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Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21

Botswana*

The present report is a summary of five stakeholders' submissions¹ to the universal periodic review. It follows the general guidelines adopted by the Human Rights Council in its decision 17/119. It does not contain any opinions, views or suggestions on the part of the Office of the United Nations High Commissioner for Human Rights (OHCHR), nor any judgment or determination in relation to specific claims. The information included herein has been systematically referenced in endnotes and, to the extent possible, the original texts have not been altered. As provided for in Resolution 16/21 of the Human Rights Council, where appropriate, a separate section is provided for contributions by the national human rights institution of the State under review that is accredited in full compliance with the Paris Principles. The full texts of all submissions received are available on the OHCHR website. The report has been prepared taking into consideration the periodicity of the review and developments during that period.

* The present document was not edited before being sent to United Nations translation services.

I. Information provided by stakeholders

A. Background and framework

1. Scope of international obligations

1. The Commonwealth Human Rights Initiative (CHRI) recommended that Botswana sign and ratify the International Covenant on Economic, Social and Cultural Rights, the International Convention for the Protection of All Persons from Enforced Disappearance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of Persons with Disabilities.²

2. Joint Submission 1 (JS 1) recommended ratification of the International Covenant on Economic, Social and Cultural Rights to ensure long-term poverty eradication, as well as the Second Optional Protocol to the International Covenant on Civil and Political Rights and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It called on Botswana to provide a timetable for the ratification of these instruments.³

2. Constitutional and legislative framework

3. The Minority Rights Group (MRG) stated that while the Constitution of Botswana protected individuals, it did not support or protect the rights and freedoms of Botswana's tribes as collective entities.⁴

4. JS 1 stated that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Civil and Political Rights were not incorporated in Botswana's legal system.⁵ It recommended incorporation of these instruments in Botswana's national legal order.⁶

3. Institutional and human rights infrastructure and policy measures

5. CHRI stated that Botswana accepted recommendations made at its universal periodic review on 1 December 2008 ("review") with regard to the establishment of a national human rights institution in compliance with the Paris Principles, and the continued strengthening of the national human rights architecture and institutional framework by providing the necessary funds and resources. However, the Office of the Ombudsman remained the sole agency that dealt with human rights issues. Furthermore, the Ombudsman's mandate continued to be narrow and restrictive.⁷

6. JS 1 stated that the work of the Office of the Ombudsman was being undermined by slow responses by Government departments and linked low case resolution rate, which has serious implications for the promotion and protection of human rights.⁸

7. JS 1 recommended that Botswana commit to producing a national human rights strategy linked to national development principles and priorities. This strategy should include relevant capacity-building in the Government, civil society and the private sector, as well as the creation of an independent national human rights institution in accordance with the Paris Principles.⁹

8. JS 1 referred to recommendations accepted by Botswana during its review and recommended that Botswana formulate a national plan of action for implementation of

accepted recommendations, voluntary pledges and commitments; and produce a mid-term report on the status of the implementation of these recommendations and commitments.¹⁰

B. Cooperation with human rights mechanisms

1. Cooperation with treaty bodies

9. CHRI stated that at the review, Botswana accepted the recommendation to submit all outstanding treaty reports, particularly those relating to the Convention on the Elimination of All Forms of Discrimination against women.¹¹ Also, reports in relation to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, as well as its two Optional Protocols, were overdue.¹² JS 1 recommended that Botswana submit these reports without delay.¹³

2. Cooperation with special procedures

10. CHRI stated that Botswana accepted the recommendation made at its review to invite the Special Rapporteur on Indigenous Peoples and that this visit took place in March 2009.¹⁴

11. CHRI and JS 1 recommended that Botswana issue a standing invitation to the Human Rights Council's Special Procedures.¹⁵

12. JS 1 recommended that Botswana consider inviting the Special Rapporteur on the Eradication of Extreme Poverty and Human Rights for a country visit.¹⁶

C. Implementation of international human rights obligations, taking into account applicable international humanitarian law

1. Equality and non-discrimination

13. JS 1 stated there was gender inequality in relation to inheritance. It added that as of July 2012, an appeal of a lower court ruling that *Ngwaketse* customary law, which provided that only males could inherit the family home, did not violate a daughter's right to equality as guaranteed in the Constitution, was pending.¹⁷ JS 1 recommended that Botswana reform customary law to eliminate discrimination against women in relation to their access to property.¹⁸

2. Right to life, liberty and security of the person

14. JS 1 stated that Botswana remained committed to retaining the death penalty and that the Government had not considered a moratorium on the execution of this sentence.¹⁹ It made recommendations including that the Government hold public consultations to ascertain the desirability and long-term effectiveness of the death penalty as a deterrent, as well as the implementation of a moratorium on the execution of the death penalty.²⁰

15. JS 1 stated that corporal punishment was applied under the statutory and the customary law systems, as a form of correction. Relevant provisions existed in both the Penal Code and the Customary Courts Act. Despite the requirements for the administration of corporal punishment, such punishment constituted torture, cruel, inhuman and degrading treatment and was an offence to the dignity of the person subjected to this form of punishment.²¹

16. The Global Initiative to End All Corporal Punishment of Children (GIEACPC) stated that while Botswana rejected the recommendation to abolish corporal punishment,²²

it accepted the recommendation to inter alia incorporate the provisions of the Convention on the Rights of the Child into its national legislation.²³ This Convention and other human rights treaties create the obligation to enact legislation to prohibit corporal punishment of children in all settings – the home, schools, penal system and care settings. However, the Children’s Act (2009) enacted shortly after the review, failed to prohibit corporal punishment in any setting and on the contrary, it expressly authorises corporal punishment of children, including as appropriate sentences imposed by the courts.²⁴ JS 1 recommended that Botswana review the inconsistencies between the Children’s Act (2009) and its international legal commitments to the core principles of the Convention on the Rights of the Child.²⁵

17. JS 1 stated that the dual legal system of customary and common law made it difficult to ensure adequate protection of women against domestic violence. Cultural perceptions of women as perpetual minors under the care of their father, husband, uncle or brother, reinforced an environment which enabled assertion of authority through violence.²⁶

18. JS 1 stated that the Domestic Violence Act did not “specifically prohibit” domestic violence and that addressing domestic and gender violence has been largely ineffective particularly because of the poor dissemination of information on the law and programmes for victims.²⁷

19. JS 1 made recommendations including the strengthening of laws and policies; the creation and availability of adequate shelters for victims; and the criminalization of rape in marriage.²⁸

20. JS 1 stated that prisoners who were HIV-positive and who were not citizens were deprived of anti-retroviral treatment.²⁹ It recommended a review of this policy.³⁰

3. Administration of justice and the rule of law

21. The Child Rights International Network (CRIN) stated that the minimum age of criminality was eight years.³¹ It recommended raise in the age of criminality.³²

22. CRIN stated that corporal punishment in the form of whipping was lawful as a sentence for males. The penal code punished a number of crimes for which corporal punishment was identified as an appropriate sentence. These crimes include sexual offences and offences relating to murder, assault, robbery, and travelling by train without a ticket. For persons aged fourteen and over, corporal punishment can be ordered in addition to or in lieu of imprisonment. The Magistrates’ Courts Act authorized all magistrates to impose a sentence of whipping. The Customary Courts Act authorised customary courts to sentence a convicted person to corporal punishment.³³ CRIN recommended the repeal of all legal provisions that authorised corporal punishment as a sentence. It also recommended the enactment of legislation that would explicitly prohibit corporal punishment for offenders under the age of 18.³⁴

23. CRIN stated that there was no explicit prohibition of life imprisonment for child offenders in the penal code, which provided for a number of offences including mutiny, piracy, hijacking, rioting, incest, manslaughter, murder, the causing of grievous bodily harm, kidnapping and arson, to be punished with life imprisonment.³⁵ Also, the Children’s Act (2009) which provided for child offenders to be sentenced to imprisonment did not prohibit imprisonment for life.³⁶ CRIN recommended the explicit prohibition of life imprisonment and indeterminate detention of child offenders, including where such imprisonment is in lieu of the death penalty. It also recommended legislation which provided for the detention of children only as a last resort and for the shortest possible time.³⁷

4. Right to privacy

24. CHRI stated that Article 164 of Botswana's penal code criminalized any person who has "carnal knowledge" of another which is "against the order of nature", while Article 167 criminalized gross indecency committed in public or in private.³⁸ CHRI stated that a 2003 court judgment affirmed that these provisions effectively prohibited same-sex relations and was applicable to lesbian sexual activity.³⁹ CHRI made recommendations including the repealing of articles 164 and 167 of the penal code.⁴⁰

25. CHRI stated that the criminalization of same-sex conduct was incompatible with Botswana's obligations under articles 17 and 26 of the International Covenant on Civil and Political Rights.⁴¹ It added that statements made by political leaders were at odds with these obligations.⁴² Also, religious leaders fuelled discrimination and homophobia. In this regard, CHRI stated that The Evangelical Fellowship of Botswana published a statement in a national newspaper condemning the actions of civil society that advocated for the decriminalisation of homosexuality.⁴³

26. JS 1 stated that transgendered persons experienced difficulties in obtaining documents reflecting their changed gender identity following transition from one gender to another. While the changing of one's name was permissible under the law, there was no legislation specifically addressing a change of identity.⁴⁴

27. JS 1 stated that transsexual applicants were required to submit to the court, a medical report concerning their sexual identity. This report must be approved by the Ministry of Health. The ignorance of civil servants and members of the judiciary about transgendered persons resulted in the process being unnecessarily prolonged.⁴⁵

5. Freedom of expression and association

28. CHRI stated that in 2010, a private member's bill proposed the enactment of the "Freedom of Information law". This bill required substantial amendment if the right to information were to be operationalized in accordance with international best practices.⁴⁶ The coverage of this bill must be expanded to include the Office of the President, commissions of inquiry sanctioned by the President, the Judiciary, political parties and private bodies in which public funds were invested or which perform public functions or provide public services.⁴⁷ The bill should place an obligation on the Government to provide training to its officers in charge of implementing the eventual law as well as to members of the public on the use of this law.⁴⁸ It must also explicitly stipulate that when requests are being made, the reasons for such request need not be provided.⁴⁹

29. CHRI stated that organizations that work on LGBTI issues have been denied any legal status, thus restricting their ability to raise fund from donors.⁵⁰ This has infringed the right to association guaranteed under Article 13(1) of the Constitution of Botswana and enshrined in Article 22 of the International Covenant on Civil and Political Rights.⁵¹

6. Right to education

30. JS 1 stated that during the review Botswana accepted the recommendation to mainstream human rights in the education system through the development of a national strategy for human rights education in the school system in accordance with the Plan of Action 2005-2009 of the World Programme for Human Rights Education. However, this recommendation has not been implemented.⁵² JS 1 recommended that Botswana provide a national strategy for human rights education and a plan for the mainstreaming of human rights within the school system.⁵³

7. Cultural right

31. MRG stated that in Botswana each tribe spoke a different language and that there were 26 unrecognized languages.⁵⁴ It recommended that Botswana recognize these languages.⁵⁵

32. MRG stated that Botswana during the review accepted the recommendation to introduce mother-tongue schooling. A meeting hosted by the Ministry of Education involving non-governmental organisations concluded that Government would organise a conference to map out a way forward. Since then, nothing more has happened.⁵⁶ MRG recommended that Botswana take positive steps to provide for the primary education of the children of distinct tribes and indigenous groups in their mother tongue.⁵⁷

8. Indigenous peoples

33. MRG stated that Botswana voted in favour of adopting the United Nations Declaration on the Rights of Indigenous Peoples. However, Botswana has not ratified International Labour Organization (ILO) Convention No. 169 (1989) on Indigenous and Tribal Peoples, although the Government has indicated to the Special Rapporteur on the rights of indigenous peoples that it supported the general principles and objectives of the Convention.⁵⁸ MRG recommended ratification of ILO Convention 169.

34. MRG stated that Botswana was a multi-ethnic state in which there resided approximately 45 tribes, eight of which were Tswana. The Tribal Territories Act, 1933, provided group rights to land only for the Tswana while other tribes have individual rights derived from the Land Act of 1970 (revised in 1993). As a result, the Tswana tribes have both group rights and individual rights to land whereas non-Tswana ethnic groups have no right to land in their capacity as a group.⁵⁹ MRG made recommendations including that Botswana take active steps to ensure that tribal chiefs, and tribal groups, were afforded rights over their communal land, and adopt positive measures to ensure that the non-Tswana tribes were able to effectively and freely participate in decisions that affect them and their lands.⁶⁰

35. MRG stated that the “House of Chiefs” acted as an advisory body to the elected National Assembly in Parliament. Its advice must be sought on all bills affecting tribal organisation or tribal property, organization, administration and powers of customary courts, and customary law. Its permanent membership consisted of eight chiefs drawn only from the eight major Tswana tribes. The Constitutional Amendment Act No. 9 of 2005 increased the number of members but did not make provision for each tribe to be represented by its own chief.⁶¹ With the non-Tswana chiefs routinely not represented, this has had an impact on their ability to discuss and influence tribal and customary law matters.⁶²

36. Society for Threatened People (STP) stated that in the mid-1990s the San Bushman were forcefully removed from their settlements in the Central Kalahari Game Reserve (CKGR) by the authorities.⁶³ In January 2011, Botswana’s highest court affirmed the right of the San Bushmen to return to the previous settlements in the CKGR. In June 2011, the Government permitted the San to have access to drinking water.⁶⁴ Even though the San were allowed to hunt inside the CKGR, they were regularly refused a hunting permit by the Government.⁶⁵

Notes

- ¹ The stakeholders listed below have contributed information for this summary; the full texts of all original submissions are available at: www.ohchr.org. (One asterisk denotes a national human rights institution with “A” status):
- Civil society*
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| CHRI | Commonwealth Human Rights Initiative, New Delhi, India; |
| CRIN | Child Rights International Network; |
| GIEACPC | Global Initiative to End All Corporal Punishment of Children; |
| JS 1 | The Botswana Centre for Human Rights, The Botswana Council of Non-Governmental Organisations, Lesbians, Gays and Bisexuals of Botswana and Rainbow Identity, Botswana (Joint Submission 1); |
| MRG | Minority Rights Group, London, United Kingdom. |
- ² CHRI, p. 5, para. 37.
- ³ JS 1, p. 3, para. 6.
- ⁴ MRG, p. 1, para. 4.
- ⁵ JS 1, p.2, para. 4.
- ⁶ JS 1, p. 3, para. 6.
- ⁷ CHRI, p. 4, paras. 21, 22.
- ⁸ JS 1, p. 3, para. 8.
- ⁹ JS 1, p. 4, para. 9.
- ¹⁰ JS 1, p. 9, para. 34.
- ¹¹ CHRI, p. 5, para. 34.
- ¹² CHRI, p. 5, para. 35. *See also* JS 1, p. 2, para. 5.
- ¹³ JS 1, p. 3, para. 6.
- ¹⁴ CHRI, p. 4, para. 27.
- ¹⁵ CHRI, p. 4, para. 29. JS 1, p. 5, para. 12.
- ¹⁶ JS 1, p. 3, para. 6.
- ¹⁷ JS 1, p. 5, para. 13.
- ¹⁸ JS 1, p. 6, para. 16.
- ¹⁹ JS 1, p. 7, para. 24.
- ²⁰ JS 1, p. 8, para. 26.
- ²¹ JS 1, p. 8, para. 29.
- ²² GIEACPC, p. 2, para. 1.1.
- ²³ GIEACPC, p. 2, para. 1.3.
- ²⁴ GIEACPC, p. 2, para. 1.5.
- ²⁵ JS 1, p. 8, para. 29.
- ²⁶ JS 1, p. 6, para. 17.
- ²⁷ JS 1, p. 6, para. 17.
- ²⁸ JS 1, p. 6, para. 18.
- ²⁹ JS 1, p. 9, para. 31.
- ³⁰ JS 1, p. 9, para. 32.
- ³¹ CRIN, p. 1.
- ³² CRIN, p. 4.
- ³³ CRIN, p. 1.
- ³⁴ CRIN, p. 3.
- ³⁵ CRIN, p. 2.
- ³⁶ CRIN, p. 2.
- ³⁷ CRIN, p. 4.
- ³⁸ CHRI, p. 2, para. 10.
- ³⁹ CHRI, p. 2, para. 10. CHRI referred to *Kanane v State*, Court of Appeal, Botswana (30 July 2003), p. 3, fn. 3.
- ⁴⁰ CHRI, p. 4, para. 3.
- ⁴¹ CHRI, p. 3, para. 12.
- ⁴² CHRI, p. 3, para. 13.
- ⁴³ CHRI, p. 3, para. 14.
- ⁴⁴ JS 1, p. 7, para. 22.

- ⁴⁵ JS 1, p. 7, para. 22.
⁴⁶ CHRI, p. 2, para. 3.
⁴⁷ CHRI, p. 2, para. 5.
⁴⁸ CHRI, p. 2, para. 6.
⁴⁹ CHRI, p. 2, para. 6.
⁵⁰ CHRI, p. 3, para. 15.
⁵¹ CHRI, p. 4, para. 16.
⁵² JS 1, p. 9, para. 33.
⁵³ JS 1, p. 9, para. 34.
⁵⁴ MRG, p. 3, para. 139.
⁵⁵ MRG, p. 5, para. 25 (3).
⁵⁶ MRG, p. 5, para. 20.
⁵⁷ MRG, p. 5, para. 25 (4).
⁵⁸ MRG, p. 1, para. 2.
⁵⁹ MRG, p. 1, para. 3.
⁶⁰ MRG, p. 6, paras. 25 (9) and (10).
⁶¹ MRG, p. 2, paras. 5 and 6.
⁶² MRG, p. 3, para. 14.
⁶³ STP, para. 3.
⁶⁴ STP, para. 2.
⁶⁵ STP, para. 6.
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