



**AMERINDIAN PEOPLES
ASSOCIATION OF GUYANA**
200 Charlotte St., Bourda
Georgetown, Guyana
Tel: (592)227-027;
E-mail: apaguy@networksgy.com



FOREST PEOPLES PROGRAMME
1c, Fosseway Business
Centre, Stratford Road,
Moreton-in-Marsh GL56 9NQ,
UK.
Tel: (44)1608 652893
Email: info@forestpeoples.org

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United Nations Special Rapporteur on the Rights of Indigenous Peoples
United Nations Special Rapporteur on the Right to Food
United Nations Special Rapporteur on Cultural Rights
United Nations Independent Expert on Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment
United Nations Special Rapporteur on to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health
United Nations Special Rapporteur on Environmentally Sound Management and Disposal of Hazardous Wastes and Substances
United Nations Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation

UNOG-OHCHR
1211 Geneva 10,
Switzerland

URGENT COMMUNICATION ON THE SITUATIONS OF THE AKAWAIO INDIGENOUS COMMUNITIES OF ISSENERU AND KAKO IN GUYANA

I. INTRODUCTION

1. The Village Councils of the Akawaio indigenous communities of Isseneru and Kako ("Isseneru" and "Kako" or "the affected communities"), the Amerindian Peoples Association of Guyana, a national Guyanese indigenous peoples' organisation, and the Forest Peoples Programme, an international NGO ("the submitting organisations"), respectfully submit this urgent communication to the above listed special procedures of the United Nations Human Rights Council ("the Special Procedures"). Specifically, the submitting organisations are writing to request that said Special Procedures treat the situation of Isseneru and Kako as urgent and, consequently, communicate with the State of Guyana in line with the requests made in paragraph 44 below as soon as possible, as well as issue a joint press release about this situation.

2. Although part of a persistent pattern of serious and pervasive violations of indigenous peoples' rights throughout Guyana, the events described herein came to a head in late 2012 and January 2013 when the Guyanese judiciary upheld and privileged the interests of miners over the rights of Isseneru and Kako (see Section II below), holding, in the case of Isseneru, that the Village Council has no jurisdiction over the activities of miners on the basis of when the State granted title to its lands. Isseneru's title is presently almost completely engulfed in mining concessions that, by law, it can do nothing about, and about which it was not consulted and did not consent. This directly contravenes the UN Committee on the Elimination of Racial

Discrimination's ("UNCERD") 2006, 2007 and 2008 recommendations to Guyana.¹ In the case of Kako, the judiciary held that its Village Council has no authority to prevent miners entering its titled lands on the basis of the provisions of the 2006 *Amerindian Act*, nor any right to prevent mining in its traditionally owned lands outside of this titled area. In April 2006, the UNCERD found that the *Amerindian Act* discriminates against indigenous peoples in many respects, including specifically with regard to the precise issues raised herein (see section III below).² Kako's traditional lands are also covered by numerous mining concessions that were issued without its knowledge. Its traditional and elected authority, known as 'the *Toshao*', is now facing criminal charges and possible imprisonment in relation to his village's attempts to keep miners out of its lands and waters and could be sentenced as early as 13 February 2013.

3. In its judgments against Isseneru and Kako, while denying the rights of the affected communities, the Guyanese judiciary simultaneously upheld and privileged the 'prior rights' of miners without regard for the extreme damage that they cause to the environmental integrity of indigenous lands, indigenous socio-cultural integrity and their human rights more broadly. This is also the position adopted by Guyana in general, which routinely privileges the rights of miners – and the income it generates from mining – over the rights of indigenous peoples.³ For instance, Guyana quickly abandoned efforts to ban highly destructive river mining after one month – the very mining that Kako seeks protection from – following protests made by the Guyana Gold and Diamond Miners Association ("GGDMA"), a body that represents the interests of miners.⁴ The GGDMA was even made part of Guyana's delegation to negotiate an international treaty on banning mercury in December 2012, as the responsible Minister explained, to ensure that mercury is not immediately banned so as not to harm the mining industry.⁵ Indigenous peoples were neither part of the delegation nor were they consulted about

¹ See Section III, *infra*, discussing: *Guyana*, 04/04/2006. CERD/C/GUY/CO/14, para. 15, 16 and 19 (recommending, at para. 19, that Guyana "seek[s] the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities"); *Communication of the UNCERD on the Elimination of Racial Discrimination (Follow-Up Procedure)*, 24 August 2007, at p. 2; and *Communication of the UNCERD on the Elimination of Racial Discrimination to Guyana (Follow-Up procedure)*, 15 August 2008, at p. 2 (stressing that "The UNCERD would like to recall that the full rights of indigenous populations over their lands include the right to the subsoil. The State party is therefore requested to provide information on the measures taken to ensure that the *informed consent* of the indigenous communities is being sought for all mining projects on indigenous lands").

² CERD/C/GUY/CO/14, at para. 28 (requesting that "the State party inform it of its implementation of the recommendations contained in paragraphs 15, 16 and 19 above, within one year of the adoption of the present conclusions.

³ See 'GHRA lambasts judge over ruling on mining on Amerindian lands', *Guyana News*, 19 January 2013 (where the Guyana Human Rights Association details a series of government decisions that demonstrate that the State routinely privileges miners interests over the rights of indigenous peoples and explains that the injunction granted against Isseneru opens "'a Pandora's box' for unscrupulous miners" and; "Unscrupulous miners and mining companies have been handed yet another weapon to undermine Amerindians' control of their own communities"). Available at: <http://www.guyananeews.co/2013/01/19/ghra-lambasts-judge-over-ruling-on-mining-on-amerindian-lands/>.

⁴ *Id.* (explaining how "The move in June 2012 to suspend river mining licenses for twelve months to allow a review of river mining lasted less than a month, following howls of protest from the Guyana Gold & Diamond Miners Association (GGDMA)"; and "[i]n September 2012 the President caved into assuring miners that there would be no ban on mercury, nor would river mining be suspended. Taken together these incidents suggest there is a case to be made that having the same Minister responsible for both mining and the environment is a conflict of interest,' GHRA said").

⁵ 'Guyana seeks transition period to phase out mercury use in mining' *Kaieteur News*, 25 November 2012 (quoting Minister of Natural Resources and Environment, Robert Persaud saying that the

this and it appears that the substantial harm caused to them by mercury contamination of their environment is viewed by the State as little more than one of the costs of doing business. This privileging of mining interests even extends to State agencies responsible for mining objecting to the issuance of land titles for indigenous communities on the grounds that this would affect the 'prior title' of miners.⁶

4. Mining in Guyana, particularly small- and medium-scale operations, is inadequately regulated, environmentally and socially destructive, and causes severe and often irreparable violations of indigenous peoples' rights.⁷ For instance, mining severely degrades, and in some cases renders unusable, the lands and waters traditionally used by indigenous peoples for their subsistence⁸ – which also drastically affects their cultural integrity⁹ – and the abduction and

"Government intends to vigorously represent miners at the meeting next week in Bogota, towards the aim of the voluntary phasing out of mercury, which is widely used within the mining and manufacturing sectors in Guyana;" and that "The Minister, during a press conference Friday, pointed out that the socio-economic implications of a ban in the production and supply of mercury against its use in mining will be highlighted as approximately 100,000 persons directly or indirectly depend on the mining sector to earn a livelihood;" and, observing that "Minister Persaud will be accompanied to Colombia by Commissioner (ag) of the Guyana Geology and Mines Commission, Rickford Vieira, and an Executive Member of the Guyana Gold and Diamond Miners Association. Because of international pressure, Government is moving in the direction of doing away with mercury because it is toxic to both human and the environment. There has been rejection of the move by especially small miners as gold prices continue to reach record levels. Mercury is the easiest way to extract gold"). Available at: <http://www.kaieteurnews.com/2012/11/25/guyana-seeks-transition-period-to-phase-out-mercury-use-in-mining/>.

⁶ See 'Miners' assoc., GGMC object to Amerindian land extensions', *Demerara Waves*, 15 November 2012 (stating that "in a letter seen by DemWaves from GGMC Commissioner Karen Livan to Amerindian Affairs Minister Pauline Sukhai in which the former objected to "absolute title" being granted for several extensions being considered. "The Guyana Geology and Mines (GGMC) is aware of the pending grant of absolute title for areas that have been requested as Amerindian extension areas for titling. The commission would like to point out in the attached list, the extent to which these areas are overlapping with existing mineral properties"). The same article also records the Guyana Gold and Diamond Miner's Association's representative threatening legal action to prevent land titles being issued to indigenous communities and stating that "we're seeing extensions to the titled lands are being requested by Amerindian villages and we're concerned about these extensions because most of these extensions seem to be on land that miners and other stakeholders, forestry people, agriculture people, have title to, people have invested in these lands and these lands have economic value..."). Available at: <http://www.demerarawaves.com/index.php/201208154397/Latest/miners-assoc-ggmc-object-to-amerindian-land-extensions.html>.

⁷ This situation is extensively documented in *Gold Mining in Guyana. The Failure of Government Oversight and the Human Rights of Amerindian Communities*, International Human Rights Clinic Human Rights Program, Harvard Law School, March 2007 (documenting, at p. iv, "the failure of Guyanese mining regulations to prevent severe human rights abuses and devastating damage to the natural environment and the communities in which Amerindians live. Analysis of mining laws and regulations, administrative structures established to oversee mining activities, and the way small and medium scale mining operations are conducted in Guyana's interior demonstrate that the laws leave large gaps in regulation, deprive people of critical rights over the lands they occupy, and misallocate resources and responsibilities. Weaknesses in the Guyanese political and judicial systems as well as resource constraints and geographical difficulties further tilt the playing field against effective regulation of mining"). Available at: http://zunia.org/sites/default/files/media/node-files/al/157177_AllThatGlitters1.pdf.

⁸ See M. Colchester, J. La Rose and K. James, *Mining and Amerindians in Guyana. Final report of the APA/NSI project on 'Exploring Indigenous Perspective on Consultation and Engagement within the Mining Sector in Latin America and the Caribbean'*, North South Institute/Amerindian Peoples Association (2002), at p. 41-2 (explaining that "Apparently the miners have their own word for gang

rape of indigenous girls and women by miners is commonplace, but normally neither investigated nor punished.¹⁰ Small- and medium-scale mining almost always take place without the conduct of prior environmental and social impact assessments, despite the legal requirement in the 1996 *Environmental Protection Act* requiring such assessments, and this is the case with all of the concessions presently affecting Isseneru and Kako.¹¹ By allowing miners to operate with impunity in the affected communities' titled and otherwise traditionally owned lands, Guyana is allowing serious human rights violations to intensify and expand to their extreme detriment. This situation both invites and compels urgent international scrutiny and action, a conclusion that is amplified and further justified in light of non-existent or inadequate domestic remedies, as epitomized by the most recent judicial rulings.

5. As previously observed by the UNCERD and the former Special Rapporteur on the Rights of Indigenous Peoples, these violations are in large part attributable to discriminatory defects in Guyana's law (especially the 2006 *Amerindian Act*) and practice as related to the delimitation, demarcation and titling of indigenous lands and territories and the powers of indigenous 'Village

rape. "They 'bank' the girl or the woman - which means more than one"). Available at: <http://idl-bnc.idrc.ca/dspace/bitstream/10625/35237/2/117714.pdf> . See also *id.* at p. 26, (stating that "Considering the irreversibility of much of the harm caused by mining operations, the failure of the government to address concerns of Amerindians may cause serious injury to these communities;" and, at p. 25, stating that "The invasive nature of mining operations and the permanence of the damage caused make the effects of mining's supremacy over surface rights in Guyana particularly severe").

⁹ See e.g., Decision 2(54), Australia, 18/03/99, UN Doc. A/54/18, para. 21(2) (stating that "the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land that has been generally recognized") and; in the case of Guyana, D. Canterbury, *Consultative Processes in Guyana's Mineral Sector: Bauxite and Gold*. Paper presented at World Bank Conference on Mining and the Community, May 7-9, 1997, at p. 10-11. (explaining that "Despite their special treatment the indigenous peoples in Guyana are severely affected by mining in terms of linguistic, social and economic disruptions. These effects include a disruption and disappearance of their fishing and farming ground and languages, the prevalence of new diseases such as AIDS, flooding, pollution of rivers and creeks, depopulation and a degraded environment. In some cases indigenous peoples are considered squatters on their own land, experience poor education/school conditions, veiled racism, malaria, lack of piped water and electricity, and are paid poor salaries").

¹⁰ For detailed studies of the impacts of mining on indigenous peoples in Guyana, see *inter alia* *Mining and Amerindians in Guyana*, *supra* note 8 (detailing that "mining, through small-scale permits, medium-scale enterprises and large-scale exploratory licences, extended over more than 25% of the country and was widely present on indigenous lands. Illegality, environmental damage and severe social problems resulted partly from the weak regulations and enforcement capacity of the Guyana Geology and Mines Commission. A lack of effective recognition of Amerindian land rights exacerbated these problems"); and M. Colchester & J. La Rose, *Our Land, Our Future: Promoting Indigenous Participation and Rights in Mining, Climate Change and other Natural Resource Decision-making in Guyana*, North South Institute, Canada and Amerindian Peoples Association (2010) (explaining, at p. 12, that "Reflecting a buoyant market in mineral prices worldwide, the mining sector in Guyana has experienced a steady increase over the past ten years;" and "[b]y the end of 2008, the Guyana Geology and Mines Commission recorded 2,471 licensed dredges with a further 815 being registered in 2009 alone"). Available at: <http://www.nsi-ins.ca/wp-content/uploads/2012/11/2010-Our-Land-our-future.pdf>. Many, if not most, of these permits affect lands traditionally owned by indigenous peoples.

¹¹ Section 68(1)(z)) of *Environment Protection Act* additionally provides that the Minister for the Environment is authorised to make regulations defining "principles to facilitate the participation of communities which are likely to be affected by the activities of a developer, taking account of the rights of indigenous communities." See http://www.theredddesk.org/sites/default/files/ep_act.pdf. No such regulations have yet been passed and the Minister for Environment is also at the same time the Minister for Mining.

Councils' to exercise their right to control and manage these lands and territories.¹² Among other things, the present situations in Isseneru and Kako are directly related to Guyana's failure to recognise that indigenous territorial rights are inherent and do not depend on the acts or endorsement of the State for their existence as well as its failure to adequately recognise indigenous ownership and authority over the full extent of their traditional lands, including those lands currently titled by the State. These discriminatory defects, that nullify the exercise and enjoyment of indigenous peoples' territorial rights, are reflected in the title of the *Amerindian Act* itself, which states that one of its purposes is "the granting of land to Amerindian Villages and Communities."

6. Rather than modify its policy and practice and, especially, amend the *Amerindian Act* to bring all of them into compliance with its international obligations – as it is required to do by the international instruments it is bound by – Guyana is pursuing a land titling project to be funded by the UNDP that is based on and confirms the inadequate and discriminatory delimitation, demarcation and titling of existing indigenous titles set forth in the *Amerindian Act*, and does little to address outstanding rights to traditionally owned lands that are not included in these titled areas. The August 2012 UNDP project document,¹³ which was elaborated without adequate participation by indigenous peoples and perpetuates the violations of their rights that are codified in the *Amerindian Act*, explains that its purpose is "to fast track the process of titling the outstanding Amerindian lands currently awaiting demarcation and titling, based on an existing titling process [set forth in the *Amerindian Act*]."¹⁴

7. These titles were arbitrarily determined without reference to indigenous customary tenure systems.¹⁵ Thus, this project will confirm and further concretise the discriminatory and substandard process of recognising and titling indigenous lands in Guyana that is conducted without regard for the rights of indigenous peoples in international law. The project itself also directly contravenes the 2006 recommendations of UNCERD highlighted herein by explicitly endorsing the discriminatory distinction between titled and untitled communities.¹⁶ This will

¹² See Section III *infra* and *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*. UN Doc. E/CN.4/2006/78/Add.1, para. 44-45 (expressing concerns about the *Amerindian Act* in general, and Guyana's failure to recognize and respect indigenous peoples' property rights in international law and the overly broad powers of the Minister of Amerindian Affairs vis-à-vis indigenous Village Councils, more specifically. The Special Rapporteur concluded by noting that he "regrets not having received a reply from the Government of Guyana at the time of this writing").

¹³ In elaborating this project that disregards indigenous peoples' rights, the UNDP is also disregarding the instructions of the UN General Assembly set forth in Articles 41 and 42 of the 2007 UN Declaration of the Rights of Indigenous Peoples, which, respectively, requires that UN specialised agencies, such as the UNDP, "shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance;" and "shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration").

¹⁴ UNDP/GOG, *Amerindian Land Titling Project, Final Draft Project Document*, 6 August 2012, at para. 24.

¹⁵ The discrepancy between State granted titles and indigenous customary tenure systems is illustrated in detail in *Wa Wiizi - Wa Kaduzu: Our territory - Our Custom, Customary Use of Biological Resources and Related Traditional Practices within Wapichan Territory in Guyana - an indigenous case study*, SCPDA/Forest Peoples Programme, 3 April, 2006, at p. 12 (containing a maps of land titles issued by the State to the Wapichan people in relation to their traditionally owned lands and territory). Available at: <http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/guyana10capr06eng.pdf>. See also Annex A hereto (containing a map showing the area traditionally owned by the Upper Mazaruni Akawaio and Arecuna communities in relation to the titles issued by the State).

¹⁶ UNDP/GOG, *Amerindian Land Titling Project, Final Draft Project Document*, 6 August 2012, at p. 4 (stating that "The Act is clear on the distinction between a village and a community. Only villages have

simply exacerbate the multitude of problems experienced by indigenous peoples, for instance, as exemplified by the situations of Isseneru and Kako described herein. For example, this UNDP-funded and designed project will not address prior grants of mining permits in indigenous lands.

8. In this respect, Isseneru is denied any rights in relation to mining within its titled lands on the basis of *when* the State “granted” title to those lands, while Kako is denied rights to prevent miners from accessing and operating in the river that flows through its titled lands on the basis of legislation that unjustifiably excludes rivers from indigenous title (see below). It is also denied rights to prevent mining in lands that are traditionally owned by the Akawaio but which were arbitrarily excluded from the title “granted” by the State. This mining is also taking place in Kako’s traditionally owned lands despite the fact that the question of their ownership is currently *sub judice* in a case filed in 1998 by the six Akawaio and Arecuna communities of the Upper Mazaruni (including Kako), discussed below, that asserts indigenous ownership on the basis of the common law doctrine of aboriginal title. Guyanese courts have yet to recognize the applicability of this doctrine – long accepted throughout the commonwealth and reflected in international standards pertaining to indigenous peoples’ property rights¹⁷ – as part of Guyanese law.¹⁸ To the contrary, in 2009, Guyana’s Chief Justice penned a judgment – in a case also challenging grants of mining concessions on indigenous lands – holding that the assertion of sovereignty over Guyana by the British fatally displaced pre-existing indigenous property rights, which passed to the Crown and its successor, the independent State of Guyana.¹⁹

9. The situation described herein thus threatens imminent, gross and irreparable harm to Isseneru and Kako. In particular, this situation constitutes large-scale “Encroachment on the traditional lands of indigenous peoples ... for the purpose of exploitation of natural resources,” as well as a grave threat to the individual and collective rights of the affected communities and their members.²⁰ This situation also negatively affects rights that have been highlighted on a number of occasions by the Special Procedures and falls squarely within their respective

legal title to the land they occupy, i.e., when a community is granted title it formally becomes recognized as a village [with quantitatively and qualitatively different rights to an untitled indigenous ‘community’]).

¹⁷ See e.g., *Communication of the Special Rapporteur on the right to food and the Special Rapporteur on the rights of indigenous peoples to Malaysia* (AL Food (2000-9) Indigenous (2001-8), MYS 3/2011), 18 February 2011 (observing that much of the [native title] jurisprudence of Malaysian courts recognizing that indigenous groups have rights to land based on their traditional use and occupancy is largely in line with article 26 of the Declaration”). Available at: [http://spcomms.ohchr.org/Docs/01ComRepSep2011/Com/2011_02/AL_Malaysia_18.02.11_\(3.2011\).pdf](http://spcomms.ohchr.org/Docs/01ComRepSep2011/Com/2011_02/AL_Malaysia_18.02.11_(3.2011).pdf).

¹⁸ See notes 45-48 *infra*.

¹⁹ *Thomas and Arau Village Council v Attorney General of Guyana and another*, No. 166-M/2007, HC of Guyana, unreported decision dated 30th April 2009. This judgment is extensively critiqued in A. Bulkan, *From Instrument of Empire to Vehicle for Change: The Potential of Emerging International Standards for Indigenous Peoples of the Commonwealth Caribbean*, Faculty Workshop Series, Faculty of Law, University of the West Indies, 17 March 2010, p. 23-31 (explaining, at p. 24-5, that “The result was not only to set the law back by more than 100 years, but also to render completely worthless the slew of constitutional reforms enacted in 2001, by which an enhanced regime of equality rights and strengthened respect for indigenous peoples were incorporated in the Guyana constitution;” and “[e]qually disquieting is the Chief Justice’s rejection of international law, despite the legitimacy of recourse thereto when interpreting the fundamental rights’ provisions”). Available at: http://www.cavehill.uwi.edu/news/articles/2010/March/Bulkan_Instrument_to_Vehicle.pdf. See also *Defense of the Government of Guyana in Van Mendason et al*, *infra* note 38.

²⁰ See *Guidelines for the Use of the Early Warning and Urgent Action Procedure*, August 2007, at p. 3, para. 12.

mandates.²¹ The submitting organisations, therefore, respectfully request that the Special Procedures treat the situation of Isseneru and Kako as urgent and communicate with the State of Guyana in line with the requests made in paragraph 44 below as soon as possible, as well as issue a joint press release about this situation.

II. THE URGENT SITUATIONS OF ISSENERU AND KAKO

A. Judicial Sanction for Massive Violations of Isseneru's Rights

10. After many years of enjoying no legal protection for its traditional lands, Isseneru was 'granted' title in 2007. This title, however, was considerably smaller than the area initially requested by the community and it had to submit and argue over a number of requests that were rejected by the Ministry of Amerindian Affairs ("MAA") because, in the latter's view and without further explanation, the area requested was "too big". The titled area was demarcated in late 2009-early 2010 and a 'certificate of title' (an administrative requirement needed to complete the titling process) was issued on 21 May 2010.

11. Isseneru has long complained about the activities of miners – small-scale and medium-scale – within its traditional lands. Indeed, the submitting organisations highlighted the situation of Isseneru in a 2007 submission to the UNCERD and the UNCERD made indirect reference to it in a 2007 letter to the State pursuant to its 'follow-up' procedure.²² Isseneru continuously complained about the deleterious effects of mining on its well-being and rights prior to the issuance of title in 2007 and during the finalisation of the demarcation and titling process in mid-2010. At that time, there were 24 dredges (mining operations) active at Haimaraka, a location within the titled lands, as well as a number of other operations both within the titled area and their traditionally owned lands that were excluded from the title when it was delimited in 2007.

²¹ See e.g., *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, UN Doc. A/HRC/21/47, 6 July 2012 (concerning human rights impacts on indigenous peoples in relation to extractive industries); Special Rapporteur in the Field of Cultural Rights, *Mission to Brazil*, 8-19 November 2010), A/HRC/17/38/Add.1, 21 March 2011 (discussing cultural impacts of development projects on indigenous peoples); Special Rapporteur on the Right to Food, *Mission to Mexico*, A/HRC/19/59/Add.2, 17 January 2012 and *Mission to Canada*, 6-16 May 2012, *End of Mission Statement*, (discussing the impact of development activities on the right to food of indigenous peoples, including their right to consent to such activities); Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Mission to Guatemala*, A/HRC/17/25/Add.2, 16 March 2011 (discussing, *inter alia*, health impacts of disregard for indigenous peoples' territorial rights); Independent Expert on the right to water and sanitation, *Mission to the USA: End of Mission Statement*, 22 February - 4 March 2011 (discussing indigenous peoples' right to safe water and sanitation and their "distinctive spiritual relationship with their traditionally used waters").

²² See *Additional information presented in accordance with the request of the Committee on the Elimination of Racial Discrimination, (CERD/C/GUY/CO/14, para. 28)*, APA/FPP, 10 January 2007, para. 25-6 (discussing the situation of Isseneru and explaining that "[t]he members of this community have constantly complained that miners continually pollute the river and streams from which they use water for domestic purposes and take fish for their daily sustenance. Their complaints have not been addressed by the Guyana Geology and Mines Commission nor by the Ministry of Amerindian Affairs"); and *Communication of the UNCERD on the Elimination of Racial Discrimination (Follow-Up Procedure)*, 24 August 2007, at p. 2 (explaining that the UNCERD has received "information that would indicate a continued lack of respect for the interests of the indigenous population in a clean environment. The UNCERD has for example been informed that small- and medium-scale miners have been granted one more year of grace from provisions regulating the discharge of waste water into rivers and creeks used by indigenous Communities"). Available at: <http://www2.ohchr.org/english/bodies/cerd/docs/LetterGuyana24Aug07.pdf>.

12. One of these operations within the titled lands is held by a miner by the name of Lalta Narine. The Village Council of Isseneru sought to stop his operation in 2007, but he refused and sought an injunction against the community in December 2007. The High Court of Guyana ruled in his favour in August 2008, holding that the community has no authority over mining that commenced prior to its obtaining title pursuant to the 2006 *Amerindian Act*,²³ and enjoining the community from interfering with his operations.²⁴ The community appealed against this decision, but to date no final ruling has been made on the matter by the Guyana Court of Appeals, the highest domestic court. This ruling shattered the community's belief that once it had obtained title it would be able to control mining in its lands (as the *Amerindian Act* ostensibly provides and as the State has adamantly asserted in its communications to the UNCERD).²⁵ Lalta Narine continues to mine with impunity in Isseneru's titled lands today; the community enjoys no benefit and suffers all of the negative consequences.

13. The concessions in question were all issued without even notifying the community and have had serious negative impacts on their environment, means of subsistence and health. For instance, a World Wildlife Fund survey of mercury contamination found that "no one sampled in Isseneru has a concentration of mercury considered to be safe or even normal. The most salient determinant factor for the elevated Hg levels in Isseneru in the study was diet."²⁶ A 2002 study funded by the Canadian International Development Agency "showed that 89-96% of the population surveyed in Isseneru had dangerous levels of mercury contamination as examined by its presence in human hair."²⁷ This mercury has entered the food chain due to mining operations, and, as the UNCERD observed in 2006, is a serious health impact caused by mining

²³ See in this respect, Section 48(1)(g) of the *Amerindian Act*, which requires that the consent of indigenous communities must be obtained for mining activities on titled lands, but only after a concession or permit has already been issued by the State. However, in addition to not applying to indigenous lands that are not titled, sections 50 and 53 substantially undermine this right. Section 50(1)(a) provides that should a community refuse consent in the case of large-scale mining, its decision may be over-turned "if the Minister with responsibility for mining and the Minister [of Amerindian Affairs] declare that the mining activities are in the public interest;" while section 53 does not require that the GGMC ensure effective participation by indigenous peoples before concessions or permits are granted, requiring only that it notify the community and, by unspecified means, "satisfy itself that the impact of mining on the Community will not be harmful" (sec. 53(i)(ii).

²⁴ Ironically, indigenous communities' rights are more secure under the 1989 *Mining Act* and its regulations in relation to small- and medium-scale mining (see *infra* para. 29-30), yet these provisions were apparently not considered by the judiciary.

²⁵ See *Comments of the Government of Guyana on the concluding observations of the UNCERD on the Elimination of Racial Discrimination*. UN Doc. CERD/C/GUY/CO/14/Add.1, 14 May 2008, at p. 13 (contending, for instance, that "there are no limitations on indigenous peoples' right to control their lands, but, rather, that this right is protected under the *Amerindian Act*"). Available at: <http://www2.ohchr.org/english/bodies/cerd/docs/followup/CERD.C.GUY.CO.14.Add1.pdf>. This report is largely dismissive of the UNCERD's views and explicitly or implicitly rejects the UNCERD's important recommendations. Among other things, Guyana argues that the UNCERD fails to understand Guyana's laws, claims that the UNCERD has been misled, and cites various provisions of Guyana law to support its argument that the UNCERD's recommendations are misplaced or unfounded.

²⁶ *Review of Mercury Studies in Guyana for the Development of a Project to Reduce Mercury Pollution – Study done by Saudia Rahat, PAHO Consultant, WWF Guianas (1998)*, at p.14.

²⁷ See 'Isseneru scaling down on fish to limit mercury poisoning', *Stabroek News*, 6 August 2009. Available at: <http://www.stabroeknews.com/2009/archives/08/06/isseneru-scaling-down-on-fish-to-limit-mercury-poisoning/>

in Guyana.²⁸ Consequently, Isseneru community members have been forced to stop consuming fish, a major source of protein in their diet, due to contamination and their traditional fishing, an economic activity that is central to their culture, is substantially hindered for this same reason.²⁹

14. To make matters worse, in 2011, a miner by the name of Joan Chang entered Isseneru's titled lands to commence operations in a mining permit acquired in 1989 by Ivor Chang. The community's objections to this were ignored and they were forced to seek 'Cease Work Orders' from the Guyana Geology and Mines Commission ("GGMC"), the State agency that regulates mining, after the mining operation started. Two Cease Work Orders were issued in November and December 2011, but both were ignored, and in late December 2011, the miner filed a request for an injunction in the High Court.³⁰ On 17 January 2013, the High Court granted the injunction, holding that miners who obtained mining permits prior to the entry into force of the *Amerindian Act* in March 2006 are not bound by its provisions and, consequently, do not have to obtain permission from the village before carrying out operations on titled land.³¹ A few days after the judgment was adopted, the community obtained a map of the mining concessions in their area from the GGMC and were dismayed to learn that almost all of their titled lands are covered by mining concessions, which, following the recent judgments, the Village Council has no authority over or recourse to seek protection for its rights.

15. Finally, on 22 January 2013, following massive public demonstrations against the ruling of the High Court, Isseneru's representatives were permitted to meet with the State officials, including the Office of the President and the Minister of Amerindian Affairs.³² Government representatives informed the community leaders that, while they in principle had sympathy for their plight, they could not interfere with judicial rulings.³³ They did however assure the

²⁸ CERD/C/GUY/CO/14, para. 19 (stating that the "UNCERD is deeply concerned that ... indigenous peoples ... are reportedly disproportionately affected by malaria and environmental pollution, in particular mercury and bacterial contamination of rivers caused by mining activities...").

²⁹ See 'Isseneru scaling down on fish to limit mercury poisoning', *Stabroek News*, 6 August 2009, *supra* (additionally explaining that "During a recent visit to Isseneru, Stabroek News was informed by residents there that they have been using alternative sources of protein as well as adapting to the use of other foods such as cassava and plantains as opposed to fish").

³⁰ See 'Mining company flouting cease work orders, say Isseneru village leaders', *Stabroek News*, 14 January 2012. Available at: <http://www.stabroeknews.com/2012/news/stories/01/14/mining-company-flouting-cess-work-orders-say-isseneru-village-leaders/>.

³¹ See 'Court upholds miner's rights to operate in Isseneru', *Stabroek News*, 18 January 2013. Available at: <http://www.stabroeknews.com/2013/news/stories/01/18/court-upholds-miners-rights-to-operate-in-isseneru/>; and 'This ruling marks the latest erosion of Amerindian legal and customary rights over their lands', *Stabroek News*, 21 January 2012. Available at: <http://www.stabroeknews.com/2013/opinion/letters/01/21/this-ruling-marks-the-latest-erosion-of-amerindian-legal-and-customary-rights-over-their-lands/>.

³² See 'Isseneru villagers picket OP over court ruling -press demand for revised Amerindian Act', *Stabroek News*, 26 January 2013. Available at: <http://www.stabroeknews.com/2013/news/stories/01/26/isseneru-villagers-picket-op-over-court-ruling/>; and 'Isseneru supporters protest', *Stabroek News*, 23 January 2013. Available at: <http://www.stabroeknews.com/2013/media/photos/01/23/isseneru-supporters-protest/>.

³³ While this statement is strictly true under domestic law, the State is nonetheless liable for the acts and omissions of the judiciary, which is part of the State for international purposes, both in general in relation to its obligations pursuant to human rights law to provide effective domestic remedies for violations of the internationally guaranteed rights of persons subject to its jurisdiction, and specifically, in relation to judicial acts that discriminate against persons or groups on the basis of, inter alia, race or ethnicity (as do the judgments in the Isseneru and Kako cases) pursuant to Article 1, 2 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. Moreover, the State

community that the GGMC would appeal against the injunction. The community observed in this respect that it had appealed against the injunction granted to Lalta Narine in 2008 but, almost five years later, still had not received a decision, and the miner in question continues to operate with impunity and to their detriment in their titled lands. Moreover, based on the map they obtained from the GGMC, they explained that their entire titled area is covered by numerous mining concessions that they were not even informed about, and that it appears that all of these concessions are, according to the ruling of the Court, beyond their authority. They further explained that they are deeply concerned about the well-being of their people and the sustainability of their lands and believe now that their rights are worthless under extant law. A few days later, the Attorney General bluntly explained that the government saw no need to make any amendments to the *Amerindian Act* to address this problem (despite the increasingly glaring fact that many of its provisions are the underlying cause of the problem).³⁴

16. These judicial rulings and other related acts and omissions of the State directly contravene the UNCERD's 2006 recommendations to Guyana (see Section III below) and further perpetuate the discrimination against indigenous peoples that pervades Guyana's law as it relates to their rights. In particular, these rulings rely on a fundamental and discriminatory misconstruction of indigenous peoples' rights that runs throughout Guyana's law and practice, especially its land titling procedure.³⁵ This misconstruction holds that indigenous peoples' rights are "granted" or "given" by the State, rather than being inherent rights,³⁶ and are not valid and enforceable without State endorsement, in this instance, through the issuance of title and pursuant to legislation that restricts indigenous participation and self-governance rights on the basis of whether and when the State "granted" them rights.³⁷ In the case of Isseneru, the State neglected to issue title until 2007, a discriminatory omission for which it alone bears responsibility. In international law, however, indigenous peoples' rights are not dependent on the good will of the State and nor is their existence or enforceability dependent on any

may amend or adopt legislation or administrative measures to correct unjust or discriminatory judicial rulings.

³⁴ See 'No plans now to amend Amerindian Act over Isseneru ruling - Nandlall', *Stabroek News*, 28 January 2013. Available at: <http://www.stabroeknews.com/2013/news/stories/01/28/no-plans-now-to-amend-amerindian-act-over-isseneru-ruling-nandlall/>.

³⁵ See in this regard *Comments of the Government of Guyana on the concluding observations of the UNCERD on the Elimination of Racial Discrimination*. CERD/C/GUY/CO/14/Add.1, 14 May 2008, at para. 8 (stating, in contravention of the UNCERD's jurisprudence (see CERD/C/NZL/CO/17, para. 15), that the *Amerindian Act* "is a special measure discriminating in favour of Amerindians and is a special measure within Article 1 paragraph 4 of the Convention"); and, at para. 20 (explaining in relation to the *Amerindian Act*'s provisions on mining that "the Act gives Amerindian villages a right which no other section of Guyanese society has. This right must be limited to what is justifiably necessary to protect Amerindians but it cannot give Amerindians rights to the detriment of others").

³⁶ See in this respect *Communication of the UNCERD on the Elimination of Racial Discrimination (Follow-Up Procedure)*, 24 August 2007, at p. 2 (where the UNCERD made this same point, observing that "to the extent title has been granted to indigenous groups, this has been done unilaterally by the State party, rather than within the framework of a procedure respecting the inherent rights of the indigenous groups to such areas").

³⁷ See Thomas and Arau Village Council, *supra* note 19. See also F.W. Ramsahoye, *THE DEVELOPMENT OF LAND LAW IN BRITISH GUIANA*. (Oceana Publications, Dobbs Ferry, New York, 1966) at p. 25 (the leading treatise on property rights used by the Guyana Law School and setting forth principles that inform and underlie present Guyanese law, stating that: "The ownership of all land in British Guiana can be traced to the prerogative by virtue of which ownership of land vested in the crown at cession, or to grants from the Dutch West India Company and later from the Crown in favour of the Colonial Government, private individuals and in some cases, corporations") and; A. Bulkan, *Amerindian Land Rights: Is the Struggle for Equality Really Over?* 3 *Guyana Law Review* 30 (2002).

affirmative act of the State.³⁸ The same is also the case with respect to the preponderance of Commonwealth 'aboriginal title' jurisprudence.³⁹

17. The judicial rulings against Isseneru and Kako also privilege the interests of non-indigenous miners over the rights of indigenous peoples, an outcome previously rejected by the UNCERD in a Decision adopted under its early warning and urgent action procedure in 1999. In particular, the UNCERD determined that Australia's amended *Native Title Act* was discriminatory because, *inter alia*, "[w]hile the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for Governments and third parties at the expense of indigenous title."⁴⁰ Moreover, by upholding the interests of miners in its recent judgments, the Guyanese judiciary has transcended simply creating certainty for the rights of non-indigenous parties at the expense of indigenous title. In the case of Isseneru, the court has rendered its title illusory given the vast number of concessions that have been granted therein and which are declared to be beyond the authority of its Village Council. This point was made by a member of the community, who observed that:

We feel that when the High Court tells us that we have no rights to decide and control what takes place on our land, then the land is not ours. Just Friday, when inquiring at the office of the GGMC, we learnt that our whole land is covered with mining concessions. Yet, the government has not informed us about this.⁴¹

18. In the case of Kako (discussed immediately below), the judgment of the court not only renders the village's land title and authority nugatory, it also completely ignores and nullifies the

³⁸ See e.g., *General Recommendation XXIII on Indigenous Peoples*, adopted by the UNCERD on the Elimination of Racial Discrimination at its 51st session, 18 August 1997, at para. 5 (calling on states parties to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories"); and *Report No. 40/04, Maya Indigenous Communities of the Toledo District, Case 12.053 (Belize)*, Inter-American Commission on Human Rights, 12 October 2004, at para 117. (observing that "the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition").

³⁹ The Canadian Supreme Court has stated many times that aboriginal rights arise "by operation of law, and do not depend on a grant from the Crown." *Roberts v. Canada* [1989] 1 S.C.R. 322, at 340. Likewise the Australian High Court has repeatedly and unequivocally held that "native title does not require any conduct on the part of any person to complete it, nor does it depend for its existence on any legislative, executive or judicial declaration." See *inter alia Wik Peoples v. Queensland & Ors*, [1997] 187 CLR 1, at 84 (per Brennan CJ). See also *Alexkor Ltd and the Republic of South Africa v. The Richtersveld Community and Others*, [2003] CCT 19/03 (finding, at para. 64, that "racial discrimination lay in the failure to recognise and accord protection to indigenous law ownership while, on the other hand, according protection to registered title. The inevitable impact of this differential treatment was racial discrimination against the Richtersveld Community which caused it to be dispossessed of its land rights").

⁴⁰ *Decision 2(54) on Australia, 18/03/99*. UN Doc. A/54/18, para. 21(2), at para. 6 (further noting, at para. 7, that there are "four specific provisions that discriminate against indigenous title holders under the newly amended Act. These include the Act's 'validation' provisions; the 'confirmation of extinguishment' provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses").

⁴¹ 'Miners win ruling over indigenous groups in Guyana', *Mongabay*, 29 January 2013. Available at: <http://news.mongabay.com/2013/0129-hance-mining-guyana.html>

rights and title of the community to its traditional lands outside of the titled area, the very area in which the mining operation is taking place and over which the community has been seeking recognition of its ownership rights (without result) before the judicial system since 1998.

B. Judicial Sanction for Violations of Kako's Rights and the Persecution of its Toshao

19. Kako village lies on the Kako River at its confluence with the Upper Mazaruni River in western Guyana. It received title to part of its traditional lands in 1991 following years of struggle against a proposed hydro-electric dam that would have flooded the entire region. This title has not been demarcated and no certificate of title has been issued to-date. This is in part due to the community's strong disagreement with the area titled and its pursuit of the full recognition of its ownership rights over its traditional lands in conjunction with six other communities of the Upper Mazaruni region (see Annex A hereto comparing the State-issued titles to the lands traditionally owned by these six communities).⁴² They are seeking this recognition in a complaint submitted to the High Court in October 1998 that asserts ownership on the basis of, *inter alia*, an existing and enforceable 'aboriginal title' in accordance with Commonwealth judicial precedent.⁴³ Disregarding its international obligations, the State's formal defence in this case argues that any pre-existing rights that the Akawaio and Arekuna may have held to their traditional lands were extinguished when the British Crown acquired sovereignty in the 19th century.⁴⁴ This defense is contrary to not only the preponderance of Commonwealth precedent on this point,⁴⁵ including decisions of the Judicial Committee of the Privy Council that were binding on Guyana until 1980,⁴⁶ it also contradicts the jurisprudence of numerous international human rights protection organs pertaining to human rights instruments binding on Guyana and in principle incorporated into domestic law via Guyana's Constitution.⁴⁷ This jurisprudence holds that the acquisition of sovereignty by the British Crown had no effect on prior indigenous property rights⁴⁸ and that state policies or laws that unilaterally extinguish inherent indigenous rights are illegitimate.⁴⁹

⁴² Oxford University professor of anthropology, Audrey Butt-Colson's book, entitled *Land: the case of the Akawaio and Arekuna of the Upper Mazaruni District, Guyana* (Last Refuge Ltd., Panborough, 2009) is an exhaustive study of the Akawaio and Arekuna peoples of the Upper Mazaruni, based on over 40 years of research, which shows in minute detail how these peoples have occupied and used the entire Upper Mazaruni river basin (and also a much wider area) for thousands of years before the time of European colonization).

⁴³ *Van Mendason et al v. Attorney General of Guyana*, High Court of Guyana, 27 October 1998.

⁴⁴ *Statement of Defense by the Attorney General of Guyana in Van Mendason et al. v. A.G.*, High Court of Guyana, No. 1114-W.

⁴⁵ See *inter alia* *Mabo v. Queensland* (1992) 66 A.L.J.R. 408; *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010; *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*, (1997) 1 MLJ 418; *R. v. Symonds* (1847) NZPCC 387 (SCNZ); *Maya Village of Conejo v. A.G et al*, Supreme Court of Belize, Claim No. 172 (2007).

⁴⁶ See e.g., *Amodu Tijani v. Secretary, Southern Nigeria* [1921], 2 A.C. 399, per Viscount Haldane, at 407 (holding that "a mere change in sovereignty is not to be presumed to disturb rights of private owners..."); and in accord, *Nireaha Tamaki v. Baker*, (1901), NZPCC 371; *Re Southern Rhodesia* [1919] A.C. 211; and, *Adeyinka Oyekan v. Mussendiku Adele* [1957], 1 WLR 876.

⁴⁷ See Guyana Constitution, as amended in 2003, Article 154A (incorporating into domestic law and giving constitutional status to ratified human rights instruments).

⁴⁸ See e.g., *Roberts v. Canada* [1989] 1 S.C.R. 322, at 340 (holding that aboriginal rights and title arise "by operation of law, and do not depend on a grant from the Crown"); *Wik Peoples v. Queensland & Ors*, [1997] 187 CLR 1, at 84 (per Brennan CJ, explaining that "native title does not require any conduct on the part of any person to complete it, nor does it depend for its existence on any legislative, executive or judicial declaration"); *Nor Anak Nyawai et al* (12 May 2001), Suit No. 22-28-99-I, High Court for Sabah and Sarawak at Kuching, at para. 57 (explaining that "[native/aboriginal title] is therefore not dependent for its existence on any legislation, executive or judicial declaration ...

20. The High Court began hearing evidence in this case in December 2011 without any explanation for the unreasonable delay (more than 13 years) in the proceedings.⁵⁰ While this case has been *sub judice*, State authorities have issued numerous mining concessions and permits in the lands and rivers claimed by the plaintiff communities, including in areas traditionally owned by Kako and which are immediately adjacent to its titled lands. These concessions were issued without even informing the communities and over their vociferous objections once they were discovered.

21. Of immediate concern given the threat of irreparable harm it poses to Kako, is an injunction granted by the High Court that allows a miner to access and operate within the Kako River, despite the strenuous opposition of the community, both in the community's titled lands and upstream of this titled area.⁵¹ Also of immediate concern is contempt of court proceedings filed in relation to this injunction against Mario Hastings, the *Toshao* of Kako, that could result in him being incarcerated in relation to his community's opposition to mining in its traditional lands.⁵² Mining concessions in Kako's traditional lands – as well as the lands of the other indigenous communities of the Upper Mazaruni – have already caused substantial damage to their socio-cultural integrity and the environment (water quality especially) that the community depends on for its basic needs. In addition to presently negatively affecting a wide range of

though they can be extinguished by those acts. Therefore, I am unable to agree ... that native customary rights owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights had been extinguished"); and *Maya Village of Conejo v. A.G et al*, Supreme Court of Belize, Claim No. 172 (2007), at para. 77 (per Conteh CJ, stating that "I am, however, convinced and fortified by authorities that the acquisition of sovereignty over Belize, first by the Crown and later, by independent governments, did not displace, discharge or extinguish pre-existing interests in and rights to land. The mere acquisition or change of sovereignty did not in and of itself extinguish pre-existing title to or interests in the land").

⁴⁹ See *inter alia* Decision 1(66), *New Zealand*, 27/04/2005, CERD/C/DEC/NZL/1, at para. 6 (observing that "the legislation appears to the UNCERD, on balance, to contain discriminatory aspects against the Maori, in particular in its extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress..."); *Decision 2(54) on Australia*, 18/03/99. UN Doc. A/54/18, para. 21(2), at para. 6-7; *Concluding observations of the Human Rights UNCERD: Canada*. 07/04/99, at para. 8. UN Doc. CCPR/C/79/Add.105 (recommending that "the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant"); *Concluding observations of the UNCERD on Economic, Social and Cultural Rights: Canada*. 10/12/98. E/C.12/1/Add.31, at para. 18 (endorsing "the recommendations of Royal Commission on Aboriginal Peoples that policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party") and; *Report N° 75/02, Mary and Carrie Dann*, Case N° 11.140 (United States), Inter-American Commission on Human Rights, 27 Dec. 2002. OEA/Ser.L/V/II.116, Doc. 46, para. 144-45 (rejecting the state's argument that indigenous title had been 'extinguished by encroachment').

⁵⁰ The main decision of the High Court to-date has been to exclude from evidence the testimony and academic works of Audrey Butt-Colson, the only anthropologist with substantial academic expertise on the Akawaio and Arecuna peoples of the Upper Mazaruni – having conducted field work there since the 1950s and written numerous academic works on their cultures and situation – who had been led as an expert witness on behalf of the communities.

⁵¹ See 'Kako Village in standoff with miner', *Stabroek News*, 16 October 2012. Available at: <http://www.stabroeknews.com/2012/news/stories/10/16/kako-village-in-standoff-with-miner/>

⁵² See 'Kako toshao faces jail after denying miner entry', *Stabroek News*, 3 November 2012. Available at: <http://www.stabroeknews.com/2012/news/stories/11/03/kako-toshao-faces-jail-after-denying-miner-entry/>; and 'Kako toshao in court over blocking miner's access', *Stabroek News*, 6 November 2012. Available at: <http://www.stabroeknews.com/2012/news/stories/11/06/kako-toshao-in-court-over-blocking-miners-access/>.

their human rights, these concessions also substantially affect the enjoyment of their rights should they ultimately succeed with their lawsuit that seeks recognition of their ownership rights to their traditional (and presently untitled) lands, which also constitutes violation of basic due process and fair trial guarantees.⁵³

22. These events have their origins in a mining permit that extraordinarily (insofar as it is not geographically circumscribed to any particular location) grants Belina Charlie, a license to prospect for gold and precious stones “within Guyana.” Ms. Charlie first arrived in Kako in July 2011 and had a meeting with *Toshao* Hastings, informing him that she had a mining permit and wanted to pass through the village along the Kako River. After a village meeting to discuss this, *Toshao* Hastings informed the miner that the village unanimously opposed her request because they hunt, fish, farm and have settlements in the area in question and were also concerned about the contamination of the Kako River upstream of the village and its numerous riverine homesteads. They also informed the miner that they were concerned that the area to be mined is included in the Upper Mazaruni aboriginal title case and that they had neither been informed that the area had been opened to mining nor consulted about its possible impact on their lives and livelihoods. At that time, Ms. Charlie left the area.

23. However, in March 2012, Ms. Charlie returned and put up notice boards on trees in Kako’s traditional lands stating that the area was her mining concession. This made the community very angry. She returned at the end of July 2012 and attempted to transport mining equipment through the village via the Kako River. At that time, she showed *Toshao* Hastings letters from the MAA and GGMC, dated 4 July 2012 and 24 July 2012, respectively, which notified him of the miner’s permit and requested his “cooperation” to enable Ms. Charlie to transport her mining equipment and water dredge to her concession so that she could conduct river mining operations in the Kako River and its tributaries. Despite the fact that no environmental or social impact assessment has been conducted in relation to this operation, the letter from the GGMC inexplicably asserts that the GGMC is satisfied that “said locations will not provide harmful effects to your village.”⁵⁴ As noted above, the State is well aware of the severe environmental damage caused by river mining, having overturned its own ban on this kind of mining at the insistence of the GGDMA in 2012.⁵⁵ Kako is also painfully aware of this having seen the Mazaruni River rendered unfit for human use for over a decade due to river dredge mining.⁵⁶

⁵³ See *Gold Mining in Guyana. The Failure of Government Oversight and the Human Rights of Amerindian Communities*, *supra* note 7, at p. 26 (explaining that “the government has permitted miners to prospect and mine on disputed lands, such that by the time the land disputes are resolved, the lands in question may no longer be fit for use by the Amerindian communities claiming them”).

⁵⁴ *Letter of the GGMC to Kako Village Council*, 24 July 2012, at p. 1. This statement is likely in relation to a requirement in the *Amerindian Act*, which provides in Section 53 that the GGMC, shall, by unspecified means and, as the case of Kako confirms, without indigenous participation, “satisfy itself that the impact of mining on the Community will not be harmful” before concessions or permits are granted.

⁵⁵ See *supra* note 4. See also R. Goodland, *Guyana: Social and Environmental Impact Reconnaissance of Gold Dredging on Indigenous Peoples in the Upper Mazaruni*. A Report for the Upper Mazaruni Amerindian District Council and the Amerindian Peoples Association, October 2005, at 14 (where the former Chief Environmental Advisor to the World Bank observes that “Missile dredges persist because GoG permits their environmental costs to be externalized onto the Indigenous peoples, and is unwilling to enforce its own laws and regulations.”)

⁵⁶ See e.g., *Gold Mining in Guyana. The Failure of Government Oversight and the Human Rights of Amerindian Communities*, *supra* note 7, at p. 24 (observing that “Just across the Mazaruni River – 200 meters – from [the indigenous community of] Kambaru is a small scale mining operation, and the noise of the dredge disturbs village life all day and sometimes late into the night. Furthermore, the

24. The community nonetheless prevented Ms. Charlie from accessing the concession (and did so on other occasions, on 21 August and 5 October 2012, when she again tried to transport mining equipment up the Kako River). Consequently, on 18 September 2012, Ms. Charlie filed for an injunction in the High Court, which was granted on 20 September 2012 and restrained the Kako Village Council from preventing her water dredge and other mining equipment “from safe passage through the Kako River.” This injunction remains in effect and a trial date in relation to its extension has been scheduled for 26 February 2013. Finally, maintaining her disregard for the democratically-determined decisions of Kako that were reached in accordance with indigenous peoples’ international guaranteed rights, Ms. Charlie was observed transporting her mining equipment up the Kako River on 26 January 2013 when the majority of the community were attending church services and is now mining in the river adjacent to the boundary of Kako’s titled area.

25. In October 2012, *Toshao* Hastings filed a ‘Statement of Complaint’ with the GGMC in relation to this situation, a complaint that has not been investigated to-date – in contrast, note the mere two day-long period in which the injunction filed by Ms. Charlie was processed and granted and the 20 day-long period in which the injunction against Isseneru was granted in favour of Joan Chang. Moreover, when he filed this complaint with the GGMC, the *Toshao* discovered that numerous additional mining concessions have been granted in the headwaters of the Kako Rivers and other areas traditionally owned by Kako and the other indigenous communities of the Upper Mazaruni area.

26. If this were not bad enough, on 5 November 2012, as a result of Kako’s repeated objections to the entry and operations of Ms. Charlie, a ‘Notice of Motion’ was submitted to the High Court requesting that “the *Toshao* of Kako Village be committed to the Georgetown Prison for his wilful and brazen disobedience and contempt of the Order of the Honourable Madam Justice Dawn Gregory granted the 18th day of September 2012.” Consequently, *Toshao* Hastings stood trial for contempt of court on 5 February 2013, a charge that carries a prison sentence if he is convicted. After discussing preliminary matters, the judge scheduled a hearing on the merits at which he could be found guilty and sentenced for 13 February 2013.

27. As discussed below, the injunction granted to Ms. Charlie is based on provisions of the *Amerindian Act* that the UNCERD explicitly recommended be amended due to their discriminatory nature in 2006. *Inter alia*, the *Amerindian Act* and titles issued pursuant thereto explicitly exclude rivers and creeks and their banks up to 66 feet inland from the mean low water mark and other bodies of waters traditionally owned by indigenous peoples from their title. In practice, this excludes a considerable area from indigenous titles as these areas include numerous rivers and creeks. This exclusion is based on the notion that all Guyanese have the right to traverse these waterways for transportation purposes, even if some of them are not navigable and despite the fact that this objective can be achieved through less restrictive means than denying indigenous ownership (e.g., an easement). It is also in place to allow travellers to camp on river banks, but in reality the 66 feet zone along the river banks is a vehicle to allow miners to extract resources from rivers and their banks, and as such allows for substantial mining operations within indigenous titled areas.

28. This injunction also completely fails to respond to: the fact that the area in question is both traditionally owned by Kako and the question of their ownership rights is presently *sub judice*; that mining may have serious negative impacts on the community in violation of their

effluent from the mine’s tailings pipe makes the river at Kambaru unfit for most uses”). Kambaru is about an hour upstream from Kako.

rights; that no impact assessment has been completed despite the requirement in the *Environmental Protection Act* that assessments must be done; and fails to consider that (if interpreted correctly and without discrimination) granting small- and medium-scale scale mining permits in this area is technically illegal pursuant to the 1989 *Mining Act* and its Regulations (see immediately below).⁵⁷ The issues raised in this instance therefore go far beyond whether Ms. Charlie has a right to unhindered travel on the Kako River, yet none of them were considered by the judiciary or by the executive or by the administrative State agencies that have authority over these matters. The State is well aware of these issues as counsel for the plaintiffs in the Upper Mazaruni case has detailed these concerns in more than one formal complaint sent to various state agencies, all of which remain unanswered.

29. The issue of the *Mining Act* is relevant to the situations of both Kako and Isseneru and demonstrates that Guyana is ignoring its own domestic laws, to indigenous peoples' extreme detriment, as well as violating indigenous peoples' rights through the decisions of its judicial system. Section 112 of the *Mining Act* read in conjunction with Form 5C of the *Mining Regulations* provides that small-scale mining may not take place on "all land occupied or used by Amerindian communities and all land necessary for the quiet enjoyment by Amerindians of any Amerindian settlement, [which] shall be deemed lawfully occupied by them."⁵⁸ Whereas Form 5B of the *Mining Regulations* prohibits medium-scale mining on "lands held under title", which presumably also applies to indigenous lands titled by the State. Further illustrating discrimination against indigenous peoples and the denial of equal protection of the law in practice, this provision is not understood by the State to extend to indigenous lands traditionally owned pursuant to indigenous title, meaning traditional lands not recognised by the State as owned by indigenous peoples pursuant to its land titling procedure.

30. Consequently, the GGMC was and is prohibited by law from granting small-scale mining concessions and permits (which comprise the vast majority of the concessions/permits at issue) in the lands occupied and used by and necessary for the quiet enjoyment of both Isseneru and Kako, irrespective of whether they now have or, at the time the concessions/permits were issued, had title issued pursuant to the *Amerindian Act*. It is well documented however that this provision of the *Mining Act* is routinely ignored by State authorities.⁵⁹ The GGMC is also prohibited from issuing medium-scale permits on State sanctioned titled indigenous lands, but due to discrimination against indigenous peoples and their unequal treatment in Guyanese law and practice, this provision does not extend to lands owned pursuant to indigenous title. While Guyana touts that the *Amerindian Act* provides indigenous peoples with control over small- and

⁵⁷ Bowing to the wishes of the GGDMA, Guyana has exempted small- and medium-scale mining from the requirement to conduct impact assessments and comply with other environmental regulations in the past, as was observed by the UNCERD in 2007. See *Communication of the UNCERD on the Elimination of Racial Discrimination (Follow-Up Procedure)*, 24 August 2007, at p. 2 (observing that it has received "information that would indicate a continued lack of respect for the interests of the indigenous population in a clean environment. The UNCERD has for example been informed that small - and medium - scale miners have been granted one more year of grace from provisions regulating the discharge of waste water into rivers and creeks used by indigenous communities"). At any rate, these requirements are simply not enforced by the State irrespective of whether a formal exemption has been granted.

⁵⁸ *Mining Act*, No. 20 of 1989. Available at: http://www.sice.oas.org/investment/NatLeg/GUY/Mining_e.pdf.

⁵⁹ See *inter alia* Mining and Amerindians in Guyana, *supra* note 8, p. 19-20 (explaining that the GGMC and the MAA have differing views on the intent and scope of this provision (the former believing that it refers only to titled indigenous lands, the latter doing nothing in practice to correct this erroneous interpretation), documenting overwhelming evidence that it is routinely violated, and verifying that the Guyana judiciary has not upheld indigenous peoples' rights in relation to this provision).

medium-scale mining, its innovation is simply to allow indigenous peoples to agree to this kind of mining on their titled lands (in principle now prohibited by the *Mining Act*) and to negotiate benefits with the miner. Disregarding their internationally guaranteed rights, it does nothing however to address indigenous peoples' rights in connection with mining in untitled but traditionally owned lands.

III. GUYANA'S ACTS AND OMISSIONS DIRECTLY CONTRAVENE THE UNCERD'S 2006 RECOMMENDATIONS AND INDIGENOUS PEOPLES' RIGHTS MORE GENERALLY AND THREATEN IMMINENT AND IRREPARABLE HARM TO THE AFFECTED COMMUNITIES

31. The UNCERD concluded in March 2006 that Guyana's 2006 *Amerindian Act* discriminates against indigenous peoples in multiple ways.⁶⁰ Despite the substantial and pressing concerns raised by the UNCERD and other international human rights bodies, Guyana has not amended this discriminatory law in any way and nor has it modified its policy or practice in any way since that time.⁶¹ In fact, as discussed below, it has refused to do so, including in a written communication to the UNCERD that explicitly rejects its recommendations. Racial discrimination is particularly evident in relation to the lack of recognition of and protection for indigenous peoples' rights to own and control their lands, territories and resources traditionally owned or otherwise occupied and used.⁶² Failure to fully recognise and protect these rights threatens indigenous peoples' survival as distinct cultural and territorial entities and violates other internationally guaranteed rights.⁶³ Guyana's present treatment of Isseneru and Kako directly

⁶⁰ CERD/C/GUY/CO/14.

⁶¹ See e.g., *Guyana: 25/04/2000*. CCPR/C/79/Add.121, at para. 21 (expressing concern "that the right of Amerindians to enjoy their own culture is threatened by logging, mining and delays in the demarcation of their traditional lands, that in some cases insufficient land is demarcated to enable them to pursue their traditional economic activities and that there appears to be no effective means to enable members of Amerindian communities to enforce their rights under article 27"); and *Guyana: 30/01/2004*. CRC/C/15/Add.224, at para. 22 and 57 (observing that "discrimination against indigenous children was persistent," expressing its concern at "the living conditions of Amerindian children with regard to the full enjoyment of all rights enshrined in the Convention, especially the degradation of their natural environment and the fact that they are not taught in their own languages," and recommending that the "the current revision of the Amerindian Act reflect the provisions and principles of the Convention on the Rights of the Child").

⁶² The deficiencies in the *Amerindian Act* with respect to territorial rights are chiefly grounded in Guyana's refusal to recognize and respect indigenous peoples' inherent rights to own and control their traditional lands and territories. This refusal is firmly entrenched in the *Amerindian Act*, which fails to enumerate any rights that could form the basis for a territorial regularisation procedure and vests ultimate authority in the Minister with respect to which lands shall be held by Village Councils. Because no rights are specified, this procedure is essentially arbitrary and discretionary, a conclusion recognised in the UNCERD's recommendation on this point (see CERD/C/GUY/CO/14, at para. 16, recommending that Guyana "establish adequate procedures, and to define clear and just criteria to resolve land claims by indigenous communities within the domestic judicial system while taking due account of relevant indigenous customary laws...").

⁶³ See *inter alia Kichwa Indigenous People of Sarayaku. Merits and reparations*, Judgment, 2012 Inter-Am. Ct. H.R. (ser. C) No. 245, at para. 146 (stating that, given the "intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival"); and *Saramaka People, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment, 2008, Inter-Am. Ct. H.R. (ser. C) No. 185, at para. 37 (12 August 2008) (where the Court defined the term 'survival' to mean indigenous peoples' "ability to 'preserve, protect and guarantee the special relationship that they have with their territory', so that 'they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected'").

contravenes the UNCERD's prior recommendations and threatens the very imminent and irreparable harm that the UNCERD sought to prevent when they were adopted.

32. Paragraph 15 of the UNCERD's 2006 concluding observations addresses the powers of indigenous Village Councils as set forth in the *Amerindian Act* and that law's discriminatory distinction between titled and untitled indigenous communities.⁶⁴ In this respect, the UNCERD recommended that Guyana

... remove the discriminatory distinction between titled and untitled communities from the 2006 *Amerindian Act* and from any other legislation. In particular, it urges the State party to recognize and support the establishment of Village Councils or other appropriate institutions in all indigenous communities, vested with the powers necessary for the self-administration and the control of the use, management and conservation of traditional lands and resources.⁶⁵

33. That this discriminatory distinction persists is well illustrated in the Isseneru and Kako situations where both communities are denied their right to "control of the use, management and conservation of traditional lands and resources." In the case of Isseneru, it is denied the right to control mining on its lands (titled and otherwise) on the basis of the date when it acquired title under the *Amerindian Act*. The judiciary reasoned that prior to that date it was an 'untitled community' without powers vested in a Village Council, and thus additionally denied the exercise of these powers on the basis of when miners acquired their (now judicially privileged) 'pre-existing rights'. For Kako, the community is denied the exercise and enjoyment of its rights on the basis of the exclusion of bodies of water and various areas of traditionally owned lands from its title, an exclusion it has sought to correct before the courts since 1998. Given that these areas are not within its title, it is *de facto* and *de jure* treated in the same manner as an untitled community. This discriminatory distinction also extends to the failure of the State to equally protect traditionally owned lands held under indigenous title in relation to the prohibition of medium-scale mining on (State sanctioned) titled lands pursuant to the *Mining Act*. This distinction is not however present in the case of the prohibition of small-scale mining on traditionally occupied and used lands – which are declared to be "lawfully occupied" in the *Mining Act* – but this provision is nonetheless misinterpreted in practice by the State and routinely ignored.

34. Paragraph 16 concerns a series of discriminatory defects with respect to the recognition and protection of indigenous peoples' rights to own and control their traditional lands, territories and resources, including the exclusion of rivers and other bodies of water from indigenous titles.⁶⁶ This also includes the absence of a land titling procedure grounded in and regularising pre-existing indigenous property rights in accordance with the customary tenure systems of

⁶⁴ CERD/C/GUY/CO/14, at para. 15 (noting "with deep concern that, under the *Amerindian Act* (2006), decisions taken by the Village Councils of indigenous communities concerning, *inter alia*, scientific research and large scale mining on their lands, as well as taxation, are subject to approval and/or gazetting by the competent Minister, and that indigenous communities without any land title ("untitled communities") are also not entitled to a Village Council. (Art. 5 (c))").

⁶⁵ *Id.*

⁶⁶ *Id.* at para. 16 (stating that "The Committee is deeply concerned about the lack of legal recognition of the rights of ownership and possession of indigenous communities over the lands which they traditionally occupy and about the State party's practice of granting land titles excluding bodies of waters and subsoil resources to indigenous communities on the basis of numerical and other criteria not necessarily in accordance with the traditions of indigenous communities concerned, thereby depriving untitled and ineligible communities of rights to lands they traditionally occupy. (Art. 5 (d) (v))").

indigenous peoples, rather than, as is now the case, the unilateral and arbitrary decisions of the State. The UNCERD recommended that Guyana

... recognize and protect the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources, and to safeguard their right to use lands not exclusively occupied by them, to which they have traditionally had access for their subsistence, in accordance with the UNCERD's General Recommendation No. 23 and taking into account ILO Convention No. 169 on Indigenous and Tribal Peoples. It also urges the State party, in consultation with the indigenous communities concerned, (a) to demarcate or otherwise identify the lands which they traditionally occupy or use, (b) to establish adequate procedures, and to define clear and just criteria to resolve land claims by indigenous communities within the domestic judicial system while taking due account of relevant indigenous customary laws.⁶⁷

35. Likewise, in paragraph 17, the UNCERD recommended that Guyana "afford non-discriminatory protection to indigenous property, in particular to the rights of ownership and possession of indigenous communities over the lands which they traditionally occupy."⁶⁸ Even a cursory examination of the situations described herein demonstrates that Guyana discriminates against indigenous property rights and denies indigenous peoples' equal protection of the law (see e.g., the discussion on prohibitions of medium-scale mining and the differential treatment of indigenous title in connection therewith above).

36. Paragraphs 16 and 17 (and international legal standards more generally) require that the recognition and regularisation of indigenous title be based on objective criteria that accord with indigenous peoples' rights and which are grounded in their traditional tenure systems. Guyana, however, continues to discriminate against indigenous peoples by applying numerical and other conditions that are not in accordance with indigenous peoples' traditions and rights and by unilaterally and arbitrarily determining the areas to which title shall be granted. The MAA, for instance, routinely rejects requests for title (or the extension of title for communities that already hold title), stating without further justification that the area is 'too big' or 'bigger than Barbados' (an area of 66 square miles), and the community should resubmit a scaled-down request – this response would be precluded if objective criteria were indeed employed and would have to be justified on the basis of said criteria. This also happened in the case of Isseneru, which obtained title in 2007, but to an area that was substantially smaller than that requested and after resubmitting requests a number of times that were rejected by the MAA as being 'too big'. These title grants are thus largely divorced from any meaningful understanding and recognition of the rights of indigenous peoples, including the continuity and sustainability of their traditional land tenure systems and resource management practices.

37. By persisting with the deficient and discriminatory land titling procedures set forth in the *Amerindian Act* – which Guyana now seeks to further concretise with funding from the UNDP – Guyana is explicitly rejecting the UNCERD's recommendations and knowingly disregarding indigenous peoples' internationally guaranteed rights. There remain no explicitly recognised or vested rights to lands and resources in the *Amerindian Act* that could objectively inform the State's current overriding and unreasonable discretion in these matters and all titles are considered "grants" by the State rather than effectuating and regularising pre-existing and inherent rights, and in most cases they bear little resemblance to indigenous customary tenure. The State also continues to discriminate against indigenous peoples by denying them their rights

⁶⁷ *Id.*

⁶⁸ *Id.* at para. 17.

to the subsoil resources pertaining to their territories and to the bodies of water therein. The extreme consequences of these acts and omissions are well illustrated by the situations of Isseneru and Kako in the case of mining (other issues could also be raised, e.g., logging and the establishment of protected areas).

38. Paragraph 19 highlights severe health problems suffered by indigenous peoples in relation to extractive industries and recommends that the State ensure the availability of adequate health services in indigenous areas.⁶⁹ This paragraph recommends, in pertinent part, that the State ensures that impact assessments are conducted and “seek[s] the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities.”⁷⁰ As noted above, the mining concessions and permits affecting Isseneru and Kako, whether within the titled area or in traditionally owned lands, were all issued without notifying them, let alone seeking and obtaining their consent, and (in contravention of extant domestic law, the UNCERD’s recommendations and other norms of international human rights and environmental law) without conducting any form of impact assessment.⁷¹

39. In its communication adopted under its follow-up procedure in August 2007, the UNCERD observed that “no steps have been taken by the State party to implement the recommendations set out in paragraphs 15, 16 and 19 of the concluding observations and; the situation has deteriorated further in certain areas, making the concerns expressed by the UNCERD ... all the more urgent.”⁷² The UNCERD was in part making this statement with reference to the situation of Isseneru.⁷³ It added that “[i]n light of the information available to the UNCERD and the absence of any response from your Government, please note, that failing receipt of the information requested by 30 November 2007, the UNCERD may decide to consider the relevant issues under its early warning and urgent action procedure...”⁷⁴ It further observed that “[a]ccording to information submitted to the UNCERD, the State party continues to deny the indigenous groups right to subsoil and water resources in indigenous areas. Echoing the points discussed above, it additionally highlighted that, “to the extent title has been granted to indigenous groups, this has been done unilaterally by the State party, rather than within the framework of a procedure respecting the inherent rights of the indigenous groups to such areas.”⁷⁵

40. Guyana submitted information to the UNCERD in May 2008, but therein explicitly and implicitly rejected the various recommendations adopted by the UNCERD in 2006, a position that the State continues to adhere to today.⁷⁶ For example, Guyana explicitly rejected the UNCERD’s

⁶⁹ *Id.* at para. 19 (stating that the “UNCERD is deeply concerned that, despite the State party’s efforts mentioned in paragraph 6 above, the average life expectancy among indigenous peoples is low, and that they are reportedly disproportionately affected by malaria and environmental pollution, in particular mercury and bacterial contamination of rivers caused by mining activities in areas inhabited by indigenous peoples. (Art. 5(e)(iv))”).

⁷⁰ *Id.* Pursuant to the *Amerindian Act*, indigenous consent to mining is restricted to titled lands and may, as the State itself explained to the UNCERD in 2006 and 2008 (see Additional information, *supra* note 22, p.16-20), be voided by the Minister in the case of large-scale mining (see note 23 *supra*).

⁷¹ See e.g., *Saramaka People v. Suriname, Merits and Reparations*, Judgment, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, para. 129 (28 November 2007).

⁷² *Communication of the UNCERD on the Elimination of Racial Discrimination (Follow-Up Procedure)*, 24 August 2007, at p. 1.

⁷³ *Id.* at p. 2.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ CERD/C/GUY/CO/14/Add.1, *supra* note 22.

recommendation in paragraph 15 of its concluding observations, stating that it is “impossible to remove the distinction between the titled and untitled communities. It is very clear that one has title (ownership) to the land they occupy and use and the other does not.”⁷⁷ Likewise, it argued that “while communities without legal title have traditional rights as specified in the *Amerindian Act*, they do not have the level of rights as the titled communities.”⁷⁸ These statements not only refute the UNCERD’s recommendations, they also betray the fundamental and discriminatory misconstruction of indigenous peoples’ rights that pervades Guyana’s law and practice; again, the State views indigenous peoples’ rights and title to lands as an exercise of its discretion and good will and not as inherent rights arising from customary tenure that it is obligated to recognise, respect and protect.

41. Finally, the submitting organisations stress that the UNCERD is not the only international body to have raised serious concerns about the substantial deficiencies in the *Amerindian Act*. Indeed, the World Bank and Global Environment Facility were obliged to suspend and withdraw from the proposed ‘Guyana Protected Area System Project’ because the *Amerindian Act* was deemed to be contrary to the Bank’s 2005 Operational Policy on Indigenous Peoples and the State refused, as it continues to do, to amend the offending provisions.⁷⁹ A previously proposed ‘National Protected Areas System Project’ had also been abandoned five years earlier owing to the incompatibility of Guyana’s policy on indigenous peoples and the *Amerindian Act* with the 1991 World Bank policy on indigenous peoples. International human rights law pertaining to indigenous peoples has much more stringent requirements than these World Bank policies, especially with regard to respect for indigenous land and resource rights, yet the World Bank twice determined that the *Amerindian Act*, including its 2006 and current incarnation, was sufficiently sub-standard in relation to indigenous peoples’ rights to require that it withdraw from two important biodiversity conservation projects put forward by Guyana.

IV. CONCLUSION AND REQUEST

42. The threats faced by Isseneru and Kako due to mining on their lands are grave, imminent and substantial. They are faced with irreparable harm to their social, cultural and environmental integrity if mining is allowed to continue and increase in their lands. The discriminatory rulings of the High Court privilege the interests of miners over Isseneru and Kako; allow this mining to take place with impunity; negate the rights of the affected communities; and disregard extant domestic laws such as the *Mining Act* and *Environmental Protection Act*. Denied access to effective domestic remedies, the affected communities – and all other similarly situated indigenous communities in Guyana – are defenceless and in urgent need of international assistance and protection.

43. Such situations demand international oversight and action, particularly in light of Guyana’s explicit refusal to act on the UNCERD’s prior recommendations that seek to remedy the discriminatory aspects of the *Amerindian Act*. Indeed, the UNCERD highlighted the urgent need for Guyana to comply with these recommendations, both by explicitly requesting that it submit information on compliance with one year of their adoption and in its subsequent communication under its follow-up procedure, which stated that its concerns had become “all the more urgent” due to the deteriorating situation in Guyana. The recent judicial decisions that violate the affected communities’ rights are emblematic of this deterioration and need for urgent action as

⁷⁷ *Id.* at p. 11.

⁷⁸ *Id.* at p. 6.

⁷⁹ See C. Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation. The Natural bit often Forgotten Partners* (World Bank, Washington DC., 2008). Available at: http://www.forestpeoples.org/documents/ifi_igo/wb_ips_guyana_may00_eng.pdf.

is the consequent attempt to imprison *Toshao* Mario Hastings for doing nothing more than seeking respect for his community's rights.

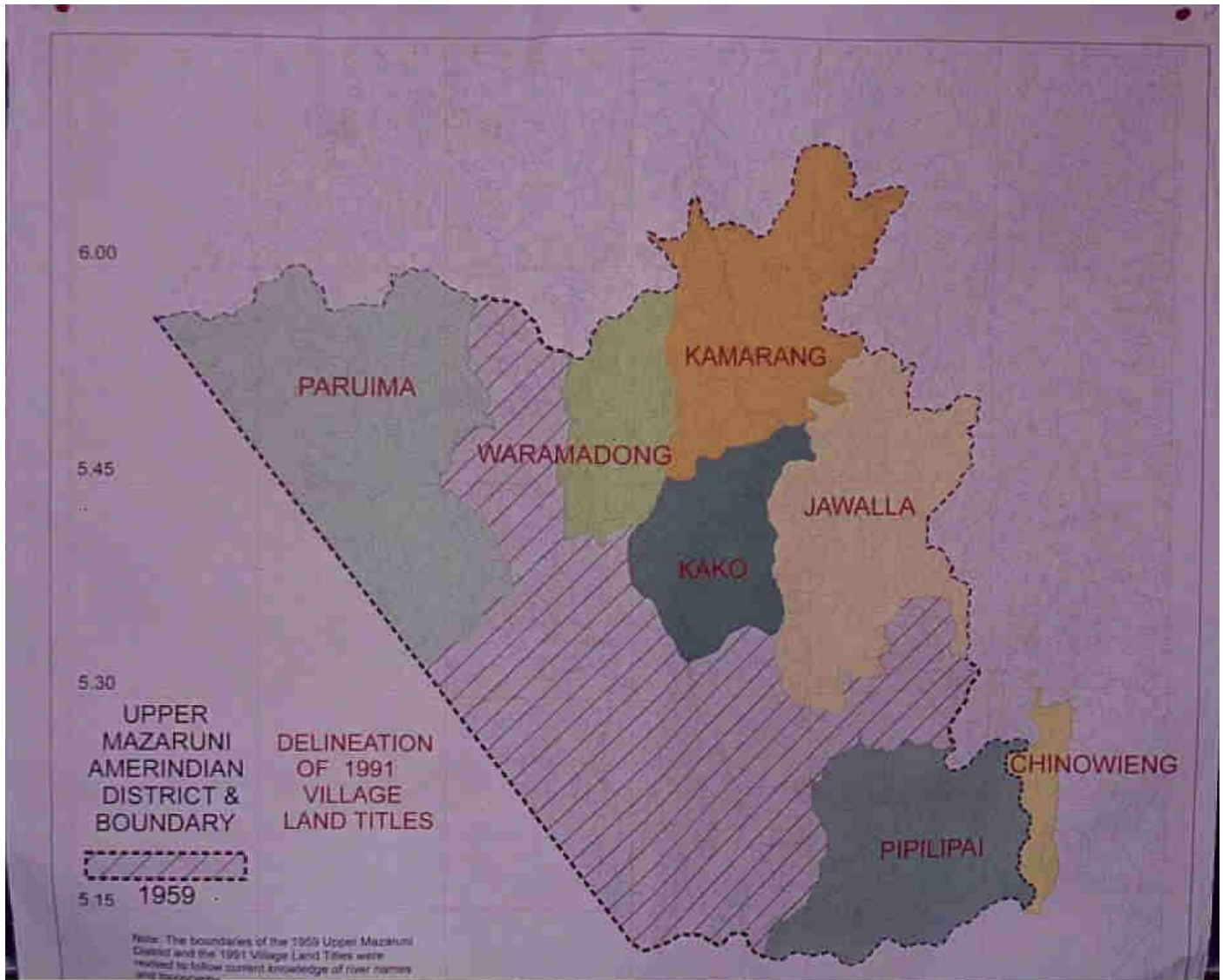
44. In this light, the submitting organisations respectfully request that the Special Procedures:

- a) consider the situations of Isseneru and Kako as urgent situations and act accordingly, including by issuing a joint press release, and
- b) recommend that Guyana:
 - i) amends the *Amerindian Act* of 2006 in line with its concluding observations of 2006 and in particular, that it ensures that indigenous peoples' are able to consent to and control mining on their lands and territories (titled or otherwise), including bodies of water therein, without regard to when title may have been issued and without regard for the date the *Amerindian Act* of 2006 entered into force;
 - ii) immediately instructs the GGMC that it shall not issue mining permits or concessions within indigenous lands and territories, titled or otherwise, without first obtaining the consent of the affected community and/or indigenous peoples in accordance with their customs and traditions and through their freely chosen representatives or institutions, and that it amends Section 53 of the *Amerindian Act* accordingly;
 - iii) immediately suspends and, where necessary, revokes all mining concessions not consented to by Isseneru and Kako and which affect their traditionally owned lands whether titled in accordance with the *Amerindian Act* or not;
 - iv) instructs the GGMC, MAA and any other competent State agency to fully respect the requirements set forth in the *Mining Act* that prohibit the grant of small-scale mining permits on lands traditional occupied and used by and necessary for the quiet enjoyment of indigenous communities irrespective of whether they have title issued by the State;
 - v) instructs the GGMC to not apply the discriminatory distinction between lands held under title issued by the State and lands held under title pursuant to indigenous customary tenure and law with respect to the prohibition of medium-scale mining under the *Mining Act*;
 - vi) amends the *Amerindian Act*, as a matter of priority and urgency, to recognise and reflect the inherent nature of indigenous peoples' rights and to establish procedures for land titling that are grounded in and consistent with those rights, rather than continue to pursue unilateral and arbitrary actions with regard to indigenous land titling that fail to regularise their pre-existing and inherent rights;
 - vii) ensures that indigenous peoples have access to effective and prompt judicial and other remedies to seek protection for their rights, and immediately acts to ensure that the judiciary is made aware of indigenous peoples' rights and passes the necessary laws or regulations to ensure that the type of injunctions that were adopted in relation to Isseneru and Kako are not adopted in the future;

- viii) ensures that all criminal charges brought against *Toshao* Mario Hastings of Kako are immediately dropped; and
 - ix) gives priority to resolving the appeal filed by Isseneru in relation to the injunction granted to Lalta Narine; and,
- c) requests that the UNDP complies with its duties pursuant to Articles 41 and 42 of the UN Declaration on the Rights of Indigenous Peoples and reformulates its 'Amerindian Land Titling' project so as to be consistent with the rights of indigenous peoples in international law and, if Guyana refuses to agree to do so, that it withdraws its consideration of funding for that project.

ANNEX A

Map Comparing State Issued Titles (coloured areas) Held by Six Indigenous Communities in the Upper Mazaruni in relation to the Area Traditionally Owned by them (hatched area) in Accordance with their Customary Tenure System and Laws⁸⁰



⁸⁰ See also A. Butt-Colson, *Land: the case of the Akawaio and Arekuna of the Upper Mazaruni District, Guyana* (Last Refuge Ltd., Panborough, 2009) (an exhaustive study of the Akawaio and Arekuna peoples of the Upper Mazaruni, based on over 40 years of research, which shows in minute detail how these peoples have occupied and used the entire Upper Mazaruni river basin (and also a much wider area) for thousands of years before the time of European colonization). An overview of the book is available at: <http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/guyanalandflyercolsonaug09eng.pdf>