



"Neither here nor there"

Indigeneity, marginalisation and land rights in post-independence Namibia

Edited by
Willem Odendaal and Wolfgang Werner



Land, Environment and Development Project
LEGAL ASSISTANCE CENTRE

2020

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Windhoek
Republic of Namibia
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PUBLISHER'S CONTACT DETAILS
Legal Assistance Centre
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

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In September 2018 the Legal Assistance Centre (LAC) received a research grant from the United States Department of State, the purpose of which was to support the LAC to develop a series of concept chapters, with a comprehensive and updated examination of the land rights of indigenous and marginalised communities in Namibia.

This grant could not have come at a more opportune moment. Firstly, 2018 marked the 21st birthday of the LAC's Land, Environment and Development Project (LEAD). Since its inception, LEAD has supported the land and natural resource rights of Namibia's indigenous and marginalised communities through legal advice and representation, research, advocacy, capacity building and litigation. Thus, the LAC as a public interest law firm is well placed to evaluate the current state of Namibia's indigenous and marginalised communities' land rights.

Secondly, the Second National Land Conference was scheduled to take place in October 2018, hence the LAC's intention was to produce a publication that would help to maintain the momentum generated by the conference discussions. Specific resolutions were taken at the end of the conference, to which policy makers are compelled to give effect. We are hopeful that this publication will be of use to those tasked with the implementation of the 2018 Land Conference resolutions.

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Willem Odendaal and Wolfgang Werner
Editors

Namibia's administrative regions



Introduction



The selection of chapter themes for this publication was guided mainly by the deliberations that took place during the Second National Land Conference in October 2018.

Against the background of the skewed land tenure system Namibia inherited at the time of independence, Samuel Amoo's chapter, **"Land reform in Namibia: Beyond 2018"**, focuses on the policies and legislation the Government of the Republic of Namibia (GRN) adopted and promulgated in order to address the land question in the country. Amoo shows that for decades after independence, the land question in Namibia has remained an issue of national concern, and that many issues related to land rights were addressed at the Second National Land Conference.

This chapter illustrates the processes of land reform since independence, including the reform of agricultural commercial land, the reform of tenure rights in communal land areas, and urban land reform.

The chapter states that land reform is a complex undertaking, and argues that its effective and successful implementation requires more than the existence of an enabling legal regime. In addition, Amoo argues that it requires a healthy economic environment that is capable of providing the requisite fiscal cushioning and integrity for the GRN to execute a meaningful land reform programme, and that it further requires the cooperation, commitment and partnership of the public and private sectors alike.

The chapter of Selma Lendelvo, Martin Shapi and Clever Mapaure, **"The economic viability of commercial farms under the government's resettlement programme"**, outlines the long history of land issues in Namibia, and how the GRN approached the skewed land ownership regime by introducing the Land Reform Programme after independence. It focuses on the different policies and programmes implemented by the GRN in order to ensure fair land distribution among all Namibians and the integration of previously disadvantaged Namibians into the mainstream of the country's economy.

The chapter points to the National Resettlement Policy, the Agricultural (Commercial) Land Reform Act (No. 6 of 1995), and the Communal Land Reform Act (No. 5 of 2002), as the key instruments that guide land reform in the country, particularly concerning the acquisition of farmland for redistribution purposes. The chapter seeks to document factors influencing the economic viability of the resettlement programme in Namibia by analysing both the ability of leasehold agreements granted to resettlement beneficiaries by the MLR to attract investment

and subsequently trigger agricultural productivity, and the impact of other promoters contributing to this output. It concludes that although there is little evidence that land tenure security attained through the registration of leases has the potential to contribute to the economic viability of farmers, there is evidence that the current state of affairs, with the majority of beneficiaries farming without lease agreements, runs counter to commercial farming philosophies and is likely to have undesired impacts on the future of resettlement farms. It argues that the slow pace at which land rights are being secured among resettled farmers through the registration of leasehold agreements with the Deeds Office prevents farmers from accessing credit and making the investment in their farming operations that could improve their productivity.

The chapter reveals the high farm-related expenditure that must be borne by farmers, underlining the need for them to access credit to succeed in their operations. Farmers with a stable source of off-farm income are more likely to invest in their farming operations, contributing to better returns. The authors argue that this reality indicates that the goal of creating employment and alleviating poverty by enabling the majority of resettlement beneficiaries to become “full-time farmers” is still a long way from being attained.

In his chapter, “**The legacy of Namibia’s landless generational farm-working community**”, James Suzman provides an historical background of the issues now facing the generational farmers, people mostly from minority language communities that have worked on farms over multiple generations and consequently have no access to land elsewhere. This growing demographic group accounts for a significant proportion of the in-migration of unskilled and unemployed people into informal settlements on the fringes of Namibia’s towns and villages. Suzman argues for the recognition of this group as an apartheid legacy population that should be prioritised in land resettlement and provided extensive support as they adjust to life in peri-urban settlements.

The chapter states that since 1991, there has been a clear failure to translate often well-intentioned policy into effective practice in respect of generational farmworkers. Suzman refers to the resolutions passed at the Second National Land Conference in 2018 that aim to ameliorate farmworkers’ lives and working conditions. However, as Suzman argues, there are now very few among the generational farm-working community who are still employed on Namibia’s commercial farms. The resolutions do not apply to these unemployed and landless generational farmworkers and do not provide a remedy to the fact that they form an apartheid legacy community.

Suzman suggests that beyond establishing protections and access rights for generational farmworkers in line with the resolutions at the Second National Land Conference, Namibia is obliged to ensure that any individuals involuntarily displaced by GRN programmes are immediately resettled and compensated on the basis of an appropriate resettlement action plan that seeks to secure their free prior and informed consent. To the extent that there simply aren’t the resources or land

to sustainably resettle all generational farmworkers, priority must also be given to initiatives to help them adjust to life in peri-urban settlements.

The chapter **“Urban Land and Life in Namibia’s Informal Settlements”** by Rune Larsen and Gabriel Augustus deals with Namibia’s urban land and housing issues highlighted by the increasing number of informal settlements across the country. It aims to present a new perspective on these issues by describing life in these informal settlements as presented by residents of the three urban/semi-urban areas adjoining Oshakati, Gobabis and Windhoek. By drawing on the voices of the often-neglected residents of the informal settlements, the chapter aims to provide background and context for the discussion on current public and academic perspectives on Namibia’s urban land and housing issues and projects.

By visiting the settlements in the abovementioned places and conducting interviews with individual residents, the authors highlight the residents’ concerns arising from their daily experiences. The absence of basic services, direct experience of crime and violence, longing for space and ownership and mistrust of authorities were prevalent amongst the issues raised by the interviewees.

On the basis of the interviews the authors establish that there is a disconnect between the concern of the informal settlement residents and the GRN’s initiatives to solve housing and land issues stemming from miscommunication and the perception of exclusion, which in turn leads to the residents obstructing the implementation of GRN resolutions.

The chapter also draws attention to the apartheid sedimentation that characterises the phenomenon of informal settlements in present-day Namibia and argues that a reconfiguration of the approaches towards urban land and housing is imperative.

The chapter presents the central resolutions made during the Second Land Conference in 2018 and highlights the difficulties of reconfiguring the way in which urban land is being dealt with in Namibia. It shows that there are many points of contestation on the issue of urban land rights and uncertainties concerning the implementation of the abovementioned resolutions. While the chapter does not propose a solution to the issues concerning urban land rights, it argues that including the residents’ perspective in the process of seeking solutions is imperative. The chapter concludes that, since the residents are most affected by any implementation of policy, their perspectives should inform policy formulation and collaboration between authorities and residents, and should be key in development and practical servicing in the areas they live in.

Ute Dieckmann’s chapter, **“From colonial land dispossession to the Etosha and Mangetti West land claim – Hai||om struggles in independent Namibia”**, deals with the history of colonial land dispossession as well as the current state of land rights issues with regard to the Hai||om people. The land south of Etosha National Park (ENP) was increasingly occupied by white settlers during the first half of the 20th century, and the Hai||om were evicted from ENP in the 1950s without any consultation. At the time of Namibia’s independence in 1990, and in

contrast to other ethnic groups in Namibia, the Hai||om found themselves to be altogether dispossessed of their land, with no access to communal land. That is the reason why neither traditional livelihood strategies (hunting and gathering) nor agriculture can play a significant role in sustaining the Hai||om peoples' livelihoods. Formal employment opportunities are rare, and dependence on welfare support provided by the state is high, while educational levels among the Hai||om are generally low.

Around 2007, the GRN commenced with some efforts to compensate Hai||om for the loss of their land during colonial times by purchasing a number of farms for them in the vicinity of ENP and offering them relocations. This chapter explains that the Hai||om were dissatisfied with this approach because it lacked actual access to the park, thereby ignoring the Hai||om's spiritual connection to the land and failing to enable them to sustain their livelihoods. This resulted in the Hai||om launching a legal claim to the ENP and Mangetti West areas. In this context, the chapter highlights the issue of representation of ethnic minorities in negotiations and legal process with the GRN. In this regard, the most powerful institutions are currently the traditional authorities, provided for by the Traditional Authorities Act (No. 25 of 2000). However, the Traditional Authorities Act in essence applies the traditional system of Oshiwambo-speaking groups as a model, which is characterised by a hierarchical authority structure with a single representative leader for a large group. This model is not universally applicable, and is not a good fit for San groups in the country. The chapter concludes that the traditional authority is not the right institution to represent San communities because they are traditionally organised in an "egalitarian" way, without a single traditional leader. Dieckmann therefore argues for an amendment of existing legislation in order to accommodate the leadership structures of communities such as the San.

The chapter of Willem Odendaal, Jeremie Gilbert and Saskia Vermeulen, **"Recognition of ancestral land claims for indigenous peoples and marginalised communities in Namibia: A case study of the Hai||om litigation"**, is closely related to the chapter of Ute Dieckmann. In this chapter, the broader focus is on the international case studies of indigenous peoples' and marginalised communities' claims to ancestral land rights. This is brought into the specific context of the Namibian case of the Hai||om peoples' recent court battles seeking a legal remedy for the dispossession of their ancestral land in ENP that took place in the 1950s.

The chapter demonstrates how bringing ancestral land rights claims in front of a court of law can be a means to enforce the rights of indigenous peoples and shed light on the different issues these communities face after being removed from their ancestral lands.

Until the "Etosha case", Namibian courts have not previously considered the rights of indigenous people to the restoration of their rights in land, nor have they considered how an indigenous people should be represented in litigation. It is still unclear which law applies and what the content of the development should be, and

it is uncertain whether the Hai||om people have a potentially tenable claim for the return of their land, or compensation for its loss.

As the ancestral land claim is new in Namibian law, the chapter depicts different precedents in comparative international law to establish the rights of indigenous peoples to their ancient land. On the basis of precedents in other countries, the chapter highlights how litigation could allow the Hai||om people to assert the importance of their ancestral rights with regard to cultural survival as well as to obtain recognition with regard to their ancestral connection to ENP as an indigenous people. The authors conclude that asserting their ancestral rights through a court of law is thus important not only for their cultural rights, but also in terms of their right to development, allowing them to be part of the GRN's decision-making structure vis-à-vis nationally important economic activities centred on tourism and wildlife. The authors of this chapter argue that the case put forward by the Hai||om is not only important for them, but for the whole country, as it will define the way claims to ancestral land rights could be approached in future, and how Namibia should integrate the rights of its indigenous and marginalised communities in the legal framework of the country.

John Nakuta's chapter, **"Ancestral land claims: Why bygones can't be bygones ..."**, deals with the question of how best to handle land right claims from communities who during Namibia's colonial and apartheid occupation were forcibly and arbitrarily deprived of the lands, territories and resources they traditionally occupied. Nakuta argues that calls for restoration cannot be equated with notions of apportioning blame and/or exacting punishment, but much rather emanate from the inalienable right to an effective remedy for victims of human rights violations as guaranteed in numerous human rights instruments.

The primary contention of the chapter is that the dispossession of indigenous communities of their ancestral lands during colonial times constituted a gross human rights violation.

The chapter begins by highlighting the reality of land dispossession as it occurred in Namibia. It explains the racist and discredited doctrine of *terra nullius* which formed the basis of land dispossession at the advent of colonialism. It then proceeds to argue for the development and invocation of aboriginal title in the Namibian legal system to repair historical land injustices.

It then considers the ground-breaking jurisprudential work of the African Commission of Human and Peoples' Rights, the African Court on Human and Peoples' Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights, namely the evolutionary and expansive interpretation they adopted to the concept of "property rights" with a view to obtaining land justice for indigenous communities/populations. This is juxtaposed against the overly cautious approach followed by Namibia's Superior Courts when it comes to historical land injustice issues. The chapter provides the example of the *Tsumib v Government of the Republic of Namibia* case (see Dieckmann's and

Odendaal et al.'s chapters), in which members from the Hai||om community sought permission from the court to be allowed to take legal action as representatives of their community to reclaim their ancestral lands. This case was dismissed without the court considering the merits thereof.

In light of the *Tsumib* case, Nakuta makes the point that litigation is a less than ideal vehicle for redressing claims for historical land injustices. In this regard, Namibia's narrow and exclusive rules on *locus standi*, as well as the adversarial nature of litigation, are flagged as the major hurdles for seeking reparation in the courts. As an alternative, land restitution models from South Africa, achieved through mediation and negotiations, are presented as the kind of administrative reparation programmes Namibia should begin to consider.

The last part of the chapter warns against the danger of relegating legitimate ancestral claims to frivolous phrases such as "Let bygones be bygones". It is argued that such an attitude and approach to something so fundamental runs the risk of being hijacked for political ends.

In their chapter, "**The fencing issue in Namibia: a case study in Omusati Region**", Rose-Mary Kashululu and Paul Hebinck discuss the theory of legal and illegal fencing in Omusati Region, presenting recent data on fencing and the results of their own fieldwork. They explain how fencing generates problems with development as well as with access and rights to land. The authors argue that identifying fencing as part of the series of development issues and making fencing a central component of the analysis allows them to generate a series of key questions, such as who fences and for what purpose; who benefits most and who is losing out; and perhaps more importantly, what is the social and material effect of fencing and thereby (re)ordering communal areas? The chapter focuses on what fencing does to property and property relations, on processes related to exclusion and the future of the commons in Namibia, and on how the struggle to remove fences is organised.

The authors state that the fencing problem has multiple dimensions. They argue that it embodies the problem of overlapping and conflicting spheres of authority, power relations and the capture of resources by elites, and multiple legal contexts in the communal areas. These are the by-products of the creation of new institutions following the decentralisation of resource management after independence to local and regional institutions such as the communal land boards, traditional authorities and regional MLR offices, but also of a private business network strategically associating itself with the state.

They conclude that the conflict that fences generate is at least evidence of the uncertain future of the communal lands; such conflict raises the question of whether they should be managed collectively or privately for purposes of production, grazing and conservation. It may also be that a combination of collective and private management defines the future of the communal lands, although such systems are not always easily combined.

The chapter of Jennifer Hays and Robert Hitchcock, **“Land and resource rights in the Tsumkwe Conservancies – Nyae Nyae and Nǃa Jaqna”**, focuses on the issues the indigenous San communities in these conservancies are facing, especially concerning rights to land and resources. Tsumkwe Constituency, situated in what is today Otjozondjupa Region, has the highest concentration of San in Namibia.

The authors of this chapter point out that the concept of indigenous rights is not about special rights for some communities but about ensuring that the most marginalised peoples in the country have their human rights respected. They emphasise that even though these San conservancies are the best scenarios for marginalised groups in southern Africa, they still constantly have to defend their land against external groups who are stronger, have more resources, and engage in more intensive land use strategies.

Using the example of the two conservancies in Tsumkwe Constituency, the authors outline critical issues concerning all San groups in Namibia. With a focus on the preservation of the traditional lifestyle of San groups and respect of their ancestral rights, the chapter draws five conclusions: First, hunting and gathering should be recognised and respected as a legitimate form of land use, and one that furthermore might be beneficial to the society as a whole. Secondly, the subsistence and land rights of one ethnic group in Namibia should not be held up against the rights of another ethnic group that has also been historically marginalised. Thirdly, it is important to recognise that the San communities are made up of individuals and to take their individual perspectives into consideration while simultaneously allowing for the general aim of the maintenance of traditional subsistence practices. Fourthly, the authors emphasise that the political will of the GRN in upholding its own laws and court judgments is crucial to securing the land rights of the two San communities. And finally, despite all the setbacks and violations that are still occurring, it is crucial to look at the way that San groups are actively negotiating their circumstances, especially with respect to land and resources, because the San of Nyae Nyae, in particular, have had a significant measure of success in negotiating their rights.

The authors argue that the focus should be on carefully protecting and enforcing the land rights of San groups as they are defined in national and international law, with the goal of making Nyae Nyae and Nǃa Jaqna positive models of what could be possible elsewhere.

In their chapter, **“Access to land and security of tenure for the San people in Namibia: the case of Okongo Constituency in Ohangwena Region”**, Romie Nghitevelekwa, Fenny Nakanyete and Selma Lendelvo analyse security of tenure within the context of the ongoing registration and statutory recognition of land rights in Namibia’s communal areas, to determine their applicability to the customary tenure system of San people. Before the in-migration and settlement of the Bantu groups, San people were spread out over most of modern-day Namibia, living a highly mobile life of hunting and gathering. Their customary tenure is based on land as a common property or a common-pool resource with open access. However, the

chapter suggests that the San's lifestyle is critically hampered by individualisation and fencing-off of land by sedentary agriculturalists. It has left the San people on the margins, with their access to land becoming ever-more precarious.

In 2002, Namibia passed the Communal Land Reform Act (CLRA), which came into force in March 2003. The CLRA provides for the registration and statutory recognition of land rights on communal land in order to give the legal security of land tenure which has long been denied. However, while the model adopted by the CLRA and ultimately the Land Rights Registration Programme protects and secures the rights of certain social groups, particularly women in Namibia, it does not give special consideration to other social groups, in particular San people.

With the shortcomings identified in communal land reform and the securing of tenure, the authors state that community-based natural resources management (CBNRM) provides a possible window of opportunity through which San people's land tenure can be maintained. CBNRM is a programme established in the 1990s as part of the GRN's efforts to promote conservation and the sustainable utilisation and management of Namibia's resources. The authors argue that community-based organisations in the forms of community forests and communal conservancies are the only avenues through which the rights of groups of people to common pool resources can be secured. Through community forests and communal conservancies, the GRN devolves management and use rights to communities with the end goal of sustainable management. The authors argue that as there are still regulations contradicting the very purpose of these community-based institutions, it is important that all management communities of community forests and communal conservancies are sensitised about the basic needs of San people and alerted to the fact that their respective regulations should take these needs into consideration.

The conclusion is therefore that the MLR, through the communal land boards, should consider protecting and securing land rights beyond individual land rights, and include forest-based or common-pool resources rights.

In her chapter, "**Land and resource rights of the Khwe in Bwabwata National Park**", Gertrud Boden discusses the land rights situation of the Khwe, an indigenous and disadvantaged San group in Namibia that live in the main part of Bwabwata National Park (BNP). Boden describes how the Khwe have lost control over land and livelihood opportunities since 1890, and particularly since the 1960s. The aim of the chapter is to raise awareness regarding the particular land rights and livelihood situation of the Khwe as residents of a national park and people without a political leadership recognised by the GRN.

Although the Khwe in BNP were not expelled from their ancestral land in colonial times, they are collectively disadvantaged with respect to land rights as they have been and remain dispossessed of the self-determined use of their land. The chapter describes the nature of such land rights during precolonial times and how they were lost in the course of Namibia's colonial and postcolonial history. The chapter goes

on to portray the current land and resource rights situation of the Khwe people and its consequences for their livelihoods. For the Khwe in BNP, the deprivation of land and resource rights did not stop with Namibian independence. Instead, the Khwe in BNP have experienced an increasing influx of non-San persons seeking land for settlement, grazing and crop production on Khwe ancestral land. The access to and use of the natural wealth of Khwe ancestral lands are increasingly restricted for the original inhabitants, while other people, recent settlers in BNP as well as people living outside the park, are permitted to benefit from them.

The chapter sheds light on the issue that to date, the Khwe are the sole Namibian San community without GRN recognition for their traditional authority.

Finally, Boden makes recommendations by referring to the relevant resolutions of the Second Namibian Land Conference held in October 2018. She suggests that communal property rights over BNP should be established and that the Khwe Traditional Authority should be recognised as a legal body for self-determination. If this were to be done, together with developing tourism infrastructure and creating job opportunities in the park, all relevant resolutions of the Land Conference would be satisfied.

In **“Land, resource and governance conflicts in Kunene Region involving conservancies”**, Wolfgang Werner focuses on the uncertainties concerning legitimate access and rights to land in Kunene Region, the former “Kaokoland”. Against the background of a survey carried out in preparation for the Second Land Conference in 2018, Werner discusses issues concerning unrecognised traditional authorities and the absence of clear areas of jurisdiction, access to the communal areas of Kunene Region, wildlife management, transhumance, and mining and land rights in a broader historical context. The chapter shows that the recognition of traditional leaders has long colonial antecedents that an independent Namibian government has uncritically adopted. Werner also argues that the issues identified by communities in 2019 are largely the result of the current policy and legal framework dealing with traditional leaders and land administration, which fail to recognise and build on local customs and practices with regard to tenure systems and land administration. The chapter shows that there is mounting evidence that the provisions of the CLRA and the Traditional Authorities Act are increasing land disputes and social tensions in Kunene Region primarily as a result of the non-recognition of traditional leaders, despite the fact that most of them enjoy local legitimacy. Werner argues that a fundamental flaw in the CLRA is that it offers a one-size-fits-all framework for very different tenure situations in Namibia’s communal areas. The Act fails to recognise local customs and practices and is therefore inappropriate in Kaokoland for protecting customary land rights to commonages. In practice, this means that 30 years after independence, pastoralists in Namibia’s north-west do not enjoy legally protected rights.

Werner concludes that Namibia needs a new land policy and legal framework that is simultaneously specific enough to provide for good governance in land

administration and flexible enough to protect local customs and practices. It must acknowledge and enable customary land rights holders to elect local-level leadership and participate in the administration of their land rights. Local-level institutions capable of administering customary land rights do exist and are well known. These need to be supported and modernised if the country is serious about making land rights more secure. Downward accountability and consultation with customary land rights holders need to be improved.

“Understanding Damara / ǀNūkhoen and ||Ukun indigeneity and marginalisation in Namibia” is the title of Sian Sullivan and Welhemina Suro Ganuses’ chapter, which seeks to offer some context for understanding present circumstances and ongoing debate regarding Damara / ǀNūkhoen and ||Ukun indigeneity and marginalisation in Namibia. With their data on the basis of oral histories and personal testimonies collected since the 1990s, the authors highlight how colonialism affected the subgroup in relation to land distribution and connected policies.


The chapter engages with the following intersecting themes: It depicts how and by whom the Damara were perceived before colonisation. To better understand issues of identity and displacement, the chapter then analyses the dynamic social relationships between Damara / ǀNūkhoen lineages and specific land areas. Since a high proportion of Damara / ǀNūkhoen and ||Ukun do not now occupy their former land areas, the chapter outlines some of the processes by which the majority of Damara / ǀNūkhoen and ||Ukun lost rights over and access to land areas with which they had understood themselves to be in relationships of belonging and custodianship, also specifically focusing on 20th century historical evictions. This section is followed by an outline of the issues associated with the post-Odendaal creation of the Damaraland “homeland”. It is depicted that whilst the creation of “Damaraland” offered an expanded settlement area for Damara / ǀNūkhoen living at the time in other parts of the country, it also led to some further displacements. In the section on the post-independence era, the chapter highlights changes in the administration of land in the former “homeland”. The section touches on the diverse opportunities and constraints engendered by the post-independence establishment of conservancies in and around the former homeland area as a core element of a national and donor-funded programme of CBNRM; and it touches on some implications of an unclear policy setting for asserting exclusionary rights to and control over communal area land. Lastly, the authors review the reasons for ongoing discrimination against Damara / ǀNūkhoen, arguing for their inclusion in discourses of indigeneity and marginalisation in Namibia.

In conclusion, the chapter demonstrates that Damara / ǀNūkhoen and ||Ukun achievements, adaptations and resilience in contemporary circumstances are unevenly enjoyed, and have been accomplished against a background of significant marginalisation and deprivation. The authors argue that recognising Damara / ǀNūkhoen and ||Ukun presence and indigeneity, as well as their experiences of

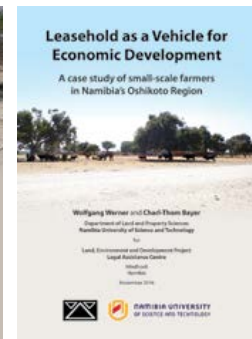
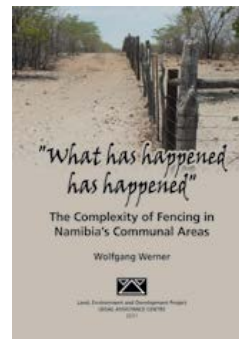
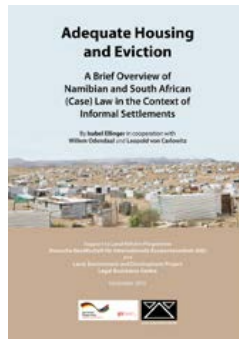
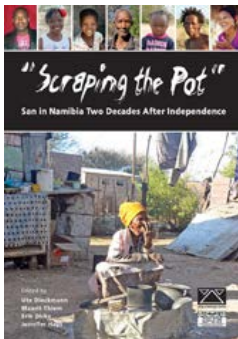
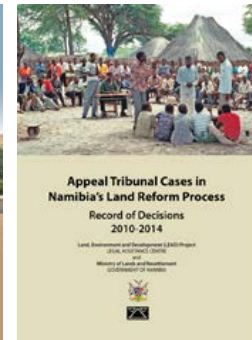
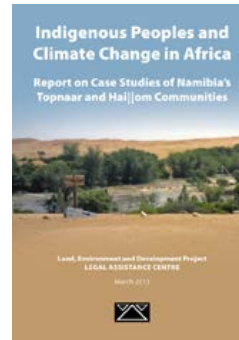
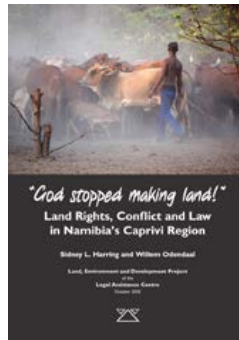
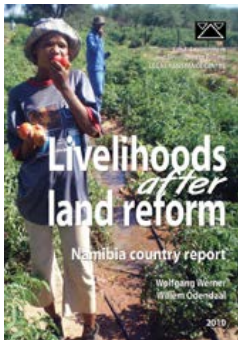
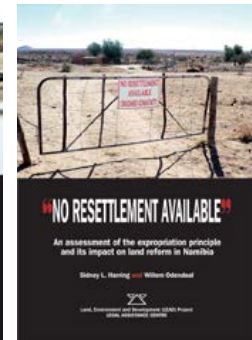
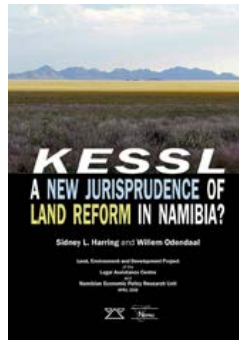
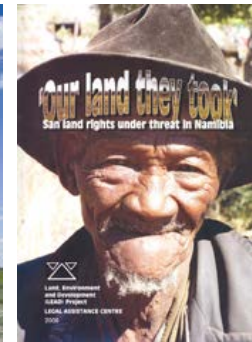
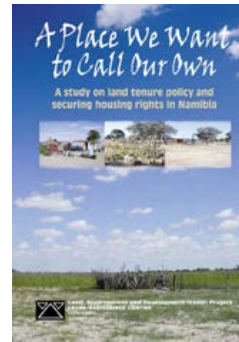
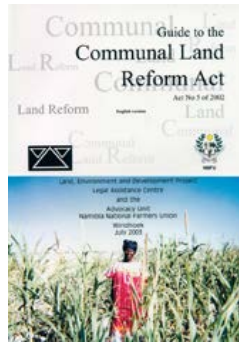
marginalisation through historical processes causing their loss of land and resources, is an important step towards fair redress.

In the concluding chapter, **“San land rights in Namibia: Current national processes and community priorities”**, Ben Begbie-Clench and Noelia Gravotta focus on current national processes and policy proposals concerning primarily land rights of the San communities in Namibia and suggest possible action steps regarding the respective issues.

The chapter states that there has been substantial progress in many areas of land governance since Namibia’s independence, including the development of appropriate national legislation and policies, land acquisition for resettlement, and investments in communal areas. However, the concerns of San groups, and the negative public sentiments about land, are reinforced by the limited success of Namibia’s resettlement programme and shortcomings in the management of communal land, amongst other issues. At the time of writing, several processes within the GRN related to both San groups and land were underway. These included follow-up on the Second National Land Conference, a Presidential Commission of Inquiry to examine questions surrounding ancestral land in Namibia established by the GRN, and the review of a draft White Paper on the Rights of Indigenous Peoples in Namibia.



A few of the many publications of the LEAD Project of the LAC relating to land reform in Namibia generally and specific topics covered in this book. All are freely available at www.lac.org.na.



Land reform in Namibia: Beyond 2018

Samuel Kwesi Amoo

1 Introduction

At the time of the attainment of independence and sovereignty, Namibia inherited a skewed land tenure system which had to be redressed by the duly elected Government of the Republic of Namibia (GRN). The subsequent land reform policies and the legal regime embarked upon by the GRN have been premised on underpinnings and imperatives such as the concepts of sovereignty emanating from relevant provisions of the United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962 on Permanent Sovereignty Over Natural Resources; the right to property under Article 17 of the Universal Declaration of Human Rights; and Article 14 of the African Charter on Human and Peoples' Rights. These conventions guarantee the right to property and the right to housing under the UN-Habitat standards, which in turn are based on international human rights law that recognises everyone's right to an adequate standard of living, including adequate housing.

On the basis of the imperatives of these international conventions, similar provisions in the Namibian Constitution and the dire need for access to land and adequate housing, the GRN has adopted policies and promulgated various pieces of legislation to address and ameliorate the land question inherited at the time of independence.

For almost three decades of independence, however, the land question in Namibia has remained an issue of national concern. Pronouncements by the GRN, activists, and a sector of traditional authorities all attest to the fact that matters such as informal settlement in peri-urban areas and the redistribution of GRN land, whether unalienated or acquired in terms of the provisions of the Namibian Constitution, the Agricultural (Commercial) Land Reform Act (No. 6 of 1995) (ACLRA) or the land

rights provided for by the Communal Land Reform Act (No. 5 of 2002) (CLRA), must be addressed. The question of the right to ancestral land, which does not seem to have been adequately addressed by policy or a legal instrument, has also featured prominently in the land reform debate.

To address these concerns, the Second National Land Conference was held in October 2018. The papers presented and debates from the floor covered, inter alia, areas such as expropriation of private property without compensation, the effectiveness of the willing buyer, willing seller option, the recognition of the right to occupy state land occupied illegally or informally in peri-urban areas, rent control, and the right to ancestral land, including the related principle of public trust that has been the legal underpinning for the pedigree of rights of use provided for by the CLRA.

Whilst recognising the dire need for reform in areas such as access to land in the urban centres, the redistribution of land to the landless members of the Namibian community, and the reappraisal of the question of rights to ancestral land, participants also generally reaffirmed the recognition of the existing legal regime of the land tenure system in Namibia and both the substantive and procedural rights of persons whose properties are earmarked for expropriation by the state.

Recommendations also included the establishment of various committees to be vested with the mandate to consult and make appropriate recommendations for the effective implementation of the conference resolutions or recommendations.

The implementation of some of the resolutions on land reform in Namibia will require a legislative process. However, for purposes of legitimacy, one would expect the legislative process to be preceded by national consultative conferences for an objective evaluation of the resolutions, especially on decisions relating to ancestral land rights and restitution claims.

2 Land reform since independence

Land reform is among the most challenging processes allowed for by the law. This is because it requires a major transformation of property rights in impoverished and skewed agrarian societies, of which Namibia is one, through peaceful, legal means. The recent calls for ancestral land titles and the reforms we see in customary land tenure regimes is a vivid manifestation of not only rising contestations as far as land claims are concerned, but also the potential of law in addressing the “land question”.¹ These challenging possibilities of law in the land reform process can

1 A Commission of Inquiry into Claims of Ancestral Land Rights and Restitution has been established to make recommendations to the President regarding claims to ancestral land rights and restitution. See also *Centre for Minority Rights Development (Kenya), Minority Rights Group International and Endorois Welfare Council (On Behalf of the Endorois Community) v Kenya* (276/2003).

also be traced to the potential that law and legal mechanisms have in transforming inherited and existing political, social and economic conditions of the most vulnerable in society. In Namibia, the *Grundnorm* for land reform can be traced to the sovereign right over natural resources and the right to expropriate private property in the public interest subject to the payment of compensation vested in the state in terms of Articles 100 and 16 of the Namibian Constitution respectively.

2.1 Reform of agricultural commercial land

Just as land dispossession has its history, so does the white agricultural order which followed. Namibian agriculture, under colonialism and apartheid, took on particular forms. In a state where farm ownership is politically and racially charged, it is not easy to determine exactly who owns the land, because some ownership is concealed through various legal devices.² However, the statistics provided in the Executive Summary of the presentation of Hon. Utoni Nujoma, the Minister of Land Reform, indicate that at the time of independence, out of the 69.6 million hectares available for agricultural purposes, a total area of 36.2 million hectares (or 52%) was deemed freehold land or commercial land and was occupied by some 4 200 (predominantly white) farming households.³ Conversely, some 33.4 million hectares (48%) were deemed communal, or rather, non-freehold land, with this area providing for the livelihood of some 70% of the Namibian population. National parks, forests, mining areas, agricultural research stations and conservancies constituted approximately 12.7 million hectares (15%). This is all state land occupied and used by some state agencies.⁴ He concluded that this illustrated how skewed land distribution in Namibia is, and hence the need for land reform.

Pursuant to various national conferences on the land question⁵ and consistent with its avowed policy of land reform, the GRN had the ALCRA promulgated. This Act is meant to provide the GRN with the necessary legal tools to acquire commercial farms for the resettlement of displaced persons, and for the purposes of land reform. To date, the implementation of the policy has been facilitated by the state and by market-assisted acquisition schemes based on the “willing seller, willing buyer” principle.

In his presentation at the Second Land Conference, Hon. Utoni Nujoma indicated that “the acquisition of 549 farms measuring 3.2 million hectares through the willing

2 Because some of these various legal arrangements are secret and private, it is not possible to say precisely how common these devices are, or even exactly what they are.

3 Government of the Republic of Namibia, *The State of Land Reform Since the 1991 National Conference on Land Reform and the Land Question*, Ministry of Land Reform, Windhoek, October 2018, p. 12.

4 Ibid.

5 The Namibian Government has held a number of consultative conferences on the land question since the National Conference in 1991. These led to the enactment of legislation on land and related matters, and to the drafting of the National Land Policy (1998).

seller – willing buyer principle at a cost of N\$1.9 billion and the resettlement of 5 338 beneficiaries is one of the notable achievements of the [land reform] programme to date”.⁶ He added, however, that the escalating land prices had impinged on the ability of the Ministry to meet its set target of 5 million hectares by 2020.⁷ Similar concerns had been expressed by two former ministers who had equally bemoaned the problems associated with the implementation of the Act and the programme. As pointed out by the then Minister of Lands, Resettlement and Rehabilitation, Hon. Pendukeni Ithana, the GRN’s willing seller, willing buyer policy “has imposed constraints on its ability to acquire fertile and more productive commercial farms”.⁸

In terms of the acquisition scheme known as the National Resettlement Programme (NRP) (or currently the Land Acquisition Programme), the state acquires land for resettlement purposes in the market under the auspices of the Ministry of Lands and Resettlement (MLR). The Affirmative Action Loan Scheme (AALS) is a programme implemented by the Agricultural Bank of Namibia (Agribank) on behalf of the Ministry of Agriculture, Water and Forestry. This programme was introduced by the Agricultural Bank Amendment Act (No. 27 of 1991) and the Agricultural Bank Matters Amendment Act (No. 15 of 1992) with the aim of, inter alia, resettling well-established and strong communal farmers on commercial farmland so as to minimise the pressure on grazing in communal areas. It assists formerly disadvantaged persons to acquire land themselves on the open market at subsidised interest rates. The recent figures provided by the Namibia Statistics Agency indicate that a total of 12 382 commercial farms and portions of farms in Namibia cover an area of 39.7 million hectares, of which 97.7% is owned by Namibians. Much of the 39.7 million hectares of land (43 million hectares) is privately owned (86%) while the GRN owns the remaining 5.4 million hectares of land (14%). Previously advantaged Namibians own 27.8 million hectares (70%) of the freehold agricultural land, while previously disadvantaged Namibians own only 6.4 million hectares (16%). Under the NRP, a total of 3 million hectares have been acquired since 1990, with 5 352 beneficiaries. The programme also acquired 496 farms benefiting households. Under the Affirmative Action Scheme, a total of 6.4 million hectares of land were acquired through Agribank between 1992 and 2018. Of this, 3.4 million hectares (54%) of commercial farmland were acquired through the AALS Programme, while commercial banks funded 2.8 million hectares (46%). Only 10% of females benefited through the AALS Programme compared to 60% males.⁹

6 Government of the Republic of Namibia, *The State of Land Reform Since the 1991 National Conference on Land Reform and the Land Question*, Ministry of Land Reform, Windhoek, October 2018, p. 3.

7 Ibid.

8 See Nandjaa, T., ‘The land question: Namibians demand urgent answers’, *Namibia Review*, 1997, pp. 1–4.

9 Namibia Statistics Agency, *Namibia Land Statistics Booklet*, NSA, Windhoek, September 2018, p. 44.

The figures also indicate that companies including both close corporations and limited liability companies owning agricultural (commercial) land in Namibia are registered to be more than 96%. The remaining 4% is registered under estates, churches, farmers' associations, foundations and trusts. Trusts own 672 153 hectares. A total of 2 859 farms are registered under companies, of which close corporations account for 1 568 farms (55%) and limited liability companies for the remaining 1 291 farms (45%).¹⁰

However, an option that is open to the GRN as a possible solution to the constraints of the willing buyer, willing seller option may be found under the provisions of Chapter IV of the ALCRA. Section 20, read with section 14(1), empowers the Minister to expropriate any commercial land for purposes of land reform in case of a failure to negotiate the sale of property by mutual agreement. Under Article 16 of the Constitution, the GRN has the sovereign power to expropriate private property¹¹ in accordance with the norms of international law.¹² The Namibian Constitution provides for the justification of such expropriation on grounds of public interest and the payment of compensation. The power to expropriate is therefore a legal matter, while the decision to expropriate and determine the public interest is a political one. In the case of *Gunther Kessl & Others v Ministry of Lands and Resettlement*,¹³ it was held that the welfare of farm workers constitutes public interest and also that the exercise of this mandate must comply with the provisions of Article 18 of the Namibian Constitution. It is also worth mentioning that this clause is not entrenched, and can therefore be derogated from should a state of emergency be declared under Article 24(3) and Article 26 of the Constitution.¹⁴ The GRN has to date expropriated about nine farms. At the Second National Land Conference, there were suggestions that the expropriation laws be amended to allow for expropriation without compensation. This was, however, rejected.

These commercial farms are at the core of an agrarian social structure that may provide jobs for the unskilled sector of population. In this context, it was reported that the Ministry of Labour, Industrial Relations and Employment Creation has enacted legislation providing for the protection of farm workers' rights and that under the Ministry of Land Reform, the resettlement criteria prioritised the allocation of land to generational farm workers. The report concluded that a total of 119 farm workers out of 5 338 beneficiaries have been resettled to date.¹⁵

¹⁰ Ibid., p. 31.

¹¹ See Article 16(2) of the Namibian Constitution and sections 14(1) and 20 of the Agricultural (Commercial) Land Reform Act (No. 6 of 1995).

¹² See UN General Assembly Resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources', adopted in the case of *Texaco v Libya* (1977) 53 ILR 389.

¹³ 2008 1 NR 167 (HC).

¹⁴ This clearly means that the government, under such a state of emergency, can expropriate private property without compensation.

¹⁵ Government of the Republic of Namibia, *The State of Land Reform Since the 1991 National Conference on Land Reform and the Land Question*, Ministry of Land Reform, Windhoek, October 2018, p. 55.

2.2 Access to urban land and tenure in the informal areas in urban centres

The unavailability of affordable land and adequate housing and the lack of security of tenure over land in the informal settlements were also raised at the Second National Land Conference. It was suggested that measures to ameliorate the problem of the high cost of land in urban centres should include the effective implementation of rent control strategies. The non-existence of a more secure tenure system for urban settlements in the former Bantustan areas can be traced back to the deliberate policy of the colonial administration to deny these urban centres official recognition as municipalities.¹⁶

The first democratic GRN responded to this situation by establishing local authorities in these areas under the Local Authorities Act (No. 23 of 1992). The formalisation of urban centres in terms of this statute involves, firstly, the proclamation of the area as an urban area under the jurisdiction of the relevant local authority. This step is then followed by the registration of the town in the name of the state or relevant local authority. The proclamation and subsequent registration enable the local authority to subdivide the area and create plots or erven of urban land. The occupants of such plots receive freehold titles. In the formal areas the intention is to sell existing erven to the relevant local authority, “subject to the holders of Permissions to Occupy being given the first option on the plots they occupy at the sale date”.¹⁷

Although these measures may to some degree have corrected the injustices of the skewed colonial land policies, the effects of past racial discrimination and urbanisation had their own inherent problems. Whilst the right to freehold titles has been made accessible to all Namibians as a result of the combined effect of Article 16(1) of the Namibian Constitution and the promulgation of the Local Authorities Act, there has been an increased influx of people into urban areas. This has led to considerable growth of informal settlements in the peri-urban areas. The City of Windhoek, for example, grew rapidly following independence, from 141 562 inhabitants in 1991 to 322 300 residents in 2011, this constituting growth of 128% at an annual growth rate of 4.2%. At that rate, the population in 2017 can be estimated to have been about 413 000 people. Much of this growth occurred in the city’s informal settlements. While in 1991, only 3% of all houses in Windhoek were shacks, they made up about one-third (32%) of all homes by the time of the 2011 census.¹⁸ This growth means

16 The National Land Policy (1998, p. 4) requires the establishment and proclamation of urban and urbanising areas as townships and municipalities, where appropriate, to promote decentralisation of government and the close involvement of communities in their own administration.

17 National Land Policy (1998), p. 12.

18 Weber, Beat & John Mendelsohn, *Informal Settlements in Namibia: their Nature and Growth: Exploring Ways to Make Namibian Urban Development More Socially Just and Inclusive*, NCE/DW/German Cooperation/GIZ, 2017 (<https://www.raison.com.na/sites/default/files/Informal-Settlements-in-Namibia-Book-Web.pdf>), p. 73; see also Christensen, S.F. & P.D. Hojgaard, *Report on Flexible Land Tenure System for Namibia*, Ministry of Lands, Resettlement and Rehabilitation, Windhoek, 1997.

that there is not only need for more land for urban settlement but also for security of tenure for people whose rights are not recognised by the existing system.¹⁹ Most of these residents are squatters on land belonging to individuals or local authorities.

The GRN responded by creating alternative forms of land title that are simpler and cheaper to administer but still provide security of title for persons who live in these informal settlements. This was done through the Flexible Land Tenure Act (No. 4 of 2012). The basic objectives of the Act are the formalisation of the settlements by the granting of legal recognition, and the provision of formal land rights and security of tenure over the land occupied informally in the peri-urban areas by the vast majority of the urban poor, thereby promoting affordable access to land and tenure rights in these peri-urban areas.

The Flexible Land Tenure Act also seeks to address the issues of land registration. The informal settlement areas are almost invariably not surveyed for demarcation and subdivision of the land into plots for eventual registration. But the present land registration system is too procedurally and technically bureaucratic to accommodate the needs of the vast majority of the urban poor. Another burden experienced under the current system is the fact that local authorities demand high standards for infrastructure, which are expensive to satisfy.

Furthermore, freehold title, besides being costly, is complex, and requires high levels expertise for the surveying and transfer of land. It is therefore not responsive to the needs and financial capabilities of the rural poor. The Flexible Land Tenure Act seeks to remedy this situation by introducing a parallel interchangeable land system, where the initial secure right is not only simple and affordable, but also upgradable over time. This it does by creating starter and land hold title schemes, both of which are models for a parallel interchangeable property registration system. Therefore, the most basic feature or characteristic of the Flexible Land Tenure System is its parallelism and interchangeability.

The Flexible Land Tenure System is meant to operate parallel to the existing registration system. This means that the same land parcel would be the subject of registration in both the starter and land hold title registry at the Deeds Office. However, the deeds registry would only reflect the ownership of the whole block erf of land and the fact that a starter and land hold title registry exists. Individual starter title and land hold title rights within that block erf would not be visible in the main registry, but only in the starter and land hold title registry. Interchangeability, on the other hand, makes reference to the fact that the different tenure types listed in the parallel registries can be upgraded over time from a basic security of tenure into individual freehold title granting full ownership.²⁰

A starter title provides the holder of such a title with the right to occupy and erect a dwelling on a block erf at a specified location. Such occupation can be in

19 Weber, Beat & John Mendelsohn, *op. cit.*, p. 72.

20 Sections 14 and 15.

perpetuity depending on whether the holder of the title in question opts to upgrade to another form of tenure. The holder can bequeath the dwelling to his or her heirs or lease it to another person.²¹ A starter title therefore constitutes a right of use and not a right of ownership. However, it does provide a statutory form of security over a piece of land on the block erf. Provisions are made for the upgrading of a starter title over time to a land hold title, or where appropriate directly to freehold title.²² Upgrading from a starter title, to any other title is only possible if the majority occupying the block of land agree on this decision.²³ A land hold title enables the holder of such a title to exercise rights over the land acquired that an owner would have in respect of the land under common law.²⁴ Therefore, a land hold title holder may perform all the juristic acts in respect of the plot concerned that an owner may perform in respect of his or her erf or land under the common law.²⁵ Land under land hold title may be sold, donated, inherited and mortgaged, and as such be sold in execution. The Act also provides for the upgrading of a land hold title to full ownership.²⁶

2.3 Tenure in communal land areas

The Namibian land programme has to be understood not only against the background of the misdistribution of land along racial lines, but also from the perspective of customary land tenure systems that operated in the communal areas within the general context of customary law. One of the legacies of colonisation in Africa is the juxtaposition of the received law emanating from the legal systems of the colonial countries alongside the customary law of the indigenous African communities. This juxtaposition subjected the application of customary law to various tests of recognition. As Max Gluckman²⁷ and other students of the jurisprudence and legal systems of traditional African societies have acknowledged, before the advent of colonialism, African communities had their own laws and legal systems regulating the behaviour of individuals in society. These laws covered areas like civil and criminal liability, marriage, inheritance and succession, and land tenure systems.

Faced with the problem of accommodation, the colonial administration accorded limited recognition to customary law by subsuming it under the received law and

21 Section 9(1)(a)–(e).

22 Section 14(1).

23 Section 15(3).

24 Section 10(a).

25 Section 10(b).

26 Section 15(1).

27 Gluckman, M., *Judicial process among the Barotse of Northern Rhodesia*, Manchester University Press (published on behalf of the Institute for Social Research, University of Zambia), Manchester, 1967.

by subjecting it to the all-too-familiar repugnancy clause test for equity, good conscience, and morality. This precondition for the recognition of customary law still exists in the constitutions and statute books of many African countries.

Customary law principles relating to criminal law generally did not withstand scrutiny under the repugnancy clause test. In the area of land law, however, the recognition and survival of indigenous legal principles depended upon different factors and considerations, including the ultimate colonial intent and design, economic factors, public domain concerns, and environmental and land use preoccupations. The general pattern was that in territories where the colonial administration did not intend to settle immigrants from the colonial country or from elsewhere in Europe, customary law relating to land tenure was given a fair amount of recognition.²⁸ In territories where the settlement of immigrants from Europe was the ultimate goal of the colonial powers, indigenous land tenure systems and property rights were given only marginal recognition, and the indigenous communities were dispossessed of their property rights in favour of the immigrants and their property rights regimes. By legislation, land was classified into crown (or state land) and native reserves (or communal lands) so that, as pointed out by T.W. Bennett,²⁹ “the authority of customary law recognised in the administration of communal lands was a creation of colonial authorities.” In other words, native land was not communal land until the colonial authorities defined away all other forms of native land tenure. The latter pattern was more prominent in southern Africa so that in these areas the characteristic feature of the customary law of land tenure is either the adulteration or lack of development of the indigenous systems. The Namibian pattern of classification, as described earlier, fits into this general southern African pattern.

With the promulgation of the Namibian Constitution, customary law was recognised as one of the sources of law in Namibia. In its recognition of customary law as a source of law,³⁰ the Constitution removes the repugnancy clause and puts customary law on an equal footing with Roman-Dutch common law. However, although the Constitution left open the question of whether the new constitutional status of customary law in Namibia means that ownership of the communal lands is vested in the indigenous people as the holders of allodial titles to their ancestral

28 Da Rocha, B.J. & C.H.K. Lodoh, *Ghana Land Law and Conveyancing*, 1995, state that in Ghana, for example, neither in theory nor in practice can it be said that all land is held from the state. Land in Ghana is held from various stools (skins) or families or clans, which are the allodial owners. The state holds lands only by acquisition from these traditional allodial owners. This right was recognised by C.J. Rayner in a report on land tenure in West Africa, cited in the Judgment of the Privy Council in the case of *Amodu Tijani v Secretary, Government of Southern Nigeria* 19212 AC 399.

29 Bennett, T.W. & N.S. Peart, *A sourcebook of African customary law for Southern Africa*, 1991, pp. 384–96.

30 Article 66(1) of the Constitution states that both the customary law and the common law of Namibia in force on the date of independence shall remain valid to the extent to which such customary and common law does not conflict with this Constitution or any other statutory law.

lands, the argument can be made that communal land rights must be defined in terms of Article 16(1), and therefore that holders of rights over communal lands should be granted freehold titles.

Article 100 of the Constitution vests ownership of all land in Namibia in the state, except for land that is otherwise lawfully owned. The application of customary law in the communal areas, coupled with the fact that communal lands were the creation of legislation, has left many uncertainties regarding the exact rights of the indigenous people who occupy the communal lands and the administrative authority of the chiefs.

The position reflected in the National Land Policy of 1998 is that in terms of Schedule 5(1) of the Constitution, communal land is vested in the state to be administered in trust for the benefit of traditional communities and for the purpose of promoting the economic and social development of the Namibian people. This position constitutes one of the underlying principles of the CLRA.

As stated above, Article 100³¹ of the Constitution and section 17 of the CLRA have maintained the position that the communal lands are vested in the state in trust for the benefit of the traditional communities residing in those communal areas and for the purpose of promoting the economic and social development of the people, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agricultural activities. This position supports the rights of the inhabitants of communal lands to a greater degree than such rights had been supported at the time of independence, as is explained hereafter.

The GRN's proposals on communal land reform in the National Land Policy of 1998 have been taken up in the CLRA.³² The primary purpose of the Act is to make the process of land allocation and land administration fair and transparent, and to enhance security of tenure in the communal areas by giving statutory recognition to existing land rights and by creating new rights. The Act also seeks to introduce a certain degree of uniformity in land policy throughout the country by laying down new procedures regarding land allocation, utilisation, and transfer or inheritance. It addresses, inter alia, issues relevant to administration of communal land, titles to communal land, and security of tenure, and as stated earlier, it reiterates the position articulated in the National Land Policy that ownership of rural land is vested in the state.

With regard to rights over communal land, whilst recognising the underlining principle that the ownership of communal lands is vested in the state, the Act

31 Article 100 provides that: "[l]and, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned".

32 The Communal Land Reform Act contains the proposed provisions on the question of ownership, types of titles, security of tenure and administration of communal land. In addition to this, the Traditional Authorities Act (No. 17 of 1995) and the Council of Traditional Leaders Act (No. 19 of 1997) provide for jurisdiction with regard to certain matters pertaining to the allocation and administration of communal land to the traditional authorities.

creates two rights that may be allocated in respect of communal land: customary land rights, and rights of leasehold.³³ The Act thus reaffirms customary rights of usufruct³⁴ granted to occupiers of communal land and seeks to confer statutory recognition on this tenure system. In this regard, the Act does not go beyond the customary right of usufruct. It does, however, specify the duration of customary land rights³⁵ and makes provision for their registration.³⁶ Registration only constitutes publicity or proof of title. It does not confer on the holder any additional power, for example, the power to use the title as collateral.

The other right created by the Act is the right of leasehold, or statutory leasehold.³⁷ This right has replaced the Permission to Occupy (PTO). In terms of the Act, the power to grant leasehold rights is vested in the Communal Land Board.³⁸ The right is granted for a maximum statutory period of 99 years. If the right is granted for a period exceeding 10 years, it is invalid unless it is approved by the Minister.³⁹ The grant of leasehold rights is subject to registration.⁴⁰ If the land in respect of which the right of leasehold is granted is surveyed land, in other words land which is shown on a diagram as defined in section 1 of the Land Survey Act (No. 33 of 1993), and the lease is for a period of 10 years or more, the leasehold must be registered in accordance with the Deeds Registries Act (No. 47 of 1937).⁴¹ These provisions therefore guarantee security of tenure, and could serve as a catalyst for the development of commercial activities in the communal areas.

The Act recognises the role of traditional authorities in communal land administration by vesting in the chiefs and the traditional authorities the power to allocate customary land rights, subject to supervision by the communal land boards.⁴² This provision should not be interpreted as a potential threat to the rights of traditional leaders under Article 102(5) of the Constitution, which provides for the establishment of a Council of Traditional Leaders by Act of Parliament “to advise the President on the control and utilization of Communal land”.

The Act⁴³ vests the right to grant the right of leasehold in the board concerned. It is therefore within the remit of the board to consider applications for the grant of leasehold over designated communal land, but in the process of exercising this mandate, the interests of harmonious relationships and propriety will require

33 See section 19 of the Act.

34 See section 21.

35 See section 26.

36 See section 25.

37 See section 19(b).

38 See section 30(1).

39 See section 34(1) and (2).

40 See section 33.

41 See section 33(2).

42 See section 20.

43 See section 30(1).

the consent of the traditional authority concerned.⁴⁴ The mandate of a traditional authority with respect to the approval of an application for the grant of the right of leasehold in relation to the powers and functions of the board as provided for by sub-section 30(4) are as follows:

Subject to subsection (5) a board may grant a right of leasehold only if the Traditional Authority of the traditional community in whose communal area the land is situated consents to the grant of the right.

A traditional authority is not vested with the absolute right to grant a right of leasehold. This is also supported by the principles relating to the exercise of powers granted to statutory bodies as stated by LA Rose-Innes in his work, *Judicial Review of Administrative Tribunals in South Africa* at 91 and also quoted in the case of *Gunther Kessl v Ministry of Lands Resettlement and Others*,⁴⁵ as follows:

Administration is thus the exercise of power which is conferred upon specifically designated authorities by statute, and which however great the power which is conferred may be, and however wide the discretion which may be exercised, is a power limited by statute. The Administration can only do what it has statutory authority to do, and it must justify all its acts by pointing to a statute. If a public authority exceeds these powers, it acts unlawfully.

A traditional authority is a creation of an Act of Parliament. It is vested with statutory mandate. Its powers and functions and the exercise of these powers and functions are prescribed by the Act, more specifically, section 30 of the Act. Ueitele J in the case of *Chaune v Ditshabue and Others*,⁴⁶ with reference to the exercise of the powers conferred on traditional authorities stated thus:

There is nothing private or personal about the exercise of the powers conferred on traditional authorities. The powers are given to the traditional authorities in the interests of the proper conduct of the affairs of traditional communities. In my view therefore the exercise of power by traditional authorities pursuant to the Traditional Authorities Act 2000 is plainly the exercise of a public power, and in exercising those powers the traditional authority is an administrative body as contemplated in Article 18 of the Namibian Constitution.

This comment was made with respect to the exercise of the mandate of the traditional authorities as provided for by the Traditional Authorities Act of 2000. However, the principle is relevant and applicable in the context of the exercise of the mandate of the traditional authorities as provided for by the CLRA.

44 See section 30(4).

45 2008 (1) NR 167 at 206 (HC).

46 Case No A5/2011 [2013] NAHCMD111.

In the Supreme Court case of the *Chairperson of the Immigration Control Board v Elizabeth Frank and Others*,⁴⁷ the Court laid down the principle that the provisions of Article 18 of the Namibian Constitution demand that, inter alia, the exercise of a discretionary power granted by a statute must comply with the principles of natural justice, including the *audi alteram partem* rule and the provision of reason(s) for a decision or action taken by the repository of such statutory power. In that case O'Lynn J stated thus:

The principles of administrative justice require that in circumstances such as the present, the Board should have disclosed such facts, principles and policies to the applicant for the resident permit and allowed an opportunity to respond thereto by letter or personal appearance before the Board or both.

The Court *a quo* misdirected itself in regard to interpretation and application of the law and applicable procedure. That Court should have set aside the decision of the Board but for the reason that the Board had failed to apply the *audi alteram partem* rule properly. In the premises, the application should have been remitted to the Board for rehearing, where the applicants are given the opportunity to respond to the contents of the aforesaid paragraphs 10 and 12 of the Board's replying affidavit.

This was not the case where exceptional circumstances existed, e.g. where there were long periods of delay, where applicant would suffer grave prejudice or where it would otherwise be grossly unfair.

This affirms the position of Namibian jurisprudence on the exercise of the statutory powers given to both the traditional authorities and the communal land boards; that is, that the exercise of such powers is subject to the provisions of Article 18 of the Namibian Constitution.

The Act also makes provisions for the legal status of rights over communal lands granted before the commencement of the Act and the change in the designation of a communal land area following the establishment of a local authority area within the boundaries of a communal land area.

Before the independence of Namibia and the promulgation of the CLRA, certain rights had been created over the communal lands. This category of land rights included PTOs, but the PTO-s are not included in the customary land rights and the right of leasehold created by the Act.⁴⁸ These rights are separately recognised by the Act⁴⁹ and provisions are made for the holders of such rights to be granted the rights of leasehold upon application to the relevant communal land board for the recognition of the offer of a right of leasehold in respect of the land.⁵⁰ The statutory requirements for the recognition of the existing land right include a letter with

47 2001 NR 107 (SCA) 65. See also *Sikunda v Government of the Republic of Namibia* (3) 2001 NR 181(HC).

48 Section 19 of the Communal Land Reform Act.

49 Section 35(1)(a).

50 Section 35(2)(a)–(b).

prescribed information from the chief or traditional authority of the traditional community within whose communal area the land in question is situated.⁵¹ The mandate conferred upon the communal land boards, the chiefs and traditional authorities in terms of the decisions in the cases of *Chaune v Ditshabue and Others*,⁵² and *Chairperson of the Immigration Control Board v Elizabeth Frank and Others*,⁵³ must, as stated above, be exercised in compliance with the principles of natural justice.

Another aspect of the legal status of land rights granted over lands situated in communal land was addressed by the Supreme Court of Namibia in the case of *Agnes Kahimbi Kashela v Katima Mulilo Town Council*.⁵⁴ The Act provides that where a local authority area is situated or established within the boundaries of any communal land area, the land comprising such local authority area shall not form part of that communal land area and shall not be communal land.⁵⁵ A person whose customary land right has been terminated under such circumstances, i.e. due to the establishment of a local authority area within the boundaries of a communal land area, is entitled to compensation only in respect of any necessary improvement effected by that person.⁵⁶ Such person is not entitled to compensation with respect to the loss of the title to the land since he or she has not been vested with a freehold title.⁵⁷

In the case of *Agnes Kahimbi Kashela v Katima Mulilo Town Council*,⁵⁸ the appellant's late father was allocated a piece of land in 1985 in the then Caprivi Region (now Zambezi Region) by the Mafwe Traditional Authority on communal land. Following independence on 21 March 1990, all communal lands in Namibia became the property of the state of Namibia by virtue of Article 124 read with Schedule 5(1) of the Namibian Constitution – but, in terms of Schedule 5(3) of the Constitution, subject to, amongst others, the “rights”, “obligations” and “trusts” existing on or over that land.

The appellant's father was still alive at the time of independence and continued to live without interference on the land (the land in dispute) allocated to him by the Mafwe Traditional Authority with his family, including the appellant.

In 1995, the GRN, which by certificate of state title owned the communal land of which the land in dispute was part, transferred a surveyed portion of it to the newly created Katima Mulilo Town Council (KTC) in terms of the Local Authorities Act. The appellant's father was still alive then and continued to live on the land

51 Section 35(5)(b).

52 Case No. A5/2011 [2013] NAHCMD111.

53 2001 NR 107 (SCA) 65.

54 Case No. SA 15/2017.

55 Communal Land Reform Act (No. 5 of 2002).

56 Section 40.

57 Section 17(1)–(2).

58 As above.

as aforesaid. He died in 2001, with the appellant as the only surviving heir, who continued to live on the land – according to her as “heir” to the land in terms of Mafwe customary law.

Whilst the appellant was living on the land in dispute, the KTC as the newly registered title holder of the land, rented out certain portions of the land.

The appellant issued a summons in the High Court (Main Division) claiming that the KTC was unjustly enriched by unlawfully renting out the land in dispute. She also claimed that, by offering to sell the land, the KTC unlawfully “expropriated” her land “without just compensation” “at market value”. The appellant relied for those allegations on Art 16(1) of the Constitution, which guarantees property rights, and Article 16(2), which provides that property may only be expropriated upon payment of just compensation. She also relied on section 16(2) of the CLRA, which states that land may not be removed from a communal land area without just compensation to the persons affected.

The appellant therefore claimed as damages the rental amounts received by the KTC as claim one, and under claim two, the amount for which the lands were offered for sale as being reasonable compensation for the “expropriation”.

The KTC pleaded that the appellant was not entitled to the relief sought because at independence and also upon transfer of the land to the KTC, the land in dispute ceased to be communal land and the appellant could not claim any communal land tenure right in that land. The KTC, having become the absolute owner of the land, could deal with it as owner without any encumbrance thereon.

The High Court agreed with the KTC and dismissed the appellant’s claim with costs, holding in the main that in terms of section 15(2) of the CLRA, the land in dispute had ceased to be communal land and that no communal land right claimed by the appellant could exist therein. The court *a quo* also held that if the appellant had any right to compensation it would be enforceable only against the GRN and not the KTC, and that in any event, such a claim was prescribed.

On appeal it was held that, inter alia, Schedule 5(3) of the Constitution creates a *sui generis* right in favour of the appellant and those similarly situated over communal lands succeeded to by the GRN, and that such right continued to exist even when transferred to a local authority such as the KTC.

In rejecting the respondents’ argument to the contrary, the Court held that such right did not need to be registered in terms of section 16 of the Deeds Registries Act to be enforceable.

It was also held that a right created by Schedule 5(3) of the Namibian Constitution did not necessarily have to be vindicated in terms of Article 16(2) of the Constitution because the framers of the Constitution must have intended a remedy to be fashioned by the courts to give effect to the right created by the schedule. In other words, where there is a right, there must be a remedy.

3 Registration of communal lands in Namibia

The distinction between communal land and land held under a freehold title, including commercial land, creates a dual system of land ownership and an even more complicated system of land registration.⁵⁹

Namibia has a dual land registration system: a deeds registry system (as opposed to the Torrens system) applies under the provisions of the Deeds Registries Act,⁶⁰ except in the Rehoboth Gebiet, which historically operated under a different registry system, which resembles the Torrens system of registration.

Under the deeds registry system (the “notarial system”), title deeds are executed and registered by the Registrar of Deeds. Other documents such as antenuptial contracts, lease agreements, and servitudes are registered in the Deeds Office (in Windhoek) after they have been prepared and executed by a notary public.

Before the adoption of the Namibian Constitution,⁶¹ the Rehoboth Baster Community or the Rehoboth Gebiet was administered as a self-governing entity within the South West African territory, under the provisions of the Rehoboth Self-Government Act (No. 56 of 1976).⁶² The governing authority (“Kaptein’s Council” and Legislative Council) passed the Registration of Deeds in Rehoboth Act.⁶³ It applies still, in amended form, but only to the Rehoboth District.⁶⁴ This Act is based on the endorsement of titles system which is consistent with the Torrens system.⁶⁵ For ease of reference it is referred to here as “the Rehoboth system”.

The two registration systems mentioned are fundamentally different. One major difference is that the notarial system requires the services of a qualified conveyancer or a notary public for the preparation of deeds or other documents for registration.⁶⁶ The Rehoboth system,⁶⁷ by contrast, does not contain a similar requirement. In terms of the system of registration of land rights provided for by the CLRA, the services of a qualified conveyancer or a notary public will be required

59 Amoo, S.K. & C. Mapaire, ‘Registration of Communal Lands in Namibia: Critical Analysis of Practical Legal Intricacies’, in Hanri Mostert et al. (eds), *Land Law and Governance: African perspectives on land tenure and title*, Juta & Co., Cape Town, 2017, pp. 171–187.

60 Act 47 of 1937.

61 Act 1 of 1990.

62 Act 56 of 1976, in accordance with the Paternal Law of 1872. The Rehoboth Self-Government Act provided for, inter alia, the establishment of a Kaptein’s Council and a Legislative Council.

63 Act 93 of 1976.

64 As defined in section 6 of the Rehoboth Self-Government Act (No. 56 of 1976).

65 Currently there is a draft Deeds Bill which is intended to harmonise and consolidate the Registration of Deeds in Rehoboth Act (No. 93 of 1976) and the Deeds Registries Act (No. 47 of 1937).

66 It is provided for under the Deeds Registries Act (No. 47 of 1937), specifically section 15, that no deed of transfer, mortgage bond or certificate of title or registration of any kind mentioned in the Act shall be attested, executed or registered by a Registrar unless it has been prepared by a conveyancer practising within the province within which his registry is situate.

67 Registration of Deeds in Rehoboth Act (No. 93 of 1976).

for the registration of a right of leasehold in accordance with the provisions of the Deeds Registries Act⁶⁸ if the land in respect of which the right of leasehold is granted is surveyed land and the term of lease is for a period of 10 years or more.⁶⁹ On the other hand, if the right to be registered is a customary land right⁷⁰ or the right of leasehold is in respect of un-surveyed land and the term of the leasehold is for a period of less than 10 years, then the law requires mere registration in the prescribed register.⁷¹ This will not require the services of a conveyancer or a notary public.

Registration, apart from evidence of ownership, affords security of title needed for the land to serve as collateral for the advancement of loans by financial institutions and building societies.

In Namibia, the registration of land rights is governed by the deeds registry system, which is meant to ensure certainty and security of land rights and title, but the CLRA generally governs the registration of land titles over communal lands. Land registration facilitates the flow of and access to capital from financial institutions to holders of registered rights, generally through mortgages.⁷² Flow of capital is therefore underpinned by registered rights. However, given the differing interests in land, registration *per se* does not guarantee equity in access to capital. Rights created by short-term leases, or even statutory leases, created over communal lands and customary land rights do not attract the level of security that financial institutions require for the release of capital. This is attributed to the basic fact that because the holders of these land rights are not vested with ownership rights, there are uncertainties surrounding sureties in cases of defaults in repayment of the loans.

As a matter of principle, since customary land rights amount to limited real rights,⁷³ they qualify to be registered under the Deeds Registries Act.⁷⁴ However, in practice, since these rights are short of the right of ownership, they are inherently incapable of creating the security needed to access loans from commercial banks and building societies.

The current communal land registration process is not comprehensive, and is fraught with shortcomings. This point has been raised on several consultative meetings and conferences with the relevant line-ministry. In its response, since 2007 the Ministry of Lands and Resettlement has undertaken a Communal Land

68 Section 15.

69 See section 33(2) of the Communal Land Reform Act.

70 See section 25 of the Communal Land Reform Act.

71 See sections 33(1)(a)–(b) and 33(2) of the Communal Land Reform Act.

72 It would be interesting for one to conduct research into the various ways of accessing credit in Namibia through the registration of various land titles, as mentioned in the text.

73 See section 63(1) of the Deeds Registries Act and the doctrine of subtraction from the test as laid down in the case of *Ex parte Geldenhuys* (1926) OPD 155.

74 See section 63(1).

Administration System (CLAS) which consists of two components, namely a communal deeds component (based on an MS Access database) and a communal cadastre component (based on an ArcGIS geodatabase).⁷⁵ The former stores any applicant-related data whilst the latter contains the geometries of the parcels sampled. Although separate in operation, the two databases are linked by a UPI (unique parcel identifier) system. The overall objective of the CLAS is eventually to integrate the commercial and communal land registration systems.

As stated earlier, one of the handicaps experienced by occupiers of communal land is their inability to access credit from financial institutions, because of their inability to use their titles as collateral. This is primarily the social responsibility of the GRN, but financial institutions and building societies must be encouraged to adopt proactive strategies to assist the GRN in its efforts to reform land rights in the communal areas and ensure access to credit. There might be the need for an appropriate legislative intervention and the adoption of progressive policies by these institutions to roll out credit facilities to develop the communal lands. Some banking institutions have initiated the granting of loans for the purpose of building houses in communal lands or un-proclaimed areas, against a guarantee issued by a pension fund to which the member belongs, in terms of the provisions of the Pension Funds Act (No. 24 of 1956).⁷⁶

4 Settlement areas in the land reform strategies of Namibia

The GRN's land reform strategies have included the resettlement programme, which also falls under the general rubric of the decentralisation programme,⁷⁷ and as discussed above, is interlinked with reform of the communal land system,⁷⁸ the provision of affordable and more secure land rights in the informal settlements under the jurisdiction of the local authorities, especially in peri-urban areas,⁷⁹ and the AALS.

Decentralisation in Namibia is a constitutional requirement which should give certain powers and responsibilities to the regions. The GRN's decentralisation programme has been seen as an effective implementation strategy of the Namibian Land Reform and Resettlement Programme. Namibia has a three-layer government

75 Ministry of Lands and Resettlement, *A Decade of Communal Land Reform in Namibia: Review and Lessons Learnt, with a Focus on Communal Land Rights Registration*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2014, p. 42.

76 Section 19 of the Act.

77 Article 16(2) of the Namibian Constitution and sections 14 and 20 of the Agricultural (Commercial) Land Reform Act (No. 6 of 1995).

78 Communal Land Reform Act (No. 5 of 2002).

79 Flexible Land Tenure Act (No. 4 of 2012).

structure, made up of the central government, local authorities and regional councils. Key services like health and education are centralised under line ministries, while the regional government is responsible for specified service delivery in rural areas. Local authorities share the responsibility with central government for service delivery in urban areas.

One area where both the local authorities and central government share such responsibility is in the development of settlement areas in the communal land areas under the jurisdiction of the traditional chiefs, traditional authorities and the land boards, and until the subsequent declaration of such areas as settlement areas.

In terms of section 31(1) of the Regional Councils Act (No. 22 of 1992), a regional council may by notice in the *Gazette* declare any area falling within the region in respect of which a regional council has been established, but outside any such local authority area, as a settlement area. Such declaration will be necessitated by reason of the fact that the prevailing circumstances in such area demand that provision should be made for the management, control and regulation of matters pertaining to the health and welfare of the inhabitants of such area, and consequently *ipso facto* such area ought to be developed and established as a local authority. The declaration is a step in the process of the eventual upgrading of the area to the status of a local authority. The process includes an application by the GRN for the issue of a Certificate of Registered State Title under the provisions of section 18 of the Deeds Registries Act (No. 47 of 1937) in respect of the unalienated State land which has been declared a settlement area. This will be followed by the endorsement of the name of the relevant regional council on the Certificate of Registered State Title, symbolising that the land is vested in the regional council. Such declaration affords the legal basis for the provision of services and land rights by the regional councils. Settlements in Namibia are non-self-governed populated places under the jurisdiction of the regional councils. There are currently about 70 settlement areas in Namibia.

In the context of land reform and development strategies in Namibia, the establishment of a settlement affords access to serviced land. It is a catalyst for development and therefore contributes to the arrest of rural-to-urban migration. In terms of section 32 of the Regional Councils Act, the declaration of a settlement area vests the mandate for the management and control of such settlement area in a regional council “as if such regional council were a village council, with the proviso that certain sections of the Local Authorities Act will not be applicable”. Through comprehensive and intensive development involving relevant line ministries, the council ought to be capable of providing certain services in the settlement areas. These will include services such as community development and early childhood development; rural water development and management; primary health care; pre-primary education; forest development and management; physical and economic planning (including capital development projects); emergency management; vehicle

testing and licensing; responsibility and accountability for electricity distribution; full responsibility for town planning schemes within the framework of approved master plans; business registration; housing provisions; electricity distribution; liquor licensing; full responsibility for the environment and conservation; social services; youth, sports and recreational activities; collection of some form of taxes; non-personal health services; libraries; agency services to towns, villages and settlements; traffic control; control of aerodromes, etc.

As stated earlier, one fundamental principle of decentralisation is the provision of structures for the concentration of development at the regional level. In the context of land reform, it provides access to serviced land and helps reduce the incidence of rural-to-urban migration resulting in the proliferation of informal settlements in the peri-urban areas. However, regional councils have been confronted with limitations and challenges in the implementation of their mandate in the context of land reform generally, and the development of their respective regions as envisaged under the decentralisation policy.

A major principle of local government in Namibia is that the local authorities should ideally be financially autonomous. However, with respect to the existing finance system of the settlement areas, this fiscal autonomy is fictional. Firstly, under the Regional Councils Act,⁸⁰ upon the declaration of an area as a settlement area, the assets of the area, and all rights, liabilities and obligations connected with such assets, shall vest in the regional council concerned. Furthermore, in terms of the State Finance Act (No. 31 of 1991), the budget of the settlement area cannot be submitted directly to the Ministry of Finance/Treasury, but must be submitted through the regional council responsible for the administration and management of the settlement area. By way of contrast, local authorities enjoy more fiscal autonomy. This deprives the settlement areas of the fiscal autonomy that is a prerequisite for their effective management and development. It is recommended that regional councils should get a direct vote from Treasury, but not through the line ministry, for the running of settlement areas.

Secondly, The Traditional Authorities Act (No. 25 of 2000) recognises traditional authorities (e.g. chiefs, headmen) as legal entities, provides for their designation as leaders, and defines their powers and duties. Traditional authorities have, in terms of this Act, the obligation to supervise and ensure observation of customary law, to assist the local government with the development of land use plans, and to ensure that their communities are using natural resources in a sustainable manner. Growth points that can potentially be declared settlement areas come under the jurisdiction and management of the traditional authorities and the communal land boards. There have been reported cases where the process of declaration of settlement areas has been fraught with tensions between the traditional authorities and officials of the regional councils. Regional councils are advised to build good

80 Section 33(1)(b).

working relationships with traditional authorities and engage them on issues concerning the management and development of undeclared areas or areas under their jurisdiction. Legislation may not be an effective tool for resolving tension.

A related challenge pertains to the tenure rights that are available to the residents of the settlement areas. Under current law, residents of settlement areas cannot be vested with freehold titles. In terms of section 32(1)–(4) of the Regional Council Act, the regional councils are empowered to manage the settlement areas as if such regional council were a village council, but there are limitations which hamper a comprehensive execution of this as a result of the provisions of section 30(1)(s)–(t) of the Local Authorities Act. These provisions vest in the local authorities the power to acquire both movable and immovable property and to hypothecate and alienate both movable and immovable property under their jurisdiction. But the regional councils do not have the mandate to grant freehold titles to the residents of the settlement areas. They can only grant leasehold titles. There is evidence that this has discouraged investors from investing in the settlement areas, as leasehold titles do not attract the security attached to freehold titles. There is therefore the need for the residents of the settlement areas to be vested with freehold titles, especially for development purposes. It is therefore recommended that section 30(1)–(t) of the Local Authorities Act on land alienation and disposal be made applicable to the settlements areas to facilitate the provision of serviced land to attract investors. This will ultimately involve the amendment of the relevant provisions of the Regional Councils Act.⁸¹ It is also recommended that the process of proclamation of settlement areas to village councils be expedited where conditions justify such proclamation to enable residents to benefit from the rights of ownership over immovable properties of the proclaimed areas.

5 Conclusion

Access to land and tenure of land were among the most important concerns of the Namibian people in their struggle for independence. Consequently, since independence, Namibia's democratically elected government has maintained and developed its commitments to redressing the injustices of the past in the spirit of national reconciliation and to promoting sustainable economic development. Land reform in Namibia is premised on the need to correct the imbalance created by the apartheid-skewed land dispensation. It is driven by the policy of reconciliation and it is geared towards poverty alleviation and social and economic equity. In this sense, it is aimed at redistribution and restitution, which are necessary to ensure the long-term stability of the country. Poverty alleviation in the context of land reform can be realised through the effective and productive utilisation of the

81 Section 28(c), (i) and (j) of the Regional Councils Act (No. 22 of 1992) will be amended to grant residents the right of ownership of properties.

distributed land, which in turn contributes to increased agricultural productivity and improvement in gross national income.

The Land Reform and Resettlement Programme has followed a trajectory of broad policy positions on the acquisition of commercial agricultural land (either through the willing buyer, willing seller option, or expropriation), and of urban and communal lands, implemented under a legal regime of constitutional and legislative enactments. It is expected that this trajectory will be followed after the Second Land Conference held in 2018, with the strong possibility of a definite GRN position on the right to ancestral land and restitution being formulated.

Land reform is a complex undertaking, and its effective and successful implementation requires more than the existence of an enabling legal regime. One can cite the Flexible Land Tenure Act as a classic example of successful implementation requiring capital, civic education and cooperation between both public and private sectors. It requires a healthy economic environment that is capable of providing the requisite fiscal cushioning and integrity for the GRN to execute a meaningful land reform programme. It will further require the cooperation and partnership of the public and private sectors alike.



The economic viability of emerging commercial farmers under the resettlement programme

Selma Lendelvo, Martin Shapi and Clever Mapaure



Abstract

Land reform programmes have been embarked upon by some African governments to address land inequalities after gaining independence from their colonial masters. Land redistribution to the land poor and from large-scale farmers to small-scale farmers is thus robust, both theoretically and empirically. The Government of the Republic of Namibia (GRN) committed to addressing the skewed land ownership that prevailed for over a century in the country by introducing land reform programmes after independence. The National Resettlement Policy, the Agricultural (Commercial) Land Reform Act (No. 6 of 1995) and the Communal Land Reform Act (No. 5 of 2002) are the key instruments that guide land reform in the country, particularly concerning the acquisition of farmland for redistribution purposes. Secure land tenure is a necessary but not sufficient condition for the socioeconomic development of any society. Historically, many Namibian people were dispossessed of their land to pave the way for the establishment of large-scale commercial farms with freehold title for settlers. This practice resulted in many Namibians being confined to small-scale communal subsistence farming characterised by low returns and insecure land rights. The land redistribution programmes aimed at ensuring fair land distribution among all Namibians and the integration of previously disadvantaged Namibians into the mainstream of the country's economy. The Affirmative Action Loan Scheme (AALS) provides subsidised loans to previously disadvantaged Namibians enabling them to

acquire commercial farms and engage in large-scale farming, while the National Resettlement Programme (NRP) targets small-scale commercial farmers. While recognising that secure land rights are not the panacea for all shortcomings in agricultural productivity, this paper seeks to document factors influencing the economic viability of the resettlement programme in Namibia. This is done by analysing the ability of leasehold agreements granted to resettlement beneficiaries by the Ministry of Land Reform (MLR) to attract investment and subsequently trigger agricultural productivity, as well as by establishing other promoters contributing to this throughput. It is found that there has been improved productivity at the resettlement farms, but that there is still a lot of room for improvement. The current interventions by the stakeholders involved in land reform therefore have to be buttressed by more innovative efforts and also by the cooperation of the farmers themselves.

1 Introduction

African states' land reform policies and programmes have been geared towards redressing the land inequalities inherited from colonial regimes, particularly in countries where dispossession of land from local people was experienced.¹ In the same way, redistributive land policies respond to the demand for land by redressing skewed land distribution in order to promote inclusive agriculture for economic development.² The land reform legislation of southern African countries such as Namibia, South Africa and Zimbabwe, and to some extent Eswatini and Malawi, has been informed by redistributive land policies aimed at redressing unequal land distribution inherited from colonial regimes.^{3,4} The rationale is that inclusive economic growth will be achieved through reformed land governance that improves agricultural productivity and eradicates poverty.⁵

- 1 Byamugisha, F.K., 'Introduction and Overview of Agricultural Land Redistribution and Land Administration Case Studies', in Byamugisha, F., *Agricultural Land Redistribution and Land Administration in Sub-Saharan Africa: Case Studies of Recent Reforms*, International Bank for Reconstruction and Development / World Bank, Washington D.C., 2014.
- 2 McKay, B., 'Redistributive Land Policies for Inclusive Growth and Poverty Eradication', International Institute of Social Studies (ISS) of Erasmus University, paper prepared for the meeting, 'Strategies for Eradicating Poverty to Achieve Sustainable Development for All', United Nations Department of Economic and Social Affairs (<https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2017/04/Benedict-Mckay-Redistributive-Land-Policies-UN.pdf>).
- 3 Mufune, P., 'Land Reform Management in Namibia, South Africa and Zimbabwe: A Comparative Perspective', *International Journal of Rural Management*, 6(1), 2010, pp. 1–31.
- 4 Garcia, T. (n.d.), 'Land reform in Namibia: economic versus socio-political rationale' (retrieved 23 June 2019 from <http://www.fao.org/3/y5639t/y5639t05.htm>).
- 5 Adams, M. & J. Howell, 'Redistributive Land Reform in Southern Africa', *Natural Resource Perspectives*, No. 64, Overseas Development Institute (ODI), London, 2001.

Against the backdrop of the foregoing, like many other southern African countries, Namibia has been, and to a lesser extent still is, an agrarian society.⁶ Approximately 70% of the Namibian population depend on agricultural activities for their livelihoods; such activities are therefore imbued with deep cultural and social meaning for the Namibian people.⁷ Agricultural land also accounts for 85% of the country's land area, with commercial farmland accounting for 44%.⁸ Agriculture plays an important role in the country's economic sector as it is one of the pillar sectors. According to the 2016 Namibian Labour Force Survey,⁹ together with the forestry and fishing sectors, agriculture accounted for 20.1% of total employment in the country. The Land Reform and Resettlement Programme (LRRP) has targeted further employment creation through the promotion of full-time farming.¹⁰

One of the burning issues at independence was the demand for agricultural land. After 1990, the GRN began to address the imbalances in land ownership to improve access to land and develop secure land tenure through land redistribution. The Namibian land reform policies and programmes are sociopolitically driven in the sense that they are intended to redress skewed land ownership brought about by the German and South African colonial regimes,¹¹ while also promoting rural development, economic empowerment and poverty alleviation.¹² Secure land rights are critical to the achievement of sustainable livelihoods and poverty reduction.¹³ The provision of secure land tenure has also been documented as being important in improving land productivity in various countries.¹⁴ In one model,¹⁵ agricultural land over which there is secure tenure can serve as collateral for credit from financial institutions, and as an incentive to invest in the land, thereby strengthening long-

- 6 Harring, S. & W. Odendaal, *"No Resettlement Available": An assessment of the expropriation principle and its impact on land reform in Namibia*, Land, Environment and Development Project (LEAD), Legal Assistance Centre (LAC), Windhoek, 2007.
- 7 Food and Agriculture Organization (FAO) (n.d.), 'Extending the area under sustainable Land Management and reliable Water Control System' (retrieved 23 June 2019 from www.fao.org/3/y6831e/y6831e-03.htm).
- 8 Garcia, T., op. cit.
- 9 Namibia Statistics Agency (NSA), *The Namibia Labour Force Survey of 2016 Report* and *The Namibia Labour Force Survey of 2017 Report*, NSA, Windhoek, 2017 and 2018.
- 10 Republic of Namibia, *National Resettlement Policy*, Ministry of Lands, Resettlement and Rehabilitation, Windhoek, 2001.
- 11 Garcia, T., op. cit.
- 12 Werner, W., *Land reform in Namibia: Motor or obstacle of democratic development*, Friedrich Ebert Foundation (1–18), FES, Berlin, 2003.
- 13 Deininger, K. & R. van den Brink, *How land reform can contribute to economic growth and poverty reduction: Empirical evidence from international and Zimbabwean experience*, World Bank, Washington D.C., 2000.
- 14 Deininger, K. & H. Binswanger, 'The Evolution of the World Bank's Land Policy: Principles, Experience, and Future Challenges', *World Bank Research Observer*, Vol. 14, No. 2, pp. 247–276.
- 15 Place, F., 'Land Tenure and Agricultural Productivity in Africa: A Comparative Analysis of the Economic Literature and Recent Policy Strategies and Reforms', *World Development*, 37(8), pp. 1326–1336, 2009.

term user rights. In many Asian and North American countries, the land title has encouraged long-term investment and the adoption of the best, profitable and sustainable farming practices.¹⁶

Although it has been richly documented that access to agricultural land will enhance productivity, very little is known on land tenure security among the resettlement beneficiaries and the socioeconomic impact of land reform in Namibia. Therefore, this chapter seeks to demonstrate the economic viability of the resettlement programme in Namibia. This is done by analysing the ability of leasehold agreements given to resettlement beneficiaries to attract investment and subsequently trigger agricultural productivity. While economic viability is diversely defined, the definition adopted by O'Donoghue et al.¹⁷ is suitable for the discussions in this chapter: "Broad goals that are basic livelihood security for farmers, and a return on investment sufficient to encourage investments in quality food production and responsible land stewardship". On the other hand, agricultural productivity is commonly defined as a ratio of output to inputs, with land, labour and capital being regarded as important factors for the evaluation of agricultural productivity. Other key production factors include labour, farming experience, fertilisers or animal feed and vaccinations, the availability and management of water, and other biological factors.¹⁸ The analysis within this chapter will draw on MLR statistics and past assessments relating to impacts on poverty (2010), job creation through the National Resettlement Programme (NRP) and Affirmative Action Loans Scheme (AALS) farms, and the 2016 lease agreement assessment.

2 Land acquisition for redistributive purposes

Land tenure defines how property rights over land are to be allocated within societies.¹⁹ The GRN thus developed appropriate regulations and procedures on the acquisition and granting of rights over commercial agricultural land in the hands of formerly advantaged Namibians to allow for access to and ownership of commercial farms by landless Namibians. LRRP initiatives are undertaken mainly under two pieces of legislation, namely the Agricultural (Commercial) Land Reform Act (No. 6 of 1995) (ACLRA) and the Communal Land Reform Act (No. 5

16 Holden, S.T. & H. Ghebru, 'Land tenure reforms, tenure security and food security in poor agrarian economies: Causal linkages and research gaps', *Global Food Security*, Vol. 10, 2016, pp. 21–28.

17 O'Donoghue, C., S. Devisme, M. Ryan, R. Conneely, P. Gillespie & H. Vrolijk, 'Farm economic sustainability in the European Union: A pilot study', *Studies in Agricultural Economics*, Vol. 118, 2016, pp. 163–171 (oi.org/10.7896/j.1631), at p. 164.

18 Mikecz, Orsolya & Rob Vos, 'Can smallholders double their productivity and incomes by 2030?', *ESA Working Paper No. 16-04*, FAO, Rome, 2016.

19 Deininger, K., G. Feder, G. Gordillo de Anda & Paul Munro-Faure, *Land policy to facilitate growth and poverty reductions*, 2002 (<http://www.fao.org/3/y5026e/y5026e03.htm>).

of 2002). The Commercial Land Reform Act guides land reform in the country, particularly the acquisition of commercial farmland. The Act gives the State the right to buy commercial farmland when an owner wants to sell it. The GRN must decide whether it wants to buy a particular farm, and only if it chooses not to may the farm be sold to another buyer, following the issuance of a certificate of waiver. Section 16 of the Act²⁰ defines certificate of waiver as a statement in writing by the minister certifying that the state does not intend to acquire the agricultural land in question at the time of the offer. In most cases, waivers are issued by the GRN when negotiations over farm prices fail or when land is not suitable for resettlement, as the GRN utilises state funds that should be spent prudently. Some waivers have been issued in cases where a change of ownership is contemplated where a farm forms part of an inheritance, and no actual sale is involved. In some cases, when an offer is accompanied by AALS applications, the GRN will assess the applications, and in most cases waivers are issued in favour of prospective AALS farmers. In such cases, the farms in question are nevertheless classified by the GRN as land acquired for redistribution purposes.

The Namibian LRRP thus has two main components, namely the NRP and the AALS. Whereas the AALS provides subsidised loans to previously disadvantaged Namibians to enable them to own commercial farms, the NRP aims to provide 99-year leases to small-scale farmers. Section 14 of the ACLRA provides that any land acquired by the state under section 17 will be used for land reform. The land is mainly acquired under the willing-buyer willing-seller method and to a lesser extent through expropriation.²¹ A total of 6 100 farms covering 19 700 000 hectares of land had been put on the market or offered between 1990 and May 2019.²² Until 2015, the trend was for both farmland offers and waivers to increase; since 2015/16, however, offers have been almost unchanged, while waivers have decreased dramatically. The GRN had acquired about 48% of the total offers by May 2019 for redistribution purposes for the NRP and AALS programmes. These purchases included 3 194 775 hectares for the NRP, and 6 207 948 hectares for the AALS and commercial buyers. On average, farms bought via the NRP cost N\$709 per hectare, as opposed to only N\$228 per hectare for AALS purchases. Nearly two billion Namibian dollars (N\$1 888 673 716) had been spent by May 2019 by the GRN to acquire land for resettlement.²³

There has also been a gradual increase in the acquisition of land owned by foreign and absentee landlords. By May 2019, there were 250 commercial farms that were said to be the private property of foreign nationals, most of whom were

20 Republic of Namibia, Communal Land Reform Act (No. 5 of 2002), Windhoek, 2002.

21 Republic of Namibia, Regulations on Criteria to be used for Expropriation of Agricultural Land: Agricultural (Commercial) Land Reform Act (No. 6 of 1995), Windhoek, 1995.

22 Ministry of Land Reform updated land acquisition statistics, MLR, Windhoek.

23 Ibid.

alleged to be absentee landlords,²⁴ down from 382 such commercial farms in 1996.²⁵

3 Trends in the resettlement of beneficiaries

The MLR facilitates the resettlement of land-poor and landless Namibians on state-acquired commercial farmland through the Land Reform Advisory Commission and decentralised regional resettlement committees. The beneficiaries of resettlement are those Namibian citizens who do not own or have the use of any or adequate agricultural land, and primarily those Namibian citizens who have been disadvantaged by past discriminatory laws or practices. The ACLRA stipulates that after the GRN has purchased the land, it should be demarcated into farming units which must be advertised for allocation. The farming units or allotments are mainly demarcated for livestock farming, with a few that are targeted for crop farming. The sizes of allotments for livestock range between 1 000 hectares in the areas with relatively high rainfall (north/northeast Namibia) and 3 000 hectares for medium to low rainfall areas (southern Namibia). Applications for advertised units are screened through the regional resettlement committees and thereafter passed on to the Land Reform Advisory Commission, which recommends beneficiaries for resettlement to the Minister of Land Reform.

The resettlement beneficiaries have hailed mainly from communal areas, and in the cases of historic farm labourers or those who were landless, from commercial farms. By 2005, only 1 526 families had been resettled on 142 commercial farms, comprising some 843 789 hectares, acquired at a total cost of N\$127 836 132.²⁶ By May 2019, the number of resettlement beneficiaries (inclusive of group resettlements) stood at 5 360 families on 3 194 775 hectares.²⁷ Group resettlements included cooperatives and agricultural group projects, and accounted for 33% of all resettlement beneficiaries. Group resettlement also targeted marginalised communities and destitute persons, mainly those found grazing their livestock in the corridors. However, this study does not analyse the viability of group resettlement.

Despite being perceived as emerging commercial farmers, most of the beneficiaries of resettlement had some farming background from communal areas, while a few had been farmworkers for many years. Resettlement farms are earmarked for small-scale farming with a livestock capacity of not more than 150

24 NSA, *Namibia Household Income and Expenditure Survey (NHIES) 2015/2016 Report*, Windhoek, 2018.

25 Pankhurst, D., 'A Resolvable Conflict: The Politics of Land in Namibia', *Peace Research Report No. 36*, Department of Peace Studies, University of Bradford, United Kingdom, 1996.

26 Haring, S. & W. Odendaal, "No Resettlement Available": *An assessment of the expropriation principle and its impact on land reform in Namibia*, Land, Environment and Development Project (LEAD), Legal Assistance Centre (LAC), Windhoek, 2007.

27 Ministry of Land Reform updated land acquisition statistics, MLR, Windhoek.

large-stock units (LSU) or 800 small-stock units (SSU). This arrangement is intended not only to provide an opportunity for upcoming farmers but also to address the most important objectives of the NRP, namely to redress past imbalances by providing an opportunity to more Namibians to enter the agricultural economy.

4 Land tenure security among resettlement farmers

Redistributive land reform interventions to alleviate poverty and enhance economic development do not only involve land acquisition and distribution, but also entail technical and administrative processes supporting the titling of land.²⁸ The NRP in Namibia requires that successful applicants who are resettled enter into lease arrangements following an allotment letter issued by the Minister of Land Reform. In terms of section 42(2) of the ACLRA, beneficiaries receive a leasehold right over the allocated farming unit for the period of 99 years. The National Resettlement Policy states that such rights are granted so that beneficiaries can use the lease agreement as collateral to leverage agricultural credit from financial institutions to upsurge their production capacity.²⁹ By May 2019, a total of 509 lease agreements had been entered into with beneficiaries, accounting for only 14% of the 3 581 individual beneficiaries. This low level of lease agreements was brought about by several factors,³⁰ amongst them being the fact that the MLR recalled the initial lease agreement documents in 2008 which lacked clear terms and conditions, including confirmed demarcation of the farming units. The MLR started issuing the revised version from 2009, but the process has been hampered by a lack of the internal coordination within and between MLR directorates that is required to enable the synchronised surveying, demarcation and valuation of allotments, and by financial and human capital constraints faced by the MLR.³¹

Upon receiving the lease agreement signed by the Minister, the farmer is expected to register the agreement in the Deeds Registry within the MLR. Before such registration, the Office of the Surveyor-General has to survey the land after demarcation, whereafter the land is valued by the Office of the Valuer-General. The survey diagram, valuation letter and resettlement notice must then be attached to the leasehold agreement, which eventually enables the lessee to be registered in the Deeds Registry. Only a total of 14 (3%) of lease agreements had been registered in the Deeds Registry by May 2019. The issuance and registration of lease agreements

28 Byamugisha, F.K., op cit.

29 Republic of Namibia, *National Resettlement Policy*, Ministry of Land, Resettlement and Rehabilitation, Windhoek, 2001.

30 Ministry of Land Reform updated land acquisition statistics, MLR, Windhoek.

31 Republic of Namibia, 'The Potential Impact of Lease Agreements on the Livelihoods and Productivity of National Resettlement Programme beneficiaries in Namibia', Ministry of Land Reform, Windhoek, 2018.

do not run concurrently with the resettlement process, as beneficiaries have been allowed to occupy and commence farming without registered leaseholds. The process has been retarded by the high degree of dependence on the MLR for land demarcations, surveying and valuation, as these services would be very costly for individual resettled farmers. Limited knowledge regarding the registration process on the part of most beneficiaries has also resulted in low registration rates of leases with the Deeds Office, as the GRN has done very little to educate the beneficiaries.

Furthermore, even if not yet registered with the Deeds Office, all lease agreement holders are expected to pay their rental fees to the GRN a month after issuance. This has led to the unpopularity of lease agreements amongst resettlement beneficiaries and has not only retarded the advancement of farmers' capacity but also resulted in the GRN forfeiting large sums of revenue that could have been generated through lease agreement rental fees.³² Registered titles for land provide secure land tenure to the beneficiaries, not only legalising the ownership or lease agreement but also broadening benefits to the titleholders. Secured land tenure is able to contribute to a reduction in land-related disputes, incentives for environmental management, and the collateralisation effect by enabling access to finance to support farming.³³ Some studies have found that superior investment and higher productivity were associated with leaseholds titles, especially in Latin America and Asia.³⁴ Although the titling of land is important for security of land tenure, there has been no differentiated impact from land titling on investment behaviour in many African states.³⁵

5 Levels of livestock production among resettlement beneficiaries

On average, resettlement farmers have recorded some appreciable successes in their farming activities, which would suggest that these are financially viable. Livestock production among resettlement farmers was assessed on the basis of changes over time, and the lease agreement status of the beneficiaries. Livestock numbers were generally low at the time of resettlement, and after several years

32 Republic of Namibia, *ibid.*

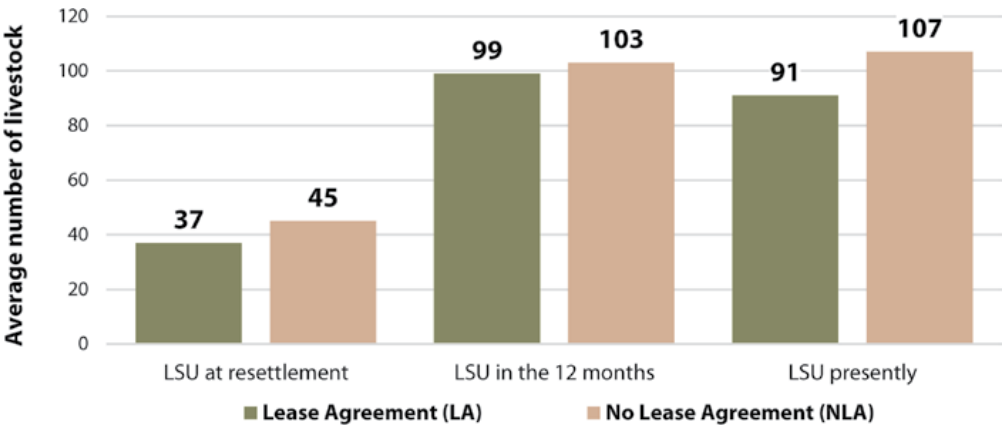
33 Zwelendaba, V.V., *An evaluation of the effects of land tenure security in on-farm investment and on-farm productivity: A case of the smallholder farmers in the Amathole District of the Eastern Cape Province of South Africa*, Thesis for the University of Fort Hare (Private), 2014.

34 Lawry, S.C., Samii, R. Hall, A. Leopold, D. Hornby & F. Mtero, 'The impact of land property rights interventions on investment and agricultural productivity in developing countries: a systematic review', *Campbell Systematic Reviews*, 2014, p. 1 (DOI: 10.4073/csr.2014.1.).

35 Platteau, J-P., 'Does Africa need land reform?', in C. Toulmin & J. Quan (eds), *Evolving land rights, policy and tenure in Africa*, DFID/IIED/NRI, London, 2000.

these farmers had started building up and maintaining their livestock numbers within the required capacity of less than 150 LSU (Figure 1). The maintenance of livestock numbers was also clearly illustrated in Table 1, which shows that farmers had continued with farming activities and that there had been a slight increase in livestock prices. However, livestock losses caused by predation and drought were more devastating in 2016³⁶ than they had been in 2009.³⁷ Most of the farmers could nevertheless make a living and meet most of their daily expenditures, although there were a few whose livestock numbers had declined over time.

Figure 1: LSUs between resettlement and 2016 among leaseholder and non-leaseholder resettlement farmers



Studies published in 2010³⁸ and 2018³⁹ record evidence of livestock marketing, with resettled farmers maintaining a certain level of livestock and selling between 15 and 18 LSU. However, the price per unit also fluctuated between 2009 and 2016 by just over N\$700, making it difficult for the farmers to make accurate projections of returns from their farming activities. There was very little difference between farmers with registered lease agreements, and (freehold) farmers without lease agreements in terms of farming investment measured in livestock numbers kept, purchased and sold, which suggests that lease registration does indeed trigger greater investment.

36 Republic of Namibia, ‘The Potential Impact of Lease Agreements on the Livelihoods and Productivity of National Resettlement Programme beneficiaries in Namibia’, Ministry of Land Reform, Windhoek, 2018.

37 Republic of Namibia, ‘Poverty Impact Assessment of different Land Reform Programmes’, Ministry of Land Reform and Namibia Institute of Democracy, Windhoek, 2010.

38 Ibid.

39 Republic of Namibia, ‘The Potential Impact of Lease Agreements on the Livelihoods and Productivity of National Resettlement Programme beneficiaries in Namibia’, Ministry of Land Reform, Windhoek, 2018.

Table 1: Livestock production variation over time

	2009		2016	
	Average Number	N\$ @ 3 473/unit	Average Number	N\$ @ 4 250/unit
Number owned	120	416 760	100	425 000
Offtake				
Number used	2.1	7 293	3.1	13 175
Number sold	18.5	64 251	15	63 750
Number lost	4.7	16 323	11.5	48 875
Total offtake	25.3	87 867	29.6	125 800

Table 2: Lease agreement status

	Lease agreement		No lease agreement	
	Average Number	N\$ @ 4 250/unit	Average Number	N\$ @ 4 250/unit
Number owned	91	386 750	107	454 750
Number bought	13	55 250	10	42 500
Number sold	18	76 500	12	51 000

6 Enhancers of farm productivity among resettlement farmers

One of the concerns raised during the 2nd National Land Conference held in 2018 was that the model of the resettlement programme was not working, and required revamping. However, there is a need for introspection and consideration of the achievements among the beneficiaries of resettlement farms, and on progress made by them, as well as for an exploration of factors impeding the realisation of the desired and expected outcomes. The MLR studies used for analysis have quantified growth in farming activities among the resettlement farmers, reflecting the contribution of the programme to national objectives of economic development and poverty alleviation. The upturn in productivity on these farms was attributed to several financial and mentorship programmes that the GRN has implemented in support of resettled farmers, although the personal investments of the farmers should also be recognised. It was also revealed that there were close-to-equal numbers of the full-time and part-time individual resettlement farmer beneficiaries, despite the National Resettlement Policy target of achieving a high proportion of full-time farmers in order to create employment.^{40, 41, 42}

40 Republic of Namibia, 'Poverty Impact Assessment of different Land Reform Programmes', Ministry of Land Reform and Namibia Institute of Democracy, Windhoek, 2010.

41 Republic of Namibia, 'Employment creation by land reform programmes in commercial land, Namibia', Ministry of Land Reform, Windhoek, 2015.

42 Republic of Namibia, 'The Potential Impact of Lease Agreements on the Livelihoods and Productivity of National Resettlement Programme beneficiaries in Namibia', Ministry of Land Reform, Windhoek, 2018.

Capital accumulation in the form of livestock has been astonishing over the years on the resettlement farms, with the beneficiaries on average doubling their herds. A significant difference between the regions regarding land productivity was observed, with livestock production being significantly lower in //Kharas and Hardap regions than in Khomas, Oshikoto and Omaheke regions. This pattern is attributed to the prevailing climatic conditions in the respective regions. In general, the annual growth rate in LSUs was not influenced by the presence or absence of a leasehold agreement, but was more influenced by the type of income the farmers could access, with off-farm income opportunities being shown to be a crucial factor in annual growth in herds.⁴³ This is because farmers whose main income came from non-farm activities were more likely to increase their herds than those who depended entirely or substantially on income from farming activities. A part-time farmer may be employed elsewhere or may be running another business apart from farming that will enable him or her to finance operations. Rigg (2005) reflected in his paper on experience in Thailand that reduced land productivity coupled with a lack of sufficient investment opportunities for farmers leads to farmers going beyond farming to generate additional income. It is important to point out that resettled farmers who depended on sources of income other than farming were also likely to increase and sustain productivity, while also adhering to environmental provisions and employing more farmworkers.⁴⁴ Farmers cite investments aimed at improving agricultural management practices (for example grazing management, and using licks and concentrates) and years of good rains as having led to the positive growth in livestock herds.

Just as the previously advantaged farmers during the colonial regime built their operations on government subsidies and support, it has become clear that emerging farmers under the current LRRP would not be able to sustain profitable farming operations without some level of support under either the resettlement programme or the AALS.⁴⁵ To speed up the process of establishing successful farms, the new owners need to receive significant immediate support after they settle on the farms, and to benefit from long-term support structures to secure access to input and output markets, credit, and advisory services.⁴⁶

The need for GRN support to resettled farmers cannot be avoided as the LRRP is making slow progress in the issuance and registration of leases that could have assisted farmers to diversify financial support systems. It became evident from earlier studies that there were no discernible differences in the levels of farm operations for resettled farmers with and without lease agreements. This might

43 Ibid..

44 Ibid.

45 Fuller, B. & G. Eiseb, 'The commercial farm market in Namibia: Evidence from the first eleven years', *IPPR Briefing Paper No. 15*, Institute for Public Policy Research, Windhoek, 2002, pp. 1–16.

46 Binswanger-Mkhize, P.H., C. Bourguignon & R. van den Brink (eds), *Agricultural Land Redistribution: Toward Greater Consensus*, World Bank, Washington D.C., 2009.

also have contributed to the introduction of the collaborative post-resettlement support package between the MLR and Agribank, resulting in \$200 000 being available to each resettled farmer who applied, irrespective of their lease agreement status.

The support package has been in operation since 2009, with 1 145 farmers benefiting by May 2019, at a total cost of N\$60 610 067.⁴⁷ Beneficiaries used this support to invest in their farming operations by buying livestock and farming implements, and making infrastructural improvements. Investment in infrastructure has been cited as an important source of growth in agriculture.⁴⁸ The MLR studies published in 2015 and 2018 revealed that most of the resettled farmers obtained credit for their farm operations through post-settlement support.^{49, 50} The acquisition of credit from private financial institutions was very low amongst the resettled farmers, perhaps as financial institutions were reluctant to make loans on the basis of personal credentials in the absence of collateral from the farm title.

7 Factors hampering productivity among resettlement farmers

Commercial farming is a long-term business operation with high start-up costs, as has been demonstrated among resettlement farmers who cited several costs associated with building up their farms before starting to invest in production. Moreover, the agricultural production on the resettlement farms was affected by various inhibiting factors including but not limited to the high acquisition and maintenance cost of infrastructure, limited access to credit or finance due to collateral issues emanating from tenure insecurities, and shortcomings in experience, training and mentorship.^{51, 52, 53}

Productivity on resettlement farms has also been negatively affected by poor veld conditions caused by overgrazing, poor grazing management and/or recurrent droughts, bringing about further marginalisation especially among the lower

47 Agribank latest statistics, Namibia.

48 Mikecz, Orsolya & Rob Vos, 'Can smallholders double their productivity and incomes by 2030?', *ESA Working Paper No. 16-04*, FAO, Rome, 2016.

49 Republic of Namibia, 'Employment creation by land reform programmes in commercial land, Namibia', Ministry of Land Reform, Windhoek, 2015.

50 Republic of Namibia, 'The Potential Impact of Lease Agreements on the Livelihoods and Productivity of National Resettlement Programme beneficiaries in Namibia', Ministry of Land Reform, Windhoek, 2018.

51 Ibid.

52 Republic of Namibia, 'Employment creation by land reform programmes in commercial land, Namibia', Ministry of Land Reform, Windhoek, 2015.

53 Republic of Namibia, 'Poverty Impact Assessment of different Land Reform Programmes', Ministry of Land Reform and Namibia Institute of Democracy, Windhoek, 2010.

performing farmers (MLR, 2018?). Farmers associated poor veld conditions with the limited size of the farming units, which they felt contributed to low productivity. They believed that their farming units are too small for commercial farming, even with the application of rotational grazing and other sustainable farming methods. Unemployed women, the elderly, the youth and former farmworkers are among the weaker performing farmers. The leasehold agreement makes provision for monitoring of sustainable environmental and land management strategies, and particularly for ensuring that the carrying capacity is adhered to on all farms. However, the 2018 study of the MLR revealed that monitoring has been weak, and that some farmers did not observe the environmental monitoring indicators,⁵⁴ which could have negative repercussions for the sustainability of farming activities.

The Namibian climatic reality is also reflected in statements from farmers who lost some of their stock due to drought. A large number of SSUs were lost as a result of the high prevalence of predators, and farmers complained about the limited support received from the Ministry of Environment and Tourism for resolving predator problems.

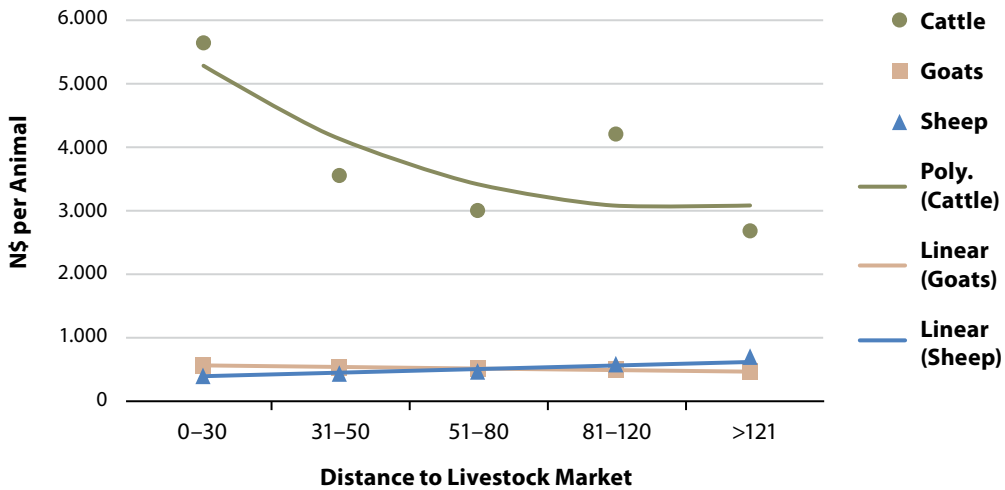
The lack of access to markets is another factor hampering productivity among resettled farmers. A 2009 study found that returns on sales of large stock were very strongly influenced by the distance to the market. The further the farm is from the market place, the lower the returns a farmer can generate from their livestock sales (see Figure 2 on the next page). Returns ranged between N\$5 625 where the markets were nearby and N\$2 614 where the markets were the furthest away.⁵⁵ As could be expected, the 2016 study revealed that about 76% of the farmers invested in vehicles to reach markets.⁵⁶ Farmers depend heavily on formal markets in Namibia, and these are situated at fixed auction locations because they are consistent and offer market-rate prices. Although informal markets also exist for livestock, they are more inconsistent, and do not operate following commercial trade principles. It also emerged from farmers that prices were strongly associated with the levels of rainfall, as the persistent drought has been depressing livestock prices in the country. Resettled farmers will be the most vulnerable to fluctuations in prices, because their farming businesses are not yet well-established and lack substantial investment.

54 Republic of Namibia, 'The Potential Impact of Lease Agreements on the Livelihoods and Productivity of National Resettlement Programme beneficiaries in Namibia', Ministry of Land Reform, Windhoek, 2018.

55 Republic of Namibia, 'Poverty Impact Assessment of different Land Reform Programmes', Ministry of Land Reform and Namibia Institute of Democracy, Windhoek, 2010.

56 Republic of Namibia, 'The Potential Impact of Lease Agreements on the Livelihoods and Productivity of National Resettlement Programme beneficiaries in Namibia', Ministry of Land Reform, Windhoek, 2018.

Figure 2: Impact of distance to markets on returns on livestock sales (2009)



Connected to the distance to the marketplace is the matter of access to services. The data reveal that most land reform beneficiaries operate a long way from their respective service centres.⁵⁷ This has serious financial implications for their farming operations and the expenditure they are required to make, since farmers who are further from service centres spend more of their income than those who are nearby. Long distances to the service centres reduce the prospect of regular support and/or access to service providers. At the same time, those who are further away may not receive important information in time, or at all.⁵⁸ Farmers who are far from service centres attend training sessions infrequently, and are automatically disadvantaged.

On the other hand, although marginal profits were evident, farming in Namibia is regarded as not only an economic activity, but a valuable cultural practice. This strengthens the resilience of resettlement farmers and supports their farming operations in the face of profound challenges.

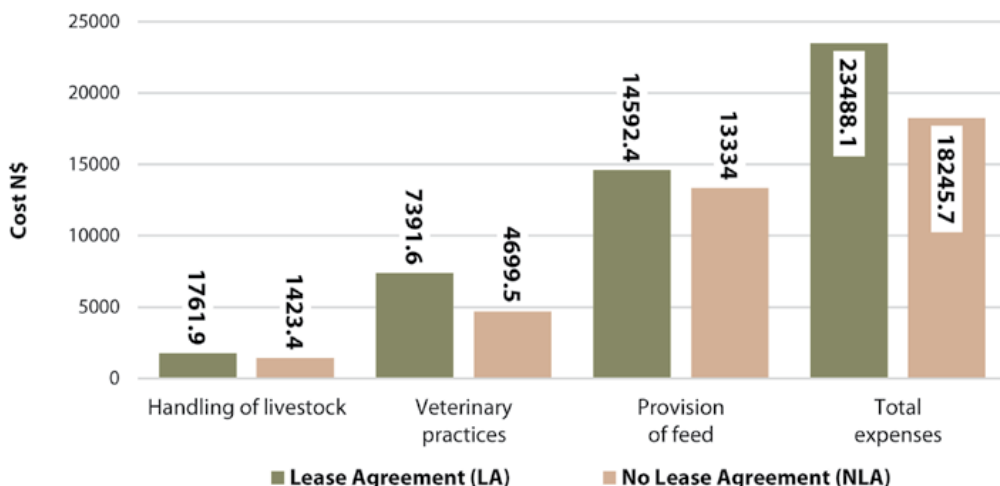
Expenditure related to farming operations are a further drain on the already overburdened capital resources of resettled farmers. Figure 3 shows expenditure related to livestock management, which was regarded as high by emerging farmers who are still in the process of establishing their income base.⁵⁹ Figure 3 also reflects minimal differences with respect to farm expenditure between resettled farmers with and without lease agreements.

⁵⁷ Republic of Namibia, 'Poverty Impact Assessment of different Land Reform Programmes', Ministry of Land Reform and Namibia Institute of Democracy, Windhoek, 2010.

⁵⁸ Ibid.

⁵⁹ Republic of Namibia, 'The Potential Impact of Lease Agreements on the Livelihoods and Productivity of National Resettlement Programme beneficiaries in Namibia', Ministry of Land Reform, Windhoek, 2018.

Figure 3: Livestock management expenditure of resettlement farmers




The acquisition and maintenance of farming infrastructure and wages for farmworkers were among the farming-related expenditures that were said to affect the farming outcome of the resettled farmers. Furthermore, resettled farmers were also able to create jobs, on average each employing two farm workers. Despite this level of job creation, over 40% of the resettlement farmers complained that their farming operations were most affected by high staff turnover, with farm labourers only keeping their jobs for short periods. Water infrastructure, fencing, livestock handling equipment and vehicles for farming purposes were among the expenditures that were important, yet costly. During 2016, resettlement farmers on average spent N\$27 000 on buying or maintaining water infrastructure, which matched the amount spent on livestock handling, kraals and fencing of the farm. The analysis confirmed that part-time farmers with off-farm income sources were more able to invest in farm infrastructure, while those who depended on limited alternative income sources relied more on the GRN for these services, which are not always provided timeously.⁶⁰

8 Conclusions

This chapter has shown that the land issue in Namibia has a long history, and that much remains to be done to resolve it. The chapter has further highlighted the status of land redistribution in Namibia to resettlement beneficiaries and its role in reducing land marginalisation and poverty. The speed of land reform now depends largely on increasing efficiency in land acquisition and administration. It is imperative that the

⁶⁰ Ibid.

land acquisition and allocation process, including the registration of leases, is more carefully planned and synchronised during implementation. Although there is little evidence that land tenure security attained through the registration of leases has the potential to contribute to the economic viability of farmers, there is evidence that the current state of affairs, with the majority of beneficiaries farming without lease agreements, runs counter to commercial farming philosophies and is likely to have undesired impacts in the future on the condition of farms. The chapter has further highlighted the current levels of productivity and existing support for production for emerging farmers to enhance their productivity. However, the slow pace at which land rights are being secured among resettled farmers through the registration of leasehold agreements with the Deeds Office prevents farmers from accessing credit and making the investments in their farming operations that could improve their productivity. Resettled farmers have primarily depended on the post-resettlement support provided through a special start-up capital arrangement between the MLR and Agribank. This chapter revealed the high farm-related expenditures that must be borne by farmers, underlining the need for them to access credit to succeed in their operations. Farmers with a stable source of off-farm income are more likely to invest in their farming operations, contributing to better returns. This reality indicates that the goal of creating employment and alleviating poverty by enabling the majority of resettlement beneficiaries to become “full-time farmers” is still a long way from being attained.



The legacy of Namibia's landless generational farm-working community

James Suzman

Abstract

An estimated half of the roughly 50 000 farmworkers employed in Namibia during the height of the apartheid era considered themselves generational farmworkers. This group, mainly from minority language communities, laboured on farms over multiple generations as a result of their having no access to land elsewhere and depended on farmers in order to meet their most basic needs: a place to stay, food to eat, and water to drink. While the Government of the Republic of Namibia (GRN) has made commitments to protect the few generational farmworkers still employed on farms, most former generational farmworkers are no longer employed on farms. This growing demographic group, who have been underserved by GRN resettlement programmes and now constitute a highly marginal, predominantly unemployed underclass, accounts for a significant proportion of the in-migration of unskilled and unemployed people into informal settlements on the fringes of Namibia's towns and villages. This paper argues for the recognition of this group as an apartheid legacy population that should be prioritised in land resettlement and provided extensive support as they adjust to life in peri-urban settlements.

1 Introduction

At the Omaheke "Town Hall Consultation" with President Hage Geingob, held on 11 July 2019, Chief Frederik Langman, Traditional Leader of the =Kau//Eisi San, informed the gathered dignitaries that "before independence most of the San

people were farmworkers but after independence most have been fired from the farms.” As a result of this he noted that “most of them have been wandering around the country not knowing where to sleep or to stay.”¹

Chief Langman was making this point specifically in relation to the San constituents of his traditional community. But he was also invoking a broader problem, one that lies at the intersection of a sequence of demographic, developmental and economic challenges and that are felt particularly acutely by an historically significant segment of Namibia’s population, “generational farmworkers”. This group, who retained no independent rights of residence anywhere in Namibia other than the farms on which they laboured over several generations, were the progeny of the peculiarities of South West Africa’s highly exploitative farm labour system and the inflexible ethnic logic of apartheid’s “homeland” system.

Even though it would be some years before the term “generational farmworkers” entered Namibia’s political lexicon, the unique challenges faced by this community were well understood by Namibia’s first democratic government in 1990.² But while generational farmworkers were identified as a priority concern at the time and specific provisions were made for them in the agricultural land reform and resettlement policies, this community has been notably underserved over the course of the last three decades.³ As a result, early opportunities to limit the impact of a ballooning socioeconomic problem through resettlement were squandered. The fact that these communities’ challenges have continued to grow is firstly symptomatic of broader demographic changes that have seen Namibia’s national population double since independence, placing unprecedented pressure on rural livelihoods; and secondly it is an unintended consequence of initiatives aimed at formalising what was once an ad hoc and highly exploitative farm labour market, specifically the introduction of social security, minimum wage and other legislation intended to regulate the farm labour market and bring it into line with the normative standards associated with other employment sectors.

In both his opening and closing keynote addresses at the Second National Land Conference held in Windhoek in October 2018, President Hage Geingob made specific reference to generational farmworkers. Noting that “as the son of a farmworker, the plight of generational farmworkers” was “close to his heart,”⁴ he instructed delegates at the conference to be mindful of the unique challenges faced by this community and recommended that “all resettlement programmes should pay special attention to the plight of generational farmworkers who themselves are

1 *New Era*, ‘From the town hall: Omaheke engages Geingob in lively interaction’, 15 July 2019.

2 GRN, *National Conference on Land Reform and the Land Question: Windhoek, 25 June-1 July 1991, Volume 1*, Office of the Prime Minister, Windhoek, 1991.

3 Kaapama, P., ‘Commercial land reforms in postcolonial Namibia: What happened to liberation struggle rhetoric?’, in H. Melber (ed.), *Transitions in Namibia: Which Change for Whom?*, Nordica Africa Institute, Uppsala, 2007.

4 President Geingob, closing keynote address at the Second National Land Conference, 1 October 2018.

inherently landless, more so when the farm they lived on all their lives changes in ownership.”⁵

In line with President’s admonitions, two specific resolutions were passed by delegates at the conference vis-à-vis generational farmworkers. These were that government should:

- develop a policy to protect generational farmworkers by providing alternative residence or providing a portion of the land to such workers; and
- develop a policy to ensure farmers offer unhindered access to graves and heritage sites and structures.⁶

It remains to be seen whether there is sufficient political appetite to give these policies teeth and, if so, the extent to which the GRN is able to effectively implement them, given the historical shortcomings in translating well-intentioned policy into effective practice. Nevertheless, early signs are positive, as soon after the conclusion of the Second National Land Conference, the Minister for Land Reform, Utoni Nujoma, stated that primarily as a result of budgetary constraints that meant they could not take on more ambitious resolutions, the Ministry of Land Reform (MLR) would focus its efforts on “low hanging fruits”, among them the two resolutions that focussed on generational farmworkers.⁷

But in passing these resolutions to address the challenges faced by generational farmworkers, delegates attending the 2nd National Land Conference failed to take into account the fact that, as alluded to in Chief Langman’s comments at the Omaheke Town Hall, there are now very few among the generational farm-working community who are still employed on Namibia’s commercial farms, and as a result they primarily form an apartheid legacy community characterised by landlessness, poverty and unemployment, rather than an active category of employees with specific workplace issues to manage. Indeed, after Namibian independence, the legislative and economic framework that made it possible for farmworkers to be employed on a generational basis was effectively dismantled with the result that the generational farmworker community is now comprised predominantly of populations who live in peri-urban settlements, eking out a living on the fringes of Namibia’s communal areas and on resettlement farms.⁸ Indeed, despite Namibia’s population having increased fourfold since 1971, the current number of individuals formally employed as agricultural workers in Namibia is less than 20% of the size of the commercial agriculture labour force in that year.

5 President Geingob, opening keynote address at the Second National Land Conference, 1 October 2018.

6 GRN, ‘Resolutions of the Second National Land Conference, 1st–5th October 2018’, Ministry of Land Reform, Windhoek, 2018.

7 Kahiurika, Ndanki, ‘Farmworker evictions a 2019 priority – Nujoma’, *The Namibian*, 24 January 2019.

8 Suzman, J., *In the Margins: A Qualitative Examination of the Status of Farm Workers in the Commercial and Communal Farming Areas of the Omaheke Region (Research Report Series No. 1)*, Farm Workers Project, Legal Assistance Centre, Windhoek, 1995; Werner W., *Land Acquisition for Resettlement: An assessment*, Ministry of Lands and Resettlement and GTZ, Windhoek, 2009.

From a policy and planning perspective, it is therefore vital to recognise that the generational farm-working community extends beyond those still employed in agriculture and includes:

- the ever-growing population of the dependants and descendants of apartheid-era generational farmworkers who over the course of the last three decades have been unable to find work on farms, and who now account for a significant proportion of the population of the rapidly growing informal settlements like Kanaan on the outskirts of Gobabis; and
- other unemployed generational farmworkers who now depend on informal and unregulated labour exchange in communal areas where they hold no traditional land rights, and where their labour relationships fall outside of the scope of the better regulated and more carefully managed formal agricultural employment contracts now characteristic of commercial farms.
- In view of the above-mentioned, this chapter will argue that:
- it is necessary to conceptualise generational farmworkers not just as a contemporary community but as an apartheid legacy community who, like former PLAN fighters and other legacy communities, are afflicted by a series of challenges very specific to their particular circumstances;
- future efforts to address the plight of the generational farm-working community must extend beyond those who still retain employment on commercial farms and include those in peri-urban settlements who continue to provide cheap labour in communal areas; and
- policy initiatives to address the status of generational farmworkers need to be mindful of both the particular historical circumstances that gave rise to the phenomenon of this group, and to their changing demographic profile.

2 Context

Addressing the specific challenges faced by generational farmworkers in Namibia requires understanding of the specific historical, economic, social and cultural forces that gave rise to this legacy community. It is as a result of these that generational farmworkers are caught in a self-replicating cycle of poverty; are poorly placed to compete for jobs in the urban areas where many now congregate; and lack the basic capital resources or security of tenure to establish themselves independently as farmers. It is also as a result of these challenges that a strong case can be made that, purely on the basis of needs, this community should be and should have been the primary focus of initiatives to sustainably resettle people on commercial farmland purchased by the GRN for resettlement purposes.

Creating economically viable commercial farming operations in a country that is predominantly arid and semi-arid posed a series of critical challenges to Namibia's first white settler farmers during the period of German rule and subsequently, after

1917, the period during which South West Africa was administered by the Republic of South Africa. Beyond various state subsidies and support programmes, the two key elements of administrative support for farmers in their efforts to develop economically viable farms were firstly to ensure that they were allocated enough land to farm at a commercial scale, and secondly to ensure that they had access to sufficient cheap labour to work that land. To this end, policies were developed firstly to ensure that farmers had easy access to “migrant labour” by relocating some traditional communities into environmentally marginal native reserves, and secondly by empowering farmers to press-gang indigenous populations into their labour forces and retain their services against their will by means of statutes including the Masters and Servants Proclamation of 1907 and the Vagrancy Proclamation of 1920.

Namibia’s generational farm-working population is comprised primarily, but not exclusively, of the descendants of people from traditional communities that were not granted quasi-autonomous communal areas by the 1963 Odendaal Commission or native reserves under South West African administrations. It must therefore be recognised that this community had its genesis in the differential land dispensations granted to specific “ethnic” communities by the apartheid regime, and that it is composed primarily of people from minority language communities who were not afforded communal areas of their own. Many in this group claim strong ancestral associations with land in both commercial and communal farming areas, as well as with land areas set aside for nature conservation. Thus, for example, the generational farmworker community in Omaheke Region is comprised mainly of San and Khoekhoegowab speakers⁹ with established ancestral ties to land across much of the commercial farming block, as well as in Aminuis, the Korridor, eastern Hereroland and the Tswana-speaking areas like the Ben-Hur/Shaka complex of farms and Epukiro RC. The generational farmworking community of the Outjo District has ties to both commercial farmland and state land in the form of Etosha National Park from which a significant number of Hai||om were evicted in 1955.

The generational farm labour system arose partially as a result of commercial farmers’ desire to secure stable and secure labour forces during a period characterised by crippling labour shortages. It also arose as a result of the fact that a significant proportion of the generational farmworker population is comprised of the descendants of people who claimed individual farms as part of their traditional territories and simply remained there when white farmers moved in. Thus, for example, in the Omaheke area between 1917 and 1960, Ju|’hoansi generational farmworkers typically worked on farms they associated with their traditional *n!oresi* (territories). Their status as generational farmworkers was cemented by the fact

9 Central Statistics Office, *Living Conditions in Namibia: The 1993/1994 Namibia Household Income and Expenditure Survey*, Windhoek, 1995, p. 275.

that up until the 1970s, farmers often expected the children of adult staff to work. This was viewed as desirable because it meant that from an early age they became accustomed to the specific work regimens of individual farms and familiar with the sometimes idiosyncratic demands of their employers. Importantly, those who grew up on the farms served what in effect were long agricultural apprenticeships and so became highly skilled farmworkers in their own right whom employers often valued and were keen on retaining. Thus, by the mid-1980s it was not uncommon for three generations from the same family to be working together on the same farms.

While agricultural employment in South West Africa was legally regulated, it was done with a light touch. In practice this meant that commercial farmers were often left free to administer their farms as they saw fit. While migrant labourers typically had greater leverage to demand employment in formal terms from commercial farmers because they could theoretically leave their jobs, farmers wielded considerable leverage over generational farmworkers largely because members of this community were entirely dependent on farmers in order to meet their most basic needs. With nowhere to live outside of the commercial farms on which they were employed, generational farmworkers had little option but to accept whatever conditions farmers offered. Thus, during the 1960s, 1970s and early 1980s, generational farmworkers typically worked outside of any formal contractual arrangements with their employers. This resulted in a wide variety of labour regimes on the commercial farms, some considerably more exploitative than others. On some farms, generational farmworkers were only ever paid in “farm rations”, whereas on others they were offered cash and food. On some they were provided with housing, but on many others they were left to build their own housing.

Despite the fact that farmers had few enforceable legal obligations to their workers, many nevertheless assumed a paternalistic duty of care for their workers’ families enshrined in the concept of *baasskap* (“boss-ship”). This not only increased the extent of the dependency of this population on their employers but also resulted in farmers often tolerating large populations of workers’ dependants living on their farms, with women and children often being given work on a casual basis. For example, in 1984 it was reported that 81 individual farms in the Outjo, Grootfontein, Tsumeb, Otjiwarongo and Gobabis districts hosted San generational farm-working populations that exceeded 50 individuals, and a further 141 farms hosted populations of between 30 and 50 individuals.¹⁰

The highly restrictive nature of farm life during the apartheid period severely limited future prospects for generational farm labourers after independence. While populations in communal areas and townships had access to some state schooling, the children of generational farmworkers were largely excluded from the state

10 Marais et al., *Ondersoek na die Boesmanbevolkingsgroepe in SWA* (The Brand Report), Development Directorate, South West Africa Administration, Windhoek, 1984.

education system altogether. In a few instances, farmers took it upon themselves to establish farm-schools which provided the children of some generational farmworkers a rudimentary education, but the numbers catered for under such programmes were statistically insignificant. The net result of this was that while generational farmworkers became highly specialised agricultural professionals by 1991, they had few transferrable skills or qualifications to enable them to access anything other than unskilled jobs in other sectors of the economy.

During the mid-1970s the farm labour market in South West Africa entered a significant transitional period. Prior to then it had been shaped by an undersupply of labour and efforts by farmers to recruit widely and even retain labourers by force. Indeed, the number of people employed in commercial agriculture peaked at around 50 000 in 1971. As many as half of these were migrant labourers with homes in Khoekhoegowab-, Oshiwambo- and Otjiherero-speaking communal areas.¹¹ By 1975, however, the agricultural labour market had increasingly come to be reorganised on the basis of an oversupply of labour. This was in part a demographic issue, as Namibia's population in 1975 of close to a million was nearly double what it had been in 1950, and in part a result of the fact that by 1975 farmers were beginning to rely ever more on mechanisation, and had by then completed many of the longer-term, more labour-intensive projects like fence erection and waterpoint development needed to make their farms economically viable. As a result, by 1991 the population of people formally employed on farms had declined by close to forty percent, to 32 613.¹²

There is no comprehensive dataset with which to accurately chart the rates of decline in agricultural employment between 1975 and 1991. Qualitative evidence combined with partial census data suggests that the process accelerated rapidly during the 1980s, as it became increasingly clear that Namibian independence would be inevitable. It is also clear that purging of excess labour from commercial farms in the run up to independence occurred across Namibia, and in numerical terms probably impacted migrant labourers as severely as generational ones. For migrant labourers, the loss of a job necessitated either a return to communal areas or migration into townships. Generational farmworkers from minority communities and who also typically had no urban connections and no access to land in communal areas lacked either option. As a result, those who lost their jobs and their dependants had nowhere to go. Thus by 1991 hundreds of generational farmworkers squatted along the verges of roads like the C22 that cuts northwards through Omaheke Region from Gobabis to Otjinene and southwards from Gobabis to Aminuis. Others gathered in buffer zones between commercial and communal

11 Suzman, J., *An Assessment of the Status of the San in Namibia*, Report No. 4 of 5 on the *Regional Assessment of the Status of the San in Southern Africa*, Legal Assistance Centre, Windhoek, 2001, p. 61.

12 Central Statistics Office, *Living Conditions in Namibia: The 1993/1994 Namibia Household Income and Expenditure Survey*, Windhoek, 1995, p. 275.

farming areas like Oshivelo in Oshikoto Region, and many others still gravitated to existing communal areas where they squatted on the peripheries of villages or sought informal employment at cattle posts, often in return for food.

After 1991, formal employment on commercial farms continued to decline, and as a result, by 2013 the number of people formally employed in commercial agriculture in Namibia had declined from its historical high of over 50 000 people in 1971 to well below 10 000 (see Table 1).

There were several critical factors that further accelerated this decline:

- the formalisation of farm labour with the introduction of the Labour Act (No. 6 of 1992), the Social Security Act (No. 34 of 1994) and later in 2003 the introduction of minimum wage requirements;
- the purchase of 517 farms by the GRN for resettlement purposes, and job losses associated with these purchases;
- the decline in support and subsidies for established commercial farmers;
- the expansion of tourism and the transformation of many formerly far more labour-intensive cattle ranches into less labour-intensive hunting and tourism concerns; and
- increasing unemployment nationally and an increasingly saturated labour market that enabled commercial farmers to be far more selective in employment practices.

3 Definition, identification and enumeration

Recognising that generational farmworkers are an apartheid legacy community also requires recognition of the fact that the children and dependants of individual labourers on farms that were developed during the apartheid era form part of this constituency. It furthermore requires recognition of the fact that this community is primarily, though not exclusively, made up of individuals from ethno-linguistic communities that were *not* granted specific land entitlements through the Odendaal Commission. This community can therefore be broadly defined as being made up of people who have:

- limited access to land in communal or commercial farming areas by means of historical association, membership of a traditional community or established kinship links;
- a multi-generational family history of farm labour during and beyond the apartheid era primarily in commercial farming areas, but also in communal areas where the place of employment was also the individual or family's primary residence and where loss of employment would render the individual and dependants without anywhere to go "home"; and
- a lack of access to capital assets and historically limited access to formal education, making it difficult to compete for jobs in other sectors.

- While not directly pertinent to their classification as a legacy community, it must be recognised that this community falls into several residential categories:
- those who still retain employment on farms and use these farms as their primary and only permanent residence;
- those who as a result of losing their jobs on farms now form part of a highly mobile itinerant population living on the fringes of urban and rural settlements and who depend on informal, usually short-term labour exchange in order to survive; and
- those who now live in group resettlement facilities with insufficient land access to develop viable small-scale farms and who consequently depend on state aid and informal short-term labour contracts in order to make a living.

It is similarly difficult to accurately establish the size of the current legacy community of generational farmworkers. There are of course some from all traditional communities in Namibia who simply as a result of long service on farms during the apartheid era or some other reasons were effectively alienated from their traditional communities or lands. But by far the largest linguistic constituency of this community hail from Namibia's San- and Khoekhoegowab-speaking communities who, like the Omaheke Region's G/obanin people simply had no direct association with lands allocated to their linguistic communities under the Odendaal Commission. In 1995 the Legal Assistance Centre and the Social Sciences Division of the Multi-Disciplinary Research Centre at the University of Namibia conducted a farm survey, and found that 90% of their San respondents were the children of farm workers.¹³ While establishing the size of this community should be a priority for the MLR in future, for now it is only possible to infer the size of this community based on what is at best partial historical data.

Table 1: Agricultural employment in Namibia 2013/2014¹⁴

Type of workforce	Number of Paid Work Force						Number of Unpaid Work Force					
	Permanent workers			Temporary workers			Contract workers			Household members		
	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total
Management	438	142	580	43	9	52	11	3	14	244	213	457
Technical	356	47	403	139	23	162	5	0	5	14	8	22
Clerical	44	60	104	13	16	29	4	0	4	8	17	25
Farm labourer	6 269	1 182	7 451	1 874	933	2 807	953	168	1 121	748	810	1 558
Other	460	334	794	55	23	78	84	10	94	134	102	236
Total	7 567	1 765	9 332	2 124	1 004	3 128	1 057	181	1 238	1 148	1 150	2 298

¹³ Devereaux, S., V. Katjiuanjo & G. Van Rooy, *The Living and Working Conditions of Farm Workers in Namibia*, Farmworkers Project, Legal Assistance Centre and Social Sciences Division, Multi-Disciplinary Research Centre, University of Namibia, Windhoek, 1996.

¹⁴ Namibia Statistics Agency, *Namibia Census of Agriculture 2013/2014*, Windhoek, p. 59.

The best available numerical data comes courtesy of the Brand Report on Namibia's San Population, which was published in 1984.¹⁵ It is important to note, however, that it only pertains to San generational farmworkers, and crucially omits other linguistic constituencies, most notably the large Khoekhoegowab-speaking generational farm-working populations in the regions of Hardap, Omaheke, Khomas and Kunene. The Brand Report indicates that in 1981, in total 15 900 San lived on commercial farms across the country and that a further 7 823 lived as farmworkers and casual labourers, and their dependants, working for Oshiwambo-, Otjiherero- and Kavango-speaking farmers in communal areas. Based on demographic trends which have seen Namibia's total population increase to the point that it is now approximately 150% larger than it was in 1981, it is reasonable to assume that this extended community alone represents a population in the region of 35 000 individuals, half of whom will be under the age of 16. Based on prior qualitative research into the status of generational farmworkers in Namibia¹⁶ which suggests that San comprised roughly half of the total of generational farm-working community, the total is probably more likely to be in the region of 70 000 individuals and to account for a significant proportion of the populations now based in informal settlements like Kanaan outside Gobabis and the Outjo's Plakkersdorp.

4 Efforts to address the status of general farmworkers post-1991

Since 1991, there has been a clear failure to translate often well-intentioned policy into effective practice in respect of generational farmworkers. This is partially a consequence of a clear shift in MLR priorities from poverty eradication and addressing the needs of the most marginalised towards a more mainstream economic transformation agenda based on the transfer of capital assets "to previously disadvantaged" populations regardless of contemporary economic and social needs.

While the term "generational farmworkers" was not specifically used at the time there was a clear acknowledgement in all early deliberations on land reform of the unique challenges faced by this group in the years immediately following independence. At the 1991 *National Conference on Land Reform and the Land Question*, for example, it was agreed that in the absence of ancestral land claims

15 Marais et al., *Onderzoek na die Boesmanbevolkingsgroepe in SWA* (The Brand Report), Development Directorate, South West Africa Administration, Windhoek, 1984.

16 See Suzman, J., *In the Margins: A Qualitative Examination of the Status of Farm Workers in the Commercial and Communal Farming Areas of the Omaheke Region* (Research Report Series No. 1), Farm Workers Project, Legal Assistance Centre, Windhoek, 1995; Gebhardt, F., 'The Socio-Economic Status of Farm Labourers in Namibia', in *South African Legal Bulletin*, Vol. 4, Nos. 1 & 2.

“that disadvantaged groups, in particular the San and the disabled, should receive special protection of their land rights”.¹⁷ This determination was subsequently reaffirmed in the National Land Policy (NLP) (section 101). It was stated that “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 does commit special support to all landless or historically disadvantaged communities.”

The focus in the first instance on social equity, justice and poverty eradication rather was also reaffirmed in the NLP that was developed in 1997, which stipulated that:

Within Namibia’s unitary land system, Government Policy will at all times seek to secure and promote the interests of the poor, ensuring that they are in practice able to enjoy the rights which they are assured in principle. A special commitment will be made to ensuring equity in land access and security in land tenure. Special programmes to help the poor to acquire and develop land will be considered.

The most important individual piece of legislation ratified after independence relating to the status of generational farmworkers was the Agricultural (Commercial) Land Reform Act (No. 6 of 1995) (ACLRA). The ACLRA Act was intended, among other things, to address “long-standing grievances about the injustice of colonial land allocations” (NLP section 3), and to ensure that the equity in land access called for in the NLP was translated into effective practice.

Specifically, the ACLRA granted the GRN the mandate to establish a resettlement programme by purchasing commercial farms on a “willing seller, willing buyer” basis, as well as in exceptional circumstances to acquire “underutilised” or “excessive” lands with a view to redistributing these to “Namibian citizens who do not own or otherwise have the use of adequate agricultural land and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices” (section 14(1)).

This restitutive focus is also clearly present in the Preamble to the ACLRA, which uses near-identical wording to that in section 14(1). The implicit identification of generational farmers as being among the primary intended beneficiaries for resettlement on commercial farmland was also made explicit in the eligibility criteria established in 2001 National Resettlement Policy. These are:

- people who have no land, no income and no livestock;
- people who have neither land nor income but a few heads of stock; and
- people who have no land but have income and livestock and need land to resettle their families or graze their livestock.

17 GRN, *National Conference on Land Reform and the Land Question: Windhoek, 25 June-1 July 1991, Volume 1*, Consensus No. 14, Office of the Prime Minister, Windhoek, 1991.

5 Resettlement

In its National Resettlement Policy criteria for resettlement, the MLR notes that “Generational farm workers have been described as being among the most marginalized people in our society”¹⁸ and that as a result are to be afforded special consideration in resettlement applications.

The widespread recognition that resettlement on former commercial farms acquired by the GRN was the only realistic short-option to address the plight of unemployed generational farmworkers was made clear in 1991 and 1993 when several hundred generational farmworkers and their dependants who had been squatting on the verges of the C22 in Omaheke Region were resettled at Drimiopsis and Skoonheid. Despite this promising start, the GRN’s broad-based resettlement programme stalled over subsequent years. While the process was held back to some extent by challenges in acquiring land from commercial farmers on a willing seller, willing buyer basis, the primary constraints were institutional. Several successive independent reviews of the resettlement process since independence have highlighted a range of problems.¹⁹ Key among these are:

- an insufficiently clear and occasionally contradictory policy framework;
- severe budgetary constraints;
- unrealistic and inappropriate goals;
- systematic failure to consider the social and political dimensions of rural poverty in particular vis-à-vis landless generational farmworkers;
- poor inter-ministerial co-ordination in respect of support programmes;
- capacity and resource issues resulting in the poor management of resettlement facilities;
- failure to make specific allowances for illiterate applicants or engage in proactive outreach to vulnerable individuals who otherwise lacked the means, networks or resources to formally apply for resettlement or understand their entitlements; and

18 MLR, *Resettlement Criteria* (http://209.88.21.57/documents/20541/88025/Resettlement_Criteria.pdf/88db4b77-0fb4-472a-a271-8a8441c5ce4d, accessed 18/08/2019).

19 Department of Environmental and Geographical Science – Masters Students, *A Retrospective Assessment of the Environmental Implications of Resettlement in Namibia (RAEIR)*, University of Cape Town, 1998; Maclean, B., *Resettlement and Namibian San Communities: Perspectives for Sustainable Community Development Through Empowerment*, M.Phil Thesis, University of Cape Town, Cape Town, 1998; Suzman, J., *An Assessment of the Status of the San in Namibia*, Legal Assistance Centre, Windhoek, 2001; Werner, W., *Land Acquisition for Resettlement: An assessment*, Ministry of Lands and Resettlement and GTZ, Windhoek, 2009; Werner, W. & W. Odendaal, *Livelihoods after land reform: Namibia country report*, Land, Environment and Development Project, Legal Assistance Centre, Windhoek, 2010; Ombudsman of Namibia, *The Promised Land and Frustrated Expectations: A report on the Land Reform and Resettlement Programme in Namibia*, 2018 (<https://www.ombudsman.org.na/wp-content/uploads/2018/09/Land-Resettlement-recommendations.pdf>).

- the fact that resettlement on commercial land is a zero-sum game because the purchase of a farm typically results in the displacement of a similar number of people that could be settled on that land on a sustainable basis.

Subsequent to the turn of the millennium, Government efforts to meet land acquisition targets proceeded far quicker than during the first ten years after independence. Thus, when the Second National Land Conference was convened in 2018, government had acquired a total of 443 farms for resettlement purposes totalling in excess of three million hectares (see Table 2). Furthermore, the MLR has reported that a total of 5 352 individuals have been formally resettled since the programme's inception.

Table 2: Namibia resettlement farms and beneficiaries, September 2018²⁰

Region/Place	Number of farms	Total farmland (Ha)	Total beneficiaries resettled	Average beneficiaries per farm	Average area (Ha) per beneficiary
//Kharas	95	927 366.63	218	2.3	4 254
Hardap	91	689 445.07	371	4.1	1 858
Omaheke	88	462 220.27	1 443	16.4	320
Otjozondjupa	60	282 549.39	467	7.8	605.0
Erongo	25	211 067.24	90	3.6	2 345.2
Farms under the Division of the Marginalised Community	22	116 606.59	864	39.3	135.0
Oshikoto	17	64 558.02	1 494	87.9	43.2
Kunene	16	93 193.83	194	12.1	480.4
Queen Sofia Resettlement Project	15	88 669.39	89	5.9	996.3
Khomas	14	86 283.47	122	8.7	707.2
Total	443	3 021 959.90	5 352	12.1	564.6²¹

Importantly though, over this period of accelerating farm purchases, the initial focus on using resettlement land to support unemployed generational farmworkers and other impoverished and landless beneficiaries was pushed aside in favour of resettling a broader category of “previously disadvantaged” – a constituency that included many who by national standards were already economically well-off. In part this shift was motivated by constraints in public finances and the desire of the MLR to recover some of its investments in land purchases through the receipt of payments from resettlement beneficiaries for long leases, as well as the net reduction of ongoing costs associated with providing development support and food aid to the poorest settlers. It was also because other, better networked, more economically empowered individuals were better able to capitalise on loopholes

20 Namibia Statistics Agency, *Namibia Land Statistics Booklet*, NSA, Windhoek, September 2018.

21 This figure is a recalculation of the figure published in the *Namibia Land Statistics Booklet* (September 2018) prepared by the Namibia Statistics Agency, which erroneously states that at a national level the average size of land allocated to individual settlers was a remarkable 11 745 ha (p. 39).

in the policy and on political influence in order to achieve personal ambitions of becoming large-scale landowners. As a result, while resettlement initiatives have had some success in redressing historical racial imbalances in land ownership, they have significantly served to entrench and exacerbate broader economic inequality in Namibia. Thus a 2007 assessment of the expropriation principle and its impact on land reform in Namibia reviewed recent allocations of resettlement land at that time and concluded that there is “no doubt that most of Government’s land reform efforts have been designed to help middle class or wealthy black Namibians” to acquire farms.²² Indeed, over the past two decades the resettlement programme has been characterised by the granting of plots of several thousand hectares of land on leasehold terms to economically secure applicants and the herding of poorer applicants, most notably those from well recognised generational farm working communities, into poorly organised and under-supported “Group Resettlement Programmes”, where large numbers of settlers have been allocated places in quasi-communal resettlement villages where, in practice, individual households do not have sufficient access to land to do anything more with than engage in small-scale horticultural activities. For example, whereas the hundred and fifty or so generational farm-working families resettled at Skoonheid in Omaheke Region have no formal leasehold rights and are in practice limited to a few hectares of land each on which to farm, and as a result remain dependent on external support, the Governor of Zambezi Region, Lawrence Sampofu, has been resettled on an individual farm plot approaching 2 000 hectares in extent – moreover in Omaheke, a region to which he has no historical ties.²³

Of greater concern, a leaked list documenting individual beneficiaries of resettlement land between 2011 and January 2018²⁴ revealed that the Zambezi Governor was not alone among politically prominent individuals being allocated resettlement land at the expense of others. The list – now published online by the Office of the Ombudsman – details the allocation of substantial tracts of land to former ministers, active deputy ministers, spouses of deceased ministers, retired army generals, senior bureaucrats including permanent secretaries (among them a number employed in the MLR) business people and judges, many of whom are now among Namibia’s highest earners. These beneficiaries typically already own substantial capital assets, including shareholdings in various business enterprises and own homes in the capital while also retaining customary rights to land in communal areas. Understandably, for generational farmworkers this is a betrayal of if not the letter of the resettlement policy, then certainly of its spirit, not least because

22 Haring, S. & W. Odendaal, “No Resettlement Available”: *An assessment of the expropriation principle and its impact on land reform in Namibia*, Land, Environment and Development Project (LEAD), Legal Assistance Centre (LAC), Windhoek, 2007.

23 Likela, Sakeus, ‘Top Govt officials benefit from resettlement farms’, *The Namibian*, 25 September 2018.

24 <https://www.ombudsman.org.na/news/list-of-land-resettlement-beneficiaries/>.

those with the means to operate at a commercial or semi-commercial scale are already catered for under the Affirmative Action Loan Scheme, by means of which they are offered direct support to service debts incurred in the purchase of commercial land.

Regardless of the merits or questions concerning each individual case, from the perspective of the thousands of generational farmworkers who now live without access to land and with little or no opportunities for employment, the allocation of substantial resettlement land holdings to those who are considerably better off reeks of cronyism and was described repeatedly in interviews as “apartheid”. Thus far, the GRN’s response to criticism in this regard has resulted in their repackaging the MLR’s shift in focus towards supporting “middle class or wealthy black Namibians” in the form of a three-tiered resettlement programme.²⁵ Using the nomenclature proposed in the Draft Resettlement Policy for 2018–2027, the first tier is based on a “High Economic Value Model”. It is intended to benefit individuals with sufficient access to capital to farm at a quasi-commercial scale. The senior government and politically prominent individuals that have acquired resettlement land are among those who have been resettled on this basis. The second tier is the Moderate Economic Value Model. The MLR classifies this as a “semi-commercial model” intended to benefit already “established communal farmers whose farming enterprises’ successes are threatened by the environment in which they are operating i.e. shared grazing which often is not well managed.” The stated objective of this particular model is to “enhance the welfare of the people through improvement of productivity and to enable them to be self-reliant in terms of food security”.²⁶ The final tier, the Lower Economic Value Model is the one under which generational farmworkers have been resettled.

According to the MLR’s Draft Revised National Resettlement Policy, the Lower Economic Value Model is intended to benefit “landless citizens who are neither farming in communal areas nor leasing on privately owned commercial farmland. It also includes those with or without capital, those with access to capital (bank loans, cash or livestock) or [who] are low to medium income earners or have no income.”²⁷ Notwithstanding the fact the most economically and socially marginalised were identified as the priority candidates for resettlement in the ACLRA, the Draft Revised National Resettlement Policy also notes that the Lower Economic Value Model “presents an option or opportunity for people that arguably feel they have been left out under the current land reform practices” and that it could offer “post-settlement support in the form of housing, infrastructure, knowledge and skills ... in order to afford them an opportunity to develop and maintain their new environment and gradually ensure self-reliance.”²⁸

25 *Revised National Resettlement Policy, 2018 – 2027*.

26 *Ibid.*, section 13.2.

27 *Ibid.*, p. 23.

28 *Ibid.*, p. 24.

For now, the majority of the relatively small number of generational farmworkers that have acquired access to land under the resettlement programme have been resettled in seven group initiatives across the Hardap, Omaheke, Otjozondjupa and Oshikoto regions. Reflecting the lack of a uniform strategy or approach, there is considerable variation between these facilities. Even so, there are a number of characteristics these have in common and that have raised questions about their economic sustainability. These include:

- inadequate land for sustainable farming;
- high levels of dependency on state aid and external development support;
- a lack of clarity regarding land tenure security;
- ad hoc planning;
- insufficient resources and support;
- inadequate inter-ministerial planning and co-operation; and
- failure to deal with illegal settlers on facilities like Skoonheid.

6 Conclusions and recommendations

It may have enabled the GRN to better meet stated targets for land acquisition, but the shift in focus from resettling the most impoverished Namibians to those capable of assisting the GRN to recover some capital costs through servicing leaseholds is in the long run a false economy. This is firstly because those that have been resettled under the Lower Economic Value Model will, as a result of being resettled on units too small to ever enable them to farm at even a modest subsistence level, continue to rely on the costly GRN support supplemented by occasional third-party financed projects and low value, ad hoc wage labour on farms. Indeed, in the case of resettlement facilities like Skoonheid and Ondera, local commercial farmers now have access to a large, highly qualified pool of generational farmworkers that they can afford to employ on a casual or temporary basis, thereby avoiding some of the more onerous obligations and costs that would have arisen had they been employed on a permanent basis. Secondly, it is because by precipitating the migration of these communities to urban fringes, they have in effect transferred the costs of development support to stretched municipal authorities that are already unable to meet the extensive costs associated with service provision in informal settlements. In addition, these municipal authorities must bear the social and economic costs (policing etc.) brought about by hosting a ballooning unemployed population with few realistic prospects of accessing the job market on urban fringes.

It is unclear how many people still in employment on commercial farms consider themselves generational farmworkers. This number might be established by adding appropriate census questions or on the basis of targeted sampling surveys.

Beyond establishing protections and access rights for generational farmworkers in line with the resolutions at the Second National Land Conference, Namibia is

obliged under a range of international instruments to ensure that any individuals involuntarily displaced by GRN programmes, including purchases of agricultural land for resettlement purposes, are themselves immediately resettled and compensated on the basis of an appropriate resettlement action plan that seeks to secure their free prior and informed consent.²⁹ This is also an established principle in the private sector and among international development banks, including the World Bank³⁰ and the African Development Bank.³¹

Given the substantial declines in the agricultural labour market since independence, however, it is clear that while establishing adequate protections for the handful of generational farmworkers still in employment on farms remains important, priority needs to be given to addressing the needs of the broader legacy community which is comprised primarily of people who no longer have employment or residential rights on commercial farms.

Based on the assumption that roughly half the commercial agricultural labour force in 1970 was comprised of generational farmworkers, it is reasonable to assume that this legacy community today is in the region of 75 000 people, the majority of whom now live in informal urban settlements and on the fringes of towns and villages in communal areas. Given the inadequacy of using inferred data, there is clearly an urgent need to get a better understanding of the size and distribution of this community based at the very least on targeted surveys, or ideally a more comprehensive census. Doing so will not only help to make the urgent case for their prioritisation in resettlement, but also offer a better sense of what is realistically achievable through resettlement, and the extent to which interventions will need to focus on alternative support such as enabling this group to better access education or compete for limited jobs in urban areas. Such research would also be likely to provide municipalities who are now battling to cope with large-scale urban in-migration with a better sense of the scale and costs of the challenges they face.

To the extent that there simply aren't the resources or land to sustainably resettle all generational farmworkers, priority must also be given to initiatives to help them adjust to life in peri-urban settlements. There is a well-established precedent in post-independence Namibia for enacting legislation or developing programmes to meet the particular needs of specific apartheid legacy communities. Indeed, this principle underwrites the majority of established restitutive and restorative

29 Terminski, B., 'Development-Induced Displacement and Resettlement: Causes, Consequences, and Legal Context', *Revista europea de derecho de la navegación y aeronáutica*, Vol. 30, 2013; see also Articles 17 and 25 of the Universal Declaration of Human Rights (UDHR); Articles 6 and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 22 of the African Charter of Human and Peoples' Rights; the UN Declaration on the Right to Development 1986; the Vienna Declaration and Program of Action of 1993; and the Rio Declaration on Environment and Development, 1992.

30 World Bank, *Involuntary Resettlement Sourcebook: Planning and Implementation in Development Projects*, Washington D.C., 2004.

31 African Development Bank, *Involuntary Resettlement Policy*, Tunis, 2003.

economic and social empowerment programmes in contemporary Namibia. There is thus a strong case to be made in favour of recognising that generational farmworkers constitute just such a community, and as a result of this, providing them priority support in education, accessing health care and retraining.

This noted, resettlement remains the most effective short- and medium-term approach for addressing the challenges faced by generational farm-working families, many of whom, thanks to a long apprenticeship on farms, retain the skills necessary to manage sustainable enterprises, but lack the resources or access to capital to do so. It is nevertheless clear that the effective and sustainable resettlement of generational farmworkers demands that they are resettled on plots that will enable them to farm at least at a subsistence scale, and that they are provided the necessary support to do so. While resettlement into group programmes remains an option, it must be recognised that doing so creates village settlement in which people will rely on limited employment opportunities and will depend on extensive long-term third-party technical and financial support.



Urban land and life in Namibia's informal settlements

Rune Larsen and Gabriel Augustus

In light of Namibia's persisting issues regarding urban land rights and informal settlements, this chapter presents selected descriptions of life in Namibia's informal settlements, as presented by residents of the three urban/semi-urban areas of Oshakati, Gobabis and Windhoek. These perspectives act as the background for a discussion on current public and academic perspectives on Namibia's urban land and housing issues. Based on this, we argue for the central importance of drawing on the perspectives of residents of Namibia's informal settlements in policy formulations pertaining to issues of informal settlements, and actively collaborating with these actors in the development and servicing of the areas they live in.

1 Introduction

The urgency of Namibia's urban land and housing issues is clear to many in light of the ever-increasing number of informal settlements across the country. This has caused dissatisfaction among Namibian activists, and led to the formation of the Affirmative Repositioning (AR) movement in 2014. They have since organised various interventions, including two demonstrations and acts of civil disobedience in their struggle for improved urban land rights for poor and marginalised Namibians. Likewise, a group of students and lecturers from the Namibia University of Science and Technology (NUST) are, in collaboration with the Shack Dwellers' Federation Namibia (SDFN)¹ and the Namibia Housing Agency Group (NHAG), servicing,

1 A saving scheme assisting residents of Namibia's informal settlements in collectively saving money for acquiring their own erven (demarcated plots of land), servicing this land with water, sanitation and electricity, and building brick structures for its members.

demarcating and formalising land plots – locally known as an erf (singular), or erven (plural) – across Namibia’s informal settlements. Freedom Square and Kanaan in Gobabis are both examples of the success of this initiative (see section 5). The issue of informal settlements has also caught the attention of Namibian artists such as those in the arts collective Decolonizing Space, who, among other things, address issues of urban land rights through arts interventions such as the Land Pavilion Project. Private actors are equally engaged on the issue, with a recent example being Standard Bank’s “Buy-a-Brick” campaign. According to Lühl and Delgado:

There are three main ways that Government invests in urban housing: through the National Housing Enterprise (NHE) and the suspended Mass Housing Development Programme (MHDP), through the Build Together Programme (BTP), and through support to Shack Dwellers’ Federation of Namibia (SDFN). The NHE is characterised by a slow pace of delivery and high input cost. Although BTP is the most long-term and far-reaching programme there is no thorough evaluation of its impact; a pilot study by NUST is currently underway. Government support for SDFN is through an annual financial allocation to the Twangana Fund, but this is negligible versus the scale of the informal settlement challenge.²

They continue arguing that the budget allocations of the Government of the Republic of Namibia (GRN) for these projects historically amount to around 0.1% of Gross Domestic Product (GDP). They deem this to be inadequate for reversing Namibia’s current housing backlog,³ which some estimate to be around 300 000 housing units.⁴

Between 1992 and 1998, the GRN commenced with the development of the Flexible Land Tenure System (FLTS) – a three-step land tenure system for low- and middle-income groups residing in informal areas. The system allows these residents to upgrade and formalise their land, starting from a “starter title”, and moving up to a “land hold title” that provides initial tenure security until residents have resources to upgrade to a “freehold titled deed”. The Flexible Land Tenure Act (No. 4 of 2012) (FLTA) was however only passed in parliament in 2012.⁵ As we enquired about the implementation of the FLTS, we found that it had only recently

2 Lühl, Philip & Guillermo Delgado, ‘Urban Land Reform in Namibia Getting Ready for Namibia’s Urban Future: Policy Paper for Submission to the 2018 National Land Conference’, Windhoek, 1–5 October 2018.

3 Ibid.

4 Remmert, Dietrich & Pauline Ndhlovu, *Housing in Namibia: Rights, Challenges and Opportunities – Research Report: Right to Housing Project*, Institute for Public Policy Research (IPPR), Windhoek, 2018.

5 For a more detailed explanation of the FLTS and FLTA, see Christensen, Åse, ‘Namibia’s Flexible Land Tenure System’, in Bankie, B.F. & H. Jauch (eds), *The Urban Housing Crisis in Namibia: Exploring a Youth Perspective*, National Youth Council of Namibia (NYCN), Windhoek, 2016, pp. 100–109; Weber, Beat & John Mendelsohn, *Informal Settlements in Namibia: Their Nature and Growth – Exploring Ways to Make Namibian Urban Development More Socially Just and Inclusive*, Development Workshop Namibia, Windhoek, 2017.

started being rolled-out, and we were not able to make a proper assessment of its implementation. However, it is striking to note that the implementation of this system is only occurring more than 20 years after the formulation of the FLTS.

Following increasing public attention on the country's land issues, Namibia held its Second National Land Conference on 1–5 October 2018. One component that distinguished this conference from the First National Land Conference, which was held in 1991, was the topic of urban land. Some resolutions related to urban land that are of particular interest for this chapter include:

- Government to subsidise low-income housing and essential services to increase affordability.
- Scale up community-based land delivery process for the lower income community as they have a much bigger impact.
- Timeframe for land delivery should be limited to six months.
- Prioritise large-scale informal settlement upgrading and integrated, planned urban expansion areas (for new urban residents) and mainstream to all local authorities.
- Build 300 000 housing units/opportunities over the next seven years. This is a national emergency.
- Allow for partially serviced land (sewerage and water) to be sold. Other services can be added.
- Include the rights to housing as a human right in the constitution.
- Government expenditure should be increased from the current level of 0.1% to at least 10% of GDP.⁶

These resolutions will be discussed together with public and academic perspectives on the urban land and housing issues in Namibia, and perspectives from residents of Namibia's informal settlements in section 7.

2 Aim

In this chapter we analyse descriptions of life in Namibia's informal settlements in relation to public, academic and political perspectives on urban land rights, informal settlements, and equal access to serviced land and housing in urban areas. This generates an understanding of some main issues and concerns shaping peoples' everyday lives in Namibia's informal settlements. We hope this will inform future policy developments pertaining to the issue. Public debate often becomes politicised and fails to remain focused on the concerns of residents in the informal settlements; their everyday experiences are characterised by a lack of basic services (such as water, sanitation and electricity), increasing insecurity caused by the

6 GRN, 'Resolutions of the Second National Land Conference, 1st-5th October 2018', Ministry of Land Reform, 2018 (<http://www.mlr.gov.na/documents/20541/638917/Second+National+Land+Conference+Resolutions+2018.pdf/15b498fd-fdc6-4898-aeda-91fecbc74319>).

growing influx of people, the spread of diseases such as Hepatitis E, and exposure to crime and assault. We argue that the possible solutions to these issues will require the active and inclusive involvement of the residents of the informal settlements, both in terms of policy-formulation, and the practical servicing and upgrading of these areas.

We define informal settlements in accordance with the UN Habitat III, which defines informal settlements as:

[...] residential areas where 1) inhabitants have no security of tenure vis-à-vis the land or dwellings they inhabit, with modalities ranging from squatting to informal rental housing, 2) the neighbourhoods usually lack, or are cut off from, basic services and city infrastructure and 3) the housing may not comply with current planning and building regulations, and is often situated in geographically and environmentally hazardous areas. [...] Slums are the most deprived and excluded form of informal settlements characterized by poverty and large agglomerations of dilapidated housing often located in the most hazardous urban land. In addition to tenure insecurity, slum dwellers lack formal supply of basic infrastructure and services, public space and green areas, and are constantly exposed to eviction, disease and violence.⁷

These characteristics were prevalent throughout our research. It was saddening that conditions in many of the settlements we visited, particularly those in Windhoek and Oshakati, are consistent with the definition of slums, with many respondents describing a life in hazardous environments without proper sanitation, and as a result thereof, regular occurrences of preventable diseases. Severe fire hazards are also a result of these settlements' high population density and people relying on open fires for cooking and light. However, the settlements also differed greatly, both in access to different services, and in the prevalence of issues such as crime and disease.



Havana informal settlement in Windhoek



A shared flushing toilet in Havana shown by a resident as an example of the unhygienic conditions in the settlement

⁷ United Nations, *Habitat III Issue Papers 22 – Informal Settlements*, prepared for the United Nations Conference on Housing and Sustainable Urban Development, New York, 2015.

The chapter continues with a presentation of our methodology, which is followed by a brief contextualisation of Namibia's informal settlement challenge. This presents the historic transformation of Namibia's urban spaces and their unresolved sediments from the country's colonial and apartheid past. It is a legacy that caters for the spatial segregation that today rests on social class, financial capabilities (and to some extent ethnicity), and is maintained through Namibia's severe socioeconomic inequality. This inequality is argued to be a core reason behind the challenge constituted by the country's informal settlements.⁸

3 Methodology

We conducted a series of short, semi-structured interviews within the informal settlements of Oshakati, Gobabis and Windhoek during March – May 2019. These included interviews with 45 residents from four of Oshakati's informal settlements, namely Sky, Ompumbu, Evululuku and Oneshila – all conducted during a five-day fieldtrip. During this trip we also engaged with the Oshakati regional office of the SDFN, and a selection of its members. Lastly, we conducted a semi-structured interview with the Public Relations Officer (PRO) of Oshakati Town Council. In Gobabis we conducted 20 interviews with representatives from the two informal settlements, Kanaan and Freedom Square, during a three-day fieldtrip. We ended our visit with a semi-structured interview with the PRO of the Gobabis Municipality, and the regional coordinator of SDFN. We finalised our data collection in Windhoek, where we conducted 40 interviews in the informal settlements of Havana and One Nation, and two interviews with the regional councillors of Moses Garoeb⁹ and Tobias Hanyeko constituencies.¹⁰

Our contact within the informal settlements was facilitated by the local authorities (LAs) of the three areas. From there we got in direct contact with representatives (primarily headwomen and headmen) from the informal settlements. These representatives facilitated our contact with the remaining respondents. The rationale behind this approach was threefold, and had implications for our data and its analysis. The first consideration was our limited timeframe. We decided that the best starting point would be the people who, ideally at least, communicate with the communities on an everyday basis. The second consideration was for our study to gain legitimacy in the eyes of our respondents. Before the research was

8 Friedman, Fatima, *Deconstructing Windhoek: The Urban Morphology of a Post-Apartheid City*, Development Planning Unit, University College London, 2000; Jauch, Herbert, 'Youth and Urban Land/Housing in Namibia', in Bankie, B.F. & H. Jauch (eds), *The Urban Housing Crisis in Namibia: A Youth Perspective*, National Youth Council of Namibia (NYCN), Windhoek, 2016, pp. 126–182; Sweeney-Bindels, Els, 'Housing Policy and Delivery in Namibia', *Research Report No. 12*, Institute for Public Policy Research (IPPR), Windhoek, 2011.

9 Under which Havana is governed.

10 Under which One Nation is governed.

conducted, a central reflection was how to ensure the trust of our respondents, as such trust when working with socially exposed communities does not come automatically – and rightfully so. We therefore deemed it necessary to show that our research had been officially acknowledged by the responsible authorities. Lastly, we found it important not only to capture the views of the residents of the informal settlements, but also to engage the LAs. This had an effect on how we, as researchers affiliated to the Legal Assistance Centre, were met in the communities. We emphasised that we had not been sent by the LAs, and made our reasons known for going through these entities. However, the LAs' acknowledgement of our study – backed with printouts of our interaction with them – seemed to reassure our respondents of our genuine cause. The residents who showed reluctance towards our study mostly proved willing to engage after seeing proof of acknowledgement from the responsible authorities – an interesting finding in the light of the mistrust and communication issues that exist between LAs and our respondents from the informal settlements (see section 5).

While Gabriel translated our interviews from Oshivambo, Afrikaans and Otjiherero into English, we gratefully received assistance from a young headman in Gobabis who made himself available to translate from Nama/Damara and Setswana.

4 Urban Namibia and its present-day challenges

In Namibia land has been a topic of debate and contestation throughout history. Indeed, the protests resulting from the then-South African regime's decision, in line with its apartheid policy, to forcefully relocate the black residents of Windhoek, who resided in the city to obtain employment within its white-owned industrial sector, were a significant emergence of resistance that gave rise to the independence struggle. These residents were relocated in 1959 from the area today known as "the old location" (then known as "the main location" situated in today's suburbs of Hochland Park and Pioneers Park). The residents of the old location were moved to what became known as Katutura, north-west of Windhoek's central business district, with the northern industrial area separating it from the city centre. Katutura thus became Windhoek's black township until the end of the South African occupation in 1990 and is still largely inhabited by the city's black population.¹¹ There are striking similarities between these events and contemporary developments in urban Namibia. First, an estimated 85% of the inhabitants of Windhoek's informal settlements come from elsewhere, primarily from the northern

11 Likuwa, Kletus Mukeua, 'Tracing the History of Land Dispossession in Namibia', in Bankie, B.F. & H. Jauch (eds), *The Urban Housing Crisis in Namibia: Exploring a Youth Perspective*, National Youth Council of Namibia (NYCN), Windhoek, 2016, pp. 9–30; Friedman, Fatima, *Deconstructing Windhoek: The Urban Morphology of a Post-Apartheid City*, Development Planning Unit, University College London, 2000.

parts of the country.¹² Many of these seek employment opportunities in the city. Hence, urban migration still largely stems from hopes for employment opportunities within an industrial sector that mainly centres around specific urban areas. Second, the apartheid logic of relocation resonates with the way present-day issues of urban migration and illegal settlements have been dealt with. Consider how the PRO of Gobabis described the Municipal Council's decision to relocate the town's increasing number of informal residents to Kanaan, on the outskirts of the former black township Epako, in 2009–2010: "Kanaan, what happened is that we relocated people from all over Gobabis, because everyone were [sic] building everywhere, some on planned areas and so on. So we relocated them to Kanaan."¹³

This relocation to the outskirts of Epako, and the country's history of racial segregation, apartheid and spatial compartmentalisation based on class and ethnicity, suggest a structural issue that prevails in contemporary urban Namibia, namely a tendency to reproduce the basic ideals of an apartheid city within post-apartheid Namibian society,^{14, 15, 16} The main difference being that newly developed segregation is determined on social class and position, rather than ethnicity. However, informal settlements, and the predominance of houses built mainly with metal sheeting within these areas, is primarily a post-apartheid phenomenon, as informal settlements were banned during the years of apartheid.¹⁷

The phenomenon of post-colonial reproduction of the colonial city finds resonance in Fanon's well-known prophesy:

The violence which governed the ordering of the colonial world, which tirelessly punctuated the destruction of the indigenous social fabric, and demolished unchecked the systems of reference of the country's economy, lifestyles, and modes of dress, this same violence will be vindicated and appropriated when, taking history into their own hands, the colonized swarm into the forbidden cities. To blow the colonial world to smithereens is henceforth a clear image within the grasp and imagination of every colonized subject. To dislocate the colonial world does not mean that once the

12 Lühl, Philip & Gillerimo Delgado, 'Urban Land Reform in Namibia Getting Ready for Namibia's Urban Future: Policy Paper for Submission to the 2018 National Land Conference', Windhoek, 1–5 October 2018 (http://dna.nust.na/landconference/submissions_2018/policy-paper-urban-land-reform-2018-final.pdf).

13 PRO of Gobabis Municipal Council, 'Semi-structured interview with the PRO of Gobabis Municipal Council', edited by Rune Larsen and Gabriel Augustus.

14 This apartheid sedimentation is equally acknowledged by the GRN, which is currently in the process of repealing/amending obsolete apartheid laws (see Likela, Sakeus, '144 Apartheid Laws to Be Repealed,' *The Namibian*, 3 December 2018).

15 Friedman, Fatima, *Deconstructing Windhoek: The Urban Morphology of a Post-Apartheid City*, Development Planning Unit, University College London, 2000.

16 For aerial footage illustrating this urban compartmentalisation, see: Weber, Beat & John Mendelsohn, *Informal Settlements in Namibia: Their Nature and Growth – Exploring Ways to Make Namibian Urban Development More Socially Just and Inclusive*, Development Workshop Namibia, Windhoek, 2017.

17 Ibid.

borders have been eliminated there will be a right of way between the two sectors. To destroy the colonial world means nothing less than demolishing the colonist's sector, burying it deep within the earth or banishing it from the territory.¹⁸

This dramatic prophesy's manifestation in Namibia's cityscapes suggests that to adequately deal with the country's land issues, "demolishing the colonist's sector" is imperative. Achieving this will require a radical reconfiguration of the approach towards the country's increasing urban poor, and a proper integration of these segments into Namibia's urban societies, rather than their segregation on the outskirts of the former black townships. This will be necessary to ensure socially and economically sustainable urbanisation,¹⁹ not to mention a shared sense of humanity. Including these segments actively in solving the issues of urban land is imperative for decolonising urban land and town planning; it has also proved to be far more efficient than the GRN's previous top-down approaches.

It is of course important to acknowledge the pragmatism behind the relocation in Gobabis, and as elaborated in the following section, it did bring about positive and admirable changes in the living standards of Kanaan's residents.

Furthermore, despite these local particularities, increasing urbanisation is a global phenomenon, and one that comes with both possibilities and challenges. Ottolenghi and Watson reflect on the Namibian Government's Vision 2030, and its goal of diversifying Namibia's urbanisation so that it does not only occur within certain urban centres, but reaches other areas throughout the country. They write:

Though highly desirable, the achievement of these goals should not be taken for granted; indeed if previous international experience is to provide a model, the exact opposite may occur; that is: urbanization may increasingly concentrate in a very few centers with the capital city being ever more predominant, unless strong and proactive guiding mechanisms are applied.²⁰

They point to a risk that is increasingly present in contemporary Namibia, namely that rural-to-urban migration generally occurs within selected areas of the country, thus placing pressure on particular LAs. This pressure, and the experience of not receiving adequate assistance from the central Government, was mentioned in our interviews with the PROs of both Oshakati and Gobabis municipalities, and the councillors of Moses Garoeb and Tobias Hanyeko constituencies in Windhoek.

18 Fanon, Frantz, *The Wretched of the Earth* Grove Press, New York, 1968, pp. 5–6.

19 Lühl, Philip & Guillermo Delgado, 'Urban Land Reform in Namibia Getting Ready for Namibia's Urban Future: Policy Paper for Submission to the 2018 National Land Conference', Windhoek, 1–5 October 2018 (http://dna.nust.na/landconference/submissions_2018/policy-paper-urban-land-reform-2018-final.pdf).

20 Ottolenghi, Roberto & Barrie Watson, *Toward a National Urbanization Strategy for Namibia: Issue Analysis and Key Recommendations*, Windhoek, Government of the Republic of Namibia (Ministry of Regional and Local Government, Housing and Rural Development) and UN-Habitat, 2011, p. 4.

5 Life in the informal settlements

Having briefly presented the context of Namibia's informal settlements, and the colonial and apartheid sediments that have catered for this structural issue, we proceed by presenting findings from the three areas where we conducted our interviews.

General issues such as a lack of basic services (water, sanitation and electricity), and direct experience of crime and violence, coupled with mistrust of LAs and national authorities (NAs), were prevalent within each of the informal settlements. Nevertheless, the experiences of respondents in the informal settlements differed in certain ways. We therefore briefly describe each of the three areas before we present selected descriptions of life in the settlements, combined with observations and reflections from our fieldtrips.

5.1 Oshakati

Oshakati is the fifth largest town in Namibia, with 36 541 residents and 2 113 metal-sheet houses (generally referred to as “shacks”) counted during the 2011 National Census. At that time, such shacks accounted for 21% of the towns housing structures.²¹ One thing that distinguishes the informal settlements of Oshakati from those of Windhoek and Gobabis is that the town's informal settlements are spread throughout its urban area, rather than being situated solely on its outskirts.²² This is a result of Oshakati being situated to the north of the Veterinary Control Fence (known as the “red line”) which separates the commercial farming areas to the south from the communal areas to the north, formerly known as “Bantustans” or “homelands” during the apartheid period. Informal settlements had already developed in the 1980s, making some informal settlements in Oshakati significantly older than those of Windhoek and Gobabis.

Due to the town's status as the economic hub of the north, there is a steady daily influx of people, and one issue that the PRO raised regarding the formalisation of the town's informal settlements was the problem of how to determine the number of residents who need to be relocated to serviced plots:

We don't want them [the informal residents] to build at the moment, because it is going to cost us even more. We called a number of public meetings. We had [meetings at] Evululuku and Oneshila – we want to focus on those areas because they are not so complicated as the other areas. However, the ones that are there, we spoke to them

21 Weber, Beat & John Mendelsohn, *Informal Settlements in Namibia: Their Nature and Growth – Exploring Ways to Make Namibian Urban Development More Socially Just and Inclusive*, Development Workshop Namibia, Windhoek, 2017.

22 For aerial footage illustrating this, see *ibid.*, p. 69.

and said: “Please do not build – we are busy with formalisation.” It is just unfortunate that that procedure takes so long, and some of them are complaining: “You have been telling us not to build for how many years now?” Now, that is a challenge that we are faced with; we don’t want them to build because it is going to cost us more. The more they build, the more they hinder the process of formalising the area. Although they want the area to be formalised, they also need to cooperate! So that is an issue we have. Say you build, and you are in the street – now you are going to hinder the whole procedure, because now we have to wait so we can budget money to compensate you, and while waiting for the money the other person is busy also building, and while waiting for that money the other person is busy building, so that’s a challenge we are faced with.²³

As is the case in Windhoek and Gobabis, Oshakati Town Council is thus faced with the problem of increasing numbers of informal residents who establish shacks and even brick structures, while the Town Council is busy trying to formalise and upgrade the plots of already established residents. However, the quote from the Oshakati PRO also points towards the pervasive and deeply rooted sense of mutual mistrust between LAs and the residents of the informal areas. This issue will be elaborated upon in section 6.4 of this chapter.

5.2 Gobabis

During our second fieldtrip we went to Gobabis, a small town 210 km to the east of Windhoek. The town had 19 101 residents in 2011, and metal-sheet shacks constituted 42% of the housing structures²⁴; in 2016, 5 297 metal-sheet shacks were counted around the former black township Epako. A significant proportion of Gobabis’ revenue comes from the farms around the area, and many residents living in Epako and the informal settlements on its outskirts work on these nearby farms. However, these employment opportunities have been negatively influenced by the recent drought, and the country’s deepening economic crisis. Consequently, many of our respondents were currently un- or self-employed. As mentioned, in 2010 the Gobabis Municipality decided to relocate the town’s informal residents to the minimally structured and demarcated area of Kanaan. However, it remained an informal settlement without proper security of tenure for the residents.²⁵ As alluded to, this relocation was reminiscent of apartheid-era institutionalised segregation. One thing that both residents of Gobabis’ informal settlements and the PRO of the Municipality agree upon, however, was that they all expressed pride in the fact

23 PRO of Oshakati Town Council, ‘Semi-Structured Interview with PRO of Oshakati Town Council’, edited by Rune Larsen and Gabriel Augustus.

24 Weber, Beat & John Mendelsohn, *Informal Settlements in Namibia: Their Nature and Growth – Exploring Ways to Make Namibian Urban Development More Socially Just and Inclusive*, Development Workshop Namibia, Windhoek, 2017.

25 Ibid.

that representatives from other areas came to this small town to draw inspiration from the demarcation of its informal settlements – in particular Kanaan A and B, and Freedom Square. In contrast to both Oshakati and Windhoek, a striking particularity of these areas was indeed the neat demarcation of plots, and the fact that in the better-off areas the residents had access to private flushing toilets, private water taps, and electricity.

However, these services became scarcer the further we ventured into the settlements, and in the recently occupied parts of the settlements such as Kanaan C, none of these services were yet available. SDFN and NHAG, together with Gobabis Municipality, are currently in the process of upgrading, servicing and formalising all of both Kanaan and Freedom Square as part of the implementation of the FLTS. This is an interesting development, and we deem it desirable to conduct future research on the implementation of this process.

Another characteristic that distinguished Gobabis' informal settlements from those in Windhoek and Oshakati was the extent to which residents tended private green areas and small gardens, undertook small-scale livestock breeding, and decorated their homes. One respondent explained that this is also influenced by the interconnection between life and love in the cosmology of the Damara – an ethnic group that is strongly represented in Kanaan and Freedom Square.

Another, more unsettling, dimension predominant in these residents' narratives pertained to the insecurities caused by the fear of rape and assault. While such sentiments presented themselves throughout the three areas, they were most predominant in Gobabis' informal settlements.



A small recreational garden and pidgeon breeding in Freedom Square, Gobabis

5.3 Windhoek

Windhoek is the capital of Namibia and the most populated urban area of the country, with 322 300 inhabitants and 26 736 metal-sheet shacks counted in the 2011 Census. The number of shacks is projected to rise to 51 000 by 2021, based on

estimations of the current growth rates.²⁶ As mentioned, the city's apartheid history is visible in its present-day spatial appearance, with the eastern parts catering for its black and white elites, while the former townships of Khomasdal (Windhoek's former coloured township) and Katutura to the north-west accommodate the city's middle- and lower-income residents. On the outskirts of these two former townships one finds the city's informal settlements, where the city's poorest residents live. During our data collection we focus particularly on two informal settlements around Katutura, namely Havana and One Nation.

One feature of our findings in Windhoek was the number of respondents with some kind of formal employment, albeit often in low-earning positions such as security guards and shop attendants. Likewise, most of the respondents without formal employment were engaged in different types of informal economic activity (self-employment), such as selling fruit, vegetables, *kapana* (meat cooked over open coals in public areas and markets) and other everyday necessities; working in barbershops, mechanic workshops and other small-scale enterprises across the settlement; working in (or owning) technically illegal but ubiquitous shebeens – seemingly the most prevalent business-model across the settlements. Hence, Windhoek's informal settlements reveal the human ingenuity and agency it takes to build a city – with their own infrastructure, established without assistance from or the approval of the NA. This is not to romanticise informal settlements, but rather points out the latent potential of their residents, who after all have the capacity to build their own cities. This potential should be accessed in finding solutions to Namibia's urban land issues. The success of such approaches can be seen in SDFN and NHAG's interventions across the country, which have enabled “[the building of] 3 488 houses and secured land for roughly 6 230 families.”²⁷



One Nation informal settlement, Windhoek



Printing shop in Havana informal settlement, Windhoek

²⁶ Ibid.

²⁷ SDFN Website, 'Shack Dwellers Federation of Namibia', <https://sdfn.weebly.com/>.

6 Narratives from the informal settlements

In this section we present selected descriptions of life in the informal settlements. The section has been divided into four main themes that permeated our interviews, namely: the lack of services; insecurity in the informal settlements; longing for space and ownership; and (mis)communication between LAs and residents. All respondents from the informal settlements have been intentionally anonymised.

6.1 Lack of services

One key issue raised by all our respondents was the lack of basic services such as water, sanitary facilities (including flushing toilets) and electricity. Likewise, many respondents complained that public services such as medical clinics, hospitals, police stations, fire-brigades and schools are located far from the settlements. Another dominant issue described by our respondents was lack of garbage collection, which was evident from the heaps of garbage, often burning, throughout the settlements.

Sanitation

The lack of services has created health risks; the lack of private water supplies and proper sanitation, in particular, creates favourable conditions for diseases to spread. One settlement where these issues were particularly severe was Sky location in Oshakati. Here respondents explained that they live without any sanitation and resort to relieving themselves in the bushes (a common narrative throughout our study). In his field-notes, Larsen wrote:

As we drive out we see a small boy sitting and defecating by the road. The headwoman pokes me on the shoulder and says: “See ... see!” I respond: “I see ... but I don’t think it is appropriate for me to take a picture ...” The headwoman says: “You must take a picture”. I never take the picture, but promise to include the observation in the writing.

Observations like this were not limited to Sky location, but were made frequently throughout our journey. The sight of small children defecating by the road and having to dodge human and animal excrement when walking through the settlements underlined the severe health hazards the residents must live with. As a 26-year-old woman residing in Havana, Windhoek explained:

Living here has two sides: One thing is that you have a place to live, but there is no hygiene, no water, no electricity and no toilet! Imagine living with these small ones here [points at the child on her lap] – the flies are just coming into the houses ... We are in and out of the hospital with these ones [points to the child again]. We grown-ups are probably used to this by now, but the children get sick ...

Beyond health hazards caused by living without proper sanitation in densely populated areas, respondents also expressed a sense of inhumane conditions and humiliation caused by the absence of sanitary facilities. A young male resident of Sky location said:

There is no dignity! We relieve ourselves in front of our uncles, our parents and our grandparents ... We are just seen as a place of dirt and of rubbish!

Besides constituting a health risk, this lack of sanitation and privacy causes residents to feel disregarded and marginalised. Another issue caused by the lack of sanitary facilities was expressed by a 31-year-old male respondent from Evululuku, Oshakati:

There is also the problem of toilets ... People have to go far into the bush ... Imagine at night – it's very dangerous ... Women and girls can get raped and assaulted when they go there at night ...

A similar sentiment was expressed by a 30-year-old woman who has lived in Havana the past two years:

We are suffering – we just need water and sanitation! For those of us with phones we go far to charge them, and we also walk far to go to the toilet – or we just go to the bush ... It is very dangerous, and when you go there, there might be those guys who are doing drugs ...



Dumping ground and improvised "toilet" in Oneshila, Oshakati

In short, numerous issues stem from the lack of sanitary facilities, and these in turn cause insecurity amongst the residents of the informal settlements. The manifestations of this insecurity are elaborated upon in section 6.2.

Water

While some residents did have access to their own private water taps, most relied on communal water points which are accessed using a pre-paid access chip.



Public water tap, Havana, Windhoek



Water meter, Ompumbu settlement, Oshakati

While residents said that access to water had improved over the years, and pointed to the issue of the lack of sanitary facilities as a matter of greater urgency, the lack of private water taps does cause certain difficulties, particularly for elderly and physically disabled residents. While her unwell husband was being assisted into a taxi by two people, a 61-year-old female respondent from Kanaan B explained:

The water taps were also [installed], but they stopped in the middle [of the settlement]. To go and fetch water is very difficult as I am a pensioner – an old lady. The water points are very far from my place, and as you can see my husband is also sick.

Likewise, including those relying on the public water taps, many respondents complained about high water prices.

Electricity

Another concern for the majority of respondents was the lack of electricity. One lady who has lived in Freedom Square, Gobabis for the past 20 years explained:

Our houses are burning day and night, because we don't have electricity ...

This lack of electricity makes residents resort to gas or kerosene stoves and open fires for cooking, and candles for illuminating their metal-sheet shacks. However, the issue is not only accessing electricity, but also the additional financial burden that follows when the residents add electricity to their already tight monthly budgets. A 44-year-old woman from Evululuku, Oshakati explains:

We don't receive any help from the government – there is only electricity for those who can afford it ... My rent is N\$600, but some months this is too much for me to afford it ...

Hence, beyond the mere provision of access to basic services, it is important to consider the affordability of these services, as many of the respondents were without formal employment and had to rely on informal income to sustain themselves, and pay for whatever services they could access.

For many people relying on an income from informal trade and production, electricity is a crucial asset that our respondents explained has the potential to ease their financial burdens. Consider the words of a female section leader in One Nation, Windhoek:

We used to sew, but there is no electricity – we used to use our generator and buy five litres of petrol, but that finishes in one day ...

Services such as electricity can assist residents in generating their own income, thereby contributing to sustainable urban growth. However, this requires adequate support, and if needs be, subsidisation (in line with the resolutions of the 2nd Land Conference outlined in section 1). It would be counterproductive to demand payment for electricity if the cost of the service prevented residents from engaging in income-generating activities.

Many respondents described the effectiveness of streetlights in preventing crime and assault in their communities. A 35-year-old woman from Havana, Windhoek told us:

The crime is not too bad because we have streetlights now. The problem is that the *botsotsos* [thugs, gang members] are standing there by the toilets at night to check if you have a phone or something with you ...

This points on the one hand to the generally agreed-upon benefit of streetlights in Namibia's informal settlements. On the other hand, however, it highlights the fact that this only solves one aspect of the crime problems in the informal settlements: even with streetlights, residents remain insecure, and at risk of being robbed or assaulted. These problems probably stem from the severe poverty and the “lack of order” described by most residents of the settlements.

Lastly, many respondents complained about the inaccessibility of clinics, schools, fire brigades and police stations. One lady in her forties from Freedom

Square, Gobabis described the inefficiency of the police in responding to violence in her community:

And if you have to phone the police, they never respond or come back to us. If there is a fight and people stab each other, and you call the police, they will ask you for your number, and then even if that person has to die from the bleeding it will take HOURS for the police to respond to you.

6.2 Insecurities in the settlement

As shown above, a direct consequence of the lack of basic services is insecurity on the part of respondents. This is manifested in many ways, such as the spread of Hepatitis E and other life-threatening diseases that are preventable through proper sanitation; fire hazards resulting from the use of open fires in densely populated areas; high crime rates and a lack of law enforcement; tenure insecurity due to many respondents' status as *de jure* illegal occupants; children playing on roads with cars speeding past due to the lack of recreational facilities; and high levels of alcohol consumption causing frequent incidents of physical violence, to mention but a few. The experiences of crime has already been mentioned above. The words of a retired 63-year-old male police officer from One Nation, Windhoek underline the severity of this problem:

There is an issue of safety and security – if a family is going up north they and have to go early in the morning and then people come and rob them using their guns. And these are not small guns – it is machine-gun sounds I hear from the bush in the morning.

Another issue is the high consumption of alcohol in the communities. A 65-year-old headman from Evululuku explained the consequences of this consumption:

There are a lot of problems around here. Crime is a big problem and people are fighting and assaulting each other at night when they go from the shebeens. They just go around and beat each other up!

The woman from Freedom Square quoted above also explained:

In this location the youth is very much involved in the alcoholic actions. And these young kids do not drink this alcohol we buy in the shops – the kids are drinking *tombo* – home-brewed alcohol.

The high consumption of alcohol in the informal settlements, combined with the multitude of factors presented in this chapter, contributes to insecurity induced by violence (intensified by inadequate crime prevention and law enforcement), and uncertainty regarding the upbringing and futures of the children in the settlements.

The high consumption of alcohol is not restricted to the residents of the informal settlements, however: the World Health Organization reported Namibia's national annual alcohol per capita (15+) consumption (in litres of pure alcohol) to be 9.8, compared to the World Health Organization (WHO) African Region's average of 6.3. High alcohol consumption is thus a broader national phenomenon.²⁸ In combination with other structural issues that pertain in Namibia's informal settlements, however, this has particularly deleterious consequences for the residents.

While some respondents had received some kind of recognition of their residence, others were still deemed *de jure* illegal occupants of the land. Some of these residents explained how the LAs had marked their metal-sheet shacks with the words "Illegal – Remove". In Oneshila, Oshakati, a number of residents reported such labelling of their shacks. We saw evidence that residents had painted over these words in an act of silent resistance.



"Illegal – Remove" labelling on shacks obscured by residents in Oneshila, Oshakati

The residents explained how their lack of tenure security, and being labelled as "illegal" occupants of the land, also intensified the unstructured character of the settlement. A 57-year-old female resident from Oneshila explained:

If you look at the land where people have settled illegally, you'll find that people are just squeezing ... And there you'll find quarrels and disputes and arguments with newcomers who has started building their structure right next to yours ... That is also why there is no hygiene and that is why there is no order in terms of where people should put their garbage, so people decide that they will just throw their rubbish where they feel like ...

A 40-year-old woman in Evululuku, Oshakati, expressed a similar sentiment:

I just want them to give us our own plots. It will make me very happy. Having our own place will make it possible to put things in order.

²⁸ World Health Organization, *Alcohol – Country Profiles: Namibia*, WHO, Geneva, 2018.

By way of contrast, although Kanaan A is not problem-free, residents expressed appreciation for the improvements demarcation and partial servicing had brought to their community.

6.3 Longing for space and ownership

Longing for space and ownership was a central narrative. Many respondents expressed how tenure insecurities in the country's informal settlements – intensified by forceful evictions – hindered them from establishing a stable livelihood. A 30-year-old woman from Havana, Windhoek told us:

We feel isolated – we don't feel safe! We need demarcated land so we can have security and start our own businesses.

The notion of tenure security providing both a sense of existential security, in terms of having a place to call one's own, and a more tangible sense of livelihood security in terms of feeling able to start private businesses without fear of eviction, was mentioned by many respondents.

Likewise, when discussing the prospects of one day obtaining their tenure-secure private plots of land, many respondents highlighted that this would enable them to leave something behind. A 32-year-old woman from Oneshila, Oshakati explained:

I would be very happy to own my own land as it would make me able to extend my place and leave something for my children.

Another dimension relates to dreams of having one's own private space, with the ability to create a sense of freedom for oneself. A 46-year-old woman and member of SDFN, living in Oneshila, Oshakati, in light of other members of SDFN obtaining their own land, explained the prospects of one day getting her own erf:

All I want is a place that I can call my own. Having a place that you can call your own gives you freedom, and you don't have to feel like you are disturbing others when your children are playing around.

This is more than a wish for personal comfort. One consequence stemming from the lack of personal space emerged from the school-going children of residents of Oneshila, Oshakati: when asked to draw a picture of their families, some drew parents having sexual intercourse, presumably due to the lack of privacy in the metal-sheet shacks. Overcrowding also results in a greater risk of fires within the settlements, exacerbated by the fire brigade's inability to access areas with poor or non-existent road infrastructure.

6.4 Miscommunication between local authorities and residents

Mistrust of both LAs and NAs was widespread among respondents, as can be seen in this example of a 49-year-old male resident from Kanaan C, Gobabis:

We are people who are not sustained by the people who are having authority over us – our leaders – they are just coming here to sustain us with food and blankets whenever they want something from us! Whenever they want something ... Now we are at that point where we are going towards elections – it is just that you came too early ... Start from June, July, and they start coming, and they are coming with empty promises: “We are going to do this, we are going to do that” ... And then we poor people, because we don’t have food at home and because they are giving mealie meal there and giving rice there, so what are we going to do? So we go and [show support] to those leaders who are there, because if you don’t [show support], or you don’t wear that T-shirt, you are not going to get those benefits ... So because we are poor – what can we do?

This sentiment that politicians and LAs only make themselves visible during election times was widespread. Together with complaints about the lack of basic services, this was among the most common concerns expressed by the respondents. In describing the Town Council’s interaction with her community, a 26-year-old resident of Sky, Oshakati told us:

At some point you’ll see locations that are being developed, but us living here, there is always a delay when it comes to servicing land and making electricity ... There are other locations that are moving forwards, but when it comes to Sky – it is always the last location ... When you compare us, it is like we are not counted as human beings, we are just counted as isolated animals ... But we are breathing – we are human beings! It is just that the standard of living – it is not good ...

An explanation for this perception of being excluded and dehumanised was presented by the PRO of Oshakati:

Okay, our first priority of relocation: We already did a public meeting on the 7th of March, at Eemwandi. We have been strategising internally before we went out to tell the people. So the idea is to already have enough plots serviced for Eemwandi. Because it is better to relocate the whole area first, rather than taking a portion from here, and a portion from there. The minute you take five people from here, those open spaces that you leave there, someone will come build up a shack. Then again you have to start over ... When strategising this thing we kept quiet, so that we don’t encourage people. By the time we are going to relocate Eemwandi there are thousands of people there because [they say] “Oh, they are going to be relocated there, let’s all go settle there.” Because they know that they are being relocated there. Even Sky – I’ll mention it to you know – we gave them hints that they are after Eemwandi – we are relocating

them after Eemwandi. Eemwandi is worse than Sky – trust me. That’s why we started with Eemwandi. Sky is our second priority. So, even though we told them we want to relocate you – we don’t want to spread too much of it. Otherwise if we start to spread too much of it, by the time we want to start with Sky it is full! We don’t even know from where these people are coming. Some people even have houses in urban areas – I mean in the town land – but they will go and build there.²⁹

Clearly, then, experiences of being neglected and disregarded stem at least in part from mutual distrust between residents and LAs. It is therefore imperative that community members be included in the process of formalising and upgrading the settlements – at the very least, to minimise the chances of miscommunication resulting in their feeling excluded and ignored. In light of their already engrained mistrust towards LAs and NAs, however, establishing such inclusive collaborations with the residents of the informal settlements will be a formidable challenge to be overcome.

7 Discussion

Much scholarly and policy-oriented work has been published on the issue of urban land rights in Namibia. However, what often goes unnoticed are the voices of the people residing in the informal settlements. In the preceding sections, we have presented a small selection of such voices, although including only short quotes does partial justice at best to the sentiments shared by our respondents. These perspectives will now provide the background for a discussion on existing literature, and perspectives from public and political discourse.

One point of contestation relates to the involvement of private sector actors in potential solutions to Namibia’s urban land and housing issues. Sweeney-Bindels suggests that the Namibian government should “involve the private sector as a tool for integration and scaling up delivery,”³⁰ whereas Jauch, based on his comparative analysis between Zimbabwe, Kenya, South Africa and Namibia, argues that “the private sector may not be capable of delivering houses to low-income households which do not have a regular income.”³¹ Our respondents’ accounts seem at first glance to legitimise Jauch’s scepticism regarding reliance on private sector solutions, particularly as they already struggle with the unaffordability of the basic services provided by private entities (see section 6.1: Water and electricity). On this issue, however, Sweeney-Bindels also states that:

29 PRO of Oshakati Town Council, ‘Semi-Structured Interview with PRO of Oshakati Town Council’, edited by Rune Larsen and Gabriel Augustus.

30 Sweeney-Bindels, Els, ‘Housing Policy and Delivery in Namibia’, *Research Report No. 12*, Institute for Public Policy Research (IPPR), Windhoek, 2011, p. 4.

31 Jauch, Herbert, ‘Youth and Urban Land/Housing in Namibia’, in Bankie, B.F. & H. Jauch (eds), *The Urban Housing Crisis in Namibia: A Youth Perspective*, National Youth Council of Namibia (NYCN), Windhoek, 2016, p. 145.

... problems in the housing market are often problems caused by the input markets. Especially in Namibia, one could argue that this might be exacerbated by the small scale of the market. In addition, the high inequality in Namibia could play an aggravating role. Certain providers of inputs and producers of housing might be used to high returns in one part of the market, but reluctant to move to another sector of the market where those returns might be lower.³²

Relying on private actor engagement as the solution to Namibia's urban land and housing issues would therefore seem to be a dubious approach – especially considering the profound socioeconomic inequality in Namibia that pushes market prices upwards, thus accentuating the income gap that underlies the structural issues that bedevil informal settlements.

One solution suggested by Jauch is that the Namibian government should diversify their approaches towards general housing delivery, on the one hand, and social housing, on the other. He suggests that a “mix of delivery modes and tenure systems seems to be the best option for Namibia.”³³ He points out that various degrees of government subsidisation on housing, and the option of establishing realistically rentable housing in urban areas, would be possible examples of such diversification. He also criticises how the NHE was contracted to build affordable housing units, but in the event only middle-income buyers could afford them. Remmert and Ndhlovu hold a similar view:

It is clear that house ownership remains a priority strategy for government in addressing housing shortfalls. This approach continues to ignore citizens' needs and preferences for a wide variety of housing options. The survey demonstrates this clearly with Walvis Bay respondents having much more interest in affordable rented accommodation than ownership. Low-income groups might also be better and faster served with urban land and associated legal tenure rights than costly houses constructed under government initiatives.³⁴

Considering these sentiments in the light of our respondents' perspectives strengthens the case that by and large, only lip service has been paid in NA and LA initiatives to the inclusion of community members in finding solutions for Namibia's urban land and housing issues. In line with Remmert and Ndhlovu's study, we found that most of our respondents did indeed wish for some degree of

32 Sweeney-Bindels, Els, 'Housing Policy and Delivery in Namibia', *Research Report No. 12*, Institute for Public Policy Research (IPPR), Windhoek, 2011, p. 10.

33 Jauch, Herbert, 'Youth and Urban Land/Housing in Namibia', in Bankie, B.F. & H. Jauch (eds), *The Urban Housing Crisis in Namibia: A Youth Perspective*, National Youth Council of Namibia (NYCN), Windhoek, 2016, p. 176.

34 Remmert, Dietrich & Pauline Ndhlovu, *Housing in Namibia: Rights, Challenges and Opportunities – Research Report: Right to Housing Project*, Institute for Public Policy Research (IPPR), Windhoek, 2018, p. 73.

ownership. This was based on their experience of tenure insecurity and problems caused by the lack of space and proper demarcation, however, and not on dreams of mortgaging their homes in order to secure loans for future investments. This seemed far from most of our respondents experienced reality.

Hoffman argues that the modern city has become alienating and uninhabitable for the urban poor, who are often forced into demeaning environments that were not made with their interests in mind. This is especially true in the modern African city, which is a product of constant externally driven experimentation.^{35, 36} This concern is serious, and based on our research we deem it imperative to actively and creatively include the residents of Namibia's informal settlements in both the formulation and the implementation of policy. The success of this approach is manifest in the achievements of SDFN and NHAG initiatives, which many point out greatly outnumber those of the GRN's approaches to urban land issues, particularly in view of the differences in resources spent.³⁷ And again, residents of Namibia's informal settlements do manage, in various ways, to create some kind of livelihood within the near-uninhabitable spaces many have no choice but to live in.



Women doing tailoring in Kanaan B, Gobabis



Scrap metal collected by young men in One Nation, Windhoek, as a means of supporting their mother's household

35 Hoffman, Danny, *Monrovia Modern: Urban Form and Political Imagination in Liberia*, Duke University Press, Durham and London, 2017.

36 Interestingly, the word 'Katutura' loosely translates into: "the place where we don't want to live" in Otjiherero.

37 See, for example: Jauch, Herbert, 'Youth and Urban Land/Housing in Namibia', in Bankie, B.F. & H. Jauch (eds), *The Urban Housing Crisis in Namibia: A Youth Perspective*, National Youth Council of Namibia (NYCN), Windhoek, 2016; Lühl, Philip and Gillermo Delgado, 'Urban Land Reform in Namibia Getting Ready for Namibia's Urban Future: Policy Paper for Submission to the 2018 National Land Conference', Windhoek, 1–5 October 2018; Sweeney-Bindels, Els, 'Housing Policy and Delivery in Namibia', *Research Report No. 12*, Institute for Public Policy Research (IPPR), Windhoek, 2011; and Weber, Beat & John Mendelsohn, *Informal Settlements in Namibia: Their Nature and Growth – Exploring Ways to Make Namibian Urban Development More Socially Just and Inclusive*. Development Workshop Namibia, Windhoek, 2017.

In late January 2019 *The Namibian* newspaper paraphrased President Hage Geingob as having stated in the context of the GRN's Harambee Prosperity Plan³⁸ that he wants all “shacks” to have been removed from Namibia within the next five years. Considering this optimistic objective, we found it interesting to ask the PROs and councillors if they considered this implementable in light of the realities they face as LAs. The four replied as follows:

PRO, Gobabis

For myself, and this is my personal opinion – not the council's, those things are realistic only if the government decentralises it – if they give the money to the local councils – we can do it – we can do that! We can!³⁹

PRO, Oshakati

From my point of view it can be done. How can it be done? If we revoke some of the laws. Some of the urban land laws require us to build with certain types of bricks – certain standards. But there are people from other countries, and they come to Namibia, and they say: “You know what, in America for example, there are those straight brick things – I don't know what you call them – but you just pour in cement, and then the structure is safe.” There are people in informal settlements who want to build – but they don't have money. They want to take up loans, but the bank will only fund on urban land that is proclaimed, but if those things can be looked at and we remove some of those harsh requirements – I think it can be done.⁴⁰

Regional Councillor, Tobias Hanyeko Constituency

I can't say that in five years the shacks will be reduced, because, if we since 2016 have been struggling with the budget – I don't know if the budget will come once. But we can't make it. Honestly speaking – even in five years. Because, number one, where people are now the ground servicing might take even one or two years. Secondly, where people are living now, their [living] standard – for me to put you into the [better living] standard it must not be like a spoon to put in your mouth, I would rather use the talent of you to upgrade you and to upgrade me. It is not easy work. Even if we take one area, we cannot make it in five years – seriously. That means that politically it might be working, but when it comes down to the practicalities it is a challenge ... We should have started this process already, but up until now we did not start. Then it is a challenge. It is a challenge and we must face it.⁴¹

38 Ngutjinazo, Okeri & Ndanki Kahiurika, ‘Shacks ‘Offend’ Geingob ... Wants Them Gone in 5 Years’, *The Namibian*, 20 January 2019.

39 PRO of Gobabis Municipal Council, ‘Semi-structured interview with the PRO of Gobabis Municipal Council’, edited by Rune Larsen and Gabriel Augustus.

40 PRO of Oshakati Town Council, ‘Semi-Structured Interview with PRO of Oshakati Town Council’, edited by Rune Larsen and Gabriel Augustus.

41 Regional Councillor of Tobias Hanyeko, ‘Semi-Structured Interview with the Regional Councillor of Tobias Hanyeko’, edited by Rune Larsen and Gabriel Augustus.

Regional Councillor, Moses Garoeb Constituency

Yes. The previous president, Dr Pohamba, was having a project of mass housing and here in Windhoek, my friend, nothing has happened here. All has moved out, but now what about Windhoek? Windhoek sees dust in the air! You demarcate a plot, so that people can now have a plot, and you stop people from settling on their own – because you have provided basic services. We demarcate plots, put up the street – we make a plan. A plan is just to draw up a paper and then you make a plan, then you go to the area and you see here we adjust and here we change. Then the plan is there and people can get their place, there is a room there – a space – then you charge them a small fee, you charge them 50 Namibia Dollars. This 50 Namibia Dollars will make for you another fund for you to service the land. People have already settled there, but services are coming. That way we will manage it. But now, since last year when the land conference took place – we are waiting for these programmes of the land conference to take place. But here in the city, the resolutions will start in the city, but I am telling you, if the city worked together with the State House, things would happen!⁴²

As these four LA representatives' different perspectives illustrate, reaching the goal of eradicating metal-sheet shacks in Namibia within the next five years requires more than just a few marginal adjustments, especially in light of Namibia's increasing urbanisation.

Four central resolutions pertaining urban land, made during the Second National Land Conference are:

- Build 300 000 housing units/opportunities over the next 7 years.
- Government expenditure should be increased from the current level of 0.1% to at least 10% of GDP.
- Scale up [the] community-based land delivery process for the lower income community as [this process has] a much bigger impact.
- Allow for partially serviced land (sewerage and water) to be sold. Other services can be added at a later stage.⁴³

These resolutions all point to the necessity of radically reconfiguring the way in which urban land is being dealt with in Namibia, especially if the first objective of building 300 000 housing units/opportunities (presumably within a price range affordable for Namibia's poorer segments) is to be met. Interestingly, the resolutions echo the sentiments shared by the LAs above. Considering the words of the councillors, and the example given earlier regarding the delayed implementation of the FLTA, however, one wonders when – and indeed if – these admirable resolutions will be implemented. Particularly the objective of increasing GRN urban land expenditure

42 Regional Councillor of Moses Garoeb, 'Semi-Structured Interview with the Regional Councillor of Moses Garoeb', edited by Rune Larsen and Gabriel Augustus.

43 GRN, 'Resolutions of the Second National Land Conference, 1st-5th October 2018', Ministry of Land Reform, 2018 (<http://www.mlr.gov.na/documents/20541/638917/Second+National+Land+Conference+Resolutions+2018.pdf/15b498fd-fdc6-4898-aeda-91fecbc74319>).

to 10% of GDP, in the midst of an economic crisis and the government's struggle to provide basic land servicing to its urban poor, would entail a drastic change in the way public finances are allocated. That being said, our research also showed that the FLTS is (slowly) being implemented. While we were not able to assess its impact, it shows that the resolution of scaling-up community-based land delivery processes has been initiated – despite being over 20 years in the planning, and both LAs and respondents from the communities expressing a lack of knowledge about its progress and implementation.

8 Concluding remarks and suggestions for further research

While our study did not clearly assess how the residents of the informal settlements envision solutions to their current predicament, we did manage to highlight some common concerns that emerged throughout our interviews. Our study lends support to the adoption of a new approach, based on active community involvement on various levels, to deal with Namibia's informal settlement challenge. We encourage future research focused on community-centred projects and initiatives to generate better understanding of Namibia's urban land and housing issues, and to evaluate innovative solutions to these issues. We also encourage longer-term qualitative and ethnographic research in Namibia's informal settlements as our study, within the limitation imposed by the available time and resources, points to the necessity of deepening our understanding in these regards. Despite this limitation, however, we established that there is a disconnect between the concerns of the informal settlement residents and GRN initiatives to solve housing and land issues, and illustrated how miscommunication stemming from mutual mistrust between LAs and residents in the informal settlements results in a counterproductive repeating cycle of LAs keeping information from community members, who as a result of the perception of exclusion defy the LAs, for example by building regardless of the LA's restriction on further developments before relocation (see section 6.4).

We likewise pointed out the apartheid sedimentation that characterises the phenomenon of informal settlements in present-day Namibia. In order to counter this historic sediment in Namibia's cityscapes, we argue that a reconfiguration of the approaches towards urban land and housing is imperative. This requires the integration of the urban poor into Namibia's broader urban spaces. One way of achieving this is exactly by including these actors in the decision-making and policy-implementation processes concerning issues that they are deeply affected by. The perspectives presented within this chapter should be considered an invitation to initiate and scale-up such collaborations.

From colonial land dispossession to the Etosha and Mangetti West land claim – Hai||om struggles in independent Namibia

Ute Dieckmann

1 Introduction

Since time immemorial, north-central Namibia, including the eastern part of Etosha National Park (ENP),¹ has been the home of the Hai||om – a subgroup of San who survived there by hunting and gathering. The land south of the ENP had been increasingly occupied by white settlers during the first half of the 20th century, and the Hai||om were evicted from ENP in the 1950s without any consultation. At the time of the Namibia's independence in 1990, and in contrast to other ethnic groups in Namibia, the Hai||om found themselves to be altogether dispossessed of their land, with no access to communal lands at all.

Nowadays, around 10 000 Hai||om are living mostly in the Kunene and Oshikoto regions of Namibia, and to a lesser degree in the Ohangwena and Oshana regions.² They speak a variety of Khoekhoe gowab, as do Namas, Damaras and some other San groups in Namibia. Hai||om in all regions share a high level of marginalisation and poverty, though there are some variations depending on sites and available

1 The area west of the Etosha pan lacked permanent water and might have been used temporarily by different groups before the boreholes were drilled from the 1950s.

2 For more detailed information on the number of Hai||om, see 'Affidavit of Ute Dieckmann' in *Jan Tsumib and Others v Government of the Republic of Namibia and Others*, Case Number A206/2015 (Founding Affidavit), at paras 15–35.

livelihood options.³ Due to the large-scale dispossession of their land, which will be discussed below, neither traditional livelihood strategies (hunting and gathering) nor agriculture can play a significant role in sustaining livelihoods. Formal employment opportunities are rare, and dependence on welfare support provided by the state is high; educational levels are generally low.⁴

Furthermore, Hai||om feel highly discriminated against by other ethnic groups and disadvantaged in comparison to others, for example with respect to access to land and employment and wages, so much so that the experience of marginalisation has become an integral part of a shared Hai||om identity.⁵

Although it is nowadays widely acknowledged that the ENP area was once the ancestral land of the Hai||om and that they have a right to “some” land, ideas regarding how to address these admissions differ. Around 2007, the time of the centenary celebrations of ENP, the Government of the Republic of Namibia (GRN) commenced with some efforts to “compensate” Hai||om for the loss of their land during colonial times by purchasing a number of farms for them in the vicinity of ENP. Sometime later, being dissatisfied with this approach, Hai||om launched a legal claim to the ENP and Mangetti West areas.

After a brief outline of the history of their land dispossession and issues regarding representation, this contribution analyses these developments and provides the context for the Hai||om litigation, which is dealt with in more detail in Chapter 6 of Odendaal, Gilbert and Vermeulen.

2 The colonial land dispossession of the Hai||om and its aftermath

At the onset of the colonial period, Hai||om lived in north-central Namibia, in an area stretching from Ovamboland, Etosha, Grootfontein, Tsumeb, Otavi and Outjo, in the north, to Otjiwarongo in the south. They lived mainly from hunting and gathering, but were part of an elaborate trade network with their Oshiwambo-, Otjiherero- and Khoekhoegowab-speaking neighbours.⁶ At times, they shared areas of land and resources with neighbouring groups.⁷

3 Dieckmann, Ute, ‘Kunene, Oshana and Oshikoto Regions’ in Dieckmann, Ute, Maarit Thiem, Erik Dirckx & 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. 173–232.

4 Ibid.

5 Dieckmann, Ute, *Hai||om in the Etosha region: A history of colonial settlement, ethnicity and nature conservation*, Basler Afrika Bibliographien, Basel, 2007, pp. 296–299.

6 Ibid., pp. 44–50.

7 Widlok, Thomas, ‘The Needy, the Greedy, and the State: Dividing Hai||om Land in the Oshikoto Region’, in Hohmann, Thekla (ed.), *San and the State: Contesting Land, Development, Identity and Representation*, Rüdiger Köppe Verlag, Cologne, 2003, pp. 87–119.

Namibia became a German colony in 1884. In 1898, the German colonial government concluded a treaty with a Hai||om man, Captain Aribib. In terms of this “protection treaty”, the “Bushmen” ceded a huge area from Outjo to Grootfontein with the northern limit of the Etosha Pan to the German colonial government. In return, the Germans promised to provide “Bushmen” with “security and protection from everyone”,⁸ and Aribib was assured of an annual allowance of 500 marks, if he fulfilled his obligations.⁹ From a Hai||om perspective, Aribib could not have signed such a contract because it contravened the Hai||om social system. According to Hai||om customs at the time, only respected elderly men or women could hold responsibility in the small areas and the family groups to which they were closely connected; there was no hierarchical leadership structure beyond this level. In the memory of the Hai||om, Aribib was not an overall Hai||om leader. Only in recent years, a group of Hai||om in Outjo claimed to have discovered their genealogical links to Aribib and use this in correspondence with the GRN in support of their land claims.

In 1907, Governor von Lindequist proclaimed the Etosha region as one of three game reserves. The explicit reason for the establishment of game reserves was to protect game in specific areas, since it had become scarce in the territory due to the hunting activities of European travellers and traders.¹⁰ Economic motivations were clearly the underlying motive for the establishment of the game reserves. The proclaimed Game Reserve No. 2 included today’s ENP, as well as Kaokoland from the Kunene River to the Hoarusib River, an area of 93 240 km².¹¹ Following its proclamation, Game Reserve No. 2 underwent several boundary alterations under the South African administration.¹²

For almost fifty years after the proclamation, the Hai||om were accepted as inhabitants of the game reserve, while white settlers increasingly occupied the surrounding area. The game reserve became the last refuge where the Hai||om could still practise a hunting and gathering lifestyle, and up to the 1940s, the Hai||om were regarded as “part and parcel” of it. Between a few hundred and 1 000 Hai||om lived in the park, mainly inhabiting the southern part of Etosha Pan. Lebzelter even estimated that 1 500 Hai||om lived around Etosha Pan in the 1920s.¹³ The Hai||om

8 Gordon, Robert, ‘Can Namibian San Stop Dispossession of Their Land?’, in Wilmsen, Edwin N. (ed.), *We are Here: Politics of Aboriginal Land Tenure*, University of California Press, Berkeley, Los Angeles, 1989, pp. 138–154.

9 Ibid.; Friedrich, Reinhard, *Verjagt... vergessen... verweht... Die Hai||om und das Etoscha Gebiet*, Macmillan Education Namibia, Windhoek, 2009.

10 Gordon, Robert, *The Bushman Myth: The Making of a Namibian Underclass*, Westview Press, Boulder, San Francisco, Oxford, 1992, p. 34.

11 De la Bat, Bernabé, ‘Etosha 75 Years’, in *South West Africa Annual*, 1982, p. 12.

12 Berry, Hugh, ‘Historical review of the Etosha Region and its subsequent administration as a National Park’, *MADOQUA*, 20(1), 1997, p. 4.

13 Lebzelter, Viktor, *Eingeborenenkulturen in Südwest- und Südafrika*, Verlag Karl W. Hirsemann, Leipzig, 1934, p. 83.

staying in the park lived predominantly from hunting and gathering; in addition, many families had livestock, especially goats, but also a few head of cattle and donkeys.¹⁴ Furthermore, Hai||om men in particular had several opportunities for seasonal or regular work, either inside or outside Etosha, on farms, in mines, in road construction or at the police stations of Okaukuejo and Namutoni.

In 1949, the Commission for the Preservation of Bushmen was appointed to investigate the “Bushman question” in South West Africa. The Commission was asked to make recommendations primarily on the question of whether “Bushman reserves” were advisable or not. In the commission’s final report, the Hai||om were not regarded as sufficiently “Bushman-like” as “the process of assimilation has proceeded too far [for the Hai||om] to be preserved”.¹⁵ It was recommended that the Hai||om be removed from Etosha to work on farms or to settle in Ovamboland. In the beginning of 1954, the Native Commissioner of Ovamboland convened a series of meetings in Etosha with the Hai||om to reveal the decision to expel them from the game reserve. All Hai||om, with the exception of 12 families who were employed in the park, had to leave.¹⁶ Although the game reserve still had a way to go in order to become ENP, by the 1950s, the “national park ideal”¹⁷ had emerged as the underlying concept for further development: “nature” and “culture” had to be physically separated, and in terms of the evolutionary paradigm, the Hai||om were not considered to be “pure” enough to count as “nature” and therefore, “nature” had to be “purified” from the Hai||om.

After 1954, at least some Hai||om could stay in the park, although no longer at the various waterholes, but at the rest camps at Okaukuejo and Namutoni and near the two gates, Lindequist and Ombika. In 1958, Game Reserve No. 2 became the Etosha Game Park. In 1967, it received the status of a national park. Fencing its perimeter became an important and labour-intensive task, and this allowed some Hai||om to return to Etosha in order to work there. The fencing was only completed in 1973.¹⁸

Those who could not or did not want to return to Etosha in order to work there joined the legions of landless generational farm labourers eking out a living on the farms on Etosha’s borders, where their labour sustained an uneconomic and heavily subsidised white-owned commercial agricultural sector before independence. In

14 Peters, Joris, Ute Dieckmann & Ralf Vogelsang, ‘Losing the spoor: Hai||om animal exploitation in the Etosha region’, in Grupe, Gisela, George McGlynn & Joris Peters (eds), *Tracking down the past: Ethnohistory meets archaeozoology, Documenta Archaeobiologiae*, Vol. 7, pp. 103–185, Verlag Marie Leidorf, Rahden/Westfalen, 2009.

15 Namibian National Archives, SWAA A627/11/1, 1956 Native Affairs: Bushmen reserve.

16 Dieckmann, Ute, ‘“The Vast White Place”: A History of the Etosha National Park and the Hai||om Nomadic People’, *Nomadic Peoples*, 5(2), 2001, pp. 125–153.

17 Neumann, Roderick P., ‘Imposing wilderness: Struggles over livelihood and nature preservation in Africa’, *California Studies in Critical Human Geography*, Vol. 4, University of California Press, Berkeley C.A., 2002 [1998].

18 Berry, Hugh, *Final Report: Ecology, Behaviour and Population Dynamics of the Blue Wildebeest at the Etosha National Park*, Okaukuejo, 1980.

West Block is an area of about 80 000 ha, 50km to the north-west of Tsintsabis. It was originally acquired by the South African administration as a quarantine camp for livestock moving from the northern communal areas into the commercial farmlands to the south. After 1970, water-pumps and permanent enclosures were established on the Mangetti lands for the livestock of white farmers. Hai||om provided occasional labour and exchanged bush products with farm employees at these newly established cattle posts. By 1979, there were over 300 Hai||om living on the Mangetti lands (on “Farm Six”).²² Today, the Namibian Development Corporation leases the Mangetti West Block from the GRN.

3 Current land situation

Following Namibia’s independence in March 1990 and the first National Conference on Land Reform and the Land Question in 1991, the GRN took measures to redistribute the country’s land and facilitate land reform. Though the GRN made some attempts in the 1990s and early years of the new millennium to address the landlessness of the San, including the Hai||om, these have not made a fundamental difference to their situation. Worse still, and though the GRN denies it,²³ it has failed to protect Hai||om who still had *de facto* land rights (e.g. those living in Mangetti West) from encroachment by other ethnic groups.

Concerning the various land-tenure systems under with Hai||om are living, the situation of Hai||om regarding land can be outlined as follows:

- The Hai||om in the Etosha National Park have no *de jure* land rights.
- Hai||om who live and work on commercial farms have no rights to such land at all; Hai||om whose farm employment ceases have no land to call their own, and usually end up in informal settlements in towns in the vicinity, or with family on resettlement farms (many of which are already overpopulated). Most of the Hai||om in urban areas (e.g. in Outjo, Otjiwarongo or Tsumeb) have no tenure security, and are living in informal settlements where residents are regularly threatened with eviction. The communal land in the north where Hai||om are living as a minority among the large majority of Oshivambo-speaking residents falls under the traditional authorities (TAs) of the respective Oshivambo-speaking groups.²⁴

²² Ibid., p. 4.

²³ United Nations Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the Convention Thirteenth to fifteenth periodic reports of States parties due in 2012 Namibia*, 2015.

²⁴ Dieckmann, Ute & Erik Dirx, ‘Access to land’, in Dieckmann, Ute, Maarit Thiem, Eric Dirx & 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. 437–464.

- Some Hai||om were resettled under the national resettlement programme by the Ministry of Land Reform (MLR) on group resettlement farms in the first 15 years after independence.²⁵ From the approximately 55 group resettlement farms, about seven of them (Exelsior, Oerwoud, Tsintsabis, Kleinhuis, Namatanga, Queen Sofia and Stille) have considerable numbers of Hai||om beneficiaries. However, a high level of dependency on GRN support exists on these farms, and self-sufficiency is unlikely to be achieved in the near future.²⁶ Furthermore, it is unlikely that any of the resettled Hai||om beneficiaries have ever received any title deed in their individual names.
- The Hai||om community of Farm Six in the Mangetti West Block face even worse problems regarding access to land.²⁷ For a long time, they had *de facto* land rights and could hunt and, even more so, gather bushfood in the area. These activities came under pressure when the Namibian Development Corporation made four farms in the Mangetti area available for the relocation of Oshiwambo-speaking cattle owners who had lost a court battle regarding their illegal cattle grazing activities in western Kavango Region. Although this was meant to be a temporary solution, in 2010 the Owambo farmers' stay was extended. Even though not all the 57 cattle owners moved to this area, the number of cattle has continued to increase, putting heavy strain on the water resources.²⁸ The Owambo farmers' cattle are grazing in the area where Hai||om used to have temporary camps to hunt and gather bush food.

4 The issue of community representation

Given this shared experience of land dispossession and marginalisation, Hai||om see an urgent need to have a “representative” to negotiate on behalf of the Hai||om with the state. In this regard, the most powerful institution is currently the TA, provided for by the Traditional Authorities Act (No. 25 of 2000). The main functions of all of Namibia's TAs, as established by the act, are: to cooperate with and assist the GRN; to supervise and ensure the observance of customary law; to give support and advice, and disseminate information; and to promote the welfare and peace of rural communities.

25 Note that this was another scheme, namely the Land Reform Programme, and Hai||om were resettled amongst others; this was different to the scheme under the San Development Programme, through which farms were explicitly handed over to the Hai||om – described in detail further on in this chapter.

26 Republic of Namibia, *Report on the Review of Post-Resettlement Support to Group Resettlement Projects/Farms 1991–2009*, Republic of Namibia, Windhoek, 2010.

27 National Planning Commission, *Oshikoto Regional Poverty Profile*, Windhoek, 2007, p. 39.

28 Shivute, Oswald, ‘Oshiwambo farmers have their Mangetti stay extended’, *The Namibian*, 2 August 2010.

It is noteworthy that in the past, the traditional social organisation of Hai||om (and other San groups) was generally “egalitarian”, and made no provision for a single traditional leader. On the contrary, levelling mechanisms were in place that countered the establishment of powerful authorities.²⁹ Headmen of smaller family groups had certain responsibilities, especially in the context of managing natural resources, but decisions were made rather by consensus, than by one individual.³⁰ However, the Traditional Authorities Act in essence applies the traditional system of Oshiwambo-speaking groups (who constitute over 50% of the Namibian population) as a model, and this model is characterised by a hierarchical authority structure with a single representative leader for a large group. This model does not work well for all leadership structures in the country, and San communities, in particular, find it difficult to use this institution for their own benefit.³¹ Nevertheless, Hai||om perceive the institution as being an important tool for making their voices heard.

The official Hai||om TA under Chief David ||Khamuxab was recognised by the GRN on 29 July 2004. Already then, other local Hai||om groups immediately rejected the recognition claiming that the “so-called Traditional Authority was nothing but a SWAPO structure”³² and that the TA had not been elected by the Hai||om community. During the following years, most of the development targeting the Hai||om was channelled through the Hai||om TA. Currently, dissatisfaction with the chief is evident in most Hai||om communities, and there is a division amongst the Hai||om between supporters of the chief (whose numbers continue to decline) and opponents of the chief.³³ Major concerns include the absence of proper elections to appoint the chief, a lack of information and transparency, corruption and favouritism, and therefore a general lack of representation of Hai||om community interests. This conflict is a major impediment to development.³⁴ In recent years, the GRN has become increasingly aware of this challenging situation, and of the complexities regarding the role Chief ||Khamuxab plays in community development efforts.³⁵

29 Guenther, Mathias, *Tricksters and Trancers: Bushman Religion and Society*, University Press, Bloomington and Indianapolis, 1999, pp. 33–34.

30 Ibid., p. 45.

31 Dieckmann, Ute, Maarit Thiem & Jennifer Hays, ‘Introduction’ in Dieckmann, Ute, Maarit Thiem, Erik Dirks & Jennifer Hays (eds), *“Scraping the Pot”: San in Namibia Two Decades After Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, 2014.

32 Amupadhi, Tangeni, ‘New Hai||om Traditional Authority eyes Etosha’, *The Namibian*, 29 July 2004.

33 Oreseb, Costa, Reader’s Letter: ‘All is not well with the Hai//om’, *New Era*, 24 June 2011.

34 See also Koot, Stasja & Robert Hitchcock, ‘In the way: perpetuating land dispossession of the indigenous Hai||om and the collective action law suit for Etosha National Park and Mangetti West, Namibia’, *Nomadic Peoples*, 23(1), pp. 55–77.

35 Collinson, Roger & Willem Odendaal, personal communication, Outjo, 2019.

These issues can be understood as a conflict between the traditional structures and processes of the Hai||om and those defined by the Traditional Authorities Act. The Act stipulates that TAs should be designated in accordance with the customary law of the applicable traditional community. However, unlike the customary laws of many other traditional communities in Namibia, the customary law of the Hai||om (like that of most San communities) does not make any provision for the establishment of overall authorities.³⁶ Furthermore, whereas local and national political leaders come to power through elections, traditional leaders are appointed, and there is little transparency in the appointment process, so the system is open to abuse. In some cases, the process through which a TA comes to power is very obscure, and it is often said that party politics have played a role. Furthermore, the lack of powerful individual leaders in “traditional” Hai||om society means that the TAs lack internal role models to emulate in their own leadership positions. In general, training for Namibian TAs, monitoring of their performance, and the requirement of accountability are virtually non-existent, and the GRN does not provide support or training to help TAs to acquire the necessary competencies to fulfil their roles as community leaders. Another difficulty is posed by the fact that all TAs in Namibia receive monthly remuneration, as well as a 4X4 vehicle and other provisions from the government. For many reasons, this access to money, transportation and other benefits is the source of conflict in a community whose traditional values were strongly egalitarian.

Over the years, Hai||om have also attempted to establish several other community-based organisations to represent either segments of the Hai||om community or the overall community independently of the TA. None of these organisations proved capable of providing the Hai||om with a powerful common political voice. As with the TAs, one of the biggest obstacles in the path of any overall Hai||om organisation is that the former egalitarian structures do not provide for any kind of formal “authority” that is empowered to speak on behalf of the Hai||om on the whole. Furthermore, the legacies of the colonial history, above all land dispossession (resulting in a lack of communication and transport) and marginalisation (implying low levels of education and the lack of money and transport), are additional challenges.³⁷

Most importantly, however, the GRN is hesitant to accept any other structures than the TA for indigenous communities to negotiate with.³⁸

36 See also Dieckmann, Ute & Erik Dirks, ‘Culture, Discrimination and Development’, in Dieckmann, Ute, Maarit Thiem, Erik Dirks & 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. 509–512.

37 Dieckmann, Ute & Ben Begbie-Clench, ‘Consultation, Participation and Representation’, in Dieckmann, Ute, Maarit Thiem, Erik Dirks & Jennifer Hays (eds), *“Scraping the Pot”*, pp. 604–606.

38 Ibid., p. 608.

5 The strategy of the Namibian government: Resettlement

The establishment of the San Development Programme (SDP) resorting under the Office of the Prime Minister (OPM) in 2005 helped to raise awareness of the marginalised situation of the San in Namibia. The aim of the SDP was to ensure the integration of San in the mainstream of Namibia's economy. In 2007, the programme was extended to cover other marginalised communities such as the Ovaherero, Ovambo and Ovahimba. In 2009, the programme was transformed into the Division of San Development (DSD), still resorting under the OPM. In 2015, the DSD was renamed the Marginalised Communities' Division (MCD) and shifted to the Office of the Vice-President (OVP). The urgent issues acknowledged under the SDP/DSD/MCD included the impact of colonial land dispossession on the San, the current landlessness of San communities, education, and unemployment. The SDP/DSD/MCD responded to the land issue of the San by donating resettlement farms to San communities in various regions. Despite the well-known challenges associated with group resettlement, this model was employed for San resettlement.

Some of these resettlement farms were earmarked specifically for the Hai||om. This was also related to the centenary celebrations of ENP in 2007: the GRN could not ignore the fact that the Hai||om had lost their land due to the establishment and development of the ENP, and that the centenary was therefore not an event to celebrate for them.³⁹

Prior to 2007, the MLR had already carried out farm assessments and identified potential farms for purchase. In 2007, a professional consultant was contracted to conduct research on behalf of the Ministry of Environment and Tourism (MET), and this resulted in a project implementation plan for the resettlement of the Hai||om and the establishment of conservancy-like institutions.⁴⁰

Originally, the primary target group for resettlement was the Hai||om still residing within ENP, of whom only a minority were employed by the MET and Namibia Wildlife Resorts (NWR)⁴¹ while the rest were retired or unemployed, and staying with their employed relatives. Another target group for resettlement were the Hai||om staying in Oshivelo, a settlement at the eastern side of ENP.⁴² The plans envisaged that farms be bought for resettlement by the MLR on the eastern side of the park (close to Oshivelo) and at the southern border of the park (close to the Anderson gate and Ombika). The resettled Hai||om should be assisted to develop

39 Weidlich, Brigitte, 'Hai||om settled near former Etosha home', *The Namibian*, 17 November 2008.

40 Ministry of Environment and Tourism, *Hai||om San Socio-economic Development Adjacent to the Etosha National Park: Project Information Document*, MET, Windhoek, 2007.

41 NWR is a state-owned enterprise, mandated to run the tourism facilities within the protected areas of Namibia.

42 Shigwedha, Absalom, 'San to get land near Etosha', *The Namibian*, 26 March 2007.

sustainable livelihoods on the redistributed land through a variety of strategies and land uses, involving the utilisation of wildlife, tourism, and, as in the case of communal areas, the creation of conservancies. There were also discussions about the Hai||om getting access in the form of concessional rights over specific sites in ENP which were of particular cultural importance to them.⁴³ It is noteworthy that in his report the consultant stressed that there was a considerable need for proper planning at different stages of the project, including a need to carry out certain feasibility studies before some of the proposed activities could be initiated. Moreover, he warned that if the project moved too quickly, simply in order to get results on the ground, then the Hai||om community would not properly benefit from the project. Additionally, the necessity to provide sound capacity-building programmes was stressed. It was anticipated that the project would require commitment from the GRN and donors over a period of at least ten years so as to provide the Hai||om with sustainable livelihoods based on sound land management, the development of productive businesses and partnerships, and good governance.

In November 2008, the first farms (Seringkop and part of Koppies, with a total area of 7 968 ha on the southern border of ENP) were officially handed over to the Hai||om TA. It was the first time in the country's post-colonial resettlement history that a resettlement farm had been handed over to a particular ethnic group.⁴⁴ On the one hand, this could be interpreted as a deviation from relevant national policies on land and resettlement, but on the other hand, the Hai||om are recognised as a primary target group of the Resettlement Programme.

Since 2008, the GRN has purchased five more farms close the southern border of ENP specifically for the Hai||om: Bellalaika (3 528 ha), Mooiplaas (6 539 ha), Werda (6 414 ha), Nuchas (6 361 ha) and Toevlug (6 218 ha); and in early 2013, Ondera/Kumewa (7 148 ha), a combined farming unit around 30 km east of Oshivelo (see Figure 1).

Most of the Hai||om residents in ENP initially resisted their relocation, fearing that they would lose all access to the park once they had agreed to be resettled on the farms, while their priority was to get employment in the park and to stay there. Since 2012, though, a small number of Hai||om from ENP have agreed to move to the farms, as the MET promised to provide them with housing and other support.⁴⁵

43 For more detail, see Dieckmann, Ute, 'The Hai||om and Etosha: a case study of resettlement in Namibia', in Helliker, Kirk & Tendai Murisa (eds), *Land struggles and civil society in Southern Africa*, Africa World Press, New Jersey, 2011, pp. 155–189.

44 Another farm of 6 389 hectares (data provided by MAWF) had already been handed over to San communities in February 2008. However, this farm was handed to "San" belonging to several of the six different San groups. As the six different San groups do not identify themselves as one overarching ethnic group, this resettlement project was – strictly speaking – not a resettlement project based on ethnic criteria.

45 Lawry, Steven, Ben Begbie-Clench & Robert K. Hitchcock, *Hai||om Resettlement Farms Strategy and Action Plan*, Windhoek, 2012, p. 9.

The MET saw an opportunity for an innovative public–private partnership between current landowners, the GRN and the Hai||om community at Oshivelo to the east of ENP. A Hai||om community trust (the Namutoni Hai||om Trust), with a focus on the Hai||om around Oshivelo, had been developed as an initiative of the private land owners, and an agreement had been reached to create a conservancy-like institution with the Trust and the private landowners as partners. Apparently, however, the negotiations between the GRN and the private landowners did not work out as anticipated. For many years, no development whatsoever for the Hai||om at Oshivelo materialised. Only in 2013 were the farms Ondera/Kumewa were handed over to the Hai||om TA. Notably, Ondera/Kumewa had been a commercial farm with agricultural infrastructure in place. Subsequently, Hai||om from Oshivelo surrounding commercial farms and other resettlement farms have started moving there.⁴⁶

By September 2012, around 690 Hai||om were living on the seven resettlement farms south of Etosha, including the chief. The fact, that a Land Use Plan and Livelihood Support Strategy,⁴⁷ followed by a Strategy and Action Plan, was only released in 2012 is an indication that there has been very little coordinated planning beyond land purchases in the early stages, and stands in stark contrast to the measures proposed in the initial consultant's report. The reports mentioned above had been commissioned by Millennium Challenge Account – Namibia (MCA-N) as response to a request from the MET for planning assistance. Access to the resettlement farms was managed by the Hai||om TA. The chief received resettlement requests from local Hai||om people and then provided them with places on the resettlement farms once the farms had been purchased and handed over to the TA. This was a matter of concern for many Hai||om, who felt that many of those people first resettled were family of the chief, or closely connected to him.

Pension money and food aid were the main livelihood strategies on the farms for the majority of farm residents. Transport to Outjo, which is at least 90 km away, mostly by gravel road, in order to access the pension money was a problem. Livestock was an important source of subsistence and income for only a minority of the Hai||om, as only 14.73 % of the Hai||om on the farms actually owned livestock. Livestock production was constrained by the limited access to water at some parts of the farms, uneven grazing conditions, disease and predation. Income-generating activities included the exploitation of natural resources such as firewood, mopane worms and medicinal plants, and the production of crafts, but were relatively undeveloped. Communal gardens were established on two farms, but they were not very successful, and resettlement beneficiaries indicated that they would

46 *Jan Tsumib and Others v Government of the Republic of Namibia and Others*, Case Number A206/2015 at para 78 (Founding Affidavit of Jan Tsumib).

47 Lawry, Steven & Robert K. Hitchcock, *Hai||om Resettlement Farms: Land Use Plan and Livelihood Support Strategy*, Windhoek, 2012.

prefer individual gardens. Few of the Hai||om had backyard gardens that were irrigated. The limited availability of water was a major constraint in this regard. The resettlement farms received support through a variety of GRN agencies (e.g. in terms of infrastructure, financial and technical support) and the Namibian–German Special Initiative Programme.

It was additionally envisaged since the early stages of planning that the Hai||om on the resettlement farms should be enabled to gain additional income through the granting of a tourism concession to the specific area around the waterhole !Gobaub in ENP, and in 2011, a feasibility study was conducted to assess this option.⁴⁸ Extensive debate took place between the MET and MCA-N during 2011 and 2012 regarding the type of legal entity such a concession could be granted to, with the latter emphasising the need to have a democratic institution in place. It was most probably the involvement of MCA-N, whose representatives were aware of the internal conflicts around the TA and understood that the community therefore had no single representative body, which led to the establishment of an association to operate as “the concessionaire” instead of the Hai||om TA.⁴⁹ Eventually, in September 2012, the !Gobaub Community Association was established to oversee the wildlife tourism concession around the !Gobaub area. The constitution of the association was drawn up by lawyers in Windhoek without proper consultation or participation of the potential members and without taking the realities on the ground into account.

Contrary to the recommendations made in another consultancy report which recommended a broader approach, the MET decided that benefits from the concession should only be available to Hai||om residents on the resettlement farms. This meant that the people who decided to stay in Etosha, as well as other Hai||om who had lost land during the colonial period but did not stay on the resettlement farms, were excluded from any benefits arising from the !Gobaub concession, whereas the *Report on the Strategy and Action Plan for the Hai||om Resettlement Farms* compiled in September 2012 had concluded: “We believe that there is considerable merit in including the Etosha Hai||om in the membership of the !Gobaub Community Association.” Shortly after the association was established, the concession agreement was signed between the MET and the !Gobaub Community Association.⁵⁰ Despite the contract’s statement that the Hai||om community would be the concessionaire, the reality was that only people from the resettlement farms, as members of the association, would become beneficiaries of the concession. There had been no thorough consultations or participation by the members of the association or

48 Collinson, Roger, ‘Feasibility Study: Exclusive access tourism concession inside Etosha National Park for direct award to the Hai||om Community’, Windhoek, 2011.

49 Jones, Brian & Lara Diez, ‘Report to Define Potential MCA-N Tourism Project Support to the Hai||om’, Windhoek, 2011.

50 Ministry of Environment and Tourism, ‘Head Concession Contract for the Etosha South Activity Concession – Etosha National Park’, 2012.

with the rest of the Hai||om. Furthermore, the rights for the concessionaire were very limited, and it is questionable whether the Hai||om would receive any kind of sustainable benefit based on the contract. It should be noted that the idea of building a lodge at !Gobaub for the exclusive benefit of the Hai||om was originally developed by the residents in ENP (see next section).

Currently, the MCD in the OVP coordinates and leads the post-resettlement support, and OVP employees are paying regular visits to the resettlement farms. However, the residents do not see the desired changes. Residents who moved to the farms from ENP complained about the lack of job opportunities on the farms and considered moving back to Okaukuejo.⁵¹

Some residents received livestock through the Namibian–German Special Initiative Programme, which ended in 2014. It was stated that ongoing and sufficient post-donation support was lacking. Furthermore, predators preying on livestock, especially hyenas and lions breaking through the ENP fences, remained a problem. Some residents collected firewood or produced charcoal for sale, while a few women received sporadic payments from working in a gardening project which is managed by the MCD.

The residents reported not having any papers testifying to their rights to land, and not feeling secure with regard to their right to stay on and use the land.⁵²

In short, land acquisition and resettlement planning and strategy on the resettlement farms south of Etosha were of a piecemeal nature, and the resettlement of the Hai||om was anything but a well-planned and coordinated process. The crucial question of livelihood sustainability was not adequately addressed. Although resettlement had already begun in 2008, 11 years later the Hai||om remain unable to sustain themselves on these farms. Due to the remoteness of the farms, employment opportunities, piece work options and options to engage in small businesses were more limited than in larger settlements and towns such as Okaukuejo, Outjo or Otavi. At Ballalaika, the garden project was not self-sustainable, and few Hai||om actually kept livestock there. It appears that the Hai||om became even more dependent on GRN aid on the resettlement farms than they had been beforehand during the times when they lived in towns or in ENP. Furthermore, GRN participation and consultation initiatives were mainly facilitated through the Hai||om TA, which, as it turned out, complicated issues further and led to more divisions amongst the community.

With regard to the tourism concession, it also appears that no substantial progress has been made. This is also due to internal disagreements regarding who should negotiate on behalf of the Hai||om. While the chief would apparently like to take a leading role in this, both the MET and the !Gobaub Community Association

51 The Legal Assistance Centre visited the resettlement farms of Ballalaika and Nuchas in June 2019 in order to talk to Hai||om residents there about their living conditions.

52 Ballalaika community, resettlement farms, Ballalaika, 2019.

persist in making the association the sole concessionaire. Apparently, this is hampering negotiations with several lodge-owners who have expressed an interest in investing and building a lodge at the farm Nuchas. As a result, no benefits have yet been derived from the concession for “the Hai||om community”.

At first sight, it appears that the situation on Ondera, the farm to the east of ENP that was handed over to the Hai||om in 2013, is better than that on the farms south of ENP. In 2016, a reporter from *The Namibian* newspaper even referred to Ondera as “Namibia’s resettlement jewel”.⁵³

The number of households on Ondera has grown considerably since the early stages of resettlement. In 2016, around 120 households were reported to be living there;⁵⁴ by 2018, the Deputy Minister of Marginalised Communities, Royal /Ui/o/oo, mentioned 430 households,⁵⁵ and speaking to the Legal Assistance Centre (LAC) team in 2019, a resident estimated around 460 households to be living there.⁵⁶

At the time when the farm became a resettlement project, it had fully operational dry and irrigation farming systems in place, and the agricultural activities were ongoing. The income from sales was kept in a trust account, and the people involved in the project were getting a monthly allowance of N\$1 200 each from the MCD.

In terms of a 2014 agreement between Namsov Fishing Enterprises (Pty) Ltd. and the OVP, the Namsov Community Trust made several donations to the Hai||om at Ondera, although this support ended in 2018. In 2016, it was reported that the Namsov Community Trust had donated 212 cattle to the community, and that 10 herders were paid a monthly allowance of N\$700 each. In 2018, Ondera received another major donation of 205 cattle, a new double-cab utility vehicle, a tractor and a variety of farming implements worth a combined N\$7 million from Namsov.

In 2019, the main sources of income at Ondera were pension money and the garden project. However, pensioners without a “smart card” still need to travel to Tsumeb to receive their pensions. A regular electricity supply is a major challenge at the farm and also hampers the cultivation of crops. Residents would also prefer to have individual plots, rather than the community cultivation project. The allowances paid by the MCD were reported to be irregular. The drought aid (including mealie-meal, tinned fish and cooking oil) supplied by the GRN was insufficient and irregular. Residents were told that the carrying capacity of the farm for all types of livestock was 400. With 460 households living at Ondera, this would amount to less than one head of livestock per household, which cannot possibly represent a significant source of income or food.

The nearest clinic is at Oshivelo, about 45km away; there are hospitals at Tsumeb and Oshivelo, and two health workers are working at Ondera. Food is also mainly

⁵³ Itamalo, Marx, ‘Ondera is Namibia’s resettlement jewel’, *The Namibian*, 29 July 2016.

⁵⁴ Ibid.

⁵⁵ Staff reporter, ‘Hai//om San receive N\$7m farming boost’, *The Namibian*, 1 October 2018.

⁵⁶ Ondera community, resettlement farm, Ondera, 2019.

bought at Oshivelo or Tsumeb. An Early Childhood Development Centre and a primary school, reportedly attended by 350 – 400 children, are at Ondera. Secondary schools are located at Ombili, Oshivelo and Tsumeb. Residents mentioned the lack of job opportunities as a major stumbling block preventing the completion of schooling, mainly because people are pessimistic about finding work after doing so.

Irregular electricity supply and transport appear to be major problems at Ondera, and residents complained that the MCD did not always react and assist when problems, e.g. concerning electricity, were reported. Residents felt insecure with regards to land rights, and reported that GRN officials had told them to leave when they were not willing to work on the farm.

In sum, compared to the farms south of ENP, Ondera would at first sight seem to have better prospects for development. Considering the fact that 460 households (estimations of the total population are as high as 2 000) already reside at the farm, however, farming activities (livestock and cultivation) can hardly meet the needs of the inhabitants. The distance to the nearest towns are major obstacles that limit other income generating activities.

To date, Hai||om have been resettled on eight farms with about 44 206 ha of land under the OPM/OVP. Dependency on GRN support is high, and opportunities to develop self-sustainable livelihoods on these farms seem to be low in the absence of strong and coordinated efforts to establish diversified livelihood options moving beyond small-scale gardening and small-scale livestock production.

6 Legal action by the Hai||om: Reclaiming Etosha and Mangetti West

A group of Hai||om within Etosha, the Okaukuejo Hai||om Community Group, became increasingly unsettled with the developments regarding the resettlement farms south of Etosha after the first farms were handed over to the chief.⁵⁷ They were reminded of the eviction of the Hai||om in the 1950s and feared that the remaining Hai||om still living in ENP would now also be expelled from their ancestral land. Furthermore, having lived and worked in Etosha for most of their lives, they had hardly any experience in farming and no spiritual connection to the land outside the park. Living on a resettlement farm did not seem like a viable option to them. In 2010, they held a meeting with the Prime Minister to raise their concerns.⁵⁸

57 Due to my previous research and my work at the LAC (2008–2015), I was kept updated on developments. The Hai||om Community Group, and later the Etosha Hai||om Association (EHA) regularly consulted the lawyers at the LAC and forwarded the letters they had sent to government officials to the LAC.

58 Komob, Bandu, 'Letter to the Minister of MET on behalf of the Hai||om Community Group', Okaukuejo, 2010.

The Prime Minister referred them to the Minister of the MET, Netumbo Nandi-Ndaitwah, to discuss the matter. Her opinion was that it was in the Hai||om's best interests to move out of Etosha.⁵⁹ She also visited Okaukuejo to present the GRN's plans regarding resettlement and possibly a concession.

The Okaukuejo Hai||om Community Group felt that their concerns and demands were not being taken seriously, and continued writing letters to the Minister of Environment and Tourism. They clarified that they didn't recognise Chief David ||Khamuxab as their chief because he had not been democratically elected by the Hai||om and was not working on their behalf, and asked for new elections to appoint a Hai||om TA. They wanted the GRN to recognise that the Hai||om are the indigenous inhabitants of ENP and for respect of their cultural heritage there. They therefore wanted to be consulted and to take part in decision-making processes regarding the development of ENP. They noted that they did not want to be resettled on farms and that they had never requested resettlement farms. They further requested that the GRN should hand over !Gobaub as a cultural heritage site to the Hai||om. As second option instead of !Gobaub as a cultural heritage site, they asked for the Okaukuejo location to be declared a Hai||om heritage site, referring to the plans of the government (with MCA-N) to build staff quarters for MET employees at Ombika Gate (the southern entrance to ENP).⁶⁰ Furthermore, they asked the GRN to take affirmative action to address the high level of unemployment amongst Hai||om youths within the park, pointing out that members from other ethnic groups, originating from other areas, would nowadays get preferential employment in the park.

A letter addressed to the Minister of Minister of Environment and Tourism, written on the 7th July 2010, stated:

Our hearts are in Etosha and we don't want to be resettled on farms without any acknowledgement that we are the original inhabitants of Etosha. We don't want our rich cultural heritage to be forgotten and we strongly believe that the Government can benefit in providing space for our rich cultural heritage within the Etosha National Park. Tourists will also appreciate it and the image of the Park will be improved. After having lost the land long time ago and with it our livelihoods, we ask to start to benefit from the Etosha National Park. We hope to start negotiations with the Namibian Government in order to find solutions for all of us.

The MET did not react to the letter, and the Okaukuejo Community Group decided to ask the LAC for legal assistance with respect to "taking government to court".⁶¹

⁵⁹ Ibid.

⁶⁰ They apparently envisaged that all MET employees would move to the new staff quarters at the gate and that the location which was used as so-called junior staff quarters would become a Hai||om heritage site.

⁶¹ Komob, Bandu, 'Letter to LAC: Okaukuejo Hai||om are ready to take the Namibia Government to court', 2010.

During the following months, on advice of the LAC, the Etosha Hai||om Association (EHA) was established in order to have a legally recognised voice which could act independently of the TA, which was at that time the only voice of the Hai||om officially recognised by the GRN. The main objectives of the EHA was to promote the general welfare of all the Hai||om and to secure for themselves and their descendants security of tenure within or in connection with ENP, and to secure their legal rights within Namibia. Importantly, the membership was open, subject to certain conditions, for any person who shared a common cultural identity with the Hai||om people or the Hai||om traditional community. The founders of the association travelled to other Hai||om communities to introduce the organisation and its aims, to secure support for it, and to extend the membership to Hai||om living outside ENP.

In April 2011, the committee of the EHA wrote another letter to the Minister of Environment and Tourism and other stakeholders to call a stakeholder meeting in order to discuss their concerns again with a view to reaching a consensus on the way forward.

In the letter, the EHA explained its mandate, based upon accepted international human rights as set out in the United Nations Declaration on the Rights of Indigenous Peoples, to which Namibia is a signatory:

- (a) To ensure that the relevant land upon which Etosha National Park is situated is openly/formally acknowledged as being Hai||om ancestral land;
- (b) That the area around !Gobaub and Halali be handed back to the Hai||om under a tenure system that is secure for the benefit of future generations; see attached map.
- (c) That Hai||om have exclusive rights to benefit from any tourism development and resources within the aforesaid exclusive area and to enable its members and their families to assert and gain rights to develop tourism accommodation establishments and conduct and operate guided tours within the boundaries of the area;
- (d) That as compensation for dispossession of other land Hai||om are financially remunerated from the tourism operations of the National Park.
- (e) That affirmative action is applied in favour of Hai||om employment opportunities within the National Park.”⁶²

The meeting took place on 30 May 2011 and was attended by representatives from the MET, including the Minister, members of the Hai||om TA (including the

62 EHA committee, ‘Letter EHA to Minister of Environment and Tourism, Honorable Minister Mrs. Netumbo Nandi-Ndaitwah, CC to Ministry of Lands and Resettlement, Millennium Challenge Account, Namibia Wildlife Resorts, Hai||om Traditional Authority, Office of the Prime Minister, San Development Programme, The Legal Assistance Centre’, Windhoek, 2011.

chief), members from MCA-N and several NGOs (Namibian Association of CBNRM Support Organisations, the Nyae Nyae Development Foundation of Namibia, Working Group of Indigenous Minorities in Southern Africa and the LAC). It is worth describing the meeting in some detail, as it might have been a turning point in the Hai||om strategy to get heard.

The Permanent Secretary of the MET introduced the “Hai||om Programme”, mainly the state of affairs and the plans regarding the resettlement farms and explained which GRN bodies and other organisations were involved.

Subsequently, the MCA-N representative, Fanel Dermas, explained the involvement of MCA-N to support the Hai||om.⁶³ He stressed the importance of the establishment of a legal entity, i.e. the EHA, in order to benefit from MCA-N support, and pointed to a “needs assessment”, which had already been commissioned.

In short, the MET Permanent Secretary, with the additions of the MCA-N representative, outlined a prosperous Hai||om future on the resettlement farms with ample support and development (i.e. agriculture, infrastructure, wildlife). But she also stressed that the Hai||om would need to move out of ENP to the farms, and remarked: “You would still be with the wildlife of Etosha but only on the other side of the fence!”⁶⁴

The EHA attendees were not convinced, and repeated their claims and demands. They also mentioned that the director of the SDP had visited them and told them to just move to the farms. The EHA Chairperson, Kadisen ||Khumub, gave an emotional speech (which was translated), and asked for the recognition of the Hai||om residents in ENP as an integral part of the park. He requested affirmative action for their children and grandchildren regarding employment in the park and thereby the right to stay in ENP. He said that he got the impression that not employing members of other ethnic groups over Hai||om youths in ENP meant “erasing Hai||om blood from Etosha, to remove the original owners from the park”.⁶⁵

When the Permanent Secretary wanted to close the meeting after a brief absence, saying she would need to consult with the Minister, the Minister arrived unexpectedly, telling the audience that she had not read the agenda but got to know that the Hai||om TA was present and thus came to greet. She pointed out that the MET was not responsible for ancestral land claims, and referred the EHA to the MLR. She mentioned that accommodation was needed for those who would move to the resettlement farms, that a tourist concession had already been decided upon, and that a lodge should be built on one of the farms. She further mentioned that the GRN would support the Hai||om on the farms with education and job creation.

63 Since the idea was initially to establish a conservancy adjoining the Etosha National Park, MCA-N's support ran under its Conservancy Support Programmes.

64 Dieckmann, Ute, ‘Minutes of Meeting EHA with MET’, 2011.

65 Ibid.

The representatives of the EHA came back to the topic of unemployment in ENP and handed the Minister a list of 79 unemployed Hai||om youths in the park. The Minister referred them to the general job creation programme in Namibia, stressing that Hai||om were not the only unemployed people in the country. She referred to the potential for jobs to be created for Hai||om by the operation of a lodge on the resettlement farms. The Minister stressed that she would work with the chief of the Hai||om TA. The representatives of the EHA again clarified that the EHA had been established because they did not recognise the chief, and because the chief neither took the concerns of the community into account nor shared any benefits provided to the Hai||om TA with the community. Shortly thereafter, the Minister closed the meeting.⁶⁶

Whereas the EHA was at that stage open to negotiations, the MET remained inflexible and did not make any effort to accommodate the concerns and claims of the Hai||om represented by the EHA. It is likely that even some minor concessions by the MET concerning the various claims made by EHA would have smoothed the way for further negotiations. However, the meeting left the EHA attendees with the impression that the GRN's sole intention was to remove the Hai||om from ENP to the resettlement farms, and that Hai||om would never be included in any development plans for ENP. Against this background, the EHA asked the LAC to initiate further legal action.⁶⁷

On 31 August 2011, the Minister again came for a meeting at Okaukuejo, where Roger Collinson, the consultant contracted by MCA-N to conduct a feasibility study on a tourist concession to !Gobaub, presented his concept. As was made clear by Kadisen ||Khumub at the meeting, this feasibility study had been undertaken without proper consultation of the Hai||om in ENP. After the presentation, he stressed the significance of !Gobaub as a holy place for the Hai||om. Thus, people who wanted to go to !Gobaub should first ask permission from Hai||om elders like himself to visit the place. He admitted that he had not understood this "concession thing" and expressed his fear that the significance of !Gobaub for him and other Hai||om would not be respected in this initiative.⁶⁸

It is noteworthy that the feasibility study explicitly identified both members of the Hai||om community who had moved to the resettlement farms neighbouring Etosha and members of the Hai||om community who resided within ENP as beneficiaries. Furthermore, the study stated that the "Hai||om community" would need to accept the proposals before any further steps were taken, and that the formation of a legal entity such as a trust or an association of the Hai||om was advisable.

66 Ibid.

67 Komob, Bandu, 'Minutes EHA community meeting at Okaukuejo', 2011.

68 Komob, Bandu, 'Minutes of the Presentation on the Draft Proposal Tourism Traversing Rights Concession with Hai||om Communities in and out Etosha National Park', 2011.

In September 2011, the EHA sent a letter again to the Minister of the MET demanding that they also be consulted in future planning regarding the concession. The letter, signed by Kadisen ||Khumub as the Chairperson of the EHA, stated the following:

However, we still fear that the Hai||om living within Etosha will not benefit from the unilateral plan for the “upliftment” of the Hai||om unless we agree to resettle outside of the National Park on the resettlement farms under the jurisdiction of the appointed chief, which we do not intend to do that at this time for fear of breaking our link with our ancestral land. We would also like to stress that the Concession Policy requires priority to be given to communities that are resident inside or directly adjacent to protected areas, it is diabolical to exclude certain persons who reside within the protected area to force them to move adjacent to the protected areas. Furthermore the government concession policy seeks to promote the economic empowerment of formerly disadvantaged Namibians and requires affirmative action to be applied to ensure maximum participation of directly affected people. In this instance there is no guarantee that such an affirmative policy has been considered for the Hai||om in regard to the proposed developments in Etosha.

Unfortunately then, this plan has no merit whatsoever if it excludes us because we have never opted to leave our societal culture and our ancestral land. In the circumstances we again urge the Honourable Minister to ensure that we remain part of the planning process and that we have meaningful participation in this process. We look forward to your reply.”⁶⁹

Since there was no reply from the MET, five months later the EHA reiterated the claims in another letter to the MET. They stated that: “In the premises we are left with little option but to assert our rights by way of possible legal action and refuse to be forced out of Etosha. We trust that you will appreciate that you have left us with no other options.”⁷⁰

This time, the MET did react. In a letter to the Chief Executive Officer of MCA-N, the Minister allowed for the inclusion of “the Hai||om groups”, most likely referring to the EHA, in the Trust (the legal entity to be formed).⁷¹ Strangely, though, this decision was not given effect in further developments.

In the meantime, the MET provided transport and building materials for those Hai||om who were willing to move to the resettlement farms, while the LAC asked for assistance from the Legal Resource Centre (LRC) in South Africa in the Hai||om legal matter. Together with lawyers from the LAC, lawyers from the LRC visited Okaukuejo and introduced the option of land claims, providing several examples from South Africa. The community in Okaukuejo decided to follow this route.⁷²

69 Khomob, Kadisen, ‘EHA letter to MET’, 2011.

70 Khomob, Kadisen, ‘EHA letter to MET’, 2012.

71 Ministry of Environment and Tourism, ‘Letter to Chief Executive Officer, MCA-N’, 2012.

72 Komob, Bandu, ‘Minutes Meeting EHA and LAC/LRC’, 2012.

As mentioned above, when the !Gobaub Community Association was eventually constituted in September 2012, only the resettled Hai||om were permitted to be members, and benefits from the concession would therefore only be available to Hai||om residents on the resettlement farms.

It should be mentioned that Hai||om had also tried on another front to get their cultural heritage acknowledged. Since the turn of the millennium, a couple of Hai||om elders had worked closely with an anthropologist and other involved researchers and organisations to document their cultural heritage in ENP. The work, which had started rather informally involving various individuals and organisations, got formalised as the *Xoms /Omis Project* (Etosha Heritage Project), a community trust under the guidance of the LAC. The main objectives of the project were to research, maintain, protect and promote Hai||om heritage associated with ENP and the surrounding areas in order to capitalise on that heritage in the tourism sector, also through capacity-building programmes based on this heritage for Hai||om individuals with genuine interest in the cultural, historical and environmental heritage of the park. Furthermore, the project aimed at designing, creating, supporting and implementing sustainable livelihood projects for Hai||om communities indigenous to, or with strong historical associations with, the park – based on the Hai||om cultural heritage of the Etosha area.

Within the project, maps with Hai||om place names and seasonal mobility patterns, posters about hunting and veld food, postcards, T-Shirts, a tour guide book and a children's book were produced in order to conserve the cultural heritage of the Hai||om and to raise some income for the project.⁷³ The project had made several attempts to collaborate with NWR with a view to making the products available in the tourist shops in ENP, allowing traditional dancing and generally increasing the visibility of the Hai||om cultural heritage in ENP. All these attempts met with no success. It seemed that NWR had no interest at all in allowing attention to be drawn to the former presence of Hai||om in ENP, and did not consider it to be a potential tourist attraction.

During the same period, Hai||om from different communities had also employed a variety of strategies to bring about new elections for a Hai||om TA. One initiative was a petition filed in 2011 in order to spark new elections.⁷⁴ Another was the organisation of Hai||om according to traditional subgroups with individuals representing these subgroups.⁷⁵ These efforts too were unsuccessful.

The diplomatic strategies for Hai||om to have their concerns taken seriously and to get recognition as former inhabitants of ENP therefore seemed to be exhausted,

73 Dieckmann, Ute, *Born in Etosha: Living and Learning in the Wild*, Legal Assistance Centre, Windhoek, 2012; Dieckmann, Ute, *Born in Etosha: Homage to the Cultural Heritage of the Hai||om*, Legal Assistance Centre, Windhoek, 2009.

74 Watson, Peter, personal communication.

75 Naoxab, Erastus, meeting with Hai||om Subgroup Leaders, 2014.

and Hai||om chose legal action as the last resort. During 2013, the LAC and LRC had meetings with Hai||om in Oshivelo and Outjo in order to further assess the possibilities and intricacies of a land claim and to garner further support for the case.

The United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, made the following recommendations with regard to ENP and the resettlement farms and San TAs in his report based on his mission to Namibia in 2012:

82. Namibia should take measures to reform protected-area laws and policies that now prohibit San people, especially the Khwe in Bwabwata National Park and the Hai//om in Etosha National Park, from securing rights to lands and resources that they have traditionally occupied and used within those parks. The Government should guarantee that San people currently living within the boundaries of national parks are allowed to stay, with secure rights over the lands they occupy.

83. In addition, the Government should take steps to increase the participation of San people in the management of park lands, through concessions or other constructive arrangements, and should minimize any restrictions that prohibit San from carrying out traditional subsistence and cultural activities within these parks.

84. The Government should review its decision not to allow the Hai//om San people to operate a tourism lodge within the boundaries of Etosha National Park under their current tourism concession. Further, management of concessions should not be limited to only those Hai//om groups that opt to move to the resettlement farms.⁷⁶

87. Recognition of the traditional authorities of indigenous peoples in Namibia is an important step in advancing their rights to self-governance and in maintaining their distinct identities. The State should review past decisions denying the recognition of traditional authorities put forth by certain indigenous groups, with a view to promoting the recognition of legitimate authorities *selected in accordance with traditional decision-making processes* [emphasis added].⁷⁷

Without venturing into legal questions in detail, reference should be made to the issue of *locus standi* and the subject of land, which were discussed at length amongst the involved lawyers (see Chapter 6 of this volume, discussing the Hai||om litigation in detail). Being aware of the intricacies of the Central Kalahari Court Case, which originally included 243 applicants, a number which decreased

76 Anaya, James, *Report of the Special Rapporteur on the rights of indigenous peoples: The situation of indigenous peoples in Namibia* (<http://unsr.jamesanaya.org/docs/countries/2013-report-namibia-a-hrc-24-41-add1-en.pdf>), pp. 19–20.

77 *Ibid.*, p. 20.

to 189 surviving applicants,⁷⁸ and being aware of the problematic position of the officially recognised Hai||om chief, and moreover being aware of the problem of representation within former hunter-gatherer groups, it was decided to first launch a class action application on behalf of the Hai||om. Class action lawsuits are not at this stage an option in Namibian law, and the country's law would need to be developed to allow the applicants to pursue the legal action in a representative capacity on behalf of their community.⁷⁹ Eight Hai||om are the applicants in this action. Along with the GRN and some others stakeholders, the Hai||om TA is a respondent.

The application was filed in 2015 and after two initial postponements, was heard in November 2018.⁸⁰ It was dismissed in a judgment announced on 28 August 2019.⁸¹ The rationale for the dismissal was grounded in the Traditional Authority Act (No. 25 of 2000). The judges held that the competent body to launch such an action would be the Hai||om TA, and that the applicants had not exhausted the internal remedies provided by the act, nor had they challenged the constitutionality of the provisions of the act.⁸²

It is likely that the legal team will continue their legal battle.

7 Conclusion

During the course of the developments described in this chapter, it became evident that a major challenge of the Hai||om struggle was the institution of the TA, which in the case of San communities is a “neo-traditional” authority. Most of the other San communities face similar challenges, which suggests that the culprits are not particular individuals, but the institution itself. Customary law in traditional San societies made no provision for a single chief to have authority over a very large group; on the contrary, it prevented such centralised authority. However, the Act requires the appointment of such a chief. San chiefs thus lack internal or historic role models. Additionally, during colonial times, the land dispossession and the Hai||om's consequent social fragmentation made the establishment of stable overall leadership structures virtually impossible.

78 Sapignoli, Maria, 'Dispossession in the Age of Humanity: Human Rights, Citizenship, and Indigeneity in the Central Kalahari', *Anthropological Forum*, 25(3), p. 295; Hitchcock, Robert K., Maria Sapignoli & Wayne A. Babchuk, 'What about our rights? Settlements, subsistence and livelihood security among Central Kalahari San and Bakgalagadi', in *International Journal of Human Rights*, 15(1), p. 80.

79 Menges, Werner, 'High-stakes Etosha land rights hearing starts', *The Namibian*, 27 November 2018.

80 Ibid.

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

82 High Court of Namibia (2019). Ruling Case No. A 206/2015.

Although the GRN might have implemented the Traditional Authorities Act in order to accommodate customary law within the postcolonial democratic state, it failed to take the customary law of San communities into account. In its current form, the Act actually leads to more internal fragmentation and conflicts within San communities, and therefore further disrupts the social structure (and customary law) of such communities. It also prevents, or at least constraints, Hai||om and other San groups from finding a common political voice.

At this stage, considering the current judgment, it appears to have impeded them succeeding with any claims to their ancestral land.

This might, of course, be welcomed by the GRN. However, the GRN strategy of only negotiating with the Hai||om TA brings with it its own problems and costs for the GRN.

Firstly, having not ensured the support of the wider Hai||om community in their resettlement plans impeded the GRN plans to resettle the Hai||om from ENP. The initial issue of unemployed Hai||om there has not been solved, as the GRN is loath to involuntarily remove them. Secondly, the development of the concession has also not been taken forward. Thirdly, financial and technical support channelled through the chief does not necessarily reach the wider community, or even all beneficiaries on the resettlement farms, where there are high levels of dependency on GRN aid, and no signs that this might change in the near future. Finally, regarding the court case: The decision to apply for representative action on behalf of the Hai||om in order to pursue a land claim over ENP seemed to have been the last resort in their struggle, because many Hai||om had realised that the TA was not representing the concerns of the wider community. When the Hai||om from Etosha started corresponding with the GRN in 2010, they asked for acknowledgement that they were the former inhabitants of ENP, and wanted as such to be involved in decision making regarding Etosha's future development. They also wanted recognition that their cultural heritage and history is inseparably connected to the ENP lands, and they therefore asked for !Gobaub as a Hai||om cultural heritage site. For those still employed in ENP and their descendants, they demanded that the Hai||om should be given preferential status when it comes to employment opportunities in the park. This would enable them to preserve their connections to their ancestral land and, at least for a small portion of Hai||om, to continue living there. It is noteworthy that at the initial stage of their struggle, no explicit request was made for financial compensation. Considering the estimated market value of the ENP lands being around N\$3.8 billion,⁸³ these initial requests appear rather modest. However, the GRN was not inclined to accommodate any of the requests, but continued with their resettlement, which in the eyes of most of the Hai||om is an attempt to completely erase the connection of the Hai||om with ENP as their ancestral land. The GRN

83 'Annexure A, Particulars of Claim', in *Jan Tsumib and Others v Government of the Republic of Namibia and Others*, Case Number A206/2015, at para 32.1.

could have reacted with a rather minor admission in order to circumvent litigation and save costs. Furthermore, although the application was turned down, this might not be the end of litigation, involving more costs for all parties.

The GRN is aware of the problematic role played by the recognised chief, but they blame the individual for his shortcomings and failure to adequately perform the tasks demanded by his position.⁸⁴

But the similarities with other San communities dealing with other TAs as well as problems encountered with the TAs of other groups suggest that blame should not be laid at the door of the individual chief. Rather, it is the institution itself which lies at the heart of the problems. It is time to amend the legislation.



84 This becomes evident when government officials informally advise Hai||om to sort out the chief or to reconcile with him.

Recognition of ancestral land claims for indigenous peoples and marginalised communities in Namibia: A case study of the Hai||om litigation

Willem Odendaal, Jeremie Gilbert and Saskia Vermeylen

1 Introduction

... we are all connected to God through the land, plants and animals.

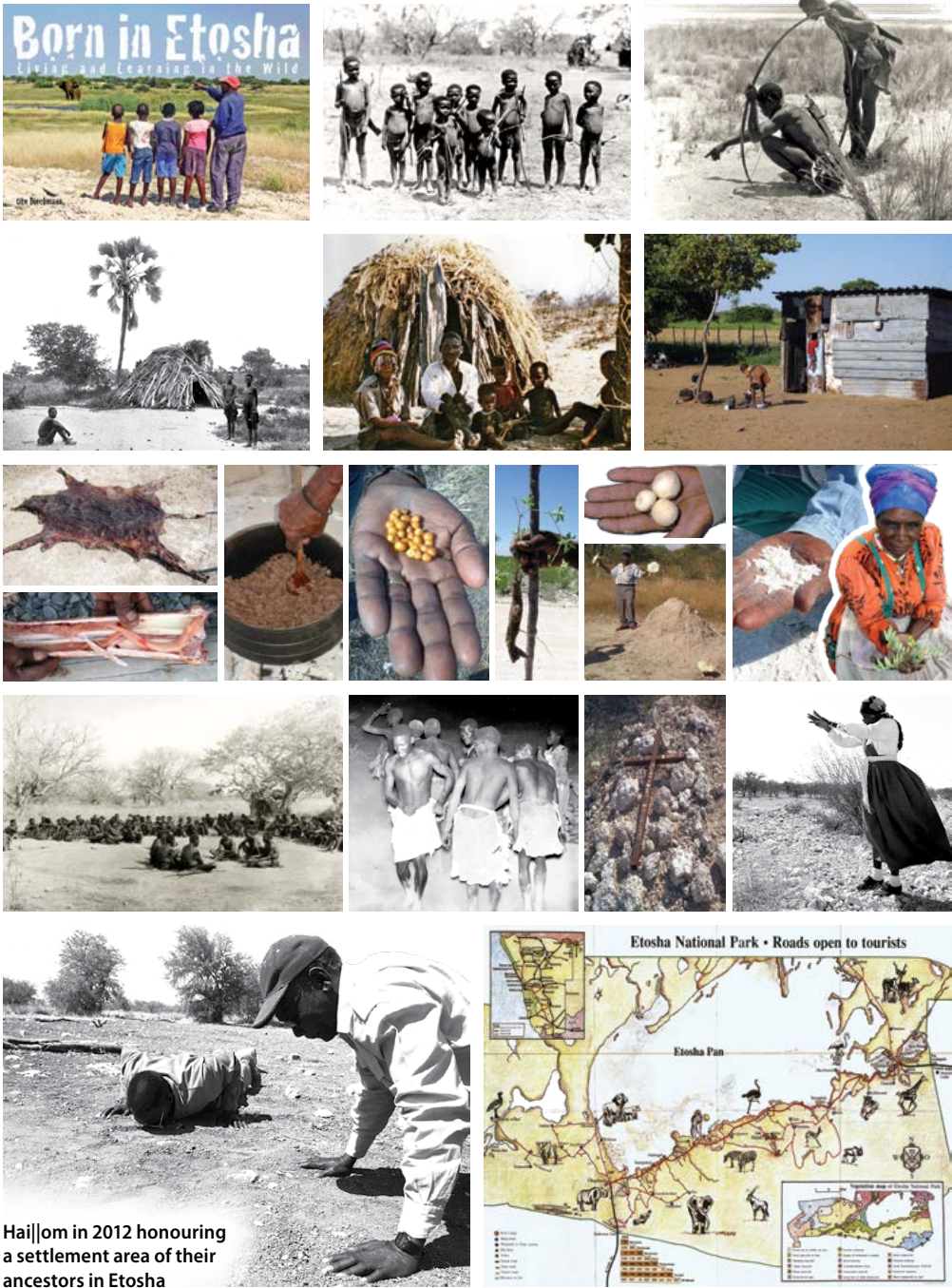
– Jan Tsumib¹

When a country's legal system falls short in recognising its indigenous peoples and marginalised communities' claims to ancestral land rights, they have to find innovative legal remedies when litigation becomes their only option to assert their rights. Currently, the Hai||om people who belong to the deeply marginalised San minority of Namibia, are engaged in such judicial effort.² The Hai||om are indigenous to Namibia, and have a distinctive language that falls within the Khoekhoegowab continuum; their history is one of dispossession, and they are

1 Founding Affidavit of Jan Tsumib (First Applicant) in *Jan Tsumib and Others v Government of the Republic of Namibia and Others*, Case Number A206/2015.

2 The Hai||om are the largest San grouping in Namibia, with an estimated adult population of 6 200. See paragraph 16 of Ute Dieckmann's affidavit in *Jan Tsumib and Others v Government of the Republic of Namibia and Others*.

Images from *Born in Etosha: Living and Learning in the Wild* (Ute Dieckmann, LAC, 2012), illustrating the words of Jan Tsumib quoted on the previous page, and the Hai||om's ancestral and still close connection to the land constituting and surrounding the Etosha National Park – one of Namibia's primary tourist destinations, where the Hai||om still live, with no land rights, in poverty, and disconnected from their homes, families and culture.



Hai||om in 2012 honouring a settlement area of their ancestors in Etosha

not generally politically empowered.³ Their forced removal from Etosha National Park (ENP) in the 1950s under the then-apartheid South African Administration, without any form of compensation, is not a distant historical grievance – on the contrary, it is still fresh in the minds of many of their community members. The Hai||om's religious and spiritual beliefs are connected to Etosha's landscape and fauna, and the spirits of those who have passed away remain with and around them.⁴ The ENP lands are filled with indigenous significance, and most places have cultural significance, being as much a part of the Hai||om culture as the language and their shared kinship. Today, as a direct result of their mass removal, many Hai||om live in poverty, disconnected from their homes, families and culture.

Community members have sought legal remedies for their dispossession. To do so they have asked for the support the Legal Assistance Centre (LAC), a public interest law firm concerned with the promotion of justice for all Namibians, which is duty bound in terms of its mandate to assist the Hai||om people to ventilate their legal rights over ENP and the Mangetti West block.⁵ In 2015, the LAC, instructed by eight members of the Hai||om community, submitted a court application asking the High Court of Namibia to allow the applicants to bring a representative action claim on behalf of all the Hai||om people in order to determine their rights over their ancestral land. After several delays, the application for representative action was finally heard on 26–29 November 2018.⁶

The applicants were chosen by the Hai||om community to try and restore the land that was taken from them in the 1950s.⁷ The land which is the subject of the claim consists of two parts, the first being the ENP, and the second consisting of eleven farms in the Mangetti West block, both ancestral territories of the Hai||om. The Etosha lands consist of unregistered and unsurveyed land within the boundaries

3 See Dieckmann, Ute, Maarit Thiem, Eric Dirkx & Jennifer Hays (eds), *“Scraping the Pot”: San in Namibia Two Decades after Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, 2014.

4 See Applicants' Heads of Argument in *Jan Tsumib and Others v Government of the Republic of Namibia and Others*, Case Number A206/2015, at para 22.3.

5 The Hai||om living at Mangetti West did not suffer the same degree of encroachment upon their land as it was an area of little activity. From the 1970s, however, the apartheid administration encouraged Owambo farmers to settle on the land and installed infrastructure there to support white farmers in the area when they needed emergency grazing for their livestock in times of drought.

6 The application hearing was first to be heard in November 2017, but was then postponed to May 2018, only to be postponed once again. On 28 August 2019, judgment was delivered against the Applicants, who are appealing the matter in the Supreme Court.

7 Each of the applicants, except for fifth applicant, was selected at a meeting held for that purpose by the Hai||om people living in the town or on the farm where the particular applicant resides, to be their representative in the proposed action. See Record 98-99, Record 127 par 92 and Record 1007-1008 par 10-11. “Record” hereinafter refers to the record prepared for the High Court in the matter of *Jan Tsumib and Others v Government of the Republic of Namibia and Others*, Case Number A206/2015.

of ENP, which has a total area of approximately 23 150 square kilometres.⁸ The selection proceedings were prompted because of inability or unwillingness on the part of the Government of the Republic of Namibia (GRN) and the Hai||om Traditional Authority⁹ to assist the Hai||om to regain rights in their ancestral land. The main question that the applicants asked the High Court in November 2018 was: “How should the Hai||om people approach [the] Court to assert their rights?” The applicants argued that the best and only way to assert their rights would be through a representative action brought on behalf of the Hai||om people.¹⁰ If they were not permitted to represent the Hai||om people in the proposed action, they argued, it would be almost certain that the action would never be brought. The rights of the Hai||om would then go unprotected and unfulfilled.¹¹

Linked to the issue of representation, crucial legal issues need to be addressed. Namibian courts have not previously considered the rights of indigenous people to the restoration of their rights in land, nor have they considered how an indigenous people should be represented in litigation. Consequently, the case raises important additional questions. Firstly, should the (Roman Dutch) common law be developed to permit this type of representative action? Secondly, if so, what should the content of that development be? Thirdly, do the Hai||om people have a potentially tenable claim for the return of their land, or compensation for its loss? And fourthly, is it in the interests of justice to allow the applicants to represent the Hai||om in the proposed action?¹² Overall, the case touches on six essential claims for the Hai||om, namely, their “right to the land”, their “right to natural resources”, their “right to development”, their “right to ‘beneficial use and occupation’ “ over their ancestral lands, their “cultural and religious rights” over their ancestral land, and finally compensation as a result of the indigenous peoples’ rights they have lost because of the colonial past.¹³

While this ancestral land claim might be new in Namibian law, it already has strong precedent in comparative international law. The right to represent collective

8 Record 20-21 paragraph 30.1.

9 The GRN is the first respondent while the Hai||om Traditional Authority is the third respondent in the application. In total the application includes 20 respondents.

10 The applicants brought this claim in a representative action and do not seek to represent a class as would be the case in a “class action”. Instead, the applicants seek to represent “the Hai||om people”, “the Hai||om as members of a minority group”, and “the individuals who constitute the Hai||om” as a single, distinct legal entity, or the members of that legal entity in one case. See Heads of Argument par 25, *Jan Tsumib and Others v Government of the Republic of Namibia and Others*, Case Number A206/2015.

11 Heads of Argument par 3, *Jan Tsumib and Others v Government of the Republic of Namibia and Others*, Case Number A206/2015.

12 Heads of Argument par 4, *Jan Tsumib and Others v Government of the Republic of Namibia and Others*, Case Number A206/2015.

13 Heads of Argument par 16 and paras 61–75, *Jan Tsumib and Others v Government of the Republic of Namibia and Others*, Case Number A206/2015.

rights-holding entities is common and well-protected. As discussed further on, the right of indigenous people to the return of their land, or to claim compensation for the loss of their land, is recognised in Africa (e.g. South Africa, Kenya and Botswana) and the Commonwealth (e.g. Australia and Canada). There is a well-recognised body of international law regarding the land rights of indigenous peoples, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and decisions of the African regional human rights institutions (African Commission on Human and Peoples' Rights (ACHPR) and the African Court on Human and Peoples' Rights (ACtHPR)). As affirmed by the Namibian Constitution, all treaties binding upon Namibia, as well as "general rules of public international law", are incorporated into Namibia's domestic law.¹⁴ This is significant as it means that all the international treaties concerning the rights of indigenous peoples that have been ratified by Namibia are directly relevant to the interpretation of the country's domestic laws.¹⁵ It is also significant that Namibia voted in favour of adopting the UNDRIP.¹⁶ The lack of adequate national legal recognition of indigenous peoples' rights has pushed indigenous communities and their lawyers to turn to international law to support the recognition of their ancestral land rights. The other significant body of norms comes from comparative law, especially cases and jurisprudence from countries where the judiciary has had to examine ancestral land claims by indigenous communities. Significantly for Namibia, this ancestral land jurisprudence has been used in neighbouring countries which have similar legal systems, making these decisions relevant to the judiciary in Namibia. The combination of regional comparative jurisprudence and international/regional treaties is relevant to the current debates concerning ancestral land claims by marginalised indigenous communities in Namibia. Subsequently, we want to deal with the legal approach in relation to comparative international ancestral land law by addressing the following themes in this chapter, namely:

- Marginalisation, cultural survival and indigenous people
- Extinguishment and colonial "survival"
- Cultural rights to land and natural resources
- Participation, consultation and development

14 Article 144. See also the case from the Namibian Supreme Court providing that article 14(3)(d) of the ICCPR took precedence over conflicting provisions in the Legal Aid Act (*Government of the Republic of Namibia & Others v Mwilima & Others*, Supreme Court Decision, SA 29/01; ILDC 162 (NA 2002), [2002] NASC 8, 7 June 2002).

15 This includes: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the African Charter on Human and Peoples' Rights.

16 UNDRIP was passed by the United Nations General Assembly by 143 in favour to 4 against (Australia, Canada, New Zealand and the United States); Namibia voted in favour of its adoption. See Resolution adopted by the General Assembly on 13 September 2007: United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295.

2 Themes pertaining to ancestral and claims

2.1 Marginalisation, cultural survival and indigenous peoples

The focus on addressing the rights of some of the most marginalised indigenous communities has been one of the key developments in the regional African human rights system. The notion of “indigenous peoples” has greatly evolved over the last few decades, acquiring a contemporary interpretation which revises the colonial view that all pre-colonial inhabitants of the continent are “indigenous”. This evolution is apparent in the work of the ACHPR, which defines indigenous peoples based on the characteristics that:

- their culture and way of life differ considerably from the dominant society, to the extent that their culture is under threat of extinction;
- the survival of their particular way of life depends on access to lands and natural resources;
- they suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society;
- they often live in inaccessible regions and are often geographically isolated; and
- they are subject to domination and exploitation within national political and economic structures.¹⁷

The ACHPR has further clarified that the term “indigenous populations” does not mean “first inhabitants” in reference to aboriginality in post-colonial settler societies.¹⁸ As noted by the ACHPR: “... if the concept of indigenous is exclusively linked with a colonial situation, it leaves us without a suitable concept for analysing the internal structural relationships of inequality that have persisted from colonial dominance.”

The United Nations on many occasions through the work of its various treaty-monitoring bodies, and the ACHPR, have affirmed that the San are indigenous peoples under this contemporary definition. As an example, the UN Special Rapporteur on Indigenous Rights drew attention to the fact that several of the marginalised communities of Namibia, including the San, can be identified as similar to those of groups identified as indigenous worldwide.¹⁹

17 *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, submitted in accordance with the ‘Resolution on the rights of indigenous peoples/communities in Africa’ and adopted by the African Commission at its 28th ordinary session in November 2003 and published in 2005.

18 Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples.

19 Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, ‘The situation of indigenous peoples in Namibia’, para. 9 (<http://unsr.jamesanaya.org/docs/countries/2013-report-namibia-a-hrc-24-41-add1-en.pdf>).

There are illustrations from courts in Africa on the application of the term ‘indigenous’ to specific communities to recognise their ancestral land rights. For example, the High Court of Kenya in *Joseph Letuya v Attorney General* recognised the Ogiek as an “indigenous community” in Kenya. The court stated: “(...) the distinguishing factor for indigenous communities is their historical ties to a particular territory, and their cultural or historical distinctiveness from other populations that are often politically dominant.”²⁰ Likewise, in Botswana, the issue of indigenous rights has been at the centre of litigation on indigenous peoples’ rights, which has attracted significant attention nationally, regionally and internationally.²¹ At the heart of the legal battle was the claim of the San and Bakgalagadi residents of the Central Kalahari Game Reserve (CKGR) – Botswana’s largest protected area, and the second largest game reserve in Africa – that they had been illegally removed from their ancestral land. The recognition of the concerned CKGR residents as indigenous peoples was an important element of their legal claims. Ultimately, the High Court of Botswana recognised the right of the community to live on their ancestral territory. In reaching this decision, two of the judges specifically highlighted the need to recognise them as indigenous, with Justice Dow noting: “the fact the applicants belong to a class of peoples that have now come to be recognized as ‘indigenous peoples’ is of relevance.”²² The main relevance of this legal recognition as indigenous peoples is the acknowledgement that they have suffered from historical denial of their ancestral rights to their land and ancestral territories leading to their severe marginalisation in contemporary times.

It is important to note that it does not mean that indigenous peoples’ cultures have to be static and frozen in time, and exactly as they were at the time of colonisation. Courts have recognised that cultures evolve and transform under contemporary influences. As an illustration, the debate between modernity and the traditional way of life took place during the litigation of the *Ogiek case* before the ACtHPR. In May 2017, the ACtHPR decided on the *Ogiek case*, holding that the Government of the Republic of Kenya (GRK) had violated numerous rights of the Ogiek as guaranteed by the African Charter. In so doing, the court rejected the GRK’s arguments that it had not violated Ogiek cultural identity by evicting them because “the Ogiek no longer led traditional lifestyles and as a result of their new and more modern way of life the community had lost their distinctive cultural identity”. The court held the GRK had not demonstrated that the Ogiek’s lifestyle

20 ELC Civil Suit No. 821 of 2012 (OS), 13, para 7.

21 Central Kalahari Legal Case No. MISCA 52/2002 in the Matter between Roy Sesana, First Applicant, Keiwa Setlhobogwa and 241 others, Second and Further Applicants, and the Attorney General High Court of Botswana (2006); and High Court Civil Case No. MAHLB 000 393-09 in the matter between Matsipane Mosetlhanyene, First Appellant, and Gakenyatsiwe Matsipane, Second Appellant, and the Attorney General Respondent (2011).

22 CCJ, 2006, at 201.

had changed to the extent that it might be said that they had eliminated their cultural distinctiveness. It held:

A static way of life is not a defining element of culture or cultural distinctiveness. ... It is natural that some aspects of indigenous population's culture, such as certain ways of dressing or group symbols, could change over time. Yet the values, mostly the invisible tradition of values embedded in the self-identification [of the group] often remain unchanged.²³

The issue whether the Hai||om are indigenous or not has also been at the heart of the Etosha representative action application hearing. The lawyers for the applicants refer to evolving international law in this matter and argue that the Hai||om people “constitute a people in terms of international law” and refer explicitly to Articles 20, 21 and 22 of the African Charter on Human and Peoples’ Rights to establish that they are a people and to Article 27 of the International Covenant on Civil and Political Rights (ICCPR) to establish that they are a minority.²⁴ On the other hand, the GRN rejects the idea that the Hai||om fulfil the criteria to be recognised as indigenous people based on the following objections:

- the Hai||om have little commonality, continuity or solidarity as a community;
- the majority have been assimilated into modern Namibian life, so they no longer persist with wanting to practise their traditional cultures and religion; and
- they have no cohesive community identity.²⁵
- To rebut the GRN’s objections, the applicants’ lawyers refer to the ACtHPR, which considered various international documents, amongst others, the UNDRIP and the ILO 169 Convention. According to the ACtHPR there are four criteria to qualify as an indigenous people:
- priority in claim with respect to the occupation and use of land (i.e. “you were the first”);
- the voluntary perpetuation of cultural distinctiveness, including language, social organisation and religion;
- self-identification and recognition by other groups in the state; and
- the experience of subjugation, marginalisation, dispossession, exclusion or discrimination.²⁶

Given the ACtHPR’s criteria, the Hai||om evidently qualify as an indigenous people. In their supporting documentation, the applicants submitted evidence relating to their cultural practices and their continued use of the land. Particulars

23 Application No 006/2012, *African Court on Human and Peoples’ Rights v Republic of Kenya*, para. 185.

24 Transcripts of application hearing of *Jan Tsumib and Others v Government of the Republic of Namibia and Others*, Case Number A206/2015, on 26–29 November 2018, pp. 40–41 (hereinafter referred to as “Transcripts”).

25 Transcripts p. 69.

26 Transcripts p. 7.

of the applicants' self-identification are also referred to in the First Applicant's Founding Affidavit. Furthermore, the Hai||om are also recognised as a distinct group, evidenced by the existence and recognition of the Hai||om Traditional Authority²⁷ and international organisations. Finally, the fact that the Hai||om experience subjugation, marginalisation, dispossession, exclusion or discrimination is also clearly stated in their application.²⁸

Notwithstanding this evidence that the Hai||om fulfil the ACtHPR's criteria of indigenous peoples, the Namibian government persisted in their claim that the Hai||om have departed from their traditional culture,²⁹ in spite of the fact that the Hai||om were forcibly removed from their land or were relocated to other parts of the country, which challenges the continued practice of culture in any case. The GRN's argument that the Hai||om are too modernised and have abandoned their "traditional" culture is analogous to the arguments that were made in the *Ogiek case*. However, as was pointed out above, this argument was rejected by the ACtHPR on the basis that rather than being static, culture is something that evolves. The GRN's statement that the Hai||om are not identifiable was rejected by affidavits submitted by expert witnesses.³⁰ Thus, despite the objections raised by the GRN that the Hai||om cannot be identified as indigenous peoples,³¹ the applicants argued that the Hai||om are an indigenous people with a common language, culture and experience who continue to experience marginalisation, and that they therefore fulfil the criteria established in international law for recognition as an indigenous people with an entitlement to their ancestral land and rights to ensure their cultural survival.³²

2.2 Dealing with the past: Extinguishment and colonial "survival"

Many marginalised indigenous communities across Africa have been removed from their customary and ancestral lands as a result of colonial laws, often in the name of nature conservation (e.g. gazetting of national protected areas). Many protected areas in Africa were established during the latter half of the 19th century and the early 20th century. The establishment of such protected areas was mainly carried

27 The GRN admits to the existence of the Hai||om as a distinct ethnic group by having given recognition to them in terms of the Traditional Authorities Act (No. 25 of 2000). See Record 425 para. 194.4.

28 Transcripts p. 70.

29 Transcripts p. 71.

30 As mentioned under footnote 19 of this chapter, Professor James Anaya, a specialist human rights scholar on indigenous peoples' rights and former Special Rapporteur for Indigenous Peoples, referred to his findings during a UN fact-finding mission to Namibia in 2012.

31 The Applicants point out in their Heads of Argument that the GRN has made certain admissions regarding the Hai||om's indigeneity (see page 10 para. 22.3 of Applicants' Heads of Argument).

32 Transcripts pp. 116–117.

out without any regard to the local indigenous communities living on these lands. The colonial approach was to simply ignore indigenous customary laws on land and natural resources, classifying these as “primitive” or simply non-existent.³³ Unfortunately, post-colonial legislation has to a significant degree not addressed this colonial legacy. This lack of redress often leaves affected communities with no choice but to turn to the judiciary to seek some form of remedy and legal recognition. This is why such land claims are often classified as “ancestral”, as they seek to address historical cases of forced and unjust evictions. This is also why contemporary court cases have become important vehicles to address these historical grievances, by recognising contemporary rights.³⁴

This conundrum of addressing the relationship between historical wrongs and the current situation faced by indigenous peoples is not specific to Africa, as it is quite a common legacy of colonisation across the world where indigenous peoples have suffered a similar fate. Many courts across the globe have addressed the issue of historical ancestral claims, leading to the development of a very rich, developed and somewhat complex comparative international jurisprudence. Although each country has its specific history and legal issues, there are nonetheless some important common legal grounds which inform courts across different jurisdictions. This has led to the development of a significant body of comparative legal principles addressing some of the common issues concerning ancestral land rights.

The most relevant points concern the issue of extinguishment and survival of indigenous peoples’ customary land rights. A complex issue when dealing with historical claims is often that the facts should be judged by the law applicable at the time. This legal principle, known as “intertemporal law”, is at the heart of some post-colonial land claims, since we are trying to judge the legality of some of the forced evictions based on contemporary notions of rights.³⁵ The strict application of this principle would simply mean that the colonial and racist approach to land rights for indigenous peoples would be continued. To address such injustice, courts have recognised the important fact that for being so bluntly racist, these colonial laws have not

“extinguished” indigenous rights. On the contrary, courts have affirmed that the rights of indigenous peoples have “survived” colonial rule, and have been revived and are applicable in contemporary law. An important body of comparative legal

33 See for example Colchester, Marcus, ‘Indigenous peoples and protected areas: Rights, principles and practice’, *Nomadic Peoples*, Vol. 7, No. 1, 2003 (JSTOR, www.jstor.org/stable/43124118), pp. 33–51.

34 See Gilbert, Jeremie & Ben Begbie-Clench, ‘Mapping for Rights: Indigenous Peoples, Litigation and Legal Empowerment’, *Erasmus Law Review*, Issue 1, 2018.

35 The doctrine of intertemporal law means that legal arguments should be assessed in the light of the rules of law that are contemporary with it. In the words of Judge Huber in the Island of Palmas arbitration, “a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled” (Island of Palmas Arbitration 2 R Int’l Arb Awards 831, 1928).

jurisprudence has emerged to examine the connection between discriminatory dispossession of indigenous peoples in the past and their current situations.³⁶ Under this jurisprudence, often referred to as “aboriginal”, “native” or “indigenous” title, it is recognised that the rights of the indigenous communities have survived the acquisition of the lands by colonial powers. The survival of indigenous customary land rights over the colonial (and post-colonial) acquisition of ancestral lands has been affirmed in the jurisprudence of courts throughout the world, including the High Court of Australia, the Supreme Court of Canada, the High Court of Malaysia, the Supreme Court of Belize, the Constitutional Court of South Africa, the High Court of Botswana, and the High Court of Kenya. The fact that it is based on a mix of international legal treaties to which Namibia is a party, and legal systems similar to Namibia (notably a mixture of common, Roman-Dutch and customary law) makes its particularly relevant to Namibia.

As an illustration, the courts of South Africa have examined in detail the connection between historical land rights and indigenous peoples’ rights in a case which reached both the Supreme Court and the Constitutional Court.³⁷ The case concerned members of the Richtersveld community, who brought a claim for the restoration of their ancestral land under the Restitution of Land Rights Act (No. 22 of 1994), a statutory mechanism giving effect to the government’s constitutionally mandated land reform and restitution programme. The Richtersveld community is a community of approximately 3 000 formerly nomadic and pastoralist people who traditionally occupied land that was then annexed by Alexkor, a State-owned diamond mine. When the land was annexed, the company argued that the community had lost their rights to the land. The government contended that indigenous customary laws on ownership ceased with the annexation of the Richtersveld by the British in 1847, and that this loss of rights was not a dispossession as envisaged under the post-apartheid Restitution of Land Rights Act. An important aspect of the case was the community’s assertion that it used the land according to its “indigenous customs” and that such customary law interest had not been extinguished by colonisation and its following apartheid legacy. The case went to the South African Land Court, then to the Supreme Court, and then to the Constitutional Court.

An essential element was for the courts to define whether or not the customary land rights of the community could constitute land rights as protected under the Restitution of Land Act. One of the arguments was that the community had a right to the land in question on the basis of their own indigenous customary land rights – rights that were discriminatorily ignored. At the lower level (i.e. the Land Court), the

36 See Gilbert, J., ‘Historical Indigenous Peoples’ Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title’, 56 ICLQ 584, 2007.

37 See Chan, T.M., ‘The Richtersveld Challenge: South Africa Finally Adopts Aboriginal Title’, in Hitchcock, R. & D. Vinding (eds), *Indigenous Peoples’ Rights in Southern Africa*, International Work Group for Indigenous Affairs, Copenhagen, 2004, pp. 114–30.

claim was dismissed on the grounds that the claimants were dispossessed for the purpose of the mining of diamonds and not because of racially discriminatory laws or practices. On appeal, the Supreme Court of Appeal recognised that the dispossession of the community was racially discriminatory “because it was based upon the false, albeit unexpressed premise that, because of the Richtersveld community’s race and lack of civilization, they had lost all rights in the land upon annexation.”³⁸ The Court noted that even though the undisturbed possession of the land by the indigenous community concerned was ignored on discriminatory grounds, indigenous laws regarding land rights had survived and extended to the current South African legal regime. The judges ruled that the Richtersveld community’s customary right of ownership had survived the annexation by the British Crown as “these rights constituted a ‘customary law interest’ and consequently a ‘right in land.’”³⁹ As noted by the Court: “[A]n interest in land held under a system of indigenous law is thus expressly recognised as a ‘right in land,’ whether or not it was recognised by civil law as a legal right.”⁴⁰ The Court ultimately recognised the Richtersveld community’s right to land based on their “customary law interest under their indigenous customary law entitling them to exclusive occupation and use of the subject land and that its interest was akin to the right of ownership held under (Roman Dutch) common law.”⁴¹

Another relevant case comes from Botswana. In the case concerning the CKGR, one of the central issues for the court was to determine whether the indigenous community had any right to the land and, if so, whether their forced removal was illegal. To address this issue the judges had to examine the issue of survival of customary land laws and the nature and value of possession as constituting title. The High Court of Botswana ruled in favour of the indigenous community, noting that their possession based on customary law “survived” the creation of the game reserve both under colonial rule and in the post-independence period. The court noted that the forced removals of the community and the denial of their rights to occupy their ancestral territory were unlawful and unconstitutional. As noted by one of the judges, the establishment of the game reserve did not extinguish their customary land rights so the applicants “were in possession of the land that they lawfully occupied.”⁴² The court unanimously recognised the right of the applicants to live and reside in the reserve. In a similar approach to that adopted by the judges in South Africa in the *Richtersveld* case, an important element of the ruling was

38 *The Richtersveld Community and Others v Alexkor Limited and the Government of South Africa*, Case No. 488/2001 at para. 8 (24 March, 2003).

39 *Ibid.* at para. 8.

40 *Ibid.* at para. 9.

41 *Ibid.* at para. 27.

42 Statement from Judge Phumpahi, Central Kalahari Legal Case No. MISCA 52/2002 in the Matter between Roy Sesana, First Applicant, Keiwa Setlhobogwa and 241 others, Second and Further Applicants, and the Attorney General High Court of Botswana (2006).

the recognition of the non-extinguishment of indigenous peoples' customary land rights under colonial rules and post-independence legislation.

International comparative jurisprudence with regard to the extinguishment of ancestral land claims also played an important role in the ENP application hearing. From the outset, the GRN argued that colonial laws extinguished claims over ancestral land. While the Hai||om people might have held land rights in ENP and the Mangetti West block, the GRN argued that with regard to the ENP, the ancestral rights over Etosha were extinguished by legislation that was passed during the colonial period in 1907, 1928, 1958 and 1975, while the ancestral land rights over Mangetti West block was extinguished by post-independence legislation, namely the Communal Land Reform Act (No. 5 of 2002), which allocated rights over the land to the Ondonga Traditional Authority.⁴³ The GRN applied the Australian approach to the extinguishment test, by arguing that the above-mentioned legislation has extinguished the Hai||om's land claims. The applicants' lawyers argued that the crux of the *ENP case* is not about the test applicable to extinguishment of native title, but about the interpretation of the legislation that the GRN relies upon to make the case for extinguishment. The applicants' lawyers then applied some of the same Australian case law used by the GRN to make their point. While it would be too cumbersome to go through an in-depth comparative legal analysis, it is worthwhile to draw attention to a few points made by the applicants' lawyers to support their reasoning.

First, referring to the *Mabo case*, the applicants' lawyers argued that if dealing with legislation that exhibits a clean and plain intention to extinguishing indigenous rights, they would be compelled to accept that those rights have been extinguished. However, they also refer to the *Torres Strait case* to make the point that in Australia native title is seen as a bundle of rights to the extent that if there is an inconsistency with the other rights or with legislation, only those parts will be extinguished and other rights will be found to have continued.⁴⁴

If legislation that the government refers to would have the effect of extinguishing in the *Etosha case*, this would only relate to the Hai||om having a say about the use to which the land would be put, and this can at best only be described as a partial extinguishment. If the Court would decide that the legislation the GRN refers to is indeed applicable to ENP, this would mean that the Hai||om peoples' right to determine the use to which the land is put may be extinguished, but it does not follow that the other rights to the land have been extinguished, as native title rights are characterised by a bundle of rights. In essence this would mean that each bundle of rights (such as the rights to natural resources, the land, religious sites) would have to be examined separately in order to determine if each particular right had been extinguished.⁴⁵

43 Transcripts p. 128.

44 Transcripts p. 129–132.

45 Transcripts p. 133.

The applicants argued that it had not been shown that the applicants or the Hai||om peoples' rights had been extinguished, and alternatively, that even if the Court was persuaded by the respondents' argument that those rights had been extinguished, it did not preclude the certification of the claims, in particular Claims 5 and 6, but also potentially also Claims 1 to 4.⁴⁶

The applicants also referred to other comparative case law to provide further evidence. In addition to Australian case law, they also adduced Canadian and South African case law, and the African Charter for Human and Peoples Rights as alternative routes for the test of extinguishment. The applicants pointed out that the routes chosen by the Court may have an effect on the outcome for the Hai||om, and argued that the route of the African Charter may be more favourable for the Hai||om than applying the test of extinguishment based on Canadian and Australian case law.

To support their argument, the applicants' lawyers referred to the *Sparrow* case as the most important Canadian case with regard to extinguishment and the leading case for establishing whether legislation has the effect of extinguishing indigenous rights, or simply regulating them. The Court argued that in the *Sparrow* case, nothing in the Canadian Fisheries Act or its detailed intension had the effect of extinguishing the Indian Aboriginal rights to fish. The permits were seen as controlling the fisheries, not defining underlying property rights. Based on this, Indians had an existing Aboriginal right to fish. These principles were also applied again in *R v Gladstone*. However, as the applicants argued that if the Court would follow this route of weighing up the legislation⁴⁷ as either establishing extinguishment or regulation, the Hai||om may have a more difficult case to argue because of the bundle of rights approach. The applicants' lawyers argued that the interpretation of the legislation and the context in which it has been applied is entirely consistent with a governmental intention of regulating rather than extinguishing the Hai||om people's rights. In the case of a bundle of rights, however, it may be more difficult to ascertain that they still have the right to determine the purpose for which the land can be used, and by extension it would also be more difficult to establish the scope of "survival" for the other rights that make up the bundle of rights which constitute the indigenous rights over the ENP. Acknowledging the difficulties, the applicants' lawyers noted that the bundle of rights route would only lead to an academic exercise, as in any case the applicants had no intention to change the use of the ENP.⁴⁸

46 See description of the six claims mentioned earlier in this chapter.

47 With regard to regulating the Hai||om's land use, the government was mainly referring to the Nature Conservation Ordinance 4 of 1975.

48 The First Applicant states in his Founding Affidavit that they support the conservation and tourism activities conducted presently in Etosha National Park, and that they support the fact that there are anti-poaching activities in a park that is regarded at present as a national asset (see transcripts of hearing on 26 November, p. 6).

The lawyers were therefore of the opinion that the ACHPR's report in the *Endorois case* was a better and easier route to follow when establishing the test of extinguishment. The test applied by the ACHPRs' report in the *Endorois case* states that "members of indigenous peoples who have unwillingly left their traditional lands or lost possession thereto even though they lack the legal title unless the lands have been under good faith transferred to third parties" still retain their rights. Applying this ruling to the *ENP case* would mean that the Hai||om's rights to ENP have not been extinguished. In the case of transferring rights to third parties, applying the ACHPR's logic, the Hai||om would still be entitled to restitution or compensation.⁴⁹

International and comparative jurisprudence highlights the fact that the question of land rights is often an issue of restoring lands that were taken under the past discriminatory colonial enterprise and linked to a continuing denial of indigenous peoples' rights. In the context of Namibia, international and comparative jurisprudence shows that despite the acquisition of the lands by the colonial powers prior to independence, the original rights of the concerned indigenous marginalised communities have not been extinguished. It also means that post-independence laws, norms and policies need to address, recognise and promote these ancestral land rights of marginalised indigenous communities, even if some of the legacy is to be blamed on colonial occupation. Indeed, the "survival" of customary indigenous land rights also means that when indigenous communities were forced out of their land in more recent years, they were still the legal owners of their ancestral territories, and as such should have been considered as the legal occupiers of these lands with all the legal consequences that such ownership entails, including restitution and compensation.

2.3 Cultural rights to land and natural resources

An important evolution of international and regional law concerning ancestral land claims is the recognition of the fundamental connection between cultural survival and land rights. This broader approach to cultural rights integrates indigenous peoples' claims that cultural rights are part of their way of life, which includes access to land central to their own culture. Under international law there is now strong robust jurisprudence, notably emerging from the Inter-American Court of Human Rights, highlighting that possession should constitute title to land property.⁵⁰ This

49 Transcripts p. 147–150.

50 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79 (2001); *Moiwana Village v Suriname*, Inter-Am. Ct. HR (ser. C) No. 124 (2005); *Yakye Axa Indigenous Community v Paraguay*, Inter-Am. Ct. HR (ser. C) No. 125 (2005); *Sawhoyamaza Indigenous Community v Paraguay* (2006); *Saramaka People v Suriname*, Series C No. 172 (2007); *Xákmok Kásek Indigenous Community v Paraguay*, Series C No. 214 (2010); *Kichwa People of Sarayaku v Ecuador*, Series C No. 245 (2012); *Kaliña and Lokono Peoples v Suriname* (2015).

jurisprudence highlights the importance of recognising indigenous peoples' rights to land and natural resources as an essential element of their cultural rights. In *Centre for Minority Rights Development (Kenya) & Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, popularly known as "the Endorois case", the ACTHPR defined culture as:

that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups and in that it encompasses a group's religion, language, and other defining characteristics.⁵¹

In that case, the Endorois community claimed that their forced removal was a violation of their right to culture, and more particularly their "right to cultural integrity". The "right to cultural integrity" introduces a broader understanding of culture, which includes the economic, social and spiritual aspects of a culture. The ACHPR has also highlighted the importance of land rights to ensure the cultural integrity of indigenous peoples, notably referring to the right to religion and the right to health.⁵² The ACHPR concluded that for indigenous peoples, traditional possession of land "has the equivalent effect as that of a state-granted full property title" and "entitles indigenous people to demand official recognition and registration of property title," adding that: "the jurisprudence under international law bestows the right of ownership rather than mere access."⁵³ "It is also of the view that even if the Game Reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need."⁵⁴ The ACTHPR also noted the strong connection between cultural rights and rights to ancestral lands in the *Ogieks case*, noting that article 17 of the African Charter proclaiming cultural rights is intrinsically connected to access to ancestral territories for marginalised indigenous communities, as these territories are fundamental areas to practise and maintain their culture.⁵⁵

The international law approach of recognising the connection between cultural survival and land rights is not a development that has been adopted by the GRN. Their strategy regarding property rights is to show that the Hai||om did not hold and exercise rights in land in common as a collective rights holder, but that the

51 Communication 276/03 (the Endorois case), para 241 (<http://www.achpr.org/communications/decision/276.03/>).

52 African Commission on Human and Peoples' Rights, 'Communication 276/2003: *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*', 2010.

53 Ibid. at para. 204.

54 Ibid. at para. 215.

55 *Ogiek case*, at para. 178.

historical and anthropological record of the applicants shows that land rights were held and exercised by smaller kinship groups. The GRN also argued that the rights were held by family groups, typical in relation to land surrounding waterholes, and the argument is developed that insofar as members of the Hai||om people seek to assert rights in land, this should be done by the different family groupings that it is argued actually held and exercised those rights; and that it does not follow that all the family groups have a collective claim to the ancestral land. The government is clearly using a proprietary approach towards establishing land rights, embedded in a discourse of exclusive and individual titles and far removed from the more holistic development in international law that moves away from this exclusive proprietary property ideology.

The applicants base the fifth claim on the cultural and religious rights on both the right to culture and the freedom to practise religion under the Constitution, as well as international law, where the African Charter is the most important treaty dealing with rights to culture; the applicants also refer to the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Racism, the Convention on the Rights of the Child, and the Convention on Biological Diversity.⁵⁶ The main argument that is put forward by the applicants' lawyers using provisions under international law is that the Hai||om have been deprived of their right to practise their traditional way of life which is dependent on access to and the use of their ancestral land and its resources.⁵⁷ In other words, the applicants are using international law to make the claim that a right to culture is inextricably linked to their access, use and enjoyment of their ancestral land. The claim the applicants are putting forward is to seek a remedy for the violation of their right to practise their culture on their ancestral land. In this context it is relevant to note that the right to culture as expressed in the Namibian Constitution is very similar to the right to culture as affirmed in the African Charter. It would therefore only be logical to apply the legal approach and interpretation to cultural rights as being closely connected to land and natural resources for marginalised indigenous communities.

2.4 Right to participation, consultation and development

The most recent international policies regarding the establishment of protected areas or wildlife reserves now fully recognise that indigenous peoples' land rights have to be fully protected, respected, and promoted.⁵⁸ This paradigm shift in

⁵⁶ Transcripts p. 255–256.

⁵⁷ Transcripts p. 256.

⁵⁸ See for example *Concluding observations of the Committee on the Elimination of Racial Discrimination: Sri Lanka, 14/09/2001*, in connection with a national park in Sri Lanka: the Committee called on the state to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources”.

nature conservation means that whereas in the past, mere consultation with local indigenous communities was required, now, in line with the principles of human rights law, the unqualified recognition of the land ownership rights of indigenous peoples in international environmental law is not only ethically desirable, but also a legal prerequisite for the protection of natural resources.⁵⁹ States can no longer claim that conferring protected status on areas permits the curtailment of indigenous peoples' land rights. Such curtailments are not only out-dated and ineffective according to the most recent environmental conservation evidence, but also in conflict with human rights law. What is emerging from this intersection of environmental law and human rights law is the need to ensure that indigenous peoples are full participants in efforts to protect natural resources. It is therefore incumbent upon states and environmental agencies to fully respect indigenous peoples' land ownership.

Best practices regarding indigenous peoples and protected areas strongly suggest that it is now acknowledged that ownership, rather than co-management or consultation, is the single most important incentive to sustained community-based conservation.⁶⁰ This is becoming evident in both environmentally based research and the integration of human rights principles within the environmental sphere.⁶¹

The shortfall is to separate conservation status from the issue of land tenure. It has been demonstrated that unsound tenure and governance conditions not only put indigenous peoples in acute socioeconomic and cultural danger, but ultimately lead to negative environmental impacts. Protected areas are one of the main issues addressed under the Convention on Biological Diversity (CBD). For example, Decision VII/28, adopted by the 7th Conference of Parties to the Convention on Biological Diversity (COP) in 2004, provides that "the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for, the rights of indigenous [peoples] consistent with national law and applicable international obligations."⁶² This language has

59 The UN General Assembly adopted the *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples* which reaffirms and recognises, among other things, "the significant contribution of Indigenous Peoples to the promotion of sustainable development" and ecosystem management, including their associated knowledge.

60 See Decision VII/28 on Protected Areas, adopted at the 7th Conference of Parties to the Convention on Biological Diversity in 2004: the CBD COP decided that "the establishment, management and monitoring of protected areas should take place with the full and effective participation, and the full respect for the rights of, indigenous and local communities consistent with domestic law and applicable international obligations."

61 Several global organisations – including the International Union for the Conservation of Nature (IUCN), United Nations Educational, Scientific and Cultural Organization (UNESCO), and the World Bank – are increasingly linking global sustainability to the rights and interests of indigenous peoples.

62 Decision VII/28 Protected Areas, at para. 22, in *Decisions Adopted by the Conference of Parties to the Convention on Biological Diversity at its Seventh Meeting*, UNEP/BDP/COP/7/21, pp. 343–364.

been repeatedly affirmed by the COP.⁶³ The CBD decisions have also highlighted that the establishment of indigenous-owned and -managed protected areas is an effective way of protecting biodiversity. Moreover, in 2014, the COP adopted a decision that addresses Article 10c in relation to protected areas. It explains, first, that “Protected areas established without the prior informed consent or approval and involvement of indigenous [peoples] can restrict access to and use of traditional areas and therefore undermine customary practices and knowledge associated with certain areas or biological resources.”⁶⁴ It adds that “Customary sustainable use of biological diversity and traditional knowledge can contribute to the effective conservation of important biodiversity sites, either through shared governance or joint management of official protected areas or through indigenous and community conserved territories and areas.” This again emphasises the need for a collaborative and consent-based approach to protected areas or recognition of indigenous peoples’ own conservation initiatives within their territories.⁶⁵

In recent years several countries have recognised the rights of indigenous peoples over part of their ancestral lands from which they had previously been removed when such territories were gazetted as natural protected areas. These countries have come to recognise that indigenous peoples have legal claim to such territories as they were wrongly expelled from, and that such land rights should be translated into rights to ownership of some portion of the gazetted area to exercise some form of co-management over the running of such natural reserves.

63 See e.g. Decision X/31, para. 32(c).

64 Decision XII/12, Plan of Action on Customary Sustainable Use of Biological Diversity, at para. 9: “Protected areas established without the prior informed consent or approval and involvement of indigenous and local communities can restrict access to and use of traditional areas and therefore undermine customary practices and knowledge associated with certain areas or biological resources. At the same time, conservation of biodiversity is vital for the protection and maintenance of customary sustainable use of biological diversity and associated traditional knowledge. Customary sustainable use of biological diversity and traditional knowledge can contribute to the effective conservation of important biodiversity sites, either through shared governance or joint management of official protected areas or through indigenous and community conserved territories and areas. Community protocols and other community procedures can be used by indigenous and local communities to articulate their values, procedures and priorities and engage in dialogue and collaboration with external actors (such as government agencies and conservation organizations) towards shared aims, for example, appropriate ways to respect, recognize and support customary sustainable use of biological diversity and traditional cultural practices in protected areas.”

65 See also *id.* at p. 8, Tasks, 3(i), containing one of the action points listed in the programme of work annexed to this decision, which further illustrates the consent requirement as well as the explicit linkage to human rights norms more broadly, and mandating compiling examples of best practice that “Promote, in accordance with national legislation and applicable international obligations, the full and effective participation of indigenous [peoples], and also their prior and informed consent to or approval of, and involvement in, the establishment, expansion, governance and management of protected areas, including marine protected areas ...”.

For example, this often includes revenue sharing and access to employment within the natural reserves. The establishment of these co-management agreements is usually the direct consequence of the legal recognition of the right of indigenous peoples over some part of the protected areas. These recent developments are a vivid illustration of the need to consider indigenous peoples as partners in the ultimate goal of protection of the environment and the natural reserve. In the context of Namibia, this means that the concerned communities should be regarded as legal owners of the protected areas and also as partners in the co-management of these parks. Co-management and benefit-sharing are natural consequence of the recognition that the marginalised indigenous communities have rights to their ancestral lands.

The impact of tourism is another significant issue concerning the rights to ancestral land for indigenous peoples. Across Africa, many of the traditional ancestral territories of indigenous peoples, often being places of extreme natural beauty and wildlife, have been turned into tourism parks. By way of example, this was one of the main issues at stake in the *Endorois case* examined by the ACHPR. The Endorois had lost access to parts of their ancestral territory when a game reserve was established with several game lodges, roads and a hotel around Lake Bogoria. A central argument of the government was that tourism would bring significant resources to the region. The government highlighted the fact that the project for tourism around Lake Bogoria was seen as a potentially positive development, and that all revenue raised by the game reserve was used to support development projects carried out by the County Council for the area. One of the arguments put forward by the government was that the establishment “of a Game Reserve under the Wildlife laws of Kenya is with the objective of ensuring that wildlife is managed and conserved to yield to the nation in general and to individual areas in particular optimum returns in terms of cultural, aesthetic and scientific gains as well as economic gains as are incidental to proper wildlife management and conservation.”⁶⁶ The ACHPR examined this claim, balancing it with the current situation faced by the Endorois, who since having lost access to their ancestral land had been plunged into poverty and pushed to the brink of cultural extinction. Consequently, the ACHPR found that the GRK had violated several of the rights of the indigenous community, noting that “the contested land is the site of a conservation area, and the Endorois—as the ancestral guardians of that land—are best equipped to maintain its delicate ecosystems”; and that “the Endorois are prepared to continue the conservation work begun by the Government ...” The Commission concentrated on two principal issues: 1) the extent to which the community had (or had not) been consulted prior to the establishment of the wildlife reserve on their territories; and 2) whether such development provided benefits to the community concerned. The Commission found that the lack of

66 Ibid. at para. 178.

“meaningful participation” by the Endorois, who “were informed of the impending project [on their land] as a *fait accompli*”, was a violation of the right to development. The Commission found that the government had violated the right of the indigenous community to their culture, land, and development. It rejected the argument put forward by the government that the community’s rights should be “sacrificed” in the name of development, tourism and conservation. Instead, the Commission underscored that a fair balance should be struck ensuring that the community would also benefit from and participate in these developments.

The applicants in the *ENP case* are seeking the right to freely develop Etosha’s land; alternatively, they seek that their consent be obtained on future decisions, and preferential access to employment opportunities and royalties, compensation and access, reasonable access to the Etosha lands, and similar relief around the profits and proof of the accounts.⁶⁷ Their claims are based on the dispossession of their lands that was done without the consultation of the Hai||om, which is in violation of international law. Furthermore, the applicants argue they have an intrinsic right to development based on Article 22 of the African Charter and the right of people to self-determination established in the ICCPR and the International Covenant on Economic, Social and Cultural Rights.⁶⁸ With regard to the issue of participation, the applicants also took note of how the United Nations Human Rights Commission interpret Article 27 of the ICCPR by quoting as follows:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous people. That right may include such traditional activities as fishing or hunting and their right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation [emphasis added] of members of minority communities in decisions which affect them.⁶⁹

Overall, under international law, including both human rights law and environmental law, there is a strong support for the rights of indigenous peoples to directly participate in, benefit from and consent to any development taking place on their ancestral lands, and this includes development connected to tourism and wildlife protection.


67 Transcripts p. 254.

68 Transcripts p. 253.

69 UN Human Rights Committee, General Comment No. 23: The Rights of Minorities, 1994/04/08, par 7.

3 Conclusion

We started this chapter by pointing out that the applicants have brought an application for representative action in the High Court of Namibia due to the limitations of Namibia's jurisprudence on *locus standi*. The application was an essential step for enabling the Hai||om people to ventilate their legal rights over areas of ENP and Mangetti West block at a future action trail. We conclude by pointing out that litigation could allow the Hai||om to assert the importance of their ancestral rights with regard to cultural survival as well as to obtain recognition with regard to their ancestral connection to ENP as an indigenous people. Asserting their ancestral rights through a court of law is thus important not only for their cultural rights, but also in terms of their right to development, allowing them to be part of the GRN's decision-making structure vis-à-vis nationally important economic activities centred on tourism and wildlife. The case put forward by the Hai||om is not only important for them, but for the whole country, as it will define the way claims to ancestral land rights should be approached, and how Namibia should integrate the rights of its indigenous and marginalised communities in the legal framework of the country.



Ancestral land claims: Why bygones can't be bygones

John B. Nakuta

1 Introduction

The occurrence of land dispossession during Namibia's colonial occupation is an undisputed historical fact. Sadly, the history of conquest and dispossession, of forced removals and a racially skewed distribution, has left the country with a complex and problematic legacy.¹ Unsurprisingly, calls from communities who during Namibia's colonial and apartheid occupation forcibly and arbitrarily lost the lands, territories and resources they had traditionally occupied have come to dominate national discourse in recent times.

Calls for the restoration of ancestral land in Namibia clearly relate to issues of justice, redress and accountability. Such calls, while grounded in reflection upon past events, do not amount to the apportioning of blame and or the exacting of revenge.² Rather, they emanate from the inalienable right to an effective remedy for victims of human rights violations as guaranteed in numerous human rights instruments. As noted by the UN Human Rights Committee in its General Comment No. 31: "Without reparation to individuals whose Covenant rights have been violated, the obligation to provide effective remedy ... is not discharged".³ This statement affirms the jurisprudence of many human rights bodies, which increasingly attaches importance to the view that effective remedies imply a right of the victims and not

- 1 South Africa Human Rights Commission, *Report of the SAHRC Investigative Hearing Monitoring and Investigating the Systemic Challenges Affecting the Land Restitution Process in South Africa*, 2013, p. 1.
- 2 Young, I.M., 'Responsibility and Global Labor Justice', *Journal of Political Philosophy*, Vol. 12, No. 4, 2004, p. 375.
- 3 Human Rights Committee, 'General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 2004, para. 16.

only a duty for states.⁴ As it is expressed in common legal parlance, “where there is a right, there is a remedy” – *ubi jus ibi remedium*. This phrase suggests that the very notion of a right is inextricably linked to an enforceable claim.

Viewed from this vantage point, the appointment of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution by President Geingob on 21 February 2019 should be hailed as a bold, necessary and welcome initiative. Under international human rights law, the state is regarded as the primary duty bearer to respect, to protect and to fulfil human rights. These obligations likewise extend to instances of collective harm suffered by a group of persons and or communities as clarified by the African Commission on Human and Peoples’ Rights (the African Commission) in its General Comment No. 4. In this General Comment the African Commission, amongst others, clarifies that: “State Parties have an obligation to provide redress for collective harm.”⁵ Calls for the restoration of ancestral land undoubtedly fall in this category. Thus, by appointing the Commission, President Geingob has set into motion his government’s effort to comply with its human rights obligations to redress the historic injustice of land disposessions, as required by international human rights law. It must be stressed, though, that the appointment of the Commission is by no means a matter of goodwill or benevolence on the part of the Government of the Republic of Namibia (GRN).

The appointment of the Commission is consistent with the GRN’s human rights obligation to right historical land injustices. However, the appointment of the Commission does not mean that the issue of ancestral land has dissipated or become less relevant. In fact, the contrary is true. The *raison d’être* of the Commission is to inquire into why the restoration of ancestral land should be entertained. Point 1(l) of the Commission’s Terms of Reference, impressively, tasks the Commission with inquiring and reporting on:

[...] how the claim [for] ancestral land should be premised on the human rights principle and standards guaranteed in the Namibian Constitution as well as international and regional human rights instruments binding on Namibia.⁶

This requires that the Commission must give guidance on complex concepts such as aboriginal title, constitutional and legislative hurdles for reparations, and best practices on reparation programmes, amongst others. These and other related issues are discussed in this chapter.

4 UN General Assembly, ‘Report to the General Assembly on reparations for gross human rights violations and serious violations of international humanitarian law’, 2014, para. 16.

5 African Commission on Human and Peoples’ Rights, ‘General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)’, 2017, para. 50.

6 See Government Notice No. 59: ‘Appointment of Commission of Inquiry into Claims of Ancestral Land Rights and Restitution and its terms of reference’, 15 March 2019.

The primary contention of this chapter is that the dispossession of indigenous communities/populations from their ancestral lands during colonial times constituted a gross human rights violation. This argument unfolds over six parts.

Following the overview provided in this introduction, section 2 serves to set the scene and tone of the discussion. It highlights the reality of land dispossession as it occurred in Namibia and reflects on the various methods employed to achieve such despicable ends.

Section 3 deals with the racist and discredited doctrine of *terra nullius*, which formed the basis of land dispossession at the advent of colonialism. It then proceeds to strongly argue for the development and invocation of aboriginal title in the Namibian legal system to redress historical land injustices.

Section 4 considers the groundbreaking jurisprudential work of the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights, specifically the evolutionary and expansive interpretation adopted by that court to the concept of "property rights" with a view to obtaining land justice for indigenous communities/populations. This is juxtaposed with the overly cautious "escapist approach" followed by Namibia's Superior Courts when it comes to historic land injustice issues – an approach that is found to be wanting in that it is at variance with the trend of international human rights law and jurisprudence. Attention in this section also falls on the decision of the African Court on Human and Peoples' Rights in favour of the Ogiek community. It presents the expansive meaning attached to property (as guaranteed in Article 14 of the African Charter) by this Court, and argues for a similar approach to be adopted in respect of Article 16 – the sister article of the Namibia Constitution.

Section 5 makes the point that litigation is not ideal for redressing claims for historical land injustices. In this regard, Namibia's narrow and exclusionary rules of *locus standi*, as well as the adversarial nature of litigation, are flagged as the major hurdles for seeking reparation through the courts. As an alternative, land restitution models from South Africa, achieved through mediation and negotiations, are presented as the kind of administrative reparation programmes Namibia must begin to consider.

Section 6 contains a warning against the danger of relegating legitimate ancestral claims to frivolous phrases such as "Let bygones be bygones". It is argued that such an attitude and approach to something so fundamental runs the risk of being hijacked for political ends.

2 Land dispossession in Namibia

This section will not attempt to give a historical narration of land dispossession in Namibia as it occurred during colonial times. However, it will recount some instances of land dispossession to highlight the fact that colonialism and apartheid

were accompanied by massive and widespread land alienation for the benefit of the colonial settlers. This is done in order to set the scene and point to the connection between land dispossession and human rights which is argued in greater detail in the subsequent sections.

Dispossession of land was central to colonialism and apartheid. To begin with, the colonial settlers considered uninhabited territories as *terra nullius* and obtained title of such territories by occupation. Where the territory was inhabited, it was obtained by cession or conquest, i.e. through the barrel of the gun and through “trickery”.⁷ Land dispossession was also given legitimacy through the law. For instance, the Imperial Ordinance Concerning the Expropriation of Natives in the South-West African Protectorate of 26 December 1905 set the legal framework and basis for the expropriation of ancestral land. Three months later, the Proclamation of the Governor of German South West Africa of 23 March 1906 ordered the expropriation of the property of Hereros, and Zwartbooi- and Topnaar-Nama. Similarly, the Proclamation of the Governor of German South West Africa of 8 May 1907 allowed for the expropriation of the property of the Witbooi-, Rooinasie-, Bondelzwarts- and Swartmodder-Nama.⁸

The South African colonial regime continued and perfected what the Germans had started when they took over. The dispossession of black people became a major policy of the racist apartheid regime, and was legitimised through an arsenal of apartheid laws and regulations. These included the Native Administration Proclamation (No. 11 of 1922), the Native Reserve Proclamation, the Development of Self-Government for Native Nations in South-West Africa Act (No. 54 of 1968) (an offshoot of the Odendaal Commission), and the Representative Authorities Proclamation (No. 8 of 1980).

These abhorrent pieces of legislation served as the basis for the forced removal of many indigenous communities from their ancestral homes. The forced removal of the Hai||om people from Etosha Game Park in 1954 serves as stark reminder in this regard. The impassioned and painful effects the eviction had on this community is vividly captured in the case for the reclaiming of Etosha National Park by the Hai||om people in the High Court. The heads of arguments of the Legal Assistance Centre (LAC), which represented the claimants in this case, give vivid accounts of how this community was rounded up, bundled into trucks and maltreated on that fateful day in May 1954. One bewildered old lady reportedly wandered off into the wilderness and was never seen again. Families were separated and people were forcibly taken as farm labourers for surrounding farmers. Others were reportedly simply dumped outside the gate of the Park.

Colonialism and apartheid incontrovertibly had an overwhelmingly devastating impact on Namibia, leaving the country with highly unequal patterns of land and

7 *Daniels v Scribante and Another* 2017 ZACC 13, para. 14.

8 Hillebrecht, W., ‘The expropriation of the land and livestock of the Ovaherero and Nama by the German State, Original legal texts and partial translation’ (unpublished manuscript), Windhoek, 2017.

property ownership, and a spatial legacy that locks the majority of the population into poverty traps.⁹ For instance, statistics released by the Namibia Statistics Agency in 2018 revealed that most of the arable, productive commercial land in the country is still owned by white persons, who account for a mere 6% of the total population.¹⁰ In stark contrast to the descendants of those who were dispossessed, the descendants of the settler immigrants are the more affluent persons in the country. Conversely, the groups who suffered the brunt of land dispossession, i.e. the San, Nama, Damara, Topnaars and others, are today at the lower end of the socioeconomic spectrum.¹¹ This fact cannot be made light of as a mere historical coincidence.

Such statistics, sadly, confirm that independence has hitherto failed to reverse the loss of land experienced by the various indigenous communities. The skewed patterns of land and property ownership of colonial and apartheid times remain virtually unchanged. The prime reason for this can arguably be traced back to the resolution adopted at the 1st Land Conference in 1991. At this Conference it was resolved that:¹²

[...] the complexities in redressing ancestral land claims [renders the] restitution of such claims in full [...] impossible.

However, this resolution has come to haunt the nation. The reality in which we live is that some 28 years after the adoption of the impugned resolution, the affected communities are even more resolute in their calls for reparations and the restitution of the ancestral land, territories and resources their ancestors lost during the colonial and apartheid period. Such calls give credence to the claim of Hannah Arendt:¹³

We can no longer afford to take that which was good in the past and simply call it our heritage, to discard the bad and simply think of it as a dead load which by itself time will bury in oblivion. The subterranean stream of Western history has finally come to the surface and usurped the dignity of our tradition. This is the reality in which we live. And this is why all efforts to escape from the grimness of the present into nostalgia for a still intact past, or into the anticipated oblivion of a better future, are vain.”

Admittedly, the further the terrible historical injustices recede into the past, the harder it becomes to trace lines of accountability.¹⁴ The effects of those historical injustices, as aptly pointed out by Kofi Anan, are undiminished:¹⁵

9 *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture, 04 May 2019, for His Excellency the President of South Africa*, p. 10.

10 Namibia Statistics Agency, *Namibia Land Statistics Booklet*, NSA, Windhoek, September 2018.

11 *Ibid.*, pp. 77–78.

12 See Consensus Resolution 2 of the 1991 Land Conference.

13 Arendt, Hannah, *The Origins of Totalitarianism*, The World Publishing Company, Ohio, 1973, p. 10.

14 Annan, Kofi, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Durban, 31 August – 8 September 2001.

15 *Ibid.*

The pain and anger [of land dispossession] are still felt. The dead, through their descendants, cry out for justice. Tracing a connection with past crimes may not always be the most constructive way to redress present inequalities, in material terms. But man does not live by bread alone.

These statements strongly affirm that calls for the restoration of the ancestral land and territories lost during colonial time cannot be discarded as “backward-looking”, vengeful or frivolous. These are calls for justice and redress. The dispossessed indigenous communities/populations had an inalienable right over the lands and territories they occupied upon the arrival of the colonial settlers. Phrased differently, these indigenous communities/populations had aboriginal title to the lands and territories they occupied upon the arrival of colonial settlers. This begs the questions: What is aboriginal title? Is aboriginal title recognised in the Namibian legal system?

These are but some of the questions that will have to be answered before an entitlement to reparation and restitution for dispossessed ancestral land can be addressed in the country.

3 Invoking aboriginal title to repair historical land injustice

The doctrine of aboriginal title can be traced to common law jurisdictions, such as Canada, the United States, Australia and New Zealand, where the history of colonisation and interaction between aboriginal and non-aboriginal peoples is prominent.¹⁶ Aboriginal title is also sometimes referred to as native title, indigenous title or Indian title. Bennett and Powell describe aboriginal as follows:¹⁷

Aboriginal title (or native title as it is also called) is a right in land, one vesting in a community that occupied the land at the time of colonisation. Once such a title is established, the claimants may vindicate their land or, if it has been expropriated without adequate reimbursement, claim compensation.

Significant aboriginal title litigation in the mentioned jurisdictions produced stellar victories for indigenous peoples and bolstered their resolve to reclaim their ancestral land. As far back as 1835, the *Mitchel v United States* case in the U.S. was one instance of such litigation. In this matter, the U.S. Supreme Court clarified that by means of aboriginal title:¹⁸

16 Ülgen, Özlem, ‘Developing the Doctrine of Aboriginal Title in South Africa: Source and Content’, *Journal of African Law*, Vol. 46, No. 2, 2002, p. 147.

17 Bennett, T.W. & C.H. Powell, ‘Aboriginal Title in South Africa Revisited’, *South African Journal on Human Rights*, Vol. 15, No. 4, 2004, p. 449.

18 *Mitchel v United States* 34 US (9 Peters) 711, para. 745.

[...] Indians [indigenous people] were protected in the possession of the lands they occupied [at the time of colonisation], and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.

Importantly, the court stressed that Indian property rights, and by extension that of all indigenous peoples, were ‘as sacred as the fee simple¹⁹ of whites’.²⁰ indigenous peoples, were ‘as sacred as the fee simple of whites’.²¹

The *Mitchel* ruling is in stark contrast with the view that indigenous people were supposedly way too low on the scale of social organisation to uphold their claims of indigenous land rights as purported in the *Re Southern Rhodesia* case. Such racist views provided the colonial settlers with justification to deny indigenous people their traditional rights and interests in land. For instance, Lord Sumner speaking for the Privy Council in this infamous case said:²²

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.

This thinking was undoubtedly informed by the colonial conception of private property rights and the doctrine of *terra nullius*. The colonial conception of private property rights as individual rights coupled with the doctrine of *terra nullis* justified the non-recognition and denial of pre-existing aboriginal use and the occupation of lands.²³ In legal terms this meant that aborigines had no interests in or rights to land, and that the state had no obligations to recognise any such interests and rights.²⁴

The racist and discredited doctrine of *terra nullius* has since been rejected under international law and certain domestic laws. The much-celebrated judgments of the International Court of Justice (ICJ) in its Advisory Opinion on *Western Sahara* and *Mabo* of the Australian Supreme Court serve as prime authority in this regard. To a

19 Fee simple is an American and English common law property term. The Free Legal Dictionary defines fee simple as follows: “The greatest possible estate in land, wherein the owner has the right to use it, exclusively possess it, commit waste upon it, dispose of it by deed or will, and take its fruits. A fee simple represents absolute ownership of land, and therefore the owner may do whatever he or she chooses with the land. If an owner of a fee simple dies intestate, the land will descend to the heirs.”

20 *Mitchel v US*, para. 746.

21 Ibid.

22 [1919] AC 211 (PC), pp. 233–234.

23 Ülgen, Özlem, ‘Developing the Doctrine of Aboriginal Title in South Africa: Source and Content’, *Journal of African Law*, Vol. 46, No. 2, 2002, p. 135.

24 Ibid.

lesser extent, the South African Constitutional Court, in its *Richtersveld* decision, also dealt with the matter. Similarly, the judgment of the Namibian Supreme in *Kashela* in 2017 arguably indirectly touches on issues related to aboriginal title.

The ICJ critically examined the concept of *terra nullius* in its Advisory Opinion on Western Sahara on the request by the UN General Assembly on 13 December 1974. By way of resolution, the General Assembly requested the ICJ to advise on whether: “[...] Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain was a territory belonging to no one (*terra nullius*)?”²⁵ The ICJ answered this question in the negative. The Advisory Opinion of the Court on the issue of *terra nullius* is instructive and warrants full quotation:

[...] whatever differences of opinion there have been among jurists [...] territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through ‘occupation’ of *terra nullius* by original title but through agreements concluded with local rulers.²⁶

The court was unanimously of the opinion that Western Sahara at the time of colonisation by Spain in 1884 was not *terra nullius*.²⁷ The doctrine of *terra nullius* was similarly rejected by the Supreme Court of Canada in the case of *Guerin v The Queen*. In this case, the Court held that aboriginal title (in this instance called Indian title) is an independent and pre-existing legal right, not created by any executive order or legislative provision, but deriving from the historic occupation and possession of lands by aboriginal peoples.²⁸ Importantly, the Court described and characterised the nature of the Indians’ interest in their land as an inalienable right.²⁹ The judicial development concerning aboriginal title in Canada has led to the constitutional protection of a range of aboriginal rights in the Canadian Constitution. For instance, section 35 of the Canadian Constitution Act of 1982 expressly recognises and affirms the existence of aboriginal and treaty rights of the aboriginal peoples of Canada.³⁰ Most recently, in 2014, in what is hailed as a landmark decision, the Supreme Court of Canada reportedly for the first time declared that a specific group has aboriginal title to Crown land.³¹ In this case, *Tsilhqot’in Nation v British Columbia*,³² the Court held that the Tsilhqot’in Nation,

25 See UN General Assembly Resolution No. A/RES/3292(XXIX).

26 See I.C.J., ‘Western Sahara: Advisory Opinion of 16 October 1975’, para. 80.

27 Ibid. at para. 83.

28 *Guerin v The Queen* (1984) 2 SCR at 376.

29 Ibid., p. 336.

30 See section 35(1)–(4) and section 35.1.

31 Eyford, Douglas R., *Advancing Aboriginal and Treaty Rights*, Aboriginal Affairs and Northern Development, Canada, 2015, p. 6.

32 2014 SCC 44, [2014] 2 S.C.R. 256.

a semi-nomadic grouping of six bands, had aboriginal title over the disputed area they had historically occupied; and further, that British Columbia had breached its duty to first meaningfully consult and engage the Tsilhqot'in Nation in respect of the logging started on their lands.³³

The most striking dismissal of the doctrine of *terra nullius*, to echo Ülgen, has come from Australia.³⁴ In *Mabo v Queensland*, the High Court rejected the legal fiction that Australia was uninhabited territory at the time of British settlement in 1788. Denial of aboriginal land rights on this basis was found to be “unjust and discriminatory” and inconsistent with international obligations and standards.³⁵ Among other holdings, *Mabo* required that native title to communal lands must be determined by reference to traditional laws and customs, and not with respect to colonial legal processes that native people did not have access to.³⁶ The *Mabo* judgment, as aptly observed by Bennett and Powell, had repercussions far beyond the shores of Australia.³⁷

The ancestral land claim instituted by the Richtersveld people and decided by the superior courts of South Africa is most relevant to the topic under discussion.

By way of background, the Richtersveld people claimed that they are entitled to the exclusive beneficial occupation and use of the land in question, the Richtersveld, on the grounds that they hold aboriginal title to the said land. The portion of land taken from them in the 1920s contained valuable diamond deposits. The dispossession allegedly happened without any compensation. They accordingly claimed restitution in terms of the Restitution of Land Rights Act.³⁸ After their dispossession, the land was registered in the name of a state-owned company, Alexcor Limited. Alexcor and the government contended that any rights in the land which the Richtersveld community may have had prior to the annexation of the land by the British Crown were terminated by the annexation.

Importantly, the High Court affirmed that the concept of *terra nullius* – the mark of imperialist paternalism – had no place in the South African constitutional dispensation. However, the Court expressed doubt as to whether the doctrine of aboriginal title forms part of South African law and as such did not decide on this point. The Court eventually found that the Richtersveld people had no rights of ownership in the land in question after its annexation in 1847, and also that

33 See *Tsilhqot'in Nation v British Columbia*.

34 Ülgen, Özlem, ‘Developing the Doctrine of Aboriginal Title in South Africa: Source and Content’, *Journal of African Law*, Vol. 46, No. 2, 2002, p. 146.

35 *Mabo v Queensland* (No. 2) (1992) 175 CLR 1, para. 42.

36 Harring, Sidney L., ‘The Constitution of Namibia and the Rights and Freedoms’ Guaranteed Communal Land Holders: Resolving the Inconsistency between Article 16, Article 100, and Schedule 5’, *South African Journal on Human Rights*, Vol. 12, 1996, p. 467.

37 Bennett, T.W. & C.H. Powell, ‘Aboriginal Title in South Africa Revisited’, *South African Journal on Human Rights*, Vol. 15, No. 4, 2004, p. 454.

38 See the Restitution of Land Rights Act (No. 22 of 1994), as amended; restitution of a right in land is defined in section 1 of the Act as the restoration of a right in land or equitable redress.

the dispossession of the land after 1913 was not as a consequence of racially discriminatory laws, as required by the Restitution of Land Rights Act.³⁹ Upon appeal, both the Supreme Court of Appeal and the Constitutional Court upheld the Richtersveld people's assertion that they used the land in accordance with their indigenous customs. On this basis, both courts accordingly ordered that the land in question be returned to the community. The courts differed, however, regarding whether such a claim should be evaluated through the lens of the common law, or that of customary law. The Constitutional Court decisively ruled that the ancestral land claim of the Richtersveld people must be scrutinised in accordance with their prevailing customary laws at the time that the dispossession occurred. The Court held that while in the past, indigenous law was seen through the common law lens, it must now be seen as an integral part of South African law. It follows that in this instance, the law to be considered was the indigenous Nama law, in terms of which land was communally owned by the community. After careful consideration of the evidence adduced, by Court held that:⁴⁰

The real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law.

It is worth noting that the South African Constitutional Court did not directly address the issue of aboriginal title. The country thus remains a potential candidate for the assertion of aboriginal title.⁴¹ The Court did, however, rule on a very important derivative element related to aboriginal title, namely, extinguishment. On this point, the Court ruled that the annexation of Richtersveld did not extinguish the right of ownership which the Richtersveld people possessed over the disputed land.⁴² It appears that the approach of the Court in this judgment has, albeit implicitly, found resonance in Namibia.

In Namibia, a case is currently being heard in which Hai||om applicants are claiming recognition as an indigenous people, and reparation for the loss of their ancestral lands in Etosha National Park (see the chapters by Odendaal et al. and Dieckmann in this publication). Other than that, no legal action has at yet been taken to assert aboriginal title. The closest action in this regard relates to the matters

39 *Richtersveld and Others v Alexkor Ltd and Another* (LCC151/98) [2001].

40 *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18, paras. 49–62.

41 Bennett, T.W. & C.H. Powell, 'Aboriginal Title in South Africa Revisited', *South African Journal on Human Rights*, Vol. 15, No. 4, 2004, p. 450.

42 *Richtersveld and Others v Alexkor Ltd and Another* (LCC151/98) [2001], para. 82.

raised in the case of *Kashela v Katima Mulilo Town Council*.⁴³ In this case the plaintiff, Agnes Kahimbi Kashela, took issue with the Katima Mulilo Town Council (KTC) for having dispossessed her, without compensation, from her communal land she inherited from her deceased father in terms of the Mafwe customary law and norms. After the alleged dispossession, the KTC rented out a portion of the disputed piece of land and was also planning to sell some of the rented portions. Ms Kashela claimed N\$2 415 000.00, inclusive of the rental money she was entitled to as reasonable and just compensation. Her claim was based on section 16(2) of the Communal Land Reform Act (No. 5 of 2002),⁴⁴ as well as the Namibian Constitution's Article 16(1), which guarantees property rights, and Article 2, which provides that property may only be expropriated upon payment of just compensation.

The KTC, needless to say, opposed the claim, in the main averring that the customary rights that the claimant held in the land in question ceased to exist when Katima Mulilo was declared a township in 1995. The High Court agreed with this argument. It also held that the claim for compensation was misdirected in that it lay against the state and not the KTC. Ms Kashela's claim was accordingly dismissed.

Upon appeal, the Supreme Court found the very opposite. The Supreme Court, in a decision that is not perfect, but is nevertheless welcomed, opted to decide this matter without reference to Article (16), thus avoiding the opportunity to clarify the meaning and scope of the concept of property as guaranteed in that article. It preferred to rather resurrect Schedule 5(3) of the Constitution in resolving the dispute. At the risk of regressing, it is worth pointing out that a Schedule, as noted by Haring, cannot add or subtract substantive rights set forth in other parts of a constitution.⁴⁵ The Namibian Constitution contains eight schedules. None of these matters was constitutionally necessary: all could simply have been adopted by statute immediately upon the convening of the National Assembly. However, they were included in the Constitution because they were urgent.⁴⁶ It is difficult not to agree with Haring's sentiments regarding Schedule 5, which in his view should be read:

[...] as nothing more than a housekeeping measure defining the scope of the transfer of extensive governmental property from South Africa to Namibia, mostly lands and buildings held for governmental purposes. Schedule 5 is not a complete legal definition of the law of any form of property, communal or otherwise, for constitutional purposes, equal to Art 16, although it can be used for interpretive

43 (I 1157/2012) [2017] NAHCMD 49 (01 March 2017).

44 The subsection provides that 'Land may not be withdrawn from any communal land area under subsection (1)(c), unless all rights held by persons under this Act in respect of such land or any portion thereof have first been acquired by the State and just compensation for the acquisition of such rights is paid to the persons concerned'.

45 Haring, Sidney L., 'The Constitution of Namibia and the Rights and Freedoms' Guaranteed Communal Land Holders: Resolving the Inconsistency between Article 16, Article 100, and Schedule 5', *South African Journal on Human Rights*, Vol. 12, 1996, p. 475.

46 Ibid.

purposes. Therefore, Schedule 5 can neither define, nor define away communal or any other property rights protected under Art 16. Rather, it defines fully which South African state property ‘vests’ in the Government of Namibia.⁴⁷

This notwithstanding, the decision of the Supreme Court is significant in respect of the extinguishment of customary land rights. The Court held:

It cannot be correct that the State’s succession to communal land areas at independence extinguished the communal land tenure rights that subsisted in that land such that the interference with them would not attract a remedy within the scheme created by para (3) of Schedule 5, regardless of whether or not it falls within the ambit of Art 16(2).⁴⁸

This judgment arguably holds the potential to advance the restoration of ancestral land claims in the country. There is a strong argument to be made that colonialism did not extinguish the right of communal ownership the various indigenous communities enjoyed under their pre-existing indigenous laws. It must follow, therefore, that the pre-existing customary land laws under which indigenous communities/populations held their land communally must be constitutionally recognised and accorded a legal status,⁴⁹ thereby making a case for the doctrine of aboriginal title. Once established in our law, this doctrine will have significant implications for the state’s administration of land. If it is accepted that the state (or one of its organs) does not own a particular tract of land that it happens to control, then it will follow that the state may be obliged to return the land to the aboriginal titleholder or, possibly even more importantly, account for its past management.⁵⁰ The *Agnes Kashela* judgment most definitely calls for a revisiting of the concept of property.

4 Towards a purposive understanding of the “property” clause (Article 16)

Many commentators have lamented the fact that Article 16 of the Constitution mainly protects private property. This might be the reason why in the *Agnes Kashela* case, the Supreme Court was implored to adopt a purposive interpretation of Article

47 Ibid.

48 *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15/2017) [2018] NASC (16 November 2018), para. 68.

49 Harring, Sidney L., ‘The Constitution of Namibia and the Rights and Freedoms’ Guaranteed Communal Land Holders: Resolving the Inconsistency between Article 16, Article 100, and Schedule 5’, *South African Journal on Human Rights*, Vol. 12, 1996, p. 473.

50 Bennett, T.W. & C.H. Powell, ‘Aboriginal Title in South Africa Revisited’, *South African Journal on Human Rights*, Vol. 15, No. 4, 2004, pp. 484–485.

16⁵¹ – in other words, to direct that Article 16 applies broadly to all forms of property rights, and specifically that Ms Kashela’s interest in the piece of communal land was grounded in Mafwe traditional customary law. As noted earlier, the Court opted to resolve this matter via Schedule 5(3). The approach adopted by the Court is, with respect, unsatisfactory. The Court’s chosen route does not resolve the question of whether property as framed in Article 16 is wide enough to accommodate land collectively owned by indigenous communities. Guidance should thus necessarily be sought elsewhere. In this regard, the work of African and Latin American human rights bodies is instructive. In Africa and Latin America, regional human rights mechanisms have been instrumental in addressing indigenous peoples’ rights, particularly to lands and territories.

The Inter-American Commission and Inter-American Court have contributed extensively to the understanding and development of indigenous peoples’ rights, particularly in areas of collective land rights and the duty of states to consult. These bodies have both interpreted the American Convention on Human Rights as a living document in this regard.

For instance, in the case of *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001),⁵² the Inter-American Court of Human Rights interpreted the American Convention on Human Rights in a progressive and expansive manner. Central to the analysis was whether Article 21 of the American Convention protected the right to communal lands. Article 21 provides: “Everyone has the right to the use and enjoyment of his property.” The Court found that protection of communal lands was obtained through an “evolutionary interpretation of international instruments for the protection of human rights”.⁵³ The Court accordingly held that the right to property included indigenous peoples’ property rights as originating in indigenous tradition and that the State (Nicaragua) therefore had no right to grant concessions to third parties with respect to indigenous land.

The African Commission expressly drew from the *Mayagna (Sumo) Awas Tingni Community* judgment in the *Endorois*⁵⁴ case. The Commission held that the rights, interests and benefits that traditional African communities have in their traditional lands constitute “property” under the Charter. This presupposes that special measures may have to be taken to secure such “property rights”. One such measure is the granting to indigenous traditional African communities of full title to their territory in order to guarantee its permanent use and enjoyment; as opposed to granting them a privilege to use land, which can be withdrawn by the state

51 *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15/2017) [2018] NASC 409 (16 November 2018), para. 32.

52 Inter-Am. Ct. H.R. (ser. C) No. 79, 1 148 (Aug. 31, 2001).

53 Ibid. at para. 148.

54 *Centre for Minority Rights Development (Kenya), Minority Rights Group International and Endorois Welfare Council (On Behalf of the Endorois Community) v Kenya* (276/2003).

or trumped by the real property rights of third parties.⁵⁵ Through an expansive interpretation in a manner consistent with international law, the Commission ruled that “property right” includes traditional African customary land as well as ancestral land. The Commission accordingly found that the actions of the Kenyan government had violated the provisions of the African Charter relating to Article 14 (property rights) in that the:⁵⁶

[...] property of the Endorois people has been severely encroached upon and continues to be so encroached upon. The encroachment is not proportionate to any public need and is not in accordance with national and international law.

The domino effect and the much-needed cross-fertilisation of progressive jurisprudential thinking is also discernible in the judgment in *African Commission on Human and Peoples’ Rights v Republic Of Kenya*⁵⁷ (also referred to as the *Ogiek case*) of the African Court on Human and Peoples’ Rights (2017). The case centred around the routine eviction of the Ogiek people from the Mau Forest by the Kenyan government, purportedly because such evictions were needed to preserve the natural ecosystem of the forest. The African Commission on Human and Peoples’ Rights, which brought the case on behalf of the Ogiek people, argued that the evictions violated several rights of the Ogiek people as guaranteed under the African Charter on Human and Peoples’ Rights, including the right to property as guaranteed in Article 14 of the Charter.⁵⁸

The Court clarified that the right to property as guaranteed by the Charter applies to individuals, groups and communities alike. It thus caters for both individual and collective property rights. The Court interpreted the right in light of Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This article recognises and guarantees indigenous peoples’ “right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership”.⁵⁹ The Court accordingly found that the expulsion of the Ogiek from their ancestral lands against their will, without prior consultation, constituted a violation of Article 14 of the African Charter.⁶⁰ In recognising the Ogiek’s communal property rights over their ancestral land, the judgment arguably protects not only Africans who define themselves as indigenous people, but all rural dwellers who own land on the basis of customary law.⁶¹

55 Ibid. at paras 185–206.

56 Ibid. at para. 238.

57 Application No. 006/2012, 27 May 2017.

58 *Ogiek case*, paras 6–10.

59 See Article 26 of the UNDRIP.

60 *Ogiek case*, paras. 114–131.

61 Claridge, Lucy, *Briefing: Victory for Kenya’s Ogiek as African Court sets major precedent for indigenous peoples’ land rights African Commission on Human and Peoples’ Rights v the Republic of Kenya*, Minority Rights Group International, 2017, p. 8.

The *Endorois* and *Ogiek* cases, in particular, are profoundly significant for Namibia. Like Kenya's Constitution, the Namibian Constitution does not recognise collective rights. This notwithstanding, both the African Commission and the African Court on Human and Peoples' Rights, in the *Endorois* and *Ogiek* cases respectively, recognised these peoples' claims over their ancestral lands under Article 14 of the African Charter. This was done through adopting an expansive and evolutionary interpretation of the concept of the right to property. The adoption of a similar approach in Namibia is not far-fetched, and would indeed be warranted.

A purposive reading and interpretation given to the right to property by the Court provides great relief for those who may want to claim their ancestral lands as part of the right to property under Article 16. Article 26 of the UNDRIP, which has been ratified by Namibia, is accordingly part of the country's body of law in terms of Article 144 of the Constitution. This article, significantly, affirms that all treaties binding upon Namibia, as well as "general rules of public international law", are incorporated into Namibia domestic law. In sum, the concept of property as guaranteed under Article 16 cannot be confined to the Western, private ownership paradigm. The indigenous forms of land tenure, as historically and currently practised, must be fully recognised, protected and accorded Article 16-status. Doing so cannot be viewed as placing "undue emphasis on article 16", as stated by the Deputy Chief Justice.⁶² The contrary is true. In fact, it is deeply concerning that the court in this instance appeared wholly oblivious to the jurisprudential trend of international and regional human rights bodies in this regard.

The international cases presented in this chapter serve as persuasive authority for embracing a broad and purposive meaning to the land rights and interests guaranteed as property under Article 16 of the Namibian Constitution. In this regard, an inevitable objection that would have to be overcome is that foreign judgments are not binding on Namibia's courts. Such an objection must, however, be weighed against the powerful arguments of principle and equity that informed the decisions in these cases.⁶³

5 Administrative reparation programmes

Calls for the restoration of ancestral land in Namibia, as noted earlier, relate to issues of redress and accountability. It is worth reiterating that such calls are inextricably linked to the inalienable right to an effective remedy for victims of human rights violations, as guaranteed in numerous human rights instruments.

62 *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15/2017) [2018] NASC 409 (16 November 2018), para. 69.

63 Bennett, T.W. & C.H. Powell, 'Aboriginal Title in South Africa Revisited', *South African Journal on Human Rights*, Vol. 15, No. 4, 2004, p. 451.

The international legal basis for the right to a remedy and reparation became firmly enshrined in the elaborate corpus of international human rights instruments now widely accepted by states. Among the numerous international instruments are the Universal Declaration of Human Rights (Article 8); the International Covenant on Civil and Political Rights (Article 2); the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 14); and the Convention on the Rights of the Child (Article 39).⁶⁴ The relevance of Article 5 of the African Charter of Human and Peoples Rights, international humanitarian law and international criminal law must also be borne in mind in this regard. The right to a remedy and reparation for victims of human rights violations was affirmed by the UN General Assembly in its Resolution 60/147 adopted on 16 December 2005. In fact, on 29 September 2011, the UN Human Rights Council adopted a resolution in which it decided to appoint, for a period of three years, a Special Rapporteur with the mandate to promote truth, justice, reparation and guarantees of non-recurrence of atrocities.⁶⁵ Article 18 and Article 25 of the Namibian Constitution must also be added to this list.

Calls for reparations and the restitution of ancestral land can therefore not be divorced from human rights. In this context, the guideline of the African Commission in respect of the right to property and the concomitant obligations of state parties to the Charter in respect of this right, is instructive. The African Commission clarified that State parties to the Charter are obliged to:⁶⁶

[...] ensure that members of vulnerable and disadvantaged groups, including indigenous populations/communities who are victims of historical land injustices, have independent access to and use of land and the right to reclaim their ancestral rights, and are adequately compensated for both historical and current destruction or alienation of wealth and resources.”

According to Pablo de Greiff,⁶⁷ an effective remedy is best achieved through administrative reparation programmes as opposed to litigation. For the claimants, such programmes are preferable to judicial procedures because they offer faster

64 See UN General Assembly in its Resolution 60/147: ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’, UN Doc. A/RES/60/147 (<https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>).

65 See Human Rights Council Resolution 18/7: ‘Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’, UN Doc A/HRC/RES/18/7 (<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/166/33/PDF/G1116633.pdf?OpenElement>).

66 See Guideline 55(f) of the African Union’s Principles and Guidelines on the Implementation of ESC Rights in the African Charter.

67 The former Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence.

results, attract lower costs, demand relaxed standards of evidence, and involve non-adversarial procedures and a higher likelihood of receiving benefits.⁶⁸

Indeed, the limits of litigation as a means to redress historical land injustices has been illustrated in the recent *Tsumib v Government of the Republic of Namibia* case.⁶⁹ In this case, eight members from the Hai||om community sought permission from the court to be allowed to take legal action as representatives of their community to reclaim Etosha National Park and the Mangetti area as their ancestral land rights. To this end, they submitted six distinct claims on behalf of the Hai||om people.⁷⁰ The case was thrown out without the Court considering the merits thereof on the basis that the plaintiffs did not have the necessary *locus standi* to represent the Hai||om people. Namibia's current law on standing is very restrictive. For example, it does not recognise class actions in which one or more plaintiffs litigate on behalf of themselves and other similarly situated persons. The *Tsumib* judgment is disturbing and indeed regrettable. This case presented the Court with an ideal opportunity to develop the archaic rules on standing so as to espouse the value, spirit and purport of the Namibian Constitution. It appears that Namibian courts are not ready to take such a bold step and to break new grounds. The message from the judgment in *Mabo v Queensland* to the courts in this regard is unambiguous:⁷¹

If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in [old age principles and rules that perpetuate inequality and limit access to justice].

The conservatism of our courts invites those seeking redress for historical land injustices to explore extrajudicial means to obtain an effective remedy. In this regard, examples from South Africa serve as proof that much more land justice can be achieved through meaningful engagement and constructive dialogue. In fact, section 13 of the South African Restitution Act⁷² provides that complex and overlapping land claims should preferably be settled through mediation and negotiation. To this end, two best practices are presented.

The records shows that intensive and constructive negotiations between 1996 and 1998 involving many interested groups culminated in the settlement of the historic Makuleke land claim in the Kruger National Park. The Makuleke community was forcibly removed from their ancestral lands within Kruger National Park in 1969. A settlement agreement was reached on 30 May 1998 between the Makuleke

68 UN General Assembly, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence', 2014, UN Doc. A/69/518, para. 4.

69 (A 206/2015) [2019] NAHCMD 312 (28 August 2019).

70 See Chapter 6 by Odendaal et al. herein.

71 *Mabo v Queensland* (No 2) (1992) 175 CLR 1, para. 41.

72 Restitution of Land Rights Act (No. 22 of 1994) as amended.

community, six national ministers, the Northern Province provincial government and SANParks. The agreement, an example of effective social cooperation between government bodies and land claiming communities, contains many historic elements. In essence, the agreement determines that:⁷³

- indigenous communities will participate in the management of sensitive environments;
- indigenous communities have rights of ownership;
- indigenous communities are equal partners with SANParks; and
- mineral rights will be reserved in favour of the state (but with prospecting and mining prohibited to protect the area's ecological integrity, and if mineral rights are ever privatised, the community will have a preferred right to acquire them).

Another best practice worth highlighting is the historic Ae! Hai Kalahari Heritage Agreement between the South African government and representatives of the Mier and ‡Khomani San communities. In terms of the agreement, six farms (totalling around 35 000 hectares) to the south of the Kgalagadi Transfrontier Park, and nearly 60 000 hectares of land within the park, were restored to the ‡Khomani San and Mier communities in 2002. The agreement committed the parties to establishing and developing a contractual park, the Ae! Hai Kalahari Heritage Park, on 28 May 2002. In terms of this agreement, the park is managed by a Joint Management Board with representatives from the Mier and ‡Khomani San communities and SANParks. The agreement also provides for the implementation of ‡Khomani San resource use and cultural rights, a three-way revenue sharing agreement for the !Xaus Lodge, future socioeconomic benefits, and the donation of game to the ‡Khomani San; SANParks is responsible for day-to-day conservation management.⁷⁴

Namibia can learn much from these best practices. The sitting Commission on Ancestral Land Claims have received various claims from communities for the restoration of their ancestral land and territories they previously occupied. For instance, the Khwe people are laying claim to Bwabwata National Park, and the Hai||om people are demanding the return and/or enjoyment of their land rights in respect of Etosha National Park. The Topnaar people, similarly, are claiming ownership of Namib Naukluft National Park, Sperrgebiet National Park and Dorob National Park and demanding compensation for the loss of their land and the resources they originally owned. The /Khomani Damara likewise are laying claim to Daan Viljoen National Park as their ancestral home from which they were forcibly evicted during the South African colonial period.

73 Makuleke Land Claim, 'Meeting Report, Joint Meeting of Environmental Affairs & Tourism Portfolio Committee; Agriculture, Land & Environmental Affairs Select Committee', 17 February 1999 (available at <https://pmg.org.za/committee-meeting/5638/>).

74 See *Kalahari Gemsbok National Park: Park Management Plan for the period 2016 – 2026* (2016) (https://www.sanparks.org/assets/docs/conservation/park_man/kalahari-management-plan.pdf); and the presentation of Mr Fundisile Mketeni: CEO SANPARKS, Land Claims Sharing Models 30 August 2016. Available at <https://slideplayer.com/slide/13804698/>.

These and other claims submitted to the Commission present the country with complex and formidable challenges. Given the complexity of these claims, it is clear that mutually acceptable outcomes should much rather be sought out of the court system through meaningful engagement between the affected parties. Litigation, by its very nature is less suited to achieving such desired outcomes. The conceptualisation, design and implementation of targeted administrative reparation programmes appear to be the preferred vehicle to redress historical land injustices. Examples of such programmes serve to illustrate their feasibility. As the adage goes, “Where there is a will, there is a way”.

Inasmuch as the South African Programme of Land Restitution is presented as a best practice, the pitfalls and shortcomings of the programme as flagged in the Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, chaired by the former Deputy President, Kgalema Motlanthe, are worth noting. Some of the administrative reparation programmes in South Africa reportedly rendered the process “personality-driven”, ad hoc, and vulnerable to corruption. Furthermore, in an attempt to speed up the process, claims were bunched together, creating artificial communal property associations in the process. In so doing, the Commission ignored the definition of a “community” whose members are eligible to apply for restitution.⁷⁵

It must also be stressed, however, that the preference expressed for the establishment of administrative reparation programmes does not imply that the powers of the courts in such matters should be ousted, as such a proposition would in any event be unconstitutional. The Supreme Court and the High Court are vested with inherent jurisdiction to hear any matter.⁷⁶ The suggestion, with reference to administrative reparation programmes, is that recourse to the court system should be the last resort.

Efforts to redress colonial injustices in Namibia cannot be resolved by placing premium reliance on the very laws which caused such injustices. Following the *Tsumib* judgment, there is a strong case to be made for exploring and investing in restorative justice processes as a means of achieving reconciliatory justice for colonial and/or historic land injustices in Namibia.

6 Conclusion

The right of indigenous communities/populations to their lands, territories and resources is recognised under international law. As such this right must be respected, protected and fulfilled by states, including Namibia. The case law of the African Commission on Human and Peoples’ Rights, the African Court on Humans

75 Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, Chairperson Kgalema Motlanthe, November 2017, pp. 233–235.

76 See Article 78(4) of the Namibian Constitution.

and Peoples' Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights, amongst others, affirm the fact that indigenous land rights are recognised and guaranteed within the international human rights system. These human rights bodies adopted an evolutionary and expansive interpretation of the concept of "property rights". Such an expansive interpretation, as has been shown, allows for the right to property as guaranteed in the Namibian Constitution and the African Charter, which Namibia has ratified, to include ancestral lands and territories as well as African customary law land tenure systems within the ambit of property rights. It is highly regrettable that the Namibian apex court opted to shy away from making a similar ruling when called upon to do so.

Calls for the restoration of ancestral land in Namibia are consistent with international and regional law and human rights law and jurisprudence. A contrary interpretation would be inconsistent with the ethos of rationality, equality, non-discrimination, fairness and "justice of all" which permeates the preamble and substantive structures of the Namibian Constitution.⁷⁷

Repairing historical land and other injustices necessarily calls for a new mind set and paradigm – one that is anchored in international human rights law. In other words, what is required is an approach that recognises human rights as setting the ground rules for obtaining reparation for historical injustices. Such a paradigm recognises that calls from indigenous communities/populations for reparations are neither frivolous nor vengeful. Furthermore, they are far from being disguised get-rich-quick schemes or, worse still, calls for charity. These calls have graduated into entitlements, and cannot be viewed otherwise, as doing so would be disingenuous and insensitive – and downright dangerous. Examples from other parts of the world involving unresolved land claims which have escalated into ethnic conflicts demonstrate the dangers of leaving such claims unresolved in the hope that they will eventually be forgotten.⁷⁸ Calls for the restoration of ancestral land can therefore not be 'swept away with frivolous phrases such "Let bygones be bygones"'. Adopting such an attitude and approach to matters of historical land injustice would be at our own peril.

⁷⁷ *S v Van Wyk* 1993 NR 426 (SC) at 456G-H.

⁷⁸ Shelton, Dinah, 'Reparations for human rights violations: how far back?', *Amicus Curiae*, Issue 44, November/December 2002, p. 3.

The fencing question in Namibia: A case study in Omusati Region

Rose-Mary Popyeni Kashululu and Paul Hebinck

1 Introduction

6 new fences have recently been erected.	Onanyalala	"These six fences have been set up, not long ago, but the TA do not know the owners. They are just there."
30 new fences have recently been erected.	Onanyalala area next to Olunkeyama	"These fences are recently done, claimed worked during the night with headlights of cars on. The Headman and his committee do not know who the owners are."

The introductory quotes are from a report of the Ongandjera Traditional Authority (TA) to the Ministry of Land Reform (MLR), Omusati Region, in 2018.¹ Fences are "illegal" when they demarcate lands that are regarded as communal. If land is communal, it is vested in the state and held in trust for those that reside on the commons. Communal land also implies that the residents have the right to claim their customary land rights and practise their customary land use practices (e.g. residential, cropping, grazing). Communal land also implies that these lands are considered by the MLR in its rural development policies as an open-access resource for grazing cattle and wild animals. This characteristic of the commons is a fundamental aspect of the Communal Land Reform Act (No. 5 of 2002) (CLRA).² Regulation 26 of the Act allows for fences around homesteads, crop fields, water

- 1 Ongandjera Traditional Authority, 'Identification of Illegal Fences in Ongandjera Communal Area, Okahao, 2018', a report compiled as part of the outcomes of the Second National Land Conference held in Windhoek in 2018.
- 2 Republic of Namibia, Communal Land Reform Act (No. 5 of 2002), Windhoek, 2002.

troughs or cattle pens on portions of land parcels. Fences that are fenced in line with the Act are recorded in the databases of MLR as “legal”. Section 44 of the CLRA also states that it is an offence to erect a fence on a piece of land without first being granted a land right certificate.

The fencing of communal lands in Namibia is not a recent phenomenon. Older case material and reports,³ databases from the regional Division: Land Reform offices, and reports from TAs such as the one quoted above show that the fencing of communal lands has been taking place over more than 40 years. The first cases of illegal fencing had already been reported in the early 1970s, when local businessmen began to seek and obtain approval from local chiefs and headman for large areas of communal land to be allocated to them for grazing.⁴ Fencing expanded rapidly in the 1980s and accelerated thereafter. Towards the end of 1990, it was estimated that in the densely populated Oshikoto Region of northern Namibia, between 25% and 50% of the communal land had been fenced off into large private ranches. In parts of some regions, the enclosure of land has now effectively been completed.⁵ The recent Ongandjera TA report confirms what was found during a fact-finding mission in 2011 in Omusati Region, in which one of the authors participated. On the basis of a comparison with the results of the 2011 fact-finding mission and of conversations with many residents in the field and MLR office personnel, the researchers noted that the clear pattern that emerged was that fencing had escalated and intensified.

There is some agreement in Namibian society, as well as in scholarly and grey literature and reports that fencing in communal lands is problematic. Fencing is primarily associated with issues concerning access to key resources. A Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) report published 1991 highlighted that not only have many illegal fences recently been erected, but also that fencing increasingly generates conflict between fencers and non-fencers.⁶

3 Cox, J., ‘The Research Context’, in Cox, Jonathan, Carol Kerven, Wolfgang Werner & Roy Behnke (eds), *The Privatisation of Rangeland Resources in Namibia: Enclosure in Eastern Oshikoto*, Overseas Development Institute, London, 1998, pp. 8–18; Fuller, B., S. Nghikembua & T. Forbes Irving, ‘The Enclosure of Range Lands in the Eastern Oshikoto Region of Namibia’, *SSD Research Report 24*, Social Sciences Division, Multi-Disciplinary Research Centre, University of Namibia, Windhoek, 1996.

4 Cox, J., ‘The Research Context’, in Cox, Jonathan, Carol Kerven, Wolfgang Werner & Roy Behnke (eds), *The Privatisation of Rangeland Resources in Namibia: Enclosure in Eastern Oshikoto*, Overseas Development Institute, London, 1998, pp. 8–18; see also Devereux, S., *Fuzzy Entitlements and Common Property Resources: Struggles over Rights to Communal Land in Namibia*, Institute for Development Studies, Brighton, 1996.

5 Fuller, B., S. Nghikembua & T. Forbes Irving, ‘The Enclosure of Range Lands in the Eastern Oshikoto Region of Namibia’, *SSD Research Report 24*, Social Sciences Division, Multi-Disciplinary Research Centre, University of Namibia, Windhoek, 1996.

6 Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), *Sustainable Livestock Production in the Less Developed Areas of Namibia*, GTZ, Eschborn, 1991.

The title of the chapter suggests that our perspective on illegal fencing as a developmental question is that it is rather similar to the agrarian or land question. The land question literature focuses on land as a key resource, debates the distribution of benefits from the use of the land, and so on.⁷ Identifying fencing as part of the series of development issues and making fencing a central component of the analysis allows us to generate a series of key questions, such as who fences and for what purpose; who benefits most and who is losing out; and perhaps more importantly, what is the social and material effect of fencing and thereby (re) ordering the communal areas. We will not be able to answer questions related to material or ecological changes such as biodiversity loss, soil degradation, and so on.⁸ Our focus is on what fencing does to property and property relations, on processes related to exclusion and the future of the commons in Namibia, and on how the struggle to remove fences is organised. We proceed from the following understanding of fencing:

- 1) Fencing is an act that lays claim to the land and the natural resources on that piece of land, such as water and grass.⁹ This is classically studied under the heading of enclosure of property and privatisation of land.¹⁰ The claim-making is sanctioned by authorities which in turn legitimise the claim.¹¹ This aspect of legitimizing and authority has, as we will see, unfolded in Namibia as an essential instrument in the defence of fencing by fencers.
- 2) Fencing or enclosing land is the material infrastructure that reduces and limits livelihood opportunities for quite a number of communal farmers, who because of the fences have been disconnected from their communally owned and managed land and its related resources. This aspect is usually associated with historical processes of exclusion and dispossession which is for many the reason to associate

7 See for example Moyo, S., 'The Land Question in Southern Africa: A Comparative View', in Ntsebeza, L. & R. Hall (eds), *The Land Question in South Africa: The Challenge of Transformation and Redistribution*, Human Sciences Research Council, Cape Town, 2007, pp. 60–87; Bernstein, H., '“Changing before Our Very Eyes”: Agrarian Questions and the Politics of Land in Capitalism Today', *Journal of Agrarian Change*, Vol. 4, No. 1–2, 2004, pp. 190–225.

8 See, for a first attempt, Verlinden, A. & A.S. Kruger, 'Changing Grazing Systems in Central North Namibia', *Land Degradation & Development*, Vol. 18, No. 2, 2007, pp. 179–197.

9 For a more theoretical explanation about claims and access, see Ribot, J., & N. Peluso, 'A Theory of Access', *Rural Sociology*, Vol. 68, No. 2, 2003, pp. 153–181; Kronenburg García, A.J.N. & H. van Dijk, 'Towards a Theory of Claim Making: Bridging Access and Property Theory', *Society & Natural Resources*, 2019, pp. 1–17.

10 See for example van Sittert, L., 'Holding the Line: The Rural Enclosure Movement in the Cape Colony, C. 1865–1910', *Journal of African History*, Vol. 43, No. 1, 2002, pp. 95–118; Woodhouse, P., 'African Enclosures: A Default Mode of Development', *World Development*, Vol. 31, No. 10, 2003, pp. 1705–1720.

11 This point is eloquently made by T. Sikor and C. Lund in 'Access and Property: A Question of Power and Authority', *Development and Change*, Vol. 40, No. 1, 2009, pp. 1–22.

fencing with issues of privatisation and enclosure, social differentiation, and elites capturing land and resources.¹² Besides, it raises concerns within circles of the Government of the Republic of Namibia (GRN), NGOs, activists and observers of the fencing processes in Namibia that fencing negatively affects herd mobility. Many communal farmers and development practitioners complain that their seasonal transhumance routes have been disrupted.

In other words, fencing drives transformations with intended, but perhaps also with unintended and unwanted consequences. Enduring poverty and the loss of rights to land are important consequences mentioned in the literature, and it is argued that action is required from the GRN with support from the NGO sector to adequately respond to these challenges. Fences manifest that the outcome of these transformations does not provide equal opportunities for all commoners. The former Minister of Lands and Resettlement stated in Parliament on August 1990 that “the fencing of communal land is continuing to endanger the important right of all people in those particular areas to have access to land”.¹³ Despite these political statements and the enactment of the CLRA in 2002, the fencing has increased over the years and the issues that render it problematic have become more and more revealing.

This chapter first presents more recent data on fencing and attempts to explain the process that leads to fences generating problems with development, and access and rights to land. Field visits and the MLR database reveal that not all fences and fencers are alike. We took the categorisation and inherent ordering of the commons that the MLR applies as a starting point for our analysis. The MLR distinguishes between fences on the basis of their legality or illegality, the date of their construction, and whether or not they have been removed. Some of the fences are from before independence in 1990; some have been removed, while some remain in place still despite action taken by the TA or MLR; other fences have even been extended. We add to this that there is also a need to differentiate between the fencers themselves. Some of the fencers are commoners who are or claim to be law-abiding citizens; for others, the label “elites” is fitting. Also, some are from nearby villages, while others are from further afield, and have no prior connection to the land or the village. The section that follows is a sociopolitical analysis of the

12 Tapscott, C. & L. Hangula, *Fencing of Communal Range Land in Northern Namibia: Social and Ecological Implications*, Social Sciences Division, Multi-Disciplinary Research Centre, University of Namibia, Windhoek, 1994; Twyman, C., A. Dougill, D. Sporton & D. Thomas, ‘Community Fencing in Open Rangelands: Self-Empowerment in Eastern Namibia’, *Review of African Political Economy*, Vol. 28, No. 87, 2001, pp. 9–26; Werner, W., *“What Has Happened Has Happened”: The Complexity of Fencing in Namibia’s Communal Areas*, Land, Environment and Development Project, Legal Assistance Centre, Windhoek, 2011.

13 Quoted in Odendaal, W., *Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia*, paper presented at the International Conference on Global Land Grabbing, Sussex, 2011, p. 13.

fencing problem. We explain the processes at play in the communal areas that on the one hand contribute to fencing, or alternatively streamline the struggle against fences. This includes a further expansion of the commodity economy and changes in land use, as well as the post-independence type of state interventions to maintain and reshape the commons as a common property resource. Apart from initiating reforms at the level of land rights, the CLRA of 2002 also contains perspectives for the future of the commons and makes allowance for contestation of decisions related to the construction and removal of fences. In the concluding section, we explain why fences in Namibia are and will remain problematic for some time to come. We argue that this has to do with the upholding of contrasting communal lands development discourses, as well as with the existence of what we refer to as institutional voids.

The data sources for this chapter are multiple. We accessed the MLR Outapi database and read the older case material and reports. We examined the recent report of the Ongandjera TA, and in a week in June 2019 set out to trace and measure the 14 illegal fences in Etilyasa District, in the villages Ombwata A and B, Okeendapa, Oshandumbala and Amariika. Together with a local informant and the headmen and women of the villages, we visited the fenced areas. During our investigations, we tried to measure these fenced areas, determine when they had been fenced, establish whether approval had been sought and granted, and record whether or not the fenced areas were currently in use, and if they were, for what purpose. We tried to establish who the owners of the fenced areas were, and whether they were from the village or from elsewhere. We also interviewed land users in Oshakati and Okahao who felt themselves to be disadvantaged by the fencing activities of others. We interviewed them to gain an understanding of fencing practices and what constitutes being disadvantaged by the erection of fences. We also interviewed the Ongandjera TA Council to establish their experiences of and procedures regarding fencing. The King of Ongandjera, the chairperson and his deputy, senior and deputy councillors, and an advisor to the King were present. This data complements and provides contextual depth regarding what has already been recorded by the MLR for Omusati Region and what was discovered during a fact-finding mission headed by an investigative team from the MLR and the Legal Assistance Centre (LAC) in November 2011.

2 Categorising fences and fencers

The fencing cases which we further investigated from the Ongandjera TA report¹⁴ show that every fence has a story to tell about the dynamics and transformations occurring in the communal areas. No two fences are identical, and they differ with

14 Ongandjera Traditional Authority, 'Identification of Illegal Fences in Ongandjera Communal Area, Okahao, 2018', a report compiled as part of the outcomes of the Second National Land Conference held in Windhoek in 2018.

respect to their age and state of maintenance. Some fencers belong to commoners who are making a part-time living by using communal resources. Other belong to the so-called elites¹⁵ whose aim is to privatise communal areas in order to benefit from their resources. Some of the fences date back to the period before independence, when approval for the erection of fences was given by headman and chiefs. The latter involved decisions that were taken based on their interpretations of customary law concerning land. Some of these decisions were not properly entered in the records of the administration at the time, and these decisions and interpretations of customary law may very well be disputed by the MLR for purposes of the CLRA.

Five of the fences we investigated were not well maintained and required re-erecting to be effective for the purpose they were erected for. The other 10 fences appeared to be well maintained; the fenced land, however, in most cases appeared not to be used, and the “owners” were nowhere to be seen. None of the 15 fenced fields we inspected showed any sign of agricultural use at all – no cattle were grazing, and no *omahangu* had been planted. Regarding *omahangu* cultivation, the Ongandjera TA notes that there are two categories of fencers, and this was confirmed by our visits. It is important to point out that most of the fences listed in the Ongandjera TA report had been erected by people that were not from the village. They had no kinship or other relationship with the village where they had asked for permission to fence a piece of land for either a cattle post or an *omahangu* field. One of the headwomen who accompanied us to the field mentioned that the “outsiders” come with a letter from the headman in their village stating that there is a shortage of land (see Annex 1 for an example of such a letter). With this letter, they seek permission from the headman/woman of the village to fence a piece of land. This is usually granted, the headwoman said, as they cannot deny people access to land. They go out and stake the land together, and the fences are erected. Initially, the plots are not larger than 50 ha, as specified in the CLRA. Of the illegal fences that are known to and reported by the Ongandjera TA,¹⁶ most were erected by outsiders and have been expanded beyond the 50 ha without any permission having been sought. The fencing erected by outsiders, in particular, may be instances of people claiming land for future use or for speculative motives. “Locals” also request permission to erect fences, and stake a piece of land with their headman in the same manner, but this does not always mean that the fencing is erected in accordance with the provisions of the CLRA. One of the illegal fences we examined in the Okahao area was erected by a local resident enclosing a communal grazing area which includes a

15 *The Namibian*, 15 June 2015, alerts the reader in a front-page article that ‘Army commander fences off communal land’. Similarly, *Namibian Sun* published a news item on 2 February 2013 headlined ‘Pensioner accuses government official of snatching his land’. The official allegedly fenced an area of 2 000 ha.

16 Ongandjera Traditional Authority, ‘Identification of Illegal Fences in Ongandjera Communal Area, Okahao, 2018’, a report compiled as part of the outcomes of the Second National Land Conference held in Windhoek in 2018.

GRN-constructed water point. Before it was fenced, the grazing area was frequently used by several cattle owners that had long collaborated in a cattle post system. After the fence had been constructed, the cattle post partners were denied access to grazing and water. When interviewed about this illegal fence and how it affects their cattle rearing, the former partners pointed out that they had not yet launched a lawsuit as they hoped to be able to settle the matter out of court. They had brought it to the attention of the MLR, however.

The MLR distinguishes between four categories of fences for its fencing policies.

The first category is that of **fences that were erected before the promulgation of the CLRA**. The fenced areas range between 120 ha and 5 000 ha. These were reported to the then MLR North-North West Regional Office in Oshakati on 19 December 2001 by a whistle-blower. In 2003, the Ongandjera TA issued notices requiring the removal of illegal fences erected by 10 fencers, as per section 44 of the CLRA. The fencers challenged the decision of the TA, and on 16 February 2006, they applied through their legal representative to the Omusati Communal Land Board (OMUCLB) for the retention of their fences. They claimed that they had been allocated the land and authorised to fence it by the Ongandjera TA. Upon scrutinising the applications, however, the OMUCLB realised that the applications had not been consented to by the TA. Several communications were issued by the Ongandjera TA in an attempt to clarify its position on the legality of the fences, but to no avail, as the TA members were divided on the matter. Meanwhile, the existence of these fences without legal authorisation as per section 28 of the CLRA has created a precedent that has encouraged other farmers to start fencing land illegally in other areas of the region. Moreover, the existence of these fences continues to be objected to and questioned by other community members who graze in the same areas. The Ongandjera TA is thus under increasing pressure to provide a clear explanation and to give direction as to what should be done with these illegal fences.

It is rumoured that one of the fencers in this category was a top GRN official in the MLR who advised friends and business associates to acquire large tracks of land before the CLRA was enacted. Some of the fenced lands contain GRN-funded and constructed boreholes. The Department of Water Affairs is silent about the way in which GRN resources are said to have been captured, and it does not interfere.

The second category is of **fences that were erected after the promulgation of the CLRA**. The lands that are fenced off are all situated in areas that are designated as communal. These range in size from 70 ha to 300 ha. The areas fall under the Vita TA in Ruacana Constituency. The fences were reported by villagers who grazed their livestock there and complained about reduced access to good grazing land. Since 2010, these cases have been dealt with by the OMUCLB. Following section 44 of the CLRA that specifies that communal lands should not be fenced, the Board ordered fencers to remove their fences. However, they have remained defiant, and the fences remain intact. Some of the fencers reduced the extent of their fenced areas (e.g. from 300 ha to 70 ha or 30 ha) in an attempt to escape legal consequences. They also

wrote to the OMUCLB requesting to be allowed to fence off lands up to 50 ha, which is now the permitted size as per the CLRA. The Board has requested the Vita TA to seek clarity on the land uses of the area. In 2010, the TA informed the OMUCLB that the area is used for grazing and that the area for cultivating and fencing is in Volwater, where communities can till. The matter has still not been resolved, and the Board is said to be closely monitoring the situation.

One of the fencers challenged the decision of the Board by appealing to the Minister. The Appeal Tribunal sat on 28 May 2019. The case is, however, still pending. This particular fencer fenced large tracks of land in the areas designated for communal grazing and in the area where customary land is to be allocated to other Namibian land seekers at Oluhalu in the Uukwaluudhi TA region. He was allocated 16.8 ha in 2013 and went on to expand to 189.11 ha, but without the TA's permission. He allegedly bribed the assistant of the village headman with a sum of N\$1,800.00 (see Annex 2 and Annex 3 for a situational sketch of the case and the corresponding communication between the Board and the lawyers of the fencer). The headman's assistant has no power to allocate land without the headman's knowledge. He managed through bribery to arrange all this because the headman was blind. The headman meanwhile passed away. The extended allocation is not registered in the village books and not reported at the TA's head office. The extension he argued is for his 4 sons and daughters who currently live in Sweden and are adopted by a Swedish national and who carry his surname. This case was reported by Uukwaluudhi TA to the OMUCLB to intervene. This happened after the Board approached all the fencers who have excess land at the village and who are occupying grazing land without permission. The Board investigated in July 2016 and decided he should remove his fences and reduce the fenced area to the original 16.8 ha he had legitimately been allocated by the headman. He was not happy with the Board's decision and appealed to the Minister as per the provisions of the CLRA. The appeal tribunal sat in June 2018 and was postponed and again later to 31 August 2018. The appeal tribunal finally sat again on 28 May 2019 then and the results are not communicated yet. The Board is still in communication with the rest of fencers in this category and MLR expects that these will be removed eventually.

A third category is of **illegally erected fences located in an area designated for agricultural purposes as per section 30(2)–(3) of the CLRA**. The area in question is customarily grazed by members of the Owambo and San communities. The intention of these fencers was to become members of the Project of Communal Land Development Cooperatives, for which the GRN has provided infrastructure consisting of water points and perimeter fences. They hoped that once completed, the fencing would enable them to reap the benefits of GRN investments. They effectively leapfrogged those farmers who had been farming in the area for a long time, and who had already been identified and listed as beneficiaries under this scheme during the planning process (their names are recorded in the Cooperative Registration Documents with the Division of Cooperative Development and Regulation at the

Ministry of Agriculture Water and Forestry. The current fencers were never part of that process, and they are depriving other farmers of their grazing rights and the use of the commonage. The TA and the Land Board are currently notifying the fencers that they are required to remove their fences from the community project areas. A number of cases dealt with at the Appeal Tribunal¹⁷ between 2010 and 2014 concerned appeals against decisions of the relevant institutions requiring the removal of fences that had been erected. In most cases, the appeals were rejected as the fencers had erected fences in zones designated for communal grazing.

The fourth category is that of **fences that were successfully removed, either voluntary or pursuant to a court order**. The communications that are available about voluntary removals show that, as one interviewee commented, “people want to be and are law-abiding people and citizens”. There are seven cases within the Vita TA in Ruacana Constituency where fencers were first served with 30-day notices to remove their illegal fences. This was followed by an awareness-raising meeting on the CLRA held on 25 January 2013, and attended by fencers, the OMUCLB, the Outapi prosecutor, affected TAs, and the Namibian Police. At the end of the meeting, fencers were issued with the final removal notices which informed them that should they fail to comply, the Board would take steps to remove the fences. Three fencers decided after this to voluntarily remove their fences, and notified the Board accordingly in writing.

Four fencers appealed to the Minister of Lands and Resettlement against the Board decision, however, whereupon the Minister appointed a three-member Appeal Tribunal who reviewed the case and dismissed the appeal. The fencers were not happy with the outcome and now appealed against the Minister’s decision to the High Court. The High Court heard the appeal and ordered the fencers to remove their fences as they had not been erected in accordance with the provisions of the CLRA. The court order was issued to the Board on 3rd April 2014 with instructions to remove the fences. While preparing the procedures to remove the fences, the four fencers called the Board’s Secretary at the beginning of October 2014 requesting the Board to allow them to remove the fences themselves. They were informed by the Secretary to put this in writing and channel the communication through the Government Attorney Offices. They did so through their lawyer, indicating that the fences would be removed by 31 December 2014. The Board had no objection and so it allowed the fencers to remove their fences themselves. However, and to the Board’s surprise, the fencers did not adhere to this agreement, and when its representatives visited the area on 2 January 2015, they found that all four fences were still intact, and that there was no indication of even an attempt having been made to remove a single wire or pole.

17 Republic of Namibia, Ministry of Lands and Resettlement & Land, Environment and Development Project of the Legal Assistance Centre, *Appeal Tribunal Cases in Namibia’s Land Reform Process: Record of Decisions 2010–2014*, MLR/LAC, Windhoek, 2014.

The Board wrote to the Attorney General with a brief visit report, indicating that they intended to remove the fences due to the fencers' failure to honour their agreement. The Attorney General agreed and ordered the Board to remove these fences. In March 2015, following an open tender process, the MLR appointed a contractor, and the fences were removed. The costs of the operation were recovered by the sale of the fencing materials.

3 Background to the fencing problem

The fencing problem is complex and multidimensional, and can be viewed from differing perspectives. Various stakeholders such as communal farmers, headmen, chiefs, MLR officials, NGOs, conservancies and businessmen, perceive fencing differently. To unravel the complexity, we situate fences and the act of fencing in the context of, on the one hand, the ongoing processes of the social and material transformation of the communal areas of Namibia; and on the other, vis-à-vis the attempts of the state to maintain the communal areas as a common property resource, thereby preventing the privatisation of the commons.

The transformation of the communal areas is itself multidimensional, and set in motion by a series of state interventions such as land and agrarian reform policies, and programmes aimed at reducing poverty which triggered a neoliberal process of development that gives prominence to the markets as an institution governing the use of resources. These policies, in turn, accommodated new opportunities for some but certainly not all the inhabitants of the communal areas to enhance their livelihoods. The new policies are embedded and governed by a set of institutions (e.g. TAs, communal land boards (CLBs)); it is assumed of such institutions that they possess power and authority over land and resources matters in communal areas and that the interpretation of statutory and customary laws and rights is commonly shared.

The transformations and interventions that occur have winners and losers and have created institutional confusion as authority and power over land and resource issues has gradually but varyingly shifted from TAs to elite and business networks. Fencing implies changing ownership of communal land and makes the owner the de facto sole user of that land. Communal land is, as we have pointed out earlier, increasingly under pressure of privatisation through a process of illegal fencing. Fencing does not allow inclusive development and growth. It deprives others of access to land and the resources it contains, such as water and grass.¹⁸

18 Odendaal, W., *Land Grabbing in Namibia: A Case Study from the Omusati Region, Northern Namibia*, paper presented at the International Conference on Global Land Grabbing, Sussex, 2011; Fowler, M., 'The Current Status and Impact of Fencing in the Communal-Tenure Areas of Northern Namibia', *Agrekon*, Vol. 37, No. 4, 1998, pp. 435–462; Werner, W., *What Has Happened Has Happened: The Complexity of Fencing in Namibia's Communal Areas*, Land, Environment and Development Project, Legal Assistance Centre, Windhoek, 2011.

3.1 Transforming the communal areas “from within”

Residents of communal areas attempt to transform and reshape the areas in which they live. Putting up fences is a further instance of the commoditisation of cattle and natural resources and an attempt to reshape the communal areas. The transformation that occurs regarding land, land use and rights over land exhibits two distinct patterns enacted by two different categories of social actors that inhabit the communal areas, and who can claim rights to communal land. Fencing serves for some to demarcate one's land and to claim usufruct; for others, fencing off land implies claiming ownership (i.e. privatising land ownership) and in effect also claiming land for future use. Some of the social actors may be considered as “commoners” who use the communal areas as a common property resource for their customary practices of cultivating *omahangu* and grazing cattle. Some command substantial societal, financial and political powers and can transform the communal landscape to suit their aspirations and interests. These are “elites” for whom fencing off large tracks of land is part of their material means to reshape the communal landscape and to de facto privatise the land. These elites have the means (e.g. vehicles to scout the area for “empty” land and the political connections and resources to bribe local authorities) that allow them to construct fences illegally. They are in most cases absentee “landowners” who leave the management of cattle to hired herders or farm workers and combine their farm and non-farm capital sources to continue livestock operations.¹⁹ They are seemingly well connected to influential politicians in Windhoek and at the same time maintain good relationships with the local tribal authorities. Before independence, TAs were responsible for granting permission to fence communal land. There is some evidence that, in contrast to the experience of elites, for commoners it was not always so easy to get permission to enclose land. Fencing thus tells us something about power relations between “fencers”, “commoners”, chiefs and headmen.

One can also argue that fencing is part of an environmental strategy by communal landowners. Fencing for them means preventing others from invading community land to access their water and grass resources.²⁰ Such fencing is defended as a response to drought conditions aimed at protecting their resources for the future.

The communal areas have for long been managed and owned collectively. The system of communal tenure ensured that every homestead had access to land.

19 Cox, J., ‘The Research Context’, in Cox, Jonathan, Carol Kerven, Wolfgang Werner & Roy Behnke (eds), *The Privatisation of Rangeland Resources in Namibia: Enclosure in Eastern Oshikoto*, Overseas Development Institute, London, 1998, pp. 8–18; see also Greiner, C., ‘Migration, Translocal Networks and Socio-Economic Stratification in Namibia’, *Africa*, Vol. 81, No. 4, 2011, pp. 606–627.

20 This point is made by C. Twyman, A. Dougill, D. Sporton and D. Thomas in ‘Community Fencing in Open Rangelands: Self-Empowerment in Eastern Namibia’, *Review of African Political Economy*, Vol. 28, No. 87, 2001, pp. 9–26. The extent to which this occurs is unknown and requires scrutiny.

Landowners and users customarily established homesteads and constructed cattle sheds and fields for cultivating *omahangu*. Cattle ownership was rather skewed, forming the basis for social differentiation processes and informal wage labour relations.²¹ Cattle ownership and the distribution of cattle are difficult to measure, partly because of huge variations over time due to drought, and partly also because of a complex loan system whereby “poor” homesteads “own” cattle on loan from relatively “rich” homesteads. Managing the herds occurs individually or collectively in the cattle post system. Smaller and bigger herds are merged and jointly herded. These were usually established in the flood plains, notably during the long dry period from June to December. To conserve precious water and forage resources during the dry period, herdsmen herd the cattle to distant cattle posts outside of the Owambo floodplain until the return of the rains.²² Whereas the homestead areas are restricted in terms of access, the grazing areas are open access areas with no restrictions placed on the movement of people and their cattle, or on game. Fencing restricts this kind of mobility, and it is this loss of mobility that motivates most people who report fencing activities to the headman or the TA.

At the same time, due to the deepening of a commodity economy which is also a result of increasing cross-border trade with Angola since the end of the civil war, new opportunities for generating monetary income emerged which could serve as the basis for further accumulation through investments in cattle, shops, small businesses and acquiring shares in companies. While previously, such accumulation was restricted to seeking opportunities in communal farming,²³ GRN positions (as teachers, etc.) or labour migration to Windhoek or commercial farming areas, communal mining and tourism have since expanded opportunities for collectives and individuals to generate monetary incomes. New business opportunities, investments by Chinese entrepreneurs, trade across borders, and new types of jobs (notably in GRN departments) have fuelled the growth of cities like

21 Werner, W., ‘A Brief History of Land Dispossession in Namibia’, *Journal of Southern African Studies*, Vol. 19, No. 1, 1993, pp. 135–146; see also Clarence-Smith, G. & R. Moorsom, ‘Underdevelopment and Class Formation in Ovamboland, 1845–1915’, *Journal of African History*, Vol. 16, No. 3, 1975, pp. 365–381; Werner, W., ‘What Has Happened Has Happened’: *The Complexity of Fencing in Namibia’s Communal Areas*, Land, Environment and Development Project, Legal Assistance Centre, Windhoek, 2011.

22 Kreike, E., *Re-Creating Eden: Land Use, Environment, and Society in Southern Angola and Northern Namibia*, Heinemann, Portsmouth, 2004; and ‘De-Globalisation and Deforestation in Colonial Africa: Closed Markets, the Cattle Complex, and Environmental Change in North-Central Namibia, 1890–1990’, *Journal of Southern African Studies*, Vol. 35, No. 1, 2009, pp. 81–98. The dry-season cattle-post areas in the 1890s included the Kaokoveld to the west of the floodplain, Etosha Pan to the south and Oshimolo to the northeast.

23 Euphemistically, communal farming is always associated with subsistence farming. Subsistence is analytically an inadequate qualification for portraying the cattle economy in the north-central regions. See for instance Kreike, E., ‘De-Globalisation and Deforestation in Colonial Africa: Closed Markets, the Cattle Complex, and Environmental Change in North-Central Namibia, 1890–1990’, *Journal of Southern African Studies*, Vol. 35, No. 1, 2009, pp. 81–98.

Outapi, Oshakati and Oshikango.²⁴ Moreover, the establishment of a community-based natural resource management (CBNRM) programme²⁵ stimulated a further circulation of money in the communal areas – money that people seek to invest in assets. Land and cattle are important assets forming the basis for two types of development trajectories:

- **Development based on accumulation through commercialising cattle for national and global markets:** Excluding communal farmers and other commoners from productive and well-watered grazing areas is the core of the strategy of the accumulators owning large numbers of cattle.²⁶ Fencing reduces the number of cattle that utilise existing water points.²⁷ Fencing also advances cattle production beyond previously existing levels of production and productivity.
- **Development founded upon a homestead economy:** This is based on local forms of exchange to secure food for the homestead and money for buying food in local supermarkets and for school fees and education. Access to good grazing areas in the dry period as well as government constructed water points is essential for the homestead economy.

These two ideal type trajectories of development occur side by side in the north-central regions and elsewhere in the country. To varying degrees, both trajectories structurally and historically involve straddling positions in the rural economy as land and cattle owners, and in an urban economy in wage labour positions in the region as well as in the capital Windhoek. These two trajectories of development, we argue here, can also be associated with the two distinct patterns of fencing, as well as with two different types of fencers.

24 For a detailed analysis of these processes, see the work of Gregor Dobler: Dobler, G., 'From Scotch Whisky to Chinese Sneakers: International Commodity Flows and New Trade Networks in Oshikango, Namibia', *Africa*, Vol. 78, No. 3, 2008, pp. 410–432; 'Oshikango: The Dynamics of Growth and Regulation in a Namibian Boom Town', *Journal of Southern African Studies*, Vol. 35, No. 1, 2009, pp. 115–131; 'The Green, the Grey and the Blue: A Typology of Cross-Border Trade in Africa', *Journal of Modern African Studies*, Vol. 54, No. 1, 2016, pp. 145–169; and 'China and Namibia, 1990 to 2015: How a New Actor Changes the Dynamics of Political Economy', *Review of African Political Economy*, Vol. 44, No. 153, 2017, pp. 449–465.

25 We will not go into the dynamics generated by the CBNRM programme in the country. For an overview, see for example Nuulimba, K., & J. Taylor, '25 Years of CBNRM in Namibia: A Retrospective on Accomplishments, Contestation and Contemporary Challenges', *Journal of Namibian Studies: History Culture Politics*, Vol. 18, 2015, pp. 89–110.

26 Available data on livestock show that ownership is concentrated in a few hands.

27 Klintonberg, P. & A. Verlinden, 'Water Points and their Influence on Grazing Resources in Central Northern Namibia', *Land Degradation & Development*, Vol. 19, No. 1, 2008, pp. 1–20.

3.2 Government interventions to reform the communal areas

Fencing and the struggle to remove fences should also be situated in the post-independence drive to embrace the communal areas of the country in the land and agrarian reform process and to stimulate processes of social transformation and market-oriented development. The CLRA aims to secure land rights for the communal land user; hence communal farmers, both men and women, are asked to claim their communal and customary rights to land in the process. Securing such rights should provide the inhabitants of the communal area with security of access to key resources, enabling them to participate in the commodity economy and get a fair share of the proceeds from nature. Land and agrarian reforms and the implementation of the CBNRM programme serve to support these objectives.

The CLRA also sets out to jointly maintain the social and physical landscape that shapes customary land use practices and to create opportunities for commoditising land and cattle. The CLRA specifically and intentionally contains a zonation policy to maintain and create space for homestead agriculture (that is keeping cultivation close to the homestead in the villages, and specifically for cultivating *omahangu*). The fencing of fields up to 50 ha is allowed. These are separate from zones for cattle farming, where farmers can either individually manage their cattle or make use of the cattle post system for joint herding. These should remain open access zones where no restrictions on the movement of cattle are in place. The zonation policy also serves to concentrate the supply of services (water, electricity, extension, clinics) close to existing villages. To encourage sustainable land management, the GRN has intensified the construction of water points for cattle. Fencing complicates the implementation of the zonation policy and the maintenance of the customary land use system in the communal areas. This explains why the GRN, notably the MLR with assistance from the CLBs and TAs, is keen to remove the fences.

3.3 Institutional repertoires and fencing

The period leading up to independence in 1990 is characterised by the absence of a clear land policy and the lack of customary land rights in the communal lands of the country. The lack of a legislative framework at the time and the formulation of reform policies provided, and still provide, ample space for fencing communal land illegally,²⁸ in this way subtly reinterpreting customary rights to (grazing) land. Fencing thus occurs in the politico-economic arena where different actor groups (elites, commoners, state bureaucrats and NGOs) operate, collide and struggle with each other on how to organise access to and the use of natural resources like land, grass and water. This unfolding arena is not static – it evolves and is heterogeneous.

28 This point is made by W. Odendaal in 'Elite Land Grabbing in Namibian Communal Areas and its Impact on Subsistence Farmers' Livelihoods', *PLAAS Policy Brief No. 33*, 2011, pp. 1–7.

Not all TAs and CLBs operate in similar ways. More importantly, the CLRA provides the institutions responsible for the management of communal areas and resources with the legal means to remove illegal fences. However, this is not always achieved, as the fencing cases reported below will indicate. This is partly because of the role of the TA is not always clear, because TAs are not always aware of their powers, and because not all members of TAs understand and interpret customary rights to land and fencing in similar ways. On top of that, there are reported disputes over boundaries between TAs.²⁹ For example, the boundary between Ongandjera TA and Uukwambi TA is currently disputed. These disputes and the way some TAs handle cases of illegal fencing create more space for yet more fencing. It can thus also be associated with the problem of the CLRA not being enforced.

Based on the interview we held with Ongandjera TA members, we can unpack the constitution of what we understand as the institutional void. The ongoing disputes mentioned earlier constitute only one aspect of the institutional void. Other key elements, as the Ongandjera TA members admitted, are that it took time for them to understand the law, and the CLRA in particular. They hastened to add, however, that by now they do know what illegal fencing is and how the TA should act. The TA managed to remove around 10 illegal fences in Okaanka and Onanyalala villages and auctioned the material to recover the costs. These are listed in the report sent to the MLR which we consulted. However, other fenced lands are situated in the area over which the Uukwambi TA also claims authority. The removal of these fences was stopped by the office of the Omusati Governor with the assistance of the Namibian Police. The Governor instructed the two TAs to first resolve their dispute, and both were instructed to refrain from allocating any land in the disputed area. In other areas, the TA's decisions to remove fences are contested by the fencers, as they argue that their fences were erected prior to the promulgation of the CLRA. It remains unclear, however, whether, how and from whom the fencers received permission at the time, as the records are unclear. The TA acknowledged that the headmen and headwomen who play a key role in the allocation of land rights, and thus fencing, are not always or equally equipped with the means to administer and monitor fences. They referred to situations where fences are erected in the bush far away from the village and they do not have the resources to monitor the construction. Moreover, the TA admitted that the administration and recording of *ombanduyekaya* (the administrative fees paid to the TA in the north-central regions for land allocation) before and also after the CLRA became law was often incomplete and not transparent. In defence of the TA, some illegal fencers also fenced the land without even informing headmen or head women. The TA is aware that fencers also sell off parts of the land at a later stage, despite the fact that the law prohibits the sale and purchase of communal land.

29 See also Dobler, G., 'Boundary Drawing and the Notion of Territoriality in Pre-Colonial and Early Colonial Ovamboland', *Journal of Namibian Studies: History Politics Culture*, Vol. 3, 2008, pp. 7–30.

One other interesting aspect mentioned by the TA council was that headmen, headwomen and villagers alike have been discouraged from reporting illegal fences because they feel that not much is being done to address their complaints. Fences are not always removed when they submit their reports to the TA, CLB or MLR. It is felt that the responsible authorities are not enforcing the law. They also said that fencers are not afraid of the law and they can do as they wish, as they know it takes long before a fence is removed.

4 Discussion

The bigger picture we argue here is that the state has, perhaps unintentionally, created an institutional space in which the illegal fencing problem can flourish. In this section, we pay specific attention to the fact that the state has created a policy and legal framework for both the contestation of findings and the defence of offences. We also argue that there is a development policy dimension that ensures that the fencing continues to emerge as problematic, creating the basis for ongoing conflict.

A fascinating dimension of the fencing problem that triggers the sociological imagination is that fences can be both contested and defended, both socially and legally. The CLRA, notably in sections 28 and 44, provides the MLR, the CLB's and TAs with the legal means to order offenders to remove the fences. Section 39(1) of the Act also provides that "any person aggrieved by the decision of a Chief or Traditional Authority or any board under this Act, may appeal in the prescribed manner against that decision to an appeal tribunal appointed by the Minister for the purpose of the appeal concerned."

Fencing and the struggle against or in favour of fences thus produces court cases, appeal court cases and legal hearings. The fencing struggles takes place in multiple ways with multiple forms of discourse³⁰ and in multiple sites. The defending occurs mostly in lawyers' offices and courtrooms, with judges interpreting the law and lawyers defending their clients' interests. It can be argued that the defence of fencing is also silently manifest in the floodplains of the communal north, in that individuals, mostly elites of some sort, are simply erecting and extending fences without permission, or circumventing the rules and regulations. There are plenty of rumours of fencers not paying *ombanduyekaya* and of the fees that are paid not being recorded in the books of the TA, as effectively confirmed in the interview with the Ongandjera TA Council. That most fences in the Ongandjera TA report were not known to the MLR office in Outapi and were therefore not recorded in the

30 The notion of discourse classically refers to texts such as policy documents and laws. Policymakers fix their views in policy documents and laws. The CLRA of 2002 is a perfect example. However, we also treat and interpret discourse as a practice (e.g. land use). The practices of land use and the way actors talk about it and act can also be taken as an indication of how they perceive (in different ways) the future of the communal lands. See MacDonald, C., 'The Value of Discourse Analysis as a Methodological Tool for Understanding a Land Reform Program', *Policy Sciences*, Vol. 36, No. 2, 2003, pp. 151–173.

department's GIS (geographic information system) lends support to the rumours. The contestation of the fences also occurs through villagers talking about fencing and pointing out illegal fences, but not taking any action. In some cases, however, the contestation occurs openly. Villagers report illegal fences to their headmen or headwomen; MLR officials measure and document the illegal fences; in various ways, TAs take fencing seriously and take steps to remove them.

The quote at the opening of the chapter signifies a key institutional dimension of the fencing problem in the communal areas of Namibia: they are mostly constructed without the consent of the authorities. Furthermore, in situations where permission has been granted by a headman/woman or a chief, the fenced areas have been gradually enlarged afterwards without any permission having been obtained. On the one hand, because of the flaws in the systems for recording illegal fences, the full extent of the problem is not known. If a fence is not filed in the MLR databases as "illegal", there is unlikely to be any institutional pressure to pursue legal actions to have it removed. On the other hand, the various actions undertaken to have illegal fences removed, and the differing degrees of success such actions have met with, point both to the limitations on the enforceability of the CLRA and to the existence of institutional voids and overlapping spheres of authority.³¹ Not all institutions operate as the CLRA specifies in the endeavour to remove illegal fences, nor are the institutions sufficiently equipped to perform their roles in the removal of fencing. An additional aspect, which may in turn aggravate the existing institutional voids, is that so-called "elites" (e.g. businessmen and people with good political connections in Windhoek or with the TA) are among the illegal fencers. The TA stated in communications with us that they are sometimes threatened by fencers who send letters written by their lawyers. This also signifies the kinds of sensitivity fencing and fencers generate.

Ribot³² and Bierschenk and Olivier de Sardan³³ argued that many states in Africa have transferred or shifted authority from the central state to local bodies and institutions of governance and given these a pivotal role in land governance (e.g. the TAs and CLBs in Namibia), but have failed to set up adequate institutional infrastructure that is required for local institutions to deal with land issues

31 See the work of Bierschenk, T. & J.P. Olivier de Sardan, 'Local Powers and a Distant State in Rural Central African Republic', *Journal of Modern African Studies*, Vol. 35, No. 3, 1997, pp. 441–468; and Bierschenk, T., 'Powers in the Village: Rural Benin between Democratisation and Decentralisation', *Africa: Journal of the International African Institute*, Vol. 73, No. 2, 2003, pp. 145–173.

32 Ribot, J., 'Democratic Decentralisation of Natural Resources: Institutional Choice and Discretionary Power Transfers in Sub-Saharan Africa', *Public Administration and Development*, Vol. 23, No. 1, 2003, pp. 53–65; and Ribot, J.C., *Waiting for Democracy: The Politics of Choice in Natural Resource Decentralization*, World Resources Institute, Washington D.C., 2004.

33 Bierschenk, T. & J.P. Olivier de Sardan, 'Local Powers and a Distant State in Rural Central African Republic', *Journal of Modern African Studies*, Vol. 35, No. 3, 1997; Bierschenk, T., 'Powers in the Village: Rural Benin between Democratisation and Decentralisation', *Africa: Journal of the International African Institute*, Vol. 73, No. 2, 2003, pp. 145–173.

(for example allocating land and settling land disputes). This makes it difficult for institutions dealing with matters associated with land to react adequately to the claims and disputes brought forward by the various actors involved. The resulting ambiguity creates room for manoeuvre, especially for those that have the means, technically and financially, to devise extra-legal strategies to gain access to resources and de facto ownership through the exclusion of others. The fencing problem in Namibia attests to this.

Erecting fences and the social struggle against fences represent diametrically opposed institutionalised and entrenched views and interpretations about how to use land and other natural resources. Netz³⁴ and Razac³⁵ associate fences and fencing (or the extension of barbed wire in the landscape) with the tensions that unfold when modernity spreads. Fences stand for both the enclosing or demarcating of land and the controlling (i.e. restricting or managing) of mobility and the space of human and non-human actors. The wider southern African region has since the times of colonial expansion been the stage of the construction of fences in what were then communally owned and managed territories.³⁶ Their construction and expansion generated violence and conflict between and amongst human actors regarding the interpretation of what constitutes modernity for the communal lands which we previously associated with two distinct, co-existing development trajectories: accumulation, and homestead production. The potential conflict between these two futures of the commons profoundly involves many social actors. In Namibia these include various categories of cattle owners, local San communities, conservancy members, GRN departments and officials, and NGOs. The control exerted over space through fencing is at the forefront of the fencing problem, and encompasses the clash between different forms, interpretations and means of bringing about modernity and development in the northern communal areas, and Namibia at large. The fencing off of parts of the commons is evidence that social exclusion also occurs in collective systems and not only in systems where property is regulated by private, state or associative relations.³⁷ In essence, the fencing-related court cases initiated by the enforcement of the CLRA are about the questions: “Whose modernity counts?” Whose future is deemed to be more important in the communal areas?³⁸ Is it the future of the fencers, whether elite

34 See Netz, R., *Barbed Wire: An Ecology of Modernity*, Wesleyan University Press, Middletown, Connecticut, 2004.

35 Razac, O., *Barbed Wire*, New Press, New York and London, 2002.

36 See for example van Sittert, L., ‘Holding the Line: The Rural Enclosure Movement in the Cape Colony, C.1865–1910’, *Journal of African History*, Vol. 43, No. 1, 2002, pp. 95–118.

37 For a summary of the debate see Shucksmith, M., ‘Class, Power and Inequality in Rural Areas: Beyond Social Exclusion?’, *Sociologia Ruralis*, Vol. 52, No. 4, 2012, pp. 377–397.

38 The making of modernity or the mutation of modernity is well elaborated and problematised by Alberto Arce and Norman Long in ‘Reconfiguring Modernity and Development from an Anthropological Perspective’, in Arce, Alberto & Norman Long (eds), *Anthropology, Development and Modernities: Exploring Discourses, Counter-Tendencies and Violence*, Routledge, London, 2000,

or commoners; or of those that struggle against fences; or of those from the MLR and related GRN institutions and ministries that formulate policy documents and interventions advancing their visions regarding the future of the communal lands? The overarching question, then, is whose modernity counts.³⁹ Fencing only further complicates that question.

5 Conclusion

The fencing problem has multiple dimensions. It embodies the problem of overlapping and conflicting spheres of authority, power relations and the capture of resources by elites, and multiple legal contexts in the communal areas. These are the by-products of the creation of new institutions following the decentralisation of resource management after independence to local and regional institutions such as the CLBs, TAs and regional MLR offices, but also a private business network strategically associating itself with the state. The fencing brings to the fore the ambiguities that neo-liberalism generates. State policies generate both spaces for social inclusion and the protection of (land) rights through the promulgation of the CLRA. The CLRA, combined with agricultural support for the further commoditisation of the (rural) economy simultaneously creates spaces for elites to emerge and to invest in land and related resources for accumulation, often at the expense of others. This is a global trend. Besides, the question of how to interpret customary laws about land and usufruct and whose interpretations are taken as a guide for solving the fencing problem emerge as key political questions in post-colonial Namibia. The fencing question will endure as long as the institutional void exists. It is good to have good laws, but if these are subject to inconsistent interpretation and can be manipulated in many ways, illegal fencing will remain an intractable problem.

The fencing question raises an additional issue that requires further consideration and elaboration. Fencing, we feel, challenges the optimistic view on land management that communal farmers (i.e. herders, agriculturalists, natural resource harvesters, fisherfolk) are rational resource users that design ways to sustainably exploit and maintain their common property resources. The conflict and struggles that fences generate is at least evidence of the uncertain future of the communal lands, and raises the question of whether they should be managed collectively or privately for purposes of production, grazing and conservation. It may also be that a combination of collective and private management defines the future of the communal lands, although such systems are not always so easily combined.

pp. 1–31. See also Hebinck, P., L. Bosma & G.J. Veldwisch, 'Petrol Pumps and the Making of Modernity Along the Shores of Lake Victoria, Kenya', *Water Alternatives*, Vol. 12, No. 1, 2019, pp. 13–29.

39 Here we paraphrase Chambers, R., *Whose Reality Counts? Putting the First Last*, Intermediate Technology Publications, London, 1997.

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Land and resource rights in the Tsumkwe Conservancies – Nyae Nyae and Nǃa Jaqna

Jennifer Hays and Robert Hitchcock

1 Introduction

Nyae Nyae Conservancy and Nǃa Jaqna Conservancy in Tsumkwe Constituency of northeast Namibia are the home of some of the best-known, and simultaneously some of the most marginalised, communities in the country. The whole of Tsumkwe Constituency, situated in what is today known as Otjozondjupa Region, corresponds with the former homeland “Bushmanland” established in 1969 under the apartheid system of South West Africa, and is today the constituency with the highest concentration of San in Namibia. The majority of the residents of both Tsumkwe East (which largely comprises Nyae Nyae Conservancy) and Tsumkwe West (most of which is part of Nǃa Jaqna Conservancy) are San. They are the largest San-majority conservancies in the country,¹ but the demographic composition of the two areas differs in some important ways, as will be outlined in the following sections.

As conservancy members, the San communities living in these two areas have rights over the wildlife resources in their areas, and community forest designations also give them rights over plant resources. Both communities also have political representation in the form of a Traditional Authority (TA), which in combination with their conservancy and community forest status provides a level of recognition by and access to the national government that most other San do not have. Both conservancies today have the support of a well-funded organisation that has been

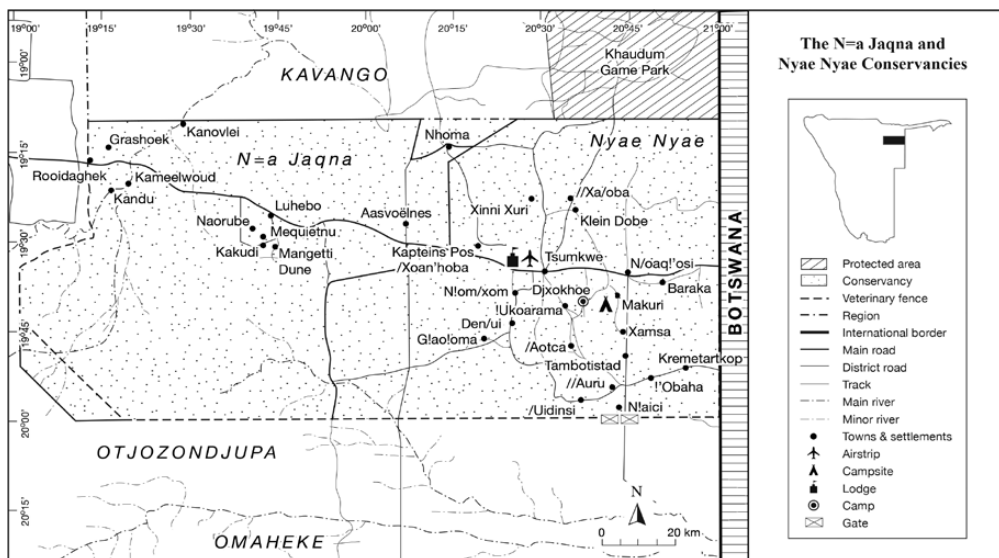
1 Technically these two are the only San-majority conservancies in the country. However, the Kyaramacan Association in Bwabwata National Park has a majority of Khwe San members and is run like a conservancy.

operating continuously for decades, and that assists the communities with financial, political and legal advice, and logistical support.

Because of the relative advantages that both of these communities have in comparison to other San groups, there is a tendency to consider them as well-off. While it may be true that they have resource rights, political recognition, donor support and opportunities that other San communities do not have, in all of these areas they still fall far short of what *all* Namibian communities have a right to, according to the Namibian Constitution and policy. In addition, these rights are by no means secure, and are currently under threat from many directions.

In this chapter we outline the current situations for both the Nyae Nyae and N=ǀa Jaqna conservancy communities, with emphasis on the rights to land and resources that they do have, the ways in which they have been able to defend these rights and to access resources, and the ways in which their rights are continuously being violated. In the next section, we highlight current legislation – in particular that relating to communal land and conservancies, community forests, and traditional authorities – and the ways in which these two San-majority conservancies are affected by these policies and laws.

In sections 3 and 4, we briefly outline the ethnic composition of each area and their recent history. We also describe the current situation in both conservancies, their legal status within the nation, and their traditional leadership and land management practices and how these relate to the contemporary status of the conservancies. Both conservancies are currently facing serious threats to their land and autonomy, and they both have cases before the High Court. In each section, we will describe these cases that are currently under negotiation, and their implications for the communities.



A key point already alluded to must be emphasised and kept in mind throughout this chapter: Although these communities are often portrayed as fortunate, and in some cases even as “spoiled”,² in fact very many of their human rights are far from being fulfilled. The supposed advantages that these communities have should be seen instead as a baseline for what all communities have a right to. In addition, much more attention should be given to ensuring that their constitutional rights are met. At the end of the chapter we make recommendations aimed at ensuring equity, social justice and human rights for all people in both conservancies.

2 Tsumkwe Constituency context

At the 1991 Conference on Land Reform and the Land Question held in Windhoek a year after independence, a three-minute speech by Ju|’hoan spokesperson Tsamkxao #Oma on the importance of the Ju|’hoan land management system received a standing ovation. As #Oma put it, the Ju|’hoansi placed social relationships among themselves at the heart of their economic lives, which were tied to the land: “our old people long ago worked hard talking together to decide how to share resources.” Using the term *n!ore* (plural *n!oresi*,) meaning an area over which local people have rights of access and resource use (see section 3), he described their system of land rights, responsibilities and inheritance:

My mother said: ‘This is my father’s father’s father’s *n!ore*, and I hold rights in it, and so through me do you.’ So it is with my people ... A *n!ore* has a responsible person, who holds the rights in it for everyone else who has rights there. Up to now, we had been holding our *n!oresi* in this way, not sharing with a government our say over the land.³

In essence, the Ju|’hoansi had long-standing ties to their land, which they asked that the Government of the Republic of Namibia (GRN) recognise. In 1991, following the successful defence of their territory from pastoralists who were trying to move in, the then President of Namibia, Sam Nujoma, visited Tsumkwe. Nujoma said then that the Ju|’hoansi were the “owners” of their land.⁴ The Ju|’hoansi understood Namibia’s first president to be confirming their inherent land rights in Nyae Nyae.

The Tsumkwe district plays an important role in Namibia’s national imagination, as well as the country’s approach to land rights. As former “Bushmanland”, it is the area most closely associated with the San – who are simultaneously seen both as a source of pride, and as problematic. They are recognised as the first inhabitants of the region and as an important part of history, and they are part of Namibia’s

2 This is an adjective that both authors have frequently heard used in reference to these conservancies.

3 Bieseke, Megan & Robert K. Hitchcock, *The Ju|’hoan San of Nyae Nyae and Namibian Independence: Development, Democracy, and Indigenous Voices in Southern Africa* (Paperback Edition), Berghahn Books, London, New York and Oxford, 2013, pp. 28–30.

4 Ibid., p. xxvii.

self-representation, especially in the tourism industry. This recognition does not necessarily translate into respect for their traditional culture or land use strategies, however, and these are often seen as being backward.⁵ Nevertheless, they are also important in the history of community-based natural resource management (CBNRM), an innovative approach integrating community development and conservation that was pioneered in Namibia – with some of the first projects in Tsumkwe Constituency – and that has become a signature development strategy of the country.

This section will briefly highlight the context in which both conservancies are operating today, noting both similarities and differences between the two. In addition to being communal conservancies, both have designated community forests covering all or part of their areas, and both have a TA that corresponds to their respective conservancy areas. Both are also specifically supported by the Nyae Nyae Development Foundation of Namibia (NNDNF), which has a long and uninterrupted history of targeted support in this part of Namibia.⁶ Each of these elements is highlighted below. Key differences, for example in ethnic composition and historical occupation of the area, conservancy regulations, and the TA, are noted where relevant, and described in more detail in the sections that follow.

2.1 People, history and environment

The Tsumkwe district is in the northwest part of the Kalahari desert of southern Africa, one of the major desert systems of Africa. For hundreds of years at least this region has been inhabited by San communities of mobile hunters and gatherers who moved from one residential location to another between five and 15 times a year, depending on the availability of water, plants and wildlife resources.⁷ The name *Nyae Nyae* comes from the Ju|'hoan word *N//oaq!'ae*, which means “area of broken rocks.”

The northern Kalahari is semi-arid and supports what is classified as tree-bush savanna.⁸ Soils are sandy, with pockets of black cotton soil and outcrops of calcrete. Geomorphological features include undulating savannas and grassland areas, linear sand dunes fixed with vegetation, and fossilised river valleys.⁹ There are also

5 See also Hays, Jennifer, *Owners of Learning: The Nyae Nyae Village Schools Over Twenty-Five Years*, Basler Afrika Bibliographien, Basel, 2016.

6 Cole, Dave, *Water, Land and a Voice: the Nyae Nyae Development Foundation of Namibia, 36 Years of Support to the Ju|'hoan San Living in Namibia*, Nyae Nyae Development Foundation of Namibia, Windhoek, 2018.

7 Marshall, Lorna, *The !Kung of Nyae Nyae*, Harvard University Press, Cambridge, 1976; Yellen, John E. & Richard B. Lee, ‘The Dobe-Du/Da Environment: Background to a Hunting and Gathering Way of Life’, in Richard B. Lee & Irvén DeVore (eds), *Kalahari Hunter Gatherers: Studies of the !Kung San and Their Neighbors*, Harvard University Press, Cambridge, 1976, pp. 27–46.

8 Thomas, David S.G. & Paul A. Shaw, *The Kalahari Environment*, Cambridge University Press, Cambridge, pp. 99–105.

9 (Marshall 1976); Yellen, John E. & Richard B. Lee, ‘The Dobe-Du/Da Environment: Background to a Hunting and Gathering Way of Life’, in Richard B. Lee & Irvén DeVore (eds), *Kalahari Hunter Gatherers: Studies of the !Kung San and Their Neighbors*, Harvard University Press, Cambridge, 1976, pp. 27–46.

important physiographic features known as pans, low-lying playa-like areas that have clay bottoms where water accumulates after rains. These pans were important to the adaptations of both animal and human populations, serving as sources of water, minerals and nutrients, and utilised for hunting and resource collection purposes. The Omatako Valley on the west side of Nǃa Jaqna is a fossilised river valley where water flows occasionally, especially after rains. Rainfall varies, with an average of 400 mm per annum at Tsumkwe. Droughts are common, occurring on average every two years in five.¹⁰ In 2018 and 2019, Namibia saw the height of its worst drought in nearly four decades and one of the worst recorded droughts in the country's history, which affected both conservancies severely.

The Ju|'hoansi and !Kung, two of the main San groups that reside in the area, have a lengthy history and prehistory in the area. A large body of evidence indicates that Ju|'hoansi and !Kung resided in this region in relative isolation for many generations, with archaeological, linguistic and genetic evidence as well as oral traditions indicating that they are directly connected to hunter-gatherers who have been living in the region for millennia. Archaeological and genetics records indicate that they have links going back at least 20 000 years, and possibly much farther.¹¹ In the past two thousand years, other groups with agro-pastoral backgrounds have moved into the region and begun interacting with local hunting and gathering populations.

In 1959, the town of Tsumkwe, in the eastern side of the district, was established as an administrative centre by the South West African administration.¹² In 1964 the area now known as Tsumkwe Constituency was designated as *Bushmanland* under the Odendaal Commission, and the South West African administration began moving San from other parts of the country to the western side. In the 1970s and 1980s, military posts were established throughout the area as part of efforts to ensure military security against the South West Africa People's Organisation (SWAPO), who were fighting a war for independence.¹³ Beginning in the late 1970s, !Kung, Khwe, !Xun and Ju|'hoansi San were employed by the South African Defence Force and the South West African Territorial Force, mainly as trackers and military

10 Meteorological Service Division, 'An overview of Rainfall Performance and Drought occurrences in Namibia', Windhoek, 2013.

11 Kinahan, John, 'From the Beginning: The Archaeological Evidence', in Wallace, Marion (ed.), *A History of Namibia: From the Beginning to 1990*, Hurst & Co., London, 2011, pp. 15–43; Kinahan, John & Jill H.A. Kinahan, *An Archaeological Survey of Tsumkwe District, Namibia*, Report to the South West Africa Department of Agriculture and Nature Conservation, Department of Agriculture and Nature Conservation, Windhoek, 1984.

12 (Marshall 1976: 60–61)

13 Marshall, John & Claire Ritchie, 'Where Are the Ju/Wasi of Nyae Nyae? Changes in a Bushman Society: 1958–1981', *Communications No. 9*, Center for African Area Studies, University of Cape Town, Cape Town, 1984; Marshall, John, *A Kalahari Family* (film), Documentary Educational Resources, Watertown, 2003; Hitchcock, Robert K., 'Refugees, Resettlement, and Land and Resource Conflicts: The Politics of Identity among !Xun and Khwe San of Northeastern Namibia', *African Study Monographs*, 33(2), 2012.

personnel (some of the people in Tsumkwe District joined the military forces of SWAPO). The social and economic effects of this occupancy and their participation in the military were devastating,¹⁴ and the residual effects of the military presence in Nyae Nyae and (especially) in Nǃa Jaqna continue to be felt today.

In the run-up to independence in March, 1990, the San of Tsumkwe Constituency took part in numerous local, regional and national meetings regarding land and political representation.¹⁵ This participation laid the groundwork for their future classification as conservancies.

2.2 Conservancies and legislation

Both conservancies have special status within the country. Nyae Nyae was the first conservancy established under the Living in a Finite Environment (LIFE) programme, a USAID programme implemented by the US-based World Wildlife Fund in 1998. Nǃa Jaqna, established in 2003, is still the largest conservancy in the country. They are in many ways two of the most successful conservancies in Namibia from a financial standpoint (see Table 1).

Table 1: Nyae Nyae and Nǃa Jaqna Conservancy data

	Nyae Nyae	Nǃa Jaqna	
Conservancy area	8 992 km ²	9 120 km ²	
Community Forest area	8 992 km ²	Nǃa Jaqna	8 253 km ²
		M'kata	867 km ²
Year established	1998	2003	
Number of villages	38	26	
Number of people	2 700	7 000	
Conservancy members	1 450	2 000	
Main ethnic identity of members	Vast majority Ju/'hoansi (San)	!Kung, !Xun, Khwe, Hai om and Ju/'hoansi; some Kavango and Herero	
Earnings in 2018	N\$ 7 million	N\$ 1.5 million	
Traditional authority	Ju/'hoan TA (est. 1998)	!Kung Traditional Authority (est. 1998)	
District capital	Tsumkwe (pop. ca. 2 000)	Tsumkwe (pop. ca. 2 000)	

14 Marshall, John & Claire Ritchie, 'Where Are the Ju/Wasi of Nyae Nyae? Changes in a Bushman Society: 1958–1981', *Communications No. 9*, Center for African Area Studies, University of Cape Town, Cape Town, 1984; Lee, Richard B., 'Indigenism and Its Discontents' in Max Kirsch (ed.), *Inclusion and Exclusion in the Global Arena*, Routledge, New York, 2007, pp. 129–60; Hitchcock, Robert K., 'The Impacts of Conservation and Militarization on Indigenous Peoples: A Southern African San Perspective', *Human Nature*, 30(1), 2019.

15 Bieseke, Megan & Robert K. Hitchcock, *The Ju/'hoan San of Nyae Nyae and Namibian Independence: Development, Democracy, and Indigenous Voices in Southern Africa* (Paperback Edition), Berghahn Books, London, New York and Oxford, 2013.

Under present legislation, the State has a duty to keep all communal land in trust for the benefit of the traditional communities living in those areas,¹⁶ but conservancies have the right to manage and use the wildlife within its boundaries, in consultation with the Ministry of Environment and Tourism (MET) under the Nature Conservation Amendment Act (No. 5 of 1996).¹⁷ This Act regulates the right of designated communities to use and manage wildlife resources.

The ways that communal conservancies define wildlife use and management, together with the MET, can vary depending on the community's traditions and preferences, and the resources available on the land. A significant difference between the two conservancies described here, for example, is that in Nyae Nyae members have the right to engage in subsistence hunting, while in Nǃa Jaqna they do not. The only area of Nǃa Jaqna where community members have the right to hunt using traditional weapons is in Grashoek, where they have a Living Museum¹⁸ and are allowed to demonstrate hunting techniques for tourists, and to keep the animals that they obtain (see Table 2 on the next page for a comparison of hunting rules in the Nyae Nyae Conservancy and the Nǃa Jaqna Conservancy).

Both conservancies also have the right to grant two-year concessions to professional trophy hunters. These hunters bring clients to shoot big game animals, with quotas again decided in conjunction with the MET. These ventures are economically important to both communities at many levels. The conservancies receive a large sum for each animal hunted; the meat is distributed to communities on a rotating basis; and individuals are employed by the professional hunters as trackers and in other service positions.

The Communal Land Reform Act (No. 5 of 2002) provides for the allocation of rights in respect of communal land, and the establishment of communal land boards under the Ministry of Land Reform; it also provides for the powers of chiefs and TAs (see below) in relation to communal land, and regards conservancies as an integral part of Namibia's CBNRM programme.¹⁹

16 See for example section 17 of the Communal Land Reform Act.

17 Republic of Namibia, Nature Conservation Amendment Act (No. 5 of 1996), Government of the Republic of Namibia, Windhoek.

18 Living Museums, supported by the Living Culture Foundation, are community-run projects designed to present local traditional culture to interested visitors: <https://www.lcfn.info/>. There are two Living Museums in Tsumkwe District: the Ju'hoansi Museum in Grashoek (Nǃa Jaqna), established in 2004, and the Little Hunter's Museum in ||Xa|hoba (Nyae Nyae), established in 2010.

19 See for example the provision under section 31(4) of the Communal Land Reform Act (No. 5 of 2002): "Before granting a right of leasehold in terms of subsection (1) in respect of land which is wholly or partly situated in an area which has been declared a conservancy in terms of section 24A of the Nature Conservation Ordinance, 1975 (Ordinance No. 4 of 1975), a board must have due regard to any management and utilization plan framed by the conservancy committee concerned in relation to that conservancy, and such board may not grant the right of leasehold if the purpose for which the land in question is proposed to be used under such right would defeat the objects of such management and utilization plan."

Table 2: Comparison of hunting rules, natural resource management and utilisation strategies in Nyae Nyae and N#á Jaqna

Tsumkwe District East (Nyae Nyae)	Tsumkwe District West (N#á Jaqna)
Subsistence hunting allowed	Not allowed to hunt (except in Grashoek)
Use of traditional weapons, including bows and arrows with poison	No use of traditional or modern weapons allowed
Can use traditional snares	No snares or traps allowed
Cannot use dogs to assist in hunting	Cannot use dogs to assist in hunting
No mounted hunting allowed (horses, donkeys)	No mounted hunting allowed (horses, donkeys)
Ambush hunting is allowed	Ambush hunting is not allowed
Limits on types of animals to be hunted	Limits on all animals – no hunting (except Grashoek)
There are quotas for “own-use” subsistence hunting, for safari hunting and for the TA	Quota set by the MET; MET obtains meat for the villages
Some safari hunting done by a concession holder (SMJ Safaris)	Some safari hunting done with a concession holder (Peter Thormalen Trophy Hunting)
No shooting of predators by local people; problem animal control by MET	Problem animal (predator) control done by the MET
Resource management by Nyae Nyae Conservancy and local <i>n!ore kxaosi</i> (Ju ’hoan territorial overseers)	Resource management by N#á Jaqna Conservancy members at the village level and traditional leaders and managers
Tourism encouraged, done in conjunction with communities and the Conservancy Management Committee; 2 community campsites; Little Hunters Museum at Ao oba provides funds to the Nyae Nyae Conservancy	Tourism encouraged; the Living Museum of the Ju ’hoansi San, Grashoek and local-level involvement in tourism, some returns from a private lodge in the Nhoma area

Note: Data obtained from the N#á Jaqna and Nyae Nyae conservancy management committees, the NNDFN, the Living Culture Foundation of Namibia, the MET, and fieldwork

Although having the right to use and manage wildlife resources is critical for both communities, there are challenging aspects. Keeping close track of animal numbers is necessary for broad decision-making about management, and this is a complex task. Exercises such as the full moon counts of wildlife, conducted once a year in the Nyae Nyae region by the MET, and monitoring of water point usage by wild animals in Nyae Nyae have provided important data,²⁰ and since 2017 the US-based World Wildlife Fund has also assisted Nyae Nyae Conservancy to conduct ground transect counts of wildlife (see also section 3 of this chapter).

20 Rispel, Melanie & Selma Lendelvo, ‘The Utilization of Water Points by Wildlife Species in Nyae Nyae Conservancy, Namibia’, *Environment and Natural Resources Research*, 6(4), Namibia, 2016, 91–103.

Although wildlife is an important income resource in both conservancies, they also express a desire to keep limited numbers of domestic livestock and to practise gardening and small-scale agriculture. Determining the balance between farming and wildlife management has proven to be challenging, for a number of reasons (see also sections 3 and 4). Human–wildlife conflict includes threats to people and their livestock (including the destruction of gardens and waterholes), and this has been widely reported in both Nyae Nyae and Nꞑa Jaqna. In Nyae Nyae, for example, when people began keeping livestock in the early 1980s, predators frequently took their livestock. This is less of a problem today due to better management and assistance, but water points and gardens are still often damaged or destroyed by elephants (see also section 2.5 on support organisations). Occasionally, people are also killed by wild animals. Despite these challenges, residents interviewed by the authors and others in recent years express a strong desire to maintain wildlife management as a central focus of their conservancy subsistence plan, alongside the small-scale cultivation of crops and rearing of domestic animals.²¹

2.3 Community forests

Both areas have community forests, as defined under the Forest Act (No.12 of 2001) and the Forest Amendment Act (No. 13 of 2005).²² They are overseen by the Ministry of Agriculture, Water and Forestry (MAWF). The Nyae Nyae Community Forest, which was established in 2013, has the same boundaries as the Nyae Nyae Conservancy. Nꞑa Jaqna has two community forests: the M’Kata Community Forest (established in 2000) and the Nꞑa Jaqna Conservancy Community Forest (established in 2018; see Table 1 for specific data). The 2015 Forest Regulations allow for the people in designated community forests to be able to make decisions about using plant resources for wood (including for fuel and timber), food, medicinal purposes and grazing.²³

Because community forests fall under the MAWF, while conservancies fall under the MET, in theory this designation should provide an additional level of GRN support (see section 2.5 on support organisations for a discussion of the implications in practice).

21 See also Hays, Jennifer, Maarit Thiem & Brian Jones, ‘Otjozondjupa Region’ in *“Scraping the Pot”: San in Namibia Two Decades After Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, 2014, pp. 93–172.

22 Republic of Namibia, Forest Act (No. 12 of 2001), Government of the Republic of Namibia, Windhoek, 2001; Republic of Namibia, Forest Amendment Act (No. 13 of 2005), Government of the Republic of Namibia, Windhoek, 2005.

23 Ministry of Agriculture, Water and Forestry, Community Forest Guidelines, Windhoek, 2005; Hazam, John, *Conservancies, Community Forests, and Land Issues from a Legal Perspective: Constraints and Opportunities*, Legal Assistance Centre, Windhoek, 2017.

2.4 Traditional authority and leadership

The Traditional Authorities Act (No. 25 of 2000)²⁴ under the Ministry of Urban and Rural Development (MURD) allows a “traditional community”²⁵ to designate a TA in accordance with customary law. This body includes a “chief or head” and traditional councillors.²⁶ A traditional authority can make decisions about civil cases according to customary law, as long as it does not contradict the Constitution of the Republic of Namibia. Furthermore, as noted above, chiefs and the TA are part of the decision-making process regarding communal lands and conservancies, with the communal land boards having the ultimate authority.

Today, five San TAs in Namibia have been accorded GRN recognition; of these, two are the leaders of the Nyae Nyae and Nǃa Jaqna communities, which were also the first two San TAs to be appointed, both in 1998. During the first round of applications for TA status, none of the San who applied were approved – mainly due to the misunderstanding that their “egalitarian” social organisation meant they had no leadership structures at all (see paragraph below). Following a formal complaint and reconsideration, however, both Nyae Nyae and Nǃa Jaqna were officially recognised. The NNDFN attributes this to the fact that both communities had retained a portion of their traditional land base.²⁷ The Nyae Nyae chief has remained in this position since 1998, and his position is not disputed within the community. In Nǃa Jaqna there is more conflict around this role. The chief elected in 1998 died in a car accident in 2012, and there is controversy around the inheritance of the position by his daughter, Gloney Arnold. Issues confronting both of these chiefs and the TA will be described in sections 3 and 4 of this chapter.

Misperceptions about the nature of leadership and land tenure among San groups can undermine their efforts to gain representation and a voice in the Namibian political system, and to maintain land tenure, and here we would like to highlight some general difficulties for San leaders that affect both of these TAs and their chiefs. Although the characterisation of San social organisation as egalitarian is accurate, this does not mean that there are no authority structures. Different groups have their own systems of land tenure and stewardship and recognise individuals as leaders. In the Ju|’hoansi language, there is a word for “leader”: *//aiha*. In the case of Nyae Nyae, for example, the former *//aiha* for Gautscha, the village in the centre of the area which was most active politically, was the father of the present chief in Nyae Nyae. The continuity between traditional leadership structures and the current TA is an important aspect of its legitimacy.

24 Republic of Namibia, Traditional Authorities Act (No. 25 of 2000), Government of the Republic of Namibia, Windhoek, 2000.

25 Understood to be an entity sharing a common language, culture and heritage. To be a part of a community, one has to (a) self-identify with and (b) be accepted by the rest of the community.

26 (Republic of Namibia 2000)

27 (Cole 2018)

Equally important to point out, however is that traditional San leadership styles are different from what is often recognised as such in hierarchical social systems. Like many San groups (and other small-scale hunter-gatherer societies worldwide), the politics of the Ju|'hoansi, !Kung and other San groups were historically based on consensus, and resource distribution systems were based on sharing. Leaders were individuals who had substantial knowledge of their areas (in Ju|'hoansi they were called *n!ore kxaosi*), and who could facilitate consensus and ensure fair sharing among their family group. Leadership qualities that were reinforced at the community level consisted of self-effacing behaviour, possession of historical and social knowledge, notable abilities to resolve conflicts between individuals or groups, and willingness to share goods and services. Although such qualities are still valued today in a leader among San communities, they are not always ideal in modern leadership positions.

For example, as with many small-scale egalitarian societies, a reluctance to impose one's own will on others, or to speak on behalf of others, are deep cultural values that can pose difficulties for modern San leaders, who are expected to do both of these things as national representatives of their communities. Furthermore, pressure exerted by family members to share access to resources, while adaptive at a small group level, can easily lead to actions that are viewed as highly unfair – or even corrupt – when a leader is responsible for much larger groups of people (though it is important to note that recognising the boundaries between responsibility to family and corruption creates problems for many leaders, not only those of the San). These contradictory expectations are at the root of many issues facing San communities and their leaders today, and they affect decision-making processes around land. Nonetheless, community members in both Nyae Nyae and Nǃa Jaqna consistently assert that the representation at the national level is critical for their communities.

The highest-ranking San politician in Namibia is Royal Johan Kxao |Ui|o|oo (known locally as Kxao Royal), a Ju|'hoan who started out in Tsumkwe as a teacher and who was appointed by the ruling party SWAPO as a member of parliament in 2005. Since 2015 he has been the Deputy Minister of Marginalized Communities, directly under the Office of the Vice President. Although he is not representing any specific San community, Kxao Royal does face many of the challenges noted above, especially in relation to his home community in Nyae Nyae.

Both the Nyae Nyae and Nǃa Jaqna communities, like other San groups in southern Africa, are thus negotiating a dramatic transition in leadership requirements (among other transitions). Recognition of and support for such processes is critical for their effective political participation and decision-making processes.

2.5 Support organisations

Both conservancies receive support from organisations like the Legal Assistance Centre, which supports San communities nationally by providing legal advice and representation; the Namibian Association of CBNRM Support Organisations, which

supports conservancies; and previously, the Working Group of Indigenous Minorities in Southern Africa (WIMSA), a regional organisation which was an advocacy and support group for San communities in the southern African region. The Division for Marginalised Communities, under the Office of the Vice President, also has a major focus on San communities in the country including those in Nyae Nyae and Nǃa Jaqna.

Both Nyae Nyae and Nǃa Jaqna receive important support from the NNDFN, an NGO whose primary function is to assist these conservancies with their economic, political and social processes. The organisation grew out of the development-oriented work of anthropologists John Marshall and Claire Ritchie, beginning in 1981. They sought to support the Ju|'hoan communities in Nyae Nyae who wished to move out of the town of Tsumkwe, which had become known as the “place of death” due to severe food shortages and alcoholism during the 1960s and 1970s.²⁸ To support the communities’ move back to their own land (*n!oresi*), Marshall and Ritchie established a Cattle Fund to assist people with small-scale agricultural projects, and provided seeds, livestock, tools, water and technical advice to the Ju|'hoansi.²⁹ This fund was called the Ju/wa Bushman Development Fund for a few years before being renamed as the Nyae Nyae Development Fund.³⁰ Since that time the NNDFN has undertaken a wide variety of development and capacity-building activities in Nyae Nyae.³¹

The Nǃa Jaqna communities have had far less NGO assistance. Most of the support for these communities in the past came from the GRN, the Evangelical Lutheran Church of Namibia and WIMSA, which was the main funder of Nǃa Jaqna from c. 1995 to 2005.³² In 2010 the NNDFN officially added support for Nǃa Jaqna to its mandate.

Based in Windhoek and with international financial support, the NNDFN has for decades played a critical role in facilitating negotiations between communities in the Tsumkwe constituency and decision-makers in the capital. The organisation also alerts national media about current issues in the conservancies, ensuring that the challenges confronting a marginalised group in a remote area are made visible to the general public. The NNDFN also attends national meetings on CBNRM and land policy issues where the challenges that are facing the two conservancies are made known.

The NNDFN today assists both conservancies in their negotiations with professional trophy hunting concessions and with other development and conservation activities, including the hosting of the annual general meetings each year where conservancy business matters are discussed with the conservancies and their members. Considerable investment is also being made in protecting water points and gardens from elephants, as well as in repairing damages.

28 (Marshall 2003)

29 (Marshall & Ritchie 1984)

30 (Bieseke & Hitchcock 2013: 19–21, 66–72, 84–90)

31 See (Bieseke & Hitchcock 2013 and Cole 2018).

32 (Hitchcock 2012); Welch, Cameron, ‘“Land is Life, Conservancy is Life”: The San and the Nǃa Jaqna Conservancy, Tsumkwe District, Namibia’, *Basel Namibia Studies Series 20*, Basler Afrika Bibliographien, Basel, 2018.

Both communities also receive support from various ministries. As conservancies, both Nyae Nyae and N̄a Jaqna are supported by the MET, which provides support for wildlife management and agricultural development and intersections between these areas. As community forests, Nyae Nyae and N̄a Jaqna have the support of the Directorate of Forestry in the MAWF, which provides a water support team that helps to maintain water points. For example, support is also provided for human–wildlife conflict; problems with elephants are on the increase in both conservancies, and the MAWF has a team that repairs the water points that these animals often damage. In addition to practical, logistical and economic assistance, having the support of two ministries also in theory provides advantages in terms of access to GRN services and information; furthermore, the two areas are protected by specific legislation that grants them control over resources. In the town of Tsumkwe, the Ministry of Justice and the MURD also have offices, as do the Namibian Police. Although these offices are there to serve the general population and not specifically the conservancies or community forests, their presence in the area could be instrumental in upholding and implementing the national laws pertaining to land rights.

Overall, the economic support and legal protection described above is far beyond that which other San communities in the country have access to,³³ which gives the conservancies the legal footing that they need to bring injustices to court. However, such protection is only meaningful if it is upheld by local, regional and national officials. In practice, both communities have found it very difficult to make their cases heard at all of these levels – examples of this are given in the case studies further on in this chapter. Therefore, although the communities have far more support and access to legal recourse than other San communities, we would like to emphasise here again that firstly, this support is in fact the minimum requirement for addressing the severe historical and current marginalisation faced by these communities; and secondly, that these advantages by no means guarantee justice or economic security.

2.6 Important differences

Although the two conservancies share many characteristics and historical influences, there are several important historical, environmental, demographic and economic differences between them, all of which lead to different considerations regarding land rights.³⁴

33 Other San groups, in particular the Hai||om and the Khwe, have received much legal support and advice, in particular from the LAC. However, these and other communities mostly lack the economic support and protection that the two conservancies receive.

34 See also (Hays et al. 2014) and Hitchcock, Robert K., *Improving the Viability and Sustainability of the Nyae Nyae Conservancy and the N̄a Jaqna Conservancy: A Mid-Term Evaluation of an NNDFN/ Brot für die Welt Project in Namibia*, Nyae Nyae Development Foundation of Namibia, Windhoek, and Brot für die Welt, Berlin, 2015.

One major difference between Nyae Nyae and Nǀa Jaqna is the time depth of the occupation by current residents. As noted earlier, the residents of Nyae Nyae have been in the area for many generations, as have the resident !Kung in Nǀa Jaqna. However, many current residents of Nǀa Jaqna are people who were resettled there in the 1970s and 1980s, and in 1990 (described in more detail below). This historical difference is important. Sometimes the assumption is made that residents in both conservancies were resettled there during the apartheid era, when in fact the vast majority of Nyae Nyae residents are descended from people who have lived in the area since before any other current group arrived; this is also the case for the !Kung in Nǀa Jaqna. Although all San have indigenous status in the region, most San communities have been displaced by other groups and are currently landless. The Nyae Nyae Jul'hoansi and the Nǀa Jaqna !Kung are among the very few who are still living on their ancestral land. It must be emphasised, however, that all San communities in Tsumkwe Constituency are equally entitled to the legal protection outlined in the various Acts described above.

A second difference between Nyae Nyae and Nǀa Jaqna is environmental: the Nyae Nyae area is richer and more diverse in terms of both fauna and flora. Nyae Nyae also has more surface water and a generally higher water table than Nǀa Jaqna. Nǀa Jaqna has a significant problem with places that contain mogau (gifblaar; *Dichapetalum cymosum*), a plant that is poisonous for cattle. Furthermore, the Nǀa Jaqna area has a lower wildlife density than Nyae Nyae. These characteristics have led to differences in decisions about land use regulations for the conservancies; they also entail different arguments about the land rights in each conservancy.

Another area of difference is demographic: Nǀa Jaqna has a much higher total population and population density than Nyae Nyae. In combination with the environmental differences noted above, this higher population affects the economic opportunities available to members of the conservancies. The ecotourism and professional hunting potential for Nǀa Jaqna is much lower than it is for Nyae Nyae. Nǀa Jaqna Conservancy thus generates much less income per annum than Nyae Nyae, and the benefits have to be distributed more widely in view of the numbers of members in the respective conservancies. These economic differences are also intensified by the fact that Nǀa Jaqna Conservancy has historically had less investment in infrastructure and capacity building than Nyae Nyae.³⁵

Finally, Nǀa Jaqna Conservancy has a much higher number of people who hail from elsewhere, and who have established illegal fences and cattle posts, than is the case for Nyae Nyae. The following sections will provide more detail about the Nyae Nyae and Nǀa Jaqna communities, highlighting their specific historical trajectories as these relate to land use and tenure, and how these characteristics play into current, ongoing dynamics and challenges. Some of the general challenges that they face are shared with all San communities, including poverty, severe social

35 (Welch 2018)

stigmatisation, very low levels of education, and high levels of vulnerability to economic and environmental disruptions, including droughts, floods and other changes resulting from global warming.

Other general challenges are common to the two areas because of their particular status. For example, both conservancies are experiencing illegal incursions of other groups and their livestock onto their territory – land that is attractive precisely because much of it has not been overgrazed, which is direct result of their careful land management and the NGO and GRN support described above. The following sections will highlight specific characteristics of both conservancies and outline the current cases that are before the Namibian High Court.

3 Profile of Nyae Nyae Conservancy

The Ju|'hoansi San of the Nyae Nyae area of north-eastern Namibia represent one of the few African indigenous peoples who have been able to retain a relatively significant portion of their ancestral land.³⁶ The Nyae Nyae Conservancy is the only place in all of Africa where a hunter-gatherer community has the right to maintain its traditional culture and subsistence strategy to the extent that members of the Nyae Nyae Ju|'hoansi community do. This makes it unique in Africa, and rare in the world. The Ju|'hoansi have been able to do this though careful management of their natural resources and the land where they live, and through extensive participation in GRN policy debates and initiatives.

Nyae Nyae, established in February 1998, was the first communal conservancy in the country. Its TA was recognised later in the same year. The recognition of the people and their land rights had much to do with the visibility of the current chief, Tsamkxao ǀOma, and the support of organisations like the NNDFN, and others. Nyae Nyae currently has 42 villages – more than any other conservancy in the country – with 38 of these being recognised officially by the Nyae Nyae Conservancy, while others are new settlements resulting from individuals and families seeking to start their own tourism or other projects.³⁷ The expansion of villages is currently causing tensions in the conservancy, as they directly impact land, water and other resources.

The conservancy has a management committee and a board who work in conjunction with the NNDFN and other NGOs. Importantly, Tsumkwe itself, the largest and most important town in the Tsumkwe district, is a municipality and not a part of the conservancy. Although it is in the centre of the conservancy, the town itself is subject to different legislation and has independent political representation.

The borders of Nyae Nyae define not only its landmass, but also in part the circumstances of the people living there. To the west it borders Nǀa Jaqna, with whom it shares important historical elements and current situations, and with

³⁶ See (Bieseles & Hitchcock 2013).

³⁷ As of June 2019 (Hitchcock & Kelly, field notes).

whom its fate is partially intertwined. The eastern boundary of the conservancy is the national border with Botswana which was fenced in 1965, separating many Jul'hoan families from their relatives. Today, there is a regular flow of people across the border to visit relatives and for social and economic purposes. Nyae Nyae borders Kavango West Region, and to the north of Nyae Nyae lies the Khaudum National Park. Much of Khaudum was the ancestral territory of the Jul'hoansi, and its establishment as a game reserve in 1989 resulted in the resettlement of several Jul'hoan communities into what are now the Nyae Nyae and Nǃa Jaqna conservancies. In 2007 it was declared a national park,³⁸ which has both positive and negative implications for the Nyae Nyae community. For some villages on the road to Khaudum, this has resulted in increased tourism; on the other hand, its zoning as a national park further restricted possibilities for hunting and collecting plant resources in the area.

The southern border of Nyae Nyae (bordering Nǃa Jaqna too) is the demarcation created by the Odendaal Commission of 1964 to divide “Bushmanland” from “Hereroland”. Since the 1960s, a veterinary cordon fence known as the Redline Fence has separated the two areas,³⁹ preventing the flow of animals from northern districts (including the Tsumkwe district) into the disease-free (notably foot-and-mouth disease-free) area to the south, which is made up largely of commercial farms.⁴⁰ As discussed in the case study further on in this chapter, a breach of this boundary in 2009 is currently having serious implications for the Nyae Nyae community.

3.1 Research and development organisations

The Jul'hoansi in particular have been the subjects of long-term interdisciplinary studies since the Marshall family began working in Nyae Nyae at /Aotcha, where they and their colleagues undertook a variety of ethnographic, archaeological, medical and other investigations over the period from 1951 to 1961.⁴¹ Beginning in the 1980s, the Nyae Nyae people have been the hosts to a disproportionate number of researchers and filmmakers, especially relative to Nǃa Jaqna. This has some advantages; as a result of this research, we have a comprehensive understanding of the land use patterns and how they connect to social structures.

Many of these researchers also focused on how their understanding could support the communities' efforts to be more autonomous. These efforts formed the basis of the NNDFN efforts and facilitated the creation of the conservancy; led to

38 This park encompasses an area of some 3 840 km².

39 The original Red-line Fence was constructed in 1896 (Miescher, Giorgio, *Namibia's Red Line: The History of a Veterinary and Settlement Border*, Palgrave Macmillan, New York, 2012).

40 This includes the Omaheke district, where many San also live; see Chapter 3 by James Suzman in this volume.

41 (Marshall 1976 and 2003); Thomas, Elizabeth Marshall, *The Old Way: A Story of the First People*, Farrar, Straus & Giroux, New York, 2006.

the documentation of the language;⁴² and inspired important projects like the Nyae Nyae Village Schools, which were started in collaboration with an anthropologist and a linguist.⁴³ These schools (of which there are about five to seven in operation at any given time) have been providing mother tongue education in Grade 1 to Grade 3 for over 25 years, and are important in that they allow people to live on their land and have access to some formal education.⁴⁴

Due to its progressive approach to community-based control over natural resources, the Nyae Nyae area has also become a sort of laboratory for the implementation of CBNRM, and for observing community decision-making processes, making it an easy focus for development efforts, and also for researchers. While some of this attention is necessary in order to support community-based efforts to maintain their autonomy and control over their land, it can also create enormous problems, such as the sheer number of organisations involved and of research projects conducted; the lack of coordination among them; and a lack of consistent consultation with the community and its key support organisations, ultimately threatening community control.⁴⁵

Furthermore, attention by researchers can be especially problematic when there are disagreements between outsiders about the best approaches to take to development, or when research is only deconstructive or critical, without providing insights that are useful to the community. An ongoing debate among outsiders has been over whether the Ju|'hoansi wish to primarily maintain their focus on wildlife, and on hunting and gathering, or if they want to become primarily cattle herders. The Ju|'hoansi consistently say that they wish to try to combine these subsistence strategies, and this is reflected in their current land management plan, described in the section below.

3.2 Management and subsistence options and land use

As described above, Nyae Nyae Conservancy is the ancestral land of the Ju|'hoansi; however, their actual territory extended much further. Their term *kxa/ho* (literally “sand surface”) signifies all of the land inhabited in the past and present by the Ju|'hoansi and all of its water, bush foods, game, grazing, wood, minerals and other natural resources, as well as places of historic and cultural significance.⁴⁶ At one time, roughly around the beginning of the 20th century, it is estimated that the

42 Dickens, Patrick, *English-Ju|'hoan, Ju|'hoan English Dictionary*, Rudiger Koppe Verlag, Koeln, 1994; Dickens, Patrick, *A concise grammar of Ju|'hoan: with a Ju|'hoan-English glossary and a subject index*, Rudiger Koppe Verlag, Koeln, 2005.

43 Biese, Megan, “*Women like Meat*”: *Ju|'hoan Bushman Folklore and Foraging Ideology*, Witwatersrand University Press, Johannesburg, and Indiana University Press, Bloomington, Indiana, 1993.

44 (Hays 2016)

45 See also (Hays et al. 2014).

46 For more information see (Marshall 1976 and Biese & Hitchcock 2013).

Ju|'hoan ancestral territory was between 70 000 and 80 000 km² in size, including what is now Khaudom, the area to the south that is now Ondjovine Conservancy, and parts of western Botswana stretching across to Kauri near the Okavango Delta. The current territory of Nyae Nyae Conservancy (8 992 km²) is thus just over 10% of this ancestral territory.⁴⁷

Although the Nyae Nyae community is indeed fortunate to have the land and resource rights and the possibility of maintaining traditional subsistence practices (which many express a desire to continue doing), the population density is now too high for them to rely on that as their only, or even their primary, means of subsistence. Nonetheless, hunting and gathering continue to play a critical role in their overall subsistence strategy, both directly and indirectly. The conservancy has thus made a conscious choice to prioritise wildlife and plant resources and traditional land use patterns in its land management strategy.

Partly as a result of the existence of the conservancy and the emphasis on wildlife, most employment opportunities in the area (both temporary and long term) are directly connected to traditional hunting and gathering activities. These include activities in three primary (and overlapping) categories: gathering, hunting and tracking, and tourism – each of these is described below. In addition, the land use plan allows for cattle and other livestock – but in limited numbers in order to avoid overgrazing and to allow space for wildlife to thrive and move freely, and to preserve the plants that people depend on for their subsistence.

The gathering of plant foods (and worms that feed on plants) provides an extremely important part of the everyday diet of Nyae Nyae residents, and one that should not be overlooked – even though it does not in most cases result in cash income. An exception to this is the gathering of devil's claw (*Harpagophytum procumbens*), which is one of the most important sources of income for many villages. People receive payment by weight, and they usually make N\$20 – N\$30 per day. People usually leave their villages (and gardens and herds, if they have these) to go to collecting camps for several days to a few weeks. This involves significant trade-offs – children are taken out of school to accompany parents, gardens and herds suffer, and a significant portion of their income is used for transport to the sites and to pay for food and water to be supplied. Nevertheless, people are choosing to engage in this activity, and it will be crucial to examine the benefits and options to enable people in Nyae Nyae to more efficiently take advantage of this important resource.

Hunting and tracking are also major sources of subsistence, both directly and because of cash earned through these activities. Many households in Nyae Nyae do still rely on the hunting of large or small animals for a significant part of their

47 This situation is exacerbated by the fact that Ju|'hoan family size is growing substantially, from what used to be 2 children in the past to 6–8 children today. Factors contributing to this change include sedentarisation of the Ju|'hoansi in Nyae Nyae and Nǃa Jaqna, and GRN programmes that provide N\$250/month per child to Namibian families.

subsistence.⁴⁸ It is important to note here that subsistence hunting has a relatively low impact on the resource base in Nyae Nyae, and is currently sustainable. Some individuals work as trackers for trophy hunters, or as guides for tourists on bush walks or drives; this is an important source of income for individuals, and is redistributed among family members and village residents. In addition, Nyae Nyae Conservancy earns money from a lease agreement with a safari company.⁴⁹ The meat from kills is distributed on a rotating basis among community members, and the profits from this arrangement are divided equally among conservancy members, each of whom receives a cash benefit once a year.

In addition to tracking for professional hunters, general tourism is another important source of revenue for conservancy members. However, it has both costs and benefits in Nyae Nyae. Some communities have had limited success with their own tourism projects (such as the Living Museum in ||Xa|hoba noted earlier, and similar projects in a handful of other villages). Competition among various Nyae Nyae communities to attract tourists is causing some social tensions, however, and it must be carefully managed. Furthermore, data from Tsumkwe Lodge and Nyae Nyae Conservancy suggest that many of the tourists who visit Nyae Nyae do not pay tourist fees to the conservancy, and there are many tourists who camp in the conservancy without paying, rather than staying at Tsumkwe Lodge. There is a significant need to address issues relating to community tourism and its impacts on Nyae Nyae Conservancy.

In addition to food and money obtained from the traditional livelihood strategy of hunting and gathering, people in Nyae Nyae also rely upon wages earned through either piecework or salaried positions.⁵⁰ The latter include employment by the conservancy and the TA; acting as pastors for local churches, and as teachers for the Village Schools; and positions at Tsumkwe Lodge, shops in the town, or the Namibian Police, among others. But these jobs are limited, and often require special training and/or residence in Tsumkwe, which makes them unavailable to the vast majority of Nyae Nyae residents – most of whom have limited education and many of whom prefer to live in their *n!oresi*. Thus, despite the limitations and concerns noted above, clearly having access to wildlife and other natural resources

48 (Hays et al. 2014); Lee, Richard B., 'In the Bush the Food is Free: The Ju|'hoansi of Tsumkwe in the 21st Century', in Brian Coddling & Karen Kramer (eds), *Why Forage? Hunting and Gathering in the 21st Century*, School for Advanced Research Press, Albuquerque, and University of New Mexico Press, Santa Fe, 2016, pp. 61–87; Laws, Megan, *All things being equal: trust, transparency, and ambivalence in a Namibian conservancy*, Ph.D. Dissertation, London School of Economics and Political Science, London, 2019.

49 For example, in 2017, Nyae Nyae earned N\$7.2 million (about US\$492,000), most of it coming from the lease agreement with SMJ Safaris (Nyae Nyae Development Foundation of Namibia, Annual Report 2017, NNDFN, Windhoek, 2017).

50 Wiessner, Polly W., 'Embers of Society: Firelight Talk among the Ju|'hoansi Bushmen', *Proceedings of the National Academy of Sciences*, 111(39), 2014.

in these areas has brought significant benefits to the Ju|'hoansi – and any threats to these resources have serious impacts on the community.

3.3 Traditional land management systems

As noted above, a *n!ore* is an area over which local people have rights of access and resource use. *N!oresi* contain natural resources upon which people depend, including water, wild edible and medicinal plants, trees for shade, fuel wood and construction, and materials such as stone used in the manufacture of tools and other goods (e.g. hammerstones for cracking mongongo nuts).⁵¹ Since 1991, the Ju|'hoansi in Nyae Nyae have been mapping their traditional *n!oresi*.⁵² The advantage of the *n!ore* system is that it spreads people out across space and facilitates management at the local level. The management of the *n!oresi* among Ju|'hoansi is done collectively, often overseen by individuals known as *n!ore kxaosi* (land owners/managers), usually older people in the group who have a deep understanding of the history of land use and occupancy of the areas where they live.⁵³ It is these individuals to whom outsiders go to seek permission to enter a *n!ore* and use its resources. Today, people often go to the Ju|'hoan TA to ask for land; nevertheless, the *n!ore kxaosi* are well known to the local group members as well as to other Ju|'hoansi, and they still play an important role in local decision-making processes.

As Polly Wiessner points out, “Land rights were largely maintained by social boundary maintenance, with *hxaro* partnerships giving others temporary access.”⁵⁴ *Hxaro* is a delayed-return system of reciprocity linking people as exchange partners over extensive areas, through the exchange of gifts (traditionally often ostrich eggshell bead bracelets and necklaces). These exchanges have been reduced over time, but people retain the knowledge of their *hxaro* partners, and these links are important to mobility options available to people in both the Nyae Nyae and Nṁa Jaqna conservancies.

We mention these two examples as illustrations of how land management systems are inextricably connected to exchange systems, both of which (along with

51 *N!ore* sizes vary substantially, averaging approximately 200 km² to 400 km² in the Nyae Nyae region. The boundaries between the *n!oresi* are generally not marked, but most local people were familiar with these areas and knew where their own *n!oresi* ended and where the *n!oresi* of others began. Rights to the *n!oresi* are inherited from both sets of parents, though in some cases, Ju|'hoansi could gain access to an empty *n!ore* through moving in and living there, in other words, through occupation.

52 Vermeulen, Saskia, Gemma Davies & Dan van der Horst, ‘Deconstructing the Conservancy Map: *Hxaro*, *N!ore*, and *Rhizomes* in the Kalahari’, *Cartographica: The International Journal for Geographic Information and Geovisualization* 47(2), 2012; (Bieseles & Hitchcock 2013); Begbie-Clench, Benjamin, *Illegal Grazing in Nyae Nyae Conservancy: Assessment and Recommendations*. Nyae Nyae Development Foundation of Namibia and Legal Assistance Centre, Windhoek and Nyae Nyae Conservancy, Tsumkwe, 2016.

53 (Bieseles & Hitchcock 2013)

54 (Wiessner 2014: 1428)

other cultural aspects) were integral aspects of a broad network that connected Ju|'hoansi over a large territorial range. This simultaneously provided a security net for people, and it allowed them to manage resources effectively for many thousands of years. A question is whether such systems are still relevant today, either for the community themselves, or for broader society; increasingly, the evidence suggests that they are.

Given the unique position of the Nyae Nyae community in terms of land tenure, we would like to emphasise that maintenance of their land rights is crucial both for the residents themselves, and because it can set a precedent for similar communities elsewhere in the nation, the region, and the continent. We present the following section describing a current serious threat to the long-term land tenure by the Ju|'hoansi with this perspective in mind.

3.4 Legal case: the Nyae Nyae invasion

On 29 April 2009, an incident occurred that has triggered a series of threats to Nyae Nyae Conservancy. A group of Herero farmers from what was then called Gam, a conservancy to the south (now Ondjou), cut the veterinary cordon fence (the Redline Fence) that separated them from Nyae Nyae, and moved into the conservancy with their cattle. This initial illegal invasion ultimately grew to 1 200 cattle, all of which were confiscated by the government in May and June of 2009. The farmers subsequently sued the government and were awarded a financial settlement, with which they proceeded to purchase more cattle, while still remaining in Tsumkwe.⁵⁵ As the cattle had been confiscated because the farmers broke the law by cutting the veterinary cordon fence and entering illegally into the Nyae Nyae territory, the fact that the Herero farmers were awarded a financial settlement was surprising.

This situation has now been playing out for over 10 years. Despite numerous efforts to address the situation through political and legal channels, many of the initial group that entered remain in Tsumkwe, the number of cattle held illegally in the Municipality of Tsumkwe continues to increase, and resources from the conservancy are being illegally consumed by non-conservancy members. In this section we highlight the main concerns that this situation raises and the legal issues involved, and note some critical lessons that can be learnt.

It is important to note that there are two different jurisdictions in Nyae Nyae: 1) the Municipality of Tsumkwe; and 2) the surrounding Nyae Nyae Conservancy, which falls under the authority of the Ju|'hoan TA. The increasing numbers of cattle are problematic in both areas, and in practice, as the municipality is in the

55 Hays, Jennifer, 'The Invasion of Nyae Nyae: A Case Study in on-going Aggression against Hunter-gatherers in Namibia' in *Forum Conference on Indigenous Peoples 2009: Violent Conflicts, Ceasefires, and Peace Accords Through the Lens of Indigenous Peoples*, Report, Forum for Development Cooperation with Indigenous Peoples, Tromsø, 2009, pp. 25–32.

centre of the conservancy and many members live there, it is difficult to separate the two jurisdictions. In the municipal area of Tsumkwe, it is not legal to maintain cattle; the farmers (and others) are thus in violation of the municipal regulations. The cattle themselves frequently move onto conservancy land; and there are also several reports of illegal resource harvesting by farmers within the conservancy boundaries.

Immediate and visible problems that have been reported by community members and by other witnesses include the following:

- the overgrazing of plants in general, specifically around Tsumkwe, but also extending into the conservancy;
- a reduction in plants such as devil's claw harvested for sale, especially around Tsumkwe, because of trampling and cattle and other domestic animal plant consumption;
- the illegal harvesting of trees for poles to make kraals;
- some harvesting of high-value timber, and sales to outsiders;
- incursions by non-conservancy members onto conservancy land; and
- a dramatic increase in cattle in Tsumkwe, which is interfering with the quality of life in the municipality itself, because the cattle are making both driving and walking dangerous, are noisy, and eat plants and peoples' gardens produce and crops.

A key point is that these are violations of Namibian laws and regulations. The Ju|'hoansi are *not* requesting special rights – the lack of conformation with and upholding of national laws relating to land rights is the foremost problem. Ju|'hoan leaders have articulated this position since the first invasion. Kiewiet |Un, then the Conservancy Chairperson, expressed this, and other key facets of the situation in 2009:

And I ask myself, are we a people here in Namibia who have not one law but two? I thought we had one law, that we had made one law, that we had our *n!ore* and they had theirs. What has been sustaining us is our wildlife ... and we have people who dig Kamaku roots [devil's claw] and sell them. It's a business of ours, and as I now see it, if the Gam farmers still stay with us here, it will die.⁵⁶

As |Un highlights, Nyae Nyae Conservancy made a deliberate choice to prioritise wildlife and maintaining their plants over increasing their numbers of cattle. They say that this is important to them because it is their culture and heritage; because it is an integral part of a nature conservation strategy and land use plan agreed upon with the GRN; and because they are making a living from these resources. The Ju|'hoansi say that they have always depended on these resources, and they want the wildlife to be there for their children and future descendants. They understood

56 "Kiewiet" |Un, interview with Megan Bieseke, 27 June 2009.

that their land rights are protected under Namibian law. The increase of cattle not owned by conservancy members within the conservancy and the Nyae Nyae Community Forest are not in accordance with their land use plan – this thus clearly constitutes illegal grazing. The chief and other members of the community consistently express concern and frustration over the apparent lack of will on the part of the GRN to uphold the laws of the land.

3.5 Cumulative effects of the initial lack of repercussions

Long term effects of the illegal grazing and the failure to resolve it include the potential for the gradual spread of overgrazing and a reduction in usable plant and wildlife species. This will seriously affect subsistence hunting and gathering, tourism, big game hunting, and the gathering of valuable commercially useful plants, and will bring about a reduction in other resources that people rely on, as described above. There is increasing anxiety among the population of Nyae Nyae and concern for their future. The current situation also leads to a general distrust of legal structures and processes, and in the legal protection they thought they had.

An important – and complicating – factor is that the ongoing expansion in livestock numbers is not only due to the accumulation of cattle by the initial group of invaders; individuals from other ethnic groups have also acquired more cattle. Furthermore, local Ju|’hoansi have also obtained cattle through programmes run by the NNDNF, and through their own purchases. The lack of legal repercussions over the past ten years has created an environment in which many individuals in Tsumkwe feel free to amass more cattle than is legally allowed because they feel that they can do so with impunity. The result of this lack of control is a dramatic increase in cattle within the Tsumkwe Municipality. These cattle are in turn encroaching onto Nyae Nyae Conservancy and Nyae Nyae Community Forest beyond the boundaries of Tsumkwe, and extending west into N’ja Jaqna.

In July 2015, a criminal legal case against several of the illegal grazers in Nyae Nyae was filed in terms of the Forest Act of 2001 with the High Court in Namibia. For three years the High Court made no decision on this matter, and as a result of that delay, the numbers of in-migrants continued to increase. The GRN, including the president of the country and the Ministry of Justice, were reluctant to take sides in the dispute, since both groups (Ju|’hoan and Herero) are seen as “marginalized communities” that were historically disadvantaged.⁵⁷ The second matter was brought in 2018 before the High Court in Windhoek. This was a civil application in which Chief Tsamkxao #Oma, as first applicant, was seeking an interdict preventing the Herero cattle owner respondents from unlawfully grazing their cattle in Nyae Nyae Conservancy and Community Forest. On 10 August 2018, the High Court ruled

57 Otjondjupa Regional Governor, personal communication, June 2019.

by default judgment on behalf of the applicants and against the illegal grazers, ordering them to leave the Nyae Nyae area. However, the Herero cattle farmers brought an application to rescind the default judgment. The applicants did not oppose the application. An initial hearing on the Nyae Nyae case scheduled for July 2019 was delayed, and was eventually heard in October 2019.

4 Profile of Nǀa Jaqna Conservancy

The Nǀa Jaqna area has had a more complex history than Nyae Nyae. As described earlier, Nǀa Jaqna was originally inhabited by small groups of hunter gatherers whose descendants are today known as the !Kung. However, Nǀa Jaqna has experienced efforts by colonial powers to resettle people from outside the area for over a century. Afrikaners who had made the trek from South Africa established farms in the vicinity at what came to be known as the Republic of Upingtonia in 1885,⁵⁸ and the German colonial government established the Grootfontein Farms in the late 1890s. !Xun were moved from the town of Grootfontein to these farms, and some of them moved into the Omatako area in the Nǀa Jaqna lands prior to the 20th century when they left the farms to seek places of their own to settle. The !Xun and the !Kung, with different backgrounds and histories, thus ended up in the same area.⁵⁹

During the war in Angola, many San fled south across the border to the northern regions of Namibia, and in particular to the (then) Caprivi Strip. In the 1970s and 1980s, the South West African Administration forcibly relocated Khwe, !Xun, and Mpungu and Vasekele San from Caprivi into what was then known as “West Bushmanland”, in part to create a “buffer zone” against SWAPO. Just before independence in March, 1990, Khwe and !Xun working for the South African Defence Force and the South West African Territorial Force were given the options of going to South Africa, remaining in what was then West Caprivi, or moving to Nǀa Jaqna. Some 4 500 !Xun and Khwe moved to Schmidtsdrift in South Africa, while at least 2 000 !Xun and Khwe opted to relocate to Nǀa Jaqna.⁶⁰

Today, Nǀa Jaqna is bound on the west by the Grootfontein Farms, where sizable numbers of San have engaged in farm work for farm owners of Afrikaner and German ancestry. Over the years, many farmworkers migrated to Nǀa Jaqna, including Hai||om who are still living in the conservancy. To the south is the Ondjou Conservancy (described in section 3 above), and Herero farmers from this

58 Gordon, Robert, *The Bushman Myth: The Making of a Namibian Underclass*, Westview Press, Boulder, San Francisco, Oxford, 1992; Nedvěd, Radek, ‘Outline of the Economic Strategies of the Urban Bushmen Dwellers: Case Study of the !Xun Living in the Omulunga Township of Grootfontein in Namibia’, *Český LID*, 101(3), 2014, pp: 299–320, 301–302.

59 For a detailed discussion of the !Xun see Takada, Akira, *Narratives on San Ethnicity: The Cultural and Ecological Foundations of Lifeworld among the !Xun of North-Central Namibia*, Kyoto University Press, Kyoto, and Trans Pacific Press, Melbourne, 2015.

60 (Hitchcock 2012 and 2019; Welch 2018)

area have also migrated into NꞤa Jaqna. The result is that today, NꞤa Jaqna has a much more diverse San population than does Nyae Nyae. It also has a much higher population of Otjiherero- and Oshiwambo-speaking people, and speakers of one of the languages from the Kavango regions, many of whom moved into the area toward the end of the 20th century and in the first decade of the 21st century. This in-migration was highly controversial, and was opposed by NꞤa Jaqna Conservancy, as will be described below.

In view of its diverse ethnic composition, NꞤa Jaqna Conservancy has different systems of land management than those of Nyae Nyae (which uses the *n!ore* system and does not have fences in the conservancy). Some of the people in NꞤa Jaqna, including the Mpungu and Vasekele !Xun and the Khwe, have somewhat different land management systems than do the !Kung and the Jul'hoansi, with a greater emphasis on farming.

The numbers of cattle and small stock owned by conservancy members in NꞤa Jaqna are lower than those in Nyae Nyae, and the degree of dependence on wild plants for food and income is also less than in Nyae Nyae. Fewer people in NꞤa Jaqna Conservancy are involved in tourism activities in the conservancy and elsewhere (e.g. in places such as Grootfontein and Outjo) than is the case in Nyae Nyae. Devil's claw is a more important source of revenue than it is in Nyae Nyae; in 2015 and 2016, for example, devil's claw collection returns constituted a third of the total annual benefits for NꞤa Jaqna Conservancy. Subsistence options in NꞤa Jaqna are much more limited than in their neighbouring conservancy. An updated membership list for NꞤa Jaqna Conservancy would go some way towards ensuring more equitable distribution of benefits to the members of the conservancy.

Probably in part as a result of this history and the greater ethnic diversity, there are more tensions over land and resources in NꞤa Jaqna than in Nyae Nyae. One village, Nhoma, which currently is under !Kung TA and NꞤa Jaqna Conservancy authority, comprises mainly Jul'hoansi. People in Nhoma have applied to the GRN and the Otjozondjupa Regional Land Board for the right to fall under the Jul'hoan TA and Nyae Nyae Conservancy. Decisions are in the process of being made in this regard.

4.1 !Kung Traditional Authority

NꞤa Jaqna Conservancy is overseen by the !Kung TA, which is based in Omatoko. John Arnold became the !Kung Traditional Authority Chief in 1998. He played a significant role in the efforts of the people of NꞤa Jaqna to resist the GRN's plans in 2000–2001 to move the Osire Refugee Camp to M'Kata, a community in NꞤa Jaqna. This was one of the first GRN efforts to bring outsiders into the region. John Arnold died in 2012, and for three years there was a leadership vacuum in the conservancy. John Arnold's daughter, Glony Arnold, was appointed by the GRN to the position of chief in NꞤa Jaqna on 28 March 2015. However, some of the community members in NꞤa Jaqna objected, saying that there was not a formal electoral process; they also

said that there was no such thing as a “royal house” in which a traditional leader could pass on his or her authority to the next generation. They argued instead for a new election to be held, something that the GRN chose to ignore in 2015.

At present, Nǃa Jaqna Conservancy is experiencing severe conflict between the !Kung TA and the Nǃa Jaqna Conservancy Management Committee. Some of these conflicts revolve around the alleged !Kung TA allocation of land to outsiders, as occurred in 2019 in Aasvoëlsnes. The following section will outline the issue of illegal fencing in Nǃa Jaqna.

4.2 Legal case: Nǃa Jaqna illegal fencing and cattle posts

Although incursions of other groups with their livestock is an issue in both conservancies, Nǃa Jaqna is facing more – and more diverse – threats than is Nyae Nyae. This can be traced in part to the history of migration patterns and forced resettlement described above.

A major turning point in the history of Nǃa Jaqna was the decision in 2000 by the GRN to move the large refugee camp known as Osire south of Otjiwarongo to M’Kata in the Nǃa Jaqna area.⁶¹ This plan was opposed by the then Chief John Arnold, backed up by organisations such as the WIMSA and the NDNF. The refugee resettlement plan was abandoned in 2002 after the death of Jonas Savimbi of UNITA (*Uniao Nacional para a Independencia Total de Angola*) and the negotiations leading to peace accords between Namibia and Angola. However, the series of visits by GRN officials and others relating to the Osire resettlement effort led to an increase in applications of people from outside the region for land in M’kata and Nǃa Jaqna, and some of them moved into the area and established small farms without the explicit agreement of either the !Kung TA or Nǃa Jaqna Conservancy. This laid the foundation for the illegal fencing crisis which is still playing out in the area today.

In addition, Hereros from the south would periodically approach the (then) chief John Arnold and ask for land to establish a residence (*okarango*) and a cattle kraal (corral/*orumbo*). Chief Arnold turned down these requests but that did not prevent some people of Herero, Owambo and Kavango backgrounds from moving into the Omatako and Nǃa Jaqna areas and establishing small cattle posts, which they then began to fence, especially toward the end of the first decade of the 21st century.

In 2006, the GRN decided to establish a small-scale farming programme in Nǃa Jaqna.⁶² This effort, which was aimed at supporting livestock producers and farmers

61 See Hitchcock, Robert K., *Anthropological Study in the Potential Impact of Refugees in M’Kata, Namibia*, United Nations High Commissioner for Refugees, Windhoek, 2001; (Hitchcock 2012).

62 Odendaal, Willem, *San Communal Lands Contested: The Battle over N/a Jaqna Conservancy*, Legal Assistance Centre, Windhoek, 2006.

from outside Nǀa Jaqna, was countered through efforts by Nǀa Jaqna Conservancy and their supporters. Nevertheless, by 2013, there were over 120 fences in Nǀa Jaqna, and dozens of inhabited cattle posts. The fences, according to Nǀa Jaqna Conservancy, restricted access to gathering areas for food plants and medicines. Several cases were reported in which cattle post owners refused to let !Kung and other San enter their areas, sometimes threatening them at gunpoint.

This in-migration was consistently opposed by Nǀa Jaqna Conservancy, which sought help from the Legal Assistance Centre to file a legal case against 32 individuals who had established fenced farms in Nǀa Jaqna Conservancy, some of them clearly with the implicit agreement of the !Kung Traditional Authority. A legal case filed in the High Court in 2013 against those responsible for the illegal fences was won by the applicants (the Nǀa Jaqna Conservancy Committee) in 2016.⁶³

One of the orders was that the Otjozondjupa Land Board and the TA should, where any one of the respondents failed to remove a fence erected in contravention of the Communal Land Reform Act of 2002, or to remove their livestock from the area constituting Nǀa Jaqna Communal Conservancy, take the necessary action to cause the fences and the livestock to be removed. However, the lack of enforcement of the High Court decision by the Otjozondjupa Communal Land Board and the !Kung TA continues to be problematic, and Nǀa Jaqna Conservancy is today facing a number of land-related and leadership issues. Tensions between the !Kung TA and its chief, Glony Arnold, on the one hand, and Nǀa Jaqna Conservancy, on the other, are high,⁶⁴ fences continue to be built in Nǀa Jaqna, and the numbers of people from other parts of Namibia in the area continues to rise.

From a legal standpoint, the Otjozondjupa Communal Land Board is required by statute to enforce the Communal Land Reform Act and the Namibian Constitution. Nǀa Jaqna Conservancy is pushing for enforcement of the High Court decision of 2016, and the removal of the fences and cattle posts that have been established in Nǀa Jaqna over the past decade. Overall, the land situation in Nǀa Jaqna continues to be complex and needs to be addressed at the local, regional and national levels.

63 High Court of Namibia, *Case No. A: 276/2013, In the High Court of Namibia, Main Division, Windhoek in the matter between the N/a Jaqna Conservancy Committee, Applicant and Minister of Lands and Resettlement and 35 Others, Respondents*, Windhoek, High Court of Namibia, 2013; High Court of Namibia, *Case No. A: 276/2013, In the High Court of Namibia, Main Division, Windhoek, Thursday, 18 August, 2016 in the matter between the N/a Jaqna Conservancy Committee, Applicant and Minister of Lands and Resettlement and 35 Others, Respondents*, Windhoek, High Court of Namibia, 2016; Hebinck, Paul & Christa van der Wulp (in press), 'Fighting Fences: The Legal Battle for Negotiating the Cattle-Conservation Nexus in Namibia', *African Affairs*.

64 Sassman, Catherine, 'Illegal Invasion in Nǀa Jaqna Continues', *Namibian Sun*, 3 October, 2016a; Sassman, Catherine, 'Angolan San must get out', *Namibian Sun*, 20 October, 2016b (<https://www.namibiansun.com/news/angolan-san-must-get-out>); Sassman, Catherine, 'Police break up San meeting: traditional leaders say meetings cannot take place without the chief's knowledge and consent', *The Namibian*, 15 December, 2016c.

Nǃa Jaqna Conservancy management committee and some of the members maintained that the presence of the fenced areas and cattle posts was leading to overgrazing and to a reduction in water availability for local people and their animals, especially during the rainy season. There were also complaints that some of the cattle posts were in areas where !Kung and other San engaged in collection of devil's claw. In addition, some of the farms that were declared illegal in the High Court lawsuit were in areas that had a high water table and supported high quality grazing and economically important plants and timber. The Nǃa Jaqna Conservancy members have maintained in their annual general meetings since 2015 that the expansion of fenced areas and cattle posts in the conservancy was the equivalent of a "land invasion".

Both Nǃa Jaqna Conservancy and Nyae Nyae Conservancy are on communal land, which, in effect, is state land, and hence the GRN technically has the right to make decisions about land allocation and resettlement in these areas.⁶⁵ However, the GRN cannot make unilateral decisions on land without proper consultation with those who are living on the land. A more recent effort to establish small-scale cattle farms in the Aasvoëlsnes area near Nhoma under the Programme for Communal Land Development in 2015–2016 by the Ministry of Land Reform with financial support from the European Union and the German Development Bank was stopped by Nǃa Jaqna Conservancy in 2018.⁶⁶ Meetings held between the GRN, the !Kung TA and Nǃa Jaqna Conservancy revealed deep divisions between the TA and the members of Nǃa Jaqna Conservancy. The conservancy was concerned that some of the illegal fencers in the west would simply move over to the east and occupy the newly established small-scale farms. Being so close to Nyae Nyae, the illegal occupation of San land could then easily have spilled over to Nyae Nyae, creating a bigger problem in the whole of the Tsumkwe Constituency.

As of 2019, few of the fences had been removed, and there were significant tensions between the Nǃa Jaqna Conservancy Management Committee and its members, and the !Kung TA.⁶⁷ The Otjozondjupa Communal Land Board and the !Kung TA were asked to meet with the conservancy about their failure to remove the fences in 2019. The conservancy called for a formal inspection to be made of the area that would include both aerial and ground survey methods, with follow-up enforcement of the 2016 High Court decision. The land issue in Nǃa Jaqna remains unresolved at the time of writing (August 2019). Clearly, enforcement of the High Court decision on the Nǃa Jaqna case is crucial, and will require the collaboration

65 Werner, Wolfgang, 'Land tenure and governance on communal Land in Namibia', paper presented at the Second National Land Conference, Windhoek, 1–5 October 2018.

66 Steinmann, Daniel, 'Nǃa Jaqna and Communal Land Development Partners Talk Over Each Others' Heads – Land invasion is the Core Issue', *Namibia Economist*, 18 July 2018; Tijhenuna, Theresia, 'San Reject Govt Livestock Project', *The Namibian*, 15 June 2018 (<https://www.namibian.com.na/178448/archive-read/San-reject-Govt-livestock-project>).

67 (Hebinck & van der Wulp, in press)

of GRN line ministries with local institutions, including the !Kung TA and Nǀa Jaqna Conservancy.

5 Discussion and conclusion

Discussions around land issues for the San are often framed in language that suggests that the San are being accorded “special rights” of some kind. This perception is most often expressed in reference to Tsumkwe Constituency – especially Nyae Nyae – where the San have more rights to territory and resources than any other San in Namibia. However, the concept of indigenous rights is specifically *not* about special rights, but about ensuring that the most marginalised peoples in the country have their *human rights* respected. Even in these conservancies, which are the best scenarios in the country – indeed, in all of southern Africa – San communities must constantly defend their land against incoming groups, who are stronger, have more resources, and engage in more intensive land use strategies.

These differences in land use strategies are of crucial importance, as they are at the centre of the threats to their land that San and other small-scale subsistence societies in Namibia – and elsewhere in the world – are experiencing today. Nyae Nyae and Nǀa Jaqna are important areas in which to look at these issues, precisely because they have more land rights, access and support than groups in other parts of Namibia. In this section we would like to highlight some critical issues that are relevant to all San in Namibia, and that are especially visible in the conservancies.

Hunter-gatherers (even those engaging in small-scale agriculture) are not a threat to pastoralists; in general, they do not tend to invade others’ land. As a rule, the lower impact land use strategy is the one under threat. A common refrain in the Nyae Nyae case is that the Ju|’hoansi’s land was “not being used” and thus should be made available for grazing cattle. In other words, a low-impact environmental management plan based on traditional livelihood patterns is effectively “invisible”. This could be considered a measure of success from a natural resource management perspective. This is especially true in a semi-arid area such as the Kalahari, where drought and other effects of climate change put additional strain on the land and sustainable use of natural resources, and the land quickly becomes degraded if disciplined land management systems are not in place. However, in this case, this success is being turned against them as they are increasingly pressured to give up portions of the land that they have been so carefully managing, in order that a more intensive (and potentially destructive) form of land use should be allowed.

The very reason that the land in Nyae Nyae was attractive to the neighbouring pastoralists was that it was not overgrazed, but instead had been carefully managed. Likewise, the concern of the Nyae Nyae Conservancy and community members is

that if the numbers of cattle continue to increase at the current rate, their land will also become overgrazed – a concern that is underscored by a comparison between the results of land management strategies in Ondjou, with those of Nyae Nyae. All of this is particularly problematic when one considers that hunter-gatherer land use patterns are the ones that are contributing the least to environmental problems that are currently faced globally, and within Namibia.

First, hunting and gathering should be recognised and respected as a legitimate form of land use, and one that furthermore might be beneficial to the society as a whole. There is increasing evidence that small-scale subsistence practices of societies such as the San are effective forms of land use management. The specialised skills associated with tracking are important for observations of climate change, for wildlife management, and for anti-poaching efforts, as well as for trophy hunting and other economic enterprises. Their intimate knowledge of plants has yielded medicinal, nutritional and other knowledge beneficial for wider society. Their skills are useful for carrying out ecological surveys, and they also provide employment and local learning opportunities for adults and children.

Secondly, the complex situations that we have described in this paper are often seen as examples of “inter-ethnic conflict” – between the Ju|’hoansi and Herero in Nyae Nyae, for example. However, this perspective takes the focus away from larger issues that are at the root of problems confronting both groups. The Ju|’hoansi and Herero have both been excluded from territories that they once occupied, and they have both suffered historically at the hands of other groups (this is also true for the !Kung, Khwe, !Xun, and other San in the Tsumkwe area). However, recognising that both groups are disadvantaged does not justify the encroachment of one group onto the land of another.

The subsistence and land rights of one ethnic group in Namibia should not be held up against the rights of another ethnic group that has also been historically marginalised. The illegal encroachment of individuals from pastoralist groups deeply threatens the capacity of San groups to maintain their way of life. A solution should be found that preserves the rights of all groups. In the case of Nyae Nyae, this means fully maintaining the rights of the Ju|’hoansi while also seeking a solution for the Herero and other farmers in Nyae Nyae. In N꞉a Jaqna Conservancy, it means maintaining the rights of the !Kung and other San who have been residing there.

A third important point is that research regarding what the San say about their viewpoints and values has revealed various perspectives – some individuals want to own cattle, for example; others prefer to continue their traditional way of life; others might want to get salaried positions or go for further studies. There is a tendency to present information gathered from a section of the population and to say what “the Ju|’hoansi” or “the San” want – but these societies are made up of individuals with differing goals and motivations. It is important to simultaneously take into consideration these multiple perspectives while also allowing for the

general aim of maintenance of traditional subsistence practices, as this is indeed a desire expressed by many San.⁶⁸

One argument that San in both conservancies have made is that they live “sustainable” lives, and that they work hard to ensure that the resources of their areas are not overexploited. However, although emphatic about their close connection to the land and their desire to manage the natural resources on their territories, San groups in Tsumkwe Constituency and elsewhere say that they belong not just to nature, but also to society. They argue that they are citizens of Namibia and therefore have rights equal to other citizens. They want to be able to access the benefits of modernity and development if they choose to, while at the same time protecting and promoting their languages and cultures and passing on their cultural heritage, traditions and values to their children. They also value the wildlife in their areas, and they want to have the opportunity to both maintain it, and to benefit from it.

Fourthly, we would like to emphasise that the political will of the GRN in upholding its own laws and court judgments is crucial. This is illustrated by the Nꞑa Jaqna case, where a positive judgment given in 2016 in favour of the conservancy committee against illegal fencers remains unenforced. Authorities offer a number of reasons for this, none of which are legally defensible. Thus, although the legal rights of the conservancy have technically been upheld in court, in practice these rights are still being violated. The practical implication is that NGOs supporting the community are spending (limited) donor funds to enforce GRN compliance with its own legislation, which has been passed through parliament. The point we would like to make here is that this is a national issue – it is the responsibility of the GRN to uphold its own laws and to enforce judgments that its own courts have made.

Finally, despite all the setbacks and violations that are still occurring, it is crucially important to look at the way that the San are actively negotiating their circumstances, especially with respect to land and resources. The San of Nyae Nyae, in particular, have had a significant measure of success negotiating their rights. They have done this in part through participating in regional, national and international meetings and discussions, presenting their case and describing in detailed terms their land and resource management systems. They have attended the United Nations Permanent Forum on Indigenous Issues meetings in New York and meetings held by the Marginalized Communities Division of the GRN. They have sought to change GRN policies; for example, the Jul’hoansi and !Kung both opposed the GRN’s decision to relocate the Osire refugee camp at M’Kata in 2001, and they together opposed the decision of the Ministry of Land Reform and its predecessor to establish small-scale farms in the Nhoma and Aasvoëlsnes area.⁶⁹


68 Dieckmann, Ute, Maarit Thiem, Eric Dirkx & Jennifer Hays (eds), *“Scraping the Pot”: San in Namibia Two Decades after Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, 2014; (Cole 2018).

69 (Odendaal 2006; Hitchcock 2012; Welch 2018)

At the time of this book going to print in early 2020, rumours are circulating that another potential threat to the land and people in Nyae Nyae is the possibility that the GRN will establish a Namibian Defence Force base in the area to the east of Tsumkwe, closer to the Botswana border. Such a move would be reminiscent of the attempt to relocate the Osire Refugee Camp to M’Kata in 2001, and the presence of military personnel would have significant impacts on the people of Nyae Nyae Conservancy.

This potential threat is one among many that face the area. Some Ju|’hoansi stress that the *kxa/ho*, “the landscape of home”, is threatened, and that they want to ensure that they are able to regain access to lands and resources that have been lost in the past. Filing legal cases and seeking answers from regional and central government authorities demonstrates the degree to which the Ju|’hoansi and !Kung and their neighbours want to defend their areas from outsiders and to reinforce their control over their land and resources. The San definitely want to establish what they see as their customary rights to communal land – land which they feel has belonged to them since, as they put it, “time immemorial”. They want to have both their collective and individual rights recognised. The residents of the two conservancies are striving to use the legal systems that they understand are there to protect them, as Namibian citizens.

Although the Nyae Nyae community, and to a lesser extent that of Nǃa Jaqna, may have many “advantages” in comparison to other San communities, these are actually *rights*, not privileges. Furthermore, these rights are tenuous and currently highly threatened. We argue that the focus should be on carefully protecting and enforcing the land rights of these groups as they are defined in national and international law, with the goal of making Nyae Nyae and Nǃa Jaqna positive models of what could be possible elsewhere.



Access to land and security of tenure for the San people in Namibia: the case of Okongo Constituency, Ohangwena Region

Romie Nghitevelekwa, Fenny Nakanyete and Selma Lendelvo



Abstract

This chapter analyses the dynamics of access to land, land use and security of tenure for the San people in Namibia, with a particular focus on Okongo Constituency in Ohangwena Region. It analyses security of tenure within the context of the ongoing registration and statutory recognition of land rights in Namibia's communal areas, to determine their applicability to the customary tenure system of the San people. The chapter suggests that the San people still have some forms of access to land for their livelihoods, although this is critically hampered by individualisation and fencing-off of land by sedentary agriculturalists. More importantly, individualisation of tenure has severely affected the San people's customary tenure of land as a common-pool resource that should be accessed and used as a group right. The chapter regards community-based natural resources management (CBNRM) as a possible window of opportunity through which the San people's customary tenure system, and therefore their basis of livelihoods, can be maintained. The chapter draws from data collected between 2013 and 2018 in Ohangwena Region, particularly from the San people that are living in and around Okongo Community Forest and Okongo Conservancy. Data were collected using a combination of methods of observation, semi-structured interviews, informal discussions, and analysis of land rights registration records.

1 Introduction

Namibia's communal lands are home to diverse groups of land users from different social groups who follow differentiated customary tenure arrangements and land use patterns. Customary tenure is used to refer to "the systems that most rural African communities operate to express and order ownership, possession, and access, and to regulate use and transfer".¹ In Namibia, the different social groups following customary tenure systems range from sedentary agriculturalists and pastoralists to hunters and gatherers. The San people, who are renowned as the descendants of the first people to inhabit Namibia, and indeed the broader southern African region, have long been primarily and sometimes exclusively relying on hunting wild animals, collecting wild food and seeking water sources for survival. As hunters and gatherers, they have led a nomadic lifestyle. Before the in-migration and settlement of the Bantu groups (who are mainly pastoralists and sedentary agriculturalists), the San people "were spread out thinly over most of modern-day

1 Wily, Liz Alden, *Customary Land Tenure in the Modern World: Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa – Brief #1 of 5*, Rights and Resources Initiative, 2011 (<https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/7713/customary%20land%20tenure%20in%20the%20modern%20world.pdf?sequence=1>).

Namibia, living a highly mobile life of hunting and gathering”.² The San people in Namibia are comprised of different groups, which identify themselves with their respective languages, traditions, customs and histories.³ The groups vary in size, from larger groups such as the Hai||om, Khwe, !Kung, Ju|’hoansi, Naro and =Au//eisi, to smaller groups such as the //Anikwe, !Xoo, l’Auni, and /Nu-//en.⁴ These different groups are spread across nine of the fourteen political and administrative regions of Namibia: Kavango East, Kavango West, Kunene, Ohangwena, Omaheke, Omusati, Oshikoto, Otjozondjupa and Zambezi.

Today, there are three main land tenure systems found in Namibia, namely freehold (urban areas and commercial agricultural land), communal, and state land. Some San people live on commercial agricultural farmlands and in the corridors between commercial agricultural farmlands, others on communal lands which are largely of other ethnic groups, and a small number live in protected areas, i.e. national parks.⁵ Historical records indicate that the San people lived in some of these areas before they were later demarcated as freehold, communal and/or state land areas. Most of these demarcations have resulted in their dislocation and/or current marginalisation. It is similarly argued elsewhere that “the colonization process resulted in the San being marginalized and experiencing a significant loss of their lands and their customary livelihoods.”⁶

According to the Namibia Population and Housing Census of 2011, there is an estimated total number of 464 389 households in Namibia, with the various San languages being reported in 3 745 households, or 0.8% of the total.⁷ In terms of the total population, the San people are estimated to number about 38 000, or 2% of the 2.4 million people in Namibia. These statistics should be treated with caution due to the inconsistent demographic and linguistic characteristics used in surveys – for example, the surveys only captured those San who speak a San language at home.⁸ However, there are more San people living in these regions, who use

2 Lankhorst, Marco, ‘Land Tenure Reform and Tenure Security in Namibia’, in Ubink, J.M., A.J. Hoekema & W.J. Assies (eds), *Legalising Land Rights: Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*, Leiden University Press, Leiden, 2009.

3 Anaya, James, ‘Report of the Special Rapporteur on the rights of indigenous peoples’, in James Anaya, *The situation of indigenous peoples in Namibia*, 2013 (<https://www.refworld.org/docid/522db4014.html>).

4 (Anaya 2013); Dieckmann, Ute, Maarit Thiem, Erik Dirkx & Jennifer Hays, ‘Executive Summary’, in *‘Scraping the Pot’: San in Namibia Two Decades After Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, 2014.

5 Ibid.

6 (Anaya 2013: 5)

7 Namibia Statistics Agency, *Namibia 2011 Population and Housing Census Main Report*, NSA, Windhoek, 2011.

8 (Dieckmann et al. 2013); Pohamba-Ndume, Kaleinasho Ngeteuya, *An Investigation into the Poverty Situation of the Hai//Om People Resettled at Okongo Constituency in the Ohangwena Region*, Masters Thesis, University of Namibia, Windhoek, 2016 (http://repository.unam.edu.na/bitstream/handle/11070/2022/pohamba-ndume_2016.pdf?sequence=1&isAllowed=y).

a language other than their own as their main spoken language, and therefore they are not documented as San. It is also reported that some San communities in northern Namibia have lost their languages completely, and now speak the language/s of neighbouring ethnic groups.⁹ In Ohangwena Region, which is the focus of this chapter, the San people mostly live in the constituencies of Okongo, Omundaungilo, Epembe and Eenhana. Okongo is one of the constituencies in which the San are recognised as the first inhabitants. In 2018, the Okongo Constituency Office in Ohangwena Region estimated that there were 308 households and a total population of 942 San people in Okongo Constituency.¹⁰ They are generally spread across thirty-four villages, with the majority living in Ekoka, Eendobe, Onamatadiva and Oshanashiwa villages. According to Berger and Zimprich, the settlement of the San people in these villages is largely a result of the resettlement projects that were founded by the Finnish missionaries in the 1950s, but are currently managed and supported by the Government of the Republic of Namibia (GRN).¹¹ The rest of the San people in Okongo Constituency are reported to live in the villages of Eenguluve, Ehafo, Eloolo, Ohameva, Oidiva, Okafanyama, Okakango ka Hilka, Okalukuwena, Okanyandi, Okashamambo, Okatope No1, Okongo, Olukula, Olupale, Omauni manini, Ombabi, Omboloka, Ombuudiya, Omipapa, Omupanda, Omuepmbe, Omwandi, Onane, Onghwiyu, Oshalande, Oshixoha, Oshinanyiki, Oshushu, Oshuudiya and Otutunda.

2 The San people and interventions by Finnish missionaries

Okongo is known as Nkong in the !Xun language, and was earlier occupied by San who were sparsely distributed until the mid-1900s. The arrival of Ovawambo, in particular the Ovakwanyama people, who later established *omahangu* crop fields and were looking for grazing lands for their livestock in the 1960s,¹² as well as earlier on, along with the arrival of the Finnish missionaries in the 1950s, started to significantly transform the nomadic lifestyle of the San people. The Finnish missionaries arrived through the Evangelical Lutheran Owambo-Kavango Church.¹³ The missionaries gathered the San people to be evangelised and converted to Christianity, and resettled them in project camps such as Onamatadiva, Eendobe, Oshanashiwa and

9 (Dieckmann et al. 2013)

10 Okongo Constituency Office, 'List of San Communities in the Okongo Constituency', 2018.

11 Cited in Mouton, Randolph & Erik Dirkx, 'Ohangwena Region', in *"Scraping the Pot": San in Namibia Two Decades After Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, 2014.

12 Nampala, Lovisa, 'Okongo: A Case Study of the Impact of the Liberation Struggle in the Ohangwena Region', in *Re-Viewing Resistance in Namibian History*, University of Namibia Press, Windhoek, 2015 (<http://repository.unam.edu.na/handle/11070/1820>).

13 (Nampala 2015)

Ekoka villages. These centres came to be locally known as the *omapyatumo gaayelele yOkongo*.¹⁴ In these projects, the San people were introduced to “[new] cultures, education, business and others” with the intention of civilising them.¹⁵ They were also introduced to sedentary agriculture as practised by their neighbouring Ovawambo and Kavango. This was regarded as the only sustainable basis for livelihoods.¹⁶ Takada had similarly reported that the missionaries played a central role in the “introduction of permanent settlement and residential concentration for the San people” who were allocated farming units at the camps by the missionaries.¹⁷ In the 1980s, the Finnish missionaries withdrew their interventions as a result of the intensification of the war for the liberation of Namibia. The missionaries returned soon after independence to carry on with their activities, but again left the area a few years later.¹⁸ The government of the newly independent Namibia built on the resettlement projects initiated by the missionaries by continuing to support common farming units for the entire San people for subsistence purposes. These interventions have been criticised and regarded as unsuccessful due to several factors, such as “inflexible policy, unrealistic and inappropriate goals, [and] failure to consider social and political dimension of poverty” in respect of the San people’s lifestyles.¹⁹

3 The basis of San people’s livelihoods and their marginalised status

Nationally and regionally, the San people are not only statistically a minority, but they are also severely marginalised. This is manifested in a diversity of ways, such as their exclusion as evident in the lack of opportunities available to them; their limited participation in society; relative deprivation, as characterised by poor housing conditions, limited employment opportunities, limited chances to access improved income, and high rates of poverty; and social injustice, such as the loss of their lands during colonialism, and the continuing precariousness in their access to land and threats to their customary tenure. Overall, the marginalisation of the San people is evident in the differences in their socioeconomic, political and environmental conditions, which are all inferior to those of other social groups.²⁰

14 (Nampala 2015: 210)

15 (Pohamba-Ndume et al. 2016, at http://repository.unam.edu.na/bitstream/handle/11070/2022/pohamba-ndume_2016.pdf?sequence=1&isAllowed=y)

16 (Mouton et al. 2014: 235)

17 Takada, Akira, *Narratives on San Ethnicity: The Cultural and Ecological Foundations of Lifeworld among the !Xun of North-Central Namibia*, Kyoto University Press, Kyoto, and Trans Pacific Press, Melbourne, 2015. (<https://www.amazon.com/Narratives-San-Ethnicity-Foundations-North-Central/dp/1920901922>).

18 (Pohamba-Ndume et al. 2016)

19 Cited in (Pohamba-Ndume et al. 2016).

20 See also (Anaya 2013).

The Namibia Household Income and Expenditure Survey of 2009/2010 showed that poverty in Namibia is highest amongst those who speak Khoisan languages, followed by Rukavango speakers.²¹ The San people's poverty levels are directly linked to factors such as a lack of employment opportunities, threatened traditional livelihoods and limited access to education. This is exacerbated by insecure access to and tenure over land. These manifestations of marginalisation affect their ability to subsist and continue to follow their customary livelihoods practices. Additionally, the majority of those in the communal areas have no recognised traditional authorities of their own, but live under the leadership of the dominant group's traditional authority (TA). It is only in the former "Bushmanland" where the San people constitute a majority within the communal lands in which they live, and therefore, where they have decision-making powers with respect to land administration.²² In Ohangwena Region, for example, San people live under the jurisdiction of the Oukwanyama TA, and partially under the Ondonga TA. These TAs are hierarchical, and led by two Ovawambo polities which operate in accordance with their respective customary laws. The lack of recognised TAs for the San people in many regions has rendered them politically weak, and so they are not included in decision-making on matters affecting them, and especially regarding land administration. As a result, many depend on other traditional communities and authorities for access to land, in particular for land allocation, but even for food and basic services.²³

Poverty in Okongo does not coincide with ethnicity, because some of the Ovawambo in the constituency are also classified as poor. However, the living conditions of the San people are generally poorer, and the conditions are often appalling to the point of being inhumane. One of the interactions during fieldwork in 2018 was with a San family living just outside the fence of the offices of Okongo Community Forest and Okongo Conservancy. There, a woman who had just given birth (the baby was two weeks old at the time of the fieldwork) lived in a small hut with her husband. Nearby were other shacks belonging to family members. In the meetings, other members of the community forest and the communal conservancy from other ethnic groups also raised concerns over these appalling and inhumane shelters, and recommended that assistance be given for the building better shelters and the establishment of household gardens to improve the basic household food security of the San people. The Regional Governor, whose office is situated in Eenhana, the capital of Ohangwena Region, also shared similar sentiments by calling for donor-funded projects proposed in the area to consider the replanting of, for example, zimenia and other fruit trees on which the San people depend for their livelihoods, to enable them to maintain their traditional gathering customs.

21 Namibia Statistics Agency, *Namibia Household Income and Expenditure Survey (NHIES) 2009/2010*, NSA, Windhoek, 2012.

22 (Anaya 2013: 8)

23 (Lankhorst 2009)

The San people in Okongo, as in most other parts of the country, now depend on a diversity of sources for their livelihoods. These include “food aid, piecework, veldfood gathering, pensions, subsistence agriculture, child labour and [support from neighbouring households in the form of food and other essential items]”.²⁴ A few San are employed, particularly in the informal sector as casual-, day- or seasonal labourers. The type of employment they obtain ranges from livestock herding, clearing land, fencing, and fetching water, to housekeeping or caring for children. Due to their historic and current higher rates of unemployment in formal sectors, poverty and desperation in the rural areas where San and other marginalised people live create a state of dependency, where labourers trade off their manual work for goods such as food and alcohol. The diversity of sources of livelihoods can be explained in terms of the multiple threats undermining the original basis of their livelihoods. It is now generally true that the original basis of livelihoods, namely hunting and gathering, has been compromised. This is a result of the individualisation of land access, and the fencing-off of land by sedentary agriculturalists. Sedentary agriculture has transformed the dynamics around access to land in the Okongo area by increasing the demand for grazing lands for the growing numbers of livestock, as well as for land for dwellings and crop cultivation. This has consequently resulted in changed natural habitats and a reduction in wildlife – formerly the basis of San livelihoods in the area. Despite the threats to their livelihoods, the San continue with their traditional practice of gathering veldfoods, even though such resources are currently compromised. Today, the veldfood that the San people in Okongo collect includes *omambibo*, *eeshe*, *omauni*, *eembu* and *eemheke*, amongst others. The fact that the San can still collect these resources suggests that they still have some form of access to land, even if it is hampered in most cases. Their access and tenure relations have been altered by the individualisation of tenure by other groups, compromising their now precarious livelihoods.

4 The land tenure system of the San people

Today, the population of Okongo Constituency is the third largest in Ohangwena Region, with recent estimates placing it at 25 698 inhabitants.²⁵ The constituency has grown from being an area that was sparsely populated with no forms of infrastructural development, to one with fully-fledged villages, and there is even a town emerging. The area is dominated by sedentary agriculturalists who depend on individualised holdings for homesteads and crop production, and who have fenced-off large tracts of land to include grazing lands.

²⁴ (Mouton et al. 2014: 243).

²⁵ Namibia Statistics Agency, *Namibia 2011 Population and Housing Census Main Report*, NSA, Windhoek, 2011.

Hunting and gathering formed the basis of the livelihoods of the San people. As early, sparsely distributed inhabitants of Okongo, they led a highly mobile lifestyle of hunting wild animals and gathering veldfoods, with no restrictions. Like the sedentary agriculturalists, the San people used land on the basis of customary tenure. However, it is important to underscore that customary tenure arrangements differ amongst communities. The customary tenure of the sedentary agriculturalists in north-central Namibia entails individualised tenure, with individual families having exclusive rights to land for dwellings and crops; other members of the community could be excluded from using these resources without the consent of those who hold the rights. Sedentary agriculturists also have communal tenure, in term of which a right of common usage exists and is exercised by members of the community – for example, members of a community may have the right to graze their livestock on a common pasture.²⁶ It is important to note that for sedentary agriculturalists, communal tenure has reduced as a result of the individualisation and fencing-off of large tracts of lands for grazing purposes.²⁷ This has not only reduced the availability of land as common resource, but has left the San people on the margins, with their access to land becoming ever-more precarious. The San people's customary tenure was and is based on land as common property or a common-pool resource with open access. In such a tenure system, "specific rights are not assigned to anyone and no-one can be excluded";²⁸ where it still pertains, there is no individualisation of tenure amongst the San people, as the land is open to the entire group.

It was observed in the field that individualisation and fencing-off of the land has led some of the San people – especially those in villages outside the special resettlement projects – to settle in the corridors between the fences of individualised landholdings. Other researchers have revealed that the village headmen where the San people live have indicated that San people can be allocated land if they have requested it.²⁹ However, there are factors that inhibit the land from being put into productive use, such as the lack of agricultural tools and cattle necessary for ploughing the land.³⁰ However, as described above, several projects, whether initiated by the missionaries in the past or by the current government, have not worked. Therefore, a critical question is whether the current GRN projects are adopting the wrong prescriptions as solutions to the marginalisation of the San people? Do the San people need individualised landholdings? Do they need individualised tenure? Or do they need a secured and protected common-pool

26 FAO, *Land Tenure and Rural Development*, Rome, 2002.

27 Nghitevelekwa, Romie, *Communal Lands in Namibia Transitions in Customary Land Tenure, Land Uses and Tenure Security in North Central Communal Areas of Namibia*, Windhoek, University of Namibia Press, forthcoming.

28 (FAO 2002)

29 (Mouton et al. 2014)

30 Ibid.

and open-access system of tenure, as they have had in the past? In the section below, we analyse how the securing of land rights on communal land addresses and integrates the tenure systems of the San people.

5 Communal land reform in securing San people's land rights

In 2002, Namibia passed the Communal Land Reform Act (No. 5 of 2002), which subsequently came into force in March 2003. The Communal Land Reform Act provides for the registration and statutory recognition of land rights on communal land in order to give the legal security of land tenure which has long been denied.³¹ The enforcement of the Communal Land Reform Act marked the beginning of the communal land reform process in Namibia. The land rights registered and recognised on communal land are customary land rights, rights of leasehold for general business purposes, rights of leasehold for agricultural purposes, and occupational land rights. Rights of leasehold for general business purposes are granted for land uses such as tourism enterprises, filling stations, supermarkets, small- and medium-sized trading stores, and others. Rights of leasehold for agricultural purposes are mainly granted for land uses in areas designated and gazetted for agricultural purposes, such as the small-scale farming units. Occupational land rights are granted for land uses of public interest such as schools, hospitals, churches and others. The Act defines customary land rights as rights to farming units (crop fields), rights for residential units, and any form of customary tenure that may be recognised and described by the Minister in the *Gazette*.³² Here, the Communal Land Reform Act is specific about individualised tenure, but other forms such as open access tenure as practised by the San people and where resources are found on commonage are also clearly specified.

The GRN has identified and recognises the San people amongst others (Himba, Ovaherero, Ovambo, and Ovazemba) as particularly marginalised, and they have been recognised in different laws and policies as groups that merit special attention and concern.³³ This identification and recognition can be compared with that of gender as a social category. In this regard, women are recognised as being historically marginalised in many spheres of life, including in access to and rights over land. As a result, the Communal Land Reform Act makes specific provision for closing gender gaps in the governance structures over communal land, for example by setting a quota for women as representatives on the communal land boards. Currently, this quota requires four women to be members of each communal land

31 (Nghitevelekwa forthcoming)

32 Republic of Namibia, Communal Land Reform Act (No. 5 of 2002).

33 (Anaya 2013: 5)

board (two women who are engaged in farming operations in the respective board's area, and two women who have expertise relevant to the functions of a board).³⁴ Similarly, there are clear provisions set out in section 26 of the Act, to ensure, protect and secure the rights of women and especially widows' land rights upon the death of their spouses.³⁵ While we acknowledge the limitations that still exist regarding the implementation of these provisions, they do represent a recognition of the historical vulnerabilities, marginalisation and precarious positions which women, and in particular widows, have long occupied in relation to access to and rights over land. Setting a quota for female representatives on the communal land boards is intended to close the gender gap in relation to governance structures on land administration.³⁶ However, the same cannot be said for the San people, who have also been identified as marginalised and of concern, and needing special attention. The San's involvement in land administration should be given the same attention that has been given to women, with a view to securing their access to land and security of land tenure. In the absence of this recognition in the Act, they will continue to be marginalised, and to depend on marginal livelihoods. There are no indications of gaps in access to land and rights over land of the marginalised groups in Namibia being resolved by the Act.

Because of individualisation and fencing-off of land by sedentary agriculturalists, the institutions of community forests and conservancies under CBNRM seem to be the last hope of maintaining the San people's customary livelihoods, as discussed further on.

6 Community-based natural resources management: A window of opportunity?

With the shortcomings identified in communal land reform and the securing of tenure, this paper argues that CBNRM provides a possible window of opportunity through which the San people's land tenure can be maintained. CBNRM is a programme established in the 1990s as part of the GRN's efforts to promote conservation and the sustainable utilisation and management of Namibia's resources. It rests on the belief that "if natural resources have sufficient value to rural communities, and allow for rights to use, benefit and manage, then appropriate incentives for people to use natural resources in a sustainable way will be created".³⁷ According to Hulme and Murphree (1999) and Adams and Hulme (2002), CBNRM is a new approach to conservation, departing from and challenging earlier fortress conservation models

34 Republic of Namibia, Communal Land Reform Act (No. 5 of 2002), p. 5.

35 Ibid.

36 (Nghitevelekwa forthcoming)

37 'National Policy on Community-Based Natural Resources Management', Ministry of Environment and Tourism, 2013, p. i.

under colonial dispensations that excluded local communities from the equation of conservation.³⁸ According to Caruthers (2007), fortress conservation approaches were characterised by the “creation of protected areas from which Africans were forcibly, and often violently removed or displaced and subsequently excluded.”³⁹ It was these types of exclusions that the new conservation model in the form of CBNRM had to overcome. In Namibia CBNRM is implemented through communal conservancies and community forests. The programme was pioneered and officially launched in 1998 with the gazettment of the four first communal conservancies, namely; Nyae Nyae in the east, Salambala in the north-east, ǀKhoadi-ǁHôas in the north-west, and Torra in the west of Namibia.⁴⁰ Over the years communal conservancies and community forests have gone from strength to strength. By 2018, in Namibia there were 86 registered conservancies spread across the country, covering 166 045 km² and benefiting over 227 941 people.⁴¹ Similarly, there were about 40 community forests spread across the country. The first 13 community forests were established in 2006. All community forests in Namibia are established under section 15(3) of the Forest Act (No. 12 of 2001).⁴² Community Forests in Namibia further function in line with the Namibia Forestry Strategic Plan of 1996. Like the communal conservancies, the rationale behind the establishment of community forests is to promote the sustainable utilisation of forests and forest resources, with strong involvement of local communities in the management and decision-making process. The end goal is to reduce poverty, improve rural livelihoods, provide an opportunity for rural communities to reinforce their traditional rights to communal land, and provide an opportunity for community-based decision making and conflict resolution.⁴³

In far-northern Namibia, Okongo Community Forest and Okongo Communal Conservancy were registered in 2006 and 2009, respectively. Okongo Community Forest is among the pioneer community forests to be registered in Namibia, and it plays an important role in the preservation of the forests in Ohangwena Region, which have been critical in the provision of grazing, timber and non-timber forest products to its users. Okongo Community Forest has played a role in maintaining the forest resources, albeit while having to face challenges along the way. The

38 Cited in Nuulimba, Karine & Julie J. Taylor: ‘25 Years of CBNRM in Namibia: A Retrospective on Accomplishments, Contestation and Contemporary Challenges’, *Journal of Namibian Studies: History Culture Politics*, Vol. 18, 2015, pp. 89–110 (<https://namibian-studies.com/index.php/JNS/article/view/425>).

39 Cited in (Nuulimba & Taylor 2015: 91)

40 Ministry of Environment and Tourism, ‘Conservancies’ (accessed 9 August 2019 at <http://www.met.gov.na/services/conservancies/193/>).

41 Namibia Association of CBNRM Support Organisations, ‘Registered Communal Conservancies’, NACSO (accessed 9 August 2019 at <http://www.nacso.org.na/conservancies>).

42 Ministry of Agriculture Water and Forestry, ‘Community Forestry’ (accessed 9 August 2019 at <http://www.mawf.gov.na/community-forestry>).

43 Ministry of Agriculture, Water and Forestry, ‘Community Forestry Guidelines’, 2005.

preservation of the natural forest endowment has promoted the San people's livelihoods, and has perhaps played an important role in sustaining them and contributing to their continued presence in the area.

Okongo Community Forest, as part of the CBNRM programme, is rich in a variety of tree and plant species that are potential resources of timber, livestock grazing, and edible and medicinal plants.⁴⁴ In comparison to medicinal plants, however, the resource of edible plants has diminished as a result of degradation.⁴⁵ This has a direct impact on the San communities who depend on edible plants or veldfoods as part of their livelihoods. Members of the Okongo Community Forest Management Committee have made proposals for new donor-funded projects to include reforestation with edible plants so as to revive these resources. A socioeconomic survey for Okongo Community Forest undertaken by Okongo Agricultural College in 2000 estimated that a total of around 150 San people and around 1 100 Ovakwanyama live in Okongo Community Forest and are its primary users.⁴⁶

The San people have occupation and use rights as registered members of the two community-based institutions (Okongo Community Forest and Okongo Communal Conservancy), just as members from other ethnic groups do. They have access to resources such as firewood and veldfood, but also share in general benefits generated and/or provided through the community forest or the conservancy. The Participatory Integrated Okongo Community Forest Management Plan is very clear on the integration of the San people. The plan emphasises that "the San community shall continue to be represented in the forest management committee and other forums, where their aspiration shall be discussed".⁴⁷ The management plan further provides for the integration of the San community and fully recognises their traditional lifestyle. However, while the management plan is clear on this, findings from the field reveal that this representation is not altogether effective, as the San members tend not to attend meetings. It has been suggested that this is a consequence of the San's mobile lifestyle. However, despite the absence of San representatives on the committee, the members ensure that the needs of the San members are addressed. One of the committee members shared that "most people that are in need of assistance are our San people. The immediate help needed is food and decent shelter."⁴⁸ The outcome envisaged in the management plan is that the preservation of forests will increase the availability of veldfood for the San to collect.⁴⁹ We contend that community-based organisations in the

44 Shinyala, Cecilia, Andreas Nikodemus & Agnes Shikomba, 'Forest Resources Inventory Report for Okongo Community Forest', Ministry of Agriculture, Water and Forestry, Windhoek, 2017.

45 Ibid.

46 Mulofwa, Jericho, Bernhard Pfaff, Esther Amadhila & Michael Otsub, 'Participatory Integrated Forest Management Plan', Okongo Community Forest, Namibia, 2003.

47 (Mulofwa et al.: 24)

48 Informal discussion, Okongo Community Forest, 2018.

49 (Mulofwa et al.: 24)

forms of community forests and communal conservancies are the only avenues through which the “rights of groups of people to common pool resources [can be] secured”.⁵⁰ Furthermore, there are other forms of support that come from the community forest, namely the use of funds to support the San people in marketing their products such as fruits and crafts, to buy them blankets, especially during the winter season, and to contribute to funeral costs in times of bereavement.

Although community forests and conservancies have the capacity to preserve the San people’s livelihood basis and improve their standard of living, these benefits are threatened by the high demands for land, failure to comply with the bylaws and management plans, especially by the traditional authorities which allocate land for agriculture in the forest reserve area. This in the end defeats the very goal of sustainable utilisation and conservation. While these good intentions are clear on paper and provided for through legislation, research has revealed that some San people have “complained that the regulations [of the community forest] were also inhibiting them from accessing veldfood and other natural resources”.⁵¹ Similarly, their hunting lifestyle is also inhibited because hunting is no longer permitted, or it is regulated. This means that access to and rights over common-pool resources are limited and conditional.⁵² Werner (2015) additionally reveals that conservancies and community forests have no powers with regard to the administration of land rights, including land allocation. On communal land it is the traditional authorities at the level of the village headmen which have the legal power to allocate land. Members of Okongo Community Forest have shared that the village headman allocated land in the community forest although this is prohibited. These allocations have resulted in the individualisation and fencing off of land – and therefore in a reduction in the size of the community forest, and a restriction in access to its common-pool resources. These were confirmed by the representatives from the Ohangwena Communal Land Board, who noted that the new allocations and fencing in the community forest are treated as illegal fencing, and that there is now a moratorium on any allocations in the community forest. This moratorium is viewed as a positive development as having no individualisation in the community forest’s core area allows for the continuing availability of land on open access tenure. Similar lessons are evident in the Nyae Nyae and the N̄a Jaqna conservancies in Otjozondjupa Region. It has been found that these conservancies provide a wide range of benefits to the San people, especially by allowing them to have access to traditional veldfood, which ensures food security.⁵³ Nyae Nyae Conservancy, in particular, is said to be playing an important role in providing a platform for the San people

50 Werner, Wolfgang, ‘Tenure Reform in Namibia’s Communal Areas’, *Journal of Namibian Studies*, No. 18, 2015.

51 (Mouton et al. 2014: 246)

52 (Werner 2015)

53 (Hays et al. 2014: 139)

there to make their interests known to outsiders, to engage with the GRN and, in particular, to defend their land rights.⁵⁴

7 Conclusion

Access to land for the San people in Okongo Constituency remains in a precarious state. This is a result of in-migration, and the settlement and individualisation of land by agriculturalists and pastoralists. Over the years, precariousness in access to land has resulted in the marginalisation of the San people and the erosion of their livelihoods. While the model adopted by the Communal Land Reform Act and ultimately the Land Rights Registration Programme protects and secures the rights of other social groups, particularly women in Namibia, it does not give special consideration to other social groups, in particular the San people, who have long been and marginalised in relation to access to and rights over land. They therefore remain excluded from statutory recognition and protection of their customary land rights. Gathering continues to play a critical role in the livelihoods of the San people, and the fact that the current land rights registration does not include these activities reflects their exclusion from security of tenure. There is a window of opportunity in the community forests and communal conservancies model for the San people to be secured in terms of access to resources that are critical for their livelihoods. Through community forests and communal conservancies, the GRN devolves management and use rights to communities with the end goal of sustainable management. However, the presence of regulations inhibiting or prohibiting San people from accessing veldfoods contradicts the very purpose of these community-based institutions. Hence, it is important that all management communities of community forests and communal conservancies are sensitised about the basic needs of the San people, and alerted to the fact that their respective regulations should take these needs into consideration. The registration of land rights, and in particular customary land rights, ought to be specific regarding rights to forest-based or common-pool resources for the San people and other land users who depend on them. A one-size-fits-all model of land rights registration only works to the benefit of some land users, as the current model best fits their land use patterns. Other land users whose land use patterns do not revolve around the individualisation of land, for example, are excluded. Our conclusion is therefore that the Ministry of Land Reform, through the communal land boards, should consider protecting and securing land rights beyond individual land rights, and include forest-based or common-pool resources rights.

⁵⁴ Ibid.

Land and resource rights of the Khwe in Bwabwata National Park

Gertrud Boden

1 Introduction

This chapter discusses the land rights situation of the Khwe, one of the indigenous and disadvantaged San groups in Namibia. It describes how the Khwe have lost control over land and livelihood opportunities since 1890, and particularly since the 1960s.

Most of the Namibian Khwe live in the stretch of land between the Kavango and Kwando Rivers. This is the main part of Bwabwata National Park (BNP), which is situated at the centre of the ancestral Khwe settlement area (see section 3). It falls within two administrative regions, namely Kavango East and Zambezi. The border between the two regions is at 22° 30' E, just west of Chetto.

About 6 700 Khwe are currently living in the park.¹ BNP is divided into three core areas reserved for wildlife, and a multiple use area where people can settle, plough and use natural resources subject to the park's restrictions. In the villages in the multiple use area, the government of the Republic of Namibia (GRN) provides infrastructure and services such as boreholes, schools, clinics and food aid.

The legitimate body to represent the residents of BNP – namely the Khwe and an increasing number of Mbukushu and other Kavango people – is the Kyaramacan Association (KA). All commercial use of land and natural resources within both the core and multiple use areas, such as the contracting of hunting concessionaires,

1 'BCP Biocultural Community Protocol of the Khwe Community residing inside Bwabwata National Park – Draft Version 27.06.2019', made available by Natural Justice, Cape Town (<https://naturaljustice.org/>).

tourism activities, the commercial harvesting of devil's claw or large-scale agricultural projects, needs to be authorised by the Ministry of Environment and Tourism (MET). Through the KA, the park residents are awarded rights to benefit from natural resources. The KA manages the communal income from tourism and trophy hunting.²

Access to ancestral land and its resources is vital for the economic, social, cultural, psychological and spiritual wellbeing of indigenous people. Having access to sufficient land as a productive asset not only enables long-term survival and various development options, but also fosters dignity and prevents social disintegration.³ For Namibia, deprivation of land together with the limited ability to practise traditional livelihoods and cultural traditions have been identified as causes of the impoverishment, food insecurity, and marginalisation of the San.⁴ For the Khwe in BNP, the deprivation of land and resource rights has not stopped with Namibian independence. Instead, the Khwe in BNP have experienced an increasing influx of non-San persons seeking land for settlement, grazing and crop production on Khwe ancestral land. This is partly the result of the deliberate strategy of the Mbukushu Traditional Authority to increase the number of Mbukushu residents in the park and within the Kyaramacan Association, as well as to extend the cultivated land in those parts of the multiple use areas considered for de-proclamation and transformation into communal land. It is thus also the result of the inability of the national land reform programme to meet the expectations for land held by many Namibians in neighbouring communal areas, given as one of the reasons by new residents for their settling in BNP.⁵ A third reason is the unwillingness or inability of the MET to effectively deal with threats to both Khwe land rights and the natural environment in BNP.

- 2 Nuulimba, Karine, 'Living in a Park: Strategic Approaches used by Khwe San to Secure Rights in Namibia's Bwabwata National Park', paper presented at the 22nd Conference of the African Studies Association (VAD e.V.), Cologne, Germany, 30 May to 2 June 2012; Taylor, J.J., *Naming the Land: San Identity and Community Conservation in Namibia's West Caprivi*, Basler Afrika Bibliographien, Basel, 2012.
- 3 Welch, C., "Land is Life, Conservancy is Life": The San and the Nǀa Jaqna Conservancy, Tsumkwe District, Namibia', *Basel Namibia Studies Series 20*, Basler Afrika Bibliographien, Basel, 2018.
- 4 Suzman, J., *An Assessment of the Status of the San in Namibia*, Report No. 4 of 5 on the *Regional Assessment of the Status of the San in Southern Africa*, Legal Assistance Centre, Windhoek, 2001; Dieckmann, U. et al., "Scraping the Pot": *San in Namibia Two Decades After Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, 2014; Heim, A. & A. Paksi, 'Low dietary diversity and its influencing factors among a San group in Namibia', *BMC Research Notes* 12, 2019, pp. 365–372 (<https://bmcresearchnotes.biomedcentral.com/articles/10.1186/s13104-019-4408-8>), pp. 365–372. The appropriateness of the denominations 'San' and 'Bushmen' have been discussed at length in the literature. I will use the term 'San' when writing from my own perspective, but stick to the term 'Bushmen' when referring to documents using this term.
- 5 Boden, G., "Elephant is my Chief and my Councillors are Kudus. We don't talk and I will not get Development", unpublished research report on the status of crop cultivation projects and other livelihood options in Bwabwata National Park, Legal Assistance Centre, Windhoek, 2014.

After introducing the Khwe as indigenous, marginalised and disadvantaged people (section 2), the chapter gives proof of BNP as Khwe ancestral land and outlines customary Khwe land management (section 3), describes the effects of historical developments on Khwe access to land and resources (section 4), and depicts their current land and resource rights situation, and its consequences for Khwe livelihoods (section 5). The account is based on oral and written sources, group discussions, interviews with key informants, and household survey data. Finally, the chapter makes recommendations by referring to the relevant resolutions of the Second Namibian Land Conference held in October 2018 (section 6). Since land rights depend on political leadership rights for their enforcement, the question of governance has to be considered in each section. To date, the Khwe are the sole Namibian San community without GRN recognition for their Traditional Authority (TA). This is the case in spite of the fact that they are a community with a common ancestry, language, cultural heritage, customs and traditions, as required in the Namibian Traditional Authorities Act (No. 25 of 2000). The aim of the chapter is to raise awareness regarding the particular land rights and livelihood situation of the Khwe as residents of a national park and people without a GRN-recognised political leadership.

2 The Khwe as indigenous and disadvantaged people

Rights to and control over land are linked to concepts of collectiveness and distinct cultural traditions in both international law and Namibian legislation such as the Traditional Authorities Act. In the accepted definition of the United Nations, the Khwe are an indigenous people as there is historical continuity between them and pre-colonial societies that developed on their territories, and they consider themselves to be distinct, are a non-dominant sector of society, and are determined to preserve, develop and transmit to future generations their ancestral territories, ethnic identity, and cultural and social practices.⁶ BNP is at the centre of the Khwe ancestral settlement area.⁷ The Khwe have a distinct language and distinct cultural values.⁸ They constitute about 0.25 percent of the national population

6 <https://www.un.org/development/desa/indigenouspeoples/about-us.html>, accessed 31.7.2019.

7 Brenzinger, M., 'Moving to survive: Kxoe communities in arid lands', in Schladt, M., *Language, Identity, and Conceptualization among the Khoisan*, Rüdiger Köppe, Cologne, 1998.

8 Kilian-Hatz, Ch., 'Khwe Dictionary – With a Supplement on Khwe Place-names of West Caprivi', *Namibian African Studies* 7, Rüdiger Köppe, Cologne, 2003; Kilian-Hatz, Ch., 'A Grammar of Modern Khwe (Central Khoisan)', *Research in Khoisan Studies* 23, Rüdiger Köppe, Cologne, 2008; Köhler, O., *Die Welt der Kxoe-Buschleute im südlichen Afrika – Eine Selbstdarstellung in ihrer eigenen Sprache*, Dietrich Reimer, Berlin, 1989, 1991, 1996, 2018:

- *Band 1: Die Kxoe-Buschleute und ihre ethnische Umgebung* (1989);
- *Band 2: Grundlagen des Lebens: Wasser, Sammeln und Jagd; Bodenbau und Tierhaltung* (1991);
- *Band 3: Materielle Ausrüstung: Werden und Wandel; Wohnplatz und Buschlager* (1996);

and, like other San, have a history and current experience of marginalisation characterised by extreme poverty, a low Human Development Index, dependency, political alienation and a variety of social, educational and health problems such as high infant mortality rates.⁹ The commitment of the Khwe to transmit their ancestral land as well as their cultural identity and practices to future generations finds expression in the continuous use of their language and cultural practices, the formation of the Bwabwata Khwe Custodian Committee, and plans for a Traditional Ecological Knowledge Academy. Most recently, they have designed a Bio-cultural Community Protocol (BCP) determining the Khwe community's values, procedures and priorities, as well as the rights and responsibilities under customary, state and international law as the basis for engaging with external actors such as the GRN, companies, academics and NGOs. The Khwe BCP defines BNP and the lifestyle of hunting and gathering as given to the Khwe by God.¹⁰ Once the BCP has been officially launched, it will at least ensure some form of recognition for the collective existence of the Khwe and might help to advocate greater access, use and management rights in the BNP core areas as well as the development of a cultural centre for teaching traditional knowledge to Khwe children in the multiple use area.

Namibia has signed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). However, it considers all Namibians indigenous and sees San rights as being adequately respected by their equal enjoyment of human rights as guaranteed in the Namibian constitution. On the grounds that all Namibian citizens who are descendants of pre-colonial communities are indigenous, the Namibian government has also long refused to recognise ancestral land claims of the San as indigenous peoples in terms of UNDRIP. It prefers to speak of “disadvantaged communities” with respect to land ownership and “most marginalised people” with respect to rights to the satisfaction of basic needs. It acknowledges that the San are among the most marginalised people, and has established a San Development Programme under the auspices of the Office of the Prime Minister, but this has been criticised for inadequate funding and the unsustainability of individual programmes, and the attainment of very few long-term improvements.¹¹

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- Vol. 4.1: *The World of the Khwe Bushmen in Southern Africa – A Self-Portrait in their Own Language, Family and Society: Customary Law – Norms and Practices*, edited by Boden, G. & A.-M. Fehn, with assistance from T. Chedau (2018).

This encyclopaedic collection of texts on Khwe culture recorded by Oswin Köhler also covers texts describing Khwe religion, healing, music, dance, games, arts, folklore and traditional ecological knowledge, which are currently being edited.

- 9 Dieckmann, U. et al., ‘Scraping the Pot’; Suzman, J., *An Assessment of the Status of the San in Namibia*, Report No. 4 of 5 on the *Regional Assessment of the Status of the San in Southern Africa*, 2001.
- 10 Biocultural Community Protocol of the Khwe Community Residing inside Bwabwata National Park, 6.
- 11 Dieckmann, U. et al., ‘Scraping the Pot’; Welch, C., ‘Land is Life, Conservancy is Life’.

Although the Khwe in BNP were not expelled from their ancestral land in colonial times, they are collectively disadvantaged with respect to land rights as they have been and remain dispossessed of the self-determined use of their land since the 1960s (see sections 4 and 5). During the Second Namibian Land Conference in October 2018, Khwe representatives were able to draw attention to their case.¹² One of the resolutions passed at the conference called on the GRN to establish a commission of inquiry to look into the matter of ancestral lands. In February 2019, President Hage Geingob announced the establishment of the Presidential Commission of Inquiry into Claims of Ancestral Land Rights and Restitution. In July 2019, the Legal Assistance Centre (LAC) recorded a statement on Khwe ancestral land by Khwe representatives and submitted a Claim of Ancestral Land Rights and Restitution to the commission.¹³ Together with the anticipated launch of the BCP, this gives hope for the recognition of Khwe land use rights and rights to self-determination in the future. However, for today, their situation remains precarious and characterised by insecure land tenure, a lack of self-determination, and poor livelihoods, as described in more detail in section 5.

The hardships experienced by current Khwe lives are certainly partly due to the remoteness of their settlement area and low status on the social ladder. The core problem is the lack of rights to land and resources that would enable the Khwe to live an economically independent life. I will now describe the nature of such rights during pre-colonial times (section 3) and how they were lost in the course of Namibia's colonial and post-colonial history (section 4).

3 Khwe ancestral lands and customary land management

The majority of the Namibian Khwe used to live, as they still do today, in the narrow stretch of Namibian territory between the Okavango and Kwando Rivers, which in 2007, together with the Mahango Park on the other side of the Okavango (see Figure 1 on the next page) became the Bwabwata National Park. BNP is at the core of the ancestral settlement area of the Khwe, which also includes adjacent areas in Angola, Botswana, Zambia, and the eastern part of Namibia's Zambezi Region.¹⁴ Khwe traditional livelihoods were based on hunting and gathering as well as horticulture.¹⁵

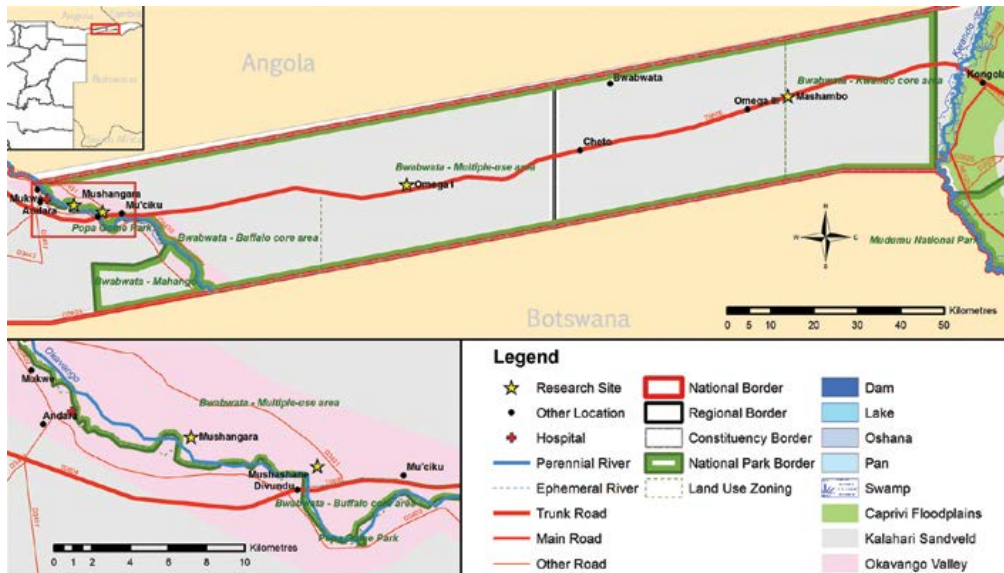
12 David Mushavanga, Khwe representative in the Namibian San Council, pers. comm. 12 March 2019.

13 Statements taken at the Legal Assistance Centre on 30 July 2019 from representatives of the Khwe people, namely Thaddeus Chedau, Alfred Chadau, Xuesom Renah Mushavanga and Stephanus Dikoshi, for 'Submission to the Presidential Commission of Inquiry into Claims of Ancestral Land Rights and Restitution by The Khwe People of Bwabwata', 8 August 2019.

14 Brenzinger, M., 'Moving to survive'.

15 Köhler, O., 'Grundlagen des Lebens'.

Figure 1: Core and multiple use areas in Bwabwata National Park



Source: Dieckmann et al. (eds), “Scraping the Pot”: *San in Namibia Two Decades After Independence*, LEAD Project of the Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, 2014.

The earliest written sources dealing with this stretch of land, formerly known as “West Caprivi”, are from German colonial times and depict it as Khwe land.¹⁶ After a reconnaissance trip in 1903, Lieutenant Volkmann from Grootfontein reported that a military post would be very easy to establish between the Okavango and the Tschobe [Kwando] because “only Bushmen were living there”.¹⁷ Franz Seiner, an Austrian geographer and race biologist, sent by the German colonial government to explore the economic value of the strip, called the area between the Okavango and Kwando Rivers “Hukwefeld” after its inhabitants, i.e. the Hukwe, or Khwe.¹⁸

16 Earlier explorers of the wider region, such as:

- Livingstone – Livingstone, D., *Missionary Travels and Researches in South Africa* (Reprint 1858), Johnson Reprint Corporation, New York & London, 1971;
- Holub – Holub, E., *Sieben Jahre in Süd-Afrika: Erlebnisse, Forschungen und Jagden 1872–1879* (Vols 1 & 2), Hölder, Wien, 1881; Holub, E., *Von der Capstadt ins Land der Maschukulumbé: Reisen im südlichen Afrika in den Jahren 1883–1887* (Vols 1 & 2), Hölder, Wien, 1890;
- Schulz & Hammar – Schulz, A. & Hammar, A., *The New Africa: A Journey up the Chobe and down the Okavango Rivers*, William Heinemann, London, 1897;
- Passarge – cf. Wilmsen, E.N., *The Kalahari Ethnographies of Siegfried Passarge (1896–1989)*, Rüdiger Köppe, Cologne, 1997; or travelled along the rivers but not through the dry lands between the Okavango and Kwando.

17 ZBU 1009 J XIIIb 4, Vol. 1, p. 10: Letter of the District Head Grootfontein to the Imperial Government Windhoek, 23 May 1903, National Archives of Namibia.

18 Seiner, F., ‘Ergebnisse einer Bereisung des Gebietes zwischen Okavango und Sambesi (Caprivizipfel) in den Jahren 1905 und 1906’, *Mitteilungen aus den Deutschen Schutzgebieten* 22, 1909, pp. 1–111.

A great number of biographical records and place names provide further evidence of the land between the two rivers being Khwe ancestral land. Köhler (1989) identified about 60 Khwe place names in the Okavango area, while Diemer (1996) and Boden (2005) identified more than 200 in the eastern part of BNP.¹⁹ During German colonial times, the German Imperial Resident of the Caprivi Strip, Captain Kurt Streitwolf, also documented some of these when searching for a reliable travel route on German territory through the dry strip of land between the two rivers, albeit in mutilated forms such as Gaudinga for Kx'eu-dinga, or Gautscha for ‡Geu-ca.²⁰

The lack of surface water not only presented an enormous obstacle to travellers and administration personnel²¹ but also to agro-pastoralists, who were unable to cultivate fields and keep cattle in the dry lands between the two rivers. Seiner (1913) reported that the “Natives” (the colonial category for Bantu-speaking agro-pastoralists as opposed to “Bushmen”) knew only one water place in the central Hukwefeld (nowadays BNP), namely the Mbukushu village Gauschiku. The “Natives” further told Seiner that it was impossible to keep cattle in the area, which was completely inaccessible for whites and themselves due to the lack of water.²² And according to Schönfelder (1935), who travelled through what is now BNP to recruit mineworkers for the Witwatersrand Native Labour Association, the area offered relatively lush living conditions to “the Bushman” while it was only a migratory area for the Bantu populations whose preferred living places were the riverbanks and valleys.²³ All of these sources confirm that in pre-colonial and early colonial times, BNP was Khwe land. Other people occasionally used it for seasonal grazing in years with good rains, and for trading as well as for capturing and selling Khwe as slaves.²⁴

Customary Khwe land rights on their ancestral land followed the first settler principle. Since time immemorial, the Khwe had lived at permanent settlements in dry riverbeds, close to permanent water sources (dug wells) where they also used to practise horticulture. From such permanent settlements, some residents or groups of residents moved to seasonal water places for hunting and gathering, while other residents, most often elderly people, remained at the permanent settlement.²⁵ Although the boundaries of foraging territories were to some degree fluid and

19 Boden, G., *Prozesse sozialen Wandels vor dem Hintergrund staatlicher Eingriffe: Eine Fallstudie zu den Khwe in West Caprivi/Namibia*, Ph.D. Thesis, University of Cologne, Cologne, 2005 (<http://kups.ub.uni-koeln.de/volltexte/2005/1595/>).

20 Map attached to Streitwolf, K., *Der Caprivizipfel*, Süsserott, Berlin, 1911.

21 Fisch, M., *Der Caprivizipfel während der deutschen Zeit 1890–1914*, Rüdiger Köppe, Cologne, 1996; Streitwolf, K., *Der Caprivizipfel*; Von Frankenberg, V., ‘Vom Sambesi zum Okavango durch das deutsche Hukwefeld, Juni bis August 1911’, *Mitteilungen aus den deutschen Schutzgebieten* 32, 1919, pp. 33–35.

22 Seiner, F., *Die wirtschaftsgeographischen und politischen Verhältnisse*.

23 Schönfelder, E., ‘Südost-Angola und der westliche Caprivizipfel’, *Petermanns Geographische Mitteilungen*, 1935, pp. 49–52, 87–89.

24 Köhler, O., *Die Kxoé-Buschleute und ihre ethnische Umgebung*.

25 Köhler, O., *Die Kxoé-Buschleute und ihre ethnische Umgebung*.

overlapping and could change over time, the overlap and transfer of land use rights relied on mutual agreements and respect for customary law.²⁶

There was also a spiritual aspect to Khwe ideas about sovereignty over land, based on the relationship between ancestors and the right of residence on a certain stretch of land. The Khwe believe that the ancestors, buried on ancestral land, would render foreign settlers sick and thereby repulse them so that their own descendants would be the only ones to live on the land. When someone died, the homestead was deserted and a new homestead was built in the vicinity, i.e. on the same stretch of ancestral land.²⁷

So-called *díxa-//'áé*, literally “responsible owners of homesteads or villages”, presided over the settlements. *Díxa-//'áé* were elders who had detected the water source, founded the settlement and performed the necessary rituals, namely the setting up of the hunting altar and the lighting of the first fire.²⁸ They would also decide when to initiate the harvest of certain veldfruit.²⁹ The *díxa-//'áé* were in charge of the people living in settlements, as well as the resources in the areas surrounding them, including seasonal foraging grounds. Newcomers who wanted to join a settlement had to ask for permission. The *díxa-//'áé* then indicated to them spaces for building a house and clearing a field, and for hunting and gathering. Even though the *díxa-//'áé* usually agreed to such requests, it was and continues to be considered a violation to ignore their authority and settle on a territory without asking for and being granted permission. The *díxa-//'áé* also instructed admitted newcomers in the sustainable use of resources.³⁰

More generally, the *díxa-//'áé* provided guidance and supervised their communities, mediated disagreements within their communities and represented them in issues with other Khwe, as well as non-Khwe. Although the Khwe did not have a paramount chief, *díxa-//'áé* with outstanding conflict solving abilities were addressed and considered in charge of issues also above the local level.³¹

Khwe customary law had different regulations for different types of natural resources. One never denied water to travellers or visitors. Only when people wanted to come and settle for a longer period or permanently at a waterhole, they had to ask the *díxa-//'áé*. The people who prepared fields for cultivation, worked on them and grew the crops were the owners of both the fields and the crops. Honey belonged to the person who spotted the beehive and marked the respective tree.

26 Boden, G., ‘Mapping culture, representing boundaries and politicizing difference: Reflections on two San cases in Namibia’, in Bubenzer, O., A. Bolten & F. Darius (eds): *Atlas of Cultural and Environmental Change in Arid Africa*, Heinrich-Barth-Institut, Cologne, 2007, pp. 112–115.

27 Köhler, O., *Die Kxoe-Buschleute und ihre ethnische Umgebung*; Köhler, O., *Wohnplatz und Buschlager*.

28 Köhler, O., *Wohnplatz und Buschlager*.

29 Köhler, O., *Grundlagen des Lebens*.

30 Köhler, O., *Wohnplatz und Buschlager*.

31 Boden, G., ‘Recognition of Khwe Traditional Authority and their Rights to Traditional Land in Bwabwaba National Park’, unpublished report, Legal Assistance Centre, Windhoek, 2011.

Plant and animal resources were not owned individually, but belonged to the whole group. When an animal, hit by a poisoned arrow, ran into the land of other people, the hunter had to share the meat with the landowners.³²

Because of relocations and the nature conservation status of the land, the boundaries of former foraging territories have lost their practical relevance today. Nevertheless, the Khwe still knew about and respected one another's habitual foraging grounds within settlements at the dawn of the current millennium,³³ and certain Khwe family groups continue to be associated with particular stretches of land to this day. As a result, members of some family groups are still more likely to live in villages situated on their ancestral family territories.³⁴

In the past, non-Khwe neighbours also adhered to the customary law of the Khwe as the original inhabitants, e.g. when Mbukushu came to ask for seasonal grazing rights.³⁵ While the South West Africa Administration (SWAA) kept the agro-pastoralists out of the strip, first for veterinary and later for military reasons, the strip has seen an increasing influx of Mbukushu and other agro-pastoralists since Namibian independence, and even after it became a national park. The next section will show how the Khwe continuously lost authority over their ancestral land as a result of state decisions and actions.

4 Historical changes to Khwe ancestral lands in Bwabwata National Park

During the German colonial period and the first two decades under the SWAA, the strip of land between the Okavango and Kwando, then called “West Caprivi”, remained largely un-administered. Although not profoundly affecting the daily lives of the Khwe at the time, the German colonial power had far-reaching consequences in the long term by determining the national boundaries, thereby dividing the ancestral land of the Khwe and contributing to their economic marginalisation, and by rendering some customary activities illegal, as well as by delineating territories of warfare and refuge.

Government interventions started in 1938, when the SWAA declared West Caprivi a livestock- and Native-free zone, with only the “already resident Bushmen” being allowed to live there.³⁶ The aim was to stop the movement of cattle from

32 Köhler, O., *Customary Law*.

33 Boden, G., *Prozesse sozialen Wandels*.

34 Boden, G. (ed.), *Khwe kúri-|x'ón-dji / Khwe family names* (texts by Fabi Camarongo, Kuconya Djunu, Ou Nboma, Macirico Ndeundu & Nashira /Uingyeu), Kalahari Cultural Heritage Publications, Cologne, 2014.

35 Köhler, O., *Die Kxoé-Buschleute und ihre ethnische Umgebung*.

36 SWAA 2267 A 503/1-7: Letter of Native Commissioner in Rundu, 24th September 1952, National Archives of Namibia.

Angola and Zambia into Namibia in order to protect the white-owned cattle in the commercial farming area by preventing the southward spread of animal epidemics.³⁷ The administration installed two so-called Native Guards, whose prime duties were to enforce the cattle decree and to stop slave raids.³⁸

Under the SWAA, two more governmental decisions recognised West Caprivi as Khwe ancestral land and confirmed their right to use it. In 1949, the so-called Commission for the Preservation of the Bushmen in South West Africa found the Khwe to be the first inhabitants of West Caprivi and advised against resettling them in a Bushman reserve,³⁹ and in 1964, the Odendaal Commission recommended creating a homeland for the Khwe in West Caprivi.⁴⁰

At the same time, the inauguration of Martin Ndumba as Khwe paramount leader amounted to an acknowledgement of the Khwe as a distinct and sovereign people. Martin Ndumba was based at Mutc'iku on the Okavango River. He conveyed local authority to Kandunda Kaseta in Bwabwata, Kyaku Ngoro in Yiceca, and Kapaco in the Kwando area. The Khwe thus interpreted the leadership structure predefined by the SWAA internally according to their own customary law.⁴¹

From the 1960s onwards, however, the SWAA started to change its policy regarding Khwe land rights, and set West Caprivi aside for its own purposes, at first as a nature conservation area, and later for military activities. For the Khwe this meant profound changes in their settlement and land use practices.⁴² In 1963, West Caprivi became a Nature Park,⁴³ which was upgraded and renamed "Caprivi Game Park" in 1968.⁴⁴ Its remoteness and geopolitical position at the borders with Zambia and Angola gave it unique strategic importance for the South African Defence Force (SADF) during the early years of the Namibian war of liberation.⁴⁵ In the 1970s and 1980s, West Caprivi became a military no-access zone in which the SADF built several military camps and recruited Bushmen as soldiers. The Khwe were no longer allowed to forage or live on their ancestral family grounds. Instead, they had to settle in or close to the military camps and became economically dependent on their soldiers' pay. During this period, the number of San residents in West Caprivi

37 Bollig, M., 'The Colonial Encapsulation of the North-Western Namibian Pastoral Economy', *Africa*, Vol. 68, No. 4, 1998, pp. 506–536.

38 SWAA 2267 A 503/1: Letter of the Native Commissioner Rundu to the Chief Native Commissioner Windhoek, 8th February 1950, National Archives of Namibia.

39 SWAA A 267/11/1: Report of the Commission for the Preservation of Bushmen in South West Africa, 1956, National Archives of Namibia.

40 Republic of South Africa, *Report of the Commission of Inquiry into South West African Affairs*, Government Printer, Pretoria, 1964.

41 Boden, G., 'The Khwe and West Caprivi'; Boden, G., 'Recognition of Khwe Traditional Authority'.

42 Suzman, J., *An Assessment of the Status of the San in Namibia*, Legal Assistance Centre, 2001.

43 Republic of South Africa, Proclamation 67/1963.

44 Republic of South Africa, Government Notice 19 of 1968.

45 Kangumu, B., *A Forgotten Corner of Namibia: Aspects of the History of the Caprivi Strip, 1939–1980*, M.A. Thesis, University of Cape Town, Cape Town, 2000.

increased because not only local Khwe but also !Xun and Khwe refugees from Angola were recruited into the SADF. When Namibia attained independence, the South African government offered the San soldiers and their families the option of relocating to South Africa, and about 4 000 San (1 600 Khwe and 2 400 !Xun) were resettled in that country.⁴⁶ However, the majority of Namibian Khwe decided to stay on their ancestral lands in West Caprivi.

The military period resulted in broken up livelihoods and land use practices as large stretches of land were forcefully emptied. The withdrawal of the SADF left many Khwe dislocated from the family territories where they had previously been living, and in a parlous economic position.⁴⁷ After Namibian independence, the Khwe tried to re-establish their occupation of their ancestral lands, but now had to compete with other Namibians with more economic power and better political standing.

In the early 1990s, a rehabilitation and resettlement scheme, based on crop cultivation, was implemented by the Evangelical Lutheran Church in Namibia on behalf of the then Ministry of Lands, Resettlement and Rehabilitation (MLRR) for the “Bushmen ex-servicemen”. Crop cultivation was meant to become the main source of livelihood for the San in BNP. The project was expected to become self-sufficient after seed distribution in the first years, but success was very limited. Field sizes were only 1.8 hectares on average, and the evaluation report of 1994 stated that the harvest projection was about 200 tonnes less than the estimated needs.⁴⁸ Although such precise numbers are lacking for subsequent periods, the ongoing need for food aid shows that crop cultivation within the scheme never became sustainable.

The initial plan was to relocate Khwe from the eastern part of BNP to the so-called “Bagani resettlement scheme” in the very west of the park (locally most often referred to as Mutc’iku, Mashashane and Mushangara villages), where plots were prepared for cultivation in a block-and-plot design through a food-for-work-programme. However, many Khwe originating from the east refused to resettle at Bagani and eventually received GRN services and support at the places where they were staying, or where they went to settle on their former family grounds. In fact, the establishment of new villages after Namibian independence when the Khwe were able to leave the military camps of the SADF confirms the continuing validity of Khwe customary land rights. At the time, many Khwe went back to settle on their former family territories. This holds true for Mashambo, |Ui-tcu-kx’om, Guixa and

46 Suzman, J., *An Assessment of the Status of the San in Namibia*, Legal Assistance Centre, 2001.

47 In addition, they have a tarnished reputation among the SWAPO government for having been unpatriotic to independent Namibia. The ramifications of the Khwe involvement with the SADF are long-lasting and complex, and cannot be discussed in detail here. (For first steps on this terrain see Taylor & Battistoni 2009.)

48 Jansen, R., N. Pradhan & J. Spencer, *Bushmen Ex-Servicemen and Dependents Rehabilitation and Resettlement Programme, West Bushmanland and Western Caprivi, Evaluation (Final Report)*, Evangelical Lutheran Church in Namibia (ELCIN) and Royal Norwegian Embassy/NORAD, Windhoek, 1994.

‡Qowexa, although inhabitants of the latter two villages deserted these villages when seeking refuge in Botswana after being harassed by Namibian security forces at the time of the secessionist upheavals in 1999.⁴⁹ Khwe brought to Mashambo or Omega III after repatriation from Botswana also later went to settle at T'on-xei and Po-ca, thereby acknowledging and respecting the customary land use rights of the original inhabitants of Mashambo and Omega III. They explained that their decision to go and settle on their own former family territory was occasioned by conflicts over the use of natural resources on the ancestral family grounds of their temporary hosts.⁵⁰ Such moves and reasoning confirm a continuous and shared understanding of traditional land use rights among the Khwe.

At first, the government provided services only in the bigger settlements and former military camps, namely the Bagani resettlement scheme, Omega I, Chetto and Omega III. Later, at least some services were also provided in the smaller settlements: Mashambo (1992); |Ui-tcu-kx'om, also known as Katcendje (1992); Mangarandgandja (before 1996); Pipo (1997); Poca (2005); and T'on-xei (2007).⁵¹ The drilling of boreholes also attracted Mbukushu and other Kavango agro-pastoralists with their cattle, who started to move into the strip. Areas deforested for farming by incoming agro-pastoralists, as well as the number of incoming cattle, have continued to increase since Namibian independence,⁵² and even accelerated after the declaration of BNP.⁵³ Nowadays, large parts of what were once the ancestral lands and foraging areas of the Khwe are occupied and used by agro-pastoralists who moved in from other parts of the country. These people have more economic and political capital than the Khwe. Non-Khwe newcomers to BNP usually have substantial herds of cattle, as well as more jobs and cash income. They either informally join family members who were granted access by the former Khwe Chief Kippie George in the early years of Namibian independence or appeal to the Mbukushu Traditional Authority and the Khwe headmen who are co-opted into the ranks of the Mbukushu TA or are collaborating with it.⁵⁴

Martin Ndumba, the paramount leader of the Khwe who was recognised as such by the SWAA, had appointed his nephew Kippie George as his successor. Kippie

49 Amnesty International, 'Angola and Namibia: Human Rights Abuses in the Border Area', AI-index: AFR 03/001/2000 (<https://www.amnesty.org/en/documents/AFR03/001/2000/en/>); Bieseke, M. & R.K. Hitchcock, 'Caught in the Crossfire: The Caprivi Strip', *Cultural Survival Quarterly*, 26(1), 2002, p. 30; Boden, G., 'Caught in the Middle: Impacts of State Decisions and Armed Conflicts on Khwe Economy and Ethnicity between 1998 and 2002', in Hohmann, T. (ed.), *San and the State: Contesting Land, Development, Identity and Representation*, Rüdiger Köppe, Cologne, 2003, pp. 161–204.

50 Boden, G., *Prozesse sozialen Wandels*; Boden, G., 'Recognition of Khwe Traditional Authority'.

51 All dates based on information from residents during village group meetings in 2014.

52 World Wildlife Fund, *Report on Mbukushu Migration to Kxoe Use Areas to the East of the Okavango River*, World Wildlife Fund, Windhoek, 1997.

53 Geria, S., 'Khwe injustices in Bwabwata park, Namibia: Letter by the Chairman of the Bwabwata Khwe Custodian Committee to all stakeholders, 2 September 2017'.

54 Boden, G., 'Recognition of Khwe Traditional Authority'; Boden, G., 'Elephant is my chief'.

George was well respected in the Khwe Community, and was the first Khwe Chief to head the application for a Khwe TA in 1997. He died in December 2000 before the application had been decided on. After his replacement by Thaddeus Chedau, the Council of Traditional Leaders came to the conclusion that the area claimed belonged to the Mbukushu TA, but later decided to reinvestigate the claim. A second application headed by Chief Ben Ngobara in 2005 has not yet been dealt with conclusively. By selecting local leaders from the different Khwe villages as senior councillors and traditional councillors, all Khwe applications for a GRN-recognised TA follow the traditional Khwe leadership structure.⁵⁵ The fact that during the first years after independence, the first Mbukushu settlers in the area asked the Khwe Chief Kippie George for permission to settle, shows that at the time, the customary understanding of the area as belonging to and governed by the Khwe was still prevalent, also among the Mbukushu. The failure of the GRN to recognise the Khwe TA and the Khwe as a traditional community, in combination with the efforts of the Mbukushu TA to incorporate the Khwe and their ancestral land into their dominion, has started to erode the customary understanding of land rights in BNP.

As mentioned above, BNP falls into two administrative regions (Kavango East and Zambezi) and constituencies (Mukwe and Kongola). Non-Khwe TAs from both areas claim sovereignty over BNP and take action on the land which falls under their respective administrative units. The Mbukushu TA based in Mukwe claim that the Khwe were their former servants and that BNP as a territory falls under its control and jurisdiction. It actively encourages Mbukushu people to settle there, or at least condones their doing so. Complaints and protests by Khwe leaders regarding the immigration of people and cattle and the deforestation of land for making fields have so far not resulted in action on the part of the MET, under the authority of which BNP as a national park falls.⁵⁶ The actions of Chief Joseph Tembwe Mayuni from the Mashi TA in Zambezi Region are less aggressive with respect to the settlement of his people and generally more supportive of the Khwe. He offered Khwe headmen the option of using the stamp of the Mashi TA for their village-level pleas to the GRN. However, the stamp combined the name of the Khwe village with the coat of arms of the Mashi TA, which suggests at least a symbolic occupation. The practice was stopped by the Regional Councillor of Zambezi Region. This shows that the support from GRN institutions for the Mashi TA in dominating the Khwe is much weaker than it is for the Mbukushu TA.⁵⁷

Since the Khwe do not have a GRN-recognised political leadership of their own, Khwe leaders lack the legal means to enforce their rights and stop immigration. The

55 For more detail on the story of the Khwe application for government recognition of their TA, see Boden, G., 'Recognition of Khwe Traditional Authority'; and The Khwe People of Bwabwata, 'Submission to the Presidential Commission of Inquiry into Claims of Ancestral Land Rights and Restitution by The Khwe People of Bwabwata, 8 August 2019'.

56 Boden, G., 'Recognition of Khwe Traditional Authority'; Boden, G., 'Elephant is my chief'.

57 Boden, G., 'Recognition of Khwe Traditional Authority'.

influence of the unrecognised Khwe TA on the park level is limited to an advisory capacity to the KA. The story of the Khwe application for GRN recognition for their TA is a story of protraction, obstructions and blocking.⁵⁸ The latest reason given in 2008 by the GRN for delaying a decision explicitly refers to the land's status as a national park, and claims that there would be uncertainty regarding the extent of land that would be left as communal areas, and about the numerical ratio of different communities within this area. This is the clearest signal yet that the Khwe might be outnumbered by the ever-increasing new residents on their ancestral lands and within the KA. This can also be inferred from the fact that the MET has asked the KA to review its board structure, as it was no longer representative of the population in the park. The GRN's failure to officially recognise the Khwe leadership has rendered Khwe leaders weak and vulnerable towards the GRN in relation to competing TAs and other outsiders, and has also resulted in dissatisfaction with the leadership among the Khwe themselves, who are frustrated by their limited power and lack of assertiveness. Some Khwe headman have even been misled to collaborate with the Mbukushu Traditional Authority.⁵⁹

5 Current situation

The previous section outlined how the Khwe have lost authority over their ancestral land and self-determination as a people, with serious effects on their livelihoods.

BNP is partitioned into a large multiple use area and three core conservation areas (Kwando in the east, Buffalo in the west, and Mahango across the Kavango River; the Mahango core area does not belong to Khwe ancestral land (see map 1)).⁶⁰ De facto, however, the multiple use area is further partitioned into zones, where cattle are allowed, namely the villages in Kavango East Region with mixed Khwe and non-Khwe populations, and zones, where cattle are prohibited, namely the villages in Zambezi Region, with predominantly Khwe populations. While the Khwe suffer from the restrictions of the park, the new residents, in addition to occupying Khwe ancestral lands without their consent, do not suffer from the same restrictions. This de facto inequality in livelihood options and means of production (for example, oxen being used as draft animals in crop cultivation) constitutes an additional injustice over and above the loss of rights to land and self-determination,

58 G. Boden, 'Recognition of Khwe Traditional Authority'; 'Claims of Ancestral Land Rights and Restitution by The Khwe People of Bwabwata'; Felton, S., '“We Want our own Chief”: San Communities Battle against their Image', in Le Beau, D. & R.J. Gordon, *Challenges for Anthropology in the African Renaissance: A Southern African Contribution*, University of Namibia Press, Windhoek, 2002, pp. 55–67; The Khwe People of Bwabwata, 'Ancestral Land Rights Claim'.

59 Boden, G., 'Recognition of Khwe Traditional Authority'.

60 Ministry of Environment and Tourism of the Republic of Namibia, *Strategic Management Plan for Namibia's North-East Parks*, MET, Windhoek, 2009.

and furthermore calls the status of BNP as a park into question. In the words of a Mashambo resident: “If we are going to accept this park, all cattle must be removed, then we will believe that this is a park.”⁶¹



Cattle herd between Omega I and Chetto (Photo: G. Boden, 2019)

As a result of the influence of the Mbukushu TA in the part of BNP situated in Kavango East Region, land allocation practices and land tenure security with regard to land use by individuals for homesteads or fields are different for villagers in the eastern and western portions of BNP. The residents of the eastern villages (Mashambo, Poca, Omega III, T'on-xei, |Ui-tcu-kx'om, Pipo, Chetto, Bwabwata), i.e. the villages in Zambezi Region, who are mainly Khwe, are convinced that the land they have been using for crop cultivation will not be taken away from them by other individuals. During a survey in 2014, they stated that they were choosing the land by themselves, not even necessarily involving local headmen. Instead, immediate neighbours would agree about mutual borders. They were confident that no other person would start ploughing on their fields without permission, even if they themselves had not been cultivating it for several years. Here, allocation of and tenure with respect to land for homesteads and fields is still based on established customary rights alone, and people felt that their individual use rights were secure.

In the villages situated in Kavango East Region, however, the situation is very different, and Khwe feel insecure even with respect to land that is individually used

61 Taylor, J.J., 'Naming the Land'; Boden, G., 'Elephant is my chief'.

for homesteads and fields. Not even the resettlement programme of the MLRR has led to secure land tenure on the plots of the resettlement scheme. According to local residents, the MLRR has not updated the registers at least since 1998.⁶² Due to the overspill of the Angolan civil war into northern Namibia from late 1999 until 2002, many Khwe in the Bagani resettlement scheme left their plots for safety reasons and settled closer to each other and closer to the B8 road. This applied in particular to those Khwe who used to live in blocks A–C and H–I of the Bagani resettlement scheme, who still have not moved back; many of their plots have since been occupied and are cultivated by Mbukushu. Most Khwe plot-owners in blocks D–F stayed on their plots during the upheavals of 1999–2002, but even there Mbukushu who at first had started crop fields in areas between the blocks are expanding their crop fields onto the neighbouring resettlement plots of the Khwe. Resulting conflicts are dealt with by Khwe headmen who are cooperating with the Mbukushu Chief, with the effect that land use issues are in fact under his authority. In household interviews conducted in 2014, Mbukushu individuals said they pay “traditional tax” to the Mbukushu TA with the expectation of being able to use the tax book or receipt as a proof of land tenure. A revision of a household-survey from 1998, conducted in March 2019, revealed that most of the resettlement plots in blocks A–C and H–I were now occupied by Mbukushu.

Incidents of individual plots for cultivation being occupied by new residents were also reported in Omega I. Whereas conflicts about land between Khwe are solved by local Khwe headmen, the Mbukushu do not respect the decisions of Khwe headmen. In Omega I too, the first non-Khwe came legally, because they were invited by the GRN to a large-scale agricultural project. Although meant to also serve local San, it nowadays mainly serves non-Khwe, while the Khwe are only workhands on the fields of others. Furthermore, the area cultivated by Mbukushu east of Omega I is constantly expanding. In 1998, there was only one Mbukushu village, namely Shamakwi (translated from Khwe Kx’ã-ca, i.e. “vulture water”) about three kilometres east of Omega I, but new settlements have sprung up almost every year since 2007, and the cultivated area has been extended for kilometres eastwards from Omega I. Instead of limiting the in-migration of people and cattle into the park, the GRN in fact supports it by providing ever more boreholes to those settlers. Today, Mbukushu are settling and ploughing as far as 15 km outside of Omega I, whereas Khwe, who tried to make a field only three kilometres outside of Omega I, were stopped by the MET, even though the Omega headman had allocated the land. The Khwe headmen in Omega I are unable to stop Mbukushu from settling in their area. They are also unable to stop Chief Mbambo’s vassal headman in Omega I from allocating unoccupied old army houses which the Khwe regard as belonging to their community, or to stop Mbukushu getting most of the jobs in the agricultural project.

62 Boden, G., *Prozesse sozialen Wandels*.

In sum, both the Bagani resettlement scheme and the agricultural scheme in Omega now only partially serve the needs of those for whom they were originally established. In the villages of BNP which are located in Kavango East Region, authority over Mbukushu settlement on Khwe ancestral land is effectively exercised by the Mbukushu TA, both by the granting of permission to settle, and also, in rare cases, by the protection of individual Khwe claims to plots. Khwe can enforce their land tenure rights to certain plots only by approaching Khwe headmen who collaborate with Chief Mbambo. Even when a Khwe person wants to occupy an empty plot and has been given permission to do so from a headman of the Khwe TA, Chief Mbambo's headmen warn those people that they have failed to follow the right channel.⁶³



Panga Nanyambi, a new village east of Omega I (Photo: G. Boden, 2019)

The Khwe have thus lost not only authority over their collective ancestral land to the state authorities, but also a good deal of authority over individual land tenure, in particular in the villages situated in Kavango East Region. The Khwe ascribe all these injustices to the lack of GRN recognition of the Khwe TA. This is seen as the

⁶³ The authority exercised by Khwe headmen has declined and shifted into the hands of Chief Mbambo's headmen, even in the domain of family law. Chief Mbambo's headmen rely on the written customary law of the Mbukushu, identifying fines and fees. Even Martin Ndumba's daughters have addressed Chief Mbambo when they were dissatisfied with the way the commemoration of their father's death was exercised in 2010.

reason why requests and complaints by Khwe in BNP often fail to receive attention, responses or any follow-up from GRN officials. Complaints to the KA, the MET, the Regional Council, various ministries and even the LAC were said not to have led to action or consequences. This also has serious effects on development options since submissions by the village development committees have to be approved by the responsible TA. Here again, the situation is different for villages in Zambezi and Kavango regions. In the Mbukushu-dominated Mukwe Constituency, Khwe members of the Constituency Development Committee were frustrated with the lack of attention they received on the constituency level.⁶⁴

Khwe livelihoods are based on a mixed economy combining crop cultivation, livestock farming, cash income from formal employment, small informal petty businesses (selling traditional medicine, beer, etc.), piecework (mostly on the fields of non-Khwe), craft production (basketry), income from the KA, the use of natural resources, and mutual support. However, revenue from these activities is insufficient for covering even basic needs. The Khwe therefore remain dependent on GRN aid, even for their daily meals.

The following description of Khwe livelihood options, unless otherwise specified, is based on surveys conducted by the author in 2011 and 2014.⁶⁵ In the 2014 survey, Khwe residents of BNP reported that crop cultivation was the most important livelihood option. (The Namibian government has also identified support to communal farmers for crop cultivation as a most promising tool for securing the livelihoods of Namibia's rural population,⁶⁶ including those of marginalised San communities.⁶⁷) The main crops were identified as being maize and mahangu, while some respondents also cultivated watermelons, pumpkins, groundnuts and beans. Soils in BNP are good for crop cultivation in most places. This is one of the reasons why more and more Mbukushu and other Kavango residents come to settle inside the park. Beside the issue of insecure land tenure discussed above, there are two main obstacles hampering crop production: the lack of an efficient means of ploughing; and the increasing number of elephants destroying crops. Both are burdens of the status of BNP as a national park. Ploughing for efficient crop cultivation would depend on either oxen as draft animals, or tractors. However, livestock farming is prohibited in large parts of the park. With hoes or donkeys, it is impossible to plough efficiently. In theory, the MLR provides tractor services and seeds to registered farmers commensurate with field sizes, but these services were said to be unreliable and not made available at the right time, or simply non-existent. Although most people were registered for seed distribution and ploughing services, they start ploughing and planting by themselves at the beginning of the season, and should tractor services eventually materialise, make use of the opportunity

64 Boden, G., 'Recognition of Khwe Traditional Authority'.

65 Boden, G., 'Recognition of Khwe Traditional Authority'; Boden, G., 'Elephant is my chief'.

66 Republic of Namibia, 'Report on the Review of Post-Resettlement Support'.

67 Dieckmann, U. et al., 'Scraping the Pot'.

to expand their fields then. Elephant numbers have increased considerably since 2007, when BNP was proclaimed. Especially in the villages in the eastern part of the park, which has become a corridor for wildlife transboundary movements,⁶⁸ many farmers have stopped cultivating fields because they were frustrated by their efforts increasingly being thwarted by elephants. Unlike in communal areas, crop shortfalls resulting from elephants attract no compensation in the BNP. Furthermore, the increasing number of elephants has also attracted an increasing number of poachers. This has recently led to restrictions being placed on movements and the use of natural resources by villagers, as well as threats and borderline violent assaults by anti-poaching units.

Crop cultivation cannot be discussed in isolation from livestock farming, because efficient crop cultivation still relies on oxen as draft animals for ploughing. As outlined above, the multiple use area is *de facto* partitioned into zones where cattle are allowed, and zones where they are prohibited. To understand the inherent injustice of this, one has to know that prior to 1996, Khwe households also had up to 50 head of cattle. In 1996, after the outbreak of a bovine lung disease, all the cattle of the Khwe were lost, either being slaughtered or sold for low prices. Due to the lack of oxen as draft animals, crop yields subsequently declined from twenty 50 kg bags of mahangu, to virtually nothing. At the same time, non-San residents of Shamakwi, Omega and Mutc'iku intervened with support from MLRR staff and the Mbukushu TA, and were eventually allowed to keep their cattle, which only had to receive medical treatment. Although the Khwe whose cattle were destroyed were promised compensation in cattle, this was never paid out because of the plans for the area's proclamation as a national park. The money and goats they did receive did not recompense them for their losses, neither in terms of money value nor in terms of the value ascribed to cattle as capital investment and a means of production. Donkeys distributed as part of the San Development Programme and intended as a substitute for oxen as draft animals for ploughs are much less effective. They often fall prey to wild animals, but because of the status of the land as a national park, no compensation is paid out when this happens.

Few Khwe are formally employed. During the survey in 2014, only 32 of the 201 adult respondents in village group discussions (10.9%) had formal employment. The main obstacles to employment are the lack of opportunities within the boundaries of the park, and the low level of school and vocational education. Searching for employment outside the park is difficult because families have to be left behind, and because of alleged discrimination against the Khwe by fellow Namibians.

In many households, money from old age pensions or social grants is the only regular cash income and is therefore essential for survival. However, *de facto* access to these resources is far removed from *de jure* access. Many old Khwe who on the basis of their date of birth should be entitled to old age pensions do not manage to

68 World Wildlife Fund, 'Wilde Tiere auf Wanderschaft', *WWF Magazin*, 2014 (2), pp. 25–27.

be registered. Reasons include problems with their ID documents, low degrees of literacy and language competence in office languages (English or the vernaculars of the officials), the cost of travelling to the offices of the Ministry of Home Affairs in either Rundu or Katima Mulilo, and problems caused by spelling errors of names, which affects San more than most citizens because the spelling of their names contains orthographic symbols that are not widely known. Where ID documents are missing, affidavits of the TA are required, and obtaining these depends on the goodwill of other TAs.

Food aid also makes up a crucial part of Khwe livelihoods. The GRN has three food aid programmes: the Drought Relief Programme, the San Feeding Programme, and the School Feeding Programme. The School Feeding Programme falls under the auspices of the Ministry of Education, and according to all school principals in BNP, has dramatically improved school attendance, in particular of Khwe children. Drought relief is distributed in times of drought and decided upon on a yearly basis. The San Feeding Programme falls under the San Development Programme, and provides food aid exclusively to San in periods not covered by the Drought Relief Programme. However, it is unreliable, and often of poor quality. In 2014, rations consisted of one 12.5 kg bag of maize meal per person per month up to a maximum of six bags per household, plus two tins of fish per household. According to staff of the Regional Council in Kongola, rations differ over time, are decided upon by the Office of the Prime Minister, and are partly reliant on donor money.

As part of the San Development Programme, several community projects were started, such as community vegetable gardens in the villages of Omega III, Chetto and Mutc'iku, bee-keeping projects in Omega and |Ui-tcu-kx'om, and a bakery project in Mashambo.⁶⁹ In 2019, none of these projects was in operation. Through the programme, donkeys and goats were also given to Khwe households. The goat rearing project provided three goats to selected individuals who had to pass on offspring to others. Some people were able to build up herds, but not necessarily the poorest households. Because of occasional losses to disease, car accidents, wild animals and the occasional outtake of animals for consumption or cash needs, a much larger basis is required for building up herds, in particular in those households where there is no other source of cash.

The KA manages the communal income from trophy hunting and tourism. The bulk comes from the hunting concessions in the two core areas of the park, which are worth N\$4 million per year, shared equally between the GRN and the KA. Benefits from tourism are currently still marginal because the KA does not share in income from entry fees into the core areas, and because tourism facilities in the park are almost non-existent. Benefits are distributed annually to the residents at

69 Until stopped by the Regional Councillor, local Khwe headmen, cooperating with the Mbukushu TA, allowed Kavango residents to share in resources directed to the San by the GRN, e.g. under the food-for-work programme when de-bushing the community garden was undertaken in Mutc'iku.

the discretion of the board, either as cash payment to individuals or in the form of community projects. The KA has also paid for infrastructure, namely offices in five villages and community halls in three. According to its benefit distribution plans, the KA sets sums aside to support vulnerable children and orphans, as well as motivated and well-performing students. Indirect benefits derived via the KA from the hunting concessions are individual employment as trackers, skinners and cleaners with the hunting companies, the distribution of meat from trophy animals, and payments by the hunting companies for projects and vocational training, partly as determined in the concession contracts and partly paid voluntarily.

The KA, alongside the GRN, is one of two big employers in the park. More than half of the KA budget goes into the salaries of 63 employees (executive staff, community game guards, resource monitors, field officers, security personnel, drivers and community campsite staff). Apart from the salaries, the most important impact of the KA in terms of income generation for individual park residents is through devil's claw harvesting. In cooperation with the MET, the KA had organised and controlled the commercial harvesting of devil's claw. Between 2011 and 2013, the annual total income from this source ranged between N\$434 000 and N\$717 000. In 2017, however, the devil's claw harvesting came to a halt when anti-poaching units of the Namibian Police restricted the movement of local people to a few kilometres around the villages. This affected not only the devil's claw harvesting but also the collection of other natural resources.⁷⁰ Even community game guards and resource monitors in the service of the KA were told to stay at home.⁷¹

As BNP is a national park, the use of natural resources is restricted. Subsistence hunting is prohibited throughout the park. The gathering of bushfood, medicinal plants, firewood and building material is only allowed in the multiple use area, and only for own consumption or use. Gathering has to be performed in a sustainable manner, so, for example, it is prohibited to chop branches to harvest the fruits. Community game guards and community resource monitors are employed by KA to prevent poaching and supervise the sustainable use of plant resources. Currently, the sole plant resources for which commercial harvesting regulations are in place are devil's claw and the leaves of the fan palm, which are woven into baskets. Both activities have ground to a halt in recent years since every person met in the bush runs the risk of being considered a poacher.⁷²

KA benefits can so far only compensate for a small fraction of the wealth that has been lost. Park residents feel that the restriction or loss of earlier livelihood options should be compensated for by opening up access to new livelihood options

70 Braun, W.B., 'Namibia vermittelt Euphorie und Entsetzen: Ein Erfahrungsbericht aus der Sambesi Region – März 2019', *Allgemeine Zeitung*, 23 November 2018 and 10 July 2019; Kooper, L., 'Khwe tribe wants freedom on ancestral land', *The Namibian*, 10 July 2019.

71 Geria, S., 'Khwe injustices in Bwabwata park'.

72 Braun, W.B., 'Namibia vermittelt Euphorie und Entsetzen'; Geria, S., 'Khwe injustices in Bwabwata park'; Kooper, L., 'Khwe tribe wants freedom'.

such as employment, in particular in the tourism sector. They feel particularly disadvantaged compared to neighbouring communities outside the park because tourists currently reside in lodges and campsites beyond park boundaries, and communities there can earn income from employment in the tourism sector, whereas park residents cannot, even though they have to bear the costs of the park status.

Poverty, discrimination and feelings of inferiority are also underlying causes of poor education and health conditions. Khwe learners tend to drop out of schools after the first years of primary education when they have to leave their home villages and join non-Khwe learners in the higher grades of secondary education. Early pregnancy, often also resulting from poverty, is another cause. Education within the park is only provided up to Grade 10. Furthermore, young adults seeking to go back to school some years after dropping out are by then often responsible for families, and face difficulties in being accepted back by the school principals. Preschool, primary and secondary education, mother tongue education, vocational training, and adult literacy courses were on the wish list of Khwe respondents in 2014.⁷³



Khwe Children at Mushashane (Photo: Dieckmann et al., 'Scraping the Pot', 2014, p. 385)

⁷³ Dieckmann, U. et al., 'Scraping the Pot'.

Along with poor educational opportunities, health conditions are also poor. Malaria, tuberculosis, diarrhoea and HIV are the most critical diseases, and in some villages, polluted water is a problem. Clinics are only provided in the four big villages, and hospitals are as far away as Andara and Katima Mulilo, i.e. up to 180 km away. People often lack money for transport, and so cannot get to a clinic or hospital.⁷⁴

In summary, the access to and use of the natural wealth of Khwe ancestral lands are increasingly restricted for the original inhabitants, while other people, recent settlers in BNP as well as people living outside the park, are permitted to benefit from them. These injustices with respect to livelihood options, insecure land tenure and the lack of political power are the most relevant obstacles preventing the Khwe from living a dignified life. Although the Khwe still live on their ancestral land in BNP, they have increasingly lost control over the land and its resources.

6 Recommendations

The inclusion of disadvantaged indigenous communities within a national society entails efficient and accountable institutions that promote development, protect human rights, and ensure that members of such communities contribute to decision-making processes on issues that affect their lives. The Khwe were living in what is today BNP before the German colonial power decided on its borders, and before it was made a conservation area by the SWAA and a national park by the GRN. The Khwe did not have a say in any of these decisions. Restrictions on Khwe livelihoods oblige the GRN to provide alternative opportunities by way of compensation and to ensure food security, as well as peace and general well-being. The development of a diversified repertoire of livelihood options is essential, including through improving crop cultivation, creating job opportunities, allowing and promoting local businesses and sustainable venues for the commercial use of natural resources, and, last but not least, increasing KA revenues.

The well-being of the Khwe will require the provision of infrastructure, ranging from infrastructure for sufficient clean water to clinics and schools for all grades (pre-school up to tertiary education), while ensuring that the provision of government services will not attract more people to settle in the national park. Instead of allowing more people to come into the park, better livelihood options for those who have always been there should be a priority. The unjust treatment and social disparity experienced by the Khwe oblige the GRN to restore justice and guarantee political self-determination by recognising a Khwe TA.

These demands are in line with relevant resolutions of the Second Namibian Land Conference of October 2018, namely resolutions 8, 11, 18, 20, 37 and 38.⁷⁵ All

⁷⁴ Ibid.

⁷⁵ Resolutions of the Second National Land Conference, Windhoek, 1st–5th October 2018.

of these depend on the prerequisites of secure land tenure and control over land use practices by a state-recognised Khwe TA.

Resolution No. 8 states that a policy should be developed to ensure the prioritisation of various categories of disadvantaged communities and to review and harmonise all legal instruments related to disadvantaged communities. The current situation of the disadvantaged Khwe in BNP has been outlined in the previous section. Their situation is characterised by extreme poverty, food insecurity, insufficient health and education infrastructure, the lack of access to governmental offices (resulting from both distance and language barriers), and insufficient economic opportunities. The disadvantageous situation of the Khwe is exacerbated by the de facto prioritisation of the agro-pastoralists who recently came to settle in the park. BNP currently falls under two constituencies and two administrative regions. A single administration for all BNP residents would be more effective in doing justice to and promoting the particular concerns and needs of BNP residents.

Resolution No. 11 states that land allocation and administration must continue to rest in TAs and Communal Land Boards, and that “All communal communities should have traditional authorities to deal with land matters in their areas of jurisdiction.” It clearly points out the relationship between TAs and access to and control over land, and acknowledges communities’ need to have their own TA to deal with land matters. Almost 20 years after the promulgation of the Traditional Authorities Act of 2000, the GRN should recognise the Khwe as a distinct cultural community, and thus should recognise their TA. This is essential for the Khwe to feel recognised as fellow Namibians and, in fact, as human beings with their own language and culture.

Resolution No. 18 on wildlife conservation and utilisation rights says that TAs should avoid allocating land to people in wildlife corridors, that proper administration and management of human–wildlife conflict should be provided, and that existing protected areas should be strengthened and developed in terms of infrastructure and marketed to attract more visitors. The Mbukushu TA has continued to allocate land in BNP to its people and thus undermined its conservation status. At the same time, the Khwe are not compensated for losses of crops and domestic animals, and the development of tourist infrastructure such as lodges or a Khwe cultural centre from which the Khwe as original inhabitants would benefit is lagging behind, while benefits from tourism mostly go to people outside the park.

Resolution No. 20 concerning residential land within national parks states that such communities should have tourism concessions in the national parks, that the zonation plans of parks should be maintained and should provide for multiple use areas where communities are residing, and that measures that would reduce the extent of protected areas should be discouraged or not considered.⁷⁶ At present,

76 The first two points of the resolution concern farms close to national parks, but BNP is surrounded by communal land, i.e. there are no farms on which residents could be resettled and assisted with development.


tourism facilities in the park are almost non-existent. This disadvantages the Khwe relative to communities living outside the park who do have lodges and can make money from park visitors. First steps in the direction of the achievement of the conservation aim would be to prevent in-migration of additional people and livestock into the park and to put effective means of registration and control in place. While environmental assessment procedures are in place for businesses, and have prevented the development of tourism and visitor infrastructure in the park, an environmental assessment regarding the in-migration of people and cattle is lacking. This will be necessary for ensuring Namibia's conservational aims in BNP, its obligations within the KAZA (Kavango-Zambezi) Transfrontier Conservation Area, and for fulfilling its responsibilities towards current residents.

Resolution No. 37 acknowledges the need to define ancestral lands and identify communities who have lost ancestral lands, and Resolution No. 38 states that instances of ancestral land loss have to be addressed through a number of measures, including by addressing ancestral land claims. It has been shown above that the main part of BNP is Khwe ancestral land. Many Khwe still live on their ancestral land, but they do not have control over it, firstly because it is a national park, and secondly because other people are increasingly moving into the park, thereby violating both the Khwe's ancestral land rights and also the park regulations. The Khwe have embraced the idea of nature conservation as it is in accordance with their traditional livelihoods. They should be allowed to continue living there, to practise their traditional livelihoods, and to develop tourism enterprises in the park for their own benefit.



Entering the park from the east (Photo: Dieckmann et al., 'Scraping the Pot', 2014, p. 365)

In conclusion, the Khwe are a distinct cultural group with a legitimate and long-standing claim to BNP as ancestral land. The gazetting of the park as such imposes limits on Khwe livelihoods and their ability to participate in decisions that affect their lives. This is aggravated by the failure of the GRN to recognise the Khwe as a group with distinct cultural traditions and the Khwe TA as their rightful means of self-determination. It is also aggravated by a great number of injustices in the form of newcomers and outsiders exploiting assets in the park. This state of affairs can only be changed by establishing communal property rights over BNP and recognising the Khwe TA as a legal body for self-determination. Recognising the Khwe's claim to BNP as their ancestral land and providing them authority over land allocation on their ancestral land by recognising their TA, while developing tourism infrastructure and creating job opportunities in the park would satisfy all relevant resolutions, as discussed above. It would restore justice for a thus-far disadvantaged community (Resolution 8); recognise each community's right to an own TA (Resolution 18); ensure wildlife conservation while simultaneously developing economic opportunities for park residents (Resolution 20); and address ancestral land loss (Resolution 37 and Resolution 38).



Land, resource and governance conflicts in Kunene Region involving conservancies

Wolfgang Werner

1 Introduction

Since independence, the discourse on the land question and land administration in Namibia has been dominated by the unequal distribution of land between black and white Namibians. A legal framework for the redistribution of freehold agricultural land was in place within six years of independence. A law to govern land administration in communal¹ areas was approved only in 2002, despite the fact that over 50% of the Namibian population living in those areas were faced by unresolved issues of jurisdiction and authority over land, impacting negatively on customary land rights. With the abolition of homelands-turned-representative authorities in 1990, a legal vacuum was created in the communal areas. Fuller² argued that as a consequence, traditional leaders were unsure about their continued role in land administration. Some felt they had lost all authority over communal land administration, while others continued as before, albeit without a clear policy and legal framework. Enforcing decisions taken by traditional authorities (TAs) was difficult if not impossible, increasing the vulnerability of many holders of customary land rights. The most obvious manifestation of this is the mushrooming of private

1 The term 'communal land' is a misnomer; such land is more accurately referred to as non-freehold land on account of the fact that no freehold title can be obtained on communal land. Communal land and non-freehold land will be used interchangeably.

2 Fuller, B., 'Improving Tenure Security for the Rural Poor: Namibia Country Case Study', *LEP Working Paper No. 6*, Food and Agricultural Organization (FAO), Windhoek/Rome, 2006.

enclosures of communal grazing areas that has taken place since independence. The National Land Policy³ described the situation prevailing in the country in the following way:

... in some areas, traditional authorities currently undertake land administration with varying degrees of efficiency and legitimacy. In other areas, there is no clear or broadly accepted authority over land. In several parts of the country there is growing tension between those who are thereby excluded from access to this land. The roles and rights of the government, the chiefs, the rich and the poor are still uncertain. Under these circumstances, many people continue to see the communal areas, and communal land tenure, as receiving second class treatment and offering second class land rights to the Namibians who live there.

A survey was carried out in preparation for the National Conference on Land Reform and the Land Question in 1991 to identify land issues in all regions of the country. One of the main issues in northern Kunene Region, or Kaokoland (also known as Koakoveld),⁴ was fear on the part of Ovaherero and Ovahimba residents that people who had no traditional rights in the area would move in to occupy land. The constitutional right to settle in any part of Namibia exacerbated these fears, and the authors of the survey expressed the opinion that “The implications of these respective rights for the more vulnerable groups in Namibia will ... need careful consideration by Government.”⁵

The survey made no attempt to explain why communities in Kaokoland should be referred to as most vulnerable. Unlike for other regions, the survey provided no information on land governance, and in particular on the role of headmen in land administration, in Kaokoland. As this paper will argue, the security of customary land rights is inseparable from land governance in communal areas generally. Customary land governance systems are in place in Kaokoland but do not have any legal protection. It will be argued that by not recognising these local-level institutions, the Communal Land Reform Act (No. 5 of 2002) (CLRA) has increased vulnerability instead of reducing it. It is not customary tenure *per se* that renders it ineffective for providing tenure security, but the absence of legal sanctions.

Customary land rights holders in the sub-region faced another potential threat to their customary rights of access to grazing, as the future development of these

3 Government of the Republic of Namibia, Ministry of Land Reform, National Land Policy, 1998 (<http://www.mlr.gov.na/documents/20541/634749/National+Land+Policy.pdf/5fc90cc9-0850-443f-ac6d-c17939b1278f>).

4 The study area in Kunene Region is still officially referred to as Kaokoland in Schedule 1 of the Communal Land Reform Act (No. 5 of 2002). This is ironic, as it is the name given to the proposed homeland in the wake of the Odendaal Commission.

5 GRN, *National Conference on Land Reform and the Land Question: Windhoek, 25 June-1 July 1991, Volume I*, Consensus No. 14, Office of the Prime Minister, Windhoek, 1991.

grazing areas was contested. A strong lobby articulated the view that overgrazing and the perceived backwardness of the Himba people could only be addressed meaningfully by sub-dividing the land into fenced economic units for commercial farming. These views were opposed by those who were “born in the district, or who [had] long associations with it”, who defended “the present system of land use which involves extensive grazing over large tracts of land, unimpeded by fencing” as well adapted to the arid conditions of Kaokoland.⁶

The survey results from across the country informed the deliberations of the National Conference on Land Reform and the Land Question in 1991. Conference participants discussed a range of land issues in communal areas and passed 13 consensus resolutions on communal land.⁷ As the Conference was of a consultative nature, the resolutions were not binding on the Government of the Republic of Namibia (GRN). The CLRA therefore gives legal expression only to some of these resolutions. Its main objective continues to be to improve land administration and tenure security in areas that are governed by customary rules and practices. Traditional leaders continue to play a central role in the administration of customary land rights. The Act seeks to improve their accountability through communal land boards, whose task it is to ensure that land allocations and cancellations by traditional authorities comply with the law. Tenure security will be gradually improved through the mapping and registration of existing and new customary land rights.

The provisions of the CLRA do not appear to have removed the uncertainty about legitimate access and rights to land in Kaokoland. This is borne out by the land issues that people identified during regional consultations in preparation of the Second Land Conference held in October 2018 in Windhoek. These fall into five broad thematic areas:

- 1) **Unrecognised traditional authorities and the absence of clear areas of jurisdiction:** While not raised explicitly in the deliberations, the study will document how decentralised structures of natural resources management articulate with traditional authorities and the disputes that arise.
- 2) **Access to the communal areas of Kunene:** Cases of people from other regions making claims to land in Kaokoland without prior consultations with TAs are well known. Illegal fencing is often associated with such claims. Some traditional leaders were accused of conniving in these activities.

⁶ Ibid.

⁷ See Nghitevelekwa, R., M. Shapi & J. Kambatuku, *The land question and land reform in Namibia: Review of the implementation of Consensus Resolutions of the 1991 National Conference on Land Reform and the Land Question*, University Central Consultancy Bureau (UCCB), University of Namibia, Windhoek, p. 78 for a review of implementation.

- 3) **Wildlife management:** Concerns were raised during regional consultations that many people had lost their say over land matters as a result of concession areas and that too much land was allocated for conservation at the expense of farming.
- 4) **Transhumance:** Transhumance was blamed for land degradation, and some participants called for improved grazing management systems to be implemented. This would impact on customary land rights.
- 5) **Mining and land rights:** The allocation of mining rights was done by the MME without any consultations with or regard for people's land rights.

This chapter will discuss these concerns in a broader historical context. It will show that the recognition of traditional leaders has long colonial antecedents that an independent Namibian government has uncritically adopted. It will also argue that the issues identified by communities in 2018 are largely the result of the current policy and legal framework dealing with traditional leaders and land administration, which fail to recognise and build on local customs and practices with regard to tenure systems and land administration.

2 Land and resource rights

2.1 Legislation and litigation

The pre-independence period was characterised by “an absence of a coherent system of laws and rules that protected the rights of the people who lived on [communal land]”.⁸ Following independence, Schedule 5 of the Constitution transferred all moveable and immoveable property held by the previous government and representative authorities to the GRN, “subject to any existing right, charge, obligation or trust on or over such property ...”.⁹ This created the misconception that the holders of customary land rights in communal areas “lost whatever rights they might have had in communal land upon that land becoming state land [at independence] and, subsequently, municipal or town land”.¹⁰ In addition, many people believed that because customary land rights could not be registered in the Deeds Office, the Constitution could not recognise such rights in terms of Schedule 5.

These misconceptions were removed in a recent judgment in the Supreme Court of Namibia. The case was brought to court as a result of Katima Mulilo Town Council opposing the claims of a customary land rights holder to compensation

8 See *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15/2017) [2018] NASC 409 (16 November 2018).

9 Republic of Namibia, *The Constitution of the Republic of Namibia*, Windhoek, 1990, p. 77.

10 *Ibid.*, p. 23.

as a result of her land becoming part of the proclaimed town. The Town Council argued that

... the land in dispute ceased to be communal land and the appellant could not claim any communal land tenure right in that land. [The Katima Mulilo Town Council], having become the absolute owner of the land, could deal with it as owner without any encumbrance thereon.¹¹

Against this the judges ruled:

It cannot be correct that the State's succession to communal land areas at Independence extinguished the communal land tenure rights that subsisted in that land such that the interference with them would not attract a remedy within the scheme created by para (3) of Schedule 5, regardless of whether or not it falls within the ambit of Art 16 (2).¹²

Customary land rights were not extinguished as a result of ownership of communal land passing to the state, not even in cases where new towns were proclaimed, and such rights could be enforceable by courts of law.¹³ The judges argued that when the state took ownership of communal land at independence, "it assumed an obligation, at a bare minimum, to look after the interests of the people who lived on it ... an obligation which involves recognition [of] and respect for the rights of the members of the community to live on the land, work it and sustain themselves". The state, as owner of the land, "has social 'obligations' which a private owner does not have."¹⁴ They also rejected the argument that customary land rights were not enforceable because they could not be registered in terms of section 16 of the Deeds Registries Act (No. 47 of 1937).¹⁵

This judgment strengthens the provisions of section 28(1) of the CLRA, which stipulate that a customary right "in respect of the occupation or **use** of communal land" (author's emphasis) that "was granted to or acquired ... in terms of any law or otherwise" before commencement of the Act will continue to be valid unless a claim to such right is rejected by the Communal Land Board (CLB) or reverts back to the state on account of holders missing the deadline for registration. The deadline has been extended indefinitely. The right to **use** communal land by definition includes grazing rights. People holding customary land rights are obliged to apply to relevant CLBs for the ratification and registration of such rights. Only once a customary land right has been registered does it become a legally protected right.

11 *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15/2017) [2018] NASC 409 (16 November 2018), p. 3.

12 *Ibid.*, p. 26.

13 *Ibid.*, pp. 30–31.

14 *Ibid.*, pp. 27–29.

15 *Ibid.*, p. 16.

Provisions in the CLRA to obtain legal protection of a customary land right through registration apply only to private rights on communal land.¹⁶ Typically these are rights for a residential and a farming unit as specified in section 19 of the Act. What a farming unit is exactly is not spelt out in the Act, but its maximum size of 50 ha suggests that it involves land for a residential unit, cropland and limited grazing.¹⁷

The CLRA does not provide similar protection for customary land rights to grazing on commonages. Grazing rights are dealt with in section 29, which simply states that commonages are available to the legal residents of such areas for grazing subject to such conditions as the chief or traditional authority (TA) may impose. These conditions may include the type and numbers of livestock grazed, as well as which areas of commonage should rest. Currently, the regulations state that a resident may not graze more than 300 large stock units, or the small stock equivalent, on communal land. Chiefs or TAs must also give permission for people who are not regarded as residents of a particular area to bring livestock onto commonages (Regulation 10). Rights to grazing may be withdrawn if a rights holder does not observe the conditions imposed by the TA, or has access to other grazing land.

These provisions evince a one-size-fits-all approach to securing land rights to commonages across diverse communal areas, and have failed to make customary land rights more secure in Kaokoland. The CLRA is imposing a centralised system of governance that does not fit local laws and customs that are characterised by multi-layered governance. Bollig¹⁸ and Behnke¹⁹ have shown how land tenure and land governance in Kaokoland operate at different levels and that rights to commonages were well-defined. Contrary to the assumption in the legislation that commonages fall under the jurisdiction of a chief or TA, both authors have shown that important decisions over land and natural resources are not taken by chiefs, but at a lower level. Writing about Etanga, Behnke²⁰ noted that the grazing system was decentralised, where “most critical decisions are left to the individual households or small clusters of households with minimal interference from any outside authority”. Typically, “pastoral households ‘owned’ specific places that had reliable water, from which they organized grazing in the adjoining hills ...

16 The term ‘private rights’ is preferred to ‘individual rights’, as it includes powers of exclusion. However, these private rights do not amount to the same private rights commonly associated with freehold title.

17 See Chiari, G.P., *Report of the UNDP Mission on Rural Livelihoods and Poverty in Namibia*, UNDP, Windhoek, 2004, p. 7.

18 Bollig, M., ‘Probleme Kommunalen Ressourcenmanagements in ländlichen Gemeinschaften des Südlichen Afrika: Transformationen des Bodenrechts zwischen Staat, Markt und lokaler Gemeinschaft’, in Apelt, W. & J. Motte (eds), *Landrecht. Perspektiven der Konfliktvermeidung im Südlichen Afrika*, Wuppertal, Foedus Verlag, 2002; Bollig, M., ‘Towards an Arid Eden? Boundary-Making, Governance and Benefit-sharing and the Political Ecology of the New Commons of Kunene Region, Northern Namibia’, *International Journal of the Commons*, 10.2, 2016.

19 Behnke, R., *Range and Livestock Management in the Etanga Development Area, Kunene Region*, Northern Regions Livestock Development Project (NOLIDEP), Windhoek, 1998.

20 Ibid., p. 33.

The heads of these place-owning households were addressed as *oveni vehi*, ‘owners of the earth/land’.²¹ People who want to settle in a community needed to obtain permission from the *oveni vehi*. They were usually relatives of the *oveni vehi*.²²

Land use rights in Kaokoland are flexible and negotiated to facilitate seasonal movements of livestock. Behnke²³ observed that despite seasonal movements of livestock and people, “households are identified with home villages which appear to have a stable composition”. These villages appear to be close-knit social and kinship units, which provide stability. There are no hard and fast boundaries and access to land and resources is negotiated among small communities. Clear rules of land use and utilisation laid down how livestock was to be herded and how to coordinate cattle movements with other cattle posts. Himba communities could not migrate to wherever they wanted. Instead, user groups of commonages were relatively well defined and fairly stable. Sanctions existed for transgressing these rules.²⁴

These local level powers to manage the land notwithstanding, Behnke²⁵ argued that final authority over land use decisions rested with the senior headman at Etanga. However, he only involved himself in issues that could not be amicably agreed and decided upon at the local level.

This discussion suggests strongly that customarily, chiefs and TAs in Kaokoland do not have any of the powers given to them by the CLRA. The current legal framework governing the appointment of traditional leaders and land administration provides aspiring headmen and chiefs with a framework within which they can assume those powers and other benefits that come with recognition. It has opened the door for recognised TAs to interfere with land access rights in areas that are under the jurisdiction of non-recognised traditional leaders, leading to increased disputes and vulnerability.

While the CLRA states that grazing on commonages should be available to legal residents of a specific area, it fails to stipulate what a legal resident of an area is, or more generally, how the claim of a customary land right to commonages can be verified, let alone registered. A first step in addressing this issue is to recognise that customary land is typically “owned” by communities, and that access to land is dependent on group membership. Individual or collective property rights to land and natural resources in communal areas are defined by membership of a specific community.²⁶ It follows from this that in order to improve tenure security

21 Bollig, M., ‘Towards an Arid Eden?’ p. 776.

22 Bollig, M., ‘Probleme Kommunalen Ressourcenmanagements’, p. 79; Behnke, R., ‘Range and Livestock Management’, p. 34.

23 Ibid.

24 Bollig, M., ‘Probleme Kommunalen Ressourcenmanagements’, p. 80.

25 Behnke, R., ‘Range and Livestock Management’.

26 Ellis 1993 as cited in Bollig, M. & A. Corbett, *An Assessment of the Namibian Conservancy Programme*, Evangelischer Entwicklungsdienst (EED) and Legal Assistance Centre (LAC), Windhoek, 2002, p. 49.

to commonages, the law must provide procedures to enable local communities to confirm customary rights to commonages.

A first foray in this direction was presented in the Draft National Land Tenure Policy.²⁷ It proposes to recognise, define and demarcate traditional villages, which by definition include large commonages:

Once a village is demarcated and a constitution is drafted in line with an Act of Parliament, the village should be registered and the effect of such registration should be that the village becomes a juristic person, in order to give better security to the land tenure of the members of the village.²⁸

It continues to propose that residents of the village be registered and that such register be kept up to date:

The village residents will have the discretion to accept or reject persons or families wishing to enter its community, as long as this does not infringe on Article 16(1) of the Constitution of Namibia.²⁹

These proposals have never been opened to public debate and have not been submitted to the National Assembly. This notwithstanding, similar proposals have been made more recently in connection with group rights.

There appears to be a good understanding that the provisions in the CLRA to register customary land rights are not appropriate in Kaokoland. Mendelsohn³⁰ reported that among the multitude of objections raised by the Otjikaoko TA to the requirements of customary land rights was that they were “contrary to the tradition of its people, and that the only acceptable registration would be group registration over the old headman wards”. Underlying this assessment was probably the realisation that the individualisation of customary land rights through a process of registration may lead to increased land conflicts, as it amounts to imposing individual rights on “pre-existing systems of multiple rights”.³¹

Defining the content of customary land rights to commonages as pertaining only to grazing does not do justice to the complex nature of customary tenure systems. Bruce (1999) argued that “indigenous tenure systems have customised tenure arrangements for land under different uses [...] A community’s tenure system is composed of several tenures, each of which defines different rights and

27 Ministry of Lands and Resettlement, *National Land Tenure Policy (Final Draft)*, Windhoek, 2005.

28 *Ibid.*, p. 17.

29 *Ibid.*, p. 18.

30 Mendelsohn, J., ‘Customary and Legislative Aspects of Land Registration and Management on Communal Land in Namibia’, Ministry of Lands and Resettlement, Windhoek, 2008, p. 48.

31 Quan, J., ‘Land Tenure, Economic Growth and Poverty in Sub-Saharan Africa’, in Toulmin, C. & J. Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa*, DFID/IIED/NRI, London, 2000, p. 37.

responsibilities for resource use.”³² A customary right to cultivate a parcel of land, for example, does not automatically imply rights to hunting or the collection of specific natural products. As Bollig and Corbett³³ have argued, “different sets of rules (may apply) over the same locations”. The notion of communal tenure refers to a bundle of rights and duties that different levels such as individuals, family, sub-groups and the larger group enjoy to a variety of natural resources.³⁴

Information obtained during a field visit in June 2019 confirmed that that rules of access to commons as well as the broad boundaries of wards and sub-wards were well-known, but do not enjoy any legal protection. If anything, the implementation of the CLRA has made communities with unrecognised traditional leaders vulnerable to outsiders coming into their areas without proper authorisation at the local level. Several instances were reported during the field visit of recognised TAs who authorised the settlement of people in areas of unrecognised traditional leaders and even conservancies. These actions are based on the perception that as recognised TAs they are the only traditional leaders with powers to implement the CLRA. These powers include rights to allocate and cancel customary land rights in areas under the jurisdiction of unrecognised traditional leaders. The CLRA increased contestation between recognised and unrecognised headmen at the expense of ordinary land rights holders. The most explosive example of this can be found in Omakange.

Omakange is part of Kunene Region and the recognised Otjikaoko TA claims jurisdiction over it. A small portion of land under the Otjikaoko TA lies east of the main tar road and is in Omusati Region, bordering the Uukwaluudhi TA in the east, which is a recognised TA. Both TAs are contesting under whose control the Omakange area falls. Over a number of years, 162 land parcels of 10 ha on average were fenced in the area of Okapundja to Otjomukandi, allegedly by people from Uukwaluudhi. The land was used for crop production and animal husbandry. The Uukwaluudhi TA, which is recognised, and the unrecognised Otjerunda TA allocated customary land rights in Okomakuara, Omateteue and half of Omakange. Both claim jurisdiction over the villages. The Ovandu Vovivapa and Tjeura TAs (both unrecognised) allocated land for residential and cropping purposes in Okapunja and Otjomukandji, but did not permit any fences.³⁵

This situation has created insecurity and confusion, in particular with the granting and registration of customary land rights. Seventy rights claimants

32 Bruce 1999 as cited in Bollig & Corbett, *An Assessment of the Namibian Conservancy Programme*, p. 47.

33 Ibid., p. 48.

34 Cousins, B. & A. Claassens, ‘Communal Land Rights, Democracy and Traditional Leaders in Post-Apartheid South Africa’, in Saruchera, M. (ed.), *Securing Land and Resource Rights in Africa: Pan-African Perspectives*, PLAAS, Bellville, Cape Town, 2004, p. 22.

35 Namwoonde, I.H. & M.H. Karunga, *Investigation on the Fences Erected along the Kamanjab Road between Okapundja and Otjomukandi*, Ministry of Lands and Resettlement, Windhoek, 2014, p. 4.

have lodged their applications for recognition of a customary land right with the Uukwaluudhi TA. However, even though being approved by the latter, these rights cannot be registered by the Kunene Communal Land Board “because the Uukwaluudhi [TA] is not recognised in the Kunene region”. In 2014 only eight of the 162 fenced land parcels had been registered in terms of the provisions of the CLRA with the Kunene Communal Land Board.³⁶ Mendelsohn³⁷ stated that the Uukwaluudhi TA was “accused of expanding its control by soliciting [communal land rights] applications from Owambo residents who settled illegitimately in areas claimed to be under the jurisdiction of the Otjikaoko TA.”

The CLRA provides only limited *de jure* land rights over commonages, and TAs are not able to invoke statutory law to enforce customary laws and practices.³⁸ Section 43(2) of the CLRA provides for a chief, TA or communal land board to “institute legal action for the eviction of any person who occupies any land in contravention of [the Act]”, but this provision has never been used in a court of law. However, the provisions of the CLRA were successfully adduced in some cases to have illegal fences removed from communal land. An example of this involved a Supreme Court judgment authorising the Ohangwena Communal Land Board to order the removal of a fence erected by a certain Wapulile, the respondent in the that case.³⁹ However, these legal provisions cannot be used by unrecognised traditional leaders. As a result, the rights of livestock farmers in Kaokoland, who are dependent on flexible access to grazing, remain precarious; rights holders are vulnerable, particularly to outsiders appropriating land. In their review of the implementation of the resolutions taken at the first Land Conference in 1991, Nghitevelekwa et al.⁴⁰ have argued that

... the lack of clarity and lack of clear pronouncement on the protection and security of commonage in the Communal Land Reform Act, 2002 represent the main breeding ground for people to fence off large tracts of communal land.

2.1 Conservancies

In the absence of legal protection of group rights to land and natural resources in the CLRA, many rural communities turned to other natural resources legislation, and in particular the legislation governing communal conservancies. The establishment of conservancies required that the area of the conservancy be accurately determined, that a constitution be developed to govern the activities of the conservancy, and that the members of the conservancy be recorded in a register. The rights of conservancies

³⁶ Ibid.

³⁷ Mendelsohn, J., ‘Customary and Legislative Aspects of Land Registration and Management’, p. 48.

³⁸ Bollig and Corbett, *An Assessment of the Namibian Conservancy Programme*, p. 49.

³⁹ NASC 19, 08 June 2017, *Chairman Ohangwena Communal Land Board N.O. v Wapulile* (SA 81/2013) (<https://namiblii.org/na/judgment/supreme-court/2017/18>).

⁴⁰ Nghitevelekwa et al., ‘The Land Question and Land Reform in Namibia’, p. 107.

involved primarily the sustainable utilisation of wildlife and other natural resources for consumptive and non-consumptive use, with limited powers with regard to managing land rights. They have no rights to allocate or cancel customary land rights, but, as interested parties in terms of the CLRA's regulation 7(4), they can object within seven days to applications for customary land rights to be recognised and registered. In addition, section 31(4) of the Act provides conservancies with rights to object to applications for leaseholds, if these are found to be wholly or partly situated within a declared conservancy area.

While this community-based approach represented a form of devolution of powers, the central state retained substantive rights over the land and conservancies. These restrictions notwithstanding, the establishment of conservancies gave rise to a perception among the people involved "that more substantive rights to land were gained when a conservancy was gazetted, or that the institutions they devise to govern the communal resources – game – actually have a much broader mandate than that".⁴¹ More specifically, Bollig⁴² argued:

Although legally the state did not cede land ownership rights to local communities, but only devolved specific management and transfer rights to them, the delimitation of territorial boundaries fostered the idea held by local people that they had in fact wrenched land rights from the government.

Bollig⁴³ also argued that in some instances the establishment of conservancies had more to do with traditional authority politics than conservation. He referred to the process of establishing conservancy boundaries as "a new type of territorialisation" with

... new territorial entities conform(ing) to the ideas and strategies of traditional and newly established leaders alike; in their view, bounded territories precluded unwanted immigration, (re-)legitimized and (re-)territorialized traditional leadership, reconfirmed communal ownership of pastures and other natural resources, and also opened venues for investment from the outside.

This may help to explain why Kunene Region has the largest percentage of communal land falling under proclaimed conservancies countrywide. In 2017, the area covered by conservancies in the region was 58 943 km², or 79.5% of communal land in Kunene, with 59 207 people, or 81.7% of Kunene communal area residents, living in conservancies.

In terms of a recent judgment in the High Court of Namibia, conservancies are not as powerless with regard to protecting their members' customary land rights

41 Bollig, M., 'Towards an Arid Eden?', p. 775.

42 Ibid., p. 780.

43 Ibid.

as had been assumed for a long time. In a recent judgment in *N#jagna Conservancy Committee v The Minister of Lands and Resettlement*,⁴⁴ Judge Ueitele found that the N#ja Jaqna Conservancy – and by implication other conservancy committees recognised under the Nature Conservation Amendment Act (No. 3 of 2017) – had *locus standi* to bring an application for an eviction of persons, thus indicating that the committee had a right to the land in order to assert their rights over wildlife utilisation. The significance of this judgment is that the Court accepted that there was *locus standi* of a different entity, not just the TA or the Communal Land Board.⁴⁵

Apart from the inherent shortcomings of the CLRA to protect customary rights to land and natural resources, the very same Act excludes a substantial part of the Ovahimba and Ovaherero livestock owners in Kaokoland from the provisions of the Act on account of the fact that a large number of headmen are not recognised, and are therefore not able to implement the procedures set out in the CLRA for the recognition of customary land rights and the approval of new applications.⁴⁶ In terms of the Act, customary land rights become legally valid land rights only after a communal land board has verified or ratified such a right. With regard to new allocations, the Act specifically states that the allocation “by the Chief or Traditional Authority is not enough to give the applicant the right to use the land”.⁴⁷ This implies that for as long as a customary land right is not registered, it does not have any legal standing in terms of the CLRA, and hence enjoys no legal protection. And in many parts of Kaokoland, this cannot happen. This is the reason why unrecognised traditional leaders have enrolled the Legal Assistance Centre to assist with their applications to be recognised.

3 Himba headmen and the state

The recognition or non-recognition of headmen in Kaokoland is a major point of dissatisfaction among traditional leaders. Regardless of the possible personal interests of individual headmen in being recognised, the current situation has a negative impact on tenure security and land administration in the sub-region. But the relationship between Ovahimba headmen and the state – whether colonial or post-independence – has always been characterised by ambiguities and tensions. The requirement that headmen needed to be recognised was a colonial invention

44 NAHCMD 250 (A 276/2013), *The N#jagna Conservancy Committee v The Minister of Lands and Resettlement*, 13 September 2016.

45 Willem Odendaal, personal communication.

46 Hinz, M., ‘Traditional Governance and African Customary Law: Comparative Observations from a Namibian Perspective’, in Horn, N. & A. Bösl (eds), *Human Rights and the Rule of Law in Namibia*, Macmillan Namibia, Windhoek, 2008 (<http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/hinz.pdf>).

47 Legal Assistance Centre, *Guide to the Communal Land Reform Act, 2002 (No. 5 of 2002)*, 2nd Edition, Windhoek, 2009, p. 23.

which was uncritically adopted by the independent Namibian government, and probably for the same reasons. Both the colonial and independent state had to ensure that traditional leaders, particularly in areas where the state was not well represented, could be trusted politically. Most traditional leaders enjoy widespread legitimacy and considerable influence in areas under their jurisdiction.

Against this background, it is conceivable that TAs might have been perceived as threats to attempts by the new state to establish itself in rural areas after independence. At least one politician was reported to have expressed fears that strong traditional leaders “might ... marginalise the function of constitutionally established institutions and offices such as the regional governor and councillors”.⁴⁸ Political expediency rather than customary legitimacy were and continue to be the main criteria for recognising traditional leaders.

A major challenge for the South African colonial regime was that there were no traditional chiefs among the Ovahimba. In a sense, the colonial state was faced with what Mamdani⁴⁹ referred to in a different context as “stateless communities” where

... colonial imposition could not resonate with any aspect of tradition. Often tribes were created on the basis of territorial contiguity as villages were brought together under a single administrative authority. Chiefship was similarly manufactured and chiefs were imposed.

When Major Manning visited Kaokoland for the first time in 1917, he reportedly “could not identify distinctive geographically bounded tribes. Instead, he noted the existence of so-called sections of people living under the authority of individual leaders”. Chieftainship had to be “manufactured”, and Manning proceeded to “establish more familiar and workable structures through which the South African Administration could rule in Kaoko” by appointing Vita Thom, Muhona Katiti and Kakurukouye as chiefs.⁵⁰ Bollig⁵¹ observed that “all three chiefs appointed in 1920 had careers as war lords or mercenary leaders and had only vague claims to traditional forms of leadership.”

Traditional leaders of one kind or another were an essential component of colonial rule. And Kaoko was no exception, as the Native Commissioner of Ovamboland pointed when he stated that:

48 Werner, W., ‘Tenure Reform in Namibia’s Communal Areas’, *Journal of Namibian Studies*, Vol. 18, 2015, p. 76.

49 Mamdani, M., *Citizen and Subject: Contemporary Africa and the Legacy of Colonialism*, James Curry, London, 1996, p. 41.

50 Friedman, J.T., ‘Making Politics, Making History: Chiefship and the Post-Apartheid State in Namibia’, *Journal of Southern African Studies*, Vol. 31, No. 1, 2005; Bollig, M., ‘Chieftancies and Chiefs in Northern Namibia: Intermediaries of Power between Traditionalism, Modernization and Democratization’, in Düllfer, J. & M. Frey (eds), *Elites and Decolonization in the Twentieth Century*, Palgrave Macmillan, Basingstoke, 2011, p. 160.

51 M. Bollig, ‘Chieftancies and Chiefs in Northern Namibia’, p. 160.

The political aspect of native administration in the Kaokoveld is similar to that followed in Ovamboland. It is a form of indirect rule whereby the rank and file are controlled through their traditional leaders. It is of first importance therefore to uphold the influence and status of such leaders. Without their aid and co-operation it would be impossible to carry out the policy of the Administration satisfactorily.⁵²

It was therefore imperative to develop a system of centralised traditional leadership among the Ovahimba. Unlike the Ovahimba sections in Kaoko, the Ovaherero sections were quite familiar with a centralised system of governance. This process was characterised by tensions and conflicts between kin-based organisation and leadership, and the “administrative mode of organisation” introduced by the colonial state.⁵³ Twenty years after the advent of South African colonial rule, the Officer-In-Charge of Native Affairs in Kaokoland wrote to the Chief Native Commissioner (CNC):

The Ovahimbas have never submitted to tribal control and their headmen are faced with an impossible task. The Native Commissioner of Ovamboland tried for nearly 20 years to get the Ovahimbas to co-operate but could not even persuade them to attend meetings and had to travel from place to place to discuss matters with a few at a time.⁵⁴

A prominent Himba headman, Uaripaka, confirmed this assessment when he lamented the fact that his subjects did not respect him as headmen and refused to carry out instructions:

The Ovahimbas treat us [headmen] like dirt; we are nothing. The head of every family considers himself the headman of his people and will not listen to us. When I tell my people what work you have given us to do or communicate any order to them, they say: “You have been to the White man about work; do it yourself and go to hell!” The Government must not think that the Ovahimbas are like the Europeans who respect their superiors. They do not listen to their headmen and treat us like dogs because every stock owner is a big man.⁵⁵

This situation had not changed much by the early 1950s when the Officer-in-Charge of Native Affairs in Ohopoho (present-day Opuwo) observed that the Himba headmen had no control over their subjects, who treated the former “as being just another Ovahimba. They are unable to deal with complaints brought to them and in such cases always consult me and one of the Herero headmen, usually Willem Tjerije.”⁵⁶

52 NAN SWAA 2513 A 552/1 Vol. 2 Monthly Reports OIC of NA Ohopuho to CNC Windhoek 1.10.1940.

53 Mamdani, M., ‘Citizen and subject’, pp. 42–43.

54 NAN SWAA 1168 A 158 40/2 Minutes of a general meeting held at Okorosave on the 2nd October 1939.

55 Ibid.

56 NAN NAO 61 12/3 Officer-in-Charge Native Affairs Ohopoho to Chief Native Commissioner, Annual Report on Native Affairs 1952, 31.12.1952.

In theory, for the system of indirect rule to work, the autonomy of traditional leaders vis-à-vis the colonial state had to be reduced by making chieftainship or headmanship “subject to appointment, transfer and dismissal”.⁵⁷ Headmen were often given warnings if they failed to carry out the instructions of colonial officials and threatened with removal from Kaokoland.⁵⁸ In some specific cases, police action and/or deportation were proposed “to maintain law and order” among the Ovahimbas, especially followers of Mariha and Veripaka, who were regarded as being “entirely out of hand”, seemingly because they ignored an instruction by the Officer-In-Charge to provide labour for road construction.⁵⁹

But the colonial administration was careful not to take drastic action too quickly. This was partly the result of not having been able to assess whether these headmen derived their power from being recognised as headmen by the Administrator, or by the “tribe”. With no tradition of headmanship, colonial officials were left guessing whether the successor of a deposed headman would be recognised as leaders by the “tribe”.⁶⁰ The CNC in Windhoek argued as follows:

[It would be an] unhappy position if the Himbas were to continue to recognise their deposed headmen and that a successor headman would not enjoy the confidence of the tribesmen which might have an unfortunate reaction on the present relations existing between the Administration and the tribe.

...

Under the system of indirect rule, at present obtaining in the Kaokoveld, the governing power, in order to maintain their tribal authority, generally accepts leaders nominated by the tribe and will not depose them except for very serious cause or because they have lost the confidence of the tribesmen and with it their real power and status. In the latter case the request for deposition would have to come from the tribesmen and not from the governing power and the fact that they are negligent in attending meetings is not regarded as sufficient cause for the Administration to depose them.⁶¹

The policy of the colonial administration towards Himba headmen in particular was characterised by ambiguity. “No one – including the colonial officials themselves – seemed certain whether they were ‘chiefs’, ‘headmen’ or just ‘leaders’ ...”.⁶²

A major issue in appointing and recognising headmen, and later chiefs, was whether these should be elected or inherit their headmanship. It would appear that until the late 1980s, a hybrid system was used. Potential headmen and councillors

57 Mamdani, M., ‘Citizen and subject’, p. 55.

58 Friedman, J.T., ‘Making Politics, Making History’, pp. 29–30.

59 NAN SWAA 1168 A 158 40/2 Undesirable features evidenced by report of meeting held at Ohopuho in the Kaokoveld on 31st January and 1st and 2nd February 1940.

60 NAN SWAA 2513 A 552/1 Vol. 2 Monthly Reports NC Ondangua to CNC Windhoek 5.12.1949.

61 NAN SWAA 2513 A 552/1 Vol. 2 Monthly Reports CNC Windhoek to NC Ondangua 28.2.1950.

62 Friedman, J.T., ‘Making Politics, Making History’, p. 29.

were proposed at meetings and then confirmed through elections. Whatever the outcomes of these processes were, the names had to be approved by the Native Commissioner in Ohopoho and then forwarded to the CNC in Windhoek. The names of newly appointed headmen in Kaokoland had to be sent for the approval of the Administrator.⁶³

In the mid-1970s, “villages” were said to elect their headmen. The Council of Headmen then had to approve and submit the results to the Bantu Affairs Commissioner in Ohopoho. He made a comment on the outcomes and forwarded the same to the CNC in Windhoek for ratification. The CNC in Windhoek then forwarded it to the Department of Bantu Administration and Development in Pretoria for approval. The approval or otherwise of the Minister of Bantu Affairs and Development in Pretoria was then communicated back to the CNC in Windhoek and then to Opuwo.⁶⁴ In the late 1970s the powers of the Minister were transferred to the Administrator-General in terms of Proclamation 3 of 1977.⁶⁵ Before being forwarded to the Administrator-General for approval, the recommendations to appoint headmen in Kaokoland were first submitted to the Paramount Chief (Riruako) to be discussed by Herero headmen in Okakarara.⁶⁶

Ambiguities about appointing and recognising headmen continued until independence. The colonial administration appears to have supported the election of new headmen instead of simple succession, presumably to retain control over traditional leaders. In 1985, the Secretary of the Administration of Hereros argued that all leadership positions from headman to councillor in Kaokoland were regarded as inheritable and that this practice was wrong and not legal. That, he felt, was why there were so many headmen and councillors in Kaokoland. He felt that the issues needed to be addressed urgently and proposed that Kaokoland be divided into wards – six or eight, depending on size; that headmen be appointed according to wards; that a distinction be drawn between official positions (*ampstoele*) and ordinary positions (*stoele*) that are inheritable according to custom; and that appointments should also be made through elections.⁶⁷

Historically, Kaokoland had a disproportionate number of headmen relative to the population. In 1952 the number of principal and sub-headmen among the Ovaherero and Ovahimba sections were given as follows:

63 NAN SWAA 2513 A 552/1 Vol. 2 CNC to NC Ondangua, 1.4.1950.

64 See NAN AHR 32 10/5/2 (A-06) Vol. 1 Hohorua Kakuwa (councillor) and 35 others, Otjorunda to Bantoesakekommissaris, Opuwa (sic) 1.4.1976 and Bantoesakekommissaris Opuwo to Hoofbantoekommissaris Windhoek, 1.8.1976; Sekretaris van Bantoe-Administrasie en – Ontwikkeling Pretoria to Hoofbantoesakekommissaris, Windhoek 18.2.1977.

65 NAN AHR 32 10/5/2 (A-06) Vol. 1 Hoofbantoesakekommissaris S.W.A. Windhoek to Bantoesakekommissaris Opuwo 24.11.1977.

66 NAN AHR 32 10/5/2 (A-06) Vol. 1 Hoof Naturellekommissaris vir SWA to AG Memo: Aanstelling van Hoofmanne te Kaokoland 17.10.1978.

67 NAN AHR 30 10/4/2 (5) Sekretaris: Administrasie vir Hereros. Die ondersoek van die 7-man komitee oor die beswaar van Hoofman Kephaz Muzuma n.d. [1985].

- **Herero:** seven principal and six sub-headmen; estimated population: 1 555
- **Ovahimba:** nine principal and three sub-headmen; estimated population: 2 917
- **Ovatjimba:** no headmen; estimated population: 3 987⁶⁸

Among the Himba, this amounted to one headman for 324 people. Over the years, the colonial administration expanded the number of traditional authorities. In 1990, 27 “territorial headmen” were counted among the Ovahimba,⁶⁹ while the Commission of Inquiry into Matters relating to Chiefs, Headmen and other Traditional or Tribal Leaders recorded 35 traditional leaders in the Kaokoland region.⁷⁰ Today, however, only three TAs are recognised in northern Kunene:

- **Otjikaoko TA:** Chief Paulus Tjavara, four senior councillors, two traditional councillors. All of them were designated in August 1996 and recognised in March 1998.⁷¹
- **Vita Royal House TA:** Chief Kapuka John Thom, six senior traditional councillors, 13 traditional councillors. Some councillors were designated as far back as 1950 and 1960 and recognised in March 1998 (GN 65 31.3.1998 GG 1828).⁷²
- **Kakurukouje TA:** Vemuui Tjambiru was designated as Chief (*ombara*) of the Kakurukouje TA on 21 March 2008 and recognised in July of the same year.⁷³ The following year, two senior traditional councillors and five traditional councillors were also recognised.⁷⁴

Many headmen in Kaokoland feel aggrieved at not being recognised. At the time of writing, approximately 28 headmen were working through the Legal Assistance Centre to be recognised. A major part of the problem is that “a very substantial part of the [Ovahimba] are not part of the procedures before Land Boards that finalise the allocation of land under customary law”⁷⁵ as their unrecognised headmen cannot approve any applications for customary or leasehold rights. The three recognised TAs believe that their areas of jurisdiction, although not clearly defined among themselves, extend over all Ovahimba and Ovaherero communities. In the event of customary land rights holders in areas without a recognised TA wanting to apply or register a customary land right or apply for a right of leasehold, they have to work through a recognised TA, which may not enjoy any legitimacy in the particular area. This in turn legitimises their claim of jurisdiction. It is also alleged that recognised

68 NAN NAO 051 NC Ovamboland to CNC Windhoek, 30.4.1952; the Ovatjimba were said to have lived primarily with Ovaherero communities.

69 Government of the Republic of Namibia, *The State of Land Reform Since the 1991 National Conference on Land Reform and the Land Question*, Ministry of Land Reform, October 2018, p. 282.

70 Republic of Namibia, *Report by the Commission of Inquiry into matters relating to chiefs, headmen and other traditional or tribal leaders*, Windhoek, 1991, p. 98.

71 See Friedman, J.T., ‘Making Politics, Making History’, p. 38 for origins of OtjiKaokoland and Big Group.

72 See *ibid.* p. 35 for information on the Vita Royal House.

73 Proc. 26 of 2008, GG 4090, 30.7.2008.

74 GN 2005 of 2009.

75 Hinz, M., ‘Traditional governance and African customary law’, *op. cit.*, p. 81.

TAs appoint their headmen in areas that do not necessarily recognise them and allocate land and grazing rights in conservancies and areas that are traditionally not regarded as under their control.

In short, the authority of a large number of unrecognised headmen is simply ignored by recognised chiefs on the strength that they are recognised and hence have the power to administer land even in areas where their powers are contested by unrecognised headmen. This has given rise to demands expressed during regional consultations in 2018 that clear areas of jurisdiction are established, each under a recognised (or newly recognised) traditional leader.

3.1 Areas of jurisdiction

The clear delimitation of areas of jurisdiction in societies practising transhumance is a major challenge, as this particular form of land use requires flexibility and the opportunity and capacity to negotiate access to grazing and other resources outside one's home area. As much as South African colonial officials were hoping to define the areas of jurisdiction of their appointed headmen, in reality this remained wishful thinking.

In theory, the basic area of jurisdiction under colonial rule was the ward, but the history of wards in Kaokoland is not entirely clear. What is clear, however, is that continuous disputes among headmen included contestations over areas of jurisdictions. This notwithstanding, in 1968 Kaokoland was divided into the following wards:

- **Ovahimba:** 10 wards; ± 7 000 subjects
- **Ovatjimba:** six wards; ± 2 000 subjects
- **Herero:** seven wards; ± 4 000 subjects

Each headman was assisted in the management of his ward by a number of sub-headmen.⁷⁶ A report and recommendations on management development in South West Africa found that “currently this system was working excellently”.⁷⁷

However, realities on the ground belied this generous assessment, as continuous rivalries among emerging headmen called ward boundaries or areas of jurisdiction into question. To aggravate matters, a map indicating ward boundaries was said to have existed many years ago, but could no longer be found.⁷⁸ The only map indicating areas of individual headmen appeared in *Notes on the Kaokoveld (South West Africa) and its people* (van Warmelo⁷⁹). In June 2019 participants in a focus

76 NAN BOP 66 N11/2/2 Verslag en aanbevelings van komitee insake bestuursontwikkeling in Suidwes-Afrika: Administratiewe en bestuursontwikkeling; Damaraland: Kaokoland: Hereroland, September 1968.

77 Ibid.

78 NAN AHR 33 10/5/2 (A-06) Notule van vergadering gehou te Okatumba op die 10de Januarie 1989.

79 Van Warmelo, N.J., ‘Notes on the Kaokoveld (South West Africa) and its People’, *Ethnological Publications* 26, Department of Bantu Administration, Pretoria, 1962 (1951).

group discussion in Opuwo not only confirmed that the only map indicating wards was van Warmelo's but held it as part of the documentation supporting their claims to areas of jurisdiction and legitimacy as headmen.

The disunity and disputes can be traced back to 1952, when members of the Ovatombo objected for the first time to being dominated by the Herero, an event that "marked the rooting of political consciousness, an awareness of oppression".⁸⁰ They felt they were treated unfairly and that the government "only allowed 'outsiders' to become headmen".⁸¹ The Ovatombo wanted their own headmen, but the Native Commissioner in Ohopoho commented:

The Ovatombo Headmen serve no purpose whatsoever. They have no control over their subjects and in some instances appear to be afraid of them. Whenever a complaint is brought to them they seem unable to settle such but come to the office for assistance. I have warned Ovatombas that whenever it comes to my notice that they simply ignore instructions issued to them by their headmen, they will be punished most severely.⁸²

The conflict took the form of headmen belonging to either the *groot groep* (big group) and *klein groep* (small group). Native Kaokoland - Ovatombo - became the *groot groep* (big group) (*otjombo*) ("a reference to their majority status in Kaokoland") and the Herero were referred to as the *klein groep* (*okambo*, or sometimes *ndamuranda*).⁸³ The severity of these tensions became apparent when the colonial administration wanted to use headmen as enumerators in the 1970 census, only to find out that the *groot groep* did not want to talk to the *klein groep*. The latter were regarded as traitors because they cooperated with the whites and offered their livestock for tests and inoculations. Both groups recognised Clemens Kapuu as their leader and accepted his political views and orders. This division and resulting tensions between headmen of these two groups lasted through the 1970s until independence.⁸⁴

The *groot groep* and *klein groep* each appointed their own headmen in the respective headmen's wards. This led to a mushrooming of wards, as people in the concerned wards were sub-dividing existing wards into up to three units to

80 Friedman, J.T., 'Making Politics, Making History', p. 30.

81 Cited in *ibid.*, p. 31.

82 NAN SWAA 2513 A 552/1 Vol. 2 OIC NC Ohopoho to CNC Windhoek 31.12.1952 Report of the Officer-in-Charge, Native Affairs, Kaokoveld for the quarter ended 31st December 1952, p. 2.

83 Friedman, J.T., 'Making Politics, Making History', pp. 32-33. These generalisations need to be qualified. A submission to the Administration for Hereros in 1985 argued that the dispute was between the Tjimbo and Hereros, but that this was also misleading. The Tjimbo claim they are the owners of Kaokoland and that the Herero were emigrants who did not have much say in Kaokoland. But this is the wrong point of departure. 'There are Tjimbo who support the Hereros and vice versa'; NAN AHR 33 10/5/2 (A-06) Voorlegging aan die Uitvoerende Komitee van die Administrasie vir Herero's 7.1.1985.

84 NAN AHR 32 10/5/2 (A-06) Vol. 1 Bantoesakekommissaris Opuwo to Hoofbantoesakekommissaris Windhoek, 10.12.1976.

accommodate rival headmen. The number of wards stood at 27 at the time, catering for a population estimated to have been 13 000, which suggests that the number of headmen and councillors was disproportionately high relative to the population.⁸⁵ A former Native Commissioner in Kaokoland, Ben van Zyl, stated that there were 36 headmen's wards in Kaokoland in the latter half of the 1970s. Each headman "was autonomous in his own area".⁸⁶

3.2 1980s: Second Tier Representative Authorities

The advent of representative authorities in 1980 exacerbated the sense of neglect and domination by the Ovaherero among the Ovahimba. The representative authorities represented a new system of government based on ethnic affiliation rather than geographically demarcated homelands. The Herero Representative Authority supposedly "represented" the interests of all Ovaherero-speaking communities, including the Ovahimba.⁸⁷ But there was a strong perception among the Ovahimba that this was not the case, in particular with regard to the appointment of headmen.

In the mid-1980s, the powers to appoint headmen rested with the Executive Committee of the Representative Authority, subject to the prior approval of the Administrator General. The latter's mandate was subsequently transferred to the "Cabinet" of the Interim Government established in June 1985.⁸⁸ As Friedman⁸⁹ pointed out, delegates of the *small group* and *big group* "alike used the power of the new governing body to appoint their own group's headmen throughout Kaokoland". Examples abound in the archival records of headmen of the *small group* being appointed in areas under the control of the *groot groep*. In one instance, headman Mbumbijazo Muharukua alleged that Paramount Chief Riruako had forced a headman on them twice before under pressure from the *klein groep*. He stated that the Ovahimba would not allow that they were only recognised in elections for national government but ignored in choosing their own leaders. They would not allow that their democratic rights be taken away illegally and granted only to certain Hereros. He continued that headmen in Kaokoland were not elected by government office but by the people themselves and the Council of Headmen. "Not even the Bantu tribal and apartheid government of Odendaal forced headmen onto us."⁹⁰

85 NAN AHR 32 10/5/2 (A-06) Vol. 1 Bantoesakekommissaries Opuwo to Hoofbantoesakekommissaris Windhoek 26.7.1976.

86 NAN AHR 42 11/4/1 Sekretaris: Adminstrasie vir Herero's to Die Beheerlandros Windhoek: Afskrif: Hofsaak nr 35/88 Opuwo. Aanhangel A Die staat teen Ruben Inpinge (sic) 12.9.1988.

87 Friedman, J.T., 'Making Politics, Making History', p. 34.

88 NAN AHR 30 10/4/2 (5) Aanstelling van Hoofmanne: Kaokoland. Die Uitvoerende Komitee 31.7.1985.

89 Friedman, J.T., 'Making Politics, Making History', p. 34.

90 NAN AHR 30 10/4/2 (5) Mbumbijazo Muharukua to Sekretaris, Admin van Hereros 2.10.1982 writing on behalf of 22 headmen and councillors.

A year later the appointment of a second headman caused Ngeendepi Muharukua to write a letter to the Administrator General to draw his attention to the “irregularities, corruption and monopoly” in the Second Tier Authority. He wanted to inform him that the Tjimba were oppressed and discriminated against by the Herero Administration. They brought this to the attention of Mr van Zyl – both orally and in writing – but to no avail. They had also informed Chief Riruako but he had communicated, through his behaviour, that he would not listen to them. The actions of appointing second headmen in some villages was done solely to undermine the leadership of the Tjimba and establish “*alleenheerskappy*”.⁹¹

In a letter to the Chairman of the DTA, Dirk Mudge, Headman Mumbiazo Muharukua requested that the Herero Representative Authority be completely abolished and replaced with an Executive Committee that was not influenced by Riruako and his privileged group. If the Chairman of the DTA and Minister of Finance would not act within 14 days, “you will have to excuse us if we take our own decisions”. He argued that their “struggle was not against SWAPO or the Odendaal Plan but against our own elected administration which was born from the DTA, and which later on changed into a dictatorship which started to belittle and oppress us”. This would ultimately drive them out of the DTA and everything that Dirk Mudge and Clemens Kapuuu left them with.⁹²

This was followed by the submission of a motion of no confidence in the Executive Committee of the Hereros to the Paramount Chief of the Hereros, President of NUDO and the DTA, Kuaima Riruako in February 1987 by 13 headmen from Kaokoland, writing on behalf of the Council of Headmen and the people of Kaokoland. Amongst other things, they accused the Herero Administration of having discriminated against Kaokolandians (Otjikaoko) and oppressed them from the start: “It started with the undemocratic appointment and imposition of headmen in our wards against our will ... The administration is still doing this and it is busy exploiting traditional headmen’s authority and to rob us of our traditional ownership and authority over communal land in an unjustified and brutal manner.”⁹³

A confidential report on the political situation in Kaokoland in the mid-1980s stated that the *groot groep* and the *klein groep* were united in their opposition to Paramount Chief Riruako and/or the Herero Administration. Their grievances included neglect, underdevelopment, poor treatment of pensioners, poor maintenance of boreholes and weak communication between Windhoek and Kaokoland. Both groups wanted to withdraw from the Administration and continue on their own. A few young people of the OtjiKaokoland party were opposed to

91 NAN AHR 32 10/5/2 (A-06) Ngeendepi Muharukua to Aministrateur-Generaal van SWA/Namibië 23.3.1983.

92 NAN AHR 30 10/4/2 (5) Headman Mbumbijazo Muharukua on behalf the Kaokolandians to die Voorsitter van DTA en Minister van Finansies en Owerheidsake, 22.7.1985.

93 NAN AHR 30 10/4/2 (5) Hoofman Mbumbiazo and 12 others to Die Opperhoof van die Hereros 12.2.1987.

Proclamation AG8 of 1980 and would have welcomed its repeal. This would have opened the door for them to break away from the Herero Administration.

The report also mentioned that reference to *groot groep* and *klein groep* was now replaced with the following:

- **Otjikaoko (former *groot groep*):** the Himba, Tjimba-Himba and a part of the Tjimba. They regarded Mbunibijazo Muharukua as their leader, “but behind the scene it is the young men who manipulate everybody”. It included people such as Edward Mumbuu, Johannes Muharukua, Lukas Tjoola and Gersom Tjiirora. Edward was regarded as the behind-the-scenes adviser.
- **Otjimaruru (former *klein groep*):** mainly Kefas Muzuma, who was regarded as the leader. This grouping also included Matjihurie Muhenje, Johannes Ruiter and a few others with their followers. Their numbers were not close to those of former *groot groep*.⁹⁴

The foregoing discussion has shown that Ovahimba headmen in Kaokoland were at the receiving end of the Paramount Chief and tribal politicians that were running the Herero Representative Authority. The appointment and recognition of headmen in Kaokoland became a tool to try and entrench certain political interests aligned to the DTA. Political expediency rather than long established traditions about local level leadership determined who would be an officially recognised headman and who would not.

This principle continued well into independence. Although little information about the recognition process reaches the public, there is a widespread perception that politics plays a major role. A recent court case involving headman Hikuminue Kapika and the line ministry supports this view.

The headmanship of Kapika at Okonguati has been mired in controversy and contestation since before independence. In September 1982, 200 residents of Okanguati/Omuramba ward held a meeting and unanimously elected Hikuminue Kapika as successor to his late father Muniomuhoro Kapika.⁹⁵ The following year the Kaokoland Legislative and Executive discussed the inheritance of headmanship and found that it was wrong and anti-democratic and should be stopped. Headmanship was considered to be completely independent of a last will and testament, and it should be left to voters to elect who should govern them.⁹⁶ His appointment was contested by J. Thom of the *klein groep*, who also based his claim on being the descendant of a former headman. The Kaokoland Legislative and Executive “explicitly recommended” that he was entitled to his father’s chair within law and custom and recommended the termination of his position as headman so that he

94 NAN AHR 30 10/4/2 (5) Vertroulik. Politieke onderstroming in Kaokoland, n.d. [1986?].

95 NAN AHR 33 10/5/2 (A-06) Kommissaris Opuwo to Sekretaris Administrasie vir Herero’s: Aanstelling van Hikuminue Kapika as Hoofman n.d.

96 NAN AHR 30 10/4/2 (5) Vergadering van die Kaokoland Wetgewende en Uitvoerende verteenwoordigers vanaf 19 Februarie 1983 tot 21 Februarie 1983.

could be elected and appointed in a lawful, just and honest manner, according to tribal customs and practices.⁹⁷

An election was duly held, and Thom won with 202 votes against Kapika's 194 votes.⁹⁸ A meeting of the Council of Ovaherero Headmen held at Okakarara on 12 April 1984 endorsed the results of the election and "stated explicitly that the winners must be appointed and the losers must be discarded [sic]". However, the Administrator General was of the opinion that the difference in votes between Kapika and Thom (eight votes) was small, and that both should be appointed. The meeting of the Council of Ovaherero Headmen held at Okakarara on 12 April 1984 accepted this.⁹⁹ Kapika did not accept the outcome and alleged that his people had not been informed about the election. He also alleged that Tom was trying to chase him out of Okanguati and alleged that Thom was hardly ever in Okonguati, but lived at Kaoko-Otavi.¹⁰⁰

Chief Kapika rose to prominence as the main opponent of the proposed Epupa Dam in the early 1990s.¹⁰¹ He caused the ire of the GRN when he stated that "the goats had more of a right to the land than the government did because at least the goats lived here". He also argued "that the current Namibian government was treating them worse than the South Africans had".¹⁰²

Against this background it is not surprising that Chief Kapika's applications to be recognised by the GRN as Chief in terms of the Traditional Authorities Act (No. 17 of 1995), the Council of Traditional Leaders Act (No. 13 of 1997) and the Traditional Authorities Act (No. 25 of 2000) were unsuccessful.¹⁰³ His prospects of being recognised improved dramatically after 2013 when three Namibian business people "who [were] involved in the construction of dams" paid him a visit to obtain his support for the construction of the Epupa Dam. In the wake of this visit, the Chief sent a delegation to China in November 2013 "to learn about the construction of hydro-electric dams and to see those types of dams".¹⁰⁴ In January 2014 when the

97 NAN AHR 30 10/4/2 (5) Vergadering van die Kaokoland Wetgewende en Uitvoerende verteenwoordigers vanaf 19 Februarie 1983 tot 21 Februarie 1983.

98 NAN AHR 30 10/4/2 (5) Aanstelling van Hoofmanne: Kaokoland. Die Uitvoerende Komitee 31.7.1985.

99 NAN AHR 30 10/4/2 (5) Paramount Chief of the Hereros. Okakarara. Recommendations of the Committee of Ten (10), 9.7.1984.

100 NAN AHR 33 10/5/2 (A-06) Commissioner (F. Nicklaus) to Sekretaris Admin vir Herero's Windhoek: Hoofman geskille – Okanguati Wyk 9.6.1989.

101 Haring, S.L., "God gave us this land": the Ovahimba, the proposed Epupa Dam, the independent Namibian state, and law and development in Africa', *Georgetown International Environmental Law Review*, 14(1), 2001, p. 61ff; NAHCMD 51, HC-MD-CIV-MOT-REV-2016/00331, 9 March 2018, *Mutaambanda Kapika v Minister of Urban and Rural Development and Others*, p. 4.

102 Haring, S.L., 'God gave us this land', p. 62.

103 NAHCMD 51, HC-MD-CIV-MOT-REV-2016/00331, 9 March 2018, *Mutaambanda Kapika v Minister of Urban and Rural Development and Others*, p. 14.

104 Ibid., p. 4.

delegation was expected to provide feedback to the community about their trip to China, the Chief disappeared and was found a month later on the farm of the three business people who advised and presumably facilitated the trip to China. After he returned to his home village, Ombuko, he was guarded by 15 policemen. He told the national television station, NBC, that he would no longer oppose the construction of the Epupa Dam.¹⁰⁵

Kapika's prospects of being recognised undoubtedly improved even further after he joined SWAPO in June 2014. He was said to have explained that "he joined Swapo because his community had allegedly turned against him and [planned] to dethrone him ... he joined the Swapo-Party by choice as it is a party where he would find peace and where his leadership would be guaranteed".¹⁰⁶

In March 2015 Chief Hikumine Kapika applied for recognition, and the Minister of Urban and Rural Development, Sophia Shaningwa, immediately appointed an investigation committee to provide her with relevant information on the application of Chief Kapika. Amongst other things the Committee reported that:

Kapika's last wish is to leave a legacy in the area of socio-economic development for this community. They further substantiated their support for Kapika's vision as he promised to be a cooperative partner with the Government in development for the sake of his future generation. They pleaded with Government to bury their past differences of not being cooperative with the Government and further promised to join hands with it in any area of development ...".¹⁰⁷

In April 2016 the Chief's application for recognition was approved.¹⁰⁸ However, on 8 March 2018 the decision of the Minister to approve the designation of Hikemuine Kapika as Chief of the Ombuku Traditional Community in terms of sections 4, 5, 8 and 12 of the Traditional Authorities Act was set aside. The court held that there was no evidence that the requirements set out in section 5(1) of the Act had been met, and secondly that the Minister had also failed to establish that the jurisdictional facts required under section 12 existed for her to establish the ministerial investigation committee that she did, and on whose report she relied to arrive at her decision to designate the fourth respondent as Chief of the Ombuku Traditional community. Thus, in short, the Minister had acted *ultra vires*, based on the irrational and unlawful exercise of her powers. The decision has been appealed by Hikuminue Kapika and was due to be heard on 9 October 2019 in the Supreme Court of Namibia.¹⁰⁹

105 Ibid., p. 5.

106 'Chief Kapika joins Swapo-Party', 21 July 2014 (<https://www.leramobile.com/content/27007/Chief-Kapika-joins-Swapo-Party/>) (thanks to Willem Odendaal for pointing this out and providing the reference).

107 HC-MD-CIV-MOT-REV-2016/00331, 9 March 2018, *Mutaambanda Kapika v Minister of Urban and Rural Development and Others*, p. 17.

108 Ibid., p. 6.

109 Willem Odendaal personal communication.

3.3 Traditional leaders after independence

The ruling party and the independent government appear to have had an ambiguous relationship with traditional leaders. Hinz¹¹⁰ found that *Perspectives for National Reconstruction and Development* published by UNIN before independence “did not have a word to say about traditional authorities”. Moreover, the drafters of the Namibian Constitution

... did not envisage much of a role for traditional authorities beyond providing for the establishment of a Council of Traditional Leaders to advise the President on communal land matters. The drafters of the Constitution were rather sceptical about this sector of governance, mainly because of the sometimes ambivalent position of some traditional leaders during times of colonialism.¹¹¹

It was clear, however, that government needed to come up with a policy on traditional leaders. It appears to have accorded this issue similar prominence to the land question, given that the President appointed the Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders¹¹² while the first Land Conference was underway.

The Commission provided a platform for traditional leaders to put forward arguments that would strengthen their positions. It observed that “the submissions ... of those consulted ... would suggest a strong preference for the traditional leaders to be of ‘Royal blood’ or be chosen from the ‘Royal House’”.¹¹³ With regard to Kaoko, Senior Headman Kephass Muzuma claimed that Herero succession was by inheritance and “not by means of election”. To support his assertion he cited the case of “King Vita Thom of Kaoko” whose “traditional leadership is God created” and who was “born out of the Royal House of Zeraua, who is his uncle”.¹¹⁴ Uaundjisa Muharukua of Opuwo supported this view, arguing that “leaders should be from Royal Families or people who traditionally played leadership roles”. He identified three royal families in Kaoko: Mureti Ua Tjavara; Kakurukouje uaTjambiru; and Muhonakatiti uaMbendura.¹¹⁵ The disadvantage he saw in elected leaders was that such a leader

... is a victim of insults as those who have elected him threaten him that they can out vote him with the same votes they brought him with to that position.¹¹⁶

110 Hinz, M., ‘Traditional governance and African customary law’, op. cit., p. 69.

111 Ibid.

112 Republic of Namibia, *Report by the Commission of Inquiry into matters relating to chiefs, headmen and other traditional or tribal leaders*, Windhoek, 1991.

113 Ibid., p. 57.

114 Ibid., p. 26.

115 Ibid., p. 27.

116 Muharukua, U., ‘Proposal on traditional leadership presented by Uaundjisa F.G. Muharuka of Opuwo on 25 April 1991 to Chairman of the Commission on Traditional Authorities, Opuwo’, p. 1.

The Commission recognised that many “Royal Houses” were ‘divided amongst themselves as to the choice of the particular person from their ranks to become the king’.¹¹⁷

In its recommendation, the Commission found “that the traditional systems is not only necessary but also viable” and that it should be retained. On the appointment and recognition of traditional leaders, it recommended “that a Chief be designated by his/her community assembled in a meeting convened for that purpose and in accordance with customary law”. Once the responsible Minister had satisfied him/herself that such an assembly had been properly convened, the person so appointed should be recognised by the Minister. The criteria for recognition and appointment should be decided by the “Community in Assembly”.¹¹⁸ In view of the Land Conference, the Commission abstained from making any recommendations regarding the role of traditional leaders in land administration.

The Traditional Authorities Act of 2000 gives legal expression to some of these recommendations. Section 4 provides for the designation of a chief or head of a traditional community by election or hereditary succession “or any other method of instituting a chief or head of a traditional community recognised under customary law”.¹¹⁹ Section 6 provides for the recognition of a Chief or traditional leader.

It was argued above that a major problem arises in communal land administration as a result of the fact that only those chiefs and traditional authorities can exercise functions and powers under the Act as are recognised in terms of the Traditional Authorities Act of 2000.¹²⁰ In those areas where traditional leaders are not recognised, the procedures set out in the CLRA for the recognition of customary land rights and the approval of new applications cannot be implemented.¹²¹

This situation is exacerbated by the fact that the provisions of the CLRA assume that even recognised traditional leaders have specific areas of jurisdiction. This is generally true in the north-central and north-eastern communal areas, where most households practise cultivation, but areas of jurisdiction are not always clearly defined in communal areas used mainly for extensive livestock farming, such as Kaokoland and communal areas south of the Red Line. The Traditional Authorities Act of 2000 does not link the mandates of traditional leaders to geographic areas. In terms of section 2(2):

117 Republic of Namibia, *Report by the Commission of Inquiry into matters relating to chiefs, headmen and other traditional or tribal leaders*, Windhoek, 1991, p. 58.

118 Ibid., pp. 73–74.

119 Cited in NAHCMD 51, HC-MD-CIV-MOT-REV-2016/00331, 9 March 2018, *Mutaambanda Kapika v Minister of Urban and Rural Development and Others*, Heads of Argument, p 9.

120 For a more general discussion see Werner, W., ‘Land Tenure and Governance on Communal Land in Namibia’, paper presented at the Second National Land Conference, Windhoek, Namibia, 2018, p. 9.

121 Hinz, M., ‘Traditional governance and African customary law’, op. cit., p. 81.

A traditional authority shall in the exercise of its powers and the execution of its duties and functions have jurisdiction over the members of the traditional community in respect of which it has been established.¹²²

A traditional community “may include the members of that traditional community residing outside the common communal area”.¹²³

Moreover, the Traditional Authorities Act of 2000 is imprecise with regard to the boundary demarcation of a TA’s area of jurisdiction. The Act only once refers to what a “geographic area” is, in that it refers to “communal area” as the geographic area habitually inhabited by a specific traditional community, excluding any local authority area as defined in section 1 of the Local Authorities Act (No. 23 of 1992).¹²⁴

4 Conclusion

Removing uncertainties about peoples’ customary land rights and providing tenure security depends to a large extent on the policy and legal framework. It has been argued above that it is questionable whether the current legislation is successful in achieving this. There is mounting evidence that the provisions of the CLRA and Traditional Authorities Act are increasing land disputes and social tensions in northern Kunene Region primarily as a result of the non-recognition of traditional leaders, despite the fact that most of them enjoy local legitimacy.

A fundamental flaw in the CLRA is that it offers a one-size-fits-all framework for very different tenure situations in Namibia’s communal areas. The Act fails to recognise local customs and practices and is therefore inappropriate in Kaokoland for protecting customary land rights to commonages. In practice, this means that 30 years after independence, pastoralists in Namibia’s north-west do not enjoy legally protected rights.

Namibia needs a new land policy and legal framework that is simultaneously specific enough to provide for good governance in land administration and flexible enough to protect local customs and practices. It must acknowledge and enable customary land rights holders to elect local level leadership and participate in the administration of their land rights. Local level institutions to administer customary land rights do exist and are well known. These need to be supported and modernised if the country is serious about making land rights more secure. Downward accountability and consultation with customary land rights holders need to be dramatically improved.

With the Draft Land Tenure Policy, the GRN took the first step in this general direction to identify group rights to land and natural resources and provide

122 Office of the Prime Minister, Traditional Authorities Act (No. 25 of 2000).

123 Ibid., p. 3.

124 Willem Odendaal, personal communication.

legal protection for such rights. In subsequent years, and most recently as part of the Communal Land Support Activity of the Millennium Challenge Account, a substantial amount of work has been done to introduce and implement group rights. This includes a proposed working policy¹²⁵ and proposed guidelines for group land rights in communal areas.¹²⁶ These documents should be dusted off and moulded into a policy and legal framework on group rights as part of the implementation plan of the Second Land Conference. Whether the political will exists to do so remains to be seen. The fact that the Draft Land Tenure Policy has been in hibernation since 2005 suggests that it is not a GRN priority to provide legal protection for customary land rights to common grazing areas.

Finally, for policies and laws to be successful, they need to be implemented conscientiously. This is not always the case. In *N#jagna Conservancy Committee v The Minister of Lands and Resettlement*¹²⁷ the judge expressed his disappointment with the Otjozondjupa Communal Land Board, which resorts under the Ministry of Land Reform and the Ministry of Environment and Tourism, not to have assisted the community in the conservancy to remove illegal fences. His judgment, that all fences must be removed within 60 days has still not been implemented. A line ministry whose mandate it is to protect the land rights of half the Namibian population which can ignore a judgment with impunity does not instil confidence in its sincerity to fulfil its mandate. To conclude, as noted by the judge:

The state institutions must therefore do all in their power to ensure that we do not denigrate or further impoverish any section of our community.¹²⁸



125 Millennium Challenge Account, *Proposed working policy for group land rights in communal areas*, Millennium Challenge, Account Communal Land Support Activity, Windhoek, 2014a.

126 Millennium Challenge Account, *Proposed guidelines for group land rights in communal areas*, Millennium Challenge Account Communal Land Support Activity, Windhoek, 2014b.

127 NAHCMD 250 (A 276/2013), *The N#jagna Conservancy Committee v The Minister of Lands and Resettlement*, 13 September 2016, p. 34.

128 Ibid.

Understanding Damara / ǀNūkhoen and ||Ukun indigeneity and marginalisation in Namibia

Sian Sullivan and Welhemina Suro Ganuses¹

1 Introduction

In historical and ethnographic texts for Namibia, Damara / ǀNūkhoen peoples are usually understood to be amongst the territory's "oldest" or "original" inhabitants.² Similarly, histories written or narrated by Damara / ǀNūkhoen peoples include their self-identification as original inhabitants of large swathes of Namibia's

- 1 *Contribution statement:* Sian Sullivan has drafted the text of this chapter and carried out the literature review, with all field research and Khoekhoegowab-English translations and interpretations being carried out with Welhemina Suro Ganuses from Sesfontein / !Nani|aus. We have worked together on and off since meeting in 1994. The authors' stipend for this work is being directed to support the Future Pasts Trust, currently being established with local trustees to support heritage activities in Sesfontein / !Nani|aus and surrounding areas, particularly by the Hoanib Cultural Group (see <https://www.futurepasts.net/future-pasts-trust>).
- 2 See, for example, Goldblatt, Isaak, *South West Africa From the Beginning of the 19th Century*, Juta & Co. Ltd, Cape Town, 1971; Lau, Brigitte, *A Critique of the Historical Sources and Historiography Relating to the 'Damaras' in Precolonial Namibia*, BA History Dissertation, University of Cape Town, Cape Town, 1979; Fuller, Ben, *Institutional Appropriation and Social Change Among Agropastoralists in Central Namibia 1916–1988*, PhD Dissertation, Boston Graduate School, Boston, 1993; Wallace, Marion, *A History of Namibia: From the Beginning to 1990*, Hurst & Co., London, 2011.

central and north-westerly landscapes,³ as a “minority tribe”,⁴ and as comprised of communities that are marginalised and consequently impoverished.⁵ The !Ao-||aexas Community Group established in 1991 to represent the displaced ǀNūkhoen community from the [Khomas area west of Windhoek that was proclaimed Daan Viljoen Game Reserve specifically referred to themselves as “the indigenous people” who were moved to “other arid areas such as Sorris-Sorris, Okombahe, etc.”.⁶ The Spitzkoppe Farmers Union similarly describe Damara / ǀNūkhoen members as “the natural inhabitants of the country”.⁷

Damara Khoekhoegowab-speaking⁸ people name themselves as ǀNūkhoen, meaning literally “black” or “real” people and thus distinguished from *Nau khoen* or “other people”. Historically, the ethnonym “Dama-ra” is based on an “exonym”, i.e. an external name for a group of people, “Dama” being the name given by Nama for darker-skinned people generally.⁹ Since Nama(qua) pastoralists were often those whom early European colonial travellers first encountered in the western part of southern Africa, the latter took on this application of the term “Dama”. This usage gave rise to a confusing situation in the historical literature whereby the term “Damara”, as well as the central part of Namibia that in the 1800s was known as “Damaraland”, tended to refer to dark-skinned cattle pastoralists known as Herero.¹⁰

3 For example, Boois, Seth M., *Reflections on Modern Damara History: Ôae Hôxae!*, Seth Boois & ||Garoëb Royal Foundation, Windhoek, 2017; New Mission Films, *The History and Livelihood of the Nami-Daman*, Windhoek, 2015.

4 ||Garoëb, Justus, ‘Preface’ in Boois, Seth M., ‘Reflections on Modern Damara History’, op. cit., pp. iv-v.

5 Ibid., p. vi; Luqman, Cloete, ‘ǀNuKhoen clan wants ancestral land back’, *The Namibian*, 6 August 2019 (<https://www.namibian.com.na/81647/read/%E2%89%A0NuKhoen-clan-wants-ancestral-land-back>, last accessed 26 August 2019).

6 !Ao-||Aexas Community, ‘Submission to National Conference on Land Reform’, Windhoek, 1991.

7 Spitzkoppe Farmers Union, ‘Submission to National Conference on Land Reform’, Windhoek, 1991.

8 Shortly after independence, the glossonym (language name) and former endonym ‘Khoekhoegowab’ was ‘officially reintroduced for the language that had become known as ‘Nama’ or ‘Nama/Damara’, “a dialect continuum with Nama as southernmost and Damara, Hai||om and ǀAakhoe as northernmost dialect clusters”. Khoekhoegowab “is the sole surviving language of the *Khoekhoe* branch of the *Khoe* family”. See Haacke, Wilfred, ‘Khoekhoegowab (Nama/Damara)’, in Kamusella, T. & Ndhlovu, F. (eds), *The Social and Political History of Southern Africa’s Languages*, Palgrave Macmillan, London, 2018, pp. 133–158, 133–134. Damara / ǀNūkhoen (and very small numbers of ||Ukun) are a proportion of the 11.8% of Namibia’s population (244 769 of 2 066 389) recorded in 2010 as speaking ‘Nama/Damara’ (Haacke, ‘Khoekhoegowab (Nama/Damara)’, op. cit., pp. 141–142, after *Namibia Household Income and Expenditure Survey 2009/2010*. Haacke suggests that the figure for ‘Nama/Damara’ speakers may be an underestimate for Khoekhoegowab “as most Hai||om and ǀAakhoe speakers presumably are included in the latter survey under the meaningless language category ‘Khoisan’” (1.3%, 27 764 speakers).

9 With ‘ra’ referring to either third person feminine or common gender plural’, ibid., p. 140.

10 See, for example, Alexander, James Edward, *An Expedition of Discovery into the Interior of Africa: Through the Hitherto Undescribed Countries of the Great Namaquas, Boschmans, and Hill Damaras, Vols. 1 and 2*, London, *Elibron Classics Series*, originally published by Henry Colburn, 2006 [1838]; Galton, Francis, *Narrative of an Explorer in Tropical South Africa*, Ward, Lock and Co., London, 1890 [1851]; Tindall, B.A., *The Journal of Joseph Tindall: Missionary in South West Africa 1839–55*, Cape Town, The Van Riebeeck Society, 1959.

The terms “Hill Damaras” (“Berg-Dama” / ‘*!hom* Dama’ / and the derogatory “klip kaffir”¹¹) and “Plains Damaras” (or “Cattle Damara” / *Gomadama*) were used to distinguish contemporary Damara or ǀNūkhoen (i.e. “Khoekhoegowab-speaking black-skinned people”) from speakers of the Bantu language oshiHerero.

In conjunction, these terms also signalled historically constitutive processes whereby pressure on land through expansionary cattle pastoralism pushed Khoekhoegowab-speaking Damara / ǀNūkhoen further into mountainous areas that became their refuge and stronghold¹² (see section 4). Increasing use by missionaries in the nineteenth century of the exonym “Nama” instead of the endonym “Khoekhoegowab” for the Khoekhoe language contributed to the now disproved “popular claim” that “the ethnically distinct Damara ... adopted the language from the Nama”, a discourse with pernicious marginalising impacts for Damara / ǀNūkhoen.¹³ Alongside a more recent consolidation and appropriation of a homogenising Damara ethnic identity associated with colonial and apartheid governance processes,¹⁴ ǀNūkhoen are linked with a diversity of dynamic and more-or-less autonomous lineages (*!haos* or “clans”) associated with different land areas (*!hūs*), with both specific and overlapping livelihoods and lifeworlds enacted by different lineages (see section 3). In total, Damara / ǀNūkhoen were estimated to number “probably not less than 30,000 or 40,000” at the time of German annexation in 1890, falling to around 13 000 in 1911, according to the official German census of that year,¹⁵ and in 2019 recorded as almost 188 000, or 7.5% of the total population.¹⁶

Khoekhoegowab-speaking ||Ukun currently living in Sesfontein and environs are sometimes referred to as “Nama” and at other times referred to as “Bushmen”, for whom a mythologised origin tale tells that they split from ǀAonin / Topnaar Nama

11 Identifying terms such as this one can carry derogatory associations. After some consideration we have elected to incorporate them when written as such in quoted historical texts only where their use in such texts conveys information relevant for present understanding, by clarifying the past presence of specific self-identifying groups of people.

12 Lau, B., ‘A Critique of the Historical Sources and Historiography’, op. cit.

13 The proximity (i.e. similarity) of Damara Khoekhoegowab dialects compared with Nama decreases with contemporary geographical distance between groups of speakers, although ‘northern dialects’ (associated with Sesfontein and surrounding area) have been shown ‘to share a considerable amount of lexicon with especially Naro of West Kalahari Khoe’: both observations point to Damara / ǀNūkhoen speaking Khoekhoegowab “before they encountered the Nama” – see Haacke, ‘Khoekhoegowab (Nama/Damara)’, op. cit., pp. 133–134, 138. Missionary Heinrich Vedder reportedly “searched the whole country to find distant mountain communities of Damara speaking a language other than Nama [and] could not find any” (in Lau, B., ‘A Critique of the Historical Sources and Historiography’, op. cit., p. 23), again indicating long-established and independent ǀNūkhoen usage of Khoekhoegowab, both geographically and historically.

14 Fuller, B., ‘Institutional Appropriation and Social Change’, op. cit.

15 In Union of South Africa, *Report on the Natives of South-West Africa and Their Treatment by Germany*, Administrator’s Office, Windhoek, 1918, p. 107.

16 <http://worldpopulationreview.com/countries/namibia-population/>, accessed 24 August 2019.

at Utuseb in the !Khuiseb River valley, following a dispute in which a ‡Aonin woman refused her sister the creamy milk (*||ham*) that the latter desired.¹⁷ They travelled and established themselves north of the !Khuiseb and are linked with many former dwelling sites located in the Namib close to the ocean (i.e. “*hurib*”)¹⁸ in this westerly area, from which they were progressively displaced and incorporated into the settlement of Sesfontein / !Nani|aus and surrounding area¹⁹ (see section 3). There are only a few elderly people in the Sesfontein area currently identifying themselves as ||Ukun, their distinctive !nara-oriented²⁰ livelihood practices rendered impossible in the twentieth century, for reasons outlined in section 4.

Access by Damara / ‡Nūkhoen and ||Ukun to land areas lived in by their ancestors has been severely constrained through historical processes of marginalisation,²¹ stimulating calls for restorative justice and compensation,²² for example in the form of “royalties from the profitable proceeds of their stolen land”.²³ Despite observed and documented experiences of marginalisation, however, Damara / ‡Nūkhoen continue to be excluded from representations of Namibia’s indigenous and marginalised peoples. This is the case, for example, for the 2019 entry (and previous entries) for Namibia in the Yearbook of the Indigenous Working Group on Indigenous Affairs,²⁴ which includes San, Ovatomjimba, Ovatomue and Nama, but excludes Damara / ‡Nūkhoen, despite the many sources documenting their long histories of association with central and western areas of the country, their experience of processes of land and resource dispossession, and evidence for their continuous

17 For example, Franz ||Hoëb (near ‡Os), 06/04/14 and Emma Ganuses (!Nao-dâis), 12/11/15.

18 Interviews with Hildegart |Nuas (Sesfontein), 06/04/14, and Emma Ganuses (!Nao-dâis), 12/11/15.

19 Sullivan, Sian & Welhemina Suro Ganuses with Franz ||Hoëb, Noag Ganaseb, Christophone Tauros, Michael Ganaseb, Ruben Sanib, Sophia |Awises, Hildegart |Nuas and Filemon |Nuab, ‘!Nara harvesters of the northern Namib: retrieving disrupted socio-ecological pasts through on-site oral histories’, *Future Pasts Working Paper Series* 9, 2019 (<https://www.futurepasts.net/fpwp9-sullivan-et-al-2019>).

20 ‘!Nara’ is the Khoekhoegowab name for the plant and fruit of the cucurbit *Acanthosicyos horridus* whose present use is associated especially with peoples living along the !Khuiseb, but whose past use stretched north and south of this central Namib ephemeral river, *ibid*.

21 Lau, B., ‘A Critique of the Historical Sources and Historiography’, *op. cit.*; Lau, Brigitte, *Namibia in Jonker Afrikaner’s Time (Archeia Series No. 8)*, National Archives of Namibia, Windhoek, 1987; Wadley, Lynn, ‘Big Elephant Shelter and its role in the Holocene prehistory of South West Africa’, *Cimbebasia* (B), Vol. 3(1), 1979, pp. 1–76, 1979; Sullivan, Sian, ‘Difference, identity and access to official discourses: Hai||om, “Bushmen”, and a recent Namibian ethnography’, *Anthropos*, Vol. 96, 2001, pp. 179–192; Sullivan, Sian, ‘Maps and memory, rights and relationships: articulations of global modernity and local dwelling in delineating land for a communal-area conservancy in north-west Namibia’, *Future Pasts Working Paper Series* 7, 2019 (<https://www.futurepasts.net/fpwp7-sullivan-2019>).

22 Boois, S., ‘Reflections on Modern Damara History’, *op. cit.*, p. vii; Sasman, Catherine, ‘Community wants mineral rights’, *Namibian Sun*, 6 August 2019 (<https://www.namibiansun.com/news/community-wants-mineral-rights2019-08-06>, last accessed 22 August 2019).

23 ||Garoëb, J., ‘Preface’ in Boois, ‘Reflections on Modern Damara History’, *op. cit.*, p. iv.

24 <https://www.iwgia.org/en/resources/yearbook>, last accessed 22 August 2019.

use and habitation in land areas over generations. Khoe-speaking ||Ukun formerly associated with the far western desert reaches of the Namib are not mentioned at all in these representations.

In this chapter we seek to offer some context for understanding present circumstances and ongoing debate regarding Damara / ǀNūkhoen and ||Ukun indigeneity and marginalisation in Namibia. The chapter is organised into sections engaging with the following intersecting themes:

- precolonial Damara / ǀNūkhoen presence in Namibia;
- social organisation of Dama / ǀNūkhoen connecting lineage groups (*!haos*) with land areas (*!hūs*);
- historical processes of displacement and marginalisation;
- specific 20th century historical evictions;
- consideration of land access and administration issues associated with the post-Odendaal creation of the Damaraland “homeland” (from the early 1970s to 1990);
- some post-independence changes in the administration of land in the former “homeland”; and
- a review of reasons for continuing discrimination against Damara / ǀNūkhoen in terms of their inclusion in discourses of indigeneity and marginalisation in Namibia.

The chapter draws on a dataset of oral histories and personal testimonies recorded by the lead authors in west Namibia since the mid-1990s, most recently for the Future Pasts project (www.futurepasts.net) affiliated with the National Museum of Namibia, the Gobabeb Research and Training Centre, and Save the Rhino Trust. Historical documents held in the National Archives of Namibia and other secondary and grey literature sources regarding the governance regimes effected through colonialism, apartheid and the postcolonial state have also been consulted, especially in relation to land distribution and connected policies.²⁵

2 Precolonial Damara / ǀNūkhoen presence in Namibia

The Berg-Damaras (also known as the Damaras or the Berg-Damas) are a people of mysterious origin, difficult to classify. Some say that they vie with the Bushmen for first claim to the country.²⁶

25 This underlying literature review and the ways this has unfolded and been framed is available in a series of iteratively updated texts embedded online at <https://www.futurepasts.net/timeline-to-kunene-from-the-cape>.

26 First, Ruth, *South West Africa*, Penguin, Harmondsworth, 1963, p. 34.

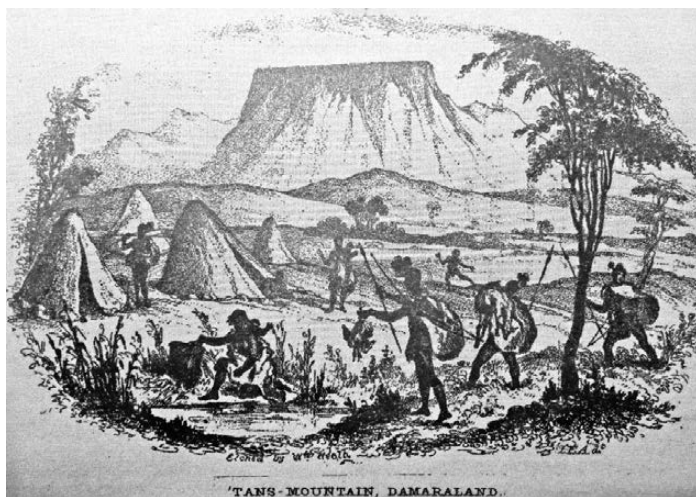


Figure 1a:
“Hill Damara”
village in foothills of
the table-topped Tans
[ǀGans] Mountain”,
as sketched in the 1830s
narrative by British
Captain James Edward
Alexander



Figure 1b:
The commercial,
freehold Gamsberg
farming area as
it is today

(Photo: Sian Sullivan,
 8 March 2014)

A “Bergdama” is amongst those baptised by Missionary Scheppman at Rooibank (Scheppmannsdorf / |Awa-!haos³³) on the !Khuiseb in 1846,³⁴ and around this time British mercantile explorer Captain William Messum encounters “a tribe of Berg Damaras” at a “high mountain” inland from Cape Cross, with “water, and plenty of goats, but no cattle”.³⁵ Travelling inland from Walvis Bay in 1850, Francis Galton (British) and Charles John Andersson (Anglo-Swede) observe apparently permanent “Hill Damara” settlements in the Swakop River catchment such as at Onanis

33 Köhler, Oswin, ‘Die Topnaar Hottentotten am unteren Kuiseb’, in Ethnological Section (eds), *Ethnological and Linguistic Studies in Honour of NJ Van Warmelo (Ethnological Publications 52)*, Department of Bantu Administration and Development, Pretoria, 1969, pp. 99–122, map.

34 Ibid., p. 107.

35 Messum, William, ‘The exploration of Western Africa’, *Nautical Magazine*, April 1855, pp. 210–215, 211.

(ǀŃ!nanis³⁶) and Tsaobis,³⁷ where in the 1890s German Schutztruppe officer Hugo von François photographs a “Bergdamara” village and hut (Figure 2a and Figure 2b), as well as a Schutztruppe target practice (Figure 2c). Galton notes that Berg Damara live at mountain strongholds such as Erongo (!Oeǂgā), Brandberg (Dâures), Auas, |Khomas, Parësis and Otavi (“cattle Damara”,³⁸ i.e. Herero, having taken space on the plains). Accompanied by Berg Damara in his party, he visits their relatives at Erongo (their “remarkable stronghold”), finding them to have “plenty of sheep and goats”, although also to be “always fighting” with Damara of the plains, i.e. Herero.³⁹



Figure 2:
Plates of Tsaobis under
German occupation

(Source: Von François, 1896, pp. 293, 299 and 133 – out of copyright originals held at British Library and available on Wikimedia)

Figure 2a:
“Bergdamara” village

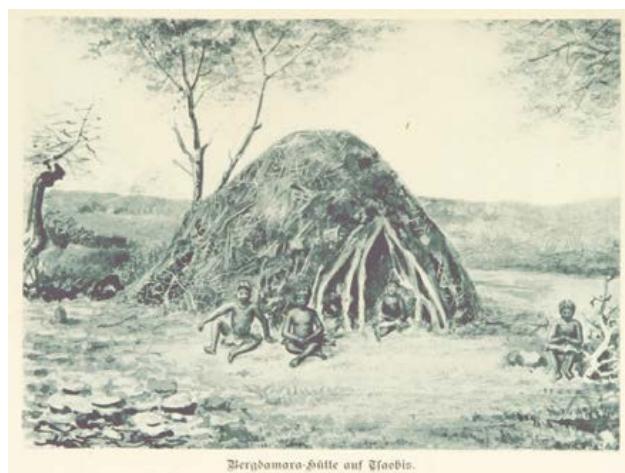


Figure 2b:
“Bergdamara” hut

36 Lau, Brigitte (ed.), ‘The Matchless Copper Mine in 1857: Correspondence’, *Charles John Andersson Papers Vol. 1 (Archeia Series No. 7)*, National Archives of Namibia, Windhoek, 1987, p. 18.

37 Andersson, Charles John, *Lake Ngami or Explorations and Discovery During Four Years of Wanderings in the Wilds of Southwestern Africa*, Harper & Brothers, New York, 1861, p. 89.

38 For example, Galton, F., *Narrative of an Explorer in Tropical South Africa*, op. cit., p. 30.

39 Ibid., pp. 59, 63.



Figure 2c:
Schutztruppe military exercise

An 1864 Rhenish Mission Society Chronicle of Otjimbingue records that “Bergdama” and “Bushmen” were living in the Sesfontein area when the |Uixamab !Gomen (“Topnaar”) and later Swartbooi Oorlam Nama lineages moved there, in part to escape escalating Herero–Nama conflict in central parts of the territory.⁴⁰ The American trader Gerald McKiernan reports “Berg-Damara” living at the Waterberg in 1875,⁴¹ and Missionary Buttner in 1879 observes that “a few Dama chiefs are living north of the Waterberg plateau who have apparent authority over several 1 000s of people”.⁴² In 1918, Damara Chief Judas Goresib of Okombahe confirms that “[our] Chief’s [Nawabib’s] village used, many years ago, to be at the place now known as Okanjande near the Waterberg. It was known to us by the name of Kanubis [!Khanubis] ...”.⁴³ In 1896, Captain Peter Möller, a Swedish traveller who journeyed from Mossamedes southwards through “Owampoland” and “Damaraland” to Walvis Bay, photographs “Bergdamara” west of Etosha pan in the area of Okahakana⁴⁴ (see Figure 3a). To the right in Figure 3a can be seen oblong

40 In Köhler, O., ‘Die Topnaar Hottentotten’, op. cit., p. 111. The Swartbooi were defeated in these struggles and forced to leave |Anhes / Rehoboth (previously settled by “Berg Damara”), from where they trekked “along the Kuiseb River, and thence to the Swakop River in order to find new dwelling places in Hereroland”, only to be pursued by the expansionary Oorlam Nama leader Jan Jonker Afrikaner who overtook them and set fire to their wagons in retaliation for Swartbooi support for Kamaherero. This experience sped up their retreat along the Kuiseb, from where they settled at Salem on the Swakop River and then moved towards Fransfontein and Sesfontein where they settled, via Ameib in the Erongo mountains, finding !Oeṭgā “Bergdama” there, some of whom also subsequently trekked north, both with the Swartbooi and independently (see section 3) (see Lau, Brigitte (ed.), ‘The Matchless Copper Mine in 1857’, op. cit., pp. 100, 104; Wallace, M., ‘A History of Namibia’, op. cit., p. 61). !Oeṭgā is the Damara / !Nūkhoen name for the Erongo mountains.

41 Serton, P. (ed.), *The narrative and journal of Gerald McKiernan in South West Africa: 1874–1879* (Van Riebeeck Society Journal No. 35), 1954, p. 67, cited in Wadley, P., ‘Big Elephant Shelter’, op. cit., p. 8.

42 Buttner, C.G., ‘The Berg-Damara’, *Cape Monthly Magazine*, Vol. 18, 1879, pp. 285–294, 286.

43 Union of South Africa, ‘Report on the Natives of South-West Africa’, op. cit., p. 104.

44 Rudner, I. & J. Rudner, *Journey in Africa Through Angola, Ovampoland and Damaraland 1895–1896 by P. Möller*, C. Struik, Cape Town, 1974 (1899).

wooden bowls used especially for making and sharing *sâu* beer,⁴⁵ which appear identical to a bowl found in the area of Onanis in the Swakop River catchment (see Figure 3b).

From 1866, under the Chieftainship of Abraham Goresib (?||Guruseb – see above), many “Berg-Damara” became consolidated at Okombahe / |Âṡgommes. The Okombahe Damara are described in 1877 by the British Cape Colony magistrate, W.C. Palgrave, as making “gardens in which they grow mealies, pumpkins and tobacco”, with “a mile of the river-bed under cultivation” from which “300 muids” of wheat were harvested, “the greater part of which was sold for more than 40 shillings a muid, being also a provident people ... fast becoming rich in cattle and goats”.⁴⁶

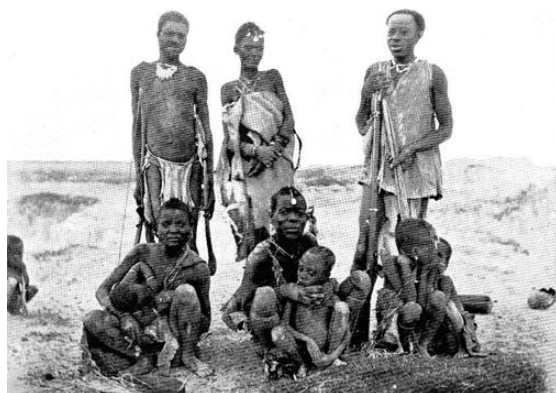


Figure 3a:
“Bergdama” group encountered in 1896 at Okahahana, west of Etosha pan. To the right of the image are two distinctive oblong wooden bowls used for making and sharing beer (|khari) made from *Stipagrostis* spp. grass seeds (*sâun*) and honey (*danib*).

(Source: Scan from Rudner and Rudner [Möller] 1974[1899], opp. p. 147)



Figure 3b:
Wooden bowl bearing close resemblance to those to the right of Figure 3a, found cached in a rock crevice in the vicinity of Onanis

(Photo: Sian Sullivan, 3 April 2018)

Historical encounters and mentions such as those above are too numerous to include more fully here, but are mapped in detail online at <https://www.futurepasts.net/historical-references-dama-namibia> (see screenshot at Figure 4). Figure 4 thus provides an indication of the former wide distribution of Damara / ṡNūkhoen. Compiled through spatialising references in historical texts from the late 1700s on, each placemark on the map represents written mentions of people encountered

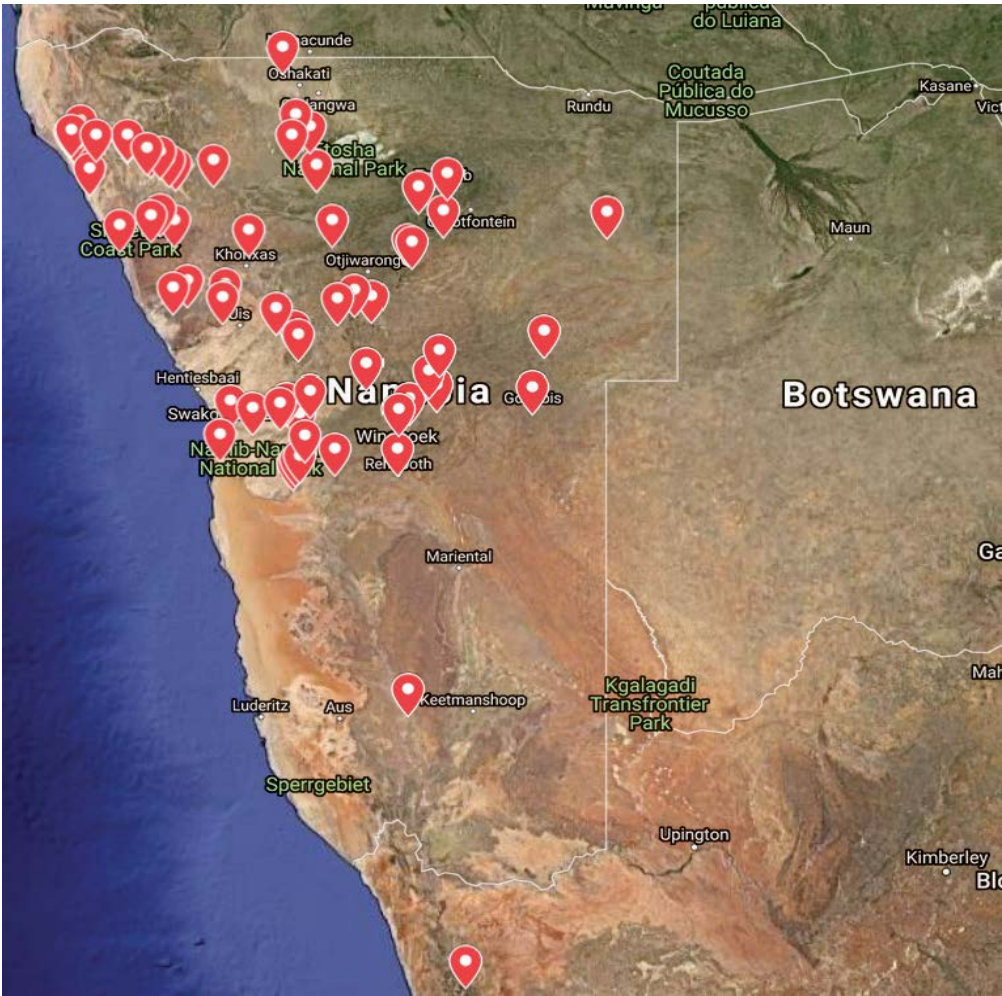
45 As described by Jacobus ||Hoëb of the Hoanib Cultural Group, Sesfontein, on 23 May 2019.

46 Palgrave 1877, quoted in Union of South Africa, ‘Report on the Natives of South-West Africa’, op. cit., pp. 105–106.

for which the name and context clarifies them as Damara / ǀNūkhoen. Clearly the map is limited by the extent of travel by the writers – for example the area north of the Brandberg / Dâures remains more-or-less a blank in terms of historical record until the late 1800s – as well as the biases the writers bring to their encounters and observations. Nonetheless, the map provides some idea of the spread of observed past presence of Damara / ǀNūkhoen.

Figure 4: Screenshot of online map for historical references to the presence of Damara / ǀNūkhoen in Namibia

(Source: <https://www.futurepasts.net/historical-references-dama-namibia>)



Of note in historical texts are the diverse combinations of livelihood practices observed to be enacted by “Berg Damara”, whose “mode of production” incorporated “elaborate hunting methods involving large-scale co-operation and extensive

areas”,⁴⁷ as well as keeping goats and sheep⁴⁸ and sometimes cattle.⁴⁹ Regarding cooperative hunting linked historically with Berg Damara, a report of 1852 “states that the enclosures made from thorn tree branches are 4–6 feet wide, sometimes ‘several hours long’ and become lower in height towards the apex. Along these were posted watchmen who chased the game along”.⁵⁰ Most communities also “grew tobacco, processed it, and traded it with Nama, Herero and Ovambo”,⁵¹ copper smelting was undertaken in central and southern Namibia,⁵² a wide variety of plants and invertebrates were sources of food and medicines,⁵³ and wooden bowls and ceramic containers were made for storing and cooking foods.⁵⁴

In her rigorous student dissertation, historian Brigitte Lau asserts that “the Damaras are *historically* a group apart and settled in the country *before* other Nama and Orlams moved in”, living in “a scattered collection of communities *historically apart and separate* from all other Nama peoples who migrated into the territory”.⁵⁵ They are considered to have migrated south “in remote times”, from probably western-central Africa, to become “widely scattered throughout the country in extended families without centralised political structures”, as probably the “most widely distributed ethnic community, ranging from the periphery of the Namib in the west to the Kalahari in the east and Grootfontein in the north to south of the central plateau”.⁵⁶

Figure 5 provides detail for “closed areas of occupation” (the blue shaded areas) for “Berg Damara” before the German colonial war of 1904–07, listed as:

47 Lau, B., ‘A Critique of the Historical Sources and Historiography’, op. cit., pp. 31–32, citing Berichte, R.

48 For example, Andersson, C., ‘Lake Ngami or Explorations and Discovery’, op. cit., p. 300.

49 Berichte, R., 1852, in Lau, ‘A Critique of the Historical Sources and Historiography’, op. cit., p. 31.

50 Lau, B., ‘A Critique of the Historical Sources and Historiography’, op. cit., citing Berichte, R., 1852, p. 211, also observed by Knudsen in 1844 in Lau, B., ‘A Critique of the Historical Sources and Historiography’, op. cit., p. 50, Appendix 3, and references therein, and by Gürich, G., ‘Deutsch Südwest-Afrika: Reisebilder und Skizzen aus den Jahren 1888 und 1889 mit einer Original Routenkarte’, *Mitteilungen der Geographische Geschichte (Hamburg)*, Vol. 1, 1891, pp. 1–216, p. 138.

51 Lau, B., ‘A Critique of the Historical Sources and Historiography’, op. cit., p. 13.

52 Kinahan, John, ‘Eighteenth century coppersmiths in central Namibia: comments on some sources and syntheses’, *Namibiana*, 2(2), 1980, pp. 17–22.

53 Sullivan, Sian, *People, Plants and Practice in Drylands: Sociopolitical and Ecological Dynamics of Resource Use by Damara Farmers in Arid North-west Namibia, including Annexe of Damara Ethnobotany*, Ph.D. Anthropology, University College London, 1998 (<http://discovery.ucl.ac.uk/1317514/>), and references therein.

54 Du Pisani, E. & L. Jacobson, ‘Dama clay vessel from Gomatsarab, Damaraland, and its relevance for Dama ceramic studies’, *South African Archaeological Bulletin*, 40(142), 1985, pp. 109–111. The making and use of black clay pots called *!nomsus* have been recalled in several oral histories, such as Michael |Amigu Ganaseb (Purros), 13/04/15, who recalled cooking mussels in black pots in his early life in the northern Namib, and a ||Ubun man Franz |Haen ||Hoëb (Sesfontein), 04/04/19, who demonstrated for us how such pots were made in the past.

55 Lau, B., ‘A Critique of the Historical Sources and Historiography’, op. cit., pp. 31, 30, emphasis in original; also Hahn, Carl Hugo, ‘Damaraland and the Berg Damaras’, *Cape Monthly Magazine*, 1928.

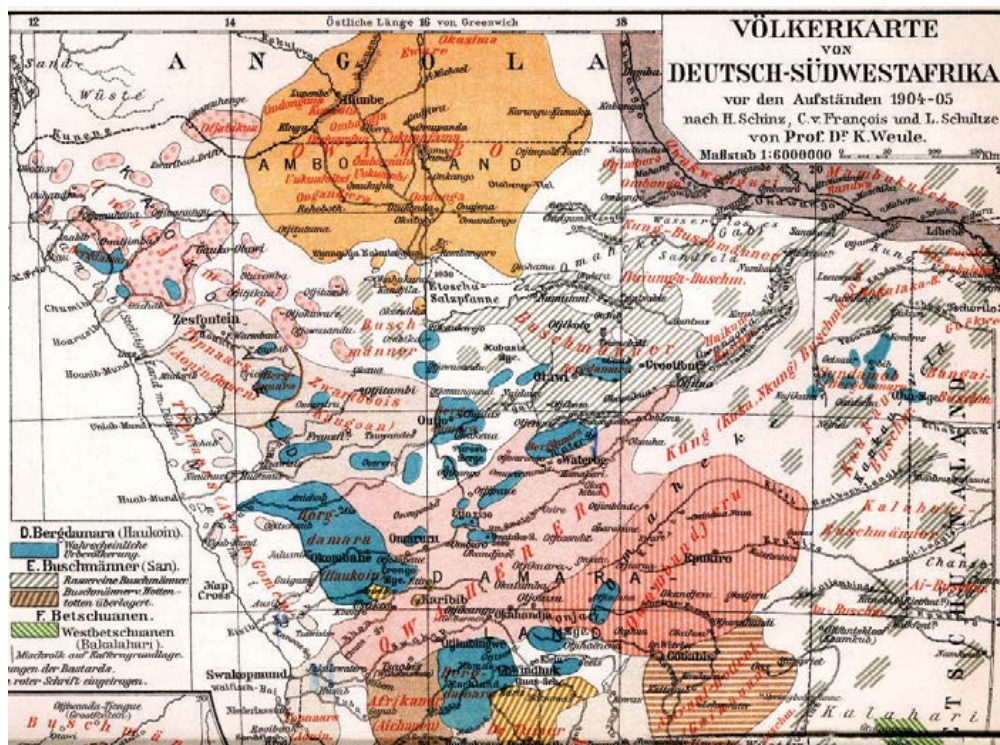
56 Haacke, W., ‘Khoekhoegowab (Nama/Damara)’, op. cit., pp. 137, 140.

a larger tract of land at the Chumib and two smaller ones at Oachab and at the Hoarusib, further east of Sesfontein at the water source of Anabib and at Urieis, and one larger one south-west of Fransfontein, besides southwards of Okaukuejo at the water sources of Ombika and Otjovasandu and at the central region, the land to the south of the Ugab, which includes the Brandberg, Okombahe, and the Erongo, and furthermore, smaller groups at Esere [southeast of Otavi], Otjikango and Outjo, west of Otavi; in the mountain land of Gaub, at the Waterberg, Otjipaue, Etjo, Omburo, northwestern Omaruru [on the upper Huab], in the Khomas Highlands at Seeis, in the Onjati Mountains and at Otjisauna and in the Kaukauveld.⁵⁷

Although noticeably reduced compared to the spread of localities in Figure 4, it can again be seen that Damara / ǀNūkhoen were documented in the early 1900s as widely distributed from west to east across central and northern Namibia.

Figure 5: Detail from “Map of nations (Völkerkarte) for Deutsch-Südwestafrika before the uprisings of 1904-05” by Prof. Dr K. Weule

(I am grateful to Ute Dieckmann for sharing a scan of this map.)



57 Weule, 1910, in V. Lebzelter, *Eingeborenenkulturen in Südwest- Und Südafrika*, Verlag Karl W. Hiersemann, Leipzig, 1934, p. 107, quoted in Inskeep, A., *Heinrich Vedder's The Bergdama: An Annotated Translation of the German Original With Additional Ethnographic Material (Vol. 1)*, Köln, Rüdiger Köppe Verlag, pp. 62–63.

3 Social organisation of Dama / ꞤNūkhoen connecting lineage groups (!haos) with land areas (!hūs)

An understanding of issues of identity and displacement comes into sharper focus through considering dynamic relationships between Damara / ꞤNūkhoen lineages (!haos or “clans”) and specific land areas or !hūs – or what anthropologist Alan Barnard refers to as “local-incorporative units”.⁵⁸ Contemporary lists of Damara / ꞤNūkhoen clans tend to name around 34 as being linked with specific land areas in Namibia (see Figure 6 and in progress literature review online at <https://www.futurepasts.net/damara-lineages>). As detailed in section 4, Damara / ꞤNūkhoen experienced the appropriation of large areas of land inhabited prior to and during European occupation, an experience shared by many Namibians in especially southern and central parts of the country. Many Damara / ꞤNūkhoen !haoti were uprooted completely from the !hūs that constituted the fabric of their homes and lives.⁵⁹ |Khomaniin of the valleys and mountains of the |Khomas Hochland to the west and south of Windhoek, ꞤAodaman of Outjo/Kamanjab/Etosha area, |Gaiodaman of Parësis/Outjo/Otjiwarongo area, !OeꞤgān of Usakos/Omaruru/Erongo mountain areas, and |Gowanin of Hoachanas/western Gobabis area lost all legal and autonomous access to their

land. Since much of this land was delineated and settled as commercial farms by Europeans, many Damara / ꞤNūkhoen found their way back to areas they had known as their own as domestic servants and farm labourers for those with legal title to land under the German and



Figure 6:
Approximate locations of major Dama / ꞤNūkhoen lineages (!haos, “clans”) in the recent past

(Sources: Haacke and Boois, 1991, p. 51, supplemented with information in ||Garoëb, J., 1991, and oral history field research in north-west Namibia; also see forthcoming literature review online at <https://www.futurepasts.net/damara-lineages>).

58 Barnard, Alan, *Hunters and Herders of Southern Africa: A Comparative Ethnography of Khoisan Peoples*, Cambridge University Press, Cambridge, 1992, p. 203.

59 Also see Sullivan, S., ‘Difference, identity and access to official discourses’, op. cit.

South African administrations⁶⁰ (see sections 3 and 4). Others left their *!hūs* to become concentrated in “Native Reserves” and absorbed into the labour system servicing urban areas and industry. From the 1950s onwards, ||Ukun also lost all access to prior areas of dwelling and resource access, for reasons detailed in section 4.

Field research in the Sesfontein area of north-west Namibia – an area north of the Red Line (Veterinary Cordon Fence) (see section 4) where Damara / ‡Nūkhoen have retained some continuity of habitation for at least several generations can help clarify conceptions of and relationships between *!haos* and *!hūs*. As the late headman of Kowareb, Andreas !Kharuxab, explained, a *!hūs* is a named area of the *!garob* or “veld”:

From the !Uniab River to this side it's called Aogubus. And the Hoanib River is the reason why this area is called Hoanib. And from the !Uniab to the other side (south) is called Hurubes. That is Hurubes. From the !Uniab to that big mountain (Dâures) is called Hurubes. If you come to the ||Huab River – from the ||Huab to the other side (south) is called ||Oba (now Morewag Farm). Khorixas area is called |Huib. And from there if you pass through and come to the !U‡gab River we refer to that area as |Awan !Huba, i.e. “Red Ground “. *Every area has got its names.*⁶¹

Oral testimonies affirm Damara / ‡Nūkhoen identification with reference to the *!hūs* that they or their ancestors hail from, at least in recent generations, for example:

... the people get their names according to where they were living. ... My mother's parents were both Damara and my father's parents were both Damara. I am a Damara child; I am part of the Damara 'nation' (*!hao*). I am a Damara (*Damara ta ge*). We are Damara but we are also Dâure Dama. We are part of the Dâure Dama “nation” (*!hao*). We are Dâure Dama. (*Dâure Dama da ge*).⁶²

My father was really from this place [Sesfontein/!Nani|aus], and my mother was from Hurubes. Really she's from Hurubes. She's ||Khao-a Damara.⁶³

!Narenin were living in the western areas of Hoanib and Hoarusib. Where we were just now [i.e. Hūnkab area] was ||Ukun land. ||Ubu people were living in the places close to the ocean like Hūnkab, !Uniab, |Garis, Xūxūes. Those are the areas of *Huri-daman* ||Ukun di *!huba* [lit. the ‘Sea-Dama (referring to !Narenin) and ||Ukun land’].⁶⁴

60 Also see Suzman, James, *In the Margins: A Qualitative Examination of the Status of Farm Workers in the Commercial and Communal Farming Areas of the Omaheke Region* (Research Report Series No. 1), Farm Workers Project, Legal Assistance Centre, Windhoek, 1995, who observes this situation for land-dispossessed Hai||om and Sān.

61 Andreas !Kharuxab, Kowareb, 13/05/99.

62 Ibid. (Nb. ‘Dâures’ is the Khoekhoegowab name for the Brandberg massif).

63 Philippine |Hairo ||Nowaxas, Sesfontein, 15/04/99.

64 Ruben Sauneib Sanib (|Awagu-dao-am), 19/04/15.

Dynamic relationship with a lineage-associated *!hūs* is further reflected in the location and orientation of families in larger settlements, and the directions to which people travel when venturing into the *!garob* to herd livestock, gather foods and other items, and previously to hunt.

Figure 7 shows named land areas (*!hūs*) for a series of *!haos* in north-west Namibia who have been associated with these areas for at least several generations, such that despite recent restrictions on access (see section 4) some claims for continuous habitation can be made. Oral histories clarify these *!haos* / *!hūs* relationships and interactions over the last few generations, as outlined below. In southern Kunene, these different groupings are now categorised under the broader linguistic, lineage, and land-based grouping of *Namidaman* and represented by the Namidaman Traditional Authority (TA).

!Narenin are Damara / *‡Nūkhoen* associated with the western reaches of the northerly Hoanib and Hoarusib Rivers, who for as long into the past as people can remember relied significantly on *!nara*, hence their ethnonym. They harvested *!nara* from the Hoarusib River and from near Dumita (towards the mouth of the Hoarusib), Gantias and Sarusa springs:⁶⁵

... my great, great-grandfathers and mothers were there at Sarusa, and I was born here [in Hoanib] at *‡Hoadi||gams*.⁶⁶

... my family are the people who are/were living in the *!nara* area, and they collect the *!naras* – that’s where the name [*!Narenin*] is coming from.⁶⁷

... they would move in between the Hoarusib and Hoanib. In Hoanib in the rain time they came here to collect food, especially *‡ares*⁶⁸ and *‡namib*⁶⁹ – the latter is not found in Hoarusib. At this time they wore leather skirts from springbok leather. They would collect lots and take back bag by bag to the Hoarusib. The *!naras* grow ripe in the Hoarusib at this time and were harvested by *!narab* Dama, i.e. *!Narenin*.⁷⁰

The *!Narenin* people were the people living next to the ocean [i.e. “*Huri-dama*”, see above]. And when the *!naras* is ripe then they go to the ocean side of the *!naras* and then they stay there, and when they are finished with the *!naras* it’s now the *xori*-time,

65 Reportedly the *‡Aonin* of the *!Kuiseb* River have also at times been given the alternative name of *!Narenin* or *!Naranin*, derived from the word “*!nara*” and inflected with a derogatory connotation when used by other Nama people – see Budack, K.F.R., “The *‡Aonin* or Topnaar of the lower *!Kuiseb* Valley, and the sea”, in Traill, A. (ed.), *Khoisan Linguistic Studies* 3, A.S.I. Communication No. 6, University of the Witwatersrand, Johannesburg, 1977, pp. 1–42, 2.

66 Christophine Daumū Tauros (Purros), 13/11/15.

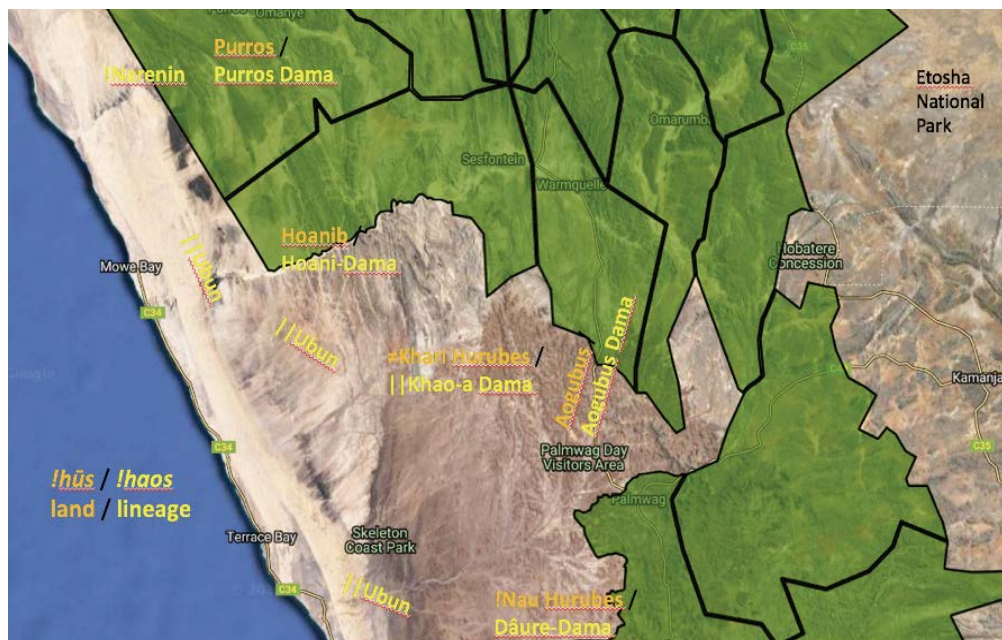
67 Hildegaart |Nuas (Sesfontein), 06/04/14.

68 Meaning grass seeds from *Setaria verticillata* collected from underneath especially *Acacia tortilis* trees. Nb. Manning reports so-called “Klip Kaffirs”, i.e. “Berg Damara” harvesting these seeds in the Hoarusib River on his “Traveller’s Map of Kaokoveld” of 1917 (National Archives of Namibia).

69 Grass seeds of *Danthoniopsis dinteri* that appear white when ‘cleaned’.

70 Eva |Habuhe Ganuses, née *‡Gawuses* (Sesfontein), 1995.

Figure 7: Named land areas (*!hūs*) as dynamically known in recent generations by Damara / #Nūkhoen and ||Ukun inhabitants of present-day conservancies in southern Kunene (shaded green, see section 7)
(Source: fieldnotes and on-site oral histories)



and the *xoris*⁷¹ is now ripe and so they came to the Hoanib [to harvest *xoris*] and they stay there. So they are not the people who are staying in one place – they are moving from place to place.⁷²

In recent generations, at least, !Narenin and ||Ukun would interact and intermarry in these northern Namib areas:

The !Narenin people were living in Purros and the ocean side is where the *!naras* are living, and the ||Ukun were at !Ui||gams / Auses in the Hoanib. Now when they are looking for the food they meet and it's where the !Narenin men take the ||Ukun women and the ||Ukun women take the !Narenib,⁷³ like that. So they were moving from place to place because of the *sāu* and *bosū* – when it's now the time of the *sāu* and *bosū* they came to ||Gams [Amspoort], and Dubis and |Aub [Hoanib] – those are the places where they stayed because of *sāu* and *bosū*. So at the *!nara* time then they go back to !Ui||gams.⁷⁴

71 Fruits of *Salavadora persica*.

72 Christophine Daumū Tauros and Michael |Amigu Ganaseb (Purros), 13/11/15.

73 Khoekhoegowab is a gendered language in which nouns and names ending in 'b' are denoted as masculine whilst those ending in 's' are feminine, thus "!"Narenib" here means a !Narenin man.

74 Christophine Daumū Tauros and Michael |Amigu Ganaseb (Purros), 13/11/15.

As noted above, *||Ubun* are a Khoekhoegowab-speaking people sometimes referred to as “Nama” and at other times as “Bushmen”, who “a long time ago” split from peoples living along the !Khuiseb and are likely to be amongst those coastal peoples associated with the term “Strandloper” in historical texts. The story goes that when they came north to the !Uniab River a *!nara* plant was found by their dog and when they saw the dog eating the *!nara* without being harmed they also started eating the *!naras*.⁷⁵ *||Ubun* would move between *!nara* fields at the mouths of the !Uniab and Hoanib Rivers via Kai-as and Hûnkab springs, now in the Palmwag Tourism Concession.⁷⁶ *||Ubun* also stayed at Dumita where there is a fountain,⁷⁷ and are considered to be:

... the people who built the houses at Terrace Bay and Möwe Bay and were living there. Those circle houses with the rocks at !Uniab are also the houses of the *||Ubun* – my great grandparents were coming from those rock houses.⁷⁸

... when other people saw them in the Namib with their houses built very close together (i.e. ‘*||ubero*’) they said exclaimed over the way the houses were being made – hence the name ‘*||Ubun*’.⁷⁹

The grave of a remembered *||Ubun* ancestor called ‡Gîeb is located in the lower !Uniab (at -20.13615, 13.31687). ‡Gîeb was the maternal grandfather of Franz |Haen ||Hoëb, an elderly *||Ubun* man now living in Sesfontein who was born at |Ui||gams / Auses in the dunes of the Hoanib. Franz remembers his family harvesting *!nara* in the lower Hoanib and moving between *!nara* fields in the !Uniab and Hoanib via Kai-as. ‡Gîeb’s grave is next to a former dwelling site called Daniro, where ‡Gîeb and others first encountered German men travelling along the !Uniab – possibly the 1896 journey by L. Von Estorff which finds “deserted, circular reed huts at the Uniab River mouth” and on return a month later, finds here a band of 30 ‘Bushmen’ who had just arrived from the Hoanib River. They were living off narra for the most part [using] a narra knife made from elephant rib at the Hoarusib River (Jacobson and Noli 1987: 174).⁸⁰ This encounter was described to Franz as being the first occasion when these *||Ubun* had seen white men and encountered food in tins. *||Ubun* presence in the northern Namib appears to be confirmed at least as far back as 1893 by the name “Hubun” in the lower reaches of the Hoarusib and Hoanib Rivers on the *Deutscher Kolonial Atlas* of this year (see Figure 8).

75 Hildegaart |Nuas (Sesfontein), 06/04/14; Franz ||Hoëb (near ‡Ôs), 06/04/14.

76 Documented through journeys with Franz ||Hoëb and Noag Ganaseb, 20-26/11/15, and Franz ||Hoëb, 5-9/05/19.

77 Hildegaart |Nuas, op. cit.

78 Franz ||Hoëb op. cit.

79 Emma Ganuses (!Nao-dâis), 12/11/15.

80 Jacobson, Leon & D. Noli, ‘An eye witness account of coastal settlement and subsistence along the northern Namibian coast’, *South African Archaeological Bulletin*, Vol. 42, 1987, pp. 174. Or possibly even the 1896 journey by L. Von Estorff to the Uniab mouth, *ibid*.

Figure 8: Detail from the Deutscher Kolonial Atlas of 1893, naming “Hubun” as one of the peoples of the northern Namib
(Source: Sam Cohen Library, Swakopmund)



As noted above, *||Khao-a Dama* are associated with the land area known as Hurubes and are a lineage that in times past were associated with *||Khao-as* mountain, a large mountain at the confluence of the *‡Gâob* (Aub) and *!Uniab* Rivers in the present-day Palmwag Tourism Concession. A known ancestor of the *|Awise* *||Khao-a Dama* family is buried at the former settlement of Kai-as (at -19.7588, 13.59574), and a more recent ancestor (Aukhoeb *|Awise*), alive at least until the ca. 1930s, is buried at Soaub in *!Nau* (“fat”) Hurubes (at -20.09555, 13.86885), having also previously herded livestock at Sixori south-west of Sesfontein in *‡Khari* Hurubes.⁸¹ Three *||Khao-Dama* brothers from the *|Awise* family of several generations back are buried on the edge of the settlement of Sesfontein (at -19.12971, 13.61739).

Purros Dama are descendants of a small group of *!Oe‡gā* (Damara / *‡Nūkhoen* from Erongo / *!Oe‡gā* and Omaruru areas) who moved autonomously northwards in the late 1800s, fleeing conflict in these southern areas. They established themselves in Purros and surrounding areas, encountering *!Narenin* there and becoming entangled with the Himba Mbomboro family under the leadership of Guseb Mbomboro, described as also arriving in Purros at around the same time.

81 Multiple oral histories with especially Ruben Sauneib Sanib and Sophia Opi *|Awises*.

A number of graves of those !Oeǂgā Damara who first trekked to the Purros area and their immediate descendants are located at Purros (for example, at -18.78712, 12.95551 and -18.78755, 12.95552⁸²). Most of the “Purros Dama” family relocated to Sesfontein in the 1960s following the death of Guseb but continued to go into the field to the northwest of Sesfontein to harvest honey, grass seeds and other foods.⁸³

Aogubu-Dama were associated with the mountainous area in the vicinity of the ǂGâob (Aub) and ǂKhabaka (Kawaka) Rivers which flow from north to south into the !Uniab. At Bukuba-ǂnoaehes, multiple Damara / ǂNūkhoen graves (at -19.47947, 13.64738) attributed to late 1800s conflict with incoming Oorlam / !Gomen Nama, attest to some of the dramatic events that played out in this land area. Some decades later, both Damara / ǂNūkhoen and Herero families and their livestock were forced to leave this area, as detailed in section 4.

4 Historical processes of displacement and marginalisation

As noted above, a high proportion of Damara / ǂNūkhoen and ||Ubun do not now occupy their former land areas. It is thus observed by today’s Damara leader, Gaob Justus ||Garoëb, that recognition of the loss of land experienced by specific ǂNūkhoen communities “is the first genuine start to the realities of the decolonisation process”.⁸⁴ In this section we outline some of the processes by which the majority of Damara / ǂNūkhoen and ||Ubun lost rights over and access to land areas with which they had understood themselves to be in relationships of belonging and custodianship.

As clarified in section 2, historical records describing encounters with Damara / ǂNūkhoen indicate the presence of diverse relatively autonomous groups of dark-skinned peoples speaking Khoekhoegowab rather than a Bantu language, who were spread from the coast to the Waterberg Plateau (!Hos), and from the southern Namib to Etosha. These peoples were variously displaced, subordinated and incorporated by peoples considered to have become established more recently in areas already lived in by Damara / ǂNūkhoen.

From the early to mid-1800s, and as indicated in multiple historical documents, Oorlam Nama from the Cape Colony and Herero pastoralists from the north competed for pastures and trade routes in the central and north-west parts of the territory, progressively squeezing Damara / ǂNūkhoen into mountainous

82 Malhana !Oe-amses and !Hanre’s first daughter, !Gôahe, respectively the maternal great grandmother and second cousin of Julia Tauros, visited at Purros, 18/05/19, and following numerous interviews with Julia Tauros and her late mother, Elizabet Ge!abasen Tauros.

83 Sullivan, Sian, ‘Folk and formal, local and national: Damara cultural knowledge and community-based conservation in southern Kunene, Namibia’, *Cimbebasia*, Vol. 15, 1999, pp. 1–28.

84 ||Garoëb, J., ‘Preface’ in Boois, ‘Reflections on Modern Damara History’, op. cit., p. iv.

“strongholds”, or incorporating them into various patron-client relations, at times described as servitude. Although some authors of historical texts are probably guilty of exacerbating tales of instability and conflict between “groups”, enough descriptions emerge to suggest that Damara / ǀNūkhoen were significantly disadvantaged from the mid- to late 1800s: for example, the Afrikaners following Jonker Afrikaner northwards took “possession of a part of Damaraland, most likely the country of the Berg or Mountain Damaras”;⁸⁵ a two-week march from Otjimbingwe to Rehoboth of “Maharero’s and [Charles John] Andersson’s forces” in 1864 robbed “Damara settlements of sheep and goats to provision the troops”⁸⁶; Andersson himself recorded on 21 June 1864 that they “more or less surprised some Bergdamara werfts” from whom they took “a few hundred sheep and goats”⁸⁷; and in 1883 around 200 Damara / ǀNūkhoen who had settled in the Sesfontein area under their leader !Nauriseb reportedly fled this area and moved south to Okombahe, complaining that incoming Oorlam Nama (!Gomen from Walvis Bay under the leadership of Jan |Uixamab) were making war on them.⁸⁸ Experiences such as these are suggestive of the considerable displacement and fluidity for all Africans in the territory during this time.

Damara / ǀNūkhoen were also unable to escape the increasing hunger for labour on the part of European colonial enterprise, both within the territory and stretching to the Cape Colony. From 1879–1880s, labour recruitment and shipment of “Berg Damara” as well as Herero and others from central Namibia to the Cape Colony saw several hundred men, women and children recruited as indentured labour for households and farms through a labour recruitment programme of the Cape administration. They were listed on arrival by “the Immigration Agent for the Cape Colony (IAC) as either ‘Damara’, ‘Damara emigrants’, ‘natives from Damaraland’ or mostly, ... as ‘Berg-Damaras’”.⁸⁹ Testimonies recorded in the 1920s by missionary Heinrich Vedder recall this experience: for example, “Bergdamara |Ubeb” at Otjimbingwe recalls “that the Cape Commissioner Coates Palgrave, who was instrumental in the Cape Labour recruitment programme for central Namibia in the 1870s, ‘put the poor Bergdama, who neither had goats nor cattle, together and sent them with a ship for work to Cape Town’”, some of them returning at a later date.⁹⁰ Historian Dag Henrichsen argues that the shipment to the Cape of predominantly “Berg-Dama” played a part in facilitating re-pastoralisation and the

85 Tindall, B., ‘The Journal of Joseph Tindall’, op. cit., p. 32.

86 Wallace, M., ‘A History of Namibia’, op. cit., p. 71.

87 Lau, b., *Namibia in Jonker Afrikaner’s Time*, op. cit., p. 133.

88 Reported in Köhler, Oswin, *A study of Omaruru District South West Africa (Ethnological Publications 43)*, Government Printer, Pretoria, 1959, and in oral histories, for example Philippine |Hairo |!Nowaxas (Sesfontein), 15/04/99.

89 Henrichsen, Dag, “‘Damara’ labour recruitment to the Cape Colony and marginalisation and hegemony in late 19th century central Namibia”, *Journal of Namibian Studies*, Vol. 3, 2008, pp. 63–82, 63–64.

90 Ibid., p. 65.

establishment of Herero chiefdoms during the late 1800s, as well as consolidating “a more rigid identity politics”.⁹¹

As German occupation took hold in the late 1800s, appropriation of land accelerated and Damara / ǀNūkhoen were further impoverished, particularly in productive areas desired for European settlement such as Otavi and Parësis. The presently acknowledged leader of Damara / ǀNūkhoen, Gaob Justus ||Garoëb, recalls that in 1895 Damara / ǀNūkhoen were ordered to vacate their water-rich land in Otavi area and became concentrated around the Rhenish Missionary Society mission station established in the same year on the farm ||Gaub⁹² that constitutes one of the early 1900s areas of “Bergdama” occupation illustrated in Figure 5. Land and livestock were appropriated from Damara people at Parasib (the Parësis mountains),⁹³ a process forcing them “into towns such as Otjiwarongo, Outjo, Kalkveld, and Omaruru”.⁹⁴ Chief Judas Goresib of Okombahe recalls that further south, in 1918, cattle and sheep used to be taken for debts to traders.⁹⁵

These negative colonial processes were both avoided (through displacement and retreat) and resisted by Damara / ǀNūkhoen. As an example of the latter, from the late 1800s it was reported that “a small band of marauders” were causing significant disruption to consolidating colonial ox-wagon transport and cattle stock-posts between Otjimbingwe and the coast. The group was associated with a Damara / ǀNūkhoen man called |Haihāb ||Guruseb, a son of Abraham ||Guruseb, who had been a chief (*gao-aob*) in the vicinity of the Gamsberg (ǀGans; see above) who “had had to leave that area for the area near ǀĀǀgommes (Okombahe)”.⁹⁶ Named after his grey (*|hai*) horse (*hāb*), |Haihāb ||Guruseb became an outlaw in the Khan (ǀKhanni) River and Usakos (!Ūsa!khōs) areas to the east of Swakopmund (see Figure 9). The disruption caused by |Haihāb and followers led to a price of 500 Marks being placed on his head by 1901 (and 100 Marks for each of his proven allies). A local German newspaper published suggestions that Africans – specifically Witboois – should be hired to “assist in the hunt for |Haihāb”. By early 1903, |Haihāb’s activities had reached as far as the colonial authorities in Berlin, leading to a request to the imperial government in Windhoek “to terminate the robberies through appropriate action”. In May 1903, German colonial Governor Theodor Leutwein approached Captain !Nanseb Hendrik Witbooi in Gibeon for the supply of horsemen to search for

91 Ibid.

92 ||Garoëb, Justus, ‘Questions related to land rights in Namibia: A brief summary for presentation by the King of the Damaras on the occasion of a meeting with the United Evangelical Mission – Germany, 21 January 2002’, letter shared by Max Haraseb, |Gaio Traditional Authority, and referred to with permission; Moritz, Walter, ‘Der Beginn der Rheinischen Mission Unter den Damara in Tsumamas, Gaub, Okombahe und Anderen Plätzen’, *Heft 21 der Reihe Aus alten Tagen in Südwest*, Werther, Westphalia, 2015.

93 Max Haraseb, Khamdescha, 02/11/14.

94 Boois, S., ‘Reflections on Modern Damara History’, op. cit., p. 2.

95 Quoted in Union of South Africa, ‘Report on the Natives of South-West Africa’, op. cit., p. 109.

96 Haacke, ‘The hunt for the Damara’ |Haihāb’, op. cit., p. 23.

|Haihāb. The commando based itself at Aukas / Aukhās – an outspan on the Khan River some 16km south-west of Usakos. They found footprints of |Haihāb’s “gang” at various locations in this rugged terrain. At Charadeb waterhole they startled a group who took flight, at which point a Lieutenant Müller von Berneck ordered his men “to fire on the fleeing”, killing several, including a woman and a boy. The tough and “extremely shrewd” |Haihāb was eventually shot on 30 September “in the area between the Khan River and the Chuos mountains”. His hand was reportedly cut off at the wrist for presenting to the authorities.⁹⁷

Figure 9: Map showing |Haihāb ||Guruseb’s sphere of influence from the late 1800s to his death at the hands of the German colonial authorities and collaborating Witbooi troopers in 1903 (reconstructed drawing on Haacke 2010)⁹⁸



⁹⁷ Narrative summarised from ibid.

⁹⁸ A fully referenced and annotated map can be viewed online at <https://www.futurepasts.net/sphere-of-influence-of-haihab>.

One of the relatively well-known series of displacements is associated with the creation of Daan Viljoen Game Reserve for recreational use by white inhabitants of Windhoek following the deproclamation of the Aukeigas (!Ao||Aexas) Reserve in 1945 “to rid Windhoek and |Khomas Hochland from Damara influence”.¹⁰³ Damara / ǀNūkhoen were relocated to the Okombahe Reserve on the Ugab in 1938 and 1941. In 1948, more were uprooted from the former Aukeigas Reserve and displaced to Okakarara in the east.¹⁰⁴ In the 1950s, |Khomanin Damara / ǀNūkhoen were further evicted from Aukeigas and relocated several hundred kilometres away to the farm Sores-Sores on the Ugab (!Uǀgab) River, purchased by the administration to enlarge the Okombahe Reserve.¹⁰⁵ This was a significantly more marginal area in terms of rainfall and productivity, and many of the promises for state assistance remained unmet.

In the early 1960s, Fritz Gariseb, described as “Windhoek spokesmen of the Berg-Damara”, related to South African journalist Ruth First that he had been born “on Aukeigas” in the late 1800s, saying that during this time “we were living as a free people and we lived wherever we pleased. Our flocks, and we had many livestock, used to graze everywhere.” German occupation began to increasingly control their lives through the imposition of passes, government taxes and restrictions on livestock ownership for workers on white-owned farms.¹⁰⁶ Gariseb spoke of how Damara / ǀNūkhoen labour built the large dams for water storage at Aukeigas, work that improved and thus raised the real estate value of the land, for which Damara / ǀNūkhoen have not been compensated:

[t]he first dam was built by our people with the aid of the Boers and was Aukeigas dam, the second one was Autos, the third Kawabas. Here we lived until the South West African Administration deemed it fit to uproot the homes in the Reserve of Aukeigas without consulting the people ... We were promised a Canaan in our new homes, but even so this trek can be described as a national suicide. Thousands of their cattle died, and from the people who moved originally from Aukeigas only forty-six families remain. Today the Damara people are a fallen race in Sorris-Sorris and other Reserves. What happens in the Aukeigas district at the present moment? Two or three rich Whites have bought farms there and make use of the water storage left by the people. ... The other part of the Reserve was declared a game reserve. This means that even the animals have more state protection than human souls.¹⁰⁷

103 ||Garoëb, Justus, ‘Questions related to land rights in Namibia’, op. cit., p. 4.

104 Ibid.

105 Cf. Köhler, ‘A study of Omaruru District’, op. cit.

106 Quoted in First, R., *South West Africa*, op. cit., pp. 35–36.

107 Quoted in *ibid.*, p. 146. First adds that “[t]he home of 401 Africans, Aukeigas was divided into two White farms of 4,950 hectares each, with the rest turned into game reserve. The Berg-Damara were removed 250 miles north to land bordering on the Okombahe Reserve. The new area was slightly smaller than their Aukeigas home, but the size was not its main defect. In the judgment of the Agricultural Commission, a minimum of 10,000 hectares in the area was needed to provide a living for one farming family (White).”

In 1999 we recorded the late Meda Xamses (Figure 10), then living at ||Gaisoas on the Ugab (!U#gab), relating her own experience of these evictions from Aukeigas / !Ao||Aexas. Meda described how after she had had her fourth baby, the government requested that they move from Aukeigas saying that the land they would go to “is a good land and we will make gardens and provide seeds – nothing will be difficult, the water will be free, and the plains are beautiful”. But when they moved to Sores-Sores they found that:

the good life we had at !Ao||aexas is not here! The water we drank freely is not here; the plains just lie there, stretching out; the seeds they said would come they didn't give to us; until now a garden hasn't been planted. And we get too much drought. At !Ao||Aexas we lived from our cattle, we lived from our goats; we farmed and sold for ourselves. Now we have no life. We were moved to this land by a white man called Holom and a white man called Elan. Those white men brought us to live on these plains which have no life, and then they left us. And now the people who were brought here have died, the chiefs who came with us have died, the people have died. And we struggle to ask for our land back. Give us back our land, so that we can go back and stay at our place – at !Ao||aexas. But the government said now you must not want your land anymore. It has been made into a place for wild animals and no one can go back.¹⁰⁸

Figure 10: Meda Xamses and her partner Trougod photographed in 1995 at their home at ||Gaisoas on the Ugab River



108 Meda Xamses (||Gaisoas), 19/04/99.

Less well known are evictions affecting Damara / ǀNūkhoen and ǁUkun in the westerly areas of southern Kunene Region, overlaying already complex circumstances of land use and access (see section 3). Archive records for this rugged westerly area are sparse but nonetheless connect with oral histories confirming “Berg Damara” presence in this area. In 1906, George Elers (mentioned above) builds a road so as to travel northwards towards Sesfontein, accomplished with:

a large number of Berg-Damaras who live in this *[sic]* Velds. I may say that these natives gave me every assistance and made nearly 100 miles of new road taking in new water places, as so many of the known ones were dry.¹⁰⁹

On the coast near the Hoanib mouth he encountered “[a]n old sea Bushman [who] remembered the birds [white breasted cormorants] nesting there as he used to kill them for food and take the eggs”.¹¹⁰ Between the Hoanib and Hoarusib he found “some Berg-Damaras and Bushman who live close to the sea ... constantly walking up and down the coast in search for whales that come ashore [with] their Kraals all the way to Khumib”.¹¹¹ In 1910 a geologist for the Kaoko Land und Minengesellschaft notes “Bergdamara” at places along the !Uniab River called “Gamgamas” and “Swartmodder”, and also meets “Bergdamara” (possibly ǁUkun) returning from “Uniab-Mund”.¹¹² In 1917, the First Resident Commissioner for ‘Ovamboland’, Major Charles N. Manning, encountered “Berg-Damara” at Kowareb, Sesfontein and north-west of Sesfontein along the Hoanib and Hoarusib Rivers (Manning did not travel south of Sesfontein so his report is unable to provide information about this more southerly area).¹¹³ In 1946, a settler farmer, David Levin, looking for grazing in the area of Twyfelfontein / ǀUi-ǁaes, found a Damara / ǀNūkhoen family living there who regularly moved for grazing between “Gwarab” (Kowareb, south-east of Sesfontein), Grootberg and ǀUi-ǁaes.¹¹⁴

The presence of Damara / ǀNūkhoen and ǁUkun families in these and other areas of the north-west was impacted by several layers of land reorganisation. In early decades of the twentieth century a livestock-free zone north of the Red Line veterinary fence dissecting Namibia from east to west was coercively cleared of people living there so as to control the movement of animals from communal areas in the north to settler commercial farming areas in the south.¹¹⁵ Africans including “Berg Damara” were repeatedly and forcibly moved out of the western

109 Quoted in Jacobson, L. & D. Noli, ‘An eye witness account of coastal settlement’, op. cit., p. 173.

110 Ibid.

111 Ibid.

112 NAN.A.327 Krause and Kuntz, *report to the Kaoko Land und Minengesellschaft*, 25/8/1910.

113 Manning Report, ADM 156 W 32 National Archives of Namibia, 1917.

114 Levin, M. & M. Goldbeck, *David Levin of Twyfelfontein: The Unknown Story*, Gondwana Collection, Windhoek, 2013, p. 17.

115 Miescher, Giorgio, *Namibia's Red Line: The History of a Veterinary and Settlement Border*, Palgrave Macmillan, Basingstoke, 2012.

areas between the Hoanib and Ugab Rivers, although inability to police this remote area meant that people tended to move back as soon as the police presence had left.¹¹⁶ Some years later, an Inspection report for the Kaokoveld by an Agricultural Officer recommended that the then derelict gardens at Warmquelle, at the time under small-scale agriculture by several families, be used “... to provide grazing and gardening ground for the Damaras who moved to Sesfontein from the Southern Kaokoveld”.¹¹⁷ Moments of this clearance process are vividly remembered by elderly informants in the present. At the waterhole of †Khabaka, Ruben Sauneib Sanib of the |Awise ||Khaos-a Damara family, recalled his experience of being evicted from the formerly large settlement of Gomagorra in Aogubus (see Figure 11), now in the Palmwag Concession. This was an event that occurred prior to the memorable death of Husa, then Nama captain of Sesfontein / !Nani|aus, who in 1941 was mauled by a lion at the place known as †Ao-daos!¹¹⁸

Figure 11: The locations of Gomagorra and |Gui-gomabi-!gaus in the !hūs known as Aogubus



116 Ibid., p. 152; SWAA 1930 *Territory of South-West Africa, Report of the Administrator For the Year 1930*, Windhoek, p. 14.

117 SWAA.2515.A.552/13, *Inspection report, Kaokoveld. Principal Agricultural Officer to Assistant Chief Commissioner Windhoek*, 06/02/52.

118 Personal fieldnotes and Van Warmelo, N.J., *Notes on the Kaokoveld (South West Africa) and its People (Ethnological Publications 26)*, Department of Bantu Administration, Pretoria, 1962 (1951), pp. 37, 43–44.

The government said this is now the wildlife area and you cannot move in here. We had to move to the other side of the mountains – to Tsabididi [the area also known today as Mbakondja]. Ok, now government police from Kamanjab and Fransfontein told the people to move from here. And the people moved some of the cattle already to Sesfontein area, but they left some of the cattle [for the people still in Hurubes and Aogubus] to drink the milk. Those are the cattle the government came and shot to make the people move.

Some of these cattle belonged to a grandfather of Ruben's called Sabuemib:

And Sabuemib took one of the bulls into a cave at |Gui-gomabi-!gaus and he shot it there with a bow and arrow [so that they would at least be able to eat biltong from the meat and prevent the animal being killed by the authorities]. Other cattle were collected together with those of Hereros [also herding in the area] and were shot by the government people at Gomagorras [named after the word *goman* for cattle and located in the hills south of Tsabididi]. Some of Sabuemib's cattle were killed in this way.¹¹⁹

In the 1950s relief grazing and farm tenancies were made available in this north-western area for Afrikaans livestock farmers under Namibia's South African administration,¹²⁰ who were thereby able to gain from the prior clearances of local peoples. As shown in Figures 12a and b, these newly surveyed farms overlapped with former Damara / ǀNūkhoen living places (||*an*||*huib*): the settlement of Soaub, for example, formerly under the leadership of a man called !Abudoeb and the place where the ||Khaa-a Dama man Aukhoeb |Awise is buried¹²¹ (see Figure 13), is located in what became Farm Rooiplaat 710.¹²²

From 1950, several diamond mines were established in the northern Namib, at Möwe Bay, Terrace Bay, Toscanini and Saurusa,¹²³ making this territory a "restricted access area". This is a remembered process that displaced especially ||Ubun people living and moving in this far-westerly area (as indicated in Figure 14), as well as offering new employment opportunities in the new mines.

119 Ruben Sauneib Sanib (ǀKhabaka), 20/11/14.

120 Kambatuku, Jack R., 'Historical profiles of farms in former Damaraland: Notes from the archival files', *DRFN Occasional Paper No. 4*, Desert Research Foundation of Namibia, Windhoek, 1996.

121 Ruben Sauneib Sanib and Sophia Opi |Awises (Soaub), 07/11/15; revisited with Ruben Sanib, 15/05/19.

122 Kambatuku, J., 'Historical profiles of farms', op. cit., p. v.

123 Mansfield, C., 'Environmental Impacts of Prospecting and Mining in Namibian National Parks: Implications for Legislative Compliance', unpublished Masters dissertation, University of Stellenbosch, 2006.



Figure 12a:
Sites of two farm
dams at Rooiplaat,
positioned next to a
living place called Soaub,
remembered by elderly
Damara / #Nükhoen

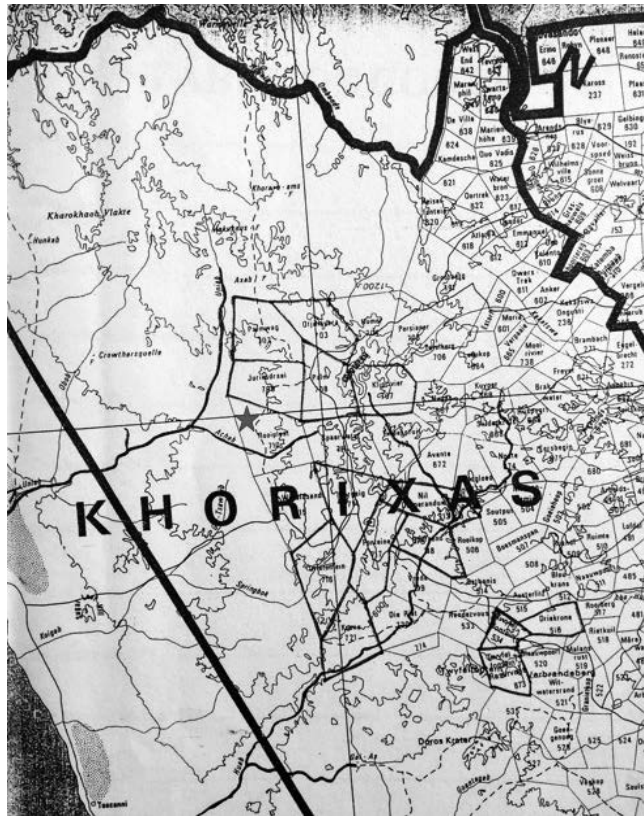


Figure 12b:
1950s–1960s farm
boundaries for farms
established in the
north-west following
relocation of the “Red Line”
in 1955 – the asterisk
marks farm Rooiplaas 710

Figure 13: Ruben Sauneib Sanib sitting at Aukhoeb's grave at the former living place of Soaub
(Photo: Sian Sullivan, 15/05/19)



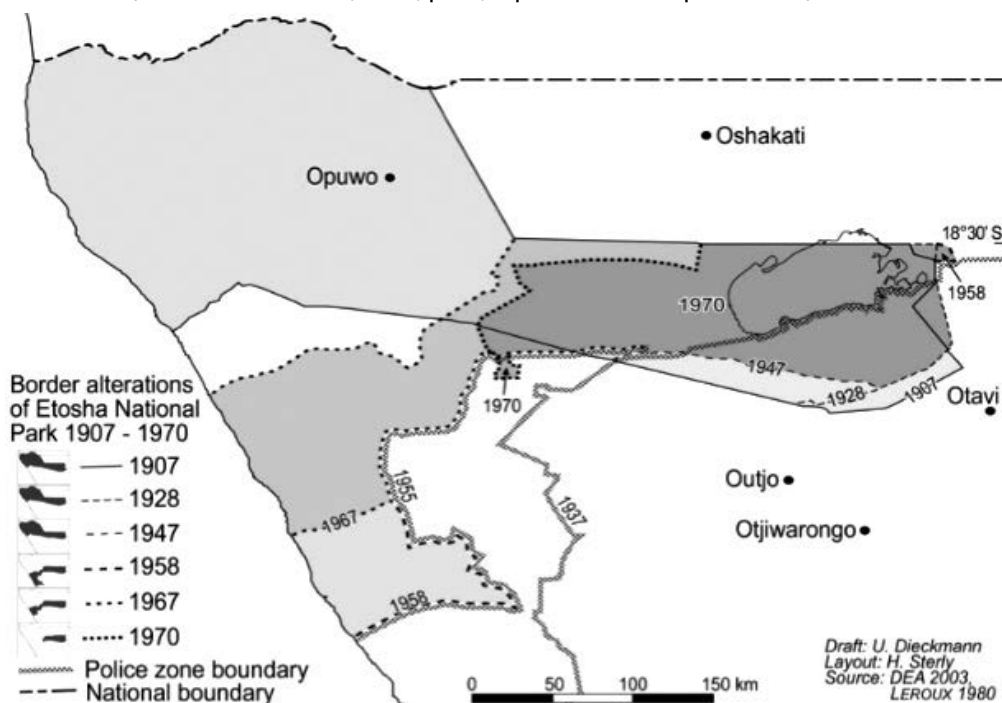
Figure 14: Former living places and associated springs east to west along the Hoanib from Sesfontein



In 1958, and following the westward and northward shift in 1955 of the so-called Police Zone boundary and the opening up of farms for white settlers in this area, the boundary of the former “Game Reserve no. 2”, now Etosha National Park (ENP), was extended westwards to the coast following the Hoanib River in the north and the Ugab River in the south¹²⁴ (see Figure 15), further justifying the removal of people and livestock from this area.

Figure 15: The shifting boundaries of Game Reserve No. 2 / ENP, 1907–1970

(Source: Dieckmann, 2007, p. 76, reproduced with permission)



In sum, these overlapping processes particularly affected the land areas (!hūs) known as ‡Khari Hurubes, !Nau Hurubes,¹²⁵ Aogubus, and Namib (see Figure 7), where a number of Damara / ‡Nūkhoen and ||Ubun families recall living in the past at specific places where their family members are buried. ||Khao-a Dama of ‡Khari Hurubes and Aogubus mostly became consolidated in the northern settlements of Sesfontein / !Nani|aus, Anabeb, Warmquelle and Kowareb. Dāure-Dama of the more southerly !Nau Hurubes mostly became concentrated in the vicinity of the Ugab River and the associated former Okombahe Reserve. The map¹²⁶ at Figure 16 shows places

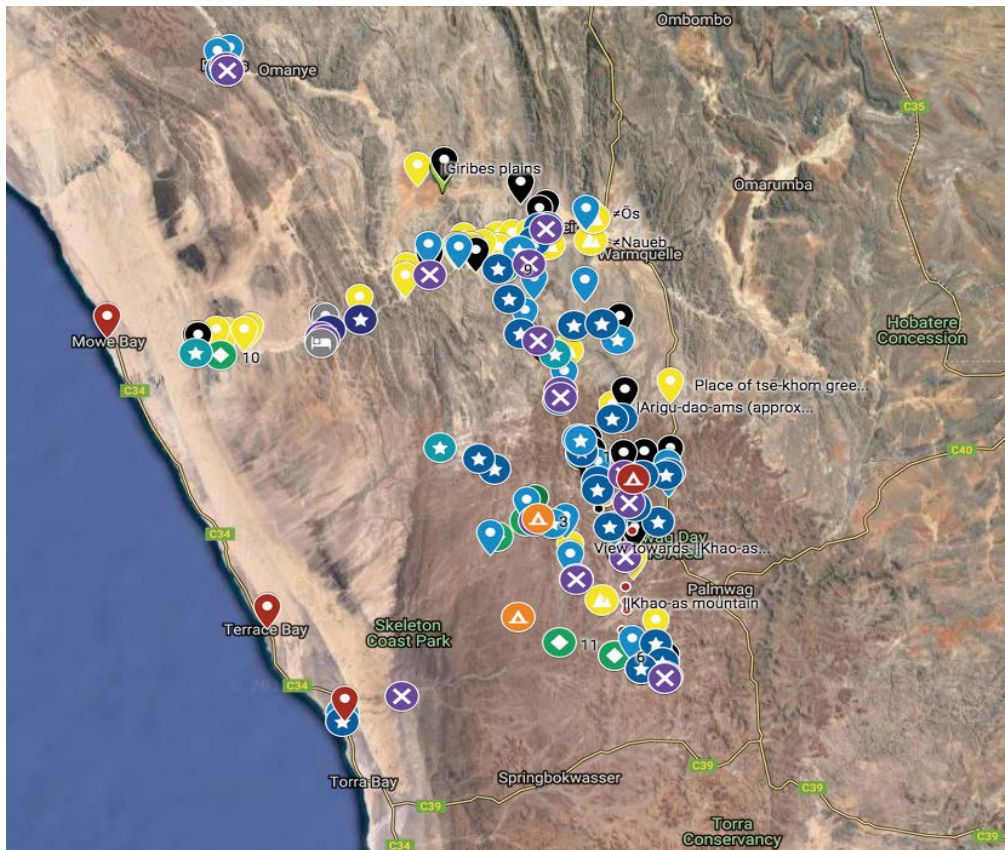
124 Tinley, Ken L., 'Etosha and the Kaokoveld', *Supplement to African Wild Life*, Vol. 25(1), 1971, pp. 3–16.

125 Also '||Hurubes', see Dāure Daman Traditional Authority in Hinz, M. & A. Gairiseb (eds), 'Customary Law Ascertained', op. cit., p. 186.

126 Available online at <https://www.futurepasts.net/cultural-landscapes-mapping>.

mapped in this north-western area through recent on-site oral history research with elderly members of Damara / ǀNūkhoen and ǁUkun families now living in the vicinity of Sesfontein and Kowareb.¹²⁷ It has formed the basis for reporting to the Namidaman TA¹²⁸ and is currently being mobilised as part of this TA's submission to the Ancestral Land Commission established by the Namibian government in 2019.¹²⁹

Figure 16: Screenshot of online map showing former ǁan-ǁhuib (living places) and other sites (such as springs, graves, Haiseb cairns and topographic features) in the broader landscape of the Sesfontein, Anabeb and Purros conservancies
(Source: on-site oral history research, 2014–2019, building on oral history documentation in the late 1990s)



127 Also see Sullivan, S., “Maps and memory”, op. cit.

128 Sullivan, Sian & Welhemina Suro Ganuses, Filemon ǁNuab and senior members of Sesfontein and Anabeb Conservancies, ‘Dama / ǀNūkhoen and ǁUkun Cultural Landscapes Mapping, West Namibia’, in *Progress Report to Namidaman Traditional Authority, Sesfontein*, Bath Spa University, Future Pasts, 6 August 2019.

129 Tjitemisa, Kuzeeko, ‘President appoints ancestral land commission’, *New Era*, 22 February 2019 (<https://neweralive.na/posts/president-appoints-ancestral-land-commission>).

6 Consideration of land access and administration issues associated with the post-Odendaal creation of the Damaraland “homeland” (from early 1970s to 1990)¹³⁰

Various further boundary changes took place in connection with the creation of new enlarged “homeland” areas following government recommendations in the 1960s,¹³¹ established in part to remove so-called “Black Spots” of African habitation in “white areas”.¹³² The farms that had been opened up by the 1955 westward repositioning of the Police Zone boundary were reallocated as part of the “homeland” of “Damaraland”, the western ENP boundary being moved eastwards to its 1970 (and current) position (see Figure 15). The process allowed the Skeleton Coast National Park to be gazetted (in 1971) from the northern Namib,¹³³ already progressively emptied of people, in part through its establishment as a restricted access mining area from 1950.

The new “Damaraland Homeland” of the 1970s provided an opportunity for many Damara / ǀNūkhoen to become established as relatively independent farmers whose former land areas (see Figures 4, 5 and 6) were bypassed by the “homeland”. In the southern parts of the homeland territory in particular, surveyed farms that had been settled by predominantly Afrikaans farmers (see Figure 12b) were “communalised” (i.e. turned into communal land) through their (re)allocation to ǀNūkhoen herders.¹³⁴ It is noticeable, however, that such farmers were disadvantaged relative to the prior settler farmers, both through being required to support more families on the same land areas and through receiving relatively little in terms of subsidies, loans and other elements of state support. Later, the Damara Regional Authorities under the leadership of Justus ||Garoëb committed a large area of land between ENP and Skeleton Coast Parks as the hunting and then tourism concession of Palmwag, an area that had been successively emptied of people and livestock through the processes outlined in section 5.

Whilst the creation of “Damaraland” offered an expanded settlement area for Damara / ǀNūkhoen living at the time in other parts of the country, it also led to some further displacements. For example, the settlement of Warmquelle/ǀAexaǀaus

130 Drawing on Sullivan, S., ‘The “Communalization” of Former Commercial Farmland’, op. cit.

131 Republic of South Africa, *Report of the Commission of Enquiry into South West African Affairs 1962–1963* (‘Odendaal Report’), Government Printer, Pretoria, 1964.

132 Memorandum N.2/10/3, 10 on ‘Removal of Black Spots’, Department of Bantu Administration, Pretoria, February 1962.

133 Tinley, K., ‘Etosha and the Kaokoveld’, op. cit.

134 For detail regarding this process and case studies of the farms Blaauwpoort 520, Malansrust 519, Rietkuil 518 and Morewag 480 near the Aba-Huab River, see Sullivan, S., ‘The “Communalization” of Former Commercial Farmland’, op. cit.

became part of Opuwo District to the north and thereby (re)created as a Herero/Himba constituency, i.e. as located in the Kaokoland ovaHimba “homeland”. Warmquelle/|Aexa|aus had been lived in by Khoekhoegowab-speaking people from at least prior to German colonial rule, with the incoming captain of Sesfontein, Jan |Uixamab of !Gomes (Walvis Bay), being able to assert such a position of prominence in the area in the late 1800s that on 3 October 1898 he “sold” 4 000 hectares constituting the farm Warmbad (Warmquelle) to the colonial Kaoko Land and Mining Company.¹³⁵ This farm was later taken over by a German settler called Carl Schlettwein,¹³⁶ and under German colonial rule Damara / ‡Nūkhoen of the area contributed labour for the newly established German outpost and farm at the growing settlement.

Andreas !Kharuxab, former ‡Nūkhoen (Dâureb Dama) headman of Kowareb, and his peer and friend, Salmon Ganamub, recalled these dynamics in an interview recorded in May 1999:

First, Damara people were staying at |Aexa|aus/Warmquelle. Damara were there. ... At that time Gabriel, who is now dead, was the headman [at |Aexa|aus/Warmquelle]; it was he who passed the leadership on to me. You're asking how long had the Damara people been there? Those people were born there, they grew up and worked there. Look at that man [points to Salmon, who is very old]. It was a German place then. ... Damara people were already there, then the Germans came and they gathered other people who were in the veld [!garob] and they gave them work [for food]. They rounded them up with horses and some people came of their own accord.

First before we came to Kowareb we stayed for years and years at |Aexa|aus/Warmquelle and we worked the gardens there. Here (i.e. Kowareb) was the farm-post of Nama people. !Nani|aus/Sesfontein and |Aexa|aus/Warmquelle were big villages and the Nama people of !Nani|aus/Sesfontein and the Damara people of |Aexa|aus/Warmquelle used to keep livestock here at Kowareb.¹³⁷

But there are reasons why we came here and made this garden [at Kowareb]. Political things¹³⁸ came in which were not here before in our lives. Political things were introduced which made |Aexa|aus/Warmquelle part of Opuwo district. That commissioner of Opuwo made |Aexa|aus/Warmquelle part of Opuwo district and

135 Rizzo, Lorena, *Gender and Colonialism: A History of Kaoko in North-western Namibia*, Basler Afrika Bibliographien, Basel, 2012.

136 !Haroës, I., 'Max !Gâgu Dax: In the footsteps of the uncrowned prince (1869-1972)', *The Namibian*, 17 September 2010; Miescher, G., 'Namibia's Red Line', op. cit., p. 33; Rizzo, L., 'Gender and Colonialism', op. cit., pp. 64–67; 'Manning Report 1917', op. cit., p. 7.

137 As Manning confirms, on 8 August 1917, 'Manning Report 1917', op. cit., p. 6; also in oral histories, for example Manasse & Hildegaard |Nuab/s, Sesfontein / !Nani-|aus, 11/05/99.

138 This is a literal translation of 'politiek xun'. Andreas is referring to the 1970s enacting of the recommendations of the Odendaal Report which amounted to the establishment of “homelands”, and the redrawing of administrative boundaries in the name of *apartheid* or “separate development”.

he gave it to Herero people. We sat then on the plains and then we came here (to Kowareb) and talked with the government and they built us this garden; they built the dam and they pushed the water here (for irrigation). Then we founded this garden here.¹³⁹

This narrative describes the 1970s displacement of Khoekhoegowab-speaking people inhabiting Warmquelle /|Aexa|aus southwards to Kowareb in what became designated as “Damaraland” – the “homeland” of “the Damara”. It is apparently only since this time that Herero families who are now so important in the local politics of the area settled permanently in Warmquelle, and more recently (since the 1990s) have become prominently established at Kowareb. Additional local displacements were effected through the relocation in the early 1970s of a community known as “Riemvasmakers” from Riemvasmaak near Upington in South Africa’s northern Cape (where a new SADF military base was to be established),¹⁴⁰ to what was Ward 11 around Bergsig, now part of one of the first established communal area conservancies in the former “Damaraland homeland” (see section 6).

7 Subsequent post-independence changes in administration of land in the former “Damaraland homeland”

An array of new laws and policies in post-independence Namibia have precipitated further far-reaching changes with implications for Damara / ǀNūkhoen in their short-lived designated ‘homeland’ in north-west Namibia. In this section we touch on two intersecting dimensions:

- the diverse opportunities and constraints engendered by post-independence establishment of conservancies in and around the former homeland area as a core element of a national and donor-funded programme of community-based natural resources management (CBNRM); and
- some implications of an unclear policy setting for asserting exclusionary rights to and control over communal area land.¹⁴¹

Since 1996, a national CBNRM policy framework has allowed Namibian citizens in communally managed areas to register new natural resource management institutions called conservancies. Communal-area conservancies enable Namibians inhabiting communal land to receive benefits from, and make some management decisions over, the natural resources within the territory demarcated

139 Interview with Andreas !Kharuxab, Kowareb, 13/05/99.

140 Clemans Miyanicwe, ‘Riemvasmakers seek recognition’, *The Namibian*, 22 October 2014 (<https://www.namibian.com.na/index.php?id=129523&page=archive-read>, accessed 29 August 2019).

141 Harring, Sidney & Willem Odendaal, *“Our Land They Took”: San Land Rights Under Threat in Namibia*, Legal Assistance Centre, Windhoek, 2006.

as a conservancy.¹⁴² Legally, a number of requirements have to be satisfied in order for a communal-area conservancy to be registered: its territorial boundaries have to be agreed upon; its membership has to be decided and registered; and a constitution and a management plan have to be drawn up, focusing particularly on the management and distribution of conservancy wildlife and associated income. Conservancies are now described in part as organisations established to enable business, particularly with tourism and trophy hunting operators.¹⁴³ A recent report of the Namibian Association of CBNRM Support Organisations thus states that a conservancy is “a business venture in communal land use ... although its key function is actually to enable business”, such that conservancies:

do not necessarily need to run any of the business ventures that use the resources themselves. In fact, these are often best controlled and carried out by private sector operators with the necessary know-how and market linkages.¹⁴⁴

The premise is that it is through business that both conservation and conservation-related development will arise. CBNRM is thereby clearly positioned as a state-, NGO- and donor-facilitated process of outsourcing access to significant public natural/wildlife resources and associated potential income streams to private sector (frequently foreign) business interests – a governance arrangement associated with neoliberalism. CBNRM in Namibia strengthens market-based approaches to biodiversity conservation in particular by increasing income sourced from international tourism travel and trophy-hunting, and increasing the area of land available for such activities.¹⁴⁵ With its populations of rare desert-dwelling elephant and rhino,¹⁴⁶ the former Damaraland “homeland” area of southern Kunene has become a primary focus for this conservation-oriented governance, and is now a high-end “wilderness” tourism destination.

142 Note that this demarcation does not ascribe ownership over the land, which legally remains with the state – see discussion in Sullivan, S., ‘How sustainable is the communalising discourse of “new” conservation? The masking of difference, inequality and aspiration in the fledgling “conservancies” of Namibia’, in Chatty, Dawn & Marcus Colchester (eds), *Conservation and Mobile Indigenous People: Displacement, Forced Settlement and Sustainable Development*, Berghahn Press, Oxford, 2002, pp. 158–187; Harring, S. & W. Odendaal, ‘Our Land They Took’, op. cit.

143 Naidoo, Robin L., Chris Weaver, R.W. Diggle et al., ‘Complementary benefits of tourism and hunting to communal conservancies in Namibia’, *Conservation Biology*, Vol. 30(3), 2016, pp. 628–638.

144 NACSO, *The State of Community Conservation in Namibia: A Review of Communal Conservancies, Community Forests and Other CBNRM Initiatives (2013 Annual Report)*, Windhoek, NACSO, 2014.

145 Lapeyre, Renaud, ‘The Grootberg Lodge partnership in Namibia: towards poverty alleviation and empowerment for long-term sustainability?’, *Current Issues in Tourism* Vol. 14(3), 2011, pp. 221–234; Naidoo, Weaver, Diggle et al., ‘Complementary benefits of tourism and hunting’, op. cit.

146 The area is home to the largest population of endangered black rhino (*Diceros bicornis bicornis*) outside a national park, Muntifering, Jeff R., Wayne L. Linklater, Susan G. Clark et al., ‘Harnessing values to save the rhinoceros: insights from Namibia’, *Oryx*, Vol. 51(1), 2017, pp. 98–105.

Through improving use rights and devolving some management decisions to communal area conservancies, CBNRM is rightly described as progressive in relation to past restrictions. At the same time, it is noticeable that conservancies in independent Namibia are being established on top of the pattern of land control set up during Namibia's colonial and apartheid history. As shown in Figure 17 and described above, most of the central and southern parts of the country were surveyed, fenced and settled by commercial white farmers once indigenous peoples – other than those that became labourers in commercial farming areas – had been constrained to more marginal areas (coloured green in Figure 17a). It is these remaining *communally managed areas* that have been the focus of CBNRM and the establishment of communal area conservancies (also coloured green in Figure 17b) as a new process of “... land acquisition for conservation in the non-formal sense”¹⁴⁷ that facilitates access by investors, as noted above. Many analyses also ask questions of this arrangement in relation to unequal distributions of new conservancy-related income, impacts on rural livelihoods of amplified human–wildlife conflict, and decreased local autonomy over land and natural resources.¹⁴⁸

It is important to note that conservancies in communal areas give residents, more specifically the conservancy management committee, some specified rights over wildlife resources occurring within conservancy areas, but do not give conservancy members formal property rights over land in a conservancy. Tensions can arise between new conservancy management structures, former Ward administrative boundaries and TAs, and be exacerbated by recent shifts in constitutional boundaries, especially where these units of governance do not fully correspond, or where how they might correspond is unclear. The Namibian Traditional Authorities Act (No. 25 of 2000) recognises ethnic difference and the specificities of cultural heritage, as well as the legitimacy of previous so-called “traditional” leadership structures,¹⁴⁹ whilst new conservancy institutional structures have been intended, rhetorically at least, to foster a modernising endeavour for “communal area dwellers” that nominally downplays cultural-ethnic difference. This postcolonial homogenising of cultural-ethnic identities and associated pasts and knowledges

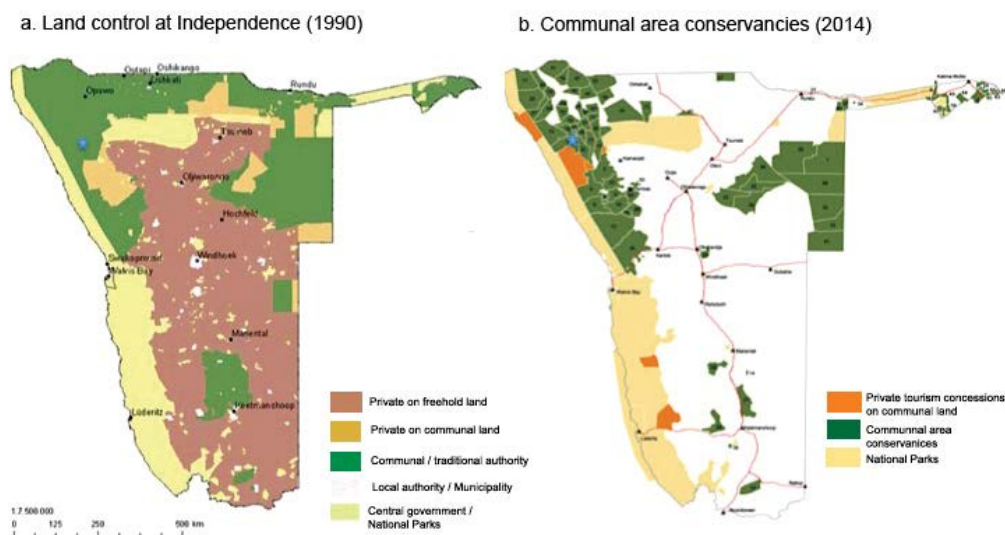
147 Jones, Brian T.B, ‘Community-Based Natural Resource Management in Botswana and Namibia: An Inventory and Preliminary Analysis of Progress’, *Evaluating Eden Series Discussion Paper 6*, International Institute for Environment and Development, London, 1999, p. 47.

148 For conservancies in the former “Damaraland”, see, for example, Sullivan, Sian: ‘The elephant in the room? Problematizing “new” (neoliberal) biodiversity conservation’, *Forum for Development Studies*, Vol. 33(1), 2006, pp. 105–135; Sullivan, Sian, ‘Dissonant sustainabilities? Politicising and psychologising antagonisms in the conservation-development nexus’, *Future Pasts Working Paper Series 5*, 2018 (<https://www.futurepasts.net/fpwp5-sullivan-2018>); Bollig, M., ‘Towards an Arid Eden? Boundary-Making, Governance and Benefit-sharing and the Political Ecology of the New Commons of Kunene Region, Northern Namibia’, *International Journal of the Commons*, Vol. 10.2, 2016, pp. 771–799; Schnegg, Michael & Richard D. Kiaka, ‘Subsidized elephants: community-based resource governance and environmental (in)justice in Namibia’, *Geoforum*, Vol. 93, 2018, pp. 105–115.

149 Hinz, M. & A. Gairiseb, ‘Customary Law Ascertained’, op. cit.

Figure 17a: Pattern of land control in Namibia showing areas under private and communal tenure (the pink and green coloured areas respectively)
(Source: Adapted from ACACIA Project E1 2007 online: http://www.uni-koeln.de/sfb389/e1/download/atlas_namibia/pics/land_history/control-over-land.jpg)

Figure 17b: The area now administered as communal area conservancies (in green; the blue asterisk indicates the location of Sesfontein Conservancy)
(Source: NACSO, Windhoek, online http://www.nacso.org.na/sites/default/files/Conservancies_A1.jpg)



may give an appearance of modernising away axes of difference, but it does not in itself succeed in removing power struggles based on these differences.¹⁵⁰

It is worth making this point in relation to conservancies in the former “homeland” of “Damaraland”. Here, anxieties over land rights are compounded by two further elements:

- concerns over pastoralists with relatively large cattle herds moving into conservancy areas that are also under varied TA jurisdictions, creating pressure on resources and generating experiences of displacement;¹⁵¹ and
- a lack of clarity regarding tenure and decision-making rights over high-value tourism and conservation-value landscapes in the area.

¹⁵⁰ Also Rapold, Christian J. & Thomas Widlok, ‘Dimensions of variability in Northern Khoekhoe language’, *Southern African Humanities*, Vol. 20, 2008, pp. 133–161, 135.

¹⁵¹ As noted elsewhere in the country – see Botelle, A. & R. Rohde, *Those Who Live on the Land: A Socio-economic Baseline Survey for Land Use Planning in the Communal Areas of Eastern Otjozondjupa (Land Use Planning Series Report No. 1)*, Ministry of Lands, Resettlement and Rehabilitation, Windhoek, 1995; Harring, S. & W. Odendaal, ‘Our Land They Took’, op. cit.; Taylor, Julie J., *Naming the Land: San Identity and Community Conservation in Namibia’s West Caprivi*, Basler Afrika Bibliographien, Basel, 2012.

With regard to the latter, southern Kunene Region is currently the focus of re-energised thinking around transforming a large area into a “People’s Park” that moves towards linking the inland ENP with the Skeleton Coast Park via the valuable Palmwag Concession.¹⁵² The latter area is understood to have been allocated for conservation by the former Regional Authority for the “homeland” under the leadership of Gaob Justus ||Garoëb. Since 2012 the “concessionaire” has been understood to be the Big Three Trust formed by the neighbouring conservancies of Sesfontein, Anabeb and Torra, seen as able to enter into contracts with tourism operators in the concession. People locally in both conservancy and TA structures now have new questions regarding who has what rights to the Palmwag and other concession areas in southern Kunene, in relation to both new proposals for a “Kunene People’s Park” (or something along these lines) and a context wherein the 2007 National Policy on Tourism and Wildlife Concessions on State Land is currently being revised.

8 Review of reasons for a continuing discrimination against Damara / ǀNūkhoen in terms of their inclusion in discourses of indigeneity and marginalisation in Namibia

As noted in our introduction, Damara / ǀNūkhoen continue to be excluded from representations of Namibia’s indigenous and marginalised peoples, such as in the 2019 entry (and previous entries) for the Yearbook of the Indigenous Working Group on Indigenous Affairs.¹⁵³ We find this exclusion mystifying and hope that the material shared above clarifies both that Damara / ǀNūkhoen claims to indigeneity are justified, and that Damara / ǀNūkhoen and ||Ukun have been significantly marginalised through historical processes. In this brief final section, we consider a few reasons for this ongoing exclusion.

It seems to us that the ongoing exclusion of Damara / ǀNūkhoen is linked with deep-rooted prejudice that in many contexts continues to occlude and demote their perspectives, agency and concerns. Except for in the earliest historical texts, “Berg Damara” were consistently placed on the lowest rung of colonial racial hierarchies by multiple early writers, and often written about in strongly derogatory terms.¹⁵⁴ They were stripped by onlookers of their ability to speak their

152 Massyn, P.J., E. Humphrey & D. Grossman, *Tourism Scoping Report: Kunene People’s Park*, Ministry of Environment and Tourism, Windhoek, 2009; <http://www.nacso.org.na/news/2018/05/women-for-conservation-a-first-step-towards-africa-s-first-people-s-park>, last accessed 30 August 2019.

153 <https://www.iwgia.org/en/resources/yearbook>, last accessed 22 August 2019.

154 As discussed in Lau, B., ‘A Critique of the Historical Sources’, op. cit., p. 32, drawing on references therein.

own language, and viewed as people without agency who “lived mainly by serving others”.¹⁵⁵ These perspectives are repeated even in the most up-to-date analyses of genetic history, a recent one of which asserts that “it is reasonable to assume that the Damara, like the Tjimba, are a cattleless branch of the Himba/Herero who changed their original Herero language after entering into a subordinate, peripatetic-like relationship with the pastoral Nama”.¹⁵⁶ Such a conclusion seems to return understanding to colonial perspectives that have been discredited and discarded in historical, ethnographic and linguistic research (as cited above), and that conflicts sharply with Damara / ǀNūkhoen perspectives. It is in marked tension with what is known about Damara / ǀNūkhoen’s prior presence in areas independent of the historical reach of Nama, and begs questions of sampling strategies, decontextualised ethnic identifications of individuals, and reconstructed time-depths of genetic connections between “groups”. An additional issue is a legitimate practice in archaeology that refuses to ascribe researched material culture remains to contemporary peoples, thereby perhaps denying possible overlaps and connections between the ancestors of present peoples, and sites and artefacts that may overlap with what is understood about their pasts.

Added to this prejudicial mix is a view that Damara / ǀNūkhoen have allied themselves or sided with oppressor administrations, without considering contexts. For example, Okombahe “Berg-Damara” considered to have “remained neutral during the Herero rebellion” were disadvantaged through being disarmed and living in the shadow of German control through a military station at the reserve, where reportedly:

our customs and laws were over-ruled, and the soldiers at Okambahe became the real governors ... [o]ur people were flogged and beaten, and there were no courts to which they could go for justice.¹⁵⁷

The apparent decline by perhaps more than two-thirds in the Damara / ǀNūkhoen population during German rule speaks for itself. Today, Gaob Justus ||Garoëb is outspoken regarding the deprivations experienced by Damara during this period in the country’s history, and perceived discrimination in terms of the absence of formal apology, reparation and compensation.¹⁵⁸ More recently, Damara recruitment by the SADF as trackers during the war for independence (for example in Battalion 10, understood to have worked from Otjiwarongo, which recruited several Damara

155 Quoted in First, R., *South West Africa*, op. cit., p. 35.

156 Oliveira, Sandra, Anne-Maria Fehn, Teresa Aço et al., ‘The maternal genetic history of the Angolan Namib Desert: A key region for understanding the peopling of southern Africa’, *American Journal of Physical Anthropology*, 165(3), 2018 (<https://www.biorxiv.org/content/10.1101/162230v1.full>, last accessed 30 August 2019).

157 Simon Tsobasib, senior councillor and cousin of then Chief Judas Goresib, quoted in Union of South Africa, ‘Report on the Natives of South-West Africa’, op. cit., p. 109.

158 Miyanicwe, C., ‘ǀNūkhoen clan wants return’, op. cit.

men from Sesfontein), combined with persistent Damara / ǀNūkhoen political support for the UDF over SWAPO, perhaps lends itself to an attitude of distrust and even discrimination.¹⁵⁹ Conversely, a visibly strong and consolidated political leadership under the South African administration, combined with the fact that the current President of Namibia is Damara / ǀNūkhoen, can create the impression that Damara are far from marginalised.

Amidst this historical and present complexity, we hope to have demonstrated that Damara / ǀNūkhoen and ǁUbun achievements, adaptations and resilience in contemporary circumstances are both unevenly enjoyed and have been accomplished against a background of significant marginalisation and deprivation. Recognising Damara / ǀNūkhoen and ǁUbun presence and indigeneity, as well as their experiences of marginalisation through historical processes causing their loss of land and resources, is an important step towards fair redress.


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159 Cf. as documented for San former employees of the SADF, Harring, S. & W. Odendaal, 'Our Land They Took', op. cit.


San land rights in Namibia: Current national processes and community priorities

Ben Begbie-Clench and Noelia Gravotta



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1 Introduction

During 2017, the Office of the Vice President: Division Marginalised Communities and the United Nations Department of Economic and Social Affairs carried out five regional consultations targeting San communities. The aim was to identify, prioritise and discuss thematic issues, including education, consultation, representation, discrimination, health, culture, language and land. At each of the five consultations, attended by 30 to 40 San leaders and community members, the issue of land was overwhelmingly chosen as the number one priority. This prioritisation of land by the San participants reflects a growing dissatisfaction expressed in Namibia's public life, national media and social media over the last decade concerning the demand for, allocation of, and management of land.¹

1 Werner, W., 'Land Tenure and Governance on Communal Land in Namibia', paper presented at the Second National Land Conference, Windhoek, 2018.

There has been substantial progress in many areas of land governance since Namibia's independence in 1991, including the development of appropriate national legislation and policies, land acquisition for resettlement, investments in communal areas, and regional consultations on land planning and land reform by the Ministry of Land Reform (MLR). However, the concerns of San groups, and the aforementioned negative public sentiments regarding land, are reinforced by the limited success of Namibia's resettlement programme² (despite significant interventions by the MLR in a number of areas) and shortcomings in the management of communal land,³ amongst other issues.

Moreover, San people in Namibia, who speak six languages within the Khoesan languages grouping,⁴ with an estimated total population of 40 000,⁵ are certainly the worst-affected of Namibia's ethnic groups in terms of landlessness and historical dispossession of land.⁶ They also continue to face extreme marginalisation, and have lower overall indicators than other Namibian ethnic groups in many areas, including economic development, educational attainment and political representation.

Namibia's San groups live on communal land, commercial farmland and resettlement farms, and in protected areas and, increasingly, peri-urban and urban areas. Each of these land types presents challenges and opportunities for realising land rights, some unique to the San, and others which affect many Namibians.

On communal land where San are the majority, principally the Ju|'hoansi of Tsumkwe East and the !Kung of Tsumkwe West, management rights are well established through traditional authorities, the Communal Land Reform Act (No. 5 of 2002), and conservancy and community forest legislation. However, pressure from encroachment into their lands in the forms of illegal settlement, illegal grazing and illegal fencing continues to be high. On communal land where San are a minority, their representation and participation in land-related decisions, tenure rights and complaint resolutions tend to be limited. These groups include the !Kung and Hai||om of Ohangwena, Oshana, Omusati and Oshikoto Regions, the ‡Kao||Aesi, Naro, !Xóo and !Kung of eastern Omaheke, and the Khwe of Kavango East and Zambezi.

2 Odendaal, W. & W. Werner, 'Financing Resettlement and Securing Tenure: Are Leasehold Agreements the Key to Success?', *Livelihoods after Land Reform Policy Brief No. 2*, Land, Environment and Development Project of the Legal Assistance Centre, Windhoek, 2010.

3 Becker, H., 'Namibia's moment: Youth and urban land activism', *Review of African Political Economy*, 2016 (<http://roape.net/2016/01/18/namibias-moment-youth-and-urban-land-activism/>).

4 Consisting of the Hai||om, !Kung (also referred to as !Xun and !Xung), Ju|'hoansi, Khwe, Naro and !Xóo (also referred to as !Xoon). There are also distinct sub-groups such as the ‡Kao||Aesi (or southern Ju|'hoansi), Vasekela (!Kung of northern Namibia), ‡Akhoe (a Hai||om sub-group) and 'N|oha (related to the !Xóo).

5 Various sources including the LAC/DRFN's 'Scraping the Pot' (Dieckmann et al. 2014) cite this number based on established estimates. However, the Division Marginalized Communities estimates up to 80 000 San in Namibia based on household food distribution.

6 Dieckmann, U., M. Thiem, E. Dirkx & J. Hays (eds), *"Scraping the Pot": San in Namibia Two Decades After Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, 2014.

Within areas of commercial farmland, the San are often landless or employed as labourers (formally or informally, as are many Namibians) and have increasingly moved to peri-urban and urban informal settlements. These groups include the Hai||om of Otjozondjupa and southern Kunene Region (for example moving to Outjo and Grootfontein), the Khwe of Kavango East and Zambezi (often moving to Rundu and Katima Mulilo) and ǀKao||Aesi, Naro, !Xóo and !Kung of Omaheke Region (many of whom are found in Gobabis). Peri-urban and urban areas provide better access than many rural areas to services and livelihood opportunities but present challenges, especially within informal settlements, in terms of tenure security, service provision, sanitation, planning, and security. These challenges are commonly experienced by all Namibians in such areas.

Otjozondjupa, Omaheke, Oshikoto, Ohangwena, Kunene, Zambezi and Kavango East and West have both individual and group state resettlement farms with majority San populations. Group schemes emerged after independence in response to the need to accommodate large numbers of landless people, but have fallen out of favour due to the generally poor outcomes for residents and their lack of sustainability.⁷ Despite this, the San in particular have continued to be resettled in group schemes, and hence have been resettled in groups far more than individually. San groups found on resettlement farms in the areas mentioned above benefit from increased land security and sometimes from significant government support,⁸ though there remains a lack of clarity over land tenure (as the resettlement farms are in effect owned by the state⁹) and frequent deficiencies in planning, service provision and support to ensure sustainable livelihoods.

Lastly, a significant proportion of the Khwe population reside within Bwabwata National Park. While they remain on their ancestral territory, there is considerable tension between the Khwe, who perceive themselves to be the rightful owners of the land and desire to improve their livelihoods, and the conservation authorities, whose policies and management are focused on protecting wildlife within the park.

At the time of writing, several processes within the Government of the Republic of Namibia (GRN) related to both San groups and land were underway. These include developing strategies, policy, and implementation plans related to resolutions that emerged from the Second National Land Conference held in 2018. Moreover, the GRN has established a Presidential Commission of Inquiry to examine questions surrounding ancestral land in Namibia, and a draft White Paper on the Rights of Indigenous Peoples in Namibia that, having been reviewed by the Attorney General's Office in 2019, awaits possible debate and approval by Cabinet. Adoption

7 Werner, W. & W. Odendaal, *Livelihoods after land reform: Namibia country report*, Legal Assistance Centre, Windhoek, 2010, pp. 24–25.

8 In particular from MLR, as well as from the Ministry of Agriculture, Water and Forestry and the Office of the Vice President: Division Marginalised Communities.

9 The Ministry of Land Reform has considered a number of solutions, including the Flexible Land Tenure Act, but the issue remains unresolved at the time of writing in late 2019.

of this white paper would lead to specific policy and national planning in relation to San and other indigenous peoples or marginalised communities in Namibia.

The current situation in regard to future land policies and programmes relevant to the San is thus fluid and multifaceted, but there is potential for Namibia to better realise aspects of human rights and land rights – such as improving tenure security, enhancing livelihoods and reducing landlessness – for San groups in Namibia in the coming years.

The purpose of the first part of this chapter is to provide an overview of the current status quo in terms of national processes, policies and legislation relating to San populations in Namibia, primarily but not solely focused on land issues. The second part condenses feedback and recommendations from San groups consulted during the fieldwork conducted for this chapter, specifically concerning land and related service provision in relation to the resolutions of the Second National Land Conference.

2 An overview of current legislation and institutions related to San groups

The Constitution of the Republic of Namibia is progressive in nature, and provides protections for equality and freedom from discrimination (Article 10), rights to culture, language and tradition (Article 19), and recognition of customary law (Article 66) as having the same status as statutory law, insofar as it is not in conflict with the Constitution and statutory laws.

Namibia's Constitution affords limited rights over land and resource management for communities, but states that "Land, water and natural resources below the surface of the land ... shall belong to the State if they are not otherwise lawfully owned" (Article 100). Hence, the GRN takes the position that communal land is ultimately state land.

However, recent court cases have tested this argument to show that communal land is held in trust by the GRN for the various traditional communities living on it, and the GRN has to ensure that its actions reflect the interests and desires of those traditional communities. This argument relies on Article 124 and Schedule 5 of Namibia's Constitution, which deal with the transfer of immovable property upon independence, and Section 17 of the Communal Land Reform Act.¹⁰

Namibia follows a monist approach, hence binding international law and international agreements form part of the national law of Namibia (Article 144). Other than the Constitution, the following national legislation is generally relevant to San land governance:

10 *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15/2017) [2018] NASC 409 (16 November 2018).

- a) The Communal Land Reform Act (No. 5 of 2002) (and amendments), which provides for the allocation of customary land rights and leaseholds to communities for farming and residential units through the decisions of the communal land board and the traditional authority of the area. It also provides for fines for illegal grazing and fencing. Notably, however, the Act does not permit group tenure under customary law, to the detriment of the San, whose customary land governance was based on allocations to family and village groups, rather than individuals.¹¹
- b) The Agricultural (Commercial) Land Reform Act (No. 6 of 1995) (and amendments), through which the government acquired agricultural land in order to resettle landless individuals – “foremost ... Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices”.
- c) The Traditional Authorities Act (No. 25 of 2000), which sets out the requirements for the recognition and roles of traditional leaders and their councillors, including their duties in administering the allocation and management of communal land.
- d) The Nature Conservation Amendment Act (No. 5 of 1996), which governs the formation and management of conservancies, principally of interest for the San-majority Nyae Nyae and Nꞁa Jaqna conservancies.
- e) The Forest Act (No. 5 of 2002), which similarly governs the formation and management of community forests (also established in the Nyae Nyae and Nꞁa Jaqna Conservancies), as well as fines for illegal usage of natural resources.

The following acts are relevant in specific circumstances:

- f) The Access to Biological and Genetic Resources and Associated Traditional Knowledge Act (No. 2 of 2017), which allows for the recognition and protection of the rights of local communities over their genetic and biological resources and associated traditional knowledge.
- g) The National Heritage Act (No. 27 of 2004), which provides for “the protection and conservation of places and objects of heritage significance and the registration of such places and objects”.
- h) The Flexible Land Tenure Act (No. 4 of 2012), which allows for three stages of tenure. The first stage of tenure does not require surveying of the area in question, but still allows for improved inheritance rights and bankability of land, therefore greatly improving access and reducing costs of tenure. The Act is likely to play a greater role in the coming years in securing tenure rights in informal settlements and potentially in state resettlement farms.

In addition, the National Land Policy (1998) provides guidance in terms of tenure and management rights, including: the inclusion of rights over renewable natural resources on the land, when used sustainably; the recognition of various types of land right, including customary, leasehold, freehold, licences, certificates and permits, and state ownership; and exclusive tenure rights, including for co-operatives.

11 This type of customary allocation is still understood by the San, for example the *//ai* practised in some areas, and the “*!nores*” in Tsumkwe East.

The National Resettlement Policy (2001) identifies the San as a specific target group for resettlement (and notably, it is one of the few documents following up on the identification of San as deserving beneficiaries of resettlement in the 1991 Land Conference).

A number of GRN ministries have, to a greater or lesser degree, commenced with specific activities regarding the San. In relation to land, the Ministry of Land Reform is involved in policy development and project implementation, especially regarding technical support to group resettlement farms. The Office of the Ombudsman has been involved in a number of human rights issues concerning San groups, including land issues, has published a handbook on indigenous peoples' rights in Namibia, and between 2012 and 2014 led the development of the first draft of the White Paper on the Rights of Indigenous Peoples in Namibia.

The principal institution with regard to the San is the Division of Marginalised Communities (DMC) within the Office of Veterans Affairs, Disability Affairs and Marginalised Communities (OVADAMC) in the Office of the Vice-President. Its strategy is to "ensure sustainable livelihood of the marginalized communities, to restore community organization of the marginalized communities and to ensure education and training for the marginalized communities" (NPC, 2015).¹²

Championed by the then-Deputy Prime Minister of Namibia, Dr Libertina Amathila, a San Development Programme was approved by the Cabinet in 2005. This programme existed under the Office of the Deputy Prime Minister until 2009, when the Cabinet elevated the programme to the Division of San Development (DSD). By this point, the remit of the programme also included the Ovatue and Ovatjimba (pastoralist groups with similarities to the Ovahimba who reside in north-west Namibia). However, the budget for the division remained limited, meaning that most interventions were local rather than national. Initially, a working group of relevant line ministries was formed to coordinate implementation around issues affecting these communities, but these meetings were not continued in later years.

Since moving to the Office of the Vice President under the Government of President Hage Geingob in 2015, the DSD's budget has substantially increased – though as with many parts of the GRN, this has recently been cut due Namibia's economic downturn.¹³ The DSD is now placed under the supervision of the Deputy Minister of Marginalised Communities, Honourable Royal [Ui]o[oo], a San member of Parliament. He is the only San political representative within GRN besides the current regional councillor in Tsumkwe.

The DMC (and previously the DSD) has overseen considerable improvements in the level of engagement with and attitudes towards marginalised communities by national and local government. These have included greater participation of

12 National Planning Commission, 'Strategy to Mainstream the Marginalized Communities, Developed', 2015 (<https://www.npc.gov.na/?p=823>).

13 Kahiurika, Ndanki, 'Govt trims funding for marginalised students', *The Namibian*, 22 August 2019 (<https://www.namibian.com.na/82295/read/Govt-trims-funding-for-marginalised-students>).

marginalised communities in GRN programmes, increased focus and awareness of civil servants regarding such groups, and improvements in the language used to describe such groups within the GRN.

Livelihoods and education projects run under the DMC and its predecessors have shown a mix of successes and failures (though it should be noted that, in general, civil society projects with the San are also well known for experiencing difficulties). In the case of resettlement projects and land disputes, while gains have been seen (such as the scaling up of agricultural production on the Farm Ondera group resettlement project in Oshikoto), there are questions to be raised regarding the limited levels of service provision and poverty reduction fostered under DMC resettlement projects, and the adequacy of consultations with San groups in regard to land issues.

In terms of directly developing policy, the DMC had little to show from its inception until initiating the process of revising the draft White Paper on the Rights of Indigenous Peoples in 2016, which had remained stagnant since being drafted under the Office of the Ombudsman in 2014.

2.1 The draft White Paper on the Rights of Indigenous Peoples

The Universal Periodic Review report of 2011 recommended that Namibia “formulate a white paper in accordance with the United Nations Declaration on the Rights of Indigenous Peoples”, and that it should also take into consideration recommendations from the Committee on the Elimination of Racial Discrimination, the International Labour Organization (ILO) and the African Commission’s Working Group on Indigenous Populations/Communities.¹⁴ Accepting this recommendation, Namibia tasked the Office of the Ombudsman with developing the draft White Paper, with support from the International Labour Organization PRO169 Programme and the Legal Assistance Centre of Namibia. A final draft was completed and disseminated within GRN offices in late 2014, but not taken further.

In 2016, a cooperation agreement was concluded between the DMC and the United Nations Department of Economic and Social Affairs. This enabled a series of national and local consultations regarding the White Paper with GRN representatives and indigenous communities, resulting in substantial redrafting of the White Paper. The final draft of the White Paper was submitted to the Office of the Attorney General in May 2019 for review and subsequent consideration by the Cabinet for approval. Until its approval and translation into a policy or action plan, the GRN will continue to lack an overarching framework and coordination strategy when it comes to the country’s San, Ovatie and Ovatjimba communities.

The White Paper refers in particular to those three groups who, due to their high levels of marginalisation and inequality, have been targeted under DMC

14 United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review: Namibia*, A/HRC/17/14.

programmes. The White Paper gives broad coverage of specific issues faced by indigenous peoples in Namibia, and includes recommendations based in national policy and international treaties.

The objectives and recommendations of the White Paper include:

- recognising indigenous peoples and ensuring the protection and promotion of their rights;
- strengthening institutional frameworks and improving coordination;
- ensuring effective consultation, participation and representation;
- improving access to land and ensuring secure land tenure (which includes issues around improving tenure, resettlement and consultation);
- ensuring equal access to quality education for indigenous peoples and protecting and promoting indigenous languages;
- promoting respect for cultural diversity and traditional knowledge of indigenous peoples;
- ensuring accessible, quality and flexible health services for indigenous peoples;
- ensuring food security, access to employment and sustainable livelihoods;
- advancing gender equality for indigenous peoples; and
- improving the monitoring of programmes targeting indigenous peoples.

Should the White Paper be approved by Cabinet, it will form the basis for the drafting of future policy, or may be directly translated into a policy. It will also immediately provide guidance for GRN offices, ministries and agencies for delivering current and future programme implementation.

2.2 “Marginalised communities” versus “indigenous peoples” in Namibia

The GRN does not recognise the term “indigenous peoples” as commonly defined in international law. In common with a number of African states, the GRN considers all “formerly disadvantaged” Namibians, i.e. those not of European descent, to be indigenous. The GRN therefore uses its preferred term, “marginalised communities”, for groups that are considered to be disadvantaged, particularly in economic terms, though also in relation to social and educational factors.

Despite this, GRN officials have alluded to the term “marginalised communities” being analogous to “indigenous peoples” in various speeches and documents. Indeed, the terms are often used interchangeably in international contexts, for example in Namibia’s reporting on human rights to the international community, including annual addresses to the United Nations Permanent Forum on Indigenous Issues.¹⁵ The Office of the Ombudsman, civil society, and national media often use the term “indigenous peoples”, and again, some GRN ministries adopt it for international

15 Republic of Namibia, ‘Statement By Honourable Royal J. K. /Ui/O/Oo, MP, Deputy Minister: Marginalised Communities’, 2017 (<http://papersmart.unmeetings.org/media2/14684112/namibia.pdf>).

reports. Additionally, the current Head of State, President Hage Geingob, has referred to the use of “marginalised communities” as being disagreeable, as have San leaders,¹⁶ in the context of national development goals, and on the basis of the perception that marginalisation “must not be permanent otherwise it becomes a state of mind”.¹⁷

Hence, “indigenous peoples” appears to be slowly becoming a more acceptable term in the Namibian context. Its usage can also be justified by the definition of indigenous peoples adopted by the African Commission on Human and People’s Rights (ACHPR), to which Namibia is a signatory.¹⁸ The ACHPR’s definition differs slightly from the United Nations definition of indigenous peoples in order to better suit the African context. Nevertheless, despite the increased prominence of the term “indigenous peoples,” the GRN has yet to grapple with the differences between marginalised communities and indigenous peoples, which are not synonymous terms.

The use of the term “indigenous peoples” would align Namibia with international norms, and would be a positive step in recognising and realising an area of human rights often avoided by governments in Africa. However, in that eventuality, other Namibian groups may also seek national recognition as indigenous peoples. For example, Ovahimba are regularly, and the Nama less regularly, referred to as indigenous peoples in international contexts, but neither population is served by the DMC programmes, as they are not considered to be marginalised communities.

In Namibia, identification as a marginalised community signifies a requirement for additional GRN support, but in general, the term “indigenous peoples” does not automatically imply this. However, these two terms are currently somewhat conflated. Therefore, the increased adoption of the term “indigenous peoples” in Namibia, especially if replacing the term “marginalised communities”, may necessitate a differently phrased and better quantified definition of which groups in the country require increased investment and support.

3 An overview of current national processes related to San land

In October 2018, Namibia held the long-awaited Second National Land Conference. While delayed and subject to some political controversy in the run up to the event, the conference nevertheless signified the GRN’s willingness to engage on the often thorny and emotionally charged issues of land governance and reform in the

16 Xaogub, Francis, ‘“Don’t call us marginalized” ... San communities claim discrimination’, *The Namibian*, 17 June 2019 (<https://www.namibian.com.na/189643/archive-read/Dont-call-us-marginalised--San-communities-claim-discrimination>).

17 *New Era*, ‘Geingob’s trip to Tsumkwe explained’, 28 May 2015 (<https://neweralive.na/posts/geingobs-trip-tsumkwe-explained>).

18 African Commission on Human and Peoples’ Rights (ACHPR) & International Work Group for Indigenous Affairs (IWGIA), *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities*, ACHPR & IWGIA, Copenhagen, 2005, p. 89.

country. Twenty-seven years earlier, in 1991, the first land conference, the National Conference on Land Reform and the Land Question, set out newly independent Namibia's approaches to land policy and pressing land issues, including the GRN's refusal to entertain the complications of ancestral land claims.

One of the outcomes of the first national land conference was twenty-four statements of consensus, clarifying the outcomes of discussions and public submissions in regard to commercial and communal land, service provision, and policy.¹⁹ A number of San groups were represented at the 1991 land conference, in particular the Ju|'hoansi of Nyae Nyae, whose traditional leader addressed the audience.²⁰ Of particular relevance to the San, the 1991 *National Conference on Land Reform and the Land Question: Consensus Document* included the following statements (abbreviated and excluding the specific recommendations under each statement):¹⁶

- 2) **Ancestral rights** ... given the complexities in redressing ancestral land claims, restitution of such claims in full is impossible.
- 4) **Underutilised land** ... abandoned and underutilised commercial land should be reallocated and brought into productive use [note that this excludes communal land]
- 9) **Land tenure** ... Evaluate the legal options concerning possible forms of land tenure consistent with the Constitution.
- 10) **Farm workers** ... should be afforded rights and protection under the labour code.
- 12) **Access to communal land** ... in a particular communal area the rights of intending farmers from outside the area need to be reconciled with the rights of the local community having access to that land.
- 13) **Disadvantaged communities** ... disadvantaged communities and groups, in particular the San and the disabled, should receive special protection of their land rights.
- 19) **Illegal fencing** ... illegal fencing of land must be stopped and all illegal fences be removed.

As observed in this and other chapters in this publication, despite progress in a number of areas concerning land policy and programmes, and improvements in terms of San peoples' human rights and their economic development, a number of the good intentions embodied in the 1991 'Consensus Document' remain only partially realised, and in some cases not applied.

19 Office of the Prime Minister, *National Conference on Land Reform and the Land Question: Consensus Document*, 1991 (<http://www.mlr.gov.na/documents/20541/290353/Conference+Consensus+Document+%28Booklet+and+Programme%29.pdf/dfa21c58-1112-49e8-b22e-54d09e77cf52>).

20 Bieseke, Megan & Robert K Hitchcock, *The Ju/'hoan San of Nyae Nyae and Namibian Independence: Development, Democracy, and Indigenous Voices in Southern Africa* (Paperback Edition), Berghahn Books, New York and Oxford, 2013.

San groups were also well represented in the 2018 Second National Land Conference, which provided an opportunity for a broadly inclusive cross-section of stakeholders to submit and in some cases present their views on all aspects of land governance and reform in Namibia. Since 1991, five San traditional authorities have been recognised by the GRN under the Traditional Authorities Act,²¹ and their chiefs and councillors attended, alongside a number of younger community representatives invited by the MLR and the DMC. Presentations and comments by San delegates were well received by the audience, and conversations between San representatives and politicians appeared to be promising.

As with the 1991 conference, a set of resolutions was agreed upon by participants. This time there were 40 resolutions – some with numerous sub-sections – reflecting the myriad challenges and disputes that have fermented regarding land governance in Namibia in the years since independence. The published *Resolutions of the Second National Land Conference, 1st-5th October 2018*²² contains many areas relevant to the San. The resolutions are more comprehensive in detail and cover a broader range of issues than had been included in the first conference. The San themselves have experienced considerable social, economic, cultural, and geographic change, such that while they were historically most affected by issues in communal areas and commercial farmland, significant portions of San populations are now present in urban areas and within resettlement areas. Thus, an even larger set of the resolutions are relevant to the San.

Resolutions of the 2018 National Land Conference that are of particular interest to San groups include, in brief:²³

- 3) Resettlement policy and criteria;
- 4) Pre- and post-resettlement support;
- 6) Access to land by women, youth, war veterans, Botswana returnees and persons with disabilities;
- 7) Farmworkers (including generational farmworkers);
- 8) Disadvantaged communities;
- 11) Land allocation & administration by traditional authorities & communal land boards;
- 13) Land rights registration in communal areas;
- 14) Illegal fencing in communal areas;
- 15) Access to communal land;

21 The Hai||om, !Kung, Ju|'hoansi, ǀKao||Aesi and !Xóo have recognised traditional authorities. The Khwe remain the largest San group without a recognised traditional authority, and the Naro of Omaheke are also seeking recognition.

22 Ministry of Land Reform, 'Resolutions of the Second National Land Conference, 1–5 October 2018', paper presented at the Second National Land Conference, Windhoek, 2018 (<http://www.mlr.gov.na/documents/20541/638917/Second+National+Land+Conference+Resolutions+2018.pdf/15b498fd-fdc6-4898-aeda-91fecbc74319>).

23 Note that the resolution document provides significant detail on these subjects.

- 16) The impact of climate change on productivity;
- 18) Wildlife conservation and utilisation rights;
- 20) Residential land within national parks;
- 23) Tenure insecurity for urban informal settlement;
- 37) Definition of ancestral land (economic, cultural & spiritual); and
- 38) Ancestral land rights and claims.

The resolutions, while not binding, are considered to be official policy guidance. Rather than being mere recommendations, they therefore do carry weight in terms of policy and programme development.

While consultation processes resulting from the Second National Land Conference are being carried out and the findings collated, an initial draft implementation plan has been developed aimed at promoting the objectives of the resolutions, though this plan is not currently available to the public. The degree to which such objectives will be realised remains to be seen, since processes to formulate and implement strategies are still ongoing. However, at the time of writing, nine months after the conference, more straightforward resolutions such as the imposition of spot fines for illegal fencing have not yet been acted upon.

Where significant activity has taken place in the public eye is in the formation of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution, a 15-member commission formed by the Office of the President and working in conjunction with the MLR. The Commission carried out a series of consultations, including the participation of a San representative from the Office of the President, in Namibia's regions during mid-2019 in order to gather public input on issues of ancestral land, including claims. This process has garnered significant input by some San communities, with the Khwe of Kavango East and Zambezi receiving national media attention.²⁴ The process and potential outcomes of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution is described in detail in chapter 7 of this book.

4 Consultations with San communities concerning the Resolutions of the Second National Land Conference

The drafting of this chapter gave rise to an opportunity to engage San groups in Namibia's regions with the outcomes of the Second National Land Conference. The Legal Assistance Centre engaged with the DMC and the MLR, and agreed to hold a series of one-day consultations with San leaders and community members in:

²⁴ Namibian Broadcasting Corporation, 'Kwee [sic] San community wants ownership of Bwabwata National Park', 2019 (<https://www.nbc.na/news/kwee-san-community-wants-ownership-bwabwata-national-park.21453>).

- Otjiwarongo, for western Otjozondjupa Region and southern Kunene Region (including San communities bordering Etosha National Park), with Hai||om and !Kung²⁵ participants;
- Tsumkwe, for eastern Otjozondjupa Region (Tsumkwe West / Nyae Nyae Conservancy and Tsumkwe East / Nǃa Jaqna Conservancy), with Jul'hoansi and !Kung participants;
- Gobabis, for Omaheke Region, with ǀKao||Aesi, Naro and !Xóo participants;
- Divundu, for Kavango East and Zambezi Regions, including Bwabwata National Park, with Khwe and !Kung participants; and
- Oshakati, for Oshana, Omusati, Oshikoto (including San communities bordering Etosha National Park), Ohangwena and Kavango West regions, with !Kung and Hai||om participants.

DMC staff and community representatives agreed upon a list of 15 to 18 San attendees for each session, alongside four or five local and national government staff, depending on the location.

While, as previously mentioned, San representation at the conference had been relatively good, knowledge about the content of the Second National Land Conference resolutions was relatively limited among the San representatives at these consultations. Similarly, as internal planning processes following the conference within the Presidency and the MLR have not been well publicised, little was known about the outcomes of the conference. This is likely to have been exacerbated by the fact that access to information via newspapers, radio broadcasts and contact with GRN officials in rural areas can be very limited, and by literacy and language barriers.

The consultations were therefore also an opportunity to disseminate the outcomes of the Second National Land Conference, and discuss possible future policy and programmatic changes by the GRN, as well as to gather reactions and recommendations from the San representatives who took part. This feedback will be presented to the High Level Committee, established by the President to ensure implementations plans are developed and actioned from the Second National Land Conference resolutions and consultations.

The discussion points were based on a questionnaire, formulated from the resolutions of the Second National Land Conference that were relevant to San groups, which was distributed to participants before the consultations. Participants presented their answers to the questionnaire, along with any other related issues, in the morning sessions. Group discussions in the afternoon were based on priorities that had been identified in the morning's discussions.

While discussions were on the whole comprehensive and lively, some difficulties were encountered. Not all participants had received the questionnaire beforehand, due to geographic remoteness and capacity limitations on the part of local GRN staff. It became clear on occasion during the consultation sessions that not all of those

25 Also referred to as !Xun and !Xung.

participants who had received the questionnaire before the meetings had had access to adequate translations, and some questions had therefore been misunderstood.

As previously mentioned, these consultations were an opportunity to focus solely on San representatives, which had not been possible in the comprehensive conference process involving all stakeholders. As a result, the comments and recommendations below capture the views of selected San representatives and communities, and may not reflect the best efforts by the GRN and civil society across the country, or the impact of factors beyond immediate control, such as Namibia's current drought and economic recession.

Such consultations are understandably one of the limited opportunities to air local issues to officials in a group setting. Self-reflection regarding issues within San groups is therefore not evident in this section. Further research and discussion are required regarding any shortcomings within San groups, such as challenges with respect to the organisation and coordination of effective representation, and to participation and community engagement regarding the issues raised in the consultations. It should also be recognised that the summary below presents direct feedback from San groups, and therefore does not constitute a comprehensive or balanced analysis of the issues at hand. The topics covered include:

- land tenure;
- infrastructure and training;
- resettlement;
- generational farm workers;
- the veterinary cordon fence and livestock movement;
- relationships with traditional authorities and communal land boards;
- illegal fencing, grazing, and poaching;
- climate change;
- ancestral land and national parks;
- conservation and wildlife; and
- urban land.

This summary will also form part of a report presented to GRN partners on the outcomes of the consultations. (The relevant resolutions from the Land Conference are given in brackets.)

4.1 Land tenure

(Resolutions 3, 8, 18)

Lack of tenure rights was a primary concern for most participants. Interestingly, in three consultations, participants felt they had rights over land, despite seemingly knowing that in terms of legislation this may not be the case. This disconnect between perception and legal reality may reflect the strong attachment to the land felt by these participants, and/or the lack of information regarding tenure provided to them. Other participants did not know whether or not they had any right to be

on the land they are settled on, and wanted to have their tenure rights clarified. Several consultations highlighted the need for training on land-related policies and legislation.

Barriers to tenure security specified during consultations include discrimination against San people by other ethnic groups and in land allocation processes, the limited relevance to San groups of selection criteria and processes for resettlement (including difficulties in obtaining documents, resources for applications and farm investments, and recognition of prior learning as farm labourers), and limited local availability of information on the resettlement process and application documents.

Participants identified the lack of representation by a traditional authority as an important barrier to land allocation and tenure. In some areas there was no San traditional authority, and San community representation was perceived as poor within the local non-San traditional authority (an issue expanded upon in section 4.6 of this chapter). Concerns were also raised about the stability of customary tenure rights, as in some cases, traditional authorities or local headman had recognised an individual's land rights, but had later reallocated such land due to perceptions of its being underutilised (which may result from a lack of resources or from cultural and personal choices about 'appropriate' land use), or because of personal disagreements, changes in chiefs or headmen, or for motives of personal gain.

In several sessions in areas where participants had been resettled, the lack of tenure negatively impacted the bankability of land. The inability to present a deed meant that participants were unable to access loans, resulting in reduced willingness and ability to invest in and sustainably manage the land. The promotion of group leaseholds for communities was discussed as a possible solution to the lack of tenure, though it would not be suitable in all circumstances.

In communal areas, San participants similarly stated that greater tenure security would promote investment and improve resource management. They believed that enhanced tenure rights would better enable San communities to leverage enforcement mechanisms to protect their land from illegal fencing, grazing, or poaching. A number of participants also drew a link between strengthening tenure and strengthening traditional knowledge, culture, and San languages. San groups have a strong cultural attachment to land, and their traditional livelihoods, as well as many facets of San culture, reflect the importance of their close relationship with land and natural resources. Others suggested that encouraging San youth to have more secure tenure over land would encourage investment and entrepreneurship.

Relatively few specific direct action steps to improve tenure were identified during the consultations. However, many of the action steps for other topics covered below would also result in strengthened tenure rights.

Suggested action steps:

- sensitise GRN staff regarding San communities;
- improve dissemination of resettlement information and application forms;

- provide information and training to improve the understanding of San groups in regard to land legislation, processes, and rights; and
- provide a form of tenure right, such as a deed or flexible form of tenure, that would enable the assertion of rights and bankability of land for San groups on resettlement farms, in communal areas and, where applicable, within national parks.

4.2 Infrastructure and training

(Resolutions 3, 4, 6)

Feedback from all the consultations highlighted the need for more investment in infrastructure and training in agricultural skills in order to manage the land effectively.

Feedback from different regions made it clear that levels of GRN and civil society support for training and infrastructure differ significantly from area to area. In some areas, such as Nyae Nyae Conservancy, long-term civil society and GRN support in the form of training and, to a lesser degree, tools and infrastructure, has been provided, though community members still perceive themselves to be in need of more support. Other areas receive almost no support. The contrasting levels of support, and limited sustainability where support is delivered, demonstrate the need for more scrutiny regarding the scale, types and appropriateness of investments in infrastructure and training for San communities. There are also wider implications regarding whether an enabling environment exists for the groups receiving such investments to succeed. This could include factors such as market access, land capacity and productivity, prevailing approaches to livelihoods, climate, education and service provision.

Similarly, while there is obviously high demand for increased training and infrastructure provision, the outcomes of resettlement projects in Namibia are on the whole not attaining the intended targets of self-sufficiency and growth. Questions therefore remain over whether the types and volume of support are insufficient, or whether new models of resettlement should be investigated.

It would be pertinent to review current trends and the recent history of support to San communities on a national scale, including the performance of group and individual resettlement, to analyse gaps in methods and barriers to success.²⁶

Regarding resettlement farms, participants noted that even if the GRN provides land, both access to capital and support for tools and infrastructure are often weak to non-existent, limiting the resettlement farms' productivity. Additionally, they noted that farms acquired for resettlement are often not productive at the time of acquisition (which might well have been the reason for their having been made

26 Some reviews have been conducted, for example regional assessments of the Desert Research Foundation of Namibia's support to San resettlement farms in Omaheke Region. It should also be noted that many San engaged in small-scale agriculture are not generational farmers, therefore their adoption of successful agricultural practices is slower than it is for groups which have historically engaged in farming on a larger scale.

available for sale), and that successfully farming on low quality land requires higher levels of skills and resources than most San possess.

Participants suggested diverse infrastructural needs across all farming areas: water infrastructure; fencing to help prevent encroachment and illegal grazing; electrical infrastructure; houses, schools and clinics; and generally improved service provision to resettlement farms. At several of the consultations, participants highlighted the need to improve road infrastructure, communications (particularly mobile telephone coverage and local transport availability), and community halls for meetings and youth activities.

Training requirements suggested by participants included a wide range of subjects, notably general agriculture, animal husbandry, livestock vaccination, apiculture, aquaculture, poultry farming, marketing and commercialisation, arts and crafts marketing focused on San women, and vocational training, particularly for livelihood projects aimed at San youth. The need for training in natural resource management was emphasised in all the consultations. This wide range of training requirements reflects a broader desire to achieve diversified livelihoods and build skills that are difficult to attain in the arid, low-resource areas that are common in Namibia.

Where support for training does exist, for example within conservancies and some resettlement farms, there was also a sense that there needs to be more communication and consultation in order to better direct and tailor that support.²⁷

Suggested action steps:

- in view of the vastly differing levels of support for infrastructure and training found from location to location, identify and implement a basic level of training support for all San groups;
- carry out a community-based review of infrastructure and training needs in established San communities, with an approach and timeline for the provision of support in identified priority areas; and
- invest substantially in training and infrastructure for many San communities in both resettlement farms and communal areas with a view to the economic integration of San groups.

4.3 Resettlement

(Resolutions 3, 4, 5, 6)

San representatives at the consultations generally perceived the benefits of the resettlement programme for San groups to be limited, mentioning a variety of issues. These focused on two areas: the barriers to becoming a successful San

27 Within conservancies, training and acquiring skills should be also considered an indirect benefit derived from land; the measurement of land utilisation should not be limited to assets and tangible production alone.

applicant for individual resettlement, resulting from the nature of the application requirements, perceived discrimination against San applicants, and inadequate access to information; and the lack of investment and service provision for resettled San communities required for them to improve their livelihoods.

For example, they stated that there is little support for San people to apply for resettlement, and that access to information and resources to do so is often restricted. Participants stated that there was a common perception in San communities that San applications for individual resettlement are not successful because of discrimination,²⁸ despite the resettlement criteria of the National Resettlement Policy of 2001 specifying that resettlement is intended for applicants with no land, no livestock, and no income. There is also concern that, because of their having inadequate access to information regarding the application process, applications by San people are not completed properly. Some stated that it appeared that beneficiaries of resettlement were regularly people who already had access to land, rather than the landless people who were most in need. Some participants also stated that the criteria of the Affirmative Action Loan Scheme (AALS)²⁹ were not strictly adhered to, since it was often those with resources who were approved for loans, while applications from those most in need were not successful. Participants asserted that those who already had significant income should be referred to other lending resources.

Participants living on group resettlement farms asked for clarification of current and future land tenure rights – clarification that is especially important in view of the current lack of recourse for encroachment by other groups into their land. Participants also mentioned the limited investment in and renovation of infrastructure on resettlement farms.

Suggested action steps:

- improve identification of vulnerable and marginalised groups by the MLR and ensure they have access to resettlement as defined in Namibia's land policies;
- as the resettlement policy is meant to address the needs of marginalised communities, including the San, ascertain why this appears not to have been achieved, despite the “no land, no livestock, no income” resettlement criteria, and tailor the policy to address the needs of marginalised communities;

28 Regarding this perception, though relatively populous in some areas, the San comprise less than two percent of Namibia's total population, so on a proportional basis, resettlement allocation would be low overall. On the other hand, resettlement (according to the first National Land Conference and later policies) was explicitly intended to benefit the San due to their acknowledged dispossession and resulting landlessness. Additionally, the San have continued to be resettled on group resettlement schemes rather than being individually resettled, despite the MLR having ceased to promote group resettlement. While individual resettlement in Namibia has not reaped great benefits for its beneficiaries, group resettlement is probably even less effective in improving the livelihoods of beneficiaries. See Werner, W. & W. Odendaal, *Livelihoods after land reform: Namibia country report*, LAC, 2010.

29 The AALS targets emerging commercial farmers to enable them to acquire land in commercial areas.

- as the criteria and application procedures are perceived to be complicated and therefore have the effect of limiting opportunities for resettlement for the San, ensure that information is communicated by the MLR in a method, time, and language suitable for San groups to effectively participate in resettlement; and
- clarify current and future tenure rights of those who have been resettled on both group and individual resettlement farms.

4.4 Generational farm workers

(Resolution 7)

The issue of generational farm workers was of particular concern to San people in the Otjiwarongo and Gobabis meetings. Participants pointed out that generational farm workers experienced an extreme lack of access to land and labour security. There was also concern about farm owners not being honest and simply evicting long-term workers without paying them the benefits to which they are entitled.

The primary request by San participants was that the policy regarding the resettlement of farm workers be closely adhered to. They urged GRN officials to consult with traditional authorities and local headmen in cases in which potential disputes regarding farm workers are identified, as they often know who the farm workers are and how many years they have lived on given farms. The fact that GRN funds are transferred to the farm owner, who is then responsible for severance and pension payouts to the workers, was flagged as being problematic, since there is no follow-up monitoring by the GRN of the payments made by the farm owner to former workers.

San participants also requested that the GRN should ensure that when they acquire a farm for resettlement, generational farm workers who have applied for resettlement should be prioritised for land allocation.

Suggested action steps:

- improve the implementation of current policies for generational farm workers, including by consulting with traditional authorities and local headmen;
- monitor farm owners regarding pay outs made upon the eviction or retirement of farm workers; and
- prioritise generational farm workers for resettlement.

4.5 The Veterinary Cordon Fence and livestock movements

(Resolution 10)

To comply with disease control regulations, meat from north of the Veterinary Cordon Fence (VCF) (also known as the “Red Line”) cannot be exported overseas. Due to the large number of small-scale farmers on communal land north of the VCF, it is mainly discussed in the context of northern Namibia, where many communal

farmers call for the removal of the VCF. In contrast, San groups who may be affected by such a move, principally the Hai||om, expressed concerns over the potential reduction in control over animal movements such an action would have, resulting in increased stock theft, the spread of animal disease amongst wildlife and livestock, and increased poaching.

The potential removal of the VCF is generally presumed to apply only to the north-central areas of Namibia, and if this were to be the case, it would not affect San groups in Tsumkwe West and Tsumkwe East, who are bordered by the VCF to the south and west. However, the resolution concerning the removal of the VCF only mentions the fence as a whole, not specific sections. The removal of the VCF in its entirety would have implications for San groups in Tsumkwe West and Tsumkwe East, who highlighted that they are opposed to any changes to the VCF due to the uncontrolled movement of domestic animals, illegal settlement, illegal fencing, and illegal grazing already occurring in their areas. They claim that these occurrences have resulted in increased unsustainable land use, for example through over-grazing. They requested improved control of the VCF through patrols and prosecution.

The participants in Tsumkwe mentioned market competition as another possible concern. Changes to the veterinary cordon fence might open up the market, such that emerging San farmers north of the fence in the Tsumkwe area may lose out in terms of land, resources, and market access to communities moving into the area from south of the fence with more farming experience and resources, and greater livestock numbers. They are concerned that this would reduce the prospects of successful farming livelihoods for San people, and lead to the exploitation of San as labourers and the destruction of natural resources in their area. These concerns are based upon current pressure from illegal settlement and grazing and the history of San exploitation on farms in neighbouring regions. While not explicitly mentioned by the Hai||om, they might be exposed to similar risks.

Nevertheless, some participants in Tsumkwe agreed that there could be benefits to opening up the market, given they that want to eventually commercialise their livestock production. They discussed improving quarantine infrastructure and processes to improve access to markets, but noted San-specific barriers to entry into those markets.

Suggested action steps:

- ensure that San communities are fully informed and properly consulted during planning processes related to moving the VCF in order to identify and mitigate risks;
- ensure regular patrols of the VCF by the police and/or veterinary services, and ensure prosecution for the illegal transport of animals across the fence; and
- investigate ways to improve quarantine processes for small-scale farmers north of the VCF.

4.6 Relationships with traditional authorities and communal land boards

(Resolution 11)

San traditional authorities

Participants in areas with recognised San traditional authorities made substantial suggestions for improving relations and activities with their traditional authority. These primarily included the need for regular community meetings and workshops on specific issues with the traditional authority, and holding consultations before the traditional authority makes important decisions.

There were also suggestions that meetings should be held at regular intervals, for example on a quarterly basis, including both meetings between the community and traditional authority, and sessions for traditional authority councillors to report back to the Chief and community members on work they have done. Traditional chiefs or councillors present at the consultations largely agreed with these suggestions. Traditional authority chiefs, for their part, proposed that community members should volunteer to assist the traditional authority and heed calls to attend meetings, so as to facilitate their work.

Participants highlighted that traditional authority chiefs need to visit the villages and informal settlements where their communities are situated. However, they conceded that traditional authority travel allowances were often insufficient to achieve this regularly.

Participants in Tsumkwe suggested that systems to improve accountability and performance of the duties of traditional authorities should be required as a matter of customary law, as should induction training for traditional chiefs and councillors on their duties and due process. Tsumkwe West participants stated they would like five-year terms and regular elections to be instated to prevent the same councillors from serving indefinitely. Other participants suggested that the GRN should assist communities to engage in a higher level of scrutiny or the application of selection criteria when choosing leaders and representatives, in order to respond to the need for more persuasive and motivated spokespeople in San communities.

Some participants complained that headmen and traditional authorities do not always interact well with young women and the youth, especially when the youth propose new ideas.

Non-San traditional authorities

Participants' relationships with non-San traditional authorities varied from area to area. In Otjiwarongo, participants stated that they had largely good relations with neighbouring traditional authorities. In Omaheke Region, however, participants requested government mediation to assist traditional authorities in the region

to work together with the San community, as well as GRN intervention to ensure that correct procedures are followed by non-San traditional authorities when dealing with San groups to ensure equality and respect. They also suggested that neighbouring traditional authorities should meet annually without GRN officials presiding over meetings, in order to improve resource sharing and information.

San participants from Kavango East and Zambezi regions reported having good relationships with traditional authorities in Zambezi due to historical ties, but poor relations in Kavango East due to land and leadership disputes.³⁰ The Khwe stated that they want to be represented by their own traditional authority and to follow their own customary laws. They would want leadership and governance training for this traditional authority when established.

Participants in Tsumkwe had variable relations with neighbouring Herero traditional authorities, with several issues highlighted regarding land disputes, as well as illegal settlement and grazing, though they voiced a willingness to improve communication.

San groups consulted in Oshakati reflected on the need for improved oversight of non-San traditional authorities to ensure that they act in accordance with law and policy when dealing with San people. They stated that they would prefer their own traditional authority due to their poor relations with and lack of equitable treatment by other traditional authorities in their areas.

Communal land boards

Participants generally reported reasonable relations with their communal land board (CLB) members. However, despite training provided in previous years for communal land board (CLB) members by, among others, MLR and LAC, a number of challenges were highlighted by participants. Some complained that they lacked representation on the boards. In particular, participants in Tsumkwe and Gobabis questioned the CLBs' information-gathering and decision-making, citing inadequate representation on the CLBs and a lack of understanding of the issues in their areas.

There was agreement that the CLB or the MLR, together with the regional resettlement committee and with the assistance of the traditional authority, should hold meetings with communities to explain in detail how the institutions and policies of land allocation work. Participants also advocated for regular community and traditional authority meetings with the CLB, with perhaps three being scheduled per year.

At several consultations, San representatives stated that the CLB did not work well with the San because they did not take into account the specific context of interacting with San groups. For example, under the regulations of the Communal Land Reform Act, a public notice regarding the allocation of land must be displayed

30 Despite meeting the requirements of the Traditional Authorities Act, and applying for recognition on multiple occasions, a Khwe traditional authority has never been given recognition. Thus, the Khwe fall under the Mbukushu Traditional Authority.

for a minimum of seven days at the CLB office, and the public have seven days to lodge complaints with the CLB regarding that allocation. However, this short display period, the need to have read government postings, and the requirement that complaints be submitted in writing are all significant barriers for remote communities in which significant numbers of people are illiterate, and where communications are poor. Participants therefore called for a policy requiring consultation by the CLB in villages or settlements before allocations to non-residents are made.

Additionally, participants perceived the CLB's approvals of land allocation to be unequal between San and non-San groups. They encouraged the traditional authorities and the CLBs to monitor each other's decisions more closely, to ensure accountability and follow-up. Interestingly, it is clear from these discussions that the participants feel that CLBs wield considerable power on land allocation, rather than acting as bodies ensuring "checks and balances". Overall, it is unclear whether this assumption stems from a lack of information, or from actual experience, though complaints in some areas, detailed below, would suggest that the latter is the case.

Participants from Tsumkwe West stated that the CLB did not always act in accordance with the Communal Land Reform Act and did not work well with the traditional authority. They also emphasised that land allocation laws and land management plans should be followed to avoid the allocation of land that is unsuitable for farming, for example in wildlife zones and corridors. The ongoing issues of illegal fencing and illegal grazing in contravention of the Communal Land Reform Act and the Forest Act were repeatedly highlighted. Despite rulings by the High Court against individuals responsible for illegal fencing in Tsumkwe West and illegal grazing in Tsumkwe East, these issues have not been effectively dealt with by the CLB, the police, the MLR or the Ministry of Environment and Tourism (MET).

Suggested action steps:

- ensure that traditional authorities hold at least a minimum number of community meetings and workshops per year on priority issues for each area, and ensure that accountability mechanisms are in place;
- ensure that there is consultation by traditional authorities with communities before important decisions are taken;
- ensure sufficient travel allowances for traditional authorities to effectively consult with their community members;
- ensure that information is communicated by CLBs in a method, time and language that is suitable for San groups to effectively participate in decision-making, including the use of radio, television broadcasts and video over social media (principally Whatsapp);
- provide training for newly appointed traditional authority chiefs and councillors and for communities on land allocation processes, and make similar information available to communities through radio broadcasts and other media;

- examine the situations where San groups are living as minority populations, and formulate actions to ensure that non-San traditional authorities respect and represent the interests of the San community there, providing mediation as needed; and
- work towards the recognition of a Khwe traditional authority under the Traditional Authorities Act.

4.7 Illegal fencing, grazing and poaching

(Resolution 14)

Illegal fencing, illegal grazing, and poaching were of particular concern for San participants from Tsumkwe East, Tsumkwe West and Bwabwata National Park. They emphasised the need for the strict application of national law and the formulation of appropriate customary laws, the promotion of awareness in the community regarding regulations and procedures to address illegal fencing, illegal grazing and poaching, and collaboration between community members, traditional authorities, the GRN, and civil society.

Participants living in Bwabwata National Park stated that neighbouring traditional authorities allowed people to move into the park and bring cattle, despite this being illegal. This is being done without the consent of the Khwe and others living there, yet no actions have been taken in response by the GRN. They accused such intruders of also engaging in poaching within the park, and furthermore reported that San are more often targeted for questioning by anti-poaching units than other groups. Complaints were also made about the inappropriate conduct on the part of anti-poaching units and police in settlements within the park. Additionally, participants requested that rather than bringing in workers from other areas, the GRN should employ more San as border guards and rangers to limit poaching and illegal fencing and grazing, as they have in-depth knowledge of the area and suffer from high unemployment in their communities.

Participants from Tsumkwe West stated that they want a freeze on the allocation of land by the CLB, the traditional authority and the MLR in order to get a clearer picture of the extent of illegal fencing, grazing and settlement in Tsumkwe West. They felt that this was necessary in light of the lengthy delays in investigating these issues and the lack of implementation of removal orders, and the lack of adherence to VCF regulations. In the longer term, they highlighted the need to limit the number of livestock in the area in accordance with sustainability regulations. It should be noted that High Court rulings regarding illegal fencing and illegal grazing have been made in favour of both NꞤa Jaqna Conservancy in Tsumkwe West and Nyae Nyae Conservancy in Tsumkwe East, though these have not alleviated the specific cases or wider challenges due to lack of enforcement.

San participants from Omaheke, Oshana, Omusati, Ohangwena and Kavango West regions, including those on resettlement farms, stated that illegal fencing

had limited their access to land they had been allocated. Due to their not having their own traditional authority and lacking representation on the non-San traditional authority, they were not assisted by local institutions in dealing with these issues.

Suggested action steps:

- ensure timely investigation into complaints and the application of national law in cases of poaching and illegal fencing, grazing and settlement on communal land, in protected areas, and on resettlement farms;
- take steps to systemically improve cooperation between government ministries and stakeholders in combatting poaching and illegal fencing, grazing and settlement;
- organise consultations to improve relations between San communities and law enforcement and anti-poaching units, to improve cooperation and intelligence gathering;
- declare a moratorium on land allocations, fencing permits and livestock movement into Tsumkwe West (and other areas where significant illegal activity occurs) until such time as the situation has been evaluated and controlled; and
- ensure GRN support to minority San communities, including through mediation, where land disputes occur.

4.8 Climate change

(Resolution 16)

Participants from all areas agreed that they experience the effects of climate change in the forms of changing weather patterns and decreased rainfall. Those from Tsumkwe requested more outreach and information from the GRN and the MET, and particularly for more information about GRN funding for climate change adaptation and mitigation. They also highlighted the importance for their community and for other stakeholders of using the ancestral knowledge of San elders about the land in order to improve sustainability and adaptation strategies in their areas and beyond.

Participants residing in Bwabwata National Park stated that restricted access to areas of the park limits traditional subsistence activities during drought and climate change-related events, worsening the effects on the area's San population. They also emphasised that climate change impacts not just livestock and agriculture, but also the wild animals and plants which are important to their traditional livelihoods and to value of tourism and hunting concessions. Because of its disproportionate impacts on already-vulnerable communities, and particularly communities that rely on the land for their livelihoods, they requested training, funds and other resources to mitigate and adapt to climate change.

Suggested action steps:

- improve the delivery of information on climate change and strategies for mitigation and adaptation;
- improve the dissemination of information about funding opportunities related to climate change;
- research and recognise the importance of San traditional knowledge that is relevant to sustainable land and resource management, and climate change mitigation and adaptation.

4.9 Ancestral land and national parks

(Resolutions 18, 20)

The issue of national parks was only covered in detail in the Otjiwarongo, Oshakati and Divundu meetings, in reference to the Hai||om peoples' historical occupation of Etosha National Park, and the current Khwe occupation of Bwabwata National Park. Issues concerning both national parks are described in detail in other chapters.

Issues raised regarding Etosha included the Hai||om only being allocated one tourism concession, which together with resettlement farms that have been assigned to the Hai||om south of Etosha is not enough to compensate for the scale of the loss of their ancestral land.³¹ Hai||om participants remarked that they currently receive no benefits from the sole concession they have, or royalties from businesses in Etosha, despite the park being on their ancestral land.

Additionally, participants expressed the desire for a museum about Hai||om history and culture within Etosha or close by, both to provide tourism income and as a means for Namibians and San youth to learn about Hai||om history, culture and way of life. Questions were also raised regarding whether the National Heritage Council might be able to facilitate discussions to investigate benefit-sharing agreements between San groups and owners of private land – especially established lodges – that contain San heritage sites used for tourism.

At the Otjiwarongo consultation, !Kung representatives from the Otjituuo area, where they are a minority group and are often relatively isolated from service provision and participation in national meetings, voiced their desire for a tourism or a hunting concession within both Waterberg Park and the large private Eden Game Farm.

In regard to Bwabwata National Park, Khwe representatives stated that the demarcation and fencing of the core wildlife area was carried out by the GRN without adequate consultation with the community. In 2016, this core area was further extended, again without adequate community consultation. This restriction of access severely limits the seasonal collection of veld foods, access to traditional medicine, and the application of other traditional knowledge and cultural livelihood

31 The Hai||om were evicted from Etosha National Park by the former colonial government.

practises. They also asserted that Bwabwata is their ancestral territory, and they are concerned about their lack of tenure within the park. They would wish their children to be able to inherit land rights in the area.

Furthermore, the participants in the Divundu meeting stated that while the MET works directly with the Kyaramacan Association³² (the local community association within Bwabwata National Park), they also want headmen in the area to be receiving information first-hand as the representatives of their villages. This would improve the perceived lack of San autonomy in the region regarding their ancestral land.

As was the case with Etosha National Park, the lack of tourism concessions in Bwabwata was of concern to the community (though at least one concession is in the process of being developed). Additionally, the Khwe requested greater employment for the local community within the park, highlighting the benefits of utilising traditional knowledge for park management, patrols, and the operation of tourism activities.

Suggested action steps:

- increase tourism concessions and, where appropriate, hunting and gathering concessions to San communities within territories previously occupied by San groups;
- acquire land to compensate for the loss of territories previously occupied by San groups;
- improve access to employment opportunities for San groups within territories they currently occupy or previously occupied;
- facilitate discussions between San groups and landowners or tourism operators working in San heritage sites or territories they previously occupied;
- hold consultations with San communities to find solutions allowing for increased access to protected areas, in order to protect their cultural practices and traditional livelihoods; and
- request the MET to consult with and provide information to headmen within Bwabwata National Park directly, rather than solely via the Kyaramacan Association.

4.10 Conservation and wildlife

(Resolution 18)

Participants from areas bordering Etosha National Park stated that they do not receive many benefits from conservation and wildlife due to their lack of land tenure and lack of benefits from the park.

32 The Kyaramacan Association is a community association organised along similar lines to a conservancy, hence it represents all community members, not exclusively the Khwe.

Those in Tsumkwe agreed that they receive benefits from conservation and wildlife both directly and in kind. However, they expressed concerns regarding issues of human–wildlife conflict, stating that they believe that trophy hunting is increasing elephant aggression, and that drought is exacerbating human–wildlife conflict by limiting food and water resources.

Participants from Bwabwata National Park also receive some benefits from conservation and wildlife both directly (e.g. meat and community income from trophy hunting) and in-kind (e.g. a limited number of employment opportunities). However, they expressed concern that there is no compensation when livestock or crops are damaged by wildlife, and some believed that the disadvantages of living in a conservation area outweighed the benefits. These disadvantages included restrictions on movement, dispossession of land, and limitations and conflicts regarding livelihood activities. They considered that benefits may be improved through closer cooperation between the GRN and communities within the park.

Suggested action steps:

- identify ways to improve cooperation with San communities and their participation in conservation and wildlife management, including through community consultation, employment and investigated options for joint management plans;
- review compensation procedures for human–wildlife conflict within national parks; and
- strengthen monitoring and reporting of human–wildlife conflict in protected areas.

4.11 Urban land

(Resolution 22)

In the Namibian context, the provision of land to the landless is often focused on resettlement in rural areas. However, the provision of urban land should also be considered given population trends and economic conditions. Issues of urban settlement were discussed in the Otjiwarongo and Gobabis meetings. In these regions, significant proportions of San populations live in urban and peri-urbans areas, mostly in informal settlements. One issue reported concerning urban settlements was that it is a common occurrence that one person leases a plot, but too many people live on it and it becomes overcrowded, due to the housing needs of extended family. They requested that this should be considered in the allocation of urban land to San people when assessing the demand for such land, and deciding on allocation quantities, occupation conditions, and monitoring requirements.

Participants also highlighted the extent of land grabbing in municipal areas where formal access to land is not established. For this reason, where the demand for urban land is high, processes for formal allocation should be fast-tracked.

Participants in Gobabis related that despite living for many years in the same location in informal settlements, and feeling some sense of tenure, they realised

that legally they lacked any right to the land and could face eviction at any time. They requested that mechanisms for applying for tenure and programmes for land allocation in such informal areas be implemented more widely, especially for marginalised communities.

Suggested action steps:

- conduct research into conditions in informal San settlements in known San population centres (including Gobabis, Outjo and Otjiwarongo), with a view to designing policy and interventions;
- give consideration to urban land allocation in lieu of rural resettlement where requested by community members;
- fast-track processes of land allocation in urban areas experiencing high growth in informal settlements; and
- consider options to process urban tenure for marginalised communities, with the support of the DMC and the MLR.

5 Conclusion

At the time of writing – less than a year after the Second National Land Conference and with its outcomes still being finalised, and with the potential Cabinet approval of the Draft White Paper on the Rights of Indigenous Peoples in Namibia in the coming months – the land rights of San people, along with the relevance of national legislation and policy to their lives, is potentially subject to considerable positive change. However, the situation is fluid and its outcome remains unknown, which lends itself to conjecture rather than to clear conclusions.

In reviewing the status quo, Namibia has various land and resource legislation and policies that, while often not specific to San needs, should provide a range of protections to ensure the wellbeing of San communities. Namibia is also one of the few African states to have established a specific government institution, in the form of the DMC, to attend to issues affecting groups such as the San.

However, the quality and extent of implementation and enforcement of the relevant legislation and policy has been inadequate. This has been the case due to a complex range of interwoven factors, from a lack of resources and inadequate consultation with affected communities, to discrimination against and exploitation of the San. In some areas and instances, these failures emerge merely from neglect; in others, national law and policy have been flagrantly disregarded.

The lack of overarching policy and coordination mechanisms within the GRN to deal with groups such as the San remains a severe impediment to remedying gaps in implementation and ensuring sustained progress. Ultimately, this presents a considerable barrier to the GRN's stated aim of having an inclusive "Namibian House", and to the attainment of the goals of the UN 2030 Agenda for Sustainable Development, which pledges to "leave no one behind".

Two general findings can be drawn from the consultations. First, there is inadequate information dissemination both to and from San communities. Consequently, at times there is a lack of understanding in GRN circles regarding the needs of San groups and appropriate approaches to related policy and implementation, and similarly a lack of understanding in San communities regarding relevant policies and processes, and about how to effectively interact with GRN offices and agencies. Secondly, in some areas of land governance and reform, consultation with San groups by policy makers and local institutions would assist them to understand how current institutions could better serve such groups.

The consolidated conclusions from the consultation topics include the following:

- Twenty-eight years after the First National Land Conference, dispossession of land and landlessness are still key issues for the San in Namibia.
- There is a need to enhance and clarify tenure rights for San communities in respect of all land classifications.
- Traditional authorities and communal land boards significantly vary in their effectiveness for land allocation decisions affecting San people.
- Current national legislation regarding illegal activities affecting San communities on communal land, in protected areas and on resettlement farms is not being adequately implemented.
- Despite changing lifestyles and livelihoods, San culture and traditions retain important links to land and resources, which should inform policy making and implementation.
- San demand for urban land in regional centres is growing.

It is clear from the Second National Land Conference and the consultations for this chapter that many of the conference resolutions are relevant to issues facing the San, thus the San must be active participants in the ongoing national, regional and local consultation, planning and implementation processes. The responsibility to ensure that this participation is wide-ranging and takes into account the issues of literacy, language, geography and other barriers, lies partly with the GRN and partly with the San, who must ensure discussion of the issues within their groups, interaction with their representatives and submission of their views to the GRN.

Further, the potential adoption of the White Paper on the Rights of Indigenous Peoples, developed in a participatory manner and with bearing on both national circumstances and international treaties, presents an internationally progressive position by the Republic of Namibia regarding indigenous peoples and marginalised communities. Whether the outcomes, in terms of legislative and policy changes and ensuing implementation, are effective remedies remains to be seen. What is abundantly clear in the midst of these processes is that San people themselves have given thorough consideration to their situations and the factors affecting their communities, and have many of the answers to the challenges they face.

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10 ~ Access to land and security of tenure for the San people in Namibia: the case of Okongo Constituency, Ohangwena Region

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11 ~ Land and resource rights of the Khwe in Bwabwata National Park

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12 ~ Land, resource and governance conflicts in Kunene Region involving conservancies

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Philippine |Hairo ||Nowaxas, Sesfontein, 15/04/99.

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Ruben Sauneib Sanib (|Awagu-dao-am), 19/04/15.

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In September 2018, the Legal Assistance Centre (LAC) received a research grant from the United States Department of State, for the purpose of supporting the LAC to develop a series of concept chapters constituting an updated and comprehensive examination of the land rights of indigenous and marginalised communities in Namibia. This grant could not have come at a more opportune moment. Firstly, 2018 marked the 21st birthday of the LAC's Land, Environment and Development Project (LEAD). Since its inception, LEAD has supported the land and natural resource rights of Namibia's indigenous and marginalised communities through legal advice and representation, research, advocacy, capacity building and litigation. Thus, the LAC as a public interest law firm is well placed to evaluate the current state of Namibia's indigenous and marginalised communities' land rights. Secondly, the Second National Land Conference was scheduled to take place in October 2018, hence the LAC's intention was to produce a publication that would help to maintain the momentum generated by the conference discussions. Specific resolutions were taken at the end of the conference, to which policy makers are compelled to give effect. We are hopeful that this publication will be of use to those tasked with the implementation of the 2018 Land Conference resolutions.



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