INTER-AMERICAN COURT OF HUMAN RIGHTS

THE CASE OF THE MAYAGNA (SUMO) AWAS TINGNI COMMUNITY *V.* NICARAGUA

JUDGMENT OF AUGUST 31, 2001

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

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

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

also present,

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

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

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[*] Pursuant to the March 13, 2001 Order of the Court on Transitory Provisions

I
INTRODUCTION OF THE CASE

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

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

3. The Commission also requested that the Court declare that the State must establish a legal procedure to allow rapid demarcation and official recognition of the property rights of the Mayagna Community, as well as that it must abstain from granting or considering the granting of any concessions to exploit natural resources on the lands used and occupied by Awas Tingni until the issue of land tenure affecting the community has been resolved.

4. Finally, the Commission requested that the Court sentence the State to payment of equitable compensation for material and moral damages suffered by the Community, and to payment of costs and expenses incurred in prosecuting the case under domestic jurisdiction and before the inter-American System.

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pertaining to the Rules of Procedure of the Court, this Judgment on the merits of the case is rendered under the terms of the Rules of Procedure approved by the September 16, 1996 Order of the Court.

IV
PROCEEDING BEFORE THE COURT

29. The Commission filed the application before the Court on June 4, 1998.

30. The Commission appointed Claudio Grossman and Hélio Bicudo as its delegates, David Padilla, Hernando Valencia and Bertha Santoscoy, as its legal advisors, and James Anaya, Todd Crider, and María Luisa Acosta Castellón as the assistants.

31. On June 19, 1998, after a preliminary examination of the application by the President of the Court (hereinafter "the President"), the Secretariat of the Court (hereinafter "the Secretariat") notified the State of the application, as well as of the periods within which it should respond to it, raise preliminary objections, and appoint its representatives. Furthermore, it invited the State to appoint an *ad hoc* Judge. That same day, the Secretariat requested the Commission to send some pages of the petition annexes which were illegible.

32. On July 2, 1998, Nicaragua appointed Alejandro Montiel Argüello as *ad hoc* Judge, and Edmundo Castillo Salazar as its agent.

33. That same day, the Commission submitted to the Court copies of the application annex pages requested by the Secretariat (*supra* para. 31), as well as the addresses and powers of attorney of the representatives of the victims, with the exception of Todd Crider's power of attorney, which was submitted on July 24, 1998.

34. On August 18, 1998, the State attested the appointment of Rosenaldo J. Castro S. and Bertha Marino Argüello as its legal advisors.

35. On August 19, 1998, Nicaragua filed the preliminary objection stating that domestic remedies had not been exhausted, pursuant to articles 46 and 47 of the Convention, and requested that the Court declare the application inadmissible.

36. On September 25, 1998, the Commission submitted its observations to the preliminary objection raised by the State.

37. On October 19, 1998, the State submitted its reply to the application.

38. On January 27, 1999, the Organization of Indigenous Syndics of the Nicaraguan Caribbean (OSICAN) submitted a brief as *amicus curiae*. On February 4, 1999, the Secretariat received a note from Eduardo Conrado Poveda, in which he acceded to the abovementioned *amicus curiae* brief.

39. On March 15, 1999, the Secretariat requested that the State send various documents offered as annexes in the briefs of reply to the application and on preliminary objections, which had not been submitted at that time. Documents requested from the reply to the application were: pages 129 and 130 of annex 10; maps and physical descriptions offered in annex 15, and documents pertaining to titling of neighboring communities to Awas Tingni, offered in that same annex. The following documents were requested for annex 10 of the brief on preliminary objections: estimated projections of the geographical location of the area claimed by the Awas Tingni Community, claims by other communities, "overlap" of claims, *ejido* lands, national lands, and other illustrations relevant to the case; a certification by the *Instituto Nicaragüense de Reforma Agraria* (hereinafter "INRA") in connection with the request for titling by the Awas Tingni Community; the Nicaraguan Constitution; certification of articles of the Nicaraguan Legal Codes, relevant Laws and Decrees, and certification of the actions taken by Central Government institutions, decentralized bodies or autonomous entities, and other institutions of the National Assembly and the Supreme Court of Justice of Nicaragua.

40. On May 26, 1999, the State submitted a brief to which it attached the following documents: the Nicaraguan Constitution, with its amendments, the Amparo Law, Law No. 290 and pages 8984 to 8989 of the Official Newspaper La Gaceta No. 205, of October 30, 1998. In that same brief, Nicaragua stated that it would not submit the maps and physical descriptions offered as annex 15 in its brief replying to the application, because "the maps submitted with the brief on preliminary objections show the geographical location of the area claimed by the Community, claims by other communities, physical descriptions, and so forth". The State also expressed that it would not submit the INRA certification regarding titling of the Awas Tingni Community, offered as annex 10 of the brief on preliminary objections, "because that same brief […] included a certification issued by that institution on this same affair, on August 5, 1998". Regarding pages 129 and 130 of annex 10 of the brief replying to the application, the State indicated that said annex actually ended on page 128. As regards the documents pertaining to titling of other indigenous communities, the State pointed out that, if it deemed this appropriate, it would submit them later on during the proceedings.

41. On May 28, 1999, the Canadian organization Assembly of First Nations (AFN) submitted a brief in English, acting as *amicus curiae.* The Spanish version of that document was presented in February, 2000.

42. On May 31, 1999, the organization International Human Rights Law Group submitted a brief in English, acting as *amicus curiae.*

43. A public hearing was held on preliminary objections, at the seat of the Court, on May 31, 1999.

44. On February 1, 2000, the Court rendered its Judgment on preliminary objections, in which it dismissed the preliminary objection raised by Nicaragua.

45. On February 2, 2000, the Secretariat requested that the Commission send the definitive list of witnesses and expert witnesses offered by the Commission to render testimony at the public hearing on the merits of the case. The Commission submitted said information on the 18th of that same month and year.

46. On March 20, 2000, the President issued an Order convening the Inter-American Commission and the State to a public hearing on the merits, to be held at the seat of the Court on June 13, 2000. That public hearing did not take place due to budgetary cutbacks which made the Court postpone its XLVIII Regular Session, at which that hearing was to take place.

47. On April 7, 2000, the State submitted a brief stating "the names of the persons who w[ould] explain the content and scope of the documentary evidence offered at the appropriate time", for the following persons to be heard as witnesses and expert witnesses at the public hearing on the merits of the present case: Marco Antonio Centeno Caffarena, Director of the Office of Rural Titling; Uriel Vanegas, Director of the Secretariat of Territorial Demarcation of the Regional Council of the RAAN; Gonzalo Medina, advisor and an expert in Geodesics and Cartography at the Nicaraguan Institute of Territorial Studies, and María Nella Rocha, Special Public Attorney for the Environment at the Office of the Attorney General of the Republic.

The arguments submitted by the State in said brief indicate that testimony of the witnesses and expert witnesses offered would contribute to establishing:

> a) damages caused to property rights of indigenous communities that are neighbors of the Mayagna Awas Tingni Community, if title were given to the disproportionate area claimed by that Community [;]
>
> b) damages to land claims of the rest of the indigenous communities of the Atlantic Coast of Nicaragua, if the disproportionate area claimed by the Awas Tingni Indigenous Community were allocated to it;
>
> c) the interest of the State in carrying out an equable and objective titling process on the lands of the Indigenous Communities, which will safeguard the rights of each one of the Communities; arguments presented in the brief on Preliminary Objections and in the Reply to the Application, and supported by documents submitted by means of the Annexes previously referred to.

48. On April 13, 2000, the Commission sent a brief in which it requested that the Court order the State to adopt "the necessary measures to ensure that its officials do not act in such a way that they tend to apply pressure on the Community to give up its claim, or that tends to interfere in the relationship between the Community and its attorneys, [, and…] that it cease to attempt to negotiate with members of the Community without a prior agreement or understanding with the Commission and the Court in that regard". The Commission attached an April 12, 2000 brief by James Anaya, legal representative of the Community, to Jorge E. Taiana, Executive Secretary of the Commission, which included as an annex the report prepared by María Luisa Acosta Castellón on the meeting between officials of the State and the Awas Tingni Community, held on March 30 and 31, 2000, in the offices of the Nicaraguan Ministry of Foreign Affairs.

49. On April 14, 2000, the Secretariat gave the State 30 days within which to submit its comments to the aforementioned brief. On May 10 of that same year, Nicaragua stated that it had not applied any pressure at all on the Community nor had it interfered in the Community's relations with its legal representatives. The State also indicated its willingness to seek a friendly settlement through direct and exclusive conversations with the Commission. It submitted an attached document dated February 3, 2000, with the title "record of appointment of the representatives of the inhabitants who constitute the Mayagna ethnic group of the Community of Awas Tingni, Municipality of Wa[s]pam, Río Coco, RAAN".

50. On May 10, 2000, the Commission sent a brief in which it stated that Nicaragua, in its reply to the application, had not offered witnesses nor expert witnesses. It also added that the State had not argued that *force majeure* or other reasons justified admitting evidence not listed in its reply, and for this reason the Commission requested that the Court declare the calling of witnesses and expert witnesses offered by Nicaragua inadmissible (*supra* para. 47).

51. On June 1, 2000, the Secretariat requested that the State submit, no later than June 15 of that year, the grounds for or comments on its offering of witnesses and expert witnesses, for the President to consider their admissibility. In its August 18, 2000 Order, the Court reiterated its request for the State to submit the grounds for the extemporaneous proposal of witnesses and expert witnesses (*supra* para. 47); the Court also requested that the State specify which persons were offered as witnesses and which as expert witnesses.

52. On May 31, 2000, the Hutchins, Soroka & Dionne law firm submitted an *amicus curiae* brief in English, on behalf of the Mohawks Indigenous Community of Akwesasne.

53. On September 5, 2000, the State submitted a brief in which it stated that the persons listed in its April 7, 2000 brief (*supra* para. 47) had been offered as expert witnesses. The following day the Secretariat, under instructions by the President, asked the Commission to send its observations to that brief, as well as its definitive list of witnesses and expert witnesses by September 12, 2000.

54. On September 12, 2000, the Commission sent a note in which it upheld its request for the appointment of expert witnesses offered by the State to be declared inadmissible, since the State did not give reasons to substantiate the extemporaneous proposal. In that same note, the Commission gave the definitive list of its witnesses and expert witnesses, including as an expert witness Theodore Macdonald Jr., who in the application had been offered as a witness.

55. In his September 14, 2000 Order, the President decided that the offer of evidence made by the State on April 7, 2000 *(supra* para. 47*)* was time-barred; however, as evidence to facilitate adjudication of the case, in accordance with article 44(1) of the Rules of Procedure, the President summoned Marco Antonio Centeno Caffarena to come before the Court as witness. The President also rejected the request by the Commission for Theodore Macdonald Jr. to appear as an expert witness, because it was time-barred, and admitted him as a witness, as originally offered. The President also summoned witnesses Jaime Castillo Felipe, Charly Webster Mclean Cornelio, Wilfredo Mclean Salvador, Brooklyn Rivera Bryan, Humberto Thompson Sang, Guillermo Castilleja and Galio Claudio Enrique Gurdián Gurdián, and expert witnesses Lottie Marie Cunningham de Aguirre, Charles Rice Hale, Roque de Jesús Roldán Ortega and Rodolfo Stavenhagen Gruenbaum, all of them offered by the Commission in its application, to render testimony at the public hearing on the merits of the case, scheduled to be held at the seat of the Court on November 16, 2000.

56. On October 5, 2000, the Commission submitted a brief in which it requested the good offices of the Court for the public hearing on the merits to be held at the seat of the Supreme Court of Justice of Costa Rica, given the large number of people who had shown an interest in attending that hearing.

57. On October 20, 2000, the President issued an Order in which he informed the Commission and the State that the public hearing convened by the September 14, 2000 Order would be held at the seat of the Supreme Electoral Board of Costa Rica, starting at 16:00 hours on November 16, 2000, to hear the testimony and reports, respectively, of the witnesses and expert witnesses previously summoned.

58. On October 26, 2000, the State sent a brief requesting the Court to reject the request by the Commission to hold the public hearing on the merits at the seat of the Supreme Court of Justice of Costa Rica, because the reasons given were "purely speculative" and were not "sufficient juridical reason to justify the

transfer of said hearings".

59. On October 27, 2000, the Commission sent a brief with a list of 19 members of the Awas Tingni Community who would attend the public hearing as observers.

60. On that same day, the President issued an Order in which he decided that, given the request by the State for the public hearing on the merits be held at the seat of the Court and that the number of members of the Mayagna Community who would attend the hearing, according to the Commission, was much smaller than had originally been envisioned, the reason given for holding the public hearing outside the seat of the Court did not exist, and he therefore decided that the hearing would be held at the seat of the Court, on the same day and at the same time specified in his October 20, 2000 Order (*supra* para. 57).

61. In November, 2000, Robert A. Williams Jr., on behalf of the organization National Congress of American Indians (NCAI), submitted a brief, in English, acting as *amicus curiae.*

62. On November 16, 17, and 18, 2000, at the public hearing on the merits of the case, the Court heard the testimony of the witnesses and expert witnesses offered by the Commission and that of the witness summoned by the Court in accordance with article 44(1) of the Rules of Procedure. The Court also heard the final oral pleadings of the parties.

There appeared before the Court:

For the Inter-American Commission on Human Rights:

Hélio Bicudo, delegate;
Claudio Grossman, delegate;
Bertha Santoscoy, attorney; and
James Anaya, assistant.

For the State of Nicaragua:

Edmundo Castillo Salazar, agent;
Rosenaldo Castro, advisor;
Betsy Baltodano, advisor; and
Ligia Margarita Guevara, advisor.

Witnesses offered by the Inter-American Commission on Human Rights:

Jaime Castillo Felipe (Interpreter: Modesto José Frank Wilson);
Charly Webster Mclean Cornelio;
Theodore Macdonald Jr.;
Guillermo Castilleja;
Galio Claudio Enrique Gurdián Gurdián;
Brooklyn Rivera Bryan;
Humberto Thompson Sang; and
Wilfredo Mclean Salvador.

Expert witnesses offered by the Inter-American Commission on Human Rights:

Rodolfo Stavenhagen Gruenbaum;
Charles Rice Hale;
Roque de Jesús Roldán Ortega; and
Lottie Marie Cunningham de Aguirre.

Witness summoned by the Inter-American Court of Human Rights (art. 44(1) of the Rules of Procedure):

Marco Antonio Centeno Caffarena.

63. During his appearance at the public hearing on the merits of the case on November 17, 2000, Marco Antonio Centeno Caffarena offered several documents to substantiate his testimony, and on November 21, 2000 he submitted eight documents *(infra* para. 79 and 95).

64. On November 24, 2000, the Court, in accordance with article 44 of its Rules of Procedure, decided that it was useful to add to the body of evidence in this case the following documents offered by Marco Antonio Centeno Caffarena: a copy, certified by a notary public, of the February 22, 1983 certification of the entry in the Public Registry of Real Estate of the Department of Zelaya, on February 10, 1917, of estate No. 2111, and the ethnographic expert opinion by Ramiro García Vásquez on the document prepared by Theodore Macdonald, "Awas Tingni an Ethnographic Study of the Community and its Territory" (*infra* paras. 79 and 95). The Court also asked that the State, no later than December 15, 2000, submit a copy of the complete study, "Diagnostic study of land tenure in the indigenous communities of the Atlantic Coast", prepared by the *Central American and Caribbean Research Council*.

65. On December 20, 2000 the State complied with the request made by the

Court in the Order mentioned in the previous paragraph, by providing a copy of the General framework, Executive summary and Final Report of the document "Diagnostic study of land tenure in the indigenous communities of the Atlantic Coast", prepared by the *Central American and Caribbean Research Council* (*infra* paras. 80 and 96).

66. On January 29, 2001, the Commission submitted a note together with three documents: comments by Theodore Macdonald on January 20, 2001, and comments by Charles Rice Hale on January 7, 2001, both in connection with the ethnographic expert opinion by Ramiro García Vásquez on the document prepared by Theodore Macdonald, "Awas Tingni an Ethnographic Study of the Community and its Territory" (*infra* paras. 81 and 97); and a copy of the document "Awas Tingni an Ethnographic Study of the Community and its Territory. 1999 Report".

67. On June 21, 2001, the Secretariat, following instructions by the President, granted the Commission and the State up to July 23 of that year to submit their final written arguments. On July 3, 2001, the Commission requested an extension until August 10 of that same year to submit its brief. On July 6, 2001, the Secretariat, following instructions by the President, informed the Commission and the State that the extension requested had been granted.

68. In its July 31, 2001 note, the Secretariat, following instructions by the President and pursuant to article 44 of the Rules of Procedure, requested that the Commission submit the documentary evidence and pleadings to substantiate the request for payment of reparations, costs and expenses submitted by the Commission in the point on petitions in its application (*supra* para. 4), no later than August 10, 2001.

69. On July 31, 2001 the Secretariat, following instructions by the Court and in accordance with article 44 of the Rules of Procedure, granted Nicaragua up to August 13, 2001 to supply, as evidence to facilitate the adjudication of the case, the following documents: existing title deeds of the Awas Tingni Community (Mayagna Community); of the Ten Communities (Miskita Community); of the Tasba Raya Indigenous Community (also known as the Six Communities), which includes the communities of Miguel Bikan, Wisconsin, Esperanza, Francia Sirpi, Santa Clara and Tasba Pain (Miskito Communities) and of the Karatá Indigenous Community (Miskito Community). These documents were not submitted to the Court.

70. On August 8, 2001, the State objected to the parties being granted the possibility of submitting final written arguments and requested that, in case the Court decided to proceed with the admission of those pleadings, the State be granted an extension up to September 10, 2001, to submit them. The following day, the Secretariat, under instructions by the President, informed the State that it

had been a constant and uniform practice at the Court to grant the parties the opportunity to submit final written arguments, taken to be a summary of the positions stated by the parties at the public hearing on the merits, in the understanding that said briefs were not subject to additional contradictory comments by the parties. In connection with the request for an extension of the period for the State to submit its final pleadings, the Secretariat expressed that, following instructions by the President, given the time allotted to the parties to submit their final written arguments, and so as to avoid impairing the balance which the Court must maintain in protecting human rights, legal certainty and procedural equity, an unpostponable period up to August 17, 2001, was granted to both parties.

71. On August 10, 2001, the Commission submitted its final written arguments, which included an annex (*infra* para. 82).

72. On August 17, 2001, Nicaragua submitted its final written pleadings.

73. On August 22, 2001, the Commission extemporaneously submitted the brief pertaining to reparations, costs and expenses (*infra* para. 159).

74. On August 25, 2001, the State requested that the Court not consider the brief submitted by the Commission on reparations, costs and expenses, because it was time-barred.

V

THE EVIDENCE

A) DOCUMENTARY EVIDENCE

75. The Inter-American Commission submitted copies of 58 documents in 50 annexes with its application (*supra* paras. 1 and 29).[1]

76. In its reply to the application (*supra* para. 37), the State attached copies of 16 documents contained in 14 annexes.[2]

77. During the preliminary objections stage, the State submitted copies of 26

Note: citations 1-8 omitted

documents.[3]

78. The Commission submitted copies of 27 documents during the preliminary objections stage. [4]

79. On November 21, 2000, Marco Antonio Centeno Caffarena, General Director of the Office of Rural Titling of Nicaragua, sent copies of 8 documents *(supra* paras. 63 and 64).[5]

80. On December 20, 2000, in response to a request by the Court, the State submitted a copy of one document *(supra* para. 65).[6]

81. The Commission submitted 3 documents together with its note of January 29, 2001 (*supra* para. 66)[7].

82. On August 10, 2001, together with the final written pleadings, the Commission submitted one document as an annex to that brief (*supra* para. 71).[8]

B) ORAL AND EXPERT EVIDENCE

83. At the public hearing held on November 16, 17 and 18, 2000 (*supra* para. 62), the Court heard the testimony of eight witnesses and four expert witnesses offered by the Inter-American Commission, as well as the testimony of one witness summoned by the Tribunal, exercising its authority under article 44(1) of the Rules of Procedure.

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VI
EVALUATION OF THE EVIDENCE

84. Article 43 of the Rules of Procedure indicates the appropriate procedural moment to submit items of evidence and their admissibility, as follows:

> Items of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto and, when appropriate, in the document setting out the preliminary objections and in the answer thereto. Should any of the parties allege *force majeure*, serious impediment or the emergence of supervening events as grounds for producing an item of evidence, the Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing parties are guaranteed the right of defense.

85. Article 44 of the Rules of Procedure empowers the Court to:

> 1. Obtain, on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant.
>
> 2. Request the parties to provide any evidence within their reach or any explanation or statement that, in its opinion, may be useful.
>
> 3. Request any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point. The documents may not be published without the authorization of the Court.
> […]

86. It is important to point out that the principle of presence of both parties to an action rules matters pertaining to evidence. This principle is one of the foundations for article 43 of the Rules of Procedure, as regards the time at which evidence must be submitted for there to be equality among the parties.

87. Given that the purpose of evidence is to demonstrate the veracity of the facts alleged, it is extremely important to establish the criteria applied by an international human rights court in evaluating items of evidence.

88. The Court has discretional authority to evaluate testimony or statements made, both in writing and by other means. For this, it can adequately evaluate evidence following the rule of "competent analysis", which allows the judges to arrive at a conclusion on the veracity of the facts alleged, taking into account the object and purpose of the American Convention.[9]

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[9] *cfr. Ivcher Bronstein Case.* Judgment of February 6, 2001. C Series No. 74, para. 69; *"The Last Temptation of Christ" (Olmedo Bustos et al.).* Judgment of February 5, 2001. C Series No. 73, para. 54; and *Baena Ricardo et al.* Judgment of February 2, 2001. C Series No. 72, para. 70.

89. So as to obtain the greatest possible number of items of evidence, this Court has been very flexible in admitting and evaluating them, following the rules of logic and based on experience. A criterion which has already been mentioned and applied previously by the Court is non-formalism in evaluation of evidence. The procedure established for contentious cases before the Inter-American Court has its own characteristics that differentiate it from that which is applicable in domestic legal processes, as the former is not subject to the formalities of the latter.

90. For this reason, "competent analysis" and the non-requirement of formalities in admission and evaluation of evidence are fundamental criteria for its evaluation, as evidence is assessed rationally and as a whole.

91. The Court will now assess the value of the items of evidence tendered by the parties in the instant case.

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92. Regarding the documentary evidence tendered by the Commission and by the State, which was neither disputed nor challenged, nor were questions raised on its authenticity, this Court attaches legal value to that evidence and admits it into evidence in the instant case.

93. The documents "Awas Tingni. An Ethnographic Study of the Community and its Territory", prepared by Theodore Macdonald in February, 1996; "Ethnographic expert opinion on the document prepared by Dr. Theodore Macdonald", written by Ramiro García Vásquez, and several maps of the territory occupied by the Awas Tingni Community, were challenged as regards their content. The Court takes into account the various positions of the parties regarding said documents; nevertheless, the Court believes it useful to admit them into evidence in the present case.

94. Regarding the newspaper clippings tendered by the Commission, the Court believes that even though they are not properly documentary evidence, they can be appraised insofar as they reflect publicly or well-known facts, statements by high-level State agents, or corroborate what is established in other documents or testimony received during the proceedings.[10]

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[10] *cfr. Ivcher Bronstein case, supra* note 9, para. 70; *Baena Ricardo et al. case, supra* note 9, para. 78; and *Constitutional Court case,* Decision of January 31, 2001. C Series No. 71, para. 53.

95. The documents tendered by Marco Antonio Centeno Caffarena on November 21, 2000, at the public hearing, were assessed by the Court, and in its Order of November 24, 2000, this Court admitted into evidence, pursuant to article 44 of its Rules of Procedure, two of the eight documents he submitted (*supra* paras. 63, 64 and 79).

96. The document "General diagnostic study of land tenure in the indigenous communities of the Atlantic Coast", prepared by the Central American and Caribbean Research Council, was tendered by the State on December 20, 2000, as requested by the November 24, 2000 Court Order (*supra* paras. 64, 65 and 80). Since that document was requested by the Court, based on article 44 of its Rules of Procedure, it is admitted into evidence in the instant case pursuant to the provision in subparagraph one of that same norm.

97. The Court finds the three documents tendered by the Commission on January 29, 2001 (*supra* paras. 66 and 81) to be useful, especially since they were not disputed nor challenged, nor were their authenticity or veracity questioned. Therefore, they are admitted into evidence in the instant case.

98. The body of evidence of a case is indivisible and is formed by the evidence tendered throughout all stages of the proceedings.[11] For this reason, the documentary evidence tendered by the State and by the Commission during the preliminary objections stage is admitted into evidence in the present case.

99. The State did not submit the documents requested by the Court on July 31, 2001, as evidence to facilitate adjudication of the case (*supra* para. 69*)*. In this regard, the Court makes the observation that the parties must submit to the Court the evidence requested by the Court, whether documents, testimony, expert opinions, or other types of evidence. The Commission and the State must supply all required evidentiary items -*ex officio,* as evidence to facilitate adjudication of the case, or upon a request by a party- for the Court to have as many elements of judgment as possible to determine the facts and as a basis for its decisions. In this regard, it must be taken into account that in proceedings on violations of human rights it may be the case that the applicant does not have the possibility of tendering evidence which can only be obtained with the cooperation of the State.[12]

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11 *cfr. Case of the "Street Children" (Villagrán Morales et al.). Reparations* (art. 63.1 American Convention on Human Rights). Judgment of May 26, 2001. C Series No. 77, par 53; and *Blake case. Reparations* (art. 63.1 American Convention on Human Rights). Judgment of January 22, 1999. C Series No. 48, para. 28.

12 *cfr. Baena Ricardo et al. case, supra* note 9, para. 81; *Durand and Ugarte case.* Judgment of August 16, 2000. Series C No. 68, para. 51; and *Neira Alegría et al. case.* Judgment of January 19, 1995. C Series No. 20, para. 65.

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* *

100. Regarding the expert opinions and testimonial evidence heard, which was neither challenged nor disputed, the Court admits it into evidence only insofar as it is in accordance with the object of the respective examination.

101. In the brief submitting its final arguments, the State expressed that:

> Almost all the expert witnesses presented by [t]he Commission recognized that they had no direct knowledge of the claim to ancestral lands made by the Awas Tingni Indigenous Community; in other words, they recognized that their professional opinions were based on studies carried out by other persons. The few experts presented by [t]he Commission who might have some direct knowledge of the claim to ancestral rights made by Awas Tingni, recognized the preliminary and, therefore, inconclusive nature of their essays. As those studies are not conclusive, they should not be admitted as scientific evidence to substantiate an accusation of non-titling of ancestral lands.

102. Regarding the above, the Court has discretionary authority to evaluate statements and pronouncements submitted to the Court. For this purpose, the Court will conduct an appropriate appraisal of the evidence, following the rules of "competent analysis".[13]

VII
PROVEN FACTS

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

a. the Awas Tingni Community is an indigenous community of the Mayagna or Sumo ethnic group, located in the Northern Atlantic Autonomous Region (RAAN) of the Atlantic Coast of Nicaragua; [14]

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

Note: citations 14-45 omitted

b. the administrative organization of the RAAN is formed by a Regional Council, a Regional Coordinator, municipal and communal authorities, and other bodies corresponding to the administrative subdivision of the municipalities;[15]

c. the organization of the Awas Tingni Community includes a Board of Directors whose members are the Town Judge, the Syndic, the Deputy Syndic, and the Person Responsible for the Forest. These members are elected in an assembly of all adult members of the Community, and they answer directly to that assembly;[16]

d. the Mayagna (Sumo) Awas Tingni Community is formed by more than six hundred persons; [17]

e. the members of the Community subsist on the basis of family farming and communal agriculture, fruit gathering and medicinal plants, hunting and fishing. These activities, as well as the use and enjoyment of the land they inhabit, are carried out within a territorial space in accordance with a traditional collective form of organization;[18]

f. there are "overlaps" or superpositions of communal lands claimed by the indigenous communities of the Atlantic Coast. Some communities allege rights over the same lands claimed by the Awas Tingni Community;[19] furthermore, the State maintains that part of the lands claimed by the Awas Tingni Community belong to the State;[20]

g. the Community has no real property title deed to the lands it claims;[21]

h. on March 26, 1992, a contract was signed by the Awas Tingni Community and Maderas y Derivados de Nicaragua, S.A. (MADENSA) for the comprehensive management of the forest;[22]

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

Community's territorial claims;[23]

Concession to the SOLCARSA corporation for the utilization of timber

j. on January 5, 1995, the National Forestry Service of MARENA approved the forest management plan submitted by SOLCARSA to utilize timber "in the area of the Wawa River and Cerro Wakambay". In March, 1995, that plan was submitted to the Regional Council of the RAAN. On April 28, 1995, the Regional Coordinator of the RAAN and the SOLCARSA corporation signed an agreement, and on June 28 of that year the Board of Directors of the Regional Council of the RAAN, in resolution No. 2-95, recognized that agreement and authorized the beginning of logging operations in the area of Wakambay, as set forth in the forest management plan;[24]

k. on March 13, 1996 the State, through MARENA, granted a 30 year concession to the SOLCARSA corporation to manage and utilize the forest in an area of roughly 62,000 hectares located in the RAAN, between the municipalities of Puerto Cabezas and Waspam;[25]

l. SOLCARSA was sanctioned by Ministerial Order No. 02-97, adopted by MARENA on May 16, 1997, for having illegally felled trees "on the site of the Kukulaya community" and for having carried out works without the environmental permit;[26]

m. on February 27, 1997 the Constitutional Panel of the Supreme Court of Justice declared the concession granted to SOLCARSA to be unconstitutional because it had not been approved by the plenary of the Regional Council of the RAAN (*infra* para. 103(q)(iii)). Subsequently, the Minister of MARENA requested that the Regional Council of the RAAN approve this concession;[27]

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

Administrative efforts made by the Awas Tingni Community

ñ. on July 11, 1995 María Luisa Acosta Castellón, representing the Community, submitted a letter to the Minister of MARENA, with a request that no further steps be taken to grant the concession to the SOLCARSA corporation without an agreement with the Community. The letter also stated that MARENA had the duty to "facilitate the definition of the communal lands and [...] to avoid damaging [...] the territorial claims of the Community", since it was thus stipulated in the agreement signed by the Community, MADENSA, and MARENA in May, 1994 (supra para. 103 (i);[29]

o. in March, 1996 the Community submitted a brief to the Regional Council of the RAAN, in which it requested "that the Regional Council initiate a study process leading to an appropriate territorial demarcation" with participation by the Awas Tingni Community and other interested communities, "so as to ensure their property rights on their ancestral communal lands", and to "prevent the granting of concessions for exploitation of natural resources within the area under discussion without prior consent by the Community". For this, they proposed the following: a) an evaluation of the ethnographic study submitted by the Community and, if necessary, a supplementary study; b) a process of negotiation between the Awas Tingni Community and the neighboring communities regarding the borders of their communal lands; c) identification of State lands in the area; and d) "delimitation of the communal lands of Awas Tingni". The Community stated that the request was submitted "due to lack of administrative remedies available within the Nicaraguan legal system through which indigenous communities can ensure property rights to their communal lands";[30]

Legal steps and actions

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

> p.i) on September 11, 1995 María Luisa Acosta Castellón, acting as special agent for Jaime Castillo Felipe, Marcial Salomón Sebastián and Siriaco Castillo Fenley, representatives of the Community, filed an amparo remedy before the Appellate Court of Matagalpa against Milton Caldera Cardenal, Minister of MARENA, Roberto Araquistain, Director of the National Forestry Service of MARENA, and Alejandro Láinez,

Director of the National Forestry Administration of MARENA. In that application they requested that: a) the abovementioned officials be ordered to abstain from granting the concession to SOLCARSA; that the agents of SOLCARSA be ordered to leave the communal lands of Awas Tingni, where "they [had been] carrying out works directed toward initiating the lumber operation" and that they begin a process of dialogue and negotiation with the Community, in case the SOLCARSA corporation continued to have "an interest in utilization of timber on Community lands"; b) any other remedies be adopted that the Supreme Court of Justice deemed just; and c) an order be issued to suspend the process of granting the concession requested from MARENA by SOLCARSA. Furthermore, when they referred to the Constitutional provisions breached, the applicants stated that the disputed actions and omissions "[were] violations of articles 5, 46, 89 and 180 of the Nicaraguan Constitution, which together ensure the property and use rights of the indigenous communities to their communal lands" and that, even though "[t]he Community lacks a real title deed […], the rights to its communal lands have solid foundations in a traditional land tenure system linked to communitarian organization and cultural practices";[31]

p.ii) on September 19, 1995 the Civil Panel of the Appellate Court of the Sixth Region of Matagalpa declared the amparo application inadmissible as "unfounded", arguing that the Community had tacitly consented to the granting of the concession, according to the Amparo Law, because the applicants allowed the thirty days "since they became aware of the action or omission" to elapse, before submitting that application. That Court considered that the applicants were aware of the actions by MARENA since before July 11, 1995, the date at which they addressed a letter to the Minister of MARENA (*supra* para. 103(ñ));[32]

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

be counted as of the last violation which the members of the Community [were] aware of"; [33]

p.iv) on February 27, 1997 the Constitutional Panel of the Supreme Court of Justice dismissed the amparo application appealing for review of facts as well as law, based on the same reasons argued by the Civil Panel of the Appellate Court of the Sixth Region of Matagalpa (*supra* para. 103.p.ii); [34]

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

q.i) on March 29, 1996, Alfonso Smith Warman and Humberto Thompson Sang, members of the Regional Council of the RAAN, filed an amparo remedy before the Appellate Court of Matagalpa, against Claudio Gutiérrez, Minister of MARENA, and Alejandro Láinez, Director of the National Forestry Administration of MARENA, for having "signed and authorized" the logging concession to SOLCARSA, without it having been discussed and evaluated by the plenary of the Regional Council of the RAAN, thus breaching article 181 of the Constitution of Nicaragua. In that remedy, they requested that implementation of the concession be suspended, and that the concession be annulled;[35]

q.ii) on April 9, 1996, the Civil Panel of the Appellate Court of Matagalpa admitted the amparo remedy filed, ordered that the Attorney General of the Republic be informed, warned the officials against whom the remedy had been filed that they should submit reports on their actions to the Supreme Court of Justice, and summoned the parties to appear before the latter Court "to exercise their rights". Finally, it denied the request to suspend the disputed act;[36]

q.iii) in judgment No. 12 of February 27, 1997 the Constitutional Panel of the Supreme Court of Justice granted the amparo application and ruled that the concession was unconstitutional as it "was not approved by the Regional Council [of the RAAN], but rather by its Board of Directors, and by the Regional Coordinator of the [RAAN]", thus breaching article 181 of the Constitution of Nicaragua;[37]

q.iv) on January 22, 1998, Humberto Thompson Sang, a member of

the Regional Council of the RAAN, submitted a brief to the Constitutional Court of the Supreme Court of Justice, in which he requested execution of judgment No. 12 issued on February 27, 1997;[38]

q.v) on February 3, 1998, the Constitutional Panel of the Supreme Court of Justice issued an order to inform the President of the Republic that the Minister of MARENA had not complied with Judgment No. 12 of February 27, 1997, for the President to order that the Minister duly comply with that judgment, and the Court also ordered that the National Assembly be informed of this;[39]

q.vi) in an official letter of February 16, 1998, the Minister of MARENA informed the General Manager of SOLCARSA that he should order "the suspension of all actions" pertaining to the logging concession contract, since that contract had become "devoid of any effect or value", in accordance with judgment No. 12 of February 27, 1997 by the Supreme Court of Justice; [40]

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

r.i) on November 7, 1997, María Luisa Acosta Castellón, representing Benevicto Salomón Mclean, Siriaco Castillo Fenley, Orlando Salomón Felipe and Jotam López Espinoza, who appeared on their own behalf and as representatives of the Mayagna (Sumo) Awas Tingni Community, filed an amparo remedy before the Civil Court of the Appellate Court of the Sixth Region of Matagalpa, against Roberto Stadhagen Vogl, Minister of MARENA, Roberto Araquistain, General Director of the National Forestry Service of MARENA, Jorge Brooks Saldaña, Director of the State Forestry Administration (ADFOREST) of MARENA, and Efraín Osejo et al., members of the Board of Directors of the Regional Council of the RAAN during the periods from 1994 to 1996 and 1996 to 1998. In that remedy they requested that: a) the concession to SOLCARSA be declared null, because it was granted and ratified setting aside the Constitutional rights and guarantees of the Awas Tingni Community; b) an order be issued for the Board of Directors of the Regional Council of the RAAN to process the request submitted in March, 1996 to "further a process to attain recognition and official [c]ertification of the property rights of the Community to its ancestral lands"; c) an order be issued for "the officials of MARENA to refrain

from furthering a concession to utilize [n]atural [r]esources in the area of the concession to SOLCARSA, until land tenure in that area has been defined or an agreement has been reached with Awas Tingni and any other Community which has a justified claim to communal lands within that area", and d) the disputed act be suspended;[41]

r.ii) on November 12, 1997, the Civil Panel of the Appellate Court of the Sixth Region of Matagalpa admitted the amparo application; it denied the request of the applicants that the act be suspended because "apparently the act ha[d] been carried out"; it ordered that the decision be made known to the Attorney General of the Republic, and that the officials against whom the application had been filed should be notified for them to report to the Supreme Court of Justice on their actions, and it summoned the parties to appear before that Court "to exercise their rights";[42]

r.iii) on October 14, 1998, the Constitutional Panel of the Supreme Court of Justice declared "the amparo remedy application to be inadmissible because it is time-barred", arguing that the applicants allowed the thirty days to elapse after they became aware of the act, without submitting the remedy. That Court concluded, in this regard, that the concession was signed on March 13, 1996, and that the applicants were aware of the concession shortly after it was signed;[43]

s. indigenous communities in Nicaragua have received no title deeds to land since 1990;[44]

t. on October 13, 1998, the President of Nicaragua submitted to the National Assembly the draft bill "Organic Law Regulating the Communal Property System of the Indigenous Communities of the Atlantic Coast and BOSAWAS", which sought to "implement the provisions of [a]rticles 5, 89, 107, and 180 of the Political Constitution" because such provisions "require the existence of a legal instrument which specifically regulates delimitation and titling of indigenous community lands, to give concrete expression to the principles embodied in them"[45]. At the time this Judgment is issued, the aforementioned draft bill has not yet been adopted as law in Nicaragua.

VIII
VIOLATION OF ARTICLE 25
Right to Judicial Protection

***

Considerations of the Court

106. Article 25 of the Convention states that:

> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws […] or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
>
> 2. The States Parties undertake:
>
> a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State;
>
> b. to develop the possibilities of judicial remedy; and
>
> c. to ensure that the competent authorities shall enforce such remedies when granted.

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

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

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

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

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

110. The State, in turn, argues basically that the Community has disproportionate claims, since its possession is not ancestral, it is requesting title to lands that have been claimed by other indigenous communities of the Atlantic Coast of Nicaragua, and it has never made a formal titling request before the competent authorities. Nicaragua also maintains that there is a legal framework which regulates the procedure of land titling for indigenous communities under the authority of the Nicaraguan Agrarian Reform Institute (INRA). As regards the logging concession granted to SOLCARSA, the State points out that the Awas Tingni Community suffered no prejudice, as that concession was not executed but rather was declared unconstitutional.

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

> the obligation of the States to offer, to all persons under their jurisdiction, effective legal remedy against acts that violate their fundamental rights. It also establishes that the right protected therein applies not only to rights included in the Convention, but also to those recognized by the Constitution or the law.[46]

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

112. The Court has also reiterated that the right of every person to simple and rapid remedy or to any other effective remedy before the competent judges or courts, to protect them against acts which violate their fundamental rights, "is one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society, in the sense set forth in the Convention".[47]

113. The Court has also pointed out that

> the inexistence of an effective recourse against the violation of the rights recognized by the Convention constitutes a transgression of the Convention by the State Party in which such a situation occurs. In that respect, it should be emphasized that, for such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it.[48]

114. This Court has further stated that for the State to comply with the provisions of the aforementioned article, it is not enough for the remedies to exist formally, since they must also be effective.[49]

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

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

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

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

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

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

> Freedom, justice, respect for the dignity of the human person, political, social, and ethnic pluralism, recognition of the various forms of property, free international cooperation and respect for free self-determination are principles of the Nicaraguan nation.
>
> […]
>
> The State recognizes the existence of the indigenous peoples, who have the rights, duties and guarantees set forth in the Constitution, and especially those of maintaining and developing their identity and culture, having their own forms of social organization and managing their local affairs, as well as maintaining communal forms of ownership of their lands, and also the use and enjoyment of those lands, in accordance with the law. An autonomous regime is established in the [...] Constitution for the communities of the Atlantic Coast.
>
> The various forms of property: public, private, associative, cooperative, and communitarian, must be guaranteed and promoted with no discrimination, to produce wealth, and all of them while functioning freely must carry out a social function.

117. Article 89 of the Constitution further states that:

> The Communities of the Atlantic Coast are an inseparable part of the Nicaraguan people, and as such they have the same rights and the same obligations.
>
> The Communities of the Atlantic Coast have the right to maintain and develop their cultural identity within national unity; to have their own forms of social organization and to manage their local affairs according to their traditions.
>
> The State recognizes the communal forms of land ownership of the Community of the Atlantic Coast. It also recognizes the use and enjoyment of the waters and forests on their communal lands.

118. Article 180 of said Constitution states that:

> The Communities of the Atlantic Coast have the right to live and develop under the forms of social organization which correspond to their historical and cultural traditions.
>
> The State guarantees these communities the enjoyment of their natural resources, the effectiveness of their communal forms of property and free election of their authorities and representatives.
>
> It also guarantees preservation of their cultures and languages, religions and customs.

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

> Art. 4. The Regions inhabited by the Communities of the Atlantic Coast enjoy, within the unity of the Nicaraguan State, an Autonomous Regime which guarantees effective exercise of their historical and other rights, set forth in the Constitution.
>
> […]
>
> Art. 9. Rational use of the mining, forestry, fishing, and other natural resources of the Autonomous Regions will recognize the property rights to their communal lands, and must benefit their inhabitants in a just proportion through agreements between the Regional Government and the Central Government.

120. Decree No. 16-96 of August 23, 1996, pertaining to the creation of the National Commission for the Demarcation of the Lands of the Indigenous Communities of the Atlantic Coast, established that "the State recognizes communal forms of property of the lands of the Communities of the Atlantic Coast", and pointed out that "it is necessary to establish an appropriate administrative body to begin the process of demarcation of the traditional lands of the indigenous communities". To this end, the decree entrusts that national commission, among other functions, with that of identifying the lands which the various indigenous communities have traditionally occupied, to conduct a geographical analysis process to determine the communal areas and those belonging to the State, to prepare a demarcation project and to seek funding for this project.

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

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

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

123. Now then, it would seem that the procedure for titling of lands occupied by indigenous groups has not been clearly regulated in Nicaraguan legislation.

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

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

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

> […] there is an incompatibility between the specific Agrarian Reform laws on the question of indigenous lands and the country's legal system. That problem brings with it legal and conceptual confusion, and contributes to the political ineffectiveness of the institutions entrusted with resolving this issue.
>
> […]
>
> […] in Nicaragua the problem is the lack of laws to allow concrete application of the Constitutional principles, or [that] when laws do exist (case of the Autonomy Law) there has not been sufficient political will

> for them to be regulated.
>
> […]
>
> [Nicaragua] lacks a clear legal delimitation on the status of national lands in relation to indigenous communal lands.
>
> […]
>
> […] beyond the relation between national and communal land, the very concept of indigenous communal land lacks a clear definition.

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

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

b) Administrative and judicial steps:

128. Due to the lack of specific and effective legislation for indigenous communities to exercise their rights and to the fact that the State has disposed of lands occupied by indigenous communities by granting a concession, the "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast", carried out by the *Central American and Caribbean Research Council*, points out that " 'amparo remedies' have been filed several times, alleging that a concession by the State (normally to a logging firm) interferes with the communal rights of a specific indigenous community".

129. It has been proven that the Awas Tingni Community has taken various steps before different Nicaraguan authorities (*supra* paras. 103(ñ), (o), (p), (r), as follows:

a) on July 11, 1995, they submitted a letter to the Minister of MARENA in which they requested that no further steps be taken to grant the concession to the SOLCARSA corporation without a prior agreement with the Community;
b) in March, 1996, a request was filed before the Regional Council of the RAAN to ensure their property rights to their ancestral communal lands, in accordance with the Constitution of Nicaragua, and for the Regional Council of the RAAN to prevent the granting of concessions for the utilization of natural resources in the area without the assent of the Community. The latter submitted several proposals for delimitation and official recognition of its communal lands and for State lands to be

identified in the area;

c) on September 11, 1995, an amparo remedy aaplication was filed before the Appellate Court of Matagalpa, requesting suspension of the "process of granting the concession requested by SOLCARSA of MARENA" and for an order to be issued for "the agents of SOLCARSA […] to evacuate the communal lands of Awas Tingni[,] where works are currently underway to begin logging", since the disputed actions and omissions "were violations of articles 5, 46, 89, and 180 of the Constitution of Nicaragua, which together guarantee the property and use rights of the indigenous communities to their communal lands". On September 19, 1995 the Civil Panel of the Appellate Court of the Sixth Region of Matagalpa declared this remedy inadmissible because it was "unfounded";

d) on September 21, 1995 an amparo remedy application was filed before the Supreme Court of Justice for review of fact as well as law to dispute the decision mentioned in the previous paragraph. On February 27, 1997, the Supreme Court rejected that remedy; and

e) on November 7, 1997 the Community filed an amparo remedy before the Civil Panel of the Appellate Court of the Sixth Region of Matagalpa against the Minister of MARENA, the General Director of the National Forestry Service of MARENA, and the members of the Board of Directors of the Regional Council of the RAAN during 1994 to 1996 and 1996 to 1998, in which they requested, basically, that the concession to SOLCARSA be declared null and that an order be issued for the Board of Directors of the Regional Council of the RAAN to process the request filed in March, 1996 to "promote a process to attain official recognition and [c]ertification of the property rights of the Community to its ancestral lands". On November 12, 1997 this application was admitted by that Panel, which summoned the parties to appear before the Supreme Court of Justice. On October 14, 1998 the Constitutional Court of the Supreme Court of Justice declared "the amparo remedy unfounded because it is time-barred".

130. In addition to those steps, on March 29, 1996 Alfonso Smith Warman and Humberto Thompson Sang, members of the Regional Council of the RAAN, filed an amparo remedy before the Appellate Court of Matagalpa, against the Minister of MARENA and the Director of the National Forestry Administration of MARENA, for having "signed and authorized" the logging concession to SOLCARSA without it having been discussed and evaluated by the plenary of the Regional Council of the NAAR, in violation of article 181 of the Constitution of Nicaragua. On April 9, 1996 the Civil Panel of the Appellate Court of Matagalpa admitted the amparo remedy filed, issued an order that the Attorney General of the Republic be informed of it, denied the request to suspend the disputed act, referred it to the Supreme Court of Justice, warned the officials against whom the appeal

was directed that they should send a written report on their actions to the Supreme Court of Justice, and summoned the parties to appear before the Supreme Court to exercise their rights. On February 27, 1997 the Constitutional Court of the Supreme Court of Justice admitted the amparo remedy filed and ruled that the concession was unconstitutional as it was not approved by the Regional Council of the RAAN but rather by its Board of Directors and by the Regional Coordinator of the RAAN. On January 22, 1998 Humberto Thompson Sang filed a brief before the Supreme Court of Justice of Nicaragua in which he requested execution of Judgment No. 12, of February 27, 1997. On February 13, 1998 the Constitutional Court of the Supreme Court of Justice issued an order to inform the President of Nicaragua of the non-compliance by the Minister of MARENA with Judgment No. 12 of February 27, 1997, for the latter to be ordered to duly comply with that order and, also, to report to the National Assembly of Nicaragua on the matter (*supra* para. 103 (q)).

131. In the course of examining simple, rapid, and effective mechanisms involved in the provision discussed, this Court has maintained that the procedural institution of amparo has the required characteristics to effectively protect fundamental rights[50], that is, being simple and brief. In the Nicaraguan context, in accordance with the procedure established for amparo remedies in Law No. 49 published in La Gaceta No. 241, called "Amparo Law", it should be decided within 45 days.

132. In the instant case, the first amparo remedy was filed before the Appellate Court of Matagalpa on September 11, 1995 and the court decision was reached on the 19 of that same month and year, that is, eight days later. Since that remedy was dismissed, on September 21, 1995 the representatives of the Community filed a remedy to appeal for review of fact as well as law before the Supreme Court of Justice, pursuant to article 25 of the Amparo Law. On February 27, 1997 the Supreme Court of Justice rejected that remedy. The Inter-American Court notes that the first of the abovementioned judicial decisions was reached within a reasonable time. However, processing the remedy filed for review of fact as well as law took one year, five months, and six days before it was decided by the Supreme Court of Justice.

133. The second amparo remedy was filed before the Civil Panel of the Appellate Court of the Sixth Region of Matagalpa on November 7, 1997, admitted by that court on the 12th of that same month and year, and decided by the Constitutional Panel of the Supreme Court of Justice on October 14, 1998. In

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50 *cfr. Case of the Constitutional Court, supra* note 10, para. 91 and *Judicial Guarantees in States of Emergency* (arts. 27.2, 25 and 8 American Convention on Human Rights), *supra* note 46, para. 23.

other words, 11 months and seven days elapsed from the time the remedy was filed until a decision was reached on it.

134. In light of the criteria established on the subject by this Court, and bearing in mind the scope of reasonable terms in judicial proceedings[51], it can be said that the procedure followed in the various courts which heard the amparo remedies in this case did not respect the principle of a reasonable term protected by the American Convention. According to the criteria of this Court, amparo remedies will be illusory and ineffective if there is unjustified delay in reaching a decision on them.[52]

135. Furthermore, the Court has already said that article 25 of the Convention is closely linked to the general obligation of article 1(1) of the Convention, which assigns protective functions to domestic law in the States Party, and therefore the State has the responsibility to designate an effective remedy and to reflect it in norms, as well as to ensure due application of that remedy by its judicial authorities.[53]

136. Along these same lines, the Court has expressed that

> [t]he general duty under article 2 of the American Convention involves adopting protective measures in two directions. On the one hand, suppressing norms and practices of any type that carry with them the violation of guarantees set forth in the convention. On the other hand, issuing norms and developing practices which are conducive to effective respect for such guarantees.[54]

137. As stated before, in this case Nicaragua has not adopted the adequate domestic legal measures to allow delimitation, demarcation, and titling of indigenous community lands, nor did it process the amparo remedy filed by

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51 *cfr. Case of the Constitutional Court, supra* note 10, para. 93; *Paniagua Morales et al. case*. Judgment of March 8, 1998. C Series No. 37, para. 152; and *Genie Lacayo case*. Judgment of January 29, 1997. C Series No. 30, para. 77.

52 *cfr. Ivcher Bronstein case, supra* note 9, para.137; *Case of the Constitutional Court, supra* note 10, para. 93; and *Judicial Guarantees in States of Emergency* (arts. 27.2, 25 and 8 American Convention on Human Rights), *supra* note 46, para. 24.

53 *cfr. Villagrán Morales et al. case* (*"Street Children" case*). Judgment of November 19, 1999. C Series No. 63, para. 237; also see*, Ivcher Bronstein case*, *supra* note 9, para. 135; and *Cantoral Benavides case*, *supra* note 48, para. 163.

54 *cfr. Baena Ricardo et al. case*, *supra* note 9, para. 180; and *Cantoral Benavides case*, *supra* note 48, para. 178.

members of the Awas Tingni Community within a reasonable time.

138. The Court believes it necessary to make the rights recognized by the Nicaraguan Constitution and legislation effective, in accordance with the American Convention. Therefore, pursuant to article 2 of the American Convention, the State must adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the Awas Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community.

139. From all the above, the Court concludes that the State violated article 25 of the American Convention, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1(1) and 2 of the Convention.

IX

VIOLATION OF ARTICLE 21
Right to Private Property[55]

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Considerations of the Court

142. Article 21 of the Convention declares that:

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

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

by prohibited by law.

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

144. "Property" can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.[56]

145. During the study and consideration of the preparatory work for the American Convention on Human Rights, the phrase "[e]veryone has the right to the use and enjoyment of *private property*, but the law may subordinate its use and enjoyment to public interest" was replaced by "[e]veryone has the right to the *use and enjoyment* of his property. The law may subordinate such use and enjoyment to the social interest." In other words, it was decided to refer to the "use and enjoyment of his *property"* instead of "private property".[57]

146. The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.[58]

147. Article 29(b) of the Convention, in turn, establishes that no provision may be interpreted as "restricting the enjoyment or exercise of any right or

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[56] *cfr. Ivcher Bronstein case*, *supra* note 9, para. 122.

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

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

freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party".

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

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

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

> Communal property are the lands, waters, and forests that have traditionally belonged to the Communities of the Atlantic Coast, and they are subject to the following provisions:
>
> 1. Communal lands are inalienable; they cannot be donated, sold, encumbered nor mortgaged, and they are inextinguishable.
>
> 2. The inhabitants of the Communities have the right to cultivate plots on communal property and to the usufruct of goods obtained from the work carried out.

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

registration.

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

153. It is the opinion of the Court that, pursuant to article 5 of the Constitution of Nicaragua, the members of the Awas Tingni Community have a communal property right to the lands they currently inhabit, without detriment to the rights of other indigenous communities. Nevertheless, the Court notes that the limits of the territory on which that property right exists have not been effectively delimited and demarcated by the State. This situation has created a climate of constant uncertainty among the members of the Awas Tingni Community, insofar as they do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property. Based on this understanding, the Court considers that the members of the Awas Tingni Community have the right that the State

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

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

154. Together with the above, we must recall what has already been established by this court, based on article 1(1) of the American Convention, regarding the obligation of the State to respect the rights and freedoms recognized by the Convention and to organize public power so as to ensure the full enjoyment of human rights by the persons under its jurisdiction. According to the rules of law pertaining to the international responsibility of the State and applicable under

International Human Rights Law, actions or omissions by any public authority, whatever its hierarchic position, are chargeable to the State which is responsible under the terms set forth in the American Convention[59].

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

X
OTHER ARTICLES OF THE AMERICAN CONVENTION

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

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Considerations of the Court

157. With respect to the alleged violation of articles 4, 11, 12, 16, 17, 22 and 23 of the Convention, as argued by the Commission in its brief on final pleadings, the Court has considered that even when the violation of any article of the Convention has not been alleged in the petition brief, this does not impede the violation being declared by the Court, if the proven facts lead to conclude that such a violation did in fact occur.[60] However, in the instant case, the Court refers

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

60 *cfr. Durand and Ugarte case, supra* note 12, para.84; *Castillo Petruzzi et al. case.*

to what was decided in this same Judgment in connection with the right to property and the right to judicial protection of the members of the Awas Tingni Community, and it also dismisses the violation of rights protected by the abovementioned article because the Commission did not state the grounds for it in its brief on final arguments.

XI
APPLICATION OF ARTICLE 63(1)

Arguments of the Commission

158. In its application brief, the Commission requested that the Court, pursuant to article 63(1) of the Convention, declare that the State must:

> 1. Establish a juridical procedure, in accordance with relevant international and national legal norms, which will lead to prompt and specific official recognition and demarcation of the rights of the Awas Tingni Community to its communal natural resources and rights;
> 2. Abstain from granting or considering any concessions to utilize natural resources in the lands used and occupied by Awas Tingni, until the issue of land tenure affecting Awas Tingni has been resolved, or until a specific agreement has been reached on this matter between the State and the Community;
> 3. Pay equitable compensation for the monetary and moral damage suffered by the Community due to lack of specific official recognition of its rights to natural resources and lands and due to the concession to SOLCARSA, [and]
> 4. Pay the Indigenous Community for the costs it incurred in to defend its rights before the Courts in Nicaragua and in the procedures before the Commission and the Inter-American Court.

159. On August 22, 2001 the Commission filed the brief on reparations, costs and expenses, which had been requested by the Secretariat on July 31, 2001. The deadline for filing that brief expired on August 10, 2001, so it was received 12

Judgment of May 30, 1999. C Series No. 52, para. 178; and *Blake case.* Judgment of January 24, 1998. C Series No. 36, para. 112.

days after expiration of the term. In this regard, the Court considers that the time elapsed cannot be considered reasonable, according to the criterion the Court has followed in its jurisprudence.[61] Under the circumstances of this case, the delay was not due to a mere mistake in calculating the term. Furthermore, the imperatives of legal certainty and procedural balance require that terms be respected[62], unless exceptional circumstances impede this, which did not occur in the instant case. Therefore, the Court rejects the brief filed by the Commission on August 22, 2001, because it was time-barred, and abstains from discussing its content.

Arguments of the State

160. The State, in turn, stated in its briefs responding to the petition and to the final arguments, that:

> a) any claim to compensation due to lack of titling or granting of the logging concession to the SOLCARSA corporation is unfounded because:
>
> > i) the SOLCARSA concession caused no damage to the Community. In its submission on the facts, the Commission recognized that it is not clear whether there was damage to the forest in the areas claimed by the Community. Execution of the logging activity derived from the concession granted to SOLCARSA did not begin, because the State did not approve the First Management Plan for the logging operation. However, the corporation did in effect cause damage to the forest in the area of Cerro Wakambay, through illegal felling of trees outside the area of the logging concession granted to it. The illegal action by SOLCARSA, which was external to the concession, was a private action not linked to any governmental permissiveness, and which was punished by the State authorities;

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61 *cfr. Baena Ricardo et al. case*, *supra* note 9, para. 50; *Case of "The Last Temptation of Christ"* (*Olmedo Bustos et al. case*). Order by the Inter-American Court of Human Rights on November 9, 1999, whereas clause No. 4; Castillo *Páez case*, *Preliminary Objections*. Judgment of January 30, 1996. C Series No. 24, para. 34; *Paniagua Morales et al. case*, *Preliminary Objections*. Judgment of January 25, 1996. C Series No. 23, paras. 38, 40-42; and *Cayara case*, *Preliminary Objections*. Judgment of February 3, 1993. C Series No. 14, paras. 42 and 63.

62 *cfr. Case of "The Last Temptation of Christ"*, *supra* note 61, whereas clause No. 4.

ii) in its effort to determine monetary responsibilities against the State, the Commission concludes that in any case those damages were against third parties, who are not parties to this case nor have they brought claims against the State, for which reason it does not recognize the ancillary nature of international jurisdiction;

iii) the claim made by the Community is disproportionate and irrational, and it refers to an area in which they have not had ancestral possession;

iv) the Community has not been displaced from the lands it claims; and

v) there has been no alteration of the form of life, beliefs, customs, and production patterns of the Community;

b) any claim for compensation derived from actions of the courts of justice is unfounded because the Community:

i) did not request titling of its alleged ancestral lands through judicial procedures;

ii) did not exhaust domestic remedies;

iii) did not exercise due diligence in its procedural actions; and

iv) obtained the annulment of the logging concession, "the only judicial remedy requested";

c) the alleged judicial delay attributed to the national courts did not cause any type of moral nor patrimonial damage to the detriment of the Community, because:

i) it was not displaced nor did it suffer invasion of the areas occupied;

ii) it has remained within the area it claims as ancestral, "hunting, fishing, farming, and visiting its sacred places";

iii) its ancestral form of life (social cohesion, values, beliefs, customs, health standards, and productive patterns) was

not altered; and

iv) it suffered no lost earnings nor consequential damages;

d) the State proved that there has been considerable progress regarding land titling of indigenous communities on the Atlantic Coast, such as:

i) making a contract for a study to diagnose the land tenure situation and the areas claimed by those communities; and

ii) preparing a draft bill for the "Special Law to Regulate the Communal Property System of the Indigenous Communities of the Atlantic Coast and BOSAWAS", and conducting an extensive process of consultation with the communities, so as to substantially improve the existing legal and institutional framework; and

e) for the abovementioned reasons, the application for reparations filed by the Commission must be rejected.

161. Regarding costs, in its brief on final pleadings the State indicated that it must not be sentenced to such payment for the following reasons, including that:

a) Nicaragua showed good faith in its allegations;

b) the State proved that the evidence submitted by the Commission regarding ancestral possession of the Community was insufficient, and that its claim is excessive and over-dimensioned to the detriment of third parties;

c) the operating costs of the Commission and of the Court are covered by the OAS budget;

d) "access to the Commission [and] the Court is subject to no schedule of fees or rates";

e) article 45 of the Rules of Procedure states that the party proposing an item of evidence will cover the costs incurred for it; and

f) Nicaragua is one of the poorest States of the hemisphere and must commit its limited resources, among other uses, to funding the costly process of titling and demarcating the lands of indigenous

communities.

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Considerations of the Court

162. Article 63(1) of the American Convention establishes that

> [i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

163. In the instant case the Court established that Nicaragua breached articles 25 and 21 of the Convention in relation to articles 1(1) and 2 of the Convention. In this regard, the Court has reiterated in its constant jurisprudence that it is a principle of international law that any violation of an international obligation which has caused damage carries with it the obligation to provide adequate reparation for it.[63]

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63 *cfr. Cesti Hurtado case. Reparations*, *supra* note 13, para. 32; *"Street Children" case* (*Villagrán Morales et al. vs. Guatemala*). *Reparations*, *supra* note 11 para. 59; *"White van" case* (*Paniagua Morales et al. vs. Guatemala*). *Reparations*, *supra* note 13, para. 75; *Ivcher Bronstein case*, *supra* note 9, para.177; *Baena Ricardo et al. case*, *supra* note 9, para.201; *Case of the Constitutional Court*, *supra* note 10, para.118; *Suárez Rosero case*. *Reparations* (art. 63.1 American Convention on Human Rights). Judgment of January 20 1999. C Series No. 44, para.40; *Loayza Tamayo Case*. *Reparations* (art. 63.1 American Convention on Human Rights), Judgment of November 27, 1998. C Series No. 42, para.84; *Caballero Delgado and Santana case*. *Reparations* (art. 63.1 American Convention on Human Rights). Judgment of January 29, 1997. C Series No. 31, para.15; *Neira Alegría et al. case*. *Reparations* (art. 63.1 American Convention on Human Rights). Judgment of September 19, 1996. C Series No. 29, para.36; El Amparo case. Reparations (art. 63.1 American Convention on Human Rights). Judgment of September 14, 1996. C Series No. 28, para.14; and *Aloeboetoe et al. case*. *Reparations* (art. 63.1 American Convention on Human Rights). Judgment of September 10, 1993. C Series No. 15, para.43. In this same direction, *cfr*., *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *I.C.J.* Reports 1949, p. 184; *Factory at Chorzów*, Merits, Judgment No. 13, 1928, *P.C.I.J.,* Series A, No. 17, p. 29; and *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, *P.C.I.J.*, Series A, No. 9, p. 21.

164. For the aforementioned reason, pursuant to article 2 of the American Convention on Human Rights, this Court considers that the State must adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores. Furthermore, as a consequence of the aforementioned violations of rights protected by the Convention in the instant case, the Court rules that the State must carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Awas Tingni Community, within a maximum term of 15 months, with full participation by the Community and taking into account its customary law, values, customs and mores. Until the delimitation, demarcation, and titling of the lands of the members of the Community has been carried out, Nicaragua must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Awas Tingni Community live and carry out their activities.

165. In the instant case, the Court notes that the Commission did not prove that there were material damages caused to the members of the Mayagna Community.

166. The Court considers that this Judgment is, in and of itself, a form of reparation to the members of the Awas Tingni Community.[64]

167. The Court considers that due to the situation in which the members of the Awas Tingni Community find themselves due to lack of delimitation, demarcation, and titling of their communal property, the immaterial damage caused must also be repaired, by way of substitution, through a monetary compensation. Under the circumstances of the case it is necessary to resort to this type of compensation, setting it in accordance with equity and based on a prudent estimate of the immaterial damage, which is not susceptible of precise valuation.[65]

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64 *cfr. Case of "The Last Temptation of Christ"* (*Olmedo Bustos et al*.), *supra* note 9, para.99; and *Suárez Rosero case*. *Reparations*, *supra* note 63, para.72.

65 *cfr. Cesti Hurtado case*. *Reparations*, *supra* note 13, para.51; *"White van" case* (*Paniagua Morales et al. vs. Guatemala*). *Reparations*, *supra* note 13, para.105; *Ivcher Bronstein case*, *supra* note 9, para.183; *Baena Ricardo et al. case*, *supra* note 9, para. 206; and *Castillo Páez case*, *Reparations* (art. 63.1 American Convention on Human Rights). Judgment of November 27, 1998. C Series No. 43, para. 84. Also *cfr., inter alia, Eur. Court H.R., Wiesinger Judgment of 30 October 1991, series A no. 213*, para. 85; *Eur. Court H.R., Kenmmache v. France (article 50) judgment of 2 November 1993, Series A no. 270-B, para. 11; Eur. Court H.R., Mats Jacobsson judgment of 28 June 1990, Series A no. 180-A*, para. 44; and *Eur. Court H.R., Ferraro judgment of 19 February 1991, Series A no. 197-A*, para. 21.

Due to the above and taking into account the circumstances of the cases and what has been decided in similar cases, the Court considers that the State must invest, as reparation for the immaterial damages, in the course of 12 months, the total sum of US$ 50,000 (fifty thousand United States dollars) in works or services of collective interest for the benefit of the Awas Tingni Community, by common agreement with the Community and under the supervision of the Inter-American Commission. [66]

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168. Regarding reimbursement for costs and expenses, this Court must prudently assess them, including expenses for actions taken by the Community before the authorities under domestic jurisdiction, as well as those generated in the course of the proceedings before the inter-American system. This assessment can be done on the basis of the principle of equity.[67]

169. To this end, the Court considers that it is equitable to grant, through the Inter-American Commission, the sum total of US$ 30,000 (thirty thousand United States dollars) for expenses and costs incurred by the members of the Awas Tingni Community and their representatives, both those caused in domestic proceedings and in the international proceedings before the inter-American system of protection. To comply with the above, the State must make the respective payment within the term of 6 months from the time of notification of this Judgment.

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66 *cfr., inter alia, "Street children" case* (*Villagrán Morales et al. vs. Guatemala*). *Reparations*, *supra* note 11, para. 103; *Benavides Cevallos case*. Judgment of June 19, 1998. C Series No. 38, para. 48.5; and *Aloeboetoe et al. case*. *Reparations*, *supra* note 63, paras. 54 to 65, 81 to 84, and 96.

67 *cfr. Cesti Hurtado case*. *Reparations*, *supra* note 13, para.72; *"Street children" case* (*Villagrán Morales et al. vs. Guatemala*). *Reparations*, *supra* note 11, para.109; and *"White van" case* (*Paniagua Morales et al. vs. Guatemala*). *Reparations*, *supra* note 13, para. 213.

170. The State can fulfill its obligations through payment in United States dollars or in an equivalent amount of Nicaraguan currency, using for the respective calculation the exchange rate between both currencies in the New York, United States of America exchange the day before that payment.

171. Payment of immaterial damages as well as of costs and expenses, as set forth in this Judgment, shall not be subject to any current or future tax. Furthermore, if the State were to delay payment, it must pay interest on the amount owed, at the banking rate for delay in Nicaragua. Finally, if for any reason it were not possible for the beneficiaries to receive their respective payments or to receive the respective benefits within the above stated term of twelve months, the State must deposit the respective amounts in their name to an account or certificate of deposit in a solvent financial institution, in United States dollars or their equivalent in Nicaraguan currency, under the most favorable conditions allowed by banking practices and legislation. If after ten years the payment has not been claimed, the amount will be returned, with interest earned, to the Nicaraguan State.

172. According to its regular practice, the Court reserves the authority to oversee full compliance with this Judgment. The proceeding will be concluded once the State has fully complied with the provisions set forth in this decision.

XII
OPERATIVE PARAGRAPHS

173. Therefore,

THE COURT,

By seven votes to one,

1. finds that the State violated the right to judicial protection enshrined in article 25 of the American Convention on Human Rights, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1(1) and 2 of the Convention, in accordance with what was set forth in paragraph 139 of this Judgment.

Judge Montiel Argüello dissenting.

By seven votes to one,

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

Judge Montiel Argüello dissenting.

Unanimously,

3. decides that the State must adopt in its domestic law, pursuant to article 2 of the American Convention on Human Rights, the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores, pursuant to what was set forth in paragraphs 138 and 164 of this Judgment.

Unanimously,

4. decides that the State must carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Mayagna (Sumo) Awas Tingni Community and, until that delimitation, demarcation and titling has been done, it must abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Mayagna (Sumo) Awas Tingni Community live and carry out their activities, the above in accordance with what was set forth in paragraphs 153 and 164 of this Judgment.

Unanimously,

5. finds that this Judgment constitutes, in an of itself, a form of reparation for the members of the Mayagna (Sumo) Awas Tingni Community.

By seven votes to one,

6. finds that, in equity, the State must invest, as reparation for immaterial

damages, in the course of 12 months, the total sum of US$ 50,000 (fifty thousand United States dollars) in works or services of collective interest for the benefit of the Mayagna (Sumo) Awas Tingni Community, by common agreement with the Community and under supervision by the Inter-American Commission of Human Rights, pursuant to what was set forth in paragraph 167 of this Judgment.

Judge Montiel Argüello dissenting.

By seven votes to one,

7. finds that, in equity, the State must pay the members of the Mayagna (Sumo) Awas Tingni Community, through the Inter-American Commission of Human Rights, the total sum of US$ 30,000 (thirty thousand United States dollars) for expenses and costs incurred by the members of that Community and their representatives, both those caused in domestic proceedings and in the international proceedings before the inter-American system of protection, pursuant to what was stated in paragraph 169 of this Judgment.

Judge Montiel Argüello dissenting.

Unanimously,

8. finds that the State must submit a report on measures taken to comply with this Judgment to the Inter-American Court of Human Rights every six months, counted from the date of notification of this Judgment.

Unanimously,

9. decides to oversee compliance with this Judgment and that this case will be concluded once the State has fully carried out the provisions set forth in this Judgment.

Judges Cançado Trindade, Pacheco-Gómez and Abreu-Burelli informed the Court of their Joint Opinion, Judges Salgado- Pesantes and García- Ramirez informed the Court of their Opinions, and Judge Montiel- Argüello informed the Court of his dissenting vote, all of which accompany this Judgment.