Land, Environment and Development Project
LEGAL ASSISTANCE CENTRE
January 2021

The Role of Constitutional and International Law in the Development of Ancestral Land Rights Claims in Namibia

By **Willem Odendaal**

Willem Odendaal (LLM), served as Coordinator of the Land, Environment and Development (LEAD) Project of the Legal Assistance Centre from 2006 to the end of 2019. He was admitted as a legal practitioner with the High Court of Namibia in 2016, and with the Supreme Court of Namibia in 2017. Currently, while continuing to work as a consultant on land and environmental matters, he is pursuing a PhD at the University of Strathclyde in Glasgow, Scotland, on the topic of ancestral land rights claims in Namibia.
Contact: willem_odendaal@hotmail.com

Introduction

This paper examines the role of constitutional and international law in the development of ancestral land rights claims in Namibia. It reflects primarily on the High Court application and outcome of *Tsumib v the Government of the Republic of Namibia* (A206/2015) [2019] NAHCMD (hereinafter "*Tsumib*") brought in 2015 by eight members of the Hai||om San community. The purpose of the application was to request permission from the Court to bring a future representative action on behalf of all Hai||om people in Namibia that would determine their rights over what they claim are their ancestral lands. The significance of *Tsumib* is that it was the first Namibian court case to address the subject of ancestral land rights restitution.

Around the world, the ancestral lands of those who self-identify as indigenous peoples form not only the basis of their existence as communities, but also the roots of their spiritual and cultural values, which cannot otherwise be protected and preserved. For centuries, indigenous peoples everywhere have experienced dispossession, forced removals and discrimination.[1] In Namibia, land dispossession took place during the colonial era, when many indigenous peoples lost their land to European settlers.[2] This situation continues in post-independent Namibia, with indigenous communities seeing their traditional lands increasingly threatened, encroached on or expropriated for the benefit of agriculture, mineral exploitations and other economic activities.[3]

However, indigenous communities have not been submissive in the face of threats to their lands. Over the last few decades, such communities around the world have approached courts to assert their rights over what they consider to be their ancestral lands. Cases such as *Mabo*[4] in Australia, *Delgamuukw*[5] in Canada, *Adong*[6] in Malaysia, *Richtersveld*[7] in South Africa and both *Endorois*[8]

1 Albert K. Barume, *Indigenous Peoples Land Rights in Africa* (Second Revised Edition), International Work Group for Indigenous Affairs, Copenhagen, 2015, p. 12.
2 See Sidney Harring and Willem Odendaal, *"Our Land They Took": San Land Rights Under threat in Namibia*, Legal Assistance Centre, Windhoek, 2006.
3 See, for example, *The Njagna Conservancy Committee v The Minister of Lands and Resettlement (A 276-2013) [2016] NAHCMD 250 (18 August 2016)* and *Tsamxao Oma v the Minister of Land Reform* (HC-MD-CIV-MOT-GEN-2018/00093) [2020] NAHCMD 162 (07 May 2020).
4 *Eddie Mabo, David Passi, and James Rice v State of Queensland* (1992) 166 CLR 186.
5 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.
6 *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418.
7 *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).
8 African Commission on Human and Peoples' Rights (ACHPR), *Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya.*

and *Ogiek*[9] in Kenya, have established case law precedents in support of indigenous peoples' land rights. In addition, under international law, two key instruments have seen the light over the last few decades, namely the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007, and the Indigenous and Tribal Peoples Convention, 1989 (No. 169) (ILO Convention 169). Namibia has ratified the UNDRIP, but not ILO Convention 169. An overview of the UNDRIP and ILO Convention 169 is provided further on.

While international laws ratified by the Namibian Government place a duty on Namibia's courts to enforce them, when and where appropriate, a significant challenge in litigating ancestral land rights claims in Namibia is the fact that there is no national statutory framework supporting such claims.[10] The Government's aversion to adopting a national policy and legislative framework for addressing the question of ancestral land rights restitution in the country has been ongoing since 1991, a year after Independence, when the Government held a National Conference on Land Reform and the Land Question to address Namibia's land reform process. The Conference was intended to provide broad public input for the formulation of a land policy. However, it was not binding on the Government.[11] In total, 24 recommendations in the form of consensus resolutions were adopted at the Conference. Despite being non-binding, the resolutions still influenced government land policy in the early years of independence. One of the Conference resolutions was that the restitution of ancestral land rights was impossible under the conditions that existed at Independence. As a result, land-reform legislation that followed, such as the Agricultural (Commercial) Land Reform Act 6 of 1995 and the Communal Land Reform Act 5 of 2002, is silent on the restitution of ancestral land rights.

In the absence of a national statutory legislative framework for the restitution of ancestral land rights in Namibia, the respondents in the *Tsumib* case had to rely mainly on constitutional and international law, and only minimally on common, statutory and customary law as the other components of Namibia's pluralistic legal system. For this reason, this paper begins with a summary of how international law interacts with the Namibian legal system as a whole, and its application in the Namibian courts since Independence. The paper then unravels some of the contemporary international human rights law debates, such as the debate about what the concept "indigenous peoples" means, its implications under international law, and its reception and application in Namibia.

This paper also provides an overview and analysis of the *Tsumib* case, before concluding with a few thoughts regarding the way forward on the matter of restitution of ancestral land rights in Namibia.

9 *African Commission on Human and Peoples' Rights v. Republic of Kenya*, ACtHPR, Application No. 006/2012 (2017).

10 See, for example, the Agricultural Communal Land Reform Act 6 of 1995 (as amended) and the Communal Land Reform Act 5 of 2002 (as amended). See also section 3.12 of the National Land Policy of 1998: "Restitution of land rights abrogated by the colonial and South African authorities prior to Independence, will not form part of Namibia's Land Policy. However, this policy is committed to special support to all landless or historically disadvantaged person and communities."

11 Wolfgang Werner, "Land Reform in Namibia, the First Seven Years", *NEPRU Working Paper No. 61*, in Sidney Harring and Willem Odendaal, *"One Day we Will Be Equal": A Socio-Legal Perspective on the Namibian Land Reform and Resettlement Process*, Legal Assistance Centre, Windhoek, 2002.

The application of international law in Namibia

International law is defined as a set of rules, norms and standards generally accepted in relations between nations.[12] It establishes obligations, normative guidelines and a common conceptual framework, to guide nations across a broad range of domains such as war, diplomacy, trade and human rights. International law also plays a regulatory role with regard to the relationships among natural persons and juristic persons such as international organisations and non-governmental organisations.[13] In general, international law provides a means for nations to practise stable, consistent and organised international relations.[14] Over the years, international law has also developed into a legal system that on its own addresses matters internal to the State, by way of, for example, the ratification of various international human rights obligations.

A clear relationship exists between the Namibian Constitution and international law. For example, the Bill of Rights in Chapter 3 of the Constitution is largely based on the 1948 Universal Declaration of Human Rights, and in general on the International Bill of Human Rights, which consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[15] In addition, international law is incorporated into Namibian law through Article 144 of the Constitution, which stipulates that, "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia." One of the important implications of Article 144 is that international law is one of the sources of Namibian law, and courts are obliged to use Article 144 as a source of Namibian law.[16] This was confirmed in the case of *Mwilima*, for example, in which the Supreme Court referred to Article 144 as a "special mechanism" that introduces international treaties (i.e. the ICCPR) into the law of Namibia.[17]

International law also has to conform to the Namibian Constitution in order for it to be valid. This means that, whenever a treaty provision or other rule of international law is inconsistent with the Constitution, the constitutional provision will prevail. Also, a treaty will only be binding in Namibia in terms of Article 144 if the relevant international and constitutional requirements have been met in terms of the law of treaties and the Constitution.[18] International agreements become Namibian law when they come into force for Namibia.[19] Article 144 also confirms the position in the Roman-Dutch common law that the general rules of public international law binding upon Namibia have always been part of national law.[20] For example, in the pre-independence Namibia

12 "International law", *American Heritage Dictionary of the English Language* (Fifth Edition), Houghton Mifflin Harcourt Publishing Company, 2016 – retrieved at https://www.thefreedictionary.com/international+law.
13 Rebecca M.M. Wallace, *International Law* (Fifth Edition), Sweet & Maxwell, London, 2005.
14 William Slomanson, *Fundamental Perspectives on International Law*, Wadsworth, Boston, 2011, pp. 4-5.
15 Dunia P. Zongwe, "What International Law Is", in Dunia P. Zongwe, *International Law in Namibia*, Langaa Research and Publishing Common Initiative Group (Langaa RPCIG), Bamenda, Cameroon, 2019, pp. 15-34.
16 Dunia P. Zongwe, "International Law in the Namibian Legal System", in ibid., pp. 69-86, at p. 80.
17 *Government of the Republic of Namibia and Others v Mwilima and Others* (SA29/01) [2002] NR 235 (SC), at page 56.
18 The conclusion of, or accession to, an international agreement is governed by Articles 32(3)(e), 40(i) and 63(2)(e) of the Namibian Constitution.
19 Marthinus G. Erasmus, "The Namibian Constitution and the Application of International Law in Namibia", in Dawid H. van Wyk, Marinus Wiechers and Romaine Hill (eds), *Namibia: Constitutional and international law issues*, VerLoren van Themaat Centre for Public Law Studies, University of South Africa (UNISA), Pretoria, 1991, pp. 81-110.
20 Dunia P. Zongwe, "International Law in the Namibian Legal System", p. 80.

decision of *Binga*, the Court stated that where the terms of the legislation are not clear, and if they are reasonably capable of having more than one meaning, the (international) treaty itself becomes relevant, because there is a *prima facie* presumption that the Legislature does not intend to act in breach of international law.[21]

International law as a monist system in Namibia

Namibia has, as far as international law is concerned, a monist legal system, but it contains elements of dualism.[22] In a monist legal system, international law is considered to be part of the internal legal order of a state, whereas in a dualist legal system, international law stands apart from national law, and to have any effect on rights and obligations at the national level, international law must be ratified through the legislative process.[23] However, while the Namibian Constitution provides for the direct implementation of the human rights treaties, it seems almost impossible to implement these treaties without a domestic legal framework.[24] For example, in the *Frank* case, the Applicant was denied permanent residence in Namibia based on the fact that she was in a same-sex relationship.[25] Under the International Covenant on Civil and Political Rights, as well as other treaties, several advisory opinions were given over the years on the meaning of the word "sex", including "sexual orientation", as a category for protection. However, in *Frank*, the Namibian Supreme Court opted to ignore the jurisprudence of international human rights law and followed the Zimbabwean courts' narrow interpretation that defines "spouse" as someone in a recognised heterosexual marital relationship and not someone who is a "partner in a homosexual relationship".[26] Reflecting on the application of international law in Namibia's jurisprudence, the Supreme Court relied on the Supreme Court judgment of *Namunjepo*,[27] which states: "[W]hilst it is extremely instructive and useful to refer to, and analyse, decisions by other Courts such as the International Court of Human Rights … the one major and basic consideration in arriving at a decision involves an enquiry into the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people."[28]

Thus, in Namibia, as in Zimbabwe where the Constitution does not expressly prohibit discrimination on the grounds of sexual orientation,[29] the Namibian Supreme Court made a value judgment that "social norms and values" with regard to the sexual behaviour of Namibians appear to correspond more with those of conservative-leaning Zimbabwean legislatures than with those of "liberal" international human rights lawyers.

21 *Binga v Cabinet for South West Africa and Others* (250/1984) [1988] ZASCA 22 (24 March 1988) at page 27.
22 Dunia P. Zongwe, "International Law in the Namibian Legal System", p. 79.
23 Carolyn A. Dubay, "General Principles of International Law: Monism and Dualism", *International Judicial Monitor*, Winter 2014 Issue.
24 Nico Horn, "Human Rights and the Rule of Law in Namibia", in Nico Horn and Anton Bösl (eds), *Human Rights and the Rule of Law in Namibia*, Macmillan Namibia, Windhoek, 2008.
25 See *The Chairperson of the Immigration Selection Board v Frank & Another*, 2001 NR 107 (SC) (hereinafter "*Frank* judgment" or "*Frank*").
26 See *Frank* judgment at page 117.
27 *Namunjepo and Others v Commanding Officer Windhoek Prison and Another* (SA 3/98) [1999] NASC 3.
28 See *Frank* judgment at page 95.
29 See *Frank* judgment at page 120.

Dausab echoes similar sentiments, and adds that Namibian courts have generally been reluctant to apply international law directly, especially when it appears to be in conflict with long-standing practice or tradition in the country.[30] In her evaluation of Namibian cases in which international law was considered, Dausab states that the approach in the majority of cases has been to refer to international law and positions in other jurisdictions as guiding examples with persuasive value when courts are called upon to interpret the Namibian Constitution.[31] Further, Dausab states that Namibian courts are more likely to refer to decisions of other jurisdictions such as Canada, India, South Africa, the United Kingdom, the United States of America, Zimbabwe and, on occasion, the European Court of Human Rights, than to directly apply a provision from a treaty or convention of international law.[32]

In view of the above and the following discussion of the international legal framework on indigenous peoples' rights, it is useful to highlight the benefits of a monist system over a dualist system.

Firstly, as mentioned earlier, international law traditionally focuses on the relationships among states, while national law normally focuses on relationships among persons within the national jurisdictions. Over the years, however, the two systems have seen a merging of interests, because both have at heart the wellbeing of individuals. This common goal is apparent in areas such as human rights law, environmental law and commercial law, where there is an increased interaction between national and international law.[33] Thus, the relationship between international and national law has become one of great importance, especially in national legal systems where individuals seek to rely on an international legal instrument for the protection of their rights.

Secondly, although international law does not command that either a monist or a dualist method be followed in its application, the benefits of its incorporation into national law are clear. When international human rights instruments are internalised in domestic law, national judiciaries have the opportunity to provide remedies in cases of human rights violations before they are taken to regional or international dispute resolution forums, thereby saving both time and money.[34]

Lastly, the relevance of incorporating international law into the Namibian national legal system is that Namibian courts, since Independence, have continuously applied rules of international law and relied on Article 144 of the Constitution in a relatively long line of cases, the majority of which involve human rights issues.[35] As discussed further on, the Applicants in the *Tsumib* case have argued that a clear connection exists between international human rights law and the Bill of Rights in the Namibian Constitution.[36]

30 Yvonne Dausab, "International Law vis-à-vis Municipal Law: An Appraisal of Article 144 of the Namibian Constitution from a Human Rights Perspective", in Anton Bösl, Nico Horn and André du Pisani (eds), *Constitutional Democracy in Namibia: A critical analysis after two decades,* Macmillan Education Namibia, 2010, p. 276.

31 Dausab, ibid.

32 Dausab, ibid., p. 279.

33 Francois-Xavier Bangamwabo, "The implementation of international and regional human rights instruments in the Namibian legal framework", in Nico Horn and Anton Bösl (eds), *Human Rights and the Rule of Law in Namibia*, Macmillan Namibia, Windhoek, 2008, p. 167.

34 Francois-Xavier Bangamwabo, ibid., p. 168.

35 Dunia P. Zongwe, "International Law in the Namibian Legal System", p. 70.

36 The "Bill of Rights" constitutes Chapter 3 of the Namibian Constitution, on "Fundamental Human Rights and Freedoms", comprising 25 articles.

International law and its relationship with indigenous peoples' rights

International law plays an important role in the area of human rights.[37] The international human rights treaties and instruments adopted since 1945 form a comprehensive body of international human rights law. In addition, states have adopted constitutions and other laws that are in line with international human rights law.[38] As mentioned earlier, Namibia's Bill of Rights is largely based on the Universal Declaration of Human Rights (UNDHR), adopted in 1948. Along with the international treaties and customary international law that form the pillars of international human rights law, other instruments, such as declarations, guidelines and principles adopted at the international level, contribute to the understanding, implementation and development of international human rights law. In ratifying international human rights treaties and instruments, governments undertake to develop domestic measures and legislation that are compatible with their international treaty obligations and duties.[39] African countries have been at the forefront of developing international human rights legislation, especially during the late 1950s and early 1960s when they set agendas on decolonialisation, self-determination and racial discrimination.[40] For example, the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960 was one of the first initiatives driven by the African states. This was followed by the 1965 Convention of the Elimination of All Forms of Racial Discrimination (CERD), the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 Covenant on Economic, Social and Cultural Rights (ICESCR).[41] Namibia has ratified all these instruments.[42] While both the ICCPR and the ICESCR provide for the right to self-determination,[43] the ICESCR differs from the ICCPR in that it deals with second-generation human rights (i.e. socio-economic rights), whereas the ICCPR deals with first-generation human rights.[44] But, despite Namibia's ratification of the ICESCR, the Namibian Constitution does not make provision for justiciable socio-economic rights. Certain socio-economic rights are provided for in Chapter 11 dealing with the "Principles of State Policy",[45] but Namibian courts cannot enforce the principles of state policy, including the socio-economic rights, because in terms of Article 101 of Chapter 11, the principles of state policy merely guide government in making and applying laws that give effect to these principles.

With regard to the protection of indigenous peoples' land rights under international human rights law, two key instruments exist, namely the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Indigenous and Tribal Peoples Convention, 1989 (No. 169) (ILO Convention 169).

37 Equality and Human Rights Commission, at https://www.equalityhumanrights.com/en/what-are-human-rights/what-universal-declaration-human-rights (accessed 25 August 2020).

38 Office of the High Commissioner for Human Rights (OHCHR), "International Human Rights Law", at https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx (accessed 25 August 2020).

39 Ibid.

40 Michael Haas, *International Human Rights: A Comprehensive Introduction*, Routledge, London, 2008, pp. 83-85.

41 Ibid., p. 84.

42 *Namlex Appendix on International Law*, Legal Assistance Centre, 2017. (Namlex is available at www.lac.org.na. It is updated twice per year.)

43 See Article 1(1) of the ICCPR and Article 1(1) of the ICESCR.

44 Dunia P. Zongwe, "Human Rights", in Dunia P. Zongwe, *International Law in Namibia*, p. 344.

45 Ibid.

The UNDRIP is the outcome of a long process during which the human rights of indigenous peoples, including their rights to lands, territories and resources, have been defined, recognised and enshrined at international level.[46] Although a Declaration is formally not legally binding on states,[47] the fact that the UNDRIP text is consistent with customary international law, and with, more importantly, the purposes and principles of the Universal Declaration of Human Rights (UNDHR), ensures that the UNDRIP will play a dynamic and long-lasting role in indigenous/state relations and international law.[48]

One purpose of ILO Convention 169, as expressed in the "Preamble", is to assist indigenous peoples "to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities languages and religions, within the framework of the States in which they live".[49] In other words, this Convention calls on governments to embrace its principles on indigenous peoples' rights by adopting them into their national legal systems. More importantly, ILO Convention 169, similar to the UNDRIP, also addresses the relationship between indigenous people and their lands – in Part II of the Convention. This requires, for example, that parties adopt protective measures against the arbitrary removal of indigenous peoples from their traditional lands.[50] Presently, ILO Convention 169 is the only legally binding instrument that exclusively addresses indigenous peoples' rights. So far, only 23 countries have ratified this Convention. The Central African Republic is the only African country to have done so.[51] Gilbert argues that while land rights have been considered a specifically important right for indigenous peoples, it is yet to be included as an exclusive right under international human rights law.[52] However, because of the inclusion of "land" as a category in ILO Convention 169, "land rights" as an exclusive right under international law possibly does exist. But, because of the Convention's poor ratification status at international level, this right is not generally enforced at national level. However, other instruments such as the International Bill of Human Rights, CERD and the African Charter conceivably provide similar protection to indigenous peoples' rights. In addition, the relationship between human rights and land rights under international law intersect at numerous other levels. This includes, for example, the human right to food and water, for which access to land is obviously

46 Albert K. Barume, *Indigenous Peoples Land Rights in Africa*, p. 253.

47 See Indigenous Peoples Indigenous Voices, "Frequently asked questions: Declaration on Indigenous Peoples", at https://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf.

However, as Sylvanus G. Barnabas points out, some academic debates about the legal status of some of the rights of indigenous peoples, i.e. rights which are now declared under the UNDRIP, have led some scholars to argue that some indigenous peoples' rights are already part of customary international law. For example, James Anaya and Siegfried Wiessner state that several categories of indigenous peoples' rights have developed into customary international law, such as the rights to "demarcation, ownership, development, control and the use of lands that [indigenous peoples] have traditionally owned or otherwise occupied and used" (Anaya and Wiessner, as quoted in Sylvanus G. Barnabas, "The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law", *International Human Rights Review*, Vol. 6, No. 2 (2017), pp. 242-261).

48 Dalee Sambo Dorough, "Human Rights", in United Nations Permanent Forum on Indigenous Issues (UNPFII) (ed.), *State of the World's Indigenous Peoples*, United Nations, New York, 2009, p. 198, cited in Albert K. Barume, at p. 254.

49 See "Preamble" to the Indigenous and Tribal Peoples Convention, 1989 (No. 169), ILO.

50 See Articles 14(1)-(3), 15(1) and 16(1) of the Convention.

51 See https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314.

52 See Jeremie Gilbert, "Land Rights as Human Rights: The Case for a Specific Right to Land", *International Journal of Human Rights*, Vol. 10, No. 18 (2013).

required.[53] Property rights are also linked to land rights.[54] Also, property rights are included in the UNDHR (in Article 17 in particular). The African Charter on Human and Peoples' Rights (Article 14) and the United Nations Declaration on Social Progress and Development (Article 6) are of relevance in this regard.

Application of the term "indigenous peoples"

The term "indigenous peoples" is often substituted by other terms such as "first peoples",[55] "aboriginal peoples"[56] or "native peoples".[57]

53 See, for example, Christine Frison and Priscilla Claeys, "Right to Food in International Law", in Paul B. Thompson and David M. Kaplan (eds), *Encyclopaedia of Food and Agricultural Ethics*, Springer, Dordrecht, 2014. The human right to food is recognised in paragraph (1) of Article 25 of the Universal Declaration of Human Rights (UN General Assembly 1948): "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

The right to food is also recognised in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The human right to adequate food is also recognised in specific international instruments such as the Convention on the Rights of the Child (Articles 24(2)(c) and 27(3)), the Convention on the Elimination of All Forms of Discrimination against Women (Article 12(2)) and the Convention on the Rights of Persons with Disabilities (Articles 25(f) and 28(1)). The right to food is also recognised in the African Charter on the Rights and Welfare of the Child (1990) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

54 Juanita M. Pienaar, *Land Reform,* Juta, Cape Town, 2014, p. 41.

55 The ACHPR, in its *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (ACHPR and IWGIA, 2010), states (p. 31): "… in Africa, the term indigenous populations does not mean 'first inhabitants' in reference to aboriginality as opposed to non-African communities or those having come from elsewhere. This peculiarity distinguishes Africa from other continents where native communities have been almost annihilated by non-native populations." (Accessed at https://www.iwgia.org/en/resources/publications/305-books/2979-advisory-opinion-of-the-african-commission-on-human-and-peoples-rights-on-the-united-nations-declaration-of-indigenous-peoples.html.)

56 Karin Lehmann states that "all aboriginal peoples are indigenous peoples, and vice versa". See Karin Lehmann, "Aboriginal title, indigenous people rights and the right to culture", *South African Journal on Human Rights*, Vol. 20, No. 1 (2004), p. 91.

57 The Constitution of Canada uses the term "aboriginal", but the term "first nations" is also a widely used term in Canada, because it is preferred by Indian people themselves (see https://www.arcticcentre.org/EN/arcticregion/Arctic-Indigenous-Peoples/Definitions# – accessed 1 June 2020).

In addition, the word "marginalised" is often also used in connection with indigenous peoples. This is because indigenous peoples often have much in common with other neglected segments of societies, i.e. lack of political representation and participation, economic marginalisation and poverty, lack of access to social services, and discrimination. Despite their cultural differences, the diverse indigenous peoples share common problems also related to the protection of their rights. They strive for recognition of their identities, their ways of life and their right to traditional lands, territories and natural resources. (See United Nations Permanent Forum on Indigenous Issues, *Indigenous Peoples, Indigenous Voices – Factsheet: Who are indigenous peoples?*, at https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (accessed 1 June 2020).

In the Southern African context, the concept "indigenous" is also used in combination with other words, such as "indigenous minorities" (see Ute Dieckmann et al. (eds), *"Scraping the Pot": San in Namibia Two Decades after Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, 2014).

Equally, the concept "minority" is used in combination with "indigenous", but, because most indigenous peoples would come under the definition of minorities, and some indigenous peoples self-identify as both minorities and indigenous peoples, not all minorities can be defined as indigenous peoples (see Miriam J. Aukerman, "Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context", *Human Rights Quarterly*, Vol. 22, No. 4 (November 2000), pp. 1011-1050).

One of the first attempts at international level to define indigenous peoples was that of Jose Martinez Cobo, who states that indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them.[58] They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[59] In addition, self-identification as "indigenous" is also regarded as a fundamental element in Cobo's working definition. It declares that an indigenous person is one who belongs to an indigenous people through self-identification as indigenous, and is recognised and accepted by the group as one of its members.[60]

Other than Cobo's working definition of "indigenous peoples", there appears to be no universal agreement on the definition of the term. For example, the UNDRIP identifies "indigenous peoples" as being the beneficiaries of the rights contained in the Declaration, without defining the term,[61] while the statement made on indigenous peoples under Article 1(1)b of ILO Convention 169 is largely based on the criteria developed by Cobo.[62]

While the use of the term "indigenous" has become increasingly popular, it also is controversial, in both a Namibian[63] and an African context. One of the difficulties in conceptualising "indigenous" in Africa is that the dominant position of white colonial forces left all of black Africa in a subordinate position that in many respects was similar to the position of indigenous peoples elsewhere in the

Also, the World Bank "Operational Directive 4.20 on Indigenous Peoples" (17 September 1991) considers that, "the terms 'indigenous peoples', 'indigenous ethnic minorities', 'tribal groups', and 'scheduled tribes', … are social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process …".

58 See José R. Martinez Cobo, "A working definition", at https://web.archive.org/web/20191026153237/https://www.iwgia.org/en/news-alerts/archive?view=article&id=340:a-working-definition-by-jose-martinez-cobo&catid=143 (accessed 29 May 2020). For Cobo's full and comprehensive report, see the 1982 UN-commissioned report titled "Study of the Problem of Discrimination against Indigenous Populations", at https://www.un.org/esa/socdev/unpfii/documents/MCS_v_en.pdf (accessed 29 May 2020).

59 Cobo, Ibid.

60 Cobo, Ibid.

61 John B. Henriksen, "Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169, Case Study 7: Key Principles in Implementing ILO Convention No. 169", Programme to Promote ILO Convention No. 169, 2008, at page 5. The preamble of the UNDRIP, however, makes reference to certain socio-economic and political characteristics normally attributed to indigenous peoples, as well as to their connection to their lands, territories and resources.

62 Hendriksen, ibid., at page 7. Article 1(1)b of ILO Convention No. 169 states: "Peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present states boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."

63 See, for example, Nigel Crawhall, "Africa and the UN Declaration on the Rights of Indigenous Peoples", *International Journal of Human Rights*, Vol. 15, No. 1 (2011), pp. 11-36. Crawhall's paper deals with the discussions among African states that led to the adoption of UNDRIP. Crawhall describe Namibia, together with Botswana, Kenya and Nigeria, as part of conservative forces on the continent attempting to use bloc politics to undermine the process. Namibia, without providing evidence, was responsible for the circulation of a "Draft Aide Memoire" to the Africa Group that focused on the apparent threat that indigenous rights would pose in terms of secessionism. Despite Namibia leading a devastating attack on UNDRIP in 2006, it quietly supported the final result in 2007.

world. In relation to the colonial powers, all native Africans were first-comers, non-dominant and different in culture from the white colonisers.[64] Moreover, black Africans were associated with "nature" and "traditional lifestyles". In addition, the dominant black/white dichotomy in colonised Africa leaned towards reinforcing the idea that all native Africans were "indigenous".[65] However, linking the concept of "indigenous" with one particular type of colonial situation leaves us without a suitable concept for analysing the same type of uneven internal relationships that continue to persist after the liberation from colonial dominance.

As a way of settling the debate, for now at least, the pragmatic approach of the African Commission on Human and Peoples' Rights on how and in what African context the term "indigenous people" could be used, brings some relief. In its work on Indigenous People in Africa, the Commission states:

> "…. there is no question that all Africans are indigenous to Africa in the sense that they were there before the European colonialists arrived and that they have been subject to subordination during colonialism. [However] when some particular marginalized groups use the term indigenous to describe their situation, they use the modern analytical form of the concept (of indigenous) in an attempt to draw attention to and alleviate the particular form of discrimination they suffer from."[66]

In other words, marginalised groups do not use the term "indigenous" to deny other Africans their legitimate claim and identity to belong to Africa, but rather, they use the term in the present-day situation, which gives them an opportunity to express the exactitudes of their sufferings, and to seek protection in international human rights law.

Background to the *Tsumib* case

The *Tsumib* case is about the Hai||om people, and the loss of their ancestral lands during Namibia's apartheid era. Their ancestral lands include the Etosha National Park, one of Namibia's foremost tourist attractions. The Hai||om are the largest San population in Namibia, with around 11 000 members.[67] In pre-colonial times the Hai||om occupied large tracts of north-central Namibia in the vicinity of the former Ovamboland, Etosha, Grootfontein, Tsumeb, Outjo and down to Otjiwarongo in the south.[68] They lived from hunting wild animals and gathering plants for food, medicine, building materials and other purposes. They also traded in goods such as ivory, ostrich feathers and beads, and in pre-colonial times they also mined copper near Otavi and developed extensive trade networks for copper ore.[69] Following the colonisation of Namibia by Germany in

64 Sidsel Saugestad, "Contested Images: 'First Peoples' or 'Marginalised Minorities' in Africa?", in Alan Barnard and Justin Kenrick (eds), *Africa's Indigenous Peoples: 'First Peoples' or 'Marginalised Minorities'?*, Centre for African Studies, University of Edinburgh, 2001.

65 Saugestad, ibid., p. 4.

66 "Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's work on Indigenous People in Africa", ACHPR/IWGIA, 2006, p. 12.

67 Ute Dieckmann, Maarit Thiem, Erik Dirkx, and Jennifer Hays (eds), *"Scraping the Pot": San in Namibia Two Decades after Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, 2014, pp. 173, 203.

68 Ute Dieckmann, "'The Vast White Place': A History of the Etosha National Park and the Hai||om Nomadic People", *Nomadic Peoples*, Vol. 5, No. 2 (2001), p. 127.

69 Dieckmann, ibid., p. 128.

the 1880s, the Hai||om people were gradually dispossessed of their ancestral lands through the allocation of farms to colonial settlers as well as the establishment of the Etosha Game Reserve in 1907. For many years after the proclamation of the game reserve, the Hai||om were accepted as residents in the park. It is estimated that 1 500 Hai||om lived in the game reserve in the vicinity of the Etosha Pan in the 1920s.[70]

The Hai||om were allowed to reside in the Etosha Game Reserve until 1954 when they were evicted. During 1953 the South African Administration, following recommendations of the "Commission for the Preservation of Bushmen", decided that they should leave the Etosha Game Reserve, except for a few who should be employed at the Police Posts in the Reserve. The others were told to either move north to the former Ovamboland or work on white commercial farms south of Etosha.[71] Since their eviction from Etosha, most of these Hai||om have become landless, which in turn has led to increased socio-economic hardships for them. Those who ended up as farm workers virtually had no rights protecting them from poor working conditions. As the study of Pickering and Longden shows, the average Hai||om lives and works on several farms during his or her lifetime.[72] Quite often, this involves a life of poverty, hunger and frequent relocation. Wages are low and working conditions poor. With the dawn of Namibia's independence in 1990, there was optimism for improved working conditions for many farm workers across Namibia. However, the Government's efforts to improve the wages of farm workers have brought about massive unemployment among farm workers across the country, though many continue to be employed illegally for wages below the minimum.[73]

During the 1991 National Land Conference, the topic of restitution of ancestral land rights was discussed. Namibia decided not to adopt a land restitution programme at that conference. The reason the Government provided for not adopting an ancestral land restitution policy appears to be connected to what it called the uncertain and contested state of land occupation during pre-colonial times. In addition, the new Government feared that various ethnic groups would fight over competing ancestral land rights claims that would undermine national unity.[74]

Over the years following the Government's decision to not entertain ancestral land rights claims in independent Namibia, ethnic groups who were dispossessed of land during the colonial period have come to criticise this decision. These groups argue that they have been overlooked for resettlement at the expense of other ethnic groups who hardly lost any land in the colonial period.[75] The groups who have been arguing in favour of ancestral land rights claims include the Herero, Nama and

70 Ute Dieckmann, "The Impact of Nature Conservation on the San: A case study of Etosha National Park", in Thekla Hohmann (ed.), *San and the State: Contesting Land, Development, Identity and Representation* (Vol. 18), Rüdiger Köppe Verlag, Köln, 2003, p. 50.

71 Dieckmann, ibid., p. 64.

72 Yvonne Pickering and Christina Longden, *The Way it Used to Be: The Lives of Hai||om Elders by Hai||om Youth*, Working Group of Indigenous Minorities in Southern Africa (WIMSA), Windhoek, 2006. This book maps the life histories of nine Hai||om in the region just south and west of Etosha.

73 Willem Odendaal, "Determination of the Feasibility of Conducting an Assessment of the Impact of Farm Worker Evictions on Farm Worker Livelihoods in Namibia", Legal Assistance Centre, Windhoek, 2006.

74 Lazarus Hangula, "Ancestral Land in Namibia", *SSD Discussion Paper No. 20*, Social Sciences Division, Multi-Disciplinary Research Centre, University of Namibia, Windhoek, 1998 (June).

75 Eduard Gargallo, "Beyond Black and White: Ethnicity and Land Reform in Namibia", *Politique africaine*, Vol. 4, No. 120 (2010), pp. 153-173.

Damara.[76] While the San have arguably suffered the most over the years due to land losses, they often lack the organisational capacity and socio-political influence necessary to make themselves heard in the ancestral land rights debate.[77]

In 1997, a group of Hai||om activists, claiming Etosha as their ancestral land, blockaded a main road and gates to the park, to which the Government responded with teargas and mass arrests.[78] Since that year, the Hai||om have pursued more subdued efforts to bring their plight over the loss of their ancestral land to the government.[79] However, all these efforts appeared to have been in vain as the Government was adamant that it will not support ancestral land rights claims.

In 2010, a group of concerned Hai||om community members approached the Legal Assistance Centre for legal advice about their ancestral land rights. In August 2015, the Legal Assistance Centre filed an application with the High Court on behalf of 8 Hai||om Applicants seeking to represent all of the Hai||om in a future representative action to determine their rights over their ancestral lands consisting of two parts, the Etosha National Park and 11 farms in Mangetti West. Unlike the Hai||om of Etosha, the Hai||om living in Mangetti West remained on their lands and continue to inhabit the area to this day, despite the apartheid administration encouraging Ovambo cattle herders in the 1970s to settle on the lands and developing infrastructure in the area to accommodate white farmers' livestock in times of drought. In 2010, the Government settled Ovambo farmers in some of the camps in Mangetti West as part of a court settlement agreement between the Ukwangali Traditional Authority and the Ovambo cattle farmers, after the former obtained an eviction order against the latter from its area of jurisdiction. The settlement of the Ovambo cattle farmers in Mangetti West was done without the consent of the Hai||om living in Mangetti West.[80]

The challenges of bringing the *Tsumib* application

From the very beginning, the court application faced several procedural challenges. Firstly, it was brought by 8 Hai||om representatives instead of the government-recognised Hai||om Traditional Authority (TA). The Hai||om TA was wary of supporting the ancestral land rights claim, fearing that supporting legal action against the Government might jeopardise its relationship with the Government. In the absence of a recognised legal entity willing to support the case, the 8 Hai||om representatives had to show to the Court that they had the necessary standing ("*locus standi*") to represent the whole Hai||om community. Traditionally, the Roman-Dutch common-law system that Namibia inherited from South Africa has followed a rather conservative line on standing. Today,

76 See, for example, Namibia Press Agency (NAMPA), "Herero and Nama Authorities blast gimmick ancestral land commission", 10 July 2019, at https://nampa.org/index.php?model=categories&function=display&id=19149014, and *New Era*, "Who are the Landless People's Movement?", 17 February 2017, at https://neweralive.na/posts/just-who-are-the-landless-peoples-movement.

77 See Harring and Odendaal, "*Our Land They Took*".

78 James Suzman, "Etosha Dreams: An Historical Account of the Hai||om Predicament", *Journal of Modern African Studies*, Vol. 42, No. 2 (June 2004), pp. 221-238.

79 For a detailed account of the Hai||om peoples' negotiation process around the loss of their ancestral lands, see Ute Dieckmann, "From colonial land dispossession to the Etosha and Mangetti West land claim – Hai||om struggles in independent Namibia", in Willem Odendaal and Wolfgang Werner (eds), *"Neither here nor there": Indigeneity, marginalisation and land rights in post-independence Namibia*, Legal Assistance Centre, Windhoek, 2020.

80 Dieckmann, ibid., p. 101.

Namibia's courts continue to apply a narrow interpretation on standing. Under current rules, a person who brings a case to a Namibian court must have a direct and substantial interest in the outcome of the case. This means that a person can bring a court case only to protect his or her own interests and not to protect the rights of anyone else.[81]

In view of the restraints that the rules on standing pose to the Hai||om people's quest to find clarity over their rights, the *Tsumib* application has raised an important legal question for the Court to consider. On the one hand, the Namibian Constitution supports everyone's right to have access to court (e.g. Article 12 on "Fair Trial" and Article 25 on "Enforcement of Fundamental Rights and Freedoms"), while on the other hand, the Roman-Dutch common-law principle on standing limits the rights of potential litigants in respect of the type of cases they are allowed to bring to court. Consequently, the Court has been tasked to weigh up the importance of the rights-giving nature of the Constitution against that of the right-limiting nature of the Roman-Dutch common-law principle on standing. Being aware of this anomaly in the Namibian legal system, the 8 Applicants, with the support of approximately 3 000 Hai||om community members, brought an application for representative action in the High Court. The main purpose of the application was to ask the Court to relax the rules on standing so as to allow the 8 Applicants to represent not only themselves in the application, but also the Hai||om people in general, because of the clear interest they had in the determination of the rights they sought to assert on behalf of the Hai||om people and the Hai||om minority group.[82] The current rules on standing, the Applicants argued, made it impossible for them to have their legal rights determined if the Court did not create an exception to the general rules of litigation to allow the Applicants to bring the proposed action.[83] Thus, they argued, an application for representative action was the most suitable way to enable the Applicants to bring their case to court. To support this argument, the Applicants referred to the judgment in *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*, where O'Regan AJA states that, "In a constitutional State, citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law, to determine their rights. … The rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements."[84]

The *Tsumib* application was filed in August 2015, but was held back by two initial postponements. It was eventually heard over a total of four days, i.e. 26-29 November 2018. Judgment was delivered on 28 August 2019, with the three judges dismissing the application.[85] In total, from the date of filing the application until judgment was delivered, it took the Court four years to reach its conclusion on the matter. This excludes the approximately four years that went into conducting the legal research and consultative process with the community before the application was filed in the High Court in 2015.

Following is an overview of the judges' reasons for dismissing the application, with a discussion of the way forward for the Applicants, who have subsequently appealed the matter. At the time of writing, no date has been set for the hearing of the appeal in the Namibian Supreme Court.

81 See Zoila Hinson and Dianne Hubbard, *Access to Justice in Namibia: Proposals for Improving Public Access to Courts: Locus Standi – Standing to Bring Legal Action (Paper 2)*, Legal Assistance Centre, Windhoek, 2012.

82 Paragraph 73, *Tsumib*, Heads of Argument.

83 Paragraph 105.2, *Tsumib*, Heads of Argument.

84 *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at 733 par 18.

85 Werner Menges, "Etosha land rights claim stumbles at first hurdle", *The Namibian,* 29 August 2019.

Overview of the *Tsumib* judgment and the way forward

After all was said and done, the key question that the High Court focused on was whether the *Tsumib* application constituted a "proper and condign case" in which to allow the applicants to institute a representative action.[86]

In general, the Court opted to pay special attention to the provisions of the Traditional Authorities Act (TAA) in order to assess whether it is a sufficient mechanism available to the Applicants and other interested members of the community to institute the intended claims.[87]

The Court found import in section 3 of the TAA, which provides that it is the (Hai||om) Traditional Authority that "shall" uphold, promote, protect and preserve the culture, language, tradition and traditional values of the Hai||om people, and also preserve and maintain the cultural sites of the Hai||om people,[88] and consequently, only a recognised TA shall represent members of a traditional community.[89]

The Court did not agree with the Applicants' argument that the Hai||om TA was conflicted and could not bring the action contemplated, because in terms of sections 3(2)(b) and 16 of the TAA,[90] the TA's duties are to assist and co-operate with the Government in the execution of the latter's policies.[91] In addition, the Court pointed out that the effect of the order sought by the Applicants would be the establishment of a parallel representative and decision-making structure for the Hai||om people, which would undermine the authority of the Hai||om TA given to them under the TAA.[92] The Court remarked that if the Applicants felt that the Act infringed upon the constitutional rights of Hai||om people, then they should have challenged the constitutionality of the offending provisions of the Act.[93]

In short, the Court's reasons for dismissing the application were that the Applicants did not exhaust the internal remedies provided for by the TAA in asserting their rights, nor had they challenged the constitutionality of the provisions of the Act that they perceived to be an obstacle in the way of their asserting their rights. As a result, the Court concluded that it is not legally permissible for

86 Paragraph 2 of *Tsumib v the Government of the Republic of Namibia* (A206/2015) [2019] NAHCMD.
87 Ibid., paragraph 31.
88 Ibid., paragraph 37.
89 Ibid., p. 38.
90 Sections 3(2)(b) and 16 of the TAA provide:

(2) A member of a traditional authority shall in addition to the functions referred to in subsection (1) have the following duties, namely -

(b) to assist and co-operate with the Government, regional councils and local authority council in the execution of their policies and keep the members of the traditional community informed of developmental projects in their area.

...

16. A traditional authority shall in the exercise of its powers and the performance of its duties and functions under customary law or as specified in this Act give support to the policies of the Government, regional councils and local authority councils and refrain from any act which undermines the authority of those institutions.

91 Paragraph 40 of *Tsumib v the Government of the Republic of Namibia* (A206/2015) [2019] NAHCMD.
92 Ibid., paragraph 49.
93 Ibid., paragraph 50.

the Applicants to approach the Court for leave, because, should such relief be granted, the Court would aid the Applicants in circumventing the provisions of the TAA.[94]

Unfortunately, the judgment has left several questions unanswered as far as the application of constitutional and international human rights law principles in *Tsumib* is concerned.

Firstly, the Court's strict focus on the provisions of the TAA leaves the Applicants with virtually no direction as to how they could assert their constitutional rights to approach the Court (Article 12) and to remedy a constitutional violation (Article 25). In addition, the judgment leaves the applicants without an impression as to how they could assert their constitutional rights such as the rights to equality (Article 10) and property (Article 16), and to practise any culture (Article 19) and religion (Article 21).

Secondly, the Court did not deal with the question of how the Applicants' rights under comparative international human rights law could be asserted. This went unanswered despite the Applicants' efforts to extensively refer to the relevant international law provisions in their application, and despite the fact that these rights supported under international law are also law in Namibia. Some of the international laws referred to here include, in the African Charter on Human and Peoples' Rights, Article 14 on the right to property, Article 21 on the right to natural resources and Article 22 on the right to development, and several provisions of the ICCPR and ICESCR. In addition, the Applicants referred to comparative case law on ancestral land rights, such as the Richtersveld claim in South Africa, the Central Kalahari Game Reserve case in Botswana and the claims of the Endorois and Ogiek peoples in Kenya.

In *Tsumib*, the Court did not consider the precedents that these trailblazing African cases have set in support of ancestral land rights claims on the continent. Instead, it restricted its ruling in line with the Respondents' argument that the only competent body to launch the action sought by the Applicants is the Hai||om TA, by virtue of its powers under the TAA. Yet, the Applicants have made it clear throughout their argument that they never sought authority to exercise or circumvent any of the functions assigned to the Hai||om TA in terms of the TAA. All they sought was clarity on how the Hai||om people could assert their constitutional and international law rights in support of their ancestral land claim while the Hai||om TA could not, or would not, support their cause.

Meanwhile, with the appeal against the *Tsumib* judgment pending, the role of constitutional and international law in asserting ancestral land rights in Namibia remains undecided. However, the establishment in 2019 of the Commission of Inquiry into the Claims of Ancestral Land Rights and Restitution, tasked to determine the desirability (or not) of ancestral land claims in Namibia, was a clear response to the call of many of our Namibian communities for the inclusion of the restitution of ancestral land claims in the present land reform programme. The public attention that *Tsumib* created in the establishment of the Commission cannot be underestimated.

Had the Applicants in *Tsumib* been allowed to pursue their case as a representative action, this could have strengthened the Government's efforts to find a solution to the 30-year-old question concerning ancestral land rights. Worldwide, the restitution of ancestral land rights is not an

94 Ibid., paragraph 61.

unfamiliar concept, and this concept has a well-established foundation in both comparative and international law. But, perhaps most importantly, the application of comparative and international law in the national legal framework will complement and strengthen the existing Namibian land reform programme by helping to enable the implementation of land rights that so many of this country's minority and marginalised indigenous peoples still do not have.

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LEGAL ASSISTANCE CENTRE
Land, Environment and Development (LEAD) Project
4 Marien Ngouabi Street, Windhoek • P.O. Box 604, Windhoek, Namibia
Telephone: (+264) (0)61-223356 • Fax: (+264) (0)61-234953
Email: info@lac.org.na • Website: www.lac.org.na