

Observations on the State of Indigenous Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples

South Africa

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CULTURAL SURVIVAL

Cultural Survival is an international non-governmental organization that focuses on indigenous rights. It has a global indigenous leadership and consultative status with ECOSOC. Cultural Survival is located in Cambridge, Massachusetts, and is registered as a 501(c)(3) nonprofit organization in the United States. Cultural Survival monitors the protection of indigenous peoples' rights in countries throughout the world and publishes its findings in its magazine, the *Cultural Survival Quarterly*; in a newspaper, *Voices*, that educates indigenous peoples about their rights; and on its website: www.cs.org. In preparation for this report, Cultural Survival collaborated with researchers from Harvard College Student Advocates for Human Rights (HCS Advocates). Researchers consulted with a broad range of indigenous and human rights organizations, advocates, and other sources of verifiable information on South Africa.

SOUTH AFRICA

EXECUTIVE SUMMARY

While working to promote peace and justice in the nation as a whole, South Africa has fallen short in protecting the rights of the country's Khoisan peoples to identity, political representation, land restitution, and language. Since revising its Constitution in 1996, the government has made positive legislative and administrative steps in each of these areas, but ineffective implementation has often left the Khoisan without fully realized or enforceable rights. The South African government should officially recognize its indigenous peoples and should eliminate the legislative classification of its citizens into Black, White, and Colored categories in order to improve accountability for violations of their rights, and ensure that they are adequately represented within the government. The government must continue to denounce unjustified police violence and should take steps to ascertain the reasons for and eliminate violence directed at Khoisan peoples. While the steps the government has taken towards restitution of Khoisan lands are welcome, the government needs to provide better resources to Khoisan indigenous communities, both during resettlement onto their lands and after they are resettled, to ensure proper sustainable development within these areas. Finally, South Africa must do more to preserve indigenous languages and promote Khoisan traditional history and culture.

Background

South Africa's 320,000 indigenous citizens include the San peoples—!Xun, Khwe, and Khomani—the Nama Communities, the Griqua associations and Koranna descendants, and the “revivalist Khoisan,” which we refer to collectively as the Khoisan.¹ During the apartheid regime, indigenous identification and culture were discouraged, when not actually banned, and many Khoisan people were forced to learn Afrikaans as their primary language. In 1996, the post-apartheid South African government took steps toward recognizing Khoisan rights. Article 6 of the constitution contains references to indigenous languages, and Article 12 creates an active role for traditional leadership within the nation's legal system. But Khoisan ability to exercise

these rights is restricted by the country's continued use of the out-dated designations of Black, White, and Colored.

IDENTITY AND RECOGNITION

The South African government recognizes the importance of the country's ethnic diversity, but it has not yet replaced the apartheid-era ethnic classifications, which denies the Khoisan peoples their right to their identity. The Committee on the Elimination of All Forms of Racial Discrimination (CERD) has noted that the classification of ethnicities within a nation should be based on self-identification of the people in question.² The Khoisan peoples identify as indigenous (or rather by their own names for themselves), not as "Colored people," a classification they find shaming.³ South Africa should give distinct statutory recognition to all ethnic groups, particularly its indigenous Khoisan peoples.

Recognition of the Khoisan as distinct peoples is necessary to enable the government to measure how well these indigenous peoples are faring in relation to the South African population as a whole when it comes to respect for human rights. South Africa is battling enormous social problems, including poverty, HIV/AIDS, illiteracy, and ethnically motivated hate crimes. But the government does not have a means to measure how these problems are affecting its indigenous minorities, or a way to ensure that those who violate their rights are held accountable.

The need for accountability is particularly urgent in the case of ethnically motivated violence and police brutality. The South African government has made great strides in reducing police violence resulting from racial and ethnic tensions, both by criminalizing racism in its constitution and creating an Equity Court system to enforce this legislation. But excessive use of force by police officials and racist attitudes through the judicial system remain serious human rights issues.⁴ The government has established an Independent Complaints Directorate (ICD) to investigate claims of police brutality and prosecute responsible individuals.⁵ According to the ICD, black people, and particularly marginalized black ethnic groups, are the primary victims, but the report fails to specify what constitutes a marginalized black group. Under article 5 of the Convention for the Elimination of All Forms of Racial Discrimination,⁶ the government has a duty to protect people against violence, and Articles 2 and 7 of the Declaration on the Rights of Indigenous Peoples provide a specific right against discrimination.⁷ The government has taken positive steps by creating the ICD and implementing training procedures for police with a human

rights focus. But without the government recognizing its indigenous peoples, it is impossible to determine whether they are being discriminated against or to provide accountability.

POLITICAL REPRESENTATION

In addition, the tripartite apartheid-era social designations deny the Khoisan peoples their right to representation within the government. Articles 4, 18, and 29 of the Declaration on the Rights of Indigenous Peoples give the Khoisan the rights to self-governance and to representation in the national government by representatives of their choosing.¹⁸ Most Khoisan peoples are culturally or geographically isolated. Without self-representation in government, they lack an official means to direct governmental attention to problems in their communities.

To implement Article 12 of its 1996 constitution, South Africa created the National House of Traditional Leaders as an advisory board to the national and provincial governments, but due to government difficulties in identifying proper Khoisan authorities, they are not members of that body. Some provinces, however, are taking steps toward acknowledging Khoisan identity and including Khoisan authorities in decision-making processes. For example, Northern Cape Province is finalizing a Traditional Leadership and Governance Bill, which will provide a legal framework for introducing traditional leadership in the province. It also is establishing a unit in the Office of the Premier to deal with traditional leadership issues.⁹

LAND RESTITUTION

There is a direct link between adequate protection of indigenous land rights and the ability of indigenous peoples to freely pursue their economic and cultural development and protect their cultural heritage and identity.¹⁰ During the apartheid era, many Khoisan were relocated from their lands to rural villages or impoverished urban neighborhoods. The relative poverty of the Khoisan today, as well as the continued demise of their indigenous traditions, can be explained, in part, by a lack of access to traditional territories and by the Khoisan peoples' inability to exploit the resources (both surface and subsurface) of these lands. The UN Special Rapporteur on the situation of fundamental human rights and fundamental freedoms of Indigenous People has asserted that dispossession from their lands has caused indigenous

¹ Although the Declaration has no binding legal effect, the UNHCHR notes that "such instruments have an undeniable moral force and provide practical guidance to States in their conduct."

peoples in South Africa to become increasingly dependent on external resources.¹¹ Such practices violate Article 1 of the International Covenant on Civil and Political Rights,¹² Articles 14.1 and 15.2 of ILO Convention 169,¹³ and Article 10, 11, 26, 27, and 28 of the Declaration on the Rights of Indigenous Peoples.¹⁴

South Africa deserves credit for making strides in restoring lands to peoples who were dispossessed from their lands during the apartheid era. The government has created a land restitution program to provide remedy, and some groups have regained traditional lands, but implementation remains problematic. Section 25(7) of South Africa's constitution and the country's *Restitution of Land Rights Act of 1994* provides for land restitution to any person or community dispossessed of property after June 19, 1913, the adoption date for the Native Land Act, which dispossessed a large part of the country's Black population from its lands.¹⁵ With the help of indigenous non-governmental organizations, a number of Khoisan groups have successfully reclaimed their lands.¹⁶ There have been shortcomings, however. Many Khoisan argue that their land rights were violated long before 1913.¹⁷ A landmark court victory in 2003 held that one Nama group was entitled to recovery under the principle of restitution even though it had been dispossessed prior to 1913,¹⁸ but in 2005 the Minister of Agriculture announced that the 1913 cut-off date would remain in force.¹⁹ In addition, the land restitution process is complex and costly and sometimes prohibitive to communities seeking restitution.

Furthermore, the government has failed to provide adequate support to communities that have returned to their reclaimed lands. For example, the Khomani San successfully reclaimed a portion of their traditional territory, but within five years the community was in disarray and complained that the government had failed to provide promised assistance to enable the community to initiate sustainable-development programs.²⁰

This is a pervasive problem. South Africa needs to recognize that mere recovery of traditional lands is not sufficient to enable indigenous peoples to overcome generations of marginalization and discrimination. The South Africa Human Rights Council has chided the government for its failure to provide urgently needed support: "Service at a local level has not been delivered by the local municipality, such as issues around health, water, and housing. The declaration of a township is often given as the reason for this slow delivery, but this is not enough. In addition, services such as education, social services and policing are also seriously lacking."²¹

EDUCATION AND LANGUAGE

Articles 5 and 6 of the 1996 Constitution recognize the importance of indigenous languages. South Africa recognizes 11 official languages, including Afrikaans, English, and 9 southern Bantu languages. The government has taken steps towards recognizing the Khoisan's right to their language, in accordance with Article 13 of the Declaration on the Rights of Indigenous Peoples, but it has yet to elevate the Khoisan languages to the status of an official languages.²² Article 6 of South Africa's Constitution recognizes the need to do so and established the Pan South African Language Board (PanSALB),²³ which was charged with promoting multilingualism and developing the country's 11 official languages, South African sign language, and the Khoisan languages.²⁴ PanSALB created a Khoe and San National Language Board, but to date this board has been relatively ineffective. There is almost no Nama literacy, Khoisan languages are still not taught in schools or recognized as official languages, and while other PanSALB Boards have worked to standardize other written languages, N/u still has no standardized alphabet. These shortcomings make it difficult for the government to provide the Khoisan with an education in their native tongues, as guaranteed in Article 14 of the Declaration on the Rights of Indigenous Peoples,²⁵ Article 30 of the Convention on the Rights of the Child,²⁶ and Article 27 of the International Covenant on Civil and Political Rights.²⁷ Education and language development are necessary for the cultural survival of the Khoisan.

REFERENCES

¹ Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Addendum: Mission to South Africa*. ¶ 13, delivered to the Economic and Social Council, U.N. Doc. E/CN.4/2006/78/Add.2 (Dec. 15, 2005).

² Committee for the Elimination of Racial Discrimination, Reporting Guideline General Recommendation VII. "Such identification of the population should be based upon self-identification by the individual(s) concerned."

³ Special Rapporteur, *supra* note 1, paras. 47 & 58.

⁴ See Committee on the Elimination of Racial Discrimination, Summary Record of the 1767th Meeting. CERD/C/SR.1767 (Aug. 7, 2006); OMCT (World Organization Against Torture), *Report to the UN Committee*

Against Torture: Economic, Social and Cultural root causes of violence, including torture and cruel, inhuman and degrading treatment (1/11/06), http://www.ohchr.org/english/bodies/cat/docs/ngos/omct_sa.doc<http://www.state.gov/g/drl/rls/hrrpt/2006/78859.htm>; Human Rights Watch, *World Report on South Africa*, 2005, http://hrw.org/english/docs/2005/01/13/safric9886_txt.htm.

⁵ Independent Complaints Directorate, *Annual Report 2006/2007*, <http://www.icd.gov.za/reports/index.html>

⁶ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (Dec. 21, 1965). “Article 5: (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.”

⁷ Declaration on the Rights of Indigenous Peoples, arts. 2 & 7, G.A. Res. 61/68, U.N. Doc. A/RES/61/295 (Sep. 13, 2007) [hereinafter Declaration Indigenous Rights].

“*Article 2*: Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.”

“*Article 7*: 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.”

⁸ Declaration Indigenous Peoples, *supra* note 7, arts. 4, 18, & 19.

“*Article 4*: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

Article 18: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”

Article 19: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

⁹ Northern Cape: Debate State of the Province Address (20 February 2007), <http://www.northern-cape.gov.za/show.asp?show=sp&ID=387>

¹⁰ ILO Convention on indigenous and tribal peoples, 1989 (No.169). “A manual,” Geneva, International Labour Office, 2003. See also the discussions of the UN Permanent Forum on Indigenous Issues and the wording of ILO-169 and the Declaration on the Rights of Indigenous Peoples.

¹¹ Special Rapporteur, *supra* note 1, para. 33.

¹² International Covenant on Civil and Political Rights (ICCPR), art. 27, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]. “Article 1: 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

¹³ Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 169 I.L.O. 1989, art. 28.3

“*Article 14*: 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.”

“*Article 15*: 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be

prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”

¹⁴ Declaration Indigenous Rights, *supra* note 7, arts. 10, 11, 26, 27 & 28.

“Article 10. Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”

“Article 11:2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”

“Article 26: 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

“Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.”

“Article 28: 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.”

¹⁵ See Act No. 22 of 1994: Restitution of Land Rights Act, Nov. 25, 1994. Available at

<http://www.info.gov.za/acts/1994/a22-94.pdf>. See also Special Rapporteur, *supra* note 1, para. 35.

¹⁶ Special Rapporteur, *supra* note 1, para. 37. “Khoen and San communities that have benefited from the land restitution programme include the Riemvasmaak Nama Community, ongoing claims by Steinkopf and Richtersveld Namas; the !Xun and Khwe San communities who were displaced from Schmidtsdrift by a counter-claim; the Kleinfontejntjie Griqua community as well as the Khomani San Community in the southern Kalahari; and resettlement projects in Gudaus, Pella and Witbank. Griqua groups in the Northern Cape have also shown some success with land claims and redistribution projects, including the use of trust laws to gain collective land rights.”

¹⁷ See e.g. Land Summit 2005: Commission 2 Land Restitution: Balancing Rights of the Dispossessed and Economic Development, July 29, 2005.

land.pwv.gov.za/Land_Summit/Position_Conference_Papers/Audio/Reports/Fri/Commission%202.mht

¹⁸ Alexkor Limited and the Government of South Africa v The Richtersveld Community, Constitutional Court of South Africa, CCT 19/03 (Oct 14, 2003). See also Special Rapporteur, *supra* note 1, para. 35.

¹⁹ “South Africa Pushes Back Deadline for Settling Land Claims,” *Agence France Presse*, Feb. 17, 2005, http://www.nda.agric.za/docs/landsummit/Land_Reform/France-SA_pushes_back_deadline_for_settling_land_claims.pdf

²⁰ South Africa Human Rights Council, *Report on Inquiry into Human Rights Violations in the Khomani San Community*, Mar 1, 2005, http://www.sahrc.org.za/sahrc/cms/publish/article_129.shtml.

²¹ *Id.*

²² Declaration on the Rights of Indigenous Peoples, *supra* note 7, art. 13.1.

“Article 13.1: Indigenous peoples have the right to revitalize, use, develop, and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.”

²³ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, arts. 6.2 & 6.5. Article 6.2: “Recognizing the historically diminished use and status of the indigenous language of our people, the state must take practical and positive

measures to elevate the status and advance the use of these languages.” Article 6.5: “A Pan South African Language Board established by national legislation must promote, and create conditions for, the development and use of...the Khoi, Nama and San languages.”

²⁴ National Research Foundation, Pan South African Language Board, <http://www.nrf.ac.za/pansalb/>

²⁵ Declaration Indigenous Rights, *supra* note 7, art. 14. “Article 14: 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.”

²⁶ Convention on the Rights of the Child (CRC), art. 30, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (Nov. 20, 1989). “Article 30: In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”

²⁷ ICCPR, *supra* note 12, art. 27. “Article 27: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”