

# RWANDA'S POST-GENOCIDE APPROACH TO ETHNICITY AND ITS IMPACT ON THE BATWA AS AN INDIGENOUS PEOPLE: AN INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVE

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*Following the 1994 genocide, Rwanda embarked on a nation-building program designed, inter alia, to create unity by resisting the attribution of minority or ethnic categories within Rwanda. For Batwa, the effect is to render their claims as indigenous mute. This paper critically examines Rwanda's approach to ethnicity using international human rights as an analytical lens, arguing that Batwa have a legitimate claim as Rwanda's indigenous people. It concludes that pressure on Rwanda to recognise Batwa indigenous rights will remain unsuccessful and argues that a normative approach, based on alternatives such as descent- and work-based discrimination, may prove effective for ensuring their long-term survival as a marginalised people.*

## I INTRODUCTION

Twenty years after the 1994 genocide, Rwanda is arguably still transitioning from what is typically framed as a 'paradigmatic case of ethnic conflict'.<sup>1</sup> With Tutsi the principal victims, and approximately 200 000 Hutu implicated as perpetrators ('*genocidaires*'),<sup>2</sup> a delineation of victim and offender along ethnic lines strongly informed the Tutsi-dominated Government's approach to post-genocide reconstruction; one in which Tutsi were cast as victims/survivors and Hutu as perpetrators, with anyone who deviated from this 'rigid typology' at risk of being labelled a genocide denier.<sup>3</sup>

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<sup>1</sup> Scott Straus, 'The Historiography of the Rwandan Genocide' in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008) 517, 517.

<sup>2</sup> Ibid 527.

<sup>3</sup> Johan Pottier, 'Escape from Genocide: The Politics of Identity in Rwanda's 1994 Massacres' in Vigdis Broch-Due (ed), *Violence and Belonging: The Quest for Identity in Post-Colonial Africa* (Routledge, 2005) 210.

Situated outside this typology, the Batwa scarcely feature in the literature examining the genocide;<sup>4</sup> however, their plight has attracted increasing attention from Non-Government Organisations ('NGO') and treaty-bodies as focus shifted from more immediate concerns, related to the genocide, to longer-term issues in the nation-building phase.<sup>5</sup> Interchangeably referred to as Twa, Batwa are classified as pygmies; an academic, though often derogatory, label applied to small-statured hunter-gatherers in forested areas of Central Africa.<sup>6</sup>

Constituting less than one per cent of the population,<sup>7</sup> Batwa have fared poorly in Rwanda's reconstruction, which is centred on an ambitious program of reconciliation and nation-building in which the Policy of National Unity and Reconciliation ('NUR Policy')<sup>8</sup> acts as a lodestar for reconfiguring Rwandan society. Designed to promote unity by rejecting traditional divisions of ethnicity ('creating one Rwanda for all Rwandans'),<sup>9</sup> the policy 'officially abolish[es] ethnicity'.<sup>10</sup> It is premised on the argument that (Ba)Hutu, (Ba)Tutsi and (Ba)twa are social categories racialised by colonial rulers,<sup>11</sup> and means officially 'there are no Hutu or Tutsi [or Batwa] in today's Rwanda, only Banyarwanda [people of Rwanda]'.<sup>12</sup>

For Batwa, one of the policy's consequences is that they are unable to assert themselves as culturally or ethnically unique with defensible claims as Rwanda's Indigenous people and to benefit from corresponding protections under international human rights law ('IHRL'). Indeed, Rwanda stated in its 'Eighth Periodical Report of Rwanda to the African Commission on Human and Peoples' Rights' ('ACHPR'), that it 'refrains from recognising in this or that category of Rwandese, communities willing to identify themselves as under ethnic form or under any grouping presenting itself as having some inborn rights that other Rwandese cannot have'.<sup>13</sup> The primary ground Rwanda appears willing to concede is the classification of the Batwa as a historically marginalised population; a label the International Work Group for Indigenous Affairs ('IWGIA')

<sup>4</sup> A notable exception is Susan Thompson, 'Ethnic Twa and Rwandan National Unity and Reconciliation Policy' (2009) 7 *Peace Review* 313.

<sup>5</sup> Compare Committee on the Elimination of Racial Discrimination's *Concluding Observations on Rwanda's 8–12th Periodic Reports*, UN GAOR, 56<sup>th</sup> sess, UN Doc CERD/C/304/Add.97 (19 April 2000) ('CERD') where Batwa receive no mention, vis-a-vis CERD's *Concluding Observations on Rwanda 13–17th Periodic Reports*, UN GAOR, 78<sup>th</sup> sess, UN Doc CERD/C/RWA/CO/13-17 (19 April 2011) in which Batwa feature heavily.

<sup>6</sup> Jerome Lewis, *The Batwa Pygmies of the Great Lakes Region* (2000) Minority Rights Group, 5 <[www.minorityrights.org/?lid=1056](http://www.minorityrights.org/?lid=1056)>.

<sup>7</sup> Pauline Overeem, *Batwa Final Report: A Report of the UNPO Mission with APB, Investigating the Situation of the Batwa People of Rwanda September 28–December 15, 1994* (1995) Unrepresented Nations and Peoples Organisation Report, 23 <[www.unpo.org/article/7022](http://www.unpo.org/article/7022)>.

<sup>8</sup> See <[www.nurc.gov.rw](http://www.nurc.gov.rw)>.

<sup>9</sup> Thompson, above n 4, 314.

<sup>10</sup> Arthur Molenaar, 'Gacaca: Grassroots Justice after Genocide. The Key to Reconciliation in Rwanda?' (Research Report No 77/2005, African Studies Centre, Leiden, 2005) 49 <[openaccess.leidenuniv.nl/bitstream/handle/1887/4645/ASC-1236144-071.pdf?sequence=1](http://openaccess.leidenuniv.nl/bitstream/handle/1887/4645/ASC-1236144-071.pdf?sequence=1)>.

<sup>11</sup> Pottier, above n 3, 200.

<sup>12</sup> Rene Lemarchand, 'The Politics of Memory in Post-Genocide Rwanda' in Phil Clark and Zachary Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Hurst, 2008) 65, 65.

<sup>13</sup> 'Eighth Periodical Report of Rwanda to the African Commission on Human and Peoples' Rights' 2002–4 (March 2005), 42 ('ACHPR').

argues was ‘invented ... with the aim of categorically refusing to recognise the indigenous identity of the Batwa’.<sup>14</sup>

This paper critically examines Rwanda’s approach to ethnicity and the consequences for Batwa, using IHRL as an analytical lens. It seeks to validate Batwa claims to indigeneity, understand structural impediments to their realisation of indigenous rights, and generate workable interim solutions that take account of Rwanda’s *realpolitik*. The paper argues this may be achieved by exploiting the normative framework with reference to descent- and work-based discrimination. It is suggested that by focusing attention on this form of discrimination and the mechanisms for addressing it, the politically-contentious issue of Batwa indigeneity (and of ethnic distinctiveness) can be de-emphasised in the short-to-medium term to allow targeted special measures to be implemented without threatening the Rwandan government’s apparently unassailable position on ethnic unity.

## II ETHNICITY IDENTITY IN RWANDA

Rene Lemarchand<sup>15</sup> posits that ‘ethnicity is never what it seems’, and in the context of Rwanda its evolution is highly complex,<sup>16</sup> with the meanings attached to the labels Hutu, Tutsi and Batwa changing over time.<sup>17</sup> Historical accounts suggest Batwa arrived in Rwanda first, followed by Hutu and then Tutsi,<sup>18</sup> although some accounts dispute whether migration occurred at all.<sup>19</sup> Nevertheless, when Europeans arrived in the late-1800s, Rwanda’s population was clearly divided into these three groups.<sup>20</sup> Stereotypically, Batwa were pygmies living as hunter-gatherers or performing menial tasks for officials, Hutu were short and stocky peasants cultivating the land, and Tutsi were ‘extremely tall and thin’ cattle-herders with white-like features,<sup>21</sup> who occupied the apex of society.<sup>22</sup>

Rwanda’s domination by colonial powers had a dramatic effect on the perception of ethnicity, and although not inventing the labels Hutu, Tutsi, and Batwa, ‘the colonial intervention changed what the categories meant and how they mattered’.<sup>23</sup> Europeans effectively racialised ethnic identities, with Tutsi viewed as superior, having supposedly migrated from northern Africa only to dominate the racially inferior Hutu.<sup>24</sup> Ultimately, Tutsi came to treat Hutu as inferior and Hutu came to believe ‘the two ethnic groups were ... fundamentally dissimilar in nature and irreconcilable in practice’, with Tutsi cast as a ‘foreign invading power with no entitlements in Rwanda’.<sup>25</sup> These

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<sup>14</sup> *The Indigenous World 2010* (IWGIA, 2010) 504.

<sup>15</sup> Rene Lemarchand, *The Dynamics of Violence in Central Africa* (University of Pennsylvania Press, 2009) 49.

<sup>16</sup> Johan Pottier, *Re-Imagining Rwanda* (Cambridge University Press, 2002) 118.

<sup>17</sup> Mahmood Mamdani, *When Victims Become Killers* (Princeton University Press, 2001) 15.

<sup>18</sup> Pottier, above n 16, 12.

<sup>19</sup> Linda Melvern, *A People Betrayed: The Role of the West in Rwanda’s Genocide* (Zed Books, 2000) 8.

<sup>20</sup> *Ibid.*

<sup>21</sup> Gerard Prunier, *The Rwandan Crises: History of a Genocide* (Hurst & Co, 1995) 5.

<sup>22</sup> Scott Straus, *The Order of Genocide: Race, Power & War in Rwanda* (Cornell University Press, 2006) 20–2.

<sup>23</sup> *Ibid.* 20.

<sup>24</sup> *Ibid.*

<sup>25</sup> Gerald Caplan, ‘Rwanda: Walking the Road to Genocide’ in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press, 2007) 1, 5.

beliefs were manipulated in the post-colonial environment, priming Hutus for a genocide unprecedented in speed, intensity and popular involvement.<sup>26</sup>

Two opposing perspectives on ethnicity are evident from this historiography. First, what Mahmood Mamdani refers to as the ‘no difference’ perspective (all Rwandans are the same) associated with Tutsi power, and second, the ‘distinct difference’ perspective (Tutsi as foreign invader) associated with Hutu power.<sup>27</sup> Whatever the merits of these polarised views, Batwa occupy a less muddled space, with Batwa themselves arguing their identity cannot be conflated with Hutu or Tutsi because of their unique history and culture;<sup>28</sup> including their traditions, social organisation and special affiliation with the land. For example, in speaking with Batwa communities and NGOs during her 2011 mission to Rwanda, the UN’s independent expert on minority issues, Gay McDougall, reported that Batwa representatives emphasised their ‘ethnic and cultural distinctiveness’, highlighting that they ‘have distinctive dialects and intonation comprehensible only to other Batwa, and unique elements of culture and custom.’<sup>29</sup> Cultural/ethnic distinctiveness aside, their diminutive stature, lifestyle, stereotypical occupation as potters and the discrimination they experience are features which clearly distinguish the Batwa from other groups within Rwanda.<sup>30</sup>

While the attenuation of radicalised ethnic differences is essential for a society transitioning from Rwanda’s past, the Rwandan government has chosen to perpetrate a ‘no difference’ version of history rather than adopt a more nuanced perspective on ethnic diversity. In their *Thirteenth to Seventeenth Periodic Reports* to the Committee on the Elimination of Racial Discrimination (‘CERD’), Rwanda argued that ‘Tutsiness’ and ‘Hutuness’ were not static ethnic categories, but rather social categories based on wealth and that a Hutu or Batwa could historically become Tutsi based on, for example, a gain in ownership of cows.<sup>31</sup> As McDougall noted, ‘[c]urrent-day Government officials consistently repeat this ethno-historical analysis.’<sup>32</sup>

### III INDIGENOUS RIGHTS AND THE BATWA

#### A *Recognising Indigenous Rights*

Kealeboga Bojosi argues that claims of indigeneity are not simply analytical tools, ‘but are intended to access legal rights accruing to indigenous people under international law’.<sup>33</sup> Indeed, there has been significant international and African momentum behind developing and formalising

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<sup>26</sup> Charles Mironko, ‘Igitero: Means and Motive in the Rwandan Genocide’ (2004) 6 *Journal of Genocide Research* 47.

<sup>27</sup> Mamdani, above n 17, 56–57.

<sup>28</sup> Fay Warrilow, *The Right to Learn: Batwa Education in the Great Lakes Region of Africa* (2008) Minority Rights Group Report, 20 <[www.minorityrights.org/645/reports/reports.html](http://www.minorityrights.org/645/reports/reports.html)>.

<sup>29</sup> Gay McDougall, *Report of the Independent Expert on Minority Issues on Her Mission to Rwanda*. 19<sup>th</sup> sess, UN Doc A/HRC/19/56/Add.1 (28 November 2011) para 54.

<sup>30</sup> Ibid.

<sup>31</sup> Republic of Rwanda, *Thirteenth to Seventeenth Periodic Reports*, UN Doc CERD/C/RWA/13–17 (9 August 2010) para 11.

<sup>32</sup> McDougall, above n 29, para 11.

<sup>33</sup> Kealeboga Bojosi, ‘The African Commission Working Group of Experts on the Rights of Indigenous Communities/Populations: Some Reflections on its Work so Far’ in Solomon Dersso (ed), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (PULP, 2010) 95, 112.

the rights of indigenous peoples.<sup>34</sup> The movement had its genesis in regions such as the Americas and Australasia where the distinction between first peoples and those coming later was axiomatic.<sup>35</sup> It arose out of growing recognition that indigenous populations had become excluded from mainstream society, and was premised on ‘morally compelling claims’ for recognition and redress based on being first, with indigeneity itself defined in opposition to those who came second.<sup>36</sup> The movement was underpinned by ‘decolonisation’ processes in countries such as Canada, Australia, New Zealand and the United States (‘CANZUS’), which followed their emancipation from British rule with unsuccessful ‘policies to assimilate all prior occupants of the lands into the newly crafted national identities’.<sup>37</sup> Of course, this was not decolonisation in the true sense of the word, with ‘the settlers, rather than the original inhabitants ... the real beneficiaries of decolonisation and independent statehood’.<sup>38</sup> Suffering from political, social and economic exclusion, ‘indigenous’ communities in CANZUS countries ‘remained strongly determined to preserve their own identity ... [and] initiated their struggle for recognition of their differential identity’ against the newly formed nation-states during a period when populations in Africa, who were collectively labelled as ‘indigenous’ by European colonisers, were struggling to break free from colonial rule.<sup>39</sup>

Unsurprisingly, recognition of indigenous rights in Africa evolved more slowly and differently from CANZUS jurisdictions, particularly given the view that most Africans are indigenous (consistent with the conceptualisation of indigenosity held by former European colonisers).<sup>40</sup> This perspective was reinforced by the African Union, which affirmed ‘that the vast majority of the peoples of Africa are indigenous to the African Continent’,<sup>41</sup> a concern acknowledged by Erica-Irene Daes, who notes that to the extent definitions of indigenous imply a distinction between settlers and persons originating in a particular country, ‘the unease of many African and Asian Governments is understandable’.<sup>42</sup> However, Daes counters with the argument that the conceptual difficulties over such definitions ‘disappear if we think of “indigenous” peoples as groups which are native to their own specific ancestral territories within the borders of the existing State, rather than persons that are native generally to the region in which the State is located.’<sup>43</sup> Certainly, Rwanda leverages the classic coloniser/colonised distinction deployed in, for example, CANZUS jurisdictions by arguing it ‘is not a country where native populations (autochthones) can be identified in the western meaning of the term’<sup>44</sup> and that there ‘is no indigenous population in

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<sup>34</sup> Francis Deng, *Identity, Diversity and Constitutionalism in Africa* (United States Institute of Peace Press, 2009) 154.

<sup>35</sup> *Ibid* 155.

<sup>36</sup> Francis Viljoen, *International Human Rights Law in Africa* (Oxford University Press, 2007) 277–8.

<sup>37</sup> Felix Ndahinda, *Indigenosity in Africa: A Contested Legal Framework for Empowerment of ‘Marginalized’ Communities* (Springer, 2011) 26–7.

<sup>38</sup> Erica-Irene Daes, *Working Paper by the Chairperson-Rapporteur on the Concept of Indigenous People*, UN Doc E/CN.4/Sub.2/AC.4/1996/2 (10 June 1996) para 61.

<sup>39</sup> Ndahinda, above n 37, 26–7.

<sup>40</sup> Deng, above n 34, 154.

<sup>41</sup> African Union, *Decision on Declaration on the Rights of Indigenous Peoples*, Assembly/AU/Dec.141 (VIII) para 7.

<sup>42</sup> Daes, above n 38, para 64.

<sup>43</sup> *Ibid*.

<sup>44</sup> ACHPR, above n 13, 42.

Rwanda as people share the same territory, the same language and the same culture'.<sup>45</sup> Conceptual issues aside, what is clear is that in contrast to CANZUS countries, 'the contemporary lack of a dominant colonial population [in Africa] converges with long histories of conquest, assimilation, migration, and movement to make the criteria for deciding who is "indigenous" far murkier.'<sup>46</sup>

Notably, African peoples identifying as indigenous are often those alienated through colonial and post-colonial policies elevating agriculture over activities such as hunter-gathering.<sup>47</sup> The dominant group often views them as backward, primitive and inferior, and where the indigenous label is accepted, it is often used negatively.<sup>48</sup> This marginalisation is accentuated by the reality that in many countries, one ethnic group was 'privileged' in the consolidation of the colonial/post-colonial state, resulting in a lack of tolerance for diversity and exposing non-dominant communities to exploitation and exclusion.<sup>49</sup>

Nevertheless, there have been positive movements towards recognising indigenous rights in Africa. Most notably, the ACHPR has adopted indigenous rights as part of its mandate, with one of its most significant contributions being the establishment of the African Commission's Working Group of Experts on Indigenous Populations/Communities ('ACWGIP') and ACWGIP's report,<sup>50</sup> which followed (described as 'the ACHPR's official conceptualisation of, and framework for, the issue of the human rights of indigenous populations').<sup>51</sup> ACWGIP has acknowledged that all Africans are indigenous, but argues the term should not be linked exclusively with 'the colonial situation', but instead used for 'analysing internal structural relationships of inequality that have persisted after liberation from colonialism'.<sup>52</sup> Accordingly, ACWGIP argues the term should not be equated with 'aboriginality' (that is, the first or original inhabitants) given problems deploying this concept in Africa, 'except in certain very clear-cut cases like the San of Southern Africa and the pygmies of Central Africa'.<sup>53</sup>

On the judicial front, the landmark 2010 ruling in the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* ('Endorois case')<sup>54</sup> was the first by the ACHPR 'to recognise indigenous people in the African

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<sup>45</sup> African Commission's Working Group of Experts on Indigenous Populations/Communities ('ACWGIP'), 'Report of the African Commission's Working Group on Indigenous Populations/Communities: Mission to Rwanda' (IWGIA 2010) 43.

<sup>46</sup> Dorothy Hodgson, 'Introduction: Comparative Perspectives on the Indigenous Rights Movements in Africa and the Americas' (2002) 104 *American Anthropologist* 1037, 1037.

<sup>47</sup> Sheila Aikman, 'Education and Indigenous Justice in Africa' (2011) 31 *International Journal of Educational Development* 16.

<sup>48</sup> Deng, above n 34, 154.

<sup>49</sup> Viljoen, above n 36, 280.

<sup>50</sup> African Commission's Working Group of Experts on Indigenous Populations/Communities ('ACWGIP'), 'Report Submitted in Accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa' (2003).

<sup>51</sup> *Ibid* 9.

<sup>52</sup> *Ibid* 92.

<sup>53</sup> *Ibid* (emphasis added).

<sup>54</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2003) 276.

< [http://www.achpr.org/files/sessions/46th/communications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/communications/276.03/achpr46_276_03_eng.pdf).

context',<sup>55</sup> with the Commission drawing, among other things, on international law and the conceptualisation of African indigeneity established by the ACWGIP. The ACHPR found that the Kenyan government had violated, among other things, the Endorois community's rights over traditional lands following their forced eviction from the Lake Bogoria area of Kenya's Rift Valley to make way for a wildlife reserve. As Korir Sing'Oei Abraham, co-counsel for the Endorois community, noted

the Commission established that actual aboriginality or distinctiveness were not a requirement for indigenous status in Africa [and that] proof regarding unambiguous dependence on a specific territory and the experience of marginalization and discrimination was sufficient.<sup>56</sup>

Following the success of the Endorois community, the Ogiek people of Kenya are currently pursuing an action over forced evictions from their traditional lands, the Mau Forest.<sup>57</sup> The case was referred by the ACHPR to the African Court on Human and Peoples' Rights ('ACtHPR') and represents the first time the ACtHPR will adjudicate on an indigenous rights claim (public hearings were held by the ACtHPR in November 2014 with a date for judgment yet to be set).<sup>58</sup> This rare referral by the ACHPR may be explained by the fact that the Kenyan government has largely failed to implement the ACHPR's ruling on the Endorois people's claim.<sup>59</sup> At least one commentator suggests that the ACHPR may be hoping that the ACtHPR will fare better in the enforcement of its judgments against the Kenyan government (assuming a favourable ruling for the Ogiek community).<sup>60</sup>

### B Normative Criteria for Assessing Indigeneity

There is no universally accepted definition of indigenous peoples, with the UN noting 'the prevailing view today is that no formal definition is necessary for the recognition and protection of [indigenous peoples'] rights'.<sup>61</sup> This is echoed by ACWGIP, which argues a strict definition may be misused by some governments not to recognise rights where their indigenous populations

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<sup>55</sup> Cynthia Morel, 'Indigenous as Equals under the African Charter' in Ridwan Laher and Korir Sing'Oei (eds), *Indigenous People in Africa: Contestations, Empowerment and Group Rights* (Africa Institute of South Africa, 2014) 1, 1.

<sup>56</sup> Korir Sing'Oei Abraham, 'Kenya at 50: Unrealized Rights of Minorities and Indigenous Peoples' (Minority Rights Group International Report, 2012) 9.

<sup>57</sup> ACHPR, Communication 381/2009, *CEMIRIDGE and MRG (On behalf of the Ogiek community v Kenya)*.

<sup>58</sup> George Mukundi Wachira and Tuuli Karjala, 'Advocacy for Indigenous Peoples' Rights in Africa' in Ridwan Laher and Korir Sing'Oei (eds), *Indigenous People in Africa: Contestations, Empowerment and Group Rights* (Africa Institute of South Africa, 2014) 112; African Union, 'African Court on Human and Peoples' Rights Concludes Hearing of Application Concerning Kenya's Ogiek Community Land Rights' (Press Release, 30 November 2014) <<http://legal.au.int/en/content/african-court-human-and-peoples%E2%80%99-rights-concludes-hearing-application-concerning-kenya%E2%80%99s-ogi>>.

<sup>59</sup> Rebecca Marlin, 'The Endorois Decision – Four Years On, the Endorois Still Await Action by the Kenyan Government' (Minority Rights Group, 23 September 2014) <<https://minorityrights.wordpress.com/2014/09/23/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/>>.

<sup>60</sup> See, eg, Oliver Windridge, 'Once Bitten, Twice Shy? The Commission v Kenya' *The ACtHPR Monitor* (26 November 2014) <<http://www.acthprmonitor.org/once-bitten-twice-shy-the-commission-v-kenya/>>.

<sup>61</sup> United Nations Development Group ('UNDP'), *Guidelines on Indigenous Peoples' Issues* (2008) 8 <<http://www2.ohchr.org/English/issues/indigenous/docs/guidelines.pdf>>.

fall outside the margins of ‘clear-cut’ boundaries.<sup>62</sup> Nevertheless, a number of distinct elements characterising indigeneity can be distilled from prevailing definitions, namely: non-dominance, historical continuity with pre-colonial societies (although a limiting characteristic in the Africa context as per Daes’s comments noted above), ancestral territories, ethnic identity and self-identification.<sup>63</sup> In relation to self-identification, the International Labour Organization’s (‘ILO’) *Convention Concerning Indigenous and Tribal Peoples in Independent Countries No. 169* (‘ILO 169’) provides: ‘[s]elf-identification as indigenous and tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply’.<sup>64</sup> Similarly, in their decision in the *Endorois case*, the ACHPR affirmed the importance of self-identification for recognising indigeneity.<sup>65</sup>

Rather than labouring over definition, of greatest utility for present purposes is to focus on normative criteria for assessing Batwa claims to indigeneity. As Patrick Thornberry notes, various ‘indigenous descriptors’ (which he differentiates from those ‘not commonly found in descriptions of “minority”’) are discernible from legal instruments and the analysis of ‘specialist commentators’.<sup>66</sup> They relate to ‘precedent habitation; historical continuity; attachment to land; the communal sense and the community right ... a cultural gap between the dominant groups in a State and the indigenous, and the colonial context’, and additionally ‘the specific of *self-identification as indigenous peoples*’.<sup>67</sup> These descriptors accord substantively with the guiding principles which the UN Working Group on Indigenous Populations (‘UNWGIP’) argues should be considered in any definition:

- 1) priority in time, with respect to the occupation and use of a specific territory;
- 2) voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;
- 3) self-identification, as well as recognition by other groups, as a distinct collectivity;
- 4) experience of subjugation, marginalisation, dispossession, exclusion or discrimination.<sup>68</sup>

From an African perspective, these principles direct attention away from ‘old-generation’ notions of colonialism and are guiding principles under which not all criteria need be present at any one time to characterise indigenous peoples.<sup>69</sup> Importantly, the ACWGIP emphasised that the focus for Africa should be:

on self-definition as indigenous and distinctly different from other groups within the state; on a *special attachment to and use of their traditional land* whereby their ancestral land and territory has a fundamental importance for their collective physical culture and survival as peoples; on an experience of *subjugation, marginalisation, dispossession, exclusion or discrimination* because

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<sup>62</sup> ACWGIP, above n 50, 87.

<sup>63</sup> Javaid Rehman, *International Human Rights Law* (Pearson, 2<sup>nd</sup> ed, 2010) 483.

<sup>64</sup> *Convention Concerning Indigenous and Tribal Peoples in Independent Countries No. 169*, open for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991), Article 1(2).

<sup>65</sup> ACHPR, above n 57, para 154.

<sup>66</sup> Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002) 55.

<sup>67</sup> *Ibid* (emphasis in original).

<sup>68</sup> Rodolfo Stavenhagen, ‘Indigenous Peoples in Comparative Perspective — Problems and Policies’ (UNDP Occasional Paper No 2004/14) 2 <[http://hdr.undp.org/sites/default/files/hdr2004\\_rodolfo\\_stavenhagen.pdf](http://hdr.undp.org/sites/default/files/hdr2004_rodolfo_stavenhagen.pdf)>.

<sup>69</sup> ACWGIP, above n 50, 92–3.



these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.<sup>70</sup>

The term ‘indigenous’ used by the ACWGIP is contemporary, shifting focus to unjust relations and power imbalances, which can be used to support strategies for participation and self-determination.<sup>71</sup> It also sits comfortably with the UNWGIP principles outlined above, although demotes the significance of ‘precedent habituation’ highlighted by Thornberry as noted above.

### C *Assessing Batwa Claims to Indigeneity*

A logical focus for assessing Batwa claims is to examine their situation against UNWGIP’s four principles, to determine whether they satisfy the constitutive elements of definitions of indigenous peoples. To this end, with respect to priority in time, Batwa are recognised as a part of a broader hunter-gatherer community of pygmies present in countries such as Burundi, Uganda, and the Democratic Republic of Congo.<sup>72</sup> They are recognised as the ‘oldest recorded inhabitants of the Great Lakes Region of Central Africa’<sup>73</sup> and ACWGIP argues that the term ‘aboriginal’ could apply to Batwa as one of the exceptional cases in Africa.<sup>74</sup> Unlike Hutu and Tutsi, whose oral histories focus on migration and conquest, Batwa ‘origin stories’ ‘emphasise that they have no origins elsewhere, no history of migration, that they are the truly indigenous people of this region’.<sup>75</sup>

In relation to cultural distinctiveness, aspects of Batwa social organisation set them apart, including ‘a boundary-less, flexible social system that emphasises the equality of all’<sup>76</sup> and customary systems of collective land ownership.<sup>77</sup> They take pride in ‘forest knowledge’ and pottery has become central to their contemporary identity.<sup>78</sup> They retain a ‘great number of songs, dances, oral narratives and other cultural artefacts which clearly identify their Batwa identity.’<sup>79</sup> Importantly, Batwa also self-identify as indigenous peoples and are recognised as such by others, including many Hutu and Tutsi.<sup>80</sup>

In relation to subjugation, marginalisation, dispossession, exclusion and discrimination, the Batwa’s situation is so apparent, that it can be taken on ‘judicial notice’. Batwa have been systematically displaced from the forest regions by dominant populations of agriculturalists and pastoralists since the 19<sup>th</sup> Century, and have more recently been the ‘direct victims of

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<sup>70</sup> Ibid (emphasis in original).

<sup>71</sup> Aikman, above n 47, 17.

<sup>72</sup> ACWGIP, above n 50, 15–16.

<sup>73</sup> ACWGIP, above n 45, 27.

<sup>74</sup> ACWGIP, above n 50, 91.

<sup>75</sup> Jerome Lewis, *The Batwa Pygmies of the Great Lakes Region* (2000) Minority Rights Group, 6–8 <[www.minorityrights.org/?lid=1056](http://www.minorityrights.org/?lid=1056)>.

<sup>76</sup> Ibid.

<sup>77</sup> Chris Huggins, *Land Rights and the Forest Peoples of Africa: Historical, Legal and Anthropological Perspectives* (2009) Forest Peoples Programme, 2 <<http://www.forestpeoples.org/topics/rights-land-natural-resources/publication/2010/land-rights-and-forest-peoples-africa-4-rwanda>>.

<sup>78</sup> Warrilow, above n 28, 8.

<sup>79</sup> Huggins, above n 77, 2.

<sup>80</sup> Ibid 1.

uncompensated land expropriation by the state'.<sup>81</sup> They suffer discrimination from Hutu and Tutsi who will often not sit near or talk to them,<sup>82</sup> or 'drink from the same beer pot for fear of social pollution'.<sup>83</sup> While Hutu and Tutsi intermarry,<sup>84</sup> intermarrying with Batwa is taboo given perceptions they are subhuman because of their association with hunter-gathering.<sup>85</sup> In observing the Batwa's situation, ACWGIP noted that:

their education level remains very low, and far below the national average, they do not have access to land; they suffer from discrimination, especially with respect to access to employment; and they do not participate equally with other communities in the management of public affairs.<sup>86</sup>

Given the above, it is evident Batwa satisfy all four criteria elucidated by UNWGIP to qualify as indigenous. Their characterisation also fits with ACWGIP's conceptualisation of indigenous given the structural inequality Batwa face, whether or not they are recognised as 'first peoples'. They are categorised by Rwanda as a historically marginalised population, and it is this factor of marginalisation that is a central feature in ACWGIP's notion of indigenesness.<sup>87</sup> Considered together, Batwa *prima facie* qualify as indigenous peoples for the purposes of ILO 169 and the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').<sup>88</sup> Obviously, Batwa also qualify for the full panoply of universal human rights, but their claims as indigenous are aimed at accessing distinctive indigenous rights; such as a special right to land, territories and natural resources.<sup>89</sup>

#### IV NUR POLICY AND THE BATWA

Undoubtedly, Rwanda's concern over ethnic discord is rational given the country's history. Indeed, McDougall noted that '[e]fforts by the Government to forge unity through a national Rwandan identity and to diminish the role of ethnicity as a destructive force are laudable'.<sup>90</sup> However, the NUR Policy relies on interpretative filters of history that effectively render Batwa invisible.<sup>91</sup> This includes framing the genocide as a purely ethnic conflict (disregarding catalysts such as social inequality) and re-casting ethnicity as a correctible colonial construct.

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<sup>81</sup> Ibid 7.

<sup>82</sup> Ibid.

<sup>83</sup> Jan Vansina, *Antecedents to Modern Rwanda* (Wisconsin University Press, 2004) 36–7.

<sup>84</sup> Mamdani, above n 17, 53–4.

<sup>85</sup> Justin Kenrick and Jerome Lewis, 'Discrimination Against the Forest People ("Pygmies") of Central Africa' in Suhas Chakma and Marianne Jensen (eds), *Racism Against Indigenous Peoples* (IWGIA, 2001) 314; Lewis, above n 75, 13.

<sup>86</sup> ACWGIP, above n 45, 44.

<sup>87</sup> ACWGIP, above n 50, 90.

<sup>88</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

<sup>89</sup> Bojosi, above n 33, 111.

<sup>90</sup> McDougall, above n 29, para 83.

<sup>91</sup> Thompson, above n 4, 317–18.

Notably, Rwanda has ratified various IHRL instruments and is far from being a human rights pariah having,<sup>92</sup> inter alia, abolished the death penalty, improved the quality and access to justice,<sup>93</sup> introduced domestic legislation to fight discrimination,<sup>94</sup> and made solid progress in improving children's and women's rights.<sup>95</sup> For example, the Committee for the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW') congratulated Rwanda 'for having the highest representation of women in Parliament worldwide', for outlawing polygamy and acceding to the Optional Protocol.<sup>96</sup> From a socio-economic perspective, McDougall commended the Rwandan government for many of its 'post-genocide initiatives and positive practices to promote healing and transformation, development and growth' and noted that Rwanda 'is now a country unrecognisable in comparison to 1994 — a country of increasing opportunity, prosperity and stability'.<sup>97</sup> Nevertheless, the area in which Rwanda is consistently criticised — its record on civil and political rights — has significant consequences for Batwa.<sup>98</sup>

The NUR Policy's concept of 'one Rwanda for all Rwandans' finds legal expression in the 2003 *Constitution of the Republic of Rwanda* ('*Constitution*') and in the criminal law. Article 8 of the *Constitution* provides, as a fundamental principle, the 'eradication of ethnic, regional and other divisions and promotion of national unity'. The *Constitution* is littered with indirect prohibitions on activities that may be linked to ethnic division. For example, Article 54 provides 'political organisations are prohibited from basing themselves on race, ethnic group, tribe, clan, region, sex, religion or any other division which may give rise to discrimination' and that 'political organisations must constantly reflect the unity of the people of Rwanda'. Consequently, the *Constitution* effectively prohibits organisations that promote the interests of one ethnic group to the exclusion of others, a fact criticised by the Human Rights Committee which expressed concern 'in the reported obstacles to the registration and freedom of action of human rights NGOs and

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<sup>92</sup> These include the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969), the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) all ratified by Rwanda on 16 April 1975, the *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 6 October 1999, 2131 UNTS 85 (entered into force 22 December 2000) and ratified by Rwanda on 2 March 1981, the *Convention on the Rights of the Child*, opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force 2 December 1990) and ratified by Rwanda on 24 January 1991, and the *African Charter on Human and Peoples' Rights*, open for signature 27 June 1981, 1520 UNTS 217 (entered into force October 1986) and ratified by Rwanda on 22 July 1983.

<sup>93</sup> Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda* (2008) 31–2 <<http://www.hrw.org/en/node/62097/section/1>>.

<sup>94</sup> CERD, *Concluding Observations on Rwanda 13–17th Periodic Reports*, 78<sup>th</sup> sess, UN Doc CERD/C/RWA/CO/13–17 (19 April 2011) paras 2–6.

<sup>95</sup> Committee on the Rights of the Child, *Concluding Observations — Rwanda*, 36<sup>th</sup> sess, UN Doc CRC/C/15/Add.234 (1 July 2004) para 3.

<sup>96</sup> Committee for the *Convention on the Elimination of All Forms of Discrimination Against Women*, *Concluding Observations of the Committee on the Elimination of Discrimination against Women — Rwanda*, 43<sup>rd</sup> sess, UN Doc CEDAW/C/RWA/CO/6 (6 February 2009) paras 6–9 ('CEDAW').

<sup>97</sup> McDougall, above n 29, para 81.

<sup>98</sup> Human Rights Watch, *World Report 2012: Events of 2011* (2012) 154 <<http://www.hrw.org/world-report-2012/world-report-2012-rwanda>>.

opposition political parties' in breach of various articles of the *International Covenant on Civil and Political Rights* ('ICCPR').<sup>99</sup>

Rwanda argues the *Constitution*, 'as the supreme law of the land', 'prohibits any discriminatory acts',<sup>100</sup> which is supplemented by *Law No.47/2001 Instituting Punishment for Offences of Discrimination and Sectarianism* (the '*Criminal Law*'). The *Criminal Law*'s preamble highlights the need 'to punish anyone found guilty of fuelling conflicts among Rwandans and sowing divisions among them'. For Batwa, the *Criminal Law* has had a range of perverse effects. For example, local NGOs working with Batwa have been forced to change their names and/or redefine their mandate to avoid sanction; the most infamous example being *Communaute des Autochtones Rwandais* ('CAURWA'), which was forced to remove '*Autochtones*' (that is, 'indigenous') from its title and replace it with 'potters' (now, 'COPORWA'). As Susan Thompson observes, this has meant organisations working for the Batwa are placed in the position of justifying their focus on a subset of the population without breaching NUR Policy.<sup>101</sup> Moreover, the *Constitution* and *Criminal Law* operate synergistically to effectively prohibit self-identification as a member of an ethnic group, because doing so could be considered as divisive. This runs counter to CERD and its interpretation of Article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD'). CERD, in *General Recommendation 8*, opined that the way in which individuals are identified as belonging to a particular racial or ethnic group 'shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.'<sup>102</sup> As Thornberry notes, the latter also reflects CERD's preference for identifying 'who is indigenous', subject 'to the last qualification'.<sup>103</sup> It follows that with CERD calling for Rwanda to recognise Batwa as indigenous, CERD is of the opinion that no contrary justification exists.<sup>104</sup>

Collectively, the *Constitution* and *Criminal Law* provide the basis on which Rwanda argues discrimination is not tolerated and equality is assured. For example, Rwanda argued in its *Third Periodic Report* to the Human Rights Committee 'that the Constitution ... guarantees the civil and political rights enshrined in the [ICCPR] to all persons living in Rwanda' and that 'equality is guaranteed...'<sup>105</sup> Nevertheless, what remains apparent is that despite formal prohibitions, discrimination and inequality remain prevalent. Racism towards the Batwa permeates Rwandan culture and is at times overt. For example, MRG observed that 'despite the prohibition on mentioning ethnicity, Kinyarwanda radio stations continue to broadcast racist jokes insulting Batwa'.<sup>106</sup> The UN Committee on Economic, Social and Cultural Rights noted in 2013 the

<sup>99</sup> Human Rights Committee, *Concluding Observations — Rwanda*, 95<sup>th</sup> sess, UN Doc CCPR/C/RWA/CO/3 (3 April 2009) para 21.

<sup>100</sup> Republic of Rwanda, *Thirteenth to Seventeenth Periodic Reports*, UN Doc CERD/C/RWA/13-17 (9 August 2010) para 28.

<sup>101</sup> Thompson, above n 4, 316.

<sup>102</sup> CERD, *General Recommendation 8*, 38<sup>th</sup> sess (1990).

<sup>103</sup> Patrick Thornberry, 'Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD Practice' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 61, 83.

<sup>104</sup> CERD, above n 94, para 11.

<sup>105</sup> Republic of Rwanda, *Third Periodic Report*, UN Doc CCPR/C/RWA/3 (27 November 2007) paras 133–4.

<sup>106</sup> Minority Rights Group International, *Submission to CERD — Rwanda* (2011) 1 <<http://www2.ohchr.org/english/bodies/cerd/cerds78.htm>>.

persistence of stereotypes against Batwa and recommended that Rwanda ‘firmly combat stereotypes, stigma and discrimination against and marginalisation of Batwa, including by ensuring the effective application of its anti-discrimination legislation’.<sup>107</sup>

In contrast to *ICERD*, which ‘reaches beyond formal equality to equality in fact’,<sup>108</sup> the *Constitution* and *Criminal Law* encourage only the former. This is significant, given one of the fundamental defences for not privileging the Batwa is that all Rwandans are treated equally, with the formalisation of equality providing an argument for avoiding ethnically-targeted affirmative action on the basis it is unequal treatment. Relevantly, CERD noted in *General Recommendation 14* that ‘a differentiation of treatment will not constitute discrimination for such differentiation, judged against the objectives and purposes of [*ICERD*], are legitimate or fall within the scope of article 1, paragraph 4’,<sup>109</sup> which provides (in conjunction with Article 2(2) in *ICERD*) the scope of acceptable differential treatment (special measures) in *ICERD*. Notably, special measures are distinguishable from indigenous rights in that the former have a temporal dimension that lasts until the objective (equality in fact) is realised, unlike the latter, which are permanent.<sup>110</sup>

The Rwandan government’s concession to the Batwa is their classification as a historically marginalised population (‘HMP’), although the precise meaning of the term is unclear; an issue raised by CERD, who called for Rwanda to clarify the concept.<sup>111</sup> What appears evident is that the label is not exclusively applied to Batwa, a fact made apparent by a Rwandan Minister for Local Administration, who informed ACWGIP that ‘historically marginalised communities were so called because of their backward culture ... [and the Batwa] are not the only vulnerable community in Rwanda.’<sup>112</sup> Problematically, Rwanda’s approach to ethnic unanimity means that broadly speaking, it also treats the unequal equally — *like other people* — because it operates through the no-difference *Banyarwanda* lens (conceptually referred to hereinafter as the ‘HMP Framework’).

To meet their immediate survival and developmental needs, Batwa clearly need the benefit of tailored special measures, whether or not they are recognised as indigenous. Batwa representatives emphasise that ‘Government policy to treat all as equal has as a consequence the failure of national Government and local authorities to acknowledge or respond to their particular economic and social circumstances.’<sup>113</sup> It is evident that Rwanda is not doing enough to assist the Batwa, but how should the debate move forward given the contextual reality, and how can a shift towards tailored special measures and/or indigenous rights be actualised?

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<sup>107</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Second to Fourth Periodic Report of Rwanda, Adopted by the Committee at its Fiftieth Session (29 April – 17 May 2013)*, 50<sup>th</sup> sess, UN Doc E/C.12/RWA/CO/2–4 (10 June 2013) para 8.

<sup>108</sup> Thornberry, above n 103, 63.

<sup>109</sup> CERD, *General Recommendation 14*, 42<sup>nd</sup> sess (1993) para 2.

<sup>110</sup> Thornberry, above n 103, 81–2.

<sup>111</sup> CERD, above n 94, para 12.

<sup>112</sup> ACWGIP, above n 45, 42.

<sup>113</sup> McDougall, above n 29, para 52.

V HMP FRAMEWORK AND DESCENT- AND WORK-BASED DISCRIMINATION

A *Critiquing the HMP Framework*

Rwanda has introduced a range of initiatives designed to alleviate Batwa marginalisation, but they are generally neither ‘targeted’ nor bespoke enough to address their specific problems. Indeed, the ACWGIP noted, ‘considering the Batwa as part of the Rwandan society without any distinction other than the fact they have been historically marginalised has led to the adoption of inappropriate measures to address the[ir] needs’.<sup>114</sup> The disconnect the ACWGIP identifies between the HMP Framework and the types of:

- (a) differential and targeted special measures envisaged under, for example, *ICERD*, to alleviate inequality, and
- (b) the permanent interventions/rights necessary to account for Batwa as a marginalised people, are at the heart of why the HMP Framework is fundamentally flawed.

Commendably, Rwanda’s initiatives are designed to address a range of more typical aspects of disadvantage linked, amongst other things, to land, housing, health and education. While characteristic of affirmative action mechanisms typically used for assisting the disadvantaged, the lens through which they have been developed places Batwa in no more a distinct category than, for example, the poor. The mechanisms border on discrimination in effect because they have not been tailored to the Batwa’s unique needs. That is, they ‘treat in an equal manner persons or groups whose situations are objectively different’.<sup>115</sup> Consequently, the HMP Framework does not account for variables such as identity, culture, historic disadvantage, and endemic discrimination, nor does it account for how variables of marginalisation interact — as the following illustrates.

The Rwandan government argues that Batwa benefit from universal education for all, and evidently some positive steps have been made to improve educational opportunities (for example, exempting Batwa from school fees and assisting some to undertake university-level education).<sup>116</sup> Nevertheless, ACWGIP noted that the ‘absence of other incentives and assistance makes it difficult for Batwa to attend or remain at school, including overt racial discrimination, [and] the prohibitive cost of school materials/uniforms’.<sup>117</sup> In-turn, lack of education limits Batwa employment opportunities and their ability to articulate/assert rights either directly (for example, by accessing political positions) or indirectly (for example, by pursuing influential professional roles).<sup>118</sup> As the UN Expert Mechanism on the Rights of Indigenous Peoples found, an inability to access ‘quality education is a major factor contributing to social marginalization, poverty and dispossession of indigenous peoples.’<sup>119</sup> Overall, Batwa poverty, lack of opportunity, education, discrimination

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<sup>114</sup> ACWGIP, above n 45, 45.

<sup>115</sup> CERD, *General Recommendation 32*, 75<sup>th</sup> sess (2009) para 8.

<sup>116</sup> ACWGIP, above n 45, 46–7; IWGIA, above n 14, 507.

<sup>117</sup> ACWGIP, above n 45, 46–7.

<sup>118</sup> *Ibid* 9.

<sup>119</sup> Expert Mechanism on Rights of Indigenous People, *Expert Mechanism Advice No.1 (2009) On the Rights of Indigenous Peoples to Education*, para 4  
<<http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismAdvice.aspx>>.

and social exclusion ‘creates a vicious circle, each reinforcing the other, perpetuating their impoverished and marginalised situation.’<sup>120</sup>

Notably, some land and housing distribution has taken place,<sup>121</sup> although the distribution of land is not targeted to their cultural or traditional uses of land. Instead, the policy represents a poverty reduction strategy that encourages assimilation and is focused on maximising economic returns through agricultural and pastoral uses.<sup>122</sup> No Batwa ‘are thought to maintain a traditional existence as forest dwellers’, and most now work as potters, labourers, porters or beggars.<sup>123</sup> Overall, their ‘extreme landlessness is a root cause of severe poverty, marginalisation and discrimination’,<sup>124</sup> a situation compounded by the advent of cheap plastic and metal bowls, reducing economic returns on clay pottery.<sup>125</sup>

To understand why Batwa cannot simply embrace the Rwandan government’s notion of ‘progress’, it is useful to examine their relationship to land and implications of dispossession. A ‘key characteristic’ of indigenous people identified by ACWGIP is that for most, ‘the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon’.<sup>126</sup> For Batwa, access to marshlands and ancestral forests is essential to their culture and identity, be that as hunter-gatherers or in their modern incarnation as potters.<sup>127</sup> For example, notwithstanding pottery is a ‘loss-making activity’, many Batwa derive their modern identity and attach significant social importance to the activity, such as ‘the process of digging the clay and carrying it to their settlements allow[ing] for socialisation and a sense of community’.<sup>128</sup> More fundamentally, Batwa social organisation is inextricably linked to their traditional relationship to forests as hunter-gatherers and is premised, amongst other things, on obtaining direct and immediate returns on labour, obligatory sharing, social equality, and a mobile lifestyle that was necessary for hunting and gathering to remain viable.<sup>129</sup>

The linkages between land and culture, identity and social organisation outlined above are fundamentally different from those of the Hutu and Tutsi and go some way to explain the observation of the Rwandan Human Rights Commissioner that Batwa ‘refuse to change their way of life’ and ‘with respect to land ... Batwa people sell their own land and even the iron sheets of the houses built for them by the Government, and they keep moving from place to place’.<sup>130</sup> Ironically, this observation highlights the HMP Framework’s flaws. Without accounting for cultural and contextual differences, a non-discriminating approach to relieving Batwa

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<sup>120</sup> Forest Peoples Programme, *Submission Concerning the Republic of Rwanda and its Compliance with the ICCPR* (2006) 6 <<http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/rwandahrcrepoc06eng.pdf>>.

<sup>121</sup> IWGIA, above n 14, 507.

<sup>122</sup> See comments in Integrated Regional Information Networks (IRIN), *Minorities under Siege: Pygmies Today in Africa* (2006) 18, 28 <<http://www.irinnews.org/InDepthMain.aspx?InDepthId=9&ReportId=58647>>.

<sup>123</sup> Thompson, above n 4, 318.

<sup>124</sup> Forest Peoples Programme, above n 120, 6.

<sup>125</sup> Lisa Matthews, ‘The People Who Don’t Exist’ (2006) 30 *Cultural Survival Quarterly* <<http://www.culturalsurvival.org/publications/cultural-survival-quarterly/rwanda/people-who-dont-exist>>.

<sup>126</sup> ACWGIP, above n 50, 89.

<sup>127</sup> Huggins, above n 77, 13.

<sup>128</sup> ACWGIP, above n 45, 30.

<sup>129</sup> Lewis, above n 75, 8.

<sup>130</sup> ACWGIP, above n 45, 36.

marginalisation will be ineffective no matter how sincerely such an approach is implemented, a situation replicated elsewhere. For example, in Australia a failure to account for cultural factors such as high levels of mobility, obligations to share, and little community consultation has contributed to the failure of government housing initiatives designed to alleviate social problems and reduce poverty.<sup>131</sup>

Overall, Rwanda's HMP initiatives masquerade as special measures, yet none of the conditions for the adoption and implementation of special measures recommended by CERD are evident;<sup>132</sup> including that they should be 'grounded in a realistic appraisal of the current situation of the individuals and communities concerned' and 'designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities'.<sup>133</sup> The ACWGIP noted that 'the initiatives of building houses for the Batwa is to be commended, [however] the mission deplores the fact that the beneficiaries are not consulted in the process of relocation and housing'.<sup>134</sup> HMP initiatives also fall outside the permanent rights that one might expect to see in similar situations, including 'the rights of persons belonging to minorities to enjoy their own culture ... [and] the rights of indigenous peoples, including rights to land'.<sup>135</sup>

For the foreseeable future, it appears unlikely Rwanda will shift from its HMP Framework or dilute its approach to divisionism. There is simply too much public commitment to this trajectory given statements in treaty-body reports and the considerable internal investment in targeting divisionism and re-orientating Rwandans to the *Banyarwanda* philosophy. For now, any successful approach targeted at alleviating Batwa marginalisation will likely need to accommodate Rwanda's substantial commitment to its current strategy and not be focused on indigenous rights. The immediate concerns of bodies such as COPORWA include Batwa poverty, hunger, lack of shelter and land, education, unemployment, discrimination and lack of representation in decision-making bodies.<sup>136</sup> Given these more immediate 'survival' and developmental concerns, contextually-driven solutions for relieving Batwa marginalisation and sustaining them as a distinctive people are urgently needed; although the author emphasises that long-term advocacy efforts should remain focused on securing their indigenous rights, if accessing these rights remains the Batwa's objective.

### B *Descent- and Work-Based Discrimination*

One alternative is to address the Batwa's immediate concerns through the lens of descent- and work-based discrimination, which is defined in the draft *Principles and Guidelines on the Effective Elimination of Discrimination Based on Work and Descent* as:

any distinction, exclusion, restriction, or preference based on inherited status such as caste, including present or ancestral occupation, family, community or social origin, name, birth place, place of residence, dialect and accent that has the purpose or effect of nullifying or impairing the recognition,

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<sup>131</sup> Max Neutze, 'Housing for Indigenous Australians' (2000) 15 *Housing Studies* 485.

<sup>132</sup> CERD, above n 115, paras 16–8.

<sup>133</sup> *Ibid.*

<sup>134</sup> ACWGIP, above n 45, 46.

<sup>135</sup> CERD, above n 115, para 15.

<sup>136</sup> *Ibid* 41.



enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life.<sup>137</sup>

The prohibition on descent-based discrimination is found in Article 1(1) of *ICERD* (notably this prohibition is found only in *ICERD*).<sup>138</sup> Although originally targeted at India's caste system, CERD member Thornberry commented at the Committee's *Thematic Discussion on Discrimination Based on Descent* that 'the term [descent] was clear, and encompassed caste and other analogous systems of social stratification based on birth',<sup>139</sup> while member Aboul-Nasr argued that the term caste was 'an important aspect of descent but surely not the sum of it'.<sup>140</sup> Significantly, CERD's *General Recommendation 29* applies this concept to descent-based communities who suffer discrimination on the basis of 'caste and analogous systems of inherited status and whose existence may be recognized on the basis of various factors' which include 'restricted ability to alter inherited status', 'subjection to dehumanising discourses referring to pollution or untouchability' and a 'generalised lack of respect for their human dignity and equality',<sup>141</sup> all of which are readily applicable to Batwa.

Relevantly, the International Dalit Solidarity Network argues 'what is obvious is that [Batwa] suffer greatly due to their perceived lower position in an ascribed social hierarchy, and that they suffer this discrimination due to their descent'.<sup>142</sup> 'Work' in the context of descent- and work-based discrimination is understood to refer to 'the occupation or functional role of individuals or groups',<sup>143</sup> and it is the interrelationship between descent and work that forms the basis of this form of discrimination.

In 2000, the UN Sub-Commission on the Promotion and Protection of Human Rights passed *Resolution 2000/4 on Discrimination Based on Work and Descent*, which provides that 'discrimination based on work and descent is a form of discrimination prohibited by international human rights law'.<sup>144</sup> A subsequent UN working paper on Discrimination Based on Work and Descent made mention of 'potters' in Africa and set out the indicia of work-descent discrimination.<sup>145</sup> This includes group membership by birth and work specialisation or connection with type of work (even where original roles no longer exist, such as hunter-gathering), which combines with discrimination based on, amongst other things, perceptions of members of the

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<sup>137</sup> *Draft Principles and Guidelines on the Effective Elimination of Discrimination Based on Work and Descent*, para 2 (A/HRC/11/CRP 3).

<sup>138</sup> David Keane, 'Descent-Based Discrimination in International Law: A Legal History' (2005) 12 *International Journal on Minority and Group Rights* 94.

<sup>139</sup> CERD, *Thematic Discussion on Discrimination Based on Descent*, 61<sup>st</sup> sess, UN Doc CERD/C/SR.1531 (16 August 2002) para 12.

<sup>140</sup> *Ibid* para 3.

<sup>141</sup> CERD, *General Recommendation 29*, 61<sup>st</sup> sess (2002) para 1.

<sup>142</sup> Alexander Stevens, *Discrimination Based on Descent in Africa* (2002) International Dalit Solidarity Network [3.2.3] <[http://www.idsn.org/fileadmin/user\\_folder/pdf/Old\\_files/africa/pdf/Africafull.pdf](http://www.idsn.org/fileadmin/user_folder/pdf/Old_files/africa/pdf/Africafull.pdf)>.

<sup>143</sup> Asbjorn Eide and Yozo Yokoto, *Working Paper on Discrimination Based on Work and Descent*, UN Doc E/CN.4/Sub.2/2003/24 (2003) para 7.

<sup>144</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, *Resolution 2000/4 on Discrimination Based on Work and Descent*, UN Doc E/CN.4/Sub.2/RES/2004 (2004) para 1.

<sup>145</sup> Eide and Yokoto, above n 143, para 17.

marginalised group as dirty, social proscription of intermarriage, and notions of pollution.<sup>146</sup> Similarly, UN Special Rapporteur, Githu Muigai, noted that the marginalisation experienced by hunter-gather societies and their descendants in Africa ‘may contain aspects of a purity-pollution dyad, as well as degrees of real or specialised occupation’.<sup>147</sup> Once again, this is relevant to the Batwa, which the Rwandan government reinforced when it forced CAURWA to change its name by replacing ‘indigenous’ with ‘potters.’ In so doing, the Rwandan government effectively crystallised the nexus between descent and work, further entrenching this form of discrimination as their low-standing occupational role is clearly defined by birth — once hunter-gatherers, now potters.

Significantly, the measures that flow from *General Recommendation 29*<sup>148</sup> address a broad range of concerns relevant to Batwa. These include requirements to consult the affected community, prohibitions on discrimination/stereotyping in, for example, the media and education, and requirements to involve the affected community in decision-making at all levels of government. The Draft Guidelines are even more wide-ranging, and provide a strong foundation on which to build a comprehensive program to address Batwa marginalisation.

Notably, Article 11 of Rwanda’s *Constitution* mandates that

discrimination of whatever kind based on, amongst other things, ethnic origin, tribe, clan, colour, sex, region, social origin, religion or faith, opinion, economic status, culture, language, social status, physical or mental disability or any other form of discrimination is prohibited and punishable by law.<sup>149</sup>

CERD have been critical of Article 11, as it does not conform with Article 1 of *ICERD* because it fails to incorporate the elements of ‘descent’ and ‘national origin’ as a basis on which racial discrimination is prohibited.<sup>150</sup> Nevertheless, the absence of specific reference to descent is not a substantive impediment to addressing Batwa descent- and work-based discrimination. Assuming discrimination based on ‘ethnic origin’ is unavailable in the case of the Batwa, discrimination based on ‘social origin’ (notably, UN treaty bodies have found that caste-based discrimination can be accommodated under the concept of social origin).<sup>151</sup> The notion of social origin is not inconsistent with the Rwandan government’s argument that the labels ‘Hutu’, ‘Tutsi’ and ‘Batwa’ were colonial constructs, but it does require the government to address the contemporary reality of Batwa discrimination, whatever its social origins.

Although not addressing indigenous rights per se (such as traditional land rights or compensation for dispossession), a focus on descent- and work-based discrimination moves the debate into a workable space. The principles and prohibitions around this form of discrimination could be leveraged to address many of the Batwa’s immediate concerns in a politically-palatable way (by

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<sup>146</sup> Ibid.

<sup>147</sup> Githu Muigai, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 17<sup>th</sup> sess, UN Doc A/HRC/17/40 (24 May 2011) para 57.

<sup>148</sup> CERD, above n 141.

<sup>149</sup> *Constitution* (Rwanda), Title II (Fundamental Human Rights and the Rights and Duties of the Citizen), Ch 1 (Fundamental Human Rights), art 11.

<sup>150</sup> CERD, above n 115, para 13.

<sup>151</sup> International Dalit Solidarity Network, *Caste Discrimination and Human Rights* (9<sup>th</sup> edition, August 2014).

not directly undermining the *Banyarwanda* philosophy) and by taking a more holistic and integrated approach than that currently accommodated for under the HMP Framework. Such an approach would allow for the recognition of the contemporary realities of a particular form of marginalisation and would provide a framework to address these without the need to address contested issues of ethnicity and indigenesness.

Problematically, this approach provides only interim remedies that fail to address important indigenous issues, such as connection to land, and comes with a number of discrete dangers, including the acceleration of assimilation and irreversible losses of culture and identity. For example, ‘having been denied access to their forests for two or more generations, the majority of Batwa in Rwanda are at great risk of losing what remains of their forest knowledge’,<sup>152</sup> and a shift in focus away from indigenous rights by the international community raises the possibility that this knowledge may be irretrievably lost. Indeed, some Batwa community members have made it clear that they wish to return to the forests and their traditional ways of life,<sup>153</sup> something that may be more difficult to accommodate if the panoply of indigenous rights are de-emphasised. Nevertheless, it is hoped that a shorter-term focus on special measures based on the adoption of novel approaches, such as descent- and work-based discrimination, may help break the poverty cycle for the Batwa and place them in a better position to advocate effectively on their own behalf for specific indigenous rights if they so wish.

## VI CONCLUSION

ACWGIP posits that ‘conflicts do not arise because people demand their rights but because their rights are violated’<sup>154</sup> and in the case of the Batwa, their rights have been violated for generations. They are simultaneously historic victims of prejudice and discrimination and contemporary victims of a larger struggle predicated on a flawed recasting of the meaning of ethnicity and a misunderstanding of the value of diversity in the process of nation-building. As Francis Deng argues, ‘the concept of unity within diversity is predicated on the assumption that a successful nation is one that can pool together its diverse social intermixtures in a manner that builds on their richness and does not alienate any group’.<sup>155</sup> Similarly, Ted Cantle suggests that ‘the concept of “community cohesion” recognises, first, that equality of opportunity is central to a cohesive society and that the very existence of a substantial disaffected and disadvantaged group will militate against any real sense of community harmony.’<sup>156</sup>

If it is true, as Lisa Matthews asserts, that ‘the government recognizes the Batwas’ plight, but it cannot get past the horror of the recent past’,<sup>157</sup> then there remains hope that alternative strategies can be deployed in the short-to-medium term that more fully recognise rights, which are arguably of more immediate importance. Although the author acknowledges that at least for some Batwa, recognition as a distinct ethnic group (that is, as Batwa per se) rather than material wellbeing

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<sup>152</sup> Forest Peoples Programme, above n 120, 14.

<sup>153</sup> McDougall, above n 29, para 55.

<sup>154</sup> ACWGIP, above n 50, 88.

<sup>155</sup> Deng, above n 34, 43.

<sup>156</sup> Ted Cantle, *Community Cohesion: A New Framework for Race and Diversity* (Palgrave, 2008) 160.

<sup>157</sup> Matthews, above n 125, 4.

remains of greater concern.<sup>158</sup> This is premised on the view that the Rwandan government would be willing to do more for the Batwa if it was not placed in the position where it was forced to reverse its policy on ethnic unity. Arguably, the international community and Batwa themselves should strive for full recognition of indigenous rights. In the meantime, alternative normative approaches based around, for example, descent and work-based discrimination, may be needed in the interim.

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<sup>158</sup> Gilbert Mwijuke, 'We are Simply Bawtwa, Not a "Historically Marginalised Population"', *The East African* (25 October 2014) <<http://www.theeastafican.co.ke/Rwanda/News/We-are-simply-Batwa--not-a--marginalised-people--/1433218/2499322/-/kjjycqz/-/index.html>>.