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By
Thomas M. Antkowiak*

"The government destroyed the cultural tradition . . . of the Maroon people in Moiwana," declared Andre Ajintoena during a public hearing before the Inter-American Court of Human Rights in the case of *Moiwana Village v. Suriname.*[1] Mr. Ajintoena is a leader of the Maroon community known as Moiwana, a collection of camps tucked deep into the forest of eastern Suriname.[2] The village and surrounding territories have been abandoned since November 29, 1986, the date of a brutal attack by government and militia forces.[3] The incursion was ordered on the suspicion that some community members were involved in the Jungle Commando, an insurgency movement that had raided military installations in the region.[4] By dusk of that late November day, State agents and collaborators had killed at least thirty-nine defenseless Moiwana residents, including infants, women, and the elderly, and wounded many others.[5] Moreover, the operation destroyed village houses and forced survivors to run for their lives—dispersing many throughout the countryside, and driving the rest

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1. Moiwana Village v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 at ¶ 102 (June 15, 2005). Note that, starting from 2004, very few of the Court's judgments and orders are available in English; *Moiwana Village v. Suriname* is an exception. *See* http://www.corteidh.or.cr/casos.cfm. All judgments and orders are available in Spanish at http://www.corteidh.or.cr/casos.cfm.

2. *Id.* at ¶ 86(11).

3. *Id.* at ¶ 86(15), 86(19).

4. *Id.* at ¶ 86(12), 86(27).

5. *Id.* at ¶ 86(15).

across the border into French Guiana.[6]

On June 15, 2005, the Inter-American Court issued its judgment in *Moiwana*, which held Suriname responsible for numerous human rights violations and ordered several remedial measures. In a separate opinion, one of the Tribunal's veteran judges, Antônio Cançado-Trindade, wrote that the case "raises issues of great transcendence."[7] Certainly, the decision illustrates several of the Court's latest jurisprudential developments, and navigates a few rising socio-political tides in South and Central America. This brief essay seeks to demonstrate how the *Moiwana* case: a) presents factual situations that are increasingly common before the Court; b) continues to develop key legal constructions in response to such facts; c) foreshadows a significant evolution with respect to elements of the Tribunal's more "traditional" jurisprudence; and d) reflects, nevertheless, a prevailing caution regarding other aspects of legal analysis.

I.
TRENDS IN THE COURT'S DOCKET

While the Inter-American Court has heard cases of extra-judicial execution and torture for twenty years, *Moiwana* and a series of other recent actions from Colombia, Guatemala, and Ecuador mark a striking new trend in the docket: a growing proportion of assaults upon entire communities.[8] Two additional judgments issued within a year of *Moiwana*, *"Plan de Sánchez Massacre" v. Guatemala*[9] and *"Mapiripán Massacre" v. Colombia*,[10] reveal the same distressing elements: i) military collaboration in the planning of an attack; ii) cold-blooded efficiency in its execution, in concert with civilian volunteers; iii) cruel acts of violence perpetrated upon a defenseless population, including women, children, and the elderly; and iv) subsequent impunity for the majority of those responsible.

Many who have suffered these coordinated attacks belong to indigenous or tribal populations, groups who have endured long-standing abuse within their respective countries. In fact, in response to an array of rights violations, such communities lately have petitioned the Court in record numbers: during its June

6. *Id.* at ¶ 86(15) and 86(18).

7. Cançado-Trindade, Separate Opinion at ¶ 1, in *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005).

8. *See, e.g.*, "Mapiripán Massacre" v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 (September 15, 2005); "Plan de Sánchez Massacre" v. Guatemala, 2004 Inter-Am. Ct. H.R. (ser. C) No. 105 (April 29, 2004); Jiguamiandó and Curbaradó Communities v. Colombia, 2003 Inter-Am. Ct. H.R. (ser. E) (March 6, 2003); Peace Community of San José de Apartadó v. Colombia, 2000 Inter-Am. Ct. H.R. (ser. E) (October 9, 2000); Indigenous Community of Sarayaku v. Ecuador, 2004 Inter-Am. Ct. H.R. (ser. E) (July 6, 2004).

9. *"Plan de Sánchez Massacre"*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 105.

10. *"Mapiripán Massacre"*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134.

2005 Session alone, the Tribunal handed down judgments in *Moiwana*, *Yakye Axa Indigenous Community v. Paraguay*,[11] and *YATAMA v. Nicaragua*,[12] as well as ordered provisional measures in *Indigenous Community of Sarayaku v. Ecuador*.[13] The disputes encompassed a range of legal issues, from freedom of movement and residence to rights to life, political participation, due process, and property—several of which shall be discussed below.

Moiwana is also emblematic of another increasingly frequent subject of litigation before the Court: *ratione temporis* jurisdiction.[14] This is a vital matter as it can significantly curtail—or even eliminate—a state's responsibility for a given set of facts. For instance, since Suriname did not accept the Court's jurisdiction until November 12, 1987, the Tribunal could not rule upon the events surrounding the 1986 attack. The Court emphasized that it was 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."[15] A comparable result was found in the 2004 decision *Serrano-Cruz Sisters v. El Salvador*,[16] although the Tribunal's jurisdiction was further limited by a reservation made by the State when originally recognizing the Court's competence. During the same year, the Court concluded in *Martin del Campo-Dodd v. Mexico*[17] that all violations alleged in the case would have occurred before the State's acceptance of the Tribunal's jurisdiction, leading to the dismissal of the entire matter.

11. Yakye Axa Indigenous Community v. *Paraguay*, Judgment of June 17, 2005, Inter-Am. Ct. H.R. (ser. C) No. 125 (2005).

12. YATAMA v. Nicaragua, Judgment of June 23, 2005, Inter-Am. Ct. H.R. (ser. C) No. 127 (2005).

13. Indigenous Community of Sarayaku v. Ecuador, 2005 Inter-Am. Ct. H.R. (ser. E) (June 17, 2005).

14. Article 28 of the Vienna Convention on the Law of Treaties refers to the non-retroactivity of treaties and *ratione temporis* jurisdiction: "Unless 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."

15. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 70.

16. Serrano-Cruz Sisters v. El Salvador, 2004 Inter-Am. Ct. H.R. (ser. C) No. 118 at ¶¶ 57-96 (November 23, 2004).

17. Martin del Campo-Dodd v. Mexico, 2004 Inter-Am. Ct. H.R. (ser. C) No. 113 at ¶¶ 64-85 (September 3, 2004).

II.
DEVELOPING LEGAL CONCEPTS

A. The Use of Cultural Context

The Court's method of approaching the facts and legal issues in *Moiwana* displays a true highlight of its recent case law: the assessment of indigenous and tribal communities *vis-à-vis* their own cultural milieu. As Tribunal President Sergio García-Ramírez remarked in his concurring opinion in *YATAMA*,

> Analyzing [such community members] in their own circumstances—in the broadest sense of the word, current and historic—provides not only factual information to understand the events of a case, but also legal information, through cultural references, to establish . . . the legal implications.[18]

It is now routine, then, for the Court to inform itself of such "current and historic" circumstances through the careful evaluation of both community members' declarations and expert testimony. Additional sources, such as anthropological studies and reports by inter-governmental bodies, are consulted as well.[19]

In the past, social and ethnic factors were taken into account within the reparations context of some Court judgments, most notably in *Aloeboetoe et al. v. Suriname*.[20] However, not until *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*[21] did this cultural approach become central to the Court's assessment of potential human rights violations. In *Mayagna*, a landmark 2001 decision, the Tribunal recognized the relationships of indigenous communities to their lands as "the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival."[22] Upon observing such enduring "material and spiritual elements," the Court concluded that, in the case of indigenous peoples 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.[23] Since the State had not only failed to grant formal recognition of such ownership, but had also provided concessions to third parties to develop the property in question, the Court found a violation of Article 21 of the American

18. Sergio García-Ramírez Concurring Opinion at ¶ 7, in *YATAMA v. Nicaragua, supra* note 12 (translation by author).

19. *See, e.g.*, *Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶¶ 86(1)–86(43) (see the footnotes for proven facts, which indicate sources consulted); *Yakye Axa Indigenous Community*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 at ¶¶ 50(1)–50(16) (note sources for proven facts).

20. *See* Aloeboetoe et al. v. Suriname, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15 (September 10, 1993); *infra* Section II-C (discussing case).

21. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (August 31, 2001).

22. *Id.* at ¶¶ 149.

23. *Id.* at ¶¶ 149, 151.

Convention on Human Rights (Right to Property).[24]

In *Moiwana*, the Court took another important step forward, extending its *Mayagna* ruling to comprehend the traditional beliefs and practices of tribal communities, consistent with the standards advanced in the International Labour Organization's Convention No. 169.[25] The Tribunal asserted:

> [T]he 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. Thus, this Court's holding with regard to indigenous communities and their communal rights to property . . . 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 [. . .]—should suffice to obtain State recognition of their ownership.[26]

In this way, although the Moiwana community members were not indigenous to the region, for a century they had lived in the area "in strict adherence to N'djuka custom," creating a communal property right protected by Article 21 of the American Convention.[27]

The use of cultural context as a lens to assess the villagers' predicament was essential to all aspects of *Moiwana*, not simply to the Court's ruling on communal property.[28] For example, the Tribunal determined that the ongoing impunity in the case had a "particularly severe impact" upon the Moiwana survivors, as a N'djuka people, since "justice and collective responsibility are central precepts within traditional N'djuka society."[29] N'djuka believe that when an offense against community members goes unpunished, or burial rituals are not strictly performed according to tradition, they have betrayed their ancestral spirits, who, in reprisal, may torment the living.[30] As Suriname has not brought the perpetrators of the massacre to justice, nor located the remains of most of the slain victims—despite the Moiwana survivors' efforts to advance the process—the community has been demoralized by fear and guilt.[31] These factors, along with the community members' continued separation from their traditional lands—a source of the culture's "very identity and integrity"—led the Court to rule that the State had violated Article 5(1) of the American Convention

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24. *See id. at* ¶¶ 155, 173.

25. *See* International Labor Organization, Indigenous and Tribal Peoples in Independent Countries, Article 1, June 27, 1989.

26. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 133. Note that the N'djuka people are one of six distinct groups of Maroons inhabiting eastern Suriname. *Id.* at ¶ 86(1).

27. *Id.* at ¶ 132.

28. For other current examples of this approach, see *Yakye Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005), and *YATAMA v. Nicaragua*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005).

29. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 95.

30. *Id.* at ¶¶ 95-96, 98-99.

31. *Id.* at ¶¶ 93-103.

(Right to Humane Treatment), in conjunction with Article 1(1) (Obligation to Respect Rights).[32]

B. Recognition of Forced Displacement and Exile

The community members declared that they have been unable to return to Moiwana Village since the 1986 attack because they have not placated the angry spirits of their deceased family members and purified their lands—as both actions, according to the survivors, first require bringing justice upon their attackers.[33] Indeed, even when briefly visiting the territory, a group of community members fell ill. The Court observed:

> 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 [. . .]—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.[34]

Moreover, as the survivors had received no official explanation or apology for the attack, and had seen no prosecution of the responsible parties, they were afraid of further government persecution upon returning to their homeland.[35]

The described circumstances have either maintained the displacement of the community members within their own country, or continued their exile in neighboring French Guiana.[36] This tragic situation—prolonged over twenty years—provided the first opportunity for the Court to analyze the worldwide epidemic of internal displacement.[37] In a pioneering chapter on Article 22 of the American Convention (Freedom of Movement and Residence), the Court held that many of the Guiding Principles on Internal Displacement[38]—a framework incorporating "existing international humanitarian law and human rights standards" that was issued in 1998 by the UN Secretary General's Special Representative on Internally Displaced Persons—"illuminate the reach and

32. *Id.* at ¶¶ 101-103.

33. *Id.* at ¶¶ 113, 118.

34. *Id.* at ¶ 113.

35. *Id.* at ¶ 114.

36. *Id.* at ¶¶ 114-116, 118-120.

37. In a related matter, the Court has ordered the protection of individuals allegedly deported, in an arbitrary manner, from the Dominican Republic to Haiti. *See* Haitians and Dominicans of Haitian Origin in the Dominican Republic v. the Dominican Republic, 2000 Inter-Am. Ct. H.R. (ser. E) (August 18, 2000). Furthermore, the Tribunal has issued an advisory opinion concerning the rights of undocumented immigrants. *See* Legal Condition and Rights of Undocumented Immigrants, 2003 Inter. Am. Ct. H.R. (ser. A) No. 18/03 (September 17, 2003).

38. United Nations Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2 (1998).

content of Article 22."[39] Significantly, one Principle singled out in *Moiwana* underscored a state's "particular obligation to protect against the displacement of indigenous peoples, minorities . . . and other groups with a special dependency on and attachment to their lands."[40]

The Court could not consider the events that initially produced the displacement, owing to *ratione temporis* limitations.[41] Nevertheless, it assessed the "ongoing nature" of the community's separation from its territory,[42] including the dire living conditions of both the refugees in French Guiana and those survivors who never left Suriname.[43] The Tribunal decided that the community members' freedom of movement and residence was "circumscribed by a very precise, *de facto* restriction, originating from their well-founded fears . . . which excludes them only from their ancestral territory."[44] As a result, the Court concluded:

> 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 . . . 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.[45]

Consequently, the Court held Suriname responsible for a violation of the Convention's Article 22, in relation to Article 1(1) of the same instrument.[46]

The *Moiwana* judgment, then, declared violations of a wide range of human rights: humane treatment, property, judicial guarantees, and judicial protection,[47] as well as freedom of movement and residence—all with regard to a population forcefully removed from its traditional lands. In this way, the case stands for the proposition that the globe's millions of internally displaced do not languish in a legal purgatory: they are entitled to humanity's full spectrum of rights and freedoms. And in fact, only a few months after its publication, the decision served as a key precedent in the Court's ruling to protect the rights of many internally displaced in Colombia, a nation in recent years beleaguered by

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39. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 111.

40. *Id. citing* United Nations Guiding Principles on Internal Displacement, *supra* note 37, Principle 9.

41. See *supra* Section I, for a discussion of ratione temporis jurisdiction.

42. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 108.

43. *Id.* at ¶¶ 114-115, 117.

44. *Id.* at ¶¶ 119.

45. *Id.* at ¶ 120.

46. *Id.* at ¶¶ 111, 121.

47. *Id.* at ¶¶ 139–67.

this phenomenon.[48]

C. Enhanced Access to Justice and Remedies

Another prominent contour in the Tribunal's recent jurisprudence, also salient in *Moiwana*, traces what Judge Cançado-Trindade calls the "current process of humanization of international law."[49] In the Inter-American system, this development is appreciated in the petitioner's enhanced access to justice. One crucial element has been the Court's relaxation of procedural restrictions, provided that fairness is still accorded to all parties. A greater flexibility results, leading to a more significant role for the petitioners in proceedings—and, in the event of their successful claims, greater nuance and depth in reparations orders.

This development originates in the Court's reformed Rules of Procedure,[50] which, along with other innovations, provide for the direct participation of alleged victims, their family members or their representatives, during *all* procedural stages before the Tribunal. In the first case involving the new rules, the Court was quick to confirm the autonomy of the petitioners to advance legal arguments not contained in the application submitted by the Inter-American Commission on Human Rights,[51] declaring the petitioners to be "the holders of all of the rights enshrined in the Convention."[52]

In fact, in efforts to safeguard these rights, the Court has also declared violations of the Convention based upon the principle of *iura novit curia*, by which "a court has the power and the duty to apply the juridical provisions relevant to a proceeding."[53] On a number of occasions, the Tribunal has referred to this competence to consider violations "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."[54] In *Moiwana*, the Court's invocation of *iura novit curia* certainly

48. *See* "Mapiripán Massacre" v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 at ¶¶ 96(57)-96(67) (September 15, 2005).

49. *See* Cançado-Trindade, Separate Opinion at ¶ 8, in *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005).

50. Approved by the Inter-American Court during its 49th Ordinary Period of Sessions by Order of November 24, 2000, which entered into force on June 1st, 2001. Note that previous to this reform, the alleged victims, their family members, and their representatives were only able to act autonomously before the Court during the reparations stage.

51. Article 61(1) of the American Convention provides that "[o]nly the States Parties and the Commission shall have the right to submit a case to the Court."

52. "Five Pensioners" v. Peru, 2003 Inter-Am. Ct. H.R. (ser. C) No. 98 at ¶ 155 (February 28, 2003).

53. Hilaire, Constantine, Benjamin and Others v. Trinidad and Tobago, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94 at ¶ 107 (June 21, 2002); *see also* Castillo-Petruzzi and Others v. Peru, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52 at ¶¶ 116-22 and 178-88 (May 30, 1999); Godínez-Cruz v. Honduras, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5 at ¶ 172 (January 20, 1989).

54. *See, e.g.*, *Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 91; "Juvenile Reeducation Institute" v. Paraguay, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112 at ¶ 126 (September 2, 2004).

seemed responsible: forced displacement was a substantiated and compelling aspect of the case, yet neither the victims' representatives nor the Inter-American Commission expressly alleged a violation of Article 22 of the Convention.

The increase in procedural flexibility is probably best discerned in the Tribunal's larger and more complex cases, which have involved up to thousands of alleged victims. In *YATAMA*, which involved hundreds of candidates unfairly excluded from municipal elections, the Court dismissed Nicaragua's preliminary objection concerning the failure of some alleged victims to present powers of attorney.[55] The Tribunal established that "an individual's access to the Inter-American System . . . cannot be restricted on the basis of a requirement for legal representation," reasoning that "the formalities characteristic of certain areas of domestic law are not binding in international human rights law, whose principal and definitive concern is the due and complete protection of such rights."[56]

As in *Moiwana*, the Tribunal has also accepted efforts by petitioners and the Commission to supplement the list of alleged victims originally submitted with the application, as long as the State was guaranteed its right of defense.[57] In fact, names have been added over a State's objection, in consideration of credible evidence in the record and the case's particular circumstances.[58] Furthermore, the Court in *Mapiripán*—perhaps imprudently—even declared violations and ordered remedies with respect to still unidentified victims.[59] According to the Tribunal, Colombia's deficient investigation of a state-sponsored massacre rendered the identification of many victims impossible at the time of the Court's judgment.[60] The Court's rare lenience on this point[61]—a clear individualization of alleged victims has been typically required[62]—may also be justified by Colombia's partial recognition of responsibility in the case.

Thus, the Court has cleared some formalistic obstacles that stood in the petitioner's path to justice. These recent advances are consistent with the Tribunal's long-held practice, at the reparations stage, to study the victims' reality to ensure appropriate and effective remedies. In *Aloeboetoe et al. v.*

55. YATAMA v. Nicaragua, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 at ¶¶ 77-96 (June 23, 2005).

56. *Id.* at ¶ 82 (translation by author).

57. *See, e.g.*, *Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶¶ 71-74; *"Nile Reeducation Institute,"* 2004 Inter-Am. Ct. H.R. at ¶¶ 110-11.

58. *See* Gutiérrez-Soler v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132 at ¶ 58 (September 12, 2005).

59. "Mapiripán Massacre" v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 at ¶ 137 (September 15, 2005).

60. *Id.*

61. *See also* Caracazo v. Venezuela, 2002 Inter-Am. Ct. H.R. (ser. C) No. 95 at ¶¶ 67-74 (August 29, 2002).

62. *See, e.g.*, *Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 177; *"Juvenile Reeducation Institute,"* 2004 Inter-Am. Ct. H.R. at ¶¶ 107-09.

Suriname, the first case against Suriname and one featuring "exemplary" state cooperation,[63] the Court took great pains to examine the social structure of the Saramaka tribe in order to identify the victims' successors.[64] *Moiwana*, *Plan de Sánchez*, and *Mapiripán*, following the spirit of *Aloeboetoe*, have permitted more leeway regarding claims before government authorities for the Court's reparations orders. For instance, those victims not in possession of a typical government identity document, owing to the remoteness of their location or other adverse circumstances, were allowed to produce a variety of other state-issued documents.[65] In light of information that some villagers owned nothing of the kind, and had never even been inscribed in the national registry, *Moiwana* established that victims could also present witnesses that would satisfactorily attest to their identity.[66]

Both the Court's powerful faculty to order reparations, granted by the broad language of Article 63(1) of the American Convention, and its ongoing commitment to fully remedy violations are evident in the measures required of Suriname in *Moiwana*: (1) payment of material and moral damages, as well as legal costs; (2) a full investigation of the massacre; (3) the prompt recovery of the slain community members' remains; (4) collective title to traditional territories; (5) guarantees of safety for those community members who decide to return to Moiwana; (6) a developmental fund to be directed toward health, housing, and educational programs in the community; (7) an official, public apology for the events of November 29, 1986; and (8) a monument to memorialize the attack and its consequences.[67]

Although a full analysis of these measures falls outside this essay's limited scope, some operational details are particularly noteworthy. For example, once the community members return to Moiwana, state representatives must meet with them on a monthly basis to monitor their security situation, and the officials must respond promptly if the villagers express safety concerns.[68] Moreover, if the implementing committee for the developmental fund is not created within a specified time, the Court will convene the parties to inquire into the matter.[69] Such requirements, which mandate the participation and informed consent of the victims or their representatives, represent new contributions to the Tribunal's

63. *See Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 1 (Cançado-Trindade, J., separate opinion).

64. *See* Aloeboetoe et al. v. Suriname, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15 at ¶¶ 59-66 (September 10, 1993).

65. *See* "Mapiripán Massacre" v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 at ¶ 257 (September 15, 2005); Moiwana Village v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 at ¶ 178 (June 15, 2005); "Plan de Sánchez Massacre" v. Guatemala, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116 at ¶ 63 (November 19, 2004).

66. *See Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 178.

67. *Id.* at ¶¶ 185-87, 191-96, 201-18, 222-24.

68. *Id.* at ¶ 212.

69. *Id.* at ¶ 215.

wide repertoire of measures seeking satisfaction, rehabilitation, and non-repetition of violations.[70]

III.
A POSSIBILITY FOR CHANGE REGARDING MORE TRADITIONAL JURISPRUDENCE

As explained previously, because the 1986 massacre took place before Suriname accepted the Court's jurisdiction, the State could not be held responsible for taking the lives of the thirty-nine Moiwana community members, nor for committing additional violent acts during the attack—abuses that are usually actionable under Articles 4 (Right to Life) and 5 (Right to Humane Treatment) of the American Convention. On the other hand, following its case law, the Tribunal held that it had competence to examine "the State's fulfillment of its obligation to investigate those occurrences" starting from 1987, when Suriname acceded to the Convention and recognized the Court's jurisdiction.[71]

Judge Cecilia Medina-Quiroga, in her *Moiwana* concurring opinion, cogently argued that this obligation to investigate may only be demanded in conjunction with a substantive right to be protected, such as the right to life or humane treatment.[72] That is, the duty to investigate, rooted in a state party's obligation to ensure the rights enumerated in the Convention,[73] does not exist in isolation.[74] Starting from the moment Suriname accepted the Court's competence, then, Judge Medina-Quiroga would have held it responsible for failing to guarantee the rights to life and humane treatment—by not effectively investigating the Moiwana attack—leading to "procedural violations" of Articles 4 and 5, in conjunction with 1(1).[75]

Moiwana's factual and legal architecture brings to the foreground this theory—traditionally avoided by the Court,[76] but well established in the case

70. In response to serious violations of human rights, the Court frequently orders an array of such measures "for purposes of comprehensive reparation to victims"; such remedies may include "public acts or works that seek, *inter alia*, to commemorate and dignify victims, as well as to avoid the repetition of human rights violations." *Id.* at ¶ 191. *See generally* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc A/RES/60/147 (March 21, 2006).

71. *Id.* at ¶ 141.

72. *See Moiwana Village*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005) (Medina-Quiroga, J., concurring).

73. *See* American Convention art. 1(1).

74. *See Moiwana Village*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005) (Medina-Quiroga, J., concurring).

75. *See id.* Note that, as described previously, Suriname was still held responsible for an Article 5 violation owing to the suffering of community members that occurred after the State's recognition of the Court's jurisdiction. *See Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 103.

76. *See, e.g.*, Las Palmeras v. Colombia, 2001 Inter-Am. Ct. H.R. (ser. C) No. 90 at ¶ 42 (December 6, 2001).

law of the European Court of Human Rights[77]—concerning "procedural violations" of rights to life and humane treatment. Particularly in cases like *Moiwana*, where *ratione temporis* jurisdiction limits state responsibility regarding facts (like the massacre) that have been proven before the Court, finding procedural violations to Articles 4 and 5 seems warranted. While such violations do not hold states responsible for actually carrying out the deaths or torture, they still call attention to the key events behind the cases, and condemn the government's lack of due diligence in investigating those serious facts.[78] Although it remains to be seen, there is a strong possibility that the Tribunal will assimilate this concept, considering language in the *Moiwana* judgment,[79] as well as in other Court decisions[80]—and particularly given that the Tribunal's current President, Judge García-Ramírez, signed Judge Medina-Quiroga's opinion.

The possible ramifications of such a conceptual shift, including corresponding changes to the Court's assessment of damages, are difficult to predict.[81] What is certain, however, is that the declaration of procedural violations to the rights to life and humane treatment, in circumstances such as those presented in *Moiwana*, would augment the force of the Court's judgment against the offending state and explicitly address the origin of the victims' suffering, thus providing them and their family members greater moral satisfaction.

IV.
A CAUTION WITH REGARD TO ARTICLE 2 OF THE AMERICAN CONVENTION

In contrast to some of its bold approaches described above, the Court has demonstrated a newfound wariness with respect to Article 2 of the Convention (Domestic Legal Effects). This provision establishes that states must "undertake to adopt . . . such legislative or other measures as may be necessary to give effect to [the rights or freedoms of the Convention]." The Court has employed this Article to hold states internationally responsible when national laws fail to

77. *See, e.g.*, Akdeniz v. Turkey, 2005 Eur. Ct. H.R. at ¶¶ 103-12 (May 31, 2005); Celikbilek v. Turkey, 2005 Eur. Ct. H.R. at ¶¶ 80-95 (May 31, 2005). Both judgments are available at http://cmiskp.echr.coe.int/.

78. It is true that the *Moiwana* Court declared violations of the Convention's Articles 8(1) and 25 due to Suriname's deficient investigation into the 1986 attack; however, that analysis addressed standards for access to justice and due process, not the substantive rights to life and humane treatment *per se*. *See Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶¶ 139-164.

79. *See, e.g.*, *Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 92.

80. *See, e.g.*, Tibi v. Ecuador, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114 at ¶ 159 (September 7, 2004); Myrna Mack Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101 at ¶ 157 (November 25, 2003); Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 at ¶ 162 (July 29, 1988).

81. In this respect, European Court cases provide limited prognostic value, since the two Tribunals have significantly different powers and attributes in the reparations domain.

provide the means for individuals to enjoy those rights.[82]

In *Moiwana*, the community possessed neither individual nor collective legal title to their traditional lands; rather, the territory formally belonged to the State in default, as no private individual or group officially owned the land.[83] Yet, as related above, the Court decided that the Moiwana survivors held a communal right to such property, a right that the State violated by effectively preventing their return to that homeland. In the chapter on Article 21 of the Convention (Right to Property), however, the Court refrained from discussing Suriname's obligation to enable the community's right to property through national laws. Although existing lacuna were pointed out in the judgment's section on proven facts—"national legislation does not provide for collective property rights"[84]—the Tribunal did not deem it necessary to declare an express breach of the State's Article 2 duties. This exclusion, similar to that in another recent case,[85] was at least partially remedied in the reparations chapter, where the Court ordered the State to adopt those measures necessary to ensure the villagers' collective rights to their traditional lands.[86]

Conversely, the spirit of Article 2 prohibits laws and official practices that result in the violation of rights and freedoms enumerated in the Convention. This interpretation is fully supported in the Tribunal's jurisprudence,[87] although in the context of a contentious case the Court will not pronounce upon legislation unless it is self-executing, and thus capable of impacting the rights of individuals.[88]

However, in some recent judgments the Court has shown restraint in examining challenged regulations and judicial decisions;[89] such reluctance was

82. *See, e.g.*, Raxcacó-Reyes v. Guatemala, 2005 Inter-Am. Ct. H.R. (ser. C.) No. 133 at ¶ 89 (September 15, 2005); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 at ¶ 138 (August 31, 2001); Baena-Ricardo and Others v. Panama, 2001 Inter-Am. Ct. H.R. (ser. C) No. 72 at ¶ 180 (February 2, 2001).

83. *See Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 130.

84. *Id.* at ¶ 86(5).

85. *See* The Yean and Bosico Girls v. the Dominican Republic, 2005 Inter-Am. Ct. H.R. (ser. C) No. 130 at ¶ 188-92 (September 8, 2005) (no breach declared with respect to the State's Article 2 obligations, yet reparations measures ordered on the point).

86. *See Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶¶ 209-11.

87. *See, e.g.*, Hilaire, Constantine, Benjamin and Others v. Trinidad and Tobago, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94 at ¶ 113 (June 21, 2002); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 at ¶ 138 (August 31, 2001); Baena-Ricardo and Others v. Panama, 2001 Inter-Am. Ct. H.R. (ser. C) No. 72 at ¶ 180 (February 2, 2001); International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, 1994 Inter-Am. Ct. H.R. (ser. A) No. 14 at ¶¶ 31-50 (December 9, 1994).

88. *See, e.g., International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, 1994 Inter-Am. Ct. H.R. at ¶¶ 40-50.

89. *See, e.g.*, "Mapiripán Massacre" v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 at ¶¶ 301-04 (September 15, 2005); Canese v. Paraguay, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111 at ¶ 109 (August 31, 2004); Herrera-Ulloa v. Costa Rica, 2004, Inter-Am. Ct. H.R. (ser. C) No. 107 at ¶ 136 (July 2, 2004).

found in *Moiwana* with regard to the Amnesty Act of 1989. The legislation, which on its face appears self-executing, grants amnesty to those who committed certain criminal acts—with the exception of crimes against humanity—during a specific period of time that includes the Moiwana attack.[90] The Court has famously declared amnesty laws in contravention of Article 2 obligations in the past.[91] Furthermore, the representatives of the Moiwana victims argued that the statute has exerted a "chilling effect" on the criminal investigation, since Surinamese officials have allegedly interpreted the law as applying to the 1986 attack, grinding the progress to a halt.[92] Yet, in response to the controversy, the Court preferred issuing a more general statement rather than a specific ruling on the legislation: "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."[93]

Perhaps the Tribunal avoided an explicit pronouncement on the amnesty legislation because its alleged effect upon the investigation was too speculative. Nevertheless, the Court has, upon a textual analysis, found other national laws to breach Article 2 of the Convention *per se*—that is, independently of their application in the particular case.[94] In addition, it has held that "[i]n the case of self-executing laws [inconsistent with the American Convention], [. . .] the violation of human rights, whether individual or collective, occurs upon their promulgation."[95] Apparently, then, Suriname's Amnesty Act, despite excluding only the gravest of crimes from amnesty, did not strike the Tribunal as objectionable on its face.

Some may argue that the Court's restraint on this point was sensible. First, owing to an apparently democratic process leading to its enactment,[96] the statute was not a clear example of "self-amnesty" legislation. "Self-amnesty" laws, described as unilateral decrees issued by authorities to escape accountability for their own crimes, are understandably held in particular reproach by the

90. According to the statute, "crimes against humanity" are "those crimes which according to international law are classified as such." *Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 86(39).

91. *See* Barrios Altos v. Peru, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75 at ¶ 41-44 (March 14, 2001).

92. In fact, one organization affiliated with the victims, Moiwana '86, even sought an injunction before national courts against the legislation's enactment, which was denied. *See Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 86(40).

93. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 167.

94. *See, e.g.*, Acosta-Calderón v. Ecuador, 2005 Inter-Am. Ct. H.R. (ser. C) No. 129 at ¶ 135 (June 24, 2005); Raxcacó-Reyes v. Guatemala, 2005 Inter-Am. Ct. H.R. (ser. C.) No. 133 at ¶ 88 (September 15, 2005); Hilaire, Constantine, Benjamin and Others v. Trinidad and Tobago, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94 at ¶ 116 (June 21, 2002).

95. *Raxcacó-Reyes*, 2005 Inter-Am. Ct. H.R. at ¶ 88; *Hilaire, Constantine, Benjamin and Others*, 2002 Inter-Am. Ct. H.R. at ¶ 116; *see also International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, 1994 Inter-Am. Ct. H.R. at ¶ 43.

96. *See Moiwana Village*, 2005 Inter-Am. Ct. H.R. at ¶ 86(39).

Tribunal.[97] Second, the Amnesty Act had not yet been applied in Suriname. Whether or not one finds such arguments convincing,[98] the *Moiwana* decision points to a general caution on the part of the current Court with regard to untested or complex legislation. Although not consonant with Article 2's spirit, this posture at times could be defensible in a practical sense, as the Court's already scant resources would be overwhelmed if it decided to rule upon every regulation conceivably related to a case's facts.

V.
CONCLUSION

The Inter-American Court's traditional docket—comprised of forced disappearances, arbitrary detentions, extra-judicial executions, and acts of torture—has diversified in recent years to include more nuanced situations involving, *inter alia*, property rights, political liberties, and freedom of movement. There has also been an influx of complex cases involving multiple victims, such as members of indigenous and tribal communities, as well as incarcerated populations. The *Moiwana* judgment incorporates several of the Court's distinctive approaches toward these developments, as much as it establishes new paradigms and future directions for the Tribunal's jurisprudence. A study of the decision is not only instructive in those respects, however. The ruling also reaffirms the Court's commitment to deliver justice and transformation to victims of rights violations in the Americas, beginning, of course, with the long-suffering Moiwana survivors.

97. *See* García-Ramírez, Concurring Opinion, in Castillo-Páez v. Perú, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43 at ¶ 9 (November 27, 1998) ("[A] distinction must be made between the so-called 'self-amnesty laws' promulgated by and for those in power, and amnesties that are the result of a peace process, with a democratic base and reasonable in scope, that preclude prosecution for acts or behaviors of members of rival factions, but leave open the possibility of punishment for the kind of very egregious acts that no faction either approves or views as appropriate.").

98 The author is not persuaded, and, assessing the Court's own jurisprudence, considers Suriname's Amnesty Act to violate Article 2 of the American Convention.