



This publication provides an overview of status and trends regarding the constitutional, legislative and administrative protection of the rights of indigenous peoples in South Africa.

This report provides the results of a research project by the International Labour Organization and the African Commission's Working Group on Indigenous Communities/Populations in Africa with the Centre for Human Rights, University of Pretoria, acting as implementing institution. The project examines the extent to which the legal framework of 24 selected African countries impacts on and protects the rights of indigenous peoples.

This report was researched and written by G Wachira Mukundi.

For an electronic copy of the other 23 country studies and the overview report of the study, see www.chr.up.ac.za/indigenous

Country Report of the Research Project by
the International Labour Organization and the African Commission on Human and Peoples' Rights on
the constitutional and legislative protection of
the rights of indigenous peoples:
South Africa

Published with the support of:



Danida



Copyright © 2009 International Labour Organization and African Commission on Human & Peoples' Rights
First published 2009

For rights of reproduction or translation, permission should be obtained by both the ILO Publications (Rights and Permissions), International Labour Office, CH-1211 Geneva 22, Switzerland, or by email: pubdroit@ilo.org, and the Information and Documentation Centre, African Commission on Human and Peoples' Rights, PO Box 673, Banjul, The Gambia, or by e-mail: idoc@achpr.org mailto:idoc@achpr.org .

ILO/ACHPR

South Africa : constitutional, legislative and administrative provisions concerning indigenous peoples /
International Labour Office. - Geneva: ILO, 2009

1 v.

ISBN: 978-92-2-122815-8 (web pdf)

Indigenous people / economic and social rights / cultural rights / administrative aspect / constitutional law /
legislation / comment / South Africa R
14.08

ILO Cataloguing in Publication Data

The designations employed in this publication, and the presentation of material therein do not imply the expression of any opinion whatsoever on the part of the International Labour Office and the African Commission on Human & Peoples' Rights concerning the legal status of any country, area or territory or of its authorities, or concerning the delimitation of its frontiers.

The ILO and the African Commission on Human & Peoples' Rights shall accept no responsibility for any inaccuracy, errors or omissions resulting from the use of the data.

The responsibility for opinions expressed in signed articles, studies and other contributions rests solely with their authors, and publication does not constitute an endorsement by the International Labour Office and the African Commission on Human & Peoples' Rights of the opinions expressed in them.

SOUTH AFRICA: CONSTITUTIONAL, LEGISLATIVE AND ADMINISTRATIVE PROVISIONS CONCERNING INDIGENOUS PEOPLES

G Wachira Mukundi,
*South Africa: Constitutional, legislative and administrative provisions concerning
indigenous peoples*

Table of contents	Pages
Background to the study	
Part I: Introduction to indigenous peoples, the country and its legal system	1
1 Indigenous peoples in the country – basic situational overview	1
1.1 Indigenous peoples, criteria for identification, demographic details, main economic sources of livelihood and cultural life	1
1.1.1 Indigenous peoples, criteria for identification	1
1.1.2 Demographic details	4
1.1.3 Main economic sources of livelihood and cultural life	5
1.2 Main human rights concerns of indigenous peoples	6
1.2.1 Equality and non-discrimination	6
1.2.2 Recognition of their identity, language and culture	7
1.2.3 Rights to land and resources	7
1.2.4 Access to and enjoyment of economic, social and cultural rights	8
1.2.5 Other important human rights concerns	8
1.3 Background to the country	9
1.3.1 Pre-colonial history	9
1.3.2 Colonial and apartheid history	11
1.3.3 Current state structure	12
1.3.4 Population indicators	13
1.3.5 Role of media and civil society	13
1.4 Background to the legal system	14
1.4.1 Legal system	14
1.4.2 Sources of law (Constitutional, legislation and status of indigenous/ customary law)	15
1.4.3 Court structure	15
1.4.4 Status of international law and ratifications	15

1.5	Institutional and policy bodies protecting indigenous peoples	18
Part II: Legal protection of indigenous peoples in South Africa		
A	Introduction	21
1.	Recognition and identification	21
2.	Non-discrimination	24
3.	Self-management	25
4.	Participation and consultation	27
5.	Access to justice	29
6.	Cultural and language rights	32
7.	Education	37
8.	Land, natural resources and environment	39
9.	Socio economic rights (housing, health, social welfare, intellectual property, traditional economy, employment and occupation)	48
10.	Gender equality	51
11.	Indigenous children	53
12.	Indigenous peoples in border areas	56
Part III: Conclusion and recommendations		58
Part IV: Bibliography		62

Background to the report

This report is both a desk-top survey and an in-depth study of South Africa's legal framework and the extent to which it protects the country's indigenous peoples. The in-depth study was carried out from 15 September 2008 - 3 October 2008. The research team engaged with the Departments of Foreign Affairs, Education and Justice & Constitutional Development. Consultations were also held with the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and the National House of Traditional Leaders.

The research team met with various representatives of indigenous peoples' communities based in the Western Cape and Northern Cape. The research team wishes to express its gratitude for their assistance and facilitation of the in-depth study to three NGOs working with indigenous peoples in South Africa: Indigenous Peoples of Africa Coordinating Committee (IPACC), the South African San Institute (SASI) and the Legal Resources Centre (Cape Town).

Part I: Introduction to indigenous peoples, the country and its legal system

1 Indigenous peoples in the country – basic situational overview

1.1 Indigenous peoples, criteria for identification, demographic details, main economic sources of livelihood and cultural life

1.1.1 Indigenous peoples, criteria for identification

As is the case in most African countries, no criterion exists for identifying indigenous peoples in South Africa¹ The term ‘indigenous’ is used in South Africa’s legal discourse in reference to the languages and legal customs of the majority black African population as opposed to the other races.² Indeed, the Preamble to the Traditional Leadership and Governance Framework Amendment Act provides that ‘South African indigenous people consist of a diversity of cultural communities’.³ However, in terms of the criteria proposed by the African Commission’s Working Group of Experts on Indigenous Populations / Communities, whose emphasis is on self-identification and groups that are in a structurally-subordinate position to the dominating groups and the state, the term is applied to refer to the various San and Khoe ethnic groups.⁴ In South Africa, these are peoples who, despite the gains made since the end of apartheid, remain in a subordinate position, discriminated against, marginalised and continue to demand recognition as indigenous peoples and protection of their fundamental human rights and freedoms.⁵

Apart from the report of the African Commission’s Working Group of Experts on Indigenous Populations / Communities in Africa, other studies and experts have also indicated that the San and Khoe ethnic groups self-identify as indigenous peoples in South Africa and seek recognition of their fundamental human rights and freedoms which they feel have been violated on the basis

¹ For a more detailed expose on the question of ‘who is indigenous in South Africa’ see N Crawhall *Indigenous Peoples of South Africa: Current Trends* Project to Promote ILO Policy on Indigenous and Tribal Peoples / South African San Institute, International Labour Office, Geneva, 1999, 2-11; see also R Chennels and A du Toit ‘The Rights of Indigenous Peoples in South Africa’ in R Hitchcock and D Vinding (ed) *Indigenous Peoples’ Rights in Southern Africa* IWGIA (2004) 98.

² See Constitution of the Republic of South Africa (1996) arts 6 and 26; see also below.

³ Preamble to the Traditional Leadership and Governance Framework Amendment Act 41 of 2003.

⁴ See Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the ‘Resolution on the Rights of Indigenous Populations/Communities in Africa’ Adopted by the African Commission on Human and Peoples’ Rights (African Commission) at its 28th Ordinary Session, ACHPR & IWGIA (2005) 15-17; 89.

⁵ See Concluding Observations of the Committee on the Elimination of Racial Discrimination on South Africa, CERD/C/ZAF/CO/3, 19 October 2006, para 19 (CERD Concluding Observations on South Africa 2006).

of that identity.⁶ The groups identified as indigenous peoples in South Africa include ‘the three main San peoples (!Xun, Khwe and ≠Khomani), the various Nama(Khoe) communities, the major Griqua associations and so-called revivalist Khoisan’.⁷ The report of the UN Special Rapporteur on Indigenous Peoples on South Africa, in essence, reflects the same groups identified earlier by Nigel Crawhall’s study,⁸ which provides a detailed account and analysis of the groups who have self-identified as indigenous peoples in South Africa.⁹ According to Crawhall, there are four main groups self-identifying as indigenous peoples in South Africa: the San who comprise various sub-ethnic groups(!Xû and Khwe, †Khomani, /’Auni, Saasi, //Xegwi, !Kung, and /Xam descendants)¹⁰; the Nama who are also referred to as the Khoekhoean; Griqua and Korana; and revivalist Khoesan groups.¹¹

However, the principle of self-identification alone is not enough and should be coupled with other elements that characterise indigenous peoples, particularly marginalisation and discrimination. In the case of South Africa, this was illustrated when a group of Afrikaner nationalists in 1996 attended the United Nations Working Group on Indigenous Populations (UNWGIP), claiming indigenous status.¹² A petition by the same or similar group was made in 2005 to the UN Special Rapporteur on Indigenous Peoples during his mission to South Africa. The UNWGIP - as did the UN Special Rapporteur - rejected these claims on the grounds that the group was neither marginalised / discriminated against, nor did it meet the other criteria ‘set out in international legal standards and discourses at the present time’.¹³ For purposes of this research, the international standards applied are those identified by the ILO Convention No 169 (Article 1) and the African Commission’s Working Group, in its Report on Indigenous Populations / Communities in Africa.¹⁴ The standards were further used as the primary reference by

⁶ Examples of such studies include: Report of the UN Special Rapporteur on Indigenous Peoples mission to South Africa 2005 (E/CN.4/2006/78/Add.2) 2 (Hereinafter Report of the UN Special Rapporteur on Indigenous Peoples Mission to South Africa); N Crawhall (1999) 1-11; Chennels and du Toit in Hitchcock and Vinding 98.

⁷ UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa 2; see also Chennels and du Toit 98.

⁸ Crawhall 5-11.

⁹ See also Report of the UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa 2-3; para 79 which essentially endorses the findings of Nigel Crawhall’s study, particularly on the groups self-identifying as indigenous peoples in South Africa.

¹⁰ Crawhall 5-7.

¹¹ As above, 9.

¹² As above, 11.

¹³ Report of the UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa para 79; Crawhall 11.

¹⁴ See Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities 89.

stakeholders during a workshop to determine the scope and methodology of this research examining constitutional, administrative and legislative provisions within African states concerning the protection and promotion of the rights of indigenous communities on the continent.¹⁵ These include:

- Indigenous peoples are socially, culturally and economically distinct. Their cultures and ways of life differ considerably from that of the dominant society and their cultures are often under threat, in some cases to the extent of extinction.
- They have a special attachment to their lands or territories. A key characteristic for most indigenous peoples is that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon.
- They suffer discrimination as they are regarded as ‘less developed’ and ‘less advanced’ than other more dominant sectors of society. They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority.
- They often live in inaccessible regions, often geographically isolated and are subjected to various forms of marginalisation, both politically and socially.
- In addition to the criteria outlined above, the primary importance of self-identification is emphasised, whereby the people themselves acknowledge their distinct cultural identity, way of life, and seek to perpetuate and retain their identity.¹⁶

Based on these criteria, the primary focus of this report is the San and Khoe(Nama) indigenous peoples and particularly so since they are the most marginalised ethnic groups in South Africa. They retain and continue to use their indigenous San and Khoe languages, elements of their traditions, culture, customs, economy, knowledge systems and way of life.¹⁷ While admittedly other groups such as the Griquas, Koranas and the revivalist Khoesan groups self-identify and seek similar rights to indigenous peoples globally, their general socio-economic and cultural situation is not as precarious as that faced by the San and Khoe.¹⁸ It is argued that the majority of these groups - possibly due to the assimilation policies of the apartheid regime - have little if any

¹⁵ See generally the ILO/ African Commission on Human and Peoples’ Rights, Report of the Workshop to determine the scope and methodology of the research, Examining constitutional, legislative and administrative provisions concerning indigenous and tribal peoples in Africa 18-20 September 2006 Yaounde, Cameroon.

¹⁶ A above 11-12.

¹⁷ Crawhall 1.

¹⁸ As above, 8-9; See also Report of the UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa, para 29.

attachment to their traditional languages, cultures and ways of life.¹⁹ Indeed they ‘acknowledge that they enjoy full political and human rights in South Africa’, save for the ‘lack of official recognition as a distinct community’.²⁰ Granted, and where applicable, issues that affect these other groups (Griquas, Koranas and revivalist Khoesan) are also surveyed in a bid to illustrate the situation of peoples that self-identify as indigenous in South Africa.

1.1.2 Demographic details

There are no official statistics on the population distribution of the indigenous peoples of South Africa.²¹ However, the government of South Africa acknowledges their existence as evidenced by the Constitutional reference to the need to promote the Khoe and San languages,²² and the adoption of a cabinet memorandum in 2004 that would lead to an official policy recognising the ‘vulnerable’ indigenous peoples of South Africa.²³ A copy of that memorandum is attached.²⁴

Some statistical information on indigenous peoples in South Africa is scanned from the Report of the UN Special Rapporteur on Indigenous Peoples Mission to South Africa who relies on information presented to him during his mission, as well as the study by Crawhall, which also provides some numbers and presence:²⁵

- ≠Khomani San- 1000
- Khwe San-1100
- Xun San-4500
- Nama(Khoe)-10000
- Griquas-300000.

According to the UN Special Rapporteur on Indigenous Peoples, these groups are ‘mostly resident in the sparsely populated Northern Cape Province’. The Griquas, he indicates, are

¹⁹ As above, 8-10.

²⁰ Report of the UN Special Rapporteur on Indigenous Peoples Mission to South Africa, para 29.

²¹ Crawhall 1; see also Report of the UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa, para 12; see Chennels and du Toit 100.

²² Sec 6(5) South African Constitution.

²³ Report of the UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa, para 19.

²⁴ Attempts at acquiring an official copy of the Cabinet Memorandum were not successful and the copy attached was shared with the research team by Chief Little of the National Khoi San Council during the in-depth study.

²⁵ Report of the UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa, para 14. See also Crawhall 5-11; The UN Special Rapporteur acknowledges that he draws extensively on the information provided on the Crawhall Report; see also Chennels and du Toit in Hitchcock and Vinding 98.

‘mostly located in the Northern and Western Cape Provinces, but with significant communities in the Eastern Cape, Free State and KwaZulu-Natal’.²⁶ However, it is instructive to note that ‘the ethnic boundaries of these groups are not fixed and the dividing lines between the Khoe and the San are not always evident’.²⁷

1.1.3 Main economic sources of livelihood and cultural life

The groups self-identifying as indigenous peoples in South Africa are engaged in different forms of economic sustenance and livelihood. The ≠Khomani San are probably the only San ethnic group that still relies on traditional hunting and gathering. However, due to severe land constraints and government regulations on hunting, they have taken up some subsistence economic activities. ‘On 21 March 1999, the South African Government signed a land restitution deal with their Community Property Association (CPA) for 25 000 hectares inside the then Kalahari Gemsbok National Park,²⁸ and 40 000 hectares outside the KGNP for farming, subsistence economic practices and other development’.²⁹ Although the other San ethnic groups (*Kung; Xam descendants; //Xegwi; !Xû and Khwe*) could still be involved in some form of traditional hunting and gathering on a very small scale (mainly for medicinal plants), due to land constraints, for example, none of the //Xegwi ‘community owns land; they are mostly labour tenants on farms’ with ‘a small amount of subsistence gathering’.³⁰ The *Xam descendants in the Prieska area of the Northern Cape* ‘are semi-nomadic farm labourers known as Karretjie Mense or Swerwers (cart people or wanderers)’.³¹ *!Xû and Khwe*, who were ‘moved from Angola and Namibia by the SA Defence Force (SADF), were awarded land at Plattfontein outside Kimberley to be owned collectively and administered by the CPA’.³²

Today the Nama (Khoe) are also practicing some form of mixed economy but the rural groups ‘particularly [in] the Richtersveld, communities have managed to maintain communal land for grazing. This extends into the Richtersveld National Park. Some people are able to conduct limited hunting and plant gathering’.³³ As far as the other groups self-identifying as indigenous groups are concerned, notably the Griqua, Koranas and revivalist Khoesan communities, there is

²⁶ As above para 14.

²⁷ Channels and du Toit 99.

²⁸ The former KGNP became the Kgalagadi Transfrontier Park (the KTP) in 2002.

²⁹ Crawhall 6.

³⁰ As above, 6.

³¹ Crawhall 6.

³² As above 5.

³³ As above, 8.

little evidence, if any at all, that they practice their traditional and cultural lifestyles and way of life such as ‘subsistence hunting, gathering or pastoralism principally due to lack of land’ and have generally assimilated with some of the dominant communities.³⁴

1.2 Main human rights concerns of indigenous peoples

Indigenous peoples in South Africa suffer from a variety of breaches of their fundamental human rights and freedoms - some similar to those of indigenous peoples all over the world.³⁵ That said, South Africa stands as one of the few countries on the continent that has embarked on ambitious efforts aimed at redressing the problems of its indigenous peoples. These include legislative, policy and judicial interventions that are emerging as possible best practices for other countries on the continent to borrow in their bid to address indigenous peoples’ concerns. However, at present some concerns remain and are hereto briefly highlighted. These concerns and how the state has attempted to solve them are discussed in further detail in part II of this report during the examination of the legal framework impacting upon and protecting indigenous peoples in the country. The following therefore are some of the main human rights concerns still pertinent to these groups:

1.2.1 Equality and non-discrimination

While the post apartheid democratic state of South Africa is anchored on non-discrimination and the principle of equality, some indigenous peoples, especially the San and Nama (Khoe), continue to suffer from exclusion and marginalisation.³⁶ While this situation is traced to the apartheid legacy, given that the current government has committed to redressing the wrongs of the past to indigenous peoples, a lot remains to be done to change their precarious circumstances.³⁷ The effects of the historical processes of assimilation of indigenous peoples in South Africa continue to affect indigenous peoples’ capacity to enjoy equal rights with dominant communities. They also continue to suffer from negative stereotypes in their bid to reclaim their cultural and language heritage.³⁸ This issue is analysed in detail in Part 11 of this report.

³⁴ As above, 9-10.

³⁵ See CERD’s Concluding Observations on South Africa 2006, para 19; see also generally the Report of the UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa; Crawhall Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities in Africa; Chennells and du Toit 98-113.

³⁶ CERD Concluding Observations on South Africa 2006 para 19; Crawhall 12; Report of the UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa 2.

³⁷ Report of the UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa 2.

³⁸ As above; Crawhall 14.

1.2.2 Recognition of their identity, language and culture

During apartheid, indigenous identities and languages were discouraged and a process to promote the use of Afrikaans and their assimilation resulted in the loss of most indigenous peoples' languages. Apart from a few indigenous peoples situated in very rural and remote places, the majority of indigenous groups adopted Afrikaans as the language of communication. As well, since indigenous languages were not taught in schools or used anywhere officially most became extinct or completely forgotten.³⁹ In fact, it is reported that 'children using Khoe or San languages in state and church schools received corporal punishment and were forced to recant their identity'.⁴⁰ Today indigenous peoples are still concerned that despite the gains of a democratic state, the fact that their languages and identity are not officially recognised continues to hamper their capacity and efforts to enjoy socio-economic development as well as other fundamental human rights and freedoms.⁴¹ Part II of this report examines this question further.

1.2.3 Rights to land and resources

Indigenous peoples, particularly the Nama and San, were dispossessed of most of their lands and resources using racially-discriminatory laws and policies and, in effect, today 'constitute some of the poorest of the poor in South Africa'.⁴² According to the Report of the UN Special Rapporteur on Indigenous Peoples in South Africa, 'the root cause hindering economic development and intergenerational cultural survival (of indigenous peoples in South Africa) has been the forced dispossession of traditional land that once formed the basis of hunter-gatherer and pastoralist economies and identities. This historic dispossession of land and natural resources has caused indigenous people to plunge from a situation of self-reliance into poverty and a dependency on external resources.⁴³ Nutritional levels have dropped due to sedentarisation and lack of access to traditional bush food.⁴⁴ As far as land and resource rights are concerned, 'the most pressing concern of all the indigenous communities is securing their land base, and, where possible, re-establishing access to natural resources necessary for pastoralism, hunting-gathering or new land-based ventures such as farming. This issue is revisited at greater length in part II of this report.

³⁹ Crawhall 12.

⁴⁰ As above, 15.

⁴¹ Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa 2, paras 26-32.

⁴² Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa para 33; Crawhall 12; Chennels and du Toit 100.

⁴³ S Saugestad 'The Indigenous Peoples of Southern Africa: An overview' in Hitchcock and Vinding (eds) *Indigenous Peoples' Rights in Southern Africa* IWGIA (2004) 38.

⁴⁴ As above.

1.2.4 Access to and enjoyment of economic social and cultural rights

Indigenous peoples in South Africa have in principle equal access to all social services provided by the government, including education, health delivery systems and infrastructure. However, they tend to be more marginalized than other sectors to the extent that they are concentrated at the lower end of the socio-economic scale. This is partly due to the historical marginalisation and the fact that to date they are yet to be accorded their rights in accordance with their preferred choices and way of life that takes in cognisance their culture and way of life. However, like in many other spheres of government interventions, there are ongoing efforts to formulate and implement an appropriate legal framework to address the socio-economic concerns of indigenous peoples in South Africa. These are discussed in part II of this report.

1.2.5 Other important human rights concerns

There are a number of indigenous peoples' concerns in South Africa, some of which are touched on in part II of this report. However, due to the limited scope of this research, many others are mentioned only briefly. These include the recognition of traditional leadership and such structures, of particular relevance at present in light of the need for formal organised structures to provide leadership and vision for land and resource claims as well as the general management of those resources. Other key concerns include access to justice given the indigent status of most of these communities and the need to espouse their rights in courts, as well as the protection of their traditional intellectual property and knowledge systems and such other related negotiations.

Having sketched a brief situational overview of indigenous peoples in South Africa, the next section seeks to provide a background to the country in a bid to put these issues in context.

1.3 Background to the country

1.3.1 Pre-colonial history

The Khoekhoe and the San were the first inhabitants of South Africa.⁴⁵ The San, who have a hunter-gatherer ancestry, were in Southern Africa at least 120 000 years ago while Khoekhoe herders arrived in the Western Cape about 2 000 years ago.⁴⁶ The San traditionally were hunter

⁴⁵ F Welsh *A history of South Africa* (1998) 16; see also EA Walker *A History of South Africa*, (1928) 34; M Tong *Lest we forget, Restitution digest on administrative decisions*, (2002) 3. See also C Heyns (ed) *Human Rights Law in Africa* 2004 Vol 2 1507; A Mountain *The First Peoples of the Cape* (2003) 7 & 22.

⁴⁶ Mountain 7 & 22.

gatherers while the Khoekhoe were pastoralists and pottery-makers, but as they interacted they adopted each others' trade when the need arose.⁴⁷ The San were organised 'into bands according to kinship ties which consisted of a married couple with their children, a sister or brother, a cousin or close friend with their partner and children and several grandparents or elderly relatives'.⁴⁸ Several bands had rights over resources of a particular territory, and as such others could only access these resources on invitation or with special leave.⁴⁹ A band of about 25 members occupied, utilised and handed down their specific territories from one generation to the next, developing very strong bonds with the land.⁵⁰

The Khoekhoe, on the other hand, were organised along patrilineal lines into clans and lived in villages comprising about 100 members.⁵¹ 'Each group recognised the authority of a hereditary head man'.⁵² Each clan had a clearly-defined territory in which to graze their livestock and depending on the climate and pasture, moved accordingly. According to Mountain 'this practice of transhumance was misunderstood by early European settlers who were accustomed to the conventions of land ownership and land use exclusivity' to mean the land was *terra nullius*.⁵³ Therefore, the argument that the lands occupied by the earliest inhabitants of Southern Africa were 'terra nullius' and that they lacked an organised system of habitation is unfounded and was simply used to justify dispossession.

The next group to arrive after the Khoekhoe and San from about 250 AD onwards were the Bantus who are said to have their origins in Central Africa.⁵⁴ The Bantus are mainly farmers and include various sub-groups such as the Batswana, Basotho, Bapedi, AmaZulu, AmaXhosa, AmaSwati, Vhavhenda, MaTsonga and AmaNdebele.⁵⁵ The Bantus were organised into clans by people claiming a common ancestor. A homestead, composed of a man with his wife or wives and other relatives or dependants, was the basic unit and several units grouped themselves under a

⁴⁷ Mountain 23 & 40.

⁴⁸ Mountain 25.

⁴⁹ As above 25; see also I Schapera *The Khoi San Peoples of South Africa* 77.

⁵⁰ HJ Deacon & J Deacon *Human Beginnings in South Africa: Uncovering the secrets of the stone age* (1999) 132.

⁵¹ Mountain 44.

⁵² As above, 46.

⁵³ As above (The concept of *terra nullius* developed or emerged during the colonisation period to legitimise the acquisition of indigenous peoples' lands on the basis that such lands were legally unoccupied or vacant; see Oppenheim LFL *International Law* (3rd ed) (1920) 126.

⁵⁴ T Tlou & A Campbell *History of Botswana* (1986) 30; Mountain 22.

⁵⁵ Tong 15 fn 47.

chief.⁵⁶ The chief's position was usually hereditary and not political in the colonial sense,⁵⁷ but the community leader whose 'authority was limited by the obligation to consult with the people, sometimes in general assembly'.⁵⁸ The interaction between the Bantu and the Khoekhoe resulted in various adaptations of cultures, language, economic activities and assimilation.⁵⁹

Portuguese explorers and sailors led by Bartholomey Diaz arrived at Mossel Bay on 3 February 1488.⁶⁰ The first Europeans were in transit, and rarely interacted with the local population mainly comprising the Khoekhoe and the San, but over time they began to settle. Formal European settlement began with the establishment of a refreshment station by a Dutch Commander, Jan van Riebeeck, in 1652.⁶¹ The refreshment station was meant to provide fresh food and water supplies to ships on their way to India. The refreshment station was run by employees of the Dutch East India Company who, on retirement or expiry of their contracts, settled in South Africa as farmers (then called *Boers*). By the 1700s more Europeans settled at the Cape and as demand for more land intensified they moved inland. The Europeans intermarried with the Khoekhoe and San, resulting in mixed and distinct communities such as the Griquas.⁶²

1.3.2 Colonial and apartheid history

The British first occupied the Cape from 1795 onwards, seizing control of the Cape of Good Hope from the Dutch whose quiet settlement had begun in 1652 under Jan van Riebeeck.⁶³ The British at the Cape introduced their own concepts of freedom and equality which were opposed by the Dutch who in turn joined other Dutch speakers (commonly known as the *Voortrekkers*) who had began trekking into the interior.⁶⁴ The Voortrekker communities developed an 'Afrikaner' identity with their own language, religion and republican idealism. The rivalry between the 'Afrikaners' and the English occasioned the Anglo Boer War between 1899 and 1902 which was won by the English. However, in 1910 the Dutch Republicans (Afrikaners) came

⁵⁶ Welsh 70.

⁵⁷ After colonialism, the administration retained or appointed chiefs to collect taxes and execute some of the policies of the colonial authority, a practice that was in conflict with the traditional role of the chiefs. The chief had *quasi* magical powers and blessed warriors during expeditions sometimes presiding over religious ceremonies.

⁵⁸ Welsh 70.

⁵⁹ Eg, some Bantu speaking people adopted some of click sounds typical of San languages. Some such as the amaXhosa acquired some of the racial characteristics of the San such as high cheek bones and a lighter skin. See further Mountain 24.

⁶⁰ Walker 1.

⁶¹ Tong 1 & 7.

⁶² Tlou and Campbell 120.

⁶³ Mountain 31.

⁶⁴ Welsh xxii.

to power in what was known as the Union of South Africa.⁶⁵ Increased restrictions on black political rights inspired black resistance and organisations such as the South African Native National Congress in 1911 (renamed the African National Congress in 1923). It was during this time that black Africans - including indigenous peoples - lost most of their land and suffered under various repressive and discriminatory laws.⁶⁶

In 1948 the National Party won the whites-only general election and formed the government that started a process of social engineering supported by legislation aimed at excluding black people from political power. The Apartheid legacy was characterised by racial discriminatory laws and policies and, in turn, mass agitation for liberation which resulted in detentions, imprisonment and assassinations of the anti-apartheid activists. Nelson Mandela and others were imprisoned for life in 1963. In the 1970s the 'apartheid policies gave rise to the "independence" of four "homelands", The Transkei, Bophutatswana, Venda and Ciskei'.⁶⁷ International pressure and violent protests gradually prompted the apartheid regime to give in to demands for the release of political prisoners in 1990. An interim Constitution was enacted in 1993, ushering in the first democratic elections in 1994.⁶⁸

The apartheid regime promoted a policy which encouraged the assimilation of the San and Khoe so that the majority of these groups' members lost their identity and languages.⁶⁹ 'Under apartheid, the [s]tate enforced a policy whereby all Khoe and San people who had not already been assimilated into other populations were forcibly registered as coloured. Failure to register was illegal and unavoidable.'⁷⁰

1.3.4 Current state structure

On 27 April 1994, the first democratic elections resulted in a black majority government by the African National Congress with Mr Nelson Mandela as President. The ANC won the subsequent general elections of 1999 and 2004 as well, appointing Mr. Thabo Mbeki as the country's President. The next general elections are scheduled for April 2009.

⁶⁵ 31 May 1910 is the date South Africa became independent from British colonial rule. South Africa became a republic in 1961 following an October 1960 referendum; see <<https://www.cia.gov/cia/publications/factbook/geos/sf.html>> accessed 20 January 2007.

⁶⁶ Such laws were, for example, the Native Land Act of 1913 and the Native Affairs Act of 1920.

⁶⁷ Heyns 1508.

⁶⁸ As above.

⁶⁹ Crawhall (1999) 12 & 14.

⁷⁰ As above, 14

The South African Constitution of 1996 enshrines the doctrine of the separation of powers. The Executive consists of the President, Deputy President, Cabinet and the state departments which deal with policy and administration. South Africa is governed on the basis of the principle of co-operative governance in the national, provincial and local spheres of government. The national government's primary responsibility is policy, while the provincial and local spheres are the implementing levels.

Parliament is the country's legislative body and consists of two houses: the National Assembly and the National Council of Provinces. The National Assembly consists of 400 members, elected by proportional representation in national elections which are held every five years. The National Council of Provinces consists of representatives of the nine provincial legislatures and is in charge of provincial legislation. Each of the nine provinces has an elected legislature and its own executive council.

An independent judiciary has the the Constitutional Court as the highest court in the land. Its members are appointed by the President after consulting the Judicial Service Commission and the leaders of political parties represented in Parliament.⁷¹ The South African court structure is discussed in ensuing sections.

An important structure introduced by the new government is the traditional leaders framework.⁷² Traditional leaders in South Africa are the 'custodians of the moral, value, cultural and social systems of many people in South Africa, which the apartheid system had mainly undermined'.⁷³ However, the issue of the San and Khoe traditional leadership is yet to be resolved given that these communities' structures had been completely destroyed so that they are not recognised by the new government. There are efforts to re-establish and identify them.⁷⁴

1.3.5 Population indicators

South Africa's 2001 census does not reflect the number of individuals or communities who self-identify as indigenous peoples. While it is possible to discern the population numbers of the majority of the other black Bantu populations, indigenous communities would fall either within

⁷¹ Sec 174 SA Constitution 1996.

⁷² Ch 12 SA Constitution.

⁷³ Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa para 50.

⁷⁴ Paras 49-54.

the Afrikaans, English or other language speakers, which makes it difficult to accurately determine their numbers.⁷⁵

1.3.6 Role of media and civil society

South Africa has a free media and vibrant civil society. The government-owned South African Broadcasting Corporation is the main media provider in terms of radio and television, but private satellite television and radio stations are also available. Community radio stations are also increasingly being licensed, such as the !Xu and Khwe community radio station (X-K Fm).⁷⁶ Leading civil society organisations working with indigenous peoples include the Working Group of Indigenous Minorities in South Africa (WIMSA)(www.san.org.za/wimsa/home.htm) established in 1996 to provide a platform for San Communities in Namibia, Botswana, South Africa, Zambia and Zimbabwe.⁷⁷ WIMSA has been instrumental in advocating and lobbying for San rights and helped establish the South African San Council in 2001. One of the significant achievements of the Council thus far was to ‘secure San Intellectual Property and heritage rights against commercial interests that have sought to profit’ from San knowledge regarding the succulent hoodia plant and the San rock art heritage in the Drakensberg.⁷⁸

The Indigenous Peoples of Africa Coordinating Committee (IPACC) (www.ipacc.org.za) is another organisation that caters for indigenous peoples’ rights in the region. The main local organisations dealing with indigenous peoples’ issues in South Africa are the South African San Institute (SASI) (www.san.org.za/sasi/home.htm), founded in 1996; Khoisan National Forum; Cape Cultural Heritage Development Council; and the Khoe and San Coordinating Council that unites Khoe and San groups.⁷⁹

⁷⁵ See Statistics South Africa, Census 2001, Key Results sourced at http://www.statssa.gov.za/census01/HTML/Key%20results_files/Key%20results.pdf accessed 10 October 2008.

⁷⁶ See www.polity.org.za accessed 10 January 2006 (Statement by the communications Minister Dr Ivy Matsepe-Casaburri during the official launch of the !Xu and Khwe community radio station (X-K fm) in Smithsdrift 18 August 2000.

⁷⁷ S Saugestad “The Indigenous Peoples of Southern Africa: An overview” in Hitchcock and Vinding 36.

⁷⁸ As above 37.

⁷⁹ As above.

1.4 Background to the legal system

1.4.1 Legal system

The South Africa legal system is based on the Constitution, which is the supreme law of the land, and any law that is inconsistent with the Constitution is null and void to the extent of its inconsistency with the Constitution.⁸⁰ The legal system derives its roots from Roman Dutch law. The legal system further borrows from the common law owing to its English colonial history. African Customary law forms part of South Africa's legal system.⁸¹ A more detailed survey on the application of African customary law in the South African legal system (which is of particular significance to indigenous peoples) is given in part II of this report.

1.4.2 Sources of law (Constitutional, legislation and status of indigenous/customary law)

The following are the main sources of law in South Africa:

- Constitution
- Legislation
- Case law
- International instruments where applicable
- Common law and comparative foreign law
- African customary law is subject to the Constitution. The South African Constitutional Court has, however, expressly stated that African customary law is part and parcel of the South African constitutional legal order.⁸²

1.4.3 Court structure

The following is the hierarchy of South Africa's courts.

- Constitutional Court
- Supreme Court of Appeal
- High Courts and Land Claims Court
- Magistrate Courts

⁸⁰ Sec 2 SA Constitution.

⁸¹ See *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community* 2003 (12) BCLR 1301 (CC) paras 51-64.

⁸² See *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community* 2003 (12) BCLR 1301 (CC) (*Richtersveld* decision).

1.4.4 Status of international law and ratifications

Section 82(1) (i) of the South African Constitution empowers the President to negotiate and sign international agreements.⁸³ However, the signed agreements and treaties bind South Africa only after parliamentary approval in accordance with section 231(3) of the South African Constitution. A treaty therefore only becomes part of national law if Parliament expressly provides so and the provisions are not inconsistent with the Constitution.⁸⁴ The only human rights treaty domesticated by South Africa is the Hague Convention on the Civil Aspects of International Child Abduction.⁸⁵ South Africa has also ratified a number of ILO Conventions (see table below), some of which have been reflected in domestic laws. Of key relevance to indigenous children is the recent ratification of the Worst Forms of Child Labour Convention, 1999 (No 182) in 2000.

In South Africa customary international law forms part of national law unless it is inconsistent with the Constitution.⁸⁶ South Africa is therefore obliged to respect the rights of indigenous peoples that have crystallised into norms of international customary law.⁸⁷ Apart from customary international law, general principles of international law are among the principal sources of international law.⁸⁸ Section 39(1) of South Africa's Constitution determines that, when interpreting the Bill of Rights, courts must have regard to public international law and may have regard to comparable foreign case law. In interpreting legislation, the courts must opt for any reasonable interpretation that is consistent with international law over an interpretation that is not consistent with international law.⁸⁹ This Constitutional provision is key and important to indigenous peoples in South Africa since although South Africa is not a party to the ILO Convention No 169 (which is the only treaty relevant to indigenous peoples) courts would be bound to apply it in their interpretation of issues affecting indigenous peoples, noting that the treaty - 'along with foreign case law - forms part of the body of international law'.⁹⁰ It is also instructive to note that general principles of international law and comparable foreign case law all point to a growing trend of state practice which respects and protects indigenous peoples' rights.⁹¹

⁸³ See Heyns 1509.

⁸⁴ As above.

⁸⁵ As above 1510; Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996.

⁸⁶ Sec 231(4) SA Constitution.

⁸⁷ Anaya *J Indigenous Peoples in International Law* (2nded) (2004) 16-26; some of these rights include indigenous peoples' rights to their traditional lands and resources.

⁸⁸ Art 38(1) Statute of the International Court of Justice, 26 June 1945.

⁸⁹ Sec 233 SA Constitution.

⁹⁰ Chennells and du Toit 103.

⁹¹ This trend can be discerned from progressive case law including in South Africa in the *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community* 2003 (12) BCLR

South Africa is also a party to the following relevant international human rights instruments which have a bearing on indigenous peoples' rights in South Africa.

Instrument	Date of deposit of ratification/accession
International Covenant on Civil and Political Rights (ICCPR)	10 Dec 1998
International Covenant on Economic, Social and Cultural Rights (ICESCR)	-
Optional Protocol to ICCPR	28 August 2002
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	10 December 1998
Art 14 of CERD	10 December 1998
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	15 December 1995
Optional Protocol to CEDAW	18 October 2005
Convention on the Rights of the Child (CRC)	16 June 1995
Optional Protocol to CRC- Armed Conflict	-
Protocol to CRC - Sexual Exploitation	-
Convention on the Prevention and Punishment of the Crime of Genocide	10 December 1998
Slavery Convention 1927	18 June 1927
Supplementary Slavery Convention 1956	-
Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or punishment(CAT)	10 December 1998
Art 22 of CAT	10 December 1998
International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (CMW)	-
Art 77 of CMW	-
Convention on Biological Diversity	02 November 1995

Relevant ILO Conventions

Convention	Date of ratification
ILO 29 (Forced Labour)	05 March 1997
ILO 105 (Abolition of Forced Labour)	05 March 1997
ILO 100 (Equal remuneration)	03 March 2000

1301 (CC); Botswana in the *Sesana & Others v Attorney-General* (52/2002) [2006] BWHC 1 (Bots) 202 pt H.1 para 3; Australia in *Mabo v Queensland II* (1992) 175 C.L.R. 1; Canada in *[Delgamuukw v British Columbia [1997] 153 D.L.R. (4th) 193.*

ILO 111 (Discrimination in employment and occupation)	05 March 1997
ILO 107 (Indigenous and tribal populations)	-
ILO 169 (Indigenous Peoples)	-
ILO 138 (Minimum age)	03 March 2000
ILO 182 (Worst Forms of Child Labour)	07 June 2000

AU instruments

African [Banjul] Charter on Human and Peoples' Rights	9 June 1996
Convention Governing the Specific Aspects of Refugee Problems in Africa	15 December 1995
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	17 December 2004
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights	3 July 2002
African Charter on the Rights and Welfare of the Child	7 January 2000
Cultural Charter for Africa	-
Convention on Nature and Natural Resources, 1968	-
Revised Version of Convention on Nature and Natural Resources, 2003	-

Status of reporting under the African Charter on Human and Peoples' Rights

The initial report of the Republic of South Africa to the African Charter on Human and Peoples' Rights (the African Charter) was submitted in 1998. The first periodic report was submitted to the Secretariat of the African Commission on 14 May 2005 and was examined at the 38th Ordinary Session of the African Commission held in Banjul, The Gambia, from 21 November to 5 December 2005. Issues arising from the report and concluding observations of the Commission are analysed in the discussion of the legal framework. Other reports submitted in accordance with UN Charter and Treaty bodies requirements, are also surveyed in part II of this report and, where feasible, the concluding observations and recommendations briefly discussed.

1.5 Institutional and policy bodies protecting indigenous peoples

Chapter 9 of the South African Constitution establishes institutions to support constitutional democracy. Most of these institutions are relevant in the promotion and protection of indigenous

peoples' rights, given that part of their mandate is human rights protection. These institutions are independent and subject only to the Constitution and law.⁹² The following are some of these institutions.

- The Public Protector
- The South African Human Rights Commission
- The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- The Commission on the Restitution of Land Rights
- The Commission on Gender Equality
- The Electoral Commission⁹³

The Public Protector is an institution with the powers to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.⁹⁴

The South African Human Rights Commission is mandated to promote respect for human rights and a culture of human rights; to promote the development and attainment of human rights; and to monitor and evaluate the observance of human rights in South Africa.⁹⁵ The Commission is also vested with the powers to investigate and report on the observance of human rights; to take steps necessary to secure appropriate redress where human rights have been violated; to carry out research; and to educate the population regarding human rights.⁹⁶ For example, the South African Human Rights Commission has undertaken research on the issue of indigenous rights in South Africa.⁹⁷ However, beyond the research report the findings of which have not been followed up to ensure implementation, the Chief Executive Officer of the Commission, Advocate Tseliso Thipanyane, acknowledges that the institution has not been as proactive as it could have been in seeking to protect the rights of groups self-identifying as indigenous peoples.⁹⁸ According to Advocate Thipanyane, while the mandate of the Commission was to protect and promote the

⁹² Sec 181(2) SA Constitution.

⁹³ Sec 181(1) SA Constitution.

⁹⁴ Sec 182(1) SA Constitution; The Public Protector Act 23 of 1994 regulates his powers and functions.

⁹⁵ As above, sec 184(1).

⁹⁶ As above, sec 184(2); The Human Rights Commission Act 54 of 1994 regulates the functioning and powers of the Commission.

⁹⁷ See South African Human Rights Commission *Research Project: Indigenous Peoples' Rights* (2002).

⁹⁸ Interview with Mr Tseliso Thipanyane during the in-depth study at the SAHRC offices in May 2008.

rights of all in accordance with the South African Bill of Rights, the Commission's resources were overstretched and, in his opinion, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities was the specialised institution that should be at the forefront of protecting indigenous peoples' rights in South Africa. Granted, he indicated that the Northern Cape and Western Cape branches of the Commission were mandated to look into issues of all marginalised communities and groups who include indigenous peoples in those regions.

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities has as its primary objective to promote respect for the rights of cultural, religious and linguistic communities.⁹⁹ According to the Chairperson of the Commission, Dr MD Guma, the Institution has in recent years sought to engage the most marginalised communities in South Africa, in particular the Khoe and San.¹⁰⁰ These deliberations include consultative workshops and conferences with indigenous communities in South Africa.¹⁰¹ However, the Commission, in the words of Dr Guma, 'was yet to execute its mandate effectively, especially with regard to the protection of marginalised cultural, religious and linguistic communities due to institutional and bureaucratic challenges'.¹⁰² Indeed, even an attempt to get any information from the website of the Commission on the reports of the proceedings of the consultative workshops and such other relevant information on the Commission's work remains fruitless. According to the Commission's Chair, part of the challenge has been lack of institutional support and what he terms a lack of 'horizontal conversation or engagement' among government departments and institutions. That has led to a duplication of efforts and a misunderstanding of the content and scope of the mandates of the institutions that support constitutional democracy in South Africa.

The Commission for Gender Equality promotes respect for gender equality and the protection, development and attainment of gender equality.¹⁰³ The Commission has the power to monitor, investigate, research, educate, lobby, advise and report on issues of gender equality.¹⁰⁴

⁹⁹ As above, secs 185-186; The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 regulates its operations.

¹⁰⁰ Interview with Dr MD Guma, Chairperson of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities at the Commission's offices on 22 September 2008.

¹⁰¹ One such conference was held in May 2008 in Bloemfontein, South Africa, to create a platform for indigenous communities' engagement with the Commission and government departments.

¹⁰² Above, n 99.

¹⁰³ As above, sec 187(1).

The Commission on the Restitution of Land Rights was established by an Act of Parliament.¹⁰⁵ The Commission is of particular use to indigenous peoples in South Africa as it was the first forum where land restitution claims could be lodged. However, the Commission is constrained by the Act, and cannot give full effect or recourse to the land claims of indigenous peoples due to the Act's time limitation clauses. In accordance with the Act, restitution claims had a cut-off date of 1913 and had to be lodged by 31 December 1998, dates that could potentially negatively impact indigenous peoples whose claims predate the 1913 cut-off date, and those who failed to lodge their claims by the 1998 deadline. The Commission has nevertheless been instrumental in awarding a number of successful land claims to some indigenous peoples, notably to the ≠Khomani San.¹⁰⁶ Further details are provided in part II of this report which examines the legal framework protecting indigenous peoples' land and resource rights.

Finally, the Electoral Commission manages elections in national, provincial and municipal legislative bodies.¹⁰⁷ Apart from the institutions which strengthen the constitutional democracy in South Africa, the following institutions have a direct role in the protection and promotion of indigenous peoples' rights in South Africa.

- Pan South African Language Board (www.pansalb.org.za)
- Khoe and San Language Board (KSNLB)
- National House of Traditional Leaders
- The National Khoisan Council

¹⁰⁴ As above, sec 187(2); Commission for Gender Equality Act 39 of 1996 regulates its powers and functions.

¹⁰⁵ Restitution of Land Rights Act 22 of 1994.

¹⁰⁶ See Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa, para 39; Crawhall 19.

¹⁰⁷ As above, sec 190; The Independent Electoral Commission Act 150 of 1993 and the Electoral Act 73 of 1998 regulate its functioning and the conduct of elections.

Part II: Legal protection of indigenous peoples in South Africa

A Introduction

This section highlights the legal framework protecting and promoting indigenous peoples in South Africa, capturing some of the key provisions of the laws that have a bearing on indigenous peoples. However, the analysis is not complete and it is hoped that a further analysis of the information and legal framework will be undertaken through in-depth research. In-depth research might assess the level of implementation of the legal framework surveyed. The section discusses the issues thematically, based on core claims made by indigenous peoples all over the world.

1 Recognition and identification

The question of identity is important since it is associated with a quest to belong and with a capacity to exercise rights that accrue with that identity.¹⁰⁸ In acknowledging the importance of identity, the South African Constitution provides for the right to citizenship in section 3. This section provides for a common citizenship for all South Africans. The Constitution further provides that all citizens are equally entitled to the rights, privileges and benefits of citizenship, but are also subject to the same duties and responsibilities of citizenship. The South African Citizenship Act¹⁰⁹ and the Restoration and Extension of South African Citizenship Act¹¹⁰ provide for the acquisition, loss and restoration of citizenship. The Restoration and Extension of South African Citizenship Act deals with persons who were deprived or did not gain citizenship as a result of the apartheid policy of creating Bantustan territories of Transkei, Bophuthatswana, Venda and Ciskei.

To indigenous people, identity goes beyond the granting of citizenship rights and includes their recognition as an indigenous group. Through being identified formally as an indigenous community they will be able to claim rights that accrue with indigenous identity, such as the protection of their territory, language, culture, tradition and way of life. While article 1(2) of the ILO Convention 169 provides that self-identification shall be regarded as the fundamental criterion for determining the groups to which the provisions of the Convention applies, recognition by the state is also important. In South Africa, 'the cabinet adopted a memorandum in 2004 setting out a policy process to recognise [the] Khoer and San as vulnerable indigenous

¹⁰⁸ See Saugestad 40.

¹⁰⁹ Act 88 of 1995.

¹¹⁰ Act 196 of 1993.

communities'.¹¹¹ This is a positive step towards the recognition of indigenous peoples in South Africa and, as illustrated by a variety of government and official statements, the Khoi and the San are regarded by the state as 'indigenous people' who have been marginalised and who deserve special protection.¹¹² However, the memorandum and the public officials' statements have not translated into an official policy recognising the Khoi and the San as the indigenous peoples of South Africa.¹¹³

Since the emergence of a new democratic order in 1994, South Africa has consistently maintained that it recognises the vulnerability of the Khoekhoe and the San and that it is working towards improving their welfare.¹¹⁴ South Africa also participates in the deliberations of the UN Working Group on Indigenous Affairs,¹¹⁵ and nominated an indigenous person, Dr William Langeveldt, a Korana, to represent it in the UN Permanent Forum on Indigenous Affairs. The South African Constitution further makes express mention of the Khoi, Nama and San, but within the context of language.¹¹⁶ While the three indigenous languages are not given the same official status as other predominantly Bantu African languages, the fact that they are mentioned in the Constitution signals that the state acknowledges their importance and realises that they deserve protection. Sections 30 and 31 of the Constitution on language and culture, as well as cultural, religious and linguistic communities respectively, have important guarantees to some of the fundamental rights of indigenous peoples given that these provisions speak directly to minorities and cultural communities. However, it is unfortunately similarly telling that indigenous peoples' languages

¹¹¹ See IWGIA *The Indigenous World* (2006) 516. The state has also established an Inter Departmental Working Group on Khoi and San Issues.

¹¹² See n 153 below on examples of some policy statements.

¹¹³ See Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa 2; para 81,

¹¹⁴ See, for example, the statement of President Thabo Mbeki during the opening of Parliament on 25 June 1999 on the promotion and protection of the cultural, linguistic and religious rights of all peoples; Speech of the then deputy President Thabo Mbeki at the ceremony to symbolically hand over the successfully claimed land to the Khomani san of the Southern Kalahari; Statement of Deputy President Thabo Mbeki during the budget debate in the National Assembly, Cape Town 23 March 1999; see also keynote address by Dr Essop Pahad, Minister in The Presidency at the National Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (15/12/2005); Statement by the Minister for Provincial Affairs and Constitutional Development, Mohammed Valli Moosa, during the inauguration of the National Khoisan Forum, 27 May 1999, Upington; Minister of Finance, Trevor Manuel's address at the David Wynne Lecture, Somerset College 18/08/2006; address by the then deputy president Jacob Zuma to the opening ceremony of the National Khoisan consultative conference 29 March 2001; see Report of the Department of Provincial and Local Government, Khoi San Communities in South Africa (2004) all available at <www.polity.org.za> accessed 10 January 2007; see also Tong 3.

¹¹⁵ See <www.ohchr.org/english/issues/indigenous/groups/groups-01.htm> accessed 22 March 2007.

¹¹⁶ See sec 6(5) SA Constitution.

are not accorded official status as are the other languages. The UN Special Rapporteur on Indigenous Peoples' Mission to South Africa called upon the state give constitutional recognition in parity with the other 11 officially recognised languages to the various Khoe and San groups.¹¹⁷

The Committee on the Elimination of Racial Discrimination (CERD) has also called upon South Africa to provide a 'qualitative description of the ethnic composition of its population, in particular indigenous peoples'.¹¹⁸ It is hoped that such an exercise will give an 'accurate perception of the effective enjoyment of the rights provided in the Convention (CERD) by different ethnic groups', particularly indigenous peoples whose rights, the Committee observed, continue to be violated.¹¹⁹

Indigenous peoples in South Africa have also decried the fact that, despite having resided in certain regions for generations, particularly the Northern Cape Province, there is not a single correct San or Khoe place name in the region.¹²⁰ In democratic South Africa the name changes of places have elicited deep emotions and sentiments and it is unfortunate that a group considered indigenous to the country has been ignored because they have not formally petitioned for such recognition. Crawhall aptly captures this irony 'the newly reformed SA Geographical Names Council has rejected accusations of anti-indigenous bias pointing out that no indigenous group made applications for name changes. It is a statement on the current constitutional set-up. If you do not have the infrastructure and sophistication to use formal channels to ensure that rights are implemented, they are of little or no use to you'.¹²¹

It is significant that the South African government has established a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.¹²² Indeed it is hoped that this important Commission will ensure that the indigenous peoples in South Africa are recognised and their rights protected.

¹¹⁷ Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa para 81.

¹¹⁸ CERD Concluding Observations 2006 para 11; see also para 84.

¹¹⁹ As above para 19.

¹²⁰ Crawhall 19.

¹²¹ As above.

¹²² See secs 181(1), 185, and 186 SA Constitution; see also Act 19 of 2002 establishing the Commission.

2 Non-discrimination

Indigenous peoples have often been discriminated against on grounds of race and due to their strong attachment to culture and traditions. Given South Africa's history of racially discriminatory policies and laws, the 1996 Constitution sought to address the issue through a variety of provisions. Section 1, for example, provides that the democratic state is founded on, among others, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms as well as non-racialism and non-sexism. Section 9 of the Constitution further provides for the right to equality before the law and the right to equal protection and benefit of the law and non-discrimination on various grounds, including ethnic or social origin and culture.¹²³ Parliament also passed the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000,¹²⁴ to give effect to section 9(4) of the Constitution. Indigenous peoples may therefore not be discriminated against on the basis of their race, culture religion or any of the grounds envisaged in section 9(3) of the Constitution. The Constitution further provides that due to past inequalities affirmative action is acceptable.¹²⁵ This provision is important to indigenous peoples in South Africa since they continue to be marginalised and could potentially benefit from affirmative action programmes.¹²⁶

Sections 30 and 31 of the Constitution on language and culture provide for a legal framework for indigenous peoples to espouse their fundamental human rights without discrimination. These stipulations provide a reasonable threshold upon which indigenous peoples in South Africa may find recourse within the justice system. It has been argued correctly that 'although the rights envisaged by section 30 and 31 give rise at minimum, to negative liberty, it may be interpreted as placing a positive obligation on the state to ensure the survival and development of minority cultures where they are threatened with integration'.¹²⁷ Some of the possible factors leading to such a situation are discriminatory practices, policies and measures aimed at assimilating indigenous peoples to the mainstream communities and their development agendas.

However, evidence of indigenous peoples' social exclusion and discrimination remains a cause for concern in South Africa despite the legal framework.¹²⁸ The CERD, for instance, has

¹²³ Sec 9(3) SA Constitution.

¹²⁴ Act 4 of 2000.

¹²⁵ Sec 9(2) SA Constitution.

¹²⁶ Chennells and du Toit 101.

¹²⁷ Chennells and du Toit 102, citing Chaskalson *et al* (1996) 1999: 38-18.

¹²⁸ See generally Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa; CERD Concluding Observations 2006 para 19; see also Channels and du Toit 101, citing

expressed ‘concern at the situation of indigenous peoples, inter alia the Khoi, San, Nama and Griqua communities, and in particular, hunter-gatherer, pastoralist and nomadic groups’ and decried the ‘absence of information on the specific measures adopted by the state to ensure the enjoyment of all rights by indigenous communities’.¹²⁹

3 Self-management

The Preamble to ILO Convention No 169 recognises the aspirations of indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages, and religions within the framework of the states in which they live. The South African Constitution provides for ‘the right of the South African people as a whole to self-determination, as manifested in the Constitution, and does not preclude within the broad framework of this right, recognition of the right to self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic, or in any other way, determined by national legislation’.¹³⁰ The state has given meaning to this provision by making provision for communities to govern themselves through its principle of cooperative government.¹³¹ By virtue of section 40(1) of the Constitution the government is comprised of national, provincial and local spheres which are distinctive, interdependent and interrelated. Local communities such as indigenous communities are therefore able to influence and play an active role in local spheres of government. However, given that indigenous communities at present in South Africa are minorities with little if any economic power to influence local politics and policies, they continue being marginalised.

The government has also supported and revived traditional leadership and institutions through the Constitution and legislation in a bid to promote self-government. Chapter 12 of the South African Constitution provides for traditional leadership that functions according to customs and traditions.¹³² The Traditional Leadership and Governance Framework Act¹³³ provides for the recognition of traditional communities whose customs recognise traditional leadership and observe customary law.¹³⁴ This provision theoretically excluded the majority of the San and Khoe

¹²⁹ an ILO report that documents a campaign of assimilation of Nama and San children who were beaten for acknowledging their identity or use of their language.

¹³⁰ CERD Concluding Observations 2006 para 19.

¹³¹ Sec 235 SA Constitution.

¹³² Secs 40-41 SA Constitution.

¹³³ Secs 211-212 SA Constitution.

¹³⁴ Act 41 of 2003.

¹³⁴ Sec 2.

communities who did not exhibit established structures recognising traditional leadership by virtue of these structures having been dismantled by the apartheid regime in its policy of assimilation.¹³⁵ However, since the coming into existence of the democratic state, the San and Khoe and other indigenous groups have reorganised to re-establish and form these leadership structures.¹³⁶ Although the state is still in the process of recognising these structures, indigenous peoples are making all possible efforts to ensure they are recognised within the traditional leadership framework envisaged by the Act.¹³⁷ The recognition of traditional leaders is done by the Premier of the province through official gazettment after consultation with the relevant provincial house of traditional leaders, the community concerned and the king or queen under whose authority the community will be subject.¹³⁸ The customs of the community should also accord to the values and norms of the Constitutional Bill of Rights such as equality and prevention of unfair discrimination.¹³⁹ On recognition of a traditional community, a traditional council is then established to, among other tasks, administer the affairs of the community in accordance with customs and traditions.¹⁴⁰ However, as is indicated below, traditional communities have not yet been legally recognised among South Africa's indigenous peoples. This has perhaps been due to a lack of legal recognition for indigenous peoples' traditional leadership structures which, as described below, is currently under review and consideration by state structures.

The National House of Traditional Leaders, provided for in chapter 12 of the Constitution, functions as an advisory body at the national level, and similar advisory Provincial Houses of Traditional Leaders have been established at the provincial level. However, these Houses do not include the traditional leadership of the Khoi-San communities.¹⁴¹ Furthermore, while a number of traditional communities and councils have been recognised for the mainstream communities in

¹³⁵ Crawhall 19; see also Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa paras 49-54.

¹³⁶ As above.

¹³⁷ As above.

¹³⁸ Traditional Leadership and Governance Framework Act sec 2(2) (a).

¹³⁹ See *Bhe & Others v Magistrate, Khayelitsha; Shibi v Sithole and others; SAHRC & Another v President of the RSA & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('*Bhe*'); see also *Tinyiko Shilubana & others v Sidwell Nwamitwa & others* Case CCT 03/07(2008) ZACC 9, <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/20080605083932/SIRSI/0/520/J-CCT3-07C>. In this case the Constitutional Court of South Africa upheld the legitimacy of traditional authorities to develop their customary laws in conformity with the principles and values of the Constitution.

¹⁴⁰ Traditional Leadership and Governance Framework Act secs 2, 3 and 4.

¹⁴¹ Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa para 51.

various provinces in South Africa, none has been recognised to cater for indigenous peoples such as the Khoi and the San.¹⁴²

The National Khoi-San Council in recent years has been demanding the official and legal recognition of San and Khoi traditional authorities.¹⁴³ The Council comprises of 21 representatives of five main groupings of the Khoi-San communities: Griqua, Korana, Cape Khoi, Nama and San – and is a national non-statutory body. Established on 22 May 1999, the Council’s main focus has been to engage the government on the issue of recognition of indigenous peoples’ traditional structures and authority.¹⁴⁴ Indigenous communities in South Africa hold the view that ‘Chapter 12 of the Constitution on Traditional Leadership and the Traditional Leadership and Governance Framework Act, were not meant, and cannot be used, to provide a basis for the recognition of Khoi-San communities and leadership’¹⁴⁵ The National Khoi-San Council on behalf of indigenous communities in South Africa has thus sought the enactment of specific legislation providing for the recognition of Khoi-San communities and leadership.¹⁴⁶ In the alternative they demand that the Traditional Leadership and Authorities Act should be amended and expanded ‘to accommodate participation by the Khoi-San at the local, provincial and national levels of government’.¹⁴⁷ Discussions over these issues are still ongoing. According to Chief Little, the chair of the National Khoi San Council, ‘there is a flicker of hope’ that the state will eventually grant indigenous communities their wishes through continued constructive engagement.¹⁴⁸

4 Participation and consultation

Participation is a fundamental principle of the ILO Convention 169.¹⁴⁹ Participation includes political participation, participation in decision-making and in the design and implementation of projects affecting indigenous peoples. Participation in elections is one of the means of such participation. To facilitate the conduct of elections in South Africa, the Constitution establishes

¹⁴² As above.

¹⁴³ See a copy of a discussion document of a meeting between the Minister of Provincial and Local Government and the National Khoi San Council held on 13 May 2008.

¹⁴⁴ As above.

¹⁴⁵ As above para 4.

¹⁴⁶ As above, paras 4 & 8; see also a Draft Proposed National Khoi-San Council Bill- by the current National Khoi San Council.

¹⁴⁷ As above para 9.

¹⁴⁸ Discussions with Chief Little in Cape Town in September 2008.

¹⁴⁹ See arts 6.1 & 7.1 of the Convention. See also ILO Convention on Indigenous and Tribal Peoples, 1989; Manual A (2003) 18, 19.

the Independent Electoral Commission¹⁵⁰. The mandate and functions of the Commission are elaborated by the Electoral Commission Act, 1996.¹⁵¹ The Commission oversees the free and fair participation of every registered voter in the election, either to vote or to stand for election. The UN Special Rapporteur on Indigenous Peoples' has called on South Africa's political parties to 'take a stand in favour of constitutional recognition of indigenous peoples', which in essence would also mean their active participation in the political parties' affairs that would translate to nomination in elective posts and the formulation of policies.¹⁵²

Due to lack of recognition of traditional community structures of indigenous peoples, there has been little if any consultation of these groups on matters of national importance, least those that affect them.¹⁵³ The few occasions where the state has attempted to engage indigenous communities have been with regard to their persistent clamour for recognition of their traditional authorities. For example, the National Khoi-San Council (NKSC) has been funded by the Government for the purposes of negotiation on specific themes.¹⁵⁴ Among others, it has been mandated to 'review the contents of the Government's Status Quo Report on the role of traditional leaders in local government, providing advice on indigenous issues'.¹⁵⁵ The consultations are occurring within the realm of the Department of Provincial and Local Government and involve 'negotiations regarding the constitutional accommodation of indigenous communities in South Africa'.¹⁵⁶ Although indigenous peoples have expressed 'dissatisfaction over the slow pace of the process and that it has been placed under general negotiations relating to the status of traditional authorities,' the process affords indigenous peoples with a forum to engage directly with the state on issues that affect them.¹⁵⁷

Consultation of indigenous peoples in South Africa has also been facilitated through 'the Project for the Promotion of ILO Policy on Indigenous and Tribal Peoples and the South African Department for Constitutional Development on their rights as equal citizens according to the

¹⁵⁰ SA Constitution secs 190-191.

¹⁵¹ Act 51 of 1996.

¹⁵² Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa Report para 103.

¹⁵³ Revelations made during discussions with indigenous communities in Cape Town, Upington, Richtersveld and Kimberly, with the research team in September 2008

¹⁵⁴ As above para 53.

¹⁵⁵ See ILO Convention on Indigenous and Tribal Peoples, Manual 20.

¹⁵⁶ Chennells and du Toit 103.

¹⁵⁷ As above 103.

South African Constitution'.¹⁵⁸ A resolution and plan of action are said to have resulted from the consultation. According to representatives of indigenous communities interviewed during the course of this research, while such high level government and international organisations' projects are ostensibly initiated on behalf of indigenous peoples, they have not involved indigenous peoples in their formulation and implementation. Accordingly, most indigenous peoples are not even aware of their existence or the status of their implementation, as was the case with that particular project.

Indigenous peoples' participation and consultation - particularly over the management of natural resources – are also supposed to be facilitated through the National Heritage Resources Act.¹⁵⁹ The Act grants participation opportunities to non-governmental heritage organisations and community groups which include indigenous peoples' organisations and community structures.¹⁶⁰ However, indigenous peoples surveyed were either not aware of the Act or had not established heritage organisations that would facilitate such participation.

5 Access to justice

Access to justice is envisioned by the South African Constitution through its guarantee of equal protection of the law and the right to a fair trial.¹⁶¹ Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by application of law decided in a fair hearing before a court, or where appropriate, another independent and impartial tribunal or forum. Efficient and accessible courts of law and quasi-judicial forums are therefore important to guarantee access to justice to all in South Africa, including indigenous peoples. Indeed, the Constitutional Court in the case of *Bernstein v Bester* observed that the state has a duty to establish independent tribunals for the resolution of civil disputes and the prosecution of persons charged with having committed crimes.¹⁶²

The South African Constitutional Court has further observed that the judiciary has a role to play in protecting the rights of minorities and the marginalised. The Court has through a number of pronouncements demonstrated that courts can progressively utilise constitutional provisions as entrenched in the Bill of Rights to contribute significantly to the empowerment of disadvantaged

¹⁵⁸ As above.

¹⁵⁹ National Heritage Resources Act 25 of 1999.

¹⁶⁰ Chennells and du Toit 103.

¹⁶¹ Secs 9(1) and 35(3) SA Constitution.

¹⁶² *Bernstein v Bester* 1996 2 SA 751 (CC) para 51.

groups. Indeed, courts have the capacity to provide a judicial forum in which the marginalised can be heard and seek redress, in circumstances where the political process could not have been successfully mobilised to assist them.¹⁶³ The Richtersveld Community case, discussed in the land and natural resources theme below, is a case in point.¹⁶⁴ The Constitutional Court of South Africa, in its judgment on the constitutionality of the death penalty under the transitional 1993 Constitution states that:

The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.¹⁶⁵

Judicial legal processes are technical, expensive and take considerable time to be resolved. Given that most indigenous peoples due to their historical and continued marginalisation are indigent, there is a need for more than a mere availability of courts to espouse their rights. To cater for persons who can not afford legal services, South Africa has established a national legal aid scheme.¹⁶⁶ Courts in South Africa recognise the need for legal aid in civil and criminal matters.¹⁶⁷ Section 35(2) of the Constitution provides that everyone who is detained, including sentenced prisoners, has the right to choose and consult with a legal practitioner and to be informed of their rights promptly. Legal Aid is also envisaged for poor people in civil matters by the Legal Aid Act,¹⁶⁸ and the rules promulgated under the Magistrates Courts Act¹⁶⁹ and the Supreme Court Act.¹⁷⁰ However, unlike in criminal matters, there are no specific constitutional duties imposed upon the state to provide the services of a legal practitioner to litigants in civil matters.¹⁷¹

Many universities' legal aid clinics and non-governmental organisations provide some form of legal aid. Indigenous peoples in South Africa have been assisted by non-governmental organisations to espouse their rights before courts of law and tribunals.¹⁷² Other state efforts to

¹⁶³ M Darrow & P Alston 'Bills of Rights in Comparative Perspectives' in P Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 493.

¹⁶⁴ *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community* 2003 (12) BCLR 1301 (CC).

¹⁶⁵ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) para 88.

¹⁶⁶ See Legal Aid Act 22 of 1969 as amended by Legal Aid Amendment Act 20 of 1996.

¹⁶⁷ See *S v Wessels* 1966 4 SA 89(C) 95.

¹⁶⁸ Act 22 of 1969 sec 3; See also Legal Aid Guide para 3.2.

¹⁶⁹ Act 32 of 1944, r 53.

¹⁷⁰ Act 59 of 1959: uniform Rules 40.

¹⁷¹ See DJ Mcquoid-Mason 'Legal Aid' in WA Joubert *The Law of South Africa* (2nd ed) (2004) 5 part 3, 213.

¹⁷² See eg the Legal Resources Centre involvement in the Richtersveld case <www.lrc.org.za>.

make justice accessible for all include the establishment of Citizen Advice Desks aimed at incorporating and expanding community participation in the administration of justice. The desks provide useful information and general advice for magistrate court users, as well as information regarding the court system, the administration of justice and people's rights.¹⁷³ Other efforts include information desks, which offer legal information, advice and referral to appropriate agencies. Some courts have also set up a 'witness friend' who assists witnesses with issues such as ushering them to the correct courts. They also attend to some of the concerns of witnesses and provide support.¹⁷⁴ 'One Stop Centres' have also been established to render services to victims of domestic violence or sexual offences, as well as to reduce secondary victimisation and increase prosecution.¹⁷⁵ Mobile courts have been launched on a needs basis to facilitate access to justice to rural and isolated communities. This initiative could be very useful for indigenous people who live in remote and often inaccessible places.¹⁷⁶ The South African Human Rights Commission has in fact recommended that there existed a need for circuit, periodic or special courts in Indigenous peoples' local areas such as Ashkam or Rietfontein.¹⁷⁷ According to officials at the Department of Justice and Constitutional Development, mobile courts in remote areas, especially in the Northern Cape Province, often operated on an *ad hoc* basis, although most dealt with criminal matters and civil disputes.¹⁷⁸ However, most indigenous peoples decried the fact that the courts relied mainly on a statutory legal framework which is often inconsistent with their version of justice.¹⁷⁹ For instance, the adversarial nature of resolving matters by the courts of law and the lengthy period it took to resolve disputes continued to frustrate indigenous peoples who prefer dialogue and negotiation, consistent with their traditions and customs.

The Small Claims Court is another innovation by the state to establish a court for the adjudication of small civil claims not exceeding in value the amount determined by the Minister of Justice.¹⁸⁰ Small claims courts have jurisdiction in respect of persons but not in respect of the state and only natural persons may institute action, although a juristic person may be sued.¹⁸¹ The court is a

¹⁷³ See First Periodic Report of South Africa to the African Human Rights Commission para 99.

¹⁷⁴ First Periodic Report of South Africa to the African Human Rights Commission (2001) para 101.

¹⁷⁵ As above para 102.

¹⁷⁶ As above para 103.

¹⁷⁷ See Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa, paras 99-100.

¹⁷⁸ Interview with officials of the department of Justice and Constitutional Affairs in Pretoria South Africa, in September 2008.

¹⁷⁹ Discussions with indigenous communities in Upington and Kimberley at the South African San Institute Offices in September 2008.

¹⁸⁰ Small Claims Court Act 61 of 1984, sec 15.

¹⁸¹ As above, sec 7.

good avenue for indigenous peoples' claims consisting of small disputes as there are no charges or complex legal technicalities before the court. However, a lack of awareness of these courts amongst indigenous peoples remains a serious constraint in these communities' ability to utilise them to resolve disputes.¹⁸²

In terms of the Black Administration Act 38 of 1927, the Minister may also authorise a chief or headman to hear and determine civil claims arising out of indigenous law and custom. The chiefs' judgment is enforced according to indigenous law (African customary law) and laws of the tribe which are suitable for most indigenous peoples, particularly the Nama (Khoe) and the San.¹⁸³ These groups retain a close attachment to their cultures, traditions and ways of solving disputes. The South African Constitutional Court has also affirmed that customary law in South Africa is an integral part of South African law.¹⁸⁴ The importance of customary law to indigenous peoples cannot be overemphasised. Indeed, indigenous peoples rely on traditional justice systems which apply their customary laws for settling most disputes. The case of *Bangindawo v The Head of the Nyanda Regional Assembly* held that 'the believers in and adherents of African Customary law believe in the impartiality of the chief or king when he exercises his judicial function'.¹⁸⁵ The recognition and role of traditional leaders for indigenous peoples are therefore crucial to their rights to access justice. Indeed, CERD has called upon South Africa to furnish information on 'how the Traditional Leadership and Governance Framework Act of 2003 addresses the status of customary law and traditional leadership, *vis-à-vis* both national and provincial legislation, in relation to the elimination of racial discrimination'.¹⁸⁶ This is important since the application of such laws may have the effect of creating or perpetuating discrimination and infringing upon other fundamental human rights.¹⁸⁷

Although the above innovations and legal aid exist in the South African legal framework, most indigenous peoples access to justice for remains a serious challenge.¹⁸⁸ 'While noting the existence of legal aid mechanisms' in South Africa, CERD for instance expressed concern 'about the difficulties of access to justice, especially for members of the most disadvantaged and poor

¹⁸² Discussions with indigenous communities in Kimberley, Upington, Alexander Bay, and Cape Town in September 2008.

¹⁸³ See TW Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 6170.

¹⁸⁴ *Richtersveld* decision para 51 (referring to customary law); see also para 7 n 8, stating that customary law is synonymous with indigenous law.

¹⁸⁵ *Bangindawo v Head of the Nyanda Regional Assembly* (1998) (3) BCLR 314 (Tk) 327D.

¹⁸⁶ See CERD Concluding Observations (2006) para 12.

¹⁸⁷ See I Currie & J de Waal *The Bill of Rights Handbook* (2005) 731.

¹⁸⁸ See CERD Concluding Observations (2006) para 24.

ethnic groups, including indigenous people, especially those unfamiliar with English or Afrikaans'.¹⁸⁹ The CERD called upon the state to 'take the necessary measures to ensure access to justice, including through the use of official languages other than English and Afrikaans, and to establish mechanisms to strengthen the provision of legal aid for all members of disadvantaged and poor ethnic groups'.¹⁹⁰ Crawhall's 1999 ILO study also noted that 'currently, most representatives of the [s]tate, and courts in particular, ignore the constitutional guarantee (in article 35 of the Constitution of South Africa that requires accused persons to be informed in language they understand) for Nama, !Xû and Khwedam speakers'.¹⁹¹ The Mission to South Africa of the UN Special Rapporteur on Indigenous Peoples' similarly recommended that 'special training activities for personnel in judiciary be undertaken to overcome prevailing cultural ignorance of specific needs of indigenous communities'.¹⁹² English and Afrikaans are widely used in courts in South Africa, especially in most areas where indigenous peoples reside.¹⁹³ The indigenous peoples that engaged with the research team for this report revealed that the use of Afrikaans among indigenous peoples in the Western and Northern Cape Provinces was widespread. Indeed, apart from a few remaining indigenous language speakers - especially Nama speakers in the Northern Cape, the majority had adopted Afrikaans as their language of communication, mainly as a result of the assimilationist policies of the apartheid regime.¹⁹⁴

6 Cultural and language rights

One of the key elements of identifying indigenous peoples is that their cultures and ways of life differ considerably from those of the dominant society and that their cultures are often under threat, in some cases to the extent of being threatened with extinction.¹⁹⁵ In South Africa, according to the South African San Institute, 'at least four languages have become extinct and the four surviving languages Khoekhoegowab (Nama), !Xun, Khwedam and the almost extinct N/u

¹⁸⁹ As above.

¹⁹⁰ As above, para 24.

¹⁹¹ Crawhall 19.

¹⁹² Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa para 99.

¹⁹³ Discussions with indigenous communities in Kimberley, Upington, Alexander Bay, and Cape Town in September 2008.

¹⁹⁴ As above.

¹⁹⁵ See ILO Convention on Indigenous Peoples and Tribal Peoples 1989 169; Manual ILO 2003, 7; see also ILO Convention 169, arts 1(a); 2(b); 5(a); 8 13(1); see ILO / African Commission on Human and Peoples' Rights Report of the Workshop to determine the scope and methodology of the research, Examining constitutional, legislative and administrative provisions concerning indigenous and tribal peoples in Africa, 18-20 September 2006, Yaounde, Cameroon, para 1.3.

language are under extreme threat'.¹⁹⁶ Indigenous peoples take pride in practising, retaining and perpetuating their culture and traditions, making culture one of the most important rights that need protection and promotion. Of relevance to indigenous peoples in South Africa is section 31 of the South African Constitution. The section provides that persons belonging to cultural, religious or linguistic communities may not be denied the right, with other members of that community, to enjoy their culture, practice their religion and use their language, and to form, join or maintain cultural, religious and linguistic associations and other organs of civil society (institutions).¹⁹⁷ Section 31 of the South African Constitution reflects section 27 of the International Convention on Civil and Political Rights (ICCPR)¹⁹⁸ to which South Africa is a party. South Africa is therefore obliged to uphold its international and domestic law obligations by giving effect to this provision which has been interpreted by the UN Human Rights Committee to include 'economic and social activities which are part of the culture of a community' to which indigenous peoples belong.¹⁹⁹ Indeed, according to Beukes, the South African Constitution provides for 'both a collective and communal (in community with a group) and individual protection of the right'.²⁰⁰

Indigenous peoples have a spiritual connection to their lands and territories and their culture and traditions are further influenced by spiritual beliefs. Section 15 of the South African Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion. Freedom of religion includes traditional African religions and practices which are therefore protected. This provision reflects South Africa's other international obligations such as article 18(1) of the ICCPR and article 8 of the African Charter on Human and Peoples' Rights. However, in the exercise of religion, an individual or a community may not exercise the right in a manner inconsistent with the other provisions of the Bill of Rights. In South Africa, most

¹⁹⁶ South African San Institute (SASI) Annual report 2000-2001, Cape Town SASI (2001) cited in Chennells and du Toit 106.

¹⁹⁷ Sec 31(1) SA Constitution.

¹⁹⁸ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (16) 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. Sec 27: 'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

¹⁹⁹ *Chief Bernard Ominayak and the Lubicon Lake Band v Canada*, Communication 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990) para 32.2.

²⁰⁰ M Beukes 'Culture and Cultural Rights' in WA Joubert *The Law of South Africa* (2004) 5 part 3, 423.

indigenous peoples have adopted and practice Christianity and are at liberty to freely exercise their religious rights.²⁰¹

In order to regulate the right to culture, various acts of Parliament have been promulgated in South Africa. Most of these acts establish institutions that promote and protect the right to culture. These acts include: The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act,²⁰² the Culture Promotion Act,²⁰³ The National Arts Council Act,²⁰⁴ The Pan South African Language Board Act (PANSALB);²⁰⁵ and the Cultural Institutions Act.²⁰⁶ The government of South Africa has also issued a policy document on culture - the White Paper on Arts, Culture and Heritage.²⁰⁷ The White paper defines culture as ‘the dynamic totality of distinctive spiritual, material, intellectual and emotional features which characterise a society or social group. It includes the arts and letters, but also the modes of life, the fundamental rights of the human being, value systems, traditions, heritage and beliefs developed over time and subject to change’.²⁰⁸

From the foregoing it is evident that the right to culture is adequately provided for and that the law and policy seek to be inclusive in their coverage of what constitutes culture. The Commission for the Promotion of and Protection of the Rights of Cultural, Religious and Linguistic Communities, for instance, is mandated to:

- Promote respect for and further the protection of the rights of cultural, religious and linguistic communities ;
- Promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association;
- Foster mutual respect among cultural, religious and linguistic communities;
- Promote the right of communities to develop their historically diminished heritage;

²⁰¹ Discussions with indigenous communities in Kimberley, Upington, Alexander Bay, and Cape Town in September 2008.

²⁰² Act 19 of 2002.

²⁰³ Act 35 of 1983.

²⁰⁴ Act 56 of 1997.

²⁰⁵ Act 59 of 1995.

²⁰⁶ Act 119 of 1998.

²⁰⁷ The paper is issued by the Department of Arts, Culture, Science and Technology, 4 June 1996.

²⁰⁸ White Paper 12.

- Recommend the establishment or recognition of community councils in accordance with section 36 or 37 of the Act.²⁰⁹ However, the Commission to date is yet to establish any community councils although it has drafted regulations which, once adopted by the Minister of provincial and local government, will pave way for the Commission to establish community councils.²¹⁰

On the issue of culture promotion, the Culture Promotion Act assigns that obligation to the provinces. The Act provides for the establishment of regional councils for cultural affairs.²¹¹ The regional councils' functions are to preserve, develop, foster or extend culture as it finds expression in the region for which it has been established.²¹²

Language and culture are closely related since language is one of the main mediums of expressing culture. Indeed, language gives meaning to culture since it is one of the mediums of its expression. The Constitution provides that 'everyone has the right to use language and to participate in the cultural life of their choice'.²¹³ Section 30 of the South African Constitution provides that everyone has the right to use the language and participate in the cultural life of their choice but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. Section 31 provides that persons belonging to cultural, religious or linguistic communities may not be denied the right, with other members of the community, to enjoy their culture, practice their religion and use their language, and to form, join or maintain cultural, religious and linguistic associations and other organs of civil society. These rights may also not be exercised in a way inconsistent with the Bill of Rights.

The Constitution seeks to protect and promote the linguistic diversity of South Africans. Article 6 of the Constitution provides for the following languages as national languages, giving an indication of some of the recognised linguistic groups in the country: sePedi; Sesotho; Setswana; siSwati; Tshivenda; Xitsonga; Afrikaans; English; isiNdebele; isiXhosa and IsiZulu. Apart from English and Afrikaans, the rest are all Bantu languages. However, the Constitution does provide for the promotion of Khoi, Nama and San languages which indicates that it recognises the

²⁰⁹ The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 sec 4(a-e).

²¹⁰ Discussions with Dr Guma, the Chairperson of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities in September 2008.

²¹¹ Culture Promotion Act 35 of 1983 sec 3(1).

²¹² As above, sec 3(5).

²¹³ Sec 30 SA Constitution.

languages of Khoi, Nama and San speakers.²¹⁴ While indigenous peoples welcome the mention of their languages in the Constitution, they still feel aggrieved by the fact that these languages are not considered official national languages.

The Constitution also seeks to promote the use of language as a medium of instruction in education as discussed below by providing that ‘every person has the right instruction in the language of his or her choice where reasonably practical’.²¹⁵

The PANSALB gives meaning to language rights which are useful in the promotion of culture. The Board is established to promote and ensure respect for languages commonly used by South African communities, including Khoi, Nama and San languages.²¹⁶ The Board has for instance established a Khoe and San National Language Body in August 1999 which has been making some progress in challenging several government departments on the extent to which they have gone to promote the use of indigenous peoples’ languages.²¹⁷ It is also worth noting that the Board must establish national lexicography units whose function it is to promote language development. However, apart from the 11 official languages whose lexicography units had been established, indigenous languages such as the San and Khoi are yet to have any such units.²¹⁸ The PANSALB has also decried the limited resources allocated to it to the extent that it has indicated that it does not have the capacity to assist Khoe and San people to revive and develop their languages.²¹⁹ The problem is exacerbated by the lack of coherence in policy at the national level with different institutions passing the buck on who has the responsibility and mandate to undertake various functions related to the promotion of languages.²²⁰ The Mission to South Africa of the UN Special Rapporteur on Indigenous Peoples called upon the state to ‘establish as matter of priority a comprehensive feasible plan to preserve, protect and promote indigenous languages in South Africa and their preservation protected by law’.²²¹

Provincial legislatures are expected to adopt laws to regulate the use of official languages in their respective governments. The Western Cape and the Northern provinces, representative of some of

²¹⁴ Sec 6(5) SA Constitution.

²¹⁵ Sec 32 SA Constitution.

²¹⁶ Sec 6(5) SA Constitution.

²¹⁷ Chennells and du Toit 106.

²¹⁸ See the Pan South African Language Board: Annual Report 2001/2002 10.

²¹⁹ Chennells and du Toit 106.

²²⁰ As above.

²²¹ Report of the UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa paras 97-98; see also CERD Concluding Observations (2006) para 22.

the regions indigenous peoples may be found in South Africa, have adopted such legislation; the Western Cape Provincial Languages Act²²² and the Northern Province Languages Act.²²³ The Northern Cape Province ‘has also agreed to create a Provincial Language Committee, which must include a representative from the Khoe and San National Language Body’.²²⁴ The Khoe and San National Language Body ‘has visited outlying Nama Communities to inform them of the language in education opportunities and the work of the body’.²²⁵

However, none of these provinces has adopted or provided for the use of the Khoi, San or Nama languages in the provinces.²²⁶ The Western Cape has adopted the Western Cape Cultural Commission and Cultural Councils Act.²²⁷ The Western Cape Provincial Language Act also establishes a Committee of 11, known as the Western Cape Language Committee, to promote the three official languages. The Province, in consultation with the National Khoi-San Council, is also engaged in discussions to promote and facilitate the use of the Khoi, Nama and San languages although that has yet to be implemented in practice.

It is reported that the ‘Director of the Department of Culture in the Northern Cape has supervised San Projects to re-establish cultural identity and language and has made funding available for fieldwork for linguistic projects. Similarly, the provincial department of education in the Northern Cape has commissioned a report on the language needs of San (!Xun, Khwe and Khomani) and Nama communities.’²²⁸

7 Education

Section 29 of the South African Constitution provides that everyone has a right to basic education, including basic adult education, and to further education, which the state through reasonable measures must make progressively available and accessible. Everyone is entitled to be instructed in the official language of their choice in public educational institutions where such education is practicable. However, given that the Khoi and San languages are not official languages, instruction in these languages is left out. This desk research has so far not revealed any

²²² Act 13 of 1998.

²²³ Act 7 of 2000.

²²⁴ Chennells and du Toit 108.

²²⁵ As above.

²²⁶ In the Western Cape only English, Afrikaans and isiXhosa may be used in official proceedings such as in Parliament.

²²⁷ Act 14 of 1998.

²²⁸ Chennells and du Toit 108.

official policy with regard to the education of indigenous peoples.²²⁹ However ‘at the provincial level, a pilot project was initiated in 1999/2000 [in] the Northern Cape Province in the Richtersveld where about 200 learners at primary school were studying Nama as a school project’.²³⁰ The project was expanded in 2002 to a secondary school on the Orange River.²³¹ In ‘2002 a government school, the Schmidtdrift San Combined School in the Northern Cape was the largest educational project for San Children in Southern Africa’.²³² The ‘school experimented with alternative education programmes to ease the gap experienced by children moving from a traditional life style to formal schooling in a language that is not their own’.²³³ The school and project encountered monumental difficulties ranging from a lack of funding to a lack of qualified staff proficient in the indigenous languages (they taught in Afrikaans). Apart from grade one where translators were used, most of the students failed due to language barriers.²³⁴ While the project is still ongoing, the lack of institutional support and capacity has hampered the project.²³⁵ Apart from the scarcity of Nama language teachers – there are only a few from Namibia - who mostly work on a voluntary basis, the educational project does not receive official curriculum backing from the national government.²³⁶

The Constitution does not provide that basic education shall be free and compulsory. The South African Schools Act does provide for compulsory education up to 15 years of age or grade nine but fails to address the concern of most indigenous peoples in accessing education: it is not free. Most indigenous peoples lack adequate resources and if schools charge fees this may bar some children from attending schools. However, the South African Schools Act 84 of 1996 addresses and seeks to redress past injustices in the provision of educational services: those totally unable to afford fees are not to be prevented from attending school. The state has also introduced the Integrated National Primary School Nutrition Programme and Curriculum 2005, aimed at *inter*

²²⁹ As above 107.

²³⁰ As above.

²³¹ As above, citing IWGIA, *Indigenous World 2002-2003*.

²³² W Le Roux *Torn Apart: San Children as Change Agents in a Process of Acculturation. A report on the Educational Situation of Children in Southern Africa* Ghanzi: Kuru Development Trust and Windhoek: Working Group of Indigenous Minorities in Southern Africa cited in Chennels and du Toit 107.

²³³ As above.

²³⁴ As above.

²³⁵ Discussions with indigenous communities in Kimberley, Upington and Alexander Bay, in September 2008.

²³⁶ As above.

alia correcting the disparities in access to education.²³⁷ Therefore, one may argue that a lack of financial resources should not bar anyone from accessing basic education. Indeed, the government recently issued regulations for school fees free areas and it is expected that some of these areas would be areas inhabited by indigenous peoples.

Skills development is important to indigenous peoples since some may not have a formal education or skills. The Skills Development Act of 1998²³⁸ provides an institutional framework to devise and implement national, sectoral and workplace strategies to develop and improve the skills of the South African workforce; to integrate those strategies within the National Qualifications Framework contemplated in the South African Qualifications Authority Act of 1995; to provide for learnerships that lead to recognised occupational qualifications; to provide for financing of skills development by means of a levy financing scheme and a National Skills Fund; to provide for and regulate employment services. The Skills Development Levies Act of 1999²³⁹ provides for the imposition of a skills development levy; and for matters connected therewith. Sector Education and Training Authorities (SETAs) receive the bigger part (80%) of the funding collected for the utilization of skills development programmes for the specific SETA.

8 Land, natural resources and environment

Land and resources are at the core of indigenous peoples' claims given that their culture and way of life are closely connected to the lands and territories they inhabit. Part II of the ILO Convention 169 relates to land and emphasis is given of the importance of having regard to the collective aspects of indigenous peoples' relationship to their lands.²⁴⁰

In South Africa the question of land ownership has been high on the democratic government's agenda in a bid to facilitate an effective mechanism to redress past wrongs perpetuated by the apartheid regime. Apart from the Constitution making provision for land reform,²⁴¹ a number of laws were enacted to recognise indigenous land tenure as well as address dispossessions. The Constitution also provides for the payment of just and equitable compensation where property is

²³⁷ See Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations of the Committee on the Rights of the Child: South Africa, CRC/C/15/ADD.122 (CRC, South Africa 2000) para 34.

²³⁸ Act 97 of 1998.

²³⁹ Act 9 of 1999.

²⁴⁰ ILO Convention 169, art 13.1.

²⁴¹ SA Constitution, sec 25(4-9)'

expropriated for public purposes or in the public interest.²⁴² Public interest may include the state's commitment to land restitution and reform.²⁴³

One of the most significant laws geared towards land reform is the Abolition of Racially Based Land Measures Act.²⁴⁴ The Act repealed the Black Land Act 27 of 1913 and the Development of Trust and Land Act 18 of 1936 that reserved land in certain rural areas for occupation by black people. Other laws that are relevant to indigenous peoples that have been enacted include the Communal Land Rights Act²⁴⁵ that recognises and protects communal land tenure arrangements favoured by most indigenous people. Other relevant laws include the Restitution of Land Rights Act 22 of 1994 which will be discussed in detail below, Provision of Certain Land for Settlement Act 126 of 1993,²⁴⁶ Development Facilitation Act 67 of 1995, Upgrading of Land Tenure Rights Act 112 of 1991,²⁴⁷ Land Administration Act of 1996, Land Reform (Labour Tenants) Act 3 of 1996,²⁴⁸ Interim Protection of Informal Land Rights Act 31 of 1996,²⁴⁹ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998,²⁵⁰ Extension of Security of Tenure Act,²⁵¹ and the Communal Property Association Act 28 of 1996.²⁵² These laws have the potential to protect the land rights of indigenous peoples since they are designed to address historical injustices related to land use, tenure and ownership. The Communal Property Association Act has been instrumental in according indigenous peoples the right to own and utilise the land collectively, especially after the restitution of their traditional land as discussed below. However, the conditions envisaged by the Act which demand the election of officials to

²⁴² SA Constitution, sec 25(2) (8).

²⁴³ See Land Restitution and Reform Laws Amendment Act 78 of 1996.

²⁴⁴ Act 108 of 1991.

²⁴⁵ Act 11 of 2004.

²⁴⁶ The Act provides for the designation of certain land for settlement and regulates the subdivision and development of such land and the settlement of persons thereon. See JHL Scheepers 'Land' in Joubert (n 73 above) 100.

²⁴⁷ Provides for the upgrading of and the conversion into ownership of certain land tenure rights, including household, deeds of grant and quitrents. It also provides for the transfer of tribal land to full ownership of tribes, as above 102.

²⁴⁸ Provides for security of tenure of labour tenants and those persons occupying or using land as a result of their association with labour tenants. See Scheepers 108.

²⁴⁹ Provides for temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law - as above 113.

²⁵⁰ Provides for the prohibition of unlawful eviction and for the procedures to be followed for the eviction of unlawful occupiers.

²⁵¹ Provides for measures with state assistance to facilitate long term security of land tenure, regulates the conditions of residence on certain land, the conditions on and circumstances under which the right of persons to reside on land may be terminated and conditions of evictions.

²⁵² The Act enables communities to form juristic persons, to be known as Communal Property Association in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution. See Scheepers 111.

represent the community, sometimes clash with existing traditional leadership structures of indigenous communities, in turn create tension, and delay the management and execution of certain decisions.

The Restitution of Land Rights Act 22 of 1994 was promulgated to deal with historical dispossessions.²⁵³ However, given the scale of land dispossession under colonial and apartheid regimes and the proportion of the population that would potentially claim restitution of their lands, the Interim Constitution, a document by negotiated political parties and stakeholders, agreed to set 19 June 1913 as the cut-off date.²⁵⁴ Claims to the Commission on Restitution of Land Rights (CRLR) (which is the first avenue for lodging such claims) must have been received by 31 December 1998.²⁵⁵ The Restitution Act established the Commission on Restitution of Land Rights and a Land Claims Court which has the same powers as the High Court.²⁵⁶ The CRLR acts as facilitator in resolving land claims. Some claims go to the LCC but others get settled in terms of section 42D of the Act by the Minister and now recently also in terms of section 10 of the Act by the Regional Land Claims Commissioners. The CRLR is also responsible for the settlement and the implementation of settlement agreements. Only cases of dispute are referred to the LCC and obviously the CRLR needs to implement any court order.²⁵⁷

On the basis of the Restitution of Lands Rights Act, an indigenous community, the ≠Khomani San of the Andriesvale area, were successful in getting a land claim settlement from the state of about 36,889.00 hectares in 1999 and 2002.²⁵⁸ They use the land granted to them outside the Kgalagadi Transfrontier Park (approx 25 000 ha)²⁵⁹ for eco-tourism, game farming and other sustainable economic activities. They were also granted rights of access and utilisation of parts of the Kgalagadi Transfrontier Park (approx 25 000 ha of land granted to them in the Park). Other successes include ‘the !Xun and Khwe San, who had been living at an army base at Schmidtsdrift

²⁵³ Restitution of Land Rights Act 22 of 1994; see also Tong 69.

²⁵⁴ T Roux ‘Pro poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court’ 20 *SAJHR* 522 (2004). See also South African Constitution 1996 sec 25(7) and sec 2 of the Restitution Act. This, Theunis argues, is derived from the fact that it was the date of commencement of the first pillar in the edifice of what was later to be known as apartheid land law, the Natives Land Act 28 of 1913.

²⁵⁵ Restitution of Land Rights Act, sec 2 (1) e.

²⁵⁶ Restitution of Land Rights Act, secs 1 and 6.

²⁵⁷ Although ‘section 6 of the Restitution Act list functions of the Commission as to receive claims, assist the claimants and investigate the claims, the Commission carries the sole responsibility of implementing land restitution programmes in South Africa’, see Tong 1, 71.

²⁵⁸ Report of the UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa, paras 38-39.

²⁵⁹ Chennells and du Toit 104.

since 1990, after serving the South African Defence Forces in its war in Angola and Namibia who were granted land at the Platfontein farm near Kimberley (2900 ha) in May 1999'. 'Two other successful land claims involving the Griqua have also been negotiated under the Restitution of land programme'.²⁶⁰

However, not all claimants have been successful in the lodging and/or settlement of land claims with the CRLR since most indigenous communities in South Africa such as the San and the Khoi argue that they were dispossessed of their lands long before the 1913 cut-off date. The Constitutional Court has been a forum of last resort with reasonable success as will be illustrated by the Richtersveld decision²⁶¹ which, due to its importance and possible lessons for other indigenous communities on the continent, is discussed below in some detail.

The 'Richtersveld is a large area of land situated in the north-western corner of the Northern Cape Province in South Africa and for centuries has been inhabited by what is now known as the Richtersveld Community'.²⁶² The 'Richtersveld community had been in occupation of the subject land prior to its annexation to the British Crown in December 1847. Even after the annexation, the Richtersveld community continued to occupy the land until the 1920s when diamonds were discovered. They were then dispossessed of the lands and rights therein'.²⁶³ After the initiation of mining operations in the 1920s, the Richtersveld community was progressively denied access to its lands until, by 1994, the government had granted ownership of the subject land to the company Alexkor Limited.²⁶⁴ Spurred by the provisions of the Restitution Act, the Richtersveld community in December 1998 lodged a claim for their land rights and associated valuable mineral rights to a

²⁶⁰ As above.

²⁶¹ *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community* 2003 (12) BCLR 1301 (CC).

²⁶² *Richtersveld* para 4; see also Y Trahan *Richtersveld Community & Others v Alexkor Ltd: Declaration of a "Right in Land" Through a "Customary Law Interest" Sets Stage for Introduction of Aboriginal Title into South African Legal System*, 12 *Tulane Journal of International & Comparative Law* 565. The present Richtersveld population descends from the Nama people, who are thought to be a subgroup of the Khoi people. These people were a "discrete ethnic group" who "shared the same culture, including the same language, religion, social and political structures, customs and lifestyle." The primary rule of these people was that the land of their territory belonged to their community as a whole.

²⁶³ *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (LCC), para 28 (*Richtersveld LCC decision*).

²⁶⁴ *Richtersveld decision* para 9; *Alexkor Limited*, the first Appellee, is a company in which the sole shareholder is the government of the Republic of South Africa, the second Appellee; See AHN Laboni 'Land Restitution and the Doctrine of Aboriginal Title: *Richtersveld Community v Alexkor Ltd and Another*' 18 *SAJHR*, 421, 423 (2002).

large diamond-rich area of land in the Barren Northern Cape.²⁶⁵ The application was made by the members of the community through a non-governmental organisation, the Legal Resources Centre (Cape Town), which continues to represent the community.²⁶⁶

The 'Richtersveld Community originally filed two claims: in 1997 it filed one in the Cape High Court, and one year later it lodged a restitution claim before the Land Claims Court (LCC). It eventually decided to give precedence to the claim at the LCC'.²⁶⁷ The High Court case 'was based squarely on the doctrine of aboriginal title which the Richtersveld community alleged was part of South African common law. The second case under the Restitution Act was launched in the LCC'.²⁶⁸

The 'community originally argued that their right in land was either (a) ownership; (b) a right in land based on the common law doctrine of aboriginal title; or (c) a right in land acquired through its beneficial occupation of the land for a period of longer than 10 years prior to their eventual dispossession, as per section 1 of the Restitution Act'.²⁶⁹ The respondents argued that 'any right in land that the community may have possessed had been extinguished prior to the 1913 cut-off date contained in the Restitution Act. They contended that the Richtersveld community lost any title to the land when the area was annexed to the British Crown in 1847'.²⁷⁰ In dismissing the application, the Land Claims Court held that the annexation of the Richtersveld land to the British Crown in 1847 extinguished any right that the community may have held.²⁷¹ The Land Claims Court argued that it had no jurisdiction to adjudicate on land dispossessions that occurred before the 1913 cut-off date.²⁷² The court was of the view that determining rights accruing before the statutory cut-off date would require it to develop common law in order to develop rights that arise

²⁶⁵ Chennells and du Toit 'The Rights of Indigenous Peoples in South Africa' in Hitchcock and Vinding (eds) *Indigenous Peoples of Southern Africa*, IWGIA (2004) 105.

²⁶⁶ See <http://www.lrc.org.za/Features/Archive_detail.asp?art_ID=82> accessed 10 January 2007.

²⁶⁷ M Barry 'Now another thing must happen: *Richtersveld* and the dilemmas of land reform in post-apartheid South Africa' (2004) 20 *SAJHR* 365.

²⁶⁸ Roux 522.

²⁶⁹ *Richtersveld LCC decision* para 6; Barry 365; sec 1 of the Restitution Act defines a right in land as 'any right in land registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question'.

²⁷⁰ *Richtersveld LCC decision* para 6; Barry 366.

²⁷¹ *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC), para 43.

²⁷² See also *Richtersveld Community v Alexkor Ltd and Another* 2001(4) ALL SA 567(LCC) and 2003 (3) 1293 (LCC); see the courts similar views in *Mahlangu NO v Minister of Land Affairs* 2001 (2) ALL SA 190 (LCC).

from the concept of aboriginal title for which it felt it had no jurisdiction.²⁷³ Further, the LCC did not find any subsequent dispossession of rights that the community may have held in the subject land to be as a result of ‘past racially discriminatory laws or practices’ as required for restitution under the Act.²⁷⁴

This outcome did not deter the community and, despite being denied leave to appeal by the LCC they made a successful direct application to the Supreme Court of Appeal.²⁷⁵ The SCA held that ‘the Richtersveld Community is entitled in terms of section 2(1) of the Restitution of Land Rights Act 22 of 1994 to restitution of the right to exclusive beneficial occupation and use, akin to that held under common-law ownership, of the subject land (including its minerals and precious stones)’.²⁷⁶ The Court found that the dispossessions were racially discriminatory ‘because they were based on the implicit premise that because of the Richtersveld community’s race and presumed lack of civilization, its rights to the land had been lost with annexation’.²⁷⁷

Alexkor Limited, the company that had been granted ownership of the subject land appealed to the highest court in South Africa, the Constitutional Court, which ‘recognized the right of the Richtersveld community to restitution of the rights of ownership of the land including its minerals and precious stones and to the exclusive beneficial use and occupation thereof’.²⁷⁸ The Constitutional Court went further, finding that the Richtersveld community held ownership of the subject land under indigenous law.²⁷⁹ The Court found that the community had a right to the land, not by virtue of the common law, but by virtue of the Constitution.²⁸⁰ The Court held that:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution [T]he Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system [I]ndigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.²⁸¹

²⁷³ Richtersveld LCC decision para 93.

²⁷⁴ As above para 93. The Court relied on its earlier case of the *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC).

²⁷⁵ *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583 (SCA) (*Richtersveld* SCA decision).

²⁷⁶ *Richtersveld* SCA decision para 111.

²⁷⁷ *Richtersveld* SCA decision Ibid , para 8; Marcia Barry, 366.

²⁷⁸ *Richtersveld* Concourt decision, para 103.

²⁷⁹ *Richtersveld* Concourt decision para 102.

²⁸⁰ *Richtersveld* Concourt decision, , para 51.

²⁸¹ As above para 51.

The ‘South African Constitution expressly recognised and validated indigenous law to the extent the law comported with the purpose and values set forth in the Constitution’.²⁸² The Court therefore affirmed the independent status of customary law under the South African Constitution.

After lengthy delays (the decision was handed down in 2003) the government finally in late 2006 agreed on reasonable compensation to the community as well as an agreement with the company on profit-sharing on minerals mined in the area.²⁸³ The Richtersveld case illustrates that a progressive judiciary is a vital vehicle to realising indigenous peoples’ rights albeit a long and tedious process. Indeed, while express provisions in the Constitution and legislation in South Africa provide a clear route for the restitution of land through the courts, the community also explored alternative grounds of action.²⁸⁴ These alternative grounds and the express acknowledgement that indigenous law forms part of the Constitutional framework of the South African legal system are particularly useful in other African countries where there are no express provisions for restitution.²⁸⁵ This is the concept of aboriginal title, an alternative course of action that could be used where a claim may fail to qualify under the Restitution Act. Indeed, it has been argued that for those who cannot meet the requirements of the Restitution of Land Rights Act or in other jurisdictions where such an Act is non-existent, the concept of aboriginal title could provide an alternative ground of action.²⁸⁶

However, even after successful restitution, indigenous peoples need ‘post-settlement support in order to ensure that those resettled ethnic communities [experience] an improvement in the enjoyment of their economic, social and cultural rights’.²⁸⁷ The government of South Africa

²⁸² As above para 51 (referring to customary law) see also para 7 n.8, stating that customary law is synonymous with indigenous law.

²⁸³ See news update at <www.iwgia.org> accessed 15 January 2007.

²⁸⁴ The community had also sought protection of their rights to land under aboriginal title. While the Constitutional Court found that the community was entitled to their right to land through the more direct route of the Restitution Act it acknowledged that the community’s indigenous law was applicable in the matter and indeed could be said to have paved way for the application of aboriginal title in South Africa under its indigenous law as evidenced by customary laws; See *Richtersveld* Concourt decision 51-64.

²⁸⁵ As above para 51.

²⁸⁶ See TW Bennett & CH Powell ‘Aboriginal Title in South Africa Revisited’ 15 *SAJHR*, 450 (1999) See also TM Chan ‘The Richtersveld Challenge: South Africa Finally Adopts Aboriginal Title’ in Hitchcock and Vinding 118; see also *Richtersveld LCC*, para 48 where the Court intimated that the doctrine of indigenous title is an alternative remedy to restitution under the Restitution Act but fell outside the LCC’s jurisdiction a position since overturned by the SCA and the CC.

²⁸⁷ CERD Concluding Observations (2006) para 18; see also Report of the UN Special Rapporteur on Indigenous Peoples’ Mission to South Africa, para 92.

needs to implement effective programmes designed to facilitate self-sufficiency, self-reliance and the proper utilisation of resources after land restitution.

The ILO Convention 169 provides that, apart from safeguarding rights to natural resources, indigenous peoples shall participate in the use, management and conservation of these resources.²⁸⁸ Given that most minerals and natural resources usually vest in the state, the Convention calls for consultation with indigenous peoples whenever there is exploration or exploitation of resources and, where damage occurs, the provision of reasonable compensation.²⁸⁹ Indigenous peoples' natural resources include water, minerals, forests and wild animals. In South Africa, ownership control and rights of access to these are regulated by acts of Parliament.²⁹⁰

Regarding the environment it is important to note that article 7.4 of the ILO Convention 169 provides that governments shall take measures in cooperation with the people concerned to protect and preserve the environment of the territories they inhabit. The land indigenous peoples inhabit is often arid and sometimes inaccessible and as such it is crucial that it is managed to preserve it and to ensure its sustainability and that it supports the indigenous peoples' way of life and economic activities. Section 24 of the South African Constitution provides for environmental protection. It stipulates that everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and the optimal use of resources while promoting essential economic and social development.²⁹¹ Section 24(a) of the Constitution 'guarantees an individual the right to a justiciable right against law and conduct which are harmful to the environment'.²⁹² The relevant legislation dealing with the environment in South Africa are the Environmental Conservation Act 73 of 1989 and the National Environment Management Act 107 of 1998, as well as amendments 28 of 2002, 56 of 2002, 46 of 2003, 8 of 204 and 39 of 2004. The National Environment Management Act establishes the National Environmental Advisory Forum and Committee for Environmental Co-

²⁸⁸ Art 15.1 ILO Convention 169.

²⁸⁹ Art 15.2. ILO Convention 169.

²⁹⁰ Some of these Acts include the National Parks Act 1926 (1976); Nature Conservation Act 10 of 1987; Forest Act 16 1913; Forest Laws Rationalization and Amendment Act 51 of 1994; National Forests Act 84 1998; National Water Act 36 1998; Water Services Act 108 of 1997; Diamond Control Act 39 of 1925; Diamonds Act 56 of 1986 and the Gold Mines Assistance Act 82 of 1968.

²⁹¹ SA Constitution sec 24.

²⁹² Joubert 123.

ordination.²⁹³ These institutions are mandated to advise the Minister on matters concerning the environment and they are expected to consist of nominees from community-based organisations which would naturally include indigenous peoples. In line with the principle of co-operative governance in South Africa, provinces are expected to have similar institutions to advise the provinces on environmental matters relevant to the province.

It has also been noted correctly that ‘concepts of both sustainable development and bio-diversity require those indigenous persons subject to customary law to be involved in the process of environmental development and preservation as participants and as beneficiaries’.²⁹⁴ In an effort to give meaning to national heritage resources, the state has also enacted the National Heritage Resources Act 25 of 1999. The Act is particularly important for indigenous peoples in South Africa since it gives room for indigenous peoples through non-governmental heritage organisations and community groups to participate in the conservation and management of resources. The Act demands that heritage resource authorities develop the skills and capacities of individuals and groups undertaking heritage resources management. This is significant to indigenous peoples given that they possess skills and know-how on the sound management of their resources and environment.

9 Socio economic rights ((housing, health, social welfare, intellectual property, traditional economy, employment and occupation)

The South African Constitution makes provision for socio-economic rights in section 26 (housing) and section 27 (health care, food and water). Other provisions containing socio-economic rights are section 25(5) which deals with land distribution, section 29 which deals with education and section 35(2)e which deals with detainees’ rights to adequate accommodation, nutrition, reading material and medical treatment. Socio-economic rights impose a positive obligation on the state to adopt reasonable measures to comply with the Constitution. While a ‘meaningful margin of discretion is accorded to the state in the provision of socio-economic rights, the reasonableness of such measures is justiciable’.²⁹⁵ The Constitutional Court in the case of *Government of the Republic of South Africa v Grootboom*²⁹⁶ upheld the justiciability of socio-

²⁹³ See the National Environment Management Act 107 of 1998, secs 3-10.

²⁹⁴ See Joubert 124, citing the ‘New Plans for Africa’s Parks’ *The Star* 17 October 1994, a report on the declaration by 120 delegates from international organisations and representatives of 30 African countries on better ways of management of national parks in Africa.

²⁹⁵ Joubert 149.

²⁹⁶ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC).

economic rights.²⁹⁷ The Court found that the government had not adopted reasonable measures to provide housing to homeless people.²⁹⁸ Section 26 of the Constitution provides that everyone has the right to have access to adequate housing. The state is obliged to provide reasonable legislative and other measures, within its resources, to achieve the progressive realisation of this right.²⁹⁹

Section 27 of the South African Constitution provides that everyone has the right to have access to health care services, including reproductive health care, sufficient food and water, and social services including, if they are unable to support themselves and their dependants, appropriate social assistance. As in the case of other socio-economic rights, the state is obliged to adopt reasonable measures, legislation, policies and programmes to give effect to these rights. The programmes must also be reasonably implemented. The prevalence of HIV/AIDS in South Africa is matter of growing concern.³⁰⁰ The HIV/AIDS transmission from mother to child is preventable and in the case of *Treatment Action Campaign v Minister of Health*,³⁰¹ the Constitutional Court held that the state must take reasonable measures to provide for the use of the drug zidovudine to HIV pregnant women throughout the public health sector as well as extend testing and counselling.

However, the CERD, while acknowledging South Africa's programmes for the prevention and treatment of HIV/AIDS, expressed concern at the high rate of HIV/AIDS among persons belonging to the most vulnerable ethnic groups. The Committee recommended 'that the [s]tate strengthens its programmes in the field of health, with particular attention to minorities, bearing in mind their disadvantaged situation resulting from poverty and lack of access to education, and to take further measures to combat HIV/AIDS'.³⁰² The Mission to South Africa of the UN Special Rapporteur on Indigenous Peoples similarly called upon the state to provide health care delivery services targeted at indigenous communities, especially those living in dire poverty.³⁰³ It is instructive that the government provides free antiretroviral drugs and free condoms in health centres and hospitals which could also be accessed by indigenous communities. However, a lack

²⁹⁷ As above para 20.

²⁹⁸ As above.

²⁹⁹ SA Constitution sec 26(2).

³⁰⁰ See 5 of this report which shows that the HIV prevalence rate in South Africa is 18.8 sourced from the UNICEF website. Indeed the CIA estimate that the population growth rate in South Africa is negative 0.4 due to the high rate of deaths compared to births in the country mainly as a result of the HIV/AIDS pandemic.

³⁰¹ *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356.

³⁰² CERD Concluding Observations (2006) para 20.

³⁰³ Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa, para 94-95.

of sensitization and awareness of their availability limit the accessibility of these facilities among indigenous communities.³⁰⁴

Of key importance to indigenous peoples is the Traditional Health Practitioners Act (Act 22 of 2007), as indigenous peoples rely mainly on traditional medicine to treat most of their ailments. The Act recognises and regulates the practice of South Africa's traditional healers. (Also see the discussion on the protection of intellectual property rights below.) Although the requirements of formal registration and proof of a prior qualification apply to all traditional health practitioners, it may in practice be much more difficult for health practitioners in indigenous communities to meet them.

The Constitution further provides for labour rights through section 23 which guarantees all workers the right to fair labour practices. One could argue that indigenous peoples are also protected under this provision. The Constitution further accords workers the right to form, join and participate in a trade union and its activities. However, the right to work is not included and as such there is no guarantee of work and, by extension, remuneration. Laws that give effect to this constitutional provision are: the Labour Relations Act 66 of 1995; the Basic Conditions of Employment Act 75 of 1997; and the Employment Equity Act 55 of 1998. The Employment Equity Act is aimed at achieving equity in the workplace by promoting equal opportunities and fair treatment in employment through the elimination of unfair discrimination and the implementation of affirmative action measures to redress disadvantages in employment experienced by designated groups to ensure their equitable representation in all occupational categories and levels in the workplace.

For indigenous peoples the fact that socio-economic rights are justiciable in South Africa is a welcome development since they have the opportunity where need arises to go to court in cases where the state does not have a coherent and co-ordinated programme to meet socio-economic obligations that affect them. However, as earlier highlighted access to justice remains a matter of concern for these people due to indigence and related limitations. Indeed, many indigenous people in South Africa to this day do not have access to proper health care, education, housing and even social welfare.³⁰⁵ The Mission to South Africa of the UN Special Rapporteur on Indigenous Peoples called upon 'relevant ministries to set up economic, social and human

³⁰⁴ Discussions with indigenous communities in Kimberley, Upington, Alexander Bay, and Cape Town in September 2008.

³⁰⁵ See generally Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa; see also CERD Concluding Observations (2006), para 15.

development indicators for indigenous peoples, in order to ensure in official statistics [the] inclusion of specific data on these peoples as a basis for effective public policies and programme planning for social services and economic development'.³⁰⁶ The CERD has also called upon the state to adopt necessary and appropriate measures to reduce poverty and stimulate economic growth, particularly related to the socio-economic situation of disadvantaged ethnic groups.³⁰⁷

Intellectual property rights are similarly very important to indigenous peoples, given that they use traditional knowledge systems. For example, the San have for generations used the *Hoordia gordonii* plant to suppress hunger. Through the assistance of the Working Group on Indigenous Minorities in Southern Africa (WIMSA) a non-governmental organisation³⁰⁸, the San were able to demand and share profits on a patent of the plant by the Council for Scientific and Industrial Research.³⁰⁹ The South African San Institute (SASI) was also able to negotiate a share of profits of San rock art heritage in KwaZulu-Natal.³¹⁰ However, San groups have 'regularly found themselves exploited by tourism, film and media projects [and] have repeatedly stressed their need to improve their contracting power'.³¹¹ This is partly attributed to the difficulty in securing the intellectual property of a community as captured by Roger Chennells:

Much traditional knowledge is patentable, but the expense involved, the collective ownership, and the potential difficulty of proving the novelty (ie that no other groups possess such knowledge) discourage the regular use of patents. Patent protection is appropriate when traditional knowledge is researched, and then commercially exploited in partnership with a commercial partner, such as a pharmaceutical firm.³¹²

A lot therefore remains to be done to secure indigenous peoples' intellectual property rights in South Africa, a feat that would be eased by state cooperation and technical assistance. During his mission in South Africa the UN Special Rapporteur on Indigenous Peoples for instance urged various government departments to support 'comprehensive local development plans with indigenous communities, concentrating on community-based tourism, crafts and eco-tourism ventures combined with varying degrees of hunting and wild gathering'.³¹³ He also called upon

³⁰⁶ Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa, para 91.

³⁰⁷ CERD para 15

³⁰⁸ WIMSA was formed in 1996, and is a San networking organisation governed by a board made up of the three registered San Councils that in turn represent the San communities of South Africa, Namibia and Botswana.

³⁰⁹ See Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa para 55.

³¹⁰ See para 56.

³¹¹ Crawhall 20.

³¹² R Chennells (1998) *Intellectual Property Rights, An Introduction* in unpublished report to SASI (South African San Institute, in Crawhall 20.

³¹³ Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa para 102.

the state to protect through law the intellectual property rights of indigenous communities, such as the case of ‘commercial exploitation of *Hoodia gordonii* plant used by the San, conservation of various rock art and sacred sites that have a special meaning for indigenous communities and preservation of traditional medical practices’.³¹⁴ However, most of the recommendations of the UN Special Rapporteur remain unattended to in what officials of the department of Foreign Affairs acknowledge is lack of a co-ordinated framework to ensure recommendations from international treaty monitoring bodies and institutions that South Africa has committed to are adhered to.³¹⁵ According to Pitso Montwedi, a Chief Director at the Department of Foreign Affairs, ‘while South Africa has made significant progress in domesticating most international standards that it has committed to, it is unfortunate that there is a lack of structured follow-up mechanisms to ensure that resolutions, comments and recommendations from treaty monitoring bodies and international United Nations experts are implemented’.³¹⁶

10 Gender equality

Gender discrimination is addressed by the South African Constitution in the prohibition of discrimination in section 9. Apart from the Constitutional provisions and legislation that give effect to equality, South Africa has also ratified CEDAW.³¹⁷ The state is therefore bound by international law and the treaty to prevent and stop discrimination against women.³¹⁸ However, under customary law women generally do not always enjoy equal status with men, especially during the subsistence of customary marriages. This has been addressed by the Recognition of Customary Marriages Act 120 of 1998 which provides for the recognition of customary marriages. This is important for indigenous peoples since they rely mainly on customs and traditions and, as such, the Act gives indigenous spouses the legal backing of their unions. Section 3 of the Act provides for the consent of prospective spouses, aged above 18 years, before a valid customary marriage can be concluded, which ensures that marriages among indigenous persons are through mutual consent. Section 6 provides for the equal status and capacity of spouses who concluded a customary marriage, so guaranteeing gender equality among indigenous spouses. This includes a wife’s capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have under customary law. Section 7 provides that a customary marriage entered into after the commencement of the

³¹⁴ As above para 101.

³¹⁵ Discussions with officials of the Department of Foreign Affairs in September 2008.

³¹⁶ As above.

³¹⁷ CEDAW was ratified in December 1995.

³¹⁸ Art 7 of CEDAW.

Act is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an ante-nuptial contract, which regulates the matrimonial property system of their marriage. The Act reinforces the right to equality among different races, while also taking into account divergent cultures, especially different forms of marriage in South Africa. Furthermore, the Act underlines the right to equality between different sexes.³¹⁹

A number of indigenous women have suffered domestic violence at the hands of their men.³²⁰ The Domestic Violence Act 116 of 1998³²¹ addresses this issue. For example, section 4 of the Act provides that any complainant may in the prescribed manner apply to the court for a protection order. Section 5 provides that if the court is satisfied that there is *prima facie* evidence that the respondent is committing, or has committed an act of domestic violence and undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately, the court must issue an interim protection order against the respondent.

South Africa also established Equality Courts under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. These courts are expected to provide and enhance access to victims of discrimination on any grounds, including gender. However, incidences of violence against women in South Africa, particularly women from disadvantaged and poor ethnic groups, are still rampant.³²² Indeed, the CERD has called upon South Africa to adopt effective measures ‘to address those phenomena of double discrimination, in particular regarding women and children from the most disadvantaged and poor ethnic groups’.³²³

South Africa does not have ‘specific national legislation criminalizing human trafficking, which also mainly affects women and children from the most disadvantaged ethnic groups’.³²⁴ The CERD has therefore called upon South Africa ‘to adopt legislation, and other effective measures, in order to adequately prevent, combat and punish human trafficking’.³²⁵

³¹⁹ See South Africa’s Periodic Report to the African Commission on Human and Peoples’ Rights, para 45.

³²⁰ See CRC South Africa 2000 para 27.

³²¹ Act 116 of 1998.

³²² See CERD Concluding Observations (2006) para 16.

³²³ As above.

³²⁴ As above para 17.

³²⁵ As above.

One other key issue affecting gender equality amongst indigenous peoples is the question of the role and participation of indigenous women in development. At present most indigenous women do not take part in designing and participating in negotiations and strategies to uplift their communities. Indeed ‘most spokespersons recognised by the government tend to be men and in effect male agendas dominate planning and negotiations’.³²⁶ However, over time some of these communities are appreciating the important contribution and role of women in development. For example, the ‘Riemvasmaak Namas have made a concerted effort to ensure that women are at the forefront of advocacy training and negotiations with the government. The traditional ǀKhomani community, in co-operation with SASI and DLA, has developed a technique where women form their own working groups [speak] during planning sessions to ensure that their gender-specific contribution is developed and heard’.³²⁷ This is a commendable development and it is envisaged that more indigenous communities will take their cue from the progress achieved amongst the Riemvasmaak Namas. It is also hoped that the state will facilitate the participation of more indigenous women in issues that affect these communities through active programs and interventions that promote the involvement of women in development and the promotion and protection of indigenous peoples’ rights, especially in education and other socio-economic rights.

11 Indigenous children

Section 28 of the South African Constitution addresses children’s rights. According to the Constitution children are persons under the age of 18.³²⁸ Children also enjoy all the other rights under the Bill of Rights, apart from the right to vote. A child’s best interest is the guiding principle in all matters concerning children.³²⁹ It is a parent’s primary obligation to care properly for their children but the state is also obliged to create the necessary environment to enable parents to take care of their children.³³⁰ The culture and traditions of indigenous peoples must be taken into account in matters that concern children, although such social and cultural factors must not be inconsistent with the Bill of Rights.³³¹ However, the United Nations Committee on the Rights of the Child (CRC) in 2000 decried the fact that in South Africa, ‘customary law and traditional practice continue to threaten [the] full realisation of rights guaranteed to children

³²⁶ Crawhall 33.

³²⁷ Crawhall 33.

³²⁸ SA Constitution sec 28(3).

³²⁹ SA Constitution sec 28(2).

³³⁰ See *Bannatyne v Bannatyene* 2003 2 SA 363 (CC).

³³¹ See Rwezaura in Alton (ed) *The best interests of the child: Reconciling culture and human rights* (1994) 100.

belonging to minority groups'.³³² The CRC has called upon the state to 'undertake all appropriate measures to ensure that rights of children belonging to minority groups are guaranteed, including Khoi-Khoi and San, particularly those rights concerning culture, religion, language and access to information'.³³³

Violence against children and human trafficking affecting indigenous children remain problems in South Africa.³³⁴ The ILO Committee of Experts has called upon South Africa to adopt specific legislative and policy measures geared towards the elimination of child trafficking and the prohibition of the worst forms of child labour generally.³³⁵ The African Commission on Human and Peoples' Rights has also expressed concern 'at the high incidence of sexual violence against women and children'.³³⁶ Child labour is also still an issue that demands concrete and specific efforts by the state. The African Commission has called upon South Africa 'to design and implement appropriate policies and measures, including care and rehabilitation, to prevent and combat the sexual exploitation of children'.³³⁷ It has further recommended to the state that to 'undertake all appropriate measures to ensure that the rights of children belonging to minority groups, including the Khoi-Khoi and San, are guaranteed, particularly those rights concerning culture, religion, language and access to information'.³³⁸

The Child Care Act 74 of 1983, the Sexual Offences Act of 1957, and the Children's Act 38 of 2005³³⁹ are some of the key statutes regulating children's rights. For example, section 50A(1) of the Child Care Act prohibits the use, procuring or offering of a child for prostitution, which is a big problem due to the poverty of indigenous children which puts them at risk of being recruited and tempted to engage in such kind of child labour.³⁴⁰ The South Africa Law Commission, the

³³² Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations of the Committee on the Rights of the Child: South Africa CRC/C/15/ADD.122 (CRC, South Africa 2000) para 41.

³³³ As above para 41.

³³⁴ See CEACR: Individual Direct Request concerning Worst Forms of Child Labour Convention, 1999 (No. 182) South Africa(2006) iloex: 092006ZAF 183, 1; See also CRC South Africa 2000, para 39.

³³⁵ As above.

³³⁶ See Concluding observations and recommendations on the First Periodic Report of the Republic of South Africa, adopted at the 38th Ordinary Session of the African Commission on Human and Peoples' Rights held from 21 November to 5 December 2005 in Banjul, The Gambia, para 20 available at <http://www.chr.up.ac.za/hr_docs/countries/southafrica.html> accessed 10 April 2007.

³³⁷ Concluding observations of the African Commission para 33.

³³⁸ As above para 34.

³³⁹ Children's Act 2005 came into effect in July 2007.

³⁴⁰ See also sec 9 of the Sexual Offences Act of 1957.

state body charged with the mandate of reviewing, and recommending legislative reform has proposed that the government adopt legislative measures to combat the worst forms of child labour, such as:

(a) a complete prohibition on the commercial sexual exploitation of children, including child prostitution, pornography and trafficking in children, shall be included in the new Sexual Offences Act; (b) anyone who offers or engages a child for commercial sexual exploitation, or who facilitates or receives consideration for the child's commercial sexual exploitation, shall be guilty of an offence; (c) the trafficking in, or transporting of, children from their place of residence to another destination, whether within the country or abroad, constitutes commercial sexual exploitation and should therefore be an offence; (d) in order to combat sex tourism and other forms of sexual exploitation, effective national legislation with extraterritorial application is proposed; and (e) legal entities incorporated or doing business in South Africa will be prosecuted under the proposed Sexual Offences Act.³⁴¹

Towards this end the state has adopted the Children's Act and the Criminal Law (Sexual Offences and Related Matters) Act (32 of 2007). There have also been important legal developments in South Africa's Constitution, with regard to the forced or compulsory recruitment of indigenous children and peoples into armed conflict. The Constitution prohibits the use of children in armed conflict as well as protecting them in times of armed conflict.³⁴² This prohibition is particularly relevant to indigenous children: some indigenous groups such as the San (*!Xû and Khwe*) were forcefully recruited into the military by the apartheid regime in its wars in Angola and Namibia.³⁴³ In terms of article 37(4) of the Constitution, children under the age of 15 can under no circumstances (including in terms of an emergency) be recruited into armed conflict. However, the ILO Committee of Experts notes that, by limiting the age of recruitment to 15 in times of emergency permits the state to recruit children between the ages of 15 and 18 which would contravene the state's international law obligations as far as the Convention on the Worst Forms of Child Labour Convention 182 of 1999 is concerned.³⁴⁴ The Committee therefore calls on the state to put in place measures that would address that *lacuna*.³⁴⁵

Indigenous children in South Africa are also at a risk of being engaged in hazardous work due to extreme levels of poverty and a lack of access to other basic social services.³⁴⁶ This is despite the fact that the Basic Conditions of Employment Act (BCEA) prohibits the employment of a child

³⁴¹ See CEACR: Individual Direct Request concerning Worst Forms of Child Labour Convention, 1999 (182) South Africa, 1.

³⁴² SA Constitution art 28(1)(i).

³⁴³ Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa, para 26;59

³⁴⁴ See CEACR: Individual Direct Request concerning Worst Forms of Child Labour Convention, 1999 (182) South Africa.

³⁴⁵ As above.

³⁴⁶ Crawhall 14; 16; 31; see also CRC South Africa 2000 para 37.

(below) 18 years for work that is inappropriate for a person of that age or that places at risk the well-being of the child.³⁴⁷ The problem seems to be the lack of effective mechanisms for enforcing the laws and related regulations adopted by the Minister of Labour.³⁴⁸ The CRC has called upon the state to bring its domestic legislation into conformity with international labour standards.³⁴⁹

12 Indigenous peoples in border areas

Available data so far does not reveal any special laws or legislation dealing with the question of indigenous people in border areas. The citizenship laws discussed earlier apply to South African citizens and others are treated as aliens, including indigenous San and Khoi located within the borders of Namibia and Botswana who are close relatives of the indigenous San and Khoi in South Africa. The normal migration and alien regulations and laws apply to them any time they need to cross the border to visit or stay in South Africa.

³⁴⁷ Sec 43(2) of the Basic Conditions of Employment Act (BCEA); see also sec 85 of the Mine Health and safety Act of 1996.

³⁴⁸ See CEACR: Individual Direct Request concerning Worst Forms of Child Labour Convention, 1999 (182) South Africa 3; some of these regulations include: Occupational Health and Safety Regulations in terms of sec 43(1) of the Occupational Health and Safety Act 1993; BCEA Regulations in terms of secs 44 and 45 of the Basic Conditions Of Employment Act 1997.

³⁴⁹ CRC South Africa 2000 paras 14; 37.

Part III: Conclusion and recommendations

1 Conclusion and recommendations

It is important to note that the legal framework identified thus far in the report is not exhaustive and only reflects some of the existing provisions that are available generally and could be useful to protect and promote indigenous peoples' rights in South Africa. Research in South Africa is still ongoing and it is hoped that in-depth research will reveal further and more precise details. The issues identified thus far are useful for further investigation of the legal framework. However, as already indicated, most of the legal framework is not specific to groups' self-identifying as indigenous peoples and as such one would have to read in relevant provisions from the existing general laws and policy.

It is acknowledged that indigenous peoples in South Africa- in the same way as all other South Africans - may in principle access rights guaranteed by the Constitution. The government has also made several attempts that would seem to address and or identify the concerns of these peoples. Various statements of high ranking members of the government to date reflect a policy geared towards recognising and acknowledging that, indeed, indigenous peoples notably the Khoi and San have been marginalised.³⁵⁰ Cabinet has also adopted a 'memorandum that would lead to an official policy recognising vulnerable indigenous communities'.³⁵¹ The Judiciary has shown that it is willing and ready to hear, accommodate and affirm the rights claimed by indigenous peoples as demonstrated by the Constitutional Court in the Richtersveld decision.³⁵²

Indigenous peoples in South Africa remain 'more marginalised than other sectors...and face different challenges within the national society as a result of historical processes and current circumstances'.³⁵³ Granted, there is need to formulate and implement appropriate mechanisms through legislation and policies to comprehensively address issues such as land and resource rights, cultural rights, language, political participation and representation of traditional authorities and the delivery of the socio-economic rights of indigenous people.

³⁵⁰ See some examples of some policy statements available at <www.polity.org.za> accessed 10 January 2006.

³⁵¹ Report of UN Special Rapporteur on Indigenous Peoples' Mission to South Africa 2.

³⁵² See *Alexkor Ltd and Another v Richtersveld Community and Others* CCT19/03.

³⁵³ See Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa 2.

Further, notwithstanding the progressive provisions within the South African legal framework (as identified in this report) which have the potential to give protection to indigenous peoples' rights, the situation remains grave. Indigenous peoples in South Africa continue to lack capacity, partly due to extreme levels of poverty, and a lack of awareness to enforce these rights and provisions for their benefit and, as such, some of these issues fall within the ambit of advocacy and lobbying.³⁵⁴ The state is yet to set in motion specific measures to address these problems and empower indigenous peoples to espouse their rights.³⁵⁵

The following are some of the key issues this report identifies as deserving the attention of the state in a bid to address indigenous peoples' concerns.

- Indigenous peoples, notably the Khoi and San, should be recognised as distinct groups with specific needs. Their languages should be added in the Constitution as official languages with the attendant benefits of research and promotion of the languages and use in education. The state should also endeavour to provide official statistical data on these groups as a basis to identify their needs and areas of intervention to uplift their livelihood and give meaning to their fundamental human rights.
- One of the immediate and key interventions should be to better the socio-economic conditions of indigenous peoples through proper policies and a framework aimed at redressing their recurrent poverty. Government programmes and initiatives designed towards this end should give regard to indigenous peoples' unique but dire circumstances that demand holistic measures if their precarious socio-economic conditions are to be ameliorated. This should be done in consultation and through active participation of the indigenous peoples themselves, development partners and with regard to international standards such as ILO Convention 169. For instance, the state needs to assist indigenous communities in South Africa to 'develop viable income-generating projects that maximize existing community knowledge and lifestyle preferences'.³⁵⁶
- The restitution of land claims and compensation by indigenous peoples should be expedited and, where necessary, the Land Claims Commission and Court should recognise the concept of aboriginal title, particularly where the statutory limitations period of 1913 is incompatible with an indigenous land claim.

³⁵⁴ Chennels and du Toit 103.

³⁵⁵ See generally, the Report of the UN Special Rapporteur on Indigenous Peoples' Mission to South Africa; see also Chennels and du Toit 103.

³⁵⁶ See Crawhall 32.

- The state should empower and give capacity to indigenous peoples to manage and utilise the lands and resources which they occupy for the benefit of the community. This should be within the purview of the state's institutional framework which is best placed to engage other relevant state departments to ensure indigenous peoples to realise their rights and to access and manage their natural resources, including their intellectual property rights, effectively. Indigenous peoples should also be adequately consulted and empowered to participate in issues that affect them and, as such, the various policies so far adopted by the state should be comprehensive and coherent to avoid inconsistencies and delays in implementation.
- An effective legal framework to facilitate the progressive realisation of socio-economic rights should be enacted for the benefit of indigenous peoples, particularly in education, the right to access to housing, health care and social security.
- Indigenous peoples' traditional form of government should be officially recognised and they should be represented in the national, provincial and local houses of traditional leaders.
- The inter-departmental task team on Khoe and San issues should make public its findings and give direction on the protection and promotion of indigenous peoples' rights in South Africa.
- The South African Human Rights Commission should set up a specific desk to deal with indigenous peoples' concerns and human rights violations, especially in regions they inhabit.
- Indigenous peoples' intellectual property rights, such as traditional medicine plants, artwork and traditional knowledge systems should be protected by law.
- Gender mainstreaming should be the focus of all policy and legal framework interventions geared towards addressing the issues of indigenous peoples. The state should put in place a proper framework that recognises women and affords them a voice throughout its engagement with indigenous peoples in the state's efforts to address their concerns, particularly on issues of development and dealing with gender-based discrimination and violence.
- The situation of indigenous children demands urgent and immediate measures by the state through policy and a legal framework to ward off the cycle of poverty, marginalisation and exclusion that have pervaded indigenous peoples' lives. This is true particularly in the area of education. Therefore, the state has a duty to put in place

- The state needs to recognise and appreciate the special and unique relationship that exists between indigenous peoples in border areas and as such provide a legal framework that allows easier movement and settlement when necessary.

Bibliography

Books

Anaya, J *Indigenous Peoples in International Law* (2nd ed) (2004) New York: Oxford University Press

Deacon, HJ & Deacon, J *Human Beginnings in South Africa: Uncovering the secrets of the Stone Age* (1999) Cape Town: David Philip

Heyns, C (ed) *Human Rights Law in Africa* Vol II PLACE OF PUBLICATION: Martinus Nijhoff

IWGIA-*The Indigenous World*-2006

IWGIA-*The Indigenous World*-2007

Joubert, W *The Law of South Africa* (2nd ed) (2004) Cape Town: Lexis Nexis Butterworths

Mountain, A *The First Peoples of the Cape*, (2003) Cape Town: David Philip

Schapera, I *The Khoi San Peoples of South Africa* (1951) London: Routledge & Kegan Paul Ltd

Tlou, T & Campbell, A *History of Botswana* (1986) Gabarone: Macmillan Botswana

Tong, M *Lest we forget, Restitution digest on administrative decisions* (2002) Pretoria: Government printers

Walker, EA *A History of South Africa* (1928) Cape Town: Longmans Green and Co Ltd

Welsh, F *A history of South Africa* (1998) Cape Town: Harper Collins

Chapters in books and Journal articles

Barry, M 'Now another thing must happen: *Richtersveld* and the dilemmas of land reform in post-apartheid South Africa' (2004) 20 *SAJHR* 355

Bennett, TW & Powell, CH 'Aboriginal Title in South Africa Revisited' 15 (1999) *SAJHR* 449

Beukes, M 'Culture and Cultural Rights' in Joubert *The Law of South Africa* (2nd ed) (2004) Cape Town: Lexis Nexis Butterworths

Chan, TM 'The *Richtersveld* Challenge: South Africa Finally Adopts Aboriginal Title' in Hitchcock, R and Vinding, D(eds) *Indigenous Peoples of Southern Africa IWGIA* (2004)

Chennells, R and Toit, A 'The Rights of Indigenous Peoples in South Africa' in Hitchcock, R and Vinding, D (ed) *Indigenous Peoples of Southern Africa IWGIA* (2004)

Darrow, M & Alston, P 'Bills of Rights in Comparative Perspectives' in Alston P (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) Oxford: Oxford University Press

Laboni, AHN 'Land Restitution and the Doctrine of Aboriginal Title: *Richtersveld Community versus Alexkor Ltd and Another*' 18 (2002) *SAJHR*

Mcquoid-Mason, DJ 'Legal Aid' in Joubert, W *The Law of South Africa* (2nd ed) (2004) Cape Town: Lexis Nexis Butterworths

Roux, T 'Pro poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court' 20 (2004) *SAJHR* 522

Saugestad, S 'The Indigenous Peoples of Southern Africa: An overview' in Hitchcock, R and Vinding, D (ed) *Indigenous Peoples' Rights in Southern Africa* (2004) IWGIA

Scheepers, JHL 'Land' in Joubert, W *The Law of South Africa* (2nd ed) (2004) Cape Town: Lexis Nexis Butterworths

Trahan, Y 'The *Richtersveld Community & Others v Alexkor Ltd*: Declaration of a "Right in Land" Through a "Customary Law Interest" Sets Stage for the introduction of aboriginal title into South African Legal System' 12 (XXXX) *Tulane Journal of International & Comparative Law*

Manuals and Reports

Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations of the Committee on the Rights of the Child: South Africa, CRC/C/15/ADD.122 (CRC, South Africa 2000)

Consideration of Reports Submitted by States Parties Under Article 9 of The Convention: International Convention On The Elimination Of All Forms of Racial Discrimination: Concluding Observations of the Committee on the Elimination of Racial Discrimination: South Africa CERD/C/ZAF/CO/3 (CERD, 2006)

Crawhall, N *Indigenous Peoples of South Africa: Current Trends* Project to Promote ILO Policy on Indigenous and Tribal Peoples / South African San Institute, International Labour Office, Geneva, 1999

First Periodic Report of South Africa on the African Charter on Human and Peoples' Rights: 2001

ILO Convention on Indigenous and Tribal Peoples, 1989 (NO 169) *A Manual* (2003)

ILO/ African Commission on Human and Peoples Rights, Report of the Workshop to determine the scope and methodology of the research, Examining constitutional, legislative and administrative provisions concerning indigenous and tribal peoples in Africa, 18-20 September 2006, Yaounde

Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities in Africa, 2003

Report of the UN Special Rapporteur on Indigenous Peoples mission to South Africa 2005(E/CN.4/2006/78/Add.2)