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# **AWAS TINGNI V. NICARAGUA: INTERNATIONAL PRECEDENT FOR INDIGENOUS LAND RIGHTS?**

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## I. INTRODUCTION

The battle of *Awás Tingni Community v. Nicaragua* was the culmination of years of legal wrangling between the Mayagna Community of Awás Tingni (“Awás Tingni Community” or “Awás Tingni”) and the sovereign state of Nicaragua. Awás Tingni is one of many communities indigenous to Nicaragua’s Atlantic Coast region; the community has held its ancestral territory for hundreds of years and now appears to be succeeding in defending its rights to that territory in the face of state resistance. In doing so, the Awás Tingni Community could help set precedent for recognition of indigenous land rights in the Inter-American Court system and in international law generally.

In 1995, the Awás Tingni learned of the Nicaraguan government’s plan to grant a logging license to a Korean lumber company, SOLCARSA, on approximately 62,000 hectares of the community’s homeland.<sup>1</sup> Although the Nicaraguan Constitution concedes equal protection under the law for the many indigenous communities of the state’s Atlantic coast region, the

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<sup>1</sup> Mayagna (Sumo) Awás Tingni Community v. Nicaragua, Inter-Am. Ct. Hum. Rts. (Ser. C) Case No. 79, para. 103(k) (Judgment of Aug. 31, 2001), *available at* [http://www.corteidh.or.cr/seriecing/serie\\_c\\_79\\_ing.doc](http://www.corteidh.or.cr/seriecing/serie_c_79_ing.doc) [hereinafter Awás Tingni].

government claimed that the Awas Tingni had neither legal title nor ancestral right to the land in question.<sup>2</sup> The legal battle culminated in a hearing before the Inter-American Court of Human Rights (“Inter-American Court” or “Court”). The Inter-American Court found Nicaragua in violation of several articles of the American Convention on Human Rights, and ordered the state to demarcate and grant title to the land as property of the Awas Tingni Community as well as to pay reparations.<sup>3</sup>

With its decision, the Inter-American Court took an important step in solidifying the rights of indigenous peoples to the use and enjoyment of their ancestral land and natural resources as a human right to be honored and protected. While this outcome was unquestionably a legal and moral victory for the Awas Tingni Community, some questions remain about its broader applicability, such as whether this decision will prompt Nicaragua and similarly situated countries to recognize and demarcate indigenous territories. Moreover, at the one-year mark of the decision, Nicaragua has yet to comply with the Inter-American Court’s orders to demarcate and grant title to the Awas Tingni territory. Although the Court’s order of August 31, 2001 required that Nicaragua submit progress reports on the demarcation process every six months, no reports have been filed.<sup>4</sup> In response, on September 6, 2002 the Court issued a resolution requiring Nicaragua to take the necessary measures to protect Awas Tingni’s rights to the use and enjoyment of their land “without delay.”<sup>5</sup> Nicaragua has not yet responded to this resolution. Undoubtedly, Nicaragua’s ultimate handling of this matter will have wide-reaching implications for future indigenous land rights cases, and for the authority of the Inter-American Court in general.

The concept that indigenous communities have fundamental rights to the recognition and protection of their ancestral lands has been formally recognized in several international legal conventions, and is now being claimed by some commentators as a norm of customary international law.<sup>6</sup> Whether indigenous land rights are enforceable is an issue to be tested in several cases pending before the Inter-American Court of Human Rights.<sup>7</sup> This note examines the current legal status of indigenous

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<sup>2</sup> *Id.* at para. 27.

<sup>3</sup> *Id.* at para. 173(4)-(7).

<sup>4</sup> *Id.* at para. 173(8).

<sup>5</sup> Press Release, Indian Law Resource Center, La Corte Interamericana de Derechos Humanos vuelve a exigir a Nicaragua que garantice los derechos de la Comunidad Awas Tingni (Sept. 11, 2002), available at [http://www.indianlaw.org/awas\\_Tingni\\_measures.htm](http://www.indianlaw.org/awas_Tingni_measures.htm).

<sup>6</sup> 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, 33-34 (2001).

<sup>7</sup> See, e.g., Sawhoyamaya Indigenous Community of the Enxet People, Petition 322.01, Inter-Am. C.H.R. 12 (Feb. 20, 2003), available at <http://www.iachr.org/annual>

rights in international law and specifically in the Inter-American Court system through an examination of the landmark case, *Awas Tingni Community v. Nicaragua*, the Awas Tingni people, and the impact of the case on other indigenous communities bringing similar issues before the Court. The note's objective is two-fold: to critically examine the potential protections provided by the Inter-American Court in *Awas Tingni* and to put a human face to the struggle of indigenous peoples by providing a cultural context as well as a legal context.

## II. INDIGENOUS PEOPLES IN INTERNATIONAL LAW

### A. *General Introduction to Indigenous Peoples in International Law*

Indigenous peoples occupy a position of expanding importance both in international law and in the domestic law of many nations. Early views of the place of indigenous groups in the evolving world community focused on the assimilation of such peoples into the colonizing, conquering, or displacing society that surrounded them.<sup>8</sup> In the later colonial period, the prevailing air of Social Darwinism left little sympathy for the "primitive," "uneducated," "uncivilized" indigenous communities throughout the Americas, Africa, and the Pacific Rim.<sup>9</sup> In the early twentieth century, however, views of indigenous cultures began, through scholarly curiosity, to transform from indifference, to the realization that these peoples have inherent, unquestionable human value and much to offer to 'advanced' societies.

By the mid-twentieth century, the international community recognized indigenous peoples as "special subjects of international concern," and began to codify this recognition in instruments such as the Inter-American Charter of Social Guaranties of 1948 and the International Labor Organization's ("ILO") Convention No. 107 of 1957.<sup>10</sup> Today, international agreements protect several indigenous rights such as those espoused by the Organization of American States ("OAS"), and certain rights (such as entitlement to ancestral land) are now considered protected norms of customary international law.<sup>11</sup> Despite increasing recognition and protection, indigenous peoples remain overwhelmingly

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rep/2003eng/Paraguay.322.01.htm; Xakmok Kásek Indigenous Community, Petition 326.01, Inter-Am. C.H.R. 11, (Feb. 20, 2003), available at <http://www.iachr.org/annualrep/2003eng/Paraguay.32601.htm>; Yakye Axa Indigenous Community of the Enxet-Lengua People, Petition 12.313, Inter-Am. C.H.R. 2, (Feb. 27, 2002), available at <http://www.cidh.oas.org/annualrep/2002eng/Paraguay.12313.htm>; Maya Indigenous Communities and Their Members, Case No. 12.053, Inter-Am. C.H.R. 78, (Oct. 5, 2000), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Admissible/Belize12.053.htm>.

<sup>8</sup> S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 44 (1996).

<sup>9</sup> See generally *id.*

<sup>10</sup> Anaya & Williams, *supra* note 6, at 33-34.

<sup>11</sup> ANAYA, *supra* note 8, at 49-58.

disadvantaged and suffer from a “pervasive pattern of subjugation, marginalization, dispossession, exclusion and discrimination.”<sup>12</sup> Undoubtedly, concerns over indigenous rights and how to properly administer them are forcing states to change their policies towards the indigenous peoples within their borders.

### B. *The Difficulty of Defining “Indigenous”*

The conceptual difficulties of the place of indigenous peoples in international law begin with the term “indigenous” itself. Attempts to define “indigenous” implicate a number of questions: Who should be considered indigenous? Must an individual be of full indigenous ancestry to be a member of the group? How do we determine indigenous ancestry: by Western cultural standards or by the indigenous group’s standards? How do we know a particular group is indigenous to a region? Similarly, how does the group itself know? How long must a community have been established in an area to be considered the original inhabitants? How does an indigenous group delineate its territorial boundaries? How should a state delineate these boundaries?

The questions are wide-ranging, and have led some to feel that any attempt at definition is necessarily limiting and under-inclusive.<sup>13</sup> It has also been suggested that “indigenous” be self-defined by the people in

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<sup>12</sup> Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 60 (1999).

<sup>13</sup> See, e.g., Thomas W. Simon, *Prevent Harms First: Minority Protection in International Law*, 9 INT’L LEGAL PERSP. 129, 161 (1997) (noting the difficulties encountered in defining “indigenous”); Jon M. Van Dyke et al., *Self-Determination for Nonself-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii*, 18 HAW. L. REV. 623, 632 (1996) (“Indigenous peoples are found in many countries and have diverse cultures and historical situations, making it difficult and inappropriate to adopt a rigid or uniform approach to dealing with all such people.”); John A. Mills, Note, *Legal Constructions of Cultural Identity in Latin America: An Argument Against Defining “Indigenous Peoples,”* 8 TEX. HISP. J.L. & POL’Y 49 (2002) (arguing against using standardized international legal definition of “indigenous peoples”); Gerald P. Neugebauer III, Note, *Indigenous Peoples as Stakeholders: Influencing Resource-Management Decisions Affecting Indigenous Community Interests in Latin America*, 78 N.Y.U. L. REV. 1227, 1231, 1231 n.16 (2003) (announcing that Latin America “is home to a large contingent of people who are unanimously recognized as indigenous” and thereby “steer[ing] clear of the sticky and polemical debate on the precise definition of ‘indigenous’”); see generally ANAYA, *supra* note 8, at 75, 77-81; Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33 (1994); Benedict Kingsbury, “Indigenous Peoples” in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT’L L. 414 (1998); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 93-128 (1999).

question.<sup>14</sup> Defining the term in a meaningful way is essential, however, if it is to be applied in a general but sensitive way to the thousands of diverse groups currently included under the blanket term so that they may be afforded the protections of international law.

Several attempts at definition have been made. The ILO has supplied one well-regarded definition of indigenous people:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>15</sup>

This definition, though it does not answer each of the particular questions noted above, provides a workable starting definition for the analysis of indigenous issues.

### C. *The Critical Importance of Indigenous Land Rights*

Although indigenous peoples are diverse in almost every conceivable way, it is safe to say that for many such groups the connection to ancestral land is central to religious, social, and cultural values. Often an indigenous group's relationship to land is based on religious values and beliefs, and forms the basis of their community identity. Furthermore, the land is very often an indigenous community's only means of subsistence. This unique relationship between indigenous peoples and their lands presents difficulties of legal analysis and application.

Each indigenous community has unique customs, and a unique system for the group's relation to the land. As S. James Anaya, University of Arizona School of Law Professor and Special Counsel to the *Awas Tingni* Community in its case against Nicaragua, has pointed out: "Because each indigenous community possesses its own unique social, political, and economic history, each has adapted and adopted methods of cultural survival

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<sup>14</sup> Wiessner, *supra* note 12, at 114 n.392 (citing Working Group on Indigenous Populations, Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people," U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 14th Sess., at 5, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996)).

<sup>15</sup> Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, art. 1, 28 I.L.M. 1382, 1384-85.

and development suited to the unique environment and ecosystem inhabited by that community . . . each indigenous community creates its own customary laws for governing its lands and resources.”<sup>16</sup> Because of this diversity of property laws among indigenous peoples, there can be no true universal “one-size-fits-all definition of indigenous property rights” for an international agreement to reflect or for an international tribunal to apply.<sup>17</sup>

Another difficulty arises where, as is very often the case, an indigenous community considers its lands to be held communally. This is a very odd arrangement under Western law standards, one that raises questions such as: Who will be granted title to the land—the community, a leader, a council? How is this land alienated, and under whose authority? Within indigenous communities, these questions will of course be answered by community traditions and conventions, or the group will of necessity create new norms. But how are the indigenous land system and the property law of the surrounding state to interact? Will there be a duty to protect indigenous land from its people’s own devices (i.e., will a state or private organization be allowed, after demarcation and entitlement, to purchase and develop the land without permission of the group as a whole)? The resolution of these issues is intrinsically connected to the question of the “self-determination” of indigenous communities. The right of an indigenous people to “freely determine their political status and freely pursue their economic, social, and cultural development” is another right some commentators see as either a crystallized or emerging custom of international law, that should therefore should be respected.<sup>18</sup> This right is also likely to be tested under international law in the near future.

#### D. *Other Current Topics in Indigenous Law*

The depth, complexity, and importance of the indigenous land rights problem is so staggering that it can seem to become the primary or even the only indigenous issue. Brief mention should also be made about the range of issues involving indigenous peoples, so that land rights can be kept in proper perspective.

One area receiving increasing attention is indigenous intellectual property. Although it may sound odd to pair indigenous peoples with cutting edge technology, over the last decade there has been increasing concern that indigenous peoples who inhabit biodiversity-rich areas such as rainforests are becoming the victims of “biopiracy.”<sup>19</sup> There are really

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<sup>16</sup> Anaya & Williams, *supra* note 6, at 43.

<sup>17</sup> *Id.*

<sup>18</sup> Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law*, 34 N.Y.U. J. INT’L L. & POL. 189, 217 (2001).

<sup>19</sup> Nuno Pires de Carvalho, *Requiring Disclosure of the Origin of Genetic Resources and Prior Informed Consent in Patent Applications Without Infringing The*

two problems involved here. First, researchers from developed countries extract genetic resources from biodiversity-rich areas without proper indigenous authorization, and use these resources to develop new technologies. Second, researchers rely on indigenous peoples to help discover and identify genetic resources, with little recognition or compensation given for this knowledge and service.<sup>20</sup> One proposal to help alleviate this problem is the Convention on Biological Diversity (“CBD”).<sup>21</sup> The CBD sets forth several requirements for research and extraction of such resources, including prior informed consent of the providing party and mutually agreed upon terms for access.<sup>22</sup> Furthermore, the CBD encourages “the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices” of indigenous and local communities “relevant for the conservation and sustainable use of biological diversity.”<sup>23</sup> With the dramatic pace of technological advancement, this area of international indigenous law is likely to develop rapidly.

Another concern for many indigenous peoples is the right to freely practice religion in the surrounding state. This issue has affected law and policy in the United States, most poignantly when the Supreme Court denied members of the Native American Church an exception from state law pursuant to the free exercise clause of the First Amendment to ingest peyote for sacramental purposes.<sup>24</sup> As that case indicates, even with the greater respect and protections afforded indigenous peoples today, indigenous peoples face a tough road ahead which is sure to involve losing battles. Internationally, however, there have been steps to protect indigenous religious freedoms, as a unique communal, indigenous right, under the guise of religion as a human right, and with attempts to outlaw all forms of discrimination, including religious discrimination.<sup>25</sup>

With this introduction to indigenous issues in mind, an analysis of the Awas Tingni culture will help to provide insight into the fragility of some indigenous groups’ social and biological environments, indigenous peoples’ relation to the wider society, international law’s role in protecting them, and the effectiveness of these protections.

### III. CULTURAL CONTEXT OF THE AWAS TINGNI

The Awas Tingni Community inhabits the sparsely populated, dense jungle of Nicaragua’s eastern coastal region. The community is part of

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*TRIPS Agreement: The Problem and the Solution*, 2 WASH. U. J.L. & POL’Y 371, 375 (2000).

<sup>20</sup> *Id.* at 376.

<sup>21</sup> Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

<sup>22</sup> *Id.* at art. 15, 1760 U.N.T.S. 152.

<sup>23</sup> *Id.* at art. 8(j), 1760 U.N.T.S. 148-9.

<sup>24</sup> See *Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>25</sup> See generally ANAYA, *supra* note 8; Kingsbury, *supra* note 18; Wiessner, *supra* note 12.

the greater Mayagna group indigenous to the area. The Mayagna is one of three groups of the Atlantic coast region belonging to a single linguistic family that is generally agreed to have existed in the area at least since the 14th century.<sup>26</sup> The population of the Awas Tingni Community is approximately 650 individuals, or 150 families. The principal language of the Awas Tingni is Mayagna, although most members speak at least some Spanish.<sup>27</sup>

The Awas Tingni hold their land communally; communal land ownership is a pervasive feature among indigenous peoples the world over, and has been the root of many of the conceptual difficulties in analyzing indigenous land rights.<sup>28</sup> Hunting, fishing, and agriculture are the primary methods of subsistence.<sup>29</sup>

Each Awas Tingni family maintains several plantations of about one-half to one hectare each, which they cultivate using the “slash and burn” method.<sup>30</sup> This method, frequently used among indigenous groups throughout the Americas, mimics the natural forest system and is economically productive as well as ecologically sustainable.<sup>31</sup> In the first phase of the method, the group plants and cultivates crops on a fertile area of land until soil nutrients are nearly exhausted.<sup>32</sup> Typical crops of the Awas Tingni Community include beans, rice, corn, plantains and bananas; generally around fifty percent of their crops are used in commerce.<sup>33</sup>

During this phase, the Awas Tingni Community constructs its village in the outlying areas; this village is the community’s social center.<sup>34</sup> When the soil nears exhaustion, the vegetation is burned and laid fallow for a period of years, in order to restore and replenish nutrients to the soil.<sup>35</sup> At this point the community will deconstruct the village and will rebuild it in a fertile area of their territory.<sup>36</sup> During the rotating period of regeneration, it appears that the community is not really using the land.<sup>37</sup> In order for the land to regenerate to productive capacity, it must remain

<sup>26</sup> Theodore Macdonald, *Awas Tingni: Un Estudio Etnografico de la Comunidad y su Territorio* (1999) (unpublished report) (on file with author).

<sup>27</sup> *Id.*

<sup>28</sup> See generally Kingsbury, *supra* note 18 (discussing the issues surrounding indigenous’ operational reference to groups); see also Wiessner, *supra* note 12 (noting the difficulty of formulating specific protections for distinctive indigenous groups’ need for their lands based on spiritual ties).

<sup>29</sup> Macdonald, *supra* note 26.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*



idle for approximately 15 years.<sup>38</sup> Thus, in order for the Awas Tingni to maintain their traditional subsistence, they require a much greater land area than is in use at a given time.

The other primary method of Awas Tingni subsistence is the hunt. Although the Awas Tingni hunt deer and fowl, they mainly focus on hunting the pecari—wild boar—that inhabit the hills of their territory and hold great spiritual value.<sup>39</sup> Entire families sometimes go on hunts for days or even weeks for these special animals.<sup>40</sup> The rites of passage, camaraderie, and vital acquisition of meat and skins, has led the Awas Tingni to associate the communal hunt for pecari with the very spirit of the people.<sup>41</sup> The Awas Tingni spiritual connection to the pecari brings to light the special nexus between the community and their land. As mentioned above, spirituality is another intricacy of the worldwide indigenous land rights controversy: convergence of the property law of a colonizing or displacing state and the religious values of a displaced people has presented a myriad problems for many nations, including the United States.<sup>42</sup> The Awas Tingni connection to the pecari illustrates how varied indigenous cultural institutions can be and how an encroachment on indigenous peoples' rights to these institutions could have a drastic impact on their way of life.

Awes Tingni territory plays an important role in two key areas of their spirituality—relations with ancestors and relations with the spirits that inhabit and exercise control over the mountains and wildlife. Awes Tingni lands are flush with burial grounds, which community members visit regularly and which are of key importance to their spirituality.<sup>43</sup> The dead are buried with material possessions such as clothes, hunting weapons and ceramics, and relatives transmit the specific locations of the sites from generation to generation.<sup>44</sup> The mountain spirits have the capacity to heal the sick and control the movements of the mountain animals, and thereby, control the hunt.<sup>45</sup> To displease the mountain spirits is to jeopardize the life and soul of the community.<sup>46</sup> Thus the destruction of this habitat would be devastating to the community. Deforestation would reduce the natural environment of the pecari and other wildlife and would cause their numbers to dwindle. Not only would this result in less food for the Awes Tingni, but the social aspects of the hunt and feasts would be disrupted or discontinued. Furthermore, deforesting their terri-

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See generally Wiessner, *supra* note 12.

<sup>43</sup> Macdonald, *supra* note 26.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

tory would have serious spiritual repercussions for the community. Awas Tingni burial grounds would be defiled, which, according to their belief system, would produce unknown horrors for their people. In both a spiritual or practical sense, those horrors are a very real possibility for this community.

Both Awas Tingni spiritual and subsistence activities depend on their land. Loss or development of large portions of their territory would negatively impact their spiritual integrity as well as the region's ecology. Environmental concerns with the logging and development of vast areas, have led to mutually beneficial alliances between nongovernmental organizations ("NGOs") which strive to further the cause of indigenous peoples (e.g., Cultural Survival, Human Rights Watch, etc.) and with NGOs which aim to protect natural resources (e.g., World Wildlife Fund).<sup>47</sup> Along with watchdog and conservation efforts, NGOs have actively participated as *amici curiae* in the adjudication process of indigenous rights and environmental protection cases before international courts.<sup>48</sup>

All agree that the Awas Tingni Community, like all indigenous communities, is a unique human cultural group worth protecting. Difficulties originate where indigenous groups' unique cultural characteristics, such as communal land ownership, come into contact with and conflict with the wider states' legal conception of these same phenomena. This is the province of indigenous rights advocacy, one of the primary goals of which is to harmonize varying indigenous cultural systems with state jurisprudence in an equitable manner. Nicaragua continues to show little effort to substantively resolve conflicts with the Awas Tingni Community, even though the state has expressly vowed to protect indigenous rights.

#### IV. LEGAL CONTEXT

The indigenous peoples of Nicaragua are recognized and protected under both the Nicaraguan Constitution and Nicaragua's Statute of Autonomy of the Atlantic Coast Region.<sup>49</sup> The Nicaraguan Constitution recognizes the communal forms of property of the indigenous communities of the Atlantic Coast and guarantees those communities the benefits of their natural resources.<sup>50</sup> The Statute of Autonomy created northern and southern regional governments that coexist with municipal authorities elsewhere established in Nicaraguan law. The regional governments are comprised of a regional council and a regional coordinator named

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<sup>47</sup> See Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994).

<sup>48</sup> *Id.*

<sup>49</sup> See CONSTITUCIÓN POLÍTICA arts. 89, 180 (Nicar.); Autonomy Statute for the Regions of the Atlantic Coast of Nicaragua, Law No. 28, art. 39, Sept. 7, 1987, reprinted in DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS 386, 394 (Hurst Hannum, ed. 1993) [hereinafter *Autonomy Statute*].

<sup>50</sup> CONSTITUCIÓN POLÍTICA art. 89 (Nicar.).

from among the councilors.<sup>51</sup> The Statute affirms that the communal property of indigenous communities is comprised of the lands, waters, and forests that traditionally have belonged to them.<sup>52</sup>

Nicaragua has undertaken additional responsibilities vis-à-vis indigenous peoples as a member of the OAS and the ILO. The OAS is a regional international organization, established by member states “to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.”<sup>53</sup> The OAS has adopted conventions and formed commissions to defend human rights and to combat economic corruption, illegal arms and drug trafficking, and violence against women. In 1969, the OAS chartered the American Convention on Human Rights (“American Convention”), which calls for a commitment by all parties to recognize and respect the rights of all humans to equal judicial protection and to property, as well as to life, privacy, and expression.<sup>54</sup> The Inter-American Commission on Human Rights is an arm of the OAS that evaluates human rights claims and can recommend such claims to the Inter-American Court. The Inter-American Court is the highest human rights court in the Americas, and has jurisdiction to hear cases and to grant remedies for violations for all OAS member-states.

The International Labor Organization is an agency of the United Nations, founded in 1919 to seek “the promotion of social justice and internationally recognized human and labour rights.”<sup>55</sup> ILO Convention No. 169 on Indigenous and Tribal Peoples (entered into force in 1989), established many of the same fundamental rights as the American Convention, but particularized to indigenous communities. Of particular significance to the Awas Tingni is the ILO’s recognition of “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.”<sup>56</sup>

Nicaragua has pledged to recognize and respect the rights of indigenous peoples not only through its own Constitution and legislation, but as

<sup>51</sup> Autonomy Statute, *supra* note 49.

<sup>52</sup> *Id.* at arts. 15-31.

<sup>53</sup> Charter of the Organization of American States, Apr. 30, 1948, pt. I, ch. I, art. I., 2 U.S.T. 2394, 119 U.N.T.S. 3, 50.

<sup>54</sup> American Convention on Human Rights, *entered into force* July 18, 1978, 1144 U.N.T.S. 123, 145, 148-51, *available at* <http://www.oas.org/juridico/english/Treaties/b-32.htm> [hereinafter American Convention].

<sup>55</sup> *International Labor Organization Mandate* (Apr. 20, 2002), *available at* <http://www.ilo.org/public/english/about/index.htm>

<sup>56</sup> Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 15, art. 13, para. 1, 28 I.L.M. at 1387.

a member of both the OAS and the ILO. Furthermore, several indigenous rights are now recognized as norms of customary international law. Despite all of its commitments, Nicaragua has in practice virtually ignored the rights of its indigenous communities, particularly the right to the use and enjoyment of ancestral territory.

## V. THE CASE

### A. *Development of the Case*

*Awas Tingni v. Nicaragua* is the result of a process that began in 1995, when the Nicaraguan government granted SOLCARSA a logging concession on a massive portion of Awas Tingni ancestral land. The Community was not consulted about the contract nor even informed that logging would commence on their territory. The Nicaraguan government's position was that the land was not demarcated nor in use by any indigenous group. The Awas Tingni Community only discovered the logging operation while Harvard anthropologist Theodore Macdonald was in the territory performing an ethnographic study which included mapping the group's territory using Global Positioning technology.<sup>57</sup>

After seeking legal counsel, including S. James Anaya, a leading scholar and advocate of indigenous rights, the community sought an *amparo* action (a legal proceeding similar to a request for an injunction) to enjoin the logging operations and to order the Ministry of the Environment and Natural Resources ("MARENA") to nullify the SOLCARSA logging contract. This primary attempt was thwarted, however, because the Community failed to file the action within thirty days of obtaining knowledge of the alleged infringement of their rights.<sup>58</sup>

In March of 1996, the Regional Council of the North Atlantic Coast Autonomous Region ("RAAN") filed another *amparo* action requesting the revocation of the SOLCARSA concession. The Nicaraguan Supreme Court granted this request and declared the concession unconstitutional in February 1997.<sup>59</sup> The Nicaraguan government ignored their own Supreme Court's decision, however, and the logging operations continued unabated.

The Nicaraguan government has shown remarkable indifference to the people of Awas Tingni and an utter disrespect for their rights that is sadly typical of treatment of indigenous peoples the world over. First, the Nicaraguan government failed to consult with or even to notify the Awas Tingni that logging was to begin in their area. Even considering that the government did not recognize the community as having legal title to the land, it is unquestionable that officials knew of the existence of indigenous communities in the area. Further, after protest from the Commu-

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<sup>57</sup> Macdonald, *supra* note 26.

<sup>58</sup> *Awas Tingni*, Inter-Am. Ct. Hum. Rts., (Ser. C) No. 79, at para. 103(p).

<sup>59</sup> *Id.* at para. 103(q).

nity and a long process of adjudication that in the end clearly declared the logging concession an infringement of Awas Tingni rights, the Nicaraguan government blatantly refused to honor its own highest court's decision. Although no one would deny that Nicaragua is a developing country that is in clear need of capital to improve nearly every facet of governance, this capital should not come at the expense of a unique human community.

Because of the failure of the Nicaraguan legal system to effectively act on this situation, the Community filed a petition with the Inter-American Commission. After evaluating the Community's concerns, the Inter-American Commission filed a petition before the Inter-American Court against Nicaragua on behalf of the Awas Tingni. The Community sought recognition of their communal land rights, demarcation of their territory to guarantee their legal rights, and reparations for the damages incurred by the logging concession.

In November 2000, the Inter-American Court heard the case. During the course of the trial, Awas Tingni leaders presented evidence of their traditional land claims and local and international lawyers and anthropologists testified in support of the community. The Nicaraguan government claimed that the Awas Tingni were of mixed ethnic origin and were not indigenous to the area, but had only recently moved there.

#### B. *The Legal Basis of the Court's Decision*

The Inter-American Court drew from several sources to determine that an indigenous communal right to property exists, and that the Nicaraguan government violated this right with respect to the Awas Tingni Community. Article 21 of the American Convention was central to the Court's reasoning, but the Court also bolstered its decision with several other articles of the American Convention, as well as with the Nicaraguan Constitution and Nicaraguan legislation.<sup>60</sup> However, the Court did not address the Commission's argument that "there is an international customary international law norm which affirms the rights of indigenous peoples to their traditional lands."<sup>61</sup> Thus, although the decision was a clear step toward recognition of indigenous communal land rights for parties to the American Convention within the Inter-American system, it seems premature to point to this judgment as an acknowledgement of this right as a crystallized norm of customary international law.

Article 21 of the American Convention provides for the right to property. The article declares:

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.

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<sup>60</sup> *Id.* at paras. 142-55.

<sup>61</sup> *See id.* at para. 140(d).

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.<sup>62</sup>

The Inter-American Court approached the American Convention with an “evolutionary interpretation,” declaring that “human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.”<sup>63</sup> With this statement the Court was apparently addressing the concern, in light of the meager stage of development of indigenous law in 1969, that the framers of the Convention may not have considered indigenous communal property while drafting article 21.

To solidify its interpretation of article 21 as applying to indigenous communal property, the Court noted article 29(b), which declares that “[n]o provision of the Convention shall be interpreted as . . . [r]estricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.”<sup>64</sup> This article provided the Court the opportunity to frame the Convention’s use of the term “property” with a view to the rights granted by the laws of Nicaragua. To this end, the Court pointed to the protections provided to indigenous communal property in article 5 of the Nicaraguan Constitution and in article 36 of Nicaraguan Law No. 28. Specifically, article 5 of the Nicaraguan Constitution states:

The State recognizes the existence of the indigenous peoples, who have the rights, duties and guarantees set forth in the Constitution, and especially those of maintaining and developing their identity and culture, having their own forms of social organization and managing their local affairs, as well as maintaining communal forms of ownership of their lands, and also the use and enjoyment of those lands.<sup>65</sup>

Article 36 of Law No. 28 states:

Communal property are the lands, waters, and forests that have traditionally belonged to the Communities of the Atlantic Coast, and they are subject to the following provisions:

1. Communal lands are inalienable; they cannot be donated, sold, encumbered nor mortgaged, and they are inextinguishable.<sup>66</sup>

Combining the definition of communal property in Law No. 28 with the protections afforded indigenous communal land ownership in article 5 of

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<sup>62</sup> American Convention, *supra* note 54, art. 21, 1144 U.N.T.S. at 150.

<sup>63</sup> *Awas Tingni*, Inter-Am. Ct. Hum. Rts., (Ser. C) No. 79, paras. 146, 148.

<sup>64</sup> American Convention, *supra* note 54, art. 29 (b), 1144 U.N.T.S. at 153.

<sup>65</sup> See CONSTITUCIÓN POLÍTICA art. 5 (Nicar.).

<sup>66</sup> *Awas Tingni*, Inter-Am. Ct. Hum. Rts., (Ser. C) No. 79, para. 150.

the Constitution, and reading this combination into the American Convention by virtue of the Convention article 29(b) moratorium on restriction of rights afforded by laws of State Parties within the Convention, the Court concluded that “article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.”<sup>67</sup>

Having made this conclusion of law and accepting as proven fact that Nicaragua had granted the logging contract to Awas Tingni communal land without the group’s approval and to their detriment, the Court concluded that Nicaragua was in violation of article 21 of the American Convention.<sup>68</sup> To fashion a remedy for the violation, the Court relied on articles 1, 2, and 63 of the Convention.<sup>69</sup> Article 1 expresses an obligation to respect the rights and freedoms of all persons under state parties’ jurisdiction.<sup>70</sup> Article 2 provides that “[w]here the exercise of any of the rights or freedoms referred to in article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”<sup>71</sup> Article 63(1) authorizes the Court to enforce the rights referred to in articles 1 and 2, providing:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.<sup>72</sup>

Armed with these provisions, the Court concluded that the appropriate remedy for the violation of the Awas Tingni Community’s rights was for Nicaragua to “adopt in its domestic law . . . the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores.”<sup>73</sup> Furthermore, the Court ordered Nicaragua to “abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area” of the

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<sup>67</sup> See *id.* at para. 148.

<sup>68</sup> See *id.* at paras. 103(k), 155.

<sup>69</sup> See *id.* at paras. 162-73.

<sup>70</sup> American Convention, *supra* note 54, art. 1, 1144 U.N.T.S. 145.

<sup>71</sup> *Id.* at art. 2.

<sup>72</sup> *Id.* at art. 63(1), 1144 U.N.T.S. 159.

<sup>73</sup> Awas Tingni, Inter-Am. Ct. Hum. Rts., (Ser. C) No. 79, para. 173(3).

Awas Tingni Community.<sup>74</sup> The Court also ordered Nicaragua to pay \$50,000 for “works or services of collective interest for the benefit of the Awas Tingni Community” as well as \$30,000 for the Community’s legal costs.<sup>75</sup>

Given the factual circumstances of *Awas Tingni*, the remedy created by the Inter-American Court for the violations of the Community’s rights seems appropriate. For a proper analysis of this remedy, the Court’s conclusions of fact must first be assumed as correct; it should be pointed out, however, that Nicaragua raised several serious concerns that, if not applicable to the Awas Tingni Community, will undoubtedly arise in future indigenous land rights cases. Nicaragua argued, for example, that the Awas Tingni Community came to the disputed area by “communal separation and successive geographic shifts” and the group now “possess lands which are not ancestral and on part of which title has been obtained by other indigenous communities, or other communities claim that they have ancestral possession rights predating the alleged right of Awas Tingni.”<sup>76</sup> The crux of this argument is that the Awas Tingni splintered off from a “‘mother’ indigenous community” but “it claims separate and independent titling of lands the possession of which is not ancestral.”<sup>77</sup>

To evaluate the Court’s legal analysis and conclusions, we must accept the Court’s factual finding that the Awas Tingni Community communally held the disputed territory for a period requisite for considering the land ‘ancestral.’ Nicaragua’s argument, although not fully developed in the *Awas Tingni* case, is of critical conceptual importance. It is fully recognized that the Awas Tingni Community is a member of a wider cultural group, the Mayagna, which in turn is but one member of a larger linguistic family, the Sumo.<sup>78</sup> Nicaragua’s argument raises a number of questions for consideration in similar cases: How particularized a community may be within a larger indigenous group while reserving independent rights? What will be the requisite criteria for making this determination? The Court did not announce a standard for doing so. The Awas Tingni Community had the benefit of attorneys, anthropologists, and cartographers, and the support of multiple NGOs with both indigenous and environmental concerns. With the support and data gathered from these groups, the Court’s finding that the Awas Tingni territory is their true ancestral lands is not surprising. The Court did not emphasize which particular types of data were more convincing than others, however, and so it remains rather ambiguous, exactly how far removed a community may be from the wider indigenous culture while making a land claim.

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<sup>74</sup> *Id.* at para. 173(4).

<sup>75</sup> *Id.* at paras. 167-69.

<sup>76</sup> *Id.* at para. 141(a).

<sup>77</sup> *Id.* at para. 141(d).

<sup>78</sup> See Macdonald, *supra* note 26.



The remedy the Court provided after making the determination that the Awas Tingni had a clear ancestral right to the disputed lands was, although suitable for this case, quite expansive. The infringement on the Awas Tingni Community's rights occurred due to a combination of the ambiguity of their claim exactly where and of how much land their claim consisted and the Nicaraguan government's willingness to use that ambiguity to generate money through development. Assuming the Court's legal and factual conclusions are correct, demarcation and titling of the land to the Community should remove such ambiguity. But the Court's judgment went beyond demarcation and titling for the Awas Tingni and effectively ordered Nicaragua "to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities."<sup>79</sup> Because the Awas Tingni Community brought this case, the judgment and orders as to their group seem clear and reasonable; was the Court correct, or even realistic, however, in ordering Nicaragua to demarcate and title the property of all indigenous communities? As of March 2004, Nicaragua has not complied with the Court's order for even the Awas Tingni. Demarcation and titling of the Atlantic Coast region of Nicaragua is a daunting task, considering only the conceptual problems with determining which indigenous groups have a valid claim to what land, much less the resources it will cost the government to do so, and the income forgone due to necessarily cancelled development contracts. Thus, although the Awas Tingni Community's rights to this land are clear, the Court's decision in the case can be seen as an overly ambitious attempt to push indigenous land rights law forward with one great heave. However worthy the cause, efforts to enforce the judgment will require considerable time, and doubtless, further adjudication.

The Inter-American Court issued its decision on August 31, 2001, and the saga has continued. Nicaragua had indeed violated the Awas Tingni Community's rights—in particular their collective right to their traditional lands. The Court ordered Nicaragua to recognize title to the territory in the Awas Tingni Community and to adopt measures to demarcate property of indigenous communities throughout the country. In addition, the Court ordered Nicaragua to pay the Community reparations and legal fees.<sup>80</sup> One year after the decision, however, Nicaragua had yet to take any affirmative action to demarcate Awas Tingni territory or that of any other indigenous group. On September 6, 2002, the Inter-American Court issued a "provisional measures" resolution, requiring Nicaragua to take the necessary steps to demarcate and grant title to the Awas Tingni community's territory without delay.<sup>81</sup> As of March 2004, the Nicaraguan government has not complied with the Court's order, although the cur-

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<sup>79</sup> Awas Tingni, Inter-Am. Ct. Hum. Rts., (Ser. C) No. 79, para. 173(3).

<sup>80</sup> Awas Tingni, Inter-Am. Ct. Hum. Rts., (Ser. C) No. 79, para. 173(4)-(7).

<sup>81</sup> Press Release, Indian Law Resource Center, La Corte Interamericana de Derechos Humanos vuelve a exigir a Nicaragua que garantice los derechos de la

rent president has expressed that a “strong political will of his government to fully comply with the decision” exists.<sup>82</sup> On January 16, 2003, the Awas Tingni Community filed suit in the Nicaraguan court system against Nicaraguan President Enrique Bolaños and various other government officials seeking to enforce the Inter-American Court’s decision in *Awas Tingni*.<sup>83</sup> The Nicaraguan Supreme Court accepted jurisdiction over the case, but over a year has passed and no ruling has been issued.<sup>84</sup>

Although the 2001 decision was a moral victory for the Awas Tingni, there is yet no indication that this victory will be enforced. The Community’s land rights, therefore, remain uncertain. Furthermore, the failure of Nicaragua to comply with the Court’s orders does not bode well for the other indigenous groups that have cases pending in the Inter-American Court system. Even if the Court’s reasoning in *Awas Tingni* may be successfully applied in other situations, it appears as if Nicaragua is setting a precedent of its own for neglecting the Court’s authority and the obligation to adhere to international human rights agreements. While other indigenous groups fight their way through their respective domestic court systems and/or the Inter-American Court, the battle for effective enforcement continues in Nicaragua.

## VI. HOW *AWAS TINGNI* WILL BE APPLIED: MAYA INDIGENOUS COMMUNITIES OF BELIZE AND YAKYE AXA INDIGENOUS COMMUNITY OF PARAGUAY

### A. *The Maya of Belize*

The struggle of the Maya indigenous communities of Belize closely parallels that of the Awas Tingni. The Maya people “are descendants of the Maya civilization that flourished throughout substantial parts of Mexico and Central America hundreds of years prior to European colonization.”<sup>85</sup> The Maya communities of southern Belize’s Toledo District have recently been embroiled in an attempt to save their lands from environmental destruction.<sup>86</sup> Since the early 1990s, “the Ministry of Natural

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Comunidad Awas Tingni (Sept. 11, 2002), *available at* [http://www.indianlaw.org/awas\\_Tingni\\_measures.htm](http://www.indianlaw.org/awas_Tingni_measures.htm).

<sup>82</sup> Press Release, Indian Law Resource Center & International Human Rights Law Group, Meeting with President Bolanos about the Awas Tingni Case (Mar. 26, 2003), *available at* [http://www.indianlaw.org/Comunicado\\_de\\_Prensa\\_2003-01-26\\_English.pdf](http://www.indianlaw.org/Comunicado_de_Prensa_2003-01-26_English.pdf).

<sup>83</sup> Press Release, Indian Law Resource Center & International Human Rights Law Group, Indigenous Community Sues the President of Nicaragua for Failure to Implement Decision of International Tribunal (Jan. 16, 2003), *available at* [http://www.indianlaw.org/Resumen\\_implementacion\\_January\\_2003\\_English.pdf](http://www.indianlaw.org/Resumen_implementacion_January_2003_English.pdf).

<sup>84</sup> *Id.*

<sup>85</sup> S. James Anaya, *Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize*, 1 YALE HUM. RTS. & DEV. L.J. 17, 17 (1998).

<sup>86</sup> *See id.*

Resources of Belize has granted numerous concessions for logging on over half a million acres of land in the Toledo District.”<sup>87</sup> Furthermore, in 1997 the Ministry of Energy, Science, Technology and Transportation of Belize approved an application for oil exploration activities on nearly 750,000 acres of the Toledo District.<sup>88</sup>

These developments have negatively impacted a large portion of Maya traditional territory. The logging has “damag[ed] essential water supplies, threaten[ed] access to and use of Maya sacred sites, and strain[ed] plant and wildlife populations.”<sup>89</sup> According to the Toledo Maya Cultural Council:

[T]he effects of the oil activities have been devastating. Indigenous communities have suffered illness from toxins released in the oil development process, and pollutants have caused degradation in the wildlife and plant resources that are critical to indigenous subsistence. Indigenous peoples have also suffered adverse social impacts as the result of an influx of non-indigenous workers and settlers who move onto their lands in connection with the oil development activities.<sup>90</sup>

There are many striking similarities between the Maya and Awas Tingni situations. The indigenous Maya communities of the Toledo District were not consulted about any of the logging or oil exploration activities. In 1996, the Maya brought an action in the court system of Belize to “assert rights over lands and resources that are included in the concessions and seek to have the concessions enjoined and declared in violation of Maya rights.”<sup>91</sup> Unfortunately, this action stalled unanswered in Belize’s Supreme Court for two years.<sup>92</sup> Thus the Maya communities petitioned the Inter-American Commission on Human Rights for redress, and in October of 2000 the Commission held the petition admissible.<sup>93</sup> After more than three years of investigation, in January 2004 the Inter-American Commission announced that the Belizean government had indeed violated Maya property rights protected by the American

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<sup>87</sup> Petition on behalf of Indigenous Communities of the Toledo District against Belize to the Inter-American Commission on Human Rights, submitted by the Toledo Maya Cultural Council, para. 16 (Aug. 7, 1998) [hereinafter *Maya Petition*].

<sup>88</sup> *Maya Indigenous Communities and Their Members*, Case No. 12.053, Inter-Am. C.H.R. 78, para. 36 (Oct. 5, 2000), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Admissible/Belize12.053.htm> [hereinafter *Maya Indigenous Communities*].

<sup>89</sup> *Maya Petition* at para. 19.

<sup>90</sup> *See id.* at para. 13.

<sup>91</sup> Anaya, *supra* note 85, at 17.

<sup>92</sup> *Maya Indigenous Communities*, *supra* note 88, at paras. 49-59.

<sup>93</sup> *Id.* at para. 8.

Declaration on the Rights and Duties of Man.<sup>94</sup> This finding suggests that the Inter-American Commission is willing to, and likely will, file a petition before the Inter-American Court on the Maya's behalf if the Belizean government does not act to demarcate and grant legal title to the Maya's traditional communal territory.<sup>95</sup>

In light of the Maya's clear claim to their territory as indigenous peoples and the overwhelming evidence of serious infractions of the communities' rights for over ten years, it is likely that, in following *Awes Tingni*, the Inter-American Court would find for the Maya if a petition is filed. It also appears, however, that the Court will need to expand its analysis of indigenous land rights to reach this outcome. The Court based its decision in *Awes Tingni* on Nicaragua's violation of article 21 of the American Convention, to which Belize is also a party. The Court, however, extrapolated the rights and protections afforded indigenous peoples under domestic law, in order to not restrict "the enjoyment or exercise of any right or freedom recognized by virtue of the laws" of Nicaragua by virtue of article 29(b) of the Convention.<sup>96</sup>

The Constitution of Belize, in contrast, does not explicitly recognize the rights of indigenous groups to their ancestral land.<sup>97</sup> Furthermore, neither legislation nor common law courts in Belize have explicitly recognized or rejected indigenous land rights.<sup>98</sup> Nevertheless, there seem to be two distinct possible alternatives for the Inter-American Court to extend its reasoning in *Awes Tingni* to potential Maya claims.

First, the Court could choose to extend its application of article 21 of the American Convention to Maya, regardless of the absence of clear indigenous protections in Belizean domestic law. If the Court so chooses, it will be taking a step toward establishing a right of indigenous peoples to ancestral lands independent of any domestic law or international agreement. More precisely, the Court will need to recognize indigenous land rights as a norm of customary international law. As commonly formulated, norms of customary international law require consistent state practice and *opinio juris*, which is defined as "the sense of legal obligation that must be shown to transform state practice into a rule of law."<sup>99</sup>

To identify indigenous land rights as a protected norm of customary international law, the Court will need to rely on more than the provisions of the American Convention and its decision in *Awes Tingni*. Even by

<sup>94</sup> Press Release, Indian Law Resource Center, International Commission Finds Belize is Violating Maya Human Rights (Jan. 21, 2004), available at <http://www.indianlaw.org/20040121BelizePR.pdf>.

<sup>95</sup> *Id.*

<sup>96</sup> American Convention, *supra* note 54, art. 29(b), 1144 U.N.T.S. at 153.

<sup>97</sup> See generally BELIZE CONST., available at <http://www.georgetown.edu/pdba/Constitutions/Belize/belize81.html>.

<sup>98</sup> Anaya, *supra* note 85, at 25.

<sup>99</sup> See DANIEL G. PARTAN, THE INTERNATIONAL LAW PROCESS, 85 (1992).

marshalling favorable international indigenous adjudication inside and outside of the Inter-American system along with domestic and international instruments which provide for indigenous protections such as the Nicaraguan Constitution and ILO Convention No. 169, it will be a considerable stretch to find indigenous land rights protected by consistent state practice. On the contrary, state practice has not consistently protected indigenous land rights, a fact evidenced by the excitement *Awas Tingni* generated for indigenous rights advocates for its potential to set precedent for future cases in the Inter-American system.<sup>100</sup> It appears too early to present indigenous land rights protection as a norm of customary international law, and doing so would not effectively apply *Awas Tingni* to the Maya case.

Alternatively, the Court could find implicit protections for indigenous peoples in general, and for their land rights in particular, in several provisions of Belizean domestic law, in order to apply the provisions of the American Convention as in *Awas Tingni*. The Constitution of Belize has several provisions that when read together and applied in a light most favorable to indigenous groups, could be used toward this goal. The Constitution prohibits discrimination on the basis of racial or ethnic characteristics, forbids arbitrary seizure of property, and prescribes appropriate procedures for the taking of property by the government.<sup>101</sup> Because the constitutional protections extend to property “of any description,” it could be inferred that ancestral indigenous lands are entitled to such protections.<sup>102</sup> Such an application of Belizean constitutional law would require the Court to assume, however, that ancestral indigenous lands fall within the Belizean definition of “property” for purposes of the Constitution or other domestic law. This assumption was unnecessary in *Awas Tingni* because Nicaragua expressly defined indigenous communal property in Law No. 28.<sup>103</sup> Thus, if the Court chooses this reasoning, it will have fewer domestic bases to support a finding of a violation of Maya rights pursuant to article 21 of the American Convention. The Court could also be seen as basing such a decision on speculation about how the framers of the Constitution of Belize and past and present Belizean legislatures and courts have perceived their indigenous peoples.

The prospect of extending the *Awas Tingni* analysis to the Maya case thus does not seem as hopeful when the particulars of the Inter-American Court’s reasoning are applied, regardless of the factual similarity of the two cases. This is a good example the difficulty of generalizing indige-

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<sup>100</sup> See generally S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT’L & COMP. L. 1 (2002).

<sup>101</sup> See BELIZE CONST. arts. 3, 16, 17.

<sup>102</sup> *Id.* at art. 17(1).

<sup>103</sup> *Awas Tingni Community*, Inter-Am. Ct. Hum. Rts., (Ser. C) No. 79, at para. 150.

nous rights and protections across international borders. The diversity of indigenous cultures combined with the diversity of state legal systems provides a substantial challenge to a uniform indigenous rights law.

### B. *The Yakye Axa of Paraguay*

Brief mention of the *Yakye Axa* case is helpful to demonstrate further considerations in indigenous land rights cases. The *Yakye Axa* indigenous community is a part of the larger group of Enxet-Lengua people of Paraguay. The community first initiated administrative and judicial procedures to attain demarcation of and title to their ancestral territory in 1993.<sup>104</sup> The *Yakye Axa* people are a small group—47 families—of hunter-gatherers, who subsist mainly by hunting, fishing, gathering fruits and nuts, and, to a limited extent, farming.<sup>105</sup> The community is transient within their territory, maintaining a small village in a given area until fish or game numbers become scarce, at which time they move on to another area. This form of subsistence is similar in form to the *Awes Tingni's*, and likewise requires a substantial land area to remain viable. Since 1996, the *Yakye Axa* people had been occupying a strip of common land between Pozo Colorado and Concepción, which is under the jurisdiction of the Traffic Office.<sup>106</sup>

The cultural characteristics of the *Yakye Axa* raise some important issues. The group is very small, and to those without culturally sensitive eyes, may appear to be a just a band of squatters living in huts along a highway. A group with so little economic and political capital can easily be ignored by a state. And from the state perspective, it could become a burden if every such indigenous community claims a wide land area. Thus the question is raised: will there be parameters set on the size of an indigenous group before it is provided communal land protections? It would seem illogical and unethical to deny a small indigenous group like the *Yakye Axa* the right to its ancestral land, while granting larger and well-supported groups such as the *Awes Tingni* or the *Maya* title to their ancestral land. But without a principled procedure for analyzing indigenous claims, it seems likely that a land-grab would result, which would be detrimental to both legitimate indigenous and state interests.

In September 2001, while the action for title to their territory was pending, the *Yakye Axa* petitioned the Inter-American Commission to adopt provisional measures “on behalf of the *Yakye Axa* indigenous community in consideration of major incidents occurring in the past hours that seriously threaten the security of the community’s families and its

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<sup>104</sup> *Yakye Axa Indigenous Community of the Enxet-Lengua People*, Petition 12.313, Inter-Am. C.H.R. 2, para. 21 (Feb. 27, 2002), [ERROR! HYPERLINK REFERENCE NOT VALID.available at http://www.cidh.oas.org/annualrep/2002eng/Paraguay.12313.htm](http://www.cidh.oas.org/annualrep/2002eng/Paraguay.12313.htm).

<sup>105</sup> *Id.* at para. 20.

<sup>106</sup> *Id.* at paras. 11, 20.

integrity.<sup>107</sup> They reported that a criminal judge in Concepción, in proceedings entitled “*Investigation of invasion of property, serious coercion, and robbery at Estancia Loma Verde*,” ordered the Community’s houses to be removed.<sup>108</sup>

The Commission sustained the Community’s petition for provisional measures and forwarded the group’s request to the Paraguayan government.<sup>109</sup> Paraguay thereafter agreed to halt the removal of the Yakye Axa’s houses until resolution of Yakye Axa’s petition for demarcation of their territory. Because that action had been in limbo for nearly ten years, however, the Yakye Axa petitioned the Inter-American Commission again, this time for redress of Paraguay’s infringement on their rights to their ancestral lands. On February 27, 2002, the Inter-American Commission held the Yakye Axa petition admissible, and on March 17, 2003, referred the case to the Inter-American Court.<sup>110</sup>

The Yakye Axa Community will have a substantial advantage in their case: the Paraguayan Constitution includes an express protection of communal property of Indian peoples.<sup>111</sup> Article 64 of the Paraguayan Constitution provides:

- (1) Indian peoples have the right, as communities, to a shared ownership of a piece of land, which will be sufficient both in terms of size and quality for them to preserve and to develop their own lifestyles. The State will provide them with the respective land, free of charge. This land, which will be exempt from attachments, cannot be divided, transferred, or affected by the statute of limitations, nor can it be used as collateral for contractual obligations or to be leased. It will also be exempt from taxes.
- (2) The removal or transfer of Indian groups from their habitat, without their express consent, is hereby prohibited.<sup>112</sup>

Thus it would appear that the group has at least some domestic law protection that the Inter-American Court could tie to article 21 of the American Convention. Whether this case will even make it before the Court is itself an interesting question. Paraguay successfully delayed addressing this issue for over a decade while the Community’s petition for demarcation wallowed in the state’s court system. With *Awás Tingni* standing at least for the proposition that states with domestic law protections of

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at decision paras. 1-3; Contentious Cases Before the Inter-American Court of Human Rights, Annual Report of the Inter-American Commission on Human Rights 2003, OEA/Ser.L/V/II.118, Doc. 5 Rev. 2 (2003), at para. 383, available at [http://www.iachr.org/annualrep/2003eng/chap.3k.htm#\\_ftn9](http://www.iachr.org/annualrep/2003eng/chap.3k.htm#_ftn9).

<sup>111</sup> CONSTITUCIÓN DE LA REPÚBLICA DE PARAGUAY, art. 64 (Para.), available at <http://www.georgetown.edu/pdba/Constitutions/Paraguay/para1992.html>.

<sup>112</sup> *Id.*

indigenous land rights which are violating those rights will be susceptible to adverse treatment in the Inter-American human rights system, and the recent findings of the Inter-American Commission in the Maya case, it will be interesting to see how the Paraguayan government reacts.

## VII. CONCLUSIONS

The Awas Tingni's legal victory was but one step in the ongoing struggle for the recognition and protection of indigenous peoples' rights. It is uncertain exactly how this decision will prompt Nicaragua and other countries to recognize and demarcate indigenous territories. A major hurdle for any group wishing to address their grievances before the Inter-American Court is the exhaustion of their domestic legal remedies. In *Awas Tingni*, the initial, domestic complaint was dismissed on procedural grounds, and the second, although successful in the courts, was virtually ignored by the Nicaraguan government. This drastic situation ultimately allowed the Community to be heard before the Inter-American Court. Had Nicaragua taken steps to recognize and redress Awas Tingni concerns, even if performed in a manner most favorable to the state or as total pretext, the Inter-American Court may not have had jurisdiction to hear the case. One concern for future litigation of indigenous land rights is that a state may take all steps to bar trial before the Inter-American Court by erecting procedural hurdles.

A further concern is that states that do not provide indigenous protections under domestic law will not be found in violation of the American Convention for infringing on indigenous rights in cases tried before the Inter-American Court. Because the Court tied its reasoning in *Awas Tingni* to Nicaragua's domestic law, it is difficult to ascertain how claims of indigenous groups such as the Maya will fare in the Inter-American system. The great diversity of indigenous cultures and their interaction with state legal systems adds complexity and another far-reaching challenge to indigenous rights both within the Inter-American system and throughout the world.

The latest developments in *Awas Tingni* highlight the fragility of indigenous rights in a legal system that provides ambiguous protections. More than two years after the decision, Nicaragua has still not fulfilled the order of the Inter-American Court. The required progress reports have not been filed. The land has neither been demarcated nor title granted to the Awas Tingni Community. Nicaragua's failure to remit to the required judgment calls into question whether it is performing its obligations as a member of the Organization of American States and as a party to the American Convention on Human Rights in good faith. Moreover, the authority and effectiveness of the Inter-American Court could be compromised if member states continue to ignore Court orders without sanction. From here, the Inter-American Court may either assert its authority



and become a beacon for indigenous rights, or it may become obscure, obsolete, or even irrelevant.

There are also local logistical concerns in indigenous land rights. For example, indigenous lands such as those in *Awas Tingni* consist of a large area—what if they constitute the lands of two or more groups? With large areas that are not easily patrolled or demarcated, there may be overlap. How would Nicaragua or another state handle this matter? There must be equitable procedures developed and followed in good faith to demarcate indigenous lands—as is the case in Australia now with development in Native Title claims.<sup>113</sup> Otherwise, a race to demarcate could result, or even worse, groups with greater resources could prevail over others with equal claim to the same land. What will these procedures be? What rights to objection and/or review will indigenous peoples have in the process? These complicated questions can only be resolved through benchmark cases like that of the *Awas Tingni*.

The importance of *Awas Tingni* is therefore not only in the decision of the Inter-American Court; of perhaps even greater importance is the sequence of events that will follow. The *Awas Tingni* Community is poised to become a model for legal and political recognition of indigenous land rights. The Inter-American Court of Human Rights is poised to become the instrument for enforcement of those rights. But what of other indigenous communities? The *Awas Tingni* Community had certain advantages in their struggle: top international lawyers, anthropologists, development workers, and technology such as Global Positioning Systems to identify their territory. The availability of such resources was undoubtedly a key to their (tentative) success. Nicaragua's ultimate reaction to the *Awas Tingni* case will bear heavily both on the international community's view of the Inter-American Court and on the pending Maya and Yakyé Axa cases. It can only be the hope that *Awas Tingni v. Nicaragua* will provide other indigenous groups with a tool of empowerment and will provide governments with a reminder that infringement on indigenous land rights is a serious violation of human rights.

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<sup>113</sup> See generally South West Aboriginal Land & Sea Council, available at <http://www.noongar.org.au/nlc.htm>.

