JOINT CONCURRING OPINION OF JUDGES

HUMBERTO ANTONIO SIERRA PORTO AND

EDUARDO FERRER MAC-GREGOR POISOT

**CASE OF THE KALIÑA AND LOKONO PEOPLES *V.* SURINAME**

**JUDGMENT OF NOVEMBER 25, 2015**

***(Merits, Reparations and Costs)***

1. We have prepared this concurring opinion with regard to two issues dealt with in the judgment in the case of the *Kaliña and Lokono Peoples v. Suriname*, namely: (i) the guarantees of collective property in relation to the mining concession within the Wane Kreek Nature Reserve, particularly with regard to the right to effective participation through a consultation process, and (ii) the recognition of collective juridical personality.

2. With regard to the first point, in this judgment the Court established that:

200. As previously noted, in 1958, Suriname granted Suralco a mining concession until 2033, for the extraction of bauxite in the eastern part of the country. In 1997, the company started up its operations to extract bauxite from deposits in an area of approximately 100 to 144 hectares, within the Wane Kreek Nature Reserve, known as Wane Kreek 1 and 2 (*supra* paras. 88 and 90). Preparatory work, such as the construction of a highway to reach the mine and transport the mineral, was initiated in the mid-1990s (*supra* para. 89). There is no dispute about the fact that the Kaliña and Lokono peoples played no part in any of these activities and that the corresponding environmental impact assessment was not made (*infra* para. 213). However, the Court does not have competence in relation to the award of the mining concession in 1958. Nevertheless, the Court is competent to examine measures taken following the entry into force of its jurisdiction; in particular, the extraction operations carried out as of 1997.

201. In this regard, the Court has already established in the *case of the Saramaka People v. Suriname* that, under Article 1.1 of the Convention, in order to ensure that the restrictions imposed on the right to property of the indigenous and tribal peoples owing to the issue of concessions within their territory do not entail a denial of their survival, the State must comply with the following three guarantees: “first, it must ensure the effective participation of the members of the [indigenous and tribal peoples], in accordance with their customs and traditions, with regard to any development, investment, exploration or extraction plans (hereinafter “development or investment plan”) implemented within [their territory]. Second, the State must ensure that the members of the [indigenous and tribal peoples] receive a reasonable benefit from the plan implemented within their territory. Third, the State must ensure that no concession will be granted within their territory until independent and technically-qualified entities, under the State’s supervision, have conducted a prior social and environmental impact assessment. These safeguards are intended to preserve, protect and ensure the special relationship that the members of the [indigenous and tribal peoples] have with their territory, which, in turn, ensures their survival [as an indigenous people].” In the instant case, the Court will analyze the State’s alleged failure to comply with these safeguards in relation to the start-up of bauxite extraction operations in 1997.

202. Furthermore, the Court reiterates that Article 23 of the American Convention establishes that: “[e]very citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs […].” Similarly, Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples establishes that “[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives […],” and the pertinent part of Article 32 stipulates that “States shall consult and cooperate in good faith […] prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the […] utilization or exploitation of mineral […] resources.”

203. Consequently, in order to ensure the use and enjoyment of the right to indigenous collective property recognized in Articles 1.1 and 21 of the Convention, in relation to the utilization or exploitation of natural resources in their traditional territory, the State must, for the effects of this case, put in place mechanisms for the effective participation of the indigenous peoples using procedures that are culturally adapted to the decision-making of such peoples. This is not only a matter of public interest, but also forms part of the exercise of their right to take part in any decision-making on matters that affect their interests, in accordance with their own procedures and institutions, in relation to Article 23 of the American Convention (*supra* para. 196).

3. In this regard, we are essentially in agreement with the majority of the Court in the sense of reiterating the safeguards established by the Court in its case law in relation to investment or development projects in indigenous or tribal territory. In particular, the State’s obligation to organize an effective participation process, implemented by means of prior, free and informed consultation.

**Prior, free and informed consultation**

4. One of the most significant contributions of the Inter-American Court’s case law in indigenous and tribal matters has been the interpretation made of Article 21 of the American Convention. Thus, the Court has developed an interpretation that protects one of the characteristic stuations in the region, the communal ownership of ancestral territories. In this understanding, in the context of major development, investment, exploration, exploitation and extraction projects and plans, the Court has established a solid line of case law concerning the obligation to consult the indigenous and tribal peoples insofar as such projects affect both their territory and their way of life within that territory.[[1]](#footnote-1)

5. The Court has ruled on prior consultation in four cases concerning indigenous or tribal peoples, namely: *Case of the Saramaka People v. Suriname; Case of the Kichwa Indigenous People of Sarayaku v. Ecuador; and Case of the Garífuna Community of Punta Piedra and its members, and Case of the Garífuna Community of Triunfo de la Cruz and its members,* both *v. Honduras.*

6. In this regard, in addition to the considerations in paragraph 201 of this judgment, in the case of the *Saramaka People,* the Court indicated that the consultation must ensure the effective participation of the members of the Community and that the consultation must be: (i) in good faith and designed to reach an agreement; (ii) in keeping with the community’s own traditions and customs and their traditional method of decision-making; (iii) during the initital stages of the project in question, and (iv) following the delivery of all relevant information, including information on possible risks.[[2]](#footnote-2)

7. In the case of the *Kichwa Indigenous People of Sarayaku* and, subsequently, in the case of the *Garífuna Community of Triunfo de la Cruz,* the Court specified that “to ensure that the exploration for, or extraction of, natural resources in ancestral territories does not entail a negation of the survival of the indigenous people as such, the State must comply with the following safeguards: (i) conduct an appropriate and participatory process that guarantees the right to consultation, particularly with regard to large-scale development or investment projects; (ii) make an environmental impact assessment, and (iii) as appropriate, reasonably share the benefits produced by the exploitation of natural resources (as a form of just compensation required by Article 21 of the Convention), with the community itself determining and deciding who the beneficiaries of this compensation should be, according to its customs and traditions.”[[3]](#footnote-3)

8. In the case of the *Garífuna Community of Punta Piedra*, the Court reiterated that it had established that, “in the case of any development, investment, exploration or extraction project in traditional territories of indigenous or tribal communities, the State must comply with the following safeguards: (i) conduct an appropriate and participatory process that guarantees their right to consultation; (ii) make a prior social and environmental impact assessment, and (iii) as appropriate, reasonably share the benefits produced by the exploitation of the natural resources.”[[4]](#footnote-4)

9. In addition, it should be pointed out that, as established in the instant judgment, even though Suriname is not a party to ILO Convention 169, the Court reiterated what it had established in the *Saramaka* case,[[5]](#footnote-5) to the effect that “the right to property protected by Article 21 of the American Convention, and interpreted in light of the rights recognized in Article 1 common to the two Covenants, and Article 27 of the ICCPR, which cannot be restricted when interpreting the American Convention in this case, confer on the members of the Kaliña and Lokono peoples the right to the enjoyment of their property in keeping with their community-based tradition.”[[6]](#footnote-6)

10. Thus, the Court determined that, applying the foregoing criteria to the instant case, “as indigenous peoples, the Kaliña and Lokono peoples are protected by international human rights law which guarantees the right to the collective territory they have used and occupied traditionally, derived from the use and occupation of the land and of the resources necessary for their physical and cultural survival and, also, that the State has the obligation to adopt special measures to recognize, respect, protect and guarantee to their members the right to communal ownership of this territory.”[[7]](#footnote-7)

11. Furthermore, the Court considered that, for the effect of this case, the right to consultation was also founded on Article 23 of the American Convention, in ligt of the international standards.[[8]](#footnote-8) To this end, it indicated that the State must have available “mechanisms for the effective participation of the indigenous peoples using procedures that are culturally adapted to the decision-making of such peoples. This is not only a matter of public interest, but also forms part of the exercise of their right to take part in any decision-making on matters that affect their interests, in accordance with their own procedures and institutions, in relation to Article 23 of the American Convention.”[[9]](#footnote-9)

12. Consequently, it is clear that the effective participation mentioned in Chapter B.4, paragraphs 204 to 212 of the Judgment must be understood to guarantee prior, free and informed consultation, in accordance with the case law evolved by this Court in this regard.

13. Regarding the moment at which the prior consultation should be conducted, the Court established that:

1. In this regard, the Court has already established that the State must ensure the effective participation “with regard to any development, investment, exploration or extraction plan.”[[10]](#footnote-10) In particular, the Court referred to development and investment plans as “any activity that may affect the integrity of the lands and natural resources […]; specifically, any proposal related to logging or mining concessions.”[[11]](#footnote-11)
2. In this regard, the Court considers that the State’s duty in relation to this guarantee must be complied with prior to the execution of activities that may have a relevant impact on the interests of the indigenous and tribal peoples, such as the exploration, and the exploitation or extraction stages. In this case, although the mining concession was granted in 1958, the bauxite extraction operations began in 1997 – that is, 40 years later – at which time, the company had determined the precise place where the extraction operations would be implemented in relation to the rest of the territory that had previously been explored. The guarantee of effective participation should have been put in practice before the start of the mining extraction or exploitation operations, which did not happen in this case. In particular, with regard to the Kaliña and Lokono peoples who were nearby and had a direct relationship with the area, and whose traditional territory was adversely affected (*supra* para. 92)

14. We concur with this specific point because, even though the Court did not have competence to analyze the moment before the intial concession was granted, it is extremely relevant for the particular characteristics of this case to stress that the obligation to consult comes into force prior to different moments. In this regard, a mining project is composed of different stages including exploration, feasibility, construction and exploitation, as well as that of project closure. Thus, the execution of each stage is an independent act, and although the stages are interrelated and are the result of the original act of the concession itself, owing to their characteristics, they should each be subject to prior consultation. In this case, the Court noted that bauxite extraction operations – one of the most important activities of the mining project – started in Wane Kreek in 1997. The Court also verified the environmental consequences of these activities in the area.[[12]](#footnote-12)

15. Thus, the State obligation in relation to development projects in indigenous or tribal territory arises from the moment at which the State accept the obligations contained in the provisions of the American Convention, regardless of the moment at which the concession is granted, because, as mentioned previously, it includes independent stages. Denying this and understanding prior consultation in a different way, confining it explicitly only to the initial stages of the concession of a project, would lead to the absurd situation of permitting new exploitations that have an immediate impact on indigenous territory and culture, affecting them for the rest of the time that the concession is valid. Evidently, since consultation is a constant process of dialogue, it should not be restricted merely to the initial stages of a project; rather, the obligation arises whenever there is a possible impact on the traditional indigenous or tribal life concerned.

16. Based on the above, as the Court concluded in paragraph 212 of the Judgment, since the State failed to ensure the effective participation of the Kaliña and Lokono peoples, by means of a consultation process, before undertaking or authorizing the exploitation of the bauxite mine within their traditional territory, the State violated Articles 21 and 23 of the Convention, in relation to Articles 1.1 and 2 of this instrument, to the detriment of the Kaliña and Lokono peoples and their members.

**Recognition of collective juridical personality**

17. In this Judgment, the Court, based on previous cases concerning Suriname,[[13]](#footnote-13) declared that:

114. In conclusion, since the domestic laws of Suriname do not recognize the collective exercise of the juridical personality of the indigenous and tribal peoples, this Court finds that the State has violated Article 3 of the American Convention, to the detriment of the Kaliña and Lokono peoples, in relation to Article 2 of this instrument. In addition, for the effects of the instant case, the failure to recognize the juridical personality of the Kaliña and Lokono peoples has an impact on the violation of other rights recognized in Articles 1.1, 21 and 25 of the Convention.

18. We concur with this reasoning, because the recognition of collective juridical personality is an essential requirements to ensure that the indigenous and tribal peoples may exercise different rights that, owing to their communal characteristics, need to be protected collectively. Thus, the Court reiterated that:

107. […] “the right that the State recognize their juridical personality is one of the special measures that should be granted to the indigenous and tribal groups in order to ensure that they may enjoy their territories according to their traditions. This is the natural consequence of the recognition of the right of the members of the indigenous and tribal groups to enjoy certain rights collectively.”

109. […] “the recognition of juridical personality is one way, although not the only way, to ensure that the community as a whole may enjoy and exercise fully the right to property, in accordance with their system of communal ownership, as well as the right to equal judicial protection against any violation of this right.”

19. It should be noted that the Court took the State to task, considering that this non-compliance was “particularly serious owing to the provisions of the judgment in the *case of the Saramaka People* of November 28, 2007 (*supra* para. 107), which were reiterated to the State for the effects of that case, in the order on monitoring compliance of November 23, 2011.”[[14]](#footnote-14)

20. Consequently, when establishing reparations, in addition to the other elements ordered in favor of the Kaliña and Lokono peoples,[[15]](#footnote-15) the Court ordered Suriname, as a guarantee of non-repetion, to:[[16]](#footnote-16)

a) Grant the indigenous and tribal peoples in Suriname legal recognition of collective juridical personality in order to ensure them the exercise and full enjoyment of their right to property in accordance with their customs and traditions, as established in paragraphs 105 to 114. The State must comply with the measures of reparation with two years of notification of this Judgment, at the latest.

**Conclusion**

21. Based on the foregoing, the undersigned emphasize the above-mentioned developments in the Court’s case law in relation to the right to effective participation by means of a consultation process, which should be understood in light of the Court’s consistent case law and, in this specific case, in light of the right to participate in the conduct of public affairs, recognized in Article 23 of the American Convention.

22. Moreover, with regard to the right to recognition of juridical personality, established in Article 3 of the American Convention, this has been interpreted underlining the relevance of the collective dimension of indigenous and tribal peoples. And this is consistent with the enlightened interpretation that this Court has developed throughout its case law on this matter, in the sense of recognizing that the rights of indigenous and tribal peoples have singular characteristics related to their particular ways of life, traditions, world vision, and culture, which are also protected by the American Convention on Human Rights.

Humberto Antonio Sierra Porto Eduardo Ferrer Mac-Gregor Poisot

Judge Judge

Pablo Saavedra Alessandri

Secretary

1. The Court has determined that “[i]ndigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.” *Case of the* ***Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of August 31, 2001. Series C No. 79,** para. 149. [↑](#footnote-ref-1)
2. *Cf.* ***Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C No. 172**, para. 133. [↑](#footnote-ref-2)
3. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012.* Series C No. 245, para. 157, and *Case of the Garífuna Community of Triunfo de la Cruz and its members v. Honduras. Merits, Reparations and Costs.* Judgment of October 8, 2015. Series C No. 305*,* para. 156. [↑](#footnote-ref-3)
4. *Case of the Garífuna Community of Punta Piedra and its members v. Honduras. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 8, 2015. Series C No. 304, para. 215. [↑](#footnote-ref-4)
5. *Case of the Saramaka People, supra,* para. 95. [↑](#footnote-ref-5)
6. *Cf.* Paragraphs 122, 123 and 124 of the Judgment. [↑](#footnote-ref-6)
7. Paragraph 125 of the Judgment. [↑](#footnote-ref-7)
8. Article 18 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295)*.* See also, article 29 of the Declaration. Also, article 6 of the Inter-American Democratic Charter states that: “It is the right and responsibility of all citizens to participate in decisions relating to their own development […].” [↑](#footnote-ref-8)
9. Paragraph 203 of the Judgment. [↑](#footnote-ref-9)
10. *Cf.* *Case of the Saramaka People,* *supra*, para. 129. Likewise, in the *case* *of the Garífuna Community of Punta Piedra and its members,* the Court indicated that the consultation must take place beforehand, and must be carried out starting in the initial stages of the development or investment plan so that the indigenous and tribal peoples may truly participate and influence the decision-making process. *Cf.* *Case of the Garífuna Community of Punta Piedra and its members, supra*, para. 217. [↑](#footnote-ref-10)
11. *Case of the Saramaka People, supra,* para. 129. [↑](#footnote-ref-11)
12. *Cf.* Paragraphs 216 to 222 of the Judgment. [↑](#footnote-ref-12)
13. *Cf. Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 15, 2005. Series C No. 124, para. 86.5, and *Case of the Saramaka People, supra,* paras. 173 and 174. [↑](#footnote-ref-13)
14. *Cf.* Paragraph 113 of the Judgment. [↑](#footnote-ref-14)
15. *Cf.* Paragraph 279 a) of the Judgment. [↑](#footnote-ref-15)
16. *Cf.* Paragraph 305 of the Judgment. [↑](#footnote-ref-16)