

# Who Is Indigenous?: Indigenous Rights Globally, in Africa, and Among the San in Botswana

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“For many peoples in the developing world, ‘homeland security’ has a meaning very different from its post-September 11 meaning in the United States.”<sup>1</sup>

## I. INTRODUCTION

For marginalized and victimized people around the world, international law affecting them has grown enormously over the last few years.<sup>2</sup> In theory, it provides for the protection of their rights and

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1. T. Ankensen & Thomas K. Ruppert, *Defending the Polygon: The Emerging Human Right to Communal Property*, 59 OKLA. L. REV. 681, 683 (2006).

2. See INTERNATIONAL LAW AND INDIGENOUS PEOPLES (Joshua Castellino & Niamh Walsh eds., 2005); JEREMIE GILBERT, INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS, at xiii-xvi (2006); FEDERICO LENZERINI, REPARATIONS FOR INDIGENOUS PEOPLES (2008); PATRICK THORNBERRY, INDIGENOUS PEOPLES IN INTERNATIONAL LAW

recourse or redress for wrongs committed against them.<sup>3</sup> The framework of international law has grown significantly over time, and traditional persuasions toward state sovereignty have begun to give way to the recognition of laws that have universal application.<sup>4</sup> The ability of the international community to hold states and individuals accountable for violations of such laws is growing as well, especially at the regional level.<sup>5</sup> International human rights law constitutes a significant part of this framework. When individual states fail to provide justice, international human rights law offers aggrieved persons an opportunity to seek justice outside their national borders.

Although the international legal establishment does not have the capacity to provide redress for all the wronged citizens and groups of the world, its existence strengthens a foundation through which states have begun to recognize the ability of the international community to influence the way governments treat their citizens. Many states have signed and ratified into law a host of international legal agreements that hold them accountable to the international community in various ways.

In this context, indigenous rights are a growing component<sup>6</sup> of international human rights law.<sup>7</sup> Under international law, indigenous persons are afforded certain rights that underscore their vulnerable position in societies. Among these are the rights to self-determination; to pursue culture, religion, and language; to political representation; to nondiscrimination; to land and resources; to social welfare; to development; and to autonomy.<sup>8</sup> The issue of specifying indigenous rights and determining who is entitled to them is, however, highly complex and controversial,<sup>9</sup> especially in the African context.

A country that is a focal point of these issues is the Republic of Botswana. It is a sparsely populated, semiarid country lying just north of South Africa, with a total landmass of 566,730 square kilometers and a

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(2002); ANNA MEIJKNECHT, *TOWARDS INTERNATIONAL LEGAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2001).

3. See INTERNATIONAL LAW AND INDIGENOUS PEOPLES, *supra* note 2.

4. See Stephen Allen, *The Consequences of Modernity for Indigenous Peoples: An International Appraisal*, 13 INT'L J. ON MINORITY & GROUP RTS. 315, 340 (2006).

5. *Id.* at 331.

6. For example, 1993 was declared the International Year of Indigenous Peoples. The International Decade began in 1995, and in 1994 the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities was adopted.

7. Rhiannon Morgan, *Advancing Indigenous Rights at the United Nations: Strategic Framing and Its Impact on the Normative Development of International Law*, 13 SOC. & LEGAL STUD. 481, 482 (2004).

8. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 129 (2d ed. 2004).

9. PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 50, 60, 176, 377 (2002).

population of 1,990,876.<sup>10</sup> The country consists of several subpopulations: the Tswana (or Setswana) at 79%, Kalanga at 11%, the San at 3%, and others.<sup>11</sup> Although Botswana is known for ethnic homogeneity, there are, in fact, a great number of ethnic groups living in smaller numbers throughout the country, including the Ngwato, Ngwaketse, Kwena, Tawana, Kgatla, Barolong, Tlokwa, Herero, Subiya, Mbukushu, Yei, and Birwa.<sup>12</sup> Yet because the dominant Tswana speak Setswana, it has become the sole dominant local language of Botswana, spoken by 78.2% of the population,<sup>13</sup> even though English is the only official language.<sup>14</sup>

Upon independence in 1966,<sup>15</sup> Botswana premised its nation-building efforts on an overstated assertion of ethnic homogeneity because of the significant representation of the Tswana.<sup>16</sup> In reality, the ruling Tswana elite simply ignored the existing heterogeneity.<sup>17</sup> In Botswana, borders were drawn in such a way that disparate ethnic groups were brought together under the umbrella of a single nation. As in many countries, this effectively split ethnic groups at borders, including the Ju/'hoansi people in the northwest of Botswana, whose population stretches across the Namibian border, and the many Setswana speakers who live within the borders of South Africa.<sup>18</sup> As a result, and despite frequent government claims to the contrary, there is significant ethnic diversity in Botswana. The Tswana simply have critical mass and control perceptions of this diversity. Thus, the marginalization of minorities has become a significant national issue. The situation of indigenous groups in Botswana presents the government with ultimately unavoidable challenges that bring the indigeneity debate to life in the context of the real world.

The San are Botswana's oldest, and arguably most culturally unique, ethnic group. Often referred to as the Basarwa,<sup>19</sup> or Bushmen, the San have occupied the Kalahari Desert region as hunters and gatherers for

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10. CIA World Fact Book—Botswana, <https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html> (last visited Sept. 29, 2009).

11. *Id.*

12. SIDSEL SAUGESTAD, *THE INCONVENIENT INDIGENOUS: REMOTE AREA DEVELOPMENT IN BOTSWANA, DONOR ASSISTANCE, AND THE FIRST PEOPLE OF THE KALAHARI* 96, 98, 105 (2001).

13. CIA World Fact Book—Botswana, *supra* note 10.

14. *Id.*

15. *Id.*

16. SAUGESTAD, *supra* note 12, at 69.

17. *Id.*

18. *Id.* at 199.

19. Considered derogatory by many San, this term means “those who don’t own cattle” in Setswana. DITSHWANELO, *SHADOW REPORT TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD), 68TH SESSION, GENEVA § 2(a) (Mar. 3-6, 2006)*, <http://www.ditshwanelo.org/bw/images/CERD%20Shadow%20Report%202006.pdf>.

millennia.<sup>20</sup> Living in small groups, these indigenous peoples are experts at scratching subsistence from the arid land in a climate that “clearly poses problems for all forms of life” due to “persistent water deficiency.”<sup>21</sup> Despite having been collectively coined “the Bushmen” by much of the world, the San are, in fact, comprised of several unique linguistic and cultural groups.<sup>22</sup> These include the Ju/’hoansi in Ngamiland; the Nharo in Ghanzi; the Khwe in Ngamiland; the Tyua in Central District, Ngamiland, and Chobe; and the Nama (or Khoe) in the Kgaladai and Ngwaketse districts of southern Botswana,<sup>23</sup> as well as the !Kung, the !Xo, the Tsila, the Bakgalagadi, the G/wi, and the G//ana in those southern districts.<sup>24</sup> There are an estimated 95,000 San living in communities across Southern Africa, with the greatest number (45,000-60,000) in Botswana.<sup>25</sup> These groups maintain their own linguistic and cultural traditions within their specific geographic locations. What they have in common, however, is a long history tied to this region—possibly dating as far back as 40,000 years—and a troubled present.<sup>26</sup>

Botswana has agreed to the United Nations Declaration on the Rights of Indigenous Peoples (Declaration)<sup>27</sup> and the Committee on the Elimination of Racial Discrimination (CERD) General Recommendation 23, and has ratified several international treaties and conventions that obligate it to protect the rights of indigenous groups like the San.<sup>28</sup> These include the African Charter on Human and Peoples’ Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention Against Torture.<sup>29</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Labor Organization (ILO) Convention 169

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20. *Id.*

21. H.J. Cooke, *The Kalahari Today: A Case of Conflict over Resource Use*, 151 GEOGRAPHICAL J. 75, 77 (1985).

22. Int’l Work Group for Indigenous Affairs [IWGIA], *Indigenous Peoples in Botswana*, <http://www.iwgia.org/sw9942.asp> (last visited Oct. 31, 2009).

23. *Id.*

24. INT’L WORK GROUP FOR INDIGENOUS AFFAIRS, *THE INDIGENOUS WORLD 2009*, at 565 (Kathrin Wessendorf et al. eds., 2009).

25. Nicholas Olmstead, *Indigenous Rights in Botswana: Development, Democracy and Dispossession*, 3 WASH. U. GLOBAL STUD. L. REV. 799, 809-10 (2004).

26. *Id.* at 810.

27. G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

28. *See generally* U.N. Comm. on the Elimination of Racial Discrimination [CERD], *Report of the Committee on the Elimination of Racial Discrimination*, Annex V, U.N. Doc. A/52/18 (Sept. 26, 1997).

29. *See* CTR. FOR THE STUDY OF HUMAN RIGHTS, COLUMBIA UNIV., 25+ HUMAN RIGHTS DOCUMENTS (2001).

on Indigenous Peoples are also relevant, but unfortunately, Botswana has not yet ratified either.<sup>30</sup> While each of these covenants focuses on particular areas of rights, there are more general treaties, such as the United Nations Charter and the Universal Declaration of Human Rights, that, regardless of ratification, obligate Botswana to adhere to certain standards because much of their content is now recognized as customary international law.<sup>31</sup>

Despite these agreements, Botswana continues to deliberate over the appropriate application of indigenous rights to its citizenry. Botswana voted in favor of the Declaration, claiming that “the country was made up of indigenous people, who could not be against themselves. If a shoe did not fit, only the person wearing the shoe would feel the pain.”<sup>32</sup> However, Botswana’s government does not recognize within its borders the intrinsic quality of “indigeneity” to any specific group, but rather claims that all Botswana are indigenous—and therefore ineligible for additional protections under the law, international or otherwise.<sup>33</sup> Several minority groups, including the San and those who support their claims, assert that international law affords them specific indigenous rights that address their vulnerable position in society. Thus, an exploration of the concept of indigeneity is extremely relevant to the San’s ability to access the international legal framework for indigenous rights in their battles against the government.

This Article examines the extent to which indigenous communities at three levels—globally, in Africa, and in Botswana—remain marginalized despite international law designed to protect them. It explores the wide disparity between an agreed-upon conceptual framework and its attendant treaties and agreements, and the execution thereof, which is nonexistent in many locales. This Article examines the complexities of defining indigenous groups and the reasons why there has been so much difficulty in arriving at a consensus. The development of international law on indigenous peoples, minorities, and related concepts is also explored. As the rhetoric of indigenous rights develops, the exceptional difficulty of applying the concept of indigenous rights in Africa becomes clearer. The state of affairs among the San in Botswana specifically offers a lens through which to view the impediments to the

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30. See Int’l Labour Org. [ILO], Convention No. C169, [http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?\(C169\)](http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?(C169)) (last visited Sept. 29, 2009).

31. Norms of customary international law are general practices that have been accepted as law and are said to bind all governments. DAVID WEISSBRODT, JOAN FITZPATRICK & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS LAW, POLICY AND PROCESS 22 (3d ed. 2001).

32. G.A. Draft Res. SHC/3878, ¶ 66, U.N. Doc. GA/SHC/3878 (Nov. 28, 2006).

33. SAUGESTAD, *supra* note 12, at 52.

implementation of indigenous rights. This analysis examines the Government of Botswana's (GOB) position on indigeneity and the way in which it has dealt with the San. Ultimately, advances in rhetoric have not led to improvements in the ability of indigenous groups worldwide to benefit from the protections that international law supposedly affords them.

## II. INDIGENOUS RIGHTS INTERNATIONALLY

The status of international indigenous rights received an immense boost on September 13, 2007, when the U.N. General Assembly finally adopted the Declaration after more than two decades of deliberation,<sup>34</sup> which was preceded by its adoption by the U.N. Human Rights Council on June 29, 2006.<sup>35</sup> One hundred forty-four nations voted for the Declaration, including Botswana, while only four voted against it (Australia, Canada, New Zealand, and the United States)<sup>36</sup> and eleven abstained.<sup>37</sup> Many nations were absent from the vote.<sup>38</sup>

The African Group attempted to defer adoption of the Declaration, claiming that (1) a lack of consensus weakened it,<sup>39</sup> (2) there was no specific definition of indigenous persons,<sup>40</sup> and (3) some might view the concept of self-determination problematically.<sup>41</sup> The Assembly of Heads of State and Government (AHSG) of the African Union (AU), meeting in Addis Ababa in January 2007, agreed to ask for a deferment to examine several key issues, including the definition of indigenous peoples, the concept of self-determination, the issue of land ownership, the exploitation of resources, the establishment of distinct political and

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34. Int'l Work Group for Indigenous Affairs [IWGIA], Declaration on the Rights of Indigenous Peoples, <http://www.iwgia.org/sw248.asp> (last visited Sept. 29, 2009).

35. U.N. Permanent Forum on Indigenous Issues [UNPFII], United Nations Declaration on the Rights of Indigenous Peoples: A Historical Overview, <http://www.un.org/esa/socdev/unpfi/en/declaration.html> (last visited June 11, 2009).

36. *Id.* They objected to articles 3 and 4, which recognize the rights of indigenous peoples to self-determination, autonomy, and self-government, and article 26, which deals with indigenous peoples' rights to the lands they have traditionally occupied. Australia subsequently announced in April 2009 that it would sign the Declaration. See Robert McClelland, Attorney Gen., Austl., Remarks in Support of the United Nations Declaration on the Rights of Indigenous Peoples (Apr. 3, 2009).

37. UNPFII, *supra* note 35.

38. *See id.*

39. African Group, Draft Aide Memoire, United Nations Declaration on the Rights of Indigenous Peoples § 1.0 (2006), available at [www.ipacc.org.za/uploads/docs/Africanaide\\_memoire.pdf](http://www.ipacc.org.za/uploads/docs/Africanaide_memoire.pdf).

40. *Id.* § 2.1.

41. *Id.* § 3.2.

economic institutions, and the issue of national and territorial integrity.<sup>42</sup> In response to this request, various experts noted:

Africa has developed its own understanding of the concept of “indigenous peoples or communities”, whose history and demands are different from those of similar communities in other countries such as Australia, Canada or the USA. The African Group failed to make this distinction and therefore expressed unfounded concerns that the Declaration would, on the African continent, exacerbate inter-ethnic tensions, question territorial integrity, compromise states’ control over natural resources and conflict with national legislations.<sup>43</sup>

The African Commission on Human and Peoples’ Rights (ACHPR) examined these issues and ultimately concluded that

a definition is not necessary or useful as there is no universally agreed definition of the term[,] and no single definition can capture the characteristics of indigenous populations. Rather, it is much more relevant and constructive to try to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa.<sup>44</sup>

Thus, the ACHPR understood and agreed that no universal definition was necessary, desirable, or attainable. It specifically found that to try and achieve one comprehensive definition in the African context would be highly complex and probably unrealizable and may undermine the status and protections already in place for indigenous groups there.

Articles 4 and 26 of the Declaration, and their implications for indigenous groups, have given rise to discussion among those countries that support the Declaration as well as those hesitant to support it.<sup>45</sup> Article 4 states that “[i]ndigenous 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

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42. Decision on the United Nations Declaration on the Rights of Indigenous Peoples, AHS/Dec. 141, § 6, A.U. Doc. Assembly/AU/9 (VIII) add. 6 (Jan. 29-30, 2007), available at <http://www.africa-union.org/coot/AU/conferences/Past/2007/January/summit/summit1/html> (choose “Decisions”; then “Decisions and Declarations of the Assembly”).

43. An African Group of Experts, Response Note to “The Draft Aide Memoire of the African Group on the UN Declaration on the Rights of Indigenous Peoples” § 1.3 (2007), available at <http://www.ipacc.org.za/uploads/docs/AideMemoireResponse.pdf>.

44. Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples, Adopted by the African Commission on Human and Peoples’ Rights para. 10 (May 2007), [http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion\\_eng.pdf](http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf).

45. For a discussion of the debate that has arisen, see, for example, Stefania Errico, *The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview*, 7 HUM. RTS. L. REV. 741 (2007).

means for financing their autonomous functions.”<sup>46</sup> Article 26 provides for the “right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” and requires states to “give legal recognition and protection to these lands, territories and resources . . . with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”<sup>47</sup> The international community now recognizes that indigenous groups lead an “autonomous way of life [that] deserves protection.”<sup>48</sup> But does this recognition, which Falk notes “is now widely enough endorsed by states to qualify as a norm of customary international law,”<sup>49</sup> suggest the right to complete self-determination?

For some, articles 4 and 26 imply that the Declaration buttresses notions of greater autonomy and self-determination for indigenous groups,<sup>50</sup> which might lead to a threat of secession.<sup>51</sup> This poses obvious concern for certain states, especially in light of comments by Anaya—one of the foremost writers on indigenous rights—which support the notion that “self-determination is widely acknowledged to be a principle of customary international law and even *jus cogens*, a peremptory norm.”<sup>52</sup> Article 46 of the Declaration, on the other hand, limits the right to self-determination, stating:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.<sup>53</sup>

The debate over the application of articles 4 and 26 in practice continues to develop.

Despite prolonged deliberations on the text, the adoption of the Declaration further enshrines indigenous rights in international human rights law and “reflects a growing international consensus concerning the

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46. G.A. Res. 61/295, *supra* note 27, art. 4.

47. *Id.* art. 26.

48. RICHARD FALK, HUMAN RIGHTS HORIZONS: THE PURSUIT OF JUSTICE IN A GLOBALIZING WORLD 123 (2000).

49. *Id.*

50. FERGUS MACKAY, THE RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW § IV(c) (1998), *available at* <http://www.sdn.org.gy/apa/topic3.htm>.

51. PATRICIA CARLEY, U.S. INST. OF PEACE, SELF-DETERMINATION: SOVEREIGNTY, TERRITORIAL INTEGRITY, AND THE RIGHT TO SECESSION (1996), *available at* <http://www.usip.org/files/resources/pwks7.pdf>.

52. ANAYA, *supra* note 8, at 97.

53. G.A. Res. 61/295, *supra* note 27, art. 46.



content of the rights of indigenous peoples, as they have been progressively affirmed in domestic legislation, in international instruments, and in the practice of international human rights bodies.”<sup>54</sup> The declaration is not binding on states, but it “could nevertheless be an important tool,” Errico writes, “used by human rights treaty bodies and international and national courts as a guide when interpreting the human rights obligations of States in respect [to] indigenous peoples.”<sup>55</sup> The Declaration might also influence governments as they develop national legislation pertaining to indigenous peoples.<sup>56</sup>

### III. THE SITUATION OF INDIGENOUS PEOPLES INTERNATIONALLY

The current status of indigenous peoples around the world illustrates why these groups are in need of unique protections. Indigenous groups, “[w]herever they may live, in an industrialised country or a developing one, in a rural or urban area,” regularly experience poverty, discrimination, and marginalization in many forms.<sup>57</sup>

Statistical data on indigenous peoples is relatively scarce,<sup>58</sup> particularly for indigenous peoples in Africa, Asia, and Eastern Europe.<sup>59</sup> This is unfortunate, as “[i]nformation and statistics are a powerful tool for creating a culture of accountability and for realizing human rights.”<sup>60</sup> The United Nations expressed concern that “the appropriate definition of ‘Indigenous Peoples’ to use in empirical research is often unclear,” which poses difficulties for data collection because there is no agreement as to who qualifies as indigenous.<sup>61</sup>

Self-identification, which often changes with each passing generation,<sup>62</sup> is another obstacle to collecting data on indigenous groups. Although in some circumstances children of indigenous parents may

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54. Press Release, United Nations, Adoption of Declaration on Rights of Indigenous Peoples a Historic Moment for Human Rights, UN Expert Says (Sept. 14, 2007), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/2F9532F220D85BD1C125735600493F0B?opendocument>.

55. Errico, *supra* note 45, at 755.

56. *Id.*

57. HELENA WHALL, COMMONWEALTH POLICY STUDIES UNIT, SUMMARY REPORT OF THE INDIGENOUS RIGHTS IN THE COMMONWEALTH PROJECT, 2001-2004, at 3 (2004).

58. World Health Org. [WHO], *Health of Indigenous Peoples*, Fact Sheet No. 326 (Oct. 2007), available at <http://www.who.int/mediacentre/factsheets/fs326/en>; U.N. Dep’t of Econ. & Soc. Affairs, *World Bank Contribution to the Expert Workshop on Data Collection and Disaggregation for Indigenous Peoples*, § 2, U.N. Doc. PFII/2004/WS.1/6 (Jan. 19-21, 2004).

59. WHO, *supra* note 58.

60. *Id.* (quoting UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 10 (2000)).

61. U.N. Dep’t of Econ. & Soc. Affairs, *supra* note 58, § 2.

62. *Id.*

define themselves as nonindigenous,<sup>63</sup> in other areas a new generation may identify more closely with an indigenous group than did their parents' generation.<sup>64</sup> For instance, in Canada the total indigenous population jumped by 45% from 1996 to 2006, and the median age for those self-identified as indigenous was twenty-seven, compared with a median age of forty for nonindigenous people.<sup>65</sup> These statistics suggest that a larger proportion of the younger generation identifies itself as indigenous in comparison with the older generation. Thus, the number of indigenous persons in the world is difficult to quantify.<sup>66</sup>

Thornberry notes that dispute over these figures is usually political rather than analytical, normative, or cognitive.<sup>67</sup> In 2002 he wrote:

There are an estimated 200 million indigenous people in the world totaling approximately 4% of the global population[:] . . . 250,000 Aborigines in Australia, 300,000 Maoris in New Zealand, 60,000 Saami, 100,000 Inuits . . . in circumpolar States, some 30 to 80 million indigenous peoples in Central and South America, and 3 to 13 million in North America. In Asia . . . there are estimated to be some 150 million. . . . In the broader sense . . . several million in Africa could be included.<sup>68</sup>

Others estimate between 300 and 370 million indigenous people in the world today,<sup>69</sup> comprising roughly 5000 distinct groups,<sup>70</sup> living in over 70 countries, and speaking roughly 4000 distinct languages.<sup>71</sup> Many of the world's indigenous persons live in highly remote areas.<sup>72</sup> While a few hundred years ago indigenous peoples had access to huge swaths of the world's surface, today they possess the legal right to use only 6% of the planet's land, and in many cases this right is partial or qualified.<sup>73</sup>

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63. *Id.*

64. *See, e.g.*, Brodie Fenlon, *Aboriginal Numbers Soar, Census Shows*, GLOBE & MAIL, Jan. 15, 2008, <http://www.theglobeandmail.com/news/national/article660977.ece>.

65. *Id.*

66. The Chair of the United Nations Permanent Forum on Indigenous Issues, Victoria Tauli Corpuz, referred both to the importance of data collection and disaggregation in order to detect discrimination, inequality and exclusion of indigenous peoples, both individually and as a group. *See generally* Victoria Corpuz, Chair, U.N. Permanent Forum on Indigenous Issues, The Visibility of Indigenous Peoples in Statistics, Address Before IX Encuentro Internacional de Estadísticas de Género, Ronda Censal 2010 (Sept. 29-Oct. 1, 2008).

67. THORNBERRY, *supra* note 2, at 16.

68. *Id.* (quoting INDEP. COMM'N ON INT'L HUMANITARIAN ISSUES, INDIGENOUS PEOPLES: A GLOBAL QUEST FOR JUSTICE 11 (1987)).

69. Rural Poverty Portal, Statistics and Key Facts About Indigenous Peoples, <http://www.ruralpovertyportal.org> (last visited Sept. 6, 2009).

70. Int'l Work Group for Indigenous Affairs [IWGIA], Identification of Indigenous Peoples, <http://www.iwgia.org/sw641.asp> (last visited Oct. 5, 2009).

71. Rural Poverty Portal, *supra* note 69.

72. IWGIA, *supra* note 70.

73. Rural Poverty Portal, *supra* note 69.

Additionally, lands they depend upon are subject to global climate change and deforestation due to logging.<sup>74</sup>

Indigenous peoples make up around 5% of the world's population; however, they account for about 15% of the world's poor.<sup>75</sup> Out of the world's 900 million extremely poor rural people, indigenous people account for roughly one-third.<sup>76</sup> Although in most locales indigenous peoples are minorities,<sup>77</sup> this is not always the case. In Bolivia and Guatemala, indigenous people comprise more than half of the population.<sup>78</sup> The greatest concentration of indigenous people can be found in Asia, whereas the smallest concentration can be found in Europe.<sup>79</sup>

Indigenous populations endure great hardships. They "remain on the margins of society: they are poorer, less educated, die at a younger age, are much more likely to commit suicide, and are generally in worse health than the rest of the population."<sup>80</sup> They generally suffer higher rates of landlessness, malnutrition, and internal displacement than other groups in society.<sup>81</sup> Additionally, the youth of indigenous peoples face unique adversities:

Children born into indigenous families often live in remote areas where governments do not invest in basic social services. Consequently, indigenous youth and children have limited or no access to health care, quality education, justice and participation. They are at particular risk of not being registered at birth and of being denied identity documents.<sup>82</sup>

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74. See Indigenous Peoples of Afr. Coordinating Comm. [IPACC], Central Africa Region, [http://www.ipacc.org.za/eng/regional\\_centralafrica.asp](http://www.ipacc.org.za/eng/regional_centralafrica.asp) (last visited Sept. 29, 2009); see also IPACC, East Africa, [http://www.ipacc.org.za/eng/regional\\_eastafrica.asp](http://www.ipacc.org.za/eng/regional_eastafrica.asp) (last visited Sept. 29, 2009); IPACC, North Africa Region, [http://ipacc.org.za/eng/regional\\_northafrica.asp](http://ipacc.org.za/eng/regional_northafrica.asp) (last visited Sept. 29, 2009); IPACC, West Africa Region, [http://www.ipacc.org.za/eng/regional\\_westafrica.asp](http://www.ipacc.org.za/eng/regional_westafrica.asp) (last visited Sept. 29, 2009).

75. Rural Poverty Portal, *supra* note 69.

76. *Id.*

77. See generally STEVEN C. ROACH, CULTURAL AUTONOMY, MINORITY RIGHTS AND GLOBALIZATION (2005).

78. Rural Poverty Portal, *supra* note 69.

79. BRIAN GOEHRING, INDIGENOUS PEOPLES OF THE WORLD 6 (1993).

80. WHO, *supra* note 58 (quoting INT'L WORK GROUP FOR INDIGENOUS AFFAIRS [IWGIA], THE INDIGENOUS WORLD 2006, at 10 (Sille Stidsen ed., 2006)).

81. Rural Poverty Portal, *supra* note 69.

82. WHO, *supra* note 58 (quoting U.N. Permanent Forum on Indigenous Issues [PFII], *Report of the Inter-Agency Support Group on Indigenous Issues in Its 2004 Session*, 13, U.N. Doc. E/C.19/2005/2, Annex III (May 16-27, 2005)).

Educational discrepancies, including decreased levels of literacy,<sup>83</sup> result from reduced access to schooling and the implementation of curricula that disregard the cultural mores of indigenous groups.<sup>84</sup>

The health of indigenous groups is similarly discouraging. Notwithstanding impediments to data collection, there is a general consensus that life expectancy at birth for indigenous groups is commonly between ten and twenty years lower than that of the rest of the world population.<sup>85</sup> Moreover, infant mortality is 1.5 to 3 times higher than the national average.<sup>86</sup> An investigation conducted by the medical journal *The Lancet* further explored the health of indigenous peoples worldwide.<sup>87</sup> The study found that indigenous health is overall much worse than that of other communities, and often worse than the health of the poorest communities in the countries in which indigenous peoples reside.<sup>88</sup> The initial declines in the health of indigenous peoples was largely blamed on colonialism, which introduced unknown diseases and displaced large amounts of ancestral lands, resulting in major declines in population.<sup>89</sup> The analysis also concluded that the infant mortality rate was higher among indigenous groups than other communities in the “host nations.”<sup>90</sup> The infant mortality rates of the Nanti tribe in Peru, the Xavante in Brazil, the Kuttiya Kandhs in India, and the Pygmy peoples of Uganda were particularly high.<sup>91</sup> Indigenous groups have reduced access to health care,<sup>92</sup> which only exacerbates the difficulties they already face. However, the World Health Organization (WHO) noted that pending the receipt of improved information on the health of indigenous peoples, “action can be taken to ensure access to culturally

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83. Rural Poverty Portal, *supra* note 69.

84. Erica-Irene Daes, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities* para. 8 (U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, Subcomm. on the Promotion & Protection of Human Rights, U.N. Doc. E/CN.4/sub.2/2001/2).

85. Gro Harlem Brundtland, Dir. Gen., World Health Org., Address to the World Health Organization: International Consultation on the Health of Indigenous People (Nov. 23, 1999) (transcript available at [http://www.who.int/director-general/speeches/1999/English/19991123\\_indigenous\\_people.html](http://www.who.int/director-general/speeches/1999/English/19991123_indigenous_people.html)).

86. *Id.*

87. Carolyn Stephens, Clive Nettleton, John Porter, Ruth Willis & Stephanie Clark, *Indigenous Peoples' Health—Why Are They Behind Everyone, Everywhere?*, 366 LANCET 10, 11 (2005).

88. *Id.*

89. Carolyn Stephens, John Porter, Clive Nettleton & Ruth Willis, *Disappearing, Displaced, and Undervalued*, 367 LANCET 2019, 2020 (2006).

90. Stephens et al., *supra* note 87, at 11.

91. Stephens et al., *supra* note 89, at 2022.

92. See Rural Poverty Portal, *supra* note 69.

appropriate health care, as well as to safe and potable water, adequate housing and health-related education.”<sup>93</sup>

This discrepancy in the overall state of affairs of indigenous groups from the general population is not unique to the poorer, less developed countries of the world. In Canada, 40% of the indigenous people live in poverty, which is double the national average.<sup>94</sup> The indigenous unemployment rate is over 30%, compared to the national rate of 8%.<sup>95</sup> Diabetes rates are approximately five times higher than the rest of the population, and suicide rates are six times higher.<sup>96</sup>

These statistics demonstrate the global marginalization of indigenous groups caused by extreme poverty, inferior access to quality health care and education, and exclusion from political, social, and economic spheres; further, they establish the clear need for unique protections.

#### IV. THE QUANDARY OF DEFINITION

Indigenous groups continue to suffer in part due to the huge gap between theory and practice with regard to protecting indigenous rights, but also due to the difficulty of determining which peoples are indigenous. International human rights law dictates that indigenous peoples benefit from certain unique protections, called “indigenous rights,” but in order to apply indigenous rights it is necessary to establish a definition of the term “indigenous.” After all, “[h]ow can claimants effectively pursue their rights unless they know that they are, legally, indigenous?”<sup>97</sup>

Defining which peoples are indigenous is a complex and difficult question.<sup>98</sup> The difficulty, as Hitchcock recognizes, is that beyond consensus on the concept of original descendents, “[n]o single agreed-upon definition of the term ‘indigenous peoples’ exists.”<sup>99</sup> Condé has argued, however, that the common usage of the term refers to “a body of persons who are united by a common culture, tradition, ethnic

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93. WHO, *supra* note 58.

94. Jennifer Reid, *Canada Is Increasingly Alone on Native Rights*, VICTORIA TIMES COLUMNIST (Can.), May 22, 2009, at A10.

95. *Id.*

96. *Id.*

97. Karin Lehmann, *To Define or Not To Define—The Definitional Debate Revisited*, 31 AM. INDIAN L. REV. 509, 522 (2006-2007).

98. See S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT’L & COMP. L. 13, 13-14 (2004).

99. Robert K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, 5 COLO. J. INT’L ENVTL. L. & POL’Y 2 (1994).

background, and sense of kinship that often constitutes a distinct, politically organized group.”<sup>100</sup> Examples of such groups around the world include the Maasai in Kenya, the Nuba in Sudan, the Pygmies in Central Africa, the Papuan tribes in Indonesia, the Aborigines in Australia, the Awa in Brazil, the Inuit in Canada, and the San in the Kalahari.<sup>101</sup>

Despite a lack of consensus, various scholarly definitions of the term “indigenous” exist. Anaya defines the term “indigenous” as “the living descendants of preinvasion inhabitants of lands now dominated by others” who are “culturally distinct groups that find themselves engulfed by settler societies born of the forces of empire and conquest.”<sup>102</sup> Cobo’s oft-quoted definition states:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed in their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems.<sup>103</sup>

The concept of indigenous peoples has developed through politics, law, and U.N. resolutions, and a consensus was reached regarding a definition of indigenoussness that recognizes four key factors:

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100. VICTOR H. CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 107 (1999).

101. Survival Int’l, Tribes & Campaigns, <http://www.survival-international.org/tribes> (last visited Sept. 21, 2009).

102. ANAYA, *supra* note 8, at 3; *see also* S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

103. *See* FRANCESCO CAPOTORTI, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, LINGUISTIC AND RELIGIOUS MINORITIES, U.N. Doc. E/CN.4/Sub.2/384/Rev. 1, U.N. Sales No. E.78.XIV.1; *see also* Chidi Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 QUEEN’S L.J. 348, 350-51 n.6 (2004). For another definition of “indigenous peoples,” *see* 2 WORLD BANK GROUP, OPERATIONS POLICY AND COUNTRY SERVICES operational directive 4.20, *available at* <http://hei.unige.ch/~clapham/hrdoc/docs/WBOD4.20.htm> (last visited Oct. 30, 2009) (articulating indigenous groups in relation to their possessing “a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process”). *See also* Stephen B. Brush, *Whose Knowledge, Whose Genes, Whose Rights?*, in VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLES AND INTELLECTUAL PROPERTY OF OTHERS 1, 5 (Stephen B. Brush & Doreen Stabinsky eds., 1996) (arguing that the term “indigenous peoples” is limited to the New World and “is not suited to parts of Asia and Africa, where a single hybrid or Creole culture (e.g., European-Native) is not dominant”).

preexistence, nondominance, cultural difference, and self-identification as indigenous.<sup>104</sup> The Indigenous Peoples of Africa Coordinating Committee (IPACC) confirms some of these characteristics, including: “political and economic marginalisation rooted in colonialism; . . . discrimination based often on the dominance of agricultural peoples in the State system . . . ; the particularities of culture, identity, economy and territoriality that link hunting and herding peoples to their home environments”; and physical distinctions that render some indigenous groups subject to discrimination.<sup>105</sup>

Connection to ancestral land is a crucial component of indigenous identity. “The history of indigenous peoples,” Hannum argues, “is, to a large extent, the chronicle of their unsuccessful attempts to defend their land against invaders.”<sup>106</sup> Land is a defining characteristic of indigenous people, not only because it is highly regarded as a symbol of the people’s history and sense of identity, but also because it is a factor in their economic vitality as independent people.<sup>107</sup> The U.N. Committee on Economic Social and Cultural Rights has recognized the need for secure rights to traditional land in order to ensure that indigenous way of life is maintained.<sup>108</sup> It has also determined that recognition and protection of these rights is necessary for the rights enshrined in the ICESCR.<sup>109</sup> Thus,

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104. Keitseope Nthomang, *Relentless Colonialism: The Case of the Remote Area Development Programme (RADP) and the Basarwa in Botswana*, 42 J. MOD. AFR. STUD. 415, 416-17 (2004).

105. Indigenous Peoples of Afr. Coordinating Comm. [IPACC], Who Are the Indigenous Peoples of Africa?, <http://www.ipacc.org.za/eng/who.asp> (last visited Oct. 5, 2007).

106. Hitchcock, *supra* note 99, at 15.

107. See JULIAN BURGER, REPORT FROM THE FRONTIER: THE STATE OF THE WORLD’S INDIGENOUS PEOPLES 13-14 (1987).

108. See INDIGENOUS CMTY. SUPPORT ORG., NGO FORUM ON CAMBODIA, ASIAN INDIGENOUS PEOPLES’ PACT FOUND. & FOREST PEOPLES PROGRAMME, THE RIGHTS OF INDIGENOUS PEOPLES IN CAMBODIA 2, *delivered to the U.N. Committee on Economic, Social and Cultural Rights* (Apr. 3, 2009); see also U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 6 and 17 of the Covenant: Paraguay*, ¶¶ 29, 34 U.N. Doc. E/C.12/PRY/CO/3 (Jan. 4, 2008); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 6 and 17 of the Covenant: India*, ¶ 44, U.N. Doc. E/C.12/IND/CO/5 (May 10, 2008); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 6 and 17 of the Covenant: Bolivia*, ¶¶ 23, 36, U.N. Doc. E/C.12/BOL/CO/5 (Aug. 8, 2008); *Consideration of Reports Submitted by States Parties Under Articles 6 and 17 of the Covenant: Kenya*, ¶¶ 12, 31, U.N. Doc. E/C.12/KEN/CO/1 (Dec. 1, 2008). See generally Lorenzo Nesti, *Indigenous Peoples’ Rights to Land and Their Link to Environmental Protection: The Case of Mapuche-Pehuenche*, 11 L. & ANTHROPOLOGY 67 (2001).

109. See U.N. Econ. & Soc. Council [ECOSOC], *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Finland*, ¶ 34, U.N. Doc. E/C.12/FIN/CO/5 (Jan. 16, 2008).

the Committee has found that indigenous peoples are particularly vulnerable where “access to their ancestral lands [is] threatened.”<sup>110</sup>

IPACC does observe that in the African context, the term “indigenous” may offend some because it implies the application of differing levels of rights in a context where many—if not most—people face overwhelming obstacles in the pursuit of basic human rights.<sup>111</sup> Ultimately, the term “indigenous” and the rights afforded to indigenous peoples were established in order to “emphasise that affirmative recognition is necessary for hunter-gatherers and herding peoples” who have found themselves “outside the state-system and underrepresented in governance.”<sup>112</sup>

The only legally binding definition of “indigenous,” as Sylvain points out, is contained in article 1 of ILO Convention 169.<sup>113</sup> This definition is binding only upon the convention’s signatories and includes

peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>114</sup>

In international law, the term “indigenous” refers “to a particular subset of humanity that represents a certain common set of experiences rooted in historical subjugation by colonialism, or something like colonialism.”<sup>115</sup> The Declaration has recently provided a reaffirmation of the unique and vulnerable position of indigenous peoples “as discriminated peoples and long dispossessed of their ancestral resources” and compels the international community and states parties to the Declaration to take appropriate action.<sup>116</sup> Interestingly, the Declaration itself does not contain a specific definition of indigenous peoples.<sup>117</sup>

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110. U.N. Econ. & Soc. Council [ECOSOC], Substantive Issues Arising in the Implementation of the International Covenant of Economic, Social and Cultural Rights: General Comment 12, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

111. IPACC, *supra* note 105.

112. *Id.*

113. Renee Sylvain, *Land, Water and Truth: San Identity and Global Indigenism*, 104 AM. ANTHROPOLOGIST 1074, 1075 (2002) (quoting ILO, *supra* note 30, art. 1).

114. *Id.*

115. ANAYA, *supra* note 8, at 5; see also Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 672 (1990).

116. Press Release, United Nations, *supra* note 54, para. 4.

117. See Declaration on the Rights of Indigenous Persons, Draft Resolution, G.A. Res. 61/295, U.N. Doc. A/61/L.67 (Sept. 12, 2007).



However, the specific rights it seeks to protect address the vulnerabilities common to persons described by the definitions discussed above.

Although there is much debate over an exact definition of the term “indigenous,” Thuen concludes, “[W]e recognise when we see it.”<sup>118</sup> There is certainly enough agreement over the term that indigenous rights are codified in international law. Anaya maintains that groups are “indigenous because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity.”<sup>119</sup> Clearly, this statement applies to the San, who lived in the Kalahari region long before the Tswana—the “more powerful sector(s) of society”—arrived.<sup>120</sup> Yet this applies to many other groups, where realizing full citizenship rights is difficult for a variety of reasons such as the common lack of birth certificates or national identity documents among the indigenous, making access to services such as clinics, hospitals, and schools extraordinarily difficult.<sup>121</sup>

## V. INDIGENEITY IN AFRICA

While indigeneity is a highly debated and complex term around the world, many argue that the label “indigenous” is particularly difficult to apply in the African context. The length of history as it relates to the concept of original descendants is very important. It is typically assumed that indigenous groups are those that have lived longest in the region they occupy.<sup>122</sup> Yet humanity began on the African continent, and many people living in Africa today are descendants, although often through circuitous lineage, of these original inhabitants.<sup>123</sup> Tracing claims to indigeneity in Africa is far more difficult than, for example, refuting claims that Caucasians are indigenous to the Americas.

In 1999, Alfonso Martinez, then Rapporteur of the UN Working Group on Indigenous Populations, concluded that, “all Africans on the African continent are ‘autochthonous,’”<sup>124</sup> meaning they originate where

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118. *Discussion on the Concept of Indigeneity*, 14 SOC. ANTHROPOLOGY 17, 24 (2006) (comments of Trond Thuen) (internal quotations omitted).

119. ANAYA, *supra* note 8, at 3 (emphasis omitted).

120. *Id.*

121. U.N. Econ. & Soc. Council [ECOSOC], Permanent Forum on Indigenous Issues, *Report of the Inter-Agency Support Group on Indigenous Issues*, U.N. Doc. E/C.19/2005/2, Annex III, ¶ 14 (Feb. 14, 2005).

122. Jim Igoe, *Becoming Indigenous Peoples: Difference, Inequality, and the Globalization of East African Identity Politics*, 105 AFR. AFF. 399, 400 (2006).

123. *Id.* at 402.

124. The Special Rapporteur on Indigenous Peoples, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations*, ¶ 91, delivered to

found.<sup>125</sup> This has been referred to as the “Afro-Asian problematique,” which essentially claims that Asian and African peoples are all indigenous to their lands and therefore no one population should be afforded special indigenous rights.<sup>126</sup> Ultimately, the UN did not heed Martinez’s suggestion to omit African and Asian groups from its indigenous work, but his statement was symbolic of the common belief that Africa’s indigenous groups are somehow “still perceived as being not quite as ‘indigenous’ as indigenous peoples from other parts of the world.”<sup>127</sup>

The colonization of Africa added another tier of complexity to the indigeneity debate. During the colonial era, the colonizers were not considered indigenous, yet all other Africans were.<sup>128</sup> Colonial powers often pursued divide-and-rule tactics to control various ethnic groups living in Africa, thus differentiating among them. However, Africans as a whole were considered indigenous, and “levels” of indigeneity at the time were not perceived as they are today.<sup>129</sup> In the simplified terminology of the era, there were “whites” and “natives.” Who, then, “became” indigenous following the end of colonial rule?

The departure of colonial powers and the establishment of new states with new borders and new political power structures further confounded the understanding of indigenous land rights. The independence movement also created a period of flux in which rules and laws could be adjusted and were often rewritten altogether, thus further diminishing the protection of indigenous groups, who had already suffered marginalization at the hands of colonialists.<sup>130</sup> Sidsel Saugestad,<sup>131</sup> Rodolfo Stavenhagen<sup>132</sup> (the former UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples who was replaced by S. James Anaya in 2008), and Noel Dyck,<sup>133</sup> among others, argue that out of the colonial period

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*the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. Doc. E/CN.4/Sub.2/1999/20 (June 22, 1999) [hereinafter *U.N. Study*].

125. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 147 (1961).

126. *U.N. Study*, *supra* note 124, ¶ 91.

127. Lehmann, *supra* note 97, at 514.

128. SAUGESTAD, *supra* note 12, at 52.

129. *Id.*

130. Nthomang, *supra* note 104, at 417.

131. *See generally* SAUGESTAD, *supra* note 12.

132. RODOLFO STAVENHAGEN, *ETHNIC CONFLICTS AND THE NATION-STATE* 1 (1996).

133. Noel Dyck, *Aboriginal Peoples and the Nation State: An Introduction to the Analytical Issues*, in *INDIGENOUS PEOPLES AND THE NATION STATE: FOURTH WORLD POLITICS IN CANADA, AUSTRALIA AND NORWAY* 1, 1-3 (Noel Dyck ed., 1985); Noel Dyck, *Representation and*

emerged “Fourth World Peoples”:<sup>134</sup> groups that experienced political marginalization at the hands of the newly dominant state parties.<sup>135</sup> Saugestad recognized these vulnerable groups as “often geographically isolated and socially marginalized and with a culture distinct from the national hegemonic model.”<sup>136</sup> He claimed that international law was in need of a descriptive concept for these groups.<sup>137</sup> “Indigenous peoples” is the concept that arose out of this need.<sup>138</sup>

The formidable task of nation building in the postcolonial era compounded the difficulty of applying the term “indigenous” in the African context. During this time, “ethnicity” became a polluted word in Africa, one that continues to play off Western perceptions of Africa’s problems as “tribal,” which has often led to the assumption that Africans are inherently conflict-prone. Among nascent governments, the focus in the postcolonial era was to promote nationalism, not sectarianism.<sup>139</sup> This was a necessary response to the reality colonialists bestowed upon Africa by carving up the continent with no regard for existing ethnic groups or their organization within the landscape.<sup>140</sup> At independence, various ethnic groups were forced to come together to create “national” governments and to pursue “national” goals that reflected the needs of all citizens.<sup>141</sup> At that time, governments that gave too much attention to ethnicity were perceived as unwilling to progress as stable, independent nations in the global political context.<sup>142</sup>

## VI. DEFINITIONAL COMPLEXITIES

Due to the difficulties of defining the term “indigenous,” its usefulness as a concept is often debated, especially in the anthropological community. Adam Kuper’s 2003 article, “The Return of the Native,”<sup>143</sup> sparked a series of discussions on this topic, culminating in Alan Barnard’s response, “Kalahari Revisionism, Vienna and the ‘Indigenous

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*the ‘Fourth World’: A Concluding Statement, in* INDIGENOUS PEOPLES AND THE NATION STATE: FOURTH WORLD POLITICS IN CANADA, AUSTRALIA AND NORWAY, *supra*, at 236-37.

134. The term was coined in 1974 by George Manuel and Michael Posluns. See GEORGE MANUEL & MICHAEL POSLUNS, *THE FOURTH WORLD: AN INDIAN REALITY* 5 (1974).

135. SAUGESTAD, *supra* note 12, at 53.

136. *Id.*

137. *Id.* at 53.

138. *Id.*

139. *Id.* at 68.

140. *Id.*

141. *Id.*

142. *Id.*

143. Adam Kuper, *The Return of the Native*, 44 *CURRENT ANTHROPOLOGY* 389 (2003).

Peoples' Debate," in a 2006 issue of *Social Anthropology*.<sup>144</sup> Some have argued that without a concrete definition, the term "indigenous" has little use. The complexity of experience among various would-be indigenous groups often renders them impossible to classify. Interpreting even the most basic tenet of indigeneity—original descent—can be a formidable task. "Precisely whose ancestors came and when may . . . be problematic, and, of course, over the centuries communities migrated, merged, died out, or changed their languages and altered their allegiances."<sup>145</sup>

Some scholars have argued that exceptional concessions for indigenous groups cause more problems than they solve. "Granting special privileges to a particular category of poor people," Kuper notes, "is not always a simple matter of natural justice. Many of those who lose out locally will be as poor and underprivileged as those who benefit."<sup>146</sup> He also argues that "[w]herever special land and hunting rights have been extended to so-called indigenous peoples, local ethnic frictions have been exacerbated."<sup>147</sup> Whether or not this is universally true, it certainly is an issue. Igoe sheds light on what he claims is the real threat of focusing too heavily on indigenous rights—that it takes away from the larger power struggle going on today in Africa between "the small minority of elites who are able to access structures of international aid and the vast majority of people who cannot."<sup>148</sup> Ideally, however, the battle for indigenous rights can function alongside, not in conflict with, other battles against inequality.

There are a handful of scholars who refute the claim that indigenous rights represent "special privileges" by asserting that indigenous rights should not supersede other human rights. "Indigenous peoples are not . . . claiming 'special rights,'" Kenrick asserts, "they are claiming the rights of all peoples to self-determination, from the enjoyment of which rights they have been excluded through discrimination."<sup>149</sup> As Barnard explains:

Land rights and rights to utilise the resources passed down from the ancestors are *human rights*. If we want to *call* them 'indigenous rights', that is fine; but let us not take these 'indigenous rights' too literally. We no

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144. See Alan Barnard, *Kalahari Revisionism, Vienna and the "Indigenous Peoples" Debate*, 14 SOC. ANTHROPOLOGY 1 (2006).

145. Kuper, *supra* note 143, at 392.

146. *Discussion on the Concept of Indigeneity*, *supra* note 118, at 21-22 (comments of Adam Kuper).

147. Kuper, *supra* note 143, at 395.

148. Igoe, *supra* note 122, at 417.

149. *Discussion on the Concept of Indigeneity*, *supra* note 118, at 20 (comments of Justin Kenrick).

doubt all agree that every individual has a right to a claim of cultural identity, and many of us would simplify this to say that all peoples have cultural rights.<sup>150</sup>

This is a reiteration of the IPACC's assertion regarding the need to provide an "affirmative recognition" of the specific threats indigenous peoples face.<sup>151</sup> The San contend, as Kenrick decries above, that they, like other indigenous groups, are not asking for special treatment. They simply desire the human rights afforded to all peoples under international law. Perhaps it is true that *because* the San are indigenous it is more difficult for the GOB to meet their needs and fulfill these rights, but in reality, they are only asking for what many others in Botswana consider a given.

## VII. INDIGENEITY AND CULTURE

A legitimate threat posed by indigenous rights is that the structures of discrimination and marginalization that created the need for these rights could be reaffirmed. "A focus on indigenosity," argues Suzman, "may well reinforce the very structures of discrimination that disadvantage these peoples in the first place."<sup>152</sup> Access to indigenous rights could compel indigenous groups to appeal to antiquated conceptions that others associate with their indigenous identities. In order to claim their rights, as Kenrick points out, "indigenous peoples are often forced by the huge imbalance in power to fit their complex realities into the obsolete anthropological schema required by the courts."<sup>153</sup>

Defending indigeneity based on obsolete cultural traditions can mean that "[a]ppeals to stereotypes of hunter-gatherers also make it hard for local people to argue for goods that don't fit the image, like goats or cattle, or farm land. Economic priorities are distorted to fit the illusions of foreign romantics."<sup>154</sup> In this sense, defining the term indigenous too rigidly could potentially limit the ability of indigenous groups to access their basic right to self-determination, which might include a desire to shift away from historic modes of tradition and adapt their culture in such a way that allows these groups to coexist successfully with the modern world around them. After all, "situations portrayed as battles for

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150. Barnard, *supra* note 144, at 10.

151. Indigenous Peoples of Afr. Coordinating Comm. [IPACC], What Is New at IPACC?, <http://www.Ipacc.org/za/eng/default.asp> (last visited Oct. 5, 2009).

152. Kuper, *supra* note 143, at 399.

153. *Discussion on the Concept of Indigeneity*, *supra* note 118, at 20 (comments of Justin Kenrick).

154. *Id.* at 22 (comments of Adam Kuper).

'cultural survival' by the indigenous rights movement are often considered by the people concerned to be battles about livelihood, liberty, poverty alleviation, and access to development or social services."<sup>155</sup> Article 27 of the ICCPR protects this right to adapt by requiring more than the protection of *traditional* livelihoods; it "allows also for adaptation of those means to the modern way of life and ensuing technology."<sup>156</sup> In other words, being indigenous does not mean a group must live exactly as their ancestors did several thousand years ago.

It is ironic that indigenous groups have occasionally had to "reformulate their ethnic identities in order to get access to resources."<sup>157</sup> For example, "the San are still expected to perform as authentic 'bushmen' . . . if . . . land-claims judges are not to dismiss their identity claims as false and opportunistic," yet "[n]o one expects 'the English' to perform their Englishness," even though "being English allows one both to be 'modern' and to make claims on an idealized English past of kings and queens, castles, medieval villages, and pastoral landscapes."<sup>158</sup>

The discussion of indigenous tradition and culture raises an important question: Do indigenous groups that choose to "modernize" and who no longer live "traditionally" have a lesser claim to indigeneity? If so, is the international community essentially condemning indigenous groups to isolation and stasis in order to access the very rights that promise to free them from such constraints? For example, many San in Botswana now own livestock because it was a necessary response to political and environmental developments in their communities.<sup>159</sup> Does owning livestock—something not associated with San culture—then strip these individuals of their indigeneity? "San people in South Africa," Suzman notes, "are frustrated not because they cannot pursue their 'traditional culture' but because they are impoverished, marginalized, and exploited by the dominant population."<sup>160</sup> How does the international

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155. Kuper, *supra* note 143, at 399.

156. Jérémie Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 INT'L & COMP. L.Q. 583, 598 (2007) (internal quotations omitted).

157. Kuper, *supra* note 143, at 394; *see also* S. James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7 (2005).

158. Kuper, *supra* note 143, at 398.

159. Robert K. Hitchcock, *Hunters and Herding: Local Level Livestock Development Among Kalahari San*, CULTURAL SURVIVAL Q., Spring 1987, available at <http://www.cultural-survival.org/ourpublications/csqa/article/hunters-and-herding-local-level-livestock-development-among-kalahari-san>.

160. Kuper, *supra* note 143, at 400.

community reconcile the difficulty of deciding to whom to apply the indigenous label with the inevitability that indigenous peoples will change their collective identity and traditions over time?

Thus, while cultural survival has become inextricably tied to the desires of indigenous groups, it is not the sole battle indigenous peoples are fighting. Even those San who no longer live off the land as hunters and gatherers maintain their “indigeneity” in various ways. Among the Omaheke San in South Africa, who essentially have been incorporated into society as a landless underclass, “[a] large part of what it means to them to be ‘San’ . . . comes from *their culturally unique ways* of resisting and coping with their experiences of class exploitation.”<sup>161</sup>

According to Sylvain, the complexity of applying indigeneity in the African context has led indigenous peoples’ forums to “stress cultural distinctness and link it directly to prior occupancy,” which has resulted in “an overdrawn distinction between the ‘cultural’ features of indigeneity and the political economic features that indigenous peoples share with marginalized minorities—namely, nondominance.”<sup>162</sup> Because of this, what people have come to interpret as a group’s “traditional” culture is relied on too heavily as an indicator of indigeneity, while other indicators, such as “the lived patterns of practices and beliefs that make up their moral identity,” which tend to evolve as the world around them modernizes, go unnoticed.<sup>163</sup> Ultimately, it is not for the nonindigenous alone to decide what the principal indicators of indigeneity are.

The active international debate over indigenous rights may have introduced more questions than it has answered. The remaining questions include the following: Which groups in Africa should be considered indigenous? Are there tiers of indigeneity, or simply indigenous and nonindigenous? How does migration affect indigenesness in the modern context as indigenous groups roam across contemporary national borders? For example, many San move seasonally between present day Namibia and Botswana.<sup>164</sup> In this case, which government is accountable for protecting the rights of these groups? Should the length of time a group has lived in a given place prioritize them as the *most* indigenous? What about other definitions of indigeneity, such as those which look to isolation of culture and tradition

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161. Sylvain, *supra* note 114, at 1078.

162. *Id.* at 1075.

163. Renee Sylvain, *Disorderly Development: Globalization and the Idea of “Culture” in the Kalahari*, 32 AM. ANTHROPOLOGIST 354, 366 (2005).

164. Smile Dube, *The Inconvenient Indigenous: Remove Area Development, Donor Assistance, and the First People of the Kalahari*, 51 AFR. TODAY 133, 134 (2004).

as forms of indigenesness,<sup>165</sup> or those that define indigenous groups as those who continue to make a living by hunting and gathering? Does this latter definition obligate indigenous groups “to prove their ‘authenticity’ by demonstrating an archaic lifestyle” before they can access the rights afforded them under international law?<sup>166</sup> The answers to these very complicated questions are extremely relevant to resolving issues faced by groups like the San, who consider themselves “indigenous” in a way that neither they nor others consider the Tswana. Yet, because of the fluid nature of the definition, there is endless debate over who deserves this label and what it confers.

#### VIII. INDIGENEITY AS A TOOL; WHO DEFINES IT?

Some scholars, having agreed that the application of indigenous rights presents many problems, have also noted the usefulness of the phrase as a political tool when marginalized people seek to improve their situations. Indigenous groups are now afforded certain rights under international law and thus the term “indigenous,” however vague or complicated, provides such groups with a means to improve their vulnerable positions.<sup>167</sup>

In the end, the complications of applying indigenous rights do not render the concept useless. After all, both the absence of a definition for a term as well as too stringent a definition can prove more dangerous than a fluid definition. For example, governments can use a lack of definition to deny rights to indigenous groups.<sup>168</sup> On the other hand, “complexity breeds contradiction, and . . . definitions must at best be polythetic.”<sup>169</sup> This may indicate a need to consistently redefine “indigeneity” with references to local circumstances.<sup>170</sup> An analysis of indigenesness in one locale may not apply to another, and “[t]he enormous differences in historical trajectories, political conjunctures, and local responses should prevent us from assuming that in telling one story we tell them all.”<sup>171</sup>

As most scholars of indigenous issues recognize, one of the concept’s defining characteristics is self-ascription, implying that

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165. See ANAYA, *supra* note 8, at 3.

166. *Discussion on the Concept of Indigeneity*, *supra* note 118, at 24 (comments of Trond Thuen).

167. Morgan, *supra* note 7, at 482.

168. Lehmann, *supra* note 97, at 517.

169. See Barnard, *supra* note 144, at 7.

170. *Id.* at 9.

171. Kuper, *supra* note 143, at 398.



indigenous groups are empowered to define and redefine it themselves.<sup>172</sup> Scholars agree that indigeneity is a recognizable concept, but to some extent each indigenous group is responsible for defining what it sees as its culture, its ancestry, its marginalization, and so on.<sup>173</sup>

Because indigeneity does not conform to a single, official definition, the courts also play a role in the continual process of defining the term by working through the issues that complicate its application. The process of definition, regardless of its difficulties, is very important, because “[u]ncertainty and inconsistency at the international level affect[] the treatment that indigenous peoples receive at the regional and national levels.”<sup>174</sup> A combination of the parameters set by scholars, governments, courts, organizations, and indigenous groups should be applied to determine indigeneity, recognizing that a concrete definition is of little use for such a fluid concept.

#### IX. INDIGENEITY IN BOTSWANA

The intricacies of the indigeneity debate take shape in Botswana, especially through the government’s treatment of the San. The marginalization of ethnic minorities is a major issue for the GOB, and its response to these issues offers a telling example of the complexities of the indigenous debate in Africa.

Botswana’s first president, Sir Seretse Khama, focused heavily on fostering national unity in the country and his legacy has held strong to this day.<sup>175</sup> The majority of those in power at independence were of Tswana ancestry, thus nationalism in Botswana, whether consciously or not, was created by and for the Tswana people.<sup>176</sup> The San are among the many minority groups suffering from the effects of codifying this Tswana-based nationalism into the Constitution at independence, as well as through such laws as the Tribal Territories Act of 1933 and the Chieftainship Act of 1966, which added to the marginalization of the non-Tswana groups living in the country.<sup>177</sup> Many people lauded

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172. *Id.* at 396.

173. *Id.* at 395-96.

174. Lehmann, *supra* note 97, at 529.

175. Stephen L. Lewis, *Explaining Botswana’s Successes*, in *DEVELOPING CULTURES: CASE STUDIES 17* (Lawrence Harrison & Peter Berger eds., 2006).

176. SAUGESTAD, *supra* note 12, at 72.

177. DITSHWANELO, SUPPLEMENTARY REPORT FOR THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 3 (2002).

President Khama's efforts to foster unity and non-racialism,<sup>178</sup> but the San were among many of Botswana's minorities who were ultimately harmed by this agenda.<sup>179</sup>

The situation in South Africa at the time also impacted the decision making of President Khama and the new government.<sup>180</sup> Many thought it was brave that Botswana was preaching unity and equality for all its citizens at a time when its more powerful neighbor to the south was mired in Apartheid.<sup>181</sup> However, efforts to promote nationalism in many countries often came at the expense of protecting the unique cultures that comprised the citizenry of each nation. Additionally, the immense responsibilities involved in the nation-building process typically meant that indigenous issues hardly registered on the crowded agendas of newly independent governments.

Today, Botswana's Constitution officially recognizes only eight ethnic groups, while twenty-six other ethnolinguistic groups, the San among them, are not recognized.<sup>182</sup> Both the Chieftainship Act and the Tribal Territories Act have made these discriminatory practices official under Botswana law by recognizing only Tswana-speaking peoples.<sup>183</sup> The government refuses even to maintain official data on San populations.<sup>184</sup> The result is the near complete marginalization of the San in the political process. In fact, "[t]he San have largely been denied the fruits of Botswana's rapid economic growth and social development, suffering from chronic unemployment and poverty, holding little land and few assets, and frequently depending on government beneficence for survival."<sup>185</sup> Botswana has applied a policy of liberal assimilation that

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178. "Non-racialism" refers to the GOB's policy of portraying Botswana as a nonracial, culturally homogenous state, based—as it argues—on the dominance of a single ethnic group, the Tswana. SAUGESTAD, *supra* note 12, at 28, 77.

179. DITSHWANELO, *supra* note 177, at 3.

180. SAUGESTAD, *supra* note 12, at 68-69.

181. *Id.* at 68.

182. Richard Werbner, *Introduction: Challenging Minorities, Difference and Tribal Citizenship in Botswana*, 28 J. S. AFR. STUD. (SPECIAL ISSUE: MINORITIES AND CITIZENSHIP IN BOTSWANA) 670, 681 (2002).

183. *See* DITSHWANELO, *supra* note 19, § 1.

184. Olmstead, *supra* note 25, at 808.

185. *Id.* at 799-800 ("The post-independence nation building enterprise of the Republic of Botswana has not rectified these problems, in part because of the shortcomings of land reform, the enactment of increasingly burdensome hunting regulations, and a focus on assimilating the San into the Tswana-dominated mainstream, rather than on giving them control over the projects and policies that affect them.").

attempted, on the one hand, to be antidiscriminatory, but on the other hand, denied the particular attributes of San society.<sup>186</sup>

In recent years, there has been some effort to improve representation of minority groups; in fact, members of ethnic groups not recognized by law often participate in the government, particularly members of the Kalanga and Bakalagadi ethnic groups.<sup>187</sup> In 2006, twenty-three minority members held seats in the sixty-one-seat parliament, ten held seats in the twenty-seat cabinet, and five were represented in the High Court.<sup>188</sup> However, these groups often are forced to tow the line of the Tswana political leaders and chiefs in order to maintain their posts.<sup>189</sup> For this reason, the presence of representatives from minority groups in government positions has not led to better representation of the demands of those minorities.

#### X. THE GOVERNMENT OF BOTSWANA AND THE SAN

Despite uncertainty over the term, it is clear that the San fit many of the definitions of “indigenous peoples” enumerated above. Yet the GOB denies this special recognition to the San and all other indigenous groups, and continues to argue that all Batswana are equally indigenous.<sup>190</sup> In fact, the GOB has conveniently denied the very existence of an indigenous construct in Africa, claiming—as Alfonso Martinez did at the United Nations in 1999—that all Africans are indigenous and that the concept is therefore meaningless.<sup>191</sup> The GOB often defended its position by recalling the “non-racialism” policy of President Khama, who hoped to avoid the ethnicity-driven political conflicts that were destroying many African governments during the independence era by promoting the Batswana identity through citizenship rather than ethnicity.<sup>192</sup> Of course,

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186. *Id.* at 835-36 (“The government’s concern for avoiding anything resonating with apartheid in the provision of benefits, neighborhood design, and other areas is obviously compelling.”). However, Botswana’s government, in some respects,

has strengthened Tswana cultural norms at the expense of other groups. The government has stressed that all persons are first and foremost citizens of Botswana, but, as Saugestad points out, “this meant that the culture and language of the numerically dominant Tswana people became the dominant symbol” for the nation.

*Id.*

187. U.S. DEP’T OF STATE, COUNTRY REPORT: BOTSWANA (Mar. 6, 2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78720.htm>.

188. *Id.*

189. *Id.*

190. SAUGESTAD, *supra* note 12, at 52.

191. Peaceful Societies, <http://www.peacefulsocieties.org/NAR07/070719gwi.html> (last visited Nov. 2, 2009).

192. Lewis, *supra* note 175, at 20.

this objective was made easier by Tswana domination in the political and economic structures, and a policy of non-racialism is questionable in a country where a single ethnic group maintains most of the power. Is this simply a way to marginalize the disparate needs of minorities in the country so that the Tswana can pursue their own objectives masked as those of everyone? Many minorities in Botswana feel the government is denying their rights and thus do not interpret current government policy as non-racial.<sup>193</sup>

The GOB has also used “primitiveness,” a concept often closely associated with indigeneity, to defend its treatment of the San. The GOB claims that its forced removal of the San from their ancestral home in the Central Kalahari Game Reserve (CKGR), beginning in 1996, was intended to help them “progress” and integrate into modern society.<sup>194</sup> This defense certainly is not unique to Botswana. Governments across the globe have relied on the concept of primitivism to support policies aimed at marginalizing the specific needs and concerns of indigenous groups.<sup>195</sup> The debate presents some important questions. What does it mean to “progress” and who establishes the parameters? Are the San against progress? If they are, does the GOB have the right, or even the obligation, to force them to make such progress?

While the GOB refuses to refer to the San as “indigenous,” it does define the San in other, divisive ways that suggest that they are not, in fact, considered equal. In Setswana textbooks the San are referred to as people of the past, stone-age people, in blatant disregard of the reality that San are presently living in contemporary Botswana.<sup>196</sup> Through its Remote Area Development Programme, the GOB has negatively defined the San, categorizing them by their “absence of valued Tswana qualities” by targeting non-Setswana speakers and people who live “outside village settlements.”<sup>197</sup> Interestingly, this characterization demonstrates that the GOB does view the San as a unique group requiring special assistance. The only difference between the GOB’s current tactic and recognizing the San as indigenous is that the latter would bind the government to international obligations while the former allows the GOB to establish its own set of obligations.

The San vehemently disagree with the government’s claim that all Batswana are indigenous, as they see themselves as the true indigenous

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193. *Id.*

194. IWGIA, *supra* note 22.

195. *Id.*

196. SAUGESTAD, *supra* note 12, at 65.

197. *Id.*

people of the Kalahari region.<sup>198</sup> Many in the international community agree. The San claim to indigeneity is based on the fact that their ancestors were the original occupiers of the land now known as Botswana.<sup>199</sup>

The San contend that the title of indigenesness is crucial both to their ability to access certain human rights and to the obligation of the GOB under international law to promote and protect these rights. For the San, two things are certain: (1) they are not currently able to fully access the rights afforded to indigenous groups under international law; and (2) the GOB, by allowing and sometimes even enabling this denial of access, is violating international agreements and treaties that it has signed. The dramatic eviction of the San from the CKGR<sup>200</sup> only exacerbated the already problematic relationship between the San and the government and has moved the international community to assist the San in bringing a major case before the courts.<sup>201</sup>

It would seem that with the government's refusal to recognize the San as indigenous, the situation is at a standstill. According to Saugestad, however, the government's repudiation of the term "indigenous" does not obscure the reality that the San belong among those groups of people who are politically, socially, and economically marginalized; culturally unique; and original descendents of the land they occupy.<sup>202</sup> Whether the government recognizes this as indigeneity poses obstacles for the San, but it does not obviate their rights protected by international law.

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198. Khoisan Peoples, <http://www.khoisanpeoples.org/> (select "About us" hyperlink) (last visited Nov. 2, 2009); *see also* Indigenous Peoples of Afr. Coordinating Comm. [IPACC], Southern Africa Region, [http://www.ipace.org/za/cng/regional\\_southernafrica.asp](http://www.ipace.org/za/cng/regional_southernafrica.asp) (last visited Nov. 17, 2009).

199. DITSHWANELO, *supra* note 19, § 2(a).

200. In 1996, the government began an active removal campaign of the San from their homelands in the CKGR, relocating them to resettlements camps outside the Reserve. To expedite the removal of the remaining San, on January 31, 2002, the government ceased provision of basic services to the Reserve, including drinking water, borehole access, food rations, transport for children to and from school, and healthcare by means of mobile clinics and ambulance services. A group of San communities living in the CKGR led by San activist Roy Sesana brought a lawsuit against the GOB at the High Court of Botswana with the help of several NGOs. In 2006, the Court ruled that the San's eviction was "unlawful and unconstitutional." *See* IWGIA, *supra* note 22.

201. *Sesana v. Att'y Gen.*, (52/2002) [2006] BWHC (Bots.), 1 (Dec. 13, 2006), para. 152, available at [http://www.survival-international.org/files/related\\_material/bushmen\\_ruling.pdf](http://www.survival-international.org/files/related_material/bushmen_ruling.pdf).

202. SAUGESTAD, *supra* note 12, at 54.

## XI. INTERNATIONAL INDIGENOUS RIGHTS AND THE SAN

Botswana has agreed to be bound by, and is a party to, a number of international agreements that detail its obligations to protect indigenous rights, including the Declaration; the African Charter (Charter); the ICCPR; the ICERD; CERD General Recommendation 23 on the Rights of Indigenous Peoples; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, Botswana is a dualist state, which means that treaties to which it becomes a party are not automatically incorporated into national law.<sup>203</sup> Thus, the Parliament of Botswana has to enact legislation for these instruments to have national effect.<sup>204</sup> In many cases, its Parliament still needs to ensure that this is done to comply with all of its obligations.

Although Botswana is a party to these treaties and conventions, it has often shown limited support for them. For example, since ratifying the Charter on July 17, 1986, Botswana has not submitted a single state report as specified under article 62 of the Charter.<sup>205</sup> The ACHPR has recognized this failure, among others, and consequently sent a mission to Botswana in 2005.<sup>206</sup> During the trip, the ACHPR noted the state's failure to submit these reports, and drew specific attention to the situation of the San.<sup>207</sup> Botswana did submit a report as stipulated in article 9 of the ICERD, but the CERD remarked that the report did not contain information regarding the practical implementation of the Convention nor did domestic law entirely respond to the requirements of the Convention.<sup>208</sup> It further noted specific concern over "expressions of prejudice against the Basarwa/San people," lack of respect for their cultural and linguistic rights, and the dispossession of the San of their land.<sup>209</sup>

Because the GOB has not sufficiently protected the rights of Botswana's indigenous groups, especially the San, there is often little

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203. Tapiwa Zimudzi, *The Role of International Human Rights Law in the Domestic Legal Systems of Southern Africa*, <http://www.h-net.org/reviews/showrev.cgi?path=162601016214335> (last visited Apr. 6, 2008) (reviewing ONKEMETSE TSHOSA, *NATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW: CASES IN BOTSWANA, NAMIBIA AND ZIMBABWE* (2001)).

204. *Id.*

205. AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS, *MISSION REPORT: BOTSWANA* (Feb. 14-18, 2005), available at [http://www.achpr.org/english/Mission\\_reports/mission%20report\\_Botswana.pdf](http://www.achpr.org/english/Mission_reports/mission%20report_Botswana.pdf).

206. *Id.*

207. *Id.*

208. U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Botswana* paras. 297-298, U.N. Doc. A/57/18 (Aug. 23, 2002).

209. *Id.* para. 302.

recourse for these groups to seek justice within their own national borders. International law is thus a vital resource for them. Human rights law obligates the GOB to adhere to international legal standards and subjects the government to a legal framework beyond its own creation, including the powers of persuasion of governments from around the world. This framework compels Botswana in a number of ways. First, the international human rights agreements that Botswana has signed obligate it to certain standards of human rights protection. Second, the international legal regime often influences state action simply through peer pressure. States rarely wish to lose favor with other states for political and economic reasons, and thus are inclined to comply with certain international standards when pressured by other nations.

An exploration of fundamental human rights texts demonstrates that Botswana is in violation of international human rights law with respect to its treatment of the San, especially regarding their forced removal from the CKGR. The legal framework for understanding international human rights law as it applies to the CKGR case fits into several categories, including the rights to subsistence, culture, self-determination, nondiscrimination, and land, among others. This Part will explore key human rights texts and illustrate how the government has failed to uphold many of the basic human rights of the San.

Of direct relevance to the San's expulsion from the CKGR is article 1.2 of the ICCPR, which ensures that "in no case may a people be deprived of its own means of subsistence."<sup>210</sup> This is reiterated in article 1.2 of the ICESCR.<sup>211</sup> By forcibly removing the San from their homelands where they had the ability and knowledge to hunt, gather, and pursue other means of subsistence, the GOB violated this obligation. Referencing article 1.2 of the ICCPR, as well as a clause from the Inter-American Commission on Human Rights' *Third Report on the Situation of Human Rights in the Republic of Guatemala*, which states that forcible relocations of indigenous peoples violates human rights "essential to the right to life of peoples," Tom Griffiths notes, "[T]aken together, these benchmarks establish at least two fundamental norms of customary international law: indigenous peoples' right to give or withhold their consent regarding relocation, and the right to cultural integrity."<sup>212</sup> Elevating these rights to the level of customary international law

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210. CTR. FOR THE STUDY OF HUMAN RIGHTS, *supra* note 29, at 16.

211. *Id.* at 9.

212. TOM GRIFFITHS, INDIGENOUS PEOPLES, HUMAN RIGHTS AND DEVELOPMENT AGENCY STANDARDS: A COMPARATIVE REVIEW 23 (Mar. 2003), *available at* [http://www.choike.org/documentos/forest\\_peoples.pdf](http://www.choike.org/documentos/forest_peoples.pdf).

obligates the government to protect indigenous peoples whether or not it has ratified the relevant covenants.

Cultural rights are perhaps the most thoroughly agreed upon rights of indigenous persons. If Griffiths is correct in assuming that cultural integrity is protected under customary international law, then article 14.1 of the ICESCR requires that Botswana “recognize the right of everyone . . . to take part in cultural life.”<sup>213</sup> The ICCPR reiterates protection of cultural rights in article 27, which reads:

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.<sup>214</sup>

The government has taken away the San’s ability to live according to their tradition by removing them from familiar territory and subjecting them to a new way of life in resettlement camps.<sup>215</sup> They have denied the San’s right to use their own language in any meaningful way in society, most importantly through the educational system, but also in any negotiation or interaction with the government, which is conducted in Setswana.<sup>216</sup>

The GOB’s failure to protect the San’s cultural rights is especially important because of the unique vulnerability of cultural rights; if they are not properly protected, cultures can literally disappear over time. The threat on the horizon is that a lack of protection can lead to annihilation of a culture, an irreversible reality. Although the San were forcibly removed from the CKGR, they could be permitted to return. But if, over time, the San are not allowed to openly practice and maintain their cultural traditions, the very right being protected—the right to culture—could become irretrievable.

The San have based their livelihoods for centuries on hunting and gathering, which is both a form of subsistence and an intricate part of San culture and tradition. As such, hunting and gathering are basic cultural and subsistence rights that warrant protection. However, increased development and the increase of commercial livestock threaten much of the habitat on which the San have historically survived.<sup>217</sup> Increased regulation of hunting in the name of protecting the

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213. CTR. FOR THE STUDY OF HUMAN RIGHTS, *supra* note 29, at 12.

214. *Id.* at 21.

215. DITSHWANELO, *supra* note 19, § 2.

216. *Id.*

217. Olmstead, *supra* note 25, at 813.



environment has made it much more difficult for the San to eke a living out of this already challenging terrain.<sup>218</sup> The government has ceased handing out Special Game Licenses (SGLs) to individuals, a requirement put in place by the 1979 Fauna Conservation Act in hopes of limiting hunting among the San.<sup>219</sup> Now, the government has made hunting even more difficult by adding another administrative obstacle requiring San who want SGLs to apply through complicated government channels, or as a community through the creation of Wildlife Management trusts.<sup>220</sup> These obstacles to acquiring official permission to hunt have led to “illegal” hunting, which in turn has fostered animosity between wildlife officials and San hunters, in which the San have increasingly suffered from arrests, mistreatment, and even torture.<sup>221</sup>

Xanthaki argues that article 27 of the ICCPR “poses an affirmative obligation for positive action to protect minority and indigenous groups.”<sup>222</sup> The use of the words “affirmative” and “positive” are important because they imply a duty for the government to take active steps to address the protection of indigenous groups. The GOB must not only defend the San’s rights if threatened, but is also arguably compelled to take affirmative action to ensure these rights are protected. Certainly, the GOB is not taking positive action, but is in fact inhibiting the ability of the country’s oldest surviving indigenous group to access rights afforded them under international law.

The ACHPR provides additional support for indigenous rights. The African Commission has interpreted article 17 of the Charter, which claims that “the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State,”<sup>223</sup> to indicate a State’s obligation to uphold cultural rights.<sup>224</sup> CERD General Recommendation 23 on Indigenous Peoples delves deeper into the State’s obligation to support cultural rights, noting in article 4(a) that States must “[r]ecognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural identity

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218. *Id.* at 829-30.

219. *Id.* at 842-43.

220. Int’l Work Group for Indigenous Affairs [IWGIA], Central Issues—Botswana, <http://www.iwgia.org/sw9942.asp> (last visited Nov. 1, 2009).

221. Survival Int’l, Government Crackdown on Bushmen Hunters (Oct. 9, 2007), <http://www.survival-international.org/news/2577>.

222. Alexandra Xanthaki, *Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North, Siberia and Far East*, 26 HUM. RTS. Q. 74, 81 (2004).

223. CTR. FOR THE STUDY OF HUMAN RIGHTS, *supra* note 29, at 123.

224. Rachel Murray & Steven Wheatley, *Groups and the African Charter on Human and Peoples’ Rights*, 25 HUM. RTS. Q. 213, 224 n.75 (2004).

and to promote its preservation.”<sup>225</sup> Again, the article utilizes proactive terminology. States are to “promote,” not just “protect,” the preservation of cultural identity.

Foremost among indigenous concerns is the right to self-determination<sup>226</sup> and its meaning.<sup>227</sup> It has been argued that more than 50% of violent conflicts in the world are related to claims for greater self-determination.<sup>228</sup> Regarding self-determination, article 20.1 of the Charter declares, “All peoples shall have right to existence. They shall have the unquestionable and inalienable rights to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.”<sup>229</sup>

While “self-determination” is often discussed with regards to self-government for a group of people, in its simplest terms, it also refers to one’s freedom to act without external compulsion.<sup>230</sup> The right to self-determination, afforded to all peoples under article 20.1 of the Charter, applies to the San as a member of a state that is a signatory to the Charter. Self-determination reinforces the rights of indigenous groups to maintain their cultural identities.<sup>231</sup> According to Anaya, self-determination *at its minimum* requires “the absence of official policies or practices that invidiously discriminate against individuals or groups.”<sup>232</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination outlines rights related to nondiscrimination of

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225. U.N. Comm. on the Elimination of Racial Discrimination [CERD], General Recommendation 23, U.N. Doc. A/52/18, Annex V, ¶ 4, at 122 (1997).

226. LEE C. BUCHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978); Hurst Hannum, *A Principled Response to Ethnic Self-Determination Claims*, in JUSTICE PENDING: INDIGENOUS PEOPLES AND OTHER GOOD CAUSES 263 (Gudmundur Alfredsson & Maria Stavropoulou eds., 2002).

227. S. James Anaya, *The Contours of Self-Determination and Its Implementation: Implications of Development Concerning Indigenous Peoples*, in JUSTICE PENDING: INDIGENOUS PEOPLES AND OTHER GOOD CAUSES, *supra* note 226, at 5-14; Mtendeweka Owen Mhango, *Recognizing a Right to Autonomy for Ethnic Groups Under the African Charter on Human and Peoples’ Rights: Katangese Peoples Congress v. Zaire*, HUMAN RIGHTS BRIEF, Winter 2007, at 11, 11-15.

228. Lotta Harbom, Stina Hogbladh & Peter Wallensteen, *Armed Conflict and Peace Agreements: Uppsala Conflict Data Program (UCDP)*, Department of Peace and Conflict Research, Uppsala University, 43 J. PEACE RES. 617, 618-23 (2006).

229. CTR. FOR THE STUDY OF HUMAN RIGHTS, *supra* note 29, at 123.

230. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 125, at 2059.

231. ANAYA, *supra* note 8, at 131.

232. *Id.* at 129.

indigenous and minority groups.<sup>233</sup> Article 4(d) of CERD General Recommendation 23 on the Rights of Indigenous Peoples requires that States “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.”<sup>234</sup> This Article will not explore the concept in further depth, but many argue that both the Chieftainship Act and the Tribal Territories Act have infused discrimination into Botswana’s legal framework because they officially recognize only Tswana-speaking peoples and therefore marginalize smaller minorities in the country who are without effective political representation.<sup>235</sup> Article 2.2 of ICERD requires:

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.<sup>236</sup>

The GOB is certainly not upholding its obligation to protect certain racial groups. In 2002, CERD published a report criticizing the government’s treatment of the San, claiming that “the resettlement of the San outside of the CKGR ‘does not respect their political, economic, social and cultural rights,’ or the San’s linguistic and cultural rights.”<sup>237</sup> The San suffer discrimination from many sectors of society, not just the GOB, and the state does little to combat this.

Finally, land rights have always played a crucial role in the rights of indigenous peoples, because “culture ‘takes place’ *in a place* and cannot survive without it.”<sup>238</sup> In reference to land rights, CERD General Recommendation 23 article 5 states:

The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to

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233. Malcolm N. Shaw, *The Definition of Minorities in International Law*, in THE PROTECTION OF MINORITIES AND HUMAN RIGHTS 1-31 (Yoram Dinstein & Mala Tabory eds., 1992).

234. CERD, *supra* note 225, ¶ 4.

235. DITSHWANELO, *supra* note 177, at 3.

236. CTR. FOR THE STUDY OF HUMAN RIGHTS, *supra* note 29, at 38.

237. Olmstead, *supra* note 25, at 845.

238. Richard A. Griggs, Ctr. for World Indigenous Studies, The Cultural Dimensions of Environmental Decision-Making, <http://www.cwis.org/artrack.html> (last visited Oct. 5, 2009).

return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.<sup>239</sup>

Article 5 circumvents potential obstacles presented by “official” definitions of land ownership because it includes land that is simply “inhabited or used.” This would imply that the State is obligated to pay restitution to the San for depriving them of their lands.<sup>240</sup> There is a growing body of law referred to as “Aboriginal” or “Native Title Doctrine” that argues that customary indigenous laws concerning land ownership that preceded common law are title generating.<sup>241</sup> This body of law originated in the High Court of Australia and the Supreme Court of Canada, and it is quickly gaining worldwide support as it has since been referenced by courts in many countries tackling indigenous land rights cases.<sup>242</sup> Precedence in Native Title Doctrine offers recourse to indigenous groups that will only mature with time.

The Declaration now provides perhaps the strongest defense of indigenous rights. Among the rights it protects are those addressed through other conventions and declarations noted above, including the right to self-determination, culture, economic development, land, language, education, health, and identity.<sup>243</sup> It also prohibits forced removal from lands as well as forced assimilation.<sup>244</sup> Most noteworthy for the San is that “the Declaration explicitly encourages harmonious and cooperative relations between States and Indigenous Peoples.”<sup>245</sup> The difference between this Declaration and the others is that the sole purpose of this Declaration is to protect the rights of *indigenous* peoples. The Declaration offers protection uniquely required by the indigenous circumstance, and aims to provide groups like the San with the legal framework they require to fully access their rights as vulnerable peoples.

Despite its commitments, Botswana has failed to uphold many of the human rights detailed in the agreements that it has signed and ratified, specifically regarding minority groups like the San. Pressure from multilateral organizations may encourage change by urging Botswana to implement more fully the agreements to which it is a party. However, institutions like the African Commission have limited

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239. CERD, *supra* note 225, ¶ 5.

240. *Id.*

241. Gilbert, *supra* note 156, at 584-85.

242. *Id.* at 585.

243. Press Release, United Nations, *supra* note 54, para. 5.

244. G.A. Res. 61/295, *supra* note 27, art. 8.

245. *Id.*

resources and face many pressing issues. The Commission's plan to send a mission to Botswana, for example, was delayed several times due to more urgent needs in the Sudan.<sup>246</sup>

The High Court of Botswana offers another venue for pressure against the GOB. To some extent, given their recent ruling on the CKGR case, the Court appears to agree that the GOB is failing to uphold its obligations, both under international human rights law and under national laws.<sup>247</sup>

## XII. CONCLUSION

Botswana has managed to evolve from one of the poorest countries in the world in 1966 to a symbol of political stability, economic growth, international investment, and development in Africa.<sup>248</sup> It now has the resources to benefit the marginalized sectors of its society.

The GOB refers to its policy of non-racialism to prove that it is highly sensitive to racial issues and that it strives to provide equal rights to all Batswana. However, the condition of the San and the way they interpret their treatment exposes a more disturbing reality. From their vantage point, it seems as though nonracial policies are a guise for marginalizing racial issues in a Tswana-dominated society. To various degrees, many of Botswana's minorities are suffering from problems similar to those that plague the San.

The country's stability and capital put it in a position to address some of these tough problems. Botswana now has the means to truly promote the San way of life and protect the group's indigenous rights. Such investments would include providing services to the sites of established San communities in the reserve, not simply to the most convenient locations for the GOB; potentially amending the educational system to take into account San and other minorities' culture and language; and recognizing the value of San culture in the overall historic tradition of the nation. All of the above require, however, that the GOB recognize the group's indigeneity.

The problem is not simply that the GOB has failed to uphold the rights of the San, but that it clearly recognizes that the failure to do so is condemnable. The GOB goes to great lengths to hide, ignore, refute, and sideline these troublesome issues. There is little effort to simply admit

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246. AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS, *supra* note 205.

247. *Sesana v. Att'y Gen.*, (52/2002) [2006] BWHC (Bots.), 1 (Dec. 13, 2006), para. 152, available at [http://www.survival-international.org/files/related\\_material/bushmen\\_ruling.pdf](http://www.survival-international.org/files/related_material/bushmen_ruling.pdf).

248. Ian Taylor & Gladys Mokhawa, *Not Forever: Botswana, Conflict Diamonds and the Bushmen*, 102 AFR. AFF. 261 (2003).

the issues exist and address them. Furthermore, the GOB is guilty of sidetracking not only its own but also continental negotiations on indigenous issues. In 2007, at the African Union (AU) summit, the GOB introduced concerns it had about the pending U.N. Declaration on Indigenous Rights, which led to the signing of a statement by all African heads of state that concluded the African groups at the U.N. ought to make a united decision on the declaration.<sup>249</sup> The statement detailed problems the AU had with the Declaration, including the definition of indigenous peoples, the issue of self-determination, the question of land and resource ownership, and concerns over national and territorial integrity.<sup>250</sup> The irony is that in doing so the AU questioned basic tenets of the African Charter, such as the right to self-determination,<sup>251</sup> and was thus directly contradicting the founding principles of its own organization.

Clearly, indigenous peoples are an issue of great concern in Africa. Developments in international law regarding indigenous rights could have a major impact in countries all over the continent. As such, states are concerned with how jurisprudence in this field moves forward. However, attempting to derail important negotiations on the topic and professing hesitation over rights detailed in other human rights agreements to which these states are already party shows little true support for protection of these rights. As a "democratic" leader in Africa, Botswana should be encouraging progress on key issues like indigeneity, not stalling them.

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249. See AHSB Dec. 141, *supra* note 42, § 8.

250. *Id.* §§ 5-6.

251. African Charter on Human and Peoples' Rights art. 20, June 27, 1981, 1520 U.N.T.S. 217.