
March 2022
ABOUT

American Bar Association Rule of Law Initiative

The ABA Rule of Law Initiative (ABA ROLI)’s mission is to promote justice, economic opportunity and human dignity through the rule of law. For more than 30 years, and through our work in more than 100 countries, ABA ROLI and its partners have sought to strengthen legal institutions, support legal professionals, foster respect for human rights, and advance public understanding of the law and of citizen rights. In collaboration with its in-country partners—including government ministries, judges, lawyers, bar associations, law schools, court administrators, legislatures, and civil society organizations—ABA ROLI design’s programs that are responsive to local needs and that prioritize sustainable solutions to pressing rule of law challenges.

American Bar Association Center for Human Rights

The ABA Center for Human Rights (ABA CHR) mobilizes lawyers to help threatened advocates, protect vulnerable communities, and hold governments accountable under law.

The Advancing Rights in Southern Africa Programme

With support from USAID, the PROGRESS Consortium implements the Advancing Rights in Southern Africa (ARISA) program to improve the recognition, awareness, and enforcement of human rights in the region, including protection of the region’s most vulnerable and marginalized groups.

Based in Johannesburg, this cutting-edge five-year human rights program led by Freedom House in collaboration with its partners—American Bar Association Rule of Law Initiative (ABA ROLI), Internews, and Pact—works in select SADC countries to:

- Improve the enabling environment for the promotion and protection of human rights;
- Strengthen the capacity of regional and local civil society actors to seek redress of rights violations;
- Increase public demand for improved rule of law and human rights protection; and
- Foster South-to-South communities of practice for knowledge and resource sharing to advance efforts to address human rights violations.

The Program focuses on four main thematic human rights areas, namely; media freedoms and digital rights, women’s customary land rights, the rights of indigenous peoples and the protection of the rights of human rights defenders.
ACKNOWLEDGEMENTS

This manual was prepared by staff and consultants of the American Bar Association Rule of Law Initiative and the American Bar Association Center for Human Rights. It has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should therefore not be construed as representing the policy of the American Bar Association as a whole. Further, nothing in this manual should be considered as legal advice in a specific case.

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Front Cover: San / Bushmen women
Photo Credit: 10b travelling / Carsten ten Brink

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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>CBD</td>
<td>Convention on Biological Diversity</td>
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<td>CBNRM</td>
<td>Community Based Natural Resource Management</td>
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<tr>
<td>CEDAW</td>
<td>Committee on the Elimination of Discrimination Against Women</td>
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<tr>
<td>CERD</td>
<td>Committee on the Elimination of Racial Discrimination</td>
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<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<td>CRC</td>
<td>Committee on the Rights of the Child</td>
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<td>DSD</td>
<td>Division of San Development</td>
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<td>ECOSOC</td>
<td>Economic and Social Council</td>
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<td>FPIC</td>
<td>Free, Prior and Informed Consent</td>
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<td>FPK</td>
<td>First People of Kalahari</td>
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<td>GPS</td>
<td>Global Positioning System</td>
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<td>HIPO</td>
<td>HIZETJITWA Indigenous Peoples Organisation</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>WIMSA</td>
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1. INTRODUCTION

1.1 Purpose of the Resource Manual

The purpose of this resource manual is to offer paralegals and those working with indigenous peoples in Namibia a basic overview of the situation that indigenous peoples in Namibia face with regard to the protection of their rights. It provides information on available constitutional, policy and legislative protections in Namibia as well as frameworks and mechanisms that can be used at the regional and international level to protect the rights of indigenous peoples.

1.2 History of Indigenous Peoples in Southern Africa

The concept of indigenous peoples in Africa is loosely defined and has been subject to controversy due to the limited state acceptance of the term, though over time it has become more widely accepted by regional institutions, including the African Commission on Human and People’s Rights (ACHPR) and regional development banks, as well as some governments. Groups claiming indigenous identity in Africa share key similarities: ways of life differing from the dominant society, declining cultures, dependence on ancestral lands and natural resources, experiencing discrimination, and geographic, political and social isolation. They are often, though not exclusively, traditionally hunter-gatherer or nomadic pastoralist societies.¹ 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 often inaccessible. Judicial structures in the region frequently reflect those of former colonial powers, which have limited accommodations for 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.²

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1.3 Indigenous Peoples and Colonialism

The San are among the first inhabitants of Namibia. They were pushed to the margins of their own lands by the southward migration of Bantu cattle herders, beginning around the sixteenth century. Bantu peoples settled over the northern half of Namibia, and their vast herds of cattle grazed the pastures, occupied the waterholes, and drove away the game that the San depended on. European colonisation took a further strain on the San’s access to land and natural resources. Namibia was a German colony from 1884 until 1915 and German commandos engaged in 400 “Bushman patrols” in 1911-1912 alone. While many San were shot outright, others were captured and died in prison. Others died of starvation as their traditional hunting-and-gathering economy was disrupted.

Before the arrival of the Germans, Namibia was populated by about twelve ethnic groups. Each of them had their own customs and control over undefined areas. Under German colonial rule, land was seized by means of ambiguous land deals and, later on, through the 1904-1908 war against the Herero and Nama. In 1900 the German colonial government divided Namibia into two sections. One section was the Police Zone, which was largely cleared for white settlement. The remaining areas, mainly the northern and north-eastern areas, became “reserves” for the African population already living there.

Under the Versailles Treaty in 1919, Germany officially surrendered German South West Africa and the Council of the League of Nations gave the Government of the Union of South Africa a mandate over the territory of South West Africa, as Namibia was known then.

Over time, the South African administration passed several pieces of legislation that affected the socio-political rights of blacks in Namibia. Proclamation No. 11 of 1922 provided for the establishment of “native reserves” and for the promulgation of regulations for the control and administration of such “native reserves” and urban residential areas for natives. Under Act No. 42 of 1925, explicit provision was made for separate approaches to the promotion of the interests of the White inhabitants on the one hand and that of the non-White population on the other.

Proclamation No.15 of 1928 conferred extensive powers to the Administrator as the “(white) Supreme or Paramount Chief over Natives.” In terms of this Proclamation, the Administrator was allowed to “recognise or appoint any person as a chief or headman in charge of a tribe or a native reserve... and to make regulations prescribing the duties, powers and privileges of such chiefs or headmen, including over-ruling laws and customs of the indigenous people and decisions taken by their leaders.”

The formalisation and inclusion of the “apartheid” ideology in South Africa’s legal structure in 1948, soon trickled down into Namibia’s socio-political and legal systems. Apartheid, as with South Africa’s blacks, had a major impact on the arrangements of “native”

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6 Gordon, ibid.
9 The boundary that divided the Police Zone from the northern and north-eastern parts, spanned across the central northern parts of Namibia, westwards from the Atlantic Ocean bordering Botswana in the east.
10 Commission of Enquiry, ibid.
11 Section 16 of Native Administration Proclamation No 11 of 1922.
12 Commission of Enquiry, op cit. at p 58.
13 Section 25 of Proclamation 15 of 1928.
affairs in Namibia. For example, the South West Africa Affairs Amendment Act No. 231 of 1949 provided for the transfer of powers of legislation of the Governor General with respect to native affairs to the all-white Parliament of South Africa.\(^\text{14}\)

In the 1960s, the South African “Odendaal Commission” modified and implemented the dual land use system started under German colonial rule. The Commission’s recommendations led to the establishment of 10 “homelands” on communal land which indigenous communities were not allowed to buy or sell.\(^\text{15}\) The purpose of the Act was to assist the “native nations” of South West Africa to “develop in an orderly manner to self-governing nations and independence”\(^\text{16}\). Whites on the other hand were able to buy and sell freehold land in the commercial areas of Namibia.

Regarding its assessment of the socio-economic status of the San in the 1960s, the Commission seemed to sympathise with the circumstances of the “Bushman.”\(^\text{17}\) The Commission acknowledged by the 1960s that the nomadic lifestyle of the “Bushman” was coming to an end; and that if they were to survive, they would have no other option than to settle more permanently. The Commission therefore recommended that the “Bushman” should also get their own “homelands” under the guidance and protection of a commissioner\(^\text{18}\) where they could plant crops and rear livestock.\(^\text{19}\)

Initially two areas were reserved as “homelands” for the “Bushman”—the portion of the Western Caprivi east of the Okavango River, some 587,671 hectares in extent, was reserved for the “Barakwengo” Bushmen (predominantly Khwe); and some 1,805,000 hectares situated in north eastern South West Africa were designated as “Bushmanland” for all the other Bushmen.\(^\text{20}\) However, by 1966, plans to declare the portion of Western Caprivi as a “homeland” seemed to have been abandoned when the area was proclaimed as the Caprivi Game Reserve and in 1968 as the Caprivi Game Park.\(^\text{21}\)

The only area that was then eventually set aside as the communal lands for the “Bushman” was “Bushmanland”, which followed the custom of naming “homelands” after the people they were envisioned to accommodate.\(^\text{22}\) In the 1970s, the South African administration announced that all San people were to relocate to Bushmanland and accept the Ju’/hoansi Chief as their leader. The Hai||om protested against such a move, arguing that they could not speak the Ju’/hoan language.\(^\text{23}\)

The 1968 Act recognised Damaraland, Hereroland, Kaokoland, Okavangoland, Eastern Caprivi and Owamboland as native lands.\(^\text{24}\) The Odendaal Commission’s principles prevailed in Namibia until 1990 when it was repealed and replaced by the Constitution of Namibia.\(^\text{25}\)

1.4 Indigenous Peoples in Independent Namibia

The majority of the indigenous peoples in Namibia are San. As explained above, their marginalised place in contemporary Namibia is the consequence of a series of events that originate

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\(^{14}\) Commission of Enquiry, op cit. at p 53.


\(^{17}\) Commission of Enquiry, op cit. at p. 30-31.


\(^{19}\) Commission of Enquiry, op cit. at p. 82.

\(^{20}\) Commission of Enquiry, op cit. p. 100.

\(^{21}\) Harring and Odendaal, 2006 op cit. p. 13.

\(^{22}\) Harring and Odendaal, 2006 op cit. p. 38.


\(^{24}\) Section 2 of the Development of Self-Government for Native Nations in South West Africa Act 54 of 1968

\(^{25}\) In total, 16 laws as set out in Schedule 8 of the Namibian Constitution have been repealed by the enactment of the Namibian Constitution.
from the impact of migration and colonisation on Southern Africa.\(^{26}\) Today, the Namibian San population is estimated to be between 27,000 and 38,000 which is approximately 2\% of the total Namibian population.\(^{27}\) The San are the poorest and most marginalised minority group in Namibia, with little access to existing political and economic institutions. They also face problems such as extreme poverty, lack of education, high mobility, social stigmatization, and landlessness.

The per capita income of the San is the lowest of all groups, with an annual average adjusted per capita income of N$3 263 (approximately US$170) compared to the national average of N$10 358 (approximately US$500).\(^{28}\)

According to the Ombudsman’s Office, 70\% of San people depend on state-run food aid programmes. The life expectancy of the San people is 22\% lower than the normal average of the common population of Namibia. Only 15\% of San people have legal title deeds for the lands which they occupy. The level of literacy among the San is only 20\%.\(^{29}\)

Other smaller groups such as the pastoralist Ovatue, Ovahimba and Ovatjimba are also classified as part of Namibia’s indigenous peoples. They are closely related to the Herero tribe and live in the remote dry and mountainous areas of the Kunene region previously known as Kaokoland. They still uphold their traditional semi-nomadic lifestyle and culture. Their life is centred on herding goats and cattle to new grazing areas and waterholes.\(^{30}\)

A number of governments around the world weakened or removed legal and policy protections for indigenous peoples’ rights during the COVID-19 pandemic. 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.\(^{31}\) Research shows that Indigenous Peoples in Namibia faced similar challenges during the pandemic.\(^{32}\)

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\(^{26}\) Sidney Harring and Willem Odendaal. 2006. ‘Our Land They Took’: San Land Rights under Threat in Namibia. Windhoek: Legal Assistance Centre at 5.


\(^{30}\) Office of the Ombudsman, ibid.


2.1 Overview of the Role of Paralegals

Namibia became a constitutional democracy following its independence in 1990. Before independence, there was little opportunity for civic involvement in Namibia. There was moreover often extremely limited access to justice. However, despite all the constitutional changes, access to justice in independent Namibia cannot be presumed.

Financial, racial, cultural, language, and demographic factors all hamper access to the justice system in some way. For example, how close someone lives to a court often determines their access to the justice system. In addition, legal proceedings can be complicated and lengthy.

Paralegals working in communities can improve access to the legal system, assist people to claim their rights, and ensure the Government responds to community claims. They are also an important education resource to help communities understand what their rights are and how justice and government system function. In other words, paralegals provide a bridge between communities and the government, organisations, and the justice system.

Paralegal training and services have previously been supported in Namibia by the Legal Assistance Centre (LAC) and the now dormant Namibia Paralegal Association (NPA). People from all walks of life have received paralegal training under the LAC’s supervision. These include community activists, teachers and religious leaders with limited or no qualifications or experience in the field of law.

The Ministry of Justice offers Legal Aid services to people who cannot afford legal representation. However, this service has experienced several problems over the years, such as restrictive criteria for legal support, financial constraints, and delays with applications for legal aid. The Ombudsman’s Office also offers some advice to the public, on public interest matters in terms of its Constitutional mandate.

2.2 Best Practices for Paralegals

Paralegal programmes in Namibia have been limited, and therefore specific best practice for Namibia is limited. The now dormant NPA lists the following as good practices of paralegals:

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35 NPA, ibid.
Prompt Service: A paralegal must provide prompt and efficient service. This means a client’s problem must be dealt with as soon as possible. Where research is necessary, feedback must be provided at the paralegal’s earliest convenience. If there is a consultant or third person involved, a paralegal should give them necessary information as soon as possible.

Accurate service: This requires a paralegal to “double check” any information provided to a client. Hence continuous research to obtain accurate information for the client is an important ethical obligation.

Polite service: A paralegal should at all times be polite and treat clients with respect and care. Respect and care require that a paralegal should not lose his/her temper even if the client is irritating, arrogant, or rude.

Neighbouring South Africa has a long history of paralegal training, albeit not targeting indigenous peoples. A number of non-governmental organisations have been involved with paralegal training for indigenous communities elsewhere in Africa.

The Paralegal Association of South Africa (P ALSA) has a code of conduct for paralegals, available online. These include, among others;

2.2.1 Attitude

Paralegals should be willing to go the extra mile for those in need of help (advice seekers)

2.2.2 Interviewing and Communication Skills

Paralegals should present advice seekers with options to their problems which they can easily understand and suggest action to deal with problems which is in the advice seekers’ best interests.

2.2.3 Case-Recording Skills

Case-recording skills need to be accurate, and people must be able to read what has been written.

2.2.4 Referrals Procedure

Paralegals refer advice seekers to appropriate structures. Any advice seekers who are referred must receive a professionally prepared report from their paralegal.

2.2.5 Follow-Up

Follow-up of cases should be well planned, proactive and consistent, for example, recording dates to follow up, and making appointments when necessary.

2.2.6 Closing Cases

Paralegals should follow up with advice seekers to make sure that they can close a case.

2.2.7 Referring Cases to Court

Paralegals can identify good test cases that should be referred to the court and understand the legal problem involved. Where this happens, they should keep a file of all the documentation and work done; explain to the client what action will be taken and its possible outcomes; and follow-up on the case with the attorney.

Namati, an NGO working globally with community rights and legal issues, has produced resources on developing community paralegal programmes. Similarly, the Open Society Foundation’s Justice Initiative developed the Community-Based Paralegals: A Practitioner’s Guide in 2014, that provide an overview of practice areas such as mediation, community education, advocacy and legal referrals.
2.3 Ethics for Paralegals

Ethics refers to those rules and moral conduct to which every member of a group or certain profession should adhere to. Lawyers, doctors, social workers, and other professionals have their own unique ethics as well. Paralegals have their code of ethics too as prescribed by the NPA. Ethics ensure that paralegals behave uniformly in a way that is trustworthy. This lets the general public know that a paralegal is someone who can be trusted because he/she does their job according to prescribed ethics. While the NPA’s guidelines are not mandatory, it nevertheless sets a good standard for paralegals.39

Fair and impartial service: A paralegal always maintains impartiality and fairness. In other words, a paralegal should not give advice based on his/her beliefs or preferences. Prejudices should be set aside to enable the paralegal to apply his/her mind.

Free service: Whatever a paralegal does, he/she does for free. A paralegal should not charge any fee for services rendered. At times clients might highly appreciate what a paralegal did for them and might offer you a reward or present. It is important to note that to accept any sort of “reward” is against paralegal ethics.

Responsible service: A paralegal should not do work he/she is not qualified to do. For example, a paralegal should not pretend to be a lawyer and do work meant for lawyers. A responsible paralegal calculates his/her actions and deals only with matters within his/her ambit of work.

3. INDIGENOUS PEOPLE AND THE LAW IN NAMIBIA

3.1 Overview of the Namibian Legal System

The Sources of Namibian law include the Namibian Constitution, International Law, Statutes, Customary Law and Case Law.

The Namibian Constitution is the Supreme Law of Namibia and all laws that are passed must be in line with the Constitution to be valid.\textsuperscript{40}

International law, once ratified by the Namibian State, becomes part of Namibian law through the working of Article 144 of the Namibian Constitution.

Statutes are laws that have been passed by Parliament since independence, or laws that were passed by other legislative bodies before independence. Statutes are also called “legislation” and “Acts of Parliament”. Parliament can also make changes to statutes which have already been passed which are called amendments. Every statute and amendment which is passed by Parliament is published in the Government Gazette.\textsuperscript{41}

Common law is the law developed over time through the decisions of judges in Namibia’s superior courts (i.e. the High and Supreme Courts). Common law in Namibia is called “Roman-Dutch law” because it comes from ancient Roman and Dutch times, which was brought to South Africa and Namibia along with colonialism. Common law can be found in written form in reported court cases and in textbooks on law.\textsuperscript{42}

Customary law is normally unwritten law that has developed over the years in different communities in Namibia. Traditional courts, chiefs, headmen or other traditional leaders usually decide questions involving customary law.\textsuperscript{43}

Through the provision of Article 66 of the Namibian Constitution, Parliament can change both common and customary law by passing a statute that applies to all in Namibia.

3.2 Overview of Human Rights in Namibia

The Namibian Constitution sets up three branches of national government, namely, the executive, the legislature, and the judiciary (See Article 1(3) of the Namibian Constitution). In short, the legislative branch makes laws, the executive branch puts them into action, while the judicial branch interprets and enforces them. Through the division of powers, the three branches of government maintain a system of checks and balances over each other that ensures no single branch of government becomes too strong or that power is abused.
The executive branch consists of the President, Prime Minister and Cabinet (See Chapter 5 and 6 of the Namibian Constitution). The President is the Head of State and of the Government and the Commander-in-Chief of the Defence Force (Article 27(1)). The executive power of Namibia is vested in the President and the Cabinet (Article 27(2)). Except where otherwise provided in the Constitution or by law, the President exercises his or her functions in consultation with the Cabinet.

The Cabinet consists of all the Ministers representing the various Ministries of government. The Constitution also provides for the appointment of the Attorney-General and the Prosecutor-General. In terms of Article 87, the main functions of the Attorney-General are: to manage the office of the Prosecutor-General; to be the legal adviser to the President and Government; to protect and uphold the Constitution; and to perform other functions assigned by Parliament.

In terms of Article 88(2), the functions of the Prosecutor-General are to prosecute criminal court cases on behalf of the government; to prosecute and defend appeals in criminal proceedings; and to give permission to government officials to conduct criminal proceedings in Courts.

The legislature consists of the National Assembly (See Chapter 7 of the Namibian Constitution) and the National Council (See Chapter 8 of the Namibian Constitution).

Chapter 9 of the Namibian Constitution stipulates that the judicial power is vested in the Courts of Namibia. The Courts consist of the Supreme Court, based in Windhoek (See Article 79 of the Namibian Constitution), and the High Courts (See Article 80 of the Namibian Constitution). The Supreme Court functions as the highest court of appeal in Namibia. It hears appeal matters from the High Court. Decisions of the Supreme Court are binding on all other Courts of Namibia and all persons in Namibia. This is true in all cases, unless they are reversed by the Supreme Court itself or contradicted by an Act of Parliament (See Article 81 of the Namibian Constitution).

There are two High Courts - one High Court is based in Windhoek, the other in Oshakati. The High Court can hear all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed under it. The High Court also hears appeals from Lower Courts.

The Lower Courts are the Magistrates’ Courts and Community Courts (see Article 83 of the Namibian Constitution). The Jurisdiction of Lower Courts is established and limited by an Act of Parliament, namely the Magistrates’ Court Act 32 of 1944 (as amended over the years) as well as the Magistrates’ Court Rules. The Community Courts Act 10 of 2003 sets the jurisdiction and procedure of community courts and provides an appeal procedure.

In terms of Article 78(2) the Courts are independent from Executive and Legislative interference and subject only to the Namibian Constitution and the law. A seeming exception to the rule in Article 78(2) is that the appointments of Judges to the Supreme Court and the High Court are made by the President. These appointments are made on the recommendation of the Judicial Service Commission. Upon appointment, Judges shall make an oath or affirmation of office (See Article 82(1) of the Namibian Constitution).

3.3 Constitutional Protections for Indigenous Peoples

Although Namibia has a progressive constitution, it is not always reflected in the implementation of laws and realisation of rights in the country. The Namibian Constitution prohibits discrimination on the grounds of ethnic or tribal affiliation but does not specifically recognise the rights of indigenous peoples or minorities. The Namibian Government prefers to speak about “marginalised” rather than “indigenous” communities, defining “indigenous” by reference to European colonialism, implying that the vast majority of Namibians are in fact “indigenous.”

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Within the Constitution, under Chapter 3 on Fundamental Human Rights and Freedoms, there is a guarantee of equality and freedom from discrimination (Article 10), rights to culture, language, tradition (Article 19) and the right to education (Article 20), deemed as compulsory until the age of 16, with Article 3 providing the right to use mediums of instruction other than English.

Other relevant articles to indigenous peoples and communities, albeit under specific circumstances, include Children’s Rights (Article 15); Political Activity (Article 17); Apartheid and Affirmative Action (Article 23). Additionally, Article 66 upholds the validity of customary and common law where they do not conflict with statutory law and the Constitution.

Namibia follows a monist approach.45

Article 144 provides that “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia”.

Some debate exists regarding the extent to which this should be applied, but the Ministry of Justice considers international law to which Namibia is party to be binding, with further domestic legislation development only required for non-self-executing treaties. Similarly, the opinion of the Chief Justice and several cases in the Supreme Court have upheld the application of international law in Namibia, though it has also been noted that despite Article 144 Namibian courts rarely refer to applicable international treaties.46

3.4 Legal Protections for Indigenous Peoples

Except for being a signatory to several international treaties that relate to the human rights protection of indigenous peoples, Namibia itself has no domestic legislation dealing directly with indigenous peoples. However, as stipulated in the section above (“access to land and natural resources”) Namibia has a number of laws which provide for implementing certain rights of indigenous peoples, particularly in the areas of land, leadership, natural resource management and education, examples being the Communal Land Reform Act of 2002, the Traditional Authorities Act of 2000 and the Nature Conservation Amendment Act of 1996. These Acts can assist in implementing San rights regarding land, leadership, and resources. In addition, the National Resettlement Policy targets the San, among other groups (i.e., ex-soldiers; displaced, destitute, and landless Namibians; and people with disabilities), as beneficiaries.

Overall, while there is strong legal and political support for the rights of indigenous peoples in Namibia, there is still work to be done to ensure full compliance with the country’s domestic and international legal obligations.

3.5 National Policy on Indigenous Peoples

Championed by a previous Deputy Prime Minister of Namibia, Dr Libertina Amathila, a San Development Programme was approved by Cabinet in 2005 under the Office of the Deputy Prime Minister.47 It soon included the Ovatue and Ovatjimba as well as the San, collectively labelled by the government as ‘Marginalised Communities’. In 2009, Cabinet expanded the programme to the Division of San Development (DSD), and thereafter it was transferred into the Office of the Vice President as the Division of Marginalized Communities, with San Deputy

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45 In a monist legal system, international law is considered part of the internal legal order of the state. In a dualist legal system, international law stands apart from national law, and to have any effect on rights and obligations at the national level, international law must be ratified through the internal legislative process. Carolyn A. Dubay “General Principles of International Law: Monism and Dualism” International Judicial Monitor. Winter 2014 issue.


47 Dieckmann et al, op.cit. p. 28.
Minister for Marginalised Communities, Royal |Ui|o|oo, appointed as its political lead.48

While the Division’s budget is limited, projects have included resettlement through the purchase of commercial farms (particularly for Ha|i|om San); vocational training including in construction skills and coffin making; women’s needlework and bread-making projects; beekeeping; aquaculture; small-scale gardens; and education support including tertiary education sponsorship. In addition, the Division has been responsible for ‘drought relief’ to San and Ovatue communities—the distribution of maize and other items of food.49

While most projects have been limited in scope, the Division has overseen considerable improvements in the level of engagement with and attitudes towards marginalised communities by national and local government, including increased focus and awareness for civil servants regarding such groups, as well as improvements in the language to describe such groups within the Government.50

The Universal Periodic Review report of 2011 recommended that Namibia “formulate a white paper in accordance with the United Nations Declaration on the Rights of Indigenous Peoples”, and that it should also take into consideration recommendations from the Committee on the Elimination of Racial Discrimination, the International Labour Organization (ILO) and the African Commission’s Working Group on Indigenous Populations/Communities.51

Accepting this recommendation, Namibia tasked the Office of the Ombudsman with developing the draft White Paper, with support from the International Labour Organization PRO169 Programme and the Legal Assistance Centre of Namibia. A final draft was completed and disseminated within government offices in late 2014, but not taken any further. In 2016, a cooperation agreement was concluded between the Division of Marginalized Communities and the United Nations Department of Economic and Social Affairs. This enabled a series of national and local consultations regarding the White Paper with Government of the Republic of Namibia (GRN) representatives and indigenous communities, resulting in substantial redrafting of the White Paper. The final draft of the White Paper was submitted to the Office of the Attorney General in May 2019 for review and subsequent consideration by the Cabinet for approval. The Cabinet engaged in initial comment in 2021, and is now currently awaiting changes to the draft as well as requested additional supporting information.52

Additionally, the COVID-19 pandemic has directed government resources and attention away from such issues, so in general and specifically in this case, issues of policy and programmatic development have been delayed.

The White Paper refers in particular to three groups, the San, Ovatue and Ovatjimba, who due to their high levels of marginalisation and inequality, have been targeted under Division of Marginalized Communities’ programmes. The White Paper gives broad coverage of specific issues faced by indigenous peoples in Namibia, and includes recommendations based on national policy and international treaties.

The objectives and recommendations of the White Paper include:

- recognising indigenous peoples and ensuring the protection and promotion of their rights;
- strengthening institutional frameworks and improving coordination;
- ensuring effective consultation, participation, and representation;

48Dieckmann et al, ibid.
50Begbie-Clench et al, ibid.
52GRN Division Marginalized Communities (personal communications, 8 May 2021).
improving access to land and ensuring secure land tenure (which includes issues around improving tenure, resettlement, and consultation);
• ensuring equal access to quality education for indigenous peoples and protecting and promoting indigenous languages;
• promoting respect for cultural diversity and traditional knowledge of indigenous peoples;
• ensuring accessible, quality, and flexible health services for indigenous peoples;
• ensuring food security, access to employment and sustainable livelihoods;
• advancing gender equality for indigenous peoples; and
• improving the monitoring of programmes targeting indigenous peoples.

If the White Paper is approved by Cabinet, it will form the basis for the drafting of future policy, or may be directly translated into a policy, and it will also immediately provide guidance for GRN offices, ministries, and agencies for delivering current and future programme implementation. However, until its approval and translation into a policy or action plan, the GRN will still lack an overarching framework and coordination strategy when it comes to the country’s San, Ovatue and Ovatjimba communities.

3.6 Key Human Rights Issue of Concern to Indigenous Peoples in Namibia

3.6.1 Access to Land and Natural Resources

Following Independence and the National Conference on Land Reform and the Land Question in 1991 - which served as an initial platform for developing the land reform programme, policies and legislation - the Namibian Government took measures to redistribute the country’s land and facilitate land reform. This began with the establishment of the Ministry of Lands, Resettlement and Rehabilitation (MLRR) (renamed in 2020 as the Ministry of Agriculture, Water and Land Reform). Other key measures include the Agricultural (Commercial) Land Reform Act 6 of 1995, the National Resettlement Policy (MLRR 2001) and the Communal Land Reform Act 5 of 2002. The San are among the targeted beneficiary groups of the National Resettlement Policy of 2001.

Through Namibia’s Community Based Natural Resource Management (CBNRM) programme, legislation has been developed to empower communities to have access to natural resources on communal land. Section 24(A)(1) of the Nature Conservation Amendment Act 5 of 1996 provides that “[a]ny group of persons residing on communal land and which desires to have the area which they inhabit, or any part thereof, to be declared a conservancy, shall apply therefor to the Minister.” The rationale behind Namibia’s CBNRM Programme is that many of its rural communal communities live together with wildlife which often result in the loss of livestock killed by predators such as lions and crops destroyed by elephants. In order to offset these losses, communities need to receive some benefits in return. Over the years, these benefits have included joint-venture lodges and conservation hunting concessions based on formal agreements with tourism operators, obliging them to share profits and to employ and train local staff. In return, conservancies provide eco-services such as the management of wildlife habitat and anti-poaching activities, which benefit the private sector. In short, the Nature Conservation Amendment Act 5 of 1996 aims to provide for an economically-based system of sustainable management and utilisation of game in communal areas through the establishment of communal conservancies in terms of section 24A of the Amendment Act.

The declaration of community forests on communal land is another example of CBNRM in Namibia. In terms of Section 15(1) of the Forest Act 12 of 2001, the “Minister [responsible for the Act] may, with the consent of the chief or traditional authority for an area which is part of communal land or such other authority which is authorised to grant rights over that communal land enter into a written agreement.

54 Up to March 2020 the responsible Minister for implementing the Act was the Minister of Agriculture, Water and Forestry. Currently that responsibility resides with the Minister of Environment, Forestry and Tourism.
with anybody whom the Minister reasonably believes represents the interests of the persons who have rights over that communal land and is willing and able to manage that communal land as a community forest.” The community forest management may dispose of forest produce from the community forest or permit the grazing of animals, the carrying out of agricultural activity or the carrying out of any other lawful activity in the relevant community forest.55

By 2018, a total of 86 communal conservancies had been gazetted since 1998. Additionally, one community association, the Kyaramacan Association based in Bwabwata National Park, which is managed like a conservancy, existed. Together they cover 169 756km² which is about 55.4% of all communal land with a population count of about 222 871 residents. In total, 43 registered community forests were also gazetted, covering some 72 537km² of which 95% overlaps with conservancies. In addition, two community fish reserves existed. Since 1990 to the end of 2018, community conservation is estimated to have contributed N$8.375 billion to Namibia’s net income and in 2018, community conservation has facilitated 4 926 jobs.56

3.6.2 Participation in Decision-Making (Free, Prior and Informed Consent in Large Scale Land Developments)

Indigenous people depend on land and its natural resources to survive as well as to maintain and celebrate their own culture and traditions. Namibia’s indigenous peoples are no exception. Therefore, it is essential that they have proper land rights, titling, and greater access to land.57 Namibia is a signatory to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and has ratified various other international treaties, such as the African Charter on Human and Peoples’ Rights, the UN Convention on Biological Diversity, the SADC Protocol on Forestry, and the SADC Treaty that promote the principles of consultation and participation.58

Consultation and participation are the means that enable people to take decisions about their own destiny. The Ombudsman’s Guide to Indigenous Peoples’ Rights in Namibia states the following:

“The norms of consultation and participation are thus mechanisms aiming to correct the historical prejudiced view of indigenous peoples, as uncivilized and backwards who do not know what is good for them and for whom other [sic] should decide (assimilationist approach). They are means through which indigenous peoples are to gradually regain control over their destiny and secure their rights over lands, to education, employment and equality.”59

3.6.3 Language and Cultural Rights

Namibia’s Educational Language Policy provides that indigenous children be instructed in their language for the first three years before changing to the English language. A National School Feeding Programme has also been set up by the government to attract indigenous children to school. However, the practical implementation of these policies remains challenged by several factors, including a lack of personnel who can speak indigenous languages.60

Only one of Namibia’s seven San languages, Ju’/hoansi, has been recognised so far as an official language of educational instruction. The government seems not opposed to recognising others, but a lack of language development and resources has prevented this. Some San languages still lack orthography (spelling system), and many suffer from a lack of qualified mother tongue teaching staff and printed materials.61

58 Refer to the regional section to see the obligations under these treaties.
59 Office of the Ombudsman, op.cit. at 16.
60 Office of the Ombudsman, op.cit. at 3.
In terms of cultural heritage sites, the National Heritage Act 24 of 2004 is focused on preservation, and while in practice local management of heritage sites is encouraged, the rights for this are not well enshrined in the Act.

In terms of national development, some tension exists between periodic National Development Plans (NDPs, currently NDP 5) and indigenous peoples’ cultures. National development plans tend to focus on the mainstream economy, livestock and agriculture. Therefore, there is little emphasis on adapting cultures and livelihoods of indigenous peoples, and rather an assumed assimilation into majority economic activities.

3.6.4 Access to Health, Education and Government Services

Despite the expansion of government clinics, in many cases there is a serious lack of health care facilities close to the regions where indigenous peoples live. There is also a lack of medical practitioners who can speak indigenous languages which makes access and communication more difficult. The cost of medical treatments and services is also an issue. To tackle it, the government has issued circulars to national and regional health officials to exclude or adjust their tariffs and to cater for poor people including indigenous peoples. 62

While primary education is guaranteed by the Constitution, indigenous children are often faced with a lack of primary schools within easy reach, though efforts have been made by the government to improve access and abolish schools fees. However, remote schools remain poorly resourced and secondary schools are often much further away. In addition, use of minority languages and recognition of indigenous cultures is limited, and indigenous children often face discrimination within larger schools. The National Policy Options for Educationally Marginalised Children identifies the San, the Ovahimba and the children of farmworkers (many of whom are San) as “educationally marginalised”. This document is a very relevant means to achieve education for marginalised children and affirmative action that is appropriate to the San communities and the distinct challenges they face with regard to education. 63

3.6.5 Access to Justice

In terms of access to justice, emphasis is being put on the importance of traditional authorities: Namibia is trying to open access to justice by national courts but also maintain the traditional justice system of the indigenous peoples. 64 The state does provide legal aid, though the quality and availability can vary. Translators are generally catered for by the state in the courts.

As mentioned previously, barriers related to financial, racial, cultural, language and demographic factors reduce access to justice in Namibia. Furthermore, already lengthy court delays have grown longer due to the COVID-19 pandemic. The reduction in travel and monitoring during the pandemic also seems to have increased instances in some more remote areas of national laws and policies being ignored, and hence instances of illegal activities related to grazing, fencing and infrastructure development have been frequent, but are compounded by slow access to the courts. 65

3.6.6 Access to Information

Namibia holds a high standard with regard to the protection of press freedom. Reporters Without Borders reports that Namibia was regarded as Africa’s best ranked country in 2020 regarding press freedom. It also notes that Namibia enjoys constitutional guarantees with regard to freedom of speech.

Freedom of speech in Namibia is primarily supported by the Namibian Constitution’s Bill of Rights. Article 21(1)(a) of the Constitution stipulates that all Namibians have the right to

62 Office of the Ombudsman, ibid.
63 Ute Dieckmann, Maarit Thiem, Erik Dirkx, and Jennifer Hays (eds.) ‘Scraping the Pot’: San in Namibia Two Decades after Independence. Windhoek: Legal Assistance Centre and Desert Research Foundation of Namibia.
64 Office of the Ombudsman, op.cit. at 3.
65 See for example, The Namibian, “Geingob calls for better access to justice” (11 February 2021).
“freedom of speech and expression, which shall include freedom of the press and other media.” Also, the fundamental freedoms guaranteed under Article 21 must be exercised subject to the law of Namibia. Where the law imposes reasonable restrictions on the exercise of the rights and freedoms, in terms of Article 21(2) of the Constitution, it must comply with what is “...necessary in a democratic society and required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”

As with all of Namibia’s fundamental human rights, the freedom of speech enjoyed under the Namibian Constitution comes with responsibilities. For example, if someone spreads hate speech against another ethnic group on social media, it is likely that there will be consequences for their actions. A person responsible for spreading hate speech could be prosecuted under Namibian laws. Even if for some reason such a person is not prosecuted, the professional codes, industry regulations and contractual obligations that a person has signed up at work, could come into effect and result in his or her dismissal.

But, while Namibia has been praised for its performance on freedom of speech, its record on enabling public access to information remains poor. In 2016, the World Wide Web Foundation, produced an Open Data Barometer, in which Namibia was ranked 98 out of 114 countries. The Open Data Barometer evaluates the ease with which government data can be accessed by interested parties, including development partners. Access to information is regarded as a crucial ingredient for a society that upholds democracy and good governance and helps government to be transparent and accountable for its actions. Access to information is of particular relevance to indigenous peoples, especially in terms of engaging with government with regard to asserting the relevant laws applicable to their rights.

3.6.7 Rights to Peaceful Protest and Assembly

The right to assemble peacefully, or “protest rights”, is protected by the Namibian Constitution (Article 21 (1)(d) of the Namibian Constitution). In addition, Article 17 stipulates that everyone has the right to participate in peaceful political activity intended to influence the composition and policies of the Government as well as having the right to form and join political parties. Anyone who has reached the age of eighteen (18) years has the right to vote and anyone who has reached the age of twenty-one (21) years has the right to be elected to public office.

However, there are some regulations about public gatherings. The Public Gatherings Proclamation, AG 23 of 1989, requires advance notice to the police of all public gatherings and prohibits the carrying of weapons. It also gives the police powers to place conditions on gatherings and to disperse riots. Before a public gathering can take place, written notice must be given to the commander of the police station nearest to the place where the gathering is to be held (Advocacy in Action 163). In addition, the Demonstrations in or near Court Buildings is prohibited. Prohibition Act 71 of 1982 prohibits demonstrations and gatherings within a five-hundred-metre radius of a building containing a courtroom, except on weekends and public holidays. Thus, anyone planning to peacefully protest near a court building should adhere to the provisions as set out in this 1982 Act.

3.6.8 Participation in Governance of their Countries

Other than those indigenous peoples in Namibia that are recognized by the government as traditional authorities in terms of the Traditional Authorities Act 25 of 2000, very few examples of indigenous peoples’ direct participation in national governance in Namibia exist. The powers, duties and functions of traditional authorities and their members are stipulated in section 3 of the Traditional Authorities Act. Some of these include the administration and execution of the customary law of that traditional

community and to assist and co-operate with the government, regional councils, and local authority councils in the execution of their policies and keep the members of the traditional community informed of developmental projects in their area. Several of Namibia’s indigenous peoples are recognised by the government in terms of the 2000 Act. It is therefore important to be aware of the provisions of the Act and how it could potentially apply to a person’s traditional community.

Previously, there was a San-governed regional advocacy NGO, the Working group of Indigenous Minorities in Southern Africa (WIMSA), which was based in Namibia, and carried out the majority of its activities and programmatic work there. However, WIMSA has been inactive for a number of years, and is essentially defunct. The Namibian San Council (NSC) an elected body of San representatives formed by WIMSA continues to meet occasionally but has limited capacity and resources. The nomadic pastoralists of Kunene have an organization, HIZETJITWA Indigenous Peoples Organisation (HIPO), though it appears to be limited in the scope of activities and funding. The lack of coherent community or civil society representation of Namibia’s “marginalized communities” has been noted by the government, though not supported to develop by the State.

3.6.9 Access to Identity Documents and the Right to a Nationality

The government has increased mobile outreach to ensure identity documents are accessible to all communities over previous years. However, some communities remain with inadequate and unequal access to identity documents, especially in rural areas with poor communications. This limits access to government services, and grants such as the universal pension provided in Namibia (an important income source for poor communities), and grants for orphans and persons with disabilities. Many of Namibia’s indigenous communities have had poor access to apply for identity documents and as a result have not been able to access essential services such as claiming for pensions or medical services. Support to such communities to obtain their identity documents continues to be an important activity.

3.6.10 Gender-Based Violence

Several laws exist in Namibia that deal with gender-based violence. For example, the Combating of Domestic Violence Act 4 of 2003 provides for the issuing of protection orders by magistrates’ courts in domestic violence cases, it deals with matters relating to domestic violence offences and gives the police responsibilities in respect of domestic violence. In addition, the Combating of Rape Act 8 of 2000 provides for minimum sentences for rape, new rules of evidence in rape cases, special provisions concerning bail in rape cases, and new rules concerning privacy in respect of rape cases.

But despite the several laws in place to address gender-based violence in Namibia, violence against women and rape continue to be of serious concern. Due to the fact that most indigenous peoples lack access to justice, perpetrators of rape and violence on women are often not prosecuted, a situation that breeds impunity. Health and reproductive rights are also poorly regulated by the state. As a member to CEDAW, Namibia has a commitment to take all appropriate measures to eliminate discrimination against women, access to health care services including those related to family planning. Indigenous women often live in rural areas where health care facilities relating to birth-giving are absent or not adequate. There is also gender inequality as far as employment is concerned and indigenous women often suffer multiple discriminations as an indigenous person and a woman. There are numerous cultural practices, including early or forced marriages that continue to have a negative impact on indigenous girls and women.

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67 Office of the Ombudsman, op.cit. at 28.
68 Office of the Ombudsman, ibid.
69 Office of the Ombudsman, ibid.
70 Office of the Ombudsman, ibid.
3.7 Leading National Cases on Indigenous Peoples Rights

A number of major cases concerning the land rights of indigenous peoples, spearheaded by the Legal Assistance Centre (LAC) in Namibia, have been heard or are before the courts. In addition, LAC have been involved in a number of court cases regarding the legitimacy or processes surrounding certain Traditional Authority Chiefs. The transparency of Traditional Authorities and their councillors, as well as Communal Land Boards, have a marked effect on the fair allocation and application of land rights.

Cases of particular interest relating to land rights include:

3.7.1 Tsamkxao Oma & 3 others v Minister of Land Reform & 15 others (HC-MD-CIV-MOT-GEN-2018/00093)

In the Tsamkxao Oma case, a 2018 High Court ruling evicted seven farmers from the Nyae Nyae Conservancy, a predominantly Ju’hoansi San member base conservancy, with no opposition filed to the original motion. Despite this, late opposition to the ruling was filed on behalf of the farmers accused of illegal grazing which the High Court condoned, and the case was heard. Judgment was given against the applicants, the High Court arguing that the affidavit of Tsamkao Oma was not properly witnessed and attested by the police officer in Tsumkwe. The applicants disputed this. Nevertheless, the matter was dismissed based on a technicality without considering the merits of the matter. The LAC appealed the matter to the Supreme Court. As of date, no new hearing date has been set.

3.7.2 The Njagna Conservancy Committee v The Minister of Lands and Resettlement (A 276-2013) [2016] NAHCMD 250 (18 August 2016)

In September 2016, a favourable judgment to the Nǂa Jaqna Conservancy (a predominantly !Kung San area) by the High Court relied upon the Communal Land Reform Act. After long-running proceedings where the Conservancy committee alleged that 32 individuals had illegally fenced land in Nǂa Jaqna Conservancy and that some of those had obtained the land without following procedures laid down in the Act, the judgment ordered the removal of fences and for a number of the accused to vacate land and/or be restrained from occupying land in the Conservancy. This judgment is likely to set precedent for other contested areas of communal land in Namibia. However, as yet the removal of the illegal fences has to be implemented, though in 2018 the Attorney General declared the removal complete after a small proportion of the fences in question were removed. Since the 2016 judgment, numerous other illegal fences have been erected in the area. The COVID-19 pandemic has further impacted this situation by lengthening court delays and reducing monitoring of illegal activities by the conservancy, government officials and community members.


These above-mentioned cases deal with the legitimacy of the appointment of a Traditional Chief of an Ovahimba group, where a division within the community exists between those supporting a relocation and loss of traditional territory due to a proposed hydroelectric dam (the Baynes Dam) and community members opposed to this. In short, the case was brought as a review to determine whether the Namibian Government consulted properly with the whole community when Kapika Snr was appointed as Chief. Kapika Jnr, challenged the procedure used by the government to appoint his older brother, Kapika Snr. The High Court found in favour of Kapika Jnr. However, in the Supreme Court, the appeal was upheld, and the review application was dismissed.

It should also be noted that while the recognition of Traditional Authorities of most San communities in Namibia has been completed...
by the government, the legitimacy of some San leaders and the processes of their nomination has been brought into question, as with a number of non-San Traditional Authorities in Namibia. In addition, the Traditional Authority of the Khwe San of Kavango East and Zambezi regions (which includes those inside Bwabwata National Park), has not been recognised by the government, despite the Khwe meeting all criteria for recognition. This is ostensibly for political reasons related to a politically powerful neighbouring non-San Traditional Authority who have declared their leadership over the Khwe, which the Khwe dispute, and possible other issues involving the sensitive land issues of the Bwabwata National Park.

That said, it should also be mentioned that while the Khwe have in the past elected traditional leaders who were not recognised by the government, they currently have no elected traditional leader, in part due to factionalism within the Khwe community.

3.7.4 Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others (SA 15/2017) [2018] NASC 409 (16 November 2018)

This is a recent case regarding the transfer of communal land by the government to Katima Mulilo Town Council, after it was previously allocated as a communal land right to the applicant’s late father before Namibia became independent in 1985. Agnes Kashela, the daughter of Mr Kashela and only heir, inherited the land under customary law when her father passed away after independence. The key question was whether Agnes’ customary land right was extinguished by the subsequently proclaimed town of Katima Mulilo. Agnes argued that her customary land right deserved the same protection as land rights held under freehold title. The High Court ruled in favour of Katima Mulilo Town Council, dismissing the claim with costs, but on appeal to the Supreme Court the applicant’s customary land right was upheld. It was held that Agnes’ customary land right endured despite the fact that the previously communal land had become held in trust by the state after Independence and was later transferred to the local authority. In doing so the Supreme Court confirmed that customary tenure rights should be protected under the Namibian Constitution, and though customary tenure rights might be different in nature from other types of land rights, not affording customary tenure rights under the Namibian Constitution would constitute discrimination against the large portion of the population living on communal land. The Kashela judgment sets an important precedence for customary land rights in Namibia, especially given the lack of an appropriate legislative and policy framework on ancestral land rights.

3.7.5 Jan Tsumib & 7 Others v The Government of the Republic of Namibia & 11 Others (A206/2015) NAHCMD (ongoing)

This case concerns the Hai||om community land claim to the Etosha National Park and the Mangetti farming area. The Hai||om was evicted in the 1950s from Etosha National Park, or Etosha Nature Reserve, as it was known then. The South African administration at the time, considered the Hai||om as a hindrance to the park authorities plans to develop Etosha as a tourist destination. In Mangetti, the people were not evicted, but the land around them was transferred to private and state ownership, leaving the community effectively without land or decent livelihoods on their own traditional territory. The key question in this matter is how an indigenous minority group, the Hai||om San in this case, can obtain compensation from the government for the loss of their lands under apartheid rule before Namibia became independent.

While the Nyae Nyae and N‡a Jaqna Conservancy cases set a useful precedent on paper, and the willingness of the higher courts to hear such cases should be recognised, in reality the process and rulings are hindered by the following factors:

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73 Boden, ibid.
74 Boden, ibid.
• Difficulties investigating and evidence gathering due to limited capacity and resources, remote and rough terrain, and at times limited or delayed cooperation by relevant local government ministry offices, the police, and local courts.
• A perceived lack of willingness to investigate or prosecute some land related offences, especially those concerning livestock practices, due to the possible financial, social, and political ramifications for: politically or financially powerful individuals; the wider community of a given local area; creating precedent affecting other areas of Namibia.
• A lack of willingness of relevant national and local authorities and institutions to implement court rulings and national law in remote areas, where conflict or opposition to such rulings or law are present.
• Court dates and appeal processes can be subject to lengthy delays and extensions, leading to slow access to possible remedies.

These issues are common to many community legal challenges. As such, while court rulings can have a positive and have an enduring impact on indigenous peoples and local community land rights, access to justice for such groups in Namibia is often limited.

3.8 Strategic Litigation Impact on Indigenous Peoples Rights

Litigation (or “going to court”) is the term used to describe proceedings initiated between two opposing parties to enforce or defend a legal right. In human rights, litigation is “strategic” when it is consciously designed to advance the clarification, respect, protection, and fulfilment of rights. The idea of strategic litigation is to change laws, policies, and practice, and to secure remedies or relief following violations. Strategic litigation is also often about raising public awareness of an injustice.\(^75\)

Strategic litigation, in other words, plays an important role in realising and keeping alive the fundamental human rights and freedoms protected in Chapter 3 of the Namibian Constitution. Unfortunately, despite the numerous socio-economics challenges in Namibia, the country does not have a strong culture of encouraging strategic litigation to bring about the necessary changes. As a public interest law firm, the LAC has taken on several strategic litigation cases over the years. However, litigation can be very expensive, making it unaffordable to most Namibians. In addition, the time that it takes to complete matters is long. Both these issues have become important factors in denying people their basic constitutional right to a “fair trial” as stipulated under Article 12 of the Namibian Constitution. Several efforts in the past to create a “pro bono” culture in the Namibian legal profession have failed. Pro bono in Latin means “for the public good” and in law it involves providing free legal services to those in need.

In terms of Chapter 11 of the Namibian Constitution that deals with “Principles of State Policy”, the Government has an obligation to actively promote and maintain the welfare of the people by adopting polices that strive to achieve the “enactment of legislation to ensure that the unemployed, the incapacitated, the indigent, and the disadvantaged are accorded such social benefits and amenities as are determined by Parliament to be just and affordable with due regard to the resources of the State” (Article 95(g)). In addition, the government should strive to establish “a legal system to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State” (Article 95(h)). In accordance with its Constitutional obligations, the government enacted the Legal Aid Act 29 of 1990 that provides for the granting of government supported legal aid in civil and criminal matters to persons whose means are inadequate to enable them to engage legal practitioners to assist and represent them. The legal aid process is managed by the Directorate of Legal Aid under the Ministry of Justice. The

process has faced several challenges over the years, including restricted access to legal aid, delays in applications for legal aid, and funding issues.

3.9 Community and Informal Access to Justice Mechanisms

Local issues related to crime in rural Namibia are often solved through compensation agreements between families.\(^76\) This may range from minor infractions to rape (the latter should be a matter for the police but is often in practice resolved between families). There may be reluctance to pursue matters through the police and courts due to:

- The time taken to investigate and prosecute cases;
- Trust and interaction with the police, and local political pressures;
- Hesitation at enforcing fines and prison sentences that may disadvantage families of offenders.

Traditional Authorities may act as mediators between parties. If necessary, they may also enforce penalties, although it is expected that they refer serious crimes to the police.\(^77\)

Complaints can be carried forward at a national level. Formed in 1990, the Office of the Ombudsman is Namibia’s National Human Rights Institution (NHRI) and has been active with issues concerning the rights of indigenous peoples and local communities, including relevant aspects of international law.

Also, the aim of the Community Courts Act 10 of 2003 is to bring the traditional court system into the mainstream of justice administration in Namibia. It provides for the recognition and establishment of community courts, and for giving these courts the power to enforce their decisions. Community courts function as lower courts and have the jurisdiction in rural communal areas to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognised by customary law where:

a. the cause of action of such matter or any element thereof arose within the area of jurisdiction of that community court; or
b. the person (or persons) to whom the matter relates believes that the community court is closely connected with the customary law.

The Act, given its relatively new status, has not been assessed properly to determine its effectiveness in adjudicating disputes at community level. Matters heard at Community Court level can be appealed to the Magistrate’s Court and High Court.

3.10 The Role of the Ombudsman

Chapter 10 (Articles 89 to 94) of the Constitution provides for the Ombudsman to report to the National Assembly on his/her activities in investigating any irregularity or violation of fundamental rights by an organ of state or a private institution. The Constitution further enables the Ombudsman to act through investigation and prosecution to remedy situations that contravene the law. The Ombudsman has the right to subpoena and question persons and refer matters to the courts. However, the budget and capacity of the office remains limited. Budgetary and capacity issues within the Ombudsman’s office clearly limit its investigatory powers into matters that involve indigenous peoples’ complaints and cases.


\(^77\) In terms of the provisions of the Community Courts Act 10 of 2003.
4.1 Primary Legal Instruments Enshrining the Rights of Indigenous Peoples in 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.

4.1.1 International Instruments

Universal Declaration of Human Rights (UDHR), 1948

- The UDHR was drafted by representatives from 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. It has therefore assumed the status of customary international and is therefore considered universally binding.
- 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.
- Some of the provisions of the Namibian Constitution are modelled on language in the UDHR.
The ICERD was written with the goal of eliminating racial discrimination in all its forms and promoting understanding between the races. The ICERD is legally binding and has been ratified by Namibia. 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. However, Namibia has not signed up for this option.

### Key Provisions

<table>
<thead>
<tr>
<th>Article 7</th>
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<tbody>
<tr>
<td>All are <strong>equal before the law</strong> 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>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Notes on Relevance to IPR</th>
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</thead>
<tbody>
<tr>
<td>Protections against discrimination can be used to guarantee equal treatment of indigenous peoples.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 17</th>
</tr>
</thead>
</table>
| (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. |

<table>
<thead>
<tr>
<th>Notes on Relevance to IPR</th>
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</thead>
<tbody>
<tr>
<td>Property rights are central to indigenous peoples securing collective ownership, control, use, management and development of their own land and resources.</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Article 18</th>
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<tbody>
<tr>
<td>Everyone has the <strong>right to freedom of thought, conscience and religion</strong>, 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>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Notes on Relevance to IPR</th>
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</thead>
<tbody>
<tr>
<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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<table>
<thead>
<tr>
<th>Article 27</th>
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<tbody>
<tr>
<td>(1) Everyone has the <strong>right freely to participate in the cultural life of the community</strong>, to enjoy the arts and to share in scientific advancement and its benefits.</td>
</tr>
</tbody>
</table>

### International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), 1966

- 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 has been ratified by Namibia.
- 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. However, Namibia has not signed up for this option.
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 and was ratified by Namibia on 28 November 1994.

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 affecting 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, Namibia has not ratified this.

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### 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 cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

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.

#### Article 15
(1) The States Parties to the present Covenant recognize the right of everyone: (a) to take part in cultural life.

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.

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### International Covenant on Civil and Political Rights (ICCPR), 1966

- The ICCPR is legally binding and was ratified by Namibia on 28 November 1994.
- Namibia also ratified the Optional Protocol to the International Covenant on Civil and Political Rights, 1966\(^78\) and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, 1989.
- 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 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

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\(^{78}\) The 1966 Optional Protocol establishes an individual complaints mechanism, allowing individuals to complain to the UN Human Rights Committee about violations of the Covenant.
even if they may not necessarily be a true ‘minority.’\textsuperscript{79}

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

<table>
<thead>
<tr>
<th>Key Provisions</th>
<th>Notes on Relevance to IPR</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 1</strong></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>
</tr>
<tr>
<td>Article 14</td>
<td>Protections against discrimination can be used to guarantee equal treatment of indigenous peoples in justice delivery systems.</td>
</tr>
<tr>
<td>Article 27</td>
<td>The Human Rights Committee has decided that indigenous peoples are covered by this article.\textsuperscript{80} 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>
</tr>
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**Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1979**

- The CEDAW is legally binding in Namibia since 23 December 1992. So is the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women, 1999
- The CEDAW was drafted to combat the 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 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.”

\textsuperscript{79} UN Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5, available online at <http://www.refworld.org/docid/453883fc0.html>, para 8.

### Key Provisions

| Article 1 | 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. | Generally, the rights and protections enshrined in the below listed articles can be used to shield indigenous women from gender-based inequality. |
| Article 3 | 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. | |
| Article 5 | 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 custom 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; | |
| Article 14 (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. | Many indigenous women dwell rurally and therefore are covered by this article. |
| Article 15 | States Parties shall accord to women equality with men before the law. | |

### 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.
- 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.
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. Namibia is among the states which have not ratified the treaty.

The CBD promotes cooperation towards conserving biological diversity and sustainable use of its components. The CBD is legally binding in Namibia. In addition to having ratified the CBD, Namibia also ratified Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 2000; and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010.

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

Namibia was among the 143 nations that signed up to UNDRIP on 13 September 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 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

- Namibia was among the 143 nations that signed up to UNDRIP on 13 September 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.
4.1.2 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 was ratified by Namibia in 1992. 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.

<table>
<thead>
<tr>
<th>Key Provisions</th>
<th>Notes on Relevance to IPR</th>
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<tbody>
<tr>
<td><strong>Article 3</strong></td>
<td>Entitlements to equality before the law can be used to protect indigenous peoples against discrimination.</td>
</tr>
<tr>
<td><strong>Article 8</strong></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>
</tr>
<tr>
<td><strong>Article 14</strong></td>
<td>Property rights are central to indigenous peoples securing collective ownership, control, use, management and development of their own land and resources.</td>
</tr>
<tr>
<td><strong>Article 17</strong></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>
</tr>
<tr>
<td><strong>Article 19</strong></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. Protections against discrimination can be used to guarantee equal treatment of indigenous peoples.</td>
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<tr>
<td>Key Provisions (continued)</td>
<td>Notes on Relevance to IPR</td>
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<tr>
<td><strong>Article 20</strong></td>
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<tr>
<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>
<td>This is connected to the right to self-determination and FPIC.</td>
</tr>
<tr>
<td><strong>Article 21</strong></td>
<td></td>
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<tr>
<td>(1) All peoples shall <strong>freely dispose of their wealth and natural resources</strong>. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.</td>
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<tr>
<td>(2) In case of spoliation, the dispossessed people shall have the <strong>right to the lawful recovery of its property as well as to an adequate compensation</strong>.</td>
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<tr>
<td>(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.</td>
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<tr>
<td><strong>Article 22</strong></td>
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<tr>
<td>(1) All peoples shall have the <strong>right to their economic, social and cultural development</strong> with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.</td>
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<tr>
<td><strong>Article 24</strong></td>
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<tr>
<td>All peoples shall have the <strong>right to a general satisfactory environment</strong> favourable to their development.</td>
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<tr>
<td><strong>Article 60</strong></td>
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<tr>
<td>The Commission shall draw inspiration from <strong>international law</strong> on human and peoples’ rights...</td>
<td>Articles 60 and 61 have been used as license for the ACHPR to consult IP rights-friendly conventions like UNDRIP as part of its jurisprudence, regardless of UNDRIP’s not being legally binding.</td>
</tr>
<tr>
<td><strong>Article 61</strong></td>
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<tr>
<td>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.</td>
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</table>


- The Charter is designed to emulate the CRC whilst also adding special provisions that reflect the particular situation faced by children in Africa.
- The Charter is a binding instrument and was ratified by Namibia on 23 July 2004.
- 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>
<th>Notes on Relevance to IPR</th>
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<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>
<td>Generally, the rights and protections enshrined in the listed articles can be used to defend the interests and rights of indigenous children.</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>
<td></td>
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<tr>
<td>Article 5</td>
<td>Every child has a right to live.</td>
<td></td>
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<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>
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<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>
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<tr>
<td>Article 9</td>
<td>Every child has the right to freedom of thought, conscience and religion.</td>
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<tr>
<td>Article 12</td>
<td>Children have a right to play and to participate fully in cultural and artistic life.</td>
<td></td>
</tr>
<tr>
<td>Article 18</td>
<td>Families are the natural unit and basis for society, and should enjoy special protection.</td>
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<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>
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</tbody>
</table>

### 4.1.3 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 do not create 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**, as mentioned under section 3.3 above, 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** 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.

Through the workings of Article 144 of the Namibian Constitution, Namibia has largely adopted a monist system, although in some cases it has given the impression that it occasionally follows a dualist system.

### 4.2 Key Case Law Governing Jurisprudence on Indigenous Peoples’ Rights in Southern Africa

#### 4.2.1 Cases within Southern Africa


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 found 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.
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.

4.2.2 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).
- facilitated these rights violations by “placing the legal and military powers of the State at the disposal of the oil companies” (3).
- “attacked, burned and destroyed several Ogoni villages and homes” (7) and “responded to protests with massive violence and executions of Ogoni leaders” (5).
- 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.

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• 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.

Endorois Case, African Commission on Human and People’s Rights, 25 Nov. 2009, 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 in the Endorois case is unique in its recognition of indigenous peoples’ collective rights over ancestral land in Africa, and represents 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”82

• 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 culture83

• 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.84 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

82 Para 173.
83 Para 251.
84 Para 268.
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.” The failure to secure FPIC and to provide adequate compensation and benefits violated the community’s right to development.

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


This is the first time the African Court, in operation since 2006, has 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.” 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.” 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.

85 Para 298.
86 Ibid.
87 Para 169.
88 Para 131.
• 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 to development.
• Definition of “Indigenous Population” The Court identifies four factors that help determine whether a group qualifies as indigenous—extended occupation of a specific territory, cultural distinctiveness, self-identifying as an indigenous group, and experiences of discrimination or oppression.

4.3 International and Regional Bodies 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 order remedies (monetary compensation, restitution of land, etc.). Aggrieved parties with complaints can often contact these bodies mentioned below for advisory opinions. The relevant bodies can then, in turn, raise the specific concern(s) with the complainant’s government in order to seek some action on the complaint or seek an answer on how they intend to solve the complaint.

4.3.1 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. The UNPFII has cooperated with United Nations Department of Economic and Social Affairs, the latter having technical support activities with a number of African States, including Namibia regarding indigenous peoples.

Key Tasks and relevance to protecting IP Rights:

• 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.

UN 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 IP Rights:

• Assisting and encouraging constitutional and legislative reform initiatives to harmonize laws with the protection of the rights of indigenous peoples.
• Encouraging 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.

89 For further reading, see for example https://ishr.ch/latest-updates/updated-simple-guide-un-treaty-bodies-guide-simple-sur-les-organes-de-traites-des-nations-unies/.
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 IP Rights:**

- 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.

### 4.3.2 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 on 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 IP Rights:** Given the above tasks, the ACHPR can hear cases involving violations of the rights of indigenous peoples’ as defined by the African Charter. However, any such case must first have been heard by the national courts of the country in question, which is called “exhausting of 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, as brought to the Tribunal through Member States.

**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.

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90 See [https://www.achpr.org/](https://www.achpr.org/).
91 [https://www.sadc.int/about-sadc/sadc-institutions/tribun/](https://www.sadc.int/about-sadc/sadc-institutions/tribun/).
and organizations concerned with the promotion and protection of the rights and welfare of the child;
- Interpreting the provisions of the Charter; and
- Investigating any complaints alleging violations of children’s rights.

Relevance to protecting IP Rights: The ACERWC is a potential forum for litigating in defense of the rights of indigenous children. However, as with the ACHPR, any such case must first have been heard by the national courts of the country in question, which is called “exhausting of 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.

Key Tasks:
- Interpreting and applying the African Charter in cases 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; and
- Enhancing the participation of the African People in the work of the Court.

Relevance to protecting IP Rights: Similar to the ACHPR, the African Court can adjudicate violations of the rights of indigenous peoples as defined by the African Charter. However, as with the ACHPR, any such case must first have been heard by the national courts of the country in question, which is called “exhausting of domestic remedies”, and only a few states (not including Namibia) have so far allowed individuals to lodge cases directly before the Court. The ACHPR has the power to refer a case to the African Court but this does not happen frequently.
The purpose of this guide is to give paralegals and community activists a general overview of the legal, policy and constitutional framework governing the rights of indigenous peoples in Namibia. It also provides a broad overview of the international human rights frameworks and redress mechanisms that can be used to protect and promote the rights of indigenous people. At a national level, the Manual refers to several organisations that could be of assistance to the work of paralegals and community activists working to promote the rights of indigenous peoples. For further assistance and reading, the following websites/institutions can be consulted:

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<td>Ombudsman’s Office</td>
<td></td>
<td>+264-61-207 3111</td>
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<td></td>
<td></td>
<td>+264-81-122 9633 (Mobile)</td>
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<td>Law Society of Namibia</td>
<td><a href="https://www.lawsocietynamibia.org">https://www.lawsocietynamibia.org</a></td>
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<td>Namibia Institute for Democracy (NID)</td>
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<td><a href="https://naturaljustice.org">https://naturaljustice.org</a></td>
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