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土著问题

人权和土著问题

土著人民人权和基本自由情况特别报告员

鲁道夫·斯塔文哈根的报告

增 编

对南非的访问 *

* 本报告的内容提要以所有正式语文分发。报告本身附于内容提要之后，将以原文和西班牙文分发。

内 容 提 要

本报告根据人权委员会 2005/51 号决议提交，事关土著人民人权和基本自由情况。特别报告员应南非政府邀请于 2005 年 7 月 28 日至 8 月 8 日对南非的正式访问。特别报告员在南非与国家当局和区域当局、非政府组织的代表、学术界人士以及西开普、自由邦、北开普和喀拉哈里地区各组织和土著社区的成员进行了磋商。本报告便是在上述磋商期间收集的资料的基础上编写而成。

南非至今仍在处理种族隔绝政策遗留下来的问题。在这种政策下，南非所有土著人民受压迫、受歧视。Khoi-San 土著人被剥夺了土地和领土，他们的家园和文化遭到摧残。种族隔离的悲剧性后果不是在几年内就能消除的。特别报告员完全了解，南非民主政府在解决旧政权遗留下来的许多不公正方面作出的巨大努力。自 1994 年国内第一次民主选举以来，南非政府一直在坚定不移地致力于保护和增进人权。

虽然土著人民仍未得到正式承认，官方统计也没有反映出他们在南非的存在，但 1996 年《宪法》提到了 Khoe 族和 San 族。2004 年 11 月，政府内阁通过了一项备忘录，以此制定了一项承认“弱势土著社区”的官方政策。

南非有六大群体自认为是土著。这些族裔群体包括三个主要的 San 族(! Xun, Khwe 和 Khomani)、各 Nama 社区、主要的 Griqua 社团和所谓的复兴主义 Khoisan。

特别报告员感到鼓舞的是，政府宣布致力于满足本国土著群体的要求，而且当前正在努力制定并落实适当的立法和政策，力求解决土地归还、多语言和多文化教育、传统当局在公共生活中的代表以及保健和其他服务的提供等等方面的问题。政府当局认识到，急需把重点放在积累下来的土著社区未得到满足的需求上。

南非土著人民原则上能平等获得政府提供的所有社会服务，包括教育、保健服务系统和基础设施。但是，他们往往比其他阶层更受到排挤，因此他们集中在社会经济较低等级上。由于独特的历史进程和当前的情况，所有土著群体在国内社会都面临不同的挑战。

喀拉哈里的 Khomani San 族被夺走了土地，在这过程中失去了他们狩猎——采集的传统生活方式。今天，他们可能是国内最贫穷、最受排挤的土著社区之一，他们的情况需要受到优先注意。西开普和北开普的 Griqua 社区，在国内其他地区也有，这些社区长期来一直在作政治斗争，争取使他们丧失的文化特性被承认为 Khoi-San 族的

一部分。由于在种族隔离政权下，他们被列入含糊的“有色人”类，因此，他们要求依法承认他们为独特的土著社区，并尊重他们特殊的族裔身份。

特别报告员在报告最后提出几条建议，以帮助有关方面弥补现有缺陷，找到持久的解决办法，促进南非土著人民人权情况的改善。特别报告员主要建议：《宪法》承认土著社区；废除保留种族隔离政权给他们的“有色人”的恶名的法律机制。建议政府维持一个得到正式承认的土著社区国家登记册，依法承认他们的社团和酋长地位。他还建议迅速批准《国际劳工组织关于独立国家境内土著和部落民族的第 169 号公约》(1989 年)。

特别报告员还建议土著社区要求归还土地的诉讼不局限于 1913 年的截止期；对土著社区的土地需求和土地权利的开展系统研究；加速土地归还进程。政府还必须向土著社区提供资源和技术合作，以便他们能成功地进行诉讼。他还建议对土著人民要用经济、社会和人的发展指标，在偏远地区建立巡回法院，以改善土著人民和社区进入司法系统的情况。

Annex

REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLE, RODOLFO STAVENHAGEN, ON HIS MISSION TO SOUTH AFRICA (28 JULY TO 8 AUGUST 2005)

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Introduction

1. Pursuant to Commission on Human Rights resolution 2001/57 of 24 April 2001, which established his mandate, and at the invitation of the Government, the Special Rapporteur visited South Africa from 28 July to 8 August 2005.
2. The purpose of this visit was to better understand the situation of indigenous peoples in South Africa, to learn about policies and practices designed to promote and protect their rights and to dialogue with government officials at the national and provincial levels, with representatives of civil society, with the United Nations country team and the donor community on ways to strengthen the responses to the demands and needs of indigenous peoples.
3. The Special Rapporteur would like to express his gratitude to the Government of South Africa, and especially to the Ministry for Agriculture and Land Affairs, for its invitation and cooperation, as well as to the Indigenous Peoples of Africa Coordinating Committee (IPACC) for its support and to the many indigenous organizations and individuals who gave their time and provided useful information.

I. SCHEDULE OF THE VISIT

4. The Special Rapporteur visited Pretoria, Kimberley, Upington, Bloemfontein, George and Cape Town where he spoke with government authorities at the national and provincial levels. He met with Brigitte Mabandla, Minister of Justice and Constitutional Affairs; Thoko Didiza, Minister for Agriculture and Land Affairs; Pallo Jordan, Minister of Arts and Culture; Susan Van der Merwe, Deputy Minister for Foreign Affairs, and Nomatyala Hanga, Deputy Minister of Provincial and Local Government; Dipuo Peters, Premier of the Northern Cape; Beatrice Marshoff, Premier of Free State; Dr. Wallace Amos Mgoqi, UniCity Manager of Cape Town; and the Regional Land Claims Commissioners of Western Cape, Beverley Jensen, and of Free State and Northern Cape, Sugar Ramakarane.
5. The Special Rapporteur also visited the township of Platfontein, in the Northern Cape, where he met with the chiefs and members of the !Xu and Khwe communities and visited the San rock-art site in Wildebeestkuil. In Upington, he met with members of the National Khoi-San Council. In Andriesvale, in the Kalahari, the Special Rapporteur had the opportunity to learn about the living conditions, traditions and cultures of the Khomani San and met with a delegation of the Nama communities from the Orange River area and other leaders and representatives of San communities in the region. In the Western Cape, he met with the Griqua community of Kranshoek.
6. Towards the end of the mission, Mr. Stavenhagen attended a workshop on the human rights of the San, Koranna, Nama, Griqua and Cape Khoi communities at the University of the Free State in Bloemfontein with the participation of a number of non-governmental organizations and indigenous chiefs and representatives.
7. He also met with the Chairpersons of a number of Parliamentary Committees, members of the South African Human Rights Commission (SAHRC), the Commission on the Protection of the Cultural, Religious and Linguistic Minorities and the Pan South African Language Board.

The Special Rapporteur participated in a lecture panel at the University of South Africa (UNISA), and gave a talk on indigenous peoples and the United Nations at the University of Free State.

II. HISTORICAL BACKGROUND AND CONTEXT

8. After 300 years of colonialism and 40 years of white minority rule known as the apartheid regime, the first democratic elections in South Africa were held in April 1994 under an interim Constitution, which was modified in 1996. In 2004, South Africans celebrated the first 10 years of freedom, marked by important progress in the consolidation of a culture of rights and institutionalized democracy. Out of the roughly 45 million inhabitants, Black Africans represent more than three-quarters of South Africa's population with 79 per cent or 35.4 million, while Whites make up 9.6 per cent (4.3 million), "Coloureds" 8.9 per cent (4 million), and Indians/Asians 2.5 per cent (1.1 million).

9. South Africa has a unique history of the use of race and language as tools for controlling citizenship and rights, in a context of oppression and marginalization. The policy of racial segregation served to guarantee the political and economic power of the white minority. To this day, South Africa is dealing with the consequences of this disastrous policy. A large part of the fast-growing black majority lives in oppressive poverty and, in the outer districts of the cities, a spread of vast miserable settlements of tin and carton shacks, lacking sufficient sanitation, electricity and water, is the persistent reality. Illiteracy among the most marginalized groups, poverty, related to high unemployment rates, as well as important health challenges are some of the South Africa's most severe social problems. While poverty exists among all sectors of society, Blacks constitute the poorest segment of the population, making up over 90 per cent of the 22 million poor.

10. Since 1994 the Government of South Africa has been firmly committed to the protection and promotion of human rights. Chapter 2 of the Constitution of 1996, entitled "Bill of Rights", is considered the cornerstone of democracy in South Africa and is based on the principles of equality and non-discrimination. State institutions created to support constitutional democracy are the Public Protector; the Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General and the Electoral Commission. The Pan South African Language Board (PanSALB) is an independent body set up to oversee language rights.

11. The Constitution establishes the right of communities living under traditional law and custom to influence the way in which the country is run. The National House of Traditional Leaders advises the national Government on the role of traditional leaders and on customary law.

12. Official statistics do not reflect the presence of indigenous peoples. Categories in the census are still based on the apartheid typology of race and language. Nine of the 11 official languages (all except Afrikaans and English) are southern Bantu languages, Zulu and Xhosa being spoken as first languages by the majority of the African population. Afrikaans is spoken as a first language by 13.3 per cent of the population. English is spoken at home by 8.2 per cent of South Africans.

13. There are six large groups who identify themselves as indigenous and who claim this status. Under each of these groups there can be various sub-groups which differ from each other

either for their striking difference in demography or in the institutions they have adopted or again for differences in their subsistence economy. These ethnic groups include the three main San peoples (!Xun, Khwe and Khomani), the various Nama communities (Khoekhoen), the major Griqua associations and representatives of the Koranna descendants, as well as several constituencies of so-called “revivalist Khoisan”, people reclaiming their historical heritage.

14. According to the documentation provided to the Special Rapporteur during his visit, the various indigenous groups, known collectively as Khoi-San, are estimated to include approximately 1,000 Khomani San, 1,100 Khwe San, 4,500 !Xun San and 10,000 Nama people, who are mostly resident in the sparsely populated Northern Cape Province. There are a further 300,000 Grikwas, mostly located in the Northern and Western Cape Provinces, but with significant communities in the Eastern Cape, Free State and KwaZulu-Natal. There is furthermore an unspecified number of “revivalists” Khoisan people associated with the Cape Cultural Heritage Development Council (CCHDC). Most of the indigenous peoples in the western part of the country were forced to adopt Afrikaans as their primary language. The use of Khoe-San languages was strongly discouraged under apartheid.¹

15. Although indigenous peoples are still not officially recognized as such in South Africa, the 1996 Constitution, for the first time, included constitutional reference to Khoe and San people. Article 6 (2) states: “Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages”. Here the word “indigenous” is used in reference to the majority of the languages recognized under apartheid, which became the 11 official languages of the Republic in 1994, but it does not include the Khoi-San languages. However, article 6 (5) indicates that “A Pan South African Language Board established by national legislation must promote, and create conditions for, the development and use of ... the Khoi, Nama and San languages”, thus opening a whole new constitutional chapter by recognizing the presence of Khoi and San people and their endangered languages.

16. The South African Human Rights Commission prepared an extensive study on indigenous peoples’ rights in 2000, which raised some of the major issues concerning the identification of indigenous peoples in the country. In this process a number of factors would need to be taken into account. These factors include the fact that some indigenous groups were historically stripped of their indigenous identity; that inter-marriages occurred over decades between the various African indigenous groups, and also with white settlers; and that historically there has been a lack of adequate registration mechanisms of indigenous communities and their members in the country.

17. The Commission recommends that self-identification should be accepted as a criterion of definition within the context of what constitutes an indigenous community, and that individual membership should be by lineage. It further recommends that all South African indigenous communities should be afforded the same limited self-determination rights and measures, meaning that Khoi and San and related groups should be included in the framework the Constitution has set up for traditional leaders under Chapter 12. It also recommends that the Government should maintain a national register of South African indigenous communities. The

report concludes by stating that “is a society founded on human rights and respect of human dignity, the dignity of all indigenous communities in South Africa needs to be restored and enhanced”.²

18. The Department of Provincial and Local Government (DPLG) recognized in its 2004 report on the Khoi-San communities in South Africa that the Khoi-San have, over years of colonial and apartheid rule suffered, like other previously disadvantaged communities, the denial of their rights and denigration of their cultural and value systems, and they were later classified as “Coloureds” under the old race classification laws.³

19. In November 2004, the Cabinet adopted a memorandum that would lead to an official policy on recognizing “vulnerable indigenous communities” as a result of more than eight years of negotiations by Khoi and San activists, considered to be an important achievement of the national efforts within the context of the International Decade on the World’s Indigenous People. The Government has decided not to resolve the issue of Khoi and San traditional leadership within the existing framework applied to the rest of traditional chiefs, an area requiring further attention following the adoption of the Cabinet memorandum in 2004.

III. HUMAN RIGHTS SITUATION OF INDIGENOUS PEOPLES IN SOUTH AFRICA: PRIORITY ISSUES

A. The ongoing debate on recognition

20. As there is no internationally agreed upon definition of indigenous peoples, states adopt different definitions in terms of their particular contexts and circumstances. The term indigenous is frequently used interchangeably with other terms, such as “aboriginal”, “native”, “original”, “first nations”, or else “tribal” or other similar concepts.

21. The African Commission on Human and Peoples’ Rights, at its 34th Ordinary Session, adopted the report of the African Commission’s Working Group on Indigenous Populations/Communities. In this report, the Commission recognizes the concerns over the use of the term “indigenous peoples” in the African context but also considers that within the majority population, which is indigenous to the continent, some groups are in a structurally subordinate position to the dominating groups and the State, leading to marginalization and discrimination. It is in this context that the indigenous concept should be addressed.⁴

22. This is also the position, which has been taken by the Government of South Africa and by the civil society organizations involved in the protection and promotion of the human rights of indigenous peoples in South Africa. For example, the South African Human Rights Commission considers that “the 1996 Constitution provides an important framework for the restoration of the identity of the San and Khoi peoples as well as any other indigenous peoples in South Africa”.

23. There is at present no accepted South African norm as to the meaning of indigenous, a term that appears twice in the Constitution (arts. 6 and 26). Familiarity with South African political discourse suggests that “indigenous”, as it is used in the Constitution, refers to the languages and legal customs of majority Bantu-language speakers in contrast to those of the minority European settler populations.⁵

24. This meaning is the norm in southern Africa where both Botswana and Zimbabwe regularly use the term indigenous to distinguish the black majority from the European and Asian settler minorities. However, in this report the term indigenous is used in the sense developed by the Working Group on Indigenous Populations to identify non-dominant groups of aboriginal or prior descent with distinct territorial and cultural identities.⁶ In other African countries, most of these groups are pastoralists or hunter-gatherers.

25. A pattern established within certain African countries by colonialism was to marginalize indigenous peoples in order to integrate agriculturalists into the economic and political system. This pattern of exclusion of culturally and economically distinct populations has been carried over into the post-independence era so that pastoralists and hunter-gatherers found themselves outside the political system. The new South Africa regime has instituted a radical departure from this pattern, as it is actively engaging in a process of accommodating indigenous Khoe and San peoples into the constitutional and legal framework of the country.

26. Khoe and San peoples did not have a place in South African political discourse prior to 1998. Under apartheid, the system of legalized racial discrimination; they were socially and politically invisible, being forced into the racial category of "Coloured". In fact, the various (San) groups are highly diverse, speaking different languages and with different cultural practices and levels of economic development. Besides the Khomani San of the Kalahari region, two of the largest San groups in South Africa, the !Xu and the Khwe, were resettled at Schmidtsdrift near Kimberley, after having been inducted into the South African army for operations in Angola and Namibia during previous years. Owing to the close associations with military infrastructure, these communities have higher than average health care standards and basic adult literacy in Afrikaans. Indigenous groups also include the Xegwi, !Kung, Xam and the Nama (Khoekhoen).

27. A study commissioned by the Government on five vulnerable Khoi San groups in the country (San, Nama, Cape Khoekhoe, Koranna and Griqua) holds that the various criteria for being considered as indigenous apply to all of them to a greater or lesser degree. These criteria include a history or existence in South Africa before colonialization; descent from such a pre-colonial community; retention of several pre-colonial patterns and institutions; self-identification; and the insufficient or inadequate accommodation of the rights of such a community compared to other communities in South Africa. The study recommends that where continuity in traditional leadership can be shown for more than two generations, such communities should be recognized constitutionally. It recommends the statutory recognition of the National Khoisan Council. Specifically the study recognizes that political decisions are needed in respect to the amendment of chapter 12 of the Constitution to provide for the accommodation of Khoisan leadership; the enactment of national framework legislation and provincial legislation; and the ratification of ILO Convention No. 169 (1989).

28. The situations of the approximately 300,000 Grikwas who reside in various provinces of South Africa vary greatly, ranging from impoverished rural farm labour tenants, to middle-class urban dwellers. Despite having suffered extensive language and cultural loss, Griqua identity persevered through a history of resistance and rebellion and the continuity of lineages and local chieftainships. These have become more evident in recent years as the Griqua, having been

classified as “Coloureds” during the apartheid regime (that is, as neither Europeans nor Blacks), now feel that in the new South African dispensation, their identity as a distinct indigenous people goes unrecognized and may become even more marginalized.

29. The Special Rapporteur held a number of meetings with several Griqua communities in various parts of the country. Despite their forced assimilation and progressive mixing with non-Khoi-San populations, beginning in the nineteenth century they created new leadership structures designed to maintain their unity and struggle for rights and recognition. At present, the Griqua acknowledge that they enjoy full political and human rights in South Africa, but lack official recognition as a distinct community.

30. Griqua organizations complain that progress has been very slow and political decisions on their status are still to be determined. Today the Griqua claim the right to land restitution. So far they have obtained only two farms with slightly over 7,200 hectares through the Government’s land restitution programme. Unemployment and poverty among their members are one of their main concerns. They are also actively involved in reviving their ancestral culture, traditions and indigenous language in order to restore their almost lost identities.

31. The debate concerning indigenous peoples also involves the so-called “revivalist Khoi-San”, a group that demands recognition of its Khoi-San identity and has organized itself through affiliation with the Cape Cultural Heritage Development Council of South Africa. The Council, however, is not legally recognized as a statutory structure, a situation that its membership considers as unfair and discriminatory.

32. Numerous other Khoi-San communities are engaged in similar efforts, such as the Nama, the Koranna, the Cape Khoi, the Khwe and !Xun, the Attaqua Khoi-San and others with whom the Special Rapporteur had an opportunity to engage. Their organizations complain that they were not included in the negotiations leading to the democratic transition, nor in the new national constitution nor in the Truth and Reconciliation process, and the Special Rapporteur considers that this has fuelled the sense of identity crisis and the perception that their full human rights as an indigenous people are not being entirely met in the new South Africa.

B. Land rights and related human rights issues

33. The Nama and San people constitute some of the poorest of the poor in South Africa. This is a result of living in neglected rural areas and a result of their stigmatized status as a rural underclass. The root cause hindering economic development and intergenerational cultural survival has been the forced dispossession of traditional land that once formed the basis of hunter-gatherer and pastoralist economies and identities. This historic dispossession of land and natural resources has caused indigenous people to plunge from a situation of self-reliance into poverty and a dependency on external resources. Nutrition levels have dropped due to sedentarization and lack of access to traditional bush food. Research has documented a drop in health care and vitality due to poor nutrition and inadequate access to traditional or Western medicines. Where there is regular access to clinics, health care standards are higher.

34. The most pressing concern of all the indigenous communities is securing their land base, and where possible, re-establishing access to natural resources necessary for pastoralism, hunting-gathering or new land-based ventures such as farming. With the assistance of external non-governmental organizations, particularly the South African San Institute (SASI) and the

Legal Resources Centre (LRC), indigenous groups have been surprisingly effective at using legislation designed to restore or redistribute land alienated under racial legislation since 1913 (date of the Native Land Act, which dispossessed a large part of the Black population).

35. Section 25(7) of the Constitution provides for restitution of rights in land to persons or communities who were dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices. Khoi-San communities argue that they were dispossessed of their land by settlers and the colonial administration long before the 1913 cut-off date.

36. The Restitution of Land Rights Act of 1994 established the Commission on Restitution of Land Rights (Land Claims Commission), which has the responsibility to investigate and process all land claims and a Land Claims Court. Considering that there was no legislation dealing explicitly with alienating land from Khoi and San peoples on the basis of race, it is a sign of the flexibility of the current legislation that most groups have shown some success with land claims.

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

38. During the 1970s the Khomani San of the southern Kalahari (Northern Cape Province) were dispossessed from the then Kgalagadi Transfrontier Park, their traditional land, and were dispersed through South Africa, living in small groups or “clans” as a de facto underclass. In common with other displaced indigenous people, the San had become to a large degree assimilated into, or dominated by, local communities. The ancient San cultural practices, mainly nomadic in nature, were sporadically maintained in isolated groups.⁷

39. On the basis of the new legislation, the Khomani San community of the Andriesvale area launched a land claim with the help of two South African NGOs (SASI and the Working Group of Indigenous Minorities, WIMSA). In 1999 the first phase of the land claim was settled, and the claimant group received six farms totalling approximately 40,000 hectares of land, which were to be used for the benefit and development of all Khomani San people that formed part of the newly established Communal Property Association (CPA), as co-owners of the reclaimed land (about 300 people). In addition, they received rights to part of the Kgalagadi Transfrontier Park. The reclaimed land was to be used for game farming, eco-tourism and related activities. The entire claim was valued at R15 million. A second phase of the settlement was concluded in 2002, covering a further 25,000 hectares, to be managed as a “contract park”, together with another community. The land claim and resettlement process concerning the Khomani San community was uniquely challenging in that, during the years of apartheid, they had almost fully dispersed but after the resettlement they have reached a good level of institutionalization.

40. While the future activities of the community, based upon the reclaimed land, appear to have been well planned, after five years the South African Human Rights Commission has found that the living and social conditions of the Khomani San have not substantially improved, and a number of human rights issues have appeared. This results from several unresolved problems.

At the time the claim was filed, the local San community allowed San people from other parts of the country to join their organization, a situation which eventually led to a split and division within the newly formed CPA between the “traditionalists” and the “modernizers”.

41. According to the information received by the Special Rapporteur the efficiency of the CPA in managing the development challenges is questioned. The government departments responsible for the projects allegedly did not provide the promised assistance nor delivered the required social services to the community. Abuses by the local police were also reported as well as the lack of access to justice services.

42. The Special Rapporteur met with representatives of the Khomani San community, including the traditional leadership, which spearheaded the original land claim, and visited the lands they had received under the claim. He heard their complaints and saw that indeed the land was not being put to productive use. The SAHRC finds that there currently exists a situation of disarray among the Khomani San people who benefited from the land claim process and a situation of incoherent management of the Kalahari land. The Commission concludes that, despite the great deal of effort which went into the planning and achievement of a successful land claim, the implementation phase failed to initiate a process of sustainable development, to protect basic human and other rights of the land claim beneficiaries. It recommends that the Khomani San Development Strategy be implemented by the Local Municipal Council without delay. The Special Rapporteur strongly supports these and other recommendations made in the Commission’s report and agrees that this has been the result of a sad story of neglect. He expects the Government to take up the challenge without delay, so that the Khomani San’s land claim can become, in the words of their traditional chief, an area that would exist for “years and years and for all my children and their children”.

43. Another major event concerning the indigenous peoples’ claims to land was the landmark court victory for the Nama people of the Richtersveld. The Namas demanded the fulfilment of their land rights over a mineral and much exploited area. After a lengthy process, the Supreme Court of Appeal eventually acknowledged that the Nama lost their land before 1913 - year of the Native Land Act - on the basis of racial prejudice and administrative action, and stated that the principle of restitution should apply.

44. While there is no systematic study of the land needs of the indigenous peoples of South Africa, under existing legislation a number of successful land claims have been completed, leading to restitution and the opening up of new economic opportunities for a number of indigenous communities. Yet much remains to be done.

C. Administration of justice

45. Within the framework of such land claims a number of incidents between the Khomani San and the local police force have been reported. Individual policemen have been implicated in abuses against the San and cases of torture and harassment have been documented. One San community member, Optel Rooi, was fatally shot by a policeman under unexplained circumstances in January 2004 and the Special Rapporteur was informed that the alleged culprit had not yet been successfully prosecuted.

46. There is an urgent need to reconsider laws pertaining to stock theft and hunting for subsistence. The laws used against San hunters are unchanged since the last century and are out of proportion.

47. The Movement Against Domination of African Minorities (MADAM) claims that some of its members who work in the country's correctional services are victims of discrimination and have been unjustly charged with delinquent behaviour. The Special Rapporteur is concerned about the ambiguities surrounding the continued use of the category "Coloured," to which the Khoi-San were arbitrarily assigned during the apartheid regime, in policies concerning employment, recruitment and job security. He is worried that this categorization might be misused to victimize the Khoi-San in the emerging occupational structure of the country, as is alleged in the complaint addressed to him by MADAM.

48. The representatives of indigenous organizations with whom the Special Rapporteur met agree generally that they have equal access to the administration of justice system with other South Africans, and no specific complaints about discrimination or bias in the judiciary were presented to the Special Rapporteur. Nevertheless, there is a sense that prosecutors, judges, public defenders and other personnel of the judiciary are not sufficiently culturally sensitive to the particular issues of concern to indigenous communities.

D. Indigenous representation in public life

49. Chapter 12 of the South African Constitution recognizes the role and status of traditional leadership according to customary law and provides for their protection. It allows for traditional authorities to function within the framework of South Africa's legal system and states that the courts must apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. The Constitutional Court, in a 1996 judgment (CCT 23/1996), recognized the status and role of traditional leadership as an integral part of South Africa's basic constitutional framework.

50. In a statement released in 2003 on the role of the traditional leaders, the Government stated that it considered the traditional leaders as custodians of the moral, value, cultural and social systems of many people in South Africa, which the apartheid system had mainly undermined. It believed that they occupied an important place in African life and, historically, in the body politic of South Africa. However, the protection of traditional leaders remained to be developed. For instance, the Department of Provincial and Local Government had not yet defined in clear and concise terms the role and status of traditional leaders vis-à-vis elected councillors.

51. Following the first democratic elections in 1994, and as part of a comprehensive strategy to implement the new South African Constitution, particular attention was paid to the question of the constitutional accommodation and recognition of Khoi-San identity. The National House of Traditional Leaders, provided for in chapter 12 of the Constitution, functions as an advisory body at the national level, and similar advisory Provincial Houses of Traditional Leaders have been established at the provincial level. However, these Houses do not include the traditional leadership of the Khoi-San communities, an omission that has created some dissatisfaction among the various Khoi-San organizations, which was reported in no uncertain terms to the Special Rapporteur during his conversations.

52. Ongoing research undertaken by the Government reveals that there exists no clear definition or consensus about the leadership and authority structures of the various Khoi-San communities, which is one of the reasons why they were not incorporated into the constitutionally recognized structures of traditional leadership. Nevertheless, the Special Rapporteur considers, on the basis of the information presented to him during his mission, that every effort should be made to accommodate the Khoi-San leadership structures in chapter 12, with due regard to the differences between the Khoi-San and other traditional leadership structures in the country.

53. In 1998 the Government initiated negotiations with self-identified “vulnerable indigenous communities” of Griqua, Nama, San and revivalist Khoisan. This process involved establishing an elected ad hoc forum to represent the diverse claimants and to assist in a process of research and negotiations. The National Khoi-San Council (NKSC), consisting of 21 members drawn from all the components of Khoi-San society, was funded by the Government for the purposes of negotiation on specific themes, an achievement because it established and institutionalized the need of the San communities to be recognized as distinct from other Khoekhoe peoples. The South African San Council (SASC), established in 2002, is part of the Working Group of Indigenous Minorities in Southern Africa (WIMSA), the regional San advocacy and leadership structure. Its main task is to co-ordinate the advocacy and lobbying of the three major San communities, !Xun, Khwe and Khomani.

54. After extensive consultations and research, the Cabinet decided early in 2005 that the various issues and challenges facing the Khoi-San communities in the country would be addressed by different government departments, through an inter-departmental Task Team to be coordinated by the Department of Provincial and Local Government. The DPLG is the line function department in South Africa charged with the responsibility of developing policy and governance related issues for the Khoi-San communities. Nevertheless, effective coordination is still in its incipient stages and a number of indigenous representatives reported to the Special Rapporteur that they had not yet been able to observe positive outcomes from the activities of this inter-departmental Task Team.

E. Intellectual property rights

55. In 1997 it was discovered that the Council for Scientific and Industrial Research (CSIR) had patented the *Hoodia gordonii*, a hunger-suppressing plant that the San community had been using for centuries to suppress hunger and thirst during long hunting trips. After a long trial, the San community, supported by WIMSA and SASI, were successful and obtained a landmark profit-sharing agreement that would provide credit and compensation to them.

56. A major action by the SASC was to challenge the attempt of the KwaZulu-Natal government to open a San rock-art heritage site without consulting San people. KwaZulu-Natal initially intended that only local Zulu-speaking communities would be involved in any form of benefit sharing. Negotiations with the province have led to a profit-sharing agreement and an exhibition on San history and identity.

57. Another example of successful evolution in the process of the acknowledgement of intellectual property rights is the adoption in 2004 of the Traditional Health Practitioners Bill, which recognizes and regulates the practice of South Africa’s traditional healers. According to

the Bill, the formal legal recognition of the practice of traditional medicine has a number of benefits for practitioners and their patients, and affirms the dignity and respect of this segment on of the health sector. A Traditional Health Practitioners Council will be established.

F. Living conditions, poverty and basic social services for indigenous peoples

58. Inadequate access to clean water is a serious concern for a number of communities. In one San community outside Upington people have to walk eight kilometres to the river to collect water. People have been forced into barely sustainable levels of the cash economy where they work for minimal wages watching sheep or doing domestic work on farms where they have no tenure rights or job security. Some rely on poorly paid seasonal work, such as grape harvesting. Under apartheid, the State enforced a policy whereby all Khoi and San people who had not already been assimilated into other populations were forcibly registered as Coloured. Failure to register was illegal and unavoidable. Most Khoi and San people describe this period as extraordinarily humiliating.

59. Twentieth-century sedentarization has been closely associated with a collapse in nutrition and disintegration of fragile natural resources. Indigenous peoples lost their land to farmers, then to State-sponsored activities such as mining, military activities and the creation of national parks. The Riemvasmaak Nama community, for example, lost its land base to the military and spent more than 20 years in exile in Namibia before the opportunity for restitution after 1994.

60. In terms of poverty, the Nama and the San people likely constitute some of the poorest sectors in the South African society and the reason for this situation results from living in rural areas but also from a stigmatization of their status as a rural underclass, fit only for menial labour. However, the Black and Coloured populations of these districts also find themselves in situations of crisis poverty. The indigenous experience is compounded by the stigma against their identity by neighbouring peoples, the lack of government awareness in some cases, and the intergenerational crisis of knowledge loss, language loss and skill loss.

61. As a result of their forced incorporation by the apartheid regime into the wars in Angola in Namibia during earlier years, a number of !Xun and Kwe (part of the San people) were resettled in South Africa as refugees and are now established in Platfontein, a new township near Kimberley, where they have access to social services provided by the Government. But like so many other poor people in South Africa, they show high rates of unemployment and low human development indicators. A particularly serious situation for this township is the absence of a medical clinic, which compels people to travel several kilometres on foot when in need of medical attention. Similar conditions were reported by the Namaqua people in the Northern Cape.

62. Vulnerable indigenous communities represent only a small fraction of the poverty-ridden population in South Africa, estimated to make up almost half of the country's total population. The government's poverty-reduction strategies and social services delivery systems focus rightly on the needs of the people in the lowest poverty ranks, who are found in the vast urban townships but also in many rural areas. The Special Rapporteur was told by government officials that no specific poverty reduction programmes apply to vulnerable indigenous communities, because they are counted among the generally poor population. This approach,

while justified in overall terms, is likely to leave some of the most vulnerable indigenous communities out of such programmes altogether, because of their geographical dispersal and low population density, which has led to their “political invisibility” in the country.

63. Special mention must be made of the specific grievances of indigenous children, youth and women, who reported discrimination, violence, drug abuse, high suicide rates, prostitution, alcoholism and other syndromes associated with marginalization and poverty, as is so common among indigenous peoples elsewhere. Another major area of concern to San and Khoe women is the unacceptably high level of domestic violence. Violence in some communities is so extreme that it includes murders and assaults with weapons. Violence is often associated with alcohol abuse and low self-esteem by men and women.

64. The high prevalence of HIV/AIDS in South Africa is a major challenge for both government and civil society groups. During the Special Rapporteur’s visit, no figures for HIV infection among indigenous communities were available. Taking into account that, in general, the infection rates in the country are higher amongst women than men, and are higher in poorer communities than affluent communities the Special Rapporteur considers the situation needs also to be carefully studied. Noting the small number of indigenous Khoe and San, and their difficult economic and social situation, HIV and AIDS should be considered a serious threat.

G. The right to education, language and culture

65. The Pan South African Language Board (PanSALB) is responsible under article 6 of the Constitution for the protection and promotion of the language rights of Khoe- and San-language speakers. In 1999 it established the Khoe and San National Language Board (KSNLB), the first legally constituted body of indigenous peoples to represent themselves on this issue, which has raised the issue of endangered languages and the absence of indigenous languages and knowledge systems in the public school system and in governance. Overall the KSNLB has fallen short of meeting its expressed aims, as acknowledged by its own membership.

66. There is almost no Nama literacy and the language is not taught in South African schools (a pilot project is being introduced in one village). The ancient !Khomani language, N/u, has no standardized alphabet system and most of its surviving speakers are over 60 years of age, thus less likely to grasp literacy skills. Neither !Xû nor Khwedam have standardized alphabets, making literacy initiatives particularly difficult. The stigma associated with the languages (particularly Nama) by young people requires special attention by educators and policy-makers when introducing the languages to the curriculum. All indigenous languages in South Africa are under serious threat of extinction.

67. Taking into account that the knowledge of an indigenous community’s language by its own members is essential for the preservation of the cultural identity of a people, an issue of great concern to South Africa’s formerly discriminated against, ignored and often dehumanized indigenous peoples, as expressed repeatedly to the Special Rapporteur, is that particular efforts must be made to preserve, promote and develop these languages. This is, furthermore, a recognized international human right.

H. Towards indigenous economic development

68. The three most important political-economic changes that have come with the transformation to democracy and which offer opportunities for both economic development and cultural survival include (a) the question of land reform; (b) growth in tourism and; (c) a new vision of national parks.

69. Land reform refers to restitution and redistribution but also to economic development opportunities for rural areas. This provides a base for a series of economic activities, both traditional and wage related. Regarding growth in tourism, particularly relevant are environmental and cultural tourism, promoted by the Government and private companies. Indigenous cultures and bush skills have a premium value that is not being fully exploited by indigenous peoples themselves. Finally, concerning the new vision of national parks, communities are seen by the authorities as partners rather than as a threat to conservation. The old parks board system was responsible for dispossessing communities of critically important resources. The new policies are opening up skills training and job opportunities for communities bordering on or reclaiming national parks. Each of these areas have drawn the attention of indigenous communities in the search for ways to improve their current situation.

70. The main strategy developed by WIMSA and its affiliates for halting the slide into misery has been, among others, to retain or regain land and other natural resources where possible; to stimulate traditional knowledge use where possible; where the resource base is too small, to look at developing community-controlled income-generating projects which, amongst other things, tap traditional knowledge to give the San an edge in the marketplace; to insist on autonomy overdependence in relations with the outside world; to organize politically to resist further marginalization and challenge discriminatory stereotyping and victimization; and to provide communities with educational and training opportunities for activists and traditional leaders. The net result has been a growth in community-based tourism, crafts and eco-tourism ventures combined with varying degrees of hunting and wild food gathering.

71. The absence of comparative statistics is a very serious omission. It was suggested that a household survey, similar to that conducted in 1995 should be conducted in areas of dense indigenous population. This would create a baseline that would allow government departments to make decisions about the relative needs of indigenous constituencies. The Special Rapporteur fully supports this proposal.

IV. CONCLUSIONS

72. All indigenous peoples of South Africa were brutally oppressed by the colonial system and the apartheid regime up to 1994. The Khoi-San were dispossessed of their lands and territories and their communities and cultures were destroyed. The tragic sequels to apartheid cannot be overcome in a few years, and the Special Rapporteur is fully conscious of the tremendous efforts that have been made by the democratic Government of South Africa to redress the many injustices inherited from the old regime. Through his consultations with government authorities and Khoi-San people, he is also aware of the challenges faced by these communities and their longstanding demands for land rights, official statutory recognition, respect of their cultural identities and full and equal access to social services.

73. The Special Rapporteur is encouraged by the Government's declared commitment to address the demands of the indigenous groups in the country and by the ongoing effort to formulate and implement appropriate legislation and policies to address such issues as land restitution, multilingual and multicultural education, the representation of traditional authorities in public life, and the delivery of health and other services. Government authorities are aware of the urgency to focus on the accumulated backlog of unsatisfied needs of indigenous communities, and the Khoi-San, in turn, are dissatisfied by the delays in the provision of services and demand that such efforts be speeded up. More coordination between the various government departments that deal with indigenous peoples is required.

74. Indigenous people in South Africa have in principle equal access to all social services provided by the government, including education, health delivery systems and infrastructure. However, they tend to be more marginalized than other sectors to the extent that they are concentrated at the lower end of the socio-economic scale.

75. Government departments provide priority attention to all sectors of the population across the board that are in the lowest ranks of income and social development indicators without regard to ethnic criteria. This policy may, however inadvertently, leave some indigenous communities (such as the Khomani San) outside of the priority attention they need, because of their geographical isolation but also because they are not sufficiently empowered to make an impact on government decisions regarding the allocation of limited resources.

76. All indigenous groups face different challenges within the national society as a result of distinct historical processes and current circumstances. The Khomani San in the Kalahari were dispossessed of their lands and lost their traditional hunter-gatherer livelihood in the process. Today they are probably among the poorest and most marginalized indigenous communities in the country and their situation requires priority attention. Whilst they were successful in their land restitution claim of 1999, after many years of struggle, they still have to turn these farms into productive enterprises and they expect the government to provide them with more of the needed support than they have received so far.

77. The Griqua communities of the Western and Northern Cape, who are also present in other parts of the country, have long struggled politically for the recognition of their lost cultural identity as part of the Khoi-San people. Having been included during the apartheid regime in the amorphous category of "Coloureds", they demand statutory recognition as a distinct indigenous community and respect for their particular ethnic identity.

78. As in other countries, indigenous women require specific measures to empower them to overcome the constraints of poverty, low levels of education and literacy. In South Africa specific measures in the combat against HIV/AIDS are very much needed. Indigenous women, not only in South Africa but in almost all the countries the Special Rapporteur has visited, are systematically excluded on matters of land reform policy and on discussions regarding solutions to their problems, in particular those of indigenous rural women. Actions to ensure their active participation in those areas are required.

79. The Special Rapporteur cannot conclude this report on his mission to South Africa without mentioning the communication which was addressed to him by an organization purporting to represent the "Boerevolk". These Afrikaaners claim to be the "only indigenous

White nation in Africa”, and as such complain of human rights violations “on every terrain of nationhood”, and demand the right of self-determination. The Special Rapporteur considers that the Boerevolk is a formerly politically dominant ethnic and cultural minority who descend from the earliest colonial settlers, and as citizens of South Africa they enjoy the same human rights and fundamental freedoms as every other person in the country, including the right to equality and non-discrimination. The South African State provides ample opportunity for every citizen to lodge complaints against alleged human rights violations and offers the possibility for remedial action. In the opinion of the Special Rapporteur, the claim that the Boerevolk should be considered an “indigenous nation” does not meet the criteria of “indigeneity” as these have been set out in international legal standards and discourse at the present time.

V. RECOMMENDATIONS

80. On the basis of the foregoing considerations the Special Rapporteur makes the following recommendations:

A. Recommendations to the Government

Legislation

81. Indigenous communities should be recognized as such constitutionally in parity with the speakers of the 11 officially recognized languages. This refers specifically to the various Khoi and San groups, the Nama and also the Griqua who are not named as such in the Constitution.

82. National framework legislation, as recommended in the Status Quo Reports, should be promptly enacted with the full participation of indigenous communities.

83. Actions should be undertaken towards the removal from all legitimate claimants to indigenous identity of the stigma attached to having been classified as “Coloured” during the apartheid regime, and that the National Khoi-San Council receive statutory recognition. That the various Khoi-San leadership lineages be included in the National and Provincial Houses of Traditional Leaders, wherever relevant and after due and objective evaluation of their respective claims.

84. A national register of officially recognized indigenous communities should be maintained, allowing the recommendation of the report of the SAHRC of 2000 and the Cabinet memorandum of 2004.

85. The Government and the Parliament should take all the necessary steps, in consultation with indigenous peoples in the country, to ensure a prompt ratification of ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989).

Land rights

86. Needs-assessment research in indigenous communities should be undertaken by the competent government authorities that might define the magnitude of the problem and suggest practical remedial measures.

87. In the case of indigenous communities that were dispossessed of their lands by colonial and discriminatory legislation or practice before the Native Land Act of 1913, positive legal and judicial action should be initiated to enable these communities and individuals to file legitimate claims for restitution within a wider perspective of human rights and transitional justice. Likewise, the Government is urged to provide the necessary resources and technical cooperation to such indigenous communities, enabling them to proceed in this direction.

88. The land restitution process, in terms of collective land rights of indigenous communities, should be accelerated, given the dire needs of many indigenous communities around the country and indigenous communities should be provided with resources and technical cooperation to pursue these claims successfully.

Poverty and exclusion

89. Official social and economic statistics should be disaggregated to specify indigenous communities, and special poverty reduction and social services delivery programmes (such as health care, housing, nutrition, education and others) should be designed also to target indigenous communities within South Africa's efforts to meet its Millennium Development Goals.

90. Poverty reduction strategies focused on the needs of specific groups must include also the indigenous communities, just as they are now focused on women, youth, or people with disabilities. This will require an assessment of the specific needs and requirements of these communities and the use of disaggregated data (which do not exist at present) when monitoring the results of such policies.

Social services, education and health

91. The relevant ministries should set up economic, social and human development indicators for indigenous peoples, in order to ensure in official statistics the inclusion of specific data on these peoples, as a basis for effective public policies and programme planning for social services and economic development purposes.

92. High-priority attention should be given to the needs and grievances of the Khomai San in the Kalahari and an independent, accountable, self-financing development authority should be established in consultation with the Khomani San to enable them, among other issues, to manage efficiently the farms that they received as a result of their successful milestone land claim in 1999.

93. The inter-departmental task team for the development of Khoi-San communities should be fully supported at the highest level by all government departments involved and the need to promote and protect the rights of indigenous communities should be acknowledged as a crosscutting human rights issue in all relevant departments.

94. The Ministry of Health should study possible solutions to the constraints being faced by the indigenous communities in Platfontein, including the possibility of establishing a fully equipped clinic able to respond to the health demands of the inhabitants of that township.
95. Health care delivery services should target specifically the marginalized indigenous communities and particularly their poorest members.
96. The introduction of drinking water to indigenous communities should be considered as a priority in the developments plans of the areas where such service still does not exist or where these services are insufficient.
97. The KNSLB should establish as a priority a comprehensive feasible plan to preserve, protect and promote indigenous languages in South Africa and their preservation should be protected by law. Its advice should be given careful attention by the Government and be followed up by relevant legislation and public policy. The assistance of the United Nations Educational, Scientific and Cultural Organization (UNESCO) should be sought.
98. The efforts of the Nama Development Institute to promote the Nama language through language education in primary and secondary schools and the establishment of a Nama radio station should be supported by the relevant authorities and international cooperation.

Administration of justice and related justice issues

99. Special training activities for personnel in the judiciary should be undertaken to overcome the prevailing cultural ignorance of the specific needs of indigenous communities. A system of visiting or roving tribunals should be instituted for distant communities in which access to the judiciary is difficult and costly in practice.
100. In the case of the death of Optel Rooi, the Special Rapporteur recommends that the court case be resolved as soon as possible, that compensation be paid to the family of the victim, and that greater efforts be made to train the local police (as elsewhere in the country) to be even handed and fair towards the San. He also wishes to underline the urgency of the South African Human Rights Commission's recommendation that there is need for a circuit, periodic or special court in the local area (Ashkam or Rietfontein) to deal with these issues.

Intellectual property

101. The intellectual property rights of indigenous communities should be protected by law as for example in the case of the commercial exploitation of the *Hoodia gordonii* plant used by the San, the conservation of the various rock art and sacred sites that have special meaning for indigenous communities, and the preservation of traditional medical practices.

102. **The ongoing efforts by several non-governmental organizations, particularly WIMSA, to develop a number of comprehensive local development plans with indigenous communities, concentrating on community-based tourism, crafts and eco-tourism ventures combined with varying degrees of hunting and wild food gathering, should be supported by the various governmental departments and the international community.**

B. Recommendations to civil society

103. **The political parties in the country should take a stand in favour of the constitutional recognition of indigenous peoples.**

104. **Non-governmental organizations should engage more systematically with the various indigenous communities identified in the present report in order to help the general public in the country to understand their demands and aspirations within the new South Africa.**

C. Recommendations to the international community

105. **The United Nations country team should find ways to increase the attention of their respective agencies and programmes to the needs of indigenous peoples and concentrate on specific coordinated programs concerning indigenous communities in South Africa, with particular emphasis on the needs of indigenous women, youth and children.**

106. **The International Labour Organization (ILO) and the Office of the High Commissioner for Human Rights should work together in promoting awareness in the country of the provisions of ILO Convention No. 169 (1989), aiming to support efforts for its prompt ratification as well as other relevant international human rights standards.**

D. Recommendations to the academic community

107. **The Special Rapporteur recommends that the country's universities and research centres establish focal points for research on and teaching about the issues and problems faced by the various indigenous communities in their diverse circumstances.**

Notes

¹ There is no agreement on the exact nomenclature and spelling of the various indigenous communities. The Special Rapporteur uses the terms as they appear in the documents provided to him during the mission.

² South African Human Rights Commission, *Research Project: Indigenous Peoples' Rights*, January 2002.

³ Department of Provincial and Local Government, *Khoi-San Communities in South Africa*, (2004).

⁴ See also African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, 2005.

⁵ International Labor Organization, *Indigenous Peoples of South Africa: Current Trends*, Geneva, 1999. The Special Rapporteur has drawn extensively on the information provided in this important report.

⁶ See also E/CN.4/2002/97.

⁷ South African Human Rights Commission, *Report on the Inquiry into Human Rights Violations in the Khomani San Community*, November 2004.
