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The Human Rights of the San (Bushmen) of Botswana - The Clash of the Rights of Indigenous Communities and their Access to Water with the Rights of the State to Environmental Conservation and mineral Resource Exploitation

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THE HUMAN RIGHTS OF THE SAN (BUSHMEN) OF BOTSWANA – THE CLASH OF THE RIGHTS OF INDIGENOUS COMMUNITIES AND THEIR ACCESS TO WATER WITH THE RIGHTS OF THE STATE TO ENVIRONMENTAL CONSERVATION AND MINERAL RESOURCE EXPLOITATION

JEREMY SARKIN AND AMELIA COOK*

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INTRODUCTION

In July 2010, the High Court of Botswana ruled against the San,¹ often called pejoratively “Bushmen” or Basarwa,² denying their right to access water on their ancestral lands inside the Central Kalahari Game Reserve (CKGR).³ During the June 9, 2010 hearing, the San requested that either the existing borehole on their land be reopened or that they be given permission to drill another borehole at their own expense.⁴ This court’s decision represented another step in the ongoing and protracted legal dispute

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1. *Outrage as Botswana Bushmen Denied Access to Water*, THE BOTSWANA GAZETTE, (July 24, 2010), http://www.gazettebw.com/index.php?option=com_content&view=article&id=7112:outrage-as-botswana-bushmen-denied-access-to-water&catid=18:headlines&Itemid=2.

2. Considered derogatory by many San, this term means “those who not rear cattle” in Setswana. *Shadow Report to the United Nations Committee on the Elimination of Racial Discrimination*, DITSHWANELO, THE BOTSWANA CENTRE FOR HUMAN RIGHTS, 6 (Mar. 3, 2006), available at [http://www.ditshwanelo.org.bw/images/CERD Shadow Report 2006.pdf](http://www.ditshwanelo.org.bw/images/CERD%20Shadow%20Report%202006.pdf) [hereinafter *Shadow Report*].

3. *Outrage as Botswana Bushmen Denied Access to Water*, supra note 1.

4. See *id.*

between the Government of Botswana (GOB) and a group of San peoples formerly living inside the CKGR. Since 1996, when the GOB began its forced-removal campaign against the San living within the CKGR, the San have been fighting to regain access to their land. At the same time, the GOB has granted diamond-mining licenses in the Reserve on the condition that any water borehole “be utilized strictly to provide water for the mine.”⁵ The San contend that this condition specifically aims to deny them access to water from the mine.⁶

The water issue must be seen in the context of the San’s struggle to live and pursue their livelihoods on their land, butting heads with the GOB’s desire to allow diamond mining in the Reserve. While the GOB has argued that the San’s presence in the CKGR impedes conservation efforts, the United Nations (UN) Special Rapporteur on Indigenous Rights stated in a 2010 report that the GOB’s position is “inconsistent with its decision to permit Gem Diamonds/Gope Exploration Company (Pty) Ltd. to conduct mining activities within the reserve, an operation that is planned to last several decades and could involve an influx of 500-1,200 people to the site, according to the mining company.”⁷ Without access to water, the San are unable to live on their land, which has been the case since the GOB sealed and capped the San’s borehole in 2002.⁸ Recently, the GOB has permitted the drilling of new boreholes for wildlife and has permitted the opening of a wildlife lodge, with a swimming pool, in the Reserve.⁹

At the same time, the right to water as an internationally recognized human right has gained increasing support. On July 28, 2010, the UN General Assembly adopted a resolution recognizing access to clean water and sanitation as a human right.¹⁰ The resolution called on “[s]tates and international organizations to provide financial resources, build capacity[] and transfer technology, particularly to developing countries, in scaling up efforts to provide safe, clean, accessible, and affordable drinking water and sanita-

5. *Controversial Diamond Mine on Bushman Land Back on Track*, SURVIVAL INTERNATIONAL (July 12, 2010), <http://www.survivalinternational.org/news/6205>.

6. *See id.*

7. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *The Situation of Indigenous Peoples in Botswana*, Human Rights Council, ¶ 73 U.N. Doc., A/HRC/15/37/Add.2 (June 2, 2010) (by James Anaya) [hereinafter *The Situation*].

8. *Bushmen Face Agonizing Wait for Right to Water*, SURVIVAL INTERNATIONAL (June 9, 2010), <http://www.survivalinternational.org/news/6068>.

9. *Id.*

10. Press Release, General Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, U.N. Press Release GA/10967 (July 28, 2010).

tion for all.”¹¹ One hundred twenty-two states voted in favor of the resolution and none voted against it, while forty-one states, including Botswana, abstained.¹²

For many decades, the Republic of Botswana has been well known across the globe for its post-colonial achievements, including political stability and economic growth unknown to many African countries.¹³ In fact, many consider Botswana to be one of Africa’s success stories.¹⁴ Its course of action since independence in 1966 exemplifies the possibilities for economic prosperity,¹⁵ sustained growth,¹⁶ absence of conflict, and free and fair elections.¹⁷ As a result, it is often referred to as the “African Miracle.”¹⁸ Despite these monumental achievements, human rights in Botswana—particularly social and cultural rights and especially those of minority groups—have regrettably evolved slowly.¹⁹ More recent analyses²⁰ have brought many of these issues, which pose a significant threat to Botswana’s international image, to light. The tense relationship between the San and the ruling Tswana in Botswana and the case of the San’s eviction from the CKGR illustrate many of these issues.

11. *Id.*

12. *Id.*

13. Stephen R. Lewis Jr., *Explaining Botswana’s Success*, in DEVELOPING CULTURES: CASE STUDIES 3, 3 (Lawrence E. Harrison & Peter L. Berger eds., 2006).

14. See Anne Dissez, *Botswana’s Good Reputation*, 13 AFR. GEOPOLITICS 213, 213 (2004).

15. J. CLARK LEITH, WHY BOTSWANA PROSPERED 3–14 (McGill-Queen’s University Press 2005).

16. See Glenn-Marie Lange & Matthew Wright, *Sustainable Development in Mineral Economies: the Example of Botswana*, 9 ENV’T & DEV. ECON. 485, 485 (2004); see also Ellen Hillbom, *Diamonds or Development? A Structural Assessment of Botswana’s Forty Years of Success*, 46 J. MODERN AFR. STUD. 191, 191 (2008).

17. For an article disputing the fairness of Botswana’s elections, see generally Bertha Z. Osei-Hwedie & David Sebudubudu, *Botswana’s 2004 Elections: Free and Fair?*, 4 J. AFR. ELECTIONS 27 (2005). See also Daron Acemoglu et al., *An African Success Story: Botswana*, CEPR DISCUSSION PAPERS 2 (2001), available at <http://econ-www.mit.edu/files/284>.

18. See generally ABDI ISMAIL SAMATAR, AN AFRICAN MIRACLE: STATE AND CLASS LEADERSHIP AND COLONIAL LEGACY IN BOTSWANA DEVELOPMENT (Heinemann 1999); Amelia Cook & Jeremy Sarkin, *Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development*, 19 TRANSNAT’L L. & CONTEMP. PROBS. 453 (2010).

19. KENNETH GOOD, BUSHMEN AND DIAMONDS: (UN)CIVIL SOCIETY IN BOTSWANA 6-8 (Nordiska Afrikainstitutet, Uppsala 2003). This occasional paper reviews the limitations of Botswana’s liberal democracy, violations against the rights of the San, and issues of inequality and an undiversified economy.

20. See, e.g., Bugalo Maripe, *Freezing the Press: Freedom of Expression and Statutory Limitations in Botswana*, 3 AFR. HUM. RTS. L.J. 52 (2003); Scott Pegg, *Presidential Succession and Academic Freedom: Botswana Departs Leading Political Scientist Kenneth Good*, 38 POL. SCI. & POL. 829 (2005); Ian Taylor, *As Good As It Gets? Botswana’s ‘Democratic Development,’* 21 J. CONTEMP. AFR. STUD. 215 (2003); GOOD, *supra* note 19; Monageng Mogalawke, *Botswana: Exploding the Myth of Exceptionality*, 38 AFR. INSIGHT 105 (2008).

In 2004, former residents of the CKGR brought a lawsuit against the GOB in the High Court of Botswana.²¹ The San were reacting to government-supported evictions from the CKGR forcing many San off of their homelands.²² Roy Sesana led this case. He has been active in defending the indigenous rights of the San since 1991, long before the GOB evicted him and his family from the Reserve in 2002.²³ In 2000, Sesana's brother died after allegedly being tortured by wildlife officials.²⁴

In the first case brought before the courts in 2002, the High Court ruled against the San on technical grounds. However, the Court of Appeal then sent the case back to the High Court in 2004.²⁵ What followed turned out to be the longest and most expensive case in the court's history, running 134 days in court over the course of two years, with thousands of pages of legal documents and 19,000 pages of witness transcripts.²⁶

The case dealt with the following issues:

- The legality of the GOB's decision to cease provision of basic services to the inhabitants of the CKGR;
- Whether these services ought to be reinstated;
- Whether the San rightfully owned the land and were therefore wrongfully dispossessed of it; and
- Whether it was unconstitutional, and unlawful, for the GOB to deny inhabitants of the Reserve special game licenses to hunt and to refuse entrance to the Reserve to them.²⁷

This case and the hostile relationship that has developed between the San and the GOB challenge the perception of Botswana as the miracle of Africa.²⁸ The debate over indigenous land rights and the court cases that have ensued have garnered significant international attention due to the contradiction they pose to Botswana's popular image as a successful democracy and to the im-

21. Sidsel Saugestad, *Notes on the Outcome of the Ruling in the Central Kalahari Game Reserve Case, Botswana*, 4 BEFORE FARMING 10 (2007), available at http://www.waspjournals.com/journals/beforefarming/journal_20064/news/2006_4_10.pdf.

22. See *Central Issues in Botswana*, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS <http://www.iwgia.org/sw9942.asp> (last visited Dec. 20, 2010) [hereinafter IWGIA].

23. See *Media Kit: Bushmen Court Case—Biography of Bushman Roy Sesana*, SURVIVAL INTERNATIONAL, <http://www.survivalinternational.org/news/kits/bushmencourtcase> (last visited Oct. 24, 2010) [hereinafter *Media Kit-Biography*].

24. *Id.*

25. *Shadow Report*, *supra* note 2, at 7.

26. Saugestad, *supra* note 21, at 1.

27. *Id.* at 1-2.

28. See generally Ian Taylor & Gladys Mokhawa, *Not Forever: Botswana, Conflict Diamonds and the Bushmen*, 102 AFR. AFF. 261 (2003), available at <http://afraf.oxfordjournals.org/cgi/reprint/102/407/261> (discussing the relationship between diamonds and the removal of the San from their homes).

pact they could have on similar cases of disputed land rights for indigenous groups around the world.²⁹

While the San officially won the case,³⁰ the GOB has not been cooperative in implementing the ruling,³¹ raising many questions about the democratic process in Botswana. In fact, the U.S. Department of State, in its 2009 Human Rights Report on Botswana, criticized “[t]he government’s continued narrow interpretation” of the 2006 decision.³² Further, the San’s “victory” has not led to significant changes to their position in society.³³

This Article begins by reviewing the historical relations between the ruling Tswana ethnic group and the San from the time that the Tswana settled in Botswana roughly 700-800 years ago to the present day, in which the Tswana and their allies continue to dominate the political sphere. The history of the CKGR, which is central to the current debate of land and water rights for the San there today, also is reviewed. Before introducing the court case in which the San protested their eviction from the CKGR before the High Court of Botswana, the legal system in Botswana is discussed. The Article reviews and analyzes the findings of the High Court then discusses the GOB’s failure to comply with many aspects of the 2006 ruling and what this will mean for the San. It further explores the issue of human rights violations with respect to the San people of the Kalahari. It also discusses the implications this case—and the legal battle it gave rise to—have for other indigenous land rights cases and the protection of indigenous rights across Africa.³⁴

While this Article focuses specifically on the plight of the San inhabitants of the Central Kalahari, the G/wi and G//ana, it is crucial to note that all San groups in Botswana, who are represented by many distinct linguistic and cultural groups, suffer marginalization and discrimination to varying degrees at the hands of the GOB and Botswana society. They “are widely recognized as the

29. See Julie J. Taylor, *Celebrating San Victory Too Soon?*, 23 ANTHROPOLOGY TODAY 5, 4 (2007), available at http://www.chr.up.ac.za/chr_old/indigenous/documents/Botswana/Cases/Celebrating%20too%20soon%20CKGR%20Case.pdf.

30. *Botswana Bushmen Win Land Ruling*, BBC NEWS, Dec. 13, 2006, <http://news.bbc.co.uk/2/hi/africa/6174709.stm>.

31. See Lucia Van der Post, *Bushwhacked*, TIMES ONLINE (United Kingdom), Sept. 19, 2007, <http://www.timesonline.co.uk/tol/news/world/africa/article2482706.ece>.

32. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RIGHTS, AND LAB., 2009 HUMAN RIGHTS REPORT: BOTSWANA (2010), available at <http://www.state.gov/drl/rls/hrrpt/2009/af/135939.htm> [hereinafter BOTSWANA REPORT].

33. See *Bushmen of the Kalahari*, AM. CHRON. (Feb. 28, 2009), <http://www.americanchronicle.com/articles/view/92720>.

34. For a discussion of indigenous rights in general, see S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 129-84 (2d. ed. 2004).

most impoverished, disempowered, and stigmatized ethnic group in southern Africa.”³⁵

The Article discusses the implications of the current status of the San in Botswana. It analyzes the need for the GOB to address the general situation of the San and makes recommendations regarding how Botswana can protect and promote the unique value of the San in such a way that will complement its image, help drive its economy, and assist its goals of environmental protection, while at the same time improving the San’s vulnerable position in its society. The Article concludes that the current state of affairs of the San will not benefit Botswana in the long run, and that at the same time, it poses a legitimate and potentially detrimental threat to the country’s international image.

I. HISTORICAL RELATIONS AND LAND USE PATTERNS BETWEEN THE SAN AND THE TSWANA

There are roughly 100,000 San living in Botswana, Namibia, South Africa, and Angola today.³⁶ The greatest proportion, somewhere between 45,000 and 60,000, live in Botswana.³⁷ The San, consisting of more than thirteen different language groups across Southern Africa,³⁸ are distinguishable in part by their “rich knowledge of biodiversity and by their complex languages that include a range of click sounds.”³⁹ As hunter-gatherers, the San have resided in the southern African region for over 20,000 years, according to rock art and archaeological findings.⁴⁰ Geneticists have found that “the aboriginal San and their related herding neighbours, the Khoekhoe (also Khoikhoi), carry the genetic material which indicates that their ancestors are the ancestors of all living human beings.”⁴¹

The Tswana peoples originally stem from the Sotho peoples of southern Africa and are traditionally a cattle-herding culture. They arrived in the region 700-800 years ago from present-day

35. Renée Sylvain, “*Land, Water, and Truth*”: *San Identity and Global Indigenism*, 104 AM. ANTHROPOLOGIST 1074, 1074 (2002).

36. *Tribes and Campaigns*, SURVIVAL INTERNATIONAL, <http://www.survivalinternational.org/tribes/bushmen> (last visited Dec. 20, 2010) [hereinafter *Tribes*].

37. Nicholas Olmstead, *Indigenous Rights in Botswana: Development, Democracy and Dispossession*, 3 WASH. U. GLOBAL STUD. L. REV. 799, 810 (2004).

38. *Who are the San?* WORKING GROUP OF INDIGENOUS MINORITIES IN SOUTHERN AFRICA (WIMSA), <http://www.wimsanet.org/about-the-san/who-are-the-san> (last visited Dec. 21, 2010).

39. IPACC—*Southern Africa Region*, INDIGENOUS PEOPLES OF AFRICA CO-ORDINATING COMMITTEE (IPACC), http://www.ipacc.org.za/eng/regional_southernafrica.asp (last visited Dec. 21, 2010) [hereinafter IPACC].

40. *Id.*

41. *Id.*

Zambia and Zimbabwe, and between the seventeenth and nineteenth centuries, developed several major Tswana kingdoms.⁴² These kingdoms were ruled through a hierarchical structure headed by the *kgosi*, or chief.⁴³ Historically, the possession of cattle, central to Tswana livelihood, determined the power of the *kgosi*.⁴⁴ As a result, cattle herds grew, especially among the elite.⁴⁵ Tswana domination in the region intensified in the late 1800s as the group seized land and dominated the political process through their chieftainship system.⁴⁶

During this pre-colonial era, Tswana chiefs forbade the San from participating in local politics.⁴⁷ As a result, the San had no means of political representation, nor could they acquire land in such a way that would be recognized by the Tswana.⁴⁸ As the growth of the cattle industry introduced the need for a larger workforce, the Tswana elite began to take the San as serfs and slaves.⁴⁹ Because the San were organized in small and disparate community units, they were often helpless to contest this practice. Although the British Protectorate, established in 1885,⁵⁰ officially ended the practice of serfdom, it continued unofficially into the 1950s.⁵¹ Many would argue that the legacy of serfdom lives on to this day “in the form of low wage labor, exclusion from the *kgotla*, and lack of recognition of San land and resource rights.”⁵²

The position of the San in society did not change significantly during the colonial era, from 1885 to 1966.⁵³ The British recognized the Tswana, not the San or any other group, as the negotiating party in their colonial endeavors, for it appeared to them when they arrived in the region that the Tswana were already in charge.⁵⁴ When Britain parceled the land of the Protectorate into “Native Reserves” and “Crown lands,” no provision was made for the San; the Tswana tribes controlled the Native Reserves almost

42. Olmstead, *supra* note 37, at 812-13.

43. *Id.* at 813.

44. See Kenneth Good, *The State and Extreme Poverty in Botswana: The San and Destitutes*, 37 J. MODERN AFR. STUD. 185, 187 (1999).

45. *Id.* at 188.

46. See Olmstead, *supra* note 37, at 813.

47. *Id.* at 815.

48. *Id.*

49. Kenneth Good, *At the Ends of the Ladder: Radical Inequalities in Botswana*, 31 J. MODERN AFR. STUD. 203, 209-10 (1993).

50. Olmstead, *supra* note 37, at 817.

51. *Id.* at 832.

52. *Id.*, *supra* note 37, at 816. The *Kgotla* is an institution of the Tswana chieftaincy system in which the chief and community discuss issues of concern to the community. QUETT JONI KETUMILE MASIRE, *VERY BRAVE OR VERY FOOLISH?: MEMOIRS OF AN AFRICAN DEMOCRAT* 62-63 (Stephen R. Lewis, Jr. ed., 2006).

53. See AFRICANA: THE ENCYCLOPEDIA OF THE AFRICAN AND AFRICAN AMERICAN EXPERIENCE, 290-92 (Kwame Anthony Appiah & Henry Louis Gates, Jr., eds., 1999).

54. See *Shadow Report*, *supra* note 2, at 6.

entirely.⁵⁵ San communities that found themselves living inside these Native Reserves were suddenly subject to Tswana authority, and those who lived on Crown Lands were essentially “tenants at will” and subject to the authority of the Crown.⁵⁶

The evolution of the cattle industry played a significant role in the marginalization of the San. The rise of large-scale cattle ownership heralded a new era in which formerly communal lands were privatized.⁵⁷ For example, by the 1930s, a prominent Tswana chief, Tshekedi, had amassed a herd of nearly 50,000 cattle in addition to extensive grazing lands.⁵⁸ Elite Tswana cattlemen seized land where they sunk boreholes to provide secure water sources for their herds. New technology allowed the boreholes to tap into water sources in bedrock aquifers beneath the sand cover, allowing access to water previously inaccessible.⁵⁹ Smaller herds were marginalized by these private boreholes and often had to travel long distances in search of communal sources of water.⁶⁰ This new land-use strategy was extremely problematic for small-scale herders and hunter-gatherer communities like the San who lost access to large swaths of land they depended on for their livelihoods.

As a result of the power structures reinforced during the Protectorate, independent political power shifted directly from the British to the Tswana.⁶¹ In 1966, President Seretse Khama took office. President Khama pursued a policy of “non-racialism,” which allowed the GOB to sideline the individual concerns of Botswana’s many ethnic groups in the name of nationalism.⁶² Many would argue that a Tswana-based nationalism developed at this time, which has remained dominant to this day, despite the existence and participation of other ethnic groups in government.⁶³

In 1975, the GOB created the Tribal Grazing Lands Policy (TGLP), which exacerbated the land use issue by allowing commercial ranchers, who now had a major market in South Africa

55. Olmstead, *supra* note 37, at 825.

56. *Id.* at 862.

57. See Good, *supra* note 49, at 209.

58. GOOD, *supra* note 19, at 14.

59. H.J. Cooke, *The Kalahari Today: A Case of Conflict over Resource Use*, 151 GEOGRAPHIC J. 75, 80 (1985).

60. SAMATAR, *supra* note 18, at 111.

61. See Zibani Maundeni, *State Culture and Development in Botswana and Zimbabwe*, 40 J. MODERN AFR. STUD. 105, 125 (2001).

62. “Non-racialism” refers to the GOB’s policy of portraying Botswana as a non-racial, culturally homogenous state, based—as it argues—on the dominance of a single ethnic group, the Tswana. This has led to a lack of recognition for other, unique ethnic groups, like the San. See SIDSEL SAUGESTAD, *THE INCONVENIENT INDIGENOUS: REMOTE AREA DEVELOPMENT IN BOTSWANA, DONOR ASSISTANCE, AND THE FIRST PEOPLE OF THE KALAHARI* 28, 71-72 (2001).

63. Jacqueline S. Solway, *Navigating the ‘Neutral’ State: ‘Minority’ Rights in Botswana*, 28 J. S. AFR. STUD. 711, 715 (2002).

and abroad, to legally purchase and use grazing land.⁶⁴ Although the TGLP was purportedly intended to reduce inequality in rural areas and decrease overgrazing, in fact, huge tracts of land used by the San were given to commercial ranchers⁶⁵ and very few tracts of “reserved” land intended, according to the policy, to assist the poorer sectors of society actually materialized when the new policy went into effect.⁶⁶ Major sections of San homelands were parceled off to private ranchers who converted the land for grazing.⁶⁷ The TGLP allowed only limited communal lands to remain, in very small tracts, and those who owned private land also were free to graze their cattle on the remaining communal lands.⁶⁸ Over time, the cattle industry completely marginalized both small-scale herders and hunter-gatherer communities like the San.⁶⁹

This expansion of grazing cattle herds and the privatization of land did not bode well for the San, who tend not to own livestock in great numbers and historically did not believe in taking land as private holdings.⁷⁰ Unfortunately, over time, the GOB has used the San’s perceived nomadic nature as an excuse to validate denying them ownership over any land or natural resources. In a 1978 legal opinion, the GOB proclaimed that the San’s “nomadic status” indicates that, “they have ‘no rights of any kind’ deriving from customary practices, and in particular no land rights.”⁷¹ As noted at the Working Group of Indigenous Minorities in Southern Africa conference in 1997, “stereotypes of nomadism have been used to justify the exclusion of the San from their rights to land, natural resources, and development.”⁷² In reality, while the San do travel distances in search of food, they live in small communities and are very familiar with the tracts of land around those communities. They typically do not own herds, as nomads do, but they have actually engaged in agricultural and pastoral activities at times, creating “clusters of adaptive strategies” that help meet their needs.⁷³

64. Larry A. Swatuk, *From “Project” to “Context”: Community Based Natural Resource Management in Botswana*, 5 GLOBAL ENVTL. POL. 95, 111 (2005).

65. Ironically, San are today forbidden from maintaining livestock on their lands in the KGR, due to conflict with wildlife preservation, while much of their historic land was taken away for the purpose of raising cattle. See Olmstead, *supra* note 37, at 840.

66. *Id.*

67. See Robert K. Hitchcock, *Tradition, Social Justice and Land Reform in Central Botswana*, 24 J. AFR. L. 1, 14 (1980).

68. Swatuk, *supra* note 64, at 111.

69. See Jack Parson, *Cattle, Class and the State in Rural Botswana*, 7 J. S. AFR. STUD. 236, 253 (1981).

70. *Shadow Report*, *supra* note 2, at 6.

71. Olmstead, *supra* note 37, at 810 (quoting Good, *supra* note 49, at 210).

72. *Id.* (quoting Mathambo Ngakaeaja, et al., *A San Position: Research, the San and San Organizations*, in PROCEEDINGS OF THE KHOISAN IDENTITIES AND CULTURAL HERITAGE CONFERENCE 30, 30 (Andrew Bank ed., 1998)).

73. *Id.* at 811.

Beef exports in the second half of the 20th century to South Africa, and more recently to the EU, required that companies prove that herds were protected from disease, such as foot-and-mouth disease.⁷⁴ Because it was unclear at the time whether wild game were carriers of foot-and-mouth disease, the GOB constructed large-scale veterinary fencing to protect cattle from wild game in order to secure export contracts.⁷⁵ The fences had a disastrous effect on the wildlife that migrates seasonally in pursuit of water sources as well as on the San who depend on the game for food.⁷⁶ For example, during a severe drought in 1983, 65,000 wildebeest died at the base of a veterinary fence along the eastern edge of the CKGR.⁷⁷ Today, there are a staggering three million cattle in Botswana, half as great as the country's population.⁷⁸ The strain cattle place on Botswana's environmental resources, especially land and water, is immense. The resource conflict between cattle and wildlife creates a constant struggle.⁷⁹

The power struggles between the San and the Tswana continue to unfold in the present-day political and economic context. The Tswana, primary occupants of positions of leadership in Botswana today, continue to marginalize and disempower minority groups.⁸⁰ No minority group has been large enough to threaten the Tswana's hold on power, which may account, in part, for the historical lack of ethnic strife in Botswana. The San, perhaps most acutely, suffer economic inequality and discrimination,⁸¹ as well as threats to their land. "Belonging to a marginalised, often stigmatised, indigenous minority," Sidsel Saugestad notes, "almost invariably includes a state of abject poverty."⁸² The San are no exception.

One particular problem afflicting the San is the GOB's denial of applications for title deeds for property, even in areas the San have traditionally inhabited.⁸³ Instead, the homes of tens of thousands of San people are lost as the GOB allocates the land to others for "productive use."⁸⁴ This flies in the face of Botswana's own

74. Graciela Flores, *Good Fences, Good Neighbors?*, 115 NAT. HIST. 48, 50 (2006).

75. *Id.*

76. Swatuk, *supra* note 64, at 115.

77. Flores, *supra* note 74, at 50.

78. Swatuk, *supra* note 64, at 110.

79. *See* Flores, *supra* note 74, at 50.

80. *See* Press Release, DITSHWANELO: Botswana Centre for Human Rights, Press Statement Following a Workshop on Rights of Minority Groups (Feb. 15, 2006), available at <http://www.ditshwanelo.org.bw/feb15press.html>.

81. *See* BOTSWANA REPORT, *supra* note 32. The report also criticized "[t]he government's continued narrow interpretation" of the 2006 High Court.

82. SAUGESTAD, *supra* note 62, at 31.

83. IPACC, *supra* note 39.

84. *Id.*

constitution, which recognizes that all citizens have land rights,⁸⁵ rights that are reiterated in the 1975 TGLP, which claims, “all Batswana have the right to sufficient land to meet one’s needs.”⁸⁶ The constitution protects citizens from deprivation of property and entitles those who are deprived to compensation.⁸⁷ Interestingly, where the constitution protects freedom of movement, it allows “for the imposition of restrictions on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well-being of Bushmen,” implying commitment to protect the lands used by the San.⁸⁸ Yet the forced removals of the San from the CKGR directly contradict this commitment. This contradiction appears to be a result of a change in heart by the government when the “well-being of Bushmen”⁸⁹ came into conflict with other interests.

The GOB also has limited the ability of the San to find other land. While the San can apply to the Land Boards for small parcels of land, this land cannot be used for hunting and gathering, but rather only for residential, commercial, pastoral, or agricultural purposes.⁹⁰ Even if the San wanted to apply for land under these restrictions, many do not have access to information regarding this complicated process,⁹¹ language skills with which to negotiate, or the funds necessary to proceed. These types of obstacles essentially force the San to shun their traditional lifestyle and shift toward livelihoods more generally accepted by the Tswana, such as farming or commercial enterprises. Such policies do not reflect the GOB’s claim that it treats all of its citizens equally.

In general, the plight of the San illustrates that “in Botswana, democratic rights and access to the fruits of the ‘African Miracle’ are available to some more than others.”⁹² No group symbolizes the limits of Botswana’s democracy better than the San. The complex and strained relationship between the ruling Tswana and the San is poignantly brought to light by the San’s eviction from the CKGR.

85. IWGIA, *supra* note 22.

86. *Id.*

87. BOTSWANA CONST. Ch. II, § 8(1)(b)(i), available at <http://www.parliament.gov.bw/docs/documents/constitution.pdf>.

88. *Id.* at § 14(3)(c).

89. *Id.*

90. IWGIA, *supra* note 22.

91. *See id.*

92. Taylor, *supra* note 20, at 226.

II. THE CENTRAL KALAHARI GAME RESERVE ISSUE

Lying in the middle of the Kalahari Desert, the CKGR covers roughly 52,800 square kilometers.⁹³ It “is the second largest game reserve on the . . . continent,”⁹⁴ and is one of the most desolate and arid sections of Botswana, rarely accessed by outsiders. In 1961, the British Protectorate established the Reserve to protect the traditional territory of the roughly 4000-strong hunter-gatherer communities of the Central Kalahari and the game on which the communities depended.⁹⁵ However, following the discovery of diamonds on this land in the early 1980s, the GOB coerced and then forced virtually all of the Bushmen to leave the Reserve in three major clearances in 1997, 2002, and 2005.⁹⁶ These San “now live in resettlement camps outside the reserve,”⁹⁷ where alcohol, depression, and disease are rampant, and they are dependent on GOB handouts.⁹⁸

The British created the CKGR to serve as a permanent home for the San as well as a wildlife reserve.⁹⁹ While Protectorate administrative officer George Silberbauer recommended the creation of the Reserve specifically for the protection of the San, the title “game reserve” was used because of the absence of legislation permitting the establishment of a “people’s reserve.”¹⁰⁰ The administration ultimately ignored many of the recommendations Silberbauer made regarding the need to provide land for the San and instead emphasized the role of the Reserve for wildlife conservation.¹⁰¹ Silberbauer would later testify, in the CKGR case reviewed by the High Court of Botswana, that the Reserve was originally created as a refuge for traditional hunters and gatherers and the animals on which they relied.¹⁰² Then Resident Commissioner of Mafeking also confirmed this claiming that

93. *Central Kalahari National Park, Botswana Game Reserve*, UYAPHI.COM, <http://www.uyaphi.com/botswana/game-Reserves/central-kalahari-park.htm>. (last visited Dec. 21, 2010).

94. Robert K. Hitchcock, *We are the First People: Land, Natural Resources and Identity in the Central Kalahari, Botswana*, 28 J. OF S. AFR. STUD. 797, 804 (2002).

95. See Sidsel Saugestad, *Improving Their Lives: State Policies and San Resistance in Botswana*, 4 BEFORE FARMING 1, 2 (2005), available at http://www.galdu.org/govat/doc/2005_4_12.pdf.

96. *Tribes*, *supra* note 36.

97. *Id.*

98. *Id.*

99. Sandy Gall, *The Bushmen of the Kalahari*, ECOLOGIST, Sept. 2003, at 29.

100. Hitchcock, *supra* note 94, at 804.

101. Olmstead, *supra* note 37, at 829-30.

102. *Media Kit: Bushmen Court Case—The Witnesses for the Bushmen*, SURVIVAL INTERNATIONAL, <http://www.survivalinternational.org/news/kits/bushmencourtcase> (last visited Oct. 24, 2010) [hereinafter *Media Kit-Witnesses*].

[T]he object of the Reserve is to protect the food supplies of the existing Bushmen population in this area . . . from the activities of the European farming community at Ghanzi and visitors to the Territory, who are entering this area in increasingly large numbers either to poach game for biltong or to shoot predatory animals such as lion[s] and leopard[s] for their skins.¹⁰³

The establishment of the Reserve offered those indigenous groups whose traditional home was the Central Kalahari, the G/wi, G//ana, and Bakgalagadi,¹⁰⁴ a place to hunt, gather, and live indefinitely, where outsiders could not.¹⁰⁵

The CKGR remained intact through the transition at independence. However, in the 1980s, the GOB conducted a study of the Reserve to examine its purpose.¹⁰⁶ Although the GOB intended to prove its conviction that the protection of wildlife and the protection of livelihoods are incompatible objectives, the report concluded that the Reserve was indeed originally created to protect wildlife *and* provide enough land for the Bushmen.¹⁰⁷ Nonetheless, the GOB has since emphasized only the Reserve's role in preserving wildlife and the danger posed by the San who hunt it.

In 1986, the GOB announced that the settlements of its "Remote Area Dweller" (RAD) program, which provided services to the San, among others, would from that point forward be established only outside of the CKGR.¹⁰⁸ The GOB justified this decision based on the expense of providing services to the remote areas of the Reserve, the threat posed by settlements inside the Reserve to wildlife, and the greater ease with which development assistance could be provided to San communities if they were closer to transportation networks.¹⁰⁹ The San had the ability to travel relatively short distances in search of water and food¹¹⁰ and establishment of RAD settlements outside the Reserve would affect this ability. Such actions threatened the traditional system of coexistence between the San, who maintain critical knowledge of the land directly sur-

103. DITSHWANELO, The Botswana Centre for Human Rights, *Supplementary Report for the Committee on the Elimination of Discrimination*, Aug. 2002, at 4 [hereinafter *Supplementary Report*].

104. See SAUGESTAD, *supra* note 62, at 223.

105. Robert K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 1, 17 (1994).

106. See *Supplementary Report*, *supra* note 103, at 4.

107. *Id.*

108. Olmstead, *supra* note 37, at 803.

109. *Id.* at 804.

110. See Gall, *supra* note 99, at 30.

rounding their communities, allowing them to survive in this formidable climate, and the Kalahari environment.¹¹¹

The termination of RAD services inside the Reserve did not successfully encourage all San to exit the Reserve, as the GOB may have hoped. In 1996, the GOB began its eviction campaign by removing San residents from the village of Xade in the Reserve.¹¹² The GOB established two resettlements camps, New Xade and Kaudwane, for the relocated San along the outskirts of the Reserve, in the desolate and remote southwestern part of the reserve.¹¹³ In the beginning, the GOB offered homes in the resettlement camps, modest financial compensation, and cattle to encourage the San to move.¹¹⁴ Yet many still did not relocate; those who did often claimed the GOB did not follow through on its promises of compensation and other benefits.¹¹⁵ The GOB compelled the more resistant San residents to leave by establishing roadblocks to prevent them from moving in and out of the Reserve and by confiscating their vehicles.¹¹⁶

By 2001 there were roughly 700 individuals left in the Reserve out of the 2500 to 3000 thought to have lived there before the campaign began.¹¹⁷ To expedite the removal of the remaining San, on January 31, 2002, the GOB ceased provision of all basic services to the Reserve, including drinking water, borehole access, food rations (as allocated to registered "destitutes"), transport for children to and from school, and healthcare by means of mobile clinics and ambulance services.¹¹⁸ For those who remained still, the GOB discouraged them further. In 2005, the GOB discontinued the renewal of radio licenses, previously given to the First People of the Kalahari (FPK), an NGO working on behalf of San living in the Reserve, claiming that poachers were using vehicle-mounted and hand-held radios to avoid wildlife patrols.¹¹⁹ The FPK maintains that, in fact, the radios were vital to ensuring "the safety of widely scattered families living in the reserve."¹²⁰ The GOB also removed water tanks from settlements inside the Reserve and then forbade the use of donkeys, which had become necessary to transport water

111. See *Shadow Report*, *supra* note 2, at 6.

112. IWGIA, *supra* note 22.

113. *Id.*

114. Van der Post, *supra* note 31.

115. Olmstead, *supra* note 37, at 804.

116. *Id.* at 805.

117. IWGIA, *supra* note 22.

118. *Sesana v. Att'y Gen.*, (52/2002) [2006] BWHC 1, 2 (Botswana), available at <http://test.saflii.org/bw/cases/BWHC/2006/1.html>.

119. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RIGHTS, AND LAB., 2006 UNITED STATES HUMAN RIGHTS REPORT: BOTSWANA (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78720.htm>.

120. *Id.*

from further away, claiming that livestock, as potential carriers of disease, threatened the wildlife.¹²¹ In the end, roughly 2000 San relocated to the resettlement communities where many remain to this day.¹²² In the settlement camps, the San are not able to pursue their traditional livelihoods. Relocation to unfamiliar areas has resulted in their inability to survive off the land. Most await GOB handouts.¹²³ The Economist already reported in 2006 that their “communities are fragmented, poor and marginalized.”¹²⁴ Most San maintain that they would prefer to return to the Reserve rather than remain in the settlements.¹²⁵

The forced relocations and the status of those San living in the resettlement camps have led to an extensive battle between the San and the GOB. The San demanded the right to return to the Reserve based on their claim to the land, which is grounded in customary law.¹²⁶ The San’s understanding of their land rights runs far deeper than laws created under the Protectorate or at independence. For them, the Kalahari is inextricably tied to San culture and the pursuit of traditional livelihoods. As many San simply put it, the graves of their ancestors are buried there.¹²⁷

In response to the conflict that has arisen, the GOB has done everything from denying that the removals were related to diamond mining altogether to claiming that all relocations were entirely voluntary.¹²⁸ However, when pressed, the GOB has given two main reasons for its actions. First, the GOB claims that removing the San is critical to protecting the wildlife and ecology of the Reserve because the San way of life, specifically hunting, “interfere[s] with conservation.”¹²⁹ Second, the GOB fervently argues that the San must “develop” themselves, something that they cannot do if left to their traditional lifestyles within the Reserve.¹³⁰ The San have been referred to as “stone age creature[s]” who are doomed to “die out like the dodo” if they do not develop themselves.¹³¹ Through either defense, the GOB presents its position as one of

121. *Botswana: The San Can Return Home Now*, IRIN NEWS, Dec. 13, 2006, <http://www.irinnews.org/Report.aspx?ReportId=62504>.

122. See *The Row about the Bushmen*, ECONOMIST, Feb. 18, 2006, <http://globalagenda.co.uk/node/5524597>.

123. See *id.*

124. See *id.*

125. See Van der Post, *supra* note 31.

126. See *Media Kit: Bushmen Court Case—Legal Precedents*, SURVIVAL INTERNATIONAL, <http://www.survivalinternational.org/news/kits/bushmencourtcase> (last visited Dec. 20, 2010) [hereinafter *Media Kit—Legal Precedents*].

127. *Supplementary Report*, *supra* note 103, at 15.

128. *Botswana Denies Diamonds Forced Bushmen off Reserve*, ENV’T NEWS SERVICE, Nov. 11, 2002, <http://www.ens-newswire.com/ens/nov2002/2002-11-11-03.asp>.

129. *Botswana Bushmen Win Land Ruling*, *supra* note 30.

130. See IWGIA, *supra* note 22.

131. GOOD, *supra* note 19, at 16.

compassion toward the welfare of the San and the protection of Botswana's environment.

The GOB's treatment of similar land use issues in other parts of the country may illuminate its intentions in the case of the San in the CKGR. In Northern Botswana, the GOB has pursued a sophisticated management regime in order to protect the ecology and environment of the Okavango Delta, where several indigenous communities have lived for millennia. Pushed to action by the signing of the Convention on Wetlands of International Importance (the "Ramsar Convention"), the GOB created the Okavango Delta Management Plan, "to integrate resource management for the Okavango Delta that will ensure its long-term conservation and that will provide benefits for the present and future well being of people, through sustainable use of its natural resources."¹³² What is interesting about this mission statement is that it clearly reconciles the protection of the environment with the protection of livelihoods. On the other hand, the GOB has consistently referred to the incompatibility of wildlife conservation and local communities in the Central Kalahari to defend its forced removals.

Three key factors may have led to the contradiction in the GOB's stance. First, the Okavango Delta does not provide lucrative diamond resources, as the CKGR might. Second, because of *tsetse* fly outbreaks near the Delta, cattle are not well suited for the region either.¹³³ Third, the protection of the most valuable resource offered by the Delta, water, relies specifically on proper conservation. On the other hand, the Central Kalahari's most lucrative resource may be its diamonds; it has no surface water to protect. Another possibility is that the GOB simply does not recognize the real ecological and economic benefits of protecting the Kalahari because of its apparent arid and empty nature, while the value of preservation is so much more clear in a place like the Okavango Delta, which as a major scientific and tourist destination is home to 650 bird species, 208 aquatic and semiaquatic plants, and 675 herbs and grasses.¹³⁴ Currently, the state does not depend upon the CKGR as a major source of revenue for the tourism industry.¹³⁵

Despite the GOB's claims that it undertook the forced removals to protect the environment inside the Reserve and develop its people outside the Reserve, many would argue that the real reason for

132. Ruud Jansen, *The Okavango Delta Management Plan Project – Application of an Ecosystem-Based Planning Approach*, SEVENTEENTH GLOBAL BIODIVERSITY FORUM (2002).

133. *See id.*

134. *Id.*

135. *See generally* Naomi Moswete & Felix T. Mavondo, *Problems Facing the Tourism Industry of Botswana*, 35 BOTSWANA NOTES & REC. 69 (2003).

the relocations is intricately linked to the backbone of the Botswana economy.¹³⁶ When DeBeers geologists discovered diamonds in the Kalahari region in 1967, the course of modern history for Botswana changed dramatically.¹³⁷ Diamond mining is now the core of Botswana's economy. It contributes roughly 33% of GDP and two-thirds of GOB revenue.¹³⁸ Nearly all of Botswana's advancements in infrastructure, healthcare, and education are the result of diamond revenues.¹³⁹

Given the importance of diamonds to Botswana's economy,¹⁴⁰ there is little doubt that the GOB and the national diamond company, Debswana, continue to search for new sources of diamonds. The Central Kalahari is recognized as prime gem territory and has been a key target area for prospecting,¹⁴¹ especially near a former San community, Gope.¹⁴² Perhaps not coincidentally, the GOB undertook relocations one year after it conducted a formal evaluation of the mining potential at Gope.¹⁴³ Two companies, DeBeers and Falconbridge Exploration, prospected there in the early 80s, but it was not until 2000 that the GOB officially proclaimed that diamonds were found there.¹⁴⁴ At the time, the mining potential at Gope was declared "sub-economic" and the GOB abandoned plans to open a mine.¹⁴⁵ It is possible that the GOB delayed plans to mine at Gope because of the way in which the international community would interpret such action. After all, many San had just been evacuated from this area purportedly because their presence threatened the environment. According to Kenneth Good, significant diamond exploration has taken place in many of the areas from which the San have been removed.¹⁴⁶

Only two months following the closure of Xade, the Anglo-American Diamond Company conspicuously brought mining and

136. See GOOD, *supra* note 19, at 20 (noting that the "connection between the expulsion of the San and intensification of mining cannot be ignored").

137. See *Debswana – Carats by the Million*, AFR. BUS., Sept. 1999, at 23.

138. *Id.* at 24.

139. See LEITH, *supra* note 15, at 64 (noting that development of the mineral sector and mineral revenues was crucial for other types of development in Botswana).

140. See Kenneth Good, *Resource Dependency and Its Consequences: The Costs of Botswana's Shining Gems*, 23 J. CONTEMP. AFR. STUD. 27, 27 (2005) (describing Botswana's dependency on diamonds and the costs thereof).

141. See GOOD, *supra* note 19, at 18.

142. Kitsepile Nyathi, *Botswana; Bushmen Step Up Pressure on Botswana Over Desert Land*, NATION, Feb. 19, 2007, <http://allafrica.com/stories/printable/200702190039.html>.

143. *Bushmen Aren't Forever*, SURVIVAL INTERNATIONAL (Sept. 18, 2006), http://www.survivalinternational.org/files/related_material/11_513_969_diamonds_facts.pdf.

144. GOOD, *supra* note 19, at 16.

145. *Mining and Mineral Prospecting in Botswana*, GOVERNMENT OF BOTSWANA, http://www.gov.bw/index.php?option=com_content&task=view&id=51&Itemid=52 (pages accessed through <http://web.archive.org>).

146. GOOD, *supra* note 19, at 36-39. A series of maps depicts diamond concessions in the Kalahari Game Reserve before and after the Bushman evictions.

drilling equipment to this former San community that once contained a clinic, a school, a borehole, and an airstrip, as well as to other prospective mining locations in the Reserve.¹⁴⁷ The GOB also provided ninety prospecting licenses to the British company Kalahari Diamonds Limited, one third of which were for lands inside the Central Kalahari and Khutse Game Reserves.¹⁴⁸ According to a report by Survival International, an international NGO advocating on behalf of indigenous groups worldwide, “[a]lmost the entire CKGR is now being explored for both diamonds and precious metals.”¹⁴⁹

For a time, the GOB denied any intention of mining within the CKGR.¹⁵⁰ Yet, it made a point of publicly noting that mining rights in Botswana, according to the Constitution, belong to the State regardless of who owns the land.¹⁵¹ The 2009 U.S. Department of State Country Report notes that while the GOB has become slightly more tolerant of the views of human rights organizations working in Botswana, it is “considerably less open to the involvement of some international NGOs on the issue of the CKGR relocations.”¹⁵²

Fears regarding the GOB’s claim that diamond mining would never take place in the Reserve have been realized. On January 22, 2008, Survival International reported that Marsh Environmental Services, a consulting firm, conducted a twelve-day consultation regarding the establishment of a 2.2 billion dollar diamond mine inside the Reserve.¹⁵³ The mine would be located near Gope, despite previous claims by the GOB that the mining potential there was “sub-economic.” The San, represented by the FPK, fought back by requesting an independent mining expert who could apprise them of the impact of the mine, to little avail.¹⁵⁴ Although mining at Gope has yet to begin, the GOB has issued development permits.¹⁵⁵

Plans for mining within the Reserve directly contradict the GOB’s reasoning for eviction of the San. If the removal of the San from the CKGR was intended for the protection of the environment, diamond mining certainly obviates this justification. The specific variety of diamond mining used throughout most of South-

147. *Bushmen Aren’t Forever*, *supra* note 143.

148. Olmstead, *supra* note 37, at 806.

149. *Bushmen Aren’t Forever*, *supra* note 143.

150. *Botswana Denies Diamonds Forced Bushmen off Reserve*, *supra* note 114.

151. *Mining and Mineral Protection in Botswana*, *supra* note 145.

152. BOTSWANA REPORT *supra* note 32.

153. *Mine “Consultation” Process Fatally Flawed*, SURVIVAL INTERNATIONAL (Jan. 22, 2008), <http://www.survival-international.org/news/3044>.

154. *Id.*

155. Sarah Dickinson Deleon & Curtis Ventriss, *Diamonds, Land Use and Indigenous Peoples: The Dilemmas of Public Participation and Multi-National Diamond Corporations*, 15 PUB. ADMIN. & MGMT. 98, 99 (2010).

ern Africa is especially destructive to the environment. In the four major existing mines in Botswana—Jwaneng, Orapa, Letlhakane, and Damtshaa¹⁵⁶—primary deposit pipe mining is used, requiring the use of heavy equipment to dig deep into the earth, creating open-pit mines.¹⁵⁷ This type of mining is far more intrusive than diamond mining of alluvial, or secondary, deposits in riverbeds that takes place, for example, in Sierra Leone.¹⁵⁸ Prospecting for mines in a national reserve indicates that environmental protection is not of primary concern. This contradiction has led Survival International, a UK-based NGO working for indigenous rights, to refer to Botswana's diamonds as "diamonds of despair," or "conflict diamonds" as has occurred in Liberia, Angola, and Sierra Leone, among other war-torn, diamond-rich regions.¹⁵⁹

Mining within the Reserve could have important legal implications. It seemingly provides motive for the GOB's forced relocation of the San and runs contrary to any statements claiming the removal of the San was undertaken for environmental purposes. The laws of Botswana, however, protect the GOB's actions in several ways. The Mines and Minerals Act of 1999 states that the GOB maintains all rights of ownership to minerals, regardless of who owns the land.¹⁶⁰ The Act also states that, "[w]here the President considers that any land is required to secure the development or utilization of the mineral resources of Botswana, he may compulsorily acquire such land."¹⁶¹ Even the legal designation of a "reserve" does not offer much protection against taking land for mining purposes. The Wildlife Conservation and National Parks Act forbids prospecting or mining in national parks or reserves "except with the written permission of the Minister."¹⁶² In theory, state ownership of mining rights reflects the state's policy to utilize the country's resources to the benefit of all of its citizens, not just individual landowners.¹⁶³ Yet, while the GOB has been successful in translating mineral wealth into development, it has not been suc-

156. *Debswana Diamond Mines, Botswana*, MINING-TECHNOLOGY.COM, <http://www.mining-technology.com/projects/debswana/> (last visited Dec. 22, 2010).

157. *Diamond Mining*, ENVTL. LITERACY COUNCIL, <http://www.enviroliteracy.org/article.php/1121.html> (last visited Dec. 22, 2010).

158. *Diamonds – Diamond Mines & Mining*, ALL ABOUT GEMSTONES, http://www.khulsey.com/jewelry/kh_jewelry_diamond_mining.html (last visited Dec. 22, 2010).

159. GOOD, *supra* note 19, at 6.

160. Wildlife Conservation and National Parks, Ch. 66:01, § 3, available at <http://www.laws.gov.bw/VOLUME%206/CHAPTER%2038-01%20WILDLIFE%20CONSERVATION%20AND%20NATIONAL%20PARKS.pdf/>.

161. *Id.* § 64.

162. Mines and Minerals Act of 1999, Ch. 38:01, § 10, available at <http://www.laws.gov.bw/VOLUME%2014/CHAPTER%20%2066%2001%20MINES%20AND%20MINERALS.pdf/>.

163. See Richard Werbner, *Introduction: Challenging Minorities, Difference and Tribal Citizenship in Botswana*, 28 J. S. AFR. STUD. 671, 676 (2002).

cessful at ensuring that this development benefits its citizens uniformly. The constitution of Botswana protects its citizens from dispossession of property, yet the GOB has managed to circumvent this obstacle by claiming that the San are not in possession of the land they inhabit due to their “nomadic” nature.¹⁶⁴

It would seem that the laws of Botswana provide the necessary justification for the GOB to seize land from the San if minerals were present, which would make the cover of environmentalism unnecessary. However, the evictions have taken place during a time when “conflict diamonds” have threatened the value of diamonds worldwide and mentioning the words “diamond” and “Africa” in the same sentence can evoke images of child soldiers and amputees. The GOB has gone to great lengths to prove to the international community that its diamonds are “clean.”¹⁶⁵ Therefore, any association between the eviction of an indigenous group from their land and the mining of diamonds would inhibit Botswana’s ability to market its diamonds as clean. By drawing attention to Botswana’s “clean” diamonds, Taylor and Mokhawa note, the GOB may have unwittingly drawn unwanted attention to the plight of the San.¹⁶⁶

Regardless of the justification for the removals, international law forbids forcibly removing people from their land, or requires compensation if the acquisition is unavoidable.¹⁶⁷ Article 9 of the UN Declaration on the Rights of Indigenous Peoples explicitly states that indigenous lands cannot be co-opted for any purpose without the free and informed consent of the indigenous peoples living there.¹⁶⁸ As a party to other, relevant international human rights agreements,¹⁶⁹ such as the International Covenant on Civil and Political Rights (ICCPR), Botswana is obligated to uphold the rights therein, presenting an opportunity for the San to contest the forced relocations.

III. THE LEGAL SYSTEM IN BOTSWANA

Part of Botswana’s reputation as a democratic success story in

164. Olmstead, *supra* note 37, at 810.

165. See Taylor & Mokhawa, *supra* note 28, at 262, 271.

166. *Id.* at 274.

167. *Forced Evictions*, CENTRE ON HOUSING RIGHTS AND EVICTIONS, <http://www.cohre.org/GFEP> (last visited Dec. 22, 2010).

168. Declaration on the Rights of Indigenous People, ¶ 10 G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at <http://www.undemocracy.com/A-RES-61-295.pdf>.

169. *Ratification of International Human Rights Treaties – Botswana*, U. MINN. H.R. LIBR., <http://www1.umn.edu/humanrts/research/ratification-botswana.html> (last visited Oct. 27, 2010).

Africa includes recognition of its independent judiciary.¹⁷⁰ The Judicial Service Commission, an independent body, recommends judges to the President, who appoints them.¹⁷¹ The country continues to rely on magistrates and high courts, as well as traditional courts, which use customary law for dispute resolution at the local level.¹⁷² While courts are affected by long delays before trial, inadequate resources, and limited access to counsel,¹⁷³ in general, “Botswana has the reputation of a country in which the rule of law, assured by an independent court system,” Adamolekun and Morgan write, “is predictable.”¹⁷⁴

The GOB has traditionally respected this independence and often has been compliant with rulings against it, as demonstrated by the landmark 1992 case, *Dow v. Attorney-General (Botswana)*,¹⁷⁵ in which the Court of Appeal of Botswana determined that citizenship laws allowing only male citizens to pass on their citizenship to their children amounted to sexual discrimination.¹⁷⁶ In its ruling, the court poignantly noted, “Botswana seeks to avoid violating international law where possible.”¹⁷⁷ It expounded upon Botswana’s image as a liberal democracy and the country’s loyalty to the human rights agreements that it signed and ratified.¹⁷⁸

The *Unity Dow* case is remarkable for a couple of reasons. First, it marked a major step forward for women’s rights in Botswana. Second, in coming to a decision the Court referenced many sources outside the laws of Botswana, including the African Charter on Human and People’s Rights, the United Nations Declaration of Human Rights, the Convention on the Elimination of Discrimination Against Women (CEDAW), and the constitutions of five other countries.¹⁷⁹ The willingness of the courts in Botswana to reference international cases and norms of international law demonstrates that progress is possible through the courts to bring Botswana closer to reflecting in practice and in law the stipulations set forth in the agreements to which it is a party.

170. LEITH, *supra* note 15, at 59.

171. Ladipo Adamolekun & Philip Morgan, *Pragmatic Institutional Design in Botswana: Salient Features and an Assessment*, 12 INT’L J. PUB. SECTOR MGMT. 584, 588 (1999).

172. *Id.*

173. *Id.* at 591.

174. *Id.* at 590.

175. 03 I.L.R. 128 (Bots. Ct. App. 1992).

176. Gloria Somolekae, *Democracy, Civil Society and Governance in Africa: The Case of Botswana*, 18 (1998), available at <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN009287.pdf>.

177. Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT’L L. REV. 555, 564 (2003).

178. *Id.* at 592-93.

179. Valerie Knobelsdorf, *Zimbabwe’s Magaya Decisions Revisited: Women’s Rights and Land Succession in the International Context*, 15 COLUM. J. GENDER & L. 749, 792 (2006).

Despite these positive assessments of the independence of Botswana's judiciary, evidence does exist of GOB influence within the courts. For example, when the GOB evoked its right to deport University of Botswana professor Kenneth Good from the country in 2005 as a "Prohibited Immigrant" (PI), the Court of Appeal threw out Good's appeal, citing the events of September 11, 2001 and the London bombings, because the President had claimed Good was a national security threat.¹⁸⁰ The Attorney General defended the right of the President to take unilateral action in this regard, claiming, "to declare one a PI by the President was a one-sided action which cannot be challenged in court."¹⁸¹

In a decision taken at its May 2010 session, the African Commission on Human and People's Rights ruled that Botswana had infringed on Professor Good's rights and that national security was not a legitimate justification by states for infringing on the right of individuals in their country to access the courts and that he ought to be compensated as a result. The Commission ruled that "a victim's right to have his cause heard" could not be limited in the interest of the public.¹⁸² On the GOB's justification for deporting Professor Good, the Commission ruled:

There is nothing in the article [written by Professor Good] that has the potential to cause instability, unrest or any kind of violence in the country. It is not defamatory, disparaging or inflammatory. The opinions and views expressed in the article are just critical comments that are expected from an academician of the field; but even if the government, for one reason or another, considers the comments to be offensive, they are the type that can and should be tolerated. In an open and democratic society like Botswana, dissenting views must be allowed to flourish, even if they emanate from non-nationals.¹⁸³

Foreign Affairs Minister Phandu Skelemani responded to the ruling: "We are not going to follow on the recommendation made by the commission; it does not give orders, and it is not a court. We are not going to listen to them."¹⁸⁴ This statement and the decision

180. Ian Taylor, *The Limits of the 'African Miracle': Academic Freedom in Botswana and the Deportation of Kenneth Good*, 24 J. CONTEMP. AFR. STUD. 101, 106 (2006).

181. *Id.*

182. EXEC. COUNCIL, AFRICAN COMM'N ON HUMAN RIGHTS AND PEOPLE'S RIGHTS (ACHPR), 28TH ACTIVITY REPORT OF THE ACHPR 95 (2010).

183. *Id.* at 100.

184. Simisani Chilisa, *Botswana Will Not Honour African Union Ruling on Prof Good*, SUNDAY STANDARD, Aug. 2, 2010, <http://www.sundaystandard.info/article.php?NewsID=8415&GroupID=1>.

not to comply with the ruling was seen to be “regrettable” by the chairman of the Law Society of Botswana, Tebogo Sebego.¹⁸⁵ He noted that: “Judicial bodies which are meant to keep international rulings are meant to be what they are, if we are part of AU then the issues of human rights must say something about our laws.”¹⁸⁶ Akanyang Magama, the General Secretary of a political party in Botswana, the Botswana National Front (BNF), commented: “If they are a government that believes in the rule of law, then why can’t they abide by that?”¹⁸⁷ Interestingly, Good wrote significantly about the San situation.¹⁸⁸

The CKGR case, *Sesana v. Attorney General*, shows that even when the courts rule against the GOB,¹⁸⁹ the GOB does not always adhere to court’s rulings. The courts played an especially crucial role in the CKGR case. Thus far, the High Court has been the only defender of the San’s rights capable of influencing GOB action toward them, although to a very limited extent. Two of the three judges, Justice U. Dow and Justice M. P. Phumaphi, ruled, for the most part, in the San’s favor.¹⁹⁰ They invoked international law in reaching their decisions, demonstrating once again the ability of the courts in Botswana to serve as a forum for progress towards better-respected human rights.

IV. THE HIGH COURT CASE: SESANA V. ATTORNEY GENERAL

The case, *Sesana v. Attorney General*, brought before the High Court of Botswana in Lobatse in 2004, comprised several complaints. First, the San argued that the GOB should be obliged to reinstate basic services to the Reserve terminated in January 2002 and to continue to provide such services.¹⁹¹ Second, the San asserted that the GOB unlawfully deprived them of their land and therefore must restore it to their lawful possession.¹⁹² Third, the San claimed that the GOB refused to issue Special Game Licenses to San living in the CKGR and prohibited them from entering the Reserve even with permits, which was unlawful and unconstitution-

185 *Id.*

186. *Id.*

187. *Id.*

188. *See generally* GOOD, *supra* note 19.

189 *See generally* *Sesana*, *supra* note 118.

190. Justice Dow dissented on several issues, including whether the applicants were deprived of their land by the GOB wrongly or without their consent, whether the GOB refusal to issue Special Game Licenses to the applicants was unconstitutional, and whether the GOB refusal to allow the applicants to enter the Reserve unless they were issued with permits was unlawful and unconstitutional. *See id.* at 121-22.

191. *Id.* at 2-3.

192. *Id.* at 3.

al.¹⁹³ Finally, the San alleged that the GOB should be responsible for covering the costs borne by the applicants of bringing the case before the High Court.¹⁹⁴

Over the two and a half years that the court addressed these issues, the San from the CKGR continued to live in limbo. Services to those who remained in the Reserve were suspended and relatives were not permitted to bring water to the remaining inhabitants.¹⁹⁵ The GOB continued to enforce the ban on hunting, leaving those who remained to rely solely on foraged food or risk being caught—and potentially harassed or even tortured—hunting illegally by wildlife officials or the police.¹⁹⁶ In September 2005, due to an outbreak of mange among some domestic animals inside the Reserve, the GOB ordered that all livestock be removed from the Reserve within fourteen days.¹⁹⁷ A group of San legally challenged these policies and the High Court ruled that while the larger case was still pending, the GOB's refusal to allow relatives to bring water to inhabitants of the Reserve and the forced removal of livestock was in fact unreasonable and unjustifiable. Yet the Court provided the GOB with significant leeway to continue to issue orders in the interests of "the proper management of the Reserve."¹⁹⁸

On December 13, 2006, the High Court finally reached its decision. By many accounts, the San won. The court ruled in their favor on every complaint except for the question of whether it was unlawful for the GOB to cease the provision of services to CKGR inhabitants.¹⁹⁹ In this case, the court claimed that the GOB's actions were not unlawful because the San were adequately informed that these services would be terminated before it occurred, and therefore the GOB was not obligated to reinstate them.²⁰⁰ One of the three judges confirmed that as a signatory to CERD the GOB must ensure that indigenous groups have rights equal to all others in Botswana and "that no decisions directly relating to their rights and interests are taken without their informed consent."²⁰¹

The San, who argued their case based on preexisting rights to the land under common law,²⁰² received affirmation from the court that they are in fact indigenous to the Reserve, an indication of

193. *Id.*

194. *Id.*

195. *Shadow Report*, *supra* note 2, at 7.

196. *Id.* at 8.

197. *Id.*

198. *Id.*

199. Saugestad, *supra* note 21, at 2.

200. *See Sesana*, *supra* note 118, at 322.

201. *Id.* at 202.

202. Jérémie Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 INT'L & COMP. L.Q. 583, 587-88 (2007).

their lawful possession of the land.²⁰³ In doing so, the court acknowledged “the common law principle that occupation is proof of possession.”²⁰⁴ This assessment should provide the San with leverage in future negotiations regarding the compatibility of their livelihoods with contemporary laws and regulations governing property and land-use rights in Botswana, for clearly this is not the only battle the San will have to fight. In recognizing that the San community was “legally in possession of its lands,” one of the judges on the High Court referenced cases from the High Court of Australia that referred to common law and Native Title Doctrine.²⁰⁵ National courts have increasingly acknowledged “that indigenous peoples’ land rights are grounded in their pre-existing customary laws which have survived colonization,” suggesting “the emergence of a unified jurisprudence on what could be labelled [sic] as a doctrine on ‘indigenous title.’”²⁰⁶ The High Court’s decision to reference international cases demonstrates growing international recognition of Native Title Doctrine and the willingness of courts to access cases from around the world to reach their verdicts. The ruling of the High Court of Botswana adds to this growing jurisprudence.

Despite these achievements, several outcomes of the case were problematic for the San. As previously stated, the court did not rule in favor of the applicants on the question of the provision of basic services;²⁰⁷ thus, the realistic ability of San to return to the Reserve is questionable. Without basic services, such as access to education, healthcare, and water, it is unlikely that the San can survive in the Reserve. The GOB’s refusal to provide these services, which the constitution states it should provide equally to all Botswana, violates many of the human rights treaties and declarations that the GOB has ratified. Furthermore, life for the San without these services begs the question of “what the GOB expects them to live on—or even if it wants them to live at all.”²⁰⁸

It is also problematic that the court did not take a stance on the issue of diamond prospecting in the Reserve. While the court acknowledged the matter, it asserted that diamond mining was not the issue before it.²⁰⁹ This is unfortunate for the San. While the GOB has not yet begun mining inside the Reserve, extensive prospecting and planning suggests that mining will take place in the

203. See Saugestad, *supra* note 21, at 2.

204. Gilbert, *supra* note 202, at 591.

205. *Id.* at 588.

206. *Id.* at 590.

207. Saugestad, *supra* note 21, at 2.

208. *G/wi Arrested for Hunting on Their Own Land*, PEACEFULSOCIETIES.ORG (July 19, 2007), <http://www.peacefulsocieties.org/NAR07/070719gwi.html>.

209. Sesana, *supra* note 118, at 194.

near future. Negotiations began in 2008 for the establishment of a 2.2 billion dollar mine inside the CKGR.²¹⁰ Mining inside the Reserve will inevitably interfere with the San way of life and the environment on which they depend.

If the San were to bring another case before the courts to address the mining issue, given the importance of diamonds to Botswana's economy, it is unlikely that such a case would be successful. A landmark case over land rights and diamond mining in the Richtersveld community in the Northern Cape Province of South Africa might offer precedence for the San, however. The South African Supreme Court of Appeal ruled that the Richtersveld people—an indigenous group whose presence in the region pre-dates Dutch colonization in the seventeenth century—were unlawfully deprived of their diamond-rich lands by the GOB, who gave the land over to mining contracts beginning in the 1920s.²¹¹ The court held “that the Richtersveld community had a ‘right in land’ through a customary-law interest and thus is entitled to restitution of the right to ‘exclusive beneficial occupation and use’ of the land, including all minerals and precious stones, based on their dispossession through racially discriminatory means.”²¹² Of particular importance in this case was a section of the ruling that stated that a failure to uphold indigenous land rights under customary indigenous laws amounts to racial discrimination.²¹³ Should the San return to court to demand fiscal restitution for their displacement once mining inside the Reserve occurs, the Richtersveld case may be a useful precedent.

The question of to whom the verdict applies is another major concern for the San. The GOB has asserted that the ruling applies only to the 189 original applicants who brought forth the case and not to all San formerly living in the Reserve.²¹⁴ At least one of the three High Court judges agreed. In Justice M. Dibotelo's statement he claimed, “[i]t is also important to identify who the [a]pplicants are so that the outcome in this action binds only those persons.”²¹⁵ The GOB removed more than 2500 San from the Reserve, many of whom want to return, but it appears that evicted San who are not

210. *Survival Launches Bushmen Water Campaign*, SURVIVAL INTERNATIONAL (Apr. 1, 2008), <http://www.survival-international.org/news/3177>.

211. Yvette Trahan, *The Richtersveld Community & Others v. Alexkor Ltd.: Declaration of a “Right in Land” Through a “Customary Law Interest” Sets Stage for Introduction of Aboriginal Title into South African Legal System*, 12 TUL. J. INT'L & COMP. L. 565, 566-67 (2004).

212. *Id.* at 567.

213. *Media Kit—Legal Precedents*, *supra* note 126.

214. *Sesana*, *supra* note 118, at 8.

215. *Id.*

among the 189 original applicants of this case may not be able to return.²¹⁶

After the longest and most expensive court case in Botswana's history, only a fraction of those affected by this conflict "won" back their land rights, and even they are having difficulty holding the GOB accountable to the ruling. Given the difficulty of bringing this case to the courts in the first place—due to costs, limited resources, language barriers, and other obstacles—the ability of another group appealing the scope of the ruling or bringing another case before the court is limited.

Despite the failures of the case in these regards, the fact that the San won at all, given the attitude of the GOB regarding the relocations, speaks to the independence of the judiciary in Botswana. If the judges were under the thumb of the GOB, it is highly unlikely that they would have ruled in the San's favor.

V. GOB COMPLIANCE WITH THE COURT'S DECISION

The decision in this case indicates that the High Court of Botswana offers a potential avenue for reform in Botswana's human rights arena. Through the case, the court has shown a willingness to take a stand against the GOB on issues of human rights, even especially sensitive ones. This same willingness, however limited, to confront the GOB was reflected in the *Unity Dow v. Attorney General of Botswana* case.²¹⁷ It is not, however, reflected in the San water case decided in July 2010.

The courts play a critical role in ensuring and enforcing adherence to international agreements. In the *Unity Dow* case, the court claimed that it would look at both ratified and non-ratified treaties in making its decision, noting the *Bird's Galore Ltd. v. A.G.* case from New Zealand in which the judge claimed that "[a]n international treaty, even one not acceded to by New Zealand, can be looked at by this court on the basis that in the absence of express words Parliament would not have wanted a decision-maker to act contrary to such a treaty."²¹⁸ The Botswana Court of Appeal further noted, "international law represents a legitimate interpretive aid in construing domestic legislation,"²¹⁹ noting that courts "cannot afford to be immune from the progressive movements going

216. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RIGHTS, AND LAB., 2007 COUNTRY REPORT: BOTSWANA (2008), available at <http://www.state.gov/gldrl/rls/hrrprt/2007/100467.htm>.

217. See Bahdi, *supra* note 177, at 564.

218. *Id.* at 580.

219. *Id.* at 585.

on.”²²⁰

While the support of the courts in upholding international norms is crucial, it is only part of the battle. For the courts to truly elicit change, the GOB will have to comply with their rulings. Thus far, the GOB has not indicated that it will comply willingly with the CKGR ruling. For example, the ruling specifically states that the 189 applicants of the case can return to the Reserve without permits so long as they have identification papers.²²¹ Yet two weeks following the ruling, when a group of San attempted to return home, park officials refused them entrance.²²² The GOB also has continued the water ban, which forbids inhabitants of the Reserve from using existing boreholes to pump water. Despite the ruling’s stipulations, the GOB has not issued a single hunting permit to the San since the close of the case.²²³ Reflections from the Peaceful Societies Web site conclude that the GOB “clearly is resisting the decision of the country’s supreme court.”²²⁴

Failed compliance also is apparent in the discrepancy between the ruling and the actions of wildlife officials in the Reserve, who are under GOB control. The history of violence toward the San, and their mistreatment in the Reserve, dates back more than a decade.²²⁵ One victim claimed to have been severely beaten and hung upside down by park officials after being accused of poaching.²²⁶ In October 2007, several San reported arrests and torture by wildlife officials for hunting, including a group of six San whom park officials arrested, accused of poaching, and allegedly beat.²²⁷ Since the ruling, at least fifty-three arrests have been made for hunting and abuses by wildlife officials and police have included beatings, deprivation of food and water, forced exercise in high temperature, and threats.²²⁸ Many of those arrested are not among the 189 applicants of the case, so the GOB defends the arrests by asserting that the decision applies only to that particular group.²²⁹

220. *Id.* at 589.

221. Gumisai Mutume, *Indigenous People Fight for Inclusion*, AFR. RENEWAL 3 (2007), available at <http://www.un.org/ecosocdev/geninfo/afrec/vol21no1/ar-21no1.pdf>.

222. See Nyathi, *supra* note 142.

223. *Bushmen Freed as Government Clampdown Backfires*, SURVIVAL INTERNATIONAL (Aug. 5, 2009), <http://www.survivalinternational.org/news/4839>.

224. *G/wi Arrested for Hunting on Their Own Land*, *supra* note 208.

225. See Hitchcock, *supra* note 94, at 819.

226. *The Row about the Bushmen*, *supra* note 122.

227. *Torture of Bushmen—Shocking Details*, SURVIVAL INTERNATIONAL (Oct. 31, 2007), <http://www.survival-international.org/news/2572>.

228. *Id.*

229. See Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development: The Situation of Indigenous Peoples in Botswana*, Human Rights Council, ¶ 72-77 U.N. Doc., A/HRC/9/9 Add.1 (Aug. 15, 2008) (by James Anaya) available at <http://www.internal->

While the courts gave the San permission to return to the Reserve, it remains to be seen what kind of life they can return to. According to the Director of Survival International, Stephen Corry, the GOB's policy "couldn't be clearer—to terrorise the Bushmen so that they're too afraid to go home."²³⁰

Abuse and discrimination against the San are a societal problem that reaches beyond the scope of the Reserve. Such discrimination indicates that even if the GOB were to support the ruling, societal treatment of the San would still be a major issue. The outcome of the case and any minimal efforts by the GOB to uphold its verdict are not indicative of a greater understanding of the right of the San to live their way of life. This is evident in the GOB's firm opposition to allowing issues involving the San to infiltrate public discourse. In 2007, the GOB imposed additional visa requirements on seventeen journalists and academics, some of who write extensively on the San issue.²³¹ While the GOB may not publicly forbid open discourse on contentious issues like the San, it is clearly trying to dissuade it.

VI. THE SAN'S OPTIONS MOVING FORWARD

If GOB compliance with the ruling is limited, there are few options available to the San. Raising international awareness through meetings, demonstrations, increased press coverage, and the work of NGOs has thus far proven most effective. After all, it was coverage by NGOs like London-based Survival International that helped bring attention and resources to the CKGR case in the first place. In January 2010, Survival began their "Defying Logic" ad campaign in several major British publications to draw attention to the plight of San.²³² The FPK also has set up a Web site called "I Want 2 Go Home," which features the images and stories of some of the 1000 or so San hoping to return to the CKGR.²³³ Regardless of its feelings toward the San and their way of life, the GOB has a lot invested in its stable and democratic image, which draws levels of investment and prestige unknown to many African countries.²³⁴ Significant negative international attention could af-

displacement.org/8025708F004CE90B/(httpDocuments)/1DA16748507440CBC12575CC002F2C71/\$file/A+HRC+9+9+Add+1+special+rappporteur.pdf.

230. *Torture of Bushmen—Shocking Details*, *supra* note 227.

231. Thom McLachlan, *Botswana's 'Specialentry' Visas for Critics*, BUSINESS DAY (South Africa), Apr. 7, 2007.

232. *Bushmen Ad Campaign Attacks Botswana*, NAMIBIA ECON., (Jan. 15, 2010), <http://allafrica.com/stories/201001150917.html>.

233. *Home Page*, I WANT 2 GO HOME, <http://www.iwant2gohome.org> (last visited Dec. 22, 2010).

234. On investment in Botswana, see Anupam Basu & Krishna Srinivasan, *Foreign*

fect this image and is therefore likely to push the GOB to action.

Other channels through which future complainants might move would include the ICCPR, the African Commission, and the Office of the Ombudsman in Botswana. Unfortunately, while Botswana has ratified the ICCPR, it has not ratified its first optional protocol, which provides individuals with the right to bring issues before the Human Rights Committee.²³⁵ The African Commission, however, is capable of hearing complaints. The Commission sent a mission to Botswana in 2005, which criticized the GOB's treatment of the San and pressured the GOB to address human rights issues.²³⁶

The office of the Ombudsman in Botswana was established by the Ombudsman Act of 1995 as a public, extra-ministerial institution with the power to investigate "maladministration" and confer recommendations to the GOB.²³⁷ Thus far, the office has not been very active. Former Ombudsman Lethebe Maine reported to the African Commission in 2005 that he had received very few complaints to his office, other than a few grievances of human rights abuses brought by prisoners.²³⁸ The ombudsman, however, is appointed by the president, in consultation with the leader of the opposition party, and funded by the GOB.²³⁹ Questions of impartiality arise with a presidential appointee.

The San's January 2010 announcement that they intend to bring their case before the International Court of Justice (ICJ), following a stalemate in negotiations with President Ian Khama, is presumably aimed at drawing international attention.²⁴⁰ The ICJ only hears cases brought before it by states, not by individuals or other non-state actors.²⁴¹ Announcing such an intention, although not feasible in practice, is likely, however, to cast further light upon the plight of the San.

Finally, future petitioners could attempt to bring another case

Direct Investment in Africa: Some Case Studies 22 (Int'l Monetary Fund, Working Paper WP/02/61, 2002), available at <http://www.imf.org/external/pubs/ft/wp/2002/wp0261.pdf>.

235. Olmstead, *supra* note 37, at 846.

236. THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS, MISSION REPORT TO THE REPUBLIC OF BOTSWANA (2005), available at http://www.achpr.org/english/Mission_reports/Botswana/mission%20report_Botswana.pdf.

237. *See id.*

238. *See id.*

239. *Ministry of State President*, GOVERNMENT OF BOTSWANA, http://www.gov.bw/index.php?option=com_content&task=view&id=23&Itemid=40#ombudsman (page accessed through <http://web.archive.org>).

240. David Manes, *Botswana Tribe to Bring Land Dispute with Government to ICJ*, JURIST: LEGAL NEWS AND RESEARCH (Jan. 10, 2010, 12:04 PM), <http://jurist.law.pitt.edu/paperchase/2010/01/botswana-tribe-to-bring-land-dispute.php>.

241. *Frequently Asked Questions*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/information/index.php?p1=7&p2=2&PHPSESSID=a0199c5b465fd4b5c9174d26c95b1892> (last visited Dec. 22, 2010).

before the Botswana courts. Considering the effort, time, and expense the first case entailed, this is exceedingly challenging. In 2007, the San threatened to pursue another case if the GOB continued to impede their return to the Reserve.²⁴²

More recently, the San pursued a case in the High Court regarding their right to access water inside the Reserve. In 2002, the GOB sealed a borehole in the CKGR to help drive the San out. Since then, the San have had to truck water in from the nearest public borehole, 300 miles away, to bring water back to their communities.²⁴³ The GOB refused to reopen the borehole, citing the verdict of *Sesana v. Attorney General*, which said that the GOB did not have to reinstate basic services. In response, in a hearing held on June 9, 2010 in the High Court at Lobatse, the San requested that either the existing borehole be reopened or that they be given permission to drill another borehole at their own cost.²⁴⁴ The High Court ruled against the San in its July 21, 2010 judgment. Justice Lakhvinder Walia stated that the San “have become victims of their own decision to settle an inconveniently long distance from the services and facilities provided by the government.”²⁴⁵ The San announced their intent to appeal the ruling,²⁴⁶ but for now it appears that even the courts are only willing to go so far to make the San’s return to the Reserve a reality.

Overall, future complainants have limited ability to combat the GOB should it chose not to comply with the ruling or with its obligations to protect the rights of the San under international law. Increased international pressure and awareness campaigns provide the most viable options. However, significant societal changes beyond the courts are necessary to actually alter the marginalized situation of the San in Botswana today.²⁴⁷

CONCLUSION

According to the Report of the Commonwealth of Nations Expert Group on Development and Democracy entitled “Making De-

242. *Bushmen—Back to Court?*, SURVIVAL INTERNATIONAL (Nov. 20, 2007), <http://www.survival-international.org/news/2683>.

243. Mark Tran, *Kalahari Bushmen to Appeal Against Court Ban on Well in Game Reserve*, GUARDIAN (United Kingdom), July 22, 2010, <http://www.guardian.co.uk/world/2010/jul/22/kalahari-bushmen-botswana-well-court-appeal>.

244. See *Outrage as Botswana Bushmen Denied Access to Water*, *supra* note 1.

245. Tshireletso Motlogelwa, *Basarwa Lose Another One*, MMEGIONLINE (July 22, 2010), <http://www.mmegi.bw/index.php?sid=1&aid=3659&dir=2010/July/Thursday22>.

246. Tran, *supra* note 243.

247. The ruling of the High Court was reversed by the Court of Appeal on January 27, 2011. *Botswana Appeals Court Grants Water Rights to Bushmen*, JURIST (Jan. 27, 2011), <http://jurist.org/paperchase/2011/01/botswana-appeals-court-grants-water-rights-to-bushmen.php>.

mocracy Work for Pro-Poor Development,” prepared for the Commonwealth Heads of GOB in Abuja, “around half of the world’s 300 million indigenous peoples live in the Commonwealth,” and they regularly “suffer discrimination, intolerance and prejudice, and violation of their land rights.”²⁴⁸ The report specifically notes, among other things, that indigenous peoples suffer limits on their right to “own, develop, control and use their lands and territories.”²⁴⁹ Mukwiza Ndahinda writes: “indigenous peoples are frequently arbitrarily expelled—either at the hands of government officials or private actors—from lands on which their ancestors have been living.”²⁵⁰

In this context it was an important development for indigenous peoples everywhere when on December 13, 2006, the San in Botswana received judicial acknowledgement of their indigenous rights in the case over the CKGR. Locally, the ruling holds promise for the return of some San to their homelands in the Reserve. It also portends a future in which one of the world’s oldest indigenous groups may be able to carry on its unique culture. Also, it demonstrates judicial support for the existence of indigenous peoples in Botswana, which the GOB continues to deny.

Time will tell whether the GOB will come around and comply with the ruling. It has clearly shown hesitation thus far through its refusal to permit many San to return to the Reserve, its hesitation to issue special game licenses for hunting to the San, and the continued arrests and harassment of CKGR San by wildlife officials. GOB compliance would represent a crucial demonstration of support for the San, which may, over time, translate into lower levels of societal discrimination against them. Compliance would also demonstrate that Botswana does indeed take its international agreements seriously, even when adherence to them conflicts with other interests.

The case also provides a clear example of how well international pressure can work. A statement made by the Attorney General indicated that Botswana’s sudden engagement on this issue was due in major part to the involvement of the international community, supporting the theory that international pressure on GOBs who abuse human rights often elicits change. Such influence should not be underrated, especially when it concerns a country that benefits from its democratic image.

248. Helena Whall, Commonwealth Policy Studies Unit, Summary Report of the Indigenous Rights in the Commonwealth Project, 2001-2004, 13 (2004).

249. *Id.*

250. Felix Mukwiza Ndahinda, *Victimization of African Indigenous Peoples: Appraisal of Violations of Collective Rights under Victimological and International Law Lenses*, 14 INT’L J. ON MINORITY & GROUP RIGHTS 1, 9 (2007).

Although the San technically may have “won” this singular and exhaustive case, they continue to face a whole gamut of issues. The Second International San Conference in Palapye in 1993 expressed concern over issues such as poverty, lack of political representation, discrimination, exploitation as laborers, and limited cultural and social rights, issues that continue to affect the San to this day.²⁵¹ In addition, the inability of San to attend school taught in their own language threatens loss of a culture and inhibits the ability of San students to compete with others.

San still living inside the resettlement camps illustrate their dire situation. Few of those relocated have the means to return home.²⁵² Many are awaiting court dates for hunting violations, and others have neither the gas nor the transport with which to return. Although the GOB forcibly transferred the San to the settlements, they have offered no assistance for their return across great distances.²⁵³ Others have lost the skills they once had to hunt and survive in the wild and have become dependent on the rations, clinics, and boreholes that the GOB once provided in the Reserve and has now taken away. The introduction of diseases like AIDS has surpassed the ability of the San to cure illnesses with herbs and traditional medicine.²⁵⁴

The case also adds crucial precedence to Native Title Doctrine, which supports the use of customary indigenous laws to assist indigenous groups in reclaiming their homelands.²⁵⁵ There is a growing jurisprudence on indigenous rights in international law, and courts around the world will likely refer to the ruling of the High Court of Botswana in their rulings, just as the High Court referenced cases from Canada, Australia, and elsewhere.

While indigenous issues are gaining prominence in international law, as the signing of the UN Declaration on Indigenous Rights in September 2007 indicates, many questions regarding the definition of the term “indigenous” and the appropriate allocation of indigenous rights remain.²⁵⁶ This case adds to the growing jurisprudence of indigenous rights and offers insight into the questions the indigenous debate presents. The evolution of international law is an ongoing process that only can take place through implementation, exploration, and further discussion by the courts, states, civil society, indigenous groups, and the multilateral institutions

251. Hitchcock, *supra* note 94, at 811.

252. See Van der Post, *supra* note 31.

253. See *Bushmen—Back to Court?*, *supra* note 242.

254. See Van der Post, *supra* note 31.

255. See Gilbert, *supra* note 202.

256. See generally Amelia Cook & Jeremy Sarkin, *Who is Indigenous?: Indigenous Rights Globally, in Africa and Among the San in Botswana*, 18 TUL. J. INT'L & COMP. L. 93 (2010) (discussing the extent to which indigenous communities remain marginalized).

that help create and maintain this framework. Botswana's role in this process should be to keep the discussion over indigenous rights alive. After all, confronting these issues is critical to the preservation of the country's image as a model of democracy in Africa.

A culture of nonconfrontation has perhaps discouraged Botswana from addressing the limits of human rights in society, just as a weak civil society has plagued progress among victims who claim their human rights are denied. The San have found support from outside sources, but true resolution of the thorny relationship between the GOB and the San only will materialize once the GOB and the rest of Botswana society identify with the role that the San play in Botswana's collective, historic identity. The people of Botswana must recognize the value of protecting the San way of life, including recognition that indigenous groups can contribute to contemporary society. These cultures are not simply relics of the past. To this end, NGOs working on indigenous issues should pursue cultural awareness campaigns that expose the public to the potential contributions of the San.

The San can indeed play a very important role in modern Botswana. Their unmatched knowledge of the region's biodiversity and other forms of indigenous wisdom is both scientifically and historically valuable. Given the San's knowledge, a partnership with the San could be very useful as the GOB pursues conservation and eco-tourism initiatives to protect and preserve Botswana's unique flora and fauna.²⁵⁷ In recognition of this knowledge, the Trust for Okavango Cultural and Development Initiatives began a project in 2005 in which the San work with GIS mapping technologies to map territories and knowledge of wild foods in the Okavango.²⁵⁸ Some Veld products historically used by the San have recently garnered commercial value, such as the Hoodia cactus, which international scientists are currently analyzing as a potential weight loss supplement.²⁵⁹ The Hoodia plant is neither easy to find nor recognize, presenting an opportunity for the San to offer valuable assistance.

The San, much like the Maasai in Kenya, also are a source of interest for tourists because they represent the oldest chapter in Botswana's collective history, and because of their cultural distinc-

257. On tourism possibilities generally, see Erdener Kaynak & Edward E. Marandu, *Tourism Market Potential Analysis in Botswana: A Delphi Study*, 45 J. TRAVEL RES. 227 (2006).

258. IPACC, *supra* note 39.

259. See Wezi Tjaronda, *Namibia: Biggest Market for Hoodia, Originally Used by San and Nama Tribes, is U.S.*, NEW ERA, Apr. 12, 2007, <http://allafrica.com/stories/200704120215.html>.

tiveness and regional knowledge. They could play a huge role in the future development of the eco-tourism sector.²⁶⁰ There are already several Community Based Natural Resource Management (CBNRM) programs that focus on combining eco-tourism, conservation, and the livelihoods of indigenous groups. Such initiatives inside the Reserve could potentially create environmentally-friendly revenue streams that benefit the San as well as Botswana's tourism industry.

The San have proven their ability to protect the land and its resources in this region for tens of thousands of years and could therefore be effective stewards of environmental projects. In fact, according to one evicted San member, the GOB was in the process of negotiating a management plan in consultation with the San before their eviction in 2002, which would have allowed residents to stay and even hunt and gather.²⁶¹ Following the evictions, the GOB replaced the plan with a new one, according to one witness, which failed to recognize the existence of the San at all.²⁶² Yet CBNRM programs already have taken off in other areas of Botswana, especially in the Okavango Delta, where local communities are empowered to care for the land based on a system of sustainable resource use and stakeholder involvement. The theory behind CBNRM is that local communities, particularly indigenous groups, know how to best protect their resources. These programs strive to combat historical assumptions in which “ ‘conservation’ became code for ‘exclusion and dispossession.’ ”²⁶³

In some areas of the country, the GOB recognizes and supports the link between maintaining the livelihoods of indigenous groups and the protection of lands. In the Okavango, local people act as guides for adventurous tourists in the Delta, sharing intimate knowledge of local flora and fauna. Many indigenous groups also make and sell crafts. Unlike in the CKGR, the GOB supports indigenous groups in the Okavango in these endeavors. Given the similar abilities of the two indigenous groups to act as wardens of the land, it is possible that diamonds in the Kalahari are to blame for the discrepancy in GOB treatment of the groups. Incorporating the San into land management practices in the Reserve would satisfy the desire of the San to live on their land and the desire of the GOB to protect the land. To “develop” the San, much less relegate them to squatter camps, would threaten this role and do nothing for the development of the country as a whole. At the very least, if

260. Hitchcock, *supra* note 105, at 15.

261. *Media Kit—Witnesses*, *supra* note 102.

262. *Id.*

263. Swatuk, *supra* note 64, at 100.

diamond mining within the Reserve is inevitable, the GOB ought to explore ways in which the land can be jointly utilized to the benefit of both. Mining in one section of the Reserve does not have to preclude the ability of the San to live in other sections.

In general, the GOB must better incorporate the lifestyle and the traditions of Botswana's non-Tswana speaking group, both socially and legally. To this end, the GOB ought to "[p]romote incorporation of indigenous knowledge in policy and programme activities" and support, not marginalize, NGOs working with the San while emphasizing participation and dialogue.²⁶⁴ Language will be a very important aspect of respecting San rights in the future. The GOB should permit the San to negotiate in their own language and, even more importantly, to receive education in their own language, as stipulated in ICCPR Article 27.²⁶⁵

The San also are in need of economic and social assistance. The GOB should help facilitate the livelihoods of the San *as they choose to make them*. If there are San who desire to live in the Reserve, their communities will require access to water, healthcare, and educational opportunities. The Special Rapporteur on Indigenous Rights noted in his 2010 report on Botswana that:

The Government should fully and faithfully implement the *Sesana* judgment [sic] and take additional remedial action in accordance with international standards relating to the removal of indigenous peoples from their traditional lands. Such remedial action should include, at a minimum, facilitating the return of all those removed from the reserve who wish to do so, allowing them to engage in subsistence hunting and gathering in accordance with traditional practices, and providing them the same government services available to people of Botswana elsewhere, including, most immediately, access to water . . . Indigenous people who have remained or returned to the reserve face harsh and dangerous conditions due to a lack of access to water, a situation that could be easily remedied by reactivating the boreholes in the reserve. The Government should reactive the boreholes

264. Keitseope Nthomang, *Relentless Colonialism: The Case of the Remote Area Development Programme (RADP) and the Basarwa in Botswana*, 42 J. MODERN AFR. STUD. 415, 432 (2004).

265. International Covenant on Civil and Political Rights art. 27, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

or otherwise secure access to water for inhabitants of the reserve as a matter of urgent priority.²⁶⁶

The San also are in dire need of political representation. Botswana did an excellent job of incorporating traditional Tswana institutions such as the *kgotla* into modern politics. It also has facilitated the involvement of traditional chiefs in politics. This ought to provide some foundation from which to create a system that affords political representation to these remote and distinct communities, including allowing the San to elect their own representatives, rather than have the GOB appoint them.

Social programs for the San can be financed just as many projects are in Botswana, through GOB revenues, which stem mostly from diamonds. If, in the end, it becomes clear that the San were forcibly removed from their homes to make way for diamond mining, it seems only fair that, at the very least, they should benefit from the subsequent revenues through social and economic assistance programs.

The San ought to have access to schools within a reasonable distance of their communities. A 1995 study found that only 18% of San children were in school.²⁶⁷ There are many reasons for this, including commute time, language barriers, punishment methods that run contrary to San beliefs, discrimination, and the focus of education on Tswana culture.²⁶⁸ An extremely centralized system of education has prevented schools from addressing the diverse needs of various communities around the country.²⁶⁹ The GOB should consider offering classes in San languages, so that progress through education does not have to result in a loss of culture, as it does for so many local and indigenous communities around the world.

Finally, if the GOB truly wishes for the San to “progress” by joining in Botswana society, it might first address the racism confronting San peoples,²⁷⁰ which inhibits their ability to compete in the modern workplace even if they wanted. Perhaps if the San had public support, the GOB would be encouraged to address their situation and implement the ruling. An op-ed in the *Mmegi Reporter* in December 2009 criticizing the GOB’s inertia on the San issue is perhaps an indication of shifting public opinion.²⁷¹

266. *The Situation*, *supra* note 7, at ¶ 97-98.

267. R. Winkle Wagner, *An Endless Desert Walk: Perspectives of Education from the San in Botswana*, 26 INT’L J. EDUC. DEV. 88, 91 (2006).

268. *Id.* at 91-94.

269. *Id.* at 91.

270. *See id.* at 90.

271. *The Executive Must Respect the Judiciary*, MMEGIONLINE, (Dec. 15, 2009),

The courts also have a role in bringing about these changes. This case demonstrates that the courts can function, to some extent, free of GOB influence. If they could not, the San would not have won. Sadly, the San were not so lucky in the recent water rights case of June 9, 2010, in which the High Court ruled against the San, denying their right to access a borehole inside the Reserve.²⁷²

The African Commission on Human and Peoples' Rights issued a Press Statement on August 10, 2010 stating:

The African Commission wishes to recall that, after being forcibly removed from the Central Kalahari Game Reserve in 20002 [sic], the Bushmen won an historic victory on 13 December 2006, when Botswana's High Court ruled that their eviction by the government was 'unlawful and unconstitutional'. The Court also ruled that they have the right to live inside the reserve, on their ancestral land inside the Central Kalahari Game Reserve. This ruling which is consistent with the provisions of the African Charter, in particular articles 2,4,19 and 24 has been welcomed by the international Human Rights community.

The ruling has been however seriously crippled by the denial to Kalahari Bushmen, of the right to water contained in the judgment no. MAHLB-000393-09 delivered Wednesday July 21st by the High Court in Lobatse, Botswana. The High Court ruled that the Bushmen people were not entitled to use a well already established on their traditional land in the Kalahari Game Reserve or excavate a new one.

....

... Refusal to allow the Bushmen to use their existing borehole at Mothomelo can only be interpreted as a clear sign that the Government of Botswana is determined to continue what is perceived as a policy of keeping the Bushmen from returning home.²⁷³

It is insufficient, therefore, for the High Court to rule in favor of the San's return, if it is not viable for logistical reasons. The courts must play a role in mending the relationship between the San and the GOB through legal channels, as well as protecting and enforc-

<http://www.mmegi.bw/index.php?sid=9&aid=107&dir=2009/December/Tuesday15>.

272. Innocent Tshukudu, *Back to Dry Land*, THE VOICE, (July 23, 2010), <http://www.thevoicebw.com/?p=2557>.

273. Press Release, African Commission on Human and Peoples' Rights, Press Release on the Situation Facing the Bushmen of the Central Kalahari Game Reserve in Botswana (Aug. 10, 2010).

ing their rights, while NGOs and others battle social, economic, and political marginalization. The courts also have an obligation to continue to utilize international law in reaching verdicts, which will help to demonstrate the country's commitment to the international agreements to which it is a party. Similarly, the GOB should incorporate into national law the international law contained within the agreements it has ratified. Parliament must convene and enact legislation to this effect.

NGOs should increase awareness of these controversial issues in a country that receives media coverage primarily for its strong economy and its flourishing tourism. Legal aid organizations can provide advice and other assistance to the San, including helping them to understand their rights under national and international law, and the courses of action available to them. Conflict resolution organizations can assist both parties in coming to the table to discuss the future of the San and the resolution of these issues amicably.

The international community must continue to pressure the GOB to take action in support of the San. Botswana has shown itself vulnerable to international opinion. Transforming the Declaration on Indigenous Rights into a convention, so that it is binding to states, is another option. While a declaration carries significant moral weight, the indigenous rights it defends could be even more effective if binding.²⁷⁴ Furthermore, the roles of institutions and persons who could influence the vulnerable situation of indigenous persons around the world should be increased. More funds ought to be allocated for conducting missions to various countries in order to bring light to situations like that of the San are necessary. The African Commission on Human and Peoples' Rights also requires support to bolster its status and its finances so that it is able to undertake more investigations and missions. International attention is invaluable, especially for countries like Botswana. If the international community ignores the current situation of the San, the GOB has little incentive to address these issues.

Ultimately, the High Court case neither resolves the San's overall situation nor their tenuous relationship with the GOB or society as a whole. As Olmstead notes, "The outcome of this confrontation remains to be seen, but a resolution is unlikely to be lasting or effective unless the government, civil society and the international community come to grips with the deeper, structural aspects of San subordination in Botswana."²⁷⁵ Land rights repre-

274. UN PRESS KIT - HUMAN RIGHTS AT YOUR FINGERTIPS, <http://www.un.org/rights/50/game.htm#28> (last visited Dec. 22, 2010).

275. Olmstead, *supra* note 37, at 799.

sent only a small portion of the obstacles that the San face in their struggle to access the full range of human rights afforded them under international law, both as indigenous peoples and as individuals. The GOB's compliance with this ruling is important not simply because non-compliance is an indicator of the failures of justice in Botswana, but also because it is indicative of the willingness of the GOB to finally confront its poor relationship with the San and to work toward ameliorating many of the socio-economic issues that marginalize this group and other minorities in Botswana. It is not in anyone's interest for Botswana to allow this issue to continue to erode its international image. The case of the San in the CKGR is representative of the gaps Botswana must fill if it truly wants to become the "African Miracle."