

Inter-American Court of Human Rights
Case of the Mayagna (Sumo) Awas Tingni Community
v. Nicaragua

Judgment of February 1, 2000
(Preliminary Objections)

In the Mayagna (Sumo) Awas Tingni Community Case (hereinafter "the Community" or "the Mayagna Community"),

The Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), composed of the following judges:

Antônio A. Cançado Trindade, President
Máximo Pacheco Gómez, Vice President
Hernán Salgado Pesantes, Judge
Oliver Jackman, Judge
Alirio Abreu Burelli, Judge
Sergio García Ramírez, Judge
Carlos Vicente de Roux Rengifo, Judge and
Alejandro Montiel Argüello, Judge *ad hoc*;

also present,

Manuel E. Ventura Robles, Secretary and
Renzo Pomi, Deputy Secretary

pursuant to Article 36.6 of its Rules of Procedure (hereinafter "the Rules of Procedure"), delivers the following judgment on the preliminary objections filed by the State of Nicaragua (hereinafter "the State" or "Nicaragua").

I
INTRODUCTION OF THE CASE

1. This case was submitted to the Court by the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") on June 4, 1998. It originated from petition No. 11,577, received by the Secretariat of the Commission on October 2, 1995.

II
FACTS SET FORTH IN THE APPLICATION

2. In the following paragraphs, the Court summarizes the facts alleged by the Commission in the application brief that are relevant for considering the preliminary objection:

- a) The Mayagna Awas Tingni Community is an indigenous Mayagna or Sumo community of the Atlantic or Caribbean coast of Nicaragua. The Community has a population of approximately 630 individuals, in 142 families, and its principal village is on the Wawa River, in the municipality of Waspan, in the North Atlantic Autonomous Region (RAAN);
- b) members of the Community communicate among themselves almost exclusively in the Mayagna language, although most of them are also able to speak Spanish;
- c) the Community functions under a traditional leadership structure, based on custom, which is recognized in Articles 89 and 180 of the Nicaraguan Constitution and 11(4) of the Statute of Autonomy of the Regions of the Atlantic Coast of Nicaragua, Law No. 28 of 1987;
- d) the leadership of the Community consists of a Communal Administrative Council, members of which are elected by the Community and answer directly to it. The Community subsists principally on family and communal agriculture, the collection of medicinal plants and fruits, hunting and fishing; these activities are carried out within a specific territorial area, in accordance with a traditional system of land ownership that is related to the Community's socio-political organization;
- e) on June 28, 1995, the Board of Directors of the RAAN Regional Council issued an administrative directive, in which "it acknowledge[d an] agreement signed by the Autonomous Regional Government and the company Solcarsa S.A." to "initiate logging operations [...] in the Wakambay area;"
- f) on July 11, 1995, the legal representative of the Community sent a letter to the Ministry of the Environment and Natural Resources (MARENA) in which the Community protested the possibility of a concession on its lands being granted to Sol del Caribe S.A. (SOLCARSA), without it previously having been consulted;
- g) on September 11, 1995, the Community filed a first application for amparo against MARENA before the Matagalpa Appeals Tribunal, in order to try and detain the granting of the concession. This recourse was declared inadmissible on September 19, 1995, as it had not been filed within the legal time limit, a period of 30 days from the time the Community learned that the concession was being processed. Two days later, the Community filed an application for amparo before the Supreme Court of Justice under the *de facto* procedure, requesting a review of the decision of the Appeals Tribunal, but the Supreme Court did not pronounce judgment until a year and a half later, on February 27, 1997, when it dismissed the application as time-barred;
- h) on March 13, 1996, the State, through MARENA, granted a 30-year concession to SOLCARSA to exploit approximately 62,000 hectares of tropical forest in the Atlantic coast region on land claimed by the Community;
- i) on March 20, 1996, the MARENA lawyers informed the Community's lawyers that the concession granted to SOLCARSA had been approved by the RAAN Regional Council, that the indigenous communities of the region as such did not have any independent legal existence or status, but were

represented by the Regional Council and that, as the latter had approved the concession, it was valid;

j) on March 21, 1996, the Community leaders submitted a request to the plenary session of the Regional Council for assistance to demarcate their ancestral lands and detain the advance of the concession granted without the consent of the communities;

k) on March 22, 1996, the Board of Directors of the Regional Council indicated to the Community's lawyers that the resolution that it had adopted on June 25 (*sic*) was subject to ratification by the plenary session of the Regional Council, that this ratification had not taken place and that the Board of Directors itself had not granted, nor would it grant, the consent required for a concession;

l) on March 29, 1996, two members of the RAAN Regional Council filed an application for amparo against the concession to SOLCARSA before the Supreme Court. This action was initiated on the grounds that the concession was not valid because it had not been approved by the plenary session of the Regional Council, as required by Article 181 of the Nicaraguan Constitution. On February 27, 1997, the Supreme Court of Justice pronounced itself in favor of this application and declared the concession unconstitutional;

m) subsequently, State officials took steps to submit the concession to the approval of the RAAN Regional Council. On October 8, 1997, the majority of the Council voted in favor of the concession. Due to this, on November 7, 1997, the Community filed a second application for amparo, this time against "the members" of the Board of Directors who had voted in favor of the concession initially and "the members" who, on October 8, 1997, formed the majority of the Regional Council and approved the said concession. In this recourse, the Community denounced the said members for having approved the concession without having considered the rights of the indigenous communities, although it had made a formal request to the Regional Council in this respect;

n) on November 12, 1997, the Matagalpa Appeals Tribunal admitted the second application for amparo, ordered that the respondents be notified that they should submit their reports to the Supreme Court of Justice and rejected the Community's request that the concession to SOLACARSA be suspended immediately;

o) on February 12, 1998, the Supreme Court of Justice of Nicaragua issued an order that the judgment of February, 1997, in favor of the members of the RAAN Regional Council who had filed the above-mentioned application for amparo(*supra* l), should be executed.

III

PROCEEDING BEFORE THE COMMISSION

3. On October 2, 1995, the Secretariat of the Commission received a petition lodged by Jaime Castillo Felipe, principal leader of the Community, in his own name and on behalf of the Community

4. On December 3, 1995, the Commission received a supplementary request regarding precautionary measures, because the State was about to grant SOLCARSA the concession to commence logging on communal lands.
5. On January 19, 1996, the petitioners requested the Commission to grant them a hearing during its 91st Session, but the Commission informed them that it was unable to comply with their request.
6. On February 5, 1996, the Commission began processing the case and sent the pertinent parts of the petition to the State, requesting that it provide the corresponding information within ninety days.
7. On March 13, 1996, the Community submitted two newspaper articles to the Commission that "indicated the granting of [the] concession" to SOLCARSA and a letter from the Ministry of the Environment and Natural Resources to the President of SOLCARSA informing him that "his request for a logging concession was being processed, all that was lacking was the signature of the concession contract," and stating that the Community's protests were the principal obstacle.
8. In a communication of March 28, 1996, the petitioners sent a draft memorandum of understanding to the Commission in order to settle the case; this document had been submitted to the Ministers for Foreign Affairs and of the Environment and Natural Resources.
9. On April 17, 1996, the petitioners forwarded a document in which other indigenous communities of the RAAN and the Indigenous Movement of the South Atlantic Autonomous Region expressed their support for the petition submitted to the Commission.
10. On May 3, 1996, an informal meeting was held between the parties and the Commission in order to reach a friendly settlement in the case. On May 6, 1996, the Commission placed itself at the disposal of the parties to achieve this objective and gave them thirty days to forward their corresponding reply. On May 8 and 20, 1996, the petitioners and the State, respectively, accepted this proposal.
11. On June 20, 1996, a second meeting between the parties and the Commission was held. At this meeting, Nicaragua rejected the settlement agreement submitted by the petitioners. The petitioners, in turn, requested that the State submit a procedure to establish the limits of the Community's lands and, while that was happening, to suspend the concession granted to SOLCARSA. They advised that the construction of roads towards the Community's lands had been commenced and proposed that the Commission should visit Nicaragua to talk to the parties.
12. On October 3, 1996, a third meeting was held between the parties and the Commission. At this meeting, the petitioners requested the State not grant further concessions in the area, initiate the process of demarcating the Community's lands and differentiate the latter from State lands. The State presented probative documents and announced the creation of the National Demarcation Commission, inviting the petitioners to take part in it.
13. On March 5, 1997, the petitioners reiterated to the Commission their request for precautionary measures, faced with the threat of the commencement of logging

operations on indigenous lands and, on March 12, 1997, the Commission requested that the State provide it with information about this within fifteen days. On March 20, 1997, Nicaragua requested that the Commission allow it 30 days to respond to the request, and this was conceded.

14. On April 3, 1997, the petitioners informed the Commission about the judgment of the Supreme Court of Justice of Nicaragua of February 27, 1997, which decided on the application for amparo filed by members of the RAAN Regional Council and declared that the concession granted by MARENA was unconstitutional, since it did not meet the requirement of Article 181 of the Nicaraguan Constitution. They also informed the Commission that the State had not suspended logging activities under the concession.

15. On April 23, 1997, the State requested that the Commission reject the precautionary measures requested by the petitioners due to the delivery of the judgment of the Supreme Court of Justice, which it agreed to comply with. However, on June 11 that year, the petitioners informed the Commission that, despite the judgment of the Supreme Court of Justice, the State and SOLCARSA continued to act as though the concession was valid.

16. In a hearing before the Commission on October 8, 1997, the petitioners indicated that logging operations were continuing on the Community's lands and requested that the Commission observe the situation *in situ*. On October 27 that year, three days before the Commission's planned visit to Nicaragua, the State informed it that the visit was not necessary because it was preparing a brief with relevant additional information.

17. On October 31, 1997, the Commission requested that the State adopt precautionary measures designed to suspend the concession granted to SOLCARSA and established a period of 30 days for the State to inform the Commission about them. The same day, the Commission reiterated to the State that it should reply within 30 days to the Commission's request of February 5, 1996, when the process was opened.

18. On November 5, 1997, the State requested that the Commission close the case as the RAAN Regional Council had ratified the approval of the concession to SOLCARSA, correcting the error of form committed and, consequently, the concession was now valid.

19. On November 17, 1997, the petitioners declared that the central element of the petition was Nicaragua's failure to protect the Community's rights over its ancestral lands and that this situation still persisted. Furthermore, with regard to the ratification by the RAAN Regional Council, they indicated that this Council was part of the State's politico-administrative structure and had acted without taking into account the Community's territorial rights. Lastly, they requested that the Commission proceed to issue a report in accordance with Article 50 of the Convention.

20. On December 4, 1997, the State sent a communication to the Commission indicating that the petitioners had filed an application for amparo on November 7, 1997, requesting that the Matagalpa Appeals Tribunal declare the concession to SOLCARSA null, so that domestic remedies had not been exhausted, and it invoked

the application of Articles 46 of the Convention and 37 of the Commission's Regulations. The State reiterated this position on December 19, 1997.

21. On March 2, 1998, the State informed the Commission that, on January 22, 1998, the petitioners had presented a request before the Supreme Court of Justice for the execution of the judgment of February 27, 1997, delivered by that Court. On this occasion, the State reiterated its position that domestic remedies had not been exhausted due to the applications for amparo filed by the Community and requested that the Commission abstain from continuing to process the case.

22. On March 3, 1998, the Inter-American Commission approved Report No. 27/98, which was forwarded to the State on March 6 that year. In this Report, the Commission concluded:

141. Based on the acts and omissions examined, (...) that the State of Nicaragua has not complied with its obligations under the American Convention on Human Rights. The State of Nicaragua has not demarcated the communal lands of the Awas Tingni Community or other indigenous communities, nor has it taken effective measures to ensure the property rights of the Community on its lands. This omission by the State constitutes a violation of Articles 1, 2 and 21 of the Convention, which together establish the right to the said effective measures. Articles 1 and 2 oblige States to take the necessary measures to give effect to the rights contained in the Convention.

142. The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.

143. [...] the State of Nicaragua did not guarantee an effective remedy to respond to the claims of the Awas Tingni Community regarding their rights to lands and natural resources, pursuant to Article 25 of the Convention.

Moreover, the Commission recommended that Nicaragua:

- a. establish a procedure in its legal system, acceptable to the indigenous communities involved, that [would] result in the rapid official recognition and demarcation of the Awas Tingni territory and the territories of other communities of the Atlantic coast;
- b. suspend as soon as possible, all activity related to the logging concession within the Awas Tingni communal lands granted to SOLCARSA by the State, until the matter of the ownership of the land, which affects the indigenous communities, [has been] resolved, or a specific agreement [has been] reached between the State and the Awas Tingni Community; and
- c. initiate discussions with the Awas Tingni Community within one month in order to determine the circumstances under which an agreement [could] be reached between the State and the Awas Tingni Community.

When it forwarded this report to the State, the Commission granted it sixty days to transmit information on the measures that it had adopted in order to comply with these recommendations.

23. On May 7, 1998, the Commission received the State's reply dated the previous day. The Commission indicated that, although this reply had been presented after the time limit had elapsed, it would examine it in order to add it to the record of the case. With regard to the recommendations of the Inter-American Commission, Nicaragua stated that:

a) In order to comply with the recommendations of the IACHR with regard to establishing a legal procedure acceptable to the indigenous communities involved, which [would] result in the demarcation and official recognition of the lands of the Awas Tingni and other communities of the Atlantic coast, the Government of Nicaragua has a National Commission for the demarcation of the lands of the Indigenous Communities of the Atlantic Coast.

To the same end, a draft Law on Indigenous Communal Property [has been] prepared, with three elements:

1. To make the necessary provisions for accrediting the indigenous communities and their authorities.
2. To proceed to demarcate the properties and provide title documents.
3. Settlement of the dispute.

The draft law endeavors to find a legal solution to the property of indigenous people or ethnic minorities. The project will be consulted with civil society and, once there is a consensus, it will be submitted to the National Assembly for discussion and subsequent approval. The estimated time for the whole procedure is about three months from today's date.

b) Regarding the recommendation to suspend all activity relating to the logging concession granted to SOLCARSA and to comply with the judgment of the Supreme Court of Justice, the Government of Nicaragua cancelled this concession on February 16, 1998. On that day, it notified Michael Kang, General Manager of SOLCARSA[,] that, as of that date, the concession was null and void. He was also advised that he should order the suspension of all activities and warned that, to the contrary, he would be violating Article 167 of the Constitution and be liable to having either a criminal or civil suit brought against him.

c) Regarding the recommendation to initiate discussions with the Awas Tingni [C]ommunity, the Government of Nicaragua is firmly committed to finding a global solution for all the indigenous communities of the [A]tlantic [C]oast, within the framework of the [L]aw on [C]ommunal [P]roperty, and to this end, there will be extensive consultations with these communities.

As for the conclusions set forth in Report No. 27/98, the Nicaraguan State manifested its acknowledgement of the rights of the indigenous communities embodied in its Constitution and legislation. Moreover, it indicated that

the [G]overnment of Nicaragua has faithfully complied with the previous legal provisions and, consequently, it has acted in accordance with the national legal system and the provisions of the rules and procedures of the [American] Convention [on] Human Rights. Likewise, the Community of Awas Tingni exercised their rights as set forth in the law and had access to the legal remedies that the law provides.

Lastly, Nicaragua requested the Inter-American Commission to close the instant case.

24. On May 28, 1998, the Commission decided to submit the case to the Court.

IV PROCEEDING BEFORE THE COURT

25. On June 4, 1998, the Commission submitted the application to the Court, in which it invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the Convention" or "the Inter-American Convention") and 32 ff. of the Rules of Procedure of the Court. The Commission submitted this case for the Court to rule on whether the following articles of the Convention had been violated: 1

(Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property) and 25 (Right to Judicial Protection).

26. Furthermore, the Commission requested that the Court declare that the State is obliged to establish and apply a legal procedure for demarcating the lands of the Community, to abstain from granting concessions on these until the issue of their ownership has been resolved, and to compensate the Community. Lastly, the Commission requested that Nicaragua be condemned to pay the costs and expenses of this proceeding.

27. The Commission appointed Claudio Grossman and Helio Bicudo as its Delegates, David Padilla, Hernando Valencia and Bertha Santoscoy as its Advisors, and James Anaya, Todd Crider and María Luisa Acosta as the Assistants.

28. On June 19, 1998, the Secretariat of the Court (hereinafter "the Secretariat") provided for the preliminary examination of the application by the President of the Court (hereinafter "the President"), notified the State of the application, and informed the latter of the period within which it should respond to this. It also invited the State to appoint a Judge *ad hoc*.

29. On July 2, 1998, Nicaragua appointed Alejandro Montiel Argüello as Judge *ad hoc* and Edmundo Castillo Salazar as Agent.

30. The same day, the Commission submitted to the Court the copies of the annexes to the application requested by the Secretariat and the addresses and powers of attorney of the representatives of the victims, with the exception of the power of attorney of Todd Crider, which was forwarded on July 24, 1998.

31. On August 18, 1998, the State attested the appointment of Rosendo J. Castro S. and Bertha Marina Argüello as its legal advisors.

32. On August 19, 1998, Nicaragua filed the preliminary objection that domestic remedies had not been exhausted pursuant to Articles 46 and 47 of the Convention and requested the Court to declare the application inadmissible.

33. On September 25, 1998, the Commission submitted its observations on the preliminary objection filed by the State.

34. On October 19, 1998, the State forwarded its reply to the application.

35. On February 19, 1999, the President invited the State and the Inter-American Commission to a public hearing, to be held on May 31, 1999, at the seat of the Court, to hear their arguments on the preliminary objection filed by the former.

36. On March 15, 1999, the Secretariat requested that the State send some documents that were missing from its briefs on the preliminary objection and the reply to the application; they were submitted on May 26 that year.

37. The public hearing on preliminary objections was held at the seat of the Court on May 31, 1999.

There appeared

for the Republic of Nicaragua:

Edmundo Castillo Salazar, Agent;
Rosenaldo Castro, Advisor; and
Bertha Marina Argüello, Advisor.

for the Inter-American Commission on Human Rights

Claudio Grossman, Delegate
Verónica Gómez, Lawyer;
James Anaya, Assistant;
María Luisa Acosta, Assistant; and
Todd Crider, Assistant.

V COMPETENCE

38. Nicaragua has been a State Party to the American Convention since September 25, 1979, and recognized the contentious jurisdiction of the Court on February 12, 1991. Therefore, under the provisions of Article 62(3) of the Convention, the Court is competent to hear the instant case.

VI PRELIMINARY OBJECTION: FAILURE TO EXHAUST DOMESTIC REMEDIES

39. The Court proceeds to consider the objection that domestic remedies had not been exhausted, filed by Nicaragua in the case *sub judice*.

40. In this regard, the State has alleged that the Community failed to exhaust existing domestic remedies because it:

a) incurred in a series of omissions and defective procedural actions when contesting the logging concession granted by the Government to the company SOLCARSA; it did not use all the existing jurisdictional remedies and its defective procedural action had a negative influence on the provision of a prompt judicial remedy; and

b) made no request for the award of land titles to the competent authorities of the Central Administration, but addressed itself to third party institutions that lacked competence in this area.

41. With regard to its first argument, the State declared that, despite having had administrative and constitutional remedies at its disposal in order to contest the concession, the Community failed to use them at the appropriate procedural moment, thereby acting after the statutory time limit had passed or allowing their right to be precluded.

42. It also added that the Community made an "unclear" petition, thereby failing to comply with "the principles of substantiation of the petition and the violated regulations, contained in the Law of Amparo," and that it failed to request the

suspension of the contested administrative act when filing the application for amparo by the *de facto* procedure.

43. Lastly, it indicated that the Community failed to use all the existing remedies since it did not file an appeal against the logging concession on the grounds of unconstitutionality, and this was filed by third parties; this did not alter the fact that the Community had not exhausted the existing jurisdictional remedies under the national legal system. In this respect, Nicaragua indicated that the Community's attitude had a negative influence on the provision of a legal remedy within a reasonable period.

44. Regarding its second argument, Nicaragua indicated that the Community incurred in a series of omissions and negligent actions since it did not address a request for the award of land titles to the competent authority, that is, the Nicaraguan Agrarian Reform Institute (INRA), but, instead, addressed a petition to an organ that did not have competence in the matter, the RAAN Regional Council. Nicaragua also declared that there was no formal petition from the Community for the award of land titles in the files of the National Demarcation Commission, the auxiliary administrative body created to streamline the demarcation process.

45. In its observations of September 25, 1998, the Inter-American Commission stated that the preliminary objection filed by the State should be declared inadmissible, since the State had acknowledged its responsibility when, in various communications of May 1998, it indicated the way in which it was complying with the Commission's recommendations and when it subsequently requested a 12-month postponement in order to provide information on the measures that it had adopted to implement the said recommendations.

46. The Commission also indicated that the objection that domestic remedies had not been exhausted should be declared inadmissible, because Nicaragua had waived this objection tacitly by not presenting it opportunely during the proceeding before the Commission, by assuming inconsistent attitudes with regard to its legal grounds and by failing to prove that there were effective and adequate domestic remedies that had not been exhausted. Furthermore, the Commission stated that the legal grounds used by the State were arguments related, in part, to the merits of the application and not specifically to the objection filed. Therefore, the Court should not declare the application inadmissible.

47. With regard to the measures designed to award title to their lands, the Commission indicated that representatives of the Community had visited INRA officials on several occasions to this end, but the officials had told them that the Institute was not competent to resolve a matter of communal lands. The Commission also stated that MARENA had informed the Community that there was a vacuum in the pertinent administrative and legal framework. Lastly, the Commission stated that when the Community had presented a request to the RAAN Regional Council, the latter had received it and recognized its competence in that respect.

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48. The Court will proceed to examine the timing of the State's filing of the objection that domestic remedies had not been exhausted.

49. In this regard, Nicaragua declared that it had repeatedly raised the objection that domestic remedies had not been exhausted before the Commission, "since the very beginning" of the proceeding before the Commission,

specifically, in its reply to the memorandum of understanding presented by the petitioners within the framework of the friendly settlement and, in repeated briefs while the case was being processed, including those of November 5, December 4 and 19, 1997, February 14 and March 2, 1998. Further still, this position was manifested by Government representatives in hearings held at the seat of the Commission on March 4, 1997, and subsequently, in October the same year.

Thus, Nicaragua stated that these communications demonstrated that, at no time, had it renounced, either tacitly or expressly, its right to assert this objection.

50. On this aspect, the Commission indicated that, according to the principle of *estoppel*, the State was impeded from alleging the objection of failure to exhaust domestic resources, because after a long process of meetings with the Commission and the Community "it [was] the first time in the history of the case that the State [had] presented the argument that domestic remedies had not been exhausted due to a procedural error by the victims". Furthermore, it indicated that "[s]ubsequent communications from the State arguing failure to exhaust domestic remedies did not reach the Commission until November 1997, and did not refer to the Community's first application for amparo, but rather to the second application and to applications for amparo filed by other parties opposed to granting the concession to SOLCARSA." It added that the State could not file an objection that domestic remedies had not been exhausted after it had taken part in the friendly settlement procedure during two years.

51. In addition, the Inter-American Commission stated that, even if the State might have avoided the tacit waiver due to silence, its reply to the Commission's Report No. 27/98 of May 7, 1998, did not pose any objection, but rather was dedicated to responding to the Commission's recommendations, thereby acknowledging its responsibility. In this way, the Commission concluded that the State's conduct constituted a waiver of any objection that domestic remedies had not been exhausted, which it might have alleged previously.

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52. Article 46.1a of the Convention establishes that, in order for a petition or communication presented to the Inter-American Commission pursuant to Articles 44 or 45 of the Convention to be admissible, it is necessary that the remedies under domestic law have been pursued and exhausted. The Court considers it necessary to emphasize that, with regard to the matter referred to in the objection filed by the State, it has established criteria that should be taken into consideration in this case.

53. Indeed, of the generally recognized principles of international law referred to in the rule on exhaustion of domestic remedies, the foremost is that the State defendant may expressly or tacitly waive invocation of this rule (*Castillo Páez Case, Preliminary Objections*. Judgment of January 30, 1996. Series C No. 24, para. 40; *Loayza Tamayo Case, Preliminary Objections*. Judgment of January 31, 1996. Series C No. 25, para. 40). Secondly, in order to be timely, the objection that domestic remedies have not been exhausted should be raised during the first stages of the proceeding or, to the contrary, it will be presumed that the interested State has

waived its use tacitly (*Castillo Páez Case, Preliminary Objections. Ibid*, para. 40; *Loayza Tamayo Case, Preliminary Objections. Ibid*, para. 40; *Castillo Petruzzi Case, Preliminary Objections* Judgment of September 4, 1998. Series C No. 41, para. 56). Thirdly, the State that alleges non-exhaustion must indicate which domestic remedies should be exhausted and provide evidence of their effectiveness (*Castillo Páez Case, Preliminary Objections. Ibid*, para. 40; *Loayza Tamayo Case, Preliminary Objections. Ibid*, para. 40; *Cantoral Benavides Case, Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, para. 31; Durand and Ugarte Case, Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, para. 33).*

54. According to the criteria mentioned previously, the Court considers that, in order to validly oppose the admissibility of the petition submitted to the Inter-American Commission on October 2, 1995, the State should have expressly and *in a timely manner* invoked the rule that domestic remedies should be exhausted.

55. Although it is true that the briefs presented by Nicaragua to the Commission while the petition was being processed indicated, among other information, the progress of the proceedings before the domestic courts and also the State's willingness to comply with the judgments they delivered, it is evident that the State did not clearly file the objection that domestic remedies had not been exhausted during the first stages of the proceeding before the Commission. There is no record in the file that this objection had been invoked expressly until the end of 1997, specifically, in a note from the State of December 4, 1997, which was received by the Commission the following day.

56. From the foregoing, it is concluded that the State tacitly waived filing the objection that domestic remedies had not been exhausted because it did not allege this in a timely manner before the Commission.

57. The Court, in turn, observes that, in its brief of May 6, 1998, replying to the Inter-American Commission's Report No. 27/98, Nicaragua explained how it was "comply[ing] with the recommendations [of the Commission]" and once again did not allege the failure to exhaust domestic remedies, so that it is impeded from filing this objection now (*estoppel*).

58. For the above reasons, the Court dismisses the objection filed by Nicaragua.

59. Since the objection filed by the State has been dismissed because it was presented after the statutory time limit had passed, the Court does not consider it necessary to rule on the issue of the effectiveness of the domestic remedies mentioned in the objection.

VII

60. Therefore,

THE COURT

DECIDES

unanimously,

1. To dismiss the preliminary objection filed by the State of Nicaragua.
2. To continue hearing the instant case.

Judge Alejandro Montiel Argüello informed the Court of his Concurring Opinion, which is attached to this Judgment.

Done in Spanish and in English, the Spanish text being authentic, at San José, Costa Rica, this first day of February, 2000.

Antônio A. Cançado Trindade
President

Máximo Pacheco-Gómez
Pesantes

Hernán Salgado-

Oliver Jackman

Alirio Abreu-Burelli

Sergio García-Ramírez

Carlos Vicente de Roux-Rengifo

Alejandro Montiel-Argüello
Judge *ad hoc*

Manuel E. Ventura-Robles
Secretary

So ordered,

Antônio A. Cançado Trindade
President

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE MONTIEL-ARGÜELLO

1. The jurisprudence of the Court has established that the preliminary objection of failure to exhaust domestic remedies may be waived (Viviana Gallardo *et al* Case. Decision of November 13, 1981, para. 26 and abundant subsequent jurisprudence) and the waiver is presumed when the objection is not invoked in the initial stages of the proceeding before the Commission (Velásquez Rodríguez Case. Judgment of June 26, 1987, para. 88 and abundant subsequent jurisprudence).

2. I am totally in agreement with the Court's jurisprudence summarized in the preceding paragraph and, for this reason, I have voted in favor of dismissing the objection in the instant case, taking into consideration that the State did not file it until a very advanced stage of the proceeding before the Commission, which, in no way could be considered one of the initial stages.

3. Nevertheless, I believe that there is a lack of precision in the expression, initial stages, since none of the instruments that regulate the proceeding to be applied to a petition before the Commission define which are these initial stages.

4. The American Convention on Human Rights indicates the cases in which the Commission must declare a petition inadmissible (Article 47) and then, that if a petition is considered admissible, it shall request information from the government of the State (Article 48.1.a). This acceptance, which in most cases, is at the discretion of the Secretariat, since the Commission is not assembled, is undoubtedly *prima facie*, as it would be if it was alleged that rights not recognized by the Convention had been violated, and it does not prejudge the right of the State to file grounds for inadmissibility.

5. The almost constant practice of the Commission has been to continue processing the petition without making a declaration of admissibility and the Court has stated that the lack of this declaration is not a requirement that can hamper the normal course of the proceeding before the Commission and, consequently, consideration of the case by the Court. (Velásquez Rodríguez Case, *ibídem*, paras. 39-41 and subsequent jurisprudence.)

6. In order to guarantee legal certainty, it would be advisable, from all points of view, for the Commission to reform its Regulations in order to specify which are the initial stages of the proceeding during which preliminary objections against the admissibility of the petition can be filed and that these initial stages should culminate with a formal decision on admissibility in every case. This has already been indicated in several studies on the improvement of the inter-American system for the protection of human rights, even in official OAS documents, and it is to be hoped that it becomes a reality. In recent cases, the Commission has already proceeded to consider admissibility prior to and separately from examination of the merits of the case.

Alejandro Montiel-Argüello
Judge *ad hoc*

Manuel E. Ventura-Robles
Secretary