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Contested Territory: The Victory of the Saramaka People vs. Suriname¹

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On November 28, 2007, after more than a decade of struggling to get their voices heard and to receive justice, the Saramaka people won nearly everything they could have hoped for when the Inter-American Court of Human Rights rendered its judgment in the “Case of the Saramaka People *v.* Suriname.”²

Several authorities on international law who have hailed the decision have, in my view, not quite grasped its import. One legal scholar has claimed that this “is the first binding international decision to recognize tribal peoples’ rights to the natural resources located in their lands, indicating that tribal peoples are more akin to indigenous communities than they are to other ethnic, linguistic or religious minorities”³ and another, also commenting on the decision, has claimed that “the Court expanded the scope of protection for groups seeking to protect ancestral lands and resources, moving for the first time beyond indigenous peoples to extend protection to other tribal groups.”⁴ But the recognition of Suriname Maroons as “tribal peoples” and of tribal peoples as equivalent before the law to indigenous groups was recognized by the Court as early as 1993 in the judgment of *Aloeboetoe v Suriname*⁵ and is based on the Court’s use of the definition set forth in Art 1(1)(a) of ILO Convention No. 169, a treaty ratified widely in the Americas and which applies to both indigenous and tribal peoples.⁶ And while the Court ultimately did not address territorial rights in *Aloeboetoe* (although it heard a great deal of testimony on the subject), in the case of *Moiwana Village v Suriname* (2005), it specifically addressed and upheld Ndyuka Maroon land and resource rights, though in a far more limited context than in *Saramaka v Suriname*.⁷

The broader significance of the Court’s 2007 decision, and the related 2008 Interpretation Judgment⁸ is, rather, that for the first time the Court addressed a people’s *corporate* (collective) rights, including the right to self-determination, instead of viewing them merely as an aggregation of individuals or as a community. In this case, the Court established the Saramakas’ right to recognition as a corporate legal identity, despite the lack of such a possibility under current Suriname law. In addition, the Court awarded monetary damages for the first time to indigenous or tribal peoples for the State having caused environmental harm to their lands and resources.

This paper presents the background to this case, describes some of the issues at stake, and considers the legal and political implications for indigenous peoples and Maroons throughout the Americas. I intend it as a preliminary report, a way to share news with Brazilian and other colleagues who may not yet be aware of the case.⁹

Suriname's Maroons, who today number some 120,000 people, are the largest Maroon population in the Americas.¹⁰ The Saramakas, one of the two largest Maroon peoples, number about 55,000. Although the territory in which they have lived for over three hundred years began to be threatened by State and other outside interests in the middle of the twentieth century, their organized struggle to protect their lands began only in the late 1990s.¹¹

In 1996, Saramaka women on their way to their gardens began to find their paths blocked by Chinese laborers. They heard heavy earth-moving machinery in the distance. When village headmen went to have a look, they were told that the land now belonged to the Chinese and that if they interfered with logging operations, they would be arrested and imprisoned. Soon, soldiers from the Suriname army were standing guard at the logging sites, refusing entry to Saramakas. The Saramakas began to organize against this invasion of their lands, but the depredations continued. Large swaths of the territory their ancestors had fought for, and which had been granted to Saramakas by the Dutch in the treaty of 1762, were now occupied by Chinese loggers, who had by the mid-1990s received official concessions from the Suriname government to much of Saramaka territory.

Over the course of several years, as the logging continued, Saramaka leaders went from village to village—there are nearly seventy—explaining what was happening and conducting consultations. With the help of NGOs, they began to map their territory, using GPS technology, showing the multitudinous ways that their communities depended on the forest and its resources. In 2000, with the assistance of human rights lawyers (in particular, Fergus MacKay of the Forest Peoples Programme) and Hugo Jabini, a Saramaka studying law at the university, they filed a petition with the Inter-American Commission on Human Rights. Based on this petition, the Commission requested in 2002, and again in 2004, that Suriname suspend all logging concessions and mining exploration in Saramaka territory until the substantive claims raised in the case had been investigated. These “precautionary measures,” in effect injunctions, did slow logging activities, but after the government of Suriname failed to comply with the substantive remedial measures adopted by the Commission in its report of March 2006,¹² the Commission passed the case along to the Inter-American Court for Human Rights. As the acknowledged anthropological expert on Saramaka land-use and culture, I participated by written affidavits and reports in the various petitions and other filings before the Commission.

In May, 2007, the Inter-American Court, seated in San José, Costa Rica, heard the case of the Saramaka People v. Suriname. Three sets of lawyers pleaded the case—those representing the Saramakas, those representing the Inter-American Commission, and those representing the Republic of Suriname. During the contentious and tense hearing, which lasted two days, I served as expert witness for the Saramakas and Sally served as official translator for the two Saramaka witnesses. When the long second day of testimony, cross-examination, and concluding arguments was over, we resigned ourselves to the months of waiting for the Court to hand down its ruling.

In their decision of November 2007, the Court addressed eight issues.

First, do the members of the Saramaka people make up a tribal community subject to special measures that ensure the full exercise of their rights? After reviewing a great deal of specific

testimony, much of it anthropological, the Court concluded that

the members of the Saramaka people make up a tribal community ... that is, not indigenous to the region, but that share similar characteristics with indigenous peoples ... whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions.

The Court then turned to its second question, whether Article 21 of the American Convention (the right to property) protects the right of the members of tribal peoples to the use and enjoyment of *communal* property. They ruled that

the members of the Saramaka people are to be considered a tribal community, and that the Court's jurisprudence regarding indigenous peoples' right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival.

And that "the State [of Suriname] has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of the Saramaka community to said territory."

Taking up their third question, whether the State of Suriname has recognized the right to property of the members of the Saramaka people derived from their system of communal property, the Court answered, after various deliberations, No, "the State has not complied with its duty" in this respect.

The Court next moved to its fourth and more politically dicey question, "whether and to what extent the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their alleged traditionally owned territory." The State had asserted that "all land ownership, including all natural resources, vests in the State, and that, as such, the State may grant logging and mining concessions within alleged Saramaka territory, while respecting as much as possible Saramaka customs and traditions."¹³ In contrast, the lawyers for the Saramakas had argued that land concessions for forestry and mining awarded by the State to third parties on territory possessed by the Saramaka people, without their free, prior, and informed consent, violates their right to the natural resources that lie on and within the land, and that all these resources belong to the Saramakas pursuant to the right to self-determination.

Here, the Court decided first to require proof of *traditional use* of a resource by the Saramakas as a prerequisite to establishing their ownership rights in that resource, and therefore set out to "determine which natural resources found on and within the Saramaka people's territory are essential for the survival of their way of life, and are thus protected under Article 21 of the Convention." In this regard, the State argued that the Saramakas (whom they claimed were in the process of modernization and assimilation) no longer use the resources of the forest

and therefore no longer have any claim to them. But the Court patiently sorted the evidence. I quote from their deliberations on logging, as an example:

Thus, with regard to timber logging, a question arises as to whether this natural resource is one that has been traditionally used by the members of the Saramaka people in a manner inextricably related to their survival. In this regard, Dr. Richard Price, an anthropologist who gave his expert opinion during the public hearing in the present case, submitted a map in which the Saramaka people made hundreds of marks illustrating the location and variety of trees they use for different purposes. For example, the Saramakas use a special type of tree from which they build boats and canoes to move and transport people and goods from one village to another. The members of the Saramaka community also use many different species of palm trees to make different things, including roofing for their houses, and from which they obtain fruits that they process into cooking oil.

The Court concluded that the natural resources of the forest and the river, as outlined in the map made by Saramakas, are indeed essential to their continued physical and cultural survival as a people, that these resources fall under the protection of the American Convention, and that these resources form part of the Saramaka's corporate ownership rights.

The remaining questions addressed by the Court regarded the right of the State to intrude on Saramaka territory under certain circumstances for resource extraction (so-called "development projects") as well as the payment of damages for past violations by the State. The Court concluded first, that

in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of [logging or mining] concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards [in addition to the general requirements applicable to all persons, such as necessity and proportionality].¹⁴ First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.¹⁵

And finally, "the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also *to obtain their free, prior, and informed consent*, according to their customs and traditions" (my italics). In its 2008 Interpretation Judgment (Para. 17), the Court further specified (and expanded) the conditions under which free, prior, and informed consent would need to be obtained:

Depending on the level of impact of the proposed activity, the state may additionally be required to obtain consent from the Saramaka people. The tribunal has emphasized that when large-scale development or investment projects could affect the integrity of the Saramaka people's lands and natural resources, the state has a duty not only to consult with the Saramakas, but also to obtain their free, prior and informed consent in accordance with their customs and traditions.¹⁶

So the test now becomes the extent to which a large project affects the integrity of indigenous and tribal territories. Clearly, the details of how this applies in practice will need to be worked out in future cases.

Regarding the prior logging concessions granted by the State to Chinese and other multinationals without Saramaka consent, the Court noted, on the basis of the testimony it had heard, that

the Saramaka people have been left with a legacy of environmental destruction, despoiled subsistence resources, and spiritual and social problems, but they received no benefit from the logging in their territory. Government statistics submitted into evidence before the Court prove that a considerable quantity of valuable timber was extracted from the territory of the Saramaka people without any compensation.

After deliberations about the value of the timber extracted and the environmental damages caused, the Court determined a substantial monetary award to go the Saramaka people.

And finally, the Court underlined what it saw as a key element of their ruling:

The Court considers that the right to have their juridical personality recognized by the State is one of the special measures owed to indigenous and tribal groups in order to ensure that they are able to use and enjoy their territory in accordance with their own traditions. This is a natural consequence of the recognition of the right of members of indigenous and tribal groups to enjoy certain rights in a communal manner.

The Court continued,

In conclusion, the members of the Saramaka people form a distinct tribal community in a situation of vulnerability, both as regards the State as well as private third parties, insofar as they lack the juridical capacity to collectively enjoy the right to property and to challenge before domestic courts alleged violations of such right. The Court considers that the State [of Suriname] must recognize the juridical capacity of the members of the Saramaka people to fully exercise these rights in a collective manner. This may be achieved by implementing legislative or other measures that recognize and take into account the particular way in which the Saramaka people view themselves as a collectivity capable of exercising and enjoying the right to property. Thus, the State must establish, in consultation with the Saramaka people and fully respecting their traditions and customs, the judicial and administrative conditions necessary to ensure the recognition of their juridical personality, with the aim of guaranteeing them the use and enjoyment of their territory in accordance with their communal property system, as well as the rights to access to justice and equality before the law.

In other words, Suriname must rewrite its laws, including the Constitution if necessary, both to recognize indigenous and Maroon groups as legal personalities and to permit such groups to own and effectively control property communally.

The Court's ruling ends with a series of ten actions that the government of Suriname must take, the most important of which are that the State

shall delimit, demarcate, and grant collective title over the territory of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people;

shall grant the members of the Saramaka people legal recognition of the collective juridical capacity, pertaining to the community to which they belong, with the purpose of ensuring the full exercise and enjoyment of their right to communal property, as well as collective access to justice, in accordance with their communal system, customary laws, and traditions;

shall remove or amend the legal provisions that impede protection of the right to property of the members of the Saramaka people and adopt, in its domestic legislation, and through prior, effective and fully informed consultations with the Saramaka people, legislative, administrative, and other measures as may be required to recognize, protect, guarantee and give legal effect to the right of the members of the Saramaka people to hold collective title of the territory they have traditionally used and occupied as well as their right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system;

shall adopt legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs, or when necessary, the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory, and to reasonably share the benefits of such projects with the members of the Saramaka people, should these be ultimately carried out;

shall allocate the amounts set in this Judgment as compensation for material and non-material damages in a community development fund created and established for the benefit of the members of the Saramaka people [a total of some \$750,000 US].

In January 2008, the government of Suriname publicly declared that it would fully implement the judgment of the Court. The Saramakas leaders, while welcoming this statement, vowed to remain pro-active in keeping the government to the timeline laid out by the Court and in seeing that the various aspects of the complex judgment are indeed implemented.¹⁷

In April of 2009, two of the leaders of the Saramakas in this battle for their lands were awarded The Goldman Prize for the Environment, often called the Environmental Nobel Prize. For this, they were brought to San Francisco and then to Washington, D.C., where they each received a check for 75,000 US dollars. Under the banner of "A New Precedent for Indigenous and Tribal Peoples," the Goldman Foundation cited Saramaka Captain Wazen Eduards and Saramaka law student Hugo Jabini for having

guaranteed territorial rights not just for the Saramaka, but all of the Maroons and indigenous people.... In addition, because the case was settled by the binding Inter-American Court, Eduards and Jabini changed international jurisprudence so that free, prior and informed consent will be required for major development projects throughout the Americas. They saved not only their communities' 9,000 square-kilometers of forest, but strengthened the possibility of saving countless more.¹⁸

The significance of the Court's Saramaka judgment for other peoples in the Americas remains to be worked out in future cases. A "tribal peoples" argument has been used, based on ILO 169 (and its Article 1 calling for self-identification [consciousness of an indigenous or tribal identity]), for some "rural black communities" in Brazil, Colombia, and Ecuador.¹⁹ But in my view, it remains something of a stretch to argue that most rural black communities are "tribal peoples" (since they do not generally possess "social, cultural and economic characteristics ... different from other sections of the national community," nor do they necessarily "regulate themselves, at least partially, by their own norms, customs, and/or traditions" (the criteria used by the Court in the 2007 Saramaka case). In this sense, the "cultural" argument which formed part of the Court's basis for deciding the Saramaka case—and which was wholly appropriate to the needs of these Maroons, and of other Suriname Maroons (who clearly form culturally distinct groups within the State)—would seem to have more limited application to most non-indigenous communities in the Americas, such as many *remanecentes de quilombos*, who are seeking rights to their traditional territories.²⁰ In these cases, it may well be that arguments weighted more on grounds of racial discrimination and equality will be necessary to steer the Court in directions that will more clearly cover rural black communities outside of Suriname. In the Suriname judgment, the Court did several times invoke the International Convention for the Elimination of All Forms of Racial Discrimination in interpreting the content of the American Convention, and it referred to decisions and reports of the United Nations Committee on the Elimination of Racial Discrimination more than a dozen times. But the Court has not yet directly addressed issues of structural racism of the sort that is so pervasive in Latin America, and rulings affecting the property rights of large numbers of communities in the hemisphere may well depend on arguments that are more heavily weighted in this direction.²¹

For the present, the Saramakas and other Suriname Maroons will need to be vigilant in seeing that Suriname implements the Judgment of 2007 (and the Interpretive Judgment of 2008). The coming several years will be pivotal, on the ground in Suriname, in determining whether the rulings of the Court in San José have the desired local effects. The Saramaka leaders, negotiating with the government of Suriname, will need to draw on all their considerable political and warrior skills to assure that their abstract legal victory brings the desired concrete benefits to their long-suffering but proud people.

ENDNOTES

¹ I wish to thank Fergus MacKay for his many suggestions. I, however, retain sole responsibility for errors.

² The full text is available at:

www.forestpeoples.org/documents/s_c_america/suriname_iachr_saramaka_judgment_nov07_en_g.pdf

³ Lisl Brunner, “The Rise of Peoples’ Rights in the Americas: The *Saramaka People* Decision of the Inter-American Court of Human Rights,” 7 Chinese JIL (2008), para. IV.11.

⁴ Dinah L. Shelton, *Yearbook of International Environmental Law 2007*, Oxford University Press, 2008.

⁵ David J. Padilla, “Reparations in *Aloeboetoe v. Suriname*,” *Human Rights Quarterly* 17 (1995):541-555; Richard Price, “Executing Ethnicity: The Killings in Suriname,” *Cultural Anthropology* 10(1995):437-471.

⁶ That article defines tribal peoples as “peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.” The ILO’s concept of tribal peoples was developed largely for the Asian context, in particular to address alleged difficulties in Asia of establishing aboriginality, an integral component of the definition of “indigenous peoples.” In the Americas, it would seem to apply mainly to Maroons such as those in Suriname and French Guiana, who can demonstrate significant sociocultural difference from surrounding populations. Nonetheless, Brazil, Colombia, and Ecuador each apply ILO 169 in certain respects to some Afro-descendant groups.

⁷ Fergus MacKay (ed.), *Moiwana zoekt gerechtigheid: De strijd van een Marrondorp tegen de staat Suriname*, Amsterdam, KIT Publishers, 2006.

⁸ The full text is available at:

www.forestpeoples.org/documents/s_c_america/suriname_iachr_saramaka_judgment_aug08_en_g.pdf

⁹ [note added 12/2009:] In 2011, *** Press will publish my recently-completed *Rainforest Warriors: Human Rights on Trial*, a much fuller analysis of the Saramakas’ struggle to obtain legal recognition of their land rights.

¹⁰ Numerous references to Suriname Maroon (and Saramaka) history and ethnography may be found at www.richandsally.net

¹¹ In the 1960s, the colonial government and Alcoa (which had mined bauxite in coastal Suriname since 1916) constructed a massive hydroelectric dam to provide electricity for Alcoa’s smelter, with the excess going to light up nearby Paramaribo. Some 43 Saramaka villages (28, if one counts only large villages), home to some 6,000 inhabitants, disappeared under the new artificial lake that covered nearly half of traditional Saramaka territory. The flooded-out people were given the choice of moving below the dam into newly constructed, grid-pattern towns specially built for them (4000 people made this choice) or moving upriver, above the lake, to

squeeze their new villages in between already existing villages, creating considerable extra pressure on already scarce agricultural land. In their 2007 decision, the Court chose not to address these “legacy” issues, although they formed part of the Saramakas’ petition, on the grounds that they occurred before the creation of the American Convention on Human Rights.

¹² Inter-American Commission for Human Rights, Report No. 9/06, Admissibility and Merits, Case 12.338, The Twelve Saramaka Clans (Los), Suriname, March 02, 2006. This report, available at www.forestpeoples.org/documents/s_c_america/suriname_iachr_12_saramaka_clans_mar06_eng.pdf, provides a useful description of the history of the case to that date.

¹³ The State had long held the position that “Indigenous peoples and Maroons are permissive occupiers of privately held State lands and that whatever rights they may have will always be superseded by the larger interests of the State. Further, these rights are simply temporary protections conceded by the State during a transitional period in which Indigenous peoples and Maroons are to be assimilated into the larger, and inherently superior, Surinamese society and economy” (Ellen-Rose Kambel and Fergus MacKay, *The Rights of Indigenous Peoples and Maroons in Suriname*, Copenhagen: IWGIA, 1999, p. 178).

¹⁴ Paragraph 37 of the Court’s 2008 Interpretation Judgment reads in full:

The Court emphasized in the Judgment that the phrase “survival as a tribal people” must be understood as the ability of the Saramaka 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.” That is, the term survival in this context signifies much more than physical survival.

¹⁵ In its concluding remarks (Para. 158), the Court added a fourth element, a duty to implement “adequate safeguards and mechanisms in order to ensure that these activities do not significantly affect the traditional Saramaka lands and natural resources.”

¹⁶ In this Interpretive Judgment (Para. 41), the Court also reduced the large scale project requirement by requiring that cumulative impacts be assessed and factored.

¹⁷ Indeed, a few months after the State said it would implement the judgment, it submitted a request to the Court asking for an interpretation of key aspects of that judgment, resulting in the Court’s Interpretive Judgment of August 2008. In this document, the State’s interpretation of the original judgment—most of which would have severely undermined the Saramaka people’s rights—were rejected by the Court, which also further developed its reasoning on the consent standard and explained key terms in the original judgment.

¹⁸ <http://goldmanprize.org/2009/southcentralamerica>. This Internet site includes a 5-minute video about the Saramaka case.

¹⁹ Although the Saramaka analogy, particularly through the use of citations from my *First-Time* (Baltimore: Johns Hopkins University Press, 1983, 2nd edition University of Chicago Press, 2002), has been invoked in Brazilian legal cases involving *remanescentes de quilombos*, I remain concerned, intellectually and morally, about what is, ultimately, an altruistically-motivated anthropological sleight-of-hand—see Richard Price, “Scrapping Maroon History: Brazil’s Promise, Suriname’s Shame,” *New West Indian Guide* 72(1998): 233-255”; “Reinventando a história dos quilombos: rasuras e confabulações,” *Afro-Ásia* 23(2000):241-265. In my own testimony before the Court, both in *Aloeboetoe* and the present case, I insisted on Saramakas’ unique historical and spiritual relationship to their territory, and these arguments clearly influenced the judgments.

²⁰ In fact, in the Saramaka judgment, the Court deliberated on a set of arguments that went beyond an essentialized notion of culture, including these people’s distinct and ongoing (developing) relation to their territory, which they continue to regulate wholly or partially by customary norms. On the other hand, there did emerge a disturbing essentialist leaning in some of the Court’s reasoning: if the use of a resource is not “traditional,” it is not covered by property laws, so that, for example, the State could argue that eco-tourism permits in Saramaka territory need not be approved by Saramakas since eco-tourism is not a traditional activity. In the Saramaka hearing, the Court seemed to dismiss the Saramaka witnesses’ claims that they considered that the forest belonged to them “from the tops of the trees to below their deepest roots,” insisting instead that Saramakas demonstrate that they traditionally used particular resources (trees, clay from the riverbanks, and so forth), in order for them to be protected by the judgment. The Court’s reliance in this case on Western ideas about “tradition” recalls, for me, their inability in the *Aloeboetoe* case to accept the logic of matriliney as compatible with “human nature” (see Price, “Executing Ethnicity,” pp. 459-461).

²¹ In a paper presented at the LASA meeting in Rio de Janeiro in June 2009 (“When Afro-Descendants became ‘Tribal Peoples’: The Inter-American System and Rural Black Communities”), Ariel E. Dulitzky criticizes the Court (and, by implication the plaintiffs, their lawyers, and their supporting anthropologist) in the Saramaka case for stressing what he considers “cultural” rather than racial criteria in their arguments. But the idea of a one-size-fits-all argument for Afro-Descendants in the Americas (who range all the way from President Obama to Saramakas) belies the variety of historical and ethnographic realities these diverse peoples represent. I would suggest that arguments making the strongest possible case for each particular historical/ethnographic situation continue to be called for, as was done in the Saramaka case, and I would express the hope that, as more cases are adjudicated by the Court, cracks will begin to appear in the widespread systems of structural racism that Dulitzky wishes to target.