

The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples

S. James Anaya*
Claudio Grossman**

The people of Awas Tingni did not set about to forge an international legal precedent with implications for indigenous peoples throughout the world, yet that is what they have done. Awas Tingni is one of numerous Mayagna, or Sumo,¹ indigenous communities in the isolated Atlantic Coast region of Nicaragua.² The Community has sought simply, but doggedly, to be secure in the peaceful possession of traditional lands. It has achieved a major step toward that end, and more. The Community's identity in the minds of outsiders is now merged with that of a landmark case, *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, decided by the Inter-American Court of Human Rights on August 31, 2001.

In this case the Court held that the international human right to enjoy the benefits of property, particularly as affirmed in the American Convention on Human Rights, includes the right of indigenous peoples to the protection of their customary land and resource tenure. The Court held that the State of Nicaragua

* Samuel M. Fegly Professor of Law, The University of Arizona, Tucson, Arizona; Special Counsel, Indian Law Resource Center; and formerly professor of law at the University of Iowa. The author is lead counsel among the group of attorneys—working under the auspices of the Indian Law Resource Center through arrangements with the University of Iowa College of Law and the University of Arizona James E. Rogers College of Law—that has represented the Community of Awas Tingni in the Community's effort to secure its land rights before Nicaraguan and international authorities, and he was assistant to the Inter-American Commission on Human Rights in its prosecution of the case before the Inter-American Court of Human Rights.

** Dean, American University Washington College of Law; Co-Director of the Center for Human Rights and Humanitarian Law; former President of the Inter-American Commission on Human Rights (2001). Mr. Grossman was the Commission's chief delegate for the prosecution of the Awas Tingni case before the Inter-American Court of Human Rights.

1. The people of Awas Tingni prefer to call themselves *Mayagna*, as opposed to *Sumo*, a commonly used designation. They regard the latter term as one imposed by outsiders.

2. The Atlantic Coast region of Nicaragua is generally understood to include roughly the eastern third of the country. The geographically isolated region has a unique history and cultural milieu. The region is home to the Miskito, Mayagna (Sumo), and Rama Indians and to a substantial Black Creole population. For a demography and history of the Atlantic Coast region, see CARLOS M. VILAS, *DEL COLONIALISMO A LA AUTONOMÍA: MODERNIZACIÓN CAPITALISTA Y REVOLUCIÓN SOCIAL EN LA COSTA ATLÁNTICA* 19-127 (1990).

violated the property rights of the Awas Tingni Community by granting to a foreign company a concession to log within the Community's traditional lands and by failing to otherwise provide adequate recognition and protection of the Community's customary tenure. It was not enough that the Nicaraguan constitution and laws recognize in general terms the rights of indigenous peoples to the lands they traditionally use and occupy. The Court admonished that Nicaragua must secure the effective enjoyment of those rights, which it had not done for Awas Tingni nor for the vast majority of indigenous communities of the Atlantic Coast region of Nicaragua. Like Awas Tingni, most of the indigenous communities of the Atlantic Coast are without specific government recognition of their traditional lands in the form of a land title or other official document. In the absence of such specific government recognition, Nicaraguan authorities had treated the untitled traditional indigenous lands—or substantial parts of them—as state lands, as they had done in granting concessions for logging in the Awas Tingni area. The Court ordered Nicaragua to demarcate and title Awas Tingni's traditional lands in accordance with its customary land and resource tenure patterns, to refrain from any action that might undermine the Community's interests in those lands, and to establish an adequate mechanism to secure the land rights of all indigenous communities of the country.

This is the first legally binding decision by an international tribunal to uphold the collective land and resource rights of indigenous peoples in the face of a state's failure to do so. It strengthens a contemporary trend in the processes of international law that helps to empower indigenous peoples as they press their demands for self-determination as distinct groups with secure territorial rights.

AWAS TINGNI'S PATH TO THE INTER-AMERICAN COURT

The Inter-American Court of Human Rights, an affiliate of the Organization of American States, has jurisdiction to adjudicate claims alleging violations of the American Convention on Human Rights and to issue decisions binding upon states that are parties to the Convention and that have formally acceded to the Court's jurisdiction, as has Nicaragua. Cases may be brought to the Court either by the states that are subject to the Court's jurisdiction or, as is typically done, by the Inter-American Commission on Human Rights, the principal human rights investigative and monitoring body of the Inter-American system.³ The Inter-American Commission initiated the proceedings before the

3. See HECTOR FAUNDEZ LEDESMA, *EL SISTEMA INTERAMERICANO DE PROTECCION DE LOS DERECHOS HUMANOS: ASPECTOS INSTITUCIONALES Y PROCESALES* (INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS, 1996). For a description of the Inter-American human rights system with respect to indigenous peoples, see also S. James Anaya & Robert Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

Court in the Awas Tingni case in June of 1998 with its filing of a complaint against Nicaragua, after having investigated the case and found in favor of the Community. The Community itself—through its *Sindico*, or principal leader, and with the assistance of legal counsel—had submitted a petition in October of 1995 seeking the Commission’s intervention to abate the threats to its land and resource tenure.

The concerns of Awas Tingni over land tenure security had intensified when transnational companies began entering the Community’s claimed lands, with the permission of the Nicaraguan government, to inventory the valuable tropical forest resources and plan for large-scale logging. In December of 1993 the Nicaraguan government, through its Ministry of Environment and Natural Resources (MARENA), granted a concession to the Dominican-owned company Maderas y Derivados de Nicaragua, S.A. (MADENSA), for logging on approximately 43,000 hectares of land, most of which is within the area claimed by Awas Tingni on the basis of traditional land tenure. Under pressure from the World Wildlife Fund (WWF), a major international environmental organization, the government agreed to suspend the concession until an agreement could be negotiated with the Awas Tingni Community and adequate environmental controls could be established.

WWF helped develop and funded a project of the University of Iowa College of Law (the “Iowa project”) to assist the Community in negotiations with the government and MADENSA. The Community enthusiastically accepted the offer of assistance and, with the counsel of the group of attorneys⁴ and a forestry expert⁵ assembled by the Iowa project, it proceeded to negotiate a trilateral agreement with MARENA and MADENSA for sustainable timber harvesting within the 43,000-hectare area. The agreement, which was signed in May 1994, provided for economic benefits for the Community and, furthermore, committed the government to a process by which it would definitively identify and title the Community’s traditional lands.⁶ Additionally, under the agreement the

4. The group of attorneys included, in addition to the co-author James Anaya, then a professor at the University of Iowa College of Law, John Allen of the University of Iowa College of Law’s Clinical Law Programs, S. Todd Crider of Simpson, Thacher & Bartlett, and local Nicaraguan counsel María Luisa Acosta, a graduate of the University of Iowa College of Law. This same group of attorneys, joined later by Indian Law Resource Center staff, has provided legal counsel to and represented the Awas Tingni Community throughout the events described and represented by this volume. They have been assisted by law students from the University of Iowa, the University of Arizona, New York University, and the University of Toronto. In addition, students of American University Washington College of Law assisted Claudio Grossman and participated in the hearings in Costa Rica.

5. This was Hans Åkesson, a forestry expert with extensive experience in Canada, Sweden, Africa, Russia, as well as in Nicaragua.

6. See *Convenio de Aprovechamiento Forestal entre la Comunidad de Awas Tingni; Maderas y Derivados de Nicaragua, S.A.; y el Ministerio del Ambiente y los Recursos Naturales*, 15 de mayo de 1994 (on file with the authors). The process leading to this

government undertook not to take any action that would prejudice or undermine the Community's land claim.⁷

The government's commitment to a process of land titling in favor of Awas Tingni proved illusory. Even as the government was formalizing this commitment as part of a written agreement, it was engaged in discussions with a second logging company, Sol del Caribe, S.A. (SOLCARSA), a Korean-owned firm, which was soliciting the government for a concession to log an area of 63,000 hectares of land adjacent to the MADENSA management area. By the time the Awas Tingni community leaders learned of the SOLCARSA initiative, in July of 1995, the government had already granted SOLCARSA an exploration license and had given preliminary approval of the concession. Through the Community's Nicaraguan attorney, who was contracted as part of the Iowa project, Awas Tingni protested the SOLCARSA initiative, arguing that most of area sought by SOLCARSA was also part of the Community's traditional territory.

A period of time passed with no response by the government to the Community's written protest. Awas Tingni leaders and community members became increasingly alarmed by the presence of SOCLARSA agents who were conducting an inventory of the timber resources within lands used by the Community for agriculture and for subsistence hunting and gathering. When it became apparent that the government was determined to go ahead and grant SOLCARSA the concession under the assumption that the lands in question were entirely state-owned lands, the Community decided to take legal action. Awas Tingni filed an action for *amparo* (emergency relief) within the Nicaraguan judicial system, alleging violations of the relevant provisions of Nicaraguan law that affirm in general terms the rights of indigenous communities over their traditional communal lands.⁸ When that effort failed, the Community petitioned the OAS Inter-Commission on Human Rights, under the complaint procedure provided in the American Convention on Human Rights, to which Nicaragua is a party. In these and related legal actions the Community has been represented by

agreement and the agreement's content are summarized in S. James Anaya & S. Todd Crider, *Indigenous Peoples, The Environment, and Commercial Forestry in Developing Countries: The Case of Awas Tingni, Nicaragua*, 18 HUM. RTS. Q. 345 (1996).

7. Article 3.2 of the agreement provides:

MARENA promises to facilitate the definition of the communal lands and not to undermine the territorial aspirations of the Community . . . Such definition of lands should be carried out according to the historical rights of the Community and within the relevant legal framework. (Translation from Spanish).

8. The relevant provisions of the Political Constitution of Nicaragua and the Statute of Autonomy for the Atlantic Coast Regions of Nicaragua are discussed in Awas Tingni's Petition to the Inter-American Commission on Human Rights.

attorneys working under the auspices of the Iowa project, and later under the auspices of the Indian Law Resource Center and the Indigenous Peoples Law & Policy Program of the University of Arizona James E. Rogers College of Law.⁹

The petition to the Inter-American Commission alleged violations of the right to property, the right to cultural integrity, and other rights that are affirmed in the American Convention on Human Rights and other international instruments, and it requested that the Commission assist the Community in its effort to stop the concession to SOLCARSA and to achieve secure land tenure.¹⁰

An important component of the legal actions taken by Awas Tingni at the national and international levels is the data that were compiled in maps and a related ethnographic study. The initial terms of reference for the WWF-funded Iowa project included assisting Awas Tingni to compile the data to support its claim to traditional lands, with the expectation that this data would be the basis of discussions with the government that in turn would lead to titling or other official recognition of Awas Tingni lands. The data instead became the basis of contentious legal proceedings that reached the highest level of adjudication within the Inter-American human rights system.

In its early phases the Iowa project established a cooperative relationship with Harvard's Weatherhead Center for International Affairs in order to assist Awas Tingni to document the historical, ethnographic, and geographic data relevant to its land claim. Theodore Macdonald, an anthropologist from Harvard's Weatherhead Center, spent several weeks at the Community conducting research in collaboration with a specially selected team of Community members. Prior to Dr. Macdonald's arrival at the Community or the establishment of the Iowa project, Community leaders had sketched a map of the Awas Tingni traditional lands without any outside assistance.¹¹ With this sketch map as an initial point of reference, Dr. Macdonald worked with the Community researchers to document the Awas Tingni's historical and continuing land tenure patterns. Using a simple hand-held electronic device, a Magellan Geographical Positioning System (GPS), the Community researchers located relevant geographic coordinates, which were to be the basis for the production of a map illustrating Awas Tingni historical land tenure.¹²

9. For the list of the attorneys see *supra* note 3. The Indian Law Resource Center is a U.S.-based organization that provides legal assistance to indigenous peoples in several countries throughout the Hemisphere. See <http://www.indianlaw.org> for further information. Information on the University of Arizona's Indigenous Peoples Law & Policy Program is at <http://www.law.arizona.edu>.

10. See S. James Anaya, *The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua*, 9 ST. THOMAS L. REV. 157 (1996) (including full text of petition).

11. The Community sketch map is reproduced as fig. 1 *infra* p. 308.

12. See fig. 1 in the appendix to the Hearing Transcript, *infra* p. 308. The ethnographic research and mapping in relation to Awas Tingni's land claim is described in S. James Anaya & Theodore Macdonald, *Demarcating Indigenous Territories in*

At the time the Awas Tingni Community discovered the plans for the SOLCARSA concession, in mid-1995, the research just described was ongoing. After Awas Tingni filed its complaint with the Inter-American Commission on Human Rights in October of 1995, a preliminary ethnographic report and accompanying map in support of the Community's land claim was completed. The map was generated by computer using the data compiled by the Community researchers and Dr. Macdonald. Awas Tingni subsequently amended the map to include a line designating the land, within the Community's historical use area, that the Community proposed to be recognized by the government as Awas Tingni communal land.¹³

The preliminary report and map were submitted to the Inter-American Commission and to relevant Nicaraguan government agencies, including MARENA and the regional governing body of the North Atlantic Autonomous Region. Along with the submission of the preliminary report and map, Awas Tingni in early 1996 again raised to the government its concern over the SOLCARSA concession, and proposed that consideration of the concession be suspended pending resolution of the Community's land claim or an agreement with the Community.

Nonetheless, ignoring the Community's submissions and proposal, the government proceeded with its plans and formally granted the concession to SOLCARSA on March 13, 1996. In response to the mounting threat of logging under the SOLCARSA concession against the wishes of the Awas Tingni Community, Community leaders developed yet another map. This map, which was sketched by hand, details the land and resource tenure patterns of the Community within the concession area, and it also was submitted to the Inter-American Commission on Human Rights and relevant government agencies. In defending itself before the Inter-American Commission, the Nicaraguan government maintained the position that the amount of land claimed by Awas Tingni was excessive, although the government never contested the data presented by the Community, illustrated by maps, of historical and continuing land tenure. Faced with this data at a hearing before the Inter-American Commission at its headquarters in Washington, D.C., in October 1997, representatives of the Nicaraguan government conceded that at least part of the land within the SOLCARSA concession area was Awas Tingni communal land to which the Community was legally entitled.

While the case was proceeding at the international level before the Inter-American Commission on Human Rights, the SOLCARSA concession became the subject of an additional legal proceeding within the Nicaraguan judicial

Nicaragua: The Case of Awas Tingni, CULTURAL SURVIVAL Q., Fall 1995, at 69, 72-73; S. James Anaya & Theodore Macdonald, *Territorio Awas Tingni*, CULTURAL SURVIVAL Q., Spring 1996, at 73.

13. This map is reproduced as fig. 5 in the appendix to the Hearing Transcript, *infra* p. 314.

system. At the request of the Awas Tingni Community, and with the assistance of the Iowa project/Indian Law Resource Center attorneys, two members of the Regional Council of the North Atlantic Autonomous Region filed with the Nicaraguan Supreme Court another *amparo* action, again demanding that SOLCARSA's concession be revoked. Remarkably, this *amparo* action was successful. The Nicaraguan Supreme Court declared the SOLCARSA concession unconstitutional in February 1997, on the ground that the Regional Council had not approved the concession as required by article 181 of the Political Constitution of Nicaragua.

But instead of canceling the SOLCARSA concession, government officials sought to have the constitutional defect "cured" by securing a *post hoc* ratification of the concession by the Regional Council. Despite the protestations of Awas Tingni and other leaders from the region, the Regional Council in a divided vote gave its approval to the concession. The vote came in October of 1997, around the same time that Nicaraguan government officials appeared before the Inter-American Commission in Washington, D.C., saying that the government intended to follow the Nicaraguan Supreme Court's decision, misleading the Commissioners into believing that the government intended to cancel the concession. Faced with this development, Awas Tingni initiated yet another action before the Nicaraguan Courts, this one against the Regional Council members who voted in favor of ratification of the concession and the central government officials who promoted that ratification. Although this suit was filed just days after the Regional Council vote, the Nicaraguan Supreme Court eventually dismissed the case on the dubious ground that it was untimely since the concession had been initially granted more than a year earlier.

However, yet another legal action in the domestic system did result in the SOLCARSA concession being cancelled. In addition to suing Regional Council members and central government officials shortly after the Regional Council's vote in favor of the concession, the Awas Tingni lawyers assisted dissenting members of the Council to file a request for execution of the Supreme Court's earlier ruling, which had declared the concession unconstitutional because it was not preceded by Regional Council approval. The Nicaraguan Supreme Court acceded, and issued an order that the Nicaraguan President himself direct the nullification of the concession, a concession that, according to the Court, was in the first instance invalid because of a defect in the process by which it was granted that could not be cured by a subsequent Regional Council vote. Shortly after the execution order, but almost a year after the initial determination of unconstitutionality, the government agency MARENA notified SOLCARSA that its concession had been made null.

The eventual nullification of the SOLCARSA concession was a notable success for the Awas Tingni Community and for other sectors of Nicaraguan civil society that opposed the concession. Still, the underlying land tenure issue remained unresolved, and the government's disposition toward justly resolving it remained questionable at best. Awas Tingni, like the majority of other indigenous

communities of the Atlantic Coast, continued to lack official demarcation of its traditional territory or other official, specific recognition of traditional land and resource tenure. And it did not look like they could count on the government to take the needed remedial action without additional pressure of some kind.

A few weeks after MARENA'S grudging nullification of the SOLCARSA concession, the Inter-American Commission on Human Rights decided to submit the case to the Inter-American Court of Human Rights in the hopes of a decision that would bind Nicaragua to take definitive action to uphold indigenous land rights. Although the SOLCARSA concession had been canceled, the Inter-American Commission was dissatisfied with the continued lack of action by the Nicaraguan government to demarcate and otherwise secure Awas Tingni traditional lands.

THE PROCEEDINGS BEFORE THE COURT

In June of 1998, the Inter-American Commission on Human Rights named as its assistants the Awas Tingni lawyers¹⁴ and filed a complaint against Nicaragua before the Inter-American Court of Human Rights. In its complaint the Inter-American Commission charged Nicaragua with essentially the same violations of international human rights that were articulated by Awas Tingni in its earlier petition to the Commission, including violations of the right to property (considered in relation to other human rights), plus a violation of the right to judicial protection.¹⁵ The Commission adopted as its own the positions and legal theory that had been advanced by the Community, and for the most part these were the positions and legal theory ultimately adopted by the Court. Relying on the ethnographic research and mapping described above, as well as a host of other

14. Under the Rules of Procedure of the Inter-American Court of Human Rights, then in effect, neither the victims of alleged human rights abuses nor their lawyers were permitted direct participation in the proceedings in cases before the Court, other than in the proceedings on reparations subsequent to a finding of state responsibility. However, the rules of procedure permitted the Inter-American Commission to appoint as its assistants the legal representatives of the victims and thereby allow their participation in the proceedings under the authority of the Commission. *See* Rules of Procedure of the Inter-American Court of Human Rights, art. 23, Basic Documents Pertaining to Human Rights in the Inter-American System (1997), OEA/Ser.L/V/1.4 Rev.7 (repealed 2001). The revised rules of procedure of the Court, effective as of June 1, 2001, allow the victims and their legal representatives to participate directly and autonomously in all phases of the proceedings. Rules of Procedure of the Inter-American Court of Human Rights, art. 23, Basic Documents Pertaining to Human Rights in the Inter-American System (2001), in OEA/Ser.L/V/1.4 Rev.8, available at www.oas.org.

15. *See* Complaint by the Inter-American Commission on Human Rights, Submitted to the Inter-American Court of Human Rights in the Case of the Awas Tingni Mayagna (Sumo) Indigenous Community Against the Republic of Nicaragua, reproduced in its entirety, *infra* pp. 17-100.

documentation, the Inter-American Commission requested that the Inter-American Court order Nicaragua to establish and implement a procedure that would result in the prompt demarcation and specific recognition of Awas Tingni communal lands, in accordance with the Community's traditional land tenure patterns, and to provide monetary compensation to Awas Tingni for the infringement of its territorial rights.¹⁶

Nicaragua attempted to have the case dismissed on the grounds that Awas Tingni had failed to exhaust all available domestic remedies. On February 1, 2000, the Inter-American Court unanimously ruled against Nicaragua's preliminary objections and held the case admissible.¹⁷

As the case proceeded before the Court on the merits, the government of Nicaragua settled on a defense that rested, essentially, on the following assertions: Awas Tingni could not claim an ancestral entitlement to land because the existence of the Community's village at its present location dates back only to the 1940s; the area claimed by the Community is too large in proportion to the Community's membership; and, neighboring indigenous communities have rights to at least parts of the same area.¹⁸

It was never in dispute that the people of Awas Tingni moved their principal village to its present location in the 1940s. However, as the evidence presented by the Commission demonstrated, the Community moved from a location a short distance away within a contiguous territory that includes both the older and newer settlements and that corresponds with a pattern of land use and occupancy that dates back generations. The government never provided any

16. The Commission's position was further elaborated, in light of the oral testimony at the hearing on the merits, in its Post-Hearing Brief. See Final Written Arguments of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights in the case of the Mayagna (Sumo) Indigenous Community of Awas Tigni against the Republic of Nicaragua, reproduced in its entirety, *infra* pp. 325-68.

17. See *Caso de la Comunidad Mayagna (Sumo) Awas Tingni*, Excepciones Preliminares, sentencia de 1 de febrero de 2000, Corte IDH (Ser. C.) No. 67, paras. 40, 51, 56, 60 (Spanish text of the Court's admissibility decision). The Nicaraguan government argued that the Awas Tingni Community did not exhaust all available domestic legal remedies, but rather failed to properly bring a timely legal action to assert its rights. Further, the government asserted that the Community did not address its request for titling to the competent central government authority, but rather to a third party without competence to adjudicate the matter. The Commission argued that the State had waived its right to assert the Community's failure to exhaust domestic legal remedies by not raising the objection with sufficient specificity early in the proceedings. Alternatively, the Commission argued, even if the State had not waived its right to raise the objection, the Community had, in fact, exhausted all available domestic remedies.

18. See Reply of the Republic of Nicaragua to the Complaint Presented Before the Inter-American Court of Human Rights in the Case of the Mayagna Community of Awas Tingni, *infra* pp. 101-127 [hereinafter Reply of the Republic of Nicaragua]; Final Written Arguments of the Republic of Nicaragua on the Merits of the Issue (Case No. 11.577—Mayagna Community of Awas Tingni), reproduced in their entirety, *infra* pp. 369-78.

documentation or testimony to disprove the evidence of Awas Tingni's historical and continuing land tenure within the territory claimed, although it challenged the extent to which the evidence of the Community's land tenure was complete. Nor did it present any specific proof of any land entitlement on the part of neighboring communities that trumps Awas Tingni's claim; although it was undisputed that those communities do assert claims, on the basis of traditional use patterns, to parts of the same land claimed by Awas Tingni. Significantly, most of these same neighboring communities joined in an *amicus curiae* submission to the Court supporting Awas Tingni and urging a comprehensive settlement of the land claims of all the indigenous communities in the region.¹⁹

The government's approach throughout the Court's proceedings was one of asserting broad government authority and discretion in the management of lands that are not yet officially titled in favor of any individual or group, upon a presumption against the existence of indigenous land and resource rights unless presented with definitive proof within a set of narrow state-defined criteria that do not necessarily correspond with traditional tenure. Such an approach, and its underlying presumption against the existence of indigenous land or resource rights, have been shared by governments throughout the world, with the result that over time indigenous peoples have lost effective use and enjoyment of ever greater parts of their traditional lands. In the Awas Tingni case, the government of Nicaragua was faced with an effort to hold it to a different presumption—one in which indigenous peoples are presumed to be entitled to the lands they in fact have used and occupied, and which results in governments being under an affirmative obligation to recognize traditional tenure and to affirmatively protect it.

The clash of understandings about indigenous-state relations concerning lands and resources was nowhere more evident than in the public hearing on the merits of the case, a remarkable event that took place over two and a half days at the Court's seat in San José, Costa Rica.²⁰ The Commission presented twelve witnesses who included Awas Tingni and other indigenous leaders from the Atlantic Coast, the anthropologist who had assisted the Community with its ethnographic study and mapping, and several other individuals—some of them qualified by the Court as expert witnesses—with relevant knowledge on conditions among indigenous peoples in the Atlantic Coast and more generally on indigenous-state relations in the Hemisphere. The government defaulted in its

19. See Organization of Indigenous Sindicos of the Nicaraguan Caribbean (OSICAN), *amicus curiae* brief, submitted to the Inter-American Court of Human Rights on Jan. 27, 1999. Other *amicus curiae* briefs were submitted by the Assembly of First Nations (Canada); International Human Rights Law Group (USA); Mohawk Indigenous Community of Akwesasne (USA); and National Congress of American Indians (NCAI) (USA).

20. See Transcript of the Public Hearing on the Merits, Nov. 16, 17, and 18, 2000, at the Seat of the Court, reproduced in its entirety, *infra* pp. 129-306 [hereinafter Hearing Transcript].

timely presentation to the Court of a witness list, and hence it was not permitted to present witnesses of its own. However the Court itself called one of the government officials that Nicaragua had proposed as a witness, and this person in effect served as a government witness.

From the testimony of the indigenous leaders unfolded a story of people and land, and of a struggle to maintain the connection between the two. The social science and legal professionals who testified gave context for this story, providing insights into its broader implications and validating the perspective of territory advanced by the indigenous leaders. The government official who testified, and the government lawyers who cross-examined the Commission's witnesses, persisted in advancing the perspective of state dominance over territory, a perspective in which is absent a desire to understand accurately and fully the dimensions and significance of the indigenous presence. In his closing argument at the hearing, the chief government lawyer summarized the state's assessment of things in declaring emphatically—and to the alarm of the members of the Awas Tingni Community present—that Awas Tingni does not possess ancestral lands.²¹

THE COURT'S DECISION

In the end, the Inter-American Court accepted Awas Tingni's account of its relationship to territory and ruled that Awas Tingni does possess lands to which it has legal entitlement. After soliciting and receiving post-hearing final written arguments from the Commission and the government,²² the Court rendered its decision finding Nicaragua in violation of relevant provisions of the American Convention on Human Rights and ordering reparations.²³ The Court first found that Nicaragua had violated the Convention by failing to make effective the rights of indigenous peoples to lands and resources that are recognized in general terms by the Nicaraguan Constitution and legislation. The Court pointed to the absence of an adequate state mechanism to respond to the requests of the Awas Tingni Community for the titling of its lands and the failure of the Nicaraguan courts to act on the Community's legal actions in a timely manner. In this regard, the Court found violations of article 25 of the Convention, which affirms the right to judicial protection, in connection with articles 1 and 2 of the Convention, which obligate state parties to adopt the measures necessary to secure the enjoyment of fundamental rights. The Court thus established that the faithful implementation of domestic legal protections for the rights of indigenous peoples is an obligation

21. Hearing Transcript, *infra* p. 297.

22. See Inter-Am. C.H.R., *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of Aug. 31, 2001, reproduced in substantial part, *infra* p. 406, para. 67 [hereinafter Judgment].

23. *Id.* at para. 173.

under the American Convention on Human Rights and that states may incur international responsibility if they fail to make those rights effective.

The Court additionally found a violation of the right to property of article 21 of the Convention, going beyond that part of its decision predicated on the existence of a prior domestic legal norm. In what is the most significant and far-reaching part of its decision, the Court held that the concept of “property” as articulated in the American Convention includes the communal property of indigenous peoples that is defined by their customary land tenure, apart from what domestic law has to say. Although the Court stressed that, in the case of Nicaragua, domestic law does affirm indigenous communal property, the Court affirmed that the rights articulated in international human rights instruments have “autonomous meaning that cannot be limited by the meaning attributed to them by domestic law.”²⁴ The Inter-American Commission had pressed this point in its written submissions, invoking the jurisprudence of the European Court of Human Rights regarding the analogous property rights provision of the European Convention on Human Rights, and referencing developments elsewhere in international law and institutions specifically concerning indigenous peoples’ rights over lands and resources.

The Court accepted the Commission’s view that, in its meaning autonomous from domestic law, the international human right of property embraces the communal property regimes of indigenous peoples as defined by their own customs and traditions, such that “possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property.”²⁵ In arriving at this conclusion the Court employed what it termed an “evolutionary” method of interpretation, taking into account normative developments internationally both within and outside of the Inter-American system.²⁶ In his concurring opinion, Judge García Ramírez expounded upon this interpretive methodology, making reference to United Nations and Organization of American States draft instruments on the rights of indigenous peoples and to International Labour Organization Convention (No. 169) on Indigenous and Tribal Peoples, among other developments, and admonishing due regard for indigenous peoples’ own values in relation to lands and resources.²⁷

Within this interpretive framework, the Court found that the Awas Tingni Community has a communal property right to the lands they currently inhabit, which is protected by article 21 of the Convention and which, especially in light of the obligations states have to affirmatively protect rights under articles 1 and 2 of the Convention, includes the right to have those lands officially demarcated and

24. *Id.* at para. 146.

25. *Id.* at para. 151.

26. *Id.* at para. 146.

27. See Concurring Opinion of Judge Sergio García Ramírez in the Judgment on the Merits and Reparations in the ‘Mayagna (Sumo) Awas Tingni Community Case,’ reproduced in its entirety, *infra* p. 450-51, at paras. 6-9.

titled. The Court found that Nicaragua violated the right to property and its corollaries of affirmative protection by granting concessions to third parties to exploit the resources on lands that should be titled in favor of the Community and by failing to carry out that demarcation and titling. Reinforcing the understanding that indigenous property rights derive from indigenous custom and tradition, the Court's reparations order specified that Nicaragua should proceed to demarcate and title the lands of Awas Tingni and other indigenous communities, "in accordance with their customary laws, values, customs, and mores."²⁸

While marking a path in the doctrine of international law to embrace indigenous peoples' rights over lands and natural resources, the Court was notably timid and less careful in its assessments of monetary reparations and the recoverable costs incurred by Awas Tingni in the domestic and international proceedings. Article 63(1) of the American Convention grants the Court broad authority to order reparations upon finding a violation of the Convention. With this authority the Court in numerous cases has ordered appropriate non-monetary remedial measures, as it did in this case by ordering Nicaragua to demarcate and title indigenous lands. The Court also has ordered monetary relief to compensate for material and moral harm to the victims, and furthermore has ordered payment to compensate for the legal and other costs incurred by the victims in seeking vindication of their rights in the relevant domestic and international proceedings.²⁹ In prior cases the Court had conducted extensive proceedings, sometimes over a period of months, subsequent to finding a violation of the Convention in order to determine reparations.³⁰ The rules of procedure of the Court that were in effect when the Awas Tingni case was initiated before the Court reflected this practice of having a separate phase of proceeding on reparations subsequent to the merits phase.³¹ Relying on this practice and the Court's rules of procedure then in effect,

28. See Judgment, *infra* p. 441, at paras. 173(3)-(4).

29. See generally DINAH SHELTON, *Reparations in the Inter-American System*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS (David Harris & Stephen Livingston, eds., Clarendon Press 1998).

30. See Petition and Preliminary Declaration of the Mayagna Community of Awas Tingni on Reparations and Costs, *infra* p. 383, n.10-12 and accompanying text (citing Inter-Am. C.H.R., *Caballero Delgado and Santana Case*, Reparations, Judgment of January 29, 1997; *Carrido and Biagorria Case*, Reparations, Judgment of Aug. 27, 1998; *Aloeboetoe et al. Case*, Reparations, Judgment of Sept. 1993, Ser. C. No. 15; *Suárez Roser Case*, Reparations, Judgment of Jan. 20, 1999, Ser. C. No. 44; *Velásquez Rodríguez Case*, Compensatory Damages, Judgment of July 21, 1989, Ser. C. No. 7; *El Amparo Case*, Reparations, Judgment of Sept. 14, 1996; *Neira Alegria et al. Case*, Reparations, Judgment of Sept. 29, 1996) [hereinafter Reparations Brief].

31. See Rules of Procedure of the Inter-American Court of Human Rights, approved by the Court at its XXXIV Regular Session held Sept. 9-20, 1996, art. 23 stating that "[At] the reparations stage, the representatives of the victims or of their next of kin may independently submit their own arguments and evidence." Rules of Procedure of the Inter-American Court of Human Rights, art. 23, Basic Documents Pertaining to Human Rights in the Inter-American System (1997) OEA/Ser.L/V/1.4 Rev.7 (repealed 2001).

the Commission had foregone presenting specific evidence and arguments on compensable damages and costs, and instead in its complaint to the Court had explicitly reserved the right to present such evidence and arguments at a subsequent merits phase.

In the *Awas Tingni* case, however, the Court avoided a reparations phase, following what is now its apparently preferred practice of merging consideration of the merits and reparations. Prior to issuing its decision on the merits of the case, the Court requested the Inter-American Commission and Nicaragua to provide written arguments and documentary evidence on damages and costs, and it set a deadline allowing them a mere ten days to do so. Because of an internal administrative error, the Commission did not notify the Community's legal representatives of the Court's request or otherwise act on it until after the deadline had passed. Even though the Community, acting autonomously through its own legal counsel, did submit a brief on damages and costs a few days after being notified by the Commission of the Court's request,³² the Court ignored that brief in its decision. The Court referred only to the Commission's own submission on reparations, which incorporated by reference the Community's arguments, and ruled it inadmissible for being untimely.³³

Without confronting the Community's or the Commission's arguments for much larger sums, and without otherwise allowing the opportunity for the submission of specific evidence on damages and costs, the Court ordered that, "in accordance with equity," Nicaragua invest the total sum of US \$50,000 "in works or services of collective interest for the benefit of the *Awas Tingni* Community" and that it pay the Community US \$30,000 for its expenses and costs.³⁴ The Community's post-judgment request to the Court that it reconsider its reparations decision and provide for a full reparations proceeding was summarily rejected in a terse note written by the Court's Secretary. The note admonished that neither the Community nor its attorneys had standing before the Court because, under the Court's rules of procedure in effect at the time the case began, the victims were permitted to participate autonomously only in a reparations phase, and in this case there was no reparations phase.³⁵

32. See Judgment, *infra* p. 404, at para. 68; Reparations Brief, *infra* p. 380, at paras. 4-5.

33. See Judgment, *infra* pp. 433-34, para. 159.

34. *Id.* at p. 444, para. 173(7).

35. Note from Manuel E. Ventura Robles, Secretary, Inter-American Court of Human Rights, to Professor S. James Anaya, Legal Representative of the *Awas Tingni* Community (Dec. 4, 2001) (stating the Court's decision was adopted under the rules of procedure adopted on Sept. 16, 1996, and that "despite the fact that Article 23 of the applicable rules of procedure confer *locus standi* to the representatives of the victims in the reparations phase, in the *Mayagna (Sumo) Awas Tingni v. Nicaragua Case*, there was no separate reparations phase, and thus, the Court had no obligation to convoke one; neither did it have the power to receive from the Community a separate brief regarding its claims in that regard") (original Spanish note on file with the author).

Despite this outcome in regard to monetary reparations, the Court's decision in this case stands on balance as a victory for Awas Tingni and other indigenous communities of Nicaragua, and, furthermore, as an important development for indigenous peoples throughout the Hemisphere and the world in their efforts to secure rights over lands and natural resources. In a nutshell, the Court held that the American Convention on Human Rights obligates states to recognize and adopt specific measures to protect indigenous peoples' rights to land and natural resources in accordance with indigenous peoples' own customary use and occupancy patterns. The Court's view that this obligation is grounded in the right to property also has implications for states that are not parties to the American Convention. The right to property is affirmed in numerous other international human rights instruments—including the American Declaration on the Rights and the Duties of Man, which the Court considers to be expressive of the human rights obligations of all members of the Organization of American States, and in the Universal Declaration of Human Rights, which in this and other respects can be regarded as expressive of customary international law. The decision of the Inter-American Court is an authoritative interpretation of the general human right to property that is grounded in various sources of international law. The Court's interpretation avoids the discrimination of the past and, rather than excluding indigenous modalities of property, it embraces them, marking a new path for understanding the rights and status of the world's indigenous peoples.