

**FINAL WRITTEN ARGUMENTS OF THE REPUBLIC OF NICARAGUA
ON THE MERITS OF THE ISSUE
(CASE No. 11.577 - MAYAGNA COMMUNITY OF AWAS TINGNI)
(Unofficial Translation)**

The Republic of Nicaragua respectfully calls the attention of the Honorable Inter-American Court of Human Rights with respect to the facts and/or statements that were not proven by the witnesses and experts presented by the Honorable Inter-American Commission on Human Rights; as well as the facts and/or statements that were absolutely proven by the Republic of Nicaragua during the oral hearing relative to the merits of the complaint.

D) IN RELATION TO THE CLAIM OF ANCESTRAL LANDS

The Inter-American Commission (hereinafter, the Commission) did not succeed in refuting the fact that the Indigenous Community of Awas Tingni consists of a small number of persons that do not belong to the same ethnic group, and consequently, they have neither a common history nor ancestral possession of the lands that they claim.

Appendix 12 to the Reply to the Complaint, containing a Census of 1995, that indicates the total population and ethnic composition of Awas Tingni. 111 of the 576 persons that make up that community are Spanish or Miskito.

The Commission did not succeed in proving the presence of Awas Tingni in the claimed lands previous to 1945; and consequently, the ancestral possession of the lands claimed was not shown.

The Republic of Nicaragua showed the presence of other indigenous communities in the area claimed by Awas Tingni, some of which hold legitimate indigenous communal property title granted by the State, or affirm a right to prior ancestral possession to the right alleged by Awas Tingni.

Appendices 7, 8, 9, 10, and 11 of the Reply to the Complaint. Likewise, see the maps with overlapping claims of the indigenous claims presented by the Republic of Nicaragua in the referenced Complaint Reply Brief.

Almost all of the experts presented by the Commission admitted not having direct knowledge of Awas Tingni's ancestral land claim; that is, they admitted that their professional opinions were not supported by studies carried out by third parties.

The few experts presented by the Commission that could have some direct knowledge of Awas Tingni's ancestry claim recognized the preliminary nature of it and, therefore, inconclusive nature of their research. Not being conclusive,

such studies cannot be held as scientific evidence to sustain an accusation of the lack of titling of ancestral lands.

The Republic of Nicaragua showed that the studies that were presented by the Commission were supported by simple testimony of the interested parties that attempted to ignore the interests of other indigenous communities in the area and, thus, the recognition of their identical rights.

Ethnographic Report on the document prepared by Dr. Theodore Macdonald, prepared by the archeologist Dr. Ramiro Garcia, submitted to the Inter-American Court on November 21, 2000, at the request of the Court. Previously argued during the oral hearing on the merits of the complaint.

The Republic of Nicaragua showed that the studies presented by the Commission lacked a scientific basis sufficient to ignore the evidence that archeology, petroglyphs, statues, pottery, and tombs could provide; as well as population censuses, titling processes, and historic legislation in the matter.

Ibid.

The Awas Tingni Indigenous Community confessed to its population being composed of persons from the Tilba-Lupia Indigenous Community, a community that was apparently titled by the State, and from which they migrated to their modern-day settlement of the Awas Tingni river.

Statements of the witnesses Jaime Castillo Felipe (page 15 of the transcript of the oral hearing on the merits of the complaint) and Mclean (page 158 of the same document). The title granted to the Indigenous Community of Tilba-Lupia was submitted to the Inter-American Court on November 21, 2000, at the request of that tribunal.

The Awas Tingni Indigenous Community confessed [to] having been titled on an earlier occasion by the Republic of Nicaragua, in documents signed by its legitimate representatives. If that assertion was false, that Indigenous Community's good faith would be in doubt.

Contract for the Integrated Management of the Forest, between the Awas Tingni and Maderas y Derivados de Nicaragua, S.A. (MADENSA), March 6, 1992. Submitted to the Inter-American Court on November 21, 2000, at the request of the Court and argued during the oral hearing on the merits of the complaint. This document is also contained in Appendix 1 of the Complaint Reply Brief.

The Diagnostic Study of the Indigenous Communities of the Atlantic Coast – contracted for by the Republic of Nicaragua to orient/direct its titling policy –

while it has not direct relevance to the Awas Tingni claim (inasmuch as the expert contracted decided to exclude the Awas Tingni claim from his Diagnostic Study), it put into evidence situations that [show] the complexity of the indigenous titling process:

- a) the phenomenon of proliferation of the Indigenous Communities, as a consequence of the dismemberment of their groups;
- b) the phenomenon of grouping and regrouping of titled and untitled Indigenous Communities;
- c) the phenomenon of Indigenous Community migration to occupy lands that are not ancestral;
- d) The phenomenon of titled Indigenous Communities claiming ancestral lands as if they had never been titled;
- e) Human groups that claim indigenous titles without having formally registered their status as an Indigenous Community under law.

Diagnostic Study of Land Tenure in Indigenous Communities, prepared by the Central American and Caribbean Research Council, submitted in its entirety to the Inter-American Court on November 21, 2000, in compliance with its request. Arguments given during oral hearing.

All of the above, points to the necessity of caution when dealing with indigenous title claims, especially when they are shown to be excessive and disproportionate, potentially constituting distorting precedent to areas that should legitimately be titled among Indigenous Communities.

II) IN RELATION TO THE ADMINISTRATIVE PETITION FOR TITLE

The Republic of Nicaragua showed that there is a legal framework and a competent authority to carry out Indigenous Community titling, a framework that was ignored by the Awas Tingni Indigenous Community.

Appendix 2 of the Complaint Reply Brief and Page 22 and following of the Preliminary Exceptions Brief, presented by the Republic of Nicaragua.

The Republic of Nicaragua showed that, under law No. 14, Amendment to the Law of Agrarian Reform of January 11, 1986, a titling process has been carried out that has allowed titling of 28 Indigenous Communities in the Atlantic Coast of the Republic of Nicaragua.

Appendix 11, Preliminary Exceptions presented by the Republic of Nicaragua.

The Republic of Nicaragua showed that there is not a single request for title by the Awas Tingni Indigenous Community in the archives of the Nicaraguan Institute of

Agrarian Reform, the competent authority to carry out Indigenous Community titling.

Appendix 4, Preliminary Exceptions presented by the Republic of Nicaragua.

The Republic of Nicaragua showed that the obscure petitions that the Awas Tingni Community presented – in the administrative seat – were submitted to the authorities without competence in the matter, such as the Ministry of Natural Resources (MARENA) and the Regional Government of the North Atlantic Region (RAAN).

Appendix 5, Preliminary Exceptions presented by the Republic of Nicaragua. Appendix 4, of the Complaint Reply Brief (containing the entire text of the law).

The Commission presented a supposed written petition for titling (not found in the INRA archives), in which the Awas Tingni Indigenous Community asks for information on how to go about presenting a title claim for an area of 16,000 hectares.

Appended Document presented by the Commission in its Complaint and presented again by the Republic of Nicaragua – at the request of the Commission – during the oral hearing on the merits of the complaint.

The petitions presented by the Awas Tingni Community – to the authorities without competence in the matter – successively increased the area claimed, obstructing an expeditious settlement and evidencing bad faith in its conduct.

For example:

- a) 16,000 hectares, if we are going to give credibility to the supposed petition presented to the Atlantic Coast INRA delegate;

Document appended to the Complaint presented by the Commission and again presented, during the oral hearing, by the Republic of Nicaragua, at the request of the Commission itself.

- b) 43,000 hectares, claimed in the Forest Use Contract (illegal) signed between the MARENA, the MADENSA company and the Awas Tingni Indigenous Community, dated June 13, 1994.

Back of page two, lines 26 to 28. This Writing, it is worth reiterating, is illegal in view of the fact that it was executed by María Luisa Acosta, Esq. (legal advisor of the Community) and not by the notary of the State.

- c) 66,000 hectares, approximately, according to Dr. Theodore Maconald's

statement to the Court;

See page 60, of the Oral Hearing Transcript.

- d) 95,000 hectares in the obscure petition presented to the Regional Government of the North Atlantic Region (RAAN), dated March 1996;

Found in the appendices presented by the Commission in its Complaint. Page 3, paragraph in fine, of the petition presented by the Awa Tingni Community to the RAAN Regional Council.

- e) 150,000 hectares is the area represented in the map prepared by Dr. Theodore Macdonald.

That is the area estimated by the Nicaraguan Institute of Territorial Studies based on the map – prepared in 15 days – by Dr. Theodore Madonald and his team of topographers and surveyors trained by Dr. Macdonald himself.

Awas Tingni's titling claim, with the above-explained events, is forced (as far as the purported ancestry), and excessive and disproportionate (as far as the surface area claimed).

Comparative indigenist legislation in Latin American countries does not require satisfaction of questionable ancestral titling claims based on the titling of areas that have no rational relation to the subsistence needs of the indigenous group and its cultural subsistence. Such a small group of persons could never move around and remain in such a large area, especially considering the topography of the humid, tropical area, abundant in natural resources sufficient to satisfy the needs of the group.

III) IN RELATIONS TO THE LEGAL TITLING PETITION

The Republic of Nicaragua showed that the Awas Tingni Indigenous Community never presented an ancestral lands titling petition to domestic tribunals. The claims deduced were all related to contesting the logging concession granted to the SOLCARSA company. Consequently, a legal system cannot be condemned for not having provided a legal remedy that was never requested.

See each one of the actions brought by the Community, amply documented in the evidence presented by the Commission in the appendices to its Complaint.

The Republic of Nicaragua showed that the only petition directed to the Republic's tribunals, by the Awas Tingni Indigenous Community, was focused on suspending and/or contesting the logging concession granted by the Republic of Nicaragua to

the SOLCARSA company. However, this petition was characterized by a series of negligent procedural actions – attributable to the Community's legal advisors – which notably contributed to the fact that a legal remedy was not more opportunely obtained.

Among these procedural errors, the following should be emphasized:

- a) The Community did not administratively contest the logging concession within the time limit contemplated in the logging concessions administrative procedure;
- b) The Community did not contest the logging concession through legal channels within the legal time limit to bring an *Amparo* Remedy;
- c) The Community did not request – in the *Amparo* Remedy through the de facto procedure –, the suspension of the administrative act;

Ibid. All this was argued during the oral hearings on the Preliminary Exceptions and on the merits of the Complaint. Likewise, found on pages 2 and following of the Preliminary Exceptions Brief.

The Republic of Nicaragua showed that by not bringing the unconstitutionality action against the logging concession, the Awas Tingni Indigenous Community did not exhaust domestic legal remedies. That remedy, brought by a third party, from outside the Community and a member of the North Atlantic Regional Council (RAAN), dated March 29, 1996, who showed the procedural know-how that the Community lacked for the legal formulation of its petitions.

Appendix (unnumbered) of the Complaint brought by the Commission.

The Inter-American Court has stated that it is the petitioners and not third parties that must exhaust the domestic remedies of each country.

The Republic of Nicaragua showed that the Nicaraguan legal system provided the only legal remedy that was requested of it, by declaring null by reason of unconstitutionality, the logging concession granted to the SOLCARSA company, through the Sentence issued by the Supreme Court of Justice, dated February 27, 1997.

Ibid.

IV) IN RELATION TO THE HARM CAUSED TO THE COMMUNITY

The Republic of Nicaragua has been maintaining the total inappropriateness of any claim for compensation derived from the lack of titling or the granting of the

logging concession to the SOLCARSA company. It supports its position on the following considerations (documented in the evidence and explained during the Hearing on the Merits of the Complaint):

- a) Because the Awas Tingni Community has not demonstrated ancestral occupation of the lands it claims as such;
- b) Because the Awas Tingni Community disproportionately and irrationally claims an area it has not ancestrally possessed;
- c) Because the Awas Tingni Community has not been displaced from the lands it claims, maintaining its presence in its current settlement

(See statements of Jaime Castillo, who, on page 7 of the Oral Hearing Transcript, recognizes that the Community remains in its claimed lands);

- d) Because the Awas Tingni Community has maintained unchanged its system of life, beliefs, customs, and patterns of production;
- e) Because there was no logging, due to the concession granted by the State to the SOLCARSA company, in view of the fact that the State never approved the Forest Management Plan; an indispensable prerequisite for logging

Appendix 14, Complaint Reply Brief.

- f) Because the State was not remiss in proceeding to monetarily sanction the SOLCARSA company for harm to the forest it caused of its own accord;

Appendix 13, Complaint Reply Brief. The Inter-American Commission itself recognizes the application of this fine in an appendix that it presented in its Complaint (identified as Ministerial Resolution No. 02-97).

- g) Because the Inter-American Commission itself recognizes the unfounded nature of any monetary claim, admitting that it is not sure if one arose;

Complaint, paragraph 137.

The Republic of Nicaragua, likewise maintains the unjusticiability of any claim or reparation due to the actions of its tribunals of justice. As was pointed out in the previous section, the Awas Tingni Community:

- a) Did not request titling of its alleged ancestral lands through legal channels;
- b) It did not exhaust the domestic legal remedies;

- c) It did not observe diligent conduct in its procedural actions;
- d) It obtained the only legal remedy requested: the nullification of the logging concession.

Furthermore, the alleged legal delay imputed to the domestic courts – and to which the procedural actions of the Awas Tingni Indigenous Community contributed – did not result in any type of moral or pecuniary damage to the detriment of this Community, in view of the fact that:

- a) The Community was neither displaced nor suffered invasion of the occupied areas;
- b) The Community has maintained its practices of hunting, fishing, growing crops, and visiting its sacred sites, within the area that it claims as ancestral;
- c) The Community has maintained unaltered its system of living, without its social cohesion, values, beliefs and customs having been affected; as neither have been its health standards and production patterns;
- d) The Community suffered no lost profits as a resulting harm, and did not alter its ancestral system of living.

The Republic of Nicaragua showed having carried out considerable advances in the area of Indigenous Community titling on the Atlantic Coast, concretized in the following acts:

- a) Contracting of a Study to provide a Diagnostic of the Situation of land tenure by the Communities in the areas claimed;

Appendix 9 of the Preliminary Exceptions Brief. Later, it was submitted in its entirety to the Inter-American Court, on November 21, 2000, at the request of that high tribunal.

- b) Preparation of a "Special Bill that Regulates the Communal Property Regime of the Indigenous Communities of the Atlantic Coast and Bosawás," that would substantially improve the existing legal and institutional framework;

Appendix 6, Complaint Reply Brief.

- c) Conduct of an extremely ample consultation process – relative to the law in question – with the Indigenous Communities.

Documents presented during the Oral Hearing on the merits of the case, with the permission of the Inter-American Court.

V) IN RELATION TO THE CLAIM FOR COSTS IN THIS CASE

For the following reasons, the Republic of Nicaragua reiterates its position that there should be no ruling against it to pay costs:

- a) Because the Republic of Nicaragua proved its allegations in good faith, succeeding in proving that the Awas Tingni Indigenous Community did not petition for the titling of its lands claimed before the courts of the Republic, it did not exhaust domestic legal remedies; having obtained – furthermore – the only legal remedy requested, which is, the nullification of the logging concession;
- b) Because, likewise, the Republic of Nicaragua showed the insufficiency of the evidence presented by the Commission with respect to Awas Tingni's ancestral possession, as well as the excessive and out-of-proportion nature of its claim, to the detriment of third parties.
- c) Because the American Convention has instituted a system for the protection of human rights in the continent, in which it has attributed functions to the Commission and to the Court, the costs of which are financed by the budget of the OAS;

Aloeboetoe et al. case, Reparations. Judgment of September 10, 1993.
- d) Because access to the Commission or to the Court is not subject to any fee or tariff;
- e) Because article 45 of the Court's Regulations states that "the party requesting the production of an item of evidence shall cover its cost"
- f) Because the Republic of Nicaragua finances the function of the organizations of the American human rights system of through its annual dues;
- g) Because the Commission preferred to carry out its functions by contracting professionals instead of doing it with its own personnel;
- h) Because the Commission squandered its own budgetary appropriation by bringing to the Oral Hearing a large number of "experts and witnesses" that had no direct knowledge of the facts about which they were to testify;

This was the case of: Rodolfo Stavenhagen; Brooklyn Rivera; Lottie Cunningham;

Galio Gurdián; among others, who had no direct knowledge of the Awas Tingni claim and only came to the Oral Hearing to express their academic opinions or their personal feelings.

- i) Because to shift to the State the irrational and frivolous expenses of the Commission would be a legal inequity, especially when the accused State is a poor country that does not have the capacity to "compete" with the Commission in hiring dozens of experts and exhibiting dozens of witnesses;
- j) Because the inter-american human rights system was not designed and accepted by the States to subject themselves to an "all powerful" opponent, the Inter-American Commission, assisted by its own personnel and budget and with the capacity to deploy an infrastructure of material and human resources quite above the capacity of the accused State;
- k) Because the Republic of Nicaragua is one of the poorest States of the hemisphere and it does not have the resources to finance "the squanderings" of the Commission and its advisors; resources, moreover, that it should commit to finance the costly process of titling and demarcation of lands of indigenous communities.
- l) Because the Indigenous Community of Awas Tingni lacks material resources to defray the local expenses it could have incurred in its alleged administrative and legal actions, expecting that its expenses were defrayed by known non-governmental organizations involved in international indigenist issues.

For all of the above, the Republic of Nicaragua denies, rejects and controverts all of the accusations of violation of different sections of the American Convention [on] Human Rights, as stated by the Inter-American Commission in its Complaint.

See the document presented by the Republic of Nicaragua during the Oral Hearing on the merits of the complaint, which, as requested is attached to this document.

Sincerely,

Edmundo Castillo Salazar
Agent of the Republic of Nicaragua