JOINT SEPARATE OPINION OF JUDGES
A.A. CANÇADO TRINDADE, M. PACHECO GÓMEZ AND A. ABREU BURELLI

1. We, the undersigned Judges, vote in favour of the adoption of the present Judgment of the Inter-American Court of Human Rights on the merits in the case of the *Community Mayagna (Sumo) Awas Tingni versus Nicaragua*. Given the importance of the matter raised in the present case, we feel obliged to add the brief reflections that follow, about one of its central aspects, namely, the *intertemporal dimension* of the communal form of property prevailing among the members of the indigenous communities.

2. At the public hearing held in the headquarters of the Inter-American Court on 16, 17 and 18 November 2000, two members and representatives of the Community Mayagna (Sumo) Awas Tingni pointed out the vital importance of the relationship of the members of the Community with the lands they occupy, not only for their own subsistence, but also for their family, cultural and religious development. Hence their characterization of the territory as *sacred*, for encompassing not only the members of the Community who are alive, but also the mortal remains of their ancestors, as well as their divinities. Hence, for example, the great religious significance of the hills, inhabited by those divinities.

3. As one of the members of the Community referred to pointed out in his testimony in the public hearing before the Court,

> "(. . .) Cerro Urus Asang is a sacred hill since our ancestors because therein we have buried our grandparents and therefore we call it sacred. Thus, Kiamak is also a sacred hill because there we have (. . .) the arrows of our grandparents. Then comes Caño Kuru Was, it is an old village. Every name we have mentioned in this framework is sacred.(. . .)"[1].

4. And he then added that

> "(. . .) Our grandparents lived in this hill, they then had had as their small animals (. . .) the monkeys. The utensils of war of our ancestors, our grandparents, were the arrows. There they are stored. (. . .) We maintain our history, since our grandparents.

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1. Testimony of Mr. Charlie Webster Mclean Cornelio, in: Inter-American Court of Human Rights (IACtHR), Case of the Community Mayagna (Sumo) Awas Tingni - Transcripción de la Audiencia Pública sobre el Fondo Celebrada los Días 16, 17 y 18 de Noviembre de 2000 en la Sede de la Corte, p. 26 (mimeographed, internal circulation).

> That is why we have [it] as Sacred Hill. (. . .) Asangpas Muigeni is spirit of the hill, is of equal form to a human [being], but is a spirit [who] always lives under the hills. (. . .)"[2].

5. As an anthropologist observed in his testimony in the public hearing before the Court, there are two types of sacred places of the members of the Mayagna Community: a) the hills, where the "spirits of the hill" stay, with whom one "ought to have a special relation"; and b) in the frontier zones, the cemeteries, where they bury their dead "within the Community", along the river Wawa, "visited frequently until nowadays by members of the Community", above all when they "go hunting", up to a certain point as a "spiritual act"[3]. As another anthropologist and sociologist added, in an expertise, in the same hearing, the lands of the indigenous peoples constitute a space which is, at the same time, geographical and social, symbolic and religious, of crucial importance for their cultural self-identification, their mental health, their social self-perception[4].

6. As it can be inferred from the testimonies and expertises rendered in the aforementioned public hearing, the Community has a tradition contrary to the privatization and the commercialization and sale (or rent) of the natural resources (and their exploitation)[5]. The communal concept of the land - including as a spiritual place - and its natural resources form part of their customary law; their link with the territory, even if not written, integrates their day-to-day life, and the right to communal property itself has a cultural dimension. In sum, the *habitat* forms an integral part of their culture, transmitted from generation to generation.

7. The Inter-American Court has duly acknowledged these elements, in paragraph 141 of the present Judgment, in which it points out that

> "(. . .) Among the indigenous persons there exists a communitarian tradition about a communal form of the collective property of the land, in the sense that the ownership of this latter is not centered in an individual but rather in the group and his community. (. . .) To the indigenous communities the relationship with the land is not merely a question of

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2. *Ibid*., pp. 41-43.

3. Testimony of Mr. Theodore Macdonald, anthropologist, *in ibid*., pp. 67-68.

4. Expertise of Mr. Rodolfo Stavenhagen Gruenbaum, anthropologist and sociologist, *in ibid*., pp. 71-72.

5. Cf., e.g., the testimony of Mr. Charlie Webster Mclean Cornelio, member of the Community Mayagna, *in ibid*., p. 40, and the expertise of Mr. Rodolfo Stavenhagen Gruenbaum, anthropologist and sociologist, *in ibid*., p. 78.

> possession and production but rather a material and spiritual element that they ought to enjoy fully, so as to preserve their cultural legacy and transmit it to future generations".

8. We consider it necessary to enlarge this conceptual element with an emphasis on the *intertemporal dimension* of what seems to us to characterize the relationship of the indigenous persons of the Community with their lands. Without the effective use and enjoyment of these latter, they would be deprived of practicing, conserving and revitalizing their cultural habits, which give a meaning to their own existence, both individual and communitarian. The feeling which can be inferred is in the sense that, just as the land they occupy belongs to them, they in turn belong to their land. They thus have the right to preserve their past and current cultural manifestations, and the power to develop them in the future.

9. Hence the importance of the strengthening of the spiritual and material relationship of the members of the Community with the lands they have occupied, not only to preserve the legacy of past generations, but also to undertake the responsibilities that they have assumed in respect of future generations. Hence, moreover, the necessary prevalence that they attribute to the element of *conservation* over the simple exploitation of natural resources. Their communal form of property, much wider than the civilist (private law) conception, ought to, in our view, be appreciated from this angle, also under Article 21 of the American Convention on Human Rights, in the light of the facts of the *cas d'espèce*.

10. The concern with the element of conservation reflects a cultural manifestation of the integration of the human being with nature and the world wherein he lives. This integration, we believe, is projected into both space and time, as we relate ourselves, in space, with the natural system of which we are part and that we ought to treat with care, and, in time, with other generations (past and future)[6], in respect of which we have obligations.

11. Cultural manifestations of the kind form, in their turn, the *substratum* of the juridical norms which ought to govern the relations of the community members *inter se* and with their goods. As timely recalled by the present Judgment of the Court, the Political Constitution in force of Nicaragua itself

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6. Future generations begin to attract the attention of the contemporary doctrine of international law: cf., e.g., A.-Ch. Kiss, "La notion de patrimoine commun de l'humanité", 175 *Recueil des Cours de l'Académie de Droit International de La Haye* (1982) pp. 109-253; E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, Tokyo/Dobbs Ferry N.Y., United Nations University/Transnational Publs., 1989, pp. 1-351; E. Agius and S. Busuttil *et alii* (eds.), *Future Generations and International Law*, London, Earthscan, 1998, pp. 3-197; J. Symonides (ed.), *Human Rights: New Dimensions and Challenges*, Paris/Aldershot, UNESCO/Dartmouth, 1998, pp. 1-153.

provides about the preservation and the development of the cultural identity (in the national unity), and the proper forms of social organization of the indigenous peoples, as well as the maintenance of the communal forms of property of their lands and the enjoyment, use and benefit of them (article 5)[7].

12. These forms of cultural manifestation and social self-organization have, in this way, materialized, with the passing of time, into juridical norms and into case-law, at both international and national levels. This is not the first time that the Inter-American Court has kept in mind the cultural practices of collectivities. In the case of *Aloeboetoe and Others versus Suriname* (Reparations, Judgment of 10.09.1993), the Court took into account, in the determination of the amount of reparations to the relatives of the victims, the customary law itself of the maroon community (the *saramacas*, - to which the victims belonged), where poligamy [sic] prevailed, so as to extend the amount of the reparations for damages to the several widows and their sons[8].

13. In the case of *Bámaca Velásquez versus Guatemala* (Merits, Judgment of 25.11.2000), the Court took into due account the right of the relatives of the person who had disappeared by force to a worthy grave for the mortal remains of this latter and the repercussion of the issue in the *maya* culture[9]. However, in this Judgment on the merits in the case of the *Community Mayagna (Sumo) Awas Tingni*, the Court, for the first time, goes into greater depth in the analysis of the matter, in an approximation to an integral interpretation of the indigenous cosmovision, as the central point of the present Judgment.

14. In fact, there are nowadays many multicultural societies, and the attention due to the cultural diversity seems to us to constitute an essential requisite to secure the efficacy of the norms of protection of human rights, at national and international levels. Likewise, we consider that the invocation of cultural manifestations cannot attempt against the universally recognized standards of observance and respect for the fundamental rights of the human person. Thus, at the same time that we affirm the importance of the attention due to cultural *diversity*, also for the recognition of the universality of human rights, we firmly discard the distortions of the so-called cultural "relativism".

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7. Cf. also Articles 89 and 180 of the Political Constitution in force of Nicaragua.

8. IACtHR, case *Aloeboetoe and Others versus Suriname* (Reparations), Series C, n. 15, Judgment of 10.09.1993, pp. 51-96, pars. 1-116.

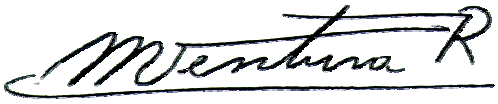
9. IACtHR, case *Bámaca Velásquez versus Guatemala* (Merits), Series C, n. 70, Judgment del 25.11.2000, pp. 191-331, pars. 1-230.

15. The interpretation and application given by the Inter-American Court to the normative content of Article 21 of the American Convention in the present case of the *Community Mayagna (Sumo) Awas Tingni* represent, in our view, a positive contribution to the protection of the communal form of property prevailing among the members of that Community. This communal conception, besides the values underlying it, has a cosmovision of its own, and an important intertemporal dimension, in bringing to the fore the bonds of human solidarity that link those who are alive with their dead and with the ones who are still to come.

Antônio Augusto Cançado Trindade
Judge

Máximo Pacheco-Gómez
Judge

Alirio Abreu-Burelli
Judge



Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE HERNÁN SALGADO PESANTES

I would like to add a few comments in connection with this case.

1. In our hemisphere, land tenure by indigenous peoples and communities in the form of communal property or by ancestral tenure, is a recognized right that many Latin American countries have raised to the level of a constitutional right.

2. This right to the land – which is the entitlement of indigenous peoples – comes under the general heading of the right to property. However, it transcends the right to property in the traditional sense, which mainly concerns the right to private property. Communal or collective tenure, on the other hand, better serves the necessary social function that it is intended to have.

3. The anthropology of the XX century made it abundantly clear that indigenous cultures have a very unique bond with their ancestral lands. They rely upon the land for their survival and look to it for moral and material fulfillment.

4. In this case, there are a number of settlements of indigenous communities (*traslapes*). When a State delimits and demarcates communal lands, the overriding criterion must be proportionality. With the interested parties participating, the State deeds over those lands that all the inhabitants-members of the indigenous communities will need to carry on their way of life and ensure it for their posterity.

5. Finally, when the right to property is asserted, one must be careful to bear in mind that the enjoyment and exercise of the right to property carries with it duties, from moral to political to social. Overarching all these is a juridical duty, specifically the limitations that law in a democratic State imposes. In the words of the American Convention: "The law may subordinate such use and enjoyment to the interest of society." (Art. 21(1)).

Hernán Salgado-Pesantes
Judge

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN THE JUDGMENT ON THE MERITS AND REPARATIONS IN THE "MAYAGNA (SUMO) AWAS TINGNI COMMUNITY CASE"

1. I have voted with the majority on the Court in the Judgment on the merits and reparations in the instant case, which finds that articles 21 and 25 of the American Convention on Human Rights were violated to the detriment of the Mayagna Awas Tingni Community. Before arriving at this decision, the Court carefully examined the arguments of the petitioners, who were represented before this Court by the Inter-American Commission on Human Rights. It also examined the position of the State, which explicitly acknowledged the rights of the Mayagna (Sumo) Awas Tingni Community and its members (par. 152 of the Judgment), the evidence offered at the hearing and other information in the case file. Building on this foundation, the Court has, in my view, correctly interpreted article 21 of the American Convention on Human Rights.

2. When exercising its contentious jurisdiction, the Inter-American Court is duty-bound to observe the provisions of the American Convention, to interpret them in accordance with the rules that the Convention itself sets forth and those that can be applied under the legal regime governing international treaties, as set forth in the Vienna Convention on the Law of Treaties, of May 23, 1969. It must also heed the principle of interpretation that requires that the object and purpose of the treaties be considered (article 31(1) of the Vienna Convention), referenced below, and the principle *pro homine* of the international law of human rights – frequently cited in this Court's case-law- which requires the interpretation that is conducive to the fullest protection of persons, all for the ultimate purpose of preserving human dignity, ensuring fundamental rights and encouraging their advancement.

3. Article 29 of the American Convention, which concerns the Convention's interpretation, states that no provision of the Convention shall be interpreted as "restricting the exercise or enjoyment of any right or freedom recognized by virtue of the laws of any State Party (. . .)." In other words, even assuming, for the sake of argument, that the Convention contained provisions that restricted or limited pre-existing rights, which it does not, those persons protected under the legal regime that the Convention establishes would not forfeit the freedoms, prerogatives or authorities they have under the laws of the State to whose jurisdiction they are subject. The rights, prerogatives and authorities recognized under domestic laws are not supplanted by Convention-recognized rights; instead, they are adjusted to conform to the rights recognized under the Convention, or are added to an ever-growing body of human rights.

4. Article 31(1) of the Vienna Convention on the Law of Treaties provides as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In this regard, the object and purpose of the American Convention on Human Rights are to uphold human dignity and recognize the demands that the protection and fulfillment of the human person pose, to articulate attendant obligations, and to provide juridical instruments that preserve that human dignity and meet those demands. When examining the ordinary meaning of the terms of the treaty now being applied – namely, the American Convention-, one has to consider the scope and meaning – or scopes and meanings- that the term "property" has in the countries of the Americas.

5. In its Advisory Opinion OC-16/99 (*The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process)* the Inter-American Court of Human Rights held that "the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty (. . .) but also the system of which it is part" (par. 113). It cited the International Court of Justice, which found that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 *ad* 31). This is precisely what the Inter-American Court has done in the judgment it delivered on the instant case.

6. Various international instruments on the life, culture and rights of indigenous peoples call for explicit recognition of their legal institutions, one of them being the concepts of property once and still prevalent among them. The review of these texts was informed by a wide array of beliefs, experiences and requirements. The finding was that the documents were legitimate and that the land tenure systems must be respected. It necessarily follows, then, that those systems must be recognized and protected. In the final analysis, the individual rights of indigenous persons and the collective rights of their peoples fit into the regime created by the more general instruments on human rights that apply to all persons, as illustrated by the texts of the more specific instruments for which there exists an ever broader and more robust consensus. This information is useful, if not indispensable, for an interpretation of those Convention provisions that the Court must apply.

7. Geneva Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries was adopted by the 76th General Conference of the International Labour Organisation (Geneva, 1989) out of a concern for the survival of indigenous and tribal peoples' cultures and the institutions that their cultures have produced and protect. It provides that "governments shall respect

the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship." (article 13(1)). The Convention also provides that "[T]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised." (article 14(1)).

8. The Draft Declaration on Discrimination against Indigenous Peoples, prepared by the United Nations Economic and Social Council's Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994) makes clear reference to these very same issues and sets the standards that the international juridical community is to observe in matters bearing upon indigenous peoples and the members of their communities. Article 4 stipulates the following: "Indigenous peoples have the right to maintain and strengthen (. . .) their legal systems (. . .)". Article 25 provides that "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard." In Article 26, the Draft Declaration recognizes indigenous peoples' right to "own, develop, control and use the lands and territories," and adds the following: "This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems (. . .) and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights."

9. The Proposed American Declaration on the Rights of Indigenous Peoples, which the Inter-American Commission on Human Rights approved on February 27, 1997, speaks to the existence, relevance and observance of the individual and collective rights of indigenous peoples. It provides the following: "Indigenous peoples have the right to the legal recognition of the varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and properties." (article XVIII.1). It further states that indigenous peoples "have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood." (*Ibid.,* par. 2).

10. Various bodies of law within the Ibero-American world contain similar provisions, informed by the very same historical and cultural experience. A case in point is the Constitution of Nicaragua, the country to whose jurisdiction the Mayagna (Sumo) Awas Tingni Community is subject. That community is on Nicaragua's Atlantic Coast. Under the heading "Rights of the Atlantic Coastal Communities," that Constitution stipulates that: "The State recognizes the

communal land-tenure systems of the Atlantic Coast communities. It also recognizes their right to enjoy, use and exploit the waters and forests on their communal lands." This recognition must be taken into account when interpreting and applying the American Convention, in keeping with the Convention's article 29(a).

11. When examining this case, the Court considered the scope of article 21 of the American Convention. Under the title "Right to Property," that article provides that "Everyone has the right to the use and enjoyment of his property." When the Court examined this question, it had before it the *travaux preparatoires* of the Convention. There one can trace the evolution of the language of article 21 to its present-day wording. Originally, the article was to speak of the right to private property, specifically. Later, the proposed language changed until the authors finally settled on the wording we have today: "the right to the use and enjoyment of [one's] property." The language in which this right is framed was meant to accommodate all subjects protected by the Convention. Obviously, there is no single model for the use and enjoyment of property. Every people, according to its culture, interests, aspirations, customs, characteristics and beliefs, can institute its own distinctive formula for the use and enjoyment of property. In short, these traditional concepts have to be examined and understood from the same perspective.

12. A number of countries in the Americas are home to indigenous ethnic groups whose ancestors – this hemisphere's aborigines- built legal systems that predate the conquest and colonization and that are to some extent still in effect. These ethnic groups established special *de facto* and *de jure* relationships with the land that they possessed and from whence they obtained their livelihood. Since the conquest, their legal institutions – which reflect their framers' way of thinking and have the full force of law- have withstood countless attempts to undermine them and have managed to survive to this day. In a number of countries, these indigenous legal institutions have been adopted into the national legal systems and are backed by specific international instruments that assert the lawful interests and traditional rights of the original inhabitants of the Americas and their descendents.

13. Such is the case with the indigenous property system, which does not preclude other forms of land ownership or tenure that are the product of differing historical and cultural processes. Indeed, it and the other forms of property and land tenure fit into the broad and pluralistic universe of rights that the inhabitants of various American countries enjoy. This set of rights has spread because of shared basic beliefs – the core idea of the use and exploitation of goods-, although there are significant differences as well – especially apropos the final disposition of those goods. But, taken together, these laws and rights are the property system that most of our countries have in common. To ignore the idiosyncratic versions of the right to use and enjoy property, recognized in article 21 of the American

Convention, and to pretend that there is only one way to use and enjoy property, is tantamount to denying protection of that right to millions of people, thereby withdrawing from them the recognition and protection of essential rights afforded to other people. Far from ensuring the equality of all persons, this would create an inequality that is utterly antithetical to the principles and to the purposes that inspire the hemispheric system for the protection of human rights.

14. In its analysis of the matter subject to its jurisdiction, the Inter-American Court regarded the rights to use and enjoy property, protected under Convention article 21, from a perfectly valid perspective, that of the members of the indigenous communities. In my opinion, the approach taken for purposes of the present judgment does not in any way imply a disregard or denial of other related rights that differ in nature, such as the collective rights so frequently referenced in the domestic and international instruments that I have cited in this opinion. It must be recalled that individual subjective rights flow from and are protected by these community rights, which are an essential part of the juridical culture of many indigenous peoples and, by extension, of their members. In short, there is an intimate and inextricable link between individual and collective rights, a linkage that is a condition *sine qua non* for genuine protection of persons belonging to indigenous ethnic groups.

15. During the hearing held to receive evidence on the merits of the case that the Court has now decided, opinions were proffered that alluded directly to this very point. In his verbal opinion, summarized in the Judgment, expert witness Rodolfo Stavenhagen Gruenbaum pointed out that "(i)n certain historical contexts, the rights of the human person can be fully guaranteed and exercised only by recognizing the rights of the collectivity and of the community to which that person has belonged since birth and of which he is part, a community that affords him the elements necessary to be able to feel self-fulfilled as a human being, which also means a social and cultural being."

16. In the history of the countries of modern-day Latin America, collective expressions of indigenous law have been attacked time and time again. These attacks have directly violated the individual rights of the members of the communities and the rights of the communities as a whole. Another expert heard by the Court, Roque de Jesús Roldán Ortega, spoke to this aspect of the issue. In the opinion he gave before the Court, he stated the following: "The experience in Latin America with the communal property issue is very telling. For almost 180 years, the policy of the Latin American States was to liquidate forms of communal ownership and the autonomous forms of government of the indigenous peoples, to annihilate them not just culturally but physically as well."

17. The judgment of the Inter-American Court of Human Rights in the Mayagna (Sumo) Awas Tingni Community Case contributes to the recognition of

certain specific juridical relationships that together make up the body of law shared by a good portion of the inhabitants of the Americas, a body of law being increasingly accepted by and recognized in domestic laws and international instruments. The topic of this judgment, and by extension the judgment itself, is at that point where civil laws and economic, social and cultural laws converge. In other words, it stands at that junction where civil law and social law meet. The American Convention, applied in accordance with the interpretation that it authorizes and in accordance with the rules of the Law of Treaties, must be and is a system of rules that affords the indigenous people of our hemisphere the same, certain protection that it affords to all people of the American countries who come under the American Convention's umbrella.

Sergio García-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary

DISSENTING OPINION OF JUDGE MONTIEL ARGÜELLO

1. I dissented on operative paragraphs 1, 2, 6 and 7 of the judgment the Court delivered in the Mayagna (Sumo) Awas Tingni Community Case.

2. I recognize that this is a highly complex case and that the Court and each of its Judges have deliberated upon it calmly and thoughtfully.

3. The Government of Nicaragua is very respectful of indigenous peoples' rights, which are amply recognized in the Constitution and secondary laws.

4. In my judgment, this case did not involve a violation of Article 25 of the American Convention on Human Rights (hereinafter "the Convention") which guarantees the existence of an effective judicial remedy against acts that violate fundamental rights. The Court has concluded otherwise, but did so on the basis of a false premise, i.e., that there is no clearly regulated procedure for titling indigenous communities' properties. The truth is that the Instituto Nicaragüense de Reforma Agraria (Nicaraguan Agrarian Reform Institute - INRA), then the MIDINRA and now the Office of Rural Land Titling, have had property-titling authorities. Their decisions can be challenged by means of a petition of *amparo* filed with the Supreme Court. That the existing legislation can be improved is not to say that it does not exist. As the Court acknowledges in its own judgment, the Government of Nicaragua has hired a consulting firm to conduct a comprehensive diagnostic study of all the indigenous communities and has introduced a bill in the Legislative Assembly, titled the "Statute Regulating the Communal Property System of the Atlantic Coast and Bosawas Indigenous Communities."

5. Again in connection with Article 25 of the Convention, the Court took a number of petitions of *amparo* under consideration. The first was filed by the Community in September 1995. It was not seeking title to their lands; instead, it was challenging a logging concession that had been awarded. The petition argued that the concession would have a detrimental effect on their lands. The petition was declared inadmissible on the grounds that it was filed extemporaneously. The fact that the Supreme Court decision came down more than one year after the petition was filed was not prejudicial to the Community. The Court would never have granted cert because the petition was filed after the time limit.

6. The other *amparo* that the Court considered was the constitutionality challenge that two members of the Consejo Regional de la Región Autónoma Atlántico Norte (RAAN) filed in March 1996 and that, after various proceedings, was successful in getting the Court to nullify and cancel the logging concession in question. However, the nullification was based solely on the fact that the

concession had not been approved by the Regional Council's full membership; in other words, it had nothing to do with the demarcation of the Community's lands and was not filed by the Community.

7. In its finding that Article 21 of the Convention, which guarantees the right to property, had been violated, the Court reasoned that Nicaragua has no procedure for putting into practice the recognition of the communal property of indigenous peoples. That premise is untrue, as the preceding paragraphs show. The fact that no titles of that nature have been awarded since 1990 does not mean that no procedure is in place. It only indicates the indigenous communities' disinterest in seeking title to their lands. In the specific case of the Awas Tingni Community, it has never filed for a land deed with any competent authority. Instead, its measures were confined to attacking the logging concession mentioned previously. The only grounds for the allegation would have been if applications seeking title had been filed and then rejected.

8. The facts recounted in the preceding paragraphs show that articles 25 and 21 of the Convention, found to have been violated in the judgment of the Court, were not in fact violated.

9. As for the reparations that the Court agreed upon, I must go on record to state that as there was no violation of a Convention-protected right, Article 63 of the Convention does not apply.

Nor is it proper to agree upon an indemnity in the absence of damages. There were no damages in the instant case: no material damages because there was no logging in the concession area; no moral damages, because the fact that the lands were not demarcated did no harm to the traditional way of life of the indigenous people in the Awas Tigni Community.

Concerning the reimbursement of costs and expenses, in my judgment such damages should only be awarded when the State has had no rational reason for contesting the application.

10. The foregoing notwithstanding, it has to be said that the Court has been fair in setting the amounts to be awarded as compensation, and has taken into consideration the difficult economic situation that Nicaragua is experiencing.

Alejandro Montiel-Argüello
Judge *ad hoc*

Manuel E. Ventura-Robles
Secretary