

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
ORGANIZATION OF AMERICAN STATES**

PETITION

by

**THE MAYAGNA INDIAN COMMUNITY OF AWAS TINGNI and
JAIME CASTILLO FELIPE, on his own behalf and
on behalf of the Community of Awas Tingni,**

against

NICARAGUA

I. Introduction

1. This petition is submitted by the MAYAGNA INDIAN COMMUNITY OF AWAS TINGNI and its leader, JAIME CASTILLO FELIPE, against NICARAGUA based on Nicaragua's failure to take steps necessary to secure the land rights of Awas Tingni and other indigenous communities in Nicaragua's Atlantic Coast region. Nicaragua's acts and omissions in this regard constitute violations of the American Convention on Human Rights (the "American Convention"), the American Declaration of the Rights and Duties of Man (the "American Declaration") and other provisions of international human rights law.

2. Through its government officials, Nicaragua has allowed to emerge a pervasive condition under which the enjoyment of indigenous land rights is generally threatened. Adding to this environment of government neglect, the Nicaraguan Ministry of Environment and Natural Resources (commonly referred to by its Spanish acronym "MARENA") is about to grant to a Korean-owned company a long-term concession for timber harvesting on Awas Tingni lands in disregard of the Community's property and other rights. The government already has granted the company permission to enter the Community's lands and to undertake preliminary work

toward the planned timber exploitation, and the company is constructing nearby a timber processing plant. Communications of protest to the responsible government officials have gone unanswered, and efforts at a judicial resolution have not been fruitful.

3. Significantly, this Petition arises in the aftermath of conditions affecting the indigenous communities of Nicaragua's Atlantic Coast that attracted the attention of this Commission in the early 1980s. In response to complaints of human rights abuses against the indigenous peoples of the Atlantic Coast, the Commission conducted an investigation which included an on-site visit and published its findings in its *Report on the Situation of a Segment of the Nicaraguan Population of Miskito Origin* (hereinafter "*Miskito Report*").¹ Among the problems identified by the Commission in its report was that of unsecured land tenure for the Miskito and other indigenous groups of the region. The Commission recommended that the government take steps to remedy this problem. However, over a decade later, the land rights of Awas Tingni and other indigenous communities remain vulnerable to violations in the persistent absence of effective government protections.

4. The Community of Awas Tingni and Mr. Castillo seek the Commission's assistance in reversing the acts and omissions of the Nicaraguan government that violate their rights and in safeguarding their rights in the future. The Commission's involvement is particularly important since, as set forth below, the government of Nicaragua appears willing to respond, if at all, only when pressure is exerted by the international community.

II. Jurisdiction

5. The Inter-American Commission on Human Rights has competence to receive and act on this petition in accordance with articles 44-51 of the American Convention, to

¹ OEA/Ser.L/V/II.62, doc. 10, rev. 3 (1983).

which Nicaragua is a party, and article 19 of the Commission's Statute.

III. The Petitioners

6. THE MAYAGNA INDIAN COMMUNITY OF AWAS TINGNI (the "Community" or "Awas Tingni") is one of the "communities of the Atlantic Coast" region recognized by the Political Constitution of Nicaragua under its articles 5, 8, 11, 49, 89, 90, 91, 121, 180, and 181, and by the Statute of Autonomy of the Atlantic Coast Regions of Nicaragua, Law No. 28 of 1987. The term "Mayagna" refers to the larger indigenous ethno-linguistic group of which Awas Tingni and its members form a part.² The Community is organized and functions under a traditional, customary leadership structure that is common to other Mayagna communities and that is recognized by the Nicaraguan Constitution, arts. 89, 180, and the Statute of Autonomy, art. 11(4). The Community's principal village is on the Wawa River, within the municipality of Waspam, Northern Atlantic Autonomous Region, Nicaragua.

7. JAIME CASTILLO FELIPE, a citizen of Nicaragua and an indigenous Mayagna, is the "Síndico" of Awas Tingni. In accordance with longstanding tradition among the indigenous communities of the Atlantic Coast, the Síndico is Awas Tingni's principal leader. In addition to serving as the Community's Síndico, Mr. Castillo's occupations include farming and seasonal wage labor. His address is Community of Awas Tingni, Waspam, Northern Atlantic Autonomous Region, Nicaragua. In submitting this petition, Mr. Castillo acts both individually and on behalf of the Community.

8. For the purposes of this petition and all related proceedings, the legal representative of the Community and Mr. Castillo is THE UNIVERSITY OF IOWA COLLEGE OF LAW, CLINICAL LAW PROGRAMS, an institution of The University of Iowa which is

² While "Mayagna" is the preferred term among those who comprise the group, the term "Sumo" is more commonly used by outsiders.

chartered by the State of Iowa, located at 386 Boyd Law Building, Iowa City, Iowa 52242. *See* appendices 1 and 1-A hereto. The Petitioners' counsel of record, to whom all notices and correspondence should be sent, is S. JAMES ANAYA of The University of Iowa College of Law, Clinical Law Programs. Mr. Anaya, an attorney and professor of law, is a United States citizen domiciled in Iowa City, Iowa and is a member of the bars of the State of New Mexico and the United States Supreme Court.

9. Also assisting the Community as legal counsel are MARIA LUISA ACOSTA CASTELLÓN, attorney, a citizen of Nicaragua, with domicile and address at casa 21-B del Asentamiento José Martí del Bo. Santa Rosa, Bluefields, Región Autónoma Atlántico Sur, Nicaragua; SIMPSON THACHER & BARTLETT (a partnership which includes professional corporations), a United States law firm with its principal offices located at 425 Lexington Avenue, New York, New York 10017-3954; and the INDIAN LAW RESOURCE CENTER, a non-profit legal advocacy organization with an office at 601 E Street Southeast, Washington, D.C. 20003.

IV. Facts

Awas Tingni and Its Lands

10. The Community of Awas Tingni has a population of approximately 150 families, or about 650 individuals. Community members converse among themselves almost exclusively in the Mayagna language, although most also speak at least some Spanish. The principal village of the Community is located in an isolated forested area approximately a hundred kilometers inland from Nicaragua's northeastern Atlantic or Caribbean coast.

11. The Community's leadership is comprised of a governing counsel which includes, in addition to the Síndico, the vice-Síndico ("Suplente del Síndico"), the Judge of the

People (“Juez del Pueblo”), and the Guardian of the Forest (“Responsable de Bosque”). The members of the governing council are elected by and answer directly to the Community at large, which meets regularly in an assembly open to all adult members of the Community.

12. Community members subsist primarily from itinerant agriculture, hunting and fishing. These activities are carried out within Awas Tingni’s ancestral territory according to a traditional system of land tenure that is linked to the Community’s socio-political organization.

13. Awas Tingni’s ancestral territory includes land that members of the Community have traditionally used and occupied, and over which the Community’s dominance has exceeded that of other groups, within the customary system of territorial distribution historically functioning among the indigenous communities of the Atlantic coast region. Within the system of land tenure common to Atlantic Coast communities, Awas Tingni holds its lands collectively while individual Community members and families enjoy subsidiary rights of use and occupancy.

14. The Community’s possession of its territory, or communal lands, extends as far back in time as the earliest moments in the history of the Mayagna that can be recounted by Community elders. Beyond providing a means of sustenance for Community members, Awas Tingni’s communal land base comprises a crucial aspect of the Community’s existence, continuity and culture.

General Legal Recognition of Indigenous Land Rights

15. The Political Constitution of Nicaragua adopted in 1985 contains progressive provisions recognizing the rights of indigenous communities to their traditional

communal lands.³ Two years after the Constitution was adopted, the Nicaraguan National Assembly supplemented the legal protections for indigenous land rights and, more generally, exalted the rights of the Atlantic Coast peoples by enacting the Statute of Autonomy for the Atlantic Coast Regions of Nicaragua, Law No. 28 of 1987.

16. Amendments of the Constitution early this year further strengthened the juridical status and rights of indigenous communities. These developments in Nicaraguan law coincide with recently articulated international standards that affirm the rights of indigenous communities to the lands they traditionally have used and occupied, rights that exist independently of formal land title.⁴ However, the protection promised indigenous land rights under Nicaraguan law has largely failed to translate into reality for Awas Tingni and most of the other indigenous communities of the Atlantic Coast.

The Lack of Specific Recognition and Adequate Protection of Indigenous Lands

17. Despite the constitutional and statutory provisions upholding indigenous land rights in general terms, the Nicaraguan government has taken no definitive steps toward demarcating indigenous lands or otherwise providing formal recognition of specific indigenous lands. The Nicaraguan Institute for Agrarian Reform (“INRA”), and other government agencies that are competent to address indigenous land tenure have failed to establish procedures to fill this void. Thus, like the vast majority of indigenous communities of Nicaragua’s Atlantic Coast, Awas Tingni lacks specific government recognition of the boundaries of its territorial rights.

18. With insecure territorial boundaries comes precarious land tenure, and, as a result, Awas Tingni and other coastal communities are vulnerable to the rush by outsiders,

³ See *infra* note 7.

⁴ See *infra* note 9 and text.

often uncontrolled, to acquire land with the region and to exploit its natural resources.

Contemporary concerns over land rights among indigenous communities already are threatening to erupt into social unrest and even violence.

19. The Community of Awas Tingni has made a good faith effort to resolve these land tenure issues with the Nicaraguan government. Community leaders and representatives have on numerous occasions contacted government agencies, including INRA, in an attempt to have the existence and geographic extent of Awas Tingni communal lands certified. In each case, government officials have failed to take action, claiming instead that recognition of the Community's property rights must be preceded by a "coordinated effort" by all relevant government agencies to resolve the larger problem of land tenure in the Atlantic Coast region.

20. Tellingly, over ten years after the Commission's publication of the *Miskito Report* -- in which the Commission recognized the dimensions of the land tenure crisis in the Atlantic Coast and admonished the Nicaraguan government to take action -- the government has failed to conduct any such "coordinated effort" to resolve the issue of land tenure. On the contrary, government agencies, particularly MARENA, have repeatedly acted in disregard of indigenous land rights in general and in defiance of the Community's land rights in particular.

21. Exacerbating the problem, Nicaragua's approach to the issue of land tenure in the Atlantic Coast region quite clearly is animated by the government's interest in securing its *own* property interest in the resource-rich region. Under the Nicaraguan Civil Code, all lands not titled to private owners belong to the state. Accordingly, the government apparently has assumed that, because the Community's lands are not "privately held" under a formal title, the government is entitled to exploit the natural resources located on those lands. In taking this

position, the government overlooks the fact that the Nicaraguan Civil Code is superseded to the extent that the Nicaraguan Constitution recognizes rights appurtenant to indigenous communal lands, rights that do not depend on the existence of a formal title but that instead may be founded entirely on traditional patterns of use and occupancy. See *infra* at note 7.

***The Natural Resources Ministry (MARENA)
And Its Disregard For Awas Tingni Land Rights***

22. The Community of Awas Tingni has been particularly affected by the government's persistent disregard for indigenous land rights. Especially at fault is MARENA, the government institution in charge of overseeing environmental protection and natural resource development in Nicaragua. The principal officials within MARENA who are responsible for acts against the Community include MILTON CALDERA CARDENAL, the Minister of MARENA; ROBERTO ARAQUISTAIN, the Director of MARENA's forest services; and ALEJANDRO LAÏNEZ, the Director of the forest service unit in charge of forestry on state lands.

The Maderas y Derivados de Nicaragua, S.A. Concession

23. In late 1993 or early 1994, MARENA secretly granted a concession to Maderas y Derivados de Nicaragua, S.A, a joint Nicaraguan-Dominican company, for lumbering on 43,000 hectares of lands, most of which were within lands claimed by the Community. MARENA eventually suspended the concession, but only after the Community learned of the concession and protested through attorneys it had retained with funding from the World Wildlife Fund (the "WWF"), an international non-governmental organization, and after the WWF itself pressured MARENA.

24. A period of subsequent negotiations led to a trilateral agreement signed by the Community, the company, and MARENA (the "Trilateral Agreement"). Under the Trilateral

Agreement, harvesting of timber in the 43,000 hectare area was to proceed under specified environmental safeguards and annual planning procedures that would involve the Community.

MARENA provisionally recognized the Community's right to the timber in the area and agreed to assist the Community in the following terms:

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 juridical framework.⁵

The Korean Timber Concession

25. MARENA's commitment to promote the Community's land rights according to the application of legal standards proved to be illusory. Shortly after executing the Trilateral Agreement, MARENA turned its attention to another segment of Awas Tingni's communal lands, repeating its pattern of surreptitious dealings exclusive of the Community.

26. At various times from May 1994 through the present, MARENA has issued permits allowing a second timber company, Sol del Caribe, S.A., ("SOLCARSA"), a subsidiary of the Korean conglomerate Kumkyung Co., Ltd., to enter Awas Tingni communal lands to explore the forest for its commercial potential, to conduct an inventory of timber resources, and to engage in work in preparation for tree cutting operations.

27. Members of the Community became increasingly alarmed when they observed an ever greater presence of SOLCARSA agents with the Community's lands in July and August of 1995. In early September 1995, undersigned counsel Anaya, while traveling from the major coastal town of Puerto Cabezas to Awas Tingni, met and talked at length with a

⁵ 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, art. 3.2 (translation from Spanish) (emphasis added).

forestry engineer employed by SOLCARSA. The engineer said he was on his way to rejoin a team of other SOLCARSA agents engaged in forest inventory in preparation for large scale tree harvesting.

28. Reliable sources within the government state that MARENA is about to execute an agreement granting SOLCARSA a long-term timber concession in an area adjacent to the lands subject to the Maderas y Derivados de Nicaragua, S.A. concession described above. In July 1995, MARENA's delegate for the Northern Atlantic Autonomous Region, James Gordon, confirmed that the process of government approval of the SOLCARSA concession was in its final stages. Further, in early September 1995, MARENA and other government sources told undersigned counsel Acosta and Anaya that MARENA had already approved the management plan developed by SOLCARSA for its intended forest exploitation.

29. In anticipation of its operations, SOLCARSA has established a permanent office in Puerto Cabezas, the capital of the Northern Atlantic Autonomous Region. The office is located in a hotel owned by another MARENA official, Rodolfo Jensi, and it is headed by foreign nationals from the Korean parent company. Additionally, SOLCARSA is constructing a large timber processing plant in the area.

30. The management plan developed by SOLCARSA and approved by MARENA is for timber cutting in an area approximately 61,000 hectares, the greater part of which is within Awas Tingni's communal lands. Within the area targeted for timber operations under the management plan is the site of the old principal village of the Community, Tuburus. Some Community members today maintain primary residences in Tuburus, while others have secondary shelters and agricultural plots there. Additionally, Community members continue to use this site (as well as others throughout the area of the management plan) for multiple

purposes, including hunting, fishing, and itinerant (swidden) agriculture. Places that have major religious significance to the Community, including burial grounds, are located within the area targeted for timber harvesting. Domesticated palm and fruit tree plantations within the area further mark the Community's historical and continuing patterns of territorial domain.

31. Totally ignoring its previous commitment to assist Awas Tingni in securing its land rights and "not to undermine the Community's territorial aspirations" (*see supra* at ¶ 24), the government has permitted SOLCARSA to enter Awas Tingni land and is now poised to grant the Korean company a timber concession without ever having consulted with the Community. Throughout the negotiations with SOLCARSA, the government has taken no account of the Community's property and use rights in its communal lands and forest resources and has disregarded the hunting, fishing and other activities crucial to the subsistence and cultural survival of the Community and its members.

Failed Efforts To Prevent The Korean Timber Concession and To Reverse Government Malfeasance

32. The Community has attempted, without success, to prevent the responsible government officials from granting a timber concession to SOLCARSA. On July 10, 1995, after the Community learned of SOLCARSA's plans, attorneys acting on behalf of Awas Tingni raised the Community's concerns in a meeting with James Gordon, MARENA's regional delegate. Mr. Gordon responded first by laughing and then by stating that the Community had no "title" to the concession area.

33. The next day, by letter dated July 11, 1995, the Community petitioned Minister Caldera of MARENA not to go forward with the timber concession in the absence of consultation and agreement with members of the Community. In this letter (a copy of which is attached as Exhibit A) the Community explained the basis for its claim that the area of the

planned concession, or a substantial part of it, belongs to the Community and stressed its desire to find a negotiated solution to the problem. Neither Minister Caldera nor any other MARENA official responded to this letter.

34. As a result of the government's apparent unwillingness to negotiate with the Community, on September 11, 1995, the Community and Mr. Castillo, along with other Community leaders, submitted a petition for amparo to the Court of Appeals of Matagalpa, Nicaragua (a copy of which is attached as Exhibit B). Under Nicaraguan law, an amparo action is initiated in the relevant court of appeals for a determination on admissibility; if deemed admissible, the action is then considered by the Nicaraguan Supreme Court of Justice for a ruling on the merits.

35. Under existing practice in Nicaragua, an amparo action must be filed in person. The Court of Appeals of Matagalpa, which has jurisdiction over Awas Tingni, is located in the city of Matagalpa, a city outside the Atlantic Coast region that is at least a full day's travel from the Community even when commercial air transportation is used. The Community incurred the substantial travel and other costs required for its leaders and Nicaraguan counsel, Maria Luisa Acosta, to go to Matagalpa to file the amparo petition. By the amparo action, the Community sought a court order that would require the responsible MARENA officials to:

- 1.-Abstain from granting the concession to SOLCARSA;
- 2.-Direct the agents of SOLCARSA to leave Awas Tingni's communal lands where they currently are engaged in tasks in preparation for the start of timber exploitation operations;
- 3.-Initiate a process of dialogue and negotiation with the Community of Awas Tingni if the company continues to be interested in forestry development in the Community's lands;
- 4.-Provide any other remedy that the Honorable Court may deem just.
(Translation from Spanish)

36. On or about September 18, 1995, the Court of Appeals ruled that the petition is inadmissible. In accordance with its practice, the Court of Appeals would not provide the Community's counsel, Ms. Acosta, with any information by telephone or mail concerning its decision, other than to communicate that an order had been rendered. Thus, Ms. Acosta was forced to travel again to Matagalpa to obtain a copy of the order rejecting the petition (a copy of which is attached as Exhibit C).

37. In ruling that the amparo petition is inadmissible, the Court of Appeals observed that the Nicaraguan law precludes such petitions where the petitioners have tacitly or actually consented to the government action being challenged. In addition, the Court of Appeals found that tacit consent may be inferred from the petitioner's failure to present the petition within thirty days of the petitioner's knowledge of the contested government action. The Court of Appeals held that, as evidenced by the July 11, 1995 letter from the Community to Minister Caldera, the Community had knowledge of MARENA's negotiations with SOLCARSA before that date, which was more than thirty days prior to filing the petition on September 11, 1995. Accordingly, the Court of Appeals reasoned that the Community must have "consented" to the Korean timber concession. Exhibit C.

38. The error in the appellate court's reasoning is immediately apparent. Plainly, the Community's July 11, 1995 letter *protesting* certain actions taken by the Nicaraguan government (including MARENA's negotiations with SOLCARSA) cannot logically serve as the basis for a finding that the Community has *consented* to those very actions. Indeed, this recent decision by the Court of Appeals is further evidence that the Nicaraguan government is at all levels unwilling to protect the Community's rights or to take seriously its obligations under either domestic or international law.

39. On September 21, 1995, Ms. Acosta filed a petition for a writ of mandamus (“recurso de hecho”) in the Nicaraguan Supreme Court of Justice (a copy of which is attached as Exhibit D) seeking review of the September 18, 1995 decision by the Court of Appeals. There is no apparent time limit within which the Supreme Court is required to rule on this application, which remains *sub judice*.

V. Violations Of International Human Rights Law

40. By its acts and omissions described above, the Nicaraguan government has failed to satisfy its obligations under both the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, as well as under other provisions of international human rights law.

The Right To Effective Measures To Secure Property

41. The Nicaraguan government has failed to demarcate the communal lands of Awas Tingni and other indigenous communities or to otherwise take effective measures to secure the Community’s property rights in those lands. This failure constitutes a violation of articles 1, 2 and 21 of the American Convention, which together establish a right to such effective measures. Articles 1 and 2 obligate states to take the measures necessary to implement the rights affirmed in the American Convention, and among these rights is the right to property set forth in article 21.⁶

42. Awas Tingni’s traditional possession of its communal lands, including the waters and forests within those lands, is a form of property recognized under both Nicaraguan

⁶ Complementing the right to property established by American Convention is the right to residence and movement set forth in article VIII of the American Declaration, which provides that “[e]very person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.”

and international law.⁷ Therefore, the obligation of Nicaragua to take effective measures to secure the rights in the American Convention, including property rights, extends to the land rights of Awas Tingni and other indigenous communities.

43. The Commission has articulated the nature and scope of this obligation and corresponding right in its recent Draft of the Inter-American Declaration of the Rights of Indigenous Peoples (“Draft Declaration”):

Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands and territories 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 . . . Where property and user rights of indigenous peoples arise from rights existing prior to the creation of those States, *the States shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and inalienable* . . . The rights of the indigenous peoples to existing natural resources on their lands must be especially protected . . . *States shall give maximum priority to the*

⁷ Notably, Nicaraguan law is consistent with the protections offered by international human rights law, *see infra* at para. 44. Article 5 of the Political Constitution of Nicaragua affirms:

El Estado reconoce la existencia de los pueblos indígenas, que gozan de los derechos, deberes y garantías consignados en la Constitución, y en especial los de mantener . . . las formas comunales de sus tierras y el goce, uso y disfrute de las mismas, todo conforme la ley.

Similarly, article 89 of the Constitution states:

El Estado reconoce las formas comunales de propiedad de las tierras de las Comunidades [indígenas] de la Costa Atlántica. Iguualmente reconoce el goce, uso y disfrute de las aguas y bosques de sus tierras comunales.

The communal property incorporated into the Nicaraguan legal system by the Constitution is defined in article 36 of the Statute of Autonomy for the Atlantic Coast regions of the Country, Law No. 28, as follows:

La propiedad communal la constituye las tierras, aguas y bosques que han pertenecido trantionalmente a las comunidades [indígenas] de la Costa Atlántica.

*demarcation of properties and areas of indigenous use.*⁸

44. Notably, the Commission's recent articulation of indigenous land rights is fully consistent with contemporary international standards, which recognize traditional patterns of use and occupancy by indigenous groups as giving rise to property rights that states are bound to respect. The contemporary international consensus concerning indigenous land rights is reflected in International Labor Organization Convention (No. 169) on Indigenous and Tribal Peoples in Independent Countries ("ILO Convention No. 169"). Article 14(1) of Convention No. 169 states:

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

Convention No. 169 further provides that:

Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.⁹

⁸ Draft of the Inter-American Declaration on the Rights of Indigenous Peoples, art. XVIII(2), (3), (4) & (8), approved by the IACHR at the 1278th session held on Sept. 18, 1995, OEA/Ser/L/V/II.90, Doc. 9 rev. 1 (1995) [hereinafter "IACHR Draft Declaration"] (emphasis added).

⁹ International Labor Organization Convention (No. 169) on Indigenous and Tribal Peoples in Independent Countries, art. 14(2). Although Nicaragua has not yet ratified Convention No. 169, the core elements of its land rights provisions represent newly developing customary international law. See S. James Anaya, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (forthcoming 1996 Oxford University Press); S. James Anaya, *Indigenous Rights Norms in the Contemporary International Law*, 8 (No. 2) *ARIZ. J. INT'L & COMP. L.* 1, 8-15, 27-29 (1991). See also Raidza Torres, *The Rights of Indigenous Peoples: The Emerging International Norm*, 16 *YALE J. INT'L L.* 127, 160-1 (1991).

In its 1983 *Miskito Report*, the Commission stated that it was "not in a position to decide on the strict legal validity of the claim of Indian communities to their ancestral lands,"

45. As set forth with particularity above, the Nicaraguan government has utterly failed to fulfill its obligations under the American Convention to take effective measures to secure the property rights of Awas Tingni and other indigenous communities. But the government's acts and omissions go well beyond passive neglect. The government has actively violated the right to property affirmed in article 21 of the American Convention by granting SOLCARSA permission to enter Awas Tingni lands and to conduct work in preparation for lumbering without the Community's consent. Additionally, the imminent granting of a concession to SOLCARSA for large scale timber exploitation threatens further and more egregious violations of the Community's right to property and of the derivative rights of its members.

The Right To Cultural Integrity

46. Related to the obligation of Nicaragua to serve indigenous land rights is Nicaragua's more general obligation to protect the integrity of indigenous cultures. In its 1983 *Miskito Report*, the Commission found that the indigenous groups of Nicaragua's Atlantic Coast are entitled to "special legal protections" for the preservation of their cultures and that these protections should cover "the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands."¹⁰

although it did recognize land claims in Nicaragua as a problem whose resolution "would represent a valuable precedent." OEA/Ser. L/V/II.62, at 127. However, in light of developments in Nicaraguan and international law and the Commission's own activities since the 1983 report promoting indigenous rights, the legal entitlement of indigenous communities to rights of property in connection with their traditional communal lands can no longer be in question.

¹⁰ OEA/Ser.L/V/II.62, doc. 10 rev. 3, at 81. The commission reiterated this position in promoting steps by the government of Brazil to secure the territorial rights of the Yanomami Indians. Case No. 7615 (Brazil), IACHR, OEA/Ser.L/V/II.66, doc. 10 rev.1, at 24, 31 (1985).

47. The Commission cited the cultural rights guaranteed by article 27 of the International Covenant on Civil and Political Rights, stressing that Nicaragua's obligations as a party to that human rights treaty could not be overlooked in considering the situation of its indigenous population. Article 27 provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The United States Human Rights Committee has confirmed that, where indigenous groups are concerned, traditional land tenure is an aspect of the enjoyment of culture protected by article 27 of the Covenant.¹¹

48. In its recent Draft Declaration, this Commission once again articulated the obligation of states to respect the cultural integrity of indigenous peoples, expressly linking land rights to the very survival of indigenous cultures:

States shall respect the cultural integrity of indigenous peoples, their development in their respective habitats and their historical and archeological heritage, which are important to the identity of the members of their groups and their ethnic survival . . . Indigenous peoples are entitled to restitution and respect of property of which they have been dispossessed, or compensation in accordance with international law.¹²

49. Accordingly, Nicaragua's failure to secure indigenous land rights also

¹¹ In *Ominayak, Chief of the Lubicon Band v. Canada*, Communication No. 267/1984, U.N. Doc. A/45/40, Annex 9(A) (1990), the U.N. Human Rights Committee construed the cultural rights guarantees of article 27 of the International Covenant to extend to "economic and social activities" upon which the Lubicon Lake Band of Cree Indians relied as a group. Thus, the Committee found that Canada, a signatory to the International Covenant on Civil and Political Rights, had violated article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the aboriginal territory of the Band. *Id.* at 27.

¹² IACHR Draft Declaration, *supra* note 8, art. VII(1) & (2).

constitutes a violation of a broader obligation to secure indigenous cultural integrity, an obligation that the Commission previously has admonished Nicaragua to fulfill. Nicaragua's failure in this regard is particularly significant. As detailed above, the cultural identity of the Awas Tingni people is inextricably tied to the communal lands that have been used and occupied by the Community since its inception. The government's actions and omissions threaten to cause Awas Tingni to become dispossessed of its communal lands, and dispossessing the Community of those lands is tantamount to destroying the Community's culture.

Right to Religion

50. An important element of the Community's culture implicated in this case is its religion. As specified above, the lands in question include burial sites and other areas of religious significance to the Community and its members. Thus, the government's actions and omissions, which threaten to break the link between the Community and its ancestral lands, also threaten violations of the right to freely exercise religion, a right guaranteed by article 12 of the American Convention, as well as by article 27 of the International Covenant on Civil and Political Rights.

51. The Commission's Draft Declaration acknowledges the link between land and indigenous people's religious practices and, furthermore, reflects the contemporary international consensus imposing relevant affirmative obligations upon states:

Indigenous peoples have the right to liberty of conscience, freedom of religion and spiritual practice for indigenous communities and their members . . . In collaboration with the indigenous peoples concerned, the States shall adopt effective measures to ensure that their sacred sites, including burial sites, are preserved, respected and protected.¹³

¹³ IACHR Draft Declaration, *supra* note 8, art X(1) & (3).

The Right To Equality Before The Law

52. The Community of Awas Tingni and its members are being denied equal protection of the law, in violation of article 24 of the American Convention and article II of the American Declaration. The people of Awas Tingni and other indigenous communities are being denied legal protections that are ordinarily available to other Nicaraguan citizens with respect to their property rights. This kind of discriminatory treatment of indigenous people's property rights in connection with ancestral lands has occurred over centuries, and the reversal of this pattern of discrimination has since the early 1970s been an express goal of the international community including the Inter-American system for the protection of human rights.¹⁴

The Right to Participate in Government

53. The government's failure to consult even minimally with the Community or its leaders, in considering and moving toward final approval of the timber concession to SOLCARSA, violates the right of the Community and its members to effectively participate in government decisions affecting them. Article 23(1)(a) of the American Convention affirms the right of every citizen "to take part in the conduct of government affairs, directly or through freely chosen representatives."

54. The implications of this right where indigenous communities are concerned are expressed in the Commission's Draft Declaration, which states:

Indigenous populations have the right to participate without discrimination . . . in all decision-making, at all levels, with regard to matters that might affect their rights, lives and destiny. They may do so through representatives elected by them in accordance

¹⁴ See the 1972 resolution of the Inter-American Commission on Human Rights identifying long-standing patterns of discrimination against indigenous peoples and stating that "special protection for indigenous populations constitutes a sacred commitment of the states." IACHR, OEA/Ser.P.AG/doc.305/73 rev. 1, at 90-91 (1973).

with their own procedures.¹⁵

55. As specified in ILO Convention No. 169, the right of indigenous peoples to participate in the decision-making affecting them applies particularly with regard to the management of their lands and resources. According to article 7(1) of the Convention:

The peoples concerned shall have the right to decided their own priorities for the process of development as it affects their lives, beliefs, institutions, and spiritual well-being and *lands they occupy or otherwise use*, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.¹⁶

The Right To Petition And A Prompt Response

56. Finally, in not responding to the Community's July 11, 1995 letter petition to Minister Caldera of MARENA to suspend consideration of the timber concession to SOLCARSA, the government violated article XXIV of the American Declaration, which affirms "the right to submit respectful petitions to any competent authority . . . and the right to obtain a prompt decision thereon."

¹⁵ IACHR Draft Declaration, *supra* note 8, art. XV(2).

¹⁶ (Emphasis added.) Notably, ILO Convention No. 169 makes clear that governments have a duty to consult with indigenous peoples in connection with natural resource development even when the government retains ownership of the resources. Article 15(2) of the Convention states:

In cases in which the State retains the ownership of mineral sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult with these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.

VI. Exhaustion Of Domestic Remedies

57. The requirement that domestic remedies be exhausted has been satisfied. Article 46(2)(a) of the American Convention establishes an exception to this requirement which applies where, as here, “the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated.” The Nicaraguan legal system does not provide due process of law for the complete vindication of rights asserted in this Petition. In particular, there is no administrative or judicial procedure to compel the governmental action that is required to provide specific official recognition of the boundaries of the communal lands of the Awas Tingni and other indigenous communities and to take whatever other measures are necessary to regularize indigenous land tenure in accordance with applicable legal standards.

58. Even if the Community were required to exhaust less formal procedures to secure its rights, however, the Community has done so and has been unable to accomplish its objectives. As set forth above, the Community has had numerous contacts with the responsible government agencies, including INRA and MARENA, all of which have proved fruitless. *See supra* at ¶¶ 19-33.

59. The Nicaraguan government may contend in response in this Petition that the requirement to exhaust domestic remedies has not yet been satisfied since the amparo action has not been finally adjudicated by the Nicaraguan Supreme Court of Justice. This argument should be rejected. *First*, under governing Nicaraguan law and institutional practice, the amparo action, even if successful, will not result in judicial order to compel the type of coordinated action among relevant government institutions that is required to fully vindicate Awas Tingni’s land rights. At most, the amparo petition will result in an order enjoining MARENA officials

from granting a timber concession to SOLCARSA. Such an order, while welcome, would not reach the heart of the problem addressed here -- namely, the need for affirmative government measures to effectively secure indigenous lands rights in the midst of a generally unsecured land tenure situation. *Second*, in light of the September 18, 1995 decision by the Nicaraguan Court of Appeals rejecting the amparo action (*see supra* at ¶ 37), the Community is unable to rely on the Nicaraguan judiciary as a means of resolving even the narrow issue of the SOLCARSA timber concession. Under “generally recognized principles of international law,” which are incorporated into the admissibility standards governing petitions to the Commission, *see* American Convention, art. 46(2), the Petitioners need not exhaust procedures that are likely to be ineffective.¹⁷

60. Even if the amparo action were considered in some way determinative of the exhaustion of domestic remedies in this case, it should not prevent this Petition from being lodged with the Commission at this time. Under the applicable Nicaraguan law, the amparo action has fewer than sixty days to run its course once it is accepted as admissible, and ordinarily admissibility is to be determined within three days of filing. By the time the Commission is likely to consider the merits of this case, either the Supreme Judicial Court will have upheld the appellate court decision rejecting the amparo action or the action otherwise will or should have been fully resolved.¹⁸ If, on the other hand, the Supreme Judicial Court does not rule on the lower court’s admissibility decision within one or two weeks of the filing of this petition, and the

¹⁷ See Hurst Hannum, *Implementing Human Rights: An Overview of Strategies and Procedures*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 19, 26 (Hurst Hannum ed., 2d ed. 1992).

¹⁸ Indeed, applying a similar rule requiring exhaustion of domestic remedies, the European Commission of Human Rights has allowed petitions to be lodged in the face of such contingencies. This practice was upheld by the European Court of Human Rights in *The Matznetter Case*, Eur. Court H.R. Ser. A., at 25, 33 (Judgement of Nov. 10, 1969).

amparo action remains pending for some time after that, the Commission should then consider the delay to be unwarranted under the circumstances. With such an unwarranted delay, 46(c) of the American Convention would come into play, which deems judicial proceedings inconsequential for the purpose of exhausting domestic remedies where “there has been unwarranted delay in rendering a final judgment.”

VII. Timeliness

61. This Petition is timely: It alleges ongoing and threatened further violations, and the last attempts at obtaining redress for these violations through domestic procedures occurred within the last six months.

VIII. Absence Of Parallel International Proceedings

62. The subject of this petition is not pending in any other international proceeding for settlement.

IX. Requested Relief

63. By reason of the foregoing, the Community of Awas Tingni and Jaime Castillo respectfully request that the Commission place itself at the disposal of the parties to mediate a friendly settlement of the disputes described herein, as authorized by article 48(f) of the American Convention and article 45 of the Regulations of the Inter-American Commission.

64. Alternatively, if no friendly settlement is reached, the Community of Awas Tingni and Jaime Castillo respectfully request that the Commission prepare a report setting forth all of the facts and applicable law, declaring the Nicaragua is in violation of its obligations under international law, and recommending that Nicaragua:

- (a) establish and institute a procedure under domestic law, acceptable to the indigenous communities concerned, that will result in the prompt

demarcation and official recognition of the territory of Awas Tingi and other indigenous communities;

- (b) suspend consideration of all government timber and other natural resource concessions within the communal lands of Awas Tingni and other indigenous communities until the land tenure issues affecting indigenous communities have been resolved, or unless a specific written agreement has been reached between the government and the indigenous community affected by the proposed concession;
- (c) suspend all activity relative to the planned timber concession to SOLCARSA until a suitable arrangement is negotiated between the government and the Community; and
- (d) engage in dialogue with the Community to determine whether and under what circumstances the proposed timber concession to SOLCARSA may go forward.

X. Request for Provisional Measures

65. In order to avoid the irreparable damage that would result from the planned timber concession to SOLCARSA or from other such concessions, the Community of Awas Tingni and Jaime Castillo respectfully request that the Commission institute provisional measures as appropriate under article 29 of the Regulations of the Inter-American Commission. The irreparable damage that the people of Awas Tingni will suffer, if SOLCARSA is allowed to further establish a foothold on Awas Tingni lands and begin logging operations, is uncertain only in the magnitude of its severity. The long history of encroachment onto indigenous lands establishes that, once commenced, such encroachment and its negative consequences for

indigenous cultures are extremely difficult, if not impossible, to reverse.

66. The Community and Mr. Castillo respectfully request that the provisional measures include, at a minimum, the recommendations specified in paragraph 64(c) & (d) above. Additionally, the Petitioners request the Commission immediately request of the government full clarification of all pending concessionary proposals, agreements and plans with respect to the exploitation of any natural resources within the area of Awas Tingni, in order to establish the foundation for friendly settlement efforts.

Date: October 2, 1995

Respectfully submitted,

By: _____

S. James Anaya
John S. Allen
THE UNIVERSITY OF IOWA COLLEGE
OF LAW, CLINICAL LAW PROGRAMS
386 Boyd Law Building
Iowa City, Iowa 52242
(319) 335-9023

Attorneys for Petitioners
THE MAYAGNA INDIAN
COMMUNITY OF AWAS TINGNI
and JAIME CASTILLO, on his
own behalf and on behalf
of the Community of Awas Tingni

MARIA LUISA ACOSTA CASTELLÒN
Attorney at Law
(Nicaraguan Co-Counsel)
casa 21-B del Asentamiento Jose
Martí del Bo. Santa Rosa
Bluefields, Región Autónoma Atlàntico Sur
Nicaragua
011-505-82 387