NICARAGUA

Observations on the 3rd Periodic Report by Nicaragua on its Compliance with the International Covenant on Civil and Political Rights

Presented by the University of Arizona Indigenous Peoples Law and Policy Program, in representation of

The Awas Tingni Indigenous Community, Nicaragua

Presented before the Human Rights Committee for its 92nd Session
(17 March – 4 April 2008)

20 March 2008

1. Introduction

1. We respectfully present the following observations before the Human Rights Committee ("the Committee") on the state of Nicaragua's compliance with the International Covenant on Civil and Political Rights ("the Covenant") in preparation of its 92nd Session from 17 March to 4 April, 2008. The present communication is presented on behalf of the Awas Tingni Community of Nicaragua ("the Community" or "Awas Tingni") by the Indigenous Peoples Law and Policy Program of the University of Arizona. In particular, we provide our observations to paragraphs 773-780 of Nicaragua's 3rd Periodic Report to the Human Rights Committee, in which Nicaragua states that it is complying with the 2001 judgment of Inter-American Court of Human Rights ("Inter-American Court") in the case of *Awas Tingni v. Nicaragua*. In that case, the Inter-American Court ordered Nicaragua to delimit, demarcate, and title the traditional territory of the indigenous Awas Tingni community.

2. The present communication also follows up on our 27 September 2005 Observations to the Committee ("2005 Observations").[1] Our 2005 Observations were presented in anticipation of the 85th session of the Human Rights Committee, during which time it was to review Nicaragua's overdue 3rd Periodic Report; however, Nicaragua postponed the submission of its report until June 2007. The information contained in the 2005 Observations remains valid today and is hereby reiterated and incorporated by reference herein.

3. The Human Rights Committee has confirmed that "the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong."[2] Thus, when indigenous groups

[1] Observations on the state of compliance with the International Covenant on Civil and Political Rights, Indigenous Peoples Law and Policy Program, University of Arizona (on behalf of Awas Tingni Community), for the 85th session of Human Right Committee (27 September 2005) [in Spanish] [hereinafter "2005 Observations"] [Attached as Appendix 1].
[2] Chief Bernard Ominayak and the Lubicon Lake Band v. Canada, para. 32.2, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990).

are concerned, traditional land tenure and resource use is an aspect of culture that must be recognized, respected, and protected.[3] According to the Committee:

> Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.[4]

Furthermore, the Committee has confirmed that states should take affirmative measures to protect those aspects of culture that are important to a group's identity, including, in the case of indigenous peoples, aspects related to lands and resources.[5]

4. The Awas Tingni case is representative of Nicaragua's failure to comply with article 27 in relation to its obligation to protect indigenous peoples' lands and resources. This failure is demonstrated in the continued delays in the legal titling of Awas Tingni's lands. These delays stem in part from the government's failure to effectively resolve overlapping claims between Awas Tingni and neighboring indigenous communities, opting instead to use the conflicts as a pretext for not fully recognizing Awas Tingni's land claim. As detailed in our 2005 Observations to the Committee, the lack of compliance by Nicaragua with its international obligations has signified not only a protraction in the demarcation and titling of Awas Tingni's lands, but has also facilitated the uncontrolled plundering of its natural resources by third party loggers and non-indigenous settlers, which have created ecological destruction, economic loss and a climate of social instability.[6]

2. The state of Nicaragua's implementation of the *Awas Tingni v. Nicaragua* judgment

5. As Nicaragua noted in its 3rd Period Report to the Committee, in its 2001 judgment in the case of *Awas Tingni v. Nicaragua*, the Inter-American Court ordered that Nicaragua adopt legislative, administrative and other measures to create an "effective mechanism for the delimitation, demarcation and titling of indigenous communities" in all of Nicaragua and that it specifically demarcate and title Awas Tingni lands within a period of 15 months.[7] While the Community's lands await demarcation and titling, Nicaragua must "abstain from carrying out … actions 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 geographical area where the members of the Community live and carry out their activities."[8]

6. Nicaragua still has not complied with the order of the Inter-American Court to secure Awas Tingni's traditional territory and to prevent further invasion onto Awas Tingni lands. The 15

[3] *Id*. paras. 32.1, 32.2, 33 (finding that article 27 had been violated when the government granted leases for oil and gas exploration and timber development within lands traditionally used and occupied by indigenous peoples).
[4] U.N. Human Rights Comm., *General Comment No. 23(50): The Rights of Minorities (Art. 27)*, para. 7, UN Doc. CCPR/C/21/Rev.1/Add.5 (6 April 1994).
[5] *Id*. paras. 6.1-6.2, 7.
[6] *See* 2005 Observations, supra note 1, at paras. 23-31.
[7] *Case of the Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, Inter-American Court of Human Rights (31 August 2001), Inter-American Court Human Rights (Series C) No.79, at para. 164.
[8] Ibid. at para. 173(4).

month deadline mandated by the Inter-American Court has long come and gone and after more than six and a half years since the Court ruling, the Community is still without title to its lands. As detailed in our 2005 Observations, to comply with the 2001 judgment in the *Awas Tingni* case, Nicaragua enacted a legislative measure providing for indigenous land demarcation (Law 445). Nevertheless, the institutions created by Law 445 continue to suffer from systemic deficiencies due to a lack of sufficient monetary and technical support provided by the Nicaraguan government. Law 445 has therefore failed to be an effective mechanism for demarcating and titling indigenous land in the Atlantic Coast of Nicaragua.[9]

7. Exacerbating the delays in Nicaragua's compliance with its international obligations is the state's failure to deal adequately and in a timely manner with the existence of overlapping land claims between Awas Tingni, a Mayangna community, and the three neighboring Miskito communities (collectively known as Tasba Raya) that the government relocated to the Awas Tingni area in the 1970s.[10] Instead of taking advantage of the spirit of cooperation and co-existence that existed between Awas Tingni and the Tasba Raya communities prior to and during the proceedings before the inter-American system,[11] government representatives have used the existence of these territorial overlaps as a pretext for not recognizing the Community's territorial claim, perhaps to divert attention from the lack of political will and institutional capacity necessary to advance the demarcation and titling process.

8. Largely on its own initiative, over the past three years Awas Tingni participated in a series of protracted and ultimately failed negotiations with the Tasba Raya communities, during which central government and regional authorities failed to establish the conditions necessary to effectively resolve the conflict and prevent hostilities from arising against Awas Tingni Community members by members of Tasba Raya. During its final mediation session with Tasba Raya in October 2006, the Awas Tingni Community offered its largest concession to date consisting of 15,000 hectares of the total 41,000 hectares of overlap for the exclusive use of the Tasba Raya communities. This offer was rejected amidst serious suspicions by the Community that government and other outside interests influenced the negative decisions of the Tasba Raya leadership present in that mediation session.[12]

9. In the absence of a mediated solution, the Demarcation Commission of the Northern Autonomous Regional Council issued a resolution to the territorial conflict, which was ratified by the full Regional Council on February 14, 2007.[13] Both the Demarcation Commission and Regional Council until that time had remained relatively idle with regard to the matter, even though under Law 445 these are the entities charged with resolving inter-communal territorial disputes. Under the resolution, Awas Tingni received 20,000 hectares of the land in the overlap

[9] 2005 Observations, supra note 1, at paras. 14-22.
[10] *See generally*, Ibid. at para. 21.
[11] The Tasba Raya communities joined in an *amicus* submission to the inter-American Court in support of Awas Tingni during the proceedings before the court.
[12] *See* "Comunidad Awas Tingni hace un último esfuerzo de reconciliación con vecinos durante histórica sesión de mediación", Boletín Informativo del Caso Awas Tingni vs. Nicaragua, No. 4 noviembre de 2007.
[13] *See* Ratificación de la Resolución de la Comisión de Demarcación y Ordenamiento Territorial del Consejo Regional Autónomo del Atlántico Norte que resuelve el Conflicto Limítrofe entre la Comunidad Indígena Awas Tingni y las Comunidades Indígenas Francia Sirpi, Santa Clara y La Esperanza del Territorio de Tasba Raya (Resolución No. C.D./CO-02-10-07).

area and the three neighboring communities shared the remaining 21,000 hectares equally. The Commission directed the National Demarcation and Titling Commission (CONADETI), the regional government institution in charge of the demarcation process, to delimit, demarcate and title the remainder of Awas Tingni's territory (totaling 73,394 hectares) without further delay.

10. Since the February 2007 Resolution, the Community has received little response from CONADETI and other demarcation institutions and instead, has been able to get some support for its land demarcation efforts from the Regional Development Council of the Caribbean Coast, which was created in 2007. During meetings in June 2007, this institution assured Awas Tingni that it would receive its long awaited title on August 9, 2007.[14] However, while the Regional Development Council helped mobilize the relevant institutions to carry out the first stage of boundary-marking, which was completed on July 18, 2007, the second and final stage of boundary-marking, leading to actual land titling, has not yet taken place. This was due to Nicaragua's Land Administration Project's (PRODEP)[15] insistence that Awas Tingni and a neighboring block of Miskito communities, Diez Comunidades, initiate a new conflict resolution stage to address a new and unsubstantiated overlap claim that was brought to the attention of Awas Tingni on June 2007.[16] Recognizing the questionable nature and timing of this alleged conflict, several government officials, particularly within the Regional Development Council, have assured Awas Tingni that they see no basis for the Diez Comunidades claim and that they intend to continue carrying out the February 2007 Resolution. However, since then, Awas Tingni has been told that its land title was scheduled to be issued on October 2007, November 2007, and then December 2007. Yet to date Awas Tingni remains without title to its lands.

11. It is important to point out that the same claim of an overlap with Diez Comunidades was raised by the Nicaraguan State during the 2001 Inter-American Court proceedings to support its claim that it could not legally recognize the totality of Awas Tingni's land claim.[17] However, at no point during those proceedings did the State ever demonstrate the existence of any property right held by any other indigenous community or third parties, including the Diez Comunidades, even after the Inter-American Court specifically requested such information.[18] The Diez Comunidades do have a land title issued in their name from around 1915 under the Harrison-Altamirano Treaty. However the boundary limits of that title do not lie within or even near

[14] *See* Committee on the Elimination of Racial Discrimination, Informe presentado por los estados partes conforme al artículo 9 de la Convención, Decimocuarto informe periódico de los Estados Partes que debía presentarse en 2006. Adicion: Nicaragua (21 June 2007) CERD/C/NIC/14, Oct. 15, 2007, at para. 164.

[15] PRODEP is an institution financed by the World Bank that began operating in 2003. It has played a major role in implementing the Bank's mission to bring legal certainty and transparency within Nicaragua's property rights regime, which has included the recognition of indigenous property right within the framework of Law 445.

[16] In fact, PRODEP has assured the Diez Comunidades leadership that it will not carry out any boundary-marking within the area allegedly claimed by Diez Comunidades. See Letter by Hazel Law, Coordinator of Indigenous Component of PRODEP to Rosa Wilson, President of Bloque Diez Comunidades (2 July 2007) (on file with legal representatives); In addition, PRODEP made a statement to the Community that it will not disburse any funds for the completion of on-the ground boundary-marking until Awas Tingni sits down to negotiate with Diez Comunidades. Personal communication from Hazel Law, Director of PRODEP Indigenous Component to Awas Tingni leaders and Leonardo Alvarado (IPLP) (August 2007).

[17] Inter-American Court of Human Rights, *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Series C) no. 79, at Testimony of Marco Antonio Centeno Caffarena, Director of the Office of Rural Titling of Nicaragua. The Awas Tingni decision is available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

[18] Ibid. at para. 69.

Awas Tingni; therefore, no actual overlap exists within the area to be titled in favor of Awas Tingni, which itself was determined based on an extensive diagnostic study of the Community's traditional use and occupation of that area, which was commissioned by the state under the requirements of Law 445.

12. Also worth noting is that the relevant institutions of Law 445 never called for a conflict resolution stage with Diez Comunidades when reviewing Awas Tingni's land title application and analyzing all legitimate neighboring land claims. The only claim identified by these institutions was the Tasba Raya conflict; and the February 2007 Resolution unequivocally concluded the conflict resolution stage and moved Awas Tingni's title application into the demarcation and titling stage under Law 445. Furthermore, the February 2007 Resolution did not state that any further conflict resolution process needed to be undertaken. Nevertheless, some members of government have insisted that Awas Tingni hold conflict resolution sessions with the Diez Comunidades. In order to comply with these requests, Awas Tingni did hold several such sessions with Diez Comunidades in June 2007. During the meetings, Diez Comunidades was still unable to present any historical or legal evidence to demonstrate property rights within the territory claimed by Awas Tingni. In addition, the conflict resolution efforts were carried out in an *ad hoc* fashion, outside the scope of Law 445, and did not apply any procedures to address or resolve the purported overlapping land claims in a manner that fully respects indigenous land rights based on traditional use and occupancy.

13. From June 2007 to February 2008 the Awas Tingni community did not receive any notice of the status of its land titling application. In late February 2008, however, CONADETI met to discuss Awas Tingni's application (without the knowledge or involvement of the Awas Tingni community). In its report following that meeting, CONADETI stated that it will advance the demarcation and titling of Awas Tingni's lands, but only after there has been solution to the Diez Comunidades conflict.[19] Of concern is CONADETI's statement that the conflict resolution process must involve participation of all "decision-making actors" including communal, territorial, municipal, regional and national authorities, and also involve the participation of religious leaders who the report states have played a "determining role" in the indigenous communities of the Atlantic Coast.[20] It is essential to note that Law 445 calls for the communities to resolve any conflicts among themselves, with assistance of the Demarcation Commission of the Regional Council. The sudden and unilaterally-determined requirement that Awas Tingni's land titling be postponed until there has been a resolution of the Diez Comunidades claim, and that numerous actors participate in conflict resolution process, presents serious concerns over procedures the efficacy of the procedures employed by CONADETI in its operations and it also reflects the state's overall willingness to effectively resolve the current impasse in the land titling process for Awas Tingni.

14. Awas Tingni has maintained that if Diez Comunidades does have a legitimate claim, it should be made in writing, and should formally request that the conflict resolution phase under Law 445 be reinitiated. No formal request has ever been presented by Diez Comunidades; and it

[19] Comisión Nacional de Demarcación y Titulación (CONADETI), Aplicación y grado de cumplimiento de la Sentencia emitida por la Corte Interamericana de Derechos Humanos sobre el caso concreto de la Comunidad de Awas Tingni, Report presented to Dr. Hernán Estrada, Attorney General (27 February 2008), at 4-5.
[20] Ibid. at 5.

is not entirely clear from the February 2008 CONADETI Report whether it has formally called for a new conflict resolution stage, especially considering that there is no provision under Law 445 that allows for CONADETI to reopen the conflict resolution phase. Under articles 52 and 53 of Law 445, the identification of actual overlapping claims that merit a conflict resolution stage is carried out by the Inter-Sectorial Demarcation and Titling Commission (CIDT), which then forwards the application to the Demarcation Commission of the Regional Council to carry out the conflict resolution phase. At no point during the five year processing of Awas Tingni's land title application has there been a mention by the CIDT of the need to undergo a conflict resolution stage with Diez Comunidades. More ambiguous still is how exactly the land demarcation institutions intend to resolve the purported overlapping land claim, and whether this process will be in accordance with national and international law, which recognizes indigenous rights to land based on traditional use and occupancy.

15. Awas Tingni has complied with all the requirements of Law 445 in order to obtain legal recognition of its ancestral title. However, the most fundamental aspect of the Inter-American Court's decision—the demarcation and titling of Awas Tingni lands—has yet to be completed. What should be a fairly simple procedure (laying physical posts along Awas Tingni's boundary and issuing a title over that area) at times seems to be as much a distant probability as it was before the 2001 judgment of the Inter-American Court.

16. Certainly, the land titling situation is more complicated in the aftermath of Hurricane Felix, which severely impacted the Northern Atlantic Coast Region on September 2007 and in the case of Awas Tingni, reduced almost all of its ancestral rainforest to an impenetrable mass of tree trunks and sticks. In a matter of hours, the Community lost the forest and resources that it has fought for years to protect. The hurricane also destroyed the majority of the posts set during the first phase of the boundary-marking process in July 2007. The Awas Tingni members fear that third parties, which have already caused ecological devastation of Awas Tingni's territory,[21] will take advantage of the chaotic situation to further exploit resources within Awas Tingni lands; and in fact, various logging companies have approached the community members with proposals to extract the valuable fallen hardwood, but which are of questionable benefit to the Community. In addition, non-indigenous settlers have continued to make incursions into Awas Tingni lands and in one case destroyed the Community's own boundary markers after Hurricane Felix, chopping it with a machete.

17. These actions by third party actors were precisely the type of problems that the Inter-American Court of Human Rights ordered Nicaragua to prevent while the Awas Tingni community awaited the demarcation and titling of its territory. Consequently, more than ever, the demarcation of the Community's territorial boundaries and the issuance of the land title will be essential to protecting the Awas Tingni traditional territory from these illegal incursions. The Awas Tingni community understands that the destruction caused by the hurricane has affected many indigenous communities in the Atlantic Coast and is aware that the Regional Council and other State institutions have considerable work to do to rebuild the disaster zones. However, it also knows that the reconstruction efforts can take place simultaneously with efforts to secure the land tenure of the affected indigenous communities.

[21] *See* supra note 6.

3. Conclusion and Request of Committee

18. There are clear steps that Nicaraguan government institutions must carry out to complete the demarcation and titling of Awas Tingni lands and comply with its obligations under article 27 of the Covenant on Civil and Political Rights. Accordingly, we respectfully suggest that the Human Rights Committee adopt the following in its list of issues regarding Nicaragua in light of the situation of the Awas Tingni community:

- Please inform the Committee of the timeline that has been set to demarcate and title Awas Tingni's lands as its internationally obligated to do by the judgment of the Inter-American Court of Human Rights in the *Awas Tingni v. Nicaragua* case;
- Please inform the Committee of the measures the State Party has taken and will take to prevent, halt, investigate, and sanction all illegal third party activities in Awas Tingni territory, including illegal land sales, settlement, and logging;
- Is the claim by Diez Comunidades being addressed by state land demarcation institutions in accordance with the procedures established under Law 445? Please detail how the State Party intends to promptly and fairly evaluate and resolve the Diez Comunidades claim in a way that respects indigenous land rights based on traditional use and occupancy, and in accordance with article 27 of the Covenant and the 2001 judgment in the *Awas Tingni v. Nicaragua* case.

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