



# Forest Peoples Programme

1c Fosseyway Business Centre, Stratford Road, Moreton-in-Marsh GL56 9NQ, UK  
tel: +44 (0)1608 652893 fax: +44 (0)1608 652878 info@forestpeoples.org www.forestpeoples.org

1 March 2009

## **Indigenous Peoples' Rights and Reduced Emissions from Reduced Deforestation and Forest Degradation: The Case of the *Saramaka People v. Suriname***

Today a great deal of attention is devoted towards tackling climate change and developing associated mitigation measures, and rightly so. Multilateral, regional and national initiatives are being negotiated and a series of *ad hoc* market-based and other mechanisms have emerged or are emerging in various countries. One mitigation measure receiving detailed attention is Reduced Emissions from Reduced Deforestation and Forest Degradation ("REDD"), which seeks to maintain or increase carbon storage in forests by reducing deforestation and forest degradation rates.<sup>1</sup> Avoided deforestation ("AD") measures have similar aims but are not predicated on reducing deforestation or degradation from a set baseline as is the case with REDD. Both may have severe implications for indigenous peoples, who have expressed deep concern about how certain proposals are evolving.<sup>2</sup> This has been acknowledged by the UN Office of the High Commissioner for Human Rights<sup>3</sup> and the UN Permanent Forum on Indigenous Issues.<sup>4</sup>

Indigenous peoples have collectively called for all climate change mitigation measures to be firmly grounded in the rights framework set forth in the 2007 UN Declaration on the Rights of Indigenous Peoples.<sup>5</sup> UN bodies and others have opined that this Declaration restates existing rules of international law and is the appropriate normative framework for conceiving and implementing measures that may affect indigenous peoples,<sup>6</sup> including climate change mitigation mechanisms and measures.<sup>7</sup> Adopting a rights-based approach, particularly one that is based on the 2007 Declaration, is consistent with, and an effective way of implementing, Article 4(8) of the UN Framework Convention on Climate Change. This article commits states parties to minimize adverse economic, social and environmental impacts resulting from the implementation of measures taken to mitigate climate change

---

<sup>1</sup> See T. Griffiths, *Seeing REDD: forests, climate change mitigation and the rights of indigenous peoples and local communities – update for Poznan FPP Briefing*, December 2008; and K. Dooley, T. Griffiths, H. Leake, & S. Ozinga, *Cutting Corners: World Bank forest and carbon fund fails forests and peoples* FPP-FERN briefing, November 2008.

<sup>2</sup> See UN REDD Programme/Tebtebba Foundation, *Global indigenous peoples' consultation on reducing emissions from deforestation and forest degradation (REDD)*, Baguio City, Philippines, 12–14 November 2008.

<sup>3</sup> *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*. UN Doc. A/HRC/10/61, 15 January 2009, para. 51-4, 68-8.

<sup>4</sup> *Report of the UN Permanent Forum on Indigenous Issues*. UN Doc. E/C.19/2008/13, at para. 45, (explaining that new proposals for reduced emissions from deforestation "must address the need for global and national policy reforms ... respecting rights to land, territories and resources, and the rights of self-determination and the free, prior and informed consent of the indigenous peoples concerned").

<sup>5</sup> See UN REDD Programme/Tebtebba Foundation, *supra*. See also *International Expert Group Meeting on Indigenous Peoples and Climate Change*, Darwin, Australia, 2-4 April 2008. UN Doc. E/C.19/2008/CRP. 9, 14 April 2008; *Statement of the International Indigenous Peoples Forum on Climate Change*, Poznan, 10 December 2008; Report of the Conference on Indigenous Peoples and Climate Change. Copenhagen, 21 – 22 February 2008. UN Doc. E/C.19/2008/CRP. 3, 10 March 2008; and V. Tauli-Corpuz & A. Lynge, *Impact of Climate Change Mitigation Measures on Indigenous Peoples and on Their Territories and Lands*. UN Doc. E/C.19/2008/10, 28 March 2008.

<sup>6</sup> See *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya*. UN Doc. A/HRC/9/9, 11 August 2008; *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States*, 08 May 2008, CERD/C/USA/CO/6, at para. 29 (explaining that that states should use the UNDRIP "as a guide to interpret [their] obligations under the Convention relating to indigenous peoples"); and, Committee on the Rights of the Child, *General Comment No. 11, Indigenous children and their rights under the Convention*. UN Doc. CRC/C/GC/11, January 2009, para. 10.

<sup>7</sup> *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*. UN Doc. A/HRC/10/61, 15 January 2009; and *Report of the UN Permanent Forum on Indigenous Issues*. UN Doc. E/C.19/2008/13.

impacts. Moreover, as the Office of the High Commissioner for Human Rights explains, the “application of a human rights approach in preventing and responding to the effects of climate change serves to empower individuals and groups, who should be perceived as active agents of change and not as passive victims.”<sup>8</sup>

Given that indigenous peoples are the traditional owners of a large percentage of the world’s remaining forests, to what extent should or must the various proposals for REDD or AD account for and respect indigenous peoples’ rights? As a way of thinking about this question, this note looks at a case decided by the Inter-American Court of Human Rights (“the Court” or “the Inter-American Court”) in November 2007, the *Saramaka People v. Suriname* case. It concludes that attention to indigenous peoples’ rights is not only desirable as a means to improve the effectiveness and sustainability of climate change mitigation measures, but, also, that these rights must be viewed as part of the applicable legal framework for conceiving and implementing such measures. Failure to do so undermines the rule of law and will expose REDD proponents and investors to a series of serious risks.

The Inter-American Court and its sister organ, the Inter-American Commission on Human Rights (“the IACHR”), supervise compliance by OAS member states with two main human rights instruments: the 1948 American Declaration on the Rights and Duties of Man and the 1969 American Convention on Human Rights. The IACHR issues recommendations whereas the judgments of the Court are, as a matter of international law, binding on respondent states and may be executed in domestic courts.<sup>9</sup> The Court may hear cases only where the respondent state is a party to the American Convention and has additionally accepted the Court’s jurisdiction. At present, this applies to all of the states in South America except Guyana and all in Central America except Belize. Judgments of the Court thus set binding precedents that apply across the Amazon basin, the largest remaining continuous area of forest in the world and home to hundreds of indigenous and tribal peoples, and all but a small area of Central America.<sup>10</sup> While judgments of the Court are directly applicable in the Americas, the *Saramaka People* judgment relies on and incorporates universally applicable norms and jurisprudence and, therefore, should not be seen solely through a regional lens.

### **Saramaka People v. Suriname**

On 28 November 2007, the Inter-American Court adopted its “landmark”<sup>11</sup> judgment in the case of the *Saramaka People v. Suriname*.<sup>12</sup> The global relevance of the case was acknowledged by the UN Permanent Forum on Indigenous Issues, which welcomed the Court’s judgment in May 2008.<sup>13</sup> A second, much shorter ‘interpretation’ judgment was issued by the Court in August 2008 following Suriname’s request that the Court explain aspects of the first judgment.<sup>14</sup> This case has its origins in Suriname’s failure to legally

---

<sup>8</sup> *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, *id.* at para. 94.

<sup>9</sup> Article 68 of the American Convention on Human Rights provides that “1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.”

<sup>10</sup> While Guyana and Belize have not ratified the American Convention, both are nonetheless subject to the legally binding norms set forth in the American Declaration. Since the Inter-American Commission, uses the Convention, including the Court’s jurisprudence, to interpret the Declaration, the *Saramaka People* case is certainly relevant to assessing the obligations of Guyana and Belize with respect to indigenous peoples.

<sup>11</sup> See *YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 2007*. Oxford: Oxford University Press, 2008 (case note by Professor Dinah Shelton); L. Brunner, *The Rise of Peoples’ Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights*, 7 *CHINESE JOURNAL OF INTERNATIONAL LAW* 699, 2008; J. Harrison, *International Law – Significant Environmental Cases 2007-08*, 20 *JOURNAL OF ENVIRONMENTAL LAW* 475, 2008; M. Orellana, *Saramaka People v. Suriname* (Case Note), 102 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 841, 2008.

<sup>12</sup> *Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 28 November 2007. Series C No. 172, at para. 194-96 (hereinafter “*Saramaka People v. Suriname*”). Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf)

<sup>13</sup> *See Permanent Forum Hails General Assembly Adoption of Indigenous Rights Declaration. Pledges to Make it ‘a Living Document’, as Seventh Session Concludes*. UN Department of Public Information, 02 May 2008. Available at: <http://www.un.org/News/Press/docs/2008/hr4953.doc.htm>.

<sup>14</sup> *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12 August 2008. Series C No. 185 (hereinafter “*Interpretation Judgment*”). Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_185\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf).

recognise and secure indigenous and tribal peoples' rights to own and control their traditional lands, territories and resources, and active violation of those rights through grants of logging and mining concessions. The Saramaka are the descendants of African slaves who fought themselves free from slavery in the 18<sup>th</sup> century and established autonomous communities in the rainforest interior of Suriname. The Saramaka are therefore not indigenous, but the Inter-American Court considers them to be tribal people and applies largely the same rights to them that pertain to indigenous peoples. In that light, this case further confirms and develops the rights of indigenous peoples under international law.

#### **A. Does *Saramaka People* apply to REDD or other mitigation measures?**

The rules set forth in the judgment apply to any proposed development or investment project that could affect the integrity of indigenous and tribal peoples' territories. The Court explains in a footnote that a 'development or investment project' means "any proposed activity that may affect the integrity of the lands and natural resources within the territory of the Saramaka people, particularly any proposal to grant logging or mining concessions."<sup>15</sup> This definition clearly includes activities such as REDD, AD and conservation projects, all of which may affect the integrity of indigenous peoples' territories and natural resources.<sup>16</sup>

#### **B. Why is *Saramaka People* relevant to REDD or other mitigation measures?**

**First**, the judgment reaffirms the Court's and IACHR's prior jurisprudence, which holds that indigenous and tribal peoples' property rights do not depend on domestic law for their existence, but, rather, are grounded in and arise from customary laws and tenure.<sup>17</sup> This means that the property rights of indigenous peoples exist even if they do not hold titles to the ancestral territories they have historically used and occupied. These property rights include natural resources.<sup>18</sup> States have corresponding obligations to recognise, secure and protect indigenous and tribal peoples' property rights, *inter alia*, through demarcation, delimitation and titling, conducted in accordance with the norms, values and customs of the indigenous peoples concerned, and must adopt or amend their domestic laws to this end where necessary.<sup>19</sup> The Court has also held that indigenous peoples have a right to restitution of traditionally owned lands which have been taken or lost without their consent, including where title is presently vested in innocent third parties.<sup>20</sup>

Because indigenous and tribal property rights do not depend on domestic law for their existence, there may be a series of unresolved property rights issues that could pose major challenges for the implementation REDD, AD or other mitigation schemes. This may

---

<sup>15</sup> *Saramaka People v. Suriname*, at para. 129, note 127.

<sup>16</sup> For human rights norms applicable to conservation projects, particularly protected areas, see *inter alia* *Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana*. 23/08/2002. UN Doc. A/57/18, paras. 292-314, at 304 (stating that "no decisions directly relating to the rights and interests of members of indigenous peoples be taken without their informed consent" in connection with a nature reserve) and; *Concluding observations of the Committee on the Elimination of Racial Discrimination: Sri Lanka*. 14/09/2001. UN Doc. A/56/18, paras. 321-342, at 335 (calling on the state to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources" in connection with a national park); and *Concluding observations of the Committee on the Elimination of Racial Discrimination: Ethiopia*. 20/06/2007. UN Doc. CERD/C/ETH/CO/15, at para. 22 (explaining that states must secure indigenous peoples effective participation and "informed consent in the establishment of national parks, and as to how the effective management of those parks is carried out;" and that the State shall "adopt all measures to guarantee that national parks established on ancestral lands of indigenous communities allow for sustainable economic and social development compatible with the cultural characteristics and living conditions of those indigenous communities").

<sup>17</sup> See *inter alia* *Mayagna (Sumo) Awajitjuna Community Case*, Inter-American Court of Human Rights, August 31, 2001, Series C No 79 and; *Moiwana Community Case*, Inter-American Court of Human Rights, June 15, 2005. Series C No. 124.

<sup>18</sup> *Saramaka People v. Suriname*, at para. 121. See also para. 122 (explaining that "the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life").

<sup>19</sup> See *inter alia id.* at para. 115 (explaining that the Court's jurisprudence holds that traditionally-owned Saramaka territory "must first be delimited and demarcated, in consultation with [the Saramaka] and other neighboring peoples," and the Saramaka people's "title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty").

<sup>20</sup> See *Yakye Axa Indigenous Community Case*, Inter-American Court of Human Rights, 17 June 2005, Series C No 125; and *Sawhoyamaya Indigenous Community Case*, Inter-American Court of Human Rights, 29 March 2006, Series C No. 146.

ultimately require that those schemes be annulled after their establishment, including where title may have been vested in ‘innocent third parties’.<sup>21</sup> In Guyana, for example, where the President has offered substantial areas of forest as a carbon store in return for payment, indigenous peoples not only own a large area of forest under domestic law (some 16 percent of the country by the government’s own estimate),<sup>22</sup> they presently are asserting rights to almost three times as much land based on their traditional use and occupancy. Guyana’s laws pertaining to recognition of indigenous territories have been severely criticised by UN human rights bodies.<sup>23</sup>

Given that human rights laws are now incorporated into Guyana’s Constitution, investors in REDD schemes are subject to reputational as well as legal and commercial risks should they invest in a project on unregularised indigenous lands without first obtaining indigenous peoples’ consent.<sup>24</sup> The IACHR and the Court have made it clear that this risk exists even with indigenous lands where the communities in question have yet to receive title from the State. Similar situations exist not only throughout the Americas but also in most forest regions of the world. States and intergovernmental organisations that pursue REDD, AD or other initiatives that do not account for and respect indigenous peoples’ rights also expose themselves to a number of similar risks. This includes states that are supporting such activities through development aid programmes. Irrespective of such risks, failure to account for and respect indigenous peoples’ rights is contrary to international legal norms and undermines the effectiveness and sustainability of climate mitigation measures.

**Second**, the judgment holds that indigenous peoples’ property rights cannot be divorced from recognition of and respect for the right to self-determination, by virtue of which indigenous and tribal peoples’ may “freely pursue their economic, social and cultural development,” and may “freely dispose of their natural wealth and resources.”<sup>25</sup> The Court explains that this supports an interpretation of Article 21, *inter alia*, that recognizes indigenous peoples’ right “to freely determine and enjoy their own social, cultural and economic development” within their traditional territories.<sup>26</sup> Consistent with this conjunctive reading of the right to property and indigenous and tribal peoples’ right to self-determination, the Court explicitly ordered that legislative recognition of territorial rights must include recognition of “their right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system.”<sup>27</sup>

The Court thus affirms that, in order to freely determine, pursue and enjoy their own development, indigenous and tribal peoples have the right, effectuated through their own institutions,<sup>28</sup> to make and implement decisions about how best to use their territory; that they have a right to own, effectively control, manage and distribute their natural wealth and

---

<sup>21</sup> Sawhoyamaya Indigenous Community Case, *id.* para 128 (holding that indigenous peoples maintain their property rights in cases where they have been forced to leave or have otherwise lost possession of their traditional lands, including where their lands have been expropriated and transferred to third parties”).

<sup>22</sup> *Comments of the Government of Guyana on the concluding observations of the Committee on the Elimination of Racial Discrimination*. UN Doc. CERD/C/GUY/CO/14/Add.1, 14 May 2008.

<sup>23</sup> *See Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana*, 04/04/2006. UN Doc. CERD/C/GUY/CO/14; *Letters of the Chair of the Committee on the Elimination of Racial Discrimination to the Permanent Mission of Guyana*, Follow-Up Procedure, 24 August 2007 and 15 August 2008.

<sup>24</sup> Guyana Const., as amended in 2001, Article 154A.

<sup>25</sup> *Saramaka People v. Suriname*, at para. at 93.

<sup>26</sup> *Id.* at para. 95. *See also Proposed American Declaration on the Rights of Indigenous Peoples*, approved by the Commission in 1997, Art. XV(1). *See also Consolidated Text of the Draft Declaration Prepared by the Chair of the Working Group*, OEA/Ser.K/XVI, GT/DADIN/doc.139/03, 17 June 2003, Art. III.

<sup>27</sup> *Id.* at para. 194 and 214(7). *See also the UN Declaration on the Rights of Indigenous Peoples* (hereinafter “UNDRIP”), Art. 26(2) (providing that “Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired”).

<sup>28</sup> *See UNDRIP*, Article 4 (providing that “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”). The Court has also highlighted the importance of the preservation of indigenous and tribal peoples’ communal structures and modes of self-governance in *Plan de Sánchez Massacre, Reparations*. Judgment of 19 November 2004, Series C No 116, para. 85.

resources.<sup>29</sup> Each of these terms has a specific meaning and describes rights and powers in relation to territory. The Court reaffirmed and emphasized this aspect of indigenous and tribal peoples' rights in its August 2008 interpretation judgment.<sup>30</sup> Indigenous and tribal peoples therefore have the right to enter into agreements, where they so choose, as part of effectively controlling and managing their territory, to develop their own REDD, AD or other mitigation measures or to otherwise negotiate agreements for 'payment for ecological services' mechanisms.<sup>31</sup>

**Third**, the Court explains that, "under specific, exceptional circumstances," indigenous and tribal people's property rights may be restricted by states,<sup>32</sup> and that this includes permits for developments or investments within or affecting their territories.<sup>33</sup> This does not mean however that states may restrict indigenous and tribal property rights for any reason or without following the applicable procedures. On the contrary, the Court has repeatedly held that a state may restrict the use and enjoyment of the right to property only "where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society."<sup>34</sup> In the case of indigenous and tribal peoples, the Court held in *Saramaka People* that "another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members."<sup>35</sup>

The requirements in the previous paragraph, which are elaborated on below, apply in all situations, including where a state invokes the national/public interest or eminent domain, none of which may be invoked alone as a valid justification for a restriction on indigenous and tribal peoples' rights.<sup>36</sup> Indeed, the Court has built these requirements into the process for assessing whether a deprivation or restriction is valid and held that they are obligations of states and explicit limitations on the powers of states to restrict indigenous and tribal peoples' property rights.<sup>37</sup> Again, this will also apply to REDD, AD and conservation projects as they may affect the integrity of indigenous peoples' territories. This means that it will not be enough for a state to simply declare that it is a national interest to conserve forests or mitigate climate change impacts if the result of REDD, AD or other conservation project will affect indigenous peoples rights, territories and resources. The requirements and conditions a state must first fulfil are much more extensive.

---

<sup>29</sup> *Saramaka People v. Suriname*, at para. 115 (stating that "the State's legal framework merely grants the members of the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference").

<sup>30</sup> Interpretation Judgment, para. 48 and 50.

<sup>31</sup> The Court has previously held that "indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations." *Indigenous Community Yakye Axa v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005 Series C No. 125, at para. 146. See also Inter-American Commission on Human Rights, *Report 75/02, Case 11.140. Mary and Carrie Dann. United States*, December 27, 2002, para. 128 (stating that that "continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples").

<sup>32</sup> In similar terms to those that apply universally, Article 21(1) and 21(2) of the American Convention state, respectively, that the "law may subordinate use and enjoyment [of property] to the interest of society" and that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

<sup>33</sup> Interpretation Judgment, at para. 49 (explaining that the right to property may be restricted, but only "under very specific, exceptional circumstances, particularly when indigenous or tribal land rights are involved"). The use of the term 'exceptional' indicates that restrictions must be extra-ordinary.

<sup>34</sup> *Saramaka People v. Suriname*, at para. 127.

<sup>35</sup> *Id.* at para. 128. The Court explains in its interpretation judgment, at para. 37, 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."

<sup>36</sup> See *inter alia* *Concluding observations of the Committee on the Elimination of Racial Discrimination: Indonesia*, 15/08/2007, CERD/C/IDN/CO/3, para. 16 and; *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*. CERD/C/AUS/CO/14, 14 April 2005, at para. 16.

<sup>37</sup> *Saramaka People v. Suriname*, para. 127-40.

The Court explains that for the state to guarantee that proposed restrictions, including REDD and AD schemes, do not amount to “a denial of survival as a tribal people,” and thus be prohibited, a state must comply with the following four, additional safeguards (the first two points are discussed in detail below):

- 1) it must ensure indigenous and tribal peoples’ effective participation with regard to any activity that may affect the integrity of their territory;
- 2) independent environmental and social impact assessments must be undertaken;<sup>38</sup>
- 3) indigenous and tribal peoples’ must receive a reasonable benefit from the project;<sup>39</sup> and
- 4) the state must implement “adequate safeguards and mechanisms in order to ensure that these activities do not significantly affect the[ir] traditional ... lands and natural resources....”<sup>40</sup>

### **Effective Participation:**

The Court explains that effective participation includes a duty to actively consult with affected communities, in “good faith” and “according to their customs and traditions.” In its 2008 interpretation judgment, the Court states that by “declaring that the consultation must take place ‘in conformity with their customs and tradition’, the Court recognized that it is the Saramaka people, not the State, who must decide which person or group of persons will represent the Saramaka people in each consultation process....”<sup>41</sup> This duty to consult also includes:

- a duty on the state and those authorized by it to both accept and disseminate information, and constant communication between the parties;
- consultations must be undertaken in good faith, through culturally appropriate procedures and with the objective of reaching an agreement;
- indigenous and tribal peoples must be consulted, “in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State;”
- the state must ensure that the indigenous and tribal peoples are aware of possible risks, including environmental and health risks, so that the proposed project is accepted knowingly and voluntarily; and,
- finally, consultation should take account of indigenous and tribal peoples’ traditional methods of decision-making.<sup>42</sup>

For some projects, the state has a duty not only to consult with the Saramaka, “but also to obtain their **free, prior, and informed consent**, according to their customs and tradition.”<sup>43</sup> In its interpretation judgment, the Court “emphasized that when large-scale 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 Saramaka’s, but also to obtain their free, prior and informed consent in accordance with their customs and traditions.”<sup>44</sup> This will also apply to REDD, AD or conservations projects as the *Saramaka People* judgment applies to any investment or project that may affect indigenous or tribal territories.<sup>45</sup> The Court

---

<sup>38</sup> *Id.* at para. 129.

<sup>39</sup> *Id.* at para. 139 (the Court explains that this should be understood as “a right to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival”).

<sup>40</sup> *Id.* at para. 158.

<sup>41</sup> Interpretation Judgment, at para. 18.

<sup>42</sup> *Saramaka People v. Suriname*, at para. 133.

<sup>43</sup> *Id.* at para. 134.

<sup>44</sup> Interpretation Judgment, at para. 17.

<sup>45</sup> See *inter alia Report No. 76/07*, The Kaliña and Lokono Peoples (Suriname), 15 October 2007. Available at: <http://www.cidh.oas.org/annualrep/2007eng/Suriname198.07eng.htm> (finding that the establishment of protected areas in indigenous territories is cognizable under human rights law and procedures, in particular to assess the nature and extent

observes that this is consistent with the jurisprudence of other international human rights bodies, which require FPIC in connection with projects that may have “a significant impact on the right of use and enjoyment of [indigenous and tribal peoples’] ancestral territories,”<sup>46</sup> as well as Article 32(2) of the UN Declaration on the Rights of Indigenous Peoples.<sup>47</sup>

### **Environmental and Social Impact Assessment:**

Environmental and social impact assessments (“ESIA”) must be undertaken as part of the process of assessing a potential restriction to indigenous and tribal peoples’ property rights, including in the case of REDD or AD. The Court states that these assessments must take place before any concessions are issued (this would include conservation projects), and that “[t]he purpose of the ESIA is not only to have some objective measure of such possible impact on the land and people, but also ... ‘to ensure that members of the Saramaka people are aware of the possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily’.”<sup>48</sup> The Court thus ties the prior ESIA to the state’s duty to guarantee the effective participation of indigenous and tribal peoples in decisions about projects and investments.<sup>49</sup> Importantly, the Court also explains that ESIA need to address the “cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual or cumulative effects of existing or future activities could jeopardize the survival of indigenous or tribal people.”<sup>50</sup> Assessment of the impact of REDD or AD schemes will therefore also have to account for cumulative impacts caused by other activities.

Further, to be consistent with the Court’s orders, the prior ESIA “must conform to the relevant international standards and best practices, and must respect the Saramaka people’s traditions and culture.”<sup>51</sup> The associated footnote states that “One of the most comprehensive and used standards for ESIA in the context of indigenous and tribal peoples is known as the *Akwe:kun Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*.”<sup>52</sup> The *Akwe:kun Guidelines* were developed by the states parties to the Convention on Biological Diversity to facilitate “the development and implementation of their impact-assessment regimes.”<sup>53</sup> The guidelines apply “whenever developments are proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.”<sup>54</sup> At the very least, failure to use the *Akwe:kun Guidelines* will raise serious questions about whether an ESIA conforms to international best practice and standards.

### **Concluding Remarks**

In summary, the *Saramaka People* judgment requires that states recognize, secure and protect indigenous and tribal peoples’ right to their traditionally owned lands, territories and resources. Such recognition must take place in law and these laws must also provide adequate and effective remedies so that rights may be enforced where necessary. By virtue of the right to self-determination, indigenous and tribal peoples’ property rights include the right to effectively control and manage their territories through their own institutions and to freely pursue their own economic, social and cultural development.

---

of violations of indigenous peoples’ rights”); and *Report No. 39/07, Comunidad Garifuna Garifuna Community of Cayos Cochinos* (Honduras), 24 July 2007. Available at: <http://www.cidh.oas.org/annualrep/2007sp/Honduras118.03sp.htm>.

<sup>46</sup> Interpretation Judgment, at para. 136.

<sup>47</sup> UNDRIP, Article 32(2) (providing that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”).

<sup>48</sup> Interpretation Judgment, at para. 40.

<sup>49</sup> *Id.* at para. 41.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (footnote omitted).

<sup>52</sup> See <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>.

<sup>53</sup> *Id.* at p. 5.

<sup>54</sup> *Id.*

Should a state, in ‘exceptional circumstances’, seek to restrict indigenous and tribal property rights, it must satisfy a series of procedural and substantive requirements. Simply invoking the national interest or eminent domain is not by itself sufficient to satisfy these requirements. One of the requirements concerns the right of indigenous peoples to effectively participate in decision making about any activities that may affect the integrity of their territories. These activities include REDD, AD and conservation measures. In the case of large-scale interventions or the cumulative impact of lesser interventions where the rights, lands and natural resources of the people may be affected, indigenous peoples have the right to give or withhold their free, prior and informed consent. Failure to respect these rights undermines the rule of law, substantially detracts from the effectiveness and sustainability of mitigation measures, and leads to a series of substantial risks for states, international financial institutions, and private sector investors.

As noted above, the rules enumerated in *Saramaka People* are not unique or peculiar to the inter-American human rights protection system. That judgment in part interprets and applies rights that are similarly affirmed and protected in universal human rights instruments. For this reason, these rules are largely repeated in the jurisprudence of UN human rights bodies responsible for human rights instruments in force in all regions of the world, and are repeated in instruments such as the UN Declaration on the Rights of Indigenous Peoples.<sup>55</sup> Indeed, the Inter-American Court cited a wide range of this jurisprudence and instruments, including the Declaration to support its holdings in *Saramaka People*.<sup>56</sup> The Committee on the Elimination of Racial Discrimination, for instance, has already examined one instance of a proposed climate mitigation measure and expressed deep concern about the threat it constitutes to the rights of indigenous peoples to own their lands and enjoy their culture.<sup>57</sup> It is likely that more decisions of this kind will be rendered in the near future as states begin to implement REDD, AD and related measures.

Complaints are all the more likely to happen given that indigenous peoples’ representatives have largely been excluded from participation in developing climate change mitigation measures.<sup>58</sup> This is true at the international level as well as the national level.<sup>59</sup> This is highly disturbing given that the Office of the UN High Commissioner for Human Rights explains that “Participation in decision-making is of key importance in efforts to tackle climate change.”<sup>60</sup> It further explains that for indigenous peoples, “the United Nations Declaration on the Rights of Indigenous Peoples states that States shall consult and cooperate with indigenous peoples ‘to obtain their free, prior and informed consent’ before adopting measures that may affect them.”<sup>61</sup> There is thus a need to establish effective mechanisms through which indigenous peoples’ freely chosen representatives can participate in designing and implementing climate mitigation measures, as well as specific operating requirements that ensure that their rights will be accounted for and respected in relation to such measures.

---

<sup>55</sup> See *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*. UN Doc. A/HRC/10/61, 15 January 2009, at para. 53 (explaining the relevance of the UNDRIP and a range of other international instruments to indigenous peoples and climate change issues).

<sup>56</sup> *Saramaka People v Suriname*, para.88 *et seq.* (citing the jurisprudence of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the UNDRIP).

<sup>57</sup> *Concluding observations of the Committee on the Elimination of Racial Discrimination: Indonesia*. UN Doc. CERD/C/IDN/CO/3, para. 17.

<sup>58</sup> See K. Dooley, T. Griffiths, H. Leake, & S. Ozinga, *Cutting Corners: World Banks forest and carbon fund fails forests and peoples* FPP-FERN briefing, November 2008.

<sup>59</sup> See *id.* and; M. Macchi et al, *Indigenous and Traditional Peoples and Climate Change*, IUCN, 2008. Available at: [http://cmsdata.iucn.org/downloads/indigenous\\_peoples\\_climate\\_change.pdf](http://cmsdata.iucn.org/downloads/indigenous_peoples_climate_change.pdf).

<sup>60</sup> *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*. UN Doc. A/HRC/10/61, 15 January 2009, at para. 79.

<sup>61</sup> *Id.*