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NOTES

MAU FOREST EVICTIONS IN KENYA: HOW AN INTERNATIONAL TRIBUNAL'S AFFIRMATION OF INDIGENOUS RIGHTS DIFFERS FROM FEDERAL INDIAN LAW IN THE UNITED STATES

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ABSTRACT

Many proponents of Indigenous rights in the United States advocate for the domestic legal system to adopt international law standards to strengthen the rights of American Indians and Tribes. This proposition assumes that domestic law is inconsistent with international law standards. In this Note, the author contrasts a recent decision from an international tribunal, the African Court on Human and People's Rights, with United States law in the areas of tribal recognition, religious rights, and property rights. Importantly, the African Court on Human and People's Rights applies international law standards, such as human rights treaties and the United Nations Declaration on the Rights of Indigenous Peoples. As this Note demonstrates by highlighting the differences between the outcomes of the case and United States law, United States law is incompatible with international law standards and provides fewer protections for its Indigenous peoples. This Note identifies the differences through the analysis and proposes solutions for the United States to better align with international Indigenous rights standards.

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I. INTRODUCTION

Since European settlers arrived in what is now the United States of America, American Indians[1] have endured centuries of oppression at their hands. Colonialism in the United States often resulted in "invasion of [the Indian's] country, appropriation of their land and natural resources, destruction of indigenous habitats and ways of life, and sometimes genocide and ethnocide."[2] The legacy of the oppression persists in modern times. As a result from centuries of oppression, American Indians today, *inter alia*, disproportionately live in poverty, have a lower life expectancy, suffer from environmental pollution, and are overrepresented in the United States criminal justice system.[3] Federal Indian Law, the area of U.S. law that relates to Indians and Tribes,[4] has played a significant role in connecting the oppressions of the past and to the present.[5]

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1. The author uses the terms American Indian, Indian, and Indian Tribes interchangeably; *See Native American and Indigenous Peoples FAQs*, UCLA EQUITY, DIVERSITY & INCLUSION, https://equity.ucla.edu/know/resources-on-native-american-and-indigenous-affairs/native-american-and-indigenous-peoples-faqs/ [https://perma.cc/J828-MNJ9] (last updated Apr. 14, 2020) (explaining "*Native American* and *American Indian* are terms used to refer to peoples living within what is now the United States prior to European contact. *American Indian* has a specific legal context because the branch of law, Federal Indian Law, uses this terminology. *American Indian* is also used by the U.S. Office of Management and Budget through the U.S. Census Bureau").

2. WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR 15 (2010).

3. *United States of America: Native Americans*, MINORITY RTS. GRP. INT'L, https://minorityrights.org/minorities/native-americans/ [https://perma.cc/ZQ4T-UQ2N] (last visited Mar. 5, 2023).

4. The author capitalizes the letter "T" in all references to Tribes; *See* Angelique EagleWoman, *The Capitalization of "Tribal Nations' and the Decolonization of Citation, Nomenclature, and Terminology in the United States*, 49 MITCHELL HAMLINE L. REV. 623, 633 (2023) ("In *Bluebook* Rule 8(c)(i) on capitalization, the following guidance is provided: 'Nouns that identify specific persons, officials, groups, government offices, or government bodies should be capitalized. Applying this guidance to the collective sovereign governments of Tribes, the terms Tribes, Tribal Nations, and Tribal should be related when referring to Tribal government-related institutions or activities.")

5. *See* Melody L. McCoy, FEDERAL INDIAN LAW AND POLICY AFFECTING AMERICAN INDIAN AND ALASKA NATIVE EDUCATION, THE NATIVE AM. RTS. FUND (2000) ("'Federal Indian law' is the body of United States law – treaties, statutes, executive orders, administrative decisions, and court cases – that define and exemplify the unique legal and political status of the over 550

Unfortunately, oppression of Indigenous peoples[6] is not limited to the United States. Indigenous peoples around the world have endured similar struggles of "widespread impoverishment, dislocation, and loss of culture and religion."[7] However, in the last several decades, the international community has taken actions in a commitment to strengthen Indigenous rights, culminating in part in the emergence of the era self-determination. The shift is evidenced by heightened protection of Indigenous rights in international law, most notably, the United Nations' adoption of the Declaration on the Rights of Indigenous Peoples ("UNDRIP") in 2007.[8]

American Indian advocate Walter Echo-Hawk contends that Federal Indian Law must undergo a reformation to better conform with international standards; "[L]egal scholars should arm the Native American movement in the twenty-first century by identifying the shortfalls between [F]ederal Indian [L]aw and the UNDRIP."[9] To fully understand the scope and text of the UNDRIP, and other international law, it is imperative to understand how the text is to be interpreted.[10] In 2017, an international tribunal — The African Court on Human and Peoples' Rights ("African Court") — interpreted the UNDRIP and relevant international law pertaining to Indigenous rights. In 2017, the African Court decided the case of *African Commission on Human and Peoples' Rights v. Kenya*, in which the rights of the Indigenous Ogiek Tribe were found to have

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federally recognized American Indian and Alaska Native [T]ribes; the relationship of [T]ribes with the federal government; and, the role of [T]ribes and states in our federalism.").

6. *See Indigenous Peoples: Respect NOT Dehumanization*, UNITED NATIONS, https://www.un.org/en/fight-racism/vulnerable-groups/indigenous-peoples [https://perma.cc/KMR6-6CKP] (last visited Mar. 3, 2023) (explaining that the United Nations does not define the term "Indigenous peoples" but characterizes the global population as "hav[ing] in common a historical continuity with a given region prior to colonization and a strong link to their lands. They maintain, at least in part, distinct social, economic and political systems. They have distinct languages, cultures, beliefs and knowledge systems. They are determined to maintain and develop their identity and distinct institutions and they form a non-dominant sector of society.").

7. Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 181 (2014); *see also* ECHO-HAWK *supra* note 2 at 14.

8. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

9. ECHO-HAWK, *supra* note 2 at 429; *See also* Matthew L. M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 MAINE L. REV. 305, 323-30 (2023) (advocating for U.S. courts to adopt the UNDRIP in Federal Indian Law); *see also* Sandra Day O'Connor Law School, *14th Annual William C. Canby lecture: Featuring Guest Lecturer Kristen Carpenter*, YOUTUBE (Mar. 21, 2022), https://www.youtube.com/watch?v=lSg2eF02G3w [https://perma.cc/KKS3-4YQP] (encouraging the United States to adopt the UNDRIP in Federal Indian Law).

10. *See* Martin Scheinin & Mattias Åhrén, *Relationship to Human Rights, and Related International Instruments*, *in* THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY 70 (Jessie Hohmann & Marc Weller eds., 2018) (explaining that some of the provisions of UNDRIP are unclear and need further interpretation; "There is a need for a coherent and authoritative institutionalized practice of interpretation that can at least partly remedy some contradiction in the text of the UNDRIP and hence evolve the current practice beyond mere textual interpretations of the Declaration").

been violated by the Kenyan government ("Ogiek Case").[11] In the Ogiek Case, the African Court considered human rights violations committed by the Kenyan government in forcibly removing the Indigenous Ogiek Tribe from their ancestral homelands.[12] The African Court utilized the UNDRIP and other international law to rule on allegations of discrimination and alleged violations of Tribal recognition, religious rights, property rights, cultural rights, and economic rights.[13] The purpose of this Note is to compare Federal Indian Law with the Ogiek Case regarding Tribal recognition, religious rights, and property rights. More importantly, this Note includes the international law relied upon by the African Court to provide a concrete example of how the consideration of international law by the African Court produces the differing legal standards.

The Note is arranged as follows. First, the Note summarizes important background information to understand Indigenous law at an international and domestic level. Second, the Note explains the background of the Ogiek Case and analyzes the African Court's rulings. Third, the Note summarizes relevant Federal Indian Law concerning Tribal recognition, religious rights, and property rights. Fourth, the Note draws distinctions between the Ogiek Case and Federal Indian Law, theorizing how the differing standards of law would produce different results in the Ogiek Case and landmark Federal Indian Law cases. Finally, the Note provides recommendations that would better situate Federal Indian Law with international law standards for Indigenous rights.

II. UNDERSTANDING INDIGENOUS LAW

First, the Note explains a few basic principles of international Indigenous law and Federal Indian Law. This section provides information on international law and guidance on Indigenous rights, an explanation of legal shortcomings for American Indians' rights in international law forums, and a few over-arching principles of Federal Indian Law.

A. Sources of International Indigenous Law

United Nations human rights treaties are some of the most prominent guarantors of human rights in international law. Many treaties guarantee rights to religion, culture, property, equal protection, economic development, and other rights pertinent to Indigenous populations. However, none of the major United Nations human rights treaties explicitly mention Indigenous rights.[14]

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11. Afr. Comm'n on Hum. & People's Rts. v. Republic of Kenya, No. 006/2012, African Court on Human and People's Rights [Afr. Ct. H.P.R.], Judgment (May 26, 2017).

12. *Id.*

13. *Id.*

14. Felipe Gomez Isa, *Cultural Diversity, Legal Pluralism, and Human Rights from an Indigenous Perspective: The Approach by the Columbian Constitutional Court and the Inter-American Court of Human Rights*, 36 HUM. RTS. Q. 722, 726 (2014).

Siegfried Wiessner explains, "What is missing in the broad-based human rights instruments, however, is a specific protection of the distinctive cultural and group identity of [I]ndigenous peoples as well as the spatial and political dimension of that identity, their way of life."[15] The International Labour Organization Convention No. 169 ("ILO No. 169") is the first, and only binding, United Nations treaty to specifically address Indigenous rights.[16] However, ILO No. 169 has only been ratified by twenty-four States, and the United States has not ratified ILO No. 169.[17]

In addition to treaties, the United Nations also adopts declarations, which "do not intend to create binding obligations but merely want to declare certain aspirations."[18] Contrary to human rights treaties, the United Nations adopted a declaration to specifically address Indigenous rights. The UNDRIP, adopted by the United Nations General Assembly in 2007, is paramount in modern-day international standards for Indigenous rights.[19] "The adoption of the [UNDRIP] . . . ha[s] introduced lasting changes in the conceptual, political, and moral underpinnings of international human rights law and policy."[20] The UNDRIP re-affirms the right to self-determination, collective rights, and other safeguards for the protection of rights specifically required to protect Indigenous peoples around the globe.[21] Though many of the provisions within the UNDRIP have risen to the level of binding customary international law, the UNDRIP itself is only a declaration of policy and not a legally binding instrument, which creates a limitation on its impact.[22] However, Mauro Barelli contends the choice to proceed with a "soft law," or non-legally binding, approach to the UNDRIP was preferred to a treaty for the following three reasons: (1) a binding treaty would not have had the same widespread support, as evidenced by small number of ratifications of ILO No. 169; (2) international soft law affects non-member States more than binding international law affects non-members; and (3) the UNDRIP provided more timely protections than a treaty would have provided, as the process of ratifying a treaty is much slower than adopting a declaration.[23]

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15. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 99 (1999).

16. *Id.* at 100.

17. *Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 [https://perma.cc/SBQ5-BPYK] (last visited Mar. 3, 2023).

18. *Glossary of terms relating to Treaty actions*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml [https://perma.cc/YD5U-R88W] (last visited Sept. 25, 2023).

19. G.A. Res. 61/295, *supra* note 8.

20. S. James Anaya and Luis Rodríguez, *The Making of the United Nations Declaration on the Rights of Indigenous Peoples*, *in* THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY 38 (Jessie Hohmann & Marc Weller eds., 2018).

21. *Id*.

22. Scheinin & Åhrén, *supra* note 10, at 64.

23. Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 INT'L & COMPAR. L. Q. 957, 964-66 (2009).

Moreover, the UNDRIP lays the foundation for a binding treaty specifically protecting Indigenous rights in the future.[24]

In addition to United Nations treaties and declarations, regional bodies of international law protect human rights around the world, including Indigenous rights.[25] Regional bodies, which correspond to geographic areas, include their own charters and treaties that bind member States.[26] Currently, the American, European, and African regions have established regional law systems and tribunals as enforcement mechanisms to ensure compliance with the States' obligations.[27] As discussed *infra*, the American system can be an effective tribunal in which to bring Indigenous law claims due to its integration of international standards.[28] The Arab States and Southeast Asian States have established regional human rights charters and committees, but these regions have not developed a tribunal to enforce the States' legal obligations.[29] This Note displays the importance of the African Union system, in which the Ogiek Tribe in Kenya relied upon to obtain legal redress.

B. Lack of International Enforcement Options for American Indians' Rights

The aforementioned Indigenous international law mechanisms present shortcomings for American Indians in obtaining legal remedies to violations of international law. As this section explains, the United States fails to comply with human rights treaty obligations that would protect Indians and does not engage with its own regional law system. In addition, domestic courts in the United States inconsistently consider international law in domestic Constitutional interpretation, which renders international law unreliable in the domestic courts.

1. Lack of United States' Compliance with Treaty Obligations

United Nations treaties have not provided legal redress for violations of American Indians' rights perpetrated by the United States government, as evidenced by guidance from the treaties' respective compliance committees. For example, the non-compliance with treaty obligations is evidenced by three treaties which the United States has signed and ratified: (1) International

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24. *Id.* at 967.

25. *Regional Systems*, INT'L JUST. RES. CTR., https://ijrcenter.org/regional/ [https://perma.cc/7B4R-SWLY] (last visited Mar. 3, 2023).

26. *Id.*

27. *Id.*

28. *See infra* Section II(B)(2).

29. *See* Ahmed Almutawa, *The Arab Court of Human Rights and the Enforcement of the Arab Charter on Human* Rights, 21 HUM. RTS. L. REV. 506, 507 (2021) (discussing the lack of enforcement tribunal for the Arab nations); *Asia*, INT'L JUST. RES. CTR., https://ijrcenter.org/regional/asia/ [https://perma.cc/K6GM-2V5X] (last visited Dec. 12, 2022) (discussing the lack of an enforcement tribunal for the Southeast Asian nations).

Covenant on Civil and Political Rights ("ICCPR")[30]; (2) International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD")[31]; and (3) Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT").[32] As recent as 2014, the Human Rights Committee, which oversees ICCPR compliance, has expressed concerns about the United States' inadequate protection of Indians' religious rights and the "insufficient measures taken to protect the sacred areas of indigenous peoples."[33] Also in 2014, the ICERD Committee expressed concerns that the United States' treatment of American Indians failed to comply with ICERD standards, including disproportionate exposure to environmental pollution, limitations on Indian voting rights, disproportionate violence against Indian women, the Tribal recognition process, religious and cultural protections of Indians, and child removal.[34] Though the CAT Committee has not directly addressed the United States treatment of Indians and Tribes, the CAT Committee could likely find violations. For example, in 2022, the CAT Committee expressed dissatisfaction with the hyper-incarceration of Aboriginal and Torres Strait Islander peoples in Australia.[35] Though the incarceration rates are less severe than in Australia, American Indians are overrepresented in the United States' prison population, thus calling into question the United States' compliance with CAT.[36] Despite these breaches of international law obligations, the United States has failed to modify its laws and policies to comply with the treaty obligations.

2. No Regional Law Remedies for American Indians and Tribes

The United States has failed to meaningfully engage with their own international regional law system, the Organization of American States. While the Indigenous community in the Ogiek Case relied on the African Union regional body of international law to validate their human rights, the same

30. *View the ratification status by country or by treaty: United States of America*, U.N. HUM. RTS. TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN [https://perma.cc/SW5Z-FZNH] (last visited Mar. 3, 2023) (showing the United States ratified the ICCPR in 1992).

31. *Id.* (showing the United States ratified the ICERD in 1994).

32. *Id.* (showing the United States ratified the CAT in 1994).

33. Hum. Rts. Comm., *Concluding observations on the fourth periodic report of the United States of America*, ¶ 25, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

34. Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, ¶ 10-11, 19, 24, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 24, 2014).

35. Comm. against Torture, *Concluding observations on the sixth periodic report of Australia*, ¶ 33, U.N. Doc. CAT/C/AUS/CO/6 (Dec. 5, 2022).

36. *See* Karen Heimer, Sarah E. Malone, & Stacy De Coster, *Trends in Women's Incarceration Rates in US Prisons and Jails: A Tale of Inequalities*, 6 Ann. Rev. of Criminology 85, 101 (2023) (explaining the disproportionate impact of the United States criminal justice system on Indian women).

option is not available for Indigenous peoples in the United States. The United States has not ratified the American Convention on Human Rights, a document similar to the African Charter that the Ogiek Case rests upon, and is therefore not bound by its terms nor within the jurisdiction of the Inter-American Court of Human Rights, which is similar to the African Court.[37] Importantly, the Inter-American Court does integrate international law standards, like the UNDRIP, in its Indigenous rights rulings, which has "marked a significant moment in the evolution of a jurisprudence that has recognized unique rights and corresponding special obligations of states with respect to the rights of indigenous peoples."[38] The United States' failure to engage with the Organization of American States poses a significant barrier to legal vindication of Indian and Tribal rights.

3. Lack of Internalization of International Law Obligations in United States Law

International law has an inconsistent role in United States domestic courts. Under the Supremacy Clause of the United States Constitution, all domestic laws, both at the state and federal levels, enacted by both legislatures and judges, must comply with international law obligations.[39] However, in United States' courts, claimants can only sue under international law obligations entered into by the United States if the treaty is defined as "self-executing."[40] Moreover, the United States can, and does, attach declarations[41] to treaties averring that the United States does not consider provisions of the treaty to be self-executing, eliminating legal redress for treaty violations in domestic courts.[42] For example, the United States declared the substantive provisions of the ICCPR, ICERD, and

37. *What is the I/A Court H.R.?*, INTER-AM. CT. OF HUM. RTS., https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en [https://perma.cc/26AC-FMT7] (last visited November 12, 2022).

38. Dinah Shelton, *The Inter-American Human Rights Law of Indigenous Peoples*, 35 U. HAW. L. REV. 937, 947-48 (2013).

39. U.S. CONST. art. VI, §2 ("[T]he Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

40. Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 601 (2008).

41. *See Treaties and Conventions*, EMORY LAW, https://guides.libraries.emory.edu/law/treaties/treaties_reservations [https://perma.cc/FX4U-S76W] (last visited Mar. 3, 2023) (explaining that "States may make statements upon signature or ratification of a treaty that purport to exclude or modify the legal effect of a treaty provision with regard to that state. These may be called reservations, declarations, or understandings. Article 19 of the Vienna Convention of 1969 specifies that a state may make a reservation unless the reservation is prohibited by the treaty, the treaty provides that only other specified reservations may be made, or the reservation is incompatible with the object and purpose of the treaty").

42. Vázquez, *supra* note 40, at 608.

CAT not to be self-executing.[43] Though these declarations seem contradictory to the purpose of human rights treaties, thus violating Article 19 of the Vienna Convention on the Law of Treaties, the declarations are likely permissible based on international law standards of reservations on treaties.[44]

Not only can claims not be brought directly under international law, the United States Constitution contains no provisions for the effect of international law on domestic interpretation of rights secured in the Constitution.[45] For this reason, the Supreme Court discretionarily utilizes international law as persuasive guidance for domestic law from "time to time."[46] Even though the application of international law is a rare and irregular occurrence in U.S. courts, many legal scholars have criticized the usage of international law for Constitutional interpretation in domestic courts.[47] The Supreme Court does not utilize international law in modern constitutional interpretations for Indians' rights,[48] though it did apply international law when developing the property rights of Indians when it applied the Doctrine of Discovery in the 1800s, discussed *infra*.[49]

C. Principles of Federal Indian Law

Though Federal Indian Law is a vast topic, there are a few underlying concepts pivotal to the basic understanding of Federal Indian Law and the analyses of this Note. These principles are the Indian-Government relationship, plenary power, and the Doctrine of Discovery.

The first Federal Indian Law principle referenced is the nature of the relationship between Indians, Tribes, and the United States government. In the landmark case of *Cherokee Nation v. State of Georgia*, the Supreme Court characterized the parties' relationship, and defined Indian Tribes within the boundaries of the United States as "domestic dependent nations," as opposed to "foreign nations."[50] This relationship permits Indians to exercise political

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43. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

44. Vázquez, *supra* note 40, at 679.

45. Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L. L. REV. 197, 198 (2011).

46. *Id.*

47. *Id.*

48. *See International Law as an Interpretive Force in Federal Indian Law,* 116 HARV. L. REV. 1751, 1763 (2003) (explaining the reluctance of United States courts to use international interpretation, particularly in the context of Federal Indian Law).

49. *See infra* Section I(B)(3)(C).

50. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 13 (1831).

autonomy on their lands, without "federal intervention in [T]ribal affairs."[51] The relationship led to significant treaty-making with Indian Tribes in the 1800s, resulting in nearly 400 treaties signed between Tribes and the federal government.[52] However, this relationship dynamic does not guarantee Indians and Tribes absolute sovereignty over their own affairs. As Hope M. Babock explains, "Tribes resemble foreign countries because they have dominion over their own lands and members. But, unlike foreign nations, with which the federal government deals at arm's length, they are subject to the paramount sovereignty of the federal government."[53]

The "paramount sovereignty of the federal government" alludes to the next key concept: the plenary power doctrine. The plenary power doctrine gives Congress a near absolute power to regulate Indian affairs, with a narrow exception for violations of constitutional rights enumerated in the Fifth Amendment of the Constitution.[54] Plenary power became fully realized in *Lone Wolf v. Hitchcock*,[55] in which the Supreme Court ruled Congress has the power to abrogate treaties signed between Tribes and the government.[56] In essence, the plenary power "has meant that Congress has had a free hand to legislate and regulate with regard to Indian affairs."[57] Critics have contended that the plenary power doctrine is not in the Constitution and was "seemingly plucked out of thin air by the Supreme Court."[58] Stephen L. Pevar describes the plenary power as a double edged sword, with Congress retaining the power to either "assist or destroy" Indians' rights.[59] Though most of this Note describes the usage of plenary power as a means for removing rights, this Note proposes using plenary power as a means for protecting rights in the recommendations section *infra*.[60]

The next important concept to discuss is the "Doctrine of Discovery," which paved the way for modern-day land rights of Indians. In the 1800s, the Doctrine of Discovery was a customary international law principle that permitted Christian colonizing nations to lay claim to any territory the nation "discovered" that had not yet adopted Christianity.[61] In the landmark 1823 case *Johnson v. M'Intosh*, a dispute arose between legal rights to land title ownership between one party who purchased the land from the Piankeshaw Indian Tribe and another

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51. Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envision, Reinvigorated, and Re-Empowered*, 2005 UTAH. L. REV. 443, 480 (2005).

52. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 46 (4th ed. 2012).

53. Babcock, *supra* note 51, at 454.

54. PEVAR, *supra* note 52, at 58.

55. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

56. *Id.*; *see also* PEVAR, *supra* note 52, at 58.

57. Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 682 (2016).

58. ECHO-HAWK, *supra* note 2, at 163.

59. PEVAR, *supra* note 52, at 58.

60. *See infra* Section VI(E).

61. Johnson & Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

party who purchased the same land from the federal government.[62] In a case limiting the extent of Indian property rights, the Supreme Court determined the Doctrine of Discovery precluded Indian rights to own legal title to land within the United States.[63] "The absolute ultimate title has been considered as acquired by discovery [by the United States]."[64] However, the Supreme Court held that Indian Tribes maintained a right to occupy and use land, often referred to as "Indian Title."[65] Though *Johnson v. M'Intosh* was decided in 1823, it remains a foundational case enumerating principles for property rights in Federal Indian Law today. Furthermore, any land that Indian Tribes have a right to collectively occupy remains subject to the plenary power of Congress; thus, Congress need only clearly intend to modify the Indian's occupation rights for those rights to be legally altered.[66]

III. *AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS V. REPUBLIC OF KENYA*

This Note analyzes a recent decision by the African Court on Human and Peoples' Rights ("African Court") to provide a comparative analysis with Federal Indian Law. This section provides background information on the establishment of the African Court, a summary of the facts of the case, the Court's rulings and legal standards applied for Tribal recognition, right to religion, and property rights, and describes the aftermath of the decision.

A. Background of the African Union Regional Law System

Adopted on June 27, 1981, the African Charter on Human and Peoples' Rights ("African Charter") established a body of regional international law in Africa to eradicate colonialism, protect the "historical tradition and the values of African civilization," protect civil and economic rights, and ensure human rights are protected across the continent.[67] As of 2023, fifty-four out of the fifty-five recognized States in Africa have signed the African Charter.[68] Following the passage of the African Charter, the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights ("The Protocol") in 1998,

62. *Id.* at 544-62.

63. *Id.* at 568.

64. *Id.* at 592.

65. *Id.* (The title is "subject only to the Indian title of occupancy"); PEVAR, *supra* note 52, at 23-24.

66. McGirt v. Oklahoma, 140 S. Ct. 2452, 2469 (2020) (referencing South Dakota v. Yanktown Sioux Tribe, 522 U.S. 329, 353 (1998), which states, "[o]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain.")

67. African (Banjul) Charter on Human and People's Rights, June 27, 1981, 21 I.L.M. 58 [hereinafter African Charter].

68. *Id.*

which established a tribunal after reaching the necessary number of State ratifications.[69] The African Court came into effect in 2004.[70] As of 2022, thirty-four nations in Africa have ratified The Protocol[71] and are thus subject to its jurisdiction, per Article 3.[72]

The scope of the African Court's jurisdiction to adjudicate legal matters is unique among regional law systems.[73] Not only is the African Court entrusted with interpreting the African Charter, but The Protocol also authorizes the African Court to adjudicate "any other" relevant international law matters to which a member state is obligated to comply.[74] The African Court does not always rule on international treaty claims, but uses such treaties as an "interpretive aid" to understand the African Charter.[75]

The African Court decision that is the focus of this Note arose from events occurring in Kenya. Kenya ratified the African Charter in 1992[76] and the Protocol to the African Charter in 2004.[77] Therefore, Kenya is both obligated to comply with the provisions of the African Charter and subject to the jurisdiction of the African Court.

B. The Ogiek Tribe and Mau Forest Evictions

The Mau Forest is geographic area in Western Kenya. Along with containing a diverse population of ecologically important birds and trees, the Mau Forest plays a significant role in providing water throughout a large part of Kenya.[78] Decades of deforestation in the twentieth century led to pressure, from

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69. Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 10, 1998, https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and [https://perma.cc/65Y6-2QWB].

70. *Welcome to the African Court*, AFR. CT. OF HUM. & PEOPLES' RTS., https://www.african-court.org/wpafc/welcome-to-the-african-court/ [https://perma.cc/9AWL-NC3W] (last visited Nov. 12, 2022).

71. *Basic Information*, AFR. CT. OF HUM. & PEOPLES' RTS., https://www.african-court.org/wpafc/basic-information/ [https://perma.cc/8RJW-X6D2] (last visited November 18, 2022).

72. Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 67, at art. 3(1) ("The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned").

73. Yakaré-Oulé (Nani) Jansen Reventlow & Rosa Curling, *The Unique Jurisdiction of the African Court on Human and Peoples' Rights: Protection of Human Rights Beyond the African Charter*, 33 EMORY INT'L. L. REV. 203 (2019).

74. *Id.* at 204.

75. *Id.* at 213.

76. African Charter, *supra* note 67.

77. Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *supra* note 69.

78. Stanley Waitagei, *The story of Mau Forest Complex*, THE SATURDAY STANDARD, https://www.standardmedia.co.ke/lifestyle/article/2001227875/the-story-of-mau-forest-complex [https://perma.cc/LQW4-UXNM] (last visited November 12, 2022).

both environmentalist groups and the United Nations, on Kenya to take necessary measures to preserve the Mau Forest.[79] The Kenyan government, allegedly in response[80] to the international pressure to preserve the Mau Forest, began forcibly evicting inhabitants of the Mau Forest in 2004.[81] Hundreds of families evicted from the Mau Forest were of the Ogiek Tribe, an Indigenous group that has historically inhabited the area.[82] The Ogiek peoples were stripped of access to their land, which held significant religious and cultural value.[83] In addition to the intangible losses, the evictions economically deprived the Ogiek Tribe, who are dependent on the land for their "traditional livelihoods, including hunting and foraging.."[84] The struggle for the Ogiek peoples to maintain property ownership in the Mau Forest is not a new phenomenon. Despite decades of deforestation and land grabbing in the Mau Forest, the resilient Ogiek have found "innovative ways" to preserve their survival and lifestyle despite the degradation of their homeland.[85] However, the complete removal from the land devastated their way of life.[86]

The underpinnings of the Mau Forest case are not isolated to Kenya. Internationally, the suffering of Indigenous peoples around the world in the name of environmental conservation efforts has garnered global concern, including from the United Nations Special Rapporteur on the Rights of Indigenous Peoples.[87] Indigenous peoples are frequently left behind in sustainability efforts, despite living harmoniously with the land for centuries before colonization and industrialization.[88] In the United States, Indigenous

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79. AMNESTY INT'L, KENYA: NOWHERE TO GO: FORCED EVICTIONS IN MAU FOREST, AI INDEX AFR 32/006/2007, at 1-2 (2007), https://www.amnesty.org/en/wp-content/uploads/2021/07/afr320062007en.pdf [https://perma.cc/A2QT-5CVS].

80. *Id.* at 15 (discussing how improper land grabbing techniques may have also been a motive for the evictions).

81. *Id.* at 1-2.

82. Nita Bhalla, *Kenya's forest communities face eviction from ancestral lands – even during pandemic*, REUTERS (July 23, 2020), https://www.reuters.com/article/us-health-coronavirus-kenya-landrights-t/kenyas-forest-communities-face-eviction-from-ancestral-lands-even-during-pandemic-idUSKCN24O2EY [https://perma.cc/335J-FW9W].

83. Afr. Comm'n on Hum. & People's Rts. v. Republic of Kenya, No. 006/2012, Afr. Ct. H.P.R., Judgment, ¶ 164 (May 26, 2017).

84. Bhalla, *supra* note 82.

85. Jemaiyo Chabeda-Barthe & Tobias Haller, *Resilience of Traditional Livelihood Approaches Despite Forest Grabbing: Ogiek to the West of Mau Forest, Uasin Gishu County*, LAND, Nov. 2018, at 140.

86. Bhalla, *supra* note 82.

87. *See* UN Human Rights, *Conservation as a pretext to evict Indigenous people*, YOUTUBE (Sept. 22, 2016), https://www.youtube.com/watch?v=xgBqgSkWV5o [https://perma.cc/E9T3-JUPC]. ("Many [Indigenous peoples] have been evicted from their territories when these have been designated as national parks or conservation areas. There is a belief that for this area to be conserved, the people should be removed from these areas. But, in reality, the better preserved areas are where the Indigenous peoples are").

88. *See* Benedict Coyne, Amy MacGuire & Bethany Butchers, *Margins and Sidelines: The Marginalisation of Indigenous Perspectives in International Climate Governance*, 14 NEWCASTLE L. REV. 30 (2019).

advocates have argued that the Indian Tribes should have a greater role in the environmental protection policies of the country.[89]

C. African Court Ruling on the Ogiek Case

In 2012, the African Commission on Human and Peoples' Rights ("African Commission") filed a complaint to the African Court, alleging that the Ogiek Tribe evictions from the Mau Forest violated several provisions of the African Charter.[90] The African Court ruled on the merits of the claims in 2017.[91] The African Court ruled that the government of Kenya violated five substantive articles of the African Charter that included the following rights: freedom of religion,[92] the right to property,[93] the right to participate in cultural life,[94] freedom of wealth disposal,[95] and freedom of economic, social, and cultural development.[96] Additionally, the African Court disagreed with the Kenyan government's contention that the Ogiek are not a distinct, recognized Tribe.[97] The forthcoming sections explain the ruling on Tribal recognition, religious rights, and land rights, as these three issues are the focus of this Note.

1. African Court Ruling on Tribal Recognition

First, the African Court considered the dispute between the Kenyan government and the Ogiek as to whether the Ogiek peoples are a distinct, Indigenous population.[98] The Kenyan government argued the Ogiek Tribe could not officially be recognized as an Indigenous community because it was a composite group comprised of several ethnic communities, with at least some members of the Ogiek Tribe adopting modern-day norms of life.[99] The African Court disagreed, and ruled that the Ogiek peoples are a recognized ethnic group.[100] To establish recognition criteria for Indigenous groups, the African Court alluded to its expansive authority to incorporate applicable international

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89. Susan Montoya Bryan, *National parks director wants to increase tribal nations' role in managing public lands*, USA TODAY (Mar. 9, 2022), https://www.usatoday.com/story/travel/experience/america/national-parks/2022/03/09/national-parks-aim-boost-tribal-nations-role-land-management/9442146002/ [https://perma.cc/2LVD-9LP8].

90. Afr. Comm'n on Hum. & People's Rts. v. Republic of Kenya, No. 006/2012, Afr. Ct. H.P.R., Judgment, ¶ 10 (May 26, 2017).

91. *Id.*

92. *Id.* at ¶ 169.

93. *Id.* at ¶ 131.

94. *Id.* at ¶ 190.

95. *Id.* at ¶ 201.

96. *Id.* at ¶ 211.

97. *Id.* at ¶ 112.

98. *Id.* at ¶ 103.

99. *Id.* at ¶ 104.

100. *Id.* at ¶ 112.

law, which it considered.[101] The African Court examined the guidance set forth by the United Nations Working Group on Indigenous Populations/Communities[102] and the United Nations Special Rapporteur on Minorities[103] to provide the following standard for Tribal recognition:

> [T]he relevant factors to consider are the presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural divisiveness, which may include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[104]

In applying this standard to the facts of the case, the African Court considered that the Ogiek Tribe had occupied a particular geographic territory (the Mau Forest) for a prolonged period, maintained a distinct culture of language, religion, and self-identification, and suffered greatly from forced evictions and attempts at assimilation.[105] Therefore, the Ogiek satisfied the international law-based standard set forth by the African Court and were recognized as an Indigenous Tribe.[106]

2. African Court Ruling on Right to Religion

Article Eight of the African Charter guarantees freedom of religion, except in the interest of public order.[107] In the Ogiek Case, the Ogiek peoples argued that the forced eviction impeded their traditional religious rituals in the Mau Forest and denied their right to access sacred religious sites.[108] The African Court again relied upon international law; it considered Article Eighteen of the

101. *Id.* at ¶ 108.
102. *Id.* at ¶ 105.
103. *Id.* at ¶ 106.
104. *Id.* at ¶ 107.
105. *Id.* at ¶ 109-11.
106. *Id.* at ¶ 112.
107. African Charter, *supra* note 67, art. VIII ("Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.").
108. Afr. Comm'n on Hum. & People's Rts., No. 006/2012, Judgment, at ¶ 158.

ICCPR[109] and Article Six[110] of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief to interpret Article Eight of the African Charter.[111] The African Court applied the following standard:

> [Article Eight] requires State Parties to *fully guarantee* freedom of conscience, the profession and free practice of religion . . . The right to manifest and practice religion includes the right to worship, engage in rituals, observe days of rest, and wear religious garb, allow individuals or groups to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes, as well as to celebrate ceremonies in accordance with the precepts of one's religion or belief.[112] (emphasis added)

According to the African Court, the obligation placed upon the States under Article Eight of the African Charter is to "fully guarantee" freedom of religion.[113] Considering the uniqueness of Indigenous religious beliefs and relationship to the land, the African Court wrote: "[I]n the context of traditional societies, where formal religious institutions often do not exist, the practice and profession of religion are usually inextricably linked with land and the environment."[114] Applying this standard to the case at hand, the African Court

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109. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. XVIII (Dec. 16, 1966) ("(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.").

110. G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, art. VI (Nov. 25, 1981) ("[T]he right to freedom of thought, conscience, religion or belief shall include, inter alia , the following freedoms: (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes; (b) To establish and maintain appropriate charitable or humanitarian institutions; (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; (d) To write, issue and disseminate relevant publications in these areas; (e) To teach a religion or belief in places suitable for these purposes; (f) To solicit and receive voluntary financial and other contributions from individuals and institutions; (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief; (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief").

111. Afr. Comm'n on Hum. & People's Rts., No. 006/2012, Judgment, at ¶ 163.

112. *Id.*

113. *Id.*

114. *Id.* at ¶ 164.

concluded: "[G]iven the link between [I]ndigenous populations and their land for purposes of practicing their religion, the eviction of the Ogiek from the Mau Forest rendered it impossible for the community to continue its religious practices and is an unjustifiable interference with the freedom of religion of the Ogiek."[115]

The African Court then considered the "law and order" exception in Article Eight of the African Charter.[116] The African Court noted that the interference of religious rights must be of necessity and reasonable, stating "[t]hough the Respondent can interfere with the religious practices of the Ogiek to protect public health and maintain law and order, these restrictions must be examined with regard to their necessity and reasonableness."[117] The African Court determined that "less onerous measures" could have been taken by the Kenyan government to achieve their desired outcome of environmental conservation.[118] Accordingly, the Kenyan government's conduct was not necessary or reasonable, with the Court acknowledging that Kenya did not exhaust other alternatives that would have prevented the religious deprivation.[119] Consequently, Kenya did not meet the law and order exception.[120] Since Kenya fell short of its obligation to fully guarantee the religious rights to the Ogiek Tribe and did not meet the public order exception, Kenya violated Article Eight of the Charter.

3. African Court Ruling on Right to Property

Article 14 of the African Charter secures property rights from governmental seizure, except if there is a public interest.[121] To determine the scope of the Ogiek property rights, the African Court relied upon international law, specifically Article 26 of the UNDRIP, which establishes property rights for "lands, territories and resources which [Indigenous peoples] have traditionally owned, occupied or otherwise used or acquired."[122] Since the Ogiek peoples are

115. *Id.* at ¶ 169.
116. *Id.* at ¶ 167.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. African Charter, *supra* note 67, art. XIV ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws").
122. G.A. Res. 61/295, *supra* note 8, art. XXVI ("(1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired; (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired; (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conduct with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned").

a recognized Indigenous community that have long-occupied the land in the Mau Forest, the Ogiek have a property right to remain on the land.[123] Importantly, the Court also notes that the right to property guaranteed in Article 14 of the African Charter should not only be recognized for individuals, but "may also apply to groups or communities; in effect, the right can be individual or collective,"[124] which is important considering Indigenous peoples' "tradition of collective rights to lands."[125]

After determining that a property right existed, the African Court considered the public interest exception to the right of property.[126] The African Court carefully scrutinized the Kenyan government's actions under the "public interest" exception to Article 14 of the African Charter.[127] The African Court did not give strong deference to the Kenyan government, but instead weighed the benefits of Ogiek evictions with the purpose of the evictions.[128] Since the purpose of the evictions was protection of the ecosystem, the Kenyan government must prove the eviction was "necessary" and "proportionate" to achieve their desired outcome of ecosystem preservation.[129] The Court ruled, "[i]n this circumstance, the Court is of the view that the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest."[130] Because the Ogiek peoples had lived harmoniously with the land and were not the source of destruction of the ecosystem, the government could not be justified in evicting them from their land.[131] Because Kenya violated the collective property rights of the Ogiek Tribe without a valid "public interest" exception, it violated Article 14 of the African Charter.[132]

What kind of property right existed for the Ogiek? The African Court answered this question five years later when ruling on the remedies in 2022. Instead of examining the UNDRIP or United Nations treaties, the African Court examined precedent from its own history and cases from the Inter-American Court.[133] The Court wrote:

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123. Afr. Comm'n on Hum. & People's Rts., No. 006/2012, Judgment, at ¶ 131.

124. *Id.* at ¶ 123.

125. *Indigenous peoples' collective rights to lands, territories and resources*, THE U.N. PERMANENT F. ON INDIGENOUS ISSUES (Apr. 19, 2018), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/04/Indigenous-Peoples-Collective-Rights-to-Lands-Territories-Resources.pdf [https://perma.cc/NBK5-72H4].

126. Afr. Comm'n on Hum. & People's Rts., No. 006/2012, Judgment, at ¶ 131.

127. *Id.* at ¶130.

128.*Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at ¶ 131.

133. Afr. Comm'n on Hum. & People's Rts. v. Republic of Kenya, No. 006/2012, Afr. Ct. H.P.R., Judgment (Reparations), ¶¶ 72, 73, 74, 91, 92 (paragraphs citing to Inter-American Court decisions) (June 23, 2022).

> The Court thus finds that, in international law, granting indigenous people privileges such as mere access to land is inadequate to protect their rights to land. What is required is to legally and securely recognise their collective title to the land in order to guarantee their permanent use and enjoyment of the same.[134]

Therefore, it is not enough for the Kenyan government to permit the Ogiek Tribe to merely occupy the land, but the Kenyan government must ensure the Ogiek Tribe legally owns the land.

D. Aftermath of the Ogiek Case Decision

Unfortunately for the Ogiek Tribe, Kenya continued to proceed with evictions following the ruling in 2017.[135] These evictions were especially burdensome during the COVID-19 pandemic.[136] However, the African Court's ruling on remedies to the violations in June 2022 could change the situation. The African Court ruled that the Kenyan government must compensate the Ogiek peoples in material damages for lost land and economic development.[137] The Kenyan government must also compensate the Ogiek peoples for moral damages for removal from their homelands.[138] Most importantly, the Kenyan government must convey legal land title in the Mau Forest to the Ogiek Tribe.[139] The African Court allotted Kenya two years to complete the transfer of land title.[140] Therefore, the potential land title restitution may begin to reveal itself by June 2024 if Kenya complies. Following the ruling on reparations, the UN Special Rapporteur on the Rights of Indigenous Peoples stated, "I welcome this unprecedented ruling for reparations and acknowledge that the decision sends a strong signal for the protection of the land and cultural rights of the Ogiek in Kenya, and for [I]ndigenous peoples' rights in Africa and around the world."[141]

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134. *Id.* at ¶ 110.

135. Lilian Chenwi, *Successes of African Human Rights Court undermined by resistance from states*, THE CONVERSATION (Aug. 31, 2021), https://theconversation.com/successes-of-african-human-rights-court-undermined-by-resistance-from-states-166454 [https://perma.cc/2L8L-3GBS].

136. Bhalla, *supra* note 80.

137. Afr. Comm'n on Hum. & People's Rts., No. 006/2012, Judgment (Reparations), at ¶ 77.

138. *Id.* at ¶ 93.

139. *Id.* at ¶ 116.

140. *Id.*

141. Press Release, Special Procedures, Kenya: UN expert hails historic ruling awarding reparations to Ogiek indigenous peoples, U.N. Press Release (July 18, 2022), https://www.ohchr.org/en/press-releases/2022/07/kenya-un-expert-hails-historic-ruling-awarding-reparations-ogiek-indigenous [https://perma.cc/4HT5-7X7V] (last visited Feb. 12, 2023).

IV. TRIBAL RECOGNITION, RELIGION, AND PROPERTY IN FEDERAL INDIAN LAW

Similar to the Ogiek Tribe, Tribal recognition, religious rights, and property rights are all principles important to American Indians, the scope of which have been litigated in American courts. Tribal recognition strengthens Indian Tribes' right to sovereignty and self-governance.[142] Religious rights are synonymous with Indians' way of life and cultural survival.[143] Property rights are intertwined with religion, culture, and economic development.[144] In this section, Federal Indian Law is examined regarding the issues of Tribal recognition, religious freedoms, and right to land. The forthcoming sections demonstrate the inadequacies of Federal Indian Law in protecting rights, proving that the "[I]ndigenous legal framework [in the United States] developed in the absence of human rights, and it is possible to see several features with an anti-[I]ndigenous function."[145]

A. Tribal Recognition Under Federal Indian Law

Tribal recognition by the federal government is of paramount importance in Federal Indian Law. "Recognition allocates power by confirming the legal status of the Indian nation as a separate sovereign government with legal rights to land, territories, and resources."[146] Therefore, the federal government must officially recognize a Tribe for the Tribe to have sovereignty over its own political affairs and to be eligible for the government benefits of recognition, such as individual healthcare and gaming rights.[147] In addition, recognition "provides the means to economic development through federal grants and loans and funding for cultural programs, educational programs, and social services."[148]

Before discussing the criteria of Indian Tribal recognition, the role of judicial review in Federal Indian Law must be examined. In 1865, the United States Supreme Court decided the case of *U.S. v. Holliday*.[149] In the case, the Supreme Court determined that the United States courts should not exercise

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142. AMY E. DEN OUDEN & JEAN M. O'BRIEN, RECOGNITION, SOVEREIGNTY STRUGGLES, & INDIGENOUS RIGHTS IN THE UNITED STATES 14 (2013) (explaining that "Recognized status qualifies [Indians] for the rights and responsibilities of tribal nationhood, including the honoring and protection of treaty rights and treaty substitutes.").

143. PEVAR, *supra* note 52, at 222.

144. *Id*. at 3 (explaining Indians continue to live on reservations "to preserve their ancestral lands and their culture, religion, and traditions, many of which are tied to those lands").

145. WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 7 (2013).

146. Kirsten M. Carlson, *Congress, Tribal Recognition, and Legislative Administrative Multiplicity*, 91 IND. L.J. 955, 957 (2016).

147. Lorinda Riley, *When a Tribal Entity Becomes a Nation: The Role of Politics in the Shifting Federal Recognition Regulations*, 39 AM. INDIAN L. REV. 451, 452 (2014-2015)

148. Carlson, *supra* note 146 at 957.

149. U.S. v. Holliday, 70 U.S. (3 Wall.) 407 (1865).

judicial review for Tribal recognition.[150] The Supreme Court wrote, "[i]f by [the executive and other political departments of the government] those Indians are recognized as a Tribe, this court must do the same."[151] The Court added, "[i]f they are a [T]ribe of Indians, then, by the Constitution of the United States, they are placed . . . within the control of the laws of Congress."[152] Therefore, Tribal recognition is the responsibility of Congress and subject to its plenary power without judicial oversight.

Congress exercised this plenary power over Tribal recognition during the "Termination Period" of Federal Indian Law from 1953-1968.[153] During this period, Congress terminated federal recognition of over 100 Tribes, depriving the Tribes of all benefits of recognition, including sovereignty and government support.[154] Congress did so via several statutes, none of which the Supreme Court declared unconstitutional when legal challenges arose regarding the parameters of the termination of rights.[155] Because of the rejection of judicial review from the courts, no procedural safeguards existed for Tribes during the Termination Period. The only judicial limitations on the termination of recognition are the Just Compensation and Due Process Clauses of the Constitution, which requires Congress to compensate for any "land or other vested interests that are lost through termination."[156] The Termination Period only ended and transitioned to the self-determination era because of the shift in public opinion and Indian policy in the 1960s and 1970s.[157]

Congress authorized the executive branch to exercise recognition power in the Federally Recognized Indian Tribe List Act of 1994.[158] In §103(1)(5) of the Act, Congress "expressly repudiate[s] the policy of terminating recognized Indian Tribes," but also retains the right to terminate under §103(1)(4).[159] Tribal recognition is often done through the executive branch process instead of petitioning Congress, as explained by Lorinda Riley, "Because the "current political environment is ill-suited to a legislative approach, the most effective avenue to the federal recognition is through the [executive branch]."[160] The executive branch process of recognition requires a Tribe to petition and receive approval from the Office of Federal Acknowledgment within the Office of the

150. *Id.* at 419.

151. *Id.*

152. *Id*.

153. PEVAR, *supra* note 52, at 67.

154. *Id.* at 11-12.

155. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) (holding that the hunting and fishing rights of the Menominee Tribe were not relinquished during termination but remaining silent of the legality of Congressional power to terminate recognition).

156. PEVAR, *supra* note 52, at 69.

157. DAVID H. GETCHES, DANIEL M. ROSENFELT, & CHARLES F. WILKINSON, FEDERAL INDIAN LAW: CASES AND MATERIALS 106 (1979).

158. 25 U.S.C. § 479 (1994).

159. *Id.*

160. Riley, *supra* note 147 at 453.

Assistant Secretary—Indian Affairs, Department of the Interior.[161] The standards set forth for recognition are codified in 25 C.F.R. §83.11, which was most recently amended in 2015.[162] The criteria for Tribal recognition requires several factors to be met: (a) Indian entity identification – identified by Federal or State authorities, historians, or self-identification; (b) Community – maintained group membership and history, geography, culture, or social organization since 1900; (c) Political influence or authority – use of governance or other methods of societal organization; (d) Governing document – proof of such governing methods; (e) Descent – proof of descendance from original native Indian roots; (f) Unique membership – members not already recognized in a national Tribe; and (g) Congressional termination – Congress cannot have banned the Tribe for the purpose of recognition.[163]

Scholars and Federal Indian Law practitioners criticize the current process of Tribal recognition. Amy E. Den Ouden and Jean M. O'Brien write, "[t]he petitioning process is an enormous and expensive undertaking, entailing exhaustive research and the preparation of a document that sometimes numbers hundreds of pages and consumes years."[164] They further contend that "[t]he process has been characterized as capricious, inconsistent, and incompetent. Critics have argued that the standards for proof have been ratcheted up, the evaluators of petitions have been biased, and criteria have been excessively stringent."[165]

B. Right to Religion Under Federal Indian Law

Colonialism and European expansion in the United States has always risked the religious freedoms of American Indians and Tribes. Since the founding of the United States, Indians and Tribes endured decades of forced religious assimilation and extermination through federal statutes, criminal laws, Christian missionaries, and Indian boarding schools.[166] As with the Ogiek Tribe, Indians' ability to exercise their religion is deeply interconnected to their ability to access sacred sites.[167] Freedom of religion challenges concerning land access have been brought under three theories of religious protections: (1) First Amendment of the Constitution; (2) The American Indian Religious Freedom Act of 1978 ("AIRA"); and (3) Religious Freedom Restoration Act of 1994 ("RFRA").

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161. 25 C.F.R. § 83.2 (2015).
162. 25 C.F.R. § 83.11 (2015).
163. *Id.*
164. DEN OUDEN & O'BRIEN, *supra* note 142, at 18.
165. *Id.* at 19.
166. KRISTEN A. CARPENTER, THE INDIAN CIVIL RIGHTS ACT AT FORTY 160 (Kristen A. Carpenter, Matthew L. M. Fletcher, and Angela R. Riley eds., 2012).
167. *See supra* Section IV.

1. Indian Religious Rights and the First Amendment

The First Amendment of the United States Constitution guarantees to all people the freedom of religion, including the freedom to exercise one's practice of their religion.[168] However, the freedom is not absolute. The 1986 Supreme Court case of *Bowen v. Roy* explains,

> The First Amendment's guarantee that 'Congress shall make no law . . . prohibiting the free exercise' of religion holds an important place in our scheme of ordered liberty, but the Court has steadfastly maintained that claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government. *Not all burdens on religion are unconstitutional*.[169] (emphasis added)

With the principle that "not all burdens" on religious rights violate the First Amendment, the Supreme Court has not ruled in favor of the First Amendment protecting sacred sites,[170] despite the assertion by some scholars that "[t]o deprive [T]ribal people of access to certain sites, or to compromise the integrity of those sites, is to effectively prohibit the free exercise of their religion."[171]

A landmark case litigated in 1988 under the Free Exercise Clause of the First Amendment was *Lyng v. Northwest Indian Cemetery Protective Association*.[172] In *Lyng*, the United States government planned to build a road and enact timber-harvesting through a National Forest located in Northern California.[173] The government first conducted a survey regarding the impact of the work on the Yurok, Karok, and Tolowa Indian Tribes in the area.[174] The survey revealed the forest area to be "significant as an integral and indispensable part of Indian religious conceptualization and practice."[175] However, the government proceeded with the plans, and the Tribes challenged the conduct under the First Amendment. [176]

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168. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

169. Bowen v. Roy, 476 U.S. 693, 701-02.

170. Peter J. Gardner, *The First Amendment's Unfulfilled Promise in Protecting Native American Sacred Sites: Is the National Historic Preservation Act a Better Alternative?*, 47 S.D. L. REV. 68, 73 (2002) ("Indian litigants' Free Exercise claims 'often fail' precisely as a result of the 'unique nature of native beliefs and the inability of courts to protect those beliefs adequately within the Constitutional framework.")

171. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1305 (2021).

172. Lyng v. Nw. Indian Cemetery Prot. Ass'n., 485 U.S. 439 (1988).

173. *Id.*

174. *Id.* at 442.

175. Lyng, 485 U.S. at 442; *see also* ECHO-HAWK, *supra* note 2, at 329-30 (2010) (comparing the sacred "High Country" at issue in this case to famous holy places in Western religions.).

176. Lyng, 485 U.S. at 443.

The Supreme Court recognized that the activity "could have devastating effects on traditional Indian religious practices."[177] However, the Supreme Court considered the claim within the context of the *Bowen* test to consider the severity of the burden on religious exercise.[178] To prevail under the *Bowen* test, the Tribes must have proved deprivation of a governmental benefit resulting from a conflict with their religious beliefs or coercion from the government to adopt a particular religious practice or belief.[179] The Supreme Court held the undisturbed access to public land is not a governmental benefit and the Supreme Court "cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions."[180] Thus, the Tribes did not satisfy the burden standard established by law pursuant to the First Amendment.

2. Religious Rights and the American Indian Religious Freedom Act

Congress has attempted to revise, enforce, and codify religious freedoms for Indians in the modern era of self-determination. In 1978, Congress passed the American Indian Religious Freedom Act of 1978 ("AIRFA").[181] The Act, in relevant part, states,

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[182]

In addition to the First Amendment claim, the Supreme Court ruled on the impact of AIRFA in the *Lyng* case. In *Lyng*, the Court rendered AIRFA useless to support the Indians' religious rights claim because the legislation did not create a cause of action under which a claim can be brought.[183] The Court states, "Nowhere in the [AIRFA] law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."[184] Therefore, AIRFA was only intended to be a policy statement by Congress and did not create a legal cause of action for a citizen to sue the government for

177. *Id.* at 451.
178. *Id.* at 448.
179. *Id*.
180. *Id.* at 450-51.
181. American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978).
182. *Id.*
183. Lyng, 485 U.S. at 455.
184. *Id.*

noncompliance with the Act.[185]

3. Religious Rights and Religious Freedom Restoration Act

Because AIRFA was perceived to be merely a policy statement without a legal remedy, Congress amended AIRFA in the Religious Freedom Restoration Act of 1993 ("RFRA").[186] Subsection (c) of RFRA creates a cause of action for Indians to bring a judicially enforceable individual right claim. RFRA states, in relevant part:

> (a) IN GENERAL – Government shall not *substantially burden* a person's exercise of religion even if the burden results from a general rule of applicability, except as provided in subsection (b).
> (b) EXCEPTION – Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
> (1) is in the furtherance of a compelling government interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.
> (c) JUDICIAL RELIEF – A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.[187] (emphasis added)

The barrier to Indians prevailing on a RFRA claim is the "substantial burden" requirement of Subsection (a), to which the courts have made it "essentially impossible for [T]ribal plaintiffs to demonstrate a substantial burden in the context of sacred sites owned by the government."[188]

One of the leading cases under RFRA claims is *Navajo Nation v. United States Forest Service*, decided by the Ninth Circuit Court of Appeals in 2008.[189] In *Navajo Nation*, the federal government leased part of a tract owned by the United States Forest Service to a ski resort on a mountain.[190] The lessees used

185. *Id.*

186. John R. Vile, *American Indian Religious Freedom Act of 1978 as Amended in 1994 (1994*), FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV., (Jan. 1, 2009), https://www.mtsu.edu/first-amendment/article/1053/american-indian-religious-freedom-act-of-1978-as-amended-in-1994 [https://perma.cc/8SUD-433F] (last visited Fe. 12, 2023).

187. 42 U.S.C. § 2000bb-1.

188. Barclay & Steele, *supra* note 160, at 1302.

189. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008).

190. *Id.* at 1064.

artificial snow containing a small percentage of human waste to provide the snow required for skiing.[191] The Navajo Tribe of Arizona attested that the mountain was sacred to their religion and filed a lawsuit, testifying that the fake snow "desecrates the entire mountain, deprecates their religious ceremonies, and injures their religious sensibilities."[192] Thus, the Navajos argued that the government permitting the use of fake snow containing human waste placed a substantial burden on the exercise of their religion, violating RFRA.[193] The Ninth Circuit Court of Appeals disagreed. The Court stated, "a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions," re-enforcing the First Amendment government benefit or coercion test applied in both the *Bowen* and *Lyng* cases.[194] Because the Navajo Tribe was not forced to choose between a public benefit and their religion, the desecration of the sacred mountain did not constitute a substantial burden on their freedom to exercise their religion.[195]

In 2022, again in the Ninth Circuit Court of Appeals, the court decided the case of *Apache Stronghold v. United States*.[196] In *Apache Stronghold*, Congress passed legislation designating a piece of federal land, called Oak Flat, to be conveyed to a private mining company.[197] However, the Apache Tribe of Arizona argued that Oak Flat is a sacred religious site for the Tribe, and mining the area would violate their freedom of religion under both the First Amendment and RFRA.[198] To distinguish from *Lyng and Navajo Nation*, the Apache Tribe argued that the mining of the land placed a tangible effect on their ability to use the land, as opposed to spiritual harm caused in *Lyng* and *Navajo Nation*.[199] The Court rejected this argument and decided that tangible and intangible deprivations were still subject to the same substantial burden standard.[200] Again, the Ninth Circuit ruled that the Apache Tribe did not satisfy the substantial burden test under RFRA.[201] The case was granted an en banc re-hearing in November of 2022, which was heard by eleven judges in March of 2023.[202] In March of 2024, a divided group of eleven judges on the Ninth Circuit re-affirmed the ruling that the government could convey Oak Flat to a private mining company, refusing to adopt a new approach that recognizes the

191. *Id.* at 1062.
192. *Id.* at 1063.
193. *Id.* at 1064.
194. *Id.* at 1069-73.
195. *Id.* at 1073.
196. Apache Stronghold v. U.S., 38 F.4th 742 (9th Cir. 2022).
197. *Id.* at 748.
198. *Id.*
199. *Id.* at 760.
200. *Id.* at 761.
201. *Id.* at 766.
202. Scheduling Order, Apache Stronghold v. United States, No. 21-15295 (9th Cir. Feb. 17, 2023) (order setting the en banc hearing for March 21, 2023).

destruction of sacred sites as a substantial burden on the Apache Tribe's exercise of religion.[203] The dissent writes, "Under RFRA, preventing religious adherents from engaging in sincere religious exercise undeniably constitutes a 'substantial burden.'"[204] In April of 2024, the organization representing the Apache Tribe confirmed that it has appealed for all twenty-nine judges on the Ninth Circuit to hear the case.[205]

The second prong of RFRA is the compelling government interest exception. As the court ruled in *Navajo Nation*, "the government is not required to prove a compelling interest for its action or that its action involves the least restrictive means to achieve its purpose, unless the plaintiff first proves the government action substantially burdens his exercise of religion."[206] Because the substantial burden test is not met in *Lyng*, *Navajo Nation*, or *Apache Stronghold*, no precedent exists on governmental compelling interest of interference with lands holding religious value under RFRA.

However, RFRA instructs the courts that the government interest must rise to the level of "compelling" and must be the "least restrictive means of furthering" the interest.[207] Essentially, RFRA instructs the courts to apply the "strict scrutiny" test to the interference with religion, which is the highest tier of scrutiny the courts apply to government action. For example, *Navajo Nation* instructs courts to turn to the strict scrutiny standard in the case of *Sherbert v. Verner*, which places the burden on the government to prove that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[208] Therefore, RFRA's inclusion of strict scrutiny minimizes the deferential treatment given to the government. However, the courts' strict adherence to the requirement of a "substantial burden" showing on the part of plaintiffs per subsection (a) of RFRA makes RFRA claims for American Indians difficult.

C. Right to Property Under Federal Indian Law

As discussed *supra*, the case of *Johnson v. M'Intosh* established that legal title to the land within the United States did not belong to Indians, even though it had been occupied by Indians and Tribes for centuries.[209] Instead, the doctrine of discovery permitted the United States to claim any Indian land it chose to obtain. However, and because the United States recognized the Indian Tribes as sovereign, a primary means of land acquisition by the United States government

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203. Apache Stronghold v. United States, 95 F.4th 608 (9th Cir. 2024)

204. *Id.* at 729.

205. *Case Detail: Apache Stronghold v. United States*, BECKET: RELIGIOUS LIBERTY FOR ALL, https://www.becketlaw.org/case/apache-stronghold-v-united-states/ [https://perma.cc/5VDB-P7AP] (last visited May 4, 2024).

206. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069 (9th Cir. 2008).

207. 42 U.S.C. § 2000bb-1.

208. Sherbert v. Verner, 374 U.S. 398, 407 (1963).

209. *See supra* Section II(C).

was through treaty negotiations between the federal government and Tribes.[210] Often, Indian Tribes consented to convey property rights to the United States in exchange for small amounts of money or the United States' protection from attacks from the French, British, or other Indian Tribes.[211] However, much of the land transferred via treaties from the Indians to the United States or white settlers was done through force, fraud, or unconscionable treaty terms.[212] Often, the United States government would simply refuse to uphold their end of the bargain in these contract agreements.[213] Frequently, the terms of the treaties included boundaries for the Indians to occupy, reflecting the modern-day norm of reservations.[214]

Indians have had little success in obtaining redress for broken treaty promises. In *Lone Wolf*, the Supreme Court stated, "If injury was occasioned [by treaty breaches], which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts."[215] Accordingly, Congress attempted to settle Indian claims regarding land rights and treaty breaches through its establishment of the U.S. Court of Claims from 1886 to 1946 and the Indian Claims Commission from 1946 to 1978.[216] However, Tribes rarely succeeded in these courts.[217] Though the Indian Claims Commission issued approximately $800 million to Indians, "[f]or many Native Nations, the [Indian Claims Commission] was little more than a hollow and largely unjust experience."[218]

The United States no longer relies upon the doctrine of discovery or treaty making to strip Indians of their lands. Instead, Congress employs its plenary powers, discussed *supra*.[219] Because Congress retains this near absolute power to regulate Indian affairs, Indian occupation of lands always remains susceptible to be reduced or eliminated by Congress. Though no legal barriers exist to limit Congress's powers over Indians' rights to land, current Supreme Court Justice Neil Gorsuch indicates a political limitation on Congress exists to "sav[e] the political branches the embarrassment of disestablishing a reservation."[220] The result of *M'Intosh*, broken treaties, and plenary power results in the current day status of reservations. Reservations are land held in trust by the United States government for Indian occupation.[221]

The United States is legally obligated to protect the rights of Indians,

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210. DAVID E. WILKINS, HOLLOW JUSTICE: A HISTORY OF INDIGENOUS CLAIMS IN THE UNITED STATES 3 (2013).

211. *Id.* at 4.

212. *Id.* at 2, 4.

213. *Id.* at 6.

214. PEVAR, *supra* note 52, at 46.

215. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

216. WILKINS, *supra* note 210, at 8, 123-24.

217. *Id.* at 11.

218. *Id.* at 121-22.

219. *See supra* Section II(C).

220. McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020).

221. PEVAR, *supra* note 52, at 70.

including reservation occupation, via the trust relationship. The trust relationship is based upon the principle established in the case of *Cherokee Nation v. Georgia*.[222] In *Cherokee Nation*, the Supreme Court decided that Indians were like a "ward," and the United States their "guardian."[223] However, the United States often falls short in its responsibility to protect concerning reservation diminution because the perpetrator of the property deprivation is oftentimes the government itself. The Tribal advocate within the government, the Bureau of Indian Affairs, is housed within the Department of the Interior, which also contains agencies like the Bureau of Land Management and the National Park Service that possess countervailing interests to the Bureau of Indian Affairs. The Hon. Judge William Canby explains that the other agencies have more political clout then than the Bureau of Indian Affairs, which generally results in the United States putting other interests above its trust obligations to protect reservations:

> The Bureau [of Indian Affairs] has the responsibility of defending the [T]ribes' trust assets when they are threatened by other interests. Unfortunately, many of these threats come from other agencies within the Department of the Interior and their constituencies. Indian land and water interests frequently conflict with the activities or designs of the Bureau of Reclamation, the Bureau of Land Management, the National Park Service and, occasionally, the Bureau of Mines and the Office of Surface Mining Reclamation and Enforcement . . . *As a result, Indian interests may suffer when compromises are made at the Secretary's level between competing bureaus.* Although this type of political compromise goes on within every executive agency, it carries the danger that the [T]ribes will be viewed merely as a weak political interest rather than a group to whom a fiduciary duty is owed.[224] (emphasis added)

This Note has established the principle that the United States government can diminish or disestablish the collective property rights to occupy land in reservations. However, not all Indians occupy reservation land. In 1887, the United States passed the General Allotment Act of 1887 ("Dawe's Act"), which allotted Indians individual rights, instead of collective rights, to reside on allotted portions of land in an effort to assimilate Indian Tribes to the individualistic European culture.[225] "Each [T]ribal member was assigned an allotment and, after a twenty-five-year 'trust' period, was to be issued a deed to it, allowing the owner to sell it at any time."[226] Leftover Tribal land that was not

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222. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1931).
223. *Id.* at 2.
224. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 55 (5th ed. 2009).
225. PEVAR, *supra* note 52 at 8-9.
226. *Id.* at 9.

allotted to Indians was given to white settlers.[227] Financial hardships and lack of resources forced many Indians to sell the Dawe's Act land to non-Indians, creating a checkerboard of Indian and non-Indian occupied land.[228] Between 1887 and 1934, when the Dawe's Act was repealed, Tribal lands diminished from 150 million acres of land to 50 million acres.[229]

In addition to many Indians being forced to sell Dawe's Act land, within two decades Congress had passed 25 U.S.C. § 357, which explicitly authorizes the government to seize any land occupied by individual Indians acquired from the Dawe's Act.[230] 25 U.S.C. § 357 permits the federal government to seize the land for "any public purpose . . . in the same manner as land owned in fee may be condemned."[231] In essence, the federal government could seize any allotment land in a manner that is consistent with the federal government's rights to seize non-Indian private property.

In private property rights, which also applies to Indians or Tribes that purchase legal title to privately owned land, the Fifth Amendment of the United States prohibits federal governmental seizure of private property unless a public use exception applies.[232] The Supreme Court has given great deference to the government regarding the public use exception in property seizures. A landmark case for public use property seizures in United States law is *Kelo v. New London*.[233] In *Kelo*, the government seized private property from owners to convey the land to a private pharmaceutical manufacturer.[234] Though the conveyed land was not to be used for public use, like roads, schools, or parks, the Supreme Court ruled that public use benefits included "promoting economic development."[235] Therefore, Congress not only has the power to reduce or eliminate lands held in collective trust from the Indian Tribes through its plenary power, but also broad discretion to seize Indian-owned property by way of 25 U.S.C.§ 357 or the Fifth Amendment, as long as the government alleges any public or economic benefit.

V. DISTINCTIONS BETWEEN THE OGIEK CASE AND FEDERAL INDIAN LAW

This Note will now provide a comparison of the African Court rulings and

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227. *Id.*

228. *Id.*

229. *Id.*

230. 25 U.S.C. § 357. ("Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.").

231. *Id.*

232. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation").

233. Kelo v. New London, 545 U.S. 469 (2005).

234. *Id.* at 472-73.

235. *Id.* at 484.

Federal Indian Law concerning Tribal recognition, religion, and property rights. Each section reiterates the African Court's application of international law in its interpretation of the African Charter to reach legal conclusions upholding indigenous rights - legal conclusions that do not currently exist in Federal Indian Law. Each section also provides a hypothetical analysis of how the Ogiek Case may have been decided under Federal Indian Law, and how Federal Indian Law would be different if decided under the international law standards applied in the Ogiek Case.

A. African Court Affords Greater Protection to Indigenous Peoples via Recognition

The standards for Tribal recognition in Federal Indian Law, codified in 25 C.F.R. 83.11(a-f), are similar to that of the standards set forth of the African Court, and, by extension, international law standards. Both standards include factors like self-identification, Tribal tradition and history, continued geographic occupation, and culture. However, the plenary power doctrine forbids judicial intervention concerning matters of Tribal recognition, which can lead to termination of Tribal recognition at Congress's sole discretion, evidenced by the Termination Period of the 1950s. Without a judicial remedy or intervention, Indian Tribes have no judicial protection for their recognition rights. In this respect, the African Court's ruling is much more favorable than Federal Indian Law, simply by virtue of substantively ruling on recognition.

Consistent with the plenary power doctrine, 25 C.F.R. §83.11(g) prohibits Tribal recognition if Congress forbids recognition.[236] As evidenced from the facts of the Ogiek Case, the Kenyan government adamantly opposed the Ogiek Tribe's rights in the Mau Forest. Had the African Court applied a quasi-plenary power doctrine to Kenyan Parliament that resembled Federal Indian Law, the Kenyan Parliament could have enacted legislation forbidding recognition of the Ogiek. In that hypothetical, the Ogiek Tribe would not have received recognition from the African Court, and the claims fail. However, the African Court did not apply a plenary power doctrine because it is United States judge-made law, does not exist in international law, and is typically used to subvert international human rights law obligations.[237]

Had plenary power not been the doctrine of the Supreme Court during the Termination Period, and the Supreme Court had taken judicial review on the stripping of recognition, the Court may have intervened when thousands of Indians were stripped of their recognition and rights by Congress. Currently in

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236. 25 C.F.R. § 83.11(g).

237. Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the ting Human Rights in the Name of Sovereignty*, 51 CATH. UNIV. L. REV. 1115, 1121 (2002). ("[P]lenary power is used against those over whom the United States exercises essentially complete control, in situations in which the United States neither respects their sovereignty nor extends the usual protections of domestic or international law").

Federal Indian Law, nothing prevents Congress from bringing about another termination era of Indian policy. Engaged judicial review, like in the Ogiek Case, could prevent a second-coming of another termination period. Currently, the only barrier limiting Congress from enacting another termination period is public policy or opinion, which is more fickle than the law.

B. African Court Secures Stronger Religious Rights Than Federal Indian Law

In assessing religious rights, the Ogiek Case demonstrates the impact international law has on judicial interpretation. In determining its legal test, it is important to acknowledge that the African Court relies upon the ICCPR, a treaty that the United States has ratified.[238] However, in the cases of *Lyng*, *Navajo Nation*, and *Apache Stronghold*, the Supreme Court did not reference or consider the ICCPR in any capacity.[239] Furthermore, *Apache Stronghold* was decided after the Human Rights Committee expressed concerns about Indians' religious rights regarding sacred sites and continued to apply the same law that the ICCPR condemns.[240]

The most significant difference between international law standards and Federal Indian Law manifests in the standards set forth for the States' obligations. The African Court's standard requires a State to *fully guarantee* the freedom of religion.[241] This standard is contrasted with the First Amendment and RFRA *substantial burden* standard, which the courts have interpreted to mean the United States only violates the First Amendment rights of Indians if they are forced to refuse government benefits because of their religion or coerced by the government into adopting a religion.[242] An obligation that a State is required to fully guarantee a right imposes a stronger protection of rights than an obligation that a State not impose a substantial burden on a right. In this regard, the Ogiek Case and international law provides a much stronger protection for religious rights than domestic law.

However, the public interest exception interpreted by the African Court and Federal Indian Law is similar. The African Court decided that any religious interference must be necessary and reasonable to achieve the public interest. United States courts are also instructed to give strict scrutiny to religious violations, which requires a compelling governmental interest that is narrowly tailored to achieve the interest. Therefore, both tribunals are instructed to carefully examine the governmental intrusion on rights and afford little deference to the government.

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238. *See supra* Section II(B)(1) (confirming the United States ratification of the ICCPR).

239. *See* Lyng v. Northwest Indian Cemetery Protection Ass'n., 485 U.S. 439 (1988); *see also* Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008); Apache Stronghold v. U.S., 38 F.4th 742 (9th Cir. 2022).

240. *See supra* Section II(B)(1) (explaining the Human Rights Committee's concern for Indian religious rights in 2014).

241. *See supra* Section III(C)(2).

242. *See supra* Section IV(B)(3).

Had the African Court interpreted Article Eight of the African Charter similar to the way U.S. courts have interpreted religious expression under Federal Indian Law, the Ogiek peoples' religious right would have been violated only if they were forced to choose between a government benefit and practicing their own religion, satisfying the substantial burden standard pronounced in *Lyng*, *Navajo Nation*, and *Apache Stronghold*. Since the Ogiek were not forced to decline a government benefit, and *Lyng* states that access to public land is not a government benefit,[243] the Ogiek could not have prevailed under Article Eight guaranteeing the right to religion as interpreted in line with current Federal Indian Law in the United States.

The facts of the Ogiek Case are similar to the facts of *Lyng*, *Navajo Nation*, and *Apache Stronghold*. In all instances, the Indigenous Tribes utilized the land for sacred religious ceremonies and were deprived of the land. If the United States courts applied the African Court's requirement to fully guarantee religious expression to Indian Tribes, the United States government would be greatly restricted from desecrating or destroying any lands sacred to Indians. In this regard, the Tribes in *Lyng*, *Navajo Nation*, and *Apache Stronghold* may have earned legal redress to protect their religious rights.

C. African Court's Ruling on Property Rights is More Favorable to Indigenous Peoples than Federal Indian Law

In the Ogiek Case, the African Court interpreted UNDRIP Article 26 to clearly show the Ogiek peoples had a right to own legal title to the land in the Mau Forest because it had historically been owned and occupied by the Tribe.[244] Ironically, property rights in Federal Indian Law are also premised on international law — the outdated principle of the doctrine of discovery — to undermine the property rights of Indians.[245] However, the doctrine of discovery is no longer an accepted principle in international law and "current understanding of international customary law in the area of Indigenous rights is the [UNDRIP]."[246] As evidenced by the African Court's interpretation of Article 26 of the UNDRIP, Federal Indian law regarding property rights is incompatible with international standards.

First, the concept of "Indian Title" to only occupy lands was rebuked by the African Court and international law. Walter Echo-Hawk contends Article 26 of UNDRIP would strengthen Indian property rights.[247] Based on the African Court's interpretation of Article 26 of the UNDRIP in the Ogiek Case, he is correct. The African Court states:

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243. Lyng, 485 U.S. at 453.
244. *See supra* Section III(C)(3).
245. Johnson & Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543, 567 (1823).
246. Fletcher, *supra* note 9, at 20.
247. ECHO-HAWK, *supra* note 2, at 177.

> The Court thus finds that, in international law, granting indigenous people privileges such as mere access to land is inadequate to protect their rights to land. What is required is to legally and securely recognise their collective title to the land in order to guarantee their permanent use and enjoyment of the same.[248]

Thus, the African Court confirms that the Federal Indian Law concept of Indian Title is entirely inconsistent with international law, including UNDRIP.[249] If Federal Indian Law meaningfully incorporated UNDRIP, *Johnson v. M'Intosh* would become obsolete. Indians would gain legal title to the land they collectively occupy. Moreover, legal title to the reservation land would remove the plenary power from Congress to diminish Indian land and secure the property rights in perpetuity.

Second, the scope of the public use exception also distinguishes the Ogiek Case from Federal Indian Law. Both tribunals permit the government to take private property, but the African Court placed a high burden on the Kenyan government to prove a valid governmental interest existed, ruling that the Tribal eviction in no way furthered the Kenyan government interest of environmental conservation.[250] The low deferential treatment to the government is similar to the scrutiny applied in the religious freedom exception by the African Court. Conversely, as evidenced by 25 U.S.C. § 357 and *Kelo*, the United States courts grant a strong deference to the government in the public use exemption to property owned by Indians that do possess legal title. In considering property rights of reservations, Federal Indian law grants an absolute power to Congress to diminish or seize any collective property rights. Regardless of how an Indian may reside on the land, the African Court provides stronger property rights through its low governmental deference for the public interest exception.

Had the Ogiek Case played out under Federal Indian Law, the African Court may have ruled the Ogiek Tribe only possessed Indian Title, or the right to use and occupy the land. The remedies would have completely differed. Instead of transfer of legal title, as discussed *supra*, the African Court would have only ruled the Ogiek have rights to occupy the land.[251] Moreover, under Federal Indian Law, the Kenyan Parliament would maintain the authority to eliminate the right of occupancy under a plenary power theory.

If the United States adopted the international standards applied by the African Court, Indian Title would cease to exist. The United States would transfer the legal title of reservation lands to Tribes. Moreover, the courts would

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248. Afr. Comm'n on Hum. & People's Rts. v. Republic of Kenya, No. 006/2012, Afr. Ct. H.P.R., Judgment (Reparations), ¶ 110 (June 23, 2022).

249. CLAIRE CHARTERS, THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY 419 at ¶ 4.5.3 (Jessie Hohmann & Marc Weller eds., 2018) (explaining that the highest courts in Belize, Canada, and New Zealand have all recently ruled that Indigenous peoples hold some degree of full legal title to the land.).

250. *See supra* Section III(C)(3).

251. *See supra* Section III(C)(4).

narrow the broad discretion afforded the government in property deprivation. The government would have to overcome a threshold similar to strict scrutiny, where the government must pass a heightened standard – that of a compelling government interest using the least restrictive means to further that interest. If the United States sought to relocate Indians or Tribes for environmental preservation, the government would need to prove that the Indians or Tribes were contributors to the degradation of the ecosystem, as in the Ogiek Case.

VI. RECOMMENDATIONS FOR FEDERAL INDIAN LAW

Legal systems must protect American Indian rights to fully realize self-determination and protect human rights. It is now established that the standards applied by the African Court, and international law, yield significantly better results for Indigenous communities than Federal Indian Law. In light of the comparisons, this section provides recommendations to strengthen the rights of Indians. However, each section also discusses practical barriers that may impede the realization of each recommendation.

A. Strengthen International Law Remedies Through Regional System Engagement

The first recommendation is straightforward: the United States should meaningfully engage with its own regional system, the Organization of American States. The Ogiek Case demonstrates how the extra layer of a regional law system provides legal redress when domestic or other international remedies are not available. Without the African Union system, the Ogiek Tribe would continue suffering at the discretion of the Kenyan government. As discussed *supra*, the United Nations treaty obligations have had little impact on securing American Indians' rights in domestic law.[252] Indians and Tribes would secure additional protections if the United States subjected itself to the jurisdiction of the Inter-American Court of Human Rights.

The obstacle to this recommendation is apparent: the United States has refused to engage with the Organization of American States system for decades and is clearly reluctant to do so. Moreover, the aftermath of the Ogiek Case, discussed *supra*, demonstrates the shortcomings of regional law systems.[253] While the Inter-American Court on Human Rights ruling on a legal violation may coerce change through public pressure, the United States, like Kenya, may choose to continue perpetuating human rights violations given the lack of enforcement mechanisms available to the regional court systems.

252. *See supra* Section II(B)(1).
253. *See supra* Section V.

B. United States Courts Should Increase the Persuasiveness of International Law in Constitutional Interpretations Concerning the Rights of American Indians

As stated *supra*, one stark difference between the African Court and the United States courts is the consistency of the application of international law to interpret legal instruments, such as the African Charter and the United States Constitution.[254] In the Ogiek Case, the African Court relied upon the ICCPR, UNDRIP, and ICERD to interpret the African Charter, resulting in strengthened protection of Indigenous peoples' rights.

This Note recommends domestic courts take a similar approach. As stated *supra*, the Supreme Court is entitled to use international law to interpret constitutional legal issues.[255] Indeed, the Supreme Court has considered international law to address domestic Constitutional questions since the ratification of the Constitution in 1789.[256] Employing non-U.S. sources to interpret Constitutional law is "a practice that was entirely routine throughout U.S. Constitutional history [before] becom[ing] controversial at the turn of the twenty-first century."[257]

The Supreme Court, and lower courts, should consistently consider international law as persuasive authority when deciding cases pertinent to the rights of Indians. These cases affect some of the most basic principles that the United States was founded upon, like freedom of religion, property, and economic development. As the comparison with the Ogiek Case demonstrates, Federal Indian Law falls short of international standards for human rights. If the courts decided to utilize the ICCPR, ICERD, and the UNDRIP in interpreting Constitutional issues facing Indians and Tribes, Federal Indian Law would experience a shift to strengthen Indian rights.

However, Mark Tushnet identifies a few obstacles to international integration in Constitutional interpretation in general. Three significant obstacles exist: the originalism approach to Constitutional interpretation, a fear of "cherry picking" which law to apply, and judicial activism.[258] Originalism is a prominent Constitutional theory of judicial interpretation which "rules out even mild uses of non-U.S. materials except to the extent that original understandings . . . license later decision makers to use post-adoption non-U.S.

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254. *See supra* Section II(B)(3).

255. *See supra* Section II(B)(3).

256. DAVID L. SLOSS, MICHAEL D. RAMSEY, & WILLIAM S. DODGE, INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 37 (David L. Sloss, Michael D. Ramsey, & William S. Dodge eds., 2011).

257. MARK TUSHNET, INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 511, 516 (David L. Sloss, Michael D. Ramsey, & William S. Dodge eds., 2011) (explaining how pushback began following the Supreme Court's usage of international law in "hot-button social issues.").

258. *Id.* at 512, 514, 517.

materials."[259] Cherry picking refers to lawyers and judges subjectively choosing when to apply international law to support their position or conclusion that has already been reached.[260] Both originalism and cherry picking underly the concern of judicial activism, in which concerns arise that the courts are becoming too loose with the law to achieve their own policy objectives.[261] Therefore, applying international law in Federal Indian Law would undoubtedly invoke skepticism in the United States legal community. Opposition to the Supreme Court utilizing international law is highest when the result may threaten a "national identity."[262] Since the national identity of the United States includes the long-standing oppression of American Indians, pushback would be expected. However, the benefits outweigh the potential obstacles.

C. Amend the Parameters of Tribal Recognition to Limit Plenary Power

Congress's plenary power should be eliminated in Tribal recognition matters. As evidenced by the Ogiek Case, Tribal recognition and State governments often possess adversarial interests.[263] Essential Indian rights, like sovereignty, remain at risk of extinction if Congress is granted authority to terminate recognition without any limitations.

25 C.F.R. 83.11, which the executive branch relies upon to recognize Tribes, contains a carve-out in subsection (g) to permit Congressional termination of a Tribe.[264] However, the executive branch cannot promulgate a rule to change 25 C.F.R. 83.11(g) because it would contradict Sec. 103(4) of the Federally Recognized Indian Tribe List Act, which grants the executive branch the power to recognize Tribes. Sec. 103(4) of the Act states, "[A] [T]ribe which has been recognized. . . may not be terminated except by an act of Congress."[265] Therefore, removal of 25 C.F.R. 83.11(g) would require a two-step process: (1) Congress should amend the Federally Recognized Indian Tribe List Act to remove Sec. 103(4) from the parameters in which the executive branch must operate; and (2) the executive branch should promulgate a rule change to 25 C.F.R. 83.11 to eliminate subsection (g). If these two steps are satisfied, it would significantly reduce the power of Congress to terminate Tribes.

Besides the obvious limitation of the lack of political support, removal of the Congressional power poses a unique issue that could call into question its constitutionality. Because the Supreme Court has already established that Congress has plenary power to terminate Tribes, Congress could potentially retain termination authority, even if it amended the Federally Recognized Indian

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259. *Id.* at 512.
260. *Id.* at 514.
261. *Id.* at 517.
262. *Id.*
263. *See supra* Section III(C)(1).
264. 25 C.F.R. § 83.11.
265. Federally Recognized Indiana Tribe List Act of 1994, 103 Pub. L. No. 454, § 103(4), 108 Stat. 4791 (1994).

Tribe Act to exclude this power.

Another option to reduce the plenary power is for the judiciary to take an active role in Tribal recognition. Courts could choose to review decisions made by the executive branch or Congress. However, this option is less likely. The judicial branch is likely to follow *stare decisis*, and not overturn centuries of precedent and the *Holliday* decision.[266]

D. Impose a Higher Burden on the Government to Protect Religious Freedoms

The United States places a great deal of emphasis on religious freedoms, evidenced by the Founders choosing to place the right in the First Amendment of the Constitution.[267] However, this Note demonstrates that the First Amendment protections often do not extend to Indians wishing to preserve sacred, religious land. The United States should impose a legal standard that replaces the existing substantial burden test with one that more closely resembles the African Court's interpretation of religious freedoms.

Because *stare decisis* likely dissuades the judiciary from reforming the substantial burden test, Congressional action provides the ideal opportunity to alter legal standards for religious freedoms. Congress should amend the RFRA to impose a more stringent obligation on the States to ensure religious freedoms. As discussed *supra*, the substantial burden is nearly impossible for American Indians and Tribes to prove.[268] Instead, Congress should use a similar standard as the African Court did in the Ogiek Case – require the United States government to fully guarantee religious freedoms. The compelling interest prong of RFRA need not change, as the burden of proving a compelling governmental interest is similarly interpreted between Federal Indian Law and the Ogiek Case.

E. Re-Examine Indian Title Considering Developments of Indigenous Rights in International Law

Comparing Federal Indian Law with the Ogiek Case demonstrates that American Indian property rights are entirely incompatible with international standards for Indigenous property rights. Indian Title prohibits Indians from owning legal title to long-occupied lands, and the African Court, in interpreting and applying international law, required that the government of Kenya give the Ogiek Tribe legal title to historically occupied land.[269] Accordingly, the United

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266. *Understanding Stare Decisis*, A.B.A. (Dec. 16, 2022), https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis/ [https://perma.cc/Z5DM-P4WW] (describing *stare decisis* as "hold[ing] that courts and judges should honor 'precedent' – or the decisions, rulings, and opinions from prior cases").

267. ECHO-HAWK, *supra* note 2, at 352.

268. *See supra* Section IV(B)(2).

269. *See supra* Section III(C)(3).

States should grant full legal collective title to Indian Tribes and abolish the current reservation system. Because of the plenary power doctrine, Congress can grant legal title of the reservation land with the stroke of a pen. Congress should convey legal title of reservations, which it currently holds in trust, to collective ownership of the land of Indian Tribes in accordance with UNDRIP while emphasizing that the transfer of legal title to the land should in no way alter Tribal sovereignty on the land. The transfer of land not currently allocated as reservation land, but to which Tribes may have a historical or moral claim, is a topic beyond the scope of this Note.

Moreover, the legal system should provide a test, similar to strict scrutiny, that gives the government less leeway to seize property. Unless the current system of property seizure is reformed, newly acquired legal title to land remains susceptible to near arbitrary seizure by the government. As long as the government retains broad autonomy to seize privately-owned lands, the relationship does not meaningfully differ from plenary power.

The biggest obstacle to the transfer of legal title to land is public opinion or support. It is unlikely that the government would voluntarily part with a major economic asset. Since the government owns approximately 56 million acres in trust for Tribes, the economic cost on the value of the land alone is in the hundreds of billions of dollars.[270] The transfer of legal title would be met with much opposition.

VII. CONCLUSION

As evidenced by this Note, Federal Indian Law falls short of international law standards for Tribal recognition, religious rights, and property rights. As a result, American Indians continue to lack adequate legal protection for these rights. However, the United States can reform Federal Indian Law to better align with the standards of the African Court and international law. This Note recommends the United States do the following: engage with the Organization of American States, consider international law in domestic law interpretation regarding Indians, eliminate the plenary power doctrine in Tribal recognition, reform RFRA to impose a greater obligation upon the government than the "substantial burden" test, and eliminate Indian Title through conveyance of collective legal title to Indian Tribes. As Walter Echo-Hawk succinctly explains, "there is simply no place for injustice in a land that professes higher ideals; and that specter should not be allowed to stalk any of our citizens."[271]

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270. *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFS., https://www.bia.gov/frequently-asked-questions [https://perma.cc/2Q3H-G9ZG] (last visited Sept. 22, 2023) (explaining that the United States government holds 56.2 million acres of land in trust for Indian reservations).

271. ECHO-HAWK, *supra* note 2, at 459.