

Institution: Inter-American Court of Human Rights  
Title/Style of Cause: *Moiwana Village v. Suriname*  
Doc. Type: Judgement (Preliminary Objections, Merits, Reparations and Costs)  
Decided by: President: Sergio Garcia-Ramirez;  
Vice President: Alirio Abreu-Burelli;  
Judges: Oliver Jackman; Antonio A. Cancado-Trindade; Cecilia Medina-Quiroga; Manuel E. Ventura-Robles; Diego Garcia-Sayan  
Dated: 15 June 2005  
Citation: *Moiwana Village v. Suriname*, Judgement (IACtHR, 15 Jun. 2005)  
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In the Case of *Moiwana Village*,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court,” “the Court,” or “the Tribunal”), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and Articles 29, 31, 37, 56, 57 and 58 of the Court’s Rules of Procedure (hereinafter “the Rules of Procedure”)\*, delivers the present Judgment.

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\* The present judgment is delivered pursuant to the terms of the Rules of Procedure approved by the Inter-American Court of Human Rights during its XLIX Ordinary Period of Sessions by Order of November 24, 2000, which entered into force on June 1, 2001, and according to the partial amendment approved by the Court during its LXI Ordinary Period of Sessions by Order of November 25, 2003, which entered into force on January 1, 2004.  
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## I. INTRODUCTION OF THE CASE

1. On December 20, 2002, pursuant to Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) submitted an application against the State of Suriname (hereinafter “the State” or “Suriname”) to the Court, originating from petition No. 11,821, which had been received at the Commission’s Secretariat on June 27, 1997.

2. The Commission submitted the application for the Court to decide whether the State has violated Articles 25 (Right to Judicial Protection), 8 (Right to a Fair Trial) and 1(1) (Obligation to Respect Rights) of the Convention, to the detriment of certain former residents of *Moiwana Village* (infra paragraphs 71-74 and 86(17) for the identification of the alleged victims).

Furthermore, the Commission requested that the Court order the State to adopt several monetary and non-monetary reparations measures, as well as to pay the legal costs and fees incurred during both the domestic and international proceedings of the instant case.

3. According to the Commission, on November 29, 1986, members of the armed forces of Suriname attacked the N'djuka Maroon village of Moiwana. State agents allegedly massacred over 40 men, women and children, and razed the village to the ground. Those who escaped the attack supposedly fled into the surrounding forest, and then into exile or internal displacement. Furthermore, as of the date of the application, there allegedly had not been an adequate investigation of the massacre, no one had been prosecuted or punished and the survivors remained displaced from their lands; in consequence, they have been supposedly unable to return to their traditional way of life. Thus, the Commission stated that, while the attack itself predated Suriname's ratification of the American Convention and its recognition of the Court's jurisdiction, the alleged denial of justice and displacement of the Moiwana community occurring subsequent to the attack comprise the subject matter of the application.

## II. JURISDICTION

4. Suriname has been a State Party to the American Convention since November 12, 1987. On that same date, Suriname also recognized the Court's jurisdiction as binding. The State has alleged in its preliminary objections that the Court lacks competence to hear the instant case (infra paragraphs 34, 45, 52, 60 and 65). Therefore, the Court shall first decide the preliminary objections submitted by Suriname; subsequently, if justified in law, the Tribunal will proceed to rule on the merits and reparations requested in the present case.

## III. PROCEEDINGS BEFORE THE COMMISSION

5. On June 27, 1997 the human rights organization Moiwana '86 filed a petition before the Inter-American Commission.

6. On March 7, 2000, during its 106th Regular Period of Sessions, the Commission approved Admissibility Report No. 26/00, in which it decided, inter alia, that the claims with respect to Articles 25, 8 and 1(1) of the American Convention were admissible.

7. On February 28, 2002, during its 114th Regular Period of Sessions, the Commission approved Report No. 35/02 on the merits of the case, in which it made the following recommendations to the State:

1. That the State of Suriname open a serious, impartial, and effective investigation into the facts so that an official report can be produced on the circumstances surrounding the Moiwana massacre and [so that the perpetrators may be] duly tried and punished.

2. That the necessary steps be taken to complete, as soon as possible and in absolute conformity with [the] law, the judicial and administrative proceedings concerning all the persons involved in the violations cited in the [...] conclusions [of Report No. 35/02], in order to investigate, prosecute and duly punish the responsible persons.

3. That the State of Suriname repair the consequences of these violations of rights to the victims, their families, and rightful claimants who have been prejudiced by the aforesaid violations of rights, [whose] reparation is to be based on the concept of family established by the Inter-American Court of Human Rights.

4. That the State of Suriname take necessary legislative and judicial measures to repeal [and] nullify the Amnesty law for this case, in so far as it allows for impunity for human rights violations, and crimes against humanity.

8. By the communication dated March 21, 2002, the Commission transmitted Report No. 35/02 to the State, with the request that the State report, within two months from the date of transmission, on the measures adopted in fulfillment of the recommendations contained therein.

9. By the communication of the same date, the Commission informed the petitioners that it had approved Report No. 35/02 and requested that they provide information pursuant to Article 43(3) of the Commission's Rules of Procedure, regarding the petitioners' position with respect to a possible referral of the case to the Inter-American Court. The petitioners complied with this request on April 20, 2002.

10. On May 20, 2002, the State submitted a communication contesting both the admissibility of the case and the Commission's decisions in Report No. 35/02.

11. After unsuccessful efforts to facilitate the State's compliance with its recommendations, and having taken into account the views of the petitioners on the matter, the Commission decided to refer the case to the Inter-American Court.

#### IV. PROCEEDINGS BEFORE THE COURT

12. On December 20, 2002, the Commission submitted the application to the Court, which included documentary evidence and offered testimonial evidence (supra paragraph 1). The Commission appointed Clare Kamau Roberts and Santiago A. Canton as delegates, and Ariel Dulitzky as legal advisor. Following the preliminary review of the application by the President of the Court (hereinafter "the President"), the Secretariat of the Court (hereinafter "the Secretariat") notified Suriname of the application on January 17, 2003, and informed the State of the time limits for answering the application and for appointing its representation in the proceeding. Furthermore, the Secretariat, following instructions of the President, advised the State of its right to appoint a Judge ad hoc to take part in the consideration of the case. By the communications dated January 9, 2003, the Secretariat, pursuant to Article 35(1)(d) of the Rules of Procedure, notified Maytrie Kuldip-Singh of Moiwana '86 of the application. By the communications of the same date, the Secretariat, pursuant to Article 35(1)(e) of the Rules of Procedure, notified Maytrie Kuldip-Singh, Julie Ann Fishel, Fergus Mackay and Martin Misiedjan (hereinafter "the representatives") of the application. On March 3, 2003, the State appointed Soebhascandre Punwasi as Agent and Armand van der Saan as Deputy Agent.

13. On March 6, 2003, the State appointed Freddy Kruisland as Judge ad hoc for the present case.

14. After having been granted an extension, on May 1, 2003 the State submitted its answer to the application, in which it also filed preliminary objections and documentary evidence.

15. Upon a request for information presented by the representatives on May 23, 2003, the Secretariat responded on May 26, 2003 that the deadline for submitting their brief containing pleadings, motions and evidence had expired on February 17, 2003.

16. On February 24, 2004, Harvard Law Student Advocates for Human Rights and the Global Justice Center jointly submitted an amicus curiae brief.

17. On May 26, 2004, the Inter-American Commission submitted a brief in response to the preliminary objections filed by the State (supra paragraph 14).

18. On August 5, 2004, the President issued an Order, in which he requested, pursuant to Article 47(3) of the Rules of Procedure, that Thomas S. Polimé, who was proposed as an expert witness by the Commission, render his testimony by affidavit. According to the terms of the Order, the affidavit was to be sent to the Court by August 23, 2004, and subsequently was to be transmitted to the State and to the representatives, to permit the submission of any pertinent observations. Furthermore, the President convened the Commission, the representatives and the State to a public hearing that would take place at the seat of the Court on September 9, 2004, in order to hear their final oral arguments on preliminary objections, possible merits, reparations and costs, as well as testimony from the witnesses and expert witness indicated below (infra paragraph 21). Finally, the President required the Commission, the representatives and the State to submit their final written arguments on preliminary objections, possible merits, reparations and costs no later than October 11, 2004.

19. On August 23, 2004, the President issued another Order in which he decided to hear testimony during the September 9, 2004 public hearing from two additional witnesses and a different expert witness, as indicated below (infra paragraph 21).

20. On the same date, the Commission submitted Thomas S. Polimé's affidavit to the Court. Although it was transmitted to the State and the representatives on August 25, 2004, neither party presented any observations on Mr. Polimé's affidavit.

21. On September 9, 2004, at the public hearing on preliminary objections, possible merits, reparations and costs, the Court heard testimony from the witnesses and expert witness proposed by the Inter-American Commission, as well as the final oral arguments on preliminary objections, possible merits, reparations and costs from the Commission, the representatives and the State.

Appearing before the Court:

for the Inter-American Commission:

Elizabeth Abi-Mershed, advisor;  
Víctor Hugo Madrigal, advisor; and

Lilly Ching, advisor;

for the representatives of the alleged victims:

Mariska Muskiet, Director, Moiwana '86; and  
Fergus MacKay, Coordinator, Forest Peoples Programme;

for the State of Suriname:

Soebaschandre Punwasi, Agent;  
Eric Rudge, advisor;  
Margo Waterval, advisor;  
Lydia Ravenberg, advisor;  
Henry MacDonald, advisor; and  
Monique Pool, interpreter;

witnesses proposed by the Inter-American Commission:

Stanley Rensch;  
Erwin Willemdam;  
Antonia Difiengo; and  
Andre Ajintoena;

expert witness proposed by the Inter-American Commission:

Kenneth M. Bilby.

22. On October 8, 2004, the representatives submitted their final written arguments on preliminary objections, possible merits, reparations and costs.
23. On October 11, 2004, both the State and the Commission submitted their final written arguments on preliminary objections, possible merits, reparations and costs.
24. On January 14, 2005, the State submitted a copy "of the recent modification of the Criminal Code of the Republic of Suriname," with regard to the extension of the statute of limitation for certain defined crimes.
25. On February 17, 2005, following the President's instructions and pursuant to Article 45 of the Rules of Procedure, the parties were requested to submit additional information to the Court no later than March 17, 2005.
26. On March 15, 2005, the representatives submitted documentation pursuant to Article 45 of the Rules of Procedure. Furthermore, the representatives requested an extension of 20 days in order to supplement the information presented. Following the instructions of the President, an extension was granted until April 6, 2005.

27. On March 17, 2005, Suriname submitted information pursuant to Article 45 of the Rules of Procedure. On that same day, the Commission also responded to the President's aforementioned request (supra paragraph 25). In its communication, the Commission indicated, inter alia, that it had received "information concerning the identification of four additional victims of the attack on Moiwana Village."

28. On April 14, 2005, Mr. F. Kruisland and the parties to the instant case were notified of the Order issued by the Court on March 15, 2005, by which Mr. Kruisland was ordered to "demit the post of ad hoc judge in the Case of Moiwana Village v. Suriname," owing to "his [previous] participation in legal proceedings that have a direct connection with significant facts and issues before the Court in the instant case." In said Order, the Court observed that its decision to dismiss Mr. Kruisland from the present case "[did] not signify that he in fact lacks independence or impartiality regarding the matters in question, nor [did] it express any form of reprimand or criticism on the part of the Tribunal."

29. On April 15, 2005, Mr. Kruisland "demit[ted] as ad hoc judge of the Court [in the instant case], effective immediately."

30. On April 25, 2005, the representatives submitted additional documentation in response to the President's request (supra paragraph 25) pursuant to Article 45 of the Rules of Procedure. Said information contained the names of seven individuals who previously had not been designated alleged victims in the present case.

31. On May 12, 2005, the representatives advised, inter alia, that they were "unable to obtain any further documentation concerning [alleged] victims beyond that which has already been transmitted previously to the Court."

32. On May 13, 2005, following the President's instructions, the Secretariat invited the parties of the case to submit observations on the information and documentation presented before the Court in response to the President's request of February 17, 2005, made pursuant to Article 45 of the Rules of Procedure. The Secretariat indicated that, if the parties chose to submit said observations, they were to be received by May 20, 2005.

33. On May 20, 2005, the Inter-American Commission submitted observations on the information and documentation presented before the Court in response to the President's request of February 17, 2005, made pursuant to Article 45 of the Rules of Procedure.

## V. PRELIMINARY OBJECTIONS

### FIRST PRELIMINARY OBJECTION

The Court lacks jurisdiction *ratione temporis* because the American Convention does not apply to the Republic of Suriname in the present case

Arguments of the State

34. The State has argued that the Court lacks jurisdiction *ratione temporis* to hear the present case on the basis of the following:

- a) the Commission has made a distinction between two categories of alleged human rights violations: i) alleged violations which took place before November 12, 1987, regarding Articles I, VII, IX, XXIII of the American Declaration of the Rights and Duties of Man; and ii) alleged violations of a continuous nature occurring after November 12, 1987, regarding Articles 1, 8 and 25 of the American Convention. These are “two clearly distinctive categories” of violations and thus should have been processed separately;
- b) a “Convention State” is an OAS member state that is a party to the American Convention. The Commission wrongly treated Suriname as a “Convention State” for the entire case, applying the Convention to the State *ex post facto*;
- c) events taking place at Moiwana Village on November 29, 1986, when Suriname was not yet a “Convention State,” would not constitute violations of Convention norms, “but perhaps a violation of the standards laid down in the Declaration.” Since the facts in question occurred before Suriname became a State Party to the Convention, the petitioners did not present the Commission with evidence of violations of that treaty;
- d) the Commission, then, should have dismissed the petition for failing to state facts tending to establish a violation under the Convention, as required under Article 47(b) of the American Convention;
- e) the Court only recognizes the possibility that forced disappearances, which are not at issue in the present case, may constitute continuing violations. The concept of the continuing violation, as applied to the alleged violations of the American Convention in the instant case, is “extreme, exceptional and against general accepted principles of international law”; and
- f) since Convention standards have never been violated, it would be impossible to have continuing violations of that treaty, as alleged by the Commission. Furthermore, in its merits report the Commission never declared a violation of Article XVIII of the Declaration; thus, it could not conclude that a violation of Articles 8 and 25 of the Convention took place.

#### Arguments of the Commission

35. With regard to the State’s preliminary objection concerning the Tribunal’s lack of jurisdiction *ratione temporis*, the Inter-American Commission contended that:

- a) this objection to admissibility is “extemporaneous”; it was not until after the Commission adopted Merits Report No. 35/02 that the State contested the American Convention’s applicability to the present case;
- b) because the State raised its admissibility challenges outside of the procedural opportunities provided to the parties litigating before the Commission, the petitioners had no opportunity to respond within the context of those proceedings;
- c) if the State is arguing that the Commission should have adopted two separate sets of admissibility and merits reports – one concerning claims under the Declaration and the other concerning claims under the Convention – it cites no legal support for such a position. Neither the Convention, nor the Commission’s Statute or Rules of Procedure require such a process, and the principle of procedural economy weighs against it;

- d) while the State contends that it has effectively been treated as a State Party to the Convention with respect to the entirety of the claims presented in the present case, both the admissibility and merits reports demonstrate that only claims relating to the alleged ongoing denial of justice were addressed under the American Convention. The claims involving the alleged attack and related violations completed on November 29, 1986 were dealt with only under the American Declaration;
- e) the Commission is not requesting that the Court apply legal norms or jurisdiction retroactively; the Court has full jurisdiction over all acts and omissions subsequent to November 12, 1987; and
- f) to the extent that the State wishes to controvert the factual and legal basis upon which the Commission grounded its Merits Report No. 35/02 and its subsequent application before the Court, those are issues that should be addressed at the merits phase of the proceedings.

#### Arguments of the representatives

36. The representatives argued in relation to the State's *ratione temporis* preliminary objection that:

- a) the violations alleged before the Court either took place subsequent to Suriname's ratification of the American Convention and acceptance of the Court's jurisdiction or are of a continuing nature;
- b) the denial of justice alleged in this case is specifically linked to Suriname's acts and omissions occurring in 1989, 1992, 1993, 1995 and 1997, and continues to the present day;
- c) the alleged violation of Article 2 of the American Convention is related to acts and omissions occurring in 1992, when the "Amnesty Act 1989" was enacted, and in 1993, when State agents allegedly invoked the "Amnesty Act 1989" as grounds for discontinuing the preliminary investigation into the massacre at Moiwana Village;
- d) the alleged violations of Article 5 of the Convention are associated with the massacre itself and are of a continuing nature, "and are also distinct and cumulative violations connected with the denial of justice and other acts and omissions that post-date the State's acceptance of the Court's jurisdiction";
- e) the alleged violation of Article 21 of the American Convention is of a continuing nature and therefore attributable to Suriname subsequent to its acceptance of the Court's jurisdiction; and
- f) whereas the alleged violations that were completed on November 29, 1986 are not before the Court, the massacre constitutes a grave and systematic violation of a series of fundamental norms of international law that are nonetheless highly relevant to determining the nature and extent of Suriname's responsibility for the denial of justice under the American Convention, as well as the nature and extent of the measures required to remedy those violations.

#### The Court's Assessment

37. The State's central defense in the case sub judice consists in its rejection of the Court's *ratione temporis* jurisdiction. Suriname contends that the violations alleged by the Commission and the representatives originate in events that occurred in November of 1986, one year prior to its accession to the American Convention and its recognition of the Court's jurisdiction.

According to the State, therefore, the terms of its international responsibility during 1986 would be defined exclusively by the American Declaration, thus prohibiting the Court from exercising jurisdiction in the instant case. Similarly, the State maintains that any violation declared by the Tribunal with regard to the facts at issue would necessarily require an ex post facto application of the Convention.

38. As indicated previously, on November 12, 1987 Suriname recognized the competence of the Court (supra paragraph 4), pursuant to Article 62 of the Convention, without any express limitations. Thus, the State recognized as binding and as not requiring any special agreement the Court's jurisdiction on all matters relating to the interpretation and application of the Convention. In light of the nature of the present preliminary objection, it is necessary to refer to Article 28 of the Vienna Convention on the Law of Treaties of 1969, [FN1] which provides:

[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

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[FN1] Cf. Case of the Serrano-Cruz Sisters. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, para. 64; Case of Alfonso Martín del Campo-Dodd. Preliminary Objections. Judgment of September 3, 2004. Series C No. 113, para. 68; and Case of Cantos. Preliminary Objections. Judgment of September 7, 2001. Series C No. 85, para. 35.

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39. According to this principle of non-retroactivity, in the case of a continuing or permanent violation, which begins before the acceptance of the Court's jurisdiction and persists even after that acceptance, the Tribunal is competent to examine the actions and omissions occurring subsequent to the recognition of jurisdiction, as well as their respective effects. [FN2]

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[FN2] Cf. Case of the Serrano-Cruz Sisters. Preliminary Objections, supra note 1, para. 67; Case of Alfonso Martín del Campo Dodd. Preliminary Objections, supra note 1, para. 79; and Case of Blake. Preliminary Objections. Judgment of July 2, 1996. Series C No. 27, paras. 39 and 40.

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40. The Commission has maintained throughout the present proceeding that the only violations which it attributes to Suriname before this Tribunal relate to "a series of acts and omissions," starting from the date of the State's acceptance of the Court's jurisdiction, which has allegedly caused an ongoing denial of justice in violation of the terms of Articles 8, 25 and 1(1) of the American Convention. In its various submissions before the Court, the Commission has referred to several examples of "individual, autonomous violations of the State's obligations under the Convention," all of which have allegedly occurred subsequent to Suriname's accession to the Convention and recognition of the Court's jurisdiction.

41. These supposed State violations are based upon, inter alia, the following alleged facts cited by the Commission: the failure until 1989 to initiate an ex officio investigation into the

November 29, 1986 occurrences at Moiwana Village; the army's forceful releasing of suspects in police custody in 1989; the 1990 murder of the police officer in charge of the Moiwana investigation and, as a consequence, a suspension of further official inquiries; and the additional "chilling effect" upon the investigation brought about by the 1992 enactment of an amnesty law.

42. For their part, the representatives argued that "[t]he denial of justice alleged in this case is specifically linked to Suriname's acts and omissions occurring in 1989, 1992, 1993, 1995 and 1996-97 and continues to the present day." Furthermore, they have alleged other State violations of the Convention, in addition to those associated with Articles 8, 25 and 1(1), which also purportedly took place following Suriname's recognition of the Court's jurisdiction, such as alleged violations of Articles 5 and 21 of the Convention.

43. In the case sub judice, the Court distinguishes between alleged violations of the American Convention that are of a continuing nature, and those that occurred after November 12, 1987. With respect to the former, the Tribunal observes that the perpetration of a massacre in 1986 has been alleged; in consequence, an obligation arose for the State to investigate, prosecute and punish the responsible parties. In that regard, Suriname initiated an investigation in 1989. Yet, the State's obligation to investigate can be assessed by the Court starting from the date when Suriname recognized the Tribunal's competence. Thus, an analysis of the State's actions and omissions with respect to that investigation, in light of Articles 8, 25 and 1.1 of the Convention, falls within the jurisdiction of this Court. On the other hand, it has been argued that the alleged victims were forcefully displaced from their ancestral lands. Although this displacement supposedly occurred in 1986, their inability to return to those territories has allegedly continued. The Court, then, has competence to rule upon these alleged facts and their legal implications. Finally, with regard to the alleged violations that took place subsequent to November 12, 1987, which need not be specified here, it is clear that they fall within the Inter-American Court's jurisdiction.

44. Consequently, the instant preliminary objection is dismissed on the grounds set out above.

## SECOND PRELIMINARY OBJECTION

The petitioners failed to exhaust domestic remedies as required by the American Convention and the Inter-American Commission's Rules of Procedure

### Arguments of the State

45. The State argued the following regarding the non-exhaustion of domestic remedies:

a) although specific remedies that apply to this case exist in Suriname, the petitioners have neglected to invoke and/or exhaust them. Furthermore, the petitioner has the burden of proof to show that specific remedies were exhausted or that they fall within the exception established in Article 37(2) of the Commission's Rules of Procedure;

b) Suriname has not waived its right to argue non-exhaustion of domestic remedies as grounds for inadmissibility; in May 2002, the State acted in a timely fashion regarding this issue;

- c) adequate and effective local remedies are provided for in the State's Civil Code, its Code of Civil Procedure and its Code of Criminal Procedure;
- d) in the instant case, the petitioner had the opportunity to commence criminal proceedings and a civil action on the basis of the alleged violations;
- e) pursuant to Article 1386 of the Civil Code, the State can be sued for damages caused by its wrongful acts. This would have been the most effective legal remedy in Suriname to obtain compensation; however, the petitioners did not litigate under Article 1386; they only opted for the criminal prosecution of those responsible;
- f) the Commission has not acknowledged that a civil action was in fact available and that the petitioners did not exhaust this remedy; nor did it show how the said civil remedy was not effective; and
- g) the petitioners cannot argue that they have been denied access to the national judicial authorities; a delay in the legal process cannot be alleged either, since the petitioners did not make use of the range of domestic legal remedies available.

#### Arguments of the Commission

46. Regarding the alleged non-exhaustion of domestic remedies, the Commission contended that:

- a) the State did not reply to reiterated requests from the Commission for information and never challenged the admissibility of the claims during the appropriate procedural opportunity. Thus, Suriname tacitly waived its right to object to noncompliance with such requirements as exhaustion of domestic remedies under Article 46 of the Convention, and is now estopped from objecting in this regard;
- b) the Commission expressly informed the State that its failure to respond to its requests for information would permit the Commission to presume, pursuant to Article 42 of its then-applicable Rules of Procedure, that the denounced facts were true, in the absence of evidence to the contrary;
- c) in its Admissibility Report No. 26/00, the Commission considered the State's silence to be an implicit waiver of its right to argue non-exhaustion of domestic remedies;
- d) the requirement that claimants exhaust domestic remedies is not to impose unjustified procedural obstacles, but rather to ensure that the State has been made aware of the claims prior to being summoned before an international mechanism of supervision. When it is not possible for claimants to exhaust such remedies as a matter of fact or law, the requirement is "consequently and necessarily excused";
- e) a civil action for damages might be appropriate for a private or civil wrong between two parties, or in certain cases for the breach of a non-contractual obligation by the State, but it does not represent an adequate and effective remedy in response to actions that may constitute serious crimes under Suriname's domestic law;
- f) the remedy suitable to address the rights violations in the present case is a criminal investigation devised to identify, prosecute and punish those responsible. Such crimes are subject to ex officio prosecution;
- g) the remedies that should have been provided by the State through its criminal justice system have been affected by "evident undue delay";

- h) by the time the application was submitted to the Court, more than 16 years had passed since the events that gave rise to the present case, and no one had been prosecuted or punished for the human rights violations. In this way, the victims have been denied effective judicial protection and guarantees; and
- i) the delay and denial of justice in this case provide the application's very basis: "[t]he case itself demonstrates that domestic remedies have been neither available nor effective for the residents of Moiwana Village."

#### Arguments of the representatives

47. The representatives argued that "[t]he testimony and other evidence presented to the Court demonstrate that the [alleged] victims actively and repeatedly sought recourse in Suriname." According to the representatives, "[t]hese attempts to obtain justice were ignored, rebuffed and even chastised by Suriname and produced no result."

#### The Court's Assessment

48. Article 46(1)(a) of the American Convention provides that, in order for a petition or communication submitted to the Inter-American Commission pursuant to Articles 44 or 45 of the Convention to be admissible, it is necessary that the remedies under domestic law have been pursued and exhausted.

49. On this matter, the Court has already established clear criteria. To begin, of the generally-recognized principles of international law regarding the rule on exhaustion of domestic remedies, the foremost is that the defendant State may expressly or tacitly waive invocation of this rule. [FN3] Secondly, in order to be considered timely, the objection that domestic remedies have not been exhausted should be raised during the first stages of the proceeding; otherwise, it will be presumed that the interested State has tacitly waived its use. [FN4] Finally, the State that alleges non-exhaustion of domestic remedies must indicate which remedies should have been exhausted, as well as provide evidence of their effectiveness. [FN5]

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[FN3] Cf. Case of the Mayagna (Sumo) Awas Tingni Community. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 53; Case of Loayza-Tamayo. Preliminary Objections. Judgment of January 31, 1996. Series C No. 25, para. 40; and Case of Castillo-Páez. Preliminary Objections. Judgment of January 30, 1996. Series C No. 24, para. 40.

[FN4] Cf. Case of the Mayagna (Sumo) Awas Tingni Community. Preliminary Objections, supra note 3, para. 53; Case of Castillo-Petruzzi. Preliminary Objections. Judgment of September 4, 1998. Series C No. 41, para. 56; and Case of Loayza-Tamayo. Preliminary Objections, supra note 3, para. 40.

[FN5] Cf. Case of the Mayagna (Sumo) Awas Tingni Community. Preliminary Objections, supra note 3, para. 53; Case of Durand and Ugarte. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, para. 33; and Case of Cantoral-Benavides. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, para. 31.

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50. In the instant case, the State disputes that it has waived its right to argue non-exhaustion of domestic remedies. Indeed, Suriname maintains that its first objection on the subject, presented in a May 20, 2002 pleading submitted to the Inter-American Commission, was made in a timely fashion. However, as the Commission has repeatedly pointed out, and as is unmistakable from the record, Suriname's first response on the matter was not presented until after the Commission had issued both its Admissibility Report of March 7, 2000, and its Merits Report of February 28, 2002 in the present case.

51. Thus, as a consequence of not challenging this issue in a timely fashion, the Court concludes that the State tacitly waived its right to object in this regard, and, therefore, dismisses the instant preliminary objection.

### THIRD PRELIMINARY OBJECTION

Owing to the Commission's late submission of the application, the Court's jurisdiction is barred, according to the terms of Article 51(1) of the Convention

#### Arguments of the State

52. The State submitted the following arguments with regard to Article 51(1) of the Convention:

- a) the Commission clearly exceeded the time limit of three months provided for in the Convention to submit the application to the Court;
- b) the relevant provisions of the Convention have not been observed, since in the present case "the Commission should have adopted an Article 51 report"; and
- c) the Commission submitted the case to the Court on the last day the State was able to respond to the Merits Report No. 35/02.

#### Arguments of the Commission

53. The Commission argued the following with regard to the present preliminary objection:

- a) the instant case was submitted in accordance with the applicable norms and practices;
- b) in June and then August of 2002 the State requested extensions of the applicable deadline, and expressly recognized that "if the suspension is granted, [...] once the [...] suspension has expired and no settlement of the case has been reached, the Commission may decide to submit the case to the Inter-American Court"; and
- c) an extension, when requested by the State, benefits the State by providing it with additional time to resolve a matter prior to its submission before the Court. Suriname cannot request and accept a benefit, and then invoke it as a procedural violation.

#### Arguments of the representatives

54. The representatives did not submit arguments related to the instant preliminary objection.

## The Court's Assessment

55. The Court will now turn to examine whether the Commission in the instant case submitted the application to this Tribunal in a timely fashion, according to the terms of Article 51(1) of the Convention.

56. Both the State and the Commission are in agreement that, after the transmission of the Merits Report No. 35/02 to the former, Suriname requested two extensions of the time limit provided for in Article 51(1) of the Convention, which regulates the submission of matters to this Court. Suriname's first request, on June 20, 2002, for an extension of the Article 51(1) time limit – which, at that point in the proceedings, was scheduled to expire on June 21, 2002 – was granted by the Commission, resulting in an extension of the deadline until August 20, 2002. On August 20, 2002, the State requested an additional four months, “primarily [...] to continue with the detailed investigation of the matter”; as a result, on August 20, 2002, the Commission revised the time limit again, and communicated to Suriname that it would accordingly expire on December 20, 2002. The Commission states that subsequently, “in the absence of substantive developments” regarding the State's investigation of the facts and the settlement of the case, it decided to submit the application to the Court on the day the second extension expired, that is, December 20, 2002.

57. The Court has already established that the extension of the three-month time period stipulated in Article 51(1) of the Convention is permissible, provided that it is, of course, carried out within a context of procedural fairness. [FN6] In the instant case, the conditions regarding the two extensions were explicitly acknowledged by both the Commission and the State. Indeed, during both occasions the State expressly recognized that “if the suspension is granted, [...] once the [...] suspension has expired and no settlement of the case has been reached, the Commission may decide to submit the case to the Inter-American Court.” Furthermore, the Tribunal notes that the Commission honored the terms of its agreement with the State, by not submitting the application to the Court until the second extension actually expired on December 20, 2002.

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[FN6] Cf. Case of Cayara. Preliminary Objections. Judgment of February 3, 1993. Series C No. 14, para. 38; and Case of Neira-Alegría et al. Preliminary Objections. Judgment of December 11, 1991. Series C No. 13, para. 34.

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58. Moreover, in accordance with international legal practice, when a party to a case adopts a position that is either beneficial to it or detrimental to the other party, it cannot subsequently, in virtue of the principle of estoppel, assume a contradictory position. In that regard, the rule of non *concedit venire contra factum proprium* applies. [FN7]

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[FN7] Cf. Case of Neira-Alegría et al. Preliminary Objections, *supra* note 6, para. 29.

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59. For the foregoing reasons, the Court rejects the instant preliminary objection.

#### FOURTH PRELIMINARY OBJECTION

In its Merits Report No. 35/02, the Commission “concluded other violations than those for which the case was admitted”

##### Arguments of the State

60. Regarding the fourth preliminary objection, Suriname has argued that in the Merits Report No. 35/02, the Commission concluded that certain violations of the American Declaration were committed, despite the fact that the petitioners did not originally allege those violations. Thus, the Commission declared other violations than those for which the case was admitted, “contrary to international law” and to the detriment of the State’s defense.

##### Arguments of the Commission

61. Regarding the fourth preliminary objection, the Commission argued that:

- a) only the alleged violations of the rights enshrined in Articles 25, 8 and 1(1) of the American Convention are before the Court in the present case;
- b) the claims before the Court were admitted and reviewed by the Commission pursuant to the applicable norms and procedures;
- c) it is neither presumed nor required that petitioners must be versed in law in proceedings before the Commission; and
- d) the fact that a petitioner does not specifically allege a particular violation does not preclude either the Commission or the Court from considering it on its own, in accordance with the principle of *iura novit curia*.

##### Arguments of the representatives

62. The representatives did not submit arguments concerning the fourth preliminary objection.

##### The Court’s Assessment

63. The Tribunal affirms that, pursuant to Article 62 of the American Convention, its jurisdiction concerns the interpretation and application of the provisions of that Convention. Consequently, although the Court generally takes into consideration the provisions of the American Declaration in its interpretation of the American Convention, the Commission’s conclusions regarding specific violations of the American Declaration do not pertain to the instant proceedings. [FN8] Furthermore, the Commission’s assessment with respect to alleged violations of the American Convention is not binding upon the Court.

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[FN8] Cf. Article 29 of the American Convention on Human Rights; and Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of

the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 36.

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64. Therefore, the Court dismisses the State's fourth preliminary objection.

#### FIFTH PRELIMINARY OBJECTION

The Commission "neglected to send all pertinent parts of the petition to the State, as intended in Article 42 of its Rules of Procedure"

#### Arguments of the State

65. With respect to the fifth preliminary objection, the State contends that the Court lacks jurisdiction in this case because the Commission neglected to send "all pertinent parts" of the petition – namely, "a number of attachments" – to the State, "as intended in Article 42 of its Regulations." Furthermore, the State considered that said attachments are of the "utmost importance" in deciding the instant case, and, as a result, its defense was compromised.

#### Arguments of the Commission

66. With regard to the fifth preliminary objection, the Commission stated that it failed to understand which would be the "pertinent parts" that were not transmitted to the State. On the other hand, given that the State declined to respond to multiple requests for information from the Commission, and that it did not challenge the admissibility or the merits of the claims raised until after Merits Report No. 35/02, the Commission cannot perceive how the State's right to defense was compromised.

#### Arguments of the representatives

67. The representatives did not submit arguments concerning the fifth preliminary objection.

#### The Court's Assessment

68. With regard to the fifth and final preliminary objection, the Court finds it necessary to indicate that, as discussed above (*supra* paragraph 50), Suriname initially participated in the proceedings before the Commission by submitting a substantive brief in May 2002, which not only was presented well after the Commission's several requests for information, but also subsequent to the issuing of the Admissibility Report of March 7, 2000 and the Merits Report of February 28, 2002. Thus, the Tribunal deems Suriname's preliminary objection regarding the Commission's alleged failure to transmit "the pertinent parts of the petition" to the State to be improper. Having chosen not to exercise its right to defense during the appropriate procedural opportunities before the Commission, Suriname may not raise said objection now, before this Court.

69. For the aforementioned reason, the Tribunal rejects the State's fifth preliminary objection.

## VI. PREVIOUS CONSIDERATIONS

70. The Court has taken into account, as it has done in other judgments, certain facts that occurred before the State's recognition of the Court's jurisdiction. [FN9] This was done only to place into the proper context those alleged violations over which the Tribunal actually exercises jurisdiction. The Court emphasizes, as stated previously (*supra* paragraph 43), that it is only competent to declare violations of the American Convention with regard to actions or omissions that have taken place following the date of recognition of the Tribunal's jurisdiction and with respect to any situations which have not ceased to exist by that date.

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[FN9] Cf. Case of the Serrano-Cruz Sisters. Judgment of March 1st., 2005. Series C No. 120, para. 27.

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71. At this juncture, the Tribunal deems it necessary to identify clearly the alleged victims of the instant case. The alleged victims are those persons individualized in the application, who are described as: a) the survivors of the events of November 29, 1986 in Moiwana Village, and b) the next of kin of those who were killed that day. It is observed that Suriname found the method applied by the Inter-American Commission to determine the list of alleged victims "open to question." However, since the State did not explain the reasons why the Commission's method was supposedly unacceptable, the Court considers that the objection must be dismissed as imprecise and lacking adequate justification. In consequence, said individuals will be deemed to be the alleged victims of the instant case, and shall hereinafter be referred to as the "alleged victims" or the "Moiwana community members."

72. The Court notes that on March 17, 2005, the Commission requested that the Tribunal consider four additional persons as victims in the instant case: Beata Misidjan, Edmundo Misidjan, Ludwig Misidjan, and Reguillio Misidjan. In support of its request, the Commission argued that such an inclusion was justified, as the mother of those four persons, Mado Misidjan, was allegedly killed during the 1986 attack on Moiwana Village. As a result, her children were dispersed within Suriname after the attack, lived with persons who had no contact with the other alleged victims, and only recently have been located. The representatives agreed with the Commission, adding that said individuals were present when the attack occurred and were originally included in the "requests for justice" that were presented at the national level. Yet, the representatives stated that "as the larger group of [alleged] victims was unsure if they had survived the massacre and was not aware of their whereabouts, they decided not to include them on the list submitted to the Commission and, ultimately, to the Court."

73. Furthermore, on May 12, 2005, in their response to a request for evidence pursuant to Article 45 of the Rules of Procedure, the representatives petitioned that seven more individuals

who had previously not been designated alleged victims in the present case be added to the list: Majo Ajintoena, Erwien Awese, Cornelly Madzy James, Humprey James, Romeo James, John James, and Manfika Kamee. The representatives explained that they had not been included earlier owing to an “oversight,” which occurred while compiling the original list of alleged victims. For its part, the Commission “support[ed] the identification of victims put forward by the petitioners.”

74. Regarding the requests to consider the additional persons as alleged victims, the Court observes that the State was transmitted both requests and then was expressly invited to submit observations on said information by the Secretariat’s communication of May 13, 2005, and yet did not respond on the matter. In consequence, since the State was duly granted its right of defense on the issue – yet did not object – the Tribunal rules that it is appropriate to consider the additional 11 individuals as alleged victims in the instant case.

## VII. EVIDENCE

75. Before turning to the analysis of the evidence received, in this chapter the Court, pursuant to Articles 44 and 45 of the Rules of Procedure, will make reference to certain general considerations applicable to the specific case, which have been previously developed in the jurisprudence of this Tribunal.

76. The principle of the presence of the parties to a dispute applies to evidentiary matters, and it involves respecting the parties’ right to defense. This principle is contained in Article 44 of the Rules of Procedure, regarding the time frame in which the evidence must be submitted, in order to secure equality among the parties. [FN10]

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[FN10] Cf. Case of Caesar. Judgment of March 11, 2005. Series C No. 123, para. 41; Case of the Serrano-Cruz Sisters, *supra* note 9, para. 31; and Case of Lori Berenson-Mejía. Judgment of November 25, 2004. Series C No. 119, para. 62.

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77. It is well-settled law and practice that international procedures relating to the admission and evaluation of evidence are not subject to the same formalities as domestic judicial procedures. This principle is especially applicable to international human rights tribunals, which enjoy greater flexibility in assessing the evidence presented before them, in accordance with the rules of logic and on the basis of experience. Evidence may be admitted only after careful attention to the circumstances of the particular case, while bearing in mind the limits imposed by a proper respect for judicial certainty and procedural equality as between the parties. [FN11]

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[FN11] Cf. Case of Caesar, *supra* note 10, para. 42; Case of the Serrano-Cruz Sisters, *supra* note 9, para. 33; and Case of Lori Berenson-Mejía, *supra* note 10, para. 64.

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78. Against this background, the Court will proceed to examine and evaluate all of the elements that comprise the corpus of evidence in the instant case.

A) DOCUMENTARY EVIDENCE

79. Regarding the documentary evidence presented by the parties, pursuant to the President's Order of August 5, 2004 (supra paragraph 18), the Commission submitted the affidavit of the expert witness Thomas S. Polimé. The Court considers it appropriate to summarize said affidavit.

a) Expert report of Thomas S. Polimé, anthropologist

Dr. Polimé's affidavit discussed the following subjects: 1) general information on the Maroons in Suriname; 2) N'djuka social structure, religious beliefs, mourning traditions, local government and justice systems; 3) history of Moiwana Village; 4) events prior to, during and after the attack at Moiwana Village; 5) the impact of the attack and the subsequent denial of justice; and 6) information relevant to the possible award of reparations in the present case.

B) TESTIMONIAL EVIDENCE

80. During the public hearing (supra paragraph 21), the Court heard oral testimony from the witnesses and expert witness proposed by the Commission. The Court considers it appropriate to summarize these declarations.

a) Stanley Rensch, founder of Moiwana '86

The massacre of November 29, 1986 was unprecedented; it is one of the most notorious human rights violations in Suriname. In recognition of its "systematic," "grave" and "terrible nature," they named the human rights organization Moiwana '86 after it. The perpetrators of the attack were organized, trained and armed by state military personnel. It was a problematic period for eastern Suriname in general; serious violations took place in that area, which was a major battleground during the internal armed conflict, and Moiwana '86 reported those violations to the government. At one point, the Ministry of Defense publicly stated that the attack at Moiwana was a military action.

Moiwana '86 was "very systematic" in requesting that the State investigate the attack of November 29, 1986. Toward this end, they collected information, put it into writing and submitted it to government authorities on a continual basis. Moiwana '86 as an organization has asked police and judicial authorities every year at least once to investigate the attack.

Moiwana '86 also tried to be "as supportive as possible" concerning Inspector Gooding's inquiries; Gooding was in charge of the State's official criminal investigation. The witness stated that Gooding "found major members of the team of perpetrators" and remarked that his accomplishments showed that he was "a very brave man." As a result of this initial investigation, Orlando Swedo was detained by the police; yet his release was demanded and obtained by a fully-armed military unit. The military leader Desire Bouterse ordered that release; this was known because Bouterse conducted a press conference once Swedo was freed.

During that meeting with the press, Gooding was warned not to cooperate with Moiwana '86. Not long after, Gooding visited the military barracks at Fort Zeelandia. Upon leaving, his car was

stopped; he was then taken out and shot to death. After Gooding's death, the police did not continue their investigation of the Moiwana attack. On the other hand, those responsible for Gooding's murder were never prosecuted and the circumstances were never clarified. Furthermore, many of the investigators that worked with Gooding had to leave the country because they faced "a life-threatening situation." "Even the highest authorities were not able to further investigate" his death.

In 1993, the witness received information about the discovery of human remains near the village of Moiwana; he was told that the bodies were from the massacre. He informed the authorities, especially the Attorney General, who was quick in establishing a committee to look into the matter. After two sessions – the witness was present during both – remains were uncovered, which were taken to Paramaribo for further investigation. The witness learned from the press that the remains of six to nine individuals, including children, were found. However, the authorities never identified the remains, and the witness never received information about further steps to investigate the situation. Moreover, there was a "reactionary statement" in the press from a government official, alluding to an amnesty law enacted in 1992, which diminished the hope that the investigation of the Moiwana case could continue.

In 1995, the Surinamese Parliament called on the Executive to investigate various human rights violations. However, the witness was unaware of any subsequent investigation into the Moiwana attack by the legal authorities. In 1996, Moiwana '86 submitted a formal request to the Attorney General under the Surinamese Code of Criminal Procedure for an investigation into the massacre. After receiving no response, they presented a formal request for an investigation to the President of the Court of Justice, who in turn sent the petition to the Attorney General; nevertheless, no further action was taken.

Moiwana '86 requested the government to reject the amnesty law that was adopted in 1992, because they considered it a means to legalize impunity. The witness also believes that the law itself negatively affected the willingness of the police to investigate the human rights violations occurring during the period from 1985 to 1992-93, which are the years covered by that legislation.

Many of those collaborating with Moiwana '86 received threats and had to leave the country. The witness himself was arrested four times; furthermore, there was an attempt made on his life, which obligated him to leave Suriname. To his knowledge, the assassination attempt was never investigated by the authorities. Efforts to investigate the Moiwana case have entailed risks because "there are not that many people in the system who would like to have this thing [...] looked into." As a result, it was "very difficult to guarantee anyone safety, to guarantee protection from people you can't control."

Of all the human rights cases that Moiwana '86 handled during the time that the witness worked there, he cannot recall a single one that reached the stage of prosecution and punishment – although the cases taken before the Inter-American Court, Aloeboetoe and Gangaram Panday, resulted in compensation for the victims.

The witness has worked with the survivors and next of kin of the attack, including the refugees in French Guiana, since 1987. The other survivors are located in Suriname, in the towns of Paramaribo and Moengo. Since that time, he and others have visited these individuals to do as much as possible to assist them and to find them a temporary place to stay. Moiwana '86 has included representatives of the survivors in its activities: "at least three members of that group were permanently participating in our activities with regard to Moiwana." Furthermore, when the

witness and Moiwana '86 submitted complaints and requests to the judicial authorities for investigation, it was made clear that they did so on behalf of the survivors.

These complaints and requests have sought criminal investigation, not a civil action for compensation. This is because the only possibility to investigate effectively the violations at Moiwana was to appeal to law enforcement authorities. As a human rights organization, Moiwana '86 tried to initiate the criminal investigation by communicating with the appropriate state institutions, "to help the State with its obligations to defend rights." Thus, the Moiwana survivors have not initiated civil proceedings yet; they have only sought a criminal investigation, after which civil actions may be filed.

Based on his experience, the witness believes that there has been "insufficient support of the idea, the concept, that the Maroons deserve the same type of legal protection in the country." A few days before the hearing, the representatives of the Moiwana survivors confirmed to the witness that they wish to return to their village.

b) Erwin Willemdam, former Moiwana Village resident

The witness was present at Moiwana Village during the events of November 29, 1986; his wife was killed during the massacre. The attack itself had the characteristics of a planned military operation, according to the witness, who had served in the army himself. He judged this by the way the attackers approached the village and surrounded it. He also heard an order given to burn down the village huts.

Immediately after the attack, the witness fled to French Guiana. After spending a year there, he decided to return to Suriname so that his children could have an education. About this time, he started collaborating with groups of survivors to seek justice. In the N'djuka culture it is an obligation to pursue justice; if it is not obtained, "then your life is disturbed; it's disrupted, and you can't continue to live in a proper way." The two children the witness had with his deceased wife also participate in these activities to seek justice, since it is a cultural responsibility that continues through the generations.

Since the attack, the witness has driven past Moiwana Village, but has never stopped. He does not know of other community members who have returned to Moiwana to live. "As long as justice is not served, [...] then they cannot go back to that place to stay." Since there has been no investigation, the witness has the feeling that the Moiwana survivors are not treated in the same way as other Surinamese citizens.

The community members believe that while those who died at Moiwana are not vindicated, their souls will not be at peace. Furthermore, as long as their bodies do not receive a proper burial, this will bring negative consequences upon the living. The witness is fearful of these angry spirits. However, "if everything is done in a proper way – justice is served and compensation is granted – then the people can go back and live again in that area." At this moment, since "nothing" has been done, the witness would not return.

One of the witness' greatest sources of suffering is that he does not know what has happened to his wife's body. He heard that some corpses from Moiwana were burned at a particular place in Moengo, the town where he now lives. Every time he passes by that location he feels very bad about what happened. "That is one of the worst things that could occur to us, if you burn the body of someone who died."

The Moiwana survivors have a committee, which coordinates with Moiwana '86 on the legal matters associated with the investigation. The witness is not a member of this committee. The

committee wrote letters to the State and tried to work with the government to advance the investigation. But the State “never reacted.” For example, the Moiwana survivors were not informed about the State’s excavation of the human remains in 1993. In this way, now “there is no interest in cooperation with the government at this [stage of the proceedings].”

On a personal level, the witness is fearful of taking the case to a judge and distrusts the State police. One day, a military officer and three police asked him questions in Moengo. Once they had spoken and the officers had taken notes, the witness requested to see what they had written, but was refused.

Because the witness’ wife was killed unjustly, “it’s not possible to live a normal life anymore.” He cannot even do the farming that he used to do at Moiwana. Since “so many of ours died on that land,” and their murders were “absolutely improper,” the witness believes that the State, in addition to providing a proper investigation and compensation, should grant the former residents their right to live in Moiwana Village. “It has to be recognized so that we can dare to live there and use [the land].”

c) Antonia Difiengo, former Moiwana Village resident

The witness was present at Moiwana Village during the events of November 29, 1986; her father, who was a N’djuka loekoman or basia, her aunt, and her baby of seven months were all killed during the massacre. Her child was killed while in her arms.

The attackers spared some of the residents and “gave the order that we should go.” As a result, the witness recalled that they “had to disappear in the forest.” Later, the witness and others were found in the jungle and assisted across the river into French Guiana. There they were placed in refugee camps in Saffé. At the camps they had to support themselves by growing produce and selling it. She and others still remain at the camps to this day. Although they have written the Surinamese government letters, State officials have not visited the Moiwana survivors in French Guiana. “They considered us like dogs: you can kill them, you don’t have to pay that much attention to them.”

At Moiwana, in the N’djuka tradition, women had the right to land and to farm. The witness believes that this right is necessary, but states that it is unavailable to them in French Guiana where she lives now: “there I can do nothing.”

The Moiwana survivors have been unable to recover the bodies of those killed, and they still do not know where the corpses are located. The witness has understood that some of the bodies were taken to Moengo. In the N’djuka culture, however, it is crucial to provide a proper burial – and there are many ceremonies to perform for the deceased before the actual burial takes place. Yet nothing can be accomplished without first recovering the remains of the deceased. If these rituals are not observed, “it will burden all the children, also be after ourselves.” Many negative consequences are possible for the next of kin, such as going mad. By not fulfilling the traditional obligations concerning the dead, “it is if we do not exist on earth.”

Her community has asked the State for justice after the attack, but Suriname has not “reacted” to the request. “Compared to the others in the country, [...] we do not have the same rights in Suriname.” It is important for the Moiwana survivors to work for justice together; toward this end, the witness has collaborated with Andre Ajintoena, the chairman of the Association Moiwana.

The State must right the wrongs that it has committed; it must address the situation in an appropriate way, “before we can return to normalcy.” Since the attack, the witness’ life “has

been completely disturbed”; she feels that she has been in the same situation since the events of November 29, 1986. Furthermore, the community may require assistance to return to Moiwana Village; she personally has not gone back yet at all. In any event, the witness is willing to return to live at Moiwana “if everything [...] is done properly” according to tradition, since her current location in French Guiana, she states, “is not my place.”

The witness never understood the reason for the attack. She stated that “it is important for me – I would like to know why. [...] It is essential to know, because that is the law [...] in the tradition of the N’djuka culture. [...] Our rights have to be observed.” Also with regard to potential reparations, the witness added that everything which would bring their lives back to normal is “welcome,” such as compensation and being provided somewhere to live.

d) Andre Ajintoena, former Moiwana Village resident and chairman of Association Moiwana

The witness was present at Moiwana Village during the events of November 29, 1986; his sisters and their children were killed during the massacre. He stated that “those killed in Moiwana, one could say, they are all family members.”

In the N’djuka culture it is “essential” to search for justice when someone dies in an unjust way. This obligation “to set things straight,” if not fulfilled, will cause the living as well as the dead to suffer. The witness himself has established a group dedicated to obtaining justice, Association Moiwana, which has collaborated with Moiwana ’86 since the attack. In this way, the survivors first tried, in coordination with Moiwana ’86, to obtain justice using domestic options; however, as soon as they realized it was not possible on that level, they decided to appeal to the international recourses available to them.

Association Moiwana has members in French Guiana as well as in Suriname. Whenever any important decision is to be taken with regard to the present case, all of Moiwana’s survivors and next of kin are consulted through the efforts of the Association. Thus, the Association conducts regular meetings; in fact, before the public hearing the witness once again met with the Moiwana survivors and next of kin in French Guiana and Suriname.

The witness and Association Moiwana did all that they could to cooperate with the Surinamese government, although during Inspector Gooding’s investigation the internal armed conflict impeded the witness and others from traveling to Paramaribo to talk with Gooding. In fact, the police have never taken a statement from the witness regarding the Moiwana case. After the death of Gooding, many people thought it would not be possible to proceed at all with the investigation.

With regard to the discovery of bodies near Moiwana in 1993, the government never informed the survivors about the final results of its exhumation. Furthermore, the survivors specifically wrote to the State to request an investigation of the massacre, to no avail. Thus, the State has never conducted a sufficient investigation with regard to the occurrences in Moiwana and “we don’t know why they didn’t do it.” The witness stated that “our lives are not valued in the same way by the government in Suriname, since they do not investigate the problems we have.”

After the attack the witness returned with others to document and take pictures of the site. Once they had finished, many began feeling ill; they realized that “things weren’t right, it wasn’t proper, because according to our culture you can’t go back to the place without having arrangements made.” A return is only possible “applying the religious [and] cultural rules.” On the other hand, the survivors need “badly” to live in Moiwana in order “to restore our life.” At

this point, approximately 100 people from Moiwana live in French Guiana; others live in Suriname along the Marowijne River, or in towns such as Moengo or Albina.

A young woman survivor, who was only two years old during the attack, is able to recount what occurred that day in vivid detail because she is “possessed by those occurrences.” The events of that day “burdened [...] the people of Moiwana very, very, very much.” They “lost everything.” The witness explains that he needs the support and help of his family members that were killed. And now, because of the denial of justice they experience, “it is as if we are dying a second time.”

During the difficult flight out of Suriname after the attack, some of the Moiwana survivors were injured and subsequently were admitted to hospitals in French Guiana. The French Guiana authorities, in recognition of their “degree of suffering” have permitted the Moiwana survivors to remain when other Surinamese refugees have been repatriated.

With the massacre, “the government destroyed the cultural tradition [...] of the Maroon communities in Moiwana.” As a result, “justice has to be served,” and the State must recognize responsibility. Furthermore, since the State cannot give back the lives of those killed, compensation should be arranged. Finally, in order to return to their land, which belongs to them according to tradition, the survivors’ safety must be guaranteed.

e) Expert witness: Kenneth M. Bilby, anthropologist

The history of the Eastern Maroons, which includes the N’djuka, Aloekoe and Saramaka communities, extends back to at least the early 18th Century, when their ancestors fled from plantations in other parts of coastal Suriname.

Land is for the N’djuka people an embodiment of their collective identity; it also serves as a repository of their cultural history, as well as the primary source of their subsistence. Furthermore, in N’djuka society a woman must have access to land so that she can fulfill her obligations and function properly within her community.

In order for a N’djuka community to function normally, the members must have a homeland. Even if they travel elsewhere, there are life rites that must be performed at their home village, which permits them to continue to express their continuity as a community. Without a traditional home to return to, the society will disintegrate, because it will be difficult to maintain its cultural integrity and social obligations.

In response to a death in N’djuka society, a whole series of complex religious rites and ceremonies are set into motion, which require between six months and a year to be completely fulfilled. This process is of critical importance because it is fundamental that the dead are honored properly; as a result, the rites demand the largest assembling of people and resources for ceremonial purposes in N’djuka society.

It is extremely important to have possession of the physical remains of the deceased, since the way the corpse is treated in death ceremonies reflects how much the person was respected during his or her life. Moreover, it is necessary that human remains be placed in the burial grounds of the appropriate descent group. On the other hand, in all Maroon societies, the idea of cremation is repugnant; thus, the possibility that the corpses of many Moiwana residents were burned would have been considered very offensive.

If the various rituals are not performed according to the traditional rules, it is considered a moral offense, which will not only anger the spirit of the individual who died, but also may offend other ancestors of the community. This leads to a number of “spiritually-caused illnesses” that

become manifest as actual physical maladies; however, they cannot be healed by conventional or Western means. These illnesses can potentially affect the entire natural lineage, that is, the descent group to which the deceased belonged. These problems and illnesses do not go away on their own, but must eventually be resolved through social and ceremonial means; if not, they will persist through generations.

Considering all of the above, the situation of the Moiwana survivors is “catastrophic” and “unprecedented for the N’djuka people or any Maroon people.” The sheer scale of the number of deaths due to the attack is imposing enough; but the fact that the community cannot even begin the necessary rituals to achieve reconciliation is “difficult to imagine.”

Justice is a central concept in traditional N’djuka society; indeed, one of their primary institutions in daily life is the council meeting, which is the means to resolve conflicts of any nature within the community. The institution has spiritual dimensions as well, since ancestors are believed to partake in council proceedings, which provide their decisions with particular legitimacy. In the context of the Moiwana massacre, traditional values would dictate that this must be dealt with on a collective level; mere individual efforts would not be enough. In order for such a serious problem to be resolved, it requires help from the community as a whole. Indeed, as time goes on and the conflict is not resolved, it will affect more and more people and social groups within the society.

Individuals acquire rights to land at birth by virtue of their membership in a number of descent groups – and each of these groups has its own legal mechanisms that are particular to it, through which these rights are distributed and activated. Land rights in N’djuka society in fact exist on several levels, ranging from rights of the entire ethnic community to those of the individual. Larger territorial land rights are vested in the entire people; these rights are considered to exist in perpetuity and are not alienable. If there were a dispute about a specific boundary, this would be adjudicated after consulting the elders and village chiefs. According to their tradition and customary law then, although the Moiwana residents have not occupied their land for at least 18 years, they would maintain rights to that area.

Nevertheless, in general there is no State recognition of the traditional customary law among the Maroons; it has existed over the centuries as an autonomous, de facto system. Only some minor aspects are recognized, such as local officials within the communities.

The expert witness had the opportunity in December 1986 to interview refugees in French Guiana who had recently fled from Moiwana. He reported that “they were tremendously distressed; they were in shock; they were disoriented.” In fact, many that he came in contact with were unable to speak at all. Not only were they traumatized, but they were also often physically exhausted after running for days in the forest.

Finally, the expert witness explained that the traditional N’djuka system of customary law contemplates various measures to remedy offenses, such as public apologies and ceremonies on the one hand, and material compensation on the other. An adequate reparations scheme in this case would demand coming to an agreement satisfactory to the N’djuka people; that is, providing measures in accord with their own customary law and traditions. Certainly, it would be extremely important for the State to create the conditions to guarantee their safe return to Moiwana. To accomplish a return, however, the first critical step would be an investigation of the events occurring on November 29, 1986. The survivors need to know why the deaths occurred and how the perpetrators will be held responsible.

### C) ASSESSMENT OF THE EVIDENCE

### Documentary evidence

81. In this case, as in others, [FN12] the Court admits the probative value of those documents presented in timely fashion by the parties, in accordance with Article 44 of the Rules of Procedure, and those documents produced at the request of the Court, pursuant to Article 45 of the Rules of Procedure, when the authenticity of said evidence was not challenged or questioned.

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[FN12] Cf. Case of Caesar, *supra* note 10, para. 46; Case of the Serrano-Cruz Sisters, *supra* note 9, para. 37; and Case of Lori Berenson-Mejía, *supra* note 10.

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82. Regarding the affidavit rendered by Thomas S. Polimé, expert witness proposed by the Commission (*supra* paragraph 79), the Court rules that it is admissible, insofar as it is in conformity with the President's Order of August 5, 2004.

83. Suriname contended that "several of the annexes submitted by the Commission are not relevant in this case," and argued that the Court's jurisdiction "does not encompass the issues" presented by said annexes. In this regard, the State only cited with specificity the Commission's annex 29. With respect to the State's objection, the Court reiterates what it asserted in its "Previous Considerations" at paragraph 70 of the instant judgment – namely, that it has properly taken into account certain facts that occurred before the State's recognition of the Court's competence only to place into the appropriate context those alleged violations over which the Tribunal actually exercises jurisdiction.

### Testimonial evidence

84. With respect to the declarations rendered by the alleged victims during the public hearing (*supra* paragraphs 86(b) – 86(d)), the Court admits them insofar as they are in conformity with the President's Orders of August 5 and 23, 2004 (*supra* paragraphs 18 and 19). In this regard, because the alleged victims have a direct interest in the case, those declarations cannot be evaluated in isolation, but rather within the context of the entire corpus of evidence submitted in the instant proceedings. Thus, as it has held in similar cases, the Court considers those declarations to be of assistance inasmuch as they can provide information on the alleged violations that may have been committed and their consequences. [FN13]

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[FN13] Cf. Case of Caesar, *supra* note 10, para. 47; Case of the Serrano-Cruz Sisters, *supra* note 9, para. 40 and 45; and Case of Lori Berenson-Mejía, *supra* note 10, para. 78.

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85. Regarding the other testimony received during the public hearing (*supra* paragraph 21), the Court rules that it is admissible, insofar as it is in conformity with the aforementioned Orders of August 5 and 23, 2004.

## VIII. PROVEN FACTS

86. Following its analysis of the documentary evidence and testimony, as well as the statements of the Commission, the representatives, and the State over the course of the proceedings, the Court finds that the following facts have been proven:

The N'djuka Society of Suriname

a) An introduction

86(1). During the European colonization of present-day Suriname in the 17th Century, Africans were forcibly taken to the region and used as slaves on the plantations. Many of these Africans, however, managed to escape to the rainforest areas in the eastern part of Suriname's present national territory, where they established new and autonomous communities; these individuals came to be known as Bush Negroes or Maroons. Eventually, six distinct groups of Maroons emerged: the N'djuka, the Matawai, the Saramaka, the Kwinti, the Paamaka, and the Boni or Aluku. [FN14]

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[FN14] Cf. affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, p. 690); and testimony of Kenneth M. Bilby delivered before the Inter-American Court on September 9, 2004.

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86(2). These six communities individually negotiated peace treaties with the colonial authorities. The N'djuka people signed a treaty in 1760 that established their freedom from slavery, a century before slavery was formally abolished in the region. In 1837, this treaty was renewed; the terms of the agreement permitted the N'djuka to continue to reside in their settled territory and determined the boundaries of that area. The Maroons generally – and the N'djuka in particular – consider these treaties still to be valid and authoritative with regard to their relationship with the State, despite the fact that Suriname secured its independence from the Netherlands in 1975. [FN15]

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[FN15] Cf. affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, pp. 690 – 692).

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86(3). The N'djuka community, which consists of approximately 49,000 members, is organized in clans that are dispersed among several villages within the community's traditional territory. The matrilineal kinship system serves as the basic organizing principle of the society and influences every aspect of life: relationships, settlement patterns, land tenure and the division of political and religious functions. Leadership positions, including those of the paramount chief, the Gaanman, are inherited through the matrilineal line. [FN16]

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[FN16] Cf. affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, pp. 692 and 693); and testimony of Kenneth M. Bilby delivered before the Inter-American Court on September 9, 2004.

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86(4). The N'djuka are distinct from other Maroon peoples of Suriname: they have their own language, history, as well as cultural and religious traditions. Furthermore, other Maroon populations and the indigenous community of the region, the Amerindians, respect the boundaries of the traditional N'djuka lands, which extend along the Tapanahoni and Cottica Rivers. [FN17]

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[FN17] Cf. affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, p. 693).

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86(5). Although individual members of indigenous and tribal communities are considered natural persons by Suriname's Constitution, the State's legal framework does not recognize such communities as legal entities. [FN18] Similarly, national legislation does not provide for collective property rights. [FN19]

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[FN18] Cf. Fact recognized by the State (case file on preliminary objections and possible merits, reparations and costs, vol. VI, pp. 1428 – 1512).

[FN19] Cf. Fact recognized by the State (case file on preliminary objections and possible merits, reparations and costs, vol. VI, pp. 1428 – 1512).

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b) Aspects of N'djuka culture relevant to the instant case

86(6). The N'djuka community's relationship to its traditional land is of vital spiritual, cultural and material importance. In order for the culture to maintain its integrity and identity, its members must have access to their homeland. Land rights in N'djuka society exist on several levels, ranging from rights of the entire ethnic community to those of the individual. Larger territorial land rights are vested in the entire people, according to N'djuka custom; community members consider such rights to exist in perpetuity and to be inalienable. [FN20]

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[FN20] Cf. testimony of Kenneth M. Bilby delivered before the Inter-American Court on September 9, 2004; testimony of Andre Ajintoena delivered before the Inter-American Court on September 9, 2004; and affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, pp. 692 and 693).

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86(7). The N'djuka have specific rituals that must be precisely followed upon the death of a community member. A series of religious ceremonies must be performed, which require between six months and one year to be completed; these rituals demand the participation of more community members and the use of more resources than any other ceremonial event of N'djuka society. [FN21]

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[FN21] Cf. testimony of Kenneth M. Bilby delivered before the Inter-American Court on September 9, 2004; testimony of Antonia Difienco delivered before the Inter-American Court on September 9, 2004; and affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, pp. 697, 698 and 717).

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86(8). It is extremely important to have possession of the physical remains of the deceased, as the corpse must be treated in a specific manner during the N'djuka death rituals and must be placed in the burial ground of the appropriate descent group. Only those who have been deemed evil do not receive an honorable burial. Furthermore, in all Maroon societies, the idea of cremation is considered very offensive. [FN22]

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[FN22] Cf. testimony of Kenneth M. Bilby delivered before the Inter-American Court on September 9, 2004; testimony of Antonia Difienco delivered before the Inter-American Court on September 9, 2004; testimony of Erwin Willemdam delivered before the Inter-American Court on September 9, 2004; and affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, p. 697).

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86(9). If the various death rituals are not performed according to N'djuka tradition, it is considered a moral transgression, which will not only anger the spirit of the individual who died, but may also offend other ancestors of the community. This leads to a number of "spiritually-caused illnesses" that become manifest as actual physical maladies and can potentially affect the entire natural lineage. The N'djuka understand that such illnesses are not cured on their own, but rather must be resolved through cultural and ceremonial means; if not, the conditions will persist through generations. [FN23]

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[FN23] Cf. testimony of Kenneth M. Bilby delivered before the Inter-American Court on September 9, 2004; testimony of Antonia Difienco delivered before the Inter-American Court on September 9, 2004; testimony of Andre Ajintoena delivered before the Inter-American Court on September 9, 2004; and affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, pp. 720 and 721).

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86(10). Justice and collective responsibility are central tenets within traditional N'djuka society. If a community member is wronged, the next of kin – which includes all members of his or her matrilineage – are obligated to avenge the offense committed. If that relative has been killed, the N'djuka believe that his or her spirit will not be able to rest until justice has been accomplished. While the offense goes unpunished, the angry spirits of the dead may torment their living next of kin. [FN24]

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[FN24] Cf. testimony of Kenneth M. Bilby delivered before the Inter-American Court on September 9, 2004; testimony of Antonia Difienjo delivered before the Inter-American Court on September 9, 2004; testimony of Andre Ajintoena delivered before the Inter-American Court on September 9, 2004; testimony of Erwin Willemdam delivered before the Inter-American Court on September 9, 2004; and affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, pp. 699, 711 and 719 – 721).

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c) The settlement of Moiwana Village

86(11). Moiwana Village was settled by N'djuka clans late in the 19th Century. By 1986, the ten camps that formed the village stretched along approximately four kilometers of the Paramaribo-Albina road in eastern Suriname. The community's traditional hunting, farming and fishing territory extended for tens of kilometers into the forest on either side of that road. [FN25]

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[FN25] Cf. affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, pp. 702 and 703).

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Suriname's Internal Conflict

a) An introduction

86(12). On February 25, 1980 Desire Bouterse led a violent coup of Suriname's young democratic government and established a military regime that would commit gross and systematic human rights violations. In 1986 an armed opposition force known as the Jungle Commando began operating in the eastern part of the country, attacking military installations in the area. Many of the Jungle Commando's members – including their leader, Ronnie Brunswijk – were Maroon. [FN26]

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[FN26] Cf. Amnesty International Report, Suriname: Violations of Human Rights. September 1987. (exhibits to the application, vol. II, exhibit 16, p. 281); and U.N. Economic and Social Council. Summary of Arbitrary Executions. E/CN.4/1988/22. Report by the Special Rapporteur, Mr. Amos S. Wako, pursuant to Economic and Social Council Resolution 1987/60 of 19 January 1988 (exhibits to the application, vol. II, exhibit 19, p. 358).

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86(13). That same year, the national army responded to the Jungle Commando's aggressions by carrying out extensive military actions in the eastern region of Suriname. From 1986 to 1987, at least 200 civilians were killed during army operations; most of these victims were Maroon villagers. During this same time period, approximately 15,000 persons fled the combat zone to the capital city, Paramaribo, and another 8,500 escaped to French Guiana. [FN27] Although some 1,000 Amerindians fled the area, the majority of the displaced were Maroons, representing more than one third of that ethnic group's total population. [FN28]

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[FN27] Cf. Inter-American Commission on Human Rights. Annual Report 1986-1987 dated September 22, 1987, Chapter IV: Political Rights, Suriname. OEA/Ser.L/V/II.71 doc.9 rev.1. (exhibits to the application, vol I, exhibit 9, pp. 263-265).

[FN28] Cf. U.N. Economic and Social Council. Summary of Arbitrary Executions. E/CN.4/1988/22 Report by the Special Rapporteur, Mr. Amos S. Wako, pursuant to Economic and Social Council Resolution/60 of 19 January 1988 (exhibits to the application, vol. II, exhibit 19, p. 358).

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86(14). Suriname returned to a civil government after the elections of November 1987; however, the military once again seized power in the country in December 1990. Although the State held democratic elections the following year, the military continued to exert substantial influence on national society throughout that decade. [FN29]

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[FN29] Fact recognized by the State in its answer to the application (case file from preliminary objections, and possible merits, reparations and costs, vol. II, pp. 345 – 346). Cf. Inter-American Commission on Human Rights. Annual Report 1989-1990 dated May 17, 1990, Chapter IV: Situation on Human Rights in Several States, Suriname. OEA/Ser.L/V/II.77 doc.7 rev.1 (exhibits to the application, vol. I, exhibit 11, p. 223); and Inter-American Commission on Human Rights. Annual Report 1990-1991 dated February 22, 1991, Chapter IV: Situation on Human Rights in Several States, Suriname. OEA/Ser.L/V/II.79 doc.12 rev.1 (exhibits to the application, vol. I, exhibit 12, p. 229).

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b) The 1986 attack on Moiwana Village and its consequences

86(15). On November 29, 1986 a military operation was conducted at Moiwana Village. State agents and collaborators killed at least 39 defenseless community members, including infants, women and the elderly, and wounded many others. Furthermore, the operation burned and destroyed Village property and forced survivors to flee. [FN30]

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[FN30] Fact recognized by the State before the Inter-American Court during the public hearing of September 9, 2004. Cf. testimony of Antonia Difenjo delivered before the Inter-American

Court on September 9, 2004; testimony of Andre Ajintoena delivered before the Inter-American Court on September 9, 2004; testimony of Erwin Willemdam delivered before the Inter-American Court on September 9, 2004; affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, pp. 705 – 706); and U.N. Economic and Social Council. Summary or Arbitrary Executions. E/CN.4/1988/22. Report by the Special Rapporteur, Mr. Amos S. Wako, pursuant to Economic and Social Council Resolution 1987/60 of 19 January 1988 (exhibits to the application, vol. II, exhibit 19, p. 358).

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86(16). The following Moiwana community members died during the attack of November 29, 1986:

- 1 Celita Ajintoena
- 2 Cherita Ajintoena
- 3 Eric (Manpi) Ajintoena
- 4 Iwan Ajintoena
- 5 Kathleen Ajintoena
- 6 Magdalena Ajintoena
- 7 Olga Ajintoena
- 8 Patrick Ajintoena
- 9 Sonny Waldo Ajintoena
- 10 Stefano Ajintoena
- 11 Albert Apinsa
- 12 Alice Yvonne Apinsa
- 13 Jenifer Asaiti
- 14 Jurgen Asaiti
- 15 Margo Asaiti
- 16 Elisabeth Asaitie or Elisabeth Asaiti
- 17 Johan Benjamin
- 18 Josephine Bron
- 19 Ma-betoe Bron
- 20 Steven Bron
- 21 Dennis Difijon
- 22 Cequita Dogodoe or Chequita Dogodoe
- 23 Ciska J. Dogodoe
- 24 Patricia Dogodoe
- 25 Theresia Dogodoe
- 26 Irene Kodjo
- 27 Jurmain Kodjo
- 28 Marilva Kodjo or Marilwa Kodjo
- 29 Remeo Kodjo
- 30 Rinia Majkel
- 31 Babaja Mijns
- 32 Betsie Misidjan
- 33 Difienjo Misidjan or Difiinjo Misidjan

- 34 Iries Misidjan
- 35 Judith Misidjan
- 36 Mado Misidjan or Nanalibie Sadow Misidjan
- 37 Ottolina M. Misidjan
- 38 Sajobegi Misidjan
- 39 Sylvano Misidjan

86(17). The following Moiwana community members survived the events of November 29, 1986:

- 1 Hesdy Adam or Hesdie Adam
- 2 Johiena Adam
- 3 Marlene Adam
- 4 Marlon Adam
- 5 Petrus Adam
- 6 Antonius Agemi
- 7 A. Andro Ajintoena
- 8 Aboeda Ajintoena
- 9 Andre Ajintoena
- 10 Atema Ajintoena
- 11 Cynthia Ajintoena
- 12 Doortje Ajintoena
- 13 Eddy Ajintoena
- 14 Franklin Ajintoena
- 15 Gladys Ajintoena
- 16 Jacoba Ajintoena
- 17 Juliana Ajintoena
- 18 Letitia Ajintoena or Lettia Ajintoena
- 19 Maikel Ajintoena
- 20 Marietje Ajintoena or Maritje Ajintoena
- 21 Maureen Ajintoena
- 22 Miranda Ajintoena
- 23 Ottolina Ajintoena
- 24 P. Joetoe Ajintoena
- 25 S. Marciano Ajintoena
- 26 Majo Ajintoena
- 27 Miraldo Allawinsi or Miraldo Misidjan
- 28 Richard Allawinsi
- 29 Roy Allawinsi
- 30 Alphons Apinsa
- 31 Anika M. Apinsa
- 32 Erna Apinsa
- 33 Gwhen D. Apinsa
- 34 Meriam Apinsa
- 35 Sylvia Apinsa
- 36 Dannie Anna Asaiti
- 37 Hermine Asaiti

- 38 Erwien Awese
- 39 Cyriel Bane
- 40 Tjamaniesting Bron
- 41 Jacqueline Bron or Jacqueline Bron
- 42 Mena Bron
- 43 Rosita Bron
- 44 Sawe Bron or Sawe Djang Abente Bron
- 45 Rudy Daniel
- 46 Marlon Difienco or Michel Difienco
- 47 Antonia Difienco
- 48 Diana Difienco
- 49 Martha Difienco
- 50 M. Milton Difienco
- 51 Patricia Difienco
- 52 Petra Difienco
- 53 Anelies Djemesie or Annelies Jemessie
- 54 Gladys Djemesie
- 55 Glenn Djemesie
- 56 Ligia Djemesie
- 57 Alfons Dogodoe
- 58 Benita Dogodoe
- 59 Benito Dogodoe
- 60 Cynthia Dogodoe
- 61 D. Silvana Dogodoe
- 62 Hellen Dogodoe
- 63 R. Patrick Dogodoe
- 64 Richenel Dogodoe
- 65 S. Claudia Dogodoe
- 66 Z. Jose Dogodoe
- 67 Johannes Jajo
- 68 Cornelly Madzy James
- 69 Humprey James or Humphrey James
- 70 John James
- 71 Romeo James
- 72 Adaja Kago
- 73 Manfika Kamee
- 74 Johannes Kanape
- 75 Agwe Kastiel
- 76 Alexander Kate
- 77 Johan Laurence
- 78 Martha Makwasie
- 79 Benito Martinies
- 80 Chequita Martinies
- 81 Marciano Martinies
- 82 Petrus Martinies
- 83 Rodney Martinies

- 84 S. Ruben Martinies
- 85 Rinia Meenars
- 86 Andre Misidjan
- 87 Awena Misidjan
- 88 Beata Misidjan or Beata Misdjan
- 89 Carla Misidjan
- 90 Edmundo Misidjan or Edmundo Misdjan
- 91 Jofita Misidjan
- 92 Ludwig Misidjan
- 93 Malai Misidjan
- 94 Marlon M. Misidjan
- 95 Mitori Misidjan
- 96 Reguillio Misidjan or Reguillio Misdjan
- 97 Rudy Misidjan
- 98 Theodorus Misidjan
- 99 Wilma Misidjan
- 100 Anoje M. Misidjan or Anoje M. Misiedjan
- 101 Sandra Misidjan or Sandra Misiedjan
- 102 Apoer Lobbi Misiedjan or Apoerlobbi Misidjan
- 103 Antonius Misiedjan or Misidjan Antonius
- 104 John Misiedjan or John Misidjan
- 105 Johnny Delano Misiedjan or Johny Delano Misidjan
- 106 Sadijeni Moiman
- 107 Jozef Toeli Pinas or Toeli-Jozef Pinas
- 108 Leonie Pinas
- 109 Felisie Sate
- 110 Alma O. Sjonko
- 111 Annelies Sjonko or Annalies Sjonko
- 112 Cornelia Sjonko
- 113 Inez Sjonko or Aines Sjonko
- 114 Jeanette E. Sjonko
- 115 R. Sjonko
- 116 Carlo Sjonko
- 117 Isabella Sjonko
- 118 Johan Sjonko
- 119 Lothar Sjonko
- 120 Natashia Sjonko
- 121 Nicolien Sjonko
- 122 Pepita M.J. Solega
- 123 Antoon Solega
- 124 A. Dorothy Solega
- 125 H. Roel Solega
- 126 K. Delano Solega
- 127 M. Sellely Solega or M. Seclely Solega
- 128 Awese Lina L. Toetoe
- 129 Jozef Toetoe or Jozef Toeboe

86(18). Many of the Village residents escaped to the forest, where they endured harsh conditions, and eventually arrived at refugee camps in French Guiana. Others became internally displaced: some fled to larger towns in the interior of Suriname, and others to the capital, Paramaribo. These displaced individuals, both in French Guiana and in Suriname, have suffered poverty and deprivation since their flight from Moiwana Village, and have been unable to practice their customary means of subsistence and livelihood. [FN31]

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[FN31] Cf. testimony of Kenneth M. Bilby delivered before the Inter-American Court on September 9, 2004; testimony of Antonia Difienco delivered before the Inter-American Court on September 9, 2004; testimony of Andre Ajintoena delivered before the Inter-American Court on September 9, 2004; and affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, pp. 711, 712, and 714).

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86(19). Moiwana Village and its surrounding traditional lands have been abandoned since the 1986 attack. Some community members have subsequently visited the area, but without the intention of staying there permanently. [FN32] (infra paragraph 86(43)).

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[FN32] Cf. testimony of Antonia Difienco delivered before the Inter-American Court on September 9, 2004; testimony of Andre Ajintoena delivered before the Inter-American Court on September 9, 2004; testimony of Erwin Willemdam delivered before the Inter-American Court on September 9, 2004; and affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, p. 724).

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86(20). The Moiwana community members have been unable to recover the remains of their relatives killed during the attack; in consequence, it has been impossible for them to provide the deceased with the appropriate death rites as required by fundamental norms of N'djuka culture (supra paragraphs 86(7) – 86(9)). [FN33]

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[FN33] Cf. testimony of Kenneth M. Bilby delivered before the Inter-American Court on September 9, 2004; testimony of Antonia Difienco delivered before the Inter-American Court on September 9, 2004; testimony of Andre Ajintoena delivered before the Inter-American Court on September 9, 2004; testimony of Erwin Willemdam delivered before the Inter-American Court on September 9, 2004; and affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, p. 717).

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c) Surinamese refugees in French Guiana

86(21). In 1991, arrangements were made – though the assistance of the United Nations High Commissioner for Refugees (hereinafter “UNHCR”) – for the thousands of Surinamese refugees, the great majority of them Maroons, to participate in national elections; however, few Maroons participated. [FN34]

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[FN34] Cf. Inter-American Commission on Human Rights. Annual Report 1990-1991 dated February 22, 1991, Chapter IV: Situation on Human Rights in Several States, Suriname. OEA/Ser.L/V/II.79 doc.12 rev.1 (exhibits to the application, vol. I, exhibit 12, p. 229); and Inter-American Commission on Human Rights. Annual Report 1991 adopted February 14, 1992, Chapter IV: Situation on Human Rights in Several States, Suriname. OEA/Ser.L/V/II.81 doc.6 rev.1 (exhibits to the application, vol. I, exhibit 13, p. 236).

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86(22). Also in 1991, the refugees presented their conditions for repatriation to Suriname before a commission comprised of representatives from the UNHCR and the governments of Suriname and French Guiana. Those requirements, which were never acted upon by said commission, demanded that Suriname ensure their safety and freedom, as well as that those responsible for having killed civilians during the internal conflict would be investigated and prosecuted. [FN35]

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[FN35] Cf. affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, p. 708).

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86(23). When the official refugee camps in French Guiana were closed in 1992, the French government allowed a certain population to remain. The great majority of the members of that group were Moiwana community members, who refused to return to Suriname without guarantees for their safety. The French government granted said individuals renewable permits to reside in French Guiana; in 1997, they were provided with five or ten-year residency permits. [FN36]

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[FN36] Cf. affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, p. 709); and testimony of Andre Ajintoena delivered before the Inter-American Court on September 9, 2004.

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86(24). In 1993, a minority of the Moiwana community members returned to Suriname, and were placed in what was designed to be a temporary reception center in Moengo. Many remain in the reception center to this day, as they have not been provided with a suitable alternative. [FN37]

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[FN37] Cf. affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, p. 711).

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## Investigation of the 1986 Attack on Moiwana Village

### a) Official efforts

86(25).The civilian police began an investigation into the November 29, 1986 events at Moiwana Village in 1989, over two years after the attack, and more than a year following the State's accession to the American Convention. During March and April of 1989, Inspector Herman Gooding, who was in charge of this investigation, questioned several suspects and arrested at least two individuals, Frits Moesel and Orlando Swedo. [FN38] Messrs. Moesel and Swedo declared to the police that they had been trained and armed by the State's national army and then had participated in the events of November 29, 1986. [FN39]

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[FN38] Cf. case file on the police investigation of the Moiwana case directed by Inspector Gooding (exhibits to the State's answer to the application, vol. I, exhibit 20, pp. 11-18).

[FN39] Cf. case file on the police investigation of the Moiwana case directed by Inspector Gooding (exhibits to the State's answer to the application, vol. I, exhibit 20, pp. 11-18).

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86(26).Shortly after Mr. Swedo was placed in state custody, a fully-armed contingent of military police arrived at the civilian police station and forcibly obtained his release. [FN40]

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[FN40] Cf. testimony of Stanley Rensch delivered before the Inter-American Court on September 9, 2004; newspaper article titled "Sweedo leer een vrij man," published in the Weekkrant Suriname, May 6 – 12, 1989 (exhibits to the application, vol. II, exhibit 27, pp. 458 – 459); newspaper article titled "Arrestaties in verband met bloedbad Moiwana," published in the Weekkrant Suriname, April 22 – 28, 1989 (exhibits to the application, vol. II, exhibit 27, pp. 460 – 461); and newspaper article titled "President ontluisterd; holding regering uiterst slap," published in the Weekkrant Suriname, April 29, 1989 (exhibits to the application, vol. II, exhibit 27, pp. 462 – 463).

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86(27).Mr. Swedo was taken to military barracks where Army Commander Bouterse had convened a meeting. There, Mr. Bouterse issued a statement to the press, by which he confirmed the following: a) that the operation in Moiwana Village was a military action which he himself had ordered; b) that he would not allow military operations to be investigated by the civilian police; and c) that he had required the release of Mr. Swedo. [FN41]

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[FN41] Cf. testimony of Stanley Rensch delivered before the Inter-American Court on September 9, 2004; newspaper article titled "Rensch: Onderzoek massamoorden in Oost-

Suriname,” published in *Algemeen Dagblad*, May 25, 1993 (exhibits to the application, vol. II, exhibit 27, pp. 464 – 466); and newspaper article titled “Wat zich te Moi Wana voltrok,” published in *De Ware Tijd*, May 28, 1993 (exhibits to the application, vol. II, exhibit 27, pp. 467 – 468).

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86(28). On August 4, 1990, Inspector Gooding, following his meeting with the Deputy Commander of the military police, was murdered. His death has not been conclusively investigated. [FN42]

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[FN42] Fact recognized by the State in its answer to the application (case file from preliminary objections, and possible merits, reparations and costs, vol. II, p. 398). Cf. testimony of Stanley Rensch delivered before the Inter-American Court on September 9, 2004.

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86(29). Some of the police investigators who collaborated with Inspector Gooding faced life-threatening circumstances and, consequently, fled Suriname. [FN43]

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[FN43] Cf. testimony of Stanley Rensch delivered before the Inter-American Court on September 9, 2004; and Inter-American Commission on Human Rights. Annual Report 1990-1991 dated February 22, 1991, Chapter IV: Situation on Human Rights in Several States, Suriname. OEA/Ser.L/V/II.79 doc.12 rev.1 (exhibits to the application, vol. I, exhibit 12, p. 229).

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86(30). On December 10, 1993, Frits Moesel – who had confessed to police that he had led the attack on Moiwana village – was killed, allegedly due to a hunting accident. [FN44]

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[FN44] Fact recognized by the State in its answer to the application (case file on preliminary objections and possible merits, reparations and costs, vol. II, p. 398). Cf. official report from interviews with Harry Moesjoekoere (exhibits to the State’s answer to the application, vol. III, exhibit 26, p. 8).

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86(31). On May 22, 1993, Moiwana ’86, an organization representing the alleged victims in the instant case (supra paragraphs 2 and 5), discovered a mass grave near Moiwana Village, in the District of Marowijne, and two days later notified the Office of the Attorney General. The grave site was then visited on two occasions – May 29 and June 9, 1993 – by military and civilian police, a pathologist and Moiwana ’86. The team uncovered human remains, which were taken to Paramaribo for further analysis. Subsequently, state authorities reported only that the remains corresponded to five to seven adults and two to three children; the identification of the corpses or further information on the grave site in general have not been provided by the State. [FN45]

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[FN45] Cf. document titled *The Moiwana Graves*, June 19, 1993 (exhibits to the application, vol. II, exhibit 25, pp. 448 – 452); communications addressed to Suriname’s Attorney General by Moiwana ’86 on May 24, June 28, and August 23, 1993 (exhibits to the application, vol. II, exhibit 24, pp. 442 – 447); 10 reports on the autopsies performed by the forensic pathologist Dr. M.A. Vrede on the mortal remains found in the excavations (exhibits to the brief filing preliminary objections and answering the application, vol. III, exhibit 29, p. 4); testimony of Stanley Rensch delivered before the Inter-American Court on September 9, 2004; and affidavit of expert Thomas Polimé, sworn on August 20, 2004 (case file from preliminary objections, and possible merits, reparations and costs, vol. III, p. 718).

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86(32). On December 19, 1995, the National Assembly of Suriname adopted a motion requesting the Executive Branch “to instigate an immediate investigation” into human rights violations committed during the military regime. [FN46]

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[FN46] Cf. Motion by the Parliament of Suriname on the Investigation of Human Rights Abuses, December 19, 1995 (case file on preliminary objections and possible merits, reparations and costs, vol. II, p. 441).

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86(33). As of the date of the present judgment, only the initial investigative steps described above have been conducted by the State. Thus, neither the events of November 29, 1986, nor the numerous incidents of obstruction of justice – including the forcible liberation of Orlando Swedo (supra paragraph 86(26)) and the death of Inspector Gooding (supra paragraph 86(28)) – have been properly investigated. In this way, not a single individual has been convicted for the attack, and the Moiwana community members have not received any form of reparation for the deaths or for being forced from their traditional lands. [FN47]

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[FN47] Cf. affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, p. 713); testimony of Antonia Difienjo delivered before the Inter-American Court on September 9, 2004; testimony of Andre Ajintoena delivered before the Inter-American Court on September 9, 2004; and testimony of Stanley Rensch delivered before the Inter-American Court on September 9, 2004.

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b) Efforts of the alleged victims

86(34). The alleged victims and the organizations acting on their behalf, Moiwana ’86 and Association Moiwana, have repeatedly sought a criminal investigation into the attack on Moiwana Village. For example, on May 24, 1993, Moiwana ’86 reported the discovery of the grave site (supra paragraph 86(31)) to the Office of the Attorney General and urged an investigation of the attack and the prosecution of those responsible. On August 23, 1993, Moiwana ’86 directed another letter to the Attorney General that requested information on the state of the criminal investigation of the attack on Moiwana Village. [FN48]

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[FN48] Cf. communications addressed to Suriname’s Attorney General from Moiwana ’86 on May 24, June 28, and August 23, 1993 (exhibits to the application, vol. II, exhibit 24, pp. 442 – 447); newspaper article titled “Sweedo leer een vrij man,” published in the Weekkrant Suriname, May 6 – 12, 1989 (exhibits to the application, vol. II, exhibit 27, pp. 458 – 459); newspaper article titled “Arrestaties in verband met bloedbad Moiwana,” published in the Weekkrant Suriname, April 22 – 28, 1989 (exhibits to the application, vol. II, exhibit 27, pp. 460 – 461); newspaper article titled “President ontluisterd; holding regering uiterst slap,” published in the Weekkrant Suriname, April 29, 1989 (exhibits to the application, vol. II, exhibit 27, pp. 462 – 463); newspaper article titled “Rensch: Onderzoek massamoorden in Oost-Suriname,” published in Algemeen Dagblad, May 25, 1993 (exhibits to the application, vol. II, exhibit 27, pp. 464 – 466); newspaper article titled “Wat zich te Moi Wana voltrok,” published in De Ware Tijd, May 28, 1993 (exhibits to the application, vol. II, exhibit 27, pp. 467 – 468); testimony of Antonia Difienjo delivered before the Inter-American Court on September 9, 2004; and testimony of Stanley Rensch delivered before the Inter-American Court on September 9, 2004.

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86(35). In 1996, following the National Assembly’s motion (supra paragraph 86(32)), Moiwana ’86 filed two formal requests with the Attorney General for a proper investigation into the attack. Having received no response, Moiwana ’86 submitted another request to the President of the Court of Justice. On August 21, 1996, the President of the Court of Justice instructed the Attorney General to submit to that Court, pursuant to Article 4 of the Code of Criminal Procedure, a report on the matter, to be accompanied by any available police files. Subsequently, in response to a follow-up inquiry from Moiwana ’86, the President of the Court of Justice advised that the Attorney General still had not responded to his request. After yet another communication from Moiwana ’86, the President of the Court of Justice, on February 26, 1997, reiterated his request for information on the investigation to the Office of the Attorney General. [FN49]

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[FN49] Cf. communications addressed from the President of the Court of Justice to the Attorney General, dated August 21, 1996, and to the Director of Moiwana ’86, dated October 2, 1996 and February 26, 1997 (exhibits to the application, vol. II, exhibit 26 and case file from preliminary objections, and possible merits, reparations and costs, vol. II, pp. 442 – 444); and testimony of Stanley Rensch delivered before the Inter-American Court on September 9, 2004.

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86(36). Association Moiwana has collaborated with Moiwana ’86 for years to obtain justice for the community. Whenever any important decision is to be taken with regard to the instant case, all of the survivors and next of kin from Moiwana Village – whether located in Suriname or in French Guiana – are consulted through the efforts of Association Moiwana. [FN50]

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[FN50] Cf. affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, p. 711); and testimony of Andre Ajintoena delivered before the Inter-American Court on September 9, 2004.

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86(37). Those who collaborated with Moiwana '86 to obtain justice for the 1986 attack and related human rights abuses were often threatened and harassed; as a result, some found it necessary to leave Suriname for their own safety. Stanley Rensch, founder of Moiwana '86, survived an assassination attempt and was arbitrarily arrested four times; eventually, he also sought refuge abroad. [FN51]

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[FN51] Cf. testimony of Stanley Rensch delivered before the Inter-American Court on September 9, 2004; and Inter-American Commission on Human Rights. Annual Report 1989-1990 dated May 17, 1990, Chapter IV: Situation on Human Rights in Several States, Suriname. OEA/Ser.L/V/II.77 doc.7 rev.1 (exhibits to the application, vol. I, exhibit 11, p. 226).

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86(38). The Moiwana community members have not pursued civil remedies in Suriname with regard to the events of November 29, 1986. [FN52]

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[FN52] Fact recognized by the State in its answer to the application (case file on preliminary objections and possible merits, reparations and costs, vol. II, pp. 369 and 407). Cf. testimony of Antonia Difienjo delivered before the Inter-American Court on September 9, 2004; and testimony of Stanley Rensch delivered before the Inter-American Court on September 9, 2004.

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#### National Legislation Relevant to the Investigation of the 1986 Attack

##### a) The "Amnesty Act 1989"

86(39). On August 19, 1992, the President of Suriname officially promulgated the "Amnesty Act 1989," which grants amnesty to those who committed certain criminal acts, with the exception of crimes against humanity, during the period from January 1, 1985 until August 20, 1992. Crimes against humanity are defined by the statute as "those crimes which according to international law are classified as such." [FN53]

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[FN53] Cf. "Amnesty Act 1989." Statutes of the Republic of Suriname No. 68, August 19, 1992 (exhibits to the application, vol. II, exhibit 28, pp. 476 – 483).

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86(40). Moiwana '86 sought to prevent the enactment of the "Amnesty Act 1989" by seeking an injunction in the First District Court in Paramaribo, arguing that the Act would violate "the Constitution of the Republic of Suriname and [...] the conventions ratified by the Republic of

Suriname in respect of human rights.” On August 19, 1992, the First District Court issued a judgment by which it refused to grant the “interim injunction” requested. [FN54]

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[FN54] Cf. Judgment of the First District Court issued on August 19, 1992 (case file on preliminary objections and possible merits, reparations and costs, vol. V, pp. 1226 – 1230).

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b) Amendment to the statute of limitations for certain crimes

86(41). On November 16, 2004, the President of Suriname officially promulgated an amendment to the Penal Code, which provides that the “right to prosecute does not expire” if the matter in question concerns, inter alia, a “crime against humanity” or a “war crime.” [FN55]

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[FN55] Cf. “Act of 16 November 2004” (case file on preliminary objections and possible merits, reparations and costs, vol. VI, pp. 1301 – 1306).

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Suffering and Fear of the Moiwana Community Members

86(42). The Moiwana community members have suffered emotionally, psychologically, spiritually and economically, owing to the attack on their village, the subsequent forced separation from their traditional lands, as well as their inability both to honor properly their deceased loved ones and to obtain justice for the events of 1986. [FN56]

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[FN56] Cf. testimony of Kenneth M. Bilby delivered before the Inter-American Court on September 9, 2004; testimony of Antonia Difienco delivered before the Inter-American Court on September 9, 2004; testimony of Andre Ajintoena delivered before the Inter-American Court on September 9, 2004; testimony of Erwin Willemdam delivered before the Inter-American Court on September 9, 2004; and affidavit of expert witness Thomas Polimé, sworn on August 20, 2004 (case file on preliminary objections and possible merits, reparations and costs, vol. III, pp. 713 – 715).

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86(43). The ongoing impunity for the 1986 raid on Moiwana Village and the inability of the community to understand the motives for that attack have generated a deep fear in the members that they may be subject to future aggressions, which is a central factor preventing them from returning to live in their traditional lands. Their permanent return to Moiwana Village, then, is contingent upon the State conducting a complete investigation into the events of 1986; according to the community members, only when justice is accomplished in the case will they be able to appease the angry spirits of their deceased family members, purify their land, and return to permanent residence without apprehension of further hostilities. [FN57]

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[FN57] Cf. testimony of Kenneth M. Bilby delivered before the Inter-American Court on September 9, 2004; testimony of Antonia Difienco delivered before the Inter-American Court on September 9, 2004; testimony of Andre Ajintoena delivered before the Inter-American Court on September 9, 2004; and testimony of Erwin Willemdam delivered before the Inter-American Court on September 9, 2004.

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#### Legal Representation of the Moiwana Community Members

86(44). The Moiwana community members have been represented domestically, as well as before the Inter-American System, by the following three organizations: Moiwana '86, the Forest Peoples Programme, and Association Moiwana. These organizations have requested compensation for the costs in which they have incurred during the instant case's preparation; on the other hand, they have waived all attorney fees. [FN58]

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[FN58] Cf. Expense receipts (case file on preliminary objections and possible merits, reparations and costs, vol. IV, pp. 903 and 924 – 994).

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#### IX. ARTICLE 5 OF THE AMERICAN CONVENTION (RIGHT TO HUMANE TREATMENT) IN RELATION WITH ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS)

##### Arguments of the representatives

87. The representatives claimed that the State violated the right to humane treatment established in Article 5 of the American Convention based on the following considerations:

- a) the alleged victims have all suffered “substantial, severe and protracted mental and moral suffering and anguish,” amounting to a violation of Article 5, which has been proven on the basis of the evidence before the Court and can be presumed as well due to the nature of the underlying violations and prevailing state of impunity in the case;
- b) the alleged victims have suffered ongoing and continuous violations of Article 5 both in their own right as survivors of the massacre and those denied justice, and by virtue of their status as the next of kin of the “39 persons known to have been murdered at Moiwana Village”;
- c) the violations of Article 5 are directly imputable to Suriname due to its responsibility for the massacre; its protracted and ongoing refusal to provide justice to the alleged victims and the resulting state of impunity; and its failure to cooperate in any way with them in their many attempts to clarify the facts, to locate and provide proper burials for the remains of their loved ones and to seek a just closure to their anguish and suffering;
- d) the alleged victims have suffered great anxiety in the knowledge that their failure to obtain justice for those killed has violated fundamental norms and obligations of their society and has “invited the wrath of the spirits of the dead,” which may also inflict suffering upon their children and future generations;

- e) the alleged victims' anguish was made substantially worse in this case due to the State's affirmative obstruction of justice;
- f) the State's failure to investigate the massacre and clarify the facts and motives has also left the alleged victims with a deep sense of uncertainty and fear that the massacre could happen again; and
- g) the alleged victims have also suffered intensely because they have been unable to provide proper burials for their loved ones and because they have had to endure two decades of forcible separation from their traditional land, which is the seat of their culture and spiritual well-being.

#### Arguments of the Commission

88. The Commission did not specifically submit arguments of law regarding the alleged violation of the right established in Article 5 of the American Convention.

#### Arguments of the State

89. The State also did not expressly present arguments of law regarding the alleged violation of the right established in Article 5 of the American Convention.

#### The Court's Assessment

90. Article 5(1) of the American Convention provides that "[e]very person has the right to have his physical, mental, and moral integrity respected."

91. The Court observes that the Commission did not submit arguments regarding the alleged violation of the right protected in Article 5 of the American Convention. Nevertheless, it is now well established in the Tribunal's case law that the representatives may argue violations of the Convention other than those alleged by the Commission, as long as such legal arguments are based upon the facts set out in the application. [FN59] The petitioners are the holders of all of the rights enshrined in the Convention; thus, preventing them from advancing their own legal arguments would be an undue restriction upon their right of access to justice, which derives from their condition as subjects of international human rights law. [FN60] Furthermore, this Court has the competence – based upon the American Convention and grounded in the *iura novit curia* principle, which is solidly supported in international law – to study the possible violation of Convention provisions that have not been alleged in the pleadings submitted before it, in the understanding that the parties have had the opportunity to express their respective positions with regard to the relevant facts. [FN61]

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[FN59] Cf. Case of De la Cruz-Flores. Judgment of November 18, 2004. Series C No. 115, para. 122; Case of the "Juvenile Reeducation Institute." Judgment of September 2, 2004. Series C No. 112, para. 125; and Case of the Gómez-Paquiyaui Brothers . Judgment of July 8, 2004. Series C No. 110, para. 179.

[FN60] Cf. Case of De la Cruz-Flores, *supra* note 59, para. 122; Case of the "Juvenile Reeducation Institute," *supra* note 59, para. 125; and Case of the Gómez-Paquiyaui Brothers, *supra* note 59, para. 179.

[FN61] Cf. Case of the “Juvenile Reeducation Institute,” supra note 59, para. 126.

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92. Turning to the case at hand, the Tribunal decided above that it does not have competence to examine the events of November 29, 1986. Nevertheless, it does exercise jurisdiction over the State’s fulfillment of its obligation to ensure the right to humane treatment, which results in the obligation to investigate possible violations of Article 5 of the Convention.

93. The State’s failure to fulfill this obligation has prevented the Moiwana community members from properly honoring their deceased loved ones and has implicated their forced separation from their traditional lands; both situations compromise the rights enshrined in Article 5 of the Convention. Furthermore, the personal integrity of the community members has been undermined as a result of the obstruction of their persistent efforts to obtain justice for the attack on their village, particularly in light of the N’djuka emphasis upon punishing offenses in a suitable manner. The following analysis will begin with that last point.

a) Obstruction of Moiwana community members’ efforts to obtain justice

94. Despite the many efforts of the Moiwana community members and their legal representatives, as well as clear evidence of the State’s responsibility in the matter, no indication exists that there has been a serious and thorough investigation into the events of November 29, 1986, as shall be discussed in the chapter concerning Articles 8 and 25 of the American Convention (infra paragraphs 139 – 164). Furthermore, the community members have not received any form of reparations for those occurrences (supra paragraph 86(33)). Such a long-standing absence of effective remedies is typically considered by the Court as a source of suffering and anguish for victims and their family members; [FN62] in fact, it has even convinced the community members that the State actively discriminates against them. For example, Antonia Difienjo remarked that “compared to others in the country, [...] we do not have the same rights in Suriname.” Stanley Rensch expressed that there is “insufficient support of the idea [...] that the Maroons deserve the same type of legal protection in the country.”

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[FN62] Cf. Case of the Serrano-Cruz Sisters, supra note 9, paras. 113-115.

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95. Moreover, the ongoing impunity has a particularly severe impact upon the Moiwana villagers, as a N’djuka people. As indicated in the proven facts (supra paragraph 86(10)), justice and collective responsibility are central precepts within traditional N’djuka society. If a community member is wronged, the next of kin – which includes all members of his or her matrilineage – are obligated to avenge the offense committed. If that relative has been killed, the N’djuka believe that his or her spirit will not be able to rest until justice has been accomplished. While the offense goes unpunished, the affronted spirit – and perhaps other ancestral spirits – may torment their living next of kin.

96. In this regard, expert witness Kenneth Bilby asserted that, according to traditional beliefs, while a serious transgression goes unresolved, over time increasing numbers of society members

will be troubled by the spirits of the dead. The witnesses who testified before this Court expressed great fear of those spirits and much remorse that their efforts at justice had not yet succeeded. As Andre Ajintoena stated, it is “essential” to search for justice when someone dies in an unfair way; this obligation “to set things straight,” if not fulfilled, will cause the living as well as the dead to suffer. For these reasons, Mr. Ajintoena established an organization, Association Moiwana, dedicated to promoting an investigation of the 1986 attack; however, owing to the denial of justice community members continue to face, Mr. Ajintoena remarked, “it is as if we are dying a second time.” Thus, not only must the Moiwana community members endure the indignation and shame of having been abandoned by Suriname’s criminal justice system – despite the grave actions perpetrated upon their village – they also must suffer the wrath of those deceased family members who were unjustly killed during the attack.

97. Furthermore, because of the ongoing impunity for the 1986 raid and the inability of the community members to understand the motives for that attack, they suffer deep apprehension that they could once again confront hostilities if they were to return to their traditional lands. Erwin Willemdam testified before the Court that, since the attack, he has driven past Moiwana Village on occasions, but has never stopped: “as long as justice is not served, [...] then we cannot go back to that place to stay.” The testimonial evidence demonstrated that, in order for community members to feel safe enough to take up residence again at Moiwana Village, they must know why the deaths occurred and how the perpetrators will be held responsible by the State.

b) Inability of Moiwana community members to honor properly their deceased loved ones

98. As indicated in the proven facts (supra paragraphs 86(7) – 86(9)), the N’djuka people have specific and complex rituals that must be precisely followed upon the death of a community member. Furthermore, it is extremely important to have possession of the physical remains of the deceased, as the corpse must be treated in a particular manner during the N’djuka death ceremonies and must be placed in the burial ground of the appropriate descent group. Only those who have been deemed unworthy do not receive an honorable burial.

99. If the various death rituals are not performed according to N’djuka tradition, it is considered a profound moral transgression, which will not only anger the spirit of the individual who died, but also may offend other ancestors of the community (supra paragraph 86(9)). This leads to a number of “spiritually-caused illnesses” that become manifest as actual physical maladies and can potentially affect the entire natural lineage (supra paragraph 86(9)). The N’djuka understand that such illnesses are not cured on their own, but rather must be resolved through cultural and ceremonial means; if not, the conditions will persist through generations (supra paragraph 86(9)). In this way, Ms. Difenjo stated that, if the death ceremonies are not performed:

it will burden all the children, also be after ourselves. [...] It is if we do not exist on earth. I mean, that will be the burden. [...] If it is not done properly with those killed, then many things can happen with us [...]. So if it is not taken care of properly for those died, then we are nowhere.

100. Thus, one of the greatest sources of suffering for the Moiwana community members is that they do not know what has happened to the remains of their loved ones, and, as a result, they cannot honor and bury them in accordance with fundamental norms of N'djuka culture. The Court notes that it is understandable, then, that community members have been distressed by reports indicating that some of the corpses were burned at a Moengo mortuary. As Mr. Willemdam stated, “that is one of the worst things that could occur to us, if you burn the body of someone who died.”

c) The separation of community members from their traditional lands

101. The proven facts demonstrate that a N'djuka community's connection to its traditional land is of vital spiritual, cultural and material importance (supra paragraph 86(6)). Indeed, as the expert witnesses Thomas Polimé and Kenneth Bilby commented (supra paragraphs 79 and 80(e)), in order for the culture to preserve its very identity and integrity, the Moiwana community members must maintain a fluid and multidimensional relationship with their ancestral lands.

102. However, Moiwana Village and its surrounding traditional lands have been abandoned since the events of November 29, 1986 (supra paragraph 86(19)). Numerous community members are internally displaced within Suriname and the rest remain to this day as refugees in French Guiana (supra paragraph 86(18)). Unable to practice their customary means of subsistence and livelihood, many, if not all, have suffered poverty and deprivation since their flight from Moiwana Village (supra paragraph 86(18)). Ms. Difiendo testified before the Court that since the attack, her life “has been completely disturbed”; moreover, she feels that the plight of the refugees has been ignored by the State and emphasized that French Guiana “is not [her] place.” Mr. Ajintoena, for his part, stated that they “lost everything” after the events of 1986 and need “badly” to return to their traditional lands in order “to restore [their] lives.” He further testified that, with the attack, “the government destroyed the cultural tradition [...] of the Maroon communities in Moiwana.”

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103. Taking into account the foregoing analysis, the Court concludes that the Moiwana community members have endured significant emotional, psychological, spiritual and economic hardship – suffering to a such a degree as to result in the State's violation of Article 5(1) of the American Convention, in relation to Article 1(1) of that treaty, to the detriment of said community members.

#### X. ARTICLE 22 OF THE AMERICAN CONVENTION (FREEDOM OF MOVEMENT AND RESIDENCE) IN RELATION WITH ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS)

##### Arguments of the representatives

104. Although the representatives did not expressly allege the violation of the right established in Article 22 of the American Convention, they argued the following:

- a) the alleged victims have been deprived of their customary means of subsistence due to their forcible expulsion from their traditional territory and their continuing inability to return; as a result of the foregoing, they live in poverty; and
- b) forcible eviction or involuntary resettlement is prohibited under international law because it does grave and disastrous harm to the basic civil, political, economic, social and cultural rights of both individuals and collectivities. In the case of tribal peoples, forcible eviction completely severs their various relationships with their ancestral lands.

#### Arguments of the Commission

105. Although the Commission did not explicitly claim the violation of the right established in Article 22 of the American Convention, it argued that – owing to the ongoing impunity for the November 29, 1986 attack on Moiwana Village and the fact that the perpetrators continue to hold power and influence in Suriname – the Moiwana survivors remain fearful and unable to return to their traditional lands. Furthermore, the Commission asserted that “[t]he [alleged] forced displacement [of the Moiwana community members] brought about by the massacre and the absence of any accountability for these violations [allegedly] continues to deny its members protection for their basic rights and human dignity.”

#### Arguments of the State

106. Although the State did not expressly refer to an alleged violation of the right enshrined in Article 22 of the American Convention, it nevertheless contended that:

- a) the Moiwana survivors “have never been an isolated community, that [...] practiced its own culture”;
- b) “[a]lthough they have mostly fled to other places, they are regularly in the northeast Marowijne coastal region of Suriname and/or elsewhere in the country”; and
- c) they move freely throughout the country. “No communications have thereby ever reached the Suriname[se] Government that the rights of these persons were violated or that they were intimidated.”

#### The Court’s Assessment

107. As already noted above (supra paragraph 91), as well as in numerous other judgments, this Court has the competence, based upon the American Convention and in light of the *iura novit curia* principle, to study the possible violation of Convention provisions that have not been alleged in a case’s pleadings. Indeed, a court has the duty to apply all appropriate legal standards – even when not expressly invoked by the parties – in the understanding that those parties have had the opportunity to express their respective positions with regard to the relevant facts. [FN63] In this way, the Tribunal underscores that the facts to be considered in the present chapter are grounded in the application and have been subsequently clarified over the course of the litigation before this Court; thus, all of the parties involved have had their due opportunity to present their positions with regard to said facts. [FN64]

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[FN63] Cf. Case of De la Cruz-Flores, *supra* note 59, para. 122; Case of the “Juvenile Reeducation Institute,” *supra* note 59, paras. 125 and 126; and Case of the Gómez-Paquiyaury Brothers, *supra* note 59, para. 179.

[FN64] Cf. Case of the “Juvenile Reeducation Institute,” *supra* note 59, para. 126.

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108. The proven facts establish that Moiwana Village and its surrounding traditional lands, formerly inhabited by the Moiwana community members, have been abandoned since the events of November 29, 1986 (*supra* paragraph 86(19)). Up to the date of this judgment, Moiwana community members continue to be either internally displaced within Suriname or live as refugees in French Guiana (*supra* paragraph 86(18)). Thus, the Tribunal may properly exercise jurisdiction over the ongoing nature of the community’s displacement, which – although initially produced by the 1986 attack on Moiwana Village – constitutes a situation that persisted after the State recognized the Tribunal’s jurisdiction in 1987 and continues to the present day.

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109. Article 22 of the American Convention establishes:

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
2. Every person has the right to leave any country freely, including his own.
3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.

[...]

110. This Court has held that liberty of movement is an indispensable condition for the free development of a person. [FN65] Furthermore, the Tribunal shares the views of the United Nations Human Rights Committee as set out in its General Comment No. 27, which states that the right to freedom of movement and residence consists, *inter alia*, in the following: a) the right of all those lawfully within a State to move freely in that State, and to choose his or her place of residence; and b) the right of a person to enter his or her country and the right to remain in one’s country. In addition, the enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. [FN66]

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[FN65] Cf. Case of Ricardo Canese. Judgment of August 31, 2004. Series C No. 111, para. 115; U.N., Human Rights Committee, General Comment no. 27, November 2, 1999.

[FN66] Cf. Case of Ricardo Canese, *supra* note 65, para. 115; U.N., Human Rights Committee, General Comment no. 27, November 2, 1999, paras. 1, 4, 5 and 19.

111. Of particular relevance to the present case, the UN Secretary General's Special Representative on Internally Displaced Persons issued Guiding Principles in 1998, [FN67] which are based upon existing international humanitarian law and human rights standards. The Court considers that many of these guidelines illuminate the reach and content of Article 22 of the Convention in the context of forced displacement. For the purposes of the instant case, then, the Tribunal emphasizes the following Principles:

1(1). Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.

5. All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

8. Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.

9. States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

14(1). Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.

28(1). Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.

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[FN67] U.N. Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2. February 11, 1998.

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112. Turning to the pleadings of the case sub judice, the representatives have submitted arguments on the general subject of Article 22 of the Convention, stating that the Moiwana community members have suffered a "forced eviction" from their ancestral lands, and asserting that, since the events of November 29, 1986, Suriname has not made any effort "to assist or facilitate [their] return" to those lands. On the contrary, the representatives argue, "[the State's] acts and omissions, that violate the American Convention, have made it impossible for the [alleged] victims to return" to Moiwana Village.

113. The record clearly demonstrates that, until the Moiwana community members obtain justice for the events of 1986, they are convinced that they cannot return to their ancestral territory. Andre Ajintoena testified that after the attack he briefly visited the area with others only to document and take pictures of the site. Once the group had finished, many felt ill;

according to Mr. Ajintoena, they realized that “things weren’t right, it wasn’t proper, because according to our culture you can’t go back to the place without having arrangements made.” By having returned without “applying the religious [and] cultural rules” – that is, performing the necessary death rituals and achieving reconciliation with the spirits of those killed in the 1986 raid (supra paragraph 86(7) – 86(9)) – Mr. Ajintoena and the others believed that they had seriously offended those spirits and, as a result, began to suffer physical and psychological maladies. All of the community members who testified before the Court expressed a similar fear of avenging spirits, and affirmed that they could only live in Moiwana Village again if their traditional lands first were purified.

114. Moreover, the Moiwana survivors have conveyed deep concern that they could once more suffer aggressions as a community if they take up residence again in their homeland, which is located in an area that was targeted during several army operations over the course of the internal conflict (supra paragraph 86(43)). Mr. Ajintoena stated as follows:

the religious cleansing, the purification of the land, that is one aspect of it; but secondly, we don’t know who the perpetrators are. There has been no investigation, so the guarantee should also be given that upon return we will not be confronted with the same type of problems that occurred in 1986.

The community members’ fear of future persecution is well illustrated by the case of those survivors, such as Mr. Ajintoena, who have remained exiled in French Guiana. In 1991, arrangements were made – through the assistance of the UNHCR – for the thousands of Surinamese refugees, the great majority of them Maroons, to participate in national elections (supra paragraph 86(21)). Nevertheless, few Maroons dared to cross the Maroni River to vote on Surinamese soil.

115. Also in 1991, the Surinamese refugees presented their conditions for repatriation to a commission comprised of representatives from the UNHCR and the governments of Suriname and French Guiana (supra paragraph 86(22)). Those requirements, which were never acted upon by said commission, demanded that Suriname ensure their safety and freedom, as well as that those responsible for having killed civilians during the internal conflict would be investigated and prosecuted. The Court considers it particularly noteworthy, furthermore, that when the official refugee camps in French Guiana were closed in 1992, the French government allowed a certain population to remain. The majority of the members of that group were Moiwana community members, who refused to return to Suriname without guarantees for their safety (supra paragraph 86(23)). The French government recognized the particular dangers those individuals faced by granting them renewable permits to reside in French Guiana; in 1997, they were provided with five or ten-year residency permits.

116. In a relevant case before the UN Human Rights Committee, a Colombian civil rights attorney was forced into exile in the United Kingdom after receiving numerous death threats and suffering an attempt against his life. [FN68] At the time of the Committee’s decision, ten years had passed after the assassination attempt, and the outcome of the criminal investigation in Colombia was still not known. With regard to the victim’s claims that his right to freedom of movement and residence had been violated, the Committee held the following:

considering the Committee's view that the right to security of person (art. 9, para. 1) was violated and that there were no effective domestic remedies allowing the author to return from involuntary exile in safety, the Committee concludes that the State party has not ensured to the author his right to remain in, return to and reside in his own country. Paragraphs 1 and 4 of article 12 of the Covenant were therefore violated. [FN69]

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[FN68] U.N. Human Rights Committee, Communication No. 859/1999: Colombia. April 15, 2002.

[FN69] U.N. Human Rights Committee, Communication No. 859/1999: Colombia. April 15, 2002, para. 7.4.

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117. In the instant case, as discussed above, many Moiwana community members have remained in French Guiana, owing to fears for their safety and the failure of the State's criminal investigation. Nevertheless, in 1993 a minority of the community members returned to Suriname and were placed in a temporary reception center in Moengo – yet, many remain in the reception center to this day, as they haven't been provided with a suitable alternative. Ms. Difienjo expressed indignation at the State's approach to the refugees in general; she testified that, although Moiwana community members have written the State letters, government officials have very rarely visited them in French Guiana or attended to their needs: "they consider us like dogs: you can kill them, you don't have to pay that much attention to them." As established previously (supra paragraph 86(18)), since their flight from Moiwana Village in 1986, both the refugees in French Guiana and those who never left Suriname have typically faced impoverished conditions and lack access to many basic services.

118. In sum, only when justice is obtained for the events of November 29, 1986 may the Moiwana community members: 1) appease the angry spirits of their deceased family members and purify their traditional land; and 2) no longer fear that further hostilities will be directed toward their community. Those two elements, in turn, are indispensable for their permanent return to Moiwana Village, which many – if not all – of the community members wish to accomplish (supra paragraph 86(43)).

119. The Court observes that Suriname has disputed that the Moiwana survivors suffer restrictions upon their travels or residence; in that regard, the State asserts that they may indeed move freely throughout the country. Regardless of whether a legal disposition actually exists in Suriname that establishes such a right – upon which the Tribunal deems it unnecessary to rule – in this case the Moiwana survivors' freedom of movement and residence is circumscribed by a very precise, de facto restriction, originating from their well-founded fears described above, which excludes them only from their ancestral territory.

120. Thus, the State has failed to both establish conditions, as well as provide the means, that would allow the Moiwana community members to return voluntarily, in safety and with dignity, to their traditional lands, in relation to which they have a special dependency and attachment – as there is objectively no guarantee that their human rights, particularly their rights to life and to

personal integrity, will be secure. By not providing such elements – including, foremost, an effective criminal investigation to end the reigning impunity for the 1986 attack – Suriname has failed to ensure the rights of the Moiwana survivors to move freely within the State and to choose their place of residence. Furthermore, the State has effectively deprived those community members still exiled in French Guiana of their rights to enter their country and to remain there.

121. For the foregoing reasons, the Court declares that Suriname violated Article 22 of the American Convention, in relation to Article 1(1) of that treaty, to the detriment of the Moiwana community members.

#### XI. ARTICLE 21 OF THE AMERICAN CONVENTION (RIGHT TO PROPERTY) IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS)

##### Arguments of the representatives

122. The representatives argued that the State violated the right to property established in Article 21 of the American Convention based on the following considerations:

- a) while the initial alleged violation – forcible expulsion of the community from its traditional lands and territory – took place on November 29, 1986, prior to Suriname’s accession to the Convention and acceptance of the Court’s jurisdiction, as a matter of fact and law, the violation of Article 21 is of a continuing nature;
- b) continuing violations are particularly common in cases where indigenous and tribal peoples have been forcibly removed from their traditional lands;
- c) the Governing Body of the International Labor Organization has routinely exercised jurisdiction over the consequences of such relocations, particularly as they relate to property rights, which persist even in cases where the originating event took place decades prior to the entry into force of Convention No. 169;
- d) the alleged victims continue to be deprived of their property rights by the following acts and omissions of the State: i) the denial of justice, which in itself deters the alleged victims from reestablishing their community on their traditional lands; and ii) the failure of Suriname to establish legislative or administrative mechanisms for the alleged victims to assert and secure their rights of tenure in accordance with N’djuka customary law, values and usage;
- e) the alleged victims’ property rights are guaranteed and protected under Article 21 of the Convention, which has an autonomous meaning and is not restricted to property as defined by domestic legal regimes; the provision also protects the rights to property of “members of [...] indigenous communities within the framework of communal property”;
- f) the alleged victims have been deprived of their customary means of subsistence due to their forcible expulsion from their traditional territory and their continuing inability to return; as a result, they live in poverty; and
- g) forcible eviction or involuntary resettlement is prohibited under international law because it does grave and disastrous harm to the basic civil, political, economic, social and cultural rights of both individuals and collectivities. In the case of tribal peoples, forcible eviction completely severs their various relationships with their ancestral lands.

##### Arguments of the Commission

123. The Commission did not specifically submit arguments of law regarding the alleged violation of the right established in Article 21 of the American Convention.

#### Arguments of the State

124. The State also did not expressly present arguments of law regarding the alleged violation of the right established in Article 21 of the American Convention.

#### The Court's Assessment

125. The Court once again notes that the Commission did not submit explicit arguments regarding the alleged violation of the right enshrined in Article 21 of the American Convention. Yet it recalls (*supra* paragraph 91) that the representatives may argue other violations of the Convention than those alleged by the Commission, as long as such legal arguments are based upon the facts delineated in the application. [FN70]

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[FN70] Cf. Case of De la Cruz-Flores, *supra* note 59; Case of the "Juvenile Reeducation Institute," *supra* note 59, para. 125; and Case of the Gómez-Paquiyaury Brothers, *supra* note 59, para. 179.  
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126. Furthermore, as established in the chapter concerning Article 22 of the American Convention (*supra* paragraph 108), the Court may properly exercise jurisdiction over the ongoing nature of the community's displacement from its traditional lands, which constitutes a situation that persisted after the State recognized the Tribunal's competence in 1987 and continues to the present day.

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127. Article 21 of the American Convention provides:

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

128. In the preceding chapter regarding Article 22 of the Convention, the Court held that the State's failure to carry out an effective investigation into the events of November 29, 1986, leading to the clarification of the facts and punishment of the responsible parties, has directly prevented the Moiwana community members from voluntarily returning to live in their traditional lands. Thus, Suriname has failed to both establish the conditions, as well as provide the means, that would allow the community members to live once again in safety and in peace in

their ancestral territory; in consequence, Moiwana Village has been abandoned since the 1986 attack.

129. In order to determine whether such circumstances constitute the deprivation of a right to the use and enjoyment of property, naturally, this Court must first assess whether Moiwana Village belongs to the community members, bearing in mind the broad concept of property developed in the Tribunal's jurisprudence.

130. The parties to the instant case are in agreement that the Moiwana community members do not possess formal legal title – neither collectively nor individually – to their traditional lands in and surrounding Moiwana Village. According to submissions from the representatives and Suriname, the territory formally belongs to the State in default, as no private individual or collectivity owns official title to the land.

131. Nevertheless, this Court has held that, in the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership. [FN71] That conclusion was reached upon considering the unique and enduring ties that bind indigenous communities to their ancestral territory. The relationship of an indigenous community with its land must be recognized and understood as the fundamental basis of its culture, spiritual life, integrity, and economic survival. [FN72] For such peoples, their communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to future generations. [FN73]

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[FN71] Cf. Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August 31, 2001. Series C No. 79, para. 151.

[FN72] Cf. Case of the Mayagna (Sumo) Awas Tingni Community, supra note 71, para. 149.

[FN73] Cf. Case of the Mayagna (Sumo) Awas Tingni Community, supra note 71, para. 149.

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132. The Moiwana community members are not indigenous to the region; according to the proven facts, Moiwana Village was settled by N'djuka clans late in the 19th Century (supra paragraph 86(11)). Nevertheless, from that time until the 1986 attack, the community members lived in the area in strict adherence to N'djuka custom. Expert witness Thomas Polimé described the nature of their relationship to the lands in and around Moiwana Village:

[the] N'djuka, like other indigenous and tribal peoples, have a profound and all-encompassing relationship to their ancestral lands. They are inextricably tied to these lands and the sacred sites that are found there and their forced displacement has severed these fundamental ties. Many of the survivors and next of kin locate their point of origin in and around Moiwana Village. Their inability to maintain their relationships with their ancestral lands and its sacred sites has deprived them of a fundamental aspect of their identity and sense of well being. Without regular commune

with these lands and sites, they are unable to practice and enjoy their cultural and religious traditions, further detracting from their personal and collective security and sense of well being.

133. In this way, the Moiwana community members, a N'djuka tribal people, possess an “all-encompassing relationship” to their traditional lands, and their concept of ownership regarding that territory is not centered on the individual, but rather on the community as a whole. [FN74] Thus, this Court’s holding with regard to indigenous communities and their communal rights to property under Article 21 of the Convention must also apply to the tribal Moiwana community members: their traditional occupancy of Moiwana Village and its surrounding lands – which has been recognized and respected by neighboring N'djuka clans and indigenous communities over the years (supra paragraph 86(4)) – should suffice to obtain State recognition of their ownership. The precise boundaries of that territory, however, may only be determined after due consultation with said neighboring communities (infra paragraph 210).

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[FN74] Cf. Case of the Mayagna (Sumo) Awas Tingni Community, supra note 71, para. 149.  
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134. Based on the foregoing, the Moiwana community members may be considered the legitimate owners of their traditional lands; as a consequence, they have the right to the use and enjoyment of that territory. The facts demonstrate, nevertheless, that they have been deprived of this right to the present day as a result of the events of November 1986 and the State’s subsequent failure to investigate those occurrences adequately.

135. In view of the preceding discussion, then, the Court concludes that Suriname violated the right of the Moiwana community members to the communal use and enjoyment of their traditional property. In consequence, the Tribunal holds that the State violated Article 21 of the American Convention, in relation to Article 1(1) of that treaty, to the detriment of the Moiwana community members.

## XII. ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION (JUDICIAL GUARANTEES AND JUDICIAL PROTECTION) IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS)

### Arguments of the Commission

136. The Commission argued in its application that the State is responsible for the violation of the rights to judicial guarantees and to judicial protection established in Articles 8 and Article 25, of the American Convention, respectively, based upon the following considerations:

- a) the alleged victims and their families were unable to invoke and exercise their right under Article 25 of the Convention to a simple, prompt and effective judicial recourse for the protection of their rights;
- b) the efforts of the alleged victims and their families were met with institutional resistance and failed to produce substantive results; consequently, they have been denied not only their

right to an effective investigation designed to establish the violations and corresponding responsibility, but also their right to seek reparation for the consequences of those violations;

c) the obligation to provide judicial protection is not met simply by the formal existence of legal remedies; rather, states must take specific measures to ensure that judicial protection is effective;

d) the judicial remedies theoretically available through the legal system have proven completely illusory in the present case, as the alleged victims have never succeeded in obtaining an adequate investigation of the attack on Moiwana Village, although the attack included multiple crimes requiring an investigation *ex officio*, including, but not limited to, murder, battery and destruction of property;

e) the only reported efforts to carry out an investigation in the instant case, those headed by Inspector Gooding, reached a stage at which a number of members of the armed forces were arrested, only to be liberated by a siege conducted by the military police;

f) although this action to release the detained soldiers was an open and notorious breach of the authority of the military police, it was not met with any official sanction. To the contrary, the investigation of the attack on Moiwana Village was suspended following the murder of Inspector Gooding, in circumstances that have themselves never been clarified. In this way, the authorities responsible for carrying out an investigation have either been intimidated or directly prevented from applying due diligence to investigate the attack;

g) in addition to a state's obligation to investigate suspected human rights violations *ex officio*, Surinamese law establishes the right of a victim to petition as a party for a criminal investigation. The alleged victims, then, had a fundamental civil right to go to the courts, and thereby play an important role in propelling the criminal case forward; however, that right cannot be realized when the investigation process is obstructed;

h) family members are entitled to know the facts and circumstances with respect to the fate of their loved ones. They are also entitled to a judicial investigation by a criminal court in order to establish responsibility for human rights violations;

i) the amnesty law adopted by the State fosters the impunity prevalent in Suriname after the attack on Moiwana Village. Since the initiatives to investigate never reached the stage of prosecution, the amnesty law was never applied in the instant case. Nevertheless, evidence suggests that the law had the effect of indicating to relevant officials that those responsible for violations committed during the relevant time period were not to be held accountable; and

j) the amnesty law continues to be interpreted by many as precluding any measures to identify, prosecute and punish those responsible for the attack on Moiwana Village; and thereby contributes to the prevailing of impunity, both in the present case and in others of Suriname.

#### Arguments of the representatives

137. The representatives agreed with the Commission that the State violated the aforementioned rights to judicial guarantees and to judicial protection, and argued as follows:

a) the evidence before the Court demonstrates that all of the alleged victims actively and repeatedly sought legal recourse in Suriname, but their attempts to obtain justice were ignored, rebuffed, and obstructed, and produced no result;

b) as a result of Suriname's failure to provide effective judicial protection and guarantees, as well as the State's affirmative obstruction of justice, the alleged victims have been denied not

only their right to an effective investigation designed to clarify the facts and assign responsibility, but also their right to seek reparation for the consequences of the violations perpetrated against them;

c) Suriname has affirmatively obstructed justice in this case, both through the actions of military officials in 1989 and through invocation of the “Amnesty Act 1989” in relation to the initial investigation of human remains in 1993;

d) Suriname bears an “aggravated international responsibility” for its obstruction of justice in this case and its continuing tolerance of that obstruction. Furthermore, the denial of justice in this case must also be viewed in the light of the “extreme gravity” of the underlying violations; in this regard, there is an affirmative obligation on the State to prosecute in cases of crimes against humanity.

### Arguments of the State

138. Regarding the alleged violation of the rights enshrined in Articles 8 and 25 of the American Convention, the State argued that:

a) if the State can prove in the instant case that it offered adequate judicial protection after its accession to the Convention, then there would be no violation of Article 25, assuming that the Court accepts the argument of a “continuous violation”;

b) the State has commenced a criminal investigation that is still ongoing, and has no intention to let any offense committed go unpunished;

c) there is no unwillingness or inability of the State to investigate, prosecute and punish those who committed the alleged human rights violations against the residents of Moiwana Village. Suriname has not refused in the past or in the present to provide justice for the alleged attack, nor did it obstruct justice in this case; and

d) although the alleged victims have urged the State to launch an independent criminal investigation, they have failed to “report an offence”; on the other hand, they have not commenced civil proceedings before the authorities;

e) in 1989 a criminal investigation was started, without having been initiated by the victims or the petitioners; however, at that moment “democracy was still not stable,” and, as a result, the climate was not suitable to carry out a sufficient investigation;

f) a criminal investigation into the events of November 29, 1986 resumed in August 2002 and is now being carried out in accordance with the national statutory provisions, for the purpose of prosecuting and punishing any guilty parties;

g) the political situation in Suriname is now appropriate for a structured approach toward the criminal investigation of the Moiwana case, as well as of other events occurring during the 1980s and early 1990s. A team has been established, consisting of investigating officers and headed by a chief public prosecutor;

h) the victims and their families had and still have the opportunity to invoke and exercise their right to a simple, prompt and effective judicial recourse for the protection of their rights;

i) the most effective manner to obtain damages and remedy is the civil process. The Surinamese Code of Civil Procedure offers everyone the opportunity to commence a civil action on the basis of one or more legal provisions; although such an action could have been instituted against the State, this has not been done in the instant case;

- j) the Legal Aid Office of the Ministry of Justice and Police provides legal assistance to economically-disadvantaged individuals;
- k) the original petitioner, Moiwana '86, is aware of the abovementioned possibility to obtain one's right to justice, since that organization instituted, at the national level, an action against the State to declare the "Amnesty Act 1989" non-binding;
- l) through the adoption of the "Amnesty Act 1989," no rights of individuals were violated. "If the State waives prosecution of certain persons [...] or postpones prosecution until an appropriate time, then it would have only postponed or waived the use of a certain means to enforce or protect such rights";
- m) A state has both the right and the authority "to postpone or to waive the use of a certain means of law enforcement," when the use of such means would seriously compromise the protection of other important interests that form part of that government's responsibilities, such as bringing about peace and order;
- n) in drafting the "Amnesty Act 1989" "the legislator did not envisage impunity of possible perpetrators of events in Moiwana Village";
- o) the "Amnesty Act 1989" is not contrary to international law, given the fact that a number of States have granted a similar amnesty, "with the cooperation of the Organization of American States and the Organization of African Unity";
- p) the "Amnesty Act 1989" does not apply to crimes against humanity. Not every infringement on the rights granted to man is included under the title of crimes against humanity; it only includes crimes that are committed within the framework of a systematic violation of human rights with the object to destroy or decimate a certain group of people, or at least deprive them of a place within normal society. Such a group is identified on the basis of national character, ethnicity, race or religion; and
- q) the "Amnesty Act 1989" expressly excludes crimes against humanity from amnesty and "is incorrectly considered as a tool for denial of justice." "If, after investigation, it appears that the events at Moiwana must be qualified as a system of terror against the population or parts thereof, which means that it can be reasonably verified that there is systematic violation of human rights, then these events, according to the law, are excluded from amnesty."

### The Court's Assessment

139. Article 8(1) of the American Convention establishes:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

140. Article 25 of the Convention provides:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

141. The Court has held above that it lacks jurisdiction over the events of November 29, 1986 in Moiwana Village; nevertheless, the Tribunal does have competence to examine the State's fulfillment of its obligation to investigate those occurrences (*supra* paragraph 43). The following assessment will establish whether that obligation was carried out pursuant to the standards set forth in Articles 8 and 25 of the American Convention.

142. The Court has affirmed that, under the American Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Article 25) – remedies that must be substantiated in accordance with the rules of due process of law (Article 8(1)) – all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction. [FN75]

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[FN75] Cf. Case of the Serrano-Cruz Sisters, *supra* note 9, para. 76; Case of 19 Merchants. Judgment of July 5, 2004. Series C No. 109, para 194; and Case of Las Palmeras. Judgment of December 6, 2001. Series C No. 90, para. 60.  
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143. In similar cases, this Court has established that “in order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may have to examine the respective domestic proceedings.” [FN76] Adhering to precedent, then, the Tribunal will consider the entirety of the relevant national proceedings in the instant case, in order to make an informed determination as to whether the Convention's abovementioned provisions regarding judicial protection and due process have been violated. [FN77] The Court's assessment will involve a discussion of the following elements: a) the appropriate legal remedy under the circumstances of the present case; b) the effectiveness of said remedy; and c) the reasonableness of the length of proceedings.

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[FN76] Cf. Case of the Serrano-Cruz Sisters, *supra* note 9, para. 57; Case of Lori Berenson-Mejía, *supra* note 10, para. 133; and Case of 19 Merchants, *supra* note 75, para 182.  
[FN77] Cf. Case of the Serrano-Cruz Sisters, *supra* note 9, para. 58.  
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- a) The appropriate legal remedy

144. Throughout the proceedings before this Court, the State has maintained that the Moiwana community members should have instituted civil actions in national courts to obtain redress for the various human rights violations they claim to have suffered. Suriname has stated that “the most effective manner to obtain damages and repair is the civil process,” and “it is a clear-cut

case that petitioners should have filed a civil suit to receive compensation for material and [moral] damages.” In this regard, Suriname has offered evidence that actions against the State for compensation have proven to be successful, yet has noted that there is no record that community members have filed such civil suits in national courts (supra paragraph 86(38)).

145. The Court observes that, eventually, civil actions may serve as a means of reparations for the human rights violations suffered by Moiwana community members at the hands of State agents and collaborators. However, it has been proven (supra paragraph 86(15)), as well as expressly recognized by Suriname, that State actors were involved in the November 29, 1986 attack that killed at least 39 defenseless Moiwana Village residents – including infants, women and the elderly – and wounded many others. Thus, the facts portray a disturbing scenario of multiple extrajudicial executions; with respect to such a situation, the Tribunal’s case law is unmistakable: the State has an ex officio duty to initiate, without delay, a serious, impartial, and effective investigation. [FN78]

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[FN78] Cf. Case of Juan Humberto Sánchez. Judgment of June 7, 2003. Series C No. 99, paras. 127 and 132.

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146. Upon its accession to the American Convention in 1987, then, the first legal remedy Suriname was obligated to provide was a swift and exhaustive judicial investigation into the events of November 29, 1986. The Court has held that such an investigation must be undertaken in a serious manner and not as a mere formality predestined to be ineffective. [FN79] Moreover, this effective search for the truth is the State’s responsibility, and decidedly does not depend upon the initiative of victims and their family members or upon their submission of evidence. [FN80]

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[FN79] Cf. Case of the Serrano-Cruz Sisters, supra note 9, para. 61; Case of Bulacio. Judgment of September 18, 2003. Series C No. 100, para. 112; and Case of Juan Humberto Sánchez, supra note 78, para. 144.

[FN80] Cf. Case of the Serrano-Cruz Sisters, supra note 9, para. 61; Case of 19 Merchants, supra note 75, para. 184; and Case of Bulacio, supra note 79, para. 112.

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147. During the investigative process and judicial proceedings, the Tribunal has asserted that victims of human rights violations, or their family members, must have ample opportunities to participate and be heard, as much in the clarification of facts and the punishment of responsible parties, as in their pursuit of due compensation. [FN81] Indeed, the Court has established that victims of rights violations and their family members have a right to know the truth regarding those violations – that is, to be informed about the relevant facts and the responsible parties. [FN82] Therefore, the Moiwana community members have the following rights: to have the deaths and violations to personal integrity occurring in 1986 effectively investigated by state authorities, to have those responsible for the unlawful acts prosecuted and appropriately punished, and to receive compensation for damages and injuries suffered. [FN83]

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[FN81] Cf. Case of the Serrano-Cruz Sisters, *supra* note 9, para. 63; Case of 19 Merchants, *supra* note 75, para. 186; and Case of Las Palmeras, *supra* note 75, para. 59.

[FN82] Cf. Case of the Serrano-Cruz Sisters, *supra* note 9, para. 62; Case of Carpio-Nicolle et al. Judgment of November 22, 2004. Series C No. 117, para. 128; and Case of Plan de Sánchez Massacre. Reparations (Art. 63.1 American Convention on Human Rights). Judgment of November 19, 2004. Series C No. 116, para. 97.

[FN83] Cf. Case of the Serrano-Cruz Sisters, *supra* note 9, para. 64; Case of 19 Merchants, *supra* note 75, para. 187; and Case of Las Palmeras, *supra* note 75, para. 59.

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b) The effectiveness of the official investigation in the instant case

148. Thus, in response to the extrajudicial killings that occurred on November 29, 1986, the foremost remedy provided should have been an effective, state-sponsored investigation and judicial process, leading to the clarification of the facts, punishment of the responsible parties, and appropriate compensation. In order to judge the effectiveness of the State's investigation in the present case, the Court will consider whether the official efforts were conducted with due diligence. [FN84]

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[FN84] Cf. Case of the Serrano-Cruz Sisters, *supra* note 9, para. 65; Case of Carpio-Nicolle et al., *supra* note 82, para. 129; and Case of Plan de Sánchez Massacre. Reparations, *supra* note 82, para. 98.

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149. In this regard, the Tribunal has previously specified the basic guidelines to follow subsequent to a death suspected to have been an extrajudicial execution. At a minimum, state authorities conducting an inquiry shall seek, *inter alia*: a) to identify the victim; b) to recover and preserve evidentiary material related to the death in order to aid in any potential prosecution of those responsible; c) to identify possible witnesses and obtain statements from them concerning the death; d) to determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death; and e) to distinguish between natural death, accidental death, suicide and homicide. [FN85] The Court further notes that: a) the crime scene must be exhaustively investigated and b) autopsies, as well as analyses of skeletal remains, must be rigorously performed by competent professionals, employing the most appropriate procedures. [FN86]

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[FN85] Cf. Case of Juan Humberto Sánchez, *supra* note 78, paras. 127 and 132; and U.N. Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc E/ST/CSDHA/.12 (1991).

[FN86] Cf. Case of Juan Humberto Sánchez, *supra* note 78, paras. 127 and 132; and U.N. Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc E/ST/CSDHA/.12 (1991).

150. Turning to the instant case, the proven facts indicate that the civilian police began an investigation into the November 29, 1986 events at Moiwana Village in 1989, over two years after the attack (supra paragraph 86(25)). During March and April of 1989, Inspector Herman Gooding, who was in charge of said investigation, questioned several suspects and arrested at least two individuals, Frits Moesel and Orlando Swedo (supra paragraph 86(25)). Nevertheless, shortly after Mr. Swedo was placed in state custody, a fully-armed contingent of military police arrived at the police station and forcibly obtained his release (supra paragraph 86(26)). Following the siege of the civilian police station, Army Commander Desire Bouterse issued a statement, by which he confirmed the following: a) that the operation in Moiwana Village was a military action which he himself had ordered; b) that he would not allow military operations to be investigated by the civilian police; and c) that he had required the release of Mr. Swedo (supra paragraph 86(27)).

151. The official investigation was then abandoned until May of 1993, when Moiwana '86 discovered a mass grave near Moiwana Village and notified the Office of the Attorney General (supra paragraph 86(31)). The grave site was then visited on two occasions – May 29 and June 9, 1993 – by military and civilian police, a pathologist and Moiwana '86 (supra paragraph 86(31)). The team uncovered human remains, which were taken to Paramaribo for further analysis (supra paragraph 86(31)). Subsequently, however, state authorities reported only that the remains corresponded to five to seven adults and two to three children; the identification of the corpses or further information regarding the grave site have not been provided by the State (supra paragraph 86(31)).

152. The Court observes with grave concern that only the limited investigative steps described above have been performed by Suriname since the events of November 29, 1986. Furthermore, the State has maintained this posture of indifference despite a directive adopted on December 19, 1995 by the National Assembly of Suriname, requesting the Executive Branch “to instigate an immediate investigation” into human rights violations committed during the military regime (supra paragraph 86(32)).

153. In efforts to explain the troublesome lack of results, the State has remarked that the political climate in Suriname after the 1986 attack prevented “an independent and impartial investigation,” since “the position of power held by the former military leaders had not yet ended and [...] democracy was still not stable.” In this regard, the Court acknowledges the difficult circumstances endured by the nation of Suriname in its struggle for democracy. Nevertheless, country conditions, however difficult, generally may not release a State Party to the American Convention from the legal obligations set out in that treaty, and particularly not in a case of extrajudicial executions. [FN87] The Tribunal has held that by carrying out or tolerating actions leading to extrajudicial killings, by not investigating such actions adequately, and by not punishing those responsible, the State breaches its duty to ensure the rights recognized in the Convention and prevents the society as a from learning the truth regarding those facts. [FN88]

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[FN87] Cf. Case of the Serrano-Cruz Sisters. Preliminary Objections, *supra* note 1, para. 118; and Case of Bámaca-Velásquez. Judgment of November 25, 2000. Series C No. 70, para. 207.

[FN88] Cf. Case of Juan Humberto Sánchez, *supra* note 78, para. 134; Case of Trujillo-Oroza. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of February 27, 2002. Series C No. 92, para. 99 – 101 and 109; and Case of Bámaca-Velásquez. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of February 22, 2002. Series C No. 91, paras. 74 – 77.

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154. For their part, the alleged victims and the organizations acting on their behalf, Moiwana '86 and Association Moiwana, have repeatedly sought an official investigation into the attack on Moiwana Village. For example, according to the proven facts, on May 24, 1993, Moiwana '86 reported the discovery of the mass grave site to the Attorney General and urged an investigation of the attack and the prosecution of those responsible (*supra* paragraph 86(31)). On August 23, 1993, Moiwana '86 directed another letter to the Attorney General that requested information on the state of the criminal investigation (*supra* paragraph 86(34)).

155. Moreover, as recounted in the proven facts (*supra* paragraph 86(35)), following the National Assembly's motion, Moiwana '86 filed two formal requests in 1996 with the Attorney General for a proper investigation into the attack. Having received no response, Moiwana '86 contacted the President of the Court of Justice. On August 21, 1996, the President of the Court of Justice instructed the Attorney General to submit to that Court, pursuant to Article 4 of the Code of Criminal Procedure, a report on the matter, to be accompanied by any available police files. However, the Office of the Attorney General never substantively responded to these requests filed by the President of the Court of Justice and Moiwana '86.

156. Suriname's manifest inactivity in the face of this case's extremely serious facts – despite pressures to investigate the 1986 attack from the alleged victims as well as the State's own legislative branch – shows a patent disregard for the principle of due diligence. Indeed, as recently as the public hearing held before this Court on September 9, 2004, not even Suriname's Attorney General himself could describe with any degree of specificity the current state of the Moiwana investigation. The Tribunal, then, shares the assessment of the United Nations Human Rights Committee, which, in its 2004 Concluding Observations on the human rights situation in Suriname, stated:

investigations into [...] the 1986 Moiwana massacre remain pending and have not yet produced concrete results. [The information supplied that the case is] still being investigated is disturbing, especially given the lapse of time since [its] occurrence. The Committee further considers that this situation reflects a lack of effective remedies available to victims of human rights violations [...]. [FN89]

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[FN89] U.N. Human Rights Committee. Concluding Observations: Suriname. CCPR/CO/80/SUR. May 4, 2004.

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157. The Court further observes that there is abundant evidence in the record that attests to the involvement of Suriname's military regime in the overt obstruction of justice in the instant case. Army Commander Desire Bouterse's forcible release of Orlando Swedo and his statement forbidding the further investigation of military operations by the civilian police serve as irrefutable examples.

158. The proven facts (supra paragraphs 86(28), 86(29) and 86(37)) also demonstrate that essential actors in the search for justice in the present case suffered serious violence and harassment: a) on August 4, 1990, Inspector Herman Gooding, following his meeting with the Deputy Commander of the military police, was murdered; b) some police investigators that collaborated with Inspector Gooding faced life-threatening circumstances and, consequently, fled Suriname; c) Stanley Rensch, founder of Moiwana '86, survived an assassination attempt and was arbitrarily arrested four times; eventually, he also sought refuge abroad; and d) those who collaborated with Moiwana '86 to obtain justice for the 1986 attack and related human rights abuses were often threatened and harassed; as a result, some found it necessary to leave Suriname for their own safety (infra paragraph 207).

159. This Court considers that the purpose of such violence and threats was to deter the aforementioned individuals from their respective roles in the investigation and clarification of the facts surrounding the 1986 attack on Moiwana Village. In this regard, the Tribunal notes with dismay that, after nearly 15 years, the murder of Inspector Gooding still has not been conclusively investigated. In order to guarantee due process and judicial protection in a renewed official investigation into the 1986 attack and related human rights violations, the State must facilitate all of the necessary means to protect investigators, witnesses, judges, prosecutors and the Moiwana community members. [FN90]

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[FN90] Cf. Case of Myrna Mack-Chang. Judgment of November 25, 2003. Series C No. 101, para. 199.  
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c) The reasonableness of the length of proceedings

160. Since Suriname recognized the competence of the Court on November 12, 1987, almost 18 years have passed and the State has not conducted a serious and effective investigation capable of leading to the conviction of those responsible for the attack on Moiwana Village (supra paragraph 86.33). The Tribunal considers that such a prolonged delay constitutes per se a violation of judicial guarantees, which only exceptionally could be justified by the State. The Court will nevertheless assess whether the delay resulted directly from the case's complexity or from the conduct of the parties. [FN91]

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[FN91] Cf. Case of the Serrano-Cruz Sisters, supra note 9, para. 69; Case of Ricardo Canese, supra note 65, para. 142; and Case of 19 Merchants, supra note 75, para. 191.  
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161. With respect to the conduct of the parties, the proven facts (supra paragraphs 86(34) and 86(35)) indicate that the alleged victims and their representatives have frequently urged a criminal investigation into the attack on Moiwana Village, and on occasions have directly facilitated the State's efforts, such as in 1993 when Moiwana '86 reported the discovery of the mass grave site to the Office of the Attorney General.

162. Regarding the case's complexity, the Court recognizes that the investigation into the events of November 29, 1986 is a difficult matter, as the attack implicated the past actions of a powerful military regime, involved a great number of possible victims – who are now either dead or displaced – and took place in a remote area of the country, among other factors. Nevertheless, it is recalled that, in Inspector Gooding's 1989 investigation, statements of witnesses were taken and arrests of suspects were carried out (supra paragraph 86(25)). Had the investigation not been abandoned shortly thereafter – owing to the obstructive actions of the military (supra paragraph 86(27)) and the subsequent lack of resolve displayed by Attorney General's Office (supra paragraphs 86(31) – 86(33) and 86(35)) – it may have promptly resulted in the identification and the subsequent punishment of the attack's perpetrators. Thus, the Court does not find the extended delay to be justified; accordingly, the length of said proceedings must be judged unreasonable.

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163. In consideration of the many facets analyzed above, the Court holds that Suriname's seriously deficient investigation into the 1986 attack upon Moiwana Village, its violent obstruction of justice, and the extended period of time that has transpired without the clarification of the facts and the punishment of the responsible parties have defied the standards for access to justice and due process established in the American Convention.

164. As a result, the Tribunal declares that the State violated Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) of that treaty, to the detriment of the Moiwana community members.

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165. The Court takes notice that, on August 19, 1992, the President of Suriname officially promulgated the "Amnesty Act 1989," which grants amnesty to those who have committed certain criminal acts, with the exception of crimes against humanity, during a period from January of 1985 until August of 1992 (supra paragraph 86(39)). The statute vaguely defines crimes against humanity as "those crimes which according to international law are classified as such." Naturally, then, during the proceedings before the Tribunal there has been much debate as to whether the elements of the 1986 attack reach the threshold of crimes against humanity.

166. In this regard, the Court finds it necessary to reiterate its holding above: in response to the extrajudicial killings that occurred on November 29, 1986, the foremost remedy to be provided by the State is an effective, swift investigation and judicial process, leading to the

clarification of the facts, punishment of the responsible parties, and appropriate compensation of the victims.

167. As the Tribunal has asserted on repeated occasions, [FN92] no domestic law or regulation – including amnesty laws and statutes of limitation – may impede the State’s compliance with the Court’s orders to investigate and punish perpetrators of human rights violations. If this were not the case, the rights found in the American Convention would be deprived of effective protection. This conclusion is consistent with the letter and spirit of the Convention, as well as general principles of international law. Figuring prominently among said principles, *pacta sunt servanda* requires that a treaty’s provisions be given meaningful effect within a State Parties’ internal legal framework. [FN93]

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[FN92] Cf. Case of the Gómez-Paquiyaury Brothers, *supra* note 59, para. 151; Case of Bulacio, *supra* note 79, paras. 117 and 142; and Case of the Five Pensioners. Judgment of February 28, 2003. Series C No. 98, para. 164.

[FN93] Cf. Case of the Gómez-Paquiyaury Brothers, *supra* note 59, para. 152; and Case of Bulacio, *supra* note 79, para. 118.

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### XIII. REPARATIONS (Application of Article 63(1) of the American Convention)

#### Obligation to provide adequate reparations

168. In accordance with the assessment on the merits set forth in previous chapters, the Court declared, based on the facts of the case, violations of Articles 5, 22, 21, 8 and 25 of the American Convention, all in relation to Article 1(1) of said instrument. The Court has held, on a number of occasions, that any violation of an international obligation resulting in harm carries with it an obligation to provide adequate reparations. [FN94] Article 63(1) of the American Convention states that:

[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party (emphasis added).

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[FN94] Cf. Case of the Serrano-Cruz Sisters, *supra* note 9, para. 133; Case of Lori Berenson-Mejía, *supra* note 10, para. 230; and Case of Carpio-Nicolle et al., *supra* note 82, para. 85.

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169. This provision constitutes a rule of customary law that enshrines one of the fundamental principles of contemporary international law on state responsibility. Thus, when an illicit act is imputed to the State, there immediately arises a responsibility on the part of that State for the

breach of the international norm involved, together with the subsequent duty to make reparations and put an end to the consequences of said violation. [FN95]

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[FN95] Cf. Case of the Serrano-Cruz Sisters, supra note 9, para. 134; Case of Carpio-Nicolle et al., supra note 82, para 86; and Case of Plan de Sánchez Massacre. Reparations , supra note 82, para. 52.

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170. The reparation of harm caused by a violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in restoring the situation that existed before the violation occurred. When this is not possible, as in the present case, it is the task of this Tribunal to order the adoption of a series of measures that, in addition to guaranteeing respect for the rights violated, will ensure that the damage resulting from the infractions is repaired, by way, inter alia, of payment of an indemnity as compensation for the harm caused. [FN96] The obligation to provide reparations, which is regulated in all its aspects (scope, nature, modalities, and designation of beneficiaries) by international law, cannot be altered or eluded by the State's invocation of provisions of its domestic law. [FN97]

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[FN96] Cf. Case of the Serrano-Cruz Sisters, supra note 9, para. 135; Case of Carpio-Nicolle et al., supra note 82, para 87; and Case of Plan de Sánchez Massacre. Reparations, supra note 82 para. 53.

[FN97] Cf. Case of the Serrano-Cruz Sisters, supra note 9, para. 135; Case of Lori Berenson-Mejía, supra note 10, para. 231; and Case of Carpio-Nicolle et al., supra note 82, para. 87.

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171. Reparations, consist in those measures necessary to make the effects of the committed violations disappear. The nature and amount of the reparations depend on the harm caused at both the material and moral levels. Reparations cannot, in any case, entail either the enrichment or the impoverishment of the victim or his or her family. [FN98]

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[FN98] Cf. Case of the Serrano-Cruz Sisters, supra note 9, para. 136; Case of Carpio-Nicolle et al., supra note 82, para. 89; and Case of Tibi. Judgment of September 7, 2004. Series C No. 114, para. 225.

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172. In light of the abovementioned criteria, the Court will proceed to analyze the submissions of the Commission and the representatives regarding reparations, in order to determine the pertinent remedial measures to be adopted in the instant case.

A) BENEFICIARIES

Arguments of the Commission

173. The Commission considers that the beneficiaries of reparations in this case should be the Moiwana residents who survived the attack and the family members of those who were killed.

#### Arguments of the representatives

174. The representatives similarly argued that the beneficiaries of reparations should be the survivors of the massacre and the next of kin of those killed.

#### Arguments of the State

175. The State requested that the Commission's claim for reparations be denied based on the fact that "the method applied by the Commission to determine the individuals who would be entitled to reparations, as well as the level of the reparations, is not justified by law."

#### The Court's Assessment

176. To begin, the Court considers that the "injured parties" in the terms of Article 63(1) of the American Convention, are those persons defined in paragraph 71 as the "Moiwana community members" (supra paragraphs 71 and 86(17) for the complete list). In consequence, said individuals shall be the beneficiaries of the reparations the Tribunal deems suitable to order.

177. It is necessary to recall that within the context of the contentious process, the identities of the beneficiaries must be properly communicated to the Court. [FN99] Thus, this Tribunal cannot grant the request that additional victims, which to date have not been individualized before the Court, be named for compensation purposes subsequent to the instant judgment. Such a decision is consistent with the Case of Plan de Sanchez Massacre, as in that case no additional victims were permitted to be identified, following the judgment on reparations, in order to receive monetary awards. [FN100]

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[FN99] Cf. Case of Plan de Sánchez Massacre. Reparations, supra note 82, para. 62; and Case of the "Juvenile Reeducation Institute," supra note 59, para. 273.

[FN100] Cf. Case of Plan de Sánchez Massacre. Reparations, supra note 82, para. 62.

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178. Following precedent, [FN101] this Court considers as properly identified those victims who are referred to in an official document, such as a birth certificate or "family book," submitted before the Tribunal. Regarding the other victims individualized in the application who have not been suitably identified, the Court holds that the compensation that corresponds to each one shall be awarded in the same manner as those properly identified by State documents – as long as they appear before the appropriate State officials within 24 months following the notification of the instant judgment and provide sufficient means of identification. [FN102] Adequate identification shall entail either: a) an official document attesting to the person's identity; or b) a statement before a competent state official by a recognized leader of the Moiwana community members, as well as the declarations of two additional persons, all of which clearly attest to the individual's identity. The Court notes that it is granting more latitude

in this case with respect to acceptable means of proving identity, in light of the statements by the Commission and the representatives that many Maroons do not possess formal identity documents, and were never inscribed in the national registry.

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[FN101] Cf. Case of Plan de Sánchez Massacre. Reparations, supra note 82, para. 63.

[FN102] Cf. Case of Plan de Sánchez Massacre. Reparations, supra note 82, para. 67.  
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179. The compensation determined by the Court shall be individually awarded to each beneficiary in his or her condition as victim of the violations enumerated in paragraph 168 of the instant judgment. If any victim has died, or dies before the issuing of his or her compensation, the amount that would have corresponded to that individual shall be distributed pursuant to national laws of succession and descent. If eventual legal successors lack official identity documents, they also must provide the alternate means of identification specified above to receive compensation (supra paragraph 178).

180. The sufficiently identified victims are the following:

- 1 Hesdy Adam or Hesdie Adam
- 2 Marlene Adam
- 3 Marlon Adam
- 4 Petrus Adam
- 5 Antonius Agemi
- 6 A. Andro Ajintoena
- 7 Aboeda Ajintoena
- 8 Andre Ajintoena
- 9 Atema Ajintoena
- 10 Cynthia Ajintoena
- 11 Doortje Ajintoena
- 12 Eddy Ajintoena
- 13 Franklin Ajintoena
- 14 Gladys Ajintoena
- 15 Jacoba Ajintoena
- 16 Juliana Ajintoena
- 17 Letitia Ajintoena or Lettia Ajintoena
- 18 Maikel Ajintoena
- 19 Marietje Ajintoena or Maritje Ajintoena
- 20 Maureen Ajintoena
- 21 Miranda Ajintoena
- 22 Ottolina Ajintoena
- 23 P. Joetoe Ajintoena
- 24 S. Marciano Ajintoena
- 25 Richard Allawinsi
- 26 Roy Allawinsi
- 27 Alphons Apiñas

- 28 Erna Apiñas
- 29 Gwhen D. Apiñas
- 30 Meriam Apiñas
- 31 Sylvia Apiñas
- 32 Dannie Anna Asaiti
- 33 Erwien Awese
- 34 Tjamaniesting Bron
- 35 Jacqueline Bron or Jacqueline Bron
- 36 Sawe Bron or Sawe Djang Abente Bron
- 37 Marlon Difiendo or Michel Difiendo
- 38 Antonia Difiendo
- 39 Diana Difiendo
- 40 Martha Difiendo
- 41 M. Milton Difiendo
- 42 Patricia Difiendo
- 43 Petra Difiendo
- 44 Anelies Djemesie or Annelies Jemessie
- 45 Alfons Dogodoe
- 46 Benita Dogodoe
- 47 Benito Dogodoe
- 48 Cynthia Dogodoe
- 49 D. Silvana Dogodoe
- 50 Hellen Dogodoe
- 51 R. Patrick Dogodoe
- 52 Richenel Dogodoe
- 53 S. Claudia Dogodoe
- 54 Z. Jose Dogodoe
- 55 Johannes Jajo
- 56 Cornelly Madzy James
- 57 Humprey James or Humphrey James
- 58 Manfika Kamee
- 59 Johannes Canapé
- 60 Agwe Kastiel
- 61 Alexander Kate
- 62 Martha Makwasie
- 63 Benito Martinies
- 64 Chequita Martinies
- 65 Marciano Martinies
- 66 Petrus Martinies
- 67 Rodney Martinies
- 68 S. Ruben Martinies
- 69 Rinia Meenars
- 70 Andre Misidjan
- 71 Beata Misidjan or Beata Misdjan
- 72 Carla Misidjan
- 73 Edmundo Misidjan or Edmundo Misdjan

- 74 Ludwig Misidjan
- 75 Malai Misidjan
- 76 Mitori Misidjan
- 77 Reguillio Misidjan or Reguillio Misdjan
- 78 Wilma Misidjan
- 79 Anoje M. Misidjan or Anoje M. Misiedjan
- 80 Sandra Misidjan or Sandra Misiedjan
- 81 Apoer Lobbi Misiedjan or Apoerlobbi Misidjan
- 82 Leonie Pinas
- 83 Felisie Sate
- 84 Annelies Sjonko or Annalies Sjonko
- 85 Cornelia Sjonko
- 86 Inez Sjonko or Aines Sjonko
- 87 Jeanette E. Sjonko
- 88 R. Sjonko
- 89 Carlo Sjonko
- 90 Isabella Sjonko
- 91 Johan Sjonko
- 92 Lothar Sjonko
- 93 Natashia Sjonko
- 94 Nicolien Sjonko
- 95 Antoon Solega
- 96 A. Dorothy Solega
- 97 H. Roel Solega
- 98 K. Delano Solega
- 99 M. Sellely Solega or M. Seclely Solega
- 100 Awese Lina L. Toetoe
- 101 Jozef Toetoe or Jozef Toeboe
- 102 Erwin Willemdam

181. Those victims who must present adequate means of identification, pursuant to the terms of paragraph 178, are the following:

- 1 Johiena Adam
- 2 Majo Ajintoena
- 3 Miraldo Allawinsi or Miraldo Misidjan
- 4 Anika M. Apinsa
- 5 Hermine Asaiti
- 6 Cyriel Bane
- 7 Mena Bron
- 8 Rosita Bron
- 9 Rudy Daniel
- 10 Gladys Djemesie
- 11 Glenn Djemesie
- 12 Ligia Djemesie
- 13 John James

- 14 Romeo James
- 15 Adaja Kago
- 16 Johan Laurence
- 17 Awena Misidjan
- 18 Jofita Misidjan
- 19 Marlon M. Misidjan
- 20 Rudy Misidjan
- 21 Theodorus Misidjan
- 22 Antonius Misiedjan or Misidjan Antonius
- 23 John Misiedjan or John Misidjan
- 24 Johnny Delano Misiedjan or Johnny Delano Misidjan
- 25 Sadijeni Moiman
- 26 Jozef Toeli Pinas or Toeli-Jozef Pinas
- 27 Alma O. Sjonko
- 28 Pepita M.J. Solega

## B) MATERIAL DAMAGES

### Arguments of the Commission

182. The Commission requested the Court to order the State to pay material damages related to the denial of justice suffered by the victims, based on the following considerations:

- a) the survivors of the attack have continued to pressure local authorities to comply with their legal duties to investigate the case, and much of that work has been done together with the organization Moiwana '86. These initiatives and efforts have implied time and costs;
- b) the former Moiwana Village residents lost their homes, possessions and means of subsistence when they were forced to flee. To this day, because they have received neither justice nor compensation in the intervening years, they remain in a precarious state with respect to their living conditions;
- c) material harm caused also includes economic losses related to medical or psychological treatment required as a consequence of the denial of justice and displacement in the instant case; and
- d) because the attack has been left in impunity, the survivors have been denied the foundation of fact and law necessary to seek compensation for the wrongs they suffered. Thus, although such losses are complicated to estimate in the present case, they should be assessed by the Court in equity.

### Arguments of the representatives

183. The representatives requested that the Court order material and moral damages resulting from the ongoing violation of Article 21 of the American Convention, which “should account for the grave harm caused to the victims’ cultural integrity, dignity and spiritual well-being caused by this arbitrary, uncompensated and ongoing deprivation, as well as the destruction of the victims’ subsistence lifestyle.”

## Arguments of the State

184. Regarding the requests for material damages, the State argued that:

- a) no concrete indications or proof have been given regarding the actual material and moral harm resulting from the alleged failure of State to provide the effective judicial protection and guarantees required under the Convention. Furthermore, there is no correlation between the alleged violations and the level and nature of the compensation demanded; and
- b) the Commission attempts to obtain, “in a roundabout way,” damages for alleged human rights violations that occurred prior to the State’s accession to the American Convention, including violations of the right to life.

## The Court’s Assessment

185. The Court will now assess material damages suffered by the victims as a result of the facts of the instant case, in order to grant an appropriate indemnity. In so doing, the Tribunal will take into account the evidence submitted, its own case law and the relevant arguments presented by the Commission, the representatives, and the State.

186. The proven facts indicate that the Moiwana community members were violently forced from their homes and traditional lands into a situation of ongoing displacement, whether in French Guiana or elsewhere in Suriname (supra paragraph 86(18)). Moreover, they have suffered poverty and deprivation since their flight from Moiwana Village, as their ability to practice their customary means of subsistence and livelihood has been drastically limited (supra paragraph 86(18)).

187. The Court, considering, *inter alia*, the circumstances of the case and that a sufficient basis exists to presume material harm, sees fit, on grounds of equity, to direct the State to grant an indemnity for material damages of US\$3,000.00 (three thousand dollars of the United States of America) to each of the victims indicated in paragraphs 180 and 181. The indemnity for material damages shall be granted to each of the victims pursuant to the terms stipulated in paragraphs 178 and 179 of the instant judgment. The Tribunal notes here that an additional measure shall be ordered in a subsequent section of this judgment, in efforts to repair the loss of the Moiwana community members’ homes (infra paragraph 214). [FN103]

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[FN103] Cf. Case of Plan de Sánchez Massacre, supra note 82, para. 74.

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## C) MORAL DAMAGES

### Arguments of the Commission

188. The Commission requested that the Court order the State to pay moral damages resulting from the denial of justice suffered by the victims, based on the following considerations:

- a) both the survivors and the family members of those killed in the massacre have experienced moral suffering as a result of the ongoing denial of justice, their forced displacement and the lack of closure regarding the events;
- b) the former residents of Moiwana Village were traumatized – physically, psychologically and emotionally – by the circumstances of the attack that forced them to flee in terror, and which resulted in the destruction of their homes and the community as a whole;
- c) the victims also suffer because they were unable to bury their loved ones in the traditional custom and, in most cases, are unaware of the location of the corpses;
- d) the victims must live with the knowledge that their failure to obtain justice has caused anger in the spiritual world, which has already manifested itself in the form of illness, disease and misfortune;
- e) their inability to maintain their relationship with their ancestral lands and its sacred sites has deprived them of a fundamental aspect of their cultural identity, which adds to their sense of loss as well as to their uncertainty about the community’s future; and
- f) they continue to fear for their personal safety, owing to the ongoing impunity.

#### Arguments of the representatives

189. The representatives requested moral damages in the following terms:

- a) given the grave circumstances and violations of basic human rights in this case, “both those before the Court and the underlying violations,” and the ongoing indifference of the State to such violations and the consequential extreme suffering of the victims, moral damages over and above a judgment of condemnation should be awarded;
- b) the aggravated circumstances of the case that should be taken into account include: gross violations of the right to life as part of a pattern of systematic, collective reprisals against civilian maroons; intentional destruction of the remains of a number of the victims of the massacre and denial of the fundamental right to conduct the required burials; ongoing dispossession of traditional lands and resources; the State’s gross indifference and hostility towards the suffering of the victims; Suriname’s affirmative obstruction of justice; and the complete failure over an 18-year period to investigate the massacre, punish those responsible and compensate the victims;
- c) the victims have suffered and still suffer greatly because of their inability to comply with fundamental cultural norms, and because “angry spirits are avenging themselves on the victims and causing them physical and mental afflictions”;
- d) the victims have been forced “to take up life in a foreign country far from the context in which [their lives] had been evolving, in a state of solitude, poverty, and severe physical and psychological distress”; and
- e) the massacre is not history for the victims, it is a burden that each and every one of them has endured for the past 18 years, made more heavy and painful by the State’s indifference to their suffering.

#### Arguments of the State

190. The State’s arguments found in the material damages section (supra paragraph 184) apply to the matter of moral damages as well.

## The Court's Assessment

191. Moral damage may include suffering and affliction, detriment to very significant personal values, as well as non-pecuniary alterations to a victim's living conditions. Since it is not possible to assign a precise monetary equivalent to non-pecuniary damage, for purposes of comprehensive reparation to victims, the Court must turn to other alternatives: first, payment of an amount of money or delivery of goods or services that can be estimated in monetary terms, which the Court will establish through reasonable application of judicial discretion and equity; and second, public acts or works that seek, inter alia, to commemorate and dignify victims, as well as to avoid the repetition of human rights violations. [FN104]

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[FN104] Cf. Case of the Serrano-Cruz Sisters, supra note 9, para. 156; Case of Plan de Sánchez Massacre. Reparations, supra note 82, para. 80; and Case of De la Cruz-Flores, supra note 59, para. 155.

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192. It is well settled in international jurisprudence that a judgment constitutes, per se, a form of reparation. However, considering the aggravated circumstances of the present case and its many non-pecuniary consequences, the Court deems it appropriate that the moral damages must also be repaired, on grounds of equity, through the payment of compensation. [FN105]

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[FN105] Cf. Case of the Serrano-Cruz Sisters, supra note 9, para. 157; Case of Carpio-Nicolle et al., supra note 82, para. 117; and Case of Plan de Sánchez Massacre. Reparations, supra note 82, para. 81.

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193. In evaluating the non-pecuniary damages suffered in the instant case – harm so serious as to have produced a violation of Article 5 of the American Convention, in conjunction with Article 1(1) of that treaty (supra para. 103) – the Court has carefully studied the testimony of Moiwana community members Erwin Willemdam, Antonia Difienjo and Andre Ajintoena, and is of the opinion that their experience may be considered representative of that of rest of the victims. [FN106] Furthermore, the Tribunal has closely examined the testimony of witness Stanley Rensch, as well as of expert witnesses Kenneth M. Bilby and Thomas Polimé (by affidavit), all of whom have demonstrated intimate familiarity with N'djuka society in general, and the circumstances of the Moiwana community members in particular.

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[FN106] Cf. Case of Plan de Sánchez Massacre. Reparations, supra note 82, para. 84.

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194. Given that the victims of the present case are members of the N'djuka culture, this Tribunal considers that the individual reparations to be awarded must be supplemented by communal measures; said reparations will be granted to the community as a whole in subsection D. [FN107]

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[FN107] Cf. Case of Plan de Sánchez Massacre. Reparations, supra note 82, para. 86.

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195. The Court's assessment of moral damage in the instant case particularly takes into account the following aspects of the Moiwana community members' suffering:

- a) their inability, despite persistent efforts, to obtain justice for the attack on their village, particularly in light of the N'djuka emphasis upon punishing offenses in a proper manner (supra paragraph 86(10)). Such long-standing impunity, fostered by violent State efforts to obstruct justice (supra paragraph 86(33)), humiliates and infuriates the community members, as much as it fills them with dread that that offended spirits will seek revenge upon them (supra paragraph 86(43)). In addition, due to the failure of the State's criminal investigation, community members are fearful that they could once again confront hostilities if they were to return to their traditional lands (supra paragraph 86(43));
- b) they do not know what has happened to the remains of their loved ones, and, as a result, they cannot honor and bury them in accordance with fundamental norms of N'djuka culture, which causes them deep anguish and despair (supra paragraph 86(42)). Since the various death rituals have not been performed according to N'djuka tradition, the community members fear "spiritually-caused illnesses," which they believe can affect the entire natural lineage and, if reconciliation is not achieved, will persist through generations (supra paragraph 86(9)); and
- c) the Moiwana community members' connection to their ancestral territory was brusquely severed – dispersing them throughout Suriname and French Guiana. Since a N'djuka community's relationship to its traditional land is of vital spiritual, cultural and material importance, their forced displacement has devastated them emotionally, spiritually, culturally, and economically (supra paragraph 86(42)).

196. In consideration of the severe circumstances discussed above, the Tribunal sees fit, on grounds of equity, to direct the State to grant an indemnity for moral damages of US\$10,000.00 (ten thousand dollars of the United States of America), or the equivalent in national currency, to each of the victims indicated in paragraphs 180 and 181 of the instant judgment. The indemnity for moral damages shall be granted to each of the victims pursuant to the terms stipulated in paragraphs 178 and 179 of the instant judgment.

D) OTHER FORMS OF REPARATION (Satisfaction measures and non-repetition guarantees)

Arguments of the Commission

197. With regard to measures of satisfaction and guarantees of non-repetition, the Commission requested that the Court order Suriname to complete the following measures:

- a) adopt all measures required to ensure the prompt and effective investigation of the attack on Moiwana Village and subsequent denial of justice in order to ensure that those responsible are tried and punished;

- b) facilitate the return of any former members of Moiwana Village, their family members and any family members of those killed who wish to resume life in that community. This measure must include: i) formal legal recognition of their right to own and occupy the traditional seat of the community; ii) guarantees to ensure their personal security; and iii) the construction, furnishing and staffing of educational and health facilities in the community;
- c) locate the remains of the victims who were killed in the massacre at Moiwana and whose bodies have not been recovered, and exhume them and/or take other measures necessary to serve the wishes of their families with respect to an appropriate final resting place;
- d) erect a monument to memorialize both the massacre at Moiwana Village and its victims, in consultation with and taking fully into account the wishes of the survivors and family members of those killed; and
- e) issue a formal apology to the designated Gaanman of the N'djuka community for the denial of judicial protection and forced displacement.

198. The Commission based the abovementioned requests on the following considerations:

1. The criminal investigation

- a) the victims feel an obligation to ensure that the dignity of those killed is vindicated through the clarification of the facts and imposition of accountability for the violations suffered. Furthermore, they have also indicated that the impunity of the instant case shows the contempt of the State toward the lives of those killed in the massacre and the suffering experienced by the survivors;
- b) the N'djuka culture attributes a central role to justice. The survivors of the massacre and the next of kin of those killed are obligated by N'djuka law to seek justice so that the spirits can rest. If this is not accomplished, the spirits may become very angry and cause great difficulties for the survivors and next of kin;
- c) the fact that the victims have not obtained justice and reparations for the massacre is seen as deeply shameful by other N'djuka, as it is perceived as a failure to honor their obligations to the dead and their ancestors. Such loss of standing within N'djuka society is a constant source of pain and embarrassment for the victims;

2. The return of the victims

- d) following the attack and massacre, the survivors fled elsewhere within Suriname as well as to neighboring French Guiana. The survivors who arrived in French Guiana were placed in a refugee camp; in early 1993, some survivors decided to return to Suriname;
- e) as provided for by agreement with France, when the victims returned to Suriname they were placed in a temporary reception center in Moengo, at which time the State promised to rebuild their villages and otherwise provide for them. However, the promise was never honored, and many remain in the reception center today;
- f) at this time, many victims are not ready to return to Moiwana permanently, due to their traumatic and intensely painful memories of the attack;
- g) others are afraid that the massacre could be repeated owing to the ongoing impunity. The author of the massacre, Desire Bouterse, maintains a prominent and powerful position in

Surinamese public life: he is a Parliament member and leader of the National Democratic Party, the largest opposition party;

h) some of the victims would like to return to Moiwana permanently and others wish simply to farm but not to live there; in any event, all want to maintain their spiritual and cultural commitments, ensuring that future generations can return when they wish;

3. Recovering the remains of the victims who were killed in the massacre

i) this measure involves the State's duty to carry out an effective investigation to ensure accountability, as well as a remedy for the moral suffering of the survivors and next of kin, who have been unable to fulfill their familial, cultural and religious obligations to provide their loved ones with a proper burial; and

4. An official apology and the construction of a monument

j) State authorities have never given the victims any "support," have not apologized, and have not shown them any respect. In fact, the State has rarely acknowledged that the massacre occurred.

#### Arguments of the representatives

199. With regard to measures of satisfaction and guarantees of non-repetition, the representatives requested that the Court order Suriname to carry out the following measures:

1. Investigation of the massacre and prosecution of its intellectual authors

a) Suriname must publicly declare that it will investigate the massacre and, in accordance with applicable law, prosecute its intellectual authors for crimes against humanity and gross violations of humanitarian and human rights law;

b) the State must in fact conduct a serious and diligent investigation of the massacre and, again pursuant to applicable law, prosecute the intellectual authors as described above;

c) Suriname must also investigate, prosecute and punish those responsible for the obstruction of justice in this case;

d) the State must adopt legislative and other measures to ensure that the preceding measures can take place and that any statute of limitations that may presently apply to the Moiwana massacre in domestic law be declared inapplicable; and

e) Suriname must repeal the "Amnesty Act 1989" and declare that it was devoid of legal effect ab initio.

2. Restitution of Traditional Lands and Resources

f) the State must provide: i) restitution and legal recognition of the community's ownership rights to their traditional lands and resources in accordance with their customary law, values and usage; ii) collective title to these traditional lands and resources that confirms and effectively secures their ownership rights in accordance with their customary law; iii) physical demarcation; iv) guarantees of safety for those who choose to return; and v) an opportunity for the full

participation and informed consent of both the victims and the other neighboring Cottica N'djuka communities regarding the preceding measures;

g) the State must adopt legislative and other measures in order to identify and effectively title the community's traditional lands in a manner that is consistent with the American Convention and indigenous peoples' rights in other human rights instruments; and

h) Suriname must rebuild the houses in the village and construct, furnish and staff fully-equipped and functional educational and health facilities, all with the prior informed consent of the victims and with their full cooperation.

### 3. Other measures

i) the State must call a press conference and publicly acknowledge that the Moiwana massacre occurred as well as its responsibility for the massacre and subsequent denial of justice and other proven violations;

j) Suriname must provide funds for the design, construction and placement of a monument to those killed at Moiwana in a suitable public place, with the agreement of the victims;

k) the State, with the full participation and consent of the victims, must use all means at its disposal to locate and return the remains of the victims of the massacre, at its own expense, to the victims and ensure the victims the free exercise of their right to bury their loved ones in accordance with their customs and beliefs; and

l) Suriname must issue a public apology for the massacre and subsequent denial of justice to Gaanman Matodja Gazon, in his capacity as paramount leader and representative of the N'djuka people, and to Surinamese society in general.

### Arguments of the State

200. With regard to the measures of reparation at issue, the State responded that:

a) the inhabitants of Moiwana Village subsist on trade and agriculture, as is typical in that region; thus, they have never been an isolated community that practiced its own culture;

b) the Commission has been unable to show that those responsible for the massacre continue to occupy positions of power and influence in the country. Nor has it been able to demonstrate that the community members have been prevented from returning to Moiwana Village or have been prevented from reconstructing their cultural life as a N'djuka people;

c) Suriname will continue its investigation into "the occurrences that took place in the village of Moiwana"; and

d) the State "has no objections" with regard to the following measures: i) issuing a public apology "to the whole nation with regard to the occurrences that took place in the village of Moiwana and to the survivors and family members in particular"; ii) establishing a memorial referring to the events of Moiwana, to serve as "a reminder to the whole nation of what happened and what may not repeat itself in the future"; and iii) paying for reasonable costs so that survivors and family members may "commence cultural activities in Suriname, with regard to the occurrences that took place on the 29th of November, 1986."

### The Court's Assessment

201. In this chapter, the Court will determine the measures of satisfaction to repair non-pecuniary damages; such measures seek to impact the public sphere. [FN108] These measures have special significance in the instant case, given the extreme gravity of the facts and the collective nature of the damages suffered.

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[FN108] Cf. Case of the Serrano-Cruz Sisters, *supra* note 9, para. 165; Case of Plan de Sánchez Massacre. Reparations, *supra* note 82, para. 93; and Case of De la Cruz-Flores, *supra* note 59, para. 164.

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a) The State's obligation to investigate the facts in question, identify, prosecute and punish the responsible parties, as well as recover the remains of the Moiwana community members killed during the 1986 attack

202. The Court held above (*supra* paragraphs 163 and 164) that Suriname's gravely deficient investigation into the November 29, 1986 attack upon Moiwana Village, the State's violent obstruction of justice, and the extended period of time that has transpired without a clarification of the facts and the punishment of the responsible parties have defied the standards for access to justice and due process established in the American Convention.

203. Thus, more than 18 years later, the impunity of the material and intellectual authors responsible for the attack continues to prevail in Suriname. The Court has defined impunity as the overall lack of investigation, arrest, prosecution and conviction of those responsible for violations of the rights protected by the American Convention. [FN109] The State is obliged to combat such a situation by all available legal means, as impunity fosters the chronic repetition of human rights violations and renders victims and their next of kin completely defenseless. [FN110]

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[FN109] Cf. Case of the Serrano-Cruz Sisters, *supra* note 9, para. 170; Case of the Gómez-Paquiyaui Brothers, *supra* note 59, para. 148; and Case of 19 Merchants, *supra* note 75, para. 175.

[FN110] Cf. Case of Carpio-Nicolle et al., *supra* note 82, para. 126; Case of Tibi, *supra* note 98, para. 255; and Case of the Gómez-Paquiyaui Brothers, *supra* note 59, para. 228.

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204. Furthermore, as stated previously, all persons, including the family members of victims of serious human rights violations, have the right to the truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations. This right to the truth, once recognized, constitutes an important means of reparation. Therefore, in the instant case, the right to the truth creates an expectation that the State must fulfill to the benefit of the victims. [FN111]

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[FN111] Cf. Case of Carpio-Nicolle et al., supra note 82, para. 128; Case of the Gómez-Paquiyaury Brothers, supra note 59, para. 230; and Case of 19 Merchants, supra note 75, para. 261.

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205. In light of the above, in response to the extrajudicial killings that occurred on November 29, 1986, the State must immediately carry out an effective, swift investigation and judicial process, leading to the clarification of the facts, punishment of the responsible parties and appropriate compensation of the victims. The results of these processes must be publicly disseminated by the State, so that the Surinamese society may know the truth regarding the facts of the instant case.

206. Moreover, as the Court asserted in a preceding chapter, no domestic law or regulation – including amnesty laws and statutes of limitation – may impede the State’s compliance with the Court’s orders to investigate and punish perpetrators of human rights violations. In particular, amnesty laws, statutes of limitation and related provisions that hinder the investigation and punishment of serious human rights violations – such as those of the present case, summary, extra-legal or arbitrary executions – are inadmissible, as said violations contravene non-derogable rights recognized in international human rights law. [FN112]

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[FN112] Cf. Case of the Serrano-Cruz Sisters, supra note 9, para. 172; Case of the Gómez-Paquiyaury Brothers, supra note 59, para. 148; and Case of 19 Merchants, supra note 75, para. 175.

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207. In fulfillment of its obligation to investigate and punish the responsible parties in the instant case, Suriname must: a) remove all obstacles, de facto and de jure, that perpetuate impunity; b) use all means at its disposal to expedite the investigation and judicial process; c) sanction, according to the appropriate domestic laws, any public officials, as well as private individuals, who are found responsible for having obstructed the criminal investigation into the attack on Moiwana Village; and d) provide adequate safety guarantees to the victims, other witnesses, judicial officers, prosecutors, and other relevant law enforcement officials.

208. Finally, Suriname must employ all technical and scientific means possible – taking into account the relevant standards in the field, such as those set out in the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions – to recover promptly the remains of the Moiwana community members killed during the 1986 attack. If such remains are found by the State, it shall deliver them as soon as possible thereafter to the surviving community members so that the deceased may be honored according to the rituals of N’ djuka culture. Moreover, the State shall conclude, within a reasonable timeframe, the analysis of the human remains found at the grave site in 1993 (supra paragraph 86(31)), and communicate the results of said analysis to the representatives of the victims.

b) Collective title to traditional territories

209. In light of its conclusions in the chapter concerning Article 21 of the American Convention (*supra* paragraph 135), the Court holds that the State shall adopt such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for their use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation and titling of said traditional territories.

210. The State shall take these measures with the participation and informed consent of the victims as expressed through their representatives, the members of the other Cottica N'djuka villages and the neighboring indigenous communities, including the community of Alfonsdorp.

211. Until the Moiwana community members' right to property with respect to their traditional territories is secured, Suriname shall refrain from actions – either of State agents or third parties acting with State acquiescence or tolerance – that would affect the existence, value, use or enjoyment of the property located in the geographical area where the Moiwana community members traditionally lived until the events of November 29, 1986.

c) State guarantees of safety for those community members who decide to return to Moiwana Village

212. The Court is aware that the Moiwana community members do not wish to return to their traditional lands until: 1) the territory is purified according to cultural rituals; and 2) they no longer fear that further hostilities will be directed toward their community. Neither of these elements is possible without an effective investigation and judicial process, leading to the clarification of the facts and punishment of the responsible parties. As these processes are carried out and led to conclusion, only the community members themselves can decide when exactly it would be appropriate to return to Moiwana Village. When community members eventually are satisfied that the necessary conditions have been reached so as to permit their return, the State shall guarantee their safety. To that effect, upon the community members' return to Moiwana Village, the State shall send representatives every month to Moiwana Village during the first year, in order to consult with the Moiwana residents. If the community members express concern regarding their safety during those monthly meetings, the State must take appropriate measures to guarantee their security, which shall be designed in strict consultation with said community members.

d) Developmental fund

213. As the 1986 military operation destroyed Moiwana Village property and forced survivors to flee, both the representatives and the Commission have emphasized the necessity of implementing a developmental program that would provide basic social services to the community members upon their return. The State, for its part, has shown willingness “to pay for the reasonable costs of survivors and family members to commence cultural activities [...], with regard to the occurrences [of November 29, 1986].”

214. In that regard, this Court rules that Suriname shall establish a developmental fund, to consist of US \$1,200,000 (one million, two hundred thousand dollars of the United States of America), which will be directed to health, housing and educational programs for the Moiwana community members. The specific aspects of said programs shall be determined by an implementation committee, which is described in the following paragraph, and shall be completed within a period of five years from the date of notification of the present judgment.

215. The abovementioned committee will be in charge of determining how the developmental fund is implemented and will be comprised of three members. The committee shall have a representative designated by the victims and another shall be chosen by the State; the third member shall be selected through an agreement between the representatives of the victims and the State. If the State and the representatives of the victims have not arrived at an agreement regarding the composition of the implementation committee within six months from the date of notification of the present judgment, the Court will convene them to a meeting in order to decide upon the matter.

e) Public apology and acknowledgment of international responsibility

216. The Court notes with appreciation Suriname's statement that it "has no objections to issue a public apology to the whole nation with regard to the occurrences that took place in the Village of Moiwana and to the survivors and family members in particular." In this regard, as a measure of satisfaction to the victims and in attempt to guarantee the non-repetition of the serious human rights violations that have occurred, the State shall publicly recognize its international responsibility for the facts of the instant case and issue an apology to the Moiwana community members. This public ceremony shall be performed with the participation of the Gaanman, the leader of the N'djuka people, as well as high-ranking State authorities, and shall be publicized through the national media. Furthermore, in consideration of the particular circumstances of the instant case, the event must also honor the memory of Herman Gooding, the civilian police official who was murdered due to his courageous efforts to investigate the events of November 29, 1986.

217. The aforementioned ceremony must be organized and funded by the State and completed within one year from the date of notification of the present judgment.

f) Monument

218. Finally, the Court also notes with satisfaction Suriname's assertion that it "has no objections to establish a memorial to point out the occurrences that took place in the Village of Moiwana [...] this memorial must be a reminder to the whole nation of what happened and what may not [be] repeat[ed] in the future." For those very reasons – to memorialize the events of November 29, 1986, as well as to prevent the recurrence of such dreadful actions in the future – the State shall build a monument and place it in a suitable public location. The memorial's design and location shall be decided upon in consultation with the victims' representatives, and shall be completed within one year from the date of notification of the instant judgment.

#### XIV. LEGAL COSTS AND FEES

## Arguments of the Commission

219. On this matter, the Commission argued that:

- a) neither the Moiwana survivors nor their representatives should be obliged to bear the costs associated with the legal representation necessary to confront the ongoing injustice in this case; and
- b) an award of costs and fees that is reasonable and justified is essential in this case; it should take into account past and current legal costs and fees, as well as those necessary to pursue the matter before the Court through all stages including compliance with an eventual judgment.

## Arguments of the representatives

220. The representatives requested an award of all costs incurred in preparing and pursuing the case domestically and before the Commission and the Court, apportioned as follows: a) US \$10,000.00 (ten thousand US dollars) to Association Moiwana, as well as an additional US \$5,000.00 (five thousand US dollars) for expected future costs; b) US \$68,213.75 (sixty-eight thousand two hundred thirteen US dollars and seventy-five cents) to Moiwana '86; and c) US \$32,681.61 (thirty two thousand six hundred eighty-one US dollars and sixty one cents) to the Forest Peoples Programme.

## Arguments of the State

221. The State requested that the payment of legal costs and fees be denied, based on the fact that legal costs of this nature bear no relationship to prevailing conditions in the Inter-American system and that their award has no legal basis within this system.

## The Court's Assessment

222. As the Court has stated on previous occasions, costs and fees are contemplated within the concept of reparations as enshrined in Article 63(1) of the American Convention, since the victims' efforts to obtain justice in the domestic as well as international stages of the case lead to expenses that must be compensated when the State's international responsibility has been determined. In this regard, the Tribunal must prudently assess such expenses, which involve both internal and international judicial processes, and take into account the particular circumstances of the case and the nature of international jurisdiction in the protection of human rights. The estimate must be made on grounds of equity and in consideration of the reasonable expenses submitted by the parties. In the instant case, the Court observes that the representatives have waived attorneys' fees, and thus only seek an award of costs.

223. In light of the above, the Court sees fit, on grounds of equity, to direct the State to grant an indemnity for costs of US \$45,000.00 (forty-five thousand US dollars), to the legal representative of Association Moiwana, which functions as a coordinating mechanism for the victims (supra paragraph 86(36)). Of that total amount, US \$27,000.00 (twenty-seven thousand

US dollars) shall correspond to the costs of the organization Moiwana '86, and US \$10,000.00 (ten thousand US dollars) shall correspond to the costs of the Forest Peoples Programme.

224. Furthermore, it has been demonstrated (supra paragraph 86(44)) that Association Moiwana has been actively involved in the efforts for justice in the instant case. Although Association Moiwana did not submit expense receipts before the Court, the representatives have nonetheless requested an award for costs to said organization, based in equity, and have also indicated that Association Moiwana will continue to be involved in advocating for the eventual investigative and judicial proceedings concerning the facts of the present case. In this way, of the total amount of US \$45,000.00 that will be disbursed to the legal representative of Association Moiwana, US \$8,000.00 (eight thousand US dollars) shall correspond to the past and likely future costs of Association Moiwana.

#### XV. MEANS OF COMPLIANCE

225. To comply with the instant judgment, the State shall pay the compensation ordered (supra paragraphs 187, 196, 223 and 224), carry out the public ceremony (supra paragraphs 216 and 217) and build the aforementioned memorial (supra paragraph 218), all within a year, except when specified otherwise (supra paragraph 217). Regarding the community development fund, which will be directed to health, housing and education programs for the Moiwana community members, the specific elements of said programs shall be determined by an implementation committee, and shall be completed within five years. If the State and the representatives of the victims have not arrived at an agreement regarding the composition of the implementation committee within six months from the date of notification of the present judgment, the Court will convene them to a meeting in order to decide upon the matter. Finally, the State shall, as soon as possible, recover the remains of the Moiwana community members killed during the events of November 29, 1986, and deliver them to the surviving community members. All of the time frames mentioned above shall be calculated from the date of the notification of the instant judgment. The other measures ordered without a specific time frame shall be completed within a reasonable period of time from the date of the notification of the present judgment.

226. The payment of compensation ordered in favor of the victims shall be carried out according to the terms set out in paragraphs 178 – 181 of the instant judgment, as is appropriate.

227. The payment of costs incurred by the representatives shall be carried out according to the terms set out in paragraphs 223 and 224 of the instant judgment.

228. The State may comply with its obligations by payment in United States dollars or the equivalent amount in national currency, using the rate of exchange between the two currencies in force on the market in New York, United States of America, the day before payment, in order to make the respective calculation.

229. If, due to causes that can be attributed to the beneficiaries of the compensation, they are unable to claim such compensation within the specified period of one year or 24 months (supra paragraphs 178 and 179), from the date of the notification of this judgment, the State shall deposit such amount in their favor in an account or a deposit certificate in a reputable national

banking institution, in United States dollars and in the most favorable financial conditions allowed by legislation and banking practice. If, after ten years, the compensation has not been claimed, the sum shall be returned to the State, with the interest earned.

230. The payments ordered in this judgment as compensation for material and moral damages, as well as costs, may not be affected, reduced or conditioned by any current or future taxes or charges. Consequently, the amounts shall be paid in full to the victims in accordance with the present judgment.

231. If the State falls in arrears, it shall pay interest on the amount owed, corresponding to bank interest on arrears in Suriname.

232. In accordance with its consistent practice, the Court retains the authority, inherent in its competence, to monitor compliance with this judgment. The instant case shall be closed when the State has fully implemented all of the provisions of this judgment. Within one year of the date of notification of this judgment, Suriname shall furnish the Court with a first report on the measures taken in compliance therewith.

#### XVI. OPERATIVE PARAGRAPHS

233. Therefore,

THE COURT,

DECIDES,

Unanimously,

1. To dismiss the State's preliminary objections.

DECLARES,

Unanimously, that:

1. The State violated the right to humane treatment enshrined in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of that treaty, to the detriment of the Moiwana community members, in the terms of paragraph 103 of this judgment.

2. The State violated the right to freedom of movement and residence enshrined in Article 22 of the American Convention, in relation to Article 1(1) of that treaty, to the detriment of the Moiwana community members, in the terms of paragraph 121 of this judgment.

3. The State violated the right to property enshrined in Article 21 of the American Convention, in relation to Article 1(1) of that treaty, to the detriment of the Moiwana community members, in the terms of paragraph 135 of this judgment.

4. The State violated the rights to judicial guarantees and judicial protection enshrined in Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) of that treaty, to the

detriment of the Moiwana community members, in the terms of paragraphs 163 and 164 of this judgment.

5. This judgment constitutes, per se, a form of reparation, in the terms of paragraph 192 of this judgment.

AND DECIDES,

Unanimously, that:

1. The State shall implement the measures ordered with respect to its obligation to investigate the facts of the case, as well as identify, prosecute, and punish the responsible parties, in the terms of paragraphs 202 – 207 of this judgment.

2. The State shall, as soon as possible, recover the remains of the Moiwana community members killed during the events of November 29, 1986, and deliver them to the surviving community members, in the terms of paragraph 208 of this judgment.

3. The State shall adopt such legislative, administrative, and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for the members' use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation and titling of said traditional territories, in the terms of paragraphs 209 – 211 of this judgment.

4. The State shall guarantee the safety of those community members who decide to return to Moiwana Village, in the terms of paragraph 212 of this judgment.

5. The State shall establish a community development fund, in the terms of paragraphs 213 – 215 of this judgment.

6. The State shall carry out a public ceremony, whereby Suriname recognizes its international responsibility and issues an apology, in the terms of paragraphs 216 – 217 of this judgment.

7. The State shall build a memorial in a suitable public location, in the terms of paragraph 218 of this judgment.

8. The State shall pay the compensation ordered in paragraph 187 of the instant judgment to the Moiwana community members for material damages, in the terms of paragraphs 178 – 181 and 225 – 231 of this judgment.

9. The State shall pay the compensation ordered in paragraph 196 of the instant judgment to the Moiwana community members for moral damages, in the terms of paragraphs 178 – 181 and 225 – 231 of this judgment.

10. The State shall pay the compensation ordered in paragraph 223 of the instant judgment for costs, in the terms of paragraphs 223 – 231 of this judgment.

11. The Court will monitor compliance with this judgment and will close this case once the State has fully implemented all of the provisions. Within one year of the date of notification of this judgment, the State shall furnish the Court with a report on the measures taken in compliance therewith, in the terms of paragraph 232 of said judgment.

Judges Cançado-Trindade and Medina-Quiroga advised the Court of their concurring opinions, which accompany this judgment. Judge García-Ramírez also signed Judge Medina-Quiroga's opinion.

Drafted in San José, Costa Rica, on June 15, 2005, in English and Spanish, both texts being authentic.

Sergio García-Ramírez  
President

Alirio Abreu-Burelli  
Oliver Jackman  
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Secretary

So ordered,

Sergio García-Ramírez  
President

Pablo Saavedra-Alessandri  
Secretary

#### SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. Almost fourteen years after its decision in the *Aloeboetoe and Others versus Suriname* case (of 04.12.1991), - my first case in this Court and a Sentence which was complied with in an exemplary way by the respondent State, a young country struck by material poverty but rich in cultural manifestations, - the present Judgment of the Inter-American Court of Human Rights in the case of the *Moiwana Community versus Suriname*, for the adoption of which I concurred with my vote, raises issues of great transcendence, from the juridical perspective. In the paragraphs that follow I shall endeavour to identify those issues, on which I feel obliged to leave my personal reflections on the records, in the hope that they may contribute to the future evolution of international law in what appears to me to be its *terra nova* or *incognita* at the present stage of its evolution.

#### I. Preliminary Observations.

2. In indicating, in my Separate Opinion in the *cas d'espèce*, the foundations of my position of the multiple aspects of the matter at issue, as I perceive them, I shall, thus, develop three lines of reflections. In the first one, I shall address the following issues: a) the legal subjectivity of peoples in international law; b) uprootedness as a human rights problem confronting the universal juridical conscience; c) the projection of human suffering in time; and d) the illusion of

the "post-modern" and the incorporation of death into life. In the second one, I shall dwell upon the following points: a) mortality and its inescapable relevance to the living; b) the duties of the living towards their dead; and c) the duties towards the dead in the origins and development of international law and domestic law. And, in the third one, I shall present my reflections, entirely *de lege ferenda*, on what I see it fit to call: a) the moving from the right to a project of life (*proyecto de vida*) to the right to a project of after-life (*proyecto de post-vida*); b) the configuration of the spiritual damage (*daño espiritual*), beyond the moral damage; and c) my concluding observations in the form of a plea against oblivion.

3. Some of my thoughts developed herein are, to the best of my knowledge, advanced for the first time, - particularly my third line of reflections, on the right to a project of after-life (*proyecto de post-vida*) and the configuration of the spiritual damage (*daño espiritual*), in the sense I conceive it, beyond the moral damage, focusing on the human person in her life and after-life. I have not yet seen them being considered, at any depth, in the so-called "centres of academic excellence" of post-industrial societies, where normally authors engage themselves in quoting each other, - in agreement or in disagreement, disclosing a blend of parochialism and self-sufficiency, - and almost invariably in their own and same language, apparently disconnected, to a large extent, from the day-to-day problems that afflict "common people".

4. On my part, I feel entirely free, besides obliged, to give expression to my thoughts on the aforementioned points, living (or being based on) as I do, in extremis, in the surrealistic city of Brasília, in the middle of nowhere, where the convincing sunset and the penetrating moonlight far outweigh and overwhelm, in my own perception, the "ultra-modern" architectural frenzy. Neither impressed nor constrained by "post-modernism" at all, I sense I can properly value the griefs of the Maroon N'djukas of the Moiwana Community, in the present case opposing them to the State of Suriname.

## II. The Legal Subjectivity of Peoples in International Law.

5. Almost as a preliminary issue, may I briefly refer to the legal subjectivity of peoples in international law. In the present Sentence in the Moiwana Community versus Suriname case, the Court indicates, in the section on proven facts of the present Judgment, that

"During the European colonization of present-day Suriname in the 17th Century, Africans were forcibly taken to the region and used as slaves on the plantations. Many of these Africans, however, managed to escape to the rainforest areas in the eastern part of Suriname's present national territory, where they established new and autonomous communities; these individuals came to be known as Bush Negroes or Maroons. Eventually, six distinct groups of Maroons emerged: the N'djuka, the Matawai, the Saramaka, the Kwinti, the Paamaka, and the Boni or Aluku.

These six communities individually negotiated peace treaties with the colonial authorities. The N'djuka people signed a treaty in 1760 that established their freedom from slavery, a century before slavery was formally abolished in the region. In 1837, this treaty was renewed; the terms of the agreement permitted the N'djuka to continue to reside in their settled territory and determined the boundaries of that area. The Maroons generally - and the N'djuka in particular - consider these treaties still to be valid and authoritative with regard to their relationship with the

State, despite the fact that Suriname secured its independence from the Netherlands in 1975" [FN1].

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[FN1] Paragraph 86(1) and (2).

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6. Thus, more than two centuries before Suriname attained statehood, its Maroon peoples celebrated peace agreements with the colonial authorities, subsequently renewed, and thus obtained their freedom from slavery. And the Maroons, - the N'djuka in particular, - regard these treaties as still valid and authoritative in the relations with the successor State, Suriname. This means that those peoples exercised their attributes of legal persons in international law, well before the territory where they lived acquired statehood. This reinforces the thesis which I have always supported, namely, that the States are not, and have never been, the sole and exclusive subjects of international law.

7. This purely inter-State outlook was forged by positivism, as from the Vattelian reductionism in the mid-XVIIIth century [FN2], and became en vogue in the late XIXth century and early XXth century [FN3], with the well-known disastrous consequences - the successive atrocities perpetrated in distinct regions of the world against human beings individually and collectively - that marked the tragic and abhorrent history of the XXth century. However, since its historical origins in the XVIth century, the law of nations (*droit des gens*, *derecho de gentes*, *direito das gentes*) encompassed not only States, but also peoples, and the human person, individually and in groups), and humankind as a whole [FN4].

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[FN2] Found in the work by E. de Vattel, *Le Droit des gens ou Principes de la loi naturelle appliquée à la conduite et aux affaires des nations et des souverains* (1758); cf., e.g., E. Jouannet, *Emer de Vattel et l'émergence doctrinale du Droit international classique*, Paris, Pédone, 1998, pp. 255, 311, 318-319, 344 and 347.

[FN3] For a criticism of State-consent theories, reflecting the dangerous voluntarist-positivist conception of international law, cf. A.A. Cançado Trindade, "The Voluntarist Conception of International Law: A Re-Assessment", 59 *Revue de droit international de sciences diplomatiques et politiques* - Geneva (1981) pp. 201-240.

[FN4] A.A. Cançado Trindade, - "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* - Belo Horizonte/Brazil (2001) pp. 11-23; A.A. Cançado Trindade, "A Personalidade e Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in *Jornadas de Direito Internacional* (Ciudad de México, Dec. 2001), Washington D.C., OAS Subsecretariat of Legal Affairs, 2002, pp. 311-347; and cf. A.A. Cançado Trindade, "Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain des droits de la personne", 14 *Revue québécoise de droit international* (2001) n. 2, pp. 207-239.

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8. In this respect, reference can be made, for example, to the inspiring work by Francisco de Vitoria [FN5], particularly his *De Indis - Relectio Prior* (1538-1539) [FN6]. In his well-known

Salamanca lectures De Indis (chapters VI and VII), Vitoria clarified his understanding of jus gentium as a law for all, individuals and peoples as well as States, "every fraction of humanity" [FN7]. In the XVIIth century, in the days of Hugo Grotius (De Jure Belli ac Pacis, 1625), likewise, the jus humanae societatis, conceived as a universal one, comprised States as well as peoples and individuals [FN8]. It is important to rescue this universalist outlook, in the current process of humanization of international law and of construction of the new jus gentium of the XXIst century.

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[FN5] Francisco de Vitoria, *Relecciones del Estado, de los Indios, y del Derecho de la Guerra* (with an Introduction by A. Gómez Robledo), 2nd. ed., Mexico, Ed. Porrúa, 1985, pp. XXX, XLIV-XLV, LXXVII and 61, and cf. pp. LXII-LXIII.

[FN6] Francisco de Vitoria, *De Indis - Relectio Prior (1538-1539)*, in: *Obras de Francisco de Vitoria - Relecciones Teológicas* (ed. T. Urdanoz), Madrid, BAC, 1960, p. 675.

[FN7] J. Brown Scott, *The Spanish Origin of International Law - Francisco de Vitoria and his Law of Nations*, Oxford/London, Clarendon Press/H. Milford - Carnegie Endowment for International Peace, 1934, pp. 140 and 170.

[FN8] Cf. H. Grotius, *De Jure Belli ac Pacis* (1625), The Hague, Nijhoff, 1948, pp. 6, 10 and 84-85; and P.P. Remec, *The Position of the Individual in International Law according to Grotius and Vattel*, The Hague, Nijhoff, 1960, pp. 203, 216-217 and 219-220.

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9. The present case of the Moiwana Community before the Inter-American Court, disclosing the cultural wealth of what is known as "Latin America", - of which we can, and have to, be proud of as human beings, - gives an eloquent testimony of the need to propound and advance further this universalist outlook of the law of nations. As the present Judgment of the Court further acknowledges, as to the proven facts,

"The N'djuka community's relationship to its traditional land is of vital spiritual, cultural and material importance. In order for the culture to maintain its integrity and identity, its members must have access to their homeland. Land rights in the N'djuka society exist on several levels, ranging from rights of the entire ethnic community to those of the individual. Larger territorial land rights are vested in the entire people, according to N'djuka custom; community members consider such rights to exist in perpetuity and to be unalienable" [FN9].

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[FN9] Paragraph 86(6).

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10. Human beings, individually and collectively, have emerged as subjects of international law. The rights protected disclose an individual and a collective or social dimensions, but it is the human beings, members of such minorities or collectivities, who are, ultimately, the titulaires of those rights [FN10]. This approach was espoused by the Inter-American Court of Human Rights in the unprecedented decision (the first pronouncement of the kind by an international tribunal) in the case of the Community Mayagna (Sumo) Awas Tingni versus Nicaragua (2001), which

safeguarded the right to communal property of their lands (under Article 21 of the American Convention on Human Rights) of the members of a whole indigenous community [FN11].

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[FN10] There are also international instruments, like the 1989 ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention n. 169, in force as from 05.09.1991), which appear to lay more emphasis, as far as duties are concerned, on the human collectivities as such.

[FN11] The Court pondered, in paragraph 141 of its Judgment (merits), that to the members of the indigenous communities (such as the present one) "the relationship with the land is not merely a question of possession and production but rather a material and spiritual element that they ought to enjoy fully, so as to preserve their cultural legacy and transmit it to future generations".

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11. In this respect, the endeavours undertaken in both the United Nations and the Organization of American States (OAS), along the nineties, to reach the recognition of indigenous peoples' rights through their projected and respective Declarations, pursuant to certain basic principles (such as, e.g., that of equality and non-discrimination), have emanated from human conscience. Those endeavours, - it has been suggested, - recognize the debt that humankind owes to indigenous peoples, due to the "historical misdeeds against them", and a corresponding sense of duty to "undo the wrongs" done to them [FN12].

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[FN12] A. Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Antwerpen/Groningen, Intersentia, 2001, pp. 228 and 233.

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12. This particular development has, likewise, contributed to the expansion of the international legal personality of individuals (belonging to groups, minorities or human collectivities) as subjects of (contemporary) international law. International Human Rights Law in general, and this Court in particular, have contributed to such development. Under human rights treaties such as the American Convention, to identify the individuals belonging to given communities presents the advantage of conferring upon them the corresponding enforceable subjective rights [FN13]. In the present Judgment in the *Moiwana Community* case, the Inter-American Court has rightly pointed out that the petitioners are the titulaires of the rights set forth in the Convention, and to deprive them of the faculty to submit their own pleadings would in fact constitute an "undue restriction" of "their condition as subjects of the International Law of Human Rights" (par. 91). Beyond that, there remains the question of the evolving condition of peoples themselves as subjects of international law [FN14].

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[FN13] N. Rouland, S. Pierré-Caps and J. Poumarède, *Direito das Minorias e dos Povos Autóctones*, Brasília, Edit. UnB, 2004, pp. 228-229.

[FN14] For general studies, cf., e.g., P. Thornberry, *Indigenous Peoples and Human Rights*, Manchester, University Press, 2002, pp. 1-429; S. James Anaya, *Indigenous Peoples in International Law*, 2nd. ed., Oxford, University Press, 2004, pp. 3-291; J. Castellino and N. Walsh (eds.), *International Law and Indigenous Peoples*, Leiden, Nijhoff, 2005, pp. 89-116 and 249-267.

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### III. Uprootedness as a Human Rights Problem Confronting the Universal Juridical Conscience.

13. The State-planned massacre of 1986 that originated the present case of the Moiwana Community versus Suriname also gave rise to displacement of former residents in the Moiwana village, besides those who sought refuge in French Guyana. They have endured this drama of social and family disruption for almost two decades. The tragedy of uprootedness, manifested in the present case, cannot pass unnoticed here, as uprootedness (*desarraigo*) affects ultimately the right to cultural identity, which conforms the material or substantive content of the right to life *lato sensu* itself.

14. In this connection, in a lecture I delivered at the Convent of San Carlos and San Ambrosio in Havana, Cuba, on 28 November 2000, in addressing the traumas generated by the forced displacements and consequent uprootedness of so many human beings nowadays, I saw it fit to recall the warning, formulated by Simone Weil already in the mid-XXth century, to the effect that to be rooted was "perhaps the most important and least recognized necessity of the human soul", and one of the "most difficult to define" [FN15]. In the same epoch and the same line of thinking, Hannah Arendt likewise warned against "the sufferings of the uprooted (the loss of home and familiarity of day-to-day life, the loss of profession and the feeling of usefulness to the others, the loss of the mother-tongue as a spontaneous expression of the sentiments)"; she further warned against the illusion of "trying to forget the past (given the influence exerted over each one by his ancestors, the previous generations)" [FN16].

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[FN15] S. Weil, *The Need for Roots*, London/N.Y., Routledge, 1952 (reprint 1995), p. 41.

[FN16] H. Arendt, *La tradition cachée*, Paris, Ch. Bourgeois Éd., 1987 (ed. orig. 1946), pp. 58-59 y 125-127.

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15. And still in the same thinking, J.-M. Domenach observed in the mid-sixties that it would not be possible to deny the roots of the human spirit itself, as the very form of acquisition of knowledge, on the part of each human being, - and consequently of his perception of the world, - was to a large extent conditioned by factors such as the place of birth, the mother-tongue, the cults, the family and the culture [FN17]. On the occasion, on my part I characterized uprootedness as a human rights problem confronting the universal juridical conscience [FN18].

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[FN17] J.-M. Domenach, *Le retour du tragique*, Paris, Éd. Seuil, 1967, p. 285.

[FN18] A.A. Cançado Trindade, "Reflexiones sobre el Desarraigo como Problema de Derechos Humanos frente a la Conciencia Jurídica Universal", in *La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI* (eds. A.A. Cançado Trindade and J. Ruiz de Santiago), 3rd. ed., San José of Costa Rica, Inter-American Court of Human Rights/UNHCR, 2004, pp. 40-41, and cf. 27-86.

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16. In fact, despite the persistence of the problem of internal displacement along mainly the last two decades, only in the first quarter of 1998, the U.N. Commission on Human Rights succeeded at last to adopt the Guiding Principles on Internal Displacement, aiming at reinforcing and strengthening the already existing means of protection; to this effect, the proposed new principles apply both to governments and insurgent groups, at all stages of the displacement. The basic principle of non-discrimination occupies a central position in the aforementioned document of 1998 [FN19], which cares to list the same rights, of internally displaced persons, which other persons in their country enjoy [FN20].

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[FN19] Principles 1(1), 4(1), 22, 24(1).

[FN20] It affirms, moreover, the prohibition of the "arbitrary displacement" (Principle 6).

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17. The 1998 Basic Principles referred to, determine that the displacement cannot take place in a way that violates the rights to life, to dignity, to freedom and security of the affected persons [FN21]; they also assert other rights, such as the right to respect for family life, the right to an adequate standard of living, the right to equality before the law, the right to education [FN22]. The basic idea underlying the whole document is in the sense that the internally displaced persons do not lose their inherent rights, as a result of displacement, and can invoke the pertinent international norms of protection to safeguard their rights.

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[FN21] Principles 8 and following.

[FN22] Principles 17, 18, 20 and 23, respectively.

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18. In the American continent, the 1984 Declarations of Cartagena on Refugees, the 1994 San José Declaration on Refugees and Displaced Persons, and the 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, are, each of them, product of a given historical moment. The first one, the Declaration of Cartagena, was motivated by urgent needs generated by a concrete crisis of great proportions; to the extent that this crisis was being overcome, due in part to that Declaration, its legacy began to project itself to other regions and subregions of the American continent.

19. The second Declaration was adopted amidst a distinct crisis, a more diffuse one, marked by the deterioration of the socio-economic conditions of wide segments of the population in distinct regions. In sum, Cartagena and San José were product of their time. The aggiornamento of the Colloquy of San José gave likewise a special emphasis on the identification of the needs of

protection of the human being in any circumstances [FN23]. There remained no place for the *vacatio legis* [FN24]. The 1994 Declaración of San José gave a special emphasis not only on the whole problem of internal displacement, but also, more widely, on the challenges presented by the new situations of human uprootedness in Latin America and the Caribbean, including the forced migratory movements originated by causes different from those foreseen in the Declaration of Cartagena.

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[FN23] Instead of subjective categorizations of persons (in accordance with the reasons which led them to abandon their homes), proper of the past, nowadays the objective criterion of the needs of protection came to be adopted, encompassing thereby a considerably greater number of persons (including the internally displaced persons) so vulnerable as the refugees, or even more than these latter.

[FN24] *Ibid.*, pp. 14-15.

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20. The 1994 Declaration recognized that the violation of human rights is one of the causes of forced displacements and that therefore the protection of those rights and the strengthening of the democratic system constitute the best measure for the search of durable solutions, as well as for the prevention of conflicts, the exoduses of refugees and the grave humanitarian crises [FN25]. Recently, at the end of consultations, with a wide public participation, undertaken at the initiative of the UNHCR, the 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America was adopted [FN26], on the occasion of the twentieth anniversary of the Cartagena Declaration (*supra*). For the first time in the present process, a document of the kind was accompanied by a Plan of Action. This can be explained by the aggravation of the humanitarian crisis in the region, particularly in the Andean subregion.

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[FN25] *Ibid.*, pp. 431-432.

[FN26] Cf. text reproduced in: UNHCR, *Memoria del Vigésimo Aniversario de la Declaración de Cartagena sobre los Refugiados (1984-2004)*, Mexico City/San José of Costa Rica, UNHCR, 2005, pp. 385-398.

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21. As the rapporteur of the Committee of Legal Experts of the UNHCR observed in his presentation of the final report to the Mexico Colloquy, at its first plenary session, on 15 November 2004, although the moments of the 1984 Cartagena Declaration and the 1994 San José Declaration are distinct, their achievements "cumulate, and constitute today a juridical patrimony" of all the peoples of the region, disclosing the new trends of the development of the international safeguard of the rights of the human person in the light of the needs of protection, and projecting themselves into the future [FN27]. Thus,

"the Declaration of Cartagena faced the great human drama of the armed conflicts in Central America, but furthermore foresaw the aggravation of the problem of internally displaced persons. The Declaration of San José, in turn, dwelt deeper upon the issue of protection of, besides

refugees, also of internally displaced persons, but moreover foresaw the aggravation of the problem of forced migratory fluxes.

Ever since anachronical compartmentalizations were overcome, proper of a way of thinking of a past which no longer exists, and one came to recognize the convergences between the three regimes of protection of the rights of the human person, namely, the International Law of Refugees, International Humanitarian Law and the International Law of Human Rights. Such convergences - en at normative, hermeneutic [cf.] and operative levels - were reaffirmed in all preparatory meetings of the present Commemorative Colloquy of Mexico City, and repercute [cf.] nowadays in other parts of the world, conforming the most [more] lucid international legal doctrine on the matter" [FN28].

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[FN27] Cf. "Presentación por el Dr. A.A. Cançado Trindade del Comité de Consultores Jurídicos del ACNUR" (Mexico City, 15.11.2004), in UNHCR, Memoria del Vigésimo Aniversario de la Declaración de Cartagena..., op. cit. supra n. (27), pp. 368-369.

[FN28] Ibid., p. 369.

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22. Those convergences [FN29] were, not surprisingly, further reflected in the 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America itself. Thus, as the rapporteur of the Committee of Legal Experts of the UNHCR at last warned at the Mexico Colloquy of November 2004,

"there is no place for the *vacatio legis*, there is no legal vacuum, and all (...) persons are under the protection of the Law, in all and any circumstances (also in face of security measures)" [FN30].

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[FN29] Cf. A.A. Cançado Trindade, "Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario: Aproximaciones y Convergencias", in 10 Años de la Declaración de Cartagena sobre Refugiados - Memoria del Coloquio Internacional (San José of Costa Rica, Dec. 1994), San José of Costa Rica, IIDH/UNHCR, 1995, pp. 77-168; A.A. Cançado Trindade, "Aproximaciones y Convergencias Revisitadas: Diez Años de Interacción entre el Derecho Internacional de los Derechos Humanos, el Derecho Internacional de los Refugiados, y el Derecho Internacional Humanitario (De Cartagena/1984 a San José/1994 y México/2004)", in Memoria del Vigésimo Aniversario de la Declaración de Cartagena sobre Refugiados (1984-2004), San José of Costa Rica, UNHCR, 2005, pp. 139-191.

[FN30] Ibid., p. 369.

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23. In the Inter-American Court, this is not the first time in which I see it fit to draw attention to the contemporary and growing tragedy of uprootedness. Already in this Court's Order of Provisional Measures of Protection, of 18.08.2000, in the case of the Haitians and Dominicans of Haitian Origin in the Dominican Republic, I devoted my whole Concurring Opinion (pars. 1-25) to disclose the truly global dimension of uprootedness in the dehumanized world in which we

live today [FN31]. It is significant that, in the present case of the Moiwana Community versus Suriname, the Court, on the basis of the American Convention and in the light of the principle *jura novit curia*, devoted a whole section of the present Judgment to forced displacement - a malaise of our times - and established a violation by the respondent State of Article 22 of the American Convention (on freedom of movement and residence) in combination with the general duty of Article 1(1) of the Convention (pars. 107-121).

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[FN31] Nowadays the number of migrants far outweigh those of refugees (18 million) and displaced persons (25 million) in the world. Current estimates indicate a total of 120 million people in situations of considerable vulnerability. Yet, the overwhelming majority of States has not yet ratified the 1990 U.N. Convention on the Rights of Migrant Workers and Their Families. This indicates that what most States (of those who temporarily rule them) care about today is to secure free flows of investment capital (for quick profit), of goods and services, but not of human beings; in fact, they do not seem to care in the least about people and their living conditions. This portrays the dehumanized world in which we happen to live.

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#### IV. The Projection of Human Suffering in Time.

24. The circumstances of the present case of the Moiwana Community versus Suriname invite one to a brief reflection, going beyond its confines. Well before, as well as after, the attainment of statehood by Suriname, the existence of the Maroon peoples (like the Saramakas in the Aloboetoe case and the N'djukas in the present Moiwana Community case, before this Court) has been marked by suffering, in their constant struggle against distinct forms of domination. This is not the first time that I address the issue which I see it fit to call the projection of human suffering in time; I have already done so in my Separate Opinion (pars. 10-14) in the *Bámaca Velásquez versus Guatemala* case (Reparations, Judgment of 22.02.2002), and I now retake the point at issue for further considerations on the matter, in the present Moiwana Community case.

25. The projection of human suffering in time (its temporal dimension) is properly acknowledged, e.g., in the final document of the U.N. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Dunbar, 2001), its adopted Declaration and Programme of Action. In this respect, it began by stating that

"We are conscious of the fact that the history of humanity is replete with major atrocities as a result of gross violations of human rights and believe that lessons can be learned through remembering history to avert future tragedies" (par. 57).

26. It then stressed the "importance and necessity of teaching about the facts and truth of the history of humankind", with a view to "achieving a comprehensive and objective cognizance of the tragedies of the past" (par. 98). In this line of thinking, the Durban final document acknowledged and profoundly regretted the "massive human suffering" and the "tragic plight" of millions of human beings caused by the atrocities of the past; it then called upon States concerned "to honour the memory of the victims of past tragedies", and affirmed that, wherever

and whenever these occurred, "they must be condemned and their recurrence prevented" (par. 99).

27. The Durban Conference final document attributed particular importance to remembering the crimes and abuses of the past, in emphatic terms:

"We emphasize that remembering the crimes or wrongs of the past, wherever and whenever they occurred, unequivocally condemning its racist tragedies and telling the truth about history, are essential elements for international reconciliation and the creation of societies based on justice, equality and solidarity" (par. 106).

It at last recognized that "historical injustices" had undeniably contributed to the poverty, marginalization and social exclusion, instability and insecurity affecting so many people in distinct parts of the world (par. 158).

28. Half a decade ago, the President of the Academy of Chinese Culture (the philosopher Tang Yi Jie) and a Professor at the Collège de France (the geophysicist Xavier Le Pichon) engaged into an academic dialogue on death, in which Tang Yi Jie recalled the Buddhist view that "human existence is a sea of sufferings" as well as R. Rolland's remark (translated from Chinese), to the same effect that

"La vie humaine est une souffrance. C'est un combat incessant pour ceux qui ne se contentent pas d'avoir une vie médiocre, un combat souvent cruel, sans gloire, sans bonheur, mené dans la solitude et le silence" [FN32].

On his turn, X. Le Pichon added that "the degree of humanization of a society is measured by the quality of taking care of those who suffer or those whose handicap exclude the possibility of having a life like the others" [FN33].

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[FN32] Cit. in: Tang Yi Jie and Xavier Le Pichon, *La Mort*, Shanghai/Paris, Presses Artistiques et Littéraires de Shanghai/DDB, 1999, pp. 32 and 76.

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[FN33] In *ibid.*, p. 149.

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29. In the present case of the Moiwana Community, the handicap of, or harm suffered by, the survivors of the massacre and close relatives of the direct victims, of the massacre perpetrated on 29 November 1986 in the N'djuka Maroon village of Moiwana, is a spiritual one. Under their culture, they remain still tormented by the circumstances of the violent deaths of their beloved ones, and the fact that the deceased did not have a proper burial. This privation, generating spiritual suffering, has lasted for almost twenty years, from the moment of the perpetration of the 1986 massacre engaging the responsibility of the State until now. The N'djukas have not forgotten their dead.

30. Nor could they. In the public hearing before this Court, of 29.09.2004, one of the two representatives of the alleged victims (F. MacKay) declared that

"the representatives of the victims of the Moiwana massacre and the next of kin stand before this Court today as part of their ongoing efforts to obtain justice; justice for the 39 persons known to have been brutally murdered and mutilated by the national army of Suriname on 29 November 1986; justice for the survivors of that massacre who witnessed their defenceless relatives being shot and hacked to pieces with machetes; their ancestral village with its sacred sites burned to the ground, and who have had to endure forced exile from their traditional lands and the spiritual congress that can only be enjoyed on those lands; and justice for the survivors and next of kin who are obliged by fundamental cultural norms to ensure that the dead are given ritual burials and to ensure that they receive justice so that their spirits may rest in peace.

The search for justice is taking place continuously throughout the almost eighteen years that have passed since the massacre. (...) The massacre constitutes a crime against humanity, a gross and flagrant violation of jus cogens norms, obligations erga omnes, and of norms of International Humanitarian Law codified in the Geneva Conventions and judged to have attained the status of customary international law. (...) The massacre amounts to murder on a large scale; at least 39 individuals were killed in a space of a few hours on 29 November 1986. Over 70 per cent of those killed were below the age of 18; 25% were 5 years old or younger, including four infants under the age of 2; and 50% were women or girls (...). By all accounts they were defenceless (...). (...) The Moiwana massacre was not an isolated incident but rather part of a policy of widespread, systematic and collective reprisals against the civilian Maroon population for the activities of the Jungle Commando. Then Commander of the Army Désiré Bouterse stated on the radio in late 1986, for instance, that he would, - and I quote, - 'kill all Maroons and find their planting grounds and bomb them'" [FN34].

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[FN34] From the recording and transcripts of the public hearing of 29.09.2004, deposited in the archives of the Inter-American Court.  
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31. And the same representative of the alleged victims went on to state before the Court that

"massacres were also reported in the Maroon villages of Morakondre, Moengotapoe, and Maroons were subject to forced starvation (...). During this time [1987] almost every Maroon village in Eastern Suriname was razed to the ground with the help of military aircraft. Some ten thousand people fled the area, and Maroon religious rites were routinely destroyed. In addition to the Moiwana massacre, reliable sources estimate that in November and December 1986 alone some 244 mostly Maroon civilians were murdered by the National Army. Finally, the Army unit responsible for the massacre was especially trained for the operation at Moiwana, indicating that the massacre was planned, calculated and deliberate.

(...) We wish further to emphasize that the classification of the massacre as a crime against humanity, as a gross violation of humanitarian law and of jus cogens norms, (...) [and] Suriname's responsibility for the subsequent denial of justice (...). With respect to the denial of justice in this case, we believe that the facts speak for themselves. The testimony and other evidence presented to the Court demonstrate that the victims actively and repeatedly sought

recourse in Suriname. These attempts to obtain justice were ignored, rebuffed and even chastised by Suriname and produced no result. (...) The intellectual authors, who are well known and who have publicly acknowledged their responsibility on more than one occasion, continue to enjoy complete impunity" [FN35].

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[FN35] From the recording and transcripts of the public hearing of 29.09.2004, deposited in the archives of the Inter-American Court.

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32. The facts do indeed speak for themselves. In the present Judgment, the Court recalled, as to the proven facts, inter alia, that the Army Commander of Suriname (D. Bouterse) had issued a statement to the press [FN36] whereby he confirmed that "the operation in Moiwana village was a military action which he himself had ordered", and that "he would not allow military operations to be investigated by the civil police" [FN37]. The Moiwana massacre was State-planned, State-calculated and State-executed: it was a crime of State. As I sustained in my Separate Opinions in the cases of Myrna Mack Chang (2003) and of the Massacre of Plan de Sánchez (Merits, 2004) before this Court, both concerning Guatemala, crimes of State do exist. Whether international lawyers like it or not, such crimes do exist. They do not cease to exist only because some - or most - international lawyers do not like the expression. Individual and State responsibility co-exist, they are complementary to each other.

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[FN36] On 21.04.1989.

[FN37] Paragraph 86(27).

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33. For the first time in almost two decades, since the massacre at Moiwana village in 1986, the survivors found redress, with the present Judgment of the Inter-American Court. In the meantime, the N'djukas did not, and could not, forget their innocent and defenceless beloved relatives, murdered in cold blood. And they will never forget them, but their suffering - theirs together with their dead - has now been at least judicially recognized. Their long-standing longing for justice may now be fulfilled, so that they can rest in peace with their beloved deceased.

#### V. The Illusion of the "Post-Modern" and the Incorporation of Death into Life.

34. May I move on to my next point in the present Separate Opinion, an important lesson to be extracted from the Moiwana Community case. Human suffering projected in time is generally minimized or ignored in the so-called "post-modern world", - a world that cares less and less about human suffering and death (preferring simply to minimize or ignore them), and values more and more, to its own detriment, the ambition of materialism and accumulation of wealth, armamentism and the use of force. The question has thus been timely asked: how can one wake up the contemporaries, how can one convey the necessity of spirituality? [FN38] The International Law of Human Rights has attempted to do so, has done its best, but appears

nowadays to be under fire and hostility, on the part of those engaged in its deconstruction, the usual heralds of the use of force and the accumulation of material wealth.

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[FN38] E. Kübler-Ross, *La Rueda de la Vida*, 2nd. ed., Madrid, Ed. BSA, 2000, p. 385.

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35. Yet, the usual blindness of power-holders as to human values has not succeeded - and will never succeed - in avoiding human thinking to dwell upon the conception of human mortality, to reflect on the enigmas of existence and death. In the fragments of his play *Faustus - Subjective Tragedy*, inspired by Goethe's masterpiece, the universal writer Fernando Pessoa remarked, in the early XXth century, precisely on the mystery surrounding life and death:

"Silente, medonho,  
Embebido em sonho  
Sombrio e profundo  
É o mistério do mundo.  
Quero fugir ao mistério  
Para onde fugirei?  
Ele é a vida e a morte  
Ó dor, onde me irei?  
Quem sabe se ainda  
Não é mais profundo  
Do que o pensamento  
O enigma do mundo!" [FN39]

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[FN39] F. Pessoa, *Fausto - Tragédia Subjectiva* (1st. integral edition), Rio de Janeiro, Ed. Nova Fronteira, 2003 (reprint), pp. 30, 154 and 184.

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36. Human thinking on mortality has, in fact, accompanied humankind in all ages and cultures. In the old Paleolithic times, there was a cult to the memory, and in ancient Egypt the living and their dead remained close together [FN40]. In ancient Greece, a new sensitivity towards post mortem destiny arose [FN41]. It need only be recalled, as two examples among many, namely, Plato's contribution, in securing the continuity of human experience through the immortality and transmigration of the soul, as well as Budha's contribution of detaching human suffering from in his view what originates it, the desires [FN42]. The myth of the "eternal return" (or repetition), so widespread in ancient societies (as in Greece), conferring upon time a cyclic structure, purported to annul (or even abolish) the irreversibility of the passing of time, to contain or withhold its virulence, and to foster regeneration [FN43].

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[FN40] J.L. de León Azcárate, *La Muerte y Su Imaginario en la Historia de las Religiones*, Bilbao, Universidad de Deusto, 2000, pp. 24-25, 37, 50-51 and 75.

[FN41] *Ibid.*, pp. 123 and 130.

[FN42] J.P. Carse, *Muerte y Existencia - Una Historia Conceptual de la Mortalidad Humana*, Mexico, Fondo de Cultura Económica, 1987, pp. 85 and 167.

[FN43] M. Eliade, *El Mito del Eterno Retorno*, Madrid/Buenos Aires, Alianza Ed./Emecé Ed., 2004, pp. 90-91.

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37. In modern times, however, human beings became ineluctably integrated into history and to the idea of "progress", implying the "definitive abandonment of the paradise of the archetypes and of the repetition" [FN44], proper of ancient cultures and religions. In the Western world, there came to prevail, in the XXth century, an attitude of clearly avoiding to refer to death; there came to prevail a "great silence" about death [FN45]. Contemporary Western societies came to "prohibit" the consideration of death at the same time that they fostered hedonism and material well-being [FN46].

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[FN44] *Ibid.*, p. 156.

[FN45] Ph. Ariès, *Morir en Occidente desde la Edad Media hasta Nuestros Días*, Buenos Aires, A. Hidalgo Ed., 2000 (reed.), pp. 196-199, and cf. pp. 213 and 238.

[FN46] *Ibid.*, p. 251.

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38. While ancient cultures were very respectful of the elderly, "modern" societies try rather to put them aside [FN47]. Ancient cultures ascribe great importance to the relationships between the living and the dead, and to death itself as part of life. Modern societies try in vain to minimize or ignore death, rather pathetically. Nowadays there is stimulus simply to forget, as pertinently denounced by some lucid writers, like Jorge Luis Borges:

"Ya a nadie le importan los hechos. Son meros puntos de partida para la invención y el razonamiento. En las escuelas nos enseñan la duda y el arte del olvido. Ante todo el olvido de lo personal y local. Vivimos en el tiempo, que es sucesivo, pero tratamos de vivir sub specie aeternitatis. Del pasado nos quedan algunos nombres, que el lenguaje tiende a olvidar. Eludimos las inútiles precisiones. No hay cronología ni historia" [FN48].

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[FN47] Cf. [Various authors,] *Dialogue among Civilizations - The Round Table on the Eve of the United Nations Millennium Summit*, Paris, UNESCO, 2001, p. 84 (intervention by E. Morin).

[FN48] J.L. Borges, *El Libro de Arena*, Madrid, Alianza Edit., 1999 [reprint], p. 99; and cf. also J.L. Borges, *Historia de la Eternidad*, Madrid, Alianza Edit., 2002 [reprint], pp. 40-44.

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39. Already in the early XXth century, the philosopher Max Scheler, in his monograph *Death and Survival*, warned that the "fanaticism" of "progress" had led "modern man" to deny the essence of death and not to care much about survival. However, "modern man" cannot attempt entirely to ignore death, pressed as he is by his own aging and infirmities; death appears then not simply an "empirical part" of one's own experience, but rather, according to Scheler, part of the

essence of the experience of living and moving towards death [FN49]. Universal history discloses the important role played by the dead and their legacy in the decisions taken by the living [FN50].

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[FN49] M. Scheler, *Muerte y Supervivencia*, Madrid, Ed. Encuentro, 2001, pp. 11, 16-17, 27 and 47.

[FN50] *Ibid.*, p. 15.

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40. There is a diffident attitude of the "post-modern", due apparently more to ignorance than anything else, about cultures of what is wrongly labelled "primitive societies", which discloses, however, a much better understanding of the relationship between human beings and the outside world and a much more respectful posture as to the relationships between the living and the dead. Those who are proud of regarding themselves as "post-modern", are, in my view, to be pitied; they are used to thinking fast, nourished by fast food, walking fast on their fast road back to primitivism, - if they are fortunate enough.

#### VI. Mortality and Its Inescapable Relevance to the Living.

41. It goes without saying, - whether the self-sufficient "post-modern" like it or not, - that mortality is endowed with an inescapable relevance to the living. An essay originally published in 1937 sustained that the consciousness of death arises out of living with others: - "Nous avons constitué un `nous' avec le mourant. Et c'est dans ce `nous' (...) que nous sommes amenés à la connaissance vécue de notre propre devoir mourir" [FN51].

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[FN51] P.-L. Landsberg, *Essai sur l'expérience de la mort*, Paris, Seuil/Points-Sagesses, 1993 (reed.), pp. 36-37 and 40, and cf. pp. 38-40.

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42. It may be recalled, in this respect, that the inspiring Tibetan Book of the Dead cares to advise the incorporation of death into life, so that the living can gradually prepare themselves for the passage into death; in fact, - the book reminds, - at every moment something is born and something dies within ourselves, and this is part of one's existence. The book deals, in a way, with "universal conscience", and points out that those who have, in life and meditation, recognized "the true nature of the spirit" are better prepared for the arrival of the day of their passage into death, into liberation [FN52].

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[FN52] Cf. *El Libro Tibetano de los Muertos (Bardo-Thödol)*, (org. E.K. Dargyay), Madrid, EDAF, 1997 (reed.), pp. 20-23, 38, 79, 170-171, 179-180 and 218-219.

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43. The equally inspiring Egyptian Book of the Dead, on its turn, reveals the belief in the afterlife and in the "spiritual substance of the gods"; to the ancient Egyptians, death was rather a

passage into the eternal world of the gods, there being thus a continuity. The living were particularly careful with their dead, so that these latter would have a "happy eternity". Hence the elaborate funerary rites, the process of mummification, so that the corpses would be well preserved to keep the soul therein (and thus avoid it "to disappear forever"), and would be carefully deposited in the funerary chambers, and would be well taken care of by the relatives of the dead [FN53].

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[FN53] Cf. *El Libro Egipcio de los Muertos* (org. A. Champdor), Madrid, EDAF, 2000 (reed.), pp. 35, 41, 51, 99-100, 118, 125, 141, 145-147, 151, 156-157 and 163, and cf. pp. 178-181.

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44. The history of human thinking reveals the permanence of the doctrine of the survival or eternity of the spirit, from Plato's days to modern times (e.g., Kant, Goethe); in Scheler's view, the belief in the immortality of the spirit guards relationship with the way one lives [FN54]. The significant attitude of remembering, reentering into the past, may provide intuitions (Plato's *Phaedon*) for the issue of survival [FN55].

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[FN54] M. Scheler, *Muerte y Supervivencia*, op. cit. supra n. (27), pp. 58, 71-72, 74-75, 87-88 and 90.

[FN55] *Ibid.*, p. 62.

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45. In face of death, distinct collective attitudes can in fact be detected not only in different cultures but also at distinct historical moments. In a pioneering study, for example, of collective attitudes in face of death in the XVII and XVIII centuries, M. Vovelle remarked that in vain were the attempts in those days to erase death from human mind, as, towards the last decades of the XVIIIth century, the reality of death came again to occupy human thinking. And he recalled Robespierre's remark that if the immortality of the soul was nothing but a dream, yet it remained one of the most beautiful conceptions of the human spirit [FN56].

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[FN56] M. Vovelle, *Mourir autrefois*, Paris, Gallimard/Julliard, 1990, pp. 207 and 223.

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46. In the recent case-law of the Inter-American Court of Human Rights, there are cases which have a direct bearing on existence and death, such as *Aloeboetoe and Others* (1991), *Bámaca Velásquez* (2000-2002), *Bulacio* (2003), *Villagrán Morales and Others* ("Street Children", 1999-2001), *Brothers Gómez Paquiyauri* (2004), *Massacre of Plan de Sánchez* (2004). There are some, like *Bámaca Velásquez*, which encapsulate an extraordinarily rich and enlightening cultural ingredient, precisely as to the relationship between existence and death, like the present case of the *Moiwana Community*. Such cases, in my view, rank among the most important ones in human rights case-law all over the world, and would be so recognized if people, including academics, everywhere, were not so provincial, shallow and narrow-minded, minding only about what looks more directly familiar to them.

## VII. The Duties of the Living towards Their Dead.

47. As I have already pointed out, it is not possible to consider the phenomenon of life without taking into account likewise that of death. Life and death have been considered *pari passu* in the history of human thinking. Ancient cultures bear witness of that; in the account of A. Bentué, for example,

"los primitivos no tienen mayor interés en saber en qué pueda consistir la 'vida de ultratumba'. Para ellos, esa otra vida no afecta para nada la vida presente. Lo que hay que procurar es simplemente que los muertos, después de haberse cumplido su breve permanencia cerca de la tumba, durante el período que duran los ritos mortuorios prescritos por el duelo, descansen en ese otro mundo, sin quedar 'vagando', afectando, ahí sí, la vida de quienes siguen permaneciendo en esta tierra ('penándoles').

Con todo, esa vida de ultratumba no es concebida como 'eterna', sino que tiene una duración mayor o menor según la 'memoria' que los sobrevivientes puedan mantener del difunto. El país de los muertos coincide con el 'recuerdo' que de ellos puedan tener los vivos, de manera que si éstos dejaran de recordarlos, las almas de los difuntos quedarían sumidas en la nada del olvido. Sin embargo, los difuntos siguen vigentes en la continuidad de la vida de los vivos que los prolongan" [FN57].

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[FN57] A. Bentué, *Muerte y Búsquedas de Inmortalidad*, Santiago, Edic. Universidad Católica de Chile, 2002, p. 33.

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48. Some traditional lines of thinking associate the soul with the proximity, for some time, of the body of those who died, requiring particular care with the mortal remains. Some contemporary thinking has warned against denying or pretending to ignore death, and has stressed the need once again to learn to integrate death to life. And it has further pointed out the "weight and sorrow" of sudden and violent death [FN58], which does not allow those who depart to bid farewell to those who survive them.

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[FN58] M. de Hennezel, *La mort intime*, Paris, R. Laffont, 1995, pp. 105, 16 and 40.

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49. In fact, distinct religious faiths [FN59] attribute particular importance to the behaviour of the living in respect of their dead. The Bahá'í faith, for example, sustains the possibility that even the condition of "those who have died in sin and unbelief may become changed" by the "prayers and supplications" for their souls by those who survived them [FN60].

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[FN59] For a call for the "purification des mémoires", and a "dialogue interreligieux" which consists in the "accueil des autres dans leurs différences", cf. J. Dupuis, "Le dialogue interreligieux dans une société pluraliste", in [Various Authors,] *Movimientos de Personas e*

Ideas y Multiculturalidad (Forum Deusto), vol. I, Bilbao, Universidad de Deusto, 2003, pp. 51-52.

[FN60] Cf. Abdu'l-Bahá, *Some Answered Questions* (transl. from the Persian by L.C. Barney), Wilmette Ill., Bahá'í Publ. Trust, 2003 [reprint], p. 232.

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50. According to the cultural tradition of the indigenous community Wayuu (living in the desert La Guajira, near the Colombian border with Venezuela), there are three stages in one's passage from life to death and afterlife. The first one takes place when one dies and is buried; his spirit is converted into "yoluja". At least three years later, one's bones are exhumed and recollected, and placed in a common grave; the dead person loses his identity forever, and the sorrow of his close relatives and friends disappears. The "definitive" death takes place when he is at last forgotten. But his spirit converts itself into rain ("wanülü") and returns to earth [FN61].

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[FN61] Cf. S. Harker, *Wayuu - Cultura del Desierto Colombiano*, Bogotá, Villegas Ed., 1998, pp. 182-183, and cf. pp. 184-186.

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51. Other examples could here be recalled. In the region of the Araucanía in Chile, e.g., the people mapuche ascribe likewise particular importance to the funerary rites; to them, the ceremony of the burial is "the expression of solidarity of the community" [FN62]. From the mapuche perspective, "the communication with the dead is cultural, logical, it forms part of the mapuche cosmovision and religion" [FN63].

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[FN62] P. Pérez-Sales, R. Bacic Herzfeld and T. Durán Pérez, *Muerte y Desaparición Forzada en la Araucanía - Una Aproximación Étnica*, Santiago de Chile, Ed. Universidad Católica de Temuco, 1998 (reed.), p. 171.

[FN63] *Ibid.*, p. 182.

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52. The mayas, aztecas and incas, on their turn, believed in life post mortem. To the aztecas, death formed part of life (cycle of regeneration); to the incas, death was no more than the passage of this life into the other one. To the maya, azteca and inca cultures, "vivir es morir y morir es vivir"; life post mortem is not conditioned by personal attitudes, it is a continuous cycle [FN64]. In distinct cultures, the passing of time is seen as reflecting the solidarity between human generations that, like the stations, succeed each other in time [FN65].

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[FN64] J.L. de León Azcárate, *La Muerte y Su Imaginario...*, op. cit. supra n. (41), pp. 187, 198 and 219.

[FN65] A.Y. Gurevitch, "El Tiempo como Problema de Historia Cultural", in *Las Culturas y el Tiempo*, Salamanca/Paris, Ed. Sígueme/UNESCO, 1979, p. 264.

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53. I well recall that, half a decade ago, during the contentious proceedings before this Court in the *Bámaca Velásquez versus Guatemala* case (Merits, 2000), a point which was sigled out before the Tribunal was the central relevance attributed by the maya culture to securing a proper burial to the victim's mortal remains, disclosing the links uniting the living to their dead. On that occasion, in my Separate Opinion in the Court's Judgment of 25.11.2000 in that memorable case, I sustained that "the human kind comprises not only the living beings - titulaires of human rights, - but also the dead with their spiritual legacy. We all live in the time; likewise, legal norms are created, interpreted and applied in the time (and not independently of it, as the positivists mistakenly assumed)" [FN66].

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[FN66] Paragraph 14, and cf. pars. 4-5.

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54. And the passing of the time, - I added, - does not represent an element of separation, but

"rather of approximation and union, between the living and the dead, in the common journey of all towards the unknown. The knowledge and the preservation of the spiritual legacy of our predecessors constitute a means whereby the dead can communicate with the living [FN67]. Just as the living experience of a human comunidad develops with the continuous flux of thought and action of the individuals who compose it, there is likewise a spiritual dimension which is transmitted from an individual to another, from a generation to another, which precedes each human being and survives him, in the time.

There is effectively a spiritual legacy from the dead to the living, apprehended by the human conscience. Likewise, in the domain of legal science, I cannot see how not to assert the existence of a universal juridical conscience (corresponding to the *opinio juris comunis*), which constitutes, in my understanding, the material source par excellence (beyond the formal sources) of the whole law of nations (*droit des gens*), responsible for the advances of the human kind not only at the juridical level but also at the spiritual one. What survives us is only the creation of our spirit, to the effect of elevating the human condition. This is how I conceive the legacy of the dead, from a perspective of human rights" [FN68].

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[FN67] Is is what I allowed myself to point out, - recalling in this sense a remark by Simone Weil in her book *L'Enracinement* (1949), - in my Concurring Opinion (par. 5) in the case of the Haitians and Dominicans of Haitian Origin in the Dominican Republic (Provisional Measures of the Inter-American Court of Human Rights, of 18.08.2000).

[FN68] Paragraphs 15-16.

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55. In the same Separate Opinion in the merits of the *Bámaca Velásquez* case, in addressing the links of solidarity between the living and their dead, I further pondered that

"The respect to the mortal remains is also due to the spirit which animated in life the dead person, in connection moreover with the beliefs of the survivors as to the destiny post mortem of the person who died [FN69]. It cannot be denied that the death of an individual affects directly

the life, as well as the juridical situation, of other individuals, especially his relatives (as illustrated, in the framework of civil law (*droit civil*), by the norms of family law and the law of successions). (...)

Universal human rights find support in the spirituality of all cultures and religions [FN70], are rooted in the human spirit itself; as such, they are not the expression of a given culture (Western or any other), but rather of the universal juridical conscience itself. All the aforementioned advances, due to this universal juridical conscience, have taken place amidst cultural diversity. Contrary to what the spokesmen of the so-called - and distorted - "cultural relativismo" preach, cultural manifestations (at least those which conform themselves with the universally accepted standards of treatment of the human being and of respect for their dead) do not constitute obstacles to the prevalence of human rights, but quite on the contrary: the cultural substratum of the norms of protection of the human being much contributes to secure their effectiveness. Such cultural manifestations - such as that of respect for the dead in the persons of the living, titulaires of rights and duties - are like superposed stones with which is erected the great pyramid [FN71] of the universality of human rights" [FN72].

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[FN69] B. Py, op. cit. supra n. (8), pp. 94 and 77, and cf. pp. 7, 38, 47, 77 and 123.

[FN70] Cf. [Various Authors,] *Les droits de l'homme - bien universel ou fruit de la culture occidentale?* (Colloquy of Chantilly/France, March 1997), Avignon, Institut R. Schuman pour l'Europe, 1999, pp. 49 and 24.

[FN71] To evoke an image quite proper to the rich maya culture.

[FN72] Paragraphs 19 and 28.

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56. Subsequently, in the Judgment on reparations in the same *Bámaca Velásquez versus Guatemala* case (2002), I further pondered, in my new *Separate Opinion*, that in social circles strongly impregnated with a communitarian vision, there prevails a feeling of harmony between the living and their dead. Thus, in the oldest graves known, those of the Neanderthal man times, the dead are buried in a foetal position, as if indicating the belief in after-life or rebirth [FN73], and funerary rites help to perpetuate the cultural legacy and to contribute to face the reality of death and the anguish provoked by it [FN74] (par. 20). And I added that

"in my view, what we conceive as the human kind comprises not only the living beings (titulaires of the human rights), but also the dead (with their spiritual legacy). The respect for the dead is in effect due in the persons of the living. Human solidarity has a wider dimension than the purely social solidarity, in so far as it manifests itself also in the links of solidarity between the dead and the living" (par. 25) [FN75].

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[FN73] Edgar Morin, *O Paradigma Perdido: A Natureza Humana*, 6a. ed., Sintra/Mem Martins, Publs. Europa-América, 2000, pp. 93 y 135-137.

[FN74] *Ibid.*, p. 95, y cf. p. 165. El conocimiento humano - inclusive el científico - no ha logrado dar una respuesta a los problemas transcendentales enfrentados por el ser humano (como el de su destino); es posible que esteamos todavía en el "inicio del conocimiento"; *ibid.*, p. 212.

[FN75] For the view that the unity of the human kind can be found in the links between the living and the dead, cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 362-373.

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57. In the present case of the *Moiwana Community versus Suriname*, originated in a massacre perpetrated more than two decades ago, the Maroon N'djuka people have consistently displayed an acute and admirable awareness of their duties towards their dead. This became clear from the testimonial evidence produced before this Court, where it became clear that the survivors, and close relatives of the direct victims of the massacre of 1986, assumed their obligation to seek justice for their dead (as "a cultural responsibility that continues through the generations"), and acknowledged the duty incumbent upon them to recover the remains of their deceased, to perform the funerary ceremonies and to give a "proper burial" to their deceased [FN76].

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[FN76] Paragraph 80(b) to (d).

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58. In addition, the expert evidence produced (by anthropologist K.M. Bilby) before the Court added that

"Justice is a central concept in traditional N'djuka society; indeed, one of their primary institutions in daily life is the council meeting, which is the means to resolve conflicts of any nature within the community. The institution has spiritual dimensions as well, since ancestors are believed to partake in council meetings, which provide their decisions with particular legitimacy. In the context of the *Moiwana* massacre, traditional values would dictate that this must be dealt with on a collective level; mere individual efforts would not be enough. In order for such a serious problem to be resolved, it requires help from the community as a whole. Indeed, as time goes on and the conflict is not resolved, it will affect more and more people and social groups within the society" [FN77].

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[FN77] Paragraph 80(e).

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59. According to one testimony, the massacre of 29.11.1986 was part of a grave and systematic pattern of violence, and its perpetrators were "organized, trained and armed by State military personnel" [FN78]. Yet another testimony before this Court added that if justice, after so many years, was not done in the case of the *Moiwana* Community, this would "cause the living as well as the dead to suffer" [FN79]. In their culture, the links of solidarity between the living and their dead are so strong that, in situations of the kind, they both keep on suffering together. The duties of the living towards their dead are, thus, to be duly performed faithfully.

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[FN78] Paragraph 80(a).

[FN79] Paragraph 80(d).

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## VIII. The Duties towards the Dead in the Origins and Development of Law.

### 1. International Law.

60. It cannot pass unnoticed that an acknowledgement of the duties of the living towards their dead was, in fact, present in the very origins, and along the development, of the law of nations. Thus, to refer but to an example, in his treatise *De Jure Belli ac Pacis* (of 1625), H. Grotius dedicated chapter XIX of book II to the right of burial ("derecho de sepultura"). Therein H. Grotius sustained that the right of burying the dead has its origin in the voluntary law of nations, and all human beings are reduced to an equality by precisely returning to the common dust of the earth [FN80].

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[FN80] H. Grocio, *Del Derecho de la Guerra y de la Paz* [1625], tomo III (libros II y III), Madrid, Edit. Reus, 1925, p. 39, and cf. p. 55.

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61. H. Grotius further recalled that there was no uniformity in the original funeral rites (for example, the ancient Egyptians embalmed, while most of the Greeks burned, the bodies of the dead before committing them to the grave; irrespective of the types of funeral rites, however, the right of burial was ultimately explained by the dignity of the human person [FN81]. H. Grotius further sustained that all human beings, including "public enemies" ("enemigos públicos") were entitled to burial, this being a precept of "virtue and humanity" [FN82].

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[FN81] *Ibid.*, pp. 43 and 45.

[FN82] *Ibid.*, pp. 47 and 49; and cf. Hugonis Grotii, *De Jure Belli ac Pacis* [1625] (ed. B.M. Telders), The Hague, Nijhoff, 1948, p. 88 (abridged version).

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62. In historical perspective, the influence of religion on the development of international law should not pass unnoticed. The contribution of the Spanish theologians Francisco de Vitoria (*Relecciones Teológicas* (1538-1539) and Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612) [FN83], and their influence on the work of H. Grotius himself [FN84], soon became widely acknowledged. And the work of these founding fathers of the discipline propounded an essentially universalist outlook, as I had occasion to stress in my *Concurring Opinion in the Inter-American Court's Advisory Opinion n. 18 on the Juridical Condition and Rights of Undocumented Migrants* (2003, pars. 4-12).

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[FN83] *Association Internationale Vitoria-Suarez, Vitoria et Suarez - Contribution des Théologiens au Droit International Moderne*, Paris, Pédone, 1939, pp. 169-170.

[FN84] M.W. Janis (ed.), *The Influence of Religion on the Development of International Law*, Dordrecht, Nijhoff, 1991, p. 61, and cf. pp. 62-81.

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63. Nowadays, International Humanitarian Law provides for respect for the remains of the deceased, whether they are buried or burned. Article 130 of the 1949 IV Geneva Convention (on the Protection of Civilian Population) requires all due care and respect with mortal remains. Article 34 of Protocol I of 1977 to the four Geneva Conventions of 1949 elaborates on the matter in greater detail; the commentary of the International Committee of the Red Cross on that Article points out that the respect due to the remains of the deceased "implies that they are disposed of as far as possible in accordance with the wishes of the religious beliefs of the deceased, insofar as these are known", and warns that

"even reasons of overriding public necessity cannot in any case justify a lack of respect for the remains of the deceased" [FN85].

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[FN85] Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 08 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC/Nijhoff, 1987, pp. 369 and 379.

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## 2. Domestic Law.

64. The duties of the living towards the dead found expression not only in international law but also in domestic law. However insufficient the treatment of the matter might appear to be, already the ancient Roman law, e.g., safeguarded penally the respect due to the dead. In the comparative law of our days, it can be found that the penal codes of numerous countries tipify and sanction the crimes against the respect for the dead (such as, e.g., the subtraction and the hiding of the mortal remains of a human being). And at least one trend of the legal doctrine on the matter visualizes as passive subject of the right to respect for the dead the community itself (starting with the relatives) which the dead belonged to. As I allowed myself to indicate in my Separate Opinion in the *Bámaca Velásquez versus Guatemala* case (Merits, 2000),

"Even though the juridical subjectivity of an individual ceases with his death (thus no longer being, when having died, a subject of Law or titulaire of rights and duties), his mortal remains - containing a corporeal parcel of humanity, - continue to be juridically protected. The respect to the mortal remains preserves the memory of the dead as well as the sentiments of the living (in particular his relatives or persons close to him) tied to him by links of affection, - this being the value juridically protected [FN86]. In safeguarding the respect for the dead, also penal law gives concrete expression to a universal feeling of the human conscience. The respect for the dead is thus due - at the levels of both internal and international legal orders, - in the persons of the living" (par. 12).

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[FN86] Bruno Py, *La mort et le droit*, Paris, PUF, 1997, pp. 31, 70-71, 79-80 and 123.

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65. The end of legal subjectivity with one's death does not mean that law is indifferent to the relationships between the living and their dead. Beyond existence one no longer needs rights, but duties nevertheless persist towards the deceased. Niceto Alcalá-Zamora, - to whom the "moral patrimony" of a people was formed by its accumulation of traditions, ideals, beliefs and culture, - once remarked, in an inspiring monograph, that

"la conciencia justa (...) irá comprendiendo y realizando una relación de derecho a través del tiempo, entre los que se suceden sin convivir; que también en esto ha de practicarse el *neminem laedere*, y para ello, previamente, el *suum cuique tribuere*" [FN87].

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[FN87] N. Alcalá-Zamora y Torres, *La Potestad Jurídica sobre el Más Allá de la Vida*, Buenos Aires, EJEA, 1959, pp. 25-26, and cf. pp. 22 and 136.

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66. Well before its penetration into law, the concern to render respect and honour to the dead was already present in ancient cultures, - though the matter has been neglected, if not trivialized, in the "post-modern" world. From their original recognition in the most distinct cultures and religions, the duties of the living towards the dead was later on to find expression also in the domain of Law, both international and domestic, and this holds true also in our days.

IX. From the Right to a Project of Life to the Right to a Project of After-Life.

67. Throughout the last seven years, the Inter-American Court has jurisprudentially asserted the right to the project of life, in particularly in the cases *Loayza Tamayo* (Reparations, 1998), *Villagrán Morales and Others* ("Street Children", Merits, 1999, and Reparations, 2001), and *Cantoral Benavides* (Reparations, 2001). The contribution of the Inter-American Court on this point, - which has parallels in the jurisprudence of certain national tribunals reflecting in comparative law, - has attracted the attention of, and has had a positive repercussion and receptiveness in, contemporary international legal doctrine. In addition, in other cases before the Inter-American Court, the right to the project of life has been invoked by the complaining parties before the Court, at individual level (cases *Myrna Mack Chang*, 2003; *Brothers Gómez Paquiyauri*, 2004; *Carpio Nicolle and Others*, 2004; and *De la Cruz Flores*, 2004), at family level (case *Molina Theissen*, 2004), and at community level (case of the *Massacre of Plan de Sánchez*, Reparations, 2004).

68. The present case of the *Moiwana Community*, in my view, takes us even further than the emerging right to the project of life. A couple of years ago this Court broke into new ground by asserting the existence of a damage to the project of life. The whole construction took into account, however, the living. In the present case, however, I can visualize, in the griefs of the *N'djukas* of the *Moiwana* village, a claim to the right to the project of after-life, taking into account the living in the relations with their dead, altogether. International Law in general, and the International Law of Human Rights in particular, cannot remain indifferent to the spiritual

manifestations of human beings, such as the ones expressed in the proceedings before this Court in the present case of the Moiwana Community.

69. There is no cogent reason to remain in the world exclusively of the living. In the cas d'espèce, it appears to me that the Ndjukas are certainly well entitled to cherish their project of after-life, the encounter of each of them with their ancestors, the harmonious relationship between the living and their dead. Their outlook of life and after-life embodies fundamental values, long forgotten and lost by the sons and daughters of the industrial and the communications "revolutions" (or rather, involutions, from the spiritual perspective).

70. My years of experience in this Court have enabled me to adjudicate on cases which have raised issues which have gone, in fact, beyond this world of the living (such as the Bámaca Velásquez case, 2000-2002, and the Massacre of Plan de Sánchez case, 2004, among others). These have been cases with a dense cultural content, and the solutions arrived at by the Court have left with me the impression that there is a fertile ground on which to advance further. I have, ever since those decisions, much reflected on the matter, and the present Moiwana Community case appears to me to constitute a most adequate occasion to propose an entirely new category of damage, not covered by the existing categories to date.

X. Beyond the Moral Damage: the Configuration of the Spiritual Damage.

71. I would dare to conceptualize it as a spiritual damage, as an aggravated form of moral damage, which has a direct bearing on what is most intimate to the human person, namely, her inner self, her beliefs in human destiny, her relations with their dead. This spiritual damage would of course not give rise to pecuniary reparations, but rather to other forms of reparation. The idea is launched herein, for the first time ever, to the best of my knowledge.

72. This new category of damage, - as I perceive it, - embodies the principle of humanity in a temporal dimension, encompassing the living in their relations with their dead, as well as the unborn, conforming the future generations. This is how I see it. The principle of humanitas has, in fact, a long historical projection, and owes much to ancient cultures (in particular to that of the Greeks), having become associated in time with the very moral and spiritual formation of human beings [FN88].

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[FN88] G. Radbruch, *Introducción a la Filosofía del Derecho*, 3rd. ed., Mexico/Buenos Aires, Fondo de Cultura Económica, 1965, pp. 153-154.

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73. This new type of damage that I am proposing herein can be distinguished from moral damages, as these became commonly understood. May I dwell upon this point for a while. Moral damages have developed in legal science under a strong influence of the theory of civil responsibility, which, in turn, was constructed in the light, above all, of the fundamental principle of the *neminem laedere*, or *alterum non laedere*. This basic conception was transposed from domestic into international law, encompassing the idea of a reaction of the international

legal order to harmful acts (or omissions) to the human person (individually and collectively) and to shared social values.

74. The determination of moral damages ensuing therefrom (explained by the Roman law notion of *id quod interest*) has, in legal practice (national and international), taken usually the form of "quantifications" of the damages. Moreover, a "quantification" of the kind is undertaken as a form of reparation, to the benefit essentially of the living (direct or indirect victims). When one comes to the proposed spiritual damage, however, I cannot see how to separate the living from their dead.

75. In historical perspective, the whole doctrinal discussion on moral damages was marked by the sterile opposition between those who admitted the possibility of reparation of moral damages (e.g., Calamandrei, Carnelutti, Ripert, Mazeaud et Mazeaud, Aubry et Rau, and others) and those who denied it (e.g., Savigny, Massin, Pedrazzi, Esmein, and others); the point that they all missed, in their endless quarrels about the *pretium doloris*, was that reparation did not, and does not, limit itself to pecuniary reparation, to indemnization. Their whole polemics was conditioned by the theory of civil responsibility.

76. Hence the undue emphasis on pecuniary reparations, feeding that long-lasting doctrinal discussion. This has led, in domestic legal systems, to reductionisms, which paved the way to distorted "industries of reparations", emptied of true human values. The advent of the International Law of Human Rights, and in particular the case-law of the Inter-American Court, came fortunately to widen considerably the horizon of reparations, and render that doctrinal difference largely immaterial, if not irrelevant, in our days. There appears to be no sense at all in attempting to resuscitate the doctrinal differences as to the *pretium doloris* in relation to the configuration of the proposed spiritual damage. This latter is not susceptible of pecuniary reparations, it requires other forms of reparation.

77. The testimonial evidence produced before this Court in the *cas d'espèce* indicated that, in the N'djukas case, in circumstances like those of the present case the living and their dead suffer together, and this has an intergenerational projection. Unlike moral damages, in my view the spiritual damage is not susceptible of "quantifications", and can only be repaired, and redress be secured, by means of obligations of doing (*obligaciones de hacer*), in the form of satisfaction (e.g., honouring the dead in the persons of the living).

78. It should be kept in mind that, in the present case of the Moiwana Community, as a result of the massacre of 1986, the whole community life in the Moiwana village was disrupted; family life was likewise disrupted, displacements took place which last until now (almost two decades later). The fate of the mortal remains of the direct victims, the non-performance of funerary rites and ceremonies, and the lack of a proper burial of the deceased, deeply disrupted the otherwise harmonious relations of the living N'djukas with their dead. The grave damage caused to them, in my view, was not only psychological, it was more than that: it was a true spiritual damage, which seriously affected, in their cosmology, not only the living, but the living with their dead altogether.

79. Moreover, the resulting impunity, in the form of a generalized and sustained violence (increased by the sense of indifference of the public power to the fate of the victims) which has persisted to date, has generated, in the members of the Moiwana Community, a sense of total defencelessness. This has been accompanied by their loss of faith in human justice, the loss of faith in Law, the loss of faith in reason and conscience governing the world.

80. In addition, in the public hearing of 09.09.2004 before this Court, as pointed out in the present Judgment, former residents of the Moiwana village indicated that they were haunted by their ancestors for not having had a proper burial; this had negative consequences for the next-of-kin. They stressed that in the N'djuka culture they had the obligation to pursue justice, and because of the denial of justice that they experienced in the present case, it is as if they were "dying a second time" [FN89]. The State-planned massacre of 1986 "destroyed the cultural tradition (...) of the Maroon communities in Moiwana" [FN90]. The expert evidence produced before this Court expressly referred to "spiritually-caused illnesses" [FN91].

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[FN89] Paragraph 80(b), (c) and (d).

[FN90] Paragraph 80(a) and (d).

[FN91] Paragraphs 80(e) and 83(9).

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81. All religions devote attention to human suffering, and attempt to provide the needed transcendental support to the faithful; all religions focus on the relations between life and death, and provide distinct interpretations and explanations of human destiny and after-life [FN92]. Undue interferences in human beliefs - whatever religion they may be attached to - cause harm to the faithful, and the International Law of Human Rights cannot remain indifferent to such harm. It is to be duly taken into account, like other injuries, for the purpose of redress. Spiritual damage, like the one undergone by the members of the Moiwana Community, is a serious harm, requiring corresponding reparation, of the (non-pecuniary) kind I have just indicated.

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[FN92] Cf., e.g., [Various Authors,] *Life after Death in World Religions*, Maryknoll N.Y., Orbis, 1997, pp. 1-124.

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## XI. Concluding Observations: A Plea against Oblivion.

82. In one of his latest publications, *Memory and Identity* (2005), the late Pope John Paul II sustained that each person has a "spiritual patrimony" to preserve, and the cultivation of memory assists one in precisely preserving his or her own identity [FN93]; it is due to the memory, that each person, or human collectivity, preserves they, and - he added - the defence of such identity is ultimately a matter of survival [FN94]. John Paul II recalled, in particular, the tragic historical experience of his own people and homeland, - the Polish, - which, despite having been attacked by their neighbours, divided and occupied by foreigners, nonetheless survived, because they conserved their identity, cultivated their memory, and based themselves, in times of utter adversity, on their own culture [FN95] (including language and religion).

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[FN93] Juan Pablo II, *Memoria e Identidad - Conversaciones al Filo de Dos Milenios*, Buenos Aires, Ed. Planeta, 2005, pp. 95, 109, 131 and 183.

[FN94] *Ibid.*, pp. 176-177.

[FN95] *Ibid.*, p. 109, and cf. pp. 28, 169-170 and 176-177.

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83. Memory is, ultimately, the faculty that preserves the identity of human beings, at both personal and collective levels [FN96]. The cultivation of memory of events occurred in times of repression, - in particular grave violations of human rights, - has in recent years been fostered by the work of successive Truth Commissions in distinct continents [FN97]. This suggests the awakening of the universal juridical conscience as to the need to combat the imposition of oblivion and impunity.

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[FN96] *Ibid.*, p. 177.

[FN97] For a study, cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 400-403, and sources referred to therein.

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84. Under the suggestive and title *Testimony against Oblivion (Testimonio contra el Olvido)*, the Comité de Iglesias para Ayudas de Emergencia, for example, published in 1999 in Paraguay a documentary book (covering the period 1954-1989) so as to reveal the injustices committed in the name of "an omnipotent State", which left the numerous victims impotent, and so as to contribute to preserve the memory of the sufferings of the victims which made it possible to recover the freedom later. It warns as to what happens when the police, instead of protecting, repress and humiliates those who think differently from the "official line of the State" [FN98].

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[FN98] Cf. *Testimonio contra el Olvido - Reseña de la Infamia y el Terror (Paraguay 1954-1989)*, Asunción, Comité de Iglesias para Ayudas de Emergencia, 1999, pp. 7-37, esp. p. 15.

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85. Recent examples to the same effect multiply themselves. The Inter-American Court has given its contribution to this liberation of the human spirit from imposed oblivion and impunity, in particular by fulminating self-amnesty laws in its historical and wide-acclaimed Judgment in the Barrios Altos case (of 14.03.2001) concerning Peru, and by discarding prescription in its substantial Judgment in the Bulacio versus Argentina case (of 18.07.2003).

86. It should not pass unnoticed that in the present case of the *Moiwana Community versus Suriname*, the human rights organization "Moiwana '86" sought in vain to prevent the enactment of an amnesty act in Suriname. As the Inter-American Court noted, as to the proven facts, in the present Sentence, on 19.08.1992 the President of Suriname officially enacted the "Amnesty Act 1989", granting amnesty to those who had committed certain criminal acts during the period

from 01.01.1985 to 20.08.1992, with the exception of crimes against humanity; these latter were defined as "those crimes which according to international law are classified as such" [FN99].

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[FN99] Paragraph 86(39) and (40).

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87. In his thoughtful book *La mémoire, l'histoire, l'oubli* (2000), P. Ricoeur timely warns that "oblivion is not only the enemy of memory and history", but is furthermore "the emblem of the vulnerability of the historical condition as a whole" [FN100]. He then directs his criticisms to the legal subterfuges precisely of prescription and amnesty:

"(...) La prescription est une institution étonnante, qui s'autorise à grand-peine de l'effet présumé du temps sur des obligations supposées persister dans le temps. À la différence de l'amnistie qui (...) tend à effacer les traces psychiques ou sociales, comme si rien ne s'était passé, la prescription consiste en une interdiction de considérer les conséquences pénales de l'action commise (...). C'est le refus, après un laps d'années défini arbitrairement, de reparcourir le temps en arrière jusqu'à l'acte et ses traces illégales ou irrégulières. Les traces ne sont pas effacées: c'est le chemin qui est interdit (...). Comment le temps pourrait - il à lui seul (...) opérer la prescription sans un consentement tacite à l'inaction de la société? Sa justification est purement utilitaire" [FN101].

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[FN100] P. Ricoeur, *La mémoire, l'histoire, l'oubli*, Paris, Éd. Seuil, 2000, pp. 374-375.

[FN101] *Ibid.*, p. 610.

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88. P. Ricoeur then turns to the reaction of Law to such attempts to impose oblivion, in particular in cases of grave violations of human rights:

"L'imprescriptibilité signifie que le principe de prescription n'a pas lieu d'être invoqué. Elle suspend un principe qui consiste lui-même à faire obstacle à l'exercice de l'action publique. En supprimant les délais de poursuite, le principe d'imprescriptibilité autorise à poursuivre indéfiniment les auteurs de ces crimes immenses. En ce sens, il restitue au droit sa force de persister en dépit des obstacles opposés au déploiement des effets du droit. (...) C'est fondamentalement la gravité extrême des crimes qui justifie la poursuite des criminels sans limite dans le temps. (...) La présomption est que la réprobation des crimes considérés ne connaît pas de limite dans le temps. À cet argument s'ajoute la considération de la perversité de plans concertés (...)" [FN102].

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[FN102] *Ibid.*, pp. 611-612.

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89. Forgetfulness can simply not be imposed on anyone. Legal or institutionalized means of imposing oblivion, - such as amnesty or prescription, - utilitarian as they may seem to be, appear rather as obstructions of justice [FN103] (*summum jus, summa injuria*). The search for, and

investigation of, past violations of human rights render the past an eternal present, so as to allow the survivors of the violations to earn their future [FN104]. It has been rightly contended that the unmasking of the atrocities of the past and of the present corresponds to a true "ethics of the memory" [FN105].

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[FN103] P. Ricoeur, "Esquisse d'un parcours de l'oubli", in *Devoir de mémoire, droit à l'oubli?* (ed. Th. Ferenczi), Bruxelles, Éditions Complexe, 2002, pp. 26-27 and 30-31.

[FN104] A. Wiewiorka, "Entre transparence et oubli", in *Devoir de mémoire...*, op. cit. supra n. (104), pp. 182-183.

[FN105] N. Weill, "Y a-t-il un bon usage de la mémoire?", in *Devoir de mémoire...*, op. cit. supra n. (104), p. 227.

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90. I surely hope that the personal thoughts I cared to give expression to, in my present Separate Opinion, may help to disclose the great transcendence of the issues raised in the present case, from the juridical perspective. I further hope that the Court's Judgment in the *Moiwana Community* case may contribute to restore, to the members of the Maroon N'djuka community of the village of *Moiwana*, their sense of justice having been done and their resulting peace of mind, as the spiritual damage they have been enduring for almost two decades with their beloved deceased has herein been judicially recognized.

91. The N'djukas had their right to the project of life, as well as their right to the project of after-life, violated, and continuously so, ever since the State-planned massacre perpetrated in the *Moiwana* village on 29.11.1986. They suffered material and immaterial damages, as well as spiritual damage. Some of the measures of reparations ordered by the Court in the present Judgment duly stand against oblivion, so that this atrocity never occurs again. Such is the case of the State's duty to investigate the facts and to try and sanction those responsible for them; the State's duty to find and identify the mortal remains of the victims of the massacre of *Moiwana* village and to pass them on to the survivors of the *Moiwana* Community; the State's duty to secure the safe return to, and resettlement in, the *Moiwana* village of all those forcefully displaced from it; the State's duty to implement a fund of community development; the State's apologies to the victims, and the building of a monument in memory and honour of the victims of the massacre of 1986 [FN106].

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[FN106] Decisory points ns. 1-8.

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92. In sum, the wide range of reparations ordered by the Court in the present Judgment in the *Moiwana* Community case appears well in keeping with the recognizedly rich case-law of the Inter-American Court on the matter, which, as widely acknowledged [FN107], has concentrated on, and enhanced the centrality of, the position of the victims, - as well as on devising a wide range of possible and adequate means of redress. In the *cas d'espèce*, the collective memory of the Maroon N'djukas is hereby duly preserved, against oblivion, honouring their dead, thus

safeguarding their right to life lato sensu, encompassing the right to cultural identity, which finds expression in their acknowledged links of solidarity with their dead.

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[FN107] Cf., e.g., I. Bottiglierio, *Redress for Victims of Crimes under International Law*, Leiden, Nijhoff, 2004, pp. 111 and 144, and cf. pp. 176-177 and 183.

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93. It is incumbent upon all of us, the still living, to resist and combat oblivion, so commonplace in our post-modern, ephemeral times. The dead need our faithfulness, they are entirely depended upon it [FN108]. The duties of the living towards them are thus not limited to securing respect for their remains and to granting them a proper burial; such duties also encompass perennial remembrance. They need our remembrance today and tomorrow, just as much as we needed their advice and care yesterday. Time, thus, instead of keeping us apart, on the contrary, brings all of us - the living and the dead - together. This, in my view, ascribes an entirely new dimension to the links of solidarity between the living and their dead. Remembrance is a manifestation of gratitude, and gratitude is perhaps the noblest manifestation of rendering true justice.

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[FN108] N. Wachtel, "Mémoire marrane", in *Devoir de mémoire...*, op. cit. supra n. (104), p. 128.

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Antônio Augusto Cançado Trindade  
Judge

Pablo Saavedra-Alessandri  
Secretary

#### CONCURRING OPINION OF JUDGE CECILIA MEDINA

I agree with the Court's decision that Articles 5(1), 22 and 21 of the American Convention have been violated, all in relation to Article 1(1) thereof, and also Articles 8(1) and 25 of the Convention. Nevertheless, I have prepared this opinion because I consider that, in the judgment, the Court failed to declare that Article 4 had also been violated, based on the State's failure to comply with its obligation to investigate the deprivation of life that occurred owing to the massacre that took place in Moiwana in 1986. Furthermore, it did not note that Article 5 had been violated, also due to the State's failure to comply with its obligation to investigate these facts, but in relation to personal integrity. [FN1] In my opinion, then, the omission of Article 4 left the violation of Articles 8 and 25 of the Convention unsubstantiated.

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[FN1] In the case of Article 5, in addition to the lack of investigation into violations of integrity that occurred during the massacre, there were other allegations regarding violations related to events that took place after the massacre, on which the Court did rule (see paras. 90 to 103)

First, I would like to establish the general premises for this position and, then, refer to the specific case that is the subject of this judgment.

With regard to the general premises:

1. The American Convention establishes the obligation of the State to respect and guarantee the human rights recognized therein. The obligation to guarantee, which is relevant in this opinion, “is not exhausted by the existence of norms designed to make compliance with this obligation possible, but requires governmental conduct that ensures the genuine existence of an effective guarantee for the free and full exercise of human rights.” [FN2] With these words, the Court establishes the notion that it is obligatory for the States Parties to implement actions designed to comply with this provision.

Since the obligation to guarantee refers to specific rights, it is complied with in different ways according to the right that is the object of the guarantee.

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[FN2] Ibid, para. 167.

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2. In my opinion, and I believe that it is the Court’s case law as well, the obligation to investigate, which the Court has mentioned consistently in cases where violations of Articles 4 and 5 of the Convention have occurred, derives from the general obligation of the States Parties to guarantee these two rights – in other words, from Article 1(1) of the Convention read in conjunction with Articles 4 or 5 thereof. The grounds supporting this position can be found from the inception of the Court’s jurisprudence and have prevailed to date. [FN3]

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[FN3] Cf. Case of Velásquez-Rodríguez. Judgment of July 29, 1988. Series C No. 4, paras. 166 to 177.

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3. Moreover, based on the above, it is evident that the obligation to investigate can only be demanded with regard to a substantive right that must be protected. The Court has regularly recognized the essential link between the obligation to guarantee, and consequently to investigate, and the respective right that must be guaranteed.

This position can already be seen in the Court’s first judgment, where it affirmed that Article 1(1) “specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) of the Convention has also been violated.” [FN4] In accordance with this position, in the Tibi case for example, the Court stated that, owing to the obligation contained in Article 1(1) to respect and ensure the rights of the Convention, “the State has the obligation to initiate an immediate effective investigation ex officio that makes it possible to identify, prosecute and

punish those responsible when there has been a complaint or there are grounds for believing that an act of torture has been committed in violation of Article 5 of the American Convention.” [FN5] In the Myrna Mack Chang case, the Court stated that “safeguarding the right to life requires conducting an effective official investigation when there are persons who have lost their life as a result of the use of force by agents of the State.” [FN6] This idea is repeated, inter alia, in the following judgments: Gómez-Paquiyaury Brothers, [FN7] Cantoral-Benavides, [FN8] Caballero-Delgado and Santana, [FN9] and Baena-Ricardo et al. [FN10]

Even in cases in which the Court has examined the violation of Article 1 in an independent chapter, it has still linked the violation of Article 1(1) to the right violated. In the Juan Humberto Sánchez case, for example, the Court decided that: “The violations of the right to liberty and personal safety, to life, to physical, mental and moral integrity, [...] that have been established in this judgment, are attributable to the State [...]. Therefore, the State is responsible for non-observance of Article 1(1) of the Convention, in connection with the violations held regarding Articles 4, 5, 7, 8 and 25 of that Convention.” [FN11] The judgment in the Bámaca-Velásquez case, based on the same violations, has the same conclusion. [FN12]

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[FN4] Cf. Case of Velásquez-Rodríguez, supra note 3, para. 162.

[FN5] Cf. Case of Tibi. Judgment of September 7, 2004. Series C No. 114, para. 159.

[FN6] Cf. Case of Myrna Mack-Chang. Judgment of November 25, 2003. Series C No. 101, para. 157.

[FN7] Cf. Case of the Gómez-Paquiyaury Brothers. Judgment of July 8, 2004. Series C No. 110, para. 131.

[FN8] Cf. Case of Cantoral-Benavides. Judgment of August 18, 2000. Series C No. 69, tenth operative paragraph.

[FN9] Cf. Case of Caballero-Delgado and Santana. Judgment of December 8, 1995. Series C No. 22, para. 56.

[FN10] Cf. Case of Baena-Ricardo et al. Judgment of February 2, 2001. Series C No. 72, fifth operative paragraph.

[FN11] Cf. Case of Juan Humberto Sánchez. Judgment of June 7, 2003. Series C No. 99, para. 145.

[FN12] Cf. Case of Bámaca-Velásquez. Judgment of November 25, 2000. Series C No. 70, para. 213. See also sixth and eighth operative paragraphs.

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4. A similar situation exists with regard to Article 2 of the Convention, which also contains a general obligation that underlies the rights recognized in the Convention. The Court’s position in this regard has been the same, even when it has dealt with the violation of Article 2 in a separate chapter. In the Suárez-Rosero case, for example, first the Court established a violation of Article 7(5) and then, in the chapter dealing with Article 2, it concluded that:

99. In conclusion, the Court points out that the exception contained in the aforementioned Article 114 bis violates Article 2 of the Convention in that Ecuador has not taken adequate measures under its domestic law to give effect to the right enshrined in Article 7(5) of the Convention. [FN13]

Thus, the Court linked the failure to comply with Article 2 to the violation of a specific right.

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[FN13] Cf. Case of Suárez-Rosero. Judgment of November 12, 1997. Series C No. 35, para. 99.

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5. This linkage between the obligation of Article 1(1) and the substantive right that is protected makes it unlikely that an autonomous violation of that right can be declared. If the State is obliged to guarantee the rights established in the Convention – as Article 1(1) states – the object of the guarantee can only be one or more of those rights, and it shall be understood that the obligation has not been complied with only with regard to that right, and constitutes a violation of the latter.

Consequently, I consider that the legal grounds that the Court can invoke to demand that a State comply with the obligation in Article 1(1) are the existence of a violation of a right that should be protected, ensured or guaranteed. In other words, there appear to be no other legal grounds for obliging a State to investigate facts, other than the Court deciding that by failing to conduct an investigation, the obligation to guarantee a specific right has been violated.

Furthermore, I do not consider that the Court has the authority to demand that a State investigate any fact, without basing this demand on legal grounds arising from the Convention or on the international norms which the Court can invoke to justify its decisions. Indeed, there appears to be no mention in the Court’s case law of legal grounds other than the one described above.

6. Looking at another aspect of the problem, the case law of the Court, with which I agree, also seems to indicate that a right recognized in the Convention may be violated by either the act or the omission of the State. This had already been stated by the Court in the Velásquez Rodríguez judgment on the merits, and is defined specifically in the Children’s Rehabilitation Center judgment. In paragraph 156 of this judgment, the Court holds that States “have the obligation to guarantee the creation of the conditions required for the full enjoyment and exercise” of the right to life, and then establishes that, since Paraguay had not taken “the necessary and sufficient positive measures to guarantee conditions for a dignified life for all the detainees or taken the special measures required for the children,” the State had violated Article 4. [FN14]

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[FN14] Cf. Case of the “Children’s Rehabilitation Institute”. Judgment of September 2, 2004. Series C No. 112, para. 176. See also fourth operative paragraph of the judgment.

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With regard to this specific case:

1. The first point that the Court had to decide in this case referred to its competence *ratione temporis* to hear it, since the massacre of many members of the Moiwana Community had occurred in 1986 - namely, before the date that the American Convention came into force in

Suriname and also before the date that this State accepted the Court's jurisdiction. [FN15] Respecting this lack of competence, and when ruling on the preliminary objection *ratione temporis* filed by the State, the Court stated that it was unable to examine the violation of Article 4 in relation to the alleged arbitrary deprivation of life of members of the Moiwana community by State agents, or the violation of Article 5, which could derive from any adverse effects on personal integrity that occurred the day of the events of 1986; that is, it could not rule on the alleged violation of the obligation to respect the right to life and the right to personal integrity that had occurred on November 29, 1986, in Suriname. [FN16]

Notwithstanding the above, the Court understood that the events that occurred in 1986 gave rise to the obligation to investigate them, and that this obligation was pending execution when the Court acquired jurisdiction to try the State of Suriname and, thus, *ratione temporis*, it came within the Court's jurisdiction. [FN17]

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[FN15] The Court encountered a similar problem in the Case of the Serrano-Cruz Sisters, but in that case there was an obstacle that prevented it from declaring that the obligation to investigate subsisted. There, the State had accepted the Court's contentious jurisdiction with the express reservation that the Court could only and exclusively examine the facts or legal acts occurring after the date of the State's acceptance of the Court's jurisdiction or those facts or legal acts whose execution had commenced after that date. See Case of the Serrano-Cruz Sisters. Judgment of November 23, 2004. Series C No. 118, paras. 57 to 96).

[FN16] See paras. 37 to 43.

[FN17] See para. 40.

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2. In my opinion, the obligation to investigate was generated at the time of the massacre. It should not be forgotten that, at that date, Suriname was a member of the Organization of American States and, as a member, it was obliged to respect and guarantee the human rights established in the American Declaration of the Rights and Duties of Man, which include, in Article 1, the rights to life, liberty and the security of the person. Thus, the massacre of the Moiwana village did not take place in the absence of norms of the system, which Suriname should have respected.

However, the Court was unable to monitor compliance with that obligation because it lacked jurisdiction to do so. Its jurisdiction commenced when Suriname deposited the appropriate instrument, in accordance with Article 62 of the Convention. At that moment, the obligation to investigate was pending, because it is an obligation that is not exhausted when the facts occur. [FN18] That is what the Court decides in paragraph 40 of the judgment.

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[FN18] Similarly, the Court indicated in the Tibi case that “[s]ince the date the said Inter-American Convention against Torture entered into force in Ecuador (December 9, 1999), the State has been obliged to comply with the obligations contained in that treaty.” (Cf. Case of Tibi, *supra* note 5, para. 159)

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3. Since the Court decided that the State had the obligation to investigate the facts of the massacre, it should have set out the legal grounds for that obligation, because if these grounds did not exist, neither did the obligation. Paragraph 156 of the judgment failed to mention this. This is essential because, if the obligation to investigate does not exist, the Court cannot maintain that there has been a violation of Articles 8(1) and 25 to the detriment of the members of the Community. Article 8(1) establishes how an investigation should be conducted, when there is an obligation to investigate, and Article 25 establishes the need for a remedy “for protection against acts that violate [...] fundamental rights...”

The mention made by the Court of Article 1(1) does not resolve this vacuum. In this case, the obligation to guarantee refers to the duty to comply with the contents of Article 8 and of Article 25, but cannot serve as grounds to hold that the State had the obligation to investigate. Due process and remedies can only be demanded to protect another human right or rights; these other rights necessarily arise from another source, which the judgment in this case fails to mention.

4. Based on the considerations and reasoning in the first part of this opinion and the considerations on the case itself that precede this paragraph, I conclude that, in this judgment, the State of Suriname is obliged to investigate the facts of the 1986 Moiwana massacre owing to the existence of its obligation to guarantee the rights to life and personal integrity, and that not guaranteeing them constitutes a violation of Articles 4 and 5 which recognize them, read in conjunction with Article 1(1).

5. Thus, I consider that the Court should have declared that Articles 4 and 5 were violated in relation to the failure to comply with the obligation to investigate, because this was part of the obligation to guarantee against the deprivation of life and the adverse effects on personal integrity that were alleged in the case.

Cecilia Medina-Quiroga  
Judge

Pablo Saavedra-Alessandri  
Secretary

Judge García-Ramírez subscribes to Judge Medina Quiroga’s opinion.

Sergio García-Ramírez  
Judge

Pablo Saavedra-Alessandri  
Secretary