

Inter-American Court of Human Rights

Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua

Judgment of August 31, 2001 (Merits, Reparations and Costs)

In the Mayagna (Sumo) Awas Tingni Community case (hereinafter "the Community", "the Mayagna Community", "the Awas Tingni Community", or "Awas Tingni"),

the Inter-American Court of Human Rights (hereinafter "the Court", "the Inter-American Court" or "the Tribunal"), composed of the following judges:

Antônio A. Cançado Trindade, President;
Máximo Pacheco-Gómez, Vice President;
Hernán Salgado-Pesantes, Judge;
Oliver Jackman, Judge;
Alirio Abreu-Burelli, Judge;
Sergio García-Ramírez, Judge;
Carlos Vicente de Roux -Rengifo, Judge, and
Alejandro Montiel Argüello, *ad hoc* Judge;

also present,

Manuel E. Ventura-Robles, Secretary, and
Pablo Saavedra-Alessandri, Deputy Secretary,

pursuant to articles 29 and 55 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure")*, delivers the following Judgment on the instant case:

I INTRODUCTION OF THE CASE

1. On June 4, 1998, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed before the Court a lawsuit against the State of Nicaragua (hereinafter "the State" or "Nicaragua"). The case in question had originated in petition No. 11,577, received at the Commission's Secretariat on October 2, 1995.

* Pursuant to the March 13, 2001 Order of the Court on Transitory Provisions pertaining to the Rules of Procedure of the Court, this Judgment on the merits of the case is rendered under the terms of the Rules of Procedure approved by the September 16, 1996 Order of the Court.

2. In its lawsuit, the Commission cited articles 50 and 51 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and article 32 and subsequent articles of the Rules of Procedure. The Commission presented this case for the Court to decide whether the State violated articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection) of the Convention, in view of the fact that Nicaragua has not demarcated the communal lands of the Awas Tingni Community, nor has the State adopted effective measures to ensure the property rights of the Community to its ancestral lands and natural resources, and also because it granted a concession on community lands without the assent of the Community, and the State did not ensure an effective remedy in response to the Community's protests regarding its property rights.

102. Regarding the above, the Court has discretionary authority to evaluate statements and pronouncements submitted to the Court. For this purpose, the Court will conduct an appropriate appraisal of the evidence, following the rules of "competent analysis".¹

VII PROVEN FACTS

103. After examining the documents, testimony, expert opinions, and the statements by the State and by the Commission, in the course of the instant proceedings, this Court finds that the following facts have been established:

- a. the Awas Tingni Community is an indigenous community of the Mayagna or Sumo ethnic group, located in the Northern Atlantic Autonomous Region (RAAN) of the Atlantic Coast of Nicaragua;²
- b. the administrative organization of the RAAN is formed by a Regional Council, a Regional Coordinator, municipal and communal authorities, and other bodies corresponding to the administrative subdivision of the municipalities;³

¹ *cfr. Cesti Hurtado case. Reparations (art. 63.1 American Convention on Human Rights. Judgment of May 31, 2001. C Series No. 78, para. 23; "Street Children" case (Villagrán Morales et al. case). Reparations, supra note 11, par 42; "White van" case (Paniagua Morales et al. case). Reparations (art. 63.1 American Convention on Human Rights). Judgment of May 25, 2001. C Series No. 76, par 52.*

² *cfr. official letter DSDG-RMS-02-Crono-014-10-98, of October 8, 1998 by Rosario Meza Soto, Deputy General Director of the National Institute of Statistics and the Census (INEC), to Fernando Robleto Lang, Secretary of the Presidency; document "Annex A Research Universe"; testimony of Charly Webster Mclean Cornelio before the Inter-American Court on November 16, 2000; "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast. General framework", prepared by the Central American and Caribbean Research Council; amparo remedy filed on September 11, 1995, before the Appellate Court of Matagalpa by María Luisa Acosta Castellón, as special agent for Jaime Castillo Felipe, Marcial Salomón Sebastián and Siriaco Castillo Fenley, Syndic and Deputy Syndic, respectively, of the Mayagna Awas Tingni Community, against Milton Caldera Cardenal, Minister of MARENA; Roberto Araquistain, Director of the National Forestry Service of MARENA, and Alejandro Láinez, Director of the National Forest Administration of MARENA, and the January, 1994 document "Territorial Rights of the Awas Tingni Indigenous Community", prepared by the University of Iowa as part of its "Project in Support of the Awas Tingni Community".*

³ *cfr. Law No. 28 "Statute on the Autonomy of the Regions of the Northern Atlantic Coast of Nicaragua", published in the official newspaper La Gaceta No. 238 on October 30, 1987.*

c. the organization of the Awas Tingni Community includes a Board of Directors whose members are the Town Judge, the Syndic, the Deputy Syndic, and the Person Responsible for the Forest. These members are elected in an assembly of all adult members of the Community, and they answer directly to that assembly;⁴

d. the Mayagna (Sumo) Awas Tingni Community is formed by more than six hundred persons;⁵

e. the members of the Community subsist on the basis of family farming and communal agriculture, fruit gathering and medicinal plants, hunting and fishing. These activities, as well as the use and enjoyment of the land they inhabit, are carried out within a territorial space in accordance with a traditional collective form of organization;⁶

f. there are "overlaps" or superpositions of communal lands claimed by the indigenous communities of the Atlantic Coast. Some communities allege rights over

⁴ *cfr.* January, 1994 document "Territorial Rights of the Awas Tingni Indigenous Community" prepared by the University of Iowa as part of its "Project in Support of the Awas Tingni Community"; amparo remedy filed on September 11, 1995, before the Appellate Court of Matagalpa by María Luisa Acosta Castellón, as special agent for Jaime Castillo Felipe, Marcial Salomón Sebastián and Siriaco Castillo Fenley, Syndic and Deputy Syndics, respectively, of the Awas Tingni Mayagna Community, against Milton Caldera Cardenal, Minister of MARENA, Roberto Araquistain, Director of the National Forestry Service of MARENA, and Alejandro Láinez, Director of the National Forestry Administration of MARENA; February 27, 1997 judgment No. 11 of the Constitutional Court of the Supreme Court of Justice of Nicaragua on the amparo remedy filed on September 11, 1995 before the Appellate Court of Matagalpa by María Luisa Acosta Castellón, as special agent for Jaime Castillo Felipe, Marcial Salomón Sebastián and Siriaco Castillo Fenley, Syndic and Deputy Syndics, respectively, of the Awas Tingni Mayagna Community, against Milton Caldera Cardenal, Minister of MARENA, Roberto Araquistain, Director of the National Forestry Service of MARENA, and Alejandro Láinez, Director of the National Forestry Administration of MARENA; and decision No. 163 of October 14, 1998 by the Constitutional Court of the Supreme Court of Justice on the amparo remedy filed by María Luisa Acosta Castellón, as legal representative of Benévicto Salomón Mclean, Siriaco Castillo Fenley, Orlando Salomón Felipe and Jotam López Espinoza, on their own behalf and as Syndic, Coordinator, Town Judge, and Person Responsible for the Forest, respectively, of the Awas Tingni Community, against Roberto Stadhagen Vogl, Minister of MARENA, Roberto Araquistain, General Director of the National Forestry Service of MARENA, Jorge Brooks Saldaña, Director of the State Forestry Administration of MARENA, and Efraín Osejo et al., members of the Board of Directors of the Regional Council of the RAAN.

⁵ *cfr.* March, 1996 brief requesting "official recognition and demarcation of ancestral lands" of the Mayagna Awas Tingni Community, addressed to the Regional Council of the RAAN; judgment No. 163 of October 14, 1998 by the Constitutional Court of the Supreme Court of Justice of Nicaragua, on the amparo remedy filed by María Luisa Acosta Castellón, representing Benévicto Salomón Mclean, Siriaco Castillo Fenley, Orlando Salomón Felipe and Jotam López Espinoza, in their own name and as Syndic, Coordinator, Town Judge and Person Responsible for the Forest, respectively, in the Awas Tingni Community, against Roberto Stadhagen Vogl, Minister of MARENA, Roberto Araquistain, General Director of the National Forestry Service of MARENA, Jorge Brooks Saldaña, Director of the State Forestry Administration of MARENA, and Efraín Osejo et al., members of the Board of Directors of the Regional Council of the RAAN; document "Awas Tingni. An Ethnographic Study of the Community and its Territory. 1999 Report", prepared by the Awas Tingni Territorial Demarcation Project, main researcher: Theodore Macdonald; official letter DSDG-RMS-02-Crono-014-10-98 of October 8, 1998, by Rosario Meza Soto, Deputy General Director of the National Institute of Statistics and the Census (INEC), to Fernando Robleto Lang, Secretary of the Presidency; document "Annex A Research Universe"; testimony by Charly Webster Mclean Cornelio before the Inter-American Court on November 16, 2000; January, 1994 document "Territorial Rights of the Awas Tingni Indigenous Community" prepared by the University of Iowa as part of its "Project in Support of the Awas Tingni Community"; and "General Census of the Awas Tingni Community" for the year 1994.

⁶ *cfr.* testimony of Charly Webster Mclean Cornelio before the Inter-American Court on November 16, 2000; testimony of Jaime Castillo Felipe before the Inter-American Court on November 16, 2000; testimony of Theodore Macdonald Jr. before the Inter-American Court on November 16, 2000; January, 1994 document "Territorial Rights of the Awas Tingni Indigenous Community", prepared by the University of Iowa as part of its "Project in Support of the Awas Tingni Community"; and document "Awas Tingni. An Ethnographic Study of the Community and its Territory. 1999 Report", prepared by the Awas Tingni Territorial Demarcation Project, main researcher: Theodore Macdonald.

the same lands claimed by the Awas Tingni Community;⁷ furthermore, the State maintains that part of the lands claimed by the Awas Tingni Community belong to the State;⁸

g. the Community has no real property title deed to the lands it claims;⁹

h. on March 26, 1992, a contract was signed by the Awas Tingni Community and Maderas y Derivados de Nicaragua, S.A. (MADENSA) for the comprehensive management of the forest;¹⁰

⁷ *cfr.* "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast", Final Report and General Framework, March 1998, prepared by the Central American and Caribbean Research Council; August, 1998 maps and projection on location of indigenous area in the Nicaraguan national territory of the RAAN, prepared by the Office of the Director of Geodesics and Cartography of the Nicaraguan Institute of Territorial Studies (INETER); July, 1996 document "Land, Natural Resources and Indigenous Rights on the Atlantic Coast of Nicaragua. Juridical Reflections on the Definition of a Strategy for Indian Participation in Participation and Development Projects, prepared by The World Bank, Technical Department Latin America & the Caribbean; October 13, 1998 brief by Arnoldo Alemán Lacayo, President of the Republic of Nicaragua, to Noel Pereira Majano, Secretary of the National Assembly; October 13, 1998 bill "Organic Law to Regulate the Communal Property System of the Indigenous Communities of the Atlantic Coast and BOSAWAS"; testimony of Galio Claudio Enrique Gurdíán Gurdíán before the Inter-American Court on November 17, 2000; testimony of Charles Rice Hale before the Inter-American Court on November 17, 2000; testimony of Marco Antonio Centeno Caffarena before the Inter-American Court on November 17, 2000; September 12, 1998 brief by Roberto Wilson Watson and Emilio Hammer Francis, President and Secretary, respectively, of The Ten Indigenous Communities, to Virgilio Gurdíán, Director of the Nicaraguan Agrarian Reform Institute (INRA); September 11, 1998 certification by Otto Borst Conrado, legal representative of the Tasba Raya Indigenous Community; March, 1996 brief requesting "official recognition and demarcation of the ancestral lands" of the Mayagna Awas Tingni Community, to the Regional Council of the RAAN; and September 11, 1998 brief by Rodolfo Spear Smith, General Coordinator of the Indigenous Community of Karatá, addressed to Virgilio Gurdíán, Minister of INRA.

⁸ *cfr.* "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast", Final Report and General Framework, March 1998, prepared by the Central American and Caribbean Research Council; testimony on public instrument number one of protocol number twenty of notary Public Oscar Saravia Baltodano, which contains the "Forest Management and Use Contract" signed on March 13, 1996, by Claudio Gutiérrez Huete, representing MARENA, and Hyong Seock Byun, representing the SOLCARSA corporation; Ministerial order No. 02-97 of May 16, 1997, by the Minister of MARENA; December, 1994 document "Cerro Wakambay Broad-leaved Forest Management Plan (Final Edition)", prepared by Swietenia S.A. Consultores for KUMKYUNG CO., LTD; and testimony by Brooklyn Rivera Bryan before the Inter-American Court on November 17, 2000.

⁹ *cfr.* July 11, 1995 brief by María Luisa Acosta Castellón, attorney for the Awas Tingni Community, to Milton Caldera C., Minister of MARENA; amparo remedy filed on September 11, 1995 before the Appellate Court of Matagalpa by María Luisa Acosta Castellón, as special agent for Jaime Castillo Felipe, Marcial Salomón Sebastián and Siriaco Castillo Fenley, Syndic and Deputy Syndics, respectively, of the Awas Tingni Mayagna Community, against Milton Caldera Cardenal, Minister of MARENA, Roberto Araquistain, Director of the National Forestry Service of MARENA, and Alejandro Láinez, Director of the National Forestry Administration of MARENA; March, 1996 brief requesting "official recognition and demarcation of the ancestral lands" of the Mayagna Awas Tingni Community, addressed to the Regional Council of the RAAN; "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast, General Framework", March 1998, prepared by the Central American and Caribbean Research Council; testimony of Jaime Castillo Felipe before the Inter-American Court on November 16, 2000; testimony of Charly Webster Mclean Cornelio before the Inter-American Court on November 16, 2000; statement by Sydney Antonio P. on August 30, 1998; and statement by Ramón Rayo Méndez on August 29, 1998; sworn statement by Miguel Taylor Ortiz on August 30, 1998; sworn statement by Ramón Rayo Méndez on August 30, 1998.

¹⁰ *cfr.* comprehensive forest management contract signed on March 26, 1992 by Jaime Castillo Felipe, Siriaco Castillo, Charly Webster Mclean Cornelio, Marcial Salomón, Genaro Mendoza and Arnoldo Clarence Demetrio, representing the Awas Tingni Community, and Francisco Lemus Lanuza, representing Maderas y Derivados de Nicaragua S.A.; and "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast. General framework", March, 1998, prepared by the Central American and Caribbean Research Council.

i. in May, 1994, the Community, MADENSA, and MARENA signed a "Forest Management Agreement" by means of which the latter undertook to facilitate the "definition" of communal lands and to avoid undermining the Community's territorial claims;¹¹

Concession to the SOLCARSA corporation for the utilization of timber

j. on January 5, 1995, the National Forestry Service of MARENA approved the forest management plan submitted by SOLCARSA to utilize timber "in the area of the Wawa River and Cerro Wakambay". In March, 1995, that plan was submitted to the Regional Council of the RAAN. On April 28, 1995, the Regional Coordinator of the RAAN and the SOLCARSA corporation signed an agreement, and on June 28 of that year the Board of Directors of the Regional Council of the RAAN, in resolution No. 2-95, recognized that agreement and authorized the beginning of logging operations in the area of Wakambay, as set forth in the forest management plan;¹²

k. on March 13, 1996 the State, through MARENA, granted a 30 year concession to the SOLCARSA corporation to manage and utilize the forest in an area of roughly 62,000 hectares located in the RAAN, between the municipalities of Puerto Cabezas and Waspam;¹³

l. SOLCARSA was sanctioned by Ministerial Order No. 02-97, adopted by MARENA on May 16, 1997, for having illegally felled trees "on the site of the Kukulaya community" and for having carried out works without the environmental permit;¹⁴

m. on February 27, 1997 the Constitutional Panel of the Supreme Court of Justice declared the concession granted to SOLCARSA to be unconstitutional because it had not been approved by the plenary of the Regional Council of the RAAN (*infra para.*

¹¹ *cfr.* "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast. General framework", March, 1998, prepared by the Central American and Caribbean Research Council; testimony of Guillermo Castilleja before the Inter-American Court on November 17, 2000; and July 11, 1995 brief by María Luisa Acosta Castellón, attorney for the Awas Tingni Community, to Milton Caldera C., Minister of MARENA.

¹² *cfr.* June 28, 1995 administrative provision No. 2-95 of the Board of Directors of the Regional Council of the RAAN; testimony in public instrument number one of protocol number twenty of notary public Oscar Saravia Baltodano which includes the "Forest Management and Use Contract" signed on March 13, 1996 by Claudio Gutiérrez Huete, representing MARENA, and Hyong Seock Byun, representing the SOLCARSA corporation; resolution No. 17-08-10-97 of the Regional Council of the RAAN on October 9, 1997; and the December, 1994 document "Cerro Wambakay Broad-leafed Forest Management Plan (Final Edition)", prepared by Swietenia S.A. Consultores for KUMKYUNG CO., LTD.

¹³ *cfr.* testimony of public instrument number one of protocol number twenty of notary public Oscar Saravia Baltodano which includes the "Forest Management and Use Contract" signed on March 13, 1996 by Claudio Gutiérrez Huete, representing MARENA, and Hyong Seock Byun, representing the SOLCARSA corporation; official letter MN-RSV-02-0113.98 on February 16, 1998, by Roberto Stadhagen Vogl, Minister of MARENA, to Michael Kang, General Manager of SOLCARSA; judgment No. 12 of February 27, 1997, by the Constitutional Court of the Supreme Court of Justice of Nicaragua on the amparo remedy filed on March 29, 1997 before the Appellate Court of Matagalpa by Alfonso Smith Warman and Humberto Thompson Sang, members of the Regional Council of the RAAN, against Claudio Gutiérrez, Minister of MARENA, and Alejandro Láinez, Director of the National Forestry Administration of MARENA; and Ministerial order No. 02-97 of May 16, 1997, by the Minister of MARENA.

¹⁴ *cfr.* Ministerial order No. 02-97 of May 16, 1997, by the Minister of MARENA.

103(q)(iii)). Subsequently, the Minister of MARENA requested that the Regional Council of the RAAN approve this concession;¹⁵

n. on October 9, 1997, the Regional Council of the RAAN decided to: a) “[r]atify Administrative Provision No. 2-95 of June 28, 1995, signed by the Board of Directors of the Autonomous Regional Council and the Regional Coordinator of the [RAAN]”, which approved the logging concession in favor of the SOLCARSA corporation; b) “[s]uspend the existing Agreement between the Regional Government and [SOLCARSA], signed on April 28, 1995”, and c) “[r]atify [...] the Contract for Management and Use of the Forest, signed by the Minister of MARENA and [...] SOLCARSA on March 13, 1996”;¹⁶

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Considerations of the Court

142. Article 21 of the Convention declares that:

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

143. Article 21 of the American Convention recognizes the right to private property. In this regard, it establishes: a) that “[e]veryone has the right to the use and enjoyment of his property”; b) that such use and enjoyment can be subordinate, according to a legal mandate, to “social interest”; c) that a person may be deprived of his or her property for reasons of “public utility or social interest, and in the cases and according to the forms established by law”; and d) that when so deprived, a just compensation must be paid.

144. “Property” can be defined as those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all

¹⁵ *cfr.* Decision No. 12 of February 27, 1997 by the Constitutional Court of the Supreme Court of Justice of Nicaragua on the amparo remedy filed on March 29, 1997 before the Appellate Court of Matagalpa by Alfonso Smith Warman and Humberto Thompson Sang, members of the Regional Council of the RAAN, against Claudio Gutiérrez, Minister of MARENA, and Alejandro Láinez, Director of the National Forestry Administration of MARENA; official letter MN-RSV-0377.97 of May 29, 1997 by Roberto Stadhagen Vogl, Minister of MARENA, to Efraín Osejo Morales, President of the Regional Council of the RAAN; resolution No. 17-08-10-97 of October 9, 1997 by the Regional Council of the RAAN; request for execution of judgment No. 12 of February 27, 1997, by the Constitutional Court of the Supreme Court of Justice of Nicaragua, filed on January 22, 1998 at the Secretariat of the Constitutional Court of the Supreme Court of Justice of Nicaragua by Humberto Thompson Sang, member of the Regional Council of the RAAN; February 3, 1998 order by the Constitutional Court of the Supreme Court of Justice of Nicaragua, regarding the request for execution of judgment No. 12 of February 27, 1997, by the Constitutional Court of the Supreme Court of Justice of Nicaragua, filed by Humberto Thompson Sang, member of the Regional Council of the RAAN; statement by Mario Guevara Somarriba on October 3, 1997; and statement by Guillermo Ernesto Espinoza Duarte, Vice-mayor, at that time Acing Mayor of Bilwi, Puerto Cabezas, RAAN, on October 1, 1997.

¹⁶ *cfr.* resolution No. 17-08-10-97 of October 9, 1997 by the Regional Council of the RAAN.

movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.¹⁷

145. During the study and consideration of the preparatory work for the American Convention on Human Rights, the phrase “[e]veryone has the right to the use and enjoyment of *private property*, but the law may subordinate its use and enjoyment to public interest” was replaced by “[e]veryone has the right to the *use and enjoyment* of his property. The law may subordinate such use and enjoyment to the social interest.” In other words, it was decided to refer to the “use and enjoyment of his *property*” instead of “private property”.¹⁸

146. The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.¹⁹

147. Article 29(b) of the Convention, in turn, establishes that no provision may be interpreted as “restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party”.

148. Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention -which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.

149. Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

¹⁷ *cfr. Ivcher Bronstein case, supra* note 9, para. 122.

¹⁸ The right to private property was one of the most widely debated points within the Commission during the study and appraisal of the preparatory work for the American Convention on Human Rights. From the start, delegations expressed the existence of three ideological trends, i.e.: a trend to suppress from the draft text any reference to property rights; another trend to include the text in the Convention as submitted, and a third, compromise position which would strengthen the social function of property. Ultimately, the prevailing criterion was to include the right to property in the text of the Convention.

¹⁹ *cfr. The Right to Information on Consular Assistance in the Framework of Guarantees for Due Legal Process* Advisory Opinion OC-16/99 of October 1, 1999. A Series No. 16, para. 114.

150. In this regard, Law No. 28, published on October 30, 1987 in La Gaceta No. 238, the Official Gazette of the Republic of Nicaragua, which regulates the Autonomy Statute of the Regions of the Atlantic Coast of Nicaragua, states in article 36 that:

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

1. Communal lands are inalienable; they cannot be donated, sold, encumbered nor taxed, and they are inextinguishable.
2. The inhabitants of the Communities have the right to cultivate plots on communal property and to the usufruct of goods obtained from the work carried out.

151. Indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.

152. As has been pointed out, Nicaragua recognizes communal property of indigenous peoples, but has not regulated the specific procedure to materialize that recognition, and therefore no such title deeds have been granted since 1990. Furthermore, in the instant case the State has not objected to the claim of the Awas Tingni Community to be declared owner, even though the extent of the area claimed is disputed.

153. It is the opinion of the Court that, pursuant to article 5 of the Constitution of Nicaragua, the 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. Nevertheless, the Court notes that the limits of the territory on which that property right exists have not been effectively delimited and demarcated by the State. This situation has created a climate of constant uncertainty among the members of the Awas Tingni Community, insofar as they do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property. Based on this understanding, the Court considers that the members of the Awas Tingni Community have the right that the State

- a) carry out the delimitation, demarcation, and titling of the territory belonging to the Community; and
- b) abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities.

Based on the above, and taking into account the criterion of the Court with respect to applying article 29(b) of the Convention (*supra* para. 148), the Court believes that, in light of article 21 of the Convention, the State has violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property, and that it has granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled.

154. Together with the above, we must recall what has already been established by this court, based on article 1(1) of the American Convention, regarding the obligation

of the State to respect the rights and freedoms recognized by the Convention and to organize public power so as to ensure the full enjoyment of human rights by the persons under its jurisdiction. According to the rules of law pertaining to the international responsibility of the State and applicable under International Human Rights Law, actions or omissions by any public authority, whatever its hierarchic position, are chargeable to the State which is responsible under the terms set forth in the American Convention²⁰.

155. For all the above, the Court concludes that the State violated article 21 of the American Convention, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1(1) and 2 of the Convention.

X OTHER ARTICLES OF THE AMERICAN CONVENTION

156. In its brief with the final pleadings, the Commission alleged that given the nature of the relationship that the Awas Tingni Community has with its traditional land and natural resources, the State is responsible for the violation of other rights protected by the American Convention. The Commission stated that, by ignoring and rejecting the territorial claim of the Community and granting a logging concession within the traditional land of the Community without consulting the opinion of the Community, "the State breached a combination" of the following articles enshrined in the Convention: 4 (Right to Life), 11 (Right to Privacy), 12 (Freedom of Conscience and Religion), 16 (Freedom of Association), 17 (Rights of the Family); 22 (Freedom of Movement and Residence), and 23 (Right to Participate in Government).

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Considerations of the Court

157. With respect to the alleged violation of articles 4, 11, 12, 16, 17, 22 and 23 of the Convention, as argued by the Commission in its brief on final pleadings, the Court has considered that even when the violation of any article of the Convention has not been alleged in the petition brief, this does not impede the violation being declared by the Court, if the proven facts lead to conclude that such a violation did in fact occur.²¹ However, in the instant case, the Court refers to what was decided in this same Judgment in connection with the right to property and the right to judicial protection of the members of the Awas Tingni Community, and it also dismisses the violation of rights protected by the abovementioned article because the Commission did not state the grounds for it in its brief on final arguments.

²⁰ cfr. *Ivcher Bronstein case*, *supra* note 9, para. 168; *Case of the Constitutional Court*, *supra* note 10, para. 109; and *Bámaca Velásquez case*, *supra* note 47, para. 210.

²¹ cfr. *Durand and Ugarte case*, *supra* note 12, para.84; *Castillo Petruzzi et al. case*. Judgment of May 30, 1999. C Series No. 52, para. 178; and *Blake case*. Judgment of January 24, 1998. C Series No. 36, para. 112.