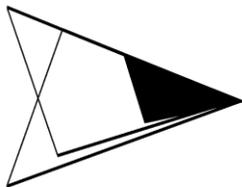


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NATION-BUILDING OR PAGEANTRY

Olivia Greene



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NATION-BUILDING OR PAGEANTRY: REPATRIATING THE REMAINS OF SOUTH AFRICA'S
KHOISAN AMID DEMANDS FOR RECOGNITION

*Olivia Greene**

Abstract

Post-apartheid Khoisan demands for recognition of their indigenous status have pushed the South African government to confront the limitations of a human rights framework with respect to the collective rights and remedies sought by Khoisan groups. This article will focus on efforts to repatriate Khoisan remains from museums in South Africa and abroad as a means of exploring the challenges that Khoisan groups and the government have faced in articulating how Khoisan communities can fully realize their constitutional human rights within the country's democratic framework.

I. Introduction

When nations undertake to unearth, remember and atone for past abuses of indigenous populations they are confronted with the present legal claims of descendent communities. Endeavors conceptualized by a state as discrete heritage projects are often firmly tethered to questions that states with sub-national indigenous communities are reluctant to address, such as sovereignty, self-governance, land rights, reparations and recognition. This article examines these issues in the context of the San and Khoi groups – collectively known as the “Khoisan” – that identify as indigenous to South Africa. It focuses on repatriations of Khoisan human remains from European and South African museums, and the intersection of those events with efforts by Khoisan groups to gain recognition from their government of their traditional group identities and indigenous status, as that term is understood in international law.¹ This article asks whether the efforts to repatriate and rebury these individuals have advanced the integration – on mutual terms – of the descendent communities in the modern state, or whether these efforts are a form of pageantry that conditions the survival of indigenous culture on the perpetuation of

* J.D., 2017, New York University School of Law. I am very grateful for and benefited from the comments and criticisms offered on drafts from Benedict Kingsbury and participants at the American Society of International Law Rights of Indigenous Peoples Interest Group Workshop in May 2016.

¹ This article relies on the definition of indigenous peoples proposed by José Martínez Cobo former Special Rapporteur of the Sub-Commission on Prevention of Discrimination against Indigenous Peoples: “[i]ndigenous 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.” Jose R. Martinez Cobo, *Final Report: Study on the Problem of Discrimination Against Indigenous Populations*, ¶379, U.N. Doc. E/CN.4/Sub.2 (1986). See also S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 28 (2009) [hereinafter *Anaya*].

mythologies that prevent the political and economic development of indigenous groups within the modern state.

Since the start of democracy in South Africa, Khoisan communities have sought many forms of redress for the historical oppression they have suffered, but of these official recognition has loomed large because of the ramifications it would have for all other Khoisan claims for redress. With respect to recognition, Khoisan groups seek two outcomes. First, that the South African government recognize Khoisan groups as distinct communities on par with Bantu-speaking groups, which are afforded specific rights as “traditional groups.” This would also correct what many Khoisan view to be a mis-identification of Khoisan people as “Coloured.” Second, Khoisan groups seek recognition of their identity as indigenous peoples. Underlying these claims is the assertion that absent official recognition Khoisan peoples cannot fully realize their constitutional human rights, both first generation civil and political rights and second-generation economic, social and cultural rights. The leader of one Khoisan association, the Griqua National Conference (“GNC”), Andrew Le Fleur, has described the demands for recognition as a kind of “third-generation” of rights, the “collective rights associated with group identity, self-determination, culture and indigenous minorities.”²

Repatriation efforts in the first twenty years of democracy in South Africa presented Khoisan groups with two opportunities related to their recognition. First, repatriation provided a platform through which Khoisan groups could educate the majority population about their history, their enduring connections to their indigenous culture, and the inferior nature of the avenues through which they can, as a group, participate in governance and benefit from constitutional protections. Second, the fact that repatriated remains must be returned to a specific place and custodian for a proper reburial has reinforced Khoisan assertions that their groups have the characteristics of traditional groups – as that term is understood in the South African legal context. These characteristics include the group’s maintenance of coherent communities and distinct customs, its ability to make valid claims to geographic areas, and its continual self-identification with its historical culture and forbearers.

² Linda Waldman, *Exploring the Intersection of Racial Labels, Rainbow Citizenship and Citizens’ Rights in Post-Apartheid South Africa*, in *THE POWER OF LABELING*, 170 (quoting Andrew Le Fleur, *Khoe and San call for government to speed up policy dialogue with indigenous communities*, C.R. Swart Memorial Lecture: University of the Free State, Bloemfontein (2006)).

This article argues that Khoisan efforts for recognition of their indigenous status have pushed the government to confront some of the limitations on constitutional human rights. By suggesting that specific indigenous rights and remedies are needed, the Khoisan have questioned whether robust incorporation of human rights into constitutional mandates is enough to address the needs of indigenous peoples absent a specific indigenous rights program. This article also argues that repatriations have illustrated that Khoisan peoples are becoming increasingly integrated into the modern democratic polity through the kind of “belated-state building” process described by Erica-Irene Daes as the heart of indigenous self-determination.³ This “belated state-building” process is one “through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion. This process...[requires] the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.”⁴

The article will proceed in three sections. Part II provides an overview of the major issues at stake in recognizing Khoisan groups as indigenous peoples and traditional groups. It will discuss (A) how Khoisan groups fit into the international indigenous peoples and South African traditional groups frameworks; and (B) the sources of resistance to recognizing Khoisan indigeneity. Part III discusses (A) how repatriation advances recognition movements, and (B) the beginning of the recognition movement and the role of the repatriation of Sarah Baartman – the first Khoisan repatriation – in building the case for recognition. Part IV will focus on subsequent repatriation efforts, which relied less on the international indigenous rights framework, instead benefiting from an expanding space within the democratic framework for Khoisan recognition and rights. It will discuss (A) efforts to repatriate remains from South African museums, and (B) the recent repatriation of a married Khoisan couple from Austria. Finally, part V focuses on the “belated state-building” taking place with respect to the recognition and inclusion of Khoisan peoples in South Africa. It discusses how this kind of process has facilitated the repatriation of

³ Erica-Irene Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 *TRANSN'L L. & CONTEMP. PROBS.* 1, 9 (1993) (arguing that “indigenous peoples do have the right to self-determination, and that the existing State has a duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically. This approach also would mean that indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing State, and, to the extent possible, to exercise their right to self-determination by this means...[thus] I believe that the right to self-determination should ordinarily be interpreted as the right of these peoples to negotiate freely their political status and representation in the States in which they live.”).

⁴ *Id.*

Khoisan remains under a banner of Khoisan cultural resurgence and national healing, and it will likely shape a resolution of recognition claims that similarly accommodates both national majoritarian interests and sub-national Khoisan interests.

II. The Stakes of Khoisan Recognition

A. *The International Indigenous Rights and Domestic Constitutional Rights Frameworks*

Khoisan as term came to the fore during the transition to democracy as a way of categorizing groups who traced their lineage to the peoples who inhabited South Africa before the migration of Bantu-speaking tribes and the arrival of the Dutch and the British. Khoisan includes San groups (Khomani, !Xun and !Khwe) who were organized in hunter gatherer societies and the Khoi, or Khoekhoe, pastoralist groups (Nama, Koranna, Griqua and Cape Khoi).⁵ The San, comprising a small proportion of Khoisan groups today, are the aboriginal people of Southern Africa. The present-day San in South African include very small groups (ranging in size from 500-1000) that are native to the country and a couple thousand San who were moved from Angola and Namibia by the South African Defense Force.⁶ The Khoi comprise the vast majority of Khoisan groups, and they are descendants of peoples who entered South Africa approximately 2,000 years ago from Namibia and Botswana.⁷ During South Africa's early colonial years from 1673 to the early 1800s, the "Khoe and San people were seen to be particularly barbaric and harmful. The State sanctioned a series of efforts to exterminate them and later to Christianize, dispossess them and stop nomadic movements."⁸ This period, which was also marked by devastating death rates from newly introduced European diseases, is sometimes described as a holocaust. Many people from

⁵ Andrew Le Fleur and Lesle Jansen, *The Khoisan in Contemporary South Africa: Challenges of Recognition as an Indigenous People*, KONRAD-ADENAUER-STIFTUNG (Aug. 26, 2013), <http://www.kas.de/suedafrika/en/publications/35255/>.

⁶ International Labour Organization, *Indigenous Peoples of South Africa: Current Trends*, THE PROJECT FOR THE RIGHTS OF INDIGENOUS AND TRIBAL PEOPLES 5 (1999) http://staging.ilo.org/public/libdoc/ilo/1999/99B09_351_engl.pdf [hereinafter *ILO Current Trends*].

⁷ *Id.* Bantu-speaking groups moved into South Africa between 1,800 and 800 years ago. *Id.* at 4. There are 5-10,000 Nama people in the Northern Cape and Nama remains the sole surviving Khoi language in the country. *Id.* at 8. There are approximately 300,000 Griqua in the country. The Griqua groups descend from Khoe peoples and settlers, but, "[t]hough many Griquas have genetic ties to European settlers, unlike coloured and Baster groups, the Griquas are explicit that their heritage is African and Khoe...The southern Griquas formed the earliest civil society structures in South Africa and have been a leading force in the recognition of indigenous rights in the democratic era." *Id.* at 9.

⁸ *Id.* at 15.

Khoisan groups assimilated into the Coloured population during this period, although others maintained a separate identity tied to their Khoisan group.⁹ Later, during apartheid, Khoisan people who had maintained their Khoisan identity were forcibly registered as Coloured.

Although Khoisan groups are not officially regarded as indigenous, or even Khoisan, “a variety of government and official statements” indicate that “the Khoi and San are regarded by the state as ‘indigenous people’ who have been marginalized and who deserve special protection.”¹⁰ Khoisan groups claim indigenous status as it is described in ILO Convention 169 (South Africa is not a party), and as it is commonly understood in international law.¹¹ This article relies on the “frequently cited definition” of indigenous groups suggested by José Martínez Cobo, former Special Rapporteur of the Sub-Commission on Prevention of Discrimination against Indigenous Peoples, as the meaning of indigenous as commonly understood in international law:¹²

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.¹³

Khoisan groups are appropriately considered indigenous under Cobo’s definition, though South Africa’s history has obfuscated the reasonable claims Khoisan have for indigenous status.

⁹ *Id.* at 4-5.

¹⁰ G. Wachira Makundi, *South Africa: Constitutional, Legislative and Administrative Provisions Concerning Indigenous Peoples*, 22 (2009), available at http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_SouthAfrica.pdf [hereinafter *Makundi*].

¹¹ ILO Current Trends, *supra* note 6, at 3. ILO Convention 169 states that the “self-identification as indigenous or tribal shall be the fundamental criterion” for determination of a group’s indigenous status. International Labour Organization Convention No. 169 art. 1, Jun. 27, 1989, 1650 U.N.T.S. 383. ILO Convention 169 defines indigenous peoples as, “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; 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.” *Id.*

¹² Anaya, *supra* note 1, at 28.

¹³ Secretariat of the Permanent Forum on Indigenous Issues, *The Concept of Indigenous Peoples*, ¶ 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986).

South Africa's history has also limited the extent to which the constitutional framework has been able to accommodate Khoisan groups and provide redress for past harms born by Khoisan groups. The naming of Khoisan peoples as Coloured under apartheid has been viewed by some Khoisan as leading to their exclusion from the constitutional negotiations at the Convention for a Democratic South Africa (CODESA), at which traditional bantu-speaking groups had some representation from Bantustan governments.¹⁴ Khoisan representation at CODESA may not have secured constitutional outcomes favorable to Khoisan recognition claims, after all, Khoisan were not only misidentified at the time as Coloured, but they were also just beginning to participate in the international indigenous peoples forums and associations.¹⁵ Regardless, with hindsight, it is clear that several constitutional provisions, particularly those providing redress for past wrongs, could have more adequately provided for harms specific to Khoisan groups.

For instance, Sec. 25(7) of the Bill of Rights, which provides restitution or equitable redress for people and communities dispossessed of their traditional lands or property, largely fails to address dispossession of Khoisan lands because its cut-off date – June 19, 1913 – is after most Khoisan communities lost their land in the latter half of the nineteenth century.¹⁶ Thus, Khoisan groups have been

¹⁴ The governments of the Bophuthatswana, Ciskei, Transkei, and Venda Bantustans participated in the negotiations. Speaking about recent complaints submitted by Khoisan communities against the government to the South African Human Rights Commission (SAHRC), the Chairperson of the Gauteng Khoisan Council said: We were not part of the CODESA process [to negotiate South Africa's constitution]...[but] traditional leaders were part of that [CODESA], the Nguni people [including the Zulu, Ndebele, Xhosa etc] they were part of drafting and crafting the Constitution and that is the reason why you find a National House of Traditional Leaders. They are covered, they are protected, their rights are protected. Where's ours, where's the Khoi and the San peoples [rights]? Interview with the Chairperson of the Gauteng Khoisan Council, John Van Rooyan, *Khoisan Fight For Recognition and Land*, SABC, available at <http://www.sabc.co.za/news/a/b44d26004b60efe9aae8ee43e5868fd4/Khoisan-fight-for-recognition-and-land-20162001>.

¹⁵ See Ewrin Schweitzer, THE MAKING OF GRIQUA, INC: INDIGENOUS STRUGGLES FOR LAND AND AUTONOMY IN SOUTH AFRICA 158-60 (2015) [hereinafter *Schweitzer*].

¹⁶ S. AFR. CONST., 1996, Art. 25(7). The June 13, 1913 cutoff date corresponds to the Natives Land Act of 1913, which reserved the vast majority of South African land for whites, forcing non-white Khoisan and Bantu-speaking groups alike off of traditional lands and left to share just 7.5% of arable land. Additional seizures were effectuated by subsequent legislation. See Edward Cavanagh, *Land Rights That Come With Cut-Off Dates: A Comparative Reflection on Restitution, Aboriginal Title, and Historical Injustice*, 28 S. AFR. J. ON HUM RTS. 437, 442-43 (2012) ("Symbolic as the first legislative attempt by a national, racist regime to curtail non-settler land rights, the Natives Land Act of 1913 became, in revolutionary anti-apartheid discourse, a much-vaunted exemplar of all that was nasty about 20th-century dispossession in South Africa."). Many San communities lost traditional lands soon after Dutch settlers arrived at the Cape. Though the Dutch viewed Khoi groups as sophisticated enough to enter into treaties, they viewed the San's hunter-gatherer lifestyle as primitive and considered their land as *terra nullus*. When the British took control of the Cape they ignored the pre-existing treaties between the Dutch and Khoi groups and set about signing their own treaties with Khoi groups often after devastating military campaigns forcing groups to agree to relinquishing vast amounts of land. *Id.* at 446-47.

unable to pursue many of their land claims through the Land Claims Court, the mechanism set up by Parliament to adjudicate claims for restitution or equitable redress for past dispossession.¹⁷

In addition, several human rights provided by the constitution are effectively truncated by the lack of recognition of Khoisan groups. For example, Khoisan languages are not among the eleven official languages, which include all those belonging to Bantu-speaking groups.¹⁸ Since Khoisan languages are not official, Khoisan children have no right to learn Khoisan languages in school (unlike their peers who speak official languages).¹⁹ The government has also struggled to implement constitutional provisions for Khoisan language speakers that clearly guarantee language rights for speakers of non-official languages, such as the right of arrested, detained and accused persons to receive information “in a language that the person understands.”²⁰

Redress for land dispossession and language rights are just a couple examples of how the constitutional framework provides unequal protection for Khoisan groups vis-à-vis other traditional groups in the constitution. Many Khoisan argue that their rights under the constitution will not be fully realized until Khoisan groups have full recognition. The South African Human Rights Commission is currently investigating human rights abuses arising from non-recognition, to be memorialized in a report to parliament, that will no doubt touch upon land and language rights and other provisions of the Bill of Rights that specifically implicate group identities and histories.

The indigenous rights crystalizing in international law are also relevant to Khoisan groups’ constitutional rights because under Sec. 39(1) of the Bill of Rights courts, tribunals and forums interpreting the Bill of Rights “must consider international law; and may consider foreign law.” This section potentially offers a way of framing the Bill of Rights against the indigenous rights in ILO Convention No. 169, the UN Declaration of Indigenous Peoples Rights and other international treaties

¹⁷ In the absence of legislation or a constitutional amendment to extend access to the Land Claims Court for Khoisan people with claims pre-dating 1913, South African courts have instead had to adjudicate such claims under common law. See *Alexkor Ltd v Richtersveld* 2004 (5) SA (CC) at 460 (S. Afr.).

¹⁸ Instead, the constitution states that they are languages the government “must take practical and positive measures to elevate...and advance.” S. AFR. CONST., 1996, Art. 6(2).

¹⁹ S. AFR. CONST., 1996, Art. 29.

²⁰ ILO Current Trends, *supra* note 6, at 19 (“Currently most representatives of the State, and courts in particular, ignore this constitutional guarantee for Nama, !Xú and Khwedam speakers. There are no qualified interpreters for any of these languages working for the Department of Justice.”).

and resolutions.²¹ In addition, under Sec. 232 of the Constitution, “customary international law is law in the republic unless it is inconsistent with the Constitution or an act of Parliament.”²² Therefore, South Africa is “obliged to respect the rights of indigenous peoples that have crystallised into norms of international customary law,” in the absence of a superseding constitutional provision or federal law.²³ Yet, recourse to these pathways of advocacy require governmental recognition of Khoisan indigeneity.

B. Resistance to Recognizing the Khoisan as Indigenous

The arguments for official recognition of Khoisan indigeneity notwithstanding, the government’s recognition of Khoisan groups as indigenous would be accompanied by controversy. It is worth mentioning five issues underlying resistance to the recognition of Khoisan as indigenous in order to contextualize the politics of the partnerships forged between Khoisan communities and the South African government in order to repatriate the Khoisan remains discussed in subsequent sections.

First, recognition of Khoisan groups entails contradicting the racial categories of apartheid and the mainstream narrative about the oppression of non-white populations upon which South Africa’s post-apartheid reconciliation and development programs have been built. In the midst of the transformation from the apartheid nation to the ‘rainbow nation’—involving a national “homogenization”—the assertion by Khoisan people that they were “not merely South African...[created] a new level of differentiation and labeling.”²⁴

Second, recognition underscores the contingency of some of the constitution’s human rights and remedial provisions on the extent to which a community’s experience is represented in mainstream historical narratives.

Third, recognition raises questions about whether the incorporation of indigenous rights in the South African context would in fact be “remedial” and “not privileging indigenous peoples with a set of

²¹ Roger Chennells and Aymone Du Toit, *The Rights of Indigenous Peoples in South Africa*, in INDIGENOUS PEOPLES RIGHTS IN SOUTHERN AFRICA 98, 103 (Robert Hitchcock and Diana Vinding, 2004), available at http://www.iwgia.org/iwgia_files_publications_files/0119_SouthernAfricaDoc110Complete.pdf.

²² S. AFR. CONST., 1996, Art. 232.

²³ Makundi, *supra* note 10, at 15.

²⁴ Linda Waldman, *supra* note 2, at 167.

rights unique to them,”²⁵ as James Anaya has described the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”). The fact that the apartheid government forcibly registered Khoisan people as Coloured during apartheid may give credence to views that indigenous status privileges Khoisan groups. Though the pain and injustice of this act of cultural destruction ought not be minimized, as Coloureds Khoisans were afforded many privileges under apartheid that their Black countrymen were not.²⁶ These privileges may be hard for some South Africans to square with indigeneity, a status that, as Avanya explains, connotes “severe disadvantage relative to others within the states constructed around them.”²⁷ However, despite being afforded a higher status during apartheid, the period left Khoisan groups – in particular the San and the Nama – as “some of the poorest of the poor in South Africa.”²⁸ Because the government refused to recognize the existence of Khoisan groups, there was “no institutionalized servicing of their needs as was the case of other ethnic groups identified by the apartheid regime’s classificatory system.”²⁹

Fourth, calls for recognition have also raised questions about whether by seeking recognition of their indigenous status Khoisan groups are calling for an ethnicity-based arrangement similar to the colonial and apartheid native affairs system that separated bantu-speaking groups from the national political unit and economy.³⁰ Some scholars have cautioned that Khoisan claims of indigeneity perpetuate an ethnic framework the country desperately needs to move past.³¹ This concern has led some researchers involved in domestic and international repatriation processes to question whether the repatriations should

²⁵ Anaya, *supra* note 1, at 59 (excerpt from Anaya’s Keynote Address to the 52d Congress of Americanists, Seville, July 2006, “Why There Should Not Have to Be a Declaration on the Rights of Indigenous Peoples”).

²⁶ Coloureds were permitted greater access to urban areas. They retained some measure of political representation through the Tricameral Parliament, which involved houses for White, Coloured and Indian representatives, though the degree of participation afforded to the latter two was wholly inadequate. Coloured schools and universities were generally superior to those reserved for Blacks.

²⁷ Anaya, *supra* note 1, at 1.

²⁸ ILO Current Trends, *supra* note 6, at 13.

²⁹ *Id.*

³⁰ See, Ciraj Rassool, *Ethnographic Elaborations, Indigenous Contestations, and the Cultural Politics of Imagining Community*, in *CONTESTING KNOWLEDGE* 116 (Susan Sleeper-Smith, ed., 2009) [hereinafter *Ethnographic Elaborations*] (Describing early Khoisan proposals for a National Council of Indigenous Peoples by arguing, “[t]his Khoisan political elite would occupy seats in a reinvented, belated, colonial system of native affairs with its origin in the system of indirect rule, a system from which the Khoisan in South Africa had largely been excluded...Also being highlighted was the ever-present shadow of colonial construction in assertions of Indigenousness.”).

³¹ *Id.* (“Khoisan Indigenousness as ethnicity...[calls for] a preferential classificatory category, with Indigenous identity as the basis of access to state resources.”).

take the form of communities bringing claims for the return of their decedents, as such a process “implicitly encourages ethnic claims...as the basis of the expression of a bona fide interest.”³²

Finally, fears of democratic fragmentation have also fueled apprehensions of recognizing Khoisan people as indigenous. The government’s timid approach to recognition should be considered in light of the anxiety that “the acknowledgement of indigenous rights, particularly the right to self-determination, may trigger a constitutional crisis amongst more privileged communities that wish to undermine the democratic regime.”³³

III. The Repatriation and Reburial of Sarah Baartman

A. *Repatriation and the Recognition Movement*

Much of the criticism of the Khoisan recognition project has been characterized by a view that there was a break in the chain of control that Khoisan people held over their indigenous culture, rendering their claims of indigeneity unreliable. Thus, as democratic rule began Khoisan groups were presented with a difficult task: convincing other populations and the government that their cultures are still alive. With the transition to democracy came the end of governmental policing of identities, but the apartheid mandate that Khoisan people register as Coloured left a widespread belief that indigenous people had been “almost wholly acculturated and had been indelibly recast as so-called ‘coloureds.’”³⁴ This belief operated in tandem with the longstanding view of Khoisan cultures and peoples as uniquely primordial and out of place in a modern state. South African apartheid and colonial scientific research had distinguished Khoisan people from Bantu-speaking people and “treated [Khoisan] much like the ‘discovered’ hominid fossils used to support claims that South Africa is the ‘cradle of humankind.’ They [were] located within ‘Africa’ but as relics of ‘prehistory’ [were] not considered *per se* ‘African’ i.e. ‘black African.’”³⁵

³² *Id.*, at 118 (noting that some academics have suggested the government hold “a mass reburial in a public ceremony and the construction of a national memorial site”).

³³ ILO Current Trends, *supra* note 6, at 12.

³⁴ Karin Lehmann, *To Define or Not to Define – the Definitional Debate Revisited*, 31 AM. INDIAN L. REV. 509 (2006-07).

³⁵ Julie McGee, *Indigenous Relations Art and Modernity in South Africa*, 3/4 CRITICAL INTERVENTIONS 114, 116 (2009), available at https://sites.udel.edu/museums/files/2015/08/McGee-Julie_Indigenous-Relations-Art-and-Modernity-in-South-Africa-14h1bwj.pdf.

During the colonial period the belief that Khoisan people were uniquely primordial created intense interest among European and South African researchers in the remains of Khoisan people, which led South African and European museums to accumulate large collections of Khoisan remains.³⁶ According to researchers, South African museums and universities held remains of over one thousand Khoisan people.³⁷ No one has yet conducted comprehensive research on the number of remains outside the country. However, the number is likely several hundred, given the remains documented in Vienna's National History Museum alone numbered 80 skeletons and 150 skulls.³⁸ Of the remains abroad, only three have been repatriated after extended efforts by both Khoisan communities and the South African government.

Khoisan groups, in particular the Griqua National Conference ("GNC"), began to demand the repatriation of remains abroad and in South Africa almost concurrently with their formal demands for recognition. In October 1995, Khoisan leaders submitted a memorandum of their aspirations for self-determination to President Mandela. Khoisan groups demanded: "recognition of aboriginality, representation at all levels of government, traditional leadership-status, the restitution of flagrantly violated treaties...[return of] land usurped by colonial powers, compensation for untold suffering, genocide, and ethnocide."³⁹ In December 1995 Khoisan groups began to petition the French and South African governments for the repatriation of the remains of a Khoekhoe woman – Sarah Baartman – from le Musee de l'Homme in Paris.⁴⁰

³⁶ *Id.* ("there was intense rivalry and competition among museums about the future possession of the skeletons of still-living persons, as well as the digging up of very recently buried bodies.")

³⁷ Martin Legassik and Ciraj Rassool, SKELETONS IN THE CUPBOARD: SOUTH AFRICAN MUSEUMS AND THE TRADE IN HUMAN REMAINS, 1907-1917 1 (2000) [hereinafter *Skeletons*] (citing findings that the "South Africa Museum in Cape Town has at 788 specimens, the National Museum in Bloemfontein 403, the Department of Anatomy at the University of Cape Town 239, the Albany Museum Grahamstown 168, and the McGregor Museum in Kimberly 150.").

³⁸ Ciraj Rassool, *Re-Storing the Skeletons of Empire*, 41 J. S. AFR. STUD. 3, 664 (2015) [hereinafter *Rassool*].

³⁹ Mansell Upham, *Statement by the Griqua National Conference of South Africa to the UN Working Group of Indigenous Populations 14th Session* (July 1996), available at <http://cwis.org/GML/UnitedNationsDocuments/>.

⁴⁰ *Id.*

B. Sarah Baartman and the Beginnings of a Recognition Movement

Sarah Baartman, also known as “Saartjie,” presented “an equivocal icon of both Khoe-San revivalism and post-apartheid nationalism.”⁴¹ Baartman, a Khoekhoe women born in 1789, was persuaded by a British navel surgeon and the South African brother of her employer to travel to London where she was exhibited nude as the ‘Hottentot Venus’ (her consent to this affair has long been debated).⁴² She was later exhibited in Paris where she died in 1816. Her body was given to French scientist Georges Cuvier who dissected it and preserved her brain and genitals.⁴³ Cuvier gave her remains to le Musée de l’Homme, which exhibited them as late as 1994.⁴⁴

In calling upon the South African and French governments to work towards the repatriation of Sarah Baartman, the GNC relied heavily on the international indigenous rights framework. Advocates pointed to the draft U.N. Declaration on the rights of indigenous peoples for support.⁴⁵ Article 12, section 2 of the final Declaration states,

States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.⁴⁶

In submissions to President Nelson Mandela petitioning him to intervene with French officials, advocates “noted that South Africa had not met its obligations as a United Nations member to protect the rights of its indigenous people.”⁴⁷ The submissions from the GNC also called on President Mandela to

⁴¹ Schweitzer, *supra* note 15, at 172.

⁴² P.V. Tobias, *Saartje Baartman: Her Life, Her Remains, and the Negotiations for Their Repatriation from France to South Africa*, 98 S. AFR. J. OF SCI. (Mar./Apr., 2002), at 107 [hereinafter *Tobias*]. Accounts tell of her being exhibited like an animal and paraded by her ‘keeper’ in a public spectacle.” Harry J. Elam Jr. and Alice Rayner, *Body Parts: Between Story and Spectacle in Venus by Suzan-Lori Parks*, in *STAGING RESISTANCE*, 265 (Jeanne M. Collieran & Jenny S. Spencer eds., 2001).

⁴³ Tobias, *supra* note 43, at 107.

⁴⁴ Elam and Rayner, *supra* note 43, at 206. The museum’s last exhibition of Baartman’s remains was “part of a documentation of ‘the harsh, racist portrayal of aboriginal peoples by nineteenth-century painters and sculptors.’” *Id.*

⁴⁵ Justin Pearce, *Hope of Saartjie’s Return Won’t Die*, MAIL & GUARDIAN (Dec. 15, 1995) <http://mg.co.za/article/1995-12-15-hope-of-saartjies-return-wont-die>.

⁴⁶ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sep. 13, 2007).

⁴⁷ Schweitzer, *supra* note 15, 172.

recognize “the Griquas as ‘an indigenous or First Nation of South Africa,’ and [to recognize the] Griqua land claims.”⁴⁸

Mandela eventually threw his support behind repatriating Baartman and directed the Ministry of Arts and Culture to negotiate the return of Baartman’s remains.⁴⁹ However, the South African government faced hesitation from their French counterparts reluctant to set a precedent “that could lead to plundered artefacts from across the globe...being returned.”⁵⁰ In 1996, the GNC brought the issue of Baartman’s removal to the Fourteenth Session of the U.N. Working Group on Indigenous Populations (WGIP) in Geneva. By bringing the issue to the WGIP, the GNC sought to raise awareness in the international community of the exclusion of Khoisan peoples from post-apartheid constitutional arrangements.⁵¹ The GNC also used the meeting to decry France’s resistance to repatriating Baartman.⁵²

As is often true in cases of repatriating remains and cultural objects from abroad, national laws prevented le Musée de l’Homme from returning Baartman’s remains on its own initiative. Baartman’s remains were part of the national collection, which under French law was unalienable.⁵³ Ultimately, Baartman was repatriated after the French National Assembly passed legislation in 2002 that mandated her return only.⁵⁴ It is not entirely clear what enabled the success of the negotiations between the governments of South Africa and France, but there appears to have been no involvement of Khoisan representatives in the government-to-government negotiations. South Africa’s Ministry of Arts and Culture appointed the country’s famed paleoanthropologist Phillip Tobias to lead “seven years of

⁴⁸ *Id.* (Quoting memorandum submitted by GNC to President Mandela.)

⁴⁹ The ministry would later go on to create a Human Remains Repatriation Advisory Committee of outside scholars and Khoisan representatives to advise on repatriation and reburials with an emphasis on “rehumanization.” Speech by Jacob Zuma on the Occasion of the Reburial of Mr. and Mrs. Klaas and Trooi Pienaar at Kuruman, Northern Cape Province (Aug. 12, 2012), <http://www.dac.gov.za/speech-president-jacob-zuma-occasion-reburial-mr-and-mrs-klaas-and-trooi-pienaar-kuruman-northern>.

⁵⁰ *Coming Home*, THE GUARDIAN (Feb. 20, 2002) <http://www.theguardian.com/education/2002/feb/21/internationaleducationnews.highereducation>.

⁵¹ Mansell Upham, *From the Venus Sickness to the Hottentot Venus, Part Two*, QUART BULL. NLSA 61(2), 78 (2007) [hereinafter *Upham*].

⁵² Mansell Upham, *Statement by the Griqua National Conference of South Africa to the UN Working Group of Indigenous Populations 14th Session* (July 1996), <http://cwis.org/GML/UnitedNationsDocuments/>.

⁵³ Tobias, *supra* note 43, at 109.

⁵⁴ Norman Palmer, *The Report of the Working Group on Human Remains*, 88 (2003), available at http://www.museumbund.de/fileadmin/geschaefts/dokumente/Leitfaeden_und_anderes/DCMS_Working_Group_Report_2003.pdf. The enactment of the French legislation was unique in the realm of cross border repatriations because it addressed the remains of one person who “had been alive when she left her land of origin and...died in poverty and degradation overseas.” *Id.* at 88. In addition, Baartman was returned to a “political unit which did not exist at the time of her removal.” *Id.*

protracted clandestine negotiations.”⁵⁵ Tobias’ account of the negotiations suggests that the South African government viewed the Khoisan perspective as relevant only at the stage of reburial. Writing shortly after the passage of French legislation mandating Baartman’s return, Tobias stated, “[i]t is strongly recommended that Baartman’s remains be handed over by the French government directly to the South African government, and that no group should seek to gain political advantage from the repatriation...The South African government should decide upon the disposition of Baartman’s remains, after approaching the various competent bodies in the country, including those representing the Khoisan themselves.”⁵⁶ The government also made concessions and representations to the French government that Khoisan representatives may have objected to, such as promising not to pursue the repatriation of other indigenous remains in French collections and suggesting the French had clean hands in their possession of Baartman’s remains.⁵⁷

Sarah Baartman was buried on August 9, 2002—South Africa’s National Women’s Day and International Day of Indigenous Peoples—in Hackney, Eastern Cape Province. The date itself signified a symbolic accommodation of the varied narratives ascribed to her. Although the main speeches at her burial were made by national figures, the ceremonies drew heavily from Khoe burial rituals. A public Khoe cleansing and dressing ritual was conducted before the burial, and attendees at the August 9 ceremonies—Khoisan representatives and government officials alike—participated in traditional rituals.⁵⁸ The ceremonies, which were broadcast to the public, not only introduced South Africans to these rituals, but also presented high-level government officials affirming the Khoe culture on display. President Thabo Mbeki’s keynote managed to artfully integrate “central Khoe-San issues such as cultural identity degradation and land dispossession” and the “wider context of a general African experience.”⁵⁹

The process of burying Baartman laid bare the emotional attachments South Africans of varied backgrounds had to her story, underscoring the tension between the national and sub-national identities

⁵⁵ Upham, *supra*, note 52, at 79.

⁵⁶ Tobias, *supra* note 43, at 109-10

⁵⁷ *Id.* at 109 (“France was not responsible for removing Baartman from South Africa, nor for [the] shameful conditions inflicted on her. The return of her remains to South Africa, therefore, would not imply that France was to blame but would be seen, rather, as a humanitarian gesture towards the peoples of South Africa and a reaffirmation of France’s historic role as an upholder of human rights.”).

⁵⁸ Schweitzer, *supra* note 15, at 175.

⁵⁹ *Id.* at 177 (“Mbeki elegantly accommodated Khoe-San people by acknowledging their Africanness without recognizing their First indigenous status.”)

ascribed to her. For Khoisan peoples “Saartjie Baartman became a symbol of our suffering, and all the misery she went through was a manifestation of how the Khoisan people were treated during that period and beyond...All through the colonial period and the decades of apartheid, our people were robbed of their lives and their identity.”⁶⁰ Khoisan leaders reacted with gratitude at the government’s success in securing Baartman’s return, but did not shy from calling attention to the government’s failure to recognize Khoisan groups. During one parliamentary debate on the subject of her reburial, a member read aloud a letter that had been sent to him from the Paramount Chief Archbishop Daniël Kanyilles of the National Council of the Khoi Tribal Chiefs.

Today, the Khoisan of South Africa has mixed feelings: On the one hand there is gratitude that Sara is eventually, after the humiliation almost 200 years ago in Europe, to be laid to rest...However, there is deep unhappiness, even bitterness, in the broader Khoisan community...Even though the United Nations, of which the RSA is a member, have already in 2000 given recognition to the Khoisan as South Africa's First Indigenous Nation, the Government has dragged their feet in doing the same. Although Sara Baartman has been elevated to a national symbol, she came from a specific nation, namely the Khoisan. Her people's constitutional recognition and accommodation is extremely urgent and essential, otherwise the current concern about her dignity is nothing other than a political game.⁶¹

For many outside the Khoisan community, Baartman’s story was a symbol of the “shackles of racial and gender oppression and discrimination,”⁶² embodying “a struggle by women to achieve equality in a patriarchal world.”⁶³ Mbeki cast her narrative in broad terms as “the story of the African people of our country in all their echelons. It is a story of the loss of our ancient freedom. It is a story of our dispossession of the land...of our reduction to the status of objects that could be owned, used and disposed of by others.”⁶⁴ Other government officials more explicitly rejected characterizations of Baartman as indigenous. The Deputy-Minister of Arts and Culture responded to Archbishop Kanyilles’ statement by saying, “[w]hen, indeed, we chose a human rights framework, it was precisely in recognition of our diversity and the fact that there are challenges that we will face as a people. So, we ought to say no

⁶⁰ *Coming Home*, THE GUARDIAN (Feb. 20, 2002) <http://www.theguardian.com/education/2002/feb/21/internationaleducationnews.highereducation> (Quoting Cecil le Fleur chairman of the GNC).

⁶¹ Letter sent to PM Mr. A.E. Van Niekerk from Paramount Chief Archbishop Daniël Kanyilles of the National Council of the Khoi Tribal Chiefs, National Assembly Debate, Aug. 7, 2002, at 55-56.

⁶² Statements by the Deputy Minister of Arts, Culture, Science and Technology, National Assembly Debate, Aug. 7 2002, at 27.

⁶³ Upham, *supra* note 52, at 78.

⁶⁴ Thabo Mbeki, *Speech at the Funeral of Sarah Baartman* (Aug. 9 2002) <http://www.dfa.gov.za/docs/speeches/2002/mbek0809.htm>

to ethnic chauvinism, and yes to nation-building ... I mean, the question is neither here nor there. As a constitutional state, whether there are first people or second people, we are all South Africans.”⁶⁵

Baartman’s repatriation and reburial had significant impact on the visibility of Khoisan groups, in particular the GNC. It garnered widespread media attention, informing the non-Khoisan population that Khoisan groups maintained their Khoisan identities and cultures and providing a public platform on which the apprehensions surrounding recognition collided with claims of exclusion unique to Khoisan peoples. Both the government and the GNC have parlayed Baartman’s reburial into numerous projects. Unsurprisingly, those initiated by the government situate Baartman as a South African hero, and those initiated by the GNC frame her as a forbearer to the modern community they seek to support.⁶⁶

IV. Post-Baartman Efforts to Repatriate Khoisan Remains

A. *Iziko Museums Repatriations*

Throughout the 1990’s the government, though it remained hesitant about recognition and recalcitrant to wade into issues such as land rights, began to devote more resources to Khoisan heritage projects, including repatriation. In 2001, the government organized a “Khoisan Diversity in National Unity” conference to discuss the implementation of a National Khoisan Legacy Project.⁶⁷ Delegates from over 36 Khoisan communities attended the conference, and although the focus was on heritage projects, the conference also featured deliberations on “how the Khoisan people and their leaders would be

⁶⁵ National Assembly Debate, 7 Aug. 2002, at 67-68.

⁶⁶ The Department of Arts and Culture allocated \$22 million (R168 million) for a national heritage site, the Saartjie Baartman Centre of Remembrance, with a library, exhibition spaces and an indigenous plant nursery and research center. Ray Maota, *Cash Boost for Baartman Memorial*, MEDIA CLUB OF SOUTH AFRICA (Mar. 15 2012) <http://www.mediaclubsouthafrica.com/culture/2836-human-rights>. The Eastern Cape province also renamed one of its municipalities the Sarah Baartman District Municipality, a gesture that positioned Baartman alongside the namesakes of the provinces’ other municipalities—former presidents of the ANC Nelson Mandela and Oliver Tambo, and anti-apartheid heroes Chris Hani, Joe Gqabi, and Alfred Nzo (also ANC leaders). *Significance of Sarah Baartman*, Sarah Baartman District Municipality, <http://www.cacadu.co.za/meaning> (last visited May 23, 2016). And the GNC received, “financial support for their land reform project in Ratelgat in 2005 from the World Bank as a consequence of their struggle for the return of Baartman’s bodily remains.” Schweitzer, *supra* note 15, at 178.

⁶⁷ Zuma, *Speech at Opening Ceremony of National Khoisan Consultative Conference* (Mar. 29, 2001) http://webcache.googleusercontent.com/search?q=cache:AtOblmF4ok8J:www.chr.up.ac.za/chr_old/indigenous/documents/South%20Africa/Report/ADDRESS%20BY%20DEPUTY%20PRESIDENT%20ZUMA%20TO%20THE%20OPENING%20CEREMONY%20OF%20THE%20NATIONAL%20KHOISAN%20CONSULTATIVE%20CONFERENCE.doc+%&cd=1&hl=en&ct=clnk&gl=us&client=safari.

accommodated constitutionally.”⁶⁸ Jacob Zuma, then Deputy-President, gave remarks that underscored the tension inherent in the government’s support for repatriation projects in light of its hesitation to address Khoisan recognition claims. Calling the conference a “watershed,” Zuma said:

The organisers of this conference and the leaders of the groups that are represented here have realised that there is value in Khoisan heritage beyond land claims and tourism. Acknowledging where you came from – as did the descendants of slaves in the United States forty years ago – is empowering because it gives you the choice to decide where to place yourself in the broader South African society.⁶⁹

This statement, comparing Khoisan peoples with an American racial—but not indigenous—minority, places Khoisan heritage in the service of the national identity. It suggests that the space for subnational identities in the new “rainbow nation” polity is within the realm of heritage, arts and culture, instead of politics and self-governance.

In the late 1990s and early 2000s, Khoisan domestic activism for Baartman’s return merged with campaigns to address the portrayal of Khoi and San people in South Africa’s museums. Initially Khoisan groups focused on removing offensive exhibits, such as the Bushman Diorama in the Museum of Natural History, which positioned casts of San people alongside wildlife, plant life and fossils.⁷⁰ After academic research into the role of domestic institutions in the perpetuation of racial science introduced the public to the large collections of Khoisan remains in the country’s museums and universities, Khoisan activists shifted their focus to the remains held by institutions.⁷¹

The Iziko Museums, comprised of several national museums in Cape Town, became the center of domestic repatriation efforts.⁷² Iziko holds over 1,000 human remains obtained through “legal archeological excavations and from the rescue of remains from development projects, as well as unethically obtained collect[ions]...taken for race-based science.”⁷³ In 2003, in response to lobbying by

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Ethnographic Elaborations, *supra* note 30, at 111 (Quoting Melanie Gosling, *Controversial Khoisan Exhibit to Close*, THE CAPE TIMES, April 2, 2001).

⁷¹ Upham, *supra* note 52, at 78-79.

⁷² After the transition to democracy, the national museums in Cape Town were consolidated by the Department of Arts and Culture under the umbrella of Iziko National Museums. The transformation was driven by efforts to consolidate resources, but it also enabled a reorganization of the museum divisions that included the creation of a Social History Collections division, into which collections relating to living indigenous peoples were moved from the Museum of Natural History.

⁷³ Iziko Museums, *Repatriation of Human Remains* (Aug. 10, 2012) <http://www.iziko.org.za/news/entry/repatriation-of-human-remains/>. While the Iziko museums has yet to publish a final list or report of its unethically acquired

Khoisan groups, the Department of Arts and Culture gave a grant to Iziko to facilitate a review of the origin and circumstances surrounding the acquisition of human remains in Iziko collections.⁷⁴ After the review, Iziko appointed a community liaison “tasked with initiating contact with leaders of affected South African communities and providing them with details about the human remains in Iziko collections...[and initiating] group discussions with representatives from communities with a view to agreeing on the consultation process for the future custodianship of the human remains.”⁷⁵ Building on its collection review and discussions with Khoisan communities, Iziko published a “Policy on the Management of Human Remains in Iziko Collections,” that has guided its engagement with Khoisan communities over the remains it holds.

The policy is drafted in adherence to the Vermillion Accord adopted by the World Archeological Conference and draws a strict distinction between “human remains that can be linked to living communities and those that are older than 10,000 years before the present, and therefore cannot be associated with a living community.”⁷⁶ Remains falling into the former category are designated as either ethically acquired or unethically acquired, and the policy obligates the museums to seek repatriation and restitution for those remains that are unethically acquired.⁷⁷ The policy defines unethically acquired remains as those collected “solely for the purposes of racial study,” or collected “without appropriate consent...from recent graves of individuals who were known in life, or were from known communities.”⁷⁸ With respect to restitution and repatriation of unethically acquired remains, the policy instructs Iziko museums to (a) “take the lead in identifying and notifying descendant communities and other stakeholders...and provide them with complete documentation and access to information on record,” and (b) “negotiate in good faith the restitution of [unethically collected] remains” and (c) appoint an advisory

remains, initial reports show that in addition to indigenous South Africans, the museum possessed remains of 74 indigenous peoples from Namibia acquired through questionable practices, as well as six aboriginal Australians. *See id.*; Rassool, *supra* note 38, at 656.

⁷⁴ Jatti Bredekamp, *Iziko S A Museum as a Site of Natural/Cultural History*, in CHALLENGE AND TRANSFORMATION: MUSEUMS IN CAPE TOWN AN SYDNEY 214, 215 (Katherine J. Goodnow, Jack Lohman, and Jatti Bredekamp eds., 2006).

⁷⁵ *Id.*

⁷⁶ *Iziko Policy on the Management of Human Remains in Iziko Collections* (Sep. 29, 2005) Art. 1.4, http://iziko.org.za/PDF/05_Iziko_SA%20Human%20Remains%20Policy.pdf.

⁷⁷ *Id.*, Arts. 1.4 & 5.

⁷⁸ *Id.*, Art. 2.10.

committee to consult “with descendant communities and other stakeholders, [and] recommend appropriate forms of memorialization.”⁷⁹

Thus far, Iziko has drawn up two lists of unethically acquired individuals, the first containing 24 individuals and the second 96 individuals, most of which came from Namibia and South Africa’s Northern Cape Province, which is home to the country’s largest share of Khoisan peoples.⁸⁰ These unethically obtained remains “have been isolated in non-accessible storage in preparation for de-accessioning and return, once national policy and appropriate models have been developed.”⁸¹ Iziko has pushed for a national policy on repatriation to govern all institutions holding unethically collected remains and has begun to build support among international peers for institutional policies governing collections of human remains.⁸² The first repatriations to result from the Iziko project were Trooi and Klaas Pienaar (two of a large number of remains discovered in Austrian museums by researchers investigating the origins of the Iziko collection) and six aboriginal Australians.⁸³

Khoisan groups continue to call for national legislation that would address the remains held in universities, non-Iziko public museums, foreign museums and domestic private museums. However, the Iziko policy represents a significant victory for Khoisan peoples who seek to transform how they are depicted in museums and assert that the living descendants, as opposed to the state, are the proper custodians of the remains. The notion that the descendants are the proper custodians appears obvious, but it is significant in the context of the non-recognition of Khoisan groups as traditional groups and as

⁷⁹ *Id.* Art. 5.

⁸⁰ Rassool, *supra* note 38, at 666.

⁸¹ Rassool, *supra* note 38, at 656 (Noting that the Minister of Arts and Culture formally approved of the de-accessioning. “Even though national repatriation policies had not yet been concluded, he gave Iziko Museums ‘permission to repatriate all human remains...with immediate effect.’” *Id.*, at 663)

⁸² Efforts to create a national policy are ongoing. Iziko officials have urged their colleagues in Parliament that the transformation of the country’s collections of indigenous remains requires legislation that distinguishes between remains that can properly be called objects and those more appropriately conceptualized as dead persons, similar to its policy. Minutes from the Site Meetings with South African Heritage Resources Agency and Iziko Museums on the mandates, Performance, Strategic Goals, Management Structures, Finances, Challenges and Successes (Sep. 2, 2004), <https://pmg.org.za/committee-meeting/17457/> (last visited May 23, 2016). The most recent Iziko annual report notes museum representatives emphasized in talks with the Department of Arts and Culture on the subject that “given that collections of this nature [holding human remains] in museums and universities exist throughout South Africa, this is a complex national issue that requires investment of substantial state funding to address these violations.” Iziko, *Annual Report* 2015/16, <https://www.iziko.org.za/PDF/Iziko%202015%20AR%20low%20resolution%20spreads.pdf> (last visited Mar. 22, 2017).

⁸³ Iziko Museums, *Repatriation of Human Remains* (Aug. 10, 2012) <http://www.iziko.org.za/news/entry/repatriation-of-human-remains/>.

indigenous. Though English common law views human remains as “quasi-property” in the sense that the “descendants retain rights of control and access and obligations for care of their deceased ancestors, regardless of where they are buried,”⁸⁴ the 1999 National Heritage Resources Act (NHRA) delegates the obligation to “conserve and generally care for burial grounds and graves” older than 60 years to the South African Heritage Resource Agency⁸⁵ and makes all archeological objects property of the state.⁸⁶ Therefore, the legal rights of Khoisan communities to their dead is ambiguous. The NHRA, unlike the United States’ Native American Graves Protection and Repatriation Act (“NAGPRA”), is general legislation that does not target or provide specific provisions for Khoisan communities. As a result, the NHRA does “not empower the indigenous population in the protection of their heritage, but rather reduce[s] remains to objects to be dealt with under property rights regimes.”⁸⁷ In contrast, the Iziko policy, which was drafted with the Khoisan in mind, recognizes the interest of the community from which unethically removed remains originated as primary, and moves away from a conceptualization of remains as property. Moreover, while the NHRA mandates museums to negotiate with “a community or body with a bona fide interest [that] makes a claim for the restitution of a movable heritage resource,”⁸⁸ the Iziko policy put the onus on the museums to locate the communities with interests and requires museums not to merely negotiate over claims for restitution, but to “negotiate in good faith *the* restitution” (emphasis added).⁸⁹ This implies a requirement of restitution, and a presumption that the modern day communities of human remains are present and discernable.

B. The Repatriation of Trooi and Klaas Pienaar

In 1909, Trooi and Klaas Pienaar, a married San couple, died within a month of each other from malaria. The Pienaars were farm workers in the Northern Cape and were buried on Pienaarspuits farm,

⁸⁴ Sherry Hutt and Jennifer Riddle, *The Law of Human Remains and Burials*, in HUMAN REMAINS: GUIDE FOR MUSEUMS AND ACADEMIC INSTITUTIONS 224 (Vicki Cassman, Nancy Odegaard, and Joseph Powell eds., 2007).

⁸⁵ National Heritage Resources Act, Act No. 25 of 1999, Art. 36(1) [hereinafter *NHRA*]

⁸⁶ *Id.*, Art. 35(2).

⁸⁷ Ryan M. Seidemann, *Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries*, 64 LA. L. REV. 545, 564 (2004).

⁸⁸ NHRA, *supra* note 86, Art. 41(1). (“The institution concerned must enter into a process of negotiation with the claimants regarding the future of the resource.”)

⁸⁹ In this respect, the Iziko Policy is more in line with the NAGRA, which requires repatriation when federally recognized tribes make a claim to remains and cultural property held by federal agencies and museums. *See* Hutt and Riddle, *supra* note 85, at 236.

owned by their employer Abel Pienaar, a Griqua man.⁹⁰ Several months later a grave robber employed by the Austrian anthropologist Rudolph Pöch dug up their bodies and transported them to Vienna along with the bodies of several other San peoples from neighboring farms.⁹¹ The Pienaars became part of a collection of Pöch's research subjects in Vienna's Natural History Museum that included "80 skeletons, 150 skulls and 50 casts" from Southern Africa.⁹² The Pienaars, though lacking Baartman's notoriety, similarly captured the interests and sympathies of South Africans and Austrians alike. Their names were known, as were the dates of their deaths, original burials and disinterment. Their status as a married couple rendered them "people of culture," and pushed back against views of 19th and 20th-century scientists that San were primitive. In South Africa, research into the Pienaars' story revealed evidence of a governmental inquiry into the trafficking in human remains by grave robbers and smugglers in the employ of European scientists like Rudolph Pöch. These investigations led to the passage of the *Bushmen Relic Act of 1911*, which aimed to prevent the removal of Khoisan remains by Europeans so that South African museums and universities could maintain a monopoly on the trade.⁹³ The Pienaars became a symbol of the country's complex history as both a colonized and a colonizing nation.

Negotiations over the Pienaars repatriation began in 2010. Without the guidance of a national policy on repatriating remains from abroad, the government approached the negotiations with Austria in an ad hoc manner, much as it had with the negotiations for Baartman's repatriation. However, despite the fact that the effort to repatriate the Pienaars originated outside the Khoisan community, the government's negotiations and the ceremonies surrounding the Pienaar's formal repatriation and reburial was characterized by greater consideration of Khoisan interests and the Pienaars' specific heritage as San than the Baartman repatriation. To begin with, the government's efforts were more transparent. The government publicly appointed a negotiation committee headed by the Deputy Director General of Arts

⁹⁰ Speech by Jacob Zuma on the Occasion of the Reburial of Mr. and Mrs. Klaas and Trooi Pienaar at Kuruman, Northern Cape Province (Aug. 12, 2012), <http://www.dac.gov.za/speech-president-jacob-zuma-occasion-reburial-mr-and-mrs-klaas-and-trooi-pienaar-kuruman-northern>.

⁹¹ *Id.*

⁹² Rassoool, *supra* note 38, at 664.

⁹³ *Skeletons*, *supra* note 37.

and Culture, national government officials, provincial government officials from the Northern Cape, and one of the researchers who had discovered the Pienaars.⁹⁴

The negotiations, like those for the return of Baartman, took place without the direct involvement of Khoisan communities. However, the committee “accepted that the return of the Pienaars would merely be the first stage of a more complex return process that would need to be negotiated with the Austrian Government after a memorandum of understanding had been reached and a mutually agreed inventory of all Pöch-related collections of human remains and cultural artefacts...[had been] established.”⁹⁵ The committee also envisaged and put forth the idea of a partnership between Austrian museums and museums in the Northern Cape, that would help revitalize museums in the province, the country’s poorest, from which Pöch’s collection largely originated.⁹⁶ It also negotiated for a repatriation process that would “rehumanize” the Pienaars, refusing to accept the return of the couple in their museum storage box, as was required by Austrian law governing the de-accessioning of museum collections.⁹⁷ Once the formal repatriation got underway, the committee involved Petrus Vaalbooi, a San leader from the Northern Cape, “able to mediate the worlds of community, performative culture and international discourses on indigenous land and cultural rights.”⁹⁸ Vaalbooi accompanied the Pienaars through six separate ceremonies that marked the stages of their return, performing San rituals and explaining the process to the Pienaars at each juncture.⁹⁹

The differences between the government-led repatriations of Baartman and the Pienaars indicate the success of Khoisan campaigns for recognition in putting Khoisan interests on the government’s agenda. Inclusion of Khoisan communities in matters that affect them, no longer an afterthought, appears to be viewed now as an obligation of good governance. The committee’s conception of what constituted proper respect of the Pienaars’ remains was heavily influenced by the San culture, and the tension that existed in Baartman’s return between her Khoi heritage and her symbolism to the broader South African

⁹⁴ Rassool, *supra* note 38, at 666.

⁹⁵ *Id.* at 665.

⁹⁶ *Id.*

⁹⁷ *Id.* Austrian law only permitted the return of “museum artefacts or cultural goods,” the parties negotiated for the remains to return under a special “corpse pass.”

⁹⁸ *Id.* at 666.

⁹⁹ *Id.* at 668.

community was largely absent in the Pienars' return and reburial. Indeed, Ciraj Rassool, the researcher appointed to the committee, notes that the backdrop of Khoisan activism influenced the manner in which the committee engaged with the communities from which the Pienars came.¹⁰⁰

V. Khoisan Recognition: An Instance of Belated State-Building

In the South African case studies discussed above recognition and repatriation meet at the crux of the overarching question driving this article: can past abuses of indigenous peoples be unearthed, remembered, atoned for, and incorporated into the nation's identity without addressing the legal claims of present populations identifying as indigenous? Repatriations serve a broader strategy for indigenous rights in the sense that awareness of the people claiming an indigenous identity is required for the formal recognition of that identity, which in turn is necessary "to claim rights that accrue with indigenous identity such as the protection of their territory, language, culture, tradition and way of life."¹⁰¹ On the other hand, Mansell Upham, the South African lawyer who represented Khoisan groups in the repatriation of Sarah Baartman, has questioned the strategy of using repatriations to raise awareness of Khoisan legal claims. Five years after Baartman's reburial Upham wrote, "[w]ith her were buried the sovereign aspirations of the almost extinct remnants of the Griqua, Nama, Korana, and San – and what of the original appeal to embrace a shared aboriginal Khoekhoe/San past?"¹⁰² Yet, the prospect of Khoisan recognition within the domestic traditional group framework has drawn closer. In 2015, the South African National Assembly introduced the *Traditional and Khoi-San Leadership Bill* ("Khoisan Leadership Bill").¹⁰³ Though the proposed legislation contains several flaws it represents a concrete step toward a scheme through which Khoisan communities and their leadership structures could gain official recognition, which would pave the way for

¹⁰⁰ *Id.* at 667 ("In the mid 1990s and 2000s, in the midst of the southern Kalahari land claim and in struggles around the recognition of San and Khoisan rights as indigenous people in South Africa, and in the context of United Nations cultural agendas, the Khomani San became connected to wider networks of NGOs, human rights law and activism, and philanthropists who offered strategies for development amid cultural tourism, or of 'cultural survival' of the San.")

¹⁰¹ Makundi, *supra* note 10, at 21.

¹⁰² Upham, *supra* note 52, at 81.

¹⁰³ *Traditional and Khoi-San Leadership Bill*, published in Government Gazette No. 39220 of 18 September 2015 (yet to be enacted), http://www.gov.za/sites/www.gov.za/files/b23-2015_traditional__khoi-san_leadership_a.pdf [hereinafter *Khoisan Leadership Bill*].

Khoisan communities to participate in governance structures at parity with other traditional bantu-speaking groups.¹⁰⁴

The repatriations have arguably played a role in advancing the prospect of some form of recognition, even if the manner in which they have integrated Khoisan and the non-Khoisan interests has signaled the end of aspirations for a more autonomous form of self-determination for Khoisan groups. First, the repatriations have brought to the public conscious an understanding of the distinct heritage of Khoisan groups in a manner that underscores the appropriateness of their identification as indigenous within international law. The repatriations have unearthed and brought to the public's attention new information about the scope of a colonial collective enterprise replete with human rights violations (under modern norms) that was uniquely born by Khoisan peoples. Greater awareness of the trade in Khoisan remains has prompted national discussions about the distinct features of historical oppression that Khoisan peoples faced vis-à-vis Bantu-speaking peoples and has underscored the ramifications of long-standing associations of Khoisan peoples with prehistoric societies and paleoanthropology. These experiences place Khoisan peoples in a similar position as other groups around the world that also maintain indigenous group identities and have, as Anaya notes, suffered a "history of subjugation...within a pattern of encroachment by others." In addition, like other indigenous groups, "the set of human rights problems they commonly face...are related to their distinct group identities."¹⁰⁵

Second, the repatriations have both brought Khoisan stories into mainstream nation-building processes and challenged some of the assumptions underlying those processes. For example, the reburials of Trooi and Klaas Pienaar and Sarah Baartmen bore similarities to Truth and Reconciliation Commission Missing Persons Task Team (TRC-MPTT) reburials, which heavily alluded to "longer histories of the

¹⁰⁴ Among the critiques of bill is that its criteria for recognizing Khoisan groups as traditional is too onerous. A Khoisan community must demonstrate that it: "(i) has a history of self-identification by members of the community concerned, as belonging to a unique community distinct from all other communities; (ii) observes distinctive established Khoi-San customary law and customs; (iii) is subject to a system of hereditary or elected Khoi-San leadership with structures exercising authority in terms of customary law and customs of that community; (iv) has an existence of distinctive cultural heritage manifestations; (v) has a proven history of coherent existence of the community from a particular point in time up to the present; and (vi) occupies a specific geographical area or various geographical areas together with other non-community members." *Id.* Art. 5(1) The Khoisan Leadership Bill would also not address issues such as land claims or language rights that may require Constitutional amendments in addition to other legislative acts.

¹⁰⁵ Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Report on the Situation of Indigenous Peoples in Nepal*, ¶13, U.N. Doc. A/HRC/12/34/Add.3 (Jul. 20, 2009) (by James Anaya).

political funeral.”¹⁰⁶ Khoisan repatriations fit easily within a national culture that has long viewed the funeral as a space of defiance that humanized the dead in a manner unavailable to the living, where political protest and agitation could exist alongside mourning.¹⁰⁷ This national culture meant that Khoisan groups could be both grateful for the return of their dead and resentful that the “government has dragged [its] feet” in recognizing Khoisan as indigenous.¹⁰⁸ On the other hand, the repatriations have challenged transitional justice mechanisms by suggesting that colonial oppression also needed to be taken into account by reconciliation efforts and that the nature and targets of racial discrimination have shifted throughout the country’s history. The role of science in the collection of Khoisan remains also challenged the implicit premise of the TRC—that knowledge, or “truth”-seeking, underpins progress and nation-building—by illustrating “the violence of knowledge.”¹⁰⁹

Just as the repatriations can be said to have inserted the Khoisan into existing post-apartheid nation-building efforts, they can also be characterized as a form of nation-building unto themselves, a process by which Khoisan groups and the government built a partnership characterized by a greater understanding of each side’s position on recognition. At the stage of securing the return of Khoisan remains, the South African government, acting through its officials and instrumentalities, was the central actor. Repatriating remains across international borders entails navigating multiple domestic legal frameworks, which inhibits the ability of Khoisan groups to act independently of the government. The forces influencing the reburials of repatriated persons, however, are more of a political and cultural nature, and are therefore a space in which Khoisan peoples could assert their cultural and political interests. From

¹⁰⁶ Nicky Rousseau, *Identification, Politics, Disciplines: Missing Persons and Colonial Skeletons in South Africa*, in *HUMAN REMAINS AND IDENTIFICATION: MASS VIOLENCE, GENOCIDE AND THE FORENSIC TURN* 175, 195 (Elisabeth Anstett and Jean-Marc Dreyfus eds., 2015) The TRC-MPTT was created to identify, exhume and return to families the bodies of people who had disappeared in apartheid era conflict, many of whom were guerilla soldiers in Umkhonto we Sizwe caught by South African defense forces. The funerals of missing persons exhumed and returned to their families valorized those killed in fighting apartheid as national heroes, brought out high-ranking politicians to speak over caskets draped in the South African flag, and led to further memorials and heritage projects.

¹⁰⁷ *Id.* Culture seeped into the political funeral to the extent that it furthered the humanization of the dead or defiance. In the early years of apartheid, funeral societies run by women buried the indigent black to save them from the humiliating manner in which the state deposited of its indigent black population. Later, as mass resistance to apartheid grew funeral committees arose to bury the movement’s fallen, “through often complex and contested negotiations with families...[the committees] scripted an overtly political funeral from wake to grave – speeches, songs, pamphlets, banners and flags.” *Id.* at 183.

¹⁰⁸ Letter sent to PM Mr. A.E. Van Niekerk from Paramount Chief Archbishop Daniël Kanyilles of the National Council of the Khoi Tribal Chiefs, Read aloud at National Assembly Debate (Aug. 7, 2002) at 55-56.

¹⁰⁹ Rousseau, *supra* note 107, at 186.

the start, Khoisan groups appeared to be aware of the utility in framing repatriated individuals as South African and their stories as part of the national history. Upon the passage of the French National Assembly legislation mandating Baartman's return to South Africa, The National Khoi-San Consultative Conference of South Africa issued a statement that "it would like the world to know that we accept that the dignified return of her remains and the body cast for burial is a matter of national heritage interest."¹¹⁰ The willingness of Khoisan groups to generalize their heritage may show the outer edges of Khoisan claims for recognition, namely that the movement for recognition is confined to battling for the rights given to all South African individuals and sub-national groups by the constitution. Put one way, Khoisan recognition demands may not serve a project for autonomy, but for integration and access to governance institutions and democratic protections.

For its part, the government has also been increasingly willing to acknowledge the distinct history and plight of Khoisan people and the necessity for Khoisan-specific remedies. Strong statements in support of Khoisan redress, implicitly recognizing Khoisan groups as enduring and political sub-national entities, were made by both President Mbeki and President Zuma at the reburials of Baartman and the Pienar's respectively. In a statement issued upon Baartman's return, Mbeki stated:

The Khoi people of our country and the descendants of the Khoi have every right solemnly to celebrate the return of one who was their daughter. They have every right to demand that this historic act of redress should be given its true meaning by the restoration to the Khoi and the San their place of pride as Africans equal to all other Africans.¹¹¹

¹¹⁰ Tobias, *supra* note 43, at 109 (quoting Le Fleur C. (2202), National Khoi-San Consultative Conference of South Africa media statement on the Sarah Baartman issue, 18 February 2002.). Cecil Le Fleur head of the Khoi-San Consultative Conference also stated in an interview, "Irrespective of the fact that she is Khoisan descent, we don't want to create the impression that we claim her as Khoisan property. Mostly we want her to have a decent burial and to treat her in death how she was never treated in life." *Coming Home*, THE GUARDIAN (Feb. 20, 2002.) <http://www.theguardian.com/education/2002/feb/21/internationaleducationnews.highereducation.Baartman>'s experience was not without precedence. Though the trafficking in the remains of Khoi and San who died in South Africa took place on a far greater scale and account for the bulk of remains in institutions abroad, there are several recorded cases of Khoi and San people taken to Europe to be put on display for European audiences dating back to 1613. Upham, *supra* note 52, at 74-75.

¹¹¹ Thabo Mbeki, *Letter from the President: Saartjie's Return Restores Our Common Dignity* (Mar. 6, 2002), http://web.mit.edu/racescience/in_media/baartman_mbekiletter.htm (last visited May 23, 2016).

However, to the extent that the government acknowledges that Khoisan peoples have group rights that must be protected, the group rights envisioned are more properly characterized as minority rights rather than indigenous rights.¹¹²

VI. Conclusion

The South African government has assertively waded into repatriation projects on behalf of its Khoisan population. All three presidents have publically thrown their support behind repatriating remains from abroad and have personally appealed to governments abroad during repatriation negotiations. This high-level interest has of course meant that the narrative of the repatriations furthers majoritarian nation-building interests, instead of being centered exclusively on the sub-national indigenous groups. But it has led to a few high profile, if nonetheless symbolic, victories that have arguably furthered the Khoisan movement for recognition. The success of repatriating Baartman “catalyzed the Khoe-San movement but also gave the South African government an opportunity to prove its willingness to tackle Khoe-San issues.”¹¹³ The stories of Baartman, the Pienaars, and the the Iziko museums’ unethically acquired collections emerged as “polyvalent symbol[s]” of the issues faced by Khoisan peoples, and thus became spaces of negotiation between Khoisan peoples and the government.¹¹⁴ Recognition is a similarly polyvalent symbol of the issues facing Khoisan peoples, such as land claims, language rights, poverty, unequal service delivery, and discrimination.

Thus far, discourses surrounding recognition of Khoisan groups have merged the separate issues of traditional group recognition on par with Bantu-speaking tribes and recognition of Khoisan peoples as

¹¹² The definition of minority groups that has the widest acceptance comes from Francesco Capotorti: “A group numerically inferior to the rest of the population of a state and in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.” U.N. Subcomm’n on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, ¶ 568, U.N. Doc. E/CN.4/Sub.2/384/Rev.1. The proposed Khoisan-Traditional Leadership Act exposes an irony in the government’s preference for a minority rights framework as it’s requirements for the recognition of Khoisan leadership structures resemble the international legal definitions of indigenous groups more than definitions for minority groups. In contrast, the Khoisan-Traditional Leadership Act and the Cobo definition of indigenous groups focus on the group’s history of self-identification as belonging to distinct community that has continuity with the historical societies that occupied the territory they claim and maintain distinct cultural, political and social institutions.

¹¹³ Schweitzer, *supra* note 15, at 178.

¹¹⁴ *Id.*

indigenous. The prospect of winning the former, increasingly likely, raises difficult questions that have thus far been able to lurk beneath the surface. If official recognition of Khoisan groups enables them to participate in governance structures on equal footing as Bantu-speaking groups, secures official language status for Khoisan languages, and facilitates appropriate restitution for land claims prior to 1913, then Khoisan groups will be forced to decide whether recognition is simply a means of achieving equal access to constitutional rights and the state's resources, and whether that can be achieved absent recognition of their indigeneity. Given the negotiated outcomes of the repatriations that have amicably accommodated both government and Khoisan interests, it would not come as a surprise if Khoisan groups are eventually willing to forgo official recognition of their indigenous identity after securing equal status for their groups with respect to Bantu-speaking groups and the collective rights and land rights provided for in the constitution.