

2001

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Recommended Citation

Grossman, Claudio. "Awas Tingni v. Nicaragua: A Landmark Case for the Inter-American System." *Human Rights Brief* 8, no. 3 (2001): 2-4, 8.

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Awas Tingni v. Nicaragua: A Landmark Case for the Inter-American System

by Claudio Grossman*

In 1996, the Republic of Nicaragua issued a Korean corporation permission to cut trees in the communal lands of the Mayagna indigenous community, the Awas Tingni. This community unsuccessfully tried to prevent the Government of Nicaragua from proceeding further in this endeavor. Community members attempted to solve the problem first by negotiating with the government, and then by resorting to the national judiciary. Finally, the case was brought to the Inter-American Commission on Human Rights (Commission), and then before the Inter-American Court on Human Rights (Inter-American Court). This case marks the first time the Inter-American Court has been called upon to address the property rights afforded to indigenous populations in the Americas.

History of the Case

The Awas Tingni, an indigenous community of approximately 630 individuals, have occupied land on the Atlantic coast of Nicaragua for generations. The land the tribe occupies is rich in timber and other natural resources. Since the 1950s, the tribe has requested that the Nicaraguan government demarcate the lands belonging to the country's indigenous populations. Once the lands are defined and registered, the tribes would have title over the property and its natural resources. To date, Nicaragua has failed to demarcate these lands.

On March 13, 1996, Nicaragua granted a 30-year timber-cutting license to the Korean company, Sol de Caribe S.A. (SOLCARSA), permitting the exploitation of nearly 62,000 hectares (nearly 160,000 acres) of tropical forest belonging to the Awas Tingni community. The indigenous tribe was not consulted prior to the negotiation of the timber contract and vehemently opposed the intervention in their land.

In order to save their land's resources, the Awas Tingni community presented a writ of *amparo*, a petition requesting the protection of recognized civil and political rights, to the Nicaraguan Supreme Court on November 12, 1996. The Supreme Court rejected the writ without explanation on February 27, 1997. The lengthy delay between the petition and the Supreme Court's decision violated Nicaraguan domestic law, which mandates that a writ of *amparo* be ruled upon within 45 days of submission.

A second writ of *amparo* was presented in March 1997. This writ alleged that the government had failed to follow the required procedures for granting a license to deforest land occupied by indigenous peoples. The Nicaraguan Supreme Court ruled in favor of the Awas Tingni and declared the timber license void. This decision was based on the grounds that the government had failed to procure certain required signatures for the issuance of the timber license. As one of the requisite steps to issue a timber license, the government must consult local institutions, including indigenous populations, on the possible environmental and social effects the tree-cutting operation could have, and obtain the signatures of regional officials signifying the approval of the indigenous groups. The government of Nicaragua failed to make such consultations with the Awas Tingni, and to obtain the needed signatures before granting the license to SOLCARSA. Although the government was required by Nicaraguan law to comply with the Supreme Court's decision within 24 hours, it failed to take measures to end SOLCARSA's timber removal operations.

Nearly a year after the Supreme Court's second ruling, the Government of Nicaragua attempted to cure the fault with the license

by obtaining the missing signatures. The Nicaraguan government then retroactively authorized the license with the new signatures. This attempt to cure the license was erroneous because a government cannot retroactively give effect to a document the courts have deemed nonexistent. The government finally complied with the Supreme Court's original mandate one year later, in March 1998, without explanation for the delay in ending the timber removal.

Throughout these legal proceedings, Nicaragua has not provided compensation to the Awas Tingni. Additionally, the indigenous community incurred significant expenses and encountered difficulties in pursuing their rights. The writs had to be presented in a language other than the tribal tongue, and members of the Awas Tingni had to travel great geographical distances in order to file the petitions.

The Case before the Commission

In addition to pursuing justice through dispute resolution mechanisms in Nicaragua, the Awas Tingni brought their claim to the Commission in October 1995. At this time, the Nicaraguan government was beginning to negotiate granting the timber license to SOLCARSA despite the Awas Tingni's repeated requests to demarcate the lands of indigenous peoples in the region. The Commission is a seven-member elected body that serves as the

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principal organ of the Organization of American States (OAS). The Commission is mandated to protect and promote human rights in the Americas and act as an advisory body to the OAS on human rights issues. The Commission oversees States Parties' compliance with Inter-American human rights obligations, and through its individual petition system, may be called upon to evaluate whether a State Party has violated the internationally protected rights of its citizens.

Following its processing of the case in accordance with applicable rules, the Commission concluded that Nicaragua had violated the American Convention on Human Rights (American Convention), a treaty Nicaragua ratified in 1979. Nicaragua was then granted a period of time to comply with the recommendations of the Commission and remedy the consequences of the violation, particularly halting the removal of trees from Awás Tingni land, and demarcating the lands belonging to indigenous populations to prevent future property rights violations. The recommendation also required Nicaragua to delineate the borders of land held by indigenous populations, to register these lands, and to provide compensation to the Awás Tingni tribe for their lost resources. Because Nicaragua did not comply with these recommendations, the Commission brought the case before the Inter-American Court of Human Rights.

In the Inter-American System for the Promotion and Protection of Human Rights, the Commission, or State Parties to the American Convention that have declared their acceptance of the court's compulsory jurisdiction, can bring a case before the Inter-American Court. In situations where the Commission brings the case, it acts as the victim's representative before the Inter-American Court. The Commission brought the Awás Tingni case before the Inter-American Court on June 19, 1998, with oral arguments heard on November 16, 2000. In my then-capacity as first vice-president of the Commission, I acted as the Commission's delegate, representing the Awás Tingni community during the Court proceedings.

The Commission's Arguments Before the Inter-American Court

The Commission first argued to the Inter-American Court that the Government of Nicaragua should be held responsible for the

The elimination of the historical discrimination against indigenous peoples requires faithful monitoring of their human rights, including the right to property.

acts and omissions of its agents, who failed to guarantee the rights of the Awás Tingni. Nicaragua failed to define the communal lands of the Awás Tingni, or the lands of other indigenous communities in Nicaragua. The government also failed to take effective measures to ensure the property rights of the Awás Tingni in their ancestral lands. The Commission also argued that the Nicaraguan government should be held responsible for the affirmative actions of its local representatives, who violated the Awás Tingni's property rights. These actions include granting the license to SOLCARSA and attempting to cure the license rather than cease logging.

These actions and omissions by the Nicaraguan government constitute violations of Articles 1, 2, 21, and 25 of the American Convention. The principle of nondiscrimination, laid down in Article 1 of the Convention, forbids state action that discriminates



Photo courtesy of Sarah C. Aird

WCL Dean Claudio Grossman with two representatives of the Awás Tingni indigenous group.

against indigenous populations. Indigenous populations are specifically mentioned in Article 1 because of their past history of discriminatory treatment, and the need to prevent such discriminatory treatment in the future. One of the greatest manifestations of this discrimination has been the lack of effective state guarantees for the traditional forms of use and possession of lands and resources belonging to indigenous groups. Nicaragua failed to clearly demarcate the lands belonging to indigenous groups, which is necessary in order to afford them proper protections. The UN Committee on the Elimination of Racial Discrimination has observed that "in many regions of the world indigenous peoples have been, and still are being, discriminated against, deprived of their human rights and fundamental freedoms and . . . have lost their lands and resources to colonists, commercial companies, and state enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardized." This situation of historical bias was also emphasized during the seminar convened by the UN on "The Effects of Racism and Racial Discrimination on the Socioeconomic Relationships between the Indigenous Peoples and the States." The seminar concluded that "indigenous peoples had been, and still were, victims of racism and racial discrimination." The report on the seminar stated, "[r]acial discrimination against indigenous peoples is the outcome of a long historical process of conquest, penetration, and marginalization, accompanied by attitudes of superiority and by a projection of what is indigenous as 'primitive' and 'inferior.' The discrimination is of a dual nature: on the one hand, gradual destruction of the material and spiritual conditions [needed] for the maintenance of their [way of life]; on the other hand, attitudes and behavior signifying exclusion or negative discrimination when indigenous peoples seek to participate in the dominant society."

The elimination of the historical discrimination against indigenous peoples requires faithful monitoring of their human rights, including the right to property. The obligation of the State is to guarantee the rights contained in the American Convention in a non-discriminatory manner, particularly with regard to property rights in land and natural resources. Article 24 of the Convention, which establishes the right to equality under the law, strengthens this obligation.

Article 2 of the Convention obligates Member States "to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms." This provision assumes a high importance when it concerns sectors of the population that historically have not been able to enjoy fully their human rights. As a result, the Inter-American

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Commission declared in a 1972 resolution: “[i]n international law generally, and in the Inter-American System specifically, special protection is required so that indigenous peoples can exercise their rights fully and equitably in comparison to the rest of the population. Furthermore, it may be necessary to establish special measures of protection for indigenous peoples to guarantee their physical and cultural survival—a right protected in several instruments and international conventions.” Article 21 of the Convention establishes that “[e]veryone has the right to the use and

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enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.” This article, examined in light of the fundamental principle of non-discrimination established in the Convention, necessarily includes protection for those forms of property that are based on the patterns of land possession typical to indigenous communities. The Awes Tingni community has property rights to lands and natural resources based on a pattern of use and ancestral, traditional occupation, thus entitling them to the protections of Article 21 of the Convention as well as other applicable provisions of international law.

Such forms of property are recognized explicitly and unconditionally by the Political Constitution of Nicaragua. The Nicaraguan constitution “recognizes the existence of the indigenous peoples that enjoy the rights, duties and guarantees allocated in the Constitution . . . [and] the communal forms of property over the lands of the Communities of the Atlantic Coast. Equally, [the state] recognizes the possession, use, and enjoyment of the waters and forests of its community lands.” Nicaragua ensures to these communities the enjoyment of its natural resources, the effectiveness of its forms of community property, and the free choice of its authorities and representatives.

The Nicaraguan Statute of Autonomy for the Regions of the Atlantic Coast of Nicaragua (Statute of Autonomy), based on these articles of the constitution, defines community property as “the lands, waters and forests that have belonged traditionally to the communities of the Atlantic Coast.” Through the Nicaraguan constitution and the Statute of Autonomy, the Nicaraguan legal framework incorporates the notion of property ownership based on the customary system of land use and possession that has historically or traditionally existed among the indigenous communities of the Atlantic Coast.

Nicaragua also violated the right to judicial protection granted in Article 25 of the Convention. Nicaragua failed to guarantee an effective, simple, and prompt recourse to answer the claims of the Awes Tingni community pertaining to their rights to utilize their lands and natural resources. Although the Supreme Court eventually provided a decision favorable to the Awes Tingni, there were extreme delays both in the Supreme Court’s rendering a decision and in the government’s following through with the Court’s instruction. Nicaragua was so slow in providing justice to the Awes Tingni that the government took over a year to stay the de-forestation.

The Commission limited its argument to focus on Articles 1, 2, 21, and 25, but the government actions that led to this case affected many other articles of the Convention. The very existence of the Awes Tingni tribe depends on the territorial space that it occupies. The lives of the members of the Awes Tingni community rely substantially on the agriculture, game, and fishing that they carry out in areas bordering their villages. These subsistence activities are part of the community’s culture and are closely linked to the family relations and to their social organization. Within the area that the Awes Tingni inhabit and use, there are identified burial grounds and other sites of religious significance. Accordingly, in addition to the rights previously mentioned, the actions of the State of Nicaragua also violated the rights to life (Article 4), honor and dignity (Article 11), freedom of conscience and of religion (Article 12), freedom of association (Article 16), protection of the family (Article 17), and movement and residence (Article 22).

Analysis of this Case under other International Law Treaties

Nicaragua is a signatory to several international conventions that the government has violated through its actions affecting the Awes Tingni. Nicaragua is a party to the International Covenant on Civil and Political Rights (ICCPR), which recognizes in Article 27 the right of minority groups to the protection of “all those characteristics that are necessary for the preservation of their cultural identity.” Article 27 stipulates that “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

The UN Human Rights Committee, formed under the ICCPR, has confirmed that for indigenous groups, such as the Awes Tingni, traditional land possession is an aspect of the enjoyment of its culture protected by Article 27 of the ICCPR: “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.”

Furthermore, Nicaragua has undertaken responsibilities under the International Convention on the Elimination of All Forms of Racial Discrimination. This Convention focuses on the right to equality and, in particular, it obliges States Parties to eliminate any form of racial discrimination. As has already been observed, the principle of non-discrimination has particular significance when it concerns indigenous peoples and the maintenance of their traditional or customary forms of land possession. As a result, within its mandate of safeguarding the fulfillment of the aforementioned Convention, the UN Committee on the Elimination of Racial Discrimination “calls upon the States Parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories, and resources and where they have been deprived of their lands . . . or used without their free and informed consent, to take steps to return those lands and territories.”

In short, the Awes Tingni, as well as the other indigenous communities of the Atlantic coast of Nicaragua, have rights to lands and resources based on traditional patterns of land possession. These rights, recognized by the Nicaraguan constitution and the Statute of Autonomy, are also protected by Article 21 of the American Convention and provisions of other international conventions that legally bind Nicaragua.

The Commission’s Petitions to the Court

The Commission requested the Inter-American Court to declare that the Government of Nicaragua violated Articles 1, 2,

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as torture, despite the previous decision of the judge that the latter crime was subject to statutory limitations.

Castañeda's decision is a correct interpretation of the rationale of Judge Luna. In addressing the Argentine impunity laws, Judge Luna held that the international community must not recognize internal provisions, such as amnesties or other laws designed to impede international justice, because the interests of the international community in general, and of the victims of the crimes in particular, transcend any particular or national interest of a State. The same reasoning applies to laws that impose statutes of limitations based on the passage of time, like the Mexican law that allows statute of limitations to run for torture. There might be a conflict if the rules that impose a statute of limitations were set in the constitution. Statutory limitations, however, are not contemplated in the Mexican constitution, but are provided for only in secondary laws such as the criminal code (Articles 100 to 115). Thus, the provision of Article 6 of the Convention Against Torture creating the obligation to prosecute or extradite (*aut dedere aut iudicare*) when an alleged torturer is under the jurisdiction of a State Party preempts the secondary internal rule that Judge Luna applied.

In addition, Mexico signed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity on July 3, 1969, years before the alleged commission of Cavallo's crimes. This Convention provides in Article 1 that no statutory limitation shall apply to war crimes or crimes against humanity irrespective of the date of their commission. Under Article 18 of the Vienna Convention on the Law of Treaties, Mexico has an international obligation not to defeat the object and purpose of the treaty. In the present case, the object and purpose of the Convention on the Non-Applicability of Statutory Limitations is to punish such crimes regardless of internal rules on statutory limitations and irrespective of the date of their commission. Here, torture fits under the rubric of crimes against humanity and, as such, no statutory limitations apply. Fortunately, the Ministry of Foreign Affairs amended the mistake of the Judge Luna, avoiding Mexico's potential breach of its international obligations.

The Amparo or Habeas Corpus Proceedings

After the decision of the Ministry of Foreign Affairs, Ricardo Miguel Cavallo filed a writ of *habeas corpus* against this decision before another federal judge. In Mexico, *habeas corpus* is contemplated under the broader writ of *amparo*, which applies to any decision of an administrative agency that may affect a constitutional right. In the Cavallo case, the *amparo* proceedings before the federal district court are currently pending, and it will likely go to the Supreme Court if it considers the case of institutional importance.

It is important to note that *habeas corpus* or *amparo* proceedings in Mexico are not an appeal against previous decisions; instead they constitute independent trials to review the constitutionality of administrative acts—in this case the extradition decision. The importance of this lies with the fact that the Supreme Court is called upon to decide whether the extradition process was done in accordance with the Mexican constitution. In this case, the issues raised by constitutional standards are intimately related to the manner of incorporation of international treaty obligations into domestic law. Thus, the eventual outcome of the Cavallo case in Mexico will have enormous repercussions as a matter of constitutional, international, and even comparative law. The ultimate fate of Cavallo lies in the federal courts' decision. All of us should stay tuned. ☺

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21, and 25 of the American Convention. The Commission asked the Inter-American Court to order Nicaragua to pay reparations to the Awas Tingni in accordance with Article 63.1 of the Convention. Under this article, if a State is found responsible for violating the Convention, the Inter-American Court may order the State to take any and all measures to ensure the negative consequences of the violation are redressed. In the Awas Tingni case, the Commission asked that Nicaragua be required to demarcate the territorial boundaries of its indigenous populations and to abstain from granting licenses allowing the use or removal of natural resources from the Awas Tingni land until the precise demarcation has taken place.

As part of Nicaragua's restitution to the Awas Tingni, the Commission requested that the government provide compensation, both material and moral, for the suffering the community experienced as a result of the State's actions. The Commission also requested the State pay for the legal expenses incurred by the Awas Tingni to defend themselves in Nicaragua, before the Commission, and before the Inter-American Court.

The Importance of this Case

This is a landmark case in the Inter-American System for the Promotion and Protection of Human Rights. It is the first case

brought before the Inter-American Court concerning the rights of an indigenous population. It is appropriate that the first such case should examine the property rights of an Indian group because the very culture and existence of the Indian community depends upon the land on which they reside.

This case is also important because it shows the value of the Inter-American System as an avenue to debate (and hopefully settle) very important and complex legal matters. Nicaragua participated fully in the proceedings, showing the vitality of the Inter-American System's framework. Also, Nicaragua's active participation renders illegitimate any later non-compliance with the Inter-American Court's decision by the government. For the Awas Tingni, this case also opens up the possibility to achieve justice and to establish principles that will help not only their community, but also establish precedent for future cases involving the rights of indigenous peoples.

The Commission expects a ruling from the Inter-American Court on the case of *Awas Tingni v. Nicaragua* by the end of 2001. ☺

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