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Impact of international mechanisms on indigenous rights in Botswana

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This article looks at the inter-relationships between the global indigenous movement on the one hand, and the national policies and the changing fortunes of local indigenous organisations on the other. It provides a case study of a court case contesting the removal of San inhabitants of the Central Kalahari Game Reserve (CKGR) in Botswana that went on from 2004 to 2006. The focus is on the transnational aspects of events leading up to, taking place during, and following after the court case in Botswana. The judgement in the court case is analysed to see to what extent it is resonant with the growing body of international customary law concerning indigenous rights. Drawing in the wider context of the court case, it is shown how changes occurred from a broad-based human rights-oriented local-global alliance supporting the case, to the leading role taken by the non-governmental organisation (NGO) Survival International in a campaign targeting an international audience. The choice of a confrontational strategy vis-à-vis the government has met with considerable resentment not only from government circles but also from the liberal section of civil society in Botswana. It is argued that the divisions created between local organisations have had adverse effects for the San, and what was initially perceived as a positive outcome of the court case has not led to an improved situation for the applicants, or for the San in general.

Keywords: indigenous rights; human rights; CKGR court case; transnational movements; NGOs; donors; advocacy

Introduction

The strength of the indigenous movement is its international and transnational nature. Drawing on mutual recognition of parallels in the indigenous predicament worldwide, indigenous peoples have been able to form strong national and regional organisations, and have brought about some remarkable innovations within the United Nations structure. The struggle for indigenous rights fits into a broader framework of universal human rights, but faces its own particular challenges in the struggle for recognition of collective rights.

International trends are captured not only in the International Labour Organisation (ILO) declaration 169 on the Rights of Tribal and Indigenous Peoples (which only a few countries have ratified) and the United Nations (UN) Declaration on the Rights of Indigenous Peoples (which eventually was passed in September 2007) but also in a series of standard-setting judgements, since the Mabo case of 1992 in Australia and onwards. These efforts have brought in new perspectives on justice and fairness that are recognised beyond the stricter confines of law. It has brought about a new ‘customary

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international law and a vocabulary to speak about expectations regarding ‘political morality, human dignity and respect of minorities’. The progress has not been linear, as a number of backlashes in Australia and elsewhere amply demonstrate. But the international process has all the time been dialectical in the sense that national initiatives have brought about the international declaration and legal instruments which in turn have been used by individual indigenous peoples to raise issues in their home countries. A prevailing focus in this process has been on the relationship between a growing body of international case law, and national jurisprudence and legal practice.

A good example is the court case in Botswana 2004–2006, over relocation from the Central Kalahari Game Reserve. The case was raised by a group of Guı̈ and Gana San and some Bakgalagadi, claiming their rights to stay in their traditional territory, which had been declared a Game Reserve. International solidarity and an indigenous rights perspective were the motivational force when the case was first raised. The outcome of the case was hailed as a considerable victory for the applicants, and has been interpreted as a significant step forward for the rights of indigenous peoples. Yet, for the San of Botswana, most matters remain unchanged, and the victory has brought some symbolic but no material gains.

This article will focus on the transnational dimension of events leading up to, taking place during, and following after the court case in Botswana. It will trace the preparation, looking at the relationship between state policy and non-state actors, and it will analyse the outcomes of the case to see to what extent they are resonant with the growing body of international mechanisms concerning indigenous rights. The last part of the article will discuss the complex role of international advocacy, highlighting two different ways of engaging in the conflict over relocation, and the way the relocation has been framed in national and international debates.

The term ‘frame’ has been developed by theorists of social movements to capture what makes an idea persuasive in a social movement. Frames are ways of presenting ideas that ‘generate shared beliefs, motivate collective action and define appropriate strategies for action’. Through their communicative strategies social movements produce meanings and interpret events to mobilise potential adherents and repudiate opposing positions. In this article, the debates over the Central Kalahari relocation will be regarded as examples of a ‘politics of representation’, taking place within a discursive field where the cultural beliefs of a hegemonic state structure are being challenged through acts of communication and social action. In the case being analysed, the targets include both different sections of Botswana’s society, and the international community. The discursive field is both multivocal and multisited, and the messages are interpreted very differently by different target groups.

A growing body of literature deals with the phenomenon of social movements, collective action and ‘new transnational activism’, promoting the views and rights of the subaltern. The international community may provide — in the best of cases — a ‘boomerang effect’, a description of human rights activism that also captures vital aspects of indigenous activism. A boomerang pattern of influence is established when domestic groups in a repressive state bypass their state and directly search out international allies to bring pressure on their state from the outside. International networks provide access, leverage, information, and often money, helping local groups to find new and innovative ways to have their voice heard.

The transnational indigenous movement is brought forward through numerous instances of collective actions and networks of solidarity, described by some as being at
the ‘cutting edge’ of the quest for global justice. In the particular case of the Central Kalahari Game Reserve we see the effect of these international processes quite clearly. This is so in terms of analysis; the lawyers who first prepared the case were drawing on debates and declarations on indigenous rights in the UN system, and new standards set in some judgements. It is so in terms of the broad international attention to the case, and in terms of soliciting funding of the heavy costs. There is no way a group of poor and illiterate San could have raised the case on their own, and government of Botswana representatives are rightly observing – with some irritation – that if it had not been for outside involvement there would not have been a case.

However, a closer examination of this case also reveals the vulnerability of the ‘precarious alliances’ established between international organisations and the local movements. The case illustrates two very different strategies for local-global alliances, in terms of arguments chosen and actions taken. The initial process was based on an informal alliance (later a NGO support coalition) that framed the indigenous concerns in a context of human rights and cultural rights. Networks of different cultural groups were united in opposition to the hegemony of Tswana culture and Setswana language, expressed for instance in the multi-cultural RETENG coalition ‘devoted to the promotion and preservation of the linguistic and cultural diversity of Botswana’s heritage’. A very active centre for human rights in Gaborone, Ditshwanelo, promoted a message of diversity and critiqued the government’s lack of tolerance for those with a different lifestyle. The local organisations engaged both with the government in an effort to influence national policies, and with international networks, such as ecumenical churches, indigenous solidarity groups and human rights platforms.

The London-based NGO Survival International (SI), that came to play a leading role in the court proceedings, has followed a very different strategy. Their involvement became visible though a media campaign starting around 2000, and expanded after the 2002 relocation, targeting an international audience. The message conveyed linked the relocation of CKGR residents to diamond prospecting by de Beers, and claimed that people were removed to make place for diamond mining. They did not seek to engage in dialogue with the government, but mobilised for international pressure through political channels and calls for boycott. This framing of the relocation, and a confrontational style vis-à-vis the government, met with considerable criticism not only from government circles but also from the liberal section of civil society in Botswana, including the loosely organised coalition that sought to prevent relocation, and later took the case to court.

This article will explore how this division came about. It will also look at the direct and indirect consequences of the CKGR verdict in light of this division. The consequences do not only concern the few hundred San directly affected by the relocations and subsequent court case, but also have implications for the wider situation of some 50,000 San in Botswana.

The case illustrates a universal problem: How best to translate transnational ideas of human rights to fit with local socio-cultural understandings? Governments in many parts of the world resist the human rights claim of subordinate groups by asserting that this is an alien, Western import not suited to local normative systems. Local intermediaries, such as NGOs, community leaders and activists, play a key role in translation. However, this translation takes place within fields of unequal power, and the intermediaries are, almost by definition, depending on the support, moral and economic, from outside.

The role of the different ‘outsiders’ is a key dimension in the present analysis. There is a thin line between involvement and interference, and often one finds that involvement based on international solidarity and greatly appreciated by marginalised groups is resented by the
power structures as improper interference. But the empowerment that is the objective of international engagement may also become over powering if activities are not properly embedded in local structures. This article will seek to deconstruct the broad and heterogeneous concept of ‘international support’, and look at different strategies for engaging with local organisations. To anticipate the conclusion, it is suggested that the framing strategy chosen by Survival International has had an adverse effect on the local organisations, pressing the applicants in the case into a frame of arguments that alienated them from the existing local network of non-governmental organisations (NGOs) and CBOs and left them in a state of considerable isolation.\(^\text{14}\) As Hitchcock, Sapignoli and Babchuk also suggest in their paper in this volume, no major changes have followed since the court case.

1. Background and context to the CKGR court case

The events that triggered legal action followed two phases of eviction from the Central Kalahari Game Reserve. The reserve was established in 1961 by the then protectorate government to protect wildlife resources and reserve sufficient land for traditional land use by ‘hunter gatherer communities in the Central Kgalagadi’, at that time estimated to be approximately 4000 Gui, Gana and Bakgalagadi people.\(^\text{15}\) George Silberbauer, Bushmen Survey Officer, had proposed the setting up of a reserve and presented further recommendations for development in his *Bushman Survey Report* published in 1965.\(^\text{16}\) The reserve occupies some 52,000 km\(^2\) of the central part of Botswana and was at the time untouched by an expanding cattle industry. The land is flat grassland and scrub savannah interlaced by fossil riverbeds. It is rich in wildlife but extremely vulnerable to drought due to its loose sandy soil and lack of permanent surface water.

In the first decades after independence (1966) the Botswana government provided services inside the reserve, including a borehole, and a small school and mobile clinic in the largest settlement, Xade. This was in line with the government’s Remote Area Development policy\(^\text{17}\) that defined ‘development’ in terms of villagisation and permanent structures. However, from the 1980s onward, concerns were expressed about the results of this same policy. The population density in Xade was perceived to endanger flora and fauna, and the cost of providing services to a small group of people over very long distances was considered prohibitive. Government representatives met with people in the reserve during the 1990s and advised them on the advantages of moving to more central settlements.\(^\text{18}\) Initially it was emphasised that all relocation would be voluntary. At this stage local opposition to resettlement was growing and the threat of relocation began to attract international attention. Increasingly, the issue was seen to be about indigenous rights.

Why ‘indigenous’ rights?

The term ‘indigenous’ has at least two meanings in English. Its conventional dictionary meaning is ‘native or belonging naturally to a place; aboriginal’. This means that people, like other aspects of flora and fauna, are indigenous unless they are immigrants or imported. The other meaning of the term has developed in modern history within the UN system and other international fora, most notably in the UN Working Group on Indigenous Populations (from 1982) and the UN Permanent Forum for Indigenous Issues (from 2002). This meaning of the term denotes a sociological and rights-based understanding of what indigenous peoples are and what their rights should be.\(^\text{19}\) Many African politicians (and a few anthropologists) prefer to use the term in its first meaning, disconnected from a historical
context, while the type of civil society organisations discussed in this article work with reference to the meaning shaped through the UN process, as pertaining to rights.

The protest over relocation plans was spearheaded by the organisation First People of the Kalahari (FPK) established in 1993 with support from international donors. The organisation under its charismatic first leader John Hardbattle (San mother, British father), along with Aaron Johannes and Roy Sesana, fit well into a pattern of organisations that had emerged among groups such as the Sami, Inuit, American Indians, Australian Aborigines and Maoris during the 1970s and 1980s, with the purpose to express and defend indigenous interests. The stated objectives of FPK were:

- to work for the recognition of the N|oakwe as one people, and to advocate the rights of N|oakwe people vis-à-vis the Botswana government and the public;
- to create a National Council for the N|oakwe through duly elected representatives, and to work for the recognition of land rights; and
- to invigorate the culture as well as the individual identification with the culture of the N|oakwe.

The First People of the Kalahari drew the core of its membership from the Ghanzi District, including the game reserve, and from the start their main activity became the mobilisation against relocating from the CKGR. In 1996 the government of Botswana made known its specific plans; the announcement led to a domestic and international outcry. John Hardbattle and Roy Sesana addressed the UN Human Rights Commission in Geneva and travelled to the United States to bring attention to the threatened violation of the constitutional and human rights of the San and the Bakgalagadi. The government denied again any intention to force the people living in CKGR to move outside the reserve, and ensured the diplomatic corps that social services to people who wished to stay in the reserve would be continued.

Efforts at negotiation and relocations

To resist relocation, a negotiation team was established in February 1997 at a workshop in D’Kar; with representatives from the Central Kalahari Settlements, and local NGOs. Legal Advisers were Glyn Williams and Roger Chennells, of Chennells Albertyn, a legal firm from Cape Town that had specialised in human rights issues during the apartheid era and successfully negotiated a settlement out of court on behalf of the =Khomani in South Africa. Their mandate was to pursue a claim to the land inside the CKGR on behalf of those San and Bakgalagadi who signed a registration form (see Figure 1).

Despite these efforts, officials from Ghanzi District administration, together with the Department of Wildlife and Natural Parks officers and others, loaded all the residents of Xade and their meagre possessions onto trucks during the third week of May 1997, and transported them to the resettlement villages that were being constructed at Kg’oesakeni (later renamed New Xade) and to Kaudwane. The government of Botswana claims the removal was voluntary. Although on the whole no physical violence was used, an extremely poor section of the population was faced with a rather merciless choice. They were given to understand that if they stayed, the government would abandon them. There was a widespread fear that there would be no access to water, health facilities, or education for their children. For those who chose to move, there were promises of compensation money, livestock, and ample public facilities: water, clinic, school. About 1700 people were moved while a few hundred in smaller dispersed locations stayed on.
PETITION AND REGISTRATION OF LAND CLAIM

I.................................

Hereby petition the Government of Botswana to recognise and acknowledge:

1. My and my family’s right of ownership to and the use of land in the Central Kalahari Game Reserve (CKGR)
2. My and my family’s constitutional rights to the provision of services and in particular to water, health and education in the CKGR.
   I authorise the Negotiation Team representing the residents of the CKGR to negotiate these rights on my behalf. IF these negotiations fail, I further authorise the Negotiation Team to take whatever steps may be necessary to institute my claims in the High Court of Botswana

Name, Date, Place.................................

Figure 1. Front page of registration form.

As it turned out, basic social services were maintained for a few more years. Some of those who had been relocated returned to the reserve, joining those who stubbornly had refused the pressure. The government now found itself in a position of providing services both inside the reserve and to the new resettlement villages. This situation came to an end with a second round of relocation, January 2002. This time considerably more force was used to move the people, by an overwhelming presence of civil servants and uniformed staff (police and Department of Wildlife officers carry weapons). Water brought in with a bowser had been one of the essential services provided by the District, but now the large water storage tanks were removed and the one good borehole, in Mothomelo, was sealed. Several witnesses testified during the court case and described a sense of anger and helplessness during the operation, watching their property dismantled, sometimes destroyed, without being able to do anything to prevent it. Families were divided, children cried and small stock absconded as people, building poles, household utensils, blankets, huts, dogs and domestic animals were loaded onto trucks and taken to the new resettlement locations. After this exercise, only a small handful of households stayed on.

Preparations for a legal case had been going on for some years, with registration of applicants and the mapping of traditional land use, but the option of a court case had been pending. The supporting NGOs argued for negotiations as the preferred strategy, and a court case only as a last resort. After the evictions in 2002, the applicants, FPK, and their legal advisers, felt there was no longer a choice. The hope was that the process that had led to a restitution of the =Khomani San land claim in South Africa, and the rights that had by then been negotiated to a presence in the Kalahari Transfrontier Park\(^28\) would set an example that would be followed in Botswana.

When the case was raised there was an expectation that it could be heard and concluded within a year. (‘In time for the residents to return before the next rainy season [October/November], said one of the lawyers.) Thus the claim was prepared with a focus on restoring essential services. Funding was provided through a ‘CKGR Legal Rights Support Coalition’; a loose coalition including international human rights NGOs such as International Work Group for Indigenous Affairs (IWGIA), Norwegian Church Aid, Dutch Global Ministries, the Saami Council (representing the Saami of Norway, Sweden, Finland and Russia), and others, with Ditshwanelo, as its secretariat. In April 2002 an
application was brought to the High Court of Botswana by Roy Sesana and 242 other individuals who had been removed from the CKGR.29

2. The case

The applicants claimed their right to stay on in their traditional territories, and claimed that they did not relocate voluntarily. They asked that basic services that were withdrawn in 2002 such as health (mobile clinic), food (destitute rations) and water should be restored. The position of the applicants was that they had used the territory in question uninterrupted since ‘time immemorial’, and that they should be able to enjoy the services in their home territory. According to the criteria set out in the ILO Convention No. 169 of 1989, the (then) UN Draft Declaration on Indigenous Rights, and numerous other documents, the inhabitants of Central Kalahari should be seen as indigenous people and they should have a right to the land that they traditionally owned or otherwise occupied or used. The case raised the following questions:

- Whether it was unlawful for the government of Botswana to terminate basic and essential services to the residents of the game reserve in January 2002.
- Whether the government had an obligation to restore services to the residents.
- Whether the residents were in possession of the land they occupied, and were deprived of such possession forcibly, wrongly and without their consent.
- Whether the government’s refusal to issue game licenses to the residents and to refuse entry to the CKGR was unlawful and unconstitutional.

The position of the government of Botswana was that it was not bound by the international declarations noted above. They argued that continued settlement was incompatible with wildlife conservation and development of the tourism potential of the reserve, because residents had increasingly taken up non-sustainable activities such as keeping livestock and growing crops. They further argued that human settlement was not allowed in a game reserve, and more importantly, that the inhabitants needed to move in order to get full access to public services. The stated intention of the government was to bring the standards of living of the Basarwa up to a level enjoyed by the rest of the country. They said the moves were voluntary and in the San’s best interest.30

Obstacles underway: legal technicalities and financial problems

The case was first dismissed on technicalities, then admitted by the Court of Appeal, and directed to the High Court for oral evidence. It took more than two years from the time the case was raised until hearings began in July 2004. The many matters of contention illustrate the novelty of the matter at hand. Under the heading ‘CKGR lawyers mess up’31 the local press reported at one stage on how the presiding judge lamented on the way papers had been prepared: ‘I still don’t understand why the papers were prepared with such laxity and not in line with the law [as] this case is of immense public interest’. Other arguments reflected the low esteem in which the applicants were held, for instance: ‘The first applicant, Mr. Roy Sesana, could not in terms of the law, bring a case of this nature, as...the contents of Mr. Sesana’s affidavit were too complex to have been within the knowledge of an illiterate person.’32

Even before the case started there were delays due to the need to raise more money. The extended preparations incurred considerable expenses, and there was no precedence to tell
how long the actual case would take. When the case eventually started long breaks added to the cost. The initial scenario was to hear the case for two to three weeks in Ghanzi, starting 12 July 2004, to hear expert witness George Silberbauer and witnesses for the applicants, then a break followed by a shorter period at the High Court in Lobatse, to hear the witnesses for the respondent. Before the start, a week was added for travelling across the game reserve for in loco observation of the abandoned settlements and remaining people. Looking back, this incredibly optimistic miscalculation (by both sides) of the amount of time the case would take, demonstrates perhaps better than anything else the degree of novelty and uncertainty of the case.

Tenuous solidarity and change in counsel

The funding needs brought out both the good and the bad side of the international engagement. Many international organisations contributed to the case, and local organisations provided valuable moral and logistic support. But donor money is unpredictable, and rarely committed for a longer period of time. Donors also differed in their views about strategy, not only for the court case, but more basically about what would be the best way to communicate with the respondent, that is to say, the government.

A few days before the travel through Central Kalahari, Survival International entered the case by offering the services of London-based barrister Gordon Bennett as companion to lead advocate John Whitehead, SC. Whitehead came from Cape Town and was on his way to Ghanzi to make the final preparations. Thus it happened that Bennett appeared as the legal front figure during the much publicised travel through CKGR. This was very much against the wish of other organisations, most clearly expressed by Ditshwanelo, who disagreed with Survival International’s style of campaigning against Botswana’s policy. By the time the case opened, Ditshwanelo stated that as the matter now was before the court they would step back: ‘Ditshwanelo’s role in the implementation of the negotiating strategy is now in abeyance’.33

After the first two weeks of proceedings, and before moving on to the High Court building in Lobatse, the Cape Town attorneys asked for a sustained break in order to raise more money. The applicants, through their organisation FPK were disappointed, and felt this was a breach of trust. They were eager to press on. The upshot was that they changed the legal team.

There were a number of reasons for this, in addition to the financial problems. Despite years of preparation, the starting up period was marked by considerable turmoil. Some of the chaos was inevitable, given the limited resources of the applicants, the logistics of picking up witnesses from various spots inside CKGR, and the difficulties in preparing the testimonials as the legal team and witnesses were scattered in makeshift accommodation. The need to strategise on the larger issues was interrupted by smaller but urgent practical problems, including difficult access to email, fax, photocopying and printing, in short all the paraphernalia of modern data gathering used for consolidation of arguments. Collegial relations were at times strained. Most notably, once the case proper started, the formalities of the legal process took control, the lawyers took centre stage, and the applicants became spectators.

However, what finally triggered the change in legal team was the financial situation. It came as a surprise to the applicants that funding should run out so quickly, and they felt they had not been party to the decision to ask for an extended break. What then transpired was that the applicants (represented by FPK and WIMSA Botswana) were approached by Survival International, and they were given to understand that (a) the Cape Town legal
team did not perform well, and was overstaffed, (b) a new team consisting of Gordon Bennett and a new Botswana-based attorney could do the job better, hence increase the likelihood to win the case, and (c) given these changes SI would fund the case (Bennett’s salary, local attorney, an assistant and basic para-legal costs).34

It is difficult to say whether the actual legal performance changed with the new team. The basic legal argument, as stated in the founding and a supplementary affidavit, remained unchanged. Much of the premises had already been set by the preparations and the list of witnesses to be called. Publicly the change was played down and the explanation given was the need for a smaller, more focused team. The new counsel had raised an expectation that land rights would be introduced into the case as a more explicit claim for ownership, not only for lawful occupation. However, this important aspect was never introduced into the proceedings. Considerable time was taken up when the court resumed in November 2004 to satisfy all legal requirements for transferring the initial power of attorney from the 243 applicants, but eventually this was sorted out.

However, the change in counsel reflects some serious differences in mode of operation within the wider context of supporting organisations. The most immediate effect was that the role of the initial support coalition changed. The fundraising that was planned among local NGOs and international donors was kept on hold, the assumption being that SI had the required means to carry the case to an end. This led to a temporary suspension of the CKGR support coalition, and this again to a total dependency for FPK and the applicants upon the financial and logistical support from Survival International.

A more critical long term consequence has been the dynamics of local reactions to Survival International’s extended campaign to identify plans for diamond mining as the main reason behind the relocation. The Botswana general public finds the strategy objectionable for a number of reasons. In part it is seen as an attack on national pride, but more importantly the ‘conflict diamond’ scenario is considered to be a wrong analysis. Accordingly, there is still considerable reluctance to be associated with Survival International. Whether this public rejection of SI’s arguments had any impact on the outcome of the case is hard to tell. But it has certainly impacted negatively on the subsequent situation, where neither the applicants nor the wider San community have been able to benefit significantly from the restricted victory gained.

Obviously, the main objective of a court case is a legal victory. However, in cases of public interest there is also a wider context that draws in public opinion. Applicants can win or lose a case, but they can also win or lose public support. Indigenous rights are depending on the latter as much as the former. History is full of examples of indigenous protests and litigations where the actual case was lost, but where changes in public sympathy over time led to changes for the better in state policies and performances.35 So what were the public reactions to the issues at stake in the CKGR case? We will return to this question after looking at the actual verdict.

3. The verdict. Indigenous rights or human rights?

When the final submissions were delivered in September 2006, more than two years had passed. The case had run to 134 days in court, 4500 pages of legal documents, 19000 pages of transcripts of witness statements, and 750 pages of final arguments from the two sides.36

Judgement in the case was delivered by three High Court judges each giving a separate verdict. In recognition of the public interest of the case, the High Court of Botswana allowed live TV reporting from the courtroom, which was watched by several hundred
San outside the courtroom and relayed as ‘breaking news’ throughout the day on BCC World News and other global channels. The court ruled on each point, either unanimously or by two of the three votes.

- The court ruled unanimously in favour of the appellants that they were lawfully in possession of the land they occupied,
- and that they were deprived of it forcibly without their consent.
- The court also ruled that the refusal by the government to issue Special Game Licenses and to deny residents entry into the CKGR was unlawful and unconstitutional.

This was perceived as a considerable victory.

However, the High Court also made two rulings in favour of the respondent.

- The court ruled that the termination of services was neither unlawful nor unconstitutional.
- The court also ruled that the government was not obliged to restore basic and essential services.

An injunction by the Attorney General the day after stated that only the 189 individuals remaining as applicants and their minor children would be allowed to enter CKGR without permits. Following the verdict, restrictions were placed on import of domestic animals, building material and water. This narrowed down the number of beneficiaries, and precluded the right for future generations to return without permits.

**Legal aspects**

The significance of the case lies both in its legal aspect, i.e. the concrete judgements and justifications given, and in the social consequences and wider interpretation. A significant concept established through court proceedings raised by indigenous peoples is the notion of ‘native title’. The Australian Native Title Act (1993) recognises that legal interest in land held by aboriginal Australians has survived the acquisition of title to the land by the Crown at the time that the Crown acquired sovereignty of Australia. While the specific legal entitlement for Australian Aborigines has been curtailed by later legislation, the concept has also acquired a more general meaning, referring to land rights that were not relinquished by treaty or other legal cases. Thus ‘native title’, and the repudiation of the concept of ‘terra nullius’ (unoccupied land) have become part of the terminology of the emerging ‘customary international law’.

There were many and varied expectations as to how cases from other countries would influence the actual judgement in the CKGR case. Botswana has a common law system where cases are determined on the basis of precedence, but there is no precedence from similar land rights cases in Botswana. References would have to be to the international jurisprudence concerning indigenous rights, native title or other related concepts.

The full text of the judgement runs to 399 pages. Each judge gave a stand-alone judgement, each with its own individual profile. Because of the sheer volume of evidence they had to exercise considerable judgement in what they chose to comment on as relevant facts. Once the judgement is passed, it opens for a post hoc analysis of the arguments that were put forward at the different stages of the court case. With the benefit of hindsight one can see what did and what did not impress the judges.
In general, the bulk of the judgements are centred on the relocation process, and what
the judges perceive as arbitrary and inappropriate implementation of a wide range of exist-
ing Botswana statutory laws and regulations. Moreover, the claim that the relocation was
‘voluntarily’ is not borne on the statements from the witnesses. Less attention is given to
the testimony of George Silberbauer on the intention behind the establishment of the
reserve in the first place. And hardly any attention is given to the rather lengthy testimonies
of two expert witnesses on the carrying capacity of the territory and the possibilities for
sustainable coexistence of people and animals.

Particularly relevant to this paper is the role of arguments concerning ‘indigenous
rights’. The counsel for the applicants referred to the concept and/or rights of indigenous
peoples by quoting the Convention for the Elimination of Racial Discrimination (CERD)
and the Covenant for Economic, Social and Cultural Rights. He referred to the doctrine
of continuity in the Richtersveld case,39 and Mabo v. Queensland,40 and he discussed
local implementation with reference to The CKGR (Control of Entry) Regulations of

In the verdict, however, the Mabo case first appears towards the end (p. 325), mentioned
by only one of the judges. The Richtersveld judgement is not mentioned at all, nor is the
restoration of land to the Khomani who had been evicted from the Kgalagadi Transfron-
tier Park. In general Human Rights instruments are not mentioned very often, with the
exception of CERD, which was discussed in some detail.

Three types of reasoning

The diverging conclusions drawn by the judges, and the themes they chose to focus on in
their comments, reflect three types of reasoning. These in turn represent different prevailing
attitudes held in Botswana society, some more widely held than others.

Judge Dibotelo, the technocrat, is the head judge. He concentrates his arguments on
the letter of the law and legal decisions made leading up to and during the court case. His concept
of ‘fairness’ is based on the premise that the law is the same for everybody and in the context
of the court there is nothing particular about the applicants, they are like ‘any other Bats-
wana’. There is no recognition of cultural diversity. Dibotelo follows the letter of the law,
and dismisses any discussion about the intention behind the initial establishment of the
game reserve. The law is technical and instrumental in creating order. The relocation was
a reasonably tidy and orderly affair and the compensation is considered to be fair.

Judge Dow, the visionary, expresses empathy and understanding. Dow stands out as the
judge most sympathetic to the applicants’ claim, recognising that they belong to a class of
peoples that have now come to be recognised as ‘indigenous peoples’ and mentions the
requirement in CERD (to which Botswana is a party) ‘that no decisions directly relating
to their rights and interests [of indigenous peoples] are taken without their informed
consent’. She further quotes the Martinez Cobo report that ‘the current wisdom, which
should inform all policy and direction in dealing with indigenous peoples, is the recognition
of the special relationship to their land’. Dow does not mince her words in describing the
situation of the San in Botswana:

The Applicants belong to an ethnic group that has been historically looked down upon, often
considered to be no more than cheap, disposable labour, by almost all other numerically
superior ethnic groups in Botswana. Until recently, perhaps it is still the case, ‘Mosarwa’,
‘Lesarwa’, ‘Lekgalagadi’ and ‘Mokgalagadi’ were common terms of insult, in the same way
as ‘Nigger’ and ‘Kaffir’ were/are. Any adult Motswana who pretends otherwise is being
dishonest in the extreme.41
However, Dow’s main argument is not so much for indigenous rights as it is a call for tolerance and recognition of cultural diversity, and in particular a criticism of the government’s failure to respect the wishes of the applicants. The issues are seen as broader human rights issues, and the question then becomes whether the actions of the government, taken in totality, amount to a ‘curtailment of their rights to life, liberty and freedom of movement’. Dow criticises the development model that underlies the government’s policy, and its assumption that ‘a cut-and-paste process’ of something that had worked somewhere else, would work with the applicants.

Judge Phumaphi is the realist. He is pragmatic, and relates to the applicants’ situation in practical terms. He comes out very strongly on the refusal by the director of the Department of Wildlife and National Parks (DWNP) to issue licenses – clearly a wrong practice that is ‘violating a constitutional right to life’. Phumaphi provides most of the references to international law, quoting other legal precedence, including the *Mabo* case in some detail. He concludes that ‘neither the declaration of the Ghanzi Crown land [in 1901] nor of CKGR [1961] extinguished the native rights of the Bushmen to the CKGR’, so the applicants ‘were in possession of the land that they lawfully occupied’. However, he argues that the court cannot confer costs on the government, and therefore the termination of services was not unlawful and government is not obliged to restore them.

**Sesana, the classical trickster**

Roy Sesana was the First Applicant and as such a key person in the legal process, but he was not called as a witness. He was touted as the hero outside the court, as a San/Bushman leader and a human rights activist. He moved in and out of the courtroom and made frequent statements to the press. He contradicted his own counsel by bringing the diamond issue into the case. Throughout the proceedings his behaviour was a source of constant irritation to the judges, and on more than one occasion Gordon Bennet, the counsel, had to apologise for Roy Sesana and promised to rein him in.

In playing out these different roles Sesana took on a striking resemblance to the classical trickster, one of the heroes in San mythology and belief. Guenther describes the dual nature of the trickster – god and protagonist – that blend into each other, creating a figure that is the embodiment of ambiguity and moral ambivalence. He appears under many names in different legends. The trickster is perfectly at home in this changing world, in tune with its spirits of disorder and flux. The personas of such complex beings are multiple, ‘ranging from lewd pranksters to divine creation; goblin to god; human to jackal’.42

Among the applicants Sesana gave his own version of the proceedings with witty comments and striking impersonations of the lead persons. He was a mine of stories, legends and allegories. No doubt he played an important role in releasing tension and cheering up the witnesses during long and tedious days at the court. His erratic behaviour fits well within the trickster paradigm, and the many stories about San cultural heroes who outwit the adversaries through cunning and deception, in versions of David versus Goliath. Mocking the court can also be seen as a ‘weapon of the weak’,43 a relief from the heavy feeling of powerlessness that the applicants must have endured in their meeting with the relentless legal machinery.

Sesana’s role, central in the case, but marginal in the proceedings, personified the clash of two cultures, and in a courtroom, there are never any doubts about whose rules count. This is a classic dilemma. Indigenous leaders are frequently faced with a paradox: in order to protect their own cultural values they have to behave in ways that, in many respects, deviate from the norms and values of that culture. Sesana’s unwillingness – or
inability – to play by the rules of the court (including instructions from his own counsel), and the applicants’ dependency on Survival International’s interpretation of events, left them in a weak position for following up what was to become an ambiguous judgement.

**Summary of outcome**

Unfortunately, the length of the court case is not an indication that the notion of ‘native title’ was discussed in careful detail in an African court. But it was mentioned, and recognised. Ng’ong’ola, professor of law at the University of Botswana concludes:

> The High Court authoritatively establishes that the applicants were aboriginal inhabitants of the area over which the CKGR was established; that the establishment of colonial rule and appropriation of land in the area for the crown did not extinguish their right or title to their land; neither did the establishment of a game reserve and impositions of some restrictions on hunting and access to the area, or the re-designation of the area as State land upon attainment of independence.\(^{44}\)

However, several factors came to weaken this important statement of fact. Basically, the rulings are described by legal experts in Botswana as ‘declaratory’, more advising the government on good conduct than instructing relevant authorities to rectify specific infringements. As time has shown, there have been no legal injunctions to implement the rulings that were in favour of the applicants. In the words of Ng’ong’ola: ‘the case for the applicants was inherently weak because of the reliance on non compliance with a procedural notion in administrative law, and not on an infringement of rights more explicitly guaranteed by the constitution’.\(^ {45}\)

In retrospect it must also be recognised that although the recognition of the right to continue residing in the CKGR was the most important in principle, the seemingly more trivial issue of restoring or withholding basic services has turned out to be the most significant factor for the applicants. More than refusing to provide water as a basic right, the government has actively denied access to water. This has been done by denying access to the one good borehole on land the applicants were recognised to be ‘in lawful possession of’, by intricate restrictions on bringing in water for personal use, and by prohibiting other NGOs to assist in securing water.\(^ {46}\)

Finally one should note the restrictions in the legal recognition of who the applicants (and subsequently the beneficiaries) were. When the case was first brought before the court, the common perception was that the case was raised by the applicants on behalf of all the residents of Central Kalahari. Indeed many media reports conveyed the impression that this was a case on behalf of the entire San community of Botswana. But in view of the court, it was a case initiated by a number of San applicants that had authorised (and renewed authorisation of) attorneys to act on their behalf, in compliance with the rules of the court. ‘These individuals, and not Basarwa as a group, were the applicants who won their case against the Botswana government, and were therefore entitled to the reliefs granted by the court.’\(^ {47}\)

In the case as a whole, most of the two years of hearings was taken up by procedural bickering, and by the parties’ two expert witnesses going into tedious details of flora and fauna. In Dow’s words: ‘The lengthy technical evidence on disease transmission from wild animals to domestic animals and vice-versa’, and the ‘equally lengthy and equally technical evidence, supported by graphs, maps tables and shape-field...was, by and large, a waste of time and did very little to help answer the questions before the court’.\(^ {48}\)

In the Founding Affidavit, the organisation the First People of the Kalahari was presented as an NGO that ‘campaigns to protect and enforce the constitutional rights of the
indigenous San and the Kgalagadi peoples of the central Kalahari region of Botswana’. However, when the Court of Appeal referred the matter to oral evidence before the High Court, the affidavits stood as pleadings that needed to be verified in court. No representative of FPK was called as a witness. This means that the objectives and visions for an organisation like the First People of the Kalahari were never presented as evidence. The eight witnesses selected from among the applicants to testify mainly concentrated on their own life histories, their way of making a living within the reserve and how they had experienced the actual relocation.

This article has argued that the San who raised the case were supported by the international community because they perceived themselves and were perceived by their advisors and supporters as the indigenous people of Botswana. Unlike many Australian and Canadian cases, the considerable time depth and continuity of San settlement in Central Kalahari was not contested, and a claim for ‘authenticity’ was not made an issue. But to the extent that such recognition was forthcoming in the judgement, the right to continued settlement (or rather, not to be evicted) was recognised with reference to sustained use of the land, traditionally and from ‘time immemorial’, not tied up with any of the modern legal instruments that could have protected the exercise of such rights. This reluctance to address indigenous issues as a matter of principle should not come as a surprise, as courts across the world are wary of recognising indigenous rights. Even in cases where the applicants enjoy a general sympathy for their cause there is a tendency to settle cases with other, less contentious legal mechanisms if at all possible.

4. After the case

The immediate reaction to the judgement was a sense of victory for the applicants. The recognition that the applicants were lawfully in possession of the land they occupied, and that ‘they were deprived of it forcibly and without their consent’ were perceived as the main issues in the case, although the subsequent restrictions by government on free movement for those who had gained the rights to return to the reserve quickly reduced the perceived gains.

The government was widely praised for choosing not to appeal the judgement. But as it turned out, they also chose only to abide by the rulings in their favour. Following the verdict there has been a restrictive interpretation of the decision, and considerable government foot-dragging in the efforts to establish new arenas for negotiations. The government still refuses to recognise the San as indigenous, or in other ways accommodating their special needs. Four years after the verdict there is a low level of organisational activities, a faltering CKGR support coalition, and general difficulties in getting new projects and initiatives up and running.

The government has restricted re-entry through intimidations, and bureaucratic red tape. Only a few hundred individuals have been able to return to CKGR and they are left entirely to live by their own resources. Small stock that was driven out in 2005 as perceived carriers of diseases was not returned. The government’s restriction on access to water has become a most effective mechanism for keeping settlement under control. In November 2009, two residents of CKGR filed an application with the High Court seeking to be granted rights to sink a borehole or to recommission use of the borehole at Mothomelo that had been closed in 2002. In an answering affidavit in the case, the Director of Wildlife and National Parks argued that the borehole is ‘currently sealed by the government as the reason for which it was drilled is non-existent’ and even permission to bring in water tanks would ‘seriously compromise the very purpose for which the CKGR was established’.

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In a visit to Botswana in 2009, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, found that those San who have returned to the reserve, ‘face harsh and dangerous conditions due to a lack of access to water’, and called on the government to reactivate the borehole ‘as a matter of urgent priority’. In his report the Special Rapporteur also notes tersely that the government’s position that human habitation is incompatible with the conservation objectives and status of the reserve ‘appears to be inconsistent with its decision to permit Gem Diamonds/Gope Exploration Company (Pty) Ltd to conduct mining activities in the reserve’. Anaya comments on the outcome of the CKGR court case that the ‘denial of services to those currently living in the reserve does not appear to be in keeping with the spirit and underlying logic of the 2006 High Court decision, nor with the relevant international human rights standards’.

The organisations are weak. The First People of the Kalahari is left alienated from other organisations, and after the support for para-legal activities in connection with the court case expired, the office has closed down. New organisations, like the New Xade Arts Commune are trying to find new ways to express a sense of communality, and to move forward. But the deep division created by the resettlement and the court case has not yet been healed. Donor funding has dried up. Like in many similar situations where resources are scarce, there is uncertainty about what should be the best strategy and disagreement over leadership. A ‘Khwedom Council’ established by some young activists, to address the urgent need for a national representative organisation, is so far rather invisible and their mandate appears unclear.

The judges had noted ‘This judgement does not finally resolve the dispute between the parties but merely refers them back to the negotiation table’. There is as yet no dialogue between the residents of CKGR and the government, only talks about talks. In 2006 the CKGR support coalition was re-established and started to discuss what new steps to take. In September 2007 a meeting was held with the Minister of Foreign Affairs, Mompati Merafhe, to introduce the members of the coalition. Issues identified by the communities were raised, but not discussed. Hopes were vested in the new president, Ian Khama, who took office in April 2008. At a meeting with the president in June 2008, the president emphasised the importance of negotiations and the use of local structures to find amicable solutions to the issue. He delegated a team lead by the Minister of Environment, Wildlife and Tourism, Kitso Mokaila, to establish further contacts. After a series of consultations with the communities, representatives were elected to a new Residents Committee. A first meeting was held in November 2008, and it was agreed that three representative bodies should be engaged in the consultation process: The government of Botswana, represented by an Inter-Ministerial Committee; the Residents Committee of the CKGR; and the CKGR NGO Coalition. The next meeting with government, led by Minister Mokaila, took place in September 2009. This meeting produced an action plan for the consultation process, and it was decided consultations should be made with the CKGR communities. In May 2010 a third meeting was held, to consider reports from last year on consultations with CKGR communities, and to decide on a new round of consultations.

This agonising slow speed, averaging one year between each meeting to plan new meetings, has caused increasing frustration. In June 2010, the three parties (government, residents committee and NGO coalition), issued a press statement listing the series of meetings that have taken place. The diplomatic community (European Union, embassies, UN representative) noted in a ‘reaction’ to the press statement that it gave no information on the content of these meetings. In the same document the CKGR NGO coalition recognised some of the underlying conflict lines, as the lack of information means that critics...
are questioning the legitimacy of the coalition. The coalition calls for concrete signs of goodwill from all parties, and mentions the case pending for access to a borehole: ‘The water issue is an urgent, immediate one. It would be useful to have this constructively dealt with before the ruling is given. This is because the ruling has potential implications for the processes.’

Three days later the highly symbolic case about access to the Mothomelo borehole was rejected by the court.

Why this dismal result? How did a process brought forward on a wave of international solidarity end up with a support coalition that is fraught by internal divisions, closed to foreign participation, tight about information, and unable to negotiate any concession from government. In retrospect it can well be argued that the CKGR residents and local organisations were not strong enough to take ownership of the complex process that the court case entailed. But the government of Botswana’s uncompromising relocation policy did not leave them with much choice. The CKGR relocation was the latest expression of a long standing asymmetrical relationship between a ruling majority and a marginalised – and still stigmatised – minority. It expressed a lack of tolerance and respect for cultural diversity that has been noted by many critics, including the African Commission’s Working Group on Indigenous Populations/Communities, and also came through in Dow’s part of the verdict. No doubt this is the major issue. However, the last section of this article will concentrate on one particular aspect of the complex process that has shaped this state of affairs, that is the role of international mechanisms and the relationship between ‘outsiders’ and local agents. For this purpose it is necessary to deconstruct the concept of ‘foreign NGOs’ and to consider the paradox that the good intentions of Survival International’s support to the CKGR applicants, probably has become part of the reasons for the present impasse.

5. International solidarity: empowering or overpowering?

A basic lesson for all indigenous peoples is that the ultimate solution to whatever problems they may experience must involve the state within whose border they reside. Kymlicka notes: ‘Indigenous peoples may get moral victories from international law, but the real power remains vested in the hands of sovereign states, who can (and do) ignore international norms with impunity.’ States may choose to ignore their indigenous minority, but the power of the state cannot be ignored. The London based Survival International (SI) promotes the same understanding and visions for indigenous rights as do the other major international advocacy organisations that started up in the 1970s. The UN Declaration on the Rights of Indigenous Peoples is held as the current guiding standard. But this organisation differs from others in that it does not try to reach governments in question directly, but seeks to influence them indirectly, through the mobilisation of international opinion. This means that their strategies for public communication become one – maybe the most – significant aspect of their activities.

Survival has a superb information machine, and reaches an unknown but large international audience through frequent press releases, news bulletins on email and a regularly updated web page (http://www.survival-international.org). The standard format of messages is an eye-catching headline, a short report on a current event, linked to some context or background, and then a brief comment from the leader, Stephen Corry. The organisation wages campaigns in some select areas of the world, currently with a focus on rainforest exploitation, uncontacted tribes, and mining operations. The criteria for identifying areas of activity are the presence of a clearly profiled indigenous population with a culturally distinct way of using their traditional territories, within a country that can be
expected to be receptive to international opinion, and preferably vulnerable to boycott (of certain products, or tourism). Botswana fits this bill. SI’s campaigns include vigils and demonstrations, letters to politicians, newspaper articles and advertisements, and calls for boycott.

In the Botswana case, with foot-dragging by the government and no strong united voice from San organisations, (nor from any political opposition or the civil society), the Survival International press releases keep up a steady reporting on the government’s failure to implement the court decision, and gives examples of the travesties that the remaining residents endure. Central in their campaign is the denial of access to water, and the quite absurd situation created by the government giving concession to an international company, Wilderness Safari, to establish a lodge inside the reserve sporting a bar with swimming pool for tourists. It is very important that such developments are brought to the public eye, and the critique that is presented here should not detract from the significance of the causes that SI is campaigning for. But it is also important to recognise the counterproductive impact that some of their campaign has on the objectives that they are working to promote. government or the diamond industry.

Survival International’s campaigning against the CKGR removals has revolved round three lines of arguments; the role of diamonds, criticism of the government, and confrontations with national NGOs. The three themes are interlinked, but draw very different reactions from different audiences.

**The contested role of diamonds**

By 2001 SI began to frame its campaign around diamonds as a simple and clear message to the international audience. The campaign was designed to embarrass the government about its treatment of the residents of CKGR, and included a sit-in of the Botswana High Commission in London and a call for tourist boycott of Botswana. Diamonds are of vital importance for Botswana’s economy and diamonds from Debswana account for 80% of the country’s export earnings, half of government’s revenues and one-third of the gross domestic product. Thus associating diamonds from Botswana with ‘blood diamonds’ and urging for an international boycott was targeting a crucial element in the national economy.

The concentration on diamonds, and the case made for boycott, provided clear conflict lines, and made it a global concern. But it also antagonised the Botswana public. Misgivings about the campaign are not only out of fear for the possible negative effects on the country’s economy. More significantly, it is not generally believed that diamonds are the reason behind the relocation. It is important to be clear on what this means. The position of the government was consistent before and during the court case: there were neither actual mining, nor any plans for future mining, inside CKGR; they cited feasibility studies showing that mining there would not be economically viable. After the court case, however, they claimed that mining had become viable and concessions have been given for exploration. To argue that the government was ‘lying’ is in fact a moot point. Most locals, and the present author, have never doubted that if and when it was deemed profitable, mining would take place. The question is whether the San needed to be relocated in order for this to happen, and there is no indication that this is the case. Sub-surface resources have always been state property and a few hundred San living in the reserve would not stop this development. This was also the reasoning behind the lawsuit, which did not lay any claim to sub-surface resources.

Internationally, however, the SI campaign has been a considerable success. There was a tremendous rise in international media attention after 2001/2002, and a large proportion of
the coverage referred to the diamond issue. As a trope for government infringement on human rights, Botswana’s trade with diamonds is still presented by some organisations working with SI as being in cohort with ‘rebel’ mining in west-Africa.

**Bashing the government**

Another local objection to SI is the terminology chosen in its efforts to embarrass the government. Blood diamonds, later rephrased as ‘conflict diamonds’ is not by any reasonable standard a fair description of Botswana’s use of its revenues, which are widely acknowledged to have gone into infrastructure and social services. And violent imageries capture poorly the prevailing condescending attitudes to minorities. During 2005, a year with considerable activity in and outside the court, terms like ‘ethnic cleansing’ and ‘genocide’ provoked the Botswana public, who viewed them as unsubstantiated and out of proportion, and furthermore as implying a lack of respect for the genocide victims of Rwanda and Darfur.

Obviously, such disputes over terminology reflect divergent perceptions of facts. Survival International is well informed. Their reports are factual, but comments may often include an observation on policy or interpretation of events that readers familiar with the context may feel are not warranted, or exaggerated. In this respect the public inside a country inevitably reads a message different from the international community, because they will have other information and a different contextual knowledge. In the case of Botswana, the terminology used finds no resonance in the public debate, and is more often met with irritation. The imagery of physical violence does not capture the kind of structural repression that Botswana is exercising over its minorities, especially the San. It does not contribute to any solution of the underlying problem, which is an authoritarian and patronising model for development, elevating the preferred lifestyle of the majority to the national norm. Unfortunately it is a fact that violence attracts media attention, and sympathy is proportional to the number of casualties. There is a professional reasoning behind the focusing on instances of assault, instead of explaining the complexities of minority/majority ethnic relations.

**Taking on national NGOs**

Survival International has a longstanding involvement with San groups within the Central Kalahari Reserve, but has been absent in the capital, Gaborone. The organisation was not visible in the preparations leading up to the court case. They have fieldworkers who link up with people on the community level, and visits have been made to the reserve since the early 1990s. This meant that when they took over the responsibility of the court case they had some established relationships, and knew the territory. It was natural that when they took over the responsibility of the court case they had some established relationships, and knew the territory. It was natural that their chosen local ally became the First People of the Kalahari, as this organisation had from its very inception worked closely with Central Kalahari residents against the plans for relocation. It was also the first ‘modern’ indigenous interest organisation in Botswana, established with support from the international community. But as it turned out, FPK was to be the only contact point. SI had little knowledge or appreciation of what went on in Gaborone, either within government circles or within NGOs and the internationally oriented section of civil society.

The Gaborone human rights scene and the NGO support coalition are dominated by Ditshwanelo, the Botswana Centre for Human Rights. Despite the many similarities in ultimate objectives, there has been a growing disagreement over strategies for handling human rights issues in Botswana, and Survival International and Ditshwanelo have come to represent most clearly the two opposing positions.
Ditshwanelo’s strength is its firm local base, its close relationship to the NGO and donor environment in Gaborone, and its relatively easy access to government. In its public role as a human rights support organisation it has made itself available to San individuals and organisations. But it has also meant that Ditshwanelo has taken on a role as gatekeeper, asserting the ability and authority to criticise its government in the locally appropriate idiom of deference and decorum. Over the years Ditshwanelo has been a most vocal advocate for negotiations as the only way to solve the ‘Basarwa issue’. But with all respect for these efforts, the two rounds of relocation (1997 and 2002), and government behaviour after the court case can in no way be said to reward this position.

Survival International has accordingly – and with considerable justification – argued that efforts at negotiation have not brought any results. However, they have taken this argument further in a veritable ‘media war’, claiming that the reason that local organisations have not achieved results is because they are sell-outs: they depend on money from the government and the diamond industry. Local NGOs ‘either stand to profit from the exploitation of Bushman land and/or think they know better than the Bushmen themselves what they need and want’.72 Moreover, claims SI, only First People of the Kalahari truly represents the San.

This line of argument reveals a lack of appreciation of differences in types of activism. In the Botswana landscape, the organisation First People of the Kalahari is (or was) an interest organisation with a stated objective to work for recognition of indigenous status. This is a classical counter-hegemonic position, seeking changes in the national policy. On the other hand development organisations such as the Kuru Family of Organisations work for social, cultural and economic development of marginalised minorities, making use of existing development incentives and legal frameworks. Both strategies are legitimate. Both represent some San, neither are representative of all San. In a country like Botswana with no formal discrimination in laws or regulations, but a considerable amount of de facto social exclusion, both types of strategies are certainly called for.

Different frames

It is possible to argue logically that the low-key human rights initiatives and the high-pitched SI campaign have successfully complemented each other as the arguments have reached different audiences.73 But this is only a limited success, and does not explain the noticeable lack of progress after the court case. The internal dividing lines have followed the very lines of confrontation that SI set up: an all-out attack on the government, and subsequent criticism of NGOs that did not follow this line.

This takes us back to the way SI entered the case publicly – by taking front stage at the opening of the case and soon after also formally taking over the responsibility for providing legal assistance in the case. Counsel for the applicants, Gordon Bennet, was meticulously loyal to his clients but adopted a very reserved and tight-lipped – no doubt legally correct – relationship to the fringe of NGOs, sympathisers and researchers that surrounded the case. This created a distance that hampered the communication between FPK and the other NGOs. The contrast to the inclusive, civil rights movement-inspired, slightly disorganised, initial legal team was striking.

Wisely, no mention of diamonds was made in the affidavits and pleadings. The debates outside and after the court, were another matter; illustrated by sarcastic comments the judges’ made about Sesana. When Survival accused development and human rights-based organisations of being subservient to the government, NGOs and the general public responded by accusing Survival of interfering in internal affairs, without
understanding local rules for conduct, and generally misrepresenting the situation. Two headlines from November 2005 capture the tone: ‘Ditshwanelo and Kuru are Useless – SI’. The response: ‘Stephen Corry Go Away! – BOCONGO’. The Botswana Council of NGOs (BOCONGO) is an umbrella organisation for Botswana’s NGOs, and their response elaborates: ‘In any...struggle for human rights, it’s important to adopt methods and measures that will not alienate the rest of the population from the Basarwa.’

The frontlines similarly divided San organisations. A letter from FPK in the same newspaper argues ‘BOCONGO – Not SI Should Stand Back’, and elaborates: ‘BOCONGO has been here for many years and have done nothing about the CKGR issue...Survival International has been having an interest and was involved by our own request’. Other San expressed a concern though WIMSA, the Working Group of Indigenous Minorities of Southern Africa: ‘We object strongly to the fact that Survival International seeks to give the impression that they speak on behalf of all “the Kalahari Bushmen” when they handpick quotes from a few San only. We...request SI to understand that the CKGR San do not want to close the door for negotiations with the Botswana Government.’

In this kind of debate the most direct loss has been for FPK, who were deprived of the support they need, and could have expected, from other San NGOs and more liberal sections of local society. Since support for para-legal activities from Survival expired, some two years after the verdict, the organisation has in practice ceased to exist.

But an even bigger loss is that people in Botswana who are increasingly critical of Botswana’s minority policies, are wary of being in any way associated with Survival International. This state of affairs fits right into the government of Botswana’s wish to avoid vibrant public debates on what might be the best future for the Bushmen. Instead one finds those who otherwise could have been the most likely supporters rally behind the government in an attitude of ‘right or wrong – my country’.

An unfinished business

Much as reconciliation in Australia has been termed ‘an unfinished business’ in light of backlashes to earlier initiatives, whatever victory that the CKGR court case brought about, it has not significantly improved the situation for the San in Botswana. The considerable international attention has been of a type that has paradoxically endangered the possibility of generating a stronger locally-based movement advocating for San rights. The divisions caused by disputes over the right strategy in the CKGR case reflect the legacy of a marginalised status within Botswana society, and has in some ways made this marginality worse.

Solway, in an article that argues very much along the same lines, notes: ‘SI and its collaborators have backed Botswana into a corner that has led the country to display some of its most illiberal and authoritarian behavior in its history.’ It would be going too far to say that the CKGR case has created a sense of xenophobia in Botswana. But when the Support Coalition was re-established in 2006, the absence of foreign NGOs was deliberate. President Ian Kama has declared that this is a national problem, and should be solved by nationals. Outsiders, meaning foreigners, should stand back.

The main objective of this article has been to explore the impact of international mechanisms on the preparation, course and aftermath of the CKGR case. This analysis has presented an ambiguous picture, containing both a high degree of international attention and a considerable local neglect of the more fundamental issues in the case. The achievement of indigenous rights is ultimately dependent upon a minimum of popular support, which
again requires some appreciation of the deeper issuers at stake: a restoration and compensation for previous injustices.

As this article has tried to demonstrate, international donor and support organisations have followed very different strategies, and the difference should be taken into consideration when looking for ways forward. The main thrust of this analysis is not to lay all the blame on one organisation, and even less to criticise the applicants and FPK for tough choices that had to be made. It is not hard to argue that local NGOs should be more active. The dominant role that Survival International has come to play in the media picture is no doubt due in large part to the silence of other parties, and has left the local mediators in an awkward position.

But this analysis also shows that the beginning of the case mobilised a broad spectrum of organisations, and that the momentum from a variety of national—international alliances was lost when SI became the leading donor. Local organisations need to reconsider the de facto disassociation from outside contacts and re-engage in old networks of solidarity across borders. For this to be effective, former and new solidarity organisations must be more proactive, not only in terms of expressing solidarity but in financial and logistical support. The newly established Centre for San Study at the University of Botswana will also have an important role to play.

Last but not least, the focus on the Central Kalahari issues should be broadened, and more attention given to the multiple types of adaptations and assimilation that the San in Botswana – who number some 50,000 – are experiencing. Most San in the country were relocated to settlements during the1970s and 1980s without much attention being paid. The CKGR case had a high symbolic significance, and the protests against relocation had a ‘last stand’ nature, but those directly affected counted, in the end, 189 persons, plus spouses. This narrowing down was not anyone’s intention, but has become a fact of the case.

There are many reasons why San from other districts failed to engage in the legal battles. One of them is their still few and weak organisations. The new type of leadership requires an assertive demeanour that conflicts with traditional peer-based and consensual leadership, and the need for proficiency in English and the ability to negotiate in formal organisational settings favours young people with education and marginalises old people’s experience and wisdom. These are commonplace problems for indigenous organisations worldwide, but the problems run deeper in southern Africa because the organisations have not yet had time to establish viable modes of operation before entering the contested field of land rights.79 Crawhall’s article (this volume) gives hope that the impact over time of transnational indigenous networks on the continent may also benefit Botswana in a more substantial way than the present scenario indicates.

Acknowledgements

The material for this paper was collected through participation in many of the meetings and other events that are discussed here, as well as regular reading of newspapers and other forms for public communication. I attended the preparations and many sequences of the court case, especially during the first year, and discussed it with anyone connected to the case willing to offer an opinion. It is part of a wider study of the relationship between state and indigenous organisations in southern Africa.

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Notes
14. Danielle Resnick makes an interesting analysis of the two disputing frames in the article ‘The Benefit of Frame Resonance Disputes for Transnational Movements: The Case of Botswana’s Central Kalahari Game Reserve’, *Social Movement Studies* 8, no. 1 (2009), 55–72. My conclusions are different from hers, as will be explained later.
19. A working definition is found in UN documents that bring out four principles to be taken into account: (a) priority in time, with respect to the occupation and use of a specific territory; (b) the voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; (c) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist; and (d) self-identification, as well as recognition by other groups, as well as state authorities, as a distinct collectivity (E/CN.4/Sub.2/ACV.4/1996/2). See also Anaya, *Indigenous Peoples in International Law*. 

21. N\oakwe is Naro and means ‘the Red People’, a commonly used label of self-designation, in contrast to ‘the Black People’, the Bantu peoples who make up the majority. The early activists tried to establish N\oakwe as a common (generic) name for all San people, but because of the substantial difference between the San languages this has not succeeded.


23. Ambassadors and an official of the European Commission in Gaborone visited the area on 22–23 May 1996 and were assured by the government representatives that ‘not only no forcible resettlement will be carried out but social services to people who wish to stay in the reserve will not be discontinued and economic development related to wildlife or tourism activities will also be encouraged’. ‘Ambassadors Visit Ghanzi to get First Hand Information about Xade Issue’, Dayly News, 29 May 1996.

24. Two representatives from each of the seven Central Kalahari Settlements, and The First People of the Kalahari (FPK), Kuru Development Trust, WIMSA Botswana, Ditshwanelo (the Botswana Centre of Human Rights) and Botswana Council of Churches.

25. Generally perceived as being ‘from Cape Town’, although the office was in Stellenbosh.


27. Kg’oesakeni was the original name, meaning ‘in search of life’. The settlement later became known as New Xade, reflecting internal debates among those who had came from the original Xade. See Kiema, Tears for My Land.


29. MISCA No. 52 of 2002 in the matter between Roy Sesana (1st Applicant), Keiwa Setlhobogwa and 241 others (2nd and further Applicants) and the Attorney General (in his capacity as recognised agent of the government of the republic of Botswana, (Respondent).


34. The cost is not known. Survival International does on principle not solicit funding from states, in order to ensure its independent position, and financial or other details about the scope of assistance to the applicants are not available.

35. In Norway, the protest against a dam encroaching on Saami reindeer-herding territories was rejected and a dam was built. But the massive mobilisation of public opinion led to a number of government initiatives that in the following years significantly changed the position of the Saami indigenous minority within Norwegian law and constitution. (See Trond Thuen, The Quest for Equity. Norway and the Saami Challenge (St. John’s: ISER, 1995).)


37. Some had fallen out when mandates were transferred to the new legal team; some had died in the meantime.

38. Later this ruling was modified to include spouses and older children.


45. Ibid.

46. Judge Dow, 189–90, in transcript of judgement.

47. James Workman compares the prohibition on access to water to siege tactics used through history, ‘using thirst and water to coerce insubordinate people’, in Heart of Dryness (New York: Walker Publishing Company, 2009), 46. See also Hitchcock, this volume.


49. Ng’ong’ola, ‘Sneaking Aboriginal Title into Botswana’s Legal System’, 111.

50. In a much publicised case about traditional land rights in northern Norway (the ‘Black Forest’ case) the entitlement for local people according to ILO convention 169 was recognised, as Norway has signed the convention. But even then it was ruled that the documentation of traditional land use provided sufficient grounds for the recognition of their legal rights. Bjørn Bjerkli, ‘Landscape and Resistance. Transformation of Saami Common Land from Dwelling to Political Landscape’, Acta Borealia (2010, forthcoming).

51. This started immediately after the verdict. Wildlife scouts would not allow wives and children of applicants into the reserve as they tried to return in January 2007. ‘Basarwa Not Allowed into CKGR?’, Mmegi, January 5, 2007.


54. By the time of breaking up, the First People of the Kalahari was also suffering from internal strife over lack of payment to staff and disagreements over further strategies. ‘FPK Broke, Embroiled in Internal Fights’, Sunday Standard, May 24, 2008.


56. The issues were: Concern that community members were arrested when trying to re-enter CKGR, communities still denied the right to bring goats back to CKGR, community members not issued with special game licences, restrictions on the amount of water allowed into CKGR. The minister promised to kick start meetings on CKGR.

57. Joint Press Statement from The Government of Botswana, the CKGR Residents’ Committee and the CKGR Non-Governmental Organisations’ Coalition on the Central Kalahari Game Reserve Consultation Process, Gaborone, 3 June 2010.


59. Ibid.


63. This analysis is based on information from Survival’s webpage and other information material, talks with Survival staff and the applicants during the court case, and an interview with Stephen Corry and other SI staff in London in October 2004.

64. SI Press Release, 11 May 2010; see also http://www.survivalinternational.org/about/wilderness-safaris (accessed May 2010).


66. See for instance the infamous front cover of The Ecologist of September 2003 ‘Dying for de Beers’.

67. Concession has been given for mining in the Gope area, and will probably start up as soon as the market picks up after the 2008/2009 recession.

70. SI Press Release, 8 October 2005.
73. Resnick, ‘The Benefit of Frame Resonance Disputes for Transnational Movements’, 68. Her analysis is a perfectly logical argument seen from the outside, but does not address the divisions within local organisations. Hence we draw different conclusions about long-term impact.
75. The Mirror, November 30, 2005.
76. The Mirror, November 30, 2005.

Notes on contributor

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