(DAY 3 OF HEARING)

PRESIDENT CANÇADO TRINIDADE: This public hearing on the merits of the case of the Mayagna (Sumo) Community of Awas Tingni is called to order with the purpose of hearing the final arguments of the Illustrious State of Nicaragua and of the Inter-American Commission on Human Rights.

Before beginning, allow me to welcome the Delegation of the Illustrious State of Nicaragua, presided over by its agent, Mr. Edmundo Castillo Salazar; his advisor, Mr. Rosenaldo Castro; and his assistants, Ms. Betsy Baltodano and Ligia Margarita Guevara. Likewise, greetings to the delegates of the Inter-American Commission on Human Rights, Mssrs. Helio Bicudo and Claudio Grossman; and its staff attorney, Ms. Bertha Santoscoy; and its advisor, Mr. James Anaya.

I would ask that those appearing before the Court speak slowly and clearly to facilitate the work of the interpreters. I will now give the floor to the Delegate, so that he may present the oral final arguments of the Honorable Inter-American Commission on Human Rights on the merits of this case. You have the floor.

IACHR (Dr. Bicudo): Honorable Court, Illustrious Government of Nicaragua, Mr. President, ladies and gentlemen, the Inter-American Commission on Human Rights would like to thank the Honorable Court for the opportunity to appear before you in this hearing on the merits of the case of the Awas Tingni Community against the State of Nicaragua in order to elucidate the facts, alleged and proved in the documents offered during the proceeding, and having been evidenced by the witnesses and experts that were heard in this hearing.

In its complaint, the Commission has asserted that the State of Nicaragua is responsible for violations of the American Convention on Human Rights because of the following:

First, the State has been negligent, persistently, by not taking the necessary and sufficient measures to assure the rights of the Awas Tingni Community over its traditional lands. The documentary evidence that has already been presented to the Illustrious Court establishes that the Community of Awas Tingni is an indigenous community of the Mayagna entity, and that the Community uses and occupies a territorial space in accordance with traditions and customs of ancestral origin. And in this hearing, witnesses that are members of the Community or who have worked with the Community corroborated, *ad nauseum*, the documentary evidence. Testimonies of the highest level of experts had, as their objective, as can be verified in their academic and professional qualifications, had as their objective to show the Honorable Court the geographic, cultural, and political context in which the Community of Awas Tingni is placed, and to emphasize the anthropological and legal significance of the traditional land tenure of this Community. Furthermore, the testimonies presented demonstrated that the Nicaraguan State had knowledge of Awas Tingni's territorial claim for years, and at a given time the State made a commitment to provide the titling of the Community.

However, in spite of that commitment, the State decided to ignore the

Awas Tingni Community's traditional land tenure, and instead of titling or demarcating the traditional land of the Community, the State has administered a large part of this land as if it were land of the State, thereby putting the Community in an extremely dangerous situation, against the enjoyment of their human rights.

The testimony and witnesses confirmed that the State has been negligent in not adequately resolving this situation. The direct result of the negligence of the Nicaraguan State is the granting by the authorities of a concession to the foreign company SOLCARSA to cut wood in the traditional land of Awas Tingni. This logging concession was granted by high State functionaries without any consultation with the Awas Tingni Community or with the other indigenous communities affected, and without thereby taking into account these communities' traditional patterns of use and occupation of the land.

By granting this logging concession, the State actively violated the rights of the Awas Tingni Community over its traditional lands in contravention of the American Convention on Human Rights. I must, Honorable Court, still insist that the Commission presented testimony fully substantiating the documentary evidence already presented to the Honorable Court, with respect to the granting of the SOLCARSA concession and its affect on the Community and its communal property.

Finally, the Inter-American Commission alleges that the State of Nicaragua has not complied with its duty under the Inter-American Convention to guarantee an effective judicial remedy. As has been demonstrated in the Commission's pleadings, the Awas Tingni Community attempted, more than once, the *amparo* action before the judicial authorities of the State to counteract the violation of its rights over its traditional communal lands.

However, these efforts were not successful because of factors establishing the lack of effectiveness of the attempted judicial remedy. These factors include the unjustified delay of the suit and the rejection of the Community's claims for futile and trivial reasons. A third *amparo* action was brought, at the request of the Community, by members of the Regional Council of the North Atlantic Autonomous Region against the SOLCARSA logging concession. That action resulted in a legal judgment declaring the concession illegal and unconstitutional, but it was not based on indigenous rights to the land; rather it was based on constitutional procedural requirements for concessions in the Atlantic Coast region.

Even so, the competent functionaries of the State did not give effect to the judgment of unconstitutionality of the concession for more than a year. To the contrary, they continued authorizing SOLCARSA's logging operations that threatened the Awas Tingni Community and other indigenous communities.

In the hearing of the last few days it is evident, among other facts, that the Illustrious State of Nicaragua does not give indigenous peoples access to the legal system, that it discriminates against them. However, if a given State denies legal protection to a sector of its population, the end result is clear discrimination,

which is the main cause of that sector's exclusion. As far as the citizens are concerned, it is evident that this is, unfortunately, not indicative of a democracy, the major foundation of which is precisely the legal system, with access for all of the population. Without a legal system, there is no democracy.

In conclusion, the IACHR reiterates its claims that are clarified in the complaint against the Illustrious State of Nicaragua. I request permission to conclude my address at this time, and give the floor, successively, to Commissioner Claudio Grossman, and then to the attorney James Anaya.

PRESIDENT CANÇADO TRINIDADE: Thank you very much; you may proceed.

IACHR (Dean Grossman): First the attorney Anaya will speak for twenty minutes, and then we are going to reserve twenty, twenty, forty-five and fifteen minutes for the second turn.

PRESIDENT CANÇADO TRINIDADE: We had agreed in a previous meeting with the parties that, since these are the summary arguments, after they can assert their right to reply [réplica] and rejoinder [dúplica], respectively.

IACHR (Prof. Anaya): Good morning, members of the Illustrious Court and representatives of the State of Nicaragua.

Members of the Honorable Court, the situation presented in this case is one of severe discrimination by the State against the people of the Awas Tingni Community, and we are not only talking about historic discrimination, but also of discrimination in the present day, which consists of the State's failure to recognize the Community and its land tenure—its traditional land—and this discrimination through non-recognition has come to this courtroom, as we have seen, by the unfounded assertions and attitudes of the representatives of the State.

As legal representative of the Awas Tingni Community, I must say that the Community seeks before this Illustrious Court, in the first place, to expose the truth, and, in spite of the difficulties of the proceeding and the obstacles presented by the State in the presentation of our evidence, we have succeeded in presenting evidence to this Court that establishes that the Awas Tingni Community is an indigenous community of the Mayagna indigenous people, and that it traditionally uses and occupies a defined area within its traditional, ancestral territory on the Atlantic Coast of Nicaragua.

This is clearly shown by the documents and statements of the witnesses and experts before this Court. The State has tried to refute this proof with confusing, irrelevant assertions, at times false and lacking any substantive counterevidence. The State tries to confuse the issue in its assertion that the Community just barely arrived in 1940 . . . .

PRESIDENT CANÇADO TRINIDADE: Please, there is a point of order, but it is a point of order, because there is no interruption as far as the content of the arguments.

GON (Mr. Castillo): We would prefer that this type of adjective not be used; maybe he could use unfounded, inexact—not false.

PRESIDENT CANÇADO TRINIDADE: I would like to clarify that, because

these are the summary arguments, there are no interruptions, but only one point of debate; I would like to request of the representative that he avoid qualifying adjectives, that he present the argument but without using qualifying adjectives.
IACHR: Very well, but . . . .
PRESIDENT CANÇADO TRINIDADE: In the line of argument, but without qualifying adjectives.
IACHR: Yes, Sir. We believe that the State intends to confuse the issue, and it is our belief regarding its assertion, and it does in fact assert that, in 1940, the Community just barely arrived in the area in which it now lives.
Fine, it is certain that the majority of the people of Awas Tingni arrived in the 1940s to the place where they currently have their main settlement. Well, let's look at the map. [Figure 6.] These were their lands, ancestral places since before settling where they live now. This was in accordance . . . It's not working.
PRESIDENT CANÇADO TRINIDADE: Wait a moment, please, so the television can be turned on so the State can have access too . . .yes?
GON (Mr. Castillo): Mr. President, a point of order. In the oral hearing, is it possible to be presenting videos and documents?
PRESIDENT CANÇADO TRINIDADE: Only as part of the summary argument; they can be presented as part of the argument, and then the State can refute them if it so desires.
GON: Thank you, Mr. President.
IACHR: As I was saying, the majority of the members were from the ancestral site, old Tuburus, and they have moved to Awas Tingni, and this movement was according to the patterns of movement that are usual among lowland indigenous peoples, as we have heard from the expert Dr. Stavenhagen. But that movement was from one place, Tuburus, a place that is within its ancestral territory, to another place within its ancestral territory. Both are located within the traditional territory and within the area which the Awas Tingni Community claims, and there is no evidence contradicting that this is the traditional land of the Community in the sense that they have been there and that their Mayagna ancestors were there from time immemorial. Nothing contradicts that.

Another assertion of the State is that the area claimed by Awas Tingni includes lands titled to other communities, but this is simply not the case. We must differentiate between the claims of surrounding communities that may overlap and titles granted by the State outside of that area to surrounding communities. Those titles are very small in comparison with the areas that they claim and do not enter into the area claimed by the Community, and this is clearly shown in the documents, the diagnostic study mentioned by the State itself, and it is borne out by the testimony of expert Hale and witness Macdonald.
And we also think it is significant what the State has not tried to refute. The State has not denied that Awas Tingni's presence is in the area that, pardon, the State has not denied that Awas Tingni's presence in the area is much prior to that of the neighboring communities, which are of another ethnicity, something that Dr. Hale explained to us. Neither has the State denied that Awas Tingni does in fact use

and occupy the extension of the area to which it lays claim according to traditional patterns.

What we can see in the assertions of the State—and I say this with all due respect, and this is nothing against the delegates here—it is a part of the lack of will of the State as an institution to study Awas Tingni's claim in depth and take it seriously, something that seems to be a generalized problem for the communities of the Atlantic Coast.

It is clear before the Court that the State of Nicaragua has no procedure or mechanism for demarcating or titling indigenous land. The very representative of the State, Mr. Centeno, of the Office of Rural Titling, who testified yesterday, said as much, contrary to what the State has asserted in its pleadings before the Court. Mr. Centeno of the OTR admitted that, since 1990, the State has not titled any land in favor of a single indigenous community, and it must be pointed out that the titles previously granted, in decades prior, were relatively few and inadequate, and that is shown in the documents that we have presented and in the diagnostic study that was mentioned previously. And in addition, still with respect to those titles, especially those that were granted in the 1970s by the IAN, the Nicaraguan Agrarian Institute, the communities reject those titles because they see them as a threat against them, a way of relocating them, a way to restrict their access to their traditional land.

Well, the inexistence of an effective mechanism for titling and demarcation of the indigenous lands is clearly seen in the Awas Tingni case, and here we have, for the State, pardon, for the Court, and also for the representatives of the State so that they can evaluate it, a brief summary of the various attempts by the Community to request assistance in the titling of land. [See Figure 13 in the Appendix to the Hearing Transcript.] And you can observe various attempts that have been described here before the Court, over the years, including an attempt before the President of the Republic himself. Well, the main excuse offered by the State for not being able to respond effectively to the requests for titling of the communities is the complexity of the subject, above all because of the so-called overlapping claims that exist among the claims of the communities.
Well, there is absolutely no doubt that the issue of titling and demarcation of indigenous lands is not simple, in any case. But the complexity of the issue in no way gives an excuse to the State for not complying for years with what the Inter-American Commission of Human Rights deems to be its duty under the American Convention, and we have seen and we have heard the testimony of expert Hale explaining how there can be solutions to this situation of the overlapping claims. The Awas Tingni Community itself has maintained, has had conversations with its neighbors, and they are quite advanced in them. The leader of one of those communities is here with them. These other communities have submitted to the Court an amicus brief, supporting the Awas Tingni Community in this case, proving that there is in fact dialogue tending toward a solution with these communities.

And neither does the complexity of the issue give the State an excuse to

treat indigenous lands as State lands, and it does not give it an excuse to grant concessions to foreign companies in these lands, as occurred in the case of Awas Tingni. We believe it important to emphasize, to indicate the high level of negligence of the State, that the concession to SOLCARSA was granted with full knowledge of the Awas Tingni claim in the concession area, with full knowledge of the State. This is the area of the concession superimposed on the traditional area of the Community, and, as you can see, it is right in the middle. [See Figure 14 in the Appendix to the Hearing Transcript.]

In all the time it was promoting the concession to SOLCARSA, the State refused to take into account the Community and its traditional land tenure in the area. The only defense that the State has for granting the concession to SOLCARSA is that the area of the concession is State land. That is what the State asserts in its brief: that the area of the concession is State land. The State makes this assertion without having disproved the claim of the indigenous communities over the area of the concession, including the area of Awas Tingni, and more than being a defense, the assertion by the State that the area of the concession is State land only indicates how serious and persistent the negligence of the State is, as far as indigenous lands are concerned.

The Inter-American Commission on Human Rights deems that the concession to SOLCARSA constitutes violations of articles 1 and 2 of the Convention in relation to the right to property and other human rights.

To conclude, and turn the floor over to Dean Grossman, allow me to say, Honorable members of the Court, that my own indigenous ancestors in the southwest part of the United States, that part is . . . my own indigenous ancestors were dispossessed of their lands in the 19th century, and they were relocated to another place. During the last seven years I have been working with the Awas Tingni Community to attempt to ensure that the same thing doesn't happen. I have traveled many times to the Community, I have spent time with them, and I have learned the meaning and importance land has for them.

The Awas Tingni Community has been requesting of the State for years that it recognize and respect their rights over their land. It is not a question of "giving them land," as the State says, it is a question of protecting them in the possession of land that they still have. We are no longer in the 19th century, but rather now in the 21st century. And alongside current forces tending to avoid the past discrimination against indigenous peoples, there are the same tendencies of the past that would like to continue, or leave this past discrimination without remedy. The most devastating forms of discrimination against indigenous peoples are not recognizing their collective forms of existence and not recognizing and valuing the bonds that they have with their traditional lands.

Members of the Court, in the name of the Awas Tingni Community, I respectfully ask that you clearly side with the forces tending to liberate indigenous peoples from discrimination. Thank you.

IACHR (Dean Grossman): Honorable Court, Illustrious Government of Nicaragua, I would like to make reference, with some comments, to what we

believe to be the uncontroverted facts; secondly, the impact of those facts on the American Convention; and thirdly, final reflections.

First, uncontroverted facts: a concession to a South Korean company called SOLCARSA, the 13th of March, 1996.

Second, an *amparo* action was brought by the Awas Tingni Community on the 12th of November, 1995 that was dismissed by the Supreme Court on the 27th of February, 1997. When it is dismissed in the first instance, if we can use that expression, it goes via, the *de facto* procedure, to the Supreme Court and was rejected the 27th of February of 1997. The action was brought as soon as the Community became aware that there had been negotiations directed toward granting of a concession and before the concession was granted, because the action was brought the 12th of November of 1995, and the concession was granted the 13th of March of 1996, and, in an act of judicial gymnastics, it was established that it was time-barred, when the administrative act granting the concession had not yet taken place.

Third, Nicaraguan law requires a ruling on the action within forty-five days; nevertheless, the Supreme Court decided that there was a decision of untimeliness. The action was dismissed the 27th of February of 1997. Nicaraguan law requires that the parties appear, the same as in all courts, that a response be given to what the petitioners assert, and the Supreme Court has not given a specific answer to the arguments of the petitioners.

Fourth, the *amparo* II presented by Thompson and Smith, brought in March of 1996 that also goes to the Supreme Court, which decides it in February of 1997; once again, we have a problem here of a violation of the Nicaraguan law that establishes forty-five days for a ruling and that generates a legal uncertainty by not dismissing or admitting the *amparo*. The *amparo* is granted.

In accordance with the law, by order of the Court, compliance must be within twenty-four hours. A concession is declared unconstitutional under an article of the Constitution of the Illustrious Republic of Nicaragua that requires consultation with the respective Regional Council. The Court says "unconstitutional," showing the applicability of the constitutional norms relating to the indigenous population in this case.

However, the government only complies with this order in March of 1998. I want to call the attention of this Illustrious Court to the fact that there is a decision of the Supreme Court of Nicaragua that is not complied with for more than a year, that relates to indigenous territories, and to a poorly done concession.

Now, what is the government's reaction? The government goes to the Regional Council and ratifies, or amends, the concession that had been declared unconstitutional. Once again, this seems to us to be something lacking a legal basis, in an intent to give it a legal basis; the government says there are things that are done, formal things, profound or substantial things, so that formally it has consulted, the consultation is not done, we will do it later, we will issue it.

That argument, in our opinion, is not convincing, because here unconstitutionality was declared. What is the reason behind this way of

operating? Retroactively giving it content, amending what is not amendable, that was what the declaration of unconstitutionality was, and one only need to see the terms to realize that. Because the proper thing to do would have been to reinitiate the entire proceeding and not seek to open the possibility to the most interested parties; situations, that is the meaning of the law. Not simply ruling for one party; ratify, ratify what? Unconstitutionality? Amend what? Unconstitutionality? From the legal perspective, that is some thing that really surprises us.

In the appendices presented by the Commission, and I will not elaborate much on this, there is a letter from the Minister of Nicaragua, from Mr. Robert Staggahenfort, relating to the meeting of the region, and there is also a sworn statement, and there, written by hand—these are official documents introduced by the Commission—this one requests of SOLCARSA, and there is a sworn statement of a person who says that the fact that money is requested from the private company to finance the Regional Council meeting is inappropriate.

This evidence that was offered as documentary proof has not been denied; if there had been a denial, we would have had thought to request or submit an expert's report with respect to whose handwriting appears there for SOLCARSA. But we simply say that to make that clear.

Now, the purpose of that Council's meeting was to give retroactive effect to something that could not have a retroactive effect. The tremendous difficulty for indigenous peoples to come and bring the *amparo* actions has not been denied here either. It was mentioned that three days, one hundred dollars, and also the lack of compliance with the language accommodation, as established by the respective law.

We have also spoken about the fact that the constitutional provisions in existence and in effect in Nicaragua have been denied, and obviously that is not fine with us. And I am going to refer to that subsequently.

One final undisputed point: the titling of indigenous lands. In Appendix 11, there is a group of titles issued to indigenous populations, and I have some copies here, they are in evidence, they can be passed out to the Illustrious Government now if it wishes to see them. It is not our intent to surprise anyone; as I say, they are in evidence, but since 1987, not a single title has been issued to an indigenous group in the Illustrious Republic of Nicaragua, since 1987.

As was asserted in Mr. Centeno's testimony yesterday, thousands of titles have been given to non-indigenous people in the Republic of Nicaragua, allowing for the possibility of assertion of discrimination issues. Neither is it disputed here that not titling indigenous land produces an interpretation by the Illustrious Government of Nicaragua that they are State lands, the reason for which tens of thousands of people are put in a situation in which there is no clarity from the perspective of the Government with respect to their status, a condition that continues.

According to the Commission's position, what is the legal argument that comes forth from those facts that we deem uncontroverted? One, that the State of Nicaragua is responsible for the acts and omissions of its agents by not taking

measures permitting the guarantee of the rights of the Awas Tingni Community over land and natural resources in accordance with its traditional patterns of use and occupation, and that this omission by the State constitutes a violation of articles 1, 2 and 21 of the American Convention. In addition, the right to property recognized in article 21 was actively violated by the granting of a concession for the cutting of wood, among other things, on occupied land, and used by the Awas Tingni Community, with a decision of the Nicaraguan Supreme Court that remains uncomplied with for more than a year and that proceeds, despite its continued abuse of the rights of that Community.

The State is also in violation of the right to judicial protection of article 25 of the Convention by not guaranteeing an effective, simple, and rapid remedy to respond to the Awas Tingni Community's claim to rights and natural resources. It fails to comply with the decisions of its own Supreme Court, does not repair the damage it has caused relating to the decisions of its own Supreme Court, and it violates all of the time limitations, absolutely all of them, in all that it says with relation to its own law and in relation to the *amparo* action: forty-five days, by Court appointment, twenty-four hours to comply.

I would also like to say something in relation to the Nicaraguan Constitution. The Nicaraguan Constitution is very clear where it says that the forms of indigenous property are explicitly recognized; article five says, "[T]he State recognizes the existence of the indigenous peoples that they enjoy the rights and guarantees of the State enshrined in the Constitution, and especially those of maintaining their communal ways in their lands, the enjoyment and use of them." "Maintain:" it is not a constituent activity; it is a prior activity. And when we speak in legal theory of human rights, they are prior to the State; I suggest that, in the case of indigenous peoples, they are literally prior.

I call to your attention to the fact that article 89 recognizes the enjoyment and use of the waters, forests, and communal lands and says that the State guarantees to this Community the enjoyment of its natural resources in article 180. To conclude, I refer to the document of the Inter-American Commission, in which the impact of each one of these articles is analyzed in detail; I refer to another international treaty, freely signed by the Illustrious State of Nicaragua, that, also in accordance with article 29, allows the interpretation of the provisions of article 21 and others that are relevant to this case, including interpretations that are of the International Covenant on Civil and Political Rights—especially article 27, where it says that it is discriminatory not to comply with what the right to property is for indigenous peoples.

I would like to conclude with the following as a reflection: one, this case that we have lived so intensely here has distinct objectives; one is to discover the truth, and the discovery of the truth is with edges, with debate, and many times there has even been some acrimonious debate. That was not our intent, and we want to say that here, but there is a sense that the rich debate permits an enrichment of the decision process of the judges that have kept the debate in the terms, that have corrected us when it was necessary, that allows us to focus on the

discovery of the truth.

Second, this debate in the Court allows something else, to be witness to the issue. This Court fulfills a function of recording things. It gives people the possibility to say what they think. It gives a feeling of compliance that also allows a backward looking historic analysis; many things that are said and that are done when looked back upon provide a different perspective, appear differently.

Third, it allows strengthening of democracy and the rule of law. Also, debates at times, for someone who may not know, may appear Kafkaesque, alien, and, for an indigenous community, the world is at times big and alien, because they have been very excluded from the situation in the region. They have been discriminated against and persecuted. But the indigenous communities of Awas Tingni have been here because they have believed in this process. I think, coming from Chile, about Pablo Neruda, who spoke of the men of clay and mud that made themselves one with the land in the fearful forests of our region. It would seem very unjust to us that those who were here before the government, before the Court, and before ourselves would not have his legitimate right recognized. We hope, Honorable Court, Illustrious Government, that justice is done in this case. Thank you.

PRESIDENT CANÇADO TRINIDADE: Thank you, Delegate of the Honorable Commission, also for adhering to the time of forty minutes agreed to for the arguments. Now I will give the floor to the Agent so that he may present the oral summary arguments of the Illustrious State of Nicaragua on the merits of this case.

GON (Mr. Castillo): Honorable, Mr. President, Honorable Court, Honorable Delegates of the Commission, I will be the only one to speak. The complaint presented by the Inter-American Commission should be dismissed by the Court, inasmuch as the Awas Tingni Indigenous Community is not in possession of ancestral lands. The Community itself has recognized that the possession of the lands it claims goes back to 1945. In addition, the Community itself has recognized that it has been titled on a previous occasion. The only proof presented by the Awas Tingni Community to sustain the supposed ancestral occupation of the lands it claims is a document based solely on the oral testimony of the interested party; a study lacking in documentary and archeological sources, as well as the testimony of the surrounding indigenous communities.

Additionally, this disproportionate claim of lands that are not ancestral robs, or intends to rob, diverse indigenous communities of another ethnic origin of their legitimate rights and expectations, as well as failing to recognize the legitimate titles to property of the *mestizo* population of the State itself in the region.

I will not refer to each one of the pieces of evidence presented by the Republic of Nicaragua showing the lack of legal basis in the Commission's complaint.

The first assertion made against us is the violation of article 21 of the American Convention, which establishes the right to property. Nicaragua

reiterates that it denies, rejects, and contradicts the violation of article 21 of the American Convention on Human Rights attributed to it based on the following considerations:

The precepts of the national Political Constitution that impose upon the State the obligation to title the ancestral lands of the indigenous communities cannot be interpreted in isolation, without recognizing the legal consequences of the titles granted prior to those communities, or else without recognizing indigenous communities that occupy lands that are not ancestral. In that sense, the Republic of Nicaragua calls the Court's attention to the social phenomenon that is occurring on the Atlantic Coast that indicates that historic indigenous communities that were titled request additional lands as if they were ancestral lands. Indigenous groups become detached from the historically titled communities to autonomously claim lands, including claim lands in areas that they have not ancestrally occupied. Indigenous groups establish communities simply by virtue of professing to be one, solely for the purpose of obtaining lands. Communities change name and relocate to other distant areas from their original settlements.

The Awas Tingni Community is within this general context, constituting a living example of the phenomenon described above. The Awas Tingni Indigenous Community has confessed to having been previously titled. However, it fails to recognize that fact, and presents a claim for 156,000 hectares, attempting to receive title to all of that surface area under the pretext of its ancestral occupation.

Let us remember: the Awas Tingni Community is made up of people of different ethnic groups, and thus, by persons who have neither a common ancestral past, nor a common ancestral occupation of the lands they claim.

The population census of 1995 that is in evidence shows that almost forty percent of this group is made up of *mestizos* and Miskito.

The Mayagna population of Awas Tingni is likewise made up of a group of people that separated from its main group and from its original settlement, moving across large geographic distances to settle, in 1945, in lands that cannot be claimed as ancestral. In the documents presented to the Court, the Community itself has recognized that it has lived on the Awas Tingni River since 1945. Likewise, the Republic of Nicaragua presented documentary evidence of the recognition that the first Mayagna inhabitants of Awas Tingni gave to the prior presence of the Miskito populations in the claimed area. See the testimony of the Ten Communities that is in evidence.

In support of its claim of ancestral lands, the Awas Tingni Community has only presented the biographic study of Dr. Macdonald, an anthropologist who was only in the country for fifteen days, preparing a document that he himself calls preliminary, and therefore a document that is neither definitive nor conclusive. In effect, it had been warned, with respect to that document, that it didn't take archeological sources into account, it didn't contrast the oral accounts with archeological information or with the pertinent official historic documents.

That he didn't support the existence of ceremonial centers, sacred sites, or ancestral cemeteries with cultural elements such as petroglyphs, boundary markers, statuaries, stone knolls/hillocks, ceramic, etc., basing itself solely on oral testimony. The ethnographic study itself recognizes that it was not supported by anything else than by the oral testimony of the interested party. Neither does the study contrast the testimony of the members of Awas Tingni with the testimony of the other ethnicities that inhabit the region and that allege being affected by the Awas Tingni claim. The different ethnic composition of this group was not taken into consideration, either. If the group is composed of different ethnicities, it is impossible for them to have a common history and ancestrality. The study does not research population census of different periods. The ethnographic study turns up inconclusive in accepting as true the accounts according to which the people of Awas Tingni moved over large distances to hunt and gather fruit from the forest, having absolutely no knowledge of the biological characteristics of the region as far as the flora and fauna that did and do not make necessary the large movement to which they alluded. Furthermore, in the referenced study, a map is attached of the area claimed by Awas Tingni that was prepared by the interested party itself. Members of the Court, the foregoing reasons are more than sufficient to conclude that the Awas Tingni Community did not demonstrate ancestral possession of the lands it claims. Additionally, the Court should notice that the unfounded claim of ancestral lands that six hundred persons assert over a surface area that vacillates between sixteen thousand, ninety-five thousand, or 156 thousand hectares, according to the successive claims that have been presented, affects the right to property of indigenous communities such as Francia Sirpi, Esperanza, and Santa Clara that were titled forty years ago. That is, almost at the time that the Awas Tingni Community was to have settled in river of the same name. The State of Nicaragua cannot fail to recognize these property titles. Similarly, this unfounded and confusing claim of ancestral lands affects, or intends to affect, the claim of other indigenous communities, such as the block of the Eighteen Communities to the north, the block of the Ten Communities to the east, and the claim of the Kukalaya, Winston, and Klarindan communities to the south, in addition to affecting the national property of the State and the legitimate titling that the State was to have done for the demobilized members of the army and of the resistance to the southeast of the area. Thus, members of the Court, not having demonstrated ancestral possession and being an unfounded, disproportionate, confusing claim of ancestrality that affects the property title and claims of other communities, the Republic of Nicaragua maintains that declaration of a violation of article 21 of the American Convention on Human Rights is inappropriate.

The Honorable delegates of the Commission, in their complaint petition, also indicated that the Republic of Nicaragua was in violation of articles 1, 2, and 21 of the American Convention relative to the measures adopted to guarantee the right to property of the Awas Tingni Community. Nicaragua reiterates that it denies, rejects, and controverts that it has violated the referenced articles of the American Convention to the detriment of the Awas Tingni Community.

Having demonstrated the lack of ancestrality of the lands claimed by Awas Tingni and therefore the inexistence of this alleged right to ancestral property, it would not be appropriate for Nicaragua to admit that it has not adopted measures to safeguard an inexistent right to ancestral property. Awas Tingni's right to titling of lands which it occupies that are not ancestral would be subject to what the State, subject to consultation with this Community, determines sufficient to guarantee the elements of a normal existence or to deal with its growth in number. And, in this sense, I cite article 14 of Convention 107 of the ILO that is in effect and that establishes the distinction between ancestral lands and additional lands. This agreement, members of the Court, is the only one that Nicaragua has ratified and that the Honorable delegates of the Commission have been ignoring.

The indigenous community of Awas Tingni, in support of its assertion that the State of Nicaragua has not adopted measures to safeguard its right to inexistent ancestral property, has maintained the supposed inexistence of a legal framework allowing for the titling of the indigenous lands and the lack of judicial protection for its claims.

With respect to the alleged inexistence of a legal framework allowing for the titling of the indigenous lands, the falseness of this assertion has been more than demonstrated, inasmuch as law 14, or the Law or Reform of the Law of Agrarian Reform, establishes the legal possibility of this titling. Remember that it has been precisely under this law, that remains in effect and relevant, that the State has titled twenty-eight indigenous communities. Likewise, the State has demonstrated that with the aim of perfecting the law in question, it has presented, since October of 1998, a bill to the Assembly that unites the communal property regime of the indigenous communities of the Atlantic Coast and BOSAWAS. While this bill has not been passed by the National Assembly, almost forty duly documented consultations have taken place with indigenous communities and indigenous groups, making this possibly the law about which civil society was most consulted in the history of Nicaragua. Awas Tingni is among the indigenous communities and groups consulted. As far as the alleged lack of judicial protection for the claims presented by Awas Tingni, and without prejudice to the ability to expound on this issue in greater detail in the following section, it is sufficient now only to say that what was judicially requested was obtained: the invalidation of the logging concession, and what was not judicially requested could not have been granted for that same reason; I am referring to the titling claim that was never presented to the Supreme Court of Justice.

For all of the foregoing, Nicaragua requests the alleged violation attributed to it of articles 1, 2, and 21 of the American Convention be dismissed as unfounded.

The Honorable members of the Inter-American Commission have also stated in their complaint petition that Nicaragua was in violation of article 25 that establishes the right to judicial protection. Nicaragua reiterates that it denies, rejects, and controverts the violation attributed to it of article 25 of the American Convention on Human Rights based on the following considerations: as will be

explained later, the indigenous Community of Awas Tingni never presented a formal petition for titling before the justice tribunals. The State of Nicaragua showed the list of the *amparo* actions brought before the Supreme Court of Justice in the six-year period from 1990 to 1996, in which there was no action brought for lack of titling of the supposed ancestral lands of Awas Tingni. If Awas Tingni exhausted administrative channels, as it states having done, it did not show the bringing of this action, leading to the conclusion that this remedy lapsed through inaction. The Supreme Court of Justice cannot be faulted for not having provided a judicial remedy that was never requested.

As far as the petition for invalidation of the logging concession granted to SOLCARSA, the Nicaraguan judicial system showed itself to be effective in providing the requested judicial remedy. That is the declaration of nullification of the logging concession granted to the company to which we referred. Those who did not show themselves to be effective were the legal advisors of the Awas Tingni indigenous community who did not bring a single action for unconstitutionality against this concession, as some members of the North Atlantic Regional Council, RAAN, did in fact do.

The Inter-American Court of Human Rights has stated on multiple occasions that it is the petitioners, and not third parties, who have to exhaust the existing legal remedies in each country. And to justify this most serious omission, the Commission, the Honorable delegates of the Inter-American Commission on Human Rights, ingeniously argued the theory of an action coordinated among the Awas Tingni Community and the Council members bringing the action, as if a political ally were a party to the action granted by the procedural right.

Finally, the Awas Tingni Indigenous Community's petition requesting that the logging concession to the SOLCARSA company be suspended had to be dismissed for reasons of time and form by the appeals tribunal, the adjudicating organ for the *amparo*, for the most obviously untimely manner in which it was brought. Members of the Court, the simple truth is that the lawyers of the Community were incapable of requesting their right in the domestic legal system, leaving their remedies to lapse or simply not bringing them at all. For that reason, the Republic of Nicaragua requests the dismissal *in limine* of the violation, attributed to it, of article 25 of the American Convention.

Let us now move to the issue of the requested reparations. The Republic of Nicaragua reiterates its request to the Court, to the Honorable Court, to dismiss all and each one of the reparations requested by the Inter-American Commission, generally, for not having demonstrated the supposed violation of a single one of the articles stated of the American Convention, and in particular for the following reasons. First, because there is a legal framework for demarcating and titling the lands of the indigenous communities under which these communities have been titled, a legal framework that will soon be perfected after the concluded civil society consultations, the most exhaustive in the history of Nicaragua.

Second, because the Republic of Nicaragua shares the view of not granting concessions in the areas claimed by Awas Tingni until obtaining an

official pronouncement by the Inter-American Court of Human Rights or having reached an agreement with the Honorable delegates of the Inter-American Commission and of the Awas Tingni Community.

Third, because the claim of compensatory and equitable damages for the supposed harm resulting from the granting of the concession to SOLCARSA is absolutely inappropriate, because the ancestral occupation of the lands claimed by Awas Tingni has not been shown, making inexistent its alleged right to property and its allegation of a violation of that right as a consequence of the logging concession.

Fourth, because the granted concession's management plan was never approved and, consequently, there was no logging activity.

Fifth, because the logging that did take place was done outside the area of the logging concession; that is, it was a harm not imputable to the State that was done in areas not claimed by Awas Tingni, the reason for which the concessionaire, SOLCARSA, was duly fined a considerable penalty.

And finally, because the Commission recognizes the unfounded nature of this claim by admitting "that it is not clear or sure whether there was damage to the forest;" number 137 of its original complaint.

Finally, the claim of procedural costs should be dismissed because it is totally inappropriate, given that it has been shown that Awas Tingni has no ancestral property right and because, all along, the intent of Nicaragua has been to streamline a disproportionate land claim. Regardless of the foregoing, Honorable members of the Court, the Republic of Nicaragua reiterates its disposition toward attempting a friendly settlement that could result in the titling of lands to the Awas Tingni Indigenous Community in sufficient quantity that could ensure cultural subsistence and the development of the Community on non-ancestral lands. Thank you very much.

PRESIDENT CANÇADO TRINIDADE: Thank you very much to the Agent of the Illustrious State of Nicaragua, and also for staying within the agreed time. We now move to the final stage of these hearings. As these are arguments, the parties, if they consider it appropriate, can assert the right to reply and rejoinder, respectively. I consult the Commission as to whether it wishes proceed to reply.

IACHR (Dr. Bicudo): Yes, Honorable Judge.

PRESIDENT CANÇADO TRINIDADE: You may proceed as we previously agreed in the informal meeting; fifteen minutes for each party.

IACHR: Thank you very much, Mr. President. Mr. President, Honorable Judges, Illustrious State of Nicaragua. The State of Nicaragua, Illustrious Magistrates, defends the thesis that, in the case *sub judice*, there is no ancestral occupation. Now then, the Honorable Judges heard various anthropologists and archeologists that, with their experience, they are professors from reputed universities, and they showed quite clearly that the occupation of those lands is prior to the European occupation. The fact is that the studies of the academics we heard have taken into account the testimony of the indigenous people and, I wonder, what other persons could be heard? There is no scientific basis because those testimonies are from

what is called the oral tradition, a fundamental element for the results of the investigation done in this field. In truth, it is not possible to consider the attitude of the Illustrious Nicaraguan State legitimate, failing to recognize, because it wants to deny the collective property right in lands occupied for thousands of years by their grandfathers, and grandfathers of their grandfathers.

I also want to point out the ILO Convention cited, whose provision is, in this case, of debatable application. It must be remembered that the violation of the provisions of the American Convention is clear, that it has precedence over whichever ILO convention, hardly to be applied secondarily.

Lastly, the argument relative to the omissions mentioned by the Illustrious State before the Nicaraguan system of justice; it is not what should be considered, because the discrimination that indigenous peoples suffer before the judiciary of Nicaragua, which delays or dismisses their actions and leaves uncomplied-with decisions resulting from actions proposed by third parties, is not in favor of the indigenous people, as has been shown. It is, Honorable Judges, what had to be said, trusting in the wisdom and experience of the Honorable Judges, who know how to distribute justice fairly. Thank you very much.

PRESIDENT CANÇADO TRINIDADE: You may proceed.

IACHR (Dean Grossman): Thank you very much. I would like to reiterate what we have asserted: that, since 1987, not a single community has been titled; we refer to Appendix 11. We have not been able to find here the name "Awas Tingni Indigenous Community;" we had it in mind to give to the Community the good news that the Illustrious Government of Nicaragua had said that they had some title, but it is impossible to find that the Community has title in the official documents that have been submitted and ratified by the governmental institutions, here they are.

Second, I would also like to reiterate that the Community requested titling, and titling is a process in which the intent of the parties is taken into account. We would also like to reiterate that Nicaragua is party to the International Covenant on Civil and Political Rights, and the respective articles have been interpreted such that the fact that it has no document of title and Nicaragua has not given a single one since 1987 is a form of discrimination against indigenous peoples.

We are in agreement that this is the most exhaustive process of consultation; it has been underway for fourteen years, since 1987. It is time that the State proceeds to give documents of title to the indigenous communities of Nicaragua. The Commission has offered proof of fishing, hunting. The Manager of the Forest of the Community was here, Charlie Mclean was the Manager of the Forest. His capacity as Manager of the Forest was not denied by the Illustrious Government; he told of the things that they do there. If it had been, then the proof of ancestrality has been demonstrated, among other things, by testimony, direct documents, expert reports. Out of principle, I must definitively reject the suggestion that the representative of the Illustrious Government of Nicaragua has made, that the racial purity of an indigenous community is the way in which

international treaties establish, to establish whether or not they have a right to the land. Thanks to God and many other things, the arguments of racial purity of communities are not well received and are not a required test to establish whether or not the Community can lay claim to ancestral lands. Of course there have been processes of mestizaje, of assimilation, etc., and we definitively reject that proof of racial purity be suggested as a reason to recognize ancestral rights.

Lastly, assertions without any proof have been made, conflicts between different communities; there is a document, or *amicus curiae*, presented by the indigenous organizations and community representatives of Nicaragua that lists the indigenous communities of Nicaragua. The Commision has requested titling, because it is often the case, as the experts suggested, that in land there are processes of superimposition that are not acceptable and that violate the American Convention and of the interpretive norms. There must be an absolute stop to this, which has been without an advance in titling since 1987. We suggest that this violates the American Convention. The final result of the titling process will tell how much is to be titled to one or another community. We wait anxiously for the response with respect to the time limits not complied with, forty-five days; the non-execution of decisions; how the inexistent was ratified. The representative of the Illustrious Government of Nicaragua has said that the concession was invalid, however, that an invalid concession was amended or ratified when it was unconstitutional, instead of having opened it up to all new possibilities that public competitions bring.

I would like lastly to say that it is normal, in the entire battery of criticisms that have been made against indigenous peoples, that the fault is theirs, that the fault is their lawyer's, that they have no right, and the fault now would seem to be of their own physical make-up. We definitively reject those assertions. The lawyer Anaya will speak in the time remaining.

PRESIDENT CANÇADO TRINIDADE: Only five minutes remain.

IACHR (Prof. Anaya): Thank you. Members of the Court, as the lawyer Roque Roldán explained, there are two tendencies reflected in the law of the American countries with respect to indigenous peoples. One goes toward the assimilation of indigenous peoples and tries to strip them of their cultural traits, their cultural integrity, not letting them prosper on the lands on which they have been; and another is the modern tendency that we find in the modern treaties, in the very Constitution of Nicaragua, which attempts to strengthen the cultural integrity, the life of indigenous peoples, and attempts to give value to their own cosmology and relationship with the land and other people. We see very clearly represented in the State's assertions the first tendency that is now rejected. Rejected is a concept of ancestrality that wants a community to stay in one place, that does not value the very patterns that they have, which were explained by Dr. Stavenhagen, who recognizes the patterns of movement of indigenous peoples. But that movement does not take away their ancestrality. There is no dispute that the people of Awas Tingni, that the Community of Awas Tingni is a community of millenary existence, which has been there for hundreds of years. It is part, it is something

that is part of a larger Mayagna people, and there is this continuity of which Dr. Stavenhagen spoke. It doesn't matter—according to modern criteria of the modern tendency that is reflected in modern legal instruments—it doesn't matter that they may have moved once in a while. What does matter is that continuity with a historic entity; there is no dispute that it exists here and that its traditional traits and patterns are maintained. So we reject the concepts of the State as far as ancestrality, and the Nicaraguan Constitution itself rejects them. It doesn't even refer to the word "ancestrality," as the State says. It refers to the traditions of indigenous peoples and their property. So we reject that. Also, as far as the State's position on means of proof: that is also part of the old tendency that is rejected, where only means of proof linked to the Western system are accepted, where the oral histories of indigenous peoples are not valued. Oral evidence is already accepted by judicial entities in various countries: Colombia, Canada, the United States, and others where the oral accounts of indigenous peoples are valuable, have legal value. And it is not true that Dr. Macdonald did not pay attention to archeological evidence; he testified here that he did in fact study it, that he studied all the literature. And most importantly, the State of Nicaragua does not contradict, does not present any evidence that contradicts what Dr. Macdonald found. Rather, we presented expert Stavenhagen, who clearly said that Dr. Macdonald's methodology and the conclusions were well done, within the discipline, and he practically congratulated Dr. Macdonald for his excellent work. As far as the existence of the Community, we also see the State adopting that old rejected tendency that does not value the mechanisms, the cosmologies, the very patterns of the Community; it requires that there be some type of organization, that be based on . . . who know what, but that it not be merely an indigenous organization.

I want to end by saying that this tendency that we reject, that is rejected by the modern legal order that is being developed internationally, is that old tendency that is reflected in the old agrarian reform laws to which the State of Nicaragua refers. That tendency is identified by the United Nations as a form of racism, a form of racism and discrimination. So we reject whatever analysis that is based on those tendencies, and we hope that the Court will adopt the modern concepts that value indigenous peoples. Thank you.

PRESIDENT CANÇADO TRINIDADE: Thank you very much to the delegation of the Honorable Inter-American Commission. Next I will give the floor to the Agent of the Illustrious State of Nicaragua, so he may present the rejoinder.

GON (Mr. Castillo): Thank you very much, Mr. President. The Honorable members of the Inter-American Commission have distorted an assertion I made by establishing the premise that we are not going to title those communities that don't comply with a racial purity requirement. I never said that; what we have stated is that the Awas Tingni Community is composed of persons of different ethnic groups, and therefore, they don't have a common ancestral past and occupation of the lands they are claiming. It has also been said that the State has not denied that

Awas Tingni uses and occupied the claimed extension. That assertion is imprecise.

We have said and we have shown that there is no evidence of ancestrality; that there is only oral testimony of the interested party; and that this testimony was not contrasted with other sources such as archeology, historic censuses, testimony of other ethnic groups, public documents, etc.

We have also stated that the biodiversity of the area neither justified nor justifies the big movements for hunting and fishing that seems to be an argument that they are using to enlarge the surface area they are claiming. And we have also seen, in the maps that they have presented, how within that ample surface area claimed, the cultivation areas are reduced to a minimum.

Also, the Honorable members of the Commission have put in the State of Nicaragua's mouth an argument that we have never sustained. They say that the State gives the excuse of the claim for . . . the excuse that the Awas Tingni Community has not been titled because the claim presented is complex, and evidently, it is known by the Commission why the claim is complex. However, we have never sustained such an assertion. What we have said, and what we do sustain, is that the claim has not been resolved simply because Awas Tingni does not occupy ancestral lands and neither has it shown that.

We have also said that the area claimed by Awas Tingni over time progressively enlarges in surface area. They started with sixteen thousand hectares; today we are at 156,000 hectares. If this suit goes on much longer, we will probably arrive at 500,000 hectares, and that population will probably continue geometrically increasing.

We have also stated that the Community claims ancestral lands as if it had never been titled. It has been recognized not once, but on different occasions, having been previously titled, and they expressly stated that in a contract that they entered into with the MADENSA company; they stated it in a meeting in Managua in the presence of their legal advisor, and we could hear it from the very mouth of the indigenous people that appeared to give statements as witnesses.

Another assertion that the Honorable members of the Commission have made is relative to the SOLCARSA concession. Here, we have said that the area given in concession to SOLCARSA is not necessarily the area . . . or rather the reverse, that Awas Tingni has not demonstrated ancestrality over those lands, and consequently has not demonstrated that that concession is illegal.

And really apart from the legal situation of the lands, it should be borne in mind that the logging concession never began, was never executed, because the management plan was never approved; there was no logging. SOLCARSA's deforestation took place outside of the concession, in areas not claimed by Awas Tingni. So the harm was not a consequence of the concession granted to SOLCARSA, but rather it was entirely imputable to SOLCARSA as a harm caused by an individual. And if the State would not have sanctioned this company, well, obviously it would have done wrong. However, we have shown that the State punished SOLCARSA with a substantial pecuniary sanction.

It has been affirmed by the Honorable delegates of the Commission that the State made a commitment to provide documents of title to Awas Tingni; it is possibly referring to the MADENSA contract. However, my attention is drawn to pointing out that the Commission itself recognizes that, in that document, Nicaragua did not recognize ancestral possession; it simply committed itself to providing the documents of title to ancestral lands, something which presupposes the presentation of a claim, to an administrative entitlement, to a legal entitlement, and the effective showing of ancestrality. The problem, members of the Court, is that Awas Tingni has not demonstrated its ancestrality, that Awas Tingni had been increasing its surface area, and that Awas Tingni intends to strip third parties, legitimately titled, or with pending claims.

Finally, members of the Court, the supposed tardy compliance of the judgment that declared the nullity of the concession has been pointed out. In that respect, it is pertinent to point out that the State requested the suspension of the SOLCARSA concession shortly after the pronouncement of the judgment. Additionally, we are not at all convinced of the relevance of this issue, inasmuch as we are speaking of an action that was brought by a third party over . . . claiming the unconstitutionality of a concession granted in areas that Awas Tingni has not shown are theirs, that are not ancestral lands. Thank you, Mr. President.

PRESIDENT CANÇADO TRINIDADE: Thank you very much to the Agent of the Illustrious State of Nicaragua.

Before adjourning this hearing, I would like to thank the representatives of the Honorable Inter-American Commission on Human Rights and of the Illustrious State of Nicaragua for their collaboration and calmness in today's arguments. Thank you very much, the session is adjourned.