INDIGENOUS LAND RIGHTS: THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE CASE OF THE AWAS TINGNI AGAINST NICARAGUA

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ABSTRACT: The purpose of this research is to expound the main characteristics of the Awas Tingni Community v. Nicaragua case, decided by the Inter-American Court of Human Rights. The main contention of the case was the right of the indigenous community to their ancestral lands. In order to understand the law concept and legal interpretation, and to clarify the rationality behind the decision, this text considers the right to equality in culture; and indigenous land rights as being vital for culture, religion and family development (elements intrinsic to subsistence). The analysis of this judicial decision shows a dialogue between morality and law (Inter-American Convention), with important notions of responsibility. The text also considers that the Theory of Integrity, defended by Ronald Dworkin, is the best model to analyze the case, as it demonstrates the overlapping between justice and morality.

KEYWORDS: Inter-American Court of Human Rights. Indigenous Rights. Justice.

RESUMO: O objetivo desta pesquisa é expor as principais características do caso Comunidade Awas Tingni vs Nicarágua, decidido pela Corte Interamericana de Direitos Humanos. A principal

alegação do caso era o direito da comunidade indígena sobre suas terras ancestrais. Para entender o conceito do direito e sua interpretação legal, e para esclarecer a racionalidade por trás da decisão, este texto considera o direito à igualdade na cultura; e os direitos territoriais indígenas como vitais para a cultura, a religião e o desenvolvimento familiar (elementos intrínsecos à subsistência). A análise dessa decisão judicial mostra um diálogo entre moralidade e lei (Convenção Interamericana), com noções importantes de responsabilidade. O texto também considera que a Teoria da Integridade, defendida por Ronald Dworkin, é o melhor modelo para analisar o caso, pois demonstra a sobreposição entre justiça e moralidade.

PALAVRAS-CHAVE: Corte Interamericana de Direitos Humanos. Direitos Indígenas. Justiça.

THE INTERNATIONALIZATION OF HUMAN RIGHTS

In the wake of the ratification of The Universal Declaration of Human Rights at the UN in 1948 – and due to the era's capitalist versus communist ideological differences – since that time, human rights have taken on differing forms.

Based on liberal ideas, the United States promoted the Covenant on Civil and Political Rights. Its provisions, considered as the first generation of human rights, were conceived as mechanisms of protection. The undersigned states committed themselves to protecting their citizens against restrictions and violations against the rights that had been established, such as the rights to life, liberty, personal safety, religious liberty, political participation, freedom of expression, amongst others.

The communist States of that time conceived the International Covenant on Economic, Social and Cultural Rights. Human rights, in this system, are referred to as second generation and can be characterized as mechanisms of commitment for States to abide by in relation to their citizens. They involve rights to food, housing, health services, water, education, leisure, a just salary and to social security.

Within cultural rights the protection of minors is included, the right to speak one's own language, and to live one's culture as allowed by tradition and access to the Earth. In this context the rights of indigenous people have been developed.

Even though derived from second generation human rights, indigenous human rights were inserted into a wider context because they were neither restricted to collective concerns, nor were they exclusively first generation. They involved the implementation of human rights, even when individual, in accordance with particular cultural norms. They were, for this reason, called third generation human rights, in contrast to the two previous qualifications.

The recognition of these rights has initially come about in international conventions which oblige States to consider, *as one*, national legislation and external instruments. For this reason, international law is coming to have an ever increasing role in affirming human rights. This is notable in the adoption of new norms for protection, and in the creation of external controlling entities.

As a result, there is an increasing tendency to attribute responsibility to the States when it comes to the protection of human rights, or when there is a failure to follow guidelines in conventions and treaties. Hence, the development of international monitoring mechanisms, since the efficiency of the system is principally related to the existence of surveillance bodies to the end of protecting these rights.

In the second half of the twentieth century, in Europe, America and Africa, regional tribunals were created for the protection of man's rights. The first was the European Tribunal of Human Rights (1959) and, following this, the Inter-American (1979) and African (2009) Tribunals. The creators of the Inter-American and African systems of control, to a great extent, used the universal system for the protection of these rights (The United Nations Charter and The Universal Declaration of Human Rights of 1948) and the experience of the European System (The European Convention on Human Rights and Fundamental Freedoms of 1950).

Alongside these international instruments, the Inter-American System adopted the American Declaration of the Rights and Duties of Man (1948), and this, one can say, has been a source of inspiration for other instruments destined towards the protection of human rights, especially indigenous rights.

The reception of tribal communities' demands, in the context of human rights, has occurred through the action of their own organizations, ever more conscious of their rights. Even more important has been the assistance of international organs such as the ILO, in its Convention 169 of 1989, and the UN, in its Declaration on Indigenous Peoples, ratified in 2007. Other agreements, such as the International Convention on the Elimination of All Forms of Racial Discrimination, even though not specifically directed towards native peoples, have had a relevant role in affirming and guaranteeing their rights.

In this scenario, the Inter-American Court contributed significantly to the general theory of international law through its decisions – in their binding to member States – on the protection of human rights, especially those decisions which are contrary to the discrimination and marginalization of indigenous peoples, at the same time in recognition of their right to self-determination, their own territory and to the natural resources which exist there.

In international juridical literature there are few studies related to indigenous peoples in the context of the Inter-American System of Protection for Human Rights. This is rather unjust because the analysis of the experience of the Inter-American judicial institution and its jurisprudence – above all in that which pertains to principles – can be useful to the European and African Tribunals in the protection of minorities.

Accordingly, this article plans to work with the theoretical and practical problems associated with indigenous rights in the jurisprudence of the Inter-American Court through the analysis of the *leading case* of the Awas Tingni tribal community vs. Nicaragua[1]. An important precedent, it involves the right to collective property on traditionally occupied lands.

1 Sentence delivered on August 31, 2001.

This article investigates the right of indigenous people to their land according to the jurisprudence of the Inter-American Court, identifying guiding principles; to then scrutinize the sense which was conferred to these principles. Importantly, from a comparative perspective, the influence of the principles of the Inter-American Court's decisions on the Brazilian jurisprudence which treats indigenous rights can be verified.

The theoretical base of this work lies in Dworkian theory[2], by showing how rationality in courts' decisions is obtained through juridical principles and by presenting a project of constructive interpretation which makes evident the values and reasoning behind the application of law.

As well, for the identification of the core principles in the jurisprudence of the Inter-American Court, the theory of discourse in Habermas[3] played a central role. From there, our intention is to work with the plural interpretation by Peter Häberle[4].

In the end, the inductive methodology by study of concrete cases was adopted – the typically American *case study* – which brings the analysis of facts to the level of norms in order to explain the re-orientation of indigenous rights under the lens of multiculturalism; and by the recognition of their demands in the International Courts.

2. HUMAN RIGHTS AND INDIGENOUS PEOPLES

Cézar Franco, in a study specifically on indigenous peoples and human rights[5], emphasizes that the latter – the rights of men – arose from

2 DWORKIN, Ronald. **Levando os direitos a sério**. São Paulo: Martins Fontes, 2007.
Idem. **O império do direito**. São Paulo: Martins Fontes, 2007.
Idem. **Uma questão de princípio**. São Paulo: Martins Fontes, 2005.

3 HABERMAS, Jürgen. **Facticidad y Validez:** sobre el derecho y el estado democrático de derecho en términos de teoría del discurso. Madrid: Trotta, 1998.

4 HÄBERLE, Peter. **Hermenêutica Constitucional, a sociedade aberta de intérpretes da Constituição**: Contribuição para a interpretação pluralista e procedimental da Constituição. Porto Alegre: Sérgio A. Fabris, 1997.

5 FRANCO, Cezar Augusto de Oliveira. Direitos indígenas e mobilização: um olhar sobre a tríplice fronteira

a reductionist conception to protect the value systems of a society or of a State and that they later evolved into a more universal conception (albeit predominantly mono-cultural and Western) which, for many years, made the autochthonous peoples "invisible" under a blanket of civil incapacity, conserving their image as wards of the State.

The author mentioned recalls it is only after the First World War, with the institutionalization of international organs directed towards guarantees of peace and "in spite of the League [of Nations] not possessing specific attributes in relation to proper human rights, being the policy of mandates and from the system of protection of minorities practiced by the League that, incidentally, there was irradiated a supranational guardianship to protect people[6]."

However, the category of minorities "did not include indigenous peoples, since the relativist measures imposed by the social Darwinism in vogue did not even allow them this *status*. The categorization was only to serve growing international worry with the promotion of international standards for work conditions and well-being which were thought to be reliable for the administration of the most operative agency of the League, the International Labor Organization – ILO.[7]"

That is to say, international rights were to migrate from a relationship between States to insert humans into the system of concepts, and hence came to encompass the ethical framework in the treatment of human rights. In this context, the minorities were incorporated and the idea of the self-determination of peoples was developed.

Franco emphasizes that this "was what made constitutional texts open themselves out to a range of principles bearing an elevated axiological char-

– Brasil, Guyana e Venezuela. 2012. Thesis (Doctorate in International Relations and Regional Development) – Inter-Institutional Doctorate Program in International Relations and Regional Development, University of Brasília/ UFRR/FLACSO, Brasília, 2012.

6 Idem, p. 23.

7 Idem, p. 24.

ge. Founded on the value of human dignity, they were to grant, gradually, a new lease on life for the circumstances of autochthonous peoples [in the Americas] - populations historically submitted to erroneous policies of contact and assimilation, considering the lack of regard for their possession of rights, yet being worthy of a differentiated governance.[8]"

However, despite this opening towards human rights in all their fragility and inherent need for internal construction, promising to overcome the antagonisms resulting from the excessively individualistic and liberal perspective, the result was the postponement of these rights, especially in those groups most deprived of organization and the fight for justice, as is the case of indigenous peoples.

Only the widening of the concept of human rights and the "ethnification" of the catalogue of constitutional rights gave potential to the indigenous emergence, putting an end to the long period of "invisibility" for these peoples. This made their identities legitimate and their demands more robust, politicizing them internally and externally[9].

This indigenous mobilization, in the face of exclusion and discrimination, managed to break the parameters of the asymmetric arrangement to which it was subjected. This strengthened ethnic identity and the rights-based agenda, also permitting the development of multicultural and indigenous governance concepts "within a margin of autonomy sufficient for living, expressing and developing in accordance with one's own way of being[10]".

In this way "the indigenous movement, beforehand restricted to protest actions and local or regional resistance, came to own space on the agenda of national and international institutions, backed by strong indigenous rights in the recognition and guaranteeing of the preservation of cultural

8 Idem, p. 26.

9 Idem, p. 112.

10 Idem, p. 39.

identity, territories and modes of social organization, differentiated as a special dimension for the international regime of human rights. This framework, added to the constitutional reforms of States, and the inherent maintenance of the coherence of the international system of human rights, came to constitute an important external resource, encouraging political confrontation directed towards the State.[11]"

As can be seen, history provides three well defined cycles in the evolution of indigenous rights. The first occurs with the incorporation of indigenous individuals in the context of human rights; however, from an assimilationalist point of view, integrating to global society. The second cycle stems from the deepening of the concept of cultural diversity and multiculturalism. The third and final cycle is organized by the idea of juridical pluralism and customary indigenous law.

In this scenario, the Awas Tingni case against Nicaragua which is under study here constitutes an important judicial paradigm, since the indigenous people themselves become protagonists on the international scene in defense of their rights and in the formation of their own citizenship.

3. NATIVE LANDS

Indigenous ownership of lands traditionally occupied, even though constitutionally guaranteed by many countries in the Americas[12], is one of the controversial subjects of contemporary law. It truly creates crossings over juridical-constitutional borders. Strictly speaking, it leads to areas beyond juridical science, perhaps involving anthropological and interdisciplinary questions – sometimes difficult to verify – or limiting (often predatory) economic advantage in certain regions. The interests involved in the process of recognizing and delineating indigenous lands are many, almost

11 Idem, p. 122.

12 Constitutions: Argentina (Art. 75), Bolivia (Art. 289-296), Brazil (Art. 231), Colombia (Arts. 96, 171, 246, 329, 330), Costa Rica (Art. 76), Ecuador (Arts. 56-60), Guiana (art. 142), Mexico (art. 113), Venezuela (arts. 119-126), amongst others.

always characterized by conflict between mining companies, logging industries, farming, environmentalists and traditional populations.

Montanari reminds us that: "history demonstrates a difficult relationship between national states and the rights to land traditionally occupied by indigenous peoples. Frequently, the State misunderstands and fails to recognize, in its respective legislations, the matter of property – beyond the juridical context – in lands occupied by indigenous peoples. A lot of the time these populations are prohibited from inhabiting, hunting, fishing and wandering, even being transferred from one place to another when they are found within territories considered valuable by the capitalist system, such as those which contain natural resources and need to be exploited by the State[13]."

Hence, the definitions about indigenous earth and its delineation are most complex matters. For this reason, an exemplary case was sought after as a frame of reference for this research, where the Inter-American Court of Human Rights recognized the State's obligation to demarcate indigenous territory and make internal constitutional norms effective in relation to those peoples and their rights.

The decision at the Court of *San José* included indigenous claims in the context of human rights, turning natives into protagonists of the international context, and opening the doors to opportunity in order to reshape the State's obligation with reference to those original inhabitants.

4. UNDERSTANDING THE CASE

On the 4th of June 1998, the Inter-American Commission of Human Rights filed a law suit against the State of Nicaragua, since the lands of

13 MONTANARI JUNIOR, Isaias. **Demarcação de Terras Indígenas e Cooperação Internacional**. Curitiba: Juruá, 2013, p. 54-55.

the Awas Tingni indigenous community[14] were not delineated, nor were there adopted effective measures to ensure and make concrete the property rights of this group. The Commission – operating in *jus postulandi* before the judicial authority - furthermore upheld that Managua had conceded permission to deforest in the region, and had authorized roadworks, without consulting the native population[15].

Subsequent to due instruction the Court decided that Nicaragua, even though challenging the territorial claim by the Awas Tingni community, should recognize traditionally occupied territories and that they should not oppose the declared ownership of these. However, in contrary to this, the country did not regulate any proceeding to materialize this right.

That situation, the sentence follows, created a permanent climate of uncertainty and precariousness for the natives, since they could not know the geographical limits of their lands and, consequently, would have no idea of where they were using and freely enjoying their assets.

The Court, based on Article 1[16] of the American Convention, affirmed that the State is obligated to respect the rights and liberties recognized in the Convention and organize the Public Authorities to guarantee for its people, and under its jurisdiction, the free and full exercise of human rights. Because of this, the Court proceeds, the action or non-action of whichever public authority, independent of its hierarchy, constitutes a fact attributable to the State in the terms of the American Convention and following the rules of international responsibility in law.

14 The Awas Tingni Community, formed by more than 600 individuals, is part of the Mayagna or the Sumo ethnic group, located on the Atlantic coast of Nicaragua.

15 The Commission affirms that Nicaragua violated the following rights contemplated in the Inter-American Convention: the basic respect of rights (Article 1), making the provisions of internal law effective (Article 2), the right to private property (Article 21) and to effective judicial protection (Article 25), since the country did not move to ensure any juridical remedy (judicial or not) adept at protecting the rights of the aforementioned community.

16 *Article 1. Obligation to respect rights:* The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

It concludes, in this way, that the defendant State violated Article 21[17] of the American Convention (right of property) - including the right for the members of the indigenous community concerned to use and enjoy belongings - when it did not set out the borders and demarcate their lands; and furthermore, it granted licenses for the exploitation of assets and resources located in the area.

For this very reason it was determined that Nicaragua, in the maximum period of 15 months, should delimit and demarcate the territory destined to the community's ownership; and that in the period that this delimitation, demarcation and concession of titles was not yet in place, it should act in acquiescence or tolerance, abstaining from behavior which would lead agents of the State or any third party to affect the existence, value, use or enjoyment of assets located in the geographical zone where the aforementioned members of the indigenous community live and carry out their activities.

Likewise, with a foothold in Article 2[18] of the Convention, the Court considered that the State should adopt legal, administrative and other measures which may become necessary to create an effective procedure in the demarcation of indigenous areas.

The judgement counted with the participation of Antônio Cançado Trindade (Brazil) as the President; Máximo Pacheco Gómez (Chile) as Vicepresident; Hernán Salgado Pesantes (Equador), Judge; Oliver Jackman (Barbados), Judge; Alirio Abreu Burelli (Venezuela), Judge; Sergio García Ramírez (Mexico), Judge; Carlos Vicente de Roux Rengifo (Colombia), Judge, and Alejandro Montiel Argüello (Nicaragua), *ad hoc* Judge[19].

17 *Article 21. Right to Property:* 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.

18 *Article 2. Domestic Legal Effects:* Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake 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.

19 The Statute of the Inter-American Commission on Human Rights, *Article 10, on ad hoc judges:* 1. If a judge is

5. *LEADING CASE*: THE NATURE OF INDIGENOUS PROPERTY RIGHTS

Contemporary law rose hand in hand with the liberal regime, in truth as a legalist-bourgeois theory. The very concept of property – albeit old and tied up with Roman law – was developed along the ideas of liberalism, assuming an individual and formal character, at least in its original characteristics.

Otherwise, property is linked to the emergence of the first human groups where assets belonged to the community in a homogenous way and there was no notion of individuality in one's hold over things. That is to say that property, in its original concept, was communal[20]. However, in flow with the development of societies, property continues to assume increasingly individualized, sectorial and complex characteristics[21] (real estate, author's rights and industrial property) until reaching limits in common interest and in social function. The concept of property, as can be seen, demands a more phenomenological, interdisciplinary and not strictly juridical approach.

As far as indigenous property is concerned, the title holder is not an individual but a group, a tribe or a people. The community's link with the earth does not have economic characteristics, but is spiritual. A lot of the conflicts – involving juridical and material densification of indigenous land rights – flow from the difficulty of understanding this old form of communal property and its interdisciplinary nature, in contrast to the modern characteristic of property rights: marked by being liberal, atomistic and a utilitarian-economic solution, where social destiny is confused with the productive capacity for the market.

a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case. 2. If one of the judges called upon to hear a case is a national of one of the States Parties to the case, any other State Party to the case may appoint a person to serve on the Court as an *ad hoc* judge. 3. If among the judges called upon to hear a case, none is a national of the States Parties to the case, each of the latter may appoint an *ad hoc* judge. Should several States have the same interest in the case, they shall be regarded as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

20 COULANGES, Fustel de. **A Cidade Antiga**. Coimbra: Porto, 1987.

21 BERLE, Adolf A. **A Propriedade Privada na Economia Moderna**. Rio de Janeiro: Ipanema, 1957.

For this very reason, the Inter American Court, in its judgment, indicated that:

> Amongst indigenous peoples there is a communitarian tradition for a communal way of collective ownership of land, in the sense that property is not centered on an individual, but in the group and within the community. Indigenous groups, by the very fact of their existence, have the right to live freely in their own territory. The strong bonds of indigenous peoples with the earth should be recognized and understood as a fundamental base of their cultures, spiritual life, integrity and economic survival. For the indigenous communities, the relationship to the earth is not merely a question of possession and production, but a material and spiritual element which is to be fully enjoyed, bearing in mind the preservation of their cultural legacy and its transmission to future generations.

As can be seen, the sentence acquired a naturalist model for justification[22] and makes it very clear that it is the State's responsibility to ensure and make the right of indigenous peoples effective, likewise for the question of dominion over lands. However, in practice, "due to the reasoning developed by state law", there exists "difficulty in framing the idea of indigenous territory within the individualist limits of property law. For this reason, the modern State found itself obliged to establish norms adept at bringing the complex set of indigenous rights closer to the generic conception of law[23]."

What underlies this right is anchored in the fundamental principle of the juridical system, that which is equality[24]. This is to accept cultural option, the choice of a lifeway – be it indigenous or not – as deserving equal respect from public institutions. It is for the State to recognized differences and to defend the individual's right to live according to their culture.

22 In opposition to Rawls' political constructivism, exposed in *A Theory of Justice*, and in later works such as *Political Liberalism and The Law of Peoples*.

23 MONTANARI JUNIOR, Isaias. op. cit., p. 56.

24 DWORKIN. **The Original Position**, *apud* DANIELS. **Reading Rawls**, 1989, p. 52.

This equity as a juridical rule became examined in the sentence under study in its two types of content: one negative, prohibiting discrimination, the other having the positive character which demands of the legislator, and the one who applies the norm, the promotion of a regime of equalities.

For this reason, the Court indicated the existence of an antagonism in Nicaragua's juridical ordering, since as long as its Constitution recognizes the indigenous right to culture, land included, these rights are only formal or abstract (juridical equality), meaning: they are not materialized (real equality).

Under these circumstances, the Tribunal concluded that "the State [of Nicaragua] violated the right to use and enjoy property by the members of the Awas Tingni Mayagna, since neither did it delimit nor demarcate communal property, and conceded permission to third parties to utilize property and resources located in an area which could correspond, totally or partially, to lands which must be delimited, demarcated and bearing titles."

In this way, committed to the imperative of equality *ex vi* of Nicaragua's Fundamental Law, the Court recognized for the indigenous peoples the public right to the demarcation of their lands and the recognition of their rights. This means that, having positive or negative constitutional impositions, the State by its organs and agents is linked to the application of, and commitment to, the valid norm.

The main innovation of this sentence, and the reason for which it constitutes a *leading case*, is that in the American Convention on Human Rights[25] there is no apparatus for indigenous rights to land ownership. The Court of San José defined indigenous rights based on Article 21 of the aforementioned Carta, according to which: "Every person has a right to the use and enjoyment of their assets". Strictly individual and liberal in character, this apparatus served as a base to construct a theory of indigenous rights to land.

25 Signed at the Specialized Inter-American Conference on Human Rights, San José, Costa Rica, on the 22nd of November, 1969.

What the Inter-American Tribunal understood was that "indigenous possession presents its own characteristics, those which differentiate it from the usual concept of possession in civil law[26]." It is not the demarcation which will create traditional ownership or a prevailing *habitat*. It is that ancestral ownership which deserves full juridical protection since it maintains cultural and ethnic identity for the group.

As can be seen, the demarcation procedure has the nature of declaration and is not constitutive by itself, since it only recognizes an active and pre-existing juridical situation, which translates as "a right which is older than any other[27]." That is to say, the State does not create indigenous land; it merely attests to its existence.

By consequence, "demarcation, thus, is the act of simple recognition of an originary right of indigenous peoples. It is not an act which is constitutive of rights, but an administrative act which declares indigenous occupation and its territorial limits, as well as establishing invalidity for acts and titles referring to its occupation, domination or ownership[28]."

Accordingly, it is for the State to be responsible for indigenous peoples with a simplified proposal, indicated by the sentence under study, assuring those people the formal recognition of their lands.

6. PROGRESSIVE HERMENEUTICS

The exclusively private and individualist dimension of property law, utilized by the American Convention – in Article 21 – is not adept at contemplating the collective and cultural aspects involved in the relationship of the indigenous peoples with the soil and could, upon first reading or in

26 ARAÚJO, Ana Valéria *et al*. **Povos Indígenas e a Lei dos "Brancos"**: O direito à diferença. Brasília: Ministério da Educação, Secretaria de Educação Continuada, Alfabetização e Diversidade; LACED/Museu Nacional, 2006.

27 STF, Pet 3.388, Rel. Min. Ayres Britto, j. 19.03.2009

28 VILLARES, Luiz Fernando. **Direitos e povos indígenas**. Curitiba: Juruá, 2009, p. 124.

a literal interpretation, transmit the impression that their right to the lands which they occupy was not contemplated or labelled in an adequate way.

This is a cause for preoccupation because these peoples live in a situation of fragility in the historical context of processes of domination, exploitation and discrimination.

The Awas Tingni case under study was a moment of bending the jurisprudence of the Court with regard to indigenous rights and marked the passage of a more timid and conservative posture to juridical-political activism in the recognition of human rights, under a multicultural perspective.

Effectively, through the progressive or evolutionary interpretation of the Convention, this recognition was adapted to reality and the Inter-American Tribunal upheld jurisprudence to protect those originary peoples. At the same time, it demonstrated its capacity to absorb important aspects of indigenous rights and make them compatible with international and regional norms in the protection of human rights[29].

Besides, the progressiveness or the evolutionary (adaptive) interpretation is inherent in the idea of the protection of human rights. It would be a *contraditio in terminis* to deny safety to groups at risk, when it comes to consider the argument that there is no specific normativity.

Considering this aspect, the judge Sergio García Ramirez, in the reasoning of his vote, recalled the "*pro homine* rule, inherent in the International Law of Human Rights – frequently invoked by the Court's jurisprudence – which leads to a greater and better protection of people with a final proposal for preserving dignity, ensuring fundamental rights and stimulating the development of human beings".

In accordance with this magistrate, the base for establishing evolutionary hermeneutics lies in article 29 of the American Convention, for-

29 LIMA JÚNIOR, Jaime Benvenuto. O Caso Mayagna Awas Tingni contra a Nicarágua perante o Sistema Interamericano de Direitos Humanos: demarcação de terras ancestrais indígenas. In: **Justiciabilidade internacional dos direitos humanos**: os casos Mayagna Awas Tingni contra a Nicarágua e Lustig-Prean e Beckett contra o Reino Unido. Recife: Ed. do autor, 2009.

bidding an interpretation which limits the enjoyment or exercise of rights or liberties, and in article 31.1 of the Vienna Convention on the Law of Treaties, which obliges them to be interpreted in good faith.

As can be seen in this sentence, the Court inverted the interpretative logic and made a reading of private rights through the lenses of human rights, giving them a collective conception (until then inconceivable) in the environment of the Convention, before the individualistic logic upon which they were built.

This hermeneutics results from the judge's duty to "decide upon which principle better represents the reading of the flow of decisions to which he must give continuity[30]" (in the current case: if the flow is individual or collective) and these interpretative dimensions must attend as much to formal characteristics (identity, coherence and integrity), as to substantial aspects of the norm in the light of the reality it is heading towards. For this reason, the interpreter should attribute value and purpose to practice in a way to justify his decision in the community's environment, which is ruled by principles.

In the hypothesis under study, the decision of the Court which reformulated the parameters of protection for the indigenous peoples identifies itself with the interpretation which did not limit itself to legal texts; it was oriented by principles. That is to say, a constructive hermeneutics was developed, which "imposed a purpose upon an object or practice, to the end of turning it into the best possible example of the form or genre to which it is taken to belong[31]".

This question over interpretative criteria in *hard cases* is recurring in Dworkin's work, being valid enough for an understanding of the act of decision. His theory is founded in the internal perspective of the judging organ, in criteria of decision justification and not in the identification of the materials upon which the juridical argument was constructed. Contrary to positivism, which upon separating the components of the decision seeks

30 DWORKIN, R. **Uma questão de princípio**. São Paulo: Martins Fontes, 2000, p. 239.

31 DWORKIN, R. **O império do Direito**. São Paulo, Martins Fontes, 1999, p. 64.

to distinguish law from moral, Dworkin, in turn, situates principles in a hermeneutic horizon. This would be a "prudential reasoning" founded by values which are mixed with political morality. For this reason, according to him: "the dignity of the judicial decision is not in the creation of law by the judge, but in the possibility of deciding by principles and fundamentals[32]".

Worthy of note is that the Inter American Court did what Dworkin calls hermeneutics with a view to Justice, since the judges passed through the totality of law in the interpretative criterion of protection for human rights and handed over a constructive interpretation to the Convention[33].

Besides, Dworkin returns to this theme in *Taking Rights Seriously:* "(…) when jurists reason or debate with regard to rights and juridical obligations, particularly in those difficult cases where our problems with these concepts seem more acute, they resort to patterns which do not function as rules but operate differently, such as principles, policies and other types of patterns.[34]"

This jurisprudential evolution that the Awas Tingni case represented for indigenous law gave ontologically just results because it placed these ancestral populations – which are at risk – at the center of the system of Inter-American protection.

Or, as said by Edson Damas da Silveira, this new interpretation contributes "to the construction of another kind of universalization, now more evolved and progressive and that, without harming individual rights, will permit indigenous peoples the possibility of having their own agendas of human rights respected, however limited to the international normative approach granted and respected by the civilization of the West.[35]"

32 Idem, p. 273

33 DWORKIN, R. Natural Law Revisited. **University of Florida Law Review**, v. 34, n.2, p. 165-188. 1982.

34 DWORKIN, R. **Levando os direitos à sério**. São Paulo: Martins Fontes, 2002, p. 36.

35 SILVEIRA, Edson Damas. Direitos fundamentais indígenas, movimento socioambiental e a formatação do Estado na modernidade. **Veredas do Direito**, Belo Horizonte, v. 6, n. 12, p.25-56, jul. – dez. 2009, p. 48.

To sum up, in this case the Court, accepting the incompleteness of the norm – since the Convention does not concern itself with indigenous ownership – admitted that this is not sufficient to guarantee the juridical safety of the natives and, in order to balance the question in dispute, parted towards the conjugation of the criteria of hermeneutics which, in practice, do away with the opposition between *common law* and *civil law*, at the same time revealing an important advance since both of these dimensions are aspects of Western juridical tradition.

7. INDIGENOUS REALITY

The relationship with the soil permeates all indigenous culture: beliefs, languages, customs, traditions and religions are hitched to the land where they live. For this reason, the "possession of a tribal territory is an essential condition for the survival of the natives.[36]" This is what underlies the precaution of identifying and demarcating their lands as a premise for the exercise of other rights.

It can be observed that, in the case being analyzed, the Court did not work with the dogmatic concept of indigenous land. This is referred to by the term communal property, defining it as the lands which the natives *currently inhabit.*

In the wake of these words, the identifying elements of indigenous land (and for this reason they must almost always be in consistent) are, in fact, the adverb "currently" and the verb "inhabit". Advancing in this concept one can define "currently" as a moment of soil occupation, the temporal marker. Where the verb "inhabit" is concerned, as utilized, here and now, with present time, the link to time gives emphasis, removing the outsider's right to demarcation on lands previously inhabited, as well as on those lands which would, by chance, be occupied in the future.

Accordingly, to inhabit or to occupy "is to develop a relationship with a determined territory in agreement with the uses, customs and traditions of

36 RIBEIRO, Darcy. **A Política Indigenista Brasileira**. Rio de Janeiro. Ministério da Agricultura, 1962, p. 143.

each indigenous people. The indigenous community sees no need to spread dwellings throughout its land, physically occupy, but (…) the earth must be essential for well-being, alongside physical and cultural reproduction. It wants to maintain its existence and amplify the physical and cultural dignity of life through the guarantee of its physical environment, its habitat.[37]"

The choice of these terms, even though in an implicit way, points towards the theory adopted in the sentence on the temporal marker of this territorial occupation. Two theories on this subject stand out.

The theory on ancient historical legacy defines that indigenous ownership is undefined by time. So indigenous earth would be that declared by them or recognized as such. The criticism that one can make of this theoretical current is that working with open concepts generates practical difficulties for anthropological enquiry.

Beyond this, it entails unsure legal grounding since the definition of property becomes linked to the subjectivity of the Amerindian group, echoing chains of command which go back to long ago. Besides, it could lead to a battle which demarcates the whole American continent as indigenous soil, since it is well known that they were the original owners.

In this direction of thought, with authority José Afonso da Silva registers the expression "traditionally occupied", used in Brazilian law for the definition of indigenous lands and which similarly corresponds to the expression used by the Inter-American Court. "It does not signify immemorial occupation. It does not mean immemorially occupied lands, being lands which they have occupied since remote times, which had already become lost from memory and, in this way, only these would be their lands.[38]"

On this subject the Supreme Court of Brazil set out in Pronouncement 650 that the demarcations of indigenous areas "do not extend to lands of extinct villages, although occupied by natives in the remote past.

37 Idem, p. 16.

38 Lands traditionally occupied by natives. SANTILLI, Juliana (Coord.). **Os Direitos Indígenas e a Constituição**. Porto Alegre: Núcleo de Direitos Indígenas e Sergio Fabris, 1993. p. 45-50.

In turn, for the theory of indigenous reality – used in the case under analysis – ownership for the purpose of demarcation is conceded in relation to a well-defined temporal measurement. According to the Inter-American Court it is the current conditions which are the instance in which the required demarcation defines the limits of such lands. That is to say, lands no longer occupied by the natives are no longer included in this process of recognition, even though they were previously inhabited.

As can be seen, the constant and persistent indigenous presence is the reality to be verified, tested and demonstrated by statements and anthropological studies so that identification and demarcation can be implemented. But what type of occupation must be protected? That traditional one, according to the *modus vivendi* and the culture one wishes to be preserved, or is it enough that this be implemented by natives?

The organ delivering the sentence does not enter into the definition of these concepts. It merely refers to the protection of communal property. However, to preserve indigenous culture – and the land is an essential part of this – "does not presuppose the creation of 'living museums', in other words, the maintenance in forced isolation of these communities in a way to impede their access to the assets and comforts of modern life". Expressed in other terms, "the Indian does not cease to be an Indian for using jeans, a cell phone or a computer. What characterizes the Indian (…) is belonging to a culturally differentiated group within the environment which surrounds him, not the utilization of loincloths and paint in the place of electronic appliances or mass-produced clothes.[39]"

Where the recognition of occupied territory is spoken of, the Inter -American Tribunal does not establish how the indigenous people should live; on the contrary, the idea which comes through in the sentence, under examination here, is the self-determination and empowerment of these communities as a distinct segment of the society which surrounds them.

39 LIMA, Edilson Vitorelli Diniz. **Estatuto do Índio**. Editora JusPodium, 2011, p. 20.

This happens not by how the native presents himself to the external world, which has no influence on the way he is determined. What defines him as an indigenous person is the way he occupies and exploits the soil. The collective and common use of the soil and its resources – what the Court calls communal property – is the characterizing element. The differing trait for the definition of the indigenous person refers to the collective body and not to the individual. In summary, it is enough to be an indigenous group to deserve protection and the degree of integration to non-indigenous culture has no bearing on this.

From this one draws the conclusion that the theory utilized to balance the case was the one for current occupation, since the possession should be verified as fact without the aid of the contingency of immemorial occupation, which presupposes an investigation into ownership which extends through time back to the discovery of the Americas.

There are practical implications for this, being that indigenous lands are those occupied by indigenous people at the beginning of the demarcation process, whether they are sufficient or not. Another consequence is that once their amplification is demarcated, if necessary, this will not result in a new demarcation process – in all of its declaratory nature and legal security – but will result in dispossession with the due indemnities for land, transfers and other benefits.

8. DEMARCATION AND RESPONSIBILITY

The sentence under study makes it clear that the constitutional control of Nicaragua for the demarcation of indigenous lands is domineering. With respect to this, the regime has ignored both appropriateness and opportuneness in the administration of public issues.

Thus, when the State fails to fulfill its constitutional role in the demarcation of these lands, there is a rupture in the juridical order by the state entity. For the cure of this illness, wound up in the mania of implementing rules, there must be a juridical remedy: not for the rule which seems invul-

nerable in its own perfection, but for the undue application of the latter, having the power to enforce acts and personal liability (administrative, civil and criminal) upon the agent who did not respect the Law; or for the State's negligence. Further still, when this negligence is due to the political choice of the State itself – as suggested by the hypothesis being studied – through the responsibility of its own centers of power, the Government itself becomes liable.

In the case under analysis, the Court, acting within a system of limits, fixed the licit and illicit fields, giving values to attributes of social interests in the Inter-American Convention on Human Rights and the Constitution of Nicaragua itself. It is true, however, that the decision went beyond the traditional responsibility of the State by the commissive act of penetrating the concept of responsibility for inaction or negligence; to abstain from the act of demarcation of indigenous territory, in spite of the constitutional obligation to do this. There was also a consideration of the implicit damage in the negligence itself. And this wound, extracted from the sentence, is not only factual but above all juridical.

Another relevant question treated by the Court alludes to what could be a reasonable timeframe to conclude the process of demarcation. This definition involves the principles of reasonableness and legal certainty as well as the right to a rapid process. Take the following excerpt from the sentence:

> As has already been observed, Nicaragua did not take the internal legal steps necessary to permit the delimitation, demarcation and granting of land to the indigenous communities, and did not indicate a reasonable term[40] [for the matter to be resolved]

It can be concluded, by the quote transcribed above, that reasonableness was fixed as a right that the indigenous community possesses in order

40 In the original: *Como ya fue señalado, en este caso Nicaragua no ha adoptado las medidas adecuadas de derecho interno que permitan la delimitación, demarcación y la titulación de las tierras de comunidades indígenas y no se ciñó a un plazo razonable (...).*

to see its claim appreciated according to the law in force and within fixed deadlines, or in the absence of these, within a reasonable time lapse.

The concept of "reasonable time", managed by the Court, or the definition of what is a "slow process" is difficult to conceive when a previously defined time scheme does not exist, as in the case under study. It requires a reflection between the pace and the justice of the decision. "The very employment of the term *reasonable* demands more than a simple subjective assessment on the behavior of the Judicial Power or of the Public Administration in the management of the process. As such behavior also attends to a constitutionally supervised interest – that of the correct administration of Justice – and since the term reasonable does not entail a way of acting within specific parameters, it is for the judge who rules indemnity to ponder both interests to the end of determining the relation of valid prevalence in the concrete case[41].

The Inter-American Court did not enter into the combination of these principles to characterize what would be a reasonable deadline, but by what the sentence indicates it presupposes the existence of clear procedural norms with defined phases, alongside a previously determined time scheme to conclude demarcation. It is worth pointing out that reasonableness translates into the existence of a demarcation rite within internal law, and the conclusion of this process in the swiftest possible way, to avoid unnecessary delays which harm the interests of all those involved, especially of the natives who represent the weaker side of the deal.

That is to say, in view of the aggrieved party's inheritance (ethnic guardianship), the sentence under analysis was to understand that swiftness was sacrificed under a carriage of justice which was lacking in effectiveness. "One identifies in this [comprehension of damage as a general clause for the selection of merits for guardianship in

41 SCHREIBER, Anderson. Novos paradigmas da responsabilidade civil: da erosão dos filtros da reparação à diluição dos danos. 2. ed. São Paulo: Atlas, 2009, p. 180-181.

the concrete case] a significant closeness between civil responsibility [from the Roman-Germanic system] and the *torts* of the Anglo-Saxon experience, with an amplification of the sphere for assessment in judicial courts, continuing to be impressive in *civil law* systems, where the legislator has always maintained primacy."[42]

This shift in paradigm, originating in the option made by the Inter-American Tribunal, in favor of judicial discretion, is "especially relevant in the matter of objective responsibility, where the discussions centered themselves exclusively on the causal relationship between harmful activity and damage" and "in practice opens out into a new space of judicial discretion which permits the magistrate to select, by way of examination of the damage, concretely protected interests, substituting traditionally applied reason for an effective reflection upon conflicting interests[43]."

As perceivable in the sentence under analysis, the blame has been increasingly directed, the causal nexus dissipated or bent and the judgment on responsibility depends less on causality and more on damage. And this has been measured in abstract, generating "the evident consequence of a greater degree of acceptability in compensation claims, for the simple reason that easing the requirements for reparation necessarily results in their amplification.[44]"

In other words, the focus of responsibility migrates from repression to harmful conduct in terms of reparation of damages. And even though there is no explicit mention made of the fact in the course followed up to the judgment - resolving reparation without pinpointing the damage suffered by the natives - the Court came nearer to the English system, contemplating the indemnities without the existence of effective harm, as a mere consecration of the illicit act (the delay in concluding the demarcation).

42 Idem, p. 187.

43 Idem, p. 187.

44 Idem, p. 82-83.

In any case, the tribunal has opted for the criteria of Anglo-American *torts* to define responsibility. In the *civil law* system, this delay by the State in stabilizing the conflict in rights gives rise to compensation, since the concept of a flawed or erring public service comes into the picture. Following this, when distanced from subjective theory, the negligence can be considered the cause of the harmful event and not as its condition, which would make the analysis of the subjective element unnecessary (malice or blame in their varied forms).

Thus negligence of responsibility, as to the demarcation of indigenous lands, is objective. The illicitness is derived from the very inaction of the State in its individualized duty to act. Simply the existence of injury generates the obligation of indemnities by the Public Authority. This situation is aggravated in the case under analysis, since a concession for woodcutting was made in the area under dispute, depriving the natives of the use and enjoyment of their lands.

In the end, what is registered is the advanced vision of the Inter-American magistrates in the establishment of new paradigms for the assessment of civil responsibility, being capable of molding a *constructive jurisprudence* as an antidote which is effective against the leniency of States in recognizing and making indigenous rights effective. In summary, the importance of the decision in the Awas Tingni case is not just in its newness; it comes from the boldness, idealism and conscientiousness of a Court with its own heading.

9. EFFECTIVENESS

The effectiveness of the decisions made by the Inter-American Court of Human Rights is an inordinately complex subject. It undergoes the integration between internal and external law, passing through the great opening from the national juridical order to regional and international concerns.

This is where a dialogue to overcome obstacles and antinomies is relevant, since "today the Constitutional State and International Law are

transformed together. Constitutional Law does not begin where International Law ends. The opposite is also valid, since International Law does not end where Constitutional Law begins.[45]"

This interaction is also important to overcome lack of confidence over internal policies resulting from the erosion of the absolute concept of State sovereignty and submission to an external nucleus of power. In the past the institutionalization of human rights, in the guise of an international concern, was an activity reserved for larger States – an instrument for ideology, domination and imposition of their own interests and agendas.

The symbiosis between internal law and international norms has produced doctrines which seek to understand this process of interaction and, in this way, overcome its antinomies. Highlighted here is the inter-constitutionalism of Canotilho[46], treating the matter through the lens of multi-leveled constitutionalism and through the transnational character of fundamental rights (interjusfundamentality), based on the experience of the European Tribunal of Human Rights. In turn, Marcelo Neves studies the problem in the light of transconstitutionalism[47], by which he searches for rationality for the problem of variations derived from the application of fundamental rights amongst diverse peoples. Zagrebelski[48], for his part, speaks of the adaptable constitution to try to explain the decentralization of the state and reflect upon its juridical pluralismo.

Häberle, not intending to place internal law on an inferior level, elaborates his theory based on common communitarian law and the principles which result from it, with a consideration which gravitates around the concept of pluralism founded in the guarantee and protection of liberties which increasingly comes to be the regulatory axis of the system.

45 HÄBERLE, Peter. **Estado constitucional cooperativo**. Rio de Janeiro: Renovar, 2007, p. 11-12.

46 CANOTILHO, Joaquim José Gomes. **Brancosos e Interconstitucionalidade**. Coimbra: Almedina, 2006.

47 NEVES, Marcelo. **Transconstitucionalismo**. São Paulo. Martins Fontes.2009

48 ZAGREBELSKY, Gustavo. **El derechoductil**: ley, derechos y justicia. Madrid: Trotta, 1995.

For this reason, according to him, the opening of the internal constitutional text to diverse aspects of fundamental rights, including those taken out of International and Regional Charters of human rights, is a sign of integration with the international community, what he calls the Cooperative Constitutional State.

All of these theories work with the concept of strengthening community law in the protection of human rights, becoming effective in the circles of Regional or International Courts.

The clear lesson on this process of fragmentation of internal law and the consolidation of transnational communities and, by consequence, international tribunals, comes from Jorge Miranda: "it is not only individuals (or private individuals) who are subjected to juridical norms. It is equally the State and the rest of the institutions that exercise public authority who owe their obedience to the Law (including the Law they create).[49]"

Even though the path to abiding by these decisions shows itself to be sinuous, history has demonstrated that it is possible to travel along this road. Increasingly, the national State has accepted its connectedness to the condemnations and the shortfall in action tends to diminish with the recognition that where human rights are concerned, the final word for the Inter-American System is interpreted at *San José* Court.

However, practice has continued to exhibit a difference between accepting the competence of the international organ and executing its decisions *pro homine*. It is perceived that observance depends on the type of condemnation.

In effect, the analysis of the reprimands decided upon by the Inter-American Court point towards five categories of condemnation and each one has presented a different dimension of access and concretization of Justice to the concrete case. One can verify:

1. condemnation to the payment of indemnities for patrimonial and extra-patrimonial damages;

49 MIRANDA, Jorge. **Teoria do Estado e da Constituição**. Rio de Janeiro: Forense, 2002. p. 1.

2. condemnation to recognize, by public act, responsibility;

3. condemnation to hold responsible, judge and punish those responsible for the violation of human rights;

4. condemnation in obligation to do, not to do, or give something;

5. condemnation to alter internal legislation in order for it to be adequate for the international parameters of human rights.

Each one of these categories demands the effectiveness, speediness and rationality of the process, as much in the phase of knowledge as in the stage of execution or compliance. And this is where the root of the problems lies, since access to Justice is directly proportional to compliance with the reprimand.

The hypothesis under study supplies us with a prime example. Between the case's inclusion within the Inter-American Commission in 1995, through to the Court's decision (2001), and until effective compliance with the regulations in 2009 – with the demarcation of Awas Tingni indigenous lands – fourteen years passed by. In the same period the defendant community – in a strange paradox - found itself vying for the effectiveness of their rights with the State which was violating them.

On this subject the European Court of Human Rights, referring to precedents relevant to the case, has pointed out that the extrapolation of the reasonable timespan for the duration of a process violates democracy itself[50] and the idea of good administration, since it compromises the credibility and effectiveness of Justice[51].

This line of reasoning, added to the reparation of moral and patrimonial damages not only by the infringing country, but also by the very agent who has caused the delay, can help to do away with the state of perplexity and doubtfulness resulting from the leniency in compliance with the judicial order.

50 Delcourt Case, 17/01/1970.

51 Boddaert Cases, 12/10/1992, and Moreira de Azevedo, 23/10/1990.

10. CONCLUSIONS

1. The case of the Awas Tingni indigenous community against Nicaragua is an important *leading case* for the Inter-American Court of Human Rights. It represented a *tipping point*, a maneuver by jurisprudence on indigenous rights, and marked the passage of a more timid and conservative posture to juridical-political activism in the recognition of human rights under a multicultural perspective.

2. This jurisprudential evolution constructed a theory of indigenous law for the Earth and unleashed an ontologically just reprieve from the heart of the Inter-American System of human rights protection: these ancestral populations had lived through a fragile situation, historically submitted to processes of domination, exploitation and discrimination.

3. In the American Convention on Human Rights there is no mechanism for indigenous law with respect to land ownership. The Court, upon accepting the incompleteness of the norm, admitted that this was insufficient to guarantee the juridical safety of the natives and parted towards the combination of hermeneutic criteria which, in practice, did away with the opposition between *common law* and *civil law*, this being an important advance, since both of them have served juridical Western tradition.

4. The Inter-American Court valued hermeneutics with a view to Justice. The judges passed through the totality of law through the interpretation of the protection of human rights and handed in a constructive interpretation to the Convention.

5. Native ownership on lands which they traditionally occupy is quite a story of a subject in contemporary law, which crosses over juridical-constitutional limits, be it for involving anthropological and interdisciplinary questions, be it for limiting economic advantage – normally the predatory kind – in certain regions. The interests involved in the process of recognition and demarcation of indigenous lands are multiple, almost always characterized by the conflict between miners, logging companies, rural production, environmentalists and traditional populations.

6. The indigenous link to the earth does not have an economic character, but is spiritual and cultural. The title holder is not an individual but a group, a tribe or a people. This exists in contrast to the modern characteristic of property law: markedly liberal, atomistic and of utilitarian-economic usefulness, in which social destiny is confused with productive capacity for the market.

7. The relationship with the soil permeates all indigenous culture: beliefs, languages, customs, traditions and religions are linked to the earth where they live. The identification and demarcation of their lands is a premise for the exercise of all other rights.

8. It is not the demarcation which will create a traditional ownership or a remaining *habitat*. This only delimits indigenous land, fixing its limits. It is this ancestral possession which deserves full juridical protection since it maintains the cultural and ethnic identity of the group. In other words, the State does not create indigenous land but only attests to its existence.

9. Under these circumstances, when the State no longer fulfills its constitutional role in demarcating these lands there is a rupture in the juridical order. For the cure of this illness, which comes from the wrong way of implementing norms, there must be a juridical remedy to oversee the objective responsibility of the government or, when this negligence represents the policies of the State itself, through the responsibility of its own centers of power.

10. In other words, the focus of responsibility migrates from repression to harmful conduct in order to make amends. The Court, in the Awas Tingi case, came close to the *torts* of the English system upon contemplating indemnities without there being effective harm, as an organ which merely consecrates the illicit act (the delay in concluding demarcation).

11. The path for the compliance with these decisions by external entities, albeit a winding path, has shown itself to be worthwhile in this case. Increasingly the State has accepted its connectedness to the condemnations, and the delay in applying the law tends to diminish, with the recog-

nition that, in terms of human rights in the Inter-American System, it is the Court of *San José* that has the last word.

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