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No. 11.821 Village of Moiwana

IN THE

INTER-AMERICAN COURT OF HUMAN RIGHTS

Stefano Ajintoena ET AL.,

Petitioners,

v.

The Republic of Suriname,

Respondent

Final Written Argument of the Victims

07 October 2004

[redacted]

Contents

000812

I. Introduction

1. The Inter-American Commission on Human Rights (hereinafter "the Commission") submitted Case 11.821 Stefano Ajintoena et al v. Suriname to the Inter-American Court of Human Rights (hereinafter "the Court") on 20 December 2002. The Commission's Application alleges that the State of Suriname (hereinafter "the State" or "Suriname") is responsible for violations of articles 8, 25 and 1 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") as a result of its denial of justice to the survivors of and the next of kin of the 39 persons killed at the massacre at Moiwana village (hereinafter 'the Victims') on 29 November 1986.

2. On 9 September 2004, the Court held a public hearing on the preliminary objections and possible merits and reparations in the case. In the hearing, the Commission called four witnesses and one expert witness. Pursuant to the Order of the Court of 5 August 2004, expert testimony was also submitted by affidavit.[1] This testimony complemented the documentary proof submitted to the Court in the appendices to the Commission's original pleadings. For its part, Suriname did not present any witnesses or experts in the hearing. The Victims also did not present witnesses or experts, although we were fully involved in identifying the witnesses and experts presented by the Commission.

3. In this case, the Commission and the Victims have alleged and substantiated violations of article 8 and 25 of the Convention in conjunction with article 1. In addition to these violations, during the public hearing and on the basis of the facts presented in the Commission's Application, the representatives of the Victims additionally asserted and substantiated violations of articles 2, 5 and 21 of the Convention in conjunction with article 1.[2] While these violations were not alleged in

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[1] *Affidavit of Drs. Thomas Polimé, Expert Witness*, Stefano Ajintoena et al., v. Suriname, 20 August 2004 (hereinafter "Affidavit of Thomas Polimé).

[2] In the *Myrna Mack Chang Case*, the Court stated that it "has already established that it is possible for the victims, their next of kin or their representatives to allege violation of other Articles of the Convention than those already included in the object of the demand filed by the Commission, based on the facts contained in said application, for which it refers to the *"Five Pensioners"* case, in which it stated that:

> [w]ith respect to inclusion of rights other than those already encompassed by the application filed by the Commission, the Court deems that the applicants can invoke said rights. It is they

the original pleadings, the state has had the procedural opportunity to assert its defense and has failed to either expressly contest the violations or has failed to expressly deny or adequately refute the facts underlying and substantiating these violations. Specifically with respect to the alleged violation of article 21, for instance, Suriname has not refuted the factual basis for such a violation but rather argued that the Court's jurisdiction *ratione temporis* would prevent it from considering such a violation.[3]

4. The following are the final written arguments of the Victims, which summarize the facts proven and the legal foundations for the conclusion that Suriname has violated articles 2, 5, 8, 21 and 25 in conjunction with article 1 of the American Convention.

II. Preliminary Objections

5. Suriname has interposed a number of preliminary objections in this case, most of them maintaining that the Court has no jurisdiction over the case because the massacre at Moiwana took place prior to its simultaneous accession to the American Convention on Human Rights and acceptance of the Court's jurisdiction in November 1987. These preliminary objections are properly addressed in the submissions of the Commission and therefore, we will highlight only a few points herein.[4] In particular, we concur with and reiterate the Commission's observation that Suriname's preliminary objections lack any basis in law or fact and should be dismissed.

A. The Court's jurisdiction *ratione temporis*

6. While Suriname contends that the alleged violations were completed on 29 November 1986 and therefore would be barred *ratione temporis*, the violations before

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who are entitled to all the rights embodied in the American convention, and not admitting this would be an undue restriction of their status as subjects of International Human Rights Law. It is understood that the above, pertaining to other rights, adheres to the facts already contained in the application.

Myrna Mack Chang Case, Judgment of 25 November 2003. Series C No. 101, at para. 224, *quoting*, *'Five Pensioners Case'*, Judgment of February 28, 2003. Series C No. 98, paras. 153, 154 and 155.

[3] *Audio transcript*, part 5, rebuttal of Suriname.

[4] *Observations of the Inter-American Commission in Response to the Preliminary Objections Presented by the Republic of Suriname*. Case of Moiwana Village (Sefano Ajintoena et al., v. Suriname).

the Court either took place subsequent to Suriname's ratification of the American Convention and acceptance of the Court's jurisdiction or are of a continuing nature. The denial of justice alleged in this case is specifically linked to Suriname's acts and omissions occurring in 1989, 1992, 1993, 1995, and 1996/7 and continues to the present day. The alleged violation of article 2 is related to acts and omissions occurring in 1992, when the Amnesty Law was enacted, and in 1993, when state agents invoked the Amnesty Law as grounds for discontinuing the preliminary investigation into the massacre at Moiwana village. The alleged violations of article 5 are associated with the massacre itself and are of a continuing nature, and are also distinct and cumulative violations directly connected with the denial of justice and other acts and omissions that post-date its acceptance of the Court's jurisdiction. The alleged violation of article 21 is of a continuing nature and therefore attributable to Suriname subsequent to its acceptance of the Court's jurisdiction.[5]

7. The Court has previously retained jurisdiction over a State's continuing violations even though such violations were initiated before that State's formal recognition of the jurisdiction of the Court. For example, in the *Blake* Case, the Court held that "the preliminary objection raised by the Government must be deemed to be without merit insofar as it relates to effects and actions subsequent to its acceptance. The Court is therefore competent to examine the possible violations which the Commission imputes to the Government in connection with those effects and actions."[6] The Court confirmed this position in *Genie Lacayo* rejecting the preliminary objection to temporal jurisdiction, in part, on the basis that the claims involved the State's obligations to respect and ensure the full enjoyment of rights established in Articles 2, 8, 24 and 25 of the American Convention.[7]

8. The position taken by the Court is also subscribed to by other international courts and tribunals which routinely exercise jurisdiction over alleged breaches of international law that began before the date of the state's ratification and continue

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[5] See, *infra*, paras. 119-38.

[6] *The Blake* Case, Judgment of July 2, 1996. Series C No. 27, at paras. 33 and 40.

[7] The *Genie Lacayo* Case, Judgment of January 27, 1995. Series C No. 21, at paras. 22-26.

thereafter.[8] The European Court of Human Rights, for instance, has held on numerous occasions that temporal limitations do not preclude review of continuing violations of the European Convention on Human Rights[9] as has the Human Rights Committee in relation to the International Covenant on Civil and Political Rights and its Optional Protocol I.[10] The principle of continuing violations has also been codified by the International Law Commission in its Articles on State Responsibility.[11]

9. Of particular relevance to the Court's jurisdiction over the alleged violation of article 21 in the case at hand is the European Court's decision in *Loizidou v. Turkey.* In this case, the Court found that a deprivation of property that occurred prior to acceptance of its jurisdiction constitutes a continuing violation of the European Convention provided that the applicant can, at present, be regarded as the legal owner of the land in question.[12] As discussed below, the members of Moiwana Village, both at the time they were forcibly driven from their traditional lands and at present, were and still are regarded as the legal owners of their traditional lands under N'djuka customary law.[13]

10. The Governing Body of the International Labour Organization has also held a State responsible for continuing violations of indigenous peoples' land and resource rights guaranteed by ILO Convention No. 169 Concerning Indigenous and Tribal

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[8] *Sandra Lovelace v. Canada*, Communication No.R.6/24, U.N.Doc.Supp.No.40 (A/36/40) (1981); *Phosphates in Morocco* case (Italy v. France), PCIJ Series A/B, No. 74 (1938), at 28.. *Also see, inter alia*, *X. v. France*, Eur. Ct. H.R., App. no. 18020/91 (1992)(Judgment)(Merits and Just Satisfaction); *Bozano v. France*, Eur. Ct. H.R., App. no. 09990/82 (1986)(Judgment)(Merits).

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

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

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

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

[13] *Infra*, paras. 60-2.

Peoples (1989), even though the initial violation took place more than a decade prior to the State's ratification of that convention. This case involved consideration of a Representation filed pursuant to article 24 of the ILO Constitution, which alleged continuing violations by Mexico of indigenous peoples' land and resource rights and their right to be free from involuntary relocation, all in connection with construction of a hydroelectric dam.[14] While observing that Mexico's view that it was not responsible for events that occurred prior to entry into force was correct, the Committee established to review the Representation nonetheless held that "the effects of the decisions that were taken at that time continue to affect the current situation of the indigenous peoples in question, both in relation to their land claims and to the lack of consultations to resolve those claims. The Committee therefore considers that the Convention does currently apply with respect to the consequences of the decisions taken prior to its entry into force."[15]

11. The Governing Body reached the same conclusion in a case against Denmark, where forcible relocation occurred 44 years prior to that State's accession to Convention No. 169. In this case, which, along with the preceding decision against Mexico, is highly relevant to the case at hand, the Governing Body stated that

> The Committee observes that the relocation of the population of the Uummannaq settlement, which forms the basis of this representation, took place in 1953. It also takes note of the fact that the Convention only came into force for Denmark on 22 February 1997. The Committee considers that the provisions of the Convention cannot be applied retroactively, particularly with regard to procedural matters, such as whether the appropriate consultations were held in 1953 with the peoples concerned. However, the Committee notes that the effects of the 1953 relocation continue today, in that the relocated persons cannot return to the Uummannaq settlement and that legal claims to those lands remain outstanding. Accordingly, the Committee considers that the consequences of the relocation that persist following the entry into force of Convention No. 169 still need to be considered with regard to

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[14] *Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, (No. 169), made under article 24 of the ILO Constitution by the Radical Trade Union of Metal and Associated Workers.* Doc.GB.273/15/6; GB.276/16/3 (1999).

[15] *Id.* at para. 36.

Articles 14(2) and (3), 16(3) and (4) and 17 of the Convention, examined below, despite the fact that the relocation was carried out prior to the entry into force of the Convention.[16]

It concluded by observing that the abovementioned "provisions of the Convention are almost invariably invoked concerning displacements of indigenous and tribal peoples which predated the ratification of the Convention by a member State."[17]

12. The Human Rights Committee's decision in *Lovelace v. Canada* is also relevant to the extent that the Victims' culture is inextricably bound to the maintenance of their various relationships with their traditional lands and they have been and continue to be denied their internationally guaranteed right to do so. In *Lovelace*, the Committee found a continuing violation of article 27 of the Covenant on Civil and Political Rights[18] though the original violation occurred prior to ratification of the Covenant and Optional Protocol I.[19] In the Committee's view, the author had been denied her right to enjoy her culture because that culture did not exist outside of her traditional lands and she was denied the legal right to reside on those lands.[20]

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

[17] *Id.* Article 14(2) of Convention 169 reads, "Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession." This standard is largely consistent with the order of the Honourable Court in the *Awas Tingni Case*, which provided, among others, that the State establish mechanisms for delimitation, demarcation, and titling of the indigenous communities' properties, "in accordance with the customary law, values, usage, and customs of these communities." *The Mayagna (Sumo)Indigenous Community of Awas Tingni Case*. Judgment of August 31, 2001. Series C, No. 79, at para. 164.

[18] ICCPR, 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."

[19] *Sandra Lovelace v. Canada*, Communication No.R.6/24, U.N.Doc.Supp.No.40 (A/36/40) (1981), at para. 11 – "The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date;" and, at 13.1 – "The Committee considers that the essence of the present complaint concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian, in particular because she cannot for this reason claim a legal right to reside where she wishes to, on the Tobique Reserve. This fact persists after the entry into force of the Covenant, and its effects have to be examined, without regard to their original cause."

[20] *Id.* at para. 17.

Suriname acceded to the Covenant on 28 December 1976. These issues are further discussed below.[21]

B. The extreme gravity of the events of 29 November 1986 is highly relevant to determining the nature and extent of Suriname's responsibility under the American Convention

13. Regrettably, violations of the right to life of the 39 persons murdered on 29 November 1986 are not before the Court. Nor are the other violations that occurred and were completed on that day. These violations were identified and addressed by the Commission in relation to the American Declaration on the Rights and Duties of Man in Report No. 35/02 issued in this case. While the Court may be constrained from exercising jurisdiction over the massacre itself, the Victims nonetheless wish to emphasize that the massacre constitutes a crime against humanity, a gross and flagrant violation of *jus cogens* norms, obligations *erga omnes* and of norms of international humanitarian law codified in the Geneva Conventions and judged to have attained the status of customary international law.[22] Suriname is a party to the Geneva Conventions of 1949 and Additional Protocol II Relating to the Protection of Victims of Non-international Armed Conflicts and they were in force for Suriname at the time of the massacre. The massacre therefore constitutes a gross and systematic violation of a range of fundamental norms of international law and basic standards of state conduct for which Suriname is now and was at the time internationally liable.

14. Although the Court does not have jurisdiction over individuals or individual accountability for international crimes and has stated that, in contentious cases, it is incompetent to find violations of instruments and norms other than those of the inter-American system,[23] the Court may interpret the obligations of a State under the American Convention in light of the obligations it has assumed under international humanitarian and criminal law[24] and observe that violations of the Convention also

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[21] *Infra* paras. 119-38

[22] *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. US) Merits*, 1986 International Court of Justice Rep. 14 (Judgment of 27 June), at 114.

[23] *Plan de Sánchez Massacre Case*, Judgment of 29 April 2004. Series C No. 105, para. 51

violate norms found in those bodies of law.[25] Additionally, as the Court held in the *Plan de Sánchez Massacre Case and Myrna Mack Chang Case*, the Court may also take into account the aggravated international responsibility of States when determining State responsibility under the Convention and for the purposes of reparations.[26] Classification of the massacre as a crime against humanity and a gross violation of humanitarian law and *jus cogens* norms, is therefore highly relevant to determining the nature and extent of Suriname's responsibility for the subsequent denial of justice and other violations that are clearly within the Court's jurisdiction including the nature and extent of any reparations that Court may decide to order.[27]

15. Finally, in the case *sub judice*, the Court need not independently assess nor declare Suriname to be in violation of international criminal and humanitarian law, it need only take notice of Suriname's express admissions that the Moiwana massacre constituted a crime against humanity and was systematic in nature.[28] It may then interpret Suriname's obligations under the Convention accordingly; specifically the obligations contained in articles 8, 25 and 1 – in relation to the denial of justice evident in this case – articles 5 and 1 – in relation to the violations of the Victims' moral and mental integrity – and article 63(1) for the purposes of reparations. Should the Court find that Suriname has violated the American Convention, it may also observe that it has violated international criminal and humanitarian law – for instance, the obligation to prosecute perpetrators of crimes against humanity incumbent on all States as a norm of customary international law in connection with articles 8, 25 and 1. The Victims urge the Court to adopt this approach as it considers this case and to

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[24] *Las Palmeras Case*, Judgment of February 4, 2000. Series C No. 67, paras. 32-4 - finding that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention.

[25] *Bámaca Velasquez Case*, Judgment of 25 November 2000. Series C No. 70, at para. 208 – "Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3."

[26] *Plan de Sánchez Massacre Case*, *supra*, para. 51; *Myrna Mack Chang Case*, *supra*, paras. 139, 260 and 261.

[27] See, *infra*, paras. 91-104

[28] See, *infra*, Section IV.B.

fully consider the extreme gravity of the massacre as well as Suriname's aggravated international responsibility when determining violations and the measures required to repair those violations.

C. Concluding remarks

16. The Court has jurisdiction *ratione temporis* and otherwise over the violations of the American Convention alleged in this case. These violations occurred either after Suriname's acceptance of the Court's jurisdiction or are violations of a continuing nature for which Suriname assumed responsibility after accession and is presently responsible. Suriname's objections to the Court's jurisdiction on temporal and other grounds are therefore unfounded as a matter of law and fact and, respectfully, should be rejected. Whereas the violations of the right to life of the 39 persons murdered and other violations that were completed on of 29 November 1986 are not before the Court, the massacre constitutes a grave and systematic violation of a series of fundamental norms of international law that are nonetheless highly relevant to determining the nature and extent of Suriname's responsibility for the denial of justice under the American Convention and the nature and extent of the measures required to repair those violations.

III. Proven Facts

17. The documentary and testimonial evidence before the Court proves the facts upon which the allegations in this case are based, and which amount to violations of the American Convention. The scarce documentary evidence presented by the State does not refute the alleged human rights violations, but instead confirms those violations. Additionally, throughout the proceedings before the Court, Suriname has not expressly contested or denied the facts presented by the Commission and the Victims, or, in the rare instances when it has raised questions of fact, it has not done so with the requisite degree of specificity that could disprove the facts presented.[29] In certain cases, Suriname has expressly or impliedly admitted to the veracity of the facts before the Court.[30]

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[29] Article 37(2) of the Court's Rules of Procedure provide that "In its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested."

A. The Moiwana massacre constitutes murder on a large-scale as part of a policy of widespread, systematic and collective reprisals against the civilian maroon population

18. The testimonial and documentary evidence demonstrate that the Moiwana massacre was not an isolated incident but rather part of a policy and practice of widespread, systematic and collective reprisals against the civilian maroon population for the activities of the Jungle Commando. Witness Stanley Rensch explained that the massacre took place in the context of a series of military operations in eastern Suriname directed against the civilian maroon population that lasted over a number of months and involved at least two other massacres, widespread and illegal detention and harassment of maroons, disappearances, and the systematic destruction of the maroon villages of the region.[31] Expert witness, Dr. Kenneth Bilby, described an influx of maroon refugees to St. Laurent du Maroni, French Guiana, between October and December 1986 and recalled that these refugees explained that they were escaping repression by the National Army of Suriname, including killings and disappearances of family members.[32] Expert witness Thomas Polimé, stated that "the *de facto* military regime began extensive military operations in the region and initiated a policy of collective reprisals against the Maroon (primarily N'djuka and Paramaka) civilian population of the region. Maroons became victims of widespread harassment and gross human rights abuses at the hands of the military (IACHR 1990, 178-82; Wako 1988, 37-47)."[33] The documentary evidence confirms that 200-250 maroon civilians were killed by the National Army in December 1986 alone.[34]

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[30] For instance, Suriname expressly admitted that the massacre was conducted by agents of the State and that it was systematic in nature. *Audio transcript*, Stefano Ajintoena et al., v. Suriname, 9 September 2004 (hereinafter "Audio transcript"), part 5.

[31] *Audio transcript*, part 1, testimony of Stanley Rensch.

[32] *Id.* part 4, testimony of Dr. Kenneth Bilby.

[33] Affidavit of Thomas Polimé, at para. 37 (footnote omitted). See, also, id. paras. 37-9.

[34] *Application of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights in the case of Stefano Ajintoena ET AL. v. The Republic of Suriname*, 20 December 2002 (hereinafter 'Application of the Commission'), Annex 17.

19. The Moiwana massacre constitutes murder on a large-scale. At least 39 individuals were killed on 29 November 1986.[35] Over 70 percent of those killed were 18 years of age or younger, 40 percent were 10 years old or younger, 25 percent were five years old or younger including four infants under the age of two, and 50 percent were women or girls. UN Commission on Human Rights Special Rapporteur, Amos Wako, stated that "[b]y all accounts, they were defenseless, some were lined up and shot, some were shot in their houses and thereafter their belongings destroyed."[36] Each of the community members who testified before the Court explained how they had personally seen their loved ones and other members of the community murdered in cold blood.[37] Witness Antonia Difienjo, for instance, explained that the military killed her father, her pregnant aunt and her seven month old baby girl who she was carrying in her arms at the time.[38]

20. Suriname provided graphic accounts of the massacre in its documentary evidence submitted to the Court that confirms the statements of the witnesses and the documentary evidence presented by the Commission.[39] In particular, the eyewitness accounts of Frits Moesel and Orlando Swedo, both arrested by Inspector Herman Gooding in 1989, describe in some detail the military operation at Moiwana, the murder of women, some of them pregnant, and children, provide details of the preparation and execution of the massacre and identify military officers who were involved in its design and commission.[40] In the public hearing before the Court, Suriname expressly admitted that the massacre was "systematic", perpetrated by agents of the State and should not be considered subject to the Amnesty Law because

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[35] It is known that more than 39 persons were killed at Moiwana, however, it has not been possible to properly identify the names of the persons killed over and above the 39 persons before the Court.

[36] *Summary or Arbitrary Executions. Report by the Special Rapporteur, Mr. Amos S. Wako, pursuant to Economic and Social Council Resolution 1987/60.* UN Doc. E/CN.4/1988/22 & Annex), at page 45, para. 50

[37] Audio transcript, parts 1, 2 and 3, testimony of Erwin Willemdam, Antonia Difienjo and Andre Ajintoena.

[38] Audio transcript, part 2, testimony of Antonia Difienjo.

[39] *Response of the Republic of Suriname to the Allegation of the Inter-American Commission on Human Rights in the Case of Moiwana Village*, 30 April 2003 (hereinafter 'Response of Suriname'), Annex 20, Process Verbal, Frits Moesel and Orlando Swedo.

[40] *Id.*

that law contains an exception for crimes against humanity.[41] Suriname also stated that the Amnesty Law does not apply to the Moiwana massacre for the same reason before the UN Committee on the Elimination of Racial Discrimination in 2004 and the Human Rights Committee in 2002.[42] In addition to these express admissions, Suriname has not denied or otherwise contested the facts presented in relation to the massacre. In its written submission to the Court, for instance, it states that "the State of Suriname does not have to address in detail the statements made by the Commission with regard to said occurrences in the village of Moiwana."[43]

B. The Victim's attempts to obtain justice were denied and obstructed

21. With respect to the denial justice in this case, the facts speak for themselves. The testimony and documentary evidence presented to the Court conclusively demonstrate that the Victims and the NGO Moiwana '86 acting on their behalf actively and repeatedly sought recourse in Suriname between 1987 and 1997, the latter being the date when Petition 11.821 was submitted to the Commission. These attempts to obtain justice were ignored, rebuffed and obstructed by Suriname, and produced no result. The intellectual authors, who are well known and have publicly acknowledged their responsibility on more than one occasion, continue to enjoy complete impunity. The evidence also proves that Suriname failed to independently conduct a serious and diligent investigation of the massacre, prosecute those responsible and provide reparations to the Victims. While Suriname protests that it has conducted an investigation and that there has been no denial of justice, the facts and Suriname's own statements and admissions prove otherwise.

1. The investigation initiated by Inspector Herman Gooding in 1989 was obstructed by state agents and produced no result

22. In 1989, police Inspector Herman Gooding initiated an investigation into the Moiwana massacre. In April 1989, he arrested and took statements from at least two

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[41] Audio transcript, part 5.

[42] *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*. UN Doc. CERD/C/64/CO/9/Rev.2, 12 March 2004, at para. 20 (full text is in Annex B); *Summary Record of the 2054th meeting, 22 October 2002*, Human Rights Committee, 76th session. UN Doc. CCPR/C/SR.2054, 28 October 2002, para. 11.

[43] Response of Suriname, at p. 68.

suspects, Frits Moesel and Orlando Swedo. However, shortly thereafter a group of 30 heavily armed military personnel surrounded the police station where one of the suspects was detained and demanded his release. Understandably the police complied and the suspect, Orlando Swedo, was taken to a specially organized event at the *Membre Boekoe* military barracks on 19 April 1989 where he was given a hero's reception. Reporters were invited and described the event.[44] As described in the documentary evidence and explained to the Court by witness Stanley Rensch, Lt. Col. Desire Bouterse and military officers Chas Mijnals and Iwan Graanoogst made the following statements regarding the Moiwana massacre:

- that Bouterse had officially ordered the military operation resulting in the massacre and it was explicitly approved by him;
- that any complaints about the military operation, the methods used and the consequences should be directed to Bouterse;
- that the other members of the military leadership were responsible for the order initiating the military operation, the manner in which that order was carried out and its consequences; and, emphatically
- that military operations were not subject to investigation.[45]

23. According to witness Rensch, threats were also made at this meeting against Inspector Gooding in relation to the investigation of the massacre.[46] He further explained that Inspector Gooding was assassinated in August 1990 after a meeting with the Deputy Commander of the Military Police and his body was found near the office of Bouterse.[47] While the circumstances of his death have yet to be investigated and clarified, it is widely known in Suriname that he was assassinated by State agents and Suriname has not expressly denied this fact before the Court. Additionally, before the UN Human Rights Committee in 2004 Suriname admitted that Inspector Gooding was assassinated in relation to the investigation of the massacre: "He went

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[44] Application of the Commission, Annex 27(a)(b). See, also, *id.* annex 25.

[45] *Id.* and Audio transcript, part 1, testimony of Stanley Rensch.

[46] *Id.*

[47] *Id.*

on to say that the Government was continuing its investigation into the 1990 murder of police Chief Inspector Herman Gooding, who had been killed while conducting an investigation into the Moiwana massacre."[48] The police officers assisting Inspector Gooding with the investigation into the massacre fled the country and today live in the Netherlands after being granted political asylum.[49] The investigation into the massacre was discontinued thereafter and no official action was taken against the military officers and personnel responsible for obstructing the investigation.

24. While the police initiated the investigation into the massacre at its own initiative in 1989, Stanley Rensch also explained to the Court how his organization acting on behalf of the Victims had cooperated with and provided information to Inspector Gooding.[50] A copy of a formal request by Moiwana '86, dated 19 April 1989, to the President of Suriname seeking investigation of the massacre also forms part of the documentary evidence before the Court.[51] This request was copied to the then-Attorney General, R.M. Reeder, and members of Parliament. No response was received.[52]

25. Suriname has not contested these facts other than by generally denying that it has failed to provide and obstructed justice in this case.[53] Moreover, it argues that the investigation initiated by Inspector Gooding is still ongoing, demonstrating, in addition to confirming Suriname's failure to seriously investigate, that there has been an unreasonable delay in this investigation and that it has produced no result: "[t]he purpose of such an investigation [initiated by Inspector Gooding] was, and still is, to prosecute and punish the guilty parties in the event that on the basis of the facts and

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[48] Statement by E. Limon, Permanent Representative of Suriname to the United Nations, *Human Rights Committee begins Review of Suriname's Report, Hearing of 'Steady Progress' in Investigation of Violations under Previous Regime. But Committee Experts Concerned at Lack of Concrete Results Regarding Murder Investigations,* UN Press Release, HR/CT/648, 18/03/2004, Human Rights Committee, Eightieth Session, 2173rd Meeting* (PM), at p. 3 (full text in Annex B).

[49] Audio transcript, part 1, testimony of Stanley Rensch.

[50] *Id.*

[51] Application of the Commission, Annex 25.

[52] *Id.*

[53] Response of Suriname, p. 69-73. See, especially, p. 70-1.

circumstances it becomes apparent from the investigation that any offence has been committed."[54]

2. Suriname rejected and failed to conduct a serious investigation of the massacre again in 1993 and the preliminary investigation at this time produced no result

26. The evidence before the Court proves that Suriname continued to deny justice to the Victims in 1993. At this time, human remains were discovered near Moiwana Village and the location was made known to the Ministry of Justice and Police, including the Attorney General. Witness Stanley Rensch[55] stated that he was told of the location of the remains by persons formally in the Jungle Commando who had buried them shortly after the massacre.[56] He further explained how his organization on behalf of the Victims submitted three requests for a judicial investigation into the massacre and that after international pressure – among others, from Human Rights Watch – and a formal meeting with the Minister of Justice and Police, the State sent a team composed of civilian and military police and a pathologist to exhume the remains.[57] After two visits, the police informed journalists that the skeletons of 5-7 adults and 2-3 children had been identified.[58] At the meeting with the Minister of Justice and Police, Mr. Rensch was told by the Minister that Suriname's social and economic problems must take precedence over investigation of the massacre.[59] Two subsequent requests for investigation submitted by Moiwana '86 were ignored.[60]

27. Witnesses Andre Ajintoena and Erwin Willemdam stated that they were aware that bodies had been exhumed in 1993 but neither they nor other Victims were interviewed by the police, officially informed of the results of the investigation nor

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[54] Response of Suriname, at p. 70.

[55] Audio transcript, part 1, testimony of Stanley Rensch.

[56] Response of Suriname, Annexes 29 and 30, containing witness statements taken by the police in relation to the human remains.

[57] *Id.* See, also, Application of the Commission, Annex 24 - requests dated 24 May, 28 June and 23 August 1993 – and, Annex 27(d)(e), containing press reports.

[58] Response of Suriname, Annex 29, containing a copy of a 1 June 1993 press release issued by the police.

[59] Application of the Commission, Annex 27(e).

[60] *Id.* Annex 24 - requests dated 28 June and 23 August 1993

told about the location of the exhumed remains.[61] The remains were not returned to Victims for burial and their whereabouts today is unknown to the Victims.[62]

3. The 1992 Amnesty Law was invoked in 1993 to prevent further investigation of the massacre

28. Immediately prior to discontinuance of the preliminary investigation of the discovery of remains near Moiwana Village, the Minister of Social Affairs and Housing, in a government-issued press statement,[63] stated that further investigation of the Moiwana massacre was not needed as prosecution was barred by the 1992 Amnesty Law.[64] Shortly thereafter the investigation was terminated. Suriname does not deny that this statement was made or that the investigation terminated shortly thereafter. Instead, Suriname argues that "[i]f a very important person has said so speaking as a private person then that is just his opinion but not the view of the State. The State wishes to note that if this and other statements have been made strictly off the record by prominent people, these statements should be also considered in light of the times in which the State found itself. The democratization process that had set in was in a prenatal phase and very fragile."[65] In his testimony, Stanley Rensch confirmed that State officials understood the Amnesty Law to require that no further steps of investigation were permitted in relation to the Moiwana massacre.[66]

29. In 1992, Moiwana '86 acting on behalf of the Victims and the victims in other outstanding human rights cases, filed legal action challenging the validity of the

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[61] Audio transcript, part 1, testimony of Erwin Willemdam, and part 3, testimony of Andre Ajintoena.

[62] *Id.*

[63] The Court has previously observed with regard to newspaper clippings that "even though they are not properly documentary evidence, they can be appraised insofar as they reflect publicly or well known facts, statements by high-level State agents, or corroborate what is established in other documents or testimony received during the proceedings. *Inter alia*, *Ivcher Bronstein Case*, Judgment of February 6, 2001. Series C No. 74, para 70; *Constitutional Court Case*, Judgment of January 31, 2001. Series C No. 71, para. 53.

[64] Application of the Commission, Annex 25, p. 4.

[65] Response of Suriname, at p. 69-70.

[66] Audio transcript, part 1, testimony of Stanley Rensch.

Amnesty Law as a violation of Constitutional rights and Suriname's international obligations.[67] This challenge was rejected by the judiciary.[68]

4. The Surinamese Parliament called for investigation of the massacre in a December 1995 resolution, yet no action was taken to conduct an investigation, to prosecute those responsible or to provide reparations to the Victims

30. In December 1995, the Surinamese Parliament adopted a Resolution calling on the Government to immediately commence an investigation into the murder of 15 prominent citizens in December 1982 and other human rights violations, including the Moiwana massacre, committed during the period of military rule.[69] Witness Stanley Rensch testified that no action was taken by the Executive to give effect to the Resolution of the Parliament.[70] This was confirmed in Suriname's submission to the Court, which states in relation to the Resolution that "[t]he political situation of the State has still not recovered to the extent that an independent and impartial investigation of the matter could be held."[71]

5. In 1996 and 1997, the Attorney General and President of the Court failed to act on the Victim's requests from investigation and prosecution

31. Article 4 of the Third Section of the Code of Criminal Procedure of Suriname provides that, at the request of a private party, the Attorney General may initiate a criminal investigation or, if she fails to do so, the President of the Court of Justice can order the Attorney General to initiate a criminal investigation.[72] This is the only formal remedy available in domestic law that permits private persons to request a criminal investigation and prosecution should the State fail to do so at its own initiative. As witness Stanley Rensch testified, Moiwana '86 acting on behalf of the

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[67] Moiwana '86 v. State of Suriname, Case No. 92/0359, Expl. No. 0515, First Cantonal Court, Paramaribo, 10 August 1992. See, Response of Suriname, Annex 28.

[68] *Moiwana '86 v. State of Suriname*, No. 92/03/59, First Cantonal Court, Paramaribo, 12 December 1992.

[69] *Motie van de National Assemblee Suriname*, 19 December 1995, in, Application of the Commission, Annex 23.

[70] Audio transcript, part 1, testimony of Stanley Rensch.

[71] Response of Suriname, at p. 71.

[72] *Wetboek van Strafvordering* (Code of Criminal Procedure), *Derde Afdeling* (Third Section), Art. 4.

Victims filed two requests under this procedure with the Attorney General's office in 1996. Receiving no response, a formal request was then filed under the same procedure with the President of the Court, also in 1996.[73]

32. While no response was received from the Attorney General, the President of the Court communicated with Moiwana '86 on three occasions. On 21 August 1996, the President of the Court wrote that he had requested information on the Moiwana massacre from the Attorney General as well as any copies of relevant police records; and on 2 October 1996, the President of the Court responded to further inquiries by Moiwana '86 stating that he had not received any information from the Attorney General and would reiterate his request for information.[74] Finally, in response to further requests for information about progress in the case, in February 1997, the President of the Court simply referred Moiwana '86 to the Attorney General.[75] No further response was received from either the Attorney General or the President of the Court and to the best of our knowledge no sanction was applied against the Attorney General for failing to comply with the requests of the President of the Court.

33. Suriname has not contested the preceding, except to imply that the Victims' failed to hire a lawyer to press their case with the Attorney General and President of the Court.[76] In this respect, we note that there is no requirement in article 4 of the Code of Criminal Procedure that a request be submitted by a lawyer. Moreover, the President of the Court deemed that the request submitted by Moiwana '86 was sufficient to initiate an assessment of whether an order to investigate was warranted.

6. To date, Suriname still has not conducted a serious investigation nor has it sought to prosecute the perpetrators or attempted to provide reparations

34. In the public hearing and its submissions before the Court, Suriname admitted that as of September 2004 it still has not conducted a serious investigation of the

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[73] See, Application of the Commission, Annex 26.

[74] *Id.*

[75] *Id.*

[76] Audio transcript, parts 1, 2, 3 and 5, questions and statements of Suriname.

Moiwana massacre, that no charges have been filed against the perpetrators and that it has neither assessed nor otherwise attempted to provide reparations to the Victims.[77] This was confirmed in the testimony of the witnesses Erwin Willemdam, Antonia Difienjo, Andre and Stanley Rensch,[78] and the affidavit of expert witness Thomas Polimé.[79]

35. Suriname maintained that it may now conduct an investigation of the massacre because the political climate is presently amenable to such an investigation.[80] Suriname's written submission to the Court stated, for example, that "[t]he political situation in Suriname is at the moment such that the green light has been given for a structured approach to restarted [*sic*] the criminal investigation into the Moiwana case.... A detailed investigative plan is being completed;"[81] and "a criminal investigation into the events of the Maroon village of Moiwana on 29 November 1986 had been launched indeed. This investigation, however, had been temporarily suspended, but was resumed in August 2002 [a temporary suspension of 13 years] and is now being carried out in accordance with the national statutory provisions, for the purpose of prosecuting and punishing the guilty party if it appears that any offenses have been committed."[82] However, when questioned by the Court about the status of this investigation, the Representative of the State, who is also the Attorney General, stated that he did not have any information about progress made to date.[83]

36. The Attorney General, however, gave an indication of the status of that investigation a few days earlier in an August 2004 interview with Radio Netherlands, the transcript of which was submitted at the request of the Court during the public hearing. He states, in response to the question, "But aren't there, as in the case of the

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[77] Response of Suriname, *inter alia*, p. 9, 19, 20, 22, 25, 49, 52, 58, 64, 65, 69, 70, 71, 72, 73, 77 & 82.

[78] Audio transcript parts 1, 2 and 3.

[79] Affidavit of Thomas Polimé, para. 54.

[80] *Inter alia*, Response of Suriname, p. 72

[81] *Id.*

[82] *Id.* p. 82.

[83] Audio transcript, part 5.

December murders, names that are known of possible people that were involved? Couldn't you then make a list and then just as with the preliminary judicial investigation of the December case, scratch?" that:

> in the Moiwana case, the police, together with the military police and a member of the Public Prosecutions Department, appointed by me, has tried to concretize the identification of possible suspects. And this you can only do on the basis of concrete indications. Statements of witnesses and others, yes, indications. And I have to tell you that this procedure is going very slowly and I would like to invite everyone, with November in view, who can provide the Public Prosecutions Department of the police or the military polic[e], some more insight into possible suspects, with concrete indications, to, yes, to go to those instances and deposit their knowledge there. And then I can guarantee you, that all information will be used and that everyone who will be named there, will be heard by official police report.[84]

37. Concerning the imminent expiration of the statute of limitation in the Moiwana case, the Attorney General states, in response to the question "Moiwana, the mass murder that took place there, the statute of limitation will expire in November. So time is pressing, is it not?" that:

> No, I do not agree with you, that especially against the background of the statute of limitation for those Moiwana murders, to put it like that, people have been killed there, that time is pressing. We are really trying our utmost you know, to trace persons, who may tell us the true story. And we invite them, but it is not always easy and yes, not only because the prescription period of the case runs out, you know, you should say: well, then let's just do guess work. We are very serious and we still invite everyone who may tell us the true story, to put it on paper, to state it in an official police report. And based on the evaluation of this, yes, to identify people as suspects. That is the work of the Public Prosecutions Department. It's not about identifying people in a backroom, but people have to be prepared to come and tell their story. People who know more about it. And then I can tell you that it is not so easy.[85]

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[84] *Acting Procurator- General Subhas Punwasi in an interview with Radio Netherlands World Service, Transcript*, recorded on 27 August 2004, broadcast 30 August 2004, at p. 2.

[85] *Id.* at p. 1.

And, in response to the question, "Is it likely that the statute of limitation will expire?" that:

> If it were up to me, it doesn't have to, but it is a fact that if we cannot on the basis of witness testimonials, or other testimonials, identify one or more suspects, then that will be the risk. As you know, you could stop something like this by ordering a preliminary judicial investigation. As happened in the 8 December-case. But that investigation requires, it is an investigation against identified persons, against the suspects. It is not that you start an investigation against, er, well, a certain case.[86]

38. The result of the preceding is that almost 18 years after the massacre, the intellectual authors and perpetrators continue to enjoy complete impunity. The severe and ongoing human rights violations suffered by the Victims have yet to be repaired and they remain defenseless and unprotected. The UN Human Rights Committee, cited by the Commission in its observations on the preliminary objections interposed by Suriname,[87] reached the same conclusion in May 2004, observing that

> The Committee is concerned by the continued impunity of those responsible for human rights violations committed during the period of military rule. In particular, investigations into the December 1982 killings and the 1986 Moiwana massacre remain pending and have not yet produced concrete results. The information supplied by the delegation that all such cases are still being investigated is disturbing, especially given the lapse of time since their occurrence. The Committee further considers that this situation reflects a lack of effective remedies available to victims of human rights violations, which is incompatible with article 2, paragraph 3, of the Covenant.[88]

39. Similarly, the UN Committee on the Elimination of Racial Discrimination concluded, in March 2004, that it "welcomes the delegation's statement that the 1992 Amnesty Act did not terminate the proceedings concerned with human rights violations committed during the civil strife of 1985-1991, including the 1986

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[86] *Id.*

[87] *Observations of the Inter-American Commission on Human Rights in Response to the Preliminary Objections Presented by the Republic of Suriname*. Case of Moiwana Village (Stefano Ajintoena et al.)

[88] *Concluding observations of the Human Rights Committee: Suriname. 04/05/2004*. UN Doc. CCPR/CO/80/SUR. (Concluding Observations/Comments), at para. 7 (full text is in Annex A).

Moiwana massacre. It is, however, disturbed that the inquiries into those events have still not reached a conclusion."[89]

7. All of the Victims actively pursued and were denied justice

40. The Commission's Application lists 165 Victims: Victims 1-39 were killed on 29 November 1986; Victims 40-165 are survivors and next of kin. The uncontroverted and uncontested evidence before the Court demonstrates that Victims 40-165 actively and repeatedly took part in the search for justice in Suriname and that this search was denied and fruitless. Witnesses Stanley Rensch, Andre Ajintoena, Erwin Willemdam and Antonia Difienjo all explained how the Victims and Moiwana '86 coordinated their attempts to obtain justice and how these efforts were routinely denied, ignored and obstructed by Suriname. Stanley Rensch stated that in all of the numerous communications between Moiwana '86 and the State, the State was informed that Moiwana '86 was acting on behalf of the Victims and that the Victims had formally authorized Moiwana '86 to act on their behalf.[90] The Victims renewed their formal authorization of Moiwana '86 in 1996 as they prepared to file their petition with the Commission and again in 2002, along with a power of attorney declaration, in preparation for the proceedings before the Court.[91]

41. Witness Andre Ajintoena explained in detail the mechanisms used by the Victims to ensure that all were represented in their collective efforts to seek and obtain justice in Suriname.[92] He also explained how the Victims had formed organizations to facilitate the search for justice, one of which is registered in French Guiana and called Association Moiwana, the other is based in Moengo in Suriname. All of the Victims are members and represented in these organizations.[93] Before any decisions are taken in relation to the case, witness Ajintoena further explained that all of the Victims – specifically those listed in the Commission's Application – were

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[89] *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*. UN Doc. CERD/C/64/CO/9/Rev.2, 12 March 2004, at para. 20 (full text is in Annex B).

[90] Audio transcript, part 1, testimony of Stanley Rensch.

[91] Application of the Commission, Annex 30.

[92] Audio transcript, part 3, testimony of Andre Ajintoena.

[93] *Id.*

consulted and participated in decision-making and that this is in line with N'djuka culture which views the search for justice a collective responsibility.[94] Thomas Polimé concurred and described how the Victims collectively pursued justice:

> The Moiwana survivors and next of kin have established their own organization 'Association Moiwana' in French Guiana to spearhead their search for justice. Association Moiwana in French Guiana is one of the main advocates for recognition by the Surinamese government of the crimes committed at Moiwana in 1986 and has been actively seeking justice for the victims and next of kin since it was established. In doing so, it has often held meetings with survivors and next of kin living in Suriname as well as with Moiwana '86 to pursue justice. Each group of survivors/next of kin is represented by two persons on a steering committee that is responsible, in coordination with Moiwana '86, for filing complaints and requests and undertaking other actions directed towards obtaining justice. In adopting this structure, they have ensured that all affected survivors/next of kin are directly involved in their search for justice even if the full number of persons are not named on complaints, etc. This is consistent with N'djuka tradition which sees responsibility as collective and compliance therewith to be the collective obligation of the next of kin and other members of the various matrilineages.[95]

42. The preceding demonstrates Suriname's manifest failure to provide effective judicial protection and guarantees. This denial of justice has permitted those responsible for the massacre to escape all sanction for the serious crimes committed at Moiwana village. Despite the passage of almost 17 years since Suriname agreed to be bound by the American Convention, there has been no diligent and effective investigation, no one has been prosecuted or punished and the Victims have not been compensated.

C. The Victims have suffered immensely because of the massacre and denial of justice

43. The Moiwana massacre, its continuing effects and the subsequent denial of justice have caused and continue to cause the Victims substantial trauma and suffering, mentally, morally, emotionally, psychologically, spiritually, economically

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[94] *Id.*

[95] Affidavit of Thomas Polimé, at para. 50.

and culturally. The massacre and subsequent denial of justice have caused and continue to cause a fundamental, brutal and debilitating rupture of the life they knew and expected to lead. Expert witness Thomas Polimé, a social worker with advanced training in counseling refugees in conflict zones, described the impact of the massacre as akin to "post-traumatic shock syndrome."[96] He has worked intensively with the Victims since 1987 and explains that this trauma is continuing up to the present.[97]

44. This trauma and suffering is further compounded by the Victim's inability to obtain justice for their loved ones and the state of limbo that characterizes their lives while justice is denied; Suriname's gross indifference to and at times hostility towards their attempts to obtain justice; the knowledge that their loved ones were not accorded indispensable burial rites, some of their remains were burned and that the deceased, and ancestral and other spirits, are seeking vengeance on the surviving next of kin; their forced separation from their traditional lands and territory, which are the foundation of their culture and spiritual well-being, and their inability to return until justice has been served; and, finally, due to the state of extreme poverty that the Victims have been forced to endure in French Guiana and various locations in Suriname since being deprived, on an ongoing basis, of their traditional means of subsistence.

45. Thomas Polimé explained in some detail the impact of the massacre and denial of justice for the Victims:

> I was present in French Guiana, both when the refugees began crossing the border in 1986-7 and as a councilor in the refugee camps between 1987-92. I have also made frequent visits to the Moiwana survivors between 1992 and 2003, most recently in February-March 2003. On this basis, I can say that the vast majority of the survivors exhibit many of the same characteristics as persons with post-traumatic shock syndrome. They are deeply scarred by the events that took place at Moiwana village on 29 November 1986 and by the lack of attention to those events by the Surinamese authorities since then. They feel lost and abandoned, dislocated from their cultural

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[96] *Id.* at para. 55.

[97] *Id.*

and spiritual roots, and deprived of the cultural, spiritual and material necessities that comprise a good life in N'djuka terms. ...

Many of the survivors and next of kin to this day report that they are unable to sleep properly, that they suffer from terrifying dreams and that their bodies are often afflicted with strange ailments caused by the anger of the spirits. Pictures drawn by the children while they were in the camps – often showing death, re-enactments of the massacre, helplessness and fear – are consistent with traumatic stress indicators identified among children in other conflict zones (Picture 1).

The vast majority of the Moiwana survivors and their and the deceased's next of kin have been forced to live a deprived existence in the camps without most of the basic necessities. They also had to live with the uncertainty of knowing that the French may have forcibly repatriated them when the residency permits expired; this happened every year between 1992 and 1997. While they were forced to endure this, they are well aware that the perpetrators of the massacre maintain positions of privilege and power in Suriname and that the authorities were (and still are) ignoring their demands for justice. This has lead to a desperate sense of helplessness, despair and anger that is still present today and manifests itself in daily life and relationships with loved ones, some of which are dysfunctional. They feel invisible and believe that they have been returned to the suffering of slavery-times, but, contrary to their ancestors, they have no means to escape their suffering, no where to run. Moreover, they have never had an explanation for why the massacre took place leaving them unaware of the killers' motivations or the likelihood that they may be targeted again and otherwise uncertain about the future.[98]

These points were also highlighted by witnesses Erwim Willemdam, Antonia Difienjo, Andre Ajintoena and Kenneth Bilby.[99]

46. Polimé summarized the impact of the massacre and subsequent denial of justice thus:

> In sum, the massacre and subsequent denial of justice has torn apart the fabric of Moiwana as an N'djuka community, destroyed the lives of the survivors and next of kin, invoked the wrath of powerful and very real ancestral and other spirits who are

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[98] *Id.* at paras. 55-7.

[99] Audio transcript, parts 1, 2, 3 and 4.

avenging themselves on the survivors and next of kin, dislocated the community from its traditional lands, lands that are the source of its identity, and cultural and spiritual sustenance, and, caused the survivors and next of kin great embarrassment, pain and suffering in their relations with other N'djuka and Maroons in general. They believe that Surinamese society does not care what happened to them and their loved ones and that this is in part due to discrimination based on their racial/ethnic identity.[100]

1. Justice is a cultural imperative for N'djuka maroons and the failure to obtain justice causes intense and increased suffering

47. Justice is a powerful concept in N'djuka culture and involves various obligations incumbent on the next of kin of persons wronged to clarify the facts and to repair the wrong.[101] As explained by Thomas Polimé, "if a member of one's matrilineage is slain, the next of kin (which includes all members of the matrilineage) are obligated to avenge and make right the offence against their kinsman otherwise the latter will not be able to rest until justice is done. This is a central tenet of N'djuka society and is a collective responsibility of all the next of kin."[102] That the search for justice is a collective obligation of all the Victims was confirmed in the testimony of witnesses Erwin Willemdam, Antonia Difienjo and Andre Ajintoena.[103] Polimé further explained, citing authoritative ethnographic studies of N'djuka, that "[i]f justice is not served, the next of kin may suffer terrible afflictions brought on them by the dead and by various ancestral and other spirits;"[104] and

> Justice has a central role within the N'djuka community and culture. Among others, according to Ndjuka tradition it is important that the dead can rest in peace; until justice has been done, they cannot. The survivors and next of kin are obligated by N'djuka law to seek justice for dead so that their spirits can rest. Otherwise,

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[100] Affidavit of Thomas Polimé, at para. 72.

[101] Affidavit of Thomas Polimé, para. 67. See, also, Audio transcript, part 4, testimony of Dr. Bilby.

[102] *Id.*

[103] Audio transcript, parts 1, 2 and 3.

[104] Affidavit of Thomas Polimé, para. 68, citing, Thoden van Velzen, and Wetering, *In the Shadow of the Oracle. Religion as Politics in a Suriname Maroon Society.* Waveland Press, Illinois, 2004, p. 27, and; Köbben, 'Unity and Disunity: Cottica Djuka Society as a Kinship System'. In, R. Price (ed.), *Maroon Societies. Rebel Slave Communities in the Americas.* Baltimore: Johns Hopkins University Press, 3rd Ed., 1996, p. 328.

> according to tradition, the spirits of the dead will be greatly angered and cause torments and sicknesses for the survivors and other members of their lineages. Many of the survivors and next of kin strongly believe that this is happening to them today and will continue to happen to them until justice is served.[105]

48. Witness Andre Ajintoena confirmed that in N'djuka culture the next of kin are obliged to seek justice for those killed at Moiwana,[106] as did witnesses Erwin Willemdam and Antonia Difienjo[107] and expert witness, Kenneth Bilby.[108] Mr. Ajintoena further explained that obtaining justice is a necessity, that failure to obtain justice results in serious spiritual and other consequences for the next of kin and that these negative consequences pass to future generations and other members of the matrilineage.[109] He cited the example of an 18 year-old women who is continually possessed by spirits of the dead – among others, the spirit of a pregnant woman killed at Moiwana who begs for her life and the life of her unborn child – and describes in graphic detail the events of 29 November 1986 even though she was only 2 years old at the time.[110] He stated that in N'djuka culture the spirits of the dead, of ancestors, and other spirits exact retribution on the next of kin if they fail to obtain justice for the dead, and that the survivors and next of kin live in daily fear of this retribution.[111] Thomas Polimé, quoting ethnographic studies, provided a detailed explanation of the nature of spiritual retribution in N'djuka culture and belief.[112] Andre Ajintoena further described how the Victims will continue to experience the suffering and retribution of the dead until justice has been obtained and that the denial of justice is equivalent to having to relive the massacre every day of their lives, causing them great suffering and anguish.[113]

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[105] *Id.* at para. 70.

[106] Audio transcript, part 3, testimony of Andre Ajintoena.

[107] *Id.* parts 1 and 2.

[108] *Id.* part 4.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] Affidavit of Thomas Polimé, paras. 66-72.

49. Expert witness Dr. Bilby, described the pursuit of justice as a cultural imperative for N'djuka.[114] In his experience, the pursuit of justice is a collective responsibility and the failure to obtain justice affects each of the Victims personally, morally and psychologically.[115] The negative consequences of the Victims inability to obtain justice are greatly exacerbated by the length of time that has passed between the massacre and the present. In Dr. Bilby's view, the passage of time has substantially increased the suffering experienced by the Victims and has lead to multiple, expanding and antagonistic spiritual problems that are intergenerational in nature.[116] Finally, Dr. Bilby described the nature of the massacre, the ongoing impunity enjoyed by the perpetrators and the inability of the next of kin to obtain justice as "catastrophic."[117]

2. Victims are unable to rebuild and continue with their lives until justice has been obtained

50. The testimonial and documentary evidence before the Court prove that Suriname's refusal to provide justice to the Victims has caused a massive and debilitating disruption in their lives that continues to prevent them from rebuilding their lives. They are essentially living in a suspended state – in limbo – and cannot move forward until justice has been obtained.[118] As Thomas Polimé explained

> The survivors and next of kin all believe that they will not be able to repair their lives until such time as they have achieved justice for those slain in November 1986. Only then will they be able to close the most painful chapter in their lives and bring the massacre to an end in their own minds and lives. The survivors and next of kin feel that they have to relive the massacre every day because there is no closure to the event. All must relive the massacre and the pain and suffering of seeing or knowing

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[113] Audio transcript, part 3, testimony of Andre Ajintoena.

[114] *Id.* part 4, testimony of Kenneth Bilby.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* parts 2, 3 and 4, testimony of Antonia Difienjo, Andre Ajintoena and Kenneth Bilby.

that their loved ones were killed and mutilated and that they, in violation of fundamental cultural imperatives, have not been able to obtain justice for them.[119]

51. Witness Andre Ajintoena explained that according to N'djuka culture it is impossible for the Moiwana survivors to rebuild their lives or to return to their traditional lands without first having obtained justice for those killed in the massacre.[120] In his view, because of the massacre, Suriname has effectively destroyed the cultural life of the community of Moiwana.[121] He also explained that until justice is obtained, including clarification of the facts, the Victims will not be able to enjoy a good life and have a normal existence.[122] In response to the question posed by the Honorable Judge Cançado Trindade concerning the importance of justice as a precondition for restoration, Mr. Ajintoena explained the steps required for the Victims to reconstitute their personal and communal lives as follows: 1) Suriname must recognize and declare that what happened at Moiwana was wrong and unjust and provide reparations; 2) when this has been done, the Victims can be at peace again and begin the long process preparing for cultural atonement and restoration; 3) the requisite religious and cultural practices can be undertaken to ensure that those who died can rest peacefully and that their traditional lands can be made habitable again through ritual cleansing and appeasement of the spirits of the land and their ancestors.[123]

3. The Victims have suffered and continue to suffer because they have been unable to conduct essential burial rites for the dead

52. The uncontested evidence before the Court proves that the Victims have been unable to recover the remains of their loved ones and provide them with appropriate burials as required by fundamental norms of N'djuka culture and law. The evidence also shows that agents of the State intentionally destroyed some of the remains when they burned down the mortuary in Moengo where these remains had been taken

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[119] Affidavit of Thomas Polimé, at para. 65.

[120] Audio transcript, part 3, testimony of Andre Ajintoena.

[121] *Id.*

[122] *Id.*

[123] *Id.*

immediately after the massacre. Witness Erwin Willemdam and expert witness Bilby stated that cremation is morally repugnant to N'djuka.[124] Expert witnesses Thomas Polimé and Kenneth Bilby explained in detail the paramount importance of burial rites in N'djuka culture and the nature of these rites.[125] Polimé stated that in "N'djuka tradition, all persons and matrilineages have a fundamental right to bury their kinsmen,"[126] and;

> N'djuka have specific funerary rites that must be observed and these rites are an important part of determining whether and how the deceased is buried: full burials are reserved for the righteous, serious sinners are buried in shallow graves and those posthumously convicted of witchcraft or other serious crimes are dumped in unholy places in the forest to be devoured by wild animals. The survivors and next of kin frequently complain is highly emotional terms that they have been denied their right to bury their loved ones because of the massacre and that their bodies have been treated as though they were witches or other evildoers. This heightens the anger of the spirits of the dead and the other spirits that presently are wreaking vengeance on the survivors and next of kin.[127]

53. Dr. Bilby explained that failure to provide a proper burial in N'djuka culture is a grave sin that is also morally offensive and causes much suffering, both to the living and to the spirits of the dead and ancestors.[128] The latter seek vengeance on their next of kin for failing to properly honor them, which often manifests in physical and mental illnesses in the nuclear family and members of the matrilineage and clan to which the deceased belonged.[129] These afflictions are intergenerational and will continue until justice has been served.[130] He further explained that the failure to recover the remains and to conduct ritual burials for those massacred at Moiwana is

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[124] *Id.* parts 1 and 4.

[125] Affidavit of Thomas Polimé, paras. 22-4; Audio transcript, part 4, testimony of Kenneth Bilby.

[126] *Id.* at para. 22.

[127] *Id.* at para. 63.

[128] Audio transcript, part 4, testimony of Kenneth Bilby.

[129] *Id.*

[130] *Id.* See, also, Affidavit of Thomas Polimé, paras. 66-72.

"catastrophic" and "unprecedented" in N'djuka history, except for the time that they were at war with the Dutch in the 18th century.[131]

4. The Victims continue to suffer because they have been forcibly deprived of their traditional lands and the cultural and spiritual congress that only can be found in those traditional lands

54. Witness Ajintoena explained that the community's traditional lands are fundamentally important and without secure enjoyment of those lands, cultural life cannot continue.[132] Dr. Bilby explained that these lands are fundamentally tied to N'djuka culture, history, identity, spirituality and physical survival and that loss of traditional lands can be characterized as "catastrophic."[133] He also testified that the Victims at present are denied congress with their traditional territory, their religious shrines and the spirits of the place, and that their territory is not in a state that it can be used due to the spiritual pollution caused by the massacre.[134] Thomas Polimé confirmed this testimony:

> N'djuka, like other indigenous and tribal peoples, have a profound and all encompassing relationship to their ancestral lands. They are inextricably tied to these lands and the sacred sites that are found there and their forced displacement has severed these fundamental ties. Many of the survivors and next of kin locate their point of origin in and around Moiwana Village. Their inability to maintain their relationships with their ancestral lands and its sacred sites has deprived them of a fundamental aspect of their identity and sense of well being. Without regular commune with these lands and sites, they are unable to practice and enjoy their cultural and religious traditions further detracting from their personal and collective security and sense of well being. This also adds to their sense of loss and uncertainty about the future, and the future well being of their children and the generations to follow. Their loss of lands and struggles in a foreign place are

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[131] *Id.*

[132] Audio transcript, part 3, testimony of Andre Ajintoena.

[133] *Id.* part 4, testimony of Kenneth Bilby.

[134] *Id.*

reminiscent of the time of slavery – a time that pervades their consciousness and identity and remains very real today.[135]

5. The Victims were forced to live in poverty and deprivation in exile from their traditional lands and territory

55. The documentary and testimonial evidence further demonstrates that the Victims were compelled to live in poverty and deprivation in refugee camps in French Guiana and, for those that were repatriated, in make shift accommodation in Suriname. This was and remains a radical departure from the life they new before the massacre when their traditional lands provided for the vast majority of their needs.[136] Antonia Difienjo, for instance, explained that she does not have access to farming lands in the refugee camp and how subsistence farming is considered both a right and duty of N'djuka women.[137] The latter was confirmed by Dr. Bilby's testimony.[138]

56. Thomas Polimé, who intimately knows the living conditions of the Victims in French Guiana and Suriname, stated with regard to the situation in French Guiana that

> From 1992 until 1997, the Moiwana survivors and others that joined them were given nothing other than a piece of land on which they could cultivate their crops. Their only source of water was one standpipe that was used by all present. Their children were not provided any education, they were denied work permits and health care was almost non-existent. After 1997, the situation improved somewhat as they received work and longer term residency permits. The children are at present getting a French education and are taken to school by bus. Each family also get an allowance (for children) and medical care. While their immediate situation has improved after obtaining work permits and schooling, they continue to be unable to practice their traditional way of life and remain separated from their traditional lands, which are an indispensable part of maintaining their traditional way of life.[139]

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[135] Affidavit of Thomas Polimé, at para. 60.

[136] Audio transcript, part 1, testimony of Erwin Willemdam, explaining that his life is worse in 2004 than it was in 1986 because of deprivation of the subsistence resources and solace provided by the community's traditional lands.

[137] *Id.* part 2.

[138] *Id.* part 4.

Explaining that the Victims lived a deprived existence in French Guiana "without most of the basic necessities," Polimé further observed that the Victims also "had to live with the uncertainty of knowing that the French may have forcibly repatriated them when their residency permits expired; this happened every year between 1992 and 1997."[140] Antonia Difienjo stated that while they were living in the refugee camp they were never once visited by anyone from the Surinamese government and, because of this, the Victims felt as if they were treated like dogs and were non-existent.[141]

57. Polimé further testified that the situation of the Victims in Suriname is worse than that of those in French Guiana. He also stated that "when they arrived in Suriname they were put in a reception centre in Moengo, at which time Suriname promised to rebuild their villages and otherwise provide for them. The reception center was a temporary residence in which the returnees were to stay until their villages were rebuilt. This promise was never honoured and many remain in the reception center today."[142] He adds that "[m]ost of those living in Paramaribo – these persons either fled to Paramaribo rather than French Guiana before the massacre or returned to Suriname from French Guiana to join kin in Paramaribo – reside in the so-called ghetto districts and lack access to most basic services. The same can also be said for the many of the survivors living in Moengo and Albina, especially those still living in the reception center."[143] Suriname itself admits that "[m]any of [the victims who returned to Suriname] have squatted [in] houses in Albina and now reside there."[144] Polimé additionally explained that the returnees reported that "government officials were generally rude to them and unhelpful when the returned to Suriname.

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[139] Affidavit of Thomas Polimé, at para. 50

[140] *Id.* at para. 57.

[141] Audio transcript, part 2.

[142] Affidavit of Thomas Polimé, at para. 51.

[143] *Id.*

[144] Response of Suriname, at p. 85.

They made statements like the returnees should not expect Suriname to provide them with the luxuries they had in French Guiana."[145]

58. That the Victims are forced to live in poverty in French Guiana was also observed by R. De Gouttes, a member of the UN Committee on the Elimination of Racial Discrimination and the Committee's Country Rapporteur for Suriname. As recorded in the summary record of the 64th session in 2004, Mr. De Gouttes observed that "the voluntary repatriation and reintegration programme for Surinamese refugees from French Guyana had not been as successful as was hoped, particularly for men. As a result, many families were living in poverty."[146] None of the preceding facts were denied or refuted by Suriname.

D. The Victims were forcibly evicted from their traditional lands and are unable to return at present due to the denial of justice and because Suriname has failed to provide the conditions for their safe return and recognition of their tenure rights

59. The uncontested documentary and testimonial evidence before the Court proves that the members of Moiwana village, as members of the N'djuka landholding clans, were and are still considered to be the owners of the lands and resources in and around Moiwana village in accordance with N'djuka customary law. It further demonstrates that the community was forcibly evicted from their traditional lands by the military operation resulting in the massacre and that they have been unable to return due to Suriname's refusal to provide justice to the Victims and the consequences thereof. As Andre Ajintoena and Thomas Polimé testified, the Victims' fear of returning to Suriname was specially acknowledged by the French Government, which allowed them to stay in French Guiana when all other Surinamese refugees were repatriated in 1993.[147]

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[145] Affidavit of Thomas Polimé, at para. 52.

[146] Committee on the Elimination of Racial Discrimination, *Summary Record of the 1614th Meeting, 64th session.* CERD/C/SR.1614, 27 February 2004, at para. 35.

[147] Affidavit of Thomas Polimé, para. 47. See, also, Audio transcript, part 3, testimony of Andre Ajintoena.

1. The Community's traditional land and resource tenure system

60. Concurring with the testimony of Thomas Polimé,[148] Dr. Bilby affirmed that N'djuka have specific customary law concerning ownership and use of lands and resources.[149] He explained that individuals within N'djuka society acquire subsidiary rights of ownership and use of lands and resources by virtue of their membership in one of the N'djuka matrilineages and matrilineal clans, while paramount ownership is vested in the clan itself.[150] These rights are intergenerational; inalienable outside of the clan, or outside of the N'djuka people with regard to larger territorial rights; clans may exclude non-members from entry to collective clan-owned lands; and the boundaries between the lands of the various matrilineages and clans and between N'djuka and non-N'djuka peoples are well understood, encoded in oral history and, although not without exception, respected.[151]

61. Dr. Bilby further explained that in the case of Moiwana village, even though its members had not been in physical possession of their traditional lands for almost 18 years, under N'djuka customary law, they are still considered to be the owners of those lands by virtue of their membership in the village's landholding clans and are recognized as such by other N'djuka communities and clans.[152] On this point, Polimé stated that "while Moiwana may now be deserted, both the Moiwana survivors and next of kin and other relations presently residing in other Cottica/Tapanahony villages maintain traditional rights to lands and resources in and around the village site."[153] Dr. Bilby also testified that the traditional lands of Moiwana village, due, *inter alia*, to overlapping kinship ties, are inextricably linked to the larger territory vested in all 23

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[148] *Id.* paras. 73-88.

[149] Audio transcript, part 4, testimony of Kenneth Bilby.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] Affidavit of Thomas Polimé, at para. 78.

Cottica N'djuka communities as well as the Tapanahoni River N'djuka communities.[154]

62. Andre Ajintoena confirmed that ownership rights to Moiwana village's traditional lands and resources are derived from traditional occupation and use and grounded in N'djuka customary law.[155] He also stated that the present members of Moiwana village still consider their traditional lands to be subject to their rights of ownership derived from N'djuka customary law.[156] The Victims, in a collective statement to the Commission in 2002, observed that "we were driven off our lands, lands that our ancestors fought and died for and secured for us for all time by treaty consecrated with their blood and oath. While the State of Suriname refuses to recognize our right to these lands, they are nonetheless ours by tradition and by right."[157]

2. Suriname has failed to provide the conditions for safe return

63. The Victims have been unable to return to their traditional lands because Suriname has not acted to bring an end to the impunity enjoyed by the perpetrators of the massacre, has obstructed attempts to investigate the massacre and has not given any indication nor taken any steps to assure the Victims that it would be safe for them to return. Further, by failing to provide justice to the Victims, Suriname has failed to

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[154] Audio transcript, part 4, testimony of Kenneth Bilby. Polimé, at para. 78, concurred, stating that:

> There are presently 23 Cottica N'djuka villages that occupy the northern most section of N'djuka territory .... These other villages are an important part of Moiwana's larger view of land tenure issues as well as the impact of intermarriage and other kinship on land tenure issues. In the first place, the Cottica villages view their territory as an interconnected whole, both among the Cottica N'djuka villages, but also with the Tapanahony River villages. While each village enjoys considerable autonomy and authority over defined areas, they nonetheless consider themselves bound to the other villages and see each village as simply one part of a larger land area that is inseparably joined to the other N'djuka villages. Second, because of inter-marriage and extensive kinship networks, N'djuka persons living even in far flung Tapanahony River communities may have rights to share and use communal lands and resource in Cottica villages and vice-versa. This is particularly the case among villages in the Cottica region, where villages are interlocked at the level of land and resources tenure rights by virtue of kinship (always through the matrilineal line).

[155] Audio transcript, part 3, testimony of Andre Ajintoena.

[156] *Id.*

[157] Application of the Commission, Annex 1, *Statement of the Petitioner, Victims, Survivors, and Dependents of the Moiwana Massacre made Pursuant to Article 43(3) of the Rules of Procedure of the Inter-American Commission on Human Rights*, at para. 20.

set in place the preconditions that would allow the Victims to reestablish their community in their traditional lands; those lands are presently spiritually polluted and cannot be cleansed in accordance with N'djuka custom and religion until justice has been served. Suriname's acts and omissions have thus created insurmountable barriers to the Victims' safe return to their traditional lands and territory and denied them their right to enjoy their culture and religion.

64. As Andre Ajintoena testified, the Victims are afraid to return to their traditional lands because of the ongoing impunity enjoyed by the perpetrators of the massacre, which leads to them conclude that such acts are not considered worthy of punishment in Suriname and could occur to them again.[158] Witnesses Stanley Rensch and Erwin Willemdam also testified that the denial of justice is itself a source of fear that deters the Victims from reestablishing their community on their traditional lands in Suriname.[159] The Victims fear that they could be targeted again because the underlying reasons for the massacre have never been clarified and explained leaving them in the dark about why their loved ones were killed and raising fears that this could happen again. As Thomas Polimé explained, the Victims "have never had an explanation for why the massacre took place leaving them unaware of the killers' motivations or the likelihood that they may be targeted again and otherwise uncertain about the future."[160] At no time, either explicitly or implicitly, has Suriname sought to assure the Victims that it will be safe to return to Suriname and that their safety would be guaranteed if they returned and reestablished their community.

65. Because justice has not been done in this case, the Victims are unable to return to the traditional lands and reestablish their community. Antonia Difienjo and Andre Ajintoena explained that before the Victims can return to Moiwana village, a series of religious and cultural rites and ceremonies must first be observed.[161] However, these rites and ceremonies cannot be held without prior clarification of the facts of the

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[158] Audio transcript, part 3, testimony of Andre Ajintoena

[159] *Id.* part 1, testimony of Stanley Rensch and Erwin Willemdam.

[160] Affidavit of Thomas Polimé, at para. 57.

[161] Audio transcript, parts 2 and 3, testimony of Antonia Difienjo and Andre Ajintoena.

massacre, Suriname's acceptance of responsibility for the massacre and its wrongfulness, and its agreement to repair the damages.[162] Dr. Bilby concurred, stating that before the village lands could be cleansed in order to be habitable again justice would have to be rendered to the Victims; specifically, the events of 29 November 1986 would have to be clarified, responsibility would have to be assigned or accepted, the dead would have to be appeased and satisfied, and reparations would have to be made.[163] Responding to a question from the Honorable Judge Cançado Trindade, Dr. Bilby also stated that the fact that the Moiwana community had been forcibly displaced should be considered a highly relevant factor in determining reparations.[164]

3. Suriname has failed to establish legal mechanisms recognizing indigenous and tribal peoples' rights to lands and resources

66. The uncontested evidence before the Court demonstrates that Suriname has failed to establish legal or other mechanisms that recognize and guarantee indigenous and tribal peoples' rights to lands and resources thereby precluding the possibility that the Victims could seek restitution of their traditional lands under domestic law. In response to the Honorable Judge Cançado Trindade's question about whether N'djuka customary law concerning land ownership and other matters is recognized or otherwise expressed in Surinamese law, Dr. Bilby testified that it was not.[165]

67. This preceding is further confirmed in the 2004 Concluding observations of the UN Human Rights Committee, by the Committee on the Elimination of Racial Discrimination, which devoted extensive attention to this issue in 2003[166] and 2004,[167]

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[162] *Id.*

[163] *Id.* part 4, testimony of Kenneth Bilby.

[164] *Id.*

[165] *Id.*

[166] *Prevention of Racial Discrimination, including Early Warning Measures and Urgent Action Procedures, Decision 3(62), Suriname*. UN Doc. CERD/C/62/CO/Dec.3, 21 March 2003, at para. 4 – "serious violations of the rights of indigenous communities, particularly the Maroons and the Amerindians, are being committed in Suriname: in addition to discrimination against these communities in respect of employment, education, culture and participation in all sectors of society, particular attention is drawn to the lack of recognition of their rights to the land and its resources, the refusal to consult them about forestry and mining concessions granted to foreign companies...."

in the observations of UN Commission on Human Rights' Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Dr. Rodolfo Stavenhagen,[168] and by numerous other sources.[169] The Human Rights Committee expressed its concern "at the lack of legal recognition and guarantees for the protection of indigenous and tribal rights to land and other resources;" and recommended that Suriname "guarantee to members of indigenous communities the full enjoyment of all the rights recognized by article 27 of the Covenant, and adopt specific legislation for this purpose."[170] CERD observed that Suriname, "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;"[171] and expressed concern that "indigenous and tribal peoples cannot as such seek recognition of their traditional rights before the courts because they are not recognized legally as juridical persons."[172]

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[167] Concluding observations of the Human Rights Committee: Suriname, *supra*, para. 21; *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, *supra*. See, also, Committee on the Elimination of Racial Discrimination, *Summary Record of the 1614th Meeting, 64th session*. CERD/C/SR.1614, 27 February 2004.

[168] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65*. UN Doc. E/CN.4/2003/90, 21 January, at para 21 – "Serious issues regarding the non-recognition of, and failure to respect, the rights of indigenous and tribal peoples have been reported in Suriname. ... Legally, the land they occupy is owned by the State, which can issue land property grants to private owners. Indigenous and tribal lands, territories and resources are not recognized in law. ... Despite petitions to the national Government and the Inter-American system of protection of human rights (Commission and Court), the indigenous and Maroon communities have not received the protection they require."

[169] A wide range of intergovernmental and non-government organizations confirming that Suriname has failed to recognize and respect indigenous and tribal peoples' land and resource rights are quoted in *Persistent and Pervasive Racial Discrimination Against Indigenous and Tribal Peoples in the Republic of Suriname. Formal Request to Initiate an Urgent Procedure to Avoid Immediate and Irreparable Harm*. Submitted to the Committee on the Elimination of Racial Discrimination by the Association of Indigenous Village Leaders in Suriname, Stichting Sanomaro Esa, the Association of Saramaka Authorities and the Forest Peoples Programme, 15 December 2002. Available at: www.forestpeoples.gn.apc.org/Briefings/ Indigenous%20Rights/suriname_cerd1_dec02_eng.pdf See, also, www.forestpeoples.gn.apc.org/Briefings/ Indigenous%20Rights/suriname_cerd3a_jan04_eng.pdf

[170] *Concluding observations of the Human Rights Committee: Suriname*, *supra*, at para 21.

[171] *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, *supra*, at para. 11.

[172] *Id.* at para 14.

68. At the public hearing, Suriname did not contest that the community is the owner of its traditional lands under N'djuka customary law or that it has failed to establish mechanisms to regularize those rights in its domestic law. Other than arguing that a violation of article 21 would be barred *ratione temporis*, Suriname's only statement on this issue was that "land rights are presently subject to a healthy discussion in Suriname" and "because of Suriname's ethnic diversity" recognition of indigenous and maroon rights to lands, territories and resources is a complicated issue.[173]

IV. The Proven Facts Establish Violations of the American Convention

69. In this case, the Commission and the Victims have alleged and substantiated violations of articles 8 and 25 of the Convention in conjunction with article 1. In addition to these violations, during the public hearing and on the basis of the facts presented in the Commission's Application, the representatives of the Victims additionally asserted and substantiated violations of articles 2, 5 and 21 of the Convention in conjunction with article 1. While these violations were not alleged in the original pleadings,[174] the Court informed and assured the Victims' representatives in its Order of 5 August 2004 that we would have the full opportunity to express our views and present our arguments concerning the possible merits and reparations in our final oral and written arguments.[175] Moreover, in the *Awas Tingni Case*, the Court held that "even when the violation of any article of the Convention has not been alleged in the petition brief, this does not impede the violation being declared by the Court, if the proven facts lead to conclude that such a violation did in fact occur."[176]

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[173] Audio transcript, part 5.

[174] The Victims did not submit an application to the Court, as specified in the Court's Rules of Procedure, due to a communication problem with the Commission regarding the deadline for submission.

[175] *Order of the President of the Inter-American Court of Human Rights of August 5, 2004*, at para. 18 – "That although the representatives did not submit their brief containing pleadings, motions and evidence (*supra* Having Seen 3 and 4), they in any event will have the procedural opportunity to present, in their final oral and written arguments, all arguments they deem appropriate concerning the present case." See, also, *Communication of the Secretariat of the Inter-American Court of 26 May 2003*, informing the representatives that the period for submitting pleadings, motions and evidence had expired on 17 February 2003 and stating that the representatives would nevertheless have the opportunity to present arguments and evidence during the oral proceedings.

70. Suriname has had the procedural opportunity to present its defense in relation to the alleged violations of articles 2, 5 and 21 of Convention raised by the Victims' representatives during the public hearing and which are repeated herein. In relation to this, the Court has previously decided that "in proceedings before an international court a party may modify its application, provided that the other party has the procedural opportunity to state its views on the subject. … Therefore, provided the other party has had the procedural opportunity to state its views, it will regard the latest arguments made as the definitive pleadings."[177] Additionally, on the basis of the principle of *iura novit curia*, on which the Court has long relied, the Court has the power to apply the juridical provisions relevant to a proceeding even when the parties have not invoked them in the initial pleadings or otherwise.[178] In the *Blake Case*, for instance, the Court observed that "the fact that the allegation of violation of Article 5 of the Convention was not included in the brief containing the Commission's application, but only in its final pleading, does not prevent this Tribunal from considering that allegation in the merits of this case, in accordance with the principle of *jura novit curia*."[179]

71. Finally, the case *sub judice* involves the N'djuka people, one of the six maroon peoples of Suriname. The N'djuka people, as a distinct tribal people, has its own cosmovision, culture, language, political, social and legal institutions, laws, religious beliefs and way of life that distinguishes it from other maroon peoples, and from other sectors of Surinamese society.[180] This is highly relevant to assessing the nature and extent of the violations of the American Convention alleged in this case and, in this respect, we highlight the judgments of the Court in the *Bámaca Velasquez, Aloeboetoe and Awas Tingni* cases concerning the "importance of taking into account

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[176] *Mayagna (Sumo) Awas Tingni Community Case,* August 31, 2001 Judgment. C Series No. 79, para. 157.

[177] *Inter alia, Aloeboetoe et al. Case*, Judgment of September 10, 1993. Series C No. 15, para. 81; *Las Palmeras Case*, Judgment of December 6, 2001. Series C No. 90, para. 31.

[178] *Inter alia, Velásquez Rodríguez Case*, Judgment of July 29, 1988. Series C No. 4, para. 163, citing *"Lotus", Judgment* No. 9, 1927, P.C.I.J., Series A No. 10, p. 31 and Eur. Court H.R., *Handyside Case*, Judgment of 7 December 1976, Series A No. 24, para. 41.

[179] *Blake Case*, Judgment of January 24, 1998. Series C No. 36, at para. 112.

[180] Affidavit of Thomas Polimé, para. 11.

certain aspects of the customs of the indigenous peoples of the Americas for purposes of application of the American Convention on Human Rights."[181]

A. Denial of Justice (articles 8, 25 and 1)

72. Suriname's manifest failure to provide effective judicial protection and guarantees, as required by articles 8, 25 and 1 of the Convention, has denied the Victims justice, and has permitted those responsible for the massacre to escape all sanction for the serious crimes committed at Moiwana village. Despite the passage of almost 17 years since Suriname agreed to be bound by the American Convention, there has been no diligent and effective investigation, no one has been prosecuted or punished and the Victims have not been compensated. The intellectual authors, who are well known and have publicly acknowledged their responsibility on more than one occasion, continue to enjoy complete impunity and continue to occupy positions of power and privilege. Desire Bouterse, for instance, is the leader of the largest opposition party in the Surinamese parliament and is expected to be a candidate in the presidential election of 2005.

73. The evidence before the Court demonstrates that all of the Victims actively and repeatedly sought recourse in Suriname.[182] Their attempts to obtain justice were ignored, rebuffed, and obstructed, and produced no result. As a consequence of Suriname's failure to diligently investigate the Moiwana massacre and prosecute those responsible, the victims and their next of kin have been and continue to be denied access to judicial remedies of fundamental importance to the enjoyment of their right to redress for human rights violations and of fundamental importance to their ability to repair their lives, individually and collectively. As a result of Suriname's failure to provide effective judicial protection and guarantees and its affirmative obstruction of justice, the Victims have been denied not only their right to an effective investigation designed to clarify the facts and assign responsibility, but also their right to seek reparation for the consequences of the violations perpetrated against them and their loved ones. The proven facts of this case conclusively

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[181] *Bamaca Velasquez Case, supra*, para. 81; *Mayagna (Sumo) Awas Tingni Community Case, supra*, para. 149; and *Aloeboetoe et al. Case, Reparations, supra*, para. 62.

[182] *Supra*, Section III.B(7)

demonstrate that this denial of justice has had and continues to have devastating consequences for the lives, integrity and well-being of the Victims.[183]

74. Suriname's attempts to evade responsibility in this case and its gross indifference to the suffering of the Victims was also evident after this case was transmitted to the inter-American human rights protection organs. Suriname failed to respond to the repeated requests of the Commission for information until after Report 35/02 on the merits was adopted.[184] It also failed to meaningfully respond to the repeated efforts of the Victims to initiate a mutually acceptable friendly settlement process.[185] Further, whereas it is increasingly common for States to accept responsibility for human rights violations before the Honourable Court,[186] Suriname has made no attempt to either explicitly or implicitly accept responsibility in this case. Instead, it interposed a series of unfounded preliminary objections aimed specifically at avoiding its responsibility and repeatedly implied that the Victims were negligent or at fault in the pursuit of justice.[187] The Victims believe that these facts should be taken into account if and when the Court orders reparations.

75. The Commission has more than adequately covered the violations of articles 8, 25 and 1 of the Convention in its written submissions to the Court, violations that have been substantiated by the proven facts.[188] For this reason, we will make only brief remarks herein on these violations intended to supplement and bolster the Commission's arguments.

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[183] *Supra*, Sections III.C and D.

[184] Application of the Commission, p. 6.

[185] *Id.* p. 6 and 9-10.

[186] *Inter alia, Trujillo Oroza Case,* Judgment of February 27, 2002. Series C No. 92.

[187] Response of Suriname and Audio transcript.

[188] *Inter alia, supra*, Section III.B

1. Suriname has failed to conduct a diligent and serious investigation of the massacre, failed to prosecute persons responsible for its commission and design and failed to assess or otherwise provide reparations to the Victims

76. The constant jurisprudence of the Court holds that "[u]nder the Convention, 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 rules of due process of 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 jurisdiction (Art. 1)."[189] As the evidence before the Court demonstrates, the Victims were denied these rights. They were and remain unable to effectively invoke and exercise their right to simple, prompt and effective judicial recourse.[190] As a consequence, they were and are denied their right to be heard with due guarantees in the substantiation of their right to justice.[191] This in turn denied them their right to seek reparation for the gross and systematic violations connected to the attack and massacre at Moiwana village and its consequences.

77. The judicial remedies theoretically available in this case have proven illusory in large part because an adequate and effective investigation has not been conducted that would provide the factual basis for prosecution, punishment and reparations.[192] The proven facts and Suriname's statements before the Court confirm this.[193] The 1989 police investigation initiated by Inspector Gooding was obstructed by State agents and terminated in its initial stages and the 1993 investigation into human remains evaporated after government officials declared that there was no need for further investigation.[194] Neither investigation produced any result. It is the constant

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[189] *Velásquez Rodriguez Case*, Judgment of June 26, 1987. Series C No. 1, at para. 91.

[190] *Supra*, Section III.B.

[191] *Id.*

[192] *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, at para. 24 – "[a] remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective." Of particular relevance to the case at hand, see, also, *Myrna Mack Chang Case*, *supra*, para. 217

[193] Response of Suriname, *inter alia*, p. 9, 19, 20, 22, 25, 49, 52, 58, 64, 65, 69, 70, 71, 72, 73, 77 & 82 – admitting that, as of September 2004, no effective investigation has been conducted.

jurisprudence of the Court that it is not enough that remedies exist formally; in order to be effective "they must give results of responses to the violations of the rights established in the Convention."[195]

78. Suriname maintains that the investigation initiated by Inspector Gooding is still ongoing, demonstrating that there has been an unreasonable delay in this investigation and additionally that it has produced no result: "The purpose of such an investigation [initiated by Inspector Gooding] was, and still is, to prosecute and punish the guilty parties in the event that on the basis of the facts and circumstances it becomes apparent from the investigation that any offence has been committed."[196]

79. In light of the intransigence and refusal of the State to investigate the massacre, in 1996, the Victims, in cooperation with Moiwana '86, exercised their right under Surinamese law to petition for a judicial order compelling the State to conduct a criminal investigation. While the Attorney General ignored these petitions, the President of the Court of Justice, the highest judicial official of the State, requested information from the Attorney General in order to consider the Victims' petition.[197] The Attorney General failed to provide any information and, after further requests from the Victims, the President of the Court simply referred them to the Attorney General and the initiative was aborted.[198] This demonstrates a lack of due diligence and willingness on the part of the highest judicial authorities to move criminal proceedings forward in order to elucidate the facts pertaining to the massacre at Moiwana and to punish those responsible.

80. The efforts of the victims aside, this Honourable Court has previously observed that a State-party to the American Convention is obligated "to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and

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[194] *Supra*, Sections III.B(1-3)

[195] *Las Palmeras Case*, *supra*, at para. 58 (footnotes omitted).

[196] Response of Suriname, at p. 70.

[197] *Supra*, Section III.B(5).

[198] *Id.*

to ensure the victim adequate compensation;"[199] and that such an investigation must be "assumed by the State as its legal duty, not a step taken by private interests that depends on the initiative of the victim or his family or upon their offer of proof."[200] Suriname has not complied with this obligation to conduct a serious investigation *de oficio* and there have been no concrete results in terms of clarifying the human rights violations that occurred at Moiwana village, holding those responsible accountable and repairing the consequences.

2. Suriname affirmatively obstructed justice

81. Suriname has not only failed to act to give full effect to the Victims' right to justice, it has also affirmatively obstructed justice in this case, both through the actions of military officials in 1989 and through invocation of the Amnesty Law in relation to the initial investigation of human remains in 1993.[201]

82. In 1989, two suspects were detained in the course of Inspector Gooding's investigation. Acting on the orders of the military leadership, a heavily armed military unit surrounded the police station where one of the suspects was held and forced his release at gun point. He was then taken to a special event at a military barracks, where in addition to admitting their responsibility of the massacre, the military leadership both threatened Inspector Gooding and declared that military operations were not subject to investigation.[202] Inspector Gooding was later assassinated, as the State admits "while conducting an investigation into the Moiwana massacre,"[203] and police officers assisting him fled the country to be granted political asylum in The Netherlands. The investigation was suspended thereafter and no attempt has been made subsequently to punish those responsible for Inspector

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[199] *Velasquez Rodriguez,* Judgment of July 29, 1988, *supra*, at para. 174.

[200] *Id.*, at para. 176.

[201] *Supra*, Sections III.B(1 and 3).

[202] *Supra*, Section III.B(1).

[203] Statement by E. Limon, Permanent Representative of Suriname to the United Nations, *Human Rights Committee begins Review of Suriname's Report, Hearing of 'Steady Progress' in Investigation of Violations under Previous Regime. But Committee Experts Concerned at Lack of Concrete Results Regarding Murder Investigations,* UN Press Release, HR/CT/648, 18/03/2004, Human Rights Committee, Eightieth Session, 2173rd Meeting* (PM), at p. 3 (full text in Annex B).

Gooding's death or the obstruction of justice. One of the detainees was also subsequently killed, as the State puts it, "under strange circumstances."[204] Finally, witness Stanley Rensch explained the he and other members of staff of Moiwana '86 were repeatedly harassed and intimidated as they attempted to obtain justice for the Victims.[205] Mr. Rensch himself was arrested without charge on a number of occasions and an attempt was made on his life.[206]

83. In line with the Court's decisions in *Genie Lacayo* and *Myrna Mack Chang*, the preceding constitutes a direct obstruction of justice in violation of articles 8, 25 and 1 of the Convention and is attributable to Suriname.[207] This obstruction of justice, murder of investigating officers and harassment of human rights workers supporting the Victims also "gives rise to an aggravated international responsibility of the respondent State."[208]

84. Four year later, when the State was pressured to conduct an investigation into the discovery of human remains near Moiwana village, the State again obstructed justice by invoking the Amnesty Law as cause for discontinuance of the investigation.[209] Settled law in the inter-American human rights system holds that such laws violate State-party obligations under customary international law and the American Convention.[210] By invoking the Amnesty Law in this case, the State has again denied the Victims access to judicial remedies to pursue their right to justice in

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[204] Response of Suriname, at p. 71.

[205] Audio transcript, part 1, testimony of Stanley Rensch.

[206] *Id.*

[207] *Genie Lacayo Case*, Judgment of January 29, 1997. Series C No. 30, paras. 76 and 95; *Myrna Mack Chang Case, supra*, para. 193, 199 and 217.

[208] *Myrna Mack Chang*, id. at para. 139.

[209] *Supra*, Section III.B(3).

[210] *Barrios Altos Case*, Judgment of March 14, 2001. Series C No. 75, paras. 41-44; and, *Trujillo Oroza Case, supra*, para. 96

violation of articles 8, 25, 1 and 2 of the Convention.[211] The Amnesty Law as a separate violation of article 2 of the Convention is discussed below.[212]

3. Systematic impunity and denial of justice continues to prevail today

85. To this day, Suriname has not conducted a serious and diligent investigation of the massacre, has not prosecuted anyone in connection therewith and has made no attempt to repair its acts and omissions that have denied the Victims justice and caused them immense pain and suffering. As a consequence, the foundations of the rule of law are undermined and there is an ongoing state of impunity in Suriname today. The Court understands impunity to be "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives."[213]

86. While Suriname maintains that it restarted the investigation of the massacre at Moiwana in 2002, the Attorney General was unable to explain what progress had been made to date at the public hearing before the Court.[214] Ten days earlier, however, in an interview with Radio Netherlands he maintained that the State had been unable to identify the persons who could be charged and thereby interrupt the statute of limitation, which is scheduled to expire in November 2004.[215] These statements do not inspire confidence that the State is committed to investigating the massacre at Moiwana or prosecuting and punishing those responsible and providing reparations to the Victims.

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[211] *Barrios Altos Case, id.* at, paras. 42-43.

[212] *Infra*, paras. 105-08.

[213] *Paniagua Morales et al. Case,* Judgment of March 8, 1998. Series C No. 37, para. 173.

[214] Audio transcript, part 5, statements of the representatives of Suriname in response to the questions posed by the Honourable Judge Medina Quiroga

[215] *Supra,* Section III.B(6), *Acting Procurator- General Subhas Punwasi in an interview with Radio Netherlands World Service, Transcript,* at p. 2.

87. Three days after the interview with the Attorney General, a member of the Surinamese Parliament was also interviewed by Radio Netherlands, a transcript of which was submitted at the request of the Court at the public hearing.[216] Commenting on the interview with the Attorney General, she stated that

> And when the Procurator General then indicates that, and we all know that as jurists, that if you want to interrupt the statute of limitations, you will have to institute an act of prosecution. He interprets this as if you should have a list of witnesses, or witnesses who can point to other witnesses who might indicate possible suspects. Now I am wondering: everybody knows that at that moment the head of the National Army, in this case it was Mr. Bouterse, who was responsible for the military back then, and whether you just can't institute a prosecution against the responsible person of that regime.[217]

Not only was Bouterse responsible for the military, he and two other high ranking military officers directly and publicly admitted responsibility for the massacre and presided over and actively participated in a serious obstruction of justice in relation to Inspector Gooding's preliminary investigation in 1989.

88. While the case *sub judice* involves the massacre at Moiwana, one of the two most notorious human rights violations from the era of military rule in Suriname, the Victims believe that it is relevant to note that none of the numerous violations of human rights from that period have been adequately investigated and not one single prosecution has occurred.[218] Suriname, for instance, stated before the Court that it is now investigating the so-called December murders of 1982 and pointed to this as evidence that there is an effective system of justice presently pertaining in Suriname.[219] With regard to this contention, we observe that these events occurred almost 20 years prior to the initiation of the reported investigation – an investigation

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[216] Member of Parliament Sharmila Mangal-Mansaram, in an interview with Radio Netherlands World Service, Transcript, recorded 30 August 2004, broadcast 31 August 2004.

[217] *Id.* at p. 1.

[218] Audio transcript, part 1, testimony of Stanley Rensch.

[219] Response of Suriname, p. 82 and 84, and Audio transcript.

that has yet to produce any results – and that the Human Rights Committee recommended in 1985 that Suriname investigate, prosecute and repair the violations.[220] Especially noteworthy in the context of the case at hand is Suriname's ongoing failure to investigate the assassination of police Inspector Herman Gooding.

89. In the abovementioned interview with Radio Netherlands, the same Member of Parliament stated in response to the question "Do you think, that just as in the December murder case, under social pressure the statute of limitation of the [Moiwana] case will be interrupted by requesting the Court of Justice to order the Public Prosecutions Department to initiate an investigation?" – such a request was previously ignored in relation to the Moiwana massacre in 1996/7[221] – that:

> Yes, we had that with the December murders, but in principle it can also be done differently. You don't need that societal pressure. And of course we also have our task as representative of the people, because we are there in the name of the people, for the people, by the people. So what you should do is have a debate in Parliament about these issues. But we've already had debates about human rights violations. And the Minister promised then that he would do everything he could. In other words, he didn't say it in these words, but that everything would be done to give these human rights violators that which they deserve. But when you say that time and time again you get to the point where statutes of limitations have to be interrupted and we don't get any further. O.K., the December murders, they are a bit further than the other issues, but besides Moiwana in 1986 we also have a number of other human rights violations, especially in the period of the 1980s and 1990s, that still have to be investigated and there is no conclusion. So I would say: there are roads that can be traveled, but I don't know what is really the problem. Does it have a

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[220] *Case No. 146/1983 and 148-154/1983 (John Khemraadi Baboeram et al. v. Suriname)*, UN Human Rights Committee. In this case, the Committee urged the State party to take effective steps (i) to investigate the killings of December 1982; (ii) to bring to justice any persons found to be responsible for the death of the victims; (iii) to pay compensation to the surviving families; and (iv) to ensure that the right to life was duly protected in Suriname.

[221] *Supra*, Section III.B(5).

political side, may be a rational reason, another reason? I really can't tell what the obstacles might be.[222]

90. Suriname has failed to meet its Constitutional and international obligations with regard to all of the outstanding human rights violations of the military era, not just the Moiwana case. The impunity that characterizes the Moiwana massacre is therefore not an exception but rather the rule in Suriname, and the defenselessness of the Victims is shared by the victims of all the outstanding human rights cases. The Court's eventual judgment in this case therefore has wider implications for the rights of all victims of human rights violations in Suriname.

B. Heightened and Aggravated Responsibility for Denial of Justice

91. Consistent with the Court's jurisprudence in *Myrna Mack Chang* and as discussed above, Suriname bears an aggravated international responsibility for its affirmative obstruction of justice in this case and its continuing tolerance of that obstruction. The denial of justice in this case must also be viewed in light of the extreme gravity of the underlying violations and the rules of international law that apply to crimes against humanity and gross violations of international humanitarian and human rights law, which also give rise to aggravated international responsibility. Specifically, there is an affirmative obligation on States pursuant to customary and conventional international law to prosecute the perpetrators of crimes against humanity and gross violations of humanitarian law. These obligations are incumbent on Suriname by virtue of its contractual obligations, which were in force at the time of the massacre, and customary international law.[223] Suriname has failed to take even

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[222] *Member of Parliament Sharmila Mangal-Mansaram, supra*, p. 2.

[223] According to the International Law Commission, common article 3 of the Geneva Conventions is a peremptory norm of international law. Report of the International Law Commission on the Work of its Thirty-Second Session, 35 *UN GAOR Supp. (No.10)*, at 98, UN Doc. A/35/10 (1980). Additional Protocol II Relating to the Protection of Victims of Non-international Armed Conflicts, "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949." *Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts* (1977), article 1(1). According the International Committee of the Red Cross, "Protocol II contains virtually all the irreducible rights of the Covenant on Civil and Political Rights.... These rights are based on rules of universal validity to which States can be held, even in the absence of any treaty obligation or any explicit commitment on their part." ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, *cited in*, T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press: Oxford, 1990, at 73.

the most basic steps to comply with these obligations further aggravating its responsibility for the manifest denial of justice the instant case.

92. In setting forth this argument, the Victims are not asking the Court to declare that Suriname has violated the Geneva Conventions or to exercise criminal jurisdiction over individuals, but, rather, as the Court decided in the *Bámaca Velasquez Case*, to observe that certain acts or omissions that violate human rights, pursuant to American Convention, also violate other international instruments and norms for the protection of the individual.[224] Ultimately, we are requesting, as the Court held in *Plan de Sánchez Massacre* and *Myrna Mack Chang*, that the Court fully takes into account Suriname's aggravated international responsibility when determining its responsibility under the Convention, including for the purposes of reparations.[225]

93. The *Plan de Sánchez Massacre Case* is particularly relevant to the present case. Therein, the Court observed that the proven facts demonstrated that the victims', the Achí Mayan people, identity and values were seriously affected and that this occurred in the context of a pattern of massacres.[226] For these reasons, the Court found that there was an aggravated impact for which the State was internationally responsible and that was also relevant for the purposes of determining reparations. The same situation described above by the Court also pertains in the case at hand.

1. There is an affirmative duty to prosecute in the case of crimes against humanity

94. From the inception of Case 11.821 before the Commission, the Victims have asserted that the massacre at Moiwana constitutes a crime against humanity. Suriname has not contested this assertion before the Court; it has instead explicitly and implicitly admitted that the massacre does constitute a crime against humanity.[227] Suriname's written submission to the Court states that "in drafting the Amnesty Act

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[224] *Bámaca Velasquez Case*, *supra*, para. 208.

[225] *Plan de Sánchez Massacre Case*, *supra*, para. 51; *Myrna Mack Chang Case*, *supra*, paras. 139 260 and 261.

[226] *Plan de Sánchez Massacre Case*, *id.*

[227] *Supra*, Sections II.B and III.A.

1989 the legislator did not envisage impunity of possible perpetrators of events in the Maroon village of Moiwana."[228] The only exception to amnesty set forth in the 1992 law is for crimes against humanity and war crimes. While its position in its written submission on this point is contradictory,[229] in the public hearing Suriname stated that the Amnesty Law does not apply as that law exempts crimes against humanity and admitted before the Court that the massacre was "systematic."[230] Suriname also stated that the Amnesty Law does not apply to the Moiwana massacre for the same reasons before the UN Committee on the Elimination of Racial Discrimination in March 2004[231] and the Human Rights Committee in October 2002.[232]

95. The preceding statements constitute admissions, notwithstanding Suriname's failure to seriously investigate, that the massacre constitutes a crime against humanity. Further, the Victims submit that sufficient evidence exists to allow the conclusion, as a matter of fact and law, that the massacre meets the substantive requirements for a crime against humanity. The intellectual authors of the massacre, members of the military command structure, have also stated their responsibility in public on more than one occasion and are liable in accordance with the rules of international criminal law.[233] Suriname has an affirmative obligation to prosecute these individuals and has failed to do so.

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[228] Response of Suriname, at p. 75.

[229] *Id.* p. 76-7.

[230] Audio transcript, part 5.

[231] *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname, supra*, at para. 20.

[232] *Summary Record of the 2054th meeting, 22 October 2002*, Human Rights Committee, 76th session. UN Doc. CCPR/C/SR.2054, 28 October 2002, at para. 11 – "As to the events in the village of Moiwana, he said that the President had established a fact-finding commission and a police investigation had started. ... Under national law the statute of limitations was due to expire in 2004. In international law, the statute of limitations on such cases did not expire and, assuming that the crimes in question satisfied the standard of "core crimes" under international law, the statute of limitations would not be in effect."

[233] *Inter alia, Statute of the International Criminal Court,* 10 November 1998, entered into force 1 July 2002, U.N.T.S, Vol. 2187, p. 2, article 25 – setting forth the bases for international criminal responsibility: "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [inter alia]: ... (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted..." – and article 28 – concerning the responsibility of military commanders and other superiors.

96. Crimes against humanity exhibit the following elements: 1) grave crimes such as murder or extermination; 2) that are widespread or systematic; 3) directed against a civilian population and, in some cases; 4) committed on national political, ethnic, racial or religious grounds.[234] The Moiwana massacre meets these substantive requirements.

97. The massacre constitutes murder on a large scale; at least 39 individuals were killed in the space of a few hours on 29 November 1986. Moreover, more than 70 percent of those killed were 18 years of age or younger, 25 percent were five years old or younger, including four infants under the age of two, and 50 percent were women or girls.

98. The proven facts demonstrate that the Moiwana massacre was not an isolated incident, but part of a policy of widespread, systematic and collective reprisals against the civilian maroon population for the activities of the Jungle Commando. Commander of the Army Desire Bouterse stated on the radio in late-1986, for instance, that he would "kill all [maroons] and find [their] planting grounds and bomb them."[235] According to the Commission's 1987 Annual Report, massacres were also reported in the maroon villages of Morakondre and Moengotapoe and maroons had been subjected to forced starvation, cutoffs of welfare entitlements and "ethnocide."[236] During this time, almost every maroon village in eastern Suriname was razed to the ground with the help of military aircraft, some 10,000 people fled the area and maroon religious sites were routinely destroyed.[237] In addition to the Moiwana massacre, reliable sources estimate that in November and December 1986 alone some 200-250 mostly maroon civilians were murdered by the National Army.[238] Finally, the army unit responsible for the massacre was specially trained for the

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[234] See, for instance, *Statute of the International Criminal Court*, article 7.

[235] Application of the Commission, Annex 5 - J. Cerquone, *Flight from Suriname: Refugees in French Guiana*, (US Committee for Refugees, 1987), at 5.

[236] *Id.* Annex 9 - *IACHR Annual Report* 1986-87, at 263-65.

[237] Application of the Commission, Annex 5. See, also, R. Price, Executing Ethnicity: The Killings in Suriname, 10 *Cultural Anthropology* 421, at 443.

[238] *Id.* Annex 9, at p. 263-65; The US State Dept. *1986 Country Report on Human Rights Practices, Suriname*, estimated that 244 Maroons were killed by the army in December 1986.

operation at Moiwana, indicating that the massacre was planned, calculated and deliberate[239] and, as found by the Commission, the massacre was "a result of the Moiwana Villagers' Maroon identity and ethnicity...."[240]

99. There is an affirmative duty in international customary law requiring all States to prosecute the perpetrators of crimes against humanity.[241] As early as 1971, the General Assembly of the United Nations declared that "refusal by states to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law."[242] A few years later, the General Assembly resolved again that

> War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.
>
> Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.[243]

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[239] *Inter alia*, Application of the Commission, Annexes 17 and 25; and Response of Suriname, Annex 20.

[240] Report 35/02, Case 11.821, Village of Moiwana (Suriname) February 28, 2002, at para. 50.

[241] *Statute of the Yugoslavia Tribunal*, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, 1993 and; *Statute of the International Criminal Tribunal for Rwanda*, Security Council Res. 955, 49th Sess., 3453d mtg. at 1, UN Doc. S/RES/955 1994. See, also, M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 1992, p 492, 500-01; M. Cherif Bassiouni and E. Wise, *Aut dedere Aut Juicaire: The Duty to Extradite or Prosecute in International Law*. Martinus Nijhof: Leiden,1995, p. 21-5, 51-55 – stating that this obligation is customary law and *jus cogens*; D. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 *Yale L.J.* 2537, at 2587-88; N. Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 449.

[242] *Question of the Punishment of War Criminals and of Persons who have Committed Crimes Against Humanity*, G.A. Res. 2840 (XXVI), U.N. GAOR, 26th Sess., 2025th mtg. at 88, U.N. Doc. A/Res/2840 (XXVI) (1971), at para. 4.

[243] *Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074 (XXVIII), U.N. GAOR 28th Sess., 2187th mtg. at 230, 231, U.N. Doc. A/Res/3074 (XXVIII) (1973), at paras. 1 and 5.

100. The preamble to the 1998 Statute of the International Criminal Court affirms these same basic norms:

> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
>
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
>
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.[244]

This duty to prosecute is further reflected in the Court's admissibility rules, which provide that "the Court shall determine that a case is inadmissible where: …

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.[245]

101. In the *Furundzija Judgment*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) observed that

> In many areas the [Rome] Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not 'limited' or 'prejudiced' by the Statute's provisions, resort may be had cum grano salis to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law.

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[244] *Statute of the International Criminal Court*, Preamble.

[245] *Id.* at article 17(a)(b).

> At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.[246]

102. Suriname is also obligated to prosecute and punish persons responsible for gross violations of international humanitarian law. These gross violations, including those occurring in non-international conflicts, are also classified as war crimes in the Statute of the International Criminal Court.[247]

103. In Report 35/02, the Commission quotes the ICTY's determination that international "customary law imposes individual criminal responsibility for 'serious violations of Common Article 3 [of the Geneva Conventions] as supplemented by other general principles and rules for the protection of victims of internal armed conflict …' The Tribunal indicated that these principles and rules reflect 'elementary considerations of humanity widely recognized as the mandatory minimum for conduct in armed conflicts of any kinds. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.'"[248]

104. Suriname has failed to comply with its obligation to prosecute the perpetrators of crimes against humanity and gross violations of humanitarian law and in doing so continues to countenance impunity for "the most serious crimes of concern to the international community as a whole."[249] It thus incurs aggravated international responsibility for the violations of the American Convention proven in the present case.

C. Article 2

105. As discussed above, the 1992 Amnesty Law was specifically invoked in the in the context of the case at hand to justify discontinuance of the preliminary

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[246] *Furundzija Judgment*, Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Judgment of 10 December 1998, at para. 227

[247] *Statute of the International Criminal Court*, article 8(c)(d) and (e).

[248] *Report 35/02, supra*, at para. 50.

[249] *Id.* article 5(1).

investigation and the possibility of prosecution in 1993, thereby contravening articles 8 and 25 of the Convention in conjunction with articles 1 and 2. By enacting the Amnesty Law to retroactively immunize perpetrators of human rights violations committed in the period 1985-92, Suriname has also *per se* breached its obligations under article 2 of the Convention.[250]

106. The Court has previously held that, as a matter of customary international law, States that ratify international human rights treaties must modify their domestic law to ensure compliance with the obligations assumed there under.[251] This obligation to adapt domestic law is codified in article 2 of the American Convention, which also requires that states "refrain both from promulgating laws that disregard or impede the free exercise of these rights [guaranteed by the American Convention], and from suppressing or modifying the existing laws protecting them."[252] The Court has also found that amnesty laws are "manifestly incompatible with the aims and spirit of the American Convention"[253] and held that it "considers that all amnesty provisions ... are inadmissible, because the are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."[254]

107. Suriname argues, *inter alia*, that Amnesty Law does not breach its obligations pursuant to "provisions of the Convention relating to human rights" because that law exempts crimes against humanity and war crimes.[255] However, the Court has held that amnesty laws violate the Convention because they provide both, immunity in

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[250] *Barrios Altos Case, supra*, para. 41; *Barrios Altos Case, Interpretation of the Judgment on the Merits*, Judgment of September 3, 2001. Series C No. 83, para. 18.

[251] *'The Last Temptation of Christ' Case*, Judgment of February 5, 2001. Series C No. 73, para. 87; *Trujillo Oroza Case, supra*, para. 96.

[252] *Hilaire, Constantine and Benjamin et al. Case*, Judgment of June 21, 2002. Series C No.94, at para. 113.

[253] *Barrios Altos Case, supra*, para. 43.

[254] *Id.* at para. 41.

[255] Response of Suriname, at p.76.

relation to non-derogable and other rights generally, and because they deny the victims remedies in relation to violations.[256] The Court has therefore not restricted the scope of inadmissible amnesty provisions only to international crimes. Suriname further argues that "the Amnesty Act could be tested against the Constitution to consider it non-binding."[257] This statement ignores the fact, as Suriname itself admitted in the public hearing,[258] that Moiwana '86 in 1992, on behalf of the Victims and the victims in other cases, sought a judicial declaration that the Amnesty Law contravened Constitutional guarantees – the right to be heard by the courts and due process of the law – and Suriname's international human rights obligations. The demand in this case was rejected by the judiciary further compounding the violation of article 2 attributable to Suriname.[259]

108. To conclude, the Court's jurisprudence holds that amnesty laws of the kind enacted by Suriname in 1992 are manifestly incompatible with the obligations the State has assumed pursuant to article 2 of the Convention. This violation of article 2 is further compounded by the failure of the judiciary to rule that the Amnesty Law contravened Constitutional guarantees and Suriname's international obligations, as it was at the time permitted to do by virtue of articles 103, 105, 106 and 137 of Suriname's 1987 Constitution.[260]

D. Article 5

109. By virtue of its acts and omissions, Suriname has violated the rights of the Victims to respect for their mental and moral integrity as guaranteed by article 5 of

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[256] *Barrios Altos Case*, *supra*, para. 41.

[257] Response of Suriname, at p. 75.

[258] Audio transcript, part 5, statement of the Representative of Suriname. Annex 28 to the Response of Suriname also contains documents relating to the case challenging the Amnesty Law.

[259] *Moiwana '86 v. State of Suriname*, No. 92/03/59, First Cantonal Court, Paramaribo, 12 December 1992

[260] We say 'at the time' because article 137 of the Constitution was amended to remove the jurisdiction of the courts over all Constitutional matter except in relation to Chapter V containing basic rights. Articles 103, 105 and 106 are not located in the basic rights chapter and are therefore beyond the courts' jurisdiction at present. The 1992 amendment to Article 137 was made in anticipation of the establishment of the Constitutional Court, which has yet to be established and current proposals for the Court speak only of advisory jurisdiction.

the Convention in conjunction with article 1. The evidence presented to the Court, and not contested by Suriname, demonstrates that the Victims have all suffered substantial, severe and protracted mental and moral suffering and anguish caused by the massacre and subsequent denial of justice, and the effects thereof.[261] Moreover, the Court's constant jurisprudence holds that grave violations and ensuing impunity cause anguish, pain and suffering to the victims as well as their next of kin, which may be presumed.[262] Therefore, in the case *sub judice*, the Victims suffering and distress, amounting to a violation of article 5, has been both proved on the basis of the evidence before the Court and can be presumed for the nature of the underlying violations and prevailing state of impunity.

110. The Victims have suffered ongoing and continuous violations of article 5, both in their own right as survivors of the massacre and those denied justice, and by virtue of their status as the next of kin[263] of the 39 persons known to have been murdered at Moiwana village on 29 November 1986.[264] These violations of article 5 alleged by the Victims are directly imputable to Suriname due to its responsibility for the massacre; its protracted and ongoing refusal to provide justice to the Victims and the consequent state of impunity; and its failure to cooperate in any way with them in their many attempts to clarify what happened and why it happened, to locate and provide proper burials for the remains of their loved ones and to seek a just closure to their anguish and suffering. These violations have been further compounded by the Victims' forced eviction from and ongoing dispossession of their traditional lands and territory caused initially by the massacre and perpetuated by the prevailing impunity

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[261] See, *inter alia*, *supra*, Section III.C.

[262] *Inter alia*, *Villagrán Morales et al. Case*, Judgment of November 19, 1999. Series C No. 63, paras. 169, 128 and 142, *citing Aksoy v. Turkey*, 1996-VI, ECHR, para. 61.

[263] The persons listed in the Commission's Application are all directly related to the 39 persons murdered during the massacre. As stated by Köbben, a Dutch anthropologist who did extensive fieldwork with Cottica N'djuka: "The inhabitants of a Djuka village will say: 'We are all kinsman,' and in most cases this is actually true, at least if affines are also regarded as kin." A.J.F. Köbben, 'Unity and Disunity: Cottica Djuka Society as a Kinship System'. In, R. Price (ed.), *Maroon Societies. Rebel Slave Communities in the Americas*. Baltimore: Johns Hopkins University Press, 3rd Ed., 1996, 321-69, at 321.

[264] *Juan Humberto Sánchez Case*, Judgment of June 7, 2003. Series C No. 99, para. 101; *Bámaca Velásquez Case*, *supra*, para. 160; and *Villagrán Morales et al.*, *supra*, para. 176.

and their inability to commence with the ritual cleansing of their lands, thereby rendering it fit for habitation again, until justice has been served.

111. The Victims have lived with the knowledge for almost 18 years that their loved ones were brutally murdered in cold blood by agents of the state. In most cases, as Erwin Willemdam, Antonia Difienjo and Andre Ajintoena testified, the Victims were present and saw their loved ones being killed and mutilated.[265] Antonia Difienjo was carrying her seven month old baby girl when a soldier killed her. She also witnessed her father and pregnant aunt being killed.[266] Thomas Polimé explained that "one man, lost his wife, all of his children and a number of other close relatives in the massacre and remains unable to speak about it without prolonged periods of nightmares, suicidal thoughts and weeping. He is constantly depressed and terrified about the spiritual consequences of his failure to obtain justice for those killed."[267] Andre Ajintoena testified that the Victims live with the massacre every day and for them it is as if it occurred yesterday.[268] He also described the Victims' situation as akin to protracted post-traumatic stress syndrome that continues to be manifest at present.[269] Their intense suffering, while originating in the massacre that occurred prior to Suriname's acceptance of the Court's jurisdiction, is ongoing and continuing to this day.

112. The Victims have had to endure a protracted struggle to obtain justice for those killed in the massacre. This search for justice has been obstructed, ignored and routinely thwarted by Suriname for almost 18 years leaving the Victims helpless, despairing and feeling invisible and profoundly alone. In the *Villagrán Morales* case, the Court described the impact on the next of kin as "the feeling of insecurity and impotence caused to the next of kin by the failure of the public authorities to fully investigate the corresponding crimes and punish those responsible."[270] Throughout

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[265] Audio transcript, parts 1, 2 and 3.

[266] *Id.* part 2.

[267] Affidavit of Thomas Polimé, at para. 56.

[268] Audio transcript, part 3, testimony of Andre Ajintoena.

[269] Affidavit of Thomas Polimé, para. 55.

the period in question, the Victims additionally have suffered great anxiety – Polimé described the feeling as terror – in the knowledge that their failure to obtain justice for those killed violated fundamental norms and obligations of their society and invited the wrath of the spirits of the dead, as well as ancestral and other spirits.[271] They also were aware that the afflictions visited on them by these spirits would be passed to their children and future generations, and ever widening numbers of the members of their matrilineages, until such time as justice was served.[272]

113. The denial of justice and the Victims helplessness was made substantially worse in this case due to Suriname affirmative obstruction of justice; in particular, the release of Orlando Swedo and associated events, the assassination of Inspector Gooding in 1989 that caused his assistants to flee the country and the investigation to wither away, and the invocation of the Amnesty Law in 1993 that caused the termination of further attempts to investigate.[273] Even after the Commission issued Report 35/02 finding Suriname in violation of it obligations, the State refused to act on or take seriously the Victims' requests to resolve the matter via a friendly settlement negotiation in 2002, as it did with the same request in 2000.[274] They were and are left with a deep feeling that the State and Surinamese society as a whole do not care about what happened to their loved ones and what has happened and is still happening to them. In Antonia Difienjo words, they feel as though there have been treated like dogs or worse, that they are non-existent.

114. Suriname's failure to investigate the massacre and clarify the facts and motives, have also left the Victims with a deep sense of uncertainty and fear that the massacre could happen again. As the Court stated in the *Myrna Mack Chang Case*, "[s]aid circumstances, made more severe by the long time that has passed without elucidation of the facts, has caused constant anguish among the next of kin of the

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[270] *Villagrán Morales et al. Case, supra*, at para. 173.

[271] Affidavit of Thomas Polimé, at para. 56.

[272] Audio transcript, parts 1, 3 and 4, testimony of Erwin Willemdamm Andre Ajintoena and Kenneth Bilby.

[273] *Myrna Mack Chang Case*, *supra*, at para. 232.

[274] See, Application of the Commission, p. 9-10.

victim, together with feelings of frustration and powerlessness and a deep fear of suffering the same pattern of violence fostered by the State."[275]

115. The Victims have also suffered intensely because they have been unable to provide for proper burials of their loved ones.[276] The testimony and other evidence before the Court attests to the fundamental importance of compliance with the strict funerary obligations observed in N'djuka culture and religion and the extreme negative consequences of failure to comply.[277] Expert witness Kenneth Bilby, described the consequences as truly catastrophic for the Victims and explained that failure to provide a proper burial in N'djuka culture is a grave sin that is also morally offensive and causes much suffering, both to the living and to the spirits of the dead and ancestors.[278] Both Dr. Bilby and Erwin Willemdam testified that cremation, as occurred when the Moengo mortuary was burned down by the military with remains from Moiwana village inside, is morally repugnant in N'djuka culture.[279] Thomas Polimé also explained that:

> N'djuka have specific funerary rites that must be observed and these rites are an important part of determining whether and how the deceased is buried: full burials are reserved for the righteous, serious sinners are buried in shallow graves and those posthumously convicted of witchcraft or other serious crimes are dumped in unholy places in the forest to be devoured by wild animals. The survivors and next of kin frequently complain is highly emotional terms that they have been denied their right to bury their loved ones because of the massacre and that their bodies have been treated as though they were witches or other evildoers;"[280]

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[275] *Myrna Mack Chang Case*, *supra*, at para. 232.

[276] See, *supra*, Section III.C(3).

[277] *Id.*

[278] Audio transcript, part 4.

[279] *Id.* parts 1 and 4.

[280] Affidavit of Thomas Polimé, at para. 63

and "[w]hat is known – and deeply shameful to the survivors and next of kin – is that none of the deceased were accorded the proper N'djuka burial rites."[281]

116. With respect to location of remains and burial, the Court has previously held that the next of kin have suffered "due to the negligence of the authorities in establishing the [victims'] identity; because State agents "did not make the necessary efforts to immediately locate the relatives" of the victims, delaying the opportunity to give them "burial according to their traditions;" and because the State abstained from investigating the corresponding crimes and punishing those responsible.[282] The Court has further held, finding a violation of article 5, that "the suffering of the victims' next of kin also arose from the treatment of the corpses, because they appeared after several days, abandoned in an uninhabited place with signs of extreme violence, exposed to the inclemency of the weather and the action of animals. Such treatment of the victims' remains, 'which were sacred to their families and, particularly, their mothers, constituted cruel and inhuman treatment for them.'"[283]

117. The Victims have also been forced to endure almost two decades of forcible separation from their traditional lands and territory, which are the seat of their culture and spiritual well-being. Andre Ajintoena explained that the community's traditional lands are fundamentally important and without secure enjoyment of those lands, cultural and spiritual life cannot continue and fundamental rituals and ceremonies cannot be performed.[284] Kenneth Bilby and Thomas Polimé concurred in affirming that the Victims' "inability to maintain their relationships with their ancestral lands and its sacred sites has deprived them of a fundamental aspect of their identity and sense of well being. Without regular commune with these lands and sites, they are unable to practice and enjoy their cultural and religious traditions further detracting from their personal and collective security and sense of well being. This also adds to their sense of loss and uncertainty about the future, and the future well being of their

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[281] *Id.* at para. 64.

[282] *Villagrán Morales et al. Case, supra*, para. 174, *quoted in, Bámaca Velásquez Case, supra*, at para. 161.

[283] *Id.*

[284] Audio transcript, part 3, testimony of Andre Ajintoena.

children and the generations to follow."[285] Their suffering and uncertainly was and is further compounded by the deprived and poverty stricken existence endured while living as refugees and in temporary accommodation in Suriname for those who returned, and continuing to the present day.

118. In conclusion, the Victims' right to moral and mental integrity has been repeatedly and continuously assaulted by the acts and omissions of Suriname and the consequences thereof from 29 November 1986 until the present day. These acts and omissions and the consequences thereof cumulatively amount to gross violations of article 5 of the Convention. Their lives have been completely disrupted by the massacre and ensuing denial of justice casting them into a state of limbo and extreme trauma, anguish and pain. Suriname's complete indifference to the Victims' plight and its hostility towards their attempts to obtain justice have prevented them from beginning the process rebuilding their shattered lives, restoring their community and their cultural and spiritual well-being, and reclaiming some amount of peace of mind and integrity.

E. Article 21

1. The violation of article 21 is ongoing and continuous

119. On the basis of the facts stated in the Commission's Application and outlined above, which have been proven before the Court, Suriname is responsible for a violation of article 21 of the Convention in conjunction with the generic obligations set forth in articles 1 and 2. Suriname has not refuted the factual basis or any specific piece of evidence confirming a violation of article 21, but rather argued that the Court's jurisdiction *ratione temporis* would prevent it from considering such a violation.[286] While the initial violation – forcible expulsion of the community from its traditional lands and territory – took place on 29 November 1986 prior to Suriname's accession to the Convention and acceptance of the Court's jurisdiction, the Victims have demonstrated that, as a matter of fact and law, the violation of

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[285] Affidavit of Thomas Polimé, at para. 60.

[286] *Audio transcript*, part 5, rebuttal of Suriname.

article 21 in this case is of a continuing nature.[287] In particular, the violation of article 21 "relates to effects and actions subsequent" to Suriname's acceptance of the Court's jurisdiction, that in and of themselves violate the American Convention and extend to the present day.[288]

120. The Governing Body of the International Labour Organization, when examining complaints concerning violations of Convention No. 169, has observed that continuing violations are particularly common in cases where indigenous and tribal peoples have been forcibly removed from their traditional lands.[289] It has routinely exercised jurisdiction over the "effects" and "consequences" of such relocations, particular as they relate to property rights, which persist after ratification or accession even in cases where the originating event took place decades prior to entry into force.[290] Of particular relevance to the case at hand, is the Governing Body's decision in the so-called 'Thule Case', where it observed that

> the effects of the 1953 relocation continue today, in that the relocated persons cannot return to the Uummannaq settlement and that legal claims to those lands remain outstanding. Accordingly, the Committee considers that the consequences of the relocation that persist following the entry into force of Convention No. 169 still need to be considered with regard to Articles 14(2) and (3), 16(3) and (4) and 17 of the Convention, examined below, despite the fact that the relocation was carried out prior to the entry into force of the Convention.[291]

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[287] *Supra*, paras. 7-12 (for points of law), and Section III.C(2)(4)(5) and III.D (for the proven facts).

[288] *The Blake* Case, Judgment of July 2, 1996. Series C No. 27, at paras. 33 and 40.

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

[290] *Id.* See, also, *Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, (No. 169), made under article 24 of the ILO Constitution by the Radical Trade Union of Metal and Associated Workers.* Doc.GB.273/15/6; GB.276/16/3 (1999).

[291] *Report of the Committee set up to examine the representation alleging non-observance by Denmark, id.* at para. 29.

2. The Victims have been and continue to be deprived of their property rights by Suriname's acts and omissions

121. The facts proven before the Court confirm that the Victims, as members of the land-owning matrilineages and clans resident at Moiwana village, were and still are today, in accordance with N'djuka customary law, deemed to be the owners of the lands and resources in and around Moiwana village.[292] These lands and resources include the residential areas of the village, farming lands, hunting, fishing and gathering areas, and sites of cultural and religious significance. They are inseparably interconnected with the lands and resources owned by the 23 other Cottica N'djuka communities and comprise in totality the territory vested in the Cottica people as a whole.[293] The same traditional lands and resources are also essential to the Victims' identity, culture, spirituality and individual and collective survival and well-being.[294]

122. The proven facts further demonstrate that the Victims' were forcibly evicted from and dispossessed of their traditional lands by the National Army of Suriname on 29 November 1986 and that they have been unable to return to those lands from that day until the present because of acts and omissions attributable to Suriname.[295] In the first place, the Victims cannot return because Suriname has not acted to bring an end to the impunity enjoyed by the perpetrators of the massacre and has affirmatively obstructed efforts to end that impunity and to provide justice to the Victims. Antonia Difienjo and Andre Ajintoena, for instance, explained that before the Victims can return to Moiwana village, a series of religious and cultural rites and ceremonies must first be observed; however, these rites and ceremonies cannot be held without prior clarification of the facts of the massacre, Suriname's acceptance of responsibility for the massacre and its wrongfulness, and its agreement to repair the damages.[296]

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[292] *Supra*, Section III.D(1)

[293] *Id.*

[294] *Supra*, Section III.C(4).

[295] *Supra*, Section III.D(2).

[296] Audio transcript, parts 2 and 3, testimony of Antonia Difienjo and Andre Ajintoena.

123. Dr. Bilby concurred, stating that before the community's lands could be cleansed in order to be habitable again justice would have to be rendered to the Victims; specifically, the events of 29 November 1986 would have to be clarified, responsibility would have to be assigned or accepted, the dead would have to be appeased and satisfied, and reparations would have to be made.[297] By failing to provide justice to the Victims, Suriname has failed to set in place the preconditions that would allow the Victims to reestablish their community in their traditional lands. In N'djuka tradition and belief, the Victims' lands are presently spiritually polluted and cannot be cleansed in accordance with N'djuka custom and religion until justice has been served. Suriname has also has not given any indication nor taken any steps to assure the Victims that it would be safe for them to return in light of the ongoing impunity enjoyed by the perpetrators. Witnesses Stanley Rensch and Erwin Willemdam both testified that the denial of justice is itself a source of fear that further deters the Victims from reestablishing their community on their traditional lands in Suriname.[298]

124. Second, the Victims' also cannot return to their traditional lands and use and enjoy their property because Suriname has failed to establish legislative or administrative mechanisms for the Victims – or any other indigenous and tribal people or community in Suriname – to assert and secure their rights of tenure in accordance with N'djuka customary law, values and usage. As expert witness, Dr. Bilby testified,[299] their customary rights to and traditional occupation and use of lands and resources are neither recognized nor regarded as sources of property rights in Surinamese law, and their peaceful possession and enjoyment is not respected in practice.[300] Surinamese law does not provide either general or specific procedures for

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[297] *Id.* part 4, testimony of Kenneth Bilby.

[298] *Id.* part 1, testimony of Stanley Rensch and Erwin Willemdam.

[299] *Id.* part 4.

[300] In 2004, the Committee on the Elimination of Racial Discrimination concluded that "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." *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, *supra*, at para. 11. It then recommended "legal acknowledgement by the State party of the rights of indigenous and tribal peoples to possess, develop, control and use their communal lands and to participate in the exploitation, management and conservation of the associated natural resources;"

the delimitation, demarcation and titling of indigenous and tribal peoples' lands and resources and that take into account their specific characteristics.[301] Additionally, judicial and administrative remedies through which indigenous and tribal peoples may seek recognition of and respect for their rights to their traditional lands and resources are non-existent.[302] There is thus no mechanism by which the Victims may assert and secure their property rights in and to their lands and resources traditionally owned further preventing them from returning to their traditional territory to repossess their lands and to reestablish their community.

125. The preceding is verified in the 2004 Concluding observations of the UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination, which were formulated after extensive dialogue with Suriname[303] and cited in the Commission's written submission to the Court, as well as numerous other intergovernmental and non-governmental sources, cited and discussed above.[304]

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and "urgent action by the State party in cooperation with the indigenous and tribal peoples concerned to identify the lands which those peoples have traditionally occupied and used." *Id.* at paras. 11 and 12, and full text in Annex C hereto. See, also, precautionary measures issued by the Commission in *Case 12.338 Twelve Saramaka Clans (Suriname), Annual Report of the Inter-American Commission on Human Rights 2002.* OEA/Ser.L/V/II.117, Doc. 1 rev. 1, 7 March 2003, at CH. III 3(c), para. 75:

> On August 8, 2002 the Commission issued precautionary measures to protect the **twelve Saramaka clans** which inhabit 58 villages located on the Upper Suriname River. The Petitioners claimed that the State of Suriname had granted numerous logging, road-building and mining concessions in the Saramaka territory, without consulting the clans and that this constituted an immediate, substantial and irreparable threat to the physical and cultural integrity of the Saramaka people. ... The Commission requested that the State take the appropriate measures to suspend all concessions, including permits and licenses for logging and mine exploration and other natural resource development activity on lands used and occupied by these clans, until the substantive claims raised in by the petitioner were examined in Case 12.338, still pending before the IACHR. The Commission also requested that the State take all appropriate measures to protect the physical integrity of the clan members.

[301] *Id.*

[302] *Id.* at para. 14 – "indigenous and tribal peoples cannot as such seek recognition of their traditional rights before the courts because they are not recognized legally as juridical persons" and; that "indigenous and tribal peoples should be granted the right of appeal to the courts, or any independent body specially created for that purpose, in order to uphold their traditional rights and their right to be consulted before concessions are granted and to be fairly compensated for any damage."

[303] The Human Rights Committee's dialogue with Suriname commenced in October 2002 and continued, after submission of a State Report, in March 2004. CERD's dialogue with Suriname commenced in March 2003 and continued, after submission of a State Party Report, in March 2004.

[304] *Supra*, Section III.D(3)

3. The Victims' property rights are guaranteed and protected under article 21 .

126. While Suriname has failed to recognize indigenous and maroon land and resource rights in its domestic law, the Court observed in its judgment in the *Awas Tingni Case* that the right to property guaranteed by the American Convention has an autonomous meaning and is not restricted to property as defined by domestic legal regimes.[305] This autonomously defined right to property guaranteed by article 21 of the Convention also protects the rights to property of "members of the indigenous communities within the framework of communal property," as is the situation in the case *sub judice*.[306]

127. In determining that indigenous peoples' property rights are guaranteed and protected under article 21, the Court has emphasized the obligations of States to take effective measures to secure indigenous peoples' property rights through the establishment of mechanisms for the prompt delimitation, demarcation and titling of their traditional lands, territories and resources "in accordance with their customary law, values, customs and mores."[307] The Commission has similarly held in cases decided under both the American Convention and American Declaration.[308] Both the Court and the Commission have further recognized the fundamental linkage between indigenous peoples' property rights and their cultural and spiritual life, integrity and economic survival.[309]

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[305] *Mayagna (Sumo) Awas Tingni Community Case, supra*, at para. 146.

[306] *Id.* at para. 148.

[307] *Id.* at para. 164.

[308] *Inter alia, Report N° 75/02*, Case N° 11.140, Mary and Carrie Dann (United States); *Maya Indigenous Communities and their Members* (Case 12.053 (Belize)); and *Report N° 2/02 (Admissibility)*, Yakye Axa Indigenous Community of the Exnet-Lengua People (Paraguay).

[309] *Id.* and; *Mayagna (Sumo) Awas Tingni Community Case, supra*, at para. 149. See, also, *Order of the Inter-American Court of Human Rights of 6 September 2002, Provisional Measures Requested by the Representatives of the Victims with Respect to the Republic of Nicaragua.*

4. The Victims' property rights are protected under other international human rights instruments in force for Suriname

128. The Court has observed that article 29(b) of the Convention establishes that no provision may 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."[310] Therefore, Suriname's obligations under universal human rights instruments are relevant to interpreting its obligations under article 21 of the Convention.

129. Article 27 of the International Covenant on Civil and Political Rights protects linguistic, cultural and religious rights and, in the case of indigenous peoples, includes, among others, land and resource, subsistence and participation rights.[311] Of particular relevance to the present case is the Human Rights Committee's decision 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; "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...."[312]

130. The Committee decision in the *Lovelace Case* is also important, both because of the Committee's views on the substantive violation and because of the finding that the violation was continuous despite having its origins prior to entry into force. In *Lovelace*, the Committee held that the author had been denied her right to enjoy her

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[310] *Id.* at para. 147

[311] 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), *supra* note 4; *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.

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

culture because that culture did not exist outside of her traditional lands and she was denied the legal right to reside on those lands.[313] Finally, the Committee has observed that indigenous peoples' have the right to self-determination, particularly the right to freely dispose of natural wealth and resources and to be secure in their means of subsistence in article 1(2), and that "the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27,"[314] which may be read in "conjunction with article 1."[315]

131. Under the Convention on the Elimination of All Forms of Racial Discrimination State Parties are obligated to recognize, respect and guarantee the right "to own property alone as well as in association with others" and the right to inherit property, without discrimination.[316] These provisions of CERD are declaratory of customary international law.[317] In its 1997 *General Recommendation on Indigenous Peoples*, the Committee on the Elimination of Racial Discrimination contextualized these rights to indigenous peoples. In particular, the Committee called upon states-parties to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories."[318] While this General Recommendation is technically non-binding, it is nonetheless "a significant elaboration of norms" and corresponding state obligations under the Convention.[319]

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[313] *Sandra Lovelace v. Canada*, Communication No.R.6/24, U.N.Doc.Supp.No.40 (A/36/40) 1981, at para. 17.

[314] *Apirana Mahuika et al v. New Zealand*. (Communication No 547/1993) CCPR/C/70/D/547/1993, 15 November 2000, at para. 9.2.

[315] *Id.* at para. 3.

[316] Articles 5(d)(v) and (vi).

[317] T. Meron, *Human Rights and Humanitarian Norms as Customary Law*. Oxford: Clarendon Press 1989, p. 21.

[318] *General Recommendation XXIII (51) concerning Indigenous Peoples*, Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4., at para. 4.

[319] P. Thornberry, Indigenous Peoples and Human Rights. Manchester: Manchester University Press (2002), at 217-18.

5. The Victims have been deprived of their means of subsistence

132. Because of their expulsion from the traditional lands, the Victims' have been deprived of their traditional means of subsistence on an ongoing basis. Both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have recognized indigenous peoples' right to freely dispose of their natural wealth and resources and their right not to be deprived of their means of subsistence under common article 1(2) of the International Covenants.[320] The Victims, as an integral part of the N'djuka people, have been denied these rights due to their forcible expulsion from their traditional lands and resources, their inability to return to the present day, Suriname's failure to recognize and guarantee their rights to traditional lands and resources, and the impoverished existence they have been forced to endure without access to their traditional means of subsistence.

6. Forcible eviction or relocation is prohibited under international law

133. Involuntary or forcible resettlement "is considered a practice that does grave and disastrous harm to the basic civil, political, economic, social and cultural rights of large numbers of people, both individual persons and collectivities."[321] Acknowledging this fact, the UN Commission on Human Rights resolved in 1993 that forcible eviction is prohibited as a "gross violation of human rights."[322] A report by

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[320] See, *Concluding observations of the Human Rights Committee: Canada. 07/04/99*, at para. 8. UN Doc. CCPR/C/79/Add.105; *Cf. Concluding observations of the Human Rights Committee: Mexico.* UN Doc. CCPR/C/79/Add.109, 1999, para. 19; *Concluding observations of the Human Rights Committee: Norway.* UN Doc. CCPR/C/79/Add.112, 1999, paras. 10 and 17; *Concluding observations of the Human Rights Committee: Australia. 28/07/2000.* UN Doc. CCPR/CO/69/AUS, para. 8; and, *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights).* UN Doc. E/C.12/2002/11, 26 November 2002 ,at para. 7

[321] *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur.* UN Doc. E/CN.4/Sub.2/1993/8, at 10. See, also, *Forced evictions: Analytical report compiled by the Secretary-General.* UN Doc. E/CN.4/1994/20 – enumerating the various human rights implicated by resettlement; and, *Report of the Representative of the Secretary-General on legal aspects relating to the protection against arbitrary displacement.* UN Doc. E/CN.4/1998/53/Add.1

[322] UN Commission on Human Rights resolution 1993/77 states that the practice of forced evictions constitutes a "gross violation of human rights" and urged governments to undertake immediate measures, at all levels, aimed at eliminating the practice.

the UN Secretary General on this issue concluded that "an express prohibition of arbitrary displacement is contained in humanitarian law and in the law relating to indigenous peoples"[323] and; "[s]pecial protection should be afforded to indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands."[324] The Committee on Economic, Social and Cultural Rights frequently expresses concern about forcible relocation and has urged states to abandon the practice as incompatible with the obligations assumed under the Covenant.[325] In its *General Comment on the Right to Adequate Housing*, the Committee stated that it "considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law."[326]

134. For indigenous peoples, forcible relocation can be disastrous, severing entirely their various relationships with their ancestral lands. As observed by the UN Sub-Commission on the Promotion and Protection of Human Rights (as it is now called), "where population transfer is the primary cause for an indigenous people's land loss, it constitutes a principal factor in the process of ethnocide;"[327] and "[f]or indigenous peoples, the loss of ancestral land is tantamount to the loss of cultural life, with all its implications."[328] These conclusions were confirmed in the testimony before the Court. Andre Ajintoena, for instance, explained that the community's traditional lands are fundamentally important and without secure enjoyment of those lands,

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[323] *Internally displaced persons, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39* UN Doc. E/CN.4/1998/53

[324] *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39. Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement.* UN Doc. E/CN.4/1998/53/Add.1, at Sec. IV, para. 4.

[325] *General Comment No. 4, The Right to Adequate Housing (Art. 11(1) of the Covenant),* adopted at the Committee's Sixth session, 1991.

[326] *Id.* at para. 18. See, also, *General Comment No. 7, The Right to Adequate Housing (Art. 11(1) of the Covenant): forced evictions*, at para. 1.

[327] *The human rights dimensions of population transfer, including the implantation of settlers. Preliminary report prepared by Mr. A.S. Al-Khasawneh and Mr. R. Hatano.* UN Doc. E/CN.4/Sub.2/1993/17*, at para. 101.

[328] *Id.* at para. 336.

cultural life cannot continue.[329] Dr. Bilby explained that these lands are fundamentally tied to N'djuka culture, history, identity, spirituality and physical survival and that loss of traditional lands can be characterized as "catastrophic."[330] Thomas Polimé confirmed this testimony, stating that

> N'djuka, like other indigenous and tribal peoples, have a profound and all encompassing relationship to their ancestral lands. They are inextricably tied to these lands and the sacred sites that are found there and their forced displacement has severed these fundamental ties. Many of the survivors and next of kin locate their point of origin in and around Moiwana Village. Their inability to maintain their relationships with their ancestral lands and its sacred sites has deprived them of a fundamental aspect of their identity and sense of well being. Without regular commune with these lands and sites, they are unable to practice and enjoy their cultural and religious traditions further detracting from their personal and collective security and sense of well being.[331]

135. The Commission recognized and commented on the "traumatic experience" of the forcible eviction of indigenous peoples as early as 1984 in the context of internal armed conflict in Nicaragua.[332] Observing that indigenous peoples' had been forcibly evicted from their lands as a result of both military operations and planned relocations, the Commission decided that its was necessary "to determine if the relocation was a form of punishment applied to what may have been considered a disloyal ethnic group."[333] It further observed that if the State failed to assist the indigenous peoples' to return to their traditional lands, their prolonged dislocation "will become a form of discriminatory punishment, in violation of the American Convention on Human Rights."[334]

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[329] Audio transcript, part 3, testimony of Andre Ajintoena.

[330] *Id.* part 4, testimony of Kenneth Bilby.

[331] Affidavit of Thomas Polimé

[332] *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin* , OEA/Ser.L/V/II.62, doc.26, 1984 , at p. 120.

[333] *Id.* at p. 121.

[334] *Id.*

136. The evidence before the Court in the present case demonstrates that massacre and the forcible eviction of the community was part of a systematic, collective reprisal against maroons, N'djuka especially, and that at no time since the forced eviction has Suriname made any effort to assist or facilitate the Victims' return to their traditional lands. On the contrary, its acts and omissions, that violate the American Convention, have made it impossible for the Victims to return. The effects and consequences of the gross violation of human rights entailed in the Victims' forcible eviction are therefore ongoing and manifest today.

137. To conclude, the Court has previously observed that in order to determine if a person or persons have been deprived of their property in violation of the Convention, "the Court should not restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced."[335] In this case, it has been proved that the violation of article 21 suffered by the Victims began on 29 November 1986 with their forcible expulsion from their traditional lands, in which they have protected property rights, by the National Army. The effects and consequences of this initial violation have continued and persist to the present in as much as the Victims are still today deprived of the ownership, possession, use and enjoyment of their property. Suriname's subsequent acts and omissions have created additional and insurmountable obstacles to the Victims' right to recover and continue to own, control, use and enjoy their property rights further perpetuating and expanding the violation of article 21. Finally, at no time has Suriname sought to assist the Victims to return to their lands nor has it attempted to assess or provide compensation or other reparations due for the prolonged and arbitrary deprivation of their property rights.

138. The violation of article 21 evident in this case must also be viewed in light of Suriname's obligations under other ratified human rights instruments, applicable to this case by virtue of article 29(b) of the Convention. These obligations include full observance of the Victims' rights to recognition of, restitution and guarantees for their collective property rights, to be secure in their means of subsistence, to be free from

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[335] *Ivcher Bronstein Case*, Judgment of February 6, 2001. Series C No. 74, at para. 124.

forcible eviction, and to affirmative protection of their right to culture, which is inextricably intertwined with their security of tenure over their traditional lands and resources.

V. Reparations and Costs

A. Reparations

139. Article 63(1) of the American Convention codifies a canon of customary law and a fundamental principle that "every violation of an international obligation which results in harm creates a duty to make adequate reparation."[336] On the basis of the proven facts and as a matter of law, Suriname is responsible for violations of the Victims' rights guaranteed and protected by articles 1, 2, 5, 8, 21 and 25 of the American Convention in the instant case. Pursuant to article 63(1) of the Convention, it has the duty to repair these violations. This obligation to repair requires *restitution in integrum* and where this is not possible, as in the instant case, measures that will safeguard the violated rights, redress the consequences of the violations and compensate for damages sustained.[337] The nature and amount of reparations depend on the damage caused at both the pecuniary and non-pecuniary level.[338] The Court may also take into account the aggravated international responsibility of the respondent state in formulating and ordering reparations; the Victims urge the Court to do so in this case.[339]

140. The beneficiaries for the purposes of reparations are the Victims listed in the Commission's Application, numbers 40-165. These persons are the survivors of the massacre and the next of kin of those murdered by the National Army (spouses, parents, children and siblings).[340] Many of the Victims witnessed their loved ones being killed and all actively and repeatedly sought justice for those killings and the other violations that occurred on 29 November 1986. All of the Victims have been

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[336] *Velasquez Rodriguez Case*, Judgment of July 21, 1989. Series C No. 7, at para. 25;

[337] *Cantoral Benavides Case*, Judgment of December 3, 2001. Series C No. 88, para. 41.

[338] *Villagrán Morales et al., Case*, Judgment of May 26, 2001. Series C No. 77, para. 63.

[339] *Plan de Sánchez Massacre Case, supra*, para. 51; *Myrna Mack Chang Case, supra*, paras. 139, 260 and 261.

[340] *Inter alia, Bámaca Velasquez, supra*, para. 163.

denied justice, suffered severe violations of their right to mental and moral integrity and have been denied the possession and enjoyment of their property. In the case of Victims who have died – Victim No. 56 Malai Misiedjan, for instance – any reparations order should be transmitted by succession to their next of kin.[341]

141. The Court's consistent jurisprudence holds that there is a presumption that immediate family members suffer moral damages for egregious human rights violations committed against their loved ones and that "[n]o evidence is required to reach this conclusion.[342] In this case, the Victims are both next of kin and direct victims in their own right. As the Court decided in *Myrna Mack Chang*, this "dual condition" should be considered for the purposes of non-pecuniary damages.[343]

142. The evidence before the Court details and proves the severe and ongoing emotional, economic, psychological, moral and cultural impact of the massacre and the associated and continuing violations of the rights guaranteed by the American Convention, including the ongoing denial of justice to the Victims and the loss of their traditional lands and resources. It also details and substantiates Suriname's aggravated international responsibility for the proven violations. In this light and for the manifest violations of Suriname's international obligations in this case, we respectfully request that the Court determine reparations as follows:

1. Investigation of the massacre and prosecution of its intellectual authors

143. Although the Court does not have jurisdiction over individuals or individual accountability for international crimes or jurisdiction to declare violations of international humanitarian law, the Court may interpret the obligations of a State under the American Convention in light of the obligations it has assumed under international humanitarian and criminal law[344] and observe that violations of the Convention also violate other instruments and norms.[345] The Court may also declare

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[341] *Villagrán Morales et al., Case, supra*, para. 65.

[342] *Myrna Mack Chang Case, supra*, at para. 264.

[343] *Id.*

[344] *Las Palmeras Case, supra*, paras. 32-4.

what measures the state is required to take to remedy those violations in connection with the State's obligations under the American Convention.[346]

144. We therefore respectfully request that this Court order:

a) that Suriname publicly declare that it will investigate the massacre and, in accordance with applicable law, prosecute its intellectual authors for crimes against humanity and gross violations of humanitarian and human rights law;

b) that the Suriname in fact conducts a serious and diligent investigation of the massacre and, again in accordance with applicable law, prosecute its intellectual authors for crimes against humanity and gross violations of humanitarian and human rights law;

c) that Suriname investigate, prosecute and punish those responsible for the obstruction of justice in this case;

d) that Suriname adopt legislative and other measures to ensure that the preceding can take place and that any statute of limitation that may presently apply to the Moiwana massacre in domestic law be declared inapplicable;

e) finally, that Suriname repeal the Amnesty Law and declare that it was devoid of legal effect *ab initio*.

145. The Commission recommended in Report 35/02 that Suriname repair the violations determined therein, including violations of the right to life guaranteed by article I of the American Declaration and the rights guaranteed by articles VI, VII, VII, IX, XI, XXII and XXIII of the same.[347] In this respect, we further observe that the Court has previously held that a state party to the American Convention "has the obligation to make every effort to comply with the recommendations of a protection

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[345] *Bámaca Velasquez Case, supra*, at para. 208.

[346] *Bámaca Velasquez Case, supra*, para. 208.

[347] *Report No. 35/02, Case 11.821, Village of Moiwana (Suriname)*, 28 February 2002, para. 91(3).

organ such as the Inter-American Commission."[348] Such an obligation is not barred *ratione temporis* as it arises specifically in 2002 when Report 35/02 was issued.

146. The Victims therefore further request that the Court order that Suriname make every effort to comply with recommendation of the Commission set forth in Report 35/02 that it fully repair the violations of the right to life and other rights that occurred on 29 November 1986. To this end, and in light of the ongoing and systematic impunity prevailing in Suriname, we request that the Court order that Suriname seek and obtain international assistance to establish a permanent or *ad hoc* human rights tribunal or some other mechanism, as has been discussed for a number of years in Suriname, that will be competent to adjudicate and order reparations for violations of the right to life in this case and the violations outstanding in other cases.

147. Finally, we request that the Court specify an appropriate schedule, according to which Suriname shall comply with these requested orders.

2. Moral Damages

148. Given the grave circumstances and violations of basic human rights in this case, both those before the Court and the underlying violations, and the ongoing indifference of the State to the violations and consequential extreme suffering of the Victims, we request moral damages over and above a judgment of condemnation.[349] The amount of moral damages should take into account the intensity of suffering caused to the Victims, the extreme alterations to the conditions of their existence, the other non-material or non-pecuniary consequences suffered, and the reprehensible and aggravated nature of the circumstances of this case.[350] These aggravated circumstances include:

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[348] *Loayza Tamayo Case,* Judgment of 17 September 1997. Series C No. 33, at para. 80.

[349] *Inter alia, Blake Case,* Judgment of January 22, 1999. Series C No. 48, para. 55 and; *El Amparo Case,* Judgment of September 14, 1996. Series C No. 28, para. 35.

[350] *Myrna Mack Chang Case, supra,* at para. 260; *Cf. Bulacio Case,* Judgment of September 18, 2003. Series C No. 100, para. 96; *Juan Humberto Sánchez Case, supra,* para. 172; *El Caracazo Case.* Judgment of August 29, 2002. Series C No. 9, para. 99; and *Velasquez Rodriguez Case,* Judgment of July 21, 1989, *supra,* para. 37.

a) gross violations of the right to life as part of a pattern of systematic, collective reprisals against civilian maroons, including the cold blooded mutilation and murder of babies, infants, children, pregnant women and other defenseless persons involving extreme cruelty and barbarity and amounting to a crime against humanity and; gross violations of the protections and rights accorded non-combatants and minors under international humanitarian law;

c) intentional destruction of the remains of a number of the victims in a manner that is morally repugnant to the Victims and denial of the fundamental rights of the survivors and next of kin to conduct the required ritual burials and other ceremonies essential to their religion and sense of well being;;

d) ongoing dispossession of traditional lands and resources, and the attendant fundamental ancestral, spiritual, religious and cultural relationships that have severely compromised the Victims' identity and cultural integrity; [351]

e) Suriname's gross indifference to and at times hostility towards the suffering and the mental and moral integrity of the Victims;

g) Suriname's affirmative obstruction of justice, including the adoption of an Amnesty Law that pretends to retroactively immunize violators of human rights and that was cited as cause for not investigating and prosecuting the massacre; and,

h) the complete failure of the State of Suriname over an 18 year period, to investigate the massacre, punish those responsible and compensate the victims, particularly in light of the severity of the violations and the obligations incumbent on states in relation to crimes against humanity and gross violations of humanitarian law.

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[351] *Plan de Sánchez Massacre Case, supra*, para. 51. In this case, the Court observed, as pertains in the case at hand, that the proven facts demonstrated that the victims', the Achí Mayan people, identity and values were seriously affected and this occurred in the context of a pattern of massacres. For these reasons, the Court found that there was an aggravated impact for which the State was internationally responsible and that was also relevant for the purposes of determining reparations.

149. That the Victims have been subjected to continuous and serious emotional, moral, mental and spiritual suffering and duress resulting in moral damages is manifestly obvious on the basis of the proven facts. This suffering was caused in the first instance by the massacre itself, which many of the survivors witnessed first hand, and continues unabated today. In the second instance, the suffering caused by the massacre has been compounded and greatly exacerbated by the denial of justice and the protracted delay in justice. The denial of justice is itself a source of severe suffering and distress that continues to affect the daily lives and well-being of the Victims.

150. The Victims have suffered and still suffer greatly not only because of their inability to comply with fundamental cultural norms demanding that they obtain justice and provide proper burials for their kin, but also because angry spirits are avenging themselves on the Victims and causing them physical and mental afflictions. This suffering is further compounded because the Victims are compelled to live in exile from their traditional lands – the foundation of their cultural, spiritual, economic and social integrity and well-being – in extreme poverty, and have been forced to witness and endure the disintegration of their cultural and social integrity. They feel as though their greatest fear – the greatest fear of all maroons in Suriname – has been realized and they have been returned to the time of slavery, when they were considered to be lower than animals. To make matters worse, to quote Thomas Polimé, "contrary to their ancestors, they have no means to escape their suffering, no where to run."[352]

151. Suriname's acts and omissions have caused irreparable damage to the lives of the victims forcing them "to take up life in a foreign country far from the context in which [their lives] had been evolving, in a state of solitude, poverty, and severe physical and psychological distress."[353] All the victims were forced to live without the nurture, relations and comfort of their family members; they were denied their ability to commune with their ancestors and the spirits of their ancestral lands; they

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[352] Affidavit of Thomas Polimé, at para. 57.

[353] *Loayza Tamayo Case,* Judgment of 27 November 1998. Series C No. 42, at para. 152.

were denied their potential to develop and take their full and rightful place as members of their cultural collectivity, a collectivity which only exists in Suriname and in the ancestral lands of the N'djuka people; and most were denied, due to living without legal status in a foreign country, the ability to obtain full education and employment possibilities as many would undoubtedly have expected in the course of their lives. In short, Suriname's acts and omissions have wreaked havoc on all aspects of their lives and well-being.

152. As shown by the evidence before the Court, the massacre is not history for the Victims, it is a burden that each and everyone of them has endured for the past 18 years, a burden made all the more heavy and painful by Suriname's indifference to their suffering and rights and its ongoing refusal to provide them the justice they require in order to repair their lives and allow the dead to finally rest. Suriname's refusal to take the necessary steps to provide justice and its gross indifference to the Victims' suffering must also be viewed in light of the fact that the Moiwana massacre is by far the largest and most notorious human rights atrocity perpetrated on Surinamese soil since the ancestors of Moiwana village were brought to Suriname in the chains of slavery three centuries earlier. This is not a case that innocentkly slipped through the cracks, but one that Suriname went to great lengths to avoid addressing in the face of incessant demands from the Victims, national exposure at least once a year, and international scrutiny by a variety of intergovernmental and non-government human rights organizations.[354]

3. Restitution of Traditional Lands and Resources

153. Theo van Boven, United Nations Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights, states in his landmark UN study on reparations that a "coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples. Against this background it is therefore necessary that, in addition to

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[354] Some of the numerous reports and recommendations of inter- and non-governmental human rights organizations concerning the massacre are located in the documentary evidence before the Court and some are quoted herein. Witness Stanley Rensch testified that Moiwana '86 issued a press release every year on 29 November 1986 calling on the State to investigate the massacre. Audio transcript, part 1. Furthermore, the massacre was also often discussed in the press in relation to Human Rights Day, 10 December.

individual means of reparation, adequate provision be made to entitle groups of victims or victimized communities to present collective claims for damages and to receive collective reparation accordingly."[355] He adds that:

> Vital to the life and well-being of indigenous peoples are land rights and rights relating to natural resources and the protection of the environment. Existing and emerging international law concerning the rights of indigenous peoples lays special emphasis on the protection of these collective rights and stipulates the entitlement of indigenous peoples to compensation in the case of damages resulting from exploration and exploitation programmes pertaining to their lands, and in case of relocation of indigenous peoples. The draft declaration on the rights of indigenous peoples [art. 27] recognizes the right to the restitution or, where this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those territories which were lost.[356]

154. To give full effect to the principle of *restitutio in integrum* in this case, the Victims request that the Court order restitution and legal recognition of the community's ownership rights in and to their traditional lands and resources in accordance with their customary law, values and usage; collective title to these traditional lands and resources that confirms and effectively secures their ownership rights in accordance with their customary law; physical demarcation; and guarantees of safety for those who choose to return.

155. As stated in expert testimony, under N'djuka customary law, these lands are also an integral part of Cottica N'djuka territory in general and cannot be divorced from the larger collective lands vested in the Cottica N'djuka people as a whole. Therefore, we further request that the Court order that the delimitation, demarcation and titling of the Victims' traditional and communal and resources lands take place

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[355] *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/1993/8, at para. 14.

[356] *Id.* at para. 17 (footnotes omitted).

with the full participation and informed consent of the Victims and the other Cottica N'djuka communities.

156. In order to identify and effectively title the community's traditional lands, Suriname will have to adopt legislative and other measures as there is presently no mechanism to achieve this end in Surinamese law. This is especially the case with regard to effective collective title as the only form of title that can presently be issued in Suriname is an easily revocable 15-40 year-long lease of State-owned lands. We therefore request that the Court order that Suriname adopt legislative and other mechanisms that provide for effective titling and guarantees for the community's lands in accordance with their customary law and in a manner that is consistent with the American Convention and indigenous peoples' rights in other instruments.

157. In light of the fact that the Victims were forcible evicted from and have been deprived of the possession, use and enjoyment of their traditional lands and resources without compensation for 17 years subsequent to Suriname accession to the American Convention, and the grave material and immaterial damages they have sustained as a result, we further request that the Court order compensation for material, moral and immaterial damages in relation to the extant violation of article 21.[357] This compensation should account for the grave harm caused to the Victims' cultural integrity, dignity and spiritual well-being caused by this arbitrary, uncompensated and ongoing deprivation, as well as the destruction of the Victims' subsistence lifestyle.[358] That damages to cultural integrity and subsistence lifestyle require compensation is a logical corollary of the right to culture and the protection of subsistence practices subsumed therein,[359] and is made explicit in article 21 of the draft United Nations Declaration on the Rights of Indigenous Peoples, which provides for compensation for the loss or deprivation of indigenous peoples' means of subsistence and development.

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[357] *The Mayagna (Sumo) Indigenous Community of Awas Tingni Case, supra*, at para. 167.

[358] See, 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 – explaining the bases in international and comparative law for cultural and subsistence lifestyle damages claims by indigenous peoples.

[359] 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

158. The Victims also request an order requiring Suriname to rebuild the houses in the village and to construct, furnish and staff fully equipped and functional education and health facilities, all in full cooperation with and with the prior informed consent of the Victims.

159. Finally, we request that the Court specify an appropriate schedule, according to which Suriname shall comply with these requested orders.

4. Other Reparations

160. The Victims further request that reparations be ordered as follows:

a) that the State call a press conference and publicly acknowledge that the Moiwana massacre occurred as well as its responsibility for the massacre and subsequent denial of justice and other proven violations;

b) that the State provide funds for the design, construction and placement in a suitable public place, all with the agreement of the survivors and next of kin, of a monument to those killed in the massacre;

c) that the State, with the full participation and consent of the Victims, use all means at its disposal to locate and return the remains of the victims of the massacre at its own expense to the Victims and ensure the Victims the free exercise of their right to bury their loved ones in accordance with their customs and beliefs;[360] and.

d) that the State issue a public apology for the massacre and subsequent denial of justice to *Gaaman* Matodja Gazon, in his capacity as paramount leader and representative of the N'djuka people, and to Surinamese society in general.

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[360] *Aloeboetoe et al., Case*, supra, para. 109; *Las Palmas Case*, Judgment of 26 November 2002, supra, 76-7; *Villagrán Morales Case*, supra, para, 102.

B. Costs

161. The Victims seek an award of all costs incurred in preparing and pursuing this case domestically and before the Commission and the Court. Receipts verifying the majority of these costs are annexed hereto. We are not however seeking an award of attorney's fees in this case, which are hereby waived. The Victims request that costs be apportioned as follows:

1. Association Moiwana

162. Association Moiwana was established by the Victims in 1994 in order to spearhead their efforts to obtain justice for the massacre. Since that time, it has expended large amounts of scare financial resources and as well as human resources in the pursuit of justice. Unfortunately, it was not able to provide receipts verifying these costs in time to meet the deadline imposed by the Court. Therefore, the Victims request that it be awarded an equitable sum of US$10,000.00. As a result of the impunity prevailing this case and the reparations proposed by the Commission and the Victims, it is foreseen that Association Moiwana will be required to take further steps to ensure that criminal proceedings are instituted to punish those responsible for the massacre and to implement the Court's order. To cover these expected future costs, the Victims request that the Court awards Association Moiwana, in equity, the sum of US$5000.00.[361]

2. Moiwana '86

163. Moiwana '86 has provided support to the Victims efforts to obtain justice since 1989. Over the intervening years, it has expended considerable sums to obtain justice for the Victims. The costs are summarized in the table below and verifying receipts, organized by year, are contained in Annex D(1).[362]

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[361] *Myrna Mack Chang Case*, *supra*, at para. 292.

[362] Receipts are not available prior to 1994.

Cost of Moiwana '86		
Year	**US$**	**Euro**[363]
1994		1,212.05
1995		2,174.12
1996		4,842.24
1997		6,471.43
1998		7,987.05
1999		10,788.86
2000	674.26	5,748.14
2001	2,968.00	119.32
2002	1,483.87	2,439.14
2003	116.60	1,403.07
2004	5,536.00	3,509.72
Sub-totals	US$10,778.73	€46,695.14 US$57,435,02
Total Costs (US$)		**68,213.75**

164. We therefore request that the Court award Moiwana '86 the following amount: US$68,213.75[364]

3. The Forest Peoples Programme

165. Fergus MacKay, authorized as a representative of the Victims before the Court, of the UK-based NGO, the Forest Peoples Programme, has provided legal counsel to the Victims since 1996, when he was authorized by them to write the petition that initiated Case 11.821. Since that time he has acted as lead attorney on the case. In doing so, he incurred costs traveling to and from Suriname to meet with the Victims and Moiwana '86, staying in Suriname, communicating by phone with the Victims, Moiwana '86 and the Commission, and expenses in relation to meetings with the Commission in Washington DC and the hearing before the Court in San José. The

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[363] Conversion of Dutch guilders to Euro.

[364] See, Annex D(1) containing receipts.

Forest Peoples Programme also paid all of the expenses in relation to the hearing before the Court.

166. The Victims therefore requests an award of costs to the Forest Peoples Programme in the following amounts:

Travel expenses:	US$20,043.40[365]
Communications:	US$4,000.00[366]
Expenses related to the public hearing of 9 September 2004:	US$8,638.21[367]
Total:	**US$32,681,61**

[365] See, Annex D(2). Travel to and from Suriname and the Washington DC to meet with the Commission.

[366] Receipts are unavailable for these expenses because of the complexity of disaggregating phone bills. Therefore, we request that the Court award an equitable amount that takes into account the costs long distance phone and fax communications between the United Kingdom/The Netherlands and Suriname/French Guiana over an 8 year period. The amount specified above is a small fraction of the total estimated communications costs, particular given the recent weakness of the US dollar in relation to the Euro and Pound Sterling.

[367] See, Annex D(2)