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ORGANIZATION OF AMERICAN STATES
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

CASE 12,338
WAZEN EDUARDS et al. (TWELVE SARAMAKA CLANS)
SURINAME

FINAL WRITTEN ARGUMENTS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") submitted its Application in Case 12.338 Wazen Eduards et al. (Twelve Saramaka Clans) to the Inter-American Court of Human Rights (hereinafter "the Court" or "the Court"), against the Republic of Suriname (hereinafter "the Surinamese State," "Suriname," or "the State"), because the Saramaka people and the way of life they have developed and sustained over three centuries in the interior of Suriname is under threat. The Saramaka people do not have legal recognition or title to their lands and are unable to exercise effective control over those lands. The facts set forth and proven in the present case demonstrate the international responsibility of the State for having violated the rights of the Saramaka people under Articles 21 (Right to Property) and 25 (Right to Judicial Protection) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), and for having failed to comply with its obligations under Article 1(1) and 2 of that treaty to respect and ensure those rights and adopt the necessary measures under domestic law to make those rights effective.

2. The Saramaka people are one of the largest Maroon tribes located along the Suriname River, one of the main watercourses in the country. They have occupied their territory since at least the early 18th century when their ancestors escaped slavery on the coastal plantations and moved into the forest. According to Saramaka tradition, ownership of their territory is divided among twelve matrilineal clans. Members of the clans have rights to hunt, fish, farm and gather forest produce in the area owned by their clan, and ownership remains vested collectively in the clan.

3. Suriname presently maintains that the Saramaka, and other indigenous and Maroon peoples, have no legal entitlement to their lands and resources, all of which are owned by the state and can be exploited at any time. Suriname remains the only country in the Western hemisphere that does not legally recognize some form of land rights for indigenous peoples. A special commission has been established by the Government to make recommendations on land rights, but it has yet to put forward any conclusions.

4. The Saramaka people derive the majority of their subsistence resources from the forest and their religion and culture are based on their relationship with the land and forest and all they provide. Thus, their religious and cultural identity and their physical survival are inextricably linked to their forest and its productive capacity. Threats to the forest

and its environmental quality are threats to the Saramaka as a whole. The forest is their hunting ground, farm, source of medical plants and water, church and home of sacred sites. It is their source of income, as from time immemorial they have sold a small and sustainable portion of their timber. As one of the witnesses in the public hearing said, it is "our marketplace."

5. The forest and the life it holds are essential not just for subsistence reasons but because they cement the cultural life and continuity of the Saramaka people. As the Commission indicated in its oral arguments, the land constitutes their history. It is the source of their narrative, their story as a people, and the record of their historical existence. This is what is under threat for the Saramaka people, due to: the lack of legal recognition of the collectivity or of their land rights; their corresponding inability to effectively control that land; and the concessions granted to outsiders absent any consideration of the devastating consequences for the Saramaka. During the public hearing, witnesses spoke of the catastrophic consequences for the Saramaka, of clear-cutting, of the pollution of water sources, and of the physical exclusion of the Saramaka from areas of their traditional territory. The consequences are, in their words, "a forever destruction" of the lands they tend in order to pass on to future generations.

6. The Commission avails itself of this opportunity to revisit certain arguments contained in its application and other presentations, and to provide some additional considerations derived from the evidence submitted in the instant case. It incorporates by reference the considerations already presented in their entirety.

III. PRELIMINARY OBJECTIONS

7. At this stage of the proceedings, the Commission wishes to make brief reference to a few principal points concerning the preliminary objections presented by the State. First and foremost, the Commission reiterates that it determined the admissibility of this case at the appropriate procedural stage in full accordance with the norms of the Convention and its Rules of Procedure. The State was given ample opportunity before the Commission to contest the admissibility of the petition, from its transmission to the State by a communication dated November 21, 2000, to the adoption of the admissibility and merits decision in Report No. 09/06 on March 2, 2006. The Commission fully considered the position of both parties in arriving at its conclusions on admissibility. The State has not argued that these conclusions were based on flawed information or a process that failed to respect due process or equality of arms. The State has supplied no juridical basis requiring the Court to review the decision on admissibility reached by the Commission. In such circumstances, the Commission notes that the Court has in previous cases declined to carry out such review.

8. Should the Court proceed to review any questions relating to admissibility, the Commission wishes to emphasize three points concerning: (1) standing; (2) the exhaustion of domestic remedies; and (3) the timely filing of the application.

9. With respect to the question of standing, the Commission reiterates that the representatives of the victims had standing to bring the claims raised in the petition, and that the Commission had the competence to admit and subsequently examine the merits of those claims. With respect to the participation of the victims and their representatives in this

current phase of the proceedings, the Commission recalls what the Court itself indicated in the "Mapiripán Massacre:"

> [a]t the current stage of the evolution of the inter-American system for the protection of human rights, the empowerment of the alleged victims, their next of kin or representatives to submit requests, arguments and evidence autonomously must be interpreted in accordance with their situation of titleholders of the rights embodied in the Convention and beneficiaries of the protection offered by the system, without thereby adversely affecting the limits to their participation established in the Convention or the exercise of the Court's jurisdiction.[1]

As the titleholders of the rights in question, it is not only proper that the victims and their representatives provide information to this Court, but necessary. It is for that reason that the Rules of Procedure of the Court and Commission provide due procedural opportunities for them to participate and be heard in the different stages of the individual case process.

10. As the Commission indicated in its oral arguments during the public hearing, it considers that the testimony of the witnesses is very coherent and consistent in indicating how leadership and decision-making functions are carried out within the Saramaka people,[2] and how traditional forms of consultation were employed by the victims in formulating and presenting their positions before this Court.[3] Further, information was provided as to the way in which land rights are held and administered under traditional Saramaka forms of land tenure,[4] and the way in which these traditions informed the form and content of the presentation before the Court. As the Commission indicated in its oral arguments, if the State considered that there were any ambiguity with respect to the question of standing in the way their claims have been presented over time, it would have been incumbent upon the State to engage with the Saramaka people as a collectivity in order to resolve it.

11. The State maintains before this Court that the case should not have been admitted by the organs of the Inter-American human rights system because the victims failed to invoke and exhaust the domestic remedies available for this purpose in Suriname. The State cites the existence of remedies under its civil code. While the State maintains that such general remedies could serve to remedy the claims raised in the present case, it has yet to clarify how they could do so, or provide examples of instances in which such remedies served this purpose. The Commission takes this opportunity to reiterate that the general remedies referred to by the State, such as a request for declaratory relief, are not, and conceptually could not be a remedy for the creation and recognition of collective rights to land. The State also cites the existence of an executive petition mechanism under the Forestry Management Act. The Commission notes that this administrative mechanism is not a judicial remedy, and consequently does not meet the terms of Article 46 of the American

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[1] I/A Court H. R., *Case of the "Mapiripán Massacre"*. Judgment of September 15, 2005. Series C No. 134, para. 58

[2] See, e.g., testimony of Wazen Eduards, transcription p. 4; testimony of Albert Aboikoni, pp. 32-33, 38.

[3] See, e.g., testimony of Wazen Eduards, transcription p. 6-7, 11

[4] See, e.g., testimony of Cesar Adjako, transcription p. 17; expert testimony of Richard Price, pp. 61-62

Convention. As the Court is aware, the petitioners in fact invoked it only to be met with silence.

12. Finally, the State maintains that the application was presented extemporaneously. It contends that the Commission notified its report on the admissibility and merits on March 22, 2006, but did not refer the case to the Court until June 23, 2006. In this respect, the Commission considers that it suffices to demonstrate that Report Nº 09/06 was transmitted to the State on March 23, 2006. This was the date in which the timeframe established in Article 51(1) of the Convention started, and the Commission has already provided documentation in this regard.[5]

IV. PROVEN FACTS

13. The documentary evidence submitted by the parties and the testimony presented by the witnesses and expert witnesses convened by the Tribunal either by affidavit or during the public hearing that took place at the seat of the Court on May 9th and 10th 2007, demonstrate that:

a) "[d]uring the European colonization of present-day Suriname in the XVII[th] Century, Africans were forcibly taken to the region and used as slaves on the plantations. Many of these Africans, however, managed to escape to the rainforest areas in the eastern part of Suriname's present national territory, where they established new and autonomous communities; these individuals came to be known as Bush Negroes or Maroons."[6]

b) the ancestors of the Maroons began rebelling against their enslavement in 1651. They fled into the jungle and developed a unique Afro-American culture with its own political system. They were the first people in the New World to achieve independence. Since that time they have been living in Suriname's rain forest, concentrated along the major waterways.[7]

c) eventually, six distinct groups of Maroons emerged: the N'djuka, the Matawai, the Saramaka, the Kwinti, the Paamaka, and the Boni or Aluku.[8] Their rights to

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[5] See, Annex 1 of the IACHR's written observations to the preliminary objections, copies of the reports of transmittal by fax to the Surinamese Foreign Relations Ministry and Mission before the OAS.

[6] I/A Court H.R. Case of the Moiwana Community vs. Suriname. Judgment of 15 June 2005. Series C No.124; para. 86.1; *see also for reference* Report of Richard Price, annex D of petition of 30 September 2000; Annex 1 of the application; *see also* Professor Richard Price, "Report in support of Provisional Measures", 15 October 2003 (mimeograph – restricted circulation); Annex 2 of the application; and testimony presented by the expert witness Prof. Richard Price during the public hearing that took place on May 9th and 10th, 2007.

See Report of Richard Price, annex D of petition of 30 September 2000; Annex 1 of the application; *see also* Professor Richard Price, "Report in support of Provisional Measures", 15 October 2003 (mimeograph – restricted circulation); Annex 2 of the application; and testimony presented by the expert witness Prof. Richard Price during the public hearing that took place on May 9th and 10th, 2007.

[8] I/A Court H.R. Case of the Moiwana Community vs. Suriname. Judgment of 15 June 2005. Series C No.124; para. 86.1; *see also for reference* Report of Richard Price, annex D of petition of 30 September 2000; Annex 1 of the application; *see also* Professor Richard Price, "Report in support of Provisional Measures", 15 October 2003 (mimeograph – restricted circulation); Annex 2 of the application; and testimony presented by the expert witness Prof. Richard Price during the public hearing that took place on May 9th and 10th, 2007.

freedom from slavery and to self-government within their territories were recognized in treaties concluded with the Dutch in the 18th Century, a century before slavery was formally abolished in the region.[9]

d) in 1762 the Saramaka signed a treaty, renewed in 1837.[10]

e) the Maroons consider themselves, and are culturally perceived to be different from other sectors of Surinamese society and they apply their own laws and customs.[11]

f) Saramaka society is essentially organized in 12 matrilineal clans (*lö*), who are the primary possessors of land in Saramaka society.[12] A Captain, who heads each clan, is in Saramaka terms the appropriate representative to act in a moment of grave threat against the polity and culture as a whole.[13]

g) the members of the Saramaka community are not native to the region. Nevertheless, they form a tribal people, with specific cultural characteristics, and an identity made up of a complex network of relations with spirits, the land, and kinship structures. The lands and resources of the Saramaka are considered as an all-embracing whole and intertwined with the social, ancestral, and spiritual relations, which govern their daily life.[14]

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[9] I/A Court H.R. Case of the Moiwana Community vs. Suriname. Judgment of 15 June 2005. Series C No.124; para. 86.2.

[10] Testimony presented by the expert witness Prof. Richard Price during the public hearing that took place on May 9th and 10th, 2007.

[11] Report of Richard Price, annex D of petition of 30 September 2000; Annex 1 of the application; *see also* Professor Richard Price, "Report in support of Provisional Measures", 15 October 2003 (mimeograph – restricted circulation); Annex 2 of the application; and testimony presented by the expert witness Prof. Richard Price during the public hearing that took place on May 9th and 10th, 2007.

[12] Report of Richard Price, annex D of petition of 30 September 2000; Annex 1 of the application; *see also* Professor Richard Price, "Report in support of Provisional Measures", 15 October 2003 (mimeograph – restricted circulation); Annex 2 of the application; and testimonies presented by witnesses Wazen Eduards, Cesar Adjako, Albert Aboikoni and expert witness Prof. Richard Price during the public hearing that took place on May 9th and 10th, 2007. Recent studies register the Saramaka population at 34.482 persons, although this would also include persons not living in the Upper Suriname River. *Vide* Kamble, Ellen Rose; *Policy Note on Indigenous Peoples and Maroons in Suriname*; Final Report. 14 November 2005; The Inter-American Development Bank's 2004 *Overview* of Indigenous and Tribal Peoples of 2004 establishes the Saramaka population living in "central Suriname" in *circa* 25.000. Petitioners have informed the Commission that the Saramaka population in the Upper Suriname River would amount to some 20.000 persons. The former study warns that no reliable data can be extracted from the census-results about the number of indigenous peoples and maroons living in certain districts.

[13] Professor Richard Price, "Report in support of Provisional Measures", 15 October 2003 (mimeograph – restricted circulation); Annex 2 of the application; and testimonies presented by witness Wazen Eduards and expert witness Prof. Richard Price during the public hearing that took place on May 9th and 10th, 2007.

[14] Report of Richard Price, annex D of petition of 30 September 2000; Annex 1of the application; *see also* Professor Richard Price, "Report in support of Provisional Measures", 15 October 2003 (mimeograph – restricted circulation); Annex 2 of the application; and testimonies presented by witnesses Wazen Eduards, Cesar Adjako, Albert Aboikoni and expert witnesses Prof. Richard Price and Prof. Salomon Emanuels during the public hearing that took place on May 9th and 10th, 2007.

h) the occupation of the Saramaka territory dates back to the beginning of the XVIII[th] Century.[15]

i) currently, the Saramaka people are scattered over some 58 communities along the Upper Suriname River.[16]

j) through agriculture, hunting, fishing, and other traditional ways of using the land and resources, the Saramaka people have occupied large areas of land in the Upper Suriname River region, over and above specific villages.[17]

k) the Saramaka territory includes lands that the Saramaka people occupied and traditionally used, for the most part to the exclusion of other groups, be they indigenous, Maroon, or other.[18]

l) during the 1960's, the flooding derived from the construction of a hydroelectric dam displaced Saramakas and created the so-called "transmigration" villages.[19]

m) While the State is the formal owner of the territories and resources occupied and used by the Saramaka people under national law, the Saramaka people have attained a certain degree of autonomy to govern their lands, territories, and resources.[20]

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[15] Testimonies presented by witness Cesar Adjako and expert witness Prof. Richard Price during the public hearing that took place on May 9[th] and 10[th], 2007.

[16] Testimonies presented by witness Wazen Eduards and expert witness Prof. Richard Price during the public hearing that took place on May 9[th] and 10[th], 2007.

[17] See, *for example* Professor Richard Price Report, "Report in Support of Provisional Measures", 15 October 2003 (mimeograph – restricted circulation); Annex 2 of the application.

[18] Report of Richard Price, annex D of petition of 30 September 2000; Annex 1 of the application; *see also* Professor Richard Price, "Report in support of Provisional Measures", 15 October 2003 (mimeograph – restricted circulation); Annex 2 of the application.

[19] Testimonies presented by witness Cesar Adjako and expert witness Prof. Richard Price during the public hearing that took place on May 9[th] and 10[th], 2007.

[20] Report of Richard Price, annex D of petition of 30 September 2000; Annex 1 of the application. This report documents the social, political, and geographical history of the Saramaka people. Specifically, the report addresses: (1) The political geography of Saramaka territory (2) ownership of Saramaka land; (3) Saramaka land use; (4) Saramaka sovereignty. The report also cites numerous articles and books put together by Dr. Price on Saramaka and Maroon culture and history. Indeed, in its note to the Commission dated December 27, 2002, the State expressly recognizes the "*sui generis* nature" of the Saramaka people, which, for the State constitutes the basis for granting it "certain privileges" under which it can exploit its territories and preserve its culture. In the same note, the State asserts that "it does not interfere in the use of these lands given that these privileges must be exercised collectively by the communities." Although it denies the existence of communal property rights, through what it calls "privileges" the State recognizes the collective management of the territories that the Saramaka people has traditionally possessed and occupied and it also recognizes the structure of authority within the Maroon communities, including the Gaama. However, in none of its submissions does the State identify any legal framework to recognize these so-called privileges or to mediate between them and the State's prerogative to subordinate them to a wider social or public interest. See *also* Professor Richard Price, "Report in support of Provisional Measures", 15 October 2003 (mimeograph – restricted circulation); Annex 2 of the application; *see also* testimonies presented by witnesses Albert Aboikoni, Rudy Strijk and expert witness Prof. Richard Price during the public hearing that took place on May 9[th] and 10[th], 2007.

n) the forests in Saramaka territory are necessary for physical survival, because they are hunting grounds and are used for farming and the creeks are used as a source of water.[21]

o) land use practices are essential to the Saramaka people, not just for the subsistence of the members of the communities, but also because they cement the life and cultural continuity of the Saramaka people.[22]

p) lands are possessed collectively by the clans (*los*), whereby the individuals and extended family units in the clan enjoy subsidiary use and occupation rights.[23]

q) Saramaka culture and identity form a complex network of ongoing relations with ancestral and other spirits, with the land and with kinship structures. The lands and resources of the Saramaka are considered in their entirety and intertwined with social, ancestral, and spiritual relations, which govern their daily life. In particular, their identity is inextricably linked to their struggle to free themselves from slavery, which they call the "first time."[24]

r) the Constitution of Suriname neither recognizes nor guarantees the rights of the indigenous and tribal peoples of Suriname to own their lands, territories, and resources.

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[21] Declaration of Saramaka Captain Wazen Eduards, before the Commission (Hearing no. 49; 119th Period of Sessions, 05.03.06); Annex 10 of the application; and testimony presented by the Wazen Eduards during the public hearing that took place on May 9th and 10th, 2007.

[22] Report of Richard Price, annex D of petition of 30 September 2000; Annex 1 of the application; *see also* Professor Richard Price, "Report in support of Provisional Measures", 15 October 2003 (mimeograph – restricted circulation); Annex 2 of the application; and testimonies presented by witnesses Wazen Eduards and Cesar Adjako, and expert witness Prof. Richard Price during the public hearing that took place on May 9th and 10th, 2007; affidavits of Ms. Silvi Adjako and Captain Eddie Fonkie submitted to the Court by the Inter-American Commission on May 1st, 2007

[23] Expert opinion of Dr. Richard Price before the Court in the *Aloeboetoe et al* Case, (1993); *vide* request for inclusion of this opinion to the evidence of this Case, *infra* Section XI 3. In his testimony, Dr. Price describes Saramaka land tenure as follows: "The Saramaka people, the Saramaka nation, if we can call it that, as a whole, have a particular territory that you can see on that map. In terms of agricultural land, and the land in which they have their houses, they are held communally, by large kinship groups, of which there are 13 or 14 in Saramaka, and the whole river is divided into large areas of several miles long, owned by one of this particular groups. Every Saramaka belongs to one of these groups, through his or her mother, these groups are called Lo. They are what anthropologists call matrilineal clans, but you belong, every Saramaka belongs to one, and only one Lo. A person's Lo owns particular land, and any member of the Lo's has rights to work, to ask the Village Captain, in the area where the Lo owns lands, for an area to cut gardens. Any member of the Lo has a right to pick food from trees that grow in that area. Members of other Lo's, other Saramaka have to ask permission in order to pick food. But land is held communally, and it's held for posterity, so that if I am given a particular garden, for the present, I do not have rights to pass that particular place on to my children, rather the matrilineal group as a whole ..."; and testimonies presented by witnesses Wazen Eduards and Cesar Adjako, Albert Aboikoni and expert witness Prof. Richard Price during the public hearing that took place on May 9th and 10th, 2007.

[24] Richard Price, *First time, The historical vision of an African-American People*; publisher John Hopkins University, Baltimore, 1983.

s) almost all the land in the inland provinces of Suriname is currently classified as State property, and all recognized land rights in Suriname must derive from a concession awarded by the State.[26]

t) according to Decree L-1 of 1982 on Basic Principles of Land Policy, any Surinamese citizen and any legal person is entitled to ask the government for a plot of uncommitted state land.[26]

u) these land titles are issued on an individual basis and are granted as leases *vis-à-vis* the State, renewable for periods of 15 to 40 years.[27]

v) the aforementioned Decree L-1 of 1982 partially recognizes the rights of tribal and indigenous peoples, but subject to the "general interest" of the State. Article 4 establishes that in allocating privately owned land, the rights of the "tribal Bushnegroes and [Indigenous Peoples] to their villages, settlements and agricultural plots are respected, provided that this is not contrary to the general interest;" and that "general interest includes the execution of any project within the framework of an approved development plan."[28]

w) according to Suriname's laws, mining, forestry, and other activities classified as being in the general interest are exempted from the requirement to respect customary rights.[29]

x) in practice, the classification of an activity as being in the "general interest" is not actionable and constitutes a political issue that cannot be challenged in the courts. What it does, in effect, is to remove land issues from the domain of judicial protection. The "general interest" exception with respect to the rights of the indigenous and Maroon communities could include any action that the State deems in the public interest or any project in a development plan. The effect of this provision is to substantially limit the fundamental rights of the indigenous and

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[25] See testimonies presented by witnesses Albert Abolkoni and Rudy Strijk during the public hearing that took place on May 9th and 10th, 2007.

[26] Decree L-1 of 1982 on Basic Principles of Land Policy. Annex to Suriname's written presentation submitted at the hearing before the Commission on 27 October 2004; hearing No.43, 121st Regular Period of Sessions (translation); Annex 5 of the application.

[27] Decree L-1 of 1982 on Basic Principles of Land Policy. Annex to Suriname's written presentation submitted at the hearing before the Commission on 27 October 2004; hearing No.43, 121st Regular Period of Sessions (translation); Annex 5 of the application.

[28] Decree L-1 of 1982 on Basic Principles of Land Policy. Annex to Suriname's written presentation submitted at the hearing before the Commission on 27 October 2004; hearing No 43, 121st Regular Period of Sessions (translation); Annex 5 of the application

[29] *See* IACHR, Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans; 2 March 2006; Appendix 1; par. 242 and previous, for the conclusions of the Commission to this respect. *See also*, Declaration of Expert Mariska Muskiet, before the Commission (Hearing no. 49; 119th Period of Sessions, 05.03.06); Annex 12. See expert opinion of Ms. Musket in support of this contention.

Maroon peoples to their land *ab initio*, in favor of an eventual interest of the State that might compete with those rights.[30]

y) the Forestry Management Act of Suriname of 1992 establishes that the customary rights of tribal inhabitants of the interior to their villages, settlements, and agricultural plots will be respected as much as possible.[31] If these rights are violated, appeals may be lodged with the President of Suriname.[32]

z) indigenous and Maroon communities lack legal status in Suriname and are not eligible to receive communal titles on behalf of the community or other traditional collective entities that possess land.[33]

aa) there is no domestic legal regime that establishes or recognizes a collective property title for indigenous or tribal peoples. In the absence of any such recognition, it follows that there is no legal regime in Suriname charged with mediating between the right of the State to appropriate (collective) property in the public interest and the right to collective ownership *per se*.[34]

bb) the State has granted concessions to third parties for forestry activities in the area of the Upper Suriname River and Saramaka territory:[35] The State did not consult

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[30] *See* IACHR, Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans; 2 March 2006; Appendix 1 of the application; par. 240 and previous, for the conclusions of the Commission to this respect.

[31] Forestry Management Act of 1992 (translation); Annex 6 of the application; *see also* testimony presented by the witness Rene Ali Somowapiro during the public hearing that took place on May 9th and 10th, 2007.

[32] *See* IACHR, Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans; 2 March 2006; Appendix 1 of the application; par. 231. The reference is to Forestry Management Law of 1992 (translation).

[33] *See* IACHR, Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans; 2 March 2006; Appendix 1; par. 230 and previous, for the conclusions of the Commission to this respect. *See also*, Declaration of Expert Mariska Muskiet, before the Commission (Hearing no. 49; 119th Period of Sessions. 05.03.06); Annex 12 of the application. *See also* affidavit of Ms. Mariska Muskiet, expert witness, submitted to the Court by the Inter-American Commission on May 1st, 2007.

[34] The Committee for the Elimination of Racial Discrimination observed that over 10 years after the Peace Accord of 1992, Suriname had not adopted an appropriate framework to govern legal recognition of the rights of indigenous and tribal peoples to their communal land, territories, and resources. Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname. CERD/C/64/CO/9/Rev 2. 12 March 2004 (CERD)

[35] *See* Declaration of Saramaka Captain Wazen Eduards, before the Commission (Hearing No. 49; 119th Period of Sessions, 05.03.06); Annex 10 of the application; Declaration of Mr. Peter Poole before the Commission (Hearing No. 49, 119th Period of Sessions, 05.03.06); Annex 11 of the application; *cfr.* Map I, submitted by Peter Poole to the Commission during public hearing (Hearing No. 49; 119th Period of Sessions); Annex 14 of the application; Map II, submitted by Peter Poole to the Commission during public hearing (Hearing No. 49; 119th Period of Sessions. 05.03.06); Annex 15. In its submission of 23 May 2003 before the Commission, the State presented maps showing the territory and the concessions granted. *See also* IACHR. Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans; 2 March 2006; Appendix 1 of the application; par. 216 and previous, for the conclusions of the Commission to this respect. *See also* affidavit of Mr. Peter Poole, expert witness, submitted to the Court by the Inter-American Commission on May 1st, 2007.

the affected people beforehand regarding those activities, nor did it obtain its free and informed consent.[36]

cc) the logging concessions awarded by the State encompass areas that include vital parts of the natural environment which the Saramaka people depend on for their subsistence, including vulnerable soils, the growth of primary forests, and major basins.[37]

dd) logging concessions to private enterprises were operating at the time of presentation of the petition[38] and have continued to operate[39].

ee) A few members of the Saramaka community have obtained forestry concessions from the Government.[40] Within the community it is understood that such a concession is required in order to be able to sell any logs.[41] Felling timber is a

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[36] *See* testimonies presented by witnesses Wazen Eduards, Cesar Adjako, Albert Aboikoni and Rudy Strijk during the public hearing that took place on May 9th and 10th, 2007. *See also* affidavits of Ms. Silvi Adjako and Captain Eddie Fonkie submitted to the Court by the Inter-American Commission on May 1st, 2007

[37] Statement by Mr. G. Huur, a Saramakan, of 7 May 2002, Annex A of petitioner's submission of 15 May 2002; Annex 9 of the application. *See also* Declaration of Saramaka Captain Wazen Eduards, before the Commission (Hearing no. 49; 119th Period of Sessions, 05.03.06); Annex 10 of the application; Map II, submitted by Peter Poole to the Commission during public hearing (Hearing No. 49; 119th Period of Sessions, 05.03.06); Annex 15 of the application. *See also* affidavit of Mr. Peter Poole, expert witness, submitted to the Court by the Inter-American Commission on May 1st, 2007 and testimonies presented by witnesses Wazen Eduards, Cesar Adjako, Albert Aboikoni and expert witness Prof. Richard Price during the public hearing that took place on May 9th and 10th, 2007.

[38] Declaration of Saramaka Captain Wazen Eduards, before the Commission (Hearing no. 49; 119th Period of Sessions, 05.03.06); Annex 10 of the application. *See also* Declaration of Mr. Peter Poole before the Commission (Hearing No. 49, 119th Period of Sessions, 05.03.06); Annex 11 of the application; Map I, submitted by Peter Poole to the Commission during public hearing (Hearing No. 49; 119th Period of Sessions); Annex 14 of the application; Map II, submitted by Peter Poole to the Commission during public hearing (Hearing No. 49; 119th Period of Sessions, 05.03.06); Annex 15 of the application. *See also* affidavit of Mr. Peter Poole, expert witness, submitted to the Court by the Inter-American Commission on May 1st, 2007 and testimonies presented by witnesses Rene Ali Somowapiro and Rudy Strijk during the public hearing that took place on May 9th and 10th, 2007.

[39] *See* Declaration of Saramaka Captain Wazen Eduards, before the Commission (Hearing no. 49; 119th Period of Sessions, 05.03.06); Annex 10 of the application; and testimony presented by witnesses Wazen Eduards, Cesar Adjako, Albert Aboikoni and expert witness Prof. Richard Price during the public hearing that took place on May 9th and 10th, 2007.

[40] In the process before the Commission, the petitioners asserted that the fact that these concessions have been obtained by members of the Saramaka people is consistent with the right of the Saramaka people to use and develop the raw materials within their traditional lands and territory, in accordance with Saramaka customary law, and in order to provide for their subsistence and other needs; and that the Saramaka people are obliged to obtain logging concessions in order to be able to use their own resources freely and to safeguard their ancestral lands from persons who are not members of their community and from the State. The State asserted that some of these concessions have been sublet or in some way transferred to third parties, who are unaware of social relations in the provinces of Suriname, or the role of traditional authorities, but provided no documentary support for this assertion. *See* IACHR, Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans; 2 March 2006; Appendix 1 of the application; par. 207 and accompanying references. *See also* testimonies presented by witnesses Rene Ali Somowapiro and Rudy Strijk during the public hearing that took place on May 9th and 10th, 2007.

[41] See testimony presented by witnesses Cesar Adjako and expert witness Richard Price during the public hearing that took place on May 9th and 10th, 2007.

traditional activity of the Saramaka, both for subsistence and economic reasons, as well as in connection with the transmission of cultural knowledge.[42]

ff) the State has granted concessions to third parties for mining activities in the area of the Upper Suriname River and Saramaka territory.[43] The State did not consult the affected people beforehand regarding those activities, nor did it obtain its free and informed consent.[44]

gg) mining activities have so far not been carried out as a result of concessions awarded by the State.[45]

hh) illegal gold mining is a common practice in Saramaka territory.[46] This has led to mercury contamination in traditional food supply areas.[47]

ii) illegal gold mining is, by definition, not regulated, and is not effectively been subject to State control, although is a situation that the State is aware of.[48]

jj) the forestry concessions awarded by the State in the Upper Suriname River lands have damaged the environment and the deterioration has a negative impact on lands that are within the limits of the territory to which the Saramaka community has a communal property right.[49]

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[42] See testimony presented by expert witness Richard Price during the public hearing that took place on May 9th and 10th, 2007.

[43] Map prepared by the Ministry of Natural Resources. Annex F4 of the original petition. *See also* IACHR, Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans; 2 March 2006; Appendix 1 of the application; par. 216 and previous, for the conclusions of the Commission to this respect.

[44] *See* affidavits of Ms. Silvi Adjako and Captain Eddie Fonkie submitted to the Court by the Inter-American Commission on May 1st, 2007; testimonies presented by witnesses Wazen Eduards, Cesar Adjako and Albert Aboikoni during the public hearing that took place on May 9th and 10th, 2007.

[45] See IACHR, Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans; 2 March 2006; Appendix 1 of the application; par. 216 and previous, for the conclusions of the Commission to this respect.

[46] *See* IACHR, Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans; 2 March 2006; Appendix 1; par. 212 and previous, for the conclusions of the Commission to this respect.

[47] Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname. CERD/C/64/CO/9/Rev.2, 12 March 2004 (CERD); para. 21. Mercury appears to be used in the small-scale mining carried out by the so-called "*garimpeiros*."

[48] See IACHR, Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans; 2 March 2006; Appendix 1 of the application; par. 217 and previous, for the conclusions of the Commission to this respect.

[49] See Professor Richard Price, "Report in support of Provisional Measures", 15 October 2003 (mimeograph – restricted circulation); Annex 2 of the application. This report documents the threat of irreparable destruction of the means of subsistence, spiritual assets, and culture of the Saramaka. See also the Declaration of Mr. Peter Poole before the Commission (Hearing No. 49, 119th Period of Sessions, 05 03 06); Annex 1 of the application, in which he presented maps and photographs of the effects of the three concessions operating in Saramaka territory. *See also* Statement by Mr. G. Huur, a Saramakan, of 7 May 2002, Annex A of petitioner's submission of 15 May 2002; Annex 9 of the application, in which he declared having been prevented from hunting and fishing by a Chinese forestry enterprise. *See also* testimonies presented by witnesses Wazen Eduards and Cesar Adjako, and expert witness Prof. Richard Price during the public hearing that took place on May 9th and

kk) the rights of indigenous and Maroon peoples, such as the Saramaka, to their lands, territories, resources, and cultural identity are not explicitly recognized or guaranteed in the 1987 Constitution and, for that reason, there are no provisions contemplating judicial recourse if they are violated.[50]

ll) the Saramaka people have lodged official complaints with the President of Suriname, and have received no reply from the Office of the President[51].

V. CONSIDERATIONS OF LAW

A. Preliminary considerations

14. The Commission reiterates that in determining the human rights norms, principles and sources applicable in the instant case, it must be taken into account that the claims relate to persons who identify themselves as members of a community forming part of a tribal people and who live in a specific territory, that is to say, the Saramaka community which inhabits the region of the Upper Suriname River. Accordingly, the Commission maintains that the jurisprudence developed by the organs of the Inter-American System concerning indigenous peoples and their relationship to the land applies to the instant case, and that pursuant to those principles the Saramaka clans must be understood to hold rights to communal property to their land.

15. Further, according to the jurisprudence of the Inter-American System, the provisions of its governing instruments, including the American Convention, should be interpreted and applied in the context of developments in the field of international human rights law since those instruments were first composed with due regard to other relevant rules of international law applicable to member states against which complaints of human rights violations are properly lodged.[52] This approach is also reflected in Article 29(b) of the American Convention which provides that "[n]o provision of this Convention shall be interpreted as: [...] b. restricting the enjoyment or exercise of any right or freedom recognized

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10th, 2007; and affidavits of Ms. Silvi Adjako and Captain Eddie Fonkie submitted to the Court by the Inter-American Commission on May 1st, 2007

[50] *See* IACHR, Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans; 2 March 2006; Appendix 1 of the application; par. 212 and previous, and 243 and previous. *See also*, Declaration of Expert Mariska Muskiet, before the Commission (Hearing no. 49; 119th Period of Sessions, 05.03.06); Annex 12 of the application. *See also* affidavit of Ms. Mariska Muskiet, expert witness, submitted to the Court by the Inter-American Commission on May 1st, 2007.

[51] *See* affidavit of Ms. Mariska Muskiet, expert witness, submitted to the Court by the Inter-American Commission on May 1st, 2007; affidavit of Captain Eddie Fonkie submitted to the Court by the Inter-American Commission on May 1st, 2007; testimonies presented by witnesses Wazen Ecuards and Cesar Adjako during the public hearing that took place on May 9th and 10th, 2007

[52] See I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights; para. 37; I/A Court H.R., The Right to Information on Consular Assistance In the Framework of the Guarantees of the due Process of Law; para. 114 (endorsing an interpretation of international human rights instruments that takes into account developments in the corpus juris gentium of international human rights law over time and in present-day conditions; Report N° 52/02, Case N° 11.753, Ramón Martinez Villareal (United States), Annual Report of the IACHR 2002 [hereinafter "Martinez Villareal Case"], para. 60.

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."

16. In the context of the Inter-American System, both the Court and the Commission have recognized, promoted and protected the rights of the indigenous peoples of the Hemisphere. In the resolution the Commission adopted in 1972, for instance, on "Special Protection for Indigenous Populations – Action to Combat Racism and Racial Discrimination," the Commission proclaimed that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states."[53] This concept of special protection has also been considered in a series of country reports and in individual reports approved by the Commission, and it has been recognized and applied in connection with numerous rights and freedoms of the American Convention, including the right to life, the right to humane treatment, the right to judicial protection, the right to a fair trial, and the right to property.[54] In its 1997 report on the human rights situation in Ecuador, the Commission declared that

> [w]ithin international law generally, and Inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival -- a right protected in a range of international instruments and conventions.[55]

17. The Commission's criterion in recognizing and giving effect to particular protections in the context of the human rights of indigenous peoples is consistent with developments in the field of international human rights law in a broader sense. The Court has likewise recognized and applied special measures to guarantee the human rights of the indigenous[56], as have the International Labor Organization,[57] the United Nations through its

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[53] Resolution on "Special Protection for Indigenous Populations. Action to Combat Racism and Racial Discrimination," cited in IACHR, IACHR; Yanomami Case, Report 12/85, 1984-1985 Annual Report; para 8.

[54] See, for instance IACHR; Yanomami Case, Report 12/85, 1984-1985 Annual Report; IACHR, Report on the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, Doc. 10 rev. 3 (November 29, 1983); IACHR, Second and Third Reports on the Situation of Human Rights in Colombia 1993, 1999; Draft American Declaration on the Rights of Indigenous Peoples, approved by the IACHR, 95th regular session, February 26,1997; Annual Report of the IACHR 1997, Chapter II.

[55] IACHR, Report on the Situation of Human Rights in Ecuador, OAS/Ser.L/V/II.96 Doc 10 rev 1, April 24, 1997, Chapter IX [hereinafter, "Ecuador Report"].

[56] See, for example: I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of 31 August 2001. Series C No. 79; Plan de Sanchez; I/A Court H.R. Case of the Moiwana Community vs. Suriname. Judgment of 15 June 2005. Series C No 124; I/A Court H.R. Case of the Yakye Axa Indigenous Community vs. Paraguay. Judgment of 17 June 2005. Series C No. 125; I/A Court H.R. Yatama Case vs. Nicaragua. Judgment of 23 June 2005. Series C No. 127.

[57] *See, for example*, ILO Convention No. 169, *supra*.

Human Rights Committee,[58] the Committee for the Elimination of All Forms of Racial Discrimination,[59] and the domestic legal systems of States.[60]

18. Accordingly, in its submissions in the instant case the Commission referred to the pertinent provisions of the American Convention in light of current developments in the field of international human rights law, including development relating to indigenous peoples, as evidenced by treaties, custom and other relevant sources of international law.

19. In this respect, a study of treaties, legislation, and international jurisprudence reflects an evolution since the beginning of the 20th century of human rights provisions and principles applicable to the situation of indigenous and tribal peoples.[61]

20. The Commission therefore submits that, in pronouncing on the violations by the State of Suriname of the American Convention to the detriment of the Saramaka people, the Court should attach special consideration to the particular principles of international human rights law governing the individual and collective interests of indigenous and tribal peoples, including consideration of any special measure that may be appropriate and necessary to assert those rights and interests.

B. Right to property (Article 21 of the Convention)

21. Article 21 of the American Convention establishes:

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

22. In its Application and oral arguments, the Commission has presented a series of interrelated conclusions with respect to the violation of this right in the present case. First, the Saramaka people are not accorded formal juridical recognition as a collectivity, and there are no provisions under Surinamese law that provide for collective title to traditional lands to vest in a tribal people. Accordingly, they lack legal standing to assert the right, and the right

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[58] *See, for example,* United Nations Human Rights Committee, General Comment 23, PIDCP, Article 27, UN Doc. HRI/GEN/1/Rev.1, 38 (1994) [hereinafter, "General Comment 23 of the UN Human Rights Committee], para. 7.

[59] *See, for example,* CERD General Recommendation XXIII (51) regarding Indigenous peoples (August 18, 1997).

[60] For a compendium of domestic laws governing the rights of indigenous peoples in numerous OAS member states, see IACHR, International and National Law Sources for the Draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser.L/V/II.110 Doc. 22 (March 1, 2001).

[61] For a historical overview of the evolution of international human rights with regard to indigenous peoples, see IACHR, *The Human Rights Situation of Indigenous Peoples in the Americas*, OEA/Ser.L/V/II.108, Doc. 62 (October 20, 2000), pp. 21-25.

is not recognized in any case under domestic law. The existing situation of de facto recognition of traditional territories means that their links to their lands are subordinated to any property title recognized as a matter of domestic law, as well as to undefined and non-reviewable determinations of general interest.

23. The State has permitted the granting and exploitation of different kinds of concessions by non-Saramaka within these traditional lands absent any form of consultation or consent with the affected Saramaka. These concessions are granted and exploited without any consideration for traditional forms of land use and tenure or the customary law of the Saramaka people. The resources are exploited not to benefit the Saramaka who have held the land for centuries, but rather to exclude and even harm them.

1. The right to property and tribal and indigenous peoples in the context of contemporary international human rights law

24. In assessing the nature and content of the right to property in Article 21 of the American Convention, in the context of the case at hand the Commission submits that certain aspects in the evolution of the international protection of the human rights of tribal and indigenous peoples are particularly relevant. First, international law now recognizes that indigenous and tribal communities frequently exercise rights and freedoms collectively, in the sense that those rights and freedoms can only be guaranteed when the guarantee concerns a community as a whole.[62] The right to property has been recognized as one such collectively exercised right. As noted, the State has acknowledged that the Saramaka people live collectively in communities and has recognized its collective cultural identity in connection with the land.

25. It is, furthermore, significant that the organs of the inter-American human rights system have specifically recognized that indigenous peoples enjoy a special relationship with the land and resources they have traditionally occupied and used, whereby these lands and resources are regarded as the property and enjoyment of the indigenous community as a whole[63] and the use and enjoyment of the land and its resources form an integral part of the physical and cultural survival of the indigenous communities and of the fulfillment of their human rights in the broader sense.[64] As the Court observed in its judgment in the case of the (Sumo) Community of Awas Tingni v. Nicaragua:

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[62] See the IACHR, Report on Merits No. 99/99 on the Case of Mary and Carrie Dann; 27 September 1999; para. 128, which cites the IACHR, *The Human Rights Situation of the Indigenous Peoples of the Americas*. 2000. OEA/Ser.L/V/II/108, Doc. 62 (October 20, 2000), page. 125; IACHR; Yanomami Case. Report 12/85, 1984-1985 Annual Report. *See also* ILO Convention N° 169, *supra*. Article 13 (which establishes that "In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.").

[63] See, for example, I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of 31 August 2001. Series C No. 79; para. 149 (which observes that" Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.")

[64] The Commission has noticed, for instance, that continued use of traditional collective systems for controlling and using territory are frequently essential for individual and collective wellbeing and, indeed, for the survival of indigenous peoples; and that this control over the land has to do with their capacity to obtain life-sustaining resources and the geographical space needed for the cultural and social reproduction of the group. Ecuador report, *supra*, page 115.

> [f]or indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[65]

26. In its reports on individual petitions and on the overall human rights situation in member states, and in precautionary measures, the Commission has pronounced on the need for states to adopt measures designed to restore, protect, and preserve the rights of indigenous peoples to their ancestral lands.[66] It has also maintained that respect for the collective rights to property and possession of the indigenous peoples vis-à-vis their lands and ancestral territories constitutes an obligation of the member states of the OAS and that the states incur international liability if they fail to meet that obligation.[67] According to the Commission, the right to property set forth in the American Convention must be interpreted and applied in connection with indigenous peoples with due consideration for the principles relating to protection of traditional forms of property and cultural survival and of the rights to land, territories, and natural resources.[68]

27. The Court has adopted a similar criterion with regard to the right to property in connection with indigenous peoples, in recognizing the communal form of indigenous land tenure as well as the special relationship of an indigenous people with its land. According to the Court,

> [a]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with

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[65] I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of 31 August 2001. Series C No. 79; para. 149.

[66] See, for example, IACHR; Yanomami Case, Report 12/85, 1984-1985 Annual Report, *supra*; IACHR, Report on Merits No. 99/99 on the Case of Mary and Carrie Dann; 27 September 1999.

[67] See, for example, IACHR, Report on Merits No. 99/99 on the Case of Mary and Carrie Dann; 27 September 1999.

[68] See IACHR, Report on Merits No. 99/99 on the Case of Mary and Carrie Dann; 27 September 1999; paras. 129-131, which cite the Draft American Convention on the Rights of Indigenous Peoples, *supra*, Article XVIII; Ecuador report, *supra*; I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of 31 August 2001. Series C No. 79; paras. 134-139; PIDCP, Article 27; PIDCP, General Comments 23, *supra*, para. 7; CERD General Recommendation XXIII (51) regarding the indigenous peoples (August 18, 1997) in which the states parties to the Convention on Racial Discriminating are called upon to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources."); ILO Convention No. 169 *supra*, Article 14(1) (which states that: The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect."); Article 15(1) (which establishes that "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources").

> the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.[69]

28. On numerous occasions the Court has emphasized that the close relationship between indigenous peoples and their land must be recognized and understood as the fundamental basis of their culture, spiritual life, integrity, economic survival and their preservation and transmission to future generations.[70] It has added that the culture of members of the indigenous communities corresponds to a special way of life, of being, seeing, and acting in the world, based on their close ties to their traditional territories and the resources found therein, not just because these are their principal means of subsistence, but also because they constitute an integral part of their vision of the cosmos, religiosity, and, consequently, their cultural identity.[71]

29. The organs of the inter-American system of human rights have therefore recognized that rights to property are not restricted to the property interests already recognized by states or defined in domestic laws, but have an autonomous significance in international human rights law.[72] Accordingly, the jurisprudence of the system has recognized that the rights to property of the indigenous peoples are not exclusively defined by the rights assigned under the State's formal legal system, but also include the indigenous communal property derived from and founded upon custom and indigenous tradition. Based on this criterion, the Court has held that:

> indigenous peoples' customary law must be especially taken into account for the purpose of [defining indigenous property rights]. As a result of customary practices, possession of the land should suffice for indigenous communities

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[69] I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of 31 August 2001. Series C No. 79; para. 149; *see also* I/A Court H.R., Case of the Indigenous Community Sawhoyamaxa. Judgement of March 29, 2006. Series C No. 146, para. 120.

[70] I/A Court H. R., Case of the Indigenous Community Sawhoyamaxa. Judgement of March 29, 2006. Series C No. 146, para 116; I/A Court H.R., Case of the Plan de Sanchez Massacre vs. Guatemala. Reparations (art. 63(1) American Convention on Human Rights). Judgment of 19 November 2004. Series C. No. 116; para. 85; and I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of 31 August 2001. Series C No. 79; para. 149; I/A Court H.R. Case of the Yakye Axa Indigenous Community vs. Paraguay. Judgment of 17 June 2005. Series C No. 125; para. 131.

[71] I/A Court H. R., Case of the Indigenous Community Sawhoyamaxa. Judgement of March 29, 2006. Series C No. 146, para. 118; I/A Court H.R., Case of the Yakye Axa Indigenous Community vs. Paraguay. Judgment of 17 June 2005. Series C No. 125; para. 135.

[72] The European Court of Human Rights has applied a similar interpretation of the concept of "possessions" in the context of Article 1 of Protocol N°1 of the European Convention on Human Rights. See Matos E Silva, Ltd v. Portugal (1997) 24 E.H.R.R. 573. The Court declared that "the notion of "possessions" in Article 1 of Protocol N° 1 has an autonomous meaning. In the present case the applicants' unchallenged rights over the disputed land for almost a century and the revenue they derive from working it may qualify as "possessions" for the purposes of Article 1." *See also* Latridis v. Greece (1999) E.C.H.R. 31107/96 Hudoc REF00000994, of March 25, 1999 (in which interests are asserted in connection with the possession and running of a movie theatre over 11 years, even though under domestic legislation there was a dispute over the title to the movie theatre); The Holy Monasteries v. Greece, (1995) 20 E.H.R.R. 1 (in which rights to property are recognized on the basis of occupation over centuries).

> lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.[73]

30. This interpretative approach is supported by the language of other instruments and other international deliberations that constitute new indications of international views of the incidence of the traditional land tenure system on modern human rights protection systems.[74]

31. HRC General Comment No. 23 touches on land rights with reference to indigenous rights:

> with regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[75]

32. The organs of the inter-American system attach special importance to protection of the right of indigenous peoples to own their ancestral territories because its effective protection implies not only protection of an economic unit, but protection of the human rights of a collective unit whose economic, social, and cultural development is based on its relation to the land. The Commission has long argued that protecting the culture of tribal peoples includes preservation of factors related to the organization of production, which includes, *inter alia*, the question of ancestral and communal lands.[76]

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[73] I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of 31 August 2001 Series C No. 79; para. 151.

[74] For example, Convention Nº 169 of the International Labour Organization on the rights of indigenous and tribal peoples, asserts the rights of the indigenous and tribal peoples to ownership and possession of the lands they traditionally occupy and requires governments to safeguard those rights and provide appropriate mechanisms for solving their land disputes. Moreover, the Draft American Declaration on the Rights of Indigenous Peoples and the Draft United Nations Declaration on the Rights of Indigenous Peoples expressly or implicitly assert the rights of the indigenous peoples to possess, develop, control, and use the lands and resources that they have traditionally possessed, or occupied, and otherwise used. Furthermore, Article XI of the CARICOM Charter of Civil Society (adopted by the CARICOM states on February 19, 1997) also obliges member states -- including Suriname -- to "recognize the contribution of the indigenous peoples to the development process and to undertake to continue to protect their historical rights and respect the culture and way of life of these peoples."

[75] General Comment No. 23: The Rights of Minorities (Art. 27) 08/04/94, CCPR/C/21/Rev.21/Add.5, para. 7.

[76] Miskito Case, *supra*, 81, Part II, para. 15. See also the IACHR; Yanomami Case, Report 12/85, 1984-1985 Annual Report; 24, 431; Ecuador Report, *supra*, 103-4.

2. **The right to property and traditional territory of the Saramaka people**

33. In the context of the provisions and principles outlined above, the Commission submits to the Court that the Saramaka people of the Upper Suriname River enjoy a right to property in accordance with Article 21 of the Convention, with respect to the lands, territories, and resources it has traditionally occupied and used.

34. As indicated above, the Commission has submitted that, based on the information available, the members of the Saramaka communities constitute a tribal people, whose ancestors have inhabited this region since the XVII[th] century, when Suriname was a Dutch colony.

35. Also in support of its position, the Commission notes that both in the proceedings before it and before the Court, the State accepted that the Saramaka people have historically inhabited the territory of the Upper Suriname River, but applied Surianme's legal and constitutional framework to defend its position that the Saramaka people do not have property rights *per se*, but rather just a privilege or permission to use and occupy the lands at the discretion of the State. This position appears o be echoed in Suriname's primary legislation, which provides for respect for the customary rights of the indigenous and the Maroons, unless they conflict with the 'general interest'. It is not apparent, however, how this general interest is balanced, if at all, with these customary indigenous and tribal 'privileges' or rights, particularly in respect to the grant of logging and mining concessions that may be exercised by third parties over lands and territories used and occupied by the Saramaka people.

36. The Commission also notes that, in its concluding observations on Suriname in March 2004, the Committee for the Elimination of Racial Discrimination observed that over 10 years after the Peace Accord of 1992, Suriname had not adopted an appropriate framework to govern legal recognition of the rights of indigenous and tribal peoples to their communal land, territories, and resources.[77]

37. In addition, the Commission relies upon the general acknowledgement by the State of a very longstanding presence of the Saramaka people in the Upper Suriname River region, which the Commission submits is proof of lasting ties between the Saramaka people and the lands of the Upper Suriname River. That view is also supported by experts in the traditional and modern land use practices of the Saramaka people, who confirm that this people, through its farming, land tenure, and other systems has, continuously and over a very long period of time, occupied vast areas of land, over and above the specific villages.

38. Consequently, in the Commission's submission, there is substantial evidence that, through agriculture, hunting, fishing, and other traditional ways of using the land and resources, the Saramaka people have occupied large areas of land in the Upper Suriname River region, over and above particular villages, since colonial times, and that the dates on which they settled in specific Saramaka villages are not in themselves what determines the existence of communal property rights of the Saramaka to those lands.

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[77] Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname CERD/C/64/CO/9/Rev 2, 12 March 2004 (CERD), para. 16.

39. In this regard, the European Court of Human Rights has said that:

> it is not required to decide whether or not in the absence of title deeds the applicants have rights of property under domestic law. The question which arises under this head is whether the overall economic activities carried out by the applicants constituted "possessions" coming within the scope of the protection afforded by Art.1 of Protocol No.1. In this regard, the Court notes that it is undisputed that the applicants all lived in Boydas village until 1994. Although they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter. The Court further notes that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling. Accordingly, in the Court's opinion, all these economic resources and the revenue that the applicants derived from them may qualify as "possessions" for the purposes of Art.1.[78]

40. Based on the arguments and evidence outlined above, the Commission submits that the Saramaka people have, in accordance with current international law, a right to communal ownership of the land it currently inhabits in the Upper Suriname River region. The Commission also submits that these rights derive from the use and occupation of the territory by the Saramaka people: a use and occupation that the parties agree has existed for centuries, ever since Suriname was a Dutch colony.

41. The Commission submits that this communal right to property of the Saramaka people qualifies for the protection of Article 21 of the American Convention, interpreted in accordance with the aforementioned principles regarding the situation of tribal and indigenous peoples, including the obligation to adopt special measures to guarantee recognition of the collective interest of indigenous peoples in the occupation and use of their traditional lands and their resources.[79] In this respect, the Commission contends that the communal right to property of the Saramaka people has a significance and autonomous foundation in international law.

42. Further, the Commission submits that parallel to the existence of a communal property right of the Saramaka people, according to Article 21 of the Convention, the State has the corresponding obligation to recognize and guarantee the enjoyment of this right. Accordingly, the State must adopt appropriate measures to protect the right of the Saramaka people to its land.[80] In the Commission's submission, this necessarily includes conducting

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[78] E.C.H.R., *Dogan v. Turkey* (2005) 41 E.H.R.R. 15 (June 29, 2004), para. 139.

[79] See, similarly, IACHR, Report on Merits No. 99/99 on the Case of Mary and Carrie Dann; 27 September 1999.

[80] In its judgment on the Awas Tingni Case, the Inter-American Court ruled that the fact that the State did not define the borders or effectively demarcate the collective assets of the Mayagna community of Awas Tingni created a climate of permanent uncertainty among the members of this community in as much as they have no certainty as to the geographical extension of their communal goods, and hence do not know the extent to which they can use and freely enjoy them. I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of 31 August 2001. Series C No. 79.

effective and informed consultations with the Saramaka people regarding possible uses of its territory and taking into account in that process the traditional forms of land use and customary land tenure systems.

43. To further illustrate this position, in the *Moiwana Case*, the Court concluded that Suriname had violated the right of the members of the community to communal use and enjoyment of their traditional property and it therefore considered that the State had violated Article 21 of the American Convention, in conjunction with Article 1.1 of the same, to the detriment of the members of the Maroon community. In substantiating its conclusion, the Court reasoned as follows:

> [t]he parties to the instant case are in agreement that 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.
>
> Nevertheless, this Court has held 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 and consequent registration.
>
> That conclusion was reached upon considering the unique and enduring ties that bind indigenous communities to their ancestral territory. The close relationship of an indigenous community with its land must be recognized and understood as the fundamental basis of its culture, spiritual life, integrity, and economic survival. For such peoples, their communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists of material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to future generations.
>
> In this way, the Moiwana community members, a N'djuka tribal people, possess an 'all-encompassing relationship' to their traditional lands, and their concept of ownership regarding that territory is not centered on the individual, but rather on the community as a whole. Thus, this Court's holding with regard to indigenous communities and their communal rights to property under Article 21 of the Convention must also apply to the tribal Moiwana community members: their traditional occupancy of Moiwana Village and its surrounding lands – which has been recognized and respected by neighbouring N'djuka clans and indigenous communities over the years (*supra* paragraph 86(4)) –, however, may only be determined after due consultation with said neighbouring communities *(infra* paragraph 210).

> Based on the foregoing, the Moiwana community members may be considered the legitimate owners of their traditional lands; as a consequence, they have the right to the use and enjoyment of that territory.[81]

44. In the instant case, the Commission reiterates that, according to the evidence before the Court, the State has not established any legal mechanism for clarifying and protecting the property rights of the Saramaka people with regard to their territory. In that regard, the evidence indicates that the current system for land titling, leasing, and granting permits under Suriname law does not either recognize or adequately protect the communal rights of the Saramaka people to the land they have traditionally used and occupied: the rules governing private property do not recognize or take into account the traditional collective system under which the Saramaka people uses and occupies its traditional lands. Formal ownership of the lands possessed by the Saramaka people resides with the State and there are no provisions recognizing or protecting the communal interests of the Saramaka in those lands. Further, there is no legal framework for regulating those interests or balancing them against the prerogative of the State to subordinate them to a clearly defined public or general interest. The Commission submits that the imperative for such a framework is inherent in the provisions of Article 21 when read in conjunction with Articles 1 and 2 of the American Convention.

45. Likewise, the Commission submits that the State has not established a mechanism in domestic law for recognizing and protecting the territory of the Saramaka people, in full and effective consultation with the Saramaka people and in accordance with its customary law, values, habits, and customs.

46. Consequently, the Commission requests the Court to declare that the State of Suriname violated the right to property established in Article 21 of the American Convention on Human Rights, in conjunction with the non-compliance of the general obligations enshrined in Articles 1(1) and 2 of the same.

3. Mining and forestry concessions in the area of the Upper Suriname River

47. The Commission recognizes the importance of economic development for the prosperity of the peoples of the Hemisphere. As the Inter-American Democratic Charter proclaims: "the promotion and observance of economic, social, and cultural rights are inherently linked to integral development, equitable economic growth, and to the consolidation of democracy in the status of the Hemisphere."[82] At the same time, development activities must be accompanied by appropriate and effective measures to guarantee that they are not conducted at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous and tribal communities, or at the expense of the environment on which they depend for their physical, cultural, and spiritual wellbeing.[83]

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[81] I/A Court H.R. Case of the Moiwana Community vs. Suriname. Judgment of 15 June 2005. Series C No.124; paras. 130, 131, 133 and 134.

[82] Inter-American Democratic Charter, approved by the OAS General Assembly at the special session held in Lima, Peru, on September 11, 2001, Article 13.

[83] See also the Report on the Situation of Human Rights in Ecuador (OEA/Ser.L/V/II.96 Doc. 10 rev. 1 of April 24, 1997).

48. The Commission has observed that "[t]he norms of the Inter-American System neither prevent nor discourage development; rather they require that development take place under conditions that respect and ensure the human rights of the individuals affected."[84] In this respect, in 1997, the IACHR recommended to one OAS Member State that it "ensure that the exploitation of natural resources found on indigenous lands should be preceded by appropriate consultations with and, to the extent legally required, consent from the affected indigenous communities. The State must also ensure that such exploitation does not cause irreparable harm to the religious, economic or cultural identity and rights of the indigenous communities."[85]

49. In relation to this position, the Commission notes that, in a complaint involving the Ogoni people and their communities in the State of Nigeria,[86] the African Commission on Human and Peoples' Rights addressed issues related to the impact of resource exploitation activities on the indigenous community. In that case, it was argued that the Nigerian Government caused grave environmental harm to the Ogoni people's rights to property and to their own culture by participating in irresponsible oil exploration activities in their communities and by allowing private oil companies to destroy the homes, villages, and food sources of the Ogoni people. In concluding that the State of Nigeria was guilty of violating several articles of the African Charter on Human and Peoples' Rights (the Banjul Charter),[87] including the right to property protected by Articles 14[88] and 21[89] of that instrument, the

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[84] Report on the Situation of Human Rights in Ecuador (OEA/Ser.L/V/II.96 Doc.10 rev. 1, April 24, 1997), Chapter VIII.

[85] Report on the Human Rights Situation in Colombia, (OEA/Ser.L/V/II.102 Doc. 9 rev.1, February 26, 1999), Chapter X (j) (3).

[86] Communication N° 155/96, African Commission on Human and Peoples' Rights, 30th ordinary session, held in Banjul, Gambia on October 13 to 27, 2001 [hereinafter, the "Ogoni Case").

[87] 27 June 1981, 21 I.L.M. 59 (1981).

[88] Article 14 establishes: "The right to property shall be guaranteed. It may only be encroached upon in the interest of the public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

[89] Article 21 of the African Charter establishes that:

> 1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
>
> 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
>
> 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
>
> 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

Commission indicated that it did not "wish to fault governments that are labouring under difficult circumstances to improve the lives of their people,"[90] but at the same time emphasized that:

> [t]he intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities.[91]

50. The State awarded forestry and mining concessions to third parties so that they could carry out activities in Saramaka territory. Forestry concessions have been and continue to be exploited. Further, illegal gold mining is practiced in Saramaka territory.

51. Regarding the illegal gold mining activities in particular, the Commission notes that the State in its submissions before the Commission, acknowledged that most of these activities are not regulated and have not effectively been subject to State control, that damage is being done to the environment by the use of mercury, and that a joint project with the Brazilian government is being processed with a view to addressing the issue of mercury use in gold mining and to ensuring that "the least possible damage is done to the environment."[92]

52. With respect to the natural resources found in the territories of indigenous peoples, this Court has established that the close ties of the indigenous peoples with their traditional territories and the natural resources related to their culture that are found therein, as well as the intangible elements arising from them must be safeguarded under Article 21 of the American Convention. On other occasions, the Court has considered that the term "property" used in Article 21 concerns "material objects that may be appropriated, and also any right that may form part of a person's patrimony; this concept includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value."[93]

53. The Commission contends in this respect that Article 21 of the Convention does not preclude the exploration and exploitation of natural resources in indigenous

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> 5 States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources

[90] Communication Nº 155/96, African Commission on Human and Peoples' Rights, 30th ordinary session, held in Banjul, Gambia on October 13 to 27, 2001; para. 69

[91] Communication Nº 155/96, African Commission on Human and Peoples' Rights, 30th ordinary session, held in Banjul, Gambia on October 13 to 27, 2001; para. 69

[92] See the submission of the State before the Commission at the 121st session, page 9, para. 18.

[93] I/A Court H. R., Case of the Indigenous Community Sawhoyamaxa. Judgement of March 29, 2006. Series C No. 146, para. 121; I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of 31 August 2001. Series C No. 79; para. 144; Ivcher; para. 122; I/A Court H.R. Case of the Yakye Axa Indigenous Community vs. Paraguay. Judgment of 17 June 2005. Series C No. 125; para. 137.

territories. However, in this case, the State did not consult the affected people beforehand regarding those activities, nor did it obtain their free and informed consent.

54. Furthermore, the State did not regulate those activities or effectively supervise the way they would be carried out, all of which violates the right to property established in Article 21 of the American Convention, to the detriment of the Saramaka people.

55. In this regard, Article 8 of the Convention on Biological Diversity, which has been ratified by 188 countries, including Suriname, affirms that "[e]ach contracting party shall, as far as possible and as appropriate:

> subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of *indigenous and local communities* embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. (emphasis added).

56. Further, it may be noted that the African Commission and domestic courts in Canada and South African have ruled that indigenous communities' land rights encompass the natural resources therein. However, the African Commission and the Canadian court recognized that the communities' rights to both the land and the natural resources were not unconditional.[94] Only the South African Constitutional Court clearly affirmed the right of an indigenous community to the mineral resources of its lands, citing a domestic law that required land rights to be returned to their original owners when they had been dispossessed by racially discriminatory policies.[95]

57. Finally, as regards the environmental damage caused by the concessions, the Commission submits that, according to the evidence presented to the Court, the forestry concessions awarded by the State in the Upper Suriname River lands have damaged the environment and the deterioration has had a negative impact on lands that are within the limits of the territory to which the Saramaka community has a communal property right. The Commission considers that the State's failure to put in place adequate safeguards, supervise or control the concessions, or ensure that the logging concessions would not cause major damage to Saramaka lands and communities have contributed in important part to this negative impact.

58. Accordingly, the Commission submits that the State's failure to comply with its obligation to respect the communal right of the Saramaka people to ownership of the land it has traditionally used and occupied has been exacerbated by the environmental damage by some forestry concessions awarded in these lands, which in turn have had a damaging impact on the members of such communities.

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[94] The *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (2001), African Commission on Human and People's Rights, Communication 155/96; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1997 CanLII 302 (S.C.C.).

[95] *Alexkor Ltd. And the Government of South Africa v. Richtersveld Community and Others*, CCT 19/03 (14 October 2003)

59. For these reasons, the Commission requests the Court to declare that the State of Suriname has violated Article 21 of the American Convention to the detriment of the Saramaka people.

B. Right to Judicial Protection (Article 25 of the Convention)

60. Article 25 of the American Convention establishes that

> [e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
>
> [... and that] State Parties undertake:
>
> a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
> b. to develop the possibilities of judicial remedy; and
> c. to ensure that the competent authorities shall enforce such remedies when granted.

61. Article 25(1) of the Convention establishes, in broad terms, the obligation of States to afford all persons subject to their jurisdiction effective judicial recourse against acts that violate their fundamental rights. It also establishes that the guarantee established therein applies not only to the rights contained in the Convention, but also to those recognized in the Constitution or the law.[86]

62. In this connection, State parties to the Convention are bound to provide effective judicial remedies to victims of human rights violations safeguarding the individual from arbitrary exercise of public authority is the paramount objective of international protection of human rights.

63. The inexistence of effective domestic recourse renders persons defenseless. In this connection, the Court has declared that

> [t]he inexistence of an effective recourse against the violation of the rights recognized by the Convention constitutes a transgression of the Convention by the State Party in which such a situation occurs[87].

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[86] I/A Court H.R., Case of Tibi v. Ecuador. Judgment of September 7, 2004; para. 130; I/A Court H.R., Case of Cantos v. Argentina. Judgment of November 28, 2002; para. 52; I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of 31 August 2001. Series C No. 79; para. 111.

[87] I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of 31 August 2001. Series C No. 79; para. 113; Ivcher; para. 136; I/A Court H.R. Yatama Case vs. Nicaragua. Judgment of 23 June 2005. Series C No. 127; para. 166. In connection to the Commission's position see, *for example*, Case 11.233, Report Nº 39/97, Martin Javier Roca Casas (Peru), 1998 Annual Report of the IACHR, paras. 98, 99

64. According to these principles, the non-existence of effective recourse in the case of violations of rights recognized by the Convention is in itself a violation of the Convention by the State in which such remedy does not exist.[98]

65. As mentioned above, Suriname's legislation regarding State-owned lands consists of the decrees of the military era, which establish that the customary "rights" of the indigenous and the Maroons to land shall be respected unless they conflict with the "general interest." The "general interest" exception with respect to the rights of the indigenous and Maroon communities could include any action that the State deems in the public interest or any project in a development plan. The effect of this provision is to substantially limit the fundamental rights of the indigenous and Maroon peoples to their land *ab initio*, in favor of an eventual interest of the State that might compete with those rights.

66. The Commission has submitted evidence to the Court, described above, that mining, forestry, and other activities classified as being in the general interest are exempted from the requirement to respect customary rights, and that this classification constitutes a political decision that cannot be challenged in Court. The Commission contends, therefore, that what this does in effect is to remove land issues from the domain of judicial protection.

67. Further, the rights of indigenous and Maroon peoples, such as the Saramaka, to their lands, territories, resources, and cultural identity are not explicitly recognized or guaranteed in the 1987 Constitution[99] and, for that reason, there are no provisions contemplating judicial recourse if they are violated.

68. These limitations notwithstanding, the Saramaka people have lodged official complaints with the President of Suriname, without receiving a reply. The Commission submits, therefore, that these "remedies", in their current form, are intrinsically ineffective for guaranteeing the rights of the Saramaka, given the balancing of interests that the State has to establish in considering land issues and their rights.

69. In this connection, as Court has previously held, the State's obligation to provide judicial recourse is not met by the mere existence of courts or formal procedures, or even by the possibility of resorting to the courts. Rather, the State has to adopt affirmative measures to guarantee that the recourses it provides through the justice system are "truly effective in establishing whether there has been a violation of human rights and in providing redress."[100]

70. In accordance with Article 25 of the American Convention, the State has the duty to adopt positive measures to guarantee the judicial protection of the individual and

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[98] I/A Court H.R., Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights); paras. 27, 28.

[99] According to Article 41 of the Constitution of Suriname: "Natural riches and resources are property of the nation and shall be used to promote economic, social and cultural development. The nation has the inalienable right to take complete possession of its natural resources in order to utilize them to the benefit of the economic, social and cultural development of Suriname."

[100] See, for example, I/A Court H.R., Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights); para. 24.

collective rights of indigenous communities. With respect to the right to collective property, the State is required to provide in its judicial regime suitable and effective judicial remedies which provide protections in accordance with the legal and social dimension of a violated right. These remedies should offer an adequate procedural framework to deal with the collective dimension of the conflict, conferring on the affected group the possibility of claiming, through its representatives or authorized persons, the guaranteed right to participate in the process and to obtain compensation.

71. Based on the foregoing considerations, the Commission reiterates its request to the Court that it declare that there are no effective domestic remedies available to the Saramaka people for the protection of their rights under Article 21 of the American Convention and, consequently, the State of Suriname is responsible for having violated the right to judicial protection established in Article 25 of this instrument.

C. Obligation to respect rights and domestic legal effects (Articles 1(1) and 2 of the Convention)

72. Article 1 of the American Convention provides that the State parties

> undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

73. Article 2 establishes that:

> [w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

74. In complying with the general obligation to respect and guarantee fundamental rights, the States are obliged to "take affirmative action, avoiding taking measures that restrict or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right."[101]

75. The Court has also declared that:

> [i]n international law, customary law establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence. The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights it embodies. This general

[101] See I/A Court H. R., Juridical Condition and Rights of the Undocumented Migrants; para. 81.

> obligation of the State Party implies that the measures of domestic law must be effective (the principle of *effet utile)*. This means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires. Such measures are only effective when the State adjusts its actions to the Convention's rules on protection.[102]

76. As regards indigenous peoples in particular, several international studies conclude that, historically, indigenous peoples have endured racial discrimination, and that one major manifestation of such discrimination has been the failure of state authorities to recognize customary indigenous forms of land possession and use.[103] The Commission has also noted that:

> within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival -- a right protected in a range of international instruments and conventions.[104]

77. As previously submitted by the Commission, the Constitution of Suriname neither explicitly recognizes nor guarantees the rights of the indigenous and tribal peoples of Suriname to own their lands, territories, and resources. Further, neither the Constitution, nor any law of Suriname confers legal status on the Saramaka people -or any of the indigenous or tribal peoples of Suriname, and therefore they lack legal status in Suriname and are not eligible to receive communal titles on behalf of the community or other traditional collective entities that possess land.

78. In the circumstances of this case, the Commission maintains that the Saramaka people constitute a separate group which merits special protection by the State, and submits that the lack of constitutional and legislative recognition or protection of the collective rights of the Saramaka communities reflects unequal treatment in the law, which is not compatible with the guarantees of the American Convention.

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[102] Five Pensioners Case, *para.* 164; and *cf.* I/A Court H.R., Case of Cantos v. Argentina. Judgment of November 28. 2002; para. 59; and the I/A Court H.R., Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Judgment of June 21, 2002; para. 213; and *cf. also "principe allant de soi"*; Exchange of Greek and Turkish Populations, Advisory *Opinion*. 1925. P.C.J., Collection of Advisory Opinions. Series B. N° 10

[103] For example, the UN Committee for the Elimination of Racial Discrimination has noted: In many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized." (Committee for the Elimination of Racial Discrimination, General Recommendation XXIII, on the rights of indigenous populations, approved by the Committee at its 1.235th meeting, August 18, 1997. CERD/C51/Misc. 13/Rev. 4(1997), para. 3.

[104] Ecuador Report, *supra*, Chapter IX.

79. Further, it has been shown that Surinamese legislation establishes that the citizens of Suriname, including the indigenous and Maroons, and other legal persons, are entitled to request a plot of state-owned land. According to this procedure, the titles issued are of an individual nature. The indigenous and Maroon communities of Suriname do not enjoy legal status in Suriname and are not eligible to receive communal titles on behalf of the community or of other traditional collective entities that possess land."[105]

80. In this context, the indigenous and tribal peoples that cannot show a title granted by the State are regarded by the latter as occupants with permission to inhabit state lands, but whose interests are subordinate to the "general interest."[106] Titles are only granted to individuals, unless a community registers itself as a legal entity: a foundation, for instance.

81. The Commission has also concluded that, unlike the treatment of rights to property derived from the formal system of individual titling, leasing, and awarding of permits contemplated in Suriname's domestic law, the State has not established the legal mechanisms needed to clarify and protect the communal property rights of the Saramaka people. Indeed, in the proceedings before the Commission, the State expressly denied that the Saramaka people have an internationally recognized right to the lands and resources it has occupied and used for over three centuries.

82. Therefore, in the circumstances of the instant case the Commission ratifies its petition to the Court to declare that Suriname failed to comply with its obligations under Articles 1 and 2 of the American Convention on Human Rights, by failing to provide the necessary protection for full exercise of the right to property.

VI. REPARATIONS

83. Reparations are the mechanism that takes the Court's decision beyond the sphere of moral condemnation. "The task of reparations is to turn the law into results, to halt violations, and to restore moral balance when an illicit act has taken place."[107] The true effectiveness of the law lies in the principle that the violation of a right makes a remedy necessary.[108]

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[105] *Ibid.* para. 33. The representatives add that an (indigenous/Maroon) community can only obtain an individual title if it registers as a foundation (*Stichting*).

[106] Suriname's primary legislation on state lands are the L Decrees of the military era, which establish that the customary "rights" to land of the indigenous and the Maroons shall be respected unless they conflict with the general interest. Decree L-1 of 1982 on Basic Principles of Land Policy. Annex to Suriname's written presentation submitted at the hearing before the Commission on 27 October 2004; hearing No 43, 121st Regular Period of Sessions. The "general interest" includes execution of any project contained in an approved development plan, which includes the granting of concessions. NFP. As regards mining activities, Article 25 (1) (b) of Decree E-58, 1986 requires a mention of the indigenous and Maroon peoples and that exploration permits must contain a list of all the tribal communities located in or near the area to be explored. Decree E58.

[107] Dinah Shelton, *Remedies in International Human Rights Law* (1999); (Secretariat translation).

[108] "Where there are unpunished violations or unrepaired damages, law enters into crisis: not only as an instrument for resolving a specific litigation, but as a method for resolving them all – in other words, for ensuring peace with justice." Sergio García Ramírez, "Reparations in the inter-American system for the protection of human rights," paper presented at the seminar "The inter-American system for the protection of human rights on the threshold of the 21st century," San José, Costa Rica (November 1999).

84. In compliance with the basic principles of international law, a State's violation of international standards gives rise to its international responsibility and, consequently, its duty to make reparations. In this regard, the Court has expressly and repeatedly maintained[109] in its jurisprudence "that any violation of an international obligation that has produced damage entails the obligation to make adequate reparation."[110]

85. In the instant case, the duty to repair acquires a special dimension on account of the collective nature of the rights infringed by the State to the detriment of the Saramaka people. The reparations cannot be seen from an individual perspective, since the victims are members of a community and the community itself has been affected.

86. The relationship among a Community's members, and of those members with the Community, is what gives meaning to their tribal existence; it gives meaning not only to their origin but to their ability to possess and transmit their own culture, which embraces their language, spirituality, lifestyles, customary law, and traditions. As has already been stated, being and belonging to the Saramaka people involves the notion of a culture and a lifestyle that are different and independent, based on ancient knowledge and traditions and fundamentally bound to a specific territory [111]

87. During the proceedings, witnesses and experts were able to speak about the significance of reparations for the Saramaka people in accordance with their own customs and traditions, therefore, the Commission asks the Court, in reaching its decision, to give consideration to the fact that the victims in the case at hand are members of the Saramaka people and that the violation of their basic rights has caused them serious harm and has even affected their right to preserve their cultural heritage and to pass it on to future generations.

88. In its judgment in the Mayagna (Sumo) Awas Tingni Community Case, the Court explored the *intertemporal* dimension of community property that prevails among indigenous (in this case tribal) peoples, thus approaching an integral interpretation of the indigenous worldview. In Aloeboetoe *et al.* versus Suriname, in determining the amount of compensation owed to the victims' families, the Court paid attention to the customary laws of the Saramaka community to which the victims belonged wherein polygamy was the norm, in order to extend the compensation paid to various widows and their children. Similarly, in Bámaca Velásquez versus Guatemala, the Court paid due attention to the right of the

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[109] I/A Court H.R., Case of Castillo-Páez v. Perú. Reparations (art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998; para. 50. I/A Court H.R., Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Judgment of June 21, 2002; para. 201

[110] I/A Court H.R., Case of the "Street Children" v. Guatemala. (Villagrán-Morales et al.) Reparations (Art. 63(1) American Convention on Human Rights). Judgment of May 26, 2001; para. 59 (Secretariat translation)

[111] Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, by Mrs. Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group of Indigenous Populations. E/CN.4/Sub.2/1993/28. July 28, 1993. United Nations, para. 1.

relatives of a forced disappearance victim to bury their loved one's mortal remains properly and to the repercussions of this question within Mayan culture.[112]

89. Pursuant to the norms that grant autonomous representation to the injured party, the Commission will briefly reiterate several general considerations concerning redress.

A. Beneficiaries

90. In the instant case, the Commission considers that, given the collective nature of violations and the resulting harm, the Saramaka people must be deemed to be the injured party, and that the corresponding reparations must be of a nature that is collective as well. This claim finds its basis in the jurisprudence of the Court in the cases of Massacre of Plan de Sánchez,[113] Yakye Axa,[114] Moiwana Village[115] and Sawhoyamaxa.[116]

91. In keeping with the nature of the reparation and the violations it must redress, the Commission also asks the Court to ensure that all reparation measures in the case at hand be implemented by the State in consultation with the Saramaka people.

B. Measures of compensation

92. The Court has established basic criteria that should guide fair compensation intended to make adequate and effective economic amends for the harm arising from rights violations. The Court has ruled that indemnification is merely compensatory in nature, and that it is to be granted in volume and fashion sufficient to repair both the material and the moral harm inflicted.

93. The jurisprudence of the inter-American system regarding reparations has consistently included material damages in economic reparations: in other words, consequential damages and future losses, together with immaterial and moral damages.

94. Consequential damages have been defined as the direct and immediate effect of the incident on property. This covers the property damage suffered as a result of the State's violations and the expenses incurred by the victims as a direct result of the facts.

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[112] I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of 31 August 2001. Series C No. 79, Joint Separate Opinion by Judges A.A. Cançado Trindade, M. Pacheco Gómez, and A. Abreu Burelli, paras. 12 and 13.

[113] I/A Court H.R., Case of the Plan de Sanchez Massacre vs. Guatemala. Reparations (art. 63(1) American Convention on Human Rights). Judgment of 19 November 2004. Series C. No. 116; para. 110, in conjunction with para. 62.

[114] I/A Court H.R. Case of the Yakye Axa Indigenous Community vs. Paraguay. Judgment of 17 June 2005. Series C No. 125; paras. 185 and 186.

[115] I/A Court H.R. Case of the Moiwana Community vs. Suriname. Judgment of 15 June 2005. Series C No.124, para. 201.

[116] I/A Court H.R. Case of the Sawhoyamaxa Indigenous Community vs. Paraguay. Judgment of 29 March 2006. Series C No.146, para. 204.

95. The Commission requests that to determine, fairly and equitably, both consequential damages, in its decision the Court consider the worldview of Saramaka people and the impact on the Community of, *inter alia*, being prevented from possessing their traditional habitat or ancestral territory and of being kept from pursuing their traditional subsistence activities.

96 Additionally, the Court has established certain presumptions regarding the moral damages (pain and suffering) inflicted on the victims of human rights violation and their families. Thus, it has ruled that:

> This non-pecuniary damage may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as other sufferings that cannot be assessed in financial terms. A common feature of the different forms of non-pecuniary damage is that, since it is not possible to assign them a precise monetary equivalent, for the purposes of making integral reparation to the victims they may only be compensated and this can be done in two ways. First, by the payment of a sum of money or the assignment of goods or services that can be assessed monetarily, as prudently determined by the Court, applying judicial discretion and the principle of equity. And, second, by the execution of acts or works of a public nature or repercussion, which have effects such as recovering the memory of the victims, re-establishing their reputation, consoling their next of kin, or transmitting a message of official condemnation of the human rights violations in question and commitment to the efforts to ensure that they do not happen again.[117]

97. As stated in the introduction of these final pleadings, for years, the members of the Saramaka people have experienced the rejection of their legitimate claims and suffer constant pressure on their ability to use their traditional lands, from private citizens and the State alike. The Commission therefore requests that the Court order reparation for moral damages.

C. Measures of satisfaction

98. Satisfaction has been defined as all measures that the perpetrator of a violation is required to adopt under international instruments or customary law with the purpose of acknowledging the commission of an illegal act.[118] Satisfaction takes place when three events occur, generally one after the other: apologies, or any other gesture showing acknowledgement of responsibility for the act in question; prosecution and punishment of the guilty; and the adoption of measures to prevent the harm from recurring.[119]

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[117] I/A Court H.R., Case of the "Street Children" v. Guatemala. (Villagrán-Morales et al.) Reparations (Art. 63(1) American Convention on Human Rights). Judgment of May 26, 2001; para. 84.

[118] Brownlie. *State Responsibility*, Part 1, Clarendon Press. Oxford. 1993. p. 208

[119] Brownlie. *State Responsibility*, Part 1. Clarendon Press. Oxford. 1993, p. 208

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D. Cessation and guarantees of non repetition

99. The Commission submitted in its application that the violation to the Saramaka people's rights will continue until there is an adequate legal framework in place to ensure their protection. Therefore, given developments in property law, as the organs of the inter-American human rights system have recognized, the State must eliminate the legal and regulatory impediments to the protection of the Saramaka people's property rights or adopt the necessary legal provisions to ensure protection.

E. Costs and fees

100. The Commission set forth in its Application its position that an award of legal costs and fees in the present case is reasonable and necessary, and reiterates those considerations. Neither the Saramaka authorities nor their representatives should be obliged to bear the costs associated with legal representation which is necessary to seek justice when that has been denied by the State concerned. The award should take into account past and current legal costs and fees, as well as those that will be necessary to pursue the matter before the Honorable Court through all stages including compliance with an eventual sentence.

VII. PETITION

101. Based on the previous analysis, the Commission again requests the Court to declare that the State is internationally responsible for the violation of:

> the right to property established in Article 21 of the American Convention, to the detriment of the Saramaka people, by not adopting effective measures to recognize its communal property right to the lands it has traditionally occupied and used, without prejudice to other tribal and indigenous communities;
>
> the right to judicial protection enshrined in Article 25 of the American Convention, to the detriment of the Saramaka people, by not providing it effective access to justice for the protection of its fundamental rights; and
>
> the non-compliance of Articles 1 and 2 of the Convention by failing to recognize or give effect to the collective rights of the Saramaka people rights to their lands and territories.

102. As a result of the abovementioned, the Inter-American Commission requests that the Court order the State to:

> remove the legal provisions that impede protection of the right to property of the Saramaka people and adopt, in its domestic legislation, and through effective and fully informed consultations with the Saramaka people, legislative, administrative, and other measures needed to protect, through special mechanisms, the territory in which the Saramaka people exercises its right to communal property, in accordance with its customary land use practices, without prejudice to other tribal and indigenous communities;

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refrain from acts that might give rise to agents of the State itself or third parties, acting with the State's acquiescence or tolerance, affecting the right to property or integrity of the territory of the Saramaka people;

repair the environmental damage caused by the logging concessions awarded by the State in the territory traditionally occupied and used by the Saramaka people, and make reparation and due compensation to the Saramaka people for the damage done by the violations established;

take the necessary steps to approve, in accordance with Suriname's constitutional procedures and the provisions of the American Convention, such legislative and other measures as may be needed to provide judicial protection and give effect to the collective and individual rights of the Saramaka people in relation to the territory it has traditional occupied and used.