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.

The American Bar Association Rule of Law Initiative and the American Bar Association Center for Human Rights would like to thank the Forest People’s Programme (United Kingdom) for taking the lead in the research and drafting of this manual.

The development of this manual is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of ABA ROLI, ABA CHR and ARISA and do not necessarily reflect the views of USAID or the United States Government.

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

All photos are modified and credited accordingly to a CC BY-NC-ND 2.0 license.

Copyright © 2022 by the American Bar Association and the Advancing Rights in Southern Africa (ARISA). All rights reserved.
1050 Connecticut Ave. N.W., Suite 450, Washington, D.C. 20036
# TABLE OF CONTENTS

**LIST OF ABBREVIATIONS** .................................................................................................................. 1

**1. INTRODUCTION** ........................................................................................................................... 2
  1.1 Purpose of the Resource Manual .................................................................................................. 2
  1.2 History of Indigenous Peoples in Southern Africa ........................................................................ 2
  1.3 Indigenous Peoples and Colonialism ............................................................................................ 3
  1.4 Indigenous Peoples in Post-Apartheid South Africa ................................................................. 3

**2. THE ROLE OF PARALEGALS IN ADVANCING INDIGENOUS PEOPLE’S RIGHTS** ................... 5
  2.1 Overview of the Role of Paralegals ............................................................................................... 5
  2.2 Best Practices for Paralegals in South Africa .............................................................................. 5
    2.2.1 Attitude .................................................................................................................................. 5
    2.2.2 Interviewing and Communication Skills ............................................................................... 5
    2.2.3 Case-Recording Skills ........................................................................................................... 5
    2.2.4 Referrals Procedure ............................................................................................................... 5
    2.2.5 Follow-Up ............................................................................................................................... 6
    2.2.6 Closing Cases ......................................................................................................................... 6
    2.2.7 Referring Cases to Court ....................................................................................................... 6
  2.3 Ethics for Paralegals ....................................................................................................................... 6

**3. INDIGENOUS PEOPLE AND THE LAW IN SOUTH AFRICA** ......................................................... 7
  3.1 Overview of the South African Legal System .............................................................................. 7
  3.2 Overview of Human Rights in South Africa ............................................................................... 8
    3.2.1 Equality - Article 9 ................................................................................................................ 8
    3.2.2 Human Dignity - Article 10 .................................................................................................. 8
    3.2.3 Freedom of Expression - Article 16 ..................................................................................... 8
  3.3 Constitutional Protections for Indigenous Peoples ....................................................................... 8
  3.4 Legal Protections for Indigenous Peoples .................................................................................... 8
  3.5 National Policy on Indigenous Peoples ....................................................................................... 9
  3.6 Overview of Law and Administration of Justice in South Africa .............................................. 9
    3.6.1 The Constitutional Court ...................................................................................................... 9
    3.6.2 The Supreme Court of Appeal .............................................................................................. 9
    3.6.3 The High Court of South Africa ............................................................................................. 9
    3.6.4 Magistrates’ Courts ............................................................................................................... 9
3.7 The Role of Customary Law and Customary Courts in Protecting the Rights of Indigenous Peoples ................................................................. 9
3.8 Community and Informal Access to Justice Mechanisms .................................................. 9
3.9 The Role of the South African Human Rights Commission (SAHRC) ................................ 10

4. KEY HUMAN RIGHTS ISSUE OF CONCERN TO INDIGENOUS PEOPLES IN SOUTH AFRICA .............. 11
4.1 Access to Land and Natural Resources ................................................................................. 11
4.2 Participation in Decision-Making (Free, Prior and Informed Consent in Large-Scale Land Developments) ........................................................................ 12
4.3 Language and Cultural Rights ................................................................................................ 13
4.4 Access to Health, Education, Government Services ............................................................... 13
4.5 Access to Justice .................................................................................................................... 13
4.6 Access to Information ............................................................................................................. 14
4.7 Protest Rights ......................................................................................................................... 14
4.8 Participation in Governance of their Countries ...................................................................... 14
4.9 Access to Identity Documents and the Right to a Nationality ................................................. 15
4.10 Gender-based Violence ........................................................................................................ 15

5. INTERNATIONAL FRAMEWORKS AND JUSTICE MECHANISMS FOR INDIGENOUS PEOPLES’ RIGHTS .............................................................. 16
5.1 The Primary Legal Instruments Enshrining the Rights of Indigenous Peoples in the Context of Southern Africa .............................................................. 16
5.1.1 International Instruments .................................................................................................. 16
Universal Declaration of Human Rights (UDHR), 1948 .............................................................. 16
International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), 1966 ........................................................................ 17
International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 ...................... 18
International Covenant on Civil and Political Rights (ICCPR), 1966 ........................................ 18
Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1979 .......................................................................... 19
Convention on the Rights of the Child (UNCRC), 1989 ............................................................ 20
Indigenous and Tribal Peoples Convention, No. 169 (ILO 169), 1989 ....................................... 21
Convention on Biological Diversity (CBD), 1992 ...................................................................... 21
United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007 ....................... 22
5.1.2 Regional Instruments ......................................................................................................... 23
5.1.3 Applicability to National Contexts ..................................................................................... 25
5.2 Key Case Law Governing Jurisprudence on Indigenous Peoples’ Rights

5.2.1 Cases in South Africa and Neighboring States


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

5.2.2 Important Cases from the Entire African Region


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


5.3 International and Regional Bodies that can Protect Indigenous Peoples’ Rights

5.3.1 International Fora

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

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

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

5.3.2 Regional Fora

African Commission on Human & Peoples’ Rights (ACHPR), 1987 to present
African Committee of Experts on Rights and Welfare of the Child (ACERWC), 2001 to present
African Court for Human and Peoples’ Rights (African Court), 2004 to present
Southern Africa Development Community Tribunal (SADC Tribunal), 2005 to 2012

6. CONCLUSION
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACERWC</td>
<td>African Committee of Experts on Rights and Welfare of the Child</td>
</tr>
<tr>
<td>ACHPR</td>
<td>African Commission on Human &amp; Peoples’ Rights</td>
</tr>
<tr>
<td>ANC</td>
<td>African National Congress</td>
</tr>
<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Committee on the Elimination of Discrimination Against Women</td>
</tr>
<tr>
<td>CERD</td>
<td>Committee on the Elimination of Racial Discrimination</td>
</tr>
<tr>
<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>CRC</td>
<td>Committee on the Rights of the Child</td>
</tr>
<tr>
<td>ECOSOC</td>
<td>Economic and Social Council</td>
</tr>
<tr>
<td>FPIC</td>
<td>Free, Prior and Informed Consent</td>
</tr>
<tr>
<td>FPK</td>
<td>First People of Kalahari</td>
</tr>
<tr>
<td>GBV</td>
<td>Gender-Based Violence</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICERD</td>
<td>International Convention on the Elimination of all Forms of Racial Discrimination</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>IPR</td>
<td>Indigenous Peoples’ Rights</td>
</tr>
<tr>
<td>NHRI</td>
<td>National Human Rights Institution</td>
</tr>
<tr>
<td>PAIA</td>
<td>Promotion of Access to Information Act</td>
</tr>
<tr>
<td>SAHRC</td>
<td>South African Human Rights Commission</td>
</tr>
<tr>
<td>SWAPO</td>
<td>South West African Peoples Organisation</td>
</tr>
<tr>
<td>TIP</td>
<td>Trafficking in Persons</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UNCRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>UNDRIP</td>
<td>United Nations Declaration on the Rights of Indigenous Peoples</td>
</tr>
<tr>
<td>UNPFII</td>
<td>United Nations Permanent Forum on Indigenous Issues</td>
</tr>
</tbody>
</table>
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 South Africa a basic overview of the situation that indigenous peoples in South Africa face with regards to the protection of their rights. It provides information on available constitutional, policy and legislative protections in South Africa as well as frameworks and mechanisms that can be used at the international level to protect the rights of indigenous peoples.

1.2 History of Indigenous Peoples in Southern Africa

The anthropologist Dr. James Suzman has said “[i]f the success of a civilization is measured by its endurance over time, then the Bushmen of the Kalahari are by far the most successful. A hunting and gathering people who... have lived in southern Africa since the evolution of our species nearly two hundred thousand years ago.”¹ Their continuous presence in southern Africa is well documented and is testified through archeological, anthropological, linguistic and cultural evidence.

The term ‘San’ is today used as an umbrella term for southern Africa’s indigenous hunter gatherers, all of whom speak distinct but connected languages characterized by the use of clicks, and consisting of the !Xun, Khwe and Khomani San.²

As hunter gatherers, the San inhabited and roamed around almost all of what is today the Republic of South Africa for tens of thousands of years before the arrival of either Khoi herders, some two thousand years ago, or of Bantu speaking pastoralists in the region.³ The date of the latter’s migration into southern Africa is subject to dispute but they were certainly present in modern South Africa as early as the establishment of Mapungubwe in the 11th Century.⁴

As such, the San can rightly be called the First Peoples of Southern Africa. It is unclear how many San groups inhabited Southern Africa, but genomic sequencing studies suggest that Khoisan hunter gatherers were the largest population in the region throughout most of modern history. The situation today has been drastically reversed, and the surviving San population is approximately 1,000 Khomani San, 1,100 Khwe San and 4,500 !Xun San concentrated largely in the Northern Cape province and the Kalahari.⁵

The various Khoi peoples of South Africa—the Nama, the Gricqua, the Cape Khoi and the Koranna—also claim indigenous status in South Africa. They are estimated to number some 300 000–400 000 individuals.⁶ Collectively, the San and the Khoi are often

---

¹ Suzman, Affluence without Abundance. 2017 (Bloomsbury).
⁶ Ibid. p.7.
referred to in academic and popular literature as the Khoisan.

1.3 Indigenous Peoples and Colonialism

The arrival of European colonists in Southern Africa proved to be devastating for the Khoi and San peoples of Southern Africa. A combination of displacement, dispossession, primarily as a result of land grabs, slavery, genocide and diseases imported from Europe against which they had no immunity or resistance wiped up to 80% of the Khoi and San population of South Africa or otherwise relegated them to the marginalized and impoverished status that they hold to this day. The earlier arrival of the Khoi, Nguni and Sotho nations had already placed great stress on San social formations, but they generally found ways to co-exist in relative harmony with each other in relationships that were sometimes beneficial and sometimes less so. Nonetheless it wasn’t until the arrival of Dutch settlers in 1652, that the indigenous people of Southern Africa were faced with the catastrophes the effects of which they still feel to the present day.

By the time that the National Party inaugurated the policy of Apartheid, officially, in 1948, Khoi and San traditional society had been largely destroyed. A series of racially motivated laws had relegated them and their descendants to the status of 2nd class citizens, dispossessed them of most of their territories and annihilated their cultures by depriving them of their ancestral lands and forbidding their expressions of culture, such as speaking their mother tongues. Apartheid policies went further by classifying the majority of San and Khoi descendants as ‘Coloureds’, thereby attempting to permanently erase their cultural identity.

During the 1970s and 1980s, many San were incorporated into the South African Army as trackers, drivers and foot soldiers in the wars against the South West Africa People’s Organisation (SWAPO) and the African National Congress (ANC) in South West Africa (Namibia) and Angola respectively. When Namibia attained its independence in 1990, and fearing possible reprisals - as had happened in Angola - from the former liberation movements, now governments in the newly independent country, many San took up an offer from the South African Defence Force to repatriate to South Africa, where many of them now endure a precarious existence in Platfontein and Schmidtsdrift, in the Northern Cape.

1.4 Indigenous Peoples in Post-Apartheid South Africa

In 1996, the newly elected, democratic government led by President Nelson Mandela, inaugurated a new Constitutional era based on equality, non-discrimination and human rights and respect for the dignity of all its citizens. Indigenous South Africans had hoped that this would usher in a new dawn for their communities who had suffered every form of abuse imaginable during the colonial and Apartheid eras. In the early years of the post-Apartheid era, there were signs that these hopes might indeed be realized. The government of President Mandela mandated the establishment of the National Khoisan Council as a national representative body for the San, Nama, Cape Khoekhoe, Koranna and Gricqua communities, and a number of successful land claims were processed. The most notable of these was the Khomani San land claim in 1999 in which eight farms were handed over to the community.

---

15 Ibid.
A decade after the dawn of democracy, however, the South African Human Rights Commission issued a report based on hearings held with the Khomani San community in which it noted that the community continued to live in abject poverty, without adequate access to water, sanitation, employment, medical care and education.\textsuperscript{16} A report by the UN Special Rapporteur on the Rights of Indigenous Peoples in South Africa similarly concluded that the lives of indigenous South Africans had not been improved much in post-Apartheid South Africa.\textsuperscript{17} Amongst the challenges they still face are the unresolved questions of land redistribution and the recognition of their languages, cultural traditions and intractable, extreme poverty.

\textsuperscript{16} Ibid.
2. OVERVIEW OF THE ROLE OF PARALEGALS

2.1 Overview of the Role of Paralegals

Paralegals fill the vacuum left by a justice system which is often alienating, inaccessible and hostile to the poor and vulnerable. This is particularly true for indigenous peoples, who remain amongst the poorest and the most marginalized communities in South Africa. As such, they play many roles. They are educators, community activists, human rights monitors, community liaisons with government departments and bureaucracies, and, of course, providers of legal advice and information. Paralegals do not enjoy regulatory recognition within the South African legal system, although their use is not prohibited.\(^1\)

2.2 Best Practices for Paralegals in South Africa

These best practices,\(^2\) adapted from Black Sash,\(^3\) apply generally to all paralegal work in the country.

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.

---


\(^3\) Black Sash is one of South Africa’s oldest human rights organisations, having been founded in 1955 as an anti-apartheid pressure group. Black Sash paralegal manuals are widely used by NGOs providing paralegal services, including the largest provider of such services in South Africa, Legal Aid South Africa, whose nation-wide network of paralegals are trained in the use of the Black Sash Manual. (Dugard and Drage, World Bank Justice and Development Working Papers series 21/2013).
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.

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. Paralegals have their code of ethics too. 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.²¹

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.²²

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.

---

²² https://paralegalassociation-sa.co.za/code-of-conduct/.
3.1 Overview of the South African Legal System

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

The South Africa Constitution is the Supreme Law of the country and all laws that are passed must be in line with the Constitution to be valid.\(^\text{23}\)

International law, in general, only becomes binding once the South African Government has signed or ratified a treaty, and has passed legislation giving effect to the provisions of the treaty.\(^\text{24}\) This means it must be approved by the National Assembly and the National Council of Provinces. South Africa is therefore called a dualist state in international treaty law.

Statutes are laws that have been passed by Parliament, or which are still in force because Parliament has not scrapped them. 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.

Common law is the law developed over time through the decisions of judges in individual court cases. Common law in South Africa is called “Roman-Dutch law” because it comes from ancient Roman and Dutch times, which was brought to South Africa along with colonialism. Common law can be found in written form in reported court cases and in textbooks on law.

Case Law is the law as it is interpreted and developed by South Africa’s High Courts, Supreme Court of Appeal and the Constitutional Court. South African law operates on the basis of stare decisis which means that the decisions of the Judges of the High Courts, Supreme Court of Appeal and the Constitutional Court create precedent which, in most cases, will be followed by the lower courts. This provides certainty and uniformity in court decisions and the interpretation of the law.

Customary law is normally unwritten law that has developed over the years in different communities in South Africa. Traditional courts, chiefs, headmen or other traditional leaders usually decide questions involving customary law.

Neither International law, Common law nor Customary law may override the provisions of the South African Constitution.

---


3.2 Overview of Human Rights in South Africa

Following the first democratic elections in 1994, which ushered in the post-Apartheid era, South Africa adopted a constitution in 1996 which enshrined the rights of all South Africans in a Bill of Rights. The Bill of Rights is based on respect for human rights, equality, dignity and freedom, and must be respected by all organs of state, and in some cases also private individuals and institutions. These rights belong to all South African citizens, including indigenous people.

The South African Constitution is modelled strongly on the Western liberal democratic model, with strong protections for individual liberties, property rights, and civil and political rights. It however also has a strong strain of progressivism in its explicit inclusion in the Bill of Rights, of Economic, Social and Cultural Rights such as the right to an environment, that is not detrimental to one’s health or well-being, housing, healthcare, education, water and sanitation, and demanding of the State that it must make every effort to ensure that these rights are realized.

These are examples of Rights guaranteed in the Bill of Rights:

3.2.1 Equality – Article 9

Everyone is equal before the law and has the right to equal protection and benefit of the law.

The state, or any person, may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

3.2.2 Human Dignity – Article 10

Everyone has inherent dignity and the right to have their dignity respected and protected.

3.2.3 Freedom of Expression – Article 16

Everyone has the right to freedom of expression, which includes freedom of the press and other media.

3.3 Constitutional Protections for Indigenous Peoples

As previously stated, all the rights in the Bill of Rights apply equally to indigenous people. In this section, we will highlight those rights which are of particular importance to indigenous peoples.

Widely hailed as one of the most progressive constitutions in the world, the South African Constitution nevertheless has several shortcomings with regards to the recognition and protection of South Africa’s indigenous Khoi and San communities.

The term ‘indigenous’ is deployed in the Constitution, in Article 6 and Article 26, to refer to the majority African population, as distinct from other population groups (White, Coloured and Indian). During the Apartheid era, the Khoi and the San were classified as ‘Coloured’, and the term ‘indigenous’ in this sense is thus not deemed to be applicable to them. South Africa, therefore, does not use the term ‘indigenous’ in the sense that it is understood in the international law context. Moreover, the use of the term ‘Coloured’ is viewed by most people who identify themselves as either Khoi or San as derogatory and oppressive. Not least because it represents a continuation of the erasure of their identity.

3.4 Legal Protections for Indigenous Peoples

South Africa has no specific legal protections for indigenous peoples. This stems, in part, from the state’s failure to recognize indigenous peoples as a category of people with distinct cultural identities and requiring specific, targeted interventions to address their particular history and contemporary state of marginalization.

---

25 Chapter 2 of the Constitution.
27 ‘Coloured race classification challenged - call to have ‘confusing’ term removed’ Cape Times (22 February 2022).
3.5 National Policy on Indigenous Peoples

Until the recent passage of the Traditional and Khoisan Leadership Act, Khoi and San traditional communities have been largely excluded from the legal arrangements pertaining to other traditional communities. This means that they do not, in general, have access to customary courts or other customary legal systems.

3.6 Overview of Law and Administration of Justice in South Africa

Section 33 of the Constitution provides for a right to “Just administrative action”, which means that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

The South Africa court system, known as the judiciary, consists of the following courts.

3.6.1 The Constitutional Court

This is often referred to as the ‘apex court’ as it is the highest court in the country, and has the responsibility primarily of hearing all matters related to Constitutional disputes. It also serves as a court of last appeal.

3.6.2 The Supreme Court of Appeal

This court hears appeals coming from the High Court of South Africa.

3.6.3 The High Court of South Africa

Referred to as the High Courts of South Africa, each of South Africa’s 9 Provinces has its own High Court.

3.6.4 Magistrates’ Courts

The Magistrates’ Courts are courts which exist at a municipal level, and there will usually be one in each town, or in some cases a Magistrates court will cover a number of small towns in the same district.

There are also ‘Special Courts’, such as the Small Claims Court, the Labour Court, and Military Courts which deal with specific matters.

3.7 The Role of Customary Law and Customary Courts in Protecting the Rights of Indigenous Peoples

In broad terms, Indigenous and Customary Law, including traditional leadership, fall under both provincial and national government. At the national level, these fall under the Department of Cooperative Governance and Traditional Affairs, the Department of Rural Development and Land Reform, the Commission on the Restitution of Land Rights, and the Land Claims Court.

At provincial level, the majority of provinces have departments of Rural Affairs, and, separately, Rural Development.

South Africa’s various Traditional Houses, Traditional Councils and Traditional Leaders themselves fall under the Department of Traditional Affairs. These designations did not apply to San and Khoi Communities until 2019, with the passage of the Traditional and Khoi-San Leadership Act. The Traditional and Khoi-San Leadership Act provided for the recognition of Khoi-San communities and their leadership positions. The Act also established Khoi-San councils. In general, it brought the “Khoi-San” traditional houses in line with the recognition and rights already granted to other traditional ethnic groups.

It should be noted that the Traditional and Khoi-San Leadership Act is highly controversial in South Africa, and has been opposed by a number of civil society organisations and local communities who have said that the Act entrenches feudal and undemocratic systems. Nonetheless, it has been welcomed in some quarters as an important step towards the recognition of Khoi and San traditional communities.

3.8 Community and Informal Access to Justice Mechanisms

South Africa’s various Traditional Houses, Traditional Councils and Traditional Leaders themselves fall under the Department of Traditional Affairs. Until 2019, with the passage of the Traditional and Khoi-San Leadership Act, these designations did not apply to San and Khoi Communities. The Traditional and Khoi-San Leadership Act provides for the recognition of traditional and Khoi-San communities, leadership
positions, to establish Khoi-San councils, and in general to bring the “Khoi-San” traditional houses in line with what is already provided for in relation to other traditional ethnic groups.

Until the recent passage of the Traditional and Khoi-San Leadership Act, Khoi and San traditional communities have been largely excluded from the legal arrangements pertaining to other traditional communities. This meant that they did not, in general, have access to customary courts or other customary legal systems. These are courts that are administered by local Traditional Authorities such as Chiefs or Headmen (these have different names depending on the traditions of the community concerned).

The Traditional and Khoi-San Leadership Act is of historic significance, as it, for the first time, recognizes the traditional leadership structures of Khoi and San communities and places these on par with existing traditional leadership structures. The Act provides for mechanisms and criteria whereby Khoi and San leadership structures will be recognized. In general, these criteria are as follows:

- A proven history of the existence of such leadership position within the community concerned;
- A proven history of acceptance of such leadership position by the community concerned;
- A history of functions and powers of the specific leadership position in terms of the established customary law and customs within the particular community;
- The recognition of the community in terms of the Act; and
- A proven history of either-
  - hereditary leadership in terms of customary law or customs of the community, with or without a customary role for community participation in the determination or confirmation of the individual as leader; or
  - elected leadership where, in terms of the customary law or customs of the community concerned, the leader is elected.\(^{29}\)

### 3.9 The Role of the South African Human Rights Commission (SAHRC)

The Commission is an independent National Human Rights Institution (NHRI) established in terms of Chapter 9 of the Constitution to support constitutional democracy. Their role is to:

- a. Promote respect for human rights and a culture of human rights;
- b. Promote the protection, development and attainment of human rights; and

They play a fundamental role in promoting the implementation of these obligations within a state, and therefore, form the cornerstone of national human rights protection systems.

They can investigate and report on the observance of human rights in the country as well as carry out research and educate citizens on human rights related matters.


\(^{29}\) Ibid.
4. KEY HUMAN RIGHTS ISSUE OF CONCERN TO INDIGENOUS PEOPLES IN SOUTH AFRICA

4.1 Access to Land and Natural Resources

The arrival of the first Dutch settlers at the Cape of Good Hope (modern Cape Town) in 1652, was the start of a continuous process of dispossession of land for South Africa’s indigenous peoples, the Khoi and the San. This was a process that continued from centuries earlier when the Bantu pastoralists who migrated into the region from the third century onwards took away land from the Khoi and the San.

By 1994, when South Africa emerged from 350 years of colonialism and Apartheid, the Nama and San people constituted a tiny minority of South Africa’s population and collectively or individually owned or controlled virtually no land. Their ability to exist as a people, dependent on having a land base and being able to exercise their traditional means of producing a livelihood, and practicing their culture, from hunting and gathering or small scale pastoralism, had been virtually wiped out. In addition, almost all San and Khoi people had been designated as ‘coloured’ by the Native Registration Act of 1950. With the stroke of a bureaucratic pen, the San and Khoi were denied their rich histories and identities. This has had a profound effect on their rights to land, natural resources and their cultural heritage.

Section 25(7) of the Constitution of South Africa provides for restitution of land rights to persons or communities who were dispossessed of property after 19 June 1913 as a result of past racially-discriminatory laws or practices. This was the date on which the Apartheid government passed the Native Lands Act, dispossessing South Africa’s black African majority of eighty percent of their communal lands. The Restitution of Land Rights Act of 1994 established the Commission on Restitution of Land Rights, which was mandated to deal with all past disposessions of land due to racially discriminatory laws. However, this scheme excludes the Khoi and the San because these communities experienced dispossession long before the date specified in the Constitution.

The effect of this has been that the Khoi-San communities, dispossessed of their land by settlers and the colonial administration long before the 1913 cut-off date, were deprived of most, if not all, means of reclaiming their ancestral lands and resources.

Nonetheless, Khoi and San communities have managed to achieve some success in reclaiming their lost territories. The most notable of these has been the Nama community of the Richtersveld, the !Xun and Khwe San communities who were displaced.

31 Ibid. p.11.
32 Act No. 30 of 1950.
from Schmidtsdrift and Khomani San Community in the southern Kalahari.

More recently San and Khoi communities have begun exploiting developments in international law to reclaim their rights to their Traditional Knowledge and Genetic Resources. The most prominent example of this has been the utilization of the provisions of the Nagoya Protocol of the Convention on Bio-Diversity by Khoi and San communities, to negotiate an Access and Benefit Sharing agreement in respect of the Rooibos plant which is the basis of a tea industry worth millions of dollars.33

The Rooibos Case

Following nine years of negotiations, the world’s first industry-wide benefit-sharing agreement was launched in South Africa between the Khoi and San, and the South African rooibos industry.

The agreement recognises the Khoikhoi and San peoples as the traditional knowledge holders to the uses of Rooibos, an indigenous plant species found only in the Cederberg region of South Africa. The agreement is the basis from which the Khoikhoi and San communities of South Africa will have access to benefits as a percentage contribution from the commercialisation of Rooibos by the South African rooibos industry.

After a thorough process of negotiations, an agreement was finally concluded on 25 May 2019. The negotiations of Access and Benefit-sharing (ABS) agreements originate from the Nagoya Protocol, an international supplementary agreement to the UN Convention on Biological Diversity (CBD). Set out in Article 1, one of the fundamental objectives of ABS is the fair and equitable sharing of the benefits arising out of the utilisation of indigenous biological resources.

In South Africa, the National Environmental Management: Biodiversity Act 10 of 2004 and the Bioprospecting, Access and Benefit Sharing Regulation of 2008 were enacted in order to provide a regulatory framework for ABS. The South African legislative framework goes beyond Nagoya Protocol’s standard of regulating “genetic components” of resources to regulating the utilisation of the whole of the indigenous biological resource.34

In general, however, it is nonetheless true to say that South Africa’s legal dispensation has yet to reckon, in any meaningful way, with the “Land Question” as it pertains to South Africa’s indigenous peoples

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

Free, Prior, and Informed Consent is the principle enshrined in the UN Declaration on the Rights of Indigenous Peoples requiring that indigenous peoples are not only consulted about decisions that will affect their lands and territories, but that they must also give consent for such projects to go ahead on terms freely agreed to, in accordance with their cultural norms and protocols.35

South Africa is a signatory to UNDRIP, and as such has affirmed its support for this principle. Notwithstanding this affirmation, however, the South African government continues to violate the principle of FPIC in its dealings with local and indigenous communities who have voiced their opposition to large scale ‘development’ projects which threaten their territories, livelihoods, and the environments that sustain their cultural and spiritual lives. In Baleni and Others v Minister of Mineral Resources and Others36, the North Gauteng High Court affirmed that the principle of FPIC forms part of South African law. In Baleni, the Court handed down a landmark judgment confirming that communities have a constitutionally-protected right to access information about mining projects that affect them.

34 https://naturaljustice.org/the-rooibos-access-and-benefit-sharing-agreement/.
35 See Articles 10, 28, 29 and 32 of the UN Declaration on the Rights of Indigenous People.
36 Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP).
4.3 Language and Cultural Rights

According to the Bill of Rights of the Constitution, everyone has the right to use the language and to participate in the cultural life of their choice.

In addition, everyone has the right to enjoy their culture, practice their religion and use their language.

Note too that Article 6(5) of the Constitution provides for the establishment of “A Pan South African Language Board established by national legislation [that] must [5(a)] promote, and create conditions for, the development and use of... [(ii)] the Khoi, Nama and San languages.”

Of the 11 (eleven) official languages recognised by South Africa, however, none are the languages spoken by the indigenous Khoi or San communities. This means that San and Khoi children are not taught their languages as a mother-tongue in school, nor is it offered as a language of instruction at any level in the South African educational system.

4.4 Access to Health, Education, Government Services

The South African Constitution, in the Bill of Rights, guarantees to all South Africans the rights to food, water, health care, education, housing and a safe and clean environment. In practise, however, these rights are not readily available to the country’s indigenous communities, and in most cases are completely inaccessible to them.

In 2004 and again in 2016, the South African Human Rights Commission held hearings on the human rights situation of indigenous peoples in South Africa. At these hearings, indigenous community members from all across South Africa reported that they faced widespread, systematic discrimination at the hands of service providers in health care and educational settings. At schools, their children are often bullied by teachers and fellow pupils by reason of their material deprivation and poverty, their physical appearance, their language and for simply being or identifying as San. Schools, in most cases, are situated far from the homes of the children, thus forcing San children to live in school hostels, where these problems are exacerbated, leading to high dropout rates and high levels of illiteracy.

The same is true of health care settings which are mostly situated far from San settlements, and which receive little or no service from ambulances. Even when they are able to access health care facilities, anything but the most basic services and medication is mostly out of the financial means of most San people. San people also report high, frequent and systemic levels of discrimination at the hands of Health care providers.39

As a result, HIV, Tuberculosis, maternal and infant mortality, alcoholism, fetal alcohol syndrome and gender based violence and serious injuries occur with high frequency in San communities.40

4.5 Access to Justice

The South African justice system is too expensive to easily access for all but the wealthiest of South Africans. In this regard, at least, indigenous South Africans share a level of inequality with nearly all of their fellow South Africans, of whom the majority are mainly poor and black. The UN Special Rapporteur on the Rights of Indigenous Peoples reported that, while many San reported that generally they did not feel discriminated against in the administration of justice in the courts, they nevertheless experienced a sense of cultural insensitivity on the part of prosecutors, magistrates and other

---

court personnel.\textsuperscript{41} The report further notes that the relationship between the police and San communities, in particular, is a distorted and disturbing one, in which the police, almost exclusively and invariably drawn from non-San communities, are often violent and arbitrarily cruel in their interactions with the community.\textsuperscript{42} The Khomani San reported to the SR that they felt unjustly persecuted by the laws governing hunting, which is not only an intrinsic part of their culture, but is also something that they resort to in times of scarcity and hunger.

4.6 Access to Information

Access to Information is governed by the Promotion of Access to Information Act 2 of 200 (PAIA) allowing access to any information held by the State, and any information held by private bodies that is required for the exercise and protection of any rights. The Act is enforced by the South African Human Rights Commission.

Section 32(1)(a) of the Constitution of the Republic of South Africa, 1996, determines that everyone has a right of access to any information held by the State, while Section 32(2) of the Constitution provides for the enactment of national legislation to give effect to this fundamental right. PAIA is the national legislation contemplated in section 32(2) of the Constitution.

Section 9 of PAIA recognises that the right of access to information is subject to certain justifiable limitations aimed at, amongst others:

a. the reasonable protection of privacy;  
b. commercial confidentiality; and  
c. effective, efficient and good governance.

While PAIA was not written with indigenous people specifically in mind, it can nevertheless be of value to indigenous communities in providing them with an inexpensive means of ensuring accountability and buttressing their demands for effective governance from private and public bodies with whom they interact. This can be seen from the objectives of PAIA, as set out by the SAHRC as follows:

- To promote transparency, accountability and effective governance of all public and private bodies.  
- To assist members of the public to effectively scrutinize and participate in decision making by public bodies.  
- To ensure that the state promotes a human rights culture and social justice.  
- To encourage openness.  
- To establish voluntary and mandatory mechanisms or procedures which give effect to the right of access to information in a speedy, inexpensive and effortless manner.\textsuperscript{43}

4.7 Protest Rights

The Bill of Rights guarantees the rights of all South Africans to free and peaceful assembly, as well the right to free expression, or freedom of speech. This includes the right to protest. A culture of violent police responses to protests in South Africa is, however, far too common, which has a chilling effect on these rights.\textsuperscript{44} While there have been few protests by San communities, the nascent Khoi-San revivalist movement has shown a great willingness to use protest as a form of communicating their demands. In recent years we have seen a number of such protests, although these have tended to garner media attention much more than they appear to have had any discernable effect on public policy.\textsuperscript{45}

4.8 Participation in Governance of their Countries

The Khoi and San are numerically and financially disadvantaged to such an extent that they have almost no notable political presence or

\textsuperscript{42} Id.  
\textsuperscript{45} Mothusi Mokalane, 'Khoisan group protest at Union Buildings' available at: https://pdbby.co.za/khoisan-group-protest-at-union-buildings/ (last accessed 22 February 2022).
representation in South Africa. Unlike Namibia, which has a San Deputy Minister\(^{46}\), and a growing number of other African countries, some of which, like Burundi, guarantee a parliamentary seat for an indigenous representative\(^{47}\), there is no indigenous representation as such, in almost any branch of government, including the most local levels. There are a number of self-identified Khoisan political parties, but to date they have yet to make any significant inroads into the political sphere.\(^{48}\)

4.9 Access to Identity Documents and the Right to a Nationality

In South Africa, an identity document is the most important legal form of identity when dealing with public and private institutions. It is required for the simplest and for the most important transactions, from opening a credit account at a commercial retailer, to being a requirement for access to housing, education and healthcare services.

Identity documents are issued to South African citizens or permanent residence permit holders who are 16 years or older. They are issued through the offices of the Department of Home Affairs, which has a large network of offices throughout the country. However, there are a few South Africans, including indigenous South Africans, who do not have an identity document.

The South African Constitution provides for Citizenship, or a right to nationality. This is in Section 3 of the founding provisions of the Constitution, which provides for a common South African citizenship, equality of privileges, benefits, and responsibilities. It is also provided for in the Bill of Rights, although this section provides merely that “no South African may be deprived of citizenship”.

4.10 Gender-based Violence

South Africa has notoriously high rates of Gender-Based Violence (GBV) and femicide.\(^{49}\) Since 1994, a raft of legislative instruments have been put in place to try and stem the tide of GBV.

Legislative provisions that specifically address violence and abuse against women and children include The Domestic Violence Act, the Criminal Law Amendment (Sexual Offences and Related Matters) Act and the Protection from Harassment Act.

The Children’s Amendment Act which replaced the Children’s Act of 2005 was enacted to, among other things, protect children from maltreatment, neglect, abuse or degradation.

In addition, South Africa is signatory to the Convention on the Elimination of All Forms of Discrimination against Women, Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, the SADC Protocol on Gender and Development, the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of Persons with Disabilities, amongst others. All these have provisions to protect women and children from violence.

---

\(^{46}\) Royal Kxao |Ui|o|oo has been serving as Deputy Minister of Marginalised People in Namibia since March 2015.


5. INTERNATIONAL FRAMEWORKS AND JUSTICE MECHANISMS FOR INDIGENOUS PEOPLE’S RIGHTS

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

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

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

5.1.1 International Instruments

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

- The UDHR was drafted by representatives 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.
- 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.
The ICERD was written with the goal of eliminating racial discrimination in all its forms and of promoting understanding between the races. South Africa signed the ICERD on 3 October 1994 and only ratified it more than four years later, on 9 January 1999. It entered into force or became binding on 9 January 1999. 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. South Africa is one of three African countries that allows for individual communications with the Committee.

### Key Provisions

<table>
<thead>
<tr>
<th>Article 7</th>
<th>Note on Relevance to IPR</th>
</tr>
</thead>
<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>
<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>
<th>Note on Relevance to IPR</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Everyone has the <strong>right to own property</strong> alone as well as in association with others.</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>(2) <strong>No one shall be arbitrarily deprived of his property.</strong></td>
<td>The right to practice religion and other aspects of culture constitute a key protection against assimilation. Additionally, indigenous peoples’ right to culture can be used to secure indigenous ownership, control, use, management and development of their land and resources, where such land and resources are used for cultural practices, including traditional livelihoods.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 18</th>
<th>Note on Relevance to IPR</th>
</tr>
</thead>
<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>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 27</th>
<th>Note on Relevance to IPR</th>
</tr>
</thead>
<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>
<td></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.
- South Africa signed the ICERD on 3 October 1994 and only ratified it more than four years later, on 9 January 1999. It entered into force or became binding on 9 January 1999.
- 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. South Africa is one of three African countries that allows for individual communications with the Committee.
International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

- 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.
- South Africa ratified the ICESCR on 12th January 2015.
- 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. South Africa has not ratified this Optional Protocol.

### Key Provisions

<table>
<thead>
<tr>
<th>Article 1</th>
<th>Notes on Relevance to IPR</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All peoples have the <strong>right of self-determination.</strong> By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.</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>(2) All peoples may, for their own ends, <strong>freely dispose of their natural wealth and resources</strong> 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.</td>
<td></td>
</tr>
</tbody>
</table>

**Article 15**

(1) The States Parties to the present Covenant recognize the **right of everyone: (a) [t]o take part in cultural life.**

<table>
<thead>
<tr>
<th>Article 15</th>
<th>Notes on Relevance to IPR</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) The States Parties to the present Covenant recognize the <strong>right of everyone: (a) [t]o take part in cultural life.</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>
</tbody>
</table>

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

- The ICCPR is legally binding and was ratified by South Africa on 10 December 1998.
- South Africa has also ratified the Optional Protocol to the International Covenant on Civil and Political Rights, 1966\(^{50}\) and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, 2002.
- 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 the 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

---

\(^{50}\) 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.’

- 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>Article 1</td>
<td></td>
</tr>
<tr>
<td>(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.</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></td>
</tr>
<tr>
<td>All persons shall be equal before the courts and tribunals...</td>
<td>Protections against discrimination can be used to guarantee equal treatment of indigenous peoples.</td>
</tr>
<tr>
<td>Article 27</td>
<td></td>
</tr>
<tr>
<td>In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.</td>
<td>The Human Rights Committee has decided that indigenous peoples are covered by this article. Indigenous peoples’ right to practice their own culture constitutes a key protection against assimilation. Additionally, the right can be used to secure indigenous ownership, control, use, management and development of their land and resources, where such land and resources are used for cultural practices, including traditional livelihoods.</td>
</tr>
</tbody>
</table>

Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1979

- The CEDAW as well as the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women, 1999 is legally binding in South Africa.
- 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.”
- The CEDAW’s Optional Protocol, which allows the Committee to hear individual complaints when rights have been violated.

---

51 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.
52 Ibid; see also for example, Communication No. 549/1993, Hopu and Bessert v. France, views of 29 July 1997, para. 10.3.
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 UNCRC is a legally binding instrument. South Africa has ratified the UNCRC. In fact, it was among the first treaties South Africa ratified as a newly democratic state.
<table>
<thead>
<tr>
<th>Key Provisions</th>
<th>Notes on Relevance to IPR</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 3</strong></td>
<td>Generally, the rights and protections enshrined in this and the below listed articles can be used to defend the interests of indigenous children.</td>
</tr>
<tr>
<td>(1) “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”</td>
<td></td>
</tr>
<tr>
<td><strong>Article 6</strong></td>
<td></td>
</tr>
<tr>
<td>(1) States Parties recognize that every child has the inherent right to life.</td>
<td></td>
</tr>
<tr>
<td>(2) States Parties shall ensure to the maximum extent possible the survival and development of the child.</td>
<td></td>
</tr>
<tr>
<td><strong>Article 24</strong></td>
<td></td>
</tr>
<tr>
<td>(1) States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.</td>
<td></td>
</tr>
<tr>
<td><strong>Article 30</strong></td>
<td></td>
</tr>
<tr>
<td>In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.</td>
<td></td>
</tr>
<tr>
<td><strong>Article 40</strong></td>
<td></td>
</tr>
<tr>
<td>(2)(b) Every child alleged as or accused of having infringed the penal law has... [the guarantee] (vi) [t]o have the free assistance of an interpreter if the child cannot understand or speak the language used.</td>
<td></td>
</tr>
</tbody>
</table>

**Indigenous and Tribal Peoples Convention, No. 169 (ILO 169), 1989**

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

**Convention on Biological Diversity (CBD), 1992**

- The CBD promotes cooperation towards conserving biological diversity and sustainable use of its components. The CBD is legally binding in South Africa. In addition to having ratified the CBD, South Africa 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.
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. South Africa is among the nations that adopted the UNDRIP in the UN General Assembly. 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) [s]ubject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

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

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

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

**Key Provisions**

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

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

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

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

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


- The African Charter enshrines a range of binding rights, duties, and freedoms applicable to all member states of the African Union.
- The African Charter was drafted to reflect African philosophy, perspective, and conceptions of human rights.
- The African Charter is legally binding and was ratified by South Africa on 9 July 1996. 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.

#### Key Provisions

<table>
<thead>
<tr>
<th>Article</th>
<th>Notes on Relevance to IPR</th>
</tr>
</thead>
</table>
| Article 3  
(1) Every individual shall be equal **before the law**  
(2) Every individual shall be entitled to **equal protection of the law** | Entitlements to equality before the law can be used to protect indigenous peoples against discrimination. |
| Article 8  
**Freedom of conscience**, the profession and **free practice of religion** shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms. | 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. |
| Article 14  
The **right to property** shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws. | Property rights are central to indigenous peoples securing collective ownership, control, use, management and development of their own land and resources. |
| Article 17  
(2) Every individual may **freely take part in the cultural life of his community.**  
(3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State. | 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. |
| Article 19  
**All peoples shall be equal;** they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another. | |

---

*Note: The above text includes excerpts from the African Charter on Human and Peoples’ Rights (African Charter), 1981.*
### Key Provisions (continued)

<table>
<thead>
<tr>
<th>Article</th>
<th>Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 20</strong></td>
<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>
</tr>
<tr>
<td><strong>Article 21</strong></td>
<td>(1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. (2) In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. (3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.</td>
</tr>
<tr>
<td><strong>Article 22</strong></td>
<td>(1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.</td>
</tr>
<tr>
<td><strong>Article 24</strong></td>
<td>All peoples shall have the right to a general satisfactory environment favourable to their development.</td>
</tr>
<tr>
<td><strong>Article 60</strong></td>
<td>The Commission shall draw inspiration from international law on human and peoples’ rights...</td>
</tr>
<tr>
<td><strong>Article 61</strong></td>
<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>
</tr>
</tbody>
</table>

### Notes on Relevance to IPR

<table>
<thead>
<tr>
<th>Notes</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 20</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>
</tr>
<tr>
<td><strong>Article 21</strong></td>
<td>This is connected to the right to self-determination and FPIC.</td>
</tr>
<tr>
<td><strong>Article 24</strong></td>
<td>Articles 60 and 61 have been used as license for the ACHPR to consult IPR-friendly conventions like UNDRIP as part of its jurisprudence, regardless of UNDRIP’s not being legally binding.</td>
</tr>
</tbody>
</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 has been ratified by South Africa.
- 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.
5.1.3 Applicability to National Contexts

**Binding and Non-Binding Instruments**

International legal agreements come in two varieties—binding and non-binding.

All states party to a binding treaty are obligated to follow its provisions. When a state becomes party to a binding treaty, it agrees 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 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. On the other hand, a state that signs on to a non-binding treaty signals that it broadly agrees 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 treat international law and domestic law as joined. International law is viewed as automatically being a part of the internal legal system. Therefore, a properly ratified international legal instrument will become a source of law integrated into domestic law in a monist state. No further action is required.

Dualist legal systems meanwhile treat international law and domestic law as essentially separate. Properly ratified international legal instruments govern a dualist state’s relationship with other nations, but it does not become a source of law in itself within the state’s internal legal system. To give international agreements the force of law domestically, dualist states require that domestic legislation is first passed.

South Africa follows a primarily dualist (see Glenister v The President of South Africa and Others, majority opinion) approach with some limited elements of monism for administrative, technical and executive international agreements.

5.2 Key Case Law Governing Jurisprudence on Indigenous Peoples’ Rights

5.2.1 Cases in South Africa and Neighboring States

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.
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.

**5.2.2 Important Cases from the Entire African Region**

**Ogoni Case, African Commission on Human and People’s Rights, 27 May 2002**  
**Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria**

This case was the first ever to come before the ACHPR that concerned Indigenous Populations. This case recognized that the extraction of commodified natural resources (in this case oil) can result in negative effects to life, housing, health, food, water, etc. amounting to a human rights violation under the African Charter. This laid 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.
- **Arts. 14, 16 and 18(1). African Charter** The Commission held that the implied right to housing (including protection from forced eviction), derived from the express rights to property, health and family protected by the above rights, was violated by the destruction of housing and harassment of residents who returned to rebuild their homes.
• Arts. 4, 16 and 22. African Charter: Finally, destruction and contamination of crops by government and non-state actors violated the duty to respect and protect the implied right to food, derived from the rights to life, health and economic and social development.

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

The African Commission’s ruling 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 with the African Commission alleging that the eviction and ensuing failure to compensate them had 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.”

• Art. 14, African Charter: The Commission found that the land management approach employed by the Government effectively caused forced evictions, violating the Endorois’ property rights. For these violations, the Commission recommended that the government recognize rights of ownership, restitute to the Endorois their ancestral lands, compensate their losses, and ensure the Endorois benefit from the royalties and employment opportunities within the game reserve.

• Art. 17, African Charter: “By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, [the Government has] created a major threat to the Endorois pastoralist way of life.” The Commission found that this violated the Endorois’ right to culture.

• 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. The Government in failing to consult or compensate the Endorois had violated these rights.

• Art. 22, African Charter: The Commission found that “any development or investment projects that would have a major impact within the Endorois territory” required the State to “obtain their free, prior, and informed consent, according to their customs and traditions.” The failure to secure FPIC and to provide adequate compensation and benefits violated the community’s right to development.
The Ogiek Case, African Court on Human and Peoples’ Rights, 26 May 2017

This was the first time the African Court, in operation since 2006, 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 recognize 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.
- 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 identified 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.
5.3 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 demand remedies (monetary compensation, restitution of land, etc.). Aggrieved parties with complaints can often contact these bodies, as mentioned below, for advice or to lodge a complaint. 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.

5.3.1 International Fora

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

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

Key Tasks and relevance to protecting IPRs:

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

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 IPRs:

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

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

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

Key Tasks and relevance to protecting IPRs:

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

---

61 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/.
as self-determination and free, prior and informed consent.

5.3.2 Regional Fora

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

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

Key Tasks:

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

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

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

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

Key Tasks:

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

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

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

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

Key Tasks:

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

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

---

62 See www.achpr.org.
domestic remedies”, and only a few states (not including South Africa) have so far allowed individuals to lodge cases directly before the Court. The ACHPR has the power to refer a case to the Court but this does not happen frequently.

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 before the Tribunal by member states.

63 https://www.sadc.int/about-sadc/sadc-institutions/tribun/.
6. CONCLUSION

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 South Africa. 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. Indigenous communities and paralegals can also work with several state and non-state entities in their efforts to protect the rights of indigenous peoples in the country. Below is a list of some of the South African organisations/institutions that can be approached to provide assistance, including legal advice, representation, legal information or information on where to get the required support.

<table>
<thead>
<tr>
<th>Name of Organisation/Institution</th>
<th>Website</th>
<th>Telephone Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Aid South Africa</td>
<td><a href="https://legal-aid.co.za">https://legal-aid.co.za</a></td>
<td>0800 110 110</td>
</tr>
<tr>
<td>Law Society of South Africa</td>
<td><a href="https://www.issa.org.za">https://www.issa.org.za</a></td>
<td>+27 12 366 8800</td>
</tr>
<tr>
<td>Legal Practice Council</td>
<td><a href="https://lpc.org.za">https://lpc.org.za</a></td>
<td>+27 10 001 8500</td>
</tr>
<tr>
<td>Legal Resources Centre (LRC)</td>
<td><a href="https://lrc.org.za">https://lrc.org.za</a></td>
<td>+27 11 836 9831</td>
</tr>
<tr>
<td>Natural Justice</td>
<td><a href="https://naturaljustice.org">https://naturaljustice.org</a></td>
<td>+27 21 426 1633</td>
</tr>
</tbody>
</table>