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HUMAN RIGHTS LAW AND THE PROTECTION OF SACRED SITES AND TERRITORIES

A case study of the Bethany Griqua community in South Africa

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Introduction

Under international human rights law, ancestral lands and sacred sites are recognised to be of cultural and spiritual importance to indigenous peoples' way of life, identity and survival. In South Africa, there has been a range of literature in the post-apartheid legislative environment focusing on sacred sites and general land restitution (Hall, 2004; Kloppers and Pienaar, 2014; Lahiff, 2008). However, whether international human rights law is compatible with post-apartheid development in relation to sacred sites on the territory of the Griqua community merits consideration. This chapter therefore examines international human rights law and domestic legislative environment in relation to sacred sites and traditional cultural properties. Through the Griqua community's own lens, the chapter investigates the extent that the law affords protection to their sacred sites and management systems. The chapter establishes that despite the position of international human rights law and the domestic legislation on the protection of ancestral lands and sacred sites, the Bethany Griqua community's right to lands, and in particular, their water, groves and customary governance has been historically undermined in South Africa. It concludes with some recommendations.

Sacred sites of indigenous peoples under international human rights law

Sacred sites and other traditional cultural properties are crucial to the preservation of the culture and society of indigenous peoples (Verschuuren, 2016). According to the "(Akwé: Kon Guidelines, 2004, para 6(g))", "sacred site"

may refer to a site, object, structure, area or natural feature or area, held by national Governments or indigenous communities to be of particular importance in accordance with the customs of an indigenous or local community because of its religious and/or spiritual significance.

(World Bank, 2006)

They are also cultural resources, which according to the Operational Manual of the World Bank are “movable or immovable objects, sites, structures, groups of structures, and natural features and landscapes that have archaeological, paleontological, historical, architectural, religious, aesthetic, or other cultural significance” (World Bank, 2006, para 1). The importance of sacred sites has found copious expression both indirectly and directly in the international human rights instruments.

Generally, an evidence of indirect protection of indigenous peoples’ sacred sites is discernible from the Universal Declaration of Human Rights (UDHR) 1948, the founding instrument on human rights law, which requires universal respect for human rights, and guarantees the protection of property rights in Article 17, religion in Article 18 and community culture in Article 27. As the significance of indigenous peoples’ sacred sites interfaces with their property, religious and cultural worldviews, these provisions set out the basis for the recognition of the right of indigenous peoples to territories containing their sacred sites. Indirect protection is also illustrated by Article 1 provisions of the UN General Assembly International Covenant on Civil and Political Rights (ICCPR; 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR; 1966) dealing with the right to self-determination. According to Article 1, “[a]ll peoples have the right of self-determination” and the right to “freely dispose of their natural wealth and resources.” As an invaluable spiritual and cultural asset, the Article 1 provision of both the ICCPR (1966) and ICESCR (1966) is an important provision on the protection of indigenous peoples’ sacred sites. In particular, the ICCPR (1966) contains other provisions of particular significance to different aspects of sacred sites. For instance, Article 18 guarantees freedom of religion, while Article 27 provides for the rights of minorities “to enjoy their own culture, to profess and practice their own religion, or to use their own language.” In what shows that the protection of sacred sites also forms part of the focus of the ICCPR (1966), the treaty monitoring body of the ICCPR, the UN Human Rights Committee (2014, para 25), in a concluding observation advises that “the state party should adopt measures to effectively protect sacred areas of indigenous peoples against desecration, contamination and destruction.” Also the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965) prohibits discrimination based on race, while the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003) protects cultural knowledge and practices that may be associated with particular landscapes.

There are direct international human rights instruments dealing with the protection of sacred sites of indigenous peoples. For instance, described as an instrument which “represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law (United Nations General Assembly, 2012, para 24)”, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) has a range of interesting provisions of particular relevance to sacred sites. Cultural traditions and customs, including archaeological and historical sites, are protected in Article 11(1) of UNDRIP. Article 12(1) protects spiritual and religious rights, including “the right to maintain, protect, and have access in privacy to their religious and cultural sites” while Article 24(1) protects the conservation of traditional medicinal sources. Article 25 provides the right “to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources.” In a statement which affirms that indigenous peoples’ worldview is intricately linked to their

territorial claim, Article 26 recognises rights to lands traditionally used or occupied which, arguably, consist their sacred sites. Article 29(1) guarantees the right to “the conservation and protection of the environment and the productive capacity of their lands or territories and resources.” Article 32(1) provides the right “to determine and develop priorities and strategies for the development or use of their lands or territories or other resources.” The International Labour Organization (ILO)’s Convention Concerning Indigenous and Tribal Peoples’ 169 (1991) in its Article 13(1) requires governments to respect “the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories . . . which they occupy or otherwise use, and in particular the collective aspects of this relationship.” Article 14(1) requires States to protect the right of indigenous peoples to access lands they have traditionally used.

At the regional level in Africa, the African Charter on Human and Peoples’ Rights (the African Charter, 1981) guarantees peoples’ right to property in Article 14, and the right of “all peoples” to freely dispose of their wealth and natural resources. The treaty monitoring body of the African Charter, the African Commission on Human and Peoples Rights (the Commission) considered the importance of sacred sites to indigenous peoples’ way of life in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.¹ The Government of the Republic of Kenya had, in 1974, ordered the Endorois community out of their ancestral land in the Lake Bogoria area and gazetted their land as a wildlife reserve and had done so without consulting the group. The government further promised compensation to the Endorois community, which it had at the date of the action failed to fulfil. Instead, it continued to deny the community access to their pristine pasturelands and their sacred sites. In a landmark ruling, the Commission found that the eviction of the Endorois people to make way for a wildlife reserve with minimal compensation violated their rights as indigenous peoples to own their customary lands and to practise their culture and religion. The Commission therefore ordered Kenya to restore the Endorois to their historic lands and to compensate them. Due to the link of the lake to the Endorois’ cultural survival, the decision is of significance to the protection of sacred sites. As observes Abraham (2014: 165), “from a social perspective, the lake epitomizes the community’s religious and other traditional practices.” The lake also provides the community with sacred prayer sites, venues for initiation rites such as circumcision rituals, and grounds for hosting the periodic assembly of the community, where norms are enacted and given force (Abraham, 2014: 165).

Hence, according to the Gaia Foundation, the *Endorois* decision constitutes “the first ruling of an international tribunal to recognise indigenous peoples in Africa and their rights to traditional lands as custodians” (Chennells et al., 2015: 17). During 2017 at its 60th Session in Niamey, the Commission also passed *Resolution 372* which recognises that sacred natural sites are one of the oldest forms of cultural conservation, often harbouring rich biodiversity. It highlights the role that custodian communities and their customary systems play in preserving traditional values, and that they require legal recognition and support to do so (ACHPR Resolution 372, 2017). The Resolution therefore calls on state parties to recognise sacred natural sites and territories and their customary governance systems, as well as to uphold their commitments under regional and international law and the rights of custodian communities. It urges states parties and other stakeholders, including businesses, to recognise and respect the intrinsic value of sacred natural sites and territories. In developing this resolution, the African Commission drew on a “Call for Legal Recognition

of Sacred Natural Sites and Territories, and their Customary Governance Systems” (ACHPR Resolution 372, 2017). It remains to be seen to what extent South Africa’s domestic legal framework has conformed with the normative developments at the international and regional levels regarding dealings with sacred sites.

South African law and the protection of indigenous peoples’ sacred sites

At the domestic level, the protection of indigenous peoples’ sacred sites is, arguably, twofold: the constitutional approach which consists of the provisions in relation to the application of international law, the protection of religious freedoms and rights to self-determination; and the legislative approach which consists of specific legislation relevant to the sacred sites of indigenous peoples.

Generally, so as to internalise international human rights law, South Africa has to ratify international conventions, and adopt them in its domestic laws. However, international human rights law can still be helpful in shaping activities of the organs of state, notwithstanding its domestication status. The application of international law in accordance with such reasoning, finds basis in Section 39 1(b) of the Constitution (1996) which stipulates that when interpreting the Bill of Rights, a court, tribunal or forum *must* consider international law. The said section of the Constitution contains authoritative provisions which connote that when interpreting the Bill of Rights, a court, tribunal or forum must make value judgments that are aimed at promoting the values which underlie an open and democratic society based on human dignity, equality and freedom, and must have regard to international law. Further reinforcing this provision, Section 233 of the Constitution prescribes that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” The significance of the application of international law cannot be overstated. For example in *Glenister v President of the Republic of South Africa and Others*,² Ngcobo CJ enunciated the significance of international law to the Constitution as follows:

Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law . . . These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.

(para 97)

The implication of the above is that, while dealing with sacred sites in relation to indigenous peoples, one can expect courts and, indeed, policy makers, to take into consideration relevant international human rights law instruments explained in the previous sections as part of the domestic legal system. The Constitution also protects freedom of religion through a variety of provisions. Section 15(1) unequivocally enshrines the right to religious freedom by providing that “everyone has the right to freedom of conscience, religion, thought, belief and opinion.” This provision is not dissimilar to the norms given in international documents on religious freedom (Goodsell, 2007). It also guarantees freedom of conscience, thought, belief and opinion and is said to probably include the right not to

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observe any religion at all (Du Plessis, 2001). This means that the thought, belief and opinion associated with sacred sites of indigenous peoples can be protected under the right to religion.

Furthermore, both Sections 30 and 31 of the 1996 Constitution dealing with language rights are important. Section 30 provides that everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. On the other hand, Section 31 states that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

From the legislative perspective, the National Heritage Resources Act (1999), which came into operation in 2000, is generally considered to establish an all-encompassing cultural heritage protection regime. It generally creates an integrated framework for the protection of cultural heritage with regard to its management and development, as well as participation in and access to heritage resources. A statement contained in the preamble of the Act emphasises its main objective:

to promote good management of the national estate, and to enable and encourage communities to nurture and conserve their legacy so that it may be bequeathed to future generations. Our heritage is unique and precious and it cannot be renewed. It helps us to define our cultural identity and therefore lies at the heart of our spiritual well-being and has the power to build our nation. It has the potential to affirm our diverse cultures, and in so doing shape our national character. Our heritage celebrates our achievements and contributes to redressing past inequities. It educates, it deepens our understanding of society and encourages us to empathize with the experience of others. It facilitates healing and material and symbolic restitution and it promotes new and previously neglected research into our rich oral traditions and customs.

Accordingly, in terms of Section 2(xvi) of the Act, any place or object that is of cultural significance qualifies as a heritage resource. Section 2(vi) goes further to describe cultural significance as encompassing historical, social, spiritual, linguistic or technological value that these resources should possess. In terms of Section 2(xvi) of the Act, any place or object that is of cultural significance qualifies as a heritage resource. Sections 2(a) and (d) state that the national estate may include places to which oral traditions are attached or which are associated with living heritage, as well as landscapes and natural features of cultural significance. Movable objects, which by implication may emanate from such places or landscapes, are also subject to protection under the Act. As is explicit in the provisions of Section 3(l)(ii), those movable objects include objects to which oral traditions are attached or which are associated with living heritage, ritual or popular memory. It follows therefore that any traditional community can, on the basis of this legislation and more specifically in terms of Section 27(3), submit a nomination to the South African Heritage Resources Agency (SAHRA) for a place to be declared a national heritage site or make a similar submission to the provincial heritage resources authority for the same place to be declared a provincial heritage site. Once such a declaration is made in terms of subsections (5) and (6), then the overall protection made available by

the Act will apply to the place in question. The Act offers guidance on the governance of heritage in South Africa as can be discerned from a number of its provisions. As a general principle, Section 5(2) (a) of the Act provides that the recognition of the skills and capacities of communities is critical to effective management of heritage resources. It is not surprising, therefore, that while Section 31(5) affirms the power of local authority to designate an area of cultural importance as a heritage site, it calls for the consultation of the provincial heritage resources authority and owners of property in the area and any affected community. Also, while acknowledging that heritage resources is a core feature of the cultural history and beliefs of such communities, Section 5(4) of the Act urges for their consultation and participation in the management of heritage resources. In fact, according to Section 36(5), unless an effort has been made to contact, consult and agree with communities and individuals who by tradition have an interest in heritage resources such as grave or burial ground, permit for any activity in such territory may not be issued by SAHRA or a provincial heritage resources authority. Section 25(1) (d) advises that assistance should be given to communities with established interests in heritage resources to obtain reasonable access, should they request it. The implication of these provisions is that consultation and the involvement of local communities such as the Griqua who have established interests in sacred sites is key in any decision-making process regarding sites affecting their interest. Hence, in terms of these provisions, indigenous worldviews and visions of heritage should count in the management of heritage resources.

Section 38 of the Act governs in general the management approach when the State is interested in the pursuit of development projects in heritage resources. Before development projects are endorsed, Section 38 calls for a report which may include, among other things, the results of consultation with communities affected by the proposed development and other interested parties regarding the impact of the development on heritage resources. Section 18 of the Act allows for the establishment of committees composed of competent persons with appropriate skills and expertise for carrying out functions relating to the management of heritage resources. These provisions constitute a legal basis for the involvement of communities, such as the Griqua community, with established interests in sacred sites declared as heritage resources, in the management of heritage resources.

In terms of claiming a territory wrongfully declared as a heritage resource, the Act is of limited relevance to communities with established interests. Section 41(1) of the Act only allows for the restitution of heritage movable objects. It endorses negotiation with a community or body with a bona fide interest for the restitution of a movable heritage resource and the future of the resource. On the basis of this provision, the Griqua community can only sustain a claim for the restitution of movable not immovable in heritage resources. To claim back a territory declared as a heritage resource, arguably, the relevant piece of legislation is the Restitution of Land Rights Act³ which enables a person or community dispossessed of a right in land, after 19 June 1913 as a result of past discriminatory laws and practices, to restoration of that right or equitable redress. Such a person or community, according to the Act, must have lodged a claim within the timeframe provided for in the Restitution Act and must not have received compensation that is just and equitable calculated at the time of dispossession in terms of Section 25(3) of the Constitution of the Republic of South Africa, 1996. The cut-off date for lodging a land claim was 31 December 1998. The cut-off date for the lodgement of claims has been extended to 30 June 2019,⁴ but, this has been nullified by the Constitutional Court.⁵

According to Section 11 (1), a claim for restitution may be submitted to the Commission which is required to investigate the merits of land claims and make a determination, through the Regional Land Claims Commissioner, as to whether a claim is not precluded by the requirements for restitution; and whether it is not frivolous or vexatious. If satisfied that these conditions are met, the Regional Land Claims Commissioner will accept the claim and thereafter publish the details of the claim in the Gazette. The claim is then investigated further and either mediated, with a view to reaching a settlement or referred to the Land Claims for adjudication. The Restitution of Land Rights Act is in fact important in the sense that it allows indigenous peoples the opportunity to recover a territory consisting their sacred sites, thus allowing them to realise the rights associated with the recognition, custody and maintenance of sacred sites.

Despite the foregoing, the narrative of the Griqua community in the pre- and post-apartheid South Africa has been not only of encroachment on their sacred sites, but, denial of general land rights.

Griqua community and sacred sites

The plight of indigenous peoples in relation to the ownership of lands and sacred sites can be argued with reference to the Griqua community. Found in the Bethany mission station in the Free State some 50 kilometres outside of Bloemfontein, the land which currently forms part of their territory consists of areas, subdivided and named Bethany Farm No 16, and later Bethany 365. The Griqua community from Bethany arrived in Phillipolis in 1823 following an invitation from Reverend John Philip, under the leadership of Adam Kok II. Some of their land within their current Bethany Farm (Bandewysfontein) was granted by



FIGURE 6.1 Here is the leader and elder, Captain Kraalshoek, at their community grave site area where most of their families are buried (Photo credit: Ivan Vaalbooi)

Adam Kok II (regarded as one of the legendary Griqua leaders in history) to Mr Jan Kraalshoek in 1833 through a historical treaty which was later renewed in 1842 and which currently forms the basis for their indigenous lands and sacred sites. The Kraalshoek family was one of the most influential families in the area. At that time Adam Kok II had been recognised as the leader of the Griqua following the death of Cornelius Kok.

Historical treaty of the Griqua 1833 to their ancestral territories

During 1833, the great Griqua leader, Adam Kok II gave the remaining Griqua people land through a historic treaty to what is today called Bethany Farm. It comprises 11 000 ha in total. The Griqua community lost most of these lands due to the Berlin Missionary Church systematically dispossessing them over a period of 200 years. They managed to claim back 5339 ha of their lands which they have to share with the Tswana community who were labourers to the Missionary Station at the time. Their struggle continues to (i) protect their current land rights and (ii) claim back the remaining 6000 ha under the control of the Church up to today.

Author Karl Schoeman writes, in *The Griqua Captaincy of Phillippols 1826–1861*:

As an example of the granting of land to Griquas by the Kaptyn and Raad, the following request which has been preserved in the Free State Archives Repository may be quoted. It is dated 13 September 1842 and is a renewal of an original request of 1833 involving an unnamed farm (translated literally). Herewith the request is renewed as the old request has been lost (of 1833) issued by the late *Kaptyn Adam Kok Senior at the request of burgher Jan Kraalshoek as lawful property of him and his heir, according to the laws of the country now in force, on condition that the burgher Jan Kraalshoek shall on no account sell this farm to any burgher or Colonist, and if such sale should take place, that such farm is to be hired out.*

The rights held by these in particular Griqua communities included the rights to reside on, cultivate on, graze livestock on, utilise the natural resources on, and utilise the natural resources in the rivers within, and along the boundaries of, the claimed land under and in terms of rights of communal ownership under indigenous law, and later within the rules set out by the Berlin Mission Society. The communities' rights were gradually and systematically eroded over time as set out below.

The dispossession of indigenous ownership rights took place in 1881 when the Deed of Grant 365 was passed without recognition of the indigenous or customary law rights. Those that occupied the land, being the Koranna, the Griqua and the Tswana, were thereafter subjected to the rules of the Berlin Mission Society who had been granted the land. There were also various attempts challenging the ownership of the land by the Berlin Mission Church as part of their attempts to resist regulations that were introduced by it. Most of those attempts, however, were not successful, including the various court challenges. This dire situation of loss of lands and resources continues up until today.

Nature of the sacred sites of Griqua community

The sacred natural sites of the Griqua consist of natural features including mountains, hills, forests, groves, rivers, lakes and caves which existed at Bethany farm (Figure 6.2).⁶ In the international conservation and heritage community these are known as sacred natural sites

(Wild and McLeod, 2008). The most important sacred sites are the water groves at Bethany. Eight such fountains can be identified. The sacred sites are in Bethany in a large track of land in the Bethany farm in Free States which officially still belong to the Lutheran Church, some of which have also been sold to large scale farmers. The interviewees indicated that although the lands have not been restored to the community, some members of the community have stayed there for about 85 years around the underground fountains of water in the farm. The head of the Griqua Council has laid down walking routes to the sacred sites which the community members must follow in accessing the sites. This serves as a form of traditional methodology in accessing the sites.

In terms of the maintenance of these sacred sites on their lands, Captain Kraalshoek explained that the Griqua community has a distinct manner of managing their lands and sacred sites. For instance, even though not at their full control, the Free State Griqua Council is in close collaboration with the relevant South African Departments in managing and preserving their Heritage. Part of the roles of the Traditional Council include the documentation of the heritage and the Council performs its roles under the watchful eye of Captain Kraalshoek's Executive Council Members. However, they still do not have the full ownership of the lands or, arguably, the water groves on the land, hence, they cannot govern their sacred natural sites and territories according to their customary governance systems, and on their own terms.

Perspectives on the relevance of the Griqua sacred sites

The community's relationship with the water groves at Bethany has intrinsically spiritual and cultural connections. It goes hand in hand with their culture and heritage from their



FIGURE 6.2 This is a cultural landscape picture locating both indigenous and non-indigenous plants and trees of the Bethany community inside of their cultural territories. (Photo credit: Ivan Vaalbooi)

ancestors. Through these sites, the community re-affirm their identity and origin in line with their history. The sacred sites create a close connection with their spiritual beliefs.⁷ These groves are an important link with their ancestors in that ancestral graves are developed with the burying of their deceased alongside water. Hence, the community members remember every time they drink water, their history and who they are and their cultural connection with their environment and ancestors. Their water groves form a central part of their customary practices and way of life.⁸ They constitute a great part in the historical healing process for the body of the community committing them to the ancestors as it is believed that the spirit of the ancestors is closed to the sites. In fact, there used to be ancient songs which spoke so eloquently about the importance of sacred sites, the interviewees recalled. However, the last language speaker (Ben Kraalshoek) died in 1938, hence, it is impossible to recall songs produced in praise of the water groves. This is largely because songs relating to the groves which form part of the language structure of the Griqua have been lost as a result of long history of colonialism and decimation of the language of the Griqua community by colonialists.⁹

The water groves are of heightened spiritual importance to the Griqua community. In their narrative, the indigenous sacred sites are important for:

the religious, spiritual and cultural activities which form part of their cultural heritage, but also contributing to that of the whole of mankind; the continuation of their historical and cultural memory; emblematised some of deep and secret arts of the Griqua Peoples prior to colonisation and religious imposition, including its contemporary forms, biological diversity (plants, animals, their habitats, ecosystems, genetic diversity and water sources) and cultural diversity, (spiritual practices and beliefs, identity, linguistic expression), which are inextricably connected in what is increasingly understood as biocultural diversity.¹⁰

Explaining the significance of the above sites to the Griqua community, it was noted that the essence of the water groves are put to use in the calendar plan which is also cascaded into a Griqua induction programme used for the yearly development of new members and accountability purpose. Describing the induction programme, the interviewee indicated that celebrations around the fountains are held on a yearly basis, such as at the end or the beginning of the years. When the Griqua Council opens at the beginning of the year, the captain as the leader usually presents the water from the groves to the council members with the view that it will give them ancestral strength for the struggle for the New Year journey. The leader of the Council also takes them to the fountains where he presents his dreams and visions as revealed to him by the ancestors. At the end of the year, where the members of the council are reporting back, a similar process is repeated.

The water groves are also of particular relevance to women and children, who have been the primary agents through which the relevance of the fountains, particularly their history, is spread by community members. Since they visit the groves from time to time to fetch water for physical and spiritual strength, the usefulness of the sites are never out of their mouth and presence. Generally, people notwithstanding their sex or age visit the fountains from different parts of South Africa. These groves are so important that even when a member of the community dies in another territory, according to the interviewees, the wish is

mostly to be brought back home and buried close to the groves. This further confirms that the groves have spiritual and cultural significance to the Griqua community (Figure 6.1).

Dispossession of water groves of the Griqua in the light of human rights law

Despite the perspectives on the uniqueness of the water groves to the community, there has been both colonial and modern dispossession of their lands which form the habitats of the water groves (Figure 6.3). The history of dispossession of indigenous ownership rights dates back to the 1881 treaty. Earlier in 1846, there was a large exodus due to the forced implementation of the regulations made by the missionary station. The Native Land Act (1913) and the Native Trust and Land Act (1936) were relied on to carry out the dispossessions. These laws laid the foundation for racial segregation in South Africa. The laws divided South Africa, according to race. Whites occupied 87 per cent of South Africa and blacks were pushed into reserves which made up about 7 per cent, later increased to 13 per cent of South Africa.

In 1881, through further land dispossession of the Bethany Griqua, land was registered in the name of the Berlin Mission Station (BMS) by Deed of Grant, but this was followed by the forceful removal of indigenous leaders for revolting against the implementation of the regulations made by the BMS in 1910. In 1910 the Berlin Mission Society forcefully removed the leaders of the Koranna that revolted against the implementation of the rules resulting in a Supreme Court case involving Thimotheus Yzerbeck, Matheus Kloete, David Jager, Hendrik Kraalshoek, Titus Witvoet, Maria Hofman and Andries Buffelbout. In their affidavit to court the above stated that they were members of the Koranna community who



FIGURE 6.3 Here we find Captain Kraalshoek with some of the Griqua community members next to the river area. (Photo credit: Ivan Vaalbooi)

occupied the Bethany Farm before the Berlin Mission Society. They also stated that there were other natives that lived on Bethany that, unlike the Koranna, were required to pay for grazing rights and were sharecroppers.

Prior to the Deed of Grant 365 in 1881 the claimed land was dealt with in terms of indigenous or customary law. The Griquas argue that the land belonged to the Griqua, that is why Adam Kok II was able to grant some of the land (Bandewysfontein) to Mr Jan Kraalshoek, and that the Berlin Mission Society was granted rights to the land by Adam Kok II.

A development which further accentuated dispossessions as authorised by courts was the application of racial discriminatory policies. For instance, in 1924 there was a court case where the Trustees of the Berlin Mission Society obtained an order to evict a certain Hosea Lechoana from the farm. When the order was granted by the Supreme Court of Appeal more “natives” were removed,¹¹ land was subdivided and approximately one third of the farm was sold to white farmers in 1925. Also between 1924 and 1925, one third of the land, at this stage owned by the BMS, was sold to white farmers. Further eviction of natives from this part of the land followed the order of court. In 1965, approximately 1000 people, mostly Tswana speaking people who were laborers to the Mission, were removed from the farm because of the Group Areas Act (1950). The legislation undermined the access of the community to their groves. Throughout this period the Griqua community were able to remain on their ever-diminishing ancestral lands and manage their community, lands and territories under difficult periods of both colonialism and apartheid.

There are some four families who have been able to keep their land based on culture and customary systems going across generations. They successfully claimed back a portion of their ancestral land through the South African Land Restitution process. The claim was settled during 1998 by awarding the Bethany Farm Number 610 to their governance structure, Bethany Communal Property Association, which was established by the Bethany community (which includes the Tswana former farm labourers. The Bethany community consists of descendants of people of Griqua and of Tswana descent that were dispossessed of rights in land on the farm in 1965). However, the Griqua community’s struggle for their ancestral lands as per their historical treaty with Adam Kok during the 1881 continues. That post-apartheid legislation and policies have still not ensured the restitution of the lands or water groves to the Griqua community. For instance, even when some of the lands have been restored in modern times, the leadership has been misinformed, according to the interviewees, to change the complainants from Griqua Council to Bethany community at Goldan Gate and later the change was effected with a visit to Pretoria (1996). Initially, according to the interviewees, when the matter started in 1974, the leader of the Griqua Community claimed the land on behalf of four Griqua communities containing the water groves. During March 1994 Mr Johannes Kraalshoek, Mr. C. Oliphant and others had one-on-one meetings with the first democratic President the late Nelson Mandela who ensured that government would do their best to restore their land crisis. A second meeting took place between President Nelson Mandela and Captain Kraalshoek at the official presidential residence in Cape Town.

Mr Johannes Kraalshoek lodged a claim on 5 September 1995 on behalf of the Griqua Community. The claim was accepted by the Commission for further investigation and its details were published in Government Notice 1168 of 1995, dated 10 November 1995.

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The claim was settled on 19 June 1998 by an award of the Bethany Farm Number 610 (5, 339 hectares) to the Bethany Communal Property Association, which was established by the Bethany community. It has been argued that it was the intention of Mr Kraalshoek to lodge a claim in respect of the original Bethany Farm No 365 on behalf of the Griqua descendants, but officials that assisted him during the lodgement process limited his claim to the present Bethany Farm 610 (which is a one third of the original Bethany Farm) and only in relation to dispossessions that took place in 1965, and to include the Tswana people as claimants as a prerequisite to getting their land back.

However, he was deceived by the government to change the complainants from Griqua Council to Bethany community and, by virtue of doing that, other tribes such as the Tswana which were neither originally part of the Griqua ancestral territories nor had affiliation with their lands and sacred sites were brought on board on the claim. These added tribes are represented by 69 families which means that on any issue of public significance in relation to claimed lands, the Griqua are always outvoted in the communal property associations even though they are the original land owners. Even then, according to the interviewees, none of the water groves are under the control of the Griqua community nor form part of the lands successfully claimed.

The failure of the state to adequately address the dispossession of the Griqua community of their lands inclusive of their water groves is incompatible with the three levels of obligations under international human rights law, namely, to *respect*, to *protect*, and to *fulfil* human rights (Koch, 2005). In the context of their dispossession, the obligation to “respect” signifies that states must refrain from measures which infringe on the rights of indigenous peoples in relation to their sacred sites (UN General Comment No 31, 2004). The fact that the dispossession took place under apartheid era is in itself evidence that the state has historically failed to respect their land rights. A similar challenge is posed to the obligation to “protect” which requires states to prevent private actors from infringing the rights of indigenous peoples. Again, considering that the dispossession took place with the connivance of non-state actors, such as the Missionaries, one can arguably affirm that the dispossession offends the obligation of state to protect the rights of the Griqua community. A parallel implication also exists for the obligation to “fulfil” which requires the state to cultivate policies and programmes that inspire the progressive realisation of human rights, and to refrain from actions that weaken the realisation of rights (Skogly, 2006; UN General Comment No 31, 2004).

Besides, the foregoing constitutes a breach of the rights of the Griqua community to have their sacred sites and ancestral territories protected as indirectly guaranteed under international human rights law instruments such as the UDHR (1948), the ICCPR (1966), ICESCR (1966), and CEDAW (1979). The development undermines the provision of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003) which protects cultural knowledge and practices associated with particular landscapes. It is incompatible with the direct provisions on the protection of sacred sites and ancestral territories under the UNDRIP (2007), ILO Convention 169 (1991), and the African Charter (1981), through its interpretation of the provision dealing with peoples’ rights to property and natural resources. In addition, the current trend on the breach of the Griqua community rights to sacred sites and ancestral territories does not conform with the protection of indigenous peoples’ sacred sites as allowed through the constitutional guarantee on the application of international law, other specific rights such as the protection of religious freedoms and rights to self-determination and other legislative provisions relevant to the sacred sites of indigenous peoples in South Africa.

Conclusion and recommendations

This chapter set out to sketch the international human rights instruments which address sacred sites and traditional cultural properties of significance to the land claims of the Griqua community in South Africa, and against that background, and from their own lens, examines the extent of protection afforded the Griqua community's indigenous sacred sites, and their management system under the law and practice. The importance of sacred sites, as was established, has found copious expression both indirectly and directly in the international human rights instruments. At the domestic level, the protection of indigenous peoples' sacred sites is evident in both the constitutional approach which consists of the provisions in relation to the application of international human rights law, the protection of religious freedoms and rights to self-determination, and the legislative approach which entails specific legislation relevant to the sacred sites of indigenous peoples. The applicable legislation is the National Heritage Resources Act 25 of 1999, and the Restitution Act. Notwithstanding the foregoing, the experience of the Griqua in pre- and post-apartheid South Africa, particularly in relation to their water groves, indicates that much is required to redress dispossession experienced by the community in relation to their sacred sites, and general land rights. The failure of the government to address this trend is, indeed, in breach of the human rights obligations of the State to *respect*, to *protect*, and to *fulfil* human rights of the Griqua community in South Africa as per their original treaty. It runs contrary to direct and indirect provisions of international human rights instruments dealing with the protection of sacred sites and ancestral lands of indigenous peoples and existing constitutional and legislative provisions at the domestic level which are relevant to the sacred sites of indigenous peoples in South Africa.

In the light of the above, it is recommended that the government should observe and enforce international and domestic instruments to which South Africa is committed for the realisation of the aspirations of the Griqua community in the interest of their sacred sites and the broader interest of their lands. Also, it is expected of the State to recognise and strengthen community rights and responsibilities to govern their sacred natural sites and territories according to their customary governance systems, and on their own terms. In their implementation of existing policies and laws and in the functioning of organs of the State, it is equally important that the Griqua communities' customary governance systems of sacred natural sites and territories are recognised. Furthermore, along with the State, the civil society can contribute in ensuring an increase in public awareness of national, regional and international laws that support the recognition of sacred natural sites and territories and community customary governance systems of the Griqua community. Finally, the civil society can pursue opportunities to use and enforce existing international human rights law and national legislation to support the recognition of the Griqua communities' customary governance of sacred natural sites and territories.

Notes

- 1 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya 276/2003.
- 2 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).
- 3 Restitution of Land Rights Act 1994 (Act No 22 of 1994).

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- 4 “Re-opening of the lodgement of land claims” www.gov.za/about-government/opening-lodgement-land-claims-campaign.
- 5 Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and others 2016 ZACC 22.
- 6 F. Kraalshoek Chairperson response during his interview with the authors; and Captain Johannes Kraalshoek response during his interview with the authors.
- 7 As above.
- 8 As above.
- 9 As above.
- 10 As above.
- 11 See Department of Land Affairs and Others v Goedgelegen Tropical Fruites (Pty) Ltd (CCT69/06) [2007] ZACC 12, 2007 (10) BCLR 1027 (CC); 2007(6) SA 199 (CC) (6 June 2007).

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