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STAKEHOLDERS' INFORMATION ON BOTSWANA

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Introduction

Botswana is one of the world fastest growing economies, since gaining independence from Britain in 1966. Although, it experienced a downward spiral in the economy at 4.7% in 2006-07,¹ population living below 1 dollar per day seems impressive at 28.0%² compared with other African nations. Comparatively too, unemployment rate in Botswana does not seem alarming at 23.8%.³ The political will to fight the infection of HIV /AIDS is commendable and fruitful with an appreciation in the life expectancy of the population to 50.58 years in 2007⁴ as opposed to 46.6% of 2005.⁵ Botswana is one of the early democracies in Africa and is signatory to international human rights instruments including notably the International Covenant on Civil and Political Rights (ICCPR) and Convention on Elimination of Discrimination against Women (CEDAW). Customary International law is applicable in so far as it is not inconsistent with any piece of domestic legislation.⁶ However, grave challenges still remain in many aspects of governance and observance of human rights in Botswana. These are discussed in the following paragraphs:

1. Freedom of Speech and of the Press in Botswana

Section 12 of the 1966 Constitution of Botswana (the Constitution) as amended⁷ provides for freedom of speech and of the press but rather sadly, the commitment of government towards achieving these rights is not impressive. The National Security Act (NSA), enacted in 1986 during Botswana's conflict with apartheid South Africa, still exists and has been used to restrict reporting on government activities.⁸ Section 5 of the National Security Act prohibits publication of any classified material without authority. Generally, the law does not provide public access to government information, and the government is loathsome of such access.⁹

The negative consequence of absence of freedom of information law is well pronounced in the well documented incidents of grievous threats, harassment and attacks on journalists in retaliation for their reporting. For instance in 2005, immigration legislation was employed by government to deport two Zimbabwean journalists, Rodrick Mukumbira and Charles Chirinda, who were critical of state policies in their articles.¹⁰ Also, Kenneth Good, an Australian-born academic was charged under the NSA and deported for criticising democratic practices in Botswana.¹¹ It was reported that in 2007 a photographer with the

¹ CIA World Factbook: Botswana (2007) <<http://www.cia.gov/publications/factbook/print/bc.html>> [accessed 6 March 2008].

² Human Development Report: Botswana (2007/2008)

³ no 1 above.

⁴ no 2 above.

⁵ As above.

⁶ Pretoria University Law Press (PULP) *Human Rights Protected? Nine Southern African country reports on HIV, AIDS and the law* (2007) 6

⁷ This provision is however qualified by the Section 7 (2) of the Constitution.

⁸ Africa Media Development: Botswana in Context

<http://downloads.bbc.co.uk/worldservice/trust/pdf/AMDI/botswana/amdi_botswana3_media_health.pdf> (accessed 10 March, 2008)

⁹ 'Mogae condemns info leaking' *Botswana Press Agency News* 12 May 2007.

¹⁰ 'Journalist appeals expulsion' *Mmegi News* 3 August 2005

<<http://www.mmegi.bw/2005/August/Wednesday3/567687881335.html>>

¹¹ 'IPI Condemns Deportation of Professor Kenneth Good from Botswana, Says Decision Undermines Country's Position as One of Africa's Freest.'

weekly newspaper *Echo* was assaulted by a businessman on trial for rape while he was covering the case's proceedings in court.¹² This trend is in grave violation of article 19 of the Universal Declaration of Human Rights (UDHR) which guarantees freedom of information.

2. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

Section 7 of the 1966 Constitution guarantees protection from torture, other cruel, inhuman or degrading treatment or punishment but recognises the infliction of lawful punishment. In Botswana, reports on the activities of the security forces in closed institutions remain a great concern. Notably, the paramilitary Special Support Group of the Botswana Police Service and the Criminal Investigation Department are known for their lack of accountability and use of torture, abuse and threats of suspects.¹³ In November 2005, five soldiers and two police special constables were arrested for allegedly forcing several Zimbabwean detainees to perform sex acts on one another.¹⁴ In August two police special constables were charged with beating a Zimbabwean prisoner.¹⁵ Rather sad, Botswana has not ratified the Convention against Torture (CAT). The prison system, which had an authorized capacity of 3,910, held 5,969 prisoners, a 12 percent reduction in overcrowding since September 2005.¹⁶ Overcrowding was worst in men's prisons and constituted a serious health threat because of the country's high incidence of HIV/AIDS and tuberculosis. Rape between inmates occurred.¹⁷ Generally, prison conditions remained poor in Botswana in contravention of article 10 of the ICCPR.

Corporal punishment is lawful in the home and at school while children have limited protection from violence under the Children's Act (1981) and the Penal Code (1986, amended 2004).¹⁸ This runs foul of article of the Convention on Right to Child to which Botswana is signatory.

3. Denial of Fair Public Trial

A 2005 report by the Office of the Ombudsman characterized the "delays in the finalization of criminal matters in all courts" as a "serious concern," particularly the delays in processing appeals.¹⁹ In another survey conducted during 2005, 31 percent of respondents cited inefficiencies in the justice system as a reason for the perceived increase in fraud in the country.²⁰ Although the constitution provides for an independent judiciary, the civil courts

<http://www.freemedia.at/cms/ipi/statements_detail.html?ctxid=CH0055&docid=CMS1144321004502&year=2005> (accessed 8 March 2008)

¹² Botswana: 2007

<<http://www.freedomhouse.org/modules/publications/pfs/modDisplayCountryDetail2.cfm?country=7141&year=2007>> (accessed 8 March 2008)

¹³ J Berg *Police Accountability in Southern Africa* (2005)

http://www.policeaccountability.co.za/File_Uploads/docs/File_Download.asp?ThisFile=PACommonwealth.pdf (accessed 8 March 2008).

¹⁴ The Bureau of Democracy, Human Rights, and Labour Country Reports on Human Rights Practices: Botswana (2006) <<http://www.state.gov/g/drl/rls/hrrpt/2006/78720.htm>>.

¹⁵ As above.

¹⁶ As above.

¹⁷ 'Councillors debate condoms in prison' *Botswana Press Agency News* 10 March 2008.

¹⁸ 'Briefing from global initiative to end all corporal punishment of children'

<http://www2.ohchr.org/english/bodies/hrc/docs/ngos/global_algeria.doc> (accessed 8 March 2008).

¹⁹ The Bureau of Democracy, Human Rights, and Labour Country Reports on Human Rights Practices: Botswana (2006).

²⁰ As above.

remained unable to provide timely, fair trials due to severe staffing shortages and a backlog of pending cases.²¹ Trials under the National Security Act could be held in secret.²² This also contravenes article 13 of the ICCPR. In some cases, tribal judges may issue sentences that include corporal punishment such as lashings on the buttocks as well as capital punishment.²³

4. Discrimination, Societal Abuses, and other abuses against Women

Section 15(4)(c) of the Constitution contains a list of issues which operate as a claw back provisions to the provision of section 15(1) which guarantees that no law shall make any provision that is discriminatory either of itself or in its effect. These issues are regarded as matters of personal laws and include adoption, marriage, divorce, burial, devolution of property on death. By virtue of that categorisation, the Constitution of Botswana offers a strong basis for discrimination and societal abuses against women in Botswana. Instances of how such discrimination have manifested are discussed below.

5.1 Elections and Political Participation

Women accounted for approximately 57 percent of voters in the October 2004 election, but stood for office much less frequently.²⁴ There were seven women in the 61-seat parliament, five women in the 20-seat cabinet, three female justices on the 13-seat High Court, and two women in the 15-seat House of Chiefs.²⁵ The constitution of Botswana makes no provision for quotas to ensure women's representation in publicly elected bodies on any level.²⁶ This violates the provision of article 4(1) of CEDAW which urges state parties to adopt temporary measures aimed at accelerating de facto equality between men and women.

5.2 Gender based violence

Although recently the Domestic violence Bill was passed into law in Botswana²⁷ domestic violence remains pronounced.²⁸ The new law does create offence in respect of domestic violence, it only serves to protect the victims of violence.²⁹ Prostitution remains illegal and is

²¹ 'Judicial Case Management fights backlog' *Botswana Press Agency News* 10 January 2008.

²² no 10 above.

²³ 'Botswana defends flogging thieves' *BBC News* 10 August 2004. 'Death Penalty for Violent Crimes –Botswana' *Hands off Cain* <<http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=25&nome=botswana>> (accessed 9 March 2008).

²⁴ 'Botswana women in Politics Fact sheet: 2005' <<http://www.genderlinks.org.za/docs/gelectionsdocs/Botswana-Women-Politics.doc>> (accessed 10 March 2008).

²⁵ The Bureau of Democracy, Human Rights, and Labour Country Reports on Human Rights Practices- Botswana (2005) <<http://www.state.gov/g/drl/rls/hrrpt/2005/61555.htm>> (accessed 8 March 2008).

'Decline in number of women parliamentarian worrying' *Botswana News Agency Daily News* 9 November 2004

²⁶ 'Botswana-Women Representation Quotas' <<http://www.eisa.org.za/WEP/botquotas.htm>> (accessed 8 March 2008).

²⁷ *Womensphere* 16 February 2008 <<http://womensphere.wordpress.com/2008/02/16/botswana-domestic-violence-bill-sails-through-parliament>> (accessed 11 March 2008).

²⁸ G Mokoodi 'The Dynamics Of Domestic Violence Against Women In Botswana' (2004) 18 *Botswana Journal of African Studies* 55. <<http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/PULA/pula018001/pula018001007.pdf>> (accessed 7 March 2008)

²⁹ The Preamble to the law provides that the law is meant for the protection of survivors of domestic violence and for matters connected therewith.

perceived as women offence.³⁰ Sexual harassments take place in the work places and schools and are often unreported let alone being addressed by the law enforcement agents.³¹ There are discriminatory traditional laws which restrict women's property rights and economic opportunities, particularly in the rural areas.³² With respect to the institution of marriage and its implications on women's right to property, discrimination persists notwithstanding the prospects of the Abolition of Marital Power Act of 2004.³³ A woman married under traditional law known as the 'common property' system is considered as a legal minor and will require her husband's consent to buy or sell property, apply for credit, and enter into legally binding contracts.³⁴ Polygyny is legal under traditional law with the consent of the first wife, but it was not common.³⁵ Sexual abuse of the girl child by step fathers and community members is common in Botswana while causes of this have been associated with pornography, drug abuse, poor parenting and child neglect.³⁶ Although, Botswana ratified the Convention on the Rights of the Child by accession, on March 14 1995³⁷, this is yet to translate into tangible benefits to children as the treaty has not been officially incorporated by legislation into Botswana law. It is therefore not surprising that cases of girl child abuse rarely get to the courts.³⁸

5. Worker Rights

6.1 Right to Association

Workers in Botswana have the right to form and join unions of their choice.³⁹ However, striking workers on several occasions have been at the risk of dismissal.⁴⁰ In 2006 for instance, two mining companies, Debswana (which is jointly owned by De Beers and the government of Botswana), and BCL (an enterprise of global mining house LionOre) tried to subvert the Botswana Mine Workers Union (BMWU), by instigating a wildcat strike at BCL

³⁰ 'In the service of the oldest profession' *Mmegi* 27 October 2005. 'No sex workers in the law books' *Mmegi* 22 February 2008. 'Prostitutes claim to be students' *UB Horizon* <<http://www.ubhorizon.com/?p=22>> (accessed 7 March 2008).

³¹ 'Sexual abuse of school girls widespread in Botswana' <http://www.gemsa.org.za/article.php?a_id=89&PHPSESSID=c4e0b853a1f10bcce961360b9a4d37bc,> (accessed 10 March 2008).

³²The Bureau of Democracy, Human Rights, and Labour Country Reports on Human Rights Practices: Botswana (2006).

³³ EK Quansah 'Abolition of Marital Power in Botswana: A new dimension in marital relationship?' (2005) 1 *University of Botswana Law Journal* 5

³⁴no 31 above.

³⁵ As above

³⁶ 'Socio-Economic Factors Contributing to Girl Child Abuse in Botswana' http://www.crin.org/resources/publications/Botswana_CIDA.doc.

³⁷ G.A. Res. 44/125, U.N. GAOR, 44th Session, Supp. No. 49, U.N. Doc. A/44/736 (1989), <http://www.ohchr.org/english/law/crc.htm>. Botswana did so with a reservation with regard to the provisions of article 1 of the Convention. < <http://www.ohchr.org/english/countries/ratification/11.htm>.> (accessed 10 March 2008).

³⁸ Committee on the Rights of the Child, *Initial reports of States parties due in 1997: Botswana*, ¶41, U.N. Doc. CRC/C/51/Add.9 (Feb. 27, 2004) <http://www.law.yale.edu/rcw/rcw/jurisdictions/afs/botswana/Botswana_CRC_Report.pdf > (accessed 10 March 2008).

³⁹ 2007 Annual Survey of the violations of Trade Union Act in Botswana < <http://survey07.ituc-csi.org/getcountry.php?IDCountry=BWA&IDLlang=EN>> (accessed 10 March 2008).

⁴⁰ Freedom in the World: Botswana 2006, <http://www.freedomhouse.org/inc/content/pubs/fiw/inc_country_detail.cfm?year=2006&country=6927&pf> (accessed 13 March 2008)

to get workers sacked, withholding union fees and starting a rival, 'yellow' (company-sponsored) union.⁴¹ In 2005, 461 miners were sacked, including the Botswana Mining Workers' Union (BMWU) Chairman, Chimbidzani Chimidza, and General Secretary, Jack Tlhagale, for taking part in what the government deemed was an illegal 13 day strike in August-September 2004. The teaching profession was not spared from assault against workers; Japhta Radibe, President of the Botswana Teachers' Union (BTU) and President of the Southern Africa Teachers' Organisation was "retired" from teaching on 24 October due to union activities in support for social issues and teachers' welfare. The previous BTU President, Phillip Matoane was also dismissed from his post at the Seepapitso secondary school under similar circumstances. Japhta Radibe was reinstated on 7 November, after hundreds of BTU members took to the streets to protest and intense media coverage.⁴²

6.2 Child Labour

Although child labour is prohibited and addressed in the Children's Act, child labour is still prevalent in Botswana. The ILO estimated that 13.5 percent of children ages 10 to 14 years in Botswana were working in 2002.⁴³ In a more recent National Labour survey conducted in Botswana in 2005/2006, it was established that 9% of all the children between the age of 7 and 17 were in employment.⁴⁴ Child labour as practiced in Botswana has been found to include commercial sexual exploitation, using children as instruments in the commitment of crimes and exposure to hazardous works.⁴⁵

6. Gay, Lesbian, Bisexual and Transgender (GLBT) Rights

Gay, Lesbian, Bisexual and Transgender (GLBT) individuals in Botswana continue to face a denial of protection of basic human rights based on their sexual orientation and gender identity and expression. Civil society organisations that advocate for the rights of the GLBT community have been denied legal status because the Republic of Botswana claims that the country does not recognise homosexuals.⁴⁶ The most egregious violation of GLBT rights lies in the Botswana penal code that still criminalises same sex sexual conducts in private between consenting adults in violation of articles 2(1), 17 and 26 of the ICCPR to which Botswana is signatory.⁴⁷ Section 164 of the Penal Code punishes the crime of 'unnatural offences'⁴⁸ while section 165 punishes with imprisonment for five years the 'attempt to commit unnatural offences.'⁴⁹ The criminalization of private consensual adult acts has been held by the Human Rights Committee in *Toonen v. Australia* to clearly violate the ICCPR's prohibition on discrimination on the basis of 'sex' which is interpreted to include 'sexual orientation.'⁵⁰ Ignoring this trend and commitments under the ICCPR, Botswanian Court of Appeals upheld the penal code stating that the constitutional rights to privacy, association and

⁴¹ no 37

⁴² As above

⁴³ US Department of Labour Report on Botswana (2004)
<http://www.dol.gov/ilab/media/reports/iclp/tda2004/botswana.htm> (accessed 13 March 2008).

⁴⁴ 'More ground gained in battle against child labour' *Child Labour Organisation Media Release* 6 Feb 2008
< <http://www.child-labour.org.za/newsroom/media-releases/botswana-apcc> > (accessed 13 March 2008).

⁴⁵ As above.

⁴⁶ Letter from Department of Civil and National Registration to LeGaBiBo Society, dated 10, 2007

⁴⁷ Botswana Penal Code, Chapter 8:01

⁴⁸ Botswana Penal Code, Section 164 Chapter 8:01

⁴⁹ Botswana Penal Code, Section 165 Chapter 8:01

⁵⁰ *Toonen v. Australia*, Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

freedom of expression of the GLBT people were legitimately curtailed by the 'public morality'.⁵¹

Private society has also stepped up its message of intolerance against homosexuality. For instance, the Evangelical Fellowship of Botswana, a coalition of evangelical churches, launched a self-named "crusade" against homosexuality. Its national secretary, Pastor Biki Butale, called on "all Christians and all morally upright persons within the four corners of Botswana to reject, resist, denounce, expose, demolish and totally frustrate any effort by whoever to infiltrate such foreign cultures of moral decay and shame into our respectable, blessed, and peaceful country."⁵² Politicians in Botswana defended sodomy laws based on the belief that homosexuality represents both the antithesis of Botswana culture and a reflection of western value. The then Assistant Minister of Labor and Home affairs, Olifant Mfa, claimed that homosexuality is 'barbaric, whether you argue it from the perspective of religion or culture.'⁵³ The Government of Botswana has the obligation at the very least, to refrain from statements that incite division, hatred and violence against the GLBT.

7. Commitment to Human Rights obligations, practices and institution

The record of Botswana with respect to ratification and reporting on international treaties and conventions is not impressive. Even less commendable is its commitment towards domestication of ratified instruments. Botswana has not ratified the International Covenant on Social Economic and Cultural Right. Botswana has not submitted any report to the African Commission on Human and People's Rights⁵⁴, the Committee Against Torture (CAT) nor has it domesticated the Convention on the Rights of Child which it ratified.⁵⁵ Also, Botswana does not have a national human rights commission or a comprehensive constitutional framework that supports human rights, particularly for women and children.

8. Conclusion

Our findings revealed that a lot remains to be achieved in Botswana in terms of the protection of the rights regarding freedom of speech and press, freedom from torture and

⁵¹ Ditshwanelo: Gays, Lesbians and Bisexuals of Botswana available at www.ditshwanelo.org/bw/gay.html

⁵² . More Than A Name: State-Sponsored Homophobia and Its Consequences in Southern Africa, Human Rights Watch and The International Gay and Lesbian Human Rights Commission (available at <http://hrw.org/reports/2003/safrica/>).

⁵³ Aubrey Lute, Homosexuality is rubbish- Mfa, The Botswana Gazette, May 24-30, 2006

⁵⁴ Pretoria University Law Press (PULP) *Human rights protected? Nine Southern African country reports on HIV, AIDS and the law* (2007) 6.

⁵⁵ President Festus Mogae of Botswana blamed the failure of his administration to comply with the obligations of international treaty on the commitment to fight HIV/AIDS which is more urgent for his administration. The remark was made at the opening of the 5th CIVICUS World Assembly which took place in Gaborone, Botswana at the end of March 2004. The theme was 'Acting Together for a Just World' where over 700 delegates from 105 countries discussed issues of civic, economic, social and political justice which contribute to a divided world. <www.civicus.org>. See Ditshwanelo, The Botswana Centre for Human rights, 'shadow report to the United Nations on the Elimination of Racial Discrimination', 6th-8th Session, Geneva, 3-6 March 2006 p 29.

other cruel, inhuman or degrading treatment or punishment, fair trial, discrimination , societal abuses and other abuses against women, association of workers and the GLBT. We urge the Human Rights Council to take into consideration the issues raised herein in its review of Botswana. Most importantly, we note that apart from the needs for Botswana to be alive to its international human rights obligations, overhaul its constitutional framework, and provide effective advocacy to evolve a culture of respect of human rights among its citizens, the government of Botswana deserves all the technical assistance necessary to achieve this. This, we view will contribute in no small measure towards the improvement of the human rights condition of the people of Botswana.