



Guide to Indigenous Peoples' Rights in Namibia

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This publication is part of the programme on “Promoting and Implementing the Rights of San Peoples in the Republic of Namibia”, which the Government of Namibia, with the technical assistance of the International Labour Organization (PRO169) and the financial support of the Spanish Government, is implementing since 2008.



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SUMMARY

Namibia has a considerable number of indigenous peoples living in its territory as citizens. The majority of these people are the San but there are also other groups such the Ovaherero and the Nama. Namibia has various obligations towards these indigenous peoples and has a duty to respect their rights. It is a state party to various international and regional legal instruments that protect the rights of indigenous people. Namibia has made some commendable efforts through its Constitution and legislation to ensure that the rights of indigenous peoples are respected and protected.

At a practical level, Namibia has dealt with the issue of discrimination towards indigenous peoples by establishing the San Development Programme in 2005. The Office of the Deputy Prime Minister is responsible for taking affirmative action measures to redress historical disadvantages suffered by indigenous peoples.

The issue of participation and consultation has been addressed by the Constitution of Namibia, which provides for political participation and equality before the law of all Namibians in articles 17 and 10 respectively. However, little distinction seems to be made between an integrationist approach, according to which all Namibians are considered to be similarly placed and differences between them are down-played, and an approach that respect, promote and protect the ethnic, cultural and social distinctness of the indigenous peoples.

Access to land for the indigenous peoples is regulated by article 16 of the Constitution and also by legislation such as the Communal Land Reform Act. The Government Policy on Tourism Wildlife Concessions on State Land of 2007 provides clear principles and guidelines on the allocation of concessions to communities living adjacent to or in protected areas. However, long processes and bureaucratic hurdles impede fast and effective access to land for indigenous peoples.

Various campaigns have been adopted by the executive branch of Namibia to ensure that indigenous children enjoy their right to education – in fact, it has the best practice thus far in the region.

Namibia's Educational Language Policy provides that indigenous children be instructed in their language for the first three years before changing to the English language. A National School Feeding Programme has also been set up by the government to attract indigenous children to school. However, the practical implementation of these policies remains fraught with various challenges.

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

Employment and gender equality are taken into account as well. Due to their low literacy level, indigenous peoples are finding it difficult to enter the mainstream work force of Namibia. The Namibian authorities have tried to apply affirmative action policies and reserve works in conservation parks for indigenous people. The Government adopted the National Gender Policy (1997) and the National Plan of Action on Gender (1998) to remedy the problem of gender inequality and gender based discrimination, but these policies have not benefited indigenous peoples specifically.

An effort has been made to preserve the culture and language of indigenous peoples. Policies have been adopted for instruction given to indigenous children in their native language. However, a problem of lack of personnel who can speak indigenous language remains a significant challenge. As for access to justice, emphasis is being put on the importance of traditional authorities: Namibia is trying to open access to justice by national courts but also maintain traditional justice system of the indigenous peoples.

Despite significant progress over the years - in law and practice - by Namibia to protect and advance the rights of indigenous peoples in its territory, some work still remains to be done to ensure full compliance with the country's domestic and international legal obligations. This guide briefly explores some of these legal obligations and examines the extent to which Namibia meets them and finally makes some recommendations.

Part I: A brief background and justification

It is estimated that the population of indigenous peoples across the world is more than 370 million in some 90 countries¹. Indigenous peoples face serious problems such as land dispossession, destruction of their livelihood, hindrance in practising their culture and identity as well as limitations in accessing education and health facilities. They live in extreme poverty and do not have access to political participation or have their cause heard and opportunity to improve their living conditions. As both the regional and international community increasingly shift towards the recognition and protection of the rights of the marginalised and excluded indigenous peoples, Namibia finds itself directly under certain obligations towards a section of its population which fall under the category of indigenous peoples.

The African Commission on Human and People's Rights (ACHPR or African Commission), which is the human rights body of the African Union, has been debating the human rights situation of indigenous peoples since 1999. Indigenous peoples are some of the most vulnerable and marginalized groups on the African continent, and their representatives have since the 29th Ordinary Session of the African Commission in 2001 participated in the ACHPR's sessions. The indigenous representatives have given strong testimonies about their situation and the human rights violations they suffer from. Their message is a strong request for recognition and respect as well as a call for improved protection of their civil, political, economic, social and cultural rights. It is also a request for the right to live as peoples and to have a say in their own future, based on their own culture, identity, hopes and visions. Indigenous peoples, moreover, wish to exercise these rights within the institutional framework of the nation-state they belong to. The African Commission has responded to this call. The African Commission recognizes that the protection and promotion of the human rights of the most disadvantaged, marginalized and excluded groups on the continent is a major concern, and that the African Charter on Human and Peoples' Rights must form the framework for this.

In order to achieve a better basis on which to advance discussions and formulate recommendations, the African Commission set up a Working Group on Indigenous Populations/Communities (Working Group) in 2001.

Namibia has two major indigenous groups, namely the San and the Ovahimba. Since 2007, other smaller indigenous groups, namely the Ovatue and Ovatjimba, have gained more visibility. Due to a significant number of indigenous peoples in Namibia and the marginalisation and exclusion these groups have witnessed, this booklet looks at the obligation Namibia has towards them, based on regional and international instruments to which Namibia is a state party.

It also evaluate how Namibia is respecting and implementing these obligations at the domestic level. This guide further seeks to provide state and non-state institutions that are in charge of delivering public services with a practical guide on standards, norms and principles to bear in mind while designing, implementing and monitoring programmes on indigenous peoples in Namibia. A further aim of the guide is to enhance the human rights situation of indigenous communities in the country and hope for a better understanding of their rights.

Part II: Frequently asked questions about indigenous peoples in Namibia

1. Who are indigenous peoples?

There is no legal formal definition of the words “indigenous peoples” in both international and regional law for two major reasons. Firstly, no single set of words could capture the cultural diversity of the concerned peoples across the world. Secondly, according to the principle of self-identification, indigenous peoples should not be defined by someone except themselves. The United Nations Declaration on the Rights of the Indigenous Peoples (UNDRIP) does not define the term “indigenous peoples”. The African Charter on Human and Peoples’ Rights (African Charter) does not define the term “peoples”.

In the *Endorois* case², the African Commission highlighted the characteristics that can help anyone understand why certain groups identify themselves as indigenous. These are the following:

- the occupation and use of a specific territory
- the voluntary perpetuation of cultural distinctiveness
- self-identification as a distinct collectivity
- an experience of subjugation, marginalization, dispossession, exclusion or discrimination

From the practice of the African Commission, the body supervising the implementation of the African Charter, the word ‘peoples’ can mean the population of a ‘state in its entirety’ or ‘an identifiable portion of the population of a state’³. The words ‘communities’ and ‘populations’ are often used interchangeably with ‘peoples’.

2. Are all Africans indigenous?

Technically speaking, not all Africans are indigenous. Indigenous peoples are understood as sections of some national populations with strong land-based cultural identity. Because of their particular life styles, they had been or continue to be considered as backward, uncivilized and unfit to enjoy all rights on the same footing with the rest of the population. Their traditional use and occupation of lands (mostly nomadic) were seen as not good enough to be legally recognized and protected.

They live in extreme poverty and on the margins of their respective societies, with illiteracy, level of poverty and unemployment levels far higher than national averages.

Historical injustices suffered by indigenous communities are deeply rooted in colonial history but were perpetuated or remained uncorrected in most post colonial African states. This is the human rights understanding of the concept 'indigenous'. According to the 2005 Report of the African Commission's Working Group of Experts on Indigenous Populations:

- Indigenous peoples are not found in all African countries.
- "Indigenous" does not necessarily mean first in exclusion to later comers.
- Most of indigenous peoples in Africa are either hunter gatherers, former hunter gatherers or pastoralists groups.
- However, the African Commission also indicates that there is also a literal or general meaning of the term indigenous: "there is no question that all African are indigenous to Africa in the sense that they were there before the European colonization".

3. Does the concept 'indigenous' foster ethnic divisions/tribalism or does it threaten national unity/territorial integrity through the right to self determination?

The African Commission stated that, by "giving recognition to all groups, respecting their differences and allowing them all to flourish in a truly democratic spirit does not lead to conflict, it prevent conflicts. Conflicts do not rise because people demand their rights but because their rights are violated. The elaboration of modalities to protect the human rights of particularly discriminated groups should not be seen as tribalism or disruption of the unity of African states".

The African Commission clarifies further that the enjoyment of the right to self- determination by indigenous peoples should be understood in terms of self governance, autonomy, and similar prerogatives that do not threaten the territorial integrity and unity of current states. This is also the understanding of articles 3, 4 and 46 of UNDRIP.

4. Who are the indigenous populations of Namibia?

The majority of the indigenous peoples in Namibia are the San People. They are currently facing problems like extreme poverty, lack of education, high mobility, social stigmatization and landlessness. 70% of San people depend on state-run food aids programmes which are only occasional. The life expectancy of the San people is 22% lower than the normal average of the

common population of Namibia. Only 15% of San has legal title deeds for the lands which they occupy. The level of literacy among the San is only 20 %⁴. The primary source of survival for the San is land on which to hunt for wildlife, veld fruits and feeding programmes by government. Smaller group such as the Ovaherero and Ovambo have also emerged. They are closely related to the Herero tribe and live in the remote dry and mountainous areas of Kunene region previously known as Kaokoland. The Himba still uphold their traditional semi-nomadic lifestyle and culture for centuries. They speak Otjiherero language and live exclusively from their herds and cattle. Their life is centred by herding their herds of goats and cattle to new grazing areas and waterholes.

5. What are Namibia's key international obligations on indigenous peoples?

As provided by the Constitution, all international human rights treaties are part of the Namibian legal system⁵, and bind the state in its dealings with all Namibians – including indigenous peoples.

The following international instruments contain the key Namibian international obligations on indigenous peoples' rights:

- 1) The International Covenant on Civil and Political Rights (ICCPR, ratified by Namibia on 28 November 1994, more specifically article 27.
- 2) The International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Namibia on 28 November 1994.
- 3) The Convention on the Elimination all forms of Racial Discrimination (CERD), ratified by Namibia on 11 November 1982.
- 4) The Convention on the Rights of the Child (CRC), ratified by Namibia on 30 September 1990, with article 30 that refers specifically to 'indigenous children'.
- 5) ILO Convention No. 111 Convention concerning Discrimination in Respect of Employment and Occupation, ratified by Namibia on 13 November 2001 which is of paramount importance to indigenous peoples because of protecting traditional occupations.
- 6) Convention on Biological Diversity (CBD), ratified by Namibia on 16 May 2005 with specific articles 10(c) and 8(j) on indigenous peoples' rights.
- 7) United Nations Declaration on the Rights of Indigenous Peoples, adopted on 13 September 2007 following an overwhelming majority vote of 143 UN Member States, including Namibia. It is the most comprehensive and updated legal instrument on indigenous peoples' rights. Although UNDRIP is not a binding treaty, its provisions are considered highly persuasive.

Namibia is yet to ratify ILO Convention No.169 on Indigenous and Tribal Peoples, which is the only international treaty, open to ratification that deals specifically with indigenous peoples' rights.

On the regional level, Namibia has ratified the following main human rights treaties:

- 1) African Charter on Human and Peoples' Rights (ratified on 30 August 1992).
- 2) The Protocol to the African Charter on the Rights of Women in Africa (ratified on 22 December 2000).
- 3) The African Charter on the Rights and Welfare of the Child (ratified on 23 July 2004).

In addition, Namibia is a party to the African Youth Charter, the SADC Protocol on Culture, Information and Sport, the SADC Forestry Protocol, the SADC Protocol on Mining and the SADC Protocol on Training and Education. As a state party to all these legal instruments, Namibia is bound to provide protection and respect for the rights of indigenous peoples.

Namibia is a state party to and thus bound to all these treaties. Indigenous peoples in Namibia, similar to all other human beings, enjoy all other rights stipulated in international human rights instruments to which Namibia has become a state party⁶.

6. Are the rights of indigenous peoples new or special?

The rights of indigenous peoples are neither new nor special. All international instruments, provisions on indigenous peoples restate, as way to emphasize, the very same rights protected under universal human rights instruments. As indicated above, indigenous peoples' histories are marked prejudiced views and marginalization that prevent them from enjoying all rights. In most cases, indigenous peoples suffer de facto discriminations or exclusion, which causes their lagging behind national averages on level of education, access to health and other public services.

Provisions on indigenous peoples' rights aim at correcting these historical injustices and socio-economic imbalances, by first restating the principle of equality as articulated in all universal human rights instruments and secondly provide not for special rights but special measures with the view to closing socio economic gaps and taking into account specificities of indigenous peoples.

7. What are key milestones on indigenous peoples-related standards in Namibia?

The rights of indigenous peoples in Namibia like all other peoples are provided for in the Constitution. It uses the words 'all people' for positive rights and 'no person' for negative rights. It has general provisions like the preamble which provide the right of the individual to life, liberty and pursuit of happiness without discrimination based on race, colour, ethnic origin and religion.

One of the principles of the Namibian Constitution is the promotion among the Namibian nation of integrity, unity and dignity of the individual.

- 1) Article 5 generally protects the fundamental rights and provides for their enforceability by courts in Namibia.
- 2) Pursuant to Article 144 of the Namibian Constitution, general principles of international law as well as international agreements binding upon Namibia form part of the law of Namibia. This implies that rules of international law as well as the provisions of international agreements to which Namibia is party are directly enforceable under the laws of Namibia.
- 3) Adoption of the Traditional Authorities Act, Community Courts Act and Communal Land Reform Act.
- 4) Adoption of the San Development Programme on the basis of a Cabinet decision No: 25th/29.11.05/001: To integrate the San Communities into the mainstream of the Namibian society and economy in line with its Vision 2030 and national development policies. The following are some of the key initiatives undertaken so far since the inception of the programme.
 - Resettlement Programme for San people. The Government has purchased farms, and allocated it to the San people. The Ministry of Land and Resettlement gave them livestock (cattle and goats), some farming implements and trained them in farming to produce food for self sustenance.
 - Education for San children The Government launched the “back to school and stay at school for San children” programme and provides them with scholarships.
 - Literacy project for all the San people.
 - Early-Childhood Development Centres were established.
 - Employment opportunities. The National Government has given directives to all Ministries and Regional Governments to apply affirmative action principles in terms of the law in the employment of San people. Many of the Ministries including the Ministry of Defence, Safety and Security have relaxed requirements for employing San people in the Defence and Police Forces.
 - With the assistance of NGO's, the Community Conservancy programme is one of the programmes established for the benefit of San people which have been more successful.
 - San Feeding Programme. Due to extreme poverty amongst the San, Government introduced feeding programmes for the San Communities on a regular basis.
 - The San Development Programme is also catering for Ovatie and Ovatjimba communities in the Kunene Region.

- Therefore close to 300 Ovaherero and Ovambo communities have been resettled at Ohaihuua, Otjikoto and Otjomuho Villages. These villages have been provided with houses, schools, clinics, cattle, goats, chicken and provision of water and garden projects.
- 5) Vote in favour of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007
- 6) Creation of the San Development Division within the ODPM in 2005
- 7) Official invitation of the African Commission Working Group on Indigenous Populations/Communities in 2005
- 8) Universal Periodic Review Report by Namibia in February 2011 making a number of commitments relating to indigenous peoples and using the term 'indigenous peoples'. The Namibia government expressed commitment to continue support and programmes by the San Development Division to ensure that indigenous minority peoples in the country are fully integrated in mainstream society and economy.

8. Why is protection of indigenous peoples good for national development?

Enhanced protection and promotion of indigenous peoples' rights is an asset to national development for the following reasons:

- 1) It prevents or resolves social conflict.
- 2) It promotes good governance through participation of the beneficiaries and other stakeholders.
- 3) It guarantees conflict-free exploitation and conservation of natural resources given that in most cases indigenous peoples live on lands that are rich in natural resources. There is no long term future in exploitation or conservation of natural resources based on social injustices, expulsions of local communities and conflicts.
- 4) Indigenous peoples have knowledge that can benefit a country as a whole.

Part III: The rights of indigenous peoples under international law and under Namibian law

This part deals with the law and the general principles which guide the implementation of indigenous peoples' rights. It addresses several issues which affect indigenous peoples. The importance of each issue is highlighted and the position of international law regarding each issue is discussed. International human rights law and the general principles are then used as a yardstick to measure the efforts made by Namibia in promoting, protecting and implementing the rights of indigenous peoples.

1. Non-Discrimination

Why is non-discrimination important to indigenous peoples in Namibia?

Discriminations that indigenous peoples suffer from come mostly from decades or centuries of prejudiced views, by which other sections of national population consider them and their way of life as uncivilized and backwards. This is what makes particular the discriminations suffered by indigenous peoples. Indigenous peoples often face severe discrimination, both at vertical and horizontal levels. Vertical discrimination is when the state adopts law and policies that are discriminatory. When other people discriminate against indigenous people, they experience horizontal discrimination.

The state has a role to protect individuals, including indigenous peoples, against discrimination by other persons (for example by adopting "Anti-Discrimination" laws). Discrimination can take a direct or indirect form. For example, direct discrimination would take place if the state made a law that excluded an indigenous community, by name, from the enjoyment of a particular right, such as the right of access to water or lands. Indirect discrimination would occur if the state adopted a law that did not discriminate against a group, by name, but if the effect of the law is to discriminate against that group.

What are the key existing international and domestic standards on non-discrimination against indigenous peoples applicable in Namibia?

- 1) The right to protection against discrimination has been recognized by major international human rights treaties like the ICCPR and the ICESCR.

- 2) The African Charter provides, in article 19, for equality of all peoples and proscribes the domination of a people by another. The African Commission held that discrimination against black Mauritians was a violation and found that any law that discriminates against a people or an ethnic group will amount to a violation of article 19⁷.
- 3) The Protocol on the Rights of Women⁸ obliges states to protect the right of every woman and requires that every woman should be allowed to develop her personality freely. One of the ways indigenous women can freely develop their personality is by being protected from all forms of discrimination especially based on gender. As a state party to the Protocol, Namibia has an obligation to refrain from making laws, policies, regulations as well as administrative and institutional procedures which result in the denial of the equal enjoyment by women of their civil, political and socio-economic rights⁹.
- 4) Article 10 of Namibia's Constitution prohibits discrimination on among other grounds race, colour, ethnic origin, religion or social or economic status. Of particular importance to indigenous peoples in Namibia is article 23 of the Constitution which provides for affirmative action measures. Although that provision is designed to address Namibia's apartheid past and accordingly covers all historically subjugated groups by the apartheid laws and policies, it can be employed to redress past and continuing marginalisation of indigenous peoples in Namibia. To give effect and implement the Constitutional provision on non-discrimination, the state adopted the Racial Discrimination Amendment Act No. 26 of 1990 and the Racial Discrimination Amendment Act No. 26 of 1998.
- 5) The establishment of the San Development Programme in 2005¹⁰ within the Office of the Deputy Prime Minister of Namibia is a positive affirmative action contribution to redress the situation of indigenous peoples in Namibia. It was an important acknowledgment by the government of Namibia that more than two decades since attaining independence, some of its people remain at the margins of development. The objective of the programme "is to ensure that the San people are fully integrated in the mainstream of the Namibian society and economy and thereby ensure that all Namibians achieve the country's vision 2030."¹¹ Although initially targeting the San community, the programme has since 2007 incorporated the Ovaherero and Ovambo communities¹².

In 2007, by a Cabinet directive, the Office of the Deputy Minister was tasked to resettle the Ovaherero and Ovambo communities in Kunene region. These communities were supported by implementing community based integrative rural development initiatives e.g. provision of cattle, goats, access to

clean water, gardens, solar electricity, education and infrastructure. The government have made it possible and build a resettlement village and health and school facilities catering for indigenous marginalised communities. The staff employed in the centres are trained professionals hailing from respective target groups.

- 6) The courts of law in Namibia have equally been instrumental in protecting the rights of indigenous peoples in the country as illustrated by the case of *Kapika v Government of Namibia* (the Himba and Epupa Hydropower Scheme case). The litigation arose out of a decision by the Namibian Government to build a dam along the Kunene River in North-Western Namibia, in the area inhabited by the Ovahimba community. The community claimed that they had not been consulted and/or involved in the initial stages of the project. According to the community the construction of the dam would inundate more than 160 ancestral graves which were local points for defining identity as well as being centres for important religious rituals. Through the Legal Assistance Centre, the Community obtained a High Court order allowing them to meet freely with their legal representatives to strategise on vindicating their rights on the matter. In addition, through successful lobbying - both locally and internationally – the Ovahimba under the leadership of Chief Hikuminue Kapika, put pressure on the government to engage the community in meaningful negotiations. The construction of the dam is presently on hold.
- 7) Chapter 10 of the Namibia Constitution establishes Ombudsman which is an independent complaints handling institution. It investigates the mal-administration, human rights violations and the over-utilisation of natural resources, upon receiving a complaint relating thereto. The Ombudsman also plays an important role in the promotion of democracy and good governance. The Ombudsman has sought to protect and promote the rights of indigenous peoples in Namibia and has undertaken community visits and consultations on strategies to protect indigenous peoples' rights. The Ombudsman is presently developing a National Human Rights Action Plan and has indicated that he will include issues and concerns of indigenous peoples in Namibia in the envisaged Action Plan.

2. Participation and Consultation

Why is participation and consultation important to indigenous peoples in Namibia?

United Nations Declaration on the Rights of Indigenous Peoples

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decisionmaking institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The principles of participation and consultation are meant to provide indigenous peoples with a say in decisions that affect them. They are designed to make indigenous peoples decide on their destiny and infuse their perspectives, aspirations and visions into national legal and policies frameworks as well as development programmes. The norms of consultation and participation are thus mechanisms aiming to correct the historical prejudiced view of indigenous peoples, as uncivilized and backwards who do not know what is good for them and for whom other should decide (assimilationist approach). They are means through which indigenous peoples are to gradually regain control over their destiny and secure their rights over lands, to education, employment and equality.

Consultation should be done through appropriate procedures and institutions whenever consideration is being given to legislative or administrative measures on lands, natural resources, educations, employment, and health, vocational training etc that may affect indigenous peoples. Consultation must be done in good faith, with enough time, well before a decision is made and with the objective of reaching an agreement with indigenous peoples. Mere sharing of information with indigenous peoples when decisions have already been made does not amount to consultation. The concept of consultation is important in this context because it allows for indigenous peoples to have their views known and to compel the authority to get their consent. It also enables the negotiation of adequate compensation in case of relocation.

The composition of national decision-making bodies and the institutions involving traditional

leadership should also cater for the special needs of indigenous peoples. The only way this is possible is by consultation and participation.

Participation of indigenous peoples in public affairs is often hindered by numerous unfair factors including high illiteracy or not having identification papers. It is important for indigenous peoples to have a say in the political affairs of their country so that they are adequately represented and their needs and complaints be properly heard and attended to. Participation breeds constructive dialogue through which indigenous peoples can voice their complaints and seek redress. Indigenous peoples must participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. Governments are bound to establish institutions or mechanisms that enable indigenous peoples participate in the planning, coordination, execution and evaluation of measures or programmes that affect them.

Who should be consulted?

Indigenous peoples should be consulted through their representative institutions. What constitutes a representative institution will have to be determined in function of the characteristics of the country, the specificities of the indigenous peoples and the subject and scope of the consultation. Given the circumstances, the appropriate institution may be representative at the national, regional or community level; it may be part of a national network or it may represent a single community. The important criteria is that it should be indigenous peoples themselves who determine which institutions are representative.

In circumstances where representation is contested or there is a diversity of competing institutions, the identification of a single representative institution may not be possible. Particular in broad national consultations, there will be a need to take an inclusive approach, allowing for participation of the diversity of organizational expressions. Ensuring that the institutions concerned are representative may in some cases also go beyond traditional institutions. For instance, it is required that consultation should be applied equally to women and men, but in some cases women may not have a say in traditional decision-making.

If the institutions consulted are not considered representative by the people they claim to represent, the consultation will have no legitimacy. Where indigenous peoples' traditional institutions lack capacities, the government should support the development of indigenous peoples' own institutions and initiatives and also, where appropriate, provide them with the necessary resources.

What are appropriate procedures?

The requirement that consultations should take place through appropriate procedures means that consultations should take place in a climate of mutual trust. In general, Governments need to recognize representative organizations, endeavor to reach an agreement, conduct genuine and constructive negotiations, avoid unjustified delays, comply with the agreements which are concluded and apply them in good faith. Governments also need to ensure indigenous peoples have all relevant information and that it can be fully understood by them. Sufficient time must be given to allow indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken in a manner consistent with their cultural and social traditions. Thus, consultation often means establishing an intercultural dialogue. This means making a real effort to understand how indigenous peoples' cultures function, their decision-making processes, and their priorities, and adapting the form and timing of consultation to this.

Does consultation lead to conflict?

Effective consultation and participation are principles of good governance and are means to reconcile different interests and pursue objectives of inclusive democracy, stability and economic development. In contrast, the lack of effective consultation will often lead to further exclusion and, in the worst cases, conflicts and confrontations. At the local level, consultation establishes dialogue and facilitates agreements. Likewise, where the ILO supervisory bodies have analysed specific conflictive situations, it has been obvious that provisions on consultation and participation had not been adequately implemented.

What are the barriers for conducting consultations?

One of the key obstacles to a good standard consultation is the situation of exclusion and mistrust, which often exist between indigenous peoples and States.

What is the concept of free, prior informed consent?

UNDRIP uses the term free, prior informed consent to establish the objective of consultation and cooperation. Specifically, it stipulates as follows (article 19):

States shall consult and cooperate in good faith with the indigenous peoples concerned through

their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative and administrative measures that affect them.

In his 2009 annual report to the UN Human Rights Council, the UN Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, has said in this regard:

“This provision of the Declaration [Article 19] should not be regarded as according indigenous peoples a general “veto power” over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples. The somewhat different language of the Declaration suggests a heightened emphasis on the need for consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process”.

It is therefore believed that an effective consultation can lead to a free, prior and informed consent of indigenous peoples.

What are the key existing international and domestic standards for consultation and participation of indigenous peoples in Namibia?

- 1) UNDRIP has recognized the concept of free, prior and informed consent of indigenous people¹³.
- 2) The African Charter also provides for the right to political participation in the government of the country which also extends to indigenous peoples¹⁴.
- 3) Article 3(2) of the SADC Forestry Protocol also provides for respect of communities rights by calling on states to cooperate in promoting respect for the rights of communities and facilitating their participation in forestry development, planning and preservation without prejudice to their property rights¹⁵.
- 4) Namibia's Constitution envisages participation in a political context. Article 17 of the Constitution provides that all citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of government.
- 5) The equality before the law provision in article 10 of the Constitution provides a clear legal basis

for ensuring that all Namibians including those from indigenous communities participate and are consulted on decision and matters that affect them.

- 6) The affirmative action clause under the Constitution in article 23 also envisages that the state can take special measures to ensure previously disadvantaged communities and individuals including women play a full, equal and effective role in the political, social, economic and cultural life of the nation.
- 7) Since the establishment of the San Development Division there have been some commendable efforts in seeking to consult indigenous peoples although not always properly structured to ensure free, prior and informed consent. One of the key concerns expressed by San communities is that their legitimate concerns and views are often ignored or not sought at all, although they may be obtained through appropriate consultations and participation¹⁶. The failure to give due regard to indigenous peoples concerns and preferred way of life and circumstances raises questions about the compliance of the consultations with the norms, standards and principles on adequate consultation.

3. Land, natural resources and property

Why is land, natural resources and property important to indigenous peoples in Namibia?

Land is of immense importance to indigenous people as it gives them a cultural identity as well as spiritual and social well-being¹⁷. Generally, indigenous peoples do not have legal title deeds for the lands they occupy since time immemorial. Therefore, it becomes problematic to decide whether they own those lands as their property. The matter even gets complicated when it comes to whether or not they have rights to any natural resources which may be found under those lands.

What justifies specific measures for the protection of indigenous peoples' land rights?

Two major historical wrongs were committed against indigenous peoples with regards to lands. Firstly, because of indigenous peoples' nomadic lifestyle that tends to leave little visible signs of land occupation, their traditional territories gave the impression of being unoccupied, contrary to sedentary agriculturalists communities whose occupation and use of lands were visible. This misconception was reflected in most colonial and post colonial land laws that considered indigenous peoples as vacant or no man lands. Secondly, indigenous peoples' use and occupation of lands were considered as wasteful and economically unviable.

What is the scope of indigenous peoples' land rights? (Do indigenous peoples' claim all national lands?)

Indigenous peoples claim lands and resources they traditionally occupy and use in a broad sense. It gives importance to the concept of territories, covering the total environment of the areas they occupy, and to the cultural and spiritual values attached to the land. The recognition of land rights is based on the traditional occupation, meaning the land where indigenous peoples have lived over time and want to pass on to future generations. Indigenous peoples' lands are not just any land but lands to which they culturally relate. In most cases those lands do not amount to all national lands and Indigenous peoples can help demarcate and delimitate their lands. The right implies that indigenous peoples must be informed, consulted and participate from the very outset of a planned intervention, including before concessions or licenses are granted to operators.

What proves indigenous peoples' rights to lands and resources?

Indigenous peoples' rights to lands and natural resources are proven by a traditional immemorial occupation and use, and not the eventual official recognition or registration of ownership, as done in modern law. These land rights comprise both individual and collective aspects. Further, governments are required to establish procedures to identify indigenous peoples' lands and protect their rights of ownership and possession, e.g. through demarcation and titling, and to establish mechanisms to resolve land claims.

What are the key international and domestic standards on indigenous peoples' land rights in Namibia?

- 1) The UNDRIP recognizes the right of indigenous peoples to lands, territories and resources they traditionally own¹⁸. Furthermore, article 27 of the UNDRIP obliges states to establish procedures by which indigenous peoples' customs and land tenure systems can be recognized, with the participation of indigenous peoples.
- 2) The Committee on Elimination of Racial Discrimination (general recommendation xxiii) as requested states to provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics, as well as to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources¹⁹.
- 3) Article 27 of the ICCPR as commented up on by the Human Rights Committee "With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law... to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources".
- 4) Article 21(1) of the African Charter stipulates that the State has a duty to allow all its citizens to freely dispose of their wealth and natural resources and in the exclusive interest of the people. In addition, the State has the obligation of not depriving any individual from this right. Article 22(1) imposes the obligation to respect the peoples' right to economic, social and cultural development in relation to their freedom and identity. Their right to equal enjoyment of the common heritage of mankind has to be respected by the State.

- 5) The Constitution of Namibia Article 16 provides that “all persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath to their heirs or legatees.” On the basis of that provision one would expect that indigenous peoples would enjoy that right but in practice, in fact collides with article 100 of the Namibia Constitution which state that all communal land vests in the state²⁰.
- 6) In addition, section 17(1) of the Communal Land Reform Act provides that “all communal land areas vest in the state in trust for the benefit of the traditional communities in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment and or engage in non agricultural business activities.” That provision which vest communal land to the state effectively means that indigenous communities unlike individuals who have private title- do not have security of tenure for their lands and in fact have no legal title to these lands. With regard to the ownership of land by indigenous peoples, the 1991 Land Conference resolved that there will be no claims to ancestral land by any person in Namibia.
- 7) The process of resettling displaced indigenous communities in Namibia remains fraught with numerous challenges and bureaucratic hurdles. However, since the establishment of the San Development Programme, a number of indigenous communities have been assisted to access communal farms²¹.
- 8) The Government Policy on Tourism Wildlife Concessions on State Land of 2007 provides clear principles and guidelines on the allocation of concessions to communities living adjacent to or in protected areas. On the basis of that policy and guidelines the San Development Programme has facilitated access by San communities to community conservancies in order to benefit from natural resources such wildlife and game in the areas they inhabit²².

4. Education

Why is education important to indigenous peoples in Namibia?

Education has been identified as an essential tool for the self-development of indigenous peoples and to empower them to fight domination and the consequences of such domination²³. Education is one of the most appropriate tools to empower present and future generations of indigenous peoples to fight marginalization and poverty. Education will also enable indigenous people to improve their conditions of life together with the respect for their culture and tradition.

Which key elements indigenous peoples' education should have?

Education of indigenous peoples should include their history and culture, align with their way of life to the extent possible, gradually be under the beneficiaries' management, use indigenous languages and promote indigenous teachers.

Indigenous peoples-focused program on education should aim at closing the gap in the education sector so that indigenous peoples can enjoy that right on the same footing with all.

What do international and Namibian domestic laws provide on education to indigenous peoples?

- 1) The Convention on the Rights of the Child recognizes compulsory and free primary education to all children which also includes indigenous children²⁴. According to CRC General Comment No 11, states have the duty to ensure that special measures are taken for indigenous children to enjoy their right to education on equal footing with non-indigenous children. It also emphasizes the fact that states should allocate targeted financial, material and human resources in order to implement policies and programmes which meet the special requirements of indigenous children's access to education.
- 2) In addition, the UNDRIP recognizes the right of indigenous children, to pursue all forms of education at all levels without discrimination²⁵.
- 3) The African Charter recognizes the right to education in article 17 and also acknowledges the right of individuals to take part in the cultural lives of their own communities. The African Charter on the Rights and the Welfare of the Child contains a provision stating the right of children to enjoy equal access to free and compulsory basic education²⁶.

- 4) Article 20 of Namibia's Constitution guarantees the right to education. Primary education shall be compulsory and the state shall provide reasonable facilities to render effective this right for every resident within Namibia by establishing and maintaining state schools at which primary education will be provided free of charge. However while primary education is free, other costs such as the school development fund, stationery, uniforms, school books, meals, transport and examination fees still need to be paid, leading to more hardship to children from poor families²⁷.
- 5) The implementing legislation for the constitutional guarantee to education is the Education Act No 16 of 2001.
- 6) Namibia's Educational Language Policy provides that "children shall be instructed in their mother tongue for the first three years of formal schooling with gradual switch to English in the fourth year."²⁸ In furtherance of that policy a collaboration between civil society and Namibia's Ministry of Education launched the Nyae Nyae Village School Project (VSP), which is a successful model integration of traditional, culturally-appropriate mother-tongue education of San indigenous children with formal education²⁹.
- 7) The San Development Programme has launched the "Back to School and Stay at School for San Children" campaign that is aimed at ensuring re-enrolment and retention of indigenous children in schools³⁰. A National School Feeding Programme (NSFP) was also introduced by the Ministry of Education in some of the indigenous peoples regions in the Kunene (Opuwo) and Otjozandjupa (Tsumkwe) in an effort to attract and retain children who would otherwise be unable to attend school because of hunger."³¹ The government has also launched satellite and mobile schools for the San and Ovahimba in conformity with their nomadic life-style³².
- 8) A multi-sectional Task Force, now known as the steering committee for Educationally Marginalized Children (EMC) was set up to look in to the plight of educationally marginalized children and to oversee the implementation of the National Policy option for the Educationally marginalized children. The committee monitors educational programs specifically meant for the San children (San Education Project) and Ovahimba children (Ondao mobile school). There are 52 mobile units with an enrolment of 2000 learners. The units grow on a rate of 4 units per year because the objective is to have the entire Ovahimba covered in terms of accessing and providing education by 2030.
- 9) Early Childhood Development Centres among San communities have also been started under the auspices of the San Development Programme in collaboration with development partners³³.

The aim of the centres is to facilitate access to pre-primary and kindergarten for indigenous children in Namibia.

5. Health

Why is health important to indigenous peoples in Namibia?

The health situation of indigenous peoples is very precarious in Namibia and very limited attention is given to this problem by medical authorities³⁴. Marginalization and extreme poverty are often the reasons for the very poor health condition of indigenous peoples who suffer from serious diseases like AIDS and tuberculosis. Infant mortality is also very high due to difficult access to health facilities. The issue of health is important because as every individual, indigenous peoples have a right to life which is inextricably linked to health.

Which key elements indigenous peoples' health programme should have?

Indigenous peoples' specificities should be taken into account including their traditional knowledge and cultural practices on health, the health services must be community-based, gradually under the responsibilities of the beneficiaries, consultation and participation of indigenous peoples, promote and give preference to community health workers and maintain links with other relevant health services.

What are the key existing international and domestic laws on the right to health for indigenous peoples in Namibia?

- 1) The International Covenant on Economic, Social and Cultural Rights provides that states have a duty to ensure right to adequate standard of living, which includes the right to health³⁵.
- 2) Article 16 of the African Charter stresses that state parties shall take all necessary measures to protect the health of their people.
- 3) States have an obligation to provide healthcare facilities. It should also be noted that proximity of those facilities to where the indigenous peoples live is very important. This is because they often lack transport and communication facilities. In addition, medical facilities should cater for traditional medical practices of indigenous people. It is even encouraged that healthcare centres promote and include traditional medical practitioners to assist normal doctors or nurses.

- 4) The right to health is not expressly provided for in Namibia's supreme law but is covered in the Constitution under principles of state policy. Article 95 (a) (e) and (j) of the Constitution of Namibia obliges the state to enact legislation to ensure the health and well being of its people and to provide access for every citizen to public facilities such as health as well as consistent planning to raise and maintain acceptable levels of nutrition and standard of living of the Namibian people and improve public health.
- 5) The government has made efforts to provide basic access to health including training to health workers among indigenous communities and constructed clinics. However, the lack of regular health facilities and health professionals who can also speak indigenous languages in regions where these communities live makes them vulnerable. The prevalence of HIV/AIDS among these communities equally demands better access for indigenous peoples to health services than is currently the case given the fact that in terms of the 2007 National HIV/AIDS Policy antiretroviral treatment is offered free of charge in state hospitals.
- 6) The Ministry of Health and Social Services in 2010 issued a circular to all national and regional health officials to adjust tariff of fees in state hospitals which include exemption of fees of particularly vulnerable individuals³⁶. However such exemption requires approval upon application by an individual, a procedure that may exclude most indigenous communities who may not even be aware of such exemptions. It is also important to note that in Namibia ante-natal and post-natal care services in state hospitals are offered free of charge which means that if the facilities were accessible to indigenous communities they would benefit from the service and alleviate the high rates of maternal and child mortality among these communities³⁷.
- 7) The government built health clinics in the resettlement centres of the San and Ovaherero communities which are staffed by nurses. However these clinics are closed after hours (17H00) and on weekends, which limits access to health services by those communities.

6. Gender equality

Why is gender equality and employment important to indigenous peoples in Namibia?

Violence against women and rape are issues that demand serious and urgent attention. Due to the fact that most indigenous peoples lack access to justice, perpetrators of rape and violence on women are often not prosecuted, a situation that breeds impunity. Health and reproductive rights are also poorly regulated by states. The CEDAW commits state parties to take all appropriate measures to eliminate discrimination against women, access to health care services including those related to family planning³⁸. Indigenous women are located in rural areas where health care facilities relating to birth-giving are absent or not adequate. There is also gender inequality as far as employment is concerned in Namibia. Often, indigenous women suffer multiple discriminations as an indigenous person and a woman. There are numerous cultural practices, including early or forced marriages that affect negatively indigenous girls and women.

What are existing key international and domestic laws on gender equality for indigenous peoples in Namibia?

- 1) Most international instruments prohibit discrimination on the basis of sex. The rights of women to enjoy all civil and political rights are equally protected as are those of men under the ICCPR³⁹.
- 2) Article 18 of the African Charter requires States to ensure the elimination of all discrimination against women and also ensure the protection of the right of the women and child as stipulated in international declarations and conventions.
- 3) The CEDAW Committee emphasized that different societal factors may determine the status of differently situated women's health rights. Consequently, special attention should be given to specific groups of women including indigenous women.
- 4) The Protocol to the African Charter on the Rights of Women in Africa requires state parties to legislate against harmful cultural practices such as female genital mutilation and forced and early marriage. Property rights and succession of indigenous women should be prioritised. They are generally very dependent on their access to land and an exclusion from access to land has harsh effects on them. Widows also have no claim on the property of their husbands which leave them deprived of any property and in a state of poverty.

The Protocol on the Rights of Women in Africa calls on state parties to ensure that men and women are treated equally in distribution of property upon dissolution of marriage or with regard to inheritance.

- 5) The Constitutional provision on equality and freedom from discrimination under article 10 also covers gender equality given that sex is one of the prohibited grounds for discrimination. In addition, the affirmative action clause in the Constitution under article 23 expressly provide for enactment of legislation and application of policies and practices to redress past discrimination and of note specifically mentions that “it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.”
- 6) One such law enacted in Namibia is the Combating of Domestic Violence Act, 2003, which provides for protection and mechanisms to protect women against domestic violence.
- 7) One of Namibia’s principles of state policy as enunciated in the Constitution article 95 is that the “state shall actively promote and maintain the welfare of the people by adopting policies aimed at enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society”. In furtherance of that principle of state policy the government, adopted the National Gender Policy in 1997 and the National Plan of Action on Gender in 1998⁴⁰. While the policies and plans adopted in that regard target all women in Namibia it is expected that if effectively implemented they would equally alleviate and address the continued marginalisation and discrimination of indigenous women in Namibia.
- 8) The San Development Programme has also launched various initiatives to empower women among indigenous communities such as bread baking and needle work⁴¹.

7. Culture and language

Why is culture and language important to indigenous peoples in Namibia?

The culture and language of indigenous peoples in Namibia are not being protected adequately. As the Namibian case of *Kapika v Government of Namibia* illustrates, judicial process should be used to protect the culture and language of those indigenous peoples⁴². Indigenous peoples have their culture and language as an integral part of their life. They identify themselves by their culture and the ancestral link with it.

Indigenous peoples' culture should be understood in broad sense, including their traditional knowledge, customs, practices, know how or traditional industries and economies as well as handicrafts.

Recognition and protection of indigenous peoples' culture is a way to recreate their self-esteem, which was destroyed by centuries of being told they were backward and stupid. Indigenous peoples are to become proud of what they are and not hiding from their culture and identity.

The Namibia Universal Periodic Review Report acknowledges that while there are a sizable number of indigenous peoples in the country only a few still practice traditional way of life. Given the desire by indigenous peoples to retain and transmit traditional culture and languages to future generations, it is imperative that the state provides support to indigenous communities' in their efforts to preserve their culture and languages some of which are becoming almost extinct. One of the key challenges in Namibia in that regard which demands urgent attention and redress is the fact that retention and transmission of indigenous cultures and languages has not been a priority of the state given its robust attempts to integrate indigenous communities to the mainstream cultures and practices. Commendably though Namibia has attempted to promote the use of indigenous languages through its Educational Language Policy as exemplified in the Nyae Nyae schools pilot project which should be replicated in all areas inhabited by indigenous communities.

What are the key international and domestic provisions on culture and language for indigenous peoples in Namibia?

- 1) According to article 15 of the UNDRIP, indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

They also have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, including their intellectual property⁴³.

- 2) Article 13 of the UNDRIP provides that indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons. It further calls on the state to take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.
- 3) Article 19 of Namibia's Constitution provides that every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the Constitution, the rights of others and national interest.
- 4) Article 3 of Namibia's Constitution prohibits discrimination of any other language as a medium of instruction in private schools or in schools financed by the state.

On the basis of that provision, there is no legal basis in Namibia for denial of use of indigenous languages in schools, but in practice the reality is different where most schools even in areas inhabited by indigenous communities do not have teachers who can teach the indigenous languages.

- 5) Article 21(c) provides of the Constitution for the freedom to practice any religion and to manifest such practice.

8. Labour rights and employment

Why are labour rights and employment important to indigenous peoples in Namibia?

As indigenous peoples came into contact with modern economies and the concept of formal employment, and as they became more urbanized, access to formal labour and employment gained importance among indigenous peoples in Namibia. However, the realization of these rights is severely constrained by the fact that most indigenous communities remain illiterate due to lack of formal education, training and school drop-outs. Indigenous peoples' right to employment should be understood as including also their traditional occupations that are often unprotected and recognized. Indigenous peoples' traditional economies, industries and technologies provide informal employment for many.

What are the existing key international and domestic standards on labour rights and employment of indigenous peoples in Namibia?

- 1) Under article 17 of the UNDRIP, indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law. States are required to take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development taking into account their special vulnerabilities and the importance of education for their empowerment. Indigenous peoples also have the right not to be subjected to any discriminatory conditions of labour including employment and salary.
- 2) ILO Convention No.111, which has been ratified by Namibia, provides that the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. Its article 2 stipulates "Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."
- 3) Article 21(1) (j) of Namibia's Constitution provide that all persons shall have the right to practice any profession, or carry on any occupation, trade and business. However that provision does not guarantee employment and indeed many indigenous peoples are unemployed.

- 4) Article 21(1) (f) is also important for indigenous peoples since it provides that all persons have the right to withhold their labour without being exposed to criminal penalties. However, many indigenous peoples in Namibia continue to do forced labour including child labour especially in commercial farms with no recourse to justice due to their particular vulnerabilities as a result of extreme poverty and often lack of alternatives. That is notwithstanding the fact that Namibia's Constitution article 15 prohibits economic exploitation of children that would interfere with their education or harmful to the spiritual, moral or social development.
- 5) The 2007 Labour Act, criminalized child labour in Namibia. In this regards, the ILO implemented with the ministry of labour and Social welfare the TECL programme: Towards the Elimination of the Worst Forms of Child Labour.
- 6) The San Development Programme has launched an initiative to adopt affirmative action measures across government departments and regional councils to provide employment opportunities for San speaking Namibians. In recognition of the need to diversity from formal employment the government through the San Development Programme has encouraged and provided training for bee keeping, honey production, coffin manufacture, aqua culture farming and efficient animal husbandry to indigenous communities as way of self-sustenance.

9. Access to justice

Why is access to justice important to indigenous peoples in Namibia?

The majority of indigenous peoples in Namibia are illiterate and live in remote locations, resulting in an inaccessibility to the justice system which is often available in urban areas⁴⁴. Indigenous peoples have the right to access justice and to prompt decision through just and fair procedures for the resolution of conflicts and disputes with states or other parties, as well as to effective remedies for all infringement of their individual and collective rights. Justice systems of countries in which live indigenous peoples should give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights⁴⁵.

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and in cases where they exist, judicial systems or customs, in accordance with international human rights standards⁴⁶. This is part of efforts to revalue indigenous peoples' culture, identities and institutions.

What are the key existing international and domestic standards on access to justice for indigenous peoples in Namibia?

- 1) According to article 13 of the UNDRIP, the state shall take effective measures to ensure that indigenous peoples are understood in legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.
- 2) Article 3 of the African Charter imposes on Namibia the obligation of treating all its citizens equally and giving them equal protection of the law.
- 3) The Namibian Constitution contains important safeguards to guarantee access to justice. Article 12 of the Constitution for instance provides for fair trial rights in civil and criminal proceedings. Article 18 of the Constitution provides that administrative bodies and officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies by common law and relevant legislation. Article 25 of the Namibia Constitution provides for the right of all in Namibia to enforce their fundamental human rights in a competent court of law. Such individuals and communities may also seek legal assistance and advice from the office of the Ombudsman.

However, in practice access to justice for indigenous Namibians remains constrained by illiteracy, lack of awareness of the legal framework and recourse, poverty and indigence, and remoteness of their places of habitat.

- 4) Through its regional complaint intake clinic programmes, the Ombudsman endeavours to visit indigenous communities at least twice per year to receive complaints, reseolve the less complicated ones and do public education.
- 5) Given that indigenous peoples rely on African customary law, it is important to note that the Namibia Constitution article 66(1) provides that “both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any statutory law.
- 6) That provision is given practical application by article 13 of the Community Courts Act of 2002 which provides that “the customary law of the traditional community lying in the court area of jurisdiction shall apply.”
- 7) Traditional authorities in Namibia have jurisdiction to determine and resolve matters in the community. Although one San community, the Khwe from the West Caprivi area is yet to be formally recognised the rest have since been recognised and in terms of article 2 of the Traditional Authorities Act of 2000, they have jurisdiction over members of the community.

Part IV: Concluding observations and recommendations of Regional and International Human Rights Bodies on the Rights of Indigenous People in Namibia

The working Group of Indigenous Populations/Communities of the African Commission visited Namibia in July – August 2005 with the following objectives:

Objective of the Mission

The general aim of the mission was to execute the mandate of the Working Group and of the African Commission. The specific objectives of the mission were inter alia, to:

- Gather information on the situation of indigenous populations in Namibia;
- Engage the Government of the Republic of Namibia in dialogue on the situation of indigenous populations in particular and its relationship with the African Commission as a whole;
- Engage civil society regarding its role in the promotion and protection of the rights of indigenous populations in Namibia; and
- Visit and discuss with indigenous communities to understand the problems, if any, affecting the effective enjoyment of their human rights.

The Working Group made recommendations on the following rights:

- | | |
|------------------------------------|---|
| • Education | • Training |
| • Land | • Health |
| • Employment | • Food |
| • Discrimination | • Traditional Leadership and Political Representation |
| • Recognition of Indigenous People | |

The United Nations Human Rights Council's Working Group on the Universal Periodic Review in February 2011, made the following recommendations in regard to indigenous peoples of Namibia which enjoy the support of Namibia.

- Continue its policy of promoting and protecting the rights of indigenous peoples by consolidating it with further measures to ensure the full exercise of the rights of all components of Namibian Society while respecting its traditions and identity;
- Increase efforts to reduce poverty and stimulate develop of the most marginalized groups, particularly indigenous communities, involving them in the decisions regarding their rights and interests;
- Ensure access to education, employment, health care and other basic services for the members of all ethnic communities, including the San and Himba communities;
- Take all necessary measures to eradicate discrimination against indigenous peoples;
- Formulate a white paper in accordance with the United Nations Declaration on the Rights of Indigenous Peoples and that recommendations from the Committee on the Elimination of Racial Discrimination, the International Labour Organisation (ILO) and the African Commission" working Group on Indigenous Populations/Communities are taken into consideration in this process.

Concerns and Recommendations of the Committee on the Elimination of Racial Discrimination after considering Namibia State Report : August 2008

1. The Committee acknowledges the difficulties within a democratic system in implementing land reform policies with a view to addressing existing imbalances. However, it is concerned about the apparent lack of clear and transparent criteria for the redistribution of land in practice, and notes with concern the paucity of information concerning the implementation of relevant policies in this field. (art. 5(d)(v))

The State party is encouraged to implement its policies on land reform in such a way to ensure the equal exercise by the different ethnic communities of the rights enshrined in the Convention within the framework of a democratic system. The Committee invites the State party to provide information on the measures taken to ensure the implementation of land reform policy and particularly its impact on vulnerable groups.

2. The Committee is concerned about the lack of recognition of the rights of ownership of indigenous communities over the lands which they traditionally occupy or have occupied. (art. 5(d)(v))

The Committee reminds the State party of its general recommendation No. 23 (1997) on the rights of indigenous peoples, in particular paragraph 5, which calls on State parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their lands and territories. It therefore encourages the State party, in consultation with the indigenous communities concerned, to demarcate or otherwise identify the lands which they traditionally occupy or use, and to establish adequate procedures to resolve land claims by indigenous communities within the domestic judicial system while taking due account of relevant indigenous customary laws.

3. The Committee welcomes the statement that local communities participate in the management of new conservation areas. However, it is concerned about the ability of the local indigenous communities to pursue their traditional way of life in such parks. The Committee is also concerned that those communities whose lands were taken before 1990 have not been able to receive redress for this dispossession (arts. 5 (d)(v) and (e)(vi)).

The Committee encourages the State party to strengthen its laws and policies aimed at ensuring that national parks established on ancestral lands of indigenous communities allow for sustainable economic and social development compatible with the cultural characteristics and living conditions of those indigenous communities. In cases where indigenous communities have been deprived of their lands and territories traditionally owned, the Committee recommends that the State party take steps to return those lands and territories or to provide adequate reparation measures, in accordance with paragraph 5 of general recommendation No. 23 (1997) on the rights of indigenous peoples.

4. The Committee remains concerned that despite the special measures taken by the State party to reduce poverty and to progressively realize equal and sustainable development, discrimination on the grounds of ethnicity with regard to the enjoyment of economic, social and cultural rights persists in the State party. (art. 5(e))

The Committee recommends that the State party conduct studies with a view to assessing and evaluating the level of enjoyment of economic, social and cultural rights by the different ethnic groups in the State party, based on which the State party should strengthen its efforts in combating poverty among marginalized groups as well as its measures aimed at promoting equal opportunities for all persons.

5. The Committee acknowledges the State party's stated intention to review the development programmes currently in place, as well as the steps taken by the State party to improve the economic and social situation of the indigenous communities, including by mobile school units, scholarships for San children, and non-discrimination training for employers. However, it remains concerned about the extreme poverty of the indigenous communities and its impact on their equal enjoyment of human rights. The Committee is particularly concerned about the high rate of HIV/AIDS infection among the San, their lack of access to identification documents, their low level of school attendance, and the comparatively low life expectancy among those communities. (art. 5(e))

The Committee recommends that the State party enhance its efforts to reduce poverty and to stimulate economic growth and development for the most marginalized groups, namely the indigenous communities, especially with regard to education and health. It requests that the State party provide, in its next periodic report, information on the active involvement of targeted beneficiaries in the decisions directly relating to their rights and interests.

6. The Committee notes with concern the low level of participation in political life and, in particular, the lack of representation in Parliament as well as regional and local public authorities of the indigenous communities, particularly the San community (art.5(c))

The Committee recommends that the State party strengthen its efforts to ensure the full participation of indigenous communities in public affairs at all levels. It encourages the State party to revise its electoral laws with a view to encouraging political parties to broaden their appeal to ethnic minorities and to include a minimum proportion of candidates from these groups.

7. The Committee is concerned about the high incidence of rape of San women by members of other communities, which seems to be caused by negative stereotypes, and it regrets the lack of detailed information provided by the State party on this issue. (art. 5(b))

The Committee recommends that the State party adopt all necessary measures to ensure prompt, thorough and independent investigations into all allegations of rape against San women. It also urges the State party to increase its efforts aimed at combating prejudices against the San and to promote tolerance and foster intercultural dialogue among the different ethnic groups of Namibia.

8. The Committee, while welcoming the State party's efforts to enhance the economic and social participation of persons belonging to marginalized groups, in particular the San, notes with concern that integration policies and programmes might be detrimental to the protection of ethnic and cultural diversity of these communities. (arts. 5 and 7)

Recalling that the principle of non-discrimination requires that the cultural characteristics of all ethnic groups be taken into consideration, the Committee urges the State party to ensure that its integration policies and programmes respect and protect the cultural identities of persons belonging to national or ethnic minorities within its territory. The Committee further encourages the State party to ensure the participation of these groups in the design and implementation of integration policies and programmes, at both national and local levels.

PART V: The Ombudsman on Promotion and Protection of the Rights of Indigenous People in Namibia

When Namibia ratified the United Nations Declaration on the Rights of Indigenous Peoples, it declared its willingness to promote, protect and realize the rights recognized in this instrument. The promotion and protection of the rights of indigenous peoples, is the concern of all and not of government alone. It should be a concerted effort by government, civil society and the Ombudsman.

The Ombudsman should recognize the experiences of indigenous peoples and work to prevent their social, political and economic marginalization. This can be accomplished by ensuring that indigenous persons feel comfortable filing complaints with the Ombudsman and that the Ombudsman staff are adequately trained to address the needs of indigenous peoples.

Experience has taught that effective engagement with civil society has helped the Ombudsman to extend outreach and advocacy measures to rural and marginalized sections of society normally outside the reach of the Ombudsman. Therefore:

- Civil society should assist indigenous peoples who are victims of human rights violations to access the Ombudsman and support them through the process of filing of a complaint;
- The Ombudsman in collaboration with civil society should develop and execute special outreach programmes directed towards indigenous peoples;
- The staff of the Ombudsman should be specially trained to respond to the specific issues faced by indigenous peoples;
- The Ombudsman should more widely disseminate information on his complaint process, the remedies available and the contact details of all its offices, and
- The Ombudsman in collaboration with civil society and government should make the principles and provisions of the Declaration widely known by appropriate and active means.
- The resources of the ombudsman should be strengthened to allow for investigations and to visit Indigenous Peoples more often, to do public awareness through targeted campaign and community based activities.

- The ombudsman should work closer with the San Development programme in the office of the Prime Minister to respond to the needs of the Indigenous communities.
- The Ombudsman should continue to encourage government to ratify ILO Convention 169 on Indigenous and Tribal Peoples.

Where to find the Ombudsman

Since the establishment of the Ombudsman Office in July 1990, the Namibian nation was served only from the head office in Windhoek. The vastness of the country with its ± 2 million inhabitants, scattered over the length and breath of the country, necessitated the Ombudsman to look at ways to make the Office accessible to all inhabitants of the country. During 2005, the Ombudsman established two regional offices, one at Oshakati and the other at Keetmanshoop with 62 additional visiting points across the country. Places that are not covered by the regional offices are covered from head office with 52 additional visiting points (see map of Namibia). A third regional office will be opened at Swakopmund during 2012 and one at Otjiwarongo the following year.

Places are visited at least once or twice per year where investigators receive complaints, resolve less complicated ones and conduct public education.

Conclusion

Namibia has adopted laws and state policies in an attempt to respect, promote and protect the rights of indigenous peoples. In addition, it matters most how these policies and measures are implemented in practice. Indigenous peoples' situation would improve only after the rest of the population accept and regard them as equal. They should be free of vertical as well as horizontal discrimination. The population as a whole needs to be educated and made aware of the plight of the indigenous people and their particular contribution to society. Only then will inclusion of the indigenous people in mainstream society as distinct equals be possible.

ENDNOTES

- ¹ See United Nations 'About UNPFII and a brief history of indigenous peoples and the international system' <http://www.un.org/esa/socdev/unpfii/en/history.html> (accessed 20 February 2011).
- ² See Communication 276/2003 Centre for Minority Rights Development (Kenya) v Kenya, 27th Activity Report (2009) para 149.
- ³ See S Dersso 'Peoples' Right under the African Charter on Human and Peoples' Rights: Much ado about nothing?' African Human Rights Law Journal (2005) 6.
- ⁴ 2005 African Commission Report pages:86-90
- ⁵ Art 144 of the Constitution.
- ⁶ See United Nations 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people' by S. James Anaya, submitted to the Human Rights Council, Ninth Session <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/149/40/G08114940.pdf?OpenElement> (accessed 5 March 2011).
- ⁷ Malawi African Association and Others v Mauritania (2000) AHRLR 149 (ACHPR 2000) 174
- ⁸ Art 3(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- ⁹ See CEDAW Committee General Recommendation No 28 UN Doc CEDAW/C/2010/47/GC.2 para 9
- ¹⁰ Cabinet decision 25th/29.11.05/001/
- ¹¹ The San Development Programme report 2005-2009, 5.
- ¹² As above.
- ¹³ Art 19, 29. 30 and 32 of the UNDRIP.
- ¹⁴ Art 13 of the African Charter.
- ¹⁵ Southern African Development Community (SADC) Protocol on Forestry.
- ¹⁶ See 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: Namibia, 2009, 21.
- ¹⁷ See Report by JR Martinez Cobo, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities: Study on the Problem of Discrimination Against Indigenous Populations. UN Doc E/CN.4/Sub.2/1986/7/Add.1, para 196 and 197.
- ¹⁸ Art 26(1) of the UNDRIP.
- ¹⁹ See Committee on the Elimination of Racial Discrimination, General Recommendation No 23: Indigenous Peoples 18 August 1997, para 4 and 5.

- ²⁰ See 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: Namibia, 2009, 27-32.
- ²¹ The San Development Programme Report 2005/2009, 9.
- ²² As above 20 page 27-32..
- ²³ International Labour Organisation and African Commission on Human and Peoples' Rights 'Country Report on the Constitutional and legislative Protection of the rights of Indigenous Peoples: Namibia' page 79.
- ²⁴ Art 29 of the CRC.
- ²⁵ Art 14(2) of the UNDRIP.
- ²⁶ Art 11 of the African Children's Charter.
- ²⁷ See the Ombudsman: Namibia (NHRI) Submission to the Universal Periodic Review Mechanism, submitted on 28 June 2010, 3.
- ²⁸ WIMSA, San Rights in Namibia, 2010, 5.
- ²⁹ For details see 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: Namibia, 2009, 24.
- ³⁰ The San Development Programme Report 2005/2009, 7; see also Republic of Namibia, Country Report for the Universal Periodic Review by the United Nations for Human Rights Council, Geneva, 2011, 2.
- ³¹ see Republic of Namibia, Country Report for the Universal Periodic Review by the United Nations for Human Rights Council, Geneva, 2011, 2; 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: Namibia, 2009, 27.
- ³² See 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: Namibia, 2009, 25.
- ³³ see Republic of Namibia, Country Report for the Universal Periodic Review by the United Nations for Human Rights Council, Geneva, 2011, 2.
- ³⁴ See Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities Adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session 2005 page 49.
- ³⁵ Art 11(1).
- ³⁶ See Ministry of Health and Social Services, office of the Permanent Secretary Circular No 12 of 2010.
- ³⁷ As above, para 3.4.
- ³⁸ Art 12 of the CEDAW.

³⁹ Art 3 of the ICCPR.

⁴⁰ 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: Namibia, 2009, 38.

⁴¹ As above, 38.

⁴² see 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: Namibia, 2009, page 78.

⁴³ Art 31 of the UNDRIP.

⁴⁴ See Republic of Namibia, Action Programme on the Elimination of Child Labour Popular Version 2010, 11, 12, 15, 17, & 19.

⁴⁵ See Republic of Namibia, Country Report for the Universal Periodic Review by the United Nations for Human Rights Council, Geneva, 2011, 2.

⁴⁶ As above 12-15.

⁴⁷ For details see 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: Namibia, 2009, 14.

⁴⁸ Art 40 of the UNDRIP.

⁴⁹ Art 34 of the UNDRIP.

Annex 1

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006, by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

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

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

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

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - a. Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - b. Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - c. Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - d. Any form of forced assimilation or integration;
 - e. Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a significant threat to relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

Notes

Namibia has a considerable number of marginalized and indigenous people living in its territory as citizens. The majority of these people are the San but there are also other groups such as the Ovaherero and the Ovambo. Nevertheless, Namibia's marginalized and indigenous peoples are still subject to precarious living conditions and remain some of the most marginalized and impoverished communities in the country.

Despite significant progress over the years - in law and practice - by Namibia to protect and advance the rights of indigenous peoples in its territory, some work still remains to be done to ensure full compliance with the country's domestic and international legal obligations.

This guide briefly explores some of these legal obligations and main legal frameworks regarding the rights of marginalized/indigenous communities in Namibia.