



REPORT OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

National Hearing Relating to the Human Rights Situation of the Khoi-San in South Africa

25-26 November 2015; 9-10 December 2015; 18 January 2016; 11-12 & 14-15 April 2016

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List of Acronyms and Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
BSA	Benefit-Sharing Agreements
CERD	Committee on the Elimination of Racial Discrimination
CODESA	Convention for a Democratic South Africa
CoGTA	Department of Cooperative Government and Traditional Affairs
CONTRALESA	Congress of Traditional Leaders of South Africa
CPA	Community Property Association
CRL Commission	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
CRLR	Commission of Restitution of Land Rights
DAC	Department of Arts and Culture
DEA	Department of Environmental Affairs
DoHS	Department of Human Settlements
DOJ&CD	Department of Justice and Constitutional Development
DRDLR	Department Rural Development and Land Reform
DSD	Department of Social Development
DWS	Department of Water and Sanitation
CGE	Commission for Gender Equality
IKS	Indigenous knowledge systems
ILO	International Labour Organization
IPACC	Indigenous Peoples of Africa Coordinating Committee
KSNLB	Khoisan National Language Board
MTA	Material Transfer Agreement
NEMA	National Environmental Management Act
NEMBA	National Environmental Management: Biodiversity Act
NHRI	National Human Rights Institution
NKC	National Khoi-San Council
OHCHR	United Nations Office for the High Commissioner for Human Rights
PanSALB	Pan South African Language Board
SANDF	South African National Defence Force
SAPS	South African Police Service
SASI	South African San Institute
TC	Traditional Council

TLGFA	Traditional Leadership and Governance Framework Act
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNDRIPS	United Nations Declaration of the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization

Executive Summary

Indigenous peoples constitute some of the oldest populations in the world, dating back thousands of years. Despite their resilience and determination to survive as groups with distinct cultures, languages, values and ways of life, the continued survival of many of them remains at risk, and they continue to face significant challenges and rights violations on a daily basis. Indigenous peoples are particularly vulnerable in modern society, being disproportionately impacted by structural forms of discrimination through poverty, marginalisation, negative stigmatisation, a lack of political power, resulting in numerous ongoing rights violations.

The South African Human Rights Commission (“Commission” or “SAHRC”) is an independent constitutional body mandated to, amongst other things, investigate and report on the observance of human rights in the country.

The Commission acknowledges that debates around the understanding of the term “indigenous peoples” continue to be controversial, particularly in the African context, and that both Khoi and San peoples¹ as well as other African communities, including Nguni, Sotho, Tswana, Venda and Tsonga-speakers may be considered to be indigenous. For the purpose of this Inquiry, however, the term “indigenous peoples” will refer to Khoi and San peoples specifically.

The Commission has been involved in monitoring the realisation of rights of indigenous peoples in South Africa since its inauguration in 1995. Comprehensive recommendations have been made by both the Commission and the then UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous persons (“the Special Rapporteur”), Rodolfo Stavenhagen, however, despite these recommendations for protections, complaints which indicate the prevalence of challenges and ongoing alleged human rights violations persist.

In light of its concerns with continued allegations of violation, the Commission resolved to host a series of public hearings throughout the country with a view to understanding prevailing challenges, the measures taken by the State to address the challenges and to identify appropriate practical measures which can be further implemented to address these. Hearings were hosted in Gauteng, the Western Cape and Northern Cape, where communities, civil society organisations, academics and organs of State were invited to participate. This process, together with in-depth desktop research culminated in the production of this Report.

In essence, the Inquiry found that South Africa stands as one of the few countries on the continent that has embarked on ambitious efforts aimed at redressing the problems of its indigenous peoples, including legislative, policy and judicial interventions. However, although some progress has been achieved, the delay and/or complete lack of effective implementation of policies and programmes designed to uplift indigenous peoples and facilitate the achievement of their rights remains highly concerning. More than a

¹ While the Commission recognises the distinction between the Khoi and San groups, this Report will make use of the collective term “Khoi-San” for ease of reference.

decade after the release of the above-mentioned reports, the majority of recommendations from the Special Rapporteur and the Commission remain largely unfulfilled.

As a result of colonisation and apartheid, the Khoi-San in South Africa became virtually invisible as a distinct group, forcibly assimilated into other ethnic groups and classified as “Coloured”. These peoples were systematically denied recognition as a people of equal worth and value, and thus were essentially denied the right to their existence as a distinct group. Notwithstanding the historic significance of the country’s transition to a democracy founded on dignity, equality and freedom, the Commission has recognised as a serious concern, the continued failure to officially recognise the Khoi-San peoples in the current democratic dispensation, with their continued ethnic categorisation as “Coloured”. After centuries of forced assimilation; discrimination and dehumanisation, this official recognition forms an imperative component in the ability of the Khoi-San peoples to live a life of dignity and respect.

The Commission notes that a recognition of the existence of the Khoi-San peoples is included in the reference to Khoi-San languages in the Constitution, through the national emblem, in the expressed intent for the establishment of the Traditional and Khoi-San Leadership Bill (B23-2015) (“Leadership Bill”), and in numerous public statements. However, without an official and legally recognised existence as a distinct group within the Country, we, as a society will be unable to realise the vision of the Constitution in healing the divisions of our past and establishing a society based on democratic values, social justice and fundamental human rights.

As a result of a combination of a multitude of factors, including inter-marriage, forced assimilation and the oppression of Khoi-San identity and culture during the colonial and apartheid eras, the practice of traditional cultures and the use of traditional Khoi-San languages has significantly and consistently declined.

Language is more than about communication, but similarlryabout identity, heritage, culture, and values. Language is crucial in understanding the intangible aspects of culture, providing a sense of belonging to a community. The importance of preserving indigenous languages is therefore, vital to safeguard the cultural identity, traditional heritage, spirituality and dignity of indigenous persons, while maintaining cultural diversity throughout the world. In recognising that language was historically utilised as a tool of oppression, the preservation and promotion of multilingualism is important in restoring dignity and a recognition of equality and identity to large portions of the country’s population. However, the use of South African indigenous languages (including Khoi-San and Afrikaans languages), in both public and private platforms is chronically diminishing. While a number of positive initiatives have been developed, these are still in the infancy stage and more is required to effectively preserve and promote the use of endangered indigenous languages.

It is well-established that the link between the multiple socio-economic challenges faced by indigenous peoples is directly attributable to the past discriminatory practices amongst which is the dispossession of land. Globally, indigenous peoples are over-represented among the poor, and despite the absence of disaggregated data, the Khoi-San peoples are likely to constitute some of the poorest sectors in South

African society. Although they are a minority and constitute a small portion of the poverty-ridden population in the country, their vulnerability is exacerbated by ongoing stigmatisation, lack of recognition and marginalisation, as well as the decline of their distinct cultures, languages and traditional way of life. The historic, and in some instances, ongoing dispossession of land of Khoi-San peoples has also removed their means of sustenance, and consequentially has given rise to a life of poverty. The importance of land for indigenous communities goes beyond its economic or productive value, but must be interpreted within the context of its traditional and customary value. Access to land is of paramount importance to indigenous peoples, not only as a result of their close spiritual link to land and to ensure that they are able to live a unique way of life in line with their cultural beliefs. One of the most pressing concerns of Khoi-San peoples, therefore, is securing access to land to carry out traditional practices, as well as new land-based ventures such as farming.

In understanding the interdependence of rights, the achievement of the right to self-determination; development; culture; and the progressive realisation of socio-economic rights, is predicated on the fulfilment of rights such access to land and natural resources. Although some land has been returned to indigenous peoples in South Africa, this has been restricted to small groups and has been insufficient to meet the needs of the majority of Khoi-San peoples. The provision of land without the necessary capacity and skills development to accompany same has further hindered the ability of these peoples to fully realise their rights.

The undertaking by the State to undertake a broader process of land restitution to include Khoi-San peoples is welcomed. The Commission however emphasises the need to expedite such a process to ensure that indigenous peoples are able to access the full enjoyment of their rights without undue delay.

The principles of equality and non-discrimination are central to the achievement of all other rights, and form part of the foundational principles of the Constitution, and this Inquiry led to a recognition that some of the most pervasive forms of discrimination is the perpetuation of negative stereotypes, prejudices and exclusion of indigenous peoples amongst the broader society. Discrimination against indigenous persons in South Africa still occurs through an engrained social stigma associated with belonging to the Khoi-San identity, resulting in social isolation and subordination, as well as the fact that many Khoi-San people have chosen to abandon their heritage and prefer to be classified as Coloured to escape the harmful stigma attached to belonging to the Khoi-San community.

The marginalisation of indigenous peoples means that they are often not represented in the decision-making bodies of the State, and lack the visibility and political leverage to ensure that their voice is heard. This gives rise to a situation where the special needs and views of indigenous peoples are not taken into account, and may lead to further discrimination. A lack of adequate consultation mechanisms negates the ability of indigenous persons to influence decisions which impact their lives; results in policies and programmes which may be not be appropriate or culturally acceptable; and may not be effective in addressing the concerns of different groups, while further contributing to the disempowerment of already marginalised and vulnerable indigenous communities.

Indigenous peoples frequently have different conceptions of wealth and poverty to other groups in society, and their priorities with regard to development and poverty alleviation are not necessarily in line with broader strategies identified by the State. In light of this, the achievement of substantive equality at times requires differential treatment or the implementation of special measures designed to address specific concerns to ensure that marginalised communities are able to meaningfully participate in decision-making. However, without disaggregated data specifically on indigenous peoples, it is difficult to measure patterns of discrimination and marginalisation, and this makes the identification of the issues and appropriate mechanisms for redress difficult.

The Constitution recognises the diverse and multicultural character of South Africa, and promotes the ideal of unity and a common citizenship. However, the Khoi-San currently view themselves as outsiders due to pervasive social exclusion and discrimination, which hinders the achievement of social cohesion and creates a fractured social fabric. National identity is not comprised of dominant identities and cultures alone, but is built upon the foundation of all diverse cultures within a state. The protection and promotion of diverse cultures on an equal level is an important aspect of maintaining our national heritage. Equality therefore requires a recognition and understanding of the cultural dimension to the implementation of rights and freedoms, and without an active commitment to this recognition and understanding, the vision of true reconciliation and a common citizenship through the restoration of the dignity of all people cannot be achieved.

In addition to the constitutional guarantee and in line with its international obligations, South Africa has established several institutions responsible for the protection and promotion of culture and language, which include the National Arts Council of South Africa; the Pan South African Language Board (“PanSALB”) and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (“CRL Commission”), which has been identified as a best practice in the African Region.

The African Committee on Human and Peoples’ Rights (“ACHPR”) has highlighted a trend on the non-implementation of laws, policies and constitutional guarantees on the continent, and noted that the failure to actively protect and promote the right to culture and language may amount to a denial of rights.² The Commission recognises that an important dimension of access to justice relates to overcoming historical injustices and achieving reconciliation and redress for past wrongs. While the Commission’s Inquiry may have contributed to improved access to justice for indigenous peoples by encouraging a recognition of indigenous peoples in South Africa, allowing a platform for public expression, and enhancing an understanding of the rights and persisting challenges, more is required by the State in order to ensure that the vision of the Constitution is realised. While the constitutional guarantee of cultural rights is a good starting point, this alone is insufficient to fulfil the obligations of the State. Therefore, what is required is more than an abstention from the prevention of an exercise of rights. The State must act on its obligations to respect, protect, promote and fulfil rights. The State needs to establish an environment

² http://www.achpr.org/files/special-mechanisms/indigenous-populations/report_international_labour_org.pdf Overview Report, p 69 and 72.

in which people are freely and equally able to realise their rights through the implementation of positive measures designed and capable of actually promoting the realisation of these rights. While the Commission is not prescriptive on the form these mechanisms should take, it stresses the dire need for measures which are capable of rebuilding trust between the Khoi-San peoples, other social groups, and the State, and emphasises the fact that the true healing of indigenous peoples in South Africa cannot take place in an environment whereby their rights continue to be eroded.

In light of the evidence, the Commission has developed recommendations with a view to contributing to the transformation of society and the attainment of social cohesion and reconciliation. The Commission strongly encourages that the recommendations be taken seriously and calls for the on-going commitment by all parties, stresses the importance of co-operative governance and inter-sectoral collaboration in addressing the complex and interlinking challenges of indigenous peoples.

Signed at Braamfontein on this the 16th day of March 2018



Chris Nissen
Commissioner, South African Human Rights Commission

INTRODUCTION

The situation of indigenous peoples globally has been described as critical and precarious³ and this in part has been attributed to the systemic discrimination, marginalisation and exclusion from social, political and economic affairs. Indigenous peoples have historically suffered horrific injustices including dispossession of land, forced assimilation, dehumanisation and extermination. This historical legacy of the Koi-San peoples is a direct result of the widespread poverty and exclusion still experienced today, contributing to the persistent isolation and degradation of dignity.

Due to their virtual social and political invisibility, the voice of indigenous peoples had been hidden and only really started to gain attention in the 1980s. The particular issues faced by indigenous peoples began to gain momentum through the establishment of the United Nations Voluntary Fund for Indigenous Populations (1985), the adoption of the International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (1989)⁴, and the adoption of the UNDRIPS⁵ (2007). Awareness of these issues was also enhanced with the proclamation of the International Year of the World's Indigenous Peoples in 1993 and two International Decades of the World's Indigenous Peoples between 1995 and 2004, and again between 2005 and 2014.⁶

Indigenous peoples constitute some of the oldest populations in the world, dating back thousands of years, and despite their resilience and determination to survive as groups with distinct cultures, languages, values and ways of life, the continued survival of many of them remains at risk, and they continue to face significant challenges and rights violations on a daily basis.

While situations differ between countries and regions, the scenario for indigenous peoples in South Africa is very much the same with the receipt of consistent reports of ongoing rights violations. This has prompted the South African Human Rights Commission ("Commission") to establish an inquiry to investigate the human rights situation of indigenous peoples in the country. In this way, the Commission aimed to raise awareness of the most important issues and challenges facing the Khoi-San today, while providing a platform for communities to voice their concerns. The ultimate objective of this Report is therefore to analyse the various challenges of the Khoi-San as well as the State in addressing these concerns, and to develop a set of practical recommendations to advance the achievement of rights.

³ http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf

United Nations "State of the World's Indigenous Peoples" (2009), p 1.

⁴ http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

⁵ http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.18_declaration%20rights%20indigenous%20peoples.pdf

UN General Assembly Resolution A/RES/61/295, 2 October 2007.

⁶ http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf

United Nations "State of the World's Indigenous Peoples" (2009), p 2-3.

OUTLINE OF THE REPORT

The Report engages with the concept of “indigenous peoples” and maps a broad context of the situation of the Khoi-San.

Section three of the Report provides a more detailed background and rationale for the decision to host a national investigative hearing, while section four describes the methodology and procedure followed during this process.

Section five gives a brief overview of the legal framework applicable to the Khoi-San and the broad framework of human rights, which forms the basis for the analysis of the various issues contained in section six.

Finally, section seven sets out the practical recommendations identified by the Commission, before concluding in section eight.

MANDATE OF THE SAHRC

The Commission is an independent National Human Rights Institution (NHRI) established in terms of Section 181, under Chapter 9 of the Constitution, to support constitutional democracy. In terms of Section 184 (1) of the Constitution, the Commission is specifically mandated to:

- (a) Promote respect for human rights and a culture of human rights;
- (b) Promote the protection, development and attainment of human rights; and
- (c) Monitor and assess the observance of human rights in the Republic.

Although the primary responsibility for the respect, protection, promotion and fulfilment of human rights rest with states, NHRIs play a fundamental role in promoting the implementation of these obligations within a state, and therefore, form the cornerstone of national human rights protection systems.

Section 184(2)(a) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country. Furthermore, Section 184(2)(c) and (d) affords the Commission authority to carry out research and to educate on human rights related matters.

The South African Human Rights Commission Act, 40 of 2013 (“SAHRC Act”) further supplements the powers of the Commission, and includes the power to carry out and report on studies concerning fundamental rights, and to monitor the implementation and compliance with international and regional conventions. Furthermore, the Commission is empowered to review policies relating to human rights and may make recommendations.⁷

Moreover, Section 181(3) of the Constitution imposes a positive obligation on organs of State to ensure the independence, impartiality, dignity and effectiveness of Chapter 9 institutions, including the Commission, and must assist and protect these institutions.

⁷ Section 13 of the South African Human Rights Commission Act, 40 of 2013.

1. DEFINITION AND CONTEXT OF “INDIGENOUS PEOPLES”

There is no internationally recognised definition of the term “indigenous peoples”, and in fact, it has been argued that the establishment of a formal definition is unnecessary and undesirable. Rather, the international community has attempted to identify a number of key characteristics which serve as guidelines for identifying indigenous peoples. The United Nations Working Group on Indigenous Populations,⁸ the International Labour Organization,⁹ and the World Bank,¹⁰ amongst others, all have criterion for the identification of indigenous persons.

The African Commission’s Working Group of Experts on Indigenous Populations/Communities (“African Commission’s Working Group”) notes that initially indigenous peoples were identified as those aboriginal peoples who lived on the land prior to the invasion of colonial powers who settled there, and over whom these colonial-settlers are still politically dominant. This definition, loses some of its resonance in post-colonial African era.

A more widely used working definition is that of the International Working Group on Indigenous Populations:

“...those which, having a historical continuity with pre-invasion and precolonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”¹¹

The following key characteristics have been identified by the international community in an effort to guide the identification of indigenous peoples as individuals and/or groups who:¹²

- are descendants from people who inhabited the country, or a geographical region to which the country belongs, at the time of conquest, colonisation or the establishment of present state borders;
- identify themselves as indigenous peoples, and acknowledge their distinct cultural identity, way of life and seek to voluntarily retain their identity (self-identification);
- are possessed of cultures and ways of life which differ considerably from the dominant society, and in many instances these cultures are under threat or near extinction;

⁸ http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf

⁹ http://www.ilo.org/global/topics/indigenous-tribal/WCMS_503321/lang--en/index.htm
Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

¹⁰ <http://www.worldbank.org/en/topic/indigenouspeoples>

¹¹ UNESCO, *UNESCO and Indigenous Peoples: Partnership to Promote Cultural Diversity*, March 2006 (as accessed at <http://unesdoc.unesco.org/images/0013/001356/135656M.pdf>).

¹² African Commission on Human and Peoples’ Rights “Indigenous Peoples in Africa: The Forgotten Peoples?” (2006).

- have a special attachment to their land and in many instances, such distinct cultures and ways of life are dependent on access to traditional lands and resources for survival;
- often live in inaccessible regions which are geographically isolated, and as a result are subjected to both political and social marginalisation; and
- frequently experience *“particular forms of systemic discrimination, subordination and marginalisation because of their particular cultures, ways of life and mode of production”*. Further Indigenous persons are often subjected to domination and exploitation as national and economic structures are commonly designed to reflect the interests of the majority.¹³

The question of aboriginality (or “who came first”), while relevant, is therefore a less significant consideration, and primary importance is placed on the principle of self-identification. However, self-identification alone is not sufficient, and must be accompanied by the other characteristics identified above,¹⁴ although the African Commission’s Working Group has acknowledged that the concept of aboriginality is useful in clear-cut cases, such as with the San of Southern Africa.¹⁵

The term “indigenous” has been the source of contention in the African context, with many countries advancing the idea of indigeneity¹⁶ of all Africans to Africa, which is particularly due to the desire to promote ideals of national unity in a multicultural context. The African Commission’s Working Group notes that domination and colonisation has not been exclusively practiced by white settlers and colonialists, and limiting the term “indigenous” to this context may make it difficult to apply the term meaningfully in Africa. While all Africans may rightly be considered indigenous to Africa, recognition must be given to the fact that some groups are structurally more marginalised and vulnerable than others, leading to systemic discrimination and increased vulnerability. In this regard, the Working Group notes that *“if the concept of indigenous is exclusively linked with a colonial situation, it leaves us without a suitable concept for analysing internal structural relationships of inequality that have persisted after liberation from colonial dominance.”*¹⁷

The true spirit of the term, as explained by the African Commission’s Working Group, is not aimed at one group gaining advantage over another nor is it aimed at promoting ethnic, cultural or racial distinction, but seeks to provide equal opportunities and a voice to severely marginalised groups. The historical legacy of subordination and dispossession from land and natural resources, together with the distinct cultures and ways of life of indigenous persons has given rise to the reality that indigenous peoples continue to suffer from discrimination and marginalisation, and frequently have less representation and access to recourse through government institutions. In this way, the desire to identify indigenous peoples within

¹³ P 11-12 and 24.

¹⁴ International Labour Organization and African Commission on Human and Peoples’ Rights “Country Report on the Rights of Indigenous Peoples: South Africa” (2009), p 2.

¹⁵ *Ibid*, P 92.

¹⁶ http://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc

¹⁷ African Commission on Human and Peoples Rights “Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities” (2005), p 92.

the broader society serves as a tool for democracy and the protection of fundamental rights and protections for all persons.¹⁸

In South Africa, the Khoi and San peoples as well as other African communities including Nguni, Sotho-Tswana, Venda and Tsonga-speakers (hereinafter referred to as “other African communities”) claim this status.¹⁹ While the Constitution uses the term “indigenous” in Section 181, it refers to the languages and legal customs of the Nguni, Sotho-Tswana, Venda and Tsonga-speakers and not the customs and languages of other races or ethnic groups. In the context of South Africa, the term “indigenous peoples” may therefore be interpreted to include all ethnic groups indigenous to the country prior to European settlement (including Khoi and San and other African communities), for the purpose of this investigation, reference to “indigenous peoples” shall be limited to the different groups of the Khoi and San peoples in South Africa who identify themselves as indigenous and who claim this status, and are recognised as such by the international indigenous forums as well as the Department of Cooperative Government and Traditional Affairs (“CoGTA”).

Despite having significantly different cultures, languages, livelihoods and identities, the term “Khoi-San” (a relatively new term coined in 1928) is largely still used to refer to these indigenous groups collectively, and to distinguish them from the other African communities in South Africa.²⁰

While recognising the existence of multiculturalism, and the fact that indigenous communities in different countries practice different cultures, social institutions and observe different religious systems, the African Commission Working Group has highlighted the fact that a number of commonalities can be found with regard to the particular challenges and rights violations faced by indigenous communities across the continent. Along with a multitude of other socio-economic issues including under-development and poor access to social services (such as adequate education and healthcare), indigenous communities suffer from a lack of access to land and natural resources; widespread discrimination and stigmatisation; denial of cultural rights; exclusion from political representation; and a lack of constitutional and legal recognition.²¹ Indigenous peoples often find themselves dominated by mainstream ways of thinking, and in this way are considered to be “uncivilised” or “backward”. Large-scale developments tend to prioritise the interests and needs of dominant social groups which subsequently have a devastating effect on their cultures and livelihoods.²²

¹⁸ African Commission on Human and Peoples Rights “Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities” (2005), p 101-103.

¹⁹ *Ibid.* In fact in 1996 and again in 2005, a group of Afrikaner nationalists made a petition to the United Nations for recognition of indigenous status, which was rejected in both instances on the ground that this group was neither marginalised, nor discriminated against, and further did not meet the other criteria.

²⁰ The Batswana, Basotho, Bapedi, AmaZulu, AmaXhosa, AmaSwati, Vhavhenda, vaTsonga and AmaNdebele.

²¹ P 106 – 110.

²² African Commission on Human and Peoples Rights and International Working Group on Indigenous Affairs “Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities” (2005), p 20.

Many of these challenges are directly linked to the historical deprivation and discrimination against indigenous peoples.

On an international level, indigenous peoples constitute a significant portion of the world's most vulnerable, disadvantaged and marginalised. Although they make up around 5% of the world's total population, statistics show that 15% of the world's poor and one third of the world's extremely poor are indigenous persons.²³

In a media statement issued by the United Nations in August 2015 it is noted that:

*“Health issues are exacerbated by the fact that indigenous peoples often find themselves in a disadvantaged socio-economic position. They disproportionately suffer from child poverty, higher rates of detention and limited access to education when compared to non-indigenous peoples. Indigenous women, children and persons with disabilities are particularly at risk of marginalisation.”*²⁴

2. HISTORICAL CONTEXT OF INDIGENOUS PEOPLES IN SOUTH AFRICA

The term “Khoi-San” is generally used to collectively refer to the Khoikhoi (alternatively “Khoekhoe” or “Khoi”) and the San peoples, who are widely recognised as the descendants of the original Homo sapiens, or “modern day man”, whose ancestry can be traced back 150,000 years. It is estimated that the San, who were mainly hunter-gatherers, have lived on the land for at least 120,000 years, while the Khoikhoi arrived in what is now the Western Cape between 2000 – 2500 years ago. In contrast to the San, the Khoikhoi were primarily pastoralists, and brought livestock and a new way of life to South Africa. While the San and Khoikhoi interacted at times and adopted each other's trade when the need arose, they remained distinct groups, with the San later migrating towards the deserts and mountains in South Africa.²⁵

Other African communities later began to migrate to parts of Southern Africa, and the first European settlers arrived at the Cape of Good Hope in 1652.

Over the next few centuries following the establishment of colonies by European settlers, the Khoi-San were displaced and dispossessed of large portions of land, resulting in a loss of livelihood and suffered a sharp decline in population as a result of conflict and disease, particularly the outbreak of smallpox during the 18th and 19th centuries.²⁶ In addition to this, Europeans were able to obtain permits to hunt the San

²³ Asia Pacific Forum of National Human Rights Institutions and OHCHR “The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions” (2013), p 3; International Fund for Agricultural Development “Engagement with Indigenous Peoples Policy” (2009).

²⁴ <http://www.un.org.za/indigenous-peoples-participation-is-key-to-the-advancement-of-their-human-rights/>

²⁵ International Labour Organization and African Commission on Human and Peoples' Rights “Country Report on the Rights of Indigenous Peoples: South Africa” (2009), p 8 – 9; South African San Institute “A history of San Peoples of South Africa” (as accessed at <http://www.san.org.za/history.php>).

²⁶ It is estimated that 90% of the Khoi-San population was wiped out during the smallpox epidemic (<http://www.sahistory.org.za/topic/khoisan-identity>).

during the 17th and 18th centuries. Between 1904 and 1908 the German imperial army engaged in a number of wars and the Nama-German war crossed over the South African border, resulting in the further displacement of San peoples in the area.

The Khoi-San were subjected to slavery by European settlers and became largely assimilated with other cultures, resulting in the inevitable disruption and alteration of traditional lifestyles and cultures. The San were frequently referred to as “Bushmen”, while the Khoikhoi were called “Hottentots”, or later “Hotnots”, amongst other names, which terms are now considered to be derogatory.

The Khoi-San and other African peoples experienced racial segregation and degradation at the hands of the colonial powers since their occupation in 1652. However, from 1910, when the Dutch Republicans came to power, increased restrictions on the political rights of black persons were imposed, and the Khoi-San and other African communities suffered greater displacement and dispossession of land under the Native Land Act, 27 of 1913, and the Native Affairs Act, 23 of 1920.

In 1948 the National Party came to power and established apartheid – a system based on racial discrimination and segregation. Under apartheid, all persons were classified into four racial groups, White, Black, Coloured and Indian. The Khoi and San were virtually invisible as a distinct group during this period, having become assimilated into other populations, or forcibly classified as “Coloured”, therefore being denied recognition of their own identity – a reality which most Khoi and San people regard to be extremely humiliating.²⁷ During apartheid, the use of indigenous languages was also strongly discouraged, with most Khoi-San forced to adopt Afrikaans as their primary language, and the knowledge and use of the indigenous Khoi and San languages have become threatened with extinction over the years.

According to a report produced by the International Labour Organization (“ILO”)²⁸ which is based on research and data collected during 2008, the main source of livelihood for indigenous communities in South Africa is working as labour tenants on farms, with a small percentage who rely on traditional hunting and gathering. Reliance on traditional hunting and gathering is severely limited due to land constraints. The report further claims that as a result of the lack of access to land, many groups do not practice their traditions and cultural lifestyles and have assimilated into some of the dominant communities.²⁹

In light of this context, the next section of the Report will provide an overview of the background and rationale for the resolution taken to host a national investigative hearing on the human rights situation of South African indigenous peoples.

²⁷ Commission on Human Rights “Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Persons, Rodolfo Stavenhagen: Mission to South Africa”, E/CN.4/2006/78/Add.2, (15 December 2005), para 58.

²⁸ ILO “Examining Constitutional, Legislative and Administrative Provisions Concerning Indigenous Peoples in South Africa” (2010) (as accessed at http://www.chr.up.ac.za/chr_old/indigenous/country_reports/ILO-South%20Africa-DATABASE.doc).

²⁹ *Ibid*, p 5-6.

3. BACKGROUND AND RATIONALE

In 2004, the Commission released a report titled “Report on the Inquiry into Human Rights Violations in the Khomani San Community” (“2004 Khomani San Report”). The Inquiry was aimed at determining the extent of human rights violations in the Khomani San community; publicising developmental conditions in the Andriesvale-Askham area, Kalahari; improving the living conditions of the community; and promoting a general respect for human rights in the Khomani San community and in the Andriesvale – Askham area.³⁰

The Commission found, *inter alia*:

- a) While the land claim process itself was successful, the implementation phase failed to initiate a process of sustainable development, to protect basic human rights and to capacitate the long-disadvantaged Khomani San people;
- b) The local government had failed to provide for water, sanitation, waste management or development in general;
- c) Not much had been done in terms of sustainable environmental management;
- d) Low levels of education persisted, largely due to the far distance of schools and lack of transport;
- e) Sufficient measures had not been taken to incorporate the unique needs with regard to language and culture of the Khomani San into schools;
- f) Substantial alcohol and drug abuse problems as a result of the community’s poverty resulted in malnutrition and illness; and
- g) That despite having regained ownership of land, the community continues to live in poverty and neglect.

The Commission also took special notice of allegations lodged against members of the South African Police Service (“SAPS”) for victimisation, harassment and discrimination and found that the police in the area were in need of a fundamental change in attitude.

Allegations of sexual abuse of Khomani San children at school were of great concern, which allegations had not been satisfactorily addressed by the relevant authorities.

Recommendations from the 2004 Khomani San Report were provided to the SAPS, the Department of Provincial and Local Government, the Department of Land Affairs, the Department of Education, the Department of Social Development, and other stakeholders. These recommendations were provided with the aim of enriching cooperation between the Khomani San people, state departments, and other stakeholders to better encourage the culture of human rights in South Africa. The recommendations included the following, amongst others:

- a) Implementation of the Khomani San Settlement and Development Strategy without delay;
- b) Assistance to the Khomani San community in managing and cultivating the land and in understanding the rights and assets afforded to the community;

³⁰ South African Human Rights Commission “Report on the Inquiry into Human Rights Violations in the Khomani San Community” (2004).

- c) The Local Council to implement systems for the delivery of basic services without delay;
- d) Ensure that educational programmes take into account the needs and interests of the children of the Khomani San;
- e) Consideration be given to the establishment of a transport system for school children in the Khomani San community;
- f) Priority to be given to further the language project aimed at encouraging the use of indigenous language amongst Khomani San children;
- g) Integration of children from different historical and cultural backgrounds, as well as the management of their unique needs;
- h) Implementation of programmes that address the specific social problems experienced, with particular attention to be paid to alcohol and drug dependency and the needs of the Khomani San children; and
- i) Roles and functions of traditional leadership to be clarified.

Following the release of the Commission's report, in 2005 the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous persons ("the Special Rapporteur"), Rodolfo Stavenhagen, conducted a mission to South Africa. In the addendum to the report produced, (the "Stavenhagen Report")³¹ the Special Rapporteur recognised that Cabinet had adopted a memorandum in November 2004 that would lead to an official policy on recognising vulnerable indigenous communities.

While acknowledging that the Khoi-San in South Africa have, in principle, equal access to all social services, the Special Rapporteur acknowledged that they "*tend to be more marginalized than other sectors to the extent that they are concentrated at the lower end of the socio-economic scale*"³² and continue to face challenges in accessing basic services and employment opportunities. The report further noted that the Nama and San people are among the poorest in the country, and that while Black and Coloured populations in the area similarly find themselves in situations of "crisis poverty", the experience for indigenous people is compounded by the "*stigma against their identity by neighbouring peoples, the lack of government awareness in some cases, and the intergenerational crisis of knowledge loss, language loss and skill loss.*"³³

The report makes special mention of the fact that indigenous communities make up only a small percentage of the poverty-ridden population of South Africa. The lack of specific poverty reduction programmes geared towards vulnerable indigenous communities was acknowledged as justified in overall terms. The report indicated that this is "*likely to leave some of the most vulnerable indigenous*

³¹ <http://www.hr-dp.org/files/2015/07/06/G0516746.pdf>

Commission on Human Rights "Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Persons, Rodolfo Stavenhagen: Mission to South Africa", E/CN.4/2006/78/Add.2, 15 December 2005.

³² *Ibid*, para 74.

³³ *Ibid*, para 60.

*communities out of such programmes altogether, because of their geographical dispersal and low population density, which has led to their “political invisibility” in the country.”*³⁴

The report takes additional notice of concerns facing the stigma associated with the languages by young people³⁵ and the challenges faced by indigenous women, in particular their exclusion on matters of land reform and discussions relating to solutions for their problems and high levels of domestic violence in indigenous communities.³⁶

Between 4 and 7 August 2006, the Committee on the Elimination of Racial Discrimination (“CERD”) considered the first to third periodic reports submitted by South Africa and on 16 August 2006 adopted a number of concluding observations³⁷, in respect of indigenous people in South Africa including the following:

- a) Concern over the situation of indigenous peoples, *inter alia* the Khoi, San, Nama and Griqua communities, and in particular, hunter-gatherer, pastoralist and nomadic groups, and noted the absence of information on the specific measures adopted by the State to ensure the enjoyment of all rights by those indigenous communities;³⁸
- b) The absence of disaggregated information on the composition of the population, resulting in the fact that an accurate perception on the effective enjoyment of the rights provided in the Convention by different ethnic groups, with particular reference to the Khoi-San and non-citizens, cannot be achieved;³⁹
- c) Concern over the extent of land restitution and sustainable development of resettled communities, where it was recommended that the State strengthen its policy on land restitution and post-settlement support;⁴⁰
- d) The lack of information on the implementation of the right to receive an education in a language of one’s choice, as well as the promotion of indigenous languages, particularly in education, including Khoi, San, Nama and sign languages in particular;⁴¹ and
- e) The numerous difficulties in access to justice, especially for members of the most disadvantaged and poor ethnic groups, including indigenous people.⁴²

The CERD consequentially made a number of recommendations including for the reporting on more specific information and initiatives in subsequent periodic reports where a lack of information had been highlighted, as well as a revision and strengthening of land restitution and post-settlement support programmes for re-settled communities. Additional measures to ensure access to justice, including through the use of other official languages other than English and Afrikaans as well as mechanisms aimed

³⁴ *Ibid*, para 62.

³⁵ *Ibid*, para 66.

³⁶ *Ibid*, para 78.

³⁷ http://olddoc.ishr.ch/hrm/tmb/treaty/cerd/reports/cerd_69/South_Africa_CERD_69.pdf

³⁸ Rodolfo Stavenhagen *op. cit.*, para 19.

³⁹ *Ibid*, para 11.

⁴⁰ *Ibid*, para 18.

⁴¹ *Ibid*, para 22.

⁴² *Ibid*, para 24.

at strengthening the provision of legal aid for disadvantaged and poor ethnic groups were also recommended along with a recommendation for the ratification of, amongst others, the International Labour Organization Convention on Indigenous and Tribal Peoples, No. 169 (“ILO Convention No.169”).⁴³

In 2009 the ILO together with the African Commission on Human and Peoples’ Rights (“ACHPR”) produced a country report on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in South Africa.⁴⁴ While the contents of this report will not be discussed in detail, this report found that the government of South Africa has acknowledged the existence of indigenous persons, and “...stands as one of the few countries on the continent that has embarked on ambitious efforts aimed at redressing the problems of its indigenous peoples” including legislative, policy and judicial interventions.

These measures notwithstanding, the report also highlighted the fact that indigenous persons in South Africa continue to suffer from exclusion and marginalisation, and “continue to lack capacity, partly due to extreme levels of poverty, and a lack of awareness to enforce these rights and provisions...”⁴⁵

That report further highlighted that due to the lack of recognition of traditional community structures of indigenous peoples, “little if any consultation” with these groups has taken place with respect to matters of national importance as well as matters which directly affect them,⁴⁶ and while there are high level governmental and international organisation projects purportedly conducted on behalf of indigenous groups, indigenous communities themselves have not been involved in their formulation and implementation.⁴⁷

Moreover, similar issues as those referred to above regarding access to land and land restitution processes (including post-settlement support); recognition of traditional structures and participation in government; protection and promotion of indigenous Khoi and San languages; education; gender issues (including the lack of participation of women in development and leadership structures and high instances of gender-based violence) and the protection and promotion of culture were also addressed in that report. In conclusion, that report states that although the current legal and policy framework of the country has the potential to protect the rights of indigenous persons, the situation remains grave.⁴⁸

Despite the Commission’s Report on the Inquiry into Human Rights Violations in the Khomani San Community published over a decade ago in November 2004 as well as the UN Stavenhagen Report, published the following year, the Commission has continued to receive complaints regarding the alleged human rights violations being experienced by indigenous communities.

The complaints laid at the Commission have predominately focused on, but are not limited to issues dealing with equality, language, education, land redistribution, and the lack of recognition of the indigenous communities and their respective leadership. These complaints have been brought forward

⁴³ *Ibid*, para 11, 18, 19, 22, 24 and 31.

⁴⁴ http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_SouthAfrica.pdf

⁴⁵ *Ibid*, page 59.

⁴⁶ *Ibid*, page 28.

⁴⁷ *Ibid*, page 29.

⁴⁸ *Ibid*, page 59.

on an individual basis, collectively by the Khoisan Council, or by the Leaders and Chiefs of the indigenous communities at various roundtable meetings hosted by the Commission.

On 27 April 2015, the Commission received a memorandum from the Gauteng Provincial Khoi and San Council, which memorandum was simultaneously delivered to the CRL Commission; the Public Protector of South Africa; and the Constitutional Court. The Commission notes that the memorandum outlined, amongst other things, concerns relating to racial classification; language; access to housing and land; the concern of the Khoi-San in celebrating Freedom Day and Human Rights Day unless their rights to dignity and equality are fully restored in terms of the United Nations on the Rights of Indigenous Peoples; and allegations of violence against the indigenous communities since the “arrival of the Bantu groupings in the 1440s and the white settlers in 1652”.⁴⁹

Although there have been comprehensive recommendations made by both the Commission and the UN Special Rapporteur on the Khomani San people, the Commission continues to receive complaints which indicate the prevalence of challenges and on-going alleged human rights violations experienced by indigenous communities in South Africa. It is on this basis that the decision was taken to host a National Hearing on the Human Rights Situation of Indigenous Peoples, with a view of understanding prevailing challenges, the measures taken by the State to address the challenges and to identify appropriate practical measures which can be further implemented in response to the challenges.

4. METHODOLOGY AND PROCEDURE OF THE HEARING

4.1 Methodology

In terms of the Commission’s Complaints Handling Procedure, the Commission may conduct a hearing under the following circumstances, *inter alia*:

- (a) if a complaint cannot be resolved by way of conciliation, negotiation or mediation;
- (b) if a hearing will offer an appropriate solution regarding the complaint;
- (c) if it is in the public interest;

⁴⁹ The memorandum called for the following relief:

- a) An amendment of the Constitution to include and recognise the Khoi and the San as the first indigenous peoples of South Africa;
- b) An amendment of the Constitution to provide for participation of the indigenous peoples in the parliamentary processes in terms of the Houses of Traditional Leadership;
- c) Reclassification of the race/nation of Khoi-San people to indigenous peoples and not ‘Coloured’;
- d) The promotion of the Khoi, Nama and San languages;
- e) An amendment of the Broad-Based Black Economic Empowerment and Affirmative Action policies to include Khoi-San and Coloured peoples;
- f) The provision of affordable housing for the indigenous peoples;
- g) Restitution of land; and
- h) Integration of former Khoi-San South African Defence Force Soldiers and Cape Corps Military Personal into the South African Military Services.

- (d) if the complaint cannot be fairly decided on the basis of documentary evidence or written statements submitted by the parties or any other person having information relevant to the complaint only; or
- (e) if a party requesting a hearing supplies reasonable grounds.

In light of the reasons outlined in the preceding section of the report, together with the responsibility of the Commission, as an NHRI, to protect the rights of vulnerable and marginalised groups, the resolution was taken to convene a national investigative hearing. A mixed methods approach was utilised whereby the hearing process was conducted in two key phases, first the conducting of a number of public hearings and second the subsequent analysis of information received together with additional desktop research, which culminated in the production of a final hearing report.

The hearing process was inquisitorial as opposed to accusatorial in nature as the primary objectives were to enlighten the Commission as to the extent to which human rights violations, if any, are being experienced by indigenous communities, and if so, to establish a deeper awareness of the factors contributing towards such rights violations.

The Commission aimed to create an understanding of concerns and challenges facing not only indigenous communities, but government and other stakeholders as well, with a view of identifying practical measures to address these challenges and further advance the realisation of rights for all persons in South Africa.

The Commission planned to include a wide range of stakeholders in order to attain a holistic view of the issues and challenges. In this regard, organs of State; civil society and community-based organisations; traditional structures; as well as particular indigenous communities were invited to appear before the Hearing Panel.

Stakeholders were invited to make written submissions, and were requested appear before the Hearing Panel to make presentations in an assigned time-slot, where after the Panel was able to pose questions in order to acquire additional information or clarity on information arising from submissions. Before making submissions, stakeholders were invited to take an oath or affirmation in the manner of their choosing.

In line with the objective of raising awareness and promoting accessibility of the process to affected communities, the hearing was hosted in three provinces, Gauteng, Western Cape and Northern Cape, which were identified and selected on the basis of the wide numbers of the Khoi-San located in these areas. The Commission acknowledges that communities of the Khoi-San are located in other provinces in South Africa and the location of the hearings in the three provinces listed above should not be interpreted to imply otherwise.

Invited stakeholders included:

- (i) DRDLR

- (ii) CoGTA
- (iii) DAC
- (iv) DEA
- (v) DoJ&CD
- (vi) PanSALB
- (vii) CRL Commission
- (viii) Commission for Gender Equality (“CGE”)
- (ix) NKC
- (x) Working Group of Indigenous Minorities in Southern Africa (“WIMSA”)
- (xi) IPACC
- (xii) SASI
- (xiii) National Khoisan Consultative Conference (as a tribal representative body)
- (xiv) Representatives of Indigenous communities in Gauteng, the Northern and Western Cape Provinces.

The list of stakeholders cited above are by no means an exhaustive list of institutions which have an interest in the right of the Khoi-San in South Africa. The Commission emphasizes the value and significance of all interested persons and formations in taking the rights of the Khoi-San forward and records that the stakeholders to the hearing both those present, and those throughout the country and the regions, but who were not necessarily a part of the Inquiry remain vital to this process.

Following the conducting of the public hearings, an analysis of information received in addition to analysis of sources identified through desktop research. These sources included, *inter alia*, SAHRC materials; domestic and international legal frameworks; multiple reports produced by international and regional bodies; and other topical research reports on the Khoi-San.

The Commission further acknowledges that not all Khoi-San groups were able to participate for practical reasons. On this basis, the Commission has endeavoured to summarise the submissions received, but also acknowledges the reality that the views expressed by representatives may not accurately represent the views of all the Khoi-San, and the views expressed through submissions, as summarised in this report, do not necessarily reflect the views of the Commission.

4.2 Composition of the Panel

In terms of Article 21(2) of the Commission’s Complaints Handling Procedures, the Panel presiding over a hearing must consist of the Chairperson of the Commission or any Commissioner designated by him or her, who must be designated as the Chairperson of the Panel; at least one additional Commissioner; and at least one natural person appointed by the Commission. For the purpose of this Hearing, the Panel comprised of the following members:

- (a) **Commissioner Danny Titus**, as the Chairperson of the National Hearing, given his extensive experience in matters relating to the rights of indigenous persons;
- (b) **Commissioner Mohamed Shafie Ameerma**, responsible for the portfolios of the right of access to adequate housing and access to justice at the SAHRC;

- (c) **Dr Martin Nsibirwa**, the then Manager in the Office of the Chief Operations Officer at the SAHRC, served on the Gauteng Panel due to his experience in a range of human rights issues;
- (d) **Karam Singh**, the then Provincial Manager of the Western Cape Provincial Office, served on the Western Cape Panel due to his experience in dealing with similar complaints lodged with the Provincial Office; and
- (e) **Chantal Williams**, Provincial Manager of the Northern Cape Provincial Office, served on the Northern Cape Panel due to her experience in dealing with similar complaints lodged with the Provincial Office.

5. LEGAL FRAMEWORK

One of the founding provisions of the Universal Declaration of Human Rights (“UDHR”)⁵⁰ is that all human beings are born free and equal in dignity and rights,⁵¹ and the fundamental principle of equality is enumerated by recognising that everyone is entitled to universal dignity and to all the rights and freedoms, without distinction of any kind, including on the ground of race and social origin, amongst others.⁵²

There are numerous legal instruments which seek to promote and protect the rights of indigenous persons, both domestic as well as international. On an international level, the key instruments which govern the rights of indigenous peoples are the UNDRIPS⁵³ and the International Labour Organization’s Indigenous and Tribal Peoples’ Convention No. 169 (“ILO Convention No.169”).⁵⁴ However, multiple other instruments also apply to various aspects of the rights of indigenous persons, including, but not limited to the International Convention on the Elimination of All Forms of Racial Discrimination;⁵⁵ the Convention on the Rights of the Child;⁵⁶ the Convention on Biological Diversity;⁵⁷ Universal Declaration on Cultural Diversity,⁵⁸ the Convention for the Safeguarding of the Intangible Cultural Heritage;⁵⁹ and the Convention for the Protection and Promotion of the Diversity of Cultural Expressions,⁶⁰ amongst others.

Indigenous persons are entitled to the full range of rights guaranteed to all persons, which are generally applicable to the individual. These include the right not to be discriminated against and to receive equal protection and benefit of the law; the right to human dignity; the progressive realisation of socio-

⁵⁰ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948.

⁵¹ Article 1.

⁵² Article 2.

⁵³ UN General Assembly Resolution A/RES/61/295, 2 October 2007.

⁵⁴ International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, 27 June 1989.

⁵⁵ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965.

⁵⁶ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989.

⁵⁷ UN General Assembly, *Convention on Biological Diversity*, 5 June 1992.

⁵⁸ UN General Assembly, *Universal Declaration on Cultural Diversity*, 2 November 2001.

⁵⁹ UN General Assembly, *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003.

⁶⁰ UN General Assembly, *Convention for the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005.

economic rights which include water, sanitation, food, housing, healthcare, social security and basic education; and the right to maintain and practice the culture, language and beliefs of one's choice. While the Khoi-San have access to the same individual rights as non-indigenous peoples, there are a number of collective rights which are important to the Khoi-San.

Social realities and multiculturalism determine that despite the universality of fundamental rights and freedoms, the practical implementation and exercise of these rights cannot be undertaken in a homogeneous manner. The cultural dimension of rights and collective rights of the Khoi-San will be explained in the sections below, followed by a brief description of the interdependency of human rights and obligations more broadly.

5.1 The cultural dimension of human rights

The core principles of equality, justice, and tolerance require the recognition and accommodation of different identities and values within diverse social contexts and cultures, where groups and individuals may have different views and priorities. For example, conceptions of a decent standard of living and priorities for poverty eradication and sustainable development will differ amongst diverse groups. Recognition of cultural diversity grounds the universality of human rights in the realities of our societies by drawing attention to their appropriation by all individuals who can identify these rights with a sense of ownership, regardless of language, tradition and location. In the same vein, the fact that these rights and freedoms are meant to be exercised in a wide variety of cultural environments by no means implies that universal norms can be relativized in terms of their application.⁶¹

5.2 Collective rights of indigenous peoples

Indigenous peoples or groups are often organised and function collectively as a group, where values of community and collective responsibility often guide the behaviour of an individual. In recognising this, the promotion of individual rights are not always adequate and particular emphasis is placed on the need to protect and promote the achievement of collective rights of indigenous peoples, the exercise of which is vital to their survival as a distinct group.

Collective rights such as the right of access to land, traditional territories and natural resources as a community; the recognition of distinct identity; self-determination; and participation in decisions which affect them, are minimum and necessary conditions for the preservation and practice of the cultural lifestyle, and therefore, for the continued existence of an indigenous community as a distinct group.⁶²

5.2.1 *Right to culture and the recognition of a distinct identity*

The Khoi-San have unique cultures, traditions, languages and ways of life, which form an essential component of their identity. The protection and promotion of this culture is therefore vital in ensuring the survival and dignity of the Khoi-San, while it also has a significant impact on the exercise of other rights such as the right to self-determination. This right to culture and the recognition of a distinct identity is

⁶¹ UNESCO World Report "Investing in Cultural Diversity and Intercultural Dialogue" (2009), p 225.

encompassed in several international law provisions relating to, *inter alia*, the right to practice, revitalise and transmit cultural traditions and customs; maintain, control and develop cultural heritage and traditional knowledge; to maintain and strengthen distinct cultural institutions; to belong to an indigenous community; and the right not to be subjected to forced assimilation or destruction of their culture. UNDRIPS, CERD⁶³ as well as the Committee on the Rights of the Child⁶⁴ have all stated the importance of giving recognition to, and in protecting and promoting the cultural rights and identities of the Khoi-San.

5.2.2 Right to self-determination, autonomy or self-governance

The historical and prevailing patterns of discrimination of indigenous peoples throughout the world have negatively affected the ability of indigenous peoples to exercise control over the decisions which directly impact their daily lives, resulting in numerous challenges and continuous marginalisation.

The right to self-determination is considered to be a “foundational” right for indigenous persons, which is required for the effective enjoyment of other individual and collective rights. Articles 3 and 4 of UNDRIPS recognise the need to promote the meaningful participation of indigenous peoples in decisions that have a direct impact on their lives. In this way, education, skills development and capacity building of indigenous communities as well as support in strengthening their own institutions and self-governing structures is essential to enable them to not only understand, but to play an active role in the design and implementation of policies and plans which aim to promote their development in a manner which is consistent with their own cultural values, customs and worldviews. Self-determination, by enabling people to take control of their own lives and futures, is therefore a matter of basic human dignity and empowerment.

The right to self-determination recognises that indigenous peoples are distinct from larger and more dominant social groups and political structures, yet inherently form part of the broader society within a state. In recognising their distinction, this right promotes the inclusion and incorporation of indigenous peoples without the effect of assimilation.

While numerous debates have been held over the content and meaning of this right, it must be interpreted in a balanced manner which does not impair the territorial integrity or independence of a state or the exercise of rights and freedoms of other persons. In this regard, the United Nations Development Group Guidelines on Indigenous Peoples’ Issues⁶⁵ summarises the key aspects of the right as follows:⁶⁶

- Autonomy or self-government in matters relating to **internal and local affairs**;

⁶³ CERD, “General recommendation No.23 (1997): Indigenous Peoples.

⁶⁴ Committee on the Rights of the Child, “General comment No.11 (2009): Indigenous children and their rights under the Convention” obliges the state to adopt special measures to facilitate the right to culture of indigenous children, which includes the need for cultural sensitivities to be aligned to the principle of the best interest of the child.

⁶⁵ United Nations Development Group Guidelines on Indigenous Peoples’ Issues (February 2008).

⁶⁶ *Ibid*, p 13.

- Respect for the principle of **free, prior and informed consent**, which includes access to information on proposed activities and the likely impacts in an understandable format;
- Prior **consultation** and **full and effective participation** in every stage of an activity that may directly or indirectly impact on them;
- **Recognition of traditional institutions**; internal justice and conflict-resolution systems; and ways of socio-political organisation; and
- Recognition of the right of indigenous persons to **freely define and pursue their economic, social and cultural development**.

5.2.3 Right to participation and the right to free, prior and informed consent

Article 18 of UNDRIPS recognises the right of indigenous persons to “*participate in decision-making in matters which would affect their rights, through representatives chosen by themselves and in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*” In addition to this, Article 19 expressed the obligation of states to consult with indigenous peoples and to obtain free, prior and informed consent before taking action which may affect them.

Generally, the right to participation contains both internal and external dimensions. The internal dimension is closely related to the right of self-determination and development, by providing equitable opportunities for indigenous persons to participate in decision-making relating to the internal or local activities which impact on them directly or indirectly. In fact, it has been found that the active participation of indigenous persons results in better and more effective programme outcomes.⁶⁷

Participation and consultation is therefore undertaken with a view of obtaining free, prior and informed consent in decision-making. “**Free**” requires the absence of coercion, intimidation or manipulation; “**prior**” implies the need for consent to be sought before any conclusion, authorisation or commencement of an activity has taken place; and finally, “**informed**” necessitates the provision of information in a form which is accessible and understandable.⁶⁸

The external dimension of the right to participate, on the other hand, refers to the right of indigenous persons to participate alongside other groups in the broader public life of the state, which may include the need to create special measures to ensure the effective participation of indigenous peoples within the political structures of the state. The need to create special measures has arisen in light of the recognition of the fact that the participation of indigenous persons in broader aspects of public life is generally not proportional to the participation of other, less-marginalised groups. Inadequate participation or representation therefore may result in further marginalisation and the inability of indigenous persons to

⁶⁷ General Assembly “Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya” A/65/264, (9 August 2010), paragraph 31.

⁶⁸ The then-Special Rapporteur, Rodolfo Stavenhagen goes on to explain that information should include certain details, such as the nature, size, pace, reversibility and scope of any proposed activity; the purpose or reasons; duration and locality of areas; likely economic, social, cultural and environmental impact; potential risks; and fair equitable benefit-sharing.

make their voices heard, and the reservation of seats in legislative bodies, or the creation of special indigenous advisory bodies are some mechanisms which may be established.

Meaningful participation requires the ability of indigenous persons not only to be heard, but to genuinely be able to influence decision-making, and in this way is seen as an “*effective means of combatting the legacy of exclusion and marginalization affecting indigenous peoples throughout the world*” while also actively promoting reconciliation.⁶⁹

This right is therefore directly related to the achievement of the right to self-determination and to development which is culturally appropriate, sustainable, and in line with the unique needs and priorities identified by indigenous communities.

5.2.4 Right to development

Article 23 of UNDRIPS guarantees the right of indigenous peoples to determine and develop priorities and strategies for exercising their right to development. As described earlier, centuries of discrimination has resulted in the deprivation and marginalisation of indigenous peoples, leading to a myriad of socio-economic, cultural and political challenges.

While indigenous peoples have a right to develop in common with broader society within a state, cognisance must be given to the particular concerns faced by indigenous peoples, including the fact that development initiatives designed to benefit the economy or broader society as a whole may have particularly detrimental impacts on indigenous persons. This effect is largely due to two reasons, according to the then Special Rapporteur, Rodolfo Stavenhagen. The first is the intention to modernise indigenous communities and to effectively integrate them into the larger factions of society, while the second is as a result of development policies which have failed to address the structural causes of marginalisation. Moreover, indigenous persons may have different development priorities to those of other sections of society. For example, the ILO has found that poverty reduction strategies developed in some states did not necessarily reflect the priorities of certain indigenous groups, which groups often identified access to land and natural resources as the key to poverty reduction.

A human rights-based approach to development is therefore promoted, which recognises indigenous peoples as the subjects of rights, and not merely recipients or objects of development policies. In this regard, indigenous peoples must be assigned an active and prominent role in determining development priorities and strategies, in line with their own cultures and values. Stavenhagen identified key principles which underlie the development discourse from a rights-based perspective, which state that development policies should be:

- Endogenous (originate with indigenous peoples as a means of fulfilling their collective needs);
- Participatory;

⁶⁹ Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights “The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions”, August 2013, p 25.

- Socially responsible (respond to the needs and priorities of indigenous peoples, and promote the principle of empowerment);
- Equitable (benefit all members equally);
- Self-sustaining and environmentally sustainable;
- Culturally appropriate;
- Self-managed (in terms of resource management);
- Democratic (in line with the respects and promotion of a multicultural society, and protection by the state); and
- Accountable.⁷⁰

5.2.5 Right of access to land, territories and natural resources

International law recognises the right of indigenous peoples to land, territories and natural resources, which right extends to ownership, maintenance, control and use. While the contents of this right will be elaborated on in the sections to follow, the achievement of this right is fundamental to the achievement of other rights for indigenous persons, highlighting the indivisibility and interdependence of rights. Indigenous peoples are dependent on access to land, traditional territories and natural resources for economic survival and development; the right to self-determination; and the ability of indigenous peoples to practice their culture and traditional ways of life, and a lack of access therefore threatens the survival of indigenous peoples as a distinct group.

5.3 The interrelated, interdependent and indivisible nature of human rights

The Commission received submissions that cultural rights have generally been less developed and there is a tendency to view these rights as being subordinate to civil, political and socio-economic rights. However, the interrelated, interdependent and indivisible nature of all rights must form the underlying basis for an interpretation and application of rights. The protection and promotion of the right to identity, self-development and culture are intrinsically linked to access to lands and natural resources, which enable indigenous persons to practice cultures and traditional ways of life. This, in turn, impacts on the ability of indigenous persons to access socio-economic rights which are culturally appropriate. In this way, the exercise of cultural rights in themselves is imperative for many communities, and contributes to the effective exercise of other rights.

5.4 The obligation to respect, protect, promote and fulfil rights

The human rights framework is broadly formed on the basis of 4 key pillars, namely universality and indivisibility; equality and non-discrimination; participation and inclusion; and accountability and rule of law. This framework must be understood in light of the obligation to respect, protect and fulfil human rights, which includes both positive as well as negative obligations. Although it is widely recognised that non-state actors, including private persons and corporations, have similar obligations, the explanation

⁷⁰ General Assembly “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen” A/HRC/6/15, (15 November 2007), paragraphs 17 – 18.

below will focus on the obligation of state as the primary actor responsible for the rights of indigenous persons.

These obligations contain specific elements and may be explained as follows:

- **Obligation to respect:** This relates to the negative obligation of the state to refrain from interfering, directly or indirectly, in the exercise of rights. The state must abstain from carrying out, sponsoring, or tolerating any conduct which violates the free and equal enjoyment of rights and freedoms, which includes conduct which may prevent persons from accessing the resources required for the effective exercise of rights. Laws and policies are likewise required to incorporate aspects to guarantee access to rights.
- **Obligation to protect:** The obligation to protect requires the state to take positive steps to prevent the violation of human rights, which includes the promulgation and enforcement of legislative, policy and administrative mechanisms, as well as providing access to legal remedies in the event that a violation occurs.
- **Obligation to promote:** This obligation requires the state to take steps to enhance an awareness and understanding of rights, as well as remedies in a manner that enables persons to realise them. This includes education, publication and a general promotion of the spirit and values of rights in legislative, judicial and administrative matters.
- **Obligation to fulfil:** The obligation to fulfil requires positive measures designed to realise rights and to enable people to effectively be able to access entitlements, which includes appropriate legislative, judicial, budgetary, administrative and other measures. While measures aimed at ensuring the realisation of rights must be undertaken in line with the principles of equality and non-divisibility, it also requires that special measures be incorporated to fulfil the rights of vulnerable and marginalised groups in particular.

6. ANALYSIS

In a speech delivered by then Deputy President, Jacob Zuma, at the opening ceremony of the National Khoisan Consultative Conference in March 2001, recognition of the existence and role of indigenous persons was made. He stated that the convening of the conference was a defining moment in history in light of the fact that the Khoi-San people were the first indigenous people of our country. He went on to state that:

“This conference is also a powerful demonstration of the enduring strength of the Khoisan people. It was, after all, the Khoi-Khoi in the Cape who waged the first wars of resistance against the colonial onslaught of the seventeenth Century. It is of historical significance that the descendants of those who were cruelly victimised, repressed, exploited, driven from their homes and suffered worse injustices and inhuman treatment, are today joining together to participate in building a better and stronger South African nation.”⁷¹

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http://www.chr.up.ac.za/chr_old/indigenous/documents/South%20Africa/Report/ADDRESS%20BY%20DEPUTY%2

During the 2012 State of the Nation Address, former President Jacob Zuma then proceeded to affirm the commitment to the recognition of Khoi-San communities, their leadership and structures. In particular he stated that:

“It is important to remember that the Khoi-San people were the most brutalised by colonialists who tried to make them extinct, and undermined their language and identity. As a free and democratic South Africa today, we cannot ignore to correct the past.”⁷²

Despite these statements, indigenous communities have continued to raise complaints with numerous bodies, including state departments and the Commission, alleging that the statements and recognition of the plight of the Khoi-San people have not resulted in any measure of support, and that the rights of indigenous persons in South Africa continue to be eroded.

During the hearing process, the information received by the Commission highlighted numerous challenges and allegations of ongoing rights violations against the Khoi-San peoples in South Africa. While the Commission notes that detailed and voluminous submissions were received over wide-ranging issues, this Report endeavours to summarise the issues raised, while taking care not to lose the essence of the issues. This section has therefore been divided into themes, where submissions and information received have been summarised, and desktop research where required was added to provide a context and thorough examination.⁷³

6.1 Identity and recognition

The cultural distinctiveness of indigenous persons is a defining characteristic. The recognition of such separate and distinct indigenous groups in society goes beyond identity in the formal sense, it speaks to a sense of belonging and a collective sense of community. As explained briefly earlier in this Report, indigenous persons have unique heritage, cultures, traditions, languages and ways of life, which form an essential component of their identity. The historical context of indigenous persons must be considered reflecting on centuries of discrimination, deprivation, marginalisation, and forced assimilation into other cultural and/or ethnic groups.

[OPRESIDENT%20ZUMA%20TO%20THE%20OPENING%20CEREMONY%20OF%20THE%20NATIONAL%20KHOISAN%20CONSULTATIVE%20CONFERENCE.doc](http://www.thepresidency.gov.za/state-of-the-nation-address/state-nation-address-his-excellency-jacob-g-zuma%2C-president-republic-3)

⁷² <http://www.thepresidency.gov.za/state-of-the-nation-address/state-nation-address-his-excellency-jacob-g-zuma%2C-president-republic-3>

⁷³ The full submissions will be made available to any person upon request to the Commission.

The following themes have been identified by the Commission, and will be examined in detail below:

- i. Identity and recognition;
- ii. Culture and language;
- iii. Access to land and basic services;
- iv. The protection of indigenous knowledge systems;
- v. Governance, consultation and participation;
- vi. Education;
- vii. Equality;
- viii. Socio-economic issues; and
- ix. Access to justice.

This historical context and the resultant legacy is still a heavy burden for many. The deplorable classification of indigenous persons as savages and vermin capable of being hunted for sport, together with the fact that settlers studied the anatomy of indigenous persons to determine whether or not they could be classified as human were cited as matters that are still deeply hurtful. Representatives of indigenous communities recalled how the bodies of their ancestors were shipped to European countries in wine barrels with salt for preservation, where further tests were carried out in laboratories; how hunting permits were granted; and accessories such as purses were made using the skin of those killed.

The importance of official recognition of the cultural identity of Khoi and San peoples on an equal standing to other cultural groups in South Africa is inextricably linked to human dignity.

The apartheid system was characterised by racial segregation and discrimination, where Khoi-San peoples were forcibly classified as “Coloured”. Not only did this classification deny them their right to identity and culture, but it resulted in their virtual political and social invisibility. Despite the advent of democracy, their continued classification as “Coloured” in post-apartheid South Africa and the afore-mentioned recognition, the legal and political framework continues to fail to officially recognise the identity of indigenous communities as separate and distinct groups.

According to representatives for indigenous communities, the perpetuation of what they deem to be “cultural genocide” continues as a result of the lack of recognition of indigenous peoples, together with inadequate measures to promote protect, and preserve indigenous culture and tradition. The prevailing lack of recognition and invisibility of Khoi-San groups exacerbates their vulnerability and marginalisation, fuelling their sense of an identity crisis and contributing to the assertions in submissions that indigenous persons are unable to access their full entitlement of rights contained in the Bill of Rights.

Formal recognition is therefore a crucial first step in empowering indigenous peoples to exercise their constitutional rights and address systemic socio-economic challenges. Despite the Constitution advocating for a collective and multicultural citizenship based on the equal enjoyment of rights and freedoms, indigenous persons feel as if they are located outside the constitutional dispensation, and are excluded from the greater unified society within the country.

As mentioned above, recognition of the Khoi-San in the Constitution is limited to the language provision in Section 6, and is further found in the national motto “!ke e: /xarra //ke” which means “people united in diversity”, or, on a literal translation, “people who are different, together”. Reference to “indigenous” in the remaining constitutional provisions, however, is interpreted and understood to refer to other African communities, including Nguni, Sotho-Tswana, Venda and Tsonga-speakers. Further, recognition has been given to indigenous persons through the 2004 Cabinet Memorandum, numerous public statements made by state officials; and most recently, through the development of the Leadership Bill, which aims to provide recognition for traditional and Khoi-San communities and leaders, as well as their functions and roles.

Notably, contention was raised by representatives of indigenous communities over the provisions of the Leadership Bill, which it alleges places an undue burden on Khoi-San to prove their identity, whereas other African tribes are recognised in terms of language, surname or custom practiced. Section 5(1)(a) of the Leadership Bill allows for a community to be recognised as a Khoi-San community if it:

- (i) has a history of **self-identification** by members of the community concerned, as belonging to a unique community distinct from all other communities;
- (ii) observes distinctive established Khoi-San **customary law and customs**;
- (iii) is subject to a **system of hereditary or elected Khoi-San leadership** with structures exercising authority in terms of customary law and customs of that community;
- (iv) has an existence of **distinctive cultural heritage manifestations**;
- (v) has a proven history of **coherent existence** of the community from a particular point in time up to the present; and
- (vi) **occupies a specific geographical area** or various geographical areas together with other non-community members.

Moreover, Section 5(1)(b) requires the application for the recognition as a Khoi-San community to be accompanied by the following:

- (i) an application for the recognition of the position of a senior Khoi-San leader of that community as contemplated in Section 10; and
- (ii) a **list of all community members**: Provided that such a list must in respect of each community member contain his or her—
 - (aa) **full names and surname**;
 - (bb) **identification number** and a **certified copy** of his or her valid identification document or passport, or in the case of a community member who is younger than 16 years, a certified copy of his or her birth certificate;
 - (cc) **physical address** as confirmed by documentary evidence, including the name of the province where such physical address is located;
 - (dd) **contact details**;
 - (ee) **signature** acknowledging his or her association with such community; and
 - (ff) any other information as may be requested by the Advisory Committee or as may be prescribed by the Minister

Section 5(1)(d) goes on to require the relevant Khoi-San council to provide an updated list of members annually, and allows the Minister or any relevant Premier to take necessary steps to verify the information contained in such a list.

In contrast to the above, Section 3(4) of the Leadership Bill allows for the recognition of a traditional community if it:

- (i) has a system of traditional leadership at a senior traditional leadership level recognised by other traditional communities;
- (ii) observes a system of customary law;
- (iii) recognises itself as a distinct traditional community with a proven history of existence, from a particular point in time up to the present, distinct and separate from other traditional communities;
- (iv) occupies a specific geographical area;
- (v) has an existence of distinctive cultural heritage manifestations; and
- (vi) where applicable, has a number of headmanship or headwomanship.

However, while an application for recognition as a traditional community must similarly be made, the only accompanying requirement is that such an application must be made with an application for the recognition of the position of a senior traditional leader of that community.

While the purpose of this report will not endeavour to conduct an in-depth legal analysis of the aforementioned provisions, it will suffice to note that a significantly greater burden is placed on persons desiring to gain recognition as Khoi-San.

The reasoning for the considerably different procedures, including the need to provide a list of members containing names; copies of identity documents; proof of residence; contact details and signature is not clear. However, the membership criteria for Khoi-San communities as set out in the Bill is contrary to the rights of indigenous communities articulated in Article 33 of UNDRIPS. Article 33 guarantees that indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. Various Khoi-San representative bodies have raised their concerns about these issues with the relevant state departments, which concerns have not been addressed at the time of drafting this report.

Further submissions centred on the lack of recognition of the Khoi-San in historical records, curriculum and heritage sites as well as to their role in the historical and present day State. This contributes to a lack of awareness of the continued existence of indigenous persons. This lack of recognition and awareness results in inadequately promotion of respect, tolerance and appreciation of diverse culture in South Africa and adds to the persistence of harmful stigmatisation and discrimination against Khoi-San peoples and will be elaborated later in this report.

6.1.1 First Nation Status

Despite the fact that international discourse has moved away from emphasising considerations of aboriginality in the identification or recognition of indigenous peoples, Khoi-San representatives persistently called for official recognition of their first nation status, or in other words, recognition that the Khoi-San were the first peoples to inhabit South Africa. It must be noted that the South African government has not denied the historical accuracy of assertions that the Khoi and San peoples were the original inhabitants of South Africa and has expressed this on several occasions. However, this is asserted

on the understanding of “indigenous” in the context of a South Africa and includes both Khoi-San peoples and other African communities.

The Department of Justice and Constitutional Development (“DoJ&CD”) and CoGTA advised the Commission that they have been working closely together for a number of years, and are making progress on finalising a position paper on the issue of indigeneity and first nation status. Once finalised, it is anticipated that Cabinet will be approached for guidance and approval. The position paper will also guide Cabinet on how to respond to issues raised by the Special Rapporteur’s 2005 Report and its recommendations.

However, in undertaking this task the Commission was advised that despite the assistance of the National Khoi-San Council the two departments have faced significant challenges as a result of the lack of comprehensive information on the Khoi-San peoples. Although it will be elaborated on later in this report, it is noted that this lack of information may be considered to be a consequence of the lack of unity and fragmented nature of indigenous communities, which at times give rise to tensions or conflict amongst the Khoi-San.

In addition to position paper aimed at clarifying the issue of indigeneity, the Department is currently working on a number of policies, which include a policies on unity and diversity.

The importance of this recognition to the Khoi-San peoples is captured in the following quote from a conference held by the Goedgedacht Forum in 2012:

“The Khoi and San need a structure from which to rebuild identity and social structures. It is time to reconstruct identity not from a place of victim hood, but from a place of strength. Struggling for the term “First Indigenous” to be recognized by government is not an attempt to disenfranchise others from their own heritage; it is about reclaiming what was taken and moving forward from a position of strength.”⁷⁴

It is important to note that the recognition of first nation status does not deny indigeneity to other groups, nor does it seek to portray other groups in the country as inferior.

The recognition of first nation status should not seek to enhance the status of the Khoi-San peoples above others, or to divide society, but holds the potential to contribute to restoring the dignity of the Khoi-San. Social cohesion and a unified state in line with the vision of the Constitution in creating a common citizenship is emphasised. While it is acknowledged that the Khoi-San are historically the original peoples to have inhabited South Africa, they too, form part of the greater society within the country.

⁷⁴ Goedgedacht Forum “Traditional Leadership in South Africa: Facing the Contradictions and Embracing the Realities” (9 and 10 February 2012), p 15 accessed at http://us-cdn.creamermedia.co.za/assets/articles/attachments/38094_traditional_leadership_report.doc.pdf

6.2 Culture and language

For indigenous persons, culture is an indispensable component of their collective and individual identity, and is therefore crucial in ensuring their survival as a distinct group. While there is no single, accepted definition of “culture”, it essentially encompasses a multitude of components, including knowledge, beliefs, arts, laws, morals, customs, while serving as an expression of one’s heritage. According to UNESCO, “*Cultural diversity, beyond the mere fact of its existence, has aesthetic, moral and instrumental value as the expression of human creativity, the embodiment of human strivings and the sum of humanity’s collective experience.*”⁷⁵

The Charter for African Diversity⁷⁶ states that “*cultural domination led to the depersonalisation of part of the African peoples, falsified their history, systematically disparaged and combated African values*”, and in this way conveys the need to affirm the centrality of a respect and tolerance of diversity for the restoration of human dignity.

Culture is not static, but constantly changes and evolves, influenced by the interactions of indigenous peoples with others, and by the changing nature of the state and the modern world. It is not, therefore, only the ancient or historical conception of a peoples’ culture that must be carefully guarded, but their right to continue to practice a way of life and to develop in line with the needs and priorities of the particular group.

The interdependence of culture and language must be emphasised as certain aspects of one’s culture can only be fully expressed in the indigenous language of a community. Language, therefore, is one of the main mediums for the expression of culture. While the Commission takes cognisance of this inextricable link, for ease of reference and a more thorough examination, culture and language will be dealt with separately.

6.2.1 Culture as a way of life

Multiple international and domestic legal instruments expressly provide for cultural rights, which include the right not to be subjected to forced assimilation or destruction of their culture;⁷⁷ the right to practice and revitalise their cultural traditions and customs;⁷⁸ the right to the dignity and diversity of their cultures, traditions, histories and aspirations;⁷⁹ and the right to maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural expression.⁸⁰

In addition to this, UNDRIPS obliges the state to enable indigenous persons to maintain, practice, develop and teach their traditions, customs and rituals through ensuring, amongst other things, the use and

⁷⁵ UNESCO World Report “Investing in Cultural Diversity and Intercultural Dialogue” (2009), p 9.

⁷⁶ Organization of African Unity, *Charter for African Diversity*, (5 July 1976).

⁷⁷ UNDRIPS, Article 8.

⁷⁸ *Ibid* Article 11.

⁷⁹ *Ibid* Article 15.

⁸⁰ *Ibid* Article 31.

control of ceremonial objects; and the repatriation of their human remains.⁸¹ In terms of the Constitution, Section 31 guarantees all persons the right to enjoy their culture, practice their religion and use their language, provided it is consistent with the provisions in the Bill of Rights.

It was submitted to the Commission that as a result of colonisation and apartheid, the Khoi-San have become assimilated, detribalised and westernised, and their traditional language and culture is now on the verge of extinction. In this regard, the success of the cultural genocide, as described by the Khoi-San submissions, of the colonialist and subsequent apartheid regime was illustrated in the fact that there remains a stigma against the Khoi-San, where individuals and communities perceive Coloured as being superior, leading to many denying their Khoi-San heritage as a result.

Khoi-San communities emphasised that there are insufficient resources allocated for the preservation and promotion of the language, culture and tradition and additionally, for the social upliftment of the largely poverty-stricken indigenous communities.

The cultures and traditions of indigenous communities are mostly unrecorded, and although many are still practiced, greater commitment towards the conducting of research and recording indigenous customs and knowledge systems has been expressly requested.

The Commission emphasises the need for additional measures surrounding education and the promotion of awareness through cultural information centres, museums and tourism initiatives.

6.2.2 Language as an important component of culture

According to the Pan South African Language Board (“PANSALB”), most communities are not aware of their linguistic human rights⁸², and do not have the financial resources to initiate processes aimed at protecting these rights. In this sense, it was reiterated that a collaborative effort is key in advancing the linguistic human rights and associated human rights of all in the country. Emphasis was given to the fact that the promotion, preservation and development of languages and the attainment of a multilingual society is essentially not a policy issue, but a human rights one that needs to be given sufficient priority in order to preserve our country’s heritage and promote the achievement of equality for all.

International law guarantees the right of indigenous peoples to maintain and use their own languages, and further includes the right of persons to be educated in their indigenous language or mother tongue, and, where practicably possible, it holds that children should be taught to read and write in their own indigenous languages.⁸³ In addition to this, the right extends to have indigenous languages recognised in a country’s constitution and laws; to be free from discrimination on the basis of language; and the right to establish and to have access to media in indigenous languages.⁸⁴

⁸¹ *Ibid* Article 12

⁸² Constitution, section 9(3) & 29(2)

⁸³ ILO Convention No. 169, Article 28.

⁸⁴ United Nations Permanent Forum on Indigenous Issues, Fact Sheet (as accessed at http://www.un.org/en/events/indigenousday/pdf/Factsheet_languages_FINAL.pdf).

From submissions received, media broadcasting is generally carried out in dominant languages, excluding minority or indigenous languages from mechanisms of mass communication. This, too, was one of the issues raised by representatives for the Khoi-San during the Commission's hearing, noting that while smaller radio stations may broadcast in indigenous languages, these languages, as well as the particular form of Afrikaans broadly spoken by the Khoi-San, are often side-lined, leaving the Khoi-San feeling excluded and isolated from mainstream society. The right to culture, includes an obligation on the state to take effective measures to ensure that state-owned media reflect indigenous cultural diversity, and to encourage private media companies to also reflect cultural diversity.⁸⁵

UNESCO has adopted a number of conventions supporting the maintenance and use of languages of lesser power, particularly the Universal Declaration on Cultural Diversity,⁸⁶ the Convention for the Safeguarding of the Intangible Cultural Heritage⁸⁷ and the Convention for the Protection and Promotion of the Diversity of Cultural Expressions.⁸⁸ International norms and standards recognised the need to preserve languages of a lesser power and these conventions preserve languages of lesser power as the means of the expression of intangible cultural heritage and the diversity of cultural expression.

Essentially, language is about more than communication, it is a core component of identity, heritage, culture, and values as well, and is crucial in understanding the intangible aspects of culture, providing a sense of belonging to a community.⁸⁹ The importance of preserving indigenous languages is therefore vital to safeguard the cultural identity, traditional heritage, spirituality and dignity of indigenous persons, while maintaining cultural diversity throughout the world.

UNESCO describes the importance of preservation of language as follows:

“Every language reflects a unique world-view with its own value systems, philosophy and particular cultural features. The extinction of a language results in the irrecoverable loss of unique cultural knowledge embodied in it for centuries, including historical, spiritual and ecological knowledge that may be essential for the survival of not only its speakers, but also countless others.

For speaker communities, languages are the creations and the vectors of tradition. They support cultural identity and are an essential part of a community's heritage.”⁹⁰

⁸⁵ Article 16 of UNDRIPS.

⁸⁶ 2 November 2001.

⁸⁷ 17 October 2003.

⁸⁸ 20 October 2005.

⁸⁹ United Nations “State of the World's Indigenous Peoples” (2009), p 57.

⁹⁰ <http://www.unesco.org/new/en/culture/themes/endangered-languages/faq-on-endangered-languages/>

The then UN Deputy High Commissioner for Human Rights, Kyung-wha Kang, also spoke of the importance of linguistic diversity, in stating that:

“Without the appropriate linguistic terminology available to express indigenous philosophies and concepts, indigenous peoples lose some of their ability to accurately define themselves in accordance with their traditions and to convey these traditions to future generations. At the same time, the world loses some of its cultural history and human knowledge.”

During apartheid, the use of indigenous languages was strongly discouraged, with most Khoi-San forced to adopt Afrikaans as their primary language.⁹¹ As a result of a combination of a multitude of factors, including inter-marriage; forced assimilation and the oppression of Khoi-San identity and culture during the colonial and apartheid eras, the use of traditional Khoi-San languages has significantly and consistently declined. The oppression of the use of traditional Khoi-San languages over decades resulted in not only the decline of the language itself, but gave rise to a harmful prejudice and stigma as those using the language or belonging to Khoi-San communities are classified as being “inferior”. This stigma against Khoi-San peoples persists today, with many declining to learn or to use the language.

Language has a significant impact on social integration, and, as posited by the PANSALB, a hierarchical perception of language (and therefore status) results in a situation where an “us and them” mentality develops where individuals perceived to be “others” are treated differently. Essentially then, as PANSALB emphasised, the promotion of multilingualism comes down to the need to ensure that all persons are treated equally, with respect and dignity.

The Khoisan National Language Board (“KSNLB”), established in 1999, has consistently raised the issues of the absence of indigenous languages and knowledge systems in the public school system and in governance, as well as the diminishing use of the languages amongst indigenous communities leading to the near-extinction of the language.⁹² The unwritten format of most of these languages has given rise to a situation whereby a large number of traditional indigenous languages are at severe risk of extinction, while many others have already become extinct.

UNESCO estimates that there are around 6,000 languages in the world today, but that half of them are likely to disappear by the end of the century, many of will be indigenous languages. This, it explains will result in the fact that “...humanity would lose not only a cultural wealth but also important ancestral knowledge embedded, in particular, in indigenous languages.”⁹³

Section 6(2) of the Constitution recognises the historically diminished use and status of indigenous languages and requires the State to take practical and positive measures aimed at elevating the status and advancing the use of such languages. Section 6(5) of the Constitution, on the other hand, specifically recognises Khoi-San languages by requiring PANSALB to create conditions for the development and use of all official languages as well as the Khoi, Nama and San languages.⁹⁴

⁹¹ Stavenhagen 2005, para 14.

⁹² Konrad-Adenauer-Stiftung e.V “*The Khoisan in contemporary South Africa: Challenges of recognition as an indigenous people*”, (August 2013), at p 4.

⁹³ <http://www.unesco.org/new/en/culture/themes/endangered-languages/>

⁹⁴ PANSALB, as the constitutional body established to protect, promote and create conditions for the development of South Africa’s official languages, provides a special focus on previously marginalised indigenous languages, including Khoi, Nama, San and sign languages. Language and culture are inextricably linked, and the co-existence and public use of multiple languages in the country contributes to the advancement of ourselves as a diverse society. In recognising that language was historically utilised as a tool of oppression, the preservation and

However, the use of South African indigenous languages (including Khoi-San, other African and Afrikaans languages), in both public as well as private platforms is chronically diminishing. PANSALB explained in their submission that the 2001 and 2011 census results are indicative of the fact that South Africa is moving towards monolingualism, with the concomitant consequence being the death of our national heritage, identity and multi-cultural coexistence.

While the establishment of official language policies at universities and public institutions are aimed at promoting multilingualism in the country, the actual implementation of policies and development of languages is severely lacking. In practice, greater emphasis is placed on the conception of policies without adequate attention on enforcement, resulting in a “tick-box” exercise which essentially fails to achieve its purpose. Ultimately, the Commission’s Hearing Panel recognised that “[t]he unfortunate thing here is that people’s identities are being washed away.”

Despite the number of challenges PANSALB faces, including institutional instability, financial capacity and continual change of political offices, it was submitted that it has launched a number of initiatives, including the establishment of the Khoi, San and Nama Languages epicentre at the Sol Plaatje University in Kimberly. Closely linked to this, PANSALB is in the process of resuscitating the relationship with the University of Namibia. It is intended that these language centres will not only focus on the development and promotion of Khoi-San languages, but will include the study of the Khoi-San history and culture as well.

In addition to the above, PANSALB has established the Khoi, San, Nama and sign language national language units, while the incremental presence of indigenous South African languages in critical and strategic platforms remains a high priority.

The role of the national language units will be to build, compile and develop dictionaries for the languages, and to further develop terminology which will provide a better opportunity for the use of such languages in official platforms such as schools and government departments, amongst others. Moreover, serious concern was raised over the prioritisation of the introduction of Mandarin into the schooling system over indigenous languages in South Africa. This demonstrates the ideological power that accompanies the official and public promotion of a particular language over indigenous (including Khoi-San, other African, and Afrikaans) languages in South Africa.

Although these initiatives are still in the infancy stage, it is a positive step towards the preservation and promotion of endangered Khoi-San languages. It constitutes a significant contribution towards the promotion of the historical significance of Khoi-San peoples in the history of Southern Africa. It will enable greater education and awareness around the history and culture of the Khoi-San peoples.

promotion of multilingualism is therefore key in restoring dignity and is a recognition of equality and identity to large portions of the country’s population.

In addition to the initiatives of the PANSALB, additional efforts have been made to preserve and promote the use of indigenous languages, including a number of projects aimed at recording the languages into written format; the broadcasting of radio shows, specifically in Schmidtsdrift in the Northern Cape, in !Xhu and Khwe languages; performance art projects to promote the Khoi-San history and culture, and the establishment of Aboriginal Customary Councils in some areas. Despite these efforts, the use of the language continues to have a negative stigma and a lack of appropriate policies, support and funding to promote its usage, particularly amongst the youth in schools.

What is required is the provision of greater funding and commitment towards projects aimed at preserving and promoting the use of indigenous languages in South Africa, in line with the constitutional and international law obligations aimed at promoting cultural diversity and linguistics.

Whilst the recording of indigenous languages into written format so that it may be preserved indefinitely is important, this alone is not enough to prevent these languages from becoming extinct. Therefore, well-developed language revitalisation and immersion programmes for adults and youth is required. This must be aligned with programmes aimed at addressing the stigma of indigenous languages (and indigeneity in general) through, *inter alia*, promoting and encouraging the use of languages in indigenous communities themselves and promoting the use of indigenous languages in media and academic institutions.

Finally, it is recognised that few indigenous persons remain who speak the original Khoi-San languages, most of whom are elders. While a significant responsibility rests with the State in protecting and promoting these languages, the primary responsibility lies within indigenous communities themselves to ensure that the languages are passed down to the new generations of youth. Without this, formal State-initiated programmes are likely to be unsuccessful, and the nation will lose a wealth of knowledge and culture through the disappearance of some of the oldest languages in the world. Quoting one of the representatives of indigenous persons at the hearing,

“The indignity of colonialism and the influences of modern society has discouraged the need to honour our identity...Our cultural heritage has to be held in a collective stewardship for future generations. Our inherited traditions will only survive on our will and determination.”

6.2.3 Conclusion on the right to culture and language for indigenous peoples in South Africa

National identity is not comprised of dominant identities and cultures alone, but is built upon the foundation of all diverse cultures within a state. The protection and promotion of diverse cultures on an equal level is an important aspect of maintaining our national heritage. Equality therefore requires a recognition and understanding of the cultural dimension to the implementation of rights and freedoms, and without an active commitment, the vision of true reconciliation and a common citizenship through the restoration of the dignity of all people cannot be achieved.

In addition to the constitutional guarantee and in line with its international obligations, South Africa has established several institutions responsible for the protection and promotion of culture and language,

which include the National Arts Council of South Africa; PANSALB and the CRL Commission, which has been identified as a best practice in the African Region.

While the constitutional guarantee of cultural rights is a good starting point, this alone is insufficient to fulfil the obligations of the state. What is required, therefore, is more than a commitment to allow the practice of diverse cultures, but effective steps to actively protect and promote the maintenance and use of diverse cultures and languages in the country.

6.3 Access to land and basic services

Various international law instruments recognise the right of indigenous peoples to own, use, develop and control lands, territories and resources,⁹⁵ as well as the right to determine and develop priorities and strategies for development.⁹⁶ In addition to this, indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories and natural resources, and to uphold their responsibilities to future generations in this regard.⁹⁷

Indigenous communities are entitled to obtain adequate redress or compensation for dispossession of land and territories, and must be consulted by the state or private parties in relation to development or other projects which may impact indigenous communities.

Finally, Article 26(3) of UNDRIPS requires the state to give recognition to these rights in a manner which provides due respect for the customs, traditions and land tenure systems of the indigenous peoples concerned. This is further reiterated by Article 13 of ILO Convention 169, requiring the state to respect the special importance for the culture and spiritual values of the relationship between indigenous peoples and their land.

Indigenous communities are dependent on access to land and natural resources for traditional livelihoods and material sustenance. The historical (and in many instances, ongoing) dispossession and forced removal of indigenous peoples from land has given rise to increased poverty, cultural erosion and at times, assimilation of indigenous peoples into other more dominant social groups.⁹⁸

The importance of land for indigenous communities goes beyond its economic or productive value, but must be interpreted within the context of traditional and customary values of indigenous peoples themselves. The ancestors of indigenous persons lived and were buried on the land where sacred places are revered, and their history, indigenous knowledge, cultures and traditional practices were developed on the land. Indigenous peoples maintain a close spiritual relationship with the land.

⁹⁵ Article 26(2) of UNDRIPS.

⁹⁶ Article 23 of UNDRIPS.

⁹⁷ Article 25 of UNDRIPS.

⁹⁸ United Nations "State of the World's Indigenous Peoples" (2009), p 54.

The lack of access to their ancestral land disrupts traditional livelihoods and the performance of spiritual practices and rituals, which leads to the social disintegration and eventual extinction of indigenous communities' and their culture. Overall, the ILO explains that territory is the *"basis for most indigenous peoples' economies and livelihood strategies, traditional institutions, spiritual well-being and distinct cultural identity"*⁹⁹ and the continued dispossession and lack of access to land and territories fundamentally threatens the survival of indigenous peoples, while driving them into a life of poverty.

The loss of land in the South African context, as submitted by the Commission for Gender Equality ("CGE"), *"has caused indigenous people to plunge from a situation of self-reliance into poverty and a dependency on external resources"*.¹⁰⁰ The loss of land is central to the subsequent rise of other social challenges, including the decline of culture, traditional social structures and language. This lack of access deprives indigenous peoples from carrying out customs, traditional practices and ways of life, including hunting and gathering, and further negates their ability to visit the graves of ancestors. One of the most pressing concerns of Khoi-San peoples, therefore, is securing access to land to carry out traditional practices, as well as new land-based ventures such as farming.

The right to restitution of land, provided for in Section 25(7) of the Constitution is further given effect through the Restitution of Land Rights Act ("Restitution Act"),¹⁰⁰ and provides all persons the right to claim restitution, including indigenous persons and/or communities, for land dispossessed as a result of past racially discriminatory laws or practices after 19 June 1913. The initial cut-off date for lodging claims was 31 December 1998, but this process has since been extended for a period of five years, ending on 30 June 2019.

In terms of Section 2(1) of the Restitution Act, claims for land restitution may be lodged by a person; deceased estate; direct descendant of a person or a community. In the latter case, the Minister of Rural Development or the Land Claims Court must ensure that all members of the dispossessed community have access to the land or the compensation in question in a manner that is fair and non-discriminatory towards any person (including a tenant), and must further ensure that the person holding the land and/or compensation on the community's behalf remains accountable.

As at 30 June 2015, the following had been achieved:

- 78,138 land claims settled;
- 1,919,125 individuals from 385,691 families had benefitted;
- 3,231,787 hectares of land had been acquired at a cost of R18.7 billion;
- Financial compensation in the amount of R9.1 billion had been paid out;
- An additional R4.1 billion had been awarded to beneficiaries that have opted for land as development assistance; and
- 7,997 claims lodged before 31 December 1998 were still outstanding.

⁹⁹ International Labour Organization "Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No.169" (2009), p 91.

¹⁰⁰ 22 of 1994.

While some indigenous communities have successfully claimed restitution of land, including the 25,000 hectares of land in the Mier Reserve returned to the Khomani San, concerns were raised over the lack of access to financial and technical resources to assist in the pursuit of such claims. This is particularly so in rural indigenous communities, where access to courts and pro bono legal services is extremely limited. The Commission of Restitution of Land Rights (“CRLR”) explained that while some claims may become quite complex and involve multiple parties, indigent indigenous persons and/or communities are entitled to legal representation, which may be provided by the CRLR.

One of the key challenges faced by the CRLR is in the allocation of land claimed by multiple parties. In many instances, multiple claims are lodged against a specific portion of land, or land claimed is not available for restitution. This means that individuals and/or communities may not get the exact piece of land they lost. Whereas some have accepted this situation, or opted for financial compensation, others maintain their claim for the exact piece of land they allege to have initially lost, presenting significant difficulties in the finalisation of matters by the CRLR.

However, in noting the reality that many Khoi-San communities were unjustly dispossessed of land prior to 1913, former President Zuma, in his 2013 State of the Nation Address¹⁰¹ announced that the State is considering the imposition of exceptions to the 1913 cut-off date to provide for Khoi-San communities, historical land-marks and heritage sites. According to the CRLR, the exceptions, which are not linked to the Restitution Act, shall be a “Special Moment” for an expanded land redistribution programme, underpinned by the principle of inclusivity and *“will be an opportunity to integrate South Africans, irrespective of race, gender, class or historical origins.”*¹⁰²

With regard to the conservation and protection of heritage sites insofar as land restitution exceptions are concerned, the National Heritage Resources Act¹⁰³ (as amended) will apply, and the Land Claims Court will remain the final arbiter where any conflict arises. What distinguishes the exceptions programme from the normal land restitution process is that, firstly, historical ownership of land is not required, and secondly, claims are not limited to land dispossessed as a result of a racially discriminatory law or practice. Rather, emphasis is placed on the historic significance of land for a particular group or community.

One of the pilot projects initiated under this programme relates to a farm located in the Southern Cape. The Paramount Chief Andrew Abraham Stockenstrom Le Fleur is buried on a farm which was owned by a friend of his at the time. The Griqua people go on an annual pilgrimage to the site of his grave on 31 December. Following a change in ownership, the Griqua people must request permission from the new owners to visit the gravesite which is an important historic site. Despite the fact that the Griqua had never asserted to have owned the land previously, the CRLR is negotiating with the current owners of the farm

¹⁰¹ <http://www.thepresidency.gov.za/state-of-the-nation-address/state-nation-address-his-excellency-jacob-g-zuma%2C-president-republic-5>

¹⁰² https://agbiz.co.za/uploads/AgbizNews16/160211_RestitutionCommission.pdf

¹⁰³ 25 of 1999.

for ownership of, or alternatively, access to the land because of its historic significance.¹⁰⁴ This is important, noting the obligation of the state set out in UNDRIPS to ensure that indigenous persons are able to maintain, practice, develop and teach their traditions, customs and rituals through ensuring access to religious and cultural sites.

A multi-disciplinary, multi-cultural research team has been established by the Department of Arts and Culture to identify heritage sites and historical landmarks for this process. In addition to this, a Task Team will be established to contribute towards the development of a policy and/or legislation with regard to the proposed exceptions, which Task Team will consist of representatives from the National Khoi-San Council (“NKSC”); the Khoi and San Reference Group; National and Provincial Houses of Traditional Leaders; the Congress of Traditional Leaders of South Africa (“CONTRALESA”); as well as relevant government departments and entities.

With regard to current practices of land allocation, concerns were raised over the current ownership regime, noting that land is either owned by a private institution and/or entity on behalf of a group of persons, or alternatively, rests in private ownership of an individual. For the Khoi-San, it was submitted, this regime is inappropriate. In the former instance, land is given to Community Property Associations (“CPAs”) or Traditional Councils (“TCs”) to own and administer on behalf of communities, where the rights of the people to the land is secondary or subordinate. Essentially, it was submitted that the vesting of property rights in CPAs or TCs violates the traditional rights and cultures of indigenous persons in South Africa. It was argued that the most appropriate form of land security of tenure reform must be based on the recognition of land rights held in common, whereby the rights must vest in families and community members rather than in institutions. Overall, the desire for indigenous peoples to return to their culture and live communally was emphasised.

The international community has largely recognised that the collective character of land tenure is a fundamental necessity for indigenous peoples.¹⁰⁵ The ILO, in its Guide to Convention No. 169, reiterates concerns raised by numerous supervisory bodies in the conversion of communal lands into individual property rights, noting that when communal lands are divided and assigned to individuals or third parties, *“the exercise of the rights of indigenous communities tend to be weakened and generally end up losing all or most of the lands, resulting in a general reduction of the resources...”*¹⁰⁶

¹⁰⁴ A second pilot project relates to the gravesite of the King Tshwane, which is located within the Wonderboom Nature Reserve, which is owned by the Local Government. The CRLR is negotiating for ownership, or alternatively, for access to the land for descendants of King Tshwane who also visit the site annually and must request permissions each year. However, interestingly this piece of land is also of historic significance for the Voortrekkers, and therefore presents an opportunity to unite the dispossessed group (being the descendants of King Tshwane) and the dispossessors (the Voortrekkers).

¹⁰⁵ African Commission on Human and Peoples Rights and International Working Group on Indigenous Affairs “Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities” (2005), p 22.

¹⁰⁶ International Labour Organization “Indigenous & Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No.169” (2009), p 95.

In line with Article 26(3) of UNDRIPS, the state must seek to recognise and promote the achievement of the rights of indigenous persons in a manner that respects their culture and land tenure systems. The concerns raised by indigenous peoples therefore needs to be addressed through meaningful engagements with the State as to the development of a land tenure system which is in line with traditional customs and ways of life, and practicably implementable, while also providing mechanisms for the promotion of gender equality.

In principle, it was submitted, the Khoi-San do not oppose the allocation of land and housing opportunities to persons from all groups. However, concern was raised over the fact that during housing developments, persons from informal settlements in neighbouring areas are prioritised for land and housing allocations in historically Coloured areas. This is despite the fact that Coloured and/or indigenous families have resided in the areas during the apartheid era and large numbers of families are backyard dwellers, facing conditions of overcrowding in households. It was emphasised that the culture of the Khoi-San is to embrace all people into the community, regardless of race, origin etc.

There are currently an estimated 2 700 informal settlements throughout the country and despite the progress made to date in the provision of housing opportunities, the Commission found in a previous inquiry that the country *“continues to face significant challenges in providing access to adequate housing to poor and vulnerable persons, many of whom continue to live in deplorable conditions without access to basic services or economic opportunities required to escape from poverty.”*¹⁰⁷ Housing is therefore a complex issue, and the planning and development of housing projects provides the State with an opportunity to reverse apartheid spatial planning, which resulted in the segregation of different racial groups.

While social integration is a key objective to be promoted, cognisance must be given to the rights of the Khoi-San to live communally, according to their own customs, traditions and ways of life. The international legal framework recognises the reality that land may not be exclusively owned or used by the Khoi-San, but may be shared with other groups and communities where complementary livelihood strategies are developed to enable each group to have access to certain types of resources within a shared territory. Ultimately, the State has a responsibility to engage with local communities with regard to land development and restitution programmes, which includes communities within the vicinity in which housing developments are undertaken as well as those communities being relocated to new developments. Without this meaningful engagement, tensions may arise between communities or groups which may frustrate social integration and give rise to conflicts.

There is a strong link between access to land and poverty. Poor people do not have a current adequate income and the lack of access to land and natural resources further deprives them of the ability to generate income or livelihoods. The United Nations further explains that access to land fulfils a number of social functions, where land owners feel a stronger sense of identity with the community.¹⁰⁸ Therefore

¹⁰⁷ SAHRC “Report on Access to Housing, Local Governance and Service Delivery” (2015).

¹⁰⁸ United Nations Department of Economic and Social Affairs “Property Rights for Poverty Reduction?” (2009), p 1.

in addition to contributing towards economic productivity, access to land raises the social standing and dignity of persons.¹⁰⁹

The right of access to land entails the development of a formalised property rights system which is developed in line with local realities and customs; which includes measures to ensure that the right is accessible to all persons within a community; and which ensures that the principles of transparency and accountability are upheld.

Calls were made for an in-depth land needs assessment to be done with regard to indigenous communities to allow the relevant state departments to understand the magnitude of the challenges faced in order to contribute to the development of appropriate remedies.

The Commission's 2004 Report highlighted that whilst land had been successfully returned to the Khomani San community, the implementation phase failed to initiate a process of sustainable development and to capacitate the long-disadvantaged Khomani San people. In this regard, the Commission recommended that the State implement the Khomani San Settlement and Development Strategy without delay and provide assistance to the Khomani San community in managing and cultivating the land and in understanding the rights and assets afforded to the community.

Despite these recommendations, the CRLR conceded during their submissions that between 1994 and 2009 the various land reform interventions prioritised the quantitative aspect of land reform, focusing on the number of hectares of commercial agricultural land redistributed or restituted. Little attention was paid to the qualitative aspect of land reform through development processes and the creation of "*institutional conditions for changing/balancing power relations in the industry.*" Since this time, the Rural Economic Transformation Model has been developed, which provides for roles and responsibilities of various role players (organs of State, community-based governance structures, investors and communities represented by households) and further defines an accountability system.

The years of dispossession and deprivation of access to land and natural resources has contributed to the inability of indigenous persons to maintain and practice their customs, skills and traditional occupations. The achievement of substantive equality and access to rights is in part dependent on capacity building and skills development to enable the Khoi-San to participate in the maintenance and control of their own resources and affairs, and to actively pursue economic development.

6.4 The protection of Cultural and Indigenous Knowledge Systems

For centuries, indigenous communities have used indigenous biological resources and developed knowledge for specific uses such as medicine, food, and conservation, and this indigenous knowledge is passed down between generations. At an international level, it is acknowledged that the current non-indigenous intellectual property legal regime is inadequate to provide protection of indigenous knowledge systems. However, the right to such protection is acknowledged and guaranteed.

¹⁰⁹ *Ibid*, p 5.

Article 31 of UNDRIPS specifically guarantees the right to maintain, control, protect and develop traditional knowledge, which includes 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. This also extends to the maintenance, control, protection and development of their intellectual property rights over such cultural heritage, traditional knowledge, and traditional cultural expressions. Moreover, the Convention on Biological Diversity places an obligation on states to respect, preserve and maintain knowledge, innovations and practices of traditional and indigenous communities, and to promote the wider application of such knowledge, innovation and practices with their consent, but must ensure equitable benefit sharing is achieved.¹¹⁰

The intellectual property of indigenous persons is therefore broad in nature, extending to not only the use and conservation of natural resources, but to cultural expressions such as music, art, dance, stories and spiritual belief systems.

The commodification of indigenous knowledge and culture has been highlighted as a serious concern by the United Nations, as products, images or logos which purport to be associated with indigenous cultures are often used for profit-making schemes run by non-Khoi-San. Not only are such initiatives undertaken without consultation and approval, but they are often considered to be derogatory, disrespectful and offensive to the Khoi-San.

In this way, indigenous knowledge systems (“IKS”) are closely linked with other rights, including the right to self-determination; to participation; to maintain and practice one’s culture; access to land and natural resources; and the right to dignity. The obligation created by the right to control their intellectual property therefore goes beyond the need to protect indigenous knowledge, it speaks to the imperative of enhancing an understanding and respect for the diversity and sanctity of different cultures in our society as a whole.

6.4.1 Protection of biological knowledge and resources of indigenous peoples in South Africa

The Department of Environmental Affairs (“DEA”), has noted in its submission that the unrestrained use of indigenous biological resources and associated indigenous knowledge (known as “bio-piracy”) has increased dramatically in recent years, particularly in the commercial sector, such as pharmaceuticals, herbal medicines, cosmetics, and nutraceuticals, by bioprospectors or biotradors. Despite the increased use of indigenous knowledge systems, indigenous and local communities do not normally share in the benefits and/or profits.

The DEA explained in their submission that “bioprospecting” can be defined as “*research on, or development or application of, indigenous biological resources for commercial or industrial exploitation*” and includes:

¹¹⁰ Article 8(j).

- (i) the systematic search, collection or gathering of such resources or making extractions from such resources;
- (ii) the utilisation of information regarding any traditional uses of such resources by indigenous communities;
- (iii) research on, or the application, development or modification of such traditional uses for commercial exploitation; and
- (iv) the trading in and exporting of indigenous biological resources in order to develop and produce products, such as drugs, industrial enzymes, food flavours, fragrances, cosmetics, emulsifiers, oleoresins, colours, extracts and essential oils.

Simply put, this refers to the process whereby value is added to a biological resource, which increases its profitability when sold. “Biotrade”, on the other hand, is defined as *“the buying and selling of milled, powdered, dried, slices or extract of indigenous biological resources for commercial exploitation.”*

Section 24 of the Constitution provides a framework for environmental rights by identifying the need to have the environment protected for the benefit of present and future generations through, *inter alia*, conservation and ecologically sustainable development and use of natural resources. Without going into extensive details of environmental legislation, it is suffice to say that a number of laws and policies have been adopted to provide for this purpose.¹¹¹

The National Environmental Management: Biodiversity Act, 10 of 2004 (“NEMBA”), provides a framework for the regulation of the bioprospecting of indigenous biological resources; regulation of the export of such resources; to ensure fair and equal benefit sharing; and further to ensure ecologically sustainable development and use of indigenous biological resources. The Act and Regulations require an individual and/or entity to comply with permit requirements for activities relating to the utilisation of indigenous biological resources, including the negotiation and entering into a Material Transfer Agreement (“MTA”) and Benefit-Sharing Agreements (“BSA”) with a holder of traditional or indigenous knowledge.¹¹² Since the Regulations came into effect in 2008, five BSAs have been concluded with representatives of the Khoi-San peoples, which have made provision for monetary benefits, with more than R1 million having been paid to beneficiaries to date, and other non-monetary benefits, such as community development projects; provision of equipment and infrastructure; royalties; bursaries etc. With respect to the latter, the DEA has advised that an estimated 450 members of traditional and indigenous communities in South Africa are involved in the harvesting, cultivation, processing and packaging of the natural products manufactured

¹¹¹ Including, *inter alia*, the National Environmental Management Act, 107 of 1998 (NEMA); the National Environmental Management: Biodiversity Act, 10 of 2004 (NEMBA); BABS Guidelines: South Africa’s Bioprospecting, Access and Benefit Sharing Regulatory Frameworks: Guidelines for Providers, Users and Regulators; Indigenous Knowledge Systems Policy; ratification of the Convention of Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol on ABS).

¹¹² Permit requirements as set out in Chapter 6 of NEMBA include the disclosure of all material/important information about bioprospecting/biotrade project to the identified access provider / traditional knowledge holder; obtain prior consent for access and use of biological resources and indigenous knowledge; BSA and MTA must be approved by the Minister.

using indigenous biological resources and associated traditional or indigenous knowledge, contributing to job creation and poverty alleviation.

In recognising the contribution of indigenous knowledge systems and indigenous biological resources to the development of a variety of commercial products, the DEA conducted an independent ethnobotanical study on the traditional knowledge associated with rooibos and honeybush, the findings of which were released in May 2015. The report¹¹³ examined the origin of indigenous knowledge associated with the species, as well as how the knowledge was transferred from indigenous communities to other groups. The report recognised that traditional knowledge has provided valuable leads into the scientific and commercial environment.

Finding that the Khoi and San are the rightful holders of the traditional knowledge associated with rooibos and honeybush, the DEA recommended that individuals or organisations involved in the bioprospecting or biotrade of these species to engage with Khoi-San communities with a view of developing BSAs. Noting the power dynamics between Khoi-San peoples and individuals and companies involved in the bioprospecting and biotrade of these species, it was proposed that the DEA should provide considerable support to communities in facilitating the establishment of such agreements.

A challenge raised by the DEA is the fact that there is inadequate participation of indigenous communities in policy discussions relating to the protection and promotion of the rights of indigenous communities, as the custodians of indigenous biological resources and associated indigenous knowledge systems. In addressing this, the Department has subsequently included representatives of indigenous and local communities in the National Bioprospecting Forum, which was launched in November 2015, and is establishing a dedicated structure at a national level to engage with indigenous and local communities in policy issues relating to the bioprospecting and biotrade of traditional or indigenous knowledge. However, it was emphasised that an agreed national standard for the identification, verification and classification of indigenous communities in South Africa is needed.

6.4.2 Protection of cultural knowledge and practices of indigenous peoples in South Africa

While the legal framework relating to the use of indigenous knowledge in relation to biological resources has been established, it would appear that not enough is done to protect indigenous cultures from exploitation, particularly in the tourism industry.

Despite being one of the oldest nations in the world, submissions from Khoi-San representatives expressed disappointment with the fact that tourist attractions do not incorporate indigenous communities or sites, and people know very little about the Khoi-San. This gap provides a significant opportunity for the enhancement of community-based tourism and crafts with varying degrees of hunting

¹¹³ DEA “Traditional Knowledge Associated with Rooibos and honeybush Species in South Africa” (October 2014) (as accessed at https://www.environment.gov.za/sites/default/files/reports/traditionalknowledge_rooibosandhoneybushspecies_report.pdf).

and wild food gathering, together with the conservation of heritage sites, including rock art. The Department of Arts and Culture (“DAC”) is currently in the process of establishing the National Khoi-San Heritage Route, which aims to link historical landmarks and heritage sites of the Khoi-San peoples across the country into one route, with the potential to contribute significantly to the socio-economic development of Khoi-San communities. However, since the baseline study for this project was released in 2012, no further progress appears to have been made in this regard.

It is recognised that tourism may play a significant role in promoting the economic development of indigenous communities, as well as in the promotion of knowledge and awareness around the Khoi-San, their history and culture. However tourism may lead to the further commodification of indigenous culture, where indigenous communities become seen as “consumer products”.¹¹⁴ This may lead to the further exploitation of the Khoi-San, and without appropriate levels of participation, consent or control exercised by the Khoi-San affected, may give rise to disrupted lifestyles; inadequate benefit sharing, and practices which may be offensive to indigenous persons.

Acknowledging that tourism can be a powerful tool for income generation, education, and empowerment of the Khoi-San, careful consideration and planning will be required to ensure indigenous peoples are intimately involved in ecotourism projects at the conceptualisation, design and implementation phases. Additionally, controls must be put in place to guarantee equitable benefit sharing to contribute to the economic development and empowerment of the Khoi-San overall, while also providing the necessary safeguards to ensure the privacy and dignity of the Khoi-San is protected.

6.5 Governance, consultation and participation

Indigenous peoples have the right to develop, maintain and use their own social, economic, cultural and political institutions¹¹⁵ and to maintain and develop their own indigenous decision-making institutions.¹¹⁶ These rights impose particular obligations on the state *inter alia* to promote the rights of indigenous peoples by respecting these special institutions;¹¹⁷ establish the means for the full development of indigenous peoples’ own institutions and initiatives;¹¹⁸ and to consult indigenous peoples through their representative institutions with regard to any legislative or administrative decision which could impact on them directly.¹¹⁹

One of the requirements of Article 18 of UNDRIPS is that indigenous peoples must be involved in the identification or election of representatives in the decision-making bodies themselves. The ILO stressed

¹¹⁴ United Nations “State of the World’s Indigenous Peoples” (2009), p 72.

¹¹⁵ Article 5 of UNDRIPS

¹¹⁶ Article 18 of UNDRIPS.

¹¹⁷ ILO Convention No. 169 Article 2(1)(b); 5(b)

¹¹⁸ *Ibid*, Article 6(1)(c), which also includes an obligation to provide the resources necessary for this purpose in appropriate cases.

¹¹⁹ *Ibid*, Article 6(1)(a).

that institutions which are not truly representative of the communities affected result in consultations that do not comply with the requirements as set out in ILO Convention No.169.¹²⁰

As explained earlier in this report, the right to participation and consultation has two dimensions. The first relates to the right to participate in local or internal affairs of indigenous peoples, while the latter refers to the participation in public affairs more broadly. States are therefore required to not only consult with indigenous persons on matters which directly affect them, but must establish means by which indigenous peoples can freely participate at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes.¹²¹

One of the major concerns which has been highlighted as a trend both in South Africa and globally, is the fact that policies and programmes which are designed to contribute to development and poverty alleviation are formulated without considering the specific needs and priorities of indigenous communities, and without seeking their input into the process. Indigenous peoples frequently have different concepts of wealth and poverty to other groups in society, and their priorities with regard to development and poverty alleviation are not necessarily in line with broader strategies identified by the state. The failure to meaningfully engage with indigenous communities, and to ensure adequate participation of, and consultation with vulnerable groups, results in policies and programmes which may be not be appropriate, culturally acceptable, or effective in addressing the concerns of different groups.

Legitimate, effective and truly representative institutions or governance structures are therefore vital in ensuring the meaningful participation of indigenous peoples in local and internal affairs, as well as in the broader public affairs of the state. However, as noted previously, the minority status and limited economic power hinders the ability of indigenous peoples to influence and to play an active role in both local and national affairs of the state, which requires the creation of special measures to ensure effective participation and that the voice of indigenous peoples can be heard.

6.5.1 Background to Traditional Leadership and Governance Structures in South Africa

Submissions allege that indigenous people had not been invited to participate in the Convention for a Democratic South Africa (“CODESA”), and were therefore not party to the drafting of the interim and final Constitution. It is alleged, this exclusion reflected the overall failure of the government and relevant stakeholders at the time to recognise the existence of indigenous peoples as a distinct and important group to contribute to the process. The result is the Constitution gives significant reference to and recognition of traditional leadership bodies of Bantu-speaking peoples, whilst almost no recognition is given to indigenous persons save for reference to indigenous languages in Section 6(2) and (5). Chapter 12 of the Constitution relates to traditional leaders, and recognises the institution, status and role of traditional authorities and customary law. This chapter states that national legislation may be promulgated to provide for the role of traditional leaders, customary law and the customs of communities

¹²⁰ International Labour Organization “Indigenous & Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No.169” (2009), p 61.

¹²¹ ILO Convention No. 169, Article 6(1)(b).

observing a system of customary law,¹²² further allows for the establishment of houses and councils of traditional leaders.

Traditional Khoi-San leadership structures were largely dismantled during apartheid and its policy of assimilation, but post-1994, the Khoi-San began to reorganise themselves and re-establish these traditional leadership structures. In 1999 the NKC was formed, with the main objectives to assist and support the research process entered into by the then Department of Provincial and Local Government into the status quo of Khoi-San peoples; to serve as a liaison between Government and the Khoi-San communities; and to make proposals regarding the future constitutional accommodation of Khoi-San communities. This body consisted of 21 representatives from the 5 main indigenous groups, namely the Griqua, Korana, Cape Khoi, Nama and San. Despite the intention of the NKC to function as a representative body of indigenous persons in South Africa, various submissions emphasised the lack of perceived credibility of this structure, in noting that it is not truly representative of all indigenous communities in South Africa and does not report back to communities on progress and developments. Additionally, the South African San Council (“SASC”) was established in 2002 as part of the Working Group of Indigenous Minorities in Southern Africa (“WIMSA”).

To supplement Chapter 12 of the Constitution, the Traditional Leadership and Governance Framework Act¹²³ (“TLGFA”) was enacted, and National and Provincial Houses of Traditional Leaders were formed to perform an advisory function to government and national and provincial levels. While calls were made for the accommodation of the Khoi-San peoples in the TLGFA, the decision was taken that the issues relating to leadership and governance amongst the Khoi-San would be dealt with under a separate process. Despite the development of a Draft White Paper on Khoi-San Communities, Leadership and Structures in 2009, the decision to deal with the Khoi-San separately was reversed and the revision of the existing TLGFA to incorporate Khoi-San structures was initiated through the drafting of a new Bill.

Following the hosting of a National Khoi and San Dialogue by the Department of Rural Development and Land Reform in April 2013 (which later became known as “Kimberly One”), it became apparent that communities were dissatisfied with the representation given by the NKC, and provincial conferences were held for the election of 5 representatives per province to form part of the National Khoi-San Reference Group (“Reference Group”).

The ACHPR has recognised that although the national Khoi and San councils and groups established may not be traditional indigenous peoples institutions, they are “*pragmatic responses to deal with social realities of the societies and times in which they exist*” and may be a good starting point for the consideration of the needs and priorities of indigenous peoples in policies and law.¹²⁴

¹²² Section 212.

¹²³ Act 41 of 2003.

¹²⁴ ILO and ACHPR “Overview Report of the International Labour Organization and African Commission on Human and Peoples’ Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries” (2009), p 50 and 59.

6.5.2 The current status of Khoi-San Traditional Leadership Structures in South Africa

The need for recognition of traditional leadership structures was continuously raised during the hearings, together with the contention that the State should recognise these structures without being prescriptive of their composition. According to one submission, despite having a thorough understanding of customary structures, laws and traditional affairs, the State is removing power from the Chiefs and their customary councils through the establishment of various indigenous organisations and reference groups.

In aiming to incorporate the Khoi-San leadership and governance structures into the same legislation as traditional authorities, the Traditional Affairs Bill was released for public comment in 2013, which was later replaced by the Leadership Bill. While at the time of the hearing of this matter the Bill had not yet been released for public comment, representatives of the Khoi-San community made numerous submissions relating to the Bill including the following:

- (i) The Bill only recognises 5 Khoi-San groups (namely the Cape Khoi; Griqua; Korana; Nama and San), and fails to recognise other groups including but not limited to the Cochoqua, Hessequa, Gainoqua; Gorochoqua; Goringhaicona; Goronaiqua; and Sonqua;
- (ii) The Bill retains the boundaries of the 1951 Bantu Authorities Act, which boundaries were artificially created during apartheid;
- (iii) Whereas the Bantu traditional leaders are allocated with land and boundaries over which they retain control and ownership, the Khoi-San leaders are not allocated specific boundaries and land restitution remains inadequate;
- (iv) The Bill places a more onerous condition on Khoi-San communities in that while the Bantu traditional structures automatically obtain authority over all persons residing within boundaries allocated to them, members of the Khoi-San communities must prove their membership on an annual basis, and must submit lists of community members, certified copies of every member's
- (v)
- (vi) ID book, address as well as signature to confirm voluntary association with the specific Khoi-San leader;
- (vii) The traditional Bantu structures have authority over the people residing in these boundaries infers that their authority and legitimacy is based on territory rather than on the people they purport to govern. This, according to the submissions, favours the interests of traditional leaders over the customary entitlements of the people, and therefore implies preference above the Khoi-San custom;
- (viii) The result of the discrepancies and the failure to allocate sufficient land to Khoi-San traditional authorities denies the Khoi-San citizens living within ancestral boundaries across the country the right to practice their culture of choice;
- (ix) The Bill recognises traditional Kings, Queens, Principal Traditional Leaders; Senior Traditional Leaders; Chiefs; Headmen and Headwomen for Bantu traditional authorities, while it only recognises Senior Khoi-San Leaders and Branch Heads, while no recognition is given to Principal Khoi-San Leaders; Chiefs; Headmen and Headwomen; and

- (x) The Bill reflects the governance frameworks of the apartheid government which was used to divide, control and exploit people (i.e., the adoption of “*rigid, colonially-constructed identities*” starts from a flawed position and “*freezes this position in time*”).

Overall, submissions contend that the Bill re-entrenches a divided citizenship and makes it difficult and inequitable for Khoi-San communities and leadership structures to be recognised, with undue burden being placed on Khoi-San individuals to prove their identity, whereas other African tribes are recognised in terms of language, surname or custom practiced. Further, dissatisfaction and concern was expressed over the fact that, at the time the hearing took place, no public consultative hearings had been held at the time of the hearing. Consultations conducted by the State with the National Khoi-San Council were rejected as some groups believe this body is not truly representative of all indigenous persons. The submissions called for public consultations to be held across all provinces, and for the State to ensure that the names of all senior Khoi-San leaders are recorded on a database to ensure that the leadership structures of all Khoi-San communities are able to actively participate in the consultative process.

With regard to the compilation of country reports in compliance with international obligations, the Commission called at the time of the hearing for a national dialogue to provide transparency and awareness of the content of the reports. In response, the DoJ&CD advised that the Department, under the leadership of the Minister, is reviewing the current process used by the inter-departmental committee on treaty obligations. The intention expressed is for the mechanism to be revised in line with the recommendation made by the United Nations Office for the High Commissioner for Human Rights (“OHCHR”) for the establishment of a national coordinating mechanism which incorporates national human rights institutions, government departments, and civil society organisations.

While welcoming the initiation of legislation around Khoi-San traditional leadership as a means to address a number of historical and contemporary community issues confronting the country’s constitutional democracy, the CGE has cautioned that traditional governance often raises challenges for women who may be denied the opportunity to be treated equally within traditional leadership and decision-making bodies. In this regard, gender inequalities within traditional communities (including Khoi-San communities) are therefore inevitable, and safeguards must be built into the system to address these inequalities. The CGE further noted that the Leadership Bill allows for the investigation of illegitimate or unfair appointments, extending some protection to female traditional leaders who are denied their succession rights.

Ultimately, while the Bill is described by indigenous peoples as being far from ideal, it is nevertheless a marked improvement from the previous situations and seems to be bringing hope for Khoi-San communities desiring constitutional accommodation.

6.5.3 Representation and participation in government and local affairs

Submissions from Khoi-San representatives stated that while the State reports annually to the United Nations on the implementation of the Declaration on the Rights of Indigenous Peoples, indigenous representatives and communities are not consulted or provided with access to the reports, and are not invited to participate at conferences and other engagements relating to the rights of indigenous persons.

An additional concern was raised over the definition of “indigenous persons” being applied by the South African government in compiling reports in line with obligations under the Declaration.

Noting the importance of the constitutional principles of transparency and accountability to the public for the protection and realisation of rights, the Commission urges the State to take steps to ensure that the public have access to formal reports submitted in compliance with their international obligations. This requires not only that the documents be made publically available, but that they are made available in a language which is understandable to the persons concerned.

The Commission notes the concerns raised relating to the lack of consultation with the Khoi-San in the formulation of the report on the implementation of UNDRIPS, which forms part of the broader challenges relating to representation and participation. Through the abovementioned structures, the government has attempted to provide the means for indigenous communities to actively and meaningfully participate in decisions that directly affect them, yet the effectiveness of the current and proposed institutions remains questionable. Despite communities having participated in the election of representatives in the NKC and Reference Group, a seemingly large proportion of indigenous persons have expressly rejected the credibility of these groups on the basis of inadequate representation and poor accountability and reporting mechanisms.

While some collaboration between different indigenous community representative bodies and clans was noted during the hearing, it became apparent that significant fractures exist within Khoi and San communities themselves. This community is comprised of multiple smaller groups, each with its own form of leadership, and the groups sometimes have differing views and priorities. While diversity within indigenous communities is not problematic, in some instances clear indications of tensions and adversity are identifiable, and frequently give rise to conflict and contradictory approaches. This presents significant practical challenges to the establishment of acceptable and representative bodies; undertaking meaningful consultations; and in obtaining cooperation and broad acceptance of programmes of action designed and implemented for the benefit of the Khoi-San.

It was submitted that despite their differences, there is a common goal and even when different roads are taken towards that goal *“we are united, because in our body and in our spirit we are Khoi”*. However, the continued lack of trust between different Khoi-San groups and the lack of clarity on appropriate representative forums to be consulted results in delays and frustrations in the finalisation of legislative and policy issues. Moreover, while the State continues to conduct consultations with the NKC and Reference Group in their current formation, the risk of decisions taken being rejected as illegitimate remains high. In terms of the submission made the right to actively participate is therefore not adequately filled for all Khoi and San groups in South Africa.

Participation and meaningful consultation is viewed as a tool to develop culturally appropriate policies and programmes; reconcile conflicting interests between different groups; while also promoting social cohesion and inclusion of minority groups more broadly. It is seen as an essential component of effective governance and the achievement of equality. In noting the ongoing issues relating to the conception of

and participation in Khoi-San representative bodies, the State must initiate broad consultations with different Khoi-San groups with a view of establishing bodies in which representatives are not only elected by Khoi-San people, but adequately reflect the diversity of the Khoi-San peoples. In this light, Khoi-San groups are encouraged to cooperate with one another in order to ensure that their needs and priorities are able to be effectively addressed in a timely manner, and that the progressive realisation of the rights of indigenous peoples can be achieved.

6.6 Education

Education is a basic human right and is fundamentally important in addressing systemic forms of discrimination and marginalisation; for the preservation and promotion of cultural and linguistic diversity for indigenous peoples; as well as being a tool to escape poverty. The right to education encompassed under the international legal framework incorporates multiple dimensions, including:

- Education which is culturally appropriate and sensitive to the needs of a multicultural society;
- Education on indigenous culture, religion and language; and
- Equitable access to education, which often requires special measures to be implemented.

In recognising the multi-dimensional nature of the right to education in the context of indigenous peoples, this portion of the report will be divided into three sub-sections, examining the language of tuition and methods of teaching and learning, curriculum and equitable access to education.

6.6.1 *Language of tuition and methods of teaching and learning*

UNDRIPS includes the right of indigenous children to have an education in their own language, in a manner appropriate to their cultural methods of teaching and learning,¹²⁵ while Section 29(2) of the Constitution states that everyone has the right to an education in an official language/s of their choice in public institutions, where this is reasonably practicable. In order to ensure effective access to, and implementation of this right, this section goes on to require the State to consider all educational alternatives, taking into account equality; practicability and the need to redress the results of past racially discriminatory laws and practices.

According to some submissions received at the hearing, the influx of other racial groups into traditionally “Coloured schools” brings tension by changing the demographics of schools, the languages of tuition, and methods of teaching and learning. Studies have shown that when a child is not fully competent in the language of instruction, his or her performance tends to be lower, which contributes to higher drop out levels. In addition to this, children often suffer prejudice from teachers and other learners. However, education also makes an important contribution towards social integration of people from diverse backgrounds and cultures, in contrast to the historical policy of separate development under the apartheid government. While the right of children to be taught in a language of their choice must be considered, this must be weighed up against practical considerations, including the limited resources

¹²⁵ Article 15(1) of UNDRIPS.

available to the government to provide an education to every child. Should it not be possible to provide for an education in a language of choice, the State should take steps to engage with communities with a view of identifying alternative options. The State must further ensure that special measures are subsequently taken to enable all children to become proficient in the language of tuition to provide for equitable education opportunities.

Bilingual or multilingual education policies which aim to protect and maintain the use of indigenous languages, particularly minority languages, must be promoted, but can only be adequately implemented through appropriate capacity building of teachers. This provides not only an opportunity for the State to fulfil its obligation in protecting and promoting indigenous language and cultural diversity, but the employment and capacity development of local persons proficient in indigenous languages also creates employment opportunities, and may subsequently contribute to development and poverty alleviation amongst local communities.

6.6.2 Curriculum

The Convention on the Rights of the Child states that indigenous children have the right to enjoy specific education on their culture, religion and language in community with other members of the indigenous group.¹²⁶ Moreover Article 28 of ILO Convention 169 states that indigenous children have the right to be taught how to read and write in their own language, in addition to being accorded the opportunity to attain fluency in the national or other official languages.

In general terms, formal education curricula is not designed to mainstream needs. The curricula does not take into account indigenous or traditional lifestyles, and therefore does not address the specific needs, ways of life or cultures of indigenous or traditional peoples. While this enables indigenous youth to obtain knowledge and skills to compete on a global level, they are not taught skills relevant for the survival and development of indigenous economies, which has the effect of removing them from indigenous cultures – ultimately contributing to social fragmentation; brain drain, poor performance and a lack of economic development.¹²⁷

At a global level, greater calls have been made for more culturally-adapted and more practical and vocational-oriented school curricula, which calls were reiterated by the Khoi-San participating in the hearing. In this regard, concerns were raised that the formal education system is not appropriate for all youth, some of which struggle with conventional forms of learning. Their poor performance at schools severely infringes on the dignity and feelings of self-worth of indigenous youth. This amplifies the existing feelings of exclusion, marginalisation and lack of identity. It was submitted that this drives many young people to a life of crime as there are insufficient alternative education programmes, compounded by a

¹²⁶ Convention on the Rights of the Child, Article 28 and 30.

¹²⁷ United Nations “State of the World’s Indigenous Peoples” (2009), p 143. As amplified in the State of the World’s Indigenous Peoples Report, when indigenous children are introduced to the national discourse at the expense of their cultural discourse, “*they are in danger of losing part of their identity, their connection with their parents and predecessors and, ultimately, of being caught in a no man’s land whereby they lose an important aspect of their identity while not fully becoming a part of the dominant national society.*”

lack of awareness and funding for existing technical or vocational training schools. Not only would an increased number of alternative education programmes aimed at practical skills development aligned to the specific needs and priorities of indigenous communities contribute to the ability of the Khoi-San to successfully manage and control their own local affairs and development, it would provide youth with a sense of purpose and belonging to a community, going a long way to restoring the sense of dignity and identity which has been continuously degraded throughout history.

The overarching goal of education in the context of the Khoi-San is therefore to promote and strengthen an awareness of indigenous cultures and languages, while strengthening communities and collective identities. Simultaneously, education is aimed at equipping indigenous youth with the necessary knowledge and skills to manage indigenous local affairs and economies in line with the right to self-determination, and enabling them to work and compete with other peoples at a global level. This being said, it is acknowledged that the development and implementation of an education system designed to be applicable to a multicultural society is a challenging task, which, according to the United Nations, requires us to “*challenge contemporary conceptions and understandings of both state education systems and indigenous communities.*”¹²⁸

While some Khoi-San in South Africa called for greater incorporation of indigenous cultures and teachings into education programmes, in their submissions, others have reflected a desire for the establishment of separate and alternative education centres for members of indigenous communities. However, despite different approaches, all representatives of the Khoi-San agreed on the need to do more to promote indigenous languages and culture amongst the youth in particular.

Both the United Nations and African Commission noted that domestic laws and practices which provide for the right to be educated in a minority language or to be taught a curriculum tailored to the specific demands of one’s culture is extremely rare, South Africa was identified as an example of best practice.¹²⁹ A number of local schools in the Northern Cape Province through the Schmidtsdrift San Combined School Project introduced an alternative education programme for indigenous children who are taught indigenous Khoi-San languages as well as isiXhosa in class. However, there were only a few teachers with knowledge of indigenous languages who worked on a voluntary basis and the project received little funding or support. A decision taken by the Department of Education in 2010 saw the discontinuation of this initiative, and although PANSALB engaged with the Department and was successful in reversing the decision, this success was short lived and the decision to discontinue these classes was reactivated in 2014.

¹²⁸ *Ibid*, p 144.

¹²⁹ ILO and ACHPR “Overview Report of the International Labour Organization and African Commission on Human and Peoples’ Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries” (2009), p 82; Commission on Human Rights “sixty-first session: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen”, E/CN.4/2005/88 (6 January 2005).

The international legal framework makes it clear that indigenous children have a right to be taught their own culture and language, and the state inevitably has a correlating obligation to promote the achievement of this right. Despite recognition of the above-mentioned initiative as a best practice and its imperative nature in sharing indigenous knowledge amongst youth, it is disappointing that the project received neither sufficient funding nor support, which led to its discontinuation, apparently without consultation with indigenous communities on alternative measures to be implemented in its place.

However, the responsibility to teach and maintain the use of indigenous languages amongst youth cannot rest with the State alone through formal education programmes. Indigenous peoples have a similar obligation to protect and maintain their language and culture within their own communities. The severely endangered nature of these languages means that there are few people left who are able to speak them, and resources need to be shared amongst the communities. Indigenous communities are able to establish community-based initiatives outside of the formal education system, which are designed to teach and promote indigenous language and culture amongst the youth and other members of the communities. This would be in line with their right to self-determination, which includes the right to establish and control their own education systems, while empowering indigenous peoples to take control of their own affairs.

This community obligation does not absolve the State from its responsibility, and regardless of whether education programmes are incorporated into the formal education system or run externally, the State must ensure that indigenous communities have access to sufficient resources and support through the provision of, *inter alia*, adequate facilities; capacity building for indigenous teachers and curricula development; the production of learning materials; and financial support where necessary. The Commission therefore encourages the State to initiate consultations with the Khoi-San throughout the country with a view of developing appropriate mechanisms for education on indigenous matters, but stresses the importance of indigenous persons in exercising their right to self-determination in establishing programmes amongst themselves designed to achieve this purpose.

Another important aspect of the right to education for indigenous persons, is the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.¹³⁰ Throughout the hearing, indigenous persons lamented the fact that they are not adequately reflected in the curricula, in either the basic and tertiary level education systems. These inaccurate reflections of not only the historical roles and contributions made by the Khoi-San, but of their current existence, cultures and challenges contributes to the perpetuation of prejudice and discrimination against the Khoi-San.

States have a responsibility to take effective measures to combat prejudice and eliminate discrimination, and to promote tolerance, understanding and good relations among the Khoi-San and all other segments of society.¹³¹ Although this will be discussed in more detail under the equality portion of this report,

¹³⁰ Article 16 of UNDRIPS

¹³¹ Article 15(2) of UNDRIPS

education is a key tool for the promotion of tolerance, understanding and respect and therefore for the elimination of discrimination. The revision of formal educational curricula is therefore required, which must be done with the participation and cooperation of the Khoi-San to incorporate special needs; histories and aspirations,¹³² and in this way, contribute to the restoration of the dignity of the Khoi-San in South Africa. Formal school curriculum should therefore aim to provide all students with information on diverse cultures, and in this way, promote the constitutional ideal of a multicultural and diverse society based on tolerance and respect.

6.6.3 Equitable access

Significant barriers of access to education on an equal footing persist for indigenous children around the world. Firstly, prevailing stereotypes and discrimination often give rise to a hostile or uncomfortable school environment, which is exacerbated by the lack of understanding by school authorities of traditional cultures and beliefs. These include aspects such as traditional dress and/or hairstyles, as well as cultural practices and religious rites which may require a child's absence during certain periods, and are not allowed because of a lack of understanding and tolerance of cultural diversity.

Underdeveloped school infrastructure; inadequate resources; too few qualified teachers and inappropriate learning materials and curricula as well as high levels of poverty continue to act as a serious barrier to equal education throughout the country, including for indigenous communities of which the vast majority are poor. Schools may be located at far distances, and the lack of transportation means that children are required to walk which not only places significant physical strain but increases the risk of the learners' exposure to environmental and other dangers. The physical exertion and frequent lack of adequate nutrition contributes to the inability to concentrate and perform, and results in high levels of drop-outs.¹³³

Education cannot, therefore, be separated from socio-economic, cultural and political realities. The promotion of substantive equality requires special measures to be taken to ensure that marginalised and vulnerable groups, including indigenous peoples, are able to access their rights in an equal manner to other groups in society. This is specifically recognised in General Comment No. 11 of the Convention on the Rights of the Child. This Convention obliges states to take special measures, which include the provision of targeted financial, material and human resources to implement programmes specifically designed to improve access to education for indigenous children,¹³⁴ which education should aim to promote their language, cultures, and specific ways of life.

In recognising the fact that education is a fundamental tool for community upliftment and poverty alleviation, education at a basic level for youth as well as further education and skills development initiatives for both indigenous youth and adults are important mechanisms for sustainable development.

¹³² ILO Convention No. 169, article 27.

¹³³ https://www.unicef.org/progressforchildren/2006n4/files/PFC4_EN_8X11.pdf

¹³⁴ Committee on the Rights of the Child, "General comment No.11 (2009): Indigenous children and their rights under the Convention".

In this way, education and capacity building may empower indigenous communities to take control of their land, heritage, and resources in fulfilment of the right to self-determination.

6.7 Equality

The principles of equality and non-discrimination are central to the achievement of all other rights, and form part of the foundational principles of the Constitution, while UNDRIPS affirms that *“indigenous peoples are equal to all other people while recognising the right of all peoples to be different, to consider themselves and be respected as such.”*¹³⁵

Discrimination can take on different forms and including both direct and indirect forms of discrimination. Direct discrimination relates to an explicit exclusion or disadvantage levelled against an individual or group, based on factors such as race, gender or ethnicity. Indirect discrimination refers to an exclusion or disadvantage that is often not intended, may be hidden or subtle and arises with the actual implementation of a law, policy or practice. Discrimination may also take place on a vertical (i.e. State) or horizontal (i.e. Individual) basis.

6.7.1 Gender equality

Indigenous women suffer compounded discrimination, for being women, poor and indigenous, which often causes them to experience the effects of discrimination and marginalisation disproportionately. According to the CGE, although no official sex disaggregated data exists on indigenous persons, gender inequality remains a cause for concern. Despite the general lack of research on indigenous groups, particularly of women and children, it was noted that there is limited participation of women in planning and development initiatives, which means that their needs or priorities are not reflected in policies or programmes. It is positive to note that it appears that many Khoi-San communities have begun to appreciate the unique and important role of women in these processes, and have made efforts to ensure that women are able to participate in development initiatives and negotiations with government.

The gender aspect of access to land is also an important consideration. Studies have shown that when women have access to land which is dependent on their relationship to men (including husbands, fathers or sons), it increases their vulnerability to abuse or eviction. Land ownership, on the other hand, strengthens the position of women in society, and has even found to reduce the likelihood of being subjected to domestic violence while increasing their ability to contribute to economic productivity in the long term.

Although not limited to indigenous peoples, it is recognised that land access and ownership has historically been controlled by males through entrenched patriarchal social, cultural, religious or traditional systems, thereby excluding women. The exclusion of women was amplified during the apartheid era policies and laws. According to the CGE, a study undertaken on the land reform process between 2000 and 2010 revealed that women constituted a small portion of land reform beneficiaries; that the land reform process was generally not gender-sensitive; and that Communal Property Associations predominantly

¹³⁵ Preamble.

consists of males. In this regard, the CGE indicated that the “One Woman One Hectare of Land” campaign was introduced, which campaign urges the State to allocate land to women with the aim of addressing the high levels of poverty amongst women, particularly in rural areas.

In addition to this, gender-based violence is a serious scourge that the country is faced with, particularly for poor ethnic groups, including indigenous women.

Education, literacy, employment and financial standing generally continue to be more accessible to men, increasing the vulnerability of women in South Africa broadly. Access to healthcare, including reproductive health may be more limited to women in rural or distant areas.

The UN Sustainable Development Goals provides a positive obligation for gender equality and the empowerment of women and girls, which is particularly important in redressing historic injustice and in promoting equality and equal opportunities for women, especially those from traditional backgrounds or indigenous groups. Therefore, in developing and implementing plans for development and poverty reduction, processes must ensure that women and other vulnerable groups are adequately represented to ensure that their concerns and needs are appropriately addressed.

6.7.2 Negative stigmatisation of indigenous peoples

The most pervasive forms of discrimination are the perpetuation of negative stereotypes, prejudices and exclusion amongst the broader society. Such attitudes perceive indigenous peoples as being undeveloped or uncivilised; ignore or undervalue the distinct identities, cultures and ways of life of indigenous peoples; and fail to understand the reason for the need to specifically protect the rights of indigenous peoples.¹³⁶ The Special Rapporteur, Victoria Tauli-Corpuz, explains that this form of discrimination originates from the “*perceived superiority of the colonial population and its descendants*” and the subsequent laws and policies which prohibited the practicing of traditional cultures and languages which promoted the assimilation of indigenous peoples into other more dominant groups. However, despite the progress which has been made, discriminatory attitudes persist and hinder the ability of indigenous peoples to thrive as distinct communities.¹³⁷

The dehumanisation and discrimination against indigenous persons in South Africa still occurs through an engrained social stigma associated with belonging to the Khoi-San identity. “Gam”, “hotnot”, “boesman”, “amalawu”, “bushie”, “bergies” and other derogatory names are frequently used as a form of discrimination. The result is that members of the Khoi-San community are socially isolated and subordinated, and many have chosen to abandon their heritage preferring to be classified as “Coloured” to escape the harmful stigma attached to belonging to the Khoi-San community.

¹³⁶ Human Rights Council “Twenty-seventh session: Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz” A/HRC/27/52, (11 August 2014); para 34.

¹³⁷ *Ibid*, para 35 – 36.

Allegations documented through the hearing were that caregivers at hospitals and clinics are racist and discriminatory towards Khoi-San persons, and one submission spoke of rape as a tool of discrimination against Khoi-San women by other racial groups. Adding to this, the lack of disaggregated data for indigenous peoples often gives rise to popular misperceptions that indigenous peoples face social issues such as high levels of gender-based violence; alcoholism and drug-abuse, which contributes to the negative stigma.

Article 15(2) of UNDRIPS sets out the obligation of states to *“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.”*¹³⁸

The late Katarina Tomasevski, United Nations Special Rapporteur (1998-2004) on the right to education, stated that education can be a means to retain as well as to eliminate inequality, and emphasises how education can contribute towards the creation of new values and attitudes. In this regard, she advocates for the integration of human rights into learning and teaching to address racial prejudice and intolerance and foster change in society.¹³⁹ Tauli-Corpuz noted that, while shifting negative perceptions and mind-sets is a challenging and complex task, measures such as increased participation of indigenous peoples in decision-making; widespread education and awareness-raising programmes; and a demonstrated commitment on the part of the State towards the promotion and fulfilment of the rights of indigenous peoples can go a long way in achieving this objective.¹⁴⁰

6.7.3 Special Measures

The achievement of substantive equality at times requires differential treatment or the implementation of special measures. In this regard, the Committee for the Elimination of Racial Discrimination (“CERD”) explained that:

*“...to treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect...”*¹⁴¹

In line with this recognition, international law specifically provides for the development and implementation of special measures to ensure continuing improvement of the situation of indigenous peoples.¹⁴²

Indigenous peoples remain some of the poorest and most vulnerable groups in society today. Given the historical and pervasive discrimination, marginalisation and rights violations faced by indigenous peoples,

¹³⁸ http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

¹³⁹ *Ibid* at p 39 – 49.

¹⁴⁰ <http://unsr.vtaulicorpuz.org/site/>

¹⁴¹ CERD “General recommendation No. 32 (2009): On the meaning and scope of special measures in the International Convention on the Elimination on All Forms of Racial Discrimination.”

¹⁴² UNDRIPS Article 21(2) and ILO Convention No.169 Article 4 and 20.

the implementation of special measures is required to redress both the past injustices and the continued disproportionate impact felt by these communities. Some special measures which have been identified as examples of best practice include targeted programming; special grants for education; consultative mechanisms; and reserved seats in decision-making bodies of the state.¹⁴³

South Africa has implemented a number of laws and policies aimed at promoting the achievement of equality and preventing unfair discrimination, as well as affirmative action measures aimed at redressing past injustices and promoting the achievement of substantive equality for previously disadvantaged groups. However, these affirmative action measures are targeted towards previously disadvantaged groups, which have been identified in South Africa as Black people, women and persons with disabilities. Apart from indigenous peoples who falls within these broader categories, these measures do not extend to indigenous peoples as specifically identifiable groups.

The incorrect assertion of the non-applicability of affirmative action measures to the Khoi-San in South Africa, it was submitted, perpetuates the discrimination faced by these peoples. With regard to further education and training, representatives stated that Khoi-San students continue to be disadvantaged, particularly in relation to funding. The current funding allocation criteria applies these incorrect assertions of affirmative action measures, where as a result Khoi-San students find it difficult to obtain loans and bursaries. The historical discrimination, together with the fact that a large number of Khoi-San families are poor, results in ongoing discrimination, thus amplifying existing disadvantages of such communities.

Submissions further raised contentions that the lack of training and skills development initiatives for indigenous persons in particular prevents them from taking advantage of economic opportunities in South Africa, confining them to poverty and under-development.

A country report produced by Konrad-Adenauer-Stiftung e.V in 2013 raised issues relating to the impact of the failure to recognise indigenous communities as a distinct group in employment and recruitment opportunities, particularly under the affirmative action framework. The paper suggests that the Khoi-San, as a political minority in South Africa, may be seriously marginalised from gaining access to employment opportunities due to their lack of recognition under the Constitution and due to their classification as “Coloured”. According to the paper, the UN Special Rapporteur *“affirms this concern that this categorization might be misused to victimize the Khoi-San in the emerging occupational structure of the democratic South Africa.”*¹⁴⁴

Submissions highlighted that Employment Equity targets are often applied and calculated on the basis of national racial demographics, rather than taking into account the provincial or local demographics of a particular area. Recent constitutional debates over this was raised as a contentious issue during the

¹⁴³ United Nations Development Group Guidelines on Indigenous Peoples’ Issues (February 2008), p 11.

¹⁴⁴ Andrew Le Fleur and Lesle Jansen, The Khoisan in Contemporary South Africa: Challenges of Recognition as an Indigenous People, KONRAD-ADENAUER-STIFTUNG (Aug. 26, 2013), <http://www.kas.de/suedafrika/en/publications/35255/>

hearing, where it was submitted that the promotion of managerial staff at local schools aligned to the national population demographics causes tension and emotional eruptions occur, resulting in allegations of racism.

The fact that indigenous peoples are marginalised and fragmented groups means they are often not represented in the decision-making bodies of the state, and lack the visibility and political leverage to ensure their voice is heard. This gives rise to a situation where the special needs and views of indigenous peoples are not taken into account, and may lead to further discrimination.

The failure of states to effectively promote and protect the rights of indigenous peoples may also give rise to discrimination. This includes the failure to take reasonable steps to provide for access to land, territories and natural resources (or alternatively to provide for appropriate restitution or compensation for dispossession); the failure to officially recognise the existence of indigenous peoples as distinct groups in society; the lack of mechanisms aimed at ensuring the participation of indigenous peoples in decision-making bodies; as well as the failure to accurately reflect the history, role and culture of indigenous communities in historical documents and formal school curriculum, which can contribute to the continuation of negative stereotypes.

Before special measures can be appropriately designed and implemented, an in-depth understanding of the particular issues facing indigenous communities is needed. In acknowledging that many individuals face multiple forms of discrimination simultaneously (such as indigenous persons who are also women), the development of special measures and programmes designed to promote the development of indigenous communities must take cognisance of the impact of simultaneous inter-sectoral discrimination and subordination on different groups. The design and implementation of special measures therefore further requires the state to consider the specific challenges and needs of different groups within indigenous communities, including women, children, the elderly and persons with disabilities. However, without disaggregated data of indigenous peoples specifically, it is difficult to measure patterns of discrimination and marginalisation, which makes the identification of the issues and appropriate mechanisms for redress difficult. This fact notwithstanding, the state must take steps to develop special measures in consultation with indigenous peoples.

6.8 Socio-economic issues

Globally, indigenous peoples are over-represented among the poor, and despite the absence of disaggregated data, it can be assumed that statistically the Khoi and San peoples constitute some of the poorest sectors in South African society. Although they are a minority and constitute a small portion of the poverty-ridden population in the country, their vulnerability is exacerbated by ongoing stigmatisation; lack of recognition and marginalisation, as well as the decline of their distinct cultures, languages and ways of life.

It is well-established that the link between the multiple socio-economic challenges faced by indigenous peoples is directly attributable to the past discriminatory practices and dispossession of land, on which

they are reliant for economic production and survival. The vast majority of Khoi-San communities have been unable to retain and practice their culture and traditional occupations, and have been forced to resort to menial and seasonal labour for low wages.¹⁴⁵

In addition to this, the prevailing poverty of indigenous peoples taken together with the continued lack of access to land and natural resources required to conduct traditional occupations has given rise to increased levels of urban migration, which in turn, may contribute to a loss of culture.

Social issues such as alcoholism and drugs may therefore be a direct result of the culmination of a history of discrimination, forced assimilation, dispossession and the denial of recognition as a distinct group, resulting in a lack of confidence, self-trust and ultimately, a loss of identity. The lack of financial independence and confinement to poverty, according to submissions, create a breeding ground for low self-esteem and an inferiority complex, which are the primary underpinning causes of the negative social issues mentioned and involvement in crime and gangsterism. In quoting one of the representatives at the hearing:

“On a daily basis our people become more demoralised by their circumstances. We are a nation living under siege of crime and poverty...we are proud people and yet we have become the centre of ridicule.”

Poverty, therefore, occurs as a result of both disempowerment and exclusion, and is not limited to a lack of material goods and opportunities. As explained by OHCHR, the lack of non-physical goods such as health; physical integrity; freedom from fear and violence; social belonging; cultural identity; organisational capacity; the ability to exert political influence; and the ability to live a life with respect and dignity also constitute important elements of poverty. Human rights violations, therefore, are both a cause and a consequence of poverty, emphasising the importance of sustainable development for the full realisation of rights and freedoms.¹⁴⁶

The social impact of poverty is complex, and although these challenges are not confined to indigenous persons, the high proportion of indigenous communities living in poverty increases their vulnerability and marginalisation as a group. Again, while specific data on Khoi-San peoples in South Africa does not exist, the global trend has indicated that on average, indigenous persons tend to have less access to social services, including water and sanitation; education and healthcare.

Inadequate access to water and sanitation can have devastating effects, particularly from a gendered-perspective where individuals, mainly women and children, are required to travel long distances to collect

¹⁴⁵ Many people (including Khoi-San peoples) employed on farms are still subjected to the so-called “dop-system”, where part of the wages are paid in wine.

¹⁴⁶ OHCHR “Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation” (2006), p 9.

water, placing women and children at significant risk of violence and rape. Moreover, poor communities, including indigenous persons, often have limited access to proper nutrition and adequate healthcare.

Although in principle, Khoi-San peoples have access to social services on an equal basis to other sectors of society, it is re-emphasised that the achievement of equality is not based on equal treatment for all persons regardless of their specific needs and situations. Measures aimed at addressing social and economic challenges of indigenous peoples must therefore be differentiated from those targeting other groups. In line with international guidelines and best practice, the specific history of indigenous peoples as well as factors such as languages, cultures, traditional ways of life and traditional forms of medicine are fundamental considerations in the development of policies which will be effective in addressing the ongoing challenges, and the measures should also specifically seek to cater for urban indigenous populations.

The advancement of socio-economic rights and development for indigenous peoples are directly reliant on the achievement of their rights to recognition; access to land and natural resources; self-determination and meaningful participation, amongst others.

6.9 Access to Justice

Access to justice is broadly understood in terms of activities through which rights are secured, and is therefore recognised as being an essential prerequisite for the protection and promotion of all other human rights.¹⁴⁷ While the exact content and meaning of access to justice is still debated, the United Nations Development Programme (“UNDP”) defines access to justice as *“the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.”*¹⁴⁸ In terms of this understanding, it includes the guarantee of equal protection of the law and the right to access to courts, and also incorporates aspects of transitional justice.¹⁴⁹

6.9.1 Law enforcement and access to courts

The Stavenhagen Report noted various allegations of discrimination, harassment and abuse of Khoi-San peoples levelled against law enforcement officials. It acknowledged that although they have equal access to the justice system, there was a sense that prosecutors, judges, public defenders and other personnel of the judiciary were not culturally sensitive to the needs and concerns of indigenous peoples. This report went on to recommend that special training activities for personnel in the judiciary be conducted.

¹⁴⁷ Opening statement by Flavia Pansieri, Deputy High Commissioner for Human Rights, at the Annual full-day meeting on the Rights of the Child, 13 March 2014 (as accessed at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14367&LangID=E>).

¹⁴⁸ UNDP “Strengthening Judicial Integrity through Enhanced Access to Justice” (2013), p 5.

¹⁴⁹ As noted by Balint, Evans and McMillan transitional justice is a complex form of political and legal intervention used by state governments to redress state-sanctioned and large-scale harms. Teitel provides that the typical aims of this model include maintaining peace during times of political flux, installing rule-of law, creating new historical narratives, and reconciliation.

Submissions received by the Commission spoke to the continued cultural ignorance of personnel in the judiciary.

The DoJ&CD reflected need for continuous training of the judiciary, and identified two key areas, being the nature and implementation of international instruments in the local context, and cultural sensitisation. The DoJ&CD runs a social and economic justice for all programme which aims to promote knowledge and awareness on the constitution and the values of equality, human dignity and fundamental human rights to all persons in South Africa.

In addition to this, the Commission's 2004 report noted a significant level of mistrust between members of indigenous communities and the SAPS and the need for a fundamental change in attitude of SAPS officials. The DoJ&CD was also requested to consider the establishment of a special circuit court in the Andriesvale-Askham area, as the long distances to the closest court hindered access to justice for local communities. While the current hearing did not examine these issues in detail, continuing barriers of access to justice were noted, although some progress has been made in this area.

The DoJ&CD is prioritising access to justice and legal services for people in poor and rural areas, which includes building new courts in rural areas; the functioning of mobile and branch courts; and it also makes use of a variety of alternative dispute resolution mechanisms.

A national legal aid scheme is operated throughout the country, but despite this positive mechanism, challenges relating to access as a result of insufficient funding and capacity constraints of these schemes have been widely documented.

In addition to this, the DoJ&CD has considered a variety of options for enhancing access to justice through the conduct of court services in indigenous languages. In 2010, a pilot project was initiated in 23 courts across the country, but was discontinued shortly after due to the absence of policies dealing with the use of languages in court. Despite this, the DoJ&CD advised that it is considering the development of legislation and policy to regulate this matter.

Overall, the Commission notes that substantial barriers of access to justice persist for many people, particularly the poor who cannot access legal aid; those in rural or remote areas of the country; those who experience language barriers in the court system; and through a continued lack of trust with law enforcement agencies. While these are still areas of concern which need to be addressed, the aspect of access to justice which formed a critical theme running throughout the hearing process was that of the dire need for reconciliation and redress for past wrongs.

6.9.2 Transitional Justice

In acknowledging that many of the persisting challenges faced by indigenous peoples are a direct result of past discriminatory practices, the Expert Mechanism on the Rights of Indigenous Peoples has explained that an important dimension of access to justice relates to overcoming historical injustices.¹⁵⁰ Although

¹⁵⁰ Human Rights Council "Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples: Study by the Expert Mechanism on the Rights of Indigenous Peoples"; A/HRC/EMRIP/2013/2, (29 April 2013), p 3.

progress has been made in the recognition and promotion of the rights of indigenous peoples globally, few steps have been taken towards reconciliation and redress for past rights violations.

Transitional justice is generally used as a tool to facilitate reconciliation in societies transforming to democracy and is seen as a critical tool for strengthening the rule of law. According to the United Nations' guidance note on transitional justice,¹⁵¹ it is "... *the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.*" The broad objectives of transitional justice therefore incorporate multiple dimensions and ultimately seeks to address the root cause for ongoing rights violations.

Transitional justice mechanisms vary depending on the particular circumstance, but include the acknowledgment of historical wrongdoing through the issuing of a public apology; the development of memorials; and the provision of reparations, amongst others.

Indigenous peoples are particularly vulnerable in modern society, being disproportionately impacted by structural forms of discrimination through poverty, marginalisation, negative stigmatisation, a lack of political power, resulting in numerous ongoing rights violations. In this context, the public nature of these mechanisms is important in providing a recognition for indigenous peoples; educating the broader public to their historical and on-going plight; and expressing a commitment towards redressing past wrongs and preventing violations from being repeated. However, public expressions of this nature are alone insufficient to achieve true redress, reconciliation and equality, they require effective measures to be put into place which are practically capable of achieving this purpose. Such measures include the legal recognition of the rights of indigenous peoples; land restitution; and the development and implementation of policies designed to address the specific needs and priorities of indigenous peoples, alongside the broader sections of society.

From 1990, South Africa entered into multi-party negotiations on the future of the country, which culminated in the hosting of the CODESA, a process which dealt with a number of issues including the drafting of the new constitution; establishment of an interim government; the electoral system; the role of the public broadcaster; the integration of armed forces into the South African National Defence Force ("SANDF"); and the granting of amnesty, amongst other things.

The Truth and Reconciliation Commission ("TRC") was established as a mechanism to deal with the injustices of the past and advance reconciliation, the scope of which was limited to acts committed between the periods of 1 March 1960 to 10 May 1994. Although rights violations against the Khoi-San during this period those violations were incorporated within the broader scope of rights violations, and the TRC did not specifically deal with the unique experience of indigenous peoples and did not extend to the pre-apartheid era.

¹⁵¹ Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (March 2010) (as accessed at https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf)

Despite the wide-ranging participants in the CODESA process, the Khoi-San highlighted that they were not recognised as an important and distinct group and were therefore not invited to participate, which has resulting in their ongoing discrimination and social exclusion. Khoi-San representatives also expressed strong feeling that they were never really “decolonised” after having been oppressed and forcefully assimilated into other cultures.

While the TRC aimed to create a sense of past for South Africans and to start the process of reconciliation, by not dealing with the historic injustices committed against indigenous peoples in particular, it was unsuccessful in bringing the Khoi-San peoples “on par” with the rest of South Africa. Despite the attainment of a democracy founded on freedom, equality, and dignity, the indigenous Khoi-San peoples of South Africa explained that “*the new dispensation has not given us hope*”, and they continue to feel outside of the Bill of Rights and the Constitution, despite being 24 years into democracy.

During the transition to democracy, the South African Cape Corp, which was largely comprised of Coloured and Khoi-San individuals, was never integrated into the SANDF, and the benefits which accrued to other defence force personnel were therefore inaccessible to members of the Cape Corp. Following consistent allegations of unfair discrimination, the matter was referred to the North Gauteng High Court, Pretoria, which ruled against an application to compel Defence Minister Lindiwe Sisulu to negotiate for the integration of around 14,000 former soldiers into the SANDF. The Commission notes the strong feelings of anguish and exclusion felt by Khoi-San peoples in particular with regard to the lack of integration, and its contribution to the overall sense of exclusion from broader society and constitutional protection guaranteed for all.

Despite a number of public statements made by State officials over the past two decades acknowledging the existence of and historical injustices suffered by the Khoi-San, the history and peculiar experiences of these peoples has not been extensively documented or examined in official records or educational materials.

Transitional justice mechanisms serve not only to publically seek or acknowledge the truth, but go further in seeking to restore the dignity of people who have suffered systemic violations and re-establish social structures. Overall, while the transitional justice model applied in South African is considered to have been successful in many respects, it has also faced criticism. The submissions received during the hearing revealed that the transition to democracy failed to adequately incorporate all groups, leaving fault lines in the country’s social fabric more than 20 years into democracy. As explained by the United Nations Human Rights Council, injustices that are not addressed and remedied constitute “*a continuing affront to the dignity of the group*”.¹⁵²

While the Commission’s 2004 hearing may have contributed to improved access to justice for indigenous peoples by encouraging a recognition of indigenous peoples in South Africa; allowing a platform for public expression and enhancing an understanding of the rights and persisting challenges, more is required by the State in order to ensure that the vision of the Constitution may be realised.

¹⁵² Human Rights Council “Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples: Study by the Expert Mechanism on the Rights of Indigenous Peoples”; A/HRC/EMRIP/2013/2, (29 April 2013), p 3.

For peoples who have been consistently denied the right to their existence and identity, the importance and impact of a public apology on the achievement of reconciliation and restoration of human dignity cannot be overemphasised. This must be combined with practical measures designed to enable indigenous peoples to exercise their rights, and actively promotes and protects access to and the achievement of rights.

While the Commission is not prescriptive on the form these mechanisms should take, it stresses the dire need for measures which are capable of rebuilding trust between the Khoi-San peoples; other social groups; and the State, and emphasises the fact that the true healing of indigenous peoples in South Africa cannot take place in an environment whereby their rights continue to be eroded.

6.10 Human Rights-Based Programming

A human rights-based approach to programming is based on the framework of rights norms and standards and considers the content of rights, and how they apply to the specific needs and challenges of different groups. In this regard, policy design and implementation must incorporate cultural diversity and take account of the specific social, political, cultural and economic context in which it is applied.

The obligations to respect, protect and fulfil fundamental human rights are freedoms do not fall within a separate sector from government strategies and policies, but should underpin the development and implementation of all policies and programmes in a holistic manner. Human rights, therefore, are intrinsically linked to considerations of good governance; principles of transparency and accountability; and to the achievement of poverty alleviation and sustainable development.

Acknowledging the universality and indivisibility of rights requires that policies and programmes should not aim to achieve one right in particular, but must be designed in a manner that aims to collectively promote the achievement of all rights holistically, emphasising the need for an inter-sectoral process. A holistic approach recognises that not all rights are immediately achievable, and includes their progressive realisation through the identification of priorities which give due respect to factors such as resource constraint and institutional capacity.

Programming is divided into five distinct phases, namely, assessment; analysis; planning; implementation and monitoring and evaluation, which may be briefly described as follows:

- **Assessment:** This phase emphasises the need for disaggregated data to form a broad understanding on the current state of realisation of rights for different groups, and considers the status of legislative, policy, institutional and budget allocations in the particular context. This is a key phase in forming an understanding of the gaps, challenges and needs to be addressed.
- **Analysis:** An analysis of the information obtained from the assessment phase enables the development of an understanding on the root causes for challenges experienced; how different factors interact; and how they impact different groups. Essentially, it enhances an understanding of social relations and the associated distribution of power which contributes to inequalities, poverty and rights violations of different groups, and is imperative in identifying gaps and the disparities between laws, policies and lived realities.

- **Planning:** The planning phase requires strategies and objectives to be identified in aiming to transform existing inequalities and contribute to development. However, a key element of human rights-based planning is meaningful participation of communities, with particular focus on vulnerable and marginalised groups. Participation is not only a fundamental right of communities, but has a profound impact on the design and effective implementation of appropriate strategies.
- **Implementation:** A human rights-based approach to programming places equal emphasis on outcomes and process (i.e. not only what is done, but also how it is done). In this regard, even where policies are fair and equitable in conception, the implementation often gives rise to unintended consequences. This is particularly the case where insufficient consideration has been given to the unique priorities and needs of different groups, and meaningful participation with affected communities is therefore essential in ensuring equitable access and delivery that is capable of achieving sustainable development.
- **Monitoring and evaluation:** Continuous monitoring and evaluation is required in order to measure progress made, and to identify continuous challenges and exclusions, and ensure accountability of the state. This phase requires the development and consideration of both quantitative as well as qualitative indicators.

The need for disaggregated data and development indicators

General household surveys conducted tend to produce national averages, but may not accurately reflect the position of particularly vulnerable or marginalised groups. In this regard, meeting the requirements of equality and prevention of non-discrimination may not be practically achievable unless the situation and peculiar challenges of a specific groups are identifiable. The collection of disaggregated data is therefore necessary to ensure that evidence-based policy formulation takes place, and that monitoring and evaluation of development indicators is able to review the progress made to specific groups, such as women and indigenous peoples.

The development of indicators should be capable of measuring both progress made in terms of the realisation of rights and development of different groups, as well as to highlight persisting failures and exclusions. Without going into detail, the development of appropriate indicators should be guided by human rights standards, including domestic and international frameworks, as well as general comments issues by international bodies. For example, indicators for measuring the achievement of the right to water include a consideration of the various elements of the right, namely availability and quantity; quality; physical accessibility; affordability; information accessibility and non-discrimination. Outcomes; structural considerations (such as legal and policy framework) as well as processes and interlinking factors must all be taken into account.

Indicators for monitoring and evaluation are useful for, inter alia:

(a) Developing more appropriate policies;

- (b) *Monitoring progress;*
- (c) *Identifying unintended consequences of laws, policies and practices;*
- (d) *Exposing issues that may have been overlooked or neglected;*
- (e) *Identifying the role of different actors, and their impact on the realisation of rights;*
- (f) *Assessing the performance of actors in line with the principle of accountability; and*
- (g) *Enhancing social consensus on difficult trade-offs to be made in the face of resource constraints.*¹⁵³

*The OHCHR has produced a guiding document entitled “Approach to a Human Rights-Based Approach for Data: Leaving No One Behind in the 2030 Development Agenda” which provides helpful guidance on the collection of disaggregated data.*¹⁵⁴

Ultimately, the UNDP has explained that *“the value of a human rights-based approach lies particularly in the transformative potential of human rights to alleviate injustice, inequality and poverty,”*¹⁵⁵ and this transformative potential is only possible if rights *“show an understanding of people’s lives, and the political, social, cultural and legal context in which rights are deployed.”*¹⁵⁶ Development policies, poverty reduction strategies, and the delivery of social services must therefore be designed in a manner that takes cognisance of the special needs of different groups, including indigenous persons, and other vulnerable sub-groups such as women, children, elderly and disabled.

A human rights-based approach is therefore based on the achievement of a core minimum threshold of rights and freedoms for all persons, and enables better planning and policy development by understanding the differing needs and challenges in a holistic manner, while also taking cognisance of the particular context in which the right is applied. A human rights-based approach leads to more sustainable development outcomes; strengthens social cohesion and entrenches the principles of equality and dignity by ensuring participation and a focus on the poorest and most marginalised groups; contributes to capacity development and ensures accountability.

Overall, programming cannot be conducted in line with a one-size-fits-all approach which is aligned to the needs and priorities of dominant or majority groups, or to those who are easily accessible, as this will perpetuate existing social inequalities.¹⁵⁷

The primary objective of a human rights-based approach to programming is therefore to transform society by identifying and addressing the underlying causes of systemic rights violations and discrimination, and

¹⁵³ UNDP “A Human Rights-Based Approach to Development Programming in UNDP – Adding the Missing Link” (2001), p 18.

¹⁵⁴ As accessed at <http://www.ohchr.org/Documents/Issues/HRIIndicators/GuidanceNoteonApproachtoData.pdf>.

¹⁵⁵ UNDP “A Human Rights-Based Approach to Development Programming in UNDP – Adding the Missing Link” (2001), p 2.

¹⁵⁶ UNDP “A Human Rights-Based Approach to Development Programming in UNDP – Adding the Missing Link” (2001), p 6.

¹⁵⁷ OHCHR “Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation” (2006), p 24.

to actively promote the achievement of substantive equality and sustainable development. This requires a shift in mind set to recognise affected communities as active participants rather than passive recipients in the achievement of rights and development, and places great emphasis on empowerment, as well as on the capacity development of both communities, organs of State and civil society organisations.

6.11 Implementation of previous recommendations and overall state of indigenous peoples in South Africa

Although the hearing did not examine the progress made with regard to the Khomani San in the Andriesvale-Askham area specifically, the Commission was able to ascertain broadly the extent to which recommendations made by the Commission in 2004 and the UN Special Rapporteur in 2005 have been implemented to date.

Overall, there have been some developments, which include enhanced protection of indigenous knowledge and intellectual property; the publication of the Leadership Bill; and consultations in anticipation of an extended land restitution programme, together with the recently initiated projects by PANSALB which aim to preserve and protect the use of indigenous Khoi-San languages. In addition to this, in 2014, South Africa affirmed its commitment to the Declaration on the Rights of Indigenous Peoples and signed the Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples. In line with submissions made, the Commission further notes the numerous processes underway, which include the development of a policy document to address the issue of indigeneity and first nation status, and is particularly supportive of the intention of the State to revise the current process of reporting on compliance with international instruments to include National Human Rights Institutions; civil society organisations and communities.

It is recognised that South Africa stands as one of the few countries on the continent that has embarked on ambitious efforts aimed at redressing the problems of its the Khoi-San, including legislative, policy and judicial interventions.

Although some progress has been achieved, the delay and/or complete lack of effective implementation of policies and programmes designed to uplift the Khoi-San and facilitate the achievement of their rights remains highly concerning. More than a decade after the release of the above-mentioned reports, the majority of recommendations remain unfulfilled, and the lack of continuity in government departments through constant reshuffling of Ministers and portfolio responsibilities together with the apparent lack of political will overall may have contributed to the lack of progress.

Notwithstanding specific recommendations, Khoi-San peoples still lack official recognition and the continuous apartheid-era racial classification results in ongoing rights violations, and severely undermines the dignity of the Khoi-San. While ongoing efforts have been taken through the Inter-Ministerial Task Team, efforts aimed at providing official recognition of Khoi-San leadership structures have been severely delayed and lack credibility. No efforts have been made to ensure the participation of Khoi-San peoples in local, provincial and national governance structures. Although the composition of the NKC has changed, this body still lacks statutory recognition and credibility amongst the broader indigenous population, and is therefore unable to adequately represent the needs and interests of the Khoi-San peoples.

The expressed need for the compilation of a national register of the Khoi-San and the disaggregation of data remains to be undertaken, while poverty reduction strategies which speak to the particular needs and priorities of the Khoi-San do not appear to have been developed. Although country statistics do not reflect the Khoi-San, some submissions advised that communities, through community councils, are beginning to gather their own statistics to provide greater clarity on the numbers, locations and challenges being faced by indigenous communities. There is a need for a central depository.

Despite some identified best practices with regard to culturally-specific education programmes, the lack of support and subsequent discontinuation of these initiatives is deeply disappointing, and has ultimately failed to fulfil the obligations of the State as outline earlier in this Report.

Communities have highlighted the lack of meaningful consultation undertaken by organs of State at multiple levels. The lack of consultation includes the development and implementation of plans designed to address the socio-economic issues of communities, as well as the representation at international conferences and the compilation of country reports in line with international obligations.

The Commission reiterates that the State remains the primary bearer of responsibilities for the promotion, protection and fulfilment of the rights of indigenous peoples, and while this hearing has found the conduct of the State in this regard wanting, the Commission is cognisant of the fact the State faces particular difficulties in fulfilling its obligations as a result of the fractured nature of indigenous communities and leadership structures. The ability of various organs of State to conduct meaningful consultations with the Khoi-San is significantly hampered by the lack of unity and internal conflicts within indigenous groups themselves, leading to frequent delays and presentation of contradictory positions. Although this fact does not detract from the Commission's finding that the State has essentially failed to fulfil its obligations, it can be found that the current fragmentation of indigenous communities has likely contributed to the on-going challenges faced, and action aimed at reconciling differences or conflicts within indigenous communities, and a commitment for greater collaboration and cooperation is therefore crucial in adequately addressing concerns.

Finally, despite previous recommendations to do so, South Africa has not yet ratified ILO Convention No.169, an essential instrument outlining international standards for the recognition and protection of the rights of indigenous persons.

The Commission further cautions against the adoption of an approach in which the Khoi-San place an almost absolute reliance on the State for the respect, protection, promotion and fulfilment of rights and upliftment. A number of initiatives may be taken by the Khoi-San themselves to contribute to local development and the protection and promotion of rights, including greater ownership and self-reliance on local projects or initiatives could contribute to the survival and flourishing of the Khoi-San in the future.

7. RECOMMENDATIONS

In terms of the SAHRC Act, the Commission is entitled to:

*"make recommendations to organs of State at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution."*¹⁵⁸

The Commission has developed directives and recommendations in line with its mandate to promote the protection, development and attainment of human rights for the Khoi-San in South Africa, and in this way, aims to contribute to the transformation of society and the attainment of social cohesion and reconciliation.

In considering the directives and recommendations set out below, organs of State must recall the obligations set out in Section 181(3) of the Constitution to support and cooperate with the Commission. On this basis, the Commission strongly encourages that the recommendations be taken seriously and calls for the on-going commitment by all Parties, but also stresses the importance of co-operative governance and inter-sectoral collaboration in addressing the complex and interlinking challenges of the Khoi-San.

In light of the Commission's mandate to promote a culture of respect for human rights and to monitor the realisation of rights in the country, a number of recommendations have been phrased in non-specific terms, noting that the responsible role players are ultimately accountable to the people. Therefore, while the Commission may recommend the broad measures which must be taken, the details must be developed in line with meaningful consultations with indigenous persons to ensure that measures and programmes implemented are consistent with their needs and cultures.

Following the order of the themes identified during its analysis of submissions made, the Commission makes the following recommendations:

7.1 Identity and recognition

- 7.1.1 The State, through the Presidency and DAC, must take steps on or before 31 March 2019 towards removal of the forceful categorisation of Khoi and San peoples as "Coloured".
- 7.1.2 CoGTA, through the Minister, must ensure before 18 months of issuing of this report that official recognition of indigenous communities, through legislative and administrative processes, are equitable to the recognition of other traditional communities, and must not place an undue burden on Khoi and San communities desiring to receive official recognition from the State. In this regard, it is noted that "equitable" does not require the same treatment, but in noting the distinct context of the Khoi-San from other traditional communities, the department is required to meaningfully engage with the Khoi-San with a view of developing reasonable and practical procedures.
- 7.1.3 With regard to the above, and in line with Article 33 of the United Nations Declaration on the Rights of Indigenous Peoples, CoGTA must ensure that the membership criteria for the Khoi-San are determined in line with their customs and traditions, provided that such

¹⁵⁸ Section 13(1)(a).

criteria is practically implementable, and must be developed through consultation with the Khoi-San.

7.2 Culture and language

- 7.2.1 The DAC, in collaboration with CoGTA; the Department of Tourism and other relevant departments must, in consultation with the Khoi-San, within 12 months of this report being issued establish projects aimed at promoting an awareness of the cultures and traditions of Khoi and San peoples. These measures include, but not be limited to, the establishment of cultural information centres, museums and tourism initiatives.
- 7.2.2 With regard to the establishment of tourism initiatives, the above-mentioned departments must ensure that such ventures provide for the active involvement of indigenous communities, and that equitable benefit-sharing is provided along with adequate capacity development to enable communities to fulfil the right to self-determination in managing such initiatives in an effective and sustainable manner.
- 7.2.3 The DAC and other relevant departments must within 12 months of this report being issued conduct research with regard to the history of the Khoi-San in Southern Africa, which information must be widely disseminated to promote an awareness of the history, as well as the current needs; aspirations and cultures of Khoi-San peoples.
- 7.2.4 The Commission notes the financial and institutional instability which has characterised PanSALB, and requires the Office on Institutions Supporting Democracy within the Office of the Speaker to provide adequate support, which support includes adequate financial and human resources, as well as the necessary political support and cooperation from various organs of State required to enable the institution to effectively implement its mandate.
- 7.2.5 With regard to budgetary allocations, the National Treasury is urged to ensure that the budget allocated to PanSALB is sufficient to enable it to effectively implement its mandate, which budget should specifically provide for measures designed to protect and promote minority indigenous languages, including the Khoi and San languages in particular.
- 7.2.6 PanSALB, with the collaboration of relevant organs of State must within 12 months of this report being issued establish coherent and structured policies for the promotion of multilingualism in South Africa as a matter of urgency in order to preserve diverse languages and the heritage of South Africa.
- 7.2.7 PanSALB, in collaboration with the DAC; Department of Basic Education and Higher Education and Training; the DoJ&CD; CoGTA; and other relevant state departments, must within 12 months of this report being issued take steps to design and implement specific projects aimed at promoting and protecting the use of Khoi and San languages. These projects should include, but should not be limited to the following:
 - i. the recording of indigenous languages into written format;
 - ii. policies to incorporate indigenous languages into the formal education curriculum, particularly for indigenous youth; and

- iii. measures to capacitate the Khoi-San with the knowledge of local languages as teachers.
- 7.2.8 The Department of Communications as well as private media houses are urged to ensure that media outlets and means of communication reflect and incorporate the diversity of culture within South Africa, including through the use of indigenous languages in local communities in order to promote multilingualism and tackle the stigma associated with minority language groups. The Department of Communications is required to provide the Commission with a report within 12 months of this report being issued setting out the steps taken.
- 7.2.9 The Khoi-San, through various leadership structures and communities, should establish informal mechanisms for the promotion of Khoi and San culture and languages within, and outside of their own communities.

7.3 Access to land and basic services

- 7.3.1 The Department of Rural Development and Land Reform (“DRDLR”) together with the Office of the Presidency is required to take steps to expedite the process of restitution for indigenous communities, in light of the recognition of the centrality of access to land, traditional territories and natural resources for the fulfilment of other rights of the Khoi-San. The DRDLR is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.3.2 The DRDLR is required to conduct meaningful consultations with indigenous communities and representative bodies with a view of developing culturally appropriate and practically implementable systems of land tenure. The system adopted must ensure that sufficient checks and balances are in place to provide for the active participation of indigenous communities in the control, use and development of land, as well as for transparency and accountability. The DRDLR is required to provide the Commission with a report within 12 months of this report being issued setting out the steps taken.
- 7.3.3 The DRDLR must align land redistribution programmes with capacity and skills development programmes to enable beneficiary communities to effectively manage and use land and natural resources in a sustainable manner. The DRDLR is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.3.4 The DRDLR; the Department of Human Settlements (“DoHS”) and local governments must meaningfully consult with all affected communities in the allocation of land or housing opportunities in order to identify priorities and prevent social tensions or conflicts from arising. In this regard, the Departments should develop social cohesion strategies as well as clearly formulated, transparent housing allocation policies which are openly communicated and available to communities. The DRDLR and DoHS respectively are required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.

- 7.3.5 In appropriate circumstances, where land is allocated for the use of both Khoi-San and other communities collectively, the DRDLR with the assistance and support from CoGTA; traditional authorities and other relevant bodies must facilitate agreements between communities for shared use and benefit of land. The DRDLR and CoGTA respectively are required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.3.6 The DRDLR, together with the DoJ&CD, must conduct awareness raising campaigns on the availability of pro bono legal services available for indigent communities desiring to submit land restitution claims. The DRDLR and DoJ&CD respectively are required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.3.7 CoGTA; the Department of Tourism and Department of Environmental Affairs (“DEA”) are required to implement immediate procedures to allow access for indigenous communities to national parks and heritage sites of cultural significance. While indigenous communities must be provided access, the departments must also ensure that communities are educated on their responsibilities with regard to such access necessary for the conservation of such areas. The CoGTA, Department of Tourism and DEA respectively are required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.3.8 The DRDLR; Department of Agriculture, Forestry and Fisheries; and Department of Mineral Resources; and other relevant state departments, must meaningfully consult indigenous communities with regard to anticipated development and/or commercial projects which may affect them, directly or indirectly. Where projects are aimed at poverty alleviation or development broadly, safeguards must be in place to ensure that such measures are not disproportionately detrimental to the Khoi-San. The DRDLR; Department of Agriculture, Forestry and Fisheries; and Department of Mineral Resources respectively are required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.

7.4 The protection of Cultural and Indigenous Knowledge Systems

- 7.4.1 The DAC, together with other relevant departments, is required to develop legislative or policy measures aimed at ensuring that the intellectual property of the Khoi-San is adequately protected, which protection must extend to the use of products; images; logos; art; and stories, amongst other forms of cultural expression. The use of such property must be undertaken in consultation with indigenous communities, and must result in equitable benefit sharing. The DAC is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.4.2 The DEA and DAC, together with other relevant state departments, must provide oversight into the development and conclusion of Material Transfer and Benefit Sharing Agreements to ensure that indigenous communities are able to equitably benefit and

that contractors abide by agreements. In this regard, the Khoi-San must be capacitated to understand their rights and responsibilities under such agreements and are empowered to hold parties accountable. The DEA and DAC are required respectively to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.

- 7.4.3 The DEA must assist Khoi-San communities in engaging with individuals or companies involved in the bioprospecting or biotrade of rooibos and honeybush with a view of entering into an equitable Benefit Sharing Agreement. The DEA is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.4.4 In line with the earlier recommendation, the DAC and Department of Tourism must ensure that tourism ventures provide for the participation and active involvement of indigenous communities, and should aim to empower the Khoi-San to control and manage such initiatives in line with their rights to development and self-determination. The DAC and Department of Tourism are required respectively to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.4.5 Specifically, with regard to the development of the National Khoi-San Heritage Route, the DAC must consult with the Khoi-San in the conceptualisation and implementation of this project, and must further collaborate with the Department of Tourism in developing the capacity and promoting the active involvement of indigenous communities. The DAC and Department of Tourism are required respectively to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.

7.5 Governance, consultation and participation

- 7.5.1 CoGTA and other relevant departments must immediately initiate broad public consultations, no later than 3 months of the issuing of this report, with indigenous communities with a view of addressing concerns over the composition and status of the National Khoi-San Council (“NKC”).
- 7.5.2 CoGTA must take immediate steps towards the statutory recognition of the National Khoi-San Council; must develop legislative or policy mechanisms to regulate the membership of the NKC; and to must ensure transparency in its processes as well as appropriate reporting and accountability mechanisms.
- 7.5.3 CoGTA must initiate public consultations expeditiously on the Traditional and Khoi-San Leadership Bill of 2015 within 3 months of the issuing of this report, which consultations must include special measures to ensure the broad participation of the Khoi-San. CoGTA, together with the Presidency and other relevant departments, must implement special measures to provide for the recognition and participation of Khoi-San leaders in local, provincial and national government, and ensure that the Khoi-San are able to participate in all decision-making processes.

7.6 Education

- 7.6.1 The Department of Basic Education (“DBE”) must develop policies which provide for the education of children in their mother tongue and/or indigenous languages. In noting resource and capacity restraints, amongst other difficulties, where this is not reasonably possible, the Department must consult with local communities with a view of developing alternative mechanisms, which may include extra-curricular programmes. The DBE is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.6.2 The DBE together with PANSALB is required to consult with Khoi and San communities with a view of developing policies and projects to incorporate indigenous languages and cultures into the formal education system, particularly for indigenous youth. The DBE and PANSALB are required respectively to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.6.3 The DBE must further undertake capacity development initiatives in order to adequately train and capacitate local persons with knowledge of indigenous language and culture with the skills to be educators. The DBE is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.6.4 In line with the above, the DBE in collaboration with PANSALB should take immediate steps to revive the Schmitsdrift San Combined School project in the Northern Cape.
- 7.6.5 The DBE in collaboration with other relevant departments must undertake a review of the national curriculum in order to accurately integrate the history, cultures and aspirations of the Khoi and San peoples of Southern Africa. The DBE is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.6.6 The DBE must conduct sensitisation training and awareness programmes and/or policies for educators to enable them to understand the requirements of a respect and tolerance of diverse cultures in South Africa, with a view of preventing discrimination and promoting the equality of all cultures. The DBE is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.6.7 The DBE as well as the Department of Higher Education and Training must conduct awareness raising campaigns about existing technical and vocational training opportunities amongst the youth. Additionally, the Departments must collaborate with CoGTA and, in consultation with the Khoi-San, must consider developing specific vocational training programmes which are designed to address the skills needs and priorities of indigenous and traditional communities with a view of enhancing development and self-determination. The DBE and the Department of Higher Education and Training are required respectively to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.6.8 While the Commission notes the severe resource and capacity restraints, the DBE together with other relevant departments must continue to take steps to ensure the development of school infrastructure which is in line with the core minimum human

rights standards, particularly in rural or geographically remote areas. In this regard, the Department is urged to take steps to ensure that appropriate transportation services are provided to children in order to ensure equitable access to education opportunities and in line with the basic principles of the best interest of the child. The DBE is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.

7.7 Equality

- 7.7.1 The DoJ&CD, together with the Department of Labour and other relevant departments should consider the development of special legislative and policy measures for the advancement of Khoi-San peoples, noting their historical discrimination and continued marginalisation. These measures may include the provision of training and capacity development initiatives; funding mechanisms; and employment practices, amongst others. The DoJ&CD and the Department of Labour are required respectively to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.7.2 The DSD and the DRDLR must ensure that land redistribution and social upliftment programmes incorporate special measures designed to promote gender equality and equality of other vulnerable groups.
- 7.7.3 CoGTA and other relevant departments must ensure that special measures are incorporated to ensure equitable gender representation in traditional and Khoi-San leadership structures and bodies.
- 7.7.4 The Khoi-San must ensure that women are able to meaningfully participate in decision-making and leadership structures, and all initiatives should specifically seek to incorporate the views of women and other vulnerable groups within indigenous communities.
- 7.7.5 CoGTA, in collaboration with other relevant departments and bodies must undertake research to understand prevailing forms of stigma and prejudice against Khoi and San peoples, and must thereafter formulate a strategy aimed at combatting the negative stigma and discrimination perpetuated against Khoi and San peoples. This must include, but should not be limited to education or awareness raising campaigns; the promotion of cultural activities; social cohesion strategies and measures designed to advance the development of the Khoi-San. CoGTA is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.

7.8 Socio-economic issues

- 7.8.1 DSD together with local municipalities and other relevant departments must develop poverty alleviation strategies for indigenous communities, in consultation with communities, which strategies must address specific values and priorities of the Khoi-San. DSD is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.

- 7.8.2 DSD and CoGTA must develop programmes aimed at developing the skills and capacities of the Khoi-San to enable them to manage their own affairs, and/or to meaningfully participate in the design and implementation of development programmes. Such programmes must be developed in consultation with the Khoi-San to ensure they are aligned to the skills needs and priorities of the communities. The DSD and CoGTA are required respectively to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.

7.9 Access to Justice

- 7.9.1 The DoJ&CD must conduct cultural sensitisation training for personnel of the judiciary in order to promote an understanding of the peculiar rights of cultural persons, as well as the cultural dimension of rights. DoJ&CD is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.9.2 The DoJ&CD is further required to conduct training for personnel of the judiciary relating to the implementation of international law instruments into domestic disputes, where applicable. DoJ&CD is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.9.3 The South African Police Service (“SAPS”) is required to conduct cultural sensitisation training for law enforcement officials in order to combat the negative stigma against Khoi and San peoples, and to understand and respect the cultural practices and dispute resolution mechanisms of the Khoi-San. SAPS is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.9.4 The SAPS must take special measures to incorporate members of indigenous communities into local police services, and must further take steps to promote the active participation of the Khoi-San into community policing structures with a view of re-establishing the relationship of trust and respect between the SAPS and indigenous communities. SAPS is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.
- 7.9.5 The State, through CoGTA must consult with the Khoi-San broadly with a view of identifying additional mechanisms aimed at achieving reconciliation and redress for past and ongoing injustices. These measures should be aimed primarily at the restoration of dignity for Khoi-San peoples, as well as social cohesion within broader society and should additionally provide for adequate compensation and redress in relation to the historic dispossession of land and subsequent impoverishment and marginalisation of the Khoi-San. Noting the ongoing nature of violations and the importance of promoting reconciliation and social cohesion, the Commission urges that such consultations take place within 12 months from the date of release of this report.

7.10 Miscellaneous

- 7.10.1 The Commission emphasises that the reporting process in respect of international obligations constitutes an essential element in the continuing commitment of a State to

respect, protect and fulfil the rights set out in the treaties to which it is party. In this regard, and in light of principles of transparency, accountability and democratic governance, the DoJ&CD should revise the current reporting mechanism in relation to international guidelines. The new mechanism should include broad consultations with the Commission, as the National Human Rights Institution; civil society organisations; and the public, with particular emphasis on vulnerable and marginalised groups, as well as groups directly impacted by the treaty obligations. DoJ&CD is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.

- 7.10.2 In strengthening its commitment towards the protection and fulfilment of the rights of the Khoi-San, the State, through the Department of International Relations and Cooperation (“DIRCO”) must ratify the International Labour Organization (ILO), Indigenous and Tribal Peoples Convention No.169 without undue delay, and should subsequently ensure its provisions are adequately incorporated into domestic legislation and policy. DIRCO is required to provide the Commission with a report within 12 months of this report being issued setting out such steps taken.

Broadly, the Commission emphasises the importance of moving away from a “one-size-fits-all” approach to policy conception and implementation, towards a human rights based approach which takes cognisance of the needs and priorities of different groups or cultures, as well as the potential impact of policies upon implementation. In this regard, the state should ensure training and capacity development for all organs of State involved in policy and programme development and implementation, to enable them to apply a human-rights based approach which is capable of achieving more effective and sustainable outcomes. Transparency and democratic governance lies at the heart of our constitutional dispensation, which requires that communities are consulted in a meaningful manner in all matters which may affect them directly or indirectly. In this regard, relevant organs of State must take steps to actively engage with communities, and persons from vulnerable groups in particular, and must further take cognisance of the requirements of free, prior and informed consent. Moreover, all organs of State must take steps to ensure that all policies, plans and programmes are made publically available, in a manner that is easily accessible and understandable to affected groups.

Many of the recommendations outlined above require meaningful consultation with the Khoi-San, and the Commission acknowledges the particular difficulties as a result of the lack of credibility of representative bodies and the fractured governance system of the Khoi-San. These difficulties notwithstanding, the state is not absolved from the responsibility to develop and implement mechanisms aimed at ensuring that meaningful consultations are undertaken, and that the diverse views of the Khoi-San are adequately represented. The Commission therefore wishes to reiterate the importance of resolving the challenge of representation and governance in order to adequately address other systemic issues.

The Commission further notes that budget allocation has a significant bearing on the fulfilment of human rights, and organs of State and other relevant bodies must therefore ensure that adequate budgetary

allocations are made to enable the effective implementation of programmes and the achievement of identified objectives.

Finally, the Commission stresses that inter-governmental and inter-departmental coordination is of paramount importance in ensuring that policies and programmes are aligned across all sectors and levels of government and adequately aim to address challenges in a collaborative and sustainable manner. In this regard, while many of the issues identified fall within the mandate of specific departments and/or organs of State, a siloed approach is likely to result in duplicated and potentially contradictory processes and give rise to frustrations amongst all parties. The Commission therefore calls on CoGTA, as the primary body responsible for the governance of traditional affairs, to coordinate the state's response to addressing these issues.

7.11 Reporting

While a number of recommendations identified are broad in nature and identify the type of measures to be taken, the Commission is not prescriptive of the forms these measures should take in recognition of the institutional integrity and unique requirements and challenges faced by each organ of state and other stakeholder body. However, the Commission will continue to actively monitor progress made in the implementation of these recommendations, and further enquiries or alternative measures may subsequently be undertaken by the Commission in exercising its mandate to protect and promote the fulfilment of the rights of indigenous communities. In this regard, the reporting obligations are identified as follows:

Department of Cooperative Governance and Traditional Affairs:

- 7.11.1 CoGTA, as the primary organ of state responsible for the governance of traditional affairs must, through the cooperation and provision of information from other relevant departments and organs of State identified in this report, provide a comprehensive and holistic report to the Commission within a period of 12 months from the date on which this report is released. Such report must include, *inter alia* the following details:
- i. Steps taken by the various organs of State to address the issues identified in this report;
 - ii. A detailed plan on measures to be taken in the short, medium and long term, which plan must include timeframes and details relating to budget allocation;
 - iii. Additional challenges faced by numerous organs of State in addressing the issues raised in this report as well as additional issues which may have been subsequently identified;
 - iv. Proposed solutions for addressing the challenges faced by the various organs of State;
 - v. Details of consultations held with the Khoi-San on the various initiatives, including reporting back on progress and/or challenges experienced to communities.

8. CONCLUSION

Indigenous peoples around the world constitute some of the most poverty stricken, and as a group, are over-represented in this category. The Khoi-San in South Africa are no exception, and although they form only a small portion of the poor in the country, their dire situation is exacerbated by multiple factors including a pervasive negative stigma, social exclusion, a declining culture, a lack of official recognition by the state, and a muted political voice. These factors give rise to multiple rights violations which occur on a daily basis.

Recognition must be given to the fact that South Africa has taken progressive measures in respect of the protection of the rights of indigenous peoples, including the establishment of numerous specific bodies and institutions and the enactment of multiple laws and policies aimed at preventing unfair discrimination and protecting the rights of indigenous peoples. These include, *inter alia*, an abundance of laws aimed at protecting the rights of indigenous peoples' indigenous knowledge systems as well as plans with respect to the restitution of land. However, this alone is insufficient to adequately protect and promote the rights of indigenous peoples, and an overall failure to effectively design and implement laws and policies has inevitably given rise to a situation whereby their rights continue to be eroded.

Access to land is of paramount importance to indigenous peoples, not only as a result of their close spiritual link to land, but is also vital in ensuring that they are able to live a unique way of life in line with their cultural beliefs. The historic, and in some instances, ongoing dispossession of land of Khoi-San peoples has removed their means of sustenance, and consequently has given rise to a life of poverty, while further denying their ability to practice their culture and tradition. In understanding the interdependence of rights, the achievement of a number of other rights including the right to self-determination and development is thus predicated on the fulfilment of the right of access to land, and access to land and natural resources, and the fulfilment of this right is therefore of central importance in the realisation of both individual as well as collective rights of indigenous peoples. Although some land has been returned to indigenous peoples in South Africa, this has been restricted to small groups and has been insufficient to meet the needs of the majority of Khoi-San peoples, while the provision of land without the necessary capacity and skills development to accompany this measure has further hindered the ability of these peoples to fully realise their rights. The Commission welcomes the expressed intention of the State to undertake a broader process of land restitution, but emphasises the need to expedite the process to ensure that indigenous peoples are able to access the full enjoyment of their rights without undue delay.

Historically, the Khoi-San in South Africa were systematically denied recognition as a people of equal worth and value, and thus were essentially denied to the right to their very existence as a distinct group. Notwithstanding the historic significance of the country's transition to a democracy founded on dignity, equality and freedom, the Commission has recognised as a serious concern the continued failure to officially recognise the Khoi-San peoples in the current democratic dispensation, with their continued ethnic categorisation as "Coloured". After centuries of forced assimilation; discrimination and dehumanisation, official recognition forms an imperative component in the ability the Khoi-San peoples to live a life of dignity and respect. Although the Commission notes that acts of recognition of the

existence of the Khoi-San peoples are included in the reference to Khoi and San languages in the Constitution; through the national emblem; the establishment of the Traditional and Khoi-San Leadership Bill, and in numerous public statements, without an official and legally recognised existence as a distinct group within the Country, we, as a society will be unable to realise the vision of the Constitution in healing the divisions of our past and establishing a society based on democratic values, social justice fundamental human rights. After all, *“the mark of all civilisations is the respect they accord to human dignity and freedom.”*¹⁵⁹

The obligations of the state to respect, protect, promote and fulfil rights speaks to the need to establish an environment in which people are freely and equally able to realise their rights. Therefore, what is required is more than an abstention from the prevention of an exercise of rights, but rather the implementation of positive measures designed and capable of actually promoting the actual realisation of these rights. The Commission notes that there is a particular responsibility on the state to protect and secure the rights of the most vulnerable, marginalised groups against whom systemic discrimination persists. An understanding of the unique cultures, priorities and challenges facing these groups is therefore required to enable the creation of special measures capable of facilitating the achievement of substantive equality which will be reflected in the lived experiences of people.

While acknowledging the contention around the concept of “indigenous”, particularly in the African context, the Commission emphasises the fact that the identification of particular groups as “indigenous peoples” is not aimed at one group gaining advantage over another nor is it aimed at promoting ethnic, cultural or racial distinction, but rather seeks to provide equal opportunities and a voice to severely marginalised groups. The historical discrimination experienced by the Khoi-San peoples is reflected in their current reality. It is also compounded by their lack of visibility and the marginal political influence they have as a result of their minority status. In this regard, the rights of indigenous peoples are integral and indispensable for their continued existence as a people with distinct culture, values, identity and way of life. The advancement of a multicultural and diverse society formed on the basis of respect and tolerance requires an express dedication towards the protection and promotion of these rights.

Through this process and the production of this Report, the Commission has endeavoured to create a greater awareness of the fundamental rights and current challenges facing the Khoi-San as indigenous peoples in South Africa. It also hopes to contribute to the advancement of the rights of all persons, and to the promotion of reconciliation and social cohesion. While it will continue to monitor the situation on an ongoing basis, the Commission calls for the sustained commitment of the Government of South Africa, supported by the concrete implementation of laws and policies designed to achieve this objective.

¹⁵⁹ UNDP “Human Development Report 2000”, p 1.

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