COMMENTS

Reaching Regional Consensus: Examining United States Native American Property Rights in Light of Recent International Developments

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I. INTRODUCTION

Indigenous peoples have long attempted to achieve equal rights with respect to their culture, their lands, and their respective systems of self-government. In the 1960s and 1970s, their voice gained enough

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volume for the international community to hear the message.[1] Since then, indigenous rights groups, with the support of several international bodies, have made considerable progress. The UN and the Organization of American States (OAS) system promulgated international instruments detailing the rights of indigenous peoples and the obligations owed to them by their state governments.[2] Notably, even some of the most egregious human rights violators incorporated these principles into their state constitutions and domestic legislation.[3] Such action represents the strength of the existing international norms regarding the protection of indigenous peoples and their ways of life.

The Inter-American system best represents the effects of this trend toward recognition and protection. Most recently, the Inter-American Court of Human Rights issued its decision on the Awas Tingni community in Nicaragua, applying the American Convention on Human Rights to indigenous populations.[4] A watershed decision in several respects, the court declared that the right to property articulated by the American Convention encompasses the communal concept of property employed by indigenous peoples.[5] States, therefore, are obligated to demarcate and protect communal lands whose boundaries are dictated by the customary ties of the indigenous peoples to the land.[6] Moreover, where indigenous rights to such lands are violated, the state government owes reparations to the community.[7] The court relied on various international instruments in its interpretation of the American Convention, signifying the importance of the international consensus on the issues involved.[8] Overall, this decision signals a large moral victory

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1. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 34 (2001).

2. *See, e.g.*, *Draft United Nations Declaration on the Rights of Indigenous Peoples, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/56 (1994), *reprinted in* 34 I.L.M. 546 (1995) [hereinafter *U.N. Draft*]; Proposed American Declaration on the Rights of Indigenous Peoples, *approved by* Inter-American Commission on Human Rights (Feb. 26, 1997), *at* http://www.cidh.oas.org/Indigenous.htm [hereinafter Proposed Declaration].

3. *See* Anaya & Williams, *supra* note 1, at 59-64. Among the OAS member states that have amended their constitutions or domestic laws are: Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, and Nicaragua. *Id.*

4. *See* Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) ¶ 2 (Aug. 31, 2001), *at* http://www.corteidh.or.cr/seriecing/Mayagna_79_ing.html.

5. *Id.* ¶ 148.

6. *Id.* ¶ 153.

7. *Id.* ¶¶ 167, 169.

8. *Id.* ¶¶ 146-148.

for indigenous peoples in the Americas and sets the standard for future action in the region.

The Awas Tingni decision is of particular import to Native Americans residing within the United States. Historically, the United States has been an international champion of human rights and has participated in the drafting of many existing human rights instruments.[9] However, the government's policy toward Native American tribes has caused serious problems for the communities, from the days of the settlers until the present, raising questions regarding the United States' human rights obligations at home. As a member of the OAS, the United States is a party to several regional instruments, including the American Convention on Human Rights.[10] Therefore, an interpretation of that treaty applies to the United States, as well. Thus, the Inter-American Court's recent determination of a state's duties under the Convention also details the United States' duties towards its indigenous populations.[11] After years of frustration in the domestic system, Native American peoples have a renewed opportunity to voice their claims within the Inter-American system, placing the United States in a crucial position.

This comment examines this development in indigenous peoples' rights, focusing on the right to property in particular. Part II analyzes the current trend in international law regarding the recognition and protection of indigenous peoples' lands. Part III discusses the Awas Tingni case in detail as an example of the current international trend applied to a concrete claim. Finally, Part IV summarizes the United States' history with the Native American peoples and contrasts the situation in the United States with the principles set forth by the international community.

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9. *See, e.g.*, Dean B. Suagee, *Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion?*, 21 AM. INDIAN L. REV. 365, 374-87 (1997) (discussing United States' participation in Draft UN Declaration on Rights of Indigenous Peoples and OAS Draft Declaration on Rights of Indigenous Peoples).

10. American Convention on Human Rights, *adopted* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].

11. *See* Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) (Aug. 31, 2001), *at* http://www.corteidh.or.cr/seriecing/Mayagna_79_ing.html.

II. THE INTERNATIONAL PERSPECTIVE ON INDIGENOUS PEOPLES' PROPERTY RIGHTS

A. International Instruments

1. The Inter-American System

The Inter-American system provides two organs for protecting human rights: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.[12] These bodies both interpret and apply the relevant provisions of various international human rights instruments.[13] The Commission permanently monitors human rights situations in member states.[14] It also processes petitions on cases of alleged human rights violations, determining if any should be submitted to the court.[15] Other agencies may also address indigenous rights issues, but the court's interpretations are deemed authoritative.[16]

The Inter-American system initiated progress in the area of indigenous peoples' rights as early as 1922.[17] Subsequent actions throughout the 1930s and 1940s built on that early initiative.[18] The OAS brought indigenous peoples into the international spotlight as subjects of special concern with the adoption of the Inter-American Charter on Social Guarantees in 1948.[19] In particular, the Inter-American Charter provides for the protection of "'life, personal liberty, and property'" of the indigenous person and recommends measures to "'ensure respect for

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12. The Human Rights Situation of the Indigenous People in the Americas ch. 1, § 2(A) (2000), *available at* http://www.ciah.org/Indigenas/TOC.htm [hereinafter Situation].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* Other agencies addressing indigenous rights include the Inter-American Indian Institute, the Inter-American Council for Integral Development, and the Unit for Promotion of Democracy of the General Secretariat. *Id.*

17. *Id.* ch. 1, § 1. The forerunner agency of the Organization of American States, the International Conference of American States, met and requested the governments to encourage study of indigenous languages and respect for archeological monuments. *Id.*

18. *Id.* In 1933, the Conference on Pan American Union called for an international meeting to examine the issues facing the indigenous peoples. *Id.* The 1938 Conference on Pan American Union declared that the indigenous populations required special protection. *Id.* Those conferences led to the First Inter-American Indian Congress in 1940, which in turn created the Inter-American Indian Institute. *Id.*

19. *See* Anaya & Williams, *supra* note 1, at 86. For text of the Charter, see *Inter-American Charter of Social Guarantees* (1948), *reprinted in* ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 432 (Edmund Jan Osmanczyk ed., 1990) [hereinafter *Social Guarantees*].

[indigenous] lands, to legalize [indigenous] ownership thereof, and to prevent invasion of such lands by outsiders.'"[20]

Within the current Inter-American system of human rights, the American Declaration of the Rights and Duties of Man[21] and the American Convention on Human Rights[22] comprise the principal normative instruments.[23] The American Declaration sets forth the legal human rights obligations of all States party to the OAS Charter.[24] In fact, the Inter-American Court found the American Declaration to set out the minimum human rights that OAS member states must uphold.[25] Additionally, many of the American Declaration's provisions have binding legal effect as principles of customary international law.[26] The American Convention, on the other hand, creates binding obligations only upon ratification.[27] Both instruments provide rights that are of special concern to indigenous people.[28]

The American Declaration and the American Convention include human rights provisions protecting indigenous lands, although neither instrument specifically mentions indigenous peoples.[29] Article XXIII of the American Declaration recognizes the right, "to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home."[30] Similarly, article

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20. Situation, *supra* note 12, ch.1, § 2(A) (quoting *Social Guarantees*, *supra* note 19). Specifically, the Charter requires states to defend indigenous peoples from extermination and to shelter them from oppression and exploitation. Anaya & Williams, *supra* note 1, at 33.

21. American Declaration of the Rights and Duties of Man, *approved by* Ninth International Conference of American States art. XXIII, *available at* http://www.cidh.oas.org/Basicos/basic2.htm [hereinafter American Declaration].

22. *See* American Convention, *supra* note 10.

23. *See* Situation, *supra* note 12, ch. 1, § 2(A). Other instruments have been drafted by the Inter-American Commission on Human Rights, including the Proposed American Declaration on the Rights of Indigenous Peoples, the Inter-American Convention to Prevent and Punish Torture, and the Additional Protocol to the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights (the "Protocol of San Salvador"). *Id.* at 13.

24. *Id.* at 12.

25. Anaya & Williams, *supra* note 1, at 41 (citing Interpretation of the American Declaration of the Rights and Duties of Man, OC-10/90 (Ser. A) no. 10 (1989), ¶¶ 42-43).

26. Situation, *supra* note 12, ch. 1, § 2(A).

27. *Id.* Currently, twenty-six states have ratified the American Convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, United States, Uruguay, and Venezuela. American Convention on Human Rights, Signatures and Current Status of Ratifications, OAS Treaty Series, No. 36, *available at* http://www.iachr.org/basicos/basic4.htm. However, not all of these states have accepted the jurisdiction of the Inter-American Court of Human Rights over alleged violations of the Convention. *See id.*

28. Situation, *supra* note 12, ch. 1, § 2(A).

29. Anaya & Williams, *supra* note 1, at 41.

30. American Declaration, *supra* note 21, art. 23.

21 of the American Convention dictates: "Everyone has the right to the use and enjoyment of his property."[31] However, because those instruments fail to specifically include traditional forms of land use employed by indigenous peoples, such forms of tenure run the risk of being excluded from official protection.[32] In response to that predicament, the Inter-American Commission drafted the Proposed American Declaration on the Rights of Indigenous Peoples in 1990.[33] It explicitly recognizes the form of communal property ownership practiced by indigenous peoples.[34]

Following the precedents set by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), the Inter-American Commission recognized that certain rights could only be fully enjoyed in the community with other members of the group.[35] They further considered that the full realization by an individual of certain individual rights may only be possible if that right is recognized for other individual members of that community as an organized group.[36] In the Proposed Declaration, that concept pervades all the articles regarding cultural, political, and economic rights therein.[37] As the Proposed Declaration enumerates the rights of indigenous communities, those rights may be invoked either by individuals or by representative authorities on behalf of the community.[38] The Inter-American Commission adopted the Proposed Declaration and referred it to the General Assembly of the OAS for consideration in 1997.[39]

In the meantime, both the Inter-American Commission and the Inter-American Court have incorporated some of the perspectives of the Proposed Declaration into their interpretations of the existing American

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31. American Convention, *supra* note 10, art. 21, at 681.
32. Anaya & Williams, *supra* note 1, at 41-43.
33. *See* Proposed Declaration, *supra* note 2.
34. *Id.* art. XVIII.
35. *See* Situation, *supra* note 12, ch. 3, § I(6)(B); *see also* Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 29(1), U.N. Doc. A/RES/217A(III) (1948) ("Everyone has duties to the community in which alone the free and full development of his personality is possible."); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR 3d Comm., 21st Sess., Supp. No. 16, , art. 27, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976) [hereinafter International Covenant] ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.").
36. Situation, *supra* note 12, ch. 3, § I(6)(B), para. 1.
37. *Id.*
38. *Id.*
39. *Id.* at 13.

instruments.[40] For example, the Inter-American Commission interpreted the American Declaration and the American Convention by reference to other applicable treaties, such as the ICCPR[41] and the International Convention on the Elimination of All Forms of Racial Discrimination.[42] These include provisions that protect indigenous peoples' communal rights to land.[43] Moreover, when the existing instruments do not expressly include the necessary protection for indigenous peoples, the Commission and the court refer to statements of the general principles of human rights, such as the Proposed Declaration or the International Labor Organization's (ILO) Convention (No. 169) Concerning Indigenous and Tribal Peoples,[44] to illustrate the direction a decision should take.

2. UN Developments

In 1919, the ILO was formed as part of the League of Nations. In 1945, the UN succeeded the League and the ILO was established as an agency under the UN.[45] Its representatives include national governments, employers, and workers.[46] Conventions adopted by the ILO bind only those state parties that ratify the instruments.[47]

Despite the low number of signatories, the ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples remains the most important statement regarding indigenous peoples' right to land.[48] Significantly, the ILO Convention (No. 169) replaced the Convention

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40. *See* Anaya & Williams, *supra* note 1, at 41-42.

41. *See* International Covenant, *supra* note 35.

42. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 212.

43. Anaya & Williams, *supra* note 1, at 42. This practice of interpreting the American treaties by reference to other international treaties finds support in the *pro homine* principle, which advocates the integration of related human rights obligations from different sources. *Id.*

44. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1991, *reprinted in* 28 I.L.M. 1382 (1989) [hereinafter ILO Convention (No. 169)]. The Convention mandates that "measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities." *Id.* art. 14(1). OAS member states were among the first to ratify the ILO Convention. Anaya & Williams, *supra* note 1, at 86.

45. Suagee, *supra* note 9, at 367.

46. *Id.*

47. *Id.*

48. *See* Michael Holley, Comment, *Recognizing the Rights of Indigenous People to Their Traditional Lands: A Case Study of an Internally-Displaced Community in Guatemala*, 15 BERK. J. INT'L L. 119, 141 (1997); Anaya & Williams, *supra* note 1, at 56 (stating the ILO Convention is "international law's most concrete manifestation of the growing recognition of indigenous peoples' rights to property in lands").

(No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, which was strongly criticized by much of the world community for its assimilationist stance.[49] As a result, ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples strives to avoid any such tendencies, focusing instead on the right of indigenous peoples to "maintain and develop their identities, languages and religions, within the framework of the States in which they live."[50]

Another noteworthy aspect of ILO Convention (No. 169) is the representative nature of its drafting committee, which included delegates from thirty-nine states as well as the worker delegates from the ILO.[51] However, its most innovative feature arguably lies within its flexibility. ILO Convention (No. 169) provides for enforcement of rights either individually or collectively.[52] This provision marks a departure from the individual-based notion of human rights generally witnessed in international treaties.[53] Additionally, the Convention makes express note of the special relationship existing between indigenous peoples and their lands.[54] Despite these advances, Convention (No. 169) was criticized for the amount of authority it left in hands of state governments.[55]

The UN itself recognizes the specialized issues facing indigenous peoples. "In 1971, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities . . . appointed a Special Rapporteur to study discrimination against indigenous peoples."[56] This led to the establishment of the Working Group on Indigenous Populations in 1982.[57] The Working Group's main responsibility was to draft a declaration on the rights of indigenous peoples, which it accomplished by 1993.[58] Although the Working Group solicited comments and suggestions from both state governments and indigenous peoples, critics believe those groups should have been more actively involved in the

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49. Suagee, *supra* note 9, at 367-68.
50. ILO Convention (No. 169), *supra* note 44, Preamble.
51. Anaya & Williams, *supra* note 1, at 53.
52. *See id.*
53. *See id.*
54. ILO Convention (No. 169), *supra* note 44, art. 13(1). ("In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.").
55. Suagee, *supra* note 9, at 368.
56. *Id.*
57. *See id.* at 369.
58. *Id.* at 369-70; *see also U.N. Draft*, *supra* note 2.

drafting of the document, rather than merely commenting on the text after the fact.[59]

States and indigenous peoples from around the world convened to discuss the draft thoroughly before the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities approved it.[60] The Draft Declaration echoed the ILO Convention (No. 169) with respect to the collective nature of indigenous peoples' land rights, specifying that indigenous peoples require security within their respective territories to maintain the integrity of their cultural identities.[61] However, this very aspect of the Draft Declaration may cause delays in its final approval by the General Assembly, as several states, including the United States, have voiced objections to the concept of collective rights[62] as well as "its association with the right to self-determination which some say carries the right to independent statehood and secession under international law."[63]

B. Customary International Law

An essential principle of treaty law is that a treaty does not create obligations or rights for third parties. However, an important exception to that principle exists when the terms of the treaty become part of the customary international law, thereby binding third parties to those terms.[64] In order for a treaty provision to enter into the realm of customary international law, the provision must be of a fundamentally norm-creating character and the international community must engage in widespread and representative practice with respect to that norm.[65] The norms then elevate to the status of binding international law when state practice reflects a common understanding that behavior must conform to those norms.[66]

Alternatively, a relatively new focus on prescriptive dialogue has arisen.[67] "Especially in multilateral settings, explicit communication may itself bring about a convergence of understanding and expectation about rules, establishing in those rules a pull toward compliance, even in

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59. *See* Suagee, *supra* note 9, at 370-72; Anaya & Williams, *supra* note 1, at 57.
60. Suagee, *supra* note 9, at 371-72.
61. *See U.N. Draft*, *supra* note 2, art. 7; Suagee, *supra* note 9, at 371.
62. Suagee, *supra* note 9, at 375-81.
63. *Id.* at 376. Brazil also opposes granting collective rights to indigenous peoples. *Id.*
64. *See* Anaya & Williams, *supra* note 1, at 54-55.
65. *See id.*
66. *See id.*
67. *See id.*

advance of a widespread corresponding pattern of physical conduct."[68] Therefore, the explicit communication contained within the various declarations, statements, and decisions regarding indigenous peoples' rights builds rules of customary international law.[69] State practice in accordance with those rules reinforces the norms.[70]

The various instruments touching upon indigenous peoples' traditional property rights evidence the growing concern of the international community: the Inter-American Charter of Social Guarantees,[71] the ILO Convention (No. 169),[72] the Proposed American Declaration on the Rights of Indigenous Peoples,[73] and the Draft United Nations Declaration on the Rights of Indigenous Peoples.[74] The World Bank and the European Union have also issued statements concerning the importance of indigenous peoples' land rights and have acted in favor of those rights.[75] Significantly, no state has willingly admitted to derogation from the norms, and no state has challenged the *opinio juris* of the international community.[76] Such acquiescence contributes to the strength of the principles. Moreover, various state governments have explicitly indicated their acceptance of the rights expressed within the ILO Convention and the Draft United Nations Declaration.[77]

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68. *Id.*

69. *Id.* at 55.

70. *Id.*

71. *See Social Guarantees*, *supra* note 19, art. 39.

72. *See* ILO Convention (No. 169), *supra* note 44, art. 14 ("The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.").

73. *See* Proposed Declaration, *supra* note 2. Article XVIII dictates that states shall not limit "the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices" and that nothing shall "affect any collective community rights over them." *Id.* art. XVIII(3)(iii).

74. *See U.N. Draft*, *supra* note 2, art. 26. Article 26 declares:

> Indigenous peoples have the right to own, develop, control and use the lands . . . which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Id. art. 26.

75. Anaya & Williams, *supra* note 1, at 58 & n.96; *see also* Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 68-69 (1994) (stating the World Bank planners must now "ensure that indigenous peoples suffer no adverse effects" and must take into consideration the preferred options of indigenous peoples affected by the World Bank projects).

76. *See* Anaya & Williams, *supra* note 1, at 58.

77. S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 349 (1994) (citing

Because a large percentage of the world's indigenous peoples reside in the Western Hemisphere, particularly in the Americas, state practice in that region greatly influences the formation of customary law regarding indigenous land rights.[78] Regional practice reflects a formal compliance with the norms generated by the international community.[79] Several states amended their constitutions or adopted new laws to protect the ancestral lands of indigenous peoples and their rights thereto.[80] Domestic judicial organs also contributed legal doctrine supportive of those rights.[81] Among the OAS member states, a sufficient pattern of common practice has been established to create, at a minimum, a regional customary law.[82]

Overall, international and domestic state practices provide a sufficiently consistent acceptance of core principles regarding the protection of indigenous peoples' land rights to rise to the level of customary international law.[83] As a matter of customary international law, therefore, states must protect indigenous peoples' rights to land based on their traditional and communal systems of "ownership."[84] This international consensus creates the expectation that these rights will be protected by states, regardless of whether a particular state has ratified a convention in accordance therewith.[85] Consequently, states face international responsibility for upholding these rights and incur the obligation to make them effective within their respective territories.[86]

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statements from the representatives to the U.N. Working Group on Indigenous Populations from Australia, Brazil, Canada, and Colombia).

78. *See* Anaya & Williams, *supra* note 1, at 35.

79. *Id.* at 58.

80. *Id.* Among the OAS member states that have amended their constitutions or domestic laws are: Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, and Nicaragua. *Id.* at 59-64. Countries in another parts of the world have also made amendments, including Australia and the Philippines. *See id.* at 69-74.

81. *Id.* at 58.

82. *Id.* at 59.

83. *Id.* at 55; Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 109-10 (1999).

84. Anaya & Williams, *supra* note 1, at 55. Indeed, a consensus has developed that indigenous peoples have distinct collective rights, including the right to land. *See* Barsh, *supra* note 75, at 43.

85. Anaya & Williams, *supra* note 1, at 54.

86. *Id.* at 74. The necessary measures would include identifying and securing indigenous peoples' lands and consulting with indigenous peoples regarding any decision likely to affect their interests. *See id.* at 75-82.

III. THE INTER-AMERICAN COURT OF HUMAN RIGHTS TAKES A GIANT STEP FORWARD: *AWAS TINGNI V. NICARAGUA*

A. The Awas Tingni *Decision*

The Awas Tingni community, an indigenous community of Mayagna (Sumo) ancestry, has inhabited the Atlantic coast of Nicaragua for generations.[87] The Awas Tingni community primarily subsists on family and communal agriculture carried out within a specific territorial area designated by custom and ancestral ties.[88] On June 28, 1995, the Autonomous Atlantic Regional Government (the RAAN) issued an administrative directive acknowledging an agreement between the RAAN and a private company to begin logging operations in the Atlantic Coast area.[89] The Community immediately protested the possibility of a concession on its lands being granted without its consultation.[90] However, on March 13, 1996, the State of Nicaragua granted the private company a thirty-year logging concession on land claimed by the Community.[91]

The Community's attempts to resolve the matter through domestic legal channels, although technically successful for the Community, seemed unlikely to resolve the matter due to lengthy procedural delays.[92] Therefore, the Community filed a petition with the Secretariat of the Inter-American Commission of Human Rights, seeking precautionary measures to stop the granting of the concession.[93] After endeavoring to achieve a resolution between the Community and the State, the

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87. Case 67, The Mayagna (Sumo) Awas Tingni Community Case, Preliminary Objections (ser. C) ¶ 2a (Feb. 1, 2000), *available at* http://www.corteidh.or.cr/serie_c/c_67_esp.html; *see also* Claudio Grossman, *Awas Tingni v. Nicaragua: A Landmark Case for the Inter-American System*, 8 HUM. RTS. BR. 2 (2001).

88. Case 67, The Mayagna (Sumo) Awas Tingni Community Case ¶ 2d. This time-honored system of land ownership is directly related to the Community's socio-political organization. *Id.*

89. *Id.* ¶ 2e.

90. *Id.* ¶¶ 2f-g.

91. *Id.* ¶ 2h. The concession permitted logging on nearly 160,000 acres of tropical forest within the traditional lands of the Awas Tingni community. Grossman, *supra* note 87, at 2.

92. *See* Case 67, The Mayagna (Sumo) Awas Tingni Community Case ¶ 2l-o. Under Nicaraguan law, the domestic procedure requesting the protection of civil and political rights, *amparo*, must be ruled upon within forty-five days of submission and parties must comply with the decision within twenty-four hours. Grossman, *supra* note 87, at 2. The Nicaraguan Supreme Court dismissed the first writ of *amparo* presented by the Awas Tingni more than ninety days after its submission. *Id.* The court ruled in favor of the Awas Tingni on the second writ of *amparo*, but the Nicaraguan government failed to comply with the court's decision for nearly a year. *Id.*

93. *See* Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) ¶ 6 (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/seriecing/Mayagna_79_ing.html.

Commission determined that Nicaragua had violated its obligations under the American Convention on Human Rights and issued recommendations to the State for compliance with the Convention.[94] Unsatisfied with Nicaragua's attempts to comply with its recommendations, the Commission decided to submit the case to the Inter-American Court of Human Rights.[95]

Referring to the Nicaraguan Constitution and domestic legislation, the Inter-American Court highlighted Nicaragua's acknowledgment of the normative duty to recognize and protect indigenous communal property.[96] However, the court found that the state had not clearly regulated the procedure for issuing title to such lands.[97] In addition, the court noted that no titles to communal lands were issued to indigenous peoples since 1990 and, therefore, concluded that no effective procedure existed in Nicaragua for delimiting, demarcating, or issuing title to indigenous communal lands.[98]

Analyzing the legislative history of the right to property set forth in article 21 of the American Convention, the court observed that the drafters had chosen the term "bienes," rather than "propiedad privada," thereby including in the definition those material things capable of being appropriated, movables and immovables, corporeals and incorporeals, and any other immaterial object with potential or actual value.[99]

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94. *See id.* ¶¶ 7-25. The recommendations of the Commission included ceasing the removal of trees from the Awas Tingni land, demarcating the indigenous lands, registering these indigenous lands, and providing compensation to the Awas Tingni community for the resources lost. Grossman, *supra* note 87, at 3. Nicaragua did respond to the Commission's recommendations, detailing the steps taken towards compliance with the recommendations. Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua ¶¶ 26-27. These measures included the drafting of a law on indigenous communal property and the cancellation of the concession. *Id.* ¶ 26. However, as of the date of the noted decision, which was almost three years later, the proposed law had still not been approved. *Id.* ¶ 103t.

95. *See id.* ¶ 28. Within the Inter-American system, the Commission may bring a case before the Inter-American Court of Human Rights. Grossman, *supra* note 87, at 3. In such circumstances, the Commission represents the victim of the alleged offense. *Id.*

96. *See* Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua ¶¶ 116-122. The Nicaraguan Constitution "'recognizes the existence of the indigenous peoples, who have the rights, duties and guarantees set forth in the Constitution, and . . . maintaining communal forms of ownership of the lands . . . for the communities of the Atlantic Coast.'" *Id.* ¶ 116 (quoting NICAR. CONST. art. 5 (1995)). Equally, the state recognizes the possession, use, and enjoyment of the waters and forests of its communal lands. *Id.* ¶ 117 (citing NICAR. CONST. art. 89). Likewise, the Nicaraguan Statute of Autonomy recognizes community property as "'the lands, waters and forests that have belonged traditionally to the communities of the Atlantic Coast.'" Grossman, *supra* note 87, at 4 (citation omitted).

97. *See* Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua ¶ 123.

98. *Id.* ¶¶ 126-127.

99. *See id.* ¶¶ 142-155. Article 21 provides:

However, the court acknowledged that terms within an international human rights treaty have meaning independent from that attributed to them within an internal framework.[100] The court declared that such treaties are live instruments, whose interpretation must evolve with the times and in reflection of the conditions of real life.[101] Therefore, the court determined that article 21 protects the right to property in a manner that encompasses, inter alia, the rights of members of indigenous communities within the framework of communal property.[102]

The court declared that, for indigenous communities who have inhabited land as a matter of custom, possession of the land is sufficient for official recognition and registration, even where the communities lack real title to the land.[103] Therefore, the members of the Awas Tingni community are entitled to the right to communal property of the lands that they actually inhabit, without prejudice to the rights of other indigenous communities.[104] As a corollary to their right to property, the members of the Community could require the state to demarcate and issue title to the property and to abstain from any acts affecting its use and enjoyment.[105] Because the state did not demarcate the territory or issue title to the property, and granted a concession that would affect the area falling within that demarcation, the state violated the Awas Tingni community's right to use and enjoyment of property as set forth in article 21 of the American Convention.[106] The court held Nicaragua liable for pecuniary damages for the Awas Tingni's moral injury and litigation expenses and, most importantly, prohibited the state from engaging in

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1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

American Convention, *supra* note 10, art. 21.

100. Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua ¶ 146.

101. *Id.*

102. *Id.* ¶ 148. In support of its interpretation, the court emphasized the language in article 29 of the American Convention, which prohibits a restrictive interpretation of the rights contained within the American Convention. *Id.* ¶ 147. Moreover, article 1 requires states to guarantee the rights contained within the Convention in a nondiscriminatory fashion and specifically forbids discrimination against indigenous populations. Grossman, *supra* note 87, at 3. In light of article 1, states must guarantee the right to property set forth in article 21 without discriminating against the traditional forms of use and possession of lands practiced by indigenous peoples. *Id.*

103. Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua ¶ 151.

104. *Id.* ¶ 153.

105. *Id.*

106. *See id.* ¶¶ 153-155.

any acts that could further affect the Community's use and enjoyment of that property.[107]

B. What the Decision Means Today

The *Awas Tingni* case represents a major step forward for the Inter-American system.[108] As the first case brought before the court concerning indigenous peoples' rights, its interpretation of the American Convention in that regard is groundbreaking.[109] Specifically, the application of the right to property, as set forth in article 21 of the American Convention, to the indigenous conception of "ownership" of land is a matter of first impression for the court.[110] Although the Inter-American Commission on Human Rights recognized the existence and importance of communal rights in its Proposed American Declaration on Human Rights,[111] that Declaration has not yet been ratified. Therefore, it is the court's incorporation of that modern position in the Awas Tingni decision that demonstrates the forward movement of the Inter-American system.

In *Awas Tingni*, the court engaged the perspective of the indigenous communities in its analysis of what the right to property means, emphasizing the importance of their spiritual connection with the land over the "mere question" of possession and production.[112] Moreover, the court emphatically stated that the indigenous communities' relationship to the land forms the fundamental foundation of "their culture, their spiritual life, their integrity, and their economic survival."[113] The underlying message, therefore, is that any exploitation of the Awas Tingni's land or resources would exploit the very culture of the community and threaten its survival.

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107. *Id.* ¶¶ 164, 167, 169. The court ordered the state to pay the Awas Tingni US$50,000 for moral injury and US$30,000 for litigation expenses. *Id.* ¶¶ 167, 169. The court also required the State to adopt an effective mechanism to demarcate and issue title to properties inhabited by indigenous communities and to implement said mechanism with respect to the Awas Tingni community's lands. *Id.* ¶ 164.

108. *See* Grossman, *supra* note 87, at 8.

109. *See id.* ("This is a landmark case in the Inter-American System for the Promotion and Protection of Human Rights. It is the first case brought before the Inter-American Court concerning the rights of an indigenous population.")

110. *See* Situation, *supra* note 12, ch. 3, § I(2), para. 3.

111. *See* Proposed Declaration, *supra* note 2.

112. Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) ¶ 149 (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/seriescing/Mayagna_79_ing.html.

113. *Id.*

This message is crucial to the struggle for indigenous rights to traditional lands. According to article 21 of the American Convention, the state (via legislation) may subordinate the use and enjoyment of property to the interest of society and may establish procedures by which persons may be deprived of their property in exchange for just compensation.[114] However, when the other party involved is an indigenous community, which traditionally has not had a voice in the domestic law-making process, this balancing test has the potential to undermine the very right it seeks to protect. Therefore, by declaring that indigenous lands are virtually inviolable per se, the court set the standard higher than that anticipated by the American Convention and strengthened future claims to ancestral lands.[115]

Moreover, this case demonstrates the ability of the Inter-American system to settle such disputes.[116] Nicaragua fully participated in the proceedings, giving every indication that it will comply with the court's decision, while the Awas Tingni community had the opportunity to present their case and have it fairly determined.[117] Both sides contributed to the ever-developing framework for the promotion of human rights, particularly with respect to the growing field of indigenous peoples' rights, by acknowledging the authority of the Inter-American system. In an area not known for its compliance with international human rights instruments, the Awas Tingni case stands out as an example for the rest of the world to follow.

IV. THE EVOLUTION OF INDIGENOUS PEOPLES' PROPERTY RIGHTS WITHIN THE UNITED STATES

A. United States Federal "Indian Law"

In the early days of the United States, settlers, legislators, and the judiciary all considered the Native American territories as sovereign nations.[118] The practice of treaty making between the United States and the Native Americans predated the signing of the Constitution and

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114. American Convention, *supra* note 10, art. 21.

115. *See* Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) ¶¶ 151-155 (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/seriecing/Mayagna_79_ing.html.

116. *See* Grossman, *supra* note 87, at 8.

117. *See id.*

118. Amy Sender, *Australia's Example of Treatment Towards Native Title: Indigenous People's Land Rights in Australia and the United States*, 25 BROOK. J. INT'L L. 521, 535-36 (1999).

continued into the late nineteenth century.[119] The United States, through treaties and legislation, expressly granted the Native Americans sovereign status over their lands and proclaimed that those lands would not be taken from the Native Americans without their consent.[120]

However, as the settlers pushed westwards, the United States' respect for Native Americans' property rights began to disappear.[121] In its place grew a spirit of domination over the indigenous peoples.[122] This spirit found its voice in the Supreme Court of the United States, as Chief Justice Marshall laid down the new policy towards Native American territories.[123] Specifically, the Native Americans could only sell their land to the British Crown or to the United States.[124] Additionally, Native Americans lost their sovereign status and became "domestic dependent nations," lacking standing to bring suit in courts of the United States.[125]

During the late nineteenth century, Native Americans were forced out of their customary territories and onto confined reservations.[126] In order to further disband the tribes, Congress enacted the General Allotment Act.[127] This Act took communally held indigenous lands and divided them into individual parcels.[128] The parcels were distributed to individual Native Americans, with the "excess" land distributed to the non-indigenous settlers.[129] Often, Native Americans, unaccustomed to the Western concept of "ownership," lost their parcels to speculators,

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119. *Id.* at 536-37. The United States—Delaware Nation Treaty dates back to 1778, while the Treaty with the Sioux Indians was signed in 1868. *Id.*

120. *Id.* The 1868 Treaty with the Sioux Indians declared: "'no white person or persons shall be permitted to settle upon or occupy any portion of the same [unceded Indian territory].'" *Id.* at 537 (citation omitted). The Northwest Ordinance of 1787 stated: "'[the Indians'] land and property shall never be taken from them without their consent . . . unless in just and lawful wars authorised by Congress.'" *Id.* at 536-37 (citation omitted).

121. *Id.* at 537.

122. *Id.*

123. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

124. *See Johnson*, 21 U.S. (8 Wheat.) at 574.

125. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. Chief Justice Marshall stated:

> [The Indian tribes] may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. . . . Their relation to the United States resembles that of a ward to his guardian.

Id.

126. Sender, *supra* note 118, at 540.

127. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331-381 (1983)).

128. *See id.*

129. Sender, *supra* note 118, at 541-42.

banks, or tax collectors.[130] Subsequently, Congress forbade Native Americans to alienate their allotments.[131] That policy aimed to assist the Native American peoples, but resulted in a further reduction of Native American control over their traditional territories.[132]

Congress did not specifically address the chaos caused by the General Allotment Act until 1934, when it passed the Indian Reorganization Act and officially abandoned the policy of allotment.[133] However, the damage continued, as the parcels previously distributed to Native Americans splintered into increasingly smaller fractional interests.[134] The greater the number of ownership interests, the more difficult it became to actually use the land.[135]

In 1946, the Indian Claims Commission was established to evaluate the Native American claims against the government and remained in operation until 1978.[136] Under the Claims Commission, Native Americans received compensation for their lands if they could prove that Congress had previously recognized their use and occupancy of the land and that Congress acted outside the parameters of good faith in taking their lands.[137] Once Congress terminated the Claims Commission in 1978, Native American claims went to the Court of Claims, if that court had jurisdiction.[138] Otherwise, the claims could not be compensated, as "native title" did not originally fall within the purview of the Fifth Amendment takings clause.[139]

Much of the twentieth-century jurisprudence reaffirmed the second-class status of Native American title.[140] However, Congress did make another attempt to rectify the fractionation of Native American property

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130. *See* Elizabeth A.C. Thompson, Babbitt v. Youpee*: Allotment and the Continuing Loss of Native American Property and Rights to Devise*, 19 U. HAW. L. REV. 265, 267 & n.16 (1997).

131. *See* 25 U.S.C. § 461 (2001) ("[N]o land of any Indian reservation . . . shall be allotted in severalty to any Indian.").

132. Thompson, *supra* note 130, at 267.

133. Indian Reorganization (Wheeler-Howard) Act ch. 576, 48 Stat. 984, 984-88 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1982 & Supp. IV 1986)).

134. Thompson, *supra* note 130, at 268.

135. *Id.* In order to lease, sell, or employ agricultural use of the land, Native Americans required consensus of all owners as well as government approval. *Id.*

136. Indian Claims Commission Act ch. 959, 60 Stat. 1049 (1946) (codified as amended at 25 U.S.C. §§ 70 to 70v-3 (1978)); 25 U.S.C. § 70v (2000) (terminating the Indian Claims Commission).

137. Sender, *supra* note 118, at 544-45.

138. *See* 25 U.S.C. § 70v (2000).

139. Sender, *supra* note 118, at 545.

140. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding Native Americans' rights to native title not constitutionally protected); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (declaring that the test for compensation requires Native Americans to show the government's exercise of plenary power was illegitimate).

interests with the Indian Land Consolidation Act (ILCA) in 1983.[141] Unfortunately, this Act allowed for allotment interests of intestate owners to automatically escheat to the tribe if those interests constituted less than two percent of the original allotment.[142] Moreover, Congress omitted compensation measures for the owners of the escheated interests.[143] The Supreme Court held this Act unconstitutional under the takings clause of the Fifth Amendment, signaling a shift in jurisprudence regarding Native American property rights.[144] Congress' attempt to amend the Act did not pass constitutional muster either, as the provisions on forced escheatment remained.[145]

With that stance, the Supreme Court appeared to acknowledge the heightening awareness of the Native Americans' plight by finally applying constitutional protections to the Native American peoples.[146] In turn, the Executive Branch demonstrated its recognition of the Native Americans' situation by signing the Religious Freedom Restoration Act,[147] meeting with tribal leaders,[148] and visiting Native American reservations.[149] The State Department officially invited tribal government officials to Washington, D.C. to consult on the Draft United Nations Declaration on the Rights of Indigenous Peoples.[150] Yet, the prior allotment policy and the lack of redress for past wrongs continue to plague Native American populations as they struggle to keep their ancestral lands.

B. Analysis of United States' Policy in Light of International Obligations

1. The Unique Position of the United States

The United States has ratified several international human rights instruments that pertain to indigenous peoples' land rights, including the

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141. 25 U.S.C. §§ 2201-2211 (2001).

142. 25 U.S.C. § 2206.

143. *See* Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2211; Hodel v. Irving, 481 U.S. 704, 709 (1987).

144. *Hodel*, 481 U.S. at 717-18.

145. *See* 25 U.S.C. § 2206; Babbitt v. Youpee, 519 U.S. 234, 243 (1997).

146. *See Hodel*, 481 U.S. at 704; *Babbitt*, 519 U.S. at 234.

147. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

148. President Clinton met with tribal leaders in 1994. Sender, *supra* note 118, at 548-49 & n.198.

149. He also visited the Ogala Lakota Sioux reservation in South Dakota, labeling the meeting a "nation to nation" visit. *Id.*

150. Suagee, *supra* note 9, at 365.

ICCPR,[151] the International Convention on the Elimination of All Forms of Racial Discrimination, the American Declaration of the Rights and Duties of Man,[152] and the American Convention on Human Rights.[153] In so doing, the United States obligated itself to respect those rights within its own territory. Specifically, as a party to the American Convention, the United States expressly obligated itself to implement the measures necessary to enforce and protect the rights named therein.[154]

Despite those formal obligations voluntarily assumed by the United States, its position at times appears at odds with the principles of those international instruments. The United States lodged several objections to the U.N. Draft Declaration on the Rights of Indigenous Peoples, stating its resistance to the concept of collective rights.[155] Although faithful to the general approach to individual rights applied domestically by the United States, this position contradicts the federal government's view of Native Americans as sovereign entities or, at least, as self-governing communities.[156] Likewise, the United States submitted suggestions for revisions to the Draft Inter-American Declaration on the Rights of Indigenous Peoples, urging the Inter-American Commission on Human Rights to render the Draft Declaration consistent with United States' federal "Indian law."[157] Such suggestions undermine formal statements by the United States to the international community, calling for a "strong" declaration on the rights of indigenous peoples.[158]

Perhaps the United States perceives its formal obligations as merely nominal. After all, the United States has virtually insulated itself from enforcement mechanisms by refusing to accept compulsory jurisdiction of either the International Court of Justice or the Inter-American Court of Human Rights, and the domestic judicial system has yet to adopt a strong policy in favor of Native American rights. As a result, the United States apparently leaves its indigenous peoples without much hope for recourse. However, the Inter-American system recently gave Native Americans a reason to hope again, placing the United States in a unique position.

The Inter-American Court's decision regarding the Awas Tingni people in Nicaragua sets a precedent within the Inter-American system for the protection of indigenous peoples' lands and compensation for any

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151. *See* International Covenant, *supra* note 35.
152. American Declaration, *supra* note 21.
153. *See* American Convention, *supra* note 10.
154. *Id.* arts. 1-2.
155. *See* Suagee, *supra* note 9, at 375-81.
156. *See id.* at 377.
157. *Id.* at 385.
158. *Id.* at 388.

encroachment thereon.[159] That alone carries significance for the United States' policy towards Native Americans. Yet, the Inter-American Commission recently ruled that a petition filed by two Native Americans, claiming infringement of ancestral land rights by the United States, warrants consideration and declared the case admissible.[160] The Danns, of the Western Shoshone tribe, have asserted title rights to ancestral lands in response to United States efforts to deprive them of those lands.[161] The United States, in turn, claimed that the "gradual encroachment" of non-Native Americans extinguished Western Shoshone rights to ancestral lands.[162] The case reached the United States Supreme Court, which held that the placement of the US$26 million judgment in an interest bearing trust account in the U.S. Treasury constituted payment, even though the government had not actually distributed the money.[163] Undeterred, the Danns brought the case to the Inter-American system, where the Commission determined that the Danns had exhausted all domestic remedies and had subsequently filed a timely petition with the Commission.[164] In addition, the Commission concluded that the alleged violations constituted an ongoing prima facie violation of rights protected by the Inter-American system and, therefore, declared the case admissible.[165]

Given the Inter-American Court's recent holding in *Awas Tingni*, the United States may find itself in a difficult position in respect to the *Dann* case. On one side, the United States has not accepted compulsory jurisdiction of the court and, therefore, is not technically bound by its decisions; on the other side, the United States would stand alone in its decision to consciously reject the principles promulgated by the various recent international instruments and the customary international law concerning indigenous peoples' rights. Two Native American women have brought the United States' Native American land policy into the

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159. *See* Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) ¶¶ 153-155 (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/serie_c/sentencia-0.html.

160. *See Mary & Carrie Dann, Against United States*, Case No. 11.140, Inter-Am. C.H.R. 99 (1999), *available at* http:www.cidh.oas.org/annualrep/99eng/Admissible/U.S.11140.htm [hereinafter *Dann Admissibility Decision*].

161. Anaya & Williams, *supra* note 1, at 40 (citing S. James Anaya, *Native Claims in the United States: The Unatoned for Spirit of Place*, *in* THE CAMBRIDGE LECTURES 1991, at 25, 28-32 (Frank E. McArdle ed., 1993) (discussing the background of the *United States v. Dann* case and relevant domestic proceedings)).

162. *Id.* at 40.

163. *See* United States v. Dann, 470 U.S. 39, 44 (1985).

164. *See Dann Admissibility Decision*, *supra* note 160, ¶¶ 83, 91.

165. *Id.* ¶ 91.

spotlight, illuminating its direct conflict with the generally accepted international norms. In light of that heightened attention, and as a world power, the United States needs to set an example by fully incorporating its human rights obligations into its domestic policies, especially with regard to Native American property rights. Although the Supreme Court has demonstrated movement towards the recognition and protection of Native American lands, its jurisprudence remains a far cry from the position taken by the Inter-American system and the international community at large.

2. Role of United States Supreme Court

Throughout the United States' relationship with the Native American peoples, the Supreme Court has played a large and definitive role in shaping Native American property rights.[166] By steadfastly applying policies established by Congress and creating new rules based on those principles, the Supreme Court shouldered much of the responsibility for the ensuing treatment of Native American territories.[167] In fact, the Supreme Court is accredited with creating the legal framework that spawned the allotment policy.[168] However, the Court has also stepped in to protect the Native American peoples and their territories on various occasions,[169] creating a somewhat confusing body of jurisprudence regarding the Native Americans' possibly sovereign

166. Thompson, *supra* note 130, at 277 ("[T]he Supreme Court, surprisingly, has been tenacious at applying the principles and precedent that created allotment and the problems that followed. As a result, the Supreme Court has been largely responsible for the legislative chipping away of Native American land holdings over the past century."); *see also* Sender, *supra* note 118, at 552 (stating the courts of the United States "have a long history of deep involvement in Native American affairs").

167. Thompson, *supra* note 130, at 277. The Supreme Court played an active role in abrogating treaty promises and failing to honor commitments made to the Native American peoples. *Id.* at 291. Moreover, at critical junctures in the development of "Indian law," the Supreme Court has refused judicial protection to the Native Americans, deferring instead to the legislative branch, and thereby denying the Native Americans the benefit of the federal checks-and-balances system. *Id.* at 291-92.

168. Three cases, known as the "Marshall Trilogy," are considered the foundation of Native American law. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1931); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832).

169. *See, e.g.*, Fletcher v. Peck, 6 U.S. (6 Cranch) 87 (1810) (holding that Indian tribes have a right to exclusive use and occupancy of territory not acquired by the government and neither a state nor its grantees can maintain an ejectment action against Indians); *Worcester*, 31 U.S. (6 Pet.) at 518 (holding that consent is required to extinguish Indians' native title); United States v. Shoshone Tribe, 304 U.S. 111, 118 (1938) (holding that the government must compensate Shoshone tribe for removing mineral and timber resources from their lands); Hodel v. Irving, 481 U.S. 704, 717 (1987) (holding that forced escheatment of Native American lands without compensation is unconstitutional under takings clause of Fifth Amendment).

status.[170] In the late twentieth century, the Court appears to have chosen a side by declaring the ILCA unconstitutional under the Fifth Amendment.[171] Nevertheless, severe land use issues continue to plague Native American peoples.[172] The Court now stands primed to push domestic policy in the direction of the international consensus regarding the property rights of indigenous peoples. As demonstrated by its historical influence, the Court could, in fact, effect such change.

Primarily as a function of the common law system employed in the United States, international instruments and norms do not influence the Court's decisions, unless the immediate legal question pertains directly to interpretation of such instruments. This is unfortunate for the Native American populations, who would benefit from the domestic incorporation of internationally recognized principles regarding their property rights. Additionally, the Court sits in a unique position in this respect, with the opportunity to examine regional or global policy trends specifically speaking to the disputes in front of the Court. Congress, for example, probably does not engage in much comparative analysis before promulgating domestic legislation.

From a legal standpoint, the treaties ratified by the United States become the "law of the land" and, therefore, must be incorporated into the body of domestic law. Likewise, customary international law also binds the courts of the United States, perhaps even more strongly when the law reaches *jus cogens* status within the international community, as is the case with human rights principles. As evidenced by the recent decision by the Inter-American Court of Human Rights regarding the Awas Tingni community, the international consensus has reached the United States' backyard.[173] The United States, although not subject to the Inter-American Court's jurisdiction, is a member of the OAS community and should exhibit some measure of respect for that court's decisions.

In this regard, the Supreme Court owes a duty to the Native American populations to acknowledge the growing international trend

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170. Sender, *supra* note 118, at 548. Federal law currently embraces two contradictory doctrines with respect to Native American property rights. *Id.* One doctrine espouses the notion of tribal sovereignty and depicts the tribes as domestic, dependent nations. *Id.* The other doctrine condones plenary congressional power over the Native Americans, who are considered "wards" of the United States. *Id.*

171. *See Hodel*, 481 U.S. at 704; Babbitt v. Youpee, 519 U.S. 234 (1997).

172. *See* Thompson, *supra* note 130, at 309-10. As a residual effect of the allotment policy, Native Americans continue to lose property interests as well as the ability to regulate and direct activities within their territories. *Id.*

173. *See* Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) ¶¶ 154-155 (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/seriecing/Mayagna_79_ing.html.

toward the recognition and protection of indigenous peoples' lands. Recently, the Court has made steps in the right direction.[174] Relying on supportive international agreements and customary law would only strengthen the Court's underlying rationale.

V. CONCLUSION

Incorporating these international obligations into the United States domestic system necessarily entails reconciling several serious issues. Arguably, the first priority would be to align the United States' domestic policy with the recent Inter-American Court's decision on the Awas Tingni community, especially in light of the pending case in the Inter-American system against the United States.[175] Regardless, reaching a regional consensus on indigenous peoples' land rights should be a priority for the United States as a member of the OAS. However, the application of the principles involved in the Awas Tingni decision raise practical concerns for the United States.

According to the Inter-American Court, indigenous peoples have the right to communal property, based on ancestral ties to the land.[176] In addition, the indigenous peoples are entitled to the demarcation and protection of those lands designated as ancestral or customary.[177] In Nicaragua, the Awas Tingni community has traditionally and continually resided in the same location for generations.[178] Therefore, the determination of the boundaries of the ancestral lands to which the Awas Tingni are entitled, is a relatively easy one. The general area has already been designated, but the details of the final boundaries require final agreement.

In contrast, the Native Americans within the United States face a gargantuan task in merely designating ancestral lands. As a result of the expansionism of the North American settlers, the allotment policy, and the establishment of Native American reservations, few tribes can identify one specific area as a traditional territory. As a corollary, Native Americans aren't merely occupying a corner of the coastline, as are the Awas Tingni. Rather, Native Americans lay claim to pockets of land sprinkled throughout the country, raising questions about the ability of the government to even promise a policy of noninterference. Another difficulty arises with respect to Native Americans already forced off

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174. *See Hodel*, 481 U.S. at 704; *Babbitt*, 519 U.S. at 234.
175. *See Dann Admissibility Decision*, *supra* note 160.
176. Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua ¶¶ 148-151.
177. *Id.* ¶ 153.
178. *See* Grossman, *supra* note 87, at 2.

traditional lands, possibly generations ago. The United States may not honestly be able to accommodate those claims, meaning the acknowledgment of indigenous peoples' rights would only apply to future claims, rather than encompass restitution for past wrongs.

In terms of restitution, the Inter-American Court found the Awas Tingni entitled to compensation for moral injury, in the absence of actual injury to the community.[179] In the United States, the Supreme Court has recently agreed that the taking of Native American property without compensation equals an unconstitutional taking under the Fifth Amendment.[180] The operation of judge-made law within the common law system requires that decision only to apply from the time it was made forward. However, including a category for moral injury might open the courts to claims for previous takings, leading to disenfranchisement, disbandment of the tribe, and loss of cultural autonomy, thereby constituting an ongoing moral injury to the present day.

The United States faces substantial practical concerns, which, understandably, contribute to its hesitancy in implementing the norms promulgated by the Inter-American system. Nevertheless, in order to maintain its position as a world leader in the area of human rights and maintain its international credibility, the United States needs to adjust its domestic policy. Perhaps the most feasible option begins with acknowledging existing Native American populations, recognizing their current territories, and protecting those lands from further encroachments by the government. Then Congress, in coordination with the Native American peoples, may be able to resolve the question of retroactivity and prior injuries. At this point, whatever steps the United States takes, it will be running to catch up with the Inter-American system.

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179. *See* Case 79, La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua ¶¶ 164, 167-169.

180. *See* Hodel v. Irving, 481 U.S. 704 (1987); Babbitt v. Youpee, 519 U.S. 234 (1997).