

**COMPLAINT OF THE INTER-AMERICAN COMMISSION ON HUMAN  
RIGHTS, SUBMITTED TO THE INTER-AMERICAN COURT OF  
HUMAN RIGHTS IN THE CASE OF THE  
  
AWAS TINGNI MAYAGNA (SUMO) INDIGENOUS COMMUNITY  
  
AGAINST THE REPUBLIC OF NICARAGUA**

I.	INTRODUCTION	21
II.	REPRESENTATION OF THE COMMISSION	22
III.	OBJECT OF THE CLAIM	22
IV.	PRESENTATION OF THE FACTS	23
V.	PROCEEDINGS BEFORE THE COMMISSION	27
	A. Presentation of the petition by the Awas Tingni Community and joinder by other indigenous communities of the North and South Atlantic Autonomous Regions.	27
	B. Case proceedings and efforts to facilitate the friendly settlement process referred to in article 48(1)(f) of the American Convention.	29
	C. Request for Precautionary Measures.	31
	D. Allegations concerning the failure to exhaust remedies under domestic law.	34
	E. Response of the State to Commission Report No. 27/98.	35

VI.	CONCLUSIONS WITH RESPECT TO PROCEDURAL LAW	39
A.	The case meets all of the requirements for admission: remedies under domestic law.	39
B.	Jurisdiction of the Inter-American Court of Human Rights.	45
VII.	SUBSTANTIVE CONCLUSIONS OF LAW	46
A.	The State has not taken measures to ensure the communal land and natural resource rights of the Awas Tingni Community, leaving those rights in a precarious condition, in violation of articles 1(1), 2, and 21 of the Convention.	46
	1. The Awas Tingni Community has property rights to land and natural resources based on traditional, ancestral patterns of use and occupation, which rights are protected under article 21 of the Convention and other applicable provisions of international law.	46
	a. Land and natural resource rights.	46
	b. Rights to land and natural resources under article 21 of the Convention.	51
	c. Land and natural resource rights protected by other international conventions binding upon the State.	55
	2. The State has violated its obligation under article 21, as well as articles 1(1) and 2 of the Convention, to guarantee the property rights of the Awas Tingni Community and to adopt the necessary domestic legal measures.	57
	a. The obligation to adopt measures	

<i>Complaint</i>		19
	necessary to guarantee property rights.	57
	b. Lack of effective measures under domestic law ensuring rights to land and natural resources.	59
	c. Precarious condition of the Awas Tingni Community.	61
B.	The State actively violated the right to property enshrined in article 21 of the Convention when it awarded the concession to SOLCARSA to conduct forest operations on the lands of the Awas Tingni Community.	67
C.	The ineffectiveness of the <i>amparo</i> action under Nicaraguan domestic law in relation to the violation of article 25 of the American Convention on Human Rights: The right to simple and prompt recourse.	70
	1. Legal nature of the <i>amparo</i> action.	70
	2. <i>Amparo</i> under domestic Nicaraguan law and filing the initial action.	72
	3. Filing the second <i>amparo</i> action with the domestic judicial bodies of Nicaragua.	78
	4. The obligation of the Nicaraguan State to ensure that competent authorities enforce the judicial decisions in favor of the action.	79
VIII.	CONCLUSIONS	83
IX.	REQUEST	84
	A. Declaration of Violations.	84
	B. Remedies.	85

X.	ANNEXES	86
A.	List of names of the 144 heads of family of the Awas Tingni Community, Northern Atlantic Autonomous Region (RAAN), Nicaragua.	86
B.	List of Witnesses.	89
C.	List of Evidentiary Documents.	95

**COMPLAINT OF THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS AGAINST THE REPUBLIC OF NICARAGUA IN THE CASE OF THE MAYAGNA (SUMO) INDIGENOUS COMMUNITY OF AWAS TINGNI**

**I. Introduction**

1. The Inter-American Commission on Human Rights (hereinafter the “Commission” or the “Inter-American Commission”), having completed the procedures set forth in Article 50 of the American Convention on Human Rights (hereinafter the “Convention” or the “American Convention”), hereby submits to the Inter-American Court of Human Rights (hereinafter the “Court”) a claim against the State of Nicaragua (hereinafter the “State” or the “State of Nicaragua” or the “Nicaraguan State”) based on the facts surrounding the failure to demarcate and officially recognize the territory of the Mayagna (Sumo) Indigenous Community of Awas Tingni (hereinafter the “Awas Tingni Community” or the “Community”).

2. Mr. Jaime Castillo Felipe, principal leader of the Awas Tingni Community, on his own behalf and on behalf of the Community, which includes 144 heads of families of the Awas Tingni Community (the list of names of these 144 persons appears as Annex A, see *infra*, section X), presented a petition to the Commission on October 2, 1995, asserting that the State had not met its obligations under national and international law to take measures to demarcate the ancestral lands of the Awas Tingni Community or to guarantee their use and enjoyment by the Community. The rights of the petitioners also were violated by the concession the Republic of Nicaragua awarded to the Korean company Sol del Caribe, S.A. (“SOLCARSA”) for forestry activities within the ancestral lands of the indigenous community.

3. The Inter-American Commission on Human Rights decided on May 28, 1998 to present the case of the Awas Tingni Community against the Republic of Nicaragua (case no. 11,577) to the Inter-American Court of Human Rights in accordance with article 51 of the American Convention on Human Rights. The case was processed in accordance with articles 50 and 51 of the Convention and has been submitted to the Honorable Court in accordance with the guidelines established in article 32 and with the Rules of Procedure of the Inter-American Court of Human Rights. The terms and definitions used in this request are in accordance with those appearing in the glossary set forth in article 2 of the Rules of Procedure.

4. In accordance with article 33 of the Court’s Rules of Procedure, a copy of the Commission’s Report no. 27/98, approved on March 3, 1998 (OEA/Ser/L/V/II.98 Doc. 35 of March 3, 1998) is presented as part of the present

claim.

## **II. REPRESENTATION OF THE COMMISSION**

### **Designation of Delegates**

5. The Commission has delegated two members, Dean Claudio Grossman and Professor Helio Bicudo, to act as its delegates for the purposes of bringing this case before the Court, in accordance with article 22(1) of the Court's Rules of Procedure. The delegates Grossman and Bicudo will be assisted by the following legal advisors: Dr. David Padilla and Dr. Hernando Valencia, Deputy Executive Secretaries with the Commission's Secretariat, and Dr. Bertha Santoscoy, Principal Specialist with the Secretariat. Other delegates or advisors may be designated at a later time.

### **Designation of Advisors**

6. The Commission's legal representatives will be assisted by the following attorneys: Mr. James Anaya, Professor at the University of Iowa College of Law and member of the Indian Law Resource Center; Ms. Maria Luisa Acosta, associate attorney in Nicaragua; and Mr. Todd Crider of the firm Simpson, Thacher & Bartlett. These individuals have been designated as Legal Advisors to the Commission. In accordance with article 22(2) of the Court's Rules of Procedure, the Commission hereby informs the Court that each of these Legal Advisors were providing legal assistance to the Awas Tingni Community when this case was brought before the Commission.

## **III. OBJECT OF THE CLAIM**

7. The Commission's aim in presenting this case is for the Inter-American Court of Human Rights to decide that the State of Nicaragua is responsible for the acts and omissions of its agents in failing to meet its obligations under the American Convention on Human Rights. The State of Nicaragua has not demarcated the communal lands of the Awas Tingni Community or of other indigenous communities on the Atlantic coast. Nor has it taken effective measures to ensure the property rights of these communities to their ancestral lands. This omission by the State constitutes a violation of articles 1, 2, and 21 of the Convention, which together establish the right to such effective measures. Articles 1 and 2 obligate the States to take the measures necessary to implement the rights set forth in the Convention.

8. The State of Nicaragua is responsible for actions it has taken in violation of the right to property enshrined in article 21 of the Convention when it awarded a concession to the company SOLCARSA to perform road construction and forest exploitation works in Awas Tingni lands, without the consent of the legitimate owner—the Awas Tingni Community. Although the State recently canceled the concession, the cancellation was not based on recognition of the owners' rights. The State has not recognized these rights nor sanctioned its agents for awarding the concession without taking into account the rights of the Awas Tingni Community to its communal lands. Nor has it provided any compensation for material and moral damages resulting from the actions attributable to it.

9. The State of Nicaragua is responsible for violating article 25 of the Convention, inasmuch as it did not ensure effective recourse for the claims of the Awas Tingni Community to its land and natural resource rights in accordance with the values protecting indigenous communities. Section IX of this complaint includes the complete text of the Commission's petition.

#### **IV. PRESENTATION OF THE FACTS**

10. The Awas Tingni Community is a Mayagna or Sumo indigenous community of the Atlantic (or Caribbean) Coast of Nicaragua. The term "Mayagna" refers to the larger ethno-linguistic group to which the Awas Tingni Community and its members belong.<sup>1</sup> With approximately 142 families, the Community has a population of approximately 630 individuals. The main village of the Community is on the Wawa River, in the Municipality of Waspan, in the North Atlantic Autonomous Region (RAAN). The members of the Community converse amongst themselves almost exclusively in the Mayagna language, although most also speak at least a little Spanish.

11. The Community is organized and functions under a traditional leadership structure based on custom, which is common among other indigenous communities on the Atlantic Coast, and which is recognized by articles 89 and 180 of the Nicaraguan Constitution and by article 11(4) of the Statute of Autonomy of Nicaragua's Atlantic Coastal Region, Law No. 28 of 1987. Community leadership consists of a Communal Council whose members are elected by the Community and answer directly to the Community as a whole. In addition, the Community meets regularly in an Assembly open to all adult members of the Community.

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<sup>1</sup> Whereas "Mayagna" is the term preferred among the members of the group, the term "Sumo" is more commonly used outside of the group.

12. The members of the Community subsist mainly on family and communal farming, the collection of fruits and medicinal plants, hunting, and fishing. These activities take place within a territorial space defined by a traditional system of land tenure closely tied with the socio-political organization of the Community. Aside from providing a means of sustenance for the Community's members, the lands occupied and used by the Community are crucial to its existence, continuity, and culture. (Documentary evidence on the Community and the lands it has traditionally used and occupied is cited in Chapter V.A.1.b).

13. On March 13, 1996, the State of Nicaragua, through the Ministry of the Environment and Natural Resources (MARENA), awarded a 30-year concession to Sol del Caribe, S.A. (SOLCARSA), a company owned by the Korean conglomerate Kумыng LTD. The concession is for the exploitation of approximately 62,000 hectares of tropical forest in the Atlantic coastal region within the lands claimed by the indigenous communities.

14. The State awarded the concession despite the fact that these lands are the property of the Mayagna (Sumo) Indigenous Community of Awas Tingni.

15. In early September 1995, after learning that the State planned to grant the concession, the Awas Tingni Community filed for *amparo* (protection of a constitutional right) with the Courts of Nicaragua in an attempt to stop the concession. The *amparo* action was initially denied on the grounds that the Community had given its tacit consent to the concession because supposedly 30 days had elapsed since the Community had learned of the concession plans. To demonstrate that the Awas Tingni Community knew about the concession, the Court cited a letter from the Community's Legal Representative, addressed to MARENA and dated July 11, 1995, in which the Community protested the concession. The Community appealed the initial Court Order before the Supreme Court of Nicaragua.

16. The State of Nicaragua is responsible for failing to fulfill its obligations under national and international law to take the steps necessary to protect the use and enjoyment by indigenous communities of their ancestral lands, and it is responsible for actively violating the rights of the Awas Tingni Community to its lands. The actions and omissions attributable to the State of Nicaragua have caused substantial injury to the Community, whose material and spiritual survival depends on the observance of its rights.

17. On March 7, 1996, shortly after the announcement that the concession would be signed, the Organization of Indigenous *Sindicos* (village leaders) of the Caribbean Coast of Nicaragua (OSICAN) issued a statement denouncing the concession and expressing its support for the *amparo* action filed by



the Awas Tingni Community and for its case before the IACHR. OSICAN is an organization composed the *Sindicos*, or leaders, of the indigenous communities in the region.

18. The Community's petition to the Commission pointed out that the logging concession awarded to SOLCARSA is an act symptomatic of a larger problem. The Awas Tingni and most of the other indigenous communities of Nicaragua's Atlantic Coast have not received specific recognition from the State of the boundaries delineating their territorial rights, even though such rights are recognized in the Constitution of Nicaragua. Because of their insecurity as to the limits of their property, the Awas Tingni and other indigenous communities have become increasingly vulnerable to efforts by outsiders to appropriate land in the region and exploit their natural resources, very frequently with the active participation of the government.

19. The concession awarded by the State to SOLCARSA was preceded by an earlier logging concession on lands claimed by the Awas Tingni. In late 1993, the State awarded a concession to *Maderas y Derivados de Nicaragua*, S.A. (MADENSA), a company set up with capital from the Dominican Republic to exploit approximately 42,000 hectares of tropical forest adjacent to the concession area awarded to SOLCARSA. Following an intervention by the World Wildlife Fund (WWF), the State agreed to suspend the concession awarded to MADENSA until a reasonable agreement could be reached with the Community.

20. In 1994, the Awas Tingni negotiated a five-year contract with MADENSA and the State, represented by MARENA, providing for environmental safeguards and guaranteeing a flow of profits to the Community. The terms of the contract with MADENSA provided for a forestry model respectful of the land and of indigenous land and natural resource rights. Nonetheless, the petitioners point out that the contract has been difficult to execute because of MARENA's unwillingness to exercise control. The State agreed to treat the land covered by the contract as communal land in order to assist the Community in its efforts to gain recognition of its ancestral land rights, and the State agreed to abstain from taking action that might be detrimental to the territorial rights of the communities.

21. However, MARENA did not follow the MADENSA model when it considered other forest exploitation projects within the Atlantic coastal region, which is populated by indigenous communities. MARENA preferred to award concessions based on the theory that all land not specifically titled to a particular owner is State property, irrespective of the presence of indigenous communities, which action is in direct violation of the rights of those communities.

22. In awarding the concession to the Korean company SOLCARSA, the State took the position that the land in question was State land, and

it did not consider continuous use and occupation by the Awas Tingni and other communities of the land within the concession area.

23. The petition indicates that, with respect to the concession awarded to SOLCARSA on March 20, 1996, the lawyers for MARENA, at a meeting requested by the petitioners, informed the lawyers for the Awas Tingni that MARENA's position was as follows: (1) the concession awarded to SOLCARSA was backed by the approval of the Regional Council of the North Atlantic Autonomous Region, which article 181 of the Constitution of Nicaragua requires for all concessions; (2) the indigenous communities of the region did not have independent legal personality or existence, but rather were represented by the Regional Council; and (3) since the Regional Council had approved the concession, it was valid.

24. The petitioners indicate that in pointing out that the Regional Council of the North Atlantic Autonomous Region had approved the concession, MARENA was referring only to a resolution adopted by the Board of Directors of the Regional Council on June 25, 1995 (Administrative Provision 2-95).<sup>2</sup>

25. At a meeting held on March 22, 1996, the Board of Directors of the Regional Council, at the request of the petitioners, told the leaders and attorneys of the Awas Tingni that the June 1995 Resolution was subject to ratification by the Regional Council in Plenary Session, which had not occurred, and that the Board had not itself granted, nor would it grant, the consent required for a concession.

26. In addition, in the Plenary Session of the Regional Council held on March 21, 1996, the leaders of the Awas Tingni presented a request for assistance in demarcating their ancestral lands and stopping further progress in awarding the concession without the consent of the communities.

27. Faced with a flagrant violation of their rights, the petitioners requested that the Commission act as a mediator in a process of dialogue between the State of Nicaragua and the Awas Tingni Community, for the purpose of developing and agreeing on measures to protect the Community's rights to its land. These measures were to include, at a minimum, an officially recognized process for demarcating the territorial boundaries of the Community according to applicable legal criteria. The petitioners also requested the Commission to recommend that the State suspend the concession to SOLCARSA until the problem of land demarcation had been resolved or until a specific agreement had been reached with the Community with respect to the concession.

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<sup>2</sup> Annex C.22 in the list of documents.

28. Even though the Nicaraguan Supreme Court itself considered the concession granted by the State to be illegal, the State did not comply with the Court's order, thus enabling SOLCARSA to continue violating the property rights of the Community for more than a year.

29. On May 7, 1998, the State of Nicaragua accepted its international responsibility for the actions and omissions that had violated the rights of the indigenous Community. However, it did not undertake measures to fully remedy those violations.

## V. PROCEEDINGS BEFORE THE COMMISSION

### A. Presentation of the petition by the Awas Tingni Community and joinder by other indigenous communities of the North and South Atlantic Autonomous Regions.

30. The denunciation of the violations of the territorial rights of the Mayagna Indigenous Community of Awas Tingni was presented to the Commission on October 2, 1995.<sup>3</sup>

31. On October 6, 1995, the Commission acknowledged receipt of the petition and informed the petitioners that it would be brought before the Commission for study and other appropriate purposes.

32. On December 3, 1995, the Commission received an additional request from the Mayagna Indigenous Community of Awas Tingni for precautionary measures since the State of Nicaragua was about to award the concession to SOLCARSA to begin forest exploitation on communal land.<sup>4</sup>

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<sup>3</sup> The denunciation was accompanied by the following documents:

- i. Letter to the Minister of the Environment and Natural Resources, Mr. Milton Caldera informing him that the area requested by SOLCARSA lay within the territory claimed by the Awas Tingni; copy of the document "Territorial Rights of the Awas Tingni Community," prepared by the University of Iowa Project to Support the Awas Tingni Community;
- ii. *Amparo* action filed with the Matagalpa Court of Appeals;
- iii. Resolution issued by the Matagalpa Court of Appeals on September 19, 1995, declaring the *amparo* action inadmissible;
- iv. Appeal filed with the Supreme Court of Justice.

<sup>4</sup> This request was accompanied by the following documents:

33. On January 19, 1996, the petitioners requested a hearing before the Commission during its ninety-first session. The Commission indicated that it would not be possible to grant the request for a hearing during that session.

34. On February 5, 1996, the Commission initiated the proceedings for the case in accordance with its Rules of Procedure, assigning the case the number 11,577. The Commission also sent to the Nicaraguan State pertinent portions of the petition and requested that it provide the corresponding information.

35. On February 6, 1996, the State provided information with respect to the receipt of case no. 11,577 regarding the indigenous Awas Tingni Community.

36. The Commission received a communication from the Awas Tingni Community, dated March 13, 1996, accompanied by two press articles reporting on the award of a 30-year concession to SOLCARSA on 62,000 hectares of forest land located in the North Atlantic Autonomous Region in the vicinity of the Wawa River.<sup>5</sup> Along with those articles was a letter sent by the Minister of MARENA to Mr. Hong Suk Byun, President of Sol del Caribe S.A., informing him that his request for the forestry concession was being processed, that the only missing element was the execution of the concession contract, and that the main obstacle consisted of the claims by the Awas Tingni Community.

37. On March 14, 1996, the petitioners presented to the Commission documents to establish the gravity of the situation and justifying the

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- i. The "Forest Management Plan for the Cerro Wakambay Forestlands."
  - ii. A communiqué from the Ministry of the Environment and Natural Resources (MARENA).
  - iii. A letter sent by the legal representative of the Community, S. James Anaya, to the Minister of Environment and Natural Resources, explaining the situation and requesting MARENA's position on the concession to SOLCARSA.
  - iv. Sworn testimony of Mr. Charlie McLean Cornelio, official in charge of the Awas Tingni Community Forests.
  - v. Sworn testimony of Mr. Hans A. Akesson, forest engineer.
  - vi. Map showing the territory of the Awas Tingni Community.
  - vii. Map demarcating the land tenure of the Awas Tingni within the SOLCARSA concession area.
  - viii. Statement by Dr. Theodore Macdonald.

<sup>5</sup> La Prensa and El Nuevo Diario, March 7 and 8, 1996, respectively.

earlier request for precautionary measures.<sup>6</sup>

38. By means of a communication dated March 28, 1996, the petitioners sent the Commission a draft memorandum of understanding for the purpose of reaching a solution to the case, which draft had been presented to the Ministers of Foreign Relations and MARENA.

39. On April 17, 1996, the petitioners presented a document in which other indigenous communities of the North Atlantic Autonomous Region joined in the petition originally presented to the Commission by the Mayagna Indigenous Community of Awas Tingni. The joining communities included: Francia Sirpi, Miguel Bikan, Santa Clara, Tasba Pain and Wisconsin, their respective leaders, and the Indigenous Movement of the South Atlantic Autonomous Region.

40. This same communication of April 17 indicated that the participants were joining in the petition of the Awas Tingni Community to demonstrate, before the international community, the lack of interest of the Nicaraguan State in taking measures necessary to protect the lands of the indigenous communities in the Atlantic Coastal Region and to obtain the Commission's assistance in reversing the actions and omissions of the State of Nicaragua that were violating the rights of the aforementioned indigenous communities.

**B. Case proceedings and efforts to facilitate the friendly settlement process referred to in article 48(1)(f) of the American Convention.**

41. In a communication dated April 23, 1996, the petitioners requested that the Commission participate as a mediator in a friendly settlement process, in which the Nicaraguan State would sit down and engage in dialogue on the

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<sup>6</sup> The documents sent were as follows:

- i. Denunciation from the Organization of Nicaraguan Caribbean Indigenous Mayors, dated March 7, 1996, expressing the displeasure and concern of the Atlantic Coast indigenous communities.
- ii. Ethnographic study and map showing the current and historical land tenure of the Community and its concept of territory, and explaining the sociopolitical organization of the Community. These materials were the result of a joint effort of the Community, the University of Iowa, Harvard University, and the World Wildlife Fund.
- iii. Copy of the request for assistance with land demarcation submitted by the Awas Tingni Community, on March 12, 1996, to the Regional Council of the North Atlantic Autonomous Region, with the goal of obtaining official recognition and demarcation of the ancestral lands of the Awas Tingni Community.

basis of the memorandum of understanding that had been proposed.

42. The Commission decided to place itself at the disposal of the parties with an aim of reaching a friendly settlement of the matter based on the observance of human rights, in accordance with article 48(1)(f) of the Convention and article 45 of the Commission's Rules of Procedure.

43. On May 3, 1996, an informal meeting was held between the Commission and the parties, during which the petitioners explained their position and objectives in the friendly settlement process. As a result of that meeting, the parties agreed to formally initiate the friendly settlement process and hold another meeting in late May or June 1996.

44. As agreed, on May 6, 1996, the Commission placed itself at the disposal of the parties with the goal of reaching a friendly settlement of the case, allowing a period of 30 days for the parties to give their response.

45. In a communication dated May 8, 1996, the petitioners accepted the initiation of the friendly settlement process. In a communication dated May 20, 1996, the State of Nicaragua also accepted the proposal.

46. Subsequently, another meeting was held as part of the friendly settlement process on June 20, 1996, at the Commission's headquarters, and both parties attended. In that meeting, the State of Nicaragua stated that it did not accept the memorandum of understanding proposed by the petitioners. The petitioners, in response, proposed that the State present a procedure for demarcating the Awas Tingni lands and that, pending completion of this procedure, the State suspend the concession awarded to SOLCARSA. The petitioners also indicated that tree cutting had not begun but that construction work had begun on a road to the Awas Tingni lands. They also indicated that they had learned of the establishment of a government committee to study the issue, but did not have information on its composition and purpose. Lastly, the petitioners proposed that the IACHR conduct an exploratory visit in Nicaragua for the purpose of dialogue with the Awas Tingni and State representatives. The State representative indicated that he would transmit this proposal.

47. In a message dated September 10, 1996, the Commission convened a third meeting of the friendly settlement process, which was held on October 3, 1996, during the Commission's ninety-third session. During that meeting, the petitioners requested that the State refrain from awarding more concessions in the area. They also requested that the State initiate the process of demarcating the indigenous territories and distinguishing them from State territory. The

representatives of the State of Nicaragua presented a series of evidentiary documents,<sup>7</sup> announced the establishment of the National Demarcation Commission, and invited the petitioners to participate in that Commission.

### C. Request for Precautionary Measures

48. From the time the initial petition was presented, the petitioners have requested precautionary measures. On March 5, 1997, the petitioners reiterated to the Commission their request for precautionary measures, alleging a threat of imminent forestry operations on indigenous land. On March 12, the Commission requested the State of Nicaragua to provide information on the initiation of forestry operations, allowing for a period of 15 days to respond.

49. The State of Nicaragua, in a communication dated March 20, 1997, requested a period of 30 days to respond to the request for information concerning the Awas Tingni Community case. The Commission granted an extension until April 11, 1997.

50. On April 3, 1997, the petitioners informed the Commission of the February 27, 1997 judgment of the Supreme Court of Justice of Nicaragua in response to the *amparo* action filed in 1996 by Alfonso Smith and Humberto Thompson in their capacity as members of the RAAN Regional Council. The judgment declared that the concession awarded by MARENA was unconstitutional since it did not fulfill the requirements of article 181 of the Constitution, which

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<sup>7</sup> The documents submitted by the representatives of the State at the October 3, 1996, meeting were as follows: an official communication of the Nicaraguan Institute of Territorial Studies (INETER), concerning its exclusive authority to prepare the official maps of the Republic of Nicaragua; the law establishing the INETER; a letter from the Board of Directors of the RAAN Regional Council clarifying that the land concession awarded to SOLCARSA had no bearing on the Awas Tingni Community's claim; a development contract between the Awas Tingni and MADENSA; a letter from indigenous communities in support of SOLCARSA; the administrative provision 2-95 of the Autonomous Regional Council, recognizing the agreement signed by the Council and SOLCARSA; a letter from the Autonomous Regional Council and the Government of the North Atlantic Autonomous Region addressed to the Inter-American Commission on Human Rights; the Supreme Court ruling on the appeals (articles 46 and 47); articles 46 and 47 of the American Convention on Human Rights; the Montelimar Agreements; the endorsement of the RAAN Regional Council and Government for the creation of the National Demarcation Commission; a decree establishing the National Demarcation Commission; a list of indigenous communities' properties in the Autonomous Regions (research by Mr. Peter Martinez Fox); a map showing the location of the indigenous communities, their population and ethnic groups from the Bosawas Case; an example of demarcation (letter and map); a resolution of the National Assembly on Law No. 222 and demarcation problems stemming from the request by the Awas Tingni Community.

provides that concessions awarded in the region must be approved by the Regional Council, the principle governing body at the regional level. (It should be noted that this *amparo* action was filed and decided not on the grounds of rights to indigenous land, but rather on the grounds of the constitutional requirement for consultation with the Regional Council). This judgment notwithstanding, the petitioners indicated that, to date, the State had not suspended any forestry activity under the concession,<sup>8</sup> in flagrant violation of a decision of its own Supreme Court. The Commission transmitted this information to the State of Nicaragua on April 8, 1997.

51. On April 23, 1997, the State of Nicaragua sent a communication to the Commission regarding the precautionary measures requested by the petitioners. It asserted: "The State recognizes that the judgments and resolutions of courts and judges are inescapably binding upon its authorities and renews to the Honorable Commission the assurance of its utmost willingness to comply with the orders of the Supreme Court. In view of the commitment of the State of Nicaragua to fully comply with the orders of the Supreme Court, we respectfully request that the Honorable Commission dismiss the request for precautionary measures submitted by the petitioners and discontinue its review of the case." On April 29, 1997, the Commission sent the pertinent portions of the communication from the State to the petitioners for their comments, which were to be submitted within 45 days.

52. On June 11, 1997, the petitioners replied to the Commission that, in spite of the judgment of the Supreme Court of Justice declaring the SOLCARSA concession to be unconstitutional, the State and the company continued to act as though the concession were valid.

53. On July 15, 1997, the petitioners requested a hearing before the Commission during its ninety-seventh session in October 1997. The Commission responded by accepting their petition.

54. During the October 8, 1997 hearing,<sup>9</sup> the petitioners stated

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<sup>8</sup> A copy of the February 27, 1997 Judgment of the Supreme Court of Justice has been filed with the IACHR. Annex C.48 of the list of documents.

<sup>9</sup> Petitioners presented a series of documents at this hearing, which were transmitted to the State. These documents included:

- i. Statement by Mario Guerra Somarriva made on October 3, 1997.
- ii. Letter from Roberto Stadhagen Vogl, Minister of Environment and Natural Resources, to Efraim Osejo Morales, President of the North Atlantic Regional Council, dated May 29, 1997.
- iii. Statement by Guillermo Ernesto Espinoza Duarte, Acting Mayor of Bilwi, Puerto



that they were aware of the forestry operations that were preparing for the initiation of logging on the lands of the Awas Tingni Community, and the petitioners requested the Commission to observe the situation *in situ*. The representatives of the State agreed to an exploratory visit by the Commission to the area in question. During its ninety-seventh session, the Commission decided to conduct an inspection visit on October 30, 1997.

55. However, on October 27, 1997, the State of Nicaragua informed the Commission that it did not consider the inspection with respect to the Awas Tingni case to be necessary because it was preparing a document providing additional information on the case. In reaction to this development, the Commission expressed its concern over the suspension of the visit.

56. On October 31, 1997, considering the gravity and urgency of the situation, the Commission requested that the State of Nicaragua take precautionary measures that would suspend the concession awarded to SOLCARSA in order to avoid irreparable damage to the ancestral lands of the Awas Tingni Community. The Commission set a deadline of 30 days for the State to report on the specific measures taken in this regard.

57. On the same day, October 31, the Commission again called upon the State to give its response to the request of February 5, 1996, with respect to the pertinent portions of the initial complaint. The Commission allowed a period of 30 days for the State to respond.

58. In a note dated November 5, 1997, the State affirmed: “its willingness to comply with the orders of the Supreme Court of Justice [in its judgment of February 27, 1997 on the action filed by Council members Smith and Thompson] . . . On a reading of the preamble to the Court’s judgment, it is concluded that the error committed is one of form not of substance. Accordingly, the North Atlantic Autonomous Regional Council has taken steps to correct this error, for which purpose it has prepared a document ratifying the approval of the 62,000 hectare Wakambay Forest Concession to the company Sol del Caribe (SOLCARSA). Inasmuch as this error has been corrected, the concession is now valid. Accordingly,

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Cabezas, RAAN, made on October 1, 1997.

- iv. Communication from the authorities of Betania.
- v. Report of the Ecotourism Educational Team, CESPAD, dated June 25, 1997.
- vi. Written report by Ms. Magda Lanuza of the Humbolt Center to Mr. Pedro Feliz Obregon, as a contribution to the publication *Guia Ambientalista*.
- vii. SOLCARSA Evaluation Report, dated August 5, 1997, prepared by Ms. Lanuza. Copy of “Privatizing the Rain Forest – a New Era of Concessions,” The CEPAD Report, June/July 1997, p.17.

we request that the Honorable Commission consider this case closed.”<sup>10</sup> This communication was transmitted to the petitioners in a note dated November 7, 1997.

59. On November 17, 1997, the indigenous Awas Tingni Community sent the Commission its comments on the communication received on October 27, 1997. The petitioners asserted that the communication from the State did not respond to the substance of the petition and neglected to include important facts. The petitioners stressed that the central complaint concerned the failure of the State of Nicaragua to protect the ancestral land rights of the Awas Tingni and that this situation persisted. With regard to the ratification of the concession by the RAAN Regional Council, the petitioners noted that the Council was the principal regional government body and, as such, formed part of the political-administrative organization of the Nicaraguan State. In ratifying the concession, it was acting—as MARENA had done—without taking into account the land rights of the Awas Tingni or consulting with the Community.

60. In that same communication, the petitioners also pointed out that, during the October 8 hearing, the State had accepted an inspection visit in connection with the case but had subsequently stopped the visit. According to the petitioners, this visit was a necessary condition for proceeding with the friendly settlement. Accordingly, they requested the Commission to issue a report in pursuance of article 50 of the American Convention on Human Rights. The pertinent portions of this communication were transmitted to the Nicaraguan State on November 21, 1997.

**D. Allegations concerning the failure to exhaust remedies under domestic law.**

61. On December 4, 1997, the State of Nicaragua sent a communication indicating that the petitioners had filed for *amparo* on November 7, 1997, requesting that the Matagalpa Court of Appeals declare the concession to SOLCARSA null and void. Arguing that the remedies under domestic law therefore had not been exhausted, it invoked application of article 46 of the Convention and article 37 of the Commission’s Rule of Procedure. The State reiterated this position on December 19, 1997.

62. In a communication dated December 19, 1997, the State of Nicaragua requested an extension of 30 days in which to present its opinion on the petitioner’s comments of November 17, 1997. On January 14, 1998, the Commission granted the extension, which was to expire on February 14, 1998.

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<sup>10</sup> The State attached a copy of Resolution No. 17-08-10-97 ratifying the approval of the Wakambay Forest Concession. Annex C.41 in the list of documents.

63. On December 22, 1997, the petitioners informed the Commission that the *amparo* action the Awas Tingni Community had filed in November 1997 had not been effective and that the desired results, in terms of the immediate suspension of the SOLCARSA concession, had not been attained. They also referred to the *amparo* action the Community had filed earlier, in September 1995, which action also had not produced results favorable to the Community. On January 21, 1998, the Commission sent the pertinent portions of that communication to the State of Nicaragua.

64. On March 2, 1998, the deadline mentioned in paragraph 60 having expired, the State of Nicaragua alleged that the petitioners had presented a writ, dated January 22, 1998, to the Supreme Court of Justice requesting the execution of Judgment No. 12, issued by the Court on February 27, 1997.

65. The State also reiterated that on November 7, 1997, the Awas Tingni Community and the members of the Board of Directors had filed an *amparo* action with the Matagalpa Court of Appeals, requesting that the concession be declared null and void. The State also added information on a second *amparo* action requesting that the concession be declared null and void, filed by Andrés López Martínez, in his capacity as the *Sindico* of the Kakamuklaya Indigenous Community. Both actions were filed against Roberto Stadthagen, Minister of Environment and Natural Resources; Roberto Araquistain, General Director of the Forest Service; and members of the Autonomous Regional Council of the North Atlantic Autonomous Region (RAAN). In that same communication, the State reiterated its position that “the remedies under domestic law have not been exhausted,” and requested that the Commission refrain from further review of case no. 11,577.

66. After repeated approaches by the Commission to the authorities of the State of Nicaragua, and due to the lack of information on the substance of the initial petition, as well as on the precautionary measures, and the unsuccessful friendly settlement, the Commission took up consideration of the admissibility and substance of the case in accordance with article 50 of the American Convention on Human Rights.

#### **E. Response of the State to Commission Report No. 27/98.**

67. The IACHR issued Report No. 27/98 on March 3, 1998, which was transmitted to the State of Nicaragua on March 6, 1998, in a communication allowing a period of two months for the State to inform the Commission of such measures as the Nicaraguan State may have taken to comply with the recommendations contained in the aforementioned report.

68. The response of the State of Nicaragua, dated May 6, 1998, was received by the Commission on May 7, 1998. Although the State's response was presented extemporaneously, the Commission will analyze its content for addition to the case records. The following is a transcription of the response:<sup>11</sup>

*I take pleasure in addressing you with reference to Confidential Report No. 27/98, approved by the Commission at its 98<sup>th</sup> Regular Session, in which the Commission agreed to allow a period of time for the State of Nicaragua to report on measures taken to comply with the recommendations of the Commission.*

*In response to these recommendations, we wish to state the following:*

*a) In order to comply with the recommendations of the IACHR for the establishment of a legal procedure acceptable to the indigenous communities concerned, resulting in the demarcation and official recognition of the territory of the Awas Tingni and other Atlantic Coast Communities, the Government of Nicaragua has established a National Commission for the Demarcation of Indigenous Community Lands in the Atlantic Coastal Region.*

*With this same objective in mind, a proposed Indigenous Communal Property Act has been drawn up with three components:*

- 1. Provisions concerning the accreditation of the Indigenous Communities and their authorities.*
- 2. The demarcation and titling of property.*
- 3. Solution of the conflict.*

*This bill is intended to find a legal solution to the property issues of indigenous groups or ethnic minorities. Consultations on the*

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<sup>11</sup> In its response to Report 27/98, the State attached, as an evidentiary document, a copy of the letter from Minister Roberto Stadthagen Vogl to Mr. Michael Kang, General Manager of Sol del Caribe, S.A., and a copy of Decree No. 16-96 establishing the National Commission for the Demarcation of Indigenous Community Lands in the Atlantic Coastal Region, published in the Official Journal.

*bill will be held with civil society, and once a consensus has been reached, it will be submitted to the National Assembly for discussion and approval. The estimated time frame for this process is approximately three months, starting today.*

*b) With regard to the recommendation to suspend all activity in connection with the logging concession awarded to SOLCARSA and to comply with the judgment of the Supreme Court of Justice, the Government of Nicaragua canceled this concession on February 16, 1998, and on that same day, notified Mr. Michael Kang, General Manager of SOLCARSA that, with immediate effect, the concession was null and void. He was also told to order the suspension of all activities lest he be found in violation of article 167 of the Political Constitution and be exposed to civil and criminal proceedings.*

*c) With respect to the recommendation to initiate a dialogue with the Awas Tingni Community, the Government of Nicaragua has the firm intention to provide a comprehensive solution for all of the Atlantic Coast indigenous communities within the framework of the proposed Communal Property Act, for which purpose extensive consultations will be conducted with the communities concerned.*

*With regard to the conclusions contained in the aforementioned Confidential Report, we wish to state the following:*

*The Government of Nicaragua reiterates to the Honorable Commission on Human Rights that it has the legislative means to ensure respect for the rights and freedoms recognized in articles 1 and 2 of the Convention. Article 8 of the Political Constitution of Nicaragua provides that the people of Nicaragua are of multiethnic character and are an integral part of the Central American nation.*

*The rights of the Atlantic Coast communities can be found explicitly enshrined in the Constitution and include the right to protection against discrimination; protection of their language, culture, religion, and their own forms of civic and governmental organization; and protection of their legal norms, natural resources, and land. In addition, article 27 of the Political Constitution provides that all persons are equal before the law and have the right to equal protection. There shall be no discrimination by reason of birth, nationality, political belief, race,*

*sex, language, religion, opinion, origin, economic status, or social condition (article 24 of the Convention).*

*On the right to property (article 21 of the Convention), we wish to inform this Honorable Commission that the ancestral beneficial interests (usufructo) of these peoples are expressly recognized in the Political Constitution of Nicaragua in articles 5, 89, and 180, as follows:*

*Article 5. The State recognizes the existence of the indigenous peoples, who enjoy the rights, duties, and guarantees set forth in the Constitution, particularly with a view to maintaining and developing their identity and culture, having their own forms of social organization and administration of local affairs, and maintaining the communal forms of their lands and the use and enjoyment of those lands, all in accordance with the law.*

*Article 89. The State recognizes the communal forms of land ownership of the Atlantic Coast communities and recognizes as well the use and enjoyment of the waters and forests of their communal lands.*

*Article 180. The State guarantees enjoyment by these communities of their natural resources and the effectiveness of their forms of communal property.*

*In recognizing the forms of communal property, the State also recognizes the cultural rights that derive from the particular uses of the land by the indigenous peoples. The right to use and enjoyment of their communal waters, forests, and lands and to their agricultural and territorial ways are intimately linked to their culture and way of life.*

*Furthermore, the Statute of Autonomy recognizes and encourages ethnic identity; respects the specific cultural characteristics of the Atlantic Coast communities; respects their history; recognizes the right to property of communal lands; repudiates any form of discrimination; recognizes religious freedom; confers the capacity to legislate on matters of taxation and land demarcation in the region and to take legislative initiatives with regard to natural resources; and confers upon the autonomous regions the capacity to administer their own affairs.*

*With regard to article 23 of the Convention, the Statute of*

*Autonomy of the Atlantic Coastal Regions provides in article 11, section 7, that the inhabitants of the Atlantic Coast communities have the right to elect, and be elected as, authorities in their respective autonomous regions.*

*The Government of Nicaragua has faithfully complied with the legal provisions enumerated above, and its actions have therefore been in accordance with the national legal system and the norms and procedures of the American Convention on Human Rights. The Awas Tingni Community exercised its rights under the law and had access to the means of recourse conferred by it.*

*For these reasons, the Government of Nicaragua requests that the present case be considered closed and thanks the Honorable Commission on Human Rights for the good offices it has provided.<sup>12</sup>*

69. The Commission noted that, according to the information from the State, the concession had been canceled. Cancellation of the concession, however, was not based on official recognition of the rights of the Awas Tingni Community to the land and natural resources in the area of the concession. Nor has there been recognition that State officials violated the Community's rights by awarding the concession without taking their rights into account or fully compensating the Community through demarcation or other effective measures that guarantee the Awas Tingni Community's rights to its land and natural resources. The acceptance of this response from the Government of Nicaragua would have foreclosed the possibility of resorting to the Inter-American Court to fully guarantee the rights of the Community.

## **VI. CONCLUSIONS WITH RESPECT TO PROCEDURAL LAW**

### **A) The case meets all of the requirements for admission: remedies under domestic law.**

70. Article 46(1) of the American Convention provides that admission by the Commission of a petition or communication presented under articles 44 or 45 shall be subject to the requirement "that the remedies under domestic

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<sup>12</sup> At the request of the Government, the letter of February 16, 1998, addressed to Mr. Michael Kang, General Manager of SOLCARSA, and a copy of Decree No. 16-96 concerning the establishment of the National Commission for the Demarcation of Atlantic Coast Indigenous Community Lands, are attached.

law have been pursued and exhausted in accordance with generally recognized principles of international law.” Article 46(2) provides that the requirement to exhaust remedies under domestic law shall not be applicable when:

- a. The domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. The party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. There has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

71. The Inter-American Court of Human Rights has stated the following in this regard: “These provisions thus apply to situations where domestic remedies cannot be exhausted because they are not available either as a matter of law or as a matter of fact.” Accordingly, the provisions of article 46(2) apply. (Advisory Opinion OC-11/90).<sup>13</sup>

72. The Commission’s position with respect to the foregoing requirements is that the petitioners exhausted the remedies under domestic law to the extent necessary for the purposes of admissibility. They invoked the remedies normally applicable and pursued them through every step of the process. Accordingly, the petitioners met the requirements established by article 46 of the American Convention.

73. The Awas Tingni Community and its leaders filed two *amparo* actions with the Nicaraguan courts, and members of the RAAN Regional Council filed another *amparo* action in connection with this case. The Community filed the first *amparo* action with the Matagalpa Court of Appeals on September 11, 1995, claiming that the Ministry of Natural Resources awarded to SOLCARSA a concession on Awas Tingni land without having consulted the Community, in violation of the Community’s land rights and the State’s obligation to guarantee those rights. That action failed because, according to the Court of Appeals, it had not been submitted within the allowed time period, that is, within 30 days after the Community was considered to have become aware that the concession was under study, even though it had not yet been signed. On September 21, the Community appealed to the

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<sup>13</sup> Advisory Opinion OC-11/90, of August 10, 1990, Exceptions to the Exhaustion of Remedies under Domestic Law (art. 46.1, 46.2(a) and 46.2(b) of the American Convention on Human Rights), Ser. A. No. 11, para. 17.



Supreme Court of Justice, requesting review of the decision by the Court of Appeals. The Supreme Court ruled against the action a year and a half later, on February 27, 1997, without providing the grounds for its decision.

74. The members of the RAAN Regional Council, for their part, filed a separate *amparo* action with the courts against the concession to SOLCARSA on March 29, 1996. Eleven months later, on February 27, 1997, the Supreme Court of Justice ruled that the concession was unconstitutional. This action was brought by two members of the RAAN Regional Council, on the separate and independent grounds that the logging concession awarded to SOLCARSA was not valid because it had not been approved by the full Regional Council, as specifically required by article 181 of the Nicaraguan Constitution. Although this action was successful, it had not raised the issue of indigenous rights to the land, nor were those rights grounds for the Court's ruling in favor of the action, which was based on article 181 of the Constitution.

75. In spite of the Supreme Court judgment declaring the concession illegal based on article 181 of the Constitution, the State allowed the concession to continue in effect. In the months after the Court's judgment, State officials took steps to have the concession submitted to the Regional Council for approval. On October 8, 1997, the Council met and voted in favor of the concession.

76. After this vote by the Regional Council, the State contended to the Commission that it had complied with the Supreme Court decision, arguing that it had corrected the constitutional error in question. The petitioners, however, considered that while approval by the Regional Council was necessary, it was not sufficient to validate the concession to SOLCARSA since the concession constituted an invasion of indigenous land. The Supreme Court made clear that approval by the Regional Council in plenary session—not simply by its executive body—was required to validate the forest concession. However, this does not mean that approval by the Regional Council eliminates the need to consult with the indigenous communities affected or to obtain their approval. Accordingly, there must be meaningful consultation with the Awas Tingni Community itself, through its own leadership structure, before awarding a concession to third parties for exploitation of the Community's land.

77. The petitioners also argued that it was a distortion of reality and of the pertinent legal institutional arrangements to suppose that approval by the Regional Council is equivalent to approval by the Awas Tingni Community. The RAAN Regional Council is a governmental administrative entity of the State. Its jurisdiction covers a territory that includes indigenous as well as non-indigenous populations. In reality, most of the population within RAAN's jurisdiction is not indigenous. The members of the Regional Council are elected by districts, through party systems that function as in the rest of the country. The Council members are

not appointed by the indigenous communities, nor do they directly represent them. On the contrary, Regional Council Members answer to political parties, and at the current time, the majority of the Regional Council Members are members of the same political party as President Alemán. The fact that several members of the Regional Council are indigenous is not enough to provide a substitute for the indigenous communities' own representatives.

78. Accordingly, on November 7, 1997, the petitioners filed an action for *amparo* against the members of the Board of Directors of the Regional Council of the North Atlantic Autonomous Region during the periods 1994-96 and 1996-98, as well as other members of the Regional Council who, at their meeting on October 8, 1997, formed a Council majority voting in favor of approving the logging concession to the Korean company SOLCARSA. In their action for *amparo*, the petitioners denounced these Council Members for having approved the concession to SOLCARSA by means of a process that set aside any consideration of indigenous land rights within the concession area, even though the Awás Tingni Community had made a formal request to the Council with regard to the matter. The action for *amparo* also named MARENA officials who had promoted and instigated the vote of the Council in favor of the concession and who were negligent in recent months in not responding to repeated requests from the petitioners.

79. The petitioners point out that the acts denounced in their last action for *amparo* are in addition to those the petitioners had denounced originally before the Inter-American Commission, and such claims continue to represent the main substance of the petition. In their petition of October 2, 1995, the petitioners denounced the failure of the State to take measures necessary to protect the land rights of the Awás Tingni Community, as well as the State's initial decision to award the logging concession to SOLCARSA on lands inhabited and used by the Awás Tingni and other indigenous communities.

80. The petitioners indicate that their last action for *amparo* was not successful. On November 12, 1997, one week after the action was filed, the Matagalpa Court of Appeals denied the request by the claimants for immediate suspension of the concession to SOLCARSA, allowing the State to continue encouraging forest operations that threatened the petitioners with irreparable damage. During these same proceedings, the Court admitted the action and gave instructions for the defendants to be notified and to report to the Supreme Court of Justice.<sup>14</sup>

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<sup>14</sup> On November 12, 1997, the Court of Appeals ruled:

I. In accordance with article 31 of the Law of *Amparo*, notice is to be given to the Attorney General, by the Departmental Prosecutor of this city, together with a copy of the action and the corresponding warrant to be placed directly in his hands, and a copy and the

81. The State of Nicaragua, for its part, indicated on two occasions that in the case in question, “the petitioners have continued with procedures in accordance with the domestic legislation of the Republic of Nicaragua, demonstrating themselves, that the remedies under domestic law have not been exhausted. We therefore wish to invoke article 46 of the American Convention and article 37 of the Commission’s Rules of Procedure.”

82. Following the rejection by the Court of Appeals of the request for suspension, the petitioners consider it improbable, based on practice, that the Supreme Court will act on the complaint within a reasonable period of time. The Supreme Court of Justice has not ruled on the vast majority of actions for *amparo* submitted to it in recent years. According to the petitioners, the Supreme Court tends to rule on *amparo* only when the claimant enjoys political influence or when in some other way, political powers in the country demand judicial intervention. An example is the first action for *amparo* filed by the petitioners on September 11, 1995, which the Supreme Court rejected in its judgment of February 27, 1997, almost a year and a half after its submission.<sup>15</sup>

83. The State of Nicaragua pointed out that in the case of the Awas Tingni Community, “the remedies under domestic law have not been exhausted.” However, under the principle *onus probandis incumbit actoris*, the State has the burden of proving these remedies have not been exhausted or what remedies still must be exhausted or why they have not proven effective.<sup>16</sup> The Commission

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respective warrant is to be sent to the officials against whom the complaint has been brought, notifying them that they are to send a written report on the actions in question to the Supreme Court of Justice, within ten days of their receipt of their copies attaching any related documentation prepared to this effect.

II. Suspension of the Action in question is unwarranted since apparently the action has already been consummated inasmuch as the claim and the accompanying documents do not indicate the contrary. Moreover, if the action has not been consummated, it would not be physically impossible, in the Court’s estimation, to restore to the complainants the enjoyment of the right they claim.

III. The parties are given notice to appear before the Supreme Court of Justice within three working days of notification, plus a day for travel as the case may be, to avail themselves of their rights, under legal admonishment if they fail to do so.

<sup>15</sup> Filed in the records of the Supreme Court of Justice, Judicial Record dated February 27, 1997 (Annex C.48).

<sup>16</sup> In this regard, the Inter-American Court of Human Rights stated the following in its preliminary considerations in the Velazquez Rodriguez case: “. . . that the State alleging

considers that the period from September 11, 1995, when the first action for *amparo* was filed, to February 27, 1997, when the Court rendered its judgment, constitutes unwarranted delay in the administration of justice in the sense required for the exception to exhaustion of domestic remedies set forth in article 46(2)(c) of the Convention and 37(2)(c) of its Rules of Procedure. There was also unwarranted delay in the proceedings on the second action for *amparo* filed by the Awas Tingni Community on November 7, 1997. The Court of Appeals denied the request for immediate suspension of the denounced act and referred the matter to the Supreme Court, where it has remained unresolved.

84. The Inter-American Court of Human Rights has stated the following in this regard: “. . . when certain exceptions to the rule concerning the exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the absence of due process of law, not only is it being alleged that the aggrieved party is not obligated to pursue such remedies, but indirectly, the State concerned is being accused of a further violation of its obligations under the Convention. Under such circumstances, the question of domestic remedy becomes more closely related to the substance of the case.”<sup>17</sup> “In the international law of human rights, the rule concerning prior exhaustion of domestic remedies has certain implications that are present in the Convention. Indeed, under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (art. 25), remedies that must be substantiated in accordance with the rules of due process of law (art. 8(1)), all in keeping with the general obligation of such States to guarantee the full and free exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (art. 1).”<sup>18</sup> However, recourse to domestic remedies in the case of the Awas Tingni Community was ineffective, and this placed the Community in a defenseless position, which explains why the Commission has taken up the present case.

85. The petitioners, for their part, demonstrated that they had resorted to the remedies under the domestic law of the Republic of Nicaragua, inasmuch as they filed the actions for *amparo* described above. Accordingly, the

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failure to exhaust the remedies under domestic law bears the burden of identifying the remedies that must be exhausted and their effectiveness.” Judgment of June 26, 1987, para. 88, p. 38.

<sup>17</sup> The Inter-American Court of Human Rights stated the following in its preliminary considerations in the Velazquez Rodriguez case: “. . . that the State alleging failure to exhaust the remedies under domestic law bears the burden of identifying the remedies that must be exhausted and their effectiveness.” Judgment of June 26, 1987, para. 91, p. 40.

<sup>18</sup> Velazquez Rodriguez case, Judgment on Preliminary Exceptions, June 26, 1987, para. 91.

Commission considers that the requirement to exhaust the remedies under domestic law established in article 46(1)(a) of the Convention has been fulfilled. It is important to note, however, that the available recourse did not offer an effective remedy in protecting the land and natural resource rights claimed. The Supreme Court ruled in favor of the action filed by Council members Smith and Thompson, but that ruling did not result in measures guaranteeing the land rights of the Awas Tingni Community. Consequently, the extensive efforts made by the petitioners under the domestic legal system and their participation in proceedings aimed towards an effective result that would guarantee their land rights were fruitless.

86. In any case, the response of May 7, 1998 from the Government of Nicaragua to the Commission's Report constitutes acceptance of responsibility in the case and therefore invalidates the Government's defense based on the failure to exhaust remedies under domestic law.

#### **B. Jurisdiction of the Inter-American Court of Human Rights**

87. The Inter-American Commission has taken up this case in accordance with the pertinent provisions of the American Convention and its Rules of Procedure. The State of Nicaragua deposited its instrument of ratification of the American Convention on Human Rights on September 25, 1979. The Convention entered into force for all States Parties on July 18, 1978.

88. On February 12, 1991, the State of Nicaragua informed the OAS General Secretariat of its intention to recognize as binding under law and without special convention the jurisdiction of the Inter-American Court of Human Rights over all cases concerning the interpretation or application of the American Convention on Human Rights, "Pact of San José, Costa Rica," in accordance with article 62 (1) of the Convention. The jurisdiction of the Court was accepted:

for a period of indefinite duration, with general character, under conditions of reciprocity and with the reservation that the cases for which jurisdiction is recognized pertain solely to events subsequent to, or events originating after, the date on which this declaration was deposited with the General Secretariat of the Organization of American States.

89. The violations that give rise to this case occurred after Nicaragua accepted the jurisdiction of the Inter-American Court of Human Rights in 1991.

90. The present case concerns violations of the American Convention over which the Court has jurisdiction under article 62(3) of that instrument. Finally, the case has been properly submitted to the Court in accordance

with article 61, inasmuch as the procedures established in articles 48 to 50 of the Convention have been followed. Accordingly, the procedural requirements for submission of the case to the Court have been fulfilled.

## VII. SUBSTANTIVE CONCLUSIONS OF LAW

91. The State of Nicaragua is responsible for the actions and omissions of its agents in failing to take measures to protect the land and natural resource rights of the Awas Tingni Community based on its traditional patterns of use and occupation. The State of Nicaragua has not demarcated the Awas Tigni communal lands, or the lands of other indigenous communities, and has not taken effective measures to protect the property rights of the Community to its ancestral lands. This omission by the State constitutes a violation of articles 1, 2, and 21 of the American Convention, which relate to the right to property. In addition, the State actively violated the right to property recognized in article 21 by awarding a concession to SOLCARSA for logging on land traditionally occupied and used by the Awas Tingni Community. The State also is in violation of the right to judicial protection under article 25 of the Convention, in that it did not ensure effective, simple, and prompt recourse in response to the claims of the Awas Tingni Community concerning its land and natural resource rights.

**A. The State has not taken measures to ensure the communal land and natural resource rights of the Awas Tingni Community, leaving those rights in a precarious condition, in violation of articles 1(1), 2, and 21 of the Convention.**

**1. The Awas Tingni Community has property rights to land and natural resources based on traditional, ancestral patterns of use and occupation, which rights are protected under article 21 of the Convention and other applicable provisions of international law.**

**a) *Land and natural resource rights.***

92. Article 21 of the Convention recognizes in general: “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.” Examined in the light of the fundamental principle of non-discrimination enshrined in article 1(1) of the Convention, article 21 necessarily includes protection for those forms of property which are based on the traditional patterns of land tenure of indigenous peoples or communities.

93. These forms of property are explicitly recognized in the

Political Constitution of Nicaragua as follows:

The State recognizes the existence of the indigenous peoples, who enjoy the rights, duties, and guarantees enshrined in the Constitution, and in particular those intended to maintain . . . the communal form of their lands and their enjoyment and use.<sup>19</sup>

. . .

The State recognizes the communal forms of land ownership of the Atlantic Coast communities. It also recognizes the use and enjoyment of the waters and forests on their communal lands.<sup>20</sup>

. . .

The State guarantees these communities the enjoyment of their natural resources, the effectiveness of their forms of communal property and the free election of their authorities and deputies.<sup>21</sup>

94. In addition, based on these articles of the Constitution, the Statute of Autonomy for the Atlantic Coastal Regions of Nicaragua makes reference to communal property, defining it as follows:

The communal property consists of the land, waters, and forests that have traditionally belonged to the Atlantic Coast communities.<sup>22</sup>

95. Accordingly, in the Political Constitution and the Statute of Autonomy, the Nicaraguan legal system incorporates property rights originating in the customary system of land tenure that historically or traditionally has existed among the Atlantic Coast indigenous communities. According to the legal provisions cited, the Mayagna Community of Awas Tingni and other Atlantic Coast indigenous communities of Nicaragua have property rights to land and natural resources by

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<sup>19</sup> Political Constitution of Nicaragua, article 5.

<sup>20</sup> Ibid., article 89.

<sup>21</sup> Ibid., article 180.

<sup>22</sup> Statute of Autonomy of the Atlantic Coastal Autonomous Regions of Nicaragua, Law 28 of 1987, article 36.

virtue of their traditional patterns of use and occupation.

96. These property rights are also enshrined in the International American Charter of Social Guarantees of 1948. Article 39 of the Charter provides:

In countries where the problem of native populations exists, the necessary measures shall be taken to provide Indians with protection and assistance, protecting their lives and property, defending them from extermination, sheltering them from oppression and exploitation, protecting them from poverty and providing them with appropriate education.

...

Institutions or services shall be established for the protection of Indians, and in particular to safeguard their lands, legalize their ownership thereof, and prevent the invasion of such lands by outsiders.

97. Conventions 107 and 169 of the International Labour Organisation also recognize the right to property of lands traditionally occupied by indigenous peoples.<sup>23</sup> Convention 169, furthermore, recognizes “the right of the [indigenous] peoples to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.”<sup>24</sup>

98. Article 18 of the Proposed American Declaration on the Rights of Indigenous Peoples refers to the right to property as follows:

1. Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.
2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of

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<sup>23</sup> Convention 107, concerning the Protection and Integration of Indigenous Populations and other Tribal and Semi-tribal Populations in the Independent Countries, of 1957, article 11; Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, of 1989, article 14.1.

<sup>24</sup> *Ibid.*, article 14.2.



those to which they have historically had access for their traditional activities and livelihood.<sup>25</sup>

99. Emphasizing that such property rights originate from traditional patterns of land tenure, the Proposed Declaration also stipulates: “Nothing . . . shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them.”<sup>26</sup>

100. Following in the same vein, the Draft United Nations Declaration on the Rights of Indigenous Peoples provides the following:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.<sup>27</sup>

101. The traditional patterns of land and natural resource use and occupation by the Awas Tingni Community, which have given rise to property rights under the pertinent legal provisions, are explained and illustrated in several documents. These documents include the report and maps produced by a project in support of the Awas Tingni Community, which project was financed by the World Wildlife Fund (WWF), a non-governmental organization. The report<sup>28</sup> was prepared

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<sup>25</sup> Proposed American Declaration on the Rights of Indigenous Peoples, article XVIII, in: 1997 IACHR Annual Report, OEA/Ser.L/V/II95.doc.7, rev. 1997, pp. 654-676 (proposal by the IACHR) (hereinafter the “Proposed American Declaration”).

<sup>26</sup> *Ibid.*, article XVIII, 3 III.

<sup>27</sup> Draft United Nations Declaration on the Rights of Indigenous Peoples, article 26, adopted and proposed by the Sub-committee on the Prevention of Discrimination and the Protection of Minorities by its Resolution 1994-45, August 26, 1994, E/CN.4/Sub.2/1994/45, p. 105 (hereinafter “Proposed UN Declaration”).

<sup>28</sup> Awas Tingni: An ethnographic study of the Community and its territory – Preliminary Report (1996) (Annex C.3) (hereinafter “Ethnographic Study”).

by the anthropologist Dr. Theodore Macdonald of Harvard University and is based on on-site research conducted by members and representatives of the Community over a period of several weeks in 1995. As explained in the Report, the maps accompanying the study are the result of on-site work by a team of Awas Tingni Community members who worked in coordination with Dr. Macdonald. This team toured the area identified by the Awas Tingni Community as its ancestral territory, ascertaining the geographical extension of the area and various traditionally used and occupied places. The corresponding geographical coordinates were determined using an electronic Global Positioning System (GPS) instrument. A professional cartographer hired by the Community indicated these coordinates on an official 1:50,000-scale map of the area. Subsequently, Dr. Macdonald and an assistant used a Geographical Information System (GIS) computer program to process the data and create a map illustrating the traditional and historic land tenure of the Awas Tingni Community.<sup>29</sup>

102. In 1992, before the territorial study financed by the WWF began, members of the Awas Tingni Community prepared a rough map showing the extent of their ancestral communal lands.<sup>30</sup> In addition, Mr. Charlie Mclean, a leader of the Community, wrote a document containing a description of the boundaries of Awas Tingni territory and a brief history of the Community.<sup>31</sup> In November 1997, the members of the Community's Governing Council prepared another map showing the location of their settlements, subsistence activities and sacred places.<sup>32</sup> The data contained in these Awas Tingni documents are substantially confirmed by the study and maps prepared in coordination with Dr. Macdonald as part of the WWF project.

103. The aforementioned documents and maps establish that the Awas Tingni Community is an indigenous community of the Mayagna (Sumo) ethnic group with historical continuity, which has occupied and used certain lands in accordance with a traditional land tenure scheme of long duration. Under this land tenure scheme, the Community owns the entire Awas Tingni territory collectively or communally, while individuals and families of the Community enjoy the subsidiary rights of use and occupation. This is clear evidence of the Awas Tingni Community's territorial use and occupation patterns. According to indigenous customs and the applicable Nicaraguan laws, which are supported in the international

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<sup>29</sup> See Map: Awas Tingni Territory (Annex C.4).

<sup>30</sup> Map designed to show the Awas Tingni lands (Annex C.1).

<sup>31</sup> Writings by Charlie Mclean on the history of the Awas Tingni and their territory (Annex C.2).

<sup>32</sup> Map showing the Occupation and Subsistence Uses of the Awas Tingni Indigenous Community (Annex C.7).

sphere, these patterns give rise to communal property rights.

**b) *Rights to land and natural resources under the protection of article 21 of the Convention***

104. These property rights of the Awas Tingni Community to land and resources fall under the protection of article 21 of the American Convention. The principle of non-discrimination set forth in article 1(1) of the Convention leads to this conclusion. An opposite interpretation of the scope of article 21 would allow for the persistence of unjustified discriminatory situations with regard to property use and enjoyment. Several studies by the United Nations and the Organization of American States have concluded that the indigenous sectors historically have been victims of racial discrimination and that one of the greatest manifestations of this discrimination has been the lack of effective State guarantees for their traditional forms of land and resource possession and use. The United Nations Committee for the Elimination of Racial Discrimination has observed:

[I]n many regions of the world indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and . . . have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardized.<sup>33</sup>

105. This historically rooted situation was highlighted during the expert seminar convened by the United Nations on “The Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous People and States.” The seminar concluded that “The Indigenous Peoples have been and continue to be the victims of racism and racial discrimination.”<sup>34</sup> The seminar report went on to say:

Racial discrimination against indigenous peoples is the outcome of a long historical process of conquest, penetration and marginalization, accompanied by attitudes of superiority and by a projection of what is indigenous as “primitive” and “inferior.” The

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<sup>33</sup> Committee for the Elimination of Racial Discrimination, General Recommendation XXIII, adopted at the Committee’s 1235<sup>th</sup> meeting, 18 August 1997, CERD/C51/Misc. 13/Rev.4 (1997), para. 3.

<sup>34</sup> “Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States,” E/CN.4/1989/22,HR/PUB/89/5 (1989), p.5.

discrimination is of a dual nature: on the one hand, gradual destruction of the material and spiritual conditions [needed] for the maintenance of their [way of life]; on the other hand, attitudes and behaviour signifying exclusion or negative discrimination when indigenous peoples seek to participate in the dominant society.<sup>35</sup>

106. The Atlantic Coast indigenous peoples of Nicaragua are among those segments of humanity who have suffered this history of discrimination and marginalization.<sup>36</sup>

107. The elimination of historical discrimination against indigenous peoples, and its legacy, requires faithful adherence to the principle of equality in the protection of human rights, including the right to property. The obligation of the States Parties to guarantee the rights contained in the American Convention on a non-discriminatory basis, particularly with regard to the use of land and resources, is reinforced by article 24, which affirms the right to equality before the law.

108. The close connection that the indigenous communities of Nicaragua's Atlantic Coast maintain with ancestral lands and natural resources also relate to other articles of the American Convention whose application should be taken into account in the context of the right to property under article 21. For the members of the Awas Tingni Community, like members of other indigenous communities, communal lands represent the site of their ancestral past and current inhabitation, as shown in the ethnographic study on the Community.<sup>37</sup> The lives of Community members depend substantially on the farming, hunting, and fishing they do in the areas surrounding their villages.<sup>38</sup> These subsistence activities form part of their

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<sup>35</sup> *Ibid* E/CN.4/1989/22,Hr/PUB/89/5 (1989), p.5.

<sup>36</sup> See Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, doc. 10, rev. 3, November 29, 1983, pp. 1-7; Jorge Jenkins Molieri, *El Desafío indígena en Nicaragua: El Caso de los Miskitos* (Mexico, D.F.: Editorial Kangtun, 1986), pp. 33-114, 175-229; Theodore Macdonald, "The Moral Economy of the Miskito Indians: Local Roots of a Geopolitical Conflict," in Remo Guidieri et al., eds., *Ethnicities and Nations: Processes of Interethnic Relations in Latin America, Southeast Asia, and the Pacific* (Houston: Rothko Chapel; distr. By Univ. of Texas Press, 1988), pp. 107, 114-22.

<sup>37</sup> See Ethnographic Study (Annex C.3).

<sup>38</sup> *Ibid*, pp. 20-24. See also Map: Awas Tingni Territory (Annex C.40; Map showing the Occupation and Subsistent Uses of the Awas Tingni Indigenous Community, (Annex C.7).

culture and are intimately connected with their family relationships and the social organization of the Community. Within the area inhabited and used by the Community, cemeteries and other sites of religious significance have been identified.<sup>39</sup> The Community's very existence depends on the territorial space it occupies and in which it performs its varied activities. In several respects, this relationship the Awas Tingni Community maintains with its lands and resources is protected under other rights enshrined in the Convention, including the rights to life (article 4), honor and dignity (article 11), freedom of conscience and religion (article 12), freedom of association (article 16), protection of the family (article 17), and freedom of movement and residence (article 22).

109. The Inter-American Commission drew attention to the significance of these many rights for indigenous peoples in its *Report on the Human Rights Situation in Ecuador*.<sup>40</sup> The Commission asserted: "For the indigenous peoples, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture."<sup>41</sup> The Commission also observed:

For many indigenous cultures, continued utilization of traditional systems for the control and use of territory is essential to their survival, as well as to their individual and collective well-being. Control over the land refers both to its capacity for providing the resources which sustain life, and to "the geographical space necessary for the cultural and social reproduction of the group."<sup>42</sup>

110. The provisions of the Convention protecting and strengthening the indigenous peoples' rights to their traditional lands also implies the right to protection of the environment of those lands. The "right to a healthy and productive life in harmony with nature" is enshrined in the Rio Declaration on Environment and Development.<sup>43</sup> The Rio Declaration also provides:

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<sup>39</sup> Ethnographic Study, (Annex C.3) *supra*, pp. 24-28. Also see Mapa: Awas Tingni Territory (Annex C.4); Map Showing the Occupation and Subsistence Uses of the Awas Tingni Community (Annex C.7).

<sup>40</sup> "Report on the Situation of Human Rights in Ecuador," OAS/Ser.L/V/II.96, Doc. 10, rev. 1, April 24, 1997 (hereinafter "Report on Ecuador").

<sup>41</sup> *Ibid.*, p. 122.

<sup>42</sup> *Ibid.* quoting R. Stavenhagen, "Indigenous Peoples: Emerging Actors in Latin America," in *Ethnic Conflict and Governance in Comparative Perspective*, Working Paper 215 at 1, 11 (Latin American Program, Woodrow Wilson Center 1995).

<sup>43</sup> Rio Declaration on Environment and Development, Principle 1, United Nations

Indigenous populations and their communities, as well as other local communities, play a fundamental role in environmental management and development given their traditional knowledge and practices. States should duly recognize and support their identity, culture, and interests and facilitate their effective participation in the achievement of sustainable development.<sup>44</sup>

111. The Proposed American Declaration on the Rights of Indigenous Peoples recognizes: “Indigenous peoples have the right to a safe and

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Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, A/CONF.151/26 (Vol. 1).

<sup>44</sup> Ibid., article 22. Also pertinent is the action program adopted by the United Nations Conference on Environment and Development, known as “Agenda 21.” Chapter 26 of Agenda 21, A/CONF.151/26 (vol. 3), annex 2 (1992), recognizes: “Indigenous people and their communities have an historic relationship with their lands and are generally descendants of the original inhabitants of such lands.” Ibid., para. 26.1. In addition, chapter 26 of Agenda 21 prescribes the following measures, *inter alia*, with regard to indigenous peoples:

- i) The adoption or ratification of appropriate national policies or legal instruments;
- ii) Recognition that the lands of indigenous peoples and their communities must be protected from environmentally unsound activities and from activities the people consider to be socially and culturally inappropriate.
- iii) Recognition of their values, traditional knowledge, and resource management practices, with a view to promoting environmentally sound and sustainable development;
- iv) Recognition that the traditional and direct dependence on renewal resources and ecosystems, including sustainable development, continue to be essential to the cultural, economic, and physical well-being of the indigenous peoples and their communities.
- v) Development and consolidation of national dispute resolution procedures to deal with concerns about the settlement of land and use of resources;
- vi) The promotion of other environmentally sound means of ensuring diverse options for improving the quality of life so as to allow them to participate effectively in sustainable development;
- vii) Attention to increasing the capacity of indigenous communities based on the adaptation and exchange of experiences, knowledge, and traditional resource management values to ensure the sustainable development of these communities;

Ibid., para. 26.3(a).

healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being.”<sup>45</sup> Similarly, the Draft United Nations Declaration provides: “Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources . . .”<sup>46</sup> These norms are implicit in the provisions of the Convention cited above when those provisions are applied to the situation of the indigenous peoples and their ancestral lands.

112. Accordingly, the property rights of the Awas Tingni Community to land and natural resources is protected under article 21 of the Convention and strengthened by other rights enshrined in the Convention that relate to traditional indigenous land tenure patterns.

**c) *Land and natural resource rights protected by other international conventions binding upon the State***

113. In interpreting the provisions of the American Convention that are pertinent to the present case, reference must be made to article 29 of the Convention, which stipulates that the Convention cannot be interpreted as restricting any right recognized by virtue of domestic laws or by virtue of another convention to which the State is a party. Provisions in the domestic laws and customs of Nicaragua recognizing land and resource rights of indigenous communities have already been cited. The responsibility of the State in this case is also a function of the provisions of various international treaties in addition to the American Convention.

114. Nicaragua is party to several international conventions that guarantee particular protections for racial and ethnic groups, including the International Covenant on Civil and Political Rights.<sup>47</sup> Article 27 of the Covenant recognizes the right of minority groups to protection of “all characteristics that are necessary for the preservation of their cultural identity.”<sup>48</sup> Article 27 provides that “in those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their

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<sup>45</sup> Proposed American Declaration, *supra*, article XIII.

<sup>46</sup> Draft UN Declaration, *supra*, article 28.

<sup>47</sup> See “Other Treaties,” Inter-American Court of Human Rights, Advisory Opinion OC-1/82.

<sup>48</sup> Resolution No. 12/85, Case No. 7615 (Brazil), March 5, 1985, in *IACHR Annual Report, 1984-85*, OAS/Ser.L/V/II.66, doc. 10, rev. 1, October 1, 1985, pp. 24, 31.

own religion, or to use their own language.” The International Convention on the Rights of the Child, to which Nicaragua is a State party, expressly recognizes the same rights of cultural integrity for children.

115. When, in 1983, the Inter-American Commission on Human Rights referred to the situation of the Atlantic Coast indigenous peoples of Nicaragua, it affirmed that these groups have a right to “special legal protection” of the integrity of their cultures and that such protection should cover “aspects connected with productive organization, which include, *inter alia*, the problem of ancestral and communal lands.”<sup>49</sup> In reaching this conclusion, the Commission made reference to article 27 of the International Covenant on Civil and Political Rights.

116. The United Nations Committee on Human Rights has confirmed that for indigenous groups, such as the Awas Tingni Community, traditional land tenure is an aspect of the enjoyment of culture protected by article 27 of the Covenant:

Culture manifests itself in many forms, including a particular way of life associated with the use of land resources especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.<sup>50</sup>

117. Also relevant are the obligations of Nicaragua under the International Convention on the Elimination of All Forms of Racial Discrimination. This convention elaborates on the right to equality and, in particular, obliges States Parties to eliminate manifestations of racial discrimination. As observed earlier, the principle of non-discrimination has particular significance in the case of indigenous peoples and the maintenance of their traditional or customary forms of land tenure. Accordingly, under its mandate to seek to ensure compliance with the aforementioned convention, the UN Committee on the Elimination of Racial Discrimination stated the following:

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<sup>49</sup> Misikito Report, *supra*, pp. 80, 84.

<sup>50</sup> General Comment No. 23 (50) (Art. 27) [of the PIDCP], adopted by the Committee on Human Rights at its 1314<sup>th</sup> meeting (fiftieth session), April 6, 1994. This interpretation of the right to culture recognized by article 27 is expressed in the following cases under the Facultative Protocol to the Pact on Civil and Political Rights: Case No. 167/1984 (B. Ominayak, Chief of the Lubicon Lake Band v. Canada), Opinion of March 26, 1990, A/45/40, vol. II, annex IX, sec. A, para. 32.2; Committee on Human Rights, Case No. 197/1985 (Kitok v. Sweden), Opinion of July 27, 1988, A/43/40, annex VII, sec. G.



The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.<sup>51</sup>

118. In short, the Mayagna Community of Awas Tingni, like other Atlantic Coast indigenous communities of Nicaragua, have land and resource rights based on traditional patterns of land tenure. These rights, recognized by the Political Constitution of Nicaragua and the Statute of Autonomy, are protected by article 21 and other articles of the American Convention and also by the provisions of other international treaties to which Nicaragua is a party.

**2. The State has violated its obligation, under article 21 as well as articles 1(1) and 2 of the Convention, to guarantee the property rights of the Awas Tingni Community and to adopt the necessary domestic legal measures.**

**a) The obligation to adopt the measures necessary to guarantee property rights.**

119. The protection accorded by article 21 of the American Convention to the right to property necessarily implies the obligation of the State to give effect to such right. In addition, article 1(1) of the Convention mandates that the States Parties undertake to respect the rights recognized in the Convention and to ensure the free and full exercise of those rights without discrimination of any kind. Article 2 explicitly provides for the obligation of the States Parties “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.”

120. These provisions take on heightened importance when applied to population segments that historically have been unable to fully enjoy their human rights. Accordingly, the Inter-American Commission has affirmed:

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<sup>51</sup> General Recommendation XXIII, *supra*, para. 5.

<sup>52</sup> The Commission has declared that “for historic reasons and based on moral and humanitarian principles, special protection for the indigenous peoples constitutes a sacred commitment of the States.” IACHR Resolution on Indigenous Peoples (1972),

Within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival—a right protected in a range of international instruments and conventions.<sup>53</sup>

121. In the present case, articles 1(1) and 2 of the American Convention, taken in conjunction with general international law, establish the obligation of Nicaragua to take the measures necessary to ensure the Awas Tingni Community's rights to the lands it has traditionally used and occupied, rights protected by article 21 and other articles of the Convention. This obligation is explicitly set forth in Convention No. 169 of the International Labour Organisation, which states:

Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.<sup>54</sup>

122. The proposed American Declaration on the Rights of Indigenous Peoples provides: "The States shall give maximum priority to the demarcation and recognition of properties and areas of indigenous use."<sup>55</sup>

123. In several countries of the American hemisphere, this obligation is being fulfilled through proceedings, governed by specific legislation or regulations, that result in indigenous land demarcation or titling by the State.<sup>56</sup> In

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OEA/Ser.P/AG/Doc. 305/73, rev. 1, pp. 90-91.

<sup>53</sup> Report on Ecuador, *supra*, p. 115.

<sup>54</sup> Convention (No. 169) on the Indigenous and Tribal Peoples of Independent Countries, 1989, article 14.2.

<sup>55</sup> Proposed American Declaration, *supra*, article XVIII, 8, p. 673.

<sup>56</sup> See M. Cardenas and H. Correa, eds., *Reconocimiento y demarcacion de territorios indigenas en la Amazonia* (Bogota: CEREC, Serie Amerindia No. 4, 1993) (with reference to Bolivia, Brazil, Colombia, Ecuador, Paraguay, Peru, and Venezuela). See also "Report on the Situation of Human Rights in Brazil" OEA/Ser.L/V/II.97, Doc. 2, rev. 1, September 29, 1997, p. 99-102 (describing the pertinent laws and procedures in Brazil).

Nicaragua, however, there is a persistent absence of effective protection of this kind for the rights of indigenous peoples—the rights to land and natural resources in this case.

**b) *Lack of effective measures under domestic law ensuring rights to land and natural resources.***

124. Fifteen years ago, the Inter-American Commission examined the situation of human rights in the Atlantic Coastal Indigenous Communities of Nicaragua and conducted an investigation that included an on-site visit.<sup>57</sup> Among the problems encountered and pointed out by the Commission was the lack of indigenous peoples' security with regard to land tenure. After the Commission published its observations and recommendations in this regard, significant progress was made within the Nicaraguan legal framework on indigenous land tenure. In particular, the constitutional and legislative provisions mentioned earlier were adopted to accord general recognition of land and resource rights based on traditional patterns of use and occupation.

125. Despite the constitutional and legal provisions recognizing indigenous land rights in general terms, the State of Nicaragua has not taken the measures necessary to demarcate indigenous communal lands or protect and guarantee in some other way the specific rights of indigenous communities to land and natural resources. In addition, no legislation has been enacted that establishes norms specifying the scope and character of the land and resource rights recognized in general terms in the Constitution and the Statute of Autonomy. The situation in Nicaragua is in contrast with that in other States of the American hemisphere, where mechanisms have been developed and implemented to demarcate indigenous lands and regulate corresponding rights.

126. In August 1996, nearly one year after this case was brought before the Inter-American Commission, a presidential decree established the National Commission for the Demarcation of Atlantic Coastal Indigenous Community Lands.<sup>58</sup> The function delegated to the National Commission was to perform a diagnostic on the matter and prepare a “demarcation proposal.” The State representatives announced the formation of the National Commission at the meeting of October 3, 1996, convened by the Inter-American Commission on Human Rights

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<sup>57</sup> See Misikito Report, *supra*.

<sup>58</sup> See Decree No. 16-96 of August 23, 1996: Creación de la Comisión Nacional para la Demarcación de las Tierras de las Comunidades Indígenas en la Costa Atlántica.

as part of the friendly settlement process attempted in this case. The State representatives characterized the creation of the National Commission as a step toward a solution to the problem, and invited the Awas Tingni representatives to participate in the National Commission along with representatives from other indigenous sectors. This commission was unable, however, to make a concrete contribution to a mechanism for demarcating or officially recognizing indigenous lands.

127. From the outset, the National Commission for Demarcation has been unable to generate fully participatory processes with the indigenous sectors to resolve the land problem. In the first meetings of the National Commission, State officials attempted to impede or limit the participation of attorney Maria Luisa Acosta, an authorized representative of the Awas Tingni Community and advisor to the indigenous organizations, despite the invitation that was extended to her at the October 3, 1996 meeting of the Inter-American Commission.<sup>59</sup> The indigenous representatives did not agree with the behavior of the State officials in the National Commission process. The indigenous representatives presented a written declaration in which they criticized the functioning of the National Commission and requested that greater indigenous representation be included.<sup>60</sup> A few days after this statement, the Organization of Indigenous Leaders of the Caribbean Coast of Nicaragua, an organization representative of Indigenous Communities in the Northern Atlantic Autonomous Region (RAAN), announced its intention to withdraw from the National Commission in a letter to the President of the World Bank, which was providing funds for the National Commission.<sup>61</sup> In a separate letter, the organization "Indigenous Movement of the Southern Atlantic Autonomous Region" also announced its intention to withdraw from the National Commission.<sup>62</sup> The State, for its part, has not informed the Inter-American Commission of any concrete steps taken by the National Commission under its mandate.

128. In any case, the National Commission and the other relevant

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<sup>59</sup> See Reports by Dr. Maria Luisa Acosta of November 1996 (Annex C.24).

<sup>60</sup> See Statement by the Indigenous People Representatives before the National Commission for the Demarcation of Atlantic Coast Indigenous Community Land in Nicaragua, on November 14, 1996 (Annex C.25).

<sup>61</sup> See Letter to James Wolsensohn [sic], President of the World Bank, OSICAN, dated November 21, 1996 (Annex C.26).

<sup>62</sup> See Letter to Mr. Enrique Brenes, Interim President of the National Commission for the Demarcation of Atlantic Coastal Communal Lands, from Fermin Chavarria, Coordinator of the RAAS Indigenous Movement, dated December 5, 1996 (Annex C.27).

State institutions have left the issue of the Atlantic Coast indigenous lands unresolved. Accordingly, the Awas Tingni Community and the majority of the Atlantic Coast indigenous communities still do not enjoy specific State recognition of the scope or geographic limits of their land and resource rights.

*c) Precarious condition of the Awas Tingni Community*

129. The lack of specific State recognition of its land rights has left the Awas Tingni Community and other communities in a vulnerable position from which to defend their property rights and avoid the exploitation of their natural resources without their consent. This vulnerability is particularly evident in the two concessions MARENA awarded for logging on lands traditionally used and occupied by the Awas Tingni Community. With regard to the first concession, awarded to the company MADENSA, the Community obtained a negotiated arrangement, but only after protesting to the State and gaining the support of the non-governmental organization WWF. On the other hand, the Community's repeated protests against the concession to SOLCARSA were ignored.

130. Both concessions were awarded on the assumption that the lands affected are State lands, since MARENA has the authority to award logging concessions only on State lands.<sup>64</sup> The management plan MARENA approved for the SOLCARSA operations identifies the entire 62,000-hectare area of the concession as State land.<sup>65</sup> It is evident that MARENA regards all land not registered with a formal

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<sup>63</sup> The numerous fruitless efforts of the Awas Tingni to convey to MARENA its opposition to the SOLCARSA concession are described in several communications from the petitioners to the Commission. See Petition of the Mayagna de Awas Tingni Indigenous Community, dated October 2, 1995, pp. 14-15; Memorandum in Support of Request for Provisional Measures, Jan. 4, 1996, pp. 4-5; Note from Mr. James Anaya, legal representative of the petitioners, to the Commission on March 28, 1996, with attachments. The State has not disputed these accounts of the events.

<sup>64</sup> Under the Forestry Regulations and the constitutional provisions on private property and indigenous communal property, MARENA is empowered to award concessions for tree cutting on state lands, whereas the right to exploit the forests on non-state lands belongs to the owner.

<sup>65</sup> See Forest Management Plan, Cerro Wakambay forestlands (final version), December 1994 (prepared by Kumyung Co. Ltd. By Swietenia S.A.), p. 11 (Annex C.10) (hereinafter "Wakambay Management Plan"). This Management Plan was approved by MARENA and incorporated within the concession contract between MARENA and SOLCARSA, signed on March 13, 1996.

ownership title as State land. This position, in which MARENA is acting in its capacity as promoter of the exploitation of State natural resources, endangers the enjoyment of indigenous community rights to the land they have possessed by virtue of their traditional ways without a formal title.

131. The State has not disputed the above-mentioned documents presented by the Awas Tingni Community that describe and illustrate the Community's traditional and historic land tenure. The ethnographic study and graphs are proof of the Community's rights to the land and resources, including rights to land and resources within a substantial portion of the SOLCARSA concession area.<sup>66</sup> But State officials have been reticent to recognize the legal meaning of these evidentiary documents. During the friendly settlement process, the only comment from the State with regard to the Awas Tingni Community's arguments was that the maps prepared by the Community were not official in character and that they showed an area that was too large in relation to the number of persons making up the Community. These arguments by the State are not compatible with the legally determinative criteria of traditional use and occupation. In the hearing before the Commission on October 8, 1997, representatives of the State admitted that the Community could have rights to at least a portion of the land it claims within the concession area.

132. However, all circumstances indicate that, in the absence of a registered title, State land and natural resource officials ignore the rights of indigenous communities that are based on traditional land tenure. Regional government officials have joined MARENA in rejecting the land and resource rights of the Awas Tingni Community due to the lack of official demarcation of the Community's communal lands and other State acts recognizing the specific scope of land rights. The main body of the RAAN regional government is the Regional Council which, under articles 180 and 181 of the Political Constitution and under the Statute of Autonomy of the Autonomous Regions of Nicaragua, forms part of the political-administrative organization of the Nicaraguan State. Before the concession was awarded to SOLCARSA, the Board of Directors of the Regional Council issued an administrative decision in favor of the concession.<sup>67</sup> Although members of the

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<sup>66</sup> See Map: Tenure of the Mayagna Awas Tingni within the SOLCARSA Concession Area (Annex C.5); Statement by Dr. Theodore Macdonald (Annex C.6) (explaining that this map (Annex C.5) is a synthesis of the map (Annex C.4) created with the ethnographic study and the map of the SOLCARSA concession area taken from the Wakambay Management Plan, *supra*); Map of the subsistence uses of the Awas Tingni Indigenous Community (Anex C.7) (map prepared by members of the Community showing subsistence uses and cultural sights in relation to the concession).

<sup>67</sup> See letter from Alta Hooker Blandford, President of the RAAN Regional Council, and Myrna Taylor, First Secretary of the Board of Directors of the RAAN Regional Council, to

Board of Directors minimized the significance of this act when responding to the concerns expressed by the Awas Tingni representatives, the President of the Regional Council and the First Secretary of the Board of Directors of the Council sent a letter to the Forestry Director of MARENA indicating that the Awas Tingni territorial claim should not be grounds for delay in awarding the concession (see Annex C.22, Administrative Provision No. 2-95, of June 28, 1995, in which the Board of Directors supports the initiation of forestry operations by SOLCARSA in accordance with the Management Plan for forest exploitation in the Wakambay area). As part of the friendly settlement process, the State used this letter and the administrative decision of the Board of Directors in an attempt to justify the award of the concession.

133. Within a few days of MARENA's execution of the concession, the Awas Tingni Community formally presented its evidentiary documents on communal land to the Regional Council and requested that the Council suspend the concession and call for an evaluation of land tenure within the affected area.<sup>68</sup> Neither the Plenary Session of the Regional Council nor its Board of Directors acted on the Community's request, although they had received it. On February 27, 1997, the Supreme Court of Justice rendered its Judgment No. 12, declaring the concession to be unconstitutional because it had not been endorsed by a Plenary Session of the Regional Council as required by article 181 of the Constitution regarding concessions in the region. However, MARENA allowed the concession to

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Roberto Araquistain, Director General for Forests, MARENA, dated December 8, 1995 (Annex C.23).

<sup>68</sup> Request by the Mayagna de Awas Tingni Community to the Regional Council of the Northern Atlantic Autonomous Region for the Official Recognition and Demarcation of the Community's Ancestral Lands (Annex C.13), with attachments, delivered to the President of the Regional Council on March 12, 1996, presented before a Plenary Session of the Regional Council on March 22, 1996, and delivered to the IACHR with a note dated 14/2/96. The request proposes a delineation of approximately 95,000 hectares within the area traditionally and historically used and occupied by the Community. See Map 2 attached to the Request. The Request also proposes:

1. An evaluation of the ethnographic study presented by Awas Tingni [Annex B]; and the preparation of a supplementary study if the Council considers it necessary.
2. A process of cooperation and coordination between the Awas Tingni and the nearby village communities with regard to the limits between their respective communal lands.
3. Identification of State lands in the area, if such lands exist.
4. Based on the above and the relevant legal criteria, the delineation of Awas Tingni communal lands.

remain in effect and took steps to have a Plenary Session of the Regional Council give its endorsement retroactively.<sup>69</sup> During the October 8, 1997, meeting of the Plenary Session of the Regional Council, the matter was submitted to the Council members, and the majority of them voted in favor of the concession as if all the lands affected were State lands.<sup>70</sup> The vote in favor of the concession took place without clarifying the land tenure situation and without concrete action by the Council in response to the Awas Tingni request.

134. The SOLCARSA concession was finally cancelled when the Supreme Court of Justice ordered the enforcement of its earlier ruling of unconstitutionality.<sup>71</sup> But that cancellation did not occur in conjunction with a confirmation by the State of the Awas Tingni Community's land and resource rights based on traditional patterns.

135. Although the SOLCARSA concession was canceled, that cancellation was not on the grounds of an official recognition of the land and resource rights of the Awas Tingni Community within the concession area. The concession was canceled by order of the Supreme Court on the grounds that the concession had not, from the outset, been endorsed by a Plenary Session of the Regional Council of RAAN, as required by article 181 of the Constitution. The Supreme Court order does not prevent MARENA and the Regional Council from awarding another concession to lands used and occupied by the Awas Tingni Community. The danger of further concessions on Awas Tingni lands will continue so long as a demarcation and official recognition of those lands has not taken place.

136. The SOLCARSA concession endangered not only the economic interests of the Awas Tingni Community in relation to its communal lands, but also the very survival and cultural integrity of the Community and its members.

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<sup>69</sup> See Press Clippings: "Concesión ilegal continúa despale en Atlántico Norte," *La Tribuna*, May 29, 1997 (Annex C.31); "Los árboles caen lejos y nadie los oye," *La Tribuna*, May 29, 1997 (Annex C. 32); Edurne Arbleoa, "Un despale en tierra de nadie," *La Tribuna*, June 12, 1997 (Annex C.33) (quoting SOLCARSA representatives as saying, "They were not even notified of the judgment . . . and learned about it from the press"); Statement by Mario Guevara Somarriva of October 3, 1997 (Annex C.34) (describing efforts by MARENA to instigate approval of the concession by the Regional Council); Letter from Roberto Stadthagen Vogl, Minister of MARENA, to Efrain Osejo, President of the Regional Council on May 29, 1997 (Annex C.35), (requesting the Regional Council to approve the concession). See also note from Mr. James Anaya, legal representative of the petitioners, to the Executive Secretary of IACHR, dated June 11, 1997.

<sup>70</sup> See Resolution No. 17-08-10-97 of the RAAN Regional Council, October 8, 1997.

<sup>71</sup> See Records, Supreme Court of Justice, February 3, 1998, 8:30 a.m.



The documents and testimony presented by the petitioners to the Commission show that the members of the Community occupy and use a substantial portion of the concession area<sup>72</sup> and depend on the forests and rivers within the area for numerous subsistence activities, which also have significance for the cultural life of the Community. There are places, located within the area where the tree cutting was to take place, that have special religious importance for the members of the Community.

137. The extent to which the forestry operations of SOLCARSA reached the traditional lands of the Awas Tingni Community is not clear. A report sponsored by MARENA and dated August 5, 1997, states that SOLCARSA still had not begun tree cutting within the concession area.<sup>73</sup> On the other hand, according to a statement an Awas Tingni made leader on June 11, 1997, he and other members of the Community had, in previous months, seen several trees marked for cutting or already cut within the portion of the concession area claimed by the Community.<sup>74</sup>

138. In any case, there are indications that the forest operations of SOLCARSA caused damage to the forests and rivers that sustain the indigenous communities in the area, and upon reaching the lands used and occupied by the Awas Tingni Community in particular, such operations could have caused damage to the forests of the Community. There is evidence of illegal tree cutting by SOLCARSA that MARENA stopped and fined,<sup>75</sup> but apparently only after being pressured to do

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<sup>72</sup> See Map: Land Tenure of the Mayagna Awas Tingni within the SOLCARSA Concession Area (Annex C.5); Statement by Dr. Theodore Macdonald (Annex C.6) (explaining that this map (Annex C.5) is a synthesis of the map (Annex C.4) created with the ethnographic study and the map of the SOLCARSA concession area, which comes from the Wakambay Management Plan, *supra*); Map of the subsistence uses of the Awas Tingni Indigenous Community (Annex C.7) (map prepared by members of the Community showing subsistence uses and cultural sights in relation to the concession).

<sup>73</sup> See Report of the Evaluation Committee to the Forest Products Company Sol del Caribe S.A., August 4, 1997, p. 4 (Annex C.36).

<sup>74</sup> See statement by Yotam Lopez Espinoza, June 11, 1997 (Annex C.29).

<sup>75</sup> MARENA Ministerial Resolution No. 02-97, of May 6, 1997, resolved that: there had been a violation by the company of technical rules and administrative procedures and that marking in the Cerro Wakambay Management Plan area had to be suspended; to apply a fine of 1,000,000.00 cordobas in accordance with the forest regulations for illegal tree-cutting; to apply a fine of 50,000.00 cordobas in accordance with the general Environment and Natural Resources Act, for having conducted works without an environmental permit; and to temporarily suspend execution of the infrastructure works until such time as the Environmental Impact Study had been prepared and approved.

so by environmental organizations.<sup>76</sup> Tree cutting for the construction of an access road to the concession area also was, and continues to be, a subject of environmental concern. Serious doubts persisted about SOLCARSA's willingness to follow the applicable environmental criteria and about MARENA's capacity to provide sufficient monitoring of the forest operations.<sup>77</sup> The Humboldt Center, a non-governmental organization concerned with the environment in Nicaragua, conducted an evaluation of the Management Plan for the SOLCARSA forest operations within the concession area. This evaluation concluded that the plan did not guarantee sustainable tree cutting, indicating a possible diminishment of the forest and its biodiversity.<sup>78</sup> The plan also did not specify any kind of mitigation to protect the subsistence and cultural activities of the Awas Tingni Community and other communities. In addition, with the construction of roads to facilitate forest operations, the concession could have initiated the kind of territorial invasion that has been associated with natural resource exploitation in other parts of the hemisphere.

139. The Awas Tingni Community and other indigenous communities in the region are vulnerable to this kind of damage if no remedy, such as the demarcation of their lands, is provided for the consequences of illegal actions taken to their detriment. A remedy is essential since, as the Commission has already indicated, "The situation of indigenous peoples . . . illustrates, on the one hand, the essential connection they maintain to their traditional territories, and on the other

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<sup>76</sup> MARENA Ministerial Resolution No. 02-97 of May 6, 1997 (Annex C.30), resolved: that there had been a violation by the company of technical rules and administrative procedures and that marking in the Cerro Wakambay Management Plan area had to be suspended; to apply a fine of 1,000,000.00 córdobas in accordance with the forest regulations for illegal logging; to apply a fine of 50,000.00 córdobas in accordance with the general Environment and Natural Resources Act, for having conducted works without an environmental permit; and to temporarily suspend execution of the infrastructure works until such time as the Environmental Impact Study had been prepared and approved.

<sup>77</sup> See, for example, Statement of Guillermo Ernesto Espinoza Duarte, Acting Mayor of Puerto Cabezas, RAAN, October 1, 1997 (Annex C.37); Community Statement by the Authorities of Betania, October 16, 1997; Internal Written Report by the Ecotourism Educational Team, CEPAD (Annex C.38); Ms. Magda Lanuza, "Solcarsa tampoco hace caso a Resolución Ministerial," written for *Guía Ambientalista* (Annex C.39); "Privatizing the Rain Forest – A New Era of Concessions," *Cepad Report*, June/July 1997, p. 17, 19-21 (Annex C.40).

<sup>78</sup> See Claude Leduc, "Consideraciones Generales al Documento Plan de Manejo Forestal de Latifolias Cerro Wakambay," p. 7, prepared by the Alexander Von Humboldt Center for Territorial Development and Environmental Management (Annex C.28). This report concluded that under the management plan "the timber company can engage in any unsustainable practice without any possibility of preventing it because of the failure to define a countless number of parameters that have not been taken into account."

hand, the human rights violations which threaten when these lands are invaded and when the land itself is degraded.”<sup>79</sup>

140. In view of the above, a remedy for the damage caused requires the State of Nicaragua to take appropriate measures to demarcate the property of the indigenous Community and fully ensure the land and resource rights of the Awas Tingni Community, putting an end to violations of articles 1 and 2 of the American Convention in relation to the right to property contained in article 21 of the Convention.

**B. The State actively violated the right to property enshrined in article 21 of the Convention when it awarded the concession to SOLCARSA to conduct forest operations on the lands of the Awas Tingni Community.**

141. Nicaragua is responsible, under the Convention, for the actions of State officials that led to the concession awarded to SOLCARSA. Under article 21, the right to property can be reasonably subordinated “to the interest of society.” However, this cannot mean that State officials can subordinate the land rights of indigenous peoples to a logging concession, even assuming that the concession was in the interest of society, without at least considering the substance and form of these rights. In Nicaragua, the owner of land also owns the renewable resources it contains. In addition, the Statute of Autonomy explicitly states that the communal property of the indigenous communities includes the forests that have traditionally belonged to them. The Awas Tingni Community submitted evidence undisputed by the State establishing the existence of the Community’s property rights within the concession area.<sup>80</sup> Without taking these rights into account by awarding the concession to SOLCARSA, the State entered into direct conflict with those rights and with the provisions of the American Convention.

142. State officials have interpreted the Civil Code as establishing that any land not registered is property of the State. But the Civil Code cannot have the effect of nullifying rights recognized under domestic law and protected by the American Convention, including the land rights of indigenous communities based not on formal titles but on traditional and cultural patterns. Under article 2 of the American Convention, Nicaragua has the obligation to adapt its domestic laws to give effect to such rights. The Inter-American Court of Human Rights has made clear that State officials cannot base their position on domestic law so as to avoid the State’s

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<sup>79</sup> Report on Ecuador, *supra*, p.122.

<sup>80</sup> See paragraphs 129, 134, *supra* of this memorandum.

responsibility under the Convention.<sup>81</sup> In addition, within Nicaragua's own legal system, the Civil Code is subordinate to the Constitution and, accordingly, should not apply when the Constitution recognizes property rights of indigenous communities on the basis of traditional patterns of land tenure and resource use.<sup>82</sup>

143. As already indicated, the SOLCARSA concession does not simply infringe on the economic interests connected with the communal property, but in fact represents a danger to the survival and cultural integrity of the Awas Tingni Community and its members. Several articles of the American Convention combine to protect against State-authorized actions that might undermine the subsistence and cultural integrity of indigenous peoples.

144. The responsibility of Nicaragua in this regard is also a function of its obligations as a party to other international conventions, in particular the International Covenant on Civil and Political Rights. Article 27 of the Covenant protects the right of indigenous community members to engage in the activities that form a part of their culture, including social and economic activities related to the use of land and natural resources.<sup>83</sup> This right exists with respect to activities that traditionally are performed within a specific territorial area, even when the question of ownership to the land is unresolved or when the land belongs to the State.<sup>84</sup> The enjoyment of this right requires protective measures when the subsistence activities or other aspects of the culture of an indigenous community might be affected by a project authorized by the State. In addition, the effective participation of a community in the decision-making process regarding the project is required.<sup>85</sup>

145. According to information provided to the Commission, MARENA awarded the concession to SOLCARSA and took steps to secure its implementation without substantively considering the land use and occupation

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<sup>81</sup> See Inter-American Court of Human Rights, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (articles 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, December 9, 1994.

<sup>82</sup> Article 182 of the Constitution provides: "The Political Constitution is the fundamental charter of the Republic; other laws are subordinate to it. Any laws, treaties, orders, or provisions that are contrary to it or alter its provisions shall have no effect whatsoever."

<sup>83</sup> See paragraphs 112-114, *supra*, of this Memorandum.

<sup>84</sup> See H.R. Committee, Case No. 671/1995 (*J.E. Lansmann v. Finland*), Opinion of August 28, 1995, CCPR/C/58/D/671/1995 (analyzing the impact of forest operations on reindeer herding on lands of disputed ownership).

<sup>85</sup> See H.R. Committee, General Comment No. 23 (50), *supra*, para. 7.

patterns of the Awas Tingni Community within the concession area. Evidence of this is in the Management Plan MARENA approved for forest operations under the concession. The Management Plan does not take into account the Community's use of the forests in the concession area and ignores the places of religious significance to the Community.

146. In addition, as indicated by the petitioners, MARENA never consulted with the Awas Tingni Community or its leaders when deciding on the concession. On the contrary, despite several attempts by the Community to approach MARENA and discuss the matter, MARENA refused to enter into a substantive discussion on the Community's interests in relation to the concession or to respond to the Community's proposals on the matter.<sup>86</sup>

147. The responsibility of the State for MARENA's actions did not change with the endorsement the Regional Council of the North Atlantic Autonomous Region gave to the concession in its Resolution No. 17-08-10-97 of October 9, 1997. It is evident that, as in the case of MARENA's award of the concession to SOLCARSA, the Regional Council endorsed the concession without taking into account the land and resource rights of the Awas Tingni Community within the concession area and without consulting the Community.

148. Clearly, according to article 181 of the Constitution, concessions by the State for the exploitation of natural resources in the Autonomous Region must be approved by the Regional Council. However, even though in giving its belated endorsement of the concession the Regional Council may have acted in accordance with article 181, such endorsement would not have placed the State in compliance with its obligations under international law to respect the land and resource rights of the Awas Tingni Community. In addition, even under the domestic law of Nicaragua, neither MARENA nor the Regional Council have the power to authorize logging on private or communal land without the consent of the owner. Article 181 concerns approval of State concessions on State lands—not the exploitation of resources on communal land.

149. Moreover, the precautionary measures requested by the Commission so as to temporarily suspend the concession granted to SOLCARSA,

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<sup>86</sup> The situation here contrasts with cases brought before the U.N. Human Rights Committee in which the Committee has found that the State concerned met its obligation under article 27 of the Pact to protect the traditional activities of Indigenous communities and consult with them in making decisions on development projects that might affect those activities. See H.R. Committee, Case No. 511/1992 (Lansmann et al. V. Finland), opinion of October 26, 1994, CCPR/C/52/D/511/1992, paragraphs 9.5-9.7; Case No. 671/1995 (J.E. Lansmann et al. V Finland), supra, paragraphs 10.3-10.7.

and thus avoid irreparable damage to the lands of the Awas Tingni Community, were never taken; nor was there a concrete response to this matter until after the Commission sent the State its report under article 50 of the Convention.<sup>87</sup>

150. MARENA officials persisted in allowing the SOLCARSA concession to remain in effect and in permitting the company to pursue its forest operations despite the judgment of the Supreme Court of Nicaragua declaring the concession unconstitutional. It was not until one year after the ruling of unconstitutionality that MARENA ordered the concession to be canceled. Even then, neither MARENA nor any other institution of the State recognized or assumed responsibility for the violation of the Awas Tingni Community's rights to its communal lands that occurred when the concession was awarded. The Supreme Court judgment declaring the concession unconstitutional does not itself have the effect of recognizing the responsibility of the officials concerned for the violation of the rights of the Awas Tingni. The judgment is based on the absence of initial approval for the concession by the RAAN Regional Council and not on the grounds of a violation of the Community's rights. Accordingly, State officials not only violated the rights of the Awas Tingni Community to its communal lands but also have managed to escape responsibility for such violation.

**C. The ineffectiveness of the *amparo* action under Nicaraguan domestic law in relation to the violation of article 25 of the American Convention on Human Rights: *The right to simple and prompt recourse.***

**1. Legal nature of the *amparo* action.**

151. The *amparo* and *habeas corpus* actions are similar in that they are both guarantees, that is, procedures intended to obtain immediate restoration of a person's constitutional rights when violated. They are procedures of a summary and urgent character, which differentiates them fundamentally from other actions. As Venezuelan jurist and current judge of the Inter-American Court of Human Rights, Alirio Abreu Burelli, stated when referring to these two guarantees, "We understand constitutional *amparo* as an expression of the supremacy of the judicial branch relative to other branches of the State—as a guardian of the Constitution and of citizen rights in general."<sup>88</sup>

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<sup>87</sup> See paragraphs 46 and 67, *supra*, of this Memorandum.

<sup>88</sup> See "La Protección de los Derechos Humanos a través del Amparo," Alirio Abreu Burelli, publicado en Estudios Básicos de Derechos Humanos, IIDH, Serie de Estudios de Derechos Humanos, Vol. VI, page 43.

152. *Amparo* is an action for the defense of constitutional—though not strictly individual—rights. The rights defended are, therefore, extremely varied, ranging from the freedom of assembly, to the right to property, to employment security, and covering a wide variety of possibilities in between. Suspension of the act claimed to be unconstitutional and giving rise to the action is an essential aspect of *amparo*, in that it guarantees the claimant’s ability to effectively enjoy his right should his action eventually prove successful—either by preventing the right from being destroyed through continued aggression or by preventing detriment or deterioration to the object of the right. The importance of suspension as an institutional mechanism is that it guarantees that the object of the right will continue to exist at the end of the proceedings. Suspension of unconstitutional acts is the essential basis of all *amparo* actions, as affirmed by Professor Ignacio Burgoa in his study *El Juicio de Amparo*:

Suspension of the impugned act is an institutional mechanism of critical importance to judgments concerning *amparo*, often to such an extent that without it our means of control would be negligible and ineffective. It is indeed through suspension of the impugned act that the essence of *amparo*—which takes form in concrete and specific situations that the aggrieved party is seeking to preserve—remains alive. It is true that, as we have noted, constitutional judgments have restitutive effects, from which it could be concluded that the complainant could thereby be reinstated in the enjoyment of his jeopardized rights in the event that protection is ordered. But it is equally true that, in many instances, if the impugned act is not suspended so as to avoid its consummation, and if the damage caused is irreparable, the object to be protected by the *amparo* ruling would be irremediably destroyed. Moreover, even in other cases, where consummation of the impugned act is not irreparable and does not result in the definitive destruction of the object of *amparo*, suspension still plays a crucial role, because in a number of instances, if the impugned act or acts are not suspended in a timely fashion, judgments granting protection to the complainant would be very difficult to enforce both legally and practically, given the diversity of legal and factual situations that could result from completion of the impugned acts—hypotheses that are very frequently realized.<sup>89</sup>

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<sup>89</sup> Porrúa Hnos., Mexico, 1983, p. 703, Cited by Alberto Borea Odria in “Evolución de las Garantías Constitucionales,” 3d ed., Editora y Distribuidora Jurídica Grijley, 1996, Lima-Peru, p. 362 (translation from Spanish).

153. The spirit and letter of the *amparo* action is recognized in article 25(1) of the American Convention on Human Rights, which provides: “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 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.”

154. The Inter-American Court of Human Rights has interpreted article 25(1) of the Convention as “a general provision that gives expression to the procedural institution known as *amparo*, which is a simple and prompt remedy designed for the protection of all rights guaranteed by the constitutions and laws of the States Parties and by the Convention.”<sup>90</sup>

155. The Court has affirmed: “Article 25(1) [of the American Convention of Human Rights] incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights. (. . .) According to this principle, the absence of an effective remedy for violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. (. . .) In normal circumstances, the above conclusions are generally valid with respect to all the rights recognized by the Convention.”<sup>91</sup>

## **2. *Amparo* under domestic Nicaraguan law and filing the initial action.**

156. Having set forth the scholarly commentary and international case law with respect to *amparo*, as well as its legal nature and importance as a

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<sup>90</sup> I/A Court H.R. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6), American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987. Series A No 8, p.18, para. 32.

<sup>91</sup> I/A Court H.R. 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. Series A No. 9, para. 24 and 25, p. 13 and 14.



guarantee whose fundamental objective is the suspension of the unconstitutional act and reinstatement of the victim's enjoyment of rights that have been infringed, the Inter-American Commission now will proceed to demonstrate to this high Court that, though enshrined in the Political Constitution and law of Nicaragua, the institution of *amparo* has been totally ineffective in preventing the State from allowing the foreign company SOLCARSA—to which it awarded the concession—to destroy and exploit lands that have belonged to the indigenous Awas Tingni Community for years.

157. Article 45 of the Political Constitution of Nicaragua provides: "Persons whose constitutional rights have been, or are in danger of being, violated, may file a *habeas corpus* or *amparo* action, as appropriate and in accordance with the Law on *Amparo*." Article 188 of the Constitution allows for an *amparo* action "against any provision, act or resolution, and in general against any act or omission by any State official, authority, or agent, that has violated or attempted to violate rights and guarantees enshrined in the political constitution." Similarly, Law No. 49, or Law on *Amparo*, establishes a series of principles that must be followed by the Nicaraguan justice system when an *amparo* action has been lodged. Article 5 of that law provides: "The courts of justice (. . .) shall (1) Direct all of the proceedings with respect to the action, preventing delay in its review and requiring adherence to the principle of procedural economy; (2) Prevent and punish acts contrary to fairness and good faith, which must be observed with respect to the action; (3) Apply the principles of equality, public access and promptness with respect to the action; (4) Take all measures necessary to give full effect to the judgments issued. There shall be no expiration of such actions" (emphasis added).

158. In the case *sub-lite*, on September 11, 1995, the Awas Tingni Community, alleging a violation of its constitutional rights to land and resources, filed an *amparo* action against MARENA officials responsible for the process leading to the SOLCARSA concession. In its action, the Community requested a court order requiring MARENA to refrain from awarding the concession to SOLCARSA and to direct the company's agents to vacate the land identified by the Community as theirs. When the Community filed its action, MARENA had already authorized SOLCARSA to enter these lands to perform a forest inventory and other preparatory work for tree-cutting; the Management Plan for forest operations had already been developed, although the concession contract had not yet been signed.<sup>92</sup>

159. Under the Law on *Amparo*, Law No. 49 of 1988, an action for *amparo* must be initiated before the appropriate court of appeals for determination of its admissibility. If it is deemed admissible, the action is placed before the Supreme Court of Justice, which must rule on the merits.

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<sup>92</sup> The concession was awarded on March 13, 1996.

160. The Court of Appeals of Matagalpa has jurisdiction of the Northern Atlantic Autonomous Region where Awas Tingni is located. On September 18, 1995, the Court of Appeals ruled that the action was inadmissible since the complainants presumably gave their tacit consent to the impugned act by not filing their action within 30 days after the date on which they supposedly learned of the constitutional transgression. The Court grounded its decision on a communication that the attorney for the Community sent to the Minister of MARENA, dated July 11, 1995, in which the Community protested against the award of the concession to SOLCARSA. Based on this note, the Court concluded that the Community had become aware of the concession prior to that date, which was more than 30 days before the action of September 11, 1995 was filed, and that accordingly, the Community had given its tacit consent to the concession.

161. For the Inter-American Commission on Human Rights, the reasoning of the Court of Appeals is flawed. The communication of July 11, 1995 from the Community, in which it expressed its opposition to the concession, cannot logically serve as a basis for concluding that the Community had consented to the acts in question. Moreover, it is not reasonable to conclude that the Community failed to file its *amparo* action against the concession on time, when the acts that culminated in the concession contract were in progress and the contract had not yet been signed. Even if this result were required by the Law on *Amparo*, it would only serve to demonstrate the ineffectiveness of judicial recourse in this instance.

162. The ineffectiveness of recourse to *amparo* under Nicaraguan domestic law also was demonstrated when on September 21, 1995, the Community, through its empowered representative, filed an appeal with the Supreme Court of Justice requesting review of the decision by the Court of Appeals.<sup>93</sup> The Supreme Court did not rule on the action until a year and a half later. In its court record of February 27, 1997, the Supreme Court ruled against the action without providing grounds for its decision,<sup>94</sup> in clear violation of article 45 of the Law on *Amparo*,

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<sup>93</sup> Article 25 of the Law on *Amparo* provides: "Actions for *Amparo* shall be filed with the appropriate Court of Appeals or with the Civil Chamber of the Court of Appeals, where divided into chambers, which shall review the action, from the initial steps in filing the action up to and including suspension of the act. The Supreme Court has final jurisdiction, to try the case to its conclusion. *If the Court of Appeals declines to admit the action, the injured party may file the amparo action, on a de facto basis with the Supreme Court of Justice*" (emphasis added).

<sup>94</sup> See annex C.46. Records of the Supreme Court of Justice, Judgment No. 11: "Based on the above considerations and article 424, 426 Pr. and 26 and 51 of the current Law on *Amparo*, the undersigned Judges of the Constitutional Chamber resolve: The *Amparo* action filed by Dr. Maria Luisa Acosta Castellon, in her capacity as Special Empowered

which states *expressis verbis* that the grounds for a judgment must be stated.<sup>95</sup> In the meantime, MARENA had signed the concession contract with SOLCARSA on March 13, 1996 and had authorized SOLCARSA to begin the construction of a road to the lands used and occupied by the Awas Tingni.

163. The facts indicate the absence of an operative means of simple, prompt, and effective recourse for addressing the claims of the Awas Tingni to their land and natural resource rights. The delay of the Supreme Court of Justice in ruling on the Awas Tingni Community's action is, moreover, an indication of judicial ineffectiveness in protecting rights enshrined in the Constitution and the American Convention. According to article 47 of the Law on *Amparo*, "The Supreme Court of Justice shall in any case issue the definitive ruling within 45 days after the action is filed." Therefore, it seems clear that the Supreme Court of Justice did not issue its decision within a reasonable period of time, leaving the victims in the present case unprotected.

164. The ineffectiveness of the judicial system also is evident in the ruling of the Matagalpa Court of Appeals, which affirmed the Supreme Court of Justice on unstated grounds after it took up the case. The Inter-American Court of Human Rights has observed that "the mere fact that a domestic remedy does not produce a result favorable to the petitioner does not in and of itself show the inexistence or the exhaustion of all the effective domestic remedies. . . ."<sup>96</sup> It is a different matter, however, "when it is shown that remedies are denied without an examination of the merits, or for trivial reasons. . . ."<sup>97</sup>

165. In the present case, the petitioners sought recourse from the

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Representative of Mr. Jaime Castillo Felipe, Mayor, Marcial Salomon Sebastian, Alternate Mayor, and Siriaco Castillo Fenley, Alternate Mayor, against Mr. Milton Caldera, Roberto Araquistain and Alejandro Lainez, all officials of the Ministry of the Environment and Natural Resources (MARENA). To be copied, notified, and published, Julio R. Garcia, V. Josefina Ramos, M. Francisco Plata López, M. Aguilar G. Fco. Rosales A.F.Z. Rojas. Before me, M.R.E. Entrelneas. Constitutional Chamber. Valid."

<sup>95</sup> Article 45 of the Law on *Amparo* states: "The grounds for the judgment must be stated, with clear specification of the act or acts impugned, an indication of the legal basis for declaring the legality of the impugned act and of the points considered in determining its legality, with a clear and precise indication of the act or acts in respect of which *amparo* is granted or denied." (See p. 3 of the Law).

<sup>96</sup> Velazquez Rodriguez, judgment of July 29, 1988, para. 67.

<sup>97</sup> Ibid., para. 68.

appropriate judicial body under the law, in order to obtain a judicial remedy that would protect them against alleged violations of their constitutional rights. This shows that the petitioners had access to such recourse. However, it is the Commission's understanding that the right to effective judicial protection provided for in article 25 goes beyond free access to and exercise of judicial recourse. It is necessary for the intervening body to issue a conclusion that, based on the merits of the claim, establishes the validity or invalidity of the legal position giving rise to judicial recourse.<sup>98</sup> In fact, such a decision is the object and purpose of the right to judicial recourse recognized by the American Convention in article 25, which also provides for indispensable guarantees of human rights and State obligations.

166. In the case of the Awas Tingni Community, the intervening court dismissed the action, stating simply that it was inadmissible without stating the grounds for its decision. The Commission considers that the effect of this judicial response was to deprive the victims of effective judicial recourse that protects them against violations of human rights enshrined in the American Convention, to which Nicaragua has been a State Party since September 25, 1979.

167. The Commission considers that following the logic inherent in any form of judicial recourse, specifically under article 25, the judge must make a concrete determination as to the veracity or error of the claimant's allegation. When a complainant resorts to a judicial body and alleges that a real violation of his rights has occurred, the judicial body in question, after evidentiary proceedings and debate concerning that allegation, has the obligation to decide whether or not the action is founded. Otherwise, judicial recourse would become inconclusive.

168. Aside from being inconclusive, judicial recourse also would be clearly ineffective since, by not recognizing the violation of rights, should such a violation be proven, judicial recourse would not be effective in protecting the claimant's rights or providing him with an appropriate remedy. The Inter-American Court has stated:

Article 25(1) incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights. As the Court has already pointed out, according to the Convention, ". . . the States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (art. 25), remedies that must be substantiated in accordance with the rules of

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<sup>98</sup> The Commission has stated its understanding of article 25 of the Convention on various occasions. See case no. 10,950, "Mejia Egocheaga."

due process of law (art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (art. 1) (Velasquez Rodriguez, Fairen Garbi and Solis Corrales and Godinez Cruz Cases, Preliminary Objections, Judgments of June 26, 1987, paras. 90, 90, and 92, respectively). According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.<sup>99</sup>

169. The Commission observes that article 25 itself, in subparagraph 2(a), explicitly provides the right of any person seeking a judicial remedy to “have his rights determined by the competent authority provided for by the legal system of the State.”<sup>100</sup> Deciding on rights entails a determination as to the legally applicable facts and provisions of law bearing on and pertaining to a specific object. That object is the specific contention being made by the claimant. When, in the present case, the Court dismissed the claim by declaring it “inadmissible,” it evaded any decision as to the petitioners’ rights and any analysis as to the viability of the Community’s claim, and as a result, prevented the claimants from enjoying the right to a judicial remedy under article 25.<sup>101</sup>

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<sup>99</sup> OC-9/87, para. 24.

<sup>100</sup> Article 13 of the European Convention on Human Rights provides that any person whose rights and freedoms guaranteed by that Convention have been violated shall have effective recourse before a national authority, even if the violation has been committed by persons acting in the exercise of their official duties. In the case “Silver and other” of March 25, 1983, the European Court, referring to article 13, provided: “The principles that arise in interpreting article 13 include the following: (a) if an individual claims to be the victim of a violation of rights guaranteed by the Convention, he should have access to recourse before the appropriate national authority to obtain a decision, and, if appropriate, to obtain the corresponding remedy. . . .”

<sup>101</sup> See Case 10.087, Report 30/97, Argentina. OEA/SER/L/V2.97.13.

### 3. Filing of the second *amparo* action with the domestic judicial bodies of Nicaragua.

170. Faced with the MARENA officials' persistence in promoting the SOLCARSA concession, the Awas Tingni Community filed a second *amparo* action on November 7, 1997. This second *amparo* action was filed against the Board of Directors of the RAAN Regional Council during the periods 1994-1996 and 1996-1998, and other members of the Regional Council, for having approved the concession at their meeting of October 8, 1997 by means of a process that set aside any consideration of indigenous territorial rights within the concession area. The *amparo* action also named officials of the Ministry of the Environment and Natural Resources (MARENA) for having promoted and instigated the Council vote in favor of the concession and for failing to respond in recent months to the repeated requests of the petitioners.

171. The Awas Tingni Community filed a second *amparo* action to defend its territorial rights. However, in its own experience, this recourse does not appear to be effective and sufficient. According to information provided by the petitioners, the Supreme Court is several years behind in considering some of the *amparo* actions that have been presented to it. This suggests that the last action filed by the Awas Tingni Community might be only another of many efforts by the Community to deal with the State through the means available.

172. Indeed, between the time the *amparo* action was filed on November 7, 1997, and the date on which this claim is presented, eight months have elapsed, and the Supreme Court of Justice still has not ruled in proceedings that should be expeditious.<sup>102</sup> It is clear that the effectiveness of the recourse established by article 25 can be undermined if, as the Court has said, the Judicial Branch does not have the independence necessary to decide impartially, if the means of executing its decisions are lacking, or if some other situation is resulting in a denial of justice—for example, when a decision is unjustifiably delayed or the plaintiff is not allowed access to judicial recourse for some other reason.<sup>103</sup>

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<sup>102</sup> Article 47 of the Law on *Amparo* indicates: "The Supreme Court of Justice must in any case issue the final decision within 45 days after receipt of the case file."

<sup>103</sup> I/A Court H.R. 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. Series A No. 9, para. 24

**4. The obligation of the Nicaraguan State to ensure that competent authorities enforce the judicial decisions in favor of the action.**

173. Article 25 of the American Convention on Human Rights establishes the obligation for all States Parties to provide citizens subject to their jurisdiction with due judicial protection. This judicial protection consists not only of the right of all persons to simple and prompt recourse to competent judges and courts, but also of the States Parties' commitment "to ensure that the competent authorities shall enforce such remedies when granted" (art. 25(2)(c)).

174. In this context, the Commission considers it necessary to demonstrate to the Honorable Court that—unlike the situations mentioned in the preceding paragraphs, where the *amparo* action was entirely ineffective in protecting the indigenous communities from the invasion, destruction and exploitation of their territory, with the consent of the Nicaraguan State—in the only case where *amparo* was actually granted, the State still failed to remedy the legal infringement, disregarding the only judicial decision in favor of the indigenous communities. All of this was in clear violation of article 25(2)(c) of the American Convention on Human Rights.

175. And so, on March 29, 1996, Council members Alfonso Smith Warman and Humberto Thomson Sang, both members of the RAAN Autonomous Regional Council, filed a separate and independent *amparo* action with the Matagalpa Court of Appeals against Claudio Gutiérrez, Minister of Environment and Natural Resources, and Alejandro Lainez, Director of the MARENA National Forest Administration, for having signed and endorsed the 62,000 hectare concession of forest land in the area surrounding Cerro Wacambay to the Korean company Sol del Caribe S.A. (SOLCARSA) in the absence of any discussion or evaluation of the concession by the RAAN Autonomous Regional Council in Plenary Session.<sup>104</sup>

176. The affected parties requested that the Court suspend the implementation of the signed concession and declare it null and void since the Nicaraguan State officials against whom the action was filed did not fulfill the requirements set forth in the Political Constitution, specifically in article 181, which provides, *inter alia*: "Concessions and contracts for natural resource development awarded by the State in the Atlantic Coastal Autonomous Regions must have been approved by the corresponding Autonomous Regional Council."

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<sup>104</sup> See *supra* number 72.

177. The Supreme Court of Justice of Nicaragua, in its decision of February 27, 1997, granted the *amparo* protection requested by Council members Alfonso Smith and Humberto Thompson, stating that “the aforementioned constitutional provision [article 181] was violated, inasmuch as the concession was not approved by the Autonomous Regional Council but rather by its Board of Directors and by the Regional Coordinator of the Northern Atlantic Autonomous Region, who were not authorized to award the forestry concession in question.”

178. According to this February 27, 1997 judgment, the Nicaraguan authorities should have enforced the Court’s decision—as required by article 25(2)(c) of the American Convention on Human Rights, to which Nicaragua is a State Party—and should have suspended promptly and on an urgent basis any act declared to be unconstitutional by the Court, thus avoiding detriment to and deterioration of the object for which protection had been granted. As indicated at the beginning of this chapter, suspension of the unconstitutional act is the basis for any *amparo* action since it guarantees the existence of the object concerned until the end of the proceedings.

179. In the case *sub-lite*, it was fundamental for the authorities of Nicaragua to comply with the Supreme Court decision in order to prevent the foreign company from causing irreparable damage to the lands of the indigenous Awas Tingni Community. However, the Nicaraguan authorities not only failed to enforce the judicial decision, but in addition, three months after the judgement was handed down, they found themselves obliged to fine the foreign company for the destruction it was causing to the indigenous territories. Indeed, MARENA Ministerial Resolution No. 02-97,<sup>105</sup> issued on May 6, 1997, found that the company had violated technical standards and administrative provisions and that tree marking in the concession area would have to be suspended. The resolution went on to impose a fine of 1,000,000 córdobas under the forest regulations for illegal tree cutting and a fine of 50,000,000 córdobas under the General Environment and Natural Resources Act for conducting works without an environmental permit. Finally, the resolution temporarily suspended execution of the infrastructure works until such time as an environmental impact study had been prepared and approved.

180. On October 8, 1997, during the ninety-seventh session of the Inter-American Commission on Human Rights, a hearing was held and attended by representatives of the Nicaraguan State and the Awas Tingni Community. During that hearing, the Community’s representatives indicated that the foreign company was continuing to cut trees and, for that reason, asked the Commission to conduct an

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<sup>105</sup> See Annex C.30.



exploratory visit to the area corresponding to the Awas Tingni Community's lands. During the same session, the Commission agreed to conduct the inspection visit in connection with the case of October 30, 1997.

181. However, on October 27, 1997, the State of Nicaragua informed the Commission that it did not consider the inspection visit to be necessary in the Awas Tingni case, since an additional written report was being prepared on the case. Having learned of this, the Commission expressed its concern over the suspension of the visit.

182. In response to the gravity and urgency of the denounced situation, the Commission, in a note dated October 31, 1997, requested that the State of Nicaragua take precautionary measures having the effect of suspending the concession awarded to SOLCARSA in order to prevent irreparable damage to the ancestral lands of the Awas Tingni Community. The Commission set a deadline of 30 days for the State to report on measures taken in the present case. On that same date—October 31, 1997—the Commission had to reiterate to the Nicaraguan State the request for information concerning the original denunciation of February 5, 1996. In other words, more than a year had elapsed and the State had still not issued its response.

183. In a note dated November 5, 1997—nearly one year after the Supreme Court of Justice declared the concession awarded by the Nicaraguan State to the foreign company to be unconstitutional—the State issued a contradictory communication. The communication indicated in one paragraph that “. . . the Government of Nicaragua, respectful of the rule of law, reiterates to the Honorable Commission on Human Rights its willingness to comply with the orders of the Supreme Court of Justice” and in the following paragraph stated that:

On a reading of the preamble to the Court's judgment, it is concluded that the error committed is one of form not of substance. Accordingly, the North Atlantic Autonomous Regional Council has taken steps to correct this error, for which purpose it has prepared a document ratifying the approval of the 62,000 hectare Wakambay Forest Concession to the company Sol del Caribe (SOLCARSA). Inasmuch as this error has been corrected, the concession is now valid. Accordingly, we request that the Honorable Commission consider this case closed.<sup>106</sup>

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<sup>106</sup> Note of the Government of Nicaragua, dated November 5, 1997 (see Annex C.50). It should be noted that the Council is the principal body of the Regional Government, inasmuch as it forms part of the political and administrative organization of the Nicaraguan State.

184. In other words, on the one hand, the Nicaraguan State expressed its desire to comply—nearly one year later—with the Supreme Court’s decision, and on the other hand, it announced its decision that the concession should stand, in order for the foreign company to continue the exploitation activities that had been declared unconstitutional.

185. The gravity of the failure by Nicaraguan authorities to comply with the judicial decision, and the State’s unwillingness to resolve the legal infringement reached such a peak that the Supreme Court of Justice had to request the Head of State—virtually one year after its decision—to order his Minister of the Environment and Natural Resources to comply with the judgment of the country’s highest court. In the Commission’s view, it is worthwhile to cite the Supreme Court order *in extenso*, given its importance and the irrefutable proof it provides of the failure by the Nicaraguan State to fulfill the international obligations it undertook when it signed and ratified the American Convention on Human Rights (article 25(2)(c)):

SUPREME COURT OF JUSTICE. Constitutional Chamber, Managua. *February 3, 1998, 8:30 a.m.*

Having seen the writ submitted at 9:40 a.m. on the morning of January 22 of last year, in which Mr. HUMBERTO THOMSON SANG, member of the RAAN Autonomous Regional Council, requests this chamber to issue a writ of execution of Judgment No. 12 rendered at 8:30 a.m. on February 27 of last year, granting him administrative *amparo* in view of the failure by the authorities of the Ministry of Natural Resources (MARENA) to adhere to the procedures required by article 181 of the Political Constitution. *However, in clear violation of the above judgment, the Minister of MARENA not only disregarded the aforementioned resolution, but also, in a letter dated May 29, 1997, addressed to the President of the RAAN Autonomous Council, Mr. EFRAIN OSEJO, requested that the concession to the company Sol del Caribe S.A. (SOLCARSA) be approved, as shown in the attached letter, for which reasons he requests that the Honorable Chamber apply the appropriate law. In accordance with the request, and on the basis of article 50 of the Law on Amparo, the Court decides: I.- That His Excellency the President of the Republic, Dr. ARNOLDO ALEMAN LACAYO should be informed of the facts in order for him to order the Minister of Environment and Natural Resources,*

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*Mr. ROBERTO STADTHAGEN VOGL to duly comply with the aforementioned judgment, which shall be transcribed by means of certified copy, with inclusion of the writ mentioned. II.- That the matter should be reported to the Honorable National Assembly, for information and other effects (emphasis added).*

186. The Inter-American Commission on Human Rights was informed by the Nicaraguan State—in a note dated May 6, 1998—that the unconstitutional act had been suspended, a year and a half after the Supreme Court of Justice ordered *amparo* against the concession and after the Commission had approved the report under article 50 of the American Convention. The Commission considers that the damage has been done. The Awas Tingni Community, in order to prevent what eventually occurred, filed its first *amparo* action on September 11, 1995, and only after a lengthy period of time had elapsed and another *amparo* action had been filed did the State decide to suspend the concession, which had been declared unconstitutional by Nicaragua's own domestic judicial bodies, on February 16, 1998, that is, three years and five months later. Throughout this period of time, not only have the indigenous communities been unprotected legally, but in addition, the foreign company, with the consent of the State, took advantage of the time allowed to move ahead with forest operations with the intent of invading and exploiting the land and natural resources that are the ancestral property of the Awas Tingni Community.

187. In any case, the response of the State of Nicaragua to the Commission's report (see paragraph number 68) constitutes an acceptance of its international responsibility since the State of Nicaragua recognized its obligations by arguing that it is in the process of following the Commission's recommendations.

188. Based on the facts set forth in this chapter, the Inter-American Commission on Human Rights considers that the State of Nicaragua is internationally responsible for the violation of article 25(1), (2)(a) and (2)(c) of the American Convention on Human Rights.

## VIII. CONCLUSIONS

189. Based on the actions and omissions examined, the Commission concludes that the State of Nicaragua has not fulfilled its obligations under the American Convention on Human Rights. The State of Nicaragua has not demarcated the communal lands of the Awas Tingni Community or of other indigenous communities. Nor has it taken effective measures to ensure the property rights of the Community to its lands. This omission by the State constitutes a violation of articles 1, 2, and 21 of the Convention, which, taken together, establish the right to such effective measures. Under articles 1 and 2, the States have the

obligation to take measures necessary to give effect to the rights enshrined in the Convention.

190. The State of Nicaragua is responsible for actively violating the right to property enshrined in article 21 of the Convention by having awarded a concession to SOLCARSA for road construction works and timber operations on Awas Tingni land without the consent of the Awas Tingni Community.

191. The Commission concludes that the State of Nicaragua did not ensure effective recourse in response to the claims of the Awas Tingni Community to their land and natural resource rights in accordance with article 25 of the Convention.

## **IX. PETITION**

192. Based on the above considerations, the Inter-American Commission on Human Rights respectfully requests that the Honorable Inter-American Court of Human Rights admit, notice, and adjudicate the present action and, in due course, decide in favor of it. The Commission requests that the Honorable Court declare that the State of Nicaragua violated the American Convention, to the detriment of the Awas Tingni Community and its members, and requests that, in view of those violations, the Court provide for appropriate remedy in due course.

### **A. Declaration of Violations.**

193. The Commission requests that the Honorable Court declare that the State has incurred international responsibility for the acts and omissions of its agents and for its own acts and omissions in violating the following provisions of the Convention:

1. Articles 1, 2, and 21, which taken together establish the right to effective measures to safeguard property since the State of Nicaragua has not demarcated the communal land of the Awas Tingni Community and has not taken appropriate measures to ensure the land and natural resource rights of the Community;
2. Article 21, which recognizes the right to property since the State awarded SOLCARSA a concession to cut trees on the communal lands of the Awas Tingni Community without the Community's consent and without taking into account the Community's rights to these lands;

3. Article 25, which establishes the right to legal protection, since the State did not provide effective recourse in response to the claims of the Awas Tingni Community to its land and natural resource rights.

**B. Remedies.**

194. In accordance with article 63(1) of the Convention, the Commission requests that the Honorable Court remedy the consequences of the violations addressed by the present claim. In particular, the Commission requests that the Honorable Court declare that the State of Nicaragua has the obligation to:

1. Establish a legal procedure, in accordance with relevant international and national legal provisions, that will result in the prompt demarcation and specific official recognition of the communal land and natural resource rights of the Awas Tingni Community;
2. Refrain from awarding, or considering the award of, any concessions for natural resource exploitation on the lands used and occupied by the Awas Tingni Community, until such time as the question of Awas Tingni land tenure has been resolved or a specific agreement has been reached between the State and the Community on the matter;
3. Pay an equitable and compensatory indemnity for the pecuniary and moral injuries the Community suffered from the State's failure to specifically recognize its land and natural resource rights and as a result of the concession to SOLCARSA;
4. Pay the indigenous Community the costs it has incurred in defending its rights before the courts of Nicaragua and in the proceedings before the Commission and the Inter-American Court.

195. The Commission respectfully reserves the right to present a separate document concerning the remedies and costs in this case at the appropriate stage of the proceedings before this Honorable Court, and to present arguments and evidence at that time with regard to those aspects of the case.

**X. ANNEXES****A) List of names of the 144 heads of family of the Awas Tingni Community, Northern Atlantic Autonomous Region (RAAN), Nicaragua.**

1. Banegas Felipe
2. Belgara Chepa
3. Brooks Francisco
4. Budier Crecencio
5. Budier Manuel
6. Castillo Amadeo
7. Castillo Donal
8. Castillo Jaimy
9. Castillo Porciano
10. Castillo Rolado
11. Castillo Ricardo
12. Castillo Siriaco
13. Castillo Zoila
14. Clearens Arnoldo
15. Cornejo Diego
16. Demetrio Axly
17. Detetrio Delians
18. Demetrio Derios
19. Demetrio Florita
20. Demetrio Julio
21. Demetrio Livinston
22. Demetrio Leocadio
23. Demetrio Leopoldo
24. Demetrio Suilila
25. Dixon Sipriano
26. Felipe Aldeos
27. Felipe José
28. Felipe Yatilda
29. Flores Roberto
30. Flores Marciano
31. Fritz Iguins
32. Genaro Rocina
33. Genry Octavio
34. Genry Emérita
35. Genry Jims
36. Grey Frimali
37. Grey Idilian
38. Gutiérrez Adelia

39. Gutiérrez Elpesario
40. Hummier Federico
41. James Rosindo
42. Jonatan Candido
43. Jonatan Gervacio
44. Jonatan José
45. Jonatan Lencho
46. Jonatan Marita
47. Lacayo Brigida
48. Lam Liner
49. Levi Danilo
50. López Bernaldo
51. López Eduardo
52. López Elena
53. López Estevan
54. López Jotam
55. López Maxi
56. López Reynel
57. López Roger
58. López Ronal
59. López Samaria
60. López Watson
61. Mmcleaqn Charlie
62. Mclean Emma
63. Mclean Marvin
64. Mclean Melanio
65. Mclean Melva
66. Mclean Netario
67. Mclean wilfredo
68. Marcial Robinson
69. Reynaldo Mena
70. Yorcortin Mendoza
71. Oriel Mercado
72. Balerio Meregildo
73. Cevito Meregildo
74. German Meregildo
75. Leborio Meregildo
76. Mosley Meregildo
77. Cristina Morales
78. Francisco Morales
79. Narvaes Alberto
80. Nelson Aristides
81. Nelson Bernardino
82. Nelson Claudia

83. Nelson David
84. Nelson Jheli
85. Nelson Joselito
86. Nelson Junior
87. Nelson Madelma
88. Nelson Marta
89. Nelson Nildo
90. Nelson Ornes
91. Nelson Pablo
92. Nelson Selman
93. Nelson Yunicia
94. Patrón Bernaldo
95. Patrón Florencio
96. Patrón Gilberto
97. Patrón Magdalena
98. Patrón Marcial
99. Patrón Marcos
100. Pedro Carlos
101. Pedro Erika
102. Pedro Humberto
103. Pedro Mercedes
104. Pedro Lino
105. Pedro Luncio
106. Pedro Noel
107. Pedro Ramiro
108. Pedro Remigio
109. Pedro Ronaldo
110. Pedro Tomás
111. Ramón Meregildo
112. Salomón Arcinio
113. Salomón Alicia
114. Salomón Alston
115. Salomón Alvian
116. Salomón Armando
117. Salomón Armino
118. Salomón Auraestela
119. Salomón Benevicto
120. Salomón Benonia
121. Salomón Carlos
122. Salomón Cleverio
123. Salomón Denarte
124. Salomón Ecleto
125. Salomón Emerencia
126. Salomón Gromilda



127. Salomón Jorge
128. Salomón Marcelino
129. Salomón Marcial
130. Salomón Merardo
131. Salomón Tiaducia
132. Sebastian Celestina
133. Sebastian Dirome
134. Sebstin Isafaas
135. Sebstin Lamson
136. Simón Dinerio
137. Simón Orlando
138. Simón Ovencio
139. Simón Richela
140. Simón William
141. Tomás Crecencio
142. Tomás Fausto
143. William Humberto
144. Zeledon Benicio

196. The preceding list of one hundred forty-four persons was presented by Mr. Charlie Mclean, responsible officer of the Mayagna Awas Tingni Community Forest, to Dr. Maria Luisa Acosta, Attorney and Notary Public of the Republic of Nicaragua, as an enumeration of the men and women of legal age who are heads of family in the Awas Tingni Indigenous Community of the Northern Atlantic Autonomos Region.

**B) List of Witnesses**

**A. The Commission plans to call the following witnesses to testify in the capacity of victims.**

197. The following persons are members of the Awas Tingni Community and victims of the violations of the Convention described above. These persons will give testimony on: their patterns of territorial use and occupation and those of the Community in general; documentation on these patterns and on their ancestral communal land; the processes that led to the preparation of an ethnographic study and maps of their communal land; the lack of demarcation or official titling of their communal lands and their efforts to obtain such demarcation or titling and to stop the SOLCARSA concession; the responses of the agents of the State to their land claims; the invasion of their lands by timber operations; the injury the Community has suffered from the acts and omissions of the State with respect to their communal lands; and facts concerning other matters affecting the Awas Tingni communal lands.

**JAIME CASTILLO**, of legal age, married, residing in the Awas Tingni Community, Municipality of Puerto Cabezas, RAAN. Former Mayor of the Community.

**SIPRIANO DIXON**, of legal age, married, residing in the Awas Tingni Community, Municipality of Puerto Cabezas, RAAN. Mayor of the Awas Tingni Indigenous Community.

**JOTAM LOPEZ**, of legal age, married, residing in the Awas Tingni Community, Municipality of Puerto Cabezas, RAAN. Former forest officer of the Awas Tingni Indigenous Community.

**CHARLIE MCLEAN**, of legal age, married, residing in the Awas Tingni Community, Municipality of Puerto Cabezas, RAAN. Forest officer of the Awas Tingni Indigenous Community.

**WILFREDO MCLEAN**, of legal age, married, residing in the Awas Tingni Community, Municipality of Puerto Cabezas, RAAN. School teacher in the Awas Tingni Indigenous Community and member of the Community's Board of Directors.

**BENEVICTO SALOMÓN**, of legal age, married, residing in the Awas Tingni Community, Municipality of Puerto Cabezas, RAAN. Former Mayor of the Community.

**MARCIAL SALOMÓN**, of legal age, married, residing in the Awas Tingni Community, Municipality of Puerto Cabezas, RAAN. Former member of the Community's Board of Directors.

**B. The Commission respectfully requests that the Court summon the following witnesses, who are or have been officials of the State.**

198. The following persons are or have been officials of the State and will be called to give testimony on: the activities and positions of the institutions and agents of the State with respect to the territorial claim of the Awas Tingni Community and the issue of indigenous lands in general; legal capacity to address the claims of the Awas Tingni Community and other indigenous communities to their land rights; the Commission for the Demarcation of Atlantic Coast Indigenous Community Lands; the preparation of relevant proposals or draft legislation; the award of concessions in RAAN, including the SOLCARSA concession; the forest activities under the SOLCARSA concession; plans and initiatives that may affect the indigenous communal lands; and other matters regarding the exploitation of natural resources and land tenure of the indigenous communities.

**JORGE BROOKS**, of legal age, married, and residing in Managua. Director of the

State Forestry Administration, which is responsible for forest administration on State land.

**GARCIA CANTARERO**, of legal age, married, and residing in Managua. Director of the MARENA Protierra Project. This project is financed by the World Bank. One of its components includes the development of preliminary draft legislation for the demarcation of indigenous land on the Atlantic Coast of Nicaragua.

**JORGE FREDERICK**, of legal age, residing in Puerto Cabezas, RAAN. Member of the YATAMA indigenous party and of the RAAN Regional Council.

**CARLOS GONZALEZ**, of legal age, married, residing in Puerto Cabezas. Member of the Regional Council and its Board of Directors during the period when the Council received a formal request from the Awas Tingni Community and acted on the SOLCARSA concession.

**CLAUDIO GUTIÉRREZ**, of legal age, residing in Managua. Minister of MARENA who signed the concession contract with SOLCARSA.

**AGUSTIN JARQUIN**, of legal age, residing in Managua. Comptroller of the State. In that capacity, he conducted an investigation of MARENA and SOLCARSA.

**ALEJANDRO LAINEZ**, of legal age, residing in Managua. Former Director of the State Forest Administration, responsible for the administration of the country's forests. He occupied that position when the SOLCARSA concession was awarded.

**RUBEN MONTENEGRO**, of legal age, married, residing in Managua. Secretary of the Constitutional Chamber of the Supreme Court of Justice of Nicaragua. Has knowledge of the statistics on *amparo* actions before the Court.

**JOSEFINA RAMOS**, of legal age, married, residing in Managua. Judge of the Constitutional Chamber of the Supreme Court of Justice of Nicaragua; co-author of the judgment declaring the SOLCARSA concession unconstitutional.

**BROOKLYN RIVERA**, of legal age, married, residing in Puerto Cabezas, RAAN. Former Minister of the Nicaraguan Institute for Development of the Autonomous Regions (INDER) and indigenous leader of the Miskita ethnic group.

**MARIANELA ROCHA ZUNIGA**, of legal age, residing in Managua. National environmental prosecutor. Has conducted research on the forestry operations of SOLCARSA and their environmental impact.

**ROSARIO SAENZ**, of legal age, married, residing in Managua. Attorney, former

legal advisor to the Minister of MARENA and legal advisor to the Protierra project until March 1998; helped prepare the demarcation proposal for the indigenous lands of Nicaragua's Atlantic Coast.

**ROBERTO STADTHAGEN VOGL**, of legal age, married, residing in Managua. Minister of Environment and Natural Resources.

**HUMBERTO THOMPSON**, of legal age, residing in Puerto Cabezas, RAAN. Former member of the RAAN Regional Council. Opposed the award of the concession to SOLCARSA and filed an *amparo* action against officials of MARENA.

**BRADY WATSON**, of legal age, married, residing in Managua. Forest engineer, former director of the Forest Administration in MARENA. Was also the Director of the BOSAWAS reserve project, sponsored by The Nature Conservancy and MARENA, and directed cartographic and socioeconomic studies on the reservation to document the land claims of the BOSAWAS indigenous communities. Currently, Director of ALISTAR, Gasolinera Shell Plaza del sol 2c al Sur, 1 ½ c. Arriba, casa No. 4. Tel: 2 77 02 37.

### C. Other Witnesses.

199. The persons listed below are additional witnesses who will be called to give testimony on unsuccessful efforts to obtain official measures for demarcation and specific recognition of indigenous communal lands; the award of concessions in RAAN, including the SOLCARSA concession; the forest activities under the SOLCARSA concession; the environmental impact of these operations and of other natural resource exploitation activities; migration and non-indigenous settlement patterns affecting indigenous communal lands; the lack of sufficient State control over the exploitation of natural resources on the Atlantic Coast; other matters with regard to natural resource exploitation and the land tenure of indigenous communities.

**HANS AKESSON**, of legal age, residing in Miami, Florida, U.S.A. Forest engineer, former forestry advisor to MARENA and current forestry advisor to the Awas Tingni Community. Will testify on the forestry sector in Nicaragua and its impact on the Awas Tingni.

**NED ARCHIVOLD**, of legal age, married, residing in Puerto Cabezas, RAAN. President of the Association of Indigenous Leaders of the Nicaraguan Caribbean (ASICAN), a civil association of indigenous leaders of the Nicaraguan Atlantic Coast.

**RALSTON BENT**, of legal age, married, residing in the Community of Tasbapunie,

**RAAS.** Leader of the Community with responsibility for land and access to natural resources.

**ELVIRA BLAS,** of legal age, residing in Managua. Member of the non-governmental organization Young Environmentalists. Conducted research on the forest operations of SOLCARSA.

**EMMA CADDY,** of legal age, single, residing in Vancouver, British Columbia, Canada. Graduate of Oxford University and currently completing her masters at the University of British Columbia on development and natural resources. Will provide testimony relating to her research on the exploitation of natural resources on the Atlantic Coast of Nicaragua and the related practices and policies of the Government and the indigenous communities.

**VICTOR CAMPOS,** of legal age, married, residing in Managua. Coordinator of the Humboldt Center's Bosawas Territorial and Environmental Planning Project. Has knowledge of environmental matters affecting indigenous lands on the Atlantic Coast.

**GUILLERMO CASTILLEJA,** of legal age, residing in Mexico City. Forest engineer and former programs coordinator for the World Wildlife Fund (WWF) in Central America; coordinated WWF support for the Awas Tingni Community and worked with MARENA on its forest sector. Will testify on the forest sector in Nicaragua as it relates to indigenous lands in general and the Awas Tingni Community in particular.

**MIRNA CUNNINGHAM,** of legal age, residing in Puerto Cabezas, RAAN. Miskita leader and Dean of the Nicaraguan Caribbean Autonomous Regional University, Puerto de Cabezas, RAAN. Has extensive knowledge on governmental affairs with regard to indigenous communities.

**FARAN DOMETS,** of legal age, residing in Bluefields, Northern Atlantic Autonomous Region. Secretary General of the Bluefields Indian Caribbean University, member of the Peace Commission established to mediate disputes between indigenous groups and the government.

**GALIO GURDIAN,** of legal age, married and residing in Managua. Director of the firm assigned to perform a diagnostic on indigenous lands in Nicaragua's Atlantic Coast from 1997 to 1998, ordered by the Nicaraguan Institute for Agrarian Reform (INRA) with World Bank funds.

**MODESTO FRANK,** of legal age, married, residing in Managua. Of Mayagna indigenous origin. Works with various governmental and non-governmental institutions on matters pertaining to indigenous communities and their lands.

**GERARDO GUTIÉRREZ**, of legal age, married, residing in Puerto Cabezas, RAAN. Of Miskita indigenous origin. Director of the CONADES Center in Puerto Cabezas, an NGO concerned with environmental affairs and development projects in the indigenous communities of the area.

**OTIS LAM**, of legal age, married, residing in Puerto Cabezas, RAAN. Officer of the Council of Elders of indigenous communities.

**MAGDA LANUZA**, of legal age, single, residing in Managua. Humboldt Center Coordinator for Environmental Management and Monitors. Has knowledge of the environmental situation of the indigenous land of Nicaragua's Atlantic Coast.

**THEODORE MACDONALD**, of legal age, single, residing in Cambridge, Massachusetts, U.S.A. Anthropologist and Director of the Program on Non-violent Sanctions and Cultural Survival, Center for International Affairs, Harvard University. Will give testimony on the ethnographic study and cartographic work he performed with the Awas Tingni Community.

**JORGE MATAMORO**, of legal age, residing in Puerto Cabezas. Worked on a diagnostic study of Atlantic Coast indigenous lands, organized by the Nicaraguan Institute for Agrarian Reform with World Bank funds.

**MARTA MOLARES**, of legal age, married, residing in Washington, D.C., U.S.A. Attorney for the World Bank and legal advisor for the Bank Support Project on the Environment and Indigenous Lands in Nicaragua.

**RAMÓN PRUDO**, of legal age, married, residing in Bluefields, South Atlantic Autonomous Region. Officer of the Indigenous Movement of the South Atlantic Autonomous Region (MIRAAS), an NGO concerned with the defense of indigenous rights.

**FELIX SUAREZ**, of legal age, married, residing in Puerto Cabezas, RAAN. Officer of the Association of Indian Leaders of the Nicaraguan Caribbean (ASICAN), a civil association of Atlantic Coastal Indigenous Leaders in Nicaragua; represents indigenous communities neighboring the Awas Tingni Community.

**JORGE UQUILLAS**, of legal age, married, residing in Washington, D.C., U.S.A. Sociologist/anthropologist with the World Bank; works on the Bank support project for the environment and indigenous lands in Nicaragua.

**D. Expert Witnesses.**

**VICTOR HUGO CARDENAS**, of legal age, residing in La Paz, Bolivia. Former Vice President of Bolivia and current Director of the Indigenous Fund. Will give testimony on the claims of indigenous peoples throughout the American hemisphere.

**LOTTIE CUNNINGHAM**, of legal age, single, residing in Puerto Cabezas, RAAN. Attorney working for the International Human Rights Law Group; author of a study on access to justice for Atlantic Coastal Indigenous Communities in Nicaragua. Will give testimony on the lack of effective judicial recourse in Nicaragua for obtaining remedy for violations of indigenous community rights.

**CHARLES HALE**, of legal age, residing in Austin, Texas. Professor at the University of Texas. Will give testimony on the Atlantic Coastal Indigenous Peoples of Nicaragua and their land use and occupation patterns.

**CLAUDE LEDUC**, of legal age, residing in Managua. Forest engineer who conducted an evaluation of the Cerro Wakambay Management Plan. Will provide testimony on that evaluation.

**ROQUE ROLDAN**, of legal age, residing in Santafé de Bogotá, Colombia. Attorney and Director of the non-governmental organization Center for Indigenous Cooperation; worked as a consultant for the World Bank in an effort to promote legislation concerning Nicaraguan indigenous land. Will give testimony on indigenous affairs legislation in Latin America, as compared with the laws and practices of Nicaragua, and on the indigenous peoples of the American hemisphere in general.

**RODOLFO STAVENHAGEN**, of legal age, residing in Mexico City. A sociologist, professor at the Colegio de Mexico, and author of numerous works on indigenous peoples. Will give testimony on indigenous peoples and their links to ancestral lands.

**C) LIST OF EVIDENTIARY DOCUMENTS**

**Evidentiary documents on the territorial rights of the Awás Tingni Community:**

Map showing the Awás Tingni lands	Annex C.1
Writings by Charlie Mclean on the History of the Awás Tingni and their territory	Annex C.2
“Awás Tingni: an ethnographic study of the Community and its territory – Preliminary Report, 1996”	Annex C.3

Map: Territory of the Awas Tingni	Annex C.4
Map: Tenure of the Mayagna Awas Tingni within the SOLCARSA Concession Area	Annex C.5
Statement by Dr. Theodore Macdonald	Annex C.6
Map of the occupation and subsistence uses of the indigenous Awas Tingni Community	Annex C.7
<b>Evidentiary documents on the failure of the State to recognize the rights of the Awas Tingni Community to its communal lands, the award of a concession to the company SOLCARSA for timber exploitation on those lands, and the environmental impact of that concession:</b>	
Letter from María Luisa Acosta to Milton Caldera, Minister of MARENA, July 11, 1995	Annex C.8
Letter to Milton Caldera, Minister of MARENA, from Mr. James Anaya, October 23, 1995	Annex C.9
Cerro Wakambay Latifoliados Forest Management Plan (final edition), December 1994 (prepared for Kumkyung Co. Ltd. By Swietenia S.A.)	Annex C.10
Statement by Charlie McLean Cornelio, December 4, 1995	Annex C.11
Memorandum in support of supplemental Request for provisional measures	Annex C.12
Request from the Awas Tingni Community to the Regional Council of the North Atlantic Autonomous Region for official recognition and demarcation of the Community's ancestral lands	Annex C.13
Letter to Ernesto Lean, Foreign Affairs Minister of Nicaragua, from Mr. James Anaya, March 20, 1996	Annex C.14
Letter to Claudio Gutiérrez, Minister of the Environment and Natural Resources of Nicaragua,	



from Mr. James Anaya, March 20, 1996	Annex C.15
Draft memorandum of understanding presented by the Awas Tingni Community to the Foreign Affairs Minister and to the Minister of the Environment and Natural Resources, March 20, 1996	Annex C.16
Press Clipping, March 24, 1996	Annex C.17
Press Clipping: "It's the Indians vs. the Loggers in Nicaragua," the New York Times, June 25, 1996	Annex C.18
Letter to Ambassador José Antonio Tijerino, Permanent Representative of Nicaragua to the OAS, from Mr. James Anaya, May 17, 1998	Annex C.19
Report from Dr. María Luisa Acosta, May 8, 1996	Annex C.20
Concession contract between the State of Nicaragua, Represented by the Ministry of the Environment and Natural Resources, and Sol del Caribe, S.A.	Annex C.21
Administrative provision No. 2-95 of the Board of Directors of the Regional Council of the North Atlantic Autonomous Region	Annex C.22
Letter from Alta Hooker Blandford, President of the RAAN Regional Council, and Myrna Taylor, First Secretary of the Board of Directors of the RAAN Regional Council, to Robert Araquistain, General Director for Forestry Affairs of MARENA, December 8, 1995	Annex C.23
Reports by Dr. Maria Luisa Acosta, November 1996	Annex C.24
Statement of the Indigenous Peoples before the National Commission for the Demarcation of Atlantic Coastal Indigenous Community Lands in Nicaragua, November 14, 1996	Annex C.25
Letter to James Wolsensohn,	

- President of the World Bank, from OSICAN,  
November 21, 1996 Annex C.26
- Letter to Mr. Enrique Brenes, Provisional  
President of the National Commission  
for the Demarcation of Atlantic Coastal  
Communal Lands, from Fermin Chavarria,  
Coordinator of the RAAS Indigenous Movement,  
December 5, 1996 Annex C.27
- Claude Leduc, "General Considerations  
Concerning the Cerro Wakanbay  
Forest Management Plan Document," p. 7  
(prepared for the Alexander Von Humboldt  
Center for Territorial Development  
and Environmental Management) Annex C.28
- Statement by Yotam López Espinoza,  
June 11, 1997 Annex C.29
- MARENA Ministerial Resolution No. 02-97,  
May 16, 1997 Annex C.30
- Press clipping: "Concesion ilegal continua  
despale en Atlantico Norte," La Tribuna,  
May 29, 1997 Annex C.31
- Press clipping: "Los arboles caen lejos y  
nadie los oye," La Tribuna, May 29, 1997 Annex C.32
- Press clipping: Eburne Arbeloa, "Un despale  
en tierra de nadie," La Tribuna, June 12, 1997 Annex C.33
- Statement by Mario Guevara Somarriba,  
October 3, 1997 Annex C.34
- Letter from Roberto Stadthagen Vogl,  
Minister of MARENA, to Efrain Osejo,  
President of the Regional Council, May 29, 1997 Annex C.35
- Report of the Evaluation Committee to  
the Forestry Company Sol del Caribe, S.A.,  
August 4, 1997 Annex C.36

Statement by Guillermo Ernesto Espinoza Duarte, Acting Mayor of Puerto Cabezas, RAAN, October 1, 1997	Annex C.37
Community statement by the Betania Authorities, October 16, 1997; Internal Written Report by the Eco-tourism-education team, CEPAD	Annex C.38
Ms. Magda Lanuza, “Solcarsa tampoco hace caso a Resolucio Ministerial” (written for Guia Ambientalista)	Annex C.39
“Privatizing the Rain Forest – a New Era of Concessions, ” Cepad Report, June/July 1997, p. 17, 19-21	Annex C.40
RAAN Regional Council Resolution No. 17-08-10-97, October 8, 1997	Annex C.41
Letter of Protest from the Organization of Nicaraguan, Caribbean indigenous leaders, November 2, 1997	Annex C.42
<b>Documents concerning <i>amparo</i> actions that proved ineffective in protecting the Awas Tingni Community, and the respective judicial decisions:</b>	
Amparo Action filed by the Mayagna (Sumo) Awas Tingni Community against MARENA Officials, September 11, 1995	Annex C.43
Ruling by the Sixth Region Court of Appeals, Civil Chamber, September 19, 1995	Annex C.44
Appeal filed with the Honorable Supreme Court of Justice, September 21, 1995	Annex C.45
Supreme Court of Justice, Judgment No. 11, February 27, 1997 (denying the appeal filed by Awas Tingni on September 1995)	Annex C.46
Ruling by the Sixth Region Court of Appeals, Civil Chamber, November 12, 1997 (on the <i>amparo</i> action filed by the Awas Tingni Community on November 1997)	Annex C.47

**Documents concerning the *amparo* action filed by Council members Smith and Thompson against the award of the forestry concession to the company SOLCARSA:**

Supreme Court of Justice, Judgment No. 12,  
February 27, 1997

Annex C.48

Supreme Court of Justice, writ of execution  
of Judgment No. 12, February 3, 1998

Annex C.49

Letter from the Government, November 5, 1997

Annex C.50