



The Bernard and Audre
RAPOPORT CENTER
For Human Rights and Justice
The University of Texas at Austin
School of Law

SUMMARY

Between the Law and Their Land: Afro-Brazilian Quilombo Communities' Struggle for Land Rights

The Bernard and Audre Rapoport Center for Human Rights and Justice at the University of Texas recently sponsored a human rights delegation to Brazil to examine the present situation of Brazil's quilombo communities and their struggle for land rights. This document contains a summary of the Rapoport delegation's report. The Center's policy recommendations for the Brazilian and U.S. governments, international aid and financial institutions, and non-governmental organizations follow this précis.

The delegation consisted of an interdisciplinary group of students and professors from the University of Texas's School of Law, Lozano Long Institute for Latin American Studies (LLILAS), and the LBJ School of Public Affairs. The delegation augmented its intensive study of Brazilian law and the rights of specific Afro-descendant communities (quilombos) by spending a week in Brazil conducting interviews with quilombo representatives, federal and local officials, non-governmental organizations (NGOs), activists, and academics in a variety of locations, including Brasilia, Rio de Janeiro, Salvador, and São Paulo. The Rapoport delegation also visited several quilombo communities in the states of Rio de Janeiro, São Paulo, and Bahia.

I. SUMMARY

Background

Quilombos are best understood as having been born out of a history of resistance to slavery whereby many slaves, beginning even in the mid-1500s in the early stages of Portuguese colonization, escaped captivity by fleeing, mostly to remote areas, and forming thousands of quilombos across Brazil. Yet for centuries, legal, social, and economic barriers have prevented them from securing title to the lands they have traditionally occupied. Only in recent decades have quilombos had the opportunity to intensify their efforts to gain land title.

That opportunity arose most prominently with Brazil's 1988 Constitution. Ratified one hundred years after the end of slavery, the constitution made the first meaningful legal effort in the country's history to provide land rights to descendants of former slaves. It grants quilombo communities the collective right to their traditionally occupied lands. Moreover, it promotes a more general acknowledgement of the rights of quilombos through broad guarantees for the right to culture, equal protection and non-discrimination.

After twenty years, however, the 1988 Constitution's pledge remains largely unfulfilled; a surprisingly low number of land titles have been granted to quilombo communities. Of the over 3,550 quilombos currently recognized by the Brazilian government, only 87 (consisting of 143 communities) had received titles as of May 2008. Caught between the promise and realization of the right to their traditional lands, quilombo communities have been left with little to shield them from a high level of invisibility within the Brazilian State and the consequent daily burdens of racism, vulnerability, and uncertainty of continued access to the lands they occupy. Indeed, in March 2008, during the Rapoport delegation's visit to Brazil, the federal government suspended the titling process altogether.

Historical Roots of Quilombos' Land Difficulties

The historical roots of Brazil's legal system provide a critical context for understanding the highly unequal state of land distribution quilombos encounter today. Portuguese colonial laws and slavery precluded the possibility that Afro-Brazilians might gain title to the lands on which they lived, and also operated so as to ensure that vast tracts of land of the Brazilian frontier lay in the hands of a few entrenched, landed elites. Independence in 1822 brought little change. The major land legislation of the nineteenth century, the 1850 *Lei de Terras*, effectively eliminated the lower classes' ability to acquire land. After the abolition of slavery in 1888, landless former slaves could either work as laborers or servants on large plantations or remain in or join quilombos. Afro-Brazilians' situation improved little in the twentieth-century. Brazil ranks fourth in the world in terms of concentration of wealth, behind only Sierra Leone, the Central African Republic, and Swaziland. Any attempt at meaningful land reform has encountered staunch opposition.

Quilombo Communities Situation Today

Lack of land title has compounded quilombos' already-acute social, economic, and political marginalization. Quilombolas, or members of quilombos, often confront disparately low levels of access to education and healthcare, and cannot obtain a dignified level of income. They face severe and disproportionate problems of racism, structural discrimination, and violence. This vulnerability has, in turn, gravely impeded their ability to make effective rights claims.

Only recently have international and Brazilian governmental organizations begun to assess the critical conditions Afro-Brazilians and quilombos confront daily. Although few in number, such investigations illuminate how general problems associated with discrimination and inequality for Afro-Brazilians consistently affect quilombo communities to a greater extent than other social groups. In particular, those studies underscore quilombos' dire living conditions, and they emphasize especially the pervasive structural racism that impedes land rights recognition.

Quilombo Rights in International Law

Quilombos' rights claims not only receive domestic support under the 1988 Constitution. They are also enshrined in various international treaties to which Brazil is party. First, important standards and precedents to ensure rights to culture and to property have been established through the International Labor Organization Convention No. 169 (ILO 169) and through case law from the Inter-American Commission and Court of Human Rights, particularly *the Saramaka People v. Suriname case*. Second, various international agreements, such as the American Convention on Human Rights and the International Convention on the Elimination on All Forms of Racial Discrimination (ICERD), uphold the principle of non-discrimination and equality. Despite substantial domestic and international validation, quilombo efforts to title their traditional lands steadily encounter numerous obstacles.

Obstacles to Land Title

The Rapoport delegation's research identifies the following, often interconnected, impediments that have prevented effective titling of quilombos' traditional lands. In fact, not until seven years after the adoption of the 1988 Constitution did the first quilombo receive title.

Lack of agreement on the term "quilombo": The definition of quilombo lies at the core of debates over the application of laws granting land rights to these communities. While it appears that there is a consensus that quilombo communities have a right to their lands, there are strong disagreements over what a quilombo is. While quilombo representatives and advocates continue to seek an expansive definition that accommodates the historical diversity of quilombos, those groups with interests in conflict with the rights of quilombo communities seek to restrict the designation.

Bureaucratic uncertainty: Responsibility for titling has been shifted among government institutions seemingly constantly. In 1995, the *Instituto Nacional de Colonização e Reforma Agraria* (National Institute of Colonization and Agrarian Reform, or INCRA) published its Portaria nº 307, which laid out a legal framework upon which regulations for the titling of quilombo lands could be built. In four years, INCRA granted only six titles, all in the state of Pará.

In 1999, the federal government transferred competence for administering the titling procedure to the *Fundação Cultural Palmares* (Palmares Cultural Foundation, or FCP) under the Ministry of Culture charged with promoting and executing programs dealing with the role of Afro-Brazilian heritage. During the FCP's four-year management of the quilombo titling process, only 14 communities received title from the federal government. Presidential Decree No. 4.887 of 2003 shifted titling competence back to INCRA. In 2005, INCRA published a new regulatory measure: Normative Instruction (IN) 20. Together, Decree 4.887 and IN 20 (which is currently under reconsideration) require quilombo communities to navigate a long, seventeen-step procedure to receive title to their traditional lands. Although INCRA heads titling efforts,

the FCP remains involved in the quilombo recognition process, and it is given the authority to issue quilombos certification of self-identification, the receipt of which is a prerequisite to title under Decree 4.887.

Given the uncertainty and ineffectiveness at the federal level, it is perhaps unsurprising that some of the most notable titling efforts have occurred at state level, particularly in Pará, Maranhão, and São Paulo, whose land agencies respectively had granted 40, 20, and 6 titles to quilombo territories as of May 2008. Other states, however, have not issued titles with the same efficacy.

Burdensome titling process: The burden of the titling process itself represents one of the principle obstacles for communities. In its present state, the titling process fails to understand and accommodate the needs, cultural particularities, and way of life of quilombo communities. The vast majority of quilombos that have applied for title are relatively isolated and maintain traditional forms of livelihood, such as subsistence fishing or agriculture, and are located hours away from major urban centers. They generally have few financial resources, little access to quality education, and maintain a differentiated viewpoint on the collective management of local affairs. The titling process provides little legal assistance and is set up in a way that does not take into account their labor- and time-intensive way of life, complicating their ability to handle the burden of paperwork and administrative hurdles.

Conflicts of interest: Innumerable conflicts often arise between quilombos and nearby large landowners (*fazendeiros*) and other parties with competing claims to quilombo-occupied lands without meaningful government intervention. In some instances, the government has sided with those opposing quilombos' claims. These conflicts have often intensified to the point where landowners have resorted to the use of breakdown tactics such as direct intimidation bribery.

Threats to quilombos' titling have come also from various levels of government. When government interests and the protection of quilombo lands have collided, the federal government has tended to privilege its own interests and those of state entities and public institutions over the protection of quilombos' rights. Perhaps the most striking examples are the cases of Alcântara in the state of Maranhão, in Northwestern Brazil, and the Ilha da Marambaia in the state of Rio de Janeiro. The two cases illustrate how State security interests seem to have prevailed over quilombos' rights. Similar conflicts between quilombos and the government have occurred over the titling of land for communities that overlap protected environmental areas. In such cases, state parklands have typically been privileged over the rights of quilombos.

A third set of pressing obstacles that threaten quilombo rights to property and culture are the many pending development projects near or on community lands. For example, many quilombo communities throughout the Vale do Ribeira presently face threats of the construction of a series of large dams that would flood much of the Vale do Ribeira. Moreover, there are presently over 200 requests for mining projects and the spread of large banana plantations. The current explosion of ethanol production in Brazil will also likely pose a threat to quilombo lands. Given the government's intention of converting millions of hectares of land into ethanol-producing crops, it is probable that the state's economic development aims and the titling of quilombo lands may come into direct conflict, if they have not already.

Negative portrayals of quilombos: Media campaigns and news stories that present the claims of quilombo communities in a negative light have weakened public support for quilombos' struggle for title. Perhaps nowhere have these attacks been more strident than in the May 2007 series of reports by *Rede Globo de Televisão*, Brazil's largest media conglomerate.

Constitutional challenges: In the few instances in which quilombo communities have been granted title, that title has not led to the certainty and stability for which its applicants had aimed. First, many of the dozen titles awarded by the Fundação Cultural Palmares from 1998-2002 are unstable due to allegations that the expropriation process used by the FCP to grant titles was unconstitutional for failing to compensate landowners. Second, title has not always meant adequate protection of quilombos' lands or the receipt of basic rights. Third, there is a pending constitutional challenge against Decree 4.887 in front of the Brazilian Supreme Court.

Current State of Land Titling Procedures

In March 2008, the federal government suspended the titling process in the face of alleged "irregularities" in the certification and titling procedures. The obstacles to the titling process and its suspension have pointed out a number of internal government conflicts as well as to a lack of political will and leadership in guaranteeing the land rights of quilombo communities. Meanwhile, as the status of the titling process is presently debated in Brasilia, thousands of quilombos continue to face immediate threats to their existence.

II. RECOMMENDATIONS

As a result of its interviews, observations, and analysis, the Rapoport delegation provides the following recommendations to parties whose actions affect the rights, resources, and titling efforts of quilombos.

Brazilian Government

The delegation recommends that the Brazilian State:

1. *Immediately resume the titling process.*
 - The President should immediately reinstate the titling process.
 - The federal government should use its best efforts to defend the constitutionality of Decree 4.887.
2. *Revise regulations so as to simplify and accelerate the titling process.*
 - The Inter-ministerial Working Group should, with full participation of quilombo community representatives, continue to engage in a process of revision of the regulatory mechanisms for quilombo titling, setting a final date for the revision within one year.
 - ILO 169 should be used as the basic guideline for both the process and substance of new regulations.

- The titling process should start immediately upon self-identification. No evidentiary burden should be placed on communities in self-identifying.
- No extensive technical report should be required unless a third party has good faith and well-grounded challenges to the quilombo's claim. At that point, the burden of the technical report should be placed on the third party and not on the community itself (following Pará's titling process).
- Specific and demanding goals should be set for the number of communities to be titled each year, and a review process and accountability system should be implemented to ensure compliance with those goals.
- Specific deadlines for completion of the different steps of the titling process should be set.
- The federal government should provide explicit support for the passage of pending legislation on racial discrimination in a form that includes the substance of Decreto 4.887 in relationship to quilombo land rights.

3. *Ensure equal protection and basic rights to quilombolas as Brazilian citizens.*

Upon self-identification, every quilombo should receive a visit from a governmental agency to ensure that the basic needs of community members have been met. An expedited program should put these communities on a fast track for the receipt of any basic public goods they are lacking, such as potable water, access to healthcare and education, sanitary services, public transportation, and electricity.

4. *Create meaningful and accessible channels for the participation and protection of quilombos in all matters that affect them.*

- In accordance with ILO 169, provide mechanisms for the prior consultation of quilombos with respect to all policies, agreements, or development projects that may affect them.
- Strengthen the role, funding, and political power of SEPPIR and the FCP so that they may adequately protect quilombos throughout and following the titling process.
- Provide state-level land agencies with the power to expropriate private land for the purpose of quilombo land-titling.
- Establish a monitoring program of rights violations, including early warnings and preventative mechanisms, so that quilombos (whether titled or not) can appeal directly to appropriate agencies regarding threats from neighboring landowners or development projects.
- Develop cultural rights strengthening initiatives and training programs for federal, state, and local public officials aimed at reducing discrimination, avoiding corruption, and improving the understanding of the particularities of quilombo collective rights.

5. *Provide effective special measures for the protection of quilombolas' rights guaranteed under domestic and international law.*

- Fully comply with the domestic law that requires differentiated education for Afro-descendant communities.

- Ensure that quilombos' local affairs, cultural activities, and traditional economic practices are not restricted by third parties, such as the military, corporations, or large-landowners.
6. *Improve coordination between governmental agencies to ensure the protection of the rights of quilombos.*
 - Require that the establishment of national park lands be coordinated with the FCP, INCRA, and other state land agencies to ensure the absence of conflicts with quilombo lands. Environmental conservation legislation should accommodate the pre-existence and special rights of quilombo communities.
 - Create an inter-agency communication system that applies not only in reference to park lands, but with all state and federal land, including the establishment of a central mapping project.
 7. *Collect, analyze, and maintain official statistics and social indicators for quilombo communities based on self-identified communities. Separate statistics should be kept for quilombo communities, as well.*
 8. *Fully implement the Millennium Development Goals and the Plan of Action of the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance with regard to quilombos.*
 9. *Exercise a more active leadership role in support of the proposed Inter-American Convention for the Prevention of Racism and All Forms of Discrimination and Intolerance, currently being drafted by the Organization of American States (OAS) and defend the inclusion of provisions about the cultural and land rights of quilombos and other traditional Afro-Descendant communities.*

Organization of American States (OAS)

The delegation recommends:

1. *That the OAS promptly finalize and adopt the proposed Inter-American Convention for the Prevention of Racism and All Forms of Discrimination and Intolerance, ensuring the inclusion of provisions protecting the cultural and land rights of quilombos and other traditional Afro-descendant communities.*
2. *That the OAS allocate to the Inter-American Commission and Court of Human Rights sufficient funds to make all of their publications and documents available in Portuguese.*
3. *That the Inter-American Commission decide the Alcântara Case, which was filed seven years ago.*
4. *That the Inter-American Commission conduct an onsite visit in Brazil to document and report on the situation of quilombo communities.*

- The visit should include visits and meetings with quilombo communities which have yet to receive title, as well as communities that have been displaced by both private and public development projects.
 - A prompt public report following such a visit should make known the extent to which Brazil recognizes the civil and political, as well as economic, social, and cultural rights, of quilombo communities.
5. *That the Inter-American Commission strengthen the Role of the Special Rapporteur on Afro-Descendant Issues.*
- The Special Rapporteur should closely monitor the situation of quilombo communities.
 - The Special Rapporteur should prepare a study on land rights of Afro-descendants in the Americas.
 - The Special Rapporteur should take an active role in preparing the Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance, and ensure that provisions are established regarding the collective property rights of Afro-descendant communities such as quilombos.

United States Government

The delegation recommends that the United States Government:

1. *Ensure that its policies on the production of biofuels will not have a negative impact on quilombos and other traditional communities.*
2. *Ensure that any trade or cooperation agreements with Brazil respect the rights of quilombo communities. No free trade or other bilateral agreement should be made without first requiring an assessment of how it would impact the rights of quilombos.*
3. *Increase direct foreign aid and assistance to support the political participation and economic development of quilombos.*
 - The United States should target foreign aid specifically to quilombo communities and require that quilombos themselves be in charge of managing the use of aid resources. The U.S. should also foster programs aimed at combating racism in Brazil.
 - The U.S. Congress should direct funds to be contributed (as Norway and Great Britain have done) to the Inter-American Development Bank's Social Inclusion Fund for the Americas.
 - Congress should increase funds for the Inter-American Foundation, the National Endowment for Democracy, or other federal agencies to initiate, increase, or improve projects specifically aimed at strengthening the rights of Afro-descendant communities and supporting their local economic development projects.
 - The United States should support efforts to meet the Millennium Development Goals by aiming to promote the social visibility of Afro-descendants and by supporting efforts to eliminate racial discrimination.

4. *Support the proposed Inter-American Convention for the Prevention of Racism and All Forms of Discrimination and Intolerance that is currently being drafted by the OAS.*

International Aid and International Financial Institutions

The delegation recommends that international organizations, such as the World Bank, the Inter-American Development Bank, and the United Nations Development Program aid quilombos' efforts to achieve title in the following ways:

1. *Provide financial support for Afro-descendant collective rights projects identified in consultation with quilombo communities.*
 - Provide funds directly to quilombo communities to support projects and programs they freely decide to pursue.
 - Provide funds and technical assistance to the Brazilian Government to improve and expedite the titling process.
 - Assist government projects and programs to increase the access of quilombo communities to basic public goods.
2. *Provide funding for NGOs and other groups working for quilombo rights in Brazil.*

Non-Governmental Organizations (NGO's)

The delegation recommends that human rights NGO's:

1. *Attend to issues of discrimination, racism, and gender inequality and their effects on the enjoyment of quilombos' rights.*
2. *Help strengthen the capacity of quilombos to make effective land rights claims by providing support for communities attempting to navigate the titling process and helping to improve access to resources and information.*
3. *Support expanded dialogue between quilombo communities and other social movements, such as the many indigenous peoples in Brazil, or Movimento de Trabalhadores Rurais Sem Terra (MST).*