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“Culture Fatigue”: The State and Minority Rights in Botswana

JACQUELINE SOLWAY*

ABSTRACT

The circulation and intersection of supranational rights, discourses, and practices with local struggles have contributed to victories, disappointments, and in many instances, new articulations and understandings of rights for local people. In Botswana, the ever-increasing interaction of minority groups with international institutions, laws and conventions, nongovernmental groups (NGOs), and the Botswana courts has created a dialectic that continues to reshape vernacular rights discourses. The state has also been a party in this evolving dialectic and has found new means of intervening in the process. The Botswana state prides itself on its liberal practices and has received international acclaim as a result. The state's success in promoting individual-based human rights provides a context for minorities to self-identify, recognize their oppression, and safely challenge the state. Initially disarmed by minority demands and legal action, the state has now attempted to redefine the goals of minorities and to reduce the substance and redress of justice claims to support for

* Professor, Department of International Development Studies & Department of Anthropology, Trent University, Peterborough, Ontario, Canada. I wish to thank the hosts and participants of the 2010 Human Rights, Legal Systems, and Customary Cultures Across the Global South conference at the Indiana University Maurer School of Law for inviting me to the conference and providing a very stimulating venue. Rosemary Coombe has been an invaluable interlocutor and has offered me much food for thought through our discussions and her written work. In Botswana many people offered their time and shared their knowledge; the full list is too long to include. I especially wish to thank Lydia Saleshando for her unfailing support and the members of Reteng for including me in many of their activities. Also in Botswana Dimpoetse Khudu, Kelone Khudu-Petersen, Josti and Doreen Moeletsi, Tsaone Moeletsi, Jeffrey Tsheboagae, Alice Mogwe of Ditshwanelo, The Botswana Centre for Human Rights, Serara Mogwe and the staff at the Department of Culture have been extremely helpful. I could not have conducted this research without generous support from the Social Sciences and Humanities Research Council of Canada and the Botswana government for granting me a research permit. Michael Lambek and Nadia Lambek have offered unstinting editorial and moral support.

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and celebration of minority groups' dance, food, and costume. This has produced, in the words of minority activists, "culture fatigue." This paper will examine these processes; consider the conflicting and converging discourses and practices resulting from the mutual absorption of rights dialogue on the part of local groups, international bodies, and the state; and discuss the ways in which these have supported, clashed with, strengthened, or distorted the positions and outcomes of the various actors and their projects.

INTRODUCTION

In this paper, I examine some of the successes, failures, indeterminacies, and ironies that have emerged in the struggle among Botswana's "minority groups" for rights and recognition. Lawfare, to borrow the Comaroffs' very apt term,¹ has been deployed to great effect by and on behalf of minority groups in Botswana. Moreover, an engagement with transnational movements and both suprastate and nonstate external actors by all parties involved has recently altered the playing field in a range of ways. To varying degrees, local struggles in Botswana have absorbed global dispositions and rhetoric in a process of partial "vernacularization."²

Global influences, it will be shown, have shaped the process, the actors, and the still uncertain outcomes of recent struggles. Equally important, by forcing the state to acknowledge and, more importantly, to confront minority struggles, lawfare has led the state to seek new means of intervening in the minority rights dialogue. A striking consequence of the state's intervention is the current fashion and proliferation of performative culture, much of it supported, if not sponsored, by the state. In a set of converging processes, local groups (minority and otherwise), the state, and the market are, for varying reasons and interests, all engaged in a process to objectify and commodify culture to be consumed locally and globally.³ This has resulted in what many minority activists call "culture fatigue."

1. JOHN L. COMAROFF & JEAN COMAROFF, *ETHNICITY, INC.* 56 (2009) [hereinafter COMAROFF & COMAROFF, *ETHNICITY*]; John L. Comaroff & Jean Comaroff, *Law and Disorder in the Postcolony: An Introduction*, in *LAW AND DISORDER IN THE POSTCOLONY* 1, 29-31 (Jean Comaroff & John L. Comaroff eds., 2006). Lawfare is waged via the use of domestic or international law with the intention of damaging an opponent.

2. Sally Engle Merry, *Legal Transplants and Cultural Translation: Making Human Rights in the Vernacular*, in *HUMAN RIGHTS: AN ANTHROPOLOGICAL READER* 265 (Mark Goodale ed., 2009).

3. See COMAROFF & COMAROFF, *ETHNICITY*, *supra* note 1, at 140-141; Rosemary Coombe, *Possessing Culture: Political Economies of Community Subjects and Their*

Botswana is recognized internationally as Africa’s “miracle,”⁴ its “exception.”⁵ It is heralded for its democratic achievements, political stability, good governance, relatively low levels of corruption, absence of violence, staggering economic growth,⁶ and, until recently, its mostly untarnished and celebrated human rights record.⁷ Botswana’s successful liberalism and creation of relatively rational bureaucratic structures and institutions have created the conditions for minority groups to self-identify, recognize the basis and reality of their exclusion, and find orderly and peaceful means of redress.⁸ Liberalism contains paradoxes within it that lead to the kind of discontent and struggle outlined in this paper. In particular, liberal democracy includes among its core values, equality of citizenship and individual rights predicated on the juridical abstract citizen. To the extent that liberalism succeeds, it provides an ethos of possibility, choice, and new direction. Whether this is a false, inflated, or unrealizable promise, liberalism at its best

Properties, in OWNERSHIP AND APPROPRIATION 105-27 (Mark Busse & Veronica Strang eds., forthcoming 2011).

4. ABDI ISMAIL SAMATAR, AN AFRICAN MIRACLE: STATE AND CLASS LEADERSHIP AND COLONIAL LEGACY IN BOTSWANA DEVELOPMENT (1999).

5. *Economics Focus: The African Exception*, ECONOMIST, Mar. 28, 2002.

6. See J. CLARK LEITH, WHY BOTSWANA PROSPERED 120-22 (2005); SAMATAR, *supra* note 4, at 3-5; RICHARD WEBNER, REASONABLE RADICALS AND CITIZENSHIP IN BOTSWANA: THE PUBLIC ANTHROPOLOGY OF KALANGA ELITES 16-18 (2004); Daron Acemoglu et al., *An African Success Story: Botswana*, in IN SEARCH OF PROSPERITY: ANALYTIC NARRATIVES ON ECONOMIC GROWTH 80, 80-84 (Dani Rodrik ed., 2003); *Democracy in Africa: A Good Example*, ECONOMIST, Oct. 24, 2009, at 57; *Botswana's Impatient President: Diamonds Are Not For Ever*, ECONOMIST, Oct. 24, 2009, at 61. But see KENNETH GOOD, DIAMONDS, DISPOSSESSION & DEMOCRACY IN BOTSWANA 9-24 (2008) (discussing how Botswana’s economic dependence on diamond-generated revenue led to economic hardships).

7. See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEPT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: BOTSWANA (1999–2009), <http://www.state.gov/g/drl/rls/hrrpt/> (follow any of the year hyperlinks on the left hand side; then follow the appropriate continent or country hyperlinks to reach each Botswana report) (containing generally positive reports that get longer and include more criticism over the years).

8. See Jacqueline S. Solway, *Reaching the Limits of Universal Citizenship: ‘Minority’ Struggles in Botswana*, in ETHNICITY & DEMOCRACY IN AFRICA 129 (Bruce Berman et al. eds., 2004); Jacqueline Solway & Lydia Nyati-Ramahobo, *Democracy in Process: Building a Coalition to Achieve Political, Cultural and Linguistic Rights in Botswana*, 38 CAN. J. AFR. STUD. 603, 604 (2004); Jacqueline S. Solway, *In the Eye of the Storm: The State and Non-Violence in Southern Africa (Botswana)*, 76 ANTHROPOLOGICAL Q. 485, 488 (2003) [hereinafter Solway, *Eye of the Storm*]; Jacqueline Solway, *Navigating the ‘Neutral’ State: ‘Minority’ Rights in Botswana*, 28 J. S. AFR. STUD., Dec. 2002, at 711, 715 [hereinafter Solway, *Navigating*].

inspires people to imagine and seek new opportunities and to embrace a sense of optimism.⁹

In Botswana, liberal ideology and practice, in combination with enabling material conditions,¹⁰ laid the basis for a new political imaginary. This new imaginary, ironically, gave rise to the minority movement in which collective/group rights were sought in tandem with individual rights. The minority movement's ultimate goal is to achieve true individual rights, but it argues that the only way to realize this is by first recognizing group rights. The movement is predicated upon redress of injustices, some of which are enshrined in Botswana's Constitution and statutes; these and others continue to manifest in everyday practice. The movement is also founded on an imagination and desire for a more emancipatory future in which all ethnic groups will act on an even playing field in which their rights—material, political, and cultural—will be enjoyed, respected, and enshrined in law and policy.

Contrary to a common perception promoted by the Botswana state,¹¹ the country is not ethnically homogeneous. Minorities in Botswana include all people of non-Tswana background, which is arguably well over half the nation's population. In the past, minorities were not recognized in the Constitution, and today their leaders still do not hold permanent positions in the Ntlo ya Kgosi, formerly known as the House

9. Elizabeth Povinelli acknowledges liberalism's capacity to produce both cynicism and optimism but credits "successful" liberalism with promoting optimism. Liberalism offers its subjects a narrative that facilitates continued action despite realities and circumstances that would otherwise promote a more pessimistic stance regarding the outcome of their actions. ELIZABETH A. POVINELLI, *THE CUNNING RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM* 155 (2002). With respect to land claims, Povinelli observes that claimants are able to "protect themselves through narrative devices, in the moment of discrimination . . . [and] to believe that this time they've gotten it right, that this time history will be ruptured." *Id.*

10. Botswana is the largest producer of gemstone quality diamonds in the world. Since independence in 1966, it has experienced unprecedented growth. In addition, for most of the years prior to the 2008 economic downturn, Botswana had one of the highest growth rates in per capita income in the world. *Background Note: Botswana*, U.S. DEPT OF STATE, <http://www.state.gov/r/pa/ei/bgn/1830.htm> (last updated September 17, 2010). From being among the poorest countries in the world at independence in 1966, it is now classed as an Upper Middle Income Country by the World Bank and its GDP per capita (2009) was USD 5,965. Botswana | Data, WORLD BANK, <http://data.worldbank.org/country/botswana> ("GDP per capita (current US\$)" indicator can be found by searching for that term using the indicator search function) (last visited Oct. 26, 2010).

11. Richard Werbner speaks of a "One Nation Consensus" that emerged in the early independence years. While national leaders acknowledged difference, their goal for the nation was assimilation into Tswana. WERBNER, *supra* note 6, at 38-39. This goal was manifest in language policy, the formation of the House of Chiefs, demarcation of tribal territories, and other practices that all reinforced the hegemony of the Tswana and the marginalization of non-Tswana citizens.

of Chiefs, the upper house of Parliament.¹² These minorities are people who, in the past, were brought either voluntarily or by compulsion into the orbit of Tswana chiefdoms where they enjoyed secondary or servitude status.¹³ Their secondary status is enshrined in various post-colonial government statutes pertaining to land, local governance, and official language status.

Minorities also experience discrimination and marginalization in a myriad of everyday forms.¹⁴ The home areas of most minority groups exhibit some of the highest poverty indicators in the country.¹⁵ Geographically, minority home areas tend to be considered remote, lacking in services and employment opportunities.¹⁶ However, remoteness is a historical outcome, a consequence of power, not a natural geographic fact. Socially and politically, minority groups were in the past, and are still in some instances today, jural minors, unable to speak in public assemblies dominated by the Tswana. In the past, their official representation needed to be through a Tswana intermediary and today, while legally in a position to speak, many lack a sense of entitlement that would enable them easily to do so. Still today, for minority groups living within the boundaries of a former tribal

12. Eight Tswana groups, referred to as “tribes” in the Constitution, and whose territories were tribal reserves at various points in colonial times, enjoy permanent hereditary membership in the House of Chiefs, now Ntlo ya Dikgosi. At independence, four additional chiefs were granted nonpermanent and elected positions in the House of Chiefs. The latter represent districts that were Crown Lands prior to independence. Upon passage of Bill No. 34 in 2005, the Constitution was amended to officially change the House of Chiefs to the Ntlo ya Dikgosi, to expand its membership to thirty-seven but to limit permanent membership to only the eight Tswana paramount chiefs that held permanent membership previously. Memorandum from the Ditshwanelo: Bots. Ctr. for Human Rights, Constitution (Amendment) Bill, 2004 (Dec. 31, 2004), *available at* <http://www.ditshwanelo.org/bw/bill.html>. Press Release, Bots. Ctr. for Human Rights, Bill Fails to Ensure Equal Recognition and Treatment of All Ethnic Groups (Apr. 18, 2005), *available at* <http://www.ditshwanelo.org/bw/april18pres.html>.

13. See generally K. Datta & A. Murray, *The Rights of Minorities and Subject Peoples in Botswana: A Historical Evaluation*, in *DEMOCRACY IN BOTSWANA* 58-74 (John Holm & Patrick Molutsi eds., 1989).

14. For instance, the Tribal Land Act of 1970 established and named land boards after the Tswana Tribes recognized in the Constitution. Tribal Land Act, 1970, c. 32:02, para. 3(1) (Bots.) (the names of the land boards can be found under the heading “First Schedule”). Most of the tribal territories are multiethnic and other tribes residing within the territory of a land board are subclassified under the tribe the territory is associated with. This further fosters Tswana identity and association with land. See LYDIA NYATI-RAMAHOBO, *MINORITY RIGHTS GROUP INT’L, MINORITY TRIBES IN BOTSWANA: THE POLITICS OF RECOGNITION* 3 (2008), *available at* <http://www.unhcr.org/refworld/pdfid/496dc0c82.pdf>.

15. See generally POVERTY STRATEGY UNIT, BOTS. GOV’T, *BOTSWANA: ANNUAL POVERTY MONITORING REPORT 06/07* (August 2007), *available at* <http://www.sarpn.org.za/documents/d0003017/index.php>.

16. See Solway & Nyati-Ramahobo, *supra* note 8, at 608.

reserve,¹⁷ their customary courts and other offices are subordinate to those of the Tswana-dominated district capitals.¹⁸

Furthermore, in the past, minorities were forced to render tribute to the dominant Tswana.¹⁹ In some cases this domination preceded colonialism, but it was strengthened and institutionalized by colonialism and indirect rule, which empowered Tswana chiefs and drew boundaries that fixed minorities' legal and geographic positions within Tswana chiefdoms. Some of the inequality was undone during and after independence, but constitutional privileges enjoyed by the eight principal tribes (all Tswana, particularly those with membership in the Ntlo ya Kgosi and having official language status) have remained,²⁰ despite the fact that in other respects, Botswana's Constitution is a modernist document.

As political philosopher Will Kymlicka notes, a state like Botswana that accords individual rights to all citizens "may appear to be 'neutral' between the various national groups. But in fact it can (and often does) systematically privilege the majority nation in certain fundamental ways."²¹ The marginalization of minorities can occur as a result of, "for example, the drawing of internal boundaries; the language of schools, courts and government services; the choice of public holidays; and the division of legislative power between central and local governments."²² It is evident that the dispositions of the politically dominant majority tend to saturate the fabric of daily social, political, and cultural life.²³

17. The boundaries and numbers of the Tswana tribal reserves shifted during the colonial period. Large stretches of land were designated by the British as Crown Lands; however, the tribal reserves covered the most populous areas of the country.

18. Chieftainship Act, 1987, c. 41:01 (Bots.).

19. I. SCHAPERLA & JOHN L. COMAROFF, *THE TSWANA* 20, 22, 31 (Kegan Paul Int'l 1991) (1953).

20. English and Setswana (the Tswana language) remain the only official or national languages in the country despite the government's stated intention in 1997 to change existing policy. 124 PARL. DEB. (pt. 8) (Aug. 8, 1997) 157-93 (Bots.). The question was "put and agreed to" on August 11. *Id.* at 193 (emphasis in original).

21. Will Kymlicka, *Ethnicity in the USA*, in *THE ETHNICITY READER* 229, 231 (Montserrat Guibernau & John Rex eds., 1997); see also WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 2-3 (1996).

22. Kymlicka, *supra* note 21, at 231.

23. The 1982 Citizenship Act, before its amendment, was a case in point and aptly illustrates how the majority's culture can be imposed on all. Not only did its prohibition on women married to expatriates passing on their citizenship to their children violate the universalistic basis of national Botswana citizenship, Human Rights Watch/Africa, *Botswana: Second Class Citizens: Discrimination Against Women Under Botswana's Citizenship Act*, Hum. Rts. Watch Women's Rts. Project, Sept. 1994, at 9-12, <http://www.hrw.org/sites/default/files/reports/BOTSWANA0994.pdf>, but it reflected the patrilineal basis of Batswana 'tribal' culture. Not all groups in Botswana share patrilineal ideology; for example many Bushmen, Yei, and Herero groups have other principles of

Consequently, in Botswana "the ability of 'minorities' to enjoy the full benefits of citizenship may be compromised."²⁴

Minority status is manifested in a range of widely varying exclusionary and discriminatory processes and practices. Some of the more subjugated minorities, such as the Bushmen (Sarwa or San),²⁵ experience stark material deprivation.²⁶ In their case, ethnic status is largely homologous to class status.²⁷ While the Bushmen, the only non-Bantu-speaking minority, have experienced some internal differentiation,²⁸ few, if any, have found their way into the national bourgeoisie. This is not the case for other former subject (current minority) peoples.²⁹ The fact that many members of other minorities

descent. See, e.g., ALAN BARNARD, *HUNTERS AND HERDERS OF SOUTHERN AFRICA: A COMPARATIVE ETHNOGRAPHY OF THE KHOISAN PEOPLES* (1992) (discussing various Bushmen descent systems). In 1993, the Citizenship Act was changed as a result of lawfare.

24. Solway, *Navigating*, *supra* note 8, at 720.

25. Most Bushmen refer to themselves by a term unique to their own language, and there are a great many languages spoken in southern Africa. Apart from these individual group names, there are no terms in Bushmen languages that encompass all the various groups. All the terms commonly deployed such as Bushmen, San, and Basarwa (in Botswana only) more or less mean the same thing and are derogatory and externally ascribed. However, recent politicization appears to have changed this. While still nascent and not necessarily an irreversible or universal trend, a more inclusive sense of identity appears to be emerging in Bushmen culture. See Jacqueline Solway, *Human Rights and NGO 'Wrongs': Conflict Diamonds, Culture Wars and the 'Bushman Question'*, 79 AFR.: J. INT'L AFR. INST. 321, 321 n.1 (2009) [hereinafter Solway, *Conflict Diamonds*]. This phenomenon is also happening in similar cultures around the world. Cf., e.g., RICHARD SALISBURY, *A HOMELAND FOR THE CREE* 7 (1986) ("The Cree insist that the biggest change since 1971 is a stronger feeling of identity as Cree, for in 1971 they rarely used the word, and thought of themselves as members of individual bands."). This is reflected in the fact that some Bushmen are beginning to embrace and thus to destigmatize both the appellations of Bushmen and San. Personal communication with Megan Biesele at numerous anthropology conferences over the preceding two decades and based on my own observation and fieldwork with Bushmen in Botswana in the last two decades.

26. See generally James Suzman, Legal Assistance Center (LAC), *AN INTRODUCTION TO THE REGIONAL ASSESSMENT OF THE STATUS OF THE SAN IN SOUTHERN AFRICA* (2001), available at <http://www.lac.org.na/projects/lead/Pdf/sanintro.pdf>.

27. Edwin N. Wilmsen & Rainer Vossen, *Labour, Language and Power in the Construction of Ethnicity in Botswana*, 10 CRITIQUE ANTHROPOLOGY 7, 7 (1990).

28. E. WILMSEN, *LAND FILLED WITH FLIES* 52-61 (1989) (discussing the existence of "class" relations among rural, tribal societies).

29. For example, there are members of Parliament from several of the groups that, according to Schapera's classification, were "serfs" in the past (e.g., Kgalagadi, Yei, Tswapong). I. SCHAPERA, *THE TSWANA* 37 (1953). However, there are no Bushmen MPs. As mentioned earlier, the home areas of many former "serf" peoples remain "remote" and poverty stricken. See Solway & Nyati-Ramahobo, *supra* note 8, at 608. "Remote," it should be noted here, denotes geographical as well as social and moral distance from Tswana centers.

have achieved middle class and professional status is a testimony to the success of Botswana's process of bureaucratic rationalization. This process has promoted universal education, appointment to office based on merit (within limits), and has enabled direct access to government services, thereby dismantling patron-client relations, especially interethnic ones.³⁰ Such minority elites provide essential leadership in minority activism, and they also stand as exemplars that can provide empirical proof to their rural compatriots that, despite what they had been led to believe by their former Tswana overlords, they and their groups are as talented and deserving as any other. Therefore, and paradoxically, the fruits of liberal success based on individual rights and recognition provide a subjective basis for rethinking group rights and recognition.

Liberalism's success in Botswana can also be measured by the mutual understanding between the Bantu-speaking minority groups and Botswana's dominant society and state. Such "success" is also a consequence of Tswana hegemony and forced assimilation. For instance, the Yei people, despite a diverse background, were able to "read" the dominant culture and law and conduct themselves in a manner commensurate with the dominant culture.³¹ Mutual legibility facilitated the efficacy of their organization and legal case, which will be discussed below. Liberalism's limits are apparent in the Bushmen's largely unsuccessful capacity to do the same, thus leaving the space of contestation with the state open for others to take the lead in working on the Bushmen's behalf.

I. LAWFARE AND MINORITY RIGHTS

Lawfare is not new in Botswana. The Tswana have long been a litigious people who have repeatedly brought cases to the chief's court.³² Citizens are familiar with customary law,³³ and appeals to external judicial authorities have deep roots, although the scale, scope, and frequency have expanded geometrically in recent decades.³⁴ Yet, the degree to which appeal has included distant and often unknown

30. Cf., e.g., Patrick Heller, *Degrees of Democracy: Some Comparative Lessons from India*, 52 *WORLD POL.* 484, 489, 493-502 (2000).

31. See, e.g., Solway, *Eye of the Storm*, *supra* note 8, at 491-92.

32. See generally I. SCHAPER, *A HANDBOOK OF TSWANA LAW AND CUSTOM* 279-300 (Neville Rubin & Eugene Cotran eds., 2d ed., new impression 1970) (describing the customary court system and procedures of the Tswana).

33. Preferably called "African jurisprudence." John Comaroff, Remarks at the Indiana University Maurer School of Law Symposium: Human Rights, Legal Systems and Customary Cultures Across the Global South (Apr. 9, 2010).

34. See generally Solway & Nyati-Ramahobo, *supra* note 8.

external authorities and actors in the legal process is now unprecedented.³⁵

Lawfare has proven central to the minority rights movements in Botswana for both Bushmen and the Bantu-speaking minorities, although in different forms and with different results. These two contrasting sets of cases illustrate the impact, efficacy, and limits of lawfare. In every instance, lawfare has entailed an ever-increasing involvement with international actors, including various United Nations’ bodies, covenants, and treaties, as well as NGOs. Lawfare has also at times traversed the lines between legal traditions.

I will begin by considering Bantu-speaking minority activism and turn later to a Bushman example. Bantu-speaking groups’ minority activism is especially fascinating because the movements are entirely grassroots in origin and do not entail external intervention or direction. Eventually, many Bantu-speaking groups sought collaboration with U.N. bodies, NGOs, and the state, but all initiative, original funds, and leadership emanated from local peoples recognizing and seeking solutions for self-identified problems.

II. POST-COLONIAL MINORITY RIGHTS, LAWFARE, AND “CULTURE”

Post-colonial minority discontent began in earnest in the late 1980s. For example, in the western Kweneng district, the Bakgalagadi’s minority discontent first manifested itself through support of the

35. A fascinating case arose in the colonial period that entailed minority rights and conflicting legal systems. The chief of the largest and most powerful Tswana chiefdom, the Ngwato, ceded a portion of his land to the British that eventually became part of the British South Africa Company. A subject people, the Birwa, resided on the land and were allowed to remain subject to paying rent to the company. Eventually the British wanted them out and in 1920 the Ngwato chief, Khama III, ordered a forced removal that was degrading and violent. The Birwa, under chief Malema, claimed that as taxpayers on British land, the chief had no jurisdiction over them. “Pared down to its central issue, the case concerned two conflicting principles of rights to land. Did people gain access to land by paying allegiance to a ruler or by paying taxes and rent to a landlord?” DIANE WYLIE, *A LITTLE GOD: THE TWILIGHT OF PATRIARCHY IN SOUTHERN AFRICAN CHIEFDOM* 149-55 (1990). The issue thus pits two legal systems against each other. Neither the chief nor the British, whose colonial system of indirect rule through chiefs would be undermined, would countenance such a claim. Malema’s Birwa responded by hiring a South African lawyer and attempting to launch a case. The British refused to hear the case and belittled both the Birwa and the lawyer. While the Birwa lost their plea, the lawyer published reports recounting the story of the Birwa’s mistreatment at the hand of the Ngwato and the British. *Id.* This is an early instance of the strategic use of the politics of shame in the region and the first instance in the region of one African chief hiring a lawyer to plead its case against another. Incidentally, the lawyer was Emanuel Gluckman, father of anthropologist Max Gluckman. Richard Brown, *Passages in Life of a White Anthropologist: Max Gluckman in Northern Rhodesia*, 20 *J. AFR. HIST.* 525, 528 (1979).

opposition party in the mid-1980s.³⁶ The timing is significant because it coincides with the period when Botswana experienced exponential economic growth and when many minority individuals found valuable positions in Botswana's expanding, largely urban, bourgeoisie.

Elsewhere, minority groups began to assert their rights earlier, and these groups were later more concerted in their actions. The Yei, a group originally from the Okavango delta in northwest Botswana, an area that now includes some of the most important tourism destinations in Botswana, are one such group. The delta is dominated by the Tawana, a Tswana group that represents a small numerical minority of the district but under whose chiefly authority all residents fall.

In the past, and to a lesser extent today, the Yei were called "Koba" by their neighbors, a derogatory term that reflected the Yei's servile status, legacy of tribute payment, and appropriation of their property.³⁷ The Yei, who comprise a substantial numeric majority in their district, have a rich history of minority activism and separatism. In 1948, a group of educated Yei elite demanded, via a petition to the colonial government, concessions from the Tawana, including rights to land, to have their own chiefs (which, in effect, would separate them from the Tawana reserve), to have their own customary courts (dikgotla), and to not have their property inherited after their death by the Tawana.³⁸ They achieved the creation of their own dikgotla only.³⁹

The Yei separatists' demands quieted, but their desires did not disappear in the years after 1948 or through the first two decades of independence. They were revived again in the mid-1980s. While living in the capital and establishing a career at the University of Botswana, Lydia Nyati-Ramahobo (now Saleshando, a Yei, and currently Deputy Vice Chancellor of the University of Botswana) spoke with a Yei elder who had been involved in the 1948 petition.⁴⁰ As he explained the

36. See Jacqueline Solway, *From Shame to Pride: Politicized Ethnicity in the Kalahari, Botswana*, 28 CAN. J. AFR. STUD. 254, 263-66 (1994). This is also based on my own extensive anthropological research first carried out from 1977 through mid-1979 and periodically since, most recently in 2010.

37. See Lydia Nyati-Ramahobo, *From a Phone Call to the High Court: Wayeyi Visibility and the Kamanakao Association's Campaign for Linguistic and Cultural Rights in Botswana*, 28 J. S. AFR. STUD. 685, 688, 694 (2002).

38. A. Murray, *The Northwest*, in THE BIRTH OF BOTSWANA 114-16 (F. Morton & J. Ramsay eds., 1987).

39. *Id.* at 115.

40. Unless otherwise indicated, much of the remaining content in this section comes from personal communications from 1998 through 2010 with Saleshando (formerly Lydia Nyati-Ramahobo), one of the founders of Kamanakao and the current Deputy Vice Chancellor of the University of Botswana, also a Professor of Education and holder of a PhD in Applied Linguistics. In addition to close association with Saleshando, I have attended Reteng, the coalition of minority groups, and other minority group meetings for

history to her, Saleshando reflected and came to realize that, despite two decades of independence, much remained the same.

This constituted an epiphanal experience in which her group's invisibility and past and present injustices were thrown into relief. The Yei remained subordinate and their language was disappearing as a result of Tswana hegemony and the policy of assimilation. However, as Saleshando recognized, assimilation was not a neutral or necessarily a "natural" process, but rather a political one resulting from unequal power relations. Shortly after, Saleshando began advocating for Yei recognition. She was instrumental in forming the maverick group, Kamanakao, which has led the struggle for minority rights in Botswana. Kamanakao, which means "remnants" in the Yei language, aims to restore, revive, preserve, and record the remnants of Yei culture and language. The organization drafted a constitution and registered with the government in 1995.⁴¹ Saleshando has always claimed that Kamanakao is a cultural organization whose mandate is to promote Yei culture. However, she acknowledges that to achieve this end, it is necessary to fight on political and economic grounds first.

While translating the Bible into Yei, collecting folktales, holding meetings, and organizing events in the Okavango, the Yei decided it was time to install their own paramount chief. This action would reinforce their integrity as a group, further valorize their culture, and allow them benefits that other recognized tribes enjoyed, such as mother tongue education at the primary level and the right to develop the land on which they lived. In addition, having their own paramount chief, under whose authority other Yei chiefs and headmen would fall, would enable them to present customary cases in their own language and to obtain judgments that would be sensitive to their culture. For instance, the Yei are historically matrilineal while the Tswana are patrilineal; thus, inheritance cases should reflect this custom. In addition, land ownership is critical, as the area is rich in tourist and agricultural potential that is either being squandered or left to others to exploit, especially the Tawana. According to Saleshando, economic development follows cultural recognition.⁴²

In April 1999, after extensive consultation among themselves, the Yei installed their Paramount Chief in an elaborate ceremony. When they informed the government that they wished to have their Chief

ten years, have become acquainted with many members, and have learned a great deal from them.

41. *About Us*, KAMANAKAO ASS'N, <http://kamanakao.com/> (last visited Nov. 14, 2010).

42. Cf. Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age*, 121 *NEW LEFT REV.* 68, 73 (1995) ("Redistributive remedies generally presuppose an underlying conception of [cultural] recognition.").

admitted to the House of Chiefs, they were rebuffed on the basis that they were not one of the eight tribes listed in the Constitution. They were told to submit their concerns to the Tswana chief as technically they fell under his jurisdiction. This was especially irksome, considering one of the more important reasons for installing a chief was to dismantle Tswana rule over the Yei.

Since the Yei did not recognize the Tswana chief as theirs, the Yei hired a lawyer to bring a case against the government.⁴³ Even though Kamanakao, the newly installed chief, and a Yei elder were the applicants, the case was, in essence, brought forward on behalf of all minority groups in the country. The group's main argument centered on Sections 3 and 15 of the Constitution, which proscribed discrimination on many grounds, including ethnicity.⁴⁴ Therefore, the complaint argued that Sections 77, 78, and 79 of the Constitution, which listed the eight Tswana tribes able to have permanent seats in the House of Chiefs, as well as certain statutes and acts, such as the Chieftaincy Act⁴⁵ and the Tribal Territories Act,⁴⁶ were discriminatory and thus unconstitutional. Frightened by the magnitude of the case and its wide-ranging implications, including the challenge to broader Tswana hegemony, the government repeatedly postponed hearing the case.

In 2000, Saleshando, frustrated and not knowing where else to turn, wrote a letter on behalf of the group to Kofi Annan, then Secretary General of the United Nations. Her letter began, "Dear Father Annan." Saleshando then proceeded to outline the Yei's case and provide historical context. This was the beginning of her and Kamanakao's engagement with a vast array of U.N. bodies, conventions, and declarations, and international human rights NGOs. Annan's office referred the letter to Botswana's ambassador to the United Nations. The office also referred Kamanakao to the Committee on the Elimination of all Forms of Racial Discrimination (CERD), to which Botswana is a signatory. Kamanakao was invited to Geneva to submit a shadow report, the results of which prompted the United Nations to cite human rights violations on the part of Botswana.

43. *Kamanakao v. Attorney-Gen.*, 2002 Afr. Hum. Rts. L. Reps. 35 (2001) (High Ct.) (Bots.), available at <http://www.chr.up.ac.za/test/index.php/browse-by-country/botswana/216-botswana-kamanakao-and-others-v-attorney-general-and-another-2002-ahrlr-35-bwhc-2001.html>.

44. *Id.* ¶ 8.1(a).

45. Chieftainship Act, 1987, c. 41:01 (Bots.). The challenged statute is available at <http://www.gov.bw/Global/MLG/Acts/Chieftainship.pdf>.

46. Tribal Territories Act, 1970, c. 32:03 (Bots.). Since the challenge, the statute has been amended. The most recent version is available at <http://www.laws.gov.bw/VOLUME%205/CHAPTER%2032-03%20TRIBAL%20TERRITORIES.pdf>.

This was one of the first of many instances in which the politics of shame⁴⁷ was deployed against Botswana, whose leaders cherished their hitherto stellar human rights record. When Saleshando showed the letter to Annan to me, she giggled at her former naïveté. Since then, Reteng, the Coalition of Minority Groups that formed in the wake of Kamanakao's actions, has submitted numerous shadow reports to various U.N. bodies. Further, Saleshando has attended workshops run by the Minority Rights Group in Geneva, and she claims to know every loophole in the system through which minority groups can hold the government accountable.

Many months later the case was still being delayed, and the President announced the formation of the Balopi Commission. The mandate of the Commission was to seek the nation's opinion regarding whether the sections of the Constitution naming the tribes that could participate in the House of Chiefs were discriminatory, along with an opinion on the efficacy and organization of the House of Chiefs.⁴⁸ The Balopi Commission toured the country and minority voices overwhelmingly revealed sentiments of oppression, while most of the Tswana supported the status quo and, more quietly, revealed resentment over their threatened status.⁴⁹ In 2001, after U.N. involvement, the Botswana High Court finally heard the Kamanakao case and ruled that the Constitution is self-protected and cannot be deemed to be internally contradictory.⁵⁰ However, the court did determine that the Chieftaincy Act was discriminatory and advised that the Constitution should be rendered tribally neutral with no individual

47. RONALD NIEZEN, *THE ORIGINS OF INDIGENISM* 179 (2003) (defining the politics of shame as "the effort to influence a decision or policy through dissemination of information to an audience that is a source of political power, information that exposes the inappropriateness, harm, or illegality of a course of action").

48. *Report of the Presidential Comm'n of Inquiry into Sections 77, 78, and 79 of the Constitution*, at 9 (2000) (Bots.).

49. The Balopi Commission coincided with the inauguration of BTV in 2000, Botswana's first and only television network. It aired the proceedings of the Balopi Commission. This, along with print media and radio coverage, resulted in the Balopi Commission saturating the public sphere. The degree of discussion and debate that occurred in all sectors of society was virtually unprecedented, such that consciousness of the minority issue was extremely intense. Many tell me that had the Balopi Commission occurred many years later, it might not have received the same media attention. BTV was brand new and experimental, with rules and practices not fully formulated. It is a state-owned entity and state media have been less sympathetic to minority issues and, generally, offered less coverage than the private media.

50. *Kamanakao*, 2002 Afr. Hum. Rts. L. Reps. at ¶ 28 (2001) (High Ct.) (Bots.). Botswana's constitution has a provision within it that one part cannot be judged or taken to violate another part.

groups mentioned.⁵¹ In late 2001, the President issued a draft White Paper on the issue in which he proposed a greatly expanded and inclusive House of Chiefs, to be renamed Ntlo ya Kgosi (Tswana for House of Chiefs), where all chiefs would be elected every five years. Within days, after hostile reaction from the Tswana, the White Paper was changed. The new name and expanded numbers remained, but the superior status of the eight Tswana tribes was restored. These eight tribes' chiefs retained paramount and permanent status, while all others were to be elected every five years.

While the overall result was seen as an unprecedented victory for minorities, the sweetness of success was muted by a final outcome that retained the existing power relations. However, it was not an empty victory; the House of Chiefs was renamed and became more inclusive with new members from minority groups as a consequence of changes to the Chieftaincy Act.⁵² More importantly, the result gave minorities a new confidence and led to a greater appreciation and recognition of ethnic diversity. But limits remain, and these will be discussed below.

Ironically, the Yei deployed civil law to attain access to their right to enjoy customary law. However, the stakes, as they knew well, were much greater than their right to either customary law or the ability to have their own chief. While the government gave lip service to tribal equality in the past, this was the first time the government acted to alter the law and the institutionalization of at least certain aspects of tribal inequality. Without Kamanakao's lawfare and appeal to the United Nations, it is unlikely that the government would have acted. The meta-goal of Kamanakao and Reteng was equal recognition for the languages and culture of all groups, and the High Court's decision was a strong first step in that direction.

III. THE BUSHMEN AND THE CENTRAL KALAHARI GAME RESERVE CASE

The Central Kalahari Game Reserve (CKGR) case illustrates another example of lawfare and also demonstrates lawfare's limits.⁵³ The High Court's 2006 judgment, to be discussed below, is clear, but its interpretation and implementation remain highly contested, and the success of its long-term outcomes are more uncertain than the

51. *Id.* ¶ 42, 52.

52. *See supra* note 12.

53. *See generally* Solway, *Conflict Diamonds*, *supra* note 25 (discussing the events leading up to the CKGR case and the case's positive and negative outcomes). The CKGR case was the longest running and most expensive case in Botswana's history. *Id.* at 321.

Kamanakao case. Many have written at length about this case, so only a short background is necessary.⁵⁴

The CKGR case was filed by some Bushmen living on the reserve, seeking to avoid relocation or the possibility of return to the CKGR for some already relocated at the hands of the government. While the CKGR case certainly has implications for all of Botswana’s Bushmen, it was launched by and on behalf of a very small number of them. Bushmen are scattered across Botswana, but a majority reside in the central and western parts of the country. As of 2006, there were approximately 50,000 Bushmen in Botswana, including 2,000 from the CKGR,⁵⁵ in a country with a total population of 2,029,307.⁵⁶ Such figures must be taken with caution,⁵⁷ but they do provide some sense of proportion. This is important to note because the inordinate media attention given to the case, much of it influenced or sponsored by Survival International (SI), a British-based NGO,⁵⁸ gives the impression that the case involved all Bushmen in Botswana.

The CKGR is over 52,000 square kilometers in size and was founded in the late colonial period, in 1961. It was established both as a game reserve and for the hunting and gathering populations residing within its boundaries.⁵⁹ These populations mostly consisted of Bushmen, but

54. See, e.g., Robert K. Hitchcock & Diana Vinding, *A Chronology of Major Events Relating to the Central Kalahari Game Reserve II: An Update*, 33 BOTS. NOTES & RECORDS 61 (2001); Sidsel Saugestad, *San Development and Challenges in Development Cooperation*, in UPDATING THE SAN: IMAGE AND REALITY OF AN AFRICAN PEOPLE IN THE 21ST CENTURY 171, 174-80 (Robert K. Hitchcock et al. eds., Nat’l Museum of Ethnology (Osaka, Japan), Senri Ethnological Studies Ser. No. 70, 2006); Solway, *Conflict Diamonds*, *supra* note 25 (discussing the role of NGO Survival International in the CKGR case); James Suzman, *Kalahari Conundrums: Relocation, Resistance and International Support in the Central Kalahari Botswana*, BEFORE FARMING, no. 2002/3_4, http://www.waspjournals.com/journals/beforefarming/journal_20023_4/news/survival.pdf; Julie J. Taylor, *Celebrating San Victory Too Soon?: Reflections on the Outcome of the Central Kalahari Game Reserve Case*, 23 ANTHROPOLOGY TODAY, Oct. 2007, at 3; Robert Hitchcock & Megan Biesele, *Seeking Social Justice: The Politics of Land and Resource Rights in the Central Kalahari, Botswana* (2006) (paper prepared for the American Anthropological Meetings) (on file with author).

55. Robert K. Hitchcock, Int’l Work Grp. for Indigenous Affairs, *Botswana*, in THE INDIGENOUS WORLD 2007 539, 539-40 (Sille Stidsen et al. eds., 2007).

56. *Botswana*, CIA - THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html> (click “People”) (last updated Nov.16, 2010).

57. It is difficult to obtain these figures as the Census does not ask for ethnic origin. Furthermore, not all Bushmen would self-identify as such; some might mention their own linguistic group, or because of the stigma of the identity, call themselves something else. Moreover, ethnicity is situational and many people have multiple identities that can be evoked depending on the circumstance.

58. See Solway, *Conflict Diamonds*, *supra* note 25, at 322-24.

59. *Id.* at 326.

also included some Kgalagadi. Kgalagadi numbers increased over time, especially as the Botswana government increased services inside the reserve and enclosed grazing land outside the reserve, a move that favored the nation's elite at the expense of the poorer Bushmen and Kgalagadi on the reserve's borders.⁶⁰

After a number of concerns were raised in the early 1980s regarding the conditions in the reserve, the government commissioned a report in 1985 that concluded the Bushmen's and Kgalagadi's lifestyle in the reserve had become incompatible with the reserve's status as a game reserve.⁶¹ The report recommended relocating the Bushmen and Kgalagadi to villages outside the reserve.⁶² By this time, very few CKGR Bushmen were living as full-time hunter-gatherers; most had a mixed livelihood strategy of hunting (often on horseback and with guns), gathering, and small-scale agro-pastoralism, including the keeping of domestic animals.⁶³ The Bushmen were also highly dependent on government services and transfers. Yet, many of these government services were deemed too expensive and difficult to provide in the reserve given the poor infrastructure and scattered population. Despite the resources formerly available in the CKGR and still available to Bushmen in many other parts of the country, it is indisputable that the Bushmen were, and remain, the most impoverished, disempowered, inarticulate, and unorganized group in Botswana.

This history of oppression long predates the founding of Botswana and the imposition of colonial rule, and the legacy of such oppression is difficult to undo. One consequence has been a conspicuous absence of grassroots organizations and activism, unlike the minority groups that formed Reteng. Thus, other groups and individuals have taken to representing the Bushmen. Those people not only speak in the

60. See also Michael Taylor, *Int'l Land Coal., CBNRM and Pastoral Development in Botswana: Implications for San Land Rights* 6, 15-16 (Dec. 1, 2006) (paper prepared for the Workshop on Environment, Identity and Community Based Natural Resource Management: Experiences of the San in Southern Africa at Oxford University), available at http://www.landcoalition.org/pdf/ev06_oxford-lec.pdf (explaining how land tenure reforms over the last century have favored the nation's elite and placed marginalized groups on smaller tracts of land).

61. See Solway, *Conflict Diamonds*, *supra* note 25, at 327.

62. *Id.*

63. KUELA KIEMA, *TEARS FOR MY LAND: A SOCIAL HISTORY OF THE KUA OF THE CENTRAL KALAHARI GAME RESERVE*, TC'AMNQOO 81 (2010) (claiming that Bushmen, Kua in his language, in the CKGR practiced agriculture, pastoralism and hunted on horseback with guns long before the 1980s and that his own father owned a rifle prior to 1961 when the CKGR was established). Kiema, a native of the CKGR, argues that colonial planners researched the western CKGR Bushmen while ignoring the larger population in the rest of the reserve, who unlike the small western portion, had relied on a mixed livelihood strategy before 1961. *Id.*

Bushmen’s place but often speak for as opposed to with them.⁶⁴ Gordon notes that the Bushmen’s lack of voice, especially in the past, is “perhaps the most damning evidence of their powerlessness.”⁶⁵ Their powerlessness opens up spaces for others to take the lead. In this case, the government set its agenda for Bushmen improvement and a whole series of NGOs, mostly from outside of the country, set up agendas as well. The dearth of grassroots organizations distinguishes the Bushmen case from the Kamanakao case and contributes to its differing outcomes.

The CKGR relocations began in 1997, but what is often silenced by the international media coverage and international NGO rhetoric around this case is that the relocation of the CKGR Bushmen, by that time, was part of what had become a nationwide strategy of Bushmen development. In central and western Botswana, dozens of new villages were established and outfitted with considerable infrastructure for Bushmen living in the region. The Bushmen were offered generous packages, including livestock, agricultural implements, money, and

64. See, e.g., SIDSEL SAUGESTAD, *THE INCONVENIENT INDIGENOUS: REMOTE AREA DEVELOPMENT IN BOTSWANA, DONOR ASSISTANCE, AND THE FIRST PEOPLE OF THE KALAHARI* 107 (2001); Dorothy L. Hodgson, *Precarious Alliances: The Cultural Politics and Structural Predicaments of the Indigenous Rights Movement in Tanzania*, 104 *AM. ANTHROPOLOGIST* 1086, 1094 (2002) (discussing how the decisions by INGOs to link local causes to the global indigenous movement creates the risk of assuming that peoples labeled as “indigenous” share common interests and a common identity, which can lead to volatile and splintering debates). Certainly Bushman leaders have emerged, but the difference between Reteng and its constituent groups, all of which are grassroots initiatives founded by local people with no or very little external support, and the Bushman groups that have such substantial NGO and donor involvement, is striking. In the 1990s John Hardbattle proved an effective leader for the First Peoples of the Kalahari (FPK). Unfortunately, his premature death in 1996 ended his career. Roy Sesana, his FPK colleague, remains active but his leadership qualities are questionable. For excellent discussions of Bushman activism, compare SAUGESTAD, *supra* (discussing how Bushmen become a “muted group” because they are perceived as not being willing to participate in development programs and present their own case); Megan Biesele, *The Kalahari Peoples Fund: The Activist Legacy of the Harvard Kalahari Research Group*, in *THE POLITICS OF EGALITARIANISM: THEORY AND PRACTICE* 131, 138-39 (Jacqueline Solway ed., 2006) (highlighting the Ju/hoansi’s efforts to obtain land rights, political representation, and resources); Mathias Guenther, *Contemporary Bushman Art, Identity Politics, and Primitive Discourse*, in *THE POLITICS OF EGALITARIANISM: THEORY AND PRACTICE*, *supra*, at 159 (arguing that the San people became more politically engaged when their art made a more prominent appearance in the 1990s); Robert Hitchcock, *Land, Livestock, and Leadership Among the Ju/hoansi San of North-Western Botswana*, in *THE POLITICS OF EGALITARIANISM: THEORY AND PRACTICE*, *supra*, at 149 (examining the ethnographic and political positions of the Ju/hoansi San of Botswana, focusing mainly on how they have been active in regaining land and resource rights).

65. ROBERT J. GORDON, *THE BUSHMAN MYTH* 8 (1992).

other perks to relocate to the new villages where they were provided with homesteads and much more.⁶⁶

I observed this process on a field trip in 1998, in an area close to the CKGR where I have conducted extensive research. At that time the local Bushmen were considering the invitation to relocate. I have since visited several of the new settlements. These new settlements, like everywhere, are not without problems, but they are not without benefits either. Many of the Bushmen with whom I spoke are proud of their new resources and relieved to no longer be in degrading patron-client relations. To overgeneralize, they also have a new sense of pride. I heard more of their own languages spoken than on past visits to the region. Unfortunately, it could now be argued that the Bushmen are clients of the state, subject to paternalism and discrimination, and it would be difficult to counter this.

In contrast, the CKGR relocations were very poorly handled from the beginning. The Bushmen were given conflicting reasons for the move; one minister told them it was because of diamond finds, another said it was for game conservation and tourism development, and yet another claimed it was to provide them with the opportunity to develop and enjoy the fruits of modernity. The lack of a consistent message and lack of respect shown to the CKGR residents reflects the government's condescension toward them.

There are at least two key differences between the CKGR Bushmen relocations and other Bushmen relocations. First, the other relocations were voluntary, such as the one in the region where I worked, and indeed, not all Bushmen chose to move. On the contrary, the CKGR Bushmen were forced to leave in three waves, each wave more coercive than the previous.⁶⁷ Second, the CKGR Bushmen had been in scattered settlements and had little experience living with their new neighbors, unlike the Bushmen in most of the new villages.

As pressure on the CKGR residents to relocate increased in the late 1990s, the CKGR residents worked with a local NGO negotiating team as well as the Ministry of Environment, Wildlife, and National Parks to produce a management plan that would allow the CKGR to be divided for mixed use into three zones: one for the residents, one for tourism, and a third for potential mining. However, negotiations with the government stopped abruptly in 2002, and the government hardened their position on the relocations.⁶⁸ At that time, the CKGR Bushmen,

66. See Solway, *Conflict Diamonds*, *supra* note 25, at 329.

67. See Hitchcock & Vinding, *supra* note 54, at 63, 68 (describing relocations occurring in May-June 1997 and Winter 2001-2002).

68. See Solway, *Conflict Diamonds*, *supra* note 25, at 328. I refer to the government and the state here as if there were unanimity in opinion. That was and is not the case. For

largely represented by the FPK, and with the support of a local NGO, Ditshwanelo, The Botswana Centre for Human Rights, launched a lawsuit against the government on the removals, but the suit was poorly planned and dismissed on technical grounds.⁶⁹ By this point, the government was in a media battle with SI due to a high profile and relatively effective media campaign that implicated Botswana in the trade of blood diamonds.⁷⁰ In addition, as the local negotiating team's efforts were overtaken by outside NGOs, appeals to supranational law also changed. For instance, the outside NGOs expected Botswana to be accountable to international conventions to which it had not been a signatory, such as the International Labour Organisation's Convention 169 on the Rights of Indigenous Peoples and the U.N. Draft Declaration of the Rights of Indigenous Peoples.⁷¹ International law, unless domesticated into local law, remains persuasive but nonbinding. However, as evidenced by the Kamanakao case, Botswana is attentive to its international obligations. As will be seen below, this perceived attack on Botswana's image, which was largely fostered by outsiders peddling untruths, the rogue use of international law, and the challenges to Botswana's sovereignty contributed to the ambiguities in the outcome of this case.

The CKGR Bushmen and FPK returned to court in 2004. This time, SI and its collaborators ran and funded the case, and provided the services of a British lawyer who defended the case. The case was decided in December 2006.⁷² The judgment by the High Court stated that although the Bushmen had been inadequately consulted, they had been adequately compensated according to the rules specified in Section 8 of the Constitution, which sets out procedures for moving people if deemed for the public good.⁷³ Like the judgment in the Kamanakao case, this judgment affirmed aspects of Botswana's democracy by highlighting the independence of the judicial branch from the executive. However,

instance, the Ministry of Environment, Wildlife, and National Parks' 2002 plan was overridden by the Ministry of Local Government. Other high level civil servants and members of the executive branch also had differing opinions, but in this paper I highlight the voices that prevailed and do not have space to discuss all the discussions along the way that may have affected outcomes and may still do so.

69. See Hitchcock & Vinding, *supra* note 54, at 69-71. Sidsel Saugestad, 'Improving Their Lives.' *State Policies and San Resistance in Botswana*, BEFORE FARMING, no. 2005/4, at 1, 1-10, n.3 (2005).

70. See Suzman, *supra* note 54, at 4-7.

71. *Id.* at 6.

72. *Sesana v. Attorney-Gen.*, 2006 Afr. Hum. Rts. L. Reps. 183 (2006) (High Ct.) (Bots.), available at <http://www.survivalinternational.org/files/news/ruling.doc>.

73. Solway, *Conflict Diamonds*, *supra* note 25, at 321 n.2 (analyzing the constitutionality of *Sesana*, 2006 Afr. Hum. Rts. L. Reps. at ¶ 55).

the CKGR case also points to the limitations of lawfare by illustrating how the implementation of a judgment by an unsympathetic executive, in this case the Attorney General, can shape the eventual outcome. The state interpreted the judgment in the most stringent manner, allowing only the 189 remaining applicants and their minor children to return unimpeded to the reserve and provided them with no services, including water, except that which could be brought in.⁷⁴ The State's stance stemmed from the ruling that the Bushmen had been adequately compensated.⁷⁵

To a significant extent, SI and its collaborators planted the seeds for the CKGR judgment and the Attorney General's implementation statement. SI portrayed the CKGR Bushmen repeatedly as "among the last Bushmen anywhere to be living self-sufficiently by hunting and gathering on their own ancestral land."⁷⁶ This is reiterated in the SI's 2007 shadow report to the United Nations Human Rights Committee.⁷⁷ Utilizing this portrayal, SI drew upon an image of the noble savage that tapped into a deep Euro-romanticism. This helped SI raise funds but did not constitute an accurate portrayal of reality. In the end, SI and the FPK got just what was implicit in their propaganda—the CKGR Bushmen's right to return to the reserve and to hunt and gather as "they have always done."⁷⁸ Of course, the CKGR Bushmen had not lived as autonomous hunter-gatherers for decades, and within days of the judgment, they were arguing for a restoration of services either by the government, which refused, or to be funded by very willing donors.⁷⁹

In a way, the case was a triumph for the Bushmen, Botswana, and indigenous rights due to the attention that was paid to the Bushmen's

74. See Statement, Athalia Molokomme, Att'y Gen. of Bots., Outcome of the Case of Roy Sesana and Others Vs. the Attorney General, 2 (Dec. 14, 2006) [hereinafter Molokomme].

75. *Sesana*, 2006 Afr. Hum. Rts. L. Reps. at ¶ 53.

76. E.g., *Democracy Now: The War and Peace Report, Diamond Giant De Beers Opens First U.S. Store Amid Protests Over Eviction of Bushman in Botswana* (radio program broadcast June 23, 2005), available at http://www.democracynow.org/2005/6/23/diamond_giant_de_beers_opens_first.

77. Report from Survival International to the U.N. Human Rights Committee, 1 (May 25, 2007) ("The Gana, Gwi and Tsila are part of the group of tribes known as 'Bushman' who are among the earliest inhabitants of southern Africa. They are probably the last Bushmen living self-sufficiently."), available at http://www.2ohchr.org/english/bodies/hrc/docs/ngos/survival_int.pdf [hereinafter HRC Report].

78. Solway, *Conflict Diamonds*, *supra* note 25, at 322.

79. See HRC Report, *supra* note 77, at 2; see also Molokomme, *supra* note 74, at 2. The only part of the judgment where the government can be specifically faulted for not abiding is the directive to issue special game licenses that would allow the Bushmen to hunt by "traditional" means. See HRC Report, *supra* note 77, at 2; see also Molokomme, *supra* note 74, at 3.

plight and because the Bushmen won most of the lawsuit. Yet, the state could have been more magnanimous in its interpretation of the judgment, but there was nothing compelling it to do so. Indeed, in 2010, with SI's support, the CKGR Bushmen launched another lawsuit, this time for permission to drill a borehole for their use in the CKGR.⁸⁰ The Court held against the Bushmen in a decision on July 21, 2010, where the judge argued that the CKGR Bushmen should have considered this in their first case.⁸¹ The plea for services seemed in the court's view to be "an afterthought."⁸² In all, what was heralded as a triumph turned out to be more hollow than it first appeared, at least in terms of its professed objectives of enabling the Bushmen to return to live in the CKGR.

IV. LAWFARE IN ACTION

According to Saleshando, the head of Kamanakao and Reteng, lawfare is the only way to go. Lawfare is a way of seeking justice and peace, not war; it is an affirmation or expectation that the state is tolerant and adheres to the rule of law. Without it, the state will not be moved to act and rights will remain unfulfilled. In Saleshando's words, if a child is angry, he or she can trash his or her mother's house. Alternatively, the child can assume that his or her mother is just and loving and that the mother will listen to the child's concerns without fear of retribution.⁸³ On this basis, Kamanakao has utilized lawfare to good effect; its campaign has been peaceful and lawful and, therefore, stands in contrast to the expression of ethnic discontent in many other parts of the world. Of course, this also speaks to the ethos of governance and accountability prevalent in Botswana. However, despite Kamanakao's considerable degree of success, the organization's ultimate goal for recognition of its groups and languages is not yet fully realized.

Nonetheless, their campaign has produced results, both with respect to direct action in terms of changes in the country's laws and institutions and, more subtly, with respect to public attitudes. For instance, in 2006, residents of a small island in the Okavango Delta were asked by the government to relocate.⁸⁴ Without turning to their urban leaders for advice, they refused the government's request and the

80. Tshireletso Motlogelwa, *Basarwa Lose Another One*, MMEGI ONLINE (July 22, 2010), <http://www.mmegi.bw/index.php?sid=1&aid=3659&dir=2010/July/Thursday22>.

81. *Id.*

82. *Id.*

83. This is based on an extensive interview in Botswana with Saleshando on March 10, 2010.

84. Personal communication with Saleshando and others, March 2010.

relocation was cancelled. Twenty years ago, they would have been cowed, quiet and accepting. Another example of the campaign's success comes from a case a few years ago in which the acting Kwena (Tswana group) chief visited a Kgalagadi (former subject people) village and took a goat as if it were the old days, when Kwena chiefs could take Kgalagadi goods as *sehuba* (tribute) without asking. The goat's owner called the police and the Kwena chief is now serving a five-year prison term for stock theft. The sentence may have been more lenient had the chief negotiated, but he refused to apologize to his *batlhanka* (servants) or to admit his guilt.⁸⁵

Several people in the country, from many walks of life, were initially outraged about the chief's actions but they are now satisfied with the judgment. They are very proud of this victory and attribute the reporting of the crime, as well as the outcome, to the recent minority activism. This case is an example of how circumstances have changed for minorities since the Balopi Commission, which was held primarily as a result of Kamanakao's first case. These examples, plus many others, including for instance, the use of minority languages in urban areas (a practice that would not have occurred fifteen years ago), attest to the increased levels of confidence and pride on the part of minorities. In addition, Tswana attitudes have also changed to a considerable extent. As one Tswana woman in the Department of Culture said, "I could marry a Kgalagadi now." Of course, not all Tswana share the same magnanimous feelings.

Since filing the initial lawsuit, Kamanakao and Reteng have become increasingly involved with various U.N. bodies and supportive NGOs. Although the initial lawsuit was submitted prior to their involvement with, and knowledge of, international bodies and covenants, their appeal to the United Nations, eventually channeled through CERD, had a significant impact on the ultimate trial results. Saleshando claims that the use of the broad U.N. scaffolding of conventions and treaties has only amplified and strengthened, but not altered, their case or their language.⁸⁶ Certainly in their external dealings, minorities have become far savvier with the United Nations and other supranational discourse since the letter sent ten years ago to "Father Annan." But, even if they are now increasingly couched in terms of, and in reference to, international protocols, their message and goals remain remarkably the

85. Isaiah Morewagae, *Kgosikwena Sebele 'Stock Theft' Judgment Today*, MMEGI (June 26, 2009), [http://www.mmegi.bw/index.php?sid=1&aid=30&dir=2010/January/Tuesday26;Keonee Kealeboga, High Court Increases Kgosikwena Sentence](http://www.mmegi.bw/index.php?sid=1&aid=30&dir=2010/January/Tuesday26;Keonee%20Kealeboga,%20High%20Court%20Increases%20Kgosikwena%20Sentence), DAILYNEWS (May 18, 2010), <http://www.dailynews.gov.bw/>.

86. Personal communication, Saleshando, Botswana, March 2010.

same.⁸⁷ Kamanakao, for instance, lodged another case with regard to the constitutional and statutory laws pertaining to chieftaincy and land, this time with the African Commission on Human Rights, to which Botswana is a signatory.⁸⁸ In 2008, prior to the case being heard, the government offered the Yei a five-year elected position in the Ntlo ya Kgosi.⁸⁹

However, and perhaps inevitably, these groups have increasingly become institutionalized and professionalized, especially Reteng.⁹⁰ Reteng maintains an office and office staff, meets regularly, applies for funds to state organs and international donors, sponsors events and festivals, creates orthographies for minority languages, translates stories and the Bible, and creates multilingual calendars, to name but a few. Further, the group maintains an active information campaign by submitting articles to local papers and reports to international and local institutions.

An important sphere in which both state and global discourses and practices have impacted Reteng, and less so Kamankao, is in the realm of “culture.” While Reteng and Kamanakao argue that their organizations are cultural, and indeed they are, culture has always been for them inseparable from power relations. The right to enjoy one’s culture is a consequence of power just as economic and political empowerment are a consequence of cultural recognition. However, liberal global discourses of essentialized culture(s), combined with state intervention to direct the expression and “experience” of culture in a neoliberal world, are now profoundly shaping the nature of minority activism, as will be more fully discussed below.

87. For instance, Saleshando’s (then Nyati-Ramahobo) 2008 briefing to the Minority Rights Group International states many of the same issues and desires with respect to constitutional change that have defined Kamanakao’s and Reteng’s struggles from the beginning although reference is made throughout to international conventions. Her conclusion begins:

Scholars have argued that it is not indigenous or minority status or unique cultures that mean minority groups warrant special attention Their struggle is about livelihood, liberty, poverty alleviation, and access to development and public services. Though the struggle by minority groups is culturally oriented, its goal is economically and socially focused.

NYATI-RAMAHOBO, *supra* note 14, at 9. This is the same message, in almost the same words, that was expressed to me in an interview with Saleshando in 1998.

88. *See id.* at 7.

89. *Id.*

90. *Cf.* Sally Engle Merry, *Rights, Religion and Community: Approaches to Violence Against Women in the Context of Globalization*, in *LAW AND ANTHROPOLOGY: A READER* 249, 260-62 (Sally Falk Moore ed., 2005) (discussing nongovernmental organizations in Hawaii and how these organizations moved away from their radical origins toward a more mainstream and less confrontational perspective due to the pressures of neoliberal globalization).

The deployment of supranational law, conventions, and treaties in the practice of lawfare and activism vary considerably between the Kamanakao/Reteng and the CKGR cases, and these strategies both influenced the procedure and outcome of these cases. Kamanakao and Reteng have been careful to evoke and criticize the Botswana government on conventions to which they have been a signatory and, thus, have sought to hold the government accountable.⁹¹ This strategy has worked to the organizations' benefit, given the government's protective stance on its international reputation. Kamanakao and Reteng's respectful approach has also given them credibility with the government, which granted them a legitimacy not always afforded to others.⁹² In addition, the fact that the actors were locally based, only drawing on international resources at their discretion and in a responsible manner, as opposed to being prompted by outside nonstate actors, increased their legitimacy and the government's inclination to take them seriously.⁹³

Alternatively, SI and FPK have been less careful and, therefore, less effective in obtaining their desired long-term results. This is evidenced by the Attorney General's narrow interpretation and implementation plan of the judgment.⁹⁴ SI and FPK showed little respect or regard for Botswana's own standing vis à vis international conventions and chose to condemn the country for contravening covenants that it had not signed. The groups' stinging media campaign engaged in falsities as well as extreme hyperbole. For instance, Botswana was accused of genocide and trafficking in blood diamonds.⁹⁵ Thus, they did not use lawfare in the way Kamanakao did. Instead of displaying trust or assuming "a mother's love and tolerance,"⁹⁶ SI and FPK used lawfare in a spiteful attempt to damage Botswana's reputation and economy through the blood diamond campaign. This angered and alienated the state, which reacted accordingly.

In addition, foreign actors played an overwhelming role in the CKGR case; perhaps that was necessary given the limited Bushmen

91. See Solway, *Conflict Diamonds*, *supra* note 25, at 333.

92. *Id.* at 335-36 (explaining the government's unwillingness to work with NGOs like SI, which "brazenly flout[] Botswana's normal legal procedures and pay[] scant attention to Botswana's constitution, laws, precedents, policies, the international instruments to which Botswana has and has not been signatory, or its sovereignty. SI disparages other organizations working on behalf of the Bushmen and, perhaps most importantly, it seems purposely innocent of the history and reality of the Bushmen's circumstances in Botswana.")

93. *Id.*

94. See *supra* note 73 and accompanying text.

95. See Solway, *Conflict Diamonds*, *supra* note 25, at 341.

96. See *supra* text accompanying note 83.

leadership and organization, but for many in Botswana, SI and collaborators went too far, put forward preposterous allegations, and left people wondering what other agendas the groups might have.⁹⁷ The politics of shame were effective in Kamanakao’s case, but this tactic backfired in the CKGR case. Kamanakao’s case may have angered many in government, but few could deny that the case had merit. In contrast, the CKGR case had merit and few would dispute the condescension in which Bushmen were held, but it was harder to feel shame with such incendiary accusations. Moreover, SI fabricated evidence of a pristine hunter-gatherer existence and presented an essentialized, ahistorical view of Bushmen culture that, in the end, contributed to both the judgment and its outcome, as well as to the promotion of culture now extant in Botswana.⁹⁸ However, SI and FPK efforts were not entirely in vain. Many in the country agreed with one of the High Court justices who, in her portion of the judgment and the verdict, drew attention to the plight of the Bushmen.⁹⁹ In fact, and in part due to this recent controversy, “Bushman,” especially Bushman “culture,” is now fashionable in Botswana.

97. See Solway, *Conflict Diamonds*, *supra* note 25, at 336, 341.

98. See *id.* at 340.

99. *Sesana*, 2006 Afr. Hum. Rts. L. Repts. (Dow, J.). In her opinion (one of three full opinions written by the panel), Justice Dow not only discussed the behavior of the government during the resettlement process, but also described the living situation of the applicants in great detail. *Id.* ¶¶ E.1-E.9. She emphasized the applicants’ status as “indigenous,” *id.* ¶ H.1.5, and severely criticized the government’s actions during the resettlement, *id.* ¶¶ H.9.1-34. In perhaps the most impassioned section of her opinion, with the subpart heading “The Relevance of the Relative Powerlessness of the Applicants to the Issue of Consent,” she states:

The Applicants belong to an ethnic group that has been historically looked down-upon, often considered to be no more than cheap, disposable labour, by almost all other numerically superior ethnic groups in Botswana. Until recently, perhaps it is still the case, ‘Mosarwa’, ‘Lesarwa’, ‘Lekgalagadi’ and ‘Mokgalagadi’ were common terms of insult, in the same way as ‘Nigger’ and ‘Kaffi’ were/are. Any adult Motswana who pretends otherwise is being dishonest in the extreme. The relevance of this fact is that those Applicants who had been politicised through their involvement with FPK, Ditshwanelo and the Negotiating Team were bound to see any action that smelled of a top-down approach as yet another act of disrespect by the initiators of the action. On the other hand, the average non-politicised Applicant, illiterate, dependant upon Government services, without political representation at the high political level, was hardly in a position to give genuine consent. It was the Respondent’s obligation to put in place mechanisms that promoted and facilitated true and genuine consent by individuals, families and communities. Groups like Ditshwanelo or the Negotiating Team could have been invited to ensure some levelling out of the negotiation playing field.

Id. ¶ H.9.3.3.

V. LAWFARE AND ITS IRONIES: CULTURE FATIGUE

In the heady days during and after the Balopi Commission, the Kamanakao case, and the debates surrounding changes to the House of Chiefs, the Ministry of Labor and Home Affairs introduced a new National Policy on Culture, which was passed by Parliament in 2001.¹⁰⁰ Since then, the government has elevated the importance of “culture” and placed the cultural policy under the supervision of the newly formed Ministry of Youth, Sport, and Culture.¹⁰¹ Culture is now “serious business,” and has become increasingly important to the nation. The policy, to some extent, is the cultural expression of the government’s stance on ethnicity as it was formulated in the 2001 White Paper that was produced in the wake of the Kamanakao case and the Balopi Commission. This stance was institutionalized subsequently in law and practice through constitutional and statutory changes including the creation of the expanded but still Tswana-dominated Ntlo ya Kgosi.¹⁰² The policy celebrates cultural and linguistic diversity,¹⁰³ especially their representation through performance.¹⁰⁴ However, the policy also emphasizes only a single national language (Setswana), demoting other languages, apart from English which is the official language,¹⁰⁵ as worthy of “developing,” but not standing on equal ground, either in terms of representing the nation or holding official status.¹⁰⁶

Similarly, while not neglecting non-Tswana cultures, the Policy promotes a national culture into which one can read Tswana or a homogenized version of cultural diversity, presented as a “national” culture.¹⁰⁷ Indeed, the Policy is carefully constructed and manages to tread a fine line, both fostering and blurring distinction. For instance, cultural groups (both cultural in a homogenized sense and groups representing specific “cultures,” such as the Yei) as well as artists, can

100. DEP’T OF CULTURE & YOUTH, MINISTRY OF LABOUR & HOME AFFAIRS, Directive No. CAB 17/2001, NATIONAL POLICY ON CULTURE (2001) (Bots.) [hereinafter POLICY ON CULTURE].

101. I interviewed senior staff at the Department of Culture on March 25, 2010, who explained many of their activities to me, including their funding of cultural group activities.

102. See *supra* note 12 and accompanying text.

103. See POLICY ON CULTURE, *supra* note 100, ¶ 3.1.

104. See *id.* at Foreword.

105. *Botswana*, CIA - THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html> (click “People”; scroll down to “Languages”) (last updated Nov. 16, 2010).

106. See POLICY ON CULTURE, *supra* note 100, ¶¶ 6.1(a), app. 1(4)(a)-(c).

107. See *id.* ¶ 3.2 (“Our multi-ethnic value systems, traditions and beliefs as reflected through the various languages, performing and visual arts as well as other forms of cultural expression constitute the strands of a broader national culture . . .”).

request funding for their festivals and performances; to my knowledge these are rarely denied. Notably, Reteng and all of its constituent groups receive funds.¹⁰⁸ The Department of Culture holds an annual national culture day in different places in the country, both Tswana and non-Tswana, where communities and artists are invited to celebrate and showcase their culture and language. In practice, this means primarily dance, poetry, costume, folklore, and food. In these instances, cultural differences are acknowledged.

This policy also promotes a homogenized representation of “national” culture in other ways. The most striking example is the unprecedented rise of what are called “Cultural Groups.” New cultural groups are formed daily, each hoping for state support, a paid audience, spots on local television, success at international competitions, and opportunities to market themselves and their performances. I have seen many and, in March 2010, attended a send-off and fundraiser, at which many prominent citizens and Members of Parliament were in attendance, for one of the more successful groups that was about to depart to Burkina Faso for a major competition.¹⁰⁹ Many of the groups are extremely popular and very talented; their DVDs are big sellers.

These are so-called traditional groups, but the question remains, what tradition? They dress in skins, use homemade instruments, wear small antelope horns (the trademark of Roy Sesana, the main applicant in the CKGR case), and their dance and music are a hybrid of Tswana morality tales, Bushmen dance, and other influences. One group, “Culture Spears,” calls itself the proud spears for the nation. For instance, in a clever pastiche, Culture Spears’ skimpy costumes include: cloth in the colors of the Botswana flag, ostrich egg shell beads, animal skins, bean-pod ankle percussion pieces, and an array of symbols from various parts and points of Botswana history. As such, the group merges time and space, enabling them to simultaneously represent all of Botswana, yet no group or historical period in particular.

The Department of Culture wishes to “mainstream” culture so that every government ministry and “stakeholder” has culture included in their activities, and it wishes to market culture in more extensive and effective ways. To quote the 2008 National Action Plan for Culture, “Botswana has a unique culture but this is not easily and immediately

108. *See id.* ¶ 7.5.

109. The event was called Dikakapa Farewell Reception and was sponsored by the Department of Arts and Culture. The group, Dikakapa, had won several regional competitions and was heading to a continental competition. They are much like the group, Culture Spears, described in the next paragraph. I attended at the invitation of a friend who is a Member of Parliament.

visible to a visitor entering the country.”¹¹⁰ To that end, the Department of Culture has planned a cultural village for tourists, but they face obstacles in further commodifying culture. To remedy this, the Department proposes consulting with other southern African nations who have had more success in branding and marketing their culture, engaging in, to use the Comaroffs’ term, “Ethnicity, Inc.”¹¹¹

The policy on culture is a key instrument through which culture and minority rights are now governed, managed, and ultimately limited. The Constitution and various statutes mentioned earlier set out the government’s official framework for the hierarchy and management of ethnic groups in government bodies, but the culture policy shapes the social expression of culture and ethnicity. For instance, while the policy celebrates cultural and linguistic diversity, it stops short of advocating that state media allow any language other than Tswana or English in print or on air. Further, despite Parliament’s 1997 agreement in principle to do so, it does not promote mother tongue education for the first years of primary school, a central plea of minority groups and one they believe would help to redress past injustices, promote true multiculturalism, and facilitate children’s learning experience.¹¹² As another example, a state television network aired the 2010 initiation ceremonies of the Kgatla, a Tswana group, but has refused to televise comparable cultural events in minority areas. Despite years of advocacy, community radio stations are still refused licenses for fear, I am told, of the languages and messages that may get aired on them.

Through the national policy on culture and the activities it promotes, the state has valorized “culture,” but it has also trivialized it and turned it into a consumable. During a post-mortem discussing Reteng’s annual cultural event in July 2009, members attributed the lower-than-expected attendance to exhaustion. In their own terms, Botswana was suffering from “culture fatigue” since their event followed a particularly intense month of performance and celebration. While this phrase was staggering to my anthropological sensibilities, it makes sense when culture is rendered in its neoliberal form as a consumable, a thing, as opposed to a habitus, a way of being in the world. This also attests to the triumph of liberalism; culture is construed as an option, a matter of individual choice. At this point, culture can be embraced or

110. WAPULA N. RADITLOANENG & MATTHEW L.S. GBOKU, MINISTRY OF YOUTH, SPORT & CULTURE, DEP’T OF CULTURE & YOUTH, NATIONAL ACTION PLAN FOR CULTURE: IMPLEMENTATION PLAN, vol. II (2008) (on file with author).

111. COMAROFF & COMAROFF, ETHNICITY, *supra* note 1.

112. Lydia Nyati-Ramahobo, *Language Policy, Cultural Rights and the Law in Botswana*, in ALONG THE ROUTES OF POWER: EXPLORATIONS OF EMPOWERMENT THROUGH LANGUAGE 285, 293, 298 (Martin Pütz et al. eds., 2006).

pushed aside according to one’s desire at the moment. Of course, by objectifying and reifying culture in such ways, the state also attempts to denude it of any political content and to marginalize rights claims articulated in its name.

CONCLUSION

This account demonstrates the power and pitfalls of political activism and lawfare when they are articulated through the modality of culture. For the Bushmen, the rendition of their culture deployed in their legal case proved their undoing. They got what they ostensibly wanted—the right to return to the CKGR and live as they supposedly always had—but the result was presumably not what they intended. Their unsuccessful 2010 lawsuit requesting the restoration of water services illustrates the conundrum produced by their earlier suit requesting the right to return to the CKGR. Other minorities, such as the Yei, achieved much more, including several key changes in government statutes. The Bushmen have gained pride, confidence, and greater recognition, although the latter is still incomplete in their view.

Lawfare has proved pivotal for rights seeking in Botswana, but its effect has been mixed. In the CKGR case, the appellants overstepped legitimate boundaries by the state’s standards. They appealed to conventions and treaties not signed by Botswana and fought a dirty media battle. Although the politics of shame have proven extremely significant in indigenous politics elsewhere,¹¹³ the appellants were successful insofar as they mustered much international support, especially in the media. But the strategy backfired in the domestic court of popular and government opinion. However, the politics of shame were effective in Kamanakao’s case due to its careful use and appeal to international law.

In each case, the struggles have been cut short and distorted by state policies, many of which have been put in place as a result of minority activism. The state has been clever in usurping culture in a way that both celebrates diversity and maintains the privileged position of Tswana culture. At the same time, the state attempts to transform subjective understandings of culture by implying that culture is an object that one chooses to enjoy or practice, at his or her discretion.¹¹⁴ In

113. NIEZEN, *supra* note 47, at 183-85.

114. Cf. POVINELLI, *supra* note 9 (exploring the downsides of liberal multiculturalism, in which peoples historically oppressed by colonialism continue to be subjugated, but now through pressure to conform to certain idealized conceptions of their own culture); Jane Cowan, *Culture and Rights After Culture and Rights*, in HUMAN RIGHTS: AN ANTHROPOLOGICAL READER 305, *supra* note 2, at 318-20 (discussing how the Australian

doing so, the state is in line with wider liberal and neoliberal forces that render culture outside the individual, as objectified and reified, as a matter of individual choice and as a commodity to be marketed.¹¹⁵

As noted earlier, liberalism produces its own paradoxes; Botswana's minority movement is one such example. Minority subjects, empowered by liberal individual rights, realize the limits inherent in these and strive for group rights. Kymlicka defends liberal principles, such as individual rights, but also notes their strong limitations, especially in "multi-national" states.¹¹⁶ He wishes to rehabilitate liberalism and find mechanisms whereby liberal regimes can offer genuine equality and recognition without eliminating genuine difference. For Kymlicka, political and historical injustices are implicit in the way in which minority nations are marginalized in modern liberal states. Political theorist Wendy Brown is less optimistic about liberalism's capacities. She emphasizes that liberalism's "reduction of freedom to [individual] rights, and of equality to equal standing before the law, eliminates from view many sources of subordination, marginalization, and inequality that organize liberal democratic societies and fashion their subjects."¹¹⁷ Brown argues that liberalism depoliticizes inequality and difference by naturalizing it; one modality of doing so is to culturalize the politics of difference.¹¹⁸ This renders questions of political economy redundant. Botswana's culture policy is an apt example. It enables the state to address minority demands and seemingly support them through funding, but in a way that reduces the political claims of minority groups to their ability to perform and market their culture. Thus, it finesses questions of historically rooted inequalities.

Marginalized minorities in Botswana have been caught in the swirl of cultural performance and are eager participants, when not fatigued by culture. But many have not abandoned their larger political agenda. It remains to be seen whether minority groups' ability to act on this agenda allows them to reclaim the political underpinning of culture as part of justice and rights claims, to navigate the paradoxes of liberalism, and to refocus their struggle.

government's official state policy of multiculturalism actually constructs Aboriginal identity at the interface of the interaction between Aboriginal Australians, European Australians, and the law).

115. See generally COMAROFF & COMAROFF, *ETHNICITY*, *supra* note 1, at 23-33.

116. See KYMLICKA, *supra* note 21, at 152-72.

117. WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* 17-18 (2006).

118. See *id.* at 19-24.

The Power of Definition: Brazil's Contribution to Universal Concepts of Indigeneity

JAN HOFFMAN FRENCH*

ABSTRACT

This article builds on discussions about the potential benefits and difficulties with developing a universal definition of indigenous peoples. It explores the spaces made available for theorizing indigeneity by the lack of a definition in the United Nations Declaration on the Rights of Indigenous Peoples, adopted in 2007. Specifically, this article addresses the challenge presented by the diversity of groups claiming indigenous status in Brazil. To what extent do distinct cosmologies and languages that mark Amazonian Indians as unquestionably indigenous affect newly recognized tribes in the rest of Brazil who share none of the indicia of authenticity? This article theorizes how to situate these newly recognized tribes within the context of the Declaration and addresses what the Brazilian experience has to offer in providing openings for claims that might have been made through alternative means, such as land reform and international cultural heritage rights.

INTRODUCTION

In my recent book, *Legalizing Identities: Becoming Black or Indian in Brazil's Northeast*,¹ I analyzed the process by which groups of black

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rural workers were reconstituting themselves in relation to their strand of indigenous ancestry and were being recognized as Indians by the Brazilian government.² Brazil is known as a place where indigenous peoples are exemplified by non-European languages, cosmologies, rituals, dress, and prequest histories. However, over the past few decades, Brazil has been pioneering a broadening of the concept of indigenous peoples to include people previously assumed to be fully assimilated into the nation's general population. In fact, over the past thirty years, the Brazilian government has recognized more than forty new "tribes" in the Northeast region alone.³ During that same period, many other presumably assimilated people demanded and received both recognition and access to land as Indians in other parts of eastern Brazil, including the state of Rio de Janeiro.⁴

These new Indians exist within a larger, flexible, international context of indigenous peoples made available for theorizing indigeneity by the lack of definition in the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration).⁵ To what extent do distinct cosmologies and languages that unquestionably mark Amazonian groups, such as the Warí, Xavante, or Kayapo, as indigenous affect newly recognized tribes in the rest of Brazil who share none of these indicia of authenticity? Is it conceptually defensible from both an ethical and legal perspective of justice to include in a single category both people who have a clear claim to "difference" and have struggled for generations to gain even limited political autonomy, and those who have just recently discovered their claim to indigeneity under an expansive view of indigenous peoples?

This article is divided into three sections. The first explains the construction of global indigenous identity through the extensive process

1. JAN HOFFMAN FRENCH, *LEGALIZING IDENTITIES: BECOMING BLACK OR INDIAN IN BRAZIL'S NORTHEAST* (2009).

2. "[I]n Brazil [the term] Indian has gone through phases of denigration and of regeneration. The indigenous movement of the 1970s and 1980s reappropriated the term and infused it with a substantial dose of political agency." ALCIDA RITA RAMOS, *INDIGENISM: ETHNIC POLITICS IN BRAZIL* 6 (1998). In fact, the use of the term has come to be considered a "dynamic element[] of struggle." MARÍA ELENA GARCÍA, *MAKING INDIGENOUS CITIZENS: IDENTITY, DEVELOPMENT, AND MULTICULTURAL ACTIVISM IN PERU* 27 (2005).

3. JOÃO PACHECO DE OLIVEIRA FILHO, *ATLAS DAS TERRAS INDÍGENAS DO NORDESTE* (1993); Stephen G. Perz, et al., *Contributions of Racial-Ethnic Reclassification and Demographic Processes to Indigenous Population Resurgence: The Case of Brazil*, 43 *LATIN AM. RES. REV.* 7, 27 (2008).

4. See generally JONATHAN W. WARREN, *RACIAL REVOLUTIONS: ANTI-RACISM AND INDIAN RESURGENCE IN BRAZIL* (2001) (analyzing the processes of racial formation among "posttraditional Indians" at various sites in eastern Brazil).

5. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter Declaration].

of negotiating and adopting the Declaration. Due to insurmountable difficulties in reaching agreement, a definition of indigenous peoples was simply excluded from the Declaration. What remains is an open-ended concept to be interpreted contextually. This article takes the view that a definition of indigenous peoples in the Declaration would be counterproductive, thus supporting the decision made by the deliberating body. In the second section, I address the challenge that the failure to agree on a legal definition of indigenous peoples poses to anthropology, a field superbly positioned to analyze and assist in conceptualizing meanings of indigeneity. Therefore, it is argued that discussions of international legal definitions of indigeneity should be made integral to anthropological perspectives. The third section uses the Brazilian example to suggest both a temporal and a spatial construction of diaspora as a justification for a broadened perspective on indigeneity worldwide. In the Brazilian case, the definition of Indian enacted in 1973 performed the same function as the exclusion of a definition of indigenous peoples in the Declaration on an international level, an opening up of the criteria for claiming indigenous rights.

I. GLOBAL INDIGENOUS IDENTITY CONSTRUCTION

After over two decades of meetings and negotiations, the Declaration was adopted by the 61st General Assembly of the United Nations on September 13, 2007, establishing

a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples. The Declaration addresses both individual and collective rights; cultural rights and identity; rights to education, health, employment, language, and others. It outlaws discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them. It also ensures their right to remain distinct and to pursue their own priorities in economic, social and cultural development. The Declaration explicitly encourages harmonious and cooperative relations between States and indigenous peoples.⁶

6. U.N. High Comm'r for Human Rights, Declaration on the Rights of Indigenous Peoples, <http://www2.ohchr.org/english/issues/indigenous/declaration.htm> (last visited Oct. 17, 2010).

Although the Declaration is not a legally binding instrument, it is declaratory of customary international law.⁷ Even while the Declaration was in draft form, national courts began citing it in support of indigenous rights.⁸ After twenty-three years of negotiation, the Declaration was adopted by a vote of 143–4 with eleven abstentions.⁹ According to a U.N. press release, “countries voting against the Declaration (Australia, Canada, New Zealand, and the United States) said they could not support it because of concerns over provisions on self-determination, land and resources rights, and, among others, language giving indigenous peoples a right of veto over national legislation and State management of resources.”¹⁰ The twenty-three year delay in adoption is attributable to two sticking points: the draft Declaration asserts the importance of self-determination of indigenous peoples,¹¹ and the term “indigenous peoples” is not defined. The adoption of the Declaration was delayed for an additional year as a result of objections and proposed amendments by a group of African states.¹² Their fundamental objections were the absence of a definition of indigenous peoples and the possible encouragement of internal ethnic groups to assert a right to self-determination and to secede from the state.¹³

7. Paul Oldham & Miriam Anne Frank, *We the Peoples...: The United Nations Declaration on the Rights of Indigenous Peoples*, 24 ANTHROPOLOGY TODAY 5, 5 (Apr. 2008).

8. See Erica-Irene A. Daes, *An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations*, 21 CAMBRIDGE REV. OF INT'L AFF. 7, 23 (2008) (citing (*Consol.*) *re Maya Land Rights*, Claim Nos. 171-72, ¶ 131 (Sup. Ct. 2007) (Belize), available at http://www.belizelaw.org/supreme_court/judge_list/civil_judge_2007.html) (follow “Supreme Court Claims Nos. 171 and 172 of 2007 (Consolidated) re Maya land rights” hyperlink).

9. Australia, Canada, New Zealand, and the United States voted against the Declaration. Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine abstained. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007) [hereinafter G.A. Press Release].

10. *Id.*

11. See generally Daes, *supra* note 8, at 8 (describing the author’s (who was the principal drafter of the Declaration) belief that there is an intrinsic link between self-identification and self-determination); Andrea Muehlebach, *What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism*, 10 IDENTITIES: GLOBAL STUD. CULTURE & POWER 241 (2003) (describing how transnational indigenous activists are shaping the development of the concept of self-determination) [hereinafter Muehlebach, *Self-Determination*].

12. The three African states that delayed the final vote were Botswana, Namibia, and Nigeria.

13. See Draft Aide Memoire, African Group, United Nations Declaration on the Rights of Indigenous People paras. 2.0-5.0 (Nov. 9, 2006), available at <http://www.ipacc.org.za/uploads/docs/Africanaidememoire.pdf>. After further negotiations, all of the African

The International Work Group for Indigenous Affairs (IWGIA), a nongovernmental organization, estimates that “[t]here are over 370 million indigenous people in Africa, the Americas, Asia, Europe and the Pacific.”¹⁴ However, the concept of indigenous peoples encoded in the Declaration is left undefined.¹⁵ In the absence of an agreement on a definition, the United Nations Working Group on Indigenous Peoples (WGIP)¹⁶ and the inter-sessional Working Group on the draft Declaration¹⁷ asserted that an explicit definition of indigenous peoples would reduce the effectiveness of the Declaration, which should, it was argued, hinge primarily on self-identification. For example, most definitions that were considered and rejected required that people show direct descent from an identifiable group of people inhabiting the same place as the group claiming indigenous rights before it was colonized. It was feared that this requirement of “firstness,” would exclude groups in Africa and Asia. Another problematic requirement was one in which cultural practices or a distinct language must be retained from the distant past. This would have excluded groups that were forced to

countries voted in favor of the Declaration; Burundi, Kenya, and Nigeria abstained. G.A. Press Release, *supra* note 9.

14. Int’l Work Grp. for Indigenous Aff. [IWGIA], *Declaration on the Rights of Indigenous Peoples*, <http://www.iwgia.org/sw248.asp> (last visited Oct.17, 2010). Their inclusion criteria can also be found on their website. IWGIA, *Identification of Indigenous Peoples: Indigenous Peoples-Who are They?*, <http://www.iwgia.org/sw641.asp> (last visited Oct. 17, 2010). The International Labour Organization confirms that “[i]ndigenous and tribal peoples constitute at least 5,000 distinct peoples with a population of more than 370 million, living in 70 different countries.” ILO, *Nicaragua Ratifies ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169)* (Aug. 30, 2010), http://www.ilocarib.org.tt/portal/index.php?option=com_content&task=view&id=1411&Itemid=368.

15. See Dep’t of Econ. & Soc. Aff., Secretariat of the Permanent Forum on Indigenous Issues, *State of the World’s Indigenous Peoples*, at 4-7, U.N. Doc. ST/ESA/328, U.N. Sales No. 09.VI.13 (2009) (explaining the decision to exclude a definition).

16. The United Nations Economic and Social Council established the WGIP as a “transnational locality” (in the sense that a new political space was created) in 1982. See Andrea Muehlebach, *Making Place’ at the United Nations: Indigenous Cultural Politics at the U.N. Working Group on Indigenous Populations*, 16 CULTURAL ANTHROPOLOGY 415, 415-16 (2001) (“It is the only global institution at which indigenous identity has for years been discussed.”) [hereinafter Muehlebach, *Cultural Politics*].

17. In 1995, the United Nations Commission on Human Rights established the inter-sessional Working Group with “the sole purpose of elaborating a draft declaration on the rights of indigenous peoples.” Office of the U.N. High Comm’r for Human Rights, Working Group on the Draft Declaration on the Rights of Indigenous Peoples, <http://www2.ohchr.org/english/issues/indigenous/groups/groups-02.htm> (last visited Oct. 22, 2010). That same year, the General Assembly decided that the “United Nations Voluntary Fund for Indigenous Populations should also be used to assist representatives of indigenous communities and organizations authorized to participate in the deliberations of the Working Group on the draft declaration.” *Id.*

assimilate but are now dedicated to reconstituting group identity as indigenous.¹⁸

Most discussions of the Declaration begin with the working definition of indigenous proposed by U.N. Special Rapporteur José Martínez-Cobo in his *Study of the Problem of Discrimination against Indigenous Populations*, which states:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹⁹

The WGIP bore this definition in mind as negotiations proceeded but did not adopt it.²⁰ Moreover, although there is a definitional provision in the International Labour Organization (ILO) International Indigenous and Tribal Peoples Convention 169 of 1989, which has been ratified by twenty-one countries,²¹ the indigenous negotiators insisted

18. For example, the Mashpee Indians in Massachusetts were only recently granted federal recognition after decades of appealing a 1980s court decision that found they had not proven historical continuity or distinct cultural practices traceable to specific ancestors from the same place. See JAMES CLIFFORD, *Identity in Mashpee*, in THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART 277 (1988). See also Andrew Ryan, *Mashpee Tribe Wins Federal Recognition*, BOS. GLOBE, Feb. 16, 2007 at B8 (for information on the 2007 federal recognition).

19. Special Rapporteur on the Study of the Problem of Discrimination Against Indigenous Populations, *Final Rep. on the Study of the Problem of Discrimination Against Indigenous Populations*, para. 379, Comm. on Human Rights, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8 (Sept. 30, 1983) (by José R. Martínez Cobo). According to Erica-Irene Daes, this definition has been unofficially used in certain cases. Special Rapporteur on the Discrimination Against Indigenous Peoples, *Final Rep. on the Protection of the Heritage of Indigenous Peoples*, para. 18, Comm. on Human Rights, U.N. Doc. E/CN.4/Sub.2/1995/26 (June 21, 1995) (by Erica-Irene Daes).

20. PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 33 (2002).

21. In 1989, ILO Convention No. 169 was adopted with the following provision in Article 1:

1. This Convention applies to:

that anything short of self-identification would not provide the flexibility needed for an inclusive and self-determining process of recognition.

Components of both the Martínez-Cobo and ILO definitions were problematic from the perspective of self-identification. For example, in the Martínez-Cobo definition, the phrase “historical continuity with pre-invasion and pre-colonial societies that developed on their territories” presented the problem of excluding peoples living in nonsettler societies, along with displaced and diasporic indigenous peoples.²² Another example is the 2006 U.S. proposal to the Working Group on the Draft Declaration, which illustrates just how limiting the effort to pin down a definition can be. The U.S. proposal was rejected by the drafters, but it would have required state recognition prior to U.N. recognition:

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- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
 - (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

ILO: Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 1, paras. 1-2, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991). Nicaragua is the most recent country to ratify the Convention, bringing the number to 21. ILO, *Nicaragua Ratifies ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169)* (Aug. 30, 2010), [www.ILO.ORG](http://www.ilocarib.org.tt/portal/index.php?option=com_content&task=view&id=1411&Itemid=368), http://www.ilocarib.org.tt/portal/index.php?option=com_content&task=view&id=1411&Itemid=368.

22. Martínez-Cobo, *supra* note 19, at para. 379; *see also* James Clifford, *Varieties of Indigenous Experience: Diasporas, Homelands, Sovereignities*, in *INDIGENOUS EXPERIENCE TODAY* 197 (Marisol de la Cadena & Orin Starn eds., 2007) (exploring the diversity of claims to indigeneity and arguing for their legitimacy). In this article, I am not directly addressing the issue of connection to land as a defining factor for indigeneity in the Declaration. The tension between a definition that focuses on social and cultural identity and one that is primarily about territory is reflected in the Declaration. Right to land “which [indigenous peoples] have traditionally owned, occupied or otherwise used” is enshrined in Article 26, along with a directive to States to “give legal recognition and protection to these lands.” Declaration, *supra* note 5, art. 26, paras. 1, 3. However, claim to land or connection to territory is not a prerequisite for coverage by the Declaration. For example, “historic injustices” are seen as resulting from “*inter alia*, their colonization and dispossession of their lands, territories and resources.” *Id.* annex (emphasis added). Cultural protection and self-determination are accorded more space in the Declaration than land issues.

Indigenous peoples have the right to be recognized as such by the State through a transparent and reasonable process. When recognizing indigenous peoples States should include a variety of factors, including, but not limited to . . . whether the group . . . self-identifies as indigenous; . . . is comprised of descendants of persons who inhabited a geographic area prior to the sovereignty of the State; . . . historically had been sovereign; . . . maintains a distinct community and aspects of governmental structure; . . . has a cultural affinity with a particular area of land or territories; . . . has distinct objective characteristics such as language, religion, culture; and, . . . has been historically regarded and treated as indigenous by the State.²³

Evident from this proposal is the influence of the U.S. Bureau of Indian Affairs requirements that have restricted federal recognition for many groups over the years.²⁴ Such a definition, it was felt by the drafters, would have been impractical in a transnational context. The indigenous participants viewed the lack of a definition of indigenous peoples as impractical and equivalent to a refusal to use the “language understood by those wielding power.”²⁵ Indigenous representatives in WGIP meetings in the 1990s expressed the view that unless a “law reaches out to the varieties of human existence,” it should be considered deficient.²⁶ They also asserted that for a law to be morally valid, “it must have the consent of . . . those affected”²⁷ by its provisions.

Self-identification, although fundamental to the recognition of indigenous peoples on the international level, is not the only criterion important to indigenous representatives, as “[i]ndigenous peoples are

23. Chairperson-Rapporteur on the ESCOR, Comm’n H.R., *Report of the Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples*, 27-29, U.N. Doc. E/CN.4/2006/79 (Mar. 22, 2006) (by Luis-Enrique Chávez). In June, the Obama administration announced that the United States would review its position on the Declaration. Press Release, Office of the Spokesman, *U.S. Review of the U.N. Declaration on the Rights of Indigenous Peoples* (June 4, 2010), <http://www.state.gov/r/pa/prs/ps/2010/06/142662.htm>.

24. *E.g.*, CLIFFORD, *supra* note 18 (describing the history of Massachusetts’ Mashpee Indians and their 1976 lawsuit claim for land, which was ultimately unsuccessful because they did not meet the “tribal” criteria).

25. Justin Kenrick & Jerome Lewis, *Indigenous Peoples’ Rights and the Politics of the Term ‘Indigenous’*, 20 ANTHROPOLOGY TODAY 4, 9 (Apr. 2004).

26. THORNBERRY, *supra* note 20, at 10 (2002) (quoting ANDREW LINKLATER, *THE TRANSFORMATION OF POLITICAL COMMUNITY: ETHICAL FOUNDATIONS OF THE POST-WESTPHALIAN ERA* 96 (1998)).

27. *Id.*

not only those who say they are indigenous but also those who are accepted by a global network of nations and communities with similar claims and sources of recognition."²⁸ Therefore, both self-identification and other-identification are critical to public recognition. There is little doubt that the decision to leave the concept open and flexible has contributed to the expansion of the number of groups who self-identify and who are recognized as indigenous by the United Nations and other international bodies. It has also encouraged the growing identification of indigenous activists, representatives, and intellectuals with a global indigenous identity that has influenced the actions of international and state entities.²⁹ Such a global indigenous identity allows groups to "gain voice through cross-national connections that empower their approach to national dilemmas."³⁰ Moreover, this global indigenous identity does not adhere to international actors alone, but is crucial to self-identification by local peoples in settings ranging from the Sami people in northern Europe to the San people in southern Africa.³¹

28. RONALD NIEZEN, *THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY* 22, 227 n.21 (2003) (reporting a definition proposed by indigenous delegates). In the United States, the assumption of solidarity among indigenous peoples is not a given. For example, the leadership of the Eastern Band of Cherokee opposes federal recognition of the Lumbee Indian Tribe in North Carolina. See, e.g., *Lumbees Clash with Cherokee at Senate Hearing*, INDIANZ.COM, (July 13, 2006), <http://64.38.12.138/News/2006/014928.asp>; *Senators Seek Lumbee Recognition*, NEWSOBSERVER.COM, (Oct. 10, 2009, 2:08 PM), <http://www.newsobserver.com/2009/10/01/121289/senators-seek-lumbee-recognition.html#storylink=misearch>.

29. See, e.g., NIEZEN, *supra* note 28 (discussing the indigenism movement as a new global political entity and providing a history of the movement's relationships with states and international bodies); Marcus Colchester, *Indigenous Rights and the Collective Conscious*, 18 ANTHROPOLOGY TODAY, Feb. 2002, at 1, 2-3; Daes, *supra* note 8, at 8-11; Kenrick & Lewis, *supra* note 25, 4-9; Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 414-15, 417-26 (1998); Muehlebach, *Self-Determination*, *supra* note 11, at 244-46, 254-56, 261-63; Muehlebach, *Cultural Politics*, *supra* note 16 (describing the WGIP's role in the transnational indigenous movement); Oldham & Frank, *supra* note 7 (giving a detailed account of the Declaration's adoption and the history of its drafting and status as a resolution); Viniyanka Prasad, *The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations*, 9 CHI. J. INT'L L. 297, 311-15 (2009). But see Michaela Pelican, *Complexities of Indigeneity and Autochthony: An African Example*, 36 AM. ETHNOLOGIST 52 (2009) (describing several examples of how countries have ignored global indigenism or used it to harm those the movement intended to protect).

30. Anna Tsing, *Indigenous Voice*, in *INDIGENOUS EXPERIENCE TODAY* 33, 57 (Marisol de la Cadena & Orin Starn eds., 2007).

31. See Dorothy L. Hodgson, *Introduction: Comparative Perspectives on the Indigenous Rights Movement in Africa and the Americas*, 104 AM. ANTHROPOLOGIST 1037, 1039-40 (2002).

The trend toward an expansive definition of indigenous peoples began well before the Declaration was adopted and is directly linked to the increased participation of representatives from Africa and Asia (places that, until recently, were excluded from consideration as not having indigenous groups).³² As standard assumptions moved away from the notion that the existence of indigenous peoples were confined to settler societies, such as those in the Western Hemisphere, Australia, and New Zealand, an expanded perspective on the definition of indigeneity began to take hold in U.N. deliberations. The involvement of indigenous participants in deliberations and negotiations leading up to the Declaration's adoption was unprecedented.³³ In 1982, when the WGIP was established, only thirty representatives were present. In 1999, nearly one thousand participants attended the WGIP meeting, creating a site of "discursive density."³⁴

The Global Indigenous Peoples' Caucus, consisting of the group of indigenous delegates present at the WGIP meetings, would meet to discuss their positions on the issues at stake through intense debate and consensus decision making.³⁵ Erica-Irene Daes, Chairperson and Special Rapporteur of the WGIP from its founding until 2001 and principal drafter of the Declaration, explains that indigenous peoples were not part of original state building.³⁶ This reminder makes the indigenous representation at every stage during the twenty-three year period of drafting, debating, and redrafting the Declaration even more impressive. Such participation contributed to the constitution of a supranational indigenous identification. Patrick Thornberry, international law scholar and an observer at WGIP meetings, described

32. U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, *Trust Fund on Indigenous Issues Relating to the Second International Decade of the World's Indigenous People* http://www.un.org/esa/socdev/unpfi/en/second_trustfund.html#2009 (last visited Oct. 9, 2010). In May 2009, the United Nations Permanent Forum on Indigenous Issues, as advisor for projects for the Second International Decade of the World's Indigenous People, proposed to award grants to nineteen projects in Africa, Asia, Latin America and the Caribbean, Eurasia (a region covering Eastern Europe, the Russian Federation, Central Asia, and Transcaucasia), North America, and the Pacific.

33. See Daes, *supra* note 8, at 12-18; see also Muehlebach, *Self-Determination*, *supra* note 11 (discussing the increasingly visible presence of indigenous delegates in the international arena in a number of contexts); Oldham & Frank, *supra* note 7, at 6-8.

34. Muehlebach *Cultural Politics*, *supra* note 16, at 415, 420.

35. E.g., Oldham & Frank, *supra* note 7 (describing in detail the response of the Caucus to the African Group's Draft Aide-Memoire).

36. See Daes, *supra* note 8, at 13. State-building is a reference to the process by which a nation is transformed into a nation-state with an independent government and laws. In Hispanic America, for example, creoles (descendants of colonizing Spaniards) were the primary group involved in state-building in the nineteenth century. Indigenous populations were excluded from the state-building project.

the meetings as “[a]rguments between government delegations and the indigenous [that] seemed interminable, their position statements incommensurable. But there was also a sense of something shifting, of ideas grinding their way through the morass of argument and rebuttal, storytelling and complaint.”³⁷

While increased indigenous participation in the draft Declaration negotiations was crucial to its eventual adoption, there was also some concern that such participation was restricted to an upper echelon of indigenous delegates. Anthropologist Jonathan Friedman has argued the risk that class inequalities might be reinforced between delegates and the people at home whom they represent.³⁸ He refers to the internationally active indigenous delegates as part of a “global cocktail circuit.”³⁹ Over a decade ago, when Friedman made this comment, it may have been appropriate to be suspicious of claims to a global indigenous identity, both as a top-down imposition and as a distraction from studying local cultural specificities. Today, it is necessary to rethink such cautionary reactions because indigeneity and indigenous rights are commonly accepted notions that affect localities around the world. Generally, an anthropological approach to indigeneity would emphasize the specificities of particular groups, paying less attention to the impact of events at an international level (see section III below). However, some anthropologists, such as Mary Louise Pratt, are beginning to take a different approach and are criticizing the established anthropological wisdom by asserting that it should no longer be a given that “perform[ing] the always legitimating scholarly gesture of presenting complicated truth against . . . reductive ideology”⁴⁰ is the only or best way to approach global indigenous identity. This still leaves the question of which foundational justifications for claims to indigenous rights are valid, particularly if self-identification has become the primary requirement on the international level. Once historical continuity, language and cultural practices, and blood quantum are no

37. THORNBERRY, *supra* note 20, at 10. See generally Noel Castree, *Differential Geographies: Place, Indigenous Rights and 'Local' Resources*, 23 POL. GEOGRAPHY 133, 161 (2004) (exploring reasons why indigenous peoples should have the right “to make their own places rather than have them made for them.”).

38. Jonathan Friedman, *Indigenous Struggles and the Discreet Charm of the Bourgeoisie*, in PLACES AND POLITICS IN AN AGE OF GLOBALIZATION 53, 64 (Roxann Prazniak & Arif Dirlik eds., 2001).

39. *Id.*

40. Mary Louise Pratt, *Afterword: Indigeneity Today*, in INDIGENOUS EXPERIENCE TODAY 397, 400 (Marisol de la Cadena & Orin Starn eds., 2007).

longer required foundational justifications for the recognition of an indigenous people, it will be crucial to develop other justifications.⁴¹

More capacious definitional possibilities allow peoples claiming indigeneity, such as international agencies and national governments, to consider other morally powerful justifications for such claims. In *The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas*, political scientist Courtney Jung provides an alternative analysis.⁴² She sees indigenous identity as a “political achievement,” not as “an accident of birth” or a “spontaneous global reaction in defense of cultural preservation.”⁴³ Jung proposes a theory of political identity formation according to which “indigenous people are partly constituted as a potential group because they occupy a common location of structural exclusion from the modern state, not because they possess a common language or culture.”⁴⁴ Recognition as indigenous should flow not from a notion of existential identity, but rather from what the larger society and state has done to the group over time—how the group has been treated by state institutions and majority populations.⁴⁵ However, such a structural location does not by itself produce an indigenous rights movement. The concept of indigenous rights must first “develop[] sufficient traction to orient, and to open the political space for, indigenous politics.”⁴⁶ Echoing such a perspective, anthropologist Mary Louise Pratt has observed that indigeneity should be viewed “not as a condition but [as] a force,” a “bundle of generative possibilities.”⁴⁷ In my opinion, the political space referred to by Jung, together with Pratt’s notion of a “force,” are served by loosening definitional fetters and considering alternative justifications for indigenous self-identification and other-identification.⁴⁸

41. There has been a certain fetishization of firstness or priority of settlement with regard to identification of indigeneity around the world. However, a claim to being first in a particular place can be a double-edged sword. Indigenous rights, based on a claim to priority, may be used by those who are structurally in a relatively powerful, and even exploitative, position. See Adam Kuper, *The Return of the Native*, 44 CURRENT ANTHROPOLOGY 389, 389 (2003).

42. COURTNEY JUNG, *THE MORAL FORCE OF INDIGENOUS POLITICS: CRITICAL LIBERALISM AND THE ZAPATISTAS* (2008) (analyzing the shift from peasant to indigenous politics by the Zapatistas in Mexico).

43. *Id.* at 11, 20.

44. *Id.* at 69.

45. See *id.* at 33.

46. *Id.* at 69.

47. Pratt, *supra* note 40, at 400, 402.

48. As one Zapatista activist who was at first reluctant to embrace indigenous identity indicated to Jung, “his concern was never an existential one Instead, what he hoped was that indigenous identity would reconstitute the terms of struggle.” JUNG, *supra* note

II. ANTHROPOLOGY AND INTERNATIONAL LAW

Anthropologist Sally Engle Merry has written on the contributions anthropology has made, and can make, to understanding international law.⁴⁹ Merry's review of the literature has unearthed a number of contributions, particularly the component that shows how anthropological theory helps us understand "how international law is produced and how it works."⁵⁰ The inverse is also true. International legal definitional discussions, decisions, and contestations can greatly enhance anthropological thinking about indigeneity.

A number of anthropologists evaluating definitional issues surrounding the terms indigenous peoples and indigeneity have concluded that such terms are not useful anthropological concepts from an analytical perspective because they are too essentializing, too tied to the land, or too broadly conceived.⁵¹ However, those same scholars condescendingly agree that, although such terms are not adequate for anthropological analysis, they are useful as legal concepts, as tools for political persuasion, or as meaningful terms "for those who identify themselves as indigenous."⁵² Some take a slippery slope approach, arguing that the use of the concepts will inevitably lead to ethnic strife,⁵³ while others distinguish between indigenism (an internationalist endeavor) and ethnonationalism, which rests on myths

42, at 78. In other words, his reluctance was not based on his own conception of his personal identity, but stemmed from considerations of his political identity.

49. See Sally Engle Merry, *Anthropology and International Law*, 35 ANN. REV. ANTHROPOLOGY 99, 100 (2006).

50. *Id.* at 9. "[A]nthropological research plays a critical role in examining how international law works in practice, mapping the circulation of ideas and procedures as well as examining the array of small sites in which international law operates . . ." *Id.* at 111.

51. See Kuper, *supra* note 41; Pelican, *supra* note 29, at 53.

52. Pelican, *supra* note 29, at 54; accord Alan Barnard, *Kalahari Revisionism, Vienna and the 'Indigenous Peoples' Debate*, 14 SOC. ANTHROPOLOGY 1, 7, 13 (2006). Pelican believes that "stripping the concept of 'indigenous peoples' of its original connotations of priority in time and historical continuity is debatable." Pelican, *supra* note 29, at 56. Pelican also discusses the relationship between Cameroon's Grassfielders and Mbororo people as an example; the latter, despite being relative newcomers "locally perceived as strangers or allogènes, qualify on the international level as indigenous peoples." *Id.* at 58. This leads me to raise the question of how much deference international agencies should give to local views (the United States' desire to impose its definitional requirements is instructive). But see John Bowen, *Should We Have a Universal Concept of 'Indigenous Peoples' Rights? Ethnicity and Essentialism in the Twenty-First Century*, 16 ANTHROPOLOGY TODAY 12 (2000) (proposing an intermediate and alternative two-level analysis for determining indigeneity from an anthropological perspective).

53. See Friedman, *supra* note 38, at 397-99; Kuper, *supra* note 41, at 395; Pelican, *supra* note 29, at 61.

of cultural purity and frequently involves movements that seek secession from the host nation-state.⁵⁴

There is also a fear that encouraging collective indigenous rights might lead to abuses of individual human rights by a group uncontrolled by the state. This concern is often based on an assumed lack of democratic process in indigenous settings. However, indigenous groups are aware of concerns about potential abuses of individual rights and have begun to address this issue at an international level. The Manila Declaration of the International Conference on Conflict Resolution, Peace Building, Sustainable Development, and Indigenous Peoples, held in December 2000 with extensive indigenous participation, recognized justice as universal and acknowledged that a revitalization of traditions should not lead to oppression of women and children.⁵⁵ Again, there is a risk of condescension in assuming that people who self-identify as indigenous are uninterested in or incapable of participating in a democratic process.⁵⁶ There is no reason why international legal processes that call human rights violations into question cannot be applied to recognized indigenous groups.

In fact, anthropologists are increasingly arguing against the notion that collective rights are intrinsically dangerous.⁵⁷ Moreover, the notion of “culture,” as conceptualized by anthropologists, has shifted to an active process of self-making and production of identity. In the international indigenous rights context, a consensus is growing that such identity construction is central to “building global alliances to resist global processes of dispossession.”⁵⁸ A number of legal scholars have begun to take the position that issues of representativeness and possible abuses of individual rights should neither be ignored nor

54. Noel Castree, *Differential Geographies: Place, Indigenous Rights and 'Local' Resources*, 23 POL. GEOGRAPHY 133, 152 (2004) (citing Ronald Niezen, *Recognizing Indigenism: Canadian Unity and the International Movement of Indigenous Peoples*, 42 COMP. STUD. SOC'Y & HIST. 119, 120 (2000)).

55. International Conference on Conflict Resolution, Peace Building, Sustainable Development and Indigenous Peoples, December 6-8, 2000, *Manila Declaration*, pmbl., § 5, available at http://www.tebtebba.org/index.php?option=com_docman&task=doc_download&gid=40&Itemid=27 (describing the proceedings of a conference with ninety participants from indigenous communities on five continents, all of whom signed the declaration).

56. For many years, scholars of the Iroquois Confederacy ironically touted the myth that the U.S. Constitution and American democracy itself were based partially on the Iroquois example. This trend has shifted but not without Congress weighing in. In 1988, Congress passed a resolution acknowledging the contribution of the Iroquois Confederacy of Nations to the development of the U.S. Constitution. See H.R. Con. Res. 331, 100th Cong. (1988), <http://www.senate.gov/reference/resources/pdf/hconres331.pdf> (last visited Oct. 29, 2010).

57. See, e.g., Colchester, *supra* note 29, at 3; Kenrick & Lewis, *supra* note 25, at 5.

58. Kenrick & Lewis, *supra* note 25, at 9.

privileged when considering who should have collective indigenous rights, thus helping to allay fears of the violation of human rights of individuals who constitute part of the group.⁵⁹

At the same time, most anthropologists dealing with these matters mention international law definitional discussions but do not incorporate such definitions into an anthropological consideration.⁶⁰ For example, Alan Barnard equates indigenous peoples with other legal categories and insists that this phrase should not be “in our glossary of *technical* terms.”⁶¹ Barnard’s view is a shortsighted approach to a term that, since the 1970s, has become embedded in theoretical discussions at all levels. In other words, the term “indigenous peoples” is not simply an “ideological construct” or “a useful tool for political persuasion,” as suggested by Barnard.⁶² Accordingly, anthropologist Sidsel Saugestad has observed, “anthropologists writing about indigenous issues need to take heed of the codification of the concept taking place within the UN system If anthropologists want to reconceptualize ‘indigenous peoples,’ the point of departure must be this present use.”⁶³

This approach also considers how the success of the global indigenous movement might affect the epistemological assumptions underlying anthropological definitions of indigeneity and indigenous peoples. Anthropologists are dedicated to specificities as the crux of much of their work, but a focus on specificity should not lead anthropologists to ignore the global framework of indigenous rights, including international legal considerations now accepted and utilized in local discourse and praxis.⁶⁴ As groups around the world adopt the

59. See, e.g., Klint A. Cowan, *International Responsibility for Human Rights Violations by American Indian Tribes*, 9 YALE HUM. RTS. & DEV. L.J. 1, 3-4 (2006) (arguing that because the U.S. is subject to international human rights norms and American Indian tribes are a political subunit of the United States, the United States is responsible for violations of individual rights that take place on tribal lands and has an obligation to rectify such situations); Kingsbury, *supra* note 29, at 425-26; Luis Roniger, *Citizenship in Latin America: New Works and Debates*, 10 CITIZENSHIP STUD. 489, 500-02 (2006).

60. See, e.g., Bowen, *supra* note 52 (arguing that the emphasis on prior occupation and universality in international law’s definitions is inadequate to fully satisfy considerations of equality and self-governance and proposing a more locally sensitive analytical framework instead).

61. Barnard, *supra* note 52, at 12.

62. *Id.* at 7.

63. Sidsel Saugestad, Discussion, *On the Return of the Native*, 45 CURRENT ANTHROPOLOGY 263, 264 (2004).

64. Anthropologists who have confronted this crucial issue include JOANNE RAPPAPORT, INTERCULTURAL UTOPIAS: PUBLIC INTELLECTUALS, CULTURAL EXPERIMENTATION, AND ETHNIC PLURALISM IN COLUMBIA 64-65 (2005); ANNA LOWENHAUPT TSING, FRICTION: AN ETHNOGRAPHY OF GLOBAL CONNECTION 205-06 (2005); Tania Murray Li, *Articulating Indigenous Identity in Indonesia: Resource Politics and the Trial Slot*, 42 COMP. STUD. SOC’Y AND HIST. 149, 155-57, 169-70 (2000).

category of indigenous peoples as a claim to recognition, self-conceptualization of indigenosity has become crucial to identity formation and visions of the future. Since the 1960s, when an epistemological shift took hold, sociocultural anthropologists have distinguished between how people being studied explain their practices and beliefs (called “emic” or folk explanations) and how anthropologists explain those same practices and beliefs (called “etic” or analytical explanations).⁶⁵ This division, though important at the time it was theorized, should be reconsidered. Peoples’ use of the international discourse of indigenous rights places in question the accepted emic/etic and folk/analytical dichotomy.

Emic and etic are merely two poles of a continuum in which varying degrees of self-definition are intertwined with what were previously purely analytical concepts, such as indigenosity. Just as the imbrications of global and local reveal transnational and translocal connections between international and local identities, it is critical that anthropologists not be dismissive of indigenous as an identity simply imposed from above, but rather as a process of self-identification. This provides an opening to consider in a different way the original question posed in this article: how to honor the long-term struggles for political autonomy and self-determination of unquestionably indigenous peoples in the eyes of the world, while at the same time expanding the definitional heft of indigenosity to encompass those who have come to self-identify as indigenous more recently.

III. PRODUCTIVE CONTRADICTIONS

When considering a contradiction based on a presumed opposition, it is often productive to question that opposition, as proposed above regarding the emic/etic divide. James Clifford suggests reconsideration of the dichotomous “poles of autochthony (we are here and have been here forever) and diaspora (we yearn for a homeland).”⁶⁶ Emphasizing the varieties of indigenous experience, he sees the displacement and migration of indigenous peoples as an “uneven, continuum of

65. See, e.g., PAUL BOHANNAN, *JUSTICE AND JUDGMENT AMONG THE TIV* 4-6 (Oxford Univ. Press reprint 1968) (1957); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 3-30 (1973); MARVIN HARRIS, *THE RISE OF ANTHROPOLOGICAL THEORY: A HISTORY OF THEORIES OF CULTURE* 568-604 (Alta Mira Press updated ed. 2001) (1968); Stanley Diamond, *Anthropology in Question*, in *REINVENTING ANTHROPOLOGY* 401, 423-25 (Dell Hymes ed., 1972); William S. Willis, Jr., *Skeletons in the Anthropological Closet*, in *REINVENTING ANTHROPOLOGY*, *supra*, at 121, 126-27.

66. Clifford, *supra* note 22, at 205.

attachments.”⁶⁷ Examples include those who have moved to urban areas, as well as people who have been expelled or forced to move from their rooted places, all of whom are “improvising new ways to be native.”⁶⁸

At this point, it is useful to return to the question first posed in this article, how to justify including in the single category of indigenous peoples both those who have a clear claim to difference and those who have only recently discovered they have a claim to indigeneity under an expansive view of indigenous peoples. In considering this question, it is fruitful to imagine how such new ways of being native as the result of displacement (to cities, for example) differ from the reconstitution of indigenous identity by people like those living in the Brazilian Northeast, who assert their identity without clear evidence of indigeneity. The first form of displacement is a movement through space. The second is a movement through time, where there has been a break in identification with an indigenous past. Both involve a yearning and desire for place, distant or immediate. Anthropologist Tom Biolsi has reviewed the varieties of “indigenous political space” in the United States and described it as one in which Indian people carry “portable rights beyond reservations” (more Indians live off than on a reservation, and primarily in urban areas). He analyzes this variety in relation to the diaspora concept and considers it a form of “indigenous cosmopolitanism” because its participants do not confine themselves to indigenous territory but situate themselves both physically and culturally throughout the national space.⁶⁹

Under this analysis, time can stand in for space, thus allowing for a form of temporal diasporic indigeneity. Just as one might consider the notion of diasporic indigeneity as an alternative way to inhabit “indigenous political space,” a temporal diaspora might be an appropriate way to think about those who are reconstituting an indigenous identity. They base their reconstitution of identity on the presumed settlement in a particular place in centuries past. The “new” tribes in Brazil’s Northeast imagine their indigenous roots in a time before prior generations were decimated by disease, assimilationist policies, and Catholic Church resettlement of surviving members of distinct tribes to missions, where they were put to work on the Church’s land. The term *remanescentes* (translated variously as remnants, remainders, or descendants) was used to describe newly reconstituted

67. *Id.* at 215.

68. *Id.* at 198.

69. Thomas Biolsi, *Imagined Geographies: Sovereignty, Indigenous Space, and American Indian Struggle*, 32 *AM. ETHNOLOGIST* 239, 248-49 (2005).

indigenous groups in Brazil from the beginning of the renewal process.⁷⁰ By recognizing these groups and providing them with land and rights as Indians, the Brazilian government is recognizing a previously unacknowledged link to a historical crime committed by the colonial authorities, the state, and the Catholic Church. This decision, made by both the state and the church,⁷¹ represents the recognition that a “claim to indigeneity is a claim to justice based not simply on historical priority but a sense of historical injustice”; such indigenous identities are “dynamic and processual and rooted in contemporary social relations, even as [people] invoke an historical perspective to make sense of who they are.”⁷² After all, it may be unjust, from a historical perspective, if the descendants of those who had their identity stolen are denied rights while those who happened to live beyond the reach of the colonial powers are unquestionably recognized as indigenous.

Brazil’s solution to this potential injustice came about as an unintended consequence of the Indian Statute of 1973.⁷³ Brazil’s military government, which ruled from 1964 to 1985, enacted this law to regularize property rights in the Amazon region to protect the country’s outer reaches from invasion by foreigners. The intention of the statute was to remove Indians from areas that could be developed and to place them in legally demarcated territories called *reservas*. Although this led to the disruption of many of the indigenous peoples in the Amazon, it also “broke political ground for Indians to stake their claims,” based on government recognition of the demarcated territories as dedicated to the Indians resettled there.⁷⁴ As it turned out, that law not only helped Amazonian Indians in their demands for demarcation of lands and provision of resources, it also inadvertently provided an opening for

70. JOSÉ MAURÍCIO ARRUTI, MOCAMBO: ANTROPOLOGIA E HISTÓRIA DO PROCESSO DE FORMAÇÃO QUILOMBOLA 80 (2005).

71. In 1971, Bishops’ Councils of the Catholic Church in the Amazon and the Northeast issued statements condemning historical and continuing dispossession of indigenous peoples in Brazil. FRENCH, *supra* note 1, at 36-37. The following year, the church created the Indigenist Missionary Council (CIMI), which is still active today supporting groups throughout the country. *Id.* at 37.

72. Andrew Canessa, *The Past Is Not Another Country: Exploring Indigenous Histories in Bolivia*, 19 HIST. & ANTHROPOLOGY 353, 355, 367 (2008).

73. FRENCH, *supra* note 1, at 25-26.

74. Seth Garfield, *Where the Earth Touches the Sky: The Xavante Indians’ Struggle for Land in Brazil, 1951-1979*, 80 HISP. AM. HIST. REV. 537, 546 (2000). Article 23 of the Indian Statute of 1973 establishes that “the lands occupied by them in accordance with their tribal usage, customs and tradition, including territories where they carry on activities essential for their subsistence or that are of economic usefulness” constitute territory of the Indians. Estatuto do Índio, Lei No. 6001, de 19 de Dezembro de 1973, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 21.12.1973 (Braz.), available at http://www.funai.gov.br/quem/legislacao/estatuto_indio.html.

previously unrecognized descendants of “reduced” Indian mission communities to demand their newly conceived rights as Indians and not simply *remanescentes*.

In 1973, for the first time, the term “Indian” was legally defined in Article 3 of the Indian Statute as follows: “Indian or forest dweller is every individual of Pre-columbian origin and ancestry who identifies himself and is identified as belonging to an ethnic group whose cultural characteristics distinguish him from the national society.”⁷⁵

Previously, indigenous people in Brazil were referred to as forest dwellers (*silvícolas*), with the assumption that there was no need to set out a definition since the only indigenous groups were isolated Amazonian tribes, each with its own language and cultural practices. Although the new definition in Article 3 codified an assimilationist perspective in following Article 4,⁷⁶ it also allowed for those of “pre-Columbian origin and ancestry” to identify themselves as Indian, so long as they were “identified as belonging to an ethnic group whose cultural characteristics distinguish [them] from the national society.”⁷⁷ Within a decade of its enactment, Article 3 of the statute was being used independently of Article 4, which defined stages of acculturation and had taken on a life of its own. In practice, the origin and ancestry clause of Article 4 has been effectively broadened, in part because of the universal Brazilian belief that all rural people have some indigenous ancestry, along with African and Portuguese (and Dutch in the Northeast).⁷⁸ Unlike the United States, African ancestry of an individual does not trump other ancestries, thus allowing each person certain flexibility in ethnoracial self-identification. In fact, the statute does not mention racial characteristics as a condition of Indian categorization. Paradoxically, in light of the spate of recognitions of peoples who could be classified as “integrated” under Article 4, it is precisely that article, with its potential and legally permissible transformation of ethnic Indians into non-Indians, which requires the origin and ancestry clause of Article 3 to be virtually ignored as a racial requirement. If some people can cease being Indians, there is no impediment for others to become Indians. In the twenty-five years since redemocratization, the assimilationist perspective has been rejected,

75. FRENCH, *supra* note 1, at 66-67.

76. Article 4 contains three classifications of indigenous communities: isolated, integrating, and integrated, reflecting the policy of the government at the time, which was to encourage, and even force, assimilation into the general population. If found to be integrated, the government could declare an entire community integrated into Brazilian society at the request of its members—this has never been requested. *Id.* at 198 n.42.

77. *Id.* at 66-67.

78. *Id.* at 67, 69.

and indigenous people who move to the city are no longer stripped of their legal identities as Indians.⁷⁹ With the newly recognized tribes, the overall indigenous population has increased dramatically.

Illustrating the power of definition (or lack thereof), in the case of Brazil, adding a definition performed the same function as excluding a definition in the Declaration on an international level. Thus, with Brazil as one example of a broadened definition of indigenous peoples, the undefined term in the Declaration permits a range of groups existing along a spatial-temporal continuum to claim indigenous rights.⁸⁰ In other words, the newly recognized, previously assimilated, northeastern Brazilian tribes; peoples in Africa and Asia who would not otherwise meet a definition that requires European colonization or “firstness” in time; and those, such as the Roma or Gypsies, who do not have a homeland (even an imagined one), can all claim indigeneity.

CONCLUSION

So long as there is no restrictive definition, a group could be recognized as indigenous on an international level because indigeneity should be “sufficiently flexible to accommodate a range of justifications” and should not be about a list of characteristics or “firstness.”⁸¹ By looking at indigenous in terms of justifications, rather than characteristics, it might be possible to recognize as indigenous “groups [that] draw upon the international concept of ‘indigenous peoples’ in constructing their own identities.”⁸² In this way, groups “whose self-concept might not have centered on prior possession may come to identify themselves as indigenous peoples with experiences and

79. The 1988 Constitution, the first democratically promulgated constitution in decades, expanded rights of, and protections for, indigenous peoples, but left the 1973 definition in effect.

80. Of course, one should not take the continuum metaphor too literally. In each case, a group’s history is marked by varying relationships to a particular space and/or identifications. I would like to thank environmental and labor historian Tom Rogers for making this observation.

81. Kingsbury, *supra* note 29, at 418. For example, Kingsbury proposes an approach that “treat[s] historical continuity as an indicator rather than a requirement,” thus emphasizing a “commonality of experiences, concerns and contributions made by groups in many different regions.” *Id.* at 457. This would “establish a unity that is not dependent on the universal presence of historical continuity,” which traditional analyses have, to date, almost always considered a justification intrinsic to indigeneity. *Id.* He argues that such a justification “does not accurately capture identities and outlooks in some regions not structured by waves of recent invasion and migration,” specifically India and China. *Id.* at 456.

82. *Id.* at 450.

worldviews shared with other indigenous peoples.”⁸³ Such an approach is reinforced by the successful assertion by representatives from Africa and Asia of their status as indigenous in the negotiations leading up to the adoption of the Declaration and by the recognition of reconstituted Indian tribes in Brazil.

Firstness in time and place is less important than the common conditions of people who consider themselves to be indigenous and claim rights as such. Although a common reaction when discussing this issue is incredulity that a legal document could lack a definitional section, upon further reflection, it becomes apparent that a lack of definition can serve as a suture, an impetus for common struggle. Further, the success of peoples currently self-identifying as indigenous, in being accepted by the international community, should be more fully incorporated into anthropological analyses of identity formation, especially as this success is connected to supranational and state entities and practices. In fact, the decision to exclude a definition from the Declaration brings that document closer to an anthropological perspective on cultural practices and identity formation.⁸⁴ Working to understand how particular indigenous peoples incorporate their new global indigenous identity will enhance both international legal and anthropological scholarship and allow those whose interests are most at stake to be given opportunities to participate in definitional discussions tied to rights and resources.

83. *Id.*

84. See Jan Hoffman French, *Making Identity: Law, Memory, and Race in Comparative Perspective in RACE, ROOTS & RELATIONS: NATIVE AND AFRICAN AMERICANS* 248 (Terry Straus ed., 2005) (comparing the use of blood quantum for determining Indian identity in the United States and the use of cultural indicia and self-identification in Brazil).

