

Mandates of the Special Rapporteur on the right to food

Ref.: AL ZAF 1/2024
(Please use this reference in your reply)

20 February 2024

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the right to food, pursuant to Human Rights Council resolution 49/13.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **criminalisation of and use of violence directed at fisherfolks in the Dwesa-Cwebe Wildlife Reserve & Marine Sanctuary in the Eastern Cape, South Africa (Dwesa-Cwebe)**.

Local communities carry out small scale finishing in the area, according to their customs, despite, Dwesa-Cwebe being declared a marine protected area (MPA) in 2000. This has led to community members facing arrests and charges including alleged physical violence. These arrests are seen as violating the community's customary fishing rights, potentially infringing on their right to life, food, and other interconnected human rights.

According to the information received:

Background

The Dwesa-Cwebe Nature Reserve is located along the 300-kilometre Wild Coast, Eastern Cape Province (Nature Reserve). It is a well-known tourist attraction known for its natural beauty and lies within the boundaries of Transkei. It comprises two forest reserves, covering about 5700 hectares, which were established in the 1890s under the Cape Colony's Forest Act of 1888, and a marine reserve. These were consolidated into one nature reserve in 1975. Before colonisation, Indigenous Peoples who lived in the area relied on natural resources such as forests, land, wildlife and fish for their survival. They primarily sustained themselves by engaging in agricultural pursuits and small-scale fishing, drawing their livelihood from both the land and the sea. These communities of Dwesa-Cwebe are all affiliated to the AmaXhosa kingship, but they differ in tribes: AmaBomvana on the Cwebe side and abaMfengu on the Dwesa side.

Between the 1890s and the 1930s African communities residing in this area were forcibly removed from the demarcated forests and were settled a few kilometres from the Nature Reserve. The removal of African communities from their land in the name of protected areas was driven by policies of racial segregation. These displaced residents, occupying seven villages, namely: Ntubeni, Mpume, Ngoma, Lurwayizo, Mendwane, Hobeni and Cwebe, and numbering about 14,720 people in 2,382 households were only allowed to make use of resources within the forest with permits. In 1978, the Transkei Bantustan government declared the reserved forests to be a Nature Reserve. As a result, the forests were fenced off, wild animals brought in, families living within the demarcated area were forcibly removed and the dispossessed

local communities were prohibited from accessing the state protected areas for natural resources which affected their livelihoods.

In 1994, the Restitution of Land Rights Act was enacted, enabling displaced African communities to reclaim land from which they had been forcefully removed since June 1913. Subsequent to the enactment of the Act, communities adjoining the Nature Reserve began their struggle for land restitution. On 17 June 2001 their claim was settled, and the communities were awarded ownership of the Nature Reserve following the settlement of the Dwesa-Cwebe land claim.

When the Nature Reserve was handed back to the formally displaced residents, the Dwesa-Cwebe Land Trust (Trust) was established. The Trust – in which the seven communities surrounding the Nature Reserve are represented by democratically elected members of their Communal Property Associations, is the legal owner of the Nature Reserve. This ownership extends to the Haven Hotel, the holiday cottages and the guest houses of the Nature Reserve.

Declaration of the Nature Reserve as a Marine Protected Area

In December 2000, the Minister of Environmental Affairs declared the sea adjacent to the Nature Reserve a marine protected area (MPA). The declaration meant that no fishing was allowed. There was allegedly no meaningful consultation with the community leading up to this decision. The 2001 land restitution maintained the Nature Reserve as a protected conservation area, the community was given access to the marine and forest resources as long as it was considered sustainable. Residents would also enjoy benefits from tourism, employment opportunities, and be allowed to make input into management policies. However, the agreement excluded the MPA.

Despite the declaration, local communities continued to fish in the area according to their customs and practices. Since September 2010, numerous instances have been reported of community members being arrested and charged with attempting to fish inside the MPA without a permit or permission, and other related charges.

Customary Law Rights to Natural Resources in Protected Areas

The National Environmental Management: Protected Areas Act 57 of 2003 does not clearly define what a “protected area” is; the Act merely lists the different types of protected areas. However, in the International Union for the Conservation of Nature Guidelines for Applying Protected Area Management Categories a “protected area” is defined as “a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values”. The basis of whether Indigenous Peoples in South Africa have a customary law right to access and exploit natural resources in a “protected area” is found in the 2004 Constitutional

Court landmark case of *Alexkor Ltd v the Richtersveld Community (Alexkor)*.¹

In *Alexkor*, the Richtersveld community successfully established a claim for the restoration of land. The Constitutional Court held that the nature of the community's land rights should be determined by considering the historical context and practices of the Richtersveld community, which included a documented history of mineral prospecting and behaviours indicative of communal mineral ownership. The Court held that the Richtersveld community's original title to the land was a form of communal ownership under indigenous law. Consequently, the Court granted the land claim, encompassing mineral resources, and acknowledged the right to seek compensation for prior use through a settlement agreement. This case underscores the importance of customary law as a legitimate basis for claims to natural resources, alongside other legal sources such as common law.

In 2018, in *Gongqose & others v Minister of Agriculture, Forestry & Fisheries (Gongqose)*,² the Supreme Court of Appeal (SCA) held that the exercise of a customary right of access to and use of marine resources can constitute a defence negating unlawfulness in criminal law. The appellants were members of the Hobeni community who live adjacent to the Nature Reserve. In 2010 they were convicted of attempting to fish in the Dwesa-Cweba MPA without a permit, in contravention of 43(2)(a) of the Marine Living Resources Act 18 of 1998 (MLRA), in the Elliotdale Magistrate's Court. They were sentenced to a fine of R500 or 30 days' imprisonment, wholly suspended for one year on condition that they do not repeat the offence. On appeal, despite finding that the appellants were exercising a customary right to fish, the Mthatha High Court dismissed the appeal against conviction on the basis that the appellants should have applied for an exemption from the provisions of the MLRA. In a further appeal to the SCA, the community members' appeal was upheld on the grounds that they proved that they were exercising customary rights of fishing in the tradition of their forebears, when the alleged offence was committed. In the criminal trial they presented evidence that a system of customary regulation governs the use of natural resources in the communities around Dwesa and Cweba, who have been historically engaged in fishing and the collection of shellfish. The SCA found that these customary rights are protected by section 211(3) of the Constitution, which provides "courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

The SCA held that the MLRA was not legislation that specifically dealt with customary law; that it did not extinguish the appellants' customary rights of access to and use of marine resources; and that its purposes of conservation and sustainable utilisation of marine resources were not inconsistent with the customary rights of the Dwesa-Cweba communities. Consequently, the appellants' conduct in attempting to fish in the MPA was not unlawful. The appeal against their convictions was upheld and the convictions and sentences

¹ *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003): <https://www.saflii.org/za/cases/ZACC/2003/18.html>.

² *Gongqose & others v Minister of Agriculture, Forestry & Fisheries and others; Gongqose & others v State & others* (1340/16 & 287/17) [2018] ZASCA 87 (01 June 2018): <https://www.saflii.org/za/cases/ZASCA/2018/87.html>

were set aside.

Arrests and Violence directed against fisherfolks

On 1 February and 11 December 2022, in Mendwane and Mpume Villages respectively – customary fishers in Dwesa-Cwebe were reportedly criminalised in contravention of *Gonggose*. The fishers were allegedly attacked by Eastern Cape Parks and Tourism Agency (ECPTA) rangers. Gun shots were fired by the rangers.

On 1 February 2022, the rangers on patrol fired three warning shots then asked **Philasanda Qhangaqha, Anele Dula** and one other fisherman to hand over their bags to be searched. The fishermen refused and the rangers assaulted them, tied them with reeds and suffocated them with their clothes. The rangers then released their catch back into the river. There were no legal repercussions following this incident as no criminal case was filed against the three fishermen.

On 11 December 2022, rangers opened fire on **Mandilakhe Ndabeni, Vuyisani Ndlumbini** and one other fisherman from Mpume village who were harvesting mussels in the Nature Reserve. Mr. **Ndabeni** was immediately arrested and charged with trespassing in the Nature Reserve. Mr. **Ndlumbini** initially fled but later turned himself into police custody and was charged with trespassing in the Nature Reserve on 26 January 2023. Ndabeni filed a case against the ECPTA Rangers.

From 30 January 2023, the hearing for the trespassing charge for Ndabeni and Ndlumbini in the local Magistrate Court was rescheduled multiple times due to the ongoing hospitalisation of one of the injured victims. Despite subsequent postponements to 1 March 2023, 20 April 2023, and 7 June 2023, the hearings were further delayed, and the case remains indefinitely postponed until one of the fishermen, expected to be discharged by the end of November 2023, is ready to appear before the Magistrate Court.

On 3 November 2023, Mr. Ndabeni received communication via SMS that his case against the rangers was withdrawn and closed. Allegedly, there has not been a single case in which a ranger was held accountable for their actions and that in most cases when incidents of violence occur, the ranger is merely relocated to another location.

On 17 May 2022, during a meeting between traditional leaders and members of the Mendwane community and ECPTA representatives; it was explained that law enforcement agents have the right to search bags of fisherfolks and may use force when there is resistance to the request. Although the force cannot include handcuffing, suffocation or beating, they may arrest persons who are caught fishing in an unauthorised area.

It must be noted that there are no sites close enough to the community for fishing and that the nearest site they are authorised to fish is three to four hours' drive from where they are located.

While I do not wish to prejudge the accuracy of these allegations, I wish to

express serious concern that small-scale fishers, who represent more than 90% of the fisheries workforce in developing countries,³ continue to face persisting challenges of marginalization, vulnerability, poor living and working conditions in South Africa. I am dismayed at allegations of criminalisation and violence that they face, even after the landmark Constitutional Court judgment which affirms the importance of customary law as a legitimate basis for claims to natural resources, alongside other legal sources such as common law; and the Supreme Court of Appeal judgment that held that the exercise of the customary right of access to and use of marine resources negates unlawfulness in criminal law. I am also concerned about the alleged exclusion of small-scale farmers from leadership and decision-making positions and processes. If concerned, these allegations would be in contravention of the State's responsibility to ensure an adequate standard of living, including the right to food and the right to feeding oneself directly from productive land or other natural resources as well as the fundamental right to freedom from hunger. The full enjoyment of human rights, including labor rights and Indigenous rights, for small-scale fishers and all fish workers is a necessary precondition for the realization of the right to food. It is more urgent than ever to respect and fulfil the human rights of vulnerable populations, such as small-scale fishermen, in the face of acute needs arising from climate change.

Globally, small-scale fishing communities suffer from unequal power relations. In many places, conflicts with large-scale fishing operations are an issue, and there is increasingly high interdependence or competition between small-scale fisheries and other sectors. This is compounded by the fact that small-scale fishing communities are commonly located in remote areas. Many small-scale fishers live in poverty and tend to have limited or disadvantaged access to markets, low levels of formal education, ill health and inadequate access to healthcare, other social services and inadequate organizational structures. These factors impede the full enjoyment of human rights including civil, political, economic, social and cultural rights. On this occasion, I wish to echo the message delivered by the former UN High Commissioner for Human rights, Michelle Bachelet who reiterated that “small-scale fishers have the right to participate in all decision-making processes that may affect their lives, lands and livelihoods. Strong and independent organizations of small-scale fishers should be respected and supported by States and will be crucial in the achievement of the 2030 Agenda for Sustainable Development goals”.

The General Assembly proclaimed 2022 to be the International Year of Artisanal Fisheries and Aquaculture. This was an opportunity to focus world attention on the role that “small-scale artisanal fishers, fish farmers and fish workers play in poverty eradication and sustainable use of natural resources – thereby increasing global understanding and action to support them.” The year ended with a series of recommendations addressing environmental sustainability, economic sustainability, social sustainability, governance, gender equality and equity, food security and nutrition, resilience, and youth. To ensure a coherent and equitable implementation of these recommendations, there was a recognition that all activities continuing from the international year needed to be implemented through a human rights-based approach. The main emphasis was to ensure the inclusion of small-scale artisanal fishers, farmers, and fish workers in decision-making processes following the principles of participation, accountability, non-discrimination, transparency, human dignity, empowerment and the rule of law in line with the SSF Guidelines.

³ https://oneoceanhub.org/wp-content/uploads/2022/06/Policy-brief_HUMANRIGHTS_Smallscalefisheries_OOH.pdf

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. What specific measures has your Excellency's Government undertaken taken to prevent the harassment and criminalization of small-scale fishing communities in marine protected areas like Dwesa-Cwebe?
3. Please outline the strategies or programs in place to engage with Community Property Associations, law enforcement, and conservation authorities to foster collaboration with small-scale fisher communities.
4. Can you please provide information on any investigations or initiatives aimed at addressing ongoing harassment and ensuring that those responsible are brought to justice? Please provide information on any repercussions that the ECTPA rangers who assaulted the victims on 1 February 2022 and 11 December 2022 have faced, and measures that have been put in place to prevent a reoccurrence of similar incidents of violence against small-scale fishers.
5. Please indicate what steps or initiatives are being considered or planned to rebuild and strengthen the strained relationship between the government and local communities affected by marine protected area regulations. These could include any initiatives for reaching out to the victims and other community members to address the wide-spread fear of violence that is directed at those who engage in small-scale fishing.
6. Does your Excellency's Government envisage changes in legislation that aim to better accommodate the traditional fishing rights of local communities while maintaining marine conservation goals?
7. Please provide information on any envisaged or undertaken steps to educate local small-scale fishing communities about *Gongqose*, as well as any measures that have been taken to ensure that it is implemented in Dwesa-Cweba and small-scale fishers benefit from it.
8. Please provide information on measures that have been taken to ensure the inclusion of small-scale fisher communities in Dwesa-Cweba in leadership and decision-making positions and processes, especially with respect to the Nature Reserve.

I would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

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

Michael Fakhri
Special Rapporteur on the right to food

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, I would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

Article 25 of the Universal Declaration of Human Rights (UDHR) recognizes the right of everyone "to a standard of living adequate for the health and well-being of himself and of his family, including food."

Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR / Covenant) – to which the Republic of South Africa acceded on 12 January 2015 – recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions." In interpreting this provision, the Committee on Economic Social and Cultural Rights (Committee) stressed in its General Comment No. 12 that the core content of the right to adequate food refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems (para. 12). It entails both economic and physical accessibility of food, as well as the sustainability of food access for both present and future generations (para. 7). While article 11(1) is subjected to progressive realization to the maximum of States available resources, article 11(2), provides "the fundamental right to freedom from hunger and malnutrition", which is of immediate application. Article 12 of the ICESCR provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. According to the ICESCR, this is "an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information."

Article 11(1) of the ICESCR further requires States to "take appropriate steps to ensure the realization of this right" and the Committee has defined the corresponding obligations of States to respect, protect, and fulfil the right to food in its General Comment No. 12. According to the Committee, the obligation to respect existing access to adequate food requires State parties to refrain from taking any pressures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including their access to land in order to ensure their food security (para. 15). The right to be free from hunger and malnutrition is not subjected to progressive realization as it must be fulfilled in a more urgent manner (para 1).

General Comment No. 36 on the right to life adopted by the Human Rights Committee states that measures called for addressing adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food. The

Human Rights Committee recognized that the right to life should not be interpreted narrowly, noting that it places not only negative obligations on States but also positive obligations to ensure access to the basic conditions necessary to sustain life. It has affirmed that measures that restrict access to basic and life-saving services, such as food are contrary to article 6 of the International Covenant on Civil and Political Rights (ICCPR) that protects the right to life.

I would like to bring your Excellency's Government's attention to the United Nations Declaration on the Rights of Peasants and other People Working in Rural Areas (UNDROP), which provides that "States shall respect, protect and fulfil the rights of peasants and other people working in rural areas. Article 1.2 of UNDROP applies to any person engaged in artisanal or small-scale activities including fishing in a rural area. It also applies to dependent family members of peasants. Article 15 includes the right to adequate food. Article 2(1) states that States shall promptly take legislative, administrative and other appropriate steps to progressively achieve the full realization of the rights set forth in the UNDROP".

I would also like to refer to the Voluntary Guideline for Securing Sustainable Small-Scale Fisheries (SSF Guidelines) in the Context of Food Security and Poverty Eradication which is the first internationally agreed instrument dedicated entirely to the immensely important small-scale fisheries sector. Para. 5 of the SSF Guidelines states that Small-scale fishing communities need to have secure tenure rights to the resources that form the basis for their social and cultural well-being, their livelihoods and their sustainable development. It also states that States, in accordance with their legislation should ensure that small-scale fishers, fish workers and their communities have secure, equitable and socially and culturally appropriate tenure rights to fishery resources and small-scale fishing areas and adjacent land. Para 6 creates an obligation to create conditions for men and women of small-scale fishing communities to fish and to carry out fisheries-related activities in an environment free from crime, violence, organized crime activities, piracy, theft, sexual abuse, corruption and abuse of authority.

The SSF Guidelines are a fundamental tool in support of the Organization's vision to eradicate hunger and promote sustainable development as outlined in FAO's new strategic framework. The SSF Guidelines complement the Code of Conduct for Responsible Fisheries, which, alongside the fishing provisions of the United Nations Convention on the Law of the Sea, is the most widely recognized and implemented international fisheries instrument. The SSF Guidelines are also closely related to the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forestry in the Context of National Food Security, the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, and the Principles for Responsible Investment in Agriculture and Food Systems. Like these instruments, the SSF Guidelines place a high priority on the realization of human rights and on the need to attend to vulnerable and marginalized groups.