Delimit, Demarcate, and Title: Sovereignty and Property Rights of Native Peoples in the Americas

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I. INTRODUCTION 101
II. INTERNATIONAL CASE LAW AND INDIGENOUS PROPERTY RIGHTS IN THE AMERICAS 102
III. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS ADDRESS INDIGENOUS PROPERTY AND SOVEREIGNTY 109
IV. UNITED STATES FEDERAL LAW AND NATIVE AMERICAN PROPERTY RIGHTS 116
A. *History* 116
B. *Case Study:* Carpenter v. Murphy 118
V. A STRATEGY FOR NATIVE PEOPLES' PROPERTY CLAIMS 120
VI. CONCLUSION 123

I. INTRODUCTION

The United States Supreme Court is presently deciding the life or death of Patrick Murphy, and in so doing the Court must first decide whether his crime occurred in Indian country.[1] The scene of Murphy's crime was a dirt road in Oklahoma, land that was part of the Creek Reservation created by an 1866 treaty with the United States.[2] The State of Oklahoma contends that the reservation was subsequently disestablished, leaving the state with jurisdiction and the state-imposed death sentence standing.[3] Murphy and the Creek nation argue that the

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1. Ronald Mann, *Argument Analysis: Justices Dubious About Ramifications of Broad Indian Reservation in Oklahoma*, SCOTUSBLOG (Nov. 27, 2018, 6:24 PM), https://www.scotusblog.com/case-files/cases/royal-v-murphy/ (discussing Carpenter v. Murphy, now Sharp v. Murphy, 139 S. Ct. 626 (2018)); 18 U.S.C. § 1151 (2006) (using the term "Indian country" to refer to reservation lands, dependent Indian communities, and allotments). The case was renamed in July 2019 after Sharp replaced Carpenter as Interim Warden. *See* Letter from Mithun Mansinghani, Solicitor Gen., Okla. Office of Att'y Gen. (July 25, 2019), https://www.supremecourt.gov/DocketPDF/17/17-1107/109307/20190725144650940_2019.07.25%20Letter.pdf.

2. Brief for Respondent at 17, *Murphy*, 139 S. Ct. 626 (No. 17-1107).

3. Brief for Petitioner at 19, *Murphy*, 139 S. Ct. 626 (No. 17-1107).

reservation survived, therefore the federal government has jurisdiction.[4] This case provides a lens for viewing the most recent chapter in the struggle of native peoples, particularly in the Americas, to retain sovereignty over tribal lands.[5] Court decisions from Canada and Latin America demonstrate both a detailed decisional framework as well as a growing willingness to value indigenous rights, which could prove instructive for the United States.[6] International human rights law, with its emphasis on self-determination, offers a policy-centered approach.[7] In turn, the legal strategy of such groups as the Native American Rights Fund could shape jurisprudence to be more favorable to indigenous interests.[8] Weaving these three perspectives together can lead to a resolution of indigenous land claims, which recognizes the fundamental nature of territory for the survival of native cultures.[9]

II. International Case Law and Indigenous Property Rights in the Americas

Disputes about the boundaries of indigenous land have occurred throughout the Americas with greater frequency in recent years, because these lands are so often rich in natural resources and farmland.[10] Tribes in Canada and the United States had treaty-based relationships with the British, Spanish, and French settlers[11] and have resorted to national courts

4. Brief for Respondent, *supra* note 2, at 17.

5. Delilah Friedler, *The History Behind the Supreme Court Showdown over Tribal Land Is Bloody and Violent; for Rebecca Nagle, It's Also Personal*, MOTHER JONES, https://www.motherjones.com/media/2019/07/the-history-behind-the-supreme-court-showdown-over-tribal-land-is-bloody-and-violent-for-rebecca-nagle-its-also-personal/.

6. *See, e.g.*, Mayagna (Sumo) Awas Tingni Cmty. v. Nicar., Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 6 (Aug. 31, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf; Tsilhqot'in Nation v. B.C., [2014] S.C.C. 44, para. 2 (Can.).

7. U.N. Charter art. 1, ¶ 2 (stating that the principle of self-determination is crucial for the establishment and maintenance of world peace).

8. *What Is the Tribal Supreme Court Project?*, NATIVE AM. RTS. FUND: TRIBAL SUP. CT. PROJECT, https://sct.narf.org/?_ga=2.131346895.1359695612.1566335262-2099080743.1549148261 (last visited Aug. 23, 2019).

9. *See Mayagna (Sumo) Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C), ¶ 6; *Tsilhqot'in*, [2014] S.C.C., para. 2; U.N. Charter art. 1, ¶ 2; *What Is the Tribal Supreme Court Project?*, *supra* note 8.

10. *See, e.g.*, Shawn E. Regan & Terry L. Anderson, *The Energy Wealth of Indian Nations*, 3 LSU J. ENERGY L. & RESOURCES 195, 196 (2014), https://digitalcommons.law.lsu.edu/jelr/vol3/iss1/9 ("[In the United States, r]eservations contain almost 30% of the nation's coal reserves west of the Mississippi, 50% of potential uranium reserves, and 20% of known oil and gas reserves.").

11. ROBERT B. ANDERSON ET AL., NAT'L CTR. FOR FIRST NATIONS GOVERNANCE, INDIGENOUS PEOPLES' LAND AND RESOURCE RIGHTS (May 2008), http://fngovernance.org/ncfng_research/robert_anderson.pdf.

when seeking relief; whereas tribes in Latin America, devastated by Spanish conquistadors, have increasingly turned to international judicial bodies.[12] The nature of native peoples' early encounters with Europeans was determinative: native North Americans were initially treated as sovereign nations, most likely because they vastly outnumbered the European settlers; native Central and South Americans were brutalized and enslaved in what has been called the "Black Legend."[13]

For example, Spanish colonization of the Pacific coast of Nicaragua in 1523 led to the near annihilation of the indigenous people there.[14] The Mayagna or Awas Tingni people on the Atlantic coast of Nicaragua, separated from the mainstream culture by a mountain range, are marginalized geographically and politically, but they occupy an area within the tropical rain forest that is attractive to both timber companies and cattle ranchers.[15] In 1995, the community learned of the State's granting an exploration license and preliminary approval for a Korean logging company to begin felling timber in part of the community's territory that they used for agriculture, hunting, and gathering.[16] The Awas Tingni filed a complaint with the Nicaraguan courts alleging violation of their constitutional rights but were denied any relief; the timber clearing proceeded.[17] In 1998, the community lodged a petition with the Inter-American Commission on Human Rights, which submitted it to the Inter-American Court of Human Rights, alleging violations of the rights to property and to judicial protection as set forth in the American Convention on Human Rights.[18]

For the first time, an international court, in the Inter-American Court of Human Rights' 2001 decision in *Mayagna (Sumo) Awas Tingni v. Nicaragua*, found a State in violation of indigenous collective land

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12. Harry Sachse, Lecture at Tulane University Law School, Rights of Native People in the U.S. and Abroad (Nov. 12, 2018).

13. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 49 (6th ed. 2011).

14. *Nicaragua: Profile*, MINORITY RTS. GROUP INT'L: WORLD DIRECTORY MINORITIES & INDIGENOUS PEOPLES, https://minorityrights.org/minorities/indigenous-peoples-5/ (last updated June 3, 2008).

15. *Id.*

16. Mayagna (Sumo) Awas Tingni Cmty. v. Nicar., Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 6 (Aug. 31, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

17. *Id.* ¶¶ 104, 116 (reproducing article 5 of the Nicaraguan Constitution, which guarantees indigenous peoples the right to maintain "communal forms of ownership of their lands").

18. *Id.* ¶¶ 1-2; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

rights.[19] The Court made its decision based, in part, on the expert testimony of anthropologist and sociologist Rodolfo Stavenhagen Gruenbaum, who explained the relationship of Nicaragua's indigenous peoples to their lands.[20] He told the Court that "[a] fundamental theme in the definition of indigenous peoples is how they relate to the land."[21] He described the Awas Tingni as "semi-nomadic," rotating amongst geographic areas for sustainability, and stated that they conceived of their territory as "collective space."[22] Gruenbaum emphasized that eroding a community's way of life, and therefore its identity, constituted a violation of human rights, citing recent developments in international human rights law.[23]

The government of Nicaragua maintained that the State had not violated the Awas Tingni's right to property, because the Awas Tingni did not have title to the land in dispute.[24] The government's representative admitted that "there ha[d] been no land titling in favor of indigenous communities, basically because the legal framework is incipient."[25] But the Inter-American Court held that the Nicaraguan government violated article 25 (right to judicial protection) of the American Convention by denying the Awas Tingni any effective legal remedy and by failing to provide a legal procedure for demarcating and titling communal indigenous lands.[26] The Court expanded the concept of property to include communal ownership, which effectively protected indigenous forms of ownership.[27] The Court also held that the State had violated article 21 (right to property) of the Convention by refusing to acknowledge the validity of communal property rights, and the Court ordered the Nicaraguan government to implement delimitation, demarcation, and titling of the Awas Tingni's territory.[28] The Court ordered the government to pay a total of $80,000 in compensation for legal expenses and "immaterial damage" caused by the lack of titling.[29] Notably, the Court

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19. *Mayagna (Sumo) Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C), ¶ 153; *Nicaragua's Titling of Native Lands Marks Crucial Step for Indigenous Rights—UN Expert*, UN NEWS (Dec. 17, 2008), https://news.un.org/en/story/2008/12/285592.
20. *Mayagna (Sumo) Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C), ¶ 83 (d).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* ¶ 83 (m) (testimony of Marco Antonio Caffarena, Director of the Office of Rural Titling in Nicaragua).
25. *Id.*
26. *Id.* ¶¶ 137-139.
27. *Id.* ¶ 148.
28. *Id.* ¶ 164.
29. *Id.* ¶¶ 167, 169.

also pointed out that it "considers that this Judgment is, in and of itself, a form of reparation to the members of the Awas Tingni Community."[30]

Six years later, the Inter-American Court again upheld the property rights of an indigenous group in *Saramaka People v. Suriname*.[31] Like the Awas Tingni, the Saramaka's 2000 petition to the Inter-American Commission was prompted by the incursion of logging companies.[32] The government of Suriname had not only granted logging concessions for the Saramaka's traditional territory, but they also sent the army to protect the Chinese bulldozers and workers who had cut logging roads deep into the Saramaka's lands, destroying sacred sites and cemeteries as well as areas used for farming, hunting, and gathering.[33]

In this case, the Court expanded its definition of "indigenous" to include the Saramaka, a group that was descended from slaves who had escaped to the forests of Suriname beginning in the eighteenth century.[34] The Court considered the Saramaka's distinct social structure, economy, and culture and their "special relationship with their ancestral territories" and concluded that these factors compelled their designation as a tribal community.[35] One Saramakan witness told the Court, "The forest is like our market place . . . . [It] is truly our entire life."[36] Even though the Saramaka people did not predate the European settlers, the Court recognized them as "shar[ing] similar characteristics with indigenous peoples" and therefore, as entitled to the same property rights accorded to indigenous peoples by both national and international law.[37]

In deciding whether the government had violated the Saramaka's property rights, the Court cited its interpretation of article 21 of the American Convention in the *Awas Tingni* case, where it recognized communal land ownership.[38] The Saramaka relied on the Peace Treaty of 1762, signed with the Dutch colonial government, as granting them their

30. *Id.* ¶ 166.

31. Saramaka People v. Surin., Objections, Merits, Reparations, Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007), http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

32. RICHARD PRICE, RAINFOREST WARRIORS: HUMAN RIGHTS ON TRIAL 119 (Bert B. Lockwood, Jr. ed., 2011).

33. *Id.* at 111-12.

34. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C), ¶¶ 79-80.

35. *Id.* ¶ 84.

36. *Id.* ¶ 82.

37. *Id.* ¶¶ 79, 86.

38. *Id.* ¶ 89.

freedom and territory.[39] The government of Suriname denied that the Saramaka had any legal property rights, claiming that they had only been granted use of the land.[40] The U.N. Special Rapporteur noted this in 2003, expressing his concern about the resulting mining and logging leases that were granted without the Saramaka's consent and that were damaging their communities.[41] Furthermore, the Suriname constitution of 1987 declared that all natural resources belonged entirely to the State.[42] As one anthropologist wrote, the Saramaka were "little more than guests on government lands."[43] The Inter-American Court intended its decision in favor of the Saramaka to change that: the Court ruled that the Saramaka had a right to the natural resources in their traditional territory, and that the government must consult with the Saramaka and secure their informed consent before granting any concessions.[44]

Despite the qualified review of concessions, the Court strongly came down on the side of the Saramaka, ordering the government to demarcate and issue collective title for the Saramaka territory, to grant legal recognition to the community, and to pay US$675,000 in damages.[45] Unfortunately, the government has done little in the nearly twelve years to comply with the judgment.[46] There has been no titling of lands yet; Suriname has attributed its delay to concern for creating a situation where "favorable treatment" for one segment of the population would

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39. PRICE, *supra* note 32, at 170 (reproducing portions of the testimony of a Saramaka captain, or clan leader); *see also* Aloeboetoe et al. v. Surin., Reparations, Costs, and Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 57 (Sept. 10, 1993) (where the Inter-American Court had previously refused to acknowledge the 1762 Treaty because it violated international human rights norms with its provisions requiring the Saramaka's return or sale of all runaway slaves).

40. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C), ¶ 116.

41. Rodolfo Stavenhagen (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Indigenous Issues* ¶ 21, U.N. Doc E/CN.4/2003/90 (Jan. 21, 2003), https://undocs.org/E/CN.4/2003/90.

42. 1987 CONSTITUTION WITH REFORMS OF 1992, art. 41 (Surin.), http://pdba.georgetown.edu/Constitutions/Suriname/english.html.

43. Richard Price, *Saramaka People v. Suriname: A Human Rights Victory and Its Messy Aftermath*, CULTURAL SURVIVAL (July 29, 2012), https://www.culturalsurvival.org/news/saramaka-people-v-suriname-human-rights-victory-and-its-messy-aftermath.

44. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C), ¶ 134; *id.* ¶ 122 (where the Court tempered this right, stating that the resources had to be ones the community traditionally used and that were necessary for the community's survival).

45. *Id.* ¶¶ 194 (a), 199-201.

46. Case of the Saramaka People v. Suriname, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R., ¶¶ 1 n.10, 9-11 (Sept. 26, 2018), http://www.corteidh.or.cr/docs/supervisiones/saramaka_26_09_18_ing.pdf (reporting that Suriname had complied with the Court's judgment insofar as it published and broadcast the judgment and paid the damages into a fund for the Saramaka).

"discriminate" against the rest.[47] In contrast, the Nicaraguan government completed the titling of the Awas Tingni's ancestral lands in 2008, seven years after the Inter-American Court's judgment, and handed over title to nearly 286 square miles of rainforest.[48]

While indigenous people in Latin America have had to seek remedies for violations of their property rights in an international human rights court, the native peoples of Canada and the United States have had domestic legal recourse available to them.[49] These differing paths to justice may be due, in part, to the nature of the early colonial relationships in each region: the British recognized the sovereignty of the indigenous people in Canada and the United States; by contrast, the Spanish and Portuguese colonizers subjugated and exploited the indigenous people they encountered.[50] One comparative law scholar has described the legal safeguards for indigenous peoples in Latin America as "rudimentary at best."[51] Fearing that recognition of indigenous sovereignty could hamper economic progress, governments have provided few constitutional protections for indigenous peoples' rights.[52]

Soon after France ceded its colonies in North America to the British, King George issued the 1763 Royal Proclamation, providing the basis for the Crown's recognition of the rights of First Nations.[53] The proclamation stated that the tribes "should not be molested or disturbed" in their possession of their lands, and it prohibited the sale of native lands to anyone other than the Crown.[54] In a 1973 decision, the Supreme Court of

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47. Comm. on the Elimination of Racial Discrimination, Rep. on the Situation of Indigenous and Tribal Peoples in Suriname and Comments on Suriname's 13th-15th Periodic Reports in Its Eighty-Seventh Session ¶¶ 18-19 (2015), https://www.forestpeoples.org/sites/fpp/files/publication/2015/07/suriname-shadow-2015-final.pdf (Surin.).

48. *Nicaragua's Titling of Native Lands Marks Crucial Step—UN Expert*, *supra* note 19; *Miskito Indigenous Communities: Nicaragua*, CEJIL, https://www.cejil.org/en/miskito-indigenous-communities (last visited Oct. 4, 2019) (citing the increase in violence against indigenous people in this region of Nicaragua since the Court's ruling).

49. R. David Edmunds, *Native Americans and the United States, Canada, and Mexico, in* A COMPANION TO AMERICAN INDIAN HISTORY 397-98, 405, 411 (Philip J. Deloria & Neal Salisbury eds., 2002).

50. Rainer Grote, *The Status and Rights of Indigenous Peoples in Latin America*, 59 MAX PLANCK INST. J. PUB. & INT'L L. 498-99 (1999), http://www.zaoerv.de/59_1999/59_1999_2_a_497_528.pdf (describing the *encomienda*, where indigenous people were forced to provide free labor to Spanish settlers in return for protection and Catholic education).

51. *Id.* at 527.

52. *Id.* at 528.

53. *250th Anniversary of the Royal Proclamation of 1763*, INDIGENOUS & NORTHERN AFF. CAN., https://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645#a1 (last visited Aug. 23, 2019).

54. *Id.* (reproducing the original text of the Royal Proclamation of 1763).

Canada first recognized the existence of a right of aboriginal ownership in traditionally occupied lands.[55] Subsequently, Canada's Constitution of 1982 explicitly protected indigenous land rights, including those set forth in the Proclamation of 1763 and other treaties.[56]

But it wasn't until 2014 that the Supreme Court of Canada granted title to an aboriginal group for their traditionally occupied land in its landmark decision, *Tsilhqot'in Nation v. British Columbia*.[57] The dispute began in 1983 when British Columbia granted a logging concession for clear-cutting in the Xeni Gwet'in's territory.[58] When the company began construction of a bridge for transporting large equipment, members of the Tsilhqot'in Nation, composed of six bands including the Xeni Gwet'in, formed a roadblock.[59] The Xeni Gwet'in went to court, demanding the right to refuse forestry concessions and asserting a title claim.[60] The British Columbia Supreme Court held that the Tsilhqot'in had established title by proving their ancestors had continuously used the land since before the Crown asserted sovereignty.[61] In reaching this decision, the Court considered a variety of ethnographic, archaeological, and historical evidence establishing the Tsilhqot'in nation's occupation of the territory during the previous 400 years.[62] This evidence included reviewing the oral traditions and legends of the Tsilhqot'in which featured landmarks within the claim area.[63] As the judge reasoned, a claim of traditional tribal ownership must be viewed from the perspective of the tribe.[64] By using

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55. Calder et al. v. Attorney-Gen. of B.C., [1973] S.C.R. 313 (Can. B.C.), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5113/index.do. In this case, a divided court denied the aboriginals' title to their lands; notably, one of the judges pointed to a parallel between the type of Indian land ownership set forth in the Canadian Proclamation and Chief Justice Marshall's U.S. Supreme Court opinions, including *Worcester v. Georgia*, *see* discussion *infra* Section IV.A, which stated that the Federal Government owned the land and that the Indians had only been granted a right of occupation, not title. *Id.* at 320-21.

56. Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), c 11, s. 35, https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html.

57. Tsilhqot'in v. B.C., [2014] S.C.C. 44, para. 2 (Can.); James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *The Situation of Indigenous Peoples in Canada* 5, U.N. Doc. A/HRC/27/52/Add.2 (July 4, 2014), http://unsr.jamesanaya.org/docs/countries/2014-report-canada-a-hrc-27-52-add-2-en.pdf [hereinafter Special Rapporteur in Canada] (noting that despite the legislative and jurisprudential achievements, by the time of his report, no "declaration of aboriginal title [had] been granted").

58. *Tsilhqot'in*, [2014] S.C.C., para. 5.

59. *Id.*

60. *Id.*

61. *Id.* para. 66.

62. William v. British Columbia, 2012 BCCA 285 (CanLII), paras. 59-62, 238.

63. *Id.* paras. 60, 67.

64. *Tsilhqot'in*, [2014] S.C.C., para. 54.

the indigenous viewpoint as its compass, this approach took a further step than the Inter-American Court's analysis had.[65] However, the Court of Appeal denied the claim, applying a stricter test that required proof of occupation of particular tracts of land.[66] Noting the dilemma posed by a seminomadic people with regards to proof of continuous occupancy, the Supreme Court of Canada upheld the historical findings of the trial judge and determined that regular use of an area for hunting and gathering that predated European sovereignty established Aboriginal title to the land.[67]

In considering the nature of Aboriginal title, the Supreme Court confirmed the Proclamation of 1763's recognition of "pre-existing legal rights" of the Aboriginal inhabitants.[68] The Court dismissed the *terra nullius* doctrine, the idea that land European colonizers "discovered" belonged to no one prior to their arrival, which was used to justify their theft of "unoccupied" lands.[69] Furthermore, the Court described the nature of Aboriginal land titles as collective, "not only for the present generation but for all succeeding generations," and as retaining exclusive control over how the land is used.[70] These characteristics gave rise to an obligation for the Crown to consult aboriginal groups before doing anything that might adversely affect them.[71] Having clarified the scope and substance of aboriginal land title, the Court upheld the original trial court's decision, concluding that British Columbia had breached its duty to consult the indigenous group about removal of timber and that the Tsilhqot'in's title should be granted.[72]

III. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS ADDRESS INDIGENOUS PROPERTY AND SOVEREIGNTY

The Canadian Supreme Court and the Inter-American Court pioneered the recognition of indigenous property rights; as one Canadian judge pointed out, the law in this area is still in its infancy.[73] The past thirty

65. While the Inter-American Court heard testimony from Saramaka leaders about their customary use of the land, anthropologists and other experts provided the bulk of the testimony. Saramaka People v. Surin., Objections, Merits, Reparations, Costs, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 172, ¶¶ 64-65 (Nov. 28, 2007), http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

66. *Tsilhqot'in*, [2014] S.C.C., paras. 27-28.

67. *Id.* paras. 50, 66.

68. *Id.* para. 69.

69. *Id.*

70. *Id.* paras. 74-75, 88.

71. *Id.* para. 78.

72. *Id.* para. 153.

73. William v. B.C., 2012 BCCA 285, para. 151 (Can.).

years have seen the adoption of international human rights instruments that have significantly impacted the legal landscape for indigenous people.[74] The International Labor Organization (ILO), a specialized agency of the United Nations founded with the purpose of contributing to universal peace through ensuring fair labor practices, adopted the first international instrument dedicated solely to the rights and protection of indigenous peoples.[75] Convention No. 107, adopted by the ILO in 1957, emphasized an integrationist approach to indigenous populations,[76] and its protections for land required the recognition of indigenous ownership of traditionally occupied lands insofar as it did not "hinder their economic and social development" and discouraged removal of indigenous populations from their lands.[77] The ILO's subsequent adoption of the Indigenous and Tribal Peoples Convention 169 (ILO 169) in 1989 was intended as a corrective to what its Preamble referred to as the "assimilationist orientation" of Convention 107.[78] ILO 169 expanded the property rights of indigenous people as well as the obligations of State parties.[79] Although ILO 169 currently has only twenty-three signatories, mainly in Latin America,[80] it established international standards for

74. U.N. Office of the High Comm'r on Human Rights, *Indigenous Peoples and the United Nations Human Rights System* 9 (2013), https://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf ("[ILO 169] signalled, at the time of its adoption . . . a greater international responsiveness to indigenous peoples' demands for greater control . . . ."); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 50, 58 (2d ed. 2004) (stating that ILO 169 initiated the contemporary era of international law's treatment of indigenous peoples, which is less Eurocentric).

75. Int'l Labor Org. [ILO], ILO Constitution pmbl. (1919), http://www.ilo.ch/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO (declaring that world peace requires social justice, which, in turn, depends on humane labor conditions); Russel L. Barsh, *Making the Most of Convention 169*, CULTURAL SURVIVAL (Mar. 1994), https://www.culturalsurvival.org/publications/cultural-survival-quarterly/making-most-ilo-convention-169.

76. ILO, *C107—Indigenous and Tribal Populations Convention*, *adopted* June 26, 1957, pmbl. [hereinafter ILO 107], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107.

77. *Id.* arts. 11-13.

78. ILO, *C169—Indigenous and Tribal Peoples Convention*, *adopted* June 26, 1989, pmbl. [hereinafter ILO 169], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

79. *Id.* arts. 2, 13-15, 18 (stating its goal of respect for the integrity of indigenous people; requiring that states include indigenous people in policy making, consult indigenous people about the use of their natural resources, and establish penalties for any unauthorized encroachment on indigenous lands; expanding the definition of indigenous lands to include those which they traditionally occupied or used); *see also* ILO 107, *supra* note 76, arts. 2, 11 (stating its goal of "progressive integration" of indigenous peoples "into the life of their respective countries," taking a paternalistic approach to policy by giving the state "primary responsibility," and requiring states to recognize ownership of traditionally occupied lands).

80. ILO, *Ratifications of C169*, https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (last visited Aug. 23. 2019).

protecting indigenous people, namely, by requiring that States safeguard the culture and environment of indigenous peoples, consult with indigenous groups before taking any actions that might affect them, including removal of natural resources, and protect indigenous ownership of their traditional lands.[81] Both the U.N. Development Program and the World Bank rely on ILO 169 when creating their own policies impacting indigenous populations.[82]

ILO 169 has some significant limitations, namely, its small number of signatories, its failure to explicitly address issues of colonialism and indigenous self-determination, and its neglect of current issues such as intellectual property rights.[83] While the Inter-American Court referred to the normative influence of ILO 169 in both the *Awas Tingni* and *Saramaka* decisions, neither Nicaragua nor Suriname was a party to that Convention.[84] Both countries were parties to the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social, and Cultural Rights (ICESCR).[85] In *Saramaka*, the Court relied on common article 1 of the ICCPR and the ICESCR, which ensures the right to self-determination, in order to connect the more particularized land rights enumerated in ILO 169 to a broader right to own property provided in

81. ILO 169, *supra* note 78, arts. 4, 6, 15.

82. U.N. Office of the High Comm'r on Human Rights, *Leaflet No. 8: The ILO and Indigenous and Tribal Peoples* 3, https://www.ohchr.org/Documents/Publications/GuideIPleaflet8en.pdf (last visited Oct. 12, 2019).

83. Barsh, *supra* note 75; 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 & COMP. L.Q. 957, 958 (Oct. 2009). *But see* International Convention on the Elimination of All Forms of Racial Discrimination art. 14 (1), Sept. 28, 1966, T.I.A.S. 94-1120, 660 U.N.T.S. 195 [hereinafter ICERD] (while anti-colonialist in its approach, complaints must present a case of racial discrimination).

84. Mayagna (Sumo) Awas Tingni Cmty. v. Nicar., Concurring Opinion of Judge Sergio Garcia Ramirez, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 2, 7 (Aug. 31, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf (citing articles 13 and 14 as norms of customary international law); *see also* Saramaka People v. Surin., Objections, Merits, Reparations, Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 92 (Nov. 28, 2007), http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

85. International Covenant on Civil and Political Rights, Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; U.N., *ICCPR Participants*, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf; U.N., *ICESCR Participants*, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf (Nicaragua ratified both the ICCPR and ICESCR in 1980; Suriname ratified them both in 1976).

article 21 of the American Convention.[86] The American Convention confers a right to the "use and enjoyment" of one's property and prohibits the deprivation of property except "for reasons of public utility or social interest."[87] ILO 169 goes much farther by placing all of the fundamental rights enshrined in the convention in service of the right of indigenous peoples "to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities."[88] The Inter-American Court employed international human rights instruments in order to expand protections for collective property, because they understood that communal territory was necessary for the "physical and cultural survival" of indigenous people.[89]

Nearly twenty years after ILO 169, the United Nations adopted its Declaration on the Rights of Indigenous Peoples (UNDRIP).[90] UNDRIP addressed some of ILO 169's gaps by recognizing indigenous peoples' rights to collectivity, self-determination, and autonomy.[91] The Declaration's provisions regarding land rights were even more progressive, granting indigenous rights to "the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired," and specified that States must recognize traditional "land tenure systems," thereby protecting both collective ownership and territory used by seminomadic peoples.[92] While UNDRIP had not yet entered into force during the *Awas Tingni* case, the Inter-American Court did rely on UNDRIP's article 32 in its holding in the *Saramaka* case, concluding that Suriname breached its duty to consult and receive consent from the Saramaka about any development projects affecting their lands or resources.[93]

The Court used the Declaration more recently and extensively in *Kalina & Lokono Peoples v. Suriname*, citing UNDRIP to support its

86. *Saramaka People*, Inter-Am. Ct. HR. (ser. C), ¶¶ 92-93; *see also id.* ¶ 130 n.128; ILO 169, *supra* note 78, art. 15 (requiring the participation and consultation of indigenous peoples when their natural resources are involved).

87. American Convention on Human Rights, *supra* note 18, art. 21(1)-(2).

88. ILO 169, *supra* note 78, pmbl.

89. *Saramaka People*, Inter-Am. Ct. HR. (ser. C), ¶ 90.

90. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

91. *Id.* arts. 1, 3-4.

92. *Id.* art. 26.

93. *Saramaka People*, Inter-Am. Ct. HR. (ser. C), ¶ 131.

interpretation of the American Convention.[94] The case involved a decades-long struggle by the Kalina and Lokono to secure legal ownership of their ancestral land, part of which had been sold by the government to third parties for building vacation homes.[95] Noting that the Suriname government still had not complied with their ruling in *Saramaka* to recognize the property rights of indigenous peoples, the Court ordered the State to create a legal framework for demarcating and titling indigenous territory.[96] As this case demonstrates, UNDRIP has helped to shaped international human rights jurisprudence, including that of the Inter-American Court, as well as providing "an authoritative 'guide'" for U.N. treaty bodies.[97] One scholar has characterized UNDRIP's role as blurring the line "between 'soft' and 'binding' law."[98] The very fact that UNDRIP is not legally binding may have contributed to its success, since it could be more radical in substance and universal in scope because it does not require States' commitment.[99]

Initially, Canada and the United States were among four states that voted against adoption of UNDRIP.[100] Canada objected to article 19, which required indigenous peoples' consent to proposed legislation that might affect them, and articles 26 and 28, which would open the door for indigenous land claims.[101] One Canadian expert on indigenous rights characterized UNDRIP as "[e]ssentially . . . asking for a decolonization of the entire system."[102] The United States expressly rejected "any possibility that this document is or can become customary international law,"

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94. Merits, Reparations, Costs, and Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶¶ 122 n.156, 139 n.178, 180, 181 n.231, 196 n.235, 202, 221, 251 nn.286, 298, 296 n.335 (Nov. 25, 2015), http://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf.

95. *Id.* ¶ 62.

96. *Id.* ¶ 329 (13)-(14).

97. Fergus MacKay, The Case of the Kalina and Lokono Peoples v. Suriname *and the UN Declaration on the Rights of Indigenous Peoples*, 1 ERASMUS L. REV. 33 (2018) (the author represented the petitioners in both the *Saramaka* and *Kalina & Lokono* cases) (noting that the African Commission on Human and Peoples' Rights has also relied on UNDRIP in a 2009 decision supporting the right of an indigenous group to their traditional land in Kenya).

98. *Id.*

99. Barelli, *supra* note 83, at 965.

100. Press Release, Gen. Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples, U.N. Press Release GA/10612 (Sept. 13, 2007) (the four states that voted against adoption were Australia, Canada, New Zealand, and the United States).

101. *Canada Votes 'No' as UN Native Rights Declaration Passes*, CBC NEWS (Sept. 13, 2007), https://www.cbc.ca/news/canada/canada-votes-no-as-un-native-rights-declaration-passes-1.632160.

102. Stefan Labbe, *Why the UN's Declaration on Indigenous Rights Has Been Slow to Implement in Canada*, OPENCANADA.ORG (July 21, 2017), https://www.opencanada.org/features/why-uns-declaration-indigenous-rights-has-been-slow-implement-canada/.

particularly objecting to the following "flaws": the expansive scope of the right of self-determination (seen as a potential threat to national unity); the provisions recognizing collective rights (viewed as creating a new class of collective human rights); and the provisions on lands and resources (which the United States regarded as threatening other "existing" land rights).[103] However, both countries have since announced their support for UNDRIP (the United States in 2010 and Canada in 2016).[104]

The Organization of American States (OAS) incorporated the principles enumerated in UNDRIP and ILO 169 as well as the lessons learned from the Inter-American Court's decisions in drafting a regional instrument for the protection of indigenous peoples.[105] The OAS adopted the American Declaration on the Rights of Indigenous Peoples in 2016.[106] Indigenous people participated in the drafting process of both the U.N. and OAS Declarations, which may account for the respectful and inclusive approach both instruments take to indigenous worldviews.[107] The OAS Declaration advanced indigenous rights in its express protection of collective rights (article VI), its recognition of the juridical personality of indigenous peoples (article IX), its protection of those who wish to remain in voluntary isolation (article XXVI), and of those who are in situations of armed conflict (article XXX).[108] It also strengthened indigenous peoples' treaty and property rights, requiring that States interpret treaties with respect to the indigenous peoples' understanding of the treaty (article

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103. Press Release, U.S. Mission to the United Nations, Observations of the United States with Respect to the Declaration on the Rights of Indigenous Peoples, Press Release #204(07), (Sept. 13, 2007), https://archive.is/20070612010029/http://www.un.int/usa/press_releases/20070913_204.html.

104. *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP'T ST. (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm (explaining that the United States' change in position was prompted by calls from many tribal leaders); Tim Fontaine, *Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples*, CBC (May 10, 2016), https://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272 (noting that Canada had officially endorsed the Declaration in 2010, but the then-conservative government only recognized it as "aspirational").

105. Stefania Errico, *The American Declaration on the Rights of Indigenous Peoples*, 21 AM. SOC'Y INT'L L. INSIGHTS (June 22, 2017), https://www.asil.org/insights/volume/21/issue/7/american-declaration-rights-indigenous-peoples.

106. G.A. Res. 2888 (XLVI), American Declaration on the Rights of Indigenous Peoples 167 (June 15, 2016) [hereinafter American Declaration], http://www.oas.org/en/sla/docs/AG07239E03.pdf.

107. INDIAN LAW RES. CTR., THE AMERICAN DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES: BACKGROUND MATERIALS & STRATEGIES FOR IMPLEMENTATION 1, http://indianlaw.org/sites/default/files/ADRIP%20Booklet%20%28web%20version%29.pdf; Barelli, *supra* note 83, at 966.

108. INDIAN LAW RES. CTR., *supra* note 107, at 7, 8, 18, 19.

XXIV) and requiring States to create regimes for demarcation and titling (article XXV (5)).[109] Although they are members of the OAS, the United States noted its persistent objector status and Canada stated its nonposition, both citing their ongoing commitment to UNDRIP as their reason.[110] The United States also made a reservation to article XXV(2), which requires compensation to indigenous peoples who are relocated.[111]

These international instruments vary in effectiveness, in part, because of their enforcement. The multilateral treaties, such as ICCPR, ICESCR, and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provide mechanisms for monitoring compliance of state parties, by establishing reporting procedures and treaty bodies, or committees, which oversee implementation.[112] But ICERD and the ILO Conventions are the only human rights treaties that explicitly provide enforcement through referral to the International Court of Justice.[113] The ILO Constitution sets forth procedures for complaints against a Member State, including by other Member States or by "industrial association" of workers or employers.[114] This could include organizations representing indigenous people engaged in traditional livelihoods such as farming, fishing, trapping, or crafts.[115] Because the U.N. and OAS Declarations are not legally enforceable, an international body must rely on either the Declaration's moral force, by publicly shaming a noncompliant State, or hope that the particular human rights violation is part of customary international law.[116] However, soft law

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109. Errico, *supra* note 105 (comparing the OAS Declaration unfavorably to ILO 169, for not including a right of indigenous peoples to enjoy the benefits of exploiting their natural resources, and equally unfavorably to UNDRIP, for failing to include a right to remedy and restitution for resources or land that has been taken).

110. American Declaration, *supra* note 106, pmbl. nn.1-2; INDIAN LAW RES. CTR., *supra* note 107, at 2, n.1.

111. INDIAN LAW RES. CTR., *supra* note 107, at 38 n.9.

112. ICCPR, *supra* note 85, arts. 28, 40 (establishing the Human Rights Committee and its monitoring function); ICESCR, *supra* note 85, arts. 16, 19 (establishing the Economic and Social Council and its monitoring function); *id.* arts. 21-22 (authorizing the Council to report compliance issues to the U.N. General Assembly and other U.N. agencies regarding the "advisability of international measures"); ICERD, *supra* note 83, arts. 8-9 (establishing the Committee and its monitoring function); *id.* arts. 11-13 (authorizing the Committee's investigatory power).

113. ICERD, *supra* note 83, art. 22; *Jurisdiction: Treaties*, INT'L CT. JUST., https://www.icj-cij.org/en/treaties (last visited Aug. 23, 2019); ILO, ILO Constitution arts. 31-32 (1919), http://www.ilo.ch/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO.

114. ILO, ILO Constitution arts. 24, 26; *id.* arts. 29, 31-32.

115. Barsh, *supra* note 75.

116. Sandeep Gopalan & Roslyn Fuller, *Enforcing International Law: States, IOs, and Courts as Shaming Reference Groups*, 39 BROOK. J. INT'L L. 73, 75-76 (2014) (discussing shaming as an effective enforcement mechanism); S. James Anaya, *International Human Rights and*

does serve a normative function, by helping to set expectations for treatment of indigenous peoples.[117] A soft law instrument does not necessarily suffer from limited adoption or watered-down provisions that can render multilateral agreements ineffective.[118]

IV. UNITED STATES FEDERAL LAW AND NATIVE AMERICAN PROPERTY RIGHTS

A. History

Vine Deloria, Jr. wrote, "Land was the means of recognizing the Indian as a human being."[119] This accurately characterizes the subordinate role human rights have played to property rights in U.S. federal law regarding Native Americans.[120] Generally, tribal sovereignty, defined here as a right to self-determination, has followed property rights and has often been shaped by disputes over criminal jurisdiction.[121] In a foundational case decided in 1832, *Worcester v. Georgia*, Chief Justice Marshall ruled that state criminal laws "can have no force" in Native American territory and that only federal law could intrude on native sovereignty that had been established by a treaty.[122] Since then, because the Constitution only mentions Indian tribes with regards to taxation (Article I, Section 2), treaties, and commerce (Article I, Section 8), tribal sovereignty has undergone a process of erosion by statute and jurisprudence.[123]

However, in *Ex parte Kan-Gi-Shun-Ca (otherwise known as Crow Dog)*, the Supreme Court limited federal jurisdiction, holding that tribes had exclusive jurisdiction over crimes committed amongst Indians within Indian territory.[124] Crow Dog, a medicine man, was convicted of murdering his chief, Spotted Tail, on the Brule Sioux reservation in Dakota

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Indigenous Peoples: The Move Toward the Multicultural State, 21 ARIZ. J. INT'L & COMP. L. 13, 15, 25 (2004) (describing the significance of customary international law in advancing indigenous peoples' rights).

117. Barelli, *supra* note 83, at 959 n.23.

118. *Id.* at 964.

119. VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 7 (1969).

120. Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure?*, 15 LEWIS & CLARK L. REV. 923, 946 (2011) (describing "the dark side of federal Indian law").

121. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 35 (1994).

122. 31 U.S. (6 Pet.) 515, 520, 535, 561 (1832).

123. DEWI IOAN BALL, THE EROSION OF TRIBAL POWER: THE SUPREME COURT'S SILENT REVOLUTION 20 (2016).

124. 109 U.S. 556, 571-72 (1883).

Territory and was sentenced to death in federal territorial court.[125] The Supreme Court reversed his conviction, relying on the Treaty of 1868 that established federal criminal jurisdiction in Sioux territory and an 1877 congressional act that established the Sioux reservation.[126] In explaining its decision, the Court affirmed tribal sovereignty but employed the racist rationale that it would be unfair to "measure[] the red man's revenge by the maxims of the white man's morality."[127] When the U.S. Supreme Court reversed Crow Dog's conviction, the Brule Sioux tribe had already negotiated a settlement, using traditional restorative justice, between the victim's and perpetrator's families, and so Crow Dog was allowed to live out his life on the reservation.[128]

Congress reacted to the public outcry against the Supreme Court decision by passing the Major Crimes Act in 1885, expanding federal jurisdiction over a list of seven major felonies, including murder, committed amongst Indians within Indian territory and on reservations.[129] The following year, the Supreme Court affirmed the constitutionality of the Major Crimes Act in *United States v. Kagama*.[130] The Court subscribed to the limited version of tribal sovereignty as set forth in *Worcester v. Georgia* 150 years before, namely, the dependent status of tribes.[131] The Court held that Congress had plenary power to protect the Indians, stating, "Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies."[132] The Act, along with the federal policy of allotment of Indian lands, where the government forced tribes to break up their lands into individually owned parcels, were intended to promote assimilation, and they effectively weakened tribal sovereignty.[133] In *Lone Wolf v. Hitchcock*, Kiowa, Comanche, and Apache tribes

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125. *Id.* at 557 (stating the trial court was the first judicial district court of Dakota; South Dakota was not admitted to the union until 1889).

126. *Id.* at 562-63, 564-65, 572.

127. *Id.* at 571.

128. HARRING, *supra* note 121, at 110 (noting that Crow Dog's family paid Spotted Tail's family $600, eight horses, and one blanket, which "redressed . . . and restored tribal harmony, a point that even the U.S. Supreme Court later recognized").

129. Indians Appropriations Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, https://www.loc.gov/law/help/statutes-at-large/48th-congress/Session%202/c48s2ch341.pdf; VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY loc. 103 (1984) (ebook).

130. 118 U.S. 375, 385 (1886).

131. *Id.* at 381-82 (describing the tribes as being "not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations").

132. *Id.* at 384.

133. DELORIA & LYTLE, *supra* note 129, at 106.

challenged the federal allotment of reservation land and subsequent purchase of "surplus land" for a low price.[134] The Supreme Court affirmed the full authority of Congress to abrogate treaties with the Native Americans, "in the interest of the country and the Indians themselves."[135] But in asserting federal jurisdiction, these Supreme Court decisions also limited state sovereignty.[136] The rules created in these cases regarding tribal sovereignty have remained in force, except where Congress has otherwise specified.[137]

B. Case Study: Carpenter v. Murphy

Just six days after hearing oral arguments in *Carpenter v. Murphy*, the Supreme Court ordered the parties, the U.S. Solicitor General as amicus for the State of Oklahoma and the Muscogee (Creek) Nation as amicus for Murphy, to file supplemental briefs on two questions: whether Congress had ever enacted a statute giving Oklahoma criminal jurisdiction over the Creek territory recognized in the 1866 treaty, and whether land could fall within a reservation but not qualify as Indian country as defined in 18 U.S.C. § 1151(a).[138] Clearly, the Court has distilled its consideration to what options remain if there is no explicit congressional grant of jurisdiction to Oklahoma.[139] Even with supplemental briefing in December and reply briefs submitted in January, the Court was unable to decide the case, and on June 27, 2019, the Court ordered the case "restored to the calendar for reargument" in the October 2019 term.[140] One observer referred to *Carpenter v. Murphy* as "the single hardest case of the term."[141]

In their reply briefs, the parties and amici had to confront the Court's 1984 decision in *Solem v. Bartlett*.[142] In that case, the Court devised a test

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134. Lone Wolf v. Hitchcock, 187 U.S. 553, 555 (1903).

135. *Id.* at 566.

136. HARRING, *supra* note 121, at 149 (noting that "the most important jurisdictional result" of these Supreme Court decisions and the Major Crimes Act was to protect tribes from the states).

137. South Dakota v. Bourland, 508 U.S. 679, 694-95 (1993).

138. Order in Pending Case, Carpenter v. Murphy, 139 S. Ct. 626 (2018) (No. 17-1107), https://www.scotusblog.com/wp-content/uploads/2018/12/Request-for-additional-briefing.pdf (requiring reply briefs to be filed by Jan. 11, 2019).

139. Ronald Mann, *Justices Call for Reargument in Dispute About Oklahoma Prosecutions of Native Americans*, SCOTUSBLOG (July 2, 2019, 12:08 PM), https://www.scotusblog.com/2019/07/justices-call-for-reargument-in-dispute-about-oklahoma-prosecutions-of-native-americans/.

140. *Id.*; *see also* Rory Little, *Overview of the Court's Criminal Docket for OT 19—Sizeable and Significant*, SCOTUSBLOG (Sept. 9, 2019, 12:03 PM), https://www.scotusblog.com/2019/09/overview-of-the-courts-criminal-docket-for-ot-19-sizeable-and-significant/ (noting that reargument of this case has still not been rescheduled for the Oct. 2019 term).

141. Mann, *supra* note 139.

142. 465 U.S. 463 (1984).

to determine whether a reservation had been disestablished in order to determine whether state or federal courts had criminal jurisdiction.[143] The Court looked to statutory language, particularly whether there was any explicit mention of cession and compensation, whether the historical record showed a contemporary widespread belief that the statute would diminish the reservation, and whether a demographic shift in the area resulted in dilution of its "Indian character."[144] In deciding Murphy's appeal in *Murphy v. Royal*, the Tenth Circuit held that the *Solem* framework was controlling.[145] The Tenth Circuit overturned Murphy's state conviction and death sentence, holding that Congress did not disestablish the Creek reservation, that the crime therefore occurred in Indian country, and that the federal government, not Oklahoma, had jurisdiction.[146]

The Supreme Court is grappling with the same questions in *Carpenter v. Murphy* as it had thirty-five years earlier in *Solem v. Bartlett*, namely, with criminal jurisdiction hinging on whether a reservation had been disestablished.[147] In oral argument before the Court in *Murphy*, the State of Oklahoma maintained that, through the incremental steps of allotment (in 1901) and the creation of the State of Oklahoma (in 1906), Congress intended to "terminate[] all tribal sovereignty."[148] The Muscogee (Creek) Nation referred to Oklahoma's version of history as "a work of fiction," instead relying on the language of the 1866 Treaty, which ceded the western half of the reservation to the federal government while retaining the eastern half for the tribe.[149] Accepting either interpretation will require the Court to decide what that means for the current occupants of the land.[150] If the Court finds that the dirt road is in Indian country, that

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143. *Id.* at 464.

144. *Id.* at 470-72.

145. Murphy v. Royal, 875 F.3d 896, 937 (10th Cir. 2017).

146. *Id.* at 966.

147. Ronald Mann, *Argument Preview: Justices to Turn Again to Rules for Disestablishing Tribal Reservations*, SCOTUSBLOG (Nov. 20, 2018, 1:20 PM), https://www.scotusblog.com/2018/11/argument-preview-justices-to-turn-again-to-rules-for-disestablishing-tribal-reservations/.

148. Transcript of Oral Argument, Carpenter v. Murphy, 139 S. Ct. 626 (2018) (No. 17-1107) (Nov. 27, 2018), https://www.oyez.org/cases/2018/17-1107; Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267, http://legisworks.org/sal/34/stats/STATUTE-34-Pg267b.pdf (Enabling Act of 1906, admitting Indian and Oklahoma Territories to the Union, and providing that federal authority over "Indians, their lands, property, or other rights . . . would remain the same as if this Act had never been passed").

149. Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Respondent at 2, *Murphy*, 139 S. Ct. 626 (No. 17-1107).

150. If the Court finds for the State, negative consequences for the tribe could include the loss of protection for native women, since the Violence Against Women Act expanded tribal

is, on land belonging to the Muscogee Nation, the State of Oklahoma worries about a "seismic shift in criminal and civil jurisdiction."[151] Representatives from oil and gas companies filed an amicus brief for Oklahoma, complaining of the potential disruption in regulatory and tax regimes.[152] The Muscogee (Creek) Nation pointed out that the consequences would be minimal because there are currently in place "intergovernmental agreements" for administering various public concerns, including law enforcement, a family violence prevention program, infrastructure throughout the reservation, taxation, liquor regulation, and gaming.[153] If the Supreme Court rules that eastern Oklahoma is a "virtual reservation," tribal and federal courts will have civil and criminal jurisdiction over tribal members.[154] In deciding whether to affirm the Tenth Circuit's decision, the Court will determine both whether Murphy will be retried in federal court and whether the territory of the 1866 treaty belongs to the five tribes in Oklahoma.[155]

V. A STRATEGY FOR NATIVE PEOPLES' PROPERTY CLAIMS

Racism and poverty are inseparable factors in any discussion of native rights.[156] Anthropologist Richard Price noted that the Inter-American Court "has not yet directly addressed issues of structural racism."[157] Neither have the highest courts in the United States or

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jurisdiction in instances of VAW in Indian country (*Supreme Court Decision in* Carpenter v. Murphy *Could Have Significant Consequences on Safety for Native Women*, INDIAN L. RES. CTR., https://indianlaw.org/swsn/supreme-court-decision-carpenter-v-murphy-could-have-significant-consequences-safety-native). It could also set a "dangerous precedent" of treating any land seizure as evidence of disestablishment (Rebecca Nagle, *Half the Land in Oklahoma Could Be Returned to Native Americans. It Should Be*, WASH. POST (Nov. 28, 2018), https://www.washingtonpost.com/outlook/2018/11/28/half-land-oklahoma-could-be-returned-native-americans-it-should-be/?utm_term=.a79937fc787c).

151. *See* Transcript of Oral Argument, *supra* note 148.

152. Brief for Okla. Indep. Petroleum Ass'n as Amicus Curiae in Support of Petitioner at 29, *Murphy*, 139 S. Ct. 626 (No. 17-1107).

153. Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Respondent, *supra* note 149, at 6-13.

154. Frank Hopper, *Casinos on Every Corner? No! How* Carpenter v. Murphy *Affects Tribal Sovereignty*, INDIAN COUNTRY TODAY (Dec. 20, 2018), https://newsmaven.io/indiancountrytoday/news/casinos-on-every-corner-no-how-carpenter-v-murphy-affects-tribal-sovereignty-zX7Wn-WkWk2-0m9pfzLycw/.

155. Nagle, *supra* note 150.

156. Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, ATLANTIC (July 30, 2016), https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/ (noting that Native Americans have the "highest poverty rates of any racial group"); CUSTER DIED FOR YOUR SINS, *supra* note 119, at ix (describing racism towards Native Americans as "still rampant among us").

157. PRICE, *supra* note 32, at 237.

Canada.[158] For example, the State of Oklahoma relied heavily in their brief for the U.S. Supreme Court on the work of a historian who described white Oklahomans as "the superior race."[159] The issue of racial discrimination against Native Americans has been explicitly addressed once so far by the Supreme Court and was rejected.[160] In *Morton v. Mancari*, the Court held that the preferential hiring of Indians for the Bureau of Indian Affairs was not racially discriminatory, because Indians were not a racial group, but were instead "members of quasi-sovereign tribal entities."[161] While removing race as a classification for Native Americans has limited equal protection claims on their behalf, the Supreme Court nevertheless preserved the constitutionality of government actions that benefit Native Americans.[162]

International human rights law, and the Inter-American Court in particular, have also framed the issue of antidiscrimination as one of preserving group identity, especially cultural integrity.[163] In the *Saramaka* and *Awas Tingni* cases, the Inter-American Court showed ingenuity in using ICCPR and ICESCR's common article 1 to uphold indigenous land claims.[164] In that article, the right of self-determination includes native peoples' sovereignty over their own economic, social, and cultural development; the right to control, preserve, and dispose of their natural resources; and state parties' obligations to promote these rights.[165] Governments throughout the Americas have viewed their native populations as incapable of anything beyond the most rudimentary government.[166] For example, the United States limits tribal criminal

158. Morton v. Mancari, 417 U.S. 535, 554 (1974).

159. Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Respondent, *supra* note 149, at 3.

160. *Morton*, 417 U.S. at 554.

161. *Id.*

162. Andrew Huff & Robert T. Coulter, *Defending* Morton v. Mancari *and the Constitutionality of Legislation Supporting Indians and Tribes*, INDIAN L. RES. CTR. 2 (Nov. 19, 2018), https://indianlaw.org/sites/default/files/Defending%20Morton%20v.%20Mancari.pdf.

163. Anaya, *supra* note 116, at 16.

164. Saramaka People v. Surin., Inter-Am. Ct. HR. (ser. C), ¶ 85 (interpreting the "full enjoyment" of human rights protected by common article 1 to include indigenous property rights in order to ensure the group's "physical and cultural survival"); Mayagna (Sumo) Awas Tingni Cmty. v. Nicar., Inter-Am. Ct. H.R. (ser. C), ¶¶ 148-49, 155.

165. ICCPR, *supra* note 85, art. 1.

166. Meetings Coverage, U.N. Gen. Assembly*,* Respect for Traditional Self-Governance, Informed Consent in Decisions Critical to Upholding Indigenous Peoples' Rights, Mandate Holder Tells Third Committee (Oct. 12, 2018), https://www.un.org/press/en/2018/gashc4234.doc.htm (summarizing the observations of the Special Rapporteur on the Rights of Indigenous Peoples, notably the "extreme marginalization" of indigenous groups throughout the world and emphasizing the need for States' support of "traditional governance systems").

jurisdiction to a small number of misdemeanors.[167] Since the United States has ratified the ICCPR, the federal government is at least morally bound to the precepts in that treaty, but the United States declared that articles 1 through 27 were not self-executing.[168] While human rights treaties and declarations can be effectively used to establish norms for governments' treatment of native peoples, these remedies cannot be applied directly in the United States without congressional implementation of legislation.[169] In fact, the U.N. Human Rights Commission, the panel that reviews compliance with the ICCPR, admonished the U.S. government for its abrogation of treaties with Native Americans and noted that "[o]f primary concern to the committee was the ability of the U.S. Congress to extinguish recognized tribal property rights without due process and fair compensation."[170]

In 2014, the U.N. Special Rapporteur praised Canada's "well-developed legal framework" protecting indigenous rights, including the 1982 Constitution, a significant body of caselaw, and old and modern treaties.[171] The strength of the Canadian Supreme Court's respect for the treaties resulted in their first decision granting aboriginal title in *Tsilhqot'in Nation v. British Columbia*.[172] The Canadian Court's twin goals of honoring the treaty and promoting reconciliation between the Crown and aboriginal people informed their approach to the land claim.[173] The Court highlighted the importance of using the indigenous peoples' own culture and traditions as a way of determining territorial boundaries and occupancy.[174] The U.S. Supreme Court follows a different path: boundaries are determined by treaty, federal legislation, and judicial decisions.[175] In this way, the U.S. Supreme Court is limited to clarifying

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167. Tribal Law & Policy Inst., *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/jurisdiction.htm (last visited Oct. 12, 2019).

168. ICCPR, *supra* note 85.

169. STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 16 (Sept. 19, 2018), https://fas.org/sgp/crs/misc/RL32528.pdf; *see also id.* at 2 (describing the effects of customary international law in the United States as "ambiguous").

170. William Brennan Thomas, *U.N. Human Rights Committee Denounces U.S. Indigenous Policies*, CULTURAL SURVIVAL Q. MAG. (Sept. 2006), https://www.culturalsurvival.org/publications/cultural-survival-quarterly/un-human-rights-committee-denounces-us-indigenous-policies.

171. Special Rapporteur in Canada, *supra* note 57, at 5.

172. Tsilhqot'in v. B.C., [2014] S.C.C. 44, para. 2 (Can.).

173. *Id.* para. 81.

174. *Id.* paras. 50, 63.

175. Three recent Supreme Court cases highlight these bases for federal Indian law: *Washington State Department of Licensing v. Cougar Den*, 139 S. Ct. 1000, 1011 (2019), decided

and interpreting decisions made by Congress. The native-centric approach used by the Canadian Court could help resolve jurisdictional disputes in the United States by expanding the scope of the inquiry to include Native Americans' connection to their lands.[176]

The self-empowerment of Native Americans could help to inspire other indigenous groups. The Native American Rights Fund established its Tribal Supreme Court Project in 2001 in order to develop litigation strategies to advance Native American rights.[177] The Project functions similarly to the NAACP in the Jim Crow era, by choosing cases that can help build tribal sovereignty and jurisdiction, "the most fundamental elements of continued tribal existence."[178]

VI. CONCLUSION

In Latin America, states are just beginning the process of establishing indigenous title to their traditional lands. Indigenous peoples there are benefitting from international human rights law.[179] Canada has a treaty tradition but is only now titling aboriginal lands,[180] which is similar to Latin America in the need to delimit and demarcate—that is, determine the boundaries—of native lands. Within the United States, which has a long history of boundaries established by treaty and by legislation, the issue is whether the treaties will be honored and what level of sovereignty and self-determination will be allowed.[181] A decision by the U.S. Supreme Court affirming tribal sovereignty in Oklahoma would not only ensure the survival of the Muscogee (Creek) Nation, but it would also give Murphy a chance at a new trial.

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on Mar. 19, 2019, held that a state fuel tax violated a treaty; *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019), decided on May 20, 2019, held that a tribe retained hunting rights granted by treaty; *Carpenter v. Murphy*, currently under consideration, hinges on the Court's interpretation of federal law (139 S. Ct. 626 (2018) (No. 17-1107) (2019)). *2018-19 Term: Supreme Court Cases Related to Indian Law*, NATIVE AM. RTS. FUND: NAT'L INDIAN L. LIBR., https://narf.org/nill/bulletins/sct/2018-2019update.html (last updated June 25, 2019).

176. Tsosie, *supra* note 120, at 949 (noting that the "cultural relationship" of native people to their lands is inadequately addressed by protections for religious freedom in the U.S. Constitution).

177. *What Is the Tribal Supreme Court Project?*, *supra* note 8.

178. *Id.*

179. MacKay, *supra* note 97, at 42 (noting that the Inter-American Court of Human Right's jurisprudence is "slowly and surely having an impact on domestic tribunals and legislatures").

180. Martin Lukacs, *The Indigenous Land Rights Ruling that Could Transform Canada*, GUARDIAN (Oct. 21, 2014), https://www.theguardian.com/environment/true-north/2014/oct/21/the-indigenous-land-rights-ruling-that-could-transform-canada.

181. Errico, *supra* note 105.