Inter-American Court of Human Rights

Pleadings, Motions and Evidence of the Victims' Representatives

Case of the Kaliña and Lokono Peoples (Case 12.639)
Against
the Republic of Suriname

24 April 2014

Representatives:

Fergus MacKay

[redacted]

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[redacted]

Contents Page

Pleadings, Motions and Evidence of the Victims' Representatives in the Case of the Kaliña and Lokono Peoples (Case 12.639) v. the Republic of Suriname

I. INTRODUCTION

1. The victims' representatives submit to the honourable Inter-American Court of Human Rights ("the Court" or "the Inter-American Court") this brief containing pleadings, motions and evidence in the Case of the Kaliña and Lokono Peoples versus the Illustrious Republic of Suriname ("Suriname" or "the State"), pursuant to Articles 25 and 40 of the Rules of Procedure of the Inter-American Court.

2. It is submitted herein that Suriname has violated Articles 3, 21 and 25 of the American Convention on Human Rights ("the American Convention" or "the Convention"), all in conjunction with Articles 1 and 2 of the same, to the extreme detriment of the victims in this case. The victims are the Kaliña and Lokono indigenous peoples of the Lower Marowijne River and their members ("the victims" or "the Kaliña and Lokono peoples"). These violations, for which Suriname is internationally liable, are based on the following:

a) Suriname's failure to legally recognize and secure the Kaliña and Lokono peoples' communal property rights in and to their traditionally owned lands, territory and resources;
b) the State's additional and active violation of those property rights through grants of logging and mining concessions, all done without the victims' effective participation and free, prior and informed consent, and its acts and omissions in connection with the consequences of those concessions;
c) Suriname's establishment and maintenance of three nature reserves in the victims' territory and the ongoing consequences thereof;
d) the unilateral allotment and discriminatory taking of lands in four of the victims' communities, grants of individual titles to non-members in those communities, and the ongoing consequences thereof;
e) Suriname's repeated failure to allow the victims access to public information about the identity of the persons who hold individual titles in the four above-mentioned communities;
f) the State's failure to provide effective judicial remedies by which the Kaliña and Lokono peoples' could seek protection for their rights;
g) Suriname's failure to recognize, regularise and respect the Kaliña and Lokono peoples' juridical personality; and, finally,
h) the State's non-compliance with the obligations to respect, without discrimination, and to give domestic legal effect to the Convention's guarantees.

3. It is further submitted, pursuant to Article 29(b) of the Convention, that the Kaliña and Lokono peoples' property rights and right to juridical personality should be interpreted in the

light of and without prejudice to their rights in universal human rights instruments in force for Suriname, including and especially the rights guaranteed in common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and Article 3 of the 2007 UN Declaration on the Rights of Indigenous Peoples. This is consistent with the Court's ruling in the 2007 *Saramaka People* case, which held that

> by virtue of the right of indigenous peoples to self-determination recognized under said Article 1, they may "freely pursue their economic, social and cultural development", and may "freely dispose of their natural wealth and resources" so as not to be "deprived of [their] own means of subsistence." Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants....[1]

4. The victims' representatives respectfully request that the Court determine the international responsibility of Suriname with respect to the alleged violations of Articles 3, 21, 25 of the American 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.

II. REPRESENTATION

5. The victims in this case have authorized Messrs. Fergus MacKay and David Padilla to represent them before the Court and in any dealings with the State in relation to this case.[2]

III. JURISDICTION OF THE COURT

6. The Court has jurisdiction to hear all cases concerning the application and interpretation of the American Convention pursuant to Article 62(3) of that instrument, provided that states parties have accepted said jurisdiction. Suriname acceded to the American Convention and simultaneously accepted the Court's jurisdiction on 12 November 1987.

7. The violations of the rights guaranteed by the American Convention alleged herein all occurred within Suriname's territory. These alleged violations were all initiated subsequent to Suriname's accession to the American Convention and acceptance of the Court's jurisdiction on 12 November 1987 or, where initiated prior to that date, exhibit ongoing and continuous effects and consequences attributable to Suriname and that violate the Convention guarantees.

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[1] *Saramaka People v. Suriname,* Judgment of 28 November 2007, Ser. C No. 172, at para. 93. *See also Kichwa Indigenous People of Sarayaku,* Judgment of 27 June 2012, Ser. C No. 245, at para. 159 and associated footnote, and 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...").

[2] Power of Attorney Declaration, 12 September 2013.

The Court therefore has competence *ratione loci, ratione materiae* and *ratione temporis* to examine the alleged violations in this case.

8. More generally, the victims' representatives consider that the Court has full jurisdiction to examine the merits of the present case, and that it meets all requirements of admissibility.

IV. FACTS

A. The Kaliña and Lokono peoples and their Territory

9. The traditional territory of the Kaliña and Lokono peoples and their eight villages is situated on the northeast coast of Suriname and is composed of moist and dry tropical forests, savannahs, coastal mangrove forests, beaches, coastal seas, inland waterways, and a variety of wetlands. They have occupied and used this territory, largely to the exclusion of other peoples, for millennia and continue to do so until this day. Their traditional boundaries with the N'djuka maroon people, who entered the area in the 18-19th centuries, to the west, south and south east are acknowledged by both parties and encoded in their respective oral histories. Their eastern boundary extends into French Guiana, where a number of related Kaliña and Lokono communities live today separated from their kin in Suriname by the international border that bisects the Marowijne River.

10. Archaeological evidence demonstrates that the Kaliña and Lokono peoples have occupied their territory for at least 2,000 to 3,000 years.[3] The reports of the first European explorers to visit the area also document their occupation from the early 17th century onward.[4] The Englishman Major John Scott, for instance, documents 800 Kaliña and 1400 Lokono families living along the Lower Marowijne River in 1661.[5] Archival research by a Dutch historian further documents 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.[6] The oral history, cosmovision and cultural traditions of Kaliña and Lokono peoples also verify the antiquity and continuity of their traditional ownership of their territory and its enduring centrality to their identity and worldviews.[7]

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3 A. Versteeg, *Suriname voor Columbus [Suriname before Columbus)]*, Paramaribo 2003, p. 177-188; and A. Boomert, 'The Barbakoeba Archaeological Complex of Northeast Suriname', 12 *Oso* 1993.

4 'A relation of the habitations and other observations on the river Marwin, and the adjoining regions', in: C. Alexander Harris ed., *A relation of a voyage to Guiana by Robert Harcourt 1613, with Purchas' transcript of a report made at Harcourt's instance on the Marrawini District,* Hakluyt Society Series II Vol. 60 (1926), Appendix II, "The "Fisher" report, p. 172-176.

5 V.T. Harlow, (ed.), *Colonising Expeditions to the West Indies and Guiana 1623-1667*, Hakluyt Society, London, 1925, at p. 137.

6 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.

7 *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.

11. The Kaliña and Lokono peoples' eight communities are described in detail in Annex 5 to the Commission's Application. At present, their total resident population is approximately 2,026 persons. Christiaankondre and Langamankondre together have a population of around 800 persons; Erowarte, 125; Tapuku, 129; Pierrekondre, 150; Wan Shi Sha (Marijkedorp), 287; Alfonsdorp, 285; and Bigi Ston, 250. There are additionally non-resident members of these communities working or studying in Paramaribo, and a sizable number of persons who fled from the villages during the 'Interior War' of the mid-1980s to French Guiana have not returned or only do so periodically.[8] These persons, estimated to number approximately 800-1000 persons, are considered by the victims to be members of the Kaliña and Lokono peoples' villages with rights to lands and resources in the victims' territory pursuant to applicable customary law.

12. In common with indigenous peoples throughout the Americas, the Kaliña and Lokono peoples have a profound and all-encompassing relationship with their traditional territory. It is the foundation of their spiritual, cultural and physical sustenance and well-being, and is integral to their identities, cosmologies and views of the world. As stated in his expert testimony, anthropologist Professor Stuart Kirsch explains 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."[9] He adds 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."[10]

13. The Kaliña and Lokono peoples' cultures and identities are thus inextricably tied to the maintenance of their multiple and profound relationships with their traditional territory and its resources. This deep connection to their territory is reinforced through kinship structures and social relations, cultural and spiritual practices and beliefs, and the customary norms and practices that govern their daily lives. In addition to Dr. Kirsch's observations, the nature and extent of their customs, traditions, relations to lands and traditional economy are detailed in a 2006 study contained in Annex 5 to the Commission's Application.[11] This research also demonstrates the enduring, multifaceted and integral relationship of the Kaliña and Lokono peoples' to their traditional lands, territory and resources.

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8 During the Interior War, the majority of the populations of the eight villages fled the area, mostly across the Marowijne River to French Guiana. The Commission concluded in its 1986-87 Annual Report, at p. 267, that "the most serious violations of human rights during the period covered by this report have been the treatment of the unarmed civilian Maroon and Amerindian populations in the eastern area of the country. These have taken on truly alarming proportions."

9 Annex 8 to the Commission's Application, Expert Report of Dr. Stuart Kirsch, at p. 17.

10 *Id.* at p. 24.

11 Annex 5 to the Commission's Application.

14. In accordance with their customary law, paramount or underlying title to the territory as a whole is vested collectively and jointly in the Kaliña and Lokono peoples. Subsidiary rights to communal land and resource ownership are vested in the extended kinship groups associated with each of the eight villages. These land and resource ownership rights apply to defined areas of their traditional territory and the boundaries between the lands of the various villages are clearly understood and scrupulously observed. Within the village lands, members have rights of occupation and use over specific areas associated with their immediate families as well as rights in communal areas not associated with any particular family group.

15. If non-members wish to use village lands, they must first obtain the permission of the village leader, who in turn must consult with and obtain the consent of any village members who hold or exercise rights in the affected area.

16. While resources are communally owned within the respective village lands, individual members or families may acquire priority rights through their labour or through inheritance. For example, when a communal forest area is cleared and planted for agriculture that area is considered to be owned by the family which toiled to cut and sow the farm. Priority rights over farming areas may also be transmitted to children and grandchildren should they choose to use those areas. Similarly, while timber resources are communally owned, a log becomes the property of the person who cuts it down.

17. The Kaliña and Lokono peoples' territory provides for the vast majority of their subsistence and cultural needs and is extensively used for, *inter alia*, hunting, fishing (inland and coastal), swidden agriculture, and the harvesting and gathering of forest produce.[12] Traditional resources gathered in their territory continue to provide a large part of the victims' diet and, among other things, important building materials, medicines, utensils, clays for pottery, cotton for hammocks, and timber for fuel and for water craft. This also applies to their traditionally owned coastal seas and the foreshore from which they traditionally derive a variety of resources, including fish, molluscs, crustaceans and clays.[13] Due to prevailing ecological conditions, including poor soil quality and low game animal density, large areas are required to maintain traditional subsistence practices and satisfy basic needs as well as to support traditional and sustainable management practices.

18. Quoting members of the victims' communities, Dr Kirsch explains that "The forests have great value to the Kaliña and Lokono: 'The forest, the creek, and the river is where we get our food; it is our pharmacy. We don't have to pay for it; we get everything we need from it.' 'Our knowledge of the forest is great; we know which plant is poisonous and which is not, and when a child is injured or sick, we take a leaf for a wound, or sap for an illness.'"

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12 *See e.g.*, Annex 3 to the Commission's Application, Indicative Land Use Map.

13 *See e.g.*, Annex 8 to the Commission's Application, Expert Report of Dr. Stuart Kirsch, at p. 21. *See also* Annex 5 to the Commission's Application, p. 72 (explaining that clay is obtained from the beaches/foreshore at low tide).

19. The first outsider to move to the Kaliña and Lokono peoples' territory was August Kappler, an officer in the Dutch army, who took up residence in what is now known as the town of Albina in December 1861. He was issued title to the land encompassing the former Kaliña village of Kuma'ka subject to the condition, "That if on the property in question there were Amer-Indian settlements, he would at all times respect these, without ever or at any time disturbing such Amer-Indians, much less to force them to move from there."[14] Nevertheless, the indigenous peoples were forced to leave and more outsiders moved to the area. At the same time and with the same result, the French established a penal colony on the site of another Kaliña village directly across the river in French Guiana.

20. In 1879, the Dutch withdrew Kappler's title and, in 1894, made Albina the capital of Marowijne District, which it remains today. In 1964, Albina was connected to Paramaribo by road and its population increased. Soon after Suriname's independence in 1975, a number of vacation homes were built along the beaches of Wan Shi Sha, Pierrekondre, Tapuku and Erowarte villages following the State's unilateral sub-division and allotment of significant areas of land in these four villages. This resulted in Kaliña and Lokono members of these villages being forced to move away from and in some cases not having access to the river anymore as well as being deprived of their lands in the allotted areas. Titles continue to be issued by the State in this area, including as recently as 2008, leaving the affected communities in a permanent state of insecurity and anxiety as well as generating a state of continual conflict. Between 1966 and 1986, three nature reserves were also established in the victims' territory. A considerable number of logging and mining permits and concessions have also been issued in the victims' territory, including large-scale bauxite mining that commenced in 1997. Each of these activities is discussed in Section IV(C) below.

B. Lack of Recognition of and Disregard for the Rights of the Kaliña and Lokono peoples in Suriname's Law and Practice

21. As confirmed by the Court in 2005, 2007 and 2011,[15] by other international human rights bodies and mechanisms,[16] and by institutions such as the Inter-American Development

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[14] Land Warrant dated 31 December 1861, in: A.J.A. Quintus Bosz, *Drie eeuwen grondpolitiek in Suriname. Een historische studie of the achtergrond and the ontwikkeling of the Surinaamse rechten op the grond (Three centuries of land policy in Suriname, a historical study of the background and the development of the Suriname rights to land)*, diss. Groningen 1954, p. 433-4.

[15] Saramaka People 2007, *supra,* para. 97-117; *Saramaka People (Monitoring Compliance),* Orders of the Inter-American Court, 23 November 2011; and *Moiwana Village v. Suriname*, Judgment of 15 June 2005, Series C No. 124, para. 86(5) (where the Court determined the following to be "proven facts" and a "Fact recognized by the State:" "Although individual members of indigenous and tribal communities are considered natural persons by Suriname's Constitution, the State's legal framework does not recognize such communities as legal entities. Similarly, national legislation does not provide for collective property rights").

[16] *See e.g.*, Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Addendum, *Measures needed to secure indigenous and tribal peoples' land and related rights in Suriname*, A/HRC/18/35/Add.7 (18 August 2011), http://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add7_en.pdf; and *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/SUR/CO/12, 13 March 2009,

Bank, Suriname's law fails to recognise and provide mechanisms for securing indigenous peoples' property rights.[17] This even extends to failing to recognise that indigenous peoples have juridical personality, which renders them incapable of holding collective rights under extant domestic law and of seeking protection for these rights in domestic venues. Nothing has changed since these findings were made; Suriname's law and practice continue to disregard and allow for daily violations with impunity of indigenous peoples' rights, including the victims in the case *sub judice*.

22. For example, the Court found in the 2007 *Saramaka People* case that "the State's legal system does not recognize the property rights of the members of the Saramaka people in connection to their territory, but rather, grants a privilege or permission to use and occupy the land at the discretion of the State."[18] It further concluded that "the State has not complied with its duty to give domestic legal effect to the members of the Saramaka people's property rights."[19] It also found that Suriname "does not recognize the Saramaka people as a juridical entity capable of using and enjoying communal property as a tribal group; [or] as a juridical entity capable of seeking equal access to judicial protection against any alleged violation of their communal property rights."[20] Additionally, the Court found that Suriname's domestic laws "do not provide adequate and effective legal recourses to protect [indigenous and tribal

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http://daccessdds.un.org/doc/UNDOC/GEN/G09/411/07/PDF/G0941107.pdf?OpenElement; and 'IACHR Concludes its Working Visit to Suriname', *IACHR Press Release 9/13,* 12 February 2013 (explaining that "The Rapporteurs received ample information throughout the visit - from both State and non-State actors - on the significance of the Inter-American Court judgments in the cases of Moiwana and Saramaka for human rights in Suriname, and considerable challenges that remain to implement the orders in those judgments. ... The Rapporteurs however underscore the need for Suriname to fortify its efforts to fully comply with these judgments, in prior consultation and with the participation of the affected Maroon communities. ... In this regard, the IACHR highlights the recommendations issued by several international procedures and bodies, such as the United Nations Rapporteur on the Rights of Indigenous Peoples, James Anaya, and the United Nations Committee on Racial Discrimination, on concrete ways to comply with these judgments in the areas of demarcation and titling, and the development of a law and procedure to carry out this goal"), http://www.oas.org/en/iachr/media_center/PReleases/2013/009.asp.

17 *See e.g., Indigenous Peoples and Maroons in Suriname*. Economic and Sector Study Series, RE3-06-005, Inter-American Development Bank, August 2006; and *Resolution PC/14/2013/7 on Suriname's Readiness Preparation Proposal*, adopted at the 14th Participants Committee Meeting of the World Bank Forest Carbon Partnership Facility, Washington D.C., 19-21 March 2013, Annex (deciding "that it is very important to link legal recognition of land and resource rights of the indigenous and tribal peoples to the further development of the REDD+ program in Suriname;" and that Suriname must revise its funding request "to reflect that the Saramaka Judgment of the Inter-American Court of Human Rights and indigenous and tribal peoples rights have implications for REDD+ in Suriname"), http://www.forestcarbonpartnership.org/sites/fcp/files/Final%20Resolution%207%20Suriname.pdf.

18 Saramaka People 2007, *supra*, at para. 116.

19 *Id.*

20 *Id.* at para. 167. *See also id.* at 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").

peoples] against acts that violate their right to property."[21] The latter includes general civil remedies and laws related to mining and logging.

23. Each of the findings quoted in the preceding paragraph concerns Suriname's legal framework as it applies to the situation of all indigenous and tribal peoples subject to its jurisdiction, including the Kaliña and Lokono peoples, rather than only the Saramaka people. These findings and conclusions therefore apply *mutatis mutandis* to the situation of Kaliña and Lokono and the violations alleged in the instant case.[22]

24. The representatives further observe that throughout the proceedings in this case before the Commission, Suriname repeatedly admitted and confirmed that it has failed to legally recognise the victims' property rights in and to their traditional lands and territory.[23] It also repeatedly admitted that it has issued the individual titles, established the nature reserves and granted the mining permits complained of in the instant case, and extensively (and incorrectly) argued that these activities all constituted valid subordinations of the victims' rights.[24] The preceding are therefore not contested facts.

C. The Victims' Efforts to Obtain Remedies Locally

25. The victims – as have all other indigenous and tribal peoples in Suriname who are similarly situated – have repeatedly objected to the above described situation for more than 30 years and have sought to address it through dialogue with the State, formal petitions, letters of complaint, conference resolutions and protests (discussed below), the only options available to them given the absence of effective judicial remedies by which they could seek protection for their rights. They first became aware that judicial remedies were ineffective when they participated in filing three cases in the courts together with the now defunct Association of Indigenous Peoples in 1975-76. These cases argued that the state had an obligation to recognize indigenous peoples' property rights and were all summarily dismissed by the judiciary

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21 *Id.* at para. 185.

22 The State has also acknowledged the Court's judgment in *Saramaka People* in the context of the proceedings in this instant case and specifically recognized the "force of precedent of the judgment for the consideration of the claims in the present case." Annex 6 to the Commission's Application, Comments of the State on the Merits in Kalina & Lokono Peoples v. Suriname, 22 March 2008, at p. 1.

23 *See e.g.,* Annex 6 to the Commission's Application, Comments of the State on the Merits in Kalina & Lokono Peoples v. Suriname, 22 March 2008, p. 1 (acknowledging, pursuant to the judgment of the Inter-American Court of Human Rights in the case of the *Saramaka People*, that the victims "are assumed to have the right ... to use and enjoy ... the land allegedly traditionally used and owned by them. This assumption does not prejudice the need to demarcate and delineate the alleged territory" and; the "subject and scope of the alleged right of ownership" remain "uncertain," and "the right itself [is] contentious" pending delimitation and demarcation by the State).

24 *See e.g.,* 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. 18 (arguing that the allotment and granting of title to third parties of lands in the four villages of Wan Shi Sha, Erowarte, Pierrekondre and Tapuku was done to satisfy an "imperative public interest," namely "a plan to develop a vacation resort in Albina and its surroundings"); and, at p. 8 (arguing that the nature reserves constitute valid restrictions of indigenous peoples' property rights).

as lacking legal merit.[25] Immediately after the dismissal of the last of these cases in 1976, the Kaliña and Lokono peoples marched 142 kilometres, from Albina to Paramaribo, to deliver a petition to the first president of Suriname. They asked the State to recognize indigenous land rights. They also protested against the expropriation of indigenous lands by the Galibi and Wia Wia Nature Reserves, and the non-consensual allotment of Wan Shi Sha, Pierrekondre, Tapuku and Erowarte and grants of title therein. Their appeals were bluntly rejected and they were told they had no rights and no right to object.[26] Likewise, a counter-claim submitted by the victims was rejected in 1998 by the judiciary on the basis that the title issued by the State to a non-indigenous person will always, as a matter of settled law, supersede and negate any alleged right that indigenous peoples may claim.[27] The land in question in that case is located within the residential area of one of the victims' communities (see below).

26. Given the lack of judicial remedies under domestic law, the victims' filed a series of formal petitions pursuant to Article 22 of Suriname 1987 Constitution between 2003 and 2007.[28] This article, set out in the fundamental rights chapter of the Constitution, provides that "Everyone has the right to submit written petitions to the competent authority." The State failed to respond to any of these petitions and otherwise took no action to address the complaints raised therein. The same was also the case with a series of complaints filed with the State Lands Office and various ministries. While there was no formal response from the State, a meeting was held in December 2005 with the then-new Minister of Land, Forest Policy and Physical Planning to discuss the victims' concerns. This meeting resulted in an informal commitment by the Minister to negotiate a settlement and, as agreed in the meeting, the victims' duly submitted draft term of reference for a settlement procedure. However, the matter ended there and nothing further was heard from the State.

27. The victims have also actively sought remedies through participation in national level initiatives in cooperation with all other indigenous and tribal peoples.[29] This includes efforts to obtain implementation of the commitment made by the State in the 1992 Lelydorp Accord that

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[25] Case No. 165, Association of Indigenous People v. Suriname, 17 March 1975; Association of Indigenous People v. Suriname, A.R. No. 754180 26 Sept. 1975; and Association of Indigenous People v. Suriname, A.R. No. 753160, 13 Jan. 1976.

[26] *See* para. 47 and associated notes *infra*.

[27] *Tjang A Sjin v. Zaalman and Others,* Cantonal Court, First Canton, Paramaribo, 21 May 1998. *See also Celientje Martina Joeroeja-Koewie and others v. The State of Suriname* (A.R. no. 025350), 30 January 2003. These cases were both cited by the Court in Saramaka People 2007, *supra*, para. 173 and, at para 180 (stating that the "Evidence submitted before this Tribunal regarding cases filed by members of other indigenous or tribal peoples in Suriname pursuant to its Civil Code support the Saramakas' contention that the recourse is ineffective to address their claims. In one such case, a domestic court denied a community's request to revoke a mining concession, holding that the community lacked the legal capacity as a collective entity to request such measures, and referred the community back to the Minister who had issued the mining concession. 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"),.

[28] *See e.g.,* Annex 11-13 and 15 to the Commission's Application.

[29] *See e.g.,* Annex 5 to the Commission's Application, *supra*, p. 110-11.

formally concluded the 'Interior War'. Article 10 of that Accord, brokered by the OAS, provides that the State "shall endeavor that legal mechanisms be created" to provide for real title and other protections for lands in and around indigenous and tribal peoples' communities.[30] The State has not adopted any measures to give effect to this provision, a fact confirmed by the UNCERD and others.[31] They also joined together with indigenous and tribal leaders in 1995, 1996 and 2006 to adopt detailed statements calling on the State to recognise their rights, none of which elicited any meaningful or positive response by the State. The latter included an explicit endorsement of the instant case by all indigenous and tribal leaders.[32]

28. They have also tried (unsuccessfully) to participate in State commissions established without their involvement in 1995, 1997, 2006, and 2011 that purported to study or otherwise address indigenous property rights. These initiatives all proved inconclusive at best; for instance, only one of these commissions even issued a report.[33] This includes a 2011 'National Land Rights Conference', which was unilaterally terminated by the State after it objected to statement read on behalf of all indigenous and tribal peoples.[34] State officials then proceeded

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30 The full provision provides that: "1. The government shall endeavor that legal mechanisms be created, under which citizens who live and reside in a tribal setting will be able to secure a real title to land requested by them in their areas of residence [*woongebieden*]. 2. The demarcation and size of the respective residential areas, referred to in the first paragraph, shall be determined on the basis of a study carried out with respect thereto by the Council for the Development of the Interior. 3. The traditional authorities of the citizens living in tribes or a body appointed thereto by them, will indicate a procedure on the basis of which individual members of a community can be considered for real title to a plot of land in the area referred to in paragraph 2. 4. Around the area mentioned in paragraph 2, the Government will establish an economic zone where the communities and citizens living in tribes can perform economic activities, including forestry, small-scale mining, hunting and fishing."

31 *See e.g., Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/SUR/CO/9, 12 March 2004, at para. 11 (stating that "The Committee is concerned that, more than 10 years after the 1992 Peace Accord, the State party has not adopted an adequate legislative framework to govern the legal recognition of the rights of indigenous and tribal peoples (Amerindians and Maroons) over their lands, territories and communal resources").

32 *See* Official Response of the State of Suriname, Case 12.338, Annex 63, *Decisions taken during the grankrutu on Land Rights of Indigenous and tribal peoples in Suriname held at Diitabiki from 1 to 5 December 2006* (stating that "All actions of Indigenous and Maroon peoples concerning their Land Rights, especially Case 12.338, 12 Saramaka *lös* versus Suriname, that is now brought before the Inter-American Court, as well as the case of the Indigenous peoples of the Lower Marowijne area (VIDS) will be supported").

33 *See e.g., Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/SUR/CO/12, 13 March 2009, at para. 13 ("While noting with interest the final report by the Presidential Commission on Land Rights presented for analysis to the President of Suriname, the Committee is concerned about the lack of an effective natural resources management regime. (Art. 2) The Committee encourages the State to intensify its consideration of the final report in view to setting the principles for a comprehensive national land rights regime and appropriate relevant legislation with the full participation of the freely chosen representatives of indigenous and tribal peoples, as per the Commission's mandate. In the Committee's opinion the State Party's consideration of the report of the Presidential Commission should not be in detriment of its full compliance with the orders of the Inter-American Court of Human Rights in the Saramaka People case').

34 Annex 2 to the Commission's Application, p. 144. *See also* 'Bouterse livid over "manipulation" of land rights conference', *Stabroek News*, 24 October 2011 (stating that "the President decided to end the conference early. Although the resolution contains many acceptable ideas, it contains 'impossible' demands that could

to publicly denigrate indigenous and tribal leaders in the weeks following the conference.[35] Efforts to resume dialogue commenced in December 2011 and a working group was established to draft a 'road map' that would set out a plan of action for addressing indigenous and tribal property rights.[36] This road map was drafted but has since been arbitrarily discarded by the State in favour of action through a 'Presidential Commissioner on Land Rights,' established in 2013. This Presidential Commissioner is presently overseeing three commissions (one functioning at present), none of which is mandated to address recognition of property rights or issues of juridical personality.[37]

29. Throughout these decades of inconclusive activity, the State, at its highest levels, has been vocally opposed to addressing indigenous and tribal peoples' rights. As noted by Professor Kirsch, this even includes the former President of the country telling one of the victims' leaders "that he would do everything in his power to prevent indigenous peoples from gaining land rights."[38] It has also explicitly rejected recommendations that it urgently recognise 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.[39] At that time, Suriname also unambiguously stated that recommendations calling on it to execute the judgment of the Court in *Saramaka People* "cannot be supported."[40]

30. Suriname has also cited and continues today to raise every conceivable excuse to justify why it cannot recognise indigenous and tribal peoples' rights, including those previously rejected by the Court in *Saramaka People*.[41] For instance, Suriname continues to maintain that recognition of indigenous and tribal peoples' property rights will somehow constitute discrimination against other citizens.[42] As recently as February 2013, the State explained that it

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harm the nation, according to Bouterse. It mentions 'right to self-determination' and 'property rights' to all that is found 'above and under the ground' in their territories. The latter is mainly a reference to natural resources such as gold and bauxite. The President pointed out that he absolutely cannot accept this. As traditional leaders agreed to the resolution with 'much fanfare and fuss', the President said in a statement that the document will be presented to Parliament, which represents the entire people. 'And I can tell you now that when this document reaches Parliament, it will never be accepted'"), http://www.stabroeknews.com/2011/archives/10/24/bouterse-livid-over-manipulation%E2%80%99-of-land-rights-conference/.

35 Annex 2 to the Commission's Application, p. 144.

36 *Id.*

37 *See* Report of the State of Suriname, Case of the Saramaka People, Monitoring Implementation, 30 October 2013.

38 Annex 8 to the Commission Application, at p. 5.

39 *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),").

40 *Id.* at para. 13 (see esp. recommendations 73.11, 73.52-73.57 listed therein).

41 *See* Saramaka People 2007, *supra*, at para. 103 (ruling that "the State's arguments regarding its inability to create legislation in this area due to the alleged complexity of the issue or the possible discriminatory nature of such legislation are without merit").

42 *See e.g., IACHR Press Release 9/13*, 'IACHR Concludes its Working Visit to Suriname', 12 February 2013 (explaining in relation to Suriname's contentions that "The principle of equality should not be equated with assimilation, and should be implemented in practice with the participation of the affected population,

still considers it contentious to even refer to indigenous peoples as "rights-holders," noting in this respect that the State remains the owner of their traditional lands under domestic law.[43] In a December 2013 report to the UNCERD, Suriname also sought to excuse its failure to implement the *Saramaka People* judgment on the basis of "complexity" caused by "the composition of Suriname's population...."[44] A few months later, and in relation to the submission of this case to the Court, the Presidential Commissioner explained in the press that "collective ownership is not an easy issue.... There are several consequences tied to issues for which there is currently no answer. The issue of creating a legal system which is foreign to that of Suriname is one risk."[45]

31. In short, and in light of the absence of any available judicial remedies, the victims' have repeatedly and in good faith sought to provide the State with every opportunity to recognise and respect their rights since Suriname became independent in 1975. The State has not only persistently failed to achieve any meaningful progress on these issues it has even failed to respond to the vast majority of the victims efforts in this respect. To make matters worse, State officials to this day continue to tell the victims that they have no rights or even no right to object when others violate their rights, and continue to raise numerous unfounded excuses for why Suriname cannot recognize indigenous peoples' rights. The result is that the Kaliña and Lokono peoples' rights remain unrecognised and are violated with impunity on a daily basis.

D. Active Violation of the Rights of the Kaliña and Lokono peoples

1. Nature Reserves

32. In the proceedings before the Commission, the State admitted that it has established three nature reserves in the territory of the Kaliña and Lokono peoples, all pursuant to the 1954 *Nature Protection Act:* the Galibi Nature Reserve (1969), the Wane Kreek Nature Reserve (1986)

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incorporating a gender and human rights perspective. It also demands respect for the equality of ethnic, racial, and religious groups in the law...").

[43] *See e.g., The National Biodiversity Action Plan (NBAP) 2012-2016. A Publication of the Ministry of Labour, Technological Development and Environment*, Government of Suriname, February 2013, at p. 18-9 (stating that "representatives of organizations which promote the interests of the Indigenous people, stated that the Indigenous people need to be considered rightholders and should also be designated as such.... The choice of words is a sensitive issue because it is related to judicial disputes between the state of Suriname on the one hand and on the other hand the Indigenous people and Maroons (and organizations that promote their interests). Based on the Constitution of the Republic of Suriname (1987) the entire Suriname territory, except for privately owned land, is 'domain' of the state. Neither this decree, nor the Constitution (1987; amended in 1992) provides for collective rights to property, while the Indigenous people and Maroons do claim these rights on the basis of international law"), http://www.cbd.int/doc/world/sr/sr-nbsap-v2-en.pdf.

[44] *Thirteenth to fifteenth periodic reports of States parties due in 2013: Suriname*, CERD/C/SUR/13-15, at para. 14, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=802&Lang=en. *See in the regard* Saramaka People 2007, *supra*, at para. 103 (ruling that "the State's arguments regarding its inability to create legislation in this area due to the alleged complexity of the issue or the possible discriminatory nature of such legislation are without merit").

[45] 'New case against Suriname at IACHR', *Stabroek News*, 8 February 2014, http://www.stabroeknews.com/2014/news/regional/02/08/new-case-suriname-iachr/.

and the Wia Wia Nature Reserve (1966). These reserves jointly cover around 850 square kilometres (85,000 hectares), a substantial percentage of the victims' territory.[46] The stated intent of the Galibi and Wia Wia Nature Reserves is the protection of nesting sea turtle populations.[47] The purpose of the Wane Kreek Reserve is the protection of important ecosystems.[48]

33. Suriname additionally confirmed that it established these reserves without the victims' effective participation, either at the time they were established or subsequently.[49] This is also acknowledged in the Galibi Nature Reserve Management Plan 1992-96, which states that, "Although the government discussed the establishment of the Galibi Nature Reserve with the local population, the villagers were not involved in the decision-making process. They were confronted with the reserve as a *fait accompli*, something to which everyone would have objections."[50] Professor Kirsch explains that it "was only in 1997 that people in the Lower Marowijne area learned that the Wane Kreek Nature Reserve had been established eleven years earlier."[51] Indeed, they learned about the establishment of the Reserve when they complained about the commencement of mining operations therein (see below) in that same year.

34. The *Nature Protection Act* makes no reference to the existence of indigenous peoples nor does it recognize or protect their ownership or any other rights to their traditional territories. Article 1 of the Act provides that "For the protection and conservation of the natural resources present in Suriname, after hearing the Council of State, the President may designate lands and waters belonging to the State Domain as a nature reserve." As indigenous peoples' territories are legally classified under extant domestic law as state lands ("State Domain"), this provision permits the State to unilaterally declare any indigenous territory or part thereof to be a nature reserve by decree. The State has admitted that this applies in the instant case, stating that "the reserves were established ... in areas which were and still are domain land...."[52] No due process or compensation was provided the victims and no consideration was given to the

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46 *See Natural Heritage in Suriname*, F. Baal, Head Nature Conservation Division of the Forest Service of Suriname, Paramaribo, 19 February 2000 (Updated 4 March 2005)), http://www.unesco-suriname.org/natural%20heritage%20in%20suriname.htm

47 Annex 18 to the Commission's Application, Affidavit of F. Baal and B. Drakenstein, p. 1.

48 *Id.*

49 Annex 18 to the Commission's Application, Affidavit of F. Baal and B. Drakenstein, p. 1. *See also* Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono, *supra*, p. 11 (stating that "These reserves are in areas that were, and are, historically and traditionally used by indigenous peoples. These nature reserves were, however, set up without the permission of, and to a certain extent without even informing the indigenous communities affected. They therefore constitute a source of conflict with the authorities").

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

51 Annex 8 to the Commission's Application, Expert Report of Dr. Stuart Kirsch, at p. 9.

52 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.

fundamental importance of these lands to the victims' integrity and well-being, and the State has not sought to rectify this situation to date.

35. The Act also makes no provision for the exercise of indigenous peoples' rights within any nature reserve established in their traditional territories.[53] Rather, under the Act, nature reserves are property of the State and hunting, fishing or any damage to the soil or the flora and fauna within the reserves are strictly prohibited and punishable as criminal offenses.[54] This fact was also admitted by the State, which testified that "The Nature Protection Act and the Resolutions by which the Galibi and Wia Wia Reserves were established do not provide for the recognition of the traditional use rights of land and resources of indigenous peoples."[55] The pertinent provisions of the Act read as follows:

> 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.
> Art. 8: Violation of this law will be punishable with imprisonment not exceeding 3 months or with a fine of one thousand guilders maximum.

36. The Wane Kreek Nature Reserve was established by a 1986 Resolution made under the 1954 Act. Article 4 of the Resolution provides that "To the extent that on the date of entry into force of this State Decree, there are parcels issued in allodial ownership and hereditary property, lease, rent, use, by permit or concession, or if there are villages and settlements of bushland inhabitants living in tribal form within the areas designated by the State Decree as nature reserves established by this State Resolution, the rights acquired by virtue thereof, will be respected."[56] As there were no indigenous villages or settlements *within* the Wane Kreek reserve when it was established this provision is essentially meaningless. The same is also the case for the phrase, "the rights acquired by virtue thereof," as no rights exist or may be acquired under extant law in relation to the traditional occupation or use of lands by indigenous peoples.

37. Further, this Decree upholds prior property rights (other than those of indigenous peoples) and for this reason saves the mining and logging concessions inside the Reserve, the same concessions that have caused the victims substantial harm (see below), including a ban on hunting and fishing that is enforced mostly against indigenous people by the mining company.[57] This privileging of the rights of non-indigenous people over those of the indigenous traditional owners of the lands in question is a common theme that runs throughout Suriname's law and practice and its acts and omissions complained of in the instant case.

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53 Nature Protection Act (Natuurbeschermingswet), GB 1954, 26 (current text SB 1992, 80).

54 *Id.* Arts. 5 and 8.

55 Annex 18 to the Commission's Application, Affidavit of F. Baal and B. Drakenstein, p. 1.

56 Annex 20 to the Commission's Application, *Nature Protection Resolution of 1986* (SB 1986, 52), Art. 4.

57 *See e.g.*, 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, *Affidavit of Glen Renaldo Kingswijk.*

38. In the almost 50 years since the Galibi and Wia Wia Reserves were established and the almost 30 years since the Wane Kreek Reserve was established, the State has not taken any meaningful action to address the numerous complaints made by the victims' communities. The Galibi Reserve has especially been a source of constant conflict since it was established.[58] This area contains important sacred sites, including an ancestral village, in addition to a considerable number of traditionally used resources.[59] Professor Kirsch explains that:

> The Kaliña living in Galibi [Christiaankondre and Langamankondre] faced economic and other problems in coping with restrictions on their use of natural resources imposed by the nature reserve and remain deeply concerned that an integral part of their territory has been unilaterally taken from them by the State. ... 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 by the Galibi Nature Reserve. Since the 1970s, they have consistently demanded complete restitution of all of their lands that were incorporated into the reserve.[60]

39. As confirmed by Professor Kirsch, the communities have presented considerable evidence to the State that the reason for declining turtle populations is shrimp and other fishing boats in the Marowijne estuary, which drown the turtles in their nets.[61] Professor Kirsch notes independent research that records a statement made by "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."[62] Despite this, the

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58 On the establishment of the Galibi Reserve, *see* Annex 8 to the Commission's Application, Expert Report of Dr. Stuart Kirsch, at p. 6 (explaining that "According to the current Captains of the Galibi villages, Dutch authorities instructed their predecessors to sign papers relating to the Galibi Nature Reserve. However, neither of the Captains was able to read the documents and they both thought they were being asked for permission to conduct research on sea turtles, not to establish a nature reserve. Some of their agricultural plots and houses were located inside the nature reserve, forcing them to relocate. There were many disputes between the communities and the Galibi Nature Reserve authorities during its establishment. However, neither the Captains at the time nor the people from the two nearby villages knew how or where to protest the taking of their lands. The current Captains of Galibi believe that the Dutch colonial administration took advantage of the fact that the Kaliña were unfamiliar with their rights. Consequently, the community members and their Captains regard the process through which the Galibi Nature Reserve was established as fraudulent and therefore a violation of their human rights").

59 A partial list of sacred sites is contained in Annex 5 to the Commission's Application, p. 101-2.

60 Annex 8 to the Commission's Application, Expert Report of Dr. Stuart Kirsch, at p. 7 and p. 26.

61 *Id.* (explaining that "The Captains of the Galibi villages ... assert that the most significant threat to the sea turtles is not from the Kaliña, but rather from fishing boats using long drift nets in the Marowijne River estuary, which kill sea turtles when they become entangled in the nets and drown. Most of these boats are from Paramaribo (Kambel 2002). Apparently, the State exerts little control over the fishing boats responsible for killing turtles in their nets (Kambel 2002:143)"). *See also* Annex 5 to the Commission's Application, *supra*, p. 106-7 (detailing extensive complaints made by the victims about commercial fishing operations and their consequences in the victims' traditional waters).

62 *Id.* at note 5.

State persists with coercive measures against community members, even to the point of establishing an armed guard post between the villages and the reserve. 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.[63] They have also recorded that these guards hinder traditional fishing activities.[64]

40. After decades of complaints by Christiaankondre and Langamankondre (collectively known as Galibi), the two closest communities to the Galibi Reserve, in 2000, the State agreed to establish a 'consultation commission'. 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. Moreover, this commission primarily dealt with issues of transporting tourists to the Galibi Reserve, in particular how many government or community boats would be involved, and steadfastly refused to address the issue identified as most important to the victims' communities: the ongoing dispossession of their property rights and denials of access to the area. In 2008, the communities withdrew from the commission altogether explaining that their views were systematically ignored. They further explained that the State had even refused to reach agreement with them on transportation issues and, instead, said that they should proceed to the courts to seek satisfaction despite both parties knowing that the victims have no legal rights.

2. Sub-division, Allotment and Alienation of Kaliña and Lokono peoples' lands in Pierrekondre, Wan Shi Sha, Tapuku and Erowarte

41. As admitted by Suriname in the proceeding before the Commission, in 1975-76, the State initiated a project in the victims' communities of Pierrekondre, Wan Shi Sha (Marijkedorp), Tapuku and Erowarte that involved the unilateral and uncompensated sub-division and allotment of a considerable strip of lands along the Marowijne River.[65] From that date on, this allotted area has been issued to non-community members who now hold title pursuant to domestic law and who mostly have built vacation homes along the beaches.[66] This

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

64 *See e.g.,* 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'").

65 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. 18 (stating that the allotment and granting of title to third parties of lands in the four villages of Wan Shi Sha, Erowarte, Pierrekondre and Tapuku was done to satisfy an "imperative public interest," namely "a plan to develop a vacation resort in Albina and its surroundings").

66 *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

allotted area is in the core residential area of these four villages. It was at the time of allotment and is still today considered part of the ancestral lands of these communities. Also, these lands were occupied and used by the communities at the time of allotment, large parts thereof continue to be occupied and used by them today,[67] and the vacations homes of the non-members were and remain literally metres away from the houses of community members.[68] As discussed further below, these non-consensual takings of the victims' lands in these communities continue to this day.

42. Between 1976 and 2008, approximately 20 titles have been issued to non-indigenous persons in Erowarte, Tapuku, Pierrekondre and Wan Shi Sha.[69] It is unknown exactly how many persons have acquired title in these villages and when because the State has been unresponsive to the victims' requests for this public information. The title holders have primarily constructed vacation homes thereon, which they use only intermittently and for recreational purposes. This was confirmed by the State, which acknowledged the inconsequential and transient nature of the interests of these third parties, explaining that they are "non-resident holders of vacation homes"[70] and that they are merely "holiday citizens."[71]

43. As much of the allotted area has not been titled to anyone to date, the four affected communities are constantly faced with additional persons either claiming to have title or seeking title within the village lands. This includes lands currently occupied by members of these communities. In 2004, 2006, 2007 and 2013, they registered formal complaints in connection with a title obtained by the Lely Foundation near their settlement of Bambusi (between Pierrekondre and Tapuku)[72] and the construction of a hotel in Wan Shi Sha.[73] They

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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").

67 *See* Annex 5 to the Commission's Application.

68 *See e.g.*, 'Kano comes up for the interests of Surinamese Indian: HOLDS PROTEST MARCH', *Pipel*, 15 January 1977, at p. 2 (interviewing Mr. Pierre, who states that "We want right of say on our land. That is what it is all about. It often happened that our land is taken by third parties just like that. For example, in Erowarte, there are pieces of land given to third parties which the inhabitants used as agricultural plots. In Pierre Kondre, there are two pieces of land; one is given to Findlay and one is given to Fereira. Together these two pieces of land are as big as our whole village, where 250 people live. Our land is State domain land and part of it has been seized just like that and given to Mr. Findlay. But he himself does not use it, it lies fallow as meadow land").

69 *See* Annex 22 to the Commission's Application, containing a partial list of the title holders in these villages.

70 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.

71 *Id.* at p. 13.

72 Annex 12 to the Commission's Application (stating that the "Indigenous persons who live on this plot, Mr. and Mrs. Pierre, were told by the police and the District Secretary on February 5, 2006, that they are not allowed to obstruct the title holder - title is registered in the name of the Lely Foundation – from entering the plot, since the holder is the only rightful owner. Furthermore, the police has [*sic*] stated that all lands of the Indigenous villages Tapuku, Erowarte, and Pierrekondre, belong to the government and that the Indigenous peoples will not get their land rights in one hundred years"). On Bambusi, *see* Annex 5 to the Commission's Application, p. 21. *See also* Annex 24 to the Commission's Application (containing copies of formal complaints submitted by the victims).

also complained in 2007 about a Mr. De Vries, who cleared a piece of land within the village of Pierrekondre with the stated intent of building a house, a filling station and a shopping mall, and a Mr. Sijlbing, who did the same with the intention of building a house.[74]

44. In 2008, the District Commissioner for Marowijne, a State official, threatened to forcibly remove a member of Wan Shi Sha from his land in the village. This land is coveted by a wealthy individual from Paramaribo, who would like to build an airplane hangar so that he can park his private aircraft.[75] In connection with this, former Captain Zaalman of Wan Shi Sha explains that

> The District-Commissioner of Marowijne, Mr. Sondroejoe and Mr. Saboerali of the Civil Aviation Service have approached me several times, in person and by telephone. The last time was on 2 September 2008. They have informed me that Mr. Robert Tjon Sie Kie intends to build a hangar right next to the home of Mr. Sabajo. They also said that Mr. Sabajo will have to move because of the construction of the hangar. They have asked me to give permission for the building of the hangar.[76]

45. After consulting the members of his community in a village meeting – as is traditional in Kaliña and Lokono culture – Captain Zaalman informed the District Commissioner that the community would not agree to the construction of the aircraft hangar. The District Commissioner responded that "if [the Captain] would not consent to the building, he would have to use force to relocate Mr. Sabajo."[77] This is the situation that confronts Wan Shi Sha, Erowarte, Pierrekondre and Tapuku on a daily basis.

46. The unilateral allotment of these villages and issuance of title to outsiders has been a continual source of conflict since the 1970s. In 1998, for instance, the Captain and other members of Wan Shi Sha attempted stop a Paramaribo resident from rebuilding his vacation home – located in the residential area of the village itself – that had been destroyed during the 'Interior War'. This person filed suit against the Captain claiming that he was unable to enjoy his property rights because the Captain and villagers had interfered with the reconstruction efforts. In this case, *Tjang A Sjin v. Zaalman and Others,* the judge ruled in the plaintiff's favour, holding that he held valid, real title to the land and that the Captain had committed an unlawful act by hindering his attempts to rebuild his vacation home.[78] In so ruling, the judge rejected the Captain's defence – and the intervention of the seven other Kaliña and Lokono Captains – that

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[73] Annex 11, 12 and 15 to the Commission's Application (containing copies of these complaints). *See also* Annex 13 to the Commission's Application (containing an unanswered petition, dated 07 October 2007, made pursuant to Article 22 of Suriname's 1987 Constitution) and Annex 24 to the Commission's Application.

[74] *See* Annex 13 to the Commission's Application.

[75] Annex A and B hereto containing the affidavits of Captain Henry Zaalman and Mr. Max Sabajo. These affidavits were submitted to the Commission on 29 October 2008, but do not appear to be included in the annexes to the Commission's Application.

[76] Annex B, Affidavit of Captain Henry Zaalman, at no. 7.

[77] *Id.* at no. 10.

[78] *Tjang A Sjin v. Zaalman and Others,* Cantonal Court, First Canton, Paramaribo, 21 May 1998.

the land was traditionally and immemorially owned by the Lokono indigenous people of Wan Shi Sha.

47. As noted above, the victims have complained about this situation on numerous occasions. As discussed above, this began in 1975-6 when the victims filed suit against the State, actions all summarily dismissed, and in 1976 when the victims carried out a 142 kilometer-long 'land rights' march from Albina to Paramaribo to emphasize their objections to, *inter alia*, the sub-division of the villages in question. The response of the State was expressed by a special commission known as the Commission on Entitlements to Land in the Interior, which bluntly stated that indigenous peoples had no rights to land and therefore no right to object.[79] This blunt rejection of indigenous peoples' rights has continued to the present day. As noted above, judicial decisions against the victims have likewise denied that indigenous peoples have any rights and privileged the title held by third parties. This is also the repeated position taken by the police and other State officials when called in to resolve disputes between the victims' communities and third parties who have acquired title in their ancestral lands, including in 2006, 2007 and 2008. Their objections are routinely ignored and the village authorities are derided and told that they have no rights and no grounds to object.[80] This extends to the highest levels of the State, which have simply ignored numerous complaints, including at least four petitions submitted pursuant to Article 22 of the 1987 Constitution.

3. Mining and Logging Operations

48. In its written submissions to the Commission, Suriname confirmed that it has issued a bauxite mining concession within the Kaliña and Lokono peoples' territory and that mining operations therein were authorised by the State and commenced in 1997.[81] These mining operations took place at locations known as Wane Hills 1-4. That these mining operations are in the victims' territory is further confirmed in reports commissioned by the operating company, BHP/Billiton,[82] and in affidavits submitted by the State to the Commission.[83] The victims' were not consulted about the bauxite mining operations in 1997 or at any time thereafter, nor did

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79 J. Vernooij, *Aktie Grondrechten Binnenland* [Action Land Rights Interior], Paramaribo, 1988, p. 13. The Kaliña and Lokono peoples joined together with other indigenous peoples and Maroons in July 1978 to discuss the report and recommendations of the Commission on Entitlements to Land in the Interior. They adopted the Declaration of Santigron on 1 July 1978, which stated that "the rights of the peoples of the interior to our lands are not recognized by the government," and the Commission "has not in any way taken into account our justified wishes."

80 *See e.g.*, Annex 12 to the Commission's Application.

81 Annex 6 to the Commission's Application, Comments of the State on the Merits, 22 March 2008, at p. 6.

82 *See* Annex 23 to the Commission's Application, SRK Consulting, Environmental Sensitivity Analysis of the Wane 4 Concession. Report prepared for NV BHP Billiton Maatschappij Suriname. Report No. 346204/1, July 2005, at p. iii (stating that "Extensive evidence of pre-Columbian habitation has been found in the Wane Creek area") and p. 17 (stating that "Current land use in the Wane Creek area includes conservation, mining, logging and subsistence agriculture, hunting and fishing").

83 *See e.g.*, Annex 21 to the Commission's Application, *Affidavit of Glen Renaldo Kingswijk*.

the State seek and obtain their free and informed consent, and the State admitted these facts in the proceedings before the Commission.[84]

49. In addition to being within the victims' territory this concession and mine are also within the Wane Kreek Nature Reserve.[85] Despite this, no environmental and social impact assessment was undertaken in relation to any phase of the mining operations that commenced in 1997. This was confirmed by the State[86] and independently verified by Professor Stuart Kirsch.[87] Dr. Kirsch reports that he was told by the company that it "did not conduct such studies because there 'is no formal requirement under Suriname legislation for an EIS'",[88] a fact also confirmed by the Court in during its consideration of the 2007 *Saramaka People* case.[89] Dr. Kirsch adds that the

> Wane Kreek [is] the heartland of the forested area of the Lower Marowijne, and a major source of subsistence resources for the indigenous people of the region. Ironically, the Wane Kreek Nature Reserve 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.[90]

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84 Annex 6 to the Commission's Application, Further comments, 12 September 2008, at p. 14. *See also* Annex 28 to the Commission's Application containing affidavits of members of the victims' communities.

85 Annex 21 to the Commission's Application, *Affidavit of Glen Renaldo Kingswijk,* at p. 1 (stating that "When the Wane nature reserve was established in 1986 the Wane I and Wane II deposits became part of the reserve regime. Planning for mining of the Wane I and Wane II deposits started in the 1990s and actual mining commenced in 1997. The plan provided for construction of a mine and building of a haul road to access the mine and transport the bauxite").

86 Annex 6 to the Commission's Application, Further comments, 12 September 2008, p. 14.

87 Annex 8 to the Commission's Application Expert Report of Dr. Stuart Kirsch, at p. 12.

88 *Id.* Further stating that "BHP Billiton only began to conduct ESIA studies for its projects in Suriname in 2005 (Ian Wood, personal communication, 10 February 2009);" and 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)."

89 *See Observations of the State of Suriname to the document: "Pleadings, Motions and Evidence of the Victims' Representatives in the Case of 12 Saramaka Clans (case 12.338) against the Republic of Suriname"*, CJDM/645/07, 26 March 2007, at para. 70. (stating that "is true ... that the concessions were issued without first conducting an environmental and social impact assessment, but [the victims' representatives] forget to state that although there are no environmental norms and standards effective in Suriname, those of the World Bank apply"); and *Testimony of Witness R. Somopawiro, Written Transcript of the Public Hearing on Preliminary Objections as well as possible Merits, Reparations and Costs, May 9 and 10, 2007, Saramaka People v. Suriname,* at p. 48 (confirming that concessions are granted without conducting an ESIA and refuting the assertion that Suriname employs World Bank standards in forestry or other environmental operations).

90 Annex 8 to the Commission's Application Expert Report of Dr. Stuart Kirsch, at p. 3.

50. A report commissioned by BHP/Billiton confirms that the mining operations at Wane Hills 1 and 2 have caused "Considerable damage."[91] Additional "damage" has occurred on 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.[92] These findings are also confirmed by Dr. Kirsch, who documents serious environmental degradation, including the dumping of wastes, ineffective rehabilitation measures, and severe impacts on the victims' subsistence practices and cultural integrity. Dr. Kirsch and others have documented that the substantial impact of these mining operations has been compounded and intensified by logging operations, some legal and some illegal, taking place in the victims' territory, including inside the Wane Kreek Reserve.[93]

51. The Wane Hills mines and associated infrastructure are within the victims' territory and cover areas used by them for their traditional economic and cultural activities, all of which have been seriously disrupted by the mining operations. As Dr. Kirsch explains, "in the past, the Wane Kreek 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."[94] Confirming testimony submitted by members of the victims' communities,[95] he further explains that "Experienced hunters told me that the creeks became polluted and the animals no longer drink there. They told me that while it is still possible to find small animals there, it is difficult to find larger game animals. One must spend several days in the forest hunting to find larger animals, whereas before they were plentiful. 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'."[96] In-depth research on the situation of the victims' communities also repeatedly highlights that hunting has been severely hindered by the mining and logging operations in Wane Kreek, and the "inhabitants of all the villages are in clear agreement on this."[97]

52. The State, Dr. Kirsch and members of the victims' communities have also confirmed that indigenous people have been prohibited from hunting and fishing and denied access to their

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

92 *Id.* at 21.

93 Annex 8 to the Commission's Application, Expert Report of Dr. Stuart Kirsch, *supra*, at p. 19 (explaining that "In most of the villages in the Lower Marowijne, today people have to travel further to hunt and hunting yields diminished returns. As one person 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]"); and Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono, *supra*, p. 81-91 and p. 105-6.

94 Annex 8 to the Commission's Application, Expert Report of Dr. Stuart Kirsch, at p. 9.

95 *See* Annex 28 to the Commission's Application, containing affidavits of members of the victims' communities.

96 *Id.* at p. 15.

97 Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono, *supra*, at p. 54 (stating, *inter alia*, that "According to the hunters, this is because Suralco [joint venture partner of BHP/Billiton] is building roads in the Wane Creek area and also because of the logging activities there. As a result of the road construction, the noise of the heavy equipment and because all sorts of people are coming there to hunt, the game is retreating deeper into the forest."

traditional hunting and fishing areas by the mining company.[98] Non-indigenous people, company employees in particular, however, have been repeatedly seen hunting and fishing in the same areas, including through the indiscriminate use of fish poisons, the use of which is highly regulated by indigenous custom as it can lead to the decimation of fish stocks if not used properly.[99]

53. Mining in Suriname is primarily regulated by the 1986 *Mining Code*. The Court found in the *Saramaka People* case that this Mining Code offers no protection whatsoever to the Saramaka and would even deny them any right to compensation in the case of any damages that they may sustain given their lack of legal status and tenure under extant Suriname law.[100] This finding applies *mutatis mutandis* to the victims in the instance case.

V. VIOLATIONS AND APPLICABLE LAW

A. Preliminary

54. The jurisprudence of the inter-American human rights system acknowledges that the American Convention should be interpreted and applied in the context of developments in the field of international human rights law and with due regard to relevant rules of international law applicable to respondent states.[101] In relation to this, the Court has referred to Article 29(b) of the Convention, which provides that "No provision of this Convention shall be interpreted as: ... restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party." The Court has also emphasized the need to take into account the evolution of international legal protection for the rights of indigenous peoples when interpreting the Convention.[102]

55. The Court has also stated on a number of occasions that the rights guaranteed by the American Convention "must be interpreted and applied in connection with indigenous peoples with due consideration of the principles relating to protection of traditional forms of property and cultural survival and of the rights to lands, territories, and natural resources."[103] The judgments of the Court in the *Bámaca Velasquez, Aloeboetoe* and *Mayagna* cases additionally call attention to the "importance of taking into account certain aspects of the customs of the

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98 *See e.g.,* Annex 21 to the Commission's Application, *Affidavit of Glen Renaldo Kingswijk*.

99 *See* Annex 28 to the Commission's Application, containing affidavits of members of the victims' communities.

100 Saramaka People 2007, *supra*, para. 111, 183. More generally, the Court also found that there are no effective remedies available to the Saramaka in domestic venues and that their lack of legal personality further and fatally undermines their ability to seek protection in said venues (para. 176-85).

101 *Case of the Massacres of Ituango*, Judgment of 1 July 2006. Series C No. 148, para. 155-56, 179; *Yakye Axa Indigenous Community Case*, 17 June 2005. Series C No. 125, para. 124-31 and; *Tibi Case*, 7 September of 2004. Series C No. 114, para. 144.

102 *See e.g., Mayagna (Sumo) Awas Tingni Community Case,* Judgment of August 31, 2001. Series C No. 79, para. 148. *See also Jurisprudencia sobre Derechos de los Pueblos Indígenas en el Sistema Interamericano de Derechos Humanos*, OEA/Ser.L/V/II.120, Doc. 43, 9 September 2004.

103 Mayagna (Sumo) Awas Tingni Case, *supra*, para. 134-39.

indigenous peoples of the Americas for purposes of application of the American Convention on Human Rights."[104]

56. Finally, the Court has 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."[105]

B. Article 21 of the Convention

57. Article 21 of the American Convention guarantees the right to property and establishes that everyone "has the right to the use and enjoyment of his property." The Court explains that 'property' includes material things that can be possessed "as well as any right which may be part of a person's patrimony; that concept includes all moveables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."[106]

58. The Court held in *Yakye Axa* that "both the private property of individuals and communal property of the members of ... indigenous communities are protected by Article 21 of the American Convention."[107] The Court has also held that indigenous peoples "have the right to own the natural resources they have traditionally used within their territory," pursuant to Article 21, "for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake."[108] As the Court further explained, "the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land."[109]

59. The Kaliña and Lokono peoples' traditional patterns of occupation and use of its lands, territory and resources correspond with a system of customary rules and norms that determines rights and entitlements among their eight constituent communities and the members thereof. This customary land tenure system, which vests paramount ownership of territory and the resources therein in the Kaliña and Lokono peoples, collectively, and subsidiary rights to lands and resources in the eight villages and their members, embodies a property regime and a form of property that is protected by Article 21 of the American Convention.

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[104] *Bamaca Velasquez Case*, 25 November 2000. Series C No. 70, para. 81; Mayagna (Sumo) Awas Tingni Case, *supra*, para. 149; and Aloeboetoe et al. Case, Reparations, *supra*, para. 62.

[105] Yakye Axa, *supra*, at para. 63.

[106] *Ivcher Bronstein Case*, 6 February 2001. Series C No. 74, at para. 122. *See also* Mayagna (Sumo) Awas Tingni, *supra*, para. 144.

[107] Yakye Axa, *supra*, at para. 143.

[108] Saramaka People 2007, *supra*, at para. 121.

[109] *Id*. at para. 122.

60. The Court has repeatedly held that Article 21 read in conjunction with Articles 1 and 2 of the Convention protects indigenous peoples' collective property rights; that states parties to the Convention have positive, special and concrete obligations to recognize, restore, secure and protect indigenous peoples' property rights; and that states parties incur international liability if they fail to meet these obligations.[110] These property rights, which have an autonomous meaning in international law, arise from indigenous peoples' own laws and forms of land tenure, and exist as valid and enforceable rights irrespective of formal recognition by the states' legal systems.[111]

61. In *Sawhoyamaxa and Xámok Kásek*, the Court observed that its jurisprudence holds, *inter alia*, that: "(1) Traditional possession by indigenous of their lands has the equivalent effect of full title granted by the State; (2) traditional possession gives the indigenous the right to demand the official recognition of their land and its registration; [and] (3) the State must delimit, demarcate and grant collective title to the lands to the members of the indigenous communities."[112] Similarly, finding that "Indigenous peoples' customary law must be especially taken into account," the Court held in *Mayagna* that "the State must adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores."[113] As discussed below, the Court has applied this jurisprudence to Suriname in the *Saramaka People* case, finding that Suriname had violated Article 21 in conjunction with Articles 1 and 2.

62. In this case, the traditional territory of the Kaliña and Lokono peoples includes coastal mangrove forests, beaches and the foreshore (the area between the high and low tide marks), and coastal seas.[114] Pursuant to their customary tenure and laws, these areas are regarded as an integral part of their traditional territory. A significant percentage of the victims' traditionally used resources are also located in these areas, including clays, molluscs, crustaceans and marine fisheries.[115] The victims' property rights in and to these areas of their territory and the resources therein are protected by Article 21 of the American Convention as well as pursuant to other international instruments.

63. In *Apirana Mahuika et al*, for instance, the Human Rights Committee held that Article 1 of the Covenant on Civil and Political Rights may be read conjunctively with Article 27 of the same[116] so as to require and protect indigenous peoples' "effective possession" of and

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110 *Inter alia*, *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006. Series C No. 146, para. 127.

111 *Id.* para. 248.

112 *Id.* at para. 128; and *Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs*, Judgment of 24 August 2010. Ser. C No. 214, at para. 109.

113 *Id.* at para. 164.

114 *See e.g.*, Annex 3 to the Commission's Application, Indicative Land Use Map.

115 *See e.g.*, Annex 8 to the Commission's Application, Expert Report of Dr. Stuart Kirsch, at p. 21. *See also* Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono, *inter alia*, p. 66 and p. 72.

116 *Apirana Mahuika et al. vs. New Zealand,* (Communication No. 547/1993, 15/11/2000), UN Doc. CCPR/C/70/D/547/1993 (2000), para. 3 (observing that "the consideration of the merits of the case would

"effective control" over coastal and off-shore fisheries, both commercial and non-commercial.[117] These articles further require the protection of indigenous peoples' "traditional means of livelihood", including coastal fishing,[118] and measures to ensure their effective participation in decision making.[119] As discussed further below, the Court highlighted the importance of indigenous peoples' right to self-determination in *Saramaka People* and other cases.[120]

64. The Convention on Biological Diversity ("CBD"), an international environmental treaty in force for Suriname is also relevant in this context as well as with regard to the nature reserves in the victims' territory. Article 10(c) of the CBD provides that states parties shall "protect and encourage [indigenous peoples'] customary use of biological resources in accordance with traditional cultural practices...." The CBD's Secretariat has explained with regard to the language "protect and encourage" that this requires legislative protection for "security of tenure over traditional terrestrial and marine estates; [and] control over and use of traditional natural resources...."[121]

65. The UNCERD has also held that indigenous peoples have the right to the recognition of their "customary title over the foreshore and seabed" and that it is discriminatory to deny the possibility of establishing such title.[122] Similarly, a number of national courts, including in the Americas, have recognized the ownership and other rights of indigenous peoples in relation to the foreshore,[123] the sea bed and coastal seas on the basis of indigenous peoples' customary laws and traditional occupation and use.[124] These rights include both subsistence and commercial utilization of resources and the right to effective participation in decision making about use and management of coastal areas.[125]

66. Article 25 of the 2007 UN Declaration on the Rights of Indigenous Peoples also provides that "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories,

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enable the Committee to determine the relevance of article 1 to the authors' claims under article 27") and; para. 9.2 (observing that "the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27"). *See also in accord J G A Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997. UN Doc. CCPR/C/69/D/760/1997 (2000), at para. 10.3.

117 *Apirana Mahuika et al. vs. New Zealand,* at para. 9.7.

118 *Id.* at para. 9.4.

119 *Id.* para. 9.5.

120 Saramaka People 2007, *supra*, para. 93-5.

121 *Traditional Knowledge and Biological Diversity*, UNEP/CBD/TKBD/1/2, 18 October 1997.

122 *Decision 1(66): New Zealand,* Urgent Action and Early Warning Procedure, 11 March 2005, at para. 6-7.

123 *See e.g., Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (New Zealand Court of Appeal upholding the existence of Maori customary title in the foreshore and seabed).

124 *See* e.g., New Zealand cases: *Te Runanganui o te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20; *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680. Canada: *R. v Sparrow* [1990] 1 SCR 1075; United States: *People of Village of Gambell v. Clark* 746 F2d 572 (9th Circuit, 1984); Australia: *Yarmirr v. Northern Territory* 156 ALR 370.

125 *Id.*

waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

1. Suriname is obligated to legally recognize and secure the property rights of the Kaliña and Lokono peoples and has failed to comply with this obligation

67. Suriname has failed to recognize, secure and protect the Kaliña and Lokono peoples' property rights in law and practice and it repeatedly admitted this fact in the proceedings before the Commission.[126] Suriname has therefore violated Article 21 in conjunction with Articles 1 and 2 of the Convention. Suriname has yet to adopt any legislative or other measures that could recognise indigenous peoples' property rights or provide for the delimitation, demarcation and titling of their lands and territories. Suriname has also admitted that it has not adopted any measures that could recognize indigenous peoples' legal personality for the purposes of vesting title or otherwise.[127] The "structural problem area involving a lack of recognition in domestic law of the juridical personality and right to collective property of indigenous peoples in Suriname" identified by the Commission when it submitted this case to the Court therefore persists and represents a substantial obstacle to the exercise and enjoyment of the victims' rights.[128]

68. The victims' property rights in and to their traditionally owned lands, territory and resources remain unrecognised in Suriname's law and practice to this day, a situation previously addressed by the Court in *Saramaka People*.[129] The Court concluded in that case that Suriname's "legal framework merely grants the members of the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference."[130] As pertains in the instant case, the Court observed that the State itself "acknowledged that its domestic legal framework does not recognize the right of the members

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126 *See e.g.,* Annex 6 to the Commission's Application, Comments of the State on the Merits, 22 March 2008, p. 1 (acknowledging, pursuant to the judgment of the Inter-American Court of Human Rights in the case of the *Saramaka People*, that the victims "are assumed to have the right ... to use and enjoy ... the land allegedly traditionally used and owned by them. This assumption does not prejudice the need to demarcate and delineate the alleged territory" and; the "subject and scope of the alleged right of ownership" remain "uncertain," and "the right itself [is] contentious" pending delimitation and demarcation by the State).

127 *See* Annex 6 to the Commission's Application, Further comments offered by the State, 12 September 2008, p. 4-5; and *Saramaka People (Monitoring Compliance),* Orders of the Inter-American Court, 23 November 2011.

128 Inter-American Commission on Human Rights, 'IACHR Takes Case involving Kaliña and Lokono Peoples v. Suriname to the Inter-American Court', *Press Release,* 4 Feb. 2014 (also stating that "the violations have to do with an existing legal framework that prevents recognition of the indigenous peoples' juridical personality, a situation that to this day continues to keep the Kaliña and Lokono peoples from being able to protect their right to collective property. In addition, the State has failed to establish the regulatory foundations that would allow for recognition of the right to collective ownership of the lands, territories, and natural resources of the Kaliña and Lokono indigenous peoples"), http://www.oas.org/en/iachr/media_center/PReleases/2014/009.asp.

129 Saramaka People 2007, supra, para. 97-117

130 *Id.* at para. 115

of the Saramaka people to the use and enjoyment of property in accordance with their system of communal property...."[131] The Court further explained that

> rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty. In order to obtain such title, the territory traditionally used and occupied by the members of the Saramaka people must first be delimited and demarcated, in consultation with such people and other neighboring peoples.[132]

69. Based on the preceding, the Court decided that Suriname "has not complied with its duty to give domestic legal effect to the members of the Saramaka people's property rights in accordance with Article 21 of the Convention in relation to Articles 2 and 1(1) of such instrument."[133] Nothing has changed since this Court reached this conclusion and it applies *mutatis mutandis* to the victims in the instant case.

70. Suriname's acts and omissions are all the more egregious given that recognition, securing and protection of the victims' property rights is inextricably related to their survival and well-being as well as respect for a range of other interrelated and interdependent rights.[134] For example, indigenous peoples' property rights must be interpreted so as not to restrict their right to self-determination, by virtue of which indigenous and tribal peoples may "freely pursue their economic, social and cultural development" and may "freely dispose of their natural wealth and resources."[135] The Court explains that this supports an interpretation of Article 21 "to the effect of calling for the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied."[136]

71. In line with this interpretation of Article 21, the Court explicitly ordered in *Saramaka People* that legislative recognition of territorial rights also must include recognition of the "right to manage, distribute, and effectively control such territory, in accordance with their customary

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131 *Id.* at para. 99, and, at para. 105 (finding that "the right of the members of the Saramaka people in particular, or members of indigenous and tribal communities in general, to collectively own their territory has not, as of yet, been recognized by any domestic court in Suriname").

132 *Id.* at para. 115.

133 *Id.* at para. 116.

134 Yakye Axa, *supra,* at para. 146 (explaining 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").

135 Saramaka People 2007, *supra*, at para. 93.

136 *Id.* at para. 95.

laws and traditional collective land tenure system."[137] The Court thus affirms that, in order to freely determine, pursue and enjoy their own development, indigenous peoples have the right, effectuated through their own institutions,[138] to make decisions about how best to use their territory; that they have a right to *effectively control*, *manage* and *distribute* their natural wealth and resources "without outside interference."[139] Each of these terms has a specific meaning and describes rights and powers in relation to territory. 'Control', for instance, can be defined as the power to "exercise authoritative or dominating influence over" a thing, in this case traditional territory. The Court reaffirmed and emphasized this aspect of indigenous peoples' rights in its August 2008 interpretation judgment in *Saramaka People*.[140] Suriname's failure to recognize, restore and secure the Kaliña and Lokono peoples' property rights also disregards and violates these extensive, interrelated and interdependent rights. As discussed in the following section, the same is also the case with respect to its additional and active violations of the victims' rights.

2. Additional and Active Violation of the Property Rights of the Kaliña and Lokono peoples

72. In addition to failing to recognize and secure the rights of the victims to their territory, Suriname has further and actively disregarded and violated these rights by unilaterally issuing concessions to exploit natural resources; by allotting areas of lands in four of the victims' communities and issuing individual titles therein; and by establishing nature reserves in their territory. Suriname has repeatedly admitted that it has issued the individual titles, established the nature reserves and granted the concessions complained of in the instant case, and extensively (and incorrectly) sought to justify these activities as valid subordinations of the victims' rights.[141]

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[137] *Id.* 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").

[138] *See* UNDRIP, Article 4 (providing that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions"). The Court has also highlighted the importance of the preservation of indigenous peoples' communal structures and modes of self-governance in *Plan de Sánchez Massacre, Reparations.* Judgment of 19 November 2004, Series C No 105, para. 85.

[139] Saramaka People 2007, *supra*, at para. 115 (stating that "the State's legal framework merely grants the members of the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference"). *See also* Yakye Axa, *supra,* 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").

[140] *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12 August 2008. Series C No. 185, para. 48 and 50.

[141] *See e.g.,* Annex 6 to the Commission's Application, Further comments offered by the State, 12 September 2008, at p. 18 (arguing that the allotment and granting of title to third parties of lands in the four villages of Wan Shi Sha, Erowarte, Pierrekondre and Tapuku was done to satisfy an "imperative public interest," namely "a plan to develop a vacation resort in Albina and its surroundings"); and, at p. 8 (arguing that the nature reserves constitute valid restrictions of indigenous peoples' property rights).

73. With respect to the State's contentions that it has validly subordinated the victims' rights in relation to the above mentioned acts, the representatives offer the following observations. To be valid, a subordination of the victims' property rights presupposes that those rights have been first recognised in law and that the requirements applicable to subordination have been thereafter fully satisfied in accordance with due process of law. Suriname admits that it has failed to recognize and secure the Kaliña and Lokono peoples' property rights and, therefore, that it has not satisfied this first condition. Failure to comply with the first condition in turn proves that Suriname has failed to comply with the second condition because the second depends on a prior recognition of property rights and the balancing, with due process, of such rights against the public interest imperative of the State.

74. This balancing is inherent and essential to a valid subordination of property rights and cannot take place if indigenous peoples' property rights are not legally recognised. As the Court explained in *Saramaka People*, "rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty."[142] Moreover, respect for indigenous peoples' rights is an underlying principle of democracy and, as the Court observed in *Yakye Axa*, a compelling public interest in its own right that must be fully weighed when considering the necessity and proportionality of restrictive measures.[143] Again, this balancing cannot be done if those rights are unrecognized in law and where, as is the case in Suriname, the law provides no procedures that the State is obligated to follow in relation to subordination or any remedies by which indigenous peoples may seek protection for their rights.

75. Subordination of indigenous property rights in the absence of a prior recognition of those rights also 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. Indigenous peoples are uniquely situated because their property rights arise from and are grounded in their customary law and tenure systems, rather than the legal system of the State, which is the source of non-indigenous persons' property rights.[144] In

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142 Saramaka People 2007, *supra*, at para. 115.

143 *Id*. para. 148.

144 The UNCERD frequently notes in this respect that "the principle of non-discrimination requires [states parties] to take account of the cultural characteristics of ethnic groups." *See e.g.,* Democratic Republic of Congo, 17/08/2007, CERD/C/COD/CO/15, at para. 14. *See also Connors v. United Kingdom*, ECtHR., Judgment of 27 May 2004, §84 (declaring that states have an obligation to take positive steps to provide for and protect the different lifestyles of minorities as a way to provide equality under the law). Accordingly, the UNCERD adheres to the principle that discrimination is evident and illegitimate where states treat persons differently in analogous situations without an objective and reasonable justification and where they, without satisfying this test, fail to treat differently persons whose situations are significantly different. *General Recommendation XIV, Definition of discrimination (Art. 1, par.1),* 22/03/93, at para. 2. A significant difference, for instance, is communal property rights grounded in customary law coupled with culturally constitutive relations to lands rather than individual property rights accorded by the national legal system.

Suriname, the law neither recognises nor provides any effective means to protect or even consider indigenous peoples' property rights, and the State is free to disregard these rights at will and for any reason, and it does so regularly. The same cannot be said for non-indigenous persons' property rights as the law sets out procedures by which they may obtain title and procedures and remedies in relation to potential or actual subordinations, and the State generally follows these procedures.[145]

76. Indigenous and tribal peoples in Suriname are the only groups to suffer from the above mentioned legal disabilities. It is uncontested that there are no laws in Suriname governing the recognition of indigenous peoples' property rights, nor any laws setting out the process for the balancing of those rights with a compelling public interest and associated criteria when restrictive measures may be under consideration or pursued. Even if the criteria for a valid subordination of property rights were to be applied by the State, the lack of legislative incorporation of these criteria denies indigenous peoples due process and any measure of legal certainty and transparency, and provides the state with a degree of latitude far in excess of that accorded in the case of non-indigenous people.

77. Indigenous peoples are therefore subject to legal disabilities that are neither justifiable nor reasonable, and which, solely on the basis of their race or ethnicity, operate to negate the exercise and enjoyment of their rights.[146] As the European Court has observed, "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...."[147] The right to be free from racial discrimination is also a non-derogable right[148] and prohibited with regard to the exercise and enjoyment of all of the rights set out in the American Convention, a requirement that is amplified in Article 1 of that instrument.[149] Article 46(2) of the UN Declaration on the Rights of Indigenous Peoples is also

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[145] Article 34 of the 1987 Constitution provides for a right to the enjoyment of property, and provides in pertinent part that "1. Property, of the community as well as of the private person, shall fulfil a social function. Everyone has the right to undisturbed enjoyment of his property subject to the limitations which stem from the law. 2. Expropriation shall take place only in the general interest, pursuant to rules to be laid down by law and against compensation guaranteed in advance." This article however does not apply to indigenous peoples because their traditional forms of land tenure are not classified or recognized as property under Suriname law.

[146] Article 1(1) of ICERD defines the term 'racial discrimination' as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

[147] *Asmundsson v. Iceland*, ECtHR, Judgment of 12 October 2004, at §40 (addressing Iceland's welfare policy). Such considerations are also incorporated into domestic legal regimes where regard to equality is often constitutionally required when assessing the 'necessity' of measures limiting rights (e.g., Section 36 of the South African Constitution).

[148] *Report of the Committee on the Elimination of Racial Discrimination*, 1 November 2002, UN Doc. A/57/18 at Chapter XI C and; *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Declaration*, 2001, preambular para. 22. *See also* T. Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW. Oxford: Clarendon Press 1989, 21.

[149] *See also Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, OC-4/84, 19 January 1984. Series A No.4, at para. 54 (stating that the prohibition "extends to the domestic law of the

relevant in this context, providing, *inter alia*, that restrictions on indigenous peoples' rights must be "non-discriminatory and strictly necessary."[150]

78. Last but not least, the State has an ongoing obligation to review developments in international law, and in particular human rights law, to assess if it is acting in compliance with that law. This includes a duty to assess past and ongoing acts and their effects to determine if they are consistent with contemporary legal norms, including those set forth in the American Convention. This principle is reflected in the Court's judgment in *Saramaka People*, which ordered that, "With regards to the concessions already granted within traditional Saramaka territory, the State must review them, in light of the present Judgment and the Court's jurisprudence, in order to evaluate whether a modification of the rights of the concessionaires is necessary in order to preserve the survival of the Saramaka people." The Court defined the term 'survival' 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'."[151]

79. Consequently, the victims representatives will, where appropriate, make reference below to the criteria for subordination of property rights in relation to, *inter alia*, the concessions to exploit natural resources, grants of individual title and nature reserves in the victims' territory. For instance, "the 'necessity' and, hence, the legality of restrictions" requires that the State assesses various options and "that which least restricts the right protected must be selected."[152] This is highly relevant to the nature reserves and individual titles complained of in this case. Likewise, Suriname's failure to compensate the Kaliña and Lokono peoples for the takings of their lands and resources and the substantial restrictions placed on their access to and use thereof also substantiates a finding that these acts are disproportionate and, therefore, illegitimate.[153] Additionally, the safeguards against restrictions on the right to property that deny the survival of indigenous peoples identified by the Court in *Saramaka People* and subsequent cases are also relevant to the assessment of the concessions to exploit natural

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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").

150 The full text reads: "... The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."

151 Saramaka People, Interpretation of the Judgment, *supra*, at para. 37.

152 *Case of Ricardo Canese*. Judgment of 31 August 2004. Series C No. 111, at para. 96; *Case of Herrera-Ulloa*. Judgment of 2 July 2004. Series C No. 107, at para. 121 (*quoting, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85, 13 November 1985. Series A No. 5, para. 30).

153 *See e.g., Jahn and Others v. Germany*, ECtHR, Judgment of 30 June 2005, §94; and *Former King of Greece and Others*, ECtHR, Judgment of 23 November 2000, §89.

resources in the victims' territory.[154] The same also pertains with respect to the cumulative impact of the State's active violations of the victims' property and related rights.[155]

a. Nature Reserves

80. Suriname has established three nature reserves that together encompass 850 square kilometres of the Kaliña and Lokono peoples' territory. The evidence before the Court demonstrates that the victims continue to maintain a variety of relationships with these lands and consider them to be an integral part of their territory.[156] These reserves were established without any meaningful participation, without regard for the victims' property and other rights, and pursuant to laws that disregard and even criminalise their subsistence and other activities therein. These reserves were established in 1966, 1969 and 1986, prior to Suriname's accession to the American Convention, in, as the State admits, "areas which were and still are domain [State-owned] land...."[157] Nonetheless, Suriname is liable for its acts and omissions in relation to the on-going effects of these reserves that violate the rights of the victims pursuant to the Convention.[158]

81. These reserves, *inter alia*, constitute on-going 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."[159] Moreover, the Court has observed that "any denial of the enjoyment

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154 Saramaka People 2007, *supra*, para. 128 et seq.

155 Saramaka People, Interpretation of the Judgment, *supra*, at para. 41 (explaining that "one of the factors the environmental and social impact assessment should address is the cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual and cumulative effects of existing and future activities could jeopardize the survival of the indigenous or tribal people'). *See also, Länsman III v. Finland* (1023/2001), ICCPR, A/60/40 vol. II (17 March 2005) 90, at para. at 10.3 (explaining that "the infringement of a minority's right to enjoy their own culture, as provided for in article 27, may result from the combined effects of a series of actions or measures taken by a State party over a period of time and in more than one area of the State occupied by that minority. Thus, the Committee must consider the overall effects of such measures on the ability of the minority concerned to continue to enjoy their culture. In the present case, and taking into account the specific elements brought to its attention, it must consider the effects of these measures not at one particular point in time - either immediately before or after the measures are carried out - but the effects of past, present and planned future logging on the authors' ability to enjoy their culture in community with other members of their group").

156 *See e.g.,* Annex 8 to the Commission's Application, Expert Report of Dr. Stuart Kirsch; and Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono. *See also* Sawhoyamaxa, *supra,* at para. 128 (observing that "possession is not a requisite conditioning the existence of indigenous land restitution rights"); and Xákmok Kásek, *supra*, at para. 112 (summarizing the Court's jurisprudence and stating that, "[r]egarding the possibility of recovering traditional lands, on prior occasions the Court has established that the spiritual and physical foundation of the identities of indigenous peoples is based mainly on their unique relationship with their traditional lands. As long as that relationship exists, the right to recover those lands remains applicable").

157 Annex 6 to the Commission's Application, Further comments offered by the State, *supra*, at p. 10.

158 *See e.g.,* Moiwana Village, *supra*, para. 70 and, at para. 108 (stating that "the Tribunal may properly exercise jurisdiction over the ongoing nature of the community's displacement, which ... constitutes a situation that persisted after the State recognized the Tribunal's jurisdiction in 1987 and continues to the present day").

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

or exercise of property rights harms values that are very significant to the members of those peoples, who run the risk of losing or suffering irreparable harm to their life and identity and to the cultural heritage to be passed on to future generations."[160] This conclusion is pertinent and amplified in the instant case given the substantial areas of the victims' territory that are incorporated in these nature reserves.

82. The Court has previously considered the situation of protected areas established in indigenous territories in *Xákmok Kásek.* In that case the protected area was established pursuant to law and vested in a private person.[161] As with the Kaliña and Lokono peoples, the protected area was created without the effective participation of the affected indigenous people and without consideration for their rights. Moreover, as pertains in the instant case,[162] the law in question in *Xákmok Kásek* 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."[163]

83. Notwithstanding the protected status of the land, and as a general proposition, the Court ruled that "the right of the members of the Xákmok Kásek Community to recover their lost lands remains in effect."[164] This is the same right that the victims seek protection for in this case, and the fact that the protected areas established in their territory are publicly owned, rather than privately owned, has no effect on the recognition and restitution of their property

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160 *Id.* at para. 321.

161 *Id.* 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...").

162 *See e.g.,* Annex 18 to the Commission's Application, Affidavit of F. Baal and B. Drakenstein, p. 1 (confirming coercive measures against community members, including establishment of an armed guard post between the villages and the Galibi reserve and confirming the victims' complaints that these guards have regularly harassed community members, sometimes confiscating their property, such as fishing equipment or fish, and even shot at them on one occasion.); 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'"); and Annex 21 to the Commission's Application, *Affidavit of Glen Renaldo Kingswijk* (confirming that the mining company operating in the Wane Kreek Reserve has prohibited hunting and fishing by members of the victims' communities).

163 *Xákmok Kásek, supra,* at para. 82.

164 *Id.* at para. 116. *See also id.* 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").

rights. This is consistent with the Court's jurisprudence with respect to the restitution of indigenous lands and the victims' right to recover these lands remains in effect.[165] Moreover, the Africa Commission on Human and Peoples' Rights, in a decision that heavily relied on the Court's judgment in *Saramaka People,* has upheld indigenous peoples' property rights in relation to publicly owned protected areas,[166] as has the Committee on the Elimination of Racial Discrimination.[167]

84. Decision VII/28 on Protected Areas, adopted at the 7th Conference of Parties to the Convention on Biological Diversity in 2004, applies to all protected areas and is also relevant. This Decision is legally binding on states parties, including Suriname, as an authoritative interpretation of the Convention on Biological Diversity. Recalling "the obligations of Parties towards indigenous and local communities," it provides that "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 and local communities consistent with national law and applicable international obligations."[168] These applicable international obligations include the right to property in Article 21 of the American Convention.

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[165] *See e.g.,* Sawhoyamaxa, *supra,* at para. 131-2 (where the Court observed that "the spiritual and material base of the identity of an indigenous people is sustained primarily through its unique relationship with its traditional territory," and held that indigenous peoples' right to restitution continues as long as they maintain some degree of connection with that territory. Evidence of the requisite connection may be found in "traditional spiritual or ceremonial use or presence; settlement or sporadic cultivation; seasonal or nomadic hunting, fishing or harvesting; use of natural resources in accordance with customary practices; or any other factor characteristic of the culture of the group").

[166] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (February 2010).

[167] The UNCERD has explicitly articulated the principles applicable to establishment of nature reserves in indigenous peoples' territories. Two main inter-related rules apply: first, in 2002, the Committee held that "no decisions directly relating to the rights and interests of members of indigenous peoples be taken without their informed consent" in connection with a nature reserve in Botswana. *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. Second, in connection with a national park in Sri Lanka, the Committee called on the state to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources." *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. More generally, the Committee has recognized that indigenous peoples have a right to restitution of their traditional territories and resources that also applies to nature reserves previously established in their territories. In relation to the right to property, the UNCERD has repeatedly pronounced that where indigenous peoples "have been deprived of their lands and territories traditionally owned, or such lands and territories have been otherwise used without their free and informed consent, the Committee recommends that the State party take steps to return those lands and territories." *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.

[168] *See Decisions of the Conference of Parties*, COP VII, Decision VII/28, Protected Areas (article 8a-e), at para. 22, https://www.cbd.int/convention/results/?id=7765&l0=PA. *See also Decisions of the Conference of Parties*, COP X, Decision X/31, Protected Areas, para. 32(c) ("*Recalling* paragraph 6 of decision IX/18 A, *further invites* 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"), https://www.cbd.int/decision/cop/?id=12297.

85. The Court also referenced guarantees of non-discrimination and equal protection of the law in relation to the nature reserve in *Xákmok Kásek.* In this respect, the Court 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, which has been marginalized in the enjoyment of the rights that the Court has declared violated in this judgment. In addition, it is evident that the State has not taken the necessary positive measures to reverse that exclusion."[169]

86. These guarantees are also germane to this case because, as discussed above, Suriname's practice of disregarding indigenous peoples' rights in relation to, *inter alia*, the establishment of the reserves in the victims' territory is fundamentally tainted by racial discrimination. The State cannot take non-indigenous persons property without due process and compensation. In the case of indigenous peoples, however, the law provides no procedures or guarantees whatsoever and indigenous peoples' rights are subordinated *ab initio* for any reason and rendered non-existent Recall in this respect that Article 1 of the 1954 Nature Protection Act allows the State to establish a nature reserve over lands that are part of the State domain or state lands. This, first, would exclude lands held under title issued by the State and, second, negates indigenous peoples' rights as their lands are classified as State lands precisely because the State has failed to recognise and secure their title thereto.

87. This discriminatory treatment is even more evident in the 1986 Decree establishing the Wane Kreek Nature Reserve, which explicitly saved the prior property rights of all persons except, *de facto*, those of the indigenous traditional owners.[170] This included saving the mining concession in which bauxite mining has caused "Considerable damage" to the environment, in direct contravention of the public interest justification asserted by the State,[171] and justified the denial of hunting and fishing rights to the victims.[172] It is also evident in the Galibi and Wia Wia Reserves where the State has done little to regulate and even less to punish the commercial fishing boats that are widely known to kill nesting sea turtles in their nets.[173] It is taboo for the victims to kill turtles, yet the State employs coercive and criminal measures against their access to and use of the reserves and to regulate their harvesting of turtle eggs, which they have done

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

170 Annex 20 to the Commission's Application, *Nature Protection Resolution of 1986* (SB 1986, 52), Art. 4.

171 Annex 23 to the Commission's Application, SRK Consulting, Environmental Sensitivity Analysis of the Wane 4 Concession, *supra*, at p. 20-1. Additional "damage" has occurred on 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.

172 *See e.g.*, Annex 21 to the Commission's Application, *Affidavit of Glen Renaldo Kingswijk.*

173 Annex 8 to the Commission's Application, Expert Report of Dr. Stuart Kirsch, at p.26; and Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono, at p.106-7.

sustainably for centuries.[174] Again, "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...,"[175] and there is clearly differential treatment that lacks any reasonable or objective basis and that is detrimental to the victims' in this case.

88. Suriname's ongoing deprivation of the Kaliña and Lokono peoples' property rights and its denial and criminalization of access, use and subsistence rights also violates the rights guaranteed by Article 27 of the Covenant on Civil and Political Rights. Article 27[176] protects linguistic, cultural and religious rights and, in the case of indigenous peoples, includes, *inter alia*, land and resource, subsistence and participation rights.[177] The Human Rights Committee has interpreted Article 27 to protect the rights of members of indigenous peoples to engage in the "economic and social activities which are part of the culture of the community to which they belong."[178] In reaching this conclusion, the Committee recognized that indigenous peoples' subsistence and other traditional economic activities are an integral part of their culture, and interference with those activities can be detrimental to their integrity and survival.

89. The Human Rights Committee has further held that Article 27 requires that "necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands..." and that; "securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities ... must be protected under article 27...."[179]

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[174] *See* Annex 18 to the Commission's Application, Affidavit of F. Baal and B. Drakenstein; Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono and; Annex 8 to the Commission's Application, Expert Report of Dr. Stuart Kirsch, at p. 7.

[175] *Asmundsson v. Iceland*, ECtHR, Judgment of 12 October 2004, at §40 (addressing Iceland's welfare policy). Such considerations are also incorporated into domestic legal regimes where regard to equality is often constitutionally required when assessing the 'necessity' of measures limiting rights (e.g., Section 36 of the South African Constitution).

[176] Article 27 reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

[177] Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada, *Report of the Human Rights Committee*, 45 UN GAOR Supp. (No.43), UN Doc. A/45/40, vol. 2 (1990), 1. *See also*, Kitok vs. Sweden, *Report of the Human Rights Committee*, 43 UN GAOR Supp. (No.40) UN Doc. A/43/40; Lovelace vs. Canada (No. 24/1977), *Report of the Human Rights Committee*, 36 UN GAOR Supp. (No. 40) 166, UN Doc. A/36/40 (1981). *I. Lansman et al. vs. Finland* (Communication No. 511/1992); *J. Lansman et al. vs. Finland* (Communication No. 671/1995), UN Doc. CCPR/C/58/D/671/1995; and General Comment No. 23 (50) (art. 27), *adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994. UN Doc. CCPR/C/21/Rev.1/Add.5.* Although not decided under article 27, *see also Hopu v. France*. Communication No. 549/1993: France. 29/12/97. UN Doc. CCPR/C/60/D/549/1993/Rev.1, 29 December 1997.

[178] *See e.g.*, Ominayak vs. Canada, *id.*

[179] *Concluding observations of the Human Rights Committee: Australia 28/07/2000.* UN Doc. CCPR/CO/69/AUS, at para. 10 and 11.

90. In its submissions before the Commission Suriname asserts that the establishment of the nature reserves in the victims' territory constitutes a valid subordination of their property rights. It further asserts that "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."[180] The victims' representatives, however, submit that it is not necessary to deny indigenous peoples' rights to own and effectively control and manage their territory to achieve the public interest goal of nature conservation and that the State's unilateral and uncompensated taking of their lands and denial of their rights to access and use these lands is unnecessary, disproportionate and otherwise illegitimate pursuant to Article 21 of the Convention. Moreover, the fact that the victims' rights are presently unrecognised in domestic law is an omission for which the State is solely responsible and it cannot rely on its own malfeasance to justify additional denials of the victims' rights.

91. While nature conservation may be an imperative public interest, there is a range of other factors that must be considered to determine if a restriction is necessary and proportionate in relation to satisfying said public interest.[181] To comply with these requirements, it does not suffice for the State merely to assert, as it does in this case, that the nature reserves are necessary. The State must demonstrate that these reserves are "strictly necessary"[182] and that it has, in fact, chosen the least restrictive option to satisfy the compelling public interest.[183] The unique situation, characteristics and rights of the Kaliña and Lokono peoples must also be given full consideration when determining the proportionality of the proposed restrictive measures.[184] The State did not comply with any of these requirements; it simply did not consider the indigenous peoples at all when making decisions about the reserves. This was done by decree and without reference to the victims, both at the time of establishment and thereafter.

92. In the *Ricardo Canese* and *Herrera-Ulloa* cases, the Court explains that "the 'necessity' and, hence, the legality of restrictions ... depend upon a showing that the restrictions are

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

181 Yakye Axa, *supra*, at para. 145.

182 The Human Rights Committee and the CERD apply strict standards of scrutiny to restrictions to indigenous peoples' rights and both explicitly reject the application of a 'margin of appreciation' in such cases. *I. Lansman et al. vs. Finland (Communication No. 511/1992),* CCPR/C/52/D/511/1992, at para. 9.4 (observing that "A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27"); and, Australia. CERD/C/AUS/CO/14, 14 April 2005, para. 16.

183 *See* Article 46(2) of the UN Declaration on the Rights of Indigenous Peoples (providing that restrictions on indigenous peoples' rights must be "non-discriminatory and strictly necessary," and solely concern securing due recognition and respect for the rights of others or the "just and most compelling requirements" of democratic society").

184 Yakye Axa, *supra*, para. 63 and 148. *See also* Yakye Axa, at para. 145 (explaining that for "restrictions to be compatible with the Convention, they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right").

required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected."[185] The European Court of Human Rights ("ECHR") has similarly ruled, stating that permits that restrict property rights "must not be issued if the public purpose in question can be achieved in a different way...."[186] The ECHR has also recognized that the availability of alternative options is one of the relevant factors in assessing the proportionality of a restrictive measure. In the *Hatton* case, for example, the ECHR identified the obligation of states to minimize interferences with rights by seeking alternative solutions, "and by generally seeking to achieve their aims in the least onerous way as regards human rights."[187] Indeed, the victims' representatives stress that the principle of seeking alternative options and choosing the least intrusive means where alternatives are not available is central to both the necessity and the proportionality tests.

93. Based on the preceding, Suriname has an obligation to demonstrate that it has sought and considered alternative means of achieving a strictly necessary public interest in connection with nature conservation in relation to any proposed restrictions to the victims' rights. This requires actively assessing various options and ensuring indigenous peoples' participation in such assessments. However, the State simply did not consider the victims at all when making decisions about establishing and managing the reserves. Where alternatives are not available, it may only restrict indigenous peoples' rights in the least intrusive way. Denying that indigenous peoples are the owners of these areas, constructively displacing them, and prohibiting and even criminalizing their traditional activities therein is the most intrusive and disproportionate method of achieving environmental conservation objectives.

94. The preceding issues were also examined by the African Commission on Human and Peoples Rights ("AfCom") in a 2010 decision involving a nature reserve established in indigenous peoples' lands in Kenya. The AfCom 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."[188] This is consistent with the Court's jurisprudence, which affirms the indigenous lands are fundamental to indigenous peoples' cultural integrity and survival[189] and, therefore, that proposed restrictions are subject to higher

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185 *Case of Ricardo Canese*. Judgment of 31 August 2004. Series C No. 111, at para. 96; *Case of Herrera-Ulloa*. Judgment of 2 July 2004. Series C No. 107, at para. 121 (*quoting, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85, 13 November 1985. Series A No. 5, para. 30).

186 *Sporrong & Lonnroth v. Sweden*, European Court of Human Rights, Judgment of 23 Sept. 1982, at §69.

187 *Hatton v. United Kingdom*, European Court of Human Rights, Judgment of 8 July 2003, at §127.

188 Endorois Welfare Council v Kenya, *supra*, at para. 212.

189 *See e.g., Kichwa Indigenous People of Sarayaku, supra*, 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

standards of scrutiny,[190] and that certain proposed restrictions may be either "impermissible"[191] or subject to indigenous peoples' free, prior and informed consent, irrespective of the asserted public interest.[192]

95. In accord with the jurisprudence cited above, the AfCom observed that any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible, and, consequently, the "displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the Game Reserve."[193] It added that "a limitation may not erode a right such that the right itself becomes *illusory*" and; "the point where such a right becomes illusory, the limitation cannot be considered proportionate – the limitation becomes a violation of the right."[194] Further, the AfCom held that

> the Respondent State has not only denied the Endorois community all legal rights in their ancestral land, rendering their property rights essentially illusory, but in the name of creating a Game Reserve and the subsequent eviction of the Endorois community from their own land, the Respondent State has violated the very essence of the right itself, and cannot justify such an interference with reference to "the general interest of the community" or a "public need."[195]

96. The extent to which a proposed restriction to indigenous peoples' rights adheres to relevant international standards and best practice is also highly relevant to assessing the necessity and proportionality of that proposed restriction. In this respect, the victims' representatives highlight the decisions of the Vth IUCN World Parks Congress, which include ensuring full respect for the rights of indigenous peoples in relation to all existing and future protected areas, and the establishment of "participatory mechanisms for the restitution of indigenous peoples' traditional lands and territories that were incorporated in protected areas without their free and informed consent...."[196] The World Parks Congress is held every ten years, includes government and non-governmental agencies, and is the pre-eminent, international policy making body on protected areas.[197]

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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...").

190 *See e.g.,* Saramaka People 2007, *supra*, para. 128 *et seq.*

191 *Id.* 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").

192 *Id.* para. 134.

193 Endorois Welfare Council v Kenya, *supra*, at para. 214.

194 *Id.* at para. 215.

195 *Id.*

196 *Durban Accord: Action Plan*, adopted at the Vth IUCN World Parks Congress, Durban South Africa (2003), at p. 26.

197 *See* Vth World Parks Congress, *Recommendation 5.24, Indigenous Peoples and Protected Areas*. Available at http://www.iucn.org/themes/wcpa/wpc2003/pdfs/english/Proceedings/recommendation.pdf, at p. 197.

97. The largest non-governmental conservation organizations have also adopted policies that require respect for indigenous peoples' rights in the past 10 years. The *World Wildlife Fund's Statement of Principles on Indigenous Peoples and Conservation*, for example, "acknowledges 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."[198] It also "recognizes indigenous peoples as rightful architects of and partners for conservation and development strategies that affect their territories."[199]

98. In the case *sub judice*, the State has denied the victims all legal rights in the nature reserves – indeed, in the entirety of their territory – and rendered their internationally protected rights illusory. Its acts and omissions in relation to the nature reserves are discriminatory, unnecessary and disproportionate and cannot be justified by reference to the public interest. Moreover, the State has "not taken the necessary positive measures to reverse that exclusion."[200]

99. The victims' right to recover their lands and to exercise and enjoy their rights therein remains in effect and this fully accords with the Court's jurisprudence on the right to restitution (discussed in more detail in the following section), a right also upheld in a range of other international instruments.[201] The Court has previously held, for instance, that "possession is not a requisite conditioning the existence of indigenous land restitution rights;"[202] and "[r]egarding the possibility of recovering traditional lands, on prior occasions the Court has established that the spiritual and physical foundation of the identities of indigenous peoples is based mainly on their unique relationship with their traditional lands. As long as that relationship exists, the right to recover those lands remains applicable."[203]

100. The victims' representatives submit that the public interest goal of nature conservation can be achieved without denial of or coercive restrictions to indigenous peoples' property rights. This may be done by acknowledging that indigenous peoples continue to be the owners of any protected areas that the State may seek to establish within their traditional territories, and by establishing collaborative arrangements to facilitate specific species or ecosystem protection measures via collaborative and consensual management systems that respect

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198 *Indigenous Peoples and Conservation: WWF Statement of Principles*. WWF International: Gland 2008, at p. 2. Available at: http://assets.panda.org/downloads/183113_wwf_policyrpt_en_f_2.pdf.

199 *Id.*

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

201 *See e.g.,* UNDRIP, Article 28(1) (providing that "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent"); and UNCERD, General Recommendation XXIII on Indigenous Peoples, 18 August 1997, at para. 5.

202 Sawhoyamaxa, *supra,* at para. 128.

203 Xákmok Kásek, *supra*, at para. 112 and, at para. 109 (stating that ""the members of the indigenous peoples who, for reasons beyond their control, have left their lands or lost possession of them, retain ownership rights, even without legal title...").

indigenous traditional knowledge. There should be no need to deny that indigenous peoples are the owners of such areas, as Suriname presently does, to achieve nature conservation objectives. Such an approach is broadly consistent with the effective participation requirement elaborated by the Court in *Saramaka People*, which includes the requirement – applicable to the nature reserves within the victims' territory *sub judice* – that the State obtain their free, prior and informed consent in relation to large-scale developments.

101. The victims' representatives further submit that indigenous peoples' right to self-determination in relation to their territories includes their right to freely pursue their own development and their "right to manage, distribute, and effectively control such territory."[204] These rights in turn include indigenous peoples' rights to: first, establish or maintain their own protected areas and; second, where it may be strictly necessary for the State to consider establishing a protected area in an indigenous territory, to first discuss with the indigenous peoples whether they would, in such circumstances, decide to establish the protected area themselves. The latter would be the least restrictive available option and is broadly consistent with the right to self-determination and balancing the compelling public interests of nature conservation and respect for indigenous peoples' rights and integrity.[205]

102. In sum, Suriname has violated the victims' rights protected by Article 21 of the Convention, in connection with Articles 1 and 2 of the same, in relation to the establishment and management of the three nature reserves within their traditional territory. It cannot justify that these reserves constitute valid subordinations of the victims property rights pursuant to Article 21 for the reasons stated above as well as on the basis that a valid subordination presupposes that the victims' rights have been recognized and balanced against the public interest asserted by the State. The victims' right to the restitution of their lands within these reserves remains in effect and the representatives respectfully request that the Court orders that the State returns these lands and enters into good faith negotiations with the victims' freely chosen representatives about any necessary species or ecosystem conservation measures therein.

b. Allotment and Grants of Individual Title

103. In 1976, a sizable area of the villages of Erowarte, Tapuku, Wan Shi Sha and Pierrekondre along the Marowijne River were unilaterally and without compensation allotted into individual plots of land. Some of these plots were then issued to non-indigenous persons for the purposes of building vacation homes on or near the Marowijne River. In the

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[204] Saramaka People 2007, *supra*, 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").

[205] *See also* UNDRIP, Art. 29(1) (providing that "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination").

proceedings before the Commission, the State explained that the allotment and granting of title to third parties of lands in the four villages of Wan Shi Sha, Erowarte, Pierrekondre and Tapuku was done to satisfy an "imperative public interest," namely "a plan to develop a vacation resort in Albina and its surroundings."[206]

104. Rather than being in Albina and its surroundings, this allotted area is in the core residential area of the four affected villages. These lands were at the time of allotment and are still today considered part of the ancestral lands of these communities. These lands were occupied and used by the communities at the time of allotment, large parts thereof continue to be occupied and used by them today, and the vacations homes of the non-members were and remain literally metres away from the houses of community members.[207] This was done without prior consultation, against the wishes of the victims, and over their vociferous protests: protests that continue to be made to the present day. These titles were issued between 1976 and 2008 and have been a source of conflict throughout that period.

105. One conflict culminated in a lawsuit brought against the Captain of Wan Shi Sha by one of the non-indigenous title holders 1998, who argued that the Captain was unlawfully hindering him from rebuilding his vacation home. This home was destroyed during the interior war and lies in the centre of that village next to the river. The village leaders of all the Kaliña and Lokono peoples' communities joined in a counter-claim insisting that the lands in question were traditionally owned by the victims. The judge ruled in favour of the non-indigenous title holder on the basis that he held title issued by the State, which, as a matter of settled law in Suriname, will always supersede any unregistered right asserted by indigenous peoples.[208] The discrimination against indigenous peoples that underpins this ruling is discussed further below.

106. That this privileging of the title of third parties at the expense of indigenous title violates Article 21 was confirmed by the Court in *Saramaka People*, which, as noted above, ruled that "rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty."[209]

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[206] Annex 6 to the Commission's Application, Further comments offered by the State, *supra*.

[207] *See e.g.*, 'Kano comes up for the interests of Surinamese Indian: HOLDS PROTEST MARCH', *Pipel*, 15 January 1977, at p. 2 (interviewing Mr. Pierre, who states that "We want right of say on our land. That is what it is all about. It often happened that our land is taken by third parties just like that. For example, in Erowarte, there are pieces of land given to third parties which the inhabitants used as agricultural plots. In Pierre Kondre, there are two pieces of land; one is given to Findlay and one is given to Fereira. Together these two pieces of land are as big as our whole village, where 250 people live. Our land is State domain land and part of it has been seized just like that and given to Mr. Findlay. But he himself does not use it, it lies fallow as meadow land").

[208] *Tjang A Sjin v. Zaalman and Ors.*, Cantonal Court, First Canton, Paramaribo, 21 May 1998 (holding that real title to land will void any interest claimed by indigenous peoples on the basis of traditional occupation and use).

[209] Saramaka People 2007, *supra,* at para. 115.

107. In both the *Yakye Axa* and *Sawhoyamaxa* cases, the Court addressed situations where indigenous peoples' traditional lands had been granted by the state to third parties. In both cases it recognized that indigenous peoples have a right to the restitution and restoration of their traditional lands that have been issued to third parties without indigenous peoples' consent. In *Sawhoyamaxa*, for instance, the Court observed that "the indigenous people who have suffered the involuntary expropriation of their lands and these have been legally transferred to unknowing third parties, have the right to recover them or be compensated with other lands of the same size and quality."[210]

108. In that same case, the Court observed that "the spiritual and material base of the identity of an indigenous people is sustained primarily through its unique relationship with its traditional territory," and held that indigenous peoples' right to restitution continues as long as they maintain some degree of connection with that territory.[211] 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."[212] The evidence before the Court demonstrates 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.[213] Some members of the villages live on vacant and unallocated portions of the allotted area today just as they did when the sub-division of their villages was effectuated in 1976. Their right to recover those lands therefore continues.

109. Consistent with the preceding principles elaborated upon by the Court in *Yakye Axa* and *Sawhoyamaxa*, in *Moiwana Village* the Court ordered restoration and regularization of the community's property rights "in relation to the traditional territories from which they were expelled" almost 18 years beforehand.[214] It further ordered that the "State shall take these measures with the participation and informed consent of the victims" and neighboring indigenous peoples.[215] It is important to note in relation to the case at hand that the deprivation of property rights addressed by the Court in *Moiwana Village* and the issuance of individual titles in *Sawhoyamaxa* both occurred prior to the respondent states' accession to the American Convention.

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210 Sawhoyamaxa, *supra,* at para. 128. *See also* Xákmok Kásek, *supra,* at para. 109 (stating that "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").

211 *Id.* at para. 131.

212 *Id.* at 132.

213 *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; Annex 8 to the Commission's Application Expert Report of Dr. Stuart Kirsch.

214 Sawhoyamaxa, *supra,* at para. 209, 233.

215 Moiwana Village, *supra*, at para. 210.

110. In the proceedings before the Commission in the instant case, Suriname contended that restitution of lands in Wan Shi Sha, Erowarte, Pierrekondre and Tapuku would unfairly penalise third parties.[216] The Court, however, explains that "the fact that the claimed lands are privately held by third parties is not in itself an 'objective and reasoned' ground for dismissing *prima facie* the claims by the Indigenous people. Otherwise, restitution rights become meaningless and would not entail an actual possibility of recovering traditional lands...."[217]

111. The Court also specifies the rules that apply to assessing restrictions to the property rights of third parties in order to effectuate restitution of indigenous lands.[218] In *Yakye Axa*, the Court held that where there is a conflict between non-indigenous title holders and indigenous peoples seeking restitution of their traditional lands, the respective restrictions on each party must be analysed on a case by case basis and in accordance with the requirements set forth in the American Convention.[219] 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, their development and life plans, and their ability to preserve their cultural patrimony.[220]

112. In the case at hand, the victims seek the restoration of the lands issued by the State to third parties in the villages of Wan Shi Sha, Tapuku, Pierrekondre and Erowarte, and a reversal of the decision to sub-divide these villages into individual allotments. These titles may be revoked by the State through a simple procedure with due compensation to the title holders. Moreover, the State has acknowledged the inconsequential and transient nature of the interests of these third parties in the proceedings before the Commission, explaining that they are "non-resident holders of vacation homes"[221] and that they are merely "holiday citizens."[222] For the Kaliña and Lokono peoples however, these lands are integral to their identity, cultural integrity and well-being. Consequently, when weighing the interests of and restrictions on the parties on the basis of the facts of this case, the rights and interests of the victims are paramount and must prevail.

113. The above stated conclusion is further bolstered in light of the discriminatory aspects of the granting and legal privileging of the third party rights in Suriname law, including as interpreted by the judiciary in the *Tjang A Sjin v. Zaalman* case discussed above. In particular, Suriname law privileges and provides certainty to third party rights at the expense of indigenous peoples solely on the basis of grants of title to these third parties by the State and the lack of title on the part of the victims. That the Kaliña and Lokono peoples do not have title is a discriminatory omission for which the State bears sole responsibility and it cannot on this basis alone privilege the rights of third parties.

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216 Annex 6 to the Commission's Application, Further comments offered by the State, 12 September 2008, at p. 9.
217 Sawhoyamaxa, *supra,* at para. 138.
218 *Id.* and Yakye Axa, *supra*, para. 149.
219 Yakye Axa, *supra,* para. 146.
220 *Id.*
221 Annex 6 to the Commission's Application, Further comments, 12 September 2008, at p. 10.
222 *Id.* at p. 13.

114. 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."[223] This legacy of discrimination is a crucial factor to be considered when analyzing "the respective restrictions on each party" for the purposes of determining the victims' restitution claims in the instant case and weighs heavily in favour of restoring the lands in question to the victims.

c. Mining and Logging operations

115. Suriname has admitted that it granted mining concessions in the territory of the Kaliña and Lokono peoples and that mining commenced therein in 1997.[224] It has further been proven that this occurred without the effective participation of the victims and without an environmental and social impact assessment and that considerable damage has been caused to the victims' lands.[225] It has also been proven that the victims' traditional economy has been severely affected by these mining operations.[226] The same is also the case with respect to the logging concessions that have been granted by the State in their territory.

116. Suriname asserted in the proceedings before the Commission that the mining operation is a valid restriction of the Kaliña and Lokono peoples' property rights and is fully consistent with the requirements for such restrictions.[227] However, this assertion does not stand up to scrutiny. In the first place, recognition of property rights is a prior condition to any subordination of those rights. Suriname admits that it has failed to recognise and secure the victims' property rights. It, therefore, cannot have validly restricted those rights for the reasons set forth above.

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223 *Decision 2(54) on Australia, 18/03/99*. UN Doc. A/54/18, para. 21(2), at para. 6 (further noting, at para. 7, that there are "four specific provisions that discriminate against indigenous title holders under the newly amended Act. These include the Act's 'validation' provisions; the 'confirmation of extinguishment' provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses").

224 Annex 6 to the Commission's Application, Comments of the State on the Merits in Kalina & Lokono Peoples v. Suriname, 22 March 2008, at p. 6; Annex 21 to the Commission's Application, *Affidavit of Glen Renaldo Kingswijk*, at p. 1.

225 Annex 6 to the Commission's Application, Further comments offered by the State, 12 September 2008, at p. 14. *See also* Annex 28 to the Commission's Application containing affidavits of members of the victims' communities; Annex 23 to the Commission's Application, SRK Consulting, Environmental Sensitivity Analysis of the Wane 4 Concession. Report prepared for NV BHP Billiton Maatschappij Suriname. Report No. 346204/1, July 2005; and Annex 8 to the Commission's Application Expert Report of Dr. Stuart Kirsch, at p. 12.

226 Annex 5 to the Commission's Application, Traditional use and management of the Lower Marowijne area by the Kaliña and Lokono; Annex 23 to the Commission's Application; and Annex 8 to the Commission's Application Expert Report of Dr. Stuart Kirsch.

227 Annex 6 to the Commission's Application, Comments of the State, 22 March 2008, p. 8.

117. Moreover, if the requirements for restricting property rights are assessed even a cursory review demonstrates that Suriname has failed to fully comply with the requirements specified by the Court as necessary to ensure "survival" as an indigenous or tribal people.[228] This is the case for the following reasons:

a) no environmental and social impact assessments were completed in relation to the mining operations, and this fact is proven in the evidence before the Court;
b) as no impact assessments were completed, the State would not have been able (and hence did not) implement effective safeguards to ensure that there would be no significant effect on the victims' traditional lands.[229] Nor did it consult with the victims about possible safeguards, a condition that is required to ensure their effectiveness;
c) the Kaliña and Lokono peoples did not effectively participate in the process of granting the mining permits that authorised the mining operations in 1997. They were not consulted about the mining operations, nor even notified about these operations, and the State did not at any time seek their consent;[230]
d) finally, the Kaliña and Lokono peoples have not in any way benefited from or otherwise been compensated for the use of their territory for this mining operation. While Suriname contended before the Commission that the victims have benefited because of the "economic and social benefits which accrue to society at large,"[231] this does not satisfy the Court's requirement that indigenous peoples must directly and reasonable benefit from any restriction to their property rights.[232]

118. The evidence before the Court also demonstrates that logging and other activities (Kaolin mining in Wane Kreek, for instance) in the victims' territory have also had severe effects on their ability to maintain and benefit from their traditional economy. These logging concessions, inter alia, have destroyed forests, harvested traditionally owned timber used by the victims for housing, boat building and other things, and significantly disrupted hunting and fishing in the affected areas. As with the mining operations, there was no impact assessment and no effective participation by the victims in decision making.

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228 Saramaka People 2007, *supra*, para. 128 *et seq*.

229 *Id*. para. 158.

230 *Id*. para. 137. *See also* Kichwa Indigenous People of Sarayaku, *supra,* at para. 167 (where the Court explains that "Given that the State must guarantee the rights to consultation and participation in all phases of planning and implementation of a project that may affect the territory on which an indigenous or tribal community is settled, or other rights essential to their survival, these processes of dialogue and consensus-building should take place from the first stages of planning or preparation of the proposed measures, so that the indigenous peoples can truly participate in and influence the decision-making process, in accordance with the relevant international standards. To that effect, the State must ensure that the rights of indigenous peoples are not disregarded in any other activity or agreement reached with private or third parties, or in the context of public sector decisions that would affect their rights and interests").

231 Annex 6 to the Commission's Application, Comments of the State, 22 March 2008.

232 *See* Saramaka People, *supra*, at para. 129 (explaining that "benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands...").

119. These mining and logging operations took place in the victims' traditional territory without meaningful regulation or supervision by the State, and to the detriment of their traditional food sources, environment, cultural and spiritual values. The State also failed to ensure that there would be no significant effects on the victims' traditional lands and the victims are left with a legacy of severe environmental degradation. For these and the above stated reasons, Suriname has violated Article 21 of the Convention in conjunction with Article 1 and 2 of the same.

C. Suriname has violated the right to juridical personality

120. Article 3 of the American Convention provides that "Every person has the right to recognition as a person before the law." This right to juridical personality has been described as the 'right to have rights'.[233] Denial of the right to legal personality precludes the vesting, exercise and enjoyment of fundamental human rights and renders persons and collectivities invisible to the law and the protections that it may provide for the defence and effectuation of their rights. It is uncontested that indigenous peoples are not recognized as juridical persons under the laws of Suriname, a fact also previously confirmed by the Court in *Moiwana Village* and *Saramaka People*[234] and by the UNCERD.[235] Nothing has changed since the Court made these determinations and the State has admitted that this is the case.[236]

121. According to the Court in *Yakye Axa*, recognition of juridical personality only makes operative the pre-existing rights that indigenous peoples have exercised historically; indigenous peoples' political, social, economic, cultural and religious rights and forms of organisation, as well as the right to reclaim their traditional lands, belong to the people themselves irrespective of whether the state formally recognizes their personality before the law. In *Sawhoyamaxa*, it further explained that states have to use all means at their disposal, including legal and administrative measures, to ensure that the right to juridical personality is respected, and that states have special obligations to ensure respect for this right in connection with persons in situations of vulnerability, marginalization and discrimination, and with due regard for the principle of equality before the law.[237]

122. In *Saramaka*, the Court extended the right to juridical personality to the Saramaka people, as a people. It ruled that the right to collective juridical personality is "one of the special measures owed to indigenous and tribal groups in order to ensure that they are able to use and

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[233] Yakye Axa, *supra*, para. 78-83 (where the Inter-American Court observed, at para. 82-3, that "juridical personality, for its part, is the legal mechanism that confers on [indigenous peoples] the necessary status to enjoy certain fundamental rights, as for example the rights to communal property and to demand protection each time they are vulnerable").

[234] Saramaka People 2007, *supra*, para. 167; and at para. 174; Moiwana Village, *supra*, para. 86(5).

[235] Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname, 12/03/04. *UN Doc. CERD/C/64/CO/9/Rev.2, 12 March 2004, at para. 14.*

[236] *See* Annex 6 to the Commission's Application, Further Comments of the State, 12 September 2008, p. 4-5.

[237] Sawhoyamaxa 2006, *supra*, at para. 189.

enjoy their territory in accordance with their own traditions."[238] It further explicated and ordered that the state must recognize the Saramaka people's collective legal personality in law and through judicial and administrative measures, all of which guarantee them "the use and enjoyment of their territory in accordance with their communal property system, as well as the rights to access to justice and equality before the law."[239]

123. The Court also observed the inter-connectedness between the right of indigenous peoples to collective juridical personality, their territorial rights and the exercise of their right to self-determination in *Xákmok Kásek*.[240] Consistent with this, in *Sarayaku*, the Court stressed that international law recognizes indigenous peoples and their rights "as collective subjects," and that they "exercise certain rights recognized by the Convention on a collective basis," including the right to legal personality.[241]

124. While indigenous peoples in Suriname – referred to normally as amorphous populations such 'Indians' or 'tribal inhabitants' rather than collective entities – are mentioned in some legislation, this legislation does not as such confer legal personality.[242] Indeed, indigenous peoples and their communities are not even objects of the law at present. As concluded in a UN Food and Agriculture Organization study: "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."[243] This was confirmed by the Court in *Saramaka People*, where the Court held that Suriname "does not recognize the Saramaka people as a juridical entity capable of using and enjoying communal property as a tribal group; [or] as a juridical entity capable of seeking equal access to judicial protection against any alleged violation of their communal property rights."[244]

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238 Saramaka People 2007, *supra*, at para. 172. *See also* Saramaka People, Interpretation of the Judgment 2008, para. 54.

239 Saramaka People 2007, *id.* at para. 174. With respect to how the collective juridical personality of indigenous and tribal peoples is to be exercised, the Court explained, at para. 164, that this "is a question that must be resolved by the [people concerned] in accordance with their own traditional customs and norms, not by the State or this Court in this particular case."

240 Xákmok Kásek, *supra*, at para. 255 (ruling that "although said facts constitute obstacles to conveying title to the land, as well as having an a negative impact on the Xákmok Kásek Community's abilities of self-determination, no one has presented evidence and reasoning sufficient to allow the Court to declare an autonomous violation of Article 3 of the Convention ... with regard to the collective aspect of the right to recognition of juridical personality").

241 *Kichwa Indigenous People of Sarayaku, supra,* at para. 231.

242 In Surinamese law, legal personality is treated restrictively and, with the exception of natural persons and a law providing for the establishment of non-profit foundations (*stichting*), is confined only to those entities specified in the Civil Code. These entities are associations and professional partnerships, which both fall under the general heading of corporate bodies. *Surinamese Civil Code*, arts. 1630-84

243 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.

244 Saramaka People 2007, *supra,* at para. 167 and 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").

125. In conclusion, the Kaliña and Lokono peoples are denied the right to be recognized as persons before the law. As a result, they also denied the capacity to hold, exercise and seek protection for their collective property and other rights in domestic law and tribunals. Suriname has failed to comply with its obligation to respect and give full effect to their juridical personality, which requires special protection given their vulnerable situation, their marginalization, and the discrimination that they have historically suffered and continue to suffer from at present. For the forgoing reasons, Suriname has violated Article 3 of the Convention in conjunction with Articles 1 and 2 of the same.

D. Suriname has violated the right the right to judicial protection

126. Article 25 of the American Convention is closely related to the guarantees recognized in Articles 1 and 2 of that instrument and all impose specific obligations on Suriname to give effect to the rights set out in the Convention, including redress for violations thereof, through its domestic legislation and the organization of the institutions responsible for administering justice. In this respect, the Court has repeatedly held that, "States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of the law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdictions (Art. 1)."[245]

127. Pursuant to Article 25 of the American Convention, the Kaliña and Lokono peoples have the right to timely and effective judicial remedies for violations of their human rights. Suriname has the obligation not only to pass laws that provide a remedy for the violation of their human rights but also to ensure due application of those remedies by State authorities. This includes the obligation to establish domestic legal procedures for the recognition, restoration and protection of the property rights of indigenous peoples.[246] Suriname has failed to comply with these obligations in violation of Article 25 of the Convention in conjunction with Articles 1 and 2 of the same.

128. The Court confirmed that judicial protection and domestic remedies are unavailable in Suriname for the protection of indigenous and tribal peoples' rights in *Saramaka People*.[247] For example, the Court held that Suriname's domestic laws "do not provide adequate and effective legal recourses to protect [indigenous and tribal peoples] against acts that violate their right to property;"[248] and "does not recognize the Saramaka people as a juridical entity capable of seeking equal access to judicial protection against any alleged violation of their communal

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[245] *Velasquez Rodriguez,* Judgment of July 29, 1988. Series C No. 4*; Fabien Garbi and Solis Corrales and Godinez Cruz,* Judgment of 26 June 1987, paras. 90, 90 and 92, respectively. *See also Judicial Guarantees in States of Emergency*, OC-9/87, 6 October 1987. Ser A No. 9, at para. 24.

[246] Sawhoyamaxa, *supra,* at para. 109.

[247] Saramaka People 2007, *supra*, para. 176-85.

[248] *Id*. at para. 185.

property rights."[249] Since that judgment was adopted, Suriname has not adopted any new laws or amended existing laws to provide adequate and effective remedies in relation to indigenous peoples' land and resource rights. Instead, Suriname persists with the view that its legal system provides adequate remedies and vigorously made this argument before the UNCERD in 2009[250] and in the hearing held on this case before the Commission in March 2012.[251]

129. In cases involving indigenous peoples' property rights, the Court has examined both the existence of effective judicial remedies for the recognition, restoration and protection of indigenous rights in and to their territories as well as whether the state has adopted a specific and effective legal or administrative procedure whereby indigenous peoples can seek restitution of their ancestral lands and/or have their communal lands identified, demarcated and titled.[252] Such a procedure must take into account indigenous peoples' specific characteristics including their special relationship to their traditional territories.[253] In *Mayagna* and *Sawhoyamaxa,* for instance, the Court held that the absence of effective domestic legal measures and remedies to allow for the delimitation, demarcation and titling of indigenous peoples' communal lands violates the right to judicial protection in Article 25 of the Convention in connection with Articles 1 and 2 of the same.[254]

130. As discussed above, Suriname has not established any legal or administrative mechanisms for the delimitation, demarcation and titling of indigenous peoples' territories and their communal resources therein. Suriname also has not adopted any legal measures designed to provide effective judicial remedies in relation to the restitution or recognition of indigenous peoples' property rights. Moreover, indigenous peoples lack juridical personality under domestic law to seek protection of their rights and this fatally undermines their ability to even be heard in domestic venues.

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[249] *Id.* at para. 167 and, at 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").

[250] *See Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/SUR/CO/12, 13 March 2009, at para. 19 (where the UNCERD responded to Suriname's position and stated that "The Committee notes with concern the recent trend of a growing flow of petitions regarding internal matters which have been addressed at international courts and bodies. This trend highlights the need to fortify national courts and create a legislative framework that adequately responds to domestic matters. While noting the State Party's view that the remedies provided under Surinamese law are sufficient to assert and seek protection of rights, the Committee stresses the analysis by the Inter-American Commission of Human Rights and the judgements by the Inter-American Court of Human Rights, which found the domestic legal system does not provide adequate effective remedies to collective rights. (Art. 6) The Committee invites the State Party to reconsider its position and to identify practical methods to strengthen judicial procedures, including through use of customary law practices, where appropriate, for effective protection and remedies against acts of discrimination affecting indigenous and tribal peoples").

[251] Annex 9 to the Commission's Application, Hearing on the Merits, Case 12.639, 12 March 2012.

[252] Mayagna (Sumo) Awas Tingni Case, *supra*, para. 123-24; Yakye Axa, *supra*, para. 65.

[253] Sawhoyamaxa, *supra*, para. 104; Mayagna, *id.*

[254] *Id.* para. 111-12 and 123-39, respectively.

131. Given the absence of judicial remedies, the Kaliña and Lokono peoples sought relief from the violations of their property rights by invoking the right of petition recognized in Article 22 of Suriname's Constitution. This proved to be an ineffective remedy as, other than a few inconclusive meetings with State officials, no concrete action was taken by the State to address and resolve violations of their property rights in relation to these petitions. The same was also the case with respect to complaints filed with various ministries and State agencies. At the same time, State agents and others continued to violate the victims' rights on a regular basis and with impunity.

132. For these reasons, judicial remedies by which the Kaliña and Lokono peoples indigenous may seek protection for its property rights are unavailable as a matter of fact and law. This not only excuses the petitioners from the requirement of prior exhaustion of domestic remedies, it also amounts to a violation of Article 25 of the Convention in conjunction with Articles 1 and 2 of the same.

VI. REPARATIONS AND COSTS

133. Pursuant to Article 63(1) of the Convention, the injured party in this case is the Kaliña and Lokono peoples, an identifiable and collective entity, and collective subject of international law.[255] The members of the Kaliña and Lokono are readily identifiable in accordance with the victims' customary law.[256] As the injured party in the present case and due to their status as victims of the established violations, the Kaliña and Lokono peoples are the beneficiaries of the collective forms of reparations requested herein.

A. Measures of restitution and satisfaction and guarantees of non-repetition

134. The Kaliña and Lokono peoples seek the following forms of reparation:

a) An order requiring the State to remove or amend the legal provisions that impede protection of the victims' right to property and to adopt legislative, administrative and other measures to recognize, protect, guarantee and give legal effect to the right of the Kaliña and Lokono peoples to hold collective title to the territory they have traditionally owned or otherwise used and occupied, which includes the foreshore and coastal areas

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[255] *Kichwa Indigenous People of Sarayaku, supra,* at para. 231 (stating that "international legislation concerning indigenous or tribal communities and peoples recognizes their rights as collective subjects of International Law and not only as individuals. Given that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise certain rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or issued in this Judgment should be understood from that collective perspective").

[256] Saramaka People 2007, *supra*, at para. 194 (stating that given "the collective nature of reparations to be ordered in the present case, the Court does not find it necessary in the instant case to individually name the members of the Saramaka people in order to recognize them as the injured party. Nevertheless, the Court observes that the members of the Saramaka people are identifiable in accordance with Saramaka customary law, given that each Saramaka individual belongs to only one of the twelve matrilineal *lös* in which the community is organized").

that form an integral part of their territory as well as the natural resources necessary for their social, cultural and economic survival, and their associated rights to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system and through their own freely identified institutions;

b) an order requiring the State to adopt legislative, administrative, and any other measures, required to create an effective mechanism for the delimitation, demarcation and titling of the Kaliña and Lokono peoples' traditionally owned territory and their traditionally used natural resources therein, in accordance with their customary law, values, customs and mores and with full respect for the boundaries traditionally acknowledged by the Kaliña and Lokono peoples and their neighbours, the N'djuka tribal people;

c) an order requiring the State to in fact complete, based on prior efforts by the victims, the delimitation, demarcation and titling of the Kaliña and Lokono peoples' territory, in full collaboration with the victims, within an eighteen month-long period, and requiring that until said delimitation, demarcation, and titling of their territory has been carried out, Suriname must abstain from all acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the Kaliña and Lokono peoples are entitled, unless the State obtains their free, prior and informed consent;

d) an order requiring the State to adopt or amend legislative, administrative, and any other measures, as may be required, to recognize and secure the right of the Kaliña and Lokono peoples to juridical personality with the purpose of ensuring the full exercise and enjoyment of their right to communal property, as well as collective access to justice, in accordance with their communal system, customary laws, and traditions. This includes the vesting of title to their territory in the Kaliña and Lokono peoples as well as effective measures to ensure that they can exercise effective control over their territory and effectively manage and distribute the lands therein, all in accordance with their rights to freely pursue their economic social and cultural development, to determine and freely implement priorities, plans and strategies for the development or use of their lands and resources, to freely dispose of their natural wealth and resources, and to be secure in their means of subsistence;

e) an order requiring the restitution and restoration to the victims of lands that are held by third parties within the territory of the Kaliña and Lokono peoples;

f) an order requiring the restitution and restoration to the victims of lands presently incorporated into the three protected areas in and affecting the territory of the Kaliña and Lokono peoples, recognizing their ownership and associated rights over those lands, and requiring that the State enter into negotiations with the freely identified representatives of the victims with respect to the possible maintenance of protected

area status for these lands, any ensuing and associated ecosystem and species management plans, and equitable benefit sharing mechanisms;

g) an order requiring the review, adoption or amending of legislation related to protected areas, mining, logging, hunting, and forests to ensure consistency with the victims' rights;

h) an order requiring the effective environmental remediation and rehabilitation of the lands degraded by mining within the territory of the Kaliña and Lokono peoples. As the Court ordered in *Sarayaku*, these tasks shall be carried out in full collaboration with the Kaliña and Lokono peoples and after a process of prior and informed consultation with the victims, who shall authorize the entry and presence on their territory of the materials and persons required for this purpose;

i) an order requiring the State to review and where appropriate revoke, with the effective participation of the victims, logging and oil palm concessions within the territory of the Kaliña and Lokono peoples;

j) an order requiring the State to adopt or amend legislative, administrative, and any other measures, as may be required to recognize and secure the right of the Kaliña and Lokono peoples to effective judicial remedies and protection;

k) an order requiring the State to adopt or amend legislative, administrative, and any other measures, as may be required to recognize and secure the right of the Kaliña and Lokono peoples to effective participation in decisions that may affect them and to give or withhold their free, prior and informed consent to activities that may affect them and/or their traditionally owned territory, and to reasonably share the benefits of any development projects, should these be ultimately carried out;

l) an order requiring the State to legally recognize and protect the role the traditional authorities and institutions of the Kaliña and Lokono peoples in the governance of their communities and their lands and territory;

m) an order requiring that the State shall implement, within a reasonable period and with the corresponding budgetary provisions, mandatory training programs or courses that include modules on domestic and international human rights standards concerning indigenous peoples and communities, aimed at law enforcement officials, civil servants and others whose functions involve relations with indigenous peoples, at all hierarchical levels;

n) an order requiring that the measures identified above shall be taken with the effective participation and free, prior and informed consent of the Kaliña and Lokono peoples, as expressed through their freely chosen representatives;

o) an order requiring that the State translate into Dutch the judgment of the Court and publish it in the State's Official Gazette and in a national daily newspaper; and

p) an order requiring that the State officially and publicly apologize for violations of the Kaliña and Lokono peoples' rights and which also contains a public commitment to ensure that such rights shall be upheld in the future. This apology should be made in a formal ceremony, organised and conducted with the full and effective participation of the freely chosen representatives of the Kaliña and Lokono peoples, to which all members of the victims' communities shall be invited, as well as broadcast in the media.

B. Compensation for pecuniary and non-pecuniary damages

135. The representatives further seek reparations in this case for all material and immaterial damages directly, indirectly and proximately caused by Suriname's acts and omissions that violate the Kaliña and Lokono peoples' rights under the American Convention. The material and immaterial damages in the instant case have a collective dimension. Consistent with the Court's jurisprudence the requested reparations must therefore also account for and address this collective dimension.

136. The material and immaterial damages sustained by the victims relate to their decades-long struggle for the recognition of their rights to their lands, territory and resources; the prolonged and active violation of these and related rights; the persistent and systemic discrimination against them, including the State active hostility to the recognition of their rights; and the lack of remedies by which they could assert and seek protection for their rights. In this respect, the Court has also observed that denials of indigenous peoples' subsistence rights and access to their traditional means of subsistence are prohibited by the Convention[257] and cause a range of related harm and suffering.[258] In *Moiwana Village*, for instance, the Court presumed the existence of material harm, *inter alia*, on the grounds that the community

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[257] *Masacres de Ituango*, Judgment of 1 July 2006. Series C No. 148; *Kankuamo Indigenous Community v. Colombia (Provisional Measures)*, Order of the Inter-American Court of Human Rights of July 5, 2004, at Resolution 3 (requiring immediate measures to protect the right to freedom of movement including those to permit displaced indigenous persons to return to their traditional lands); *Jiguamiandó and the Curbaradó Communities v. Colombia (Provisional Measures)*, Order of the Inter-American Court of Human Rights of March 6, 2003, at para. 9 (an Afro-Colombian tribal community who "are all in a situation of equal risk of ... being forcibly displaced from their territory, a situation that prevents them from exploiting the natural resources necessary for their subsistence;"); and *Jiguamiandó and the Curbaradó Communities v. Colombia (Provisional Measures)*, Order of the Inter-American Court of Human Rights of February 7, 2006, para. 9, 12.

[258] *Kichwa Indigenous People of Sarayaku, supra*, 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").

members' "ability to practice their customary means of subsistence and livelihood has been drastically limited."[259]

137. The acts and omissions of the State complained of herein and the victims' inability to obtain effective redress for the ensuing violations have caused the Kaliña and Lokono peoples an immense amount of pain and anguish, threatened their identity, undermined the values that they hold most dear, and caused severe pecuniary and non-pecuniary alterations to their living conditions.[260] In this respect, the Court observed in *Yakye Axa*, that the failure to recognize and respect indigenous peoples' fundamental and all-encompassing relationships to their traditional territories constitutes an actionable denigration of their basic cultural and spiritual values and threatens irreparable harm to their physical and cultural integrity.[261]

138. The Kaliña and Lokono peoples are acutely aware of the threats posed by Suriname's extended failure to recognize and effectively secure their rights and this is a source of enormous anxiety and pain at both a collective and individual level. This prolonged denigration of their basic values, and the deep anxiety and insecurity experienced over many years, also causes significant harm to their moral and mental integrity. A prolonged absence of effective remedies is typically considered by the Court to be a source of suffering and anguish for victims of human rights violations.[262] In *Saramaka People*, for example, as part of the rationale for awarding compensation to the Saramaka people for immaterial damages, the Court ruled that

> there is evidence that demonstrates the suffering and distress that the members of the Saramaka people have endured as a result of the long and ongoing struggle for the legal recognition of their right to the territory they have traditionally used and occupied for centuries ... as well as their frustration with a domestic legal system that does not protect them against violations of said right ... all of which constitutes a denigration of their basic cultural and spiritual values.[263]

139. Additionally, in the *Plan de Sanchez Massacre Case*, the Court observed that the indigenous people in question possesses traditional authorities and distinct forms of self-government centred on the principles of collective agreement and mutual respect, and that harmony with their environment is expressed through the spiritual relationship with the land, their management of resources, and their profound respect for nature. However, their traditional authorities, customary resource management systems and communal decision

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[259] Moiwana Village, *supra,* at para. 186-7. *See also* G. Handl, Indigenous Peoples' Subsistence Lifestyle as an Environmental Valuation Problem. In M. Bowman and A. Boyle (eds.), ENVIRONMENTAL DAMAGE IN INTERNATIONAL AND COMPARATIVE LAW. PROBLEMS OF DEFINITION AND VALUATION, (Oxford: OUP, 2002), 85-110, (explaining the bases in international and comparative law for cultural and subsistence lifestyle damage claims by indigenous peoples.)

[260] Moiwana Village, *supra*, at para. 191.

[261] Yakye Axa, *supra,* para. 203.

[262] *Serrano-Cruz Sisters Case*, Judgment of 1 March 2005. Series C, No. 120, para. 113-15; *Plan de Sánchez Massacre Case, Reparations*, *supra*, para. 80, 87(e).

[263] Saramaka People, *supra*, at para. 200.

making processes were severely undermined due to the state's acts and omissions, all of which the Court determined to be relevant when finding that immaterial damage had occurred and required repair.[264] The same conclusion can also be drawn in the case at hand, given the relationship between the Kaliña and Lokono peoples' cultural integrity, their traditional authorities and land and resource control and management, and the denigration and denial of this authority due to Suriname's acts and omissions.

140. In short, the Kaliña and Lokono peoples have suffered a prolonged assault on their physical, psychological, moral and cultural integrity due to Suriname's acts and omissions that affect their rights to their sacred and ancestral territory. They have been told repeatedly that all of their territory belongs to the State and their efforts to seek an amicable settlement in relation to recognition of their rights have been ignored and rebuffed. In short, they have endured years of their rights being violated with impunity, and years of pain and frustration.

141. In light of the preceding and the proven violations in the instant case, the representatives specifically seek reparations for, *inter alia,* the following material and immaterial damages:

a) the denial of access to and damage to the victims' lands caused by bauxite mining operations in their territory since 1997;

b) the denial of access to the victims' lands resulting from the alienation of the same to third parties who used these lands for vacation homes and other purposes and were and remain the source of constant conflict;

c) the deprivation of the victims' access to vitally important subsistence and other resources;

d) the suffering and distress that the Kaliña and Lokono peoples have endured as a result of the long and ongoing struggle for the legal recognition of their right to the territory they have traditionally used and occupied for millennia, as well as their frustration with a domestic legal system that does not protect them against violations of said right, all of which constitutes a denigration of their basic cultural and spiritual values; and,

e) the suffering caused to the Kaliña and Lokono of the Lower Marowijne, to their cultural identity, the impact on their territory, as well as the changes caused in their living conditions and way of life and other non-pecuniary damages that they suffered.

142. The establishment of a development fund as a repository for funds awarded for material and immaterial damages would be appropriate in this case. However, the victims' representatives do not consider that a fund along the precise lines of those created in the *Moiwana Village* and *Saramaka People* cases is a viable option. The representatives understand

[264] Plan de Sánchez Massacre Case, Reparations, *supra*, para. 87(d)

that neither has functioned well and they do not wish to repeat these situations. Instead, they request an order requiring the State to transfer any awarded compensation to an entity to be freely identified by the victims and controlled and autonomously managed by them, and which may be used at their discretion to invest in, for example, health, education, resource management and other projects in their territory.

C. Costs

143. The representatives also seek an award of all costs incurred in prosecuting this case domestically and before the Inter-American system. The VIDS and the KLIM seek costs in the amount of US$179,970.94. The Forest Peoples Programme has waived attorney's fees and seeks only a nominal sum of US$15,000 to cover a small part of its expenses over the past 15 years. The evidence substantiating these costs is bound separately.

VII. WITNESSES AND EVIDENCE

A. Witnesses proposed by the Representatives

144. The victims' representatives offer the following witnesses and expert witness to provide evidence and testimony before the Court.

Testimonial Evidence:

a) **Captain Ricardo Pané.** Captain Pané has been the traditional chief/authority of Christiaankondre for more than 20 years and was the Chairperson of the Association of Indigenous Village Leaders in Suriname from 1995-2011. He will testify about the nature and extent of the victims' traditional territory and associated customary laws, their efforts to obtain redress in domestic venues, and the impact of establishment and maintenance of the Galibi and Wia Wia Nature Reserves.

b) **Captain Jona Gunther.** Captain Gunther is the traditional chief/authority of Erowarte. He will testify about the nature and impact of the allotment of four of the victims' communities, the impact of the Wane Kreek Nature Reserve and the mining operations therein, and the nature and extent of logging operations in the victims' territory.

c) **Dr. Stuart Kirsch, Associate Professor of Anthropology, University of Michigan**. Dr. Kirsch will testify about the impact of natural resources extraction and other activities on the well-being and cultures of the victims, as well as the nature of the mining operations in their territory.

Evidence by Affidavit:

145. In addition to the affidavits submitted as annexes hereto[265] and to the Commission's Application, the representatives offer the following testimony by affidavit:

a) **Head Captain Palata**. Head Captain Palata will testify about the boundary between the territories of the N'djuka tribal people and the Kaliña and Lokono peoples, as well as the impact of the mining operations in the Wane Kreek Nature Reserve.

b) **Victoria Tauli-Corpuz**. Ms. Tauli-Corpuz is the UN Special Rapporteur on the Rights of Indigenous Peoples-elect and the former Chairperson of the UN Permanent Forum on Indigenous Issues. She will testify about international norms and policies regarding protected areas and the conservation and sustainable use of biological diversity as they relate to the rights of indigenous peoples, including under the Convention on Biological Diversity.

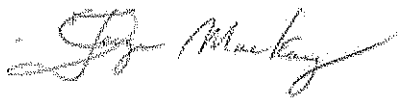
c) The representatives request that the Court incorporates the testimony of **Professor Mariska Muskiet** and **Magda Hoever-Venoaks**, both submitted by affidavit in the proceedings in the *Saramaka People v Suriname* case. This testimony concerns Suriname's property laws, laws related to natural resources extraction, and assesses legal remedies in the case of indigenous and tribal peoples' land rights, including in the context of natural resource extraction. The information therein remains valid as no changes have occurred since the time they were submitted.

B. Other Evidence

146. The representatives request the Court's permission to submit maps of the concessions to exploit natural resources in the victims' territory. These maps were submitted to the Commission at the March 2012 hearing on the merits in this case, but do not appear to be included in the case file.

VIII. SIGNATURE

146. Signed on behalf of the victims' representatives,



Fergus MacKay
Counsel of Record

[265] Annex A and B hereto, Affidavits Zaalman and Sabajo.