**No. 12.338 Case of the Saramaka People**

**IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

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

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19 May 2008

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## I. Introduction

1. The victims' representatives have the honour of again addressing the Honourable Inter-American Court of Human Rights ("the Court"). On this occasion, they respectfully offer their comments on the Illustrious State of Suriname's ("the State" or "Suriname") request for an interpretation of the Court's judgment in the *Case of the Saramaka People*.[1] This request was submitted to the Court by the State on 10 March 2008 and subsequently transmitted to the victims' representatives on 25 March 2008.[2] The Court instructed the representatives to submit their comments on Suriname's request no later than 05 May 2008, a deadline which was subsequently extended to 19 May 2008.[3]

2. The Court has repeatedly held that the "sole purpose" of a request for interpretation is "to clarify the meaning of a ruling when a party maintains that the text in its operative paragraphs or its considering clauses is not clear or precise, provided that such considerations have a bearing on the operative paragraphs."[4] Pursuant to Article 59(1) of the Court's Rules of Procedure, such requests must set out precisely identified issues in order to obtain clarification of the meaning or scope of the judgment.

3. Suriname has requested that the Court interpret its judgment in *Saramaka People* with regard to seven discernable issues. These issues are summarised in paragraph 5 below and concern various aspects of the judgment and its scope and meaning. While the victims' representatives believe that there is no ambiguity in the Court's judgment with respect to four of the issues raised by the State (issues (a), (b), (c) and (g)), they consider that an interpretation is imperative with regard to the remaining points. The State's formulation of these remaining issues betrays a series

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1 *Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 28 November 2007. Series C No. 172 (hereinafter "Saramaka People").

2 *Request for Interpretation of the Judgment of the Inter-American Court of Human Rights in Saramaka People v. Suriname*, 10 March 2008 (CJDM/938/08) (hereinafter "Request for Interpretation submitted by Suriname").

3 CDH-12.338/165, 29 April 2008 (conveying the instructions of the President of the Court and granting an extension of the deadline for submitting comments).

4 *Case of the Dismissed Congressional Employees v. Peru. Request for Interpretation of the Judgment on Preliminary Objection, Merits, Reparations and Costs.* Judgment of 30 November 2007. Ser C No. 174, at para. 11; *Case of the Pueblo Bello Massacre V. Colombia. Interpretation of the Judgment of Merits, Reparations and Costs.* Judgment of November 25, 2006. Series C No. 159, para. 13; and *Case of Acevedo-Jaramillo et al. V. Peru. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2006. Series C No. 157, para. 27.

of misinterpretations of the Court's judgment that require rectification if the rights of the Saramaka people are to be secured and respected.

4. The victims' representatives emphasize that they are deeply troubled by the State's apparent misunderstanding of the judgment. They respectfully urge the Court to fully explain its judgment so as to ensure that there is no further misconstruction. Moreover, the State does not appear to have reconsidered the nature of its relationship with the Saramaka people in light of the judgment and, instead, all but one of the State's issues for interpretation concern the manner by which the State may restrict the rights of the Saramaka people and its members. Interpretation by the Court is also indispensable given that the judgment will, as the State itself explains, greatly influence required legislative enactments concerning indigenous and tribal peoples in Suriname, which will be the first such enactments in that country's history.[5]

5. The seven issues on which Suriname requests an interpretation of the judgment may be explained as follows:

a) When Suriname seeks to restrict the Saramaka people's property rights, who must the State communicate with for the purposes of securing effective participation? Must the State deal with the collective of Saramaka Captains, with individual Captains, with the *Gaama* (paramount chief), or with some other entity within the Saramaka people?[6]

b) Given that any individual or group within Saramaka society can file a petition in the inter-American human rights system, must the State deal with each individual and group within Saramaka society when it sets up a system for Saramaka participation in decision making about restrictions to property rights?[7]

c) With respect to the requirement that the Saramaka must reasonably share in benefits from restrictions on their property rights, the State argues that: i) "it is the State that has to take charge in determining this system of benefit sharing…;"[8] ii) it will hinder the development of the nation "if concession holders are confronted with factions of the Saramaka tribe, demanding benefits on behalf of those parts of the Saramaka people that live in close …" proximity to the concession;[9] and iii) a system should be created so as to benefit all members of the Saramaka people. There is no specific question related to this issue; Suriname simply states that it "requests the Court's interpretation as to the understanding of the State with regard to this aspect of the judgment."[10] Ostensibly, Suriname is asking the Court to interpret the judgment so as to confirm or refute points i, ii and iii above, and to confirm that it is for the State to design a system that it controls and through which any benefits will be shared with the Saramaka as a whole.

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5 Request for Interpretation submitted by Suriname, p. 6.
6 *Id*. p. 2, point 1.1.
7 *Id*. point 1.2.
8 *Id*. at p. 2-3.
9 *Id*. at p. 3.
10 *Id*. p. 3, point 2.1.

d) Suriname argues that it alone may issue permits or concessions for investments or developments within Saramaka territory and that this applies to the Saramaka and non-Saramaka persons alike. It states that "Any party that wants to engage in activities on the territory traditionally occupied by the Saramaka people, can request a concession from the State. The State will grant the concession once it satisfies the three requirements listed in the judgment."[11] Suriname thus maintains that it can grant concessions to non-Saramaka persons and also require that permits or concessions be obtained by the Saramaka themselves for any activities that cannot be classified as "traditional" activities – specifying that commercial forestry, mining, and tourism are all non-traditional Saramaka activities.[12] While the State poses no specific question in relation to these statements, it is requesting the Court's interpretation to confirm or deny whether its stated view is the correct interpretation of the judgment.

e) This issue concerns the Court's requirement that prior environmental and social impact assessments ("ESIA") are conducted in relation to any proposed investment or development within Saramaka territory. The State argues that a concession may only be granted if the ESIA is "positive," meaning that "the impact must not be of such a nature that this amounts to a denial of the survival of the Saramaka as a tribal entity."[13] Impacts that deny the survival of the Saramaka would preclude granting a concession, while impacts of a "lesser nature, meaning it has only minor effects and does not amount to a denial of the survival of the Saramaka," will allow the grant.[14] Suriname notes that an "unbalanced interpretation of this requirement can lead to obstruction" of its development, and that this is the reason it seeks the Court's interpretation with respect to its understanding of the judgment on these points.[15]

f) Suriname requests that the Court interpret the judgment with regard to the nature and scope of the obligation to conduct ESIAs and in particular the "possible level of effect" that must be demonstrated in such assessments.[16] The victims' representatives understand this point to relate to the threshold between lesser impacts and impacts that 'deny the survival of the Saramaka as a tribal entity'. Put another way, the State is requesting clarification about the nature and scale of impacts that may be permissible, as identified in an ESIA, in relation to grants of resource exploitation concessions. This point is basically a reformulation of issue (e).

g) Suriname requests that the Court explains how it understands Article 3 of the American Convention in light of the State's prior argument that Article 3 only

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11 *Id*. at p. 3 (referring to Saramaka People, para. 129).

12 As discussed further below, and as the Court found, the Saramaka have traditionally practiced commercial logging for centuries. *See* Saramaka People, at para. 146 (stating that the "evidence shows that the members of the Saramaka people have traditionally harvested, used, traded and sold timber and non-timber forest products, and continue to do so until the present day"). *See also* Saramaka People, para. 148 (finding that the Saramaka use non-timber forest products for both subsistence and commercial purposes).

13 Request for Interpretation submitted by Suriname, at p. 4.

14 *Id*.

15 *Id*. at p. 5, point 3.1.

16 *Id*. at p. 5, point 4.1.

applies to individuals and not 'distinct peoples'.[17] The State believes that the Court did not adequately answer this point.

## II. Admissibility

6. Article 67 of the American Convention on Human Rights ("the Convention" or "the American Convention") and Articles 29(3) and 59 of the Court's Rules of Procedure govern the submission and consideration of requests for interpretation of the Court's judgments. Article 67 requires that such requests are submitted within 90 days from the date that the parties were notified of the judgment. Article 29(3) of the Court's Rules precludes using requests for interpretation as a means to challenge or contest the judgment. Article 59 of the Rules, in part, requires that requests for interpretation "shall state with precision the issues relating to the meaning or scope of the judgment of which the interpretation is requested."

7. The parties were formally notified of the judgment of the Court on 19 December 2008. Suriname's request for interpretation was submitted on 10 March 2008, thus within the 90 day period specified in Article 67 of the Convention. The representatives do not consider that Suriname's request explicitly or implicitly contests or challenges the judgment. The request is therefore admissible in relation to these requirements.

8. However, some of the seven issues presented by Suriname are unfocused and imprecise and are, therefore, not amenable to precise responses. Issue (f) – as it was formulated by the State – for instance, simply asks the Court to explain the ESIA requirement in relation investment projects, but it is entirely indefinite about which aspect thereof requires clarification or how this relates to the operative paragraphs of the judgment. Similarly, issue (g) asks the Court to revisit an argument presented by the State in its initial pleadings – and may be inadmissible on this basis[18] – yet does not clarify what is sought by way of an interpretation by the Court. With the exception of issues (f) and (g), both of which are imprecise, the victims' representatives have no further comment on the admissibility of Suriname's request.

## III. Substantive Issues raised by Suriname's Specific Requests

### A. Issues (a) and (b) – Saramaka Representation

9. In issues (a) and (b), Suriname seeks clarification about the Saramaka entity or entities with which it should communicate in order to secure effective participation when considering potential restrictions to Saramaka property rights. For instance, should the State deal with the collective of Saramaka Captains, with individual Captains, with the *Gaama*, or with some other Saramaka entity? Suriname also asks whether it must communicate with each individual and group within Saramaka society given that any of these individuals or groups can file a petition in the inter-American human rights system.

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17 *Id*. p. 5-6.

18 *Case of the Dismissed Congressional Employees v. Peru. Request for Interpretation of the Judgment on Preliminary Objection, Merits, Reparations and Costs.* Judgment of 30 November 2007. Ser C No. 174, at para. 12.

10. The victims' representatives consider that the answer to issue (a) is clearly specified in the Court's judgment and there is no ambiguity that requires clarification. Issue (b) is merely a reformulation of Suriname's repeated statements about standing issues made during the proceedings before the Inter-American Commission on Human Rights ("the Commission") and the Court, and there is no ambiguity in the judgment that requires clarification in this respect.[19]

11. The judgment of the Court plainly indicates that the modes of effective participation and the entity or entities that shall participate in decision making are to be determined by the Saramaka in accordance with their custom and tradition. The Court explains that Suriname "must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions…," in relation to any proposed development or investment, and that this includes a duty to actively consult with the Saramaka, again "according to their customs and traditions."[20] For some investments or developments, the State has a duty not only to consult with the Saramaka, "but also to obtain their free, prior, and informed consent, according to their customs and tradition."[21] These obligations are reinforced and unequivocal in the Court's treatment of the right of the Saramaka people to juridical personality.

12. With respect to how the collective juridical personality of the Saramaka is to be exercised, the Court put in plain words that this "is a question that must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case."[22] It further explained that "… the true representatives of the [Saramaka people's] juridical personality would be chosen in accordance with their own traditions, and the decisions affecting the Saramaka territory will be the responsibility of those representatives, not of the individual members."[23] The Court also makes clear that Suriname must adopt measures that "recognize and take into account the particular way in which the Saramaka people view themselves as a collectivity capable of exercising and enjoying the right to property."[24]

13. The State is not best placed to interpret Saramaka custom and tradition with regard to identifying who shall represent the Saramaka in any given situation. Such determinations are made in accordance with Saramaka custom and are to be made by the Saramaka, as the authoritative interpreters of their own custom and tradition, and then communicated to the State. Conversely, if Suriname is uncertain about these

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19 *See* Saramaka People, at para. 170 (explaining that "the State has constantly objected to whether the twelve captains of the twelve Saramaka clans (*lös*) truly represent the will of the community as a whole…").

20 *Id*. para. 129, 133.

21 *Id*. at para. 134.

22 *Id.* at para. 164 (stating that "the question of whether certain self-identified members of the Saramaka people may assert certain communal rights on behalf of the juridical personality of such people is a question that must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case").

23 *Id*. at para. 169. *See also id.* at para. 188 (explaining that the "members of the Saramaka people are identifiable in accordance with Saramaka customary law, given that each Saramaka individual belongs to only one of the twelve matrilineal *lös* in which the community is organized").

24 *Id*. at para. 174.

matters, it may communicate with the Saramaka to seek clarity. The Court reached largely the same conclusion in relation to alleged uncertainty about the Saramaka people's land tenure system. It stated that this alleged lack of clarity "does not present an insurmountable obstacle for the State, which has the duty to consult with the members of the Saramaka people and seek clarification of this issue…."[25]

14. The Court explained in the *Yatama* case that indigenous and tribal peoples' rights to participate shall be effectuated through their own freely identified institutions. In that case, the Court ordered that Nicaragua adopt measures to guarantee that indigenous peoples "can participate, in conditions of equality, in decision-making on matters that affect or could affect their rights and the development of their communities … and that they are able to do so through their own institutions and in accordance with their values, uses, customs and forms of organization…."[26]

15. The Court's jurisprudence is also reflected in the 2007 United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). Article 18 provides that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures…."[27] Articles 19 and 32(2) are also relevant, providing, respectively, that

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them;

and, as quoted by the Court:[28]

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

16. These provisions of the UNDRIP restate existing international law. Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination, for example, guarantees the right, without discrimination of any kind, to take part in government and the conduct of public affairs. The Committee on the Elimination of Racial Discrimination ("CERD") has interpreted this provision to require respect for indigenous peoples' right to effective participation through their

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25 Saramaka People, at para. 101.

26 *Yatama v. Nicaragua*, Judgment of the Inter-American Court of Human Rights, 23 June 2005. Series C No. 127, para. 225.

27 See, also, International Labour Organisation Convention No. 169, *inter alia*, Arts. 3, 4, 5 and 6. Article 6(1)(a), for instance, provides that states shall "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."

28 Saramaka People, para. 131 and 138, note 137.

own freely chosen representatives, and repeatedly affirmed that all decisions directly relating to indigenous peoples' rights shall be taken only with "their informed consent."[29] CERD also emphasizes indigenous peoples' right to give their informed consent through representatives chosen by themselves in connection with a range of specific activities, including: mining, oil and gas operations;[30] logging;[31] the establishment of protected areas;[32] dams;[33] agro-industrial plantations;[34] resettlement;[35] and compulsory takings[36] and other decisions affecting the status of territorial rights.[37] CERD further holds that states should use the UNDRIP "as a guide to interpret [their] obligations under the Convention relating to indigenous peoples."[38]

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29 *Inter alia*, Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 14 (recommending that "that the representatives of indigenous communities be consulted, and their informed consent sought, in any decision-making processes directly affecting their rights and interests, in accordance with the Committee's General Recommendation No. 23"); Argentina, 24/08/2004, CERD/C/65/CO/1, at para. 18 (referring to the Co-ordinating Council of Argentine Indigenous Peoples envisaged by Act No. 23,302 to represent indigenous peoples in the National Institute of Indigenous Affairs and to the right to informed consent).

30 *Inter alia*, Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 19 (recommending that Guyana "seek the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities"); Guatemala, 15/05/2006, CERD/C/GTM/CO/11, para. 19; and Suriname, 18/08/2005, Decision 1(67), CERD/C/DEC/SUR/4, para. 3.

31 *Inter alia*, Cambodia, 31/03/98, CERD/C/304/Add.54, at para. 13 and 19 (observing that the "rights of indigenous peoples have been disregarded in many government decisions, in particular those relating to citizenship, logging concessions and concessions for industrial plantations" and recommending that Cambodia "ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent").

32 *Inter alia*, Botswana. 23/08/2002, UN Doc. A/57/18,paras.292-314, at para. 304 (concerning the Central Kalahri Game Reserve); and Botswana, 04/04/2006, CERD/C/BWA/CO/16, at para. 12.

33 *Inter alia*, India, 05/05/2007, CERD/C/IND/CO/19, at para. 19 (stating that the India "should seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects and provide adequate compensation and alternative land and housing to those communities").

34 *Inter alia*, Indonesia, 15/08/2007, CERD/C/IDN/CO/3, at para. 17 (recommending that Indonesia "ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in the Plan"); and Cambodia, 31/03/98, CERD/C/304/Add.54, para. 13 and 19.

35 *Inter alia*, India, 05/05/2007, CERD/C/IND/CO/19, at para. 20 (stating that the "State party should also ensure that tribal communities are not evicted from their lands without seeking their prior informed consent and provision of adequate alternative land and compensation…"); and Botswana, 04/04/2006, CERD/C/BWA/CO/16, at para. 12 (recommending that the state "study all possible alternatives to relocation; and (d) seek the prior free and informed consent of the persons and groups concerned"). *See also* Laos, 18/04/2005, CERD/C/LAO/CO/15, para. 18.

36 Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 17 (recommending that Guyana "confine the taking of indigenous property to cases where this is strictly necessary, following consultation with the communities concerned, with a view to securing their informed consent…").

37 Australia. CERD/C/AUS/CO/14, 14 April 2005, at para. 11 (recommending "that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land"); and United States of America, 14/08/2001, A/56/18, para. 380-407, at para. 400 (concerning "plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, placing their land up for auction for private sale, and other actions affecting the rights of indigenous peoples").

38 United States, 02/2008, CERD/C/USA/CO/6, at para. 29 (advanced unedited version).

17. In sum, issues (a) and (b) presented by Suriname are both clearly addressed in the judgment of the Court. The representatives of the Saramaka for the purposes of effective participation in decision making are to be freely determined by the Saramaka in accordance with their custom and tradition. Because there is no ambiguity in the judgment with respect to issues (a) and (b), there is no strict need for the Court to interpret either of these points. Nonetheless, the victims' representatives respectfully suggest that it would be helpful if the Court would illuminate, based on its ruling described above, these points for the State.

**B. Issue (c) – Benefit Sharing**

18. Suriname has requested clarification about the benefit sharing requirement identified in the Court's judgment. In this respect, the Court ruled, pursuant to Article 21(2) of the American Convention, that any restriction or deprivation of Saramaka property rights must include benefit sharing measures.[39] It explains that "benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands…."[40] The scope of benefit sharing measures thus includes compensation or other forms of reparation for any damages sustained in relation to investments and developments as well as an equitable share in the proceeds thereof or other project-related benefits. As discussed in paragraphs 26-8 below, the nature and extent of benefit sharing measures also must also take full account of the significance of the Saramaka's profound and multiple relationships with their traditional lands, territory and resources.

19. The Court also observes that the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples has determined that benefit sharing should be "mutually acceptable" in the case of indigenous and tribal peoples.[41] Agreement about benefit sharing and compensation is also inherent to the requirements of Article 32(2) of the UNDRIP, which restates existing international law requiring indigenous peoples' consent in relation to activities affecting traditional territories.

20. With respect to benefit sharing, Suriname contends in its present request to the Court that: i) "it is the State that has to take charge in determining this system of benefit sharing…;"[42] ii) it will hinder the development of the nation "if concession holders are confronted with factions of the Saramaka tribe, demanding benefits on behalf of those parts of the Saramaka people that live in close …" proximity to the concession,[43] and; iii) a system should be created so as to benefit all members of the Saramaka people. There is no specific question posed in relation to this issue; Suriname simply "requests the Court's interpretation as to the understanding of the State with regard to this aspect of the judgment."[44]

21. The victims' representatives respectfully submit that the State has misconstrued the terms of the Court's judgment. In the first place, with respect to the

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39 Saramaka People, para. 129.
40 *Id*. at para. 140.
41 *Id*.
42 Request for Interpretation submitted by Suriname, at p. 2-3.
43 *Id*. at p. 3.
44 *Id*. p. 3, point 2.1.

State's first contention – that it alone must determine the benefit sharing system – the Court ordered that Suriname adopts legislative and other measures, *inter alia*, to secure the Saramaka people's right to "reasonably share the benefits" from investments or developments in its territory.[45] The Court stresses that the Saramaka people "must be consulted during the process established to comply with this form of reparation."[46] The judgment further explains the various components of the State's duty to consult with the Saramaka, including the requirement that "consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement."[47] Article 19 of the UNDRIP, quoted above, also addresses this point, requiring that states consult with and obtain indigenous peoples' free, prior and informed consent before adopting and implementing legislative or other measures that may affect them.

22. The victims' representatives respectfully suggest that the Court clarify in its the response to the State's first assertion that the legislative and administrative basis for the benefit sharing system must be developed and determined with the effective participation of the Saramaka, not by the State alone. In addition to the adoption of legislative and administrative measures, and as discussed in paragraph 28 *infra*, the Saramaka must also effectively participate in decisions about benefit sharing on a case-by-case basis.

23. The representatives consider that the State's second and third assertions, regarding the determination of who within the Saramaka people shall receive benefits, are addressed by the resolution of its first assertion. In particular, these matters can be discussed and addressed during the consultations and process of reaching agreement on the legislative and administrative measures required to give effect to, *inter alia*, the benefit sharing requirement.

24. Notwithstanding the conclusion stated in the preceding paragraph, the victims' representatives believe that it is important to highlight three points in relation to the benefit sharing requirement, all of which are directly relevant to the interpretation and implementation of the operative paragraphs of the judgment. The first concerns the beneficiaries of benefits sharing measures; the second deals with the nature and assessment of such measures; and the third addresses non-discrimination and equal protection considerations.

25. First, the victims' representatives emphasize that should Saramaka persons living in the vicinity of concessions demand benefits from concession holders, there is a very high probability that they are the traditional owners of the affected lands and resources, and thus are entitled to such benefits pursuant to Saramaka customary law. In this respect, it is important to understand that pursuant to Saramaka law, benefits associated with the use of certain locations within Saramaka territory may rightfully belong to one or more clans or extended family groups, or even individuals within Saramaka society, rather than to the Saramaka generally. In other cases, the nature of the activity, its impacts, or its location may require that benefits are received by the Saramaka people as a whole. This, however, is an internal matter that shall be guided by Saramaka customary laws. The same considerations pertain in relation to effective

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45 Saramaka People, at para. 194, 214(8).
46 *Id*.
47 *Id*. at para. 133.

participation in decision making, which includes the right to free, prior and informed consent. Saramaka law specifies which entity or person(s) shall consent in various situations and this varies depending on the circumstances. As discussed above in connection with Saramaka representation and juridical personality, the identification of the beneficiaries of benefit sharing measures must be made by the Saramaka, again as the authoritative interpreters of their customs and laws, and then communicated to the State.

26. Second, benefit sharing and compensation measures must account for both economic and non-economic factors and values. Assessment and valuation of forest resources and damage, for example, would be seriously deficient if they only included economic loss from declines in forest functions, such as providing food, fuel and shelter, or as a sink for greenhouse gasses – carbon sequestered in the trees owned by the Saramaka is also a commodity that can be valued and traded – but failed to include non-economic damage related to the impairment of indigenous and tribal peoples' forest-based subsistence lifestyles, spirituality, and cultural identity. In other words, non-economic relations to traditional lands, territory and resources must also be factored into benefit sharing and compensation measures. A comprehensive assessment of these factors can only be done with the effective participation of the Saramaka people who best know their relationship with and dependency on their lands and resources. The required assessment cannot be done unilaterally by the State.

27. The preceding interpretation is consistent with the Court's jurisprudence and the jurisprudence of other international tribunals and bodies. In the *Yakye Axa* case, the Court explained that compensation granted to indigenous peoples "must be guided by the meaning of the land for them…."[48] The Court has also awarded moral damages in relation to interferences with indigenous peoples' relations to lands and resources in *Moiwana Village*, *Yakye Axa*, *Sawhoyamaxa*, and the instant case where the Court awarded damages for harm, "not just as it pertains to its subsistence resources, but also with regards to the spiritual connection the Saramaka people have with their territory."[49] The former United Nations Intergovernmental Forum on Forests has also looked at this issue, recommending that the valuation of forests should "reflect the social, cultural, economic and ecological context and consider values that are important to local and/or indigenous communities…."[50]

28. Because the State is not best placed to interpret Saramaka culture and the full extent and significance of their relations with lands and resources, the preceding presupposes and demands that the Saramaka people's right to effectively participate in decision making also extends, at a minimum, to participation in determining any benefit sharing and compensation measures on a case-by-case basis. This is also implied in the Court's requirement that consultations be undertaken with the objective

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48 *Indigenous Community Yakye Axa v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005 Series C No. 125, at para. 149 (referring to, *inter alia*, para. 131, which states that "this Court has underlined that the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations").

49 Saramaka People, at para. 200.

50 *Report of the Intergovernmental Forum on Forests on its Third Session*, UN Doc. E/CN.17/IFF/1999/25, at p. 20, para. 1. Available at: http://daccessdds.un.org/doc/UNDOC/GEN/N00/228/81/PDF/N0022881.pdf?OpenElement

of reaching agreement. Where large-scale developments or investments may have a significant impact on the Saramaka and their territory, and consequently require that the Saramaka people's free, prior and informed consent is obtained, the Saramaka have a right to consent to the benefit sharing measures as part of the overall decision making process related to such investments.

29. Third, and finally, the victims' representatives highlight that the legislative and other measures that Suriname has been ordered to adopt to give effect to the rights of the Saramaka to share benefits must be fully consistent with non-discrimination and equal protection guarantees. These measures may not fall below the standard contained in analogous measures that apply to non-indigenous or non-tribal persons in Suriname. The victims' representatives raise this issue because Suriname's current mining laws, as well as the draft law designed to replace it, contains a provision that requires the negotiation of agreements on compensation for damages. Article 48 of the 1986 Mining Decree provides that the holder of a mining license is strictly liable to compensate for damages and allows for an appeal to the judiciary should the miner and the holder of rights to affected land be unable to reach an agreement on the amount of compensation required. Because indigenous and tribal peoples are not regarded as holding rights to land under contemporary Suriname law, this provision does not apply to them.

30. Suriname's revised draft Mining Act of November 2004, submitted to its National Assembly for enactment on 03 April 2007, contains a provision with similar language and effect.[51] This provision, which has been the subject of urgent action decisions issued by the CERD,[52] requires the negotiation of agreements on compensation for prospective damages, and that non-indigenous or non-tribal persons may seek a judicial determination of the amount of compensation if agreement cannot be reached.[53] Indigenous and tribal peoples' remedies, however, are limited to an appeal to the "executive," which will issue a "binding decision."[54] According to the explanatory note, this overt discrimination is warranted "because traditional rights do not lend themselves to the normal court procedure as individual rights are not involved."[55]

31. With respect to the legislation ordered by the Court to secure the Saramaka people's rights, if non-indigenous or non-tribal persons may negotiate and agree to the

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

52 *See* Decision 3(66), Suriname, 09/03/2005, CERD/C/66/SUR/Dec.3; Decision 1(67), Suriname, 18/08/2005, CERD/C/DEC/SUR/2; Decision 1(69), Suriname, 18/08/2006, CERD/C/DEC/SUR/3.

53 Draft Revised Mining Act, *supra*, at Art. 70(2)(3): ( providing that "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").

54 *Id*. at Art. 78(2) and Explanatory Note to Article 76. Art. 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."

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

terms of compensation and benefit sharing mechanisms, it would be impermissible to treat the Saramaka differently without an objective and compelling reason for such differential treatment. The victims' representatives stress that equal treatment in this context does not require that the Saramaka are treated exactly the same as non-indigenous or non-tribal persons, but, rather, that they are accorded equal protection of the law in a manner consistent with their unique characteristics and rights.

32. In conclusion, the Court's judgment is unequivocal that Suriname must consult with the Saramaka about the legislative and other measures that must be adopted to guarantee the Saramaka people's right to share in benefits from any restriction to their property rights. Such consultation must be in good faith and, at a minimum, be aimed at reaching agreement. The State's argument that it alone must determine these measures ignores both the letter and spirit of the Court's judgment. Indeed, it must be said that Suriname's unilateralist approach suffuses all of the violations found in *Saramaka People* and most likely also will result in future violations. The Saramaka must also participate in and, where appropriate, consent to decisions about benefit sharing in relation to each and every proposed restriction to their property rights. Finally, benefit sharing measures must be fully consistent with non-discrimination and equal protection guarantees, fully account for the Saramaka people's multiple relationships with their lands and resources, and the beneficiaries are to be authoritatively determined by the Saramaka in accordance with their custom and tradition.

**C. Issue (d) – Concessions and Permits in Saramaka Territory**

33. Suriname contends that it understands the Court's judgment to: i) allow it to grant concessions and permits within Saramaka territory to non-Saramaka persons, provided it complies with the "three requirements" specified by the Court as necessary to ensure the survival of the Saramaka; and ii) require that the Saramaka themselves must obtain permits or concessions for any activities within their territory that cannot be classified as "traditional" activities.[56] On the latter, the State seems to be arguing, despite the Court's ruling, that Suriname, and not the Saramaka people, has the authority to ultimately decide which activities take place in Saramaka territory. The victims' representatives will discuss the preceding two points separately below. While the State poses no specific question in relation to its contentions on this issue, it is clearly requesting that the Court confirm or deny whether its stated view is the correct interpretation of the judgment.

34. Given the State's misunderstanding of the Court's judgment and the likelihood that its misapplication can result in serious and irreparable harm to the Saramaka people, the representatives entreat the Court to clarify its judgement on both of these points. Indeed, Suriname's failure to comprehend the Court's judgment on the two points specified in the preceding paragraph is extremely disturbing. Its stated views divulge a fundamental misconstruction of Saramaka property, political, cultural, and other rights that seriously undermines those rights and threatens the Saramakas' individual and collective integrity.

[56] Request for Interpretation submitted by Suriname, p. 3.

35. Suriname interprets the judgment in such a way as to allow for the exploitation of Saramaka territory in largely the same way that it has always done, the only difference being that it must now check a series of boxes in an administrative process first. Much worse, the series of "boxes" it must check appear to wilfully ignore critical requirements stipulated by the Court (see below). The State appears to assume that it can process applications for and issue extractive concessions or permits for other activities, and thereby restrict Saramaka property and other rights, as a routine matter rather than an as exceptional measure where no other viable alternative is available to satisfy a clearly identified and compelling public need. It views Saramaka culture as static and, accordingly, the Saramaka people's right to freely pursue its development as limited only to 'traditional' activities. It further seeks to deny them the right to decide how best to use their territory – a prerogative it apparently believes the State should exercise – unless the decision relates to a traditional activity. The victims' representatives strongly urge the Court to correct these misperceptions and to provide greater clarity so as to assist the State and the Saramaka people to fully understand and implement the judgment.

**1. Grants of concessions to non-Saramaka within Saramaka territory**

36. In its request for interpretation, Suriname asserts that the Court's judgment permits the State to issue concessions and permits, not only for resource extraction but for any non-traditional activity (e.g., for tourism purposes), to anyone in Saramaka territory provided that it complies with the three conditions identified by the Court as being necessary to ensure the survival of the Saramaka.[57] These three conditions are specified in the judgment as: i) effective participation (including consent where large developments or investments will have a significant impact on the Saramaka, their territory, or their rights); ii) benefit sharing; and iii) completion of a prior ESIA.[58]

37. In its submission to the Court however, Suriname has omitted to mention two important and additional requirements identified by the Court. The first is the State's duty to implement "adequate safeguards and mechanisms in order to ensure that these activities [concessions] do not significantly affect the traditional Saramaka lands and natural resources…."[59] The State's obligation to adopt such measures is restated in the Article 32(3) of the UNDRIP, which highlights mitigation of any "adverse environmental, economic, social, cultural or spiritual impact."[60] The second is the State's duty to satisfy the general preconditions applicable to any restriction of property rights (listed in paragraph 39 below).[61] As per the Court's ruling, these

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57 *Id*. (stating that "Any party that wants to engage in activities on the territory traditionally occupied by the Saramaka people, can request a concession from the State. The State will grant the concession once it satisfies the three requirements listed in the judgment [referring to para. 129]."

58 Saramaka People, para. 129.

59 *Id*. at para. 158. *See also id*. at para. 154 (finding that Suriname "failed to put in place adequate safeguards and mechanisms in order to ensure that these logging concessions would not cause major damage to Saramaka territory and communities").

60 UNDRIP Art. 32(3) (providing that "States shall provide effective mechanisms for just and fair redress for any such activities [projects affecting lands or territories and other resources], and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact").

61 Saramaka People, at para. 128 (stating that "the State may restrict the Saramakas' right to use and enjoy their traditionally owned lands and natural resources only when such restriction complies with the aforementioned requirements and, additionally, when it does not deny their survival as a tribal people…").

additional requirements are no less important than the three referred to by Suriname, and they also must be applied in the case of indigenous and tribal peoples to ensure their survival as indigenous or tribal peoples.[62]

38. 'Survival' turns on and should be understood to mean the ability of the Saramaka to "preserve, protect and guarantee the special relationship that … [they] have with their territory;"[63] to exercise "control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations;"[64] and concrete guarantees that "they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States."[65] The weight of these rights not only demands Saramaka participation or consent with regard to potential restrictions, but also that any restrictions, *inter alia*, must be demonstrably and strictly necessary in order to satisfy a compelling public interest and be non-discriminatory, both substantively and procedurally.

39. With regard to the general preconditions that apply to restrictions of property rights, the Court has repeatedly held that a state may restrict the use and enjoyment of the right to property only "where the restrictions are: a) previously established by law; b) necessary; c) proportional; and d) with the aim of achieving a legitimate objective in a democratic society."[66] Suriname is thus going to have to satisfy each of these important requirements as well as the four additional requirements applicable to indigenous and tribal peoples identified in *Saramaka People* (and only after the State has completed the regularization of Saramaka territorial rights).[67] These general preconditions must also be viewed, interpreted and applied in the context of indigenous and tribal peoples' rights.[68]

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62 Saramaka People, at para. 129 (stating that "These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people").

63 *Id*. at para. 91 and 129.

64 Yakye Axa, *supra*, at para. 146.

65 Saramaka People at para. 121. *See also* Yakye Axa, *supra*, at para. 147 (stating that "Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members").

66 *Id*. at para. 129.

67 These measures apply once Saramaka territory has been regularized because the Court ordered in *Saramaka People*, *id*. at para. 194(a) and 214(5), that until delimitation, demarcation and titling of Saramaka territory have been completed, "Suriname must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the State obtains the free, informed and prior consent of the Saramaka people."

68 This Court has repeatedly recognized the "importance of taking into account certain aspects of the customs of the indigenous peoples of the Americas for purposes of application of the American Convention on Human Rights." *Aloeboetoe et al. Case*, Judgment of September 10, 1993, Series C No 15, at para 62; *Bamaca Velasquez Case*, Judgment of 25 November 2000, Series C No 70, para 81; and *Mayagna (Sumo) Awas Tingni Community Case*, Judgment of August 31, 2001, Series C No 79, para 149. *See also* Yakye Axa, *supra*, at para 63 (explaining that "it is indispensable that States grant effective protection that takes into account [indigenous peoples'] particularities, their economic and social characteristics, as well as their especially vulnerable situation, their customary law, values, customs and mores").

40. The Court has elaborated on the above listed preconditions in its jurisprudence. In *Yakye Axa*, for example, the Court explained that

> The necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest; it is insufficient to prove, for example, that the law fulfills a useful or timely purpose. Proportionality is based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right. Finally, for the restrictions to be compatible with the Convention, they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right.[69]

41. In the *Ricardo Canese* and *Herrera-Ulloa* cases, the Court further explained that "the 'necessity' and, hence, the legality of restrictions … depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected."[70] The European Court of Human Rights ("ECHR") has similarly ruled, stating that permits that restrict property rights "must not be issued if the public purpose in question can be achieved in a different way…."[71] In the context of proposed resource extraction concessions in Saramaka territory, this requirement clearly suggests that, in the absence of Saramaka consent to a concession, if an alternative location(s) of similar quality is available, exploitation of this alternative location would be likely to satisfy the same public interest goal, but in a manner less restrictive to the individual and collective rights of the Saramaka. Exploitation of Saramaka territory is therefore not strictly necessary in this scenario and the public purpose can be achieved in a less restrictive or different way.

42. Another less restrictive alternative to issuing resource extraction concessions or permits for other activities within Saramaka territory would be for the State to support, facilitate or otherwise enable the Saramaka themselves to conduct such activities, at least where the Saramaka have clearly stated the desire to do so. At the very least, the Saramaka should be given priority or preference to undertake activities, alone or in partnership with others, that would otherwise require that their rights be restricted. This is especially the case with regard to tourism as the Saramaka are now successfully engaged in their own tourism operations. There should be, therefore, no need for the State to restrict or to take Saramaka property for tourism purposes unless this is agreed to by the Saramaka.

43. Where the Saramaka themselves conduct investment or development projects, either alone or in partnership with others, revenue would accrue to the State,[72] where

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69 Yakye Axa, *supra*, at para. 145.

70 *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, at para. 96; *Case of Herrera-Ulloa.* Judgment of July 2, 2004. Series C No. 107, at para. 121 (*quoting, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85, 13 November 1985. Series A No. 5, para. 30).

71 *Sporrong & Lonnroth v. Sweden*, European Court of Human Rights, Judgment of 23 Sept. 1982, at §69.

72 Generating revenue for the treasury clearly may be a public purpose. However, the mere assertion that an activity generates revenue for the state may only be considered a compelling public purpose when assessed in the light of a series of factors: for instance, when measured against objective and transparent budgetary projections.

appropriate, by virtue of taxes and duties and, in cases where the resource(s) in question is not owned by the Saramaka, through royalties. In some cases, this may be difficult to achieve (e.g., large-scale industrial mining); however, the point made here is solely that the necessity requirement demands that the State explore and be able to demonstrate that it has explored all reasonable alternatives to restricting Saramaka rights, and that the least restrictive option is required in cases where a restriction is proved to be strictly necessary. The least restrictive option may be supporting the Saramaka themselves to conduct the activity in question. Indeed, the Saramaka have a right to implement their own development and investment projects. These considerations are also important when considering the design and conduct of development and investment projects; these must be done in the least restrictive manner from a human rights perspective and this includes a duty to modify project parameters and methods based on issues raised during consultations with the Saramaka.[73]

44. The ECHR has also recognized that the availability of alternative options is one of the relevant factors in assessing the proportionality of a restrictive measure. Indeed, the victims' representatives stress that the principle of seeking alternative options and choosing the least intrusive means where avoidance is not possible is central to both the necessity and the proportionality tests. In the *Hatton* case, for example, the ECHR identified the obligation of states to minimize interferences with rights by seeking alternative solutions, "and by generally seeking to achieve their aims in the least onerous way as regards human rights."[74] This Court has also expressed the need for applying a heightened standard of proportionality in reliance on the principle of the least restrictive option in its 1985 advisory opinion on *Compulsory Membership in an Association*.[75]

45. In assessing the necessity and proportionality of a proposed restrictive measure, states are required to pay particular regard to the special situation of indigenous and tribal peoples and especially their profound relationships to traditional territory. The unique situation and characteristics of the Saramaka must therefore also be given full consideration when determining the proportionality of the proposed restrictive measures.[76] What is more, respect for indigenous and tribal rights is an underlying principle of democracy and, as this Court observed in *Yakye Axa*, a compelling public interest in its own right that must be fully weighed when considering the necessity and proportionality of restrictive measures.[77] In this respect,

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73 *See inter alia Apirana Mahuika et al v. New Zealand*. (Communication No 547/1993) CCPR/C/70/D/547/1993, at para. 9.6 (observing that "Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement"); and *Mrs. Anni Äärelä and Mr. Jouni Näkkäläjärvi v. Finland*. (Communication No 779/1997) CCPR/C/73/D/779/1997, 7 November 2001 (noting that the authors "were consulted in the evolution of the logging plans drawn up by the Forestry Service, and that the plans were partially altered in response…").

74 *Hatton v. United Kingdom*, European Court of Human Rights, Judgment of 8 July 2003, at §127.

75 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism *supra*, para. 46.

76 Yakye Axa, *supra*, para. 63 and 148. *See also* Yakye Axa, at para. 145 (explaining that for "restrictions to be compatible with the Convention, they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right").

77 *Id*. para. 148. *See also Inter-American Democratic Charter*, Art. 9 (providing that "The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as

the ECHR explains that "Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."[78]

46. Unfounded "differential treatment in itself" strongly indicates that restrictive measures are unjustified, "which consideration must carry great weight in the assessment of the proportionality issue…."[79] This is especially pertinent in Suriname, where indigenous and tribal peoples have suffered and continue to suffer from pervasive and institutionalized discrimination,[80] and where they are disproportionately affected by a very high percentage of resource exploitation, nature reserves, tourism operations, and other activities that adversely affect their rights.[81] The prohibition of discrimination with regard to the exercise and enjoyment of all of the rights set out in the American Convention is amplified in Article 1 of that instrument.[82]

47. Article 46(2) of the UNDRIP is also relevant in this context, providing that restrictions on indigenous peoples' rights must be "non-discriminatory and strictly necessary," and solely concern securing due recognition and respect for the rights of others or the "just and most compelling requirements" of democratic society.[83] The victims' representatives observe that "due recognition" of the rights of others applies only to situations where there may be a conflict between the rights of indigenous peoples and non-indigenous persons and requires that the respective rights and interests are weighed in relation to each other. This does not necessarily mean that that conflicting rights must always be accommodated; it is possible that the rights of

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well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation"). Available at: http://www.oas.org/charter/docs/resolution1_en_p4.htm

78 *Young, James and Webster,* European Court of Human Rights, Judgment of 13 Aug. 1981, at §63.

79 *Asmundsson v. Iceland*, European Court of Human Rights Judgment of 12 October 2004, at §40 (addressing Iceland's welfare policy). Such considerations are also incorporated into domestic legal regimes where regard to equality is frequently constitutionally required when assessing the 'necessity' of the measures limiting rights (for example, Section 36 of the South African Constitution).

80 *See for instance* Decision 3(66), Suriname, 09/03/2005, CERD/C/66/SUR/Dec.3; Decision 1(67), Suriname, 18/08/2005, CERD/C/DEC/SUR/2; Decision 1(69), Suriname, 18/08/2006, CERD/C/DEC/SUR/3; and I-A Com. H.R., *Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans (Suriname)*, 2 Mar. 2006, at para. 236 (finding that Suriname had violated the prohibition of discrimination in Article 1(1) in relation to the Saramaka people's property rights, a conclusion that applies to all indigenous and tribal peoples in that country).

81 Because at least three-quarters of Suriname's population is concentrated on a narrow strip of the coast with indigenous and tribal peoples occupying the forested interior and north eastern coast, the latter are disproportionately affected by most of the resource exploitation, nature reserves and (eco-)tourism operations.

82 *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, OC-4/84, January 19, 1984. Series A No.4, at para. 54 (stating that the prohibition "extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations").

83 The full text reads: "… The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."

one party may outweigh and prevail over the rights of the other.[84] The Human Rights Committee, for example, has observed that the right to freedom of movement may be restricted by "limitations on the freedom to settle in areas inhabited by indigenous or minorities communities."[85]

48. Last but not least, the Court's judgment in the case at hand should also be read consistently with the jurisprudence of other human rights bodies that apply higher standards of scrutiny to the general preconditions applicable to restrictions of property and other rights where indigenous and tribal peoples are affected. For instance, states are normally accorded some 'margin of appreciation'[86] in relation to decisions about restrictions to certain rights.[87] However, the Human Rights Committee and the CERD apply strict standards of scrutiny to restrictions to indigenous peoples' rights and both explicitly reject the application of a 'margin of appreciation' in such cases.[88] Suriname thus will have to substantively prove that a proposed restriction on Saramaka property rights is in fact in the public interest, is in fact strictly necessary, and is strictly compatible with the proportionality and other requirements concerning such restrictions.[89]

49. This section has addressed the general preconditions that must be met as part of the process of assessing whether restrictions to the Saramaka people's property rights are warranted. The victims' representatives have discussed these requirements at length because of the deep concern expressed by the Saramaka people that Suriname continues to view their territory as little more than a place to exploit resources or to give Saramaka lands to outsiders for other purposes, tourism being mentioned more than once by the State, and that they are little more than a negotiable hindrance to its economic objectives. These concerns are based on a discussion of the

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84 *See* Yakye Axa, para. 149.

85 Human Rights Committee, *General comment No. 27: Article 12 (Freedom of movement)* (1999), at para. 16 (and also observing that **"t**he application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality").

86 The margin of appreciation doctrine, most associated with the case law of the European Court of Human Rights, establishes a methodology for scrutiny by international courts of the decisions of national authorities. In sum, it refers to the degree of discretion given to the state with regard to restrictions on certain human rights. *See* Y. Shany, Toward a General Margin of Appreciation Doctrine in International Law? 16 *European Journal of International Law* 907-40 (2006) (discussing the doctrine, including in the judgments of the International Court of Justice). Available at: http://www.ejil.org/journal/Vol16/No5/art5.pdf

87 *See for example Connors v. The United Kingdom*, European Court of Human Rights, Judgment of 27 May 2004, §82; and *Rasmussen v. Denmark*, European Court of Human Rights, Judgment of 28 November 1984, §40 (both applying different standards of scrutiny to restrictions to rights because of the nature and importance of the rights in question, and because of the relevance and weight of important contextual factors, such as the special situation of the applicant as a member of a minority group).

88 *I. Lansman et al. vs. Finland (Communication No. 511/1992)*, CCPR/C/52/D/511/1992, at para. 9.4 (observing that "A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27"); and, Australia. CERD/C/AUS/CO/14, 14 April 2005, para. 16.

89 *See for example Funke v. France*, European Court of Human Rights, Judgment of 25 Feb. 1993, §55 (observing that the necessity for any restriction to human rights "must be convincingly established" in cases where some degree of margin of appreciation is accorded to the state. Logically, therefore, a higher standard of proof is required in cases involving indigenous peoples where no margin of appreciation is permitted).

State's present request for interpretation and centuries of experience with State agents. Indeed, the Saramaka presently are trying to remove a politically-connected non-Saramaka person who has established a tourism camp *within* a Saramaka village and refuses to comply with Saramaka customary rules and the village authorities. As has been their experience in general, their complaints about this unlawful occupation of their lands have been ignored by the State.

50. In sum, the victims' representatives understand that the Court's judgment requires that a proposed restriction to Saramaka property rights – and most likely also restriction of the other rights that are inextricably intertwined with relationships to territory[90] – is viewed as an exceptional measure that:

- must be previously established by law;
- must be justified as strictly necessary pursuant to a compelling or imperative public interest;
- must be proportional in light of the Saramaka's characteristics and rights and the imperative public interest considerations, including the imperative public interest of protecting the Saramaka;
- must be non-discriminatory; and
- must also satisfy, at a minimum, the four additional criteria applicable to indigenous and tribal peoples set forth by the Court in *Saramaka People*: i) effective participation; ii) benefit sharing; iii) ESIA; and, iv) the adoption and effective implementation of adequate safeguards and mechanisms to ensure that development or investment projects do not significantly affect traditional Saramaka lands and natural resources.

51. Consideration of potential restrictions to Saramaka rights must be undertaken with great seriousness and diligence given the rights at issue and their vulnerability. In this respect, it should not be forgotten that the Saramaka have already irretrievably lost some 50 percent of their traditional territory to a dam and an additional ten percent has been severely degraded by logging companies.[91] This process must also be undertaken in a transparent manner and, given that the State should not be accorded a margin of appreciation when making decisions to restrict indigenous and tribal peoples' rights, the State has the burden to prove that the proposed restriction is fully consistent with the requirements. That the Saramaka may be involved in decision making or consent to the proposed restriction is an additional, albeit highly important and persuasive, factor that should be considered in assessing whether Suriname has complied with its obligations. Last but not least, both the Court and the Human Rights Committee have held that the acceptability of measures that affect or interfere with indigenous and tribal peoples' cultural rights depends, in part, on "whether they will continue to benefit from their traditional economy."[92]

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90 *See inter alia*, Yakye Axa, *supra*, at para. 147 (observing that "Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members").

91 Saramaka People, at para. 153 (finding that "Not only have the members of the Saramaka people been left with a legacy of environmental destruction, despoiled subsistence resources, and spiritual and social problems, but they received no benefit from the logging in their territory").

92 *Id*., at para. 130 (*citing Apirana Mahuika et al v. New Zealand*. (Communication No 547/1993)).

## 2. Saramaka rights to manage, distribute and effectively control their territory

52. In the previous section, the victims' representatives discuss Suriname's assertions with regard to what should be extraordinary situations in which it is strictly necessary to restrict the Saramaka people's property and/or other rights. This section concerns Suriname's contentions about the nature and extent of the Saramaka people's property rights in situations where the State is not invoking the procedure to restrict their rights. In particular, it addresses Suriname's view that it can require that the Saramaka themselves obtain permits and concessions from the State for any non-traditional activity within their territory. The representatives believe that Suriname's views in this respect not only fail to understand the Court's judgment, but stand in stark contrast to the terms of that judgment and would cause grave harm to the Saramaka if allowed to stand.

53. In its request to the Court, Suriname maintains that

> Any party that wants to engage in activities on the territory traditionally occupied by the Saramaka people, can request a concession from the State. The State will grant this concession once it satisfies the three requirements listed in the judgment. The State concludes that with these activities the Honorable Court meant activities that are not traditionally within the scope of the Saramaka people e.g. mining activities, big scale or commercial forestry, tourism, etc. Since all these activities can have a huge impact on the living conditions of the Saramaka tribe as one entity, the involvement of the State is a necessity since it is the State as a subject of international law that is a member of this human rights system. Therefore it is the State that is charged with several obligations under international law.[93]

54. Ostensibly, the State is arguing that because it is ultimately liable under the American Convention for violations of the rights of the Saramaka, that it has the decisive authority with respect to the conduct of any non-traditional activity within Saramaka territory, irrespective of whether that activity is conducted by a Saramaka or non-Saramaka person or entity ("Any party"). The victims' representatives fully agree that the State has obligations to respect and protect the rights of the Saramaka and that it is liable should it fail to do so. These obligations especially pertain in cases where the State directly or by proxy seeks to undertake or permit activities that may affect the Saramaka and their territory.

55. However, the State's obligations may not be perversely invoked to deny the rights of the Saramaka to determine and implement decisions about how best to use their territory and their traditionally owned resources, or to freely enter into agreements with non-Saramaka persons in this respect. The State may regulate the exercise of rights in accordance with human rights law, which requires that regulation be both reasonable and required "to preserve the identity of the tribe," but it may not impair or negate the exercise and enjoyment of those rights by such regulation.[94]

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93 Request for Interpretation submitted by Suriname, at p. 3-4.

94 *Lovelace vs. Canada* (No. 24/1977), *Report of the Human Rights Committee*, 36 UN GAOR Supp. (No. 40), UN Doc. A/36/40 (1981), p. 166, at para. 17. *See also* Kitok vs. Sweden, *Report of the Human Rights Committee*, 43 UN GAOR Supp. (No.40), UN Doc. A/43/40 (1988), p. 221, at para. 9.8 (stating that "a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the minority as a whole").

With regard to these regulatory powers, the representatives submit that the right to self-determination, being, *inter alia*, a right to freely determine and pursue economic, social and cultural development, is qualitatively different from the individual rights regime and this difference implies substantial limitations on the State's regulatory powers. Regulation of rights aside, the existence of a procedure for restricting Saramaka property rights, where this proves to be strictly necessary, should not be confused with or imply a power vested in the State to impair the free exercise of those rights on a daily basis and under normal circumstances.

56. The representatives further emphasize that Suriname's views directly contradict the Court's holding that Article 21 of the American Convention must be interpreted so as not to restrict the right to self-determination, by virtue of which indigenous and tribal peoples may "freely pursue their economic, social and cultural development," and may "freely dispose of their natural wealth and resources."[95] The Court explains that this supports an interpretation of Article 21 "to the effect of calling for the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development…."[96]

57. The Court further observes that Suriname's current legal framework is incompatible with Article 21 of the Convention because it "does not guarantee [the Saramaka] the right to effectively control their territory without outside interference."[97] It would follow then that the State has an obligation pursuant to Article 21 to guarantee, respect and protect the Saramaka people's right to effectively control its territory without outside interference, including through freely determining how best to use that territory for its economic, social and cultural development.

58. Furthermore, consistent with its conjunctive reading of Article 21 and the Saramaka people's right to self-determination, the Court explicitly ordered that legislative recognition of the Saramaka people's territorial rights must include recognition of "their right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system."[98] The Court thus affirms that, in order to freely determine, pursue and enjoy their own development, the Saramaka have the right, effectuated through their own institutions,[99] to make decisions about how best to use their territory; that they have a right to *effectively control*, *manage* and *distribute* their natural wealth and resources

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95 Saramaka People, at para. 93.

96 *Id*. at para. 95. *See also Proposed American Declaration on the Rights of Indigenous Peoples*, approved by the I-A Com. H.R. in 1997, Art. XV(1). *See also Consolidated Text of the Draft Declaration Prepared by the Chair of the Working Group*, OEA/Ser.K/XVI, GT/DADIN/doc.139/03,17 June 2003, Art. III.

97 Saramaka People, at para. 115.

98 *Id*. at para. 194 and 214(7). *See also* UNDRIP, Art. 26(2) (providing that "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired").

99 *See* UNDRIP, Article 4 (providing that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions"). The Court has also highlighted the importance of the preservation of indigenous and tribal peoples' communal structures and modes of self-governance in *Plan de Sánchez Massacre, Reparations.* Judgment of 19 November 2004, Series C No 105, para. 85.

without outside interference.[100] Each of these terms has a specific meaning and describes rights and powers vested in the Saramaka people in relation to its territory. 'Control', for instance, can be defined as the power to "exercise authoritative or dominating influence over" a thing, in this case Saramaka territory or specific traditionally owned resources within that territory.

59. The victims' representatives also recall the Court's judgment in *Yakye Axa*, where the Court unequivocally equates control over territory with indigenous peoples' survival, development and the pursuit of their aspirations.[101] In that case, the Court observes that "indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations."[102]

60. The Court's judgment in the instant case unambiguously upholds the Saramaka people's interrelated and interdependent rights to freely pursue their own development and to effectively control, manage and distribute their territory,[103] and to do so "without outside interference."[104] The representatives submit that this includes the right to freely determine, develop and implement development plans and projects concerning the use and management of Saramaka-owned lands and resources without seeking the permission of the State as prior condition or otherwise. They further submit that this right includes, for example, and again without seeking the prior permission of the State, rights:

- to manage Saramaka territory by protecting important ecological functions (e.g., watershed or water quality protection measures or by establishing or otherwise regularizing Saramaka-owned and controlled nature reserves);[105]
- to monitor and maintain the integrity of the borders of Saramaka territory;
- to establish and manage Saramaka-owned and operated tourism operations;
- to develop and implement environmental remediation and sanitation programs;
- to sustainably harvest, manufacture and market products made from Saramaka-owned resources or other resources over which they may acquire rights;

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100 Saramaka People, at para. 115 (stating that "the State's legal framework merely grants the members of the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference").

101 *See also* I-A. Com. H.R., *Report 75/02, Case 11.140. Mary and Carrie Dann. United States*, December 27, 2002, para. 128 (observing that "continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples").

102 Yakye Axa, *supra*, at para. 146.

103 *See also* UNDRIP, Art. 32(1) (providing that "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources").

104 Saramaka People, at para. 115.

105 The Saramaka's customary land tenure and management system includes concepts analogous to nature reserves and places a heavy emphasis on sustainable use and conservation criteria. It also contains detailed rules pertaining to the management and protection of biological diversity, wildlife management, and the protection of ecological services. Indeed, their physical and cultural survival is dependent on their continued ability to sustainably manage their resources and ensure the continuing ecological sustainability of their territory.

- to establish and manage agro-forestry operations and to harvest and sell the resulting crops; and,
- to enter into agreements to receive payments for carbon sequestration in the trees comprising Saramaka-owned forests.[106]

61. The representatives additionally understand the Court's judgment to recognize the Saramaka people's right to determine, design and implement the preceding examples and other activities, and to do so both in their own capacity and/or through agreements or joint ventures with private sector entities or the State should such arrangements be mutually acceptable.

62. Contrary to the views expressed by Suriname, the victims' representatives further understand that the Court's judgment does not restrict, but rather affirms the broad scope of the Saramaka people's right to freely pursue its economic, social and cultural development, and does not limit that right to solely the continuation of traditional activities.[107] Indeed, the application of such a standard would represent a racially discriminatory impediment to the exercise of the Saramaka people's rights, in violation of a range of international guarantees, because no other society on earth is limited by law in its development options to unspecified 'traditional activities'.[108] The Saramaka have a right to freely determine and pursue their own economic, social and cultural development, and the exercise of that right may result in legally protected decisions to use their lands for non-traditional activities, such as eco-tourism or in exchange for payment for ecological services.

63. Article 20(1) of the UNDRIP further supports the conclusion that indigenous and tribal peoples have the right pursue their own development, including through non-traditional means. It affirms that "Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." The jurisprudence of the Human Rights Committee also acknowledges that non-traditional activities such a

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[106] The Court found that the Saramaka traditionally own the timber and non-timber forest products within their territory and that their rights of ownership over these resources are protected by Article 21. *See* Saramaka People, at para. 145 (finding that "timber logging as part of their economic structure"); and, at 146 (the "evidence shows that the members of the Saramaka people have traditionally harvested, used, traded and sold timber and non-timber forest products, and continue to do so until the present day").

[107] In this regard, *see Revised Environmental and Social Policy*, EBRD, London, 25 February 2008, p. 50, para. 5. Available at: http://www.ebrd.com/about/policies/enviro/policy/review/draft.pdf (observing that "Indigenous Peoples are no longer involved solely in customary subsistence livelihoods nor can their identity be associated solely with the pursuit of such traditional livelihoods").

[108] *See inter alia, I. Lansman v. Finland (Communication No. 511/1992)*, CCPR/C/52/D/511/1992, at para. 10 (affirming that the right to enjoy culture must be viewed in context and "does not only protect traditional means of livelihood … that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant") and; *Apirana Mahuika et al. vs. New Zealand, (Communication No. 547/1993, 15/11/2000)*, UN Doc. CCPR/C/70/D/547/1993, para. 9.4 (observing that "right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In particular, article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology").

large-scale and deep-sea commercial fishing are protected activities pursuant to Articles 1 and 27 of the International Covenant.[109]

64. To sum up, this section has discussed two issues: first, the requirements that pertain when the State seeks to restrict the Saramaka people's property rights; and second, the rights of the Saramaka to own and effectively control their traditional territory without outside interference. On the first issue, the victims' representatives understand the Court's judgment to require, *inter alia*, that the State may only restrict Saramaka property rights where strictly necessary pursuant to a compelling public purpose, where such restrictions are proportional and non-discriminatory, and where the State is able to strictly prove it has fully complied with these requirements. The State must also respect the Saramaka people's right to effectively participate in decision making, which includes the right to free, prior and informed consent in relation to large projects with a significant impact, and to share benefits and be compensated for any damages. The State must also conduct ESIA's before permitting development and investment projects and adopt and implement effective measures to ensure that said projects do not significantly affect traditional Saramaka lands and natural resources.

65. Turning to the second issue, the representatives submit that the Court's judgment unambiguously affirms the Saramaka people's right to freely determine and pursue their own economic, social and cultural development. Reading this right together with the right to property, the Court further and explicitly upholds the Saramaka people's right to effectively control, manage and distribute its traditional territory and to do so without outside interference – including attempts by the State to usurp and exercise those rights in place of the Saramaka. Although the State may restrict Saramaka property rights where this proves to be strictly necessary and complies with the other preconditions, the existence of a procedure for doing so does not imply that the State has the authority to impair the rights of the Saramaka to freely determine how best to use their territory on a daily basis, in particularly by requiring that they first obtain the State's permission prior to conducting, alone or by agreement with others, any 'non-traditional' activities in their territory. Moreover, any powers the State may have to regulate the exercise of these rights are substantially limited due to the application of the right to self-determination in this context.

**D. Issues (e) and (f) – Environmental and Social Impact Assessment**

66. Issues (e) and (f) presented by Suriname again concern the standards that apply to restrictions to the Saramaka people's rights. Suriname apparently seeks clarification about the ESIA process and the degree of potential impact that would require the State to disallow a grant of a concession or permit within Saramaka territory. According to the State, a concession may be granted where the ESIA is "positive," meaning that "the impact must not be of such a nature that this amounts to a denial of the survival of the Saramaka as a tribal entity."[110] However, impacts of a "lesser nature, meaning it has only minor effects and does not amount to a denial of the survival of the Saramaka," will allow the concession to be issued.[111]

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[109] *See* Apirana Mahuika, *id*.
[110] Request for Interpretation submitted by Suriname, at p. 4.
[111] *Id*.

67. The victims' representatives comprehend, although its requests are imprecise with regard to this issue, that Suriname is requesting an interpretation of the judgment with regard to the nature and scope of the obligation to conduct ESIAs and, more specifically, the "possible level of effect" that must be demonstrated in such assessments.[112] In this sense, they understand that Suriname is seeking clarification about the threshold between lesser impacts and impacts that 'deny the survival of the Saramaka as a tribal entity' in relation to permissible restrictions to Saramaka property rights. The nature and scope of the ESIA obligation is directly related to Suriname's request for interpretation and the meaning and scope of the operative paragraphs of the judgment.

68. At the outset, the victims' representatives emphasize that it is imperative that the parties fully understand the meaning, relevance and scope of the language 'to deny the survival of the Saramaka as a tribal entity'. How this language and its underlying rationale relate to the ESIA process and to decisions about potential restrictions to Saramaka property rights more generally is crucially important. An incorrect interpretation of its meaning and application may result in a gross misunderstanding of the judgment as a whole and lead to serious human rights violations. The victims' representatives therefore respectfully entreat the Court to clarify the judgment in this respect.

69. Also at the outset, the representatives observe that Suriname has interpreted the 'survival as a tribal people' language in a case that is pending before the Commission to mean that an extractive operation must "not endanger the life of the victims."[113] Violations of non-derogable rights, perhaps even genocidal impacts, are clearly impermissible in any context. This self-serving definition put forth by Suriname also goes far beyond the Court's statement that "States must respect the special relationship that members of indigenous and tribal peoples have with their territory in a way that guarantees their social, cultural, and economic survival."[114] Moreover, while the State may restrict property rights in certain circumstances, this does not by itself amount to a valid excuse to restrict or violate other human rights. Therefore, the relationship between restrictions on property rights and possible restrictions on or violations of other interdependent or related rights is another important issue that also requires clarification by the Court.

70. Starting with the meaning of the 'survival' language, the Court explains in its judgment that when the State analyzes whether restrictions on the property rights of the Saramaka are permissible, in addition to complying with the general preconditions for restricting such rights, another "crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members."[115] It then identifies four safeguards – effective participation, benefit sharing, ESIA and effective measures to prevent significant damage to Saramaka lands – which, it explains, are "intended to preserve, protect and guarantee the special relationship that the members of the

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[112] *Id*. at p. 5, point 4.1.

[113] *See Comments of the State on the Merits in Kalina and Lokono Peoples v. Suriname (Case 12.639)*, 10 March 2008, at p. 7 (*citing* Saramaka People, para, 128 and stating that "The Mining activities also do not endanger the life of the victims").

[114] Saramaka People, at para. 91.

[115] *Id*. at para. 128.

Saramaka community have with their territory, which in turn ensures their survival as a tribal people."[116]

71. The Court also explains in *Saramaka People* that its prior decisions on indigenous and tribal peoples' property rights have all "been based upon the special relationship that members of indigenous and tribal peoples have with their territory, and on the need to protect their right to that territory in order to safeguard the physical and cultural survival of such peoples."[117]

72. In light of the preceding, the victims' representatives understand the Court's judgment to require the protection of indigenous and tribal peoples' multiple relationships to their traditional lands, territories and resources, which in turn ensures their social, spiritual, cultural, economic and physical survival.[118] The judgment therefore requires an assessment of the extent to which proposed development or investment projects (separately or cumulatively if there is more than one being considered), interfere with, impair, or negate the maintenance and continued enjoyment of the full spectrum of relationships to traditional lands, territories and resources. This analysis then allows a conclusion to be drawn about whether survival as an indigenous or tribal people is endangered or denied.

73. In undertaking such an assessment, particular attention should also be given to the cumulative impacts of multiple restrictions or other relevant circumstances caused by past and present projects, as well as any additional proposed future projects.[119] Such projects may be quite small in scale, but because of their number they may have a cumulative and very significant impact that equals or exceeds the impacts caused by a large-scale project. The representatives submit that this is also relevant in determining whether free, prior and informed consent is required.

74. The ESIA is one way, but not the only way, of assessing the significance of a development or investment project's impact on the maintenance and continued enjoyment of indigenous and tribal peoples' relationships with their traditional territories. Additional factors, which are also not by themselves determinative, include the extent to which indigenous and tribal peoples participate in or consent to a proposed (and strictly necessary) restriction, including the extent to which project parameters and design were modified in relation to their input, and whether they

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116 *Id*. at para. 129, 154 and 158.

117 *Id*. at para. 90.

118 *Id* at para. 120 (highlighting the "inextricable relationship between both land and the natural resources that lie therein, as well as between the territory (understood as encompassing both land and natural resources) and the economic, social, and cultural survival of indigenous and tribal peoples, and thus, of their members").

119 The Human Rights Committee also requires the assessment of cumulative impacts when a state is considering whether an activity denies the right to culture. *See Jouni Lansman et al. v. Finland (Communication No. 671/1995)*, CCPR/C/58/D/671/1995, at para. 15 (stating that "The crucial question to be determined in the present case is whether the logging that has already taken place within the area specified in the communication, as well as such logging as has been approved for the future and which will be spread over a number of years, is of such proportions as to deny the authors the right to enjoy their culture in that area"); and, at para. 10.7 (observing that "the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture").

benefit.[120] The ESIA should also be part of assessing and determining the measures required to ensure that development or investment projects do not significantly affect traditional Saramaka lands and natural resources, including, as appropriate, by modifying or abstaining from the project, and whether consent is required in the case of large-scale or multiple projects with significant impacts.[121]

75. With regard to the nature of the ESIA process, the Court explains that the required ESIAs are to be undertaken by "independent and technically capable entities, with the State's supervision."[122] In order to ensure that these entities fully comprehend the nature, extent and significance of impacts on the Saramaka people's relationships to its territory, the representatives submit that the Saramaka have a right to participate in the ESIA process, and that all relevant information about the ESIA and the proposed project in general must be made available to them in an understandable format, as well as be made publicly available.[123] They further submit that this is required not only pursuant to the terms of the judgment in *Saramaka People*,[124] but also pursuant to Article 13 of the American Convention.[125] Additionally, the significance of the impacts must be assessed with full account taken of Saramaka custom and tradition.[126]

76. Given the great weight of the rights at stake, the highest standards of due diligence must be adhered to in the ESIA process. As such, the process should be fully informed by the most appropriate and relevant international standards and best practice. In the case of indigenous and tribal peoples, the most comprehensive standards are set forth in the *Akwé:Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and*

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120 On the duty to modify, *see inter alia*, *Mrs. Anni Äärelä and Mr. Jouni Näkkäläjärvi v. Finland*. (Communication No 779/1997) CCPR/C/73/D/779/1997, 7 November 2001. (noting that the authors "were consulted in the evolution of the logging plans drawn up by the Forestry Service, and that the plans were partially altered in response…").

121 *Id*. at para. 147 (stating that "the question for the State is not whether to consult with the Saramaka people, but whether the State must also obtain their consent (*supra* paras. 133-137)").

122 *Id*. at para. 129.

123 With regard to indigenous peoples' participation in ESIAs, *see* Int'l. Finance Corp., *Performance Standard 7*, at Guidance Note 11. Available at: http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_GuidanceNote2007_7/$FILE/2007+Updated+Guidance+Note_7.pdf (stating that "Qualified social scientists should be retained to carry out such analysis as part of the project's Assessment. Such analysis should use participatory approaches and reflect the views of the affected communities of Indigenous Peoples on expected project risks, impacts and benefits").

124 *Id*. at para. 133 (stating that "The State must also ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily"); and, at para. 134 (requiring that consent must be informed).

125 *See Claude-Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of 19 September 2006. Series C No. 151.

126 *See for instance* Int'l. Finance Corp., *Performance Standard 7*, *supra*, at Guidance Note 23 (explaining that: "Cultural, ceremonial and spiritual uses are an integral part of Indigenous Peoples' relationships to their lands and resources, are embedded within their unique knowledge and belief systems, and are key to their cultural integrity. Such uses may be intermittent, may take place in areas distant from population centers, and may not be site specific. Any potential adverse impacts on such use must be documented and addressed within the context of these belief systems").

*Waters Traditionally Occupied or Used by Indigenous and Local Communities.*[127] These guidelines were adopted by consensus by the Conference of Parties to the Convention on Biological Diversity, a convention in force for Suriname since 1995, and were developed with considerable input by indigenous peoples.

77. The *Akwé:Kon Guidelines* were developed "to serve as guidance" for the state parties "in the development and implementation of their impact-assessment regimes. The guidelines should be taken into consideration whenever developments are proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities."[128] The victims' representatives submit that "these guidelines illuminate the reach and content" of the ESIA obligation under the American Convention in the case of indigenous and tribal peoples.[129]

78. Finally, the representatives now turn to the relationship between restrictions on property rights and restrictions on or violations of other interdependent or related rights. As stated above, the existence of a procedure for restricting property rights should not be confused with permission to also restrict or violate other human rights, including those interrelated with property rights. Some rights are non-derogable, while varying standards apply to restrictions to or violations of other rights. For example, while economic, social and cultural rights are subject to progressive realization, such rights all nonetheless include core obligations that are of immediate effect. These immediate core obligations generally require that the level of rights-enjoyment is not significantly degraded as a result of acts and omissions attributable to the state, including in relation to restrictions to property rights.[130]

79. The Court has acknowledged on a number of occasions that indigenous and tribal peoples' property rights are inextricably tied to the exercise and enjoyment of other rights.[131] An assessment of a proposed restriction on property rights must therefore fully consider the potential impact on other potentially affected rights, the enjoyment of which is also tied to the maintenance of indigenous and tribal peoples' multiple relations with traditional territory. For example, control over and access to sacred sites is protected by rights to freedom of religion, privacy, and family.[132] The

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127 *See* http://www.cbd.int/doc/publications/akwe-brochure-en.pdf.

128 *Id*. at p. 5.

129 Moiwana Village, *supra*, at para. 111 (referring to the UN Secretary General's Special Representative on Internally Displaced Persons' *Guiding Principles on Internal Displacement* and explaining that "these guidelines illuminate the reach and content of Article 22 of the Convention in the context of forced displacement").

130 *See for instance* Committee on Economic, Social and Cultural Rights, *General comment No. 12: The right to adequate food (art. 11)* (1999), para. 19 (explaining how states may violate the right to adequate food).

131 *See* Yakye Axa, *supra*, para. 147. *See also* Committee on Economic, Social and Cultural Rights, *General comment No. 14: The right to the highest attainable standard of health (art. 12)* (2000), at para. 27 (observing that "that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health").

132 *See for instance Hopu and Bessert v. France.* (Communication No 549/1993) CCPR/C/60/D/549/1993/Rev.1, 29 December 1997, at para. 10.3 (concluding "that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy. The State party has not shown that this interference was reasonable in

Human Rights Committee has also held that sites of religious or cultural significance must be protected under article 27 of the International Covenant.[133] To properly assess the affect that a restriction on property rights may have on other rights, the representatives submit that, at a minimum, a Human Rights Impact Assessment is required as part of the ESIA process. This would ensure that potentially violative impacts are assessed and mitigated or avoided in the design of an investment or development project. It may also ensure that adequate and effective remedies are identified and made available, both at the project and national levels, should mitigation or avoidance measures fail.

80. To conclude, Suriname appears to have incorrectly interpreted the Court's language about 'survival as a tribal people'. The representatives submit that this language should be seen as encompassing a detailed assessment of the impacts of a proposed restriction on property rights with regard to all of the Saramaka's relationships with their traditional territory. Significant adverse impacts, whether caused by a single or multiple projects, in relation to an aspect or aspects of these relationships, potentially endangers or denies their survival as a tribal people. This language should not be viewed as requiring violations of the right to life or possible genocidal impacts before the State is precluded from issuing a concession – these are non-derogable rights and must always be respected. Additionally, indigenous and tribal peoples have a right to participate in ESIA processes, which must fully account for their perspectives when assessing the significance of impacts and explicitly include Human Rights Impact Assessments. ESIAs should also conform to the most appropriate and relevant international standards and best practice; in the case of indigenous and tribal peoples, these standards are set forth in the *Akwé:Kon Guidelines*.

**E. Issue (g) – Juridical Personality**

81. Suriname seeks the Court's clarification as to whether the judgment determines that the Saramaka comprise a distinct people with collective juridical personality pursuant to Article 3 of the American Convention. The State's request is made in relation to its prior argument that individuals are the only 'persons' with a right pursuant to Article 3. The representatives believe that, if accepted, this argument would result in severely weakening the effective recognition and protection of the rights of the Saramaka people. As discussed below, the victims' representatives trust that the Court's judgment is sufficiently clear on this point. Clarification is therefore only needed to ensure that the State is certain about its obligations, particularly in relation to the legislative enactments required to give effect to the rights held by the Saramaka people. Although the judgment is clear, the victims' representatives urge the Court to provide an interpretation so as to assist the State and the Saramaka, and to ensure that there are no further misunderstandings.

82. For the following reasons, the victims' representatives interpret the judgment to clearly recognize, and to require that Suriname recognizes and guarantees, the

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the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex").

[133] *Concluding observations of the Human Rights Committee: Australia. 28/07/2000.* CCPR/CO/69/AUS, at para. 11.

collective juridical personality of the Saramaka people. First, the Court found that the Saramaka people is a "distinct tribal group" that exercises and enjoys certain rights "in a distinctly collective manner…."[134] Second, the Court observed that the Saramaka people hold the right to self-determination, a right that adheres only to 'peoples', and the vesting, exercise and enjoyment of this right depends on a concomitant recognition of a people's juridical personality.[135] Third, the Court explained that sole recognition of individual juridical personality is insufficient because it "fails to take into account the manner in which the Saramaka enjoy and exercise a particular right; that is, the right to use and enjoy property collectively in accordance with their ancestral traditions."[136]

83. Fourth, the Court explicitly declared that

> the right to have their juridical personality recognized by the State is one of the special measures owed to indigenous and tribal *groups* in order to ensure that they are able to use and enjoy their territory in accordance with their own traditions. This is a natural consequence of the recognition of the right of members of indigenous and tribal groups to enjoy certain rights in a communal manner.[137]

84. Fifth, the operative paragraphs of the judgment unambiguously specify that Suriname shall recognize the Saramaka's "collective juridical capacity, pertaining to the community to which they belong, with the purpose of ensuring the full exercise and enjoyment of their right to communal property, as well as collective access to justice, in accordance with their communal system, customary laws, and traditions."[138] With respect to access to justice, the Court also makes clear that Suriname's failure to recognize the Saramaka's collective juridical personality fundamentally undercuts their internationally guaranteed right to equal access to judicial recourse and protection.[139]

85. Sixth, the Court explains the manner in which the State shall recognize the Saramaka people's collective juridical personality. This must be done by implementing legislative and other measures that guarantee the Saramaka's collective juridical personality in order to secure "the use and enjoyment of their territory in accordance with their communal property system, as well as the rights to access to justice and equality before the law."[140] These measures must be promulgated in full

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134 Saramaka People, at para. 164 (referring to paras. 80-4 and 87-96).

135 *Id*. para. 93. *See also* UN Human Rights Committee, *General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 of 26 May 2004, at para 9 (stating that "The beneficiaries of the rights recognized by the Covenant are individuals. [W]ith the exception of article 1, the Covenant does not mention the rights of legal persons or similar entities or collectivities…").

136 *Id*. at para. 168.

137 *Id*. at para. 172 (emphasis added).

138 *Id*. at para. 214(6).

139 *Id*. para. 171, 173, 174 and, at para. 179 (referring to paras. 159-75 and stating that the "Saramaka people, as a collective entity whose legal personality is not recognized by the State, may not resort to such [judicial] recourse as a community asserting its members' rights to communal property").

140 *Id*. at 174.

consultation with the Saramaka people and with full respect for their traditions and customs.[141]

86. Finally, the Court specified that the legislative or other measures discussed in the preceding paragraph must "recognize and take into account the particular way in which the Saramaka people view themselves as a collectivity capable of exercising and enjoying the right to property."[142] In this regard, the victims' representatives stress that the Saramaka have consistently maintained throughout the proceedings before the inter-American protection organs that they view themselves first and foremost as a self-determining people (and hence a juridical person), with the right to hold, exercise and enjoy rights accordingly. They also stress that the preceding is without prejudice to the rights and duties that each Saramaka holds as a proud citizen of Suriname.

87. As they explained before the Court – and as the Court found – Saramaka customary law vests rights to Saramaka territory (territorial rights) in the Saramaka people collectively, and this is the way that they desire to have their property rights recognized and secured in the laws of Suriname.[143] Subsidiary rights (meaning rights to lands within Saramaka territory), are vested in the twelve *lö* (clans), the *bëë* (extended families) and individuals, and will continue to be allocated and regulated in accordance with Saramaka custom and tradition and their communal property system. Therefore, while legislative enactments must recognize, secure and protect Saramaka rights to traditionally owned or used lands, territories and resources, delimitation and demarcation need focus only on the external boundaries of Saramaka territory rather than Saramaka land rights, the latter being delimited and defined internally by Saramaka customary law.

88. To sum up, the preceding demonstrates that the Court both recognizes and requires that Suriname recognizes and secures the Saramaka people's collective juridical personality. This is the case for the vesting and exercise of rights and also for access to judicial and other remedies to seek protection for their rights. Suriname has been ordered to adopt legislative measures guaranteeing the Saramaka people its collective juridical personality and must adopt these measures in consultation with the Saramaka and in accordance with how the Saramaka see themselves as a collectivity. There is no ambiguity in the judgment in this respect. Nevertheless, the representatives urge the Court to provide an interpretation of this issue so as to assist the State and the Saramaka people to fully understand and give effect to the judgment.

## IV. Conclusion and Prayer

89. In its request for an interpretation of the Court's judgment in the case of the *Saramaka People*, Suriname seeks clarification of seven issues. Although two of the issues presented by the State are formulated in vague terms that are not amenable to a precise response, the victims' representatives consider that the Suriname's request is otherwise consistent with the admissibility requirements that apply to interpretations of the Court's judgments. Suriname's requests all concern the scope and meaning of

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141 *Id.*

142 *Id.*

143 *Id.* para. 100 (finding that rights to Saramaka lands and territory are vested respectively in the twelve *lö* and their constituents and the Saramaka people as a whole).

the operative parts of the judgment or the considerations as they relate to those operative parts.

90. The representatives conclude that there is no ambiguity in the judgment with respect to at least four of the seven issues submitted by Suriname. Nevertheless, because all of the issues raised by the State are highly important and/or reveal serious misinterpretations of the judgment, they respectfully urge the Court to explain each of these seven points. This is necessary to rectify these serious misinterpretations and to assist the parties to fully understand and implement the judgment.

91. The representatives have explained more than once that the nature and tone of Suriname's request to the Court are deeply troubling. Some of the issues for interpretation presented by the State betray gross misconstructions of the judgment that could cause grave harm to the Saramaka people and their rights. Also, all but one of these requests concerns the manner in which the State may restrict their rights. The Saramaka people are profoundly concerned about the emphasis chosen by the State and its apparent failure to fully comprehend that they have internationally guaranteed rights, rights that do not depend on the good will of the State for their existence and exercise. The Court's judgement explains the conditions that apply to any restriction of Saramaka property right and is clear that these rights may only be restricted where it is strictly and demonstrably necessary and full conforms to all the other applicable requirements.

92. The Saramaka are especially concerned that the State appears to believe that it may, on a daily basis, impair and negate their rights to effectively control their territory and to freely determine and pursue their economic, social and cultural development. If this were true, from their perspective, they would beyond doubt be returned to the days of slavery, their worst fears would have been realized, and their centuries-long struggle for freedom and dignity, in all senses of those words, would have been for nothing.

93. Finally, the Saramaka people's concerns about the views expressed by Suriname in its request for interpretation should also be viewed in the light of the State's failure to comply with the first deadline set by the Court in its judgment. Specifically, the Court ordered that Suriname must commence the regularization of Saramaka territory no later than 19 March 2008.[144] The Saramaka wrote to the State on 18 February 2008, *inter alia*, to discuss how to begin the regularization process, but have received no response to date.[145]

[144] *Id*. para. 194(a) and 214.
[145] See Annex A hereto for a translated copy of this communication.

## V. ANNEX A:

(original in Dutch)

R.R. Venetiaan
President of the Republic of Suriname
Office of the President

18 February 2008

Your Excellency:

The *Gaama* of the Saramaka people and the Chairman of the Association of Saramaka Authorities send you our respectful greetings.

We are writing to you about the implementation of the judgment of the Inter-American Court of Human Rights in the *Case of the Saramaka People*. In particular, we are writing to inform you of a decision that we have taken in relation to implementation of the judgment and because we also have a number of questions and requests concerning implementation. We also wish to congratulate your Government for declaring that the State will fully comply with and implement the judgment in accordance with the timetable established by the Court.

First, we wish to inform you that we have appointed Mr. S. Hugo Jabini as coordinator for implementation of the judgment. Mr. Jabini will henceforth be the person responsible for arranging matters for the Saramaka people and for coordinating our efforts to implement the judgment of the Court. Mr. Jabini will discharge his duties in full consultation with the *Gaama* and the Chairman of the ASA and he has our full confidence.

We respectfully request that you inform the relevant persons within your Government of Mr. Jabini's appointment and instruct them to communicate with him as the first point of contact in relation to the judgment.

Second, we request that you please inform us at your earliest convenience about who your Government has appointed to be responsible for implementation of the judgment.

Third, the judgment of the Court (para. 194(a)) requires that the State begins the process of delimitation, demarcation and titling of Saramaka territory no later than 19 March 2008 (within 3 months of the date of notification). This process is also to be undertaken with "effective and fully informed consultations with the Saramaka people." We respectfully propose that the first step in this process should be to meet with your implementation team so that we can get to know each other and start to discuss the various steps needed to complete the process within the timeframe set by the Court.

Your Excellency, we look forward to your response to this letter. We also look forward to working with your Government in the spirit of mutual respect and understanding and for the benefit of the nation.

Yours sincerely,

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Belfon Aboikoni
*Gaama* of the Saramaka People

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Head Captain Wazen Eduards
Fiscali and Chairman of the
Association of Saramaka Authorities