

**Alternative Report Submitted to the UN Committee on the Elimination of
All Forms of Racial Discrimination
(CERD)**

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Submitted by Minority Rights Group International (MRG), London, UK

Introduction

1. This shadow report is respectfully submitted to the attention of the Committee on the Elimination of all Forms of Racial Discrimination (CERD) upon its examination of the Government of Botswana's 15th and 16th periodic reports. The report compliments information notes previously addressed to the during the Committee's August 2004 and March 2005 sessions.
2. The comments herein focus mainly on the discrimination faced by non-Tswana tribes of Botswana, and more specifically, on the privileged status and access of the Tswana speaking tribes to the House of Chiefs. The issue is intrinsically related to the 2001 High Court challenge brought by the Wayeyi; a judgment which has yet to be adequately implemented by the Botswana authorities, and which therefore continues to be closely monitored by both CERD and MRG.¹
3. The present note is to be read in conjunction with the shadow report submitted by *Reteng: The Multicultural Coalition of Botswana*, which sets out in detail the extent to which amendments to the domestic legislation through Bill No. 34 of 2004 has left all discriminatory effects intact.² MRG's contribution in turn draws attention to standards of key importance for the protection of the linguistic and cultural identity of the Wayeyi and other non-Tswana tribes in Botswana. The standards in question include the right to effective participation.
4. Though the nature and content of many of the rights set out in this report draw from the body of law relating to minority rights, a review of CERD Concluding Observations confirms that it regularly draws attention to the situation of minorities.³ Further evidence of the Committee's sensitivity to minority rights is evidenced through its General Recommendations relating to Roma, indigenous peoples, caste-based discrimination and non-citizens.⁴

¹ Shitaki Calvin Keene Kamanakao I et al. v Attorney General of Botswana. High Court of Botswana, Misca No. 377/99, November 23, 2001.

² This Bill was passed by the Parliament of Botswana on April 14, 2005.

³ Views of the Committee on the Elimination of Racial Discrimination on the implementation of the Convention on the Elimination of all forms of Racial Discrimination and its effectiveness, submitted to the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, UN Doc. E/CN.4/2004/WG.21/10.Add1, 2004, para. 18.

⁴ These are respectively General Recommendations XXVII, XXIII, XXIX, and XXX.

5. MRG believes that the Committee's acceptance to draw on these principles, when and where relevant, is crucial to acknowledging and addressing the collective experience of discrimination suffered by ethnic, linguistic and religious minorities; a collective experience of discrimination that commonly results in a socio-economic and cultural marginalization. This marginalization, in turn, often goes hand in hand with invisibility of minorities and/or their assimilation.

Who are minorities?

6. Prior to delving into the scope of the Botswana Government's discriminatory practices, it is important to first clarify who is a minority, as generally understood under international law.
7. Although there is no internationally accepted legal definition of a 'minority', there can be no doubt that minorities do exist. The diversity of cultures globally is clear evidence that human beings can form or constitute distinct communities.

Criteria beyond numbers

8. Many States recognise that minorities exist within their territories; for example, through direct constitutional recognition of groups, or through indirect policies or programmes such as identification in census data. Other States may deny that minorities exist in their territory; indeed the non-recognition of minorities is a common obstacle set by States and an excuse for not respecting minority rights. The UN has confirmed, however, that the existence of minorities is a matter of fact and "does not depend upon a decision by that State party but requires to be established by objective criteria".⁵
9. Objective criteria used to define minorities are generally acknowledged to include group characteristics such as ethnicity, language, or religion. With regard to population size, more important than numbers is the position of power held by various groups, a concept commonly referred to as '*non-dominance*'. This position of non-dominance is in relation to social, political and/or economic status within a given country.

Freedom of Choice

10. It is important to note that, in addition to objective requirements, subjective criteria also play a key role in defining minorities. Subjective criteria include the wish of individual members to collectively preserve and develop their distinct ethnic identity.⁶ The subjective criteria of *self-*

⁵ UN Human Rights Committee, General Comment 23, The rights of minorities (Art. 27): 08/04/94, para 5.2.

⁶ To be clear, elements of both objective *and* subjective criteria must be met in order to legitimately identify a minority.

identification is also of particular importance for defining who is and who is not part of a minority, as is the case with indigenous peoples.⁷

Opting-out

11. Fears or resistance of articulating minority rights out of concern that such mobilization would force all members of that ethnic, linguistic or religious group to self-identify as such have no legitimate basis on the grounds that the *right to 'opt-out'* and thus not self-identify as part of a minority is a fundamental principle of minority rights. In this regard, existing standards, such as the Framework Convention on National Minorities not only emphasizes the right to freely choose to be treated or not to be treated as minorities, but also that *no disadvantage* shall result from this choice.⁸
12. Beyond recognizing that not all within a minority group may wish to identify as such, this principle also recognizes the reality that individuals within a minority are not homogenous. Different realities will indeed require different forms of protection, the most notable example stemming from the contrast between rural and urban areas. Whereas recognition of collective land rights may be a necessary form of protection for preserving the identity and way of life of some, similar protection could not be legitimately sought for minorities living in a nation's capital, as their association with others, mode of production and way of life would be unlikely to be rooted in collective use of land. Urban minorities would nonetheless most likely require protection in the form of effective participation, access to media, education, etc.
13. MRG notes with concern that, throughout its state report, the Government of Botswana refers to its minorities as "minorities". The Government's emphasis on the non-Tswana tribes forming together the numerical majority of the country's population denotes an important

⁷ Tensions associated with self-identification pose particular difficulties when it comes to data collection. If governments rely purely on self-identification of individuals in data collection, then there is often under-reporting of minorities in the statistics due to minority fear of discrimination if they self-identify as such. This then leads to inaccurate data being used in developing policies and programmes which could undermine their effectiveness. In some cases, the opposite is also true. Where programmes are established for particular groups, for example a programme to assist members of minorities obtain jobs, individuals who do not meet any of the objective criteria for membership of a particular ethnic group (culture, ethnicity, religion, language), may attempt to self-identify with that group in order to benefit from the programme; however, there is no right to arbitrarily choose to belong to a particular minority. 'The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity'. [CoE, Framework Convention for the protection of National Minorities (FCNM), Article 3.1 and Explanatory Report, H(1995)010, para 35]. Governments should recognise that the collection of ethnic data can be sensitive and work on a consultative basis with minority communities in order to their build confidence. Governments should collect ethnic data in accordance with basic principals. The reason for the data collection, the process and what will happen to the data collected should all be transparent.

⁸ FCNM, Article 3(1): Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.

disregard for the fact that they are nonetheless in a position of non-dominance in their society, and that without positive measures and forms of protection, they are unable to effectively protect themselves against marginalization and assimilation.⁹ The following sections will outline how this non-recognition, which runs counter to the essential first step for promoting and protecting minorities, results in both direct and indirect discrimination under the Convention.

Article 1

Article 1(1) states that:

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁰

Eight principle tribes of Botswana – House of Chiefs

14. A point of critical interest in this shadow report relates to Botswana's official recognition of only eight principle Tswana speaking tribes, to the exclusion of all non-Tswana speaking minorities. The recognition of these tribes translates into permanent and automatic admission to the House of Chiefs. Chiefs from Tswana speaking areas are designated in accordance with their customs. Moreover, the names of the areas they represent reflect their ethnicity, and thus their tribes.
15. The House of Chiefs advises Parliament on any matter of national concern and is particularly consulted by government on issues that are likely to impact on the culture and tradition of Botswana.¹¹ The status of the eight tribes within this body enables them to voice their approval or disapproval of policies to the government without seeking input from the non-Tswana in those districts, even if the matters directly affected the latter.¹²
16. On the other hand, Sub-chiefs of non-Tswana speaking crown lands are elected by the House of Chiefs or Senior Chiefs' representatives in the area, rather than by their people or through their own customary laws. In fact, since they are elected by other chiefs under the supervision of the Tswana chief, they are in most instances not the rightful chiefs of the tribes or the preferred choice of the people.

⁹ Government reference to "minorities" in Botswana's 2006 State report to CERD, paragraphs 32 and 33.

¹⁰ Emphasis added.

¹¹ Botswana 2006 State Report to CERD, paragraph 70.

¹² On this matter, consult Appendix 1 of the shadow report from RETENG, sections 2(a), 2(b), 2(c).

17. Furthermore, the names of their areas do not reflect their ethnicity and therefore tribes are not recognized. Finally, given their lower status in the House of Chiefs, Sub-Chiefs do not make decisions affecting their people, but implement decisions made by the Tswana Chief.¹³

Purpose or effect

18. The Government argues that, although elected and specially elected members (which are all from non-Tswana tribes) have a different term of office than the permanent status of the eight Paramount Chiefs, they all enjoy equal status within the House of Chiefs.¹⁴

19. MRG argues that the Government of Botswana's position is erroneous in both law and practice, and that the current situation in fact raises important examples of both *direct and indirect discrimination*. While the government may argue that there is no intention to discriminate, it is clear that the 'effect' has nonetheless resulted in political exclusion – in this case, on matters of central relevance to the protection and promotion of the culture and identity of minorities.

Objective and reasonable justification, proportionate to a legitimate aim

20. Constitutional Amendment Bill No. 34 of 2004, which purports to address the discrimination raised in the Wayeyi High Court decision of 2001, maintains the unequal ethnic categories created during the colonial rule, lending permanent status to the Paramount Chiefs of the Tswana tribes.¹⁵ The first step in determining whether the distinction between tribes within the House of Chiefs is discriminatory is to assess whether the reasons for maintaining this distinction are based on objective and reasonable justifications. It is then necessary to evaluate whether a reasonable justification is proportionate, and in accordance to a legitimate aim.¹⁶

21. In the present case, several factors render it difficult to confirm that the measures in place are indeed either objective or reasonable. Some of these factors include the following:

- the official recognition limits official recognition solely to Tswana speaking tribes above all non-Tswana tribes;
- the recognition is a relic of the colonial past imposed by foreign powers;
- the non-Tswana speaking tribes are said to have lived on the land prior to the arrival of Tswana speaking tribes, and should therefore at the very least share equal status with the Tswana tribes;

¹³ See Appendix 1, Sections 2(a) and 2(b), of RETENG's 2006 shadow report to CERD.

¹⁴ See Botswana 2006 State report to CERD, paragraph 73.

¹⁵ See in particular Appendix 1 of RETENG's 2006 shadow report to CERD.

¹⁶ This test was applied in the European Court of Human Rights as early as the 1960s in the *Belgian Linguistics Case*, and continues to the present day.

- and additionally, the official recognition of the eight Tswana-speaking tribes translates into privileged status for bodies such as the House of Chiefs – a consideration of particular importance for the promotion and protection of Botswana’s minorities, as this body is specifically mandated to address issues relating to culture and tradition.
22. In determining whether the distinction between Tswana and non-Tswana speaking tribes in the House of Chiefs (and also in wider Botswana society) is proportionate and in accordance to a legitimate aim, one must first examine the Government’s underpinning arguments for this practice. What emerges in Botswana’s 2006 state report to CERD is its desire ‘to promote a policy of national unity, rather than to accentuate tribal differences’.¹⁷
23. While the aim to achieve national unity is for all intents and purposes legitimate, it remains that the explicit or tacit exclusion of minority groups in order to achieve that aim stands in sharp contrast to fundamental non-discrimination and minority rights principles, and must therefore be deemed disproportionate. Article 19 of the African Charter on Human and Peoples Rights is unequivocal in this respect, firmly setting out the principle that “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another”.¹⁸
24. Indeed, the lack of official recognition and equal standing among tribes in the House of Chiefs is not only an overt form direct discrimination against non-Tswana tribes; the practical effect also arguably translates into a form of domination of one set of peoples over others in Botswana. This is particularly evident if one accepts that the denial of the very existence of a minority need not involve the physical destruction of members of the group. Minorities can be denied existence where their cultural identity is silenced or destroyed, or where they are forced to give up that identity.
25. In sum, CERD should respectfully remind the Government of Botswana that, the goal of national unity, which is arguably advanced in the name of non-discrimination, cannot disadvantage minorities under the guise of treating all citizens the same.¹⁹ Positive measures to protect their respective identities within the exercise of nation-building will therefore be required if peace, stability and democracy are to flourish in Botswana.

¹⁷ See Botswana’s 2006 State report to CERD, paragraph 33.

¹⁸ Botswana is a State Party to the African Charter on Human and Peoples Rights.

¹⁹ Treating people in different situations the exact same would in this instance constitute a classic case of indirect discrimination, a form of discrimination contrary to the provisions of ICERD.

Participation

26. The definition of discrimination in Article 1(1) of the ICERD covers any distinction that impairs the enjoyment of human rights in the 'political, economic, social, cultural or any other field of public life'.²⁰ While participation is addressed also under Article 5(e)(vi), discussion of the right to participation will be discussed under Article 1, as MRG wishes to speak on more general terms, beyond the exercise of this right in relation to cultural activities.
27. The right to participate for minorities has three aspects: the right to participate in public life and decision-making, in particular on issues that affect them; the right to participate in the life of their own community; and the right to participate in the benefits of economic progress and development.²¹
28. As previously discussed, and of particular relevance to minorities, is the fact that even where overt legal restrictions do not exist, minorities may still be denied, or have difficulties in exercising the right to participation. If the majority, or dominant groups in society, are able to participate, then the principle of non-discrimination requires that the participation of minorities is also ensured by the state.
29. In the face of government denial of any harmful impact towards minorities in Botswana, CERD must first reiterate its concerns in relation to both the *de jure* and *de facto* exclusion faced by non-Tswana speaking tribes. Moreover, MRG respectfully submits that CERD should urgently request the creation of special measures in Botswana for the promotion of minority participation and promotion of identity in public spaces such as the media, as permitted by Article 1(4) of the ICERD.
30. International instruments further supporting the effective participation of minorities includes the United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities (UNDM), which elaborates on ICCPR Article 25 by stating that 'persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life'²² and the right to '*participate effectively* in decisions on the national, and

²⁰ ICERD, Article 1(1).

²¹ See Reteng Shadow Report, paragraph 13 of Appendix 1, which states that: "International donors have been discouraged from providing funding for the introduction of bilingual and multilingual education in schools in the past. As a result, monolingual education in either Tswana or English has resulted in high failure rates, high school drop out rates, high absenteeism, and low self-esteem of the students in non-Tswana speaking areas."

²² UNDM Article 2(2).

where appropriate, regional level concerning the minority to which they belong or the regions in which they live'.²³

31. The rights outlined in Article 2(2) are essential for minorities to promote their interests within the larger society. Principles of non-discrimination in the ICERD are clear that if the majority or dominant communities can participate, then minorities must also be able to effectively participate (although the Article 1(2) restrictions in terms of citizenship may apply to aspects of participation, such as elections).

Public life

32. The right of minorities to participate in the life of their own communities facilitates participation in decision-making, by allowing minorities to form their own associations – political or otherwise – to represent their concerns and interests. This right extends to forming associations and contacts across territorial boundaries with members of the same minority group or with other minorities.²⁴

33. While the Government of Botswana has permitted and continues to allow the formation of minority associations and coalitions, what is imperative is that the Government be called upon by CERD to create spaces to enable these groups to impact and participate fully in society, instead of in the vacuums they currently occupy.

34. That said, the reading for Article 1 of CERD can be further informed by Article 4(5) of the UNDM, which provides for minority participation in 'economic progress and development in their country'.²⁵ The right to participate in the benefits of development ensures that minorities are not disadvantaged in development, for example by having their land or resources removed to make way for a development project from which they receive no benefits. It also ensures that minorities are not discriminated against and left behind in the process of development while other sections of the population benefit. This integration of minorities into the development process must take place with their full informed consent, in ways that ensure minorities can preserve their identity.²⁶

35. MRG notes with alarm the range of concerns raised by RETENG in relation to the parcelling out of land occupied by the non-Tswana speaking tribes (Babirwa in Selebi-Phikwe area) and Wayeyi, Kalanga, Khoesan, Nambya, Herero and Kgalahari (in the Orapa Letlhakane

²³ UNDM Article 2(3).

²⁴ UNDM, Article 2(5). The only limit on this is that contact must be peaceful.

²⁵ UNDM Article 4(5).

²⁶ Eide, Final Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/AC.5/2001/2, 2001. The Working Group on Minorities decided at its tenth session to 'endorse the commentary ... as the commentary of the Working Group on Minorities as a whole, to reissue it as such and to give it the widest possible distribution'. E/CN.4/Sub.2/2004/29.

area) to the Bamangwato Concession Limited (BCL) and the De Beers Mining Companies respectively, without consultation or the consent of these tribes.²⁷ It is of worth to note that the royalties from these mines are used to develop Serowe village (capital of the Tswana speaking Bangwato tribe), while the areas of the non-Tswana remain undeveloped.

Adequate Consultation

36. The key principle in all of the aforementioned provisions is that of *effective* participation. States must ensure that any measures they take or mechanisms they establish are not tokenistic. It is not sufficient for one member of a minority to rubberstamp a decision taken by the state. The measures should include opportunities for *adequate and meaningful consultation* before decisions are made and the state must take into consideration the outcomes of the consultation process when making decisions.
37. Outcomes which do not meaningfully address at least some of the core concerns of minorities cannot be construed as the result of either adequate or meaningful consultations. In this regard, MRG notes with regret that the continued resistance demonstrated by representative and consensus-based minority organizations throughout Botswana is a testament to the government's lack of goodwill to effectively consult with these groups in an effort to find a suitable solution for all parties.

Concluding Remarks and Recommendations

38. There are three over-arching problems in relation to tribal equality in Botswana. Firstly, the Government denies that the current system of Paramount Chiefs is discriminatory on the grounds that they are meant to represent all of the tribes within their Tribal Territory, and that the House of Chiefs thereby represents all people who live in Botswana.²⁸
39. Secondly, while the High Court ordered in November 2001 that Section 2 of the Chieftainship Act and other relevant laws be amended to afford equal treatment and protect to the applicants, Section 2 of the Chieftainship Act remains intact.²⁹ Moreover, legislative amendments relating to the definition of Chiefs and Tribes in Botswana (Bill No. 34 of 2005) have not only failed to address Section 2 of the Chieftainship Act, but have instead further entrenched the discrimination raised in the said application.
40. Thirdly, on the issue of dealing with further discriminatory provisions within the Constitution, the High Court held that despite its

²⁷ This has been carried out through the Bamangwato Land Grant Act (CAP 32:07) as outlined in RETENG's 2006 Shadow report to CERD, Appendix 2, heading 5.

²⁸ See Botswana State Report to CERD (2006) at paragraph 130.

²⁹ *Shitaki Calvin Keene Kamanakao I et al. v Attorney General of Botswana*. High Court of Botswana, Misc No. 377/99, November 23, 2001.

acknowledgment of discrimination against non-Tswana speaking tribes, it could not rule over the constitutionality of constitutional provisions, and therefore could not adjudicate over the prayers made in relation to Sections 77-79 of the Constitution.³⁰

De jure and de facto discrimination: reversal of the burden of proof

41. With regard to the first two issues, while the government purports that the Paramount Chiefs represent all tribes and that there is therefore no question of inequality, and in addition to this, the recent amendments through Bill No. 34 of 2005 are indeed sufficient, it is abundantly clear from the lack of representation of minority voices in the media, the virtual absence of minority cultures in textbooks, and the invisibility of non-Tswana speaking minorities more generally, that the present form of 'representation' of these communities by the Tswana-speaking tribes alone is not satisfactory.
42. MRG firmly believes that the discrimination faced by the Wayeyi and other non-Tswana tribes is sufficient evident to establish a prima facie case warranting the reversal of the burden of proof on the Government of Botswana.
43. As such, MRG recommends CERD to call upon the Government of Botswana to produce evidence through statistics or disaggregated data to prove that the current Chief structure does not (in law or practice) disproportionately impact negatively on minority tribes. The impact should be assessed with particular attention to visibility of non-Tswana tribes, their access to the media and education, as well as scope for their public participation, and their enjoyment of the benefits of economic development.³¹ Failure to produce such data should not be an excuse to overlook responsibility to address racial discrimination along tribal lines in Botswana.
44. MRG further recommends that clear data be submitted on consistent and implementation of positive measures designed to address the aforementioned issues of visibility and access, and which extend beyond the election campaign period.
45. CERD and other monitoring bodies must be weary of any system that sustains a myth of 'racial democracy', which on the surface is fluid and for the benefit of all, but which in effect (purposefully or not) blurs

³⁰ Ibid., at pages 33-34. These prayers sought the amendment of Sections 77 to 79 of the Constitution, which fails to recognize all tribes on an equal basis in the House of Chiefs.

³¹ Requirements of statistics or disaggregated data (among other forms of evidence) would be in accord with the observations of the Inter-American Court of Human Rights, which has held that, international human rights courts particularly should "enjoy substantial flexibility in the assessment of evidence submitted to them regarding the respective facts, to establish the international responsibility of a State, in accordance with the rules and logic and based on experience". *Bulacio v Argentina*, Judgment of September 18, 2003, Inter-Am. Ct. H. R. No 100 (2003) para 4.

distinctions between ethnicities in order to deny the full and equal realization of rights for all ethnic, linguistic and religious communities.³²

Duty to Respect, Protect, Fulfil

46. Finally, with regard to the High Court's alleged inability to challenge the constitutionality of discriminatory provisions within the Constitution, CERD should firmly remind the state party that it is a well-established principle of international law that:

A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law.³³

47. This principle was first recognized by the Permanent Court of International Justice and since then, it has been upheld by international jurisprudence.³⁴ The rule clearly establishes that a State may not rely on domestic law to avoid its international obligations. The principle was codified by the International Law Commission in its 1949 Draft Declaration on the Rights and Duties of States.³⁵

48. Article 13 provides:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it *may not invoke provisions in its constitution or its law as an excuse for failure to perform this duty*. [emphasis added]

³² The term 'racial democracy' has been widely used by academics in relation to the position of Afro-Descendants in Latin America – all being allegedly equal under the guise of 'mestizo' or 'mixed' ethnicity, when reducing race to class was in reality a means of making the pervasive racial discrimination invisible.

³³ I. Brownlie, *Principles of Public International Law*, 5th edition, Oxford University Press, Oxford, 1998, p. 34.

³⁴ Permanent Court of International Justice (PCIJ): *The S. S. Wimbledon* (1923), PCIJ, Ser. A, no. 1, p. 29; *Mavrommatis*, Ser. no. 5; *German Interests in Polish Upper Silesia* (1926), Ser. A, no. 7, p. 19; *Chorzów Factory* (Merits); (1928), Ser. A, no. 17, pp. 33-34; *Jurisdiction of the Courts of Danzig* (1928), Ser. B, no. 15, pp. 26-27; Advisory Opinion in the *Greco-Bulgarian Communities* case (1930) Ser. B, no. 17, p. 32; *Free Zones of Upper Savoy and the District of Gex* (1932) Ser. A, no. 24, p. 12 and Ser. A/B, no. 46, p. 167, *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory*, (1932) Ser. A/B, no. 44, p. 24. International Court of Justice (ICJ): *Fisheries case*, ICJ Reports (1951), p. 132; *Nottebohm*, ICJ Reports (1955), p. 20-21. Arbitral Tribunals: *Montijo*, Moore, *Arbitration*, p. 1850; Commission d'arbitrage pour la Commission d'arbitrage pour la Yougoslavie, avis no. 1, 29 November 1991, R.G.D.I.P. 1992, p. 264. See also International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Blaskic*, IT-95-14-1, para. 7. *Alabama Claims arbitration* (1872), Moore, *Arbitrations*, i. 653.

³⁵ G.A. Res. 375 (IV), G.A.O.R., 4th session, Resolutions, p. 66 (1949), available at <http://www.un.org/law/ilc/texts/decfra.htm> D.J. Harris, *Cases and materials on International Law*, Sweet and Maxwell, 5th edition, p. 71. See also *Treatment of Polish nationals and other persons of Polish origin or speech in the Dantzic territory*, *supra*, p. 24; *Montijo*, *supra*, p. 1850.

49. The rule has been given further expression in articles 26 and 27 of the Vienna Convention on the Law of Treaties,³⁶ which stipulate that:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith (pacta sunt servanda)"

and

[a] party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty".³⁷

50. More recently, the principle has been included in Article 32 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, elaborated and adopted by the International Law Commission (the "ILC Articles").³⁸

51. In view of the above, the Government of Botswana is in under the clear obligation to comply with all elements of the International Convention on the Elimination of all Forms of Racial Discrimination. This obligation thus extends to effectively addressing both direct and indirect discrimination.

52. While nation-building is a common concern of many states, failure to speak at some level of the situation of communities such as that of non-Tswana speaking tribes in their collective dimension compromises the ability to effectively challenged the historical, socio and political structures that pose obstacle to the full realization of their rights. It is only through the recognition, respect and effective participation of minorities that a meaningful, sustainable and successful national unity can be achieved.

³⁶ *Vienna Convention on the Law of Treaties*, adopted on 22 May 1969, in force 27 January 1980, available at <http://www.un.org/law/ilc/texts/treaties.htm>. The VCLT codified the customary international law relating to treaties (see the *Programme of Work adopted in 1949* by the International Law Commission, available at <http://www.un.org/law/ilc/progfra.htm> were the Law of Treaties was among the fourteen topics selected for *codification*).

³⁷ Article 27 admits the limited exception of article 46 VCLT relating to the procedure of ratification. The fact that this is the only exception expressly provided would indicate that once a treaty is ratified, the rule knows of no further exception.

³⁸ Draft articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chapter IV.E.1, available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm.