

**MISSION REPORT**

**TO**

**THE REPUBLIC OF BOTSWANA**

**14 – 18 February, 2005**

## Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
ADR	Alternative Dispute Resolution
APT	Association for the Prevention of Torture
AU	African Union
BCC	Botswana Council of Churches
BDP	Botswana Democratic Party
BOJA	Botswana Journalists Association
BONASO	Botswana National AIDS Organisation
BPP	Botswana Peoples' Party
BPS	Botswana Police Service
CA	Court of Appeal
CEDAW	Convention for the Elimination of All Forms of Discrimination Against Women
CEO	Chief Executive Officer
CERD	Convention on the Elimination of Racial Discrimination
CJ	Chief Justice
CKGR	Central Kalahari Game Reserve
CRC	Convention on the Rights of the Child
DCEC	Directorate of Corruption and Economic Crimes
DPS	Deputy Permanent Secretary
GNP	Gross National Product
HIV	Human Immunodeficiency Virus
IC	Industrial Court
IEC	Independent Electoral Commission
MP	Member of Parliament
NACA	National Aids Coordinating Agency
NGOs	Non –Governmental Organisation
NHRI	National Human Rights Commission
OAU	Organisation for African Unity
PLHA	People Living with HIV/AIDS.
PS	Permanent Secretary
RADP	Remote Area Development Programme
SADC	Southern African Development Community
SARPO	Southern African Regional Police Organisation
UNICEF	United Nations Children's Fund

## **Acknowledgement**

The African Commission on Human and Peoples' Rights (ACHPR) wishes to express its appreciation to the Government of the Republic of Botswana for accepting the request of the former for a promotional human rights mission to the country

The African Commission is grateful to the authorities for their hospitality and support during the period of the mission. A special note of appreciation is extended to the Chief Justice of the Republic of Botswana, Permanent Secretaries, Deputy Permanent Secretaries, Directors and senior officials of government and public institutions who found time to meet with the delegation of the African Commission in spite of their tight schedule.

It also would like to recognise the openness and frankness of the authorities who facilitated the work of the delegation. It is also important to acknowledge the remarkable services of the drivers assigned to the delegation during the period of the mission.

The African Commission also wishes to thank the staff members who organised the mission and particularly those who accompanied the delegation throughout the mission. The Commission is equally grateful to all the NGOs, Independent Statutory Institutions and other individuals and civil society bodies that found time to meet with its delegation.

## Map of Botswana



## Introduction

The African Commission on Human and People's Rights (the African Commission) was established in 1987 by Article 30 of the African Charter on Human and Peoples' Rights (the African Charter). It is a Regional human rights treaty body charged with the promotion and protection of human and peoples' rights.

The African Charter was adopted by the 18<sup>th</sup> Assembly of Heads of State and Government of the Organisation of African Unity (OAU) in Nairobi, Kenya on 26 June, 1981. Upon the deposit of the requisite instruments of ratification, the Charter came into force on 21 October, 1986 and the first members of the African Commission were elected at the 23<sup>rd</sup> Assembly of Heads of State and Government of the OAU in June 1987. The inaugural meeting of the African Commission was held in Addis Ababa, Ethiopia in November 1987.

Article 45 of the African Charter provides for the mandate of the African Commission and this includes the promotion and protection of human and peoples' rights, interpretation of the African Charter and undertaking any other task assigned to it by the Assembly of Heads of State and Government.

In terms of Article 45 (1) the promotional mandate shall include *inter alia*, to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views and make recommendations to Governments; formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples rights and fundamental freedoms upon which African Governments may base their legislation; cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

To execute the mandate in Article 45 (1), the African Commission has initiated a number of measures, including in particular the allocation of African Countries to members of the African Commission for them to undertake human rights promotion and sensitisation on regular bases. These missions are usually undertaken during the intersession periods of the African Commission and reports, including recommendations are submitted to the African Commission during its ordinary sessions for consideration and adoption.

The promotional missions have given the Commission, an opportunity to initiate dialogue with African States and other stakeholders involved with the promotion and protection of human rights in Africa.

It is in this light that Commissioner Bahame Tom Nyanduga, Member of the African Commission and Commissioner responsible for human rights promotion

in Botswana visited the Republic of Botswana from 14 – 18 February 2005. Commissioner Nyanduga was accompanied to the mission by Robert Eno from the African Commission's Secretariat.

### **The Republic of Botswana - brief history**

In 1885 the British government declared Bechuanaland a protectorate, at the request of local rulers who wished to deter encroachment by Boers from the Transvaal. It was the British government's intention that Bechuanaland would eventually be absorbed into the Union of South Africa then being proposed principally as a means of appeasing the Afrikaners following their defeat in the Anglo Boer war. In 1909, however, Bechuanaland refused to join the Union.

The British government continued to regard the protectorate as a temporary expedient, until it could be handed over to Rhodesia or, after 1910, to the new Union of South Africa. Hence the administrative capital remained at Mafeking (Mafikeng), actually outside the protectorate's borders in South Africa, from 1895 until 1964. Investment and administrative development within the territory were kept to a minimum. It declined into a mere appendage of South Africa, for which it provided migrant labour and the rail transit route to Rhodesia. Short-lived attempts to reform administration and to initiate mining and agricultural development in the 1930s were hotly disputed by leading Tswana chiefs, on the grounds that they would only enhance colonial control and white settlement. The territory remained divided into eight largely self-administering 'tribal' reserves, five white settler farm blocks, and the remainder classified as crown (i.e. state) lands.

The extent of Bechuanaland Protectorate's subordination to the interests of South Africa was revealed in 1950. In a case that caused political controversy in Britain and the Empire, the British government barred Seretse Khama from the chieftainship of the Ngwato and exiled him for six years. This, as secret documents have since confirmed, was in order to satisfy the South African government which objected to Seretse Khama's marriage to a white woman at a time when racial segregation was being reinforced in South Africa under apartheid.

From the later 1950s it became clear that Bechuanaland could no longer be handed over to South Africa, and must be developed towards political and economic self-sufficiency. The supporters of Seretse Khama began to organize political movements from 1952 onwards, and there was a nationalist spirit even among older 'tribal' leaders. A legislative council was eventually set up in 1961 after limited national elections. The Bechuanaland People's Party (BPP) was founded in 1960, and the Bechuanaland Democratic Party (later Botswana Democratic Party, BDP) - led by Seretse Khama - in 1962.

Bechuanaland became self-governing in 1965, under an elected BDP government under Seretse Khama as Prime Minister. In 1966 the country became the Republic of Botswana, with Seretse Khama as its first President.

For its first five years of political independence, Botswana remained financially dependent on Britain to cover the full cost of administration and development. The planning and execution of economic development took off in 1967-71 after the discovery of diamonds at Orapa.

Seretse Khama died in July 1980 and was succeeded as president by his deputy since 1965, Vice-President Sir Ketumile (aka Quett Masire). In April 1998, Sir Ketumile Masire retired as president, and was succeeded by his Vice-President Festus Mogae.

## **Geography**

The Republic of Botswana is a landlocked country in the center of Southern Africa with an area of about (581,700 sq km (224,000 sq miles). The capital is Gaborone (until 1969 spelt Gaborones, i.e. "Gaborone's" named after Chief Gaborone), the modern city having been founded in 1964.

The territory is approximately 1000 kilometers from north to south and 1000 kilometers from east to west. Eastern and Southern borders are river-courses and an old wagon-road; the Western border consists of lines of longitude and latitude, and the Northern border combines straight line projections between distant beacons with a river course.

## **Population structure**

With a total population of about 1,561,973 people (July 2004), Botswana is composed of the following ethnic groups - Tswana (or Setswana) 79%, Kalanga 11%, Basarwa 3%, other, including Kgalagadi and white 7%. The population structure as at 2004 stood as follows:

### **0-14 years: 39.2%**

- Male: 310,282
- Female: 302,452

### **15-64 years: 56.2%**

- Male: 424,613
- Female: 452,801

### **65 years and over: 4.6%**

- Male: 30,896;
- Female: 40,929

### **Administration**

The country is divided into 9 Administrative districts and four town councils. The districts include - Central, Ghanzi, Kgalagadi, Kgatleng, Kweneng, Northwest, Northeast, Southeast, Southern, and the town councils include - Francistown, Gaborone, Lobatse and Selebi-Pikwe.

### **Legal System**

The legal system of Botswana is a mixture of Romano-Dutch and English common law principles. There are also local systems of tribal law and custom in rural district, which govern everyday disputes and property relations but are subordinate to statutory law.

The civil legal code of Botswana dates back to 1890, when the Laws of the Cape Colony were adopted by the colonial state. The Cape Code being Romano-Dutch as modified by English common law. The civil code has itself been modified by cases and precedents since 1890, as well as by legislation. Tswana customary law, as represented by the laws and precedents of the eight recognised tribes, is also recognised in matters of property, inheritance and personal dispute arbitration.

### **System of Government**

Botswana is a unitary state with a multi-party parliamentary system, an executive presidency, and executive machinery dominated by a cabinet of ministers chaired by the president. Since independence, Botswana has exhibited strong elements of democracy - accountability of government to the electorate through regular free elections held every five years, relatively uncorrupt government bureaucracy government and judicial respect for human rights and the rule of law, and the social and economic transformation through increased resources allocation by government.

#### *Executive branch:*

The executive branch of government is headed by the President. The president is both the head of state and head of government, cabinet and appoints cabinet members. The President is elected from among elected members of parliament not by universal suffrage, for a renewable five-year term. The Vice President is appointed by the president.

#### *Legislature:*

The legislature is bicameral consisting of the National Assembly and the House of Chiefs. The National Assembly has 44 seats, 40 members are directly

elected by popular vote and 4 are appointed by the majority party for a five-year term. National Assembly elections were last held on 30 October 2004 (next to be held October 2009). The House of Chiefs, a largely advisory 15-member body consisting of the chiefs of the eight principal tribes, four elected sub-chiefs, and three members selected by the other 12 members.

#### *Judiciary:*

The Judiciary is made up of the High Court; Court of Appeal and Magistrates' Courts - one in each district. The Customary Court operates at local level.

### **Constitutional system**

The constitutional system is an adaptation of Westminster model. The Constitution provides for a non-racial democracy and an elaborate and justiciable Bill of Rights which guarantees fundamental rights. It provides for a separation of powers between the executive, legislature and the judiciary. The president is not elected directly by popular vote but by the party which has majority support in the National parliament. The Chief Justice presides over the High Court and the Court of Appeal. The Court of Appeal is made up of judges, some expatriate, constituted on a part-time basis.

Constitutional power is shared between the President and a popularly elected National Assembly. Mr. Festus Mogae became President upon former president Sir Katumile Masire's resignation in 1998. He leads the BDP, which has held majority seats in the National Assembly continuously since independence. In October 1998 elections generally regarded as largely free and fair, the BDP increased its majority in the National Assembly and elected President Mogae to a second term. The ruling party has 33 out of the 40 seats in the National Assembly. There is an independent Electoral Commission and the office of the Ombudsman. The House of Chiefs, representing the 8 designated principal Batswana tribes and some smaller ones, has a consultative role especially on traditional matters.

### **Politics**

The ruling, the Botswana Democratic Party (BDP) was first elected in 1965 and re-elected at five-yearly intervals since then. Its overwhelming majorities in elections have been based on rural support, stimulated by the benefits of development programmes usually introduced in the year immediately preceding an election.

Opposition parties have drawn their strength generally from urban areas. The BPP was the main but ineffective opposition in the 1960s when urban areas were small. Since then the Botswana National Front (BNF) has grown in strength, largely among the working class and younger middle class in the rapidly expanding urban areas but also including some support among conservatives in certain rural areas.

## **The Economy**

Botswana has maintained one of the world's highest growth rates since independence in 1966. Through fiscal discipline and sound management, Botswana has transformed itself from one of the poorest countries in the world to a middle-income country with a per capita Gross National Product (GDP) of \$9,000 in 2004. Diamond mining has fueled much of the expansion and currently accounts for more than one-third of GDP and for nine-tenths of export earnings. Tourism, subsistence farming, and cattle raising are other key sectors. On the downside, the government must deal with high rates of unemployment and poverty. Unemployment officially is 21%, but unofficial estimates place it closer to 40%. HIV/AIDS infection rates are the highest in the world and threaten Botswana's impressive economic gains. Long-term prospects are overshadowed by the expected leveling off in diamond mining production.

## **International human rights obligations**

The Republic of Botswana is a state party to the African Charter on Human and Peoples Rights. It ratified the African Charter on 17 July 1986. Since then, however, Botswana has never submitted a state report in terms of the provisions of article 62 of the Charter.

Botswana is also party to the following international human rights instruments: The OAU Convention Governing the Specific Aspects of Refugee problems in Africa, the African Charter on the Rights and Welfare of the African Child, International Covenant on Economic Social and Cultural Rights, International Covenant on Civil and Political Rights, 1<sup>st</sup> Optional Protocol to the International Covenant on Civil and Political Rights, Convention on the Elimination of all forms of Racial Discrimination, Convention on Elimination of all forms of Discrimination Against Women, Convention Against Torture, Convention on the Right of the Child.

It is a member of the United Nations, the Non-aligned Movement, the Commonwealth, African Union (AU), and the Southern African Development Community (SADC). The secretariat of SADC is based in Gaborone, the capital of Botswana.

## **Preparation of the Promotional Mission**

The Secretariat of the African Commission began exchanging *Notes Verbale* with the Ministry of Foreign Affairs and International Cooperation regarding the mission from February 2004. On two occasions, March and August 2004, the Government of the Republic of Botswana accepted the requests for the mission but the mission could not be undertaken due to unavoidable circumstances.

In March 2004, the Commissioner Bahame Tom Nyanduga who was to undertake the mission the Botswana was required to undertake an urgent mission to the Darfur Region of The Sudan. Because of the urgency of the Darfur Crisis at the time, the African Commission decided to send a mission to the region. The proposed mission to Botswana was therefore postponed at short notice.

Unfortunately, upon arrival in The Sudan, the Darfur mission did not materialize due to reasons beyond the control of both parties. Regrettably, the mission to Botswana had already been postponed to August 2004.

Since the mission to Darfur could not materialize in March 2004, and in view of the fact that the situation in Darfur continued to deteriorate, the African Commission pursued negotiations with the Sudanese Government and a mission to the country was duly authorized for July 2004. Considering the allegations of large scale human right violation in the Darfur Region, the Commission decided to increase the number of Commissioners to undertake the mission and extended the number of days for the mission. Because of this "increase", the Commission's budget was seriously affected and by August 2004, the Commission could not undertake the August mission to Botswana due to inadequate funds. Yet again the mission to Botswana was postponed.

On 29 November 2004 a Note Verbale was sent to the Botswana Government requesting for another mission and in January 2005 the Botswana Government accepted the Commission's request for the mission. By Note Verbale dated 11 January, the Government also requested the African Commission to facilitate a two day workshop on State Reporting organised by the Botswana Ministry of Foreign Affairs and International Cooperation.

In consultation with the Secretariat of the African Commission, the Botswana Foreign Ministry prepared a draft programme for the visit to Botswana and by *Note Verbale* dated 11 February 2005, the Ministry forwarded to the Secretariat the draft programme for the Commission's comments.

The Mission started with a Courtesy call to the Permanent Secretary in the Office of the President and concluded with a Press Conference held by the leader of the delegation, Commissioner, Bahame Tom Nyanduga.

### **Courtesy call to the Office of the Permanent Secretary (PS) in the office of the President**

On 14 February 2005, the delegation of the African Commission paid a courtesy call to the Permanent Secretary in the office of the President .The delegation was received by the Deputy Permanent Secretary, (DPS) Mr. Bergsman Kagiso Sentle who apologized on behalf of the P.S. who was unavoidably absent.

After introducing the delegation, Commissioner Bahame Tom Nyanduga, leader of the delegation and the African Commission's Member responsible for human rights promotion in the Republic of Botswana apologized to the DPS on behalf of the African Commission, and on his own behalf, for not being able to undertake the mission on two previous occasions - first in March and later in August 2004. He informed the DPS why the mission had to be postponed twice.

The Commissioner expressed appreciation to the Government of Botswana that in spite the two postponements, the Government had responded positively to the African Commission's request for another mission.

The Commissioner then requested amendments to the Programme of the delegation to include among others, meetings with more Non-Governmental Organisations (NGOs), the Leader of the Opposition, the Speaker of the National Assembly and the Coordinator of National Aids Coordinating Agency (NACA).

The Commissioner informed the DPS that the main purpose of the mission was to among other things:

- make a follow-up to the mission undertaken by Commissioner Barney Pityana in April 2001;
- engage the Botswana authorities and other stakeholders to understand the human rights situation in the country;
- to fulfill part of the African Commission's promotional mandate under Article 45(1) of the African charter on Human and People's Rights;
- to understand the extent to which Botswana has incorporated the provisions of the Charter and comply with its obligations under Article 1 thereof;
- to encourage Botswana to ratify those African human rights instruments she had not ratified;
- to engage the Government on the implementation of the recommendations of the African Commission made in the *Modise Case*.

He noted with respect to the latter objective that due to the inadequate follow-up mechanisms of the African human rights system, Commissioners take it upon themselves during promotional missions to engage Governments on any Recommendations, Resolutions and Declarations the African Commission might have adopted or made with respect to a State Party or States Parties to the African Charter.

To this end, the Commissioner informed the DPS that the African Commission would like to know the measures that the Botswana Government had taken to implement the African Commission's recommendations on ***Communication 97/1993-Modise vs Botswana***.

The Commissioner informed the DPS that the African Commission would also be keen to know among other things;

- if human rights education had been introduced in the school curriculum;
- whether the officials dealing with the administration of justice such as judges, the police, prison authorities understand human rights;
- the measures taken by the Government of Botswana to address the high rate of HIV/AIDS infection and in particular, the specific measures put in place to protect the rights of People Living with Aids (PLHA). In this regard, the Commissioner expressed on behalf of the African Commission solidarity with the Botswana people on the high level of HIV/AIDS infection;
- the measures taken to address the rights of marginalized groups or communities, including indigenous peoples.

The Commissioner noted with regards to the indigenous populations that due to the competing interests between the State and the indigenous communities, such as the extraction of resources, tourism, etc, it had become necessary for the African Commission to know how Governments balance such interests without violating the rights of the indigenous people.

The Commissioner noted that it had been brought to the attention of the delegation that there was a case brought by the Basarwa Indigenous Community dealing with the right to land. However, since the case was still in court at the time of the mission, the Commissioner thought it would be pre-judicial to discuss its merits as it might be submitted to the African Commission at a later stage.

The Commissioner nonetheless informed the DPS that the African Commission had undertaken a study on the question of Indigenous Populations and Communities in Africa and a Concept Framework Paper on this matter had been adopted by the Commission. The paper would be published and distributed to all States Parties to the African Charter for their input. He also noted that the Commission had established a Working Group on Indigenous Populations and Communities to undertake further research and collect documentation on the protection of the rights of indigenous populations. The Commissioner took the opportunity to inform the DPS that the Working Group will be visiting Botswana during the Second Quarter of the year.

Commissioner Nyanduga also informed the DPS that the African Commission had received reports about 8 Namibian refugees from the Caprivi Region who

were deported to Namibia and the Commission would like to know the circumstances under which they were deported.

The Commissioner also raised with the DPS the question of corporal punishment and sought explanation as to its usage and its compatibility with Botswana's obligation under the African Charter.

The DPS was also informed that one of the ways in which the Commission engages with States was through the State Reporting Procedure as provided for under Article 62 of the African Charter. He noted that since Botswana ratified the Charter in 1986 she had not submitted any report as required under Article 62, and as such had nine (9) overdue reports.

The Commissioner however, noted the commitment made by the Botswana Delegate during the 36<sup>th</sup> Ordinary Session of the African Commission that the Government of Botswana was in the process of preparing its Initial Report to the African Commission. The Commissioner said that he was pleased to have been requested to facilitate a workshop to train officials responsible for the preparation of the State Report.

He also informed the DPS about the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (Protocol on the African Human Rights Court) which came into force on the 25<sup>th</sup> of January 2004 and the Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on the Rights of Women) adopted at the Second Summit of the AU in Maputo, Mozambique in July 2003.

The Commissioner noted that Botswana had not ratified either of the Protocols and urged the DPS to advise the relevant authorities take the necessary measures to ensure their ratification.

With regards to the Protocol on the African Court on Human and Peoples' Rights, the Commissioner urged the DPS that in ratifying it, the State should also make the Declaration under Article 34(6) of the said Protocol.

The Commissioner also brought to the attention of the DPS the Decision of the Assembly of the AU at its Third Summit to merge the African Court on Human and Peoples' Rights and the African Court of Justice provided for under the Constitutive Act of the African Union.

The Commissioner informed the DPS that representations have been made to the AU to reconsider this decision. Thus, while waiting for the final decision of the AU, the Commissioner urged the Government of Botswana to ratify not only the Protocol on the Human Rights Court but also the Protocol on the Court of Justice.

The Commissioner also encouraged the Government to consider the establishment of a National Human Rights Commission (NHRI) or upgrade the institution of Ombudsman to an NHRI.

The Commissioner noted that Botswana still retained the death penalty and that two cases had been brought to the African Commission against Botswana with respect to the death penalty. The first communication – **Interights et al (on behalf of Mariette Sonjaleen Bosch) / Botswana, communication 240/2001**, was concluded at the 33<sup>rd</sup> Ordinary Session of the Commission in May 2003, and the second communication **Brian Spilg and Unoda Mack (on behalf of Lehlohonolo Bernard Kobedi)/ Botswana, Communication 277/2003**, was still being considered by the African Commission. He said because there was a communication before the African Commission on the matter, he would not discuss the death penalty in substance.

He said he would however like to inform the DPS that the African Commission adopted a Resolution at its 26<sup>th</sup> ordinary Session held in Kigali Rwanda in November 1999 calling on all States Parties to observe a Moratorium on the Death Penalty. He also said that the Commission was in the process of debating the *question of the death penalty in Africa* with a view to coming up with a final position on the matter which will be presented to all Member States of the AU for their input.

In response to the Commissioner's remarks, the DPS started by apologizing on behalf of the Permanent Secretary who was unavoidably absent. He said he was happy to receive the delegation of the African Commission and informed the delegation that the Office of the President was the lead department coordinating issues of human rights in the country. He assured the delegation that he had requested Government authorities to be open and provide whatever information is requested to ensure the success of the mission.

The DPS informed the delegation that he was sitting in for the PS simply to receive the delegation and was going to inform the PS about all the issues that had been raised and the PS will respond to them on 16 February 2005 when the delegation was scheduled to see her

The DPS said he would however like to make certain clarifications especially on illegal immigrants, corporal punishment and refugees in Botswana.

On illegal immigrants, the DPS noted that many foreigners especially Zimbabweans entered Botswana as economic migrants and did not meet the criteria of refugees. He informed the delegation that those foreigners who entered Botswana through the legal check points and presented authentic documentation were processed, and if they had a good case, were granted asylum. However, those that entered the country illegally were rounded up in

police raids called *clean up campaigns* and detained at a detention facility in Francis town pending deportation to their countries of origin. He emphasized that there was no punishment meted out to illegal immigrants, save for detention.

Regarding corporal punishment the DPS informed the delegation that it was part of the laws of Botswana and that it had support from the majority of the people. He said it was not correct to say that Zimbabweans were whipped because they were illegal immigrants. Rather, those who were whipped had been involved in criminal activities that attracted corporal punishment as prescribed in the laws of Botswana. The DPS noted further that many people prefer corporal punishment than prison sentences.

### **Meeting with the Ombudsman of Botswana**

The delegation met the Ombudsman of Botswana, **Mr Lethebe A Maine** on the 14 February 2005 at the Headquarters of the Ombudsman in Gaborone.

After explaining to the Ombudsman the purpose of the mission to Botswana, the Commissioner went further to brief the Ombudsman on the adoption and coming into force of the African Charter, its distinctive features, weaknesses; the establishment of the African Commission, its composition, meetings, mandate with particular emphasis to the promotional and protective mandates, including the examination of communications and the State Reporting Procedure.

The Commissioner also briefed the Ombudsman on the measures that the AU had taken to enhance the African human rights system, in particular through the adoption of protocols to the African Charter. In this regard, the Commissioner explained the process leading to the adoption of the Protocol on the establishment of the African Court on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa, noting that the former came into force on 25 January 2004 while the latter was yet to come into force.

He noted with regards to the protocol of the human rights court that even though it had come into force by virtue of the required number of ratifications being obtained, its establishment had been delayed following the decision of the AU Assembly in July 2004 to merge the African Court on Human and Peoples' Rights and the African Court of Justice provided for under the Constitutive Act of the AU.

The Commissioner informed the Ombudsman that as an institution dealing with the promotion and protection of human rights, the African Commission would like to know the role of the Ombudsman in this regard, in particular, in ensuring the enjoyment of the rights of women, the enjoyment of economic, social and cultural rights, the treatment of vulnerable and marginalized groups such as indigenous peoples, whether the death penalty is the most appropriate form of punishment in

an open and democratic society where human rights and fundamental freedoms should be the watch words.

In his response, the Ombudsman welcomed the initiative of the African Commission to visit Botswana and expressed the wish that the Commission's mission would help the country to adopt an inclusive process in the promotion and protection of human rights.

He informed the delegation that the Ombudsman is a Public Institution constituting what he referred to as an *Extra-Ministerial Department*.

He said in terms of the Ombudsman Act of 1995, the Ombudsman investigates complaints of maladministration in public institutions. After investigation, he makes recommendations to Government for remedial action.

The Ombudsman has no executive powers and as such made only recommendations to Government where he found infractions of the law. In terms of the Section 3 (3) (b) of the Act, the Ombudsman "shall not in any case be precluded from conducting an investigation in respect of any matter by reason only that it is open to the aggrieved person to apply to the High Court for redress under section 18 of the Constitution (which relates to redress for contravention of the provisions for the protection of fundamental rights and freedoms)". The Ombudsman interpreted this to mean that he had the mandate to deal with human rights issues. As such the Ombudsman has been receiving complaints of human rights violations especially from prisoners.

Although not specifically stated in the Act, the Ombudsman adopts measures such as arbitration, conciliation and reconciliation in dealing with complaints.

The Ombudsman noted that there had been very little complaints of human rights violation submitted to him and attributed this to the good human rights record of the country.

He informed the delegation that he had been encouraging the Government to establish a NHRI or give the Ombudsman express powers to deal with human rights matters.

On the question of the death penalty, the Ombudsman informed the delegation that a Commission was set up to collect public views on the issue and there was overwhelming support for the retention of the death penalty. He noted however that there was always a danger of subjecting such sensitive issues as the death penalty to public opinion because the public might not appreciate the new human rights thinking. The Ombudsman informed the delegation that the death penalty was reserved only for the most heinous crimes.

The Commissioner requested the Ombudsman to explain his mandate with respect to the right to freedom of association, in particular trade union rights. The Ombudsman noted that any complaint brought against a public institution or government department can be handled by his office.

The Commissioner also wanted to know how the Ombudsman measures the degree of compliance with his recommendations. The Ombudsman informed the Commissioner that most of the complaints were resolved amicably and that there was about 95% compliance with the outcome of the amicable settlement. However, where the parties couldn't agree, an investigation was instituted and recommendations made to the relevant Government Department.

The Ombudsman presents an Annual Report to the President and this is tabled in Parliament through the Minister of Presidential Affairs in Parliament. The Act does not however, compel the Minister to table the Report to Parliament.

The Ombudsman is appointed for a renewable four year term by the President in consultation with the Leader of Opposition but not ratified by Parliament. The Ombudsman is funded by the Government. This has led to criticisms that the Ombudsman cannot be independent.

According to the Ombudsman, in order to allay fears of lack of impartiality, the security of tenure should be amended. He suggested that the Ombudsman should be appointed for a fixed term of 7 or 8 years. He thought a four year tenure was too short and argued that the appointment should be made by Executive and should only be confirmed by Parliament.

The Ombudsman had a staff strength of 35 amongst whom were nine investigative officers. According to the Ombudsman, the institution was not well known even though it had been involved in public awareness campaigns in prisons and through the radio.

### **Meeting with NGOs at Ditshwanelo**

On 15 February 2005, the delegation met with the NGO community at the premises of the Botswana Centre for Human Rights, (Ditshwanelo). The African Commission appreciates the initiative of Ditshwanelo who brought together these NGOs to this meeting.

The Commissioner briefed the NGOs on the purpose of the mission and noted that as the foot soldiers on the ground and key partners in the realization of the mandate of the African Commission, it was necessary to meet with them to exchange views and learn from them on the human rights situation in the country. The Commissioner also noted that NGOs are the main sources of information on the human rights situation in any country.

The Commissioner encouraged the NGOs to lobby the Government to ratify the protocols on the human rights court and on the rights for women in Africa, and with regards to the former, suggested that NGOs should also ensure that the Government makes the Declaration under Article 34(6).

The Commissioner explained why the African Court on Human and Peoples' Rights had not been established in spite the entry into force of the protocol. He noted that the AU decision of July 2004 to merge the Court on Human and Peoples' Rights and the Court of Justice, NGOs should lobby for the ratification of both the protocol on the Human Rights Court and the protocol on the Court of Justice, so that should July 2004 decision stand, both courts could be established without delay.

The Commissioner also urged those NGOs that had not already done so to apply for observer status with the African Commission, adding that the status had added significance when it comes to the submission of communications/cases to the court on human rights as the protocol provides under Article 5 (c) that "the Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol".

The Commissioner also informed the NGOs that as part of the promotional mission, the delegation would be facilitating a two day workshop on State Reporting. This, he added, was at the request of the Government. The Commissioner informed the NGOs that State Reporting was one of the ways in which the Commission engages states in constructive dialogue on the human rights situation in their countries.

He noted that Botswana ratified the African Charter in 1986 and in terms of Article 62 of the Charter, was supposed to have submitted at least nine reports to the Commission. The non submission of the reports, the Commissioner noted, did not mean the Government was disrespecting the African Commission but rather it had been observed that failure to submit was due to several constraints. The Commissioner noted that the government had initiated the process and hoped that this would lead to a continuous process of reporting on the part of the State and strengthen the cooperation between Botswana and the African Commission in the promotion and protection of human rights in the country.

The Commissioner urged the NGOs to be involved in the State Reporting process so that it did not only reflect the views of the Government but the state as a whole. He also noted that apart from taking part in the preparation of State Reports, NGOs could also prepare and submit Shadow Reports to the African Commission.

The Commissioner also explained the protective mandate of the African Commission and in particular the communication procedure noting that one way in which NGOs can contribute to the work of the Commission was by bringing communications to the Commission in accordance with the provisions of the Charter.

In their response, the NGOs raised a number of issues regarding the preparation of the State Report, freedom of expression, HIV/AIDS, refugees and asylum seekers, the communication procedure, access to justice, and the human rights situation in Zimbabwe.

Ditshwanelo wanted to know whether it was proper for the African Commission's delegation to be meeting other stakeholders such as NGOs in the presence of Government officials.

In his response, the Commissioner differentiated between a promotional mission which is interactive and exchange of opinion and a fact-finding mission on allegations of human rights violations which are more sensitive. He said generally, in the latter, state officials were not allowed to sit in the meetings of the Commission since it was an investigative mission and there was need to preserve the security of those who appeared before the Commission and to allow people to speak freely without fear of victimization.

With regards to promotional missions there was no hard rule regarding the presence of Government officials in meetings. Where however, parties did not want state officials to be present, they were at liberty to request that they leave and the Commission will accordingly request that they do.

On the issue of State Reporting, NGOs said that the Government had been consulting civil society in the preparation of its State Reports as evidenced during the preparation of the Report to the Committee on the Elimination of Racial Discrimination (CERD) in 2002. NGOs hoped this consultation would continue with the preparation of the Report to the African Commission and subsequent Reports.

The NGOs expressed the view that for the Report to be called a State Report, and not a Government Report, consultations should not be limited to Government and NGOs, opposition political parties and other interest and pressure groups should also take part.

On freedom of expression and the press, the Botswana Journalist Association (BOJA) decried the near monopoly that the state media enjoyed in view of the resources they had. According to the BOJA, private media organizations found it difficult to operate due to resource constraints while state-funded media operated without difficulties. BOJA wanted to know how the Commission could intervene to ensure the Government distanced itself from public media.

The Commissioner indicated that the Commission was guided by the African Charter and Government policies and activities were measured against the provisions of the Charter to see whether by virtue of those policies the provisions of the Charter had been violated. In this case the Commission would like to determine whether by exercising monopoly over the media, government was impeding the enjoyment of the right to information or freedom of the press.

The Commissioner informed the NGOs that at its 36<sup>th</sup> Ordinary Session that took place from 23<sup>rd</sup> November to 7<sup>th</sup> December 2004 in Dakar, Senegal, the African Commission appointed one of its Members as Special Rapporteur on Freedom of Expression in Africa. He noted that the Special Rapporteur would study such and related issues and make appropriate recommendations to the Commission for necessary action. He encouraged the NGOs to establish contact with the Special Rapporteur on this and other matters they perceived was hampering the effective enjoyment of the right to freedom of expression in Botswana.

On HIV/AIDS, the Botswana National AIDS Organisation (BONASO) wanted to know whether the Commission had developed guidelines or policies to guide states on their policies to curb the pandemic. The Commissioner noted that the Commission had adopted a number of recommendations, resolutions and declarations dealing with various thematic issues including HIV/AIDS, torture, fair trial, prisons, etc. He said the African Union had held a special session on HIV/AIDS.

On the question of illegal immigrants and refugees, the Botswana Council of Churches (BCC) said that the Government was reluctant to recognize the fact that most Zimbabweans, especially journalists who had fled into Botswana were genuinely fleeing from persecution.

The Commissioner noted that the African Commission is guided in this regard by Article 12 of the African Charter and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa which compliments the 1951 UN Convention on Refugees. He noted that the key principle was the determination of the status of refugees which is done by the state. In determining the status, there has to be fear of persecution. The international community does not recognize economic migrants as refugees even if their rights were violated in the host state.

On the question of access to justice, Ditshwanelo informed the delegation about the lack of Legal Aid. The organization noted that about 30% of the people in Botswana live below the poverty line, as such many people did not have the means to recruit legal counsel. The state provided legal representation only for *pro duo* cases, but since remuneration was very little, qualified lawyers were usually not interested to represent suspects.

On Zimbabwe, the NGOs wanted to know what the African Commission was doing with the human rights situation in the country. They claimed that the effects of the situation in Zimbabwe was already being felt in Botswana. Many Zimbabweans had fled their country into Botswana.

The Commissioner informed the NGOs that the Commission undertook a fact-finding mission to Zimbabwe in 2002 to investigate allegations of human rights violations in the country. The Report of the mission could not be adopted by the AU Assembly at its Third Summit in July 2004 because the Heads of State and Government felt the Government of Zimbabwe had not made its observations on the Report. Zimbabwe submitted its observations in November 2004 and they were incorporated into the Commission's 17<sup>th</sup> Annual Activity Report submitted to the 4<sup>th</sup> AU Summit in Abuja, Nigeria in January 2005. The AU Assembly adopted the Report and authorized its publication.

The Commissioner informed the NGOs further that the Commission was seized with a number of communications against Zimbabwe from NGOs and individuals and it was still considering them.

#### **Meeting with the Ministry of Labour and Home Affairs (15<sup>th</sup> February 2005)**

The delegation met with authorities from the Ministry of Labour and Home Affairs on 15 February 2005.

After introducing the delegation of the Commission, the Commissioner briefed the officials on the objectives of the mission to Botswana. He also briefed them on the mandate of the Commission.

He said the delegation would like to know how the Ministry has mainstreamed the promotion and protection of human rights in its mandate, in particular to understand the enjoyment of the right to collective bargaining especially following the *Debswana Case*.

The Commissioner also urged the officials to discuss the ratification of the Protocol on the establishment of the African Court on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa.

In his response, the DPS informed the Commissioner that the Ministry of Labour and Home Affairs was one of the biggest Ministries in the country with three main departments:

- Department of Labour and Social Security;
- Department of Prisons; and
- Department of Gender.

*The Director of Labour and Social Security* informed the delegation that the Department administered labour laws and provided labour administrative services through the main pieces of legislation, namely:

- the Employment Act **Cap. 47 of 2001** which provides for basic conditions of employment;
- Employment (Amendment) Act, 2003 – Act. 14 of 2004;
- the Trade Unions and Employers' Organisation Act, Cap 48 of 2001 which regulates the registration and de-registration of these organizations. This Act also regulates industrial actions such as strikes and lockouts;
- Trade Union and Employers' Organisation (Amendment) Act, 2003 – Act No. 16 of 2004; and
- Trade Disputes Act, 2003 - Act No. 15 of 2004.

He informed the delegation that strikes were not outlawed but must be undertaken after the fulfillment of certain requirements. He also noted that industrial disputes were dealt with by the Industrial Court. (IC). If the Court declared a strike illegal, the employer was at liberty to take any action he/she deemed necessary including dismissal. The decision of the IC could be appealed to the Court of Appeal (CA).

On the *Debswana Case*, the Director noted that the matter was taken to the IC by the employer and the Court declared the strike illegal. The decision of the IC was appealed to the CA and the latter upheld the decision. He also indicated that the IC had the same status as the High Court.

*The Commissioner of Prisons* on his part informed the delegation that there were 23 prisons in the country with an original capacity of 3910 but were holding 6146 inmates. He noted that there were only two prisons operating below capacity due to shortage of water. Inmates were taught skills such as carpentry, bricklaying, agriculture, character moulding, moral instructions, etc.

*The Director of the Department of Gender* informed the delegation that Botswana had made great strides in enhancing the enjoyment of the rights of women. She said a number of laws had been amended to bring them in line with international standards including the Citizenship Amendment Act (1995), the De-registration Amendment Act (1996), the Public Service Act (2001), and the Marital Power Act.

She noted that Botswana had ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) but was yet to ratify the protocol thereto. She noted further that Botswana had signed the SADC Declaration on the Equality of Women and Men and was taking measures to deal with passion killings and was also at the initial stages of developing a law on Domestic Violence.

## **Meeting at the Ministry of Foreign Affairs and International Cooperation – 15<sup>th</sup> February 2005.**

The delegation of the African Commission met with senior officials from the Ministry of Foreign Affairs and International Cooperation on 15/02/05 at the premises of the Ministry. Among the officials present were the Director of Political Affairs and the Permanent Representative of Botswana to the African Union. After introducing the delegation, the Commissioner apologized for not being able to undertake the mission on two previous occasions in March and August 2004. He indicated that the Commission was grateful that the Government still accepted the mission in spite the two postponements.

He informed the Permanent Secretary of the Ministry, **Mr. E.S Mpofo**, who presided over the meeting that the promotional mission was to engage in dialogue with the Government and other stakeholders in the promotion and the protection of human rights in the country. He said one area of dialogue was on the State's obligation under Article 62 of the African Charter requiring States to submit periodic reports to the African Commission.

The Commissioner noted that at the 36<sup>th</sup> Ordinary Session of the Commission the Botswana delegate to the session indicated that the government was in the process of preparing its report to the Commission. The Commissioner said the Commission was pleased to be associated with the process through facilitating in a workshop to that effect.

Commissioner Nyanduga also urged the Permanent Secretary on the need for the Botswana Government to ratify the Protocols on the African Human Rights Court, and on the Rights of Women in Africa. He also informed the PS, that in view of the AU decision to merge the African Human Rights Court with the African Court of Justice, it would be prudent to ensure the ratification of both protocols establishing the two courts. With respect to the Protocol on the African Human Rights Court, the Commissioner urged the PS that in ratifying it, the Government should also made the declaration under Article 34 (6).

Commissioner Nyanduga informed the PS that the promotional mission was an experience sharing exercise. That the Commission wanted to learn from the Government the extent to which human rights, especially those enshrined in the African Charter are observed in Botswana. He said the Commission was also keen to understand the problem associated with the much publicized relocation of the Basarwa community. He noted that since the matter was in court the PS might not want to discuss the merits, but the Commission was interested in understanding the issue.

The Commissioner also informed the PS that the Commission had received two complaints against Botswana on the question of the death penalty and would like to draw the attention of the Government to the Commission's resolution urging

Member States of the African Union to observe a moratorium on the death penalty. He said the African Commission was discussing the death penalty in a broader scale and its position would be made known to all Member States.

In his response, the PS thanked the Commission for the mission and noted that it was part of the Government way of cooperating with African institutions.

He said with regards to the death penalty that a Commission had been established that went throughout the country to get the opinion of the public on the matter. The result was that an overwhelming majority of the people wanted the death penalty to be retained. He said if a Commission were to be established on the question of corporal punishment, he was sure the result would be the same.

The Commissioner noted that maybe there should be public awareness on the human rights implication of the death penalty and that if the public were informed, peoples' thinking on the death penalty could change. The PS noted in reply that the people who should start with the attitudinal change must be the leaders, the politicians. He said if politicians make public declarations in support of the death penalty it impacts a lot on the thinking of the general public.

Regarding the relocation of the Basarwa from the CKGR, the PS informed the delegation that the Basarwa were not coerced to move. He said that the Government persuaded them, and the majority of the people moved voluntarily because of the incentives provided by Government. He said out of a population of 4,000, only about 17 – 57 people were resisting relocation and this was being perpetrated by misconception orchestrated by foreign organizations. He said that the problem involved only those who had squandered the compensation the Government had given them and then started claiming that life was tough where they were relocated to.

He noted that it was wrong to say that they had been denied the benefits from the Game Reserve, adding that people who were nearer to areas of natural resources benefit more from those resources. According to the PS, it was not correct to claim there were people indigenous to Africa whereas all Africans are indigenous.

The Commissioner explained that the terminology has been accepted at the United Nations and represents communities of hunter gatherers and pastoralists.

The PS concluded by saying that the Government is open minded and welcomed anyone who could render whatever assistance to look for a just solution to the matter. He advised the delegation to pursue the issue when it meets the Ministry in charge of Tribal Administration and the Remote Area Development Programme. He said further that the Government did not agree with those who wanted to retain the Basarwa in primitive conditions for the benefit of the curiosity

of tourists or social anthropologists. He said the Basarwas deserve the benefits of social and economic development just like any other Mswana and suggested that many Batswana had lived under similar destitute conditions before independence and before the discovery of diamond. The Government had a duty to uplift the Basarwa from such conditions.

### **Meeting at the Ministry of Local Government**

After welcoming the delegation, the Deputy Permanent Secretary of the Ministry, **Mrs. Kodise A Selotlegeng** apologized for the unavoidable absence of the Permanent Secretary. She introduced the other officials who included the Director of Tribal Administration, **Mrs. Katsile D Rathedi**, the Coordinator of the Remote Area Development Programme (RADP), **Mrs. Galaletsang Maakwe** and the Deputy Commissioner in the Department of Social Services, **Mrs. Khutsafalo O Mogotsi**. She then invited each of them to brief the delegation on the activities of their respective Departments and measures put in place to ensure promotion and protection of human rights.

The *Director of Tribal Administration* informed the delegation that tribal administration procedures vary from one tribe or region to the other. However, they must all be consistent with the basic law of the land- the constitution.

The Local Administration was made up of the Local Chief, Customary Courts and Local Police. Each Customary Court dealt with cases in terms of the customs of that tribe or region. An accused person however had the option to be tried by the Customary Court or by a Magistrate Court.

The jurisdiction of a Customary Court extends to all residents in the region irrespective of whether the accused is a citizen or resident from that region. The Customary Court is presided over by a Paramount Chief assisted by advisers. Decisions of the Customary Court could be appealed to the Customary Court of Appeal presided over by the President of the Customary Court of Appeal.

According to **Mrs. Katsile D Rathedi**, corporal punishment was usually administered at the Customary Court level. The Director indicated further that there was a cultural belief that corporal punishment was more effective than imprisonment. She noted further that corporal punishment was preferred to imprisonment by most offenders because instead of depriving a person of their liberty and ability to work they were lashed and released immediately so they could continue with their daily activities. She also indicated that corporal punishment served to reduce congestion in prison. It was also pointed out that many people opted for corporal punishment than go to prison because of the stigma usually associated with imprisonment.

Corporal punishment was administered by the Local Police in the Office of the Local Chief and not in public. It was applied on the buttocks and only to men

between the ages of 16 and 40. It was not applied on women, although there was debate going on in the country that it should be extended to women, because women are imprisoned instead of being whipped.

The Commissioner wanted to know why Community Service was not preferred instead of corporal punishment if the aim was not to deprive the offender of their liberty and means of livelihood or congest the prisons. The Commissioner stated further that in a communication from Sudan, the Commission had declared corporal punishment as inhuman and degrading punishment. The Director indicated that Community Service had been tried before and there weren't enough officials to supervise offenders under the Community Service Scheme. She noted that the last time Community Service was adopted offenders failed to honor their obligations and did not complete their sentences.

The *Deputy Commissioner of the Department of Social Services* indicated that the Government had ratified the Convention on the Rights of the Child (CRC) in 1998 and in 2004, submitted its first report to the Committee on the Rights of the Child. She noted that even though the Government was still waiting for the Concluding Observations of the Committee there weren't many issues raised during the presentation and consideration of the report.

**Mrs. Khutsafalo O Mogotsi** said that Botswana had also ratified the African Charter on the Rights and Welfare of the Child of 1991 but was yet to submit a report to the Committee of Experts. She indicated that the Botswana 1981 Child Rights Act was under review to bring it in line with international standards. With the assistance from the United Nations Children Fund (UNICEF), a human rights perspective had been injected into the revision of the Act.

Other social services included the establishment in 2002 of the School of Industry for the rehabilitation of young offenders. There were about 100 young offenders in the School of industry. The School provided the young offenders with basic skills such as carpentry and bricklaying. The offenders were allowed home visits regularly under supervision by social workers.

Other institutions established to protect the rights of children included the Children's Court for Young Offenders and the SOS Children's Village to assist children in need of care. Due to the large number of children orphaned by the HIV/AIDS pandemic, the SOS Children's Village was full and the Department of Social Services had opened another institution to receive children in need of assistance.

The Department also provided children with the opportunity to participate in the development of laws affecting their welfare. Apart from encouraging their participation in the commemoration of International Children Days, and the Day of the African Child (16<sup>th</sup> June), the Department had established the Children's Forum to look at new legislation on the rights of the child. There was also the

Youth Parliament and the National Children's Council which discussed issues affecting children.

The Department also had a social assistance programme for the poor called The Food Basket. Under this programme, persons in need of help including orphans up to the age of 18 were given basket of food items and financial assistance for a specific period of time.

Social security in the form of old age pension was also provided to persons above the age of 65. The sum of 161 pula (an equivalent of US \$ 40) per month was paid as pension benefit. Financial assistance was also given to World War Veterans on a monthly basis. Where the Veteran has died, the surviving spouse and children below the age of 21 would receive the benefit.

The Department of Social Services also operated a Community Home-based Care which rendered assistance to people who were terminally ill. The terminally ill were given the food basket and financial assistance and their children were also taken care of if they were in need of assistance.

The Ministry of Local Government also had a Department responsible for a programme called the Remote Area Development Programme (RADP). This programme was to assist persons who lived outside areas not reached by Government assistance services.

The programme started in the 1970s as the Basarwa Development Programme. With the discovery of more underprivileged groups, the programme was extended to cover all under privileged communities.

Under Botswana law, a group of 500 people qualified to be settled under the RADP but this number was reduced to 250 to bring social services closer to the people.

With specific reference to the Basarwa community relocated from the Central Kalahari Game Reserve (CKGR) the Commissioner wanted to know why they were relocated, how effective the relocation programme had been and why some of them were resisting relocation while others were returning to the game reserve.

The Coordinator of the RADP, **Mrs. Galaletsang Maakwe**, traced the history of the Basarwa in the CKGR and informed the delegation of the African Commission that the CKGR was not the original home of the Basarwa people. She indicated that the Basarwa were removed from the Ghanzi Farm in the 1960s and forced to settle in the CKGR by the colonial administration. She noted further that there were about 64 Basarwa RADPs across the country.

The objective of the relocation she said was to integrate the Basarwa Community into the entire society and treat them as equal citizens. She said that the Government was concerned about the high rate of illiteracy, poverty, landlessness and the nomadic lifestyle associated with the Basarwas. To empower them economically, the Government had to relocate them to an area where social services could be provided.

The Government therefore provided them with certain incentives including free education, free health care and accommodation. They were also given livestock and taught how to take care of them. They were given a sum of 12,000 pula each (an equivalent of 3000 US dollars).

**Mrs. Galaletsang Maakwe** noted that the Government wanted them to be part of the development programmes that affected their lives and as such was encouraging them to have their own representatives at local and national levels.

Commissioner Nyanduga thanked **Mrs. Galaletsang Maakwe** for the briefing on the Basarwa question and noted that since the matter was still in the Courts of Botswana, it would be prejudicial to discuss it in substance. He informed officials of the Ministry that the African Commission had undertaken a study on the issue of indigenous peoples and communities in Africa and adopted a concept framework paper on the same. He further informed the authorities that the paper will be widely circulated to Member States of the African Union and other stakeholders for their input, and that the African Commission's Working Group on Indigenous Populations and Communities in Africa would be visiting African countries to conduct further studies on these and related phenomena.

### **Meeting with the Coordinator of the National Aids Coordinating Agency (NACA) 16<sup>th</sup> February 2005**

The delegation met with the Coordinator of NACA on 16 February 2005. After introducing the delegation, Commissioner Nyanduga explained the process leading to the adoption of the African Charter, its entry into force and the establishment of the African Commission. He further explained the mandate of the Commission emphasizing on its promotional mandate, in the context of the mission to Botswana.

In this regard, he noted that the eleven members of the Commission have been allocated African countries in which they are required to undertake human rights promotion, promotion of understanding of the African Charter and the activities of the African Commission. He said that with particular reference to the visit to NACA, the Commission was of the view that HIV/AIDS apart from being a health issue, and affecting development, also had human rights issues associated with it, such as discrimination against people living with AIDS, the problem of the girl child having to drop out of school (the right to education), sometimes to take care of the sick parents or siblings the problem of children orphaned by the pandemic,

stigmatization, access to anti-retroviral medicines, etc. Based on this, the Commissioner noted that it was important to visit the Agency dealing with this scourge, and in particular to learn how the Agency is dealing with AIDS in general and the human rights issues arising there from.

In response, the Coordinator of NACA, **Mr. Batho Chris Molomo** agreed that HIV/AIDS had very serious human rights implications. He noted that structures had been put in place to curb the pandemic and to ensure the protection of the rights of those infected and affected. He cited in particular the National AIDS Council which is a policy making body chaired by the President of the Republic.

Representation at the Council was from the public and private sector, including NGOs and Chief Executive Officers (CEOs) of parastatals and other companies. He noted that the Council was divided into sectors and one important sector is the sector dealing with *ethics, law and human rights*. This sector served as an advisory arm of the Council on issues of law and human rights vis-à-vis persons living with AIDS.

He noted further that the Government was encouraging voluntary testing to enable people to know their status. However, he indicated that this approach had some human rights implications because not everyone had access to testing. He said there was a programme called "*Tebelopele*" which means "Looking forward" in Tswana. He said that under this programme, everyone who went for testing was counseled before and after the test, and those who tested positive were referred for treatment.

He observed that many people were not going for treatment because they did not know their status. As a result, the government had instituted routine testing based on the symptomatic signs identified by doctors in hospitals. Even under this routine testing, the patient had to consent whether in writing or orally. The age of consent had not been settled, but there was a policy decision that it should be fixed at 16.

The position governing voluntary testing had also not been legislated. However, the ethics, law and human rights sector of the National AIDS Council had been mandated to look at all legislation dealing with health issues and advise on issues related to HIV/AIDS.

On discrimination and stigmatization, the Coordinator of NACA informed the delegation that apart from the Constitution that deals with discrimination, there was no specific legislation dealing with discrimination against people living with HIV/AIDS. He however, noted that the Department of Labour was looking at legislation to ensure that nobody was victimized because of their status.

On stigmatization he said that because it is a moral issue, the matter was being dealt with through sensitization and education, and not through legislation.

On the treatment available to persons living with HIV/AIDS, **Mr. Batho Chris Molomo** said that the government had introduced free antiretroviral therapy. In this regard, anybody with a CD count of less than 200 was eligible for treatment. This however was limited to Botswana citizens and did not extend to non-nationals resident in Botswana. Non nationals could access this therapy if they had the resources, or through their medical aid schemes.

On care and support for people dealing with HIV/AIDS, the Coordinator indicated that the Ministry of Local Government offered assistance to children orphaned by HIV/AIDS and other diseases. This was because there was a thinking that the majority of orphans were due to HIV/AIDS. Government provided transport assistance to care givers to ensure they took proper care of terminally ill persons.

He admitted that there was no specific programme for widows. However, there was a programme for destitutes. There was a traditional support system which discourages wife or property grabbing, and noted that one could also seek recourse through the courts. He noted further that communities were encouraged to come together through what is called *community mobilization* to address issues of discrimination, stigmatization and care and support to people infected or affected by HIV/AIDS. There were also NGOs funded by the Government to provide care and other services.

The Commissioner wanted to know the extent to which people were coming forward for voluntary testing. The Coordinator indicated that testing was free of charge and many people were coming forward. That the Government was encouraging people to be open about their status, as this was one way to de-stigmatize the issue. This notwithstanding, he noted that confidentiality remained a key issue. A health worker or an employer must not divulge the status of an employee without his or her consent.

The Commissioner also wanted to know whether persons tested positive were required to bring their partner(s) for testing. The Coordinator indicated that there was no legislation on this and that there was no obligation to bring one's partner. He noted however that couples were being encouraged to come for counseling together so that they could be counseled and tested together.

He informed the delegation that children under 16 needed to get consent from their parents before being tested. In this regard he noted that there was a problem in that, children below 16 who might be willing to take the test would be afraid to go and ask their parents for consent as this would imply they were sexually active or had started having sex. Another related problem had to do with the situation of children who had been orphaned. The problem here was whose consent they would seek.

The Coordinator observed that there wasn't much difference between the urban/rural prevalence rate. He indicated, however that transit route towns and mining towns, especially those that were male dominated, had a higher prevalence rate. In terms of age, the rate was higher between the ages of 25 to 39, and there was a prevalence rate of 6% between the ages of 15 to 19.

In terms of voluntary testing, more females came forward for voluntary testing than males. Men were therefore a challenge and were being targeted. Some men also stopped their wives from enrolling into certain programmes because of the stigma associated therewith.

The Commissioner also wanted to know the strategies that had been put in place in schools to combat the pandemic. The Coordinator indicated that the Ministry of Education had developed a programme in its curriculum called *Programme for Life* which encouraged abstinence. Condom use was also encouraged. He explained that with regards to prisons, there was no policy to distribute condoms in prisons and there had not been any policy to deal with HIV/AIDS problems of prisoners apart from encouraging them to go for testing.

### **Meeting with the Botswana Police Service**

The delegation met with the Botswana Police Service (BPS) on 16 February 2005 at its Headquarters in Gaborone. After introducing the delegation, Commissioner Nyanduga gave an overview of the African Charter and the establishment of the African Commission. He informed the police officials that the mission of the delegation was to promote awareness of the African Charter and the activities of the African Commission. He indicated that as part of the promotional mandate of the Commission, the latter seeks to engage States in dialogue on best ways to enhance the promotion and protection of human rights. In doing so, the Commission engages not only government officials, but other stakeholders involved in the promotion and protection of human rights.

The Commissioner further indicated that the visit to the police was to understand the way the BPS as an institution, participates in the promotion and protection of human rights in Botswana. The Commissioner further emphasized the indispensable role the police play in the protection of people and their property. To this end, the delegation wanted to know the extent to which officials of the Botswana Police had been trained in human rights, and the kind of human rights problems they encountered in the course of duty.

In response, the Commissioner of Police, **Mr. Edwin Jenamiso Batshu** informed the delegation that the Botswana was governed by a democratic constitution and the action of each official within the police service must conform to the spirit of that constitution. He noted further that the Mission Statement and the Values of the Botswana Police Service had all been inspired by the same constitution.

On the question of police training, he indicated that the police invest a lot in human resource development to enable its officials comply with its Mission Statements and Values. He however, admitted that human rights is not taught as a specific module at the police training college, but rather a component of human rights is always brought in during the training, especially on criminal procedure matters. He noted further that there were three trainers who had been trained on human rights.

The Police Commissioner further informed the delegation that in 1995 the BPS together with the police in other SADC countries established the Southern African Regional Police Organisation (SARPO) to amongst other things, fight cross-border crimes and other related offences, especially motor car theft. At the first meeting of SARPO it was realized that the standards of the police service were different from country to country, especially in the manner in which they discharge their duties. He noted that police officers from other countries adopted rougher or unprofessional tactics in dealing with suspects. The SARPO Code was based on the BPS Code of Conduct.

It was therefore suggested that a code of conduct for SARPO be adopted to guide the activities of all police officers in the region. This code of conduct was adopted in 2001 and signed in 2002 in Zimbabwe. A training committee was set up to train all police officers in the region.

The Police Commissioner indicated that together with the Association for the Prevention of Torture (APT) 264 officers in the Botswana Police had been trained, 136 of whom are senior officers including station commanders. He also informed the delegation that the BPS took part in the drafting of the Robben Island Guidelines on the Prevention and Prohibition of Torture adopted by the African Commission at its 32<sup>nd</sup> Ordinary Session in October 2002.

Commissioner Nyanduga indicated that he was impressed by the way the BPS seemed to be discharging its duties and working with other police officers in the region to ensure that their activities conform to basic international standards. He however raised concerns about the fact that human rights training was not a specific module in the police training curriculum.

Commissioner Nyanduga also wanted to know the impact of community policing and the difference between the BPS and the Local Police of the Tribal Administration.

In response to the issues raised by Commissioner Nyanduga, the Police Commissioner informed the delegation that the police was developing a human rights curriculum for the training of its officials.

On the difference between the BPS and the Local Police, the Police Commissioner indicated that they were two different entities. He noted that while

the Botswana Police Service dealt with national issues including serious crimes, the Local Police was at local level, dealing with customary law issues and petty crimes. He admitted that there were cases of overlaps, and as a result, the government was trying to merge the two institutions.

With regards to community policing, the Police Commissioner indicated that the only way to measure success has been by working closely with the communities through programmes like *Community Forums* or *Crime Prevention or Neighborhood Watches*. He indicated that in schools, *Crime Prevention Clubs* have been established. As at December 2004, over 534 Crime Prevention Committees had been established all over the country. Every station commander reported on a quarterly basis on the activities of the Committees in his or her region. At the end of the year, the Commissioner of Police reports to government on the activities of the Committees through out the country.

### **Meeting with the Director of the Directorate of Corruption and Economic Crimes (DCEC)**

The meeting with the Director of the DCEC, **Mr. Tymon M Katlholo**, took place on 16 February 2005. Commissioner Nyanduga informed the Director of the DCEC that the delegation was on a promotional mission to the Republic of Botswana to engage the stakeholders on how to enhance the promotion and protection of human rights in the country.

He indicated that the visit by the delegation to the DCEC is to enable the African Commission understand the work of the DCEC and how it impacts on the enjoyment of human rights in Botswana.

**Mr. Tymon M Katlholo** thanked the delegation for having made time to visit the institution and noted that it was an indication that human rights cover every sphere of human activity.

He indicated that corruption by its nature undermines democracy, the rule of law, diverts resources from their legitimate goals, undermines the economy and inevitably undermines the enjoyment of human rights.

Regarding the role of the Directorate in the human rights sphere, he indicated that the Directorate operates like a law enforcement agency and as such observes the rules of justice and fairness. He indicated that the Directorate had the power of arrest and sometimes without a warrant. That it also had the power to detain suspects for up to 48 hours. In the exercise of its powers, the directorate complies with basic human rights norms.

The Director said that if allegations were made against any persons, the Directorate had to prove the case beyond reasonable doubt. He however noted that certain Sections of the Corruption and Economic Crime Act of 1994 had

raised controversy especially with regards to their human rights applications. In this regard, he referred to Section 34 of the Act which required that any one who had amassed wealth and could not explain how they got their wealth would be forced to explain. He said this was controversial because the person was being forced to provide evidence to incriminate him/herself.

The Commissioner wanted to know the extent to which Section 34 had been used and how effective it had been in curbing corruption. The Director indicated that only one case had been taken to court under Section 34 of the Act.

He also made mention of sections 7 and 8 which empowers the Directorate to demand information from anyone and if they failed to provide information within a specified period of time they are guilty of an offence.

Regarding the right to seek information, he indicated that Section 44 prohibits the Directorate from disclosing information about an ongoing investigation without reasonable cause. He noted that the Press has complained about this provision claiming that it violated the right to receive and impart information.

To address the situation, the Director informed the delegation that, he addressed the press regularly on a case under investigation without providing details about the investigation itself.

Commissioner Nyanduga wanted to know the professional and technical capacity of the investigators. The Director indicated that the investigators are drawn from a wide range of professions including lawyers, accountants, engineers, and the Directorate can outsource any investigation to any competent agency if the required skill was not available at the Directorate.

### **Meeting with the Chief Justice**

The delegation met with the Chief Justice (CJ) on 17 February 2005. After giving an overview of the African Charter and the activities of the African Commission, Commissioner Nyanduga informed the Chief Justice of the purpose of the mission of the African Commission to the Republic of Botswana. He indicated that in terms of Article 26 of the African Charter, the judiciary is recognized as a guarantor of the rights enshrined in the Charter, and also noted that the African Commission has adopted a resolution on the Independence of the Judiciary, and Principles of Fair Trial in Africa.

The Commissioner noted that the Judiciary being an important institution in the protection of human rights, it was only fitting that the delegation of the African Commission in a promotional mission pays a courtesy call to the CJ to learn how the Judiciary in the country was ensuring that citizens enjoy their rights.

He said the delegation would in particular like to know the jurisdiction of the different courts and in particular how the local courts administer customary law especially to persons who are not indigenes of that particular custom/region. The Commissioner also said that the delegation would like to know the role of the CJ in the electoral process, and the extent to which human rights as a discipline of law had been exposed to lawyers and judges.

In his response, the CJ thanked the delegation for having found time to come and visit him. He said that most judges are aware of the African Charter and the activities of the African Commission through readings and seminars and noted that it is important that from time to time, the Commission should make visits to publicise itself.

He said the African Charter seemed to be more advanced than the constitution of Botswana especially as it incorporates economic, social and cultural rights, which were not part of the constitution of Botswana.

On the training of judges on human rights, the CJ noted that there was no specific human rights training for judges. However, judges were regularly sent to attend seminars and training courses on human rights, and this had led to the changing of several laws including the Marital Powers Act.

He said that judges are extremely vigorous on human rights litigation and that the judiciary is trying to urge Government to examine all the treaties it had ratified and see how to domesticate them. He noted further that even though there had been no domestication, the judiciary still invoked international human rights treaties.

He informed the delegation that the Botswana judiciary is part of the Association of Judges of the Southern African Development Community (SADC) countries which meets regularly to discuss various issues including recent developments on human rights. The judges also attend seminars and training courses with other Commonwealth judges. These meetings enable the judges to exchange ideas and information on various issues including human rights.

The CJ noted that there was no interference in the affairs of the judiciary by any State organ or individual, and that Botswana has a very litigious population which had resulted in many cases coming to court resulting to a lot of delays in the disposal of cases.

The CJ said that there was scope for improvement in then judiciary in his view because it did not have sufficient capacity such as court buildings and trained judges to keep up with the growing demand.

He said the motto of the Judiciary was *to bring justice to the people*, and in keeping with this motto, Magistrate Courts were being built in localities nearer to

the people. He noted that if the Judiciary wanted to provide justice for all, people must have access, including physical access to justice. He admitted that access to justice was difficult for the poor as they could not afford good lawyers while the Legal Aid was rudimentary and did not adequately assist the poor.

On sentencing, the CJ noted that some years ago, politicians thought judges were lenient in their sentencing of criminals and as such Parliament imposed mandatory minimum sentences for certain offences. This resulted in many people being condemned long term prison sentences resulting to overcrowding in prisons. The law has recently been revised to give judges some discretion in deciding sentences.

On the administration of Customary Law by the Customary Courts, the CJ noted that most Botswana customs are fairly homogenous and as such any person could be tried under customary courts throughout the country. He noted however that individuals were at liberty to choose where they wanted to be tried. Foreigners in particular always opted to be tried in the subordinate courts rather than in the customary courts.

He said Customary Courts administered Customary Laws and after the last appeal process from the Customary Court, a dissatisfied party could still appeal to the High Court. He noted that the main attraction of the Customary Court was that it is easily accessible and the process is quick and straightforward, while many people found the process of the common law courts to be cumbersome.

Regarding his role in the electoral process, the CJ noted that prior to the establishment of the Independent Electoral Commission (IEC) in 1998, the constitution provided in respect of registering for the position of the President that political parties register with the Chief Justice of the High Court. The IEC conducts all the other elections and proclaims the results while the President is elected through Parliament.

When a candidate wants to stand or register to become an MP, he/she must also indicate his or her choice for President. After the MPs have been elected, the IEC then tallies the results and presents them to the Chief Justice who certifies them and announces the results. The candidate attracting support from the highest number of MPs is declared by the CJ as President. The President is not elected from Parliament. In other words, the President is elected by only 40 MPs.

On corporal punishment, the Chief Justice indicated that the judges in the Court of Appeal are very human rights conscious and had in respect of motor car theft declared corporal punishment unconstitutional.

The Commissioner wanted to know whether it wasn't time for the judiciary to start thinking of adopting the inquisitorial system of justice so as to ensure that those who were less fortunate to secure a lawyer are also protected. He also wanted to

know whether the judiciary had explored the possibility of Alternative Dispute Resolution (ADR)

In response, the CJ noted that rules are made for the courts and not the courts for the rules and the judiciary tries to ensure that the rules do not stand in the way of justice. He indicated that if a rule stands in the way of justice, the judge was at liberty to waive the rule without prejudice to the other party. He said the judiciary tries to explain all the legal rights to the parties so as to enable the parties know their rights. He said that the judges ensured that a rule does not interfere with a fundamental law of justice.

The Chief Justice added that the judiciary was thinking about the inquisitorial system and had plans of starting a small claims court to reduce the time spent in court and the cost. He also indicated that the judiciary had undertaken a study on the ADR but was yet to implement it.

### **Visit to Gaborone Prison**

There are four prisons in Gaborone, the capital. They include the Boys Prison, the Women's Prison, the First Offenders Prison and the Central Prison.

The delegation visited two prisons – the Boys Prison and the Women's Prison. The delegation also visited the Sick Bay (Clinic).

### **The Gaborone's Boys Prison.**

This was the only Boys Prison in the country. The prison was meant to hold 120 inmates but at the time of the visit had 277 inmates that could be broken down as follows:

- Local remandees	19
- Foreign remandees	08
- Foreign convicts	33
- Botswana convicts	206
- High Court remands	11

The prison had 25 staff members, 24 male and 1 female. There were 3 social workers – 2 male and one female. The prison held persons of 21 years and below and had six cells of the same sizes – 14m x 4.5m.

The prisoners were given basic skills such as carpentry, agriculture and brick laying. Inmates were also taken for literacy classes. The delegation observed that the cells were overcrowded. Prisoners did not sleep on beds. The authorities explained that the inmates were not supplied with beds due to lack of space and as such they slept on mattresses spread on the floor. The mattresses were worn

out sponge. The level of cleanliness and hygiene was fairly good, even though toilet and bathroom facilities require upgrading. Tiles were broken or peeling off.

They were allowed visits for 15 minutes per month and had recreational facilities such as football, cards, and darts. They were fed three times a day – breakfast, lunch and supper. The authorities informed the delegation that another prison for young offenders was being built.

### **The Women's Prison**

The women inmates were separated from the male inmates. They had only female guards. At the time of the visit, there were 62 inmates plus 4 kids. They included 23 remands - 15 locals, 8 foreigners (Zimbabweans), 2 of them Botswana and 2 Zimbabwean who had small children, 10 High Court remands and 12 local court remands. The Women Prison had a staff strength of 23. At the time of the visit, 4 were on leave.

The inmates were taught basic skills in agriculture, sewing and mat making. There were six cells and a dining hall which was also used as a workshop. Due to congestion and usually during the hot season, some inmates are allowed to sleep in the dining hall. Each cell of 3m x 5m holding 7 inmates. Five of the inmates sleep on beds while the other two sleep on mattresses. Congestion was a major problem. Some Prisoners slept in the main hall which is also used as dining hall. The inmates produced vegetables for their meals and any surplus was sold to the public and the money given to the government.

According to Botswana law, children can stay in prison with their mothers up to the weaning stage, but there is no specific age. The children could then be taken by the Social Welfare Department to the SOS Children Village or to other charitable institutions.

For unknown reasons, authorization to visit the Central Prison, which is also the maximum security prison was not granted.

### **The Sick Bay (Clinic)**

The four prisons in Gaborone had a small clinic called the Sick Bay. The clinic had three nurses with no doctor. It also had a small dispensary. The clinic had 2 wards – one with six beds and another, the isolation ward, with 3 beds.

## **Briefing meeting with the Permanent Secretary – Political Affairs in the Office of the President**

After visiting all the different stakeholders, the delegation paid another visit to the Office of the President and met the Permanent Secretary to brief her on the preliminary observations of the mission.

Commissioner Nyanduga informed the Permanent Secretary that the delegation had met with a cross section of human rights stakeholders in the country, including the Chief Justice, the Ombudsman, the Commissioner for Prison, the Police Commissioner, the Coordinator of the National AIDS Coordinating Agency, the Director of DCEC, the Permanent Secretary and Deputy Permanent Secretary of the Ministry of Local Government and the Ministry of Labour and Home Affairs, officials of the Ministry of Foreign Affairs, and Members of the Civil Society.

He indicated that in his discussion with this cross-section of people, the delegation had learned a lot about the human rights situation in the country and greatly appreciated the manner in which the different officials responded to the different human rights issues that were raised.

The Commissioner informed the Permanent Secretary that as the main office responsible for coordinating human rights in the country, there were certain issues that the delegation was particularly interested in raising with her office. These included the following:

- the ratification of the Protocol on the Human Rights Court and the Protocol on the Rights of Women in Africa;
- Botswana's State Reporting obligation under Article 62 of the African Charter; and
- the measures Botswana has taken to implement the African Commission's recommendations on the John Modise case.

The Commissioner also informed the PS that there was currently a case against Botswana before the African Commission dealing with the question of the death penalty, and that since the matter was still being considered by the African Commission he wouldn't want to discuss the substance but would like to draw her attention to the fact that the African Commission had adopted a resolution on a moratorium on the death penalty and was currently looking at the question of the death penalty on a broader scale across the continent.

He also informed the PS that the Commission had initiated a study on the phenomenon of indigenous populations, and to this end had adopted a conceptual framework paper on the rights of indigenous populations and communities in Africa. He informed the PS that the African Commission's

Working Group on Indigenous Populations would be visiting Botswana in the near future to discuss this phenomenon.

Regarding the question of illegal immigrants, especially Zimbabweans, the Commissioner noted that the delegation had learnt that corporal punishment was not applied only to illegal immigrants but was part of the legal system of the country. The Commissioner wanted to know whether Community Service could not be used as an alternative to corporal punishment.

On the police, the Commissioner expressed the need to increase human rights training of the police and noted that human rights should form part of the module or curriculum in police training. He informed the PS that by and large he appreciated the human rights thinking and activities of the Botswana Police.

On the media, the Commissioner expressed the concern raised by some media practitioners that the media in Botswana did not seem to enjoy freedom of expression and of the press because of the monopoly of the government in this regard. The media practitioners had also complained about the prohibition of government advertisement in some sections of the private media.

Lastly, the Commissioner wanted to know whether the government was not considering establishing a national human rights commission or upgrading the office of the Ombudsman into one.

In her response, the PS thanked the delegation of the African Commission for the visit and said that she hoped the visit will assist government to improve on its human rights activities.

On the ratification of the protocols she said that the government was working on the ratification of the protocol on the rights of women and indicated that Mrs. Gracia Machel Mandela had visited the President on the same matter.

Regarding the ratification of the protocol on the African Court on Human and People's Rights, the PS informed the delegation that the matter was being handled by the Attorney General's office.

On the question of state reporting, the PS admitted that Botswana had not submitted any report to the African Commission and noted that that should not be interpreted as disrespect on the part of Botswana to the Commission. She said the problem had been lack of capacity. She informed the delegation that to solve this problem, the Ministry of Foreign Affairs had established an inter ministerial committee on conventions that would deal with all state reporting obligations of Botswana. She noted that she was particularly grateful that the Commission accepted to facilitate a workshop on state reporting.

On the Modise case, the PS informed the delegation that Modise had been granted citizenship by registration which he had accepted and the only problem in implementing the Commission's recommendations was quantifying the compensation to be paid to Modise. She noted that the government had offered a settlement package to Mr. Modise but the matter was still being discussed with his lawyers.

On the question of indigenous populations, the PS said that her Government would be interested to receive the African Commission's Conceptual Framework Paper and that the African Commission's Working Group on Indigenous populations was welcome to visit the country.

On the question of the death penalty, the PS informed the Commissioner that the Botswana public believed very strongly on the death penalty and that before the death penalty was actually administered on a person, it had to go through an elaborate process of adjudication thus eliminating any possibility of error. On corporal punishment, the PS noted that among other things, it was applied to decongest prisons and to ensure that people didn't lose their jobs. She noted that corporal punishment was originally meant for young offenders and petty offenses, but very recently, it was extended to include persons up to the age of 40.

On the question of the private media, the PS noted that there was complete freedom of expression in Botswana. She said the media should rather be talking about inadequate resources to operate their business.

Regarding the establishment of a national human rights commission, the PS said that it was a decision that could only be taken by government and noted further that the mandate of the Ombudsman extended to human rights issues.

### **The Workshop on State Reporting: 17 – 18 February 2005**

When the government of Botswana accepted the request of the African Commission for a promotional mission to be undertaken to the country, it also requested the Commission to facilitate a two days workshop on State Reporting to train authorities dealing with the country's reporting obligations. Following this request, the Commission proposed to extend the mission to end of 20 February so that the Workshop should take place on 19 and 20 February. However, in view of another workshop on a similar subject organized by the United Nations scheduled to begin on 21 February, the government requested the Commission to instead use the first three days of its mission – 14 – 16 to meet with stakeholders and the remaining two days 17 – 18 to facilitate the workshop so as to give participants time to prepare for the UN organized workshop. The Commission obliged.

The workshop was aimed at training Botswana authorities responsible for the preparation of the state report of Botswana for submission to the African Commission. The workshop was attended by more than 35 participants drawn from different sectors of the economy and was opened by the Permanent Secretary for Political Affairs in the Office of the President, **Mrs. Tuelonyana Ditlhabi Oliphant**.

In her opening address, **Mrs. Oliphant** said that she was delighted that the African Commission was able to accept the Government's request to facilitate a Workshop on State Reporting on the African Charter. She said Botswana was not proud of its record of non Reporting to the African Commission and added that the Commission should be assured that the Government was treating the Workshop with utmost importance. She said the non fulfillment of its state reporting obligation to the African Commission was not due to negligence and disrespect for the Commission but rather due to capacity constraints beyond the control of the Government.

She said that the Government had over the years made concerted efforts to build capacity to meet the reporting obligations of Botswana. In this regard she said Botswana had received support from the United Nations Development Programme (UNDP) and some NGOs who had sponsored workshops on reporting to certain human rights bodies.

She said the Workshop was another milestone in building capacity across Government institutions, NGOs and civil society and said that was the beginning of a collaborative working relationship with the Commission as far as reporting was concerned.

She said further that the Government had invited participants from a cross section of the society so as to accommodate different opinions in the report writing exercise. She urged participants to utilize the workshop opportunity to appreciate the requirements of the African Charter and to actively participate in the deliberations. She also informed the participants that the workshop was the beginning of a series of workshops that will eventually culminate into a report to be submitted to the African Commission.

In response, Commissioner Nyanduga thanked the PS and said the African Commission was pleased to have been given the opportunity first to undertake the mission and secondly to facilitate the Workshop.

## **Conduct of the Workshop**

The Workshop took place for two days in the *Tlotlo Recreational Centre*. It was divided into two parts. The first part dealt with three issues, namely,

- an introduction to the African Charter: a broad overview and interactive discussion;
- substantive discussion of the provisions of the African Charter; and
- the content and structure of a State Report.

The second part of the Workshop dealt with practical exercises in which the participants were broken up into groups to prepare reports on the following subjects:

- Issues of concern from an NGO perspective;
- Introduction (Back Ground information) of the Report, including civil and political rights
- Economic, Social and Cultural Rights;
- Group Rights; and
- Shadow Reports and Concluding observations and recommendations.

Each group appointed a Rapporteur that was to present the report before “the African Commission”. The Rapporteurs came together to constitute the State delegation to the Commission.

Some of the participants were selected to sit as “the African Commission”. A “Commissioner Rapporteur” was also selected from amongst the “Commissioners”. The reporting session was Chaired by Commissioner Nyanduga.

The “State delegation” presented the report and the “Commissioner Rapporteur” responsible for Botswana was given the floor to comment on the report. There after other “Commissioners” were invited to ask questions.

The session was very interactive and very thought provoking questions were asked to the State delegation.

The Commissioner then gave the floor to other participants to ask questions and make comments on the exercise. Participants made very instructive comments and contributions. From the exercise it could be said the participants fully understood the exercise.

## **Closing of the Workshop**

The Workshop was officially closed by the Deputy Permanent Secretary in the Ministry of Foreign Affairs and International Cooperation on 18 February 2005.

The DPS thanks the participants and the African Commission and said he hoped the participants found the exercise very useful. He said the Government would be waiting for the findings of the African Commission's mission to enable it deal with lapses if any.

He reiterated that the Workshop was the beginning of a long process in the preparation of the country's State report to the African Commission and said that the preparation of the report was the duty of all Batswana. He said that the Ministry is simply a facilitator and promised that the Government will do all it could to ensure that a report is submitted to the Commission before the end of 2005.

## **Conclusions and Remarks**

On arrival in Botswana, the delegation discussed with the authorities of the necessity to include other personalities in the programme, notably, the leader of the Opposition and the Speaker of the National Assembly. Despite frantic efforts made by the organizers, it was not possible to meet either of them as Parliament was in session.

The delegation was also not able to meet with the Attorney General as was originally scheduled due to other pressing engagements. The meeting with the Botswana Defence Force was cancelled due to lack of time and the meeting with the Botswana Red Cross took place during the workshop. The Botswana Red Cross explained their work, particularly at the Refugees Centre in Francistown. It also noted that one of the major problems facing refugees is lack of access to HIV/AIDS treatment in Botswana. This notwithstanding, the programme went on very well.

The delegation noted with concern the very strong feeling at government level and even among the other stake holders consulted that the death penalty and corporal punishment should be retained. During the workshop attended by participants from a cross section of the society, the same strong sentiments were expressed. These are two areas where the Commission shall continue to engage the Botswana Government.

On indigenous populations, and in particular on the Basarwa matter regarding their relocation from the CKGR, the government position is based on the State's duty to ensure a better standard of living for all citizens and the Basarwa, while on the other hand, the Basarwa representatives regard the relocation as

dispossession of their land. At the time of the visit, the matter was in the High Court of Botswana.

Notwithstanding its failure to submit its state reports, it was evident that the Republic of Botswana was keen to enhancing its cooperation with the African Commission. The delegation was informed that the African Commission's recommendations on **communication 97/93 – John Modise/Botswana** had been partially implemented and the only problem with its full implementation was assessing the quantum of compensation, which we hope the parties will resolve amicably. On the recommendation to grant John Modise citizenship by birth, the Government argues that Mr. Modise has not been denied any right as a citizen of Botswana.

The institutions responsible for the promotion and protection of human rights in Botswana were relatively active. The police, the judiciary, prisons were meeting the international standards in the performance of their duties. There was concern though that the BPS did not have a human rights module in its training curriculum. The introduction of this module would greatly enhance its efficiency vis-à-vis the respect for human rights. The prisons visited had very few facilities for rehabilitation and recreation. The cells were congested and the sleeping conditions, especially in the Boys prison needed some improvement. Like with the Police, prison officials did not undergo any specific human rights module in their training.

The NGO community in Botswana is very vibrant and there seemed to be cooperation between the Government and NGOs.

### **Recommendations**

Three days were not enough to meet all the relevant human rights stakeholders in the country. However, the individuals, institutions and authorities consulted during the mission gave the delegation of the African Commission a fair picture of the human rights situation in the country on which the Commission can rely and make an informed opinion to propose relevant recommendations on how to enhance the human rights situation in the country.

## **The African Commission makes the following recommendations:**

### **On the Police:**

The Government should introduce human rights as a module in the training of the police

### **Indigenous populations – the Basarwa community**

The Government should engage the indigenous Basarwa communities in further dialogue and explore ways of communicating with them. Assistance given to them should be accompanied with training and support mechanisms, uplift their social wellbeing without prejudicing their culture and traditions.

### **On the Death penalty**

The Government should adopt a moratorium on the question of the death penalty and undertake extensive studies on the human rights implications of the death penalty. Subjecting the question of the death penalty to public opinion, especially if the public has not been sensitized on the human rights implications, will not produce a fair result.

### **On Corporal punishment**

The Government should explore an alternative to corporal punishment because it has been found to be a degrading and inhuman punishment. In the case of Botswana, it can also be said to be discriminatory as it is administered only to men, and only to men of a certain age bracket. Alternatives such as community service could be adopted.

### **On the Ombudsman**

The Government should explore the possibility of establishing a National Human Rights Commission in conformity with the Paris Principles or elevate the Ombudsman to that status.

To allay criticisms regarding the independence of the Ombudsman, its budget should be voted by Parliament and the Ombudsman should be appointed by Parliament and confirmed by the Executive.

### **State Reporting**

The African Commission welcomes the efforts by the Government to submit its overdue state reports. The Government should redouble its efforts towards meeting its State Reporting obligations as contained in Article 62 of the African Charter.

## **Ratification of Protocols**

The Government of the Republic of Botswana should take the necessary steps to ratify the Protocol on the establishment of the African Court on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa.

In view of the fact that the African Union has decided to merge the African Court on Human and Peoples' Rights and the African Court of Justice, the Government of the Republic of Botswana should also take the necessary steps to ratify the protocol on the African Court of Justice.

## **NGOs**

The African Commission would like to see more Botswana NGOs apply for observer status and take part in the sessions of the African Commission.

## **The Presidency**

Botswana is one of the most stable democratic states in Africa based on a long tradition of multiparty politics, a vibrant and prudentially managed economy. Botswana has since 1969 regularly held popular general elections for its members of parliament, during which time the President of the Republic is elected.

Bearing in mind that the Head of State of Botswana is an executive President, with wide ranging powers, the African Commission recommends that Botswana Government explore the possibility of constitutional reforms to allow for the election of the President by adult universal suffrage, in accordance with Article 13 of the African Charter on Human and Peoples' Rights.