

## CURRENT LEGAL DEVELOPMENTS

# The *Moiwana Village* Case: A New Trend in Approaching the Rights of Ethnic Groups in the Inter-American System

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### Abstract

*Moiwana Village* is the second case to be decided by the Inter-American Court on Human Rights against Suriname in which the victims are members of an ethnic community that descends from ‘Bush Negroes’ or ‘Maroons’, namely escaped former slaves who established new autonomous communities in the eastern part of Suriname. In contrast to its prior judgment, in *Moiwana* the Court shows a striking evolution in its case law regarding the treatment of ethnic or group rights. This approach, which may be traced back to previous case law on the rights of indigenous communities, affords an enhanced protection to members of an ethnic community in the light of their disadvantaged position as a vulnerable group and taking into account the ancestral traditions followed by the community. After the *Moiwana* case, the Court decided *Yakye Axa* and *Yatama*, two cases regarding indigenous and ethnic communities in which this tribunal consolidated its approach towards the protection of these vulnerable groups.

### Key words

ethnic community; group rights; human rights; Inter-American Court; special protection; vulnerable group

*Moiwana Village v. Suriname* is the second case decided by the Inter-American Court of Human Rights (Inter-American Court or Court) against Suriname in which the victims are members of an ethnic community that descends from the so-called ‘Bush Negroes’ or ‘Maroons’, namely former slaves who managed to escape enslavement and established new autonomous communities in the eastern part of Suriname. In *Aloeboetoe*,<sup>1</sup> the first case decided by the Court, six members of this ethnic community were killed by Surinamese soldiers, while a seventh victim died in hospital after being shot and left for dead at the time of the extrajudicial executions. The difference in the scope of these two judgments, decided more than ten years apart, shows a striking evolution in the case law of the Court regarding the treatment of tribal or

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1. I/A Court H.R., *Case of Aloeboetoe et al. v. Suriname*, Judgment of 4 December 1991, Series C No. 11. Suriname recognized international responsibility for the extrajudicial executions of the victims and, in consequence, the Court accepted the facts as stated in the petition submitted by the Commission.

ethnic group rights. While in *Aloeboetoe* the Court dismissed arguments requesting this tribunal to take into account the fact that the victims were members of an ethnic community with strong communal ties when assessing the impact of the human rights violations for purposes of reparation,<sup>2</sup> in *Moiwana Village* the Court interpreted the scope of the rights of the members of the village as well as the reparations awarded to them in the light of the particular characteristics of the Maroon ethnic community. As demonstrated by the Court's continued consideration of a group's unique characteristics in deciding cases regarding indigenous and/or ethnic communities, it is clear that the evolution continues to unfold beyond *Moiwana Village*.

## I. BACKGROUND

The origin of the Court's new approach reflected in *Moiwana Village* may be traced back to the *Mayagna (Sumo) Awas Tingni Community* case, in which the Court, for the first time, provided for the protection of the rights of members of an indigenous community in Nicaragua in the light of their cultural traditions and beliefs.<sup>3</sup> In *Moiwana Village* the Court extended the protection afforded to indigenous groups to an ethnic community with similar ancestral traditions. After the *Moiwana* case, the Court decided *Yakye Axa*<sup>4</sup> and *Yatama*,<sup>5</sup> two cases regarding indigenous and ethnic communities in which this tribunal consolidated its approach towards the protection of these vulnerable groups. The relevant facts of those cases are now provided to assist in the subsequent analysis of the *Moiwana Village* case.

In *Yakye Axa*, the Court examined Paraguay's failure to process in due time an indigenous community's claim to regain access to its traditional lands, as ensured by the state Constitution. The community's claim to the territory, submitted in 1993, remained unresolved by the time the Court decided the case in 2005. Since 1993 the community has been settled on the side of a road, in land adjacent to its ancestral territory that lacked the most basic amenities such as access to clean water, food, and housing. The Court held that there was no justification for Paraguay's procedural delay of more than 12 years, which has deprived the community's members of access to their land and their traditional way of living, and has resulted in a nutritional, medical, and sanitary crisis that has threatened the community's integrity and physical survival. Moreover, the state's failure to provide an effective remedy, in addition to violating Articles 1(1), 2, 8, and 25 of the American Convention on Human Rights (American Convention or Convention), has had a detrimental impact on the community members' enjoyment of other rights protected by this treaty, particularly

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2. I/A Court H.R., *Case of Aloeboetoe et al. v. Suriname*, Reparations (Art. 63 (1) American Convention on Human Rights), Judgment of 10 September 1993, Series C No. 13, para. 83. Although the Court admitted that it would exceptionally allow for damages to be awarded to the community in a case in which it suffered direct harm, it failed to consider the impact that the human rights violations had on the community to which the victims belong.
  3. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, Series C No. 79.
  4. I/A Court H.R., *Case of Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, Series C No. 125.
  5. I/A Court H.R., *Case of Yatama v. Nicaragua*, Judgment of 23 June 2005, Series C No. 127.

the rights to property and life. In determining Paraguay's violation of the indigenous community's right to property, the Court stated that the close relationship between the indigenous community and the land must be recognized and understood as the fundamental base of their culture, spiritual life, integrity, economic survival, and cultural preservation. Although Paraguay's domestic legislation recognized the relevance of this relationship, the state's failure to ensure a remedy to enable the community to regain access to its traditional lands had, in practice, frustrated the community's enjoyment of their right to property in violation of Article 21 of the American Convention. The Court also held that lack of access to the community's land had deprived its members of using their traditional means of subsistence, enjoying clean water as well as practicing ancestral treatment to heal illnesses, which affected their right to a dignified life in contravention of Article 4(1), in conjunction with Article 1(1) of the American Convention.

Consequently the Court established extensive reparations to the community by ordering the state to realize the community's right to property, either by ensuring its access to its ancestral lands or identifying alternative land that the state could acquire for that purpose. In addition, it ordered the state to create a communal fund to support the provision of clean water and health services once the land was awarded to the community. The Court also ordered Paraguay to create a US\$950,000 fund to support the development of educational, health, and housing projects for the community.

In the same vein, the *Yatama* case relates to the protection of the right to political participation of the indigenous and ethnic communities from the Autonomous Regions of the North Atlantic (RAAN) and South Atlantic (RAAS) in Nicaragua, a country whose multiethnic, multicultural, and multilingual population is evinced by the great variation of indigenous and ethnic communities populating its Pacific and North Central regions, as well as the Atlantic Coast and Caribbean. In recognition of that diversity, the communities of the Atlantic Coast, for example, have a constitutionally recognized right to preserve and develop their cultural identities, to establish their own social structure, and to administer their local issues in conformity with their traditions. *Yatama* was initially created as an association to represent and defend the interests of these communities and had successfully elected representatives to municipal and regional authorities since 1990. However, in 2000 Nicaraguan domestic law was amended to provide that only political parties could participate in that year's electoral process; each party would need to gather 3 per cent of the registered population's signatures, and do so at least six months before the election. Also, in order to acquire judicial recognition, each political party had to provide candidates from at least 80 per cent of all municipalities. Although *Yatama*, which met the required standards for recognition as a political party, presented independent candidates in the RAAN and participated in a coalition with another political party in the RAAS, the Supreme Electoral Council rejected the candidates' participation in a disputed decision ultimately affirmed by the Supreme Court of Justice.

In the light of this decision, the Court held that the Supreme Electoral Council had failed to comply with the minimum standards of due process as required by Article 8(1) of the American Convention because it did not provide a basis for rejecting *Yatama's* candidates. Moreover, since the Supreme Electoral Council is considered

to be an independent branch of the government in Nicaragua, its decisions are not subject to judicial review, thereby depriving individuals of an effective means of challenging rulings that affect their rights to political participation in violation of Article 25 of the Convention. In addition, the Court held that under Articles 24, 1(1) and 2 of the American Convention, states have a positive obligation to adopt measures to ensure that members of vulnerable groups exercise the rights protected by the Convention under similar conditions to other groups. The requirement to participate as a political party in the regional elections imposed an undue burden on Yatama candidates, due to the foreign nature of this form of organization vis-à-vis the traditions, customs, and uses of the indigenous and ethnic communities of the Atlantic Coast. Furthermore, the state was unable to advance a pressing public need that would justify this restriction. Accordingly the Court found that the disadvantaged position in which candidates were placed violated their right to political participation enshrined in Article 23 of the American Convention, in conjunction with Articles 24, 1(1) and 2 of that treaty. It also concluded that the rejection of Yatama's candidates in the elections also imposed unjustified restrictions on the right of the members of the indigenous and ethnic community to participate and to choose candidates who represented their interests.

With regard to reparations, the Court awarded compensation for damage caused to the candidates who were unable to participate in the 2000 elections. It also ordered the state to amend its electoral legislation to ensure that members of indigenous and ethnic communities are guaranteed the right to participate in the political process. Finally the Court ordered the state to introduce into its domestic legislation a judicial means of challenging decisions adopted by the Supreme Electoral Council.

## 2. THE JUDGMENT OF THE INTER-AMERICAN COURT

### 2.1. The facts of the case

In *Moiwana Village v. Suriname*,<sup>6</sup> the events took place during Sergeant-Major (later Lieutenant-Colonel) Désiré (Desi) Bouterse's military control of Suriname from 1982 to 1987, in the midst of an internal armed conflict with the Jungle Commando, an insurgent guerrilla group that rose up to oppose the authoritarian government and which operated mainly in the eastern part of the country, where the victims in this case resided. On 29 November 1986 the village belonging to the N'djuka community, an ethnic group descended from former slaves, was surrounded, its property burned, and many of its inhabitants killed; those whose lives were spared escaped to surrounding territories, including of French Guyana. Among the dead were at least 39 men, women, and children whose remains have not been recovered, and the perpetrators have not been brought to justice by the Surinamese government. The surviving victims and civil society organizations, such as Moiwana '86 and the Moiwana Association, persistently and frequently petitioned the government for redress. Their concerns were heightened in the light of the approval of an amnesty law that would ultimately pardon the perpetrators. However, despite their efforts,

6. I/A Court H.R., *Case of Moiwana Village v. Suriname*, Judgment of 15 June 2005, Series C No. 124.

the state failed to carry out an investigation into what had transpired in Moiwana Village and, consequently, to award appropriate reparations.

## 2.2. Preliminary objections

Initially Suriname raised five preliminary objections challenging the jurisdiction of the Court to hear the case. The state's objections included jurisdictional as well as admissibility issues. With regard to the first objection, Suriname alleged that the Court lacked jurisdiction *rationae temporis* to review the petition because the facts of the case had occurred before the state ratified the American Convention and accepted the Court's contentious jurisdiction.<sup>7</sup> The Court, in following precedent case law, reaffirmed the application of the principle of non-retroactivity of treaties, which bars this tribunal from examining acts and omissions that transpired before the Convention entered into force and before the state accepted the compulsory jurisdiction of the Court. Moreover, it reiterated that the only exceptions to this principle are alleged violations of the Convention that are of a continuing nature. The Court's analysis of its jurisdiction *rationae temporis* in recent case law has been controversial, particularly with respect to states that have introduced temporal or similar limitations or reservations to their declarations recognizing the compulsory jurisdiction of this tribunal.<sup>8</sup> Contrary to those cases, however, Suriname's declaration was submitted without express limitations, and thereby poses no problems of interpretation for the Court.

The Court concluded that it had no jurisdiction to hear the facts related to the military attack on the village of Moiwana and the deaths of the members of the N'djuka tribe that resulted from the attack, given that they took place before Suriname's ratification of the American Convention and the subsequent recognition of the Court's jurisdiction. Nonetheless, it asserted jurisdiction to examine the alleged violations arising out of Suriname's failure to investigate the killings, including the victims' lack of access to an effective remedy and the suffering undergone by members of the community as a consequence of the continuous denial of justice. Moreover, the Court ruled that the forcible displacement of the community from its ancestral lands and their resulting inability to enjoy their communal property were continuous violations, thereby asserting jurisdiction to hear these claims as well. In sum, the Court found that it had jurisdiction to review the alleged violations of several provisions of the American Convention, including Articles 8(1), 25, and 1(1) with regard to the right to a remedy and the lack of appropriate investigation, Article 5 with respect to the suffering undergone by the community members, Article 22 in relation to the forceful displacement, and Article 21 in connection to the right to property.

Second, Suriname argued that the petitioners had failed to exhaust domestic remedies before submitting the case to the Inter-American Commission on Human Rights (Inter-American Commission or Commission), as required by Article 46(1)(a)

7. The attack on the village took place on 29 Nov. 1986. Suriname ratified the American Convention and accepted the compulsory jurisdiction of the Court on 12 Nov. 1987.

8. See, *inter alia*, I/A Court H.R., *Case of Serrano-Cruz Sisters v. El Salvador*, Preliminary Objections, Judgment of 23 November 2004, Series C No. 1118.

of the American Convention.<sup>9</sup> The Court, siding with the Commission, concluded that the state had not raised this objection in a timely fashion and consequently had waived its right to challenge the admissibility of the petition. It is well-established practice and precedent in the Inter-American system that states must file admissibility objections, including that on the exhaustion of domestic remedies, in the first stages of the proceedings, otherwise their right will be considered to have been tacitly waived.<sup>10</sup>

Third, Suriname alleged that the Court lacked jurisdiction to review the petition because the Commission filed the complaint following the expiration of the three-month period authorized by Article 51(1) of the Convention.<sup>11</sup> The Court noted that the Commission had agreed twice to extend the state's deadlines to reply pursuant to Suriname's request and on the state's written acknowledgment that the extensions would not prevent the Commission from submitting the case to the Court if no settlement was reached. Therefore, in following precedent, the Court rejected the objection and held that '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'.<sup>12</sup>

Another preliminary objection that deserves analysis touches on the Court's power to review alleged violations of rights protected by the American Declaration on the Rights and Duties of Man (American Declaration or Declaration). The Statute of the Inter-American Commission,<sup>13</sup> supported by a well-established practice accepted by states, provides that the American Declaration is the instrument utilized by the Commission to monitor compliance with human rights standards in a state

9. Article 46(1)(a) provides: 'Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.'

10. See *Moiwana Village v. Suriname* case, *supra* note 6, para. 49 and additional cases cited therein.

11. Article 51(1) provides that if, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

12. See *Moiwana Village v. Suriname* case, *supra* note 6, para. 58. See also I/A C.H.R., *Case of Neira Alegria et al. v. Peru*, Preliminary Objections, Judgment of 11 December 1991, Series C No. 13, paras. 34–5; *Case of Caballero Delgado and Santana*, Preliminary Objections, Judgment of 21 January 1994, Series C No. 17, para. 45.

13. Article 20 of the Statute of the Inter-American Commission on Human Rights establishes:

In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18:

- a. to pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man;
- b. to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and,
- c. to verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

party to the Organization of American States that has not yet ratified the American Convention. Once a state ratifies the Convention, however, this treaty becomes the applicable law. In the case under analysis, since many of the facts transpired before Suriname ratified the American Convention (for example the deprivation of the victims' right to life), the Commission found in its merits report several violations of rights protected by the Declaration. Moreover, given that the state's violation of the right to an effective remedy and its failure to investigate continued after Suriname had ratified the American Convention, the application of this treaty displaced the Declaration, causing the Commission to address those violations under Articles 8 and 25 of the said treaty. The Commission only argued violations of the American Convention in its submissions before the Court.

In its preliminary objection Suriname argued that the Commission's report, which found violations of rights protected by the American Declaration additional to those argued by the petitioners, was detrimental to the state's defence. In response, the Court held that the American Convention grants this tribunal the jurisdiction to interpret and apply the provisions of this treaty but does not bestow on it the power to review the Commission's findings on the American Declaration. The relevance of this conclusion lies in the fact that the jurisdiction of the Court, a tribunal created by the American Convention to hear violations of the American Declaration, has never been decided squarely in a case. In *Cantos*, the Commission argued violations of the American Declaration, but the Court refused to examine the facts, stating that it lacked jurisdiction *rationae temporis* to review the allegations.<sup>14</sup> Conversely, in *Moiwana* the Court appears to suggest that, even though it may use the American Declaration to interpret the American Convention under Article 29 of that treaty,<sup>15</sup> it lacks jurisdiction to deal with direct violations of the Declaration.

Finally, Suriname argued that the Commission had failed to provide the state with all the relevant parts of the complaint submitted by the petitioners, thereby depriving the state of essential information to mount a solid defence of its position. However, the Court rejected the preliminary objection, stating that due to Suriname's failure to appear before the Commission prior to the Commission's issuance of admissibility and merits reports, the state, by its own action, had failed to exercise its right to defence at the appropriate stages of the proceedings.

14. I/A Court H.R., *Case of Cantos v. Argentina*, Judgment of 28 November 2002, Series C No. 97, para. 48.

15. Article 29 of the American Convention provides:

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

In sum, the Court rejected the preliminary objections submitted by Suriname and found jurisdiction to deal with certain ongoing violations of rights protected by the American Convention.

### 2.3. Merits

Before examining the substantive rights violations alleged by the petitioners, it is important to note that this case involved victims who belonged to an ethnic community with strong communal traditions and views. Therefore the petitioners and the Commission struggled in their arguments to distinguish whether the victims should be treated as individuals whose rights had been violated or as part of a group with distinctive standing, thereby reflecting a contradiction between notions of individual and group rights. The decision of the Court shows a similar contradiction in the approach it follows, for example, with regard to the right to property. The tension between individual and group rights can also be observed in cases in which the Court addressed the rights of indigenous communities.<sup>16</sup> One reason for the contradiction may lie in the Commission's narrow interpretation of Article 1(2) of the American Convention, which provides that 'person' means every human being. The Commission has consistently refused to review cases on the basis of its jurisdiction *rationae personae* in which the alleged victims were not individual persons, but associations, corporations or similar entities.<sup>17</sup> However, it has never analysed whether an ethnic or indigenous community could claim rights as a group, that is to say, beyond the harm suffered by its individual members. Notwithstanding, it is worth noting that in the decision of admissibility in *Moiwana*, the Commission made it clear that the victims were the inhabitants of the community and not the community as such.<sup>18</sup> Likewise, in *Yakye Axa*, the Commission underlined that '[a]s its alleged victims, the petition identifies individual persons', indicating in a footnote that those victims include each member of the indigenous community.<sup>19</sup>

Another development that it is important to consider with regard to the substantive analysis of the case is the broader scope of protection provided to vulnerable groups by the Court's recent jurisprudence. Starting with cases involving children, the Court has interpreted the rights of the American Convention in the light of the particular status of this category of victims and has afforded them enhanced protection.<sup>20</sup> Most recently, the Court has extended broader protection to members of indigenous communities. In *Yakye Axa*, for example, the Court stated that it would take into account the particular characteristics that make up the cultural identity of

16. See *Yakye Axa Indigenous Community* case, *supra* note 4.

17. See, *inter alia*, I/A Commission H.R., *Bernard Merens and family v. Argentina*, Report No. 103/99, Petition, 27 September 1999, Annual Report 1999; *Elias Santana et al. v. Venezuela*, Report No. 92/03, Petition 453/01, 23 October 2003, Annual Report 2003.

18. I/A Commission H.R., *Village of Moiwana v. Suriname*, Report No. 26/00, Case 11.821, 7 March 2000, Annual Report 1999, para. 16.

19. I/A Commission H.R., *Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay*, Admissibility, Report No. 2/02, Petition 12.313, 27 February 2002, Annual Report 2002, para. 31.

20. See, e.g., I/A Court H.R., *Case of the Gómez Paquiyauri brothers v. Peru*, Judgment of 8 July 2004, Series C No. 110, paras. 117 and 170; *Case of Bulacio v. Argentina*, Judgment of 18 September 2003, Series C No. 100, para. 126; and *Case of Children's Rehabilitation v. Paraguay*, Judgment of 2 September 2004, Series C No. 112, para. 147.



this indigenous community when interpreting the provisions of the Convention.<sup>21</sup> Although not expressly stated in *Moiwana*, the Court followed a similar approach and interpreted the rights of the members of this ethnic community in the light of the fact that they are a vulnerable group deserving enhanced protection under the American Convention.

With regard to the merits, the Court initially addressed the consequences affecting the members of the community of the state's failure to investigate and to ensure redress. Similarly to *Serrano-Cruz Sisters*,<sup>22</sup> in *Moiwana* the Court subscribed to the approach that failure to carry out an effective investigation might entail additional violations of rights protected by the American Convention. In particular, the Court found that the ongoing denial of justice suffered by the surviving members of the community, in addition to depriving the victims of the right of access to an effective remedy, as ensured by Articles 8 and 25 of the Convention, resulted in ongoing violations of their rights to humane treatment (Article 5), freedom of movement (Article 22), and property (Article 21) granted by that treaty.

First, the Court found that Suriname's failure to carry out a proper investigation of the events that resulted in the death of 39 members of the community, as well as the forced displacement of the survivors, constituted a violation of their right to physical, mental, and moral integrity on several grounds. In previous case law the Court had ruled that a state's failure to carry out an investigation regarding the disappearance or death of a victim, and the mistreatment of his or her remains, or the failure to return the victim's body to his or her next of kin, constituted a violation of their right not to be subjected to cruel, inhumane, or degrading treatment, as protected by Article 5 of the American Convention.<sup>23</sup> In *Moiwana* the Court, taking into account the cultural background of the community, found that the lack of a serious and thorough investigation, in addition to causing anguish to the victims' next of kin, had a severe impact on the surviving villagers, given the notions of justice and collective responsibility shared by the N'djuka people. Under this cultural tradition, if a member of the tribe is arbitrarily deprived of his or her life, his or her spirit does not rest until justice is accomplished. The living members of the community have a duty to search for justice because if this obligation is not fulfilled, both the survivors and the dead will suffer. Moreover, the state's failure to return the remains of the villagers killed in the military attack or to indicate where they were buried constituted, according to the Court, an additional source of suffering for the N'djuka people because it prevented the community from honouring their deceased loved ones according to their traditions. The N'djuka people follow specific and complex rituals that must be conducted on the death of a community member; failure to comply with those rituals

21. See *Yakye Axa Indigenous Community* case, *supra* note 4, para. 51.

22. I/A Court H.R., *Case of the Serrano-Cruz Sisters v. El Salvador*, Judgment of 1 March 2005, Series C No. 120, para. 113.

23. See, e.g., I/A Court, *Case of the Street Children (Villagrán Morales et al.) v. Guatemala*, Judgment of 19 November 1999, Series C No. 63, para. 174; *Case of Bámaca Velásquez v. Guatemala*, Judgment of 25 November 2000, Series C No. 70, para. 165; *Case of Juan Humberto Sánchez v. Honduras*, Judgment of 7 June 2003, Series C No. 99, para. 102; *Case of 19 Merchants v. Colombia*, Judgment of 5 July 2004, Series C No. 109, paras. 210–17.

is considered to be a profound moral transgression that may anger the spirits of the individual who died and the other ancestors of the community, leading to 'spiritually caused illnesses' that can affect the whole community. The facts also demonstrated that the relationship between the N'djuka community and its traditional lands is essential for the spiritual, cultural, and material survival of its members. Therefore the prevailing impunity that forced the members of the Moiwana community to remain separated from their ancestral land inflicted an additional cause of anguish on the N'djuka people, preventing them from practising their customary means of subsistence and livelihood. Thus the Court concluded that Suriname's failure to carry out an effective investigation caused the Moiwana community members to endure significant emotional, psychological, spiritual, and economic hardship amounting to a violation of Article 5(1) of the American Convention in relation to Article 1(1) of the treaty.

Next, the Court addressed the impact of the lack of investigation in relation to the forced displacement of members of the Moiwana Village from their ancestral lands and found that there existed a violation of their right to freedom of movement. The Court noted that until justice was obtained the members of the community would not return to reside on their lands. According to their traditional beliefs, as long as the perpetrators of the killings are not identified and punished, the community members are unable to appease the spirits of their deceased relatives and purify their ancestral land. Moreover, the ongoing impunity creates for the members of the community a situation of continuous fear for their physical safety if they return to their homeland. Suriname challenged the alleged violation of their right to freedom of movement, arguing that there was no legislation or policy in place preventing the members of the community from returning to their country or their village. The Court, however, considering the traditional beliefs of the community and the ongoing risk to the safety of its members, concluded that the lack of investigation into the 1986 massacre that forced the displacement of the villagers *de facto* impedes them from moving freely within the state and from choosing their place of residence. Moreover, it deprives those members who are still exiled in French Guyana from their right to enter and remain in their country. Thus the Court found that there is a violation of the right to freedom of movement, as protected by Article 22 of the American Convention. In reaching this conclusion, the Court found that the UN Guiding Principles on Internal Displacement, apparently considered by this tribunal as a codification of rules of customary international law, 'illuminate the reach and content' of Article 22 in the context of forced displacement.<sup>24</sup> This approach, which relates forced displacement to the right to freedom of movement, was recently followed by the Court in *Mapiripán Massacre*, a case against Colombia, where the Court found that the forced displacement of the surviving victims as a result of the state's failure to ensure their safe return to their homes constituted a violation of their human rights.<sup>25</sup>

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24. See *Moiwana Village* case, *supra* note 6, para. 111.

25. I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*, Judgment of 15 September 2005, Series C No. 134.

Third, the Court held that Suriname's failure to ensure an effective investigation also entailed a violation of the right of the community to use and enjoy their traditional lands. The Court applied its previous holding in the *Mayagna (Sumo) Awas Tingni Community* case, which recognized indigenous groups' communal right to property, under Article 21 of the American Convention,<sup>26</sup> to the tribal Mowiana community. Although this community is not indigenous to the region, N'djuka clans settled in Mowiana Village in the nineteenth century and its members continued to live in the community until the 1986 attack, thereby developing 'a profound and all-encompassing relationship to their ancestral lands'.<sup>27</sup> For that reason, the members of this community, like the indigenous groups, have a concept of property ownership that is not centred on the individual, but rather on the community as a whole. Moreover, the Court stated that the Mowiana community members' lack of formal legal title to their traditional lands was not an obstacle for them in obtaining official recognition of their communal ownership; in fact, as provided in the Court's precedents, 'mere possession of that land should suffice' for that purpose.<sup>28</sup> In sum, the Court concluded that the inability of the members of the community to return to the village, which continues to be abandoned since the 1986 attack, deprives them of the use and enjoyment of their traditional lands. Thus there is an ongoing violation of the right to property as provided by Article 21 of the American Convention.

Finally, in following prior case law, the Court found that the state's failure to investigate effectively what had transpired in the village of Mowiana, as well as its failure to punish the perpetrators of the attack, entailed additional violations of Articles 8(1), 25, and 1(1) of the American Convention. Although the amnesty law passed in 1989 was not applied to the facts of the case, the Court anticipated that application of this law would not serve to excuse a state's non-compliance with the Court's orders to investigate and punish the perpetrators of human rights violations. The Court concluded that in order to redress the wrongs done to the victims, the state remedy must consist of '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'.<sup>29</sup>

#### 2.4. Reparations

As part of the reparations under Article 63(1) of the American Convention,<sup>30</sup> the Court followed its consistent practice of awarding monetary and non-monetary reparations. With regard to monetary reparations, the Court established, on grounds

26. See *Mayagna (Sumo) Awas Tingni Community* case, *supra* note 3.

27. See *Mowiana Village* case, *supra* note 6, para. 132.

28. See *Mayagna (Sumo) Awas Tingni Community* case, *supra* note 3, para. 151.

29. See *Mowiana Village* case, *supra* note 6, para. 166.

30. Article 63(1) of the American Convention provides: 'If 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.'

of equity, an amount for each surviving victim as redress for material and moral (pain and suffering) damages. As in other cases with multiple victims, determining the beneficiaries of the compensation proved challenging for the Court.<sup>31</sup> In this respect the Court reiterated that, for purposes of compensation, victims must be identified during the course of its contentious proceedings and before the final judgment on reparations is issued. The identity of victims can usually be established through an official document such as a birth certificate or 'family book'. However, since members of the Moiwana village do not necessarily have identity documents or were never registered with the national authorities, the Court granted more latitude to the victims in this case and authorized that they might be identified through statements before a state official by a leader of the community and by two additional persons who could clearly attest to the individual's identity.

With regard to non-monetary reparations the Court, recognizing the victims' right to know about the circumstances of the massacre (right to truth), first ordered the state to investigate the events complained of, prosecute and punish those responsible, and publicize the results of the investigation so that Surinamese society would be informed of the facts that ensued in this case. Next, the state had to use all existing technical and scientific means to locate and identify the remains of the victims killed during the attack and deliver them to their next of kin so that they could be honoured according to the N'djuka tradition. In the light of its decision regarding the violation of the right to property, the Court ordered the state to adopt all the measures necessary to ensure the delimitation, demarcation, and collective titling of the ancestral lands of the community and refrain from actions that would affect the existence, value, use, or enjoyment of that property until the rights of the community were secured. The process had to be carried out with the participation and informed consent of the victims, as well as that of the members of other, neighbouring N'djuka villages and indigenous communities. Furthermore, it ordered the state to guarantee the safety of community members who decided to return to Moiwana by sending governmental representatives every month to assess the situation of the returnees and undertake any immediate measure, if so required, to ensure the rights of the villagers.

In addition to providing for individual monetary redress, the Court ordered the state to establish a developmental fund of US\$1,200,000 to invest in health, housing, and educational programmes for the Moiwana community members. The actual projects to be implemented would be decided by a committee created for that purpose and composed of three members nominated by the victims and the state. Finally, as a measure of satisfaction, the Court requested the state publicly to recognize international responsibility for the facts that had occurred in this case, issue an apology to the Moiwana community members in the presence of the leader of the N'djuka people, and build in a suitable public location a monument honouring the victims.

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31. See, *inter alia*, I/A Court H.R., *Case of Plan de Sánchez Massacre v. Guatemala*, Reparations (Art. 63.1 American Convention on Human Rights), Judgment of 19 November 2004, Series C No. 116.

### 3. CONCLUSION

The *Moiwana Village* case represents a new step in the evolving case law of the Court, affording enhanced protection to members of ethnic communities in the light of their disadvantaged position as a vulnerable group and taking into account the ancestral traditions respected by these communities. A similar approach was subsequently followed in *Yakye Axa*, where the Court held that the scope of the rights of the members of an indigenous community in Paraguay had to be determined considering the vulnerable status of this community. Accordingly, the state must ensure the access of an indigenous community to its traditional lands or to a comparable territory where it can exercise its right to property according to its ancestral customs and uses; by providing access to its lands, the state will also ensure the community's members' enjoyment of their right to a dignified life. Likewise, in *Yatama* the Court decided that, under the principle of equality under the law, Nicaragua had to take into account the customs and traditions of the ethnic and indigenous communities that populate this state when establishing the rules that regulate access to political participation. The state must ensure that the vulnerability of these groups is not exploited to their disadvantage and that the communities' interests are fairly represented in the political spectrum of the state.

Furthermore, with regard to reparations, *Moiwana Village* appears to consolidate a trend towards awarding extensive 'community reparations' in cases in which indigenous or ethnic groups, as well as their members, have been affected as a result of human rights violations established by the Court. This notion of 'community reparations' appears to reveal the Court's intention to embrace a more collective approach regarding victims that perceives redress as going beyond traditional understandings of individual compensation. In a similar vein, the Court in *Yakye Axa* ordered the state to make reparations that were 'communal' in nature, including granting the community's access to a collective enjoyment of the right to property and the creation of developmental funds to support basic medical, housing, and educational services. In *Yatama*, although the candidates who were unable to participate in the 2000 elections received individual monetary compensation, the Court awarded broader collective reparations by ordering the state to amend domestic legislation regulating access to political participation in the light of the traditions and customs of the existing indigenous and ethnic groups in Nicaragua. Through that amendment the state must ensure that these communities are able to participate in the political process and compete on an equal footing with other, more traditional groups.

Lastly, it is worth noting that beyond the legal developments, *Moiwana Village* and the two other cases mentioned in this paper are also very relevant from a symbolic and political standpoint. It is well known that the members of ethnic and indigenous communities in the Americas remain excluded from mainstream participation and representation. Consequently, access to an international tribunal with the moral authority to address issues of inequality, and order states to redress long-accepted practices of discrimination against these vulnerable groups, serves multiple purposes. First, decisions such as those adopted by the Inter-American Court ensure

that indigenous and ethnic communities have access to justice when a fair process is denied at the domestic level. Second, reparations awarded in those decisions always have a broader impact than the individual case, particularly with regard to the amendment of existing legislation or the adoption of policies to regulate aspects that have not been contemplated in existing municipal laws or practices. Finally, decisions of this nature may spearhead a broader debate within states regarding the disadvantages faced by members of certain vulnerable groups in their ordinary lives. In the long run, awareness of these issues may contribute to ensuring that in multiethnic societies, such as those existing in Suriname, Paraguay, and Nicaragua, all the different voices are heard and represented in the process of consolidating democratic political processes in those states.