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### Inter-American System

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### III INTER-AMERICAN SYSTEM

CLAUDIA MARTIN

This report covers decisions adopted by the Inter-American Court of Human Rights in the last year, which raise new issues or develop particular aspects of the case law of this tribunal. The first case defines the protection afforded by the American Convention on Human Rights to indigenous communities in their enjoyment of communal lands and the limitations of States to dispose of that property, even in cases in which they are not demarcated and titled. The decision in the *Hilaire* Case reflects a challenge to the jurisdiction of the Court on the basis of a 'reservation' made by Trinidad and Tobago in its declaration recognising the compulsory jurisdiction of the Court. Similar decisions were adopted in the *Benjamin* et al, and *Constantine* et al Cases. On the merits, these three cases raise the issue of whether the mandatory application of the death penalty to murder cases in Trinidad and Tobago breach provisions of the American Convention on Human Rights. Finally, this report addresses the most important innovations in the new Rules of Procedure adopted by the Inter-American Court of Human Rights, which came into force on 1 June, 2001. The full text of the decisions as well as the new Rules of Procedure can be obtained on the website of the Court at [www.corteidh.or.cr](http://www.corteidh.or.cr)

*The Case of the Mayagna (Sumo) Awas Tingni Community vs Nicaragua*  
I/A Court, *The Case of the Mayagna (Sumo) Awas Tingni Community, Judgment of 31 August 2001, Series C No. 79.*

The Awas Tingni community ('community') is an indigenous group of over 600 people belonging to the Mayagna or Sumo ethnic group, located in the Northern Atlantic Autonomous Region (RAAN) of the Atlantic coast of Nicaragua. They live based on a communal property system and subsist through family farming and collective agriculture, fruit gathering and medicinal plants, hunting and fishing. The community maintains no title to any portion of their land.

In 1992, the community signed a contract with Maderas y Derivados de Nicaragua, S.A. (MADENSA) for forest management, and in 1994, the community, MADENSA, and the Ministry of the Environment and Natural Resources of Nicaragua (MARENA) signed a 'forest management agreement', under which MARENA was to facilitate the demarcation of the community lands. In 1996, the State, through an agreement sponsored by MARENA and signed by RAAN representing indigenous communities in that region, and SOLCARSA corporation, granted a 30-year concession to the SOLCARSA corporation for the removal of lumber from the communal lands.

The community submitted a letter to MARENA requesting that the concession to SOLCARSA be delayed until an agreement with the community was reached. In addition, it stated that MARENA had a duty to facilitate the definition of the communal lands as stated in the agreement signed in 1994. Also, the community submitted a request to RAAN to conduct a demographic study on the basis of which the ancestral communal lands would be demarcated.

Later in 1995, the community filed an initial Amparo remedy before the Appellate Court of Matagalpa against MARENA requesting a nullification of the concession

granted to SOLCARSA and a cessation of their pending activities on the community land. The Civil Panel of the Appellate Court of the Sixth Region of Matagalpa dismissed this application because it was not filed within 30 days of receiving knowledge of the concession. The community appealed on the premise that the 30-day expiration period begins at the last instance of a violation, but the Supreme Court of Justice disagreed and affirmed the lower court.

In 1996, the Regular Council of RAAN filed an Amparo remedy before the Appellate Court of Matagalpa against MARENA for authorising the concession to SOLCARSA without approval by the plenary Council in violation of Article 181 of the Nicaraguan Constitution, requesting annulment of the concession. The Court admitted the remedy but denied relief without comment. On appeal the following year, the Constitutional Panel of the Supreme Court of Justice reversed, finding that the concession did in fact violate Article 181. The plenary Council of RAAN subsequently ratified the concession.

A second Amparo remedy was collaterally filed in 1997 by the community in the civil division of the Appellate Court of the Sixth Region of Matagalpa against MARENA requesting: a) the nullification of the concession to SOLCARSA; b) the issuing of an order to the RAAN to take action in the request submitted by the community regarding demarcation of their communal lands; and c) the issuing of an order to MARENA to refrain from agreeing on other concessions to utilise natural resources in the area under conflict until that area has been demarcated or an agreement is reached with the community. The Court admitted this application but denied relief and was subsequently affirmed by the Constitutional Panel of the Supreme Court of Justice.

Before the Court, the Commission alleged the violation of Articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection) of the American Convention on Human Rights.

First, the Commission argued that the State violated Article 25 of the American Convention by not providing an effective remedy to the community to protect its members against the violation of their fundamental rights. Regarding the court proceedings, they claimed that Article 25 was breached in three ways: unjustified delay in deciding the Amparo remedies submitted by the community; rejection of the remedies without addressing the merits of the request; and delay in enforcing the judgment that declared the concession to be unconstitutional due to the lack of approval by the plenary Council of RAAN. The Commission further argued that Nicaragua has breached Article 25 by not providing an effective land titling system to protect the right of the community to the property of its ancestral communal land. Finally, the Commission argues that the State has violated Articles 1 and 2, in relation to 25, by failing to respect and ensure the right to an effective remedy protected by the Convention and to adopt the necessary measures to give effect to such a right.

The State contended that it has been active in the process of land titling, including its 1986 creation of the Nicaraguan Agrarian Reform Institute (INRA) and the adoption of Law 14 ('Amendment to the Agrarian Reform Law') which provides a legal framework to carry out the process of land titling for indigenous communities in the country. The community did not file a single formal request for land titling under this procedure before domestic courts; therefore, the State argued, they have not been denied judicial relief. Further, the community did not file an amparo to challenge the concession to SOLCARSA within the term established by law, though they were aware of the steps

taken by the State in that respect. In sum, the State argued that Nicaraguan domestic law provides effective remedies that the community could have utilised, but they were negligent in pursuing their legal options.

The Court focused its analysis of the alleged violation of Article 25 on two aspects: 1) was there a land titling procedure, and; 2) were the Amparo remedies decided in accordance with this provision. In reference to the first aspect, the Court found that Articles 5, 89, and 180 of the Constitution of Nicaragua, in addition to the 1996 establishment of a Demarcation Commission, presents sufficient evidence to sustain that Nicaragua ensures a domestic right protecting indigenous communal property. While the Court found the existence of a land titling procedure in Law No. 14, it finally stated that this process is not applicable to the demarcation and titling of lands held by indigenous communities. Next, the Court reasoned that Article 25 recognises a State duty to afford an effective remedy to protect victims against the violation of their rights as ensured by the American Convention, the State Constitution, and domestic laws. Thus, Nicaragua's failure to provide an effective procedure for delimitation, demarcation, and titling of indigenous communal lands constitutes a violation to this provision.

In response to the second facet, the Court found that domestic courts delayed the decisions on the Amparo remedies for an unreasonable amount of time, particularly taking into account the time limitations established by the Nicaraguan Amparo Law, according to which they must be decided within 45 days. This delay also violated Article 1(1) of the Convention since the State failed to provide effective domestic relief. Finally, the Court held that Article 2 of the Convention, requiring the State to adopt protective measures, was violated due to the State's lack of legislation giving effect to the land titling process. The State thus violated Article 25 in connection to Articles 1 and 2.

Second, the Commission argued that the community has communal property rights to the land which fall under the protection afforded by Article 21 of the Convention. They contended that the concession to SOLCARSA violated these property rights by endangering the cultural integrity of the community and threatening damage to their forests. They asked that the State adopt measures for the demarcation of their land and guarantee the protection of their rights to use the land and its resources.

The State claimed that the community is in fact a small group of indigenous people that resulted from a separation from a larger community during a geographical shift and that they do not have ancestral rights to the land they now possess. Furthermore, the State argued that the land claim made by the community is disproportionate to the number of people listed in the 1995 census (conducted by the State). Finally, they argue that the logging concession granted to SOLCARSA was restricted to areas considered 'national land' and that, in any event, the corporation has not yet taken any actions on the land and thus no damage was caused.

Article 21 of the Convention recognises the right to property. The Court reasoned that 'property' has an 'autonomous meaning' in international human rights law, independent from the definition provided by domestic laws. In addition, Article 29(b) of the American Convention establishes that no provision of this treaty may be interpreted as 'restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party...' Through an evolutive interpretation of the American Convention and in light of the fact that the Constitution of Nicaragua

protects the right of indigenous people to communal property, the Court concluded that Article 21 of the Convention also affords protection of this right. The Court said: 'the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival' (para. 149).

Emphasising the importance of the community's spiritual connection to the land and the existence of applicable indigenous customary practices, the Court held that possession should suffice for indigenous communities lacking real title to the land to obtain official recognition of their rights to that land. However, the Court went on to say that the boundaries of the land rightly occupied by the community have not been adequately demarcated by the State, and that the State should: 1) carry out delimitation, demarcation, and titling of the land belonging to the community, and; 2) until completing the previous step, abstain from taking any actions or allowing any third party actions to be taken that might impede the existence or enjoyment of that land.

Considering that actions by public authorities, such as MARENA, are attributable to the State, the Court held that the State violated the right of the community to the use and enjoyment of their property when it granted concessions to third parties to utilise the property and resources located in an area that would correspond to the lands of the community. In addition, the Court appears to have concluded that the omission of State authorities to demarcate and title the community lands also violated the duty of the State to adopt the necessary measures to ensure the full enjoyment of the right to property as protected by the Convention. Thus, the Court ruled that Nicaragua was in breach of Article 21 in connection with Articles 1 and 2 of that treaty.

Finally, the Commission requested that in application of Article 63(1) of the American Convention the Court declare that the State must: 1) establish a judicial procedure that will allow prompt demarcation of the claimed lands; 2) abstain from granting any concession to lands used by the community prior to the resolution of this dispute; 3) pay equitable compensation for the monetary and moral damage this lack of land rights has caused the community, and; 4) pay the legal costs incurred by the community in this dispute.

The State responded by arguing that the concession to SOLCARSA caused no damage to the disputed land as it had not yet begun any activity in the conceded area. Furthermore, the claim by the community is 'disproportionate and irrational, and it refers to an area in which they do not have ancestral possession'. Also, there has been no alteration of beliefs, customs, or production patterns within the community. Moreover, the community made no effort to request titling of the land, and failed to pursue their claim with due diligence, in addition to the fact that there has been considerable progress with respect to the land titling process of the community. Finally, Nicaragua is 'one of the poorest States of the hemisphere' and must conserve its resources for such activities as land titling and demarcation.

The Court considered that it is a matter of customary international law that any violation of an international obligation which has caused damage calls for adequate reparations. They held that the State must adopt legislative, administrative, or any other measures required to create an effective procedure for the delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores. In addition, regarding the Awas Tingni

Community, the State must carry out a process of demarcation, delimitation, and titling of their land within fifteen months, allowing full participation of the community and taking into account their customary law, values, customs and mores. Until this is completed, the State must abstain from taking any actions that would affect the value of the disputed land.

The Court further specified that the community did not suffer material damage, and that this ruling alone is a reparation. However, the Court felt that immaterial damages must also be repaired through monetary compensation and ordered the State to invest US \$50,000 within 12 months in works or services for the benefit of the community under the supervision of the Commission.

Finally, the Court assessed the expenses and costs incurred by the members of the community and their representatives in litigating this case in domestic and international proceedings to amount to US \$30,000, and required the State to pay this amount within six months.

### *Hilaire vs Trinidad and Tobago*

*I/A Court, Hilaire Case, Preliminary Objections, Judgment of 1 September 2001, Series C No. 80.* In May 1995, Mr. Hilaire was convicted for a murder committed in February 1991. Although Mr. Hilaire had no prior criminal offenses, he was convicted under the Trinidad and Tobago 'Offenses Against the Person Act', which stipulates a mandatory death sentence by law. The Act does not permit the judge or jury to mitigate the sentence, nor to take into account the personal circumstances of each case. Mr. Hilaire appealed once to the Court of Appeal of Trinidad and Tobago, and twice to the Judicial Committee of the Privy Council in London, all of which were dismissed.

Due to the urgent circumstances of Mr. Hilaire's imminent death sentence, the Court ruled on provisional measures as requested by the Commission ordering the State to refrain from executing the alleged victim until the organs of the Inter-American System completed their consideration of the case. The Commission argued violations of Articles 4(1) (arbitrary deprivation of life), 5(1) (deprivation of physical, mental, and moral integrity), 5(2) (subjugation to cruel, inhumane, or degrading punishment), 5(6) (failing to incorporate social reform into punishment), and 7(5) (failure to try defendant in a reasonable time), all in conjunction with a violation of Article 1(1), all protected by the American Convention on Human Rights.

The State submitted preliminary objections to the admissibility of the complaint as well as to the jurisdiction of the Court. In its objection to the admissibility of the complaint, the State argued that the claim of an Article 4(1) violation was submitted by the Commission after the Article 46 stipulated 6-month time limit passed, thus making it inadmissible. The Commission responded that Trinidad and Tobago should be prevented from raising admissibility issues at this stage of the procedure because it waived its right to challenge the admissibility of the petition and submitted its observation on the merits of the case. Additionally, the Commission stated that the exception to the rule of exhaustion of domestic remedies contemplated in Article 46(2)(a) is applicable to the case because the State does not afford due process under its domestic legislation. Alternatively, the Commission argued that, under its Rules of Procedure, petitioners must submit the facts that might constitute a human rights violation, but they do not necessarily have to indicate every article that might be

breached in a particular case. The Court held that Article 32(c) of the Commission's Rules of Procedure 'expressly allows for the possibility that "no specific reference [be] made to the article(s) alleged to have been violated" in order for a complaint to be processed before it' (para. 42). Thus, the Court concluded that when additional arguments regarding violations of other rights are pleaded on the basis of the same facts originally submitted by a petitioner, such a pleading cannot be dismissed on the basis that they were not argued at the initial petition or that specific articles of the Convention were not implicated.

The State next argued that the Court lacks jurisdiction to hear the present case because of the reservation filed by Trinidad and Tobago when recognising the compulsory jurisdiction of this tribunal. The reservation, as applicable to this case, reads: '[T]he Government of the Republic of Trinidad and Tobago, recognises the compulsory jurisdiction of the Inter-American Court of Human Rights (...) only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago ...' The State indicated that Article 75 of the American Convention as interpreted by the Court permits that reservations be made to that treaty, provided they are not incompatible with the object and purpose of the Convention. Trinidad and Tobago argued that its reservation is not incompatible with the object and purpose of the American Convention because it is related to the recognition of the compulsory jurisdiction of the Court and, consequently, it does not restrict the scope of the rights protected by this treaty. Alternately, it contended that if the Court finds the reservation incompatible with the Convention, the declaration made by the State recognising the compulsory jurisdiction of the Court is invalid. Thus, the Court lacks jurisdiction to hear the present case.

The Commission first contended that the reservation is excessively vague and ambiguous and leaves the decision on whether the Court has jurisdiction to hear a case to the State's discretion, thereby undermining the Court's authority to determine its own jurisdiction. Additionally, the Commission argued that the reservation is invalid under the permissible grounds authorised by Article 62 of the Convention, according to which a State's declaration recognising the compulsory jurisdiction of the Court may be made 'unconditionally, on the condition of reciprocity, for a specific period or for specific cases'. Furthermore, under Article 75 of the same treaty, the reservation is incompatible with the object and purpose of the Convention and must therefore be declared invalid by the Court. Finally, the Commission contended that if the Court finds the reservation invalid, it should sever the impugned terms from the declaration of acceptance made by the State instead of annulling such declaration *in toto*.

The Court held that it has the right to declare its competence to hear a case, and that any objection 'taken by the State for the purpose of somehow affecting the Court's jurisdiction has no consequence whatever, as the Court retains the *competence de la competence*, as it is master of its own jurisdiction' (para. 81). Thus, the Court held that the reservation does not fall within the permissible grounds stated in Article 62(2) of the American Convention. In addition, it has a general scope that it subordinates the application of the provision of this treaty to the domestic law of Trinidad and Tobago, thereby making this reservation manifestly incompatible with the object and purpose of the Convention. In sum, the Court ruled that the objection to its jurisdiction must be dismissed.

It is worth noting that the Court failed to expressly address the argument raised by the Commission regarding severability of reservations found incompatible with the provisions of the American Convention. The Court in this respect appeared to assume that if the reservation is declared invalid, the full provision as it stands should continue to bind the State. This assumption is reinforced by the Court when it stated that a State can only release itself from the Convention 'by following the provisions that the treaty itself stipulates'. This statement could imply that a State can submit limitations to the declaration recognising the jurisdiction only if they are in accordance with Article 62(2); otherwise, the State must denounce the treaty as provided by Article 78 of the American Convention if it wants to release itself from the international obligations assumed when ratifying this treaty.

1 NEW RULES OF PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS ADOPTED BY THE INTER-AMERICAN COURT AT ITS 49<sup>TH</sup> SESSION HELD FROM 16-25 NOVEMBER 2000. IN FORCE SINCE JUNE 1, 2001.

The most important innovation of the new Rules of Procedure of the Court is contained in Article 23, stipulating that once the case has been submitted to this tribunal, the alleged victims, their next of kin or accredited representatives (hereinafter 'victims') are granted independent standing to submit their requests, arguments and evidence throughout the proceedings before the Court. Under Article 61(1) of the American Convention, however, only the Commission or State Parties to this treaty may institute proceedings before the Court.

Article 23 of the Rules is complemented by Article 35(4), which provides that after notification of the application to the victims, they must submit their own request, arguments, and evidence within 30 days. In this respect, it is worth noting that regulations are unclear on whether victims are limited by the legal issues raised by the Commission (or a State Party) in its brief or if they can allege additional breaches to the Convention when submitting their own 'requests or arguments'. Furthermore, the new rules authorise victims to introduce their own evidence, including the request to appoint witnesses and expert witnesses; however, the party that requests the evidence must afford the costs of its production (Article 45).

Other provisions of the new rules tend to reinforce a broad participation of the victims in all aspects of the procedure, in particular: the power to interrogate witnesses and expert witnesses in oral hearings (Articles 41 and 42), to object to the hearing of a witness and the appointment of expert witnesses (Articles 48 and 49), to request the Court to adopt provisional measures (Article 25), and to submit a request for interpretation of particular aspects of a decision on the merits or on reparations as provided by Article 67 of the American Convention (Article 58).

The new Rules of the Court remain unclear about whether the Commission could continue to represent victims before the Court in cases in which victims do not have the resources to afford an international proceeding, opt not to participate in the proceedings or appoint a legal representative. The Rules only provide that the Commission will be represented by its Delegates, whom can be assisted by persons of their choice, thereby leaving open the possibility that the victims or their legal representatives be appointed as advisors.

Finally, in addition to the autonomous participation of the victims, the new Rules incorporate another relevant procedural development related to the production of the evidence. Article 43 provides that the evidence produced before the Commission will be admitted by the Court as long as minimum rules of due process are respected, in particular the principle of equality of arms. The Court will retain its power to request that in exceptional circumstances the evidence be reproduced by the parties at the Court proceedings.

## IV AFRICA

RACHEL MURRAY

### 1 ORGANISATION OF AFRICAN UNITY/AFRICAN UNION (OAU/AU)

The first meeting of the Committee of Experts established under the African Charter on the Rights and Welfare of the Child is due to take place in May 2002 in Ethiopia, with the aim of considering the Rules of Procedure, guidelines for State reporting and a work programme for the Committee.

### 2 AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

An Experts Meeting was convened from 12-16 November 2001 in Addis Ababa, Ethiopia, to examine the Draft Protocol on the Rights of Women in Africa, as adopted by the African Commission on Human and Peoples' Rights. Forty-four States were represented at the meeting, and a statement was made by the Special Rapporteur of the African Commission on the Rights of Women in Africa, Dr Angelo Melo.<sup>1</sup> The meeting examined the various provisions of the Draft Protocol. Amendments included merging the two provisions on elimination of violence and right to life, integrity and security of the person into one article and reformulating the provision on elimination of harmful practices. Of particular concern among delegates was the provision stating 18 years as a minimum age for marriage and the article on polygamy. No consensus was reached and three alternative provisions were suggested ranging from 'polygamy shall be prohibited' to requiring that it be subject to mutual consent of the parties, with States being obliged to encourage monogamy as the preferred form. A new article was inserted on monitoring and implementation of the Protocol which required that States should include reference to respect for the Protocol in their Article 62 reports before the African Commission and that a State ensure an effective remedy for violation of the Protocol. The African Commission was affirmed as the body entrusted with interpreting the Protocol.

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1 *Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 12-16 November 2001, Addis Ababa, Ethiopia, Expu/Prot.Women/Rpt. (I).