PROSPECTS AND CHALLENGES IN THE IMPLEMENTATION OF INDIGENOUS PEOPLES' HUMAN RIGHTS IN INTERNATIONAL LAW: LESSONS FROM THE CASE OF *AWAS TINGNI v. NICARAGUA*

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I. INTRODUCTION

The Inter-American Court of Human Rights' 2001 decision in the case of the *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua* is the first judgment by an international tribunal to recognize the communal property rights of indigenous peoples and to also mandate a state to protect those rights. The *Awas Tingni* case has represented an important landmark for indigenous peoples in the Americas and beyond; as a result, indigenous peoples are increasingly using international human rights institutions to defend their lands, territories, and cultures, and for their survival. This case has set a precedent within the Inter-American human rights system dealing with indigenous peoples' communal forms of property ownership, their customary land tenure practices, and their control over their natural resources.

Most recently, the *Awas Tingni* case has provided a testing ground for the actual implementation of international norms and tribunal decisions dealing with the much conflicted and contested process of state recognition and respect for indigenous peoples' distinct political, cultural, and territorial existence. Since the historic 2001 ruling in favor of the protection of its ancestral property rights, the Awas Tingni community has faced continuing challenges in obtaining the demarcation and titling of its territory, which has been its most important objective since it first brought its case against the Nicaraguan state. These challenges reflect the problems faced by other indigenous peoples in fully realizing their rights recognized under domestic and international laws. Nonetheless, Awas Tingni's victory in the Inter-American Court of Human Rights has brought the issue of land demarcation of indigenous territories and indigenous peoples' natural resource rights further into the forefront of regional and national politics in Nicaragua. It also holds important lessons for other indigenous communities facing similar battles for the recognition of their land and natural resource rights.

This article describes the events following the 2001 landmark decision and underlines the continuing significance of the *Awas Tingni* decision and its implications for other indigenous communities and advocates seeking to assert their human and territorial rights in national and international legal forums. Part II of this article provides a background and overview of the *Awas Tingni* decision by the Inter-American Court of Human Rights and the valuable contribution this decision has made to the development of international jurisprudence on indigenous peoples' rights. Part III describes events that have taken place during the implementation

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stage of the Inter-American Court judgment. Part IV analyzes the obstacles that the Awas Tingni have faced with regards to the demarcation of their traditional lands. Part V reflects on possible avenues for the implementation, both at the international and the national levels, of international tribunal decisions such as *Awas Tingni,* which take note of recent political developments in Nicaragua that are of extreme relevance to indigenous peoples.

II. BACKGROUND ON THE *AWAS TINGNI V. NICARAGUA* CASE

A. The Inter-American Court Decision

The case of the *Mayangna (Sumo) Community of Awas Tingni v. Nicaragua* began in 1995 as an effort to legally contest a concession granted to a Korean-based logging company by the Nicaraguan government within the ancestral territory of the Awas Tingni, a small indigenous community belonging to the Sumu-Mayangna indigenous people of Nicaragua's Atlantic Coast.[1] This concession was awarded without the community's consent and without regard to its previous efforts to obtain legal recognition of its ancestral lands. It also occurred despite the existence of domestic legal provisions that should have protected the rights of indigenous communities in the Atlantic Coast.

The Nicaraguan Constitution recognizes the existence, culture, and communal forms of land ownership of indigenous peoples including the right to "the use and enjoyment of the waters and forests on their communal lands."[2] Additionally, Law 28 (the Autonomy Statute),[3] which was enacted in 1987 to address the aspirations of

1. The term Sumu/Sumo has been used to refer to the Mayangna, the term they use to designate themselves. The Mayangna, along with the Miskito and Rama people, are the indigenous peoples of Nicaragua's Atlantic Coast, which constitutes the eastern portion of the country which itself has had a historical, cultural and political development different from the northern, central, and Pacific regions of the country. The Atlantic Coast is also home to communities of Afro-descendent peoples, the Creole and Garifuna. For information on the demography and current socio-cultural and economic situation of the Atlantic Coast, *see generally* Programa de las Naciones Unidas para el Desarrollo, *Informe de Desarrollo Humano 2005: Las Regiones Autónomas de la Costa Caribe*, U.N. Doc. N/303.44/P964/2005 [U.N. Dev. Program, 2005 Human Dev. Report: Atl. Coast of Nicar.], *available at* http://www.idhnicaribe.org/idh2005_pdf.zip [hereinafter UNDP Report] (providing information on the demography and current socio-cultural and economic situation of Nicaragua's Atlantic Coast).

2. Constitución Política de la República de Nicaragua [Cn.] [Constitution] tit. I, ch. I, art. 5, tit. IV, ch. VI, art. 89, La Gaceta [L.G.] 9 January 1987.

3. Ley No. 28, 2 September 1987, Estatuto de Autonomía de las Regiones Autónomas de la Costa Atlántica de Nicaragua [Autonomy Statute for the Autonomous Regions in the Atlantic Coast of Nicaragua] La Gaceta [L.G.] No. 238, 30 October 1987 (Nicar.) [hereinafter Autonomy Statute]. The Autonomy Statute created two autonomous regions in Nicaragua's historically isolated Atlantic Coast – the Northern Autonomous Atlantic Region (RAAN) and

indigenous peoples in the Atlantic Coast and establish autonomous regional governments for their benefit, provided that indigenous communal property consists of the "land, waters, and forests that have traditionally belonged to the communities of the Atlantic Coast."[4] These lands are inalienable and cannot be "donated, sold, leased nor taxed, and are inextinguishable."[5] However, like the rest of the indigenous communities in the Atlantic Coast, the Awas Tingni community did not have a title to its ancestral territory nor was there a specific procedure for indigenous peoples to register for and obtain a deed to their ancestral territories. This situation facilitated the granting of logging concessions by the Nicaraguan government on indigenous territories, which were erroneously considered to be state-owned.

After a series of frustrated attempts to invalidate the logging concession, as well as to obtain legal title to its land within the Nicaraguan legal system, the Awas Tingni community pursued the case within the Inter-American Commission of Human Rights ("Inter-American Commission" or "Commission"). This eventually led to the case being brought under the jurisdiction of the Inter-American Court of Human Rights, resulting in the historic ruling on August 31, 2001 in favor of the Awas Tingni.[6] As the highest human rights judicial body within the Organization of American States ("OAS"), the Inter-American Court adjudicates claims of violations by OAS member-states of the American Convention on Human Rights ("American Convention").[7]

Southern Autonomous Region (RAAS). These regions are further divided into municipalities according to traditional communal patterns. *Id.* arts. 6, 7. For further information on the development of the Autonomy Regime in the Nicaraguan Atlantic Coast, *see generally,* ROQUE ROLDÁN ORTEGA, LEGALIDAD Y DERECHOS ÉTNICOS EN LA COSTA ATLÁNTICA DE NICARAGUA [LEGALITY AND ETHNIC RIGHTS IN THE ATLANTIC COAST OF NICARAGUA] (Fundación Gaia/Programa de Apoyo Institucional a los Consejos Regionales y las Administraciones Regionales de la Costa Atlántica RAAN-ASDI-RAAS 2000) and MIGUEL GONZÁLEZ PÉREZ, GOBIERNOS PLURIÉTNICOS: LA CONSTITUCIÓN DE REGIONES AUTÓNOMAS EN NICARAGUA [PLURIETHNIC GOVERNMENTS: THE CONSTITUTION OF AUTONOMOUS REGIONS IN NICARAGUA] 295-319 (Editorial Plazy y Valdez y la Universidad de las Regiones Autónomas de la Costa Caribe de Nicaragua (URACCAN) 1997).

4. Autonomy Statute, *supra* note 3, at art. 36.

5. *Id.*

6. For an account of the process leading to the Inter-American Court of Human Rights decision in the *Awas Tingni* case, *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); *see also* Jennifer A. Amiott, *Environment, Equality, and Indigenous Peoples' Land Rights in the Inter-American Human Rights System:* Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, 32 ENVTL L. 873 (2002).

7. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]. Article 68(1) provides: "State Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." Nicaragua ratified the American Convention on September 25, 1979 and accepted the jurisdiction of the Inter-American Court of Human Rights on February 12, 1991.

For the first time in its history, the Court determined a state's violation of human rights principles set forth in the American Convention from the standpoint of the collective property rights of indigenous peoples as subjects of international law. Through a revolutionary approach to the interpretation of the right to property under Article 21 of the American Convention,[8] the Court looked into recent developments in international law with respect to indigenous peoples' rights and found that the right to property includes "the rights of members of the indigenous communities within the framework of communal property."[9]

The Court further stated that international legal conceptions on rights such as property "have an autonomous meaning [which] cannot be made equivalent to the meaning given to them in domestic law."[10] In recognizing indigenous peoples' customary law and land tenure patterns, the Court stated, "possession of the land should suffice for indigenous communities lacking real title to property of land to obtain official recognition of that property, and for consequent registration [sic]."[11] Consequently, Awas Tingni property rights, as an indigenous community lacking real title to the land in its possession, derive from its traditional use and occupancy and do not depend on prior official registration or recognition by a state.

Even though the Nicaraguan legal system provided constitutional and legislative recognition of indigenous customary land tenure rights, the Court considered that such measures were not enough because Nicaragua did not afford indigenous communities an effective legal or administrative procedure to officially recognize those rights through the formal demarcation and titling of their lands. Nicaragua also did not provide an effective judicial remedy that would permit the community to contest the violation of its constitutional and human rights.[12] This lack of an effective land titling procedure and the unacceptable delays in the processing of the community's domestic *amparo* claims,[13] which challenged the logging concessions threatening its lands, violated Awas Tingni's right to judicial protection under Article 25 of the American Convention.[14] As stated by the Court, "for the State to

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8. *Id.* at Art. 21(1) (Right to Property) (states "[e]veryone has the right to the use and enjoyment of his property").

9. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser C) No. 79, ¶¶ 146, 148 (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf [hereinafter Awas Tingni decision].

10. *Id.* ¶ 146.

11. *Id.* ¶ 151.

12. *Id.* ¶¶ 115-139 (analyzing the insufficiency of the legal remedies and mechanisms for land titling that were available to Awas Tingni).

13. The *amparo* action within Civil Law is a constitutional remedy to guarantee inviolability of the rights and guarantees set forth in the Constitution. *See* GERARDO SOLÍS, WEST'S SPANISH-ENGLISH/ENGLISH SPANISH LAW DICTIONARY 24 (1992).

14. American Convention, *supra* note 7, at art. 25(1) (Right to Judicial Protection) states:

comply with the provisions of the [right to judicial protection], it is not enough for the remedies to exist formally, since they must also be effective."[15] Therefore, in addition to an effective judicial procedure for protection of human rights, indigenous communities must also have the right to specific land demarcation and titling procedures that take into account the specific characteristics of indigenous culture and land tenure patterns.[16]

As a result of the violations of the right to property and judicial protection under Articles 21 and 25 of the American Convention, the Court ordered that Nicaragua adopt legislative, administrative, and other measures that create an "effective mechanism for the delimitation, demarcation and titling of the property of indigenous communities in accordance with [indigenous peoples'] customary law, values, customs and mores."[17] Most importantly, Nicaragua was ordered to delimit, demarcate, and title Awas Tingni's lands "with full participation by the community . . . taking into account its customary law, values, customs and mores" within a period of fifteen months.[18] The judgment provided that while Awas Tingni awaited for the demarcation of its land, Nicaragua had to "abstain from acts which might lead the agents of the State . . . or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property" located in Awas Tingni's traditional territory.[19]

B. The Awas Tingni Case as an Important International Legal Precedent

The *Awas Tingni* decision has helped advance the development of the jurisprudence of both the Inter-American Commission and Inter-American Court of Human Rights, thus exemplifying the growing importance of human rights instruments and institutions of the OAS system to indigenous peoples in their efforts to protect their rights.[20] For instance, in *Mary and Carrie Dann v. U.S.*, the Inter-

> Everyone has the right to simple and prompt recourse . . . to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

15. Awas Tingni decision, *supra* note 9, ¶ 114.
16. *Id.* ¶¶ 116-27.
17. *Id.* ¶¶ 164, 173(3).
18. *Id.* at 164, 173(4). The Court also ordered that Nicaragua provide monetary reparations consisting of $50,000 as reparations for immaterial damages to be invested for the benefit of the Community and an additional $30,000 for the Community's legal costs and fees. *Id.* ¶ 173(7).
19. *Id.* ¶¶ 153, 164, 173(4).
20. For information on the developments that have taken place within the Inter-American system of human rights, *see* S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-*

American Commission applied the same evolutionary interpretation utilized in *Awas Tingni* to find that international instruments, such as the Proposed Draft American Declaration on the Rights of Indigenous Peoples (although not yet approved by the OAS General Assembly nor ratified by the United States),[21] nevertheless can be "properly considered in interpreting and applying the provisions of [other Inter-American human rights instruments such as] the American Declaration [on the Rights and Duties of Man] in the context of indigenous peoples."[22] According to the Commission, the provisions on land rights found in the Draft American Declaration on the Rights of Indigenous Peoples represented "general international legal principles applicable in the context of indigenous human rights."[23] These principles included the legal recognition of the "varied and specific forms and modalities of . . . control" of indigenous peoples over their territories, the recognition of the historical occupation and ownership of territories by indigenous peoples, and the inalienability of indigenous land titles that can be changed only "by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of that nature or attributes of such property." [24]

Similarly, in *Maya Indigenous Communities of the Toledo District,* a case from Belize, the Commission further clarified its interpretation of recent international developments, including the *Awas Tingni* case, to hold that indigenous communal property rights have "an autonomous meaning and foundation under international law . . . not dependent upon particular interpretations of domestic judicial decisions [and other sources of domestic law] concerning the possible existence of aboriginal rights . . . ."[25] In this case, which concerned logging and oil concessions granted on indigenous lands without previous consultation, the Commission stated that one of the "central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories," which would ensure that decisions or other actions affecting indigenous

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American Human Rights System, 14 HARV. HUM. RTS. J. 33 (2001); and Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 HUM. RTS. L. REV. 281 (2006).

21. Organization of American States [OAS], *Proposed American Declaration on the Rights of Indigenous Peoples*, Inter-Am. C.H.R., 1333d Sess., OEA/Ser.L/V/II.95, Doc. 7, (Feb. 26, 1997), *available at* http://www1.umn.edu/humanrts/instree/indigenousdecl.html.

22. Mary and Carrie Dann v. U.S., Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶ 129 (2002), *available at* http://www.iachr.org/annualrep/2002eng/USA.11140.htm. In this case, the Inter-American Commission had to consider violations of the American Declaration on the Rights and Duties of Man since the United States has not ratified the American Convention on Human Rights. *Id.* ¶ 2.

23. *Id.* ¶ 130.

24. *Id.*

25. Maya Indigenous Cmtys. of the Toledo Dist. v. Belize, Case No. 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122 doc. 5 rev. 1 ¶ 131 (2004), *available at* http://www.cidh.oas.org/annualrep/2004eng/Belize.12053eng.htm.

property are "based upon a process of fully informed consent on the part of the indigenous community as a whole."[26] Most recently, the Inter-American Commission's findings on this case were extensively cited in a judgment by the Belize Supreme Court concerning the lack of protection for the property rights of Maya communities by Belize in violation of its domestic constitution and international treaty obligations.[27]

The Inter-American Court continued to develop its jurisprudence on indigenous peoples' property rights in cases such as *Moiwana Village v. Suriname*[28] and *Yakye Axa Indigenous Community v. Paraguay*.[29] The Court also adjudicated another case out of Nicaragua, *YATAMA v. Nicaragua*, which dealt more specifically with the right to political participation of an indigenous political party that was unjustly excluded from participating in municipal elections by restrictive and discriminatory electoral laws.[30] Consequently, Nicaragua was obligated to reform its electoral laws in order to provide real political participation for YATAMA and other indigenous peoples in Nicaragua.

In its *Yakye Axa* decision, the Court stated that the right of indigenous peoples to judicial protection and due process under the American Convention requires state recognition of the particular differences that characterize indigenous peoples. Moreover, the state must provide effective protection taking into account the following factors: "[indigenous peoples'] own economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs."[31] In relation to Paraguay's denial of Yakye Axa's juridical personality as an indigenous community, the Court held that the community's rights to its traditional lands pre-existed the domestic legal system and do not depend on the mere formality of state recognition in order for indigenous peoples to demand

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26. *Id.* ¶ 142.

27. *See infra* Part V.B.

28. Moiwana Village v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf (concerning the obligation of Suriname to provide reparations to the Maroon village of Moiwana, whose people suffered a massacre and displacement by government forces; the reparations were to include the delimitation, demarcation, and titling of the traditional lands from which they were expelled).

29. Yakye Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (Ser. C) No. 125 (June 15, 2005), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf, (concerning an Enxet-Lengua indigenous community's rights to the restitution of its ancestral lands that were lost involuntarily and of the state's obligation to provide goods and services to the community until they obtain their own territory due to the deplorable living conditions that community members were living in) [hereinafter Yakye Axa decision].

30. YATAMA v. Nicaragua, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_127_ing.pdf [hereinafter YATAMA decision].

31. Yakye Axa decision, *supra* note 29, ¶¶ 51, 63.

restitution of their lost lands.[32] The Court also tried to determine how to resolve conflicts between indigenous communal property rights and private property rights in the context of land restitution procedures.[33] In assessing the legitimate basis for restricting private property rights in the interests of protecting the cultural identity and survival of an indigenous community and its members, the Court stated, consistent with the American Convention, that such restriction would be both necessary to preserve cultural identities in a democratic, pluralist society, and proportional if just compensation is provided to the private individuals affected by the measure.[34]

Most recently, the Court has further articulated indigenous property rights principles in *Case of Sawhoyamaxa Indigenous Community v. Paraguay,* where it held, *inter alia*, that "traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title . . . [and] traditional possession entitles indigenous people to demand official recognition and registration of property title."[35] In *Sawhoyamaxa*, the Court also recognized indigenous peoples' property rights and rights to restitution in cases where indigenous peoples have unwillingly lost possession of their ancestral lands.[36] Another issue addressed by the

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32. *Id.* ¶¶ 82-84.

33. *Id.* ¶¶ 143-153.

34. *Id.* ¶¶ 144-148. The Court added, however, that such recognition does not always mean indigenous property interests will prevail over private property interests when those interests come into conflict. *Id.* ¶ 149. In its consideration of how Yakye Axa's communal property rights will be reconciled with the private property rights of individuals who now lived on the community's ancestral lands, the Court was less clear in its explanation of how Paraguay will provide restitution for Yakye Axa's ancestral lands if the state refused to expropriate portions of those lands held by private interests and instead intended to provide other lands. *See* Pasqualucci, *supra* note 20, at 298-300.

35. Sawhoyamaxa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (Ser. C) No. 146, ¶ 128 (Mar. 29, 2006) (concerning another Enxet-Lengua indigenous community that involuntarily lost its ancestral lands and the consequent state of vulnerability threatening the community's survival), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf [hereinafter Sawhoyamaxa decision].

36. *Id.* As in the *Yakye Axa* case, the Court limited indigenous rights to lost ancestral territory in cases where lands have been lawfully transferred to innocent third parties, in which case the remedy would consist of restitution, such as the affected indigenous community obtaining comparable lands:

> 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the

Court was whether there was a time restriction to an indigenous community's right of restitution that would cause it to lapse. The Court stated that as long as the spiritual and material relationships of an indigenous people to its traditional lands remain, there is a continued right to claim restitution of lands.[37]

Sawhoyamaxa may also help develop jurisprudence on the relationship between the right to life and indigenous cultural identity, which is tied to territory. As Judge Cançado Trindade's separate concurring opinion reflects, "[t]he right to life is . . . viewed in its close and unavoidable connection with cultural identity . . . [which for indigenous peoples] is closely linked to their ancestral lands. If they are deprived of them, by means of forced displacement, it seriously affects their cultural identity, and finally, their very right to life . . .."[38]

As is clear from the recent jurisprudence of the Inter-American system, the *Awas Tingni* case has had an important role in cementing indigenous rights within international customary law. It has made a significant contribution to indigenous peoples in the Americas and their efforts to use international law and institutions in furthering their aims of securing land and natural resource rights.[39] Also, it has helped to change previous formalist interpretations under international law of human rights, such as property, which were originally conceived as individual rights, and has demonstrated the increasingly dynamic role of indigenous peoples in the international legal arena traditionally dominated by governmental actors.[40] The case

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> existence of indigenous land restitution rights. The instant case is categorized under this last conclusion.

Id.

37. *Id.* ¶ 131. The Court recognized that such relationships may include spiritual and ceremonial use, seasonal hunting, gathering and fishing, sporadic cultivation, and traditional use of natural resources. *Id.* Restitution rights also remain if such activities are hindered due to threats or violence. *Id.* ¶ 32.

38. *Id.* (*separate Opinion by* Judge A.A. Cançado Trindade, ¶ 28).

39. *See* Anaya, *supra* note 6, at 15.

> "The decision of the Inter-American Court is an authoritative interpretation of the general human right to property that is grounded in various sources of international law. The Court's interpretation avoids the discrimination of the past and, rather than excluding indigenous modalities of property, it embraces them, making a new path for understanding the rights and status of the world's indigenous peoples."

Id.

40. *See* S. James Anaya, *Divergent Discourses about International Law, Indigenous Peoples, and Rights Over Lands and Natural Resources: Toward a Realist Trend*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 237, 256 (2005). As Anaya notes, international human rights instruments are increasingly interpreted, in practice, in a more dynamic and "realist" way, focusing on "the confluences of values, power . . . and change" represented by the greater presence of governmental and nongovernmental actors including indigenous peoples in the international legal and political arenas.

itself and its proceedings provided an instance where the interests and concerns of indigenous peoples were duly considered and taken into account, thus enabling indigenous communities to "confront state authorities with their grievances" and forcing a dialogue "grounded in the language of human rights, rather than being constrained by the existing and often oppressive parameters of legality at the domestic level."[41] *Awas Tingni* has also provided an example of how protecting indigenous peoples' territorial rights actually supports global environmentalists' efforts to preserve the planet's remaining viable ecosystems because it is within these areas that many indigenous peoples presently live while actively using and maintaining the natural resources therein.[42]

As representative of the legal advances indigenous peoples seek in the international arena, the *Awas Tingni* case illustrates another urgent concern: how these advances will translate into actual practice once the focus shifts from bringing and winning an indigenous land rights case to the actual implementation on the ground. It is precisely at this stage that local political factors in Nicaragua have been a major factor in the Awas Tingni's ability to use the Inter-American Court judgment to obtain the legal recognition of its ancestral territory.

III. THE IMPLEMENTATION PHASE OF THE *AWAS TINGNI* CASE

The period following the Inter-American Court's 2001 decision has proven to be as difficult and challenging, if not more so, than the period leading up to the judgment. In general terms, as of January 2008, Nicaragua has complied with the monetary reparations ordered by the Court[43] as well as the order to enact a specific administrative and legal measure to demarcate indigenous lands, although the effectiveness of the latter has been subject to question.[44] The most important element of the Court's ruling—the actual demarcation of Awas Tingni territory—has entailed a process plagued with unacceptable delays, dilatory practices by the

41. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 270-71 (2d ed. 2004).

42. *See* Amiott, *supra* note 6, at 902-03.

> "The protection of Central America's forestlands – presently being destroyed at a rate of 1160 square miles per year – is thus inextricably linked to recognizing the rights of the forests' indigenous inhabitants. . .. The Awas Tingni case may serve to convince many environmentalists that recognizing indigenous rights is an essential element in environmental protection."

Id.

43. *See supra* note 18, describing the monetary reparations Nicaragua was ordered to pay for the community.

44. *See infra* Part IV.

government, and an overall lack of political will to recognize the full extent of the Awas Tingni's territorial claim.

A. The Initial Stages of Implementation

In February 2002, the Nicaraguan government paid the $30,000 that was ordered by the Court to cover the community's legal costs and expenses during a meeting in Washington D.C. with the Inter-American Commission of Human Rights, where the government publicly expressed its commitment to comply with the Inter-American Court judgment.[45] In April 2002, the Nicaraguan government met for the first time with the Awas Tingni to negotiate the process of implementation of the Court decision. Two joint commissions composed of community representatives, their legal advisors, and government representatives were established during that first meeting.[46] Joint Commission I addressed the investment of the $50,000 ordered by the Court for "works or services of collective interest for the benefit of the community."[47] Joint Commission II addressed the "planning of the distinct phases of the delimitation, demarcation, and titling process" as well as the urgent matter of the prevention and monitoring of third party activity within Awas Tingni territory.[48] The work of Joint Commission I resulted in an agreement that eventually led to the government financing $50,000 for the construction of a boarding house for Awas Tingni students in the city of Puerto Cabezas, which opened February 28, 2003.[49]

Joint Commission II, on the other hand, was unsuccessful in addressing land demarcation and third party activities in Awas Tingni territory. It initially established certain mutually agreed-upon guiding principles for the demarcation process that included recognition of the state's exclusive responsibility to demarcate Awas Tingni lands, the acknowledgement of the community's customary land tenure patterns, and full participation of the community through its freely chosen representatives.[50] Nevertheless, the attempts to reach an agreement through consensus with the government failed and the community opted instead to let the

45. Inter-Am. C.H. R., Press Release No. 8/02 (Feb. 22, 2002), *available at* www.cidh.oas.org/Comunicados/English/2002/Press8.02.htm.

46. Record, Acta de la Reunión sobre la Implementación de la Sentencia de la Corte Interamericana de Derechos Humanos en el Caso de la Comunidad Mayagna (Sumo) Awas Tingni entre la Comunidad de Awas Tingni y el Gobierno de la República de Nicaragua (Managua, April 16, 2002), chs. I-II (on file with author).

47. *Id.* ¶¶ 1.2, 1.2.

48. *Id.* Ch. II.

49. Ministerio de Relaciones Exteriores (Nicar.), *Informe a la Corte Interamericana de Derechos Humanos en el Caso de la Comunidad Mayagna Awas Tingni* 2-4 (Feb. 21, 2005) (on file with author).

50. Record, Acta de la II Reunión de la Comisión II sobre la Implementación de la Sentencia de la Corte Interamericana de Derechos Humanos en el caso de la Comunidad Mayagna (Sumo) Awas Tingni (Bilwi – Puerto Cabezas, (April 29, 2002) (on file with author)).

government take the initiative in complying with the Court ruling through its own proposals, which the community would then approve or disapprove within the context of Joint Commission II meetings.[51]

Although Joint Commission II itself was never formally dissolved, the government began holding a series of informal "bilateral meetings" between representatives of the central and regional governments and community leaders who almost always were without the presence of their legal representatives.[52] During such meetings, government representatives tried to persuade community members to accept very disadvantageous land demarcation proposals that recognized considerably less land than what the Awas Tingni rightfully claimed as its ancestral territory.

The delays caused by the failure of Joint Commission II led to a further escalation of illegal third party activities on Awas Tingni territory – an issue that the Joint Commission was supposed to resolve. Despite efforts to get regional and national government authorities to address and resolve this matter, these activities have continued to threaten the Awas Tingni territory.

B. The Provisional Measures Resolution and the Domestic Amparo Action

The presence of logging activities (most recently by local actors)[53] and of non-indigenous colonists inside Awas Tingni territory continued even after the Court ordered Nicaragua to prevent third-party abuses occurring with the acquiescence and tolerance of the government that would affect the "existence, value, use[, and] enjoyment" of the community's land.[54] Less than a year after the Court's ruling, the community requested a new intervention by the Court to deal with these problems. In September 2002, the Inter-American Court issued a Provisional Measures Resolution, a type of resolution reserved for cases of "extreme gravity and urgency, and when necessary to avoid irreparable damage to persons."[55]

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51. Record, Acta de la V Reunión de la Comisión Conjunta II sobre la Implementación de la Sentencia de la Corte Interamericana de Derechos Humanos en el caso de la Comunidad Mayagna (Sumo) Awas Tingni (Bilwi-Puerto Cabezas, July 22, 23, 2002) (on file with author).

52. Ministerio de Relaciones Exteriores (Nicar.), *Informe a la Corte Interamericana de Derechos Humanos sobre el Estado de Cumplimiento de la Sentencia Caso Awas Tingni* 5-8 (June 2, 2004) (on file with author).

53. *See infra* Part III.C.

54. Awas Tingni decision, *supra* note 9, ¶ 173(4).

55. American Convention, *supra* note 7, art. 63(2).

In this resolution, the Court ordered Nicaragua to immediately adopt any measures necessary to protect the community's right to the use and enjoyment of its lands and natural resources in order to avoid the "immediate and irreparable damage resulting from activities of third parties who have established themselves inside the territory of the Community or who exploit the natural resources that exist within it . . .."[56] The Provisional Measures Resolution also ordered Nicaragua to "investigate the facts set forth . . . so as to discover and punish those responsible."[57] However, the Nicaraguan government has not effectively addressed the issues dealt within the Provisional Measures Resolution.

In January 2003, as a result of the passing of the deadline set by the Inter-American Court for the demarcation and titling of the community's land, the community filed an *amparo* action[58] in a domestic court. The action was filed against the Nicaraguan president and other government officials for their failure to take action to implement the Court's ruling and provisional measures resolution, thus resulting in violations of the community's constitutionally-protected rights.[59] Although under Nicaraguan law there is a deadline of forty-five days for courts to respond to *amparo* actions,[60] the community has yet to receive a formal response from the Nicaraguan appeals tribunal to which it submitted the action. The lack of response to this latest legal action can be attributed to the politicization and corruption that has plagued the Nicaraguan judicial system to the detriment of indigenous communities and other non-powerful sectors of society that have attempted to obtain justice through the courts.[61]

C. The Ongoing Human Rights Violations by Third-Party Actors

Although the foreign-based logging companies that initially threatened Awas Tingni lands have long gone, they have been replaced by illegal logging operations carried out by a diverse set of local actors including ex-combatants, members of

56. Order of the Inter-Am. Ct. H.R., Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Provisional Measures, at 6, ¶ 1 (Sept. 6, 2002), *available at* http://www.corteidh.or.cr/docs/medidas/mayagna_se_01_ing.pdf [hereinafter "Provisional Measures Resolution"].

57. *Id.* at 6, ¶ 3.

58. *See supra* note 13, for a general description of *amparo* actions.

59. Recurso de Amparo Interpuesto (Interview) con Lottie Cunningham Wren, representate legal legal representative de La Comunidad Mayanga (Sumo) Awas Tingni, antes el Honorable Tribunal de Apelaciones de Bilwi (Puerto Cabezas) (Jan. 16, 2003) (on file with author).

60. Ley No. 49, 16 Nov. 1988, Ley de Amparo [Protection Law], tit. III, ch. IV, art. 47, La Gaceta [L.G.] No. 241, 20 Dec. 1988 (Nicar.).

61. For a brief overview of corruption that has affected Nicaragua's judicial system *see* Camilo de Castro, *Global Integrity Country Report—Nicaragua: Corruption Notebook, Corruption Timeline, Integrity Scorecard, Country Facts* (2006), at 3-4, *available at* http://www.globalintegrity.org/reports/2006/pdfs/nicaragua.pdf

neighboring communities, and even public officials.[62] The extent of illegal logging operations has resulted in serious ecological damage with long-range implications for the future vitality of the community's forest resources.[63] Additionally, the community also faced the invasion of large tracts of its territory by non-indigenous colonists.[64] Local and national governmental authorities have either directly engaged in or have illegally issued permits for settling and logging within Awas Tingni territory.[65]

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62. A land diagnostic study commissioned by the government in 2003 for the purpose of validating the Awas Tingni land title claim documented the presence of the third-party loggers and colonists. The study indicated that among the main parties responsible for logging operations were groups of ex-combatants from the civil war of the 1980s, who were awarded portions of the Awas Tingni's land by regional authorities without the community's consent and who have also been awarded unauthorized logging permits by regional authorities. *See* Diagnóstico de Tenencia y Uso de la Tierra de la Comunidad Mayangna de Awas Tingni (RAAN) Informe Final (Preliminar), Alistar Nicaragua CIDCA-UCA, Tomo 1, at 102, 154-44, 172, 176 [hereinafter "Diagnostic Study"]. For an executive summary of this Diagnostic Study is available, see *Resumen Ejecutivo, Diagnostico de Tenencia y Uso de la Tierra de la Communidad Mayangna de Awas Tingni[Executive Summary: Diagnosis of Use Patterns of Land for the Mayangna Community of the Awas Tingni*], Indigenous Peoples L. & Pol'y Program, Univ. of Ariz. Rogers Coll. of L. (September 2004), *available at* http://www.law.arizona.edu/depts/iplp/advocacy/awastingni/newsletter/assets/resumenDiagnostico.pdf (cited in *Propuestas del Gobierno para Titulacion de Awas Tingni Desconocen Derechos Reconocidos en la sentencia de la Corte IDH*, AWAS TINGNI NEWSLETTER NO. 4, (Indigenous Peoples L. & Pol'y Program, Univ. of Ariz. Rogers Coll. of L.) Nov. 2006, http://www.law.arizona.edu/depts/iplp/advocacy/awastingni/newsletter/newsletterJun2006.html [hereinafter Awas Tingni newsletter]) (also on file with author).

63. *See* Diagnostic Study, *supra* note 62, at p. 102. These actions have also been reported and documented by the national media. *See* José Adán Silva & Tatiana Rothschuh, *Depredan bosques en zonas indígenas*, LA PRENSA (Nicar.), Apr. 14, 2005, *available at* http://www-ni.laprensa.com.ni/cgi-bin/print.pl?id=nacionales-20050412-14, (describing how hundreds of acres of virgin rainforest are felled each day in indigenous territories including Awas Tingni); Walter Treminio Urbina, *Despalan reserva Awas Tingni*, LA PRENSA (Nicar.), July 13, 2005, *available at* http://www-ni.laprensa.com.ni/archivo/2005/julio/13/regionales/ (citing Awas Tingni leader who stated that more than twenty thousand hectares in Awas Tingni territory have been cut).

64. Diagnostic Study, *supra* note 62, at pp. 145-149 (listing the identity and location of most of the colonists). As the Diagnostic Study notes, the non-indigenous colonists came from other areas of the country to the Atlantic Coast without supporting documentation for their settlements. A few individual colonists had questionable documents assigning them parcels of land within Awas Tingni territory. Two families of colonists stated that municipal authorities encouraged them to settle on lands claimed by the Awas Tingni. *Id.* at 84, 172.

65. *See* Ludwin Loáisiga López, *Diputados en mafia maderera*, LA PRENSA (Nicar.), May 4, 2005, *available at* http://www-ni.laprensa.com.ni/archivo/2005/mayo/04/nacionales/nacionales-20050504-17.html (describing the involvement in illegal wood-trafficking by congressional members, ex-military and police, as well as representatives of the environmental ministry); *see also* Urbina, *supra* note 63 (describing how the national

This situation is part of the general problem of the expansion of the "agricultural frontier" towards the Atlantic Coast caused by land scarcity in the Pacific region of the country and the government's unwillingness to resolve the structural causes of those problems.[66] As in other parts of Latin America, the presence of non-indigenous colonists, loggers, and oil and mining operations on indigenous lands in areas considered remote "frontier" expanses, such as Nicaragua's Atlantic Coast, has brought about a climate of violence, fear, intimidation, and inter-ethnic conflict, making it very difficult for indigenous peoples to exercise their ancestral property and natural-resource rights.[67]

IV. IMPLEMENTATION PROBLEMS WITHIN THE NICARAGUAN NATIONAL CONTEXT

A. The Enactment of the Land Demarcation Law (Law 445)

A new phase of the implementation process of the *Awas Tingni* case began in January 2003 when, in response to the *Awas Tingni* decision, the Nicaraguan General Assembly enacted a land demarcation law, Law 445,[68] which ordered the adoption of

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environmental attorney confirmed allegations that a former regional governor was responsible for issuing logging permits within Awas Tingni territory).

66. Diagnostic Study, *supra* note 62, at 186 (stating that the colonists are spearheading an invasion of land that must be controlled in order to prevent a natural disaster).

67. *See* Heberto Jarquín Manzanares, *Bomba de tiempo en el Caribe*, LA PRENSA (Nicar.), August 28, 2005 (Describing the overall threat of ethnic violence in the Atlantic Coast due to the presence of colonists on indigenous lands), *available at* http://www-usa.laprensa.com.ni/archivo/2005/agosto/28/regionales/regionales-20050828-01.html. The Inter-American Commission on Human Rights has looked into the effects of government policies that have encouraged recent waves of colonization of indigenous lands in the case of the Yanomami Indians of Brazil. *See generally* Case 7615 (Brazil), Inter-Am. C.H.R. Res. No. 12/85, OEA/Ser.L/V/II.66, Doc. 10, rev. 1 (1985), *available at* http://www.cidh.oas.org/annualrep/84.85eng/Brazil7615.htm.

68. Ley No. 445, 13 Dec. 2002, Ley del Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica de Nicaragua y de los Ríos Bocay, Coco, Indio y Maíz [Law of the Communal Property Regime of Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Bocay, Coco, Indio, and Maíz Rivers], Ley No. 445, La Gaceta [L.G.] No. 16, 23 Jan. 2003 (Nicar.), *available at* http://www.elaw.org/resources/text.asp?ID=1516 [hereinafter Law 445]. The Law also addresses rights of "ethnic" communities referring to Afro-Caribbean groups who also reside in the Atlantic Coast (the Creole and Garífuna). Like indigenous communities, these ethnic

a specific legislative or administrative mechanism for demarcation of indigenous lands in Nicaragua. The passage of the law was also prompted by the World Bank, which conditioned disbursement of funds to Nicaragua on the approval of a land demarcation law.[69] This was a component of the Bank's Property Regularization Project in Nicaragua that sought to introduce legal certainty within the Nicaraguan property rights system, albeit from the standpoint of investment interests.[70]

Law 445, which applied only to the Atlantic Coast of Nicaragua, reaffirmed indigenous peoples' rights to the customary use and occupation of their lands previously recognized in the Constitution and Autonomy Statute.[71] It established new administrative bodies that are responsible for the process of demarcation and titling of indigenous lands and are composed of elected representatives of the various ethnic groups in the Atlantic Coastal area as well as representatives from all levels of government.[72] A five-stage demarcation process was instituted, which consists of: the application for a land title, the conflict-resolution stage, the boundary-marking stage, the actual issuance of the land title, and lastly, the "saneamiento" stage involving indemnification to third parties with defective land titles within an

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groups share a common ethnicity, culture, values, and traditions closely linked to their land tenure patterns. *Id.* ch. I, art. 1.

69. The contents of Law 445 itself were already developed in previous attempts by the Regional Councils, indigenous leaders, and civic society groups to pass a draft demarcation law through the national legislature. But a real effort to consider and approve the law did not come about until after the judgment by the Inter-American Court and the World Bank's conditioning of a loan to the government for the local development of the Mesoamerican Biological Corridor and related projects. *See generally*, María Luisa Acosta, *La Política del Estado de Nicaragua sobre las Tierras Indígenas de las Regiones Autónomas de la Costa Atlántica*, 33 WANI – REVISTA DEL CARIBE NICARAGÜENSE, 35, 45-47 (2003).

70. The World Bank project, known as PRODEP (*Proyecto de Ordenamiento de la Propiedad*) began operating in 2002 based on a $32.6 million credit. Among its objectives is "to foster agrarian reform by regularizing land rights . . . . [It] will include the demarcation of indigenous lands and protected areas in Nicaragua's Atlantic Coast and will promote the sustainable use of natural resources so land owners can preserve the value of their land and prevent environmental degradation." World Bank, *Nicaragua: World Bank, Government of Nicaragua Sign US$32.6 Million Credit to Support Land Administration*, Press Release No. 2002/378/LAC (June 24, 2002), *available at* http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTPROGRAMS/EXTTRADERESEARCH/0,,contentMDK:20051334~menuPK:162686~pagePK:210083~piPK:152538~theSitePK:544849,00.html.

71. Law 445, *supra* note 68, ch. VI, arts. 29-31.

72. *Id.* ch. VIII, arts. 40-42. These bodies include the *Comisión Nacional de Demarcación y Titulación/* National Demarcation and Titling Comission (CONADETI) and three *Comisiones Intersectoriales de Demarcación y Titulación*/ Inter-sectorial Demarcation and Titling Commissions (CIDT). Both institutions have substantive roles in the different stages of the demarcation process. In addition, both regional councils, through their respective *Comisión de Demarcación*/ Demarcation Commission, have the power to mediate and resolve inter-communal conflicts during the initial phase of the titling process. *Id.*

indigenous territory.[73] The Law also contained provisions for determining priority of indigenous property rights over third party interests.[74]

After passage of Law 445, Nicaragua insisted that the Awas Tingni had to follow the procedures set by the Law in order to obtain its communal land title. The Awas Tingni reluctantly agreed to follow this process because of concerns with the constant delays that characterized the negotiation process with the government. In the Awas Tingni view, the Nicaraguan government was obligated to demarcate and title Awas Tingni lands regardless of Law 445 and its procedures because the demarcation of its lands was a separate matter from the enactment of a demarcation law. Nevertheless, the community submitted its title application in November 2003 along with the required diagnostic land use study.[75]

The Awas Tingni application was the first to be submitted under Law 445; however, it took more than a year for the institution in charge of reviewing the application to process it accordingly. Serious delays ensued after the Awas Tingni diagnostic study reflected overlapping claims by three neighboring indigenous communities, which, along with procedural errors made by the land demarcation institutions, caused the title application to be referred belatedly to the Demarcation Commission, the entity in charge of resolving inter-communal boundary disputes according to Law 445.[76]

The boundary dispute reflected in the Awas Tingni land-use diagnostic study became the source of continuing delays in the process of demarcating Awas Tingni land. The conflict with the neighboring indigenous Miskito communities was not simply the inability of two parties to resolve their differences or even a matter of

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73. *Id.* ch. VIII, art. 45. The title application stage involves the submission of a formal diagnostic study of historical, demographic, and ethnographic information concerning the community's land tenure. If this study reflects a territorial overlap with other indigenous or ethnic community, the process proceeds to the conflict resolution stage. *Id*. ch. VIII, arts. 46-53.

74. *Id.* ch. VII, arts. 35-38. According to Law 445, indigenous property rights are to prevail over third-party titles, with the exception of titles granted through possession before the 1987 reforms. If third-party property interests prevail, the land cannot be sold to anyone other than the indigenous community involved. After the community receives a title, third parties with inferior property rights who reside on communal lands have to leave and receive compensation or make leasing agreements with the community in order to remain.

75. *See* Diagnostic Study, *supra* note 62.

76. The CIDT was the institution in charge of first reviewing the application. *See supra* note 72. When a diagnostic study reflects a boundary dispute, Law 445 states that the corresponding CIDT commission must refer the case to the respective Regional Council in order for its Demarcation Commission to initiate the conflict resolution stage. The referral of the Awas Tingni case to the Demarcation Commission of the Northern Autonomous Region did not occur until December 2004, and the conflict resolution stage itself did not initiate until March 2005. According to Law 445, the Demarcation Commission must resolve such conflicts within three months. Law 445, *supra* note 68, ch. IX, art. 53. The conflict resolution stage did not seem to advance until recent developments in February 2007. *See infra* notes 96-100, and accompanying text.

pure inter-ethnic rivalry.[77] The conflict resolution stage that the Awas Tingni entered, from its inception, brought into light serious systemic deficiencies within Law 445 and the institutions it created.

B. Continuing Political Attitudes Toward Indigenous Property Rights

Awas Tingni efforts to obtain its communal property title under the procedures of Law 445 were frustrated by regional and national political factors that have also impacted other indigenous communities on Nicaragua's Atlantic Coast. Despite its passage by the Nicaraguan legislature, Law 445's effectiveness was limited by continuing political opposition from the administration of then President Enrique Bolaños, which resulted in the lack of financial and technical support for the institutions in charge of demarcating indigenous lands[78] such as the Inter-sectorial Demarcation Commissions (CIDTs) and the National Demarcation and Titling Commission (CONADETI).[79] As a result of these initial financial problems, all the land demarcation institutions incurred high operating costs that have not enabled them to sufficiently attend to all land titling applications and cases of inter-communal conflicts.

The problems faced by the land demarcation institutions were cited in a United Nations report as evidence of the continuing racial discrimination and the still precarious land-tenure-situation experienced by indigenous peoples in Nicaragua despite the passage of Law 445.[80] As the report suggests, a consequence of this systemic discrimination against indigenous peoples has been the intrusion into indigenous lands by settlers from the Pacific region along with land concessions granted to ex-combatants from both sides of the conflict that engulfed Nicaragua during the 1980s and the forestry and mining concessions granted on indigenous lands without the consent of the communities concerned.[81]

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77. *See infra* notes 89-100 and accompanying text for description of this conflict.

78. *See* Heberto Jarquín M., *Ley de Propiedad comunal agita el Caribe*, LA PRENSA (Nicar.), November 21, 2003 (indicating that President Bolaños and his delegate for Coastal Affairs disapproved of the law and expressed that disdain by being reluctant to provide a budget for the functioning of the land demarcation institutions such as CIDT and CONADETI]), *available at* http://www-ni.laprensa.com.ni/archivo/2003/noviembre/21/regionales/regionales-20031121-02.html. Another commentator noted that the approval of Law 445 was mainly due to lobbying within the legislative assembly where it was ultimately passed without much debate and not due to any initiative or support by the Executive. *See* Acosta, *supra* note 69, at 47.

79. *See supra* note 72.

80. U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Racism, Racial Discrimination, Xenophobia and all forms of Discrimination*, ¶ 17, U.N. Doc. E/CN.4/2005/18/Add.6 (Mar. 4, 2005) (*prepared by* Doudou Diène), *available at* http://ap.ohchr.org/documents/alldocs.aspx?doc_id=10760. The Report specifically mentioned the *Awas Tingni* case as an example of that situation. *Id.*

81. *Id.*

Another report by the United Nations Development Program explains that there is a continuing belief held by the governmental elite in Nicaragua that the Atlantic Coast is just a reserve of natural resources to be exploited without consideration of the local social, economic, and political contexts of the region and its cultural groups.[82] The expansion of the agricultural frontier encouraged by the government has enabled corrupt national and regional authorities to commercially deal with lands historically used by indigenous communities without their authorization.[83] The proliferation of illegal logging, mining, and settlement activities has been a major obstacle to the full realization of the goals of the Autonomy Regime, which was meant to benefit indigenous and ethnic communities on the Atlantic Coast in controlling their own lands and natural resources.

The reluctance by the previous presidential administration to provide full recognition of indigenous land rights under Law 445 was also evident in the case of communities living in the BOSAWAS Natural Biosphere Reserve[84] that did actually receive land titles in May 2005.[85] Even after ceremoniously awarding communal land titles to these communities, President Bolaños quickly tried to undermine their legality by preventing their official registration, alluding to legal problems encountered due to titles previously awarded to third persons within those territories.[86] Throughout the process, the Bolaños administration attempted to alter

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82. *See* UNDP Report, *supra* note 1, at 53.

83. *Id.* 55 (stating that recent advances in the area of indigenous rights have been weakened by the "chronic" neglect of the central government towards the autonomous regions, as well as by the "lack of transparency, the corruption, and lack of public political participation" within the autonomous regions). The UNDP Report notes:

> There has been a proliferation of informal and quasi-legal measures to negotiate the land and natural resources . . . . [I]nformal mechanisms that transfer possession rights and rights to natural resources have greatly contributed to the destructive advancement of the agricultural frontier within areas historically inhabited by Miskito, Sumu/Mayangna, Creole, Garifuna and Rama communities.

Id. (author's translation).

84. The history of the creation of this biosphere reserve would itself be an important case study of the efforts of indigenous peoples to assert their territorial rights after their ancestral lands were declared to be protected areas without prior consultation, *see generally* Anthony Stocks et al., *El Activismo Ecológico Indígena en Nicaragua: Demarcación y Legalización de Tierras Indígenas en BOSAWAS*, 25 WANI – REVISTA DEL CARIBE NICARAGÜENSE 6, 6-21 (2000).

85. Programa de Ordenamiento de la Propiedad, *Títulos Indígenas para la Gobernabilidad y Desarrollo de sus Territorios* [Native Titles for the Governability and Development of its Territories] (May 2005) (Nicar.) (on file with author). The titles were awarded to three Miskito territories and two Mayangna territories that make up 85 communities within the BOSAWAS Reserve. *Id.* at 1.

86. *See* Sergio León C., *Bolaños se burla del Caribe*, LA PRENSA (Nicar.), November 30, 2005, *available at* http://www-usa.laprensa.com.ni/archivo/2005/noviembre/30/

the nature of those communal titles by declaring the government to be a "co-owner" of the titled lands, in violation of Law 445 and the Autonomy Statute, which provide for the exclusive and communal nature of indigenous lands.[87] This notorious practice by the government was of concern to many indigenous communities and indigenous rights organizations in the Atlantic Coast, resulting in lawsuits against President Bolaños and other government authorities.[88]

C. The Inter-Communal Conflict between Awas Tingni and Neighboring Communities

One of the biggest obstacles for the implementation of the *Awas Tingni* decision was a territorial dispute with three indigenous communities whose claims overlapped part of the Awas Tingni territory. Since before the 2001 Court ruling, the Nicaraguan government alleged that a territorial overlap between the Awas Tingni and a "block" of three Miskito communities prevented it from recognizing the full

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regionales/regionales-20051130-01.html; José Garth Medina, *Pleito "ata" a la Conadeti*, LA PRENSA (Nicar.), December 14, 2005 (stating that the President's refusal to register the titles arose from alleged findings that part of the territory was titled in the government's name in 1963 and some of the land had been sold to foreign companies and mestizo settlers), *available at* http://www-ni.laprensa.com.ni/archivo/2005/diciembre/14/ regionales/. Under Law 445, the government had to clear communal titles from such encumbrances in order for the BOSAWAS titles to be registered. Law 445, *supra* note 68, chs. VIII-XII, arts. 45-59.

87. *See* Sergio León C., *Exigen Ley de Demarcación*, LA PRENSA (Nicar.), September 28, 2006, *available at* http://www-usa.laprensa.com.ni/archivo/2006/septiembre/28/ noticias/regionales/146502.shtml ("The government of Enrique Bolaños is insisting on being co-owners of territories belonging to indigenous peoples and Afro-descendents. He is an obstacle to the implementation of the Demarcation Law, he has no political will to make the Law effective.") (author's translation); *see also* Maria Luisa Acosta, Awas Tingni *versus* Nicaragua*, y el Proceso de Demarcación de Tierras Indígenas en la Costa Caribe Nicaragüense*, 47 WANI – REVISTA DEL CARIBE NICARAGÜENSE 6, 14 (2006) (citing another tactic employed by the government where some of the titles were first issued to the state, who then subsequently granted title to the communities. This violated the procedures of Law 445 and the legal principle that indigenous property rights derive from recognition of their ancestral use and possession, not from an official state granting of those rights).

88. *See* José Garth Medina, *Recurrirán de amparo contra el Estado de Nicaragua*, LA PRENSA (Nicar.), October 5, 2006, *available at* http://www-ni.laprensa.com.ni/ archivo/2006/octubre/05/noticias/regionales/147946.shtml. This article discusses a writ of amparo filed against the Nicaraguan state challenging the violations present within the title awarded by President's Bolaños to the Mayangna community of Musawas, also a part of the BOSAWAS Reserve. *Id.* This case was indicative of the political motivations and deceit behind the efforts to force co-ownership regimes in order to limit indigenous rights which also implicated members of the Property Office/ Intendencia de la Propiedad and the president of the CONADETI. *See e.g., id.*

extent of its ancestral territorial claim.[89] The government resorted to this argument increasingly during the implementation phase of the *Awas Tingni* decision in an attempt to divert attention from its unwillingness to recognize the full extent of the Awas Tingni ancestral land claim, thus provoking and exacerbating territorial conflicts between indigenous communities.

The conflict arose out of claims made by the three communities of the "Bloque Tasba Raya" to approximately forty percent (41,000 hectares) of the territory claimed by Awas Tingni.[90] The Tasba Raya communities were not originally from the particular area in dispute, owing their presence instead to relocation programs initiated in the 1970s during the Somoza regime, which awarded agrarian land titles to particular communities in an area north of Awas Tingni territory.[91] In recent years, certain families from Tasba Raya crossed over into the area claimed by the Awas Tingni without having any valid legal documentation to those lands.[92] The

89. Awas Tingni decision, *supra* note 9, ¶ 105(e) (summarizing the allegations by the Nicaraguan State countering Awas Tingni's territorial claim contending that the Awas Tingni community "through the mechanism of international judicial pressure it seeks to set aside the interests of third parties in the area"); *see also id.* ¶ 141(a) (citing another of Nicaragua's allegations that "other communities claim they have ancestral possession rights predating the alleged right of Awas Tingni").

90. The Bloque Tasba Raya is composed of three Miskito indigenous communities: Francia Sirpi, Santa Clara, and La Esperanza. Information on the origins, scope and overall validity of the overlapping claims by Tasba Raya can be found in Awas Tingni's Diagnostic Study, *supra* note 62; *see also*, Criterios jurídicos para la titulación de la Comunidad Awas Tingni según la sentencia de la Corte Interamericana de Derechos Humanos y la Ley No. 445 [Judicial Criteria for the Titling of the Awas Tingni Community according to the Inter-American Court of Human Rights], Indigenous Peoples L. & Pol'y Program, Univ. of Ariz. Rogers Coll. of L., (September 2005) [hereinafter IPLP-Criterios Jurídicos], *available at* http://www.law.arizona.edu/Depts/IPLP/advocacy/awastingni/newsletter/assets/Amicus_CRAAN__Criterios_Juridicos_sept_2005_IPLP1.pdf (a document prepared by legal representatives of the Awas Tingni directed to the Northern Atlantic Regional Council and regional land titling institutions outlining the legal criteria for resolution of the inter-communal conflict that affected Awas Tingni.).

91. *See* Diagnostic Study, *supra* note 62, at 108-09. The lands awarded to the Tasba Raya and titled in their favor during the 1970's were separated from Awas Tingni by the Wawa River which served as a natural boundary. *Id.*

92. The Caribbean Central American Research Council (CCARC), *Diagnóstico general sobre la tenencia de la tierra en las comunidades indígenas de la Costa Atlántica* [General Diagnostic Study on Land Tenancy in the Indigenous Communities of Nicaragua's Atlantic Coast] (1998), *available at* http://www.ccarconline.org/atlanticcoast.htm [hereinafter CARC Report]. The Awas Tingni Diagnostic Study explains that the overlapping claims by Tasba Raya were based on maps created during a 1998 land tenure study by the Central American and Caribbean Research Council (CACRC). *Id.* at 46-48. This particular report was not meant to be an authoritative study of actual land rights in the area since its own information-gathering methodology intended to reflect only what communities claimed to be their lands but did not include any legal foundations for those claims. *Id.* at 25, 54, 57. The CACRC Report itself notes that no land property titles have ever been awarded or

Awas Tingni were aware that those families initially came due to land scarcity in their communities, and it was willing to negotiate ceding portions of its ancestral lands to those members of Tasba Raya who needed it. This action by the community was consistent with the Inter-American ruling itself, which called for consideration of the rights of other indigenous communities,[93] although it did not mean that Tasba Raya or any other community had ancestral rights over the same territory.

The Awas Tingni made a series of proposals to the Tasba Raya, ceding tracts of land ranging from 1,000 hectares to 15,000 hectares in order to peacefully resolve the boundary dispute.[94] However, during negotiation meetings held as part of the official conflict resolution process under Law 445, the Awas Tingni proposals were routinely rejected by the Tasba Raya representatives, making such meetings fraught with tension. The Tasba Raya claimed they were entitled to the land because it was an indigenous community from the general Atlantic Coastal region; whereas the Awas Tingni asserted ancestral rights to the particular area in dispute with evidence supported by its diagnostic study. These factors made an understanding between both parties impossible during a mediation session in October 2006 that was convened by the Demarcation Commission in accordance with Law 445.[95]

After the failed mediation session, the only recourse left for the Awas Tingni under Law 445 was to await a resolution by the Demarcation Commission providing a definitive solution to the territorial dispute; such resolution had to be presented to the corresponding Regional Council for its official ratification.[96] In February 2007, the Demarcation Commission presented its proposed conflict resolution to the Northern Regional Council, which officially ratified it. The approved resolution divided the 41,000 hectares in dispute by assigning 20,000 hectares to the Awas Tingni and 21,000 hectares to the Tasba Raya, the latter portion to be divided equally among the three Miskito communities.[97] This resolution also provided for the

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have been requested by others within the territory claimed by the Awas Tingni. *Awas Tingni* decision, *supra* note 9, ¶ 83(j) (testimony by Charles Hale, co-author of CACRC Report).

93. Awas Tingni Decision, *supra* note 9, ¶ 153 ("[T]he members of the Awas Tingni Community have a communal property right to the lands they currently inhabit, without detriment to the rights of other indigenous communities.").

94. *See e.g.,* Segunda Propuesta de Titulacion del Territorio Amasau de la Comunidad Sumo-Mayagna de Awas Tingni (Jan. 3, 2006) (on file with author) (proposal to cede 10,000 hectares). The last proposal of 15,000 hectares was made during a mediation session in October 2006, *see* Leonardo Alvarado, *Comunidad Awas Tingni hace un último esfuerzo de reconciliación con vecinos durante histórica session de mediación* [Awas Tingni Community makes last reconciliation effort with Neighbors During Historic Mediation Session], Awas Tingni Newsletter, No. 4 (November 2006), *supra* note 62, *available at* http://www.law.arizona.edu/Depts/IPLP/advocacy/awastingni/newsletter/newsletterNov2006.html.

95. For a description of the mediation session, *see* Alvarado, *supra* note 94.

96. Law 445, *supra* note 68, ch. IV, art. 21.

97. *See* CRAAN, *Ratificación de la Resolución de la Comisión de Demarcación y Ordenamiento Territorial del ConsejoRegional Autónomo del Atlántico Norte que resuelve el Conflicto Limítrofe entre la Comunidad Indígena Awas Tingni y las Comunidades Indígenas*

immediate demarcation and titling of the total area claimed by the Awas Tingni and the indemnification of groups of ex-combatants who previously received invalid land titles within Awas Tingni territory from the government as part of Peace Accord Agreements of the early 1990s.[98]

This resolution, the first to be made under the conflict resolution provisions of Law 445, is a significant development within the demarcation efforts of indigenous communities on the Atlantic Coast. It is clear that, apart from what Law 445 mandated, there were practical considerations that warranted such resolution; however, its unilateral and non-consensual nature would understandably cause concern to indigenous communities trying to protect their ancestral land claims, and this is definitely an issue that needs to be addressed in future applications of Law 445.[99] In the case of the Awas Tingni, the excessive time it took to arrive at a conclusion at the conflict resolution stage has made it wary of any further delays that may come from contesting it. Although the resolution awarded more land to the Tasba Raya than the Awas Tingni offered in its last proposal during the October 2006 mediation session, the Awas Tingni did recognize the resolution as an important step to push forward the already stagnated process of demarcation and titling.

The implementation of the February 2007 resolution brought about a new set of concerns for the Awas Tingni. For example, twenty-three Awas Tingni families risked removal if the lands they had lived on were included in the 21,000 hectares assigned to the Tasba Raya.[100] Consequently, during the months following the February 2007 resolution, the Awas Tingni attempted to meet with national and regional government authorities to address the above issues and the continuing third party intrusions.[101] However, the Awas Tingni have recently faced new difficulties

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Francia Sirpi, Santa Clara y La Esperanza del Territorio de Tasba Raya (Resolución No. C.D./CO-02-10-07) [hereinafter 2007 Resolution], (cited in Awas Tingni Newsletter No. 5 (Feb. 2007), *supra* note 62, Leonardo Alvarado, *Consejo Regional Autónomo del Atlántico Norte ratifica resolución de conflicto limítrofe entre Comunidad Awas Tingni y Bloque Tasba Rayaavailable at* http://www.law.arizona.edu/depts/iplp/advocacy/awastingni/newsletter/newsletterFeb2007.html.

98. *See* 2007 Resolution, *supra* note 97, at arts. 2-4 (cited in Awas Tingni Newsletter No. 5, *supra* note 62). The total land to be titled in favor of the Awas Tingni would amount to 73,394 hectares including the 20,000 hectares provided by the Resolution, which also provided that areas considered as sacred sites by Awas Tingni were to be excluded from the lands assigned to Tasba Raya. *Id.* art. 2.

99. Under Law 445, any party not satisfied with the decisions of the Regional Council could appeal it administratively or judicially through an amparo motion, *see* Law 445, *supra* note 68, ch. XIII, arts. 60-61.

100. *See* Alvarado, *supra* note 97.

101. In June 2007, the Awas Tingni community members met with members of a recently created Regional Development Council of the Caribbean Coast and of other regional and national institutions to discuss the implementation of the February 2007 resolution and the abovementioned concerns. Subsequently, these government authorities committed themselves to immediately beginning the process of boundary-marking and eventual titling of the Awas Tingni by August of 2007 taking into account Awas Tingni's remaining concerns over

since July of 2007 that are threatening to stall the land demarcation and titling process once again. A territorial dispute with another group of neighboring indigenous Miskito communities surfaced unexpectedly. Despite the lack of support for these conflicting claims, some regional government officials have wanted to pressure the Awas Tingni to enter into yet another conflict resolution stage.[102] In addition, the Awas Tingni are recovering from the devastating effects of Hurricane Felix, which razed Atlantic Coast communities on September 4, 2007.[103]

Once these problems affecting the titling process have been overcome, the Awas Tingni will then have to await the completion of the final stage under Law 445, where third parties remaining in their land would have to: (a) return those lands, (b) leave, or (c) enter into some kind of leasing agreement with the Awas Tingni. The process itself may take additional time and may present additional difficulties for the community; however, the community would have its long-awaited title by then.

V. PROSPECTS AND AVENUES FOR IMPLEMENTATION

The difficulties experienced in the implementation phase of the *Awas Tingni* decision bring to light serious concerns over how human rights principles will be

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possibly displaced families. *See* Leonardo Alvarado et. al., *Comunidad Awas Tingni continúa a la espera de su titulo comunal, available at* http://www.law.arizona.edu/depts/iplp/advocacy/awastingni/newsletter/newsletterOct2007.html.

102. The conflict is actually the resurgence of a previous claim by another "bloc" of Miskito indigenous communities known as Diez Comunidades (Ten Communities), who alleged the existence of a territorial overlap. Just as was the case with the Tasba Raya conflict, the Nicaraguan state attempted to undermine the legitimacy of the Awas Tingni ancestral claim during the proceedings in the Inter-American Court by alleging the existence of territorial overlaps with the Diez Comunidades and other indigenous communities. These supposed overlaps, according to the state, made it impossible to recognize the Awas Tingni claim, *see supra* note 89. The Diez Comunidades do have a land title issued in 1905; however, this title does not encompass the particular area claimed by Awas Tingni. Awas Tingni decision, *supra* note 9, ¶ 83(f) (testimony of Galio Claudio Enrique Gurdián Gurdián). The Inter-American Court requested Nicaragua to show evidence of any land title within the area claimed by the Awas Tingni in order to support the claims of Diez Comunidades, the Tasba Raya, or any other community. *Id.* ¶ 69. Nicaragua never submitted such evidence. *Id.* For more information on the nature of this conflict, *see generally* Awas Tingni Newsletter, *supra* note 62.

103. Hurricane Felix destroyed nearly all the homes in Awas Tingni territory and all of the community's crops. The natural resources such as forests, flora and fauna that Awas Tingni members have traditionally relied upon have been severely impacted by the hurricane. This devastation which has hit all communities in the northern Atlantic Coast region will take years if not decades to repair. *See generally Awas Tingni v. Nicaragua*: Hurricane Felix, University of Arizona Indigenous Peoples L. & Pol'y Program, http://www.law.arizona.edu/depts/iplp/advocacy/awastingni/felix.cfm?page=advoc (last visited Nov. 28, 2007).

implemented domestically by states and how international human rights bodies will enforce rulings and decisions. The United Nations Special Rapporteur on the situation of human rights of indigenous people, Rodolfo Stavenhagen, pointed out that the implications of noncompliance in the *Awas Tingni* case gives rise to "serious doubts on [the Inter-American] system's effectiveness to bring about change in the standards and policies of States where indigenous peoples are concerned."[104] Consequently, there is an urgent need for international human rights bodies, such as the Inter-American Court of Human Rights, to "find a way of making [their] decisions binding and to succeed in establishing sanction mechanisms to be applied to States that persist in ignoring them."[105]

This difficulty in effectively enforcing officially binding decisions has characterized international human rights institutions because they lack a police force to enforce their rulings and instead rely on the willingness of states to comply for moral reasons and other types of influence on a domestic or international level.[106] In addition, international human rights law is still based on principles of non-intervention in domestic affairs of states, although that is increasingly becoming less of a barrier for international scrutiny of how a state treats citizens within its borders.[107]

As noted by the Special Rapporteur, recent national advances in indigenous peoples' rights have faced an "implementation gap" between legal principle and actual state practice.[108] International decisions such as *Awas Tingni* will take time to

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104. U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, , ¶ 68, U.N. Doc. E/CN.4/2006/78 (Feb. 16, 2006) (*prepared by* Rodolfo Stavenhagen), *available at* http://www.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm [hereinafter Stavenhagen Report (February 2006)].

105. *Id.* ¶ 72. In addition, Mr. Stavenhagen notes that "[I]t is necessary to expand and strengthen that protection measure and bring into operation mechanisms for consolidating the actions of indigenous organizations and human rights bodies in the international protection system." *Id.* ¶ 73.

106. Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 11-14 (Hurst Hannum ed., 4th ed. 2004) ("[E]ven when international courts are able to render judgments against nations that violate human rights obligations, there is no international police force to enforce such orders. Consequently, international human rights law . . . must rely heavily on voluntary compliance by states, buttressed by such moral and other influence as other countries are prepared to exert."). *Id.* at 11.

107. *See* Anaya, *supra* note 41, at 217.

108. As Stavenhagen notes, the "implementation gap" is the "vacuum between existing legislation and administrative, legal, and political practice. This divide between form and substance constitutes a violation of the rights of indigenous people." Stavenhagen Report (February 2006), *supra* note 104, ¶ 83. This gap arises out of problems within the legislative process itself that provides scarce representation and participation by indigenous peoples and also arises from continuing prejudices against indigenous rights among political actors. *See generally id.* "The problem is not only one of legislating on indigenous issues, but also of doing so with the indigenous peoples themselves." *Id.* ¶ 84.

be fully implemented since, for the most part, domestic public administration and state bureaucracies react slowly in recognizing and adapting to notions of multiculturalism and the rights of indigenous peoples.[109] Consequently, the closing of the implementation gap will require more involvement and oversight by international institutions, such as the Inter-American Court, as well as a concerted effort in the domestic arena of each state to make its institutions and officials more attentive to the demands of indigenous peoples.

A. Implementation at the International Level: Recourses within the Inter-American System

The monitoring and supervision of compliance with its judgments is one of the inherent functions of the Inter-American Court of Human Rights.[110] Under the American Convention, the Court can report those cases that have not been complied with to the OAS General Assembly and make "pertinent recommendations" regarding those cases.[111] There is no clear procedure outlining what actions the General Assembly would take to supervise compliance with Court judgments,[112] however, it could exert political pressure on a state to comply with those judgments.[113] There has not yet been an instance where the General Assembly has exerted political pressure on a state or commented on a state's noncompliance with

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109. *See e.g., id.* ¶ 87. As indicated by the Special Rapporteur, discriminatory and assimilationist policies continue to be present in the "administration of justice, education, health, environmental policy, agrarian issues and economic development." *Id.*

110. *See e.g.,* Order of the Inter-Am. Ct. H.R., Cesti-Hurtado v. Peru, Monitoring Compliance with Judgment, at 10, ¶ 1 (Sept. 22, 2006) ("[M]onitoring compliance with its decisions is a power inherent in the judicial functions of the Court."), *available at* http://www.corteidh.or.cr/docs/supervisiones/cesti_22_09_06_ing.pdf [hereinafter *Cesti-Hurtado* Monitoring Compliance]; *see also* Order of the Inter-Am. Ct. H.R., Ricardo Canese v. Paraguay, Monitoring Compliance with Judgment, at 3, ¶ 1 (Sept. 22, 2006) ("[O]ne of the inherent attributes of the jurisdictional functions of the Court is to monitor compliance with its decisions."), *available at* http://www.corteidh.or.cr/docs/supervisiones/canese_22_09_06_ing.pdf.

111. American Convention, *supra* note 7, art. 65.

112. Dinah L. Shelton, *The Inter-American Human Rights System*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 106, at 127, 141 ("The lack of a formal procedure before the OAS General Assembly to review compliance with Commission recommendations and Court judgments also weakens the political impact of the system. Nonetheless, efforts are being made to improve supervision of compliance, and the [Inter-American] Court has repeatedly asked the political organs of the OAS to exercise the duty of 'collective guarantee.'").

113. Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439-447 (1990), *reprinted in* RICHARD B. LILLICH ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 721, 724 (4th ed. 2006).

Court judgments.[114] This is a limitation that, along with the inadequate funding of the Inter-American human rights institutions by the OAS,[115] needs to be overcome in order to significantly improve the monitoring and enforcement of the judgments and resolutions of the Inter-American human rights institutions.[116]

In general, however, there is no other mechanism for enforcement of Inter-American Court judgments than initiatives the Court itself would take.[117] In the European human rights system, enforcement of judgments by the European Court of Human Rights corresponds to the Committee of Ministers of the Council of Europe.[118] The Committee of Ministers undertakes an active role in monitoring compliance of those judgments through direct communications with the states concerned and adoption of additional resolutions and measures for full implementation of the judgments.[119] Therefore, absent any action by the already

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114. JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 343-45 (Cambridge Univ. Press 2003). "The political organs of the OAS have not fulfilled their intended role of providing formal support to the [Inter-American] Commission and the Court. The failure of the political organs to exert political pressure on States Parties . . . has been a notably unsuccessful aspect of the functioning of the Inter-American system." *Id.* at 343. Pasqualucci also notes that the OAS General Assembly does not directly review the Court's annual reports nor act in egregious cases of noncompliance such as when Trinidad and Tobago renounced the American Convention and the Court. *Id.* at 344.

115. *Id.* at 346-48.

116. In one notable instance, the OAS Consultation Meetings of Ministers of Foreign Affairs exerted political pressure based on reports by the Inter-American Commission on Human Rights. In the case of Nicaragua under the Somoza regime, this entity emitted a resolution which actually influenced Somoza to resign in 1979. *See id.* at 344-45; Medina, *supra* note 113, at 447-48.

117. Among some of the proposals for reform of the Inter-American human rights system is Judge Cançado Trindade's proposals for a limited Protocol to the American Convention that would call for some changes within the procedures of both the Court and Commission among them a provision requiring the Permanent Council of the OAS to monitor state party compliance with Court decision, JUDGE CANÇADO TRINDADE, REPORT AND PROPOSALS OF THE PRESIDENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS BEFORE THE COMMISSION ON JURIDICAL AND LEGAL AFFAIRS OF THE PERMANENT COMMISSION OF THE OAS, ¶ 54, April 5, 2001, *cited in* PASQUALUCCI, *supra* note 114, at 24.

118. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 46(2), November 4, 1950, 312 U.N.T.S. 221, as amended by Protocol No. 11, ("The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.").

119. The Committee of Ministers is the decision-making body of the Council of Europe composed of foreign affairs ministers of the member states. It establishes a constructive dialogue with states and resorts in some cases to diplomatic and political pressure. It invites states subject to judgments by the European Court of Human Rights to inform it of steps taken to comply with the judgment. It also makes recommendations on measures needed to comply with judgments and also adopts additional resolutions regarding actions needed for the state to comply. The Committee is assisted by its secretariat and that of the Council of Europe through its Department for the Execution of Judgments of the European Court of Human Rights. *See generally* Council of Europe: Committee of Ministers, *Supervision of Execution of Judgments*

existent political bodies of the OAS, a body similar to the European Committee of Ministers would be necessary to exert full pressure on state members to comply with Inter-American Court decisions.

In the *Awas Tingni* case, the Court stated it would oversee Nicaragua's compliance until full compliance with the judgment had been achieved.[120] That oversight has consisted in Nicaragua's submission of periodic reports, which the Court explicitly ordered to be submitted every six months, and based on those reports, the Awas Tingni would then offer its own observations and objections.[121] In subsequent indigenous rights cases, the Court has given further interpretations of its judgments to clarify certain aspects of indigenous property rights provisions. For example, in the *Yakye Axa* case, the Court clarified that although the state would ultimately determine the lands it must demarcate for the Yakye Axa, it must still consider the community's cultural connection to its ancestral territory.[122] In clarifying the *Moiwana Village* case, the Court stated that Surinam's determination of the boundaries for the lands it would title for Moiwana must be done with the "participation and informed consent" of the Moiwana villagers as well as those of neighboring communities although still leaving "the designation of the territorial boundaries in question to 'an effective mechanism' of the State's design."[123]

In other cases, the Court has monitored state reports to determine whether or not a state is in compliance with the Court's orders. Where the Court determines that a state is noncompliant, it has issued a resolution ordering prompt and full compliance.[124] For example, in the *Sawhoyamaxa* case,[125] the Court determined Paraguay did not comply with certain aspects of the judgment; therefore, the court would continue monitoring Paraguay until it fully complied with its obligations to

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of the European Court of Human Rights, http://www.coe.int/t/cm/humanRights_en.asp (last visited Nov. 17, 2007); European Court of Human Rights Home Page, http://www.echr.coe.int/ECHR (last visited Nov. 17, 2007).

120. *Awas Tingni* decision, *supra* note 9, ¶ 173(9).

121. *See id*. at para. 173(8). ("[The Court] finds that the State must submit a report on measures taken to comply with this judgment . . . every six months."). In the case of the Provisional Measures Resolution, Nicaragua has to submit periodic compliance reports every two months. Provisional Measures Resolution, *supra* note 56, at 6, ¶ 5.

122. *See* Case of Yakye Axa Indigenous Community v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 142 ¶¶ 23-26 (Feb. 6, 2006), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_142_ing.pdf. ("[T]he task of identifying the Yakye Axa Community's ancestral lands is the responsibility of Paraguay. However, in carrying out such task, Paraguay must . . . [give] careful consideration to the values, uses, customs and customary laws of the members of the Community, which bind them to an [*sic*] specific territory.") *Id.* ¶ 26.

123. Case of Moiwana Community v. Suriname, 2006 Inter-Am. Ct. H.R. (ser. C) No. 145 ¶ 19 (Feb. 8, 2006), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_145_ing1.pdf.

124. *See Cesti-Hurtado* Monitoring Compliance, *supra* note 110, at 13, ¶¶ 19-20.

125. Sawhoyamaxa decision, *supra* note 35.

provide for the health, development, and territorial rights of the Sawhoyamaxa community.[126]

In the *Awas Tingni* case, the Court never made an official declaration regarding Nicaragua's noncompliance nor issued a compliance resolution on the matter. Nonetheless, the Awas Tingni have asked the Court to remain involved supervising and enforcing its decisions in this case. One example has been the request for additional monetary reparations from the Nicaraguan state for the ongoing human rights violations that the Awas Tingni have suffered since the 2001 judgment.[127] The success of this type of legal initiative would depend on the Court's willingness to exert pressure on state governments to comply with its judgments through novel means such as ordering additional reparations, especially since such reparations would be difficult, if not impossible, to obtain within the Nicaraguan legal system.

Considering the relatively lower level of involvement by the Court in assuring the implementation of the *Awas Tingni* decision, it could be argued that, at the very least, the Court could have made a declaration of noncompliance by Nicaragua within the OAS General Assembly. Certainly the amount of time that transpired since the Court's ruling would have been a cause for concern for the political organs

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126. Order of the Inter-Am. Ct. H.R., Sawhoyamaxa Indigenous Community v. Paraguay, Monitoring Compliance with Judgment, at Declarations and Decision sections (Feb. 2, 2007), *available at* http://www.corteidh.or.cr/docs/supervisiones/sawhoyamaxa_02_02_07.pdf (Spanish). Among the other things that Paraguay needed in order to comply was to provide information to the Court about an implementation committee that was to be in charge of facilitating projects and providing a development fund for the benefit of the indigenous community. *Sawhoyamaxa* decision, *supra* note 35, ¶¶ 224-25.

127. The community has sent separate communications to the Court detailing the serious ecological, economic and socio-cultural harms it has experienced as a result of the continuing lack of legal protection of its ancestral lands and the consequent presence of third parties. While the Awas Tingni await the definitive demarcation and titling of lands, they are incurring heavy losses in terms of the integrity of territory; natural resources, particularly its forest resources; and continues to experience social and ethnic tensions with third parties in its territories that has resulted in one instance of the uninvestigated murder of an Awas Tingni member. The damages also include continuing expenses in terms of time and resources to meet with or send communications and complaints to local authorities and government institutions in order to defend their land and natural resources protected under the judgment and provisional measures resolution of the Court. Consequently, the community and its legal advisors have made two formal requests for reparations of these material and immaterial damages as well as for its continuing expenses, which have yet to be answered by the Inter-American Court. Inter-Am. Ct. H.R., Comunidad Awas Tingni, *Solicitud de reparaciones adicionales de la Comunidad Mayagna Awas Tingni ante la Corte Interamericana de Derechos Humanos en el caso de la* Comunidad Mayagna (Sumo) Awas Tingni vs. Nicaragua [Request By Petitioner- Mayagna (Sumo) Awas Tingni for Additional Reparations], CDH-11.577 (May 3, 2005) (on file with author); and Inter-Am. Ct. H.R., Comunidad Awas Tingni, *Solicitud suplementaria de reparaciones adicionales de la Comunidad Mayagna Awas Tingni ante la Corte Interamericana de Derechos Humanos en relación con el caso de la* Comunidad Mayagna (Sumo) Awas Tingni vs. Nicaragua [Supplemental Request By Petitioner- Mayagna (Sumo) Awas Tingni for Additional Reparations] (Dec. 2, 2006) (on file with author).

of the OAS, and any political pressure they could have exerted would have aided the Awas Tingni considerably. This is an issue that the OAS system, as a whole, needs to resolve in future cases.

Along with the needed intensification of enforcement action at the international level, the *Awas Tingni* case also demonstrates the absolute necessity of action at the domestic level in order to make state governments take their international obligations more seriously.

B. Implementation at the National Level

Nicaragua's lack of full compliance with the Inter-American Court's ruling in the Awas Tingni case evidenced the need for the internalization of international human rights law by a state's social, legal, and political institutions. Such internalization can be effectuated through a "transnational legal process" that includes external pressures, international sanctions, motivations of self-interest, and gradual acceptance of those principles by states prompted by feelings of belonging to the international community.[128] Indeed, the ideal situation for Nicaragua and other Latin American countries is that through such a process of internalization states would "come to 'obey' international human rights law out of a perceived self-interest that becomes institutional habit."[129] As mentioned earlier, such a situation did occur when Nicaragua adopted Law 445 due to pressure from the World Bank as a pre-condition for a loan disbursement.[130]

The implementation of international human rights standards for indigenous peoples has been more challenging than in other arenas because of the history of dispossession and repression against indigenous peoples, the continuing perception of indigenous peoples as inferior, and the continued threats to their lands and natural resources coveted by governments, and national and transnational corporations. Coupled with these is the continued misunderstanding by state governments of indigenous peoples' aspirations in the area of land rights, autonomy, and self-determination. Such factors have made it very difficult for state governments to perceive that respect for indigenous peoples' distinct demands coincide with the state's own interests.

Notwithstanding the above factors, the *Awas Tingni* case has significantly contributed to the adoption of international human rights standards on indigenous

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128. *See generally,* Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L. J. 1397, 1399 (1999). Koh states that international human rights law is enforced through a "transnational legal process of institutional interaction, interpretation of legal norms, and attempts to internalize those norms into domestic legal systems." *Id*.

129. *Id.* at 1411. As Koh points out, non-governmental actors within a given country have played an important role in effectuating a "vertical" transnational legal process through which international human rights standards become part of institutional domestic law and practice. *Id.* at 1413.

130. *See supra* Part IV.A.

peoples' rights by the domestic courts in the Americas, most notably in Belize. For instance, in October 2007 the Supreme Court of Belize issued a landmark ruling affirming the rights of two Mayan communities in the Toledo District of southern Belize by recognizing their customary property rights and also by affirming Belize's obligation to demarcate and provide official recognition of those lands.[131] In interpreting the extent of Belize's constitutional violation of Mayan customary land rights, the Supreme Court of Belize directly cited the Inter-American Commission of Human Rights' report recognizing the collective property rights of the Maya in Belize.[132] Additionally, the Inter-American Court's judgment in *Awas Tingni* was cited as clearly persuasive authority defining indigenous property rights recognized under the treaties and other legal instruments of the Inter-American system, of which Belize was a signatory nation.[133] This judgment is also significant in its reliance on international customary law principles, particularly the general principles on indigenous human rights enunciated by the Inter-American Commission in the *Dann* case,[134] and, most notably, the indigenous land rights provisions of the United Nations Declaration on the Rights of Indigenous Peoples adopted by the U.N. General Assembly in September 2007.[135]

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131. *See* Maya Vill. of Santa Cruz v. Attorney General of Belize [Supreme Court], Consolidated Claims Nos. 171 & 172 (2007) [hereinafter Belize Supreme Court Decision]; *available at* http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf. Here, members of the Mayan villages of Santa Cruz and Conejo sued the Attorney General and Minister of Natural Resources and Environment, as representatives of the Belize government, for violations of their customary property rights as recognized under the Constitution of Belize, international treaties and international customary law. *Id.* ¶ 2. The Court held that the claimant communities did indeed have customary land rights that Belize was bound to uphold, that the government had to "determine, demarcate and provide official documentation of Santa Cruz's and Conejo's title and rights in accordance with Maya customary law and practices," and that the government had to abstain from any acts that lead its agents or third parties to affect the use and enjoyment of those communities' territory. *Id.* ¶ 136.).

132. *See Maya Indigenous Communities*, *supra* note 25. Chief Justice Abdulah Conteh of the Court explained that although the "conclusions and pronouncements of the [Inter-American] Commission may not bind this court, I can hardly be oblivious to them: and may even find these, where appropriate and cogent, to be persuasive." Belize Supreme Court Decision, *supra* note 131, at para. 22.

133. Belize Supreme Court decision, *supra* note 131, ¶ 121.

134. *See supra* notes 23-24 and accompanying text.

135. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). The Belize Supreme Court specifically cited article 26 of this Declaration which recognizes *inter alia* that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned occupied or otherwise used or acquired . . . [and in addition,] States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions, and land tenure systems of the indigenous peoples concerned." *Id.* art. 26, *cited in* Belize Supreme Court decision, *supra* note 131, ¶ 131.

Within the specific context of Nicaragua, recent developments since the installation of a new presidential administration in January 2007 also indicate positive changes towards a greater respect for indigenous land and natural resource rights as well as opportunities for internalization of international human rights standards. In early 2006, the preeminent indigenous political party on the Atlantic Coast, YATAMA,[136] entered into a political alliance with the National Sandinista Liberation Front (FSLN),[137] whose candidate, Daniel Ortega, won the November 2006 elections and regained the presidency after sixteen years since he and the FSLN lost power. The YATAMA/FSLN accord, in addition to providing for mutual political support, also called for the FSLN to support most notably: (a) the demarcation of indigenous and ethnic (Afro-descendent) territories in accordance with the principles of the *Awas Tingni* case; (b) the reform of the Autonomy Statute to make it more representative of the aspirations of the indigenous peoples of the Atlantic Coast; and (c) efforts to contain the expansion of the agricultural frontier in order to better protect indigenous and Afro-descendent peoples' lands and resources.[138] In addition, the accord stated that the government would provide compensation and reparations for indigenous communities affected by the armed conflict during the first Sandinista administration and that the government would support the reformation of the National Electoral Law to provide greater participation and representation for indigenous and Afro-descendent peoples within regional and national institutions.[139] This last provision would assure the implementation of the Inter-American Court's ruling in the *YATAMA vs. Nicaragua* case.[140]

This political accord, which seemed unlikely given the hostilities between YATAMA and the FSLN during the armed conflict of the 1980's, was motivated by the perceived need to reform the Autonomy Regime in the Atlantic Coast in order to better protect the territories of indigenous and Afro-descendant groups as well as to provide for their greater political participation. The FSLN was the only party who was willing to recognize the demands of YATAMA as opposed to the more right-of-center liberal parties that have been in power since 1990; therefore, the alliance with the FSLN presented an opportunity for YATAMA to achieve its political

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136. YATAMA (Yapti Tasba Masraka Nanih Asla Takanka – "children of the mother earth" in Miskito) grew out of the military and political mobilization of Miskito Indians during the 1980's as a result of the military campaign by the previous revolutionary Sandinista government against indigenous efforts for autonomy in the Atlantic Coast. *See generally* CHARLES R. HALE, RESISTANCE AND CONTRADICTION: MISKITU INDIANS AND THE NICARAGUAN STATE, 1894-1987 (1996).

137. Chris Chapman, *In Nicaragua, an historic—and Unlikely—Alliance for Peace*, ONEWORLD UK, Sept. 21, 2006) (UK), *available at*: http://uk.oneworld.net/article/view/139784/1.

138. *See* Acuerdo de Compromiso entre YATAMA y el FSLN con la Autonomía [Autonomy Accord between YATAMA and the FSLN] (Nicar.) (May 2, 2006), ¶¶ 1, 2, 6 (on file with author).

139. *Id.* ¶¶ 3, 7.

140. *See* YATAMA decision, *supra* note 30.

objectives.[141] While it is still early to see what the extent of the commitment of the new Sandinista government will be towards the demands made by YATAMA and the indigenous peoples of the Coast, it is hoped it will provide the necessary support for the demarcation institutions considering the FSLN's helpful role in the ratification process of Law 445 in the National Assembly.[142]

The accord itself can be viewed as a mechanism for incorporating international human rights standards on indigenous peoples as it cites the *Awas Tingni* and *YATAMA* decisions as reference points for carrying out the provisions of the accord. One of the tangible changes that has already occurred within the Nicaraguan governmental structure is the election of YATAMA's main leader, Brooklyn Rivera, (who also obtained a congressional seat in the legislative National Assembly under the YATAMA/FSLN accord) as president of the Commission on Ethnic Affairs, Autonomous Regimes and Indigenous Communities[143], an institutional organ of the National Assembly. Among some of this Commission's legislative initiatives are the proposal to ratify the International Labor Organization (ILO) Convention No. 169 on indigenous rights[144] and a general law benefiting indigenous peoples in the northern, central, and Pacific regions of Nicaragua who, unlike the indigenous peoples of the Atlantic Coastal regions, have not had any legal recognition.[145]

While these new developments will take time to translate into palpable results for indigenous peoples in Nicaragua, they have to be recognized as positive steps toward the realization of indigenous rights and their internalization by the national political system, and hopefully, by the rest of Nicaraguan civil society. As noted by

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141. *See* Chapman, *supra* note 137 (describing the role that the Autonomy Regime played in bringing peace with the Sandinistas; however, with subsequent liberal administrations "over the years it has become clear that the liberal party is only interested in promoting a homogenous Spanish [mestizo] identity that does not protect minority languages or cultures. The Autonomy [the indigenous peoples] voted for was not delivered").

142. For further discussion of the YATAMA/FSLN alliance, see generally, Álvaro Rivas Gómez, *Agenda para una estrategia de desarrollo regional autónomo*, EL NUEVO DIARIO (Nicar.), Jan. 29, 2007, *available at* http://impreso.elnuevodiario.com.ni/2007/01/29/opinion/39930.

143. Comisión de Asuntos Étnicos, Regímenes Autonómicos y Comunidades Indígenas. *See generally Summary Records of the 111th Meeting: Nicaragua*, [1995] U.N. Doc. CERD/C/SR.1111, ¶ 35, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fd501d455cfc4c5e802565cd0040bc12?Opendocument.

144. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, (entered into force Sept. 5, 1991), *availale at* http://www1.umn.edu/humanrts/instree/r1citp.htm.

145. *See* Francisco Sevilla Ruiz, *Líderes indígenas demandan aprobación de la Ley General de Pueblos Indígenas,* [Indigenous leaders demand approval of General Law on Indigenous Peoples] Press Release, National Assembly (Nov. 23, 2007) (Nicar.), *available at* http://www.asamblea.gob.ni/index.php?option=com_content&task=view&id=146.; and Mayra Vado, *Comisión Étnica realizará seminario sobre Convenio 169 en Costa Caribe,* [Ethnic Commission will hold seminar on ILO Convention 169 on Caribbean Coast], Press Release, National Assembly (Nicar.), Nov. 15, 2007, *available at* http://www.asamblea.gob.ni/index.php?option=com_content&task=view&id=137.

Special Rapporteur Stavenhagen, the effective realization of indigenous peoples' rights under international law will necessitate "full participation of the indigenous organizations and civil society [to act] constructively . . . in the quest for a solution to conflicts and for consensus, which, in the long run, will benefit the national society as a whole."[146]

VI. CONCLUSION

The *Awas Tingni* decision symbolizes an important milestone for indigenous peoples in the international legal arena and its implementation on the ground is worth the attention of the global indigenous movement and the international community in general. For international human rights institutions, this case will also demonstrate the degree to which its tribunal resolutions and operational conventions are respected by state governments and how effective they are in bringing real changes to their intended beneficiaries.

Within Nicaragua, this judgment by the Inter-American Court has bolstered nationwide efforts in support of indigenous land rights after the enactment of the Autonomy Statute and is an important indicator of how far the country needs to go to protect the indigenous rights recognized within its domestic legislation. The likely ratification of the ILO 169 will also mark the increasing level of Nicaragua's international commitments in this regard. With a new government in place closely allied to the indigenous political party YATAMA, there is room for some optimism that there will be a reversal of the pattern of governmental disregard for indigenous territorial demands and of the depredations caused by illegal loggers and colonists which has characterized the situation Awas Tingni has faced before and after the Court decision. This, of course, will depend on the new government's willingness to follow through with its political commitments to the indigenous movement, which include the demarcation of indigenous lands under the standards of the *Awas Tingni* decision and the reform of legislation to allow for greater indigenous political participation as stated in the *YATAMA* decision.

Despite the difficulties in its implementation, the *Awas Tingni* decision has helped advance the cause for greater recognition of the territorial and natural resource rights of indigenous peoples. It has had both legal and political influence along the Nicaraguan Atlantic Coast by prompting the passage of an indigenous demarcation law (Law 445), and it has served as an important reference point within the accords creating the political alliance between the current Sandinista government and YATAMA. Although recent developments, such as continuing inter-ethnic territorial disputes and the devastation caused by natural disasters, threaten to bring more delays in the demarcation of the Awas Tingni lands, it is clear that certain government officials under the new presidential administration are more attentive to

146. Stavenhagen Report (February 2006), *supra* note 104, ¶ 91.

the process of demarcation of the lands of the Awas Tingni and other indigenous communities than has been the case during previous administrations.[147]

Notwithstanding current difficulties within Nicaragua, *Awas Tingni* represents an important validation of the efforts of the international indigenous movement and has been amply relied upon as persuasive legal authority by other indigenous communities outside of Nicaragua to further their cause, both in domestic and international tribunals. It is, in essence, an important vindication of the historical struggles of indigenous peoples to reverse centuries of injustice by contributing to their efforts to regain control over their present-day territories, natural resources, and social and political institutions.

147. For future information on the latest developments in the implementation of the Awas Tingni case, *see* Awas Tingni Case Newsletter, *supra* note 62.