IN THE HIGH COURT OF BOTSWANA

ROY SESANA, KEIWA SEITLHOBOGWA, and others,

Applicants,

against

ATTORNEY GENERAL, sued on behalf of the Republic of Botswana,

Respondent.

MISCA No. 52-2002

AMICUS BRIEF PREPARED BY
THE ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN RIGHTS LAW CLINIC
YALE LAW SCHOOL
NEW HAVEN, CONNECTICUT, U.S.A.

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Interest of *Amicus Curiae*

The Allard K. Lowenstein International Human Rights Law Clinic (Clinic) is a Yale Law School program that provides students direct experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes many litigation and research projects on behalf of human rights organizations and individual victims of human rights abuse. Clinic projects have included efforts to promote the work of regional and international organizations that develop and protect human rights, including the Inter-American and African human rights systems and the United Nations. The Clinic has also investigated human rights conditions and prepared and published human rights reports. The Clinic has written and submitted *amicus* briefs to domestic U.S. courts, the courts of other nations, and various international bodies. These have included briefs on indigenous property rights for the Inter-American Commission on Human Rights and on mass expulsion for the African Commission on Human and Peoples' Rights. The clinic has also prepared reports analyzing the right of indigenous communities to exercise free, prior, and informed consent with regard to resource extraction activities that are on or affect their traditional lands. The Clinic has a particular interest in matters concerning forced relocation, indigenous rights, and property rights, which are at issue in the present case.

Summary of Argument

The protection of several widely recognized human rights necessarily requires that states, before engaging in actions that affect indigenous peoples' fundamental rights, obtain the free, prior and informed consent of, and engage in meaningful consultation with, the affected peoples. Relocating indigenous communities from their traditional lands, without the community's free,

prior and informed consent obtained through meaningful consultation, constitutes forced relocation. The internationally recognized prohibition on forced relocation is particularly significant for indigenous peoples, whose traditional relationship with their land and resources is a crucial component of their culture and well-being.

The relocation of the Basarwa living in the Central Kalahari Game Reserve raises significant questions about whether the government of Botswana obtained their free, prior and informed consent through a process of meaningful consultation.[1] If the Botswana government failed to fulfill its duty to obtain consent and to meaningfully consult with the Basarwa, its relocation of the Basarwa from their traditional lands was forced and, therefore, violated international law.

Argument

I. Forced relocation, particularly of indigenous peoples, violates international law.

Forced relocation deprives people of fundamental rights, such as the rights to freedom of movement, freedom of residence, and property, all of which are protected by international conventions to which Botswana has acceded.[2] Forcibly relocating indigenous peoples is particularly egregious because their distinctive relationship to their lands and resources underpins their ability to exercise a wide range of fundamental human rights.[3]

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[1] For the purposes of this brief, "relocation" refers to the movement of people from their home and place of habitual residence. The more specific term "forced relocation" refers to relocation that takes place without meeting the obligation under international law to obtain free, prior and informed consent and to engage in meaningful consultation.

[2] *See* Marco Simons, *The Emergence of a Norm Against Arbitrary Forced Relocation*, 34 COLUM. HUM. RTS. L. REV. 95 (2002). As with other international norms that are not *jus cogens*, a state may be permitted by treaty to derogate from this norm but only where there is legitimate justification, such as a declared state of emergency.

[3] The Inter-American Court of Human Rights recognized this relationship in the *Awas Tingni* case, stating that "the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival." Inter-Am. Ct. H.R., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Ser. C (2001), ¶149 [hereinafter *Awas Tingni*]; *see also* Inter-Am. Comm'n. H.R., *Maya Indigenous Communities of the Toledo District v. Belize*, Case No. 12.053, Report No. 96/03,

The forced relocation of indigenous peoples violates a number of fundamental rights that Botswana is obligated to protect as a party to the International Covenant on Civil and Political Rights (ICCPR).[4] These rights necessarily prohibit the forced relocation of indigenous peoples. For example, the U.N. Human Rights Committee, the international body established by the ICCPR to monitor state compliance with the treaty, has concluded that extinguishing indigenous rights is specifically incompatible with Article 1 of the ICCPR, which protects the right to self-determination.

> [T]he right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). . . . The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.[5]

By severing the relationship between indigenous peoples and their land, forced relocation extinguishes indigenous rights and is thus incompatible with Article 1.[6]

Forced relocation violates the rights to culture, freedom of movement, and freedom of residence protected in the ICCPR and other conventions to which Botswana is a party. Article 27 of the ICCPR, for example, safeguards the right of ethnic minorities to "enjoy their own culture, to profess and practice their own religion, or to use their own language."[7] The Human Rights Committee has found that Article 27 establishes an obligation for state parties to secure

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OEA/Ser.L/V/II.122, ¶114 (2004) [hereinafter *Maya Belize*] (stating "indigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them, by which those lands and resources are considered to be owned and enjoyed by the indigenous community as a whole, and according to which the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly").

[4] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

[5] U.N. Hum. Rts. Comm., *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105, ¶8 (1999).

[6] An expert report commissioned by the United Nations Commission on Human Rights to survey international norms concluded that an express prohibition of arbitrary forced removals is contained in the law relating to indigenous peoples. U.N. Comm'n on H. R., *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection Against Arbitrary Displacement*, U.N. Doc. E/CN.4/1998/53/Add.1, ¶84 (1998).

[7] ICCPR, *supra* note 4, art. 27.

"continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities."[8] The ICCPR also protects the rights to freedom of movement, residence, and equal protection of law.[9]

The African Charter on Human and Peoples' Rights (African Charter) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), to both of which Botswana has acceded, also protect rights affected by relocation. The African Charter, for example, protects rights to property, freedom of movement, freedom of residence, and equal protection of the law for both individuals and peoples.[10] CERD prohibits discrimination against indigenous peoples based on their race, color, or national or ethnic origin and protects their right to property.[11] Forcibly relocating people from their traditional lands prevents them from exercising these rights. The deprivations involved in the forced relocation of indigenous peoples—extinguishing indigenous land rights and severing the relationship between indigenous

[8] U.N. H. R. Comm., *Concluding observations of the Human Rights Committee: Australia*, U.N. Doc. CCPR/CO/69/AUS, ¶¶10-11 (2000).

[9] ICCPR, *supra* note 4, art. 12(1) states, "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." ICCPR, art. 26 states, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law." The Universal Declaration of Human Rights, which, while not a treaty, articulates well-recognized principles of international law, recognizes the right to residence (Article 13), the right to freedom of movement (Article 13), and the right to own property (Article 17). Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

[10] Article 12(1) states, "Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law." Article 14 provides that "the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." Article 3 provides that "every individual shall be equal before the law" and "be entitled to equal protection of the law." Article 19 states that "all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another." African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

[11] Article 5 of CERD provides: "State parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights . . . the right to freedom of movement and residence within the border of the State . . . the right to own property alone as well as in association with others. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

peoples and their land—violate Botswana's clear obligations under the ICCPR, CERD, and the African Charter.

II. States must obtain the free, prior and informed consent of indigenous peoples before relocating them from their traditional lands.

In order to ensure the protection of fundamental human rights, states must obtain the free, prior and informed consent of indigenous peoples before engaging in activities that affect their rights, particularly where state-sanctioned activities affect indigenous peoples' relationship to their land. International instruments to which Botswana has acceded guarantee critical rights of indigenous peoples, the exercise of which depends on their connection to their lands. The government of Botswana can effectively fulfill its duty to protect these rights only by obtaining the Basarwa's free, prior and informed consent to policies affecting their use of their ancestral lands.

A. Fundamental human rights recognized in international instruments to which Botswana has acceded necessarily entail a right of indigenous peoples not to be relocated without their free, prior and informed consent.

The right to self-determination set forth in the ICCPR, which Botswana ratified in 2000, necessarily entails a state duty to gain the free, prior and informed consent of indigenous peoples to state-sanctioned activities that affect their rights. Article 1 of the ICCPR states:

> 1. All peoples have the right of self-determination. By virtue of that right they *freely determine* their political status and *freely pursue* their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law . . . .

> 3. The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and *shall respect that right*, in conformity with the provisions of the Charter of the United Nations.[12]

The right of all peoples to "freely determine" their political status and "freely pursue" their economic, social and cultural development and states' obligation to "respect that right" necessarily require that states obtain an indigenous community's consent before taking measures that interfere with their control of their land and other resources and their economic, social, and cultural development.[13]

CERD, acceded to by Botswana in 1974, further obligates Botswana to obtain the consent of indigenous communities before taking actions that infringe upon the fundamental rights at stake in cases of forced relocation. Article 5(d)(v) of CERD requires state parties to guarantee the right of everyone to equality before the law, notably in the enjoyment of "[t]he right to own property alone as well as in association with others."[14] In General Recommendation XXIII, the Committee on the Elimination of All Forms of Racial Discrimination, the international body established by CERD to monitor state compliance, interpreted Article 5 as requiring state parties to "[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are

[12] ICCPR, *supra* note 4, art. 1 (emphasis added).
[13] Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (to which Botswana is not a party) similarly guarantees the right to self-determination and requires state parties to guarantee this right "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). The Committee on Economic, Social and Cultural Rights, which the treaty established to interpret and monitor compliance with its provisions, has disapproved of state parties making decisions affecting indigenous peoples' land without their consent. The Concluding Observations of the Committee considering the report of Colombia stated, "The Committee notes with regret that the traditional lands of indigenous peoples have been reduced or occupied, *without their consent*, by timber, mining and oil companies . . . ." Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia*, U.N. Doc. E/C.12/1/Add.74, ¶12 (2001) (emphasis added). In its Concluding Observations considering the report of Ecuador, the Committee noted that it was "deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the concerned communities." Comm. on Econ., Soc., and Cultural Rts., *Concluding Observations of the Committee on Economic Social and Cultural Rights: Ecuador*, U.N. Doc. E/C.12/1/Add.100, ¶12 (2004).
[14] CERD, *supra* note 11, art. 5(d)(v).

taken without their informed consent."[15] The Committee further found that, where indigenous peoples have been "deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent," states must "take steps to return those lands and territories."[16]

The CERD Committee has explicitly applied General Recommendation XXIII to the present situation in Botswana and expressed concern about Botswana's failure to obtain the Basarwa's informed consent to actions relating to their rights and interests:

> The Committee expresses concern [about] the ongoing dispossession of Basarwa/San people from their land . . . . The Committee draws the attention of the State party to its general recommendation XXIII on indigenous peoples and recommends that no decisions directly relating to the rights and interests of members of indigenous peoples be taken *without their informed consent*.[17]

In particular, the CERD Committee further recommended that the government of Botswana resume negotiations with the Basarwa/San and non-governmental organizations be resumed and that the government adopt a rights-based approach to development.[18]

Other law binding on Botswana supports the principle that the free, prior and informed consent of indigenous communities is required for decisions affecting their rights. Specifically, the Convention on Biological Diversity requires Botswana, which ratified the Convention in 1995, to obtain the approval of indigenous peoples before using their "knowledge, innovations and practices."[19] A subsequent Conference of the Parties to the Convention issued voluntary

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[15] Comm. on the Elimination of All Forms of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, U.N. Doc. A/52/18(SUPP), Annex V, ¶4(d) (1997).
[16] *Id.* ¶5.
[17] Comm. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. A/57/18(SUPP), ¶304 (2002) (emphasis added). *See also id*., ¶¶302, 305.
[18] *Id*., ¶304.
[19] Article 8(j) provides for Contracting Parties to obtain the "approval and involvement of holders of . . . knowledge, innovations and practices" when attempting to respect, preserve, and maintain that knowledge. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993), *available at* http://www.biodiv.org.

guidelines for the Contracting Parties that explicitly identified the obligation to obtain free, prior and informed consent for such use.

> Respecting established legal rights of indigenous and local communities associated with the genetic resources being accessed or where traditional knowledge associated with these genetic resources is being accessed, *the prior informed consent of indigenous and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices should be obtained*, in accordance with their traditional practices, national access policies and subject to domestic laws.[20]

In its submission to a U.N. Workshop on methods for gaining indigenous peoples' consent, the Secretariat of the Convention on Biological Diversity stated that the Convention, while recognizing the sovereign right of states over natural resources, establishes that access to genetic resources should be granted on mutually agreed terms and subject to the prior, informed consent of the party providing the resources.[21] Although the Convention on Biological Diversity pertains to extractive industries rather than forced relocation, the requirement under international law to obtain consent when merely using an indigenous community's knowledge or genetic resources found on their land provides strong support for the requirement that the more harmful act of removing indigenous peoples from their land requires the community's free, prior and informed consent.

As a party to the ICCPR, the African Charter, CERD, and the Convention on Biological Diversity—international conventions that protect the rights to self-determination, culture, and

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[20] Convention on Biological Diversity, *Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising out of their Utilization*, Decision VII/19 (2004), *available at* http://www.biodiv.org/decisions/?m=cop-07 (emphasis added).

[21] Secretariat of the Convention on Biological Diversity, *Contribution of the Convention on Biological Diversity and the Principle of Prior and Informed Consent*, 1, U.N. Doc. PFII/2005/WS.2/3 (2005), *available at* http://www.un.org/esa/socdev/unpfii/documents/FPIC_%202005_CBD.doc. The Conference of the Parties similarly describes itself as "[*m*]*indful* that any information-gathering exercise pertaining to knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity should be conducted with the prior informed consent of the holders of such knowledge, innovations and practices." Convention on Biological Diversity, *Decision VII/16: Article 8(j) and Related Provisions*, Feb. 2004, *available at* http://www.biodiv.org/decisions/default.aspx?m=COP-07&id=7753&lg=0.

property, among other fundamental human rights—the government of Botswana is obligated to obtain the Basarwa's free and informed consent before interfering with their economic, social and cultural development, disposing of their natural wealth and resources, or depriving them of their means of subsistence. Without evidence of such free, prior and informed consent, the state's relocation of the Basarwa from their traditional lands constitutes forced relocation and violates Botswana's obligations under international law.

B. Other sources of international law confirm the international prohibition against relocating indigenous peoples without their free, prior and informed consent.

International instruments, regional norms, and international development policies, although not directly binding on Botswana, confirm the prohibition under international law against relocating indigenous peoples without their free, prior and informed consent. Human rights instruments such as ILO Convention 169 and the U.N. Draft Declaration on Indigenous Peoples confirm that governments must obtain indigenous people's free and informed consent prior to relocation. The requirement of free, prior and informed consent under international law is further demonstrated by decisions in the inter-American human rights system and by policies of development organizations.

The Botswana Court of Appeal has affirmed the value of international instruments, even when they have not been ratified by the state, as an aid to interpreting domestic law and binding international obligations. In *Unity Dow v. Attorney General*, for example, the Botswana Court of Appeal used international human rights instruments as an aid to constitutional interpretation on the grounds that the instruments contained the aspirations and values upon which the Constitution of Botswana was based.[22] Furthermore, the Court in *Unity Dow* noted that Botswana, as one of the few liberal democracies in Africa, should not insulate itself from

[22] Unity Dow v. Attorney General [1991] L.R.C. (Const.) 574, [1992] L.R.C. (Const.) 623.

progressive movements in other states or emerging in international treaties, resolutions, and other instruments.[23]

The International Labour Organization's Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) is the most explicit international instrument concerning indigenous and tribal peoples.[24] Botswana has not ratified ILO Convention 169, but the treaty's express consideration of modern developments in international law and the conditions facing indigenous peoples make it an authoritative source of law on the rights of indigenous peoples.[25] Article 16 of ILO Convention 169 establishes the general principle that indigenous peoples "shall not be removed from the lands which they occupy" and further provides:

> Where the relocation of these peoples is considered necessary as an exceptional measure, *such relocation shall take place only with their free and informed consent*. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.[26]

Although ILO Convention 169 does not specify the circumstances in which governments may not be able to obtain consent, Article 16 requires governments to obtain the free and informed consent of indigenous peoples and, where consent cannot be obtained, to carry out relocation

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[23] "Botswana is one of the few countries in Africa where liberal democracy has taken root. . . . [W]e cannot afford to be immune from the progressive movements going on around us in other liberal and not so liberal democracies such movements manifesting themselves in international agreements, treaties, resolutions, protocols and other similar understandings as well as in the respectable and respected voices of our other learned brethren in the performance of their adjudicatory roles in other jurisdictions." Unity Dow v. Attorney General, [1992] L.R.C. (Const.) at 623. Similarly, the South African Constitutional Court has consistently held that it will consider both non-binding and binding law in interpreting the constitution. *See, e.g.*, State v. Makwanyane, 1995(6) BCLR 665 (CC), *72-73 (mandate to consider public international law, including non-binding law, when interpreting certain constitutional provisions); South Africa v. Grootboom, 2000(11) BCLR 1169 (CC), *47-48 (relevant international law can be a guide to interpreting constitutional rights).

[24] Int'l Labour Org., *Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries*, ILO 76th Sess., *entered into force* Sept. 5, 1991, reprinted in 28 I.L.M. 1382 (1989) [hereinafter ILO Convention 169].

[25] *Id.* Preamble ("[c]onsidering . . . the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world . . .").

[26] *Id.* art. 16.2 (emphasis added).

only after appropriate and legally established procedures. The International Labour Organization's Guide to ILO 169 (ILO Guide) affirms the requirement that the decision-making process for relocation of indigenous peoples include public inquiries and participation of the affected indigenous communities.[27]

The U.N. Draft Declaration on the Rights of Indigenous Peoples, which aims to provide an international platform for recognizing, promoting, and protecting indigenous peoples' rights and freedoms, similarly emphasizes the importance of obtaining consent prior to relocation. Although the Draft Declaration has not yet been finalized or opened for signature, it reflects international consensus on indigenous peoples' rights with respect to land and natural resources.[28] According to Article 10 of the U.N. Draft Declaration, indigenous peoples "shall not be forcibly removed from their lands or territories"; under Article 10, relocation is unlawful unless it occurs with "the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."[29] The Draft Declaration further states:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources . . . .[30]

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[27] MANUELA TOMEI & LEE SWEPSTON, INDIGENOUS AND TRIBAL PEOPLES: A GUIDE TO ILO CONVENTION NO. 169 (1996), *available at* http://www.ilo.org/public/english/employment/recon/eiip/publ/1998/169guide/index.htm#top [hereinafter ILO GUIDE].

[28] A working group finished its work on the text of the U.N. Draft Declaration in 1994, and the Declaration is presently working its way through the United Nations system for eventual consideration by the General Assembly. *See* U.N. Comm'n on H.R., Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (Aug. 26, 1994) [hereinafter "U.N. Draft Declaration"]. Legal scholars have characterized the Draft Declaration as reflecting international consensus on indigenous rights to land. *See, e.g.*, Michael Holley, *Recognizing the Rights of Indigenous People to their Traditional Lands: A Case Study of an Internally-Displaced Community in Guatemala*, 15 BERKELEY J. INT'L L. 119, 141 (1997); Kristin Ann Mattiske, *Recognition of Indigenous Heritage in the Modern World: U.S. Legal Protection in Light of International Custom*, 27 BROOK. J. INT'L L. 1105, 1117 (2002).

[29] U.N. Draft Declaration, art. 10.

[30] *Id.*, art. 30.

The U.N. Draft Declaration, as a reflection of emerging international law, affirms that the relocation of indigenous persons without their free and informed consent is prohibited.

The principle of free, prior and informed consent was also affirmed in a January 2005 Workshop on Methodologies Regarding Free Prior and Informed Consent and Indigenous Peoples held by the U.N. Permanent Forum on Indigenous Issues. A working paper for the U.N. Workshop, drafted by NGOs at the request of and submitted by the U.N. High Commissioner for Human Rights, stated that "[t]he principle of free, prior and informed consent is central to indigenous peoples' exercise of their right of self-determination with respect to developments affecting their lands, territories and natural resources."[31] The Workshop concluded that free, prior and informed consent is required in projects specifically directed at indigenous peoples and projects that affect indigenous peoples even if not specifically directed at them.[32] The U.N. Workshop determined that indigenous peoples' free, prior and informed consent is critical "[i]n relation to any policies or programmes that may lead to the removal of their children, or their removal, displacement or relocation from their traditional territories."[33]

The inter-American human rights system has also affirmed that indigenous peoples may not be relocated without their free, prior and informed consent. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have consistently recognized indigenous peoples' right to communal lands.[34] Furthermore, the Proposed American

[31] Comm'n on H.R., Sub-Comm. on the Promotion and Prot. of H.R., Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept submitted by Antoanella-Iulia Motoc and the Tetebba Foundation, ¶9, U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (2004) [hereinafter Workshop Preliminary Working Paper].
[32] U.N. Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, ¶12, U.N. Doc. E/C.19/2005/3 (2005) [hereinafter U.N. Workshop Report].
[33] *Id.* at ¶45.
[34] *See, e.g.*, *Awas Tingni*, *supra* note 3, ¶149 (interpreting the right to property provision under Article 21 of the American Convention on Human Rights as protecting indigenous peoples' collective right of ownership to

Declaration on the Rights of Indigenous Peoples states that "[u]nless exceptional and justified circumstances so warrant in the public interest, the states shall not transfer or relocate indigenous peoples without the free, genuine, public and informed consent of those peoples."[35]

International financial institutions and development agencies have adopted policies that recognize indigenous land rights and require the free, prior and informed consent of indigenous peoples to projects that affect them. An Inter-American Development Bank policy directive emphasizes that "[i]n the case of indigenous people, the first principle of avoiding or absolutely minimizing resettlement should be *strictly* adhered to" as "there are almost no accounts of successful resettlement involving indigenous people."[36] The United Nations Development Programme (UNDP) has incorporated free, prior and informed consent in its practice guidelines, in which it affirmed that UNDP "promotes and supports the right of indigenous peoples to free, prior informed consent with regard to development planning and programming that may affect them."[37] The UNDP guidelines state that free, prior and informed consent is especially important when the project under consideration will "involve any form of population transfer" that affects indigenous peoples' rights.[38]

Even in cases of state-sanctioned projects to exploit resources on traditional indigenous lands, where no relocation would occur, the free, prior and informed consent of the affected people has been required. The Inter-American Commission on Human Rights applied the principle of free, prior and informed consent to logging and oil concessions that the government

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traditional lands and resources); *Maya Belize*, *supra* note 3, ¶113 (recognizing that indigenous people's right to property has a collective aspect.).

[35] Inter-Am. Comm'n on H.R., *Proposed American Declaration on the Rights of Indigenous Peoples*, OEA/Ser.L.V/II.95, doc. 6, art. 18 (1997).

[36] Inter-Amer. Development Bank, *Involuntary Resettlement in IDB Projects: Principles and Guidelines*, at 14 (1999), *available at* http://www.iadb.org/sds/IND/publication/publication_138_105_e.htm.

[37] U.N. Development Programme, *UNDP and Indigenous Peoples: A Practice Note on Engagement*, ¶28 (2001), *available at* http://www.undp.org/cso/policies.html.

[38] *Id*. ¶41.

of Belize had granted on Maya indigenous communities' traditional lands. The Commission concluded that Belize's grant of these concessions without the informed consent of the Maya people violated their right to property.[39] Requiring free, prior and informed consent in cases involving the extraction of resources on indigenous peoples' traditional lands strongly suggests that the requirement is obligatory in the graver situation of the complete removal of indigenous peoples from their lands.

Finally, international bodies have made clear that the requirement of obtaining free, prior and informed consent means that states must respect indigenous peoples' rights to withhold consent. The U.N. Workshop, for instance, recognized that "despite the complexities of statutory consultations and tribal systems, indigenous peoples should have the right to consent, and the right to refuse consent."[40] The U.N. Human Rights Commission, the U.N. Ad Hoc Intergovernmental Panel on Forests (whose work is now carried out by the U.N. Forum on Forests), and the U.N. Working Group on Indigenous Populations have all determined that the power to withhold approval is integral to the concept of consent.[41] Similarly, the Secretariat of the Convention on Biological Diversity has developed principles that governments should consider "whenever developments are proposed to take place on . . . lands and waters traditionally occupied or used by indigenous and local communities."[42] These guidelines include establishing processes "whereby local and indigenous communities may have the option to

[39] *Maya Belize*, *supra* note 3, ¶153.
[40] U.N. Workshop Report, *supra* note 32, at 6.
[41] *See* Workshop Preliminary Working Paper, *supra* note 31, at 8; Ad Hoc Intergovernmental Panel on Forests, *The Leticia Declaration and Proposals for Action*, at 11 ¶2, U.N. Doc. E/CN.17/IPF/1997/6 (1997); U.N. Working Group on Indigenous Populations, *Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights*, ¶52, U.N. Doc. E/CN.4/Sub.2/AC.4/ 2002/3 (2002).
[42] Secretariat Of the Convention on Biological Diversity, *Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities*, ¶1 (2004), *available at* http://www.biodiv.org/doc/publications/akwe-brochure-en.pdf.

accept or oppose a proposed development that may impact on their community."[43] The Council of Ministers of the European Union has adopted a resolution providing that "indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas."[44] The European Commission has reaffirmed this right as the equivalent of requiring free, prior and informed consent.[45] Consequently, while there may be limited circumstances in which a government is not able to obtain consent,[46] indigenous communities' right to consent implies a state duty to respect the right to withhold consent.

Thus, international treaties and other sources of international law require governments to obtain free, prior and informed consent from indigenous peoples—and to respect their right to withhold such consent—before taking actions that affect their rights, particularly when the proposed action would impair their relationship with their traditional lands.

C. Consent is valid only if obtained adequately in advance, without coercion, and with the provision of sufficient information about the proposed move.

Governments seeking to relocate indigenous communities from their traditional lands must obtain the free consent of the community prior to relocation and must provide the community with information necessary to make an informed decision. The U.N. Workshop has elaborated on the elements of free, prior and informed consent. According to the Workshop,

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[43] *Id*. ¶8(e).
[44] Council of the Euro. Union, *Council Resolution of 30 November 1998, Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States*, ¶5, *available at* http://europa.eu.int/comm/external_relations/human_rights/ip/res98.pdf.
[45] The European Commission reaffirmed this resolution in 2002 at the Speaking Out International Conference on EU's Indigenous Peoples Policy within the Framework of the Development Cooperation of the Community and Member States, organised jointly by International Alliance of Indigenous and Tribal Peoples of the Tropical Forests, Rain Forest Movement UK and European Commission, Brussels. *See* Parshuram Tamang, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices*, ¶22, U.N. Doc. PFII/2004/WS.2/8 (2005).
[46] *See* ILO GUIDE, *supra* note 27, at "Section 2: Special Issues" (noting that "in the cases in which consent cannot be obtained, *relocation* can only take place *after appropriate procedures established by national law and regulations*.").

"free" consent is consent obtained without coercion, intimidation, or manipulation.[47] "Prior" consent must have been "sought sufficiently in advance of any authorization or commencement of activities," and respect must be shown for the "time requirements of indigenous consultation/consensus processes."[48] Finally, "informed" consent requires that information be provided regarding, at least:

> a. The nature, size, pace, reversibility and scope of any proposed project or activity;
>
> b. The reason(s) for or purpose(s) of the project and/or activity;
>
> c. The duration of the above;
>
> d. The locality of areas that will be affected;
>
> e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;
>
> f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others);
>
> g. Procedures that the project may entail.[49]

A determination that the elements of free, prior and informed consent have not been respected may justify revocation of consent.[50]

III. Governments must engage in meaningful consultation with indigenous communities about proposed actions that affect their rights and must provide them with the opportunity to influence the decision to undertake such actions.

The protection of well-established human rights requires states to obtain the free, prior and informed consent of indigenous peoples before relocating them. The obligation to obtain free, prior and informed consent necessarily includes the obligation to engage in meaningful

[47] U.N. Workshop Report, *supra* note 32, at ¶45(i).
[48] *Id*.
[49] *Id*.
[50] *Id*. at 13.

consultation to obtain such consent, and international law sources articulate this requirement. To comply with this obligation to consult, governments must observe strict procedural requirements governing the negotiation process and must give indigenous peoples a genuine opportunity to influence the outcome of the consultation.

The requirement that governments engage in meaningful consultation with indigenous peoples prior to taking actions that may affect their rights has been recognized in diverse international legal sources, including treaties and case law. The Human Rights Committee has concluded that the right to self-determination guaranteed by Article 1 of the ICCPR includes a duty to ensure the "full consultation" of indigenous persons "in matters affecting their traditional livelihood."[51] Similarly, the Human Rights Committee has found that Article 27 of the ICCPR, protecting the right of ethnic minorities to enjoy their own culture, may "require positive legal measures of protection and measures to *ensure the effective participation* of members of minority communities in decisions which affect them."[52]

ILO Convention 169 similarly affirms a general requirement to consult with indigenous peoples "whenever consideration is being given to legislative or administrative measures which may affect them directly."[53] In these situations, governments are required to "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions."[54] ILO Convention 169 emphasizes the requirement of consultation particularly in cases where indigenous lands may be affected.[55]

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[51] U.N. Hum. Rts. Comm., *Concluding Observations of the Human Rights Committee: Norway*, U.N. Doc. CCPR/C/79/Add.112, ¶10 (1999).
[52] U.N. Hum. Rts. Comm., *General Comment No. 23, The Rights of Minorities (Art. 27)*, U.N. Doc. CCPR/C/21/Rev.1/Add.5, ¶7 (1994) (emphasis added).
[53] ILO Convention 169, *supra* note 24, art. 6.1(a).
[54] *Id.*
[55] *Id.*, art. 17.2. ILO Convention 169 provides that in the context of development projects or policies that affect indigenous peoples and the land they use, indigenous peoples have the right to decide their own priorities. In such cases, "they shall participate in the formulation, implementation, and evaluation of plans and programmes for

International courts and commissions have also concluded that states must respect indigenous communities' right to consultation when resource extraction activities that will affect their lands are being considered. In *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, the African Commission on Human and Peoples' Rights affirmed the Ogoni indigenous people's right to participate in development decisions.[56] In that case, the African Commission held that Nigeria had violated the Ogoni's right to enjoy the best attainable state of physical and mental health (Article 16 of the African Charter) and their right to a generally satisfactory environment favorable to their development (Article 24 of the African Charter). The Commission notably held that to comply with the African Charter, states must provide "meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities."[57]

In the *Awas Tingni* case before the Inter-American Court of Human Rights, the Awas Tingni indigenous community sought to bar the Nicaraguan government from granting a Korean timber company a logging concession on the community's traditional lands. The Inter-American Commission on Human Rights espoused the Awas Tingni claims before the Inter-American Court of Human Rights, arguing that "*there must be meaningful consultation* with the Awas Tingni Community itself, through its own leadership structure, before awarding a concession to third parties for exploitation of the Community's land."[58] The Inter-American Court held that Nicaragua's failure to recognize indigenous land ownership and its subsequent grant of logging

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national and regional development which may affect them directly." *Id.*, art. 7.1. The ILO Guide notes, however, that Article 7 does not mean that indigenous peoples have the right to veto development programs that affect the entire country. ILO GUIDE, *supra* note 27, § Convention No. 169: its nature and fundamental principles.

[56] African Comm'n on Human and Peoples' Rights, *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (2001), *available at* http:// www1.umn.edu/humanrts/africa/comcases/155-96b.html.

[57] *Id.*, ¶55.

[58] Complaint of the Inter-American Commission on Human Rights, submitted to the Inter-American Court of Human Rights in the Case of Awas Tingni Mayagna (Sumo) Indigenous Community Against the Republic of Nicaragua, *reprinted in* 19 ARIZ. J. INT'L & COMP. L. 17, ¶76 (2002) (emphasis added).

concessions violated the indigenous community's right to property. The Court required Nicaragua to delimit, demarcate, and title the lands of the Awas Tingni Community within 15 months, "with full participation by the Community and taking into account its customary law, values, customs and mores."[59]

Meaningful consultation must provide the affected indigenous peoples with an opportunity to influence the outcome of the consultation. The official ILO Guide to Convention 169 defines consultation as "[t]he process by which a government consults its citizens about policy or proposed actions. It is not consultation unless those consulted have a chance to make their views known, and to influence the decision."[60] States must undertake consultation with the aim of achieving an agreement or consent to the measures proposed.[61] Similarly, the Organization of American States Working Group on Indigenous Rights has found consultation to require that "any objections or comments must be taken into consideration when arriving at a decision."[62] The principle is well established that "in order to be truly effective, . . . consultations must . . . provide indigenous peoples with a full and fair opportunity to be heard and to genuinely influence the decisions affecting their lives."[63] Thus, consultation with indigenous peoples about policies or activities affecting their rights must be more than mere formality or a process of providing information; rather, consultation requires a genuine opportunity for indigenous peoples to influence the relevant decisions and "should lead . . . to

[59] *Awas Tingni*, *supra* note 3, ¶164.
[60] ILO GUIDE; *see also* Gerald P. Neugebauer III, *Indigenous Peoples as Stakeholders: Influencing Resource-Management Decisions Affecting Indigenous Community Interests in Latin America*, 78 N.Y.U. L. REV. 1227, n.27 (2003) (interpreting ILO GUIDE).
[61] ILO 169, *supra* note 24, art. 6. *See also* ILO GUIDE, *supra* note 27, § General Background.
[62] Osvaldo Kreimer, *Indigenous Peoples' Rights to Land, Territories, and Natural Resources: A Technical Meeting of the OAS Working Group*, 10 No. 2. HUM. RTS. BR. 13, 16 (2003).
[63] *See* S. James Anaya & Robert A. Williams, *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 80 (2001).

specific measures to safeguard the interests and rights of the indigenous communities concerned."[64]

National courts have similarly held that meaningful consultation entails the right of indigenous communities to influence the outcome of the negotiations, particularly when the negotiations would affect the community's relationship to land. In *Haida Nation v. British Columbia*, for example, the Haida aborigines brought suit against the Canadian province of British Columbia for issuing licenses to lumber companies to log portions of the Haida people's traditional lands without their consent. The Supreme Court of Canada determined that the government was required to consult, with possible "significant accommodation to preserve the Haida interest."[65] The Court envisioned a spectrum of consultation: "[W]here the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor," consultation required only that the government "give notice, disclose information, and discuss any issues raised in response to the notice."[66] However, where a "strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high," consultation requires formal participation in the decision-making process and written evidence that indigenous concerns were considered and had an effect on the outcome.[67] The Canadian court found that although the duty to consult and consider indigenous concerns did not give indigenous communities the right to veto proposed projects, it does necessitate a "process of balancing interests, of give and take."[68] The court found that the highest standard of consultation was required in a case where the government merely granted licenses for use of indigenous lands; this standard certainly must apply when the

[64] *Id.*
[65] Haida Nation v. British Columbia [2004] 245 D.L.R. (4th) 33, ¶77.
[66] *Id.*, ¶43.
[67] *Id.*, ¶44.
[68] *Id.*, ¶48.

rights affected are of even greater significance, as in a case of relocation, where the infringement is the complete removal of the indigenous peoples from their land.

In *Taku River Tlingit First Nation v. British Columbia*, the Supreme Court of Canada declined to rule on behalf of the First Nation aboriginal people, who argued that the government had failed to meaningfully consult them in its decision to build a road through their traditional lands.[69] The Court determined that the government fulfilled its duty of meaningful consultation and accommodation even though it had not ultimately followed the First Nation's request not to build the road. The Court reiterated its holding in *Haida Nation*:

> The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.[70]

The First Nation had participated fully throughout the three-and-one-half-year consultation process; although it ultimately failed to prevent the construction of the road, the government accommodated its views in other ways. For example, the government "approved funding for wildlife monitoring programs as desired by the [First Nation]," thoroughly identified the First Nation's concerns, and adopted the mitigation strategies proposed by the community, including recommendations regarding future management of the road.[71] Thus, for the Canadian Supreme Court, although meaningful consultation may not require the indigenous peoples' full agreement to the proposed activity, it does require evidence of good-faith efforts to incorporate their views.

Negotiations, in addition to providing indigenous peoples with a real opportunity to influence decisions and ensuring that the government take their views into account, must be

[69] Taku River Tlingit First Nation v. British Columbia [2004] 245 D.L.R. (4th) 193.
[70] *Id*., ¶25.
[71] *Id*., ¶¶12, 44.

conducted entirely free of coercion and manipulation. General principles of contract law[72] and international human rights law dictate that in the process of meaningful consultation about decisions affecting their rights, indigenous peoples may not be coerced or otherwise manipulated into agreement. According to the U.N. Special Rapporteur on the Prevention of Discrimination and Protection of Indigenous Peoples:

> [I]ndigenous peoples are not to be deprived of their resources as a consequence of unequal or oppressive arrangements, contracts or concessions, especially those that are characterized by fraud, duress, unfair bargaining conditions, lack of mutual understanding, and the like . . . . [I]ndigenous peoples have the permanent right to own and control their resources so long as they wish, free from economic, legal, and political oppression or unfairness of any kind, including the often unequal and unjust conditions of the private marketplace.[73]

Thus, negotiations marred by coercion or inequality in bargaining power do not comply with the requirements of meaningful consultation, and the outcome of any such process violates the rights of indigenous peoples to participate in decisions affecting their rights.

Negotiations must be undertaken in good faith with full disclosure of all relevant information. The ILO Guide specifies that governments must undertake consultations with truly representative organizations and provide relevant and complete information that can be understood fully by the affected peoples.[74] Finally, to ensure that indigenous peoples have the ability to meaningfully participate and influence the outcome of the consultation, governments may need to "help[] these peoples acquire the skills and capabilities needed to understand and decide upon the existing development options."[75]

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[72] Lloyd's Bank v. Bundy, 1975 Q.B. 326 (Eng. C.A.) (inequality of bargaining power—Lord Denning opinion); Hedley Byrne & Co. Ltd v Heller & Partners Ltd, [1964] A.C. 465 (H.L.) (duty of care to avoid misrepresentations owed in certain situations); D & C Builders v. Rees [1965] 2 Q.B. 617 (if a promise has been obtained through improper pressure, it can be revoked).

[73] U.N. Comm'n on Hum. Rts., *Prevention of Discrimination and Protection of Indigenous Peoples: Final Report of the Special Rapporteur, Erica-Irene A. Daes*, U.N. Doc. E/CN.4/Sub.2/2004/30, ¶47 (2004).

[74] *See* ILO Guide, *supra* note 27, § Convention No. 169: its nature and fundamental principles.

[75] *Id*.

In short, for a proposed relocation, which necessarily affects indigenous people's relationship to their traditional lands, to be lawful, there must be strong evidence that the government took appropriate, effective steps to meaningfully consult with the affected communities. Consultation must be undertaken in good faith and in an atmosphere of mutual respect and full, equitable participation, including a genuine opportunity for indigenous peoples to influence decisions.[76] Negotiations must be free from coercion and manipulation and with full disclosure of all relevant information. Without proof that such steps were taken, the consultation process cannot be deemed to have been meaningful, and the resulting relocation would constitute forced relocation and violate international law.

Conclusion

In acceding to the ICCPR, the African Charter, and CERD, among other international law instruments, Botswana willingly took on international law obligations to protect human rights, including the rights to self-determination, property, and culture. The duty to protect these rights prohibits forced relocation. It also entails a duty to obtain the free and informed consent of indigenous peoples prior to taking any actions that affect them. Furthermore, Botswana is obligated to engage in meaningful consultation with indigenous peoples about decisions that affect their rights and, particularly, decisions that would affect their relationship with traditional lands; this obligation is especially strong where the relevant decision would sever this relationship. Where such standards have not been met, the resulting relocation is forced and violates Botswana's obligations under international law.

[76] *Id.*

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