No. 12.639 Case of the Kaliña and Lokono Peoples

IN THE

INTER-AMERICAN COURT OF HUMAN RIGHTS

Kaliña and Lokono Peoples

Petitioners

v.

The Republic of Suriname

Respondent

Final Written Argument of the Victims' Representatives

05 March 2015

Representatives:

Fergus MacKay

[redacted]

David Padilla

[redacted]

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Case of the Kaliña and Lokono Peoples

I. INTRODUCTION

1. The Inter-American Commission on Human Rights ("the Commission") submitted Case 12.639, *Kaliña and Lokono Peoples v. Suriname* to the Honourable Inter-American Court of Human Rights ("the Court") on 26 January 2014. The Commission's Application alleges that the State of Suriname (hereinafter "the State" or "Suriname") is responsible for violations of Articles 3, 21 and 25 of the American Convention on Human Rights ("the Convention" or "the American Convention"), all in connection with Articles 1 and 2 of that instrument.

2. The victims' representatives ("the representatives") submitted a brief containing their pleadings, motions and evidence on 24 April 2014 ("the representatives' brief").[1] They request that the Court determines Suriname's international responsibility for, *inter alia*, violations of Articles 3, 21, 25 of the Convention, all in conjunction with Articles 1 and 2 of the same. They further request that the Court additionally determine the measures required to repair these violations in accordance with Article 63 of the Convention.

3. On 3-4 February 2015, the Court held a public hearing on the possible merits and reparations. During the hearing, the Commission and the victims' representatives presented two witnesses and two expert witnesses. Pursuant to the Order of the Court of 18 December 2014, the representatives also submitted expert and other testimony by affidavit[2] and the testimony of two expert witnesses was transferred from the *Saramaka People* case file.[3] This testimony complements the documentary proof submitted to the Court by the Commission and the representatives. For its part, Suriname presented one witness, Ms. Claudine Sakimin, by affidavit. The representatives note that this affidavit was not rendered before a notary public and the stamps affixed thereto are merely those of a translator.

4. The following are the final written arguments of the victims' representatives, which summarize the facts proven and the legal foundations for the conclusion that Suriname has violated Articles 3, 21 and 25 of the American Convention, all in conjunction with Articles 1 and 2 of the same. These final written arguments are intended to supplement the evidence and arguments presented in the victims' brief, which are hereby incorporated by reference, and upon which they additionally rely.

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1 *Pleadings, Motions and Evidence of the Victim's Representatives in the* Case of the Kaliña and Lokono Peoples *(Case 12.639) Against the Republic of Suriname*, 24 April 2014 (hereinafter "Brief of the Victims' Representatives").

2 Affidavit of Captain Grace Watamaleo, Affidavit of Professor Stuart Kirsch, and Affidavit of Loreen Jubitana.

3 Affidavit of Professor Mariska Muskiet and Affidavit of Magda Hoever-Venoaks.

II. PROVEN FACTS

5. The documentary and testimonial evidence before the Court proves the facts upon which the allegations in this case are based, and which amount to violations of the American Convention. The meagre and unsupported information presented by Suriname does not refute these human rights violations, but, instead, largely confirms them. Additionally, throughout the proceedings before the Court, Suriname has not for the most part expressly contested or denied the facts presented by the Commission and the representatives. In the rare instances where it has, the State has not done so with the requisite degree of specificity, or provided any specific evidence, that could disprove the facts presented. In certain cases, Suriname has expressly or impliedly admitted to the veracity of the facts before the Court.

A. The Territory of the Kaliña and Lokono peoples

1. Traditional Ownership

6. The evidence before the Court proves that the Kaliña and Lokono peoples ("the Kaliña and Lokono peoples" or "the Kaliña and Lokono" or "the victims") have traditionally owned, occupied and used their territory since time immemorial in accordance with their customary laws and collective land tenure system. Detailed archival research further confirms and proves both the antiquity of the Kaliña and Lokono peoples' physical and cultural connection to their traditional territory and its continuity through the centuries to the present day.[4] The evidence before the Court additionally proves the profound, multifaceted and ongoing relationship that the Kaliña and Lokono peoples have with their territory and the natural resources therein, as well as their long-standing, ongoing and extensive occupation and use thereof in accordance with their traditional tenure system, customs and laws.[5] The testimony of Captains Pané, Gunther and Watamaleo further confirm these facts as does the expert testimony of Professor Stuart Kirsch, and all emphasize the enduring centrality of these relations to lands to the victims' identity, integrity and cultural survival.[6]

7. The evidence further proves the deep spiritual relations that the Kaliña and Lokono peoples maintain with their traditional territory. Captain Watamaleo, for example, explains that "We also have a strong spiritual connection to the Marowijne River, which has a central place in our cultural identity and traditions and through which we understand that we belong to this

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4 Annex 1 to the Commission's Application, C. de Jong, *Archival study of historical and contemporary sources on the Kalin'a and Lokono of the Lower Marowijne River in Suriname*, 18 March 2005.

5 *See e.g.*, Annex 5 to the Commission's Application, E-R. Kambel and C. de Jong (eds.), *Marauny Na'na Emandobo/Lokono Shikwabana ("Marowijne – our territory"). Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono: A Surinamese case study in the context of article 10(c) of the Convention on Biological Diversity.* Com. Landrechten Inheemsen Beneden-Marowijne, February 2006.

6 *See e.g.*, Affidavit of Dr. Stuart Kirsch, at p. 24 (explaining that "The continued viability of these village communities, the *cultural survival* of the Kaliña and Lokono indigenous peoples, and the exercise and enjoyment of their right to freely pursue their own economic, social, and cultural development all depend on recognition of their resource, land, and territorial rights").

place as much as we believe that it belongs to us. Stopping us from accessing the river is very painful to us...."[7] Annex 5 to the Commission's Application contains a list of some of the numerous sacred sites within their territory, and the victims consider that their entire territory is a sacred space.[8]

8. The traditional territory and its current occupation and use by the Kaliña and Lokono are depicted on the maps presented to the Court, which are contained in the annexes to Commission's application and the representatives' brief. One of these maps, delineating the approximate boundaries of the territory, was shown to the Court during the hearing. Captain Ricardo Pané explained that this traditional territory extends from the sea and coastal area down the Marowijne River to the lands of Bigiston village, then north to the lands of Alfonsdorp village and then further north back to the coast and the sea.[9] He further explained that the coast and adjacent seas are an integral part of their traditional territory and they traditionally and currently occupy and extensively use these areas and the natural resources therein.[10] In total, this territory is approximately 133,945 hectares in size.

9. Captain Pané additionally explained that the Kaliña and Lokono peoples have customary laws that regulate the occupation and use of their territory, including the internal boundaries between the lands of the eight communities, and that these laws are adhered to by the members of the Kaliña and Lokono.[11] These laws are based on the Kaliña and Lokono peoples' deep knowledge of and connection to their lands and territory, and govern their sustainable use and management of the same. This was confirmed by Captain Watamaleo, who explains that

> The boundaries with Alfonsdorp and Pierrekondre [in relation to her village of Wan Shi Sha] are traditional boundaries that have been passed down by our ancestors and we know that if someone from our village would like to do something in the lands of those villages that they must get permission from their traditional chiefs. According to our customary laws, this is a very important rule that must be observed to avoid conflicts between the communities and because we have collective management systems for our common territory that require mutual respect and cooperation. We also observe these rules even in areas of our territory that are not considered to be owned by any one community, but are collective areas. If someone from my village has a good hunting location or camp, for instance, in those common areas, permission must still be sought if someone from another village wants to use them.[12]

10. This was further confirmed by Professor Kirsch, who explains that "Central to their identity as indigenous peoples is their relationship to their land and resources, their knowledge

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7 Affidavit of Captain Grace Watamaleo, 27 January 2015, at para. 4

8 Annex 5 to the Commission's Application, *Marowijne – our territory*, p. 100-02.

9 Testimony of Ricardo Pané, Audio Transcript, at 20:07.

10 Testimony of Ricardo Pané, Audio Transcript, at 21.10.

11 Testimony of Ricardo Pané, Audio Transcript, at 22:26.

12 Affidavit of Captain Grace Watamaleo, 27 January 2015, at para. 4.

of local flora and fauna, their taboos and limits on consumption that help them protect the environment, and their subsistence practices."[13] The nature and sustainability of the traditional management practices of the Kaliña and Lokono and their inter-connections with their collective tenure system and institutions of governance are extensively detailed in the long term study of their customary use of biological resources that is contained in Annex 5 to the Commission's Application.[14] This study, *inter alia*, explains that "Preserving the right balance between man and nature is of prime importance. If this balance is upset, by incorrect or excessive use, there may be adverse consequences such as disease, accidents or misfortune. The shaman ... plays an important role in maintaining this balance."[15] It describes the customary laws and practices of the Kaliña and Lokono that strive to ensure that this balance between man and nature is maintained, and which "enable the indigenous communities to make use of the environment that surrounds them in a sustainable manner and for generation after generation."[16]

2. Suriname's unreasonable and prolonged failure to recognize and secure the territorial rights of the Kaliña and Lokono peoples

11. The undisputed evidence before the Court confirms that the Kaliña and Lokono peoples have continuously sought protection for their rights to their traditionally owned lands, territory and resources and that Suriname has been unresponsive to or, at best, dismissive of their efforts and complaints.[17] The affidavit of Loreen Jubitana also details how for decades the State has failed to take any meaningful action to recognize and secure the victims' rights as well as the rights of all other indigenous and tribal peoples in Suriname, and that this situation persists to the present day.[18]

12. Suriname itself has conceded before the Court that it has failed to recognize and secure the rights of the Kaliña and Lokono peoples. For instance, with respect to "the land rights issue," it states that "'up to this date [26 July 2013] this issue has not be addressed adequately, and up to now no solution has been found.'"[19] The evidence presented to the Court in January and February 2015 further confirms this admission and proves that this situation has not changed since the time the State made this statement in July 2013.[20] The UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, also testified that her predecessor, Professor James Anaya, confirmed that Suriname has failed to enact any laws recognizing indigenous peoples' rights following an on-site visit to that country in 2011.[21]

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13 Affidavit of Dr. Stuart Kirsch, 27 January 2015, at p. 17.

14 *See e.g.*, Annex 5 to the Commission's Application, *Marowijne – our territory*, Chapter 9 (extensively discussing traditional laws and management practices).

15 Annex 5 to the Commission's Application, *Marowijne – our territory*, at p. 93.

16 Annex 5 to the Commission's Application, *Marowijne – our territory*, at p. 93.

17 Testimony of Ricardo Pané, Audio Transcript, at 24:50; Testimony of Captain Jona Gunther, Audio Transcript; and Affidavit of Captain Grace Watamaleo, at para. 16-20, 31.

18 Affidavit of Loreen Jubitana, at para. 27.

19 Response of the State, Annex 1A, at p. 2 (quoting an unspecified source).

20 *See inter alia*, Affidavit of Loreen Jubitana; Testimony of Ricardo Pane and Jona Gunther.

21 Testimony of Expert Witness Victoria Tauli Corpuz, Audio Transcript, Part 2, at 1:39:55.

13. Suriname nonetheless claims that it is now engaged in a process to recognize the rights of indigenous peoples and for this reason the Court should "allow it the opportunity to bring the course already agreed upon with the Indigenous Peoples and Maroons to a successful conclusion."[22] This course, however, merely consists of establishing three commissions: on an awareness campaign, on developing a consultation/consent protocol, and on recognition of the traditional authorities of indigenous and tribal peoples.[23] Moreover, the testimony of Loreen Jubitana confirms that while the national indigenous peoples' organization of Suriname agreed to participate in these commissions, it nonetheless considers, and has formally informed the State, that these "are not the core issues to be addressed."[24] These activities also bear no relationship to the orders of the Court in the *Saramaka People* case. Those orders remain unimplemented more than eight years since that judgment was notified and more than four years since the deadlines imposed by the Court expired. The "prolonged condition of international illegality" identified by the UN Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya,[25] and noted by the current Special Rapporteur, Victoria Tauli-Corpuz, in her testimony before the Court, therefore persists unabated.[26] To make matters worse, Suriname even explicitly rejected recommendations that it urgently recognize the rights of indigenous and tribal peoples made by other states during the UN Human Rights Council's Universal Periodic Review process in October 2011.[27]

14. Ms. Jubitana further explains that none of the three commissions have been established to date[28] and that an individual consultant has "produced a draft law [on traditional authorities] to which we gave no input at all in spite of repeated requests to do so, and which is also proposing totally new – and unacceptable – positions of our traditional authorities in spite of the agreement that the draft would capture the existing situation...."[29] This draft law, which the State claims in its response before the Court would address the right to juridical personality,[30] was submitted by the representatives to the Court during the public hearing. It in no way addresses collective legal personality, or even legal personality, and is regressive insofar as it would incorporate indigenous and tribal peoples' traditional authorities into the local government bureaucracy and make them subservient to a government minister.[31] The

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22 Response of the State, at p. 23.

23 Response of the State, at p. 4-7.

24 Affidavit of Loreen Jubitana, at para. 27 ("Although we think and also mentioned that these issues are not the core issues to be addressed, we agreed to work on these proposed issues, for each of which a separate working group or commission would be formed").

25 *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya. Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname.* UN Doc. A/HRC/18/35/Add.7, 18 August 2011, at para. 11.

26 Testimony of Expert Witness Victoria Tauli Corpuz, Audio Transcript, Part 2, at 1:40:17.

27 *See* UN Doc. A/HRC/18/12/Add.1 (setting out Suriname's position that it cannot support the recommendations on "Indigenous Rights and [L]and Rights Issues (recommendations 73.52-73.58),").

28 Affidavit of Loreen Jubitana, para. 27 and 29.

29 Affidavit of Loreen Jubitana, at para. 27.

30 Response of the State, p. 9.

31 Affidavit of Loreen Jubitana, at para. 27-8.

representatives stress that this is the only outcome to date of the State's oft professed commitment to address indigenous and tribal peoples' rights.

15. One of the (unestablished) commissions listed by the State intends to focus on an awareness raising campaign, the aim of which is "to inform [different sectors of society] as much as possible ... about the issue of land rights ... with the purpose of gaining important insights into solving this issue."[32] It also explains in this respect that "it is clear that on a number of points ... (in particular demarcation, legislation, etc.), [that] there is so far nationally no agreement (unfamiliarity with the issue of Indigenous and Maroon rights is probably the reason for this). This given necessitates the State to initiate concrete activities with the purpose of informing society on the issue of land rights for Maroons and Indigenous Peoples...."[33] Leaving aside the obvious questions raised by these comments, the representatives observe that they unmistakably illustrate just how abject Suriname's purported efforts have been to date. The fact that these initiatives are so meagre and misdirected and remain at such an elementary, confused and indeterminate level in 2015 speaks for itself.

16. The State's self-proclaimed "solution" does not address recognition of property rights or collective legal personality, or the absence of legislation that could guarantee indigenous peoples' rights; is mostly dormant and unimplemented; and the little that has been done has been deemed objectionable and "unacceptable," both in its content and the non-participatory manner in which it has been conducted to date, by the national indigenous peoples' organization. Ms. Jubitana's testimony further demonstrates that this current 'process' is merely the latest in a long line of half-hearted and, at any rate, inconclusive initiatives,[34] dating back at least to 1992 when the State made a formal commitment to address indigenous peoples' property rights.[35] This fact was also confirmed by the Inter-American Development Bank in a 2005 report, which explained that "Since the 1980s, subsequent governments have promised to address the land rights question but have not brought any change in the situation."[36] Ms. Jubitana concludes that "it has become clear again that there is no concrete progress in any process related to legally recognizing our rights in Suriname and that we are just going in endless circles with the questionable 'efforts' by the government."[37]

17. The State's supposed good will and commitment to recognize indigenous and tribal peoples' rights should be assessed in light of the preceding. The only conclusion that can be drawn is that the State is neither committed to, nor even particularly concerned about, recognizing or

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32 Response of the State, Annex 1B, at p. 4.

33 Affidavit of Loreen Jubitana, at para. 27.

34 Affidavit of Loreen Jubitana, para. 18 – 30.

35 Affidavit of Loreen Jubitana, para. 20, and, at para. 32 (explaining that "It also seems that whenever we are able to sufficiently pressure the State to address our rights, it establishes a commission as a way of diffusing that pressure and whatever work, if any, that the commission undertakes eventually dissipates and we are left where we started or, as happened with the "roadmap", have to start all over again. This has been going on for decades...").

36 Inter-American Development Bank, Country Environment Assessment (CEA) Suriname, February 2005, at 4, http://enet.iadb.org/idbdocswebservices/idbdocsInternet/IADBPublicDoc.aspx?docnum=482598

37 Affidavit of Loreen Jubitana, at para. 30.

respecting these rights.[38] This conclusion is further bolstered by the State's routine recitation of every conceivable excuse to justify why it either cannot recognize these rights or why it will only do so at the time and in the manner of its' choosing, irrespective of the prior orders of the Court and the decisions of other international human rights bodies and mechanisms.[39] These excuses, some of which were repeated before the Court during the public hearing in the instant case, include those previously rejected by the Court in its 2007 *Saramaka People* judgment.[40] As Ms. Jubitana explains, none of the excuses proffered by the State could justify its failure to "set an agreed, joint, structured process in motion; even that is not done while threats to our rights continue and increase, so we interpret this as fundamental unwillingness to make structural changes."[41]

18. In sum, the preceding proven facts are all uncontested by the State, which has also not presented any evidence which could call into question their veracity. For instance, the State has not contested, explicitly or otherwise, the extent of the territory of the Kaliña and Lokono peoples nor their traditional ownership thereof. The abject and derisory nature of Suriname's supposed efforts to recognize indigenous peoples' rights speak for themselves as well as illuminate the paucity of its professed commitment in this regard. Additionally, the State has admitted and confirmed, with one possible, but ultimately erroneous, exception (see Section II.D below), that the active, long-standing and debilitating violations of the victims' rights described in the following sections all took place within the traditional lands and territory of the Kaliña and Lokono.

B. Nature Reserves

19. Three nature reserves have been established in the territory of the Kaliña and Lokono peoples, all pursuant to the 1954 *Nature Protection Act*: the Galibi Nature Reserve ("GNR") in 1969; the Wane Kreek Nature Reserve ("WNKR") in 1986; and the Wia Wia Nature Reserve ("WWNR") in 1966.[42] The WKNR is 45,000 hectares and is entirely within the victims' territory; the GNR is 4000 hectares and is entirely within the victims' territory; and the WWNR is 36,000 hectares, approximately 10,800 hectares of which are in the victims' territory. These reserves

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38 Affidavit of Loreen Jubitana, at para. 32 (explaining that we "do not have any indication that there is any concrete progress; to the contrary we receive strong indications that there is no willingness to concretely address this matter"), and, at para. 36 (stating that the "State's position is well-known to us and clearly shows that the government has no real intention of getting to an acceptable solution that meets international standards. ... Attempts to deny or sidetrack such standards in fact express Suriname's unwillingness to adhere to the international legal order, and moreover, again underline Suriname's unwillingness to accept, legally recognize and fulfil our human rights, thus enforcing the prevailing policy of discrimination, exclusion and marginalization of us as indigenous peoples").

39 *See e.g.*, Brief of the Victims' Representatives, para. 30; and Affidavit of Loreen Jubitana, para. 36-7.

40 Saramaka People, inter alia, para. 102-3.

41 Affidavit of Loreen Jubitana, para. 37, and, at para. 32 (explaining that "We also still hear today the same excuses for why action cannot be undertaken that we heard 20 or more years ago, and the State even tells us that it would discriminate against other Surinamese if it were to recognize our rights").

42 *See* Annex 17 to the Commission's Application, *Natural Heritage in Suriname*, F. Baal, Head Nature Conservation Division of the Forest Service of Suriname, Paramaribo, 19 February 2000 (Updated 4 March 2005)).

together comprise 59,800 hectares of the victims' territory, which is approximately 133,945 hectares in size. The area encompassed by these reserves therefore corresponds to approximately 45 percent of the territory of the Kaliña and Lokono peoples. They cumulatively represent a massive expropriation and ongoing and indefensible dispossession of the victims' lands and a substantial and unjustifiable constraint on their ability to maintain and enjoy their various relations to their lands, all amounting to a denial of their right to survive as indigenous peoples.

20. It is uncontested that these nature reserves are within the traditional territory of the Kaliña and Lokono peoples and that the State has denied and negated their property rights in the corresponding and massive area. Professor Stuart Kirsch confirms that all of the reserves are within the victims' territory, noting, for instance, with respect to the GNR, that the victims "remain deeply concerned that an integral part of their territory has been unilaterally taken from them by the State. ... Since the 1970s, they have consistently demanded complete restitution of all of their lands that were incorporated into the reserve."[43] In relation to the WKNR, Captain Grace Watamaleo testified that "Our lands [Wan Shi Sha] and the lands of the other indigenous communities are within the reserve;"[44] and it "is our land and has always been our land and an important part of the collective territory of all the communities of the Lower Marowijne."[45] Captain Pané testified that the victims' do not seek permission to engage in their traditional activities in the GNR and WWNR, even though they are required to do so by State authorities, precisely because they consider that the lands therein have always been theirs and continue to belong to them today.[46]

21. As discussed below, the uncontested evidence before the Court further proves that the Kaliña and Lokono consider these areas to be of essential importance to their survival and well-being and they have a variety of ongoing and fundamental relationships with the lands therein. Captain Watamaleo explains in this regard that "We have lost so much because the Government refuses to recognize our rights that we would have a hard time living well if this area [the WKNR] is not returned to us."[47] She further explains that the "impacts are not only economic. We have many sacred sites throughout our territory and we have strong cultural and spiritual relationships with our territory as well."[48]

22. The State admits that its 1954 *Nature Protection Act* only authorizes the State to establish nature reserves where the lands in question comprise "part of the state domain...," meaning State lands.[49] The State therefore cannot establish a reserve over lands that are privately held by virtue of a grant of property rights, conferred by and registered with the State,

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43 Affidavit of Dr. Stuart Kirsch, at p. 7.
44 Affidavit of Captain Grace Watamaleo, at para. 21.
45 Affidavit of Captain Grace Watamaleo, at para. 26.
46 Testimony of Ricardo Pané, Audio Transcript, at 59:40.
47 Affidavit of Captain Grace Watamaleo, at para. 27.
48 Affidavit of Captain Grace Watamaleo, at para. 37.
49 Response of the State, at p. 16 (referring to Article 1 of the 1954 Nature Protection Act, as contained in Annex 6 to the Response of the State).

pursuant to its domestic law.[50] The State also admits that that "the reserves [in the instant case] were established ... in areas which were and still are domain land [State owned land]...," thus confirming that it has failed to this day to even consider, let alone recognize, the victims' traditional ownership and associated rights.[51] It is also uncontested that the State's acts and omissions are the only reason that the Kaliña and Lokono do not have registered property rights and title, which, in turn, would exempt their lands from being taken and converted into nature reserves.[52]

23. As discussed further below, it is proven and the State has admitted that it does uphold the private property rights of non-indigenous persons and entities in relation to these reserves, thereby denying the Kaliña and Lokono peoples equal protection of the law in this regard. This discriminatory privileging of non-indigenous rights and interests also extends to the State's failure to adequately regulate commercial fishing in the marine area of the victims' territory adjacent to the GNR and WWNR, despite the fact that it is well documented that these fishing interests often drown sea turtles in their nets (see paragraph 40 below).

24. In its response before the Court, the State further admits that the "creation of nature reserves by the State of Suriname does run contrary to the rights of Indigenous peoples or the full exercise of their traditional way of living, since the nature reserves serve a justified general interest, ... the conservation and protection of the environment."[53] It fails to explain however why it is necessary or proportionate to take the victims' lands and otherwise curtail their rights to satisfy the asserted public interest nor why the rights of non-indigenous persons and entities are not subject to the same treatment. Nor does it explain how this statement can be reconciled with its repeated claims that these reserves have no impact on the victim's rights.[54] It is additionally uncontested that no due process or compensation has been provided to the victims and no consideration has been given to the fundamental importance of these lands to the victims' integrity, survival and well-being, and that the State has not sought to rectify this situation to date. To the contrary, as explained further below, the State has deployed additional coercive measures in relation to the GNR and WWNR that reinforce and exacerbate its ongoing denial of the Kaliña and Lokono peoples' rights and the consequences thereof.

25. These structural defects in Suriname law and practice not only affect the victims in this case, but apply to the vast majority of the protected areas in Suriname because these all affect

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50 That this also applies to logging and mining concessions, which are regarded as registered property rights, is confirmed in the affidavits of Mariska Muskiet, para. 22, and Magda Hoever-Venoaks, p. 1.

51 Annex 6 to the Commission's Application, Further comments offered by the State on the Merits in the Case of the Kalina and Lokono Peoples v. Suriname (Case 12.639), 12 September 2008, at p. 10.

52 *See e.g.*, Response of the State, Annex 1A, at p. 2 (quoting an unspecified source and stating, with respect to "the land rights issue," that "'up to this date [26 July 2013] this issue has not be addressed adequately, and up to now no solution has been found.'").

53 Response of the State, at p. 15.

54 *See e.g.*, Response of the State, at p. 22 (contending that the Kaliña and Lokono "are not restricted in anyway in the enjoyment of their rights as citizens with the territory of Suriname"); and Affidavit of Claudine Sakimin, p. 5.

indigenous and tribal peoples' lands.[55] Loreen Jubitana describes in her affidavit how indigenous peoples have sought to engage the State about these issues over the past decade[56] and observes that, while some State officials have "acknowledged and agreed with the need for legislative reform and policy changes," there have been no changes made or even proposed.[57] Concurring with, *inter alia*, the expert testimony of Victoria Tauli-Corpuz and Jeremie Gilbert,[58] she further explains that

> It is no coincidence that most of the lands with protected area status or proposed for such status are indigenous or tribal lands; these lands remain intact and full of rich biodiversity precisely because we have protected them and even enhanced biodiversity through our active management of those lands. The State would now take them and protect them from us, when our experience shows that the State is unable to properly manage these areas and even allows large-scale mining and other activities like logging to take place in them. To us, this is like being punished twice for protecting and caring for our land and it causes great harm to us and future generations of indigenous peoples who will come after us.[59]

26. The representatives further emphasize that expert witness, Victoria Tauli-Corpuz, the UN Special Rapporteur on the Rights of Indigenous Peoples, unambiguously concluded in her testimony before the Court that the protected areas that have been established in the victims' territory "illustrate a considerable deviation" from contemporary international standards.[60] In this regard, she further concludes that these protected areas are "coercive and exclusionary and the means employed are unnecessary and disproportionate to the asserted public interest, which could be achieved in a different and less drastic way. Also, because they are by law owned by the State, I would classify these reserves as an ongoing and outwardly illegitimate dispossession of indigenous lands that requires redress."[61]

1. The Galibi and Wia Wia Nature Reserves

27. The WWNR was established in 1966 and the GNR in 1969, both to protect nesting sea turtles. Captain Pané explained that the GNR encloses an area of fundamental importance to the victims' communities of Christiaankondre and Langamankondre, that these lands were taken away from them to establish and maintain the GNR, and that they continue to be deprived of these lands today.[62] The GNR and WWNR and the adjacent coastal seas are their

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55 *See* Affidavit of Loreen Jubitana, para. 40-1 (explaining that "protected areas continue to be governed by laws and policies that are outdated, that fail to recognize and respect our rights, and that assume that the State is better able to protect our lands than we are").

56 Affidavit of Loreen Jubitana, at para. 14-7.

57 Affidavit of Loreen Jubitana, at para. 15.

58 Testimony of Expert Witness Victoria Tauli Corpuz, Audio Transcript; Testimony of Professor Jeremie Gilbert, Audio Transcript, Part 2 (both explaining the effectiveness of indigenous conservation practices).

59 Affidavit of Loreen Jubitana, at para. 41.

60 Testimony of Expert Witness Victoria Tauli Corpuz, Audio Transcript, Part 2, at 1:35:14.

61 Testimony of Expert Witness Victoria Tauli Corpuz, Audio Transcript, Part 2, at 1:35:34.

62 Testimony of Ricardo Pané, Audio Transcript, at 27:55.

primary fishing area, where they traditionally utilize numerous resources of the coast and foreshore, and one of the few areas in which these communities are able to do traditional farming.[63]

28. As explained below, these activities are substantially restricted by the State, despite the fact that they do not interfere with nesting sea turtles, whose nests are confined to the beach while many of their traditional livelihood activities take place elsewhere (e.g., traditional farming, which can only take place in forested areas). This fact is partially confirmed in the affidavit of Ms. Claudine Sakimin, who quotes the 1992-96 GNR Management Plan as follows: if "the agricultural plots in the reserve are not expanded, then the traditional use of natural resources ... does not need to be harmful."[64] Additionally, the turtles are only present intermittently between March and late July each year during the egg-laying season, yet the restrictions on the victims' rights are maintained and enforced year round.[65]

29. Captain Pané testified that he grew up in the lands that are now within the GNR and that he and others were forcibly and roughly removed from the area by State officials when the it was established.[66] This is further confirmed by Professor Kirsch, who states in his affidavit that "Some of [the affected communities] agricultural plots and houses were located inside the nature reserve, forcing them to relocate."[67] Both Captain Pané[68] and Professor Kirsch confirm that the Kaliña and Lokono vigorously complained about this situation at the time; that it was one of the reasons that the communities marched to Paramaribo in 1976 to protest; and that they have continually complained to this day.[69] Both also confirm that the State has simply ignored these complaints and refused to address the victims' rights.[70]

30. It is uncontested that the Kaliña and Lokono peoples were not consulted about the establishment of the GNR and WWNR or otherwise accorded any opportunity to participate in the relevant decision making. This is acknowledged in the GNR Management Plan 1992-96, which states that, "the villagers were not involved in the decision-making process. They were confronted with the reserve as a *fait accompli*...."[71] To make matters worse, Professor Kirsch records the victims' view that their traditional authorities were misled about the nature of the

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63 Testimony of Ricardo Pané, Audio Transcript, at 21.10. These villages are surrounded by the sea to the north, swamp to the west and south, and the Marowijne River to the east. A very small part of the lands, mainly those now enclosed by the GNR, pertaining to these communities is amenable to traditional or other agriculture.

64 Affidavit of Claudine Sakimin, at p. 5.

65 *See Suriname: Sustainable Management of Fisheries*, Inter-American Development Bank, July 10, 2013, at p. 18 (confirming that the nesting season is from 1 March to 31 July), http://www.iadb.org/projectDocument.cfm?id=38149488.

66 Testimony of Ricardo Pané, Audio Transcript, 57:10 *et seq*.

67 Affidavit of Dr. Stuart Kirsch, at p. 6.

68 Testimony of Ricardo Pané, Audio Transcript, at 44:40.

69 Affidavit of Dr. Stuart Kirsch, at p. 6-8.

70 Testimony of Ricardo Pané, Audio Transcript, at 24:50; Affidavit of Dr. Stuart Kirsch, *id.*

71 H. A. Reichart, *Galibi Natuurreservaat Beheersplan* [Galibi Nature Reserve Management Plan] 1992-1996, Paramaribo, 1992, at 30.

State's intentions and "regard the process through which the [GNR] was established as fraudulent...."[72]

31. F. Baal and B. Drakenstein, the former heads of Suriname's Nature Conservation Division from 1978 to 2010, state in their affidavit submitted to the Commission that the "Nature Protection Act and the Resolutions by which the WWNR and GNR were established do not provide for recognition of the traditional use rights of land and resources of indigenous peoples."[73] In her affidavit, the current head of that Division, Ms. Claudine Sakimin, further confirms that "no specific provisions were included with respect to traditional rights of the indigenous communities" with regard to the GNR and WWNR.[74] That there are no legal guarantees for the victims' rights in these reserves was further confirmed by Captain Pané.[75] This directly rebuts and disproves the erroneous and unsupported assertions made by the State in the hearing before the Court that indigenous peoples' rights within the GNR and WWNR are legally protected.

32. While acknowledging that there are no legal guarantees in relation to these two reserves, the State's declarants nonetheless explain that "in practice traditional use rights of land and resources of the indigenous peoples have been respected;" that the State has always been willing to discuss any complaints raised by the affected communities; and that "a balance has been struck" between the public interest and the "specific interests of the indigenous peoples."[76] In common with Baal and Drakenstein, Ms. Sakimin then maintains that since 1986 "traditional rights ... were included in the national legislation (1986 Nature Protection Resolution);" and that "this became a rule within the other Nature Reserves established."[77] As discussed further below, the representatives observe that the term "traditional rights" is both undefined and has no juridical significance in extant Suriname law.[78]

33. None of these above quoted contentions, which are entirely unsubstantiated by the State, bear scrutiny. First, the evidence before the Court proves that traditional use and other rights have not been respected in practice and that the State has legally and actively prohibited and interfered with the exercise of these rights in the reserves.[79] This was confirmed by Captain Pané who cited as examples: restrictions to traditional fishing in the area, including the erection

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72 Affidavit of Dr. Stuart Kirsch, at p. 6-7.

73 Annex 18 to Commission's Application: Affidavit of F. Baal and B. Drakenstein, at p. 1. *See also* Annexes 8 and 9 to the State's Response (containing copies of the resolutions establishing the WWNR and GNR).

74 Affidavit of Claudine Sakimin, at p. 4.

75 Testimony of Ricardo Pané, Audio Transcript, 29:00.

76 Annex 18 to Commission's Application: Affidavit of F. Baal and B. Drakenstein, at p. 1. *See also* Affidavit of Claudine Sakimin.

77 Affidavit of Claudine Sakimin, at p. 4.

78 *See e.g.*, Affidavit of Mariska Muskiet.

79 The legal prohibitions are set forth in Articles 5 and 8 of the 1954 Nature Protection Act (see Annex 6 to the Response of the State). These articles provide, respectively, that "Art. 5: Within a nature reserve it is prohibited: a) to purposely or negligently damage the condition of the soil, the natural beauty, the fauna, the flora, or to perform acts which harm the value of the reserve itself;" and "Art. 8: Violation of this law will be punishable with imprisonment not exceeding 3 months or with a fine of one thousand guilders maximum."

and maintenance of small shelters used by the communities when fishing and to process fish; restrictions on farming, despite the fact that this is one of the few areas that can support traditional farming and this farming takes place in the forest far away from any turtle nests; and restrictions on hunting, despite the fact that the communities neither hunt nor eat turtles[80] and the hunting of other animals in no way affects the nesting turtles.[81] He further explained that the two most affected communities, Christiaankondre and Langamankondre (collectively known as Galibi), have suffered greatly from these restrictions; that they "have done a lot of damage to my community;" and that it has been a struggle for them to survive.[82] This is further confirmed by Professor Kirsch, who states that the "Kaliña living in Galibi faced economic and other problems in coping with restrictions on their use of natural resources imposed by the nature reserve."[83]

34. The situation is so bad that Captain Pané explained that in his view the sea turtles have more rights and protection under the laws of Suriname than the Kaliña and Lokono, a view that is amply supported by the evidence before the Court.[84] He explains that the victims feel discriminated against because of this unilateral taking of their lands and the ongoing and forcible exclusion of their ability to maintain the full or even partial spectrum of their relations to that part of their territory.[85] He further testified that this situation has created suffering and insecurity for his people,[86] physical and emotional harm that amounts to serious and ongoing trauma,[87] and a climate of fear that precludes the victims from peacefully pursuing their traditional subsistence practices in the nature reserves.[88] In response to a question posed by Judge Vio, Captain Pané additionally explained that this unjustifiable differential treatment, including in relation to the turtles, and the long-standing denial of the victims' rights causes him to feel that he is not a full citizen of Suriname.[89]

35. The active enforcement of restrictions by the State in the GNR and WWNR has waxed and waned over time, but became especially pronounced and even more intrusive after 2003. That the State increased regulation in the GNR around this time is confirmed in the affidavits of Baal/Drakenstein and Claudine Sakimin. These affidavits contain largely the same information and state on this particular point that, "With a view to the increased interest by tourists in the Galibi Nature Reserve and the new 2002 Game Order, the government intensified supervision

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80 Annex 5 to the Commission's Application, *Marowijne – our territory*, at p. 96 (explaining that "Sea turtles fall into the category of animals that may not be killed;") and, at p. 97 (further explaining that "[s]ea turtles are not killed because it is believed that the grandfather (guardian spirit) of the sea turtle will become angry and will make the guilt person, or his family members, ill").

81 Testimony of Ricardo Pané, Audio Transcript, at 30:24, 55:40. *See also* Affidavit of Dr. Stuart Kirsch, at p. 7 (explaining that the Kaliña "have a traditional taboo against eating turtles").

82 Testimony of Ricardo Pané, Audio Transcript, at 31:40 *et seq*.

83 Affidavit of Dr. Stuart Kirsch, at p. 7.

84 Testimony of Ricardo Pané, Audio Transcript, at 27:45, 45:50.

85 Testimony of Ricardo Pané, Audio Transcript, at 28:00.

86 Testimony of Ricardo Pané, Audio Transcript, at 33:11.

87 Testimony of Ricardo Pané, Audio Transcript, at 34:23.

88 Testimony of Ricardo Pané, Audio Transcript, at 57:40.

89 Testimony of Ricardo Pané, Audio Transcript, at 1:01:22.

of the activities in the nature reserve in 2003."[90] This provides further evidence of the unreasonable privileging of non-indigenous interests, this time those of tourists, over the rights of the victims. In 2006, the State also established an armed guard post between the villages and the GNR. The victims have recorded that these guards regularly harassed community members, sometimes confiscating their property, such as fishing equipment or fish, and even shot at them on one occasion.[91] Further confirming the testimony of Captain Pané, they have also recorded that these guards otherwise hinder traditional fishing activities and have created a climate of fear that further restricts the victims' freedom of movement and access to their traditionally owned and vitally important subsistence resources.[92]

36. Second, the State's claim that it has always been willing to discuss any complaints raised by the affected communities is directly refuted by the testimony of Captain Pané and Stuart Kirsch in relation to the GNR and WWNR, and by Captains Gunther and Watamaleo and Professor Kirsch in relation to the WKNR (the latter is discussed in the following sub-section). Professor Kirsch explains that there "were many disputes between the communities and the Galibi Nature Reserve authorities during its establishment,"[93] and Captain Pané testified that disputes continue to the present day.[94] The latter further explained that the affected communities had to struggle and "plead" in order to get the State to even sit down and talk with them, and even then the State has consistently refused to seriously address the complaints raised continuously by the victims.[95]

37. Ms. Sakimin confirms that it was not until 1998 that a 'consultation commission' was established (the correct name is a 'dialogue commission' (*overleg commissie* in Dutch)). Therefore, this dialogue commission was not instituted until almost 30 years after the reserve was established. This body did not meet for the first time until 2000 and in 2008, the affected communities withdrew altogether explaining that their views were systematically ignored.[96] The majority of this commission was composed of State representatives who far outnumbered the two representatives of the communities and it was officially declared to be advisory in nature only.[97] While Ms. Sakimin describes this commission as a "management structure," this

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90 Affidavit of Claudine Sakimin, at p. 3.

91 Annex 18 to the Commission's Application, Affidavit of F. Baal and B. Drakenstein, p. 1 (confirming that these events took place).

92 Testimony of Ricardo Pané, Audio Transcript, at 57:40 *et seq*. *See also* Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono, at p. 66 (explaining that "the arrival of forest wardens from the Department of Natural Resource Management who monitor sea turtles in the Galibi and Wia Wia Nature Reserves restrict the fishermen: 'We, as people from Galibi, have even become afraid to put up our fishing shelters on the beach and to stay there for a few days as we did in the past, since it was better for us because of the distance from Galibi to the sea. This is not done any more, not since the foresters have been coming here (to Babunsanti and the surrounding area) as they suspect the indigenous people of stealing the sea turtles' eggs'").

93 Affidavit of Dr. Stuart Kirsch, at p. 6.

94 Testimony of Ricardo Pané, Audio Transcript, *inter alia*, 51:00 *et seq*.

95 Testimony of Ricardo Pané, Audio Transcript, at 35:40, 44:40.

96 Affidavit of Claudine Sakimin, at p. 2.

97 Affidavit of Claudine Sakimin, p. 2 (confirming the composition of the commission).

is a considerable exaggeration and mischaracterization of its purpose and functions. For instance, at no time during the 8 years of its operation was the official management plan of the GNR or WWNR even reviewed and nor was there any direct input from the victims sought about any aspect of the management plans.[98] Captain Pané's testimony confirms that this commission only focused on the objectives of the State and largely ignored the issues raised by the victims, and that it never resulted in action in relation to any of the issues identified by the victims.[99]

38. That this commission focused almost exclusively on the objectives of the State is amply illustrated in the affidavit of Ms. Sakimin, which lists the following outcomes: "the protection of sea turtles;" traditional use of sea turtle eggs by the affected communities;[100] and "the possibility to promote tourism in the [GNR]."[101] She further notes with respect to the latter that this involved obtaining "permission" from a parastatal organization, STINASU, to transport tourists to and from the GNR. She fails to mention that permission was granted after sustained protest by the affected communities that STINASU had a monopoly on and derived all benefits from tourist activities in the GNR. At any rate, this assertion of benefit to the victims is undercut by the fact that they could have by themselves transported tourists to see the turtles without having to negotiate with the State and without having had their lands taken away and their rights otherwise curtailed. Moreover, as Professor Kirsch observes, "While some community members have established a successful ecotourism business that operates during the sea turtle egg-laying season, the communities do not see this as adequate compensation for the taking of their land...."[102]

39. Third, the proven facts recited above demonstrate that the State has made no meaningful or reasonable attempt to balance nature conservation and the "specific interests of the indigenous peoples."[103] Note that the declarants cannot even bring themselves to use the word 'rights' in this formulation and that, as discussed below, their use of the term 'interests' is consistent with the *de facto* and illusory privileges accorded to indigenous peoples by domestic law.[104] Captain Pané also testified that discussions only focused on the objectives of the State

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98 Affidavit of Claudine Sakimin, at p. 3.

99 Testimony of Ricardo Pané, Audio Transcript, at 29:45, 51:15.

100 In accordance with the Kaliña's traditional practices, the eggs that are harvested all come from "doomed nests" – those laid below the high tide mark and which are not viable – which would not have hatched at all. Consequently, harvesting these eggs has no impact on the turtle population.

101 Affidavit of Claudine Sakimin, at p. 3.

102 Affidavit of Dr. Stuart Kirsch, at p. 7.

103 Annex 18 to Commission's Application: Affidavit of F. Baal and B. Drakenstein, at p. 1. *See also* Affidavit of Claudine Sakimin.

104 *See e.g.,* Saramaka People, at para. 115-16 (where the Court ruled that Suriname's laws were substantially inadequate because its "legal framework merely grants the members of the Saramaka people a privilege to use land..."). *See also* Affidavit of Mariska Muskiet, at para. 12 (explaining that "the term '*de facto* rights' refers to the actual use and occupation of the land by the Maroons; what they do as their day-to-day activities. Its meaning may be elicited by *a contrario* reasoning: '*de jure*' rights are rights recognized in the law, which are registered and enforceable against others, whereas '*de facto* rights' are rights that are not legally recognized, not registered and are not enforceable. You could say that they are a type of privilege, similar to the revocable 'privileges' discussed above").

and largely ignored the issues raised by the victims, and that it never resulted in action in relation to any of the issues identified by the victims.[105] This confirms that there was no meaningful attempt to balance any rights or interests and that the treatment of indigenous rights and concerns in relation to the reserves has been and continues to be lacking. Moreover, it is not possible to effectively balance rights with the asserted public interest if the rights in question are unrecognized in law, and it is uncontested that the rights of the Kaliña and Lokono peoples are neither recognized nor guaranteed by extant Suriname law.

40. The absence of any meaningful attempt to respect the rights of the victims and achieve a just and rationale balance with the asserted public interest is further demonstrated in the following. In common with its privileging of mining and logging interests in WKNR, discussed below, and in direct contravention of the asserted public interest of protection of sea turtles, the State unjustifiably privileges commercial interests, namely, large-scale marine fishing, over the rights of the victims.[106] This commercial fishing occurs without meaningful regulation and takes place in the estuary of the Marowijne River and immediately adjacent to the WWNR and the GNR.[107] It is well known that these fishing interests often drown sea turtles in drift nets that can be over one kilometer long.[108] One sea turtle conservation organization, for instance, highlighted in 1996 that the "highest priority ... should be given to mandating and enforcing the use of [Turtle Excluder Devices] in all trawlers plying Surinam waters."[109] Professor Kirsch also highlights the inconsistency in the State's justification for taking the victims' lands in the GNR and WWNR and its privileging of commercial interests, as well as the ultimate ineffectiveness of this approach from a conservation perspective.[110]

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105 Testimony of Ricardo Pané, Audio Transcript, at 29:45, 51:15.

106 Testimony of Ricardo Pané, Audio Transcript, *inter alia*, at 1:07:00.

107 Testimony of Ricardo Pané, Audio Transcript, at 52:15 *et seq*. Affidavit of Dr. Stuart Kirsch, at p. 7 (citing in depth research and explaining that "the State exerts little control over the fishing boats responsible for killing turtles in their nets").

108 *See e.g.*, 'The Marine Turtle Newsletter', No. 75, 1996, at p. 3 (explaining that "Recently the U. S. has admonished the Surinam government once again to enforce the use of TEDs (turtle excluder devices). There are about 150 Surinam-based Korean and Japanese trawlers operating in Surinam waters. They all report the incidental catch of marine turtles, mostly olive ridleys. Mortality resulting from drowning in shrimp trawls occurs at a high level in Suriname. The use of TEDs in Surinam waters has been mandatory since 1992, but enforcement of the law is lacking. Insufficient evidence of TED compliance has been provided to the U. S. government so far, and for this reason Surinam-caught shrimp have been embargoed by the U. S. since May 1993"), http://www.seaturtle.org/mtn/PDF/MTN75.pdf.

109 *Id. See also* Sea Turtle Action Plan for Suriname, CEP Technical Report No. 24, *supra*, at p. vii (this 1993 study done for the United Nations Environment Programme explained that the "Incidental catch and drowning in shrimp trawls and driftnets is the most severe and unresolved sea turtle conservation issue in Suriname").

110 Affidavit of Dr. Stuart Kirsch, at p. 26-7 (observing that "The State's conservation policies are also deeply flawed because they do not respect indigenous peoples' rights to land, and ownership and use of the resources on that land. In the first case examined here, the nature reserve at Galibi has not been as effective at protecting sea turtle populations as it could be because it focuses exclusively on land-based threats to turtle populations and ignores evidence that the nets used by fishing boats on the coast and in the Marowijne estuary are hazardous to sea turtles. Indigenous peoples are treated as the primary threat to the resource instead of recognizing that they make a positive contribution to their protection and the eco-systems in which they exist").

41. Captain Pané explained in his testimony that the Kaliña and Lokono have repeatedly identified these fishing interests as the primary threat to the sea turtles but the State has taken no effective action to address this issue,[111] while at the same time it takes the victims' lands and otherwise unreasonably restricts their rights in the name of turtle protection.[112] Only in 2012 did the State institute a "no fishing zone" near the GNR, which is in effect from 1 March to 31 July,[113] but, as Captain Pané testified, this is often ignored and rarely enforced.[114] Note again the discriminatory double-standard: the "no fishing zone" is in effect only during the egg-laying season (and, if enforced, could be considered rational and proportionate), while the denial of and restrictions on the rights of the Kaliña and Lokono are in place and actively enforced year-round. Professor Kirsch offers an explanation for this situation, citing an independent researcher as follows: "Kambel (2002) notes the observation of a conservation official in Suriname that it is politically easier to blame indigenous peoples for the decline in sea turtle populations than to challenge the financial interests and power of the fishing industry."[115]

42. Additionally, the State explains that "the reason for establishing the [WWNR] is primarily to protect nesting sea turtle beaches."[116] It further explains that the "sand beaches have moved westward, out of the reserve and for the time being no nesting of sea turtles takes place within the reserve."[117] Noting that a variety of birds feed and nest in the same area, it maintains that the "protection of these birds has no impact whatsoever on the traditional way of life" of the Kaliña and Lokono peoples.[118] Therefore, while it acknowledges that the primary asserted public interest of protecting sea turtles no longer pertains, it fails to justify why protection of the birds in question necessitates the ongoing denial and deprivation of the victims' property rights in the 10,800 hectares of the WWNR that lie within their territory, nor why it remains necessary and proportionate to subject their traditional activities therein to possible criminal sanctions pursuant to Article 5 of its 1954 *Nature Protection Act*. Moreover, as Captain Pané testified before the Court (as explained above), there are in fact considerable

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111 Testimony of Ricardo Pané, Audio Transcript, at 51:15 *et seq*. *See also* Annex 5 to the Commission's Application, p. 107 (concerning complaints made by the victims about commercial fishing operations and their consequences in the victims' traditional waters).

112 Testimony of Ricardo Pané, Audio Transcript, at 51:30. *See also* Affidavit of Dr. Stuart Kirsch, at p. 7 (explaining that the GNR "continues to impose strict conservation rules on the Kaliña, who have a traditional taboo against eating turtles, although in the past they harvested turtle eggs for consumption").

113 *See Suriname: Sustainable Management of Fisheries*, Inter-American Development Bank, July 10, 2013, at p. 18 (stating that "fisheries was considered a major source of mortality for [sea turtles] ... as reported by Chevalier *et al.* (1999) and Hilterman and Goverse (2004). As a result, the Department of Fisheries has seasonal closure of these areas to fishing as evidenced in their 2012 Annual Fisheries Decree, which indicates that no fishing can the place the Galibi Region with a closed season of March 1–July 31 to protect turtle nesting"), http://www.iadb.org/projectDocument.cfm?id=38149488.

114 Testimony of Ricardo Pané, Audio Transcript, at 52:20. *See also* Suriname: Sustainable Management of Fisheries, *id*. at p. 17 (explaining that "The Fisheries Department has professional and qualified but insufficient personnel for the task of researching, and monitoring, controlling and surveillance of the fisheries sub-sector. ... Currently the Department of Fisheries has four inspectors of ~ 60 years of age").

115 Affidavit of Dr. Stuart Kirsch, at p. 7, note 5.

116 Response of the State, at p. 17.

117 Response of the State, at p. 17.

118 Response of the State, at p. 18.

restrictions imposed on the victims access to and use of the WWNR, none of which, by the State's own admission, can be reasonably justified in relation to protection of the birds if protection thereof "has no impact whatsoever on the traditional way of life" of the Kaliña and Lokono peoples.[119] If there is no impact on the victims' exercise of their rights, it stands to reason that this "traditional way of life" also has no impact on the birds, which can be protected without imposing any legal restrictions on the rights of the victims in the WWNR, let alone potential criminal sanctions or further perpetuating the denial of their ownership rights therein.

43. Last but not least, the bare assertion that the alleged recognition of 'traditional rights' in the 1986 Nature Protection Resolution "became a rule within the other Nature Reserves..." cannot be sustained.[120] In the first place, if this was in fact "a rule," it should be provided for by law and the State has not only failed to submit any such law into evidence before the Court – indeed, it cannot as no such law exists – it has expressly admitted that there are no legal guarantees for the "traditional rights of the indigenous communities" with regard to the GNR and WWNR.[121] Moreover, the 1986 Nature Protection Resolution is unambiguous in stating that it only applies to the four reserves designated therein, none of which are the GNR and the WWNR.[122] Therefore, the law that applies to the GNR and WWNR is the 1954 *Nature Protection Act*, which prohibits and criminalizes indigenous peoples' traditional subsistence and other practices.[123]

2. The Wane Kreek Nature Reserve

44. The WKNR, established in August 1986, is by far the largest of the reserves in the victims' territory, encompassing approximately one-third thereof. This reserve is entirely within the victims' territory and the testimony of Captains Watamaleo and Gunther confirms that the lands therein were traditionally owned by the victims prior to and in 1986 and they still consider that they are the owners of these lands today.[124] Professor Kirsch confirms that "Another significant taking of indigenous lands occurred with the establishment of the [WKNR] in 1986;" and, as discussed in the following section, that the "land taken from indigenous

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119 Testimony of Ricardo Pané, Audio Transcript, at 30:24 *et seq.*

120 Affidavit of Claudine Sakimin, at p. 4.

121 Affidavit of Claudine Sakimin, at p. 4.

122 *See* Article 4 of the 1986 Nature Protection Resolution in Annex 6 to the Response of the State (limiting its application to "areas designated as nature reserves by this Government Regulation...," which are listed in Article 3 thereof); and its Explanatory Notes, at p. 3-4 (referring to discussions in 1978 that resulted in "the arrangement that the surrounding resident local population ... living in tribal communities shall retain their 'traditional' rights and interests in the new to be created nature reserves." These discussions took place in 1978 and therefore the WWNR, established in 1966, and the GNR, established in 1969, clearly were not "the new to be created nature reserves" contemplated by this language).

123 *See* Article 5 of the 1954 Nature Protection Act in Annex 6 to the Response of the State.

124 Testimony of Jona Gunther, Audio Transcript, at 1:26:40; Affidavit of Grace Watamaleo, at para. 21, 26.

peoples to establish [the WKNR] was turned into an extractive zone without regard to indigenous land rights or resource use."[125] He adds that:

> the people of the Lower Marowijne area oppose the establishment of conservation areas on indigenous lands because such decisions have regularly been made without consulting the indigenous peoples who live in the area and use these resources, and have negatively impacted their economic standing, traditional practices, and well-being. They also object to the denial of their property rights and other associated rights in these reserves, which by law are the property of the State.[126]

45. Gunther, Watamaleo and Kirsch also explain the fundamental importance of this area to the Kaliña and Lokono peoples.[127] Captain Watamaleo, for instance, emphasizes that the WKNR

> is especially important for us as it is one of our primary hunting and fishing areas and where we get many important things from the forest, like medicines and clays and kaolin that are used in rituals. We have always had camps and settlements there so that we can enjoy and benefit from the forest and its resources. There are also old villages and sacred sites, areas that we consider fundamentally important to our origins and identity, in there as well and we consider it part of our ancestral heartland. I used to go there with my grandparents and my parents and we would spend many days in the forest and there was always plenty to eat. You did not have to take much with you because everything you needed could be found there.[128]

46. This is further confirmed in the expert testimony of Professor Kirsch who explains that:

> One man from Alfonsdorp told me how he previously went hunting in Wane Kreek several times a week. He explained that when hunting there, "you knew you would get meat." ... Several people told me stories about entire families camping out in Wane Kreek, living from the forest for days at a time. One woman told me how she used to take cassava bread but very little else with her into the forest apart from salt, sugar, and pepper. She found everything she needed in the forest.[129]

47. Captains Gunther and Watamaleo both confirm that there has been no meaningful attempt to involve the Kaliña and Lokono peoples in decision making about either the

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125 Affidavit of Dr. Stuart Kirsch, at p. 8 (further explaining, at p. 9, that "The irony that the State took indigenous lands at Wane Kreek for the purposes of a conservation area precisely *because* the indigenous communities sustainably managed the resources there – in contrast to widespread development elsewhere along the coastal plains – and then allowed the area to become an extractive zone is not lost on the Kaliña and Lokono indigenous peoples").

126 Affidavit of Dr. Stuart Kirsch, at p. 9-10.

127 Testimony of Jona Gunther, Audio Transcript, at 1:26:50; Affidavit of Dr. Stuart Kirsch, at p. 9 (stating that "the [WKNR] and the Wane Hills area was a place where all of the indigenous peoples of the Lower Marowijne regularly went to hunt, fish, and camp").

128 Affidavit of Grace Watamaleo, at para. 21.

129 Affidavit of Dr. Stuart Kirsch, at p. 18-9.

establishment or subsequent management of the WKNR.[130] Both explained in relation to the establishment of the WKNR in 1986 that merely one short meeting was held in only one of the victims' communities, Wan Shi Sha, in that same year, and that this community emphatically rejected its establishment.[131] Captains Watamaleo and Gunther confirm that there has been no further attempt to involve the Kaliña and Lokono peoples in decision making about the management of the WKNR and that this situation persists to this day.[132] Captain Watamaleo, for instance, explains that "I am not aware of any [management] plan [for the WKNR], nor are the former chiefs, and if there is one it was certainly not discussed with us or any of the other villages."[133] The absence of any meaningful participation in decision making about the WKNR is further proven in the affidavit of Ms. Sakimin[134] and in the response of the State.[135] Indeed, Ms. Sakimin's affidavit merely mentions a single 2013 initiative to develop tourist activities in the WKNR and explains that one meeting was held on this subject; however, this is in no way related to the management of the WKNR and this meeting has yet to lead to any results.[136] Contrast this with the State's specific identification of and claims about a 'dialogue commission' in connection with the GNR discussed above.

48. The State has repeatedly claimed that "traditional rights" are legally protected by the 1986 Nature Protection Resolution that established the WKNR and that this was done pursuant to agreements with the affected indigenous peoples, and that this somehow became a rule that applied to all other nature reserves. The latter point is discussed and disproven above, which also explains that the term 'traditional rights' has no meaning in extant domestic law. That "traditional rights" are guaranteed and that the Kaliña and Lokono peoples agreed to the WKNR or the restrictions imposed on their rights therein is an equally specious argument for the reasons set forth below.

49. The misleading and unfounded nature of the State's contentions in this regard speak for themselves and are all the more glaring in light of the wholesale and ongoing disregard for the fundamental rights of the victims that is exposed when these claims are scrutinised. First, the State's response maintains that Article 4 of the 1986 Nature Protection Resolution legally

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130 Testimony of Jona Gunther, Audio Transcript, at 1:28:50; Affidavit of Grace Watamaleo, at para. 22-5.

131 Testimony of Jona Gunther, Audio Transcript, at 1:29:01; and Affidavit of Grace Watamaleo, at para. 22 (stating that "there was one single, short meeting held in Wan Shi Sha in which the proposal was formally rejected by us. Only years later did we discover that the reserve had been established, in spite of our rejection. The same is also the case for the other villages as we have discussed this extensively in our meetings when we talk about threats to our common territory").

132 Testimony of Jona Gunther, Audio Transcript, at 1:28:30 (confirming that he has never been part of any such discussions despite being the village chief for the past 20 years); and Affidavit of Grace Watamaleo, at para. 24-5.

133 Affidavit of Grace Watamaleo, at para. 25.

134 Affidavit of Claudine Sakimin (only discussing alleged consultation mechanisms in relation to the GNR and WWNR, and none in relation to the WKNR).

135 Response of the State, p. 18-21 (discussing the WKNR and failing to mention any attempts to involve the affected communities in decision making) and; at p. 21 (noting that "consultation bodies" have been established, but failing to mention any that relate to the WKNR.

136 Affidavit of Claudine Sakimin, at p. 4.

guarantees "traditional rights,"[137] a contention repeated almost verbatim by Ms. Sakimin.[138] This provision, which does not even include the term 'traditional rights', reads:

> Insofar as, on the effective date of this Government Regulation, plots of land in the areas designated as nature reserves by this Government Regulation have been issued as allodial and hereditary titles, leasehold, rent, use, license or concession, or villages and settlements of tribal communities of inhabitants of the interior are located therein, the rights derived therefrom will be respected.[139]

50. There were no indigenous villages or settlements physically *within* the WKNR when it was established, rendering this provision meaningless. Irrespective, the same is also the case for the phrase "the rights derived therefrom," as no legal rights exist or may be acquired under extant domestic law in relation to the traditional occupation or use of lands by indigenous peoples. This fact was previously confirmed by the Court in *Saramaka People* and is further proven in the affidavit of Professor of Property Law, Mariska Muskiet.[140] The latter unambiguously explains that indigenous peoples are merely accorded unenforceable privileges to occupy and use certain parts of their lands by domestic law, rather than legal rights, and that these privileges may be and often are negated in numerous ways.[141] The ongoing denial of the victims' collective legal personality that is proven in the instant case also precludes the possibility of seeking to enforce these privileges (see Section III.D below).

51. The State nonetheless maintained before the Court that "traditional" rights (quotation marks in the original text recited below) are guaranteed on the basis of the 1986 Resolution's explanatory notes, an assertion which also underpins its erroneous and self-serving contention that the victims were consulted about the WKNR and agreed to restrictions on their rights therein.[142] The explanatory notes provide, under the heading *Article 4 "traditional" rights and interests of surrounding resident local population of the interior*, that

> In selecting the nature areas, it could not entirely be avoided that lands were selected in which the surrounding resident local population claim traditional rights and interests. In this context, officials of the State Forest Management Service have held meetings to discuss the matter with the board of and the advisor of KANO (the association of indigenous peoples in Suriname) and with local village councils and

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137 Response of the State, p. 19-20.

138 Affidavit of Claudine Sakimin, at p. 6.

139 Annex 7 to the State's Response.

140 Saramaka People, at para. 115-16 (where the Court rules that Suriname's laws were substantially inadequate because its "legal framework merely grants the members of the Saramaka people a privilege to use land...").

141 Affidavit of Mariska Muskiet, at para. 12 (explaining that "the term '*de facto* rights' refers to the actual use and occupation of the land by the Maroons; what they do as their day-to-day activities. Its meaning may be elicited by *a contrario* reasoning: '*de jure*' rights are rights recognized in the law, which are registered and enforceable against others, whereas '*de facto* rights' are rights that are not legally recognized, not registered and are not enforceable. You could say that they are a type of privilege, similar to the revocable 'privileges' discussed above').

142 *See e.g.*, Final Oral Argument of the State, Audio Transcript, Part 3, 1:09:21 *et seq.*

residents. These meetings have resulted in a summary of the "social aspects" (see Chapter IV of the above Memorandum "Recommendations for Expanding the System of Nature Reserves and Forest Reserves ...)[143] and in the arrangement that the surrounding resident local population of the interior living in tribal communities shall retain their "traditional" rights and interests in the new to be created reserves:

a. as long as the national objective of the proposed nature reserves is not prejudiced;

b. as long as the underlying reasons for these "traditional" rights and interests are still valid;

c. and during the process of progressing towards a single Surinamese citizenship.[144]

52. Leaving aside the issue of whether explanatory notes – especially ones as vague as the above quoted and which do not even appear to be consistent with the text they purport to explain – may be considered an adequate mechanism for recognizing and guaranteeing fundamental human rights, because there are no 'traditional rights' recognized or even defined in extant law, the rights and interests in question must be understood to be no more than the *de facto* privileges accorded to indigenous and tribal peoples by Suriname law, and which the Court rejected as wholly inadequate in *Saramaka People*.[145] These traditional rights and interests are not even defined in the explanatory notes either or in the referenced "social aspects" summarized in the memorandum on "Recommendations for Expanding the System of Nature Reserves." The latter are set forth in the affidavit of Ms. Sakimin and merely state that the "rights and claims of the traditional inhabitants will be respected."[146] Again, there are no rights recognized in Suriname law, traditional or otherwise, in this regard, merely vague and unenforceable privileges. Calling them 'privileges' even exaggerates their normative value and it is best said that the State merely tolerates some degree of indigenous occupation and use provided that the State does not want the same lands for some other purpose.

53. These privileges, moreover, are subject to vague, discriminatory and assimilationist conditions, including in the 1986 Resolution itself, that would negate their existence and exercise altogether. The conditions in the Resolution's explanatory notes provide that indigenous peoples "shall retain their 'traditional' rights and interests" in the four reserves established by 1986 Resolution, including the WKNR: "a. as long as the national objective of the proposed nature reserves is not prejudiced; b. as long as the underlying reasons for these 'traditional' rights and interests are still valid; c. and during the process of progressing towards

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143 Annex 7 to the State's Response, at p. 2 (referring to "Recommendations for Expanding the System of Nature Reserves and Forest Reserves in Suriname Lowlands' Second Revised and Supplemented Edition, 1 October 1979").

144 Annex 7 to the State's Response, at p. 3-4.

145 *See also* Affidavit of Loreen Jubitana, at para. 17 (explaining that "national legislation does not recognize indigenous peoples' collective ownership and other rights in accordance with international obligations, and contains outdated, and discriminatory provisions on 'traditional rights' (best called privileges, and a concept that is barely acknowledged in national law and is made subject to overriding and arbitrary powers that negate these privileges).

146 Affidavit of Claudine Sakimin, at p. 7.

a single Surinamese citizenship." The first is so vague that it could be used to justify almost any interference with or negation of indigenous peoples' privileges. It also in large part concerns the details of a management plan, which the victims have not been consulted about and in which they have had and continue to have no involvement in defining and implementing (assuming that such a plan actually exists as the State has made no mention of one and the representatives have been unable to locate one). The second and third conditions are overtly discriminatory and assimilationist. With no apparent sense of irony, the State explains in its response that, in "line with the first international signals that rather than a policy of assimilation states should pursue respect and protection of indigenous peoples['] traditions, the 1986 nature preservation resolution explicitly calls for respect for the traditions of indigenous peoples in the nature reserves."[147]

54. Additionally, the State's unsupported claims that it has guaranteed and respects these undefined 'traditional rights' are directly refuted by the evidence before the Court, both as discussed in paragraph 61-4 below, and in the section below on mining and logging, some of which took place in the WKNR itself. The State's claims are further undermined due to its unjustifiable privileging of third party interests in the WKNR. As noted above, Article 4 of the 1986 Nature Protection Resolution saves prior property rights and concessions within the WKNR. It fails to uphold indigenous peoples' prior title however and limits the purported protection to the undefined and illusory privileges discussed above.[148] This unjustifiable privileging of third party interests also negates the exercise of these privileges in those areas as well. As Baal explains, so-called traditional rights "may only take place on public lands, which have not yet been formally issued to third parties."[149] This is further confirmed in the affidavits of Mariska Muskiet and Magda Hoever-Venoaks.[150] The concession issued to the bauxite mining companies comprises 123,000 hectares and covers much of the WKNR, negating indigenous peoples' privileges in the corresponding area.[151] On this basis, BHP/Billiton and Suralco, the operating companies, imposed substantial restrictions on the victims' traditional economic and other activities within the WKNR.[152] These prohibitions were actively enforced against the victims by company employees.[153] Professor Kirsch also explains that, in "describing how the

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147 Response of the State, at p. 19.

148 *See also* Brief of the Victims' Representatives, para. 36-37.

149 Annex 17 to the Commission's Application, F. Baal, *Natural heritage in Suriname*.

150 Affidavit of Mariska Muskiet, para. 16; Affidavit of Magda Hoever-Venoaks, at p. 1 (explaining that mining rights are a right in rem) and p. 2 (explaining that forestry concessions are also a rights in rem, "which means that any other interest is subordinated to this right in rem").

151 Affidavit of Dr. Stuart Kirsch, p. 12.

152 *See e.g.,* Affidavit of Dr. Stuart Kirsch, p. 12, Figure 1 (depicting a sign erected by the mining companies and prohibiting a range of activities by the victims). *See also* Affidavit of Grace Watamaleo, at para. 30 (stating that "The mining company also used to stop people from the community from entering the reserve. They put up a big sign that said 'no hunting', 'no fishing', and 'no plant collecting,' and they would stop people from our communities going in there. At the same time we would see company people and others that they let in there hunting and fishing, even using poison to kill large numbers of fish. We know how to go there without them seeing us, but it is very hard to find food there anymore").

153 *See* Annex 28 to the Commission's Application, Affidavits of R.H. Biswana, R. Biswana and M. Wong A Soy.

[WKNR] was established on their territory, one man told me: 'It was a loss of freedom.' 'Before we were free to go there,' he said, 'but now someone is imposing rules on us.'"[154]

55. Turning to the State's erroneous and unsupported assertion that the Kaliña and Lokono peoples agreed to the establishment of the WKNR and restrictions on their rights therein, the representatives emphasize that this claim is based solely on the information set forth in the explanatory notes to the 1986 Resolution quoted above. The State provides no other information to support this baseless claim, which, as discussed below, cannot be sustained and is controverted by the extant and overwhelming evidence before the Court.

56. The State's argument, again based solely on the above quoted explanatory notes, was made in its response,[155] in the affidavit of Ms. Sakimin[156] and orally before the Court, and is as follows.[157] In 1978, the State Forest Service held meetings with an organization called "KANO (the association of indigenous peoples in Suriname) and with [unspecified] local village councils and residents."[158] These meetings resulted in an "arrangement," dated 26 August 1978,[159] that was summarized in the above mentioned report containing *Recommendations for Expanding the System of Nature Reserves*, dated 1 October 1979, and which is incorporated by reference into the explanatory notes to the 1986 Resolution.[160] This "arrangement" allegedly concerned the above discussed provision that indigenous peoples "shall retain their "traditional" rights and interests in the new to be created [but at that time unspecified] reserves."[161]

57. Therefore, the entire basis for the State's claim to have obtained the Kaliña and Lokono peoples' agreement to establishment of the WKNR and restrictions on their rights therein is a single meeting held sometime around 26 August 1978, some eight years prior to its formal establishment and when the WKNR as such was not even part of this discussion as its extension and boundaries had yet to be formally proposed. The most likely date for this single meeting was 21 August 1978.[162] No meetings were held with any of the Kaliña and Lokono peoples' communities or their legitimate representatives at this time and, as noted above, only one meeting was held with one community, Wan Shi Sha, in 1986, and that community unambiguously rejected the establishment of the WKNR.

58. With respect to KANO, which the State claims was called "the association of indigenous peoples in Suriname" even though its acronym could not possibly equate to this grandiose title,

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154 Affidavit of Dr. Stuart Kirsch, at p. 26.

155 Response of the State, p. 19-20.

156 Affidavit of Claudine Sakimin, p. 4, 7.

157 Questions of the State to Jona Gunther, Audio Transcript, 1:36:00 *et seq*; Final Oral Argument of the State, Audio Transcript, Part 3, 1:09:50 *et seq*.

158 1986 Nature Protection Resolution in Annex 7 to the State's Response, at p. 3-4.

159 Affidavit of Claudine Sakimin, at p. 7.

160 1986 Nature Protection Resolution in Annex 7 to the State's Response, at p. 3-4. *See also* Affidavit of Claudine Sakimin, at p. 7 (quoting this report).

161 1986 Nature Protection Resolution in Annex 7 to the State's Response, at p. 3-4.

162 *See* Affidavit of Claudine Sakimin, at p. 7 (explaining that there was "a meeting" on 21 August 1979 [*sic*] between the State Forest Service and KANO).

this NGO: was comprised of a number of indigenous individuals from various parts of Suriname, none of whom were the traditional authorities or legitimate representatives of the victims; it at no time claimed to represent the Kaliña and Lokono peoples; and it ceased to exist around 1980, some six years prior to the establishment of the WKNR. The information recited in the affidavit of Ms. Sakimin further demonstrates that even KANO did not consider that it represented anyone or had reached any final agreement with the State. This information clearly states that "KANO will provide detailed information to local inhabitants about the discussion and meeting with [the State Forest Service] and will exchange ideas with the local inhabitants about this."[163] Neither KANO nor anyone else held any such meetings, at any time, in any of the victims' communities.

59. Moreover, Captain Jonah Gunther testified that KANO neither represented his community nor the Kaliña and Lokono peoples more generally, and that it would be impossible for this organisation to do so.[164] He further explained that decisions on behalf of his community and the other communities could only be made through traditional village structures, and not through NGOs, such as KANO.[165] This is further confirmed by Captain Watamaleo, who states in her affidavit that

> we [the traditional authorities of the Kaliña and Lokono peoples] are all in agreement that we were not part of KANO; while we know a few of the people who used to be in KANO, it did not represent us or even talk to us; and it certainly had no right to speak for us or to make any decisions about us or our lands. These decisions can only be made by the members of the community after much discussion and through our traditional decision making processes. Since the reserve affects almost all of our communities, this decision would have to be made collectively by all of us as well. This never happened and KANO had no place in this process unless it was invited by us, which it was not.[166]

60. In sum, the text of the 1986 Resolution makes clear that the entire basis for the State's contentions was a single meeting in 1978 with KANO – a long defunct NGO that ceased to exist prior to 1980 and at no time represented the victims' communities nor had any right to speak for them – and claimed meetings with unspecified village councils – none of which were in the victims' communities. To make matters worse, the State now claims before the Court that the Kaliña and Lokono were consulted about and agreed to the WKNR solely on the basis of this single 1978 meeting, and that this would be a sufficient guarantee in the context of the taking of 45,000 hectares of their traditional territory for a nature reserve and the continuing denial of their rights and their exclusion from decision making from August 1986 to the present day. The Kaliña and Lokono were also not consulted or otherwise effectively participated in the decision making about the terms of the 1986 Resolution, nor any associated measures related to the

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163 Affidavit of Claudine Sakimin, at p. 7.
164 Testimony of Jona Gunther, Audio Transcript, at 1:27:54.
165 Testimony of Jona Gunther, Audio Transcript, at 1:28:00, 1:38:00.
166 Affidavit of Grace Watamaleo, at para. 23.

management of the WKNR at the time of its establishment or at any time thereafter.[167] The State's claims to the contrary are conclusively disproved by both the witness statements before the Court and its own contentions with regard to the one meeting with KANO, which took place in 1978, did not involve any of the representatives of the Kaliña and Lokono, and, at any rate, took place in the abstract and eight years prior to the establishment of the WKNR.[168] Furthermore, contrary to prevailing international standards, it is uncontested that there is no legal requirement in Suriname that indigenous peoples have a right to participate in decisions that may affect them, a fact previously confirmed by the Court in *Saramaka People*.

61. The evidence before the Court also substantiates that the rights of the Kaliña and Lokono peoples have not been respected in practice in the WKNR. In the first place, the WKNR constitutes an ongoing and unjustifiable taking and dispossession of 45,000 hectares of their traditional territory.[169] While it denies and fails to protect the prior title of the Kaliña and Lokono peoples, the Resolution establishing the WKNR explicitly upholds and protects the prior rights of mining companies, logging concessionaires and titles of third parties, leading Captain Watamaleo to conclude that "we feel that we are made invisible and treated as second class citizens, and this is just another example of how some people are considered more important and the indigenous peoples are not."[170]

62. This privileging of non-indigenous interests all led to the curtailment or denial of subsistence practices and access to various parts of the WKNR that were and, in some cases, remain subject these third party rights as well as severe and long lasting effects caused by mining and logging on the environment that the Kaliña and Lokono depend on for their economic, social, cultural and spiritual well-being. This was confirmed by Captains Watamaleo and Gunther and by Professor Kirsch.[171] In common with the other evidence before the Court, Captain

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[167] *See e.g.*, Sarayaku, at para. 166. (referring to the "obligation to consult the indigenous and tribal communities and peoples on any administrative or legislative measure that may affect their rights..." and; further explaining that State have an "obligation to structure their laws and institutions so that indigenous, autochthonous or tribal communities can be consulted effectively, in accordance with the relevant international standards. Thus, States must incorporate those standards into prior consultation procedures, in order to create channels for sustained, effective and reliable dialogue with the indigenous communities in consultation and participation processes through their representative institutions").

[168] *See e.g.*, Sarayaku, at para. 200 (explaining that such processes "cannot be considered a consultation carried out in good faith, inasmuch as it did not involve a genuine dialogue as part of a process of participation process aimed at reaching an agreement").

[169] Affidavit of Grace Watamaleo, at para. 26 (stating that the WKNR "is our land and has always been our land and an important part of the collective territory of all the communities of the Lower Marowijne. The Government says it belongs to the State because it refuses to recognize and respect our rights and because of this it can be made into a nature reserve").

[170] Affidavit of Grace Watamaleo, at para. 26.

[171] *See e.g.*, Testimony of Jona Gunther, Audio Transcript, at 1:29:54 *et seq*; and Affidavit of Dr. Stuart Kirsch, at p. 8 (explaining that the WKNR "has become a de facto extractive zone with negative environmental effects and detrimental consequences for the indigenous peoples of the Lower Marowijne. ... The land taken from indigenous peoples to establish a nature reserve was turned into an extractive zone without regard to indigenous land rights or resource use"); and p. 27 (explaining that "The decision by BHP Billiton and Suralco not to conduct an environmental impact assessment for the Wane Hills bauxite mine in the 1990s resulted in a

Watamaleo explains that "it is very hard to find food there anymore. That place used to be peaceful, beautiful and bountiful, but now we cry when we think what has happened there, what they have taken from us."[172] These extractive operations and the impacts are discussed further in the following section.

63. Captains Watamaleo and Gunther and Professor Kirsch also confirm that the WKNR is a nature reserve in name only given the extent of the logging and mining that took place therein, and which continue to take place today;[173] the environmental degradation caused by these operations; and the ensuing impacts on the survival and well-being of the Kaliña and Lokono peoples.[174] Professor Kirsch describes the WKNR as *"faux* conservation"[175] and explains that the WKNR "has been turned into a de facto industrial zone...."[176] Captain Watamaleo states that:

> The Government tells us that it knows how to protect this area, which is why it is a nature reserve. You only have to go there now to see that this is not true. There is plenty of logging by outsiders in that area which we have protected for so long, which is destroying the forest because they do not cut the trees in the right way to allow the young ones to grow up. The mining also has caused much damage in there, the land is red and dusty because there is hardly any top soil, the water in the creeks is polluted, it is hard to find fish and animals to hunt anymore when that place used to be full of animals and fish. It was one of the places we always went to get food and other things and now it is very hard to find them. The hunters in all the villages are in agreement about this and they know it better than anyone. This is how the Government protects that place? Still they tell us that they know best how to protect the environment and that they know better than we do. You only have to open your eyes to see that this is not true. I would say that they should not even call it a nature reserve, it is just being destroyed by all the mining and logging that benefits rich people in Paramaribo and other countries and leave us only with misery and pain.[177]

64. The representatives highlight that expert witness Victoria Tauli-Corpuz testified that allowing logging and mining in the WKNR is inconsistent with the stated public interest of nature conservation,[178] and that this view had also been expressed by her predecessor,

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project with huge environmental impacts and concomitant social impacts for the indigenous communities that previously used this area to hunt, fish, and camp").

172 Affidavit of Grace Watamaleo, at para. 30.

173 Affidavit of Grace Watamaleo, at para. 30; Affidavit of Dr. Stuart Kirsch, p. 21 (both confirming that logging and mining for materials other than bauxite are continuing in the WKNR at present); and Testimony of Jona Gunther, Audio Transcript, at 1:40:20.

174 Testimony of Jona Gunther, Audio Transcript, at 1:40:20.

175 Affidavit of Dr. Stuart Kirsch, p. 21.

176 Affidavit of Dr. Stuart Kirsch, p. 18.

177 Affidavit of Grace Watamaleo, at para. 29.

178 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:42:16 *et seq*.

Professor James Anaya, in a 2010 report to the Human Rights Council.[179] She further concluded that the fact that the decree establishing the reserve upheld the prior concession rights of the companies and titles of others while at the same time failing to protect the prior title of the Kaliña and Lokono is discriminatory as well, and this further adds to the conclusion that this situation is disproportionate and otherwise illegitimate.[180]

65. To conclude this sub-section, the evidence before the Court proves that Suriname took approximately one-third of the Kaliña and Lokono peoples' territory in 1986 for the WKNR, and that it did so without due process, without their effective participation in decision making, and without compensation. While it denied and negated the prior title of the Kaliña and Lokono, it nonetheless, and in direct contravention of the asserted public interest, upheld and saved the prior property rights of non-indigenous persons and entities, some of whose operations have caused considerable damage to the lands therein and the victims' ability to survive and prosper. This area is of immense importance to the victims for multiple reasons and they continue to maintain a variety of profound relationships therewith. The evidence further proves that the State's purported protection for "traditional" rights in the WKNR is illusory and amounts to nothing more than a vague acknowledgement of the wholly inadequate and unenforceable privileges accorded to indigenous peoples by Suriname law, privileges that are further negated and superseded by, *inter alia*, any conflicting grant of property rights. The evidence also proves that this area was high in biodiversity due to centuries of active management and protection by the Kaliña and Lokono and that its integrity has been substantially degraded due to the State's acts and omissions, including those before the Court in the instant case.[181] In this respect, Professor Kirsch correctly concludes that "the state's conservation policies are not only flawed, but also prejudicial towards indigenous peoples."[182]

3. Conservation by Indigenous Peoples is Effective

66. The flawed and prejudicial nature of the State's conservation polices is further illustrated by a considerable body of research, some of which was highlighted by the UN Special Rapporteur in her testimony before the Court, that shows that indigenous peoples' traditional management is normally very effective in terms of conservation outcomes, both as a general principle and in comparison with protected areas managed by states. Indeed, if Suriname's practice is a baseline in this respect, it would be difficult for the Kaliña and Lokono to fall below the standard set by the State. The President of the Court specifically requested that the

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179 *See Situation of Indigenous Peoples in Botswana*, A/HRC/15/37/Add.2, 2 June 2010, at para. 73 (explaining that the Government's position was that occupation and use of the reserve by the affected communities is incompatible with its conservation objectives, and observing that this "appears to be inconsistent with its decision to permit mining activities within the reserve").

180 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:43:00.

181 *See e.g.*, Affidavit of Dr. Stuart Kirsch, p. 27 (stating that "Forest and wildlife protection as historically practiced by the indigenous peoples of the Lower Marowijne offer a valuable starting point for rethinking resource use and conservation practices in the area"); and the testimony of expert witnesses Victoria Tauli-Corpuz and Jeremie Gilbert (both explaining that current research demonstrates the effectiveness of indigenous conservation practices).

182 Affidavit of Dr. Stuart Kirsch, p. 28.

representatives provide additional information on the relevant research in their final arguments, and for this reason the representatives present this information in the following paragraphs (the related legal issues are discussed in Section III.B.3 below).

67. As discussed below, the above mentioned research has greatly influenced contemporary international policy and practice on protected areas and the associated legal standards that are part of international environmental law. This research and the related standards therefore substantially support the conclusion that it is not rational, necessary or proportionate to deny indigenous peoples' ownership and other rights in relation to conservation initiatives, especially protected areas, and that it may actually be counter-productive to do so. Special Rapporteur Tauli-Corpuz also explains that this conclusion, at a minimum, "puts the onus on states to justify why non-consensual protected areas may be strictly necessary within indigenous territories" as well as to "substantiate that they have rigorously applied the criteria that would allow them to intervene in indigenous territories, including through undertaking participatory assessments of alternatives."[183]

68. In addition to the Special Rapporteur, the preceding was also stressed and endorsed by expert witnesses, Professor Jeremie Gilbert and Professor Stuart Kirsch, and by the Commission in its closing statement. It also features heavily in the Kaliña and Lokono peoples' own views on the protected areas that have been unilaterally established in their territory and the arguments presented by the representatives. In particular, the representatives have specifically argued that human rights law and contemporary international environmental law both support a ruling that it is neither necessary nor proportionate to deny indigenous peoples' ownership and other rights in the reserves; that conservation objectives can be achieved by less intrusive means; and that the appropriate and primary remedy is the restitution of these lands to indigenous peoples and the negotiation of agreements related to any necessary and specific ecosystem or species conservation measures.[184] They observe that the Special Rapporteur concurred with this view when she commented on a recent decision of the Conference of Parties to the Convention on Biological Diversity[185] that endorses the establishment of indigenous-owned and managed protected areas as an alternative and effective way of protecting biodiversity.[186]

69. For its part, Suriname has averred that while the nature reserves established in the territory of the Kaliña and Lokono are "contrary to the rights of Indigenous peoples," this is warranted "since the nature reserves serve a justified general interest ... the conservation and protection of the environment."[187] This bare assertion however is insufficient to justify the taking of almost 50 percent of the victims' lands and the ongoing denial of their rights to those lands. The State must also show, *inter alia*, that this is necessary – "strictly necessary" per Article 46 of the UN Declaration on the Rights of Indigenous Peoples; that the means employed

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183 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:30:31.

184 Final Oral Argument of the Victims' Representatives, Audio Transcript, Part 3; and Brief of the Victims' Representatives, para. 90-3.

185 *See e.g.*, Decision XI/24, para. 1(e).

186 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:43:33 et seq.

187 Response of the State, at p. 15.

are proportionate; that it has actively assessed various options, with indigenous peoples' participation, and chosen the least intrusive means from a human rights perspective; and that there is no unjustifiable differential treatment involved. Necessity and proportionality are based on the extant facts and are not solely policy decisions within the ambit of the State's discretion. Therefore, evidence, both of a general nature and specific to the Kaliña and Lokono, which substantiates that indigenous peoples' traditional management is effective in terms of conservation outcomes is central to the question of necessity and proportionality. As the Commission noted, there must be a "rational connection" between protection of the environment and restrictions on the use and enjoyment of indigenous peoples' territories.[188] This rational connection is also a question of fact.

70. Ms. Tauli-Corpuz explained that some of the relevant research is compiled in a 2008 World Bank report. As she testified, this study explains that "Traditional indigenous territories encompass up to 22 percent of the world's land surface and they coincide with areas that hold 80 percent of the planet's biodiversity."[189] It explains that this is not mere coincidence as research consistently "reveals a strong correlation between indigenous presence and the protection of natural ecosystems,"[190] not the least because "traditional ways of using and managing biodiversity are grounded in progressive principles of sustainability."[191] Recall in this regard, Loreen Jubitana's testimony that it "is no coincidence that most of the lands with protected area status or proposed for such status are indigenous or tribal lands; these lands remain intact and full of rich biodiversity precisely because we have protected them and even enhanced biodiversity through our active management of those lands."[192]

71. The 2008 World Bank study cited research conducted in the Amazon and then again in southern Mexico and Central America. These studies compared maps of forest cover and biodiversity with indigenous territories and found that the highest areas of forest cover, in some cases, the only forest cover, and highest incidences of biodiversity all coincided with the indigenous territories.[193] More recent research from numerous sources has shown that the same cannot be said for state-created protected areas, many of which have been encroached upon and degraded, leading the researchers to conclude that the evidence indicates that indigenous peoples are at least as good, if not more, effective, at conservation than states.[194]

72. A 2011 study undertaken for the World Bank's Independent Evaluation Group, for example, concludes that community-managed forests are much more effective in reducing

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188 Concluding Statement of the Commission, Audio Transcript, Part 3, at 1:32:00 (observing that there is "no rationale connection, none" in the case sub judice).

189 C. Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation: the natural but often forgotten partners*, (World Bank, Washington D.C., 2008), at p. 5.

190 *Id*

191 *Id*. at p. 9.

192 Affidavit of Loreen Jubitana, at para. 41.

193 *The Role of Indigenous Peoples in Biodiversity Conservation*, at p. 20.

194 *See* S. Stevens, INDIGENOUS PEOPLES, NATIONAL PARKS, AND PROTECTED AREAS: A NEW PARADIGM (U. Arizona Press, 2014) (summarizing the findings of the various sources).

deforestation than strict protected areas.[195] It further concludes that forest areas managed and controlled by indigenous peoples are especially effective, stating that: "In Latin America, where indigenous areas can be identified, they are found to have extremely large impacts on reducing deforestation;" and, "[i]n Latin America and the Caribbean, ... indigenous areas are almost twice as effective as any other form of protection."[196] Likewise, long-term research by the Center for International Forestry Research concludes that tropical forests designated as strictly protected areas have annual deforestation rates much higher than those managed by local communities."[197] This study also "underscores earlier findings by other scientists that show that greater rule-making autonomy at the local level is associated with better forest management and livelihood benefits."[198]

73. Research also records that previously it was widely assumed that conservation objectives could only be achieved through the removal of indigenous peoples and entrusting protected areas to state administration (what Tauli-Corpuz defined as the 'old paradigm').[199] However, consistent findings have shown that this has had "three adverse consequences from a conservation perspective" (all of which are present in the case *sub judice*): "1) the loss of indigenous peoples' custodianship and care of what have long been cultural landscapes and culturally shaped ecosystems rather than uninhabited wilderness; 2) loss of their guardianship and defense of ecosystems against environmentally destructive settlement [and] extractive industries ... and; 3) reliance for the protection, maintenance and restoration of protected area ecosystems and biodiversity on state authorities who often have lacked the necessary capacity, resources or political will to achieve these outcomes."[200]

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195 A. Nelson & K. Chomitz, *Effectiveness of Strict vs. Multiple Use Protected Areas in Reducing Tropical Forest Fires: A Global Analysis Using Matching Methods,* PLoS ONE 6(8) 2011, http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0022722.

196 A. Nelson & K. Chomitz, *Effectiveness of Strict vs. Multiple Use Protected Areas,* at Table 6.

197 L. Porter-Bolland, et al, *Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics,* JOURNAL OF FOREST ECOLOGY &. MANAGEMENT 2012, http://www.cifor.org/library/3461/community-managed-forests-and-forest-protected-areas-an-assessment-of-their-conservation-effectiveness-across-the-tropics/?pub=3461. Comparing cases in 16 countries across Latin America, Africa and Asia, this study found that protected areas lost, on average, 1.47 percent of forest cover per year compared to just 0.24 percent in community-managed forests. In addition, the range of variation within the values of deforestation rates around each of these two averages was much larger in forest-protected areas than in community-managed forests." *See also* 'Deforestation much higher in protected areas than forests run by local communities', CIFOR Press Release, 23 August 2011 (summarizing the findings), http://www.cifor.org/press-releases/deforestation-much-higher-in-protected-areas-than-forests-run-by-local-communities/.

198 Deforestation much higher in protected areas than forests run by local communities', CIFOR Press Release, 23 August 2011, at p. 1.

199 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:27:35 et seq (explaining that "the old paradigm, by which large parts of indigenous territories were essentially expropriated and nationalized, and then made subject to coercive measures that often resulted in conflict, impoverishment, and cultural deterioration, not to mention other serious human rights violations, was formally rejected as both incompatible with contemporary understandings of human rights and as ineffective in practice").

200 S. Stevens, INDIGENOUS PEOPLES, NATIONAL PARKS, AND PROTECTED AREAS: A NEW PARADIGM, at p. 4.

74. The above mentioned 2008 World Bank study also reviewed many World Bank-funded protected areas projects and identified key lessons. These include: first, that recognition of indigenous land rights is strongly related to successful outcomes and conflict avoidance; second, that "empowering Indigenous Peoples to manage biodiversity in their own territories has resulted in a more sustained and cost effective way to protect biodiversity;"[201] and third, that countries that "consistently directly incorporated Indigenous Peoples objectives into biodiversity projects" achieved the best results, from both a social and environmental perspective.[202] These findings are confirmed in an extensive analysis of scientific studies by the National University of Mexico. It concludes that indigenous peoples "hold the key to successful biodiversity conservation in most of the biologically richest areas of the world."[203] It adds that, given this, "it is essential to recognize the necessity of empowering local communities. That is to maintain, reinforce or give control to the indigenous communities on their own territories and natural resources.... Important here are legally recognized and enforceable rights to lands and waters, which give the communities both an economic incentive and a legal basis for stewardship."[204]

75. The results of this scientific research, briefly sampled above, have led to an international consensus that, as explained by Victoria Tauli-Corpuz, "there is an urgent need to re-evaluate the wisdom and effectiveness of [conservation] policies affecting indigenous peoples...." This decision was formally taken at the 2003 World Parks Congress (although it dates back to the mid-1990s), the primary global forum on protected areas, which is held once each decade under the auspices of the International Union for the Conservation of Nature.[205] The 2003 Congress formally adopted "a new protected areas paradigm" related to indigenous peoples. This new paradigm is explicitly based on full respect for the rights of indigenous peoples in relation to all existing and future protected areas, including their effective participation in all decision making based on their consent; and the establishment of "participatory mechanisms

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201 *The Role of Indigenous Peoples in Biodiversity Conservation,* at p. 45.

202 *Id.*

203 V. Toledo, *Indigenous Peoples and Biodiversity, in* S. Levin et al., (eds.) ENCYCLOPEDIA OF BIODIVERSITY, 2nd Ed. Academic Press (2007), at p. 1 (further explaining, at p. 9, that "The research accumulated in the three last decades by investigators belonging to the fields of conservation biology, linguistic and anthropology of contemporary cultures, ethnobiology and ethnoecology, have evolved convergently towards a shared principle: that world's biodiversity only will be effectively preserved by preserving diversity of cultures and vice-versa"), https://h912.boku.ac.at/gglatzel/912315/BiodivCons%20Literature%20and%20Reading/INDIGENOUS%20PEOPLES%20AND%20BIODIVERSITY.pdf.

204 V. Toledo, *Indigenous Peoples and Biodiversity*, at p. 9.

205 *Durban Accord: Action Plan*, adopted at the Vth IUCN World Parks Congress, Durban South Africa (2003), at p. 248 (explaining that "the roles, knowledge and customary laws of indigenous peoples and local communities have frequently been disregarded or undervalued by the conservation community. For example, many protected areas have been established without adequate attention to, and respect for the rights of indigenous peoples ... especially their rights to lands, territories and resources, and their right freely to consent to activities that affect them. ... Acknowledging that many mistakes have been, and continue to be made, and desiring to contribute to the goal of the United Nations International Decade of the World's Indigenous People, which ends in 2004, the Vth IUCN World Parks Congress called for an urgent re-evaluation of policies affecting indigenous peoples..."), http://cmsdata.iucn.org/downloads/durbanactionen.pdf.

for the restitution of indigenous peoples' traditional lands and territories that were incorporated in protected areas without their free and informed consent...."[206]

76. Ms. Tauli-Corpuz testified that this new paradigm has been firmly incorporated into international environmental law, especially decisions and programmes of work on protected areas adopted by the Conference of Parties to the Convention on Biological Diversity.[207] She further explained that it "also greatly influenced the world's largest non-governmental conservation organizations, all of whom have adopted policies in the past 10 years requiring compliance with indigenous peoples' rights in their activities."[208]

77. The new paradigm was reaffirmed and reinforced in the decisions of the 2014 Congress, which state that working in partnership with and recognizing the collective rights of indigenous peoples underlies the commitment to redress and remedy past and continuing injustices in accord with international agreements.[209] This Congress addressed situations where existing protected areas overlap with indigenous territories and recommended that "all countries and relevant organisations ensure that collective rights and responsibilities to own, govern, manage, and use such land, water, natural resources and coastal and marine areas are respected; [and] ensure that the indigenous peoples' ... right to free, prior and informed consent is affirmed."[210] It further decided that "Governments and UN human rights bodies ... [should] establish effective monitoring, restitution and accountability mechanisms to ensure that rights-based approaches and international standards of justice are applied in all conservation programmes. This should redress past and ongoing injustices suffered by indigenous peoples ... including restitution of lands expropriated without free, prior and informed consent...."[211]

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206 *Id.* at p. 248-9.

207 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:26:24.

208 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:26:30. *See e.g., Indigenous Peoples and Conservation: WWF Statement of Principles.* WWF International: Gland 2008, at p. 2 (stating that "without recognition of the rights of indigenous peoples, no constructive agreements can be drawn up between conservation organizations and indigenous peoples and their representative organisations" and ""recognizes indigenous peoples as rightful architects of and partners for conservation and development strategies that affect their territories"), http://assets.panda.org/downloads/183113_wwf_policyrpt_en_f_2.pdf.

209 'The Promise of Sydney Vision', http://www.worldparkscongress.org/about/promise_of_sydney_vision.html.

210 *A strategy of innovative approaches and recommendations to enhance the diversity, quality and vitality of governance in the next decade*, 2014 World Parks Congress, at p. 4 (stating that "In situations where the land, water, natural resources and coastal and marine areas of indigenous peoples and local communities overlap with established protected areas under any other governance type, all countries and relevant organisations ensure that collective rights and responsibilities to own, govern, manage, and use such land, water, natural resources and coastal and marine areas are respected. Further, they ensure that the indigenous peoples' and local communities' right to free, prior and informed consent is affirmed and their livelihoods and food and water sovereignty are appropriately recognized and supported, along with their knowledge, institutions, practices, management strategies and plans related to conservation. They foster, moreover, the full engagement of the concerned indigenous peoples and local communities in the governance of the overlapping established protected areas"), http://cmsdata.iucn.org/downloads/conclusions_of_governance_stream_wpc_2014__12_dec.pdf.

211 *Id.* at p. 7.

78. Consistent with the new paradigm, international environmental law, governments and the conservation community have recognized the importance of indigenous owned protected areas and the restitution of lands previously taken from indigenous peoples for conservation purposes, both as an effective means of conservation and to respect indigenous peoples' rights. Ms. Tauli-Corpuz, for instance, explained that in Australia alone over 20 million hectares have been declared as Indigenous Protected Areas in the past decade,[212] and a number of states have formally returned lands within protected areas to indigenous peoples, including in the Americas.[213] Restitution has been accomplished by legislative measures or sometimes pursuant to judicial proceedings. For instance, in 2002, South Africa returned 25,000 hectares of the Kgalagadi Transfrontier Park, established in 1931, to the Khomani San people and formally recognized their rights of access, use and management in another 40,000 hectares, all pursuant to an out-of-court settlement.[214]

79. New Zealand also provides notable examples,[215] for instance, in the 1998 *Ngäi Tahu Claims Settlement Act* where lands administered by the Department of Conservation were returned to Ngäi Tahu, the traditional Māori owners. This included recognition of their title to Mt. Aoraki/Cook; transfer of title to three conservation stations covering some 35,000 hectares; the return of the Crown Titï Islands Nature Reserve; and the return of the Codfish Island Nature Reserve, which is now is jointly managed by Ngäi Tahu and the State. Several areas of the South Westland World Heritage Area were also returned to Ngäi Tahu.

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[212] Both the Australian Commonwealth (Federal) and State/Territorial governments have enacted legislation that recognizes aboriginal peoples as owners of national parks or effects transfers of existing protected areas lands to aboriginal peoples. The best known aboriginal-owned parks are Uluru-Kata Tjuta National Park and Kakadu, Nitimiluk (Katherine Gorge) and Gurig National Parks in the Northern Territory, all of which were formally returned to the aboriginal owners. The *Environment Protection and Biodiversity Conservation Act* 1999 (Cwlth) provides for joint management arrangements for three Aboriginal owned and jointly managed national parks (Uluru, Kakadu and Booderee) and has various other provisions that recognise the rights and interests of aboriginal peoples. At the state level, the New South Wales *National Parks and Wildlife (Aboriginal Ownership) Amendment Act* 1996, for instance, identified seven national parks to be returned to their traditional owners, while in Tasmania, pursuant to the *Aboriginal Lands Act* 1995 (Tas), 12 parcels of land were returned, in fee simple, to the Aboriginal community. This included several islands and a number of mainland sites. *See also* M. Langston et al, *Community-Oriented Protected Areas for Indigenous Peoples and Local Communities*, 12 J. POLITICAL ECONOMY 23 (2005), at p. 42 (explaining that "an [Indigenous Protected Area] can only be achieved where there indigenous people have exclusive title to their land. While there have been a number of projects where indigenous groups have been funded to negotiate with state agencies in existing state owned national parks and reserves these have generally been less successful for a number of reasons"), http://jpe.library.arizona.edu/volume_12/LangtonPalmer.pdf.

[213] Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:44:54.

[214] See R. Chennells, 'The Khomani San Land Claim', 26(1) *Cultural Survival Quarterly* 2002; and *Mier and Khomani San. Findings by Monitoring and Evaluation Directorate, April 2002*. Dept. of Land Affairs, Republic of South Africa, 2002. Accessed on 2 Oct. 2002 at: http://www.me-dla.org.za/systems/mierkhomani.pdf.

[215] Settlements with Māori tribes, affecting lands administered by the Department of Conservation, have included the return of lands and other constructive arrangements concerning existing protected areas. See e.g., *Ngaati Ruanui Settlement, Ngati Mutunga Settlement, Ngati Tama Deed of Settlement, Ngati Turangitukua Settlement, Pouakani Claim Deed of Settlement, Rangitaane o Manawatu Settlement, Te Atiawa Settlement Heads of Agreement, Te Uri o Hau Settlement Heads of Agreement, Nga Rauru Kiitahi Settlement Agreement in Principle.*

80. In the Americas, there are examples of restitution in the United States of America and Canada, at both the federal and state/provincial levels.[216] In Bolivia, Isiboro-Sécure National Park, created in 1965, and covering an area in excess of 1.1 million hectares, was returned to indigenous peoples in 1990 and is now formally recognized as a joint indigenous territory and national park.[217] A similar arrangement has been made in the case of the Kaa-iya Protected Area of the Gran Chaco in Bolivia.[218] The primary difference between this area and Isiboro-Sécure was that indigenous ownership and management issues were addressed simultaneously with creation of Kaa-iya.

81. In sum, the necessity and proportionality of Suriname's taking of almost 50 percent of the Kaliña and Lokono peoples for the GNR, WWNR and WKNR, and the permanent denial of their ownership and other rights over these areas, must be assessed in light of the consistent findings of decades of research that confirms that indigenous peoples' traditional management of their territories is highly effective from a conservation perspective. This research also shows that indigenous peoples are at least as good and if not better at conservation than states: according to one study, in Latin America "indigenous areas are almost twice as effective as any other form of protection."[219] One need only review Suriname's practice in the WKNR, as discussed in the following section, to see that this conclusion is highly relevant in the instant case. This research has also provided the basis for the development of a new paradigm of protected areas that upholds respect for indigenous peoples' rights, not only as a matter of basic human rights but also as effective conservation practice. This includes the restitution of lands incorporated into protected areas without their consent.

82. Ms. Tauli-Corpuz explains that the preceding "puts the onus on states to justify why non-consensual protected areas may be strictly necessary within indigenous territories."[220] Suriname has singularly failed to meet its burden in this respect and it has presented no evidence that could either substantiate that it is necessary to take the victims' lands to satisfy conservation objectives or that the coercive restrictions on their rights in the reserves are

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216 Examples of restitution of lands in the USA include: the *Grand Canyon Enlargement Act,* which transferred 185,000 acres of US Park and Forest Service lands to the Havasupai Indian Reservation and created an additional 95,000 acre traditional use area within Grand Canyon National Park; and the 2000 *Timbisha Shoshone Homeland Act,* which restored lands to the traditional owners in and around the Death Valley National Monument.

217 *See* Z. Suhn, 'The Isoboro-Securé National Park'. In, *From Principles to Practice: Indigenous Peoples and Biodiversity Conservation in Latin America*. IWGIA Doc. No. 87, Copenhagen, 1998, pp. 81 – 108. Bolivia's 1993 *National Service Act for Agrarian Reform* required titling of indigenous peoples' lands and rights to natural resources and states that recognition of indigenous lands is compatible with continued protected area status. It further and explicitly instructed that the Isiboro-Sécure Indigenous Territory and National Park be immediately titled in favour of the indigenous peoples residing therein.

218 E. Arambize, 'The Kaa-iya Protected Area of the Gran Chaco: A case of collaboration between indigenous peoples and conservationists', *in, id.*, pp. 192-98. *See also* Javier Beltran (ed.) *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies*. WCPA and IUCN, Gland, 2000, pp. 31-9.

219 A. Nelson & K. Chomitz, *Effectiveness of Strict vs. Multiple Use Protected Areas*, at Table 6.

220 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:30:31.

necessary or proportionate. It has also provided no evidence that it has considered alternatives to its current practice, either at the time the reserves were established or at any time thereafter. In short, it has failed to provide any evidence that the taking of the victims' lands and the ongoing denial of their rights has any rational basis in relation to the public interest that it asserts justifies these enduring and highly prejudicial violations of the rights of the Kaliña and Lokono peoples.

C. Logging and Mining

83. During the public hearing, the Court was shown a map made by the State on which the boundaries of the territory of the Kaliña and Lokono peoples had been placed. Captain Pané was asked to explain what this map depicted and he stated that it shows that the vast majority of the victims' territory has been subsumed by mining and logging concessions.[221] This is in addition to the nature reserves discussed above and which themselves cover almost 50 percent of the victims' territory. He further explained that there is thus very little land left for the Kaliña and Lokono, a fact further confirmed by Professor Kirsch. The latter explains that if "they lose much more land, they may not be able to hunt or harvest important forest products at all;"[222] and "I think they have reached a tipping point in which the continued viability of their villages as functioning units, and all that this entails, is now at risk."[223]

84. The preceding is additionally confirmed by Captain Watamaleo, who states that "We have seen Government maps of these concessions and they cover almost all of the land, not just in the [WKNR] but also the other parts of our territory. There is nowhere left for us to go that has not been given out to others."[224] This was further supported by Captain Gunther, who explained that there are numerous logging concessions and operations, legal and illegal, within their territory[225] and that large-scale bauxite mining took place in the part of their territory that is now encompassed by the WKNR.[226] These facts are further and otherwise confirmed in the affidavit of Captain Grace Watamaleo as well as detailed extensively in the expert testimony of Professor Stuart Kirsch.[227]

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221 Testimony of Ricardo Pané, Audio Transcript, at 26:22.

222 Affidavit of Dr. Stuart Kirsch, p. 21 (further explaining that "This also applies to their traditionally owned coastal seas and the foreshore and seabed from which they traditionally derive a variety of resources, including fish, mollusks, and clays").

223 Affidavit of Dr. Stuart Kirsch, p. 22 (also stating that "Their *cultural survival* as indigenous peoples depends in large measure on the continuity of these villages and their individual and collective control over traditional resources, land, and territory, including the kinds of social relations this fosters and the reproduction of their shared culture and values").

224 Affidavit of Grace Watamaleo, at para. 34.

225 Testimony of Jona Gunther, Audio Transcript, at 1:29:40.

226 Testimony of Jona Gunther, Audio Transcript, at 1:32:00.

227 Affidavit of Dr. Stuart Kirsch, at p. 18 (explaining that "The State has also granted logging concessions on indigenous land to numerous individuals and companies. Illegal logging operations in the Lower Marowijne are rampant and mostly ignored by the State"); and Affidavit of Grace Watamaleo, at para. 34.

1. The absence of legal protection and the failure to protect the rights of the Kaliña and Lokono

85. The evidence proves, as was previously confirmed by the Court in *Saramaka People*, that the Surinamese legislative framework does not provide adequate guarantees to protect indigenous peoples from rights violations in relation to both logging and mining. The uncontroverted evidence further proves that the State failed to ensure the effective participation of the Kaliña and Lokono in decision making about the logging and mining operations that took place and continue to take place in their territory; failed to conduct environmental and social impact assessments ("ESIA"); failed to ensure that the victims received reasonable benefits from these operations; and failed to institute safeguards to ensure that these operations did not have significant, negative impacts on their rights and ability to survive as indigenous peoples more broadly.[228] The representatives will discuss these issues immediately below, which are common to both the logging and mining operations, and then turn to the severe, negative and multi-generational impacts caused by these mining and logging operations.

86. In the *Saramaka People* case,[229] the Court extensively examined Suriname's legislative framework related to logging and mining and concluded that Suriname had failed to give domestic legal effect to the rights of indigenous and tribal peoples, including in connection with logging and mining.[230] Nothing has changed since the Court reached this conclusion and the State has neither disputed this fact nor presented any evidence that might raise questions about its continuing veracity. This conclusion is further supported in the affidavits of Mariska Muskiet and Magda Hoever-Venoaks. The latter, for instance, explicitly states that Suriname's 1986 Mining Decree "does not offer legal protection to 'inhabitants of the interior living in tribal communities'."[231] The Court itself concluded that Suriname's 1992 Forest Management Act "fails to give legal effect to the communal property rights" of indigenous and tribal peoples.[232] It is therefore proven, and undisputed by the State, that the victims in the instant case are not accorded any effective rights or protections by the relevant domestic laws.

87. The evidence before the Court also proves that the Kaliña and Lokono peoples did not effectively participate in decision making or, given their magnitude, consent to the logging and mining operations in their territory. This is the case despite the fact that these operations, cumulatively and, in some cases, separately, have had and continue to have a major impact on their territory, all the more so when the additional and cumulative impact of the nature reserves is considered. Captains Watamaleo and Gunther both clearly state that there was no

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228 *See e.g.*, Affidavit of Dr. Stuart Kirsch, at p. 3 (stating that the WKNR "has become a de facto industrial development zone, including bauxite and kaolin mining, legal and illegal logging, and other forms of extraction, all without the involvement and consent of its indigenous traditional owners, and without any form of environmental and social impact assessment").

229 Saramaka People, para. 111-16, 183-4.

230 Saramaka People, at para. 116.

231 Affidavit of Magda Hoever-Venoaks, at p. 2.

232 Saramaka People, at para. 114.

prior consultation with the victims, or at any time subsequently, in relation to these operations.[233] Captain Watamaleo testified that "we only found out about [the mining] when people from the communities began to see the company starting to work. ... The company said that they had permission from the Government and there was nothing we could say...."[234] The lack of effective participation in decision making was also confirmed by Professor Kirsch,[235] who states that

> The Kaliña and Lokono are critical of the government for its failure to take indigenous rights into account. They say that "the government does not include us" and that "we are not participating in decisions being made about our land." They feel powerless in relation to a government that makes decisions without taking their needs, interests, and rights into account. Because the government does not recognize their land rights, a stranger can show up with a piece of paper and claim to be the legal owners of their land: "It can happen like this and it has." They tell stories of walking through the forest and seeing a new logging operation on their land. If the loggers have a government permit, there is nothing they can do about it.[236]

88. Captain Watamaleo explains that the mining companies – not the State – only met with them once (in 2008, more than 10 years after the mining began), and that this was only in relation to the closure of the bauxite mines. She explains that these companies "have only talked to us about their rehabilitation plans and this was when the mining was almost finished. We had one meeting in which they just explained what they were going to do. It was a presentation more than a discussion. We got together and presented our ideas and concerns to them but they just did what they had planned anyway."[237]

89. The State has presented no evidence that could controvert the preceding. It merely makes the wholly unsupported assertion, which is not contextualized to facts of the instant case, that when it authorizes projects in indigenous lands "these communities are consulted by the Government."[238] The representatives observe that the State made similar claims in the *Saramaka People* case and that its similarly unsupported assertions in that case were rejected by the Court.[239] In her affidavit, while she discusses the bauxite mining in the WKNR, Ms.

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[233] Affidavit of Grace Watamaleo, at para. 30, 35; Testimony of Jona Gunther, Audio Transcript, at 1:29:40.

[234] Affidavit of Grace Watamaleo, at para. 31. *See also* Annex 5 to the Commission's Application, p. 105 (confirming that the victims were not even notified about the mining operations in 1997, and explaining that the "Suralco concessions in particular, that exploit various bauxite mines in the Wane Creek area, constitute a great source of concern to our communities").

[235] Affidavit of Dr. Stuart Kirsch, p. 9 (explaining that "The people in Galibi only found out about the mining project when one of their hunters accidentally came across a road being built by Suralco in the [WKNR]").

[236] Affidavit of Dr. Stuart Kirsch, at p. 23.

[237] Affidavit of Grace Watamaleo, at para. 32.

[238] Response of the State, at p. 22.

[239] Saramaka People, *inter alia*, para. 147 (noting that "In the words of District Commissioner Strijk, 'if there are sacred sites, cemeteries, and agricultural plots, then we have consultation, if there are no sacred sites, [cemeteries,] and agricultural plots, then consultation doesn't take place'. This procedure evidently fails to

Sakimin does not even claim that there was any prior consultation with the victims.[240] Additionally, Loreen Jubitana testified[241] that "it is normal that [indigenous peoples] are not even informed and very unusual if we are actually talked to, and even then these discussions very rarely even come close to meeting basic requirements for consultation, let alone meaningful participation."[242]

90. Second, the State admits that "[ESIAs] are not required by law."[243] The absence of a legal requirement for ESIAs was also cited by one of the mining companies, BHP-Billiton, as the reason for not conducting an ESIA for the large-scale bauxite mining that took place in the victims' territory and in the WKNR.[244] The lack of an ESIA and prior consultation was also confirmed in the report commissioned by the mining companies that is annexed to Professor Kirsch's affidavit. He explains in this respect that

> Even in 2005, BHP Billiton continued to treat ESIA as optional. When considering whether to conduct an ESIA for the Wane 4 deposit, SRK Consulting notes: "Following these discussions, it was agreed that undertaking a full Environmental and Social Impact Assessment (ESIA) and associated public consultation process of the area would be premature at this stage. It was decided that it would be more appropriate to first establish the ecological sensitivity and value of the site prior to deciding whether to commit to an ESIA process" (SRK 2005:4). Nonetheless, the exploration process resulted in damages sufficient enough to require rehabilitation (SRK 2005:21).[245]

91. The State has also not presented any evidence that could show that any ESIAs were conducted for the numerous logging operations in the victims' territory, including those in the WKNR. The representatives have not been able to locate any evidence to this effect and the victims' report that if any ESIAs were done, they were neither aware of them nor did they participate in the conduct thereof. As noted above, ESIAs are not required by law in Suriname and generally it is only large multinationals that, at their own initiative or usually following substantial pressure from affected communities, conduct ESIAs.

92. There is no evidence that the Kaliña and Lokono peoples have reasonably benefitted from the mining and logging in their territory. On the contrary, the evidence proves that these

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guarantee the effective participation of the Saramaka people, through their own customs and traditions, in the process of evaluating the issuance of logging concessions within their territory").

240 Affidavit of Claudine Sakimin, p. 7-8.

241 Affidavit of Loreen Jubitana, para. 38-9.

242 Affidavit of Loreen Jubitana, at para. 39.

243 Response of the State, at p. 20.

244 Affidavit of Dr. Stuart Kirsch, p. 12 (explaining that "Despite it being a global norm to conduct environmental and social impact studies (EIS or EISA) prior to undertaking projects of this magnitude (Goldman 2000), BHP Billiton and Suralco did not conduct such studies because there "is no formal requirement under Suriname legislation for an EIS" (Ian Wood, Vice-President for Sustainable Development, BHP Billiton, personal communication, 10 February 2009)").

245 Affidavit of Dr. Stuart Kirsch, at p. 13, note 11.

operations have been highly prejudicial to their rights and well-being and that the damage they have suffered continues to expand and intensify with each passing day that these operations continue in their traditional territory. The absence of benefits is amply illustrated by the response of the State, which cites as the only alleged benefit the use by a handful of the victims of a haul road constructed by the mining companies.[246] Moreover, the evidence before the Court demonstrates that these same roads have contributed to the environmental degradation of the victims' lands and allowed for more intensive encroachment than was possible prior to their construction.[247]

93. Likewise, there is no evidence that the State or any of the private sector entities involved have "put in place adequate safeguards and mechanisms in order to ensure" that the logging and mining operations "would not cause major damage" to the Kaliña and Lokono peoples and their territory.[248] Rather, the evidence proves both the absence of any adequate safeguards – which at any rate could only be rationally determined after the conduct of participatory ESIAs, and it is proven that there were none conducted – and the existence of severe damage caused by these operations. As stated by Professor Kirsch, the "decision by BHP Billiton and Suralco not to conduct an environmental impact assessment for the Wane Hills bauxite mine in the 1990s resulted in a project with huge environmental impacts and concomitant social impacts for the indigenous communities that previously used this area to hunt, fish, and camp."[249]

94. Last but not least, the evidence before the Court proves that the victims' complaints about the logging and mining operations in their territory were either dismissed or simply ignored by the State. Their complaints directed to the mining companies were referred to the State and then ignored.[250] As noted above, there are no effective remedies by which the victims' could seek protection or redress for these operations. As the Court confirmed in Saramaka People, they cannot even seek compensation for damages under the 1986 Mining Decree because they are not recognized as having any rights to lands under domestic law.[251]

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246 Response of the State, at p. 12.

247 Affidavit of Dr. Stuart Kirsch, at p.11 (stating that "the wide access roads (see Figure 4) built by the mining company have facilitated access to the area by a variety of legal and illegal mining and logging operations, further degrading the Wane Kreek Nature Reserve, which has become a major industrial zone"); and, at p. 15, ("[t]he construction of wide mining roads has made it easy for legal and illegal loggers to enter the area and clear the forest. Because there was no ESIA for the project, no one had an opportunity to object to the width of the roads constructed for the Wane Hills project (see discussion of road impacts in Goodland 2007)").

248 Saramaka People, at para. 154.

249 Affidavit of Dr. Stuart Kirsch, p. 27.

250 Affidavit of Dr. Stuart Kirsch, p. 24 (explaining that "When the Lower Marowijne Indigenous Land Rights Commission (CLIM) [a body comprised of all of the traditional authorities of the Kaliña and Lokono] approached Suralco about the problem, they were told to direct their complaints to the government. When CLIM complained to the government via a number of formal, constitutional petitions, they did not receive an answer, either. Not having legally-recognized land rights meant that no one would respond their concerns about the environmental impacts of the bauxite mine").

251 Saramaka People, para.183 (concluding that "the purported remedy established under the Mining Decree is inadequate and ineffective in the case at hand because the members of the Saramaka people do not hold title

2. Impact of the Mining

95. Large-scale bauxite mining in the victims' territory and the WKNR commenced in 1997 at a location known as the Wane Hills, numbers 1-4.[252] It concluded in late 2008 to early 2009. The mining was conducted by BHP-Billiton and Suralco, the latter being a subsidiary of USA-based company, Alcoa. In 2005, the former commissioned a study on the impact of its mining operations by an independent consulting firm called SRK. This study, which is annexed to the affidavit of Professor Kirsch and the Commission's Application, concluded that the mining operations at Wane Hills 1 and 2 have caused "Considerable damage."[253] Additional "damage" has occurred at Wane Hills 4 due to the extensive exploration program carried out there as well as in relation to the access roads constructed for the exploration program.[254] Professor Kirsch also explains that "SRK Consulting (2005:21) acknowledges the need to rehabilitate the Wane 4 site due to damage from the exploration program, recommending that BHP Billiton: 'Rehabilitate damage to Wane 4 caused by the exploration programme, including all borrow areas and access roads that were constructed for the exploration programme'."[255]

96. Captain Gunther concurred with SRK's finding that the bauxite mining caused considerable damage.[256] He also testified about the severe negative impact of these operations on the Kaliña and Lokono's traditional subsistence resources and practices, how traditional village life has been turned upside down, and how the Wane Kreek, a prime source of fish, has been polluted.[257] Captain Watamaleo explained that she has personally seen the mining sites,[258] and explains that the mining "has caused much damage ... the land is red and dusty because there is hardly any top soil, the water in the creeks is polluted, it is hard to find fish and animals to hunt anymore when that place used to be full of animals and fish."[259] She further explains that

> You must understand that the mining there was going on all day and all night and that they used dynamite to blast the bauxite out of the ground and then strip mined the area. Of course they removed all the forest at the same time; it looked like the moon except it was red. We would hear the dynamite blasts. This led to many animals leaving the area, animals that we hunt for food and to live, and hunting is an important part of who were are as indigenous people. This also affected the water and there are not many fish left in the creeks. All of our people who go fishing there say this. Fish used to be plentiful, including big fish, but now they are very, very hard

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to their traditional territory or any part thereof. They cannot therefore qualify as "a rightful claimant" or "third party" under the Mining Decree").

252 Response of the State, at p. 11; Testimony of Jona Gunther, Audio Transcript, at 1:32:00; Affidavit of Dr. Stuart Kirsch; and Affidavit of Grace Watamaleo, para. 31-2.

253 Annex 23 to the Commission's Application, SRK Consulting, Environmental Sensitivity Analysis of the Wane 4 Concession, at p. 20.

254 Annex 23 to the Commission's Application, at 21.

255 Affidavit of Dr. Stuart Kirsch, at p. 14, note 12.

256 Testimony of Jona Gunther, Audio Transcript, at 1:32:36.

257 Testimony of Jona Gunther, Audio Transcript, at 1:29:52 *et seq*.

258 Affidavit of Grace Watamaleo, para. 33.

259 Affidavit of Grace Watamaleo, at para. 29.

> to find and some people have just stopped even trying to hunt or fish in there because they say it takes to long for very little reward. This is also means that our traditional foods are being diminished and these foods have great cultural importance to us. One of the creeks, the Wane Kreek, flows into the Marowijne next to my village, so we know what has happened to the water and the things that live in it very well. The company has also left all kinds of waste and garbage behind.[260]

97. Captain Watamaleo also highlights that the negative impacts "are not only economic. We have many sacred sites throughout our territory and we have strong cultural and spiritual relationships with our territory as well. All of the activities I have talked about have a negative impact on these relationships and not just when specific sacred or cultural sites are affected."[261]

98. The deleterious impacts of the mining operations are extensively detailed in the expert testimony of Professor Kirsch, which corroborates and further substantiates the testimony of Captains Watamaleo and Gunther and the findings of SRK.[262] He explains that "Explosions shook Alfonsdorp six to eight times per day. The noise and vibrations from these explosions caused wildlife to flee, which has made hunting in Wane Kreek very difficult. ... An experienced hunter from Pierrekondre was even more negative: 'For four years it has been useless to go into Wane Kreek because there are no animals or fish'."[263] Professor Kirsch reports that all the Kaliña and Lokono peoples' villages describe how the once abundant resources of the WKNR have been greatly diminished due to the mining and logging in that area, and that this has, *inter alia*, changed the victims' diet, forced many into the cash economy to survive, and undermined the retention and transmission of traditional knowledge.[264] Professor Kirsch concludes, because of the centrality of their relationship to their lands and forests to their identity, that the mining operations have significantly affected the cultural integrity of the Kaliña and Lokono peoples.[265]

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[260] Affidavit of Grace Watamaleo, at para. 36.

[261] Affidavit of Grace Watamaleo, at para. 37 (adding that "I would say that our cultural integrity and our ability to survive as indigenous peoples and to pass on our cultures and languages to future generations are severely threatened by these activities").

[262] Affidavit of Dr. Stuart Kirsch, p. 12-5.

[263] Affidavit of Dr. Stuart Kirsch, at p. 14.

[264] *See e.g.,* Affidavit of Dr. Stuart Kirsch, at p. 18-9, and, at p. 28 (explaining that "environmental degradation has had a detrimental impact on indigenous practices, forcing more indigenous people into the cash and wage economy. It also imposes significant limits on alternative livelihood strategies. As people spend less time in the forests, they potentially lose important traditional knowledge").

[265] Affidavit of Dr. Stuart Kirsch, p. 17-8 (explaining that "Central to their identity as indigenous peoples is their relationship to their land and resources, their knowledge of local flora and fauna, their taboos and limits on consumption that help them protect the environment, and their subsistence practices"); and, at p. 22, (stating that "The Kaliña and Lokono are at a crossroads in terms of their future: if they do not regain control over their lands and territory soon, many of their successful adaptations to the cash economy will probably fail as the environment continues to be degraded. At that point, they will be vulnerable to both extreme poverty and pressure to move outside of their own territory, as without land rights and therefore control over their forests and rivers, they will lack the means to support themselves. ... I think they have reached a tipping point in which the continued viability of their villages as functioning units, and all that this entails, is now at risk. Their *cultural survival* as indigenous peoples depends in large measure on the continuity of these villages and

Hunting, fishing, and the use of forest products, he explains, "is not only the historical basis of their livelihood, but also a way of life for the Kaliña and Lokono."[266]

99. Professor Kirsch also details the flawed and substantially inadequate mine closure and rehabilitation efforts of the mining companies, observing that these have done very little to mitigate the legacy of environmental degradation caused by their operations,[267] and concludes that their "limited efforts have not been effective."[268] He states that

> Visual inspection of these reclamation areas suggests that relatively little effort or expense has been invested in forest reclamation. In the areas I examined, one could see a small sprinkling of topsoil on the ground, holes dug into the laterite, and the planting of a small number of Cecropia trees (see Figure 5). Their growth appears stunted even ten years after being planted (see Figure 6). In most of the reclamation area, there is little evidence of other trees, plants, or even weeds taking root in the barren red rock.[269]

100. Captain Watamaleo additionally describes the rehabilitation efforts as follows:

> What they did is just plant some trees and these trees have hardly grown at all since they were planted and we are very worried that the forest will never grow back, at least the way it used to be before. We know which kind of tree is useful in a forest, e.g., to feed animals with their fruits and nuts, but the trees that have been planted are not useful. To call what they have done 'rehabilitation' is a joke, but it is not funny to us.[270]

101. Illustrating the long-term impacts of the mining operations, Professor Kirsch explains that

> Even if the government or the courts could compel more robust rehabilitation measures at the closed Wane Hills bauxite mine, it would take generations for that land to be returned to productive use. Meanwhile, the mining of kaolin, sand, and gravel continues to further damage the surrounding landscape. Legal and illegal logging not only destroys the forest, but also causes run-off and sedimentation of local waterways.[271]

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their individual and collective control over traditional resources, land, and territory, including the kinds of social relations this fosters and the reproduction of their shared culture and values").

266 Affidavit of Dr. Stuart Kirsch, p. 18.

267 Affidavit of Dr. Stuart Kirsch, p. 15-7.

268 Affidavit of Dr. Stuart Kirsch, at p. 15.

269 Affidavit of Dr. Stuart Kirsch, at p. 16-7.

270 Affidavit of Grace Watamaleo, at para. 32.

271 Affidavit of Dr. Stuart Kirsch, at p. 21-2.

102. In sum, the mining operations in the WKNR took place without even notifying the Kaliña and Lokono, without an ESIA, without any reasonable benefits and without any safeguards for the victims' rights or the integrity of their lands. The State has presented no evidence that might refute these proven facts. Moreover, this mining has left the victims' with a legacy of environmental degradation and substantial diminishment of their subsistence resources that will have negative impacts for decades to come. To make matters worse, the State has explained in its response that one of the companies responsible for this situation, Suralco, intends to conduct exploration work in the same area to determine if additional mining there is economically feasible.[272] While the State and Suralco claim that the latter has good relations with the Kaliña and Lokono,[273] the evidence before the Court proves that this company only met once with the victims in relation to the mining operations, that this concerned only the closure of the mines and was "a presentation more than a discussion," and that the views of the victims were simply ignored.[274] The impact of the mining operations on the victims is further compounded and intensified by the rampant and uncontrolled logging operations discussed in the following sub-section.

3. Impact of the Logging

103. The evidence before the Court proves that the Kaliña and Lokono peoples have traditionally used their forests for a variety of purposes that are intrinsic to their livelihoods and their cultures, spirituality and identity. The evidence further proves that traditional use of their forests extends to the timber therein, which they use for a variety of purposes,[275] and that they have customary laws governing the ownership and sustainable use and management of the timber[276] within their traditionally owned forests.[277]

104. The evidence further proves that the Kaliña and Lokono have been dispossessed of the forests in their lands at an alarming rate and with severe negative consequences, and that numerous logging concessions have been granted therein. Professor Kirsch, for instance, explains that the "village of Alfonsdorp is located across the road from the [WKNR], which has been turned into a de facto industrial zone, while legal and illegal logging projects are rapidly destroying what remains of their forests. All of the villages in the Lower Marowijne find their forests are shrinking due to legal and illegal logging."[278] He further explains that "one person

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272 Response of the State, p. 12, 14.

273 Response of the State, p. 14.

274 Affidavit of Grace Watamaleo, at para. 32.

275 *See e.g.*, Affidavit of Grace Watamaleo, at para. 34 (explaining that they use timber for houses and canoes).

276 *See e.g.*, Annex 5 to the Commission's Application, *Marowijne – our territory*, p. 89.

277 *See e.g.*, Testimony of Ricardo Pané, Audio Transcript, at 22:26 (explaining that the Kaliña and Lokono peoples have extensive customary laws governing the ownership and sustainable use and management of resources, including forests, in their territory); Affidavit of Captain Grace Watamaleo, 27 January 2015, at para. 4; and Brief of the Victims' Representatives, at para. 16 (explaining that "while timber resources are communally owned, a log becomes the property of the person who cuts it down").

278 Affidavit of Dr. Stuart Kirsch, at p. 18 (further explain that "The State has also granted logging concessions on indigenous land to numerous individuals and companies. Illegal logging operations in the Lower Marowijne are rampant and mostly ignored by the State").

told me: 'There is logging everywhere, making it difficult to hunt. All of the hunting tracks [through the forest] are being destroyed. The creeks are being destroyed. The animals are going away. It is more difficult to make a living [from the forest]'."[279] He also observes that "Legal and illegal logging not only destroys the forest, but also causes run-off and sedimentation of local waterways."[280]

105. Captain Watamaleo observes that the logging operations "are eating up the forest and do not cut the trees in the right way. ... They also destroy hunting tracks, which have been used for many, many generations, and cannot be re-established just like that. This also greatly impacts on our ability to hunt as does the noise caused by these logging operations."[281] She further testifies that the logging operations also cut down trees that are sacred to the Kaliña and Lokono, explaining that "We also never cut certain trees, fruit trees, for example, because these are important for the animals that we hunt, and others that have sacred values to us. These loggers just cut everything or knock down the rest with their machines."[282]

106. Captain Gunther corroborates the preceding[283] and also explains that the victims can no longer make their traditional fishing boats because all of the valuable timber that they use for this purpose has already been extracted.[284] The making of these boats is an important cultural activity and is based on traditional knowledge that is now at risk of disappearing, not to mention being fundamentally related to fishing, both for subsistence and as a cultural activity. Additionally, the loss of this timber places the communities at a significant disadvantage insofar as most are unable to afford to buy non-traditional watercraft to pursue their traditional fishing or for transportation purposes.

107. Last but not least, as with the mining discussed above, the evidence before the Court proves that the logging operations have also significantly affected the cultural integrity of the Kaliña and Lokono peoples because of the centrality of their relationship to their lands and forests to their identity.[285] This conclusion is amplified in light of the massive nature of these numerous incursions into the victims' lands and the denial of their control over and enjoyment of these substantial areas of their territory. This logging is also destroying sacred sites. The Kaliña and Lokono, for instance, have recorded that "we have learned that wood is even being cut in the Kanawa area, one of our sacred sites."[286]

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279 Affidavit of Dr. Stuart Kirsch, at p. 19.
280 Affidavit of Dr. Stuart Kirsch, at p. 22.
281 Affidavit of Grace Watamaleo, at para. 34.
282 Affidavit of Grace Watamaleo, at para. 34.
283 Testimony of Jona Gunther, Audio Transcript, at 1:29:39 *et seq*.
284 Testimony of Jona Gunther, Audio Transcript, at 1:30:35.
285 *See e.g.*, Affidavit of Dr. Stuart Kirsch, p. 17-8; Affidavit of Grace Watamaleo, at para. 37.
286 Annex 5 to the Commission's Application, *Marowijne – our territory*, p. 105.

D. Sub-division, Allotment and Grants of Third Party Rights in Four of the Victims' Villages

108. It is uncontested that the State initiated a project that involved the unilateral sub-division and allotment of a considerable strip of land along the Marowijne River in 1976.[287] This area passes through four of the victims' villages, Wan Shi Sha (Marijkedorp), Pierrekondre, Tapuku and Erowarte. It is further uncontested that the State has issued titles to at least 20 non-indigenous persons in these for communities between 1976 and 2008.[288] It is unknown exactly how many titles have been issued and when they were issued because the State has been unresponsive to the victims' requests for this ostensibly public information.

109. It is also undisputed that these non-community members have primarily built vacation homes along the beaches.[289] The State has acknowledged the inconsequential and transient nature of the interests of these third parties, explaining that they are "non-resident holders of vacation homes"[290] and that they are merely "holiday citizens."[291] The exceptions[292] include the construction of a hotel/casino in Wan Shi Sha,[293] which commenced in 2006,[294] and the activities of a Mr. De Vries, who cleared a piece of land within the village of Pierrekondre with the stated (but as yet unfulfilled) intent of building a house, a filling station and a shopping mall.[295]

110. In its response, the State contends, without providing any supporting evidence, that the area in the four villages in question was not occupied and used by the victims at the time of allotment; that these areas had somehow become "suburbs" of a town called Albina, and were therefore not indigenous lands or part of the indigenous identity that prevails farther away from Albina;[296] and that the Kaliña and Lokono did not complain about these grants of title to

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287 *See e.g.*, Response of the State, p. 10.

288 Testimony of Jona Gunther, Audio Transcript, at 1:20:30.

289 Response of the State, at p. 15; Affidavit of Grace Watamaleo, at para. 8, 10; and Testimony of Jona Gunther, Audio Transcript, at 1:23:21. *See also* Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono, *supra,* at p. 106 (explaining that "In villages where titles are issued to third parties (Pierrekondre, Marijkedorp, Erowarte), city dwellers are the ones who own the best properties along the river. We are forced to move back, inland, and as a result have reduced or no access to the river to moor our boats and to bathe, or wash our clothes").

290 Annex 6 to the Commission's Application, Further comments offered by the State on the Merits in the Case of the Kalina and Lokono Peoples v. Suriname (Case 12.639), 12 September 2008, at p. 10.

291 *Id.* at p. 13.

292 *See also* Affidavit of Grace Watamaleo, para. 11-5 (listing further encroachments); and Brief of the Victims' Representatives, Annex A and B (containing the affidavits of Captain Henry Zaalman and Mr. Max Sabajo).

293 Testimony of Jona Gunther, Audio Transcript, at 1:24:04, 1:39:04.

294 Affidavit of Grace Watamaleo, at para. 12. This is currently being built by a Mr. Dinesh Boekha, pursuant to a permit issued by the State.

295 *See* Annex 13 to the Commission's Application.

296 *See* in this regard Affidavit of Dr. Stuart Kirsch, at p. 22 (stating that "the Kaliña and Lokono have maintained their own identities and cultures for centuries, and continue to do so. They are committed to protecting their culture and passing it on to future generations. The fact that the four villages closest to the town of Albina experience the *most* pressure on their land does not mean they are any less committed to protecting their own indigenous way of life, preserving their own, distinctive worldview, and maintaining strong social

third parties, either initially or thereafter.[297] It made the same argument – in fact, using the exact same words – before the Commission and its contentions were rejected as lacking any merit on factual or legal grounds.[298]

111. The State's argument is not only unsupported by a shred of evidence, it is specious and self-serving; contradicted by its internal practice,[299] by its recognition in other parts of its response and the affidavit of Ms. Sakimin that the four villages are indigenous communities;[300] and by the overwhelming evidence before the Court.[301] Captain Watamaleo considers that the State's argument is just "a story made up to try to justify why the Government had given our lands to outsiders."[302]

112. First, Captains Watamaleo and Gunther adamantly reject the contrived notion that their communities (Wan Shi Sha and Erowarte, respectively, the former being closest to Albina, the latter furthest away) have ever been or are now suburbs of Albina. Captain Watamaleo explains that the Kaliña and Lokono first heard of this notion when they saw a submission made by the State to the Commission in 2009, and that it "made us very angry."[303] In this respect, Captain Gunther testified that his village is an indigenous village[304] and is over six kilometers away from Albina.[305] Both also explained where the boundary is between the four indigenous villages and Albina ("the Anjoemara Creek"),[306] and that they long ago erected a large sign post there, which says "'Welcome to the Indigenous Villages of Wan Shisha, Pierre-kondre, Tapuku and Erowarte,' as a way of making clear that this is where the boundary is as well as to let tourists know that they are within indigenous villages where our rules of behavior are expected."[307]

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relations among community members. Rather than view these villages as more assimilated, they should be seen as more vulnerable and at risk, and therefore in need of greater protection").

297 Response of the State, at p. 10.

298 Application of the Commission, at para. 101 – 16.

299 Affidavit of Grace Watamaleo, at para. 7 (explaining that "As a traditional chief of an indigenous village I receive a monthly stipend from the Government. The Government only pays this stipend to traditional authorities in indigenous and maroon communities. If we lived in the suburbs of Albina, the Government would not pay this stipend and the fact that it does shows that the Government considers Wan Shi Sha to be an indigenous village and not part of Albina").

300 *See e.g.*, Affidavit of Claudine Sakimin, at p. 5 (referring to the indigenous community of Marijkedorp/Wan Shi Sha).

301 Affidavit of Grace Watamaleo, at para. 3-20; Testimony of Jona Gunther, Audio Transcript; and Affidavit of Dr. Stuart Kirsch, p. 23-4.

302 Affidavit of Grace Watamaleo, at para. 6.

303 Affidavit of Grace Watamaleo, at para. 6 (adding that "I want to be clear that my village, which is closest to Albina, is an indigenous village and was never and is not now part of Albina or a suburb of Albina. Everyone in Albina and everyone in my village knows that Wan Shi Sha is an indigenous village and is separate and distinct from Albina. People from Albina do not live here and we do not live in Albina. People from Albina would not think of trying to live here because they know that this is an indigenous village and they can only live here with our permission").

304 Testimony of Jona Gunther, Audio Transcript, at 1:19:39.

305 Testimony of Jona Gunther, Audio Transcript, at 1:19:12.

306 Testimony of Jona Gunther, Audio Transcript, at 1:19:54 *et seq.*

307 Affidavit of Grace Watamaleo, at para. 5.

113. Second, the evidence before the Court proves that the Kaliña and Lokono were occupying and using the allotted area in 1976 and have continued to occupy and use large parts of the same to this day.[308] Captain Gunther stated that the community members who were living in these areas were forced to move at the time of allotment.[309] Both Captains Watamaleo and Gunther also explain that this area runs through the core, residential area of the four villages and that the vacation homes built by non-members are merely meters away from where community members live now.[310] Captain Watamaleo, for instance, explains that "I want to be very clear that these houses are in our villages and right next to where we have our houses. ... Many of the people in my community look out of their windows or front doors and see these houses. They are meters away from many of our houses and not in some uninhabited part of our lands."[311] The representatives note that the Court previously found that one of these titles is "within a residential area of an indigenous village" in *Saramaka People*.[312] Both Captains also unambiguously state that "we still consider that those lands are ours today and that we have unjustly been deprived of them. We believe that they are an integral part of our villages and our traditional lands more broadly."[313]

114. Third, the evidence proves that the victims have complained about the allotment of their lands and the grants of these individual titles in their villages[314] from the inception[315] and continuously until the present day.[316] They even marched almost 150 kilometers to Paramaribo in 1976 to protest this and other violations of their rights, particularly in relation to the GNR.[317] These complaints were simply ignored by the State, or, when a response was forthcoming in 1976 and 1978, they were summarily dismissed by the State.[318] The evidence further proves

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308 Affidavit of Grace Watamaleo, at para. 5; Testimony of Jona Gunther, Audio Transcript, 1:21:10, 1:22:45.

309 Testimony of Jona Gunther, Audio Transcript, at 1:22:19.

310 Affidavit of Grace Watamaleo, para. 9-10; Testimony of Jona Gunther, Audio Transcript, at 1:21:30, 1:21:55.

311 Affidavit of Grace Watamaleo, at para. 10.

312 Saramaka People, at para. 180.

313 Affidavit of Grace Watamaleo, at para. 10 (adding that "We also have a strong spiritual connection to the Marowijne River, which has a central place in our cultural identity and traditions and through which we understand that we belong to this place as much as we believe that it belongs to us. Stopping us from accessing the river is very painful to us for these reasons as well;') and, at para. 18 (stating that "[In 1992] we also began reoccupying our lands that had been given to other people by the Government. They were and are still our lands from our perspective and we believe that we had every right to reclaim them"); and Testimony of Jona Gunther, Audio Transcript, 1:26:40 *et seq*.

314 Affidavit of Grace Watamaleo, para. 16-20; Testimony of Jona Gunther, Audio Transcript, 1:25:10.

315 Affidavit of Grace Watamaleo, at para. 17 (explaining that "we started complaining about this immediately after we found out about the sub-division in 1975 and outsiders started coming into our villages and forcing us to move off our land. Our leaders went to court three times about this and other issues in 1975 and 1976, but the judges just threw out their complaints saying that they had no merit. Our leaders then organized a protest march and walked almost 150 kilometers to Paramaribo to again make clear our objections and to demand that the Government reverse its decisions").

316 *See e.g.,* Annex 12 to the Commission's Application. *See also* Affidavit of Grace Watamaleo, at para. 15 (stating that [Our complaints are] still going on today. In 2013, for instance, we complained to the Government about a title given to the Lely Foundation near a place called Bambusi that is between Pierrekondre and Tapuku. There are community members now living on those same lands. As usual, our complaints were ignored").

317 Testimony of Jona Gunther, Audio Transcript, 1:25:06.

318 *See e.g.*, Brief of the Victims' Representatives, para. 47.

that these non-consensual and uncompensated takings of indigenous lands have been a source of continual conflict for decades, and when the police are called in to resolve the disputes "they tell us we have no rights and cannot complain if the outsider has a title. ... [T]he police and other Government officials tell us that we will never get our rights and that we have to stay quiet. Even the former President ... said he would do everything he could to make sure that we would never get our land rights."[319]

115. The evidence further proves that in addition to constituting ongoing denials of the victims' rights to own and peacefully enjoy their lands that these takings have also had other serious negative impacts on the exercise and enjoyment of their rights and their well-being more generally. In the first place, the taking of lands and granting of titles along the Marowijne River has denied the victims in these four villages access to the river itself and this situation is ongoing. Captain Watamaleo explains that "We used to use the river for many things but we can no longer get to the river bank because of these vacation houses."[320] This fact was confirmed by Professor Kirsch[321] and is further substantiated elsewhere in the evidence before the Court.[322] This denial of access to the river also affects the Kaliña and Lokono peoples' spirituality and cultural integrity. Captain Watamaleo explains in this regard that: "We also have a strong spiritual connection to the Marowijne River, which has a central place in our cultural identity and traditions and through which we understand that we belong to this place as much as we believe that it belongs to us. Stopping us from accessing the river is very painful to us for these reasons as well."[323]

116. The preceding proves that the State's manufactured and self-serving arguments lack merit. It also proves that the State unilaterally and forcibly took the victims' lands – a situation that persists today – and that the State has consistently and unreasonably upheld the rights of the third parties to the victims' extreme detriment. This privileging of third party interests and the ongoing denial of the rights of the Kaliña and Lokono peoples has also been endorsed by the judiciary and this discriminatory treatment is otherwise firmly entrenched in Suriname's legal

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319 Affidavit of Grace Watamaleo, at para. 16.

320 Affidavit of Grace Watamaleo, at para. 9.

321 Affidavit of Dr. Stuart Kirsch, p. 23-4 (stating that "The people of Wan Shi Sha (Marijkedorp) village shared the following example of how they have been disenfranchised by the government's refusal to recognize their land rights. In the past, they traveled by canoe and caught fish in the Marowijne River. However, the government transferred land rights along the Marowijne River to wealthy outsiders from Paramaribo, who posted "trespassing forbidden" signs. This prevented the people from Wan Shi Sha from leaving their canoes along the river bank. They could still reach the Marowijne River by canoe via a creek that ran by their village. But when the government turned the creek into a concrete sluice canal, they were no longer able to paddle their canoes to the river. Today, the people from Wan Shi Sha have no access to the Marowijne River at all").

322 *See e.g.*, Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono, *supra,* at p. 106 (explaining that "In villages where titles are issued to third parties (Pierrekondre, Marijkedorp, Erowarte), city dwellers are the ones who own the best properties along the river. We are forced to move back, inland, and as a result have reduced or no access to the river to moor our boats and to bathe, or wash our clothes").

323 Affidavit of Grace Watamaleo, at para. 10.

system. The 1998 case of *Tjang A Sjin v. Zaalman and Others* is illustrative of both of these substantial defects in Suriname's law and practice.[324]

117. This case was submitted by the holder of one of the titles in Wan Shi Sha against the former Captain of the village on the basis that the community's attempt to stop him from rebuilding his vacation home in the village, which had been destroyed during the 'interior war', was illegal in light of his title issued by the State. Captain Watamaleo explains that "All of the other chiefs from the Lower Marowijne intervened in this case on our behalf and told the court that the land was indigenous land and could not just be taken away and given to others and had to be returned to us."[325] The judge however ruled that the title held by Mr. Tjang A Sjin, as a matter of settled law, superseded and invalidated any claim that the Kaliña and Lokono may have and that his rights must be respected. The Court cited this case in *Saramaka People,*[326] finding that indigenous and tribal peoples in Suriname are placed in a "vulnerable situation where individual property rights may trump their rights over communal property."[327] That this is settled law and entrenched in legislation is further confirmed in the expert testimony of Mariska Muskiet.[328]

118. Last but not least, the evidence before the Court confirms that the titles issued to third parties in the four villages in question are not "ownership titles" as that term is understood in domestic law. Consequently, pursuant to domestic law, the State remains the owner of these lands and it has merely granted limited use rights to the holders of the titles in the lands of the Kaliña and Lokono peoples. The State largely admits this fact, which is otherwise uncontested, in its response to the Commission's application, and, as explained further below, it is additionally

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[324] *Tjang A Sjin v. Zaalman and Others,* Cantonal Court, First Canton, Paramaribo, 21 May 1998. See also Brief of the Victims' Representatives, para. 46.

[325] Affidavit of Grace Watamaleo, at para. 18 (further explaining, at para. 19, that "When the case was heard in 1998 many members of our communities and many other indigenous people from all over Suriname held a vigil for many days in front of the court building so that the judge could see how strongly we felt about this situation").

[326] Saramaka People, at para. 180 (observing that "In another case, a State-issued, privately held land title within a residential area of an indigenous village was upheld over the objections of the Captain of that village. The judge held that since the holder of the land had a valid title under Surinamese law, and the indigenous community did not have title or any other written permit issued by the State, the village had to respect the ownership right of the private title holder").

[327] Saramaka People, at para. 173 (citing the "*Marijkedorp case* (holding that private property titles trump traditional forms of ownership)"); and, and para. 174 (concluding that "the members of the Saramaka people form a distinct tribal community in a situation of vulnerability, both as regards the State as well as private third parties, insofar as they lack the juridical capacity to collectively enjoy the right to property and to challenge before domestic courts alleged violations of such right"). *See also* Saramaka People, para. 108-10, at para. 109-10 (discussing the Decree L-1 of 1982 and explaining that "The official explanatory note to Article 4(1) of Decree L-1 explains that account should be given to the "factual rights" of members of indigenous and tribal peoples when domain land is being issued. The use of the term "factual rights" (or *de facto* rights) in the explanatory note to Article 4(1) of Decree L-1 serves to distinguish these "rights" from the legal *(de jure)* rights accorded to holders of individual real title or other registered property rights recognized and issued by the State") (footnotes omitted).

[328] Affidavit of Professor Mariska Muskiet, para. 21, 23-5. *See also* Affidavit of Magda Hoever-Venoaks, at p. 2 (explaining that any other interest is subordinated to a right *in rem*).

confirmed in the expert testimony of Professor Mariska Muskiet.[329] The dispute before the Court is, therefore, not one involving private parties, but is between the owner of the lands in domestic law, the State, and the traditional owners of these lands, the Kaliña and Lokono peoples.

119. Professor Muskiet explains that Suriname's domestic law provides that "all land in Suriname is owned by the State unless someone can prove their right of ownership;"[330] and that "proving a right of ownership' requires written evidence of a full ownership title. This title, known as '*BW eigendom*' (Civil Code ownership) is based on article 625 of the Surinamese Civil Code, and is currently only issued to foreign embassies. In the past, a few Civil Code ownership titles have been issued by the State."[331] In fact, these ownership titles could only have been issued prior to 1982 as Article 10a of Decree L-1, enacted in that year, provides that it can only be issued for diplomatic purposes.[332] Clearly then, there are only private ownership rights if one of the titles issued in the victims' lands corresponds to one of the few instances that BW *eigendom* has been issued and this could only apply to those titles issued prior to 1982. Professor Muskiet is definite that all "other land titles, which have been issued in Suriname, are titles that are derived from the 'mother title', that is, underlying State ownership of all land, and are classified as limited real rights/limited rights *in rem* (*beperkte zakelijke rechten*)."[333]

120. Consequently, most, if not all, of the titles that have been issued in the four villages are limited use rights and the State maintains an underlying ownership right. It is uncontested that such use rights, in fact any registered rights issued by the State, including logging and mining concessions, will supersede and negate any rights asserted by indigenous peoples under domestic law. This is confirmed by the above quoted judgment and the expert testimony of Mariska Muskiet. It is likewise uncontested and proven that there are no available or effective domestic remedies by which the Kaliña and Lokono could seek the restitution of these lands granted by the State. Indeed, as the Court found in *Saramaka*, indigenous and tribal peoples have no rights in domestic law and no access to any relevant domestic remedies in this regard. This even extends to the Kaliña and Lokono lacking legal personality, which voids their ability to pursue collective claims in domestic venues.[334]

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329 Response of the State, p. 10 (stating that "Titles of ownership, long term lease and leasehold" were granted in the four villages. It is highly improbable that any ownership titles were granted however for the reason stated by Professor Muskiet (*see* para. 3), a fact that may be finally verified if and when the State submits the information requested by the Court pertaining to these titles); and, at p. 11 (explaining the nature of 'landlease' titles, which is "a limited real right on the land" and "a right in rem for freely enjoying a piece of state land").

330 Affidavit of Professor Mariska Muskiet, at para. 2

331 Affidavit of Professor Mariska Muskiet, at para. 3.

332 Response of the State, Annex 3 (containing this decree).

333 Affidavit of Professor Mariska Muskiet, at para. 3 (further explaining that "These titles include a) allodial ownership and hereditary property (*allodiale eigendom en erfelijk bezit*); b) land lease (c) leasehold (*erfpacht*); (d) land lease (*grondhuur*). Currently [since 1982], the law only allows the State to issue land lease titles").

334 Saramaka People, at para. 174 (concluding that the "Saramaka people form a distinct tribal community in a situation of vulnerability, both as regards the State as well as private third parties, insofar as they lack the

121. Suriname law does however provide a mechanism which authorizes the State, assuming it is willing, to revoke the use rights granted pursuant to the titles in question. With respect to titles issued after 1982, the procedure is set forth in the Decree of 1 July 1982, *containing regulations in respect of granting state owned land.* It provides for revocation of the titles, *inter alia*, in the public interest and with compensation.[335] This is sanctioned by Article 34 of the 1987 Constitution, which is of general application to all land titles, irrespective of which kind of title.[336] The same also applies if there are BW *eigendom* titles in the four villages and this is explicitly provided for in the Civil Code.[337]

E. Material Harm

122. The evidence before the Court proves the existence of material harm related to past and ongoing damage to the victims' lands, denials of access to and destruction of their subsistence resources, and severe pecuniary alterations to their way of life. Professor Kirsch explains that "these changes are the consequence of encroachment on indigenous territories rather than choices made by the Kaliña and Lokono. In a very real sense, their opportunities to pursue traditional practices are being reduced or, in some cases, eliminated altogether by the destruction of the forest."[338] This is true in relation to the ongoing and unreasonable failure of the State to recognize and secure the rights of the Kaliña and Lokono peoples to their traditionally owned territory and in relation to the nature reserves, logging and mining, and the taking of the victims' lands and granting of title to non-community members.[339]

123. It is proven that the mining operations in the victims' territory have caused "considerable damage"[340] and huge environmental impacts and concomitant social impacts for the indigenous communities,"[341] and that the rehabilitation efforts "have not been

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juridical capacity to collectively enjoy the right to property and to challenge before domestic courts alleged violations of such right"); and Affidavit of Professor Mariska Muskiet, at para. 25.

335 Response of the State, Annex 2, Articles 29 and 31 (for landlease titles) and Article 40 (for land rent titles).

336 *See* Commission's Application, Annex 10 (containing the 1987 Constitution). *See also* Response of the State, Annex 2, Article 46 (providing that "the rights and obligations of all title holders shall be governed by the general laws of Suriname").

337 Article 625 of the Civil Code provides that the property rights conferred thereby include: "everything save for expropriation in general benefit against prior compensation, in accordance with the Law on the State Administration of Suriname;" [Eigendom is ...] alles behoudens de onteigening ten algemene nutte tegen voorafgaande schadevergoeding, ingevolge de Wet op de Staatsinrichting van Suriname].

338 Affidavit of Dr. Stuart Kirsch, at p. 20.

339 Affidavit of Dr. Stuart Kirsch, at p. 21 (stating that "it is clear that most of the pressure they face comes about as a result of encroachments on their territory: government taking of their land for *faux* conservation projects like the Wane Kreek Nature Reserve, government licensing of timber projects on their land, illegal logging, mining projects, and a variety of individual incursions onto indigenous territories").

340 Annex 23 to the Commission's Application, SRK Consulting, Environmental Sensitivity Analysis of the Wane 4 Concession, at p. 20.

341 Affidavit of Dr. Stuart Kirsch, at p. 27 (stating that "The decision by BHP Billiton and Suralco not to conduct an environmental impact assessment for the Wane Hills bauxite mine in the 1990s resulted in a project with huge

effective."[342] Professor Kirsch explains that "it would take generations for that land to be returned to productive use."[343] These findings are corroborated by Captains Watamaleo and Gunther.[344] The Kaliña and Lokono peoples are, therefore, left with a legacy of serious environmental degradation that may well persist for decades, if not longer, and which has resulted in a significant decrease in the animals they hunt, the fish they eat, and the plants that they use for a variety of purposes (e.g., for medicinal and ritual purposes). The same is also the case for "the mining of kaolin, sand, and gravel [which] continues to further damage the surrounding landscape."[345] The victims were also actively and in a discriminatory way denied access to their means of subsistence by the mining companies for over a decade.[346]

124. The same is also the case in relation to the logging operations which cover much of the Kaliña and Lokono peoples' territory.[347] Captain Watamaleo explains that the logging "greatly impacts on our ability to hunt" and has resulted in widespread destruction of the forest and everything that the victims derive therefrom.[348] Captain Gunther corroborates the preceding and further explains that the victims also can no longer make their traditional fishing boats because all of the valuable timber that they use for this purpose has already been extracted.[349]

125. Professor Kirsch reports that all the Kaliña and Lokono peoples' villages described how the once abundant resources of the WKNR have been greatly diminished due to the mining and logging in that area.[350] This, together with the numerous other encroachments on their lands that have caused the same, has changed the victims' diet, forced many into the cash economy to survive and undermined the retention and transmission of traditional knowledge.[351]

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environmental impacts and concomitant social impacts for the indigenous communities that previously used this area to hunt, fish, and camp").

342 Affidavit of Dr. Stuart Kirsch, at p. 15 and, at p. 11 (explaining that "The red laterite that remains after strip-mining bauxite is inimical to forest re-growth and rehabilitation efforts by BHP Billiton and Suralco have had very limited effectiveness...").

343 Affidavit of Dr. Stuart Kirsch, at p. 21.

344 Testimony of Jona Gunther, Audio Transcript; Affidavit of Grace Watamaleo.

345 Affidavit of Dr. Stuart Kirsch, at p. 21-2. *See also* Affidavit of Grace Watamaleo, at para. 33 (stating that "There are also people who use the mining company's roads to come into the area and to do sand and gravel mining and also kaolin mining. Kaolin is an important resource for us that we have traditionally used for ritual purposes. These people just leave holes behind that fill with water and can become homes for dangerous animals as well as dangerous to the people who go in there").

346 Affidavit of Grace Watamaleo, at para. 30 (explaining that "The mining company also used to stop people from the community from entering the reserve. They put up a big sign that said 'no hunting', 'no fishing', and 'no plant collecting,' and they would stop people from our communities going in there. At the same time we would see company people and others that they let in there hunting and fishing, even using poison to kill large numbers of fish").

347 *See* Section II.C.3 *supra*.

348 Affidavit of Grace Watamaleo, at para. 34.

349 Testimony of Jona Gunther, Audio Transcript, at 1:30:35.

350 Affidavit of Dr. Stuart Kirsch, at p. 8 (explaining that "the [WKNR] has become a de facto extractive zone with negative environmental effects and detrimental consequences for the indigenous peoples of the Lower Marowijne");

351 *See e.g.,* Affidavit of Dr. Stuart Kirsch, at p. 18-9, and, at p. 28 (explaining that "environmental degradation has had a detrimental impact on indigenous practices, forcing more indigenous people into the cash and wage

Professor Kirsch further explains that the destruction of the forest is also depriving the victims of the resources necessary to make a variety of tools and implements and that this also affects the transmission of the associated skills from generation to generation.[352]

126. The victims were also actively denied access to their means of subsistence in the GNR and WWNR for over 40 years.[353] Captain Pané describes how the two most affected communities, Christiaankondre and Langamankondre (collectively known as Galibi), have suffered greatly from the unnecessary, unreasonable and disproportionate restrictions imposed on them by the GNR. He explains that they "have done a lot of damage to my community" and that it has been a struggle for them to survive.[354] This was confirmed by Professor Kirsch, who observes that the "Kaliña living in Galibi faced economic and other problems in coping with restrictions on their use of natural resources imposed by the [GNR]."[355]

127. The evidence before the Court proves that the vast majority of the victims' territory has been taken away from them and that the present situation of the Kaliña and Lokono peoples is dire due to Suriname's acts and omissions. These acts and omissions are long-standing and ongoing and the damage caused thereby is ever expanding and intensifying. Professor Kirsch concludes that "If they lose much more land, they may not be able to hunt or harvest important forest products at all;"[356] and "I think they have reached a tipping point in which the continued viability of their villages as functioning units, and all that this entails, is now at risk."[357] He adds that the "Kaliña and Lokono are at a crossroads in terms of their future: if they do not regain control over their lands and territory soon, many of their successful adaptations to the cash economy will probably fail as the environment continues to be degraded. At that point, they will be vulnerable to both extreme poverty and pressure to move outside of their own territory, as without land rights and therefore control over their forests and rivers, they will lack the means to support themselves."[358]

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economy. It also imposes significant limits on alternative livelihood strategies. As people spend less time in the forests, they potentially lose important traditional knowledge").

352 Affidavit of Dr. Stuart Kirsch, p. 20-1, at p. 21 (explaining that "Many of the practical skills associated with subsistence production are no longer regularly taught by fathers to their sons and mothers to their daughters: '...even to get the materials needed ... you can no longer find them locally because of logging, but have to travel long distances.' ... This reveals their recognition of how much their lives have changed, i.e. that the reproduction of key skills and knowledge is no longer possible using traditional models for teaching and learning").

353 *See* Section II.B.1 *supra*.

354 *See e.g.*, Testimony of Ricardo Pané, Audio Transcript, at 31:40 *et seq*.

355 Affidavit of Dr. Stuart Kirsch, at p. 7.

356 Affidavit of Dr. Stuart Kirsch, p. 21 (further explaining that "This also applies to their traditionally owned coastal seas and the foreshore and seabed from which they traditionally derive a variety of resources, including fish, mollusks, and clays").

357 Affidavit of Dr. Stuart Kirsch, p. 22 (also stating that "Their *cultural survival* as indigenous peoples depends in large measure on the continuity of these villages and their individual and collective control over traditional resources, land, and territory, including the kinds of social relations this fosters and the reproduction of their shared culture and values").

358 Affidavit of Dr. Stuart Kirsch, p. 22.

F. Immaterial Harm Inflicted on the Kaliña and Lokono peoples

128. The evidence before the Court additionally proves, by virtue of Suriname's acts and omissions, including the victims' inability to obtain effective redress for the ensuing violations, that the Kaliña and Lokono peoples have suffered grave immaterial harm. This harm is long-standing, persistent, severe and pervasive. Suriname has threatened their identity and very survival as indigenous peoples, undermined the values they hold most dear, caused severe alterations to their living conditions, and caused the victims' substantial and persistent anxiety, insecurity, pain and suffering. Indeed, the evidence proves that the Kaliña and Lokono peoples have suffered a prolonged and ongoing assault on their moral, mental and cultural integrity. Consequently, on the basis of the proven facts in this case, it is both demonstrated and may be presumed that the victims have suffered moral damages.[359]

129. Captains Watamaleo and Gunther both explain how they live in a state of permanent insecurity and anxiety due to the allotment of the lands in their villages and the constant stream of non-members who either claim to have a title or to be acquiring a title in that area.[360] The former, for example, explains that "We feel that at any time people can show up saying that they have a title and then take our lands away.... We live in a constant state of fear and uncertainty because of this. I felt and knew this before I was the chief and I know it even more now as it is something I experience every day...."[361] Captain Watamaleo also describes how the victims have a "strong spiritual connection to the Marowijne River, which has a central place in our cultural identity and traditions and through which we understand that we belong to this place as much as we believe that it belongs to us. Stopping us from accessing the river is very painful to us for these reasons as well."[362]

130. Captain Pané describes how the victims have suffered physical and emotional harm that amounts to long-standing and enduring "trauma," and that this trauma is a very real part of their everyday lives.[363] He explains that the victims feel discriminated against because of the unilateral taking of their lands by the GNR and WWNR and the ongoing and forcible exclusion of their ability to maintain the full or even partial spectrum of their relations to those and other parts of their territory.[364] He further testified that this situation has created suffering and insecurity for his people[365] and a climate of fear that precludes the victims from peacefully pursuing their traditional subsistence practices in the nature reserves.[366]

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359 See e.g., Moiwana Village case, at para. 191.

360 Testimony of Jona Gunther, Audio Transcript, at 1:34:00. *See also* Affidavit of Dr. Stuart Kirsch, p. 18 (stating that "the villages closest to Albina, especially Pierrekondre, Wan Shi Sha (Marijkedorp), and Erowarte, regularly contend with non-indigenous people making use of their land and resources without permission")

361 Affidavit of Grace Watamaleo, at para. 15.

362 Affidavit of Grace Watamaleo, at para. 10.

363 Testimony of Ricardo Pané, Audio Transcript, at 34:23.

364 Testimony of Ricardo Pané, Audio Transcript, at 28:00.

365 Testimony of Ricardo Pané, Audio Transcript, at 33:11.

366 Testimony of Ricardo Pané, Audio Transcript, at 57:40.

131. Captain Gunther testified that their situation makes them very sad, "it is painful" and makes them angry.[367] "It is very painful" he explains "because our ancestors have been fighting for so long already, not with weapons but with dialogue, and even up to today we still have to struggle."[368]

132. All of the victims who testified before the Court explained how they feel discriminated against and rendered "invisible" by the State.[369] Captain Pané repeatedly used the word "discrimination" in his testimony, stated that he does not feel like a full citizen of the country,[370] and explained that he feels that sea turtles have more rights and protection under Suriname law than the victims do, a feeling that is amply supported by the evidence before the Court.[371] Captain Watamaleo explains that "It is not our fault that we cannot show paper title; it is the Government's fault for not respecting us and treating us equally to the other citizens of this country. This is very painful to us and makes us very angry and very sad. The elders in our communities have experienced this pain and sadness for much longer than I have and it has taken a toll on them, just as it does on all of us today."[372] With respect to the WKNR, she observes that the State "did respect the rights of miners and loggers in this area ... but not our rights. [W]e feel that we are made invisible and treated as second class citizens, and this is just another example of how some people are considered more important and the indigenous peoples are not."[373] Professor Kirsch quotes a member of Alfonsdorp who states that the "Suriname government 'does not see the Amerindians or take them into account.'"[374]

133. As detailed by Professor Kirsch, the Kaliña and Lokono additionally feel discriminated against in relation to the nature reserves in their territory, both by the notion that these areas must be protected against them and by the denigration of their traditional management and care for these lands and their associated traditional knowledge.[375] Captain Watamaleo, for instance, states that "It is unfair to take away our lands for a nature reserve after we have cared and protected them for so long and then to tell us that we can no longer own and manage them because the Government has to protect them, including from us."[376] They are outraged and hurt by the "discriminatory double-standard"[377] that allows these same areas to be severely damaged by "mining and logging that benefits rich people in Paramaribo and other countries and leave us only with misery and pain."[378] The same view is also expressed by Captain Pané

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367 Testimony of Jona Gunther, Audio Transcript, at 1:34:00.
368 Testimony of Jona Gunther, Audio Transcript, at 1:34:36 *et seq.*
369 *See e.g.,* Affidavit of Grace Watamaleo, at para. 26.
370 Testimony of Ricardo Pané, Audio Transcript, at 1:01:22.
371 Testimony of Ricardo Pané, Audio Transcript, at 27:45, 45:50.
372 Affidavit of Grace Watamaleo, at para. 20.
373 Affidavit of Grace Watamaleo, at para. 26.
374 Affidavit of Dr. Stuart Kirsch, at p. 21-2.
375 Affidavit of Dr. Stuart Kirsch, at p. 6-10.
376 Affidavit of Grace Watamaleo, at para. 27.
377 Affidavit of Dr. Stuart Kirsch, at p. 10.
378 Affidavit of Grace Watamaleo, at para. 29.

about the discriminatory privileging of fishing interests in connection with the GNR and WWNR.[379]

134. The Kaliña and Lokono further explain that they are acutely aware of the threats to their integrity and survival posed by Suriname's extended and unreasonable failure to recognize and secure their rights as well as by the ever expanding and ongoing destruction of their territory and their means of subsistence caused by Suriname's failure to respect their rights.[380] In this respect, Professor Kirsch confirms that "the current rate of development and other incursions onto Amerindian land suggests that there may be very little land or resources to protect by the time the State takes action...."[381] Captain Watamaleo describes that the elders "have explained to us that we must protect the land and that we have an obligation to our ancestors and to our children and future generations to protect the land."[382] Talking about the logging and mining in the WKNR,[383] she explains that "we cry when we think what has happened there, what they have taken from us. It is being destroyed even more each day because the loggers and others continue even though the mining has stopped."[384] She explicates that the damage caused by the mining "is very painful for us to see."[385] With respect to the mine closure, she also explains that "we are very worried that the forest will never grow back, at least the way it used to be before. ... To call what they have done 'rehabilitation' is a joke, but it is not funny to us."[386]

135. The Kaliña and Lokono peoples' pressing concerns about their cultural integrity and ability to survive are amply and further illustrated in the following statement by Captain Watamaleo:

> We have many sacred sites throughout our territory and we have strong cultural and spiritual relationships with our territory as well. All of the activities I have talked about have a negative impact on these relationships and not just when specific sacred or cultural sites are affected. I would say that our cultural integrity and our ability to survive as indigenous peoples and to pass on our cultures and languages to future generations are severely threatened by these activities and by the

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379 Testimony of Ricardo Pané, Audio Transcript, at 51:15 *et seq*. *See also* Annex 5 to the Commission's Application, p. 106-7 (detailing extensive complaints made by the victims about commercial fishing operations and their consequences in the victims' traditional waters).

380 *See e.g.*, Affidavit of Dr. Stuart Kirsch, at p. 22 (quoting a young man from Alfonsdorp as follows: "We are rich in natural resources, but because we do not have land rights, we cannot protect our own land." So, they wonder: "What will be left for future generations?")

381 Affidavit of Dr. Stuart Kirsch, at p. 5.

382 Affidavit of Grace Watamaleo, at para. 20.

383 Affidavit of Grace Watamaleo, at para. 20. (explaining that "We have lost so much because the Government refuses to recognize our rights that we would have a hard time living well if this area [the WKNR] is not returned to us. ... If that area needed to be protected from us, it would have been destroyed many years ago, but it was not because we take care of our lands, not only because we and our generations to come need them to live but also because our culture and our laws are based on a deep respect for and understanding of the environment and all living and even non-living things").

384 Affidavit of Grace Watamaleo, at para. 30.

385 Affidavit of Grace Watamaleo, at para. 33.

386 Affidavit of Grace Watamaleo, at para. 32.

> Government's failure to recognize and respect our rights. This is why we have filed an international complaint; we must protect our lands and territory, it is imperative that we do this or we could just disappear.[387]

136. Professor Kirsch also highlights that the Kaliña and Lokono "spoke of their love of place and of the fundamental freedom to go hunting and fishing on their own territories, and how these practices are central to their identities as indigenous peoples."[388] He also observes that "maintaining their relationship to the forests and rivers is of vital importance to them. Hunting, fishing, and the use of non-timber forest products [are] not only the historical basis of their livelihood, but also a way of life for the Kaliña and Lokono."[389] The evidence before the Court proves that these vitally important freedoms and relationships have been severely curtailed due to the State's acts and omissions and that this has inflicted both pecuniary and non-pecuniary harm. Professor Kirsch further explains that this diminishment of subsistence resources is also leading to "structural inequalities" that "may prove corrosive to traditional social relations; there is some evidence that this process has already begun."[390]

137. The victims also describe how their inability to obtain redress has caused them suffering and anxiety and that this made worse by the State's constant and unreasonable disregard for their complaints.[391] Captain Pané explained that for 40 years he has had to "plead" for recognition of their rights and that they always get a negative answer.[392] This even extends to the highest official of the State, the former President, who Captain Watamaleo reports told one of the Captains that "he would do everything he could to make sure that we would never get our land rights."[393] She further explains that "the police and other Government officials tell us that we will never get our rights and that we have to stay quiet."[394]

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387 Affidavit of Grace Watamaleo, at para. 37.

388 Affidavit of Dr. Stuart Kirsch, *inter alia*, at p. 26.

389 Affidavit of Dr. Stuart Kirsch, at p. 17-8.

390 Affidavit of Dr. Stuart Kirsch, at p. 19 (stating that "they share food when hunting and fishing, but not when they earn money. Some degree of inequality from their increased participation in the larger economy is perhaps inevitable, but the Kaliña and Lokono face unprecedented challenges from the larger structural inequalities associated with their incorporation into the monetary economy. For the most part, their societies continue to be based on egalitarian social relations, but the new structural forms of inequality may prove corrosive to traditional social relations; there is some evidence that this process has already begun. The only effective buffer against these problems is greater control over their territories, so that everyone will have access to the resources needed for survival").

391 *See e.g.,* Affidavit of Grace Watamaleo, at para. 17 (stating that "The Government set up a commission ... but it decided that we had no rights to the land and no right to object either. As I said earlier, this is the same response we get today from Government almost 40 years later").

392 Testimony of Ricardo Pané, Audio Transcript, at 35:45.

393 Affidavit of Grace Watamaleo, at para. 16. This statement was corroborated by Professor Kirsch: Affidavit of Dr. Stuart Kirsch, at p. 5 (stating that "In 2008, the former President of Suriname reportedly told one of Captains from the Lower Marowijne River that he would do everything in his power to prevent indigenous peoples from gaining land rights. Similarly, Captain Pane of the Kaliña informed me that the former President announced that it will take many more years to address the question of land rights for indigenous peoples in Suriname...").

394 Affidavit of Grace Watamaleo, at para. 16.

138. With respect to the judicial decision in the case of *Tjang A Sjin v. Zaalman* that upheld the title of Mr. Tjang A Sjin while at the same time denying the rights of the victims, Captain Watamaleo explains that: "I see his house every day, standing next to the river, when I move about in my village. Every day I am reminded about this situation and how the laws of Suriname treat us like we do not exist, how they treat us like second class citizens."[395] Professor Kirsch correctly deduces that "their experiences with the courts have led them to conclude that the laws in Suriname are biased against indigenous peoples and provide no protection or support for indigenous rights...."[396] This point is also made by Captain Watamaleo who states that "we know that we would have no hope of ever successfully challenging these mining operations in a Surinamese court."[397]

139. Professor Kirsch also explains that the Kaliña and Lokono "feel powerless in relation to a government that makes decisions without taking their needs, interests, and rights into account."[398] This also subjects them to considerable insecurity as well: "Because the government does not recognize their land rights, a stranger can show up with a piece of paper and claim to be the legal owners of their land: 'It can happen like this and it has.' They tell stories of walking through the forest and seeing a new logging operation on their land. If the loggers have a government permit, there is nothing they can do about it."[399]

140. The proven facts also demonstrate that the State's acts and omissions have negated the victims' effective control and enjoyment of their territory and greatly undermined the status and role of their traditional governance institutions and authorities. Professor Kirsch pertinently observes in this respect that their "ability to shape the ecology of the land to which they have long held traditional ownership rights and jurisdiction under their own laws is rendered null by the State's refusal to recognize their territorial rights."[400] Captain Pané also testified that the members of his community are constantly calling on him to rectify their situation during the 23

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395 Affidavit of Grace Watamaleo, at para. 19 (further stating that "How is it possible that someone has more rights to our land than we do just because he got a piece of paper less than 40 years ago from the Government when we have lived here for thousands of years. Our ancestors are buried here, we belong to this place because we know it and the spirts that take care of it and make it a good place for us to live and to be free. This land gives us life and is part of us in every way. Mr. Tjang A Sjin just visits every now and again for a few days and is not even from here, but he has more rights than we do in Suriname law. How is this possible? I ask myself this question every time I see his house in my village and the houses of people like him all along the river").

396 Affidavit of Dr. Stuart Kirsch, p. 18.

397 Affidavit of Grace Watamaleo, at para. 31. *See also* Affidavit of Dr. Stuart Kirsch, p. 24 (explaining that "When the Lower Marowijne Indigenous Land Rights Commission (CLIM) approached Suralco about the problem, they were told to direct their complaints to the government. When CLIM complained to the government via a number of formal, constitutional petitions, they did not receive an answer, either. Not having legally-recognized land rights meant that no one would respond their concerns about the environmental impacts of the bauxite mine").

398 Affidavit of Dr. Stuart Kirsch, p. 23.

399 Affidavit of Dr. Stuart Kirsch, p. 23.

400 Affidavit of Dr. Stuart Kirsch, at p. 28.

years that he has been chief and that he has met only with government intransigence.[401] He explains that this has resulted in "physical and emotional trauma, but as a leader he has to continuously struggle for recognition" of their rights.[402] Captain Watamaleo said the same with respect to the individual titles, explaining that this is "something that the elders and others tell me I have to correct whenever I talk with them."[403]

141. The preceding proven facts all establish that the Kaliña and Lokono have suffered a prolonged and ongoing assault on their moral, mental and cultural integrity due to Suriname's acts and omissions, including its long-standing and callous disregard for their rights and their numerous complaints. That they have suffered extreme and enduring moral damages is therefore substantiated and, in accordance with the Court's jurisprudence, may also be presumed. These facts, which are fully within the factual predicate of the Commission's Application, also substantiate a finding that Suriname has violated Article 5 of the American Convention. The Court has the competence, based upon the American Convention and in light of the *iura novit curia* principle, to study and declare a violation of Article 5 in this case and the representatives urge it to do so.[404]

III. THE PROVEN FACTS ESTABLISH VIOLATIONS OF THE AMERICAN CONVENTION

142. In this case, the Commission and the victims' representatives have alleged and, on the basis of the proven facts, substantiated violations of Articles 3, 21 and 25 of the Convention, all in conjunction with Articles 1 and 2 of the same. On the basis of the proven facts and as a matter of law, Suriname is internationally responsible and liable for these violations of the Kaliña and Lokono peoples' rights. Suriname has presented scant evidence that could disprove these alleged violations; on the contrary, the evidence that it has presented tends to prove the allegations made by the Commission and the representatives.

143. Suriname has also failed to offer applicable points of law and argumentation that could prove, as a matter of law, that it has not violated the rights of the Kaliña and Lokono peoples guaranteed by the American Convention or that the State is not internationally liable for those violations. For these reasons, and with the exception of the points below, the victims' representatives hereby reiterate, incorporate by reference, and rely upon their arguments pertaining to the applicable law as set forth in the representatives' brief. The points of applicable law and arguments below are intended to bolster said prior arguments or to clarify or expand on certain issues raised during the public hearing.

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401 Testimony of Ricardo Pané, Audio Transcript, at 33:15 *et seq.*

402 Testimony of Ricardo Pané, Audio Transcript, at 34:28 *et seq.*

403 Affidavit of Grace Watamaleo, at para. 15.

404 *See e.g.,* Moiwana Village, at para. 107 (explaining that "Indeed, a court has the duty to apply all appropriate legal standards – even when not expressly invoked by the parties – in the understanding that those parties have had the opportunity to express their respective positions with regard to the relevant facts").

A. Preliminary: The Court's Jurisdiction *ratione temporis*

144. All of the nature reserves complained about herein were established prior to Suriname's accession to the American Convention and simultaneous acceptance pf the Court's jurisdiction on 12 November 1987. The forcible sub-division of Erowarte, Tapuku, Wan Shi Sha and Pierrekondre and the subsequent issuance of some of the titles therein to non-indigenous persons also occurred prior to that date. However, while the initial events predate the applicability of the Convention to Suriname, the violations of Article 21 proven herein in connection with these title grants and nature reserves are of a permanent nature and concern ongoing "effects and actions subsequent" to Suriname's accession to the Convention. These effects and actions include the permanent and ongoing denial and breach of the victims' property and other rights. Because of the ongoing and continuous nature of these violations, and as further discussed immediately below, the Court has jurisdiction *ratione temporis* to review these violations.[405]

145. The representatives observe that at no time in the proceedings before the Court has the State objected to the Court's temporal jurisdiction over the violations alleged and proven in connection with the establishment and management of the nature reserves and allotment of the four villages and grants of title to third parties therein. The State, for instance, could have interposed a preliminary objection to the Court's jurisdiction in this respect, yet failed to do so, nor did it otherwise raise this issue in any of its submissions, written or oral, before the Court. Moreover, the State has expressly relied on events that occurred in 1978 to justify its acts and omissions in relation to the nature reserves established in the victims' territory, further substantiating that the Court has jurisdiction over the ongoing effects and consequences of the decisions that took place prior to its accession to the Convention. These reserves, *inter alia*, constitute ongoing and discriminatory denials of the victims' property and other rights and, to quote the Court, "the State has not taken the necessary positive measures to reverse that exclusion."[406]

146. The Court has previously retained jurisdiction over a state's continuing violations even though such violations were initiated before that state's formal recognition of its jurisdiction. For example, in the *Blake Case*, the Court rejected a preliminary objection to its jurisdiction *ratione temporis* "insofar as it relates to effects and actions subsequent to [the state's] acceptance."[407] It further explained that it "is therefore competent to examine the possible violations which the Commission imputes to the Government in connection with those effects and actions."[408]

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405 *Moiwana Village Case*, Judgment of 15 June 2005. Ser C No 124, at para. 108; *Blake Case*, Judgment of 2 July 1996. Series C No. 27, at paras. 33 and 40.

406 *Xákmok Kásek, supra,* at para. 274.

407 Blake Case, at para. 33.

408 Blake Case, at para. 40.

147. The Court reaffirmed this approach in, *inter alia*, *Genie Lacayo*, *Plan de Sanchez*, *Alfonso Martín del Campo Dodd*, *Serrano-Cruz Sisters*, *Moiwana Village* and *Sawhoyamaxa*.[409] In *Moiwana Village*, for instance, the Court stated that

> in the case of a continuing or permanent violation, which begins before the acceptance of the Court's jurisdiction and persists even after that acceptance, the Tribunal is competent to examine the actions and omissions occurring subsequent to the recognition of jurisdiction, as well as their respective effects.[410]

148. The Court further explained in its analysis of the violations of Articles 21 and 22 in *Moiwana Village* that it "may properly exercise jurisdiction over the ongoing nature of the community's displacement, which – although initially produced by the 1986 attack on Moiwana Village – constitutes a situation that persisted after the State recognized the Tribunal's jurisdiction in 1987 and continues to the present day."[411] The Court thus ordered the restoration and regularization of the community's property rights "in relation to the traditional territories from which they were expelled" notwithstanding the fact that the initial act that caused the displacement occurred prior to Suriname's acceptance of the Court's jurisdiction.[412]

149. The same is also the case with regard to the third party private property rights that were reviewed by the Court in *Yakye Axa* and *Sawhoyamaxa*. These cases concerned indigenous peoples' claims to restitution of "a property title which has been registered and has been conveyed from one owner to another for a long time."[413] The same was also the case in *Xákmok Kásek*.[414] Additionally, in *Sawhoyamaxa* and *Xákmok Kásek*, even the proceedings instituted by indigenous peoples to recover their lands predated Paraguay's acceptance of the Court's jurisdiction.[415]

150. The jurisprudence of the Court is also subscribed to by other international courts and tribunals which routinely exercise jurisdiction over alleged breaches of international law that began before the date of a state's ratification and continue thereafter.[416] The European Court

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409 *Genie Lacayo Case*, Judgment of 27 January 1995. Series C No. 21, para. 22-26; *Plan de Sánchez Massacre Case, Reparations*, 19 November 2004. Series C No. 105; *Case of Alfonso Martín del Campo-Dodd. Preliminary Objections.* Judgment of September 3, 2004. Series C No. 113, para. 79; *Case of the Serrano-Cruz Sisters. Preliminary Objections.* Judgment of November 23, 2004. Series C No. 118, para. 67; Moiwana Village, *supra*, at para. 39, 108, 126; and *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006. Series C No. 146, para. 95, 128.

410 Moiwana Village, at para. 39.

411 Moiwana Village, at para. 108 and 126.

412 Moiwana Village, at para. 210.

413 Sawhoyamaxa, at para. 125. Xákmok Kásek, para. 50(10)-(11) and para. 122(a).

414 Xákmok Kásek, para. 66 ("Between 1953 and March 2008, the Community's main settlement was in the core of the Salazar Ranch, at Km. 340 of the Trans-Chaco Highway, in the Pozo Colorado district, President Hayes department, in the western region of the Chaco").

415 Sawhoyamaxa, para. 73(6) and Xákmok Kásek, para. 67 ("On December 28, 1990, the Community's leaders filed an administrative action ... in order to recover their traditional Lands").

416 *Sandra Lovelace v. Canada*, Communication No.R.6/24, U.N.Doc.Supp.No.40 (A/36/40) (1981); *Phosphates in Morocco case (Italy v. France)*, PCIJ Series A/B, No. 74 (1938), at 28. *See also inter alia*, *X. v. France*, Eur. Ct. H.R.,

of Human Rights, for example, has held on numerous occasions that temporal limitations do not preclude its review of continuing violations of the European Convention on Human Rights,[417] as has the Human Rights Committee in relation to the International Covenant on Civil and Political Rights and its Optional Protocol I.[418] The principle of continuing violations has also been codified by the International Law Commission in its Articles on State Responsibility.[419]

151. Of particular relevance to the Court's jurisdiction over the alleged violations of Article 21 of the American Convention in this case is the European Court's decision in *Loizidou v. Turkey.* In that case, the European Court found that a deprivation of property that occurred prior to acceptance of its jurisdiction constitutes a continuing violation of the European Convention provided that the applicant can, at present, be regarded as the legal owner of the land in question.[420] The Court endorsed this position in *Moiwana Village*.[421] As proved by the evidence before the Court, under the customary law of the Kaliña and Lokono peoples, the victims remain the lawful owners of the lands and resources and they continue to be deprived of their property rights on an ongoing basis due to Suriname's continuing acts and omissions.

152. The decision of the African Commission on Human and Peoples' Rights in the *Endorois* case is also highly relevant. In that case, Kenya established a nature reserve in 1972, 20 years prior to its ratification of the African Charter of Human and Peoples Rights.[422] This fact however was no bar to the Commission ruling that Kenya had violated property and other rights and identifying the restitution of the lands in the nature reserve to the affected indigenous people as the applicable remedy.[423]

153. The Governing Body of the International Labour Organization has also held states responsible for continuing violations of indigenous peoples' land and resource rights as

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App. no. 18020/91 (1992)(Judgment)(Merits and Just Satisfaction); *Bozano v. France*, Eur. Ct. H.R., App. no. 09990/82 (1986)(Judgment)(Merits).

417 *See inter alia, Papamichalopoulos et al. v. Greece*, Eur. Ct. H.R., App. no. 14556/89 at para. 40 (1993)(Judgment)(Merits); *Agrotexim and Others v. Greece*, Eur. Ct. H.R., App. no. 14807/89 at para. 58 (1995)(Judgment)(Merits), *Loizidou v. Turkey*, Eur. Ct. H.R., App. no. 15318/89 at para. 41(1996)(Judgment), (Merits and Just Satisfaction).

418 *See inter alia, Könye v. Hungary*, Communication 520/1992, U.N. Doc. CCPR/C/50/D/520/1992 at para. 6.4 (1994); *Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic*, Communication No. 516/1992, U.N. Doc. CCPR/C/54/D/516/1992 at para. 4.5 (1995); *Dobroslav Paraga v. Croatia*, Communication No. 727/1996, U.N. Doc CCPR/C/71/D/727/1996 at para. 9.3 (2001) and; *Vladimir Kulomin v. Hungary*, Communication No. 521/1992, U.N. Doc. CCPR/C/50/D/521/1992 at para. 11.2 (1996).

419 *The International Law Commission's Articles on State Responsibility*, annexed to GA Res. 56/83, 12 December 2001, Arts. 14 and 15.

420 *Loizidou v. Turkey (Merits),* Judgment of the ECtHR, 18 December 1996, (40/1993/435/514), at para. 41.

421 Moiwana Village, para. 43 and 134.

422 Endorois Welfare Council v Kenya, para. 154. Kenya ratified the African Charter on 10 February 1992, http://www.achpr.org/instruments/achpr/ratification/.

423 Endorois Welfare Council v Kenya, at para. 199 (explaining that "The African Commission is of the view that ... the Endorois property rights have been encroached upon, in particular by the expropriation and the effective denial of ownership of their land"); and Recommendations 2(a) (recommending that Kenya "Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land").

guaranteed by ILO Convention No. 169 Concerning Indigenous and Tribal Peoples (1989), even though the original events took place decades prior to a state's ratification of that convention. One such case alleged continuing violations by Mexico of indigenous peoples' land and resource rights and their right to be free from involuntary relocation.[424] Observing that Mexico's view that it was not responsible for events that occurred prior to entry into force was correct, the Committee established to review the Representation nonetheless held that

> the effects of the decisions that were taken at that time continue to affect the current situation of the indigenous peoples in question, both in relation to their land claims and to the lack of consultations to resolve those claims. The Committee therefore considers that the Convention does currently apply with respect to the consequences of the decisions taken prior to its entry into force.[425]

154. The Governing Body reached the same conclusion in the *Thule Case* against Denmark, where forcible relocation had occurred 44 years prior to that state's accession to Convention No. 169. In this case, the Governing Body stated that

> The Committee observes that the relocation of the population of the Uummannaq settlement, which forms the basis of this representation, took place in 1953. It also takes note of the fact that the Convention only came into force for Denmark on 22 February 1997. ... However, the Committee notes that the effects of the 1953 relocation continue today, in that the relocated persons cannot return to the Uummannaq settlement and that legal claims to those lands remain outstanding. Accordingly, the Committee considers that the consequences of the relocation that persist following the entry into force of Convention No. 169 still need to be considered with regard to Articles 14(2) and (3), 16(3) and (4) and 17 of the Convention ... despite the fact that the relocation was carried out prior to the entry into force of the Convention.[426]

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[424] *Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, (No. 169), made under article 24 of the ILO Constitution by the Radical Trade Union of Metal and Associated Workers*. Doc.GB.273/15/6; GB.276/16/3 (1999). *See also, Report of the Committee of Experts set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL).* Doc. GB.277/18/4, GB.282/14/2, submitted 2000, at para. 28 and 30 (concerning oil exploration activities in the Ecuadorian Amazon and stating that "the situation created by the signature of that agreement still prevails. In addition, the obligation to consult the peoples concerned does not only apply to the concluding of agreements but also arises on a general level in connection with the application of the provisions of the Convention (see Article 6 of Convention No. 169)").

[425] *Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, (No. 169), id.* at para. 36.

[426] *Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Sulinermik Inuussutissarsiuteqartut Kattuffiat (SIK).* Doc.GB.277/18/3; GB.280/18/5 (2001), at para. 29.

155. Articles 14(2) and (3) of the ILO Convention read, respectively, that: "Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession;" and "[a]dequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned."[427] In the *Thule Case*, the Governing Body concluded by observing that these and other "provisions of the Convention are almost invariably invoked concerning displacements of indigenous and tribal peoples which predated the ratification of the Convention by a member State."[428]

156. The representatives have alleged and proven that violations of the American Convention are extant in relation to Suriname's ongoing acts and omissions: in relation to its ongoing failure to recognize and secure the victims' property rights, the nature reserves, and the individual titles. While some of these violations have their origins in events that predated Suriname's accession to the Convention, the facts proven in this case demonstrate that the ensuing violations are ongoing and continuous and in some cases have been exacerbated by additional acts and omissions that have also resulted in violations, the majority of which post-date Suriname's accession to the Convention and are also ongoing and continuous to the present day. These ongoing and continuous effects, which themselves constitute violations of the Convention – as is well established in the Court's jurisprudence and by other international authorities – *prima facie* fall within the Court's temporal jurisdiction.

B. Suriname has violated Article 21 of the Convention in conjunction with Articles 1 and 2

1. Suriname has failed to recognize and secure the Kaliña and Lokono peoples' property rights in contravention of Articles 21, 1 and 2 of the American Convention

157. The representatives hereby reiterate and incorporate their arguments, as set forth in paragraph 57–71 of the representatives' brief, in relation to Suriname's prolonged, unreasonable, discriminatory and ongoing failure to legally recognize and secure the Kaliña and Lokono peoples' property rights in and to their traditional lands, territory and resources. These violations are uncontested, admitted and confirmed by the State, and otherwise proven by the evidence before the Court.

158. In a 2004 report for the World Bank, eminent Colombian jurist, Roque Roldán concluded that "Suriname lacks even the minimal legal framework necessary to recognize the existence of

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[427] These standards are consistent with the orders of the Court in, *inter alia*, the *Awas Tingni Case*, which provide, among others, that the State establish mechanisms for delimitation, demarcation, and titling of the indigenous communities' properties, "in accordance with the customary law, values, usage, and customs of these communities." *The Mayagna (Sumo)Indigenous Community of Awas Tingni Case*. Judgment of August 31, 2001. Ser C, No. 79, at para. 164.

[428] Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169).

its indigenous peoples, let alone to guarantee their rights."[429] Every international human rights body that has examined the situation of indigenous peoples in Suriname has reached the same conclusion. The Court's 2007 judgment in *Saramaka People*, for instance, is unambiguous in finding that Suriname's law and practice fails to recognize and guarantee indigenous peoples' rights, fails to provide any mechanism by which they may seek protection for their rights, and, to make matters worse, in multiple instances, operates to negate the exercise and enjoyment thereof. The evidence before the Court conclusively demonstrates that nothing has changed to date: Suriname continues to reject, disregard and violate the rights of indigenous peoples with impunity.

159. Suriname has also explicitly admitted that it has failed to recognize and secure the victims' property rights – and the rights of all other indigenous and tribal peoples – and that this situation is ongoing. For example, it states with respect to "the land rights issue," that "'up to this date [26 July 2013] this issue has not be addressed adequately, and up to now no solution has been found.'"[430] The evidence presented to the Court in 2015 further confirms this admission and proves that this situation has not changed since the time the State made that statement in 2013.[431] The evidence before the Court additionally proves that the State is also not presently engaged in any specific activity that could lead to the recognition of these rights in the near future and strongly indicates that the State is opposed to doing so, at least in a way that would be compatible with its international obligations.[432]

160. The uncontested evidence further proves that the Kaliña and Lokono are the traditional owners of their territory, including the coast and adjacent seas that are integral parts thereof. The State is thus obligated to legally recognize their ownership, secure their rights in law and practice, including through the delimitation, demarcation and titling of their territory in accordance with the Kaliña and Lokono's customary tenure and laws, and ensure the effective protection and enjoyment of their property rights "without external interference."[433] The Court's jurisprudence – and international authorities more generally – unambiguously holds that "Traditional possession by indigenous of their lands has the equivalent effect of full title granted by the State" and must be secured in fact and equally protected by law.[434] The Court has additionally held that legislative recognition of territorial rights also must include recognition of indigenous peoples' "right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system."[435] Suriname however has failed to even begin drafting, let alone enact any legislation, that could recognize the Kaliña and

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429 R. Roldán Ortega, *Models for Recognizing Indigenous Land Rights in Latin America*, World Bank: Washington D.C., October 2004, at p. 13, http://siteresources.worldbank.org/BOLIVIA/Resources/Roque_Roldan.pdf.

430 Response of the State, Annex 1A, at p. 2 (quoting an unspecified source).

431 *See inter alia*, Affidavit of Loreen Jubitana; Testimony of Ricardo Pane and Jona Gunther.

432 *See e.g.*, Affidavit of Loreen Jubitana.

433 Saramaka People, at para. 115.

434 Sawhoyamaxa, at para. 128; and *Xákmok Kásek*, at para. 109.

435 Saramaka People, at para. 194 and 214(7). *See also* UNDRIP, Art. 26(2) (providing that "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired").

Lokono peoples' property rights or that could lead to the regularization and enjoyment thereof. To the contrary, its acts and omissions, including numerous public statements, all lead to the inescapable conclusion that it is opposed to doing so.

161. Without secure and enforceable guarantees for their traditionally owned lands, territory and resources, including the right to control internal and external activities affecting them through their own institutions, the Kaliña and Lokono peoples' means of subsistence, their identity and survival,[436] and their socio-cultural integrity and economic security are permanently threatened.[437] The Court emphasized this point in its 2012 *Sarayaku* judgment, stating that, given the "intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival."[438] There is therefore a complex of interdependent human rights converging on and inherent to indigenous peoples' various relationships with their traditional lands and territories as well as their interrelated status as self-determining entities,[439] all of which necessitates a high standard of affirmative protection.[440]

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[436] *See e.g., Río Negro Massacres,* Ser. C No. 250, at para. 160 (citing the right to self-determination and other international standards and stating that the "Court has already indicated that the special relationship of the indigenous peoples with their ancestral lands is not merely because they constitute their main means of subsistence, but also because they are an integral part of their cosmovision, religious beliefs and, consequently, their cultural identity or integrity, which is a fundamental and collective right of the indigenous communities that must be respected in a multicultural, pluralist, and democratic society...").

[437] *See e.g.,* Moiwana Village, para. 101, 102-3 (observing that: "in order for the culture to preserve its very identity and integrity, [indigenous and tribal peoples] ... must maintain a fluid and multidimensional relationship with their ancestral lands"); and Yakye Axa, at para. 146, (where the Court observes that "indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations");

[438] *Kichwa Indigenous People of Sarayaku,* Ser. C No. 245, at para 146 & para. 147 (stating that "Moreover, lack of access to the territories and their natural resources may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through their traditional activities; or having access to their traditional medicinal systems and other socio-cultural functions, thereby exposing them to poor or inhumane living conditions, to increased vulnerability to diseases and epidemics, and subjecting them to extreme situations of vulnerability that can lead to various human rights violations, as well as causing them suffering and harming the preservation of their way of life, customs and language").

[439] *See e.g.,* Sarayaku, para. 159, 171 and, at para. 305 (where the Court discusses measures to "repair the damage caused to the Sarayaku People, particularly through the violation of their rights to self-determination, cultural identity and prior consultation..."); Saramaka People, para. 93 (observing the consequences of "the right of indigenous peoples to self-determination recognized under said Article 1 [of the international Covenants]"); Río Negro Massacres, para. 160 (citing the right to self-determination and other international standards); and *Chitay Nech,* at para. 113 (discussing "the full exercise of the direct participation of an indigenous leader in the structures of the State, where the representation of groups in situations of inequality becomes a necessary prerequisite for the self-determination and the development of the indigenous communities within a plural and democratic State").

[440] *See* H. Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of Indigenous Peoples,* 25 HARVARD HUMAN RIGHTS J. 49, at 51 (2012) (analyzing United Nations' treaty body practice "concerning the rights of indigenous peoples, which suggest[s] a further dimension to the interdependence and indivisibility of human rights. These developments suggest that human rights are interdependent and indivisible not only in terms of mutual reinforcement and equal

162. The evidence before the Court proves that Suriname's long-standing failure to recognize and secure the victims' property rights is undermining and even negating this complex of rights, and the survival of the Kaliña and Lokono peoples' hangs in the balance. Professor Kirsch, for instance, explains that "I think they have reached a tipping point in which the continued viability of their villages as functioning units, and all that this entails, is now at risk."[441] The victims are also acutely aware of this situation. Captain Watamaleo explains in this regard that "our cultural integrity and our ability to survive as indigenous peoples and to pass on our cultures and languages to future generations are severely threatened by these activities and by the Government's failure to recognize and respect our rights."[442] Suriname's flagrant disregard for the victims' rights therefore transcends simple violations of their property rights and strikes at the very heart of the continuing existence of the Kaliña and Lokono peoples' as a viable cultural, political and territorial entity. Its acts and omissions in this respect are further exacerbated by the active and highly prejudicial violations of the victims' territorial rights discussed in the following sections.

163. In light of the preceding, Suriname has violated Article 21 of the Convention in conjunction with Articles 1 and 2 of the same in connection with its prolonged, discriminatory and ongoing failure to recognize and secure the victims' property rights. The representatives observe that these violations are notorious and ongoing despite the Court's orders in *Moiwana Village* and *Saramaka People*, which, if implemented, would address many of the structural issues that are present and that underlie the violations of the victims' rights in the case *sub judice*. The same may also be said for the numerous recommendations and decisions adopted by other human rights bodies and mechanisms over the past 20 years, all of which call attention to the urgent need to address indigenous peoples' rights. The UN Committee on the Elimination

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importance, but also in terms of the actual *content* of these rights") (footnote omitted). *See also e.g.*, Xákmok Kásek, at para. 263 (relating territorial rights to the rights of the child as guaranteed by Article 19 of the American Convention on Human Rights and Article 30 of the Convention on the Rights of the Child; and stating that "the Court finds that the loss of traditional practices like male and female initiation ceremonies and the Community's languages, as well as the damage from the lack of territory, have a particularly negative effect on the development and cultural identity of the Community's children, who will never be able to develop a special relationship with their traditional territory and the way of life unique to their culture if the measures necessary to guarantee the enjoyment of these rights are not implemented"); and *Río Negro Massacres,* at para. 143-44 (holding that the "Court considers it important to indicate that the special measures of protection that the States must adopt in favor of indigenous children include the promotion and protection of their right to live according to their own culture, their own religion and their own language ... and that this right 'is an important recognition of the collective traditions and values in indigenous cultures'" and; "[f]or the full and harmonious development of their personality, indigenous children, in keeping with their cosmovision, need to grow and develop preferably within their own natural and cultural environment, because they possess a distinctive identity that connects them to their land, culture, religion, and language"); and *in accord* Chitay Nech, at para. 169.

441 Affidavit of Dr. Stuart Kirsch, p. 22 (also stating that "Their *cultural survival* as indigenous peoples depends in large measure on the continuity of these villages and their individual and collective control over traditional resources, land, and territory, including the kinds of social relations this fosters and the reproduction of their shared culture and values").

442 Affidavit of Grace Watamaleo, at para. 37.

of Racial Discrimination, for example, adopted decisions under its urgent action and early warning procedures in 2003, 2005 and 2006.[443] In 2003, the Committee decided that the "problems faced by the indigenous communities call for immediate attention...;"[444] and, in 2006, it decided to draw the attention of competent UN bodies to the "particularly alarming situation in relation to the rights of indigenous and tribal peoples in Suriname...."[445] It reiterated these concerns again in 2012, noting that Suriname has failed to respond to its prior requests for information.[446]

164. Rather than comply with its international obligations, Suriname has failed to take any meaningful action and persists in making a plethora of unfounded excuses to justify its inaction, including in the instant case. The representatives respectfully urge the Court to take these facts fully into account when determining reparations. They especially urge the Court to employ the mechanism specified in *Xákmok Kásek* by which the State is required to pay additional compensation for each month of delay in implementing the orders of the Court, and that it does so in relation to each and any order relating to the recognition, restoration or protection for the property and associated rights of the Kaliña and Lokono peoples.[447]

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443 *Decision 3(62), Suriname*. UN Doc. CERD/C/62/Dec/3, 03 June 2003; *Decision 1(67), Suriname*. UN Doc. CERD/C/DEC/SUR/2, 18 August 2005; and *Decision 1(69), Suriname*. UN Doc. CERD/C/DEC/SUR/3, 18 August 2006. *See also Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/64/CO/9/Rev.2, 12 March 2004; *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/SUR/CO/12, 12 March 2009 (e.g., para. 12, stating that "the Committee is concerned at the nonexistence of specific legislative framework to guarantee the realization of the collective rights of indigenous and tribal peoples" and recommending that Suriname "ensure[s] legal acknowledgement of the collective rights of indigenous and tribal peoples ... to own, develop, control and use their lands, resources and communal territories according to customary laws and traditional land-tenure system"), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fSUR%2fCO%2f12&Lang=en.

444 *Decision 3(62), Suriname*. UN Doc. CERD/C/62/DEC/3, 3 June 2003, at para. 4.

445 *Decision 1(69), Suriname*. UN Doc. CERD/C/DEC/SUR/3, 18 August 2006, at para. 4, http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.DEC.SUR.5.pdf.

446 *Communication adopted pursuant to the early warning and urgent action procedure*, 12 March 2012, at p. 1 (stating that "The Committee is particularly concerned that despite the Committees numerous recommendations and decisions regarding the rights of indigenous peoples in Suriname, the marginalisation of indigenous people, which constitutes violation of the human rights protected under the Convention on the Elimination of all Forms of Racial Discrimination, continues in the State party"), http://www2.ohchr.org/english/bodies/cerd/docs/CERD_Suriname.pdf. *See also Communication adopted pursuant to the early warning and urgent action procedure*, 1 March 2013, at p. 1 (confirming the ongoing failure to provide the requested information and again expressing concern about the situation in Suriname, including the lack of implementation of the Court's judgment in *Saramaka People*), http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Suriname1March2013.pdf.

447 Xákmok Kásek, at para. 288 ("the Court orders that, if the three-year time frame established in this judgment expires ... without the State having delivered the traditional lands ... it must pay the leaders of the Community ... the sum of US$10,000.00 ... for each month of delay. The Court understands this reparation as compensation to the victims for the State's failure to comply with the time limits established in this judgment and the resulting pecuniary and non-pecuniary damage, so that it does not constitute compensation that replaces the return of the traditional or alternate lands to the members of the Community").

2. Suriname has contravened Articles 21 and 1 in connection with mining and logging operations

165. The representatives hereby reiterate and incorporate their arguments, set forth in paragraphs 72-79 and 115-19 of the representatives' brief, in relation to Suriname's active violations of the Kaliña and Lokono peoples' property rights in connection with the mining and logging operations that took place and continue to take place within their traditional territory. These violations are largely uncontested and otherwise proven by the evidence before the Court. For instance, it is uncontroverted and proven that Suriname's legislative framework related to logging and mining does not give domestic legal effect to the rights of indigenous and tribal peoples[448] and that there are no effective remedies by which the victims could seek protection for their rights.[449] Likewise, it is uncontested that Suriname law neither provides for the right of indigenous peoples to participate in decision making[450] nor requires ESIA, the latter being explicitly admitted by the State.[451]

166. The evidence before the Court proves that the vast majority of the victims' territory has been subsumed by mining and logging concessions[452] and that there is very little land left for the Kaliña and Lokono peoples.[453] This is in addition to the three nature reserves, which cover almost 50 percent of the victims' territory. The uncontroverted evidence further proves that the State failed to ensure the effective participation of the Kaliña and Lokono in decision making about the logging and mining operations that took place and continue to take place in their territory; failed to conduct ESIA; failed to ensure that the victims received reasonable benefits from these operations; and failed to institute safeguards to ensure that these operations did not have significant, negative impacts on their rights and ability to survive as indigenous peoples more broadly.[454] It is also proven that that considerable and enduring damage has been caused to the victims' lands by these logging and mining operations, most of which are

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448 *See e.g.,* Saramaka People, para. 111-16, 183-4 (the Court, for instance, concluded, at para. 114, that Suriname's 1992 Forest Management Act "fails to give to the communal property rights" of indigenous and tribal peoples). *See also* Affidavit of Magda Hoever-Venoaks, at p. 2.

449 Saramaka People, para. 177-85.

450 Saramaka People, *inter alia*, para. 147 (noting that "In the words of District Commissioner Strijk, 'if there are sacred sites, cemeteries, and agricultural plots, then we have consultation, if there are no sacred sites, [cemeteries,] and agricultural plots, then consultation doesn't take place'. This procedure evidently fails to guarantee the effective participation of the Saramaka people, through their own customs and traditions, in the process of evaluating the issuance of logging concessions within their territory").

451 Response of the State, at p. 20 (admitting that "[ESIAs] are not required by law").

452 Testimony of Ricardo Pané, Audio Transcript, at 26:22 (discussing the map shown to the Court during the public hearing).

453 Affidavit of Dr. Stuart Kirsch, p. 21 (explaining that "If they lose much more land, they may not be able to hunt or harvest important forest products at all;" and further explaining that "[t]his also applies to their traditionally owned coastal seas and the foreshore and seabed from which they traditionally derive a variety of resources, including fish, mollusks, and clays"); Affidavit of Grace Watamaleo, at para. 34 ("these concessions ... cover almost all of the land, not just in the [WKNR] but also the other parts of our territory. There is nowhere left for us to go that has not been given out to others").

454 *See* Section II.C.1 *supra*.

ongoing, and that, *inter alia*, their traditional economy and well-being has been severely affected.[455]

167. The jurisprudence of the Court is unambiguous that States have an obligation to fully respect and protect indigenous peoples' rights in connection with resource exploitation and that the failure to do so constitutes violations of Article 21 of the American Convention. These obligations were extensively detailed in the *Saramaka People* and *Sarayaku* cases. In addition to proving that any restrictions on indigenous property rights in relation to logging and mining are necessary, proportionate and "exceptional,"[456] States may restrict the right to use and enjoy traditionally owned lands and natural resources only when such restriction does not deny their survival as an indigenous people.[457] Additionally, the Court has ruled that States must assess the "cumulative impact of existing and proposed projects" because this allows for "a more accurate assessment on whether the individual or cumulative effects of existing or future activities could jeopardize the survival of indigenous or tribal people."[458]

168. The term 'survival' is understood to mean indigenous peoples' "ability to 'preserve, protect and guarantee the special relationship that they have with their territory', so that 'they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected'."[459] This is very relevant to the case at hand, particularly when the scale and cumulative impact of the nature reserves, extractive operations and individual titles are considered. Not only are the Kaliña and Lokono peoples severely restricted and, in some cases, denied their ability to preserve their relationships with their territory and to maintain their traditional way of life in the vast majority thereof, this even extends to the core residential areas of their villages which have been issued to third parties. The extreme nature of these restrictions is not only disproportionate, the proven facts demonstrate that the cumulative effect of the State's acts and omissions also constitutes an impermissible denial of their survival as indigenous peoples.[460]

168. The representatives have argued that the State may not validly restrict the Kaliña and Lokono peoples' property rights without first legally recognizing those rights as this precludes any

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455 *See* Section II.C. 2 and 3 *supra*.

456 *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12 August 2008. Series C No. 185, at para. 49 (stating that restrictions only permissible "under very specific, exceptional circumstances, particularly when indigenous or tribal land rights are involved").

457 Saramaka People, at para. 128. This has been followed by the Human Rights Committee, which held in *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009, at para. 7.6, that, in the case of indigenous peoples, State parties "must respect the principle of proportionality so as not to endanger the very survival of the community and its members."

458 Saramaka People, Interpretation, at para. 41.

459 Saramaka People, at para. 129-134 and; Saramaka People, Interpretation, at para. 37.

460 *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009, at para. 7.6 (ruling that, in the case of indigenous peoples, state parties "must respect the principle of proportionality so as not to endanger the very survival of the community and its members").

legitimate attempt to consider and balance the rights in question with the asserted public interest.[461] Additionally, subordination of indigenous property rights in the absence of a prior legal recognition of those rights constitutes a racially discriminatory measure imposed on indigenous peoples because no other ethnic group or its members in Suriname (except for tribal peoples) is denied due process of the law, legal certainty and compensation with respect to actual or constructive takings of their property. The representatives further observe that the Court has imposed a higher standard in such situations, requiring, for example, in *Saramaka People*, that until the delimitation, demarcation, and titling of Saramaka territory has been completed, "Suriname must abstain from acts which might lead the agents of the State itself, or third parties ... to affect the existence, value, use or enjoyment of the[ir] territory ... unless the State obtains the free, informed and prior consent of the Saramaka people."[462] The representatives consider that this is the appropriate standard in the case *sub judice* and that it is proven that Suriname has failed to comply therewith.

168. Should the Court nonetheless consider it necessary to review the specific requirements pertaining to restrictions to indigenous property rights, it is also proven that Suriname has failed to comply with these requirements in relation to the logging and mining operations in the victims' territory. In *Saramaka*, the Court identified four requirements that must be adhered to in order to ensure that a proposed restriction does not deny survival as an indigenous people. The first is effective participation in decision making; the second, the conduct of participatory ESIA; the third, reasonable benefit sharing; and the fourth, instituting adequate safeguards and mechanisms in order to ensure that the restrictions would not cause major damage.[463]

169. With regard to the effective participation requirement, the evidence before the Court proves that at no time did the State seek to involve in the Kaliña and Lokono in decision making about the logging and mining concessions and the operations therein that cover the vast majority of their territory. Indeed, the victims only found out about almost all of these operations when they discovered company employees working on their lands or when they obtained maps showing the concessions.[464] The State has presented no evidence that could controvert the preceding.

170. The representatives again assert that the correct standard to be applied in the case *sub judice* is the consent of the victims, rather than consultation. The Court has explained that this standard pertains in the case of "large-scale" projects that may have a major or significant impact within indigenous territories[465] and that the cumulative impact of smaller existing and

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461 Brief of the Victims' Representatives, para. 72-79

462 Saramaka People, at para. 214(5).

463 Saramaka People, para. 129, 154. *See also Yatama v. Nicaragua*, Ser. C No. 127, at para. 225 (where the Court held that state parties to the American Convention must guarantee that indigenous peoples "can participate, in conditions of equality, in decision-making on matters that affect or could affect their rights and the development of their communities ... and that they are able to do so through their own institutions and in accordance with their values, uses, customs and forms of organization...").

464 *See* Section II.C.1 *supra*; Affidavit of Grace Watamaleo, at para. 30, 35; Testimony of Jona Gunther, Audio Transcript, at 1:29:40; Affidavit of Dr. Stuart Kirsch, p. 9; and Affidavit of Loreen Jubitana, at para. 39.

465 Saramaka People, para. 134-37.

proposed projects may also trigger the requirement that consent be obtained.[466] The UN Expert Mechanism on the Rights of Indigenous Peoples,[467] the African Commission on Human and Peoples Rights and others have reached the same conclusion.[468] It is proven herein that the large-scale bauxite mining in the victims' territory has had a major impact on their territory and their rights and well-being and that these negative impacts may well extend far into the future.[469] These negative impacts are further extended and intensified by the logging operations and the substantial restrictions on the victims' rights in connection with the nature reserves. These activities, cumulatively, cover almost all of the Kaliña and Lokono peoples' territory and the impact thereof is extreme and highly prejudicial. This requires the consent of the Kaliña and Lokono in order to ensure their survival.[470]

171. This conclusion is further bolstered by the evidence that proves that the logging and mining operations in the victims' territory have substantially compromised their ability to pursue their traditional subsistence and other practices.[471] The Human Rights Committee, for instance, has repeatedly found that "the acceptability of measures that affect or interfere with culturally significant economic activities ... depends on whether [indigenous peoples] ... have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy."[472] It is proven that the

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466 *Saramaka People, Interpretation,* at para. 41 (explaining that explains that environmental and social impact assessments need to address the "cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual or cumulative effects of existing or future activities could jeopardize the survival or indigenous or tribal people").

467 UN Expert Mechanism on the Rights of Indigenous Peoples, *Advice No. 4 (2012): Indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, at para. 27 (explaining that "the factors relevant to assessing whether the duty to obtain indigenous peoples' consent arises in the context of proposed and ongoing extractive activities include: (a) Matters of fundamental importance to rights, survival, dignity and wellbeing, assessed from the perspective and priorities of the indigenous peoples concerned, taking into account, inter alia, the cumulative effects of previous encroachments or activities and historical inequities faced by the indigenous peoples concerned; (b) The impact on indigenous peoples' lives or territories. If it is likely to be major, significant or direct, indigenous peoples' consent is necessary; (c) The nature of the measure").

468 Endorois Welfare Council v. Kenya, para. 227.

469 *See* Section II.C.2 and 3 *supra.*

470 Saramaka People, at para. 137 (stating that "the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs"); and Saramaka People, Interpretation, at para. 17 (explaining that, "depending on the level of impact of the proposed activity, the state may additionally be required to obtain consent from the Saramaka people. The tribunal has emphasized that when large-scale development or investment projects could affect the integrity of the Saramaka people's lands and natural resources, the state has a duty not only to consult with the Saramaka's, but also to obtain their free, prior and informed consent in accordance with their customs and traditions").

471 *See* Section II.C.2 and 3 *supra.*

472 *Apirana Mahuika et al. v. New Zealand,* CCPR/C/70/D/547/1993, November 15, 2000, para. 9.5. See also *Xákmok Kásek,* at para. 157 (citing *Saramaka* and stating that "the State must ensure the effective participation of the members of the Community, in keeping with their customs and traditions, regarding any plans or decisions that might affect their traditional lands that can bring restrictions of use and enjoyment of

Kaliña and Lokono can no longer adequately benefit from their traditional economy due to the takings, use and degradation of their lands by others and that they may completely lose the ability to do so should they be deprived of additional lands and forests in the near future.[473] In this respect, the Human Rights Committee emphasized in 2009 that "the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities" of indigenous peoples depends on their participation, and "that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community."[474]

172. The Committee on Economic, Social and Cultural Rights has also ruled that states parties must recognize and respect indigenous peoples' rights "to own, develop, control and use their communal lands, territories and resources" and "respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights."[475] Likewise, the UN Committee on the Elimination of Racial Discrimination emphasizes indigenous peoples' right, effectuated through their own freely identified representatives or institutions,[476] to give their prior and informed consent in general[477] and in connection with specific activities, including: mining and oil and gas operations;[478] logging;[479] the establishment of protected

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said lands in order to prevent those plans or decisions from denying an indigenous people from their subsistence").

473 *See e.g.*, Affidavit of Dr. Stuart Kirsch, p. 21 (explaining that "If they lose much more land, they may not be able to hunt or harvest important forest products at all"); Testimony of Jona Gunther, Audio Transcript, at 1:29:52 *et seq* (explaining the severe negative impact of these operations on the Kaliña and Lokono's traditional subsistence resources and practices, how traditional village life has been turned upside down, and how the Wane Kreek, a prime source of fish, has been polluted); and Section II.C.2 and 3.

474 *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009, at para. 7.6 (stating that "the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community").

475 Committee on Economic, Social and Cultural Rights, *General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, adopted at the Committee's Forty-third session, 2–20 November 2009. UN Doc. E/C.12/GC/21, 21 December 2009, at para. 36-7.

476 *See e.g.*, 'Letter to the Permanent Mission of the Philippines, Urgent Action and Early Warning Procedure, 24 August 2007, p. 2, http://www.ohchr.org/english/bodies/cerd/docs/philippines_letter.pdf (expressing concern about alleged manipulation of the right to consent related to a government agency's "creation of a body with no status in indigenous structure and not deemed representative" by the affected people).

477 *See e.g.*, *General Recommendation XXIII on Indigenous Peoples*, adopted by the Committee on the Elimination of Racial Discrimination at its 51st session, 18 August 1997, para. 4(d) (explaining that "no decisions directly relating to their rights and interests are taken without their informed consent"); and Australia: CERD/C/AUS/CO/14, 14 April 2005, para. 11 (recommending that Australia "take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in its general recommendation XXIII").

478 *See e.g.*, Guyana: CERD/C/GUY/CO/14, 4 April 2006, para. 19 (recommending that Guyana "seek the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities"); Guatemala: CERD/C/GTM/CO/11,

areas;[480] dams;[481] agro-industrial plantations;[482] resettlement;[483] compulsory takings;[484] and other decisions affecting the status of land rights.[485] The obligation to obtain consent is also highlighted by a range of UN expert bodies and Special Procedures of the UN Human Rights Council.[486] Citing the Human Rights Committee, the Special Rapporteur on the Right to Food, for example, explains that "no people's land, including in particular indigenous peoples, can

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15 May 2006, para. 19; Suriname: Decision 1(67), CERD/C/DEC/SUR/4, 18 August 2005, para. 3.

479 *See e.g.*, Cambodia: CERD/C/304/Add.54, 31 March 1998, paras 13, 19 (observing that the "rights of indigenous peoples have been disregarded in many government decisions, in particular those relating to citizenship, logging concessions and concessions for industrial plantations" and recommending that Cambodia "ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent").

480 *See e.g.*, Botswana: UN Doc. A/57/18, 23 August 2002, paras 292-314, (para. 304 concerning the Central Kalahari Game Reserve); and Botswana: CERD/C/BWA/CO/16, 4 April 2006, para. 12.

481 *See e.g.*, India: CERD/C/IND/CO/19, 5 May 2007, para. 19 (stating that India "should seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects and provide adequate compensation and alternative land and housing to those communities").

482 *See e.g.*, 'Indonesia', CERD/C/IDN/CO/3, 15 August 2007, para. 17 (recommending that Indonesia "ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in the Plan"); and Cambodia, *supra*, paras 13, 19.

483 *See e.g.*, 'India', *supra*, para. 20 (stating that the "State party should also ensure that tribal communities are not evicted from their lands without seeking their prior informed consent and provision of adequate alternative land and compensation"); Botswana, *supra*, para. 12 (recommending that the state "study all possible alternatives to relocation; and (d) seek the prior free and informed consent of the persons and groups concerned"). *See also* Laos: CERD/C/LAO/CO/15, 18 April 2005, para. 18.

484 Guyana, *supra*, para. 17 (recommending that Guyana "confine the taking of indigenous property to cases where this is strictly necessary, following consultation with the communities concerned, with a view to securing their informed consent").

485 Australia, para. 11 (recommending "that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land"); 'United States of America', A/56/18, 14 August 2001, paras 380-407, (para. 400 concerning "plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, placing their land up for auction for private sale, and other actions affecting the rights of indigenous peoples").

486 *See e.g.*, UN Expert Mechanism on the Rights of Indigenous Peoples, *Advice No. 4 (2012): Indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, para. 21-7 (explaining, at para. 27(a), that "the factors relevant to assessing whether the duty to obtain indigenous peoples' consent arises in the context of proposed and ongoing extractive activities include: (a) Matters of fundamental importance to rights, survival, dignity and wellbeing, assessed from the perspective and priorities of the indigenous peoples concerned, taking into account, inter alia, the cumulative effects of previous encroachments or activities and historical inequities faced by the indigenous peoples concerned"); http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/CompilationEMRIP2009_2013_en.pdf; and *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, UN Doc. A/HRC/24/41, 1 July 2013, para. 26-36 (stating, at para. 28, that "The general rule identified here derives from the character of free, prior and informed consent as a safeguard for the internationally recognized rights of indigenous peoples that are typically affected by extractive activities that occur within their territories;" and "given the invasive nature of industrial-scale extraction of natural resources, the enjoyment of these rights is invariably affected in one way or another when extractive activities occur within indigenous territories – thus the general rule that indigenous consent is required for extractive activities within indigenous territories").

have its use changed without prior consultation."[487] He thus recommended that any changes in land use can only take place "with free, prior and informed consent" and emphasizes that this "is particularly important for indigenous communities, in view of the discrimination and marginalization they have been historically subjected to."[488] The latter is particularly relevant to the case at hand given the long-standing, pervasive and ongoing discrimination and marginalization suffered by the Kaliña and Lokono peoples, a fact attested to by the UN Committee on the Elimination of Racial Discrimination in 2012.[489]

173. It is additionally uncontested and proven that no ESIA was required or conducted in relation to the mining and logging operations in the victims' territory.[490] The Court has ruled that the conduct of ESIA is one of the conditions necessary to ensure survival as an indigenous people,[491] and states that the "purpose of the ESIAs is not only to have some objective measure of such possible impact on the land and people, but also ... 'to ensure that [the affected people] ... are aware of the possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily'."[492] The Court therefore ties the prior ESIA to the States' duty to guarantee the effective participation of the indigenous peoples in decisions about activities that may affect their territories.[493] Importantly, the Court also explains that ESIAs need to address the "cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual or cumulative effects of existing or future activities could jeopardize the survival of indigenous or tribal people."[494]

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487 *See Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge.* Mr. Olivier De Schutter, Special Rapporteur on the right to food, 11 June 2009, at p. 12 (citing Human Rights Committee, *Concluding Observations: Sweden*, 7 May 2009 (CCPR/C/SWE/CO/6), para. 20).

488 *Id.* at p. 13-5 (the Special Rapporteur identifies the following as one of the main human rights principles that is applicable in this context: "Indigenous peoples have been granted specific forms of protection of their rights on land under international law. States shall consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources").

489 *Communication adopted pursuant to the early warning and urgent action procedure*, 12 March 2012, at p. 1 (stating that "The Committee is particularly concerned that despite the Committees numerous recommendations and decisions regarding the rights of indigenous peoples in Suriname, the marginalisation of indigenous people, which constitutes violation of the human rights protected under the Convention on the Elimination of all Forms of Racial Discrimination, continues in the State party"), http://www2.ohchr.org/english/bodies/cerd/docs/CERD_Suriname.pdf.

490 Affidavit of Dr. Stuart Kirsch, p. 12 (explaining that "Despite it being a global norm to conduct environmental and social impact studies (EIS or EISA) prior to undertaking projects of this magnitude (Goldman 2000), BHP Billiton and Suralco did not conduct such studies because there "is no formal requirement under Suriname legislation for an EIS" (Ian Wood, Vice-President for Sustainable Development, BHP Billiton, personal communication, 10 February 2009)") and, at p. 13, note 11.

491 Saramaka People, at para. 129.

492 Saramaka People, Interpretation, at para. 40.

493 Saramaka People, Interpretation, at para. 41.

494 Saramaka People, Interpretation, at para. 41.

174. Suriname's failure to require ESIA and its failure to adequately supervise the logging and mining operations led to and continue to result in substantial damage to the victims' lands. Indeed, the evidence proves both the absence of any adequate safeguards – which could only be rationally determined after the conduct of participatory ESIAs – and the existence of severe damage caused by these operations.[495] Professor Kirsch, for example, confirms that the "decision by BHP Billiton and Suralco not to conduct an [ESIA] for the Wane Hills bauxite mine in the 1990s resulted in a project with huge environmental impacts and concomitant social impacts for the indigenous communities that previously used this area to hunt, fish, and camp."[496] Suriname has thus failed to institute adequate safeguards and mechanisms in order to ensure that the logging and mining would not cause major damage. There is likewise no evidence that the victims have received reasonable benefits from these ongoing and massive restrictions on and denials of their rights. Indeed, the only benefit claimed by the State[497] has itself caused damage to the victims' lands.[498]

175. The evidence further proves that the damage caused to the victims' lands is substantial and long-lasting and can be expected to intensify and expand as the logging and mining operations continue. This additional mining is for sand, gravel and kaolin and, as discussed below, could also involve additional large-scale bauxite mining.[499] The evidence also proves that the rehabilitation of the mining sites in the WKNR has not been effective and the area could take generations to become productive again.[500] This further substantiates the inadequate nature of any measures to avoid major damage.

176. Last but not least, the representatives emphasize that the State has clearly stated that Suralco, one of the mining companies involved in the mining of the bauxite deposits in the WKNR, intends to conduct additional exploration in the victims' lands to determine if it is

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495 *See* Section II.C.2 and 3 *supra*.

496 Affidavit of Dr. Stuart Kirsch, p. 27.

497 Response of the State, at p. 12 (identifying the only alleged benefit to be the use, by a handful of the victims, of a haul road constructed by the mining companies).

498 Affidavit of Dr. Stuart Kirsch, at p.11 (stating that "the wide access roads (see Figure 4) built by the mining company have facilitated access to the area by a variety of legal and illegal mining and logging operations, further degrading the Wane Kreek Nature Reserve, which has become a major industrial zone"); and, at p. 15, ("[t]he construction of wide mining roads has made it easy for legal and illegal loggers to enter the area and clear the forest. Because there was no ESIA for the project, no one had an opportunity to object to the width of the roads constructed for the Wane Hills project (see discussion of road impacts in Goodland 2007)").

499 Affidavit of Dr. Stuart Kirsch, at p. 21-2 (explaining that "Even if the government or the courts could compel more robust rehabilitation measures at the closed Wane Hills bauxite mine, it would take generations for that land to be returned to productive use. Meanwhile, the mining of kaolin, sand, and gravel continues to further damage the surrounding landscape. Legal and illegal logging not only destroys the forest, but also causes run-off and sedimentation of local waterways").

500 Affidavit of Dr. Stuart Kirsch, at p. 16-7 (explaining that "Visual inspection of these reclamation areas suggests that relatively little effort or expense has been invested in forest reclamation. In the areas I examined, one could see a small sprinkling of topsoil on the ground, holes dug into the laterite, and the planting of a small number of Cecropia trees (see Figure 5). Their growth appears stunted even ten years after being planted (see Figure 6). In most of the reclamation area, there is little evidence of other trees, plants, or even weeds taking root in the barren red rock"); and Affidavit of Grace Watamaleo, at para. 32.

feasible to conduct further mining operations.[501] This mining has already left the victims' with a legacy of environmental degradation and substantial diminishment of their subsistence resources that will have negative impacts for decades to come. Moreover, neither the State nor the company involved have shown any commitment to respecting the rights of the Kaliña and Lokono to date, nor given any indication that they will alter their behavior in the future. The representatives respectfully urge the Court to fully consider this when determining reparations, especially guarantees of non-repetition.

3. Suriname has contravened Articles 21, 1 and 2 in connection with the establishment and maintenance of nature reserves

177. The representatives hereby reiterate and incorporate their arguments, as set forth in paragraph 72-102 of the representatives' brief, in relation to Suriname's active violations of the Kaliña and Lokono peoples' property rights in connection with the three nature reserves in their territory. The maintenance and management of these reserves contravenes the rights of Kaliña and Lokono pursuant to, *inter alia*, Article 21 of the Convention in conjunction with Articles 1 and 2 of the same. In addition to violating the American Convention, Suriname's ongoing acts and omissions in relation to these reserves also contravene international environmental law, policy and best practice, particularly the standards established pursuant to the Convention on Biological Diversity ("CBD"). The CBD has been ratified by Suriname (entered into force in 1995) and is relevant in accordance with Article 29b of the Convention and the Court's jurisprudence.

Proven Facts:

178. Three nature reserves have been established in the territory of the Kaliña and Lokono peoples, all pursuant to the 1954 *Nature Protection Act*.[502] The WKNR is 45,000 hectares and is entirely within the victims' territory; the GNR is 4000 hectares and is entirely within the victims' territory; and the WWNR is 36,000 hectares, approximately 10,800 hectares of which are in the victims' territory. These reserves together comprise 59,800 hectares, or around 45 percent, of the victims' territory, which is approximately 133,945 hectares in size. They cumulatively represent a massive expropriation and ongoing, unnecessary and discriminatory dispossession of the victims' lands, as well as a substantial and unjustifiable constraint on their ability to survive as indigenous peoples.

179. It is uncontested and proven that the Kaliña and Lokono were neither consulted about nor consented to the establishment and management of the GNR and WWNR.[503] Suriname's claims that the victims agreed to the WKNR, and the restrictions on their rights therein, are baseless and disproven, and solely rely on a single meeting held with an NGO in 1978, more than 8 years prior to the establishment of the WKNR.[504] The Court's jurisprudence[505] is

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501 Response of the State, p. 12, 14.

502 *See* Section II.B *supra*.

503 *See* para. 30 *supra*.

504 *See* para. 55-60 *supra*.

505 *See e.g.*, Yatama v. Nicaragua, at para. 225 (stressing that states parties to the American Convention must guarantee that indigenous peoples "can participate, in conditions of equality, in decision-making on matters

unambiguous that consultation must take place in conformity with indigenous peoples' customs and traditions, and that it is the indigenous peoples "not the State, who must decide which person or group of persons will represent the[m] ... in each consultation process."[506] The Court has additionally explained that the direct representation of indigenous peoples, through their mandated representatives and institutions, is "a necessary prerequisite" for the exercise of their right to self-determination and, by extension, their right to freely pursue their economic, social and cultural development "within a plural and democratic State."[507] Suriname's claims about consultations with an NGO are thus baseless as a matter of law as well.

180. The evidence before the Court proves that the victims consider the lands incorporated into the three reserves to be their lands and an integral part of their traditional territory, and that they have been unjustly deprived of these lands on an ongoing basis.[508] The evidence further proves that the Kaliña and Lokono continue to maintain a variety of relationships to these lands, including traditional use, and cultural and spiritual connections, and that they consider themselves to be the owners in accordance with their customary laws. Captain Pané explained that the lands in the GNR and WWNR are of fundamental importance to the victims, that these lands were unilaterally taken from them, and that they continue to be deprived of these lands today.[509] The testimony of Captains Watamaleo and Gunther confirms that the lands in the WKNR were traditionally owned by the victims prior to and in 1986, and that they still consider that they are the owners of these lands today.[510] Witnesses Gunther, Watamaleo and Kirsch also explain the fundamental importance of the lands in the WKNR to the Kaliña and Lokono peoples and their ongoing and multiple relationships to those lands.[511]

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that affect or could affect their rights and the development of their communities ... and that they are able to do so through their own institutions and in accordance with their values, uses, customs and forms of organization....". *See also* Sarayaku, at para. 202-03 (explaining that consultation "procedures must include, according to systematic and pre-established criteria, the various forms of indigenous organization, provided these respond to the internal processes of these peoples" and finding that Ecuador violated indigenous peoples' rights because it was "proven that the oil company tried to negotiate directly with some members of the Sarayaku People, without respecting their forms of political organization. ... Accordingly, the Court considers that the actions carried out by the company in order to obtain the consent of the Sarayaku People cannot be construed as an appropriate and accessible consultation").

506 Saramaka People, Interpretation, at para. 18. *See also Chitay Nech v. Guatemala*, Ser. C No. 212, at para. 115 (observing that its jurisprudence confirms that indigenous peoples have a right to direct participation in decisions that may affect their rights and development, "in accordance with their values, traditions, customs and forms of organization"); and UN Declaration on the Rights of Indigenous Peoples, Article 18 (providing that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures...").

507 Chitay Nech, at para. 117.

508 *See* para. 20-1, 44-6 *supra*.

509 Testimony of Ricardo Pané, Audio Transcript, 27:55, and, at 21:10 (explaining that the GNR and the adjacent coastal seas are their primary fishing area, where they also traditionally utilize numerous resources of the coast and foreshore, and one of the few areas in which these communities are able to do traditional farming).

510 Testimony of Jona Gunther, Audio Transcript, at 1:26:40; Affidavit of Grace Watamaleo, at para. 21, 26.

511 Testimony of Jona Gunther, Audio Transcript, at 1:26:50; Affidavit of Dr. Stuart Kirsch, at p. 9 (stating that "the [WKNR] and the Wane Hills area was a place where all of the indigenous peoples of the Lower Marowijne regularly went to hunt, fish, and camp"). *See also* Affidavit of Grace Watamaleo, at para. 21 (stating that the WKNR "is especially important for us as it is one of our primary hunting and fishing areas and where we get

181. While it admits that these reserves violate the Kaliña and Lokono peoples' rights, Suriname has presented no evidence that could justify why it is necessary or proportionate to take their victims' lands to achieve the asserted public interest, nor why it is necessary or proportionate to impose severe restrictions on their use and enjoyment of these lands.[512] This includes the possibility of criminal sanctions for engaging in traditional subsistence practices.[513] It has also presented no evidence that could confirm that the Kaliña and Lokono peoples are effectively involved in decision making or have agreed to either the establishment or maintenance of these reserves or the restrictions on and denials of their rights therein. It is uncontested that no due process or compensation was provided the victims and no consideration has been given to the fundamental importance of these lands to the victims' integrity, survival and well-being, and that the State has not sought to rectify this situation to date. To the contrary, the State has deployed discriminatory and coercive measures to reinforce and increase its ongoing denial of the Kaliña and Lokono peoples' rights.[514]

182. It is additionally proven that there are no legal guarantees for the use rights of the Kaliña and Lokono peoples in the GNR and WWNR.[515] Suriname's claim that "in practice, traditional use rights of land and resources of the indigenous peoples have been respected" in the GNR and WWNR[516] is directly controverted by the evidence.[517] At any rate, respect for rights "in practice" was deemed insufficient by the Court to comply with the State's obligations under the American Convention in *Saramaka People*.[518] The State's contentions with respect to the purported protection for undefined 'traditional rights' in the WKNR also do not stand up to scrutiny and amount to no more than a vague acknowledgement of the *de facto*, illusory and unenforceable privileges accorded to indigenous peoples by Suriname law.[519] The same is also

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many important things from the forest, like medicines and clays and kaolin that are used in rituals. We have always had camps and settlements there so that we can enjoy and benefit from the forest and its resources. There are also old villages and sacred sites, areas that we consider fundamentally important to our origins and identity, in there as well and we consider it part of our ancestral heartland").

512 Response of the State, at p. 15 (stating that "the "creation of nature reserves by the State of Suriname does run contrary to the rights of Indigenous peoples or the full exercise of their traditional way of living, since the nature reserves serve a justified general interest ... the conservation and protection of the environment").

513 *See* Article 5 of the 1954 Nature Protection Act in Annex 6 to the Response of the State.

514 *See e.g.*, para. 33-5 *supra*.

515 *See* para. 31 *supra* (citing Annex 18 to Commission's Application: Affidavit of F. Baal and B. Drakenstein, at p. 1; Annexes 8 and 9 to the State's Response (containing copies of the resolutions establishing the Wia Wia and Galibi reserves); and Affidavit of Claudine Sakimin, at p. 4 (stating that "no specific provisions were included with respect to traditional rights of the indigenous communities" with regard to the GNR and WWNR)).

516 Annex 18 to Commission's Application: Affidavit of F. Baal and B. Drakenstein, at p. 1. *See also* Affidavit of Claudine Sakimin.

517 *See e.g.*, para. 33-40 *supra*.

518 Saramaka People, at para. 115 (where the Court explained that indigenous peoples' rights "must be recognized and respected, not only in practice, but also in law, in order to ensure [their] legal certainty").

519 *See* para. 49-53 *supra*; and Affidavit of Mariska Muskiet, at para. 12 (explaining that "the term *'de facto* rights' refers to the actual use and occupation of the land by the Maroons; what they do as their day-to-day activities. Its meaning may be elicited by *a contrario* reasoning: *'de jure'* rights are rights recognized in the law, which are registered and enforceable against others, whereas *'de facto* rights' are rights that are not legally

the case for its claims that these *de facto* privileges somehow became "a rule within the other Nature Reserves established."[520]

Application of Human Rights Norms:

183. International human rights bodies, including the Court,[521] have ruled that protected areas are subject to the same human rights norms, rules and treatment as any other intervention by states in indigenous territories.[522] The UN Special Rapporteur on the Rights of Indigenous Peoples explicitly made this point in her testimony before the Court.[523] She also explained that the Conference of Parties ("COP") to the CBD has also expressly and repeatedly subjected the establishment and management of protected areas to compliance with "applicable international obligations."[524] These applicable obligations include those pertaining to Suriname pursuant to the American Convention. Therefore, the same norms and criteria apply to protected areas as do to the mining and logging concessions discussed above and the individual titles discussed below.

Necessity, Proportionality, and Survival as an Indigenous People:

184. Suriname must therefore justify that the taking of close to 50 percent of the Kaliña and Lokono peoples' territory for these nature reserves is strictly necessary, proportionate, non-

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recognized, not registered and are not enforceable. You could say that they are a type of privilege, similar to the revocable 'privileges' discussed above").

520 Affidavit of Claudine Sakimin, at p. 4. *See also* para. 32 *supra*.

521 Xákmok Kásek, para. 80-3, 115 (stating that "In addition, for reasons beyond their control, the members of the Community have been entirely prevented from carrying out traditional activities on the land claimed since early 2008 owing to the creation of the private nature reserve on part of it"); 157-61, 169 (stating that "the declaration of a private nature reserve on part of the territory claimed by the Community (*supra* para. 80) not only prevented them from carrying out their traditional activities on that land, but also its expropriation and occupation under any circumstance"); and 170 (stating that "the State completely ignored the indigenous claim when it declared part of that traditional territory a private nature reserve...").

522 *Endorois Welfare Council v Kenya,* African Commission on Human and Peoples' Rights (February 2010); *Concluding observations of the Committee on the Elimination of Racial Discrimination: Ethiopia.* UN Doc. CERD/C/ETH/CO/15, at para. 22 (expressing concern "about the consequences for indigenous groups of the establishment of national parks in the State party and their ability to pursue their traditional way of life in such parks;" and recommending that *"the State party provide ... information on the effective participation of indigenous communities in the decisions directly relating to their rights and interests, including their informed consent in the establishment of national parks, and as to how the effective management of those parks is carried out"); and Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana.* 23/08/2002. UN Doc. A/57/18,paras.292-314, at 304.

523 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:24:00.

524 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:22:50 (referencing *inter alia* Decision VII/28 Protected Areas, at para. 22 ("the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous [peoples] consistent with national law and applicable international obligations"), http://www.cbd.int/decision/cop/?id=7765. *See also* Decision X/31, Protected Areas, para. 32(c) (providing that "Establish effective processes for the full and effective participation of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, in the governance of protected areas, consistent with national law and applicable international obligations"), http://www.cbd.int/decision/cop/?id=12297.

discriminatory, and does not deny their survival as indigenous peoples.[525] Again, the term 'survival' is understood to mean indigenous peoples' "ability to 'preserve, protect and guarantee the special relationship that they have with their territory', so that 'they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected'."[526] The State has failed to justify either the necessity or the proportionality of the measures employed. In short, there is no rational connection between the asserted public interest and the taking and ongoing denial of the Kaliña and Lokono peoples' ownership rights over the lands in question. Ms. Tauli-Corpuz explicitly made this point in her testimony,[527] as did expert witness, Professor Gilbert,[528] and it is fully consistent with the jurisprudence of the African Commission on Human and Peoples' Rights, which ruled in 2010 that "the denial of [indigenous peoples'] property rights over their ancestral land is disproportionate to any public need served by the Game Reserve."[529]

185. There is no rational connection between the taking of the victims' lands and the protection of nesting sea turtles in the GNR and WWNR, nor are the measures employed proportionate to the protection of the turtles.[530] First, the turtles can be protected without denying the victims' ownership rights via agreements on specific conservation measures. Second, the turtles only nest between March and late July each year, yet the restrictions, including possible criminal sanctions, are in force year round. Third, the turtles nest on the beaches and the majority of the Kaliña and Lokono's traditional activities take place elsewhere. Fourth, the Kaliña and Lokono neither hunt nor eat sea turtles and their traditional fishing does not affect the turtles. Finally, in case of the WWNR, the State itself admits that no turtles nest there anymore and that the protection of birds has no impact on traditional activities.[531] Yet, while these traditional activities logically also have no impact on the protection of the birds – the only justification now asserted by the State – the State maintains its exclusionary and coercive measures in relation the WWNR.

186. There is likewise no rational connection between the taking of the Kaliña and Lokono peoples' lands to protect the ecosystems in the WKNR, particular when the evidence before the Court shows that these areas were effectively protected by them prior to the State's unilateral

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525 Saramaka People, at para. 128. This has been followed by the Human Rights Committee, which held in *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009, at para. 7.6, that, in the case of indigenous peoples, State parties "must respect the principle of proportionality so as not to endanger the very survival of the community and its members."

526 Saramaka People, at para. 129-134 and; Saramaka People, Interpretation, at para. 37.

527 Testimony of Expert Witness Victoria Tauli Corpuz, Audio Transcript, Part 2, at 1:35:34 (concluding that the reserves are "coercive and exclusionary and the means employed are unnecessary and disproportionate to the asserted public interest, which could be achieved in a different and less drastic way. Also, because they are by law owned by the State, I would classify these reserves as an ongoing and outwardly illegitimate dispossession of indigenous lands that requires redress").

528 Testimony of Expert Witness, Professor Jeremie Gilbert, Audio Transcript, Part 2, at 26:55 *et seq.*

529 Endorois Welfare Council v Kenya, at para. 214.

530 *See* Section II.B.1 *supra*.

531 *See* para. 42 *supra*.

taking of these lands in 1986 and that they have now been substantially degraded due to the State's acts and omissions. The State has presented no evidence that could show that the Kaliña and Lokono are a threat to the WKNR and the representatives have presented copious evidence that proves that the State and those authorized by it are not only the primary threat, but have realized substantial damage to the WKNR, all to the extreme detriment of the Kaliña and Lokono peoples.[532] The evidence shows that the State has not even developed a management plan for the WKNR and that it has been "turned into an extractive zone without regard to indigenous land rights or resource use," in which logging, large-scale bauxite mining and other mining has taken and continues to take place to this day.[533]

187. Expert witnesses Tauli-Corpuz and Gilbert explained that contemporary international environmental law and policy recognize the effectiveness of indigenous management and conservation of their territories and the biodiversity therein. This recognition is in large part based on decades of research, summarized in paragraph 62-82 above, which confirms this conclusion and even strongly supports that indigenous conservation is more effective than state-created protected areas. A 2011 study undertaken for the World Bank's Independent Evaluation Group, for example, concludes that: in Latin America and the Caribbean "where indigenous areas can be identified, they are found to have extremely large impacts on reducing deforestation;" and, "indigenous areas are almost twice as effective as any other form of protection."[534]

188. Ms. Tauli-Corpuz explains that the preceding "puts the onus on states to justify why non-consensual protected areas may be strictly necessary within indigenous territories."[535] Suriname has singularly failed to meet its burden in this respect and it has presented no evidence that could either substantiate that it is necessary to take the victims' lands to satisfy conservation objectives or that coercive restrictions on their rights in the reserves are necessary or proportionate. It has also provided no evidence that it at any time considered alternatives to its current practice, either at the time the reserves were established or at any time thereafter. In short, it has failed to provide any evidence that the taking of the victims' lands and the ongoing denial of their rights has any rational basis in relation to the public interest that it asserts justifies these enduring and highly prejudicial violations of the rights of the Kaliña and Lokono peoples.

Discrimination and Denial of Equal Protection:

189. The evidence before the Court also proves that Suriname's treatment of the Kaliña and Lokono and their rights in relation to the reserves is also discriminatory and denies them equal

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532 *See e.g.*, para. 61-5 and Section II.C *supra*.

533 Affidavit of Dr. Stuart Kirsch, at p. 8 (further explaining, at p. 9, that "The irony that the State took indigenous lands at Wane Kreek for the purposes of a conservation area precisely *because* the indigenous communities sustainably managed the resources there – in contrast to widespread development elsewhere along the coastal plains – and then allowed the area to become an extractive zone is not lost on the Kaliña and Lokono indigenous peoples").

534 A. Nelson & K. Chomitz, *Effectiveness of Strict vs. Multiple Use Protected Areas*, at Table 6.

535 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:30:31.

protection of the law. This is not only relevant in relation to Articles 1 and 21 of the Convention, but also to assessing the necessity and proportionality of these reserves and the restrictive measures employed in relation thereto.[536] The prohibition of discrimination in Article 1 of the Convention "extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations."[537] The Court has also ruled that states "are obliged 'to adopt positive measures to reverse or change discriminatory situations that ... prejudice a specific group of people'."[538] Therefore, when Suriname acceded to the American Convention in November 1987, it accepted, but has yet to comply with, the obligation to affirmatively remove discriminatory provisions in its laws and practice, including as related to the nature reserves *sub judice*.

190. Discrimination and denial of equal protection of the law are evident, proven and uncontested by the State with regard to the following. First, Article 1 of the 1954 *Nature Protection Act* only authorizes the State to establish nature reserves where the lands in question comprise "part of the state domain..." or State lands.[539] The State, thus, cannot establish a reserve over lands that are privately held by virtue of a grant of property rights pursuant to its domestic law.[540] The State admits that that "the reserves [in the instant case] were established ... in areas which were and still are domain land...," confirming that it has failed to this day to even consider, let alone recognize, the victims' traditional ownership and associated rights.[541] That the State has failed to recognize and secure the title of the Kaliña and Lokono – a long-standing and discriminatory omission for which the State bears sole responsibility – is the only reason that its domestic law permits the victims' lands to be taken for nature reserves. It cannot take the property of other private persons or entities, but it can take the victims' lands solely because it has failed to recognize and secure their property rights in national law. This differential treatment is illegitimate under human rights law.[542]

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536 *See e.g., Asmundsson v. Iceland*, ECtHR, Judgment of 12 October 2004, at §40 (ruling that "Unjustifiable differential treatment in itself" strongly supports a finding that restrictive measures are impermissible, "which consideration must carry great weight in the assessment of the proportionality issue...").

537 *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, OC-4/84, January 19, 1984. Series A No.4, at para. 54. *See also Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights),* OC-11/90, August 10, 1990, Series A No.11, at para. 34 (stating that Article 1 not only requires that states-parties immediately respect and ensure the free and full exercise of the rights set out in the American Convention, it also "imposes an affirmative duty on the states ... to take all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the rights the Convention guarantees").

538 Xákmok Kásek, at para. 271.

539 Response of the State, at p. 16 (referring to Article 1 of the 1954 Nature Protection Act, as contained in Annex 6 to the Response of the State).

540 That this also applies to logging and mining concessions, which are regarded as registered property rights, is confirmed in the affidavits of Mariska Muskiet, para. 22, and Magda Hoever-Venoaks, p. 1.

541 Annex 6 to the Commission's Application, Further comments offered by the State on the Merits in the Case of the Kalina and Lokono Peoples v. Suriname (Case 12.639), 12 September 2008, at p. 10.

542 *See e.g.*, Xákmok Kásek, at para. 273 (referring to a "situation of extreme and special vulnerability of the members of the Community [which] is due, *inter alia,* to ... the prevalence of a vision of property that grants

191. The Court referenced guarantees of non-discrimination and equal protection of the law in relation to a nature reserve in *Xákmok Kásek.* It explained that "it has been proved that the declaration of a private nature reserve on part of the land reclaimed by the Community did not take into account its territorial claim and it was not consulted about this declaration;" and this "reveals *de facto* discrimination against the members of the Xákmok Kásek Community…. In addition, it is evident that the State has not taken the necessary positive measures to reverse that exclusion."[543] While not directly analogous to the facts of the instant case, this reasoning and conclusion is nonetheless justified and appropriate to the situation of the Kaliña and Lokono. They were neither consulted about the reserves, nor did the State consider their territorial rights and it has done nothing to reverse this exclusion to date.

192. To make matters worse, it is proven and the State has admitted that it does in fact uphold the private property rights of non-indigenous persons and entities in relation to the reserves. This is expressly stated in Article 4 of the 1986 Nature Protection Resolution that established the WKNR, which provides a glaring example of discriminatory treatment and denial of equal protection of the law.[544] This article saves prior property rights, titles and concessions within the WKNR, including the logging and mining concessions discussed above, but fails to uphold and equally protect indigenous peoples' prior title, limiting the purported protection for indigenous peoples to undefined and illusory privileges.[545] The Court specifically rejected the adequacy of these privileges in *Saramaka People.*[546] This unjustifiable and discriminatory privileging of third party interests[547] also negates the exercise of these privileges in the corresponding areas as well.[548]

193. Discriminatory treatment and the State's unjustifiable privileging of commercial interests is additionally evident and proven by the State's failure to adequately regulate commercial fishing in the vicinity of the GNR and WWNR and by its allowance of logging and mining in the WKNR. In the case of the former, the State has severely restricted the victims' traditional fishing,[549] while at the same time allowing commercial fishing that is notorious for killing sea turtles.[550] Only in 2012, did the State institute a 'fishing zone' in the area in question,

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greater protection to the private owners over the indigenous peoples' territorial claims, thus failing to recognize their cultural identity and threatening their physical subsistence").

543 Xákmok Kásek, at para. 274.

544 *See* para. 49 *supra*.

545 *See* para. 50-3 *supra;* and Brief of the Victims' Representatives, para. 36-37.

546 Saramaka People, at para. 115-16 (where the Court ruled that Suriname's laws were substantially inadequate because its "legal framework merely grants the members of the Saramaka people a privilege to use land…").

547 *Decision 2(54): Australia,* 18/03/99, UN Doc. A/54/18, para. 21(2), at para. 6 (addressing an analogous situation, the UNCERD determined that Australia's amended *Native Title Act* was discriminatory because, *inter alia*, "[w]hile the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for Governments and third parties at the expense of indigenous title").

548 *See* para. 54 *supra*.

549 *See e.g.*, para. 35 *supra*.

550 *See* para. 40 *supra*.

which is in effect from 1 March to 31 July,[551] but, as Captain Pané testified, this is often ignored and rarely enforced.[552] This "no fishing zone" is in effect only during the egg-laying season (and, if enforced, could be considered rational and proportionate), while the denial of and restrictions on the rights of the Kaliña and Lokono are in place and actively enforced year-round.[553] Likewise, the mining and logging interests are guaranteed by law and allowed to exercise their rights without hindrance – even to the point of causing substantial damage to the WNKR – whereas the victims' rights are unrecognized and their exercise is negated both by the existence of third party rights and severely curtailed by the extractive operations conducted by these third parties.[554]

Unreasonable Restrictions on and Denial of Access, Use and Enjoyment of Lands and Resources:

194. The evidence before the Court proves that the Kaliña and Lokono's subsistence practices and traditional economy have been severely hindered, and, in some cases, denied altogether, in the nature reserves.[555] As explained above, these restrictive measures are unnecessary and disproportionate and the State has presented no evidence that might contradict this. They also contravene the Court's jurisprudence, other international human rights norms applicable to Suriname and international environmental law. As discussed in the representatives' brief, the rights guaranteed by Articles 1 and 27 of the International Covenant on Civil and Political Rights are especially relevant and protect the full range of cultural, spiritual and economic relations to lands and resources.[556] These rights are also guaranteed under the International Covenant on Economic, Social and Cultural Rights, which also requires that states parties "respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights."[557]

195. Ms. Tauli-Corpuz also highlighted Article 10c of the CBD, which provides that state parties shall "protect and encourage [indigenous peoples'] customary use of biological resources in accordance with traditional cultural practices...,"[558] and explained that this applies

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551 *See Suriname: Sustainable Management of Fisheries*, Inter-American Development Bank, July 10, 2013, at p. 18 (stating that "fisheries was considered a major source of mortality for [sea turtles] ... as reported by Chevalier *et al.* (1999) and Hilterman and Goverse (2004). As a result, the Department of Fisheries has seasonal closure of these areas to fishing as evidenced in their 2012 Annual Fisheries Decree, which indicates that no fishing can the place the Galibi Region with a closed season of March 1–July 31 to protect turtle nesting"), http://www.iadb.org/projectDocument.cfm?id=38149488.

552 Testimony of Ricardo Pané, Audio Transcript, at 52:20.

553 *See* para. 41 *supra*.

554 *See* Sections II.B.2 and II.C *supra*.

555 *See e.g.*, para. 33-6, and 61-4.

556 Brief of the Victims' Representatives, para. 88-9.

557 Committee on Economic, Social and Cultural Rights, *General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, adopted at the Committee's Forty-third session, 2–20 November 2009. UN Doc. E/C.12/GC/21, 21 December 2009, at para. 36-7.

558 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:24:25.

to both terrestrial and marine areas of indigenous territories.[559] She further explained that, in 2014, the COP to the CBD adopted a decision that addresses Article 10c in relation to protected areas.[560] This decision "highlights the requirement that protected areas and management regimes must be consensual if indigenous peoples' rights are to be respected, and emphasizes the need for a collaborative approach, or recognition of indigenous peoples' own conservation initiatives within their territories."[561] This decision further states that "Protected areas established without the prior informed consent or approval and involvement of indigenous and local communities can restrict access to and use of traditional areas and therefore undermine customary practices and knowledge associated with certain areas or biological resources."[562] The evidence before the Court proves that this has happened in the present case.

The Ongoing Lack of Effective Participation:

196. The proven facts demonstrate that Kaliña and Lokono peoples' right to effectively participate in decision making pertaining to the nature reserves is neither legally guaranteed nor respected. There is no participation at all in relation to the WKNR, despite the fact that it covers around one-third of their territory, or the WWNR. There is also no meaningful participation in decisions about the GNR and the State's claims to the contrary are disproven by the testimony of Captain Pané and Professor Kirsch.[563] This contravenes the applicable human rights norms and international environmental law, and further perpetuates and intensifies the exclusionary and coercive nature of these reserves.

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559 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:45:22 *See also Inter-American Convention for the Protection and Conservation of the Sea Turtle*, Article 3(a) (providing that "Each Party may allow exceptions to Paragraph 2(a) to satisfy economic subsistence needs of traditional communities ... provided that such exceptions do not undermine efforts to achieve the objective of this Convention"), http://www.iacseaturtle.org/eng-docs/Texto-CIT-ENG.pdf.

560 *See* Decision XII/12, *Plan of Action on Customary Sustainable Use of Biological Diversity*, at para. 9 ("Protected areas established without the prior informed consent or approval and involvement of indigenous and local communities can restrict access to and use of traditional areas and therefore undermine customary practices and knowledge associated with certain areas or biological resources. At the same time, conservation of biodiversity is vital for the protection and maintenance of customary sustainable use of biological diversity and associated traditional knowledge. Customary sustainable use of biological diversity and traditional knowledge can contribute to the effective conservation of important biodiversity sites, either through shared governance or joint management of official protected areas or through indigenous and community conserved territories and areas. Community protocols and other community procedures can be used by indigenous and local communities to articulate their values, procedures and priorities and engage in dialogue and collaboration with external actors (such as government agencies and conservation organizations) towards shared aims, for example, appropriate ways to respect, recognize and support customary sustainable use of biological diversity and traditional cultural practices in protected areas"), http://www.cbd.int/doc/decisions/cop-12/cop-12-dec-12-en.pdf.

561 *See also Id.* at p. 8, Tasks, 3(i) (containing one of the action points listed in the programme of work annexed to this decision, and illustrating the consent requirement as well as the explicit linkage to human rights norms more broadly, and mandating compiling examples of best practice that: "Promote, in accordance with national legislation and applicable international obligations, the full and effective participation of indigenous [peoples], and also their prior and informed consent to or approval of, and involvement in, the establishment, expansion, governance and management of protected areas, including marine protected areas...").

562 Decision XII/12, *Plan of Action on Customary Sustainable Use of Biological Diversity*, at para. 9.

563 *See* para. 36-40 *supra*.

197. When it acceded to the American Convention in 1987, Suriname accepted the obligation to ensure the effective participation of the Kaliña and Lokono peoples' in decision making with regard to the reserves, yet to this day it has not taken any meaningful action to comply therewith. To make matters worse, it argued before the Court that a single meeting in 1978 with an NGO essentially discharged its obligations to ensure the participation of the victims in decision making.[564] However, the obligation to ensure effective participation and, where appropriate, indigenous peoples' consent is ongoing and not limited to solely the establishment of the nature reserves in question; it also applies to the maintenance and management thereof. The UN Special Rapporteur confirmed that these are among the norms employed by her office and are consistent with the jurisprudence of the UN treaty bodies. She explained that one of the norms is "that decision making in relation to all aspects of protected areas must take place with indigenous peoples' effective participation, and their consent where any restrictions on their rights may be proposed, and that this obligation is ongoing."[565]

198. The Court has also held that the obligation to secure indigenous peoples' effective participation is ongoing, stating in *Saramaka People* that it involves a duty to both accept and disseminate information, and "entails constant communication between the parties."[566] In *Sarayaku*, the Court explained that "States must ... create channels for sustained, effective and reliable dialogue with the indigenous communities in consultation and participation processes through their representative institutions;"[567] and "must guarantee these rights to consultation and participation at all stages of the planning and implementation of a project."[568] It further explained that "consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement."[569] The Court further holds that states "have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditions, customs and forms of organization," and this clearly entails ongoing processes of participation, particularly given the Court's ruling that "the right to cultural identity is a fundamental right."[570] Suriname, however, has failed to comply with any aspect of the Kaliña

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564 *See* para. 55-60 *supra*.

565 Testimony of Expert Witness, Victoria Tauli-Corpuz, Audio Transcript, Part 2, at 1:32:35 (additionally explaining that "The Rapporteurship has adhered to the same basic principles enunciated by the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, the latter explicitly in relation to protected areas. These basic principles are: first, that states must "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources;" second, that decision making in relation to all aspects of protected areas must take place with indigenous peoples' effective participation, and their consent where any restrictions on their rights may be proposed, and that this obligation is ongoing; and third, that indigenous peoples have a right to restitution and other forms of redress where their lands have been incorporated into protected areas without their consent").

566 Saramaka People, at para. 133.

567 Sarayaku, at para. 166.

568 Sarayaku, at para. 167 (and, at para. 184, explaining that "it has not been contested that the State did not carry out any type of consultation with the Sarayaku, at any stage of the implementation of oil exploration activities, through their institutions and representative bodies").

569 Sarayaku, at para. 177.

570 Sarayaku, at para. 217.

and Lokono peoples' right to effective participation, and most aspects of their lives have been negatively affected by the nature reserves.

199. Ms. Tauli-Corpuz additionally explained that consensual approaches to protected area maintenance and management are inherent to the relevant CBD standards and international policy and best practice. The COP to the CDB, for instance, called on states parties to "Establish effective processes for the full and effective participation of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, in the governance of protected areas, consistent with national law and applicable international obligations."[571] Its most recent decision on Article 10c and protected areas further states that ""Customary sustainable use of biological diversity and traditional knowledge can contribute to the effective conservation of important biodiversity sites, either through shared governance or joint management of official protected areas or through indigenous ... conserved territories and areas."[572] It further provides that "Cultural, social, economic and ecological elements associated with the traditional management systems of lands, waters and territories of indigenous and local communities and their involvement in the management of these areas should be recognized, secured and protected, as they contribute to customary sustainable use of biological diversity."[573]

200. Tauli-Corpuz additionally explains that these principles are also reflected in COP decisions defining the 'Ecosystem Approach' and adopting the Addis Abba Principles on Sustainable Use.The Ecosystem Approach, which the parties have identified as "the primary framework for action under the Convention," provides that the rights of indigenous peoples should be respected; that "[b]oth cultural and biological diversity are central components of the ecosystem approach;" and that management must be fair and equitable.[574] Principle 2 affirms that "[m]anagement should be decentralized to the lowest appropriate level ... and balance local interests with the wider public interest."[575] Principle 2 of the Addis Abba Principles on Sustainable Use of Biological Diversity, adopted by the COP in 2004, also recognizes the need for a legislative and administrative framework that is consistent with a state's international obligations, including human rights obligations, and provides that "sustainability is generally enhanced if Governments recognize and respect the 'rights'" of indigenous peoples and their full participation in decision making.[576] It further provides that "to reinforce local rights or stewardship of biological diversity and responsibility for its conservation, resource users should

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[571] Decision X/31, *Protected Areas*, at para. 32(c) (and, at para. 31(a), calling on the parties to "(a) Establish clear mechanisms and processes for equitable cost and benefit-sharing and for full and effective participation of indigenous and local communities, related to protected areas, in accordance with national laws and applicable international obligations");, http://www.cbd.int/decision/cop/?id=12297.This decision also provides, at para. 1(i), that state parties shall "Take note as appropriate of the United Nations Declaration on the Rights of Indigenous Peoples in the further implementation of the programme of work on protected areas").

[572] Decision XII/12, *Plan of Action on Customary Sustainable Use of Biological Diversity*, at para. 9.

[573] Decision XII/12, *Plan of Action on Customary Sustainable Use of Biological Diversity*, at para. 6(f).

[574] Decision V/6, *Ecosystem Approach*, at para. 6, Principle 1, http://www.cbd.int/decision/cop/?id=7148.

[575] Decision V/6, at para. 6, Principle 2.

[576] Addis Abba Principle on Sustainable Use, Principle 2, http://www.cbd.int/sustainable/addis-principles.shtml#2.

participate in making decisions about the resource use and have the authority to carry out any actions arising from those decisions."[577]

201. Tauli-Corpuz further testified that international policy and best practice requires the consensual management of protected areas with full respect for the rights of indigenous peoples. The 2014 World parks Congress, for instance, recommended, where existing protected areas overlap with indigenous territories, that "all countries and relevant organisations ensure that collective rights and responsibilities to own, govern, manage, and use such land, water, natural resources and coastal and marine areas are respected; [and] ensure that the indigenous peoples' ... right to free, prior and informed consent is affirmed."[578] Professor Gilbert explained that these international standards and best practices[579] also have juridical significance, a conclusion that is confirmed in the Court jurisprudence.[580] In *Saramaka People*, for example, the Court explained that ESIAs "must conform to the relevant international standards and best practices, and must respect the Saramaka people's traditions and culture."[581] The representatives respectfully submit that the same consideration applies to all aspects of protected areas.

202. The nature reserves *sub judice* encompass almost 50 percent of the traditionally owned territory of the Kaliña and Lokono peoples. Consequently, the maintenance and management of

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577 Addis Abba Principle on Sustainable Use, Principle 2.

578 *A strategy of innovative approaches and recommendations to enhance the diversity, quality and vitality of governance in the next decade*, 2014 World Parks Congress, at p. 4 (stating that "In situations where the land, water, natural resources and coastal and marine areas of indigenous peoples and local communities overlap with established protected areas under any other governance type, all countries and relevant organisations ensure that collective rights and responsibilities to own, govern, manage, and use such land, water, natural resources and coastal and marine areas are respected. Further, they ensure that the indigenous peoples' and local communities' right to free, prior and informed consent is affirmed and their livelihoods and food and water sovereignty are appropriately recognized and supported, along with their knowledge, institutions, practices, management strategies and plans related to conservation. They foster, moreover, the full engagement of the concerned indigenous peoples and local communities in the governance of the overlapping established protected areas"), http://cmsdata.iucn.org/downloads/conclusions_of_governance_stream_wpc_2014_12_dec.pdf.

579 See also *World Wildlife Fund's Statement of Principles on Indigenous Peoples and Conservation* 1998, at p. 2 (acknowledging "that, without recognition of the rights of indigenous peoples, no constructive agreements can be drawn up between conservation organizations and indigenous peoples and their representative organisations;" and recognizing "indigenous peoples as rightful architects of and partners for conservation and development strategies that affect their territories"), http://assets.panda.org/downloads/183113_wwf_policyrpt_en_f_2.pdf.

580 Testimony of Professor Gilbert, Audio Transcript, Part 2, at 37:37.

581 Saramaka People, Interpretation, at para. 41. The associated footnote states that "One of the most comprehensive and used standards for ESIAs in the context of indigenous and tribal peoples is known as the *Akwe:kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*." The *Akwe:kon Guidelines* were developed by the states parties to the CBD. *See also* Sarayaku, at para. 206 (stating that "the Court has established that environmental impact assessments must be made in conformity with the relevant international standards and best practices").

these areas constitute a major and ongoing dispossession and impact on the victims and, as currently constituted, deny their survival as indigenous peoples and substantially compromise their ability to continue to benefit from their traditional economy. The Court and the African Commission – and other international authorities[582] – have both held that large projects that may affect the integrity of indigenous territories or compromise their ability to continue to benefit from their traditional economy[583] require indigenous peoples' consent.[584] This is further supported by the above mentioned international environmental law and policy and best practices pertaining to protected areas.

203. The African Commission examined the impact of a protected area on indigenous peoples in Kenya in 2010. It began its analysis by stating that the "'public interest' test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property."[585] This is consistent with the Court's jurisprudence, which affirms the indigenous lands are fundamental to indigenous peoples' cultural integrity and survival[586] and, therefore, that proposed restrictions are subject to higher standards of scrutiny,[587] and that certain proposed restrictions may be either "impermissible"[588] or subject to indigenous peoples' free, prior and informed consent, irrespective of the asserted public interest.[589] Given the scale and impact of the maintenance of the reserves in the victims' territory, Suriname "has a duty, not only to consult with the [victims], but also to obtain their free, prior, and informed consent, according to their customs and traditions."[590]

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582 *See e.g., Concluding observations of the Committee on the Elimination of Racial Discrimination: Sri Lanka. 14/09/2001.* UN Doc. A/56/18,paras.321-342, at 335.

583 *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009, at para. 7.6 (stating that "the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community").

584 Endorois Welfare Council v Kenya, at para. 291; Saramaka People, at para. 134; Sarayaku, para. 180, note 237.

585 Endorois Welfare Council v Kenya, at para. 212.

586 *See e.g.,* Sarayaku, para. 146 (explaining that "the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their lifestyle. This connection between territory and natural resources that indigenous and tribal peoples have traditionally maintained, one that is necessary for their physical and cultural survival and the development and continuation of their worldview..."); and *Río Negro Massacres*, Judgment of 4 September 2012. Ser. C No. 250, at para. 177 (stating that "in keeping with its consistent case law on indigenous matters, in which it has recognized that the relationship of the indigenous peoples with the land is essential for maintaining their cultural structures and for their ethnic and material survival...").

587 *See e.g.,* Saramaka People, para. 128 *et seq.*

588 Saramaka People, at para. 128 ("the State may restrict the Saramakas' right to use and enjoy their traditionally owned lands and natural resources only when such restriction complies with the aforementioned requirements and, additionally, when it does not deny their survival as a tribal people").

589 Saramaka People, at para. 134.

590 Saramaka People, at para. 134; Saramaka People, Interpretation, at para. 17 (explaining that "depending on the level of impact of the proposed activity, the state may additionally be required to obtain consent from the

Restitution is the Appropriate Remedy:

205. In its submissions before the Commission, Suriname states "the stewardship [in reality, the *de jure* ownership] of the State of the nature reserves ... should at least until the claims of the Petitioners on traditionally used lands and resources have been recognised and incorporated into domestic legislation, prevail over the control which the petitioners claim over land and resources concerned."[591] The State thus concedes that restitution of these areas would be appropriate as part of the process of legally recognizing and securing the Kaliña and Lokono peoples' territorial rights. This is also consistent with the relevant international norms, a fact that is confirmed in the testimony of expert witnesses Tauli-Corpuz and Gilbert.[592] Both state unambiguously that restitution is required unless it cannot be achieved for factual reasons. There are no factual reasons that prevent restitution in the case *sub judice*. Indeed, the State is the owner of the lands in question pursuant to domestic law and need only amend or revoke administrative orders to effectuate restitution.[593] The representatives note in this regard that the Court ordered in *Xákmok Kásek* that a similar administrative order cannot be "an obstacle to returning the traditional land to the members of the Community"[594]

206. Tauli-Corpuz explained that the "the international authorities, including the UN Declaration on the Rights of Indigenous Peoples, strongly support restitution as the appropriate and primary remedy in addition to other forms of redress."[595] With regard to the UN Declaration, she referred to Article 28, which applies where lands traditionally owned by indigenous peoples have been "confiscated, taken, occupied, used or damaged without their free, prior and informed consent" and provides that restitution is the appropriate remedy unless this is impossible for factual reasons. She also referred to Articles 32(3), 40 and 8(2)(b). The latter provides that "States shall provide effective mechanisms for prevention of, and redress for: ... Any action which has the aim or effect of dispossessing [indigenous peoples] of their lands, territories or resources...."

207. She additionally explained that the UN Rapporteurship on the Rights of Indigenous Peoples "has adhered to the same basic principles enunciated by the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, the latter explicitly in relation to protected areas." These basic principles include: "that states must "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories

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Saramaka people. The tribunal has emphasized that when large-scale development or investment projects could affect the integrity of the Saramaka people's lands and natural resources, the state has a duty not only to consult with the Saramaka's, but also to obtain their free, prior and informed consent in accordance with their customs and traditions").

591 Annex 6 to the Commission's Application, Further comments offered by the State, at p. 15.

592 Testimony of Professor Gilbert, Audio Transcript, Part 2; Testimony of Victoria Tauli-Corpuz, Audio Transcript, Part 2.

593 *See* para. 22 *supra*; and Annexes 6, 8 and 9 to the State's Response (containing copies of the resolutions establishing the WKNR, the WWNR and the GNR).

594 Xákmok Kásek, at para. 313 (ordering that "the State must take the measures necessary to ensure that Decree No. 11,804 [concerning the protected area] is not an obstacle to returning the traditional land to the members of the Community").

595 Testimony of Victoria Tauli-Corpuz, Audio Transcript, Part 2, 1:36:13.

and resources;" and "that indigenous peoples have a right to restitution and other forms of redress where their lands have been incorporated into protected areas without their consent."[596] These same principles are also reflected in international policy and best practices on protected areas, for example, in the 2003 and 2014 decisions of the World Parks Congress.[597] She also noted that states around the world are returning protected area lands to indigenous peoples; the representatives cited a number of examples of restitution above.[598]

208. The preceding is also consistent with the Court's jurisprudence with regard to the right of indigenous peoples to restitution of lands. In *Xákmok Kásek*, for example, the Court found that a privately-owned nature reserve established "restrictions to use and ownership, including the prohibition to occupy the land, as well as the traditional activities of the members of the Community such as hunting, fishing and gathering. The law sanctions the breach of these prohibitions and assigns a park guard, who can be armed and make arrests."[599] Other than the private status of the reserve, this situation is analogous to the case *sub judice*, one major difference being the vast scale and impact of the reserves in the instant case. Because of the continuing relationships between the community and the lands in the reserve, the Court ruled that the affected people's right "to recover their lost lands remains in effect."[600] This is also consistent with the 2010 decision of the Africa Commission on Human and Peoples' Rights, which upheld indigenous peoples' property rights in relation to publicly owned protected areas and required restitution of the lands therein.[601]

209. As stated in paragraph 134(f) of the representatives' brief, the representatives respectfully request that the Court orders that Suriname returns the lands encompassed by the WWNR, the GNR and the WKNR, and which are within the victims' territory, to the Kaliña and

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596 Testimony of Victoria Tauli-Corpuz, Audio Transcript, Part 2, 1:32:40. *See e.g., Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala, 15/05/06*. UN Doc. CERD/C/GTM/CO/11, 15 May 2006, at para. 17; and *Concluding observations of the Human Rights Committee: Australia 28/07/2000.* UN Doc. CCPR/CO/69/AUS, at paras. 10 and 11 (where the Committee explained that "necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands ...;" that "securing continuation and sustainability of traditional forms of economy ... and protection of sites of religious or cultural significance ... must be protected under article 27...").

597 *See* para. 75-7 *supra* (for example: *Durban Accord: Action Plan*, adopted at the Vth IUCN World Parks Congress, Durban South Africa (2003), at p. 248-9, calling for "participatory mechanisms for the restitution of indigenous peoples' traditional lands and territories that were incorporated in protected areas without their free and informed consent...;" and *A strategy of innovative approaches and recommendations to enhance the diversity, quality and vitality of governance in the next decade*, 2014 World Parks Congress, at p. 7, deciding that "Governments and UN human rights bodies ... [should] establish effective monitoring, restitution and accountability mechanisms to ensure that rights-based approaches and international standards of justice are applied in all conservation programmes. This should redress past and ongoing injustices suffered by indigenous peoples ... including restitution of lands expropriated without free, prior and informed consent...").

598 *See* para. 78-80 *supra*.

599 *Xákmok Kásek,* at para. 82.

600 *Xákmok Kásek,* at para. 116 (*see also* para. 311-13, 337(26), at para. 313 (ordering that "the State must take the measures necessary to ensure that Decree No. 11,804 [concerning the protected area] is not an obstacle to returning the traditional land to the members of the Community")).

601 *Endorois Welfare Council v Kenya*.

Lokono peoples are part of regularising and securing their property rights. Said regularization must recognize their ownership and associated rights over those lands. They further request that the Court orders that the State enter into good faith negotiations with the freely identified representatives of the victims with respect to the possible maintenance of protected area status for the lands in question and that this includes full consideration of the option of establishing indigenous protected areas as an alternative.

210. Should the reserves be maintained or indigenous protected areas be established instead, the representatives further request that the Court orders that said negotiations also aim to agree on any ensuing and associated ecosystem and species management plans and equitable benefit sharing mechanisms, and that these be implemented by establishing collaborative arrangements to facilitate specific species or ecosystem protection measures via mutually acceptable, collaborative and consensual governance mechanisms and management systems. The representative again especially urge the Court to employ the mechanism specified in *Xákmok Kásek* by which the State is required to pay additional compensation for each month of delay in implementing the orders of the Court with regard to this requested order.[602]

4. Suriname has contravened Articles 21, 13, 1 and 2 in connection with the allotment of four of the victims' villages and the granting of individual titles

211. The representatives hereby reiterate and incorporate their arguments, as set forth in paragraph 103-14 of the representatives' brief, in relation to Suriname's active violations of the Kaliña and Lokono peoples' property rights in connection with the allotment and granting of individual titles.

212. Suriname initiated a project in 1976 that involved the unilateral sub-division and allotment of a considerable strip of land along the Marowijne River and in four of the victims' villages: Wan Shi Sha (Marijkedorp), Pierrekondre, Tapuku and Erowarte.[603] The State has asserted that this was done to establish a vacation resort, yet at no time has it explained why it was necessary or even appropriate to take indigenous lands for this purpose. It is uncontested that the State has issued titles to at least 20 non-indigenous persons in these four communities between 1976 and 2008.[604] It is unknown exactly how many titles have been issued and when they were issued because the State has been unresponsive to the victims' requests for this public information. These titles are limited use rights and the State retains the underlying

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602 Xákmok Kásek, at para. 288 ("the Court orders that, if the three-year time frame established in this judgment expires ... without the State having delivered the traditional lands ... it must pay the leaders of the Community ... the sum of US$10,000.00 ... for each month of delay. The Court understands this reparation as compensation to the victims for the State's failure to comply with the time limits established in this judgment and the resulting pecuniary and non-pecuniary damage, so that it does not constitute compensation that replaces the return of the traditional or alternate lands to the members of the Community").

603 *See* Section II.D.

604 Testimony of Jona Gunther, Audio Transcript, at 1:20:30.

ownership rights in domestic law despite the fact that these lands are traditionally owned by the Kaliña and Lokono and an integral part of their four villages.[605]

213. These non-community members have primarily built vacation homes along the beaches[606] and the State has acknowledged the inconsequential and transient nature of their interests, explaining that they are merely "non-resident holders of vacation homes."[607] The only exceptions[608] are a hotel/casino in Wan Shi Sha,[609] construction of which commenced in 2006 and has yet to be completed,[610] and the activities of a Mr. De Vries, who cleared a piece of land within the village of Pierrekondre with the stated (but unfulfilled) intention of building a house, a filling station and a shopping mall.[611]

214. The evidence before the Court proves that these individual titles are within the core residential areas of these four villages and merely meters away from where members of these communities live today.[612] It further proves that the victims' were occupying and using these lands at the time of allotment, that some of them continue to live on the same lands today, and that they continue to maintain a variety of relationships therewith.[613] In addition to maintaining a physical relationship to much of the allotted area, this includes considering that the lands continue to belong to the Kaliña and Lokono pursuant to their customary law at present, and cultural and spiritual connections.[614] It is also proven that the victims' complained about the

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605 Response of the State, p. 10 (stating that "Titles of ownership, long term lease and leasehold" were granted in the four villages. It is highly improbable that any ownership titles were granted however for the reason stated by Professor Muskiet (*see* Affidavit of Professor Mariska Muskiet, para. 3), a fact that may be finally verified if and when the State submits the information requested by the Court pertaining to these titles); and, at p. 11 (explaining the nature of 'landlease' titles, which is "a limited real right on the land" and "a right in rem for freely enjoying a piece of state land").

606 Response of the State, at p. 15; Affidavit of Grace Watamaleo, at para. 8, 10; and Testimony of Jona Gunther, Audio Transcript, at 1:23:21. *See also* Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono, *supra,* at p. 106 (explaining that "In villages where titles are issued to third parties (Pierrekondre, Marijkedorp, Erowarte), city dwellers are the ones who own the best properties along the river. We are forced to move back, inland, and as a result have reduced or no access to the river to moor our boats and to bathe, or wash our clothes").

607 Annex 6 to the Commission's Application, Further comments offered by the State on the Merits in the Case of the Kalina and Lokono Peoples v. Suriname (Case 12.639), 12 September 2008, at p. 10.

608 *See also* Affidavit of Grace Watamaleo, para. 11-5 (listing further encroachments); and Brief of the Victims' Representatives, Annex A and B (containing the affidavits of Captain Henry Zaalman and Mr. Max Sabajo).

609 Testimony of Jona Gunther, Audio Transcript, at 1:24:04, 1:39:04. This is currently being built by a Mr. Dinesh Boekha, pursuant to a permit issued by the State.

610 Affidavit of Grace Watamaleo, at para. 12.

611 *See* Annex 13 to the Commission's Application.

612 Affidavit of Grace Watamaleo, para. 9-10; Testimony of Jona Gunther, Audio Transcript, at 1:21:30, 1:21:55. *See also* Saramaka People, at para. 180 (finding that one of these titles is "within a residential area of an indigenous village").

613 Affidavit of Grace Watamaleo, at para. 5; Testimony of Jona Gunther, Audio Transcript, 1:21:10, 1:22:45.

614 Affidavit of Grace Watamaleo, at para. 10 (adding that "We also have a strong spiritual connection to the Marowijne River, which has a central place in our cultural identity and traditions and through which we understand that we belong to this place as much as we believe that it belongs to us. Stopping us from accessing the river is very painful to us for these reasons as well;') and, at para. 18 (stating that "[In 1992] we also began reoccupying our lands that had been given to other people by the Government. They were and are

allotment and granting of titles from the inception and continuously to the present day and that the State has been unresponsive to their complaints.[615] Their most recent complaints were submitted on 28 January 2013 in relation to the construction of the abovementioned casino in Wan Shi Sha; no response was received. The judiciary has also privileged and upheld the rights of one of these third parties, as a matter of settled law,[616] in 1998.[617]

215. The Court cited the abovementioned 1998 case in *Saramaka People,*[618] finding that indigenous and tribal peoples in Suriname are placed in a "vulnerable situation where individual property rights may trump their rights over communal property."[619] In *Xákmok Kásek*, the Court described this as a "situation of extreme and special vulnerability" due to "the prevalence of a vision of property that grants greater protection to the private owners over the indigenous peoples' territorial claims, thus failing to recognize their cultural identity and threatening their physical subsistence."[620] That this privileging of the title of third parties violates Article 21 was further confirmed by the Court in *Saramaka People*. In that case, the Court ruled that "rather than a privilege to use the land, which can be ... trumped by real property rights of third parties ... indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment."[621]

216. The Court's consistent jurisprudence holds that indigenous peoples have a right to the restitution and restoration of their traditional lands that have been issued to third parties

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still our lands from our perspective and we believe that we had every right to reclaim them"); and Testimony of Jona Gunther, Audio Transcript.

615 *See* para. 114 *supra*.

616 Affidavit of Professor Mariska Muskiet, para. 21, 23-5. *See also* Affidavit of Magda Hoever-Venoaks, at p. 2 (explaining that any other interest is subordinated to a right in rem).

617 *Tjang A Sjin v. Zaalman and Others,* Cantonal Court, First Canton, Paramaribo, 21 May 1998. *See also* Brief of the Victims' Representatives, para. 46; and para. 116-7 *supra*.

618 Saramaka People, at para. 180 (observing that "In another case, a State-issued, privately held land title within a residential area of an indigenous village was upheld over the objections of the Captain of that village. The judge held that since the holder of the land had a valid title under Surinamese law, and the indigenous community did not have title or any other written permit issued by the State, the village had to respect the ownership right of the private title holder").

619 Saramaka People, at para. 173 (citing the "*Marijkedorp case* (holding that private property titles trump traditional forms of ownership)"); and, and para. 174 (concluding that "the members of the Saramaka people form a distinct tribal community in a situation of vulnerability, both as regards the State as well as private third parties, insofar as they lack the juridical capacity to collectively enjoy the right to property and to challenge before domestic courts alleged violations of such right"). *See also* Saramaka People, para. 108-10, at para. 109-10 (discussing the Decree L-1 of 1982 and explaining that "The official explanatory note to Article 4(1) of Decree L-1 explains that account should be given to the "factual rights" of members of indigenous and tribal peoples when domain land is being issued. The use of the term "factual rights" (or *de facto* rights) in the explanatory note to Article 4(1) of Decree L-1 serves to distinguish these "rights" from the legal *(de jure)* rights accorded to holders of individual real title or other registered property rights recognized and issued by the State") (footnotes omitted).

620 Xákmok Kásek, at para. 273.

621 Saramaka People, at para. 115.

without their consent,[622] provided that they still maintain relations with those same lands.[623] The Court further held that if indigenous peoples are prevented by others from maintaining their traditional relationships with their territories, the right to recovery nonetheless continues "until such impediments disappear."[624] The evidence before the Court proves that the victims continue to maintain various cultural, spiritual, physical and other relations with the allotted lands in their four villages, the only exception being the maintenance of a physical relationship with those lands that have been titled to third parties.[625] Their right to recover those lands therefore continues. There is no factual reason that these lands cannot be returned to the Kaliña and Lokono[626] and these titles may be revoked by the State, assuming it is willing, through a simple procedure with due compensation to the title holders.[627]

217. The Court has explained that restitution of lands held by third parties requires assessing the respective restrictions on each party on a case by case basis,[628] and in doing so, the state must always bear in mind that indigenous peoples' territorial rights are fundamentally related to collective rights of survival, and that their control over territory is a necessary condition for the reproduction of culture.[629] The Court has also ruled that it cannot decide if indigenous peoples' right to property supersedes the right to third party property titles, since the Court does not settle controversies among private parties, and that this duty corresponds exclusively to the State.[630]

218. The representatives concur with the expert testimony of Professor Gilbert that there are compelling reasons to depart from this position in the instant case and to explicitly order that the lands in question be returned to the Kaliña and Lokono peoples.[631] The reasons include: the absence of any procedures in Suriname law by which the victims could seek restitution; the settled principles of Suriname law that preclude this, for instance, as pronounced by the judiciary in 1998 case mentioned above; the *prima facie* inconsequential nature of the third party interests, which are almost exclusively intermittent and merely recreational or in the case of the casino highly inappropriate in a residential village; the fact that these lands are in the

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622 *See e.g.*, Xákmok Kásek, at para. 109 (stating that "The Court recalls its case law regarding the communal ownership of indigenous lands, according to which: ... the members of the indigenous peoples who have involuntarily lost possession of their lands, which have been legitimately transferred to innocent third parties, have the right to recover them or to obtain other lands of the same size and quality").

623 Xákmok Kásek, at para. 112-13.

624 Sawhoyamaxa, at para. 132.

625 *See e.g.*, Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono, and; Affidavit of Dr. Stuart Kirsch.

626 Testimony of Professor Gilbert, Audio Transcript, Part 2, 28:17.

627 *See* para. 121 *infra*.

628 Yakye Axa, para. 146.

629 *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano v. Panama*, Ser. C No. 284, para. 143 (explaining that "This tribunal recalls its jurisprudence that the State must take into consideration that indigenous territorial rights comprise a wider and different concept, which is related to the collective right to survival as an organised people, with the control of their habitat as a necessary condition for the reproduction of their culture, for their own development and to carry out their life plans").

630 Kuna & Emberá Indigenous Peoples, at para. 144.

631 Testimony of Professor Gilbert, Audio Transcript, Part 2, 33:37 *et seq*.

intensely occupied and core residential areas of the villages; and the ongoing and increasingly apparent unwillingness of the State to recognize and respect indigenous peoples' rights. In addition to these reasons, the testimony of Mariska Muskiet substantiates that, under domestic law, the titles in question are limited use rights insofar as they subsist on the underlying ownership title of the State.[632] In domestic law, therefore, the State is the owner of these lands and it has merely granted use rights to the holders of the titles.

219. Consequently, the facts of this case may be distinguished from the Court's prior jurisprudence insofar as there is not strictly speaking a dispute among private parties, but a dispute between the State and the Kaliña and Lokono peoples about whether the maintenance of these use rights is valid in light of the State's human rights obligations.[633] Put another way, the State remains the owner of these lands in domestic law, and the controversy concerns whether the State may legitimately grant third parties rights to use traditionally owned indigenous lands for recreational purposes as opposed to complying with its duty of ensuring the effective enjoyment of the right to property by indigenous peoples. Under Suriname law, the State may revoke these use rights granted to third parties, in which case any disputes are between the State and those private parties, in the public interest and with compensation, and the Court has been very clear that respect for the rights of indigenous peoples is a vitally important public interest consideration in its own right.[634] These factors weigh heavily in favour of the adoption of the measures requested by the representatives, as does the discrimination that fundamentally taints the granting and maintenance of these use rights.

220. The representatives, therefore, respectfully urge the Court to explicitly order that the rights of the Kaliña and Lokono peoples must prevail and that the State shall revoke these use rights, and the unilateral allotment of the lands in the four affected villages, and restore these lands to the Kaliña and Lokono peoples as part of regularizing and securing their property rights pursuant to Article 21 in conjunction with Article 1 and 2, all of which have been violated by the grants of title to these third parties. They further highlight the necessity of adopting this approach, as opposed to ordering that the State adopt and implement procedures to effectuate restitution, in light of the abject failure of the State to even begin drafting, let alone adopt, any of the legislative measures ordered by the Court in *Saramaka People*, more than four years after the expiration of the associated deadlines. In this light, the representatives again especially urge the Court to employ the mechanism specified in *Xákmok Kásek* by which the

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632 Affidavit of Professor Mariska Muskiet, at para. 2-3 (stating that Suriname's domestic law provides that "all land in Suriname is owned by the State unless someone can prove their right of ownership;" and that "proving a right of ownership' requires written evidence of a full ownership title. This title, known as '*BW eigendom*' (Civil Code ownership) is based on article 625 of the Surinamese Civil Code, and is currently only issued to foreign embassies. In the past, a few Civil Code ownership titles have been issued by the State." Further explaining that: "These [non-ownership] titles include a) allodial ownership and hereditary property (*allodiale eigendom en erfelijk bezit*); b) land lease (c) leasehold (*erfpacht*); (d) land lease (*grondhuur*). Currently [since 1982], the law only allows the State to issue land lease titles").

633 Kuna & Emberá Indigenous Peoples, at para. 144 (explaining that "the Tribunal's competence is to analyse if the State guaranteed or not the human rights of the indigenous community").

634 Yakye Axa, para. 148.

State is required to pay additional compensation for each month of delay in implementing the orders of the Court.[635]

C. Suriname has violated Article 3 of the Convention in conjunction with Article 1 and 2

221. In its response, Suriname admits that "there are currently no specific provisions regarding recognition of the collective personality of the Kaliña and Lokono Indigenous peoples in its legislation...."[636] Indeed, it admits that recognition of their collective personality is currently precluded by and impossible in extant national law.[637] While it acknowledges the Court's ruling and orders in *Saramaka People* on this issue, the State has failed to present any evidence that could show that it has adopted the necessary legislative and administrative measures on collective legal personality ordered by the Court. Indeed, it has adopted no such measures to date and, to quote a study done for the UN Food and Agriculture Organization, the Kaliña and Lokono peoples, and indigenous and tribal peoples in general, remain "effectively invisible to the legal system and incapable of holding rights."[638]

222. The State did claim that it is in the process of adopting 'a law on traditional authorities,' and that it somehow believes "that this law will mean an acceptable solution to the issue of [c]ollective [l]egal [p]ersonality."[639] The representatives submitted a translation of the draft law to the Court during the public hearing. Even a cursory review, proves that it in no way addresses collective legal personality, or even legal personality otherwise, and that it, if adopted as is, would lead to serious violations of indigenous peoples' rights. At any rate, the State explained that this law is just a draft that was finalized in 2014 and therefore it has no specific bearing on the issues that the Court has been asked to adjudicate in the present case.

223. Given the State explicit admission that it is laws fail to recognize the Kaliña and Lokono peoples' collective juridical personality, the representative hereby rely on their arguments set forth in the representatives' brief (paragraph 120 – 25), which, together with the evidence before the Court, prove that Suriname has violated Article 3 of the Convention in conjunction with Articles 1 and 2 of the same.

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635 Xákmok Kásek, at para. 288 ("the Court orders that, if the three-year time frame established in this judgment expires ... without the State having delivered the traditional lands ... it must pay the leaders of the Community ... the sum of US$10,000.00 ... for each month of delay. The Court understands this reparation as compensation to the victims for the State's failure to comply with the time limits established in this judgment and the resulting pecuniary and non-pecuniary damage, so that it does not constitute compensation that replaces the return of the traditional or alternate lands to the members of the Community").

636 Response of the State, at p. 8.

637 Response of the State, at p. 8-9 (citing, *inter alia*, its Civil Code).

638 UN Food and Agriculture Organization, *Strengthening National Capacity for Sustainable Development of Forests on Public Lands; Report of the Legal Consultant, Cormac Cullinan,* FAO Project TCP/SUR/4551 (1996), at sec. 4.6.2 (stating that ""Since the [Suriname] legal system currently has no way of recognizing traditional tribal groups and institutions as legal entities, they are effectively invisible to the legal system and incapable of holding rights").

639 Response of the State, at p. 9.

D. Suriname has violated Article 25 of the Convention in conjunction with Articles 1 and 2

224. Suriname has not presented any evidence that might suggest, nor has it even alleged that the Kaliña and Lokono peoples have access to effective judicial and other remedies under domestic law. That the victims' are denied and have no access to such remedies was confirmed by the Court in *Saramaka People* and there have been no changes to date that could call into question the ongoing veracity of this conclusion and its application *mutatis mutandis* to the victims in the instant case. The representatives therefore rely on their arguments set forth in the representatives' brief (paragraph 126 – 32), which, together with the evidence before the Court, prove that Suriname has violated Article 25 of the Convention in conjunction with Articles 1 and 2 of the same.

E. Suriname has violated Article 1 of the Convention

225. The proven facts in this case and the points of law set forth above all substantiate that Suriname has violated Articles 3, 21 and 25 of the American Convention as well as Articles 1 and 2 thereof. The jurisprudence *constante* of Court holds that Article 1 not only requires that states-parties immediately respect and ensure the free and full exercise of the rights set out in the American Convention, it also "imposes an affirmative duty on the states ... to take all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the rights the Convention guarantees."[640] The fact that Suriname has failed to respect and ensure the exercise of the rights guaranteed in the abovementioned articles therefore also results in a violation of Article 1 of the Convention.

226. Moreover, Article 1 also prohibits discrimination with regard to the exercise and enjoyment of the rights set out in the American Convention. This prohibition "extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations."[641] The proven facts and applicable law confirm that Suriname's law and practice is replete with discriminatory provisions and acts and omissions. These include its protracted and unreasonable failure to recognize the property rights of the Kaliña and Lokono peoples; its unreasonable and unjustifiable privileging of third party interests at the expense of indigenous title and rights; its unreasonable privileging of third party commercial interests in relation to the nature reserves, which have had devastating consequences for the victims; and its protracted failure to recognize the victims legal personality and to provide them with effective remedies, both of which render them invisible and defenceless in domestic law and venues.

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640 *Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights),*OC-11/90, August 10, 1990, Series A No.11, at para. 34.

641 *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* OC-4/84, January 19, 1984. Series A No.4, at para. 54.

227. The Court has previously held that, "it is indispensable that States grant effective protection that takes into account [indigenous peoples'] particularities, their economic and social characteristics, as well as their especially vulnerable situation, their customary law, values, customs and mores."[642] However, in Suriname, the Kaliña and Lokono peoples are defenceless and their rights are violated with impunity and this is a longstanding situation which Suriname appears to be content to allow to continue indefinitely.

228. Suriname has failed to comply with these obligations with regard to the rights of the Kaliña and Lokono peoples. Surinamese legislation pertaining to land and natural resource rights not only fails to recognize and give effect to the victims' rights, it places discriminatory conditions and limitations on these rights that negate their exercise and that unreasonably privilege the interests of the State and third parties at their expense. The same is also true of Suriname's 1987 Constitution, which unconditionally vests ownership of all natural resources in the state without any measures to ensure that the victims' natural resource rights are secured and protected. As the Court has repeatedly confirmed:

> lack of access to their territories may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through their traditional activities; or from having access to their traditional health systems and other socio-cultural functions, thereby exposing them to poor or infrahuman living conditions and to increased vulnerability to diseases and epidemics, and subjecting them to situations of extreme vulnerability that can lead to the violation of various human rights, as well as causing them suffering and jeopardizing the preservation of their way of life, customs and language.[643]

229. These are all relevant factors and consequences of Suriname's failure to guarantee and respect the rights of the Kaliña and Lokono and they have suffered and continue to suffer immense harm and damage as a result.

IV. REPARATIONS AND COSTS

A. Reparations

230. Article 63(1) of the American Convention codifies a canon of customary law and a fundamental principle that "every violation of an international obligation which results in harm creates a duty to make adequate reparation."[644] On the basis of the proven facts and as a matter of law, Suriname is responsible for violations of the victims' rights guaranteed and protected by Articles 3, 21 and 25 of the American Convention in the instant case, all in conjunction with Articles 1 and 2 of the same. Pursuant to article 63(1) of the Convention, it has the duty to repair these violations. This obligation to repair requires *restitution in integrum*

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642 Yakye Axa, at para. 63.
643 Sarayaku, at para. 147.
644 *Velasquez Rodriguez*, Ser C No. 7, at para. 25.

or where this is not possible, measures that will safeguard the violated rights and guarantee non-repetition, redress the consequences of the violations and compensate for damages sustained.[645] The nature and amount of reparations depend on the damage caused at both the pecuniary and non-pecuniary level.[646]

231. Suriname has not offered any evidence or points of applicable law that tend to refute or qualify the facts and law upon which the alleged violations in this case and the associated obligation to make reparations are based. Nor has it offered any evidence that disproves the gravity of the harm and damage suffered by the Kaliña and Lokono peoples and which has been, and continues to be, caused by Suriname's ongoing and unmitigated acts and omissions. This is the case with respect to both the State's pleadings before the Court and the scant evidence and arguments offered by the State. Other than the points below, the victims' representatives, therefore, hereby reiterate, incorporate by reference, and rely upon their prior submissions with respect to reparations, which they believe are sufficient and do not require further elaboration at this time.

1. Compensation for pecuniary and non-pecuniary damages

232. The proven facts in this case demonstrate that the Kaliña and Lokono peoples have suffered extensive material damages[647] and profound moral damages as a result of Suriname's acts and omissions and the ensuing violations of their rights.[648] The former is related to past and ongoing damage to the victims' lands, denials of access to and destruction of their subsistence resources, and severe pecuniary alterations to their way of life. Professor Kirsch explains that "these changes are the consequence of encroachment on indigenous territories rather than choices made by the Kaliña and Lokono. In a very real sense, their opportunities to pursue traditional practices are being reduced or, in some cases, eliminated altogether by the destruction of the forest."[649] The mining operations in the victims' territory have caused "considerable damage"[650] and huge environmental impacts and concomitant social impacts for the indigenous communities,"[651] and the rehabilitation efforts have been "have not been effective."[652] Professor Kirsch explains that "it would take generations for that land to be returned to productive use."[653] The same is also the case in relation to the logging operations which cover much of the Kaliña and Lokono peoples' territory.[654]

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645 *Cantoral Benavides,* Ser C No. 88, para. 41.
646 *Villagrán Morales et al.,* Ser C No. 77, para. 63.
647 *See* Section II.E *supra*.
648 *See* Section II.F *supra*.
649 Affidavit of Dr. Stuart Kirsch, at p. 20.
650 *See e.g.*, Annex 23 to the Commission's Application, SRK Consulting, Environmental Sensitivity Analysis of the Wane 4 Concession, at p. 20.
651 Affidavit of Dr. Stuart Kirsch, at p. 27.
652 Affidavit of Dr. Stuart Kirsch, at p. 15 and, at p. 11.
653 Affidavit of Dr. Stuart Kirsch, at p. 21.
654 *See* Section II.C.3 *supra*.

233. The vast majority of the victims' territory has been taken away from them and the evidence proves that the present situation of the Kaliña and Lokono peoples is dire due to Suriname's acts and omissions. These acts and omissions are long-standing and ongoing and the damage caused thereby is ever expanding and intensifying. Professor Kirsch concludes that "If they lose much more land, they may not be able to hunt or harvest important forest products at all."[655]

234. The evidence proves that Suriname's acts and omissions, including the victims' inability to obtain effective redress for the ensuing violations, have caused the Kaliña and Lokono grave immaterial harm. This harm is long-standing, persistent, severe and pervasive. Suriname has threatened their identity and very survival as indigenous peoples; undermined the values they hold most dear; allowed their sacred sites to be degraded; caused severe alterations to their living conditions; and caused the victims' substantial and persistent anxiety, insecurity, pain and suffering. Indeed, the evidence proves that the Kaliña and Lokono peoples have suffered a prolonged and ongoing assault on their moral, mental and cultural integrity.

235. All of the victims who testified before the Court explained how they feel discriminated against and rendered "invisible" by the State.[656] Their perception, reinforced on a daily basis by Suriname's tacit and, at times, active approval of their situation, is amply supported and confirmed by the evidence before the Court. The Kaliña and Lokono are acutely aware of the threats to their integrity and survival posed by Suriname's extended and unreasonable failure to recognize and secure their rights as well as by the ever expanding and ongoing destruction of their territory and their means of subsistence caused by Suriname's failure to respect their rights.[657] This is a source of immense pain, suffering and anxiety.

236. The evidence before the Court not only substantiates the extent of moral damages suffered by the Kaliña and Lokono, it further proves, within the factual predicate of the Commission's Application, that these damages also rise to the level of constituting a violation of Article 5 of the American Convention.

2. Development Fund

237. In paragraph 142 of the representatives' brief, the representatives request that the Court orders the State to transfer any awarded compensation to an entity to be freely identified by the victims and controlled and autonomously managed by them, rather than being vested in a development fund like those created in *Moiwana Village* and *Saramaka People*. In those funds, the State has an active role, both through naming a representative to the board and through jointly agreeing on an additional member of the board. The representatives explained in their brief that neither has worked well and they do not want to repeat these

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655 Affidavit of Dr. Stuart Kirsch, p. 21.

656 *See e.g.*, Affidavit of Grace Watamaleo, at para. 26.

657 *See e.g.*, Affidavit of Dr. Stuart Kirsch, at p. 22.

problems in the instant case. During the public hearing, Judge García-Sayán requested further information on this request.

238. In the representatives' opinion, the State has not played a constructive role in either of the funds established in *Moiwana Village* and *Saramaka People*. In *Moiwana*, the use of funds has been opaque at best and there are serious questions about the amount of "administrative costs" that finance the foundation established to manage the funds (e.g., office rent, even though an office is not needed and is currently registered at the address of one of the board members).[658] The State also initially refused to disburse the funds and insisted that it would only reimburse costs upon submission of receipts, and also refused to cover the costs of the representative of the Moiwana community.[659] It has also contravened the orders of the Court by building a small number of (unoccupied) houses within the lands of Alfonsdorp village – not the traditional lands of the Moiwana community – without obtaining the consent of that village or the Kaliña and Lokono more broadly.[660] Not only did they not consent, they formally objected to the construction of these houses. Their objections were ignored however.

239. In *Saramaka People*, the representative of the State from the outset attempted to assert complete control over the fund and acted as if he were the sole decision maker. The situation became so bad that the Saramaka requested that the State remove him in early 2013. This led to an unreasonably protracted process of reconstituting the board of the fund that was not resolved until December 2014. This delay was entirely the responsibility of the State and no explanation was provided. This delay not only suspended the functioning of the fund, it also led to the Saramaka almost being sued by a publishing company, which had produced a book on Saramaka oral history at the request of the fund, but had not received payment in almost two years. The payment was only made in January 2015 after the board has been reconstituted.

240. The representatives also highlight that the Kaliña and Lokono are more than capable of managing funds and have been doing so through their traditional institutions and representative organization for decades. Both have received funds from a variety of donors and complied with

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658 *Stichting Fonds Ontwikkeling Moiwana Gemeenschaap* (in English, the Foundation for the Development of the Moiwana Community).

659 *Order of the Inter-American Court of Human Rights of 21 November 2007*, Case of the Moiwana Village (Monitoring Compliance with Judgment), at Whereas, para. 18.

660 Moiwana Village, para 209-10 (ordering that "the State shall adopt such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled;" and "State shall take these measures with the participation and informed consent of the victims as expressed through their representatives, the members of the other Cottica N'djuka villages and the neighboring indigenous communities, including the community of Alfonsdorp"). *See also Moiwana Village, Interpretation Judgment*, 15 June 2006, at para. 19 (explaining that "the Court deems pertinent to point out that, by recognizing the right of the Moiwana community members to the use and enjoyment of their traditional lands, the Court has not made any determination as to the appropriate boundaries of the territory in question"; and "[i]f said rights are to be properly ensured, the measures to be taken must naturally include "the delimitation, demarcation and titling of said traditional territories", with the participation and informed consent of the victims as expressed through their representatives, the members of the other Cottica N'djuka villages and the neighboring indigenous communities").

their, at times complex, reporting requirements to the satisfaction of the donors. The victims do not wish to have the State involved in making decisions about or managing any funds that may be ordered by the Court. They believe, and the representatives concur, that it is fully consistent with their capacity, agency and right to self-determination that they autonomously decide on the use and management of any funds that may be ordered by the Court.

B. Costs

241. The representatives respectfully request that the Court grants their requests for costs as set forth in paragraph 143 of the brief of the victims' representatives and the associated annexes. They further respectfully request that the Court orders the State to reimburse the costs incurred by the Forest Peoples Programme related to the public hearing before the Court, held on 3-4 February. The receipts and explanation of these costs are set out in Annex A hereto.