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July 11, 2022

Honorable Ahmed Shaheed
Special Rapporteur Freedom of Religion or Belief
United Nations

RE: USET SPF Submission on the Doctrine of Discovery and Indigenous Peoples' Religious Freedoms in the United States of America

Dear Special Rapporteur Shaheed,

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) respectfully provides this submission in response to your call for input regarding "Indigenous Peoples and the right to freedom of religion or belief" for your upcoming report to be delivered to the 77th session of the United Nations (UN) General Assembly.

Formed in 2014 to specifically address promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations,[1] USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.[2] USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues. USET SPF is a sister organization to United South and Eastern Tribes (USET), a 501(c)3 inter-tribal organization, which was formed in 1969 by Tribal Nations that felt that by uniting, they could better address issues common to them all.

USET SPF welcomes the Special Rapporteur's thematic report and appreciates the visit and listening sessions in the United States of America (US). As this submission describes, the US has used, and continues to use, the Doctrine of Discovery (or Doctrine) to justify the unjust and inhumane taking of Indigenous lands

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[1] For the sake of consistency with United Nations terminology, this report uses Indigenous Nations as synonymous with Tribal Nations, and Indigenous Peoples as synonymous with Tribal Nation citizens, and Indigenous as synonymous with Tribal.
[2] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

and resources and to impose limitations on Indigenous rights to self-determination and self-governance. When invoked, the Doctrine is used to support the absolute right of the sovereign—whether that be through Congress or the courts—to alter or diminish Tribal Nations' rights based on their status as colonized peoples. As Indigenous scholar Vine Deloria, Jr. stated, "We have been placed beyond the remedies of the Constitution of the United States because the Doctrine of Discovery has never been disclaimed[.]"[3]

Use of the Doctrine itself violates Indigenous Peoples' religious freedoms. Originating in medieval papal bulls and articulated in the landmark US Supreme Court case *Johnson v. M'Intosh*,[4] the Doctrine of Discovery has used religious supremacy to justify colonization and dispossession of Indigenous Peoples; including the taking of lands that are sacred to Indigenous Peoples and essential to our continued spiritual and religious practices. The Doctrine, its underlying principles, and associated legal fiction that builds upon it, have also been used to infringe repeatedly on Indigenous rights to self-determination and self-governance––rights that are necessary to the continued survival of Indigenous peoples, cultures, and spiritual practices.

The Doctrine of Discovery was, and continues to be, fundamentally at odds with respect for and protection of Indigenous Peoples' human rights. Nevertheless, it remains a cornerstone of US law and continues to be invoked, relied upon, and embraced by US courts. The Doctrine of Discovery's continued presence means that it is a threat to Indigenous Peoples every single time Indigenous rights are litigated before the US Supreme Court. USET SPF urgently and respectfully requests that the Special Rapporteur recommend to the General Assembly that: (1) the General Assembly renounce the Doctrine of Discovery through resolution; and (2) that all States that have not yet done so, repudiate the Doctrine of Discovery and eliminate it from their domestic laws, policies, and jurisprudence.

I. Religious Origins of the Doctrine of Discovery

The rationales underpinning the Doctrine of Discovery originated in medieval Christian doctrines used as justification for war and conquest during the crusades.[5] Pope Innocent IV's commentary justifying war against infidels was, for example, later relied on by Francis de Vitoria and Hugo Grotius in their expositions of international law as it applied to non-Christians in the 15th and 17th centuries, respectively.[6] The Doctrine of Discovery was specifically applied to the "New World" by Pope Alexander VI in a series of papal bulls including his 1493 *Inter Caetera*.[7] This papal bull divided the "undiscovered" world between Spain and Portugal, and declared that lands "discovered and to be discovered" by Christopher Columbus belonged to Spain so long as they were not already in "the actual possession of any Christian king or prince."[8] Any "barbarous nations" encountered were to "be overthrown and brought to the faith."[9]

II. Establishment of the Doctrine of Discovery in US Law

The Doctrine of Discovery was enshrined in domestic law in one of the US's most foundational cases. In *Johnson v. M'Intosh*, Chief Justice John Marshall found that Indigenous Peoples, as a result of "discovery" by European Christian countries did not possess title to their lands, but rather they held only a right of

[3] Vine Deloria, Jr., FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA 81 (1999).
[4] *Johnson v. M'Intosh*, 21 U.S. 543 (1823).
[5] Robert A. Williams, Jr., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGH: THE DISCOURSE OF CONQUEST 13–14 (1990).
[6] *See id.* at 13; Robert J. Miller, et al., *The International Law of Discovery, Indigenous Peoples, and Chile*, 89 Neb. L. Rev. 819, 827–828 (2011).
[7] Williams, *supra* at 80; Steven T. Newcomb, PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF DISCOVERY 83–84 (2008); Vine Deloria, Jr., GOD IS RED 258–259 (30th Ed., 2016).
[8] *See id.*; also available at https://www.papalencyclicals.net/alex06/alex06inter.htm.
[9] *Id.*

occupancy.[10] This right of occupancy was subject to the absolute prerogatives of the conqueror and could be extinguished at will.

Describing the origins of the Doctrine of Discovery, Marshall looked to the self-serving international law of conquest. He described that as "the great nations of Europe"[11] sought to colonize other lands, there grew a need for development of a principle that could prevent the European countries from fighting each other over rights of conquest. Marshall stated: "This principle was that discovery gave title to the government by whose subjects, or by whose authority it was made, against all other European governments, which might be consummated by possession."[12]

Thus, only the conqueror, and not the original inhabitants, had true title to the land, and Indigenous peoples could not sell their land to anyone other than the conqueror. In establishing this rule for resolving conflicting land claims, Marshall acknowledged "the pretension of converting discovery of an inhabited country into conquest."[13] However, he reasoned that "if the principle has been asserted in the first instance, and afterward maintained; 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."[14]

Therefore, Marshall stated that the conqueror having obtained title by discovery, "the Indian inhabitants are to be considered merely as occupants" rather than owners of their lands even though "this restriction may be opposed to natural right, and to the usages of civilized nations."[15] Despite the fact that the standard rules of conquest among "civilized" nations did not permit such absolute taking of title, Marshall famously proclaimed that: "Conquest gives a title which the Courts of the conqueror cannot deny."[16]

Marshall asserted the Doctrine of Discovery limited Indigenous Nations' political rights as well as their land rights, stating they had "a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."[17] Indigenous rights, therefore, would be determined in light of Indigenous Nations' conquered status.

This treatment of Indigenous Peoples and the application of the Doctrine of Discovery was excused, Marshall stated, because of "the character and habits of the people whose rights have been wrested from them."[18] Marshall pointed to England's authorization of the Cabot family in 1496 "to discover countries then unknown to Christian people, and to take possession of them," "notwithstanding the occupancy of the natives, who were heathens[.]"[19] Thus, as Marshall explained, "[o]n the discovery of this immense continent … the *character and religion* of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim ascendancy."[20]

As Indigenous scholar Robert A. Williams, Jr., explains, "*Johnson*'s acceptance of the Doctrine of Discovery into United States law preserved the legacy of 1,000 years of European racism and colonialism

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[10] *Id.* at 573–592.
[11] *Id.* at 572–573.
[12] *Id.* at 573.
[13] *Id.* at 591.
[14] *Id.*
[15] *Id.* at 591–592.
[16] *Id.* at 589.
[17] *Id.*at 587.
[18] *Id.*
[19] *Id.* at 576–577
[20] *Id.* at 573 (emphasis added).

directed at non-Western peoples."[21] This "ensured that future acts of genocide would proceed on a rationalized, legal basis."[22]

III. The Continuing Relevance of the Doctrine of Discovery

Despite the Doctrine of Discovery's antiquated and unjust origins, it is not, unfortunately, an antiquated legal doctrine in the United States of America. To the contrary, the Doctrine and its rationales of conquest, that exist for the direct benefit of the US and its belief in Manifest Destiny, continue to be embraced by US courts, with devastating consequences for Indigenous Peoples.

The following provide representative examples of how the US has enshrined the Doctrine of Discovery in domestic law, using it to strip Indigenous Peoples of rights to their lands and self-determination.

- **Tribes as Wards of the Government:** In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), Justice Marshall held that Indigenous Nations are "domestic dependent nations" because they occupy a territory to which we assert a title independent of their will." Marshall stated, "their relation to the United States resembles that of a ward to his guardian."
- **Absolute Authority of Congress:** Justice Marshall in *Worcester v. Georgia*, 31 U.S. 515 (1832), relied on rationales of conquest to hold that the U.S. Congress has absolute authority to regulate relations with Indigenous Nations, creating what would come to be known as the Plenary Power Doctrine.
- **Federal Encroachment on Indigenous Jurisdiction:** The Court in *US v. Kagama*, 118 U.S. 375 (1886), invoked the principles of the Doctrine of Discovery and affirmed the Plenary Power Doctrine, upholding a law usurping Indian Nations' exclusive criminal jurisdiction over their own lands because "the soil and the people … are under the political control of the government of the United States" and are "wards of the nation … dependent for their political rights."
- **Unreviewability of Congressional Treaty Abrogation:** In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Court held Congress may unilaterally abrogate a treaty with an Indigenous Nation and there can be no review or remedy from courts. The Court quoted language from one of its previous decisions: "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that is it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy…."[23]
- **Refusal to Compensate for Taking of Resources:** The Court in *Tee-Hit-Ton Indians v. US*, 348 U.S. 272 (1955), denied compensation to an Indigenous Nation for taking of timber from their lands. The Court stated that their "property interest, if any, is merely that of the right to use the land at the Government's will" and Congress had not granted them any permanent rights. The Court said: "Every American schoolboy knows that the savage tribes

[21] Williams, *supra* at 317 (1990).
[22] *Id.*
[23] Quoting *Beecher v. Wetherby*, 95 U.S. 525, 525 (1877).

of this continent were deprived of their ancestral ranges by force and that … it was not a sale but the conqueror's will that deprived them of their lands."

- **Termination of Indigenous Jurisdiction Over Non-Indians:** In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court stripped Indigenous Nations of criminal jurisdiction over non-Indians. Invoking the Doctrine of Discovery, the Court stated "[n]or are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty." The Court stated jurisdiction over non-Indians would be inconsistent with Indigenous Nations' status. The Court said the "prevalence of non-Indian crime on today's reservations which tribes forcefully argue requires the ability to try non-Indians" had "little relevance to the principles" upon which it relied.
- **Establishment of Disruptive Claims Theory:** In *City of Sherrill v. Oneida*, 470 U.S. 226 (2005), the Court cited the Doctrine of Discovery and issued an opinion creating a novel "disruptive" claims theory to deny an Indigenous Nation's land claim even though it acknowledged the lands were illegally alienated.
- **State Encroachment on Indigenous Jurisdiction:** Recently, the Court in *Oklahoma v. Castro-Huerta* (decided June 29, 2022), rejected long-standing precedent and expanded US state criminal jurisdiction to include crimes by non-Indigenous persons against Indigenous persons on Indigenous lands. While not explicitly invoking the Doctrine of Discovery, the Court relied on justifications having to do with the subordinate status of Indigenous Nations.

In contrast, an example of modern US case law that has been more protective of Indigenous rights and has steered away from invoking the Doctrine of Discovery is the 2020 *McGirt v. Oklahoma* decision, 140 S.Ct. 2452 (2020), which relied instead on treaty language between the United States and an Indigenous Nation to find that the Nation's reservation had not been disestablished.

Nevertheless, the US Supreme Court has never repudiated the Doctrine. It therefore remains available to be used by the courts of the conqueror to justify further violations of Indigenous rights based on the title by discovery or the purportedly subordinate status of Indigenous Nations.[24] For example, the Doctrine and *Johnson v. M'Intosh* continue to be invoked by lower courts to the detriment of Indigenous Peoples,[25] repeatedly re-inscribing the language and rationales of colonization and religious supremacy today.

IV. Domestic and International Law Violations

The First Amendment to the US Constitution prohibits the establishment of religion and guarantees free exercise of religion.[26] The US Supreme Court states that this "protects religious observers against unequal treatment," including indirect coercion or "laws that impose special disabilities on the basis of religious status."[27] Nonetheless, US courts continue to violate Indigenous Peoples' rights based on racist and oppressive principles of the medieval Christian church.

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[24] *See generally*, Robert A. Williams, Jr., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005).
[25] *See, e.g.*, *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 486 (5th Cir. 2014); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, EDCV 13-883-JGB (C.D. Cal. Mar. 24, 2015), *aff'd,* 849 F.3d 1262 (9th Cir. 2017).
[26] US Const., Am. I.
[27] *Espinoza v. Montana Dep't of Rev.*, 140 S.Ct. 2246, 2253 (2020) (internal quotation and citation omitted).

The United States' failure to overturn the Doctrine of Discovery is fundamentally at odds with its international legal obligations to protect rights to freedom of religion and belief under conditions of equality. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) specifically affirms in its preamble that "*all doctrines*, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust." (emphasis added). UNDRIP goes on to enshrine well-established rights to freedom of religion, spirituality, and culture (see, e.g., articles 11–13).

The United States endorsed UNDRIP in December 2010, the last of the four settler colonial states to do so.[28] However, the rights to religious freedom and equality in UNDRIP are not new. These rights are enshrined in Article 18 of the Universal Declaration of Human Rights and Article 1 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, both of which provide that "[e]veryone has the right to freedom of thought, conscience and religion … and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

Indigenous religious freedom is also provided for in legally binding treaties to which the United States is a party. The International Covenant on Civil and Political Rights (ICCPR) protects religious freedom in article 18 and guarantees equality article 26. Article 27 addresses these rights specifically in the context of persons of "ethnic, religious or linguistic minorities," including Indigenous persons.[29] Article 27 provides that they have "the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." The UN Human Rights Committee has recognized that this right to culture "manifests itself in many forms, including in a way of life associated with the use of land resources, especially in the case of indigenous peoples."[30]

The US is also party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), article 5 of which prohibits racial, national, or ethnic discrimination, including with respect to freedom of religion. The Committee on the Elimination of Racial Discrimination (CERD) has called on States Parties to respect Indigenous culture, refrain from making decisions related to Indigenous rights without free and informed consent, and recognize and protect rights to "own, develop, control and use" Indigenous "lands, territories and resources."[31]

V. Conclusion and Recommendations

The Doctrine of Discovery is, and always has been, a tool of religious supremacy that has been used to justify colonialism. It is past time for the US to disclaim the Doctrine of Discovery.

The perpetuation of the Doctrine of Discovery in US law is itself a violation of Indigenous Peoples' religious freedoms. Additionally, this violation is at the core of a legal framework that leads to numerous other violations of Indigenous rights. UNDRIP articulates rights including, but not limited to: self-determination (art. 3) and self-government (arts. 4, 5, 20); freedom from forced assimilation, destruction of

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[28] The other settler colonial states being Canada, New Zealand, and Australia.
[29] See UN Human Rights Committee, General Comment No. 23: Article 27 (Rights of Minorities), CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) (addressing Article 27 in the context of Indigenous Peoples).
[30] *Id.* at para. 7.
[31] CERD, General Recommendation No. 23: Indigenous Peoples, A/52/18, annex V (Aug. 18, 1997). CERD, in its first-ever Early Warning/Urgent Action intervention against the United States addressed the situation of the Western Shoshone, a case in which the US Supreme Court determined an Indigenous Nation's title had been extinguished. CERD, Decision 1(68), CERD/C/USA/DEC/1 (Apr. 11, 2006).

culture, or removal (arts. 8,10); participating in decision-making in accordance with Indigenous institutions (art. 18) and providing free, prior, and informed consent (art. 19); maintaining and strengthening a distinctive spiritual relationship with lands, territories, waters, and resources "and to uphold … responsibilities to future generations" (art. 25); having and protecting traditional lands, territories, and resources (arts. 26, 29); effective legal processes and remedies (arts. 27, 28) and observance and enforcement of treaties (art. 37).

The Doctrine of Discovery has been used by US courts to justify systematic violations of Indigenous rights. Dispossession of Indigenous Peoples' lands, upon which they depend spiritually and culturally, violates Indigenous religious freedoms as articulated in domestic and international law. Similarly, infringement on political rights based on the Doctrine has had disastrous consequences, for example by fueling the Missing and Murdered Indigenous Persons crisis by depriving Indigenous Nations of jurisdiction over non-Indigenous persons. Meanwhile, the Doctrine of Discovery has served to make legal remedies to violations of Indigenous rights elusive.

As the UN Permanent Forum on the Rights of Indigenous Peoples explained in its recommendations to the Economic and Social Council: "States are no longer allowed to deploy positivist legal interpretations of laws adopted during an era when doctrines such as *terra nullius* were the norm."[32] Rather, it emphasized the need to "redefine[] the relationship between indigenous peoples and the State as an important way to understand the doctrine of discovery and a way to develop a vision of the future for reconciliation, peace and justice."[33]

USET SPF respectfully requests that the Special Rapporteur recommend to the General Assembly that:

(1) the General Assembly renounce the Doctrine of Discovery through resolution; and

(2) that all States that have not yet done so repudiate the Doctrine of Discovery and eliminate it from their domestic laws, policies, and jurisprudence.

Thank you for your attention to this matter and for your commitment to protecting freedom of religion and belief for all peoples.

Sincerely,

Kirk Francis, Chief
President
USET/USET SPF

Kitcki Carroll
Executive Director
USET/USET SPF

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32 Permanent Forum on Indigenous Issues, Recommendations at para. 4, E/C.19/2012/L.2 (May 10, 2012).
33 *Id.* at para. 5.