

Nationalism, Globalization, and First Nations

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Introduction

Nationalism is a term loaded with ambiguity. One of the most important aspects of this ambiguity is that it often holds a common sense perspective of who a person is and how that person is defined according to larger aggregate of people. In this sense, if one paused in the streets of New York City and asked a person about their identity, they would, without hesitation, proclaim themselves to be American. Or, in other parts of the world, they would proclaim themselves to be Indian, Chinese, Egyptian, Italian, or otherwise. On the other hand, when we more closely examine the idea of nationalism as a very important aspect of a person's identity, we recognize that as powerful a perspective as nationalism is, it may be qualified, expanded, or restricted by other symbols of identification that shape the fundamental experience of the individual self-system as part of a group. The symbols that sustain or weaken the nationalism perspective could include ethnicity, language, culture, race, religion, and political ideology. This means that the level of intensity—or lack of it—in any or all of those symbols will strengthen or weaken the perspective of identity which we call nationalism. To better understand this, we need to get a process of cognition that can integrate, almost simultaneously, a multitude of existential perspectives.

The Soviet dictator Joseph Stalin came close to a working sense of the importance of the so-called "national question"; in his book *Marxism and the National Question*, he asserts "a nation is a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up manifested in a common culture." In our own time, one of the most important aspects of individual and collective identity has emerged from the Technological Revolution, which has compressed space and time. Human communications are almost instantaneous, and the spatial distance between people, goods, and services, have experienced a radical form of compression. The primary instrument of governance in the world today are the sovereign nation-states. The impact of the compression of space and time has generated a revolutionary flow of goods, services, and peoples, across state and national lines. To some extent, these phenomena have tended to weaken the traditional boundaries of sovereign states and generated impulses in forms of self-interest that find their inspiration in the processes of global social interaction and inter-determination. Globalization has emerged as a contender for identity, as has the integration and effective administrative management of the sovereign state. Important forces within the sovereign state express a deep concern for the salience of globalization and global identifications. At the same time, the complexities of managing sovereign states and the complexities of global security and insecurity project an incipient tension between the systems of national identity and systems of global identification.

In this state, projected forces of globalization and national integration generate complementarities and tensions. Nationalism, in terms of many nation-states, still manages many unresolved problems. One of the problems that I would like to address is the problem of aboriginal or first nations. I introduce this part of the paper with reference to two important, but possibly forgotten, first nations: the Shuar nation of Ecuador and the Khoi Khoi nation of Southern Africa.

A Brief Note on the Shuar

The Shuar Nation of Ecuador live in the Amazon Rainforest. They are internally politically-organized, and their culture and language hold historical continuity of some five thousand years. They occupy a substantial portion of the Amazon approximately the size of Italy. Yet, their lands and intellectual property, in the form of traditional medicines, are largely unprotected. Briefly, the Shuar were never conquered; they were simply incorporated into the Ecuadorian state, which gave them few specific

legal rights. In fact, for almost one hundred years or more, they had no legal standing before the courts; they were expected to be represented by the Church. Up until today, the Shuar continued to fight to acquire the title to their lands and their intellectual property. In part, the question of land and the community's right to survive and retain their essential identity is a matter of great contestation. The roots of the problem lay with the promulgation of the First Brazilian Constitution, in which it was stipulated that the rights of indigenous nations to their lands were limited to occupancy of the surface, and all interests under the surface belonged to the state. This was a model followed throughout Latin America, which in effect meant that the form of interest indigenous people could have, with regard to the lands they occupied since time immemorial, was extremely weak and difficult to secure. This of course raises the question of the relationship of land to political cohesion, political identity, and even international identity. States with substantial indigenous populations do everything in their power to prevent these resources from being controlled and managed in the interest in these populations. The fundamental idea of indigenous people and land is that land is not a commodity; it is rather an aspect of the group itself. This carries with it the implication that without access to land resources, the community cannot survive. In this sense, access to land resources is essential to solidifying the claim to national identity, another important resource which ensures the survival of the community.

A good illustration of this struggle of an inter-temporal basis has been the struggle to secure first nation status for the indigenous Khoi Khoi people of South Africa. What is important here is that the advances of globalization have served to strengthen the foundations of the Khoi Khoi claim to first nation status.

Part I

The First Nation Status of the Khoisan and the Stability of the Public Order of South Africa

This study is commenced over twenty years after South Africa attained its liberation from the repression and racism of the apartheid era of governance. Twenty years after the adoption of the new constitution, South Africa has indeed survived, but it has been a rocky and uneven process of social evolution and economic achievement. South African development, notwithstanding the new constitution, inherited a form of social, cultural, political, and economic division that constituted the legacy of apartheid. It is important for us to understand this legacy, how much of it continues to endure, and how much can we moderate it by enlightened public policy intervention?

In 1652, three ships owned by the Dutch East India Company arrived in Table Bay, led by the company official, Jan van Riebeeck. His orders from the company were not to establish a process of colonization, but to establish a company presence to supply company shipping from Europe to Asia and Asia to Europe. When van Riebeeck arrived, the Cape was occupied by an indigenous population of Khoi Khoi and Khoisan people. The Khoi spoke in a dialect of clicks, as did the San. This made communication extremely difficult. In essence, what van Riebeeck needed mostly was to supply ships going to Asia was meat and vegetables. It is fair to assume that all the land, including the land proximate to the company headquarters, was land used and possessed by the indigenous occupiers.

Van Riebeeck established a large garden near his headquarters, which essentially possessed native land but which was uncontested. Obtaining meat was more complicated. The Khoikhoi were largely a herding culture with sheep, goats and cattle. The San were hunter-gatherers. The company had to barter with the Khoikhoi for meat. Some Khoi leaders discovered that the meat exchanged for metals and other trinkets was not necessarily a good deal. Van Riebeeck found the Khoi too clever to exploit.

Van Riebeeck decided to permit company servants to establish themselves as free citizens with farm holdings on certain parts of Khoi land, issued under the authority of the company.

Since title, in the European sense, meant the right to exclude others from possessing or using what is detailed within the title, this difference in cultural perspectives about property was an initial source of friction between the company operatives and the indigenous people. In direct and indirect ways, a white settlement expanded and resulted in the displacement of the indigenous inhabitants of the Cape.

From the perspective of the San, since white settlers' livestock was occupying their traditional lands, they proceeded to take for consumption the livestock of the settlers. The settlers responded with violence and, at one point, the company declared the San to be vermin, giving settlers the right to exterminate them. This led to almost two centuries of conflict. The greatest disaster to affect the Khoikhoi was the white settlers' introduction of Small Pox, which killed a huge segment of the Khoikhoi population. The violence of the settlers led to the migration of the San to the North and West and migration of the Khoikhoi as well. During this period of dislocation, there was considerable intermarriage between the San and the Khoikhoi so that these peoples are comfortable with the designation 'Khoisan.' Some of the San attempted to assimilate their economics according to the practices of herding livestock, some of the Khoi supplemented their diets with the hunter-gatherer mode of economic expression.

One of the most important facts of this period of economic dislocation for the Khoisan was that the breakdown of their economic system forced some of them into servitude with the white settlers in order to survive. It should be noted parenthetically that in 1662, white settlement comprised 134 officials, 35 free Burghers, 15 women and 22 children. These numbers indicate an acute shortage of women among the settlers. Living in close proximity with these settlers, who continuously faced a shortage of women, there was considerable interracial sex and sometimes marriage. The consequence of the starved libido of the white settlers led to the emergence of a sub-group of the Khoisan, which the white politicians later defined as 'Cape Coloureds.' The Khoisan, providing convenient sexual outlets for the whites, also provided an amplitude of servitude to soften their lifestyle. Since sex produced offspring, the offspring fell into the culture of servitude. To the extent that there were political implications the emergence of the mixed race population and the Khoisan, social practice and law ensured discriminatory treatment and the status of permanent inferiority of the (Cape Coloured) Khoisan population group. It should also be added that the colonists brought over political prisoners from Batavia who were in servitude or enslaved. Since the Asians came with a coherent religion and a sense of identity, they too were impelled to procreate and sometimes marry into the Khoisan culture. Hence a subgroup of the Cape Coloureds represent the Cape Malays who were treated as inferior as the rest of the Khoisan and the Cape Coloureds. It is worth noting that the slaves from Batavia were scholars, religious and political leaders and artisans. These slaves exchanged important artisan skills with the Khoisan people.

The history of South Africa has little interesting to say about the relationship between the Khoisan peoples and the Dutch Burghers of the seventeenth and eighteenth centuries. The consequence of this has been to imply that the Khoisan and the complex patterns of human reproduction across racial and ethnic lines has no intrinsic historic value. It is of course convenient to have the Khoisan disappear historically to deny an identity for the mixed Khoisan races and at the same time diminish the role of sexual license that the Dutch inflicted on the Khoisan. In short, sex extinguished the Khoisan and the product of those relations, a shameful expression of settler sexuality simply meant that these unfortunate products of history do not count as historically interesting or important. What has been shown by Shula Marks in a remarkable study, *Khoisan Resistance to the Dutch in the 17th and 18th*

Centuries, demonstrates that in fact the Khoi resisted Dutch in every decade of the eighteenth century. The so-called 'Bushman Wars,' were a response to their land expropriation by the Boers. What is even more interesting was the interpenetration of violence, sex, trade and exploitation meant that the Khoisan adopted the language of the antagonists. While the Khoisan language does survive, it is not as universally spoken as the Afrikaans language. The Khoisan migrated to various parts of southern Africa and established independent republics.¹ These republics were later absorbed by the British Empire. The complex relationship of the Khoisan to the white authorities reflected the considerable skills the Khoisan had developed in the arts of horsemanship and the use of firearms. The Khoisan/Coloureds had a visible presence in the South African armed forces during the first and second World Wars.

The Position of the Khoisan in the Broader Context of South African History

The great trek, which was a consequence of a large part of the Afrikaner settler community moving north and east in the direction of the Orange Free State, the Natal, resulted in two Boer republics, the Free State and the Transvaal. The movement of the Boers provided some space for the Khoisan and their mixed relatives, who in the Cape were given the franchise in the 1850s, the right to vote. The Boer War resulted in a defeat of the Boers and a great scandal of imperial atrocity victimizing the Boers. It is possible that the shameful conduct of the British Empire resulted in the creation of a union of South Africa, which including the Boer provinces and Boer leaders. It is by no means clear that this olive branch from the empire was one that was universally embraced by the Africana population. This population maintained their strong presence of nationalistic chauvinism and later a partiality to European fascism. In any event, in the 1930s, they were able to remove the Cape Blacks from the common voters' role and, in the 1950s, they succeeded in removing the Cape Coloureds from the common voters' role. This sealed the fate of English speakers and moderate Afrikaners. It cemented rule by the extremist nationalists who then proceeded to reproduce the political and economic culture of apartheid, beginning in 1948. The party sustained its ideological purity with the support of a number of secret societies, the most prominent of which was the Broederbond. The Broederbond also supplied it with an ideological justification, which they called "Christian Nationalism."

The real ideological architect of the radical right-wing apartheid state was Hendrik Verwoerd. Verwoerd explained apartheid as a form of separate development. In an odd version of Hegelian philosophy, he explained that each ethnic group was required to follow its own Volksgeist and apartheid was the government's mechanism, for introducing the historically determined dynamic of groups evolving according to their Volksgeist. The apartheid state initiated its changes by declaring interracial sex to be criminal under Immorality Act. It also declared that mixed marriages were forbidden and those entered into such marriages would be criminally liable. To sort out the question of who was appropriately in bed with whom, they also enacted the Population Registration Act, which required South Africans to acquire an identity card and, in cases of doubt, to appear before a panel of racial experts to determine their racial pedigree. At the level of local communities, there was the notion of ordinary apartheid. For example, the Group Areas Act determined where one could live and own property so that there were such things as 'coloured group areas', 'Indian group areas' and 'black group areas' in addition to 'white group areas'.

¹ Griqualand East was founded by Waterboer. With the discovery of diamonds it was extinguished. Griqualand West was established by Adam Kok. Kokstad was his capitol and still survives. But it too was absorbed into the empire.

It should be noted that a lions shares of the urban areas were designated as exclusively for whites, and non-white who owned property in these areas found themselves essentially expropriated. In effect, the Group Areas Act provided real property gifts for poor whites and the white speculators all at the expense of the non-white population. What is important here is that since groups were defined ethnically and confined geographically, it made interethnic communication difficult and tended to isolate communities. The apartheid rules also embraced separate education, including higher education, job reservations, to prevent the emergence of an artisan class of non-whites. The other scheme of apartheid, called 'Grand Apartheid' took certain homelands and declared black populations to be citizens of those homelands and therefore persons with no citizenship rights in South Africa. This resulted in the removal of vast numbers of blacks to the 'dumping grounds,' especially in the Eastern Cape.

The apartheid state, with its rigorous policies of both discrimination and segregation as well as the repression of the cultural and political perspectives of the discriminated classes, in fact created realities among all population groups that are still to be understood, and whose legacies continue. Specifically, with regard to the Khoisan (coloured community) that community faced rigorous governmental supervision to ensure that its contacts with other community groups would be kept to a minimum. Rigorous racial segregation of housing arrangements made it difficult to establish communication lines with other parts of the population and to collaborate on strategies of resistance. Even in the sphere of sporting arrangements white sport was privileged and was mandated to keep a presence that remained purely white. On the other hand, the discriminated communities worked tirelessly to establish sporting links between so-called Coloureds, so-called Malays, so-called Indians, and so-called Africans. For example, a soccer league was formed to unite all the segregated parts of the community in an organization called the Eastern Province Soccer Federation, which arranged matches between teams from the oppressed classes. This spread to cricket and rugby. Although the state did everything possible to frustrate and prevent these competitions from being held.

It was an initiative of a former NEUM official to spearhead an international sports boycott of white South Africa because of the apartheid policies. Khoi official Dennis Brutus formed the South African Non-racial Olympic Committee, which played a major role in having segregated white South Africa expelled from the Olympic Games. Dennis Brutus and Winston Nagan continued the campaign from abroad and had Rhodesia removed from the Olympic Games. These activities led to exclusions from world soccer, world table tennis, and later world cricket. These types of activities were an indication of the insistence on the part of Khoisan activists that there must be a commitment to a no-racial South Africa in every sphere. The fact that Khoisan leaders advanced a non-racial agenda did not make them less African, less Khoisan, or less South African. The central point being, the fact that one could be a so-called Khoisan or 'Zulu' or Indian or African does not diminish one's birth right and identity or the embrace of the idea of universal dignity. The liberation struggle of South Africa had many heroes and they were represented in every sector of South African society, including the entire bend of the rainbow.

In this part of the paper we have tried to provide a description and justification of why it is a betrayal of the basic values that drove the people of South Africa to get rid of the chauvinism of apartheid and find a place for people of all the complex backgrounds of South Africa and to provide the people of South Africa with the space to evolve those identities in progressive direction without relinquishing their cultural and spiritual heritage.

The Historical Position of the First Nation Khoisan-Cape Coloureds and Its Contribution to a Non-Racial South Africa

The two indigenous first nation groups in South Africa were the Khoi Khoi and the Khoisan. The Khoi Khoi were essentially pastoral farmers with livestock. Living alongside the Khoi Khoi were the Khoisan. The Khoisan were hunter gatherers. They lived a relatively complementary existence, and when the settler population began to squeeze the Khoi Khoi out of their traditional lands, the Khoi Khoi were aided by the San and developed hunter gatherer skills as well. At some point in this history of location, the San developed some of the skills of pastoral farming. The terms Khoi Khoi and Khoisan are the terms used by these communities to describe themselves. Since the settlers found the click oriented Khoi and San languages impossible to absorb, they gave them names that were descriptive of the psychologically dominant white settlers. The Khoi Khoi were always referred to as the 'Hottentots,' and the San were referred to as the 'Bushmen.' Both these terms invariably carried a cultural understanding that suggested a depreciated status of these communities.

A part of the tension that emerged between the Khoi Khoi and the settlers emerged from Khoi translators who spent time in other Dutch colonies and who learned that the deals with the Khoi Khoi involving trading for meat and other products, were a rotten deal. This led to the Khoi having a distrust of the settlers, a matter which angered the settlers and which made trading difficult. The response of the settlers was to create a free burger population and appropriate by force, land along the river close to the company fort. The appropriation of Khoi land further exacerbated Khoi settler relations. On the other hand, the company provided titles to land occupied in other parts of southern Africa by the Khoi. This led to almost 200 years of conflict and war between the Khoi Khoi and the white settlers.

The San became the targets of settler expansion when the settlers settled in lands that they traditionally hunted and gathered plants from. The San in turn appropriated the cattle of the settlers as compensation for what had been stolen from them. Eventually the idea that these communities had the temerity to confront the settlers led the company to declare that both the Khoi Khoi and the Khoisan were vermin and the settlers had the right to exterminate them wherever they could find them.

The Khoi Khoi and Khoisan migrated to avoid the settlers but very early on in settler colonization, the settlers brought with them small pox. The disease wiped out a huge proportion of the Khoi Khoi population. Decimated by disease, their loss of traditional lands, and the ability to survive economically, the weakened Khoi were essentially fighting a war of land dispossession that they could not win. Notwithstanding, the sophisticated Khoi Khoi developed admirable military skills and many of them could ride and shoot on horseback. The policy which involved the extermination of the Khoi Khoi and the Khoisan meant that frequently the men were killed and the women were taken into servitude with their children by the white burghers. The importance of the women to the free Burghers was that under the control of the burghers, the women could be freely used for sexual gratification. Many of the Khoi Khoi were simply enslaved and the sexual connections produced more slaves who were part Khoi and part settler. Apparently, the free Burghers approached Khoi women from the perspective of sexual license giving rise to a population of mixed white Khoi who in a modern age had an identity ascribed to them called Cape Coloured. The population losses and accelerated migration as well as the servitude experienced by the Khoi and their descendants, essentially meant that they had no history of existence in the history books written by the settlers. The common understanding was that the Khoi Khoi and the Khoisan had disappeared from the pages of history.

The next phase of the history of the Khoi Khoi and the Khoisan is therefore subsumed under the history of an ascribed or imposed identity by the white colonists to the mixed race population centered mainly in the Cape.

In the latter part of the nineteenth century the grandson of slaves and the legendary Khoi leader Dr. Abdurahman became a legendary leader in the fight for coloured, civil and political rights. Abdurahman's parents were Cape Malays who were artisans and reasonably affluent. Abdurahman was sent to Glasgow for medical training. Upon his return he became a champion of Khoi-coloured rights and the only Khoi to sit on the city council and the provincial council. In later years, Abdurahman was influential in an organization known as the African People's Organization. What Abdurahman tried to do was to quietly repudiate the tainted label Cape Coloured and create an organization in which all of the oppressed in South Africa who designate themselves as South Africans, unfortunately, while the symbol of African unity was proclaimed, it did not have an effect on political mobilization on the ground. The Khoi-Coloureds were enthusiastic but black politics had yet to evolve to appreciate the nature of the pathway to freedom.

The role of Dr. Abdurahman in the evolution of the strategies to confront white supremacy was important in the sense that he devoted his life challenging every conceivable way the framework of discriminatory law and practice which specifically targeted the so-called Khoi- Coloureds of the Cape. The strategy was to work within the system of authority and control as it existed. Within this framework, Abdurahman held political positions in the city council and the provincial administration. He additionally found space in the issue of elevating the position of the Khoi-Coloureds by committing himself to vigorously support good educational opportunities for the Khoi-Coloureds. It is obvious that Abdurahman's position made him popular. In addition, the Cape had a limited franchise for Khoi-Coloureds and he went to England to lobby for the voting rights of Khoi-Coloureds and Africans in the Cape and their inclusion in the Union Constitution.

Abdurahman died in 1940. In the meanwhile, his efforts to encourage the education of the Coloureds resulted in the establishment of a number of prestigious high schools in the Cape. From these beginnings there emerged an intellectual class that saw his workings within the system as somewhat tepid. Additionally, the development of a cadre of coloured and African teachers led to the creation of a teacher's forum concerned with developing a better form of governance for South Africa and a focus on strategies to accentuate change. This resulted in the establishment of the Teachers League of South Africa and from these roots there emerged in 1943, the creation of the Non-European Unity Movement. The Unity Movement emerged with an impressive 10 point program of political demand and aspiration. They also focused on a strategy of non-cooperation and so far as possible, the boycott of segregationists institutions and policies of the authorities. It should be noted that while this seemed to be a different emphasis than Abdurahman, the idea of organizing politically on non-ethnic lines was a critical element of inheritance in effect reinforcing the symbology of the African people's organization.

The strength of the NEUM was also its Achilles heel. The Unity movement generated a powerful group of Khoi-coloured intellectuals. Indeed, this was such a self-confident group that its self-reliance made it less partial to ties with other leaders in South Africa who they thought were intellectually weak. The intellectual leaders of the NEUM did not provide us with a clear dogmatic form of a political alternative. They were convinced that organization on ethnic lines was a political trap for future action. The NEUM was fueled by the workers party of South Africa which was a largely Trotskyists organization. The program of the NEUM could have been construed in terms of a social democratic emphasis or a more doctrinal Trotskyists perspective. The Trotskyists emphasis seemed to emerge as a direct emphasis on anti-Stalinists socialism and its criticism of the commentern. In effect, this made the NEUM an anti-Communist branch of the social democratic movement. It should also be mentioned that in the mid-1930s the government led an initiative to remove Africans from the common voter's role. This gave an impetus to the African branch of the NEUM. It should be noted in

this context that Isaac B. Tabata the leading Trotskyists ideologue focused on the unity of all oppressed people and the organization along economic stratification lines. In 1935, he was instrumental in establishing the All African Convention (AAC).

Tabata also had a focus on the African People's Democratic Union of South Africa (APDUSA). APDUSA had a student branch, SOYA (Society of Young Africans). Tabata and Kies shared the political perspective that the aggressive amplification of ethnic identities to the oppressed people of South Africa, was a tactic of divide and rule, and ethnic identifications tended to weaken the struggle which was essentially a struggle between the "haves" and "have nots." Tabata's effort was to stress a class analysis on the basic that economic interests would unify the oppressed people of South Africa. Tabata unfortunately, left South Africa for exile and the promise of African unity of the oppressed diminished.

The objective shared of both the AAC and the NEUM was unity of the oppressed people. The two prominent leaders of these organizations were Tabata and the Khoi intellectual, Ben Kies. The two organizations split and Tabata was forced into exile. In May 1943, Kies gave a major address dissecting the strategic objectives of the state in the maintenance of white supremacy. Kies explained that the white authorities used race as a symbol to cement the division of working class interests. According to Kies, the fundamental class issue of owner and worker is blotted out by the crusade: white against non-white.

According to Kies:

"All of them, intellectual, worker or peasant, from the Prime Minister down to the most illiterate poor white, they live off the segregation of the nonwhites, they perpetuate that segregation in their own interests and they swagger through the land, glorying in the possession of a white skin, their passport to South African Democracy. So completely have the whites, as a group, been taken in by this racial fraud that they gladly gave their lives to fight Fascism abroad and they spend their lives to implement it at home the white working class even has its own Labour Party segregation scheme, which cannot be distinguished from that of the rulers. In their utter folly they have allowed themselves to be segregated from us, and they are siding with the Lords of Empire who will turn on them tomorrow, after they have finished dealing with the various sections of the segregated nonwhites."²

He continued:

"The control of the non-whites in South Africa represents another devious strategy designed to impose the state's view of identity onto diverse segments of non-European population. Kies maintained that the success of white supremacy did not only rest on the modern monopoly of the coercion of the state. It was successful because it was able to enslave the minds of the non-whites. In effect, white culture was literally preempting the process of how people formed their concepts of self and identity."

According to Kies:³

"The bitter truth is that white South Africa still dominates because it has been able to enslave the mind, the ideas of the non-European. It is a known historical fact that in any society, the prevailing ideas, manners and customs of even the oppressed section, are the ideas, manners and customs of the ruling class.

²The Background of Segregation, B. M. Kies, address delivered to the National Anti-C.A.D Conference, May 29, 1943.

³ See Kies, note 1.

South Africa is no exception. Segregation is the prevailing idea of the South African ruling class and it has created segregationists in our own ranks. So, we can distinguish the three main causes of our defeats:

- (1) The segregationist outlook of the non-Europeans.
- (2) The segregationist political organisations and efforts of the Non-Europeans
- (3) The segregationist and reformist leadership.”

Kies provides us with important insights into the staying power of white supremacy and the complicity of the non-whites in their own depreciated status. Kies captures the psychology of race impacted by racial dominance in the following words:

“...in this country, one still has to speak of African oppressed, Coloured oppressed and Indian oppressed sufficient evidence of the sad fact that the slaves have taken over the segregationist ideology of their master. The white minority looks upon the African as a "raw kaffir," and such he has been to the majority of Coloureds and Indians. The white minority looks upon the Coloured man as a "bastard Hottentot" and such he has been to most of the Africans and Indians. The white minority looks upon the Indian as a "bloody coolie," and such he has been to most Africans and Coloureds. The African is told that he is superior because he is "pure blooded" and he has believed this. The Coloured man is told that he is superior because the "blood of the white man" flows in his veins and he has believed this. The Indian has been told that he is superior because he belongs to a great nation with a mighty culture and he has believed this.”

Kies added:

“Yet neither the Coloured nor the African has been as big a segregationist as the Indian. He is an inverted white man. He fights bitterly against the British Herrenvolk in India, but he has looked upon himself as the chosen race amongst the non-Europeans of South Africa. There has been some intercourse between Coloured and African, but nothing to speak of between Coloured and Indian, and less than nothing between Indian and African. The chief cause of this has been the Indian merchant class, because, like all capitalists, they worry only about ways and means of gaining greater and immediate profits. They still have the most feudal family system of all the non-Europeans they still have a feudal attitude towards women they are feudal in almost everything except their attitude towards race. In this they are as modern as the Nazis. Under the cloak of race, religion and Oriental culture, they have perpetuated the segregation idea.”

Since the time that Kies wrote these words, South Africa moved dramatically in the direction of the most ambitious form of ethnic social engineering on earth. This came to be known as apartheid. What is important here is that the categories that Kies was talking about as sociological categories, became legislatively enshrined under the innovations of the law of apartheid. It will be seen that the state authorities embarked upon an aggressive policy of racial division engineered by legislation and administrative practice. Political leadership in the Cape of the so-called Khoi-Coloureds was a repudiation of the idea of imposed and artificial identities. As the state implemented policies of ethnic division, the NEUM launched a program called Anti-Cad. The state's policy was to cement the identity imposed on the so-called Coloureds and the Khoisan, while at the same time cementing white identity under the label “Swart Gevaar.” The Swart Gevaar ideology was in turn supported by the emergence of so-called Christian nationalism.

From a psychological and religious point of view, the existence of a sub-mongrelized mixed race of inferiors, was a testament to the sinful, sexual, predatory behavior of the ancestors of the Afrikaners. They needed an ideology as well of atonement. That came in the form of the cornerstone legislation of apartheid. Since sex had represented the original sin of the Afrikaner, and the product of that sin was the so-called Cape Coloured, it was important that they strike the blow for Afrikaner morality by prohibiting sexual relations across the racial lines. To do this everyone had to be registered according

to an imposed ethnic identity. This ethnic identity then served as a tool to punish sexual immorality across the color line. In this strange way, the Afrikaner sought forgiveness for being the inheritors of sinful, sexual predatory behaviour and justified the product of their sin as destined, armed with identity cards to second class social and political status, and further justified the petty brutality of overt and vulgar racist targeting and racial hate.

The cornerstone of this initiative was the Population Registration Act, then the state supplemented this with the legislated Immorality Act which criminalized sex across the colour line and the Prohibition of Mixed Marriages Act to eliminate inter-racial procreation.

The Khoisan-So-Called Coloured Identity and Apartheid

What we have not mentioned is the position of the so-called Coloured and the Khoisan. The Khoisan people suffered the extinction of economic patrimony and community cohesion and later extermination (genocide). The Khoisan survivors were radically redistributed in South Africa partly to avoid the extermination policies of the settlers. As their lands were stolen, the basis of their economic survival was also expropriated. This resulted in many Khoi being absorbed into elements of servitude indentured later and slavery with the settler overlords. Some were simply there as a matter of economic dominance, others were enslaved. This element of cultural dominance also confronted the gender factor of a shortage of white women for the settlers. It therefore became culturally permissible to utilize Khoi and San women as sexual objects and when they became pregnant the children would fall into the servitude of the parent. Thus, there emerged a mixed Khoi and settler community and those who were fortunate to migrate into the cities, essentially formed a Khoi-mixed race community which the whites conveniently called Coloureds. Later, Coloured became legislatively mandated to include all the surviving Khoisan people. It should be added that there was also inter-marriage and sexual intercourse between Nguni slaves as well as the slaves and political exiles from the Dutch East Indies. Indeed, today a sub-group of the so-called Cape Coloureds are the so-called Cape Malays.

The position of the Khoi as such was conveniently forgotten on the basis that the Khoi and the San no longer existed. However, Khoi and San culture continue to survive in the margins of the urban areas as well as rural areas and farms although they were economically depressed and terribly exploited. It was convenient to simply wipe the Khoisan off of the map of historical memory because it tended to validate the occupancy and possession of their lands by the white settlers. It will be recalled that among the justifications given by the government for the privileged position of the whites with respect to land was the idea that there were no first nations that could challenge the occupancy rights claimed by the white settlers. In short, since the Khoisan had been extinguished culturally from South African history, the settlers could assume that the land that they now occupied was terra nullius. It should be parenthetically noted, that this was meant to give a degree of legitimacy to the position of white occupancy of South Africa. This claim in fact asserted the white right to own South Africa because the whites were there first. This in fact, was a pre-emptive strike against a possible Nguni claim that Nguni migrating south and west had a claim to be a first nation of South Africa because of their migration they were the first populations to present themselves.

An important assumption, not often volubly expressed in black political circles, is that South Africa belongs to the Nguni black nations of South Africa. In short, the Coloureds, the Indians and the whites have a tenuous claim to South African patrimony because the blacks were in South Africa first. They are the true first nations. It is obvious that the Khoisan who settled in South Africa for thousands of years, simply by the evidence of anthropology and archaeology are clearly the population group with an unrivalled claim to first nation status. It should be noted that the New South African Constitution does not give them that status and all subsequent efforts of reform have sought to avoid the granting of first nation status to the Khoisan although they are entitled to first nation status by virtue of history and the status of modern international law. The South African Constitution mentions the importance of language rights for some segments of the Khoisan population but there are not given recognition as a people or indeed, a first nation community. Subsequent legislation has done everything possible to avoid the recognition of the Khoisan as a people let alone a people with first nation history.

In the Appendix to this chapter, we have included a short article detailing the timeline which affirms that the Khoisan-Coloureds are a first nation of South Africa.

The conquest of the Khoisan completely undermined the political and cultural organization of the community. The Khoisan were now to subsist culturally, as foragers. The combination of genocide and economic expropriation compelled the abandonment of traditional lands although abandonment was frequently resisted. In South Africa the Khoisan vanished from history and were replaced by the evolution of the Khoisan and the mixed race community into what the colonial authorities called "Cape Coloureds." This of course was an imposed identity.

According to Special Rapporteur, Martin Cobo, the following is his assessment:

"The Cradle of Humankind has not only scientifically and archeologically proven to be in Africa but it is significant to note that South Africa continues to play a pivotal role as host of the Maropeng (Sterkfontein Caves) which contains the discovery of 2.3 million year old fossil *Australopithecus Africanus* (nickname Mrs. Ples), found in 1947 by Robert Broom and John T. Robinson. Sterkfontein Caves produced more than a third of every hominid fossils, the sagacity of humanity is all formed on the continent and South Africa could be regarded as the gateway into civilization, a country with celebrated struggle credentials and insidious contradictions."⁴

The important conclusion here is that the seeds of humanity were preserved in Southern Africa among the Khoi Khoi and the Khoisan. It was these groups that migrated and populated the earth. Indeed, it could be urged that the entire population of the earth carries the genetic inheritance of the Khoi Khoi and San.

The South African Constitution in particular, Section 7.2 stipulates a broad avenue for the protection of political and civil rights:

The South African Constitution at section 7(2) provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. As a constitutional democracy, South Africa's values are underpinned by considerations of human dignity, the achievement of equality, and the advancement of human rights and freedoms; non-racialism and non-sexism, supremacy of the Constitution and the rule of law; and a multi-party democracy to ensure a government that is accountable, responsive and transparent. Further, the Bill of Rights binds the Legislature, the Executive, the Judiciary and all organs of state.

Unfortunately, the Constitution does not recognize the Khoisan as an indigenous first nation. This essentially means that customary rights including land rights are not enjoyed to the same extent as the broad provisions of the Constitution indicate. The kind of rights implicated here are the rights to cultural development, the development of natural resources, the importance of internal community self-determination, and the competence of self-identification, matters that are essentially absent from the corpus of the law. With regard to land and indigenous culture, it would be important to note that the concept of entitlement to land in an indigenous community does not involve the commodification of the land. This is because indigenous culture cannot conceive of land as a commodity such as the purchase and sale of Coca Cola. In indigenous culture therefore land is not a commodity aspect of the

group, it is the basis of the group itself. Without access and occupancy of land, the community cannot survive.

The governments approach to negotiating concerning culture and land rights has in effect been an exercise of obfuscation and frustration. Khoisan advocacy groups have called on the government and the courts to stop “All negotiations and engagements with the Indigenous First Nation of South Africa structures including the National Khoi and San Council (NKSC), the Rural Development and Land Reform Reference Groups and all active facilitations, until an all-inclusive National and Provincial consultation has been completed, where the nation will identify authentic leaders to lead the process. It is our considered opinion that the Executive National Assembly, Parliament, Ministries of Land Reform including Arts and Culture, Cooperative Governance and Traditional Affairs and the National Council of Provinces failed to satisfy its obligation to facilitate coherent and measured public (Khoi-San) participation in accordance with section 72(1)(a) of the Constitution.”

The central question is why the ANC decided to omit the recognition of the Khoisan-Coloured community as an authentic first nation of South Africa. From the perspective of the white establishment the obliteration of the Khoi from historic memory justified not only their expropriation, but probably satisfied a deeper level of anxiety. The settlers placed a premium on whiteness. That was their most valuable commodity. They therefore considered any race that was mixed as indicating an adulterated form of humanity: a non-self-other. The paradox is that the very same non-self-other contained a blood line that had a component of the self. This represented the sexual depravity of the settlers and thus the evidence of a mixed race stood as a sentinel indicating the moral delinquency of the supremacy of the white race. Now the critical question is why did the ANC go to such great lengths to prevent the recognition of the Khoisan as a first nation? The answer seems to be that Nguni culture in general frowns upon mixed race people. It is the pure Nguni who are the superior race. The mixed race non-whites are impure and therefore inferior. In fact, from Nguni point of view, the Khoisan and the Coloureds are non-self-others. Additionally, to recognize the Khoisan as a first nation would carry the political implication that the black constituency cannot assert any claim to a racial priority over South Africa. This may imply that notwithstanding liberalization and nationalism, black identifications still carry an archaic sense of black purity and superiority. It would therefore seem important that rather than avoid the question it should be directly confronted in the interest of everyone.

One of the important issues concerning the evolution and identity of the Khoisan-Coloured perspectives is the fact that they were the most alert to the manipulation of race ethnicity as a form of social control. Dr. Abdurahman was the first mixed race leader who challenged the idea of ethnic division when he launched the African People’s Organization in the latter part of the 19th Century. At this time, there was no ANC and when the ANC established itself in 1912, it established itself across ethnic black lines. The evolution of the Congress movement maintained the ethnic architecture put in place by the Afrikaner nationalists. Thus, there was the South African Indian Congress, the South African Coloured Peoples Congress, the Congress of Democrats (whites), and the ANC (black). It was only in the 1990s that the Congress movement moved beyond the racial categories.

On the other hand, in the late 1930s and the early 1940s, Tabata and Kies aggressively promoted a unity of all the oppressed people regardless of race. It will be obvious that the Khoisan and the Coloureds were split in two different directions. The more rural were more close to traditional Khoisan culture and the urbanized Khoisan-Coloureds came under the influence of the small Khoisan-Coloured and black intelligencia, largely teachers who promoted issues of modernization, advanced constitutional thinking and progressive ideas about human solidarity. The current ANC position is that

to qualify as a first nation in the group one has to be frozen in a cake of impermeable identity. Hardly anyone in the leadership of the ANC would find great joy in being re-tribalized and indeed, modernized and packed off into nomadic herding or making a living out of scavenging for roots and wild animals. This does not mean that they are not African and South African. It should be rendered that it was the intelligencia that arose out of the so-called Khoisan community that articulated the idea of a universal South African identity for all without disparaging localized practices and customs compatible with equal rights and human dignity. It is therefore a clear mandate on the ANC government if it is true to its Freedom Charter and if it believes in the universalization of human dignity that it recognize (1) the dignity of the first nation of South Africa, the Khoisan, (2) that it recognize their valiant struggle for freedom in resisting enslavement and genocide for over 200 years, (3) that it recognize that its intellectuals were the first to understand the implications of divide and rule segregation, and in many ways therefore shadowed the pathway to a progressive dispensation for all the people of South Africa.

The Khoisan and its Position in the Context of Contemporary International Law

Modern international law has been a leading force in the effort to protect the community integrity of indigenous nations on a worldwide basis. Initial efforts emerged through the International Labour Organization, which produced an important covenant to secure a strong legal foundation for the principle of international responsibility for the basic rights of indigenous communities. It should be remembered that the ANC government of South Africa has not endorsed the ILO position. It should be noted that the international system was a major ally of the ANC and it was the efforts in part of the general assembly which laid the foundation for the principle that apartheid was a crime against humanity. The UN following the initiatives of the ILO and guided by the Universal Declaration of Human Rights, on September 17, 2006, adopted the Declaration on the Rights of Indigenous People. This instrument is one of the most important adopted by the international community through the UN directly concerned with the promotion and protection of the fundamental rights of indigenous people (350 million) globally. We regret that we were not a full participant in these proceedings. On the other hand, we owe a great debt of gratitude to many individuals, groups and UN institutions that were able to persevere for over 25 years and finally produce this document, which is the great victory for the indigenous people worldwide and in particular, the indigenous peoples of Southern Africa.

It is therefore appropriate that in this communication we first thank the Secretary General of the United Nations, the entire Human Rights Council and the Permanent Forum on the Rights of Indigenous People. At the international level the UN and the specialized agencies under its jurisdiction acted with competence, determination and a faith in high principle, which resulted in this momentous development for human rights.

We also recognize the tremendous effort made by indigenous communities and nations and their supporters worldwide. When one considers 25 years of continuous political action, the frustrations and the costs of such representation and the enormous sacrifices that indigenous communities must make simply to participate as spectators and informal lobbyists, we realize the enormity of the achievement. We salute our brothers and sisters internationally who made the Declaration become a reality.

We also recognize that the government of the Republic of South Africa recorded its vote in support of the Declaration. We are gratified that the government of the country has expressed itself publicly, openly before the entire world community by recording its vote in favor of the adoption of the Declaration. As an international matter, a sovereign state acting unilaterally in expressing its

intentions in a serious manner is presumed to act in accord with the principle of good faith with regard to the expression of its intention and commitments. We therefore expect a new age of enlightenment regarding the rights of indigenous people in South Africa.

The South African Constitution specifically stipulates that international law shall be applied in the interpretation of its laws and Constitution. Thus in South Africa there is already a constitutional mandate to respect and honour those components of the Declaration that according to pre-existing law and practice, are simply an expression of prior human rights law. We therefore commend the government for this practical commitment to the realization of internationally codified human rights standards for the indigenous nations of South Africa. In short, South Africa's good faith commitment to the Declaration establishes itself a national binding obligation to respect, honour, promote and advance the object and purposes of the Declaration.

It is submitted that the Declaration will have an important influence on the processes of human rights and good governance under the regime of the African Union. Thus, the Declaration will have important continental effects for the development of humane governance and human dignity for all indigenous communities in Africa.

The people of South Africa have been on the receiving end of racism and exploitation for 300 years or more such as South Africa's First Nations. First Nations were a critical part of bringing the full weight of international law to challenge the legality of apartheid. This was because South Africa applied apartheid to South West Africa (now Namibia) which was an international mandate territory. Thus, it was that in the Namibia case of 1971, the struggle of First Nations and their allies in Namibia facilitated the establishment by the World Court of the principle that the Universal Declaration of Human Rights was a part of positive international law and applied to protect the discriminated populations of Namibia.

The recognition of these First Nation human rights are not something separate from the broader struggle for freedom but this Declaration focuses on the critical status of 350 million indigenous people worldwide, many millions of them live in Africa and multi-millions in Southern Africa. These communities and nations have faced genocide, policies of cultural extermination and vicious discrimination, repression and exploitation. It will be recalled that not only were the Khoisan the first nation of South Africa to be brutalized under banner of white supremacy, but they fought a courageous battle for some 300 years leading the fight against racism at all levels from the local to the global.

The Declaration is a triumph of the human spirit. Indigenous peoples often had to carry the brunt of the most brutal policies of exploitation, expropriation and repression. They have been able to survive this onslaught on a global basis. In South Africa in particular, with the adoption of the Declaration achieved a critical milestone in the recognition of their personhood, of their community integrity and of their cultural identity and right to autonomy and self-determination. This in part explains salience of the Declaration for the people of South Africa.

Although the struggle of First Nations worldwide has been a tragic and unremitting veil of tears, First Nations today live, survive and have the capacity and the political will to establish their identity and to be on the frontiers of enhancing the global consciousness of human rights for all. The rest of the world has learned great lessons from the struggle, advocacy, courage and resistance of First Nations. Theirs has been a struggle from the beginning for nothing short of individual and community dignity. The struggle will doubtless continue. There is an enormous amount of unfinished business, here in

South Africa, in Africa and in all parts of the world, we as brothers and sisters in other First Nations fight for their economic patrimony, their political integrity, their cultural identity and their right to full equality. The Khoisan have been a leading force historically in the fight for universalizing the principle of human dignity.

What does the Declaration on the Rights of Indigenous People mean for the struggle of First Nations of Africa, Latin America, Europe and Asia? The Declaration was an immense struggle to secure its adoption and to secure the broadest possible framework of declared human rights for indigenous people on a worldwide basis. Consider that the drafting and adoption of the Universal Declaration of Human Rights took only a few years from negotiation to adoption in 1948. The Indigenous Peoples Declaration that was an extrapolation and a deepening commitment to the human rights already codified in the Universal Declaration and the International Bill of Rights took over 25 years.

Why did it take so long? Why was the struggle to undermine or delay its adoption so tenaciously pursued? Two facts stand out as obvious. Indigenous peoples, First Nations have suffered so much repression that they represent the economically and politically marginalized groups on earth. Those who spoke for them often spoke with a duplicitous intent or were ineffective in providing for the basic protections that vulnerable people need if they are not to be exploited. Strong states can adopt human rights provisions for themselves but those stakes may not be so altruistic when the special human rights problems confronting vulnerable communities inside the state have to be secured.

Second, indigenous communities have historically faced another huge problem. Notwithstanding their political and cultural repression, they were and are the owners of vast tracks of material resources (land, minerals, and farms) as well as intellectual property in the form of traditional knowledge. Many communities have kept their environments from being destroyed by the forces of modernization and greed. Thus, the indigenous people of the world have played a massive role in preserving the world's biodiversity, which is one of the most precious and critical human resources central to humanities future. Political and economic marginalization has thus had to confront powerful national and global interests interested in stealing the patrimony of many indigenous communities around the world.

South Africans well know the scandalous practices of biopiracy. The Declaration provides a universal consensus about the empowerment of indigenous nations, about respect for their identity, personhood and nationhood. It seeks to provide a much clearer normative standard for the protection and support of cultural diversity, and the protection of the economic patrimony from unscrupulous practices of theft and expropriation.

Because of these important stakes from the point of view of the exploited and the exploiter, it is not surprising that the Declaration covered almost 25 years of difficult negotiations. Critical to these negotiations was a continuous effort to undermine or not to recognize the rights of First Nations to land, economic resources, cultural identity, tradition and the inherent and universal right to development. One of the strategies of those opposed to the adoption of the Declaration was delay, delay, delay, delay. Indigenous groups and international non-governmental organizations do not have the resources and unlimited budgets of states to continue expensive negotiations indefinitely.

To have overcome these obstacles underlines the importance of activism and commitment on the part of First Nations; it underlines the critical role of the UN, its commitment to principle, its commitment to a robust defense of the keynote values of the UN Charter and equally, the importance of the UN Human Rights Council.

The impatience with the long and protracted negotiations concerning the draft Declaration resulted in the Shuar Nation of Ecuador using the draft Declaration, Ecuadorian Constitutional law and Shuar indigenous law to draft and adopt the Shuar Bill of Fundamental Rights inspired by the text and direction of the draft Declaration. The idea behind this was that the draft Declaration or even a finally adopted declaration must mean something operationally on the ground for the protection and promotion of indigenous peoples interests both within the community and within the larger state structure within which the indigenous community exists.

The Shuar also considered the fact that law is to not only be found in sterile textbooks and inaccessible law libraries. It is also found in the living law of the community and the community itself must assume its critical role as a stakeholder in shaping the living law and the formal law in the direction of the common good of the people. The Khoisan Nation of Southern Africa are also in the process of developing our living law within the overarching framework of our new Constitution in South Africa, the African concepts of human rights, and the international law of human rights particularly as it targets the promotion and protection of indigenous values and interests. The Khoisan will thus their own law a part of the dynamic living law of the Khoisan peoples and share this with fellow indigenous communities across Africa and the globe.

According to the President of the General Assembly Sheikha Haya Rashed Al Khalifa, the Declaration was described as an instrument whose "importance... for indigenous peoples and... the human rights agenda cannot be underestimated." She also pointed out that indigenous peoples still face "marginalization, extreme poverty and other human rights violations. They are often dragged into conflicts and land disputes that threaten their very life and survival; and suffer from a lack of healthcare and education."

The Chairperson of the UN Permanent Forum on Indigenous Issues, Dr. Victoria Tauli-Corpuz stated as follows: "This day will forever etched in our memories as a significant gain in our peoples long struggle for our rights as distinct peoples and cultures." She added, "For us, the correct way to interpret the Declaration is to read it in its entirety or in a holistic manner and relate it to existing international law." The statement of Randall Gonzalez (Costa Rica) captures a critical sense of the momentous of the United Nations General Assembly adopting the Declaration.

We quote the summary of his remarks: "Today marks the end of a long process towards recognition of the fundamental rights of indigenous people. Still, it is only the beginning of efforts to remedy so many years of injustice. The debt to indigenous brothers and sisters must be settled, not only through the implementation of the Declaration but with assistance in such areas as poverty alleviation, improved education and wider access to decision making processes." This latter statement captures some of the most urgent tasks confronting our communities in Southern Africa as well.

One point of important concern for the indigenous peoples of Southern Africa, and Africa in general is the fact that a last minute effort was made led by the African states to postpone debate on the draft resolution because they felt they needed further consultations. This motion to delay was accepted in the Third Committee on November 28 by a vote of 82 to 67. The motion was seen as a transparent final effort to weaken and indeed to undermine the critical and important work of the Human Rights Council.

We regard this as singularly unfortunate because if there is one continent that needs to embrace human rights culture and deepen its impact in the communities and on the ground, it is the beloved Africa. Some indigenous leaders such as Chief Fontane of Canada indicated that indigenous peoples

were in fact shocked and outraged at this last minute manoeuvre. Indeed, there was even criticism of the commitment to principle in the Human Rights Council itself. This of course demonstrates what a critical struggle this is at every level of political and legal concern. It is a continuing warning that even the provisions in the Declaration could be undermined if those provisions are not understood, not embraced and not taken seriously by the critical stakeholders themselves namely, the 350 million indigenous people worldwide and their allies.

The Legal and Political Status of the United Nations Declaration on the Rights of Indigenous People

This instrument is a resolution of the General Assembly and it comes in the form of a Declaration. Legally with a few limited exceptions, a resolution of the UN General Assembly is not a legally binding instrument establishing positive legal obligations on states that participated in and voted for a resolution.

Some UN General Assembly resolutions come in the form of a Declaration. Perhaps the most famous of these Declarations is the Universal Declaration of Human Rights (UDHR). When this document was adopted, it was understood that it was not a legally binding instrument as such. It however, was meant to have strong moral force and was meant to be a commitment on the part of a state voting for it that was undertaken with due seriousness and a commitment to the sovereign expression of good faith in the public representation of its commitments.

The status of the Declaration on Human Rights raised an important question namely that human rights are a part of the purposes and principles of the International Constitution, namely the UN Charter. Thus, an interpretive question arose about whether the UDHR actually had some legal qualities imposing a kind of international soft law on states parties because the Universal Declaration was simply an extrapolation and clarification of pre-existing constitutional principles and textual language involving human rights in the UN Charter.

The adoption and coming into force of the International Covenant on Civil and Political Rights; Social, Cultural and Economic Rights were viewed as a very concrete further legal clarification of the rights and values established in the UN Charter and the UDHR.

These four international instruments which included the UDHR are now commonly referred to as the International Bill of Rights.

A further clarification of this matter of the status of a UNGA Declaration came in the Namibia case in the International Court of Justice in 1971. It will be recalled that indigenous communities in Namibia experienced high levels of repression, with notorious so-called terrorists' trials which often targeted indigenous and other leaders in Namibia (prior South West Africa). In this case the International Court of Justice determined that by 1971 the UDHR had now achieved the status independently of customary international law.

Thus, we come to the question of the status of the Declaration regarding indigenous communities. Certain governments such as Australia, New Zealand, US, and Canada have voted against the Declaration and maintained that in any event a Declaration is a resolution of the UNGA and carries no binding obligation on states. The answer to this is that the Declaration on Indigenous Peoples Rights is in fact an authoritative gloss or extrapolation of the human rights provisions in the UN Charter itself. The UN Charter is binding on all members of the UN. Thus, the Declaration is not completely

benefit of a certain juridical quality that should be honoured by states who are parties to the UN system.

In addition, the Declaration is an authoritative extrapolation and a targeted prescription and application of all the rights that are already established as positive international law in the International Bill of Rights.

Furthermore, the Declaration or most of it is an extrapolation of all of the principles and values found in the UDHR. Thus, if the UDHR has an independent status as customary international law, then it will be illogical to hold that provisions and values codified in the Declaration on indigenous rights are not customary international law. To do so would in effect mean that the Declaration would be used to undermine the UDHR and the pre-existing legal expectations that it has developed in the 50 years since it has been adopted.

Finally, when a state votes on a matter as serious as a declaration involving fundamental human rights, it must be assumed that when a state votes in this regard it is making a serious commitment to either fully honour the expectations in the instrument. Perhaps more modestly, to minimally do nothing that will in any way that undermines or detracts from those principles. This standard is expressed in the fundamental principle, which makes the UN Charter the International Constitution whose members are sovereign states. That principle is that when a sovereign expresses itself seriously and publicly, there is a good faith obligation imposed on that sovereign by customary international law and by the law of the UN Charter that the sovereign may be held to its own representations upon which the rest of the international community has a right to rely.

This principle is sometimes expressed as a good faith obligation to cooperate to fully achieve the purposes and the principles for which the UN Charter was created. At the very minimum this would mean that the municipal law of a state which falls within the powers of the Executive in foreign affairs is bound to respect and honour its own representations made in good faith to the world community and to its own people.

From the above summary, it therefore is clear that the Declaration on Indigenous Rights does have a certain or juridical character in international law. Its precise prescription and application in particular cases or contexts requires a degree of activism, advocacy, political and legal skill to fully utilize this instrument as a critical development of national, continental and global human rights expectations.

The Declaration makes clear in its Preamble that the structure and content has been guided by the UN Charter and "the good faith" commitment to honour the fulfilment of obligations assumed by states in accordance with the Charter. The main principles include the strengthening of equality of rights of indigenous people, strengthening of the respect for diversity, which includes "the richness of civilizations and cultures" which is the common heritage of human kind.

The Preamble recognizes the ubiquity of discrimination and the critical need to enhance respect for indigenous people at every level of society. It refers to the historic injustices of colonialism and by implication post-colonial practices. It further recognizes the interrelationship of all fundamental rights and values, which are critically interdependent and holistic. Thus, it recognizes "the need to respect and promote inherent rights... which derive from political economic and social structures.... cultures, spiritual traditions, history and philosophies... especially... rights to... lands, territories and resources."

Among the critically important rights recognized are those which stipulate (Article 20) indigenous peoples have the right to maintain and develop their political, economic and social systems or

institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

The document stresses the right to development (Article 23) which specifically stipulates that indigenous peoples have the right to determine and develop priorities and strategies for exercising the right to development. Another critical prescription clarifies the economic patrimony that indigenous communities have over traditional knowledge, which in effect carries the imprimatur of intellectual property and therefore an item of economic value in the current state of global economic practices. For example, Article 24 holds that indigenous peoples have the rights to their traditional medicines.

They also have rights to maintain their health practices including the conservation of their vital medicinal plants, animals and minerals. This is a matter, which is currently on the agenda of the World Intellectual Property Organization as well as the process dealing with the clarification of Article 8j of the Convention on Biodiversity (see also Article 20 of the Declaration). Finally, the Declaration goes a long way to clarifying rights to land, territories and resources traditionally owned by indigenous nations. Article 26 for example stipulates that indigenous peoples have the right to the lands, territories, and resources, which they have traditionally owned, occupied, otherwise used, or acquired. There is the recognition of land rights by traditional ownership or occupation and an obligation on the part of states to protect those titles respecting the legal traditions and customs of indigenous law.

Article 45 recognizes the possibility that sometimes an instrument such as this may be misrepresented to indigenous communities who may have only heard but not seen the document or have not received a copy in their native language. Article 45 states "nothing in this Declaration may be construed as diminishing or extinguishing the rights of indigenous peoples which they now hold or might acquire in the future."

Finally, the question is always how we interpret words in instances of particular prescription and application. Article 46.3 provides us with explicit guidelines "The provision set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect of human rights, equality, non-discrimination, good governance and good faith."

The First Nation indigenous nations of Southern Africa commend the activist indigenous communities worldwide for their role in securing the adoption of this milestone Declaration which clarifies and makes explicit the most critical and fundamental rights of all indigenous nations worldwide. They also commend the United Nations Secretariat, the Human Rights Council and the Permanent Forum for the leadership role it has taken in the development and adoption of this historically critical development regarding indigenous communities in particular.

In a larger sense, this instrument is also a marker for defining a new level of human rights consciousness on a global basis. That consciousness will not be enhanced effectively unless the critical stakeholders themselves are actively involved in making the Declaration the fundamental human rights law and expectation on the ground in our own communities, villages and towns.

They must also be active in developing coalitions to ensure that the states themselves and our government in particular, does not involve itself in hypocritical noises loudly proclaiming its commitment to human rights and dignity and then permitting it to be undermined in the operations and practices of policy on the ground. Speaking on behalf of the indigenous nations of Southern Africa, the Khoisan have committed themselves to the fullest implementation of this Declaration. They also have committed themselves to joining in alliance with other groups and interests in using

the Declaration to uplift the human rights consciousness in southern Africa and in the larger world community to a higher level of achievement consistent with the promise of the keynote principles and values of the UN Charter itself. It is therefore obvious that South Africa cannot repudiate its vote before the world community. The Declaration is a matter of international hard law, by rational interpretation of the UN Charter and UN values. It is this UN Charter that provided critical global support for the ANC's fight against apartheid as well. The Khoisan therefore have a right to rely on the legal efficacy of the Declaration and its application to their status in South Africa.

The Law and Practice of Apartheid

The legislative and other innovations indicated above were consolidated by the creation of an authoritarian police state, which institutionalized imprisonment without cause and the widespread use of torture practices to eliminate the political opposition and to sustain the momentum of the apartheid state. The state also organized death squads to eliminate opponents. There were two broad components to the Apartheid state. First, the territorial division of South Africa was largely framed by the Native's Land Act 1913, which expropriated the traditional lands of black South Africans, leaving patches, which evolved into black homelands. These homelands were given their own pseudo-constitutions and the illusion of a form of sovereignty controlled and regulated by a small class of black sell-outs. These homelands were now given the status of tribal sovereignty and blacks living outside of the homelands were removed to these homelands in large-scale acts of population removal. The destinations of these removed South Africans were described as 'the dumping grounds.' In theory, these removed blacks had minimal rights exercised only in the Bantustans. This was essentially known as a form of Grand Apartheid.

The other aspect of apartheid also extremely brutal and cruel was described as 'Petty Apartheid.' This form of apartheid governed the rest of the populations outside of the tribal homelands. In these areas, blacks were confined to so-called 'locations,' which were exclusively for black occupation. Blacks living in these areas had to carry a pass giving them a legal right to be there and an indication that they had paid taxes. If you did not have a pass, you could be removed and placed in one of the dumping grounds. In these black locations the lucky ones served as a labor force supplementing industrial manufacturing, and servicing white homes as domestic servants, gardeners, farm workers, etc. However, these occupations were often tenuous and forced removals were frequent and efficient. Additionally, many occupations were completely closed to blacks in terms of the Job Reservation Act.

The South Africans of Indian descent and South Africans of mixed descent, Khoi, Asian, Dutch and Black, loosely called the 'Coloureds' were confined under the Group Areas Act to specific areas for residents chosen by the white government. These non-white citizens of South Africa were forced to digest an apartheid condition aspect of education, including higher education. The state created a form of 'Bantu education' for the Blacks, 'Coloured education' for the Coloureds, and 'Indian education' for the Indians. The whited enjoyed their own privileged form of education at all levels. In terms of the objectives of the ethicized education, the government sought to confine opportunities in such a way as to reduce intellectual, scientific, and technological capability. As one minister put it, "it would be a waste to teach the Blacks mathematics when their aspirations should be to serve as garden boys." At the apex of this system were the innovations in higher education. In terms of the extension of the University Education Act, separate universities were created for Coloured and Indians, and multiple differentiation in universities for blacks with different ethnic backgrounds. These universities were staffed by academics committed to the values of apartheid.

This short summary simply raises the question of the intentional suppression of opportunity freedoms and capability freedoms, the suppression of which entrenched and accelerated state condition, poverty and deprivation. In this sense, the struggle against the apartheid state was essentially a political, juridical and economic struggle. When the ANC negotiated the transfer of power in South Africa, it produced through this process an advanced and highly admired new constitutional dispensation. In this sense, the constitution enhanced the civil and political rights of the suppressed class. However, we should have a clearer picture of what apartheid entailed. Apartheid represented a systematic pattern of domination and subjugation which was sustained by the full scale utilization of an ultra-modern police state. Therefore, the constitution on paper would have important challenges in changing the political and legal culture. Much has been achieved in this sphere. However, freedom is tarnished when we recognize that the necessitous human beings who were dramatically economically suppressed do not experience a defensible measure of freedom to experience the fuller benefits of citizenship.

Contemporary Problems of the Status of the Khoisan in Post-Apartheid South Africa

1. The first and most obvious problem of the status of the Khoisan today in South Africa is that they had their identity extinguished at the altar of white rule by the creation of a category of human beings with an imposed identity of colored or cape-colored. This means that their entire history of heroic struggle against racism and oppression is extinguished. Sometimes the Khoi leadership at the intellectual and political level is designed amorphously as colored activism or colored leadership. Since there is not a distinctive history of the colored that shows that the colored are both biologically and culturally as well as politically, the product of the evolution of Khoi culture, this label seems to justify their exclusion from full citizenship benefits in the new South Africa. The one point that is completely obscured is this: from the time that we have historical records, the Khoi have always been highly intelligent, perceptive and unwilling to be exploited. This generated resentment among the settlers that the Khoi were too clever to be trusted. The Khoisan understood what land expropriation and theft meant and they fought intermittent wars for 200 years to save their community and their economic entitlements. After the convenient creation of an imposed identity, "colored," the Khoi remained an active and resisting force against discrimination and oppression. They indeed were the leaders of the initial efforts in the Cape by the Khoisan leader Abdurahman to resist discrimination, to insist on educational and employment opportunities and to demand a political voice. It was Khoi leadership that generated the first notion of an African people's organization for all of South Africa.

The Khoi generated impressive intellectual leadership in the educational community (the Teacher's League of South Africa). This gave rise to a new and more aggressive stance challenging white supremacy. This continuation of their resistance led to the establishment of the non-European Union movement. This movement looked to the unity of all oppressed people in South Africa and this leadership did not diminish Khoi identity, it expanded it in progressive directions. Khoi leaders like Kies provided a brilliant analysis of the importance of critical thinking in resisting the struggle against white supremacy and the 10-point program they produced was the first articulation of the idea of nonracist social democratic future for South Africa. It should be noted that this Khoi initiative was indirectly embraced by the framers of the new South African constitution. The central point here is that these fundamental ideas emerged from a political struggle spanning over three centuries of Khoi resistance. Finally in this regard we draw attention to the progressive leadership of other Khoi

activists. Dennis Brutus, a Khoi activist from the Eastern Cape, launched the campaign against global racism in sporting bodies. He and fellow Khoi, Winston Nagan, campaigned to have South Africa and Rhodesia expelled from the Olympic Games. Their initiative led to action in such areas as football, ping pong, rugby and cricket. Brutus and Nagan were the activists that inspired the creation of the comprehensive anti-apartheid act of South Africa, which imposed sanctions on the apartheid regime. This does not mean that these Khoi activists lost their essential identity as Khoi in promoting the virtues of a society without racist or other forms of discrimination.

2. It is therefore critical that the Khoisan not be extinguished by the imposed label of colored and be punished for the progressive views of some of their activists in leading the international campaign against apartheid. Neither should they be ignored for the role they have played in seeking to expose the racist use of ethnic identity as a tool of “divide and rule.” Finally, they should not be disparaged because they saw the vital importance of the creation of the Rainbow Nation in which all are treated with equal respect, as indicated early on in the 10-Point Program.
3. When the constitution was drafted it sought to bring sensitivity to the diversity of the population in terms of economic, traditional and cultural stratification. Unfortunately, the cultural extinction of the concept of Khoisan has made it an uphill struggle to secure recognition, not only for traditional leadership but also recognition for their longstanding struggle against imperialistic rule.
4. It is a reasonable demand that the Khoi traditional leadership and culture, as well as the Khoi progressives and intellectuals, be given space for the development of forms of cultural and economic progress in light of the new constitution. This has not happened. The Traditional Affairs Bill appears to be inadequate and unsatisfactory. The parliament must rectify this. One of the ministers of the government believes that carving out space for Khoisan leadership competence will, in effect, be a claim to sovereignty and cessation. Regrettably, the minister is quite ignorant about the nature of modern constitutionalism.
5. Although there a multitude of Khoisan languages, the government acknowledges only three Khoisan languages even as it does not recognize the Khoisan as a first nation.
6. Section 25(7) of the constitution provides for reparations with regard to rights in land, dispossessed on June 19, 1913, the Native’s Land Act. This cutoff date excludes the expropriation and theft of the Khoi land that began in 1652 and continued to 1913. President Zuma has begrudgingly indicated that the state may consider the land rights that were stolen prior to the 1913 cutoff date. So far, no action. On the brighter side, the case involving the Richtersveld community did in restitution via a decision of the Constitutional Court. The court determined that the loss of their land was due to racial discrimination. The massive expropriation of Khoi land has left a sizable portion of the people as an impoverished lumpen proletariat. There are many models connected to the human right to development that could be adapted to speed up the delivery of economic justice. Justice delayed is justice denied.
7. The government’s affirmative action framework excludes the Khoisan because their historic marginalization is made invisible by the ascription of the apartheid label, “coloured.” A better understanding of the historic role of the Khoi and the price they have paid in the struggle for freedom should provide them with expeditious access to affirmative action opportunities.

8. The Khoi Khoi still carry the legacy of cultural, economic, social and political deprivation, in part a residue of the apartheid era. If the government wishes to be true to the principles of liberation that it proclaimed, it should act to rectify this historic injustice as soon as possible.
9. The Khoisan have a legal right under South African constitutional law and international constitutional law, based on the UN Charter, to have their status and identity as a First Nation of South Africa recognized. Recognition is long overdue and represents a form of legal delinquency.

Conclusion to Part I

South Africa as earlier indicated, is a nation of incredible and complex diversity. Diversity comes in many different elements, traditional, socio-cultural, economic, the legacy of its complex history of racial injustice and its challenge to consolidate a regime that promises universal justice for all citizens regardless of race, colour or creed. Notwithstanding, the euphoria of national liberation the ideals expressed in its widely praised constitution are not necessarily a description of the reality of the system of public order in place. That system of public order has many elements from its most recent past that have to be resolved. The fundamental tension in South Africa today is the promise to fulfil the ideas of human dignity on a universal basis and the practical reality that the social and political economic process has not demonstrated the determination of the ruling party to show a dynamic form of leadership initiative in bridging the gap between the ideals of the system and what it delivers in practice. The apartheid system was a radical and aggressive system of imposing a system of beliefs and practices that reinforced the ideas of separation and institutionalization of unhealthy patterns of identity in which the demographic distribution of people reinforced often expressed a parochial sense of the essential identification of the "I" and the "We." At the same time this pattern of identification accepted almost automatically the concept of a non-I and a non-We. In short, the pattern of identifications in society reflects an acute awareness of differences indicating understanding of the position of the non-self-other. These patterns of identification tend to be reinforced and exaggerated by issues such as the inability of the leadership to understand the complexity and the resilience of identifications based on narrow concepts of the "I" and the "We." We have used in this study the position of the Khoisan-Coloureds. The only real claimants to the position of first nation status in South Africa. Yet, the history of white rule and the history of black rule have conspired to extinguish the Khoisan-Coloureds not only as a non-self-other, but a non-existent non-self. The historic position in the context of white conquest and domination is easy to understand. The position of the ANC is quite simply a mystery. The unwillingness of the ruling party to acknowledge the Khoisan-Coloureds as an existential group virtually culturally extinguishes them and destroys their claim to human dignity. The only explanation that makes sense is the dismal conclusion that the ANC cannot shed itself of ethnic, parochial beliefs which undermines the foundation of its fight to liberate South Africa. In short, the acts and omissions of the leadership represent a repudiation of the foundational values of the struggle for the liberation for the people of South Africa. The idea that there will be compensatory justice for the economic losses of the victims of imperial supremacy with a cutoff date at the deprivations that occurred after 1913 is an embarrassing disgrace. The Khoisan fought valiantly for 200 years facing threat of extermination, the fact of bonded servitude and enslavement, that many Khoisan intellectuals were in the vanguard of the struggle to ensure that racism would not be used to deflect from the real struggle for dignity is a major and unacknowledged contribution to the freedom of South Africa. Worse than this, the creeping racism is a disease that could be vastly divisive and radically undermine the future of the South African state. The challenge is clear that the ANC must repudiate the racist policies that sustain the repression of the Khoisan-Coloured people. The future

history of the survivability of South Africa must rest on a celebration of its rich cultural diversity and its conscious willingness to universalize the value of mutual reciprocal respect based on human dignity for all. If it compromises on these principles, its continued viability as a state will be questioned.

