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Robert Coulter

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Text of Remarks on Panel: “Indigenous Peoples, Environmental Torts and Cultural Genocide”

BY ROBERT COULTER*

We have heard a wonderful triad of presentations, and they are very encouraging. It gives me a good opportunity to move into the area that I want to discuss particularly and that is the Awas Tingni case.

But before I do that, I should say that the Indian Law Resource Center that I head is an Indian organization that specializes in international law work. It is not the only thing we do, but we do a great deal of it. In fact, nearly all that we do at the international level is related to environmental protection, because almost always we find that the human rights situations that indigenous people confront are, in fact, principally environmental protection issues. Do we care about the environment? Is that the real issue? Or do we care about the indigenous people? Is that the real issue? I think the answer, in our experience, is, “What is the difference?” We cannot tell. It is a situation where we have categories that do not seem to fit. The separate categories are perhaps inappropriate. The same conditions that threaten the destruction of the environment threaten the destruction of the indigenous people, and the intertwining of the two is impossible to undo. So we find that in situations like Awas Tingni, the protection of indigenous people’s human rights is really protection of the environment as well.

We first found this in the situation of the Yanomami, in the Amazon, in Northern Brazil back in the late 1980s when there was a

* Executive Director of the Indian Law Resource Center, an international NGO which provides legal assistance to Indian nations and communities in major cases involving human rights and environmental protection. The Center is based in Helena, Montana and has an office in Washington, DC. Education: B.A., Williams College; J.D., Columbia University School of Law.

huge gold rush there. We were heartbroken when no one seemed to care about the Yanomami, but everyone seemed to care about the rain forest. You could not get anyone to pay attention to the fact that around 20% of the Yanomami population in Brazil had died.

But it was eye opening to us, because we were forced to realize that the environmentalists were our allies and friends, and that perhaps we were wrong in failing to recognize the unity of these two concepts—the unity of the protection of the environment and the protection of people. The other thing about it is, of course, that not everyone can be a part of an indigenous population; we cannot all be indigenous people. But so what? I doubt that that matters either; my guess is that human rights are always integrated and intertwined with the environmental issues. So, I don't really want to focus entirely on the Awas Tingni case. I would like to give attention to how these human rights mechanisms that we use in indigenous peoples' cases can be used by other people.

The situation of the Awas Tingni concerns the Sumo Indian community. "Sumo" is another word for that group, for that nation of indigenous people; Awas Tingni is a particular community. They hold their land in common—they hold it by aboriginal right. That is, they do not have a deed; they do not have a title or charter from anyone. They have just always been there or nearly always been there. And within their communally held area, there are some specific individual- or family-owned units, but that is all subsidiary to the system of land tenure where the community holds it all in common.

In Nicaragua, even though the government claims that it recognizes the land rights of the indigenous people, it never got around to saying what lands those are. And they do not do what is called "demarcation of the land." This was also the situation in Brazil. And that is the trouble Awas Tingni has. The government of Brazil was perfectly willing to say that some lands belong, for example, to the Yanomami, but they would not say exactly what land that was. And so, the human rights effort has been directed towards forcing the government to demarcate those lands. In a demarcation process, the issue of ownership is negotiated and settled. Then the parties decide exactly what it is and draw some lines on maps and then transfer those lines onto the ground so that there will be specific, defined, and enforceable rights. And that is the situation in Nicaragua as well. What you find in this situation is quite common. It is that the government, although they purport to recognize Indian

rights to land, does not say what it is. Therefore, they treat anything they want, or anything development corporations want, simply as state-owned land. And they go ahead and grant a concession for logging, oil and gas development, gold mining or what have you, usually in secret. And they say, "Well, too bad about the Indian land rights, but it was not *those* lands that the Indians owned."

So demarcation of the land was the real issue in the Awas Tingni case. The people of Awas Tingni found out about the logging concession to SOLCARSA, which is actually a Korean company, in July of 1995. They sent a letter protesting it in September. And they went to court and the court said they waited too long to complain about this. The concession had not even been signed yet, but the court threw out their effort to get a domestic remedy. Then the community took their case to the Inter-American Commission on Human Rights on the grounds that their right to own property under Article 21 of the American Convention on Human Rights was being violated, and that their right under Article 25, the right to a speedy and effective remedy, had also been denied.

Later, they did succeed in getting the concession at least nominally annulled by the Supreme Court of Nicaragua, but it was a meaningless gesture. The Supreme Court did not enforce the order, and the government never was willing to abide by the order except nominally. The Inter-American Commission on Human Rights, which is a court-like institution of the Organization of American States (OAS), tried unsuccessfully to use friendly settlement mechanisms—and that is important. I am going a little bit slowly because I am trying to point out how the Inter-American Commission does attempt to use its good offices. It is something like mediation. They attempt to bring about friendly settlements in human rights cases. They attempted that in this situation but without any success.

In 1998, the Commission used its ultimate sanction, which is to issue a report. The government of Nicaragua, in terror, recoiled. Actually, it was more serious than that. The countries do hate it when a negative report is issued. These things are not enforceable; they are not binding in a real sense. But governments actually do respond, believe it or not. They just hate it when they clearly and officially, and in writing, are shown to be serious violators of human rights. But still, although the government attempted to claim that it was solving a problem, it did nothing.

The Inter-American Commission on Human Rights can then take a case to the Inter-American Court of Human Rights in San

Jose, Costa Rica, and it is actually a court established under the OAS system. The Commission itself is the petitioner in a case before the court. They do turn the case over to us to do much of the substantive legal work in presenting the case. It is a funny kind of court there, sort of a hybrid appellate court, but they actually try cases. So, you have this panel of judges comprising the court who come from all different countries and have some very diverse views about the law and how the court operates. They try to act as an appellate court, but they are trying the case, and they hear witnesses. We had a three-day trial in the Awas Tingni case, and some very unusual arguments and procedural rulings were made in the course of the trial. But all in all it was a thoroughly legal court proceeding, and a very serious one. We expect that an historic precedent will be established when the court ultimately decides the case.

The trial was in the early part of November, and we are expecting a decision sometime in 2001.¹ There were amicus curiae briefs submitted by various indigenous organizations and other human rights groups around the United States and Canada. We think that a favorable decision will be rendered by the court that will do three things—at least that is what we have asked. We have asked the court to declare (1) that the government of Nicaragua violated the human rights of the Awas Tingni community by granting this logging concession; (2) that they have an obligation to move ahead and

1. In the judgment dated August 31, 2001, in the case of Mayagna (Sumo) Indigenous Community of Awas Tingni v. Republic of Nicaragua, the Inter-American Court of Human Rights ruled, *inter alia*:

By virtue of the fact of their very existence, indigenous communities have the right to live freely on their own territories; the close relationship that the communities have with the land must be recognized and understood as a foundation for their cultures, spiritual life, cultural integrity and economic survival.

....
... [T]hat the State must adopt measures of a legislative, administrative, and whatever other character necessary to create an effective mechanism for official delimitation, demarcation, and titling of the indigenous communities' properties, in accordance with the customary law, values, usage, and customs of these communities. . . . Nicaragua must cease acts which could cause agents of the State, or third parties acting with its acquiescence or tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area the Community of Awas Tingni inhabits and in which it carries out its activities.

Mayagna (Sumo) Indigenous Community of Awas Tingni v. Republic of Nicaragua, Judgment, paras. 149, 164 (Inter-Am. C.H.R. Aug. 31, 2001) (unofficial translation by the Indian Law Resource Center) (on file with author).

demarcate the land; and (3) that they also must pay damages and pay the attorney fees as well. The order of the Inter-American Court is enforceable in the Nicaraguan courts. So there may be teeth in it.

My time is up but I would like to add here at the end, hastily and without explanation, that I think others could use this procedure. There is nothing about this that is distinct to indigenous people. The only thing is what others have mentioned and that is that the indigenous people do tend to live in the areas that are particularly threatened. Apart from that, I think most of these remedies are available to others as well.

