



February 2009

Indigenous Peoples Right to Property in
International Law: A Look at Saramaka People v.
Suriname, The Inter-American Court of Human
Rights

Contact
Author

Start Your Own
SelectedWorks

Notify Me
of New Work

The Indigenous People's Right to Property in International Law: *Saramaka People v. Suriname*, Inter-American Court of Human Right

In the past forty years international law has recognized certain protections afforded to indigenous peoples. As a result, the International Labour Organization, the United Nations, the World Bank, and other regional human rights systems have made changes within their competence and granted indigenous communities special rights. Among these protections, international law recognizes the right to collectively own their traditionally occupied land and to control the natural resources found within. This has generated much debate as international law also recognizes the right of states to own, control, and exploit all the natural resources found within their territories.

The most recent decision by the Inter-American human rights system concerning the property rights of indigenous communities over their ancestral lands is *Saramaka People v. Suriname*.¹ The case is important because it defines a state's human rights obligations when it exploits the natural resources found within the indigenous people's territory. *Saramaka* highlights how the Inter-American Court of Human Rights (Court) has tried to address this complex issue. Cautious about the profound legal implications at hand, it provided a rather conservative approach in balancing the protection granted to the indigenous people and the

¹ I/A Court H.R., *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172

state's sovereign power to exploit the resources in its territory. This paper will discuss the factors addressed by the Court and will propose an alternative methodology in balancing these interests.

Overview: Indigenous Rights in the Inter-American Court of Human Rights

The history of the right to land within the Court's jurisprudence can be traced to the *Awas Tingis v. Nicaragua* case.² This was the first time that a human rights court recognized the collective property rights of indigenous groups over the land they have traditionally occupied. The Court defined collective property right as the tradition among indigenous peoples that does not place ownership of land in the hands of one individual, but in the whole community.³ The Court also emphasized the importance of land to the indigenous people:

“Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their culture, their spiritual life, integrity, and their economic survival.”⁴

The Court also explained that the right to land is “not merely a matter of possession and production, but one intertwined with the preservation of their [indigenous peoples'] cultural and spiritual legacy.”⁵ Moreover, the possession of land by indigenous people should be enough to trigger the state's recognition of the collective property rights, given the indigenous customary right to hold communal property. The Court ordered Nicaragua to adopt the necessary measures to protect the use and enjoyment of the lands belonging to the community and to include the petitioners in the planning and implementation of these measures.

² I/A Court H.R., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment of August 31, 2001. Series C No. 79

³ Id, parr. 149

⁴ Id, parr. 150

Four years later, in *Moiwana Community v. Suriname*,⁶ the Court dismissed the state's argument that the right to property of the indigenous people was time-barred. It concluded that in cases like this one, where the state is directly responsible for the original displacement of the population and does not facilitate for their safe return, the right to claim collective property is not lost.⁷

Later in *Yakye Axa Indigenous Community v. Paraguay*,⁸ the Court reiterated the collective nature of the indigenous people's right to property. However, it recalled that the right to property is not unlimited and acknowledged that the government can establish restrictions on the enjoyment of private property when these are: a) established by law; b) necessary; c) proportional, and d) for "the purpose of attaining a legitimate goal in a democratic society."⁹ Although restrictions may be permissible, states must be aware that in the case of indigenous property such limitations could affect other basic rights, such as "the right to cultural identity and to the very survival of the indigenous communities and their members."¹⁰ Nevertheless, the state is required to provide compensation that takes into account the community's dependency on these resources for their survival. If the restrictions result in the permanent loss of the right to the ancestral lands the state, in coordination with the indigenous community, must provide alternative lands as part of the compensation.¹¹

⁶ I/A Court H.R., *Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124

⁷ Id, parr. 128- 135

⁸ I/A Court H.R., *Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125

⁹ Id, parr. 145

¹⁰ Id, parr. 147

¹¹ Id, parr. 151

The Court had an opportunity to examine the validity of the restrictions imposed on indigenous property in *Sawhoyamaxa Indigenous Community v. Paraguay*.¹² The Court reviewed its jurisprudence on indigenous land rights and drew the following conclusions:

- 1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title;
- 2) traditional possession entitles indigenous people to demand official recognition and registration of property title;
- 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and
- 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality.

The Court determined that the indigenous people's right to restitution for the loss of property is related to their unique dependency on land.¹³ If such relationship exists after a prolonged period of time, restitution shall be awarded. On the other hand, if the indigenous community no longer exercises the customs or traditions that made them so dependent on land, then the state has no duty to provide restitution.¹⁴

Although the Inter-American Court had recognized the indigenous people's right to their traditional territories and to restitution, it was not until *Saramaka v. Suriname*, that it had to decide how a state can exploit the natural resources found within the indigenous territory without

¹² I/A Court H.R., *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146

¹³ *Sarahoya Community*, parr. 128

¹⁴ *Id.*, parr. 132 - 135

affecting the rights of its inhabitants¹⁵ The controversy that the Court faced was not only a human rights issue, but one with repercussions on the development field and international law.

In *Saramaka*, Suriname was accused of violating the American Convention because it failed to provide legal property title to the traditionally occupied lands of an indigenous community. It was also argued that Suriname had granted lodging and mining concessions within the indigenous territory without consulting the community and without their expressed consent. The Saramaka People contended that these acts violated the community's property rights.

The Court reiterated its previous jurisprudence recognizing collective property rights and the state's authority to restrict them.¹⁶ However, a state will be liable when the restrictions imposed on the indigenous property amount to "a denial of the traditions and customs of the indigenous community in a manner that endangers the very survival of the group and its members".¹⁷ It then articulated, for the first time, the elements of a three-pronged test that would allow states to make an appropriate determination as to the effects of the restrictions.

First, the State must ensure the effective participation of the indigenous community regarding any development plan or project. The Court stressed that the state has a duty to consult the indigenous people during the early stages of any proposed plan, respecting their customs and traditions. In certain cases, the state is not only required to consult, but to obtain the "free, prior and informed consent" of the affected group.¹⁸ After examining various international instruments, the Court concluded that a state must obtain consent in any "large scale development or investment projects" that could have a major impact in the indigenous territory.¹⁹

¹⁵ I/A Court H.R., *Saramaka People. v. Suriname*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172

¹⁶ Id, parr. 147
¹⁷ Id, parr. 128
¹⁸ Id, parr 134
¹⁹ Id

Secondly, the state must guarantee that the community will receive a reasonable benefit from such plan and rejected compensation packages that were similar to those awarded in expropriations cases. The difference is that indigenous people must be compensated not only for the deprivation of land, but for the loss of regular “use and enjoyment of their traditional lands and of those natural resources necessary for their survival.”²⁰ The compensation is not only for the individual, but for the community’s relationship with the land.

The third and final part of the three-pronged test requires the state to issue independent environmental and social impact assessment plans before placing any restriction.

In deciding if Suriname complied with these conditions, the Court first evaluated if Suriname ensured the effective participation of the community. To determine if the state needed to consult the community or ask for their consent, the Court examined if the restricted resources were “inextricably related to the survival of the group”.²¹

The Court found that the Saramaka People have traditionally “harvested, used, sold and traded timber and non-timber products, and continue to do so today” and concluded that the use of trees was necessary for the survival of the community.²² Thus, the state had a duty to obtain the expressed consent of the indigenous community before granting lodging concessions over their territory.²³ The Court further noted that the state had not shared the revenues generated by the lodging operations with the community, nor had it produced the required environmental and social impact assessment plans. After examining the evidence offered to satisfy the use-restriction test, it ruled that Suriname had failed to comply with all of the requirements.

²⁰ Id, parr. 139

²¹ Id, parr. 122

²² I/A Court H.R., *Case of the Saramaka People. v. Suriname*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, parr. 145

In determining the validity of the gold mining concessions, the Court found that gold was not absolutely necessary for the indigenous population's survival.²⁴ Therefore, the state did not need the expressed consent from the indigenous people to satisfy the effective participation requirement. Nevertheless, the Court did recognize that since the project could potentially affect the fishing, transporting, and harvesting activities of the community and damage the quality of their water supply, the state's duty was to prove that it had consulted with the affected indigenous community before awarding the concessions.²⁵ Suriname also failed to consult with the affected community, share the revenues from the gold mining activities with them, nor did it produce the required environmental and social impact plans.

As a result, the Court ordered Suriname to change its domestic legislation to enable the legal recognition of the customary titles of the territorial lands of the indigenous community and its demarcation. It also instructed the state to repair the environmental damages caused by the logging companies and to provide equitable compensation to the community.

Critique and Recommendation

One of the most important developments in international law is the requirement that the state recognize the rights of the indigenous people, including its obligation to seek the active participation of an indigenous community when a proposed project may have an adverse effect on them. As explained, in cases where a project significantly affects an indigenous community, the state is obliged to their consent. This entitles an affected community to an implicit veto power. Nevertheless, the obligation to obtain the consent of a community as a means of assuring their effective participation is quite new and, both states and international institutions are only beginning to grasp the scope of this obligation.

²⁴ Id, parr. 155 - 157

In its first opportunity to address the matter, the Court in *Saramaka* decided to explain the difference between the state's duty to seek consent and its duty to consult the indigenous people. After reviewing multiple international instruments addressing this very issue, it concluded that only projects that directly impact resources that are essential for the community's survival will require the community's consent, while the projects affecting non-essential resources will only require the state to consult the community. In applying this criterion, the Court found that the state needed to seek consent before granting the logging concessions, but only needed to consult with the community before granting the mining concessions.

The Court's reasoning, however, produces mismatched results. In future cases, it would be safe to predict that the Court would not find a state in violation when it exploits other subsoil resources, such as oil and gas. Since no indigenous community is known to use oil or natural gas as part of their traditional or customary practices, the Court must rule that those resources are not essential for their survival. In principle, the state would be allowed to build, exploit or develop almost anything within the territory of an indigenous community regardless of the indirect consequences that these may have on other natural resources and consequentially, on the concerned community. This approach ultimately penalizes the indigenous community for not having the technological expertise needed to utilize all the resources found within its territory. The Court's method also hinders the state's ability to exploit certain resources. For example, in the event that a state endeavors on a water management project within the confines of the indigenous territory, the state would be required to seek the indigenous people's consent because water is a resource that is essential for the survival of any group. Similarly, new energy efficient technologies like, air and solar power, along with non-carbon fuel technologies will most likely require the consent of the community.

An alternative proposal would be to follow the methodology applied by the Inter-American Development Bank (Bank) in its Operational Policy on Indigenous Peoples and Strategy for Indigenous Development.²⁶ This methodology was created by financial, development, and environmental experts with the help of various indigenous communities. It aims to minimize the foreseeable adverse impacts of a development project on an indigenous population. To achieve this, it focuses not on the characteristics of a resource, but on the overall impact that a project would have on the affected community. Like other international institutions, the Bank's policy ensures the effective participation of the indigenous people. Thus, before approving a project, it requires that a state proves that it consulted with the affected community. When the Bank considers the impact of a development project to be "significant", it requires the state to obtain the expressed consent from the affected indigenous community.

To determine if the impact is significant, the Bank will analyze: 1) the physical or geographical scope of the project; 2) the duration in time or permanence; 3) its intensity – degree of degradation or disturbance of the affected system; 4) the availability and ease of implementing mitigation techniques; 5) the capacity to implement protective measures; and 6) other special circumstances. The determination to consider the impact as significant is called a value judgment which must be supported by professional studies, data or testimony from experts in the field, along with the opinion of the affected people.

The Bank's methodology appears to provide a more accurate and robust assessment of the severity of a particular limitation to the right to property, specifically in measuring the effects that a project might have. Although this approach was originally intended for those working in

²⁶ Inter-American Development Bank, Operational Policy on Indigenous Peoples and Strategy for Indigenous Development, Sustainable Development Department Sector Policy and Strategy Series, Washington, D.C. (2006)

the development field, it incorporated the same protections that are afforded to indigenous people under international law.

The Court's methodology, on the other hand, misses the point. It limits the implicit veto power of the indigenous group only to cases where an "essential resource" is affected. The problem with this approach is that it fails to acknowledge the severity of all other damages caused by a development project, including among others, the effects from the exposure to chemicals, air and subsoil pollution, as well as related diseases and contamination to the water and food supplies.

The Court must reevaluate its methodology, which is too simplistic and does not leave space for a thorough analysis of the total consequences entrenched in a large scale development project. As discussed in this paper, the models implemented by the Inter-American Development Bank are more accurate in measuring those effects. The Court could greatly improve its reasoning by incorporating some of the key components of the models used by the Inter-American Development Bank.