

# News Notes on the outcome of the ruling in the Central Kalahari Game Reserve case, Botswana

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The ruling in the case on rights to the Central Kalahari Game Reserve can be looked at from three perspectives.

- a) The judgement on December 13 was considered a success from the point of view of the applicants.
- b) The follow up has sought to minimise the impact as much as possible, heralded by a rather restricting statement from the Attorney General.
- c) And there has been a new kind of engagement by Botswana's government in the international arena.

The court ruling and subsequent decree from the Attorney General are clearly related. It is suggested that the international attention caused by the court case also was a strong motivation behind the Government of Botswana's engagement as leading actor behind the deferment of the Declaration on the Rights for Indigenous Peoples in the UN, November 2006 and the subsequent decisions of the African Union in January 2007 (see 'Wider implications' below). This is a new strategy to contain possible negative (for the government) impact of the outcome of the court case, formulated well before the actual ruling.

## The Case

The case was raised in 2004 by former residents of the Central Kalahari Game Reserve who had been relocated in 1997 and 2002. They pleaded their right to stay on in their traditional territories, and claimed that they did not relocate voluntarily. They asked that basic services (health, food, water) that were withdrawn in 2002 should be restored. The Government of Botswana argued that the inhabitants needed to move in order to get full access to public services, and further that human settlement is not allowed in a Game Reserve. They said the move was voluntary, and in the San's best interest.

The formulation of the claim was spearheaded by local organisations: the First People of the Kalahari (FPK) and the Working Group of Indigenous Populations in Southern Africa (WIMSA Botswana), and

supported by local and international Human Rights organisations and donors. Survival International has waged a highly publicised campaign against the relocation, calling for boycott of Botswana's tourism and diamond industry. They have also covered legal expenses during the greater part of the trial.

When the final submissions were delivered in September 2006, more than two years had passed. The case had then run to 134 days in court, 4500 pages of legal documents, 19,000 pages of transcript of witness statement, and 750 pages of final arguments from the two sides. It had been the longest (and no doubt the most costly) case in Botswana's history.

## The judgement

Judgment in the case was delivered by three High Court judges on the 13 December, 2006. In recognition of the public interest in the case, the High Court of Botswana allowed live TV reporting from the delivery of the judgement, which was watched by several hundred San outside the courtroom and relayed as breaking news throughout the day on BBC World News and other global channels.

The three judges each gave a separate judgement which meant that their readings (400 pages) took a whole day. It added to the excitement that the first judge's statement came out as very favourable to the respondent (the Government) while the second judge was mainly in favour of the San applicants. Thus the third judgement would be decisive.

The final outcome was that the applicants were given the right to return to the Game Reserve, while on the other hand the government was not instructed to provide services inside the reserve. More specifically, as the votes were counted, the High Court made a ruling in favour of the applicants on the question of:

- a) whether before 2002, the residents were in possession of the land which they lawfully occupied
- b) whether they were unlawfully or wrongly

deprived of the land without their consent

c) whether refusal by the Government to issue Special Game Licenses (SGL) was unlawful and unconstitutional and

d) whether the refusal of the Government to allow residents to enter the Game Reserve without a permit was unlawful and unconstitutional.

The Court ruled that the residents had lawfully occupied the land and were unlawfully deprived of it without their consent. It held that the refusal by the Government to issue SGL to them was unlawful and unconstitutional. The Court also ruled that it was unlawful and unconstitutional to deny residents entry into the CKGR.

This was perceived as a considerable victory. However, the High Court made a ruling in favour of the respondent on the question of:

e) whether the termination of basic and essential services (health, food and water) was unlawful and unconstitutional and

f) whether the Government is obliged to restore the services.

On these issues the Court ruled that the termination of services was neither unlawful nor unconstitutional. It also decided that the Government was not obliged to restore basic and essential services.

### **The day after**

The excitement over the ruling went largely unabated by an injunction by the Attorney General the following day. Only the 189 individuals listed as applicants in the case, and their minor children, would be allowed to enter the CKGR without permits, but would need to produce identity documents. Moreover, it was prohibited to bring in domestic animals, only non-permanent structures would be allowed, and transport of water to be controlled by the Director of Wildlife and National Parks.

The first people who tried to return to their old homes in Central Kalahari were stopped at the border for lack of adequate documentation, but these restrictions were later withdrawn and around the end of the year some forty people had returned.

It was widely welcomed that the Government of Botswana accepted the judgement and did not take the case to the Court of Appeal. However, as the judges also emphasised in their statements, the development problems facing the applicants, and other San of Botswana, were not solved by the outcome of this case. This can only happen through dialogue and negotiations. The uncompromising attitude taken by the Attorney General was reiterated when President Festus

Mogae visited New Xade, the largest new settlement outside CKGR. Dauqoo Xukuri of the FPK said, "I had expected Mogae to explain to the people the ruling of that High Court and how things could be improved" (*Mmegi Monitor* 22.01.07), but Mogae's message was seemingly unchanged by the recent court case: he was praising the considerable investment in development in New Xade and promising more, while deriding those who wanted to return to ancient ways and "chasing wild animals barefooted".

In practice, then, there is still a stalemate over CKGR. Some more people have left for CKGR after having heard, and expressed disappointment with Mogae's speech. But they are entirely left to their own resources. It makes matters worse for the applicants that this is a drought year, and while the Kalahari 'normally' should have abundant vegetation and pans filled with water at this time of the year, this is not now the case.

Support and human rights organisations are repeating their call for negotiations, but they are hampered by the severe divide introduced by Survival International's heavy handed campaign, which has not only antagonised the Government but makes cooperation between FPK and the other local organisations difficult.

### **Wider implications**

The strength of the indigenous movement has been its international, or rather pan-national nature. Drawing on mutual recognition of parallels in the indigenous predicament worldwide, indigenous peoples have been able to form strong national and regional organisations, and have moved on to some remarkable innovations within the United Nations structure. International solidarity within the indigenous struggle was behind the initiatives for the case raised in Botswana. This was so both in terms of analysis: the lawyers who first prepared the case were drawing on a growing experience from debates on indigenous land rights and new standards set in some judgements; and it was so in terms of funding of the heavy costs. There is no way a group of poor and illiterate San could have raised the case on their own, and the Government is perfectly right in stating – with growing irritation – that if it had not been for outside interference there would not have been a case.

But while national policy seems so far to remain unchanged, their strategy in international fora has taken an altogether new turn. While the official government

position for years has been one of rejection: there are no indigenous people in Botswana, and the international use of the concept does not apply; they have now been actively engaged in the deferment of the 'Declaration on the Rights for Indigenous Peoples' which was put before the UN General Assembly's Third Committee in November 2006. This declaration had been discussed and amended as it moved through the levels of the UN system over a 20 years period, and it was adopted by the UN Human Rights Council in June 2006. The declaration sets some minimum standards for indigenous people's cultural and economic survival, and it was widely expected that adoption by the General Assembly would follow.

In October 2006 the President of Botswana addressed a letter to the heads of State in Africa, detailing the concerns that Botswana had on the UN Declaration. The African Caucus voted as a block for deferment. This position was reiterated during the

meeting of the African Union in Addis Ababa in January 2007, where the Botswana Minister of Foreign Affairs declared that:

The Declaration, as currently drafted, shows that, far from correcting past wrongs, it instead poses a serious threat not only to our sovereignty and territorial integrity, but to peace and stability of our respective countries and the continent at large. ..[and] provides an opportunity for Non-Governmental Organisations to meddle in the internal affairs of sovereign states in the guise of promoting human rights. A number of countries, including my own, are already facing this challenge.

For those who believed in the positive effect the Declaration might have, this is a serious set-back.

As the saying goes in Africa 'Aluta continua'.

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