

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

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

[...]

[]

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; ¹

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; ²

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; ³

d. the Mayagna (Sumo) Awas Tingni Community is formed by more than six hundred persons; ⁴

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; ⁵

f. there are "overlaps" or superpositions of communal lands claimed by the indigenous communities of the Atlantic Coast. Some communities allege rights over the same lands claimed by the Awas Tingni Community; ⁶ furthermore, the State

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

- g. the Community has no real property title deed to the lands it claims;⁸
- 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;⁹
- 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;¹⁰

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;¹¹

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;¹²

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;¹³

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. 103(q)(iii)). Subsequently, the Minister of MARENA requested that the Regional Council of the RAAN approve this concession;¹⁴

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

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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";¹⁵

Administrative efforts made by the Awas Tingni Community

ñ. on July 11, 1995 María Luisa Acosta Castellón, representing the Community, submitted a letter to the Minister of MARENA, with a request that no further steps be taken to grant the concession to the SOLCARSA corporation without an agreement with the Community. The letter also stated that MARENA had the duty to "facilitate the definition of the communal lands and [...] to avoid damaging [...] the territorial claims of the Community", since it was thus stipulated in the agreement signed by the Community, MADENSA, and MARENA in May, 1994 (*supra* para. 103 (i));¹⁶

o. in March, 1996 the Community submitted a brief to the Regional Council of the RAAN, in which it requested "that the Regional Council initiate a study process leading to an appropriate territorial demarcation" with participation by the Awas Tingni Community and other interested communities, "so as to ensure their property rights on their ancestral communal lands", and to "prevent the granting of concessions for exploitation of natural resources within the area under discussion without prior consent by the Community". For this, they proposed the following: a) an evaluation of the ethnographic study submitted by the Community and, if necessary, a supplementary study; b) a process of negotiation between the Awas Tingni Community and the neighboring communities regarding the borders of their communal lands; c) identification of State lands in the area; and d) "delimitation of the communal lands of Awas Tingni". The Community stated that the request was submitted "due to lack of administrative remedies available within the Nicaraguan legal system through which indigenous communities can ensure property rights to their communal lands";¹⁷

Legal steps and actions

p. First amparo remedy filed by the Awas Tingni Community and its leaders.

p.i) on September 11, 1995 María Luisa Acosta Castellón, acting as special agent for Jaime Castillo Felipe, Marcial Salomón Sebastián and Siriaco Castillo Fenley, representatives of the Community, filed an amparo remedy before the Appellate Court of Matagalpa 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. In that application they requested that: a) the abovementioned officials be ordered to abstain from granting the concession to SOLCARSA; that the agents of SOLCARSA be ordered to leave the communal lands of Awas Tingni, where "they [had been] carrying out works directed toward initiating the lumber operation" and that they begin a process of dialogue and negotiation with the Community, in case the SOLCARSA corporation continued to have "an interest in utilization of timber on

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Community lands"; b) any other remedies be adopted that the Supreme Court of Justice deemed just; and c) an order be issued to suspend the process of granting the concession requested from MARENA by SOLCARSA. Furthermore, when they referred to the Constitutional provisions breached, the applicants stated that the disputed actions and omissions "[were] violations of articles 5, 46, 89 and 180 of the Nicaraguan Constitution, which together ensure the property and use rights of the indigenous communities to their communal lands" and that, even though "[t]he Community lacks a real title deed [...], the rights to its communal lands have solid foundations in a traditional land tenure system linked to communitarian organization and cultural practices";¹⁸

p.ii) on September 19, 1995 the Civil Panel of the Appellate Court of the Sixth Region of Matagalpa declared the amparo application inadmissible as "unfounded", arguing that the Community had tacitly consented to the granting of the concession, according to the Amparo Law, because the applicants allowed the thirty days "since they became aware of the action or omission" to elapse, before submitting that application. That Court considered that the applicants were aware of the actions by MARENA since before July 11, 1995, the date at which they addressed a letter to the Minister of MARENA (*supra* para. 103(ñ));¹⁹

p.iii) on September 21, 1995, María Luisa Acosta Castellón, acting as special agent for Jaime Castillo Felipe, Marcial Salomón Sebastián and Siriaco Castillo Fenley, representatives of the Mayagna (Sumo) Awas Tingni Community, filed an amparo application before the Supreme Court of Justice appealing for review of facts as well as law, in which they stated that the Community and its members had not consented to the process of granting the concession, that the remedy "[was] filed against actions which [were] being committed currently, as the Community and its members [became] aware of new violations on a daily basis", and that therefore the thirty days to file the amparo remedy "could [...] begin to be counted as of the last violation which the members of the Community [were] aware of";²⁰

p.iv) on February 27, 1997 the Constitutional Panel of the Supreme Court of Justice dismissed the amparo application appealing for review of facts as well as law, based on the same reasons argued by the Civil Panel of the Appellate Court of the Sixth Region of Matagalpa (*supra* para. 103.p.ii);²¹

q. Amparo remedy filed by members of the Regional Council of the RAAN:

q.i) on March 29, 1996, Alfonso Smith Warman and Humberto Thompson Sang, members of the Regional Council of the RAAN, filed an amparo remedy before the Appellate Court of Matagalpa, against Claudio Gutiérrez, Minister of MARENA, and Alejandro Láinez, Director of the National Forestry Administration of MARENA, for having "signed and authorized" the logging concession to SOLCARSA, without it having been discussed and evaluated by the plenary of the Regional Council of the RAAN, thus breaching article 181 of the Constitution of Nicaragua. In that remedy, they requested that

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implementation of the concession be suspended, and that the concession be annulled;²²

q.ii) on April 9, 1996, the Civil Panel of the Appellate Court of Matagalpa admitted the amparo remedy filed, ordered that the Attorney General of the Republic be informed, warned the officials against whom the remedy had been filed that they should submit reports on their actions to the Supreme Court of Justice, and summoned the parties to appear before the latter Court "to exercise their rights". Finally, it denied the request to suspend the disputed act;²³

q.iii) in judgment No. 12 of February 27, 1997 the Constitutional Panel of the Supreme Court of Justice granted the amparo application and ruled that the concession was unconstitutional as it "was not approved by the Regional Council [of the RAAN], but rather by its Board of Directors, and by the Regional Coordinator of the [RAAN]", thus breaching article 181 of the Constitution of Nicaragua;²⁴

q.iv) on January 22, 1998, Humberto Thompson Sang, a member of the Regional Council of the RAAN, submitted a brief to the Constitutional Court of the Supreme Court of Justice, in which he requested execution of judgment No. 12 issued on February 27, 1997;²⁵

q.v) on February 3, 1998, the Constitutional Panel of the Supreme Court of Justice issued an order to inform the President of the Republic that the Minister of MARENA had not complied with Judgment No. 12 of February 27, 1997, for the President to order that the Minister duly comply with that judgment, and the Court also ordered that the National Assembly be informed of this;²⁶

q.vi) in an official letter of February 16, 1998, the Minister of MARENA informed the General Manager of SOLCARSA that he should order "the suspension of all actions" pertaining to the logging concession contract, since that contract had become "devoid of any effect or value", in accordance with judgment No. 12 of February 27, 1997 by the Supreme Court of Justice;²⁷

r. Second amparo remedy filed by members of the Awas Tingni Community:

r.i) on November 7, 1997, María Luisa Acosta Castellón, representing Benévicto Salomón Mclean, Siriaco Castillo Fenley, Orlando Salomón Felipe and Jotam López Espinoza, who appeared on their own behalf and as representatives of the Mayagna (Sumo) Awas Tingni Community, filed an amparo remedy before the Civil Court of the Appellate Court of the Sixth Region of Matagalpa, against Roberto Stadhagen Vogl, Minister of MARENA, Roberto Araquistain, General Director of the National Forestry Service of

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MARENA, Jorge Brooks Saldaña, Director of the State Forestry Administration (ADFOREST) of MARENA, and Efraín Osejo et al., members of the Board of Directors of the Regional Council of the RAAN during the periods from 1994 to 1996 and 1996 to 1998. In that remedy they requested that: a) the concession to SOLCARSA be declared null, because it was granted and ratified setting aside the Constitutional rights and guarantees of the Awas Tingni Community; b) an order be issued for the Board of Directors of the Regional Council of the RAAN to process the request submitted in March, 1996 to “further a process to attain recognition and official [c]ertification of the property rights of the Community to its ancestral lands”; c) an order be issued for “the officials of MARENA to refrain from furthering a concession to utilize [n]atural [r]esources in the area of the concession to SOLCARSA, until land tenure in that area has been defined or an agreement has been reached with Awas Tingni and any other Community which has a justified claim to communal lands within that area”, and d) the disputed act be suspended;²⁸

r.ii) on November 12, 1997, the Civil Panel of the Appellate Court of the Sixth Region of Matagalpa admitted the amparo application; it denied the request of the applicants that the act be suspended because “apparently the act ha[d] been carried out”; it ordered that the decision be made known to the Attorney General of the Republic, and that the officials against whom the application had been filed should be notified for them to report to the Supreme Court of Justice on their actions, and it summoned the parties to appear before that Court “to exercise their rights”;²⁹

r.iii) on October 14, 1998, the Constitutional Panel of the Supreme Court of Justice declared “the amparo remedy application to be inadmissible because it is time-barred”, arguing that the applicants allowed the thirty days to elapse after they became aware of the act, without submitting the remedy. That Court concluded, in this regard, that the concession was signed on March 13, 1996, and that the applicants were aware of the concession shortly after it was signed;³⁰

s. indigenous communities in Nicaragua have received no title deeds to land since 1990;³¹

t. on October 13, 1998, the President of Nicaragua submitted to the National Assembly the draft bill “Organic Law Regulating the Communal Property System of the Indigenous Communities of the Atlantic Coast and BOSAWAS”, which sought to “implement the provisions of [a]rticles 5, 89, 107, and 180 of the Constitution” because such provisions “require the existence of a legal instrument which specifically regulates delimitation and titling of indigenous community lands, to give concrete expression to the principles embodied in them”³². At the time this Judgment is issued, the aforementioned draft bill has not yet been adopted as law in Nicaragua.

VIII

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VIOLATION OF ARTICLE 25
Right to Judicial Protection

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Considerations of the Court

106. Article 25 of the Convention states that:

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

2. The States Parties undertake:

(a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State;

(b) to develop the possibilities of judicial remedy; and

(c) to ensure that the competent authorities shall enforce such remedies when granted.

107. Article 1(1) of the Convention affirms that

[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

108. Article 2 of the Convention, in turn, asserts that

[w]here the exercise of any the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

109. The Commission argues, as a key point, lack of recognition of the rights of the Community of Awas Tingni by Nicaragua, and more specifically the ineffectiveness of the procedures set forth in legislation to make those rights of the indigenous communities effective, as well as the lack of demarcation of the lands possessed by that Community. The Commission adds that, despite multiple steps taken by the Community, official recognition of the communal property has not yet been attained, and furthermore it has been prejudiced by a logging concession granted to a company called SOLCARSA on the lands occupied by that community.

110. The State, in turn, argues basically that the Community has disproportionate claims, since its possession is not ancestral, it is requesting title to lands that have been claimed by other indigenous communities of the Atlantic Coast of Nicaragua, and it has never made a formal titling request before the competent authorities.

Nicaragua also maintains that there is a legal framework which regulates the procedure of land titling for indigenous communities under the authority of the Nicaraguan Agrarian Reform Institute (INRA). As regards the logging concession granted to SOLCARSA, the State points out that the Awas Tingni Community suffered no prejudice, as that concession was not executed but rather was declared unconstitutional.

111. The Court has noted that article 25 of the Convention has established, in broad terms,

the obligation of the States to offer, to all persons under their jurisdiction, effective legal remedy against acts that violate their fundamental rights. It also establishes that the right protected therein applies not only to rights included in the Convention, but also to those recognized by the Constitution or the law.³³

112. The Court has also reiterated that the right of every person to simple and rapid remedy or to any other effective remedy before the competent judges or courts, to protect them against acts which violate their fundamental rights, "is one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society, in the sense set forth in the Convention".³⁴

113. The Court has also pointed out that

the inexistence of an effective recourse against the violation of the rights recognized by the Convention constitutes a transgression of the Convention by the State Party in which such a situation occurs. In that respect, it should be emphasized that, for such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it.³⁵

114. This Court has further stated that for the State to comply with the provisions of the aforementioned article, it is not enough for the remedies to exist formally, since they must also be effective.³⁶

115. In the present case, analysis of article 25 of the Convention must be carried out from two perspectives. First, there is the need to analyze whether or not there is a land titling procedure with the characteristics mentioned above, and secondly whether the amparo remedies submitted by members of the Community were decided in accordance with article 25.

a) *Existence of a procedure for indigenous land titling and demarcation:*

116. Article 5 of the 1995 Constitution of Nicaragua states that:

³³ *cfr. Case of the Constitutional Court, supra* note 10, para. 89; and *Judicial Guarantees in States of Emergency* (arts. 27.2, 25 and 8 American Convention on Human Rights) Advisory Opinion OC-9/87 of October 6, 1987. A Series No. 9, para. 23.

³⁴ *cfr. Ivcher Bronstein case, supra* note 9, para.135; *Case of the Constitutional Court, supra* note 10, para. 90; and *Bámaca Velásquez case*. Judgment of November 25, 2000. C Series No. 70, para. 191.

³⁵ *cfr. Ivcher Bronstein case, supra* note 9, para. 136; *Cantoral Benavides case*. Judgment of August 18, 2000. C Series No. 69, para. 164; and *Durand and Ugarte case, supra* note 12, para. 102.

³⁶ *cfr. Case of the Constitutional Court, supra* note 10, para. 90; *Bámaca Velásquez case, supra* note 47, para. 191; and *Cesti Hurtado case*. Judgment of September 29, 1999. C Series No. 56, para. 125.

Freedom, justice, respect for the dignity of the human person, political, social, and ethnic pluralism, recognition of the various forms of property, free international cooperation and respect for free self-determination are principles of the Nicaraguan nation.

[...]

The State recognizes the existence of the indigenous peoples, who have the rights, duties and guarantees set forth in the Constitution, and especially those of maintaining and developing their identity and culture, having their own forms of social organization and managing their local affairs, as well as maintaining communal forms of ownership of their lands, and also the use and enjoyment of those lands, in accordance with the law. An autonomous regime is established in the [...] Constitution for the communities of the Atlantic Coast.

The various forms of property: public, private, associative, cooperative, and communitarian, must be guaranteed and promoted with no discrimination, to produce wealth, and all of them while functioning freely must carry out a social function.

117. Article 89 of the Constitution further states that:

The Communities of the Atlantic Coast are an inseparable part of the Nicaraguan people, and as such they have the same rights and the same obligations.

The Communities of the Atlantic Coast have the right to maintain and develop their cultural identity within national unity; to have their own forms of social organization and to manage their local affairs according to their traditions.

The State recognizes the communal forms of land ownership of the Community of the Atlantic Coast. It also recognizes the use and enjoyment of the waters and forests on their communal lands.

118. Article 180 of said Constitution states that:

The Communities of the Atlantic Coast have the right to live and develop under the forms of social organization which correspond to their historical and cultural traditions.

The State guarantees these communities the enjoyment of their natural resources, the effectiveness of their communal forms of property and free election of their authorities and representatives.

It also guarantees preservation of their cultures and languages, religions and customs.

119. Law No. 28, published on October 30, 1987 in La Gaceta No. 238, Official Gazette of the Republic of Nicaragua, regulated the Autonomy Statute of the Regions of the Atlantic Coast of Nicaragua. In this connection, it established that:

Art. 4. The Regions inhabited by the Communities of the Atlantic Coast enjoy, within the unity of the Nicaraguan State, an Autonomous Regime which guarantees effective exercise of their historical and other rights, set forth in the Constitution.

[...]

Art. 9. Rational use of the mining, forestry, fishing, and other natural resources of the Autonomous Regions will recognize the property rights to their communal lands, and must benefit their inhabitants in a just proportion through agreements between the Regional Government and the Central Government.

120. Decree No. 16-96 of August 23, 1996, pertaining to the creation of the National Commission for the Demarcation of the Lands of the Indigenous Communities of the Atlantic Coast, established that "the State recognizes communal forms of property of the lands of the Communities of the Atlantic Coast", and pointed out that "it is necessary to establish an appropriate administrative body to begin the process of demarcation of the traditional lands of the indigenous communities". To

this end, the decree entrusts that national commission, among other functions, with that of identifying the lands which the various indigenous communities have traditionally occupied, to conduct a geographical analysis process to determine the communal areas and those belonging to the State, to prepare a demarcation project and to seek funding for this project.

121. Law No. 14, published on January 13, 1986 in La Gaceta No. 8, Official Gazette of the Republic of Nicaragua, called "Amendment to the Agrarian Reform Law", establishes in article 31 that:

The State will provide the necessary lands for the Miskito, Sumo, Rama, and other ethnic communities of the Atlantic of Nicaragua, so as to improve their standard of living and contribute to the social and economic development of the [N]ation.

122. Based on the above, the Court believes that the existence of norms recognizing and protecting indigenous communal property in Nicaragua is evident.

123. Now then, it would seem that the procedure for titling of lands occupied by indigenous groups has not been clearly regulated in Nicaraguan legislation. According to the State, the legal framework to carry out the process of land titling for indigenous communities in the country is that set forth in Law No. 14, "Amendment to the Agrarian Reform Law", and that process should take place through the Nicaraguan Agrarian Reform Institute (INRA). Law No. 14 establishes the procedures to guarantee property to land for all those who work productively and efficiently, in addition to determining that property may be declared "subject to" agrarian reform if it is abandoned, uncultivated, deficiently farmed, rented out or ceded under any other form, lands which are not directly farmed by their owners but rather by peasants through *mediería*, sharecropping, *colonato*, squatting, or other forms of peasant production, and lands which are being farmed by cooperatives or peasants organized under any other form of association. However, this Court considers that Law No. 14 does not establish a specific procedure for demarcation and titling of lands held by indigenous communities, taking into account their specific characteristics.

124. The rest of the body of evidence in the instant case also shows that the State does not have a specific procedure for indigenous land titling. Several of the witnesses and expert witnesses (Marco Antonio Centeno Caffarena, Galio Claudio Enrique Gurdíán Gurdíán, Brooklyn Rivera Bryan, Charles Rice Hale, Lottie Marie Cunningham de Aguirre, Roque de Jesús Roldán Ortega) who rendered testimony to the Court at the public hearing on the merits in the instant case (*supra* paras. 62 and 83), expressed that in Nicaragua there is a general lack of knowledge, an uncertainty as to what must be done and to whom should a request for demarcation and titling be submitted.

125. In addition, a March, 1998 document, "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast", prepared by the Central American and Caribbean Research Council and supplied by the State in the present case (*supra* paras. 64, 65, 80 and 96), recognizes "[...]lack of legislation assigning specific authority to INRA to grant title to indigenous communal lands" and points out that it is possible that the existence of "legal ambiguities has [...] contributed to the pronounced delay in the response by INRA to indigenous demands for communal titling". That diagnostic study adds that

[...] there is an incompatibility between the specific Agrarian Reform laws on the question of indigenous lands and the country's legal system. That problem brings with it legal

and conceptual confusion, and contributes to the political ineffectiveness of the institutions entrusted with resolving this issue.

[...]

[...] in Nicaragua the problem is the lack of laws to allow concrete application of the Constitutional principles, or [that] when laws do exist (case of the Autonomy Law) there has not been sufficient political will for them to be regulated.

[...]

[Nicaragua] lacks a clear legal delimitation on the status of national lands in relation to indigenous communal lands.

[...]

[...] beyond the relation between national and communal land, the very concept of indigenous communal land lacks a clear definition.

126. On the other hand, it has been proven that since 1990 no title deeds have been issued to indigenous communities (*supra* para. 103(s)).

127. In light of the above, this Court concludes that there is no effective procedure in Nicaragua for delimitation, demarcation, and titling of indigenous communal lands.

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IX VIOLATION OF ARTICLE 21 Right to Private Property³⁷

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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

³⁷ There is no substantial variation among the Spanish-, English- Portuguese-, and French-language text for article 21 of the Convention. The only difference is that the epigraph in the English-language text reads “Right to Property” while in the other three languages it reads “Right to Private Property”.

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 movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.³⁸

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".³⁹

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.⁴⁰

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

³⁸ *cfr. Ivcher Bronstein case, supra* note 9, para. 122.

³⁹ 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.

⁴⁰ *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.*

they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

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 Convention⁴¹.

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.

[...]

Considerations of the Court

[...]

By seven votes to one,

2. finds that the State violated the right to property protected by article 21 of the American Convention on Human Rights, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1(1) and 2 of the Convention, in accordance with what was set forth in paragraph 155 of this Judgment.

⁴¹ 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.