Inter-American Court of Human Rights

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Case of Twelve Saramaka Clans
(Case 12.338)

Observations of the Victims' Representatives in Response to the Preliminary Objections Presented by the Republic of Suriname

01 March 2007

Representatives:

Fergus MacKay

[redacted]

David Padilla

[redacted]

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CASE OF TWELVE SARAMAKA CLANS (CASE 12.338)

OBSERVATIONS OF THE VICTIMS' REPRESENTATIVES IN RESPONSE TO THE PRELIMINARY OBJECTIONS PRESENTED BY THE REPUBLIC OF SURINAME

I. INTRODUCTION

1. The Inter-American Commission on Human Rights ("the Commission") submitted the Case of Twelve Saramaka Clans (Case 12.338) to the Inter-American Court of Human Rights ("the Court" or "the Inter-American Court") on 23 June 2006. The Commission's Application requests that the Court determine the international responsibility of the Republic of Suriname ("Suriname" or "the State"), which has incurred in the violation of Articles 21 (Right to Property) and 25 (Right to Judicial Protection), in conjunction with the non-compliance with Article 1(1) and 2 of the American Convention on Human Rights ("the Convention" or "the American Convention").[1]

2. The victims' representatives submitted a brief containing their pleadings, motions and evidence on 03 November 2006.[2] They additionally request that the Court determine the State's international responsibility for the violation of Article 3 of the Convention and that it interpret Article 21 of the Convention, pursuant to Article 29(b) of the same, in accordance with, *inter alia*, common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

3. The victims' representatives received the Official Response of the State to the Commission's Application ("the Official Response"), dated 12 January 2007, on 2 February 2007.[3]

4. Pursuant to Article 37(4) of the Court's Rules of Procedure, the victims' representatives submit to the Inter-American Court this brief responding to the preliminary objections interposed by Suriname in its Official Response. These observations are accordingly limited to issues of jurisdiction and admissibility. As set forth below, the victims' representatives consider that the Court has full jurisdiction to examine the merits of the present case, and that it meets all requirements of admissibility. The objections presented by the State lack any foundation as a matter of law or fact, and the victims' representatives respectfully request that they be

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1 *Application of the Inter-American Commission on Human Rights in the Case of 12 Saramaka Clans (Case 12.338) Against the Republic of Suriname*, 23 June 2006 (hereinafter "Application of the Commission").

2 *Pleadings, Motions and Evidence of the Victim's Representatives in the Case of 12 Saramaka Clans (Case 12.338) Against the Republic of Suriname*, 03 November 2006 (hereinafter "Brief of the Victims' Representatives").

3 *Official Response of the State of Suriname in Case No. 12.338 Twelve Saramaka Clans v. Suriname submitted to the Inter-American Court of Human Rights*, Paramaribo, 12 January 2007 (hereinafter "Official Response of the State").

dismissed.

5. In addition to addressing the preliminary objections interposed by Suriname, this submission also contains brief observations on a number of statements made by the State in its Official Response, in relation to the witnesses offered to provide testimony before the Court, and on the State's request to submit an additional pleading (*infra* Sections V, VI and VII, respectively).

II. SUMMARY OF THE OBJECTIONS PRESENTED

6. For the sake of clarity, given that the State has addressed certain exceptions in various sections of its Official Response, the victims' representatives have summarized the preliminary objections interposed by Suriname as follows:

A. The petitioners lack standing to present a petition to the Commission
B. The victims' representatives lack standing before the Court
C. The petitioners failed to exhaust domestic remedies
D. Twelve Saramaka Clans is a duplication of other proceedings and *res judicata*
E. The Commission failed to comply with Articles 50 and 51 of the American Convention
F. The Commission abused its Rules of Procedure when processing Case 12.338
G. Mr. David Padilla is barred from representing the victims because he was Assistant Executive Secretary to the Commission when Case 12.338 was filed with the Commission in October 2000

III. SEPARATE HEARING ON PRELIMINARY OBJECTIONS

7. Suriname requests a separate hearing on the preliminary objections raised in its Official Response.[4] However, while it makes this request, it fails to substantiate that separate and extended treatment of its preliminary objections is "indispensable" pursuant to Article 37(5) of the Court's Rules of Procedure. Indeed, it fails to provide any meaningful justification in support of its request for a separate hearing in its Official Response.

8. Suriname does however attempt to extemporaneously justify the need for a separate hearing in its communication to the Court of 13 February 2007. This communication notes that the State's preliminary objections are "extremely important" and of considerable weight, and that separate treatment of these exceptions "will coincide better with the purpose of the Court as the highest autonomous judicial institution within the Inter-American Human Rights System."[5] No further explanation is offered in support of these contentions. These bare assertions do not establish that a separate hearing on preliminary objections is warranted and, therefore, that the

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[4] Official Response of the State, para. 293, p. 115. See, also, communication of the State requesting a 'special hearing on the preliminary objections in case no. 12.338, the Twelve Saramaka Clans', 13 February 2007, transmitted to the victims' representatives by the Court on 16 February 2007.

[5] *Communication of the State of Suriname to the Inter-American Court of Human Rights (CJDM/1556/07)*, 13 February 2007, at p 2.

principle of procedural economy set forth in Article 37(6) of the Court's Rules of Procedure should be set aside in the instant case.

9. The victims' representatives respectfully oppose the holding of a separate hearing on the preliminary objections interposed by the State because, as discussed in detail below, these objections do not merit distinct and extended treatment and, therefore, a separate hearing on the Suriname's preliminary objections is neither appropriate nor "indispensable."[6] They further request that the Court deny Suriname's request for a separate hearing on its preliminary objections and proceed to examine these objections together with the merits and possible reparations in a single hearing.

IV. RESPONSE OF THE VICTIMS' REPRESENTATIVES TO THE PRELIMINARY OBJECTIONS FILED BY SURINAME

10. The Court's Rules of Procedure and jurisprudence require that the State making a preliminary objection specify the article of the Convention upon which the objection is based or support its objection in some other way,[7] and that the brief containing preliminary objections must set forth, *inter alia*, the facts and legal arguments in relation to those objections.[8] The majority of the exceptions interposed by the State do not comply with this rule. They are stated in vague terms that are not amenable to precise responses and contain extended arguments of dubious relevance to the stated objection.[9] In fact, it is difficult to fully ascertain the State's contentions with respect to most of its preliminary objections, both in terms of the proffered facts and legal arguments, and most lack any supporting evidence.

A. RESPONSE TO THE FIRST OBJECTION: THE PETITIONERS LACK STANDING TO PRESENT A PETITION TO THE COMMISSION

11. The State asserts that the petitioners in Case 12.338 lack standing to submit a petition to the Commission pursuant to, *inter alia*, Article 44 of the Convention. On this basis, in Suriname's view, the Commission erred in admitting Case 12.338. The State's views in this respect appear to be based on the following considerations:

a) that the State was uncertain who was authorized to represent the petitioners, in particular that it was unclear as to the role of Mr. Hugo Jabini;[10]
b) that the NGO the Forest Peoples Programme "was never introduced to the State as being the legal representative, as mentioned in article 44(1) under d" (presumably the State is referring to Article 46(1)(d) of the Convention);[11]
c) that signatures were falsified on the petition;[12] and,
d) that while some of the petitioners satisfy the requirements in Article 44 of the Convention, they do not have the authority to petition the Commission

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6 *Rules of Procedure of the Inter-American Court of Human Rights*, Article 37(5).
7 *Genie-Lacayo v. Nicaragua Case, Preliminary Objections*. Judgment of 27 January 1995. Ser C No. 21, para. 35.
8 *Rules of Procedure of the Inter-American Court of Human Rights*, Art. 37(2).
9 See, wholly or partially, Preliminary objections 1, 2, 3, 5, 6 and 7.
10 Official Response of the State, para. 117-20.
11 *Id.* at para. 120-21.
12 *Id.* para. 118.

because, in the State's view, they may only do so through and with the express consent of the *Gaama* or paramount chief of the Saramaka people.[13]

12. For the reasons presented below, these objections lack any support in law or fact and, respectfully, should be rejected and dismissed.

13. Article 44 of the American Convention provides that "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

(a) The State was uncertain who was authorized to represent the petitioners and in particular it was unclear as to the role of Mr. Hugo Jabini

14. The State maintains that it was uncertain as to which persons were authorized to represent the petitioners and that it was particularly unclear about the role of Mr. Hugo Jabini. This point bears no relevance to the requirements of Article 44 of the Convention as Mr. Hugo Jabini is not a petitioner in Case 12.338 and therefore his standing before the Commission is not at issue.

15. When dialogue with the State commenced in relation to the instant case in 2003, the State was notified and was well aware that Mr. Hugo Jabini, himself a Saramaka person, had been designated as the petitioners' representative in the capital of Suriname due to the fact that his organization, *Stichting Tooka*, acted as the secretariat for the Association of Saramaka Authorities (also known as *Wanhati* or 'One Heart' in English).[14] The victims' representatives further observe that the State was informed from the inception of this case about the identity and location of the petitioners; the petition clearly identifies each petitioner and provides contact information as required in Article 46(1)(d) of the Convention.

(b) The State was not informed that the Forest Peoples Programme was the petitioners' legal representative

16. Suriname contends that it was not informed in petition 12.338 that the NGO the Forest Peoples Programme ("FPP") acted as the petitioners' legal representative, and that this contravenes Article 44(1)(d) of the Convention (presumably the State is referring to Article 46(1)(d)). However, Mr. Fergus MacKay, the Coordinator of the Legal and Human Rights Programme of the FPP, was not the petitioners' legal representative at the time the petition was submitted. Thus, there was no need to provide information about the FPP or Mr. MacKay in the petition submitted to the Commission in October 2000 pursuant to either Article 44 or Article 46(d)(1) of the Convention. Mr. MacKay was authorized to be legal counsel for the petitioners in July 2002. A power of attorney declaration was signed by the petitioners and duly submitted to both the Commission and the State as an annex to the petitioners' submission to the Commission of 22 July 2002. Since that date it has been clear to the State that Mr. MacKay is counsel for the petitioners in Case 12.338.

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[13] *Id.* para. 123, 148-64.

[14] *Id.* at para. 121 (confirming that the State was aware that Mr. Jabini acted as the petitioners' representative in the capital city).

(c) Signatures were falsified on the petition

17. With respect to the State's insinuation that the signatures of "a few" of the petitioners were falsified, the victims' representatives categorically deny this or any other impropriety in relation to the signatures affixed to petition 12.338.[15] The State is correct however that a granddaughter signed the petition for her grandfather.[16] The person in question is Captain Wekker Paanza, the Captain of Pambooko I Village, who stands on behalf of the Kasituu *lö* (clan) in petition 12.338. Captain Paanza is partially blind and for this reason has difficultly writing. Preferring to have his name rather than his thumb print affixed to the petition, he personally requested that his granddaughter write his name for him on the petition. This was done in his presence and in the presence of numerous witnesses.

18. Captain Paanza was recently appointed to the position of Head Captain by the *Gaama* or paramount Chief of the Saramaka people. As such, he now holds a stamp of office that he places on correspondence to verify that he is in accord with its contents. Should the Court require that Captain Paanza submit a sworn affidavit attesting to the preceding and to his status as a signatory to petition 12.338, the victims' representatives will ensure that this is transmitted to the Court forthwith.

(d) The petitioners do not have the authority to petition the Commission without the express consent of the *Gaama* or paramount chief of the Saramaka people

19. Suriname's view that Case 12.338 should be declared inadmissible or otherwise rejected – and that the Commission erred in this respect – because the petitioners failed to act through and with the express authorization of the *Gaama* of the Saramaka people is a recurrent theme in the State's Official Response.[17] In this submission, we will address only those aspects of this argument that are relevant to admissibility as set forth in the preliminary objections interposed by the State.

(i) Article 44 of the Convention and Article 23 of the Commission's Rules of Procedure

20. The State asserts, *inter alia*, that the submission of a petition to the Commission without the involvement and express authorization of the *Gaama* violates Article 44 of the Convention.[18] It also raises this issue in the section of its Official Response concerning domestic remedies. However, it is unclear if the State is arguing that this issue is relevant to the exhaustion of remedies requirement in Article 46(1)(a) of the Convention, particularly as it again refers to Article 44 in this respect.[19] This point will be addressed in the section on domestic remedies *infra*.

21. Article 44 of the Convention and Article 23 of the Commission's Rules of Procedure allow for petitions to be submitted by "any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of

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[15] *Id.* para. 118 and 152.
[16] *Id.*
[17] Official Response of the State, *inter alia*, para. 149
[18] *Id.* para. 123 and 159.
[19] *Id.* para. 148-64, at 159 (referring to Article 44).

the OAS ....." The Court has previously observed that the scope of these provisions "should be construed by the Court in accordance with the object and purpose of such treaty [the American Convention], which is the protection of human rights,[20] and in accordance with the principle of the effectiveness (*effete utile*) of legal rules."[21] The Court has also observed that the

> access of the individual to the Inter-American System for the Protection of Human Rights cannot be restricted on the basis of the requirement to have a legal representative. The Court has stated that "the formalities that characterize certain branches of domestic law do not apply to international human rights law, whose principal and determining concern is the just and complete protection of those rights."[22]

22. Petition 12.338 was submitted by the Association of Saramaka Authorities, a body comprised of traditional authorities of the Saramaka people, and by twelve Saramaka Captains (as the traditional leaders are known) standing on their own behalf and on behalf of their respective *lö* (clans). The Captains are the highest authorities within each *lö*. In petition 12.338, the Association and the Captains explicitly stated, as they are authorized to do pursuant to Article 44 of the Convention and Article 23 of the Commission's Rules of Procedure, that they were submitting the petition on behalf of the each of the twelve Saramaka *lö* and the members thereof. These twelve *lö* comprise the Saramaka people as a collective social, political, cultural and territorial entity and, therefore, the petitioners explicitly stated that they were also petitioning the Commission on behalf of the Saramaka people and its members. Further, as Saramaka persons, the petitioners have the dual capacity of also being victims in their own right in Case 12.338.

23. There is no requirement in either Article 44 of the Convention or Article 23 of the Commission's Rules of Procedures that a petition be submitted by persons or entities that the respondent State insists must be the representative(s) of the petitioners, in this case the *Gaama*. As discussed below, the petitioners consulted with the *Gaama*, both prior to and after submission of the petition; however, there is no requirement, explicit or implicit, in Article 44 of the Convention or Article 23 of the Commission's Rules of Procedures that they do so. Nor is there a requirement in said articles that they obtain the authorization, express or otherwise, of the *Gaama* prior to seeking the protection of the Commission.

24. The petitioners meet the requirements of Article 44 of the Convention in that they are 'persons' and 'groups of persons'.[23] They are legally recognized by the

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[20] *Acevedo-Jaramillo et al v. Peru*. Judgment of 7 February 2006. Ser C No. 144, at para. 135; *YATAMA v. Nicaragua*. Judgment of 23 June 2005. Ser C No. 127, para. 84; *Ricardo Canese v. Paraguay*. Judgment of 31 August 2004. Ser C No. 111, para. 178; and *19 Merchants v. Colombia*. Judgment of 5 July 2004. Ser C No. 109, para. 173.

[21] *Serrano-Cruz Sisters v. El Salvador, Preliminary Objections*. Judgment of 23 November 2004. Ser C No. 118, para. 69; and *Baena-Ricardo et al (270 workers v. Panama)*. Judgment of 28 November 2003. Ser C No. 104, para. 66.

[22] *Acevedo-Jaramillo et al v. Peru*. Judgment of 7 February 2006. Ser C No. 144, at para. 137. *Cf., Case of Castrillo-Petruzzi et al. v. Peru. Preliminary Objections* Judgment of 4 September 1998. Ser C No. 41, at para. 77.

[23] Castillo Petruzzi et al v. Peru, *id.* (explaining that "... it is clear that Article 44 of the Convention permits any group of persons to lodge petitions or complaints of the violation of the rights set forth

Saramaka people (through selection by their communities and respective *lö* as traditional authorities) and the State (by payment of a stipend) in their own right as the lawful traditional authorities of their communities and their *lö*. As such, they may by right act on behalf of the Saramaka people and its land-owning constituent entities, the twelve *lö*.[24] Finally, the Association of Saramaka Authorities qualifies as 'nongovernmental' body for the purposes of Article 44 of the Convention, although it is not considered as such by the Saramaka people because it is comprised of traditional Saramaka governing authorities. This body's members and governing board comprise the vast majority of the traditional authorities of the Saramaka people.

(ii) The petitioners consulted with the *Gaama* about the petition and the current *Gaama* has expressly endorsed the case before the Court

25. Suriname's Official Response devotes considerable energy to asserting that the victims' representatives have undermined and ignored the role and authority of the *Gaama* of the Saramaka people by seeking the assistance of the Inter-American human rights protection organs without acting through the *Gaama* and with his express consent. The State contends, *inter alia*, that this violates the customs and traditions of the Saramaka people and for this reason renders the instant case inadmissible or otherwise invalid.

26. While Article 44 of the Convention and Article 23 of the Commission's Rules of Procedure do not require the involvement or the consent of the *Gaama*, and therefore the State's objection in this respect lacks any basis in law, the victims' representatives additionally stress that the State's assertions are also factually incorrect. The late *Gaama* Songo Aboikoni was both informed about, extensively consulted, and publicly expressed his support for action to address the Saramaka people's property and other rights.[25] During his tenure as acting *Gaama*, Albert Aboikoni was also consulted about the case and presided over a meeting of more than forty Saramaka Captains to discuss the case in 2005. Albert Aboikoni also took part in a press conference in October 2002 during which the Association of Saramaka Authorities publicly presented a newly completed map of Saramaka territory.[26] At this meeting he expressed his grave concern about the State's acts and omissions with

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in the Convention. This broad authority to make a complaint is a characteristic feature of the system for the international protection of human rights. In the present case, the petitioners are a "group of persons," and therefore, for the purpose of legitimacy, they satisfy one of the possibilities set forth in the aforementioned Article 44. The evident authority in this instance makes it unnecessary to examine the registration of FASIC, and the relationship that said foundation has or is said to have with those who act as its representatives.")

24 Each of the traditional leaders, who also are members of the Association and chose to stand in their own capacity and on behalf of their *lö* and the Saramaka people generally, have been formally confirmed in their positions by the State and each receives a stipend from the State in recognition of their duties in their respective communities.

25 See, Brief of the Victims' Representatives, Annex 3.5, 'Saramaccaners make fist in battle for recognition land rights', *De West*, March 26, 1998 (containing a newspaper article explaining *Gaama* Songo Aboikoni's support for recognition of the Saramaka people's land and resource rights).

26 *Id.* Annex 3.2 'Maroon tribe in Suriname produces map to claim land rights, halt logging,' *Associated Press*, 16 October 2002 (quoting Albert Aboikoni).

regard to the rights of the Saramaka people, particularly those that lie at the heart of the instant case.[27]

27. The current *Gaama*, Belfon Aboikoni, has met with the petitioners and the victims' representatives on a number of occasions and, in December 2006, expressly and publicly declared his support for the case at hand.[28] This endorsement was made at a *Gran Krutu* (Great Gathering) of indigenous and maroon peoples held on 1-5 December 2006. The decisions of the *Gran Krutu*, signed by the leaders of all indigenous and maroon peoples in Suriname, including *Gaama* Aboikoni, state unequivocally that

> 6. All actions of Indigenous and Maroon peoples concerning their Land Rights, especially Case 12.338, 12 Saramaka *lös* versus Suriname, that is now brought before the Inter-American Court, as well as the case of the Indigenous peoples of the Lower Marowijne area (VIDS) will be supported.[29]

28. The victims' representatives offer testimony to the Court that will prove the veracity of the preceding. They also offer testimony that will demonstrate that the twelve Saramaka *lö* and their authorities, the Captains, have both the right and the obligation under Saramaka customary law and tradition to take action to protect their traditional lands, territory and resources, and may do so independently. This testimony will also show that the petitioners extensively discussed the issues connected to the instant case, both prior to and after its submission to the Commission, with the *Gaama*, in numerous village-level meetings, and in numerous meetings of traditional Saramaka authorities.

29. For the preceding reasons, the State's preliminary objection to the petitioners' *locus standi* and, although not specified as such by the State, the Commission's jurisdiction *ratione personae*, lacks merit. The victims' representatives therefore respectfully request that the State's first preliminary objection be dismissed.

B. RESPONSE TO THE SECOND OBJECTION: THE VICTIMS' REPRESENTATIVES LACK STANDING BEFORE THE COURT

30. Suriname argues that the *locus standi* of the victims' representatives before the Court contravenes the American Convention and that the Court's Rules of Procedure governing participation by the victims' representatives in the proceedings before the Court are therefore invalid. However, while it stresses its opposition to the standing of the victims' representatives before the Court, the State has not expressly objected to the admissibility of the instant case in this respect. For the sake of presenting a

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[27] *Id.* (stating that "'We are in danger of losing our very way of life,' said Albert Aboikoni, village chief in the Wanhatti tribal organization. 'The government is giving logging companies concessions in our area, and they are destroying the forest, polluting the water, and taking our land,' he said. ... 'The government now knows where our living area is, and we expect them after today to respect that,' Aboikoni said.")

[28] This fact is admitted by the State, see, Official Response of the State, para. 152.

[29] See, Official Response of the State, Annex 63, *Decisions taken during the grankrutu on Land Rights of Indigenous and tribal peoples in Suriname held at Diitabiki from 1 to 5 December 2006.*

comprehensive response, the victim's representatives will nonetheless address this issue herein.

31. To support its proposition that the victims' representatives do not have *locus standi* before the Court, Suriname cites Articles 51 and 61 of the American Convention.[30] Article 51 refers to the submission of cases to the Court by either a state or by the Commission, and Article 61(1) provides that "[o]nly the States Parties and the Commission shall have the right to submit a case to the Court."

32. Neither of these articles precludes the participation of the victims' representatives in the proceedings before the Court. Article 51 simply states that a case may be submitted to the Court by either a state or the Commission while Article 61(1) provides that only States and the Commission may submit a case. In the present case, the Commission, and no other entity, transmitted the case to the Court. The victims' representatives did not submit the case; in accordance with the Court's Rules of Procedure, discussed below, and consistent with both Articles 51 and 61 of the Convention, their standing to address the Court became operative only subsequent to referral of the case by the Commission.

33. Suriname further argues that the Court's Rules of Procedure are invalid in so far as they recognize the standing of the victims' representatives because this contravenes the Convention and that a separate protocol to the Convention is required to allow state parties to consent to the participation of the victims' representatives.[31] However, as discussed above, the Convention does not preclude, explicitly or implicitly, the participation of the victims' representatives in the proceedings before the Court.

34. Additionally, Article 60 of the Convention authorizes the Court to adopt its Rules of Procedure and state parties have consented to this by virtue of their ratification of or accession to the Convention. With regard to the participation of the victims' representatives in the Court's proceedings, Article 23(1) of the Rules of Procedure provides that "When the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their pleadings, motions and evidence, autonomously, throughout the proceedings."[32] These pleadings may only be submitted once the case has been submitted by the Commission and the application has been declared admissible by the Court. The Court has explained that the purpose of said pleadings "is to give effect to the

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30 Official Response of the State, para. 124.

31 Official Response of the State, para. 126-27. The State makes reference to Protocol 11 to the European Convention on Human Rights to justify, by analogy, its position that a separate protocol to the American Convention is required. However, Protocol 11 recognizes the right of alleged victims of human rights violations to submit cases directly and independently to the European Court of Human Rights after the abolition of the European Commission of Human Rights, rather than providing solely for the victims' right to participate in the Court's proceedings, a right which had been exercised prior to the adoption of Protocol 11.

32 Similarly, Article 36 of the Rules of Procedure provides that "When the application has been notified to the alleged victim, his next of kin or his duly accredited representatives, they shall have a period of 2 months, which may not be extended, to present autonomously to the Court their pleadings, motions and evidence."

procedural attribute of *locus standi in judicio* recognized to the alleged victims, their next of kin or representatives."[33]

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35. Further, with regard to provisional measures, Article 25(2) and (3) clearly specify that the standing of victims' representatives before the Court becomes operative only subsequent to the submission of a case by the Commission. These provisions provide, respectively, that

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

36. Consistent with Article 61(1) of the Convention, all of the preceding Rules recognize the standing of the victims' representatives to participate in proceedings before the Court only subsequent to submission of the case by the Commission. This has been the practice of the Court since 2001. As the Court has stated on numerous occasions, the victims "are the holders of all of the rights enshrined in the Convention; thus, preventing them from advancing their own legal arguments would be an undue restriction upon their right of access to justice, which derives from their condition as subjects of international human rights law."[34]

37. Suriname additionally asserts that the participation of victims' representatives in the proceedings before the Court "violates the 'equality of arms principle'."[35] However, the State provides no indication of how it is or may be prejudiced, or otherwise denied equality of arms, other than to say that it is placed in "an awkward position."[36] It also cites no jurisprudence or rule of law to support its contention that it is denied equality of arms. Article 37(2) of the Court's Rules of Procedure requires that preliminary objections must set out the facts on which the objection is based, the legal arguments, and any supporting evidence. Suriname's vague and unsupported assertions that it is denied equality of arms due to the participation of the victims' representatives fail to comply with this rule and additionally lack any basis in law or fact.

38. In conclusion, the State's objection to the *locus standi* of the victims' representatives is difficult to understand in light of the Court's prior practice and its objection to the Court's Rules of Procedure in this respect is manifestly unfounded. Consequently, the victims' representatives request that the State's second preliminary objection be rejected and dismissed by the Court.

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33 *Case of the Pueblo Bello Massacre*. Judgment of 31 January 2006. Ser C No. 140, at para. 53.

34 *Case of Moiwana Village*. Judgment of 15 June 2005. Ser C No.124, at para. 91. *Cf. Case of the "Mapiripán Massacre"*. Judgment of 15 September 2005. Ser C No. 134, para. 57; *Case of De la Cruz Flores*. Judgment of 18 November 2004. Ser C No. 115, para. 122; *Myrna Mack Chang Case*, Judgment of 25 November 2003. Ser C No. 101, para. 224, and *'Five Pensioners Case'*, Judgment of 28 February 2003. Ser C No. 98, paras. 153, 154 and 155.

35 Official Response of the State, at para. 128

36 *Id.*

C. RESPONSE TO THE THIRD OBJECTION: THE PETITIONERS FAILED TO EXHAUST DOMESTIC REMEDIES

39. In its third preliminary objection, Suriname argues that the Commission should have declared Case 12.338 inadmissible on the grounds that the petitioners failed to exhaust domestic remedies pursuant to Article 46(1)(a) of the American Convention, and that this is cause for the Court to now declare the Commission's Application inadmissible.[37] The Court has consistently held that Article 46(1)(a) of the Convention provides that domestic remedies must be filed and exhausted "according to the generally recognized principles of international law, which implies that not only should such remedies formally exist, but also be adequate and effective, as it is derived from the exceptions set forth in Article 46(2) of the Convention."[38]

40. In the section of its Official Response addressing its preliminary objection on non-exhaustion of domestic remedies, Suriname claims that Articles 1386 and 226 of the Suriname Civil Code establish available, adequate and effective remedies that the petitioners failed to exhaust prior to approaching the Commission.[39] It also appears to argue that the absence of the *Gaama* as a petitioner is relevant for the purposes of assessing the alleged non-exhaustion.[40] Elsewhere in its Official Response, Suriname makes reference to Articles 47-48 of the 1986 Mining Decree[41] and Article 41 of the 1992 Forest Management Act,[42] and argues that these provide effective remedies that should have been exhausted by the petitioners.[43]

41. The Commission and the Court have repeatedly held that should the State allege non-exhaustion it "must indicate which domestic remedies should be exhausted and provide evidence of their effectiveness."[44] The State has failed to meet the burden of proof in this rule: in particular and as discussed in detail below, it has failed to demonstrate that adequate and effective remedies are available in the circumstances of the case *sub judice*. Additionally, a number of the alleged remedies identified by the State (i.e., Article 226 of the Civil Code and Articles 47 and 48 of the Mining Decree) were not identified in the proceedings before the Commission. On this basis, Suriname constructively waived its right to raise these points at this stage of the proceedings and is barred from doing so extemporaneously.[45]

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37 *Id.* para. 137

38 *Acevedo-Jaramillo et al v. Peru*. Judgment of 7 February 2006. Ser C No. 144, at para. 123. *Cf. Case of the Serrano-Cruz Sisters v. El Salvador, Preliminary Objections*. Judgment of 23 November 2004. Ser C No. 118, para. 134; *Case of Tibi v. Ecuador*, Judgment of 7 September 2004. Ser C No. 114, para. 50; and *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Preliminary Objections*. Judgment of 1 February 2000. Ser C No. 66, para. 53.

39 Official Response of the State, para. 141, 144 (see, also, para. 261).

40 *Id.* para. 148-64.

41 *Id.* para. 245-46.

42 *Id.* para. 248, 257-60.

43 *Id.* para. 244, 256

44 *Cantoral Benavides case, Preliminary Objections*. Judgment of 3 September 1998. Ser C No. 40, at para. 31; *Durand and Ugarte case, Preliminary Objections*. Judgment of 29 May 1999. Ser C No. 50, at para. 33.

45 *Moiwana Village v. Suriname*. Judgment of 15 June 2005. Ser C No 124, at para. 49 (holding that the State must raise objections to non-exhaustion of domestic remedies "at the admissibility stage of the proceeding before the Commission .... otherwise, the State is assumed to have waived constructively its right to resort to it. [And] the respondent State may waive, either expressly or implicitly, the right to raise an objection for failure to exhaust the domestic remedies.")

42. The victims' representatives assert excuse from the requirement of exhaustion of domestic remedies under Article 46(1) of the American Convention and Article 31(1) of the Commission's Rules pursuant to Article 46(2)(a) of the American Convention and Article 31(2)(a) of the Commission's Rules. These articles provide that exhaustion of domestic remedies is not required when "the domestic legislation of the State concerned does not afford due process of the law for protection of the right or rights that have allegedly been violated."

43. As stated previously by the Commission and the Court:

> The exceptions provided for at Article 46(2) of the Convention aim to guarantee international action when the domestic remedies and the domestic legal system are ineffective in assuring respect for the victims' human rights. This being the case, the formal requirement on the non-existence of domestic remedies that guarantee the principle of due process (Article 46(2)(a) of the Convention) refers not only to the formal absence of domestic remedies, but also to cases in which they prove inadequate.[46]

44. A remedy may only be considered 'available' if the victims may make use of it in the circumstances of their case and 'adequate' if it is suitable to address an infringement of a legal right.[47] As "a general rule, the only remedies that must be exhausted are those whose function within the domestic legal system is appropriate for providing protection to remedy an infringement of a given legal right."[48] Also, the Commission and the Court have both previously held that "when domestic remedies are unavailable as a matter of fact or law, the requirement that they be exhausted is excused,"[49] and; "[t]he rule of exhaustion of domestic remedies does not require the invocation of remedies ... where this offers no possibility of success."[50]

45. As concluded by the Commission in Report 09/06 in the instant case, and as discussed below and in the other pleadings submitted by the victims' representatives, there are no effective remedies that are available to the victims in the circumstances of the instant case. Among others things, the internationally guaranteed rights of the Saramaka people to own, control and peacefully enjoy their traditional lands, territory and resources are not recognized as 'legal rights' under Suriname law and there are no

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46 Case 11.405, Brazil, *Annual Report of the IACHR 1997*, at para. 79. See, also, *Godinez Cruz Case*, Judgment of 20 January 1989. Series C No.5, para. 66; *Fairen Garbi and Solis Corrales Case*, Judgment of 26 June 1987. Ser C No. 2, para. 87; *Velasquez Rodriguez Case*, Judgment of 29 July 1988. Ser C No. 4, para. 63.

47 Godinez Cruz Case, *id.* para. 67. See, also, *Report No. 62/04, Admissibility*, Pueblo Indígena Kichwa de Sarayaku y sus Miembros (Ecuador), 12 October 2004, para. 56.

48 *Report N° 5/02*, Sergio Schiavini and Maria Teresa Schnack de Schiavini, at para. 55, citing, Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C N° 4, para. 63; *Report N° 68/01 (Admissibility)*, Case 12.117, Santos Soto Ramírez, para. 14; and *Report N° 83/01 (Admissibility)*, Case 11.581, Zulema Tarazona Arriate, para. 24.

49 *Report No. 53/97*, Case 11.312 (Guatemala), *Annual Report of the Commission 1999*, OEA/Ser.L/V/II.98, Doc. 7, rev., April 13, 1998, p.123, at para. 23; *Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights)*, Advisory Opinion No. OC-11/90, August 10, 1990, Series A No.11, at para. 17.

50 Report No. 31/99, Case 11.763 (Guatemala), *Annual Report of the Commission (Vol. I) 1998*, at 137. See, also, Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), *id.* para. 33.

mechanisms to obtain recognition of these rights and to secure them in fact and law. The victims also lack legal personality to pursue collective claims before the Suriname judiciary. Coupled with the absence of a legal basis for the rights at issue under domestic laws, this lack of legal personality precludes adjudication and settlement of claims based on collective and traditional property rights, and offers the victims no possibility of success in the circumstances of their case should they seek judicial protection.

46. As judicial remedies are unavailable, the victims invoked the remedies established by Suriname's 1992 Forest Management Act and the 'fundamental right' to petition public authorities set forth in Article 22 of Suriname's 1987 Constitution.[51] Two complaints were submitted pursuant to the former procedure and two petitions were submitted under the latter. The State failed to respond to each complaint and petition and, thus, these remedies proved to be inadequate and ineffective. The Saramaka people were left with no alternative other than to seek international assistance and protection.

(a) Effective remedies are unavailable to secure and protect the Saramaka people's property rights

47. Prior to turning to the above mentioned remedies identified by the State, the victims' representatives will address an issue that is conspicuously absent from the State's Official Response: the issue that lies at the heart of the case before the Court. This case first and foremost concerns Suriname's failure to legally recognize, guarantee and secure the collective ownership rights of the Saramaka people, its constituent *lö* and communities, and the members thereof, to their traditional lands, territory and resources. The majority of the other alleged violations in this case are additional and related effects or symptoms of this failure that by themselves amount to separate and active violations of, *inter alia*, Article 21 of the American Convention.

48. In cases involving indigenous and tribal peoples' property rights, the Court has examined both the existence of effective judicial remedies for the recognition, restoration and protection of indigenous and tribal rights in and to their territories, as well as whether the respondent state has established a specific and effective legal or administrative procedure whereby indigenous and tribal peoples can seek restitution of their ancestral lands and/or have their communal lands identified, demarcated and titled.[52] Such a procedure must take into account indigenous and tribal peoples' specific characteristics, including their special and profound relationship to their traditional territories.[53]

49. Suriname has not identified any domestic remedies that provide for the recognition, restoration and regularization of the property rights of the Saramaka people. Indeed, the State cannot identify such remedies because they do not exist. Suriname's land titling procedures cannot be used by the Saramaka people – or any

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51 These complaints and petitions are located in Annex 2 to the Brief of the Victims' Representatives.

52 *Mayagna (Sumo) Awas Tingni Community Case*, Judgment of August 31, 2001. Series C No. 79, para. 123-24; *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005. Series C No. 125, para. 65.

53 *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006. Series C No. 146, para. 104; Mayagna Case, *id.*

other indigenous or tribal people in Suriname – and there is no extant legislation that provides for issuing or seeking collective title to traditionally owned lands, territories and resources. This was acknowledged by the State before the Commission and in its Official Response.[54] Suriname's law and jurisprudence do not recognize that indigenous and tribal peoples can acquire rights to their lands, territories and resources by virtue of traditional ownership or possession.[55] Additionally, indigenous and tribal peoples, including the Saramaka people, lack legal personality under domestic law to hold collective title or to seek recognition and protection of their communal property rights (and traditional rights generally) in judicial proceedings.

50. That the Saramaka people may not apply for collective title under extant land titling procedures was confirmed by the State itself in the hearing on this case held at the Commission's 121st session in October 2004. In its written submission presented at this hearing, the State admits that, "On the basis of the Decree Principles of Land Policy ... Article 2, every Surinamer, so also the maroons as individuals, have the right to obtain a piece of state-owned land under the *right in rem* of 'land lease'. This right is an individual right that cannot be granted to peoples living in tribal communities."[56] The title referred to here is the only form of title presently available in Suriname.

51. That there is no legislative basis for seeking and securing collective title to land, and that indigenous and tribal peoples lack personality to seek protection for their communal property rights before the judiciary in Suriname, was confirmed by the Court in the *Moiwana Village Case.* In that case, the Court determined the following to be 'proven facts':

> Although individual members of indigenous and tribal communities are considered natural persons by Suriname's Constitution, the State's legal framework does not recognize such communities as legal entities. Similarly, national legislation does not provide for collective property rights.[57]

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54 With regard to the Commission, see, note 56, *infra*, and accompanying text. Concerning statements made before the Court, see, Official Response of the State, at para. 223 (stating that "since the collective rights is [*sic*] recognized [referring to a Presidential decision annexed to the Official Response] but does not form part of the Suriname Constitution, the State is working at recognition of said rights in national legislation."). For a compilation of government policy and other statements concerning the lack of recognition of indigenous and tribal peoples' land and resource rights, see, Annex A hereto, E-R. Kambel, *Indigenous Peoples and Maroons in Suriname*. Economic and Sector Study Series, RE3-06-005, Inter-American Development Bank, August 2006, p. 17-19.

55 UN Food and Agriculture Organization, *Strengthening National Capacity for Sustainable Development of Forests on Public Lands; Report of the Legal Consultant, Cormac Cullinan,* FAO Project TCP/SUR/4551 (1996), at sec. 4.6.1 (explaining that "the jurisprudential basis (*rechtsfilosofie*) of the land tenure system does not recognise that tribal people can have acquired rights over their land by virtue of historical occupation.")

56 *Presentation by the Republic of Suriname at the 121st Session of the Inter-American Commission on Human Rights regarding petition No. 12.338 "Twelve Saramaka Lös (Communities)"*, no date, Annex D, at p. 2, in *Case File before the Commission*, Volume III & IV submitted with the Commission's Application.

57 *Case of Moiwana Village v. Suriname*, Judgment of 15 June 2005, Series C No. 124, at para. 86(5)(footnotes omitted).

52. The citations for both of these proven facts state that each is a "Fact recognized by the State ...."[58] The Court thus considered as proven, and as acknowledged by the State, that Suriname's law does not recognize the legal personality of indigenous and tribal peoples and their communities for the purposes of holding, exercising and seeking protection for their communal rights, and that it does not permit the vesting and exercise of collective property rights. These findings of fact are not specific to *Moiwana Village*, but are generally applicable to the situation in Suriname as it affects all indigenous and tribal peoples, including the victims in the instant case.

53. That adequate and effective remedies do not exist in law or fact, and that indigenous and tribal peoples' rights are not recognized and protected under Suriname law, was also confirmed by the United Nations Committee on the Elimination of Racial Discrimination ("CERD"), by the United Nations Human Rights Committee,[59] and by the UN Commission on Human Rights' Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.[60]

54. In 2004, CERD observed that Suriname "has not adopted an adequate legislative framework to govern the legal recognition of the rights of indigenous and tribal peoples (Amerindians and Maroons) over their lands, territories and communal resources;"[61] and expressed its concern that "indigenous and tribal peoples cannot as such seek recognition of their traditional rights before the courts because they are not recognized legally as juridical persons."[62] These conclusions were reiterated in three subsequent decisions adopted under both CERD's Urgent Action and Follow Up procedures, most recently in August 2006.[63]

55. The preceding is further confirmed by an August 2006 Inter-American Development Bank study on indigenous peoples and maroons in Suriname.[64] It states that

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58 *Id.*

59 *Concluding observations of the Human Rights Committee: Suriname, 04/05/2004*. UN Doc. CCPR/CO/80/SUR., at para 21 (expressing concern "at the lack of legal recognition and guarantees for the protection of indigenous and tribal rights to land and other resources;" and recommending that Suriname "guarantee to members of indigenous communities the full enjoyment of all the rights recognized by article 27 of the Covenant, and adopt specific legislation for this purpose.")

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

61 *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/64/CO/9/Rev.2, 12 March 2004, at para. 11.

62 *Id.* at para 14.

63 *Follow –Up Procedure, Decision 3(66), Suriname*. UN Doc. CERD/C/66/SUR/Dec.3, 9 March 2005; *Decision 1(67), Suriname*. UN Doc. CERD/C/DEC/SUR/2, 18 August 2005; and *Decision 1(69), Suriname*. UN Doc. CERD/C/DEC/SUR/3, 18 August 2006.

64 E-R. Kambel, *Indigenous Peoples and Maroons in Suriname*. Economic and Sector Study Series, RE3-06-005, Inter-American Development Bank, August 2006. A copy of this report is annexed to this submission in Annex A.

> Under Surinamese law, indigenous and tribal peoples and communities lack legal personality and are therefore incapable of holding and enforcing rights. Moreover, the judiciary may not order that the Government adopt or amend legislation as a remedy. This is considered the exclusive prerogative of the Government and the National Assembly. Attempts by indigenous peoples to use the court system have therefore failed. In the most recent case, a complaint filed against the State by the indigenous community of Pierrekondre (district Para) concerning a sand mining concession, was rejected by the judge, who stated that the community lacked 'competence' to bring the claim and referred the community back to the Ministry of Natural Resources to seek a political settlement.[65]

56. The same Inter-American Development Bank study further concludes that

> Surinamese law does not recognize and protect the traditional land tenure systems of indigenous and tribal peoples, or their special relationship with the forest. All land and all natural resources are considered to be owned by the State. Like other Surinamese citizens, indigenous persons and Maroons have the right to apply for individual titles in the form of land lease (grondhuur) under the L-Decrees. This is a leasehold title issued for specific purposes (building, planting and recreational uses), for a maximum period of 40 years and which can be revoked by the Minister of Natural Resources, if the annual fee is not paid (in time), or if the land is not used in accordance with the request. To date 80% of the indigenous communities have explicitly rejected this title, and stated that they want recognition of their traditional, communal rights, which they have held and exercised since time immemorial. With the exception of a number of Maroons living in Paramaribo, maroon traditional authorities are also seeking collective title to their lands and territories.[66]

57. The State's Official Response does not contest the preceding other than to vaguely assert that indigenous and tribal peoples' rights, in this case the rights of the Saramaka people, are protected by its law and: "[e]ven though no provisions are made in the Constitution with respect to collective rights of the Saramaka community, the State is of the opinion that these rights have over decades always been respected. Moreover, the national legislation of Suriname provides ample protection and recourse for the maroon community."[67] This unsupported and unsubstantiated statement stands in stark contrast to Suriname's repeated statements before the Commission that the Saramaka people do not have any property rights under its domestic legal framework – or for that matter pursuant to Article 21 of the American Convention – but, rather, that they are merely permissive occupiers of state-owned lands.[68]

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65 *Id.* at p. 14 (footnotes omitted).

66 *Id.* at p. 13 (footnotes omitted).

67 Official Response of the State, at para. 244.

68 Appendix 1 to the Application of the Commission, *Report 09/06 Twelve Saramaka Clans*, para. 168-69, 187-88, 228, 236.

58. The following sub-sections of this brief will address the national laws that Suriname maintains establish effective remedies and protection in relation to the rights of the Saramaka people.

(b) Article 41(1)(b), Forest Management Act

59. Article 41(1) of the 1992 Forest Management Act states that

> 1(a) The customary law rights of the tribal and indigenous people in their villages, settlements and agricultural grounds, will be respected as much as possible.
> (b) In case of violations of the customary rights mentioned in sub1a, a written appeal can be lodged with the President, by the relevant traditional authorities of the tribal communities living in the hinterland, stating the reasons on which the appeal is based. The President appoints an appropriate commission who will advise him in this matter.

60. A study by the United Nations Food and Agriculture Organization for the Government of Suriname on the Forest Management Act correctly explains that paragraph 1 of this provision:

> only concerns the customary law relevant to villages, settlements and agricultural plots and does not apply to customary laws relevant to forests; and does not afford legal recognition to such rights but only requires that they be 'respected as much as possible' - a phrase so vague that it is almost certainly legally unenforceable.[69]

61. The same study also observes that

> Use rights in respect of public land must be granted by the state and registered at the Public Land Registry (*Domeinkantoor*) of the Ministry of Natural Resources. The content of customary laws has not been officially recorded nor have any such rights been registered. One of the consequences of this is that such rights are not legally enforceable. If a "right" cannot be enforced in court it is not generally considered to be a legal right and accordingly references to "customary rights" which appear in the Forest Management Act and in various concession agreements are probably unenforceable.[70]

62. In a good faith attempt to resolve violations of their rights at the domestic level, the Saramaka people filed official complaints with the President of Suriname under the procedure established by Article 41(1)(b) on two occasions: the first in 1999, the second in 2000.[71] While the receipt of one of these complaints was

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[69] UN Food and Agriculture Organization, *Strengthening National Capacity for Sustainable Development of Forests on Public Lands; Report of the Legal Consultant, Cormac Cullinan,* FAO Project TCP/SUR/4551 (1996), at sec. 4.6.3.

[70] *Id.* at sec. 4.6.2.

[71] See, Application of the Commission, Annex 17, for copies of these complaints and petitions.

acknowledged by the State, no substantive response was received and no action was taken to investigate the complaints or to address any of the issues raised therein.[72]

63. Suriname's Official Response admits that the President failed to respond to these complaints.[73] However, even if the President had responded, Article 41(1)(b) does not establish an effective remedy substantiated in accordance with due process of the law because, *inter alia*, the President has complete discretion to rule on the complaint and the absence of any rules of procedure governing the process.[74]

64. The appeal to the President set forth in Article 41(1)(b) of the Forest Management Act ousts the jurisdiction of the Courts and is the only remedy available to the victims pursuant to that law. While this is not stated explicitly in the Forest Management Act, an analogous and illustrative provision is contained in Suriname's revised draft Mining Act of November 2004.[75] This provision provides that non-indigenous or tribal persons may seek a judicial determination of the amount of compensation due for damages caused by mining if an agreement cannot be reached with the miner;[76] indigenous and tribal peoples' remedies however are limited to an appeal to the "executive," which will issue a "binding decision."[77] According to the explanatory note, this overt discrimination against indigenous and tribal peoples is warranted "because traditional rights do not lend themselves to the normal court procedure as individual rights are not involved."[78]

65. Additionally, and as observed in the Commission's Application, Suriname failed to indicate in the proceedings before the Commission that any alternative remedy may be available to the victims in the event that the President does not answer

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72 Brief of the Victims' Representatives, Annex 2.2, *Letter of I.E.A. Krolis, Director of the Suriname Forestry Management Foundation*, 22 November 1999 (acknowledging receipt of Article 41 complaint submitted by the Association of Saramaka Authorities and received by the State on 4 November 1999).

73 Official Response of the State, para. 258.

74 The constant jurisprudence of the Court holds that "[u]nder the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with rules of due process of law (Art. 8.1), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1)." *Inter alia*, *Velásquez Rodriguez Case*, Judgment of June 26, 1987. Ser C No. 1, at para. 91.

75 *Draft Revised Mining Act* of 16 November 2004, as approved by the Council of Ministers and the Council of State.

76 *Id.*, Article 70: "(2) The holder of a mining right is obligated to compensate all damage inflicted to the claimants and third parties, whether or not caused by his negligence as a result of his activities. (3) If the parties involved cannot reach agreement concerning the nature and the extent of the damage mentioned in subsection 2 of this article, the Cantonal Judge within whose jurisdiction the terrain is located which is the basis of this conflict, will determine, upon the request of any interested party, the amount of compensation.

77 *Id.* at Article 78(2) and Explanatory Note to Article 76. Article 76(2) provides that "If there has been no agreement on the compensation as provided in subsection 1 under b, after negotiations between the parties involved, the State will make a proposal that is binding to the parties. The State will ensure that the interests of all parties involved will reasonably be taken into account." The Explanatory note explains that "If parties cannot agree [on the amount of compensation], the executive will provide a binding decision. This model has been chosen because traditional rights do not lend themselves to the normal court procedure, because it does not concern individual rights."

78 *Id.* at Explanatory Note to article 76.

complaints submitted pursuant to Article 41(1)(b) of the Forest Management Act.[79] Thus, alleging at this stage of the proceedings – as the State does[80] – that the failure of the President to respond to the victims' complaints did not preclude resort to other remedies, specifically Article 1386 of the Suriname Civil Code, is extemporaneous and time-barred.

66. In conclusion, the petitioners invoked Article 41(1)(b) of the Forest Management Act on two occasions. Their good faith efforts however were ignored by the President who failed to even respond to their complaints, a fact admitted by the State, and there is no appeal available in such circumstances. Suriname's assertion that the petitioners could have appealed by invoking Article 1386 of its Civil Code is has no basis in domestic law and is also raised extemporaneously and, therefore, is time-barred. The petitioners also invoked the right to petition public authorities enumerated in Article 22 of the 1987 Constitution. As with the complaints submitted pursuant to Article 41(1)(b) of the Forest Management Act, they received no response. Article 41(1)(b) and Article 22 of the Constitution are not adequate and effective remedies and the State has admitted facts before the Court that prove this conclusion.

(c) Article 4(1), L-Decree 1

67. In asserting that the petitioners failed to exhaust domestic remedies, Suriname observes that Article 4(1) of the 1982 Decree on Land Management ("Decree L-1") requires that the customary rights of indigenous and tribal peoples shall be respected unless there is a conflict with the general interest.[81] The State adds that the "'general interest' is to be explained as being in the interest of the state, hence in the interest of the entire nation." It also quotes the official explanatory note to Article 4(1), which explains that "account should be given to [indigenous and tribal peoples'] factual rights ... when domain [state] land is being issued."[82] While it is unclear if the State is contending that this article establishes an effective remedy that the petitioners failed to invoke and exhaust, for the sake of presenting a comprehensive response, the victim's representatives will nonetheless address this provision here.

68. Article 4 of Decree L-1 reads as follows

> 4(1) In allocating *domainland* [State land], the rights of the tribal Bushnegroes [Maroons] and Indians to their villages, settlements and forest plots will be respected, provided that this is not contrary to the general interest;
> (2) General interest includes the execution of any project within the framework of an approved development plan.[83]

69. Article 4(1) does not provide an adequate and effective remedy that is available to the victims in the circumstances of their case because it, *inter alia*, subordinates their 'rights' to the general interest *ab initio* without containing any

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79 Application of the Commission, para. 186.
80 Official Response of the State, para. 260-61.
81 Official Response of the State, para. 251.
82 Official Response of the State, at para. 251.
83 *Decree L-1 of 15 June 1982, containing basic principles concerning Land Policy*, SB 1982, no. 10, at Art. 4.

meaningful and countervailing guarantees. Classification of an activity as being in the general interest is a non-justiciable political question that cannot be challenged in the judicial system, and the State has not specifically contested this point in its preliminary objections.

70. Article 4(2) further provides that the 'general interest' includes any activity conducted pursuant to a national development plan. In connection with this, the State explains in its Official Response that the "general interest is decided based on a certain plan drafted by the Government."[84] Both logging and mining, as activities that in principle generate income for the State, are set out in Suriname's periodic development plans as general activities to be supported and pursued by the State, and therefore are defined as activities conducted in the general interest pursuant to Article 4(1).

71. The general interest exception in Article 4(1) and (2) is so broad that the Saramaka people's 'factual rights' will always be superseded and negated by any action that the State deems in the public interest, including any activity, specific or general, included in a development plan. The effect is to substantially limit the victims' rights to the point that they are meaningless. Furthermore, and uncontested by the State, the general interest exception removes the purported guarantees set forth in Article 4(1) from the domain of judicial protection in relation to logging and mining or any other activity that the State declares to be in the general interest.

72. This overriding and arbitrary power vested in the State, a power that is not tempered by any meaningful legal guarantees for the Saramaka people, is further bolstered by Article 41 of Suriname's 1987 Constitution. Article 41 of the Constitution, which unilaterally extinguished the Saramaka people's natural resource rights and transferred ownership over those resources to the State in 1987, vests an "inalienable" right in the State to "take complete possession of," to exploit, or to authorize others to exploit, the natural resources within the Saramaka people's traditional territory.[85] This constitutional precept will override any conflicting legislative provision, including the 'factual rights' in Article 4(1) of Decree L-1.

73. Additionally, the use of the term 'factual rights' (or *de facto* rights) in the explanatory note to Article 4(1) serves to distinguish these 'rights' from the legal (*de jure*) rights accorded to holders of real title or other registered property rights recognized and issued by the State. The 'rights' referred to in Article 4(1) are therefore explicitly defined as non-legal rights and this provision, by definition, cannot be deemed to provide an adequate and effective remedy by which the Saramaka people may seek protection of its property and other rights. As both the Court and the Commission have held, a remedy may only be considered 'available' if

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[84] Official Response of the State, at para. 289(2).

[85] Article 41 of Suriname's 1987 Constitution states that, "Natural riches and resources are property of the state and shall be used for economic, social and cultural development. The state shall have the inalienable right to take complete possession of natural resources, in order to apply them to the needs of economic, social and cultural development of Suriname."

the victims may make use of it in the circumstances of their case and 'adequate' if it is suitable to address an infringement of a legal right.[86]

74. Further, as with Article 41(1)(a) of the Forest Management Act, the Saramaka people's 'factual rights' under Article 4(1) of Decree L-1 only apply to its villages, settlements and forest (meaning agricultural) plots under actual use. These 'rights' therefore do not extend to bodies of water, hunting, fishing and gathering areas, and sites of religious or cultural significance, if these are located outside of the specified areas, as well as areas not presently under cultivation. The Saramaka people practice rotational cultivation (a 25-30 year cycle is the norm) that requires extended fallow periods over large areas. Consequently, large areas of the Saramaka people's traditional territory are excluded *a priori* from the purview of the illusory protections provided by the legislation. This also fails to account for and protect the Saramaka people's traditional land tenure system, customary laws and values.

75. Neither Article 4(1) of Decree L-1 nor Article 41 of the Forest Management Act provide a mechanism for regularizing and securing the Saramaka people's property rights. They merely limit the areas of state lands that may be granted to third parties for activities not falling within the 'general interest' exception. In practice, this provision provides no protection at all because it is the jurisprudence *constante* of the Suriname judiciary that a grant of a real title will supplant any unregistered rights (i.e., 'factual rights' asserted by indigenous peoples), even if the grant is within the residential area of an indigenous or maroon village.[87] Logging concessions are considered grants of real rights pursuant to Article 25(1)(a) of the Forest Management Act and also supersede and nullify any conflicting customary rights.

76. In sum, Article 4(1) of Decree L-1 does not establish an adequate and effective remedy that may be invoked in the circumstances of the case at hand. The 'rights' enumerated therein do not apply to large areas of Saramaka territory; are negated wherever there is a conflict with the 'general interest', which is stated in the broadest possible terms and is not subject to judicial review; are superseded by any registered property right, including logging and mining concessions, and; the 'rights' in question are explicitly defined to be 'factual' or non-legal rights. In short, Article 4 negates rather than protects the Saramaka people's rights, particularly when read in conjunction with Article 41 of the Constitution.

(d) Articles 1386-1388 and 1392-1392, Suriname Civil Code

77. Suriname argues that it is possible to seek judicial protection in cases where the President fails to respond to a complaint concerning violations of customary rights

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[86] *Godinez Cruz Case*, Judgment of 20 January 1989. Series C No.5, para. 67. See, also, *Report No. 62/04, Admissibility*, Pueblo Indígena Kichwa de Sarayaku y sus Miembros (Ecuador), 12 October 2004, para. 56.

[87] See, for example, *Tjang A Sjin v. Zaalman and Others*, Cantonal Court, First Canton, Paramaribo, 21 May 1998 (holding that real title to land will void any interest claimed by indigenous peoples on the basis of traditional occupation and use); and, Annex B(1) hereto, *Celientje Martina Joeroeja-Koewie et al v. Suriname & Suriname Stone & Industries N.V.*, A.R. no. 025350, Cantonal Court, First Canton, Paramaribo, 24 July 2003 (holding that an indigenous community lacked "competence" to challenge the grant of a sand mining concession (constituting a real property right under the Mining Act) within the confines of the village itself). See, also, Annex B(2) containing the response of the State of Suriname in this case.

pursuant to Article 41(1)(b) of the Forest Management Act. In particular, it maintains that the Saramaka people could have had resort to general legal remedies and identifies Article 1386 of the Suriname Civil Code in this respect.[88] As noted above, this assertion is raised extemporaneously and therefore is time-barred. Nevertheless, as Suriname also raises Article 1386 more generally and alleges that it is an effective remedy that the victims failed to invoke and exhaust, the victims' representatives will address this provision here.

78. Article 1386 of Suriname's Civil Code establishes a general civil law tort action that requires compensation for damages caused by "unlawful acts," including those perpetrated by the State. It reads, in pertinent part, "that each unlawful action, which causes another person to suffer damages, obliges the person who is to blame for the damage, to compensate the damage."[89]

79. This is not an adequate and effective remedy that may be invoked in the circumstances of the case *sub judice*. While the petitioners may *pro forma* invoke Article 1386, they will not be able to prove an "unlawful act" precisely because the acts and omissions complained of in the instant case are entirely lawful under Suriname law. Moreover, the sole award of monetary compensation is not an adequate and effective remedy in the case of the failure of the State to recognize and guarantee the Saramaka people's rights to own, control and peacefully enjoy its traditional lands, territory and resources.[90] The *jurisprudence constante* of the Court holds that "the formal existence of remedies is not enough, if they are not effective; i.e. they must provide a solution or an answer to the violation of the rights embodied in the Convention."[91]

80. Pursuant to Article 41 of the Constitution and Suriname's land and natural resources legislation (as discussed *supra*), it is entirely lawful for the State to issue concessions or to conduct any other activity declared by the State to be in the public interest on the lands and territory traditionally owned by the Saramaka people and to do so without consulting them and without obtaining their consent. The State also has no legal obligation in domestic law to recognize and guarantee the property rights of the Saramaka people and therefore it is not unlawful for it to disregard these rights by act or omission.

81. With respect to the Saramaka people's right to be consulted and to consent, for example, Suriname's written pleading submitted at the hearing held on this case during the Commission's 121st Session states that

> When a mining right is granted or a logging concession advice is always obtained from the District Commissioner for which written permission is required from the traditional authorities for positive advice. However, this

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88 Official Response of the State, para. 141, 144, 260-61.

89 *Id.*

90 *Case of the Pueblo Bello Massacre*. Judgment of 31 January 2006. Ser C No. 140, para. 206 (referring to the "Mapiripan Massacre" Case and stating that in that case, "the Court found that the comprehensive reparation of a violation of a right protected by the Convention cannot be reduced to the payment of compensation to the next of kin of the victim.")

91 *Ximenes-Lopes. Preliminary Objections*. Judgment of 30 November 2005. Ser C No. 139, para. 4; *Palamara-Iribarne*. Judgment of 22 November 2005. Ser C No. 135, para. 184; *Acosta-Calderón*. Judgment of 24 June 2005. Ser C No. 129, para. 93.

> permission has not been incorporated in the law, but the executive power (the State) considers this to be a requirement of the decision-making process.[92]

82. This statement confirms that the rights in question have not been incorporated into law. Therefore, there are no available measures of recourse should the State fail to consult with and obtain the traditional authorities' consent, as is the case in relation to the logging and mining concessions granted by the State within the territory of the Saramaka people and which are presently before the Court.

83. Additionally, the Suriname judiciary has repeatedly held that registered real property rights will supplant any unregistered 'rights' and has done so specifically in the case of an indigenous community that sought to prevent a title holder from reconstructing his vacation home within the bounds of their village.[93] This case was submitted pursuant to Article 1386 of Civil Code. As noted above, logging concessions are classified as a registered real property right pursuant to Article 25(1)(a) of the Forest Management Act. Resort to the tort action available under Article 1386 to challenge grants of logging concessions is not only inadequate because compensation is the sole available remedy, but such actions will also be rejected by the judiciary on the grounds that it is an established principle of law, and therefore lawful, that registered property rights will supplant unregistered rights. Recall also in this respect, that indigenous and tribal peoples' rights are explicitly defined in legislation as 'factual' rather than legal rights.

84. Further, Article 1386 is unavailable in relation to the collective claims such as the property rights at issue in the instant case. Suriname explicitly admitted this point in its submissions before the Commission, stating that Article 1386 is only available to "individuals," whereas the rights and violations before the Commission are collective in nature.[94] Consistent with this, and as found by the Court, by the Commission and by CERD, indigenous and tribal peoples, such as the Saramaka people, lack the requisite legal personality to pursue collective claims in the judicial system.

85. The Suriname judiciary explicitly upheld this principle of domestic law in a case where an indigenous community challenged a sand mining concession within the residential area of its village. In this case, filed pursuant to Articles 1386 and 226 of the Civil Code, the judge held that the indigenous community in question lacked "competence" to challenge the grant and operation of the sand mining concession and dismissed the case.[95] Article 226 of the Civil Code, which provides for interim

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92 *Presentation by the Republic of Suriname at the 121st Session of the Inter-American Commission on Human Rights regarding petition No. 12.338 "Twelve Saramaka Lös (Communities)"*, no date, Annex D, at p. 1, in *Case File before the Commission*, Volume III & IV submitted with the Commission's Application.

93 *Tjang A Sjin v. Zaalman and Others*, Cantonal Court, First Canton, Paramaribo, 21 May 1998 (holding that real title to land will void any unregistered interest.)

94 *Presentation by the Republic of Suriname at the 121st Session of the Inter-American Commission on Human Rights regarding petition No. 12.338 "Twelve Saramaka Lös (Communities)"*, no date, at para. 28, in *Case File before the Commission*, Volume III & IV submitted with the Commission's Application

95 Annex B(1), *Celientje Martina Joeroeja-Koewie et al v. Suriname & Suriname Stone & Industries N.V.*, 24 July 2003.

injunctive relief and is identified in the State's Official Response as an available remedy, is discussed in the following section. 0000528

86. For the preceding reasons, invocation of Article 1386 of the Civil Code would be futile and provide no possibility of success in the circumstances of the petitioners' case.[96] This procedure "does not constitute an effective remedy to address in substance the claims raised" in the Case 12.338.[97] In the proceedings before the Commission, the State has failed to provide any evidence to refute this fact – to the contrary, it has admitted that this procedure is only available to individuals – yet it maintains before the Court, again without providing any evidence to support its assertions, that Article 1386 constitutes an effective remedy.

87. Finally, Suriname also raises Articles 1387-1388 and 1392-93 of the Civil Code and specifies that these provisions could have been invoked before the judiciary by the victims in Case 12.338.[98] Article 1387 provides for claims for compensation based on damages caused by negligence; Article 1388 simply provides the rules for attributing liability on the basis of agency; Article 1392 concerns compensation for bodily injury and; Article 1392 addresses defamation and injury to reputation. None of these articles is relevant to the case at hand and none establishes an effective remedy that is available in the circumstances of the instant case.

(e) Article 226 of the Civil Code

88. As noted above, the State refers to Article 226 of the Suriname Civil Code and contends that this article contains "another remedy which could have been pursued by the petitioners, which they failed to do...."[99] Article 226 provides for interim injunctive relief and, according to the State, "articulates that in all cases which require immediate urgency, provisional measures are required and in all cases where the interest of the parties requires a provisional measure, a decision of the Cantonal Court can be requested."[100]

89. Suriname failed to identify and demonstrate that Article 226 of the Civil Code is an available and effective remedy in the proceedings before the Commission. It may not do so extemporaneously and the State's contentions with respect to this article are time-barred and inadmissible.

90. However, should the Court decide to assess the effectiveness of Article 226, and for the sake of presenting a comprehensive response, the victims' representatives aver that this procedure is neither available nor effective to remedy the violations alleged in Case 12.338. First, to obtain injunctive relief, the victims must demonstrate that the acts and omissions in question contravene an applicable legal norm. As discussed above, there are no applicable legal norms that the victims could rely on to prove that interim relief is justified. Second, interim relief would not address or

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96 Among others, Report No. 108/00, Martinez-Villareal v. US, Case 11.753, *Annual Report of the IACHR 2000*, para. 70.

97 Report N° 19/02, Mario Alfredo Lares-Reyes et al., Petition 12.379, *Annual Report of the IACHR 2002*, para. 55.

98 Official Response of the State, para. 144.

99 *Id.* at para. 262.

100 *Id.*

remedy the failure of the State to legally recognize, respect and secure the Saramaka people's property rights.

91. Finally, the victims lack the requisite personality to seek protection for their communal property and other traditional rights under this procedure. As discussed above in relation to Article 1386 of the Civil Code, the Suriname judiciary rejected a similar case, submitted pursuant to Article 1386 and 226 of the Civil Code, involving mining activities on an indigenous community's traditional lands on the grounds that they lacked "competence" to invoke the procedure in relation to collective claims.[101]

(f) Articles 47 and 48 of the 1986 Mining Decree

92. The State observes that Articles 47 and 48 of its 1986 Mining Decree protect the rights of the Saramaka people. While it does not raise this issue in relation to its objection concerning non-exhaustion of domestic remedies, the State nonetheless identifies these articles as an example of legislation that "provides ample protection and recourse for the maroon community."[102] It does not however explain how these articles establish an effective remedy that the petitioners may or should have exhausted in the circumstances of the instant case other than to quote the language of the articles verbatim. This lack of specificity contravenes Article 37(2) of the Court's Rules of Procedure, which requires that preliminary objections must be stated clearly and the facts and legal arguments in support of the State's arguments must be provided.

93. Additionally, Suriname failed to identify and demonstrate that Articles 47 and 48 of the Mining Decree establish an available and effective remedy in the proceedings before the Commission. It may not do so extemporaneously and the State's contentions with respect to these articles are time-barred and inadmissible.

94. Should the Court decide to examine these articles in relation to the State's preliminary objection on non-exhaustion, and for the sake of presenting a comprehensive response, the victims' representatives contend that Articles 47 and 48 of the Mining Decree do not establish an available, adequate and effective remedy that may be invoked in the circumstances of the instant case. On the contrary, these articles once again demonstrate that the rights of the Saramaka people are neither recognized nor respected in the laws of Suriname and that effective remedies are not available in the circumstances of this case.

95. Article 47 of the Mining Decree provides that "rightful claimants and third parties with an interest of land on which a mining right is granted are obligated to allow the holder of this mining right to execute activities on the land ...."[103] Article 48 requires that the holder of a mining license, to the extent possible, minimizes harm to the claimant or third party; provides that the holder is strictly liable to compensate for damages; and allows for an appeal to the judiciary should the miner and the claimant/third party be unable to reach an agreement on the amount of compensation required.

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[101] Annex B(1), *Celientje Martina Joeroeja-Koewie et al v. Suriname & Suriname Stone & Industries N.V.*, 24 July 2003.

[102] Official Response of the State, at para. 244-46.

[103] Official Response of the State, at para. 245 (quoting the text of Articles 47-48, Mining Decree).

96. Article 46(b) of the Mining Decree defines 'rightful claimants' as persons "who have ownership or real user rights to private land", which, according to the explanatory note, is restricted to holders of title issued by the State.[104] According to Article 46(c) of the Mining Decree, 'third parties' are 'those whose interests ... are based on personal use rights to private land...." 'Private land' is defined in Article 46 as land owned by persons other than the State or state land issued in personal or real titles. Therefore, to qualify as a 'rightful claimant' or a 'third party' pursuant to Articles 47-48, the person(s) in question must hold some form of registered right or title issued by the State.

97. The purported remedy established by Articles 47 and 48 is unavailable in the case at hand because it is simply inapplicable to the Saramaka people and the members thereof. Neither the Saramaka people nor its constituent clans or members hold title to their traditional lands or territory or any part thereof. Legally, their traditional lands and territory are considered to be state land. They cannot therefore validly invoke Articles 47 and 48 as they do not qualify as 'rightful claimants' or 'third parties'. Even if they could invoke these articles, the remedy only applies to situations where there is a dispute with a miner concerning the amount of compensation required to repair damages caused by the mining operation.

98. As explained above (*supra*, paragraph 64), Suriname's 2004 revised draft Mining Act contains a provision that specifically denies indigenous and tribal peoples access to judicial remedies in cases where there is a dispute with miners concerning compensation. Rather than an appeal to the judiciary to resolve such disputes – the remedy available to all non-indigenous or non-tribal persons – they must seek a binding decision from the Executive. This further supports the conclusion that Articles 47 and 48 do not and were never intended to apply to indigenous and tribal peoples, including the Saramaka people, and therefore are inapplicable in the circumstances of the instant case.

(g) Role of the *Gaama*

99. In its treatment of exhaustion of domestic remedies, Suriname contends that the petitioners do not have the authority to submit a petition to the Commission because this is not based on the customs of the Saramaka people, which, in the State's view, always require that the *Gaama*, and only the *Gaama*, represent the Saramaka with regard to actions taken towards the central government and "third parties outside of the State of Suriname," such as the Commission.[105] On this basis, the State argues that Case 12.338 violates the "respective Conventional provision ... [and] should not have been admitted by the Esteemed Commission ..., [and on this basis] requests your Honourable Court to declare the application submitted by the Commission inadmissible."[106] The State does not however explain which provision of the Convention has been violated with respect to non-exhaustion of domestic remedies in relation to its contentions concerning the *Gaama*, nor is it clear how this issue relates

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[104] *Explanatory Note to the 1986 Mining Decree*, at p. 72.

[105] Official Response of the State, para. 147.

[106] *Id.* See, also, *id.* para. 152, arguing that the Commission violated the Convention by admitting Case 12.338 in the absence of express authorization by the *Gaama*, and requesting that the Court declare the Commission's application inadmissible on this basis.

to the exhaustion requirement more generally.[107] For the sake of presenting a comprehensive response, the victim's representatives will nonetheless address this issue here.

100. After a lengthy discussion of its views on the customs of the Saramaka people, the State specifies that the Commission violated Article 44 of the Convention when it admitted Case 12.338 in the absence of the express approval of the *Gaama*.[108] The victims' representatives have addressed the admissibility requirements under Article 44 *supra* and therefore will confine their comments here to reiterating that Article 44, which does not address exhaustion of domestic remedies, authorizes the submission of petitions by any person, group of persons or nongovernmental organization. It does not require that the person, group of persons or nongovernmental organization demonstrate that they are the representative of the victims, or that they are the persons that the State believes should represent the victims, or even that they have any connection at all with the victims.

101. The petitioners in Case 12.338 are persons, a group of persons, and technically a nongovernmental organization, and therefore meet the requirements set forth in Article 44 of the American Convention. The petitioners are also traditional authorities, individually and collectively, of the Saramaka people and thus have the dual capacity of also being victims in their own right in Case 12.338. They therefore meet the requirements set forth in Article 44 of the Convention.

102. Suriname also highlights the fact that the present *Gaama*, Belfon Aboikoni, expressly and publicly declared his support for Case 12.338 in December 2005. Yet, it argues that such approval may not be applied retroactively.[109] It again maintains that this is grounds for the Court to declare the Commission's Application inadmissible.[110] However, neither Article 44 nor any other provision of the American Convention requires the approval of the *Gaama* for the purposes of submitting a petition to the Commission. Moreover, the State again fails to explain how this matter is relevant to its objection with regard to the alleged non-exhaustion of domestic remedies.

103. The State's argument that the petitioners only have standing to address the central government and the Commission through the office of the *Gaama* is unsupported and the victims' representatives deny the existence of any such rule of domestic law. Moreover, this argument appears to justify the State ignoring, as it did in the instant case, serious allegations of human rights abuses unless the persons submitting such complaints meet with its approval. This argument is also contradicted by Article 41(1)(b) of the Forest Management Act, which provides that complaints may be submitted to the President "by the relevant traditional authorities of the tribal communities living in the hinterland." The use of the term 'authorities' in Article 41(1)(b) clearly demonstrates that more than one traditional authority is authorized to submit such complaints under Suriname's domestic law.

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107 Rules of Procedure of the Inter-American Court of Human Rights, Article 37(2).
108 Official Response of the State, para. 159.
109 *Id.* para. 150.
110 *Id.* para. 152.

104. The State's argument with respect to the *Gaama* stands in stark contrast to its obligations pursuant to, *inter alia*, Articles 1, 2, 3, 8 and 25 of the American Convention in so far as it denies the rights of all Saramaka persons to seek protection for their individual and collective rights unless the *Gaama* consents and acts on their behalf.

105. Finally, the victims' representatives observe that the State has chosen to proffer a range of serious allegations against the petitioners, their legal counsel, and the Commission in its arguments concerning non-exhaustion of domestic remedies and otherwise in its Official Response. These allegations are unfounded and unsubstantiated and the victims' representatives take exception to the State's attempts to impugn the integrity of these persons and the Commission. However, other than a few brief comments on these matters (Section VI, *infra*), they will not address these allegations further herein as they bear no relevance to the preliminary objections interposed by the State.

106. To conclude, in its arguments concerning the alleged non-exhaustion of domestic remedies, the State has failed to demonstrate that adequate and effective remedies are available to the victims in the circumstances of their case. The remedies identified by the State are intrinsically ineffective for addressing the violations alleged in Case 12.338. The same also proved to be the case with regard to the remedies invoked by the victims prior to submitting Case 12.338 to the Commission.

107. Instead of providing effective remedies and protection, Suriname's laws permit unfettered and active violation of the victims' rights by vesting ownership of all their lands and natural resources in the State and by permitting the State to issue permits for logging, mining and other activities without reference to the Saramaka people's internationally guaranteed property and other rights. The victims are thus defenceless and require international assistance. The exceptions to the rule that domestic remedies must be exhausted were established precisely to address situations such as this, in this case, where domestic law does not provide due process for protection of the rights allegedly violated.

108. For the preceding reasons, the State's third preliminary objection lacks merit and, respectfully, should be rejected and dismissed.

D. RESPONSE TO THE FOURTH OBJECTION: THE CASE OF TWELVE SARAMAKA CLANS IS A DUPLICATION OF OTHER PROCEEDINGS AND IS *RES JUDICATA*

109. Suriname contends that Case 12.338 duplicates "petitions" previously studied by another international organization and is also *res judicata*.[111] Specifically, Suriname asserts that

> It must be noted that in case Twelve Saramaka Clans, the same petitioner filed exactly the same claim to the CERD Committee and the ICCPR [presumably the Human Rights Committee] demanding these international

[111] *Id.* para. 186.

> quasi judicial tribunals to decide on the same subject matters [*sic*] as the case presented to the Commission.[112]

110. The State thus argues that the Commission should have declared the petition inadmissible pursuant to Articles 46(1)(c) and 47(d) of the American Convention, and requests that the Court correct this by declaring that the Commission's Application is inadmissible.[113] As discussed below, the State's assertions with regard to this preliminary objection are factually incorrect and have no basis in law.

111. While the "petitions" referred to by the State were not pending at the time Case 12.338 was submitted to the Commission, they were pending and determined by the bodies in question during the period in which the Commission processed said case. Therefore, both Article 46(1)(c) and Article 47(d) of the Convention are relevant.[114] These articles provide, respectively, that:

> Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: ... c. that the subject of the petition or communication is not pending in another international proceeding for settlement.
>
> The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: ... d. the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

112. The Court has explained with respect to Article 47(d), and equally applicable to Article 46(1)(c), that "The phrase 'substantially the same' signifies that there should be identity between the cases. In order for this identity to exist, the presence of three elements is necessary, these are: that the parties are the same, that the object of the action is the same and that the legal grounds are identical."[115] The Court has additionally differentiated between human rights bodies on the basis of the relief or measures of settlement that may be obtained when considering the issue of duplication: for example, differentiating between recommendations issued by the International Labour Organization's Freedom of Association Committee and the binding and final judgments of the Court.[116] Therefore the nature of the proceedings and the available measures of relief are also relevant to assessing the issue of duplication and *res judicata*.

113. Turning to the case at hand, first, the 'petitions' submitted to CERD and the Human Rights Committee referred to by the State are in fact NGO shadow reports submitted pursuant to those bodies' reporting procedures.[117] They provide

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112 *Id.* at para. 181.

113 *Id.* para. 190-91.

114 See, also, *Rules of Procedure of the Inter-American Commission on Human Rights*, Article 33.

115 *Baena-Ricardo et al. Preliminary Objections*. Judgment of 18 November 1999. Ser. C No 61, at para. 53.

116 *Id.* at para. 57.

117 Both CERD and the Human Rights Committee have individual petitions procedures that are distinct from the reporting procedure and are designed to resolve and reach settlements in individual cases. In the case of the Human Rights Committee, this procedure is defined by Optional Protocol I to the International Covenant on Civil and Political Rights; in the case of

supplementary information in relation to reviews of the periodic reports submitted by Suriname to those Committees.[118] The object of submitting said NGO reports is fundamentally different from the submission of a petition to the Commission. The former seeks to inform the Committees as they review a national situation; whereas the latter seeks resolution of specific claims submitted by a specified individual or group of individuals on the basis of a particular factual situation that pertains only to the complainants.

114. Second, while the State asserts that these reports contain the same factual predicate and situation before the Commission, and now before the Court, the reports in question instead concern the general human rights situation of indigenous and tribal peoples in Suriname. They do not focus solely or even in large part on the situation of the Saramaka people and the Saramaka made no claims or requests specific to their situation therein. The situation of the Saramaka people is mentioned only as one example among many to illustrate the general human rights problems experienced by all indigenous and tribal peoples in Suriname. Two of the reports predominately concern Suriname's revised draft Mining Act and do not even mention the Saramaka people. These reports therefore do not contain substantially the same subject matter as that presently before the Court.

115. CERD and the Human Rights Committee issued concluding observations on two occasions in relation to the above mentioned reports, both in 2004; a decision under CERD's Follow Up procedure[119] was adopted in 2005; and three decisions pursuant to CERD's Urgent Action and Early Warning Procedure[120] were adopted in 2003, 2005 and 2006.[121] Not one of these decisions mentions the Saramaka people by name or makes any reference to the situation presently *sub judice*; all focus on the general human rights situation of indigenous and tribal peoples in Suriname and the racially discriminatory nature of Suriname's revised draft Mining Act. This further demonstrates that the reports in question do not contain substantially the same subject matter as that before the Commission and presently before the Court.

116. Third, reviews of periodic reports and associated follow-up measures employed by, in this case, CERD and the Human Rights Committee are not 'proceedings for settlement' as that term is understood in the practice of human rights tribunals and in relation to Articles 46(c) and 47(d) of the Convention. To so qualify, the proceedings in question must be analogous to the proceedings before the Commission or the Court and, accordingly, must involve an examination of the claims of specified individuals or collectivities, be contentious in nature, offer procedural

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CERD, pursuant to Article 14 of the Convention on the Elimination of All Forms of Racial Discrimination.

118 In the case of CERD, reports were also submitted under that body's review procedure (applicable when a state party is at least five years late in submitting its periodic report), pursuant to its 'Follow Up procedure' and under its Urgent Action and Early Warning procedure.

119 The 'Follow-Up' procedure is governed by Rule 65 of CERD's Rules of Procedure and makes explicit reference to periodic reports made pursuant Article 9(1) of the Convention on the Elimination of All Forms of Racial Discrimination. See, *Rules of procedure of the Committee on the Elimination of Racial Discrimination*. UN Doc. HRI/GEN/3/Rev.2.

120 The nature of the Early Warning and Urgent Action procedures is described at: http://www.ohchr.org/english/bodies/cerd/early-warning.htm#about

121 See Brief of the Victims' Representatives, Annex 4 for copies of these concluding observations and decisions.

equality, and be designed to provide relief or settlement to the complainants when the responsibility of a respondent state is proven.[122] Proceedings analogous to those conducted by the Court and the Commission are limited to those involving individual petitions and communications that offer an effective settlement: for example, pursuant to Optional Protocol I of the International Covenant on Civil and Political Rights, Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, and in the individual complaints mechanisms of the European and African regional systems.[123]

117. This distinction is recognized in Article 33(2)(a) of the Commission's Rules of Procedure, which provides that the Commission shall not refrain from considering petitions on the basis of duplication of procedures when: "the procedure followed before the other organization is limited to a general examination of the human rights situation in the State in question and there has been no decision on the specific facts that are the subject of the petition before the Commission, or it will not lead to an effective settlement." The Commission correctly applied this rule when processing Case 12.338.

118. The Human Rights Committee applies a similar rule when considering communications submitted pursuant to Optional Protocol I to the International Covenant on Civil and Political Rights.[124] It has observed, for example, that only a procedure concerned with the examination of individual claims can constitute 'another procedure',[125] and specifically stated that the examination of periodic reports by treaty bodies does not constitute an examination of the 'same matter' as an individual claim submitted pursuant to Optional Protocol I.[126]

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[122] See, P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice*, Ashgate: Dartmouth, 1998, at p. 227 (explaining that "In general, the jurisprudence of the Committee under article 5(2)(a) of the O.P. narrowly confines the operation of the grounds of inadmissibility stated in that article to situations where an analogous body (such as the I.A.C.H.R. or E.C.H.R.) is actively considering the 'same matter' at the time of the Committee's decision on admissibility.")

[123] Note in particular that CERD's individual complaint procedure is the only mechanism employed by that body to include admissibility requirements, including the prohibition on duplication of proceedings. Note also that CERD has not considered an urgent action request submitted by the Western Shoshone indigenous people to be a duplication of or *res judicata* in relation to the *Mary and Carrie Dann Case*, decided by the Commission in 2002, despite the fact that the same persons and largely the same subject matter are involved in both instances. See, *Decision 1(68), United States of America*, UN Doc. CERD/C/USA/DEC/1, 11 April 2006. Available at: http://daccessdds.un.org/doc/UNDOC/GEN/G06/412/51/PDF/G0641251.pdf?OpenElement

[124] Article 5(2)(a) of Optional Protocol I contains language to the same effect as Article 46(1)(c) of the American Convention concerning inadmissibility *pendente lite*.

[125] Communication No. 1/1976, *HRC Selected Decisions I*, p. 17; Communications Nos. 146/1983 and 148 to 153/1983, *HRC 1985 Annual Report*, p. 191; Communication No. 172/1984, *HRC 1987 Annual Report*, p. 144; Communication No. 180/1984, *HRC 1987 Annual Report*, p. 153; Communication No. 182/1984, *HRC 1987 Annual Report*, p. 162. Tom Zwart states that "The HRC has recognised that the consideration of individual cases by the IACHR and the European Commission [and now the European Court of Human Rights] can be considered 'another procedure'. Considering the nature of their proceedings, the HRC will no doubt grant the handling of individual communications by the Committee on the Elimination of Racial Discrimination and the Committee against Torture the same status, should their paths cross in the future. T. Zwart, *The Admissibility of Human Rights Petitions. The Case Law of the European Commission of Human Rights and the Human Rights Committee*. Martinus Nijhoff: Leiden 1994, at 175.

[126] Broeks v The Netherlands, *G.A.O.R., 42nd Session, Supp. No.40* (A/42/40), Report of the HRC, p. 139, at 144 (observing that "the examination of State reports, submitted under article 16 of the

119. Fourth, the NGO reports considered by CERD were submitted by the Association of Indigenous Village Leaders in Suriname, *Stichting Sanomaro Esa* (an indigenous women's organization), the Association of Saramaka Authorities and the FPP.[127] Case 12.338, however, was submitted by twelve Saramaka Captains in addition to the Association of Saramaka Authorities. The parties therefore are not the same before the Commission and the Court.

120. Finally, the State argues that Case 12.338 is *res judicata* in relation to the 2005 judgment of the Court in the *Moiwana Village Case*.[128] Needless to say, that case involves different facts, different persons and different rights, and the case at hand cannot be construed to replicate those present in *Moiwana Village*.[129]

121. For the preceding reasons, the State's fourth preliminary objection lacks merits and, respectfully, should be rejected and dismissed.

E. RESPONSE TO THE FIFTH OBJECTION: THE COMMISSION FAILED TO COMPLY WITH ARTICLES 50 AND 51 OF THE AMERICAN CONVENTION

122. Suriname's fifth preliminary objection maintains that the Commission failed to comply with Article 50 of the American Convention read in conjunction with Article 51 of the same when transmitting Case 12.338 to the Court and, consequently, that the Commission lacks standing before the Court in this case.[130] In particular, the State argues that the case was not transmitted to the Court within the three month period specified in Article 51(1) of the Convention and; that because the three month period set forth in Article 51(1) had expired on the date that the case was transmitted to the Court, the Commission should have adopted a report pursuant to that article and failed to do so.[131]

123. While the victims' representatives believe that the Commission is best placed to respond to these points raised by the State, they offer the following brief observations. First, while the State correctly observes that it received a

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International Covenant on Economic, Social and Cultural Rights, does not, within the meaning of article 5, paragraph (2)(a), constitute an examination of the 'same matter' as a claim by an individual submitted to the Human Rights Committee under the Optional Protocol.") See, also, Danning v. The Netherlands, *id.* p. 151, 153 and Zwann-de Vries v. The Netherlands, *id.* p. 160, at 162.

127 See, *Persistent and Pervasive Racial Discrimination Against Indigenous and Tribal Peoples in the Republic of Suriname. Formal Request to Initiate an Urgent Procedure to Avoid Immediate and Irreparable Harm.* Submitted to the Committee on the Elimination of Racial Discrimination by the Association of Indigenous Village Leaders in Suriname, Stichting Sanomaro Esa, the Association of Saramaka Authorities and the Forest Peoples Programme, 15 December 2002. Available at: www.forestpeoples.gn.apc.org/Briefings/Indigenous%20Rights/suriname_cerd1_dec02_eng.pdf See, also, www.forestpeoples.gn.apc.org/Briefings/Indigenous%20Rights/suriname_cerd3a_jan04_eng.pdf

128 Official Response of the State, para. 178.

129 See, *Case of Durand and Ugarte v. Perú. Preliminary Objections*. Judgment of May 28, 1999. Series C No. 50, para. 43 (holding that "The judgment delivered in one case will not influence the outcome of other cases when the persons whose rights have been violated are different, even when the facts or events that constituted the violation of rights are the same.")

130 Official Response of the State, para. 192-203.

131 *Id.* para. 196.

communication dated 22 March 2006 from the Commission in which it was notified that Report 09/06 had been adopted, said communication was transmitted to the State on 23 March 2006 rather than 22 March 2006. Consequently, the 3 month period for transmission of the case to the Court prescribed by Article 51(1) of the Convention expired on 23 June 2006, the date on which the Commission submitted its Application to the Court. Submission of the Commission's Application to the Court was therefore timely pursuant to Article 51(1). As this submission was timely, the Commission was not required to adopt a report pursuant to Article 51 of the Convention as the State contends it was required to do. Accordingly, the State's fifth preliminary objection, respectfully, should be dismissed.

F. Response to the sixth objection: the Commission abused its Rules of Procedure when processing Case 12.338

124. Suriname argues that the Commission abused its Rules of Procedure in processing Case 12.338 and specifically identifies seven points to illustrate this contention. On the basis of this alleged abuse, the State argues that the Commission's Application must be declared inadmissible.[132] While the victims' representatives again believe that the Commission is best placed to respond to these points raised by the State, they nonetheless offer a few general observations. The State's assertions with respect to Mr. David Padilla are addressed separately in the following section of this brief.[133]

125. First, in the view of the victims' representatives, Suriname has benefited from considerable understanding and latitude shown by the Commission in the more than five years that Case 12.338 was pending before that body. For instance, the State failed to submit a substantive response to the petition in this case until 27 December 2002, over 2 years after it first received the petition on 21 November 2000.[134] The Commission's Rules of Procedure applicable at that time required that the State respond within 90 days from the date the petition was transmitted.[135] The State did not even request an extension of this 90 day period until 2 August 2001.[136] Additionally, the State formally requested and was granted at least 10 months in extensions in order to respond to requests from the Commission, and this does not include a calculation of the State's (at times extended) delays in submitting responses beyond the granted extension period.[137]

126. Second, Suriname claims that it was treated badly in relation to the two hearings held before the Commission in Case 12.338. Concerning the first hearing, held on 5 March 2004, the State was duly notified and failed to appear. While it is not required to do so, the Commission acceded to the State's request for an additional hearing, held on 27 October 2004; a hearing that the victims' representatives attended at considerable and additional expense. As the State notes, this second hearing went on for over 3 hours (concluding well after 8PM), when the allotted time for hearings

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132 *Id.* para. 203.
133 *Id.* at para. 78-102, 203(2).
134 See, *Report 09/06*, Twelve Saramaka Clans, para. 6 and 14.
135 *Rules of Procedure of the Inter-American Commission on Human Rights*, Art. 30(2).
136 *Report 09/06*, Twelve Saramaka Clans, para. 8.
137 See, *Report 09/06*, Twelve Saramaka Clans, para. 5-48 (documenting the processing by the Commission).

is one hour.[138] The State therefore had the full procedural opportunity to present its witness testimony and other evidence and to make its legal arguments during this hearing.

127. In all of the preceding examples, Suriname benefited from the same latitude it (erroneously) claims that the Commission granted the petitioners. More importantly, the Commission provided the State with ample opportunity to present its views and arguments in relation to Case 12.338, in some cases far beyond what it was required to do by its Rules of Procedure.

128. Finally, the Court's Rules of Procedure and jurisprudence require that the State interposing a preliminary objection specify the article of the Convention upon which the objection is based or support its objection in some other way,[139] and that the brief containing preliminary objections must set forth, *inter alia*, the facts and legal arguments in relation to those objections.[140] However, in alleging that it was abused by the Commission, the State has not specified any provision of the American Convention or of the Commission's Rules of Procedure that was allegedly violated, nor has it presented anything more than vague assertions to support its allegations. On these grounds alone the State's objections, respectfully, should be dismissed.

G. RESPONSE TO THE SEVENTH OBJECTION: MR. DAVID PADILLA IS BARRED FROM REPRESENTING THE VICTIMS BECAUSE HE WAS ASSISTANT EXECUTIVE SECRETARY TO THE COMMISSION WHEN CASE 12.338 WAS FILED IN OCTOBER 2000 AND THE CASE SHOULD BE DECLARED INADMISSIBLE IN THIS RESPECT DUE TO CONFLICT WITH THE COMMISSION'S RULES OF PROCEDURE

129. Suriname contends that Mr. David Padilla is barred from representing the victims before the Commission and the Court because he was Assistant Executive Secretary to the Commission when Case 12.338 was filed in October 2000.[141] It further argues that the Commission abused its Rules of Procedure because it failed to disqualify Mr. Padilla. For these reasons, the State contends that Case 12.338 should be declared inadmissible by the Court[142] and further requests that the Court "immediately remove Mr. Padilla from participating in all future proceedings of this case...."[143] In support of these arguments, the State explains that Mr. Padilla was officially responsible for the processing of petitions at the Commission; that he would have had personal knowledge of the Case 12.338; and cites a number of the Commission's Rules of Procedure which it alleges have been violated in this respect.

130. The relevant facts in relation to this preliminary objection are:

(a) Mr. Padilla was Assistant Executive Secretary of the Commission in October 2000 when petition 12.338 was submitted to the Commission. At the time of

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138 Official Response of the State, para. 203(5).

139 *Genie-Lacayo v. Nicaragua Case, Preliminary Objections*. Judgment of 27 January 1995. Ser C No. 21, para. 35.

140 *Rules of Procedure of the Inter-American Court of Human Rights*, Art. 37(2).

141 Official Response of the State, para. 78-102, 203(2), 293(p. 114).

142 *Id.* para. 102, 203(2)

143 *Id.* at para. 102.

filing, this petition was one of 800-1000 petitions pending before the Commission;

(b) Mr. Padilla was Assistant Executive Secretary until 27 July 2001, when he retired and left the Commission;

(c) Mr. Padilla was authorized to be legal counsel for the petitioners on 15 October 2003 and the Commission was duly notified on the same date. The State was notified shortly thereafter;

(d) said authorization was renewed in April 2006 and a power of attorney declaration was submitted to the Commission, and subsequently to the Court;[144]

(e) Mr. Padilla's services in this case are rendered *pro bono publico* and he has personally defrayed a significant portion of his expenses related to this matter;

(f) the victims in this case are impecunious and require the *pro bono* legal assistance of competent counsel to represent them before international fora such as the Commission and Court;

(g) Suriname did not submit a substantive response in this case until 27 December 2002, more than one year after Mr. Padilla had left the Commission;

(h) between 27 October 2000, when the Commission received petition 12.338, and the date of Mr. Padilla's departure on 27 July 2001, the Commission communicated to the State and the petitioners twice: the first time to transmit the petition to the State, the second, to transmit to the State additional information submitted by the petitioners;

(j) the Commission took three important decisions regarding this case: the first was to issue precautionary measures in August 2002 in order to halt the harvesting of lumber on Saramaka lands by a concessionaire. This decision was taken when Mr. Padilla neither worked for the Commission nor represented the petitioners;

(k) the second was the reiteration of precautionary measures in April 2004, approximately six months after Mr. Padilla was authorized as co-counsel in Case 12.338 and almost two and one-half years after he left the Commission;

(l) the third was the Commission's decision on the admissibility and merits of this case, contained in Report 09/06 of 02 March 2006, which was adopted unanimously by the seven Commission members, none of whom served on the Commission during Mr. Padilla's incumbency; and,

(m) at no time during the period that this case was pending before the Commission did the State object to Mr. Padilla's representation. The State was aware that Mr. Padilla was authorized as co-counsel from 15 October 2003, yet it did not raise any objection. Mr. Padilla also participated in two hearings before the Commission in 2004 in this matter and no objection was raised on either occasion by the State.

131. Neither the Convention, the Commission's Statute nor the Commission's Rules of Procedure address, directly or indirectly, the objection raised by the State with respect to Mr. Padilla's role as lawyer for the victims in this case. The only prohibitions provided for in the Commission's Rules of Procedure apply to members of the Commission and to the Executive Secretary. Mr. Padilla was not a member of

[144] See, Application of the Commission, para. 230.

the Commission nor was he the Executive Secretary. The State also cites no jurisprudence to support its contentions on this matter. 000540

132. Article 12(3) of the Commission's Rules of Procedure, referred to by the State to support its argument that Mr. Padilla should be barred from this case and that it be declared inadmissible because the Commission failed to exclude him,[145] provides that

> 3. The Executive Secretary, Assistant Executive Secretary, and staff of the Executive Secretariat must observe the strictest discretion in all matters the Commission considers confidential. Upon taking office, the Executive Secretary shall undertake not to represent victims or their relatives, or States, in precautionary measures, petitions, or individual cases before the IACHR for a period of two years, counted from the time he or she ceases to discharge the functions of Executive Secretary.

133. The two year time period imposed on the Executive Secretary does not apply to Mr. Padilla in his former position as Assistant Executive Secretary. Even if it did apply, Mr. Padilla was not involved with Case 12.338 for over two years after he left the Commission (27 July 2001 – 15 October 2003) and it would be unreasonable to require that a higher standard be imposed on the Assistant Executive Secretary than is imposed on the Executive Secretary. Further, if it be accepted that this provision sets forth the Commission's consensus and expectations with regard to matters of ethics and conflict of interest for senior staff, Mr. Padilla fully meets and exceeds such expectations.

134. The State has not presented any evidence that Mr. Padilla was formally or otherwise involved with Case 12.338 prior to 15 October 2003 and has not cited any relevant law, regulation, or ethical rule that would prohibit him from doing so either before or after that date. It merely states that it has "information" that in March 2003 "Mr. Padilla had several meetings with the petitioners and the foreign lawyer, Mr. MacKay."[146] It does not specify the source or nature of this information and the State otherwise fails to substantiate its veracity or relevance. Suriname then concludes that Mr. Padilla has contravened Article 12(2) and (3) of the Commission's Rules of Procedure.[147] This conclusion is manifestly ill-conceived as the two year-long exclusion period in Article 12(3) does not apply to the Assistant Executive Secretary and, at any rate, Mr. Padilla's behaviour fully conforms to the letter and spirit of that provision.

135. Finally, the victims' representatives take exception to the State's unfounded and unsubstantiated allegations against Mr. Padilla and its attempts to malign his personal and professional integrity. They assure the Court that Mr. Padilla, both prior to and in his role as co-counsel in this case, has always acted honourably and in keeping with the highest standards of the legal profession.

136. The State's objection to the admissibility of Case 12.338 in relation to Mr. Padilla is unfounded as a matter of fact and law and the victims' representatives respectfully request that this objection be dismissed by the Court.

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[145] Official Response of the State, para. 84.
[146] *Id.* para. 96.
[147] *Id.* para. 97

V. OBSERVATIONS ON WITNESSES AND EXPERTS WITNESSES

A. MS. JENNIFER VAN DIJK SILOS, WITNESS PROPOSED BY THE STATE

137. The victims' representatives were informed by facsimile on 30 January 2007 that the State has offered the testimony of Ms. Jennifer van Dijk Silos as a witness. While this offer should have been made in the State's Official Response pursuant to Article 38 of the Court's Rules of Procedure, and therefore was made extemporaneously, the victims' representatives nevertheless have no objection to the inclusion of this witness or to her providing testimony to the Court.

B. MS. MARISKA MUSKIET, EXPERT WITNESS OFFERED BY THE VICTIMS' REPRESENTATIVES

138. The victims' representatives have offered the expert testimony of Ms. Mariska Muskiet with regard to matters of Suriname's property law as it relates to the substantive violations alleged in this case as well as domestic remedies issues.[148]

139. Suriname asserts that Ms. Muskiet lack the necessary qualifications to be considered an expert witness before the Court, and points out that she has not published academic or other works on the subject matter of her testimony. The State however makes no reference to any applicable norm on which it is permissible to base an objection to Ms. Muskiet's appearance before the Court as an expert witness.

140. The State's objection to Ms. Muskiet is manifestly unfounded. She has demonstrable expertise with regard to Surinamese property law, the stated object of her proposed testimony. As the State observes in its Official Response, Ms. Muskiet is a "Professor of Law at the Anton de Kom University of Suriname."[149] Additionally, Ms. Muskiet lectures on property law at the University of Suriname. The University of Suriname thus accepts that she has sufficient expertise to teach property law to Suriname's law students. This fact alone is sufficient to qualify Ms. Muskiet as an expert witness with respect to the nature and substance of Suriname's property laws, which again is the stated object of her proposed testimony before the Court.

141. Ms. Muskiet is fully qualified and has expertise to testify about Suriname's property law and the State has not cited any rule or norm that would disqualify Ms. Muskiet from appearing before the Court as an expert witness. The Court will be able to assess the value of her testimony should she be called to testify.

142. The victims' representatives therefore request that the Court dismiss Suriname unsupported objections and reiterate their request that the Court call Ms. Muskiet's to provide expert testimony in the instant case.

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[148] Brief of the Victims' Representatives, para. 237(b).
[149] Official Response of the State, at para. 286.

VI. *AD HOMINEM* ATTACKS ARE INAPPROPRIATE BEFORE AN INTERNATIONAL HUMAN RIGHTS TRIBUNAL

143. Suriname's Official Response is replete with accusations, insinuations, and *ad hominem* attacks levelled at the witnesses, the petitioners, and victims' representatives. These accusations and attacks are interspersed throughout the various sections of the Official Response. Others are specifically set out in separate sections of the Official Response devoted to Mr. Fergus MacKay,[150] to Mr. David Padilla,[151] and to Mr. Hugo Jabini.[152] The victims' representatives observe that such accusations and attacks, and attempts to denigrate and malign the petitioners and their representatives, also occurred in the proceedings before the Commission.[153]

144. The accusations and *ad hominem* attacks contained in the Official Response include and range from:

(a) attacks on personal and professional integrity,[154] to malicious manipulation of persons and evidence;[155]
(b) from making false statements in submissions to the Inter-American human rights protection organs,[156] to absurd statements about the wilful destruction of the cultural integrity of the Saramaka people;[157] and,
(c) from impugning and denigrating the victims' motivations in bringing their case to the Commission as a surreptitious attempt to resolve an internal dispute,[158]

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150 *Id.* para. 57-77.

151 *Id.* para. 78-102.

152 *Id.* para. 103-08.

153 See, Application of the Commission, Appendices Vol. IV, *Information submitted pursuant to Article 43(3) of the Rules of Procedure of the Inter-American Commission on Human Rights*, 21 April 2006, at para. 20-29.

154 *Id.* at para. 74, 77, at para. 79 (stating that "Mr. MacKay has proven that his main purpose is not the acknowledgement by the State of the land rights of the Saramaka people, but more the accomplishment of his own personal agenda"); at para. 100 (referring to Mr. Padilla and stating that "... it is highly improper to participate in a petition that was presented to the Commission while Mr. Padilla was in Office"); at para. 289 (stating that "The concept of general interest as explained by Ms. Muskiet is simplistic and is more a populist statement made on behalf of the petitioners rather than a statement that is based on professional expertise on the subject matter").

155 *Id* at para. 106 (referring to Mr. Jabini and stating that "individuals are being used as instruments of the same person or persons who were in charge of or in fact executed several human rights violations in Suriname); at para. 111 (stating that "The State regrets that the local dignitaries were misled by Mr. Fergus MacKay and that Mr, Hugo Jabini assisted in this matter").

156 *Id.* at para. 58 (referring to Mr. MacKay and stating that "... his acts to destabilize efforts to come to an agreement before the Commission are pointed out in the numerous communications that State has submitted to the Commission. From including false statements in the petitions and subsequent communications ..."); at para. 107 ("Fabricating petitions and sending them to the Commission is not a difficult task for an experienced human rights lawyer who has his own personal agenda").

157 *Id.* at para. 110 (stating that "The State hereby asserts that Mr. MacKay is single-handedly destroying the culture and customs of the Saramaka people"); at para. 79 (stating that "Going along with Mr. MacKay on this private journey, thereby destroying established customs and practices in the Saramaka community living in Suriname, has never been anticipated by the State of such an Honorable human rights specialist as Mr. Padilla"); at para.

158 *Id.* at para. 150 (stating that "... the petitioners brought that internal dispute to the table of the Commission, by using a (false) argument, provided by the foreign lawyer, Fergus MacKay, that they do not need the approval or consent or whatever from the Gaa'man to bring a claim to the Commission").

to, at a minimum, insinuating that there is a connection between the kidnapping of *Gaama* Belfon Aboikoni and the instant case, and the conduct of the petitioners and their legal representatives.[159]

145. The State also levels accusations and attacks against the integrity and objectivity of the Commission,[160] and alleges, *inter alia*, that it engaged in *ex parte* communications with the *Gaama* of the Saramaka people, communications which, according to the State, caused him to suffer threats against his personal integrity.[161] The victims' representatives have no knowledge of these alleged *ex parte* communications and no knowledge of any threats levelled at the *Gaama* in relation thereto.

146. The victims' representatives observe that not one of the accusations made by the State is supported or substantiated by a shred of evidence; all are simply bare assertions.

147. The victims' representatives wish the record to reflect that they take exception to the unfounded and unsubstantiated *ad hominem* attacks and accusations made by the State. They categorically deny these accusations and condemn the attacks on the petitioners, their representatives, certain witnesses, and the Commission, as wholly inappropriate and inadmissible in a pleading before an international human rights tribunal.

148. The victims' representatives further wish the record to reflect that they have not responded to each and all of these accusations and attacks solely because these unfounded allegations and attacks are not relevant to the Court's consideration of the preliminary objections interposed by the State, and nor are they relevant to the human rights abuses before the Court in Case 12.338.

149. While the State would have the Court believe that Case 12.338 is about anything but its own acts and omissions, it is precisely these acts and omissions and the resulting human rights violations that the Court has been requested to adjudicate and which lie at the heart of this case. While the State would also have the Court believe that it is the victim in the proceedings to-date, the victims have always been and remain the Saramaka people, its twelve clans and the members thereof, and not the State. For these and the reasons stated above, the victims' representatives will not further address the attacks and accusations made by the State herein.

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159 *Id.* at para. 64-65.

160 *Id.* at para. 101 ("The State is of the opinion that the Commission should have taken its duties more seriously"); at para. 203(3) (stating that "The Commission did not give the State the opportunity to attend the 119th Hearing of March 2004, by purposely not inviting the State in a timely manner ..."); at para. 203(5) (stating that "... the position taken by the Commission during the hearing is not considered as that of an objective human rights organ"); at para. 203(7) (stating that "... the Commission purposely did not respond to the communications submitted by the State after it received the Article 50 report").

161 *Id.* at para. 161-62.

VII. THE STATE'S REQUEST TO SUBMIT A SEPARATE RESPONSE TO THE BRIEF CONTAINING PLEADINGS, MOTIONS AND EVIDENCE SUBMITTED BY THE VICTIMS' REPRESENTATIVES IS BARRED BY ARTICLE 38(1) OF THE COURT'S RULES OF PROCEDURE

150. In its Official Response, Suriname requests leave to submit an additional pleading in order to respond to the brief containing pleadings, motions and evidence submitted by the victims' representatives.[162] The State's communication to the Court of 16 February 2006, transmitted to the victims' representatives by the Court on 26 February 2007, clarifies that the State is making this request to submit an additional pleading pursuant to Article 39 of the Court's Rules of Procedure and in order to respond to the brief submitted by the victims' representatives.[163]

151. While the State may request the Court's leave to submit additional pleadings pursuant to Article 39 of the Court's Rules of Procedure, the victims' representatives respectfully submit to the Court that the State may not use said additional pleadings as a means to file an extemporaneous response to the brief submitted by the victims' representatives. That this is the State's intent is amply illustrated by its communication to the Court of 16 February 2006. This communication bases the State's request to submit an additional pleading on seven points, five of which specifically refer to the brief submitted to the victims' representatives. The other two points merely state that the case is complex and refer to unspecified "spin off effects for the State of a decision in this case."[164]

152. The State is barred from submitting an additional pleading pursuant to Article 39 of the Court's Rules of Procedure where the primary purpose of that pleading is to respond to the brief submitted by the victims' representatives. Such a prohibition is clear from the plain meaning of the terms of both Article 38(1) and Article 39 of the Court's Rules of Procedure. Articles 38(1) and 39 of the Court's Rules of Procedure provide, respectively, that

> **Article 38. Answer to the application**
> (1). The respondent shall answer the application in writing within a period of 4 months of the notification, which may not be extended. The requirements indicated in Article 33 of these Rules shall apply. The Secretary shall communicate the said answer to the persons referred to in Article 35(1) above. Within this same period, the respondent shall present its comments on the written brief containing pleadings, motions and evidence. These observations may be included within the answer to the application or within a separate brief.
>
> **Article 39. Other Steps in the Written Proceedings**
> Once the application has been answered, and before the opening of the oral proceedings, the parties may seek the permission of the President to enter additional written pleadings. In such a case, the President, if he sees fit, shall establish the time limits for presentation of the relevant documents.

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[162] Official Response of the State, para. 284.
[163] *Communication of the State, No. CJDM/563/07*, 16 February 2007, p. 2.
[164] *Id.*, at p. 3 (concerning points 5 and 6 set forth by Suriname).

153. Article 38(1) concerns the respondent's answer to the Commission's Application and its comments on the brief submitted by the victims' representatives. Pursuant to Article 38(1), the respondent's answer and comments, in relation to both the Commission's Application and the brief submitted by the victims' representatives, must be submitted no later than 4 months from the date of notification of the Commission's Application. In the case at hand, the four month period expired on 12 January 2007. Article 38(1) further and unambiguously provides that said four month period "may not be extended." The Court informed the State of this requirement on two occasions in response to the latter's requests for an extension to the fourth month period on 09 January 2007 and 11 January 2007 and, at the same time, the Court also expressly denied those requests for an extension.[165]

154. Additionally, Article 39 of the Court's Rules of Procedure applies only "Once the application has been answered," and to "[o]ther steps in the written proceedings." This language clearly demonstrates that additional pleadings submitted pursuant to Article 39 may not be used to respond to the Commission's Application or to the brief submitted by the victims' representatives, both of which must be answered no later that the expiration of the fourth month period prescribed in Article 38(1).

155. The victims' representatives were notified by the Court in its communication of 27 February 2007 that it had granted the State's request to submit an additional pleading pursuant to Article 39 of the Court's Rules of Procedure.[166] In this regard, and in light of the preceding, the victims' representatives respectfully request that the Court declare inadmissible each and every part of the State's additional pleading should said parts constitute a response to the brief submitted by the victims' representatives. Suriname has had the procedural opportunity to respond to the brief of the victims' representatives and may not now do so extemporaneously by submitting an additional pleading pursuant to Article 39 of the Court's Rules of Procedure.

VIII. CONCLUSION AND REQUEST

156. The case of Twelve Saramaka Clans was submitted to the Court in order to remedy violations of Articles 21 and 25 of the American Convention, in conjunction with Articles 1 and 2 of the same. The victims' representatives have additionally alleged that Suriname is responsible for the violation of Article 3 of the Convention and requested that the Court interpret Articles 3 and 21 of the same so as not to restrict the rights of the Saramaka people guaranteed by common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

157. The violations alleged by the Commission and the victims' representatives are centred on Suriname's failure to recognize and secure the rights of the Saramaka people, its twelve clans, and the members thereof, to own and control their traditional lands, territory and resources; the State's failure to provide effective domestic remedies by which the Saramaka people could seek protection for its rights; and Suriname failure to recognize the legal personality of the Saramaka people and its

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[165] See, for instance, *Communication of the Court (CDH-12.338/030)*, 11 January 2007.
[166] *Communication of the Court (CDH-12.338/050)*, 26 February 2007.

constituent members for the purpose of holding and seeking vindication of their communal property and other rights.

158. In the State's answer to the Commission's Application in the instant case, seven preliminary objections are discernable and interposed by the State. These preliminary objections for the most part lack specificity and are not amenable to precise responses. Moreover, in most cases the State has failed to adequately state the legal and factual grounds on which its objections are based. Where the State has identified the legal grounds for its objections, it has failed to provide sufficient legal arguments and evidence to substantiate these objections. In all cases, Suriname's objections lack any basis in law or fact.

159. The victims' representatives consider that the information before the Court provides a sufficient demonstration that it is both proper and necessary that it exercise jurisdiction with respect to this case and that it admit the case for consideration of the merits and possible reparations.

160. On the basis of the foregoing considerations of fact and law, the victims' representatives respectfully petition that:

(a) the Court rejects Suriname's request for a separate hearing on the preliminary objections interposed in its Official Response;

(b) the Court rejects and dismisses each and every preliminary objection filed by Suriname;

(c) the Court proceeds to examine and pronounce upon the merits of the claims placed before it and the possible reparations;

(d) the Court calls Ms. Mariska Muskiet to provide expert testimony with regard to matters of Suriname's domestic law and property law in particular;

(e) the Court accepts Suriname's offer of Ms. Jennifer van Dijk Silos as a witness in the instant case;

(f) the Court admonishes the State against making additional *ad hominem* attacks and unsupported accusations in relation to the petitioners, the victims' representatives and the Commission; and,

(g) the Court declares inadmissible each and every part of the State's additional pleading to be submitted pursuant to Article 39 of the Court's Rules of Procedure should said parts constitute an extemporaneous response to the brief submitted by the victims' representatives.

IX. ANNEXES

Annex A

Indigenous Peoples and Maroons in Suriname. Economic and Sector Study Series, RE3-06-005, Inter-American Development Bank, August 2006

Annex B

1. *Celientje Martina Joeroeja-Koewie et al v. Suriname & Suriname Stone & Industries N.V.*, A.R. no. 025350, Cantonal Court, First Canton, Paramaribo, 24 July 2003 (unofficial translation).

2. Response of the State of Suriname in *Celientje Martina Joeroeja-Koewie v. Suriname & Suriname Stone & Industries N.V.*, A.R. no. 025350, Cantonal Court, First Canton, Paramaribo, 30 January 2003 (unofficial translation)