Inter-American Court of Human Rights 0001013

Comments offered by the State following Oral Hearings in the Case of Wazen Eduards et al. vs Suriname (Case 12.338)

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Agent for the State
Mr Soebhaschandre Punwasi

Deputy Agent for the State
Mr Eric Rudge

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1.0. Introduction: preliminary objections and merits, sources of law, new courses of action and interpretation principles.

1.1. The State persists by its preliminary objections against admissibility of the complaints.

The State persists that the complaints of violations of the Convention as outlined by the Inter-American Commission (IA Commission) and elaborated and unduly expanded by Petitioners are not admissible. The State refers to the arguments it raised in earlier communications [1]

The admissibility requirement of article 46 (1)(a) in conjunction with the exception on this requirement as provided for in article 46 (2((a) of the Convention on the one hand and the complaint of a lack of juridical protection (art. 25 of the Convention) on the other hand are closely interrelated. The State therefore requests that the Court includes in its deliberations on the question of admissibility, the arguments of the State that the legal system of Suriname provides adequate and effective recourse to an independent judiciary against infringements by civilians or the State, of the law, subjective rights and unwritten standards of due care or rules of good governance. This protection includes recourse against the alleged violations in the instant case. Petitioners have failed to exhaust this remedy.[2]

1.2. National legislation, customary law and judge made law are the potential sources of legal recognition of traditional rights of the Saramaka Tribe. For each of these sources there are good reasons why recognition has not been forthcoming. When considering the legitimacy of complaints of violations of traditional rights of the Saramaka Tribe, these reasons should serve as leads.

[1] Ref. Official Response of the State , January 12, 2007 par. 116-203
[2] Infra sections 3.2 and 3.4

The traditional rights of the Saramaka Tribe have not been recognized by national customary law on grounds of legal certainty. There is a critical lack of clarity what the relevant laws and customs of the Saramaka Tribe are and what these rights would entail.[3]

The rights have not been recognized by legislation due to the complexities and sensitivities of the process of lawmaking on the subject of group rights within a framework of principles of democracy and the rule of law. These two principles are at the heart of Suriname's legal order and any 'special treatment' of individuals and groups raises questions of 'sovereignty of the State', 'discrimination' and 'responsibility for nation wide development'.

The rights have not been recognized by judge made law because Petitioners refuse to apply to the domestic courts

1.3. The Court should not take cognizance of asserted violations of the Convention which have no basis in the original Petition submitted by the Petitioners to the IA Commission and in the Application submitted by the IA Commission to the Court.

On basis of the principle of *ius curia novit*, the Court has competence to apply, at all times, *proprio motu* the law to facts which have been brought forward by the Parties. But it would be against the principle of due process as contemplated in the Inter-American System if new factual foundations in support of causes of action which have not been subject of the process before the IA Commission, could for the first time be introduced by the Petitioners in the proceedings before the Court.[4] New factual foundations and new causes of action in the instant case are the asserted violations by the State of article 21 of the Convention (i) by building the Afobaka Dam and showing disregard for effects and implications of the damage which it caused and (ii) by including articles 34 and 41 in the 1987 Constitution and article 2 in the 1986 Mining Decree. Furthermore the

[3] Infra sections 2.3 and 2.4

[4] Jo M. Pasqualucci 'The Practice and Procedure of the Inter-American Court of Human Rights ,Cambridge University Press (2003) p 6: Article 44 of the Convention requires 'that an individual who alleges that a State party to the American Convention has violated his or her rights **must** (emphasis added by the State) first file a complaint directly with the Inter-American Commission ( ) See also pp 7 and 185

assertion that the Saramaka Tribe would have the right to juridical personality as provided for in article 3 of the Convention is a new cause of action. [5]

Since the scope of the causes of action advanced by the Petitioners is wider than the scope advanced by the IA Commission, the State will make its Final Comments with reference to the issues as they have been raised by the Petitioners, without prejudice however to the State's appeal that the Court should not take cognizance of causes of action which have only been introduced in the process before the Court. Unless otherwise indicated the numbers of paragraphs in this document refer to the numbers of paragraphs in the Pleadings of the Petitioners.

1.4. Reference has been made to four principles which should be applied when interpreting the provisions of the Convention: i.e. the provisions should be interpreted in a dynamic perspective, within a wide frame of reference, with a bias in favor of human rights victims and, - specifically with respect to the rights which indigenous and tribal peoples could infer from article 21 of the Convention -, with due consideration to tradition. Caution with respect to the application of these principles in the instant case is warranted.

The State does not dispute the validity of these principles, but it should be kept in mind that these principles are not in all circumstances congruent. When applied, the principles will very often be conflicting.

In the instant case Petitioners argue that the Court should adopt a policy which would fully subordinate the principle that tradition is the genesis of the land rights of indigenous peoples [6], to the wide reference frame of other international concepts, - in particular the right of self determination of article 1 (2) of the UN Covenants'. This would overreach the purpose of the rights which the Petitioners seek to protect [7]

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[5] It is worth noting that even in the oral hearings the IA Commission has never referred to these new causes of action from which one should conclude that the IA Commission also considered their introduction only in the proceedings before the Court to be out of order.

[6] All international instruments which include a definition of the source of land rights of indigenous people explicitly refer to ' lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired ' See for example article 14(1) of the ILO Convention 169, article 26 of the Draft UN Declaration on the rights of indigenous peoples, article XXIV of the consolidated version of the Proposed American Declaration on rights of indigenous peoples.

[7] Petitioners have submitted an expert testimony of Dr Martin Scheinin in support of their contentions on this point. The State submits as annex A to these Comments an Expert Opinion

The principle of 'bias in favor of victims' should be applied with caution. The extent to which such bias would be justified will differ depending on the nature of the rights and the intensity of the alleged infringements In the instant case advocates of the Petitioners try, as one would expect from human rights protagonists, to portray Suriname as a country without respect for human rights, in particular rights of indigenous and tribal peoples on lands and resources they traditionally possess and use This is not the reality. The picture is false. Since the end of the military regime in 1991 the Government of Suriname has complied with high standards regarding respect for human rights in general. And relationships with its indigenous and tribal peoples at both the local and the national level have improved with leaps and bounds. Interests of indigenous and tribal peoples in land they traditionally possessed and used are recognized in numerous laws and duly respected in practice. The indigenous and tribal peoples became active participants in all national processes and institutions charged with democratic policy making and administration of government and are more or less proportionally represented by their own people in Government and Parliament. They decide for themselves their strategy, degree and pace of any further 'inclusion' in the national political, social and economic development

The instant case in essence deals with policy on the subject of recognition of the 'rule of traditional law' for a segment of society in a legal environment in which the 'rule of professional law' governs the entire society This is a highly sensitive political and technically difficult issue[8] Most countries in the world with indigenous people, including, those in the America's, struggle with it [9] Any application of the principle of 'bias in favor of victims' would be misplaced and if any bias would be applied it could not reasonably

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obtained from Prof Dr Nico Schrijver dated June 30, 2007 Petitioners have rightly referred in their Pleadings (par 138) to Prof Schrijver as 'a leading commentator ' on the issues of state sovereignty in general and state sovereignty with regard to natural resources in particular The State requests that Prof Schrijver's Expert Opinion will be considered an integral part of the State's Comments

[8] Illustrative for a simplistic approach of human rights protagonists on this issue is the inaudible mumbling of the expert witness Dr Richard Price (Report of the Hearings p 66) when it was observed by the State that he was in fact saying 'that there is a Republic of Suriname and a state of Saramaka

[9] Report on the Human Rights Situation of the Indigenous People in the America's OEA/SER L/V/II 108,Doc 62, October 20. 2000

be of an intensity comparable to the intensity applicable in instances of flagrant violation of the personal integrity rights of individuals [10]

2.0. The traditions on which the alleged rights of the Saramaka Tribe are based suffer from a lack of clarity.

2.1. Tradition, not the 1762 Peace Accord is the basis of the alleged land rights of the Saramaka Tribe.

Petitioners argue in their Pleadings (nrs 196-208) that according to the Vienna Convention of 1969 on the Law of Treaties, the Peace Accord concluded in 1762 between the Saramaka Tribe and the Colonial Dutch Government would have continuing validity This assertion is legally irrelevant and unsustainable It is legally irrelevant because if and to the extent the Saramaka Tribe would have rights on political and territorial autonomy, those rights would have their roots in 'tradition' and not in the 1762 Peace Accord. Petitioners argue that they have an emotional interest that the validity of the Accord (par. 198-199) be preserved, but in law this is unimportant[11].

The arguments are also not sustainable because they incorrectly assume that the Accord is a treaty governed by the Law of Treaties. The IA Commission in the Aloeboetoe et al Case explicitly refrained from taking a view on 'whether the Saramaka's, as a community, do enjoy international juridical status'[12] and (even) Kambel and Mac Kay (sic!) express doubts whether accords with Maroon Tribes[13] should be considered international agreements [14]

Under national law the 1762 Accord does not have the status of a legally binding agreement but only of a 'domestic political contract'.[15] But even if the Accord would initially have had the status of a legally binding agreement, - *quod non est*,- then it

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[10] In instances in which a bias has been applied like Villagran Morales et al v Guatemala Case, Judgment of 11 September 1997 and Mapiripan v Colombia Case Judgment of 15-20 July 1997 the subject of the judicial decisions was 'kidnap, torture and murder'

[11] The expert witness Dr Richard Price as an anthropologist may be competent to speak about this emotional value of the Peace Accord (Record of the Hearings p 57), but his observations obviously do not provide any evidence on its continuing legal validity

[12] Aloeboete et al Judgment of 4 December 1991, p. 17

[13] This reference obviously includes the 1762 Accord with the Saramaka Tribe.

[14] See Kambel and MacKay: The rights of indigenous peoples and Maroons in Suriname IWGIA Document No, 96 Copenhagen 1999 pp 58

[15] See Kambel and MacKay supra nt 14 p 63 correctly referring to this opinion as generally prevailing for more than a century in Dutch and Suriname legal practice

would now be null and void because it would be in violation of 'good morals and public order', the equivalent of the concept of *ius cogens* in national law. 'Freedom of slavery' is a peremptory norm that renders the Accord null and void in its entirety because the purport and essence of the 1762 Accord are to preserve slavery and the conditional allowance of freedom and self governance and use of territory by the Peace Accord were only means to that end.[16] When judging the continuing validity of the 1762 Accord under international law this Court came to the same conclusion in the Aloeboetoe et al. Case[17]. The State sees no reason for the Court to reverse that judgment

2.2. Its cultural distinctiveness is insufficient as a basis for recognizing the Saramaka Tribe in customary law as a (*sui generis*) juridical person in the sense of article 3 of the Convention.

Petitioners state in their Pleadings that the Saramaka Tribe would be culturally distinct and would 'for the most part' regulate themselves according to their own laws and customs (par.10). The State observes that any historical cultural distinctiveness has been severely affected by voluntary political, cultural and social inclusion of the people of the Tribe in modern society. It is beyond dispute that the majority of the Saramaka Tribe (64%) lives outside the Upper Suriname River area which the Saramaka Tribe has traditionally inhabited. They live in cities where they have adopted a western way of life and became subjects and beneficiaries of national laws and customs.

The degree to which the remaining 36% of the Saramaka people who still live on traditional land regulate themselves according to their own laws and customs is also not as 'overall' as Petitioners suggest. It has appeared from witness statements that in many respects national laws are applicable and observed by these communities[18]. They have mingled their original laws and traditions with those of modern society. The expert witness statement of Dr. Price suggesting a different state of affairs is based on knowledge he acquired more than 20 years ago when he last visited the Tribe. The

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[16] The expert witness Dr. Richard Price attributes much more to the 1762 Peace Accord than one could reasonably infer from it. Kambel and MacKay supra nt 14 p. 66 refer to 'autonomy rights' and 'land rights' as the rights contained in the Peace Accord but observe on p. 70 that 'while there seems to be little dispute over 'right to autonomy and self-government', there is less clarity regarding 'land and resource rights'.

[17] This was acknowledged by Petitioners in their Pleadings in par. 196

[18] Witness Statement of Albert Aboikoni (Record of the Hearings p. 39)

effects of modern education, health care, transportation and communication etc have passed him by completely.

The tradition based laws and rules have not only lost relevance but due to a weakened pass down of tradition also suffer from an increasing lack of clarity[19]. It is therefore understandable that, on grounds of legal certainty, the Tribe has not been recognized in national customary law as an independent bearer of rights and obligations governed by its own laws, regulations and customs as the concept of judicial personality provided for in article 3 of the Convention presumes.[20]

2.3. The land tenure system is not sufficiently defined to be recognized by customary law as a self-standing regime in the sense of article 21.

It is premised by the Petitioners that the 12 Lo's (par.11) are the primary land owning entities within Saramaka society, that the Gaama holds the highest political office, that the paramount authorities within the Lo's are the Head Captains and Captains. (par.13) and that [ ] it is the Lo's that own land and therefore have authority over matters pertaining to land and resources. The Gaama is said to have no direct authority over land and resource rights and allocations thereof within and between Lo's. The authority is vested in the Captains as the authorities and representatives of the various Lo's (par.15).

There is clearly a highly relevant lack of clarity on whether property rights are vested in the Tribe as a whole or in the individual Lo's, as well as on how the authorities and attributes inferred from these rights are allocated between the Tribe as a whole - of which the Gaama is the personification - and the Lo's governed by the (Head) Captains Who do laws and customs of the Tribe consider the holder of land rights and should be

[19] Dr Price (Record of the Hearings p.58) refers to a 'complete conflict' in the relationship between Saramaka customary law and the national legal system of Suriname. He suggests that 'during the 1960's and 1970's and 1980's the Saramaka acted quite purely according to their own law', but that since 1975 'the coastal Government has been trying to impose their law on the Saramaka' This is a very tendentious statement from someone who lacks objectivity. Dr Price made it very clears that he idealizes the Saramaka laws and customs and he completely disregards and irrationally condemns the irresistible forces of modernization

[20] Members of the Tribe have never applied to the domestic Court to seek recognition of the alleged judicial personality of the Tribe. They refuse to do so. They argue that the available recourse is inadequate and ineffective which is incorrect. They might be more reluctant to apply to the Court out of fear that they will be confronted with the need to provide clarity and evidence of the internal laws and regulations that govern the Tribe

recognized as such by national law? Petitioners themselves obviously do not know the answer. In par 74 of their Pleadings they contradict the position just outlined by stating that 'The customary land tenure system, which vests paramount ownership of territory in the Saramaka People collectively and subsidiary rights to land in the twelve clans and their members, embodies a property regime and a form of property that is protected by Article 21 of the American Convention'. [21] This fundamental contradiction undermines the basic premise of the Petitioners cause of action, which is, that the Tribe has a traditionally established and well defined tenure system

On grounds of legal certainty, this lack of clarity prevents recognition of land rights by national customary law and makes adoption of legislation for titling of the Saramaka Tribe's 'traditionally owned territory in accordance with its values, customs and mores', as requested by the Petitioners (par 230 a) virtually impossible' [22]

2.4. The dynamics of history have significantly affected the boundaries of the land which the Saramaka Tribe has traditionally possessed and used.

The premise of the Petitioners that traditional territorial boundaries are well understood, scrupulously observed and encoded in history and tradition (par. 17) is incorrect. A large part of the claimed territory is, due to voluntary migration of the majority of the members of the Tribe to the cities, no longer effectively in possession and use of the Tribe and should therefore not be part of the territory over which land rights should now be recognized

In addition it should be noted that at this time an 'expansionary' movement, clearly driven by economic motives, is demanding rights on land which have no basis whatsoever in tradition. This movement, generated by human right protagonists, has a

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[21] As appears from the Records of the Hearings contradictory statements were also made during the orals by witness Wazen Eduard (p 9) : 'Land ownership is vested in the lo's'; Witness Caesar Adjako (p 17): 'There are 12 lo's that constitute the Saramaka people and each of those 12 lo's have jurisdiction over the part of the territory that is theirs'; Dr Richard Price (p 62): 'The lo stewards that particular piece of land on which their villages are' but ultimately the land' belongs to the Saramaka's as a people'; and Expert witness Salomon Emanuels: (pp 68/70): 'These 12 clans are in fact separate groups with their own autonomy and their own territory or land (.) The clan within the Saramaka community holds the land and part of it. The tribe is a construction (. .)'

[22] Evidently Petitioners refuse for the same reason to apply to the domestic Courts to seek recognition in law of their alleged communal subjective rights

negative effect on consultations between the Government and the Saramaka people and will unnecessary complicate demarcation and delimitation efforts.

2.5. The alleged land rights of the Saramaka Tribe are *sui generis* rights. Their genesis is tradition and their scope is determined by tradition and does not extend beyond possession and use of land for subsistence, cultural and religious needs.

Petitioners argue that under Saramaka law, ownership of all resources, including waters, within, subjacent or otherwise pertaining to Saramaka territory are vested in the Saramaka people, and on a subsidiary basis , the various Lo's. No clarity is provided on what primary and subsidiary mean. But more important, there is no reference made to the most fundamental premise of land rights of indigenous and tribal peoples: the genesis and source of land rights is tradition[23] and the purpose of these rights foremost is to respect and preserve this tradition.[24] This genesis gives the land rights their *sui generis* nature and defines the scope and attributes of these rights.[25] The State emphatically disputes that Saramaka law has ever vested ownership of any resources in the Saramaka Tribe or Lo's, neither of resources on the surface nor of sub-surface resources. If Saramaka law ever provided for any ownership of the Tribe or Lo's in resources -*quod non est*- such rights were *sui generis* rights limited to traditional use of surface resources for subsistence, religious and cultural purposes [26]

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[23] See supra nt 6

[24] The scope of land rights of indigenous peoples has been understood in the jurisdiction (Case of Moiwana Village v Suriname Judgment of June 15, 2005 nrs 130-134) to encompass, apart from the right to subsistence, the right to enjoy their culture and profess and practice their religion in community with others. This finding reinforces the premise that preservation of tradition is the purpose of the recognition of land rights

[25] This relationship between the nature of indigenous land rights and tradition has been reinforced the Mayagna (Sumo) Awas Tingni Community Case) Judgment of February 1, 2000) by establishing that 'customary law, customary practices and possession of the land' determine the nature of the property that should be officially recognized.

[26] Witness Wazen Eduards (p 9) and Expert witness Richard Price (p.62) state that the traditional land rights of the Saramaka Tribe 'include everything from the top of the trees to the very deepest place that you could go under the ground' but these are mere assertions There is no factual evidence whatsoever that the concept of land rights as defined by the customs of the Saramaka Tribe has indeed ever included resources beyond what the members of the Tribe used to satisfy their traditional needs

2.6. The two basic premises that determine the rights and duties of the State and the Saramaka Tribe pursuant to article 21 of the Convention are sovereignty of the State over land and resources and traditional possession and use of land by the Tribe.

The State's permanent sovereignty over the territory and resources of the nation should be the point of departure of any exercise aimed at recognizing the property rights of the Saramaka Tribe in terms of their substance, both in a qualitative and geographical sense, the permissible restrictions on theses rights, and their other attributes. The State's permanent sovereignty dates from the 17th century and predates any traditional possession and use of the claimed land and resources by the Tribe which commenced half a century later[27] In this regard there is a fundamental difference between the sequences of origin of land rights of indigenous peoples and of tribes in relation to the origin of state sovereignty over land [28]

Moreover, rights and duties of the State and the Saramaka Tribe are premised on the principle that tradition is the source of any land rights of the Saramaka Tribe, that respect for and preservation of this tradition is the objective of such rights and that this tradition therefore determines the scope of these rights [29]

3.0. Property rights in the Suriname legislation

3.1. The underlying legal principles of the land rights system of Suriname are the domain principle, the principle that all natural resources belong to the State and the principle of separation of surface and sub-surface rights. Article 41 of the Constitution of 1987[30] , article 1 of the Decree L-1 of 1982[31] and art 2 of the Mining

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[27] Sovereignty was exercised over the territory of Suriname by the Dutch Government at least from September 23, 1682 when the relationship between the Republic of the Netherlands and the Colony of Suriname and the mode of governance of and in the Colony were embedded in a constitutional document (Het Octrooi van de West Indische Compagnie)

[28] This conclusion can be inferred from and is supported by the ICJ in its Westerns Sahara Advisory Opinion of 16 October 1975

[29] See supra nt 21, 22 and nt 23

[30] See for the text Pleadings of Petitioners par 48

[31] See for the text Pleadings of Petitioners par 52 and nt 74

Decree of 1986[32] embody these principles and are codifications of pre existing law.

The State's exercise of sovereignty over land has always been and is still based on the domain principle. Article 1 of the Decree L-1 of 1982 was a codification of existing law. The domain principle covers two forms of domain vested in the State: 'public domain' meant to serve the public good and 'free domain' of which the State can dispose of freely.[33] Traditional land rights claimed by the Saramaka Tribe came into existence well after the State began to exercise sovereignty over the territory of the country in the 17th century and these claimed rights are therefore conditioned by the domain principle. Any land rights the Saramaka people may have, came into existence as a function of their traditional possession and its recognition by the State as the sovereign holder of 'free domain'. Their *sui generis* nature based on the laws and customs of the Saramaka Tribe does not infringe on the generally recognized domain principle.

As worded in article 41 of the Constitution, sovereignty of the State includes permanent sovereignty over natural resources[34]. Rights to sub-surface resources are not and have never been part of Saramaka people's *sui generis* land rights.

The principle of separation of surface and sub-surface rights (article 2 of the 1986 Mining Decree) has always been part of part of customary law and was codified in the Suriname legal system when the Mineral Ordinance went into effect in 1932 (GB 1952 no 28)[35]

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[32] See for the text Pleadings of Petitioners par 59, nt 81 and Annex 8 to the Application of the IA Commission

[33] Kambel and Mac Kay supra nt 14 p. 87 acknowledge this well documented interpretation of history by Prof. Dr A.J.A. Quintus Bosz, Suriname's leading authority and publicist on land title and its history. Their challenge of the historical interpretation is highly subjective and in any case it does not alter the fact – which they also acknowledge - that the domain principle is and has always been a well established and generally observed legal principle in Suriname.

[34] See article 1 of the UN Declaration on Permanent Sovereignty over Natural Resources (Resolution 1803-XVII) of 14 December 1962

[35] Petitioners suggest that the principle of separation of surface and sub-surface rights was only introduced in 1986. But Anne Rose Kambel and Fergus Mac Kay supra nt 14 p 101 by referring to the provision in the Mining Ordinance of 1932 that land rights of indigenous people should be respected by holders of concessions, prove the opposite. Many laws in Suriname prescribe that interests of indigenous peoples in traditionally possessed and used land should be respected (see infra section 3.3.) but there is no recognition of legitimate interests of indigenous peoples in sub surface resources, to the contrary, the fact that the Mining Ordinance provided for mining concessions on territories possessed and used by indigenous peoples proves the separation of surface and sub-surface rights and interests as a generally applicable principle.

Ownership of minerals, subsurface and other natural resources pertaining to land has been retained by the State and any exception with respect to traditional land rights of the Saramaka people would be discriminatory. Rights to natural resources have always been and remained vested in the State but even if the Saramaka Tribe would have had these rights, these rights would have been limited to resources traditionally used for their subsistence and cultural and religious activities Moreover, if there would have been any expropriation by virtue the Mining Ordinance of 1932 or for that matter the Mining Decree of 1986 such an expropriation would not be a violation of the Convention for which the State is liable today since Suriname was not a party to the Convention at that time and expropriation should be qualified as 'an instantaneous act with continuous effects' and not as 'a continuous and ongoing violation'[36].

3.2. The Suriname legal system provides its citizens adequate and effective legal recourse against alleged infringements of land rights.

Pursuant to article 1386 of the Civil Code every citizen can apply to the independent judiciary in case of an alleged infringement of his property rights by any person, including the State. This recourse is not in the form of judicial review of legislation which would be exceptional in a civil law based constitutional system and is in any case not a requirement under article 25 of the Convention.

The reach of protection provided by Article 1386 of the Civil Code has increased significantly over the last 150 years from 'a means that provides indemnification in case of harm caused by an act that violates a legal right' (referred to as such by the Petitioners and the IA Commission) to full protection through various forms of repair of harm (damages, *restitutio in integrum*, declaratory decision, prohibition for the future) caused by any act or omission of a person or the State which either violates the law, infringes a subjective right or violates an unwritten standard of due care (*Dutch zorgvuldigheidsnorm*) or a principle of good governance (*Dutch beginsel van behoorlijk bestuur*) In the Suriname legal system the civil court, - in first instance the District Court

[36] Antoine Buyse refers to this distinction and its implications in the European Human Rights System and in general international law as follows: 'Secondly, the Court (and previously the Commission) makes this distinction between continuing situations and instantaneous acts or reacts with continuing effects. The same distinction that is made in general international law, as stated e g in Article 14(2) of the Articles on State Responsibility (Antoine Buyse in' Lifeline in Time – Non-retroactivity and Continuing Violations under the ECHR in the Nordic Journal of International Law,75:63:88,2006 p 87).

and in appeal the Supreme Court[37] - has jurisdiction to decide civil disputes between civilians and disputes between civilians and the State resulting from administrative actions or omissions of the Government In a landmark decision of 1919 (Ruling in Cohen v. Lindebaum) the Dutch Supreme Court - who's decisions automatically became part of the Suriname legal system until Suriname obtained independence in 1975 - ruled that the legal basis for liability of civilians can be violation of the law, infringement of a subjective right or violation of any unwritten standard of due care. A similar development took place with respect to liability of the State for unlawful administrative acts or omissions. The State is now, based on established case law also liable not only for effects of acts and omissions which are violations of the law and duties of the State but also for infringements of subjective rights and violations of unwritten rules of good governance (Voorste-Stroom Rulings 1940-1943).[38] This development of legal protection against infringements of property rights by individuals and the State is adequate and effective and complies with prevailing international standards as embodied in article 25 of the Convention In conclusion, the State submits that the views Petitioners have expressed with respect to judicial recourse against acts or omissions of the administration are fundamentally flawed. The State suggests that in case of doubt about the soundness of the State's position, the Court should obtain an expert opinion on this question of local law pursuant to the provision of article 45 par 3 of the Courts Rules of Procedure, [39]

Petitioners and the IA Commission argue that the available recourses in the Suriname legal system could not provide adequate recourses against violations of alleged communal land rights of the Saramaka Tribe because the legal system does not recognize (i) communal land rights in general, (ii) traditional land rights of indigenous and tribal people, and (iii) the juridical personality of indigenous and tribal peoples This reasoning puts the chart before the horse The Court in Suriname has the jurisdiction to

[37] 'The District Court' and 'the Supreme Court' are often also referred to respectively as 'the Cantonal Court' and 'the High Court of Justice'

[38] There is no specific treatise on Suriname law on this subject, but Dutch law in force in the Netherlands up to 1975 is still applicable in Suriname and the most authoritative comminatory is Asser-Hartkamp 1994 par 285-288 A translation in English of the relevant paragraphs of the treatise is annexed as Annex B.

[39] By suggesting that the Court would obtain an expert opinion the State does not wish to infringe on the policy developed by the Court in various cases starting with the Velasquez Rodriguez Case, Preliminary Objections, Judgment of June 26,1987 Series C No 1, par 62-77 that the burden of proof that these remedies were exhausted or that the case comes within the exception of article 46(2) rests with the Petitioners.

bring about the recognition in the legal system of any of the three elements An unreasonable refusal of Petitioners - and their international representatives - to submit suits of law in fact deprives the domestic Courts of the opportunity to take any decision to that effect.[40]

3.3. The alleged land rights of the Saramaka Tribe are foreign to Suriname's historic legal system, their nature is *sui generis* and it is a highly complex exercise to relate their 'rule of traditional law' to the 'rule of professional law' which prevails nationally. This complexity is increased by the continuous evolvement of international human rights standards and by the necessity of a national political debate to preceding their incorporation.

Various legal instruments provide for protection of the interests of the Saramaka Tribe These legal instruments include the Constitution (1987), the L-1 Decrees (1981-1982), the Mining Decree (1986) and the Forest Management Act (1992) The State is committed to improve the current codification of the land rights regime of its tribal and indigenous people. Various Policy Statements like the National Forest Policy Statement of 2006 , the Presidential Order 2000, the Multi Annual Development Plan 2005-2011 and the 2000 Policy Instruction for District IA Commissioners illustrate this To ensure progress the Government has installed a Presidential Committee in 2006 to work, in consultation with the various peoples and tribes to prepare an inventory of relevant traditions, define the principles of a comprehensive national land rights regime and design and develop appropriate legislation to be approved and confirmed by Parliament. The reason why a comprehensive codification is still absent is not a lack of commitment of the Government but 'defining an abstract international right that still evolves through case law' on the one hand and 'codifying a specific and comprehensive regime that complies with these international standards and fits the cultural, political and social features of unwritten and unclear traditions of a number of tribes with in many respects varying traditions, in a highly sensitive national social and political environment', on the other hand are quite different matters Such codification needs to be in tune with the traditions of the people which form the genesis of the regime and define its objective and

[40] The State wishes to make specific reference to the consideration in the Velasquez Rodriguez Case, Merits, Judgment of July 29, 1988 par. 60 that 'it must not rashly be presumed that a State party to the Convention has failed to comply with its obligation to provide effective domestic remedies'

scope. But apart from these traditions and the evolving principles of the human rights system to which the country has committed, points of departure for the codification exercise will have to be the fundamentals of the rule of law and of democracy, both central aspirations of the nation, and the internationally recognized duty of the State (par. 1 UN Declaration 1803-XVII) to promote economic, social and cultural development of the nation as a whole. Meeting these aspirations requires legitimacy of all government actions, equal treatment of all citizens and their meaningful participation in governance of the State in particular if it concerns its constitutional principles. This is a very complicated, delicate and time consuming process for which Petitioners request the Court to set a completely unrealistic timeframe of 18 months. (par. 230 a iv)

Petitioners argue that by not recognizing and guaranteeing the rights of Indigenous and Tribal People in article 41 of the Constitution of 1987 the Government shows disregard for these rights (par. 48). This is incorrect. One should appreciate that Suriname became a party to the American Convention on Human Rights in 1987 at the same time that its Constitution was adopted by referendum, immediately following almost a decade of military rule. Obviously Suriname had good reasons to become party to the Convention – to help safeguard the rule of law and democracy - but it is also fair to say that there was no realization of the far reaching and immediate consequences this Convention would have in terms of international obligations regarding property rights of indigenous and tribal people. This is confirmed by the fact that the debate on whether Suriname should accede to the ILO Convention 169 of 1989 which specifically deals with rights of indigenous and tribal people is still - like in many other countries of the world - a contentious political issue[41]. The American Convention on Human Rights on the other hand makes no mention at all of these rights and was ratified without even a discussion on the subject matter.

3.4. There are many elements in the Suriname legal system that recognize the legitimacy of the land related interests of indigenous and tribal peoples but like in most other countries in the world, development of a comprehensive system is still an ongoing process.

[41] The ILO Convention has been ratified until now by only 17 countries

Petitioners argue that Suriname is committed under international law, but has failed to recognize, secure and protect a land rights regime of the Saramaka Tribe in its legislation. There is indeed no comprehensive codification of a regime but Suriname is not exceptional in this[42]. It should be appreciated that in the Suriname legal order there are numerous legal instruments in which elements of a lands rights regime are embedded and legal relevance of the interests of the Tribe is recognized. Petitioners went out of their way to characterize these interests and their standardization as 'de facto' and 'non- justiciable' but without avail because these are legal interests, based on law and safeguarded by law. Land rights of the Saramaka Tribe are indeed not explicitly recognized or guaranteed by the 1987 Constitution. But this would only present a justified denunciation of a violation of the Convention if a constitutional embedment would have been a constitutive element of national recognition of human rights. In fact the recognition of land rights of indigenous and tribal peoples is not a matter explicitly codified in constitutions or binding international treaties like the Convention, but very much an evolving principle based on customary and case law.

The Suriname legal system allows for judicial review of formal legislation to ensure compliance with international treaties but it does not, - and this is so in most civil law constitutional systems -, allow for judicial review of formal legislation to ensure compliance with national constitutional provisions. An exemption specifically for legislation pertaining to indigenous and tribal people's land rights would be inconsistent with the principle of non-discrimination (CERD article 2).

Article 4(1) of the L1 -Decree of 1982 prescribes that due regard will be given to the rights of indigenous and tribal peoples when domain land is allocated by the State to citizens. Petitioners make reference (par.57) to the explanatory note of article 4(1) where the rights being guaranteed are qualified only as *'de facto* rights' (par.54, 55). This qualification means that 'these rights' are indeed not recognized as 'subjective rights' but this does not imply that they have no legal implications. To the contrary, their recognition by law by itself proves their legal relevance and article 1386 of the Civil Code provides recourse to the Court in case standards of care or rules of good governance have not been observed when allocating domain land to citizens.

[42] See the Report referred to supra nt 9

The land rights mentioned in article 4 (1) of the Decree L- 1explicitly refer to the villages, settlements and forest plots of the indigenous and tribal peoples. The obvious reason why the provision does not include areas 'presently not cultivated' is the evolvement of the wider geographic coverage of traditional land rights in international human rights law since 1981-1982. Respect for legitimate interests of indigenous and tribal peoples in Suriname is in practice not limited by these references.
Article 4 (1) of the Decree L-1 allows for subordination of the legal interests of indigenous and tribal peoples in their lands to the general interest. 'General interest' is the same concept as 'the interest of society' referred to in article 21 of the Convention. Both concepts are legal standards and none is 'a non-justiciable political question' as Petitioners suggest. 'General interest' is a customary legal standard in civil law legal systems *inter alia* as justification for inferences with of property. [43]

Petitioners have suggested (par 58) that it is *jurisprudence constante* in Suriname that a grant of real title pursuant to article 4 (1) of the L-Decrees will supersede any rights of indigenous and tribal peoples. This is factually incorrect. The two incidental cases referred to (note 80) are decisions by lower courts and they do not constitute an established jurisprudence. The specific circumstances of the first case justified, in the Courts opinion, that the title owner's rights would prevail but the decision may not be generalized. The second case was not about substantive rights but about judicial standing of an indigenous group which was not a 'people' or a 'tribe'.

The 1986 Mining Decree provides in article 2 that ownership of the sub-surface is distinct from surface rights and that all minerals are property of the State. This is consistent with the permanent sovereignty exercised by the State over its national resources for over half a century. The provision of article 25 (1)(b) of the Decree that all applications for exploration permits must include a list of tribal communities in or near the area to be explored is obviously to ensure that the legal interests of indigenous and tribal peoples to land which they infer from and are defined by traditional possession and use, are taken into account when a mining concession is granted. It is established practice that in addition to carrying out an investigation, agents of the State will consult

[43] This is confirmed for international law by the practice of the European Human Rights Court in the application of article 1 of the First Protocol of the European Convention on Human Rights See for example EHRM 22 September 1994, Series A 296-A(Hentrich).

the people regarding effects of the concession and the envisaged activities on their traditional possessed and used land with a view to reaching a mutually acceptable understanding

Art 41(1) of the Forest Management Act 1992 prescribes that in granting logging concessions customary rights of tribal inhabitants will continue to be respected as much as possible. This is again a clear recognition of the legal interests of the indigenous and tribal peoples related to their traditional possession and use of land In granting the concessions standards of due care and rules of good governance need to be complied with and in case of an asserted infringement of these standards, there would be recourse to the independent Court pursuant to article 1386 of the Civil Code.

Petitioners complain (par 63) that the existing titling procedure which is based on the Decrees of 1982 does not provide for a mechanism for securing property rights of indigenous and tribal peoples. When the L- Decrees came about a quarter of a century ago, the perceptions about human rights implications for indigenous en tribal peoples regarding possession and use of land were either not yet or just getting on the international agenda. It should therefore be no surprise that these implications were not addressed in the 1981-1982 Decrees. The central question now is whether recognition of these rights through a titling procedure rather than through national customary law or judge made law would be the most appropriate and effective avenue leading to conversion of the recognized legal interests of the indigenous and tribal peoples to subjective rights The State holds the firm view that under the circumstances of uncertainty about what the traditional laws and customs of the Saramaka Tribe are and the still highly unsettled status of international law with respect to the land rights of indigenous and tribal peoples and their incorporation in the national legal system,- both the UN and the American instruments on the Rights of Indigenous people are still very much under discussion - a process of law making involving all three sources would in the political and social context of Suriname be the preferred route and the State submits that this position be given ample consideration by the Court before it issues any order to the State to promulgate legislation as suggested by the IA Commission and requested by the Petitioners.

3.5. The Petitioners have opted to seek recognition of their alleged land rights through promulgation of legislation and to reject lawmaking through case law. This is against the principle of article 46 of the Convention, is counter productive and should in this instance not be encouraged by the Court.

All three instances in which Petitioners complain that the legal system of Suriname falls short of recognizing rights of the Saramaka Tribe and that this should be cured through legislations are based on the erroneous premise that a national legal system only consists of codified law and that therefore Petitioners would be relieved of the obligation, underlying article 46 par 1 (a) of the Convention, to seek recognition of these rights through judge made case law. In all three instances the legal system recognizes legitimate interests of the Tribe and in all three instances the Court would have jurisdiction to decide whether these interests should be 'elevated' to the status of subjective rights. This domestic remedy needs to be exhausted before the complaints of the Petitioners become accessible to this International Court.

The first is the Petitioner's complaint that under Suriname law the use and enjoyment of land rights of the Saramaka Tribe (article 25 of the Convention) are not recognized because the State is considered to be the owner of all land and traditional forms of land tenure are not embedded in codified law. There is no reason why it should be assumed that the Suriname Courts would not be receptive for arguments of the Petitioners that properly defined property rights of the Saramaka Tribe should be formally recognized. In fact, one could argue with force that an independent court which is an applicable principle of the rule of law in Suriname is in a better position and probably more inclined than a democratic process of lawmaking to incorporate these rights in the Suriname legal system.

The second instance is the observation that communal land related rights are currently not recognized in the Suriname legal system as subjective rights and that therefore indigenous peoples communal based interests would be deprived of protection. Indeed, communal land related subjective rights are not recognized in the Suriname legislation but there are examples of recognition of the legitimacy of communal land related interests. An example is Communal Wood Cutting licenses. Apart from recognizing the legitimate interests of indigenous people in protection of the integrity of their traditional

possession and use of land in article 41 (1) the Forestry Management Act, in article 41 (2) provides for community interests based licenses being granted to indigenous and tribal communities.[44] Again, there is no reason why it should be assumed that 'expansion' and 'elevation' of the legal recognition of such interests to subjective rights could not and should not follow from judge made law

Petitioners also complain that the State has violated article 3 of the Convention by failing to recognize the Saramaka Tribe as a person before the law. Again, there is no reason why formal recognition of this capacity could not emerge through case law. In fact there are examples in Suriname the recognition of legal entities by legal practice. A clear example is the Roman Catholic Clergy which is recognized by customary and case law as a legal entity It would seem that the Gaama, or for that matter anyone who would have an interest by such a decision, could approach the civil courts requesting a declaratory decision recognizing the tribe as a legal entity

The State firmly maintains the view that the requirement in the American Human Rights Convention (article 46) and in other international instruments, that local remedies should be exhausted before international institutions of the human rights system can be approached, should safeguard that every local legal system should in the first place evolve by itself and that national courts should be given ample opportunity to guide this process.[45] This process offers the best chance that international legal developments take root in the national society and become 'law in action' rather than remain 'law in the books'

4.0. Alleged violations in practice of land rights

[44] Since the new Forestry Management Act went into effect in 1992 13 Community Licenses were granted to indigenous en tribal communities covering an area of about 48 000 hectares Granting of these licenses did not affect the more than 100 licenses which are held pursuant to previous legislation by Captains personally in the interest of their communities Although legislation defining guidelines for Community Licenses has not yet been approved, this does not hamper granting of licenses to and enjoyment of the benefits of those licenses by the communities concerned

[45] This view is supported by the consideration of the Court in the Velasquez Rodriguez Case, Preliminary Objections, Judgment of June 26, 1987 Series C No 1, par.62-77 'that the international system for the protection of human rights is **ancillary** (emphasis added by the State)to the domestic law of Inter American States It follows from this qualification that member states must be given the full opportunity to develop their own legal systems and that national court should be allowed to discharge their guiding role with regard to human rights protection as well

4.1. Building of the Afobaka Dam in the early 1960's does not constitute a violation of article 21 for which the State can be held liable because building of the dam and the lake was not a violation of the Convention.

The Petitioners argue (par 23-47 and 98-105) that the State has shown disregard for the property rights of the Tribe by building the Afobaka Dam, forcing them to settle outside their traditional territory and inundating part of this territory. The State, on grounds of fact and law, strongly denies liability for these occurrences and their effects

Building of the dam took place in the early sixties on basis of formal national legislation that was democratically adopted in Parliament in 1958 At that time the official policy of the Government of Suriname and of most other Governments of countries in the world with indigenous and tribal people was to facilitate their inclusion in the economic development of the country It is only decades later that the preservation of their traditions appeared on the international human rights agenda and became an overriding objective. Alcoa was given a concession in the interest of the development of the nation as a whole, to build the Afobaka Dam and to inundate an area to create a water reservoir to feed the hydro-electric scheme. The Saramaka people do no longer hold any land rights over the inundated land. The land has been legitimately transferred in good faith in 1958 to Alcoa[46]. The Government dealt with the impacts and effects of the Dam in accordance with the standards regarding the rights of indigenous and tribal people prevailing at that time. The Government has consulted with the Saramaka Tribe and a common understanding of how the people, who would be affected by the dam and the lake, would be compensated, was reached. There was no question of forced displacement Those who moved accepted that there was a larger interest to be served and received agreed compensations They are precluded from asserting now, half a century later that their rights were unlawfully violated In their conclusions following the oral hearing Petitioners have conceded this point. After referring to building of the dam in the 1960's they explicitly state (Record of the Hearings p 77) that they 'are not requesting that the Court examine the events at that time' but rather that it consider the

[46] That such 'legitimate transfer in good faith' extinguishes any land rights the Saramaka Tribe may have had over the inundated land, is recognized by the Petitioners in par 101 with reference to the Sawhoyamaxa Indigenous Community Case.

ongoing and continuous effects and impacts caused by the damage' In other words, the Court is asked by Petitioners to only examine whether the State has violated the Convention by disregarding the effects and impacts of the damage caused by building the dam and not whether causing the damage itself constitutes such a violation One of those latter forms of damage was the loss of alleged land rights and all that is related to those rights This loss is therefore not an occurrence which the Court is requested to consider as a cause for liability of the State and would in any case not constitute liability under current international law [47] [48]

The request of Petitioners that the State should provide alternative 'communal lands' any other form of reparations to compensate for the alleged loss of land due to building of the dam (par 230 a ii) is therefore without foundation

4.2. Petitioners have failed to identify any effects or impacts caused by the damage from building the dam for which the State would be liable.

Accepting that the State is not liable for the damage caused by building the dam, what are the ongoing and continuing effects and impacts of the damage of building the State for which Petitioners allege liability of the State? And what would be the legal norm that should apply when considering such potential liability?

The Petitioners have not asserted any effect or impact which would not qualify as damage caused by building of the dam and would qualify as an effect or impact of the damage caused by building the dam Petitioners have summed up in their conclusions during the oral hearings (p 77) which effects and impact they consider to be relevant, but none qualifies A continuing deprivation of access to the lands which have been submerged, harm to sacred sites and disruption of land tenure and management systems and an increase of population density are all damages caused by building the dam and not effects of the damage caused by building the dam And the alleged ongoing failure of the State to secure tenure rights to those that lost lands is not caused by building the dam but follows from the wider alleged failure of the State to recognize

[47] The dam was built well before the Convention came into effect and Suriname became a party to it Building the dam is not a 'continuing situation of ongoing violations' but was an 'instantaneous act with continuing effects' These effects are therefore not violations for which the State can be held liable For this distinction and its implications see Antoine Buyse p 87 referred to supra nt 36 and art 14(2) of the Articles on State Responsibility

[48] Petitioners refer to testimonies of Dr Robert Goodland and Dr Peter Poole who evidently did not appreciate the legal implications of the principle of 'no retro-active liability'

traditional land rights beyond related legitimate interests and in that regard the transmigrated people are *mutatis mutandis* treated at par with the members of the Tribe who did remain on the traditional lands.

Legal norms pertaining to land rights for indigenous people have evolved dramatically the last two decades. Those norms will apply for the future.[49] But it is a fundamental principle of the rule of law that responsibility only exists for violation of contemporaneous legal norms. A change of those norms over time because the prevailing values in society change or for whatever other reason, does not justify liability with retro-active effect.[50] Following from the above, there should be no need for the Court to find what the content would be of norms which would apply to establish any liability of the State for effects and impacts of the damage caused by building the dam over time, but if there would be such need, the Court would have to take this changing content of the applicable norms into account.

4.3. The State did not disregard the interests of those who have transmigrated when the Afobaka Dam was built.

It has been suggested by the Petitioners that activities in the territory which the relocated people now inhabit have been undertaken without due regard for their interests (par 29,30 and 105). Following on from this, the Petitioners have requested that the Court should suspend mining activities in this territory but this request has no foundation in fact and law. The mining activities in the territory are primarily being undertaken pursuant to a concession for mining of gold granted by the State Company Grassalco to Golden Star Resources Ltd in May 2002 pursuant to a Mineral Agreement of April 7, 1994 in an area which is outside any territory that the Saramaka Tribe has traditionally possessed or

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[49] Petitioners have expressed concerns (par. 31-37) about the raise of the level of the Afobaka reservoir which may result form implementation of the Tapanahony River Diversion project. The State will, if it proceeds with the project comply with prevailing international standards regarding to the social and environmental impacts of the project. Expression of concerns at this time is highly premature.

[50] This principle is embodied in article 13 of the draft articles of the Responsibility of States for internationally wrongful acts and is recognized as a general principle of international law by Judge Huber in the Island of Palmas case in which he stated :'A judicial fact must be appreciated in the light of the law contemporary with it and not of the law in force at the time when a dispute in regard to it arises or falls to be settled' UNRIAA, vol II p 829 p 845 quoted in the UN Report of the International Law Commission. Fifty-Third session 23 April – 10 August 2001 on State Responsibility

used and on which they can claim any land rights Moreover, the activities have only commenced after extensive Social and Environmental Impact Assessments had been concluded in 2002 in accordance with accepted international standards for environmental and social assessments including those of the World Bank Impacts and Benefits Agreements have been concluded in 2003 with the Communities of the neighboring villages (Koffiekamp, Niew Lombe and Alasabaka). All stakeholders including members of the Saramaka Tribe were extensively consulted and their recommendations were fully taken into account in the project implementation and during operations. Any violation of any rights of the Saramaka Tribe under the Convention is out of the question. There is no ground whatsoever for an order as requested by the Petitioners (nr 230 a) iii)) 'that Suriname suspend all mining activities that have not been consented to by the Saramaka people in areas occupied and occupied by those communities now living outside of traditional Saramaka territory(. .)'

In addition to the concession granted to Gold Star Resources Ltd mining concessions were granted in the territory which the transmigrated people inhabit on March 19 and May 28, 2004 to Sarafina NV and on May 16, 2005 to Volcanic Resources N.V Both are small scale miners and in both instances the consultation provisions were observed and measures taken to deal with impacts and effects which these concessions would have on the living conditions of the people Petitioners express complaints about damaging effects of small scale mining in Suriname, but these complains are insufficiently specified and substantiated to support and justify an order from the Court that mining activities in the territory outside the traditional Saramaka territory should be prohibited or suspended.

In the foregoing par 4.1,4.2 and 4.3 the State has extensively addressed the issues of liability which allegedly would arise from the effects and impacts of damage caused by the Afobaka Dam including alleged violations of the interests of those who transmigrated to areas outside the traditional territory of the Saramaka Tribe. But the State wishes to repeat its position that the Court should not take cognizance of this cause of action, because neither the underlying facts nor the legal grounds for this course of action, were part of the Petition submitted by the Petitioners to the IA Commission and of the Application submitted by the IA Commission to the Court It is an imperative of the principle of due process as contemplated by the Inter American System that any course

of action submitted to the Court should have first been subject to the various stages – including the settlement stage – of the process before the IA Commission This is a new cause of action and the State strongly feels that its rights to due process are infringed by the introduction of this cause of action, both in terms of fact and law, only in the procedure before the Court. The State has outlined its position on the merits of the issue without prejudice to this procedural objection [51]

4.3. Logging and mining concessions did not in violate alleged land rights of the Saramaka Tribe.

The concessions related denunciation by the Petitioners of violation of article 21 by the State is twofold. First they claim that granting the concessions by the State to third parties was be unlawful because substantive and procedural attributes of their alleged land rights were disregarded and second that the State has acted unlawful by neglecting its duty to supervise the logging operations.[52]

The complaint that substantive attributes of their land rights were violated is based on the premise that the Saramaka Tribe would have rights which include extensive natural resources. Based on tradition, the alleged land rights of the Saramaka Tribe however would not include any interests on forest or minerals beyond what the Tribe traditionally possesses and uses for subsistence (agriculture, hunting, fishing etc) and the religious and cultural needs of its people[53].

Moreover, the Head Captains and Captains of the Lo's regularly apply for and continuously exploit logging and mining concessions on the territory on which the Saramaka Tribe claims land rights, and by doing so the Saramaka Tribe has recognized the Governments sovereignty over the forest. The Tribe is estopped from asserting that

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[51] To illustrate their untenable position that the Dam only brought them misery; Petitioners stated that they are still deprived from electricity There is no link between building the dam to generate electricity for an aluminum smelter and access of individuals to electricity for home use But the complaint is also pure rabble rousing As appears from Annex C almost all villages have access to electricity

[52] Annex D are a map and list of concessions currently in force in the territory claimed by the Saramaka Tribe It is clear that the vast majority of concessions and by far the largest area is controlled by (members of) the Sramakka Tribe

[53] Both witness Wazen Eduards (p.9) and Expert witness Richard Price p 62 state that the traditional land rights 'include everything from the top of the trees to the very deepest place that you could go under the ground' but these are mere assertions There is no factual evidence whatsoever that the customs of the Saramaka Tribe have indeed ever included resources beyond what they used to satisfy their traditional needs

those rights were violated when logging or mining concessions were granted to third parties. Granting of the specific concessions referred to by the Petitioners did not infringe on the traditional forestry interests of the Saramaka Tribe.

The Petitioners complain about the level of consultation that took place when logging concessions were given to third parties. The level of consultation that is required is obviously a function of the nature and content of the rights of the Tribe in question. In this instance the legitimate interests of the Saramaka Tribe were those that could be inferred from their traditional possession of the land and their use of timber for their subsistence activities. The concessions which were provided to third parties did not affect these traditional interests

As far as the impacts and effects of the concessions are concerned, the law provides for respect for the integrity of their villages, settlements and forest plots and when the concessions were granted these interest were fully taken into account. Impact and effects beyond those mentioned by the law, have in all instances been subject of consultation at an appropriate level with the captains concerned. The Gaama and or captains were informed and allowed to express any concerns they have so that those to the extent that they were legitimate and well founded could be taken into account in granting of the licenses.

The claim of the Petitioners that the State is liable for environmental damage caused by the logging operations because it failed to supervise these operations is also unfounded. The State exercised supervision as it normally does Any damage which was caused was inherent to logging operations. Exploitation of the logging concessions referred to by the Petitioners did not affect the legitimate interests of the Saramaka people nor did the mining concessions which were never exploited anyhow

5.0. The scope of the alleged land rights of the Saramaka People

5.1. The scope of land rights of indigenous and tribal peoples is well defined in current international human rights law.

Land rights of indigenous and tribal people, as developed by case law of the IA Commission and the Court, are based on article 21 of the Convention and have dimensions of content and dimensions of procedure The dimensions of content can be

related to two specific attributes The first is the genesis of the land rights being traditional possession and use. This determines their objective and scope. Although these land rights are not created by legal instruments, they nevertheless are considered by the Court to have the equivalent effect of title granted by the State The second attribute is the nature of the land rights from which it follows that these rights have an autonomous meaning in international law, arise from indigenous and tribal peoples own laws and forms of land tenure and exist as valid and enforceable rights in the international system irrespective of formal recognition by the States' legal systems. Procedurally indigenous and tribal people are deemed to entail both the right to demand official recognition of land rights and their registration and the right that they are guaranteed by the State through mechanisms of consultation and remedies (articles 1, 2 and 25)

5.2. There is no basis in law to extend the scope of the land rights of the Saramaka Tribe beyond the established definition.

It is worth repeating that this important argument about a widely extended scope of property rights of Tribal and Indigenous Peoples over natural resources was not raised in the initial petition and was therefore not addressed at all by the IA Commission in its Report. It was obviously prompted as a second thought by the human rights advocates in an effort to obtain judicial support for a novel thought which has no basis in international law

The Petitioners argue that 'rights of permanent sovereignty on land and resources' should be inferred from the land rights of art 21 in conjunction with the right of self determination of common art 1 of the UN Covenants This consequence of this link up would be entitled to 'effective possession' and 'effective control' over the land and all its related natural resources rather than just their 'traditional possession' and traditional use' of land. More specifically this link up would result in enhancement of the quality of land rights in the sense that sovereign rights of the State over natural resources would be incompatible with the rights to effective control over natural resources which the Tribe would infer from their rights and should give way to these rights In would more specifically mean (i) that nature and extent of these rights, including those pertaining to national resources, would be determined by reference to customary land tenure systems and laws (ii) that the rights can include resources capable of commercial exploitation

rather than only those resources used for traditional subsistence and cultural and religious purposes and finally, (iii) that indigenous and tribal peoples have the right to consent to any disposition of their natural wealth. In view of the Petitioners their proposition would also limit the scope of permissible restrictions on their rights in the sense, that application of the 'interest of society' test of article 21 of the Convention should be strictly applied and the provisions of article 41 of the of the Constitution and article 2 of the Mining Decree would be ongoing and continuous violations of the Convention

The State disagrees with each and all of these propositions both from a point of view of law and a point of view of reason

5.3. The State has permanent sovereignty over natural resources. The notion of 'sovereign rights over natural resources' is under international law not an attribute of land rights of indigenous people.

As a result of the near completion of the decolonization process and further evolution of the principle from the 1960s, the right to permanent sovereignty over natural resources became vested in each State. Rights of the State emanating from sovereignty over natural resources include the right to possess, use and feely dispose of natural resources; to determine freely and control the prospecting, exploration and exploitation, use and marketing of natural resources; and to manage and conserve natural resources pursuant to national and developmental policies. This right is embodied in article 41 of the Suriname Constitution and in numerous other Constitutions.

The Petitioners premise that under current international law, a right to permanent sovereignty over natural resources accrues to indigenous peoples as well, cannot be sustained for various reasons. One reason is that the central premise of the proposition of the Petitioners that 'permanent sovereignty over natural resources' could be inferred by indigenous people from article 1 of the common UN Covenants, i.e. that 'peoples' in this article would include ' indigenous peoples' is a misrepresentation as confirmed, among other instruments, in ILO Convention No. 169 (Article 1, par 3). Another reason is that the interpretation of the concept of land rights of indigenous peoples as established under current international law would be stretched too far if one were to consider these rights as tantamount to full sovereignty over their natural resources or a right of veto of

indigenous peoples for any exploitation of natural resources on their lands. Such interpretation confuses ownership and management rights of indigenous peoples with respect to their traditional natural resources with the principle of permanent sovereignty over natural resources as an attribute of the State. While resource rights of indigenous peoples create corollary duties of States to respect these rights, the decisive authority as regards use and exploitation of indigenous lands and their natural resources ultimately rests with the State which has the overall responsibility for national development and the well-being of the population as a whole

Petitioners have made reference to the Maori Fisheries Case of 2000 in support of their proposition that as a corollary of common article 1 of the UN Covenants 'indigenous and tribal peoples enjoy effective possession of and effective control over natural resources' (par. 117-119). The Human Rights Committee's view expressed in the Maori Fisheries Case may however not be generalized and it may not serve as a precedent for the instant case. A very critical and specific factual circumstance in the Maori Fisheries Case is that the Treaty of Waitangi of 1840 explicitly 'affirmed the rights of Maori, including their right of self-determination and the right to control tribal fisheries'. The 1762 Peace Accord between the Dutch Government and the Saramaka Tribe has no status or relevance comparable to that of the Treaty of Waitangi: It is null and void and does not provide for any affirmation of self-determination or control or resources.

5.4. State sovereignty pre-existed any land rights of the Saramaka Tribe. Tradition of the Saramaka People does not include use and exploitation of natural resources (mining and logging) nor does their tenure system provide for any laws or customs to that effect.

The State's permanent sovereignty over the territory and resources of the nation dates from the 17th century when Suriname came into existence as a constitutional entity. This predates any traditional possession and use of the claimed land and resources by the Tribe. This possession commenced only half a century later. The land rights of the Tribe may in this regard not be considered as equivalent to land rights of indigenous peoples.

The nature and extent of the rights of the indigenous people including those to natural resources, should 'in first and last instance' be determined by reference to their genesis:

the traditional possession and use of land. The view that those rights include 'permanent sovereignty over land and natural resources' is based on a legal construct and bears no relation whatsoever to the 'traditional possession and traditional use of land and resources' as their *raison d'etre* (par.128-129). Petitioners have stated that the Saramaka people have 'traditionally and continuously' used the resources within their territory including products such as minerals, clays, sand, gravel, stone material and the water courses By just listing the items and no more, it is suggested that any traditional use of a particular resource (for subsistence, religious or cultural purposes) would create an unlimited and exclusive property right of the resource This is absurd How could one maintain that the traditional use of trees to make canoe's once every year would create rights to effectively possess and control an entire forest or that incidental mining of gold would create the right to possess and control millions of tons of minerals in the ground which one has never even seen? (par 130)

Petitioners have made reference to the Awas Tingni Case of 2000 to underpin their argument that, as a general rule, indigenous people's rights on land include rights to the resources therein (par 127 – 130) The significance of this landmark decision of the IA Court is twofold One is the recognition of the land rights of indigenous people as rights with an autonomous meaning and the other the finding that the customary land tenure of indigenous people is the genesis of their land rights. The conclusion of the Court that the State has violated the land rights of the Awas Tingni Community by granting concessions to third parties to utilize the property and resources located in an area that could be part of their lands, only suggests that the concessions to use property and resources infringe customary land rights, but does not contemplate a definition of the scope of the customary land tenure Such a definition was not a question put before the Court and one must assume that if the Court had nevertheless contemplated a decision in that regard, that it would then have provided an explicit finding on such an important matter. It is worth noting that comments of authorities closely involved with the Awas Tingni ruling do not ascribe any such meaning to the decision [54]

[54] See 'The Case of Awas Tingni v Nicaragua: 'A New Step in the International Law of Indigenous People' co-authored by S James Anaya and Claudio Grossman, published in the Arizona Journal of International and Comparative Law Vol 19 No 1 p 202-215 The first author was lead counsel among the group of attorneys that has represented the Community of Awas Tingni in the Community's effort to secure its land rights before Nicaraguan and International authorities, and he was assistant to the Inter-American Commission on Human Rights in its prosecution of the case before the Inter-American Court of Human Rights The second author was the

5.5. There is also no basis in reason to extend the scope of land rights of the Saramaka people beyond the prevailing definition. The State has a duty to pursue development of the State as whole. Providing the Saramaka Tribe with 'effective possession' and 'effective control' over land and resources would result in an inappropriate standard for balancing of interests of society and group based interests.

In modern international law, permanent sovereignty over natural resources entails rights and duties for the State. Duties incumbent on States include the duty to exercise permanent-sovereignty related rights in the interest of national development and to ensure that the whole population benefits from the exploitation of resources and the resulting national development This includes the duty to respect the rights and interests of indigenous peoples and not to compromise the rights of future generations. But by necessity, such responsibilities can only be fulfilled by the State as the guardian of the public interest and national development for the well-being of the population as a whole. The proposition of the Petitioners that the Tribe should have 'effective possession and effective control over land and any land related resources' boils down to an unacceptable encroachment on the rights and duties of the State to pursue society's interest by developing its national resources It is well established international case law that permissible limitations of property rights protected in human rights instruments should reflect a fair balance between the demands of the general interest of society and the requirements of the protection of fundamental rights of individuals and group. This balance is achieved through limitations that allow for 'a reasonable relationship of proportionality between the means employed and the aim pursued by measures applied by the State' and 'enjoyment by the State of a wide margin of appreciation with regard both to choosing the means and to ascertaining whether the consequences are justified in the general interest' The State's judgments as to what is in the public interest should be respected 'unless those judgments are manifestly without reasonable foundation.'[55]

Commission's chief delegate for the prosecution of the Awas Tingi case before the Inter-American Court of Human Rights

[55] The European Commission and the European Court for Human Rights have firmly established these standards in their jurisprudence It was ruled for example in EHRM 9 December 1994,Series A 301-A (Holy Monasteries) p 34 that States are allowed 'a wide margin of appreciation' in determining whether expropriation is in the general interest This margin of

The standard proposed by Petitioners for balancing on the interests of society and the Tribe suggests that the rights which the Tribe would infer by reference to their customary systems and laws would have a more or less absolute character disregarding both the allowance for 'a reasonable relationship of proportionality between the means employed and the aim sought' and accordance to the State a wide margin of appreciation in balancing the interests at stake. Also the inference from the alleged extended scope of land rights that the Tribe would have the right to consent to any disposition of natural wealth and resources over which they claim rights is unsustainable. The State accepts that proper prior consultation procedures should prevent unjustified disregard for human rights. The nature, level and extent of such consultations depend in every instance on the specific circumstances. Property rights of indigenous and tribal people follow from and aim to preserve tradition. Tradition is the genesis, its preservation the aim and its function is to determine the scope of the rights. The nature of consent requirements should be congruent with the content of these rights. Consultation is not an end in itself but serves a purpose, in this case respect for land rights within their scope as currently defined by international law.[56]

5.6. Article 41 of the Constitution and article 2 of the Mining Decree do not violate the *sui generis* land rights of the Saramaka People. Extending those rights to include rights over natural resources would violate the generally applicable principles of State sovereignty over natural resources and separation of surface and sub-surface rights and therefore also the principle of non-discrimination.

The laws and customs of the Saramaka Tribe do not vest and have never vested rights over natural resources apart from those which have traditionally been possessed and used for subsistence, cultural and religious purposes in the Tribe.

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appreciation is only exceeded is case of 'abuse of power' or 'manifest arbitrariness' (See EHRM 21 February 1986, Series A 98 (James) p 32, ECRM 30 September 1975, B 22 (Handyside) p 50

[56] James Anaya, Indigenous Peoples Participation Rights in relation to Decisions about Natural Resource Extraction, Arizona Journal of International and Comparative Law Vol 22. No 1 pg 7:' The widespread acceptance of the norm of consultation demonstrates that it has become part of customary international law. Ambiguity remains however. as to the extent and content of the duty of consultation owed to indigenous peoples ( ) Logically, the extent of the duty and thus the level of consultation required is a function of the nature of the substantive rights at stake'

Ownership of minerals, subsurface and other natural resources pertaining to land has always been retained by the State. The ILO Convention in article 15 (2) explicitly recognizes the right of the State to retain this ownership, also with respect to indigenous people and limits any rights of indigenous people in this instance to the procedural rights of consultation. Since State sovereignty and separation of surface and sub-surface rights are generally applicable principles in the Suriname legal system, an exception as suggested by Petitioners would violate the principle of non-discrimination.

The bottom line is that Suriname by providing in its constitution and mining legislation that 'natural resources are vested in the nation and need to be used for the economic, social and cultural development (of the nation as a whole) has not violated the property rights which the Saramaka Tribe infers from article 21.

6.0. Conclusion: None of the reparations or disbursements sought by Petitioners is allowable.

6.1. Material damages

There is no justification for reparations in the form of material damages. The State has extensively explained why it is not liable for the effects of building of the Affobaka Dam. In fact Petitioners have conceded this point and the request for compensation of any material damages caused by building of the Affobaka Dam is therefore not substantiated.[57] The second cause for seeking compensation of material damages asserted are the effects of the logging operations by two Chinese and one local concessionary. The State is of the view that legitimate interests of the Saramaka Tribe were not affected by these operations. Granting of the concessions was legitimate; the environmental effects were those inherent to logging activities and the Saramaka Tribe can not claim compensation for a loss of timber resources because those resources belonged to the State and not to the Tribe.

6.2. Moral damages

[57] Supra 4.1.

Petitioners have listed a large number of circumstances which would justify a compensation for moral damages The State is firmly of view that in the instant case there is nor justification whatsoever for a compensation for moral damages All circumstances mentioned relate to the alleged failure of the State to recognize the land rights of the Tribe It may be correct the land related interests of the Sramakka are not recognized as a subjective right in the Suriname legal system but it is a tendentious misrepresentation to suggest that legitimate interests of the Tribe are not recognized by the system and respected in practice There are many laws that recognize these interests and there are remedies available for recourse if these interests are infringed Moreover, considerations related to privacy and cultural and religious heritage are highly exaggerated The alleged violations which the Petitioners claim would justify a compensation of moral damages are in essence claims for infringements of economic interests

6.3. Other forms of reparations

The State has *in extenso* explained why the requested reparations in the form of a orders requiring the State to create a mechanism for delimitation, demarcation and titling of the property rights of the Saramaka Tribe would be inappropriate By way of summary:

6 3 1 There is no clarity about the principles of a mechanism which would drive the delimitation and demarcation of the territory which the Saramaka Tribe has traditionally possessed and used

6 3 2 There are serious doubts about essential elements of the laws, values and customs on which the land property rights system would be based, in particular in which entity, the Tribe or the Lo's, the land rights should be vested and what the authority structure and decision making processes of the system would be

6 3 3 The underlying assumption of the requested order that in light of the right of self determination of art 1 of the UN Covenants the scope of the property rights should be extended beyond what is traditionally possessed and used, to include 'effective

possession' and 'effective control' of the territory and on surface and sub surface resources, has no foundation in current international law nor is there any foundation in reason

6.3.4 The proposition that the Upper Surname River would be over-crowded due to the Afobaka Dam has no factual basis; there is no justification for providing the Saramaka Tribe additional lands to compensate for lands lost To the contrary, due to the migration of 67% of the Saramaka Tribe to the cities, the population density in the area which the members of the Sramaka Tribe now inhabit is less than it historically was.

6.3.5. It would be inappropriate to order the State to suspend mining activities in the territory outside the traditional territory of the Tribe. The scope of the requested order is far too broad and open ended in terms of object and time Any order affecting the sovereignty of the State over its natural resources should have a proper basis in law and it should include limitations congruent with the basis of justification. Both elements are missing in the request

6.3.6 The period of 18 month suggested for completing delimitation, demarcation and titling is unrealistic. The process will involve time consuming consultations with the Tribe and all other more than 20 indigenous and tribal peoples in Suriname. It will involve political consultation, legislation and approval by Parliament. The process has many aspects which can hardly be influenced let alone controlled An undertaking with a fixed 'delivery' date would be most inappropriate. All that can reasonably be 'imposed' on the Government is a 'best effort' undertaking

6 3 7 The requirement of prior informed consent as a principle needs to be 'translated' in practical rules for specific categories of instances where consultation is required with a view of possible negative effects on the rights of the Tribe inferred from traditional possession and use of land

6.3.8. The State entertains an ongoing consultation process with its indigenous and tribal people. Any suggestion that progress in this process is dependent on the Government only is false In fact the process is much more dependent on the limited availability of the peoples and their advisors Consultation in this instance is an element of a wider

process of problem-solving for which not only the Government is responsible but the entire society including foremost the indigenous and tribal people and their representatives. The State by its nature bears the ultimate responsibility for the success of the process but genuine sharing of responsibility at the operational level is a condition sine qua non.

6.4. Reimbursement of costs

The State is of the view that there is no justification for an award of costs to the Petitioners. The Petitioners have refused and still refuse to seek solutions for the issues which are subject of these proceedings through the political and legal processes which are available domestically. It is their preference to appeal to an international rather than domestic forum and consequently they should absorb the cost which they incur.

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