IN THE

INTER-AMERICAN COURT OF HUMAN RIGHTS

Response of the Victim's Representatives to the State of Suriname's Request for Interpretation Pursuant to Article 67 of the American Convention on Human Rights

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I. Introduction

1. The Representatives of the Victims ("the Victims") have the honour of again addressing the esteemed Inter-American Court of Human Rights ("the Court"). On this occasion, the Victims' are responding to the Illustrious State of Suriname's ("the State" or "Suriname") request for interpretation of the judgment of the Court in the *Case of Moiwana Village*.[1] This request for interpretation was submitted by the State on 04 October 2005[2] ("the Request") and was received by the Victims on 10 October 2005.

2. Having reviewed Suriname's Request, the Victims conclude that it fails to comply with the norms applicable to requests for interpretation and, respectfully, should be therefore rejected as inadmissible. Our analysis of the admissibility issues pertaining to Suriname's Request is contained in Section II *infra*. While we do not believe that further consideration of Suriname's Request is required, in Section III, we have nonetheless provided comments on the substance of some of the points raised by the State, and have identified issues that the Court may choose to consider in relation to those points. Finally, we make a number of requests for the Court to consider in Section IV.

3. The specific requests made by Suriname with regard to interpretation of the Court's judgment (hereinafter "Specific Requests") ostensibly are as follows (listed sequentially as they appear in the Request):

(a) Suriname requests an explanation/interpretation of the applicable law pertaining to the adoption of "Article 50" and "Article 51" reports by the Inter-American Commission on Human Rights ("the Commission"), in particular as to whether these reports were adopted in conformity with the American Convention on Human Rights ("the Convention" or "the American Convention"), "as the prerequisite to petition[ing] your Honourable Court in this particular case."[3]

(b) Suriname argues that the *locus standi* of the Victims before the Court contravenes the Convention and that the Court's Rules of Procedure with regard to the Victims' participation in proceedings before the Court are therefore invalid. It further argues that the participation of the Victims has

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[1] *Case of Moiwana Village, Judgment of 15 June 2005*, Judgment on Preliminary Objections, Merits and Reparations. Series C No.124 (hereinafter "Case of Moiwana Village").

[2] *Request to the Honorable Court based on Article 67 of the American Convention of Human Rights, submitted by the State of Suriname*, 04 October 2005 (hereinafter "Request for Interpretation").

[3] Request for Interpretation, at para. 8.

"weakened" the State's defense and position. Suriname requests that the Court explains the applicable law concerning the *locus standi* of the Victims.[4]

(c) Referring in part to paragraph 97 of the judgment, Suriname requests that the Court explains its conclusion that the Victims are unaware of the underlying reasons for the attack on their village on 29 November 1986. Specifically, the State requests "the Court's explanation as to the conclusion that the Villagers do not understand the reasons for the occurrences that took place."[5]

(d) Referring to paragraph 39 of the judgment, the State asserts that the Court took cognizance of facts and circumstances not within its jurisdiction *ratione temporis*. In connection with this, Suriname argues that its defense was harmed because it did not believe that it was "necessary to provide [evidence concerning] facts and circumstances that are not within the jurisdiction of this Court to examine. ... The State believes that it cannot be punished for not providing ..." such evidence.[6] Suriname thus requests that the Court explains why its "analysis clearly places the State in a minority position," presumably in relation to the Court's consideration of said evidence.[7]

(e) Referring to paragraph 209 of the judgment, Suriname argues that "the Court's assessment and conclusion with regard to collective title to traditional territories ... cannot be based on the law and facts provided and available to your honorable Court in this particular case."[8] Suriname therefore requests "the Court's explanation on this particular matter, because it is convinced that this Court adopted a decision on a matter that was not placed before this Honourable Court and for which enough facts and circumstances were [not] provided to a take a well accepted legally sound decision."[9]

4. We have been unable to identify any further requests for explanation or interpretation in the Request and therefore our comments will relate only to the five Specific Requests set out above.

II. Admissibility

5. Article 67 of the Convention and Article 59 of the Rules of Procedure of the Court govern the submission and consideration of requests for interpretation of judgments rendered by the Court. Article 67 of the Convention establishes that:

> The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

The relevant paragraph of Article 59 of the Rules of Procedure establishes that:

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[4] *Id.* at 13.
[5] *Id.* at 17
[6] *Id.* at 18.
[7] *Id.*
[8] *Id.* at para. 20.
[9] *Id.* at para. 22.

> The request for interpretation, referred to in Article 67 of the Convention, may be made in connection with judgments on the merits or on reparations and shall be filed with the Secretariat. It shall state with precision the issues relating to the meaning or scope of the judgment of which the interpretation is requested.

6. The parties were formally notified of the judgment of the Court on 14 July 2005 and Suriname's Request was submitted on 04 October 2005. The Request therefore was submitted within the 90 day period specified in Article 67 of the Convention. Nonetheless, the Victims respectfully submit that the Specific Requests identified in Suriname's Request are otherwise incompatible with Article 67 of the Convention and Article 59 of the Court's Rules of Procedure. These Specific Requests are therefore inadmissible and, respectfully, should be rejected by the Court.

7. As discussed in greater detail below, Suriname's Request is a *de facto* appeal against the judgment of the Court because therein the State merely expresses its disagreement with and contests the factual and legal conclusions reached by the Court. Additionally, some of the Specific Requests concern extemporaneous preliminary objections; some concern matters that are unrelated to the judgment itself; and, finally, the Request otherwise fails to state with precision the issues for interpretation pertaining to the meaning or scope of the judgment.

A. Judgments of the Court are not subject to appeal

8. The Convention and the Court's Rules of Procedure both require that requests for interpretation set out precisely identified issues in order to obtain clarification of the meaning or scope of the judgment, and that said requests may not be used as a means to appeal the judgment of the Court.[10] These norms are also well established in the Court's jurisprudence. In the *Humberto Sánchez Case*, for instance, the Court explained that

> the task of interpretation that corresponds to an international court entails the clarification of a text, not only as regards the decisions in the operative paragraphs, but also as regards determining the scope, meaning and purpose of its considerations. As this Court has indicated, the request for interpretation of a judgment:
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> > should not be used as a means to appeal but rather it should have as its only purpose to clarify the meaning of a ruling when one of the parties maintains that the text in its operative parts or in its considerations lacks clarity or precision, provided that such considerations have a bearing on the operative parts ....[11]

9. In its Request, Suriname misconstrues Article 67 of the Convention so as to provide "the parties that disagree with the judgment the opportunity to petition your

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[10] Article 29(3) of the Court's Rules of Procedure provides that "Judgments and orders of the Court may not be contested in any way."

[11] *Humberto Sánchez Case*, Interpretation of the judgment on preliminary objections, merits and reparations. Judgment of November 26, 2003 Series C No 102, at para. 14. Similarly, *inter alia*, *Cesti Hurtado case*. Interpretation of the judgment on reparations. Judgment of November 27, 2001. Series C No. 86, para. 31.

honorable Court."[12] Following this logic, Suriname's Specific Requests embody its disagreement with, *inter alia,* a number of legal and factual conclusions reached by the Court rather than, as is required by the applicable norms, addressing any disagreement about the 'scope or meaning' of the operative parts of the judgment or the considerations pertaining to those operative parts.

10. Even a cursory review of the Specific Requests demonstrates that Suriname is not asserting that the terms of the operative parts or the associated considerations lack clarity or are imprecise and, therefore, that it requires interpretation of the scope or meaning of those parts. Rather, Suriname is contesting or otherwise expressing its disagreement with parts of the judgment *per se* or with issues extraneous to the judgment. In some cases, Suriname is simply seeking to revisit questions of law and fact previously and definitively decided by the Court. In so doing, Suriname has lodged a *de facto*, and inadmissible, appeal against the Court's ruling by means of a request for interpretation.[13]

11. The language employed by the State in connection with Specific Request (e) is illustrative. In that Specific Request, the State alleges that the "Court adopted a decision on a matter that was not placed before this Honourable Court and for which enough facts and circumstances were [not] provided to a take a well accepted legally sound decision."[14] This request is not directed towards seeking clarity of the scope or meaning of the judgment, but, instead, directly challenges the veracity and validity of the factual and legal conclusions underlying the Court's ruling on a particular issue. This is further confirmed in another of Suriname's statements on this same issue, which argues that, as a matter of law, the Court "can only conclude that the members of the Village of Moiwana are entitled to return on [*sic*] any moment they want to, to the traditional lands that they fled from on 29 November 1986."[15] This statement argues that the Court incorrectly interpreted the applicable law rather than seeking to address any perceived ambiguity in the Court's ruling.

12. Specific Request (e) is the only one posited by the State that concerns an operative paragraph of the judgment and it does so only tangentially. In some cases, the Specific Requests focus on and implicitly or explicitly object to procedural and substantive issues that do not concern the judgment at all – Specific Request (b) questioning the Victims' *locus standi*, for example – and by alleging that the State's right of defense was hindered imply that there was some actionable defect in the proceedings. In this respect, see Specific Request (b) and Specific Request (d), the latter seeking an explanation of why the "Court's analysis clearly places the State in a minority position."[16]

13. The subject matter of Specific Request (d) was concretely addressed by the Court in its judgment, where it explained that it "reiterates what it asserted in its "Previous Considerations" at paragraph 70 of the instant judgment – namely, that it has properly taken into account certain facts that occurred before the State's

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[12] Request for Interpretation, at para 1.
[13] *Lori Berenson Mejía Case,* Request for an Interpretation of the Judgment on the Merits, Reparations and Legal Costs. Judgment of June 23, 2005. Series C No. 128, para. 11-12.
[14] Request for Interpretation, at para. 22.
[15] *Id,* at para. 21.
[16] *Id.* at 18.

recognition of the Court's competence only to place into the appropriate context those alleged violations over which the Tribunal actually exercises jurisdiction."[17] By raising this point again in its Request the State is seeking to reopen an issue previously considered and decided by the Court, an issue that also has no bearing on the meaning or scope of the judgment. The same analysis and conclusion also applies to Specific Request (a), which does no more than reiterate a preliminary objection interposed by the State and rejected by the Court.

14. In the same vein, the State has had the procedural opportunity to address the subject matter of Specific Request (e) and cannot now seek to revisit this issue through a request for interpretation.[18] In particular, as acknowledged in the Court's judgment, Suriname failed to respond to the affidavit of Thomas Polimé,[19] did not present any arguments with regard to the alleged violation of Article 21 during the written and oral proceedings,[20] and in its additional information submitted pursuant to the Order of the Court of 17 February 2005, both failed to respond to specific issues or admitted facts proving the violations.[21]

B. Requests for interpretation cannot revisit preliminary objections

15. Pursuant to Article 59(1) of the Court's Rules of Procedure, requests for interpretation shall be made in connection with judgments on the merits or reparations. While the *Case of Moiwana Village* is a combined judgment on preliminary objections, merits and reparations, a plain reading of Article 59(1) of the Rules of Procedure clearly limits the scope of requests for interpretation to issues pertaining to the merits and reparations parts of judgments and does not encompass issues concerning preliminary objections. An exception to this rule may apply in cases where rulings on preliminary objections are intertwined with rulings on merits or reparations; this is not present however in the case at hand, at least to the extent that it may be relevant to a request for interpretation of the operative parts and attendant considerations.

16. A number of Suriname's Specific Requests merely reiterate its preliminary objections by rephrasing its objection to the Court's jurisdiction *ratione temporis* and its objection to the manner in which the Commission adopted an Article 50 report and complied with Article 51(1) of the Convention in connection with referral of the case to the Court. Specific Requests (a) and (d), in particular, are essentially reformulations of the various issues raised in Suriname's first and third preliminary objections.[22] These preliminary objections were dismissed by the Court in its judgment[23] and are extemporaneous and inappropriate subject matter for a request for interpretation.[24]

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[17] Case of Moiwana Village, at para. 83.
[18] *Case of Serrano-Cruz sisters,* Request for an Interpretation of the Judgment on the Merits, Reparations and Legal Costs. Judgment of September 9, 2005. Series C No 131, para. 15.
[19] Case of Moiwana Village, para. 20.
[20] *Id.* para. 124.
[21] *Id.* para. 33 and 86(5).
[22] *Id.* at 34 and 52.
[23] *Id.* paras. 37-44 and paras. 55-9, respectively.
[24] *Lori Berenson Mejía Case, supra,* para. 11-12.

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C. Requests for interpretation must concern the scope or meaning of operative parts and associated considerations of the judgment itself

17. A request for interpretation, by definition, must concern the judgment for which interpretation is sought; specifically, it must seek an interpretation of specific issues related to the meaning or scope of the operative parts and associated considerations of the judgment in question. Suriname's Specific Requests (b), (d) and (e) do not meet this requirement. Also, while Specific Request (c) does pertain to the judgment, an answer to the question posed by the State will not lead nor be relevant to an interpretation of the scope, meaning or purpose of the operative parts of that judgment.

18. Specific Request (b) concerns the State's contention that the Victims lack *locus standi* pursuant to the Convention and that any *locus standi* recognized in the Court's Rules of Procedure is invalid due to conflict with the superior normative status of the Convention. This issue calls for an interpretation of the American Convention and the Court's Rules of Procedure that is not related or relevant to the Court's judgment and interpretation thereof in the *Case of Moiwana Village*.

19. Specific Request (d) concerns the State's assertion that its defense was harmed because the Court considered evidence that the State believed was barred by the Court's temporal jurisdiction and, for this reason, the State refrained from providing evidence in relation to such matters. This does not concern an interpretation of the scope or meaning of the judgment but, instead, the manner in which the Court receives and considers evidence and the State's acts and omissions in relation to submitting evidence in support of its case. It should also be noted that the State has not specified how its defense was in fact harmed or how its failure to present evidence was not an omission for which it alone is liable.

20. Specific Request (e) simply argues that the Court's ruling with regard to "collective title to traditional territories" is unfounded because sufficient evidence was not before the Court to substantiate such a ruling. Specifically, Suriname requests "the Court's explanation on this particular matter, because it is convinced that this Court adopted a decision on a matter that was not placed before this Honourable Court and for which enough facts and circumstances were [not] provided to a take a well accepted legally sound decision." As with Specific Requests (b) and (d), Specific Request (e) does not seek an interpretation of the scope or meaning of the pertinent parts of the judgment, but contests the underlying basis for the Court's ruling *per se*. Moreover, as observed in paragraph 14 above, Suriname had the procedural opportunity to address this issue and cannot now seek to revisit it by means of a request for interpretation.

21. Finally, Specific Request (c) requests "the Court's explanation as to the conclusion that the Villagers do not understand the reasons for the occurrences that took place [at Moiwana village on 29 November 1986]." While in principle the requested explanation does address a matter pertaining to the judgment, a response will require an explanation of how the Court assessed and interpreted the evidence before it to reach its conclusion rather than an interpretation of the scope or meaning of the requisite parts of the judgment. This is also an inadmissible question of fact previously decided by the Court. Additionally, presuming that this explanation is

given, it is difficult to see how it would be relevant to clarifying the scope or meaning of the judgment.

D. Requests for interpretation must state with precision the issues relating to the meaning or scope of the judgment of which the interpretation is requested."

22. Pursuant to Article 59 of the Court's Rules of Procedure, requests for interpretation must "state with precision the issues relating to the meaning or scope of the judgment of which the interpretation is requested." None of the five Specific Requests submitted by Suriname are consistent with this rule.

23. As noted above, some of the State's Specific Requests do not concern the scope or meaning of the judgment in question at all. Additionally, each Specific Request is preceded by expositions on issues of dubious relevance and is stated in vague terms that are not amenable to precise responses. Indeed, it is difficult to fully ascertain what question is actually posed and what clarification the State is seeking in relation to most of the Specific Requests, while others are statements or allegations – some of which are inappropriate in an international human rights tribunal – set out in the form of questions.

III. Substantive Issues raised by Suriname's Specific Requests

24. In the preceding section, the Victims aver that each of the Specific Requests submitted by Suriname is inadmissible on multiple grounds, and, consequently, a pronouncement by the Court should not be required in relation to any substantive issues they may raise. Should the Court however decide that interpretation is necessary or appropriate, and given the importance of a few issues raised by the State, we have proffered comments on the substance of some of these Specific Requests below. In particular, we comment on Specific Request (b) pertaining to *locus standi* and highlight a number of important issues in relation to Specific Request (e). In providing these comments we have refrained from addressing a number of insinuations and unfounded and unsubstantiated allegations made by the State solely because comment on these points bears no relevance to the Court's consideration of the Request.

A. Specific Request (b)

25. In Specific Request (b), Suriname argues that the *locus standi* of the Victims contravenes the American Convention and that the Court's Rules of Procedure governing participation by the Victims' are therefore invalid. It also asserts that the participation of the Victims in the Court's proceedings has "weakened" the State's defense and position. Consequently, Suriname requests that the Court explains the applicable law concerning the *locus standi* of the Victims in proceedings before the Court.

26. As discussed above, Specific Request (b) concerns issues extraneous to the judgment and therefore is incompatible with the rules applicable to requests for interpretation and inadmissible. Nonetheless, we believe that it is important for the Court to clarify this issue if for no other reason than to reaffirm the status of individuals and groups, such as the community of Moiwana and the N'djuka people in

general, as subjects of international human rights law. It is also important to resolve this issue so that it does not arise again should other cases concerning Suriname be referred to the Court.

27. To support its proposition that the Victims do not have *locus standi* before the Court and that any representation on behalf of the Victims must be made through the Commission, as the only non-state entity with standing to address the Court, Suriname cites Articles 57 and 61(1) of the American Convention.[25] Article 57 states that "The Commission shall appear in all cases before the Court;" Article 61(1) provides that "[o]nly the States Parties and the Commission shall have the right to submit a case to the Court."

28. Neither of these Articles precludes the participation of the Victims in proceedings before the Court. Article 57 requires that the Commission shall appear in all cases before the Court, which it presently does and did in the *Case of Moiwana Village*. Article 61 provides that only States and the Commission may submit a case to the Court. In the case in question, the Commission, and no other entity, referred the case to the Court. The Victims did not submit the case; in accordance with the Court's Rules of Procedure, discussed below, and consistent with the Article 61 of the Convention, our standing to address the Court became operative only subsequent to referral of the case by the Commission.

29. Suriname further argues that the Court's Rules of Procedure are invalid in so far as they recognize the standing of the Victims because this contravenes the Convention.[26] Article 60 of the Convention authorizes the Court to adopt its Rules of Procedure. With regard to participation of the Victims in its proceedings, Article 23(1) of the Rules of Procedure provides that

> When the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their pleadings, motions and evidence, autonomously, throughout the proceedings.

Similarly, Article 36 provides that

> When the application has been notified to the alleged victim, his next of kin or his duly accredited representatives, they shall have a period of 2 months, which may not be extended, to present autonomously to the Court their pleadings, motions and evidence.

Further, with regard to provisional measures, Article 25(2) and (3) provide, respectively, that

> With respect to matters not yet submitted to it, the Court may act at the request of the Commission.
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> In contentious cases already submitted to the Court, the victims or alleged victims, their next of kin, or their duly accredited representatives, may present a request for provisional measures directly to the Court.

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[25] Request for Interpretation, para. 10.
[26] *Id.* para. 11

30. Consistent with Article 61(1) of the Convention, all of the preceding rules recognize the standing of the Victims to participate in proceedings before the Court only subsequent to submission of the case by the Commission. This has been the practice of the Court for over four years prior to the public hearing in the *Case of Moiwana Village*. As the Court has stated on numerous occasions, the Victims "are the holders of all of the rights enshrined in the Convention; thus, preventing them from advancing their own legal arguments would be an undue restriction upon their right of access to justice, which derives from their condition as subjects of international human rights law."[27]

31. In addition to citing inconsistency with the Convention,[28] the State's objection also appears to be based on the following statement:

> The State points out that the issue of individual standing before the Court is important to the State, since small economies like Suriname does [*sic*] not have the financial resources, capability and time to hire high profile foreign international human rights attorneys, while the opposing parties are backed by financially strong organizations and institutions, with a variety of not only capital but also human resources. These opposing parties might even construct questionable claims and present those to the organs in the inter-American system, thus placing the State in a difficult always defending position. The State believes that treating the individuals as separate parties before the Court, which is not in conformity with the Convention, further weakened the position of States parties.

32. This statement seems to argue that Suriname's right of defense was prejudiced ("weakened") by the participation of the Victims, who, in the State's opinion, have access to foreign lawyers and more resources than the State. No evidence is presented as to the nature of the prejudice suffered by the State, nor is it suggested that this alleged prejudice may contravene any applicable norm requiring attention at this stage in the proceedings. Finally, the State's right of defense is guaranteed by the Convention and the Court's Rules of Procedure not the nationality or profile of counsel or the comparative resources of human rights victims, supporting NGOs and sovereign States.

B. Specific Request (e)

33. Specific Request (e) concerns the violation of Article 21 of the Convention and the associated reparations ordered by the Court.[29] Suriname contends that the issue of the Moiwana community's property rights was not before the Court and "enough facts and circumstances were [not] provided to a take a well accepted legally sound decision."[30] Suriname therefore requests "the Court's explanation on this

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[27] Case of Moiwana Village, at para. 91. Similarly, *Myrna Mack Chang Case*, Judgment of 25 November 2003. Series C No. 101, para. 224, and *'Five Pensioners Case'*, Judgment of February 28, 2003. Series C No. 98, paras. 153, 154 and 155.

[28] Request for Interpretation, para. 11. *See also* Request for Interpretation, para. 12 -- arguing that the Court is somehow "ignoring" Suriname's civil law tradition by according higher status to norms set forth in its jurisprudence rather than statutory law (presumably as embodied in the Convention), the latter precluding the Victim's participation.

[29] Case of Moiwana Village, *inter alia*, paras. 86(4)-(6), 86(11), 86(15), 122-35, and 209-11

[30] Request for Interpretation, at para. 22.

particular matter."[31] The State similarly argues "that there are no facts and laws provided in this case to satisfy the Court's conclusion regarding this issue and as stated in the judgment."[32]

34. The State further asserts that the Moiwana community members are entitled to return to their traditional territories at any time and the corresponding obligation of the State is merely to "guarantee that these villagers are entitled to freely take possession of these lands in a status [equivalent to that enjoyed] prior to 29 November 1986."[33] In this and other statements, Suriname expresses its opposition to the measures ordered by the Court, particularly those pertaining to legal recognition of the community's communal property rights and the creation of effective mechanisms to guarantee and secure those rights.[34]

35. Specific Request (e) is inadmissible for the reasons stated in Section II, including Suriname's attempt to reopen questions of law and fact that it failed to address during the appropriate procedural opportunity (*supra* paras. 11, 14 and 20).[35] However, considering the nature of Suriname's reaction – as evidenced by its statements in the Request – to the Court's ruling on the Moiwana community's communal property rights, we believe that further elucidation of the scope and meaning of Suriname's obligations with respect to the Court's ruling on this issue is both important and necessary, particularly as it may relate to assisting the State and the Victims to understand and implement the ordered measures. Specific issues for interpretation are set forth in paragraph 39, *infra*.

36. In the operative paragraphs of the judgment, the Court decided that

> The State shall adopt such legislative, administrative, and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for the members' use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation and titling of said traditional territories, in the terms of paragraphs 209 – 211 of this judgment.[36]

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[31] *Id.*

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

[33] *Id.* at para. 21.

[34] *See also Decision 1(67), Suriname*, Early Warning and Urgent Action Procedures, UN Committee on the Elimination of Racial Discrimination, 18 August 2005. UN Doc. CERD/C/DEC/SUR/2. In this decision, the fourth issued about indigenous and tribal peoples' rights since 2003, the Committee "expresses deep concern about information alleging that Suriname is actively disregarding the Committee's recommendations by authorizing additional resource exploitation and associated infrastructure projects that pose substantial threats of irreparable harm to indigenous and tribal peoples, without any formal notification to the affected communities and without seeking their prior agreement or informed consent;" and; "urges the Secretary-General of the United Nations to draw the attention of the competent United Nations bodies to the particularly alarming situation in relation to the rights of indigenous peoples in Suriname, and to request them to take all appropriate measures in this regard." *Decision 1(67), Suriname,* at paras. 3 and 7.

[35] Paragraph 30 of the Court's judgment states the following however: "The parties to the instant case are in agreement that the Moiwana community members do not possess formal legal title – neither collectively nor individually – to their traditional lands in and surrounding Moiwana Village. According to submissions from the representatives and Suriname, the territory formally belongs to the State in default, as no private individual or collectivity owns official title to the land."

[36] Case of Moiwana Village, at para. 233.

37. Paragraphs 209-211 provide respectively that

> 209. In light of its conclusions in the chapter concerning Article 21 of the American Convention (*supra* paragraph 135), the Court holds that the State shall adopt such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for their use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation and titling of said traditional territories.
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> 210. The State shall take these measures with the participation and informed consent of the victims as expressed through their representatives, the members of the other Cottica N'djuka villages and the neighboring indigenous communities, including the community of Alfonsdorp.
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> 211. Until the Moiwana community members' right to property with respect to their traditional territories is secured, Suriname shall refrain from actions – either of State agents or third parties acting with State acquiescence or tolerance – that would affect the existence, value, use or enjoyment of the property located in the geographical area where the Moiwana community members traditionally lived until the events of November 29, 1986.

38. It is also important to note that the 'Proven Facts' chapter of the judgment states that (the associated footnotes specify that these are facts recognized by the State):

> Although individual members of indigenous and tribal communities are considered natural persons by Suriname's Constitution, the State's legal framework does not recognize such communities as legal entities. Similarly, national legislation does not provide for collective property rights."[37]

39. With regard to interpretation of the scope and meaning of these parts of the judgment, the Victims respectfully request that the Court clarify the following two issues:

(a) the scope, meaning and content of the 'informed consent' requirement contained in paragraph 210, and in particular:

  (i) that the Court explain the broad principles governing the substantive and procedural requirements that apply to obtaining the "informed consent of the Moiwana community, the other Cottica N'djuka villages and the neighboring indigenous communities;" and

  (ii) that the Court clarify that informed consent is required in relation to both the "legislative, administrative and other measures" the State must adopt to ensure the property rights of the Moiwana community "in relation to the traditional territories from which they were expelled," as

[37] *Id.* at para. 86(5) (footnotes omitted).

well as to the actual delimitation, demarcation and titling carried out pursuant to those measures once adopted.

(b) The scope and meaning of the term 'property rights' in paragraph 209 and 233 in order to clarify that:

(i) this term encompasses collective ownership rights; the area(s) to which these rights correspond shall be delimited, demarcated and titled in accordance with the community's customary laws, values, usage and mores; and, given the finding in paragraph 86(5) of the judgment, that such ownership rights must be recognized and guaranteed in law and protected in fact; and,

(ii) the term 'traditional territories' does not exclusively refer to the former village site as it existed prior to 29 November 1986, but also encompasses those areas which, according to N'djuka customary law, the community and its members may by right own and control or otherwise occupy and use.

1. The scope, meaning and content of the 'informed consent' requirement

40. In recent years, the United Nations Permanent Forum on Indigenous Issues ("PFII")[38] and the United Nations Working Group on Indigenous Populations ("WGIP") have both devoted considerable energy to analyzing and explaining indigenous peoples' right to informed consent – using the term 'free, prior and informed consent' ("FPIC").[39] This valuable and highly persuasive analysis may assist the Court in elaborating, should it so decide and as requested above, the broad principles governing the informed consent requirement in paragraph 210 of the judgment.

41. The WGIP and PFII have acknowledged that FPIC is defined as the consensus or consent of indigenous peoples determined in accordance with their customary laws and practices and expressed through their customary or other self-identified representative institutions.[40] Addressing the PFII in January 2005, the International Labour Organization ("ILO") concurred with this view in relation to its Convention 169 on indigenous and tribal peoples, an instrument heavily ratified by OAS member States. The ILO highlighted "the fact that, *inter alia*, the elements of good faith,

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[38] *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*. United Nations Permanent Forum on Indigenous Issues, (New York, 17-19 January 2005). UN Doc. E/C.19/2005/3.

[39] See, *Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation.* UN Doc. E/CN.4/Sub.2/AC.4/2004/4; and *Legal commentary on the concept of free, prior and informed consent. Expanded working paper submitted by Mrs. Antoanella-Iulia Motoc and the Tebtebba Foundation offering guidelines to govern the practice of implementation of the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources*. UN Doc. E/CN.4/Sub.2/AC.4/2005/2

[40] *Id. See also, inter alia, Aboriginal Lands Rights (Northern Territory) Act 1976*, secs. 42(6), 77A (Australia) and; The Philippines Indigenous Peoples Rights Act 1997, secs. 3(g), 59 (defining and setting forth requirements for FPIC).

representativity, and decision-making through indigenous peoples' own methodologies were essential to free, prior and informed consent."[41] In the same forum, the Inter-American Development Bank stated that its policies on indigenous peoples contain similar considerations concerning consent.[42]

42. Both the WGIP and the PFII – the PFII building on the standard setting work of the WGIP as it relates to FPIC – have elaborated on the content of the various components of FPIC. The WGIP states that FPIC

> contains the elemental terms "free", "prior", "informed" and "consent" which need to be interpreted in order to operationalize the concept:
>
> **Free**: It is a general principle of law that consent is not valid if obtained through coercion or manipulation. While no legislative measure is foolproof, mechanisms need to be established to verify that consent has been freely obtained.
>
> **Prior**: To be meaningful, informed consent must be sought sufficiently in advance of any authorization by the State or third parties or commencement of activities by a company that affect indigenous peoples and their lands, territories and resources.
>
> **Informed**: A procedure based on the principle of free, prior and informed consent must involve consultation and participation by indigenous peoples, which includes the full and legally accurate disclosure of information concerning the proposed development in a form which is both accessible and understandable to the affected indigenous people(s)/communities ....
>
> **Consent**: This involves consultation about and meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project. As such, consultation and meaningful participation are fundamental components of a consent process. There may also be negotiation involved to reach agreement on the proposal as a whole, certain components thereof, or conditions that may be attached to the operationalization of the principle of free, prior and informed consent. At all times, indigenous peoples have the right to participate through their own freely chosen representatives and to identify the persons, communities or other entities that may require special measures in relation to consultation and participation. They also have the right to secure and use the services of any advisers, including legal counsel of their choice.[43]

While the definition of 'consent' used here focuses on the elements of the process leading to or forming part of a decision to give or withhold consent, the WGIP is clear that the term 'consent' – in accordance with its plain meaning – involves a right to say yes or no:

> There is no single prescriptive implementation of the principle of free, prior and informed consent, as this necessarily requires respect for history, cultures and institutions of the peoples concerned. Nevertheless, it is possible to elaborate some core elements central to the exercise of this principle which were outlined in this

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[41] *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, supra* at para. 24.
[42] *Id.* para. 28.
[43] *Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples, supra,* at para. 20.

paper. Indigenous peoples' right to withhold consent or to say "no" to inappropriate development must be one of these elements.[44]

43. The PFII's analysis tracks and is consistent with that of the WGIP. With regard to consultation and participation in processes leading to a consent decision, for instance, the PFII observes that

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> Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest-holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women are essential, as well as participation of children and youth, as appropriate. This process may include the option of withholding consent.[45]

It adds that:

> As a core principle of free, prior and informed consent, all sides in a FPIC process must have equal opportunity to debate any proposed agreement/development/project. "Equal opportunity" should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in indigenous language(s), as appropriate, or through any other agreed means on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples or an impact on their rights to their territories and/or natural resources.

2. The scope and meaning of the term 'property rights'

44. As noted above, the Victims believe that it is important that the Court elucidate the scope and meaning of its judgment as it relates to the communal property rights of the Moiwana community. This is especially the case with regard to assisting the State and the Victims to fully understand and correctly implement the ordered measures. In this light, a full understanding of the scope and meaning of the term 'property rights' is crucial. For this reason, we requested in paragraph 39 *supra*, that the Court address the scope and meaning of the term 'property rights' as used in paragraph 209 and 233 of the judgment in order to clarify that:

(i) this term encompasses collective ownership rights; the area(s) to which these rights correspond shall be delimited, demarcated and titled in accordance with the community's customary laws, values, usage and mores; and, given the finding in paragraph 86(5) of the judgment, that such ownership rights must be recognized and guaranteed in law and protected in fact; and,

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[44] *Id.* at para. 27.

[45] *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, supra* at para. 47.

(ii) the term 'traditional territories' does not exclusively refer to the former village site as it existed prior to 29 November 1986, but also encompasses those areas which, according to N'djuka customary law, the community and its members, may by right own and control or otherwise occupy and use.

45. With regard to point (i), the Court observed in paragraph 133 of the judgment that the Moiwana community's "traditional occupancy of Moiwana Village and its surrounding lands – which has been recognized and respected by neighboring N'djuka clans and indigenous communities over the years (*supra* paragraph 86(4)) – should suffice to obtain State recognition of their ownership." As cited in the judgment, the Court similarly held in the *Mayagna (Sumo) Awas Tingni Community Case* – "that, in the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership."[46]

46. In addition to clarifying that the term 'property rights' refers to communal ownership, the Victims also request that the Court clarify that the delimitation, demarcation and titling of the area(s) to which those communal ownership rights correspond be done in accordance with the Moiwana community's "customary law, values, customs and mores."[47] This language is taken from the Court's ruling in the *Awas Tingni Case*. In that case, the Court observed that "Indigenous peoples' customary law must be especially taken into account" in relation to recognizing and securing indigenous peoples' – and following the *Moiwana Case*, tribal peoples' – communal property rights because their customary laws and practices are the basis of and the framework within which such communal property rights are defined and take form.[48]

47. Similarly, the Commission has observed that "the jurisprudence of the [inter-American] system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition."[49] The Commission consequently recommended that the State in question adopt "legislative, administrative, and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which the Maya people have a communal property right, in accordance with their customary land use practices ...."[50]

48. In point (i) above, we further request that the Court clarify that the community's communal ownership rights must be recognized and guaranteed in law and be secured and protected in fact.[51] Considering Suriname's views on its

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[46] Case of Moiwana Village, at 133, *citing Case of the Mayagna (Sumo) Awas Tingni Community.* Judgment of August 31, 2001. Series C No. 79, para. 151.

[47] *Case of the Mayagna (Sumo) Awas Tingni Community, id.* at 164.

[48] *Id.* at 151.

[49] *Report No. 40/04, Maya Indigenous Communities of the Toledo District (Case 12.053 (Belize)),* 12 October 2004, at para. 117.

[50] *Id.* at 197(1).

[51] *Case of the Mayagna (Sumo) Awas Tingni Community,supra* at para. 153, 164; *Case of Yakye Axa Indigenous Community v. Paraguay.* Judgment of June 17, 2005. Series C No. 125, para. 143

obligations in this respect (*supra* para. 34) and the Court's finding that "the State's legal framework does not recognize such communities as legal entities ... [and] national legislation does not provide for collective property rights,"[52] the Court's interpretation of its judgment on this issue will be highly instructive and valuable.

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49. Finally, the Victims have also requested that the Court interpret the term 'traditional territories' as used in paragraphs 209 and 233 of the judgment. In particular, we respectfully encourage the Court to explain that this term refers to those areas which, according to N'djuka customary law, the community and its members, traditionally own and control or otherwise occupy and use and not exclusively to the former village site as it existed in 1986.

50. In connection with this, it is important to take into account that Moiwana village was formed by persons originally from a village on the Neger Creek, some 8 kilometers from the site of the village in 1986. As is the norm with indigenous and tribal peoples living in tropical forest environments, N'djuka villages are periodically moved to new locations when resources are depleted or for other reasons (spiritual problems, for example). Village movements however are always within the traditional territory of the N'djuka people, specifically the areas belonging to the land holding clan(s) associated with the village in question, and are done in accordance with applicable customary norms. Thus, village movements did not and do not now involve an abandonment of rights over previous village sites and their surrounds. This issue is highly relevant because, while the Moiwana community members desire to return to their traditional lands and territory, given their traumatic experiences and the still unresolved spiritual and other problems, most do not wish to return to the exact location of their former village.

IV. Conclusion and Prayer

51. In conclusion, Suriname's request for interpretation is not in accord with the rules applicable to the admission and consideration of such requests pursuant to the American Convention and the Court's Rules of Procedure. While Suriname's Request is therefore inadmissible and should be rejected without need for further consideration, the Victims believe that a number of issues are raised that the Court nevertheless may consider for interpretation. The Victims have identified these issues in Section III above and encourage the Court to address these as they pertain to the scope and meaning of the judgment.

52. In light of the preceding, the Victims respectfully request that the Court:

(a) declare and reject Suriname's Request and each of the Specific Requests set forth therein as inadmissible; and,

(b) without prejudice to (a), provide its interpretation of the issues identified in paragraph 39 *supra*.

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[52] Case of Moiwana Village, at para. 86(5) (footnotes omitted).