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USAID
AMERICAN BAR ASSOCIATION
ADVANCING RIGHTS IN SOUTHERN AFRICA
Bien informed, well read, a model of charity.
ACKNOWLEDGEMENTS

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Front Cover: San / Bushmen women
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<td>African Committee of Experts on Rights and Welfare of the Child</td>
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<td>ACHPR</td>
<td>African Commission on Human &amp; Peoples’ Rights</td>
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<td>AHRLR</td>
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<td>BDP</td>
<td>Botswana Democratic Party</td>
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<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<td>Economic and Social Council</td>
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<td>Free, Prior and Informed Consent</td>
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<td>International Labour Organization</td>
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<td>IPR</td>
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<td>NDP</td>
<td>National Development Plan</td>
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<td>RADP</td>
<td>Rural Area Development Programme</td>
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<td>SGL</td>
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1. INTRODUCTION

1.1 Purpose of the Resource Manual

This manual aims to build paralegals’ foundational knowledge on indigenous peoples’ rights in Botswana, in an effort to encourage and strengthen strategic social impact litigation and to protect the rights of indigenous peoples. The manual will outline the role of a paralegal in the context of human rights advocacy. It also frames the current state of indigenous peoples in Botswana, and positions it in relation to the relevant national and international legal and access to justice frameworks. Finally, it discusses the legal status of indigenous peoples in Botswana in an effort to encourage advocacy for equality, non-discrimination and protection of their rights.

1.2 History of Indigenous Peoples in Southern Africa

At the core of indigenous peoples’ struggles in Southern Africa are their rights to lands, territories, and resources. Ancestral lands are the source of indigenous peoples’ cultural, spiritual, social and political identity, and are the foundation of traditional knowledge systems. Today, indigenous peoples continue to suffer serious human rights violations, with consequent grave threats to the lands they traditionally own, for which they seek urgent, increased or sustained legal support. However, indigenous peoples’ access to justice and the capacity of available legal support is nowhere near commensurate with the scale and urgency of the need, in a context of shrinking civic space, increasing violence, competition for land and the rapid expansion of large-scale agribusiness and other threats. Indigenous peoples commonly express deep alienation from systems of justice that appear to them foreign and inaccessible. Judicial structures frequently reflect those of former colonial powers, which have no sensitivity to indigenous culture. Discrimination and racism also impair indigenous access to justice in many countries, with language barriers, low levels of awareness and confidence in their legal rights, and insufficient legal advice also reducing their prospects for accessing justice.¹

In the last 18 months, governments around the world have responded to the COVID-19 pandemic by weakening or removing legal and policy protections for indigenous peoples’ rights. This includes legislative and regulatory change; the exclusion of indigenous peoples from decision-making processes; the expansion of industrial activities; increased land grabbing, illegal mining and illegal logging in or near indigenous territories; and an alarming growth in the criminalisation of, and violence against, indigenous human rights defenders.²

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² There are various organisations in Botswana working on indigenous rights activism. In the Khwai and Mababe concessions in Ngamiland district, the organisation Trust Okavango Cultural and Development Initiatives (TOCaDI) is identified as a leading organisation on human rights work. The organisation has worked on various projects including projects to secure land rights for access to water, for Basarwa; provision of electricity through the use of solar panels in the area; the establishment of an early childhood development center to introduce English and Setswana to children in the area, so that they are not first introduced to the languages at school. In Xade, Kgalagadi desert and the Central Kalahari areas, Khoidom council along with the Kuru family of organisations works towards the advancement of the rights of indigenous peoples in the area. The staff who work in the organisations are community leaders, who work on a voluntary basis as human rights defenders.
1.3 Indigenous Peoples and Colonialism

Colonial rule of the British Empire over Botswana resulted in significant social, military, political, and economic transformation. Upon the country being declared a protectorate, the name Bechuanaland Protectorate was bestowed on it. There was minimal direct oppression, as the country was separated into two parts along the Molopo River. The politics of the two parts of the country bore significant characteristics of South Africa and present-day Zimbabwe.

Indigenous peoples in Botswana, Basarwa, are believed to have lived in Botswana for twenty to thirty thousand years. Basarwa differ physically, linguistically and ethnically from the other population groups in the country. Although they were, and continue to be, found in the Chobe, Kgalagadi, Gantsi, North West, Kweneng, Central, and Kgatleng districts, the San were not considered significant masses in the colonial occupancy.

With the beginning of the protectorate period, the colonial government recognized Dikgosi (chiefs) of five Tswana tribes—Bakwena, Bangwato, Bangwaketse, Bakgatla, and Batawana—as paramount chiefs. This recognition was later extended to Dikgosi of Balete, Batlokwa, and Barolong. The land occupied by these tribes was called ‘Native Reserves,’ and the remaining land under the jurisdiction of the colonial administration was known as ‘crown land.’ The minoritization of the San has resulted in upheld oppressions in present day Botswana. It is difficult to determine the size of the Basarwa population in Botswana today (estimated at 50,000 to 60,000), because the national census process no longer identifies people on the basis of either ethnicity or language.

The eight ‘major tribes’—as recognized through colonial categorization of Batswana—have retained power over the decades since Botswana’s independence to the point that the indigenous peoples continue to fight for their rights in modern day Botswana. The imprints of colonialism on their ways of life, traditions and cultures, and even their geographical occupancy, continue to play out today in cases of visible disadvantage in living standards, and of being dispossessed of land, forcibly assimilated, and denied agency.

1.4 Indigenous Peoples in Independent Botswana

The San, the Balala, the Nama and their sub-groups are the indigenous peoples in Botswana. Mainly, they reside in and around the Central District in the Kalahari Desert, Central Kalahari Game Reserve. They are also in the Ngamiland District, in Xade, Mababe, Phuduhudu and Xade areas.

1.5 Main Challenges Faced by Indigenous Peoples in Botswana Today

Botswana adopted the United Nations Declaration on the Rights of Indigenous Peoples in 2007. Indigenous peoples in Botswana are however not recognized as indigenous, by the government or by the law. Specifically, there are no laws on the rights of indigenous peoples because the concept of indigenous peoples is not included in the Constitution of Botswana.

The indigenous community in Botswana are among the worst affected by poverty and social inequality. In fact, most indigenous peoples live at

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6 Knoetze and Hambira (2018).

7 Sharma at fn 2.


Basarwa have to contest with the Botswana government for common pool resources. In recent years, there has been a great shift from local natural resource management to state-controlled and state-defined natural resource management. This level of control by the states is achieved through the introduction of community-based natural resource management. The state makes promises to reverse the loss of common pools resources for Basarwa. However this practice has not come to pass.16

Most recently, the COVID-19 restrictions have affected Basarwa more disproportionately than other communities, socio-economically. Local organisation, Ditshwanelo: Botswana Centre for Human Rights, in an ongoing project for the protection of Human Rights Defenders, identified Basarwa as being among the communities most adversely affected by COVID-19 restrictions.17 In addition to inaccessibility of COVID-19 information which was often disseminated through government’s social media,18 or the national television channel, many of the programmes through which Basarwa could make money have stopped during the State of Emergency, and specifically during the lockdowns. The organisations which work on indigenous peoples’ rights have been the hardest hit, with funding being withdrawn.19

In the Botswana legal context, there is no definition of what or who a paralegal is. Paralegal work has been defined more by the practice of paralegal work by community members trained by various non-governmental organisations to do paralegal work. Ditshwanelo: Botswana Centre for Human Rights is a civil society organisation in Botswana, non-hunting and anti-poaching policies in Botswana have continued to intensify. No explanation on the wildlife policies, has been given to the Indigenous peoples, despite it affecting their livelihoods. There has been no compensation for damaged crops, livestock, and the loss of human life to animals in the areas where the indigenous peoples live.

Ongoing mining activities in and around the areas where indigenous peoples live also continue to be a challenge. The fracking carried out by the mining companies has resulted in dropping of the water table and has therefore affected the quality of water in the area, reducing water in the streams and rivers. In addition, there have been high levels of toxic chemicals and salts in the water, making the water undrinkable.15

The continued residence of indigenous peoples on their land is a challenge in Botswana today, as will be noted in the Roy Sesana v. The Attorney General of Botswana and the Matsipane v. The Attorney General of Botswana cases discussed below. Specifically, those who live in protected areas remain under threat of being relocated by the government.12

Botswana has struggled with droughts for many years. Leading up to, and following the Sesana and Matsipane cases, food deliveries and cash-for-work Ipelegeng13 programs, authorized by government in response to the drought, have seldom reached the Central Kalahari Game Reserve and the Ngamiland settlements where most Basarwa are populated.14

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12 Indigenous peoples in Botswana, IWIGA.

13 Ipelegeng is an unemployment relief programme by the Botswana government. The programme aims to relieve the plight of the poor with short term public work for unskilled labourers. This Public Works Programme (PWP) however fails to equip beneficiaries with long-term skills, and has locally been criticized as a source of cheap labour.

14 Indigenous rights organisation, Tohadi, indicated that this is a general problem in the area, and specifically, in Mababe, and Khwai.


16 L Magole (n10 above).

17 The other vulnerable groups identified by Ditshwanelo: Botswana Centre for Human Rights, are undocumented migrants, refugees, and people in detention places.

18 Access to social media in Botswana remains restricted to those in urban and peri urban settings. Those who are in the rural parts of the country, although they constitute a majority, do not equally have access to information shared on social media.

19 As a result of this, staff who work for organisations working on indigenous rights have had to either be let go from work, or are now working on a voluntary basis.
which has developed a paralegal training manual which has been used to train marginalized tribes\textsuperscript{20} and domestic workers.\textsuperscript{21} Originally, the Community Paralegal Training Manual was developed for training indigenous peoples in Mokubilo village in Boteti, 200km from Francistown.\textsuperscript{22} The National organisations have trained and engaged paralegals primarily in communities where there are no lawyers.\textsuperscript{23}

\textsuperscript{20} In a project which Ditshwanelo partnered with RETENG Coalition and Minority Rights Group International, 20 paralegals were trained from the Wayeyi, Basubiya, and Bakgalagadi tribes. These tribes are defined as marginalized as they are not part of the 8 major tribes in accordance with the \textit{Bogosi Act} (Act 9 of 2009). The trained paralegals are resident in Gumare, Chobe, Kweneng and Rakops areas. They were trained to conduct paralegal work in the areas, with a specific focus on minority rights.

\textsuperscript{21} The domestic workers trained are from Jwaneng, Palapye, Gaborone, Serowe, Francistown, Lobatse and Mochudi, under an OSISA project on empowerment of domestic workers on their rights and responsibilities (2015-2017).

\textsuperscript{22} Mokubilo village was selected for this project because of the challenges the residents faced when the village was promoted from being a settlement. One of the terms of the promotion was that a chief was appointed for the tribe from Ngwato tribe (a Tswana/Major tribe), to rule over Basarwa. This caused internal conflict among the Mokubilo dwellers who felt they had competent community leaders who should be appointed as chief instead. The appointment of the Ngwato chief created a great rift between the tribe and the leadership. Delinquency was heightened along with vulnerability. This village became known as the village most impacted by HIV and AIDS. In an intervention by Ditshwanelo: Botswana Centre for Human Rights and EU Delegation in Botswana, it was established that there is need for public education and rights awareness, as well as the availability of paralegals who could guide the dwellers of Mokubilo on how to deal with their cases. The Botswana Community Paralegal Training Manual was borne from this and has been used widely in paralegal trainings in various human rights interventions. The intervention resulted in the appointment of a Mosarwa Headman of Arbitration. The manual developed under the programme was used with a “know your law” booklets which summarised criminal and civil law, as well as processes to be followed upon arrest.

\textsuperscript{23} Most lawyers in Botswana are in Gaborone and surrounding areas, Francistown and surrounding areas and Lobatse. Fewer lawyers are in peri-urban areas such as Palapye, Jwaneng, Kanye, Kasane and Maun. The reasons for the concentration as outlined here are commercial – most people in rural Botswana would not be able to afford the services of a lawyer.
2.1 Overview of the Role of Paralegals

Paralegals bridge the gap between the community, lawyers, and the judicial system. They help disseminate legal information. They also follow up and investigate cases which are either registered and pending, or are yet to be registered. They can help in pre-litigation work, which is very important in the building of a case.

Paralegals offer unique skills and professional characteristics that enhance efforts to improve justice for the poor. Similar to how public health workers fill the gap between rural communities and doctors, paralegals provide a dynamic, cost-effective, community-oriented alternative to lawyers. Paralegals do not replace lawyers. But by working in conjunction with them, paralegals can enhance the use of the law and the applicability of legal and policy solutions to individual and community problems. Paralegals may bring together skill sets from diverse professions, such as social workers, mediators, educators, traditional community leaders, interpreters, administrators, and lawyers, with the added value of applying these skills according to the specific needs of the situation and the community.

Most times, the average person finds it difficult to understand technical legal procedure. This leads to more people suffering injustices and failing to fight for their rights. A paralegal attempts to simplify the law and to make it more accessible to the community that needs it.

Most people find it difficult to articulate their problem from a legal perspective. Paralegals know how to strategically use the system for maximum benefit.

The average person expects someone to help them through their problem, instead of just engaging in legalese. A paralegal is therefore the link between individual, community, and lawyer.

2.2 Best Practices for Paralegals in Botswana

The following are the best practices of a paralegal:

a. Providing Services: Paralegals handle pre-litigation work. This includes conducting investigations, embarking on fact finding activities, mediating out of court settlements, as well as drafting and even filing legal pleadings.
Once an order has been made by the Court, paralegals play a critical role in the implementation of the orders made.

b. Legal Education and Awareness: Paralegals raise awareness among the communities they work with through community education programmes. They educate the community members on their rights and keep them motivated to fight for the protection of these rights.

c. Add Social Perspective to Legal Processes: A paralegal ensures they provide social perspectives to standard court room lawyering. A typical lawyer gets caught up in the technicalities of law and does not pay attention to the social impact components of a case. A paralegal therefore plays an important role in sensitizing the lawyer to social issues that surround the case.

d. Research and Data collection: Paralegals conduct research and data collection on socio-legal issues. They constantly study the impact of laws on the lives of people, the interrelationship between the judicial system and people, the areas where laws need to change and pitfalls of implementing a particular law.

e. Negotiation, Counselling, and Conciliation: A paralegal is involved in counselling, employing a rights- or issue-based perspective. They are also involved in out-of-court settlements.

f. Litigation Activities: A paralegal investigates cases, sometimes involving legal research and writing that are then passed on to lawyers. In other cases, paralegals work as a link between a community and lawyers. Paralegals can help with taking statements, interpreting, as well as following up on cases.

g. Community organizing and advocacy: Paralegals help resolve widespread problems, both within a community and between a community and authorities, through negotiation and mediation. They also assist in engaging with the press and publicizing events and problems where necessary.

2.3 Steps to be Followed by Paralegals

a. Case intake - fill in a form which identifies the client, describes the details of the client’s problem, notes the advice given by the paralegal and the action taken. Although this is the first step, the form will be filled throughout the initial consultation.

b. Case-work knowledge - ensure full understanding of the information and can give advice to clients.

c. Present client with options - it is important to present the client with options to resolve their problems, in ways that they can easily understand.

d. Propose an approach in the best interests of the client - consider the facts objectively and try to ensure that the advice given to the client is not just what the paralegal wants, but what is in the best interests of the client, their case and will ensure they are well protected.

e. Assess problems correctly - ensure that the paralegal understands the real issue and not just what is presented to them.

f. Gather sufficient information - ensure that the information collected is enough for the initial pleadings to be filed at Court. The filing of new information after the matter has commenced is often legally not permissible, and where possible, a difficult procedure. So it is important that all the information that could help a case along be introduced from the onset in the Particulars of Claim or the Founding Affidavit.

g. If a case has been filed with Court, it is important to ensure that all the relevant dates are noted. These include the next date for appearance at Court, the next date for filing Court processes and the date for a case management meeting if applicable as guided by the Rules of the relevant Court.

h. Filing case at Court - In the event that a case demands legal action, the paralegal may refer to the Rules of the High Court to ensure that the case is ready for filing.
i. Referral procedure - it is important that a paralegal knows organisations and stakeholders who work on various issues to enable the paralegal to effectively refer matters.

j. Time usage - ensure that time is used effectively

k. Follow up case - case follow up has to be consistent to retain trust, it has to be well planned and proactive.
3. INDIGENOUS PEOPLE AND THE LAW IN BOTSWANA

3.1 Overview of Botswana Legal System

Botswana has a dual legal system. 26 This means that in Botswana, two legal systems operate side-by-side. It is important to know this as different cases can be brought before different courts under the system, for different reasons as will be discussed in greater detail in this chapter.

The legal system of Botswana is made up of the law received during the time when Botswana was a British protectorate. This law is referred to as Roman Dutch Law. 27 As in other former British colonies, the received law exists side-by-side with Customary Law.

Historically, Botswana had both foreign inhabitants living side-by-side with the people of Botswana. Each society was governed by the legal regime it was familiar with. Foreign colonizers were governed by the received law while Batswana were regulated under customary law.

3.1.1 Customary Law

Prior to the establishment of the Bechuanaland Protectorate there existed a variety of national legal systems for people living in tribal areas. These are now collectively called customary law.

The definition of customary law is given under section 2 of the Customary Courts Act, 1969 and section 4 of Common Law and Customary Act (Cap. 16:01). The 1891 proclamation instructed the High Commissioner to respect the native laws. Therefore, the Botswana peoples’ laws received recognition but did not get to be incorporated into the general law of the country. The 1966 Constitution of Botswana did not change this position and it remains so today.

Definition of Customary Law (Section 2 Customary Courts Act, 1969)

“customary law” means, in relation to any particular tribe or tribal community, the customary law of that tribe or tribal community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice

This legal customary law system—which includes certain traditional norms, values, habits, and other principles—meant that the various groups who occupied the territory had developed ways that ensured order in the social, political, economic, and legal affairs of the community.

This form of customary law had been practiced for centuries, and because it was not written, its exact contents are not really known. What remains of it has been handed down by oral

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27 Background of the Judiciary (n23 above).
tradition from one generation to another, while some of it has been lost or transformed by the rapidly changing social, economic, and political conditions.

Male elders of varying levels of authority—family heads, ward heads, and section heads—enforced these customary laws. These elders, all of whom were eventually responsible to the chief, carried out the enforcement of the laws.\(^{28}\)

Courts also existed at all these levels and the head of each unit was charged with the responsibility of maintaining law and order in his unit. These heads were also responsible for the allocation of resources such as land and for the settlement of disputes that might have arisen. Cases that could not be resolved at the lower levels proceeded right up to the chief, who was the final court of appeal. The chief in fact exercised full executive, legislative and judicial powers through the system of delegated authority to the heads of the various units.\(^{29}\)

The Customary Law Act dated 1969 provides for the application of customary law in certain actions before the courts of Botswana. To facilitate the ascertainment of customary law, the Act reduces to writing those customs that are accepted as legal requirements or obligatory rules of conduct. It also includes practices and beliefs vital and intrinsic to customary socioeconomic and cultural systems, in as much as those practices and beliefs are treated as laws themselves.

The arrival of European traders, missionaries, hunters and colonists from the 1800s brought external pressure on this traditional society and its legal system. They brought with them a different way of life and a different set of values and beliefs, which were often at variance with the traditional customs. This has since radically transformed the nature and role of customary laws.

3.1.2 Roman Dutch Law

Roman Dutch law, inherited from the Cape Colony, is the common law of Botswana. Roman Dutch law has its origins in Roman law as influenced by Dutch customary law. It was introduced to the then-Cape Colony in 1652. Over the years it has been influenced by the English Common law after the British took over the Colony.

3.1.3 Legislation

Presently, Botswana enacts laws through Parliament. Legislation refers to laws that are passed by parliament or bodies to which parliament has delegated powers to legislate. Laws passed by parliament are called Acts. Meanwhile, orders, proclamations, by-laws, regulations or rules refer to those laws passed by a subordinate/subsidiary body/authority.

Legislation consists of statutes and subsidiary legislation. Botswana’s statutes are enacted by the National Assembly as given in terms s86 of the Constitution. The validity of legislation depends on compliance with the Constitution. In addition, subordinate legislation is subject to the *ultra vires* doctrine. This means that an Act of Parliament should be in line with the principles set out in the Constitution, and subsidiary legislations must be in line with the principles set out in the Act of Parliament under which they are made. When a bill passes through the National assembly and is assented to by the State President, it becomes an Act of Parliament. It comes into effect when published in the Government Gazette, or at a later stage when a notice/proclamation states that it will come into effect at a particular date.

3.2 Overview of Human Rights in Botswana

Botswana has long been hailed as an exceptional country in protecting human rights following the era of colonialism. The country’s continued economic growth, stability, and peace have led to Botswana being frequently placed on a pedestal when it comes to issues of human rights. Undeniably, Botswana has a better track record in terms of human rights in comparison to other African states. This might be because of the size of the population and the fairly stable political landscape. While the country is able to flaunt this

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record as a measure of abiding with its commitment to democratic governance, its unparalleled peace and stability do not exempt it from having unique problems—especially with regards to indigenous peoples.

Botswana has arguably been able to maintain a stable democracy following colonialism. The country has been led by the Botswana Democratic Party (BDP) since independence in 1966. Nonetheless, the Basarwa in the country remain under threat, and as other marginalized populations in the country, they face a great deal of discrimination.  

The country’s good performance with regards to some governance and human rights indicators therefore does not mean that there isn’t room for improvement. This has been recognized in the development and proposed implementation of the National Development Plan 11 (NDP 11) thus: “Despite the country’s good human rights record over the years, NDP 11 will refocus efforts and commitment towards the protection and promotion of the citizens’ human rights. Consequently, therefore, the country will be implementing strategies for effective protection and promotion of human rights, including a review of all relevant legislation and expanding the mandate of the Ombudsman Office to deal with human rights issues.” (National Development Plan 11, 2017; 67)

3.3 Overview of Law and Administration of Justice in Botswana

The following is an overview of the history, jurisdiction and characteristics of the levels of courts in Botswana:

3.3.1 The Court of Appeal

The Court of Appeal is the highest court in the country and is the last court to hear legal matters. It is headed by the Judge President.

There are currently nine judges who sit in the Court of Appeal: the Judge President, five Batswana judges, and the rest are judges who are invited from time-to-time.

<table>
<thead>
<tr>
<th>TABLE 1</th>
<th>THE COURT OF APPEAL: PROS AND CONS FOR PARALEGALS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PROS</strong></td>
<td><strong>CONS</strong></td>
</tr>
<tr>
<td>a. They have the power to review decisions of trial court</td>
<td>a. It is very technical and therefore not user friendly</td>
</tr>
<tr>
<td>b. Have the power to change the decision/judgment of the trial court</td>
<td>b. Access to it is limited as it is expensive as you need a lawyer</td>
</tr>
<tr>
<td>c. If a person is unhappy with any part of a decision of a lower court, they can have this concern heard by the court of appeal</td>
<td>c. It is the final national court</td>
</tr>
<tr>
<td>d. The court decides whether to affirm or reverse a decision of a lower court based on legal briefs</td>
<td>d. It is limited to a very small percentage of cases</td>
</tr>
<tr>
<td>e. No new evidence can be presented on an appeal</td>
<td>e. No new evidence can be presented on an appeal</td>
</tr>
<tr>
<td>f. They are only located in Gaborone and Francistown and are therefore not easily accessible to most people in the country.</td>
<td></td>
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**Note: The Court of Appeal is a Court which deals with common law, statute law, customary law and case law. It is not user-friendly for non-lawyers, including paralegals and self-actors.**

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3.3.2 The High Court

The High Court is a Court which can hear both civil and criminal cases. All cases heard at the High Court are kept on permanent record. The Chief justice is the most senior judge. The Chief Justice is both the administrative and judicial head of the judiciary. The High Court currently has 27 Batswana judges.

<table>
<thead>
<tr>
<th>TABLE 2</th>
<th>THE HIGH COURT OF BOTSWANA: PROS AND CONS FOR PARALEGALS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PROS</strong></td>
<td><strong>CONS</strong></td>
</tr>
<tr>
<td>a. Has unlimited jurisdiction</td>
<td>a. If the Court makes a decision, the decision may remain as law, influencing other decisions even if it is outdated</td>
</tr>
<tr>
<td>i. Can hear all matters and can give various remedies</td>
<td>b. As they are often overwhelmed, cases take long to finalise.</td>
</tr>
<tr>
<td>ii. New substantive information can be presented to the Court for determination</td>
<td></td>
</tr>
<tr>
<td>iii. Can hear all cases, including appeals from some tribal courts</td>
<td></td>
</tr>
<tr>
<td>b. The court has a greater reach and influence and is located in Francistown, Maun, Lobatse and Gaborone</td>
<td></td>
</tr>
<tr>
<td>c. The pleadings filed in this Court are fairly straightforward and individuals can opt to file for themselves. Paralegals can guide self-actors on Court process by considering the rules of the High Court.</td>
<td></td>
</tr>
<tr>
<td>d. It is a court of first instance – this means cases can be brought straight to the high court without passing through lower courts</td>
<td></td>
</tr>
<tr>
<td>e. It is a court of appeal - this means it can hear appeals from the Magistrate Court and from the Land Tribunal.</td>
<td></td>
</tr>
</tbody>
</table>

Note: The High Court is a Court which deals with common law, statute law, customary law and case law. It is a relatively user-friendly court as it is not as technical as the Court of Appeal. The technicalities and processes for the Court are adequately provided for in the Rules of the High Court, which are publicly accessible.31

3.3.3 Industrial Court

The Industrial Court is created by section 14 of the Trade Disputes Act. It is a court which hears cases and decides them based on statutes and common law. It is also a Court of equity. This means it softens or corrects common law in certain instances. The judgments made at the Industrial Court can be appealed at the Court of Appeal.

<table>
<thead>
<tr>
<th>TABLE 3</th>
<th>THE INDUSTRIAL COURT: PROS AND CONS FOR PARALEGALS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PROS</strong></td>
<td><strong>CONS</strong></td>
</tr>
<tr>
<td>a. It is a court of equity</td>
<td>a. It is located in Gaborone and Francistown, making it inaccessible</td>
</tr>
<tr>
<td>b. It does not limit itself to just labour cases, and can also hear cases for damages</td>
<td></td>
</tr>
</tbody>
</table>

Note: This Court deals with labour cases, and cases specifically arising from employment disputes. It is therefore limited in the cases it can hear. As a Court of equity however, it is the most user-friendly Court for paralegals and is operated in such a way that self-actors and paralegals can use it comfortably.

3.3.4 The Magistrate Court

The Magistrate Court has lower jurisdiction than the High Court. Unlike the High Court, Magistrates Courts are not created by the Constitution. They are therefore controlled and supervised by the High Court, through reviews and appeals.

The Botswana Magistracy performs a very pivotal role in the judiciary of the nation. The Magistrates try the bulk of the offences committed and they handle the bulk of common disputes between ordinary citizens of Botswana.

The following services are available at the Magistrate Courts:

- Family related cases such as paternity and alimony orders;
- Adoption of children;
- Restraining orders in domestic violence cases;
- Civil suits, wherein individuals sue others for non-payment of debts, breach of contracts, etc; and
- Criminal trials (Magistrate Courts hear the bulk of criminal cases).

Today, the Magistrate Courts operate in 25 different centres around the country. These courts handle a large amount of litigation in the country. Magistrates can only hear cases of amounts up to P60,000.00. Cases of amounts beyond that are taken to the High Court.

3.3.5 Customary Court System

The Customary Courts Act of Botswana provides for the way customary courts will carry out justice in the customary legal system. The Act sets up tribal administration, which deals with the appointing and assigning of customary court members who preside over the courts, as well as deciding the cases that can be heard at the customary court level. The act also establishes and recognizes Customary Courts, stating that every chief may apply to the Minister, to request that recommendations be made for the recognition, establishment, abolition, or variation in matters that can be heard by the customary courts in the area. The Courts can listen to civil and criminal cases. The civil and criminal cases that cannot be taken to Customary Courts are listed in section 13. These are:

- cases in which the accused is charged with—
  i. betraying his own country, violent disturbance of the peace by crowd, or any offence involving the security or safety of the State,
  ii. an offence resulting in the death of another person,
  iii. marrying a person while you are already married,
  iv. ...
  v. giving or taking a bribe
  vi. an offence concerning counterfeit currency,

32 Section 11 and 12 of the Customary Court Act.
vii. robbery, where the person accused is of or above the age of 21 years,
viii. intimidating a person into giving up their money by means of threats,
ix. an offence against the law on bankruptcy or company law,
x. rape,
xi. contravention of laws relating to precious stones, gold and other precious metals,
xii. such other offences as may be prescribed;
b. any cause or proceeding whereby divorce or a declaration of nullity of marriage or an order for judicial separation is sought where such marriage has been contracted other than in accordance with customary law;
c. any case or proceeding—
   i. arising in connection with a testator taking a gift to allocate property to someone in exchange,
   ii. arising in connection with the administration of a deceased estate to which any law of Botswana applies,
   iii. involving matters of relationships to which customary law is inapplicable;
d. cases relating to witchcraft without the general or special consent of the Director of Public Prosecutions.”

Further, and in accordance with the Act, Customary Courts also administer customary law, whether it be written or unwritten.

### TABLE 5 | CUSTOMARY COURTS: PROS AND CONS FOR PARALEGALS

<table>
<thead>
<tr>
<th>PROS</th>
<th>CONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. These are the most accessible courts as they are in every ward, village, town and city.</td>
<td>a. It differs from tribe to tribe and is therefore not uniform.</td>
</tr>
<tr>
<td>b. They provide communities with dispute resolution mechanisms.</td>
<td>b. To a great extent, the applicable law is not written.</td>
</tr>
<tr>
<td>c. They focus on the implementation of restorative justice.</td>
<td></td>
</tr>
<tr>
<td>d. They provide a fair process for those with a dispute or criminal charges.</td>
<td></td>
</tr>
</tbody>
</table>

Note: This Court does not allow legal representation. It deals with customary law, some civil law cases and some criminal law cases. The customary court has powers which apply to the people who are tribesmen or who have agreed in writing to the jurisdiction of a customary court.

#### 3.4 Constitutional Protections for Indigenous Peoples in Botswana

The Government of Botswana has not delineated any tribal grouping as an indigenous community. The official policy position is that all Batswana are indigenous to Botswana. As noted by Keikantse Phele in a report on the Wayeyi, “the Constitution still does not recognize all ethnic groups in Botswana equally.” And while the Government of Botswana changed its stance on the recognition of the Wayeyi after the publication of the abovementioned paper, there are still significant gaps in the constitutional protections provided for someone whose first point of identity is that of an indigenous person in Botswana.

In the case of the San, through the ruling in the Sesana and Others v Attorney General case, it has been established that they (in their breadth as a non-homogenous group) are covered in the constitutional protections that apply to all...
Batswana. As such, their rights are principally guaranteed under the Constitution and other governing and enforceable legal frameworks (statutory, policy, and institutional mechanisms) for the promotion, protection, and fulfilment of human rights in Botswana.

While the above is true, there is a need to observe the access that such communities as the San have to mechanisms that would allow them unimpeded ability to mobilize these provisions. Botswana supported the adoption of the Declaration on the Rights of Indigenous Peoples by the United Nations in 2007, as another sign of commitment to upholding and safeguarding the rights of indigenous people in the country. However, little has come from this.

3.5 Other Legal Protections for Indigenous People

Although Indigenous People’s Rights (IPRs) are no different from human rights provided for in the Bill of Rights of the Constitution, a specific focus on the former is essential as they uniquely affect indigenous peoples collectively, are directly linked to the development of indigenous peoples, and are deep-rooted, necessitating a different approach for real solutions.

There are issues specifically linked to being indigenous, which are collective in nature and therefore affect whole communities and peoples instead of individuals. These issues demand solutions that address the collectiveness characteristic. Legislation in Botswana does not envisage or provide for collective solutions. Duty-bearers are often unwilling to engage in IPRs as they perceive the necessary solutions as threats. The government of the country is also reluctant to ensure the respect, protection, and promotion of IPRs as they view it as giving up political power in favour of indigenous peoples. In the 2013 Universal Periodic Report to the UN Human Rights Council, it was indicated that Botswana failed to report fully on the issues raised on the treatment of the indigenous people in the country.

The specific collective rights of indigenous peoples needing attention in Botswana are the right to self-determination, the rights to lands and resources, the right to participation in decision-making as well as the right to development.

The issues demanding attention in addressing indigenous peoples’ rights in Botswana are as follows:

a. Discrimination;

b. Conflicts related to identity and culture (including forced assimilation and self-governance);

c. Opposition to the right of self-determination and self-governance (usually around indigenous lands and lack of identity documents such as national identity and birth certificate);

d. Conflicts over ancestral lands and natural resources (often with extractive industries and tourism ventures);

e. Threats to maintenance of traditional lifestyles;

f. Land and natural resource rights;

g. Traditional authority structures and indigenous governance systems;

h. Ways of decision-taking, consultation and participation;

i. Traditional knowledge;

j. High dependence on the natural environment for survival and maintenance of traditional lifestyle;

k. Preservation and further development of indigenous peoples’ cultures, traditions and cultural expressions; and

l. Marginalization and exclusion from mainstream society (including public services), as well as from policy and decision-making.

Other issues, such as poverty, poor healthcare, lack of access to education facilities, high child and maternal mortality, triple discrimination of indigenous women, uncertainty in food security, environmental pollution, greater vulnerability to natural disasters and climate change and limited development chances and choices are not unique to indigenous peoples, however they disproportionately affect indigenous peoples and need to be visited and addressed in engaging in the violations of IPRs.
4. KEY HUMAN RIGHTS ISSUE OF CONCERN TO INDIGENOUS PEOPLES IN BOTSWANA

Although the Constitution of Botswana outlines the rights due to all citizens, it is silent on indigenous peoples’ rights, as well as the rights of other minorities. The government has repeatedly explicitly stated that it views the idea of indigenous peoples as separatist. However, Basarwa self-identify as indigenous people, and the African Commission on Human and Peoples’ Rights has recognized them as such.

4.1 Access to Land and Natural Resources

In 2005 the African Commission on Human and Peoples Rights made a recommendation that Government should take a participatory approach when developing policies with a bearing on Basarwa people, such as policies on land, natural resources, relocation and poverty alleviation.\(^{37}\)

Various organisations work on access to land rights and other natural resources for indigenous peoples. The Trust for Okavango Cultural and Development Initiatives (TOCaDI) works to empower indigenous peoples in the Okavango district to become self-reliant and to improve their standard of living.\(^{38}\) One of the Initiatives’ focal areas has been in the formation of community trusts which can work towards land security - an issue that communities face after being resettled by government.\(^{39}\) A lot of Basarwa struggle after being displaced.\(^{40}\) TOCaDI teaches them income generation through drilling and equipping boreholes, harvesting thatching grass, tending vegetable gardens and fisheries, and facilitating ecotourism projects such as Teemacane Cultural Hiking Track.\(^{41}\) COVID-19 restrictions by the government of Botswana, including lockdowns and the declaration of state of emergencies have disproportionately affected the livelihoods of indigenous peoples. Those who made a living by the means stated above were no longer able to make a living and some of their private businesses collapsed.\(^{42}\)

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39 TOCaDI (n39).
40 The African Commission Working Group on Indigenous People/Communities of 2005 observed that the relocation exercise was hasty, uncoordinated and failed to meet minimum international standards, especially General Recommendation XXIII of the UN Committee on the Elimination of Racial Discrimination which recommended that “no decisions directly relating to the rights and interests of members of indigenous people be taken without their informed consent.” A recommendation was made that consultations must continue and government must ensure services and take steps to facilitate the acquisition of land by Basarwa.
41 TOCaDI (n39).
42 Mr. Satau, TOCaDI Director in an interview expressed that because Basarwa are not represented in country leadership, matters that concern them are not prioritized in considering impacts of COVID-19 measures on livelihoods in Botswana.
San Youth Network (SYNet) is another organisation which works towards ensuring that all San people, especially the youths, thrive. The Botswana Chapter is based in New Xade, a village in Gantsi district, near the Central Kalahari Game Reserve (CKGR). Most of the issues in this area have to do with land rights of Basarwa. Gantsi is where most cattle farmers in Botswana are located. It is also where many Basarwa live. Government often sells off big portions of land in Gantsi without consulting the people in the area. SYNet works with the Basarwa communities on retrieving their land through the institution of private actions before land tribunals in the area.

One of the main characteristics of the COVID-19 induced State of Emergency (S.O.E.) is that the country leadership can make decisions without consultation. In response to COVID-19, Botswana has been placed on S.O.E.s of up to 6 (six) months each, which have been extended repeatedly. During these state of emergencies, some members of the communities assisted by SYNet report their land being taken from them without consultation.

There are also cases on land rights which have been brought to Court by some Basarwa. The Bill of Rights in the Constitution of Botswana provides for Civil and Political Rights. Cases on socio-economic and cultural rights can only be brought to court if the socio-economic or cultural rights are related to civil and political rights. In Botswana, the right to access land and natural resources have been successfully established by the High Court and the Court of Appeal in the Sesana and Matsipane cases. In the Matsipane case, the Court of Appeal protected the indigenous peoples’ right to water using the Water Act. The Court further noted that a failure to protect this right amounted to inhuman and degrading treatment, which is prohibited in the Constitution.

Although the judiciary, through judicial activism, has to date protected the rights of the indigenous people to their land, there is still a need for constitutional recognition of the San peoples’ right to their land. This will effectively avert future harassment and intimidation for it.

4.2 Access to Health, Education and Participation in Governance

Botswana’s Constitution has no express provision on the right to health, but it does make provisions for ‘protection from conduct injurious to health.’ Furthermore, section 4 guarantees a right to life, providing that no person should be deprived of their life intentionally, except under the law in execution of a sentence passed in a fair trial by a Court of which can make such sentences, in respect of a criminal offence and if the conviction and sentence have been confirmed by Court of Appeal.

There are 27 health districts in Botswana, these include mobile locations, clinics and hospitals. Healthcare services are available at almost no cost for Batswana. In addition to the treatment of common illnesses, the aim is to provide complementary preventive and rehabilitative services. Indigenous peoples are granted access to these services as provided for all in the country.

While there has been a collaborative push to tap into indigenous medicinal knowledge over recent years, there are no mainstream points of access to such services. For that reason, indigenous peoples cannot ask for, or be prescribed, such treatments in hospitals or clinics.

The government provides potable water to all recognized settlements and villages. Through initiatives such as the Rural Area Development Programme (RADP) inhabitants of the 69 identified settlement areas, are provided with

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43 Farms in Gantsi are very expensive. Beef is one of Botswana top 3 exports.
44 Consultations with San Youth Network which uncovered the challenges faced by San people as a result of COVID-19 measures in the country.
47 many of these are populated by indigenous people.
social services. Fundamentally tied to health, water is a fundamental right and the Matsipane Mosetlhanyane v The Attorney General of Botswana (as noted above) is an example of the Court ruling in favour of indigenous Basarwa people getting access to water in the Central Kalahari Game Reserve.

Botswana is a signatory of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which includes several references to education. Through the Children’s Act of 2009, access to free basic education is protected for all children in Botswana. Regardless of various debates, however, there is no provision for this education to be delivered outside of English, the official language, and Setswana, the national language—a consideration outlined in Article 14 of UNDRIP.

The impact of the linguistic discord also resonates at the level of cultural discord, which affects the development of indigenous peoples in Botswana. For education to be holistic, it is necessary for all persons to be included in the way education is structured and how teaching is done. The risk of learner dropouts is higher when the education being received is interpreted as foreign and non-empowering to indigenous peoples.

Historically, indigenous peoples have been underrepresented in the governance structures of Botswana. As noted previously, this can be directly traced to the impact of colonial governance as far back as the late 1800s. When recognizing the ‘eight major tribes’, the segregation of indigenous peoples, like the Basarwa, placed them under the control of these major tribes. Similarly, while tribal leadership is recognized, the representation of indigenous peoples in an advisory structure such as Ntlo ya Dikgosi (House of Chiefs) is secondary to the presence of the eight major tribal leaders.48 With the outlined obstacles to full access to education, it is then understandable how this caused the underrepresentation of indigenous peoples in general governance - be it through tribal election or political engagement.49

Those over the age of 18 with national identity documents may exercise their right to vote. However, due to the marginalisation that indigenous peoples are subjected to, engaging in politics that does not holistically represent one, would be unattractive to many. Beyond encouraging indigenous peoples’ engagement as leaders, significant work is required to undo the perceptions that indigenous people are unfit to engage in mechanisms of national governance. Such perceptions continue to subject indigenous peoples to being viewed as beneficiaries and not contributors in national development.

COVID-19 measures have deepened the challenges of non-participation by indigenous peoples. One of the main characteristics of S.O.Es. is that there is no need for consultation when the president makes decisions. For a people who are already generally not consulted on many issues, the vulnerability created by COVID-19 and the S.O.E is immense. The Village Development Committee in D’Kar indicated that many Basarwa in Gantsi are ‘kept’ in the farms in a manner akin to slavery.50 Their movements are limited to what the master allows, and for the time permitted.51 The further limitation on movement reportedly caused many Basarwa to default on their anti-retroviral (ARV) treatment. There is nobody in leadership for whom this is a matter demanding rethinking the livelihoods of Basarwa in the farms.52

4.3 Access to Information

Section 12 of The Constitution of Botswana, provides for the right to freedom of expression. This includes the freedom to receive ideas and

48 Ntlo ya Dikgosi advises parliament on all issues related to culture and tradition.
49 The African Commission Working Group on Indigenous People/Communities in 2005 made an observation that the lack of representation at all levels of the political structure is probably one of the reasons why the Basarwa grievances have not been adequately articulated within government circles. The recommendation was therefore that government should adopt affirmative action policies to assist the Basarwa develop political representation and provide quota representation for them.
51 Community dialogue by Ditshwanelo (n 51above).
52 Community dialogue by Ditshwanelo (n 51above).
information without interference. However, just as there is no provision granting indigenous children the right to use their language as a medium of instruction in formal education, there is no provision requiring that information be availed outside of English, as the official language, or Setswana, as the national language.

This feeds into the programme of assimilating indigenous people as their languages are placed at risk of extinction. In the event of a national crisis, for example, direct messaging to alert people is only compulsory in English and Setswana, meaning that whilst communication channels may be available to indigenous peoples, these may be of no use when they are needed the most.

The Sesana v The Attorney General case is proof that given sufficient access to information, indigenous peoples are able to summon the power of the law to defend themselves. Restricted accessibility due to language barriers however takes away such power from them.

4.4 Language and Cultural Rights

Although section 3 of the Botswana Constitution provides for the right to equality, and section 15 provides for non-discrimination on the basis of ethnicity, these protections have not been tested, in the context of culture and language. Besides these Constitutional provisions, there are no other real protections of cultural or language rights in Botswana. This is despite many years of linguistics, educators and academics calling on the government to develop a language policy, given that currently Botswana’s language policy is as a matter of practice borrowed from the language-in-education policy, and not a language specific policy or legislative provision.\(^53\)

The most prominent areas of cultural loss in Botswana’s indigenous communities are in language loss as well as the loss of traditional skills.\(^54\) “A noteworthy number of Khoesan languages are reported to have disappeared, including Haba, Ts’ao, Xam, and Xegw.”\(^55\)

Currently, the language in education policy recognizes English as a medium of instruction in education from standard 4 onwards with Setswana as a compulsory language. Setswana is also recognised as the national language and medium of instruction in primary education from standard 1 to 3, but there is no recognition of other ethnic languages.\(^56\) This results in the assimilation of non-Tswana people into Tswana language and culture as the Setswana culture and language are positioned in a dominant position over the languages and cultures of the other communities in the country, including those who self-identify as indigenous. Where Setswana and English are core considerations in the curriculum, other languages are not accorded the same status.\(^57\)

The systemic effort to silence all other languages and cultures affects the San the most, because of the vulnerability of the community. There are more than 15 sub-divisions amongst the San.\(^58\) Each of the sub-divisions has its own language as well as unique culture. The Nama are the largest group, are considered as the last of the Khoikhoi, but their culture and language are slowly disappearing as well.\(^59\)

4.5 Forced Assimilation

Section 15 of the Constitution of Botswana provides for non-discrimination. In this provision, it defines discrimination as different treatment offered to different people, on the basis, amongst other factors, of their tribe. Despite this law, there are practices and policies which continue

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\(^55\) L Nyathi-Ramahobo (n55 above).


\(^57\) L Nyathi-Ramahobo (n 55 above).


\(^59\) Cultural Survival n58 above.
to discriminate against indigenous peoples in Botswana.

Forced assimilation has been a problem in Botswana since independence. The laws enacted in that period and even the amendments thereto continue to permit discrimination against non-Tswana ethnicity, language and culture. The goal at independence was to assimilate all ethnic groups into the Tswana culture and create a monoethnic state, a model found in most British colonies. This was done through the Constitution, and laws such as the Bogosi Act and the Tribal Territories Act. Agitation against these assimilation laws and distribution of wealth has been expressed since 1969.

The consequences of this post-colonial arrangement are still seen in Botswana today. Eight Tswana tribes (a numerical minority in the country,) continue to enjoy the privileges associated with official recognition, whilst many of the other 38 tribes have experienced culture and language loss, disproportionate poverty, and invisibility on the national scene.

Typically, the Tswana elitist government has dealt with the issue of non-Tswana ethnic identity by framing it in negative terms. Those who raise the issue are treated as invoking ‘tribalism’ and even genocide; they have traditionally been viewed as divisive by Botswana’s Presidents. For example, assimilation was endorsed by Former President Festus Mogae who, during his tenure stated that all people who live in the Central District should consider themselves Bangwato. This had the effect of reinforcing Ngwato hegemony over all other ethnic groups and communities including Basarwa, Bakalanga, Babirwa, Batswapong and others who reside in the various subregions of the Central district.

However, although assimilation policies are still in place, there are indications of a slow shift in practice towards recognizing minorities and the value of cultural diversity. To date, Basubiya and their munitenge (chief) have been accorded recognition. So have the Wayeyi and their Shikati the tribal leader, or chief.

To date, however, no indigenous groups have been accorded recognition. In fact, there has been severe rejection of the Basarwa governance models as well as the models of leadership, which, unlike those of the Tswana are not premised on patrilineal lineage.

To this end, in the late 2000s, when the Mokubilo settlement became the Mokubilo Village, a decision was made by government to appoint a Ngwato chief. Bangwato are the dominant leaders amongst the 8 major tribes with 2 of Botswana’s previous presidents, Sir Seretse Khama (1966 -1980) and his son Seretse Khama Ian Khama (2008-2018) having been chiefs of the tribe. There was great resistance over the appointment of the Ngwato chief by the indigenous people in Mokubilo, who indicated that they needed a chief who was more representative of their tribe, and who was from their tribe. Following efforts by community members, a Mosarwa Headman of Arbitration was appointed. Although the Mongwato chief continues to be chief over the area, the residents of the village prefer to report cases to the Headman of Arbitration, who they believe understands their culture and traditional norms.

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61 Examples of marginalized tribes in Botswana are: Wayeyi, Basubiya, Bakgalagadi, Bakwee, Babirwa, Baerero, Banoka, Barotse, Bakalaka, Bahrutse. L Nyathi-Ramahobo (n54 above).
62 L Nyathi-Ramahobo (n54 above).
63 Basubiya are a tribe resident in Chobe District and Boteti in Botswana. They refer to themselves as Veekuhane and their language is called Chiikuhane or Subiya classified under Zone K.40 of Bantu languages. Basubiya are also in Caprivi strip of Namibia and Western Zambia up to Victoria Falls. L Nyathi-Ramahobo (n54 above).
64 Minority Rights Group International, Press Release 1 June 2021 MRG applauds government on recognition of Wayeyi. Basubiya are a tribe resident in Chobe District and Boteti in Botswana. They refer to themselves as Veekuhane and their language is called Chiikuhane or Subiya classified under Zone K.40 of Bantu languages. Basubiya are also in Caprivi strip of Namibia and Western Zambia up to Victoria Falls.
65 These were the reflections shared in the project in which Ditshwanelo partnered with RETENG Coalition and Minority Rights Group International.
66 Project Officer at Ditshwanelo shared this on interview for the development of the present manual.
67 Project Officer at Ditshwanelo shared this on interview for the development of the present manual.
68 Project Officer at Ditshwanelo shared this on interview for the development of the present manual.
69 Project Officer at Ditshwanelo shared this on interview for the development of the present manual.
Mmeya village, 60km North of Mokubilo was also transformed from a settlement to village status. Similarly government considered appointing a chief from a major tribe as chief over the new village. The residents of the newly transformed village resisted this move by government and successfully advocated for the appointment of a Mosarwa chief to lead the village. The response from the community followed in-depth trainings of paralegals as well as community empowerment programmes.

4.6 Gender-Based Violence

The law in Botswana prohibits domestic and other violence, whether against women, men or minors. The Domestic Violence Act details what is protected and prohibited regarding domestic violence. Under the Act, a magistrate’s court of any rank, including a customary court which has been authorized, by statutory instrument, may hear a domestic violence case.

According to the act: “domestic violence” means any controlling or abusive behavior that harms the health or safety of the applicant and includes:

a. physical abuse or threat thereof;
b. sexual abuse or threat thereof;
c. emotional, verbal or psychological abuse;
d. economic abuse;
e. intimidation;
f. harassment;
g. damage to property;
h. where the applicant and the respondent do not stay in the same home, entry into the applicant’s home without his or her consent;
i. unlawful detainment; or
j. stalking.

Organisations that work on Indigenous Peoples’ Rights such as Humana People to People (HPP), D’kar Village Development Trust and Letlole Trust have reported that, “There have been many reports of violence against women and girls amongst the Basarwa, in recent years.” As a problem that has been previously underreported, uncovering the root causes of this scourge is work in progress. The role of alcohol in gendered violence between men and women cannot be underplayed. San women also experience violence (sexual and non-sexual) outside of their communities. In some cases this violence “committed by people of other ethnic backgrounds, however, seemed to be linked to beliefs that San were inferior and San women the weakest members of their communities, and hence most easily abused.”

Due to their remote locations, communities of indigenous peoples struggle for access to services such as the special courts set up by the government of Botswana in late 2020 in response to the alarming incidences of violence across the country. For those employed [as farm labourers, for example], the task-based gendered divide also adds to tensions that play out in the form of violence; however, this is not unique to indigenous communities. Reporting incidents becomes selective based on the accessibility of the primary location of the people, the severity of injury or the ability to follow up on cases.

4.7 Participation in Decision-making (Free, Prior and Informed Consent in Large Scale Land Development)

There are instances where the government has argued that the San are always involved in processes of decision-making, especially on issues that affect them. An example is the Sesana case.

Informed consent is a special component of participatory decision-making. The four components of informed consent are:

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70 Project Officer at Ditshwanelo shared this on interview for the development of the present manual.
71 Project Officer at Ditshwanelo shared this on interview for the development of the present manual.
72 Project Officer at Ditshwanelo shared this on interview for the development of the present manual.
73 Domestic Violence Act (Act No. 10 of 2008 Cap.28:05).
74 These reports came up in interview consultations with Community Based Organisations in D’Kar.
76 Botswana establishes special courts to handle GBV cases.
decision capacity,
documentation of consent,
disclosure, and
transparency.

In the Sesana case, the respondent (The Government), claimed that before extracting the San people from their land, and relocating them elsewhere, outside the CKGR, there had been sufficient consultation, and that the community gave informed consent. The Court found that the applicants in the matter were wrongfully deprived of possession of the land they occupied by the government. Such deprivation was not only wrongful, as found by the court, it was also without consent.

In their arguments, the applicants stated that government could reasonably foresee that termination of services to the community would force the community which depended on the said services to relocate, and further that the intention was in fact to force these relocations.

The Court found that even though government had not brought witnesses to prove that they had consulted extensively, there was no evidence that those who were relocated were forced to move or even that they decided to move as a result of the stoppage of the services. The judge stated that because some residents of the CKGR did not relocate, that others returned to the settlement even though the amenities were limited, and further that residents had been leaving since 2002, that these factors were counted against the applicants. In addition to this, a notice of termination of services had been issued to the residents. On this basis, the Court found that there was no forcible or wrongful deprivation of possession of the land.

In a dissenting judgement, Dow J (as she then was), took a broader history-based approach to finding that government’s approach was neocolonialist and was completely opposite to the role of government to ensure the protection of the rights of all residents of the country.

Dow considered some evidentiary factors to demonstrate both “forcibly” and “without consent”:

1. The Respondent’s (government) policy framework that informed the relocation and service provision;
2. The individual versus the family in seeking consent to relocate;
3. Relative powerlessness of the Applicants;
4. Government pouring out water in the tanks in old settlements;
5. Relevance of hut dismantlement to consent;
6. Acceptance of compensation as an indicator of consent;
7. Termination of issuance of special game licenses (SGLs) to consent; and
8. Applicant’s actions.

Despite the majority ruling on the issue of informed consent in the Sesana case, it can be argued that in reality, the San are usually excluded from decision-making processes which involve them, their land, or their culture.

4.8 Access to Identity Documents and the Right to Nationality

The Births and Deaths Registration Act of 1969, and the National Registration Act of 1986 provide for registration of persons born in Botswana and those eligible to receive national identity documents.

Section 6 of the National Births and Deaths Registration Act provides for the notification of birth of a child. It states that:

1. A prescribed notice of every child born alive or of any still-born child shall be made, within 60 days of such birth or still-birth, to either a District Registrar or a Registration Officer by the—
   a. father or mother of the child or by the occupier of the dwelling in which the child is born, in the case of a birth or still-birth that occurs outside a health institution; or
   b. medical practitioner or midwife in charge in the case of a birth or still-birth that occurs in a health institution.
2. In the case of a child born out of wedlock, no person shall be required to give information under this Act as the child’s father.
Section 6 of the National Registration Act (1986) states that:

1. Subject to such regulations as shall be made by the Minister, every person of or above the age of sixteen years;
   a. who is a citizen of Botswana;
   b. who, not being a citizen of Botswana, has been granted permission under the Immigration Act to reside in Botswana for a period of six months or more; or
   c. who, not being a citizen of Botswana, has been legally resident in Botswana for six months or more at the date of the coming into force of this Act, shall be qualified to register under this Act and shall apply, to the registrar of the area in which he ordinarily resides, for registration within one month of his acquiring the relevant qualification as set out in this section.

2. Every applicant shall submit to having his finger print and his photograph taken by the registrar or a person acting under his authority.

While it is hoped that all births in Botswana take place in well-equipped facilities fit for receiving a newborn, under the supervision of a qualified practitioner, it is common for children to be born on remote cattle posts. As mandated by the Births and Deaths Registration Act, the birth must be recorded within 60 days. This period of time takes into consideration the occurrences as remote births.

While indigenous people bear the right to receive identification cards, there are instances of abuse of power where some are either not given the chance to apply for the card when eligible, or having the card taken ‘for safekeeping’ by elders or employers. Such abuses of power result in the further economic and political marginalization of indigenous peoples. In order for one to vote, they need to have registered as a voter, and they need a national identity card to register as such. The national identity card also serves as an entryway to other services such as accessing healthcare, applying for land, applying for a driver’s license, applying for jobs and to be admitted into schools in Botswana.

Being traditionally nomadic peoples, there is no data available on how many indigenous people are undocumented in Botswana. However, it is of national concern that those who have been kept out of the system be on-boarded and their active status be facilitated when the time to renew documentation arrives.

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78 A cattle post is a settlement outside the main settlement where cattle and other livestock are reared.
79 These reports although undocumented are shared by community-based organisations in D’Kar.
5. INTERNATIONAL AND REGIONAL FRAMEWORKS AND JUSTICE MECHANISMS

5.1 Primary Legal Instruments Enshrining the Rights of Indigenous Peoples in the Context of Southern Africa

The work of protecting indigenous peoples relies a great deal on legal instruments. Within a nation, these legal instruments take the form of statutes or regulations passed by a legislature. But there are also international legal instruments. These take the form of written agreements between two or more nations. These written agreements—often called conventions, treaties, or declarations—are an important source of legal rights and obligations that can be used to serve the interests of indigenous peoples.

We begin with a number of legal instruments that are global in scope. Afterwards, we list two regional instruments specific to Africa.

5.1.1 International Instruments

*Universal Declaration of Human Rights (UDHR), 1948*

- The UDHR was drafted by representatives with different legal and cultural backgrounds from all regions of the world.
- The UDHR is generally agreed to be the foundation of international human rights law.
- Although not legally binding, the UDHR has inspired other declarations, regional human rights conventions, domestic human rights bills, and constitutional provisions, which together promote and protect human rights all over the world.
- The UDHR declares that human rights are universal: every single person—regardless of nationality, gender, race, religion or any other status—is entitled to these rights and freedoms.
International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), 1965

- The ICERD was written with the goal of eliminating racial discrimination in all its forms and of promoting understanding between the races.
- The ICERD is legally binding and is ratified by Botswana.
- The ICERD established the Committee on the Elimination of Racial Discrimination (CERD), which monitors state implementation of ICERD. Many times, the CERD has applied the provisions of ICERD to the human rights of indigenous peoples.
- ICERD includes a provision that allows for individual complaints to be brought when rights have been violated. Botswana has not agreed to this complaints mechanism.

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<tr>
<th>Key Provisions</th>
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<tr>
<td>Article 7</td>
<td>Provisions against discrimination can be used to guarantee equal treatment of indigenous peoples.</td>
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<td>All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.</td>
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<td>Article 17</td>
<td>Property rights are central to indigenous peoples securing collective ownership, control, use, management and development of their own land and resources.</td>
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<td>(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.</td>
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<td>Article 18</td>
<td>The right to practice religion and other aspects of culture constitute a key protection against assimilation. Additionally, indigenous peoples’ right to culture can be used to secure indigenous ownership, control, use, management and development of their land and resources, where such land and resources are used for cultural practices, including traditional livelihoods.</td>
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<tr>
<td>Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.</td>
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<tr>
<td>Article 27</td>
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The ICESCR seeks to promote and protect three kinds of human rights:
- the right to work in just and favourable conditions;
- the right to social protection, to an adequate standard of living and to the highest attainable standards of physical and mental well-being; and
- the right to education and the enjoyment of benefits of cultural freedom and scientific progress.

The ICESCR is legally binding but has not been ratified by Botswana.

The ICESCR established the Committee on Economic, Social and Cultural Rights (CESCR), a body of 18 independent experts that monitors compliance with the ICESCR. The CESCR has applied the provisions of the ICESCR to issues touching indigenous peoples—e.g., the right to housing; the right to food; the right to education; the right to health; the right to water; and intellectual property rights.

The ICESCR also includes an Optional Protocol, which allows the CESCR to hear individual complaints when rights have been violated. As of yet, Botswana has not ratified this.

The ICCPR, jointly with the UDHR and the ICESCR, is referred to as the International Bill of Human Rights.

The ICCPR protects such civil and political rights as the right to self-determination, the right to physical integrity; the right to liberty and security of person; the right to procedural fairness, etc.

The ICCPR is legally binding and has been ratified by Botswana.

The ICCPR charges the Human Rights Committee with monitoring the fulfillment of state obligations under ICCPR. The Committee has applied ICCPR protections to indigenous populations. For example, the Committee has decided that Art. 27 covers indigenous peoples even if they may not necessarily be a true ‘minority.’

The ICCPR also boasts the best established complaints mechanism within the UN human rights system. It contains a provision that allows individuals to bring complaints to the Human Rights Committee.

**Key Provisions**

| Article 1 | (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. |
| Article 14 | All persons shall be equal before the courts and tribunals... |
| Article 27 | In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. |

**Notes on Relevance to IPR**

- The right to self-determination is foundational for indigenous peoples, and includes the right to govern their own affairs through their own institutions, systems and laws; the right to effective participation in decision-making (including the right to give or withhold free, prior and informed consent), and the right to pursue their own development priorities.

- Protections against discrimination can be used to guarantee equal treatment of indigenous peoples.

- The Human Rights Committee has decided that indigenous peoples are covered by this article. Indigenous peoples’ right to practice their own culture constitutes a key protection against assimilation.

- Additionally, the right can be used to secure indigenous ownership, control, use, management and development of their land and resources, where such land and resources are used for cultural practices, including traditional livelihoods.
The CEDAW was drafted to combat extensive discrimination against women. The CEDAW defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. The CEDAW guarantees women equal access to health, education, employment and equal opportunities in political and public life. The CEDAW is important among international treaties in affirming the reproductive rights of women. The CEDAW also recognizes the role of culture and tradition in shaping gender roles and family relations. The CEDAW is legally binding and has been ratified by Botswana. The CEDAW led to the establishment of the Committee on the Elimination of Discrimination against Women which “has paid a special attention to the situation of indigenous women as particularly vulnerable and disadvantaged groups.” The CEDAW established the Committee on the Elimination of Discrimination Against Women (Committee), a body of independent experts that monitors compliance with CEDAW. The Committee has paid special attention to indigenous women as particularly vulnerable and disadvantaged groups. The CEDAW also includes an Optional Protocol, which allows the Committee to hear individual complaints when rights have been violated. Botswana is a party to this optional protocol.

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<th>Key Provisions</th>
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<tr>
<td>Article 1</td>
<td>Generally, the rights and protections enshrined in the below listed articles can be used to shield indigenous women from gender-based inequality.</td>
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<td>For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.</td>
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<td>Article 3</td>
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<td>States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.</td>
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<tr>
<td>Article 5</td>
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<td>States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;</td>
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<tr>
<td>Article 14</td>
<td>Many indigenous women dwell rurally and therefore are covered by this article</td>
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<td>(2) States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development.</td>
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<td>Article 15</td>
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<td>States Parties shall accord to women equality with men before the law.</td>
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**Convention on the Rights of the Child (UNCRC), 1989**

- The UNCRC promotes and protects children’s rights, protecting civil, political, economic, social and cultural rights that all children are entitled to.
- The UNCRC is the most recent of the major, legally binding human rights instruments and is the most widely ratified human rights treaty in history. It has been ratified by Botswana.
- The UNCRC established the Committee on the Rights of the Child (CRC), which monitors implementation of the treaty. The CRC has given particular attention to the situation of indigenous children.

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<td><strong>Article 3</strong></td>
<td>Generally, the rights and protections enshrined in the listed articles can be used to defend the interests of indigenous children. It is an important instrument for indigenous children because indigenous children remain among the most marginalized groups within many societies.</td>
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<td>(1) “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”</td>
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<td><strong>Article 6</strong></td>
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<tr>
<td>(1) States Parties recognize that every child has the inherent right to life.</td>
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<td>(2) States Parties shall ensure to the maximum extent possible the survival and development of the child.</td>
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<td><strong>Article 24</strong></td>
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<tr>
<td>(1) States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.</td>
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<td><strong>Article 30</strong></td>
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<td>In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.</td>
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<td><strong>Article 40</strong></td>
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<td>(2)(b) Every child alleged as or accused of having infringed the penal law has... [the guarantee] (vi) [t]o have the free assistance of an interpreter if the child cannot understand or speak the language used.</td>
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**Indigenous and Tribal Peoples Convention, No. 169 (ILO 169), 1989**

- The ILO 169 is the most advanced international treaty advancing the rights of indigenous peoples.
- The ILO 169 includes a number of provisions covering administration of justice and indigenous customary law; the rights to consultation and to participation; the rights over lands, territories and natural resources; labor and social rights; bilingual education, and trans-border cooperation.
- The ILO 169 is an important backdrop to UNDRIP and paved the way for its adoption.
- The ILO 169 however has not been widely ratified. Botswana is among the states which have not ratified the treaty.
Convention on Biological Diversity (CBD), 1992

- The CBD promotes cooperation towards conserving biological diversity and sustainable use of its components.
- The CBD is legally binding and has been ratified by Botswana
- The CBD has an accompanying set of guidelines for the conduct of cultural, environmental and social impact assessments for lands and waters traditionally occupied or used by indigenous and local communities.

**Key Provisions**

**Article 8**
Each Contracting Party shall, as far as possible and as appropriate...

(j) subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

**Article 10**
(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007

- The UNDRIP is the most comprehensive international instrument on the rights of indigenous people. It is therefore the primary source of international law on Indigenous Peoples.
- Although UNDRIP is not a binding treaty, its provisions are considered highly persuasive and reflect standards set by other international laws.
- The UNDRIP is cited extensively in African Court and African Commission cases as providing guidance on how to interpret the African Charter in the context of the rights of indigenous peoples.

**Key Provisions**

**Article 3**
Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

**Article 5**
Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

**Article 8**
(1) Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

**Article 31**
“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”

**Article 32**
(2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
5.1.2 Regional Instruments


- The African Charter enshrines a range of binding rights, duties, and freedoms applicable to all member states of the African Union.
- The African Charter was drafted to reflect African philosophy, perspective, and conceptions of human rights.
- The African Charter is legally binding and has been ratified by Botswana. All African Union member states, having ratified the Charter, must respect and fulfill in good faith all the human rights and obligations contained in it.
- The African Charter also established the African Court on Human and Peoples’ Rights, through a protocol that came into force on 25 January 2004. The African Court is complementary to the African Commission in securing implementation of and compliance with the African Charter.

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<tr>
<th>Key Provisions</th>
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<tr>
<td>Article 3</td>
<td>Entitlements to equality before the law can be used to protect indigenous peoples against discrimination.</td>
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<td>(1) Every individual shall be equal before the law</td>
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<td>(2) Every individual shall be entitled to equal protection of the law</td>
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<tr>
<td>Article 8</td>
<td>The right to practice religion and other aspects of culture constitute a key protection against assimilation. Additionally, indigenous peoples’ traditional religious practices can be used to secure indigenous ownership, control, use, management and development of their land and resources, where such land and resources are used for religious practices.</td>
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<td>Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.</td>
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<tr>
<td>Article 14</td>
<td>Property rights are central to indigenous peoples securing collective ownership, control, use, management and development of their own land and resources.</td>
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<td>The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.</td>
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<tr>
<td>Article 17</td>
<td>Indigenous peoples’ right to practice their own culture constitutes a key protection against assimilation. Additionally, the right can be used to secure indigenous ownership, control, use, management and development of their land and resources, where such land and resources are used for cultural practices, including traditional livelihoods.</td>
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<td>(2) Every individual may freely take part in the cultural life of his community.</td>
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<td>(3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.</td>
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<td>Article 19</td>
<td>The right to self-determination is foundational for indigenous peoples, and includes the right to govern their own affairs through their own institutions, systems and laws; the right to effective participation in decision-making (including the right to give or withhold free, prior and informed consent), and the right to pursue their own development priorities.</td>
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<td>All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.</td>
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<td>Article 20</td>
<td>Protections against discrimination can be used to guarantee equal treatment of indigenous peoples.</td>
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<td>(1) All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.</td>
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<td>Key Provisions (continued)</td>
<td>Notes on Relevance to IPR</td>
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<td><strong>Article 21</strong></td>
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| (1) All peoples shall **freely dispose of their wealth and natural resources**. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.  
(2) In case of spoliation, the dispossessed people shall have the **right to the lawful recovery of its property as well as to an adequate compensation**.  
(3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. | This is connected to the right to self-determination and FPIC. |
| **Article 22**            |                          |
| (1) All peoples shall have the **right to their economic, social and cultural development** with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. |                          |
| **Article 24**            |                          |
| All peoples shall have the **right to a general satisfactory environment** favourable to their development. |                          |
| **Article 60**            |                          |
| The Commission shall draw inspiration from **international law** on human and peoples’ rights... | Articles 60 and 61 have been used as license for the ACHPR to consult IPR-friendly conventions like UNDRIP as part of its jurisprudence, regardless of UNDRIP not being legally binding. |
| **Article 61**            |                          |
| The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples’ Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine. |                          |
The Charter is designed to mirror the CRC while adding special provisions that reflect the particular situation faced by children in Africa. The Charter is a binding instrument and has been ratified by Botswana. The Charter establishes the African Committee of Experts on the Rights and Welfare of the Child, which is intended to promote and protect the rights established by the Charter, to practice applying these rights, and to interpret the Charter as needed.

### Key Provisions

<table>
<thead>
<tr>
<th>Article</th>
<th>Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 3</td>
<td>Every child should be allowed to enjoy the rights and freedoms in this Charter, regardless of his or her race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.</td>
</tr>
<tr>
<td>Article 4</td>
<td>(1) In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration. (2) In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.</td>
</tr>
<tr>
<td>Article 5</td>
<td>Every child has a right to live.</td>
</tr>
<tr>
<td>Article 7</td>
<td>Every child who is capable of communicating their own views should be allowed to express their opinions freely.</td>
</tr>
<tr>
<td>Article 8</td>
<td>Every child has the right to free association and freedom of peaceful assembly, in conformity with the law.</td>
</tr>
<tr>
<td>Article 9</td>
<td>Every child has the right to freedom of thought, conscience and religion.</td>
</tr>
<tr>
<td>Article 12</td>
<td>Children have a right to play and to participate fully in cultural and artistic life.</td>
</tr>
<tr>
<td>Article 18</td>
<td>Families are the natural unit and basis for society, and should enjoy special protection.</td>
</tr>
<tr>
<td>Article 21</td>
<td>Governments should do what they can to stop harmful social and cultural practices, such as child marriage, that affect the welfare and dignity of children.</td>
</tr>
</tbody>
</table>

### Notes on Relevance to IPR

Generally, the rights and protections enshrined in the listed articles can be used to defend the interests and rights of indigenous children.
5.1.3 Applicability to National Contexts

Binding and Non-Binding Instruments

International legal agreements come in two varieties—binding and non-binding. All states party to a binding treaty are obligated to follow its provisions. When a state becomes party to a binding treaty, a state is agreeing to be bound by that treaty and to respect the rights and comply with the obligations the treaty creates.

These binding treaties often identify a body that is charged with hearing complaints of state violations—this is called a “complaint mechanism.” It is often the case that states have to separately agree to be bound by a given treaty’s complaint mechanism. It is also often the case, as with several of the binding treaties above, that the number of states that have ratified a complaint mechanism is much smaller than the number of states that have ratified the main treaty.

Signing on to a non-binding treaty meanwhile simply signals that you as a state agree broadly with the principles within the treaty. Non-binding treaties technically do not create legally enforceable rights or duties. State policies can contradict declarations (i.e. a non-binding treaty) the state has signed on to. Although it may cause bad press and even condemnation by other states, such state policies are not made illegal by the non-binding treaty.

This does not however mean non-binding treaties are entirely without the force of law. It is not uncommon for courts to turn to non-binding treaties when they are trying to make sense of other treaties, statutes, or regulations that themselves have the force of law. A prominent example is in the Ogiek Ruling (discussed below). In that case, the African Court relied on UNDRIP (a non-binding treaty) in deciding how to apply the African Charter (a binding treaty) in the context of indigenous populations. In that particular case, a non-binding treaty was used by a court in a way that made its provisions have power similar to those of a binding treaty.

How does International Law Apply Domestically?

When it comes to how a country applies international legal instruments domestically, a state takes either a monist or a dualist approach.

Monist legal systems treat international law and domestic law as joined. International law is viewed as automatically being a part of the internal legal system. Therefore, a properly ratified international legal instrument will become a source of law integrated into domestic law in a monist state. No further action is required.

Dualist legal systems meanwhile treat international law and domestic law as essentially separate. Properly ratified international legal instruments govern a dualist state’s relationship with other nations, but it does not become a source of law in itself within the state’s internal legal system. To give international agreements the force of law domestically, dualist states require that domestic legislation is first passed. The legal system applicable in Botswana is the dual legal system. Therefore, for regional and international treaties, conventions and covenants to be accepted as law, they must first be passed as law.

5.2 What Important Case Law Governs Jurisprudence on Indigenous Peoples’ Rights in the Context of Southern Africa?

5.2.1 Cases in Botswana and Neighboring States

Central Kalahari Game Reserve Case, High Court of Botswana in Lobatse, 13 Dec. 2006
Sesana and Others v. The Attorney General, Misca. No. 52/2002

This case established an important right conferred to traditional occupants and users of lands. Because of the precedent established by this case, even when an indigenous group is unable to prove rightful title, they may still be able to establish certain occupation rights, which can confer certain important protections of their interests over land.
**Background:** The San were the traditional inhabitants of a portion of the Central Kalahari that became part of the Central Kalahari Game Reserve. In the 1990s, after the discovery of diamonds in the Reserve, the Government of Botswana resettled the San. The First People of the Kalahari (FPK), a group representing the San, attempted to participate in the formulation of the management plans for the Reserve. The Government instead produced a management plan without Bushmen consultation, prohibiting hunting, cultivation, and livestock use of the land.

**Key Legal Holdings:**

- The court found that although the government owns the land, residents enjoyed lawful occupation rights, which meant that the San were entitled to being consulted over the use of the land they inhabited.

*Richtersveld Case, The Constitutional Court of South Africa, 14 Oct. 2003*

Alexkor Ltd and Another v. Richtersveld Community and Others, 2004 (5) SA 460 (CC)

This case recognizes that Indigenous law is part of South African law. It establishes a strong and important precedent in finding that insofar as it is consonant with the Constitution and enacted legislation, Indigenous law is the law of the land.

**Background:** The Nama had traditionally inhabited an area of the Northern Cape Province called the Richtersveld. They had continued to occupy the land and exercise rights over it even through colonial annexation of the land by the British Crown. The Nama, sometime after diamonds were found in their land, had been removed from and denied access to the Richtersveld. Organizing into a group called the Richtersveld Community, they sued for restitution of their land in the courts.

**Key Legal Holdings:**

- The Court held that the Richtersveld community held rights to the land and its resources under indigenous law.
- The Court finds that in South Africa, unlike in other common law jurisdictions, the sovereign is not assumed to automatically acquire radical title to land. Therefore, indigenous title or right to land remained intact through and after colonial annexation.
- Under the Restitution of Land Rights Act of 1994, the Community was entitled to compensation for their land from the current occupiers (the Alexkor Company) and the South African government.

### 5.2.2 Important Cases from the Entire African Region

**Ogoni Case, African Commission on Human and People’s Rights, 27 May 2002**

*Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria*

This case was the first ever to come before the ACHPR that concerned Indigenous Populations. This case recognized that the extraction of commodified natural resources (in this case oil) can result in negative effects to life, housing, health, food, water, etc. amounting to a human rights violation under the African Charter. This lay the groundwork for subsequent, innovative argumentation in defense of the rights of indigenous peoples.

**Background:** The Ogoni, traditional inhabitants of an oil-rich portion of the Niger Delta, brought a complaint to the ACHPR alleging that the Nigerian Government

- had, in allowing oil drilling in Ogoniland without consulting the Ogoni, caused “environmental degradation and health problems resulting from the contamination of the environment” (1).
- had facilitated these rights violations by “placing the legal and military powers of the State at the disposal of the oil companies” (3).
- had “attacked, burned and destroyed several Ogoni villages and homes” (7) and “responded to protests with massive violence and executions of Ogoni leaders” (5).
- had failed to monitor the operations of the oil companies adequately and had failed to require standard safety measures.
Key Legal Holdings:

- Art. 16, African Charter: The Commission found that the Government “directly threaten[ed] the health and the environment of their citizens,” violating the Ogoni’s right to health (52).
- Art. 21, African Charter: The Commission ruled that the State’s failure to monitor oil activities and involve local communities in decisions violated the right of the Ogoni people to freely use their wealth and natural resources.
- Art. 24, African Charter: The Commission ruled that the Ogoni had suffered violations of their right to a general satisfactory environment favourable to development due to the government’s failure to prevent pollution and ecological degradation.
- Arts. 14, 16 and 18(1). African Charter: The Commission held that the implied right to housing (including protection from forced eviction), derived from the express rights to property, health and family protected by the above rights, was violated by the destruction of housing and harassment of residents who returned to rebuild their homes.
- Arts. 4, 16 and 22. African Charter: Finally, destruction and contamination of crops by government and non-state actors violated the duty to respect and protect the implied right to food, derived from the rights to life, health and economic and social development.

Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Communication No. 276/03

The African Commission’s ruling is unique in its recognition of indigenous peoples’ collective rights over ancestral land in Africa, and represented a major development in the protection and promotion of indigenous peoples’ rights, both in Africa and worldwide. The ruling sends a clear message that good government is that which takes account of the interests of minority groups, which have until now been routinely marginalized.

Background: In the 1970s, the Kenyan government evicted hundreds of Endorois families from their land around the Lake Bogoria area in the Rift Valley to create a game reserve for tourism, interrupting over 300 years of undisturbed possession of the land by the Endorois. Kenyan authorities promised compensation, informing Endorois elders that 400 families would receive plots of fertile land, and that the community would receive a specified portion of the revenue and employment coming out of the game reserve. The Government also promised to construct cattle dips and fresh water dams. None of these promises were fulfilled. In response, the Endorois lodged a complaint in the African Commission alleging that the eviction and ensuing failure to compensate violated the African Charter.

Key Legal Holdings:

- Art. 8, African Charter: The Commission found that the removal of the Endorois from their ancestral lands removed them from “sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the community to maintain religious practices central to their culture and religion” (173).
- Art. 14, African Charter: The Commission found that the land management approach employed by the Government effectively caused forced evictions, violating the Endorois’ property rights. For these violations, the Commission recommended that the government recognize rights of ownership, restitute to the Endorois their ancestral lands, compensate their losses, and ensure the Endorois benefit from the royalties and employment opportunities within the game reserve.
- Art. 17, African Charter: “By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, [the Government has] created a major threat to the Endorois pastoralist way of life.” The Commission found that this violated the Endorois’ right to culture (251).
- Art. 21, African Charter: The Commission found that the Endorois had “the right to freely dispose of their wealth and natural
resources in consultation with the... state.” The Commission also found that the Endorois were entitled to restitution and compensation in the event that their land was harmed (268). The Government in failing to consult or compensate the Endorois had violated these rights.

- Art. 22, African Charter: The Commission found that “any development or investment projects that would have a major impact within the Endorois territory” required the State to “obtain their free, prior, and informed consent, according to their customs and traditions.” (298) The failure to secure FPIC and to provide adequate compensation and benefits violated the community’s right to development (298).

**Ogiek Case, African Court on Human and Peoples’ Rights, 26 May 2017**


This is the first time the African Court, in operation since 2006, had ruled on an indigenous peoples’ rights case and is by far the largest ever case brought before the Court. This case marks a strong embrace of the UNDRIP as a guide for interpreting the African Charter in light of rights and issues concerning indigenous peoples.

Furthermore, this case is a strong repudiation of the use of conservation as an excuse for the taking of indigenous land and territories. In recognizing the Ogiek’s communal property rights over their ancestral land, the judgment arguably protects not only indigenous populations but all rural dwellers who own land on the basis of customary law.

**Background:** The Ogiek are a community of some 30,000 living in the Mau Forest within Kenya’s Rift Valley. Traditionally hunter-gatherers, they are among the last remaining forest dwellers of Africa. Through the years, the Ogiek have been routine victims of arbitrary forced evictions from their lands, without consultation or compensation. Over the last 50 years, the Ogiek have consistently raised objections to these evictions before government officials and the courts. None of these attempts have yielded a solution. In October 2009, the Kenyan Government, through the Kenya Forestry Service, gave the Ogiek and other settlers of the Mau Forest 30 days to leave the forest. The Ogiek responded by lodging a complaint against the Kenyan Government before the African Commission. The Commission referred the matter to the African Court, which in turn took up the case.

**Key Legal Holdings:**

- Art. 2 of the African Charter: The Court found that the Government discriminated against the Ogiek when they refused to recognise their status as a distinct tribe, therefore denying them the rights available to other tribes.
- Art. 8 of the African Charter: The Court found that “the evictions of the Ogieks from the Mau Forest rendered it impossible for the community to continue its religious practices” (169). This constituted a violation of the Ogiek’s freedom of religion.
- Art. 14 of the African Charter: The Court found that “by expelling the Ogieks from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent violated their rights to land” (131). The Court affirmed that the free, prior and informed consent of indigenous inhabitants of the land is required.
- Art. 17 of the African Charter: The Court found that the Government, by evicting the Ogiek from the Mau Forest, had kept the Ogiek from practicing important aspects of their culture. The Court rejected the idea that the Government had the right to do this in the name of conservation. The Court stated both that there was no proof that the Ogiek contributed to the destruction of the Mau forest, nor that this was a reason that could be used to violate the rights of the group.
- Art. 21 of the African Charter: The Court found that the Ogiek had been deprived of the right to enjoy and freely dispose of the food produced by their lands.
- Art. 22 of the African Charter & Art. 23 of the UNDRIP: The Court found that repeated evictions without consultation had effectively violated the Ogiek’s right
5.3 International and Regional Bodies Useful that can Protect Indigenous Peoples’ Rights

International and regional human rights bodies are institutions that have been given the power to consider complaints of violations of treaty rights and obligations. These can range from traditional courts where judges preside over cases to an institution headed by one or more experts in the relevant field. These bodies are important in the work of defending the rights of indigenous peoples. These bodies often have the power to say definitively whether a right has been violated. They also at times have the power to demand remedies (monetary compensation, restitution of land, etc.). Aggrieved parties with complaints can often contact these bodies (as mentioned below) for advice or to lodge a complaint. These bodies can then, in turn, raise the specific concern(s) with the complainant’s government in order to seek action on the complaint or seek an answer on how they intend to resolve the complaint.

5.3.1 International Fora

United Nations Permanent Forum on Indigenous Issues (UNPFII), 2000 to present

The UNPFII advises the Economic and Social Council (ECOSOC), among the main organs of the UN charged with development. The UNPFII advises this body on all matters to do with indigenous issues relevant to economic and social development, culture, the environment, education, health and human rights.

Key Tasks and relevance to protecting IPRs:

- Providing expert advice and recommendations on indigenous issues to ECOSOC
- Coordinating activities related to indigenous issues within the UN system
- Promoting respect for and full application of the provisions of the UN Declaration on the Rights of Indigenous Peoples.

Special Rapporteur on the Rights of Indigenous Peoples (Special Rapporteur), 2001 to present

The Special Rapporteur is appointed to examine concrete ways of achieving full and effective protection of the rights of indigenous peoples.

Key Tasks and relevance to protecting IPRs:

- Assisting and encouraging constitutional and legislative reform initiatives to harmonize laws with the protection of the rights of indigenous peoples
- Encourages steps to improve relations between indigenous peoples, States, and other stakeholders
- Promoting behavior by business enterprises that is respectful of indigenous rights
- Investigating alleged violations of the rights of indigenous peoples
- Formulating recommendations and proposals on how to prevent and remedy violations of indigenous peoples’ rights;
- Promoting the United Nations Declaration on the Rights of Indigenous Peoples and other international instruments relevant to the advancement of the rights of indigenous peoples.

Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism) 2007 to present

The Expert Mechanism advises the Human Rights Council, a UN body responsible for promoting and protecting human rights. The Expert Mechanism is meant to assist member states in achieving the goals of the UNDRIP.

Key Tasks and relevance to protecting IPRs:

- Assisting member states in developing laws and policies relating to the rights of indigenous peoples;
- Facilitating dialogue between member states, indigenous peoples, and/or private sector in order to achieve the ends of the Declaration;
- Clarifying key principles in the protection
of the rights of indigenous peoples, such as self-determination and free, prior and informed consent

5.3.2 Regional Fora

African Commission on Human & Peoples’ Rights (ACHPR), 1987 to present

The ACHPR is a body that was established to ensure the implementation of the African Charter. As part of its mandate, the ACHPR established the Working Group on Indigenous Populations/Communities. This Working Group is an authoritative source for how to interpret the African Charter in the context of indigenous peoples and issues relevant to them.

Key Tasks:

- Protecting human and people’s rights, including through settling disputes (hearing cases or complaints) and state reporting.
- Promoting human and people’s rights, including through public mobilization and disseminating information.
- Interpreting the African Charter, including through advisory opinions.
- Performing any other task entrusted to it by the Assembly of Heads of State and Government.

Relevance to protecting IPRs: Given the above tasks, the ACHPR can hear cases involving violations of the rights of indigenous peoples as defined by the African Charter. However, such cases must first have been heard by the national courts of the country in question, which is called “exhausting domestic remedies”.

Southern Africa Development Community Tribunal (SADC Tribunal), 2005 to 2012

The SADC Tribunal was charged with ensuring the proper adherence to the objectives of the Southern Africa Development Community (SADC). Although de facto suspended since 2012, the SADC in 2014 negotiated a new Protocol on the Tribunal. However the mandate of the new Tribunal is limited to interpretation of the SADC Treaty and Protocols relating to disputes between SADC states, whereas it previously accepted complaints by individuals. It is therefore unlikely to be a resource for justice for indigenous peoples in the near future, with the possible exception of indirect issues related to migration, cross-border natural resources and water usage.

African Committee of Experts on Rights and Welfare of the Child (ACERWC), 2001 to present

The ACERWC is a body of experts established to monitor implementation of the African Charter on the Rights and Welfare of the Child.

Key Tasks:

- Assessing African problems in the fields of the rights and welfare of the child
- Formulating Government recommendations to advance the goals and implementation of the Charter
- Formulating principles and rules aimed at protecting the rights and welfare of children in Africa
- Cooperating with other African, international and regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.
- Interpreting the provisions of the Charter.
- Investigating any complaints alleging violations of children’s rights.

Relevance to protecting IPRs: The ACERWC is a potential forum for litigating in defense of the rights of indigenous children. However, such cases must first have been heard by the national courts of the country in question, which is called “exhausting domestic remedies”.

African Court for Human and Peoples’ Rights (African Court), 2004 to present

Established to complement and reinforce the work of the ACHPR, the African Court is the main judicial body charged with adjudicating disputes related to the African Charter on Human and People’s Rights.

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80 https://www.sadc.int/about-sadc/sadc-institutions/tribun/.
Key Tasks:

- Interpreting and applying the African Charter in disputes brought before it
- Providing advisory opinions on any legal matter relating to the Charter or other relevant human rights instruments
- Collaborating with states and other stakeholders to enhance the protection of human rights on the continent
- Enhancing the participation of the African People in the work of the Court

Relevance to protecting IPRs: Similarly to the ACHPR, the African Court can adjudicate violations of the rights of indigenous peoples’ as defined by the African Charter. However, such cases must first have been heard by the national courts of the country in question, which is called “exhausting domestic remedies”, and only a few states (not including Botswana) have so far allowed individuals to lodge cases directly before the Court. The ACHPR has the power to refer a case to the Court but this does not happen frequently.
6. CONCLUSION

There remains a gap on the protection of indigenous peoples’ rights in Botswana. The continuing Tswana dominance in the country entrenches systemic and institutional discrimination of Basarwa, which dates back to colonialism. The laws which remain either silent or neutral on indigenous peoples’ rights need to be reformed, so as to surface the general challenges faced by Basarwa, and more specifically, the increased vulnerability as a result of COVID-19. The government’s response measures to COVID-19 have been largely inadequate in addressing the needs of this population group. It is therefore imperative that Botswana treats its international and regional obligations with seriously. Strategic litigation has proven to be an important social impact tool on land and natural resources rights despite its limitations. Paralegals in the country therefore need to strategically position themselves to undertake impact work, including helping with litigation efforts for the benefit of Basarwa communities in Botswana.

The work of organisations such as the Trust Okavango Cultural and Development Initiatives (TOCaDI), San Youth Network (SYNet), Ditshwanelo: Botswana Centre for Human Rights, Kuru Development Trust/Project, Window of Hope and Botswana Khwedom Council is critical for empowerment of the Basarwa communities in various parts of the country and the protection of their rights. Their work has, as illustrated above, resulted in successful policy reform and the inclusion of Basarwa in effective decision-making processes. Increasing the participation of Paralegals in such work would strengthen exiting work by complementing these organisations and creating linkages between the communities and national CSO, lawyers and the judiciary. This will in turn assist communities in accessing justice and redress mechanisms when they face rights violations. Below are some of the organisations/national institutions that communities and paralegals can contact in their work to ensure the protection and promotion of indigenous peoples’ rights:

<table>
<thead>
<tr>
<th>Name of Organisation/Institution</th>
<th>Website</th>
<th>Telephone Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ombudsman’s Office</td>
<td><a href="https://www.gov.bw/ministries/office-ombudsman">https://www.gov.bw/ministries/office-ombudsman</a></td>
<td>(+267) 3953322 0800 600 014 (Toll Free)</td>
</tr>
<tr>
<td>Legal Aid Botswana</td>
<td><a href="https://www.lab.co.bw">https://www.lab.co.bw</a></td>
<td>(+267) 3811384 (Legal Advice Only) 0800 600 203 (Toll Free)</td>
</tr>
<tr>
<td>The Registrar and Master of the High Court</td>
<td><a href="https://www.gov.bw/legal/masters-office">https://www.gov.bw/legal/masters-office</a></td>
<td>(+267) 3718000/3971706</td>
</tr>
<tr>
<td>Law Society of Botswana</td>
<td><a href="http://www.lawsociety.org.bw">www.lawsociety.org.bw</a></td>
<td>(+267) 3900200/777/770</td>
</tr>
<tr>
<td>Trust for Okavango Cultural and Development Initiatives (TOCaDI)</td>
<td><a href="https://www.facebook.com/Trust-for-Okavango-Cultural-and-Development-Initiatives-561241267234319/">https://www.facebook.com/Trust-for-Okavango-Cultural-and-Development-Initiatives-561241267234319/</a> (Facebook Page)</td>
<td>(+267) 6875084</td>
</tr>
<tr>
<td>San Youth Network (SYNet),</td>
<td><a href="http://www.sanyouthnetwork.com">http://www.sanyouthnetwork.com</a></td>
<td>(+267) 74196559/76847828</td>
</tr>
<tr>
<td>Ditshwanelo: Botswana Centre for Human Rights,</td>
<td><a href="https://www.facebook.com/ditshwanelobotswana">https://www.facebook.com/ditshwanelobotswana</a> (Facebook Page)</td>
<td>(+267) 3906998</td>
</tr>
<tr>
<td>Kuru Development Trust/Project</td>
<td>---------------------------</td>
<td>(+267) 6597574/6282</td>
</tr>
<tr>
<td>Window of Hope</td>
<td><a href="https://www.facebook.com/WindowOfHopeCentre/?ref=page_internal">https://www.facebook.com/WindowOfHopeCentre/?ref=page_internal</a> (Facebook Page)</td>
<td>(+267) 6597925</td>
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