

Mandate of the Special Rapporteur on the rights of indigenous peoples.

REFERENCE: AL Indigenous (2001-8)
BWA 1/2013

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the rights of indigenous peoples pursuant to Human Rights Council resolution 15/14.

In this connection, I would like to bring to the attention of your Excellency's Government the allegations received concerning **the situation of the Basarwa and Bakgalagadi indigenous peoples in the Central Kalahari Game Reserve.**

As your Government is aware, the situation of Basarwa and Bakgalagadi indigenous peoples who were removed by the Government from their traditional lands located within the Central Kalahari Game Reserve was the subject of special attention in my June 2010 report on the situation of indigenous peoples in Botswana (A/HRC/15/37/Add.2). In my report, I took note of the 2006 decision by the High Court of Botswana in the case of *Roy Sesana and Others v. The Attorney General*, which found that the removal of indigenous peoples from the Reserve constituted a wrongful and nonconsensual deprivation of their lawfully occupied land (para. 70). I recommended that your Government fully and faithfully implement the *Sesana* judgment and take additional remedial action in accordance with international standards, including "facilitating the return of all those removed from the reserve who wish to do so, allowing them to engage in subsistence hunting and gathering in accordance with traditional practices, and providing them the same government services available to people of Botswana elsewhere, including most immediately, access to water" (para. 97).

Since publication of my report, I have continued to receive information alleging ongoing noncompliance of the *Sesana* decision by the Government and the dire human rights conditions of the indigenous residents of the Central Kalahari Game Reserve.

According to the information received:

There are approximately 500 to 600 Basarwa and Bakgalagadi indigenous residents living in five communities within the Central Kalahari Game Reserve.

Approximately 2,200 to 2,400 Basarwa and Bankgaladi people who were former residents of the Reserve, but who have been evicted from their traditional lands by the Government, now live in the resettlement sites of Xere, New Xade and Kaudwane. In the *Roy Sesana and Others v. The Attorney General* decision of 2006, the High Court of Botswana held that the Government's refusal to allow the applicants in the case to enter the Reserve unless they were issued with permits was unlawful and unconstitutional.¹ It is alleged that according to this decision, all former residents of the Reserve who wished to return are entitled to do so without any permit or other type of authorization from the Government.

However, the Government has allegedly maintained a position that only the 243 applicants who were named in the *Sesana* case can return to the Reserve without obtaining a temporary entry permit. The Government has stated that other former residents of the Reserve who were not applicants in that case would need temporary entry permits, which are allegedly often only valid for one month. Even children of applicants in the *Sesana* case have allegedly been required to obtain these permits to visit their parents. Reportedly, indigenous peoples whose temporary permits expire run the risk of arrest if they remain in the Reserve.

According to the allegations, officials from the Department of Wildlife and National Parks have also refused to issue hunting licenses to indigenous residents of the Reserve. This is despite the fact that in the *Sesana* case, the High Court held that it was unlawful and unconstitutional for the Government to refuse to issue special game licenses to indigenous peoples in the Reserve.² It has been alleged that Government officials have justified these actions because they view the traditional hunting and gathering practices of the Basarwa and Bakgalagadi as antithetical to the conservation objectives of the Reserve.

Indigenous residents in the Reserve have allegedly been criminally prosecuted, arrested, harassed, beaten and intimidated by police and park officials for engaging in their traditional subsistence hunting and gathering activities. For example, in November 2012, two Basarwa men were allegedly arrested, beaten and fined by police officials for killing an antelope in the Reserve. Similarly, in January 2013, three Basarwa children were put in jail for being in possession of antelope meat, although they were subsequently released. In the same month, a Basarwa man was allegedly beaten by wildlife scouts for gathering traditional fruits within the Reserve. It has also been reported that four other Basarwa men currently await trial after having been arrested in April 2012 for having hunted in the Reserve.

In November 2012, the Government reportedly announced that it would indefinitely suspend all commercial hunting of wildlife in 2014 due to declining wildlife populations. Concern has been expressed that this ban will lead to further

¹ *Roy Sesana and Others v. The Attorney General*, (52/2002) [2006] BWHC 1, para. 55(7).

² *Ibid.*, para. 55(5)(6).

restrictions on the traditional hunting activities that are an integral part of the culture of indigenous residents in the Central Kalahari Game Reserve.

It has also been alleged that the Government has not provided residents of the Reserve with services such as food rations, water, health or schooling for children. This has led to residents having to travel to the resettlement sites of New Xade, Xere or Kaudwane in order to obtain most of these services.

With regards to the provision of water in the Reserve, residents have had to initiate litigation in order to be able to obtain water from the Mothomelo borehole, a major water source in the Reserve that was previously closed by the Government. In a January 2011 ruling, the Court of Appeals of Botswana held that the indigenous applicants in the case did not need Government authorization to use the water at the Mothomelo borehole and that they could re-open the borehole and open new wells in that vicinity. According to the information received, the Mothomlo borehole could benefit approximately 200-300 indigenous residents in the Reserve.

Despite this legal victory, it is alleged that residents throughout the Reserve still face critical food and water shortages. Government officials have allegedly sought to prohibit visitors and tourists from taking water and food to give to people in the Reserve. There is concern that these types of restrictions along with restrictions on hunting and gathering and the lack of provision of basic services are intended to force residents to move out of the Reserve and into the resettlement camps previously built by the Government before the *Sesana* case.

According to the information received, indigenous residents of the Reserve have continually called on the Government to meet with them to discuss implementation of the 2006 High Court ruling, the provision of food and other services, and the issuance of special hunting licenses. A “negotiating group” comprised of Government representatives, Reserve residents, and non-governmental organizations were reportedly formed in 2008 to address issues related to the Reserve. It is reported that this group has only met five times, the last meeting having being held in December 2010. There are reportedly no indications from the Government about when this negotiation group would meet again.

While I do not wish to prejudge the accuracy of the above allegations, I would like to refer your Excellency’s Government to relevant provisions of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007 and endorsed by Botswana.

As stated in article 18 of the Declaration, “[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures.” Article 20 provides the right of indigenous peoples to “maintain and develop their political,

economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.” In several articles, the Declaration affirms indigenous peoples’ rights to the lands, territories and resources that they traditionally owned, occupied or otherwise use or acquired, and for States to give legal recognition to those lands, territories and resources with due respect to their customs, traditions and land tenure systems. Furthermore, article 10 provides that indigenous peoples “shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned...”

I would also like to refer your Excellency’s Government’s attention to the consideration given by the Committee on the Elimination of Racial Discrimination to the situation of San/Basarwa indigenous peoples in the Central Kalahari Game Reserve under its early warning and urgent action procedure. In 2010, the Committee expressed concern about the alleged lack of implementation of the *Sesana* decision by the High Court of Botswana and requested your Government to submit comprehensive information on the situation of the San/Basarwa indigenous peoples and the implementation of this judgment.³ The Committee has previously brought this issue to your Government’s attention in its 2006 Concluding observations on Botswana, where it recommended that your Government pay close attention to the cultural ties that bound the Basarwa to their ancestral land; to protect their traditional economic activities such as hunting and gathering practices; to study all possible alternatives to their relocation; and seek the free, prior and informed consent of the persons and groups concerned.⁴

In light of the information and allegations contained in this communications, I would be interested in knowing your Excellency’s Government’s views on the accuracy of the information contained in this letter, and I would be grateful to receive any additional information your Government may deem relevant. In particular, I would like to know further information about:

1) The measures taken by your Government to implement the 2006 High Court decision in the case of *Roy Sesana and Others v. The Attorney General*, particularly with regards to the return of Basarwa and Bakgalagadi indigenous peoples who were removed by the Government from their traditional lands located within the Central Kalahari Game Reserve, and their rights to continue engaging in traditional hunting and gathering practices in the Reserve.

2) In this connection, please explain whether your Government has treated applicants and non-applicants to the *Sesana* case differently for purposes of their entry or return to the Central Kalahari Game Reserve, and if so, please state the reasons for the difference in treatment.

³ Communication from the Committee on the Elimination on Racial Discrimination to Government of Botswana (12/03/2010), available at: http://www2.ohchr.org/english/bodies/cerd/docs/Botswana_12.03.2010.pdf.

⁴ CERD/C/BWA/CO/16, para. 12.

3) The process for obtaining special game licenses in the Central Kalahari Game Reserve and whether any licenses have been issued to indigenous residents of the Reserve so that they may engage in traditional subsistence hunting. Please provide information about how traditional subsistence hunting within the Reserve will be affected by the Government's alleged decision to ban commercial hunting of wildlife in 2014.

4) The measures taken to investigate, prevent, and sanction the alleged acts of intimidation, violent assault, and harassment by police and park officials of indigenous peoples engaging in traditional hunting and gathering practices in the Central Kalahari Game Reserve.

5) The measures taken to ensure that residents of the Central Kalahari Game Reserve have adequate access to basic social, medical, food, water and other services in the Reserve.

6) Information regarding the work of the negotiation group or any other efforts by your Government to engage in dialogue with the residents of the Central Kalahari Game Reserve in order to resolve their issues of concern.

I would appreciate a response from your Excellency's Government within 60 days. I undertake to ensure that your Excellency's Government's response will be taken into account in my assessment of this situation and in developing any recommendations that I make for your Excellency's Government's consideration pursuant to the terms of my mandate.

Please accept, Excellency, the assurances of my highest consideration.

James Anaya
Special Rapporteur on the rights of indigenous peoples