



“Strengthening Partnership between States and indigenous peoples: treaties, agreements and other constructive arrangements”

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**Do constructive arrangements and ‘negotiations’ amount to recognition?
The case of South Africa, with examples from Republic of Congo, Burundi,
Botswana, Cameroon and DRC**

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The views expressed in this paper do not necessarily reflect those of the OHCHR.

1. Introduction

The South African government and the representatives of South Africa's indigenous peoples, the National Khoi-San council have been 'negotiating' for the recognition of South Africa's Indigenous Peoples for nearly two decades. Is it possible to talk about strengthening partnership between Indigenous Peoples and States if there is no recognition by the state of communities as indigenous? When the international standards set out in UNDRIP are ignored? This is the dilemma faced by many Indigenous Peoples throughout Africa. African States have been reluctant to acknowledge the existence of Indigenous Peoples in their territories.¹

2. Who are the Indigenous Peoples in Africa?

In Africa, communities and peoples who claim indigenous status are mostly those who make a living as hunter-gatherers, by nomadic pastoralism, traditional dryland horticulture and desert oases. They are also the holders of traditional knowledge of nature and sustainable development in remote tropical forests as well as arid ecosystems. Their livelihood activities and their culture are inseparable. They have historically been marginalised and discriminated against by the dominant cultures. Very often the dominant societies have derogatory terms, such as *Basarwa*, *Pygmy*, *Boesman*, *Hotnot* to denote these communities.

Many Africans are affronted by the idea that one ethnic group may be called indigenous and others not. In some cases, recent history has led to the reluctance to recognise ethnicity or difference. For example, the Rwandan constitution does not allow for different ethnicities due to the recent history of ethno-genocide. The experience of apartheid that was based on separate ethnic identities, it becomes an anathema for some South African political leaders to accord some groups indigenous status. The 2004 South African cabinet memorandum launched a policy process to recognise the Khoi and San as 'vulnerable indigenous communities.'

The Botswana Chieftainship Act only recognises the chiefs of the 8 main Tswana tribes of Botswana and thus denying non-Tswana groups equal representation at the political level.

3. Why recognition?

Indigenous Peoples have rights whether they are recognised or not, but States have obligations in respect of those rights. For example, article 8 of the UN Declaration on the Rights of Indigenous Peoples² provides that States shall provide effective mechanisms for prevention and redress for acts that undermine Indigenous Peoples rights; article 13.2 provides that states shall take effective measures to ensure that Indigenous Peoples right to transmit their cultures and languages is protected and to ensure that

¹ Report on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries. ILO. 2009.

² General Assembly (61/295) 2007.

Indigenous Peoples can understand and be understood in political, legal and administrative proceedings; and article 19 provides that States shall consult in good faith with Indigenous Peoples through representative institutions to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measure that may affect them.

The right to recognition to lands and restitution (articles 26, 27,28); the right to redress (article 28) for past and current wrongs and the right to development (articles 23, 32) are among the rights which will enable African Indigenous Peoples to overcome the marginalisation, discrimination and poverty.

4. Hope for recognition

South Africa

The advent of democracy in 1994 in South Africa brought renewed hope to Khoi and San peoples that centuries of marginalisation and discrimination would end and they would take their place as South Africa's first peoples. Indeed, the constitution recognises the historically diminished use and status of the indigenous languages of the Khoi, Nama and San languages and provides that the state *must take practical and positive measures* to elevate the status and advance the use of these languages.³

In the wake of the post-liberation euphoria, the Khomani San were among the first communities to benefit under the land restitution. In a highly publicised event presided over by the deputy President Thabo Mbeki and the Minister of Agriculture and Land Reform, Derek Hanekom, 25 000 ha of state and private land were handed to the community as compensation for their claim to land in the Mier Reserve. In terms of the agreement negotiated over two years, 55 000 ha of National Park land were to be transferred to the Khomani San and the Mier communities to be operated as a contract park, the details which had to be negotiated.

Surely, this constituted recognition and redress for past wrongs. Before returning to this question, I would like to mention the two examples of Agreement between the Nama of the Richtersveld and the State.

National Park

In 1989, the local community committee successfully brought an interdict to prevent the National Parks Board from proclaiming a national park on their land. After two years of negotiation with representatives of the community, the Richtersveld National Park was proclaimed in 1991. In terms of the agreement, the ownership of the land continues to vest in the community, South African National Parks (SANPARKS) leases the land from

³ S6.2 and s5.a.ii of the Constitution of South Africa, 1996.

the community. The proceeds are paid into a trust. In addition, the Joint Management Board comprising members of the community and SANPARKS manages the Parks. Grazing and limited mining activities continue in the Park. In 2003 the Ais/Richtersveld Transfrontier Park with Namibia was proclaimed.⁴

Land restitution and mineral rights

In 2001, the Land Claims Court of South Africa ruled that the Richtersveld community was entitled to lodge a claim to land that had been expropriated for mining purposes by the state-owned mining company, Alexkor, in terms of the Restitution of Land Rights Act. The community claimed restoration of ownership, the mineral rights to prospect and mine the land, compensation for minerals extracted since date of dispossession, compensation for the environmental degradation and rehabilitation of land and compensation for the period of dispossession. After a series of cases involving the Appeal Court and the Constitutional Court, a Deed of Settlement was negotiated between Alexkor, the Richtersveld community and the South African Government and endorsed by the Land Claims Court in 2007.⁵

The Richtersveld examples are important from a number of perspectives. They set important precedents and established legal principles relevant to the cause of indigenous peoples. The agreement to the joint management of the Park was reached prior to 1994 and was achieved under the previous legal regime setting a precedent for the so-called people and parks approach to conservation in South Africa. In this case, the ownership of the land was not in dispute, rather who had the right to make decisions regarding its use. In both cases, it took the intervention of the courts, the willingness to stay the distance and pursue the matters up and down the legal system. Days, weeks, months and years of community mobilising, capacity building and dispute resolution were invested for the parties came to the negotiation table and hammer out agreements. Similarly, the Khomani land claim was settled after years of negotiation, backed by community mobilisation, extensive research, oral history, genealogical studies and cultural mapping.

Do these examples of negotiation and agreement constitute recognition? In the case of the Richtersveld, negotiation followed court action. The community relied on the court to define their rights and thus strengthen their hand as an equal negotiating partner. In the case of the Khomani San, the negotiations took place in the context of competing land claims and were hard fought and evidentiary based to comply with the provisions of the Restitution of Land Rights Act.

It could be argued that both these cases preceded the adoption of the UN Declaration on the Rights of Indigenous Peoples. However, five years after its adoption, indigenous peoples have still not obtained constitutional recognition in South Africa. The Special

⁴ The Richtersveld: the Land and its People. Francios Odendaal,

⁵ Summary of Deed of Settlement, Parliamentary Brief. Depart of Public Enterprises. 2007.

Rapporteur on the rights of Indigenous Peoples visited South Africa in 2005 and made a number of recommendations⁶ including the need to constitutionally recognise Khoi and San communities, maintaining national register of officially recognised Indigenous Peoples and giving statutory recognition to structures. To date, none of these recommendations have been implemented.

5. The National Khoi-San Council

Despite almost two decades of interaction between representatives the Khoi and San peoples, recognition is tantalisingly close. The National Khoi-San Council (NKC) was established as a government funded forum for interaction with the Khoi and San communities. In 2004 the South African cabinet, under Pres. Mbeki, adopted a memorandum launching a policy process to recognise the Khoi and San as vulnerable indigenous communities. This process has yet to yield results of recognition.

At the most recent meeting on the 18 June 2012 between the NKC and the Minister of Cooperative Government and Traditional Affairs⁷ the statutory recognition and inclusion of the Khoi-San peoples into the formal government structures was again raised. It was agreed to expedite the processing of the National Traditional Affairs Bill, ensuring the participation of all stakeholders, and emphasising the need for a comprehensive, open and transparent process.

6. The National Traditional Affairs Bill

The NTAB is a draft Bill that has not yet been officially tabled in Parliament as a Bill nor officially distributed. It is not listed on the Department's website as a Bill and should rather be regarded as a *proposal* for a Bill.

The proposal provides for the recognition of Khoi-San communities and leadership alongside traditional communities. It represents a major step forward for the recognition of Khoi and San communities; as such recognition will provide a legal basis for the further development and implementation of the rights of the Indigenous Peoples of South Africa. The provisions of the 'Bill' have to be measured against the standards set out in the Declaration on the Rights of Indigenous Peoples, in particular Articles 3, 4, 5, 9,18,19,20 and should form the basis of the envisaged negotiations around the ' Bill'.

7. What is required to move forward?

The National Khoi San Council should be transformed from forum for liaison into a forum for negotiating to give effect to articles 18 and 19, in order to negotiate comprehensive legislation that would incorporate the provisions of the UN Declaration of the Rights of Indigenous Peoples.

⁶ E/CN.4/2006/78/Add.2 Report on Mission to South Africa. December 15, 2005.

⁷ Joint Press Statement 20 June 2012

8. Examples of Constitutional and Legislative recognition in Africa⁸

There are instances of legislative recognition of Indigenous Peoples in Africa that can serve as examples to countries such as South Africa on what is possible.

Republic of Congo

On 30 December 2010, the Republic of Congo adopted a law on indigenous peoples recognising and protecting the rights of the countries marginalised indigenous peoples. It is the only African country that has promulgated national legislation for indigenous peoples. It purports to give effect of Section 4 (6) of the national Constitution which provides for the protection of minorities. It also refers to the constitutional provisions of non-discrimination and equality of all citizens but highlights the need for special measures to address the specific situation of the 'Pygmies'. The law applies the criteria of cultural identity and institutions, customs and traditions, as well as self-identification.

Burundi

In Burundi special measures have been put into place to ensure Batwa representation in parliament in terms of Section 16 of the 2005 Burundi Constitution. Three Batwa have been elected to the National Assembly and the Senate.

9. National Policies and Programmes⁹

A number of Poverty Reduction Strategies (PRS) directly target Indigenous peoples particularly in Central Africa either because they inhabit resource rich areas that are of direct economic value or because they are among the most marginalised and poorest members of the national population.

A number of State have also developed Indigenous Peoples Development Plans, sector programmes, for example the Forest and Environment sectoral programmes in Cameroon and Gabon, the road building programme in DRC largely due to the requirements of World Bank Operational Policy No.4.10 which requires specific action when investments of the Bank and the Global Environmental Facility affect the capacity of indigenous peoples, ethnic minorities to defend their interests and rights in land and natural resources.

10. Conclusion

Despite these positive examples, Indigenous Peoples in Africa face an enormous challenge due to the fact that on the whole African States have been reluctant to

⁸ Report on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries. ILO. 2009 pp 17-20

⁹ Report on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries. ILO. 2009. P 22

acknowledge the existence of indigenous groups. Indigenous peoples in Africa have specific human rights concerns in areas of political representation and participation, non-recognition of their existence as distinct peoples, lack of access to land and natural resources, denial of cultural rights and the degradation of their environment.

The UN Declaration of the Rights of Indigenous Peoples and the promise it holds for Indigenous Peoples will have no meaning for Africa unless they become aware of the mechanisms available for their protection. As a consequence of years of domination, marginalisation and exclusion, indigenous people require special measures to protect their interests.¹⁰

¹⁰ Report on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries. ILO. 2009 p1