surrounding their actual discoveries and colonial settlements. For example, when European countries had settlements somewhat close together, each country claimed rights over the unoccupied lands between their settlements to a point half way between their settlements.³¹ Contiguity provided, for example, that the discovery of the mouth of a river created a claim over all the lands drained by that river.³²

(holding that "symbolical . . . possession . . . completed eventually by an actual and durable taking of possession within a reasonable time" created a complete title); MILLER, NATIVE AMERICA, *supra* note 2, at 72–76, 133–44 (President Jefferson and others were concerned that the United States quickly settle the Pacific Northwest so that actual possession would solidify the United States' claim to title based on first discovery); Mark A. Smith, Jr., *Sovereignty Over Unoccupied Territories – The Western Sahara Decision*, 9 CASE W. RES. J. INT'L L. 135, 135 n.2 (1977).

³¹ MILLER, NATIVE AMERICA, *supra* note 2, at 69–70 (President Thomas Jefferson discussed the idea of contiguity as part of European Discovery claims), 138 (House of Representatives 1821 report discussed principles of contiguity as establishing European Discovery claims).

³² *Id.* at 67, 70 (Secretary of State Jefferson in 1792 and President Jefferson in 1804), 138 (House of Representatives 1821 report), 147 (Congressman speech 1838). Compare the boundaries of the Louisiana Territory and the Oregon Country. *U.S. Territorial Map 1810*, <http://xroads.virginia.edu/~MAP/TERRITORY/1810map.html> (last visited Nov. 15, 2018).

9. Terra nullius. This Latin phrase means a land that is vacant or empty. Under this element of the Doctrine, if lands were not occupied by any person or nation, or even if they were occupied but they were not being used in a manner that Euro-American legal systems approved, then the lands were considered empty, vacant, and available for Discovery claims.³³ Euro-Americans often considered lands that were actually owned, occupied, and being used by Indigenous Nations to be *terra nullius*.

10. Conquest. Euro-Americans claimed they could acquire through military victories the absolute title and ownership of the lands of Indigenous Nations. Conquest was also used as a term of art to describe the property and sovereign rights Euro-Americans claimed to acquire automatically over Indigenous Nations and Peoples just by making a first discovery.

These ten elements are plainly evident in the histories and modern-day laws and policies of all settler societies. These elements were used, and are still being used, to justify limitations on the sovereignty, property, and human rights of Indigenous Nations.

What can Indigenous Nations and Peoples and their supporters do today to oppose the existence of the Doctrine of Discovery and to repeal its pernicious effects? Several suggestions have been put forward by Indigenous Nations, scholars, and activists.³⁴

First, many people have called on the international community, and the United Nations in particular, to study and truly understand the Doctrine and to begin a process of repudiating and reversing this six hundred-year-old ethnocentric, racist, and feudal legal doctrine.

Second, Indigenous scholars and advocates have suggested that all governments review their laws, regulations, and policies that impact Indigenous Peoples and repeal those that are based on the prejudices and fallacies of the Doctrine.³⁵ Furthermore, these governments should undertake such reviews in full consultation with Indigenous Nations and Peoples.³⁶

³³ MILLER, NATIVE AMERICA, *supra* note 2, at 21–22, 24, 26–28, 56. See also Johnson, 21 U.S. at 595–97 (discussing the Crown's ownership of, and right to grant titles to, the vacant lands in America); *Martin v. Waddell*, 41 U.S. 367, 409 (1842) (“[T]he territory [] occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants.”); *United States v. Rogers*, 45 U.S. 567, 572 (1846) (“the whole continent was divided and [parceled out], and granted by the governments of Europe as if it had been vacant and unoccupied land”).

³⁴ See, e.g., *The Doctrine of Discovery: The International Law of Colonialism*, Conference Room Paper, U.N. Permanent Forum on Indigenous Issues, Eleventh Session (May 7–18, 2012) (hard copy on file with author); ‘*Doctrine of Discovery*’, *Used for Centuries to Justify Seizure of Indigenous Land, Subjugate Peoples, Must Be Repudiated by United Nations, Permanent Forum Told*, U.N. Permanent Forum on Indigenous Issues, Eleventh Session (May 8, 2012), available at <https://www.un.org/press/en/2012/hr5088.doc.htm>.

³⁵ See, e.g., MILLER, NATIVE AMERICA, *supra* note 2, at 175–78.

³⁶ Robert J. Miller, *Consultation or Consent: The United States’ Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37 (2015); Colette Routel & Jeffrey

Third, Indigenous Nations and Peoples have called on all governments to educate their citizens, incorporate at all levels of formal education the true and complete history of their countries, and include the impact and application of colonization and the Doctrine of Discovery on their Indigenous citizens.³⁷

Finally, Indigenous Nations and Peoples have been working with many churches to join them in repudiating the Doctrine of Discovery. Many churches and church organizations have already done so; for example, the Episcopal Church in 2009, the Anglican Church of Canada in 2010, the World Council of Churches Executive Committee in 2012, the Unitarian Universalists, individual Quaker congregations, the United Church of Christ, the United Methodist Church, the Community of Christ, and in June 2016 the General Assembly of the Presbyterian Church USA.

How much longer can modern-day societies and churches continue to tolerate the kind of ignorance, and non-Christian principles of death, domination, prejudice, inequity, and violation of sovereign and human rights that the Doctrine of Discovery represents? Clearly, all settler societies need to learn how to repudiate and repeal this Doctrine because it is based on ethnocentric, racist, religious, and feudal ideas that have no place in the modern-day world.

Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417 (2013).

³⁷ See MILLER, *NATIVE AMERICA*, *supra* note 2, at 175–78.