No. ___

IN THE

Supreme Court of the United States

MAHICAN TRIBE AND MI'KMAQ TRIBE,
Applicants,

v.

CANADA, FRANCE, NETHERLANDS, PORTUGAL, RUSSIA, SPAIN, UNITED KINGDOM AND UNITED STATES,
Respondents.

Motion for Leave to File a Bill of Complaint

(Art. III, §2, ¶2 and r. 17)

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TABLE OF CONTENTS

TOPICAL INDEX

TABLE OF AUTHORITIES

(1). PARTIES. The applicants and the respondents jointly and severally are bound to respect and enforce the international agreement identified by this Court as the source of the constitutional law that at all material times since the discovery of North America has regulated the affairs of each in relation to the others.

The agreement recognizes and affirms that each party is a sovereign body politic entitled, as such, to be represented by officials, however styled but in any event performing the functions customarily attributed to ambassadors, public ministers and consuls in relation to treaties and commercial affairs.

Disregard of or contempt for the sovereignty of any one of the parties for the sovereignty of any other is a breach of the treaty law, the commercial law, the constitutional law and the human rights law precluding the genocide of the nationals of any nation by that nation or any other, the content of which set of laws is the common legal heritage of each and every of the parties hereto.

Particulars ensue.

(2). COMPLAINT. Applicants complain of the "serious bodily or mental harm"[1] within the meaning of Art.

[1] "A steady and uniform attachment to, and love of Justice and Equity is one of their first principles of Government." That Indian feeling is as true today as when expressed by the Lords of Trade and Plantations of the British Colonial Office in the constitutional Royal Direction of 10 July 1764 to Sir William Johnson, Superintendent of Indian Affairs for the Northern District of North America, regulating him in the conduct of his office. E.B. O'Callaghan et al., eds., *Documents relative to the Colonial History of New York*, 15 Vols., Albany, 1856-83, 7:634. Correspondingly the refutation of justice and equity by the newcomer courts' ignoring their own constitutions in order to perfect the theft of the Indians' possession of and jurisdiction over their

2(*b*) of the *Convention for the Prevention and Punishment of Genocide, 1948*, to which they and their constituents presently are being subjected in virtue of the recent[2] judicial ignoring[3] of the constitutional

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inflicts the "serious bodily or mental harm" of which complaint is made. All courts share the duty to prevent the genocide attributable to such purposeful "judicial inactivity." Appendix A: *Menchu v. Montt* (2005).

[2] Even before Independence the constitutional law was never much respected in actual practice due to the difficulty of enforcement of an unpopular law. In 1871 Congress purported to change the constitution to suit the practice and in 2004 this Court in *Lara* (note 3) purported to legitimate the unconstitutional *de facto* repeal retroactively. It is this development in 2004 that is "recent." It destroys the last vestige of hope that justice and equity is possible, that someday this Court will restore constitutional democracy under the rule of law and by so doing prevent the historical genocide from continuing to final solution stage of extermination of the tribal sovereignty constituency.

[3] *US v. Lara*, 541 US 193, 200, 214, 227 (2004). [*Per incuriam obiter dictum*] . . . the central function of the Indian Commerce Clause, as we have said, is to provide Congress with plenary power to legislate in the field of Indian affairs.

But see [noting the fact of *per incuriam, per* Thomas, J] In 1871, Congress enacted a statute that purported to prohibit entering into treaties with the 'Indian nation[s] or tribe[s].' 16 Stat. 566, codified at 25 USC §71. Although this Act is constitutionally suspect (the Constitution vests in the President both the power to make treaties, Art. II, §2, cl. 2 . . .), it nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter. To be sure, this does not quite suffice to demonstrate that the tribes lost their sovereignty . . . Federal Indian policy is, to say the least, schizophrenic . . . . I believe we must examine more critically our tribal sovereignty case law. Both the Court and the dissent, however, compound the confusion by failing to undertake the necessary rigorous constitutional analysis. I would begin by carefully following our assumptions to their logical conclusions and by identifying the

potential sources of federal power to modify tribal sovereignty . . . I do, however, agree that this case raises important constitutional questions that the Court does not begin to answer. The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty . . . I would be willing to revisit the question . . .

The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain the tribes possess anything resembling "sovereignty." The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgement might allow the Court to ask the logically antecedent question *whether* Congress (as opposed to the President) has this power. A cogent answer would serve as the foundation for the analysis of the sovereignty issues posed by this case . . . [U]ntil we begin to analyze these questions honestly and rigorously, the confusion . . . will continue to haunt our cases.

[Submission] There is no "Indian Commerce Clause," there is a "Commerce Clause." Art. I, §3, delegates to Congress jurisdiction "To regulate Commerce ***with***" two bodies politic—"foreign Nations" and "Indian Tribes"—and if "to regulate Commerce ***with***" meant "to exercise plenary power ***over***" as held in *Lara* then the constitutional relationship between Congress and those two categories of trading partners is, and always has been that of a sovereign to subjects. As at 1789 when the *Constitution* was enacted, "Such a system would be wild, as well as highly impolitic, and would tend to deluge the country in blood, by provoking the savage nations to hostilities," as was held in 1797 in *Sherer v. McFarland* (Bill of Complaint, p.6). The fledgling Republic would have appeared ludicrous to the foreign Nations whose good will it coveted.

But the legislative intent of the Constitution when enacted in 1789 was and until duly amended pursuant to Art. V will remain to constitute a government without the jurisdiction to embroil the democratic People of America in what at the time was regarded as the European sickness of imperialism with its endless cycles of war and genocide attributable to megalomania and greed, precisely by precluding imperialist pretensions to North American let alone global sovereignty.

The legislative scheme of the *Constitution* is unambiguous and unequivocal on its face.

Please read the defence, treaty and commerce articles *in pari materia* in accordance with the axioms of statutory construction *expressio unius est exclusio alterius* and words shall have their ordinary meanings, TO WIT: *Constitution*, [Preamble] We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Art. I, §8, ¶1. The Congress shall have power to…provide for the common defense . . . ; ¶3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ¶11. To declare War, . . . ; ¶15. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; ¶18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Art. II, §1, ¶1. The executive Power shall be vested in a President of the United States of America. . . . . ¶8. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." §2, ¶1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . . ¶2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . .

Art. IV, §4. The United States . . . shall protect each of them [the separate States of the Union] against Invasion.

Regarding the ignoring of the same law *mutatis mutandis* by the Supreme Court of Canada please see, *infra*, p. 21 "Canada."

protection of Indian tribal sovereignty. Because the Supreme Courts refuse to address that issue the legislative, executive and judicial branches of the governments of the United States and Canada with impunity have invaded and do still occupy, usurp tribal jurisdiction upon and dispossess Indians from unceded tribal territory in abrogation of constitutional democracy under the rule of law.

(3). LAW. The Indian Treaties contracted with these applicants[4] by Massachusetts in 1724 (Appendix B)

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[4] Particulars identifying the applicants. The Mahican Treaty of 1724 (Appendix B) identifies twenty signatory public Ministers of the Mahican tribe's original government, being the chief councilors of the several autonomous nations or bands then still surviving and comprising the remainder of the tribe originally occupying the Hudson River drainage basin as its ancestral homeland. One of these signatories in the recital is named "John VanGuilder" who makes his mark opposite the spelling "John Vangilder." His Indian name is Toanunck. He is the grandfather at some remove from the signatory hereto Rick Van Guilder who occupies the same office now as his predecessor did then. The treaty complied with the colonial constitution then consisting in the royal commission and instructions to the governor, and also with the cited Massachusetts legislation (note 5). Other than the VanGuilder or Toanunck sovereign body politic the rest of the Mahican tribe was rounded up by the missionaries at Stockbridge, Massachusetts, just north of Gilder's Pond at the foot of Mount Everett and after converting to Christianity was persuaded to abandon the homeland and accept deportation to west of the Mississippi River. The VanGuilder entity fought the last Indian war in 1756-57 in the Hudson River Valley and rather than leave instead traveled north and clandestinely relocated to what became known as Guilder Hollow in New York State.

That is south of Lake Champlain but still in the ancestral homeland which begins at Otter Creek at that lake, as confirmed by the Mahican/Mohawk/Crown adjunct to the Treaty of Fort Stanwix, 1768. Before leaving, the rest of the tribe signed over to the VanGuilder its remainder interest in the Hudson Valley.

and 1776 (Appendix C) pursuant to Stat. Prov. Mass. Bay 1701-02, c. 11[5] acknowledge tribal sovereignty

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See, Indian deeds of 24 Oct. 1737 and 1 June 1756 in Wright, *Indian Deeds of Hampden County*, 1905, 141-142, 155-157.

Particulars of the Mi'kmaq applicant may begin with Appendix C the Mi'kmaq Treaty of 1776. It constitutes a military alliance for mutual protection. This sister document to the Declaration of Independence was initiated by George Washington, authorized by the Continental Congress, and signed by Massachusetts specifically on behalf of the "United States of America." It is to this compact, above all other possible candidates, to which the Art. VI, ¶1 of the *Constitution* refers when stipulating for the binding force and effect of treaties "made" as opposed to treaties which "shall be made" under the "Authority of the United States." Art. VI, ¶1, provides, "All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."

The Mi'kmaq aboriginal government signatory "Sabbath Netobcobwit" was Ambassador and public Minister of the Gespegawagi Mi'kmaq Tribe of the Restigouche River and southerly draining Gaspé Peninsula, the same as this applicants' signatory Gary Metallic is now. His great grandmother many times removed was a Listiguj (Restigouche) hereditary government woman who married "Metallak," the youngest son of Pial, chief of the Cowasuck or, more properly, the Arosaguntacook Abenakis of the upper Androscoggin and Megalloway Rivers along the northern border of New Hampshire and Maine.

Canada has invaded, occupied, possessed and is governing his aboriginal maternal territory and the United States adversely similarly occupies his paternal territory. Pursuant to the treaty of 1776 his people fought and died so the United States could live.

[5] *An Act to prevent and make void clandestine and illegal purchases of lands from the Indians*, Stat. Prov. Mass. Bay 1701-02, c. 11. WHEREAS the government of the late colonys of the Massachusetts Bay and New Plymouth, to the intent the native Indians might not be injured or defeated of their just rights and possessions, or be imposed on and abused in selling and dispos-

ing of their lands, and thereby deprive themselves of such places as were suitable for their settlement and improvements, did, by an act and law named in the said colonys respectively many years since, inhibit and forbid all persons purchasing any land of the Indians without the licence and approbation of the general court, notwithstanding which, sundry persons for private lucre have presumed to make purchases of lands from the Indians, not having any license or approbation as aforesaid for the same, to the injury of the natives, and great disquiet and disturbance of many of the inhabitants of this province in the peaceable possession of their lands and inheritances lawfully acquired; therefore, for the vacating of such illegal purchases, and preventing of the like for the future,—

[SECT. 1.] That all deeds of bargain, sale, lease, release or quit-claim, titles and conveyances whatsoever, of any lands, tenements or hereditaments within this province, as well for term of years as forever, had, made, gotten, procured or obtained from any Indian or Indians by any person or persons whatsoever, at any time or times since the year of our Lord one thousand six hundred thirty-three, without the license or approbation of the respective general courts of the said late colonys in which such lands, tenements or hereditaments lay, . . . shall be deemed and adjudged in the law to be null, void and of none effect: . . .

[SECT. 4.] That if any person or persons whatsoever shall, after the publication of this act, presume to make any purchase or obtain any title from any Indian or Indians for any lands, tenements or hereditaments within this province, contrary to the true intent and meaning of this act, such person or persons . . . shall be punished by fine and imprisonment, at the discretion of the court where the conviction shall be, . . .

[SECT. 5] That all leases of land that shall at any time hereafter be made by any Indian or Indians for any term of years, shall be utterly void and of none effect, unless the same shall be made by and with licence first had and obtained from the court of general sessions of the peace in the county where such lands lye: *provided nevertheless*, that nothing in this act shall be taken, held or deemed in any wise to hinder, defeat or make void any bargain, sale or lease of land made by one Indian to another Indian or Indians.

and were continued by 16 Stat. 566 codified at 25 USC §71 (1871)[6] and by Art. VI, ¶1 of the *Constitution*.[7] So do the original, authoritative and therefore constitutive precedents.[8]

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[6] 16 Stat. 566, codified at 25 USC §71 (1871). No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; *but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired*. [Emphasis added.]

[7] *Constitution*, Art. VI, ¶1. All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[8] *Worcester v. Georgia*, 6 Pet. 515, 542, 544, 545, 546, 552, 553, 559, 560, 583 (1832). The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any of them to grasp the whole; and the claimants too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, "discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession." *Johnson v. McIntosh*, 8 Wheaton's Rep., 543.

This principle, acknowledged by all Europeans, because it was in the interest of all to acknowledge it, gave to the nations making the discovery, as its inevitable consequence, the sole right of acquiring the soil and making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery

made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

The relation between Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. . . . .

Except by compact we have not even claimed a right of way through the Indian lands.

Scott v. Sandford, 19 How. 393 (1857). [403] The situation of this population [descendants of African slaves] was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion.

But that claim was acknowledged to be [404] subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it.

These Indian governments were regarded and treated as foreign Governments as much as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first immigrants to the English colonies to the present day, by the different Governments which succeeded to each other.

Treaties have been negotiated with them, and these Indian political communities have always been treated as foreigners not living under our Government. . . .

[405] It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making

power; to those who formed this sovereignty and framed the Constitution.

The duty of the Court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted. . . .

[426] No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race [Africans], in the civilized nations of Europe or in this country, should induce this court to give to the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.

Such an argument would be altogether inadmissible in any tribunal called upon to interpret it.

If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. . . .

Any other rule would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes.

Higher and graver trusts have been confided to it, and it must not falter in the path of duty. . . .

[432] The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except for punishment for crime, shall be forever prohibited in all the part of the territory ceded by France, under the name Louisiana, . . . and the difficulty which meets us at the threshold of this part of the enquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority was not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under any one of the United States. . .

[435] . . . this Government was to be carefully limited in its powers, to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from the lan-

guage of the instrument, and the objects it was intended to accomplish;. . .

[449] It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers, which the Constitution denied to it . . . [450] . . . and the Federal Government can exercise no right power over his person or property beyond what the instrument confers, nor lawfully deny any right which it has reserved . . .

[460] Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it . . . And it is equally true, that no State or nation can affect or bind out of its territory, or persons not residing within it. . . .

[480] . . . to change or to abolish a fundamental principle of the society, must be the act of the society itself—of the sovereignty; and that none other can admit to the participation of that high attribute.

[483] . . . each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature…power or weakness does not make any difference. A small republic is no less sovereign than the most powerful kingdom. . .

[484] and no one nation is entitled to dictate a form of government or religion, or a course of internal policy, to another.

[485] Sovereignty, independence, and a perfect right of self-government, can signify nothing less than a superiority to and exemption from all claims of extraneous power, however expressly they may be asserted, and render all attempts to enforce such claims merely attempts at usurpation.

[501] But the recognition of a plenary power in Congress to dispose of the public domain, or to organize a Government over it, does not imply a corresponding authority to determine the internal policy, or to adjust the domestic relations, or the persons who may lawfully inhabit the territory in which it is situated. . . .

[506] This [the inflation of federal power] proceeds from a radical error, which lies at the foundation of much of this discussion. It is, that the Federal Government may lawfully do

whatever is not directly prohibited by the Constitution. This would have been a fundamental error, if no amendments to the Constitution had been made. But the final expression of the will of the people of the States, in the 10th amendment, is, that the powers of the Federal Government are limited to grants of the Constitution.

[508] In *Pollard's Lessee v. Hagan*, (3 How., 212,) the court say; "The United States have no constitutional capacity to exercise municipal [509] jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact." [513] . . . a power to make rules and regulations respecting the public domain does not confer a municipal sovereignty over persons and things upon it. . . .

[520] The King of Great Britain, by his proclamation of 1763, virtually claimed that the country west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the treaty of Paris of that year, and he says: "We reserve it under our sovereignty, protection and dominion, for the use of the Indians."

This country was conquered from the Crown of Great Britain, and surrendered to the United States by the treaty of peace of 1783.

See also, Marshall v. Clark, 1 Kentucky R 77, 80-81 (1791); *Weiser v. Moody*, 2 Yeat's 127, 127-8 (Penn. SC) (1796); *Sherer v. McFarland*, 2 Yeat's 124, 225, 226 (Penn. SCR) (1797); *Fletcher v. Peck*, 6 Cranch's 87, 142-3 (1810); *Johnson v. McIntosh*, 8 Wheat. 543, 574, 585, 588, 591, 592, 596 (1823); *Danforth v. Wear*, 9 Wheat. 673, 675, 677 (1824); *Cornet v. Winton*, 2 Yerger Tenn. CA 129, 149 (1826); *Cherokee Nation v. State of Georgia*, 5 Pet. 1, 17, 49, 76 (1831); *Mitchell v. United States*, 9 Pet. 711, 745, 746, 749, 755 (1835); *New Orleans v. Armas*, 9 Pet. 224, 236 (1835); *New Orleans v. United States*, 35 US 662, 730 (1836); *US v. Fernandez*, 35 US 303, 305 (1836); *Clark v. Williams*, 36 Mass. R 499, 500, 501 (1837); *Godfrey v. Beardsley*, 2 McLean 412, 416 (Ind.) (1841); *State of Georgia v. Canatoo*, 31 *Washington National Intelligencer* 1, 12-17 (1843) (Georgia SC); *Balliot v. Bauman*, 5 Penn. 150, 154, 155 (1843); *Brown v. Wenham*, 10 Metcalf 496, 498 (Mass. SC) (1843); *Coleman v. Tish-Ho-Mah*,

(4). JURISDICTION. Sovereign bodies politic interact with others by means of "Ambassadors, other public Ministers and Consuls" and, correspondingly, ignoring the law is "affecting" those offices within the meaning of Art. III, §2, ¶2[9] by abrogating them.

(5). REPEAL. The constitutional protection can be repealed pursuant to Article V[10] but it can not be overruled by this Court.[11]

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4 S&M 40, 48 (Miss. HCEA) (1844); *Ogden v. Lee*, 6 Hill's 546, 548-550 (NYSC) (1844); *Stockton v. Williams*, 1 Mich. R 546, 560 (SC) (1845); *Fellows v. Lee*, 5 Denio's 628 (1846) (NYCE), Headnote; *Montgomery v. Ives*, 13 S&M 161, 174-5 (Miss. HCEA) (1849); *Breaux v. Johns*, 4 Louisiana R 141, 143 (1849); *Gaines v. Nicholson*, 9 How. 356, 365 (1850); *Marsh v. Brooks*, 49 US 223, 232 (1850); *People v. Dibble*, 18 Barbour's NYSCR 412, 418 (1854); *Fellows v. Denniston*, 23 NY 420, 423, 428, 431 (CA) (1861); *US v. Foster*, 2 Bissell's 377, 377 (Wisc. Cir. Ct.) (1870); *Minter v. Shirley*, 3 Miss. 376, 381, 382 (1871); *Holden v. Joy*, 84 US 211, 244 (1872); *US v. Cook*, 19 Wall. 591, 593 (1873); and *US v. Shoshone Tribe*, 304 US 111, 116, 117, 118. The relevant excerpts are identified in the Bill of Compliant that complements this Motion by addressing the jurisprudential substrata.

[9] *Constitution*, Art. III, §2, ¶2. In all Cases affecting Ambassadors, other public Ministers and Consuls . . . the Supreme Court shall have original Jurisdiction.

[10] *Constitution*, Art. V. The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

[11] *Scott v. Sandford*, note 8.

(6). BURDEN. This Court must satisfy itself of its own jurisdiction to identify the governing constitutional law and if that law recognizes Indian tribal sovereignty, as contended, this Court must adjudicate disputed facts upon the basis of it and it alone, for the necessary implication of the constitutional recognition of tribal sovereignty is the corresponding irrelevance of conflicting federal, state, judge-invented and judge-declared "common" law.[12]

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[12] *Marbury v. Madison*, 5 US 137, 163, 176-179 (1803). The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. . . . The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such

government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and he constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipo-

The source is the principle of discovery pursuant to which the great maritime powers subjected themselves to the positive law fiduciary obligation of protecting the several nations or tribes of Indians in the unmolested and undisturbed possession of their lands pending voluntary surrender thereof by treaty, which trust devolved upon the United States as held by this Court in *Worcester v. Georgia* (note 8).

The burden of proof is governed by the *sui generis* principle or rule of generous construction.[13]

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tence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

[13] *Carleton Proclamation*, *1766*. Whereas Advices have been received That several unprovoked Violences and Murthers have een committed upon the Indians under His Majesty's Protection in the Countries adjoining to His Majesty's Provinces in North America, and that Settlements have been made in the said

Countries, beyond the Limits prescribed by His Majesty's *Royal Proclamation of 1763*, in the Grounds therein allotted to the Indians: Whereby the Indians have been greatly and unjustly discontented: His Excellency the Lieutenant-Governor and Council of this Province, do hereby strictly enjoin and command all the Inhabitants of the same, to avoid every Occasion of giving the Indians Offence, and to treat them as Friends and Brothers intitled to His Majesty's Royal Protection; and, if any of the said Inhabitants have made any Settlements on the Indian Grounds, to abandon them without Delay, under Pain, in case of Failure herein, of being prosecuted, as Disturbers of the Peace of the Province, with the utmost Rigour of the Law.

Royal Instructions to, Sir Guy Carleton, the Governor of Quebec, 1768. Art. 50. Whereas Our Province is in part Inhabited and Possessed by several Nations and Tribes of Indians . . . Assemble and treat with the said Indians, promising and Assuring them of Protection and Friendship on our part and delivering such presents as shall be sent to You for that purpose.

Goodell v. Jackson, 20 Johnson's R 693, 724 (NY 1823). It is not less wise than it is just, to give that article [Art. 37 of the *Constitution, 1777* regulating purchases of land from the Indians nations or tribes] a benign and liberal interpretation, in favor of the beneficial end in view. We ought to bear in mind, when we proceed to the consideration of the subject, that the article was introduced for the benefit and protection of the Indians, and that we are bound to the performance of it, not only by duty, but by gratitude.

Lee v. Glover, 8 NY State R 188, 190 (1828). [I]f it be Indian property in land, it is protected by our constitution and laws. . . . It is analogous to the disability of infants to contract, in not depending on the actual capacity to protect his own lands.

Cherokee Nation v. State of Georgia, 5 Pet. 1, 17 (1831). Meanwhile [until treaty of cession] they are in a state of pupilage. Their relation to the United states resembles that of a ward to a guardian.

Worcester v. Georgia, 6 Pet. 515, 552, 553, 582 (1832). So with respect to the words "hunting grounds." Hunting was at that time the principle occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting

the full use of the lands they reserved. . . . They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government. . . . Had such a result been intended it would have been openly avowed. . . . The language used in treaties with the Indians should never be construed to their prejudice.

Clark v. Williams, 36 Mass. 449, 501 (1837). [W]e think it manifest, that this law was made for the personal relief and protection of the Indians, and is to be limited in its operation. It is to be used as a shield, not as a sword.

R. v. Symonds, [1840-1932] NZPCC 387, 391 (1847). The existing rule then contemplates the Native race as under a species of guardianship. . . .

From the protective character of the rule, then, it is entitled to respect on moral grounds, no less than to judicial support on strictly legal grounds.

Chouteau v. Malony, 16 How. 203, 237, 238 (1853). The Indians within the Spanish Dominions, whether Christianized or not, were in a state of tutelage. . . . Indians are considered as persons under a legal disability and their protectors stand in the light of guardians…They were protected very much by similar laws when Louisiana was a French province.

People v. Dibble, 18 Barbour's SCR 412, 414 (NY 1854). They were regarded in many respects as independent nations, poor and weak, to be sure, and needing necessarily the guardian power of the state to protect them in the enjoyment of the little of the extensive domain that remained to them.

Muchmore v. Davis, (1868), 14 Grant's 346, 358 (Ontario Chancery). These lands were dealt with by the Crown in the way that is considered most for the benefit of the Indians, for and towards whom it is assumed the duty of trustee and guardian.

Fegan v. McLean, (1869), 29 UCQB 202, 204. The land in question is admitted to be unsurrendered land, set apart and reserved for the use of the Indians. The land either belongs to or is held by the Crown in trust for the Indians.

Choctaw Nation v. US, 119 US 1, 27 (1886). As was said by this Court recently in the case of *United States v. Kagama*, 118 US 375, 378 "These Indian tribes are the wards of the nation; they are communities dependent on the United States; depen-

(7). NECESSITY. The rule of law exists because where there is a right there is a remedy.

This Court is the default court to provide it since no alternative independent and impartial third-party

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dent largely for their daily food; dependent for their political rights. . . . " The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, . . .

AG Ontario v. AG Canada: *In re Indian Claims*, (1895), 25 SCR 434. [Strong, J, 503] As at the date of these surrenders, in 1850, the Indians were under the protection of the Imperial Government, and their affairs were administered by the Governor General, not through the responsible ministers of the province, but directly as representing the Crown.

[Sedgewick, J, 535] The wards of the nation must have the fullest benefit of every possible doubt.

[King, J, 543] . . . the treaties with the aborigines are to receive a generous interpretation n favour of them as public wards of the nation.

Ontario Mining Company v. Seybold, (1901), 32 SCR 1, 3 (Sir Henry Strong, CJ). [T]he Indians themselves have always been regarded and treated as wards of the Crown.

Dominion of Canada v. Province of Ontario, [1910] AC 637, 646 (PC). The Dominion Government were indeed, on behalf of the Crown, guardians of the Indian interest and empowered to take a surrender of it and to give equivalents in return, and in so doing they were not under any special duty to the province.

St Ann's Island Shooting and Fishing Club Ltd. v. The King, [1950] SCR 211, 219, 220. The language of the statute embodies the accepted view that these aborigines are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation.

US v. Shoshone Tribe, 304 US 111, 117 (1938). As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals or timber would be resolved in favor of the tribe.

adjudicator exists with respect to boundary disputes between native and newcomer governments.

Between 1971 and the present the applicants and other Indians with whom they are associated raised the same issue as herein in the federal, state and provincial civil and criminal courts in Washington, DC, Maine, Massachusetts, New York, Nevada, Alberta, British Columbia, New Brunswick, Ontario, Quebec and Saskatchewan; and the same with international courts.

The constitutional question systemically was ignored and each time permission was sought to appeal to this Court or the Supreme Court of Canada it was denied without reasons, which were not disclosed until this Court's 2004 *Lara case* (*supra*) and Canada 2005 *Marshall case* (*infra*).

The provenance of the independent and impartial third-party original jurisdiction derives from the era of British North America when, of necessity, it was vested in the Judicial Committee of the Privy Council. *Please see*, Joseph H. Smith, *Appeals to the Privy Council from the American Plantations*, Columbia University Press, New York, 1950.

In particular please see the discussion of the leading court jurisdiction precedent of the 18th century *Mohegan Indians v. Connecticut* (1704-1775). As a result of the commencement in 1704 of the *Mohegan* case by petition for prerogative relief the king commissioned a report from the attorney general of the United Kingdom who agreed with the Indian suggestion that justice and equity could not be seen to be done in the ordinary courts of Connecticut with which the Indian tribe was in dispute over the geographical definition of the treaty frontier beyond

which all land in North America, by operation of constitutional law alone, continues to be reserved under tribal sovereignty, precisely because the Connecticut court system was constituted by one but not the other of the disputing sovereign bodies politic.

That situation is the same in respect of the present dispute between the applicants and the federal, state and provincial governments of the United States and Canada. (It should be noted that the Supreme Court of Canada is an interested federal court, unlike the Supreme Court of the United States which is a third-party constitutional court. Accordingly justice can never be seen to be done in the Supreme Court of Canada but at least has a chance in the Supreme Court of the United States.)

The attorney general's report advised the same solution for tribal versus colonial government boundary disputes as existed for inter-colony boundary disputes. Accordingly the king by Order in Council constituted a standing sub-committee of the JCPC for such boundary disputes as they should arise, the sitting members of which were to be appointed on a case by case basis.

In 1789 the *Constitution* of the United States vested the former third-party jurisdiction of the Privy Council in this Court. (With regard to Canada it persists in the JCPC since there has never been a constitutional amendment repealing it.)

(8). CANADA. In 1869[14] Quebec's Court of Appeal confirmed the Quebec trial court's 1867[15] adoption of

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[14] *Connelly v. Woolrich*, (1869), RLOS 356-7 (CA Quebec) (Affirming the following lower court decision dated 1867). Even the United States are careful to acquire the Indian title, either

by purchase or by other conventional means, before occupancy can be allowed, or public grants made.

[15] *Connelly v. Woolrich*, (1867), 11 LCJ 197, 205-07 (SC Quebec), affirmed (1869), RLOS 356-7 (CA Quebec). . . . will it be contended that the territorial rights, political organization such as it was, or the laws of the Indian tribes, were abrogated—that they ceased to exist when these two European nations [France and the UK] began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not—that so far from being abolished, they were not even modified in the slightest degree in regard to the civil rights of the natives. As bearing upon this point, I cannot do better than to cite the decision of learned and august tribunal—the Supreme Court of the United States. In the celebrated case of *Worcester against the State of Georgia*, (6th Peters Reports, pages 515-542), Chief Justice Marshall—perhaps one of the greatest lawyers of our times—in delivering the judgment of the Court, said:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. . . . [*insert* entire content of the US Supreme Court judgment down to] . . . Certainly it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.

Though speaking more particularly of Indian lands and territories, yet the opinion of the Court as to the maintenance of the laws of the Aborigines, is manifest throughout. The principles laid down in this judgment, (and Mr. Justice Story as a Member of the Court concurred in this decision), admit of no doubt.

the constitutionalized discovery doctrine identified by this Court in *Worcester* in 1832; and in 1888[16] and

[16] *St. Catherines Milling and Lumber Company Ltd. v. The Queen*, (1888), 14 AC 46, 53-55, 60 (JCPC). Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest surrendered by the treaty. The ceded territory was at the time of the Union land vested in the Crown, subject to "an interest other than that of the Province in the same" within the meaning of sect. 109; . . . the [treaty's] legal consequences . . . opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit . . . there has been all along vested in the Crown a substantial and paramount estate underlying the Indian title, which became a *plenum dominium* [*i.e.*, "a plenary power"] whenever that title was surrendered or otherwise extinguished.

[*Submission*] The reference in that quotation to "the year 1763 in the character of the interest surrendered by the treaty" is to the *Royal Proclamation of 1763* of which the US Supreme Court in 1857 said, "The King of Great Britain, by his proclamation of 1763, virtually claimed that the country west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the treaty of Paris of that year, and he says: 'We reserve it under our sovereignty, protection and dominion, for the use of the Indians.' This country was conquered from the Crown of Great Britain, and surrendered to the United States by the treaty of peace of 1783." *Scott v. Sandford*, 19 How. 393, 520 (SC 1857), note 8.

The proclamation implemented with the force and effect of a constitutional statute the discovery doctrine and, furthermore, inaugurated the absolute (*i.e., mens rea* irrebutably is presumed by operation of law) criminal offences of "Misprision of Treason" and "Misprision of Fraud and Abuse" relative to any executive, legislative or judicial officer of the crown who might upon the basis of any "Pretence whatever" usurp tribal sovereignty and ignore the crown's duty of protecting it pending its relinquishment by treaty duly authorized by the Indian People of the Tribe affected.

Thus the Proclamation enacted: [*Preamble*] And whereas it is just and reasonable and essential to our Interest and the

Security of our Colonies that the several Nations or Tribes of Indians with whom We are connected and who live under our Protection should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as not having been ceded to or purchased by Us are reserved to them or any of them as their Hunting Grounds—We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure that:

[1st] no Governor or Commander in Chief . . . do presume upon any Pretence whatever to grant Warrants of Survey or pass any Patents . . . upon any Lands whatever which not having been ceded to or purchased by Us as aforesaid are reserved to the said Indians or any of them. . . .

And [2nd] We do hereby strictly forbid on Pain of our Displeasure all our loving Subjects from making any Purchases or Settlements whatever or taking Possession of any of the Lands above reserved without our especial leave and Licence for that Purpose first obtained.

And [3rd] We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described or upon any other Lands which not having been ceded to or purchased by Us are still reserved to the said Indians as aforesaid forthwith to remove themselves from such Settlements.

And [4th] whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians to the great Prejudice of our Interests and to the great Dissatisfaction of the said Indians In order therefore to prevent such Irregularities for the future and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent We do with the Advice of our Privy Council strictly enjoin and require that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians within those parts of our Colonies where We have thought proper to allow Settlement but that if at any Time any of the Said Indians should be inclined to dispose of the said Lands the same shall be Purchased only for Us in our Name at some public Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie . . .

1897[17] the JCPC confirmed that §109 of Canada's constitution[18] continues the paramountcy of tribal

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And [5th] We do by the Advice of our Privy Council declare and enjoin that the Trade with the said Indians shall be free and open to all our Subjects whatever provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside and also give Security to observe such Regulations as We shall at any Time think fit by ourselves or by our Commissaries to be appointed for this Purpose to direct and appoint for the Benefit of the said Trade. . . .

And [6th] We do further expressly conjoin and require all Officers whatever as well Military as those Employed in the Management and Direction of Indian Affairs within the Territories reserved as aforesaid for the use of the said Indians to seize and apprehend all Persons whatever who standing charged with Treason Misprisions of Treason Murders or other Felonies or Misdemeanors shall fly from Justice and take Refuge in the said Territory and to send them under a proper guard to the Colony where the Crime was committed of which they stand accused in order to take their Trial for the same.

Canada's *Indian Act, 1876*, unconstitutionally, *i.e*., not in compliance with the amendment formula, abolished tribal governments and made the practice of them criminal offences thusly following the approach taken by the "*Appropriations Act*" 16 Stat. 566, codified at 25 USC §71 (1871), pursuant to which the federal government presumes "to regulate virtually every aspect of the tribes through ordinary domestic legislation" as Thomas, J, said in *US v. Lara* in 2004, note 3.

It was and is a crime against Canadian domestic law for Canadian lawyers to defend Indian tribal sovereignty.

[17] *AG Ontario v. AG Canada: In re Indian Claims*, [1897] AC 199, 210-11 (JCPC). The beneficial interest in the territories ceded by the Indians under the treaties became vested, by virtue of s. 109, in the Province of Ontario. . . . The effect of the treaties was, that, whilst the title to the lands continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds,

sovereignty over the crown's constitutional "Interest" pending treaty. Tribal sovereignty's constitutional remedy of third-party adjudication via the Standing Committee has never been repealed but access to it is blocked by the JCPC Registrar's preemptive refusal to file court process without the consent of Canada's Attorney General, which politically is withheld.

In view of the JCPC's previous interpretation Canada's Supreme Court could not enlarge the Canadian "Commerce Clause"[19] into "plenary power"[20] and so, instead, it usurped[21] it by-passing the amendment formula and re-defining the aboriginal right as a primitive practice.[22] This *per incuriam*,

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passed to the Government of the Province. . . . "An interest other than that of the province in the same" appears to them [their Lordships] to denote some right or interest in a third-party, independent of and capable of being vindicated when in competition with the beneficial interest of the old province.

[18] *Constitution Act, 1867*. §109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

[19] *Constitution Act, 1867*. §91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to . . . (2). The Regulation of Trade and Commerce.

[20] *US v. Lara*, 541 US 193, 200 (2004). Note 3.

[21] *Constitution Act*, *1982*. §52(3). Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

[22] *R. v. Marshall; R. v. Barnard*, 2005 SCC 43, ¶48. The Court's task in evaluating a claim for an aboriginal right is to

perverse and *ultra vires* re-definition[23] inflicts genocide.[24]

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examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right.

[23] "Re-definition" is a euphemism for the more precise terms of legal art "Pretence," "Misprision of Treason" and "Misprision of Fraud and Abuse" within the meaning and intent of those words and phrases as used in the *Royal Proclamation of 1763* (note 16).

The repetition of those words and phrases can not arguably be criminally in contempt of court since they were saved and continued by the *Constitution Act, 1982*: §25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a). any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; §35(1). The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[*Submission*] Nevertheless the only Canadian lawyer to have repeated them was convicted of that crime and disbarred. Canadian lawyers certify land titles as good and marketable event though title can not be traced to a good originating root in a valid and registered Indian treaty as stipulated mandatory by the proclamation. Those crimes are committed with impunity in Canada because it is lawyers who commit them and they enjoy a monopoly over the administration of justice.

See, EV Dicey, *Lectures on the Relation between Law and Public Opinion in England in the Nineteenth Century*, London, Macmillan, 1920, 483. Judge-made law is subject to certain limitations. It can not openly declare a new principle of law: it must always take the form of a deduction from some legal principle whereof the legal validity is admitted, or the application or interpretation of some statutory enactment. It can not override statutory law. The courts may, by a process of interpretation, indirectly limit or possibly extend the operation of a statute, but they cannot set a statute aside. Nor have they in England ever

adopted the doctrine which exists, one is told, in Scotland, that a statute may be obsolete by disuse. It can not from its very nature override any established principle of judge-made law.

See also, John Elmsley, Chief Justice of Upper Canada, "Report to the Executive Council of Upper Canada dated October 22, 1798," PAC, RG1, E1, V46, State Book 'B', pp. 210-14. It is no secret to any person at all acquainted with the present state of Indian Affairs that the aborigines of this Part of His Majesty's American Dominions are beginning to appreciate their lands not so much by the use which they themselves, as by the value at which they are estimated by those who purchase them, and either cultivate them, or dispose of them in their natural state.

It is equally notorious, that if the Indians wanted penetration to make the discovery, there are a great many persons of European origin who have attached themselves to the several Tribes which surround us, and will not fail to inform them that the value of any article depends as much upon its importance to the purchaser, as on its usefulness to the present possessors. But if this were doubtful now, when the lands purchased from the Indians are distributed among His Majesty's Subjects at a Fee hardly exceeding the prime cost of them, it cannot possibly remain so when the Indians discover as they unquestionably will, that the purchases made from them are to be converted into a source of Revenue to ourselves—slow as their progress is towards civilization they are perfectly apprised of the value of money and of its use in maintaining them in those habits of indolence and intemperance to which most of them are more or less inclined.

In order therefore to exercise that foresight which our Indian neighbours are beginning to learn, and in which it certainly cannot be our interest to promote their improvement, we submit for your Honour's consideration the propriety of suspending the promulgation of the plan which has been laid down for us until we can make a purchase sufficiently large to secure for us the means of extending the population and increasing the strength of the Provinces so far as to enable us before our stock is exhausted to dictate instead of soliciting the terms on which future acquisitions are to be made.

[24] *Compare*, Canada's *Crimes Against Humanity and War Crimes Act* of the year 2000 which first appears to accept the

(9). ARGUMENT. The public importance of the constitutional question of tribal sovereignty is inestimable. The danger, not only to the applicants but to the People of the United States and the world they influence, of getting it wrong lurks in neglecting the overarching perspective in favor of focusing one aspect of the *Constitution* or of the nature and character of the rule of law and *stare decisis* or of the blindness and deafness attributable to ethnocentrism and temperocentrism, that inexorably results from focusing some factual or legal detail in isolation.

For this reason the applicants submit it is essential that the accompanying Motion of Leave to File a Motion for Leave to File a Document in Excess of Word Limits in Most Extraordinary Circumstances

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Rome Statute creating the independent and impartial third-party adjudication jurisdiction of the International Criminal Court (ICC) but which then in fact withdraws the acceptance. §4(1). Every person is guilty of an indictable offence who commits genocide. §9(3). No proceedings for an offence under any of section 4 of this Act,. . . may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and those proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf.

Since the AG of Canada is the primary architect and implementer of the genocide-by-chicanery of the Indian Tribes of Canada the fraud upon the Canadian People and foreign nations of posing as a defender of the rule of law in relation to the preeminent jurisprudential value of preventing and punishing genocide while at the same time preempting the Indian victims' remedies in the JCPC and the ICC invokes the clean hands doctrine of equity against the further chicanery by which Canada undoubtedly will seek to evade the jurisdiction of the Supreme Court of the United States to hold the United States to its treaty promise to protect the Mi'kmaq Tribe (note 4 and Appendix C).

Word Limits in Most Extraordinary Circumstances and Related Relief, this Motion for Leave to File a bill of Complaint and the accompanying Bill of Complaint be read and comprehended contemporaneously and *in pari materia*.

The applicants' case on the merits therefore rests without further argument.

(10). AFFIDAVIT. The attestation to the truth of this Motion for Leave to File a Bill of Complaint is made in the accompanying Motion for Leave to File a Motion for Leave to File a Document in Excess of Word Limits in Most Extraordinary Circumstances and Related Relief.

February 11, 2011.

/s/ "Rick Van Guilder"
Per: Mahican Tribe by Public Minister
"Gary Metallic"
/s/ "Gary Metallic"
Per: Mi'kmaq Tribe by Public Minister
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APPENDIX A

Menchu v. Montt

Sentence 237/2005 dated September 26, delivered by the Spanish Constitutional Court

BOE Number 258 supplement
Friday October 28, 2005
[*Page 45* … …]

17753 Second Chamber. Sentence 237/2005, dated September 26. Appeals for legal protection 1744-2003, 1755-2003 and 1773-2003 (accumulated). Brought by Ms Rigoberta Menchú Tumn and others against the Sentence and Decision of the Criminal Chambers of the Supreme Court and of the "Audiencia Nacional", in the case for crimes of genocide, terrorism and torture in Guatemala.

Violation of the right to effective legal protection (access to criminal justice): universal jurisdiction of the Spanish Law Courts in criminal matters.

The Second Chamber of the Constitutional Court, constituted by Judge Guillermo Jiménez Sánchez, President, Judge Vicente Conde Martín de Hijas, Judge Elisa Pérez Vera, Judge Ramón Rodríguez Arribas and Judge Pascual Sala Sánchez, has delivered,

IN THE NAME OF THE KING

the following

SENTENCE

In the appeals for legal protection numbers 1744-2003, 1755-2003 and 1773-2003, the first of which brought by Ms Rigoberta Menchú Tumn, Ms Silvia Solórzano Foppa, Ms Silvia Julieta Solórzano Foppa,

Santiago Solórzano Ureta, Julio Alfonso Solórzano Foppa, Lorenzo Villanueva Villanueva, Ms Juliana Villanueva Villanueva, Lorenzo Jesús Villanueva Imizocz, Ms Ana María Gran Cirera, Ms Montserrat Gibert Grant, Ms Ana María Gibert Gran, Ms Concepción Gran Cirera, José Narciso Picas Vila, Ms Aura Elena Farfán, Ms Rosario Pu Gómez, C. I. Est. Prom. Derechos Humanos, Arcadio Alonzo Fernández, Conavigua, Famdegua and Ms Ana Lucrecia Molina Theissen, represented by Court Attorney Ms Gloria Rincón Mayoral and aided by Lawyer Carlos Vila Calvo, and by the "Confederación Sindical de Comisiones Obreras" (Confederation of Trade Unions) represented by Court Attorney Ms Isabel Cañedo Vega and aided by Lawyer Antonio García Martín, Number 1755-2003, brought by the Association of Human Rights of Spain, represented by the Court Attorney Ms Irene Gutiérrez Carrillo and aided by Lawyer Victor Hortal Fernández, and number 1773-2003, brought by the free Association of Lawyers, the Association against Torture, the "Associació d'Amistat amb el Poble" of Guatemala, the Association of the Center for Documentation and Solidarity with Latin America and Africa, the Comité Solidariedad Internacionalista de Zaragoza, represented by Court Attorney Ms Isabel Calvo Villoría and aided by Lawyer Antonio Segura Hernández, and by the Argentine Association for Human Rights of Madrid, represented by Court Attorney Ms Isabel Cañedo Vega and aided by Lawyer Carlos Slepoy Prada, against the Sentence of the Supreme Court No. 327/2003, dated February 25, dismissed in the appeal for annulment No. 803-2001 that it estimates the intervening appeal for partial annulment against the Decision of the Plenary Session of the Criminal Court of the "Audiencia Nacional" dated December 13, 2000, dismissed in

Appeal No. 115-2000. The Attorney General has intervened. The final Judge was Judge Guillermo Jiménez Sánchez who expressed the view of the Court.

Prior History [*pages 46 – 50: Omitted*]

[*Page 51 … …*]

II. Basis in Law

1. The matters before the constitutional jurisdiction are various requests for protection directed against the Decision of the Second Chamber of the Supreme Court of February 25 2003 that estimated partially the intervening appeal for annulment against the Decision of the Plenary Session of the Criminal Court of the "Audiencia Nacional" of December 13, 2000, as well as against this last decision. The nucleus of the raised controversy is focused on the limited interpretation that, although by virtue of diverse arguments, both judicial organs make on art. 23.4 of the Judicial Power Organization Act (LOPJ) and the criteria of criminal jurisdictional competence there established, referred to as the so-called principle of universal jurisdiction, with the consequence of denying, totally or partly, the competence of the Spanish Courts for the prosecution and judgment of the facts object of the accusations that have given rise to this present procedure, facts qualified in the mentioned accusations as genocide, terrorism and torture, carried out in Guatemala during the seventies and the eighties. The three lawsuits for protection coincide in denouncing that the contested decisions have proceeded groundlessly to a restrictive interpretation and "contra legem" of the mentioned precept by starting from the demand for a series of

requirements not contemplated in the judicial Act, resulting in a violation of their fundamental rights.

Concretely, they estimate the right to effective judicial protection consecrated in art. 24.1 CE violated, both in the aspect to obtain a legally founded decision and in connection with the right to access the jurisdiction. They also coincide in the relative accusation to the violation of art. 24.1 CE allegedly committed by the Sentence of the Supreme Court by ending in a "reformatio in peius" by which, while the "Audiencia Nacional", on the basis of the principle of subsidiarity, discarded the competence of Spanish Courts "for the time being", leaving open such a possibility in the future, the Sentence of the High Court, rejecting such a principle but accepting the need of a connection with Spanish interests, denied in a definitive way the jurisdiction of our State, leaving, in consequence, a worse situation for the appellants in the high court appeal.

Besides the mentioned reasons for protection, both the appeal registered as No. 1744-2003, and that [*Page 52*] registered as No. 1773-2003 also allege the violation of the right for the ordinary Judge as predetermined by law (art. 24.2 CE), derived equally groundlessly by this restrictive interpretation, as well as (in the last mentioned appeal) the violation of the right to proceedings without undue delays. Lastly the appeal registered as No. 1755-2003 includes the violation of the right to proceedings with all the guarantees given by art. 24.2 CE, together with the right to equality in the application of legislation, since the concrete competence of the Spanish Courts is established by starting from discrimination of the victims based on their nationality.

The Public Prosecutor, on the other hand, is interested in the granting of protection in consideration of the violation of the right to effective judicial protection (art. 24.1 CE) in which both the Decision of the "Audiencia Nacional" and the Sentence of the Supreme Court allegedly incurred when restricting access to the proceedings with an excessively rigid and unfounded interpretation of art. 23.4 LOPJ, based on restrictive criteria or elements of the competence of the Spanish Courts which are neither included in the law nor reasonably derived from it.

2. Being several the formulated complaints, we must begin, according to our reiterated doctrine, with the examination of those from which back-dated activities can be derived with the purpose of safeguarding the subsidiary character of the process of protection (for all, SSTC 229/2003, of December 18, FJ 2; 100/2004, of June 2, FJ 4; and 53/2005, of March 14, FJ 2). More concretely, and keeping in mind that this is the reason of central protection in all the lawsuits, we will begin with the alleged violation concerning the right to effective judicial protection regulated by art. 24.1 CE in the aspect at law to obtain a legally founded decision and the right to access jurisdiction.

Both mentioned aspects at law quoted included in art. 24.1 CE, in spite of each having its own field of application, must be focused in a combined way in the present case, and this because the nuclear content of the complaint is calculated by the fact that, by means of a unfounded legal decision, it deprives the appellants from the right to access the proceedings. This combined or double tackling of the complaints performs, in consequence, a double standard or test for judgment. This is so because the

right to access jurisdiction, constituting, as we have affirmed, "the medullar substance" (STC 37/1995, of February 5, FJ 5), the "proper and primary content" (STC 133/2005, of May 23, FJ 2), of the right to effective judicial protection, is important, together with the common standards of the right to effective judicial protection in its aspect of obtaining a decision founded at law, such as the requirement of sufficient motivation, and the absence of an arbitrary aspect, of apparent unreasonableness and of patent error, a further and potentially more intense requirement of proportionality, derived from the principle "pro actione". We have taken this stand, ever since STC 35/1995, dated February 7, FJ 5, that the constitutional control of decisions for non-admissibility or for non-pronouncement on the core of the matter must be verified very thoroughly, given that these cases are still valid (as well as in the denial of jurisdiction when access to the proceedings is closed) according to the mentioned principle "pro actione" (SSTC 203/2004, of November 16, FJ 2; 44/2005, of February 28, FJ 3; 133/2005, of May 23, FJ 2, among many others). A principle "that must be observed by the Judges and Law-Courts in a way to impede that certain interpretations and applications of the legally established requirements to consent to the proceedings, block the right for a judicial organ to recognize or resolve at Law an expectation submitted to it" (SSTC 133/2005, of May 23, FJ 2; 168/2003, of September 29, FJ 2).

As we have stated on several occasions, access to the jurisdiction constitutes a right of services of legal configuration, the exercise and provision of which are subordinated to the concurrence of the prerequisites and requirements that the legislator has established, so that it would not violate the right to effective

judicial protection by a decision of non-admission or by a mere procedure that reasonably takes note of existence of an obstacle founded on an expressed precept of the Law that, in turn, fully respects the essential contents of the fundamental right (SSTC 172/2002, of September 30, FJ 3; 79/2005, of April 4, FJ 2). We have also shown that the principle "pro actione" cannot be understood as the mandatory selection of the most favorable interpretation for its admission or of the decision of the core problem from among all the possible norms that regulate it, since this requirement would make the Constitutional Court enter in questions of procedural legality that correspond to the ordinary Courts to resolve (STC 133/2005, of May 23, FJ 2). On the contrary the duty that this principle imposes only consists in forcing the judicial organs to interpret the requirements for proceedings in a proportionate way, "impeding that determined interpretations and applications of the same requirements eliminate or block in a disproportionate manner the right for a judicial organ to recognize and solve according to Law what is subjected to it" (for all, STC 122/1999, of June 28, FJ 2).

As stated by STC 73/2004, of April 23, FJ 3, "the appreciation of the legal causes that impede a pronouncement on the core matters of the expected conclusions corresponds, generally, to the Judges and Courts in the exercise of their proper functions as per art. 117.3 CE, not being, in principle, the function of this Constitutional Court to revise the applied legality. However it corresponds to this Court, as supreme guarantor of the fundamental right to obtain effective judicial protection (provided) by the Judges and the Courts, to examine the motives and arguments on which the judicial decision that does not admit the lawsuit, are founded, or which in an

equivalent way, avoid to give a pronouncement on the core of the matter discussed. And this, obviously, not to supplant the function proper of Judges and Courts to interpret the juridical norms in controversial concrete cases, but to check if the appreciated reason is justified constitutionally and in proportion with the intended aim according to the norm on which it is founded. This examination permits, accordingly, to follow this line of protection, by taking in consideration not only a case without legal guarantees, but also, even if these exist, the application or interpretation that is arbitrary, groundless, or resulting from a patent error with constitutional relevance or which does not satisfy the inherent demands of proportionality when restricting fundamental rights (SSTC 321/1993, of November 8, FJ 3; 48/1998, of March 2, FJ 3; 35/1999, of March 22, FJ 4, among many others)".

That is to say, even when the verification of the concurrence of the procedural pre-requisites and requirements constitute, in principle, a question of strictly ordinary legality, it will correspond to this Court to revise those judicial decisions in which such procedural pre-requisites have been interpreted in an arbitrary or professedly unreasonable manner or incurring in a patent error. And, besides, when dealing with access to jurisdiction, this revision will also be appropriate in cases in which the procedural regulations have been interpreted in a too rigorous or excessively formalist manner or in a way which is disproportionate with its declared aims and the interests that are sacrificed (SSTC 122/1999, of June 28, FJ 2; 179/2003, [*Page 53*] of October 13, FJ 2; 3/2004, January 14, FJ 3; 79/2005, of April 2, FJ 2). Expressed in the terms of the recent STC 133/2005, of May 23, FJ 2, "what in fact this principle implies is the interdiction of those decisions of non-admission

(or of non-pronouncement) which, through their extreme rigor, their excessive formalism or for any other reason, reveal a clear lack of proportion between the aims that these causes for non-admission—or non-pronouncement on the core matters—preserve and the interests they sacrifice".

For an exact understanding of the scope and roots of this mentioned principle "pro actione" under the protective aegis of art. 24.1 CE, it is right to emphasize the more incisive character that the norm for access to proceedings has, in the sense that judicial interpretations of the procedural legality that satisfy the test of reasonableness and for which "their correction from a theoretical perspective" was also predictable, can carry with them "a denial of the access to jurisdiction by starting from an excessively rigorous consideration of the applicable regulations" STC 157/1999, of September 14, FJ 3) and in this way violating the right to effective judicial protection in the mentioned situation.

3. Having explained the framework of the judgment that will be applied to the present case, it is now time to go into further detail. As has been clarified in the prior history, the nucleus of the controversy resides in the openly restrictive interpretation, given both by the "Audiencia Nacional" and by the Supreme Court on the rule of attribution of competence included in art. 23.4 LOPJ, with the consequence of denying the jurisdiction of Spanish Courts for the judgment of presumably qualified facts as genocide, terrorism and torture. Since the lawsuit goes against both decisions (the Decision of the "Audiencia Nacional" of December 13, 2000 and the Sentence of the Supreme Court of February 25, 2003), and since these based their respective pronounce-

ments on different arguments, it is convenient to analyze them separately.

Now then, before entering in the analysis of these arguments, it is important to remember that, even when referring to another crime included in the catalog of art. 23.4 LOPJ, the legal precept, object of the controversy, has been the object of previous pronouncements on the part of this Court, from which some implications can be extracted for the judgment of the contested decisions. Concretely the STC 21/1997, of February 10, FJ 3, showed that "when establishing the extension and limits of the jurisdiction of the Spanish Courts, art. 23.4 of the Judicial Power Organization Act 6/1985, of July 1, attributes the recognition by our judicial organs of acts made by Spaniards and foreigners outside the national territory when these same acts are susceptible to be classified as crimes according to Spanish criminal Law, in certain suppositions. . . . What this involves is that the legislator has attributed a universal reach to Spanish jurisdiction to take cognizance of these concrete crimes, both as regards their gravity and as regards their international dimension". At the same time, in the STC 87/2000, of March 27, FJ 4, we state that "the last foundation of this attributive norm of competence resides in the universalization of the jurisdictional competence of the States and their organs for the cognizance of certain acts, the prosecution and judgment of which interests all States, so that its logical consequence is the concurrence of competences, or said otherwise, the concurrence of competent States".

This consideration concerning the basis of universal jurisdiction allows the direct consideration of the constitutional dimension, from the multi-faceted

Law concerning effective judicial protection, of the Decision of the "Audiencia Nacional", whereas the theoretical pre-requisite it starts from to base the absence of jurisdiction, the principle of subsidiarity, does not seem to coincide "prima facie" with the principle of concurrence that this Court has considered preferable. In the interests of showing the relevance that this different theoretical perspective could have from the perspective of the constitutional analysis, we must first deepen the arguments by which the "Audiencia Nacional" supports its reasoning, to follow up later with a study of what have been the concrete criteria of application of such a principle that have led to the denial of Spanish jurisdiction and, with it, to the denounced violation of the right of access to proceedings.

In any event, prior to anything, we must highlight, and this both in connection with the Decision of the "Audiencia Nacional" as with the Sentence of the Supreme Court, that art. 23.4 LOPJ grants, in principle, a very wide scope to the principle of universal justice, since the only expressed limitation it introduces regarding this principle is that of the judged thing; that is, that the criminal has not been acquitted, pardoned or punished abroad. In other words, from an interpretation attached to the literal sense of the precept, as well as from the "voluntas legislatoris", we must conclude that the Judicial Power Organization Act establishes an absolute principle of universal jurisdiction, that is to say, without subjection to restrictive criteria of correction or procedure, and without any hierarchical order with regard to the other rules of attribution of competence, since, contrary to other criteria, that of universal justice is configured from the particular nature of the crimes object of prosecution. What has

just been stated does not imply, certainly, that such must be the only norm of interpretation of the precept, and that its exegesis cannot be preceded by further regulating criteria that may even restrict its scope of application. Now then, in such an exegesis, mostly when that restriction brings with it also a restriction for access to jurisdiction, the limits that define a strict or restrictive interpretation of that which, by inverse analogy, must already be conceived as a teleological reduction of the law, characterized by the exclusion of definite suppositions in its semantic nucleus from the framework of application of the precept, must be kept very much in mind. From the multi-faceted point of view of the right of access to jurisdiction, such a teleological reduction would move away from the hermeneutic principle "pro actione" and would lead to an extremely rigorous and disproportionate application of Law contrary to the principle consecrated in art. 24.1 CE. This is the analytic path we must follow.

4. As has already been anticipated, the Decision of the "Audiencia Nacional" object of the appeal, basing itself on previous decisions of the same judicial organ, starts from the Convention on genocide, and, more concretely, from its art. VI, to conclude by affirming the validity of a relationship of subsidiarity of Spanish jurisdiction over the territorial one. The mentioned precept states:

"Persons accused of genocide or of any one of the acts enumerated in article III will be judged by a competent Court of the State in whose territory the act was committed, or by the competent international criminal court from those whose jurisdiction has been recognized by the Contracting Parties".

The "Audiencia Nacional" starts off from the consideration that the mentioned precept which establishes the obligation of the States in whose territory the acts take place to take legal steps, does not in any way carry with it a prohibition for the rest of the signatory Parties to establish [*Page 54*] extraterritorial criteria of jurisdiction for genocide; as it eloquently shows, by mentioning previous decisions, such a limitation would be contrary "to the spirit of the Convention that looks for a commitment of the contracting parties, by means of the use of their respective criminal norms, to prosecute genocide as a crime of international law and to avoid impunity of such a serious crime". Nevertheless, immediately afterwards, it concludes that article VI of the mentioned Convention imposes subsidiarity of performance of jurisdictions different to those contemplated in it.

Saving the fact that in the controversial decision no explanation of the reasons which led to this conclusion are given, but rather such a relationship of subsidiary is inferred by the single mention of the criterion of territoriality (or of that related to an international criminal court), we should begin by stating that it is certain that there are weighty procedural as well as political-criminal reasons which serve to endorse the priority of the "locus delicti", and that these form part of the classic wealth of international criminal Law. Starting from this fact, and returning to the pending matter, what is certain is that, from the point of view of its theoretical formulation, the principle of subsidiarity should not be understood as a rule opposed to or divergent with the so-called principle of concurrence, and this because, with the concurrence of jurisdictions, and for the sake of avoiding an eventual duplicity of proceedings and the violation of the interdiction of

the principle "ne bis in idem", it is indispensable to introduce some rule of priority. Being a common commitment (at least at the level of principles) of all the States to prosecute such atrocious crimes because of their effect on the international community, an elementary procedural and political-criminal reasonableness must give priority to the jurisdiction of the State where the crime was committed.

Having said this, it should be subsequently noticed that the proposed topic does have constitutional relevance since what is ultimately discussed, both by the plaintiffs asking for protection and the Public Prosecutor, and by the Sentence of the Supreme Court that differs from the criteria applied by the "Audiencia Nacional" of affirming the priority of the principle of subsidiarity, are the terms under which such a rule or principle has been applied; more concretely, the greater or smaller number of requirements expected in connection with the inactivity of the State where the facts took place. The Decision of the "Audiencia Nacional" object of appeal, reproducing the doctrine established by Decisions 4 and 5 of November 1998, defines the terms of application of the rule of subsidiarity in the following way: "the jurisdiction of a State should abstain from exercising jurisdiction on acts constituent of genocide that are being judged by the Courts of the country where they took place or by an international Court". By accepting such an assertion literally, the abstention of the Courts of a third State must only happen when a procedure had already begun in the territorial jurisdiction or in the international Court; or, in any event, a reasonable modulation of the rule of subsidiarity must also include the abstention of extraterritorial jurisdiction when the effective prosecution of the crimes in the near future is foreseen.

"A sensu contrario", for the activation of the extra-territorial universal jurisdiction it must be then enough to provide, either "ex ufficio" or by the plaintiff, serious and reasonable indications of the judicial inactivity that indicate a lack, either of will or of capacity to prosecute effectively such crimes. Nevertheless the Decision of December 2003, accepting an extremely restrictive interpretation of the rule of subsidiarity which the same "Audiencia Nacional" had limited, goes further and requires from the plaintiff full accreditation of the legal impossibility or of the prolonged judicial inactivity, up to the point of demanding proof of the effective rejection of the accusation by the Guatemalan Courts.

Such a restrictive assumption of the international competence of jurisdiction of Spanish Courts established in art. 23.4 LOPJ carries with it a violation of the right to accede to jurisdiction recognized in art. 24.1 CE as a first expression of the right to effective protection (provided) by Judges and Courts. On the one hand, and just as complained by the Public Prosecutor in his report of allegations, with the requirement of proof of negative facts, the actor faces the need to undertake a task of impossible execution, to carry out a "probatio diabolica". On the other hand, this also frustrates its own purpose of universal jurisdiction consecrated in art. 23.4 LOPJ and in the Convention on genocide, precisely because the judicial inactivity of the State where the acts took place, by not reacting to a request for a complaint and thus impeding the proof required by the "Audiencia Nacional", would in fact block the international jurisdiction of a third State and lead to the impunity of genocide. In summary, such a rigorist restriction of universal jurisdiction, in open contradiction with

the hermeneutic rule "pro actione", becomes worthy of constitutional reproach for violation of art. 24.1 CE.

5. Just as has been explained in detail in the case history, the Supreme Court bases the denial of the Spanish jurisdictional competence on different arguments from those of the "Audiencia Nacional", keeping especially to the intrinsic application limits to the rule of universal jurisdiction included in art. 23.4 LOPJ. In the first place, the queried Decision gives dependence of the applicability of the mentioned precept on the fact that an international agreement of which Spain is part endorses such an extension of jurisdictional competence. Regarding the crime of genocide (on which its whole argument is centered), in spite of manifesting at first that the Convention, vis a vis the criteria of the plaintiffs, "neither establishes universal jurisdiction expressly, nor prohibits it", ends up by affirming the opposite, considering that its article VIII "does not authorize each State to institute its jurisdiction under the principle of universal jurisdiction but rather contemplates a different form of reacting when faced with the carrying out of this crime outside its territory, establishing expressly an appeal to the competent organs of the UN for them to adopt the pertinent measures in each case" (legal reason seven).

In this way the conclusion arrived at by the Supreme Court would be that, only when the appeal to unilateral universal jurisdiction is specifically authorized in conventional Law, would it be legitimate and applicable on the basis of art. 96 CE as well as of art. 27 of the Convention on the Law of Treaties, according to which what is agreed in international treaties, cannot be unfulfilled by the internal legislation of each State.

This results in an extremely rigorous interpretation, as well as, besides, one lacking argumentational support, to conclude that, by mentioning only some of the possible mechanisms of prosecution of genocide, and of the consequent silence of the Convention in connection with extraterritorial international jurisdiction, a prohibition has to be inferred directed towards the States Parties to the Convention (which, paradoxically, would not effect those which are not) which in their national legislation introduce, as established by mandate in art. I, other tools for the prosecution of the crime. From the unilateral point of view of the States, and with the exception of the mention of international Courts, what art. VI of the Convention determines is an [*Page 55*] obligation of minimal requirements which gives them a commitment to pursue the crime of international Law inside their territory. In such terms, namely once it is assumed that the so-often mentioned Convention does not incorporate a prohibition, but rather leaves open to the signatory States the possibility to establish ulterior mechanisms of prosecution of genocide, no obstacle can be expected from art. 27 of the Convention on the Law of the Treaties for assumption by the Spanish Courts of jurisdiction on the acts presumably carried out in Guatemala; more so when, from the purpose that inspires the Convention on genocide, an obligation rather than a prohibition for intervening can be deduced.

Indeed, this lack of authorization that the Supreme Court finds in the Convention on genocide for the activation of international jurisdiction in a unilateral way by a State does not agree with the principle of universal prosecution and of avoidance of impunity of such a crime of international Law which, as has been stated, pervades the spirit of the Convention and is

part of the international Common Law (and even of the "ius cogens" as been expressed by the best doctrine) rather than going in direct conflict against it. Indeed, it is contradictory with the very existence of the Convention on genocide, and with the objective and aim that inspire it, that the signatory parties make a pact to renounce a mechanism of prosecution of the crime, especially keeping in mind that the high-priority criterion of competence (the territorial) will be diminished on a multitude of occasions in its possibilities of effective exercise by the circumstances that can play a part in the different cases. Just as it must be contradictory with the spirit of the Convention that to be part of it carries with it a limitation in the possibilities of combating the crime that States which have not signed it would not have, in the same manner they should not be constrained by this supposed and questionable prohibition.

6. Universal jurisdiction not being recognized, in the opinion of the Supreme Court, by the Convention on genocide, the Second Chamber of this High Court sustains that its unilateral assumption by internal Law should, then, be limited by other principles, by virtue of what becomes the rule in international custom. From this is derived a restriction of the scope of application of art. 23.4 LOPJ, requiring for its consideration determined "connection links", such as that the presumed author of the crime is on Spanish territory, that the victims are of Spanish nationality, or that another direct connection point exists with national interests. The use of such corrective criteria is based on the Decision object of our analysis in international custom, reaching the conclusion that, since it does not correspond to each particular State to be unilaterally in charge of stabilizing order, the exercise of universal competence will

only be legitimate when the mentioned connection point exists; this, points out the contested decision, must have a significance equivalent to the criteria, recognized in the national Law or the Treaties, that allow the extraterritorial extension of competence.

In support of the point of departure, namely that according to international custom, the scope of the principle of universal justice has been restricted, the Supreme Court invokes certain decisions of jurisprudence by Courts of third States or international Courts; it mentions in particular diverse decisions by the Federal Supreme Court of Germany, the decision of the Supreme Court of Belgium on the "Sharon" case, as well as the decision of the International Court of Justice at The Hague, of February 14, 2002 (the "Yerodia" case), in which Belgium was condemned for the issuing of an international arrest order against the Minister of Foreign Affairs of the Democratic Republic of Congo.

Well, the first thing that we must clearly state is that it is fully debatable that such is the rule in international custom, and this especially because the selection of references of jurisprudence carried out by the Supreme Court in support of this thesis does not come to such a conclusion, but rather the contrary. In this respect, a wide argumentative development is not necessary, given the fact that the Vote peculiar to the contested Decision signed by seven Magistrates (the transcendence of which must be emphasized), has convincingly arrived to refute the expected validity of the decisions mentioned as theoretical support for the approach followed by the Second Chamber, contributing other references which give a sign to the contrary. As affirmed by the Magistrates who dissent from the majority, the mentioned German

decisions do not represent the "status quaestionis" in that country, since decisions taken by the German Constitutional Court taken after the decisions mentioned by the contested Decision have endorsed a principle of universal jurisdiction without the need of links with national interests (quoting, as an example, the Decision of December 12, 2000, which confirmed the condemnation for genocide delivered by the German Courts for crimes committed by Serbs in Bosnia-Herzegovina against Bosnian victims). Regarding the Decision of the International Court of The Hague in the "Yerodia" case, it must be concluded that this cannot be used as a precedent from the sought restrictions to universal competence, because it limited itself to the question of whether or not the international norms of personal immunity had been damaged, without pronouncing itself on universal jurisdiction as regards genocide, since this was the way it was expressly requested by the Democratic Republic of Congo in its lawsuit. And the same must be said in relation to the Sentence of the Supreme Court of Belgium of February 12, 2003, the contents of which are quoted by the Supreme Court only to mention the aspects related with the immunity of the state representatives in the exercise of their duties, and on the other hand omits all mention of the expressed recognition included in this decision concerning universal jurisdiction established in Belgian legislation.

If to what we have just stated, we add that there is a multitude of precedents in international Law that endorse the position contrary to that followed by the Supreme Court in the matter, the prerequisite that the Decision of the mentioned High Court sustains its restrictive interpretation of art. 23.4 LOPJ (the existence of widespread limitation of the principle of

universal justice in common international Law), this loses much of its support, keeping in mind, particularly, that the selection of references is not exhaustive and it does not include some significantly contrary to the approach taken. In this respect, it is debatable that the Decision omits to mention that, faced with what could be deduced by its reading, the Spanish Law is not the only national legislation that incorporates a principle of universal jurisdiction without linking it to national interests, and we may mention that of countries like Belgium (art. 7 of the Law of July 16, 1993, reformed by the Law of February 10, 1999, that extends universal jurisdiction to genocide), Denmark (art. 8.6 of its criminal Code), Sweden (the Law concerning the Convention on genocide of 1964), Italy (art. 7.5 CP) or Germany, States that include, to a greater or lesser extent, the repression of various crimes against the international community within the scope of their jurisdiction, without restrictions motivated by national links. As a significant example [*Page 56*], it is enough to indicate that the Sentence of the Supreme Court quotes the decision of the Federal Supreme Court of Germany dated February 13, 1994 but however it does not make any reference to the German art. 6 CP nor to the Code of crimes against international Law dated June 26, 2002 (Law promulgated with the purpose of adapting German criminal law to the Statute of the International Criminal Court), the first article of which states that its precepts will be applied to the crimes contemplated in it (genocide, crimes against humanity and war crimes included in the Statute of the Court) "even when the crime is committed abroad and does not have any relationship with Germany".

7. The Sentence of the Supreme Court also includes a listing of international treaties concerning the

prosecution of outstanding crimes for the international community subscribed by Spain with the purpose of showing that, on one side, in none of those treaties is universal jurisdiction established expressly, and that, on the other, in them the classic formula of collaboration "aut dedere aut iudicare" is established; that is to say, the States will have the obligation of judging those responsible for crimes included in the treaties when they are in their territory and the extradition requested by some other State with obligatory competence, according to the dispositions of the respective treaty, is not consented to. By analyzing this sector of the common international Law, the Supreme Court infers the necessity and the legitimacy of restricting the scope of application of art. 23.4 LOPJ to the cases in which the presumed responsible person is on Spanish territory, as established in art. 96 CE, para. g) of art. 23.4 LOPJ, and of the already mentioned art. 27 of the Convention on the Law of the Treaties, according to which the parties of a treaty will not be able to invoke their internal Law to justify the non-fulfillment of a treaty.

Independently of what we shall later affirm, the interpretation followed by the Supreme Court to justify such a criterion of restriction of the Law should already be rejected for reasons of a methodological nature. To begin with, the sought systematic reference to para. g) of art. 23.4 LOPJ cannot serve to extend the summations the High Court arrives at to the rest of the crimes contained in the preceding sections of the mentioned precept. And this is because the closing clause introduced in para. g) extends universal jurisdiction to other crimes, not included in the sections prior to art. 23.4 LOPJ which, according to the international treaties or agreements, should be followed in Spain. In other words, while sections a)

to f) of art. 23.4 LOPJ establish a catalog of crimes that can be prosecuted "ex lege" in Spain in spite of having been committed abroad and by foreigners, para. g) in fact determines precisely the possibility, if it is so agreed in an international treaty, for Spain to pursue other crimes different to those included expressly in the precept. It is, consequently, by no means evident that the limitations or conditions that, by way of the interpretation of the various international Treaties are mentioned in the Decision, are applicable in an analogous way to the first ones. An analogical procedure which, besides being contrary to the principle "pro actione" by reducing in an ostensible way the access to jurisdiction of the plaintiffs, is not supported by an identifiable enough reason, as has just been affirmed.

In the same way, it is very debatable to appeal to art. 27 of the Convention on the Law of the Treaties as support of such argumentative procedure. This is because, neither in the Convention on genocide, as has already been stated, nor in the Treaties that the contested Decision mentions, is there contemplated any prohibition of the exercise of universal unilateral jurisdiction which could be considered unfulfilled by what is established in Spanish Law.

Undoubtedly, the presence of the presumed author in Spanish territory is an unavoidable requirement for judgment and eventual condemnation, given the inexistence of trials "in absentia" in our legislation (with exceptions which are not relevant in this case). Because of this, juridical institutions such as extradition constitute fundamental aspects for the effective attainment of the purpose of universal jurisdiction: the prosecution and sanction of crimes that, because of their characteristics, affect the whole international

community. But such a conclusion cannot lead to change this circumstance into a requirement "sine qua non" for the exercise of judicial competence and the opening of the proceedings, especially when following this procedure would mean subjecting access to universal jurisdiction to a restriction not contemplated in the law; a restriction besides, that would be contradictory with the foundation and aims inherent to the institution.

8. Together with the presence of the presumed author on national territory, the contested Decision introduces another two connection links: that of passive personality, making universal competence depend on the Spanish nationality of the victims, and that of linking the crimes made with other relevant Spanish interests, which results in nothing except a generic reformulation of the so-called real principle of protection or of defense. Such restrictions seem to be again obtained from international custom, appealing, without being more concrete, to the fact that "an important part of the doctrine and some national Courts" were inclined to recognize the relevance of certain connection links.

Well, in this respect we should affirm that such an interpretation, radically restrictive of the principle of universal jurisdiction established in art. 23.4 LOPJ, which should rather be qualified as a teleological reduction (for going beyond the grammatical sense of the precept), goes beyond the limits of what is constitutionally acceptable from the framework that establishes the right to effective judicial protection consecrated in art. 24.1 CE, as much as it supposes a reduction "contra legem" to start from corrective criteria that not even implicitly can be considered present in the law and which, besides, are obviously

contrary to the purpose of the institution which is so altered that it cannot be recognized as the principle of universal jurisdiction as conceived in international Law, and that has the effect of reducing the scope of application of the precept until it almost appears to be a "de facto" abolition of art. 23.4 LOPJ.

Indeed, the right to effective judicial protection, in its aspect concerning access to jurisdiction, has been undermined in this present case because an interpretation in agreement with the "telos" of the precept would bring with it the satisfaction of exercising a fundamental right of access to the proceedings and it would be therefore be totally in accordance with the principle "pro actione", and because the literal sense of the precept analyzed, without any interpretive forcing of any type, complies with the execution of such a purpose and, with it, with the safeguard of the right consecrated in art. 24.1 CE. Therefore the forced and groundless exegesis to which the Supreme Court subjects the precept supposes an illegitimate restriction of the mentioned fundamental right, inasmuch as it violates the demand that "the judicial organs, when interpreting the legally foreseen procedural requirements, have to keep in mind the "ratio" of the norm with the purpose of avoiding that mere formalisms or unreasonable understandings of the procedural norms impede judgment of the core of the matter, violating the requirements of the principle [*Page 57*] of proportionality" (STC 220/2003, of December 15, FJ 3), by constituting a "denial to access to jurisdiction by departing from an excessively rigorous consideration of the applicable regulations" (STC 157/1999, of September 14, FJ 3).

9. The restriction based on the nationality of the victims incorporates an added requirement not

contemplated in the law, which, besides, cannot be teleologically founded since, particularly in relation to genocide, it contradicts the very nature of the crime and the shared aspiration of its universal prosecution, which is practically reduced by its basis. As established in art. 607 of the Criminal Code (CP) the legal type of genocide is characterized by the victim or victims belonging to a national, ethnic, racial or religious group, as well as because the acts carried out have the specific purpose of the destruction of such a group, precisely because of their links of belonging. The exegesis put forward by the Decision of the Supreme Court would consequently imply that the crime of genocide would be relevant for the Spanish Courts only when the victim were of Spanish nationality and, besides, when the behavior was motivated by the purpose of destroying the Spanish national group. The unlikelihood of such a possibility must be enough to show that this was not the purpose of the Legislator with the introduction of universal jurisdiction in art. 23.4 LOPJ, and that it cannot be an interpretation in agreement with the objective aims of the institution.

And the same conclusion must be reached in connection with the criterion of the national interest. Besides the fact, highlighted by the Public Prosecutor in his report, that the reference to this in the contested decision is practically nominal, without a minimum development that allows to detail its contents, it is certain that with its inclusion, number 4 of art. 23 LOPJ is practically devoid of content, by being referred to the rule of jurisdictional competence contemplated in the previous number. As has already been affirmed, the determining question is that the subjecting of competence to prosecute international crimes like genocide or terrorism to the concurrence

of national interests, in the terms outlined by the Decision, cannot in any way be reconciled with the foundation of universal jurisdiction. The international and cross-border prosecution that seeks to impose the principle of universal justice is based exclusively on the characteristics of the crimes included therein the damages of which (paradigmatically in the case of genocide) transcend beyond those of the concrete victims and reach the international community as a whole. Consequently, their prosecution and sanction constitute not only a commitment, but also an interest shared by all the States (as we had occasion of affirming in the STC 87/2000, of March 27, FJ 4) the legitimacy of which, in consequence, does not depend on ulterior interests peculiar to each one of them. In the same way the concept of universal jurisdiction in the international Law in force now is not configured around connection links based on the interests of a particular state, just as is shown by the same art. 23.4 LOPJ, the mentioned German Law of 2002 or, to provide several examples, the Decision adopted by the Institute of International Law in Krakow on August 26 2005, in which, after clearly showing the aforementioned commitment of all the States, universal jurisdiction in criminal matters is defined as "the competence of a State to pursue and, in the event of being declared guilty, to punish presumed criminals, independently of the place where the crime was committed, and irrespective of any link of active or passive nationality or other criteria of jurisdiction recognized by international Law".

Faced by the concept of the Supreme Court on universal jurisdiction, inasmuch as it aspires to unite "the common interest to avoid impunity of crimes against Humanity with a concrete interest of the State in the protection of certain goods" (legal reason

ten), it is sustained on ends which can with difficulty be reconciled with the basis of the same institution, which, as already stated, results in a practical "de facto" abrogation of art. 23.4 LOPJ. Besides, the exacerbated rigorous interpretation with which such criteria are applied by the High Court results in the incompatibility of its Decisions with the right to effective judicial protection in the aspect of access to jurisdiction, since it demands that the connection with national interests must be appreciated in direct relationship with the crime that is taken as a basis to affirm the attribution of jurisdiction, expressly excluding the possibility of less rigid interpretations of this criterion (and, in so doing, being more in agreement with the principle "pro actione"), such as that linking the connection of national interests with other crimes connected to it, or more generically, with the context that surrounds them.

10. From all the above-mentioned, it results that both the Decision of the "Audiencia Nacional" of December 13, 2000 and the Sentence of the Supreme Court of February 25, 2003 have violated the right to effective judicial protection (art. 24.1 CE) of the plaintiffs in its aspect of access to jurisdiction, for which reason it proceeds to grant the protection and, in consequence, to annul the mentioned decisions and return retroactively to the acts at the moment immediately prior to when the annulled Decision of the "Audiencia Nacional" was dictated, without the need, in the interests of preserving the subsidiary character of the appeal for protection, to analyze the accusations of violation of other fundamental rights that are made in the lawsuit.

SENTENCE

In attention to all the afore-mentioned, the Constitutional Court, BY THE AUTHORITY CONFERRED ON IT BY THE CONSTITUTION OF THE SPANISH NATION, has decided

To grant the protection requested by Ms Rigoberta Menchú Tumn and others, by the Association of Human Rights of Spain and by the free Association of Lawyers and others, and consequently:

1. Declares that the right to effective judicial protection has been violated, in its aspect of access to jurisdiction (art. 24.1 CE), for the appellants.

2. Re-establishes their right in full to these (appellants) and, to such an end, annuls the Decision of the Plenary Session of the "Audiencia Nacional" of December 13, 2000 and the Sentence of the Supreme Court of February 25, 2003, going back retroactively to the actions at the moment immediately prior to the delivery of the Decision of the "Audiencia Nacional" so that a new decision be dictated which is respectful of the violated fundamental right.

This Sentence is to be published in the "Boletín Oficial del Estado".

Delivered in Madrid, on September twenty-six, two thousand five. - Guillermo Jiménez Sánchez. - Vicente Conde Martín de Hijas. - Elisa Pérez Vera.- Ramón Rodríguez Arribas. - Pascual Sala Sánchez. - Signed and initialed.

S.I.T.S

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TO WHOM IT MAY CONCERN

This is to certify that the preceding pages, each duly numbered from page [1A] to this page [34A], contain a faithful and literal translation into English from the original official document in Spanish, published in the BOE (Spanish official Government Gazette) in supplement on October 28, 2005, concerning Sentence 237/2005 dated September 26, delivered by the Second Chamber of the Spanish Constitutional Court, which was shown to me for me this purpose.

Issued at the request of the interested party for the purposes as may be required, on this twenty-fourth day of February, two thousand and six.

(signed) Alfred A. Cauchi, Ph.Lic., M.A.
Paed., FinstCM(UK)
Official Translator
AUXILARY CONFERENCE INTEPRETER (ACI)
DG SCIC, European Union Institutions,
Brussels, BELGIUM

APPENDIX B

1724 Massachusetts/Mahican Treaty

Know all Men by these presents that we, Conkepot Poneyote Partarwake Naurnauquin Waenenocow Nawnausquan Cauconaugh-feet Nonamcaunet Nauhamiss Sunkhunk Popaqua Taunkhonkpus Tartakim Sauncokehe Cancannap Sunkiewe Nauheag Mauchewaufeet John VanGuilder Pinaskenet all of Housatonack allias Westonnook, in New England, in ye province of ye Massachusetts Bay: for & in consideration of a valuable sum well secured by bond viz Four Hundred and Sixty Pounds Three Barrels of Sider & thirty quarts of Rum: bearing date with these Presents, under ye hand & seal of Capt John Ashley of Westfield in ye County of Hampshire; we have given, granted, bargained, sold, aliened, conveyed & confirmed, and doe by these presents, fully, clearly and absolutely give, grant, bargain, sell, allinate, convey & confirm unto Col John Stoddard, Capt John Ahsley, Capt Henry Dwight & Capt Luke Hitchcock, Esqrs, all in the County of Hampshire, Committee appointed by ye General Court to purchase a certain Tract of land lying upon the Housatonick River, alias Westonook, in order for the settling of two towns there, and unto such as Committee have or shall admit in order for ye settling of said Towns, to them, their Heirs & assigns a certain tract of land, Meadow, swamp & upland lying on ye River aforesaid butted & bounded as followeth, viz: Southerly upon ye divisional line between the Province of Massachusetts Bay: and the colony of Connecticut in New England Westardly on ye patten or colony of New York, northardly upon ye Great mountain known by ye name of Manskuseehoank and Eastardly to run Four miles from ye aforesaid River and in a general way so

to extend Furthermore it is to be understood that ye aforesaid Indians reserve to themselves within the aforesaid Tract of land, described by bounds and butments, Southardly on a Brokk on ye west side of Housatonack River, known by the name of Mannanpenokcan and Northardly toa small brook lying between ye aforesaid Brook and ye River called Wampanikseeport alias White River: viz All ye land between ye aforesaid Brooks from said Westonook River extending unto ye patten of the Colleny of New York Together with a clear Meadow, between the aforesaid small brook extending Northardly unto ye said White River; viz, the aforesaid Indians reserve to themselves all ye land between ye Brooks running due West line from ye mouth of sd Brooks unto ye patten of ye Colleny of New York aforesaid And we ye aforesaid Indians doe for ourselves, our heirs Executors & Administrators, Covenant promise and grant to & with the aforesaid Committee & such as they have or shall admit of for Planters of sd Townships That before the ensealing hereof, we ye sd Indians are ye true, sole & lawful owners of ye aforegranted premises and are lawfully seized and possessed of the same in our proper right, as a good perfect & absolute estate of inheritance in fee simple, and have in ourselves good right, full power & lawful authority to grant, bargain, sell, convey & confirm sd bargained premises in manner aforesaid And ye said Committee & such as they shall or may admit for Inhabitants of sd Townships to them their heirs and assigns shall & may from time to time and at all times hereafter by virtue of these Presents, lawfully & peacibly occupie, Possess and enjoy the said bargained Premises with all ye appurtenances, free & clear, and clearly & freely acquitted & discharged of, from all & all manner, former & other Gifts, Grants,

Bargains, Sales, Jointures, Mortgages, Wills, Devises & Incumbrances whatsoever And furthermore We the sd Indians, for ourselves and for sd Heirs, Executors & Administrators doe covenant & engage to secure & defend ye said bargained Premises unto them the aforesaid Committee, and to such persons as the sd Committee have or shall admit in order to ye settling of sd Towns, to them or their Heirs & Assigns forever against the lawful claims & demands of any Person or Persons whatsoever In witness whereof, we the aforesaid Indians have hereunto set our hands and seals this 25th day of April, in ye tenth year of his Majisty's rign and in ye year of or one thousand seven hundred & twenty four:

Signed, sealed & deld
in presence of us
Conreat Borghghart
Benjamin Smith
John Gun Jun
Samuel Bartlett

Conkepot,	his mark * seal
Poneyote,	his mark * seal
Pota wakeont,	his mark * seal
Naunausquan,	his mark * seal
Wanenocow,	his mark * seal
Naunauquin,	his mark * seal
Conconaughpeet,	his mark * seal
Paunopescennot,	his mark * seal
Covconofeet,	his mark * seal
Naunhamiss,	his mark * seal
Sunkokehe,	his mark * seal
Popaqua,	his mark * seal
Taunkhonkpus,	his mark * seal
Tatakim,	his mark * seal
Saunkokehe,	his mark * seal

Cancanwap,	his mark * seal
Saunkewenaugheag,	his mark * seal
Manchewanfeet	his mark * seal
John Vangilder,	his mark * seal
Ponaskenet,	his mark * seal

The aforesaid is a Copy of ye Deed given by the Indians for ye Housatonack Land Examined by me

Ebener Pomroy by order
Acknowledged before
John Ashley, J.P.

APPENDIX C

1776 Massachusetts/Mi'kmaq Treaty

A Treaty of Alliance and Friendship entered into and concluded by and between the Governors of the State of Massachusetts Bay, and the Delegates of the St. John's and Mi'kmaq Tribes of Indians.

Whereas the United States of America in General Congress assembled have in the name, and by the authority of the good people of these Colonies, solemnly published and declared that these United Colonies are, and of right ought to be free and Independent states; that they are absolved from all allegiance to the British crown: and that all political connection between them, and the State of Great Britain is and ought to be dissolved: and that as free and independent states they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.

We, the Governor of the State of Massachusetts Bay do by virtue hereof, and by the powers vested in us, enter into and conclude the following Treaty of Friendship and Alliance, viz:

1st. We, the Governor, of the said State of Massachusetts Bay in behalf of said States, and the other United States of America on the one part, and Ambrose Var, Newell Wallis, and Francis Delegates of the St. Peter Andre and Sabbath Netobcobwit, Delegates of the Mi'kmaq Tribes of Indians, inhabiting within the Province of Nova Scotia for themselves, and in behalf of the said tribes on the other part, do solemnly agree that the people of the said State of Massachusetts Bay and of the other United States of America, and of the said Tribes of

Indians shall henceforth be at peace with each Other and be considered as friends and brothers united and allied together for their mutual defense, safety and happiness.

2nd. That each party to this Treaty shall and will consider the enemies of the other as enemies to themselves, and do hereby solemnly promise and engage to, and with each other, that when called upon for that purpose, they shall, and will to the utmost of their abilities, aid and assist each other against their public enemies; and particularly, that the people of the said Tribe of lndians shall and will afford, and give to the people of the said State of Massachusetts Bay and the people of the other United Stales of America during their present war with the king of Britain, all the aid and assistance within their power. And that they the people of said Tribes of Indians shall not, and will not directly or indirectly give any aid, or assistance to the troops or subjects of the said King of Great Britain, or others adhering to him or hold any correspondence or carry on any commerce with them during the present war.

3rd. That if any robbery or outrage happens to be committed by any of the subjects of said State of Massachusetts Bay, or of any other of the United States of America upon any of' the people of said Tribes, the said State shall upon proper application being made, cause satisfaction and restitution speedily to be made to the part injured.

4th. That if any robbery or outrage happens to be committed by any of the said tribes of Indians upon any of the subjects of said State or of any other of the United States of America. the Tribe to which the offender or offenders shall belong, shall upon proper

application being made, cause satisfaction and restitution speedily to be made to the party injured.

5th. That in the case any misunderstanding, quarrel, or injury shall happen between the said State of Massachusetts, say, or of any other of the United States of America and the said Tribes of Indians, or either of them, no private revenge shall be taken, but a peaceable application shall be made for redress.

6th. That the said Tribes of Indians shall and will furnish and supply 600 strong men out of the said Tribes, or as many as may be, who shall without delay proceed from their several homes up to the town of Boston within this State, and from thence shall march to join the Army of the United States of America now at New York under the immediate command of his Excellency General Washington, there to take his orders.

7th. That each of the Indians who shall by their respective Tribes be appointed to join the Army of the United States of America shalt bring with him a good gun and shalt be allowed one dollar for the use of it and in case the gun shall be lost in the service, shall be paid the value of it, And the pay of each man shall begin from me time they sail from Machais for Boston, and they shall be supplied with provisions, and a vessel or vessels for their passage up to Boston. Each private man shall receive the like pay as is given to our own private men. The Indians shall be formed into Companies when they arrive at Boston, and shall engage, or enlist for so long a time as General Washington shall want them, not exceeding the term of three years, unless General Washington and they shall agree for a longer time. And as Joseph Denaquara, Peter Andte, and Sabbath Netobcabwit

have manfully and generously offered to enter immediately into the war, they shall be sent as soon as may be to General Washington to join the Army and shall be considered as entering into our pay at the time of' arrival at new York.

8th. The Delegates above named, who may return to their homes, do promise and engage, to use their utmost influence with the Passamaquoddy, and other neighboring Tribes of Indians to persuade theirs to furnish and supply for the said service as many strong men of their respective Tribes as possible, and that they come along with those of the Tribes of St. John's and Mi'kmaq, And the said Governor of the said State of Massachusetts Bay do hereby engage to give to such of the Passamaquoddy or other neighboring Indians, who shall enter into the service for the United States of America, the same pay and encouragement, in every particular, as is above agreed to be given to the St. John's or Micmack Indians, and to consider them as our friends and brothers.

9th. That the said State Of Massachusetts Bay shall and will furnish their truck master at Machias as soon as may be, with proper articles for the purpose of supplying the Indians of said tribes with the necessities and conveniences of life.

10th. And the said Delegates do hereby annul and make void all former treaties by them or by others in behalf of their respective Tribes Made with any other power, State or person so far forth as the same shall be repugnant to any of the articles contained in the Treaty.

In faith and testimony whereof we the said Governors of the said State of Massachusetts Bay have

signed these presents, and caused the Seal of said State to be hereunto affixed. and the said Ambrose Var, Newell Wallis and Francis, Delegates of the St. John's Tribe, Joseph Denaqusra, Charles, Mattaltu Ontrane, hereunto put their marks, and seals in the Council Chamber at Watertown in the State aforesaid, the nineteenth day July in the year of our Lord one thousand and seven hundred and seventy six.