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True Fiction: Competing Theories of International Legal Legitimacy and a Court's Battle with *Ratione Temporis*

*Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.*¹

I. INTRODUCTION

When is the right thing to do not really the right thing to do? In international law, there are two approaches to determine when international institutions behave legitimately. One theory holds that international institutions' actions are legitimate when they promote human rights.² The other theory holds that international institutions behave legitimately only when their actions are based on the consent of states.³ The consent-based system, theoretically, only observes human rights that states consensually recognize and protect.⁴ This consent-based international system is similar to the social contract theory of political philosopher John Locke.⁵ Treaty

1. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 95 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690).

2. See ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 233-60, 289-327 (Oxford University Press 2004).

3. *Id.*

4. FERNANDO TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 41-42 (1998).

5. See generally LOCKE, *supra* note 1.

law is built upon this premise, that consent is necessary for a party to be bound to a treaty.⁶

This Note addresses one human rights treaty, the American Convention on Human Rights (“American Convention” or “Convention”). This treaty conveys power on the Inter-American Court of Human Rights (“the Court”) to hear claims brought by the Inter-American Commission on Human Rights (“the Commission”). One such claim was presented in the *Case of Moiwana Village v. Suriname*.⁷ Despite limits, the Court issued a judgment involving a matter to which Suriname did not consensually grant jurisdiction.⁸ Instead, the Court created a legal fiction that enabled it to judge Suriname for actions it took prior to becoming a State Party to the American Convention. While this action is illegitimate under a consent-based theory of legitimacy, it is consistent with a theory principled on moral legitimacy.

Part II of this Note will provide background information on the case at hand. Part III will establish the preliminary objections made by Suriname to the case and set forward the responses offered by the Commission and the Court. Part IV argues both that the Court created this legal fiction and that the Court’s remedies are extra-jurisdictional in scope. Part V will conclude by offering warnings about over-stepping the consensual bounds of human rights treaties too far in the hopes of creating a new type of international legitimacy. In cases of alleged human rights violations by states that occurred prior to that state’s assent to the treaty at issue, international courts should strike a careful balance between consent-based and human rights-based theories of international legitimacy.

II. BACKGROUND

In 1980, Desire Bouterse overthrew Suriname’s democratic government, establishing a military government in its place.⁹ The

6. Vienna Convention on the Law of Treaties art. 9, May 23, 1969, 1155 U.N.T.S 331, 8 I.L.M. 679.

7. *Case of Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 10 (June 15, 2005). Suriname is a small country in South America, situated north of Brazil, between Guyana and French Guiana, with a population of approximately 440,000 people. See generally CountryReport.org, Suriname Country Information, <http://www.countryreports.org/country.aspx?countryid=229&countryName=Suriname> (last visited Jan. 30, 2007).

8. *Id.* at 9-11.

9. *Id.* at 31.

opposition Jungle Commandos responded violently to the new military government, fighting the military in East Suriname.¹⁰ The military regime countered with increasing violence.¹¹ One such violent response occurred on November 29, 1986, when a group of Suriname troops raided Moiwana Village while searching for a rebel leader.¹² During the raid, army forces killed thirty-nine villagers and burned many village buildings, while many other villagers fled.¹³ The villagers that fled have since refused to return home and bury their dead.¹⁴

After the massacre, a civil government was re-established in Suriname from 1987 to 1990.¹⁵ Despite the re-introduction of a civil government, investigations into the massacre were slow to start and unproductive.¹⁶ In May of 1989, government troops forcibly released a lead suspect who was arrested after admitting that he had been trained by the government.¹⁷ Desire Bouterse admitted ordering the attacks but refused to cooperate with civilian investigators.¹⁸ In 1990, the lead investigator was murdered, a crime which has not been investigated.¹⁹ In 1993, many victims' bodies were found in a mass grave.²⁰ Despite a parliamentary order for the executive to investigate the massacre, no investigation has occurred.²¹ Instead, the executive passed "Amnesty Act 1989" to pardon those who committed crimes against humanity between 1985 and 1992.²²

These events culminated in *Moiwana '86*, a victims' rights non-governmental organization ("NGO"), requesting the Commission to inquire into Suriname's conduct concerning the

10. *Id.*

11. *Id.*

12. Amnesty Int'l, *Suriname: Government Commitments and Human Rights*, AI Index AMR 48/001/2003, Feb. 7, 2003, available at <http://web.amnesty.org/library/print/ENGAMR480012003>.

13. *Case of Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 32 (June 15, 2005).

14. *Id.* at 36-37.

15. *Id.* at 31.

16. *Id.* at 37-39; *Suriname: Government Commitments and Human Rights*, *supra* note 12, at 4.

17. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 37-38.

18. *Id.* at 38.

19. *Id.*

20. *Suriname: Government Commitments and Human Rights*, *supra* note 12.

21. *Id.*

22. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 41.

massacre and subsequent investigations.²³ The Commission later petitioned the Court on December 20, 2002.²⁴

III. PRELIMINARY OBJECTION

Moiwana Village v. Suriname follows from the Commission's application to the Court made on December 20, 2002.²⁵ Suriname made a preliminary objection arguing that the Court lacked jurisdiction *ratione temporis*.²⁶ An international human rights court has "jurisdiction *ratione temporis* if the alleged violation takes place during a time when the court has jurisdiction over the State."²⁷ Suriname became a Party to the American Convention on November 12, 1987.²⁸ Since time constrains jurisdiction, the date of Suriname's membership is important for determining what events the Court has jurisdiction to review.²⁹ "A State Party can only be held responsible for violations of the Convention that took place subsequent to the date of entry into force of the American Convention with respect to the State in question."³⁰ This principle of non-retroactivity is rooted in Article 28 of the Vienna Convention on the Law of Treaties, which states that a treaty's provisions are not binding on a party for acts that occurred prior to that party becoming a member of the treaty.³¹

Despite this temporal limitation on the Court's jurisdiction, "the Court may have jurisdiction over the effects of events that took place before the State accepted the Court's jurisdiction but continued or had effects," otherwise known as continuing violations.³² While there is dispute over what constitutes a continuing violation,³³ a simple definition is "the breach of an

23. *Suriname: Government Commitments and Human Rights*, *supra* note 12 (petitioning the Commission June 27, 1997).

24. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 2.

25. *Id.* at 4.

26. *Id.* at 7-11.

27. JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 107 (2003).

28. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 2.

29. SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996: VOLUME II – JURISDICTION* 579-80 (3d ed. 1997).

30. Jo M. Pasqualucci, *Preliminary Objections Before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate Tactics*, 40 VA. J. INT'L L. 1, 40 (1999).

31. Vienna Convention on the Law of Treaties, *supra* note 6, art. 28.

32. PASQUALUCCI, *supra* note 27, at 110.

33. Compare Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 MICH. J. INT'L L. 653 (2004) (discussing the different crimes that may constitute a continuing violation), with

international obligation by an act of a subject of international law extending in time and causing a duration or continuance in time of that breach.”³⁴ The clearest case of a continuing violation is forced disappearances.³⁵

In its preliminary objection, Suriname contended that the Commission applied the Convention to it *ex post facto* for acts that occurred prior to becoming a Member State to the Convention.³⁶ Suriname argued that the complaint should be dismissed because there were no allegations that Suriname violated the Convention after becoming a party, and that the Court’s only recognized continuing violation is forced disappearances.³⁷

The Commission and the representatives of the victims responded by urging that their claims are principled on a continuing denial of justice.³⁸ These parties continued that the claims are for events that occurred after Suriname became a State Party, or are of a continuing nature.³⁹ The representatives contended they only look to the facts of the massacre itself for a reference point in identifying Suriname’s subsequent obligations.⁴⁰

The Court found that it has jurisdiction to examine the effects of acts occurring prior to Suriname becoming a State Party, as well as violations occurring after Suriname became a State Party.⁴¹ First, the Court has jurisdiction to hear the violations occurring subsequent to Suriname becoming a State Party.⁴² This includes the delay in beginning an investigation, the forceful release of suspects, the murder of the lead investigator, and the amnesty law promulgated by the Suriname government.⁴³ Second, the Court also has jurisdiction to hear two continuing violations, and to hear claims related to these actions. The first alleged continuing

Joost Pauwelyn, *The Concept of a ‘Continuing Violation’ of an International Obligation: Selected Problems*, 66 BRIT. Y.B. INT’L L. 415 (1995) (proposing a methodology for analyzing whether a violation is continuing).

34. Pauwelyn, *supra* note 33, at 415 (emphasis omitted).

35. PASQUALUCCI, *supra* note 27, at 112.

36. Case of *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 7 (June 15, 2005).

37. *Id.* at 7.

38. *Id.* at 8.

39. *Id.* at 8-9.

40. *Id.* at 9.

41. *Id.* at 10.

42. *Id.*

43. *Id.*

violation is a denial of justice.⁴⁴ The second continuing violation involves the effects of villagers remaining off their ancestral lands, which were allegedly caused by a forced displacement.⁴⁵

IV. ARGUMENT

A. The Court's Analysis of Continuing and Subsequent Violations Is Rooted in a Legal Fiction

The Court's analysis involves an inherent condemnation of Suriname for its role in the massacre. The Court considered four different violations of the Convention.⁴⁶ The first allegation is that Suriname violated Article 5 of the American Convention in conjunction with Article 1(1).⁴⁷ Article 1(1) is the "basis for State responsibility in the Inter-American system."⁴⁸ Article 1(1) requires states "to respect the rights and freedoms recognized [by the Convention] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without discrimination."⁴⁹ Article 5, concerning the right to humane treatment, requires the respect for all people and their dignity.⁵⁰ The representatives argued Suriname violated this article due to, *inter alia*, its responsibility for and impunity to the massacre.⁵¹ Holding Suriname responsible for its role in the massacre is outside the jurisdictional purview of the Court because it would judge Suriname for the act itself, which occurred prior to Suriname accepting the Court's jurisdiction.

While the Court found Suriname in violation of Article 5, its reasoning was somewhat disguised.⁵² The Court first reasoned that because Suriname has not given the villagers justice, it was prolonging their suffering over the tragedy and fear of future attacks.⁵³ Next, the Court urged that the villagers' beliefs preclude

44. *Id.*

45. *Id.*

46. *Id.* at 42, 46, 52, 55.

47. *Id.* at 42.

48. PASQUALUCCI, *supra* note 27, at 220.

49. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

50. *Id.*

51. Case of *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 42 (June 15, 2005).

52. *Id.* at 43-46.

53. *Id.* at 44-45.

them from honoring the dead until “they know what happened to the remains of their loved ones.”⁵⁴ Finally, the Court blamed Suriname for the villagers having abandoned their lands.⁵⁵

On its face, this analysis seems not to lay blame on Suriname for the initial bad act, but rather for its effects. However, Suriname is not actively keeping the villagers off their land. The villagers’ refusal to return is based on their own cultural beliefs.⁵⁶ Second, the villagers’ apprehension over Suriname’s future conduct, while justified, may not be eliminated even in the event of a public apology coerced out of Suriname by the Court. Additionally, case law does not support the assertion that a state’s inability to reconcile with a culture’s belief system is either a wrongful act or a continuing violation.

A wrongful act derived from Article 5 would seem to indicate maltreatment, not a lack of activity (i.e., not investigating the massacre). Additionally, this is not a continuing violation, since continuing violations are normally reserved for forced disappearances.⁵⁷ In the *Blake Case*, the Court held that the continuing violation from a disappearance ends when “the victim’s fate or whereabouts are established.”⁵⁸ Yet in the *Cantos Case*, the Court apparently limited ongoing violations to situations like the *Blake Case*.⁵⁹ If there was no continuing violation for confiscating property in the *Cantos Case*, then it is not facially apparent how Suriname is guilty of a continuing violation based on the villagers’ choice to remain away from their land.

The facts here are distinct from the continuing crime of a forced disappearance. It is said that “[t]he paradigmatic continuing crime is [the] enforced disappearance of persons”⁶⁰ These crimes begin with a person that has vanished, much like a kidnapping, but continue as a government denies its

54. *Id.* at 45.

55. *Id.* at 46.

56. *Id.* at 22, 24, 25 (summarizing statements made by former Moiwana Village residents).

57. PASQUALUCCI, *supra* note 27, at 112.

58. Case of Moiwana Village v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 10 (June 15, 2005) (citing *Blake Case*, 1996 Inter-Am. Ct. H.R. (ser. C) No. 27, at 8-9 (July 2, 1996) (preliminary objections)).

59. *Cantos v. Argentina Case*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 85, at 10-11 (Sept. 7, 2001) (preliminary objections) (holding a property confiscation was not a continuing violation).

60. Nissel, *supra* note 33, at 668.

responsibility.⁶¹ Further, a dichotomy exists between extrajudicial killings and disappearances, based on knowledge of the victim's death.⁶² Amnesty International cites discovery of the victim's body as a way to make certain the death occurred for the purpose of ending a disappearance.⁶³ Here, the numerous witnesses' accounts guarantee that the victims died⁶⁴ and make this crime seem more similar to an extrajudicial killing than to a disappearance.

Additionally, Amnesty International distinguishes 'political killings' from 'disappearances'.⁶⁵ The reason for this rhetorical difference is the emotional effect forced disappearances have on the victim's family.⁶⁶ Even though extrajudicial executions are morally abhorrent, the uncertainty associated with a disappearance continues to harm the families indefinitely,⁶⁷ thus creating the prototypical continuing violation.

There are several possible explanations for why the Court considered the failure of justice and inability of villagers to return to Moiwana to be a continuing violation. One explanation is that the Court was influenced by the briefs of the Commission and *amici curiae* arguing for a remedy based on Suriname's involvement in the massacre itself. Knowing it could not justify a finding that Suriname had violated the Convention on this reasoning, the Court instead created a legal fiction to support its desired outcome.

Another explanation is that the Court expanded the definition of a continuing violation to address governmental impunity for past violations and to prevent future atrocities.⁶⁸ In *Velasquez v. Guatemala*, the Court "expanded the scope of reparations for cases of forced disappearances in the inter-American system" by ordering Guatemala to exhume and return the body to the victim's family.⁶⁹ This specific remedy is not stated

61. AMNESTY INT'L USA, 'DISAPPEARANCES': A WORKBOOK 84 (1981).

62. *Id.* at 86.

63. *Id.*

64. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 20, 22-24.

65. Amnesty Int'l, *Conspiracy of Terror: Political Killings and 'Disappearances' in the 1990s*, at 4, AI Index ACT 33/35/93, Oct. 1, 1993.

66. *Id.*

67. *Id.*

68. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 171 (1999).

69. Megan Hagler & Francisco Rivera, *Bamaca Velasquez v. Guatemala: An Expansion of the Inter-American System's Jurisprudence on Reparations*, 9 NO. 3 HUM.

in either the Inter-American Convention on the Forced Disappearance of Persons⁷⁰ or the Declaration on the Protection of all Persons from Enforced Disappearance.⁷¹ The *Bámaca Velásquez Case* shows the Court's tendency to expand continuing violations. This tendency, coupled with a proclivity to reward "innovative theories and claims concerning reparations"⁷² and the Suriname villagers' continuing fears to return to the village based on their own cultural beliefs,⁷³ together explain why the Court is likely to have expanded the definition of a continuing violation to include the present case. Thus, the legal fiction is that the Court is ordering remedies for a continuing violation while choosing not to indict Suriname for its actions in conducting the massacre.

The second alleged violation is of Article 22 of the Convention, relating to freedom of movement and residence.⁷⁴ Article 22 prohibits a state from denying people the opportunity to freely traverse within the state.⁷⁵ The Commission and the representatives tried to equate the villagers choosing to leave undesirable conditions with a forced eviction.⁷⁶ Even Suriname's rhetoric that the villagers fled indicates the situation was undesirable.⁷⁷ Accordingly, the Court notes that "until the Moiwana community members obtain justice for the events of 1986, they are convinced that they cannot return to their ancestral territory" because of their spiritual beliefs.⁷⁸

It is uncontested that the villagers' culture keeps them away from Moiwana. However, their fears are rooted in the actions that took place prior to Suriname becoming a Member State. The Court quoted the U.N. Guiding Principles on Internal

RTS. BRIEF 2, 2 (2002); Case of *Bámaca Velásquez v. Guatemala*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91 (Feb. 22, 2002).

70. Inter-American Convention on the Forced Disappearance of Persons, *adopted* June 9, 1994, 33 I.L.M. 1529.

71. Declaration on the Protection of all Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. Doc. A/RES/47/133 (Dec. 18, 1992). Note that the violation is continuing as long as the fate and whereabouts are concealed (Art. 17) and that compensation is available as the remedy for victim's families (Art. 19).

72. SHELTON, *supra* note 68, at 174.

73. Case of *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 22-27 (June 15, 2005).

74. *Id.* at 46-51.

75. American Convention on Human Rights, *supra* note 49, art. 22(1).

76. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 46-47.

77. *Id.* at 47.

78. *Id.* at 49.

Displacement, 28(1), in that “[c]ompetent 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.”⁷⁹

The legal fiction here is that when the Court writes that Suriname has not made conditions satisfactory for the villagers’ return, it implies the conditions are bad. The conditions are bad because of the massacre, which created a condition unacceptable to the international community. Furthermore, this recognition of unacceptable conditions inherently condemns Suriname for maintaining the conditions it created. This inherent condemnation is a judgment against Suriname for its actions prior to becoming a Member State.

The third alleged violation is of Article 21 of the Convention concerning the right to property.⁸⁰ Article 21(1) guarantees everyone “the right to the use and enjoyment of his property.”⁸¹ The representatives argued that Suriname violated this right by characterizing the events as a “forcible expulsion.”⁸² They further argued that this deprivation continued due to Suriname’s failure to investigate the massacre.⁸³ The Court does not analyze the villagers’ departure as a forcible expulsion, instead focusing on Suriname’s failure to investigate the massacre.⁸⁴ The analysis on Article 22 applies here to the extent that the Court’s analysis condemns Suriname for the conditions it created. While the Court does not mention the original act in its reasoning, the representatives’ analysis articulates the premise for the violation as the act itself. It is difficult to separate the Court’s reasoning from the act itself, while still maintaining logical continuity. To speak of a violation by Suriname for not creating conditions for the return of villagers, without referring to the original reason for their departure, leaves a large gap in the reasoning process.

79. *Id.* (quoting Representative of the Secretary General, *Report of the Representative of the Secretary General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

80. *Moiwana Village*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 52-55.

81. American Convention on Human Rights, *supra* note 49, art. 21.

82. *Case of Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 52 (June 15, 2005).

83. *Id.*

84. *Id.* at 53-55.

The fourth and final alleged violation is of Articles 8 and 25 of the Convention.⁸⁵ Article 8 covers a criminal defendant's right to a fair trial.⁸⁶ Article 25(1) protects every person's "right to simple and prompt recourse . . . to a competent court or tribunal for protection against acts that violate his fundamental rights."⁸⁷ Article 25(2) requires states to help provide that remedy.⁸⁸ The Commission and representatives focused their analysis on the lack of legal recourse available to the villagers.⁸⁹ Suriname's analysis identified that, if anything, the alleged violation is a continuing violation.⁹⁰ Suriname then argued it provided legal recourse consistent with the Convention.⁹¹

In analyzing the claim, the Court articulated its ability to examine Suriname's obligations to investigate the massacre.⁹² First, Suriname had an "*ex officio* duty to initiate, without delay, a serious, impartial, and effective investigation."⁹³ Second, Suriname did not investigate the massacre with due diligence.⁹⁴ Finally, the judicial delay was too extensive to be justified.⁹⁵ Based on these findings, the Court held that Suriname violated its duty to create conditions necessary for the villagers to receive justice.⁹⁶

The Court's reasoning is consistent, but flawed. First, there is no support to the argument that a denial of justice is a continuing violation that enables the Court to pass judgment on the original wrongful act. Second, the Court's analysis of whether Suriname is fulfilling its obligations to promote justice, even as a violation subsequent to Suriname becoming a State Party, involves an inherent condemnation of the State. While the Court argues it is only analyzing the subsequent investigations, it cannot separate that analysis from its perception of what would be a just outcome.

The Court used an outcome determinative test, not a procedural test. The Court wanted Suriname to investigate but

85. *Id.* at 55-65.

86. American Convention on Human Rights, *supra* note 49, at 4.

87. *Id.*

88. *Id.*

89. Case of *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 55-57 (June 15, 2005).

90. *Id.* at 57.

91. *Id.* at 57-59.

92. *Id.* at 59.

93. *Id.* at 60.

94. *Id.* at 61-64.

95. *Id.* at 64-65.

96. *Id.* at 65.

also required prosecution of the responsible parties.⁹⁷ This requirement assumes that a finding of responsibility is possible. Numerous crimes go unpunished in many countries despite good-faith efforts by the government. Here, the Court showed its inherent belief that Suriname is responsible. Absent that belief, the Court could not conclude that punishment must occur, since it is possible that the responsible parties could not be found.

B. The Court Awarded Reparations that are Unrelated to Continuing Violations or Subsequent Violations, Thereby Violating the Limitation of Jurisdiction Ratione Temporis

The Court ordered numerous reparations that are outside its jurisdictional power to award. The Court is authorized to award reparations by Article 63(1) of the American Convention.⁹⁸ Article 63(1) allows the Court to take appropriate measures to guarantee victims the ability to enjoy their rights, as well as to order compensation for past violations of those rights.⁹⁹ The first aspect involves remedies for the effects of the violation¹⁰⁰ and was discussed in Part IV(A) above. The second aspect involves compensation for material damages, moral damages, and other costs.¹⁰¹ In this case, the Court ordered material damages, moral damages, several other types of reparations, and costs.¹⁰²

First, the Court ordered Suriname to pay material damages for the repair of villagers' homes.¹⁰³ The Court based its decision on the violence that led the villagers to leave their lands.¹⁰⁴ The original act of violence damaged the homes prior to Suriname becoming a State Party. Suriname was probably correct in arguing that the Commission sought damages for the act itself "in a roundabout way."¹⁰⁵

Second, the Court ordered Suriname to pay moral damages to each victim.¹⁰⁶ The Court cited the failure to obtain justice, lack of

97. *Id.*

98. American Convention on Human Rights, *supra* note 49, at 18.

99. *Id.*

100. PASQUALUCCI, *supra* note 27, at 242-54.

101. *Id.* at 254-80.

102. Case of Moiwana Village v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, at 71-84 (June 15, 2005).

103. *Id.* at 72-73.

104. *Id.*

105. *Id.* at 72.

106. *Id.* at 76.

knowledge about victims' remains, and the villagers' expulsion from the land as the basis for the damages.¹⁰⁷ The arguments made previously again apply to this section. The logical root of all the violations is the act itself.

Finally, the Court ordered Suriname to pay reparations for victim satisfaction and to guarantee non-repetition in the future.¹⁰⁸ The Court obligated Suriname to pay reparations under this category for different reasons, some of which are problematic. One problematic order is for the creation of a developmental fund to aid health, housing, and education.¹⁰⁹ The Court cites the Act itself as the source of the obligation.¹¹⁰ Even though the goal is a legitimate humanitarian goal, it is a direct monetary award for Suriname's actions prior to being a State Party. Additionally, the Court ordered Suriname to apologize publicly and to build a monument, aiming to prevent similar actions by the State in the future.¹¹¹ While Suriname had initially volunteered to take these steps,¹¹² the Court's order implicitly condemns and punishes the State for its role in the attacks. Again, these orders overstep the temporal jurisdiction of the Court.

V. CONCLUSION

There is nothing morally wrong with the Court's decision. In fact, it is morally justified, and as such, is a legitimate piece of international law under the theories that find legitimacy in morality. However, the legal fiction cannot be denied. Courts do not need to utterly refrain from these fictions, as the ends here seem to justify the means. However, courts should be concerned with how these fictions affect the advancement of human rights law.

States may refrain from joining new human rights treaties for fear of retroactive application. This deterrent effect can retard the growth of new international norms. The line between a morally legitimate judicial outcome and a decision that will pragmatically advance human rights is hazy. Courts should be attuned to

107. *Id.* at 75-76.

108. *Id.* at 80-83.

109. *Id.* at 82.

110. *Id.* at 84.

111. *Id.* at 83.

112. *Id.*

thinking about the pragmatic effects of their decisions when trying to overcome jurisdictional limitations *ratione temporis*.

The purpose of human rights treaties is the advancement of those rights. However, zealous application of those norms to Member States for actions prior to their membership oversteps the jurisdiction of those courts. While courts are morally justified in so acting, they create a disincentive for new states to join those treaties. If the object of human rights treaties is to embody and codify new customary law, deterring membership undermines this objective. Therefore, while courts may be justified in principle to create legal fictions and apply human rights law to states for events prior to their membership, the effect of such application may run counter to the object of the treaties.

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