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Land Rights and Socio-Economic Development of Afro-Brazilian Communities



Final Report of the Duke University Law School Seminar and Fact-finding Trip to Brazil

July 30, 2010

Land Rights and Socio-Economic Development of Afro-Brazilian Communities:

Final Report of the Duke University Law School Seminar and Fact-finding Trip to Brazil

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Global Imprints, LLC

I. INTRODUCTION

A. Challenges Facing Afro-Latino Communities in South and Central America

Individuals of African ancestry ("Afro-Latinos") remain socially and politically marginalized in Central and South America, notwithstanding their large numbers.[1] Afro-Latinos are much more likely than other groups to live in poverty, suffer from illiteracy, die at a younger age, and reside in substandard housing.[2] Afro-Latinos fare poorly even when compared with other historically marginalized groups, such as indigenous communities. Only six countries in the Americas recognize some form of collective rights for Afro-Latinos, while fifteen do so for indigenous groups.[3] Unlike indigenous groups, whose histories long predate Spanish and Portuguese colonization, Afro-Latinos are seen by many as lacking "traditional" or "ancestral cultures"[4] that deserve protection from the government. Accordingly, Afro-Latinos have struggled for legal recognition and social acceptance by the majority populations in the region.[5]

Compounding these problems is unequal access to land. While Latin America and the Caribbean boast the world's largest arable land reserves, land ownership remains highly concentrated.[6] As a result, a large portion of the region's rural population lacks sufficient access to land or is entirely landless,[7] and 77.5 million small land owners and landless inhabitants live

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[1] Afro-Latinos represent roughly 30% of the total Latin American population, or between 100 and 150 million people. Exact estimates are difficult since many countries do not include questions about race or ethnicity in their censuses, or have only done so recently. *See* Juliet Hooker, *Afro-Descendant Struggles for Collective Rights in Latin America: Between Race and Culture*, 10 SOULS 279, 281 (2008).
[2] *Id.* at 281–82.
[3] Juliet Hooker, *Indigenous Inclusion/Black Exclusion: Race, Ethnicity and Multicultural Citizenship in Latin America*, 37 J. LATIN AM. STUD. 285, 286 (2005) (noting that only Brazil, Colombia, Ecuador, Guatemala, Honduras and Nicaragua extend collective rights to Afro-Latinos).
[4] *Id.* at 303.
[5] Hooker, *Afro-Descendant Struggles*, *supra* note 1, at 280.
[6] U.N. ENV'T PROGRAM, GEO LATIN AMERICA AND THE CARIBBEAN: ENVIRONMENT OUTLOOK 2003, at 40 (2003), *available at* http://www.unep.org/geo/pdfs/GEO__lac2003English.pdf.
[7] *See id.* at 41–42.

in poverty.[8] Unequal access to land and insecure land ownership rights stymie attempts by these groups to emerge from poverty.[9] Any effort to promote economic security and cultural preservation thus depends in large part on a fair and effective system of land access and ownership.[10]

Nowhere are the connections between Afro-Latinos, access to land, and socioeconomic development more apparent than in Brazil. Afro-Brazilians comprise 45% of the Brazilian population, yet constitute 69% of those living in extreme poverty.[11] Land ownership remains sharply concentrated, with 3.5% of landowners controlling over half of the arable land.[12] Like other Afro-Latino groups, Afro-Brazilians have sought to correct this imbalance and pursue socioeconomic development by securing collective land rights. In part, they have been successful. Under the Brazilian Constitution, "quilombos"—groups of descendents of runaway slaves who live and work on lands they have occupied for many years[13]—are entitled to obtain collective title to their land.[14] Despite this formal legal recognition, however, quilombos face formidable challenges to the full realization of these rights. Equal access to land, on which economic security and development ultimately depend, remains elusive.

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[8] *See* OCTAVIO SOTOMAYOR, FOOD AND AGRIC. ORG. OF THE U.N., GOVERNANCE AND TENURE OF LAND AND NATURAL RESOURCES IN LATIN AMERICA 3 (2008), *available at* ftp://ftp.fao.org/docrep/fao/011/ak017e/ak017e00.pdf.

[9] *See* Food and Agriculture Organization of the United Nations: Land Tenure, http://www.fao.org/ nr/tenure/lt-home/en/ (last visited Apr. 9, 2010).

[10] FOOD AND AGRIC. ORG. OF THE U.N., LAND TENURE & RURAL DEVELOPMENT 3–5 (2002), *available at* http://www.fao.org/DOCREP/005/Y4307E/y4307e00.htm#Contents.

[11] CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., AFRO-LATINOS IN LATIN AMERICA AND CONSIDERATIONS FOR U.S. POLICY 5 (2008), *available at* http://www.fas.org/sgp/crs/row/RL32713.pdf [hereinafter "CRS REPORT"].

[12] Hanna Whitman, *Reframing Agrarian Citizenship: Land, Life and Power in Brazil*, 25 J. RURAL STUDIES 120, 121 (2009).

[13] The word "quilombo" is derived from the Angolan word kilombo. Phillip D. Rasisco, *Quilombo 'Bordello': A Luso-Africanism in the Spanish and Catalan of Modernist Barcelona*, GLOBAL, AREA, AND INTERNATIONAL ARCHIVE 165, 166 (1999).

[14] *See infra* Part II.B.

B. Project Description

In the Spring of 2010, ten students from Duke University School of Law organized a seminar focused on land rights and socioeconomic development of quilombos in Brazil. The seminar, which included an intensive week of fieldwork in Brazil, explored the complex links between securing collective land title for quilombola communities and pursuing socioeconomic development. Student participants were first, second, and third-year law students, many of whom were jointly pursuing masters degrees in cultural anthropology, environmental management, journalism, and international law. Professor Laurence R. Helfer, the co-director of Duke Law School's Center for International and Comparative Law and a member of the faculty steering committee of the Duke Center on Human Rights, helped to structure the course and the fieldwork in Brazil. The students worked closely with Global Imprints, LLC, an organization that helps to arrange academic service projects around the world.

The students' primary community contact was Alto da Serra, a small quilombo in the State of Rio de Janeiro in the midst of an effort to secure land title. The students also partnered with Koinonia, a non-governmental organization (NGO) in Brazil that has worked closely with Alto da Serra throughout the titling process. Koinonia develops alliances with marginalized groups within Brazilian society in order to further socioeconomic development and promote their human rights.

Beginning in January 2010, students performed background research on land rights in Brazil, participated in weekly meetings of the seminar, and arranged telephone interviews with experts. The interviews included leading scholars on land rights issues in Brazil, a representative of a quilombo active in land rights advocacy, and a World Bank official responsible for funding

development projects in Brazil. A member of the Duke University Department of Anthropology conducted a training session for students on interviewing skills.

The students then formed three working groups to conduct more detailed research concerning the following issues: (1) the evolution and current state of Brazilian law with respect to quilombo land titling procedures; (2) governmental and non-governmental agencies and international financial organizations involved in the titling process and socioeconomic development for quilombos; and (3) comparative country research on Afro-Latino land rights in other countries in South and Central America. The results of this research provided additional context for students to understand the historical, legal, social, and economic issues involving quilombola land rights and to prepare a detailed list of questions for the interviews and meetings in Brazil.

From March 6–12, 2010, the students and Professor Helfer traveled to Brazil to perform intensive fieldwork. Meetings and interviews were held in the city of Rio de Janeiro as well as in the Alto da Serra quilombo, situated in the municipality of Rio Claro, near the town of Lídice, in the State of Rio de Janeiro, about three hours west of the city of Rio. During a two-day visit to the quilombo, students toured the community's lands and interviewed many of its members. The students also met with representatives from Marambaia and Santana, two additional quilombos located in the State of Rio de Janeiro. In the city of Rio de Janeiro, students interviewed numerous individuals involved in the land titling process, including representatives from Koinonia, a federal prosecutor who has litigated quilombola land rights claims, and an anthropologist who had prepared a detailed report on land use by Alto da Serra. The students also an interviewed an employee of the principal governmental agency that oversees the titling process, other NGOs active in land rights and the titling process, and a private sector company

that provides grants for socioeconomic development. The Fundação Getúlio Vargas law school in Rio de Janeiro hosted the students and provided an opportunity to meet Brazilian law students who had studied land rights, as well as a Brazilian law professor who is an expert in international human rights law. Appendix 1.C contains a full list of meetings and interviews.

In addition to these interviews and meetings, students worked with members of the Alto da Serra community and with Koinonia to identify several projects and research tasks that would assist in the community's efforts to secure land title and to promote its social and economic development. These projects include the following: (1) the present report and its findings; (2) a brief history of Afro-Latino land rights in South and Central America to be published in a newsletter that Koinonia distributes to quilombos throughout Brazil; and (3) a list of potential sources for grants and micro-finance loans for Alto da Serra.

C. Report Outline and Description of Post-Trip Projects

The remainder of this Report proceeds as follows. Part II provides the historical and legal background of quilombos in Brazil. After examining the definition of "quilombo," Part II describes the titling process, including the current status of the relevant laws and regulations and recent constitutional challenges. It concludes with an analysis of the different approaches to the definition of quilombo, as well as the appropriate scope of the land-titling process.

Part III provides a more fine-grained analysis of Afro-Latino land rights in Brazil and compares them to Afro-Latino land rights regimes elsewhere in Central and South America. This section first provides information about three different quilombola communities in Brazil and the status of each community's application in the land titling process. These communities include Alto da Serra, Marambaia, and Santana. Part III then analyzes how Afro-Latino land rights are recognized in other Latin American countries, including Colombia, Ecuador, and

Nicaragua. After offering a brief synopsis of the history, land title laws, current status of land title grants, and the challenges that Afro-Latino groups face in each of these countries, this section concludes by placing Brazil's land rights struggles in a wider context and suggesting lessons that can be gleaned from a broader comparative analysis. Appendix 2 contains a tabular comparison of Afro-Latino land rights in Central and South America.

Part IV examines the continuing obstacles to the realization of quilombola land rights and socioeconomic development. This section first looks at the resource and capacity problems facing Brazilian government agencies, focusing in particular on the National Institute of Colonization and Agrarian Reform (INCRA). Part IV then describes the lack of societal awareness of the problems that quilombola communities face as well as the negative coverage that the communities often receive in the Brazilian news media. Next, it considers the problems resulting from weak political mobilization and lack of coordination among quilombola communities. Finally, Part IV turns to the challenges that quilombola communities confront when attempting to gain access to tools for socioeconomic development, including problems created by the Brazilian government and by private funders, and a lack of awareness within the communities themselves.

This report concludes that, despite significant legislative strides to create a quilombo land titling mechanism in Brazil, formidable legal, social, and political obstacles remain. These challenges are complex, multi-faceted, and interrelated. Therefore, improving access to land—the pursuit of which will invariably enhance social stability and economic security—must be a priority among all sectors of Brazilian society.

II. HISTORICAL AND LEGAL BACKGROUND OF QUILOMBOS IN BRAZIL

A. History of Quilombos

Brazil was the last country in the Western Hemisphere to end the institution of slavery.[15] During the era of slavery until its abolition in 1888, Brazil imported four million African slaves—far more than any other country in the world.[16] Some of these slaves escaped or were freed by their captors, seeking refuge in remote areas, cities, and even at the edges of plantations.[17] These former slaves established "quilombos," or communities of runaway slaves. Some quilombos were particularly large and well known. The Palmares quilombo, for instance, had between 15,000 and 30,000 residents at its peak in the middle of the seventeenth century, and remains famous today.[18] The majority of quilombos, however, were much smaller. Indeed, most of the estimated 3,550[19] quilombos in Brazil today consist of less than 150 families.[20]

From their inception until the end of the twentieth century, quilombos enjoyed few, if any, land rights. Due to a lack of comprehensive land laws, squatters increased during the seventeenth and eighteenth centuries, which led to the passage of *Lei de Terras* (land law) in 1850.[21] *Lei de Terras* made land acquisition by public occupation illegal, and transferred any unused land to a state monopoly controlled by the governing elite.[22] During the military regimes of the mid-to-late twentieth century, restrictive land laws persisted and government leaders

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[15] THOMAS SOWELL, CONQUESTS AND CULTURES: AN INTERNATIONAL HISTORY 167 (1999).
[16] HUGH THOMAS, THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE, 1440–1870 804 (1997).
[17] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE, BETWEEN THE LAW AND THEIR LAND: AFRO-BRAZILIAN QUILOMBO COMMUNITIES' STRUGGLE FOR LAND RIGHTS 9 (2008), *available at* http://www.utexas.edu/law/academics/centers/humanrights/projects_and_publications/brazil-report.pdf [hereinafter "RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: BRAZIL"].
[18] *Id.* at 8.
[19] *Id.*
[20] INCRA, ANDAMENTO DOS PROCESSOS–QUADRO GERAL (2009), http://www.incra.gov.br/portal/index.php?option=com_content&view=category&layout=blog&id=252&Itemid=27.
[21] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: BRAZIL, *supra* note 17, at 12.
[22] *Id.* at 13.

ignored calls for substantive agrarian reform.[23] As a result of centuries of discriminatory land administration laws, which disadvantaged quilombos and other groups, land ownership in Brazil remains highly concentrated.[24]

During the transition to a democratically elected government in the 1980s, Afro-Brazilian activists pressed for full and equal rights in the new Brazilian Constitution of 1988.[25] They demanded, among other things, that land be granted to rural blacks. The result was a compromise: communities that could claim quilombola heritage were entitled to land grants.[26] Article 68 of the ADCT—in a single yet powerful sentence—grants collective lands rights to quilombos.[27] The provision reads: "Final ownership shall be recognized for the remaining members of the quilombola communities who are occupying their lands and the state shall grant them the respective title deeds."[28] Thus, the Constitution of 1988, passed one hundred years after the abolition of slavery in Brazil, marked the first genuine attempt to address quilombola land rights in Brazilian history.[29] Although a significant achievement, Article 68 of the ADCT has not resulted in full recognition of quilombola land rights. More than twenty years after the adoption of the new constitution, the government has granted very few collective land titles to quilombos.[30]

The remainder of this section outlines the evolution of the legal framework that the Brazilian government has established to grant collective land rights to quilombos. It also

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[23] *Id.*
[24] Whitman, *Reframing Agrarian Citizenship*, *supra* note 12, at 121.
[25] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: BRAZIL, *supra* note 17, at 14.
[26] Jan Hoffman French, *Ethnoracial Identity, Multiculturalism, and Neoliberalism in the Brazilian Northeast*, *in* BEYOND NEOLIBERALISM IN LATIN AMERICA? SOCIETIES AND POLITICS AT THE CROSSROADS 105 (John Burdick et al. eds., 2008).
[27] ADCT refers to the Temporary Constitutional Provisions Act, or *Ato das Disposições Constitucionais Transitórias*.
[28] CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, Temporary Constitutional Provisions Act art. 68 (1988).
[29] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: BRAZIL, *supra* note 17, at 14.
[30] *See infra* Part II.B.2.

demonstrates that this framework—and granting land rights to quilombos generally—remains strongly contested in Brazil today.

B. The Land Titling Process: Legal Framework and Constitutional Challenge

Article 68 of the ADCT must be understood in tandem with other prominent provisions of the 1988 Constitution that refer directly or indirectly to quilombos. Articles 215 and 216, for instance, bear directly on the interpretation of Article 68 of the ADCT. Article 215 establishes that the "State shall ensure to all the full exercise of the cultural rights and access to the sources of national culture," and specifically mentions Afro-Brazilian groups as part of that culture.[31] Article 216 goes even further, establishing that sites and documents pertaining to runaway slave communities are to be considered national heritage and protected.[32] The Palmares Cultural Foundation (FCP), the government agency charged with preserving and promoting Afro-Latino culture, has interpreted these provisions, together with Article 68 of the ADCT, to mean that quilombo lands are national public goods deserving of protection.[33]

Given its brevity, Article 68 of the ADCT obviously required implementing legislation. However, it was not until 2003, with the passage of Presidential Decree 4.887,[34] that the federal government implemented a comprehensive, step-by-step process for quilombos to receive collective land title. Decree 4.887 transferred the primary responsibility for titling from FCP, a cultural agency, to the National Institute of Colonization and Agrarian Reform (INCRA),[35] which has extensive expertise in land titling issues but less experience with Afro-Brazilian culture. Decree 4.887 thus signaled a shift in emphasis from cultural heritage to socioeconomic

[31] CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL art. 215 (1988).
[32] *Id.* art. 216.
[33] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: BRAZIL, *supra* note 17, at 15.
[34] Presidential Decree No. 4.887 (2003).
[35] *Id*. art. 3, 7–8.

stability and development as the justifications for quilombo land claims, creating an opportunity for additional Afro-Brazilian communities to seek land regularization from the government.[36]

In 2008, the federal government issued Normative Instruction 49, which established a detailed series of steps that each quilombo must follow to gain title.[37] In October 2009, the government issued Normative Instruction 57, which is largely consistent with Normative Instruction 49.[38] Together, Decree 4.887 and Normative Instruction 57 establish the foundation of quilombo land titling laws and regulations at the national level.[39]

1. Summary of the Titling Process

The quilombo land titling process consists of a complex series of seventeen steps. This section outlines the most prominent of these steps as set forth in Decree 4.887 and Normative Instruction 57. The duties of oversight and assistance for each of the seventeen steps are allocated to various agencies in Decree 4.887, with INCRA shouldering the bulk of the burden.[40] Normative Instruction 57 provides functional level guidance to the agencies to carry out these responsibilities.[41]

[36] Both government officials and NGO employees shared their opinion that the quilombo identity is first and foremost a mechanism for land regularization. Interview with Coordinator of Politics and Race Relations, Prefeitura do Rio de Janeiro, in Rio de Janeiro, Brazil (Mar. 8, 2010) [hereinafter "Prefeitura Interview"]; Interviews with Project Evaluator, Koinonia, in Rio de Janeiro, Brazil and Alto da Serra, Brazil (Mar. 8–10, 2010) [hereinafter "Koinonia Interviews"].
[37] Normative Instruction No. 49 (Sept. 29, 2008).
[38] Normative Instruction 56, issued on October 7, 2009, omitted the need for an anthropological report as required by Normative Instruction 49. However, just two weeks later, Normative Instruction 57 was issued, which repealed Normative Instruction 56 and re-instated the anthropological report. Thus, Normative Instruction 49 and Normative Instruction 57 are functionally identical. For a complete list of federal titling legislation, including all relevant Normative Instructions, see http://www.cpisp.org.br/htm/leis/leis.aspx.
[39] Seven Brazilian states have their own land titling procedures, although Rio de Janeiro State is not one of them. The summary in the text focuses only on the national land titling process. Terras Quilombolas: Commisão Pro Índio de São Paulo, http://www.cpisp.org.br/terras/html/comosetitula.asp (last visited Apr. 8, 2010).
[40] Presidential Decree No. 4.887 (2003).
[41] Normative Instruction No. 57 (Oct. 20, 2009).

The first step in the process, self-identification, occurs when a community officially declares itself as a quilombo.[42] Under Decree 3.912, a precursor to Decree 4.887 that was passed in 2001, this first step originally required the preparation and submission of a detailed anthropological report to determine whether the community was actually a quilombo.[43] However, uncertainty over how to define a "quilombo" prompted the government to adopt a system of self-identification.[44] Once a community officially declares itself a quilombo, it must then create a community association and register the association with FCP. The remaining steps in the titling process are handled by INCRA.

Once FCP registers the community, INCRA must demarcate the quilombo's territory.[45] This territory encompasses community member's residences as well as areas of agriculture, cultural activity, and social activity. INCRA then collects information about the chain of title and overlapping lands, and it creates a report called a Report of Identification and Delimitation (RTID) that identifies the lands the agency proposes to grant to the quilombo. INCRA publishes the RTID in the official state and federal gazettes, after which individuals have ninety days to challenge the contents of the report and government agencies have thirty days to do so.[46] INCRA's regional decision committee will rule on any such challenges, and INCRA will publish a new RTID if necessary. Once all challenges have been resolved, the final RTID is published.

If the quilombo's claimed territory is all on public property, then INCRA will physically demarcate the boundaries of the quilombo's territory. The government then grants title to and registers the community officially. The community as a whole, rather than any individual,

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[42] *Id.* art. 6.
[43] Presidential Decree No. 3.912 art. 3 (2001).
[44] Interview with Professor of Anthropology, Rural Federal University of Rio de Janeiro, in Rio de Janeiro, Brazil (Mar. 11, 2010) [hereinafter "Professor of Anthropology Interview"].
[45] Normative Instruction No. 57 art. 9 (Oct. 20, 2009).
[46] *Id*. art. 13.

receives the non-transferable land title. According to interviews with agency officials, this process is far more likely to be completed if the claimed land is situated entirely on public land.[47]

If the quilombo's claimed land encompasses private property, then the process is more complicated. The quilombo will get title to the land that was delineated in the RTID irrespective of the validity of competing claims of title, but the validity of those claims determines the procedures that INCRA follows. The municipal level *cartório*, roughly equivalent to a local title holding agency, determines the chain of title and who has proper title to the land.[48] Many of the titles go back to the Portuguese colonial period, and in many rural areas the records were very poorly kept, if at all. As a result, there are often major delays at this stage of the titling process.[49]

If a competing landowner is found to have proper title, that landowner is removed and compensated for his or her land as well as for any improvements thereto.[50] Under certain circumstances, INCRA may even provide new land. If the competing landowner does not have proper title, INCRA will remove the landowner and provide compensation solely for the improvements on the land. The process then concludes, as in the case of public lands, with a physical demarcation and an award of collective title to the community association.[51]

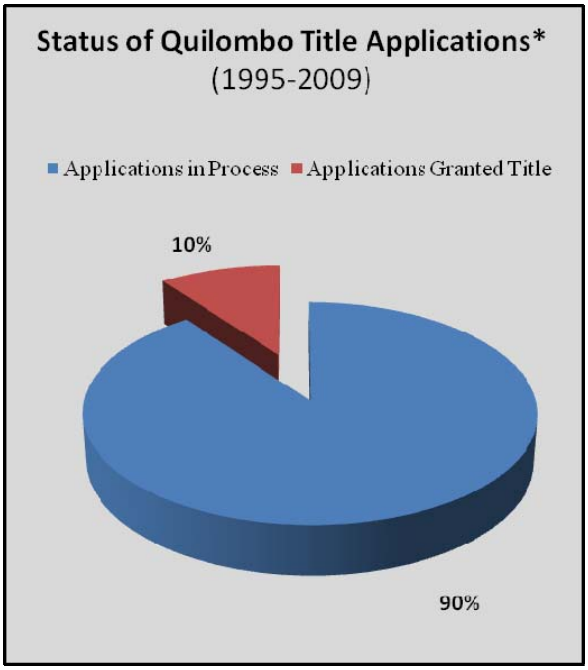
2. The Current Status of Titling

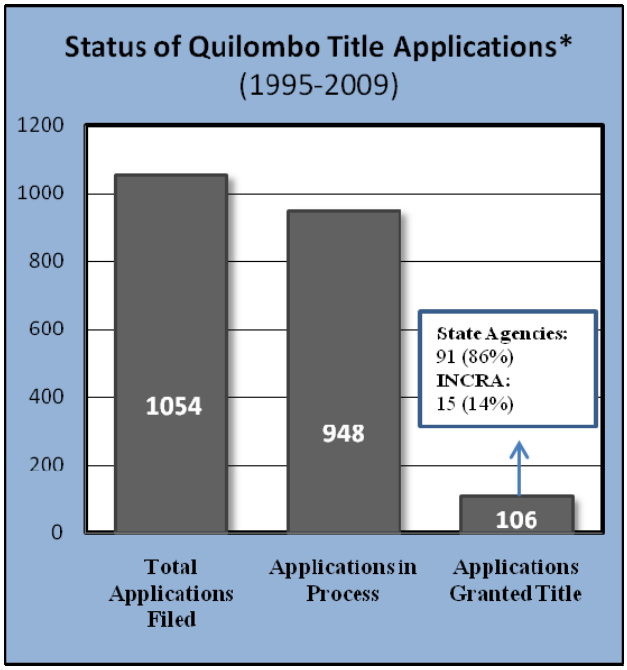
As this short summary of the regulations demonstrates, the process for obtaining collective land title is fraught with complexity. Unsurprisingly, few quilombos have the resources or understanding to navigate the many stages of this process. Due to this complexity, as well as the multiplicity of factors described in Part IV below, the vast majority of quilombo

[47] Interview with Agronomist, INCRA, in Rio de Janeiro, Brazil (Mar. 11, 2010) [hereinafter "INCRA Interview"].
[48] *Id.*
[49] *Id.*
[50] *Id.*; Normative Instruction No. 57 art. 21 (Oct. 20, 2009).
[51] INCRA Interview, *supra* note 47.

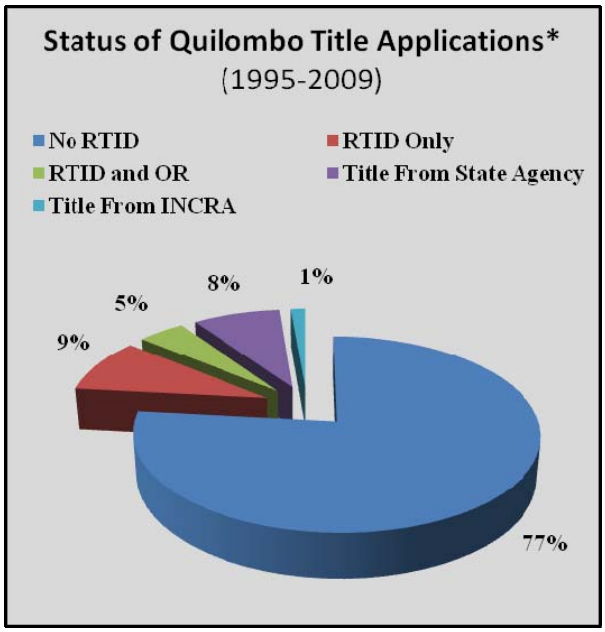
land claims—including those of the Alto da Serra community in the State of Rio de Janeiro—are languishing at one of the intermediate steps in the titling process. As the following graphs illustrate, quilombos have filed 1,054 applications since 1995, but the government has awarded only 106 land titles. Moreover, the vast majority of these applications have not even completed the official land demarcation (RTID) stage.

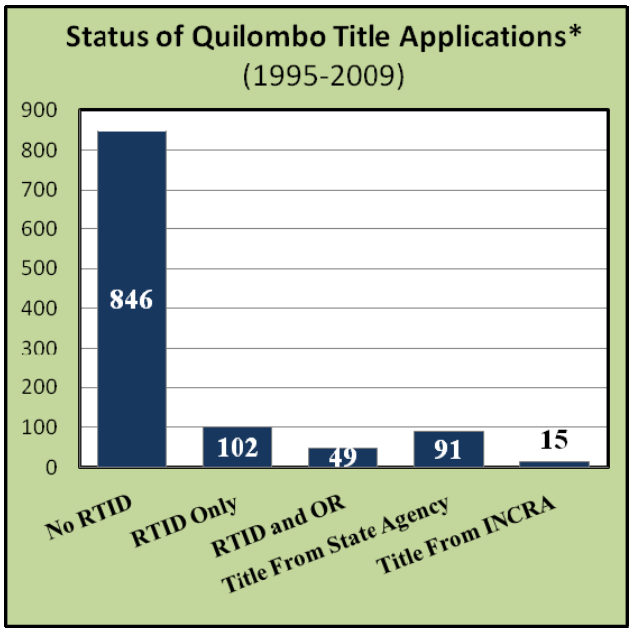
Applications for Land Title by Quilombo Communities, 1995-2009





* Note that the number of applications (1,054) does not reflect the number of communities which have applied (1,342), as some communities apply jointly. Additionally, it is not clear whether the 1,054 applications include applications to state agencies or not.

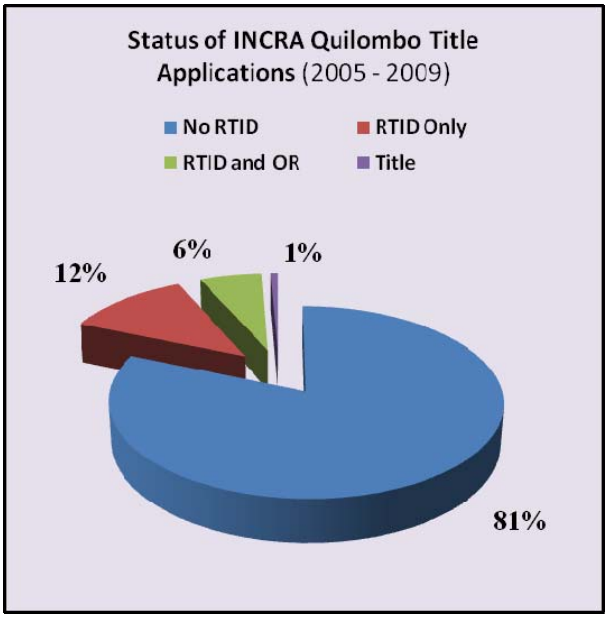


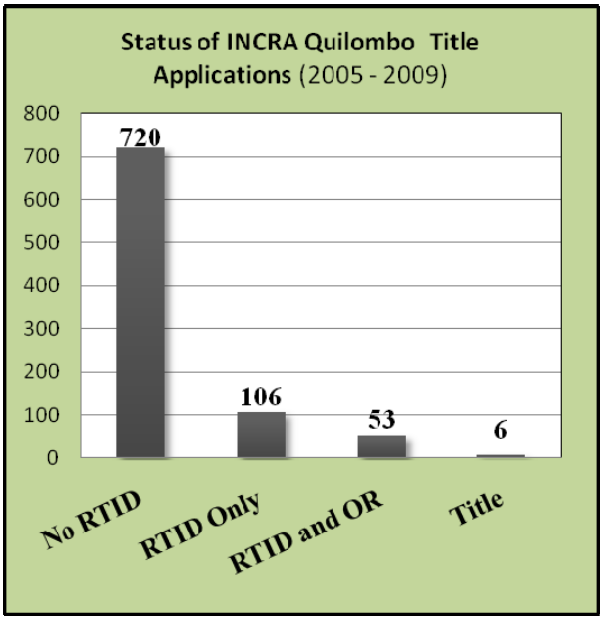


Legend:

No RTID: Cases in which a community has applied but has not yet received the RTID
RTID Only: Cases in which the community has received an RTID
RTID and OR: Cases in which a community has received and RTID, the RTID has been published, and the RTID has been approved with an Ordinance of Recognition (OR)
Title From State Agency Title: Cases in which a community has received title from a state agency
Title from INCRA: Cases in which a community has received title from INCRA

Applications for Land Title by Quilombo Communities, 2005-2009





This analysis is based upon data provided on the INCRA website, http://www.incra.gov.br. The data is assumed to relate to applications managed by INCRA. Therefore, applications specifically marked as state agency applications were excluded, and those that were unmarked were assumed to be applications to INCRA.

Comparison of INCRA Quilombo Applications Receiving RTID versus Granted Title (2005-2009)		
	RTID Only	Title
Avg # Families	143.3	60.5
Avg # Quilombo Communities	1.3	1.0
Avg Landmass (ha)	16,085.3	4,738.8

Note that these figures are based on 6 granted titles, which is an extremely small number of observations.

Comparison of INCRA Multi-Community Applications Filed versus Granted Title (2005-2009)	
Percentage of Multi-community Applications Filed With INCRA	11%
Percentage of Multi-community Applications Granted Title By INCRA	0%

Note that these figures are based on 6 granted titles, which is an extremely small number of observations.

3. Constitutional Challenge to the Titling Process

Advocates for quilombola communities often criticize the land titling process as being far too complicated and impeding the government's ability to grant collective land rights to the communities. Other groups within Brazil, however, argue that the titling process is illegal. In 2004 the Liberal Front Party[52] filed constitutional challenge No. 3239 with the Brazilian Supreme Federal Court, claiming that key provisions of Decree 4.887 are unconstitutional and should be repealed.

The constitutional challenge consists of four major claims.[53] First, because INCRA uses government funds to compensate private landowners, the rules authorizing the agency to award compensation must be enacted by the legislature, not adopted by a presidential decree or normative instruction. Second, INCRA unconstitutionally expropriates lands owned by private parties. Third, the self-identification methods are overly broad and enable communities that are not actually quilombos to secure land title. Lastly, the challenge argues that the demarcation regulations are too broad, and that land used for cultural or social activities should not be allocated to quilombos. These four arguments, which express a highly skeptical view of quilombola land claims, are also reflected in the negative public perceptions of quilombos described in Section IV.

At present there is little indication of how the Supreme Federal Court will decide this constitutional challenge. However, the Office of the Attorney General and the Advocate General

[52] The Liberal Front Party no longer exists; the Party is now named the "Democrats."
[53] Liberal Front Party, Direct Action of Unconstitutionality, No. ADI 3239 (Nov. 21, 2003), *available at* http://www.stf.jus.br/portal/geral/verPdfPaginado.asp?id=394738&tipo=TP&descricao=ADI%2F3239.

have both recommended that the Court deny the petitioners' claims.[54] Daniel Sarmento, an influential federal public prosecutor, has also written a legal brief strongly urging that the challenge be dismissed.[55] Academics have also advocated against the constitutional challenge.[56] In the meantime, the titling process continues, although apparently at a somewhat slower pace.

C. Social Underpinnings of Quilombola Land Rights: A Typology

Constitutional Challenge No. 3239, as well as Decree 4.887 and Normative Instruction 57, highlight the tensions underlying the debate over quilombos and the land titling process. Professor André Luiz Videira de Figueiredo has identified at least four fundamental questions that engender sharp divisions in the legal and social discourse relating to quilombola land rights: (1) what is the nature of a "quilombo"; (2) how should quilombola lands be defined; (3) what is the definition of a "quilombo"; and (4) what role should the government or experts play in defining quilombos?[57]

These questions continue to animate the public debate over quilombola land rights. First, there is pointed disagreement over what it means to be a quilombo. Under a strict approach,

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[54] Claudio Fonteles, Att'y Gen. of the Brazilian Republic, Direct Action of Unconstitutionality, No. ADI 3.239-9/600-DF (Sept. 17, 2004), *available at* http://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=2227157 (follow "Manifestação da PGR" hyperlink); Alvaro Augusto Ribeiro Costa, Advocate Gen. of the Brazilian Republic, Direct Action of Unconstitutionality, No. ADI 3.239-9/DF (Aug. 12, 2004), *available at* http://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=2227157 (follow "Manifestação AGU – PG – 86513/2004" hyperlink).

[55] Daniel Sarmento, Regional Prosecutor, Fed. Public Ministry, Quilombola Territory and the Constitution: Challenge 3.329 and the Constitutionality of Decree 4.887/03 (Mar. 3, 2008), *available at* http://ccr6.pgr.mpf.gov.br/documentos-e-publicacoes/docs_artigos/Territorios_Quilombolas_e_Constituicao_Dr._Daniel_Sarmento.pdf.

[56] *E.g.*, Flávia Piovesan, Prof. of Constitutional Law and Human Rights, Pontifical Catholic Univ. of São Paulo, No. ADI 3.239 (Mar. 23, 2009), *available* at http://redir.stf.jus.br/paginador/paginador.jsp?docTP=TP&docID=395162#PETIÇÃO%20(82462/2009)%20-%20PGR%20-%20requer%20juntada%20de%20pareceres; Boaventura de Sousa Santos, Prof. of Economics, Univ. of Coimbra, Quilombolas: STF Petition, http://www.petitiononline.com/quilombo/petition.html (last visited May 12, 2010).

[57] This typology is based on the work of André Figueiredo. *See* André Luiz Videira de Figueiredo, O "Caminho Quilombola": Interpretação constitucional e reconhecimento de direitos étnicos 44–58, 100–04 (Apr. 2008) (unpublished Ph.D. dissertation, Instituto Universitário de Pesquisas do Rio de Janeiro), *available at* http://www.iuperj.br/biblioteca/teses/andré%20figueiredo.pdf; Interview with Professor of Anthropology at Rural Federal University of Rio de Janeiro, Rio de Janeiro, Brazil (Mar. 8, 2010).

quilombos consist of individuals who trace their lineage to runaway slaves. The focus is on individuals as "descendents of a community." A broader conceptual approach, conversely, views quilombos as "communities of descendents." Here, the focus is on quilombos as groups of Afro-Brazilians living collectively and sharing the same parcel of land.

The second question centers around the definition of a quilombo itself. A restrictive approach defines a quilombo as a geographic area to which slaves fled and in which they remain as inhabitants. Pursuant to this definition, those communities that have been working the same land as their slave-ancestors would qualify for land rights, but those that have moved around or reestablished themselves in other locations might not. A broader approach, not as wedded to a community's historical roots, defines a quilombo along ethnic and cultural lines. The focus is on the social structure of the community and its current modes of behavior. This definition would encompass those communities that a more historically bound definition would exclude.[58]

The third point of contention revolves around how to identify quilombola lands. A strict approach advocates demarcating land based on how the community uses land as a means of production and survival. In contrast, a broader approach would also include land that contributes to community cohesion. In other words, the broader approach delimits land based not only on how it serves a quilombo's physical and economic needs, but also how it supports a community's social, religious, and cultural expression.[59]

The fourth and last question turns on the role that government officials or experts should play in identifying quilombos. A narrow approach suggests that experts perform extensive anthropological research to determine whether the community is a "true" quilombo. In contrast, a broader, more socially focused approach would merely require the community itself to

[58] *Id.*
[59] Professor of Anthropology Interview, *supra* note 44.

determine whether it wants to identify as a quilombo, with the government respecting that decision. In other words, quilombos should be allowed to self-define.[60]

The table below, adapted from the research of Professor Figueiredo,[61] summarizes the four key points of tension:

Two conceptions of a quilombo

	Narrower definition	**Broader definition**
Nature of a quilombo	Individual: "descendents of communities"	Collective: "descendant communities"
Definition of a quilombo	Place to which slaves fled	Ethnic group
Definition of quilombola territory	Space for productive use	Space for productive use as well as for social, religious or cultural expression
Method of definition	Definition by experts	Self-definition

The constitutional challenge to Decree 4.887 represents a narrow view of how quilombos are to be defined and their land demarcated. Pro-quilombo groups advocate for a broader conceptualization. While each approach has its strengths and weaknesses, Brazilian law is evolving toward a broader definition.[62] For instance, the once-laborious anthropological studies that sought to define quilombos are no longer necessary: quilombos have the right to self-define by registering with the FCP. At the same time, the broader approach may not lend itself as readily to widespread acceptance by Brazilian society—a huge obstacle for Afro-Latino groups across the Americas.[63] These conceptual differences continue to drive the legal and political debate over quilombos and their rights to land.

[60] *Id.*
[61] *See* Figueiredo, *supra* note 57, at 102.
[62] Professor of Anthropology Interview, *supra* note 44.
[63] *See* Hooker, *Afro-Descendant Struggles*, *supra* note 1, at 280.

III. COMPARISON AND CONTEXTUALIZATION OF QUILOMBOS IN LATIN AMERICA

A. Comparison of Quilombos Within Brazil

This section presents case studies of three quilombos in the State of Rio de Janeiro, laying out the origins and history of each community and the unique legal and political challenges they face. Each community is at a different stage in the federal land titling process.[64] The descriptions below, drawn primarily from interviews with community members, exemplify the tensions described in Part II regarding competing perspectives on quilombola identity. An examination of some of the similarities among, and differences between, the three quilombos also provides a context for understanding the range of social, economic, and political challenges facing Afro-Latino communities in Brazil.

1. Alto da Serra[65]

Approximately thirty families comprise the Alto da Serra quilombo, each descended from the original family group that migrated to the State of Rio de Janeiro from the State of São Paulo in 1949. The patriarch, Sr. Benedito Leite, arrived in Alto da Serra with his parents in 1959, having lived nearby for the preceding ten years harvesting bananas, hearts of palm, and wood for making charcoal at the behest of a local landowner. While working in Alto da Serra, the family endured conditions akin to slavery, receiving little more than food and shelter as payment for their labor. Because of ecological concerns, harvesting of charcoal and hearts of palm was outlawed in the early 1960s. For a short time, the land was converted to banana production, but this enterprise failed, and the owner eventually abandoned the property. Because the family lacked work permits, and had no other employment opportunities, they remained on the land and

[64] As the State of Rio de Janeiro has not yet enacted state-level implementation procedures, all of the named communities are subject to the national titling measures.

[65] Unless otherwise indicated, all information in this section was obtained during personal interviews with members of the Alto da Serra quilombo. Interview with members of Alto da Serra quilombo, in Alto da Serra, Rio de Janeiro, Brazil (Mar. 9–10, 2010) [hereinafter "Alto da Serra Community Interviews"].

survived by farming the area they occupy to this day. Currently, 85 family members live in Alto da Serra.[66]

In 2002, the community sought assistance from an NGO, Koinonia, after discovering that part of the land they had occupied since 1959 had been sold at auction to a third party by the Bank of Brazil. Koinonia introduced the community to the quilombo concept and helped them begin the land titling process through self-identification. In 2002, the community formed an Association of Rural Workers, which converted into a quilombola community association in 2007. The community association is led by Bené Leite, a son of Sr. Benedito Leite, who represents the community in its dealings with NGOs, partner communities, government agencies, and other third parties.

By the time Alto da Serra formed the quilombola association and started the titling process, a brother of Sr. Benedito Leite had already secured a contiguous parcel of land in his own name through adverse possession. Considerable discussion ensued within the community about whether it was preferable to obtain individual titles through adverse possession or to pursue collective title as a quilombo. The families determined that collective ownership would better serve their needs, and that decision has had a profound impact on the social and economic development of the community. Before organizing as a quilombo, the residents of Alto da Serra were a strong, but informal, extended family network that had very little clout with the local government. As a quilombo, however, the community enjoys increased social cohesion, and feels empowered to engage with local authorities as a unified group. According to community leaders, relations with the government have greatly improved since Alto da Serra self-identified as a quilombo.

[66] *See* Figueiredo, *supra* note 57, at 146.

The families of Alto da Serra primarily subsist on their own agricultural production, engaging in limited trade with the nearby cities of Lídice and Angra dos Reis. Since commencing the titling process, Alto da Serra has worked closely with NGOs to expand their agricultural efforts, install a sanitation system and biodigester to process human and animal waste and provide cooking gas, participate in a regional watershed protection program, and make various improvements to the property. Community members have expressed interest in pursuing other enterprises, ranging in scale from making and selling homemade jams to building an ecotourism lodge. Some of these projects could be implemented now with minimal funding; others are impossible without securing title to the land.

As described in more detail in Part IV.B, Alto da Serra has progressed through the preliminary steps of the titling process, and needs only an agronomist report to complete the RTID. According to INCRA, the agency's resources are so consumed by addressing "higher-priority" quilombos—those enmeshed in political controversy and even violence—that relatively peaceful and stable communities like Alto da Serra receive inadequate attention.[67] As a result, the community is unable to pursue its more ambitious projects until the titling process is resolved.

2. Marambaia[68]

The quilombo of Marambaia is located on the island of Ilha da Marambaia, which was used as a smuggling port and "fattening" farm for illegally trafficked slaves after Brazil outlawed the Atlantic slave trade in 1850. After the abolition of slavery in Brazil in 1888, the slave owner, Commander Breves, abandoned the island, leaving the slaves behind. According to local lore,

[67] INCRA Interview, *supra* note 47.
[68] Unless otherwise indicated, all information in this section was obtained during personal interviews with members of the Marambaia quilombola community. Interview with members of Marambaia quilombo, in Alto da Serra, Rio de Janeiro, Brazil (Mar. 9–10, 2010) [hereinafter "Marambaia Community Interview"].

the Commander made a verbal commitment to the freed slaves that they could own and occupy the island, although this was later disputed by Breves' widow. Though legal title passed through a series of hands, the island technically belongs to the federal government as part of Brazil's coastline.

The community continues to occupy the land, farming potatoes, harvesting coffee, hunting, and fishing. The current residents of Marambaia, an estimated 150 families as of 2006, trace their origins to the original slave inhabitants who intermarried with a group of Portuguese that moved onto the island after Breves' death.

In 1971, the federal government delegated administration of Ilha da Marambaia to the Navy, designating it a "strategic location." Relations between the Navy and the community were amicable throughout the 1970s, but became strained beginning in 1981, when the Navy built a training center on the island. Since that time, the Navy has increasingly restricted the use of land on,[69] and travel to and from,[70] the island. As a result, the community struggles to maintain economic and social viability.

In 1998, the Navy initiated legal proceedings to evict the community, claiming that the island is a national security area and that the community's activities threaten the environment. The Catholic Church intervened on the residents' behalf, calling on the President of Brazil to take action to protect the community. In 2002, a federal Public Prosecutor filed a class action against the Navy seeking judicial recognition of Marambaia's title to the land as a quilombo.[71]

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[69] For example, the Navy has exploited Marambaia's designation as a cultural heritage site by forbidding any improvements or modifications to the dilapidated mud houses that many community members occupy.

[70] According to residents, the Navy has absolute power to decide who may get on and off of the island by controlling access to the boats that ferry goods and passengers to and from the mainland.

[71] Interview with Federal Prosecutor, in Rio de Janeiro, Brazil (Mar. 8, 2010) [hereinafter "Federal Prosecutor Interview"]. The Office of the Public Prosecutor is an independent branch of the government, vested with authority to bring suit against any public or private party for violations of citizens' rights. According to the Federal Prosecutor, the office was modeled after that of the Swedish Ombudsman, combining government and civil society dimensions and enjoying "absolute independence." *Id.*

Government agencies such as FCP and the Secretariat for the Promotion of Racial Equality (SEPPIR) intervened on the community's behalf, and the Solicitor General of the Union (AGU) intervened to analyze the correct demarcation of the land.[72] Although the Prosecutor won an injunction to prevent further demolition of the community and removal of the residents, local residents continue to complain of harassment and restrictions on movement by the Navy.

The Prosecutor's action is currently stayed pending resolution of the constitutional challenge to Decree 4.887, described in Part II.B.3.[73] Until that time, the community is allowed to remain on the island under the terms of the injunction. If the constitutional challenge is decided favorably, the lawsuit can go forward and INCRA will be able to continue its assessment of the title claim.[74]

3. Santana[75]

Like Marambaia, the Santana community directly traces its lineage to freed slaves. According to community history, their land was given to the slaves at some time after emancipation.[76] The current residents descend from the original slaves who had worked the land, and community members express a strong sense of cultural identity and a connection with their ancestry.

Over the past century, members of the community have faced property boundary challenges from neighboring landowners, lost parcels of land due to debt, and were forcibly

[72] *Id.*
[73] *See* Part II.B.3.
[74] Under the system that existed prior to enactment of the Normative Instruction, INCRA assessed Marambaia's claim to be a slave descendent community and granted a *laudo*—a highly detailed, thorough anthropological report. Federal Prosecutor Interview, *supra* note 71. The *laudo* was later invalidated by the president of INCRA under pressure from the Navy. *Id.* In 2008, INCRA published an RTID, which was later de-published under pressure from an inter-ministerial working group that had been convened to investigate the Marambaia case. INCRA Interview, *supra* note 47.
[75] Unless otherwise indicated, all information in this section was obtained during personal interviews with members of the Santana quilombola community. Interview with members of Santana quilombo, in Alta da Serra, Rio de Janeiro, Brazil (Mar. 9–10, 2010) [hereinafter "Santana Community Interview"].
[76] However, the Catholic Church maintains that the land was dedicated to Saint Ana and that the Church holds title as a result.

evicted on more than one occasion. Although community members have always returned to occupy the land, they continue to face boundary disputes and violence and threats against their leaders.

Santana was recognized as a quilombo in 1993 and granted title in 1999 by FCP, during a period when FCP had broad authority to administer the quilombo land titling process.[77] Because the land was not properly expropriated, and certain legal and illegal occupants were not properly removed, title was contested, and proceedings have dragged on since 2000 without resolution.

4. Conclusion

As described in Part II.C, there are sharp divisions over many key aspects of quilombola communities. The narrow, more historically bound approach views quilombola identity as limited to those who can trace their ancestry to communities of runaway slaves. The broader approach, in contrast, views quilombos as defined in part by their present day communal use of land. This tension is not new: it has existed since the adoption of Article 68 of the ADCT.[78] Yet despite the underlying tension regarding how to define a quilombo, the current titling procedures require that communities *self*-identify as quilombos in order to begin the titling process. The requirement of self-identification enables communities of diverse historical origins to organize and gain title to their land.

The three quilombola communities profiled above evince this diversity. Marambaia and Santana exemplify the narrower, historical quilombo profile, tracing their direct lineage to individual slave communities that lived and worked the land in the nineteenth century. Alto da

[77] According to a representative of CPI-SP, FCP granted 14 titles in 22 communities over a two-year period. Interview with Attorney, Commissão Pro-Índio São Paulo, in Rio de Janeiro, Brazil (Mar. 8, 2010) [hereinafter "CPI-SP Interview"]. Though not void, these titles are clouded by competing claims from remnant tenants and neighboring landowners. *Id.*

[78] Jan Hoffman French, *Buried Alive: Imagining Africa in the Brazilian Northeast*, 33 AM. ETHNOLOGIST 340, 342 (2006).

Serra, conversely, traces its history only to the 1940s, and its members all descend from a single family group. Although it would seem that Marambaia and Santana have more "legitimate" historical claims as quilombos, their progress in the land titling process has been much more contentious, and the outcomes remain uncertain because of the competing factors described above. Ironically, Alto da Serra—the least historically rooted community—has had an easier time moving through the titling process than the other communities. Comparing Santana and Marambaia to Alto da Serra reveals that success in the titling process may depend not only on how a particular community identifies as a quilombo through its historical lineage, but also upon the extant political, social, and economic pressures in and around each community. History and identity are important, but so too are political exigencies and bureaucratic realities.[79]

B. Comparison of Afro-Latinos in Latin America

As indicated in Part I, the struggles of Afro-Latino groups are not unique to Brazil. To provide additional context for understanding the struggles of quilombos, this section compares the situation of Afro-Latino groups in three other South and Central American countries: Colombia, Ecuador, and Nicaragua. These three countries have all grappled with how best to extend collective rights to Afro-Latinos. Each nation has implemented policies to enhance the access of Afro-Latinos to land in order to promote economic security and social stability. These countries thus serve as examples both of how progress can be achieved and of why land rights systems in Latin America require further analysis and improvement. Although Brazil is a leader in some areas, it can learn much from how other countries in the region have addressed Afro-Latino land rights issues.

[79] *See infra* Part IV.

1. Background

Afro-descendant groups across Latin America have gained collective rights in at least two different ways. In countries where Afro-Latinos are viewed as ethnic groups with distinct cultures, they have gained collective rights to ensure the preservation of those cultures.[80] Examples are Guatemala, Honduras, and Nicaragua.[81] In countries where Afro-Latinos are seen mainly as racial groups suffering from racial discrimination, they have gained collective rights designed to combat racial discrimination. There are also a few countries where Afro-Latinos are viewed as falling within both categories and have been able to gain collective rights through both mechanisms.[82] Brazil, Colombia, and Ecuador are three examples.[83] However, the justification for Afro-descendant collective rights remains a highly contested issue throughout Latin America.[84]

One collective right that Afro-Latino groups have fought for is the right to own land. Countries that have granted Afro-descendant communities rights over communal land include Brazil, Colombia, Ecuador, Honduras, and Nicaragua, all of which granted these rights via constitutional provision.[85] These communities have based their claim to land on their identity as the descendants of runaway slaves, making rhetorically similar claims to indigenous groups in terms of having a distinct ethnic identity that should be preserved.[86]

[80] Hooker, *Afro-Descendant Struggles*, *supra* note 1, at 283.
[81] *See id.* at 285.
[82] *Id.* at 283–84.
[83] *Id.* at 285.
[84] *Id.* at 280.
[85] Eva T. Thorne, *Ethnic and Racial Political Organization in Latin America*, *in* SOCIAL INCLUSION AND ECONOMIC DEVELOPMENT IN LATIN AMERICA 312 (Buvinic, Mazza & Deutsch., eds. 2004).
[86] Hooker, *Indigenous Inclusion/Black Exclusion*, *supra* note 3, at 295.

Collective Rights for Afro-Descendants in Latin American Countries Granting Land Rights[87]						
Country	**Group Recognition**	**Customary Law**	**Communal Land Rights**	**Autonomy/Self Government**	**Bilingual Education**	**Anti-racial Discrimination Rights**
Brazil	Yes	No	Yes	No	No	Yes
Colombia	Yes	No	Yes	Yes	Yes	Yes
Ecuador	Yes	No	Yes	Yes	No	Yes
Honduras	Yes	No	Yes	No	Yes	Yes
Nicaragua	Yes	Yes	Yes	Yes	Yes	No
Guatemala	Yes	No	Yes	No	Yes	No

As is apparent from the table above, Colombia, Ecuador, and Nicaragua are not the only countries that have been grappling with and responding to the problem of Afro-Latino land rights. However, these three countries are readily comparable to Brazil.[88] Below, this section examines the history, law, current status, and challenges facing the land titling process in each of these three countries.

2. Colombia

a. History

In Colombia the term *cimarrones* is applied to runaway slaves and their ancestors.[89] These slaves established villages called *palenques* in the coastal regions where they were largely isolated from towns and cities.[90] As a result, their lifestyles and cultural practices took on a distinct character influenced by their African heritage as well as their new living experiences.[91]

[87] Table adapted from Hooker, *Afro-Descendant Struggles*, *supra* note 1, at 283.
[88] Due to space limitations, the report excludes Honduras, which, like Nicaragua, provides the same collective rights to indigenous and Afro-Latino communities via the same legal mechanisms. It also excludes Guatemala, which does not grant land rights through its constitution and therefore is significantly different from Brazil and the other countries profiled above.
[89] Peter Wade, *The Cultural Politics of Blackness in Colombia*, 22 AM. ETHNOLOGIST 341, 343 (1995).
[90] *Id.*
[91] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE, UNFULFILLED PROMISES AND PERSISTENT OBSTACLES TO THE REALIZATION OF RIGHTS OF AFRO-COLOMBIANS: A REPORT ON THE DEVELOPMENT OF LEY 70 OF 1993, at 7 (2007),

Although these communities continued to thrive for centuries, Afro-Colombians were rarely granted legal title to the land. Today, Colombia has the second largest Afro-descendant population in Latin America (behind Brazil), comprising an estimated 19% to 26% of the total population.[92] The majority of Afro-Colombians live in the underdeveloped Pacific coastal region where they constitute approximately 80% to 90% of the population.[93] Due to their continued isolation, Afro-Colombians have maintained their unique cultural beliefs, and as a result have been identified as a racial as well as an ethnic minority.[94]

In the 1970's Afro-Colombians began to organize around issues of race.[95] Drawing on the example of Palenque de San Basilio, a village near Cartagena where the Afro-descendants of a historically identifiable *cimarrone* community still live and speak a Creole language, Afro-Colombian leaders utilized the image of *cimarrones* and *palenques* to frame their identity alongside that of indigenous groups who were also organizing around collective rights.[96]

The 1980s saw a political shift and an attempt to de-mobilize guerrilla groups. In an attempt to keep political peace, the government offered to reform the 1886 Constitution. A Constituent Assembly (ANC) carried out constitutional reform, and Afro-Colombians—not unlike Afro-Brazilians—lobbied for affirmative action policies and land reform.[97] The new Constitution, ratified in 1991, required the drafting of legislation that recognized collective property rights for Afro-Colombians.[98] As a result, in 1993 the legislature passed Law 70.[99]

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available at http://www.utexas.edu/law/academics/centers/humanrights/projects_and_publications/colombia.php [hereinafter "RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: COLOMBIA"].

[92] CRS REPORT, *supra* note 11, at 5.

[93] Wade, *supra* note 89, at 342; CRS REPORT, *supra* note 11, at 5.

[94] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: COLOMBIA, *supra* note 91, at 7.

[95] Wade, *supra* note 89, at 342–44.

[96] *E.g.*, *id.* at 344–46.

[97] *E.g.*, *id.* at 346–47.

[98] Transitory Article 55 of the 1991 Constitution required the promulgation of laws aimed at addressing the problems of Afro-Colombians. *See id.* at 347–48.

[99] *E.g.*, RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: COLOMBIA, *supra* note 91, at 8.

b. Law

Law 70 is the legal mechanism that regulates Afro-Colombian communal land rights. However, Law 70's provisions are not limited to land rights. The law also includes provisions related to economic and social development for Afro-Colombians, including the right to education, health and social services, professional training, as well as the protection of cultural identity and the rights of Afro-Colombians as an ethnic group.[100]

Chapter III of Law 70 addresses collective land title for Afro-Colombians. Article 2 defines which lands are available, whereas Article 6 explicitly excludes land in urban areas, indigenous territories, national parks, and zones for national security and defense. This section also clarifies that natural resources on the land are excluded from collective ownership.[101] Article 5 stipulates a governing mechanism, called *Consejos Comunitarios*, which are the only bodies that can submit applications for land titles.[102] Article 7 declares collective titles as inalienable, protected from seizure, and exempt from statutes of limitations. Finally, Article 14 sets out environmental protections including requirements that the land be used in ways to protect the natural resources and allows for traditional mining methods to be used.[103]

The Colombian Constitutional Court has supported Afro-Colombian rights. In 2008, the Colombian Constitutional Court declared the General Forest Act (Law 1021 of 2006) unconstitutional because it lacked provisions for adequate consultation with indigenous and Afro-Colombian communities affected by the law.[104] This decision reinforced the recognition of

[100] *Id.* at 8–11.
[101] *Id.* at 9.
[102] *Id.*
[103] *Id.* at 10.
[104] Christian Courtis, *Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples*, 10 SUR: INT'L J. HUMAN RIGHTS 53, 66 (2006). International law has also influenced the direction of Colombian jurisprudence, determining that Convention 169 of the International Labor Organization (ILO), which provides "rights of ownership and possession . . . over the land," applies to Afro-Colombians. RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: COLOMBIA, *supra* note 91, at 14.

ethnic and cultural diversity as a constitutional and fundamental principle of Colombian nationality, emphasizing that this protection creates a duty to provide a consultation process for indigenous and Afro-Colombian communities. If a law directly affecting these communities does not provide for proper consultation with them, it is unconstitutional. Finally, the court determined guidelines with which the law must comply to be considered valid: to inform communities about the legislation; to illustrate the scope of legislation and how such legislation could affect them; and to give them effective opportunities to respond to such legislation.[105]

c. Current Status

After passing Law 70, the Colombian government began to implement land titling procedures.[106] For instance, Directive 1745 provides the mechanisms for recognizing collective rights of Afro-Colombian communities.[107] *INCODER* is the state administrative agency that oversees the land titling process.[108] A rough sketch of the titling process is as follows:

1. The Afro-Colombian community forms a *Consejo Comunitario* in compliance with Directive 1745.[109]
2. The *Consejo Comunitario* submits a written application to the INCODER office that includes 1) physical and socio-cultural description of the territory; 2) social organization; 3) demographic description; 4) forms of tenancy; 5) conflicts that exist with respect to the land or resources on the land; and 6) traditional practices of production.[110]
3. INCODER then visits the community, produces a technical report, and provides notice to interested parties.[111]
4. If there are no competing issues, INCODER submits the report to a technical commission, which then determines the boundaries of the territory that will be granted to the Afro-Colombian community.[112]
5. Title is granted.[113]

[105] Courtis, *supra* note 104, at 66.
[106] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: COLOMBIA, *supra* note 91, at 12–13.
[107] *Id.* at 13.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 14–15.
[111] *Id.* at 15.
[112] *Id.* at 16.
[113] *Id.*

Today, approximately 90% of the land originally designated as Afro-Colombian territory has been formally ceded to the respective communities.[114]

d. Challenges

Although the Colombian government has granted a significant number of land titles and recent judicial rulings have reaffirmed land rights, Afro-Colombians still face many challenges. First and foremost, because many aspects of Law 70 have not been implemented, Afro-Colombians are still waiting for numerous rights to be realized. Development projects have not been carried out because the government has not allocated the required funds.[115] This reflects larger patterns of racial discrimination, leaving 80% of Afro-Colombians living in extreme poverty.[116]

In addition, a lack of bureaucratic and institutional support has undermined the Articles of Law 70 that have been implemented.[117] While rarely denying claims outright, the government has effectively denied many applications by allowing them to languish in the titling process.[118] This practice is similar to what has been occurring in Brazil. Further, the government has not created adequate mechanisms for determining multiple parties' land use and settling disputes.[119] When adopting natural resource-related legislation, the Colombian government has also largely failed to consult with the communities that hold title—despite clear rules requiring such consultation.[120]

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[114] *See id.* at 12.
[115] *Id.* at 28–29.
[116] CRS REPORT, *supra* note 11, at 5.
[117] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: COLOMBIA, *supra* note 91, at 22; Minority Rights Group International, World Directory of Minorities and Indigenous Peoples–Colombia: Overview, May 2008, http://www.unhcr.org/refworld/docid/4954ce5dc.html (last visited Apr. 8, 2010) .
[118] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: COLOMBIA, *supra* note 91, at 23.
[119] *Id.* at 24–25.
[120] *Id.* at 26–27.

The largest threat to Afro-Colombians is internal displacement.[121] Although the areas occupied by Afro-Colombians used to be considered economically insignificant, these areas recently have become highly desirable because of their potential for crop growth, natural resource mining, highway construction, and tourism.[122] Incursions by agro-businesses,[123] as well as logging and mining companies,[124] have therefore led to displacement. In addition, many Afro-Colombian communities have claimed that paramilitaries have threatened them to sell their land to these businesses.[125] Members of the paramilitary have been known to simply seize the land at the completion of the titling process as a type of punishment, forcing the Afro-Colombians from the land.[126] The government has done little to stop this or support these displacements.[127]

3. Ecuador

a. History

Estimates of the exact size of the black population in Ecuador vary. According to the 2001 census, 5% of the Ecuadorian population identified itself as Afro-descendant.[128] Perhaps their small size has been an advantage: Afro-Ecuadorans may have gained broader rights than their counterparts in other Latin American nations because they are less threatening to national elites.[129] Notwithstanding the extensive legal protections afforded to Afro-Ecuadorians in the

[121] *Id.* at 30.
[122] *Id.* at 33.
[123] *Id.* at 31–32.
[124] *See* Minority Rights Group International, *supra* note 117.
[125] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: COLOMBIA, *supra* note 91, at 32.
[126] *Id.* at 34.
[127] *Id.* at 35.
[128] Jhon Antón Sánchez, *Multiethnic Nations and Cultural Citizenship: Proposals from the Afro-descendant Movement in Ecuador*, 10 SOULS 215, 216 (2008). According to the CIA World Factbook, blacks comprise only about 3% of the Ecuadorian population. CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/ec.html (last visited July 26, 2010).
[129] *See* Hooker, *Indigenous Inclusion/Black Exclusion*, *supra* note 3, at 292 n.21 (comparing Ecuador to Colombia and positing that national elites are less threatened by granting blacks rights in Ecuador).

2008 Constitution, however, Afro-Ecuadorians continue to suffer racial discrimination, exclusion, and inequality.[130]

Although Afro-Ecuadorians reside throughout the country,[131] they are concentrated along the coast and in the central Andes, in the regions of Esmeraldas and the Chota Valley, respectively.[132] The first free Africans settled in Esmeraldas in the mid-sixteenth century and created communities known as *palenques*.[133] By 1599, they had formed an autonomous confederation of about 100,000 people known as the *República de Zambos*.[134]

After the abolition of slavery in 1852, former slaves in the Chota Valley had no money or land and were forced into a system of indentured servitude that lasted into the 1960s.[135] The 1964 and 1973 Agrarian Reform Laws ended the system of indentured servitude and distributed some lands to the former servants,[136] but the overall impact was minimal as the distributed lands were of poor quality and in very small plots.[137] Meanwhile, communities in Esmeraldas began to petition the state for recognition of their collective territories, including both ancestral lands and land the communities had purchased collectively.[138] The 1994 agrarian reform law subsequently granted 38 communities in Esmeraldas collective title to their lands.[139] Once again, the impact was minimal, as these laws imposed onerous requirements that restricted the progress and organization of Afro-Ecuadorians.[140]

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[130] Sánchez, *supra* note 128, at 216.
[131] *Id.*
[132] *Id.*
[133] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE, FORGOTTEN TERRITORIES, UNREALIZED RIGHTS: RURAL AFRO-ECUADORIANS AND THEIR FIGHT FOR LAND, EQUALITY, AND SECURITY 9 (2009), *available at* http://www.utexas.edu/law/academics/centers/humanrights/projects_and_publications/Ecuador Report English.pdf [hereinafter "RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: ECUADOR"].
[134] *Id.* at 9–10.
[135] *Id.*
[136] *Id.* at 11–12.
[137] *Id.* at 12–14.
[138] *Id.* at 10.
[139] *Id.* at 10 n.17.
[140] *Id.* at 10.

b. Law

In addition to ratifying Convention 169 of the ILO on Rights of Indigenous and Tribal Peoples,[141] Ecuador has implemented robust legal protections specific to Afro-Ecuadorians.[142] The 1998 Constitution established Ecuador as a "multiethnic and pluricultural nation."[143] It recognized broad rights for Afro-Ecuadorians, including the rights to develop and strengthen their identity and spiritual, cultural, and linguistic traditions, to collective ownership of their communal lands, to have a say in the use of the natural resources found on those lands, and to conserve their forms of social organization and authority.[144] Unfortunately, the state never created sufficient legislation or administrative structures to enact the constitutional provisions.[145] Although the 1998 Constitution ensured some communities collective title to ancestral land and the right to develop territories through a model called Circumscription of Afro-Ecuadorian Territory (CTAs), there was no clear definition of which communities could qualify as CTAs or what such a status would mean.[146] As a result, no community actually obtained recognition as a CTA.[147]

Afro-Ecuadorian rights are currently protected under the 2008 Constitution, which builds upon the 1998 Constitution by recognizing Afro-Ecuadorian communities and pledging to preserve their rights to communal lands and ancestral territories.[148] Specifically, Article 57 pledges "[t]o conserve the indefeasible property of their communal lands, that are inalienable, unseizeable and indivisible," and "[t]o conserve and develop their own forms of coexistence and social organization, and of generation and exercise of authority, in their legally recognized

[141] *Id.* at 21.
[142] *Id.* at 24.
[143] Sánchez, *supra* note 128, at 216.
[144] Hooker, *Indigenous Inclusion/Black Exclusion*, *supra* note 3, at 286 n.4.
[145] *See* RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: ECUADOR, *supra* note 133, at 26.
[146] *Id.* at 25.
[147] *Id.*
[148] *Id.* at 26.

territories and communal territories of ancestral possession."[149] The new constitution also provides more precise provisions for CTAs; Afro-Ecuadorian communities can denominate themselves a CTA when two-thirds of the community votes in favor of such designation.[150]

c. Current Status

According to the National Institute for Agrarian Development (INDA), 60% of all Ecuadorians using land do not possess title.[151] Since 2009, INDA has been working on a mass titling initiative in conjunction with President Correa's campaign promise to improve access to land.[152]

Afro-Ecuadorians are also beginning to progress toward greater political inclusion. Ecuador's 2007–2010 National Development Plan (PND) explicitly aims to increase Afro-Ecuadorian inclusion and participation in policymaking.[153] Although the National Afro-Ecuadorian Confederation (CAN) was founded in 1999 to represent Afro-Ecuadorian organizations, it lacks the formal structure to connect to regional or local organizations.[154] Since March 2009, however, the International Foundation for Electoral Systems has been working with Ecuadorian civil society to promote the political inclusion of Afro-Ecuadorians.[155] In August 2009, an Afro-Ecuadorian was elected to a high public office for the first time in the country's history.[156] This is an important step in remedying Ecuador's historic pattern of political inequality and helping Afro-Ecuadorians achieve other goals, such as greater access to land.

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[149] *Id.* at 6 n.4.
[150] *Id.* at 29.
[151] *Id.*
[152] *Id.* at 44.
[153] *Id.* at 16.
[154] Thorne, *supra* note 85, at 26.
[155] *Id.*
[156] Robert Cuero was elected governor of the municipality of Guayas. Rachel Evans, *IFES Helps Promote Political Integration of Minority Populations in Ecuador*, INT'L FOUND. FOR ELECTORAL SYS., Sept. 23, 2009, http://www.ifes.org/Content/Publications/Opinions/2009/Sep/IFES-Helps-Promote-Political-Integration-of-Minority-Populations-in-Ecuador.aspx.

d. Challenges

Rural Afro-Ecuadorians in Esmeraldas are facing increased violence and instability as a result of spillover from the conflict in Colombia.[157] Due to this instability, the military presence in the region is strong and INDA will not enter the area to engage in the land titling process.[158]

In addition to violence, land trafficking[159] remains a problem in Ecuador. Landless *mestizo* farmers from other provinces continue to purchase and traffic in traditional Afro-descendant lands in Esmeraldas.[160] In the 1990s the government promised to stop granting farmers these ancestral territories but migrants still force the sale of the lands by settling on the outskirts, cutting and selling the timber, and asserting that the Afro-descendants are effectively agreeing to sell the land when they demand and receive compensation from the farmers.[161] Additionally, land traffickers continue to invade lands and threaten violence to force Afro-Ecuadorians to abandon the land.[162]

Afro-Ecuadorians, 70% of whom live in poverty,[163] also face significant obstacles in putting land to productive use. In the Chota Valley, for instance, inadequate irrigation systems and water hording and pollution by *haciendas* have led to a scarcity of potable water and increased difficulty in crop cultivation.[164] At the same time, poor access to credit limits opportunities to invest in infrastructure.[165] Highly concentrated land ownership[166] only intensifies these problems.

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[157] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: ECUADOR, *supra* note 133, at 35.
[158] *Id.* at 44.
[159] *Id.* at 7, 31.
[160] *Id.* at 31.
[161] *Id.* at 32.
[162] *Id.*
[163] U.S. DEPARTMENT OF STATE, 2008 HUMAN RIGHTS REPORT: ECUADOR (Feb. 25, 2009), http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119158.htm.
[164] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: ECUADOR, *supra* note 133, at 38.
[165] *Id.* at 40.
[166] *Id.* at 36–37.

Environmental degradation poses yet another challenge for Afro-Ecuadorians. Shrimp farming, logging, and oil palm industries have impaired and polluted Afro-Ecuadorian lands.[167] The use of agrochemicals adversely affects health conditions and the release of effluents into estuaries changes biodiversity and kills fish on which Afro-Ecuadorians rely.[168]

4. Nicaragua

a. History

Nicaragua's black population comprises 9% of the country's total, or approximately half a million people, and is concentrated in the Atlantic region. [169] National recognition of land rights of both Afro-Latino and indigenous groups grew out of the struggle for independence by inhabitants of the region, which resisted Spanish incursion and maintained de facto political autonomy throughout the colonial period.[170] In contrast to the mainly *mestizo* and Spanish-speaking Pacific region, the Atlantic region contains a patchwork of indigenous, Afro-Latino, and *mestizo* groups comprising six ethno-racial groups and four different languages. The black population is composed mostly of English-speaking Creoles who are the descendents of escaped or freed slaves, and is characterized by a high rate of inter-marriage between black and indigenous groups.[171]

During the colonial period, the dominant indigenous group in the Atlantic region, the *Moskitos*, formed a strategic alliance with the British who established a protectorate over the

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[167] *Id.* at 32–35.
[168] *Id.*
[169] The Atlantic region, which covers nearly half of the territory of Nicaragua but contains less than 10% of the population, is separated from the Pacific lowlands and the capital city of Managua by a volcanic mountain range. CIA – The World Factbook – Nicaragua, https://www.cia.gov/library/publications/the-world-factbook/geos/nu.html (last visited June 6, 2010).
[170] *See* Juliet Hooker, *Beloved Enemies: Race and Official Mestizo Nationalism in Nicaragua*, 40 LATIN AM. RES. REV. 14, 16 n.6 (2005) (citing DORA MARÍA TÉLLEZ, ¡ MUERA LA GOBIERNA!: COLONIZACIÓN EN MATAGALPA Y JINOTEGA, 1820–1890 (1999)).
[171] Jane Freeland, *Nationalist Revolution and Ethnic Rights: The Miskitu Indians of Nicaragua's Atlantic Coast*, 11 THIRD WORLD QUARTERLY 166, 168, 175 (1989).

region in the 1700s until the Treaty of Managua in 1860 recognized Nicaraguan sovereignty over the area.[172] The Atlantic region continued to exercise a degree of autonomy for several decades after Nicaragua gained independence in 1821, when domestic civil wars impeded state-building efforts in the region.[173]

In the 1980s, inhabitants of the Atlantic coast reacted to a wave of nationalization programs including mandatory Spanish language education by participating in armed rebellion against the government.[174] Ceasefire negotiations of 1985 established a National Autonomy Commission tasked with drafting semi-autonomous governance structures for the region.[175] Following a lengthy process of community consultation, the Commission's report was adopted by the General Assembly of the Sandinista National Liberation Front (FSLN) government in 1987 as Law 28.[176] The text of the law was also incorporated in the 1987 national constitution.[177]

Law 28 established two regional governing councils, one for the largely *Miskito* north and one for the Creole dominated south, composed of elected members representing self-defining ethnic communities.[178] Law 28, among other things, recognizes the right to collective land ownership of indigenous and Afro-Latino communities in the region.[179] In addition, indigenous landowners, municipalities, regional councils and the central government share profits from natural resource exploitation equitably, and regional councils have veto power over

[172] Hooker, *Beloved*, *supra* note 170, at 16 n.6.
[173] *See id.* at 16–17.
[174] *Id*. at 31.
[175] Peter Sollis, *The Atlantic Coast of Nicaragua: Development and Autonomy*, 21 J. LATIN AM. STUD. 481, 510–11 (1989).
[176] *Id.* at 514.
[177] *Id.* at 514–15.
[178] *Id.* at 515.
[179] Law 28 does not merely address the issue of land rights; it also empowers regional authorities to provide for basic services such as health care and education.

any plans for exploitation of natural resources made by the national government.[180]

b. Law

Nicaragua is one of only three Latin American countries that grants identical collective land rights to both indigenous and Afro-Latino groups.[181] The 1987 Constitution recognizes the multi-ethnic nature of Nicaragua, the existence of both indigenous and Afro-Latino groups in the Atlantic coastal region, and their rights to development and culture, language, and collective land ownership.[182] However, despite this formal recognition, the Nicaraguan Parliament did not ratify the administrative regulations to implement the land titling process until late 2003 and no land titles were issued between 1987 and 2003.

Law 445, passed in 2003, established the National Commission of Demarcation and Titling (CONADETI), the implementing body tasked with demarcation and titling communal lands.[183] There are five stages of the titling process: presentation of application; conflict resolution; measurement and marking of boundaries; titling; and restitution.[184]

c. Current Status

Law 445 was adopted in part in response to the 2001 decision of the Inter-American Court of Human Rights in *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*.[185] The decision marked the first time an international tribunal acknowledged an inherent right to land for indigenous peoples. The court ordered the demarcation and titling of land for indigenous communities in all of Nicaragua, and specifically for *Awas Tingni* lands within a period of 15

[180] SANDRA BRUNNEGGER, MINORITY RIGHTS GROUP INT'L, CONFLICT TO AUTONOMY IN NICARAGUA: LESSONS LEARNT 5 (2007), *available at* http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/mrginicaragua39wg.pdf.
[181] The other two countries are Honduras and Guatemala. Hooker, *Indigenous Inclusion/Black Exclusion*, *supra* note 3 at 286.
[182] NICARAGUAN CONSTITUTION art. 89 (1995).
[183] The Land Demarcation Law, Law 445 (2003) (Nicar.).
[184] *Id.*
[185] Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 164 (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

months. However, the *Awas Tingni* titles were not actually issued until December 2008.[186] This delay is indicative of the many challenges that remain in the titling process.[187] As of 2006, CONADETI had issued only six titles. The agency issued one more title in 2008 and six in 2009. In late 2009, CONADETI announced plans to complete the titling process for the entire Atlantic region in 2010 despite the fact that critics say the process would be too rushed and even incomplete.[188]

d. Challenges

While Afro-Nicaraguan groups have made important progress, many remain dissatisfied with the practical benefits of land rights. First, there have been long delays between the enactment of autonomy and land laws and the issuance of titles. These delays resulted partly from complications in determining power sharing arrangements between regional councils and the central government.[189] Additionally, administrations that succeeded the FSLN in 1990 have been hostile to the multicultural citizenship rights created during the *Sandinista* regime, and have adopted strategies such as withholding funds from regional councils to slow reform.[190] Regional leaders have claimed police ignore court orders to evict migrants from the Pacific coast who illegally invaded and occupied indigenous lands, and have attributed the government's lack of resources to discriminatory attitudes toward ethnic, racial, and religious minorities in those

[186] S. James Anaya, *Nicaragua's Titling of Communal Lands Marks Major Step for Indigenous Rights*, INDIAN COUNTRY TODAY (Jan. 5, 2009), *available at* http://www.indiancountrytoday.com/opinion/36996734.html.
[187] *See* UNIV. OF ARIZ. INDIGENOUS PEOPLES LAW AND POL'Y PROGRAM, NICARAGUA: OBSERVATIONS ON THE 3RD PERIODIC REPORT BY NICARAGUA ON ITS COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 2 ¶ 4 (2008), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AwasTingniObservations.pdf.
[188] Margarita Antonio, *Who Do the Coast Lands Belong to and Who Will Get Them?*, 329 ENVÍO (Dec. 2008), *available at* http://www.envio.org.ni/articulo/3922.
[189] *See* BRUNNEGGER, *supra* note 180, at 4–5.
[190] Hooker, *Beloved*, *supra* note 170, at 32.

regions.[191] The political unpopularity of land reform, coupled with a shortage of political skills at the local level, has hindered effective advocacy by communities seeking title and contributed to delays.[192]

Secondly, there is continued conflict over land between indigenous and Afro-Latino groups and *mestizo* populations. Some of these conflicts have resulted in violence because the formal structures are inadequate to resolve them.[193] Under articles 52 and 53 of Law 445, the identification of overlapping claims and mediation of conflict is carried out by the Demarcation Commission of the Regional Council.[194] However, this process has been extremely slow—in the case of conflict between the *Awas Tingni* and neighboring *Miskito* communities known as *Tasba Ray*, the Commission did not propose a resolution to the conflict until 2007.[195] Prior to this date, the *Awas Tingni* initiated negotiations on their own which broke down several times and exacerbated hostility between the two groups.[196] Attorneys for the *Awas Tingni* have claimed the government is using the conflicts as a pretext for withholding recognition of the land claim and facilitating the continued exploitation of natural resources by third party industries and settlers.[197] In addition, there are even tensions *within* Nicaraguan ethno-cultural groups—dividing supposed individual landholders from the group as a whole.[198]

Finally, the *Awas Tingni* case itself has presented challenges for collective land rights acquisition for Afro-Latino groups. The holding of the case emphasized the spiritual connection

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[191] U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: NICARAGUA (Feb. 25, 2009), http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119167.htm.
[192] BRUNNEGGER, *supra* note 180, at 6.
[193] UNIV. OF ARIZ. INDIGENOUS PEOPLES LAW AND POL'Y PROGRAM, *supra* note 187, at 3 ¶ 7.
[194] The Land Demarcation Law, Law 445 (2003) (Nicar.), art. 52, 53.
[195] UNIV. OF ARIZ. INDIGENOUS PEOPLES LAW AND POL'Y PROGRAM, *supra* note 187, at 3 ¶ 7.
[196] *Id.* at 2-4
[197] *Id.* at 3 ¶ 7.
[198] BRUNNEGGER, *supra* note 180, at 7.

between indigenous groups and their ancestral land. This may present an additional hurdle for Afro-Latino communities that do not have such connections to lands on which they reside.

5. Conclusion: Brazil in Context

Understanding how other countries in Central and South America have attempted to extend collective rights—including rights to land—to Afro-Latino populations provides an important context for evaluating the treatment of quilombo land rights claims in Brazil. All three countries profiled above have legal frameworks for titling, but each country faces distinctive challenges in implementing titling procedures that satisfy constitutional guarantees. Colombia has created a titling process consisting of a series of stages, somewhat similar to Brazil. In Colombia, as in Brazil, many title applications are not rejected but rather languish in various stages of the bureaucratic processes. However, unlike Brazil, Colombia has ceded an impressive amount of territory originally designated for Afro-Colombians, yet the rights of Afro-Colombians remain in jeopardy due to internal displacement. Fortunately, Brazil has not experienced internal displacement in great measure.[199] Ecuador, home to the smallest percentage of Afro-Latinos among the three countries profiled, has the newest and arguably most progressive constitution. Its success has yet to be demonstrated, but violence in the Colombian border region has stalled the implementation of titling procedures. Nicaragua also has progressive laws that grant collective land rights to Afro-Latinos, placing them on par with indigenous groups—an approach that Brazil has not adopted. However, strong regionalist tendencies in Nicaragua continue to strain its bureaucracy and delay the titling process.

[199] The Internal Displacement Monitoring Centre, the leading international body monitoring conflict-induced internal displacement worldwide, lists Colombia, but not Brazil, in its grouping of countries affected by internal displacement. *See* The Internal Displacement Monitoring Centre: Internal Displacement in the Americas, http://www.internal-displacement.org/ (follow "countries" tab; then follow "Americas" hyperlink) (last visited May 13, 2010).

Additionally, Afro-Nicaraguan groups struggle to mobilize effectively, a problem that, as discussed in Part IV below, also affects Afro-Brazilians.

In some ways, Brazil is a leader in recognizing the collective rights of Afro-Latinos.[200] For instance, Brazil is one of the few countries (Colombia and Ecuador being the others) where Afro-Latinos have won explicit protection against discrimination.[201] Further, Brazil has been at the forefront in the effort to include race on the national census,[202] and it was the first Latin American country to approve racial quotas in order to increase minority representation in government positions.[203] These achievements are especially noteworthy in light of the fact, noted in Part I, that Afro-Latinos comprise 45% of the Brazilian population—more than twice the percentage of the countries profiled above.[204]

Moreover, on July 20, 2010, President Lula signed the Statute of Racial Equality.[205] The new law contains several important achievements for Afro-Brazilian rights, such as criminal sanctions for the practice of racism over the internet, a requirement that all public and private schools include in their curriculum the general history of Africa and of the black population in Brazil, and a reaffirmation of the right to practice African religions.[206] The Statute also guarantees the right to preservation of quilombola customs and the creation of special sources of public financing for quilombola communities, and codifies the text of Article 68 ADCT.[207]

Despite these positive achievements, however, there is significant room for improvement. The Statute of Racial Equality, for instance, fails to include quota provisions for Afro-Brazilians

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[200] Thorne, *supra* note 85, at 11.
[201] Hooker, *Indigenous Inclusion/Black Exclusion*, *supra* note 3, at 295; CRS REPORT, *supra* note 11, at 8.
[202] CRS REPORT, *supra* note 11, at 8.
[203] *Id.* at 10.
[204] *Id.* at 5.
[205] Law No. 12.288 (July 20, 2010). The text of the new law is available at http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2010/Lei/L12288.htm.
[206] *See id*.
[207] *See id.* arts. 18, 31, 33.

in the areas of higher education, employment, and politics—advances that some advocates see as necessary and which they have long sought.[208] Representatives of quilombola communities have been particularly disappointed with the Statute. As one prominent advocate stated: "Look, we don't have many advances. We have a Constitution from 1988 where the right to title of quilombola territories was guaranteed. We are now in 2010 and are still debating how to carry out these procedures."[209] While a step forward, the Statute of Racial Equality has fallen short of once high expectations.[210]

On a broader level, Afro-Latinos still comprise nearly 70% of Brazilians living in extreme poverty. Afro-Brazilians are less educated than whites, earn a lower wage, have a lower standard of living, have lower life expectancies, and have higher infant mortality rates than whites.[211] The need for improvement applies with equal force to the granting of land titles to Afro-Latino communities. As the next Part demonstrates, Brazil shares many of the political and social challenges that Colombia, Ecuador and Nicaragua face in implementing effective land access policies. But in addition, Brazil also confronts a number of distinctive challenges, including a complex government bureaucracy, the attitude of the news media, the social exclusion of quilombola communities from Brazilian society, and the difficulties that those communities face in accessing socioeconomic development tools.

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[208] *See* Eduardo Bresciani, *Senado Aprova Estatuto da Igualdade Racial, Mas Retira Cotas* ("*Senate Approves Statute of Racial Equality but Removes Quotas*"), O GLOBO, June 16, 2010, at G1., *available at* http://g1.globo.com/politica/noticia/2010/06/senado-aprova-estatuto-da-igualdade-racial-mas-retira-cotas.html; Annie Gaspier, *Brazil Passes Racial Equality Law but Fails to Endorse Affirmative Action*, GUARDIAN WEEKLY, June 29, 2010, http://www.guardian.co.uk/world/2010/jun/29/brazil-race.

[209] Combate ao Racismo Ambiental: O Estatuto da Igualdade Racial em Entrevista com Damião Braga ("The Statute of Racial Equality in Interview with Damião Braga"), June 22 2010, http://racismoambiental.net.br/2010/06/o-estatuto-da-igualdade-racial-em-entrevista-com-damiao-braga/.

[210] *Id*.; Gaspier, *supra* note 208.

[211] CRS Report, *supra* note 11, at 5.

IV. CONTINUING OBSTACLES TO THE REALIZATION OF QUILOMBO LAND RIGHTS AND SOCIOECONOMIC DEVELOPMENT

As Part II.C detailed, there is considerable debate in Brazil over the meaning of "quilombo" and its legal and social implications. Some have embraced a narrower, historically bound conception, which stresses the connection between quilombos and their lineage as individual "descendants of slave communities." Conversely, a broader approach stresses quilombos' own self-identification, and looks to how they use their land collectively as "descendent communities." These competing notions of history and identity continue to shape controversies over Afro-Latino land rights in Brazil, a fact that underlies the obstacles to land titling and socioeconomic development described below.

The purpose of this Part is to analyze non-legal impediments to the ability of quilombola communities to complete the land titling process. Section A describes tensions within and among the Brazilian government agencies responsible for titling. Section B details the lack of social awareness about quilombolas and their negative portrayal in the media. Section C focuses on the mobilization problems that quilombolas face in advocating for collective rights. Finally, Section D outlines the hurdles that quilombos, Alto da Serra included, face in accessing avenues for socioeconomic development. The analysis in this Part is based on in-country interviews and research regarding barriers to full implementation of the land titling process.

A. Resource and Capacity Problems Among Government Agencies

1. Problems Within INCRA

Numerous experts expressed discouragement concerning the insufficient funding and resources dedicated to quilombola communities, particularly in INCRA, the primary agency responsible for quilombo land titling. Inasmuch as holding clear title is often a prerequisite for

large-scale funding for socio-economic development projects, obstacles to quilombo titling in INCRA are especially troublesome.

For instance, each title application must include an agronomy report that determines the value of the land and provides the basis for compensation to private parties whose property the government expropriates on behalf of the quilombo.[212] This key evaluation, required in every title application, takes approximately one month to prepare and is typically performed by agrarian engineers at INCRA.[213] The engineer responsible for writing the agronomy report for the Alto da Serra community has 19 active applications from quilombos across the State of Rio de Janeiro in various stages of the seventeen-step titling process described above in Part II.B.1.[214] Even if the engineer could work on the needed agronomy reports without interruption, the application of the community at the bottom of the list would not be acted upon for more than 18 months.[215]

In addition, the INCRA engineer responsible for processing applications in the State of Rio de Janeiro often spends considerable time responding to emergent, volatile situations. For example, two urban quilombos are presently engaged in high profile disputes over land, one against the Catholic Church and the other against the government over a public park.[216] Because these communities face volatile, and sometimes violent, controversies with neighboring landowners, the applications of Alto da Serra and other more peaceful quilombos is a lower priority for the engineer, even though the agronomy report is the sole remaining hurdle to

[212] INCRA Interview, *supra* note 47.
[213] *Id*.
[214] *Id*.
[215] *Id.*
[216] *Id.*

completing the final stage of the titling process.[217] The result is that some of the simplest, non-controversial titling applications face the longest delays.

Other agency practices further delay the titling process. Since approximately 2008, the internal legal counsel of INCRA has prohibited the use of outside anthropologists to complete needed anthropology reports.[218] This has created a bottleneck of 983 open applications at the first stage of titling.[219] Adding to the bottleneck is the fact that, of more than 100 staff in INCRA's Rio de Janeiro office, only two individuals work on quilombo titling: one anthropologist and one agronomist.[220] Almost all other agency employees are consumed by land challenges relating to *Movimento Sem Terra* (MST), a highly visible grassroots agrarian reform group founded in the mid-1980s that advocates for equitable land rights on behalf of landless rural workers.[221]

Increasing the visibility of quilombos is essential to keeping INCRA's attention focused on land titling for Afro-Latino communities. In March 2010, 173 MST members occupied INCRA's Rio de Janeiro office to demonstrate for landless workers' rights, and MST representatives hold weekly meetings with the agency's Superintendent.[222] In contrast, not a single quilombo representative had visited INCRA in the three months preceding March 2010.[223] In short, INCRA's responsiveness has been directly proportional to the level of activism by each group.

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[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *See* Kevin E. Colby, *Brazil and the MST: Land Reform and Human Rights*, N.Y. INT'L L. REV. 1, 2–3 (2003). Active across almost all of Brazil, *id*. at 19, the group consists of an estimated 1.5 million peasants who attempt to gain land title through squatting on unused or unproductive land and soliciting the government to transfer title to them. About the MST, http://www.mstbrazil.org/?q=about (last visited May 6, 2010). Despite its size and effectiveness, the group is unpopular with the wider public and has been the target of a severe backlash. Colby, *supra*, at 4.
[222] INCRA Interview, *supra* note 47.
[223] *Id.*

2. Problems Within Other Agencies

Other entities involved in the titling process also contribute to the problems with the quilombo land titling process. Even when the titling process moves to the final step, there is considerable uncertainty as to when the formal transfer of title will occur.[224] Some interviewees attributed this uncertainty to the *cartórios*, private enterprises responsible for the registration and documentation of land deeds.[225] Granting "quiet title" is an especially complicated process in Brazil. Land titles go back to colonial times, when they were administered by the Catholic Church, and conflicting inheritance and interfamily transfers often create uncertainty over land ownership.[226]

Fundação Cultural Palmares (FCP), which was once in charge of the titling process for quilombos, has seen its role change over time.[227] Some stakeholders observed that FCP had mismanaged land titling applications after the government transferred some of INCRA's titling duties to FCP in 2001.[228] Quilombos and NGOs were critical of this change because, while INCRA had considerable experience and broad capacity with 30 regional offices, FCP was little more than a cultural foundation based in Brasília.[229] FCP granted 14 quilombo titles over a two-year period, all of which have been contested on the grounds that the government improperly expropriated private lands or paid inadequate compensation, leaving those titles cloudy.[230] Santana is one of those communities.[231] Today, following the return of most titling

[224] *Id.*
[225] *Cartórios* are private enterprises to which the government delegates public functions and subjects to certain regulations and restrictions. The *Registros de Imóveis* keep records and information about the ownership of real estate. Other *Cartórios* keep records of, among other things, births, deaths, marriages, companies, and contracts.
[226] INCRA Interview, *supra* note 47.
[227] *See* Part II.B.
[228] CPI-SP Interview, *supra* note 77.
[229] *Id.*
[230] *Id.*
[231] *Id.*

responsibilities to INCRA, FCP's role in the titling process is limited to certifying communities that self-identify as quilombos.

3. Tensions Between Government Actors

Unlike indigenous groups, who tend to inhabit Brazil's hinterlands, quilombos are often situated on highly desirable land—according to some estimates comprising up to 5% of Brazil's landmass.[232] As in Colombia,[233] the fact that quilombos occupy economically valuable land has caused tensions, including with Brazilian government entities responsible for other public functions that have an interest in determining how land is used.

Although some commentators interpret Article 68 of the ADCT to mean that quilombo land rights are inviolate, government agencies often clash where different priorities come into conflict. The Marambaia quilombo presents a paradigmatic example of this type of controversy.[234] Although the Navy—which currently administers the island—asserts a national security interest in the land, the community, with the support of the Public Prosecutor's office,[235] claims that it has a legal and historical claim to the land under the Constitution.[236] The controversy, which pits one arm of the government against another, remains resolved.

Aside from inter-agency tensions, quilombo land titling can also give rise to conflicts within a single agency. For example, INCRA-Rio published the Marambaia RTID in 2008 despite pressure from INCRA headquarters in Brasília not to do so.[237] An inter-ministerial

[232] Federal Prosecutor Interview, *supra* note 71.
[233] *See* Part III.B.2.d.
[234] *See* Part III.A.1.ii.
[235] The Office of the Public Prosecutor (*Ministério Público Federal*) is an independent branch of the government, vested with authority to bring suit against any public or private party for violations of citizens' rights. *See supra* note 71.
[236] *Id.*
[237] Interview with members of Marambaia quilombo, *supra* note 68.

working group created to evaluate the Marambaia case later directed the de-publication of the RTID,[238] illustrating how intra-agency conflicts can retard the titling process.

Indeed, at every level of the Brazilian government, the potential exists for officials to have conflicting agendas and responsibilities regarding the treatment of quilombos.[239] For example, the Rio City Prefecture is responsible for a variety of social programs serving Afro-Brazilians, such as a mandatory school curriculum on black history.[240] The Prefecture tries to "sensitize" the city government to recognizing urban quilombos and the needs of Afro-Brazilians generally. This outreach often puts them at odds with other municipal, state, and federal agencies.[241]

B. Lack of Societal Awareness and Negative Media Treatment

In addition to barriers caused by inefficient implementation and inter-agency conflict, quilombos also suffer from a lack of popular support due to negative portrayals in the mainstream media and widespread ignorance about quilombo issues across Brazil.

Quilombola communities are largely invisible to the public eye.[242] They may sell a few handicrafts or food products in local stores, but in general, they lack the type of exposure that is needed to generate public support.[243] Although many Brazilians acknowledge the historical plight of individuals of African descent, they are less willing to embrace the modern quilombola identity. There are several plausible reasons for this. Some observers view quilombola land rights as a form of affirmative action that undermines Brazilian national identity and unity.[244] This argument rests in part on the widely-held national myth of Brazil as a racial democracy, in

[238] *Id.*
[239] Prefeitura Interview, *supra* note 36.
[240] *Id.*
[241] *Id.*
[242] Koinonia Interviews, *supra* note 36.
[243] *Id.*
[244] Prefeitura Interview, *supra* note 36.

which race is largely irrelevant in shaping socioeconomic outcomes.[245] The broader conception of quilombos discussed in Part II.C—which embraces self-identification as a separate racial or cultural group—is in tension with this myth.

The socioeconomic realities facing quilombola communities belie the claim of a racial democracy. The percentage of Afro-Latinos living in poverty far surpasses their share of the population, and Afro-Brazilians continue to have less education, lower wages, and lower life expectancies than whites.[246] Proponents of quilombola land rights, and of affirmative action generally, argue that government programs are necessary to address these enduring racial disparities. These efforts, however, run contrary to cultural and political forces that have been entrenched for generations. Despite strong socioeconomic evidence that undercuts the idea of a racial democracy, the myth has staying power and continues to influence the debate over quilombos.[247]

Media attention concerning quilombos—what little there is—is frequently negative. *O Globo*, Brazil's largest newspaper, has portrayed quilombos as a threat, both to private property owners and to the myth of cultural homogeneity.[248] This further weakens quilombos' ability to generate the political will necessary to move forward with land titling process. For example, "in May 2007, Brazil's largest media conglomerate, *Rede Globo de Televisão*, launched a series of reports that questioned the legitimacy of the quilombo certification and tilting process, and

[245] *See* Stanley R. Bailey, *Group Dominance and the Myth of Racial Democracy: Antiracism Attitudes in Brazil*, 69 AM. SOC. REV. 728, 729–30 (2004).
[246] CRS REPORT, *supra* note 11, at 5.
[247] The concept gained a strong foothold from the Left and the Right, albeit for different reasons, and has persisted ever since. Federal Prosecutor Interview, *supra* note 71; *see also* M. ELIZABETH GINWAY, BRAZILIAN SCIENCE FICTION: CULTURAL MYTHS AND NATIONHOOD 19–20 (2004).
[248] Federal Prosecutor Interview, *supra* note 71. *O Globo* portrayed the Marambaia quilombo as a future *favela* that would desecrate the island if the community were granted title to the land. Interview with members of Marambaia quilombo, *supra* note 68.

consequently, the legitimacy of quilombo rights claims."[249] Although the INCRA anthropological report featured in the story recounted centuries of evidence establishing the community in question as a quilombo, the media "spurred powerful landowners and anti-titling factions within the government to demand an investigation that eventually . . . led to the temporary suspension of the titling process [and] impelled the creation of a [governmental] working group . . . to evaluate the overall legality and constitutionality of the quilombo titling process."[250] In addition, *Revista Veja*, a conservative weekly magazine, has been particularly blunt in its criticisms of quilombola land rights. It has characterized quilombolas as advocating the "de-miscegenation" of the Brazilian population[251] and the stealing of Brazilian territory.[252]

C. Weakness of Political Mobilization and Coordination Among Communities

Finally, there is a lack of political mobilization and coordination within quilombola communities and the NGOs that advocate on their behalf. The Coordination of the Association of Quilombola Communities of the State of Rio de Janeiro (AQUILERJ) is the primary advocacy group for the collective interests of quilombos in the State of Rio de Janeiro.[253] In recent years, AQUILERJ has devolved into rival factions over the issue of whether groups in the north or the south of the State should receive priority.[254] As a result, the NGO has been unable to mobilize effectively.[255] The dispute over geographic priority dissipated the organization's momentum, and representatives have not advocated on quilomobos' behalf with INCRA.[256] As noted above, INCRA has prioritized other more volatile situations, in particular MST and a few urban

[249] RAPOPORT CTR. FOR HUMAN RIGHTS & JUSTICE: BRAZIL, *supra* note 17, at 38.
[250] *Id.* at 38–39.
[251] Cíntia Borsato & José Edward, *Eles Querem Desmiscigenar o Brasil ("They Want To De-miscegenate Brazil")*, REVISTA VEJA (Apr. 4, 2007).
[252] Leonardo Coutinho, Igor Paulin & Júlia de Medeiros, *A Farra da Antropologia Oportunista ("The Opportunistic Anthropology Spree")*, REVISTA VEJA (May 5, 2010).
[253] INCRA Interview, *supra* note 47.
[254] *Id*.
[255] *Id.*
[256] *Id*.

quilombos where controversial overlapping land claims are generating potential unrest.[257] Under these circumstances, the titling process for less controversial communities like Alto da Serra is effectively tabled.[258] The NGO Koinonia has begun to fill the advocacy void on behalf of particular quilombos like Alto da Serra, Marambaia and Santana, but without AQUILERJ, quilombos as a whole lack an organized political presence.

In contrast to AQUILERJ, the MST is highly organized and its members have exhibited considerable solidarity in support of the organization's campaign to obtain property for the rural landless poor. The contrast is reflected in land title statistics. In 2003-2004, 118,000 MST-affiliated families received title through INCRA.[259] In the same years, quilombos acquired collective title for only 509 families in 12 communities.[260] In order to garner comparable attention from INCRA, quilombos will need a more aggressive and unified advocacy effort. This will be difficult for several reasons. MST is a mass movement run by trained organizers, but quilombos are highly particularized communities, each with a unique history, identity, and development goals. Additionally, the leaders of each community association are first and foremost members of the community who live and work on the land. They cannot afford the time, and do not have the resources, to function as political advocates.

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[257] *See supra* Part IV.A.1.

[258] However, the INCRA representative confided that a personal visit from a single quilombo leader like the patriarch of Alto da Serra would do a lot to put the community back on INCRA's radar. INCRA Interview, *supra* note 47.

[259] Bradley S. Romig, *Agriculture in Brazil and Its Effect on Deforestation and the Landless Movement: A Government's Attempt to Balance Agricultural Success and Social Collateral Damage*, 11 DRAKE J. AGRIC. L. 81, 98 (2006) (citing *Settlements Fall Below Lula's Goal in 2004*, GAZETA MERCANTIL ONLINE, Jan. 20, 2005). The MST contends that the number of families settled is much smaller than INCRA claims; for instance, MST says that in 2004, only 25,000 families were settled. This is still dwarfs the number of quilombo families who were settled. *Id.*

[260] *See* charts, *supra* Part II.B.2.

D. Challenges that Quilombos Face in Gaining Access to Tools for Socioeconomic Development

In addition to the obstacles that quilombos face in acquiring official title to their land, Afro-Brazilians also encounter considerable challenges in pursuing funding for socioeconomic development projects. These challenges arise at multiple levels. Quilombos face obstacles ranging from an initial ineligibility for such projects due to a lack of land title, and a confusing decision-making structure within the Brazilian government, to complicated application processes often associated with private funders, to the lack of knowledge by NGOs and the communities themselves about potential funding sources.

1. Challenges at the Government Level

Prior to 2003, INCRA's mandate included, in addition to land titling, awarding grants to quilombos for socioeconomic development projects.[261] Including these funding activities within the agency's portfolio made sense, inasmuch as INCRA had the most familiarity with quilombos as a result of its handling of the titling process.[262] However, although INCRA possessed the knowledge to make funding decisions, this arrangement was problematic because INCRA's resources were often directed to other, more-pressing matters such as settling land controversies and managing the titling processes.[263]

Decree 4.887 changed how the government funded economic and social development projects for quilombos.[264] In 2003, President Lula transferred INCRA's funding

[261] INCRA Interview, *supra* note 47.
[262] *Id.*
[263] *Id.* He explained INCRA's priorities often paralleled which matters involved the most controversy and conflict. Questions of funding often took a backseat to higher-priority matters. *See also* Part IV.B.
[264] This representative believes that Decree 4887 was implemented with intent to discriminate on the basis of race. INCRA remains responsible for funding development projects for non-Quilombola groups. Decree 4887 singled out Afro-Brazilian groups. *Id.*

responsibilities[265] to a new agency—SEPPIR.[266] Observers differ as to whether SEPPIR has the capability to effectively carry out these responsibilities. An INCRA representative explained that, as a new agency, SEPPIR did not possess the infrastructure to be very effective, nor did it have the working knowledge of quilombos that INCRA had.[267] Conversely, representatives from Petrobras found SEPPIR to be helpful and effective, particularly with respect to funding smaller-scale development projects.[268]

SEPPIR accepts online applications from quilombos for development projects, and it gives priority to projects that focus on local development.[269] For example, in the past SEPPIR funded the training of municipal managers in quilombola communities.[270] Additionally, SEPPIR's mission encompasses far more than just the funding of quilombo projects; it includes the coordination of different ministries to promote racial equality and compliance with international agreements that promote equality and combat racism.[271] The allocation of the agency's personnel reflects this broad mandate. SEPPIR has approximately 130 employees; only nine are tasked with working with traditional communities, including quilombos.[272] As with other organizations that work with quilombos, SEPPIR representatives expressed a desire for more staff, increased funding, and a greater presence across the states.[273]

The shifting of responsibility for funding quilombola development projects from one government agency to another evinces multiple obstacles—internally for SEPPIR as a new

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[265] *Id.* He explained that 4.887 could be interpreted to allow INCRA to remain involved in funding decisions. For example, under 4.887, the Ministry of Agronomy Development ("MDA") can work on development. Because INCRA is technically a subordinate agency of MDA, INCRA could also be deemed to have the authority to fund development projects. However, INCRA's in-house counsel has chosen not to read the Decree in this way. *Id.*
[266] *Id.*
[267] *Id.*
[268] Interview with Representatives, CSR Department, Petrobras, in Rio de Janeiro, Brazil (Mar. 11, 2010) [hereinafter Petrobras Interview].
[269] Email interview with Secretary of Policies for Traditional Communities, SEPPIR (May 11, 2010).
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*

agency that does not have the resources and infrastructure to carry out its many responsibilities, and externally for communities to understand who makes the funding decisions. At the very least, the shifting of responsibility has created confusion for the communities and the NGOs that assist them in the funding process.

2. Challenges Posed by Private Funders

Additionally, quilombola development projects may not always be the right fit for corporate funders. Representatives from Petrobras, the largest corporation in Brazil,[274] explained two potential challenges for approving grants for quilombos. First, Petrobras's Corporate Social Responsibility (CSR) Division primarily funds large-scale development projects, such as the installation of sanitation systems and electricity.[275] Second, the corporation's application process is long, complicated, and usually requires the assistance of an NGO.[276]

The CSR Division has a grant making budget of U.S. $600 million for a six-year span.[277] Not surprisingly, Petrobras focuses on larger-scale projects, ranging from approximately $50,000 to $1.2 million per project.[278] Many development projects suggested by the Alto da Serra, Marambia, and Santana communities—including training for artisan work like craft- and jewelry-making and creating food products like jams—require $5,000 or less.[279] It would be pointless to apply to Petrobras for funding of such smaller-scale projects.

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[274] Forbes.com, The Global 2000, http://www.forbes.com/lists/2009/18/global-09_The-Global-2000_Counrty.html (last visited Apr. 10, 2010). The Brazilian federal government owns 55.6% of the common shares of Petrobras. *See* http://www2.petrobras.com.br/ri/ing/InformacoesAcionistas/ComposicaoCapitalSocial.asp (last visited June 9, 2010).
[275] Petrobras Interview, *supra* note 268.
[276] *Id.*
[277] *Id.*
[278] *Id.*
[279] Alto da Serra Community Interviews, *supra* note 65; Marambaia Community Interview, *supra* note 68; Santana Community Interview, *supra* note 75.

Even if a quilombola could identify a suitable project, it is unlikely that it could complete the application process, which requires significant effort and planning. Petrobras conducts four levels of review of the applications it receives: ensuring that all paperwork is properly submitted; ranking the project using pre-determined criteria; evaluating the applicant community's social vulnerability; and ensuring the selection of a diverse group of projects.[280] Additionally, the company requires applicants to submit a four-year-investment plan for each project.[281] Projects generally have a twenty-four-month schedule, with a renewal option at the end of two years if the project going well.[282] Most quilombos are ill-equipped to handle these complicated and paper-intensive requirements without the assistance of an NGO.[283]

This funding structure demonstrates a clear disconnect in the relationship between quilombos and their potential funders. Indeed, Petrobras itself admits that its framework is not designed to accommodate the expectations of quilombola communities. Petrobras has a corporate cultural that privileges written reports, whereas many quilombos have an oral tradition.[284] Moreover, the concept of deadlines, familiar in corporate circles, may not be fully appreciated in quilombola communities.[285] These communities are also typically unfamiliar with participating in an integrated and strategic approach to development projects in which they serve as full partners.[286] Petrobras seeks to fund projects that are initiated by and require the active participation of communities, since its experience has shown that these projects are the

[280] Petrobras Interview, *supra* note 268.
[281] *Id.* Petrobras has found that communities not familiar with using corporate funding have changed their minds about projects during the implementation phase and believe that they can receive additional funding without reapplying. Quilombos are typically accustomed to trying and learning—then trying again. Conversely, Petrobras executives do not want to entertain this approach; they want delivery.
[282] *Id.*
[283] *Id.* Petrobras provided several examples of partner organizations with whom they have worked well in the past and with whom they foresee continuing relationships: Plamares Institute for Human Rights, SEPPIR, Koinonia, Mariana Criolla, and Justicia Global. *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.*

most likely to succeed. As a result, Petrobras favors grant applications from communities that are well organized and whose projects will be implemented with the aid of an NGO.[287]

Despite these obstacles, Petrobras has funded 20 to 25 quilombola projects.[288] As a result, the company may still be a viable funder for large-scale quilombola projects, particularly if the applicant community partners with an NGO.

Quilombos in search of private funding may confront yet another, broader challenge: the resistance of donors to funding quilombola projects generally. As Part IV.C demonstrated, quilombos frequently suffer from negative media attention and their land rights claims are often linked to the contentious debate over affirmative action. The unresolved constitutional challenge described in Part II.B.2 also illustrates that the status quilombola communities in Brazil is highly contested. Therefore, to the extent that private funders seek to avoid political controversy, they may shy away from funding quilombos in favor of less controversial development projects.

V. CONCLUSION

Since the passage of its Constitution in 1988, Brazil has made concrete legislative strides to increase access to land by quilombola communities. Article 68 of the ACDT—succinctly but surely—enshrines the right of quilombos to their land, and numerous subsequent laws and regulations have created a step-by-step land titling process. Brazil, like many of its sister nations in the region, has recognized that increasing access to land helps promote both economic security and social stability. A comprehensive and effective land titling system is especially necessary in Brazil, where Afro-Latinos comprise nearly half of the population and land ownership remains highly concentrated.

[287] *Id.*
[288] *Id.*

Yet despite these legislative achievements, significant challenges remain. Complex bureaucratic procedures and structures, negative treatment in the news media, and social exclusion of quilombos from Brazilian society render the quilombola titling laws and regulations difficult to implement. As a result, progress in granting titles has been slow. And even after gaining legal title, quilombos encounter considerable obstacles in pursuing funding for socioeconomic development projects. Collective land title, and the avenues for socioeconomic development that such title is thought to open, remain out of grasp for many Afro-Brazilians.

Beneath these challenges lie conceptual differences over what it means to be a "quilombola." How quilombola identity should be defined—whether by direct lineage to runaway slaves or by present-day communal land use—is a key question that continues to drive the political and legal debate. Yet as the profiles of the quilombos Alto da Serra, Marambaia, and Santana demonstrate, success in the titling process may hinge not only upon how "legitimate" a quilombo's historical claim, but also upon the political, social, and economic pressures in and around each community.

The three countries profiled above—Colombia, Nicaragua, and Ecuador—demonstrate a similar theme. Each country, like Brazil, has sought to increase access to land through titling procedures, yet each faces unique challenges based on its history, politics, and priorities. Regionalism, for instance, slows titling in Nicaragua and border violence hampers titling in Colombia. Yet at the same time, some common threads emerge. Afro-Latinos in both Nicaragua and Brazil struggle to mobilize effectively, and protracted, bureaucratic titling procedures in both Colombia and Brazil continue to frustrate land applicants.

In the past two decades, Brazil has attempted, with its land titling system, to remedy the effects of centuries of slavery. This is no small mission. The goal of increased access to land,

and the social stability and economy security that will accrue through its pursuit, must remain a political and legal imperative. And with a continued, concerted effort—from NGOs, private sector partners, the government, and quilombos themselves—Brazil may enhance access to land by its citizens.

Appendix 1.A. – Acronyms and their titles in English

AGU - Solicitor-General of the Union

ANC - A Constituent Assembly

AQUILERJ - Coordination of the Association of Quilombola Communities of the State of Rio de Janeiro

CONADETI - National Commission of Demarcation and Titling

CSR - Corporate Social Responsibility

CTAs - Circumscription of Afro-Ecuadorian Territory

FCP - Palmares Cultural Foundation

FSLN - Sandinista National Liberation Front

INCRA - National Institute of Colonization and Agrarian Reform

INDA - National Institute for Agrarian Development

MST - Landless Movement

NGO - non-governmental organization

PND - National Development Plan

RTID - Report of Identification and Delimitation

SEPPIR - Secretariat for the Promotion of Racial Equality

Appendix 1.B. – Student Participants from Duke Law School

Jordan Botjer, J.D., 2010

Noah Browne, J.D. & LL.M. in International & Comparative Law, 2011

Anne Dana, J.D. & M.A. in Cultural Anthropology, 2011

Patrick Duggan, J.D. & Master in Environmental Science & Policy, 2010

Jacy Gaige, J.D. & M.A. in Humanities-Journalism, 2012

Patricia Hammond, J.D., 2011

Almira Moronne, J.D., 2011

Sheena Paul, J.D., 2010

Frank Alexis Rodríguez Palacios, J.D. & LL.M. in International & Comparative Law, 2011

Katherine Shea, J.D., 2010

Translation and research assistance:

Laura Duncan

Appendix 1.C. – Interviews

Pre-Trip Seminar Interviews (by date):

Professor of Anthropology and Sociology at the University of Richmond, telephone conference from Duke University, February 9, 2010.

Executive Director of the Duke Human Rights Center and Associate Director of Duke's International Comparative Studies Program, interview training at Duke University School of Law, February 18, 2010.

Brazilian attorney and member of a Quilombola community located outside of São Paulo, telephone conference from Duke University, February 23, 2010.

Associate Professor at the University of Texas Department of Government, telephone conference from Duke University, February 25, 2010.

Senior Land Administration Specialist, the World Bank, February 25, 2010.

In Country Interviews (by date):

Project Evaluator, Koinonia, March 8, 2010.

Attorney, Commissão Pro-Indio São Paolo, March 8, 2010.

Regional Prosecutor, Federal Public Ministry, State of Rio de Janeiro, March 8, 2010.

Law Professor, Fundação Getúlio Vargas Law School, March 8, 2010.

Restoration Assessor, Instituto Terra**,** March 9–10, 2010.

Professor of Anthropology, Universidade Rural Federal do Rio de Janeiro**,** March 8–10, 2010.

Rio de Janeiro Prefeitura, March 8, 2010.

Members of the Alto da Serra quilombo, March 9–10, 2010.

Members of the Marambaia quilombo, March 9–10, 2010.

Members of the Santana quilombo, March 9–10, 2010.

Attorney, Campos Mello Advogados, March 11, 2010.

Representatives, CSR Department, Petrobras, March 11, 2010.

Agrarian Economist, INCRA, March 11, 2010.

Quilombola Collective Rights in Context: Afro-Latino Communities in Latin America

Afro-Latinos are descendants of the 12 million Africans brought to the Americas during the slave trade, an estimated 50% of whom ended up in Brazil. In the 17th century, between 11,000 and 30,000 Africans in Latin America escaped from slavery and formed independent communities, often in remote rural areas, and developed distinct racial, cultural, and political identities.

Beginning in the 1980s, Afro-Latinos advocated for constitutional recognition and for public policies that combat racial discrimination, include race and color on census categories, promote affirmative action, and for land rights for communities descended from escaped slaves. Fifteen countries have implemented collective rights for indigenous groups, but only Brazil, Colombia, Ecuador, Guatemala, Honduras and Nicaragua extend some form of collective rights to Afro-Latinos. The disparity in collective rights across in region is due to differences population size, political strength, and in self-definition of communities.

In general, Afro-Latinos have obtained collective rights in two ways. In countries where Afro-Latinos are viewed as ethnic groups with distinct cultures, they have gained collective rights to preserve their culture. Examples are Guatemala, Honduras, and Nicaragua. In countries where Afro-Latinos are seen mainly as marginalized racial groups, they have gained separate collective rights intended to combat racial discrimination. In a few countries, Afro-Latinos are viewed as falling within both categories and have been able to gain collective rights through both mechanisms. Brazil, Colombia, and Ecuador are three examples. However, the legal and social basis of collective rights for descendants of African slaves remains a highly contested issue throughout Latin America.

COLOMBIA

History: *Cimarrones* are runaway slaves and their descendants. They live in *palenques* located in rural coastal regions. Colombia has the second largest afro-descendant population in Latin America, estimated to be 19-26% of the Colombian population.

Law: 1991 Constitution recognized the right of Afro-Colombians to collective property as well as their economic and cultural rights. In 1993 Ley 70 was adopted to regulate the titling of land. It excludes urban areas, national parks, and land for national security and defense.

Current Status: INCODER is the government agency that oversees the land titling process. Today approximately 90% of the land originally designated as Afro-Colombian territory has been formally ceded to the respective communities.

Challenges: 1) aspects of Ley 70 have yet to be implemented; 2) some title applications are in limbo; 3) inadequate mechanisms to settle land disputes; 4) massive internal displacement of Afro-Colombians from their land by agro-businesses, coca crops, and development projects.

ECUADOR

History: Afro-Ecuadorians comprise 5% of the population. The first slaves arrived in 1532 and by 1599 there were Afro-descendant *palenques* and autonomous confederations. After slavery was abolished, communities began petitioning for collective recognition.

Law: 2008 Constitution recognizes Afro-Ecuadorian communities and pledges to preserve their right to communal and ancestral lands and to conserve their social structure. An Afro-Ecuadorians community can designate itself a collective community by a 2/3 vote.

Current Status: 60% of all Afro-Ecuadorians do not possess legal title to lands they occupy. A mass titling campaign has been ongoing since 2009. The 2007-2010 National Development Plan aims to increase Afro-Ecuadorian participation in policymaking.

Challenges: 1) Violence: Spillover of conflict in Colombia interferes with land titling; 2) Land Trafficking: migrant farmers force communities to sell or abandon land by cutting timber or threatening violence; 3) Lack of Resources; 4) Environmental Degradation from shrimp, oil palm industries chemicals

NICARAGUA

History: Indigenous, Afro-Nicaraguan, and Carib groups compose 10% of the population and inhabit the Atlantic coastal area. The region remained semi-autonomous throughout the 20th century and was granted official autonomy in 1987.

Law: 1987 Constitution recognizes Afro-Nicaragua groups and grants identical cultural and collective land rights to indigenous groups. Law 445, passed in 2003, established a government agency, CONADETI, o demarcate and title communal lands.

Current Status: CONADETI issued six titles in 2006, one in 2008, and six in 2009. In late 2009, CONADETI announced plans to complete the titling process in 2010 despite the fact that critics say the process would be too rushed and incomplete.

Challenges: 1) determining power sharing arrangements between regional councils and central government; 2) political opposition to land reform; 3) insufficient political and advocacy skills at the local level; 4) delays in administrative process

BRAZIL

History: Brazil was the last country in the Western Hemisphere to make slavery illegal. During the era of slavery Brazil imported four million African slaves – more than any other country in the world. Today it has the largest population of Afro-Latinos in Central and South America – approximately 45% of the Brazilian population – yet Afro-Latinos also constitute 69% of those living in extreme poverty.

Freed and escaped slaves established "quilombos," or communities of runaway slaves. From their inception until the end of the twentieth century, quilombos had no land rights. During the 1980's Afro-Brazilian activists pressed for full and equal rights in the new Brazilian Constitution of 1988. One demand they made was that land be granted to rural blacks. The result was a compromise: communities that could claim quilombola heritage were entitled to land grants.

Law: Article 68 of the ADCT – in a single yet powerful sentence – grants collective lands rights to quilombos. In 2003, the federal government implemented Presidential Decree 4.887, which provided the procedural rules for quilombos to receive collective land title. This process is overseen by the National Institute of Colonization and Agrarian Reform (INCRA). In 2009, the government issued Normative Instruction 57, which provides a detailed series of steps that each quilombo must follow to gain title. Together, Decree 4.887 and Normative Instruction 57 establish the foundation of quilombo land titling laws and regulations at the national level.

The quilombo land titling process consists of a complex series of seventeen steps. The first step in the process, self-identification, occurs when a community officially declares itself as a quilombo. Once a community officially declares itself a quilombo, it must then create a community association and register the association with the FCP. After this, INCRA steps in and demarcates the territory, creating a Report of Identification and Delimitation (RTID) that identifies the lands the agency proposes to grant to the quilombo. INCRA publishes the RTID in the official state and federal gazettes, after which individuals have ninety days to challenge the contents of the report and government agencies have thirty days to do so. INCRA's regional decision committee will rule on any challenges, and once resolved, the final RTID is published.

Current Status: Although a significant achievement, Article 68 of the ADCT has not resulted in full recognition of quilombola land rights. More than twenty years after the adoption of the new constitution, the government has granted very few collective land titles to quilombos. The vast majority of quilombo land claims are languishing at one of the intermediate steps in the titling process. Quilombos have filed 1,054 applications since 1995, but the government has awarded only 106 land titles. Moreover, the vast majority of these applications have not even completed the official land demarcation (RTID) stage. The government then grants the non-transferable land title to the community as a whole.

Challenges: Advocates for quilombola communities often criticize the land titling process as being too complicated. Other groups within Brazil, however, argue that the titling process is illegal. In 2004 the Liberal Front Party filed constitutional challenge No. 3239 with the Brazilian Supreme Federal Court, claiming that key provisions of Decree 4.887 are unconstitutional and should be repealed.

Brazil also confronts a number of other challenges, including a complex government bureaucracy, the negative attitude of the news media towards the granting of land title, the social exclusion of quilombola communities from Brazilian society, and the difficulties that those communities face in accessing socioeconomic development tools.