



"God stopped making land!"

Land Rights, Conflict and Law in Namibia's Caprivi Region

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**Land, Environment and Development Project
of the**

Legal Assistance Centre

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Linyanti River swamplands, Caprivi

“God stopped making land!”: Land Rights, Conflict and Law in Namibia’s Caprivi Region

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Cover photo: Cattle farming in Salambala Conservancy, Caprivi Region.

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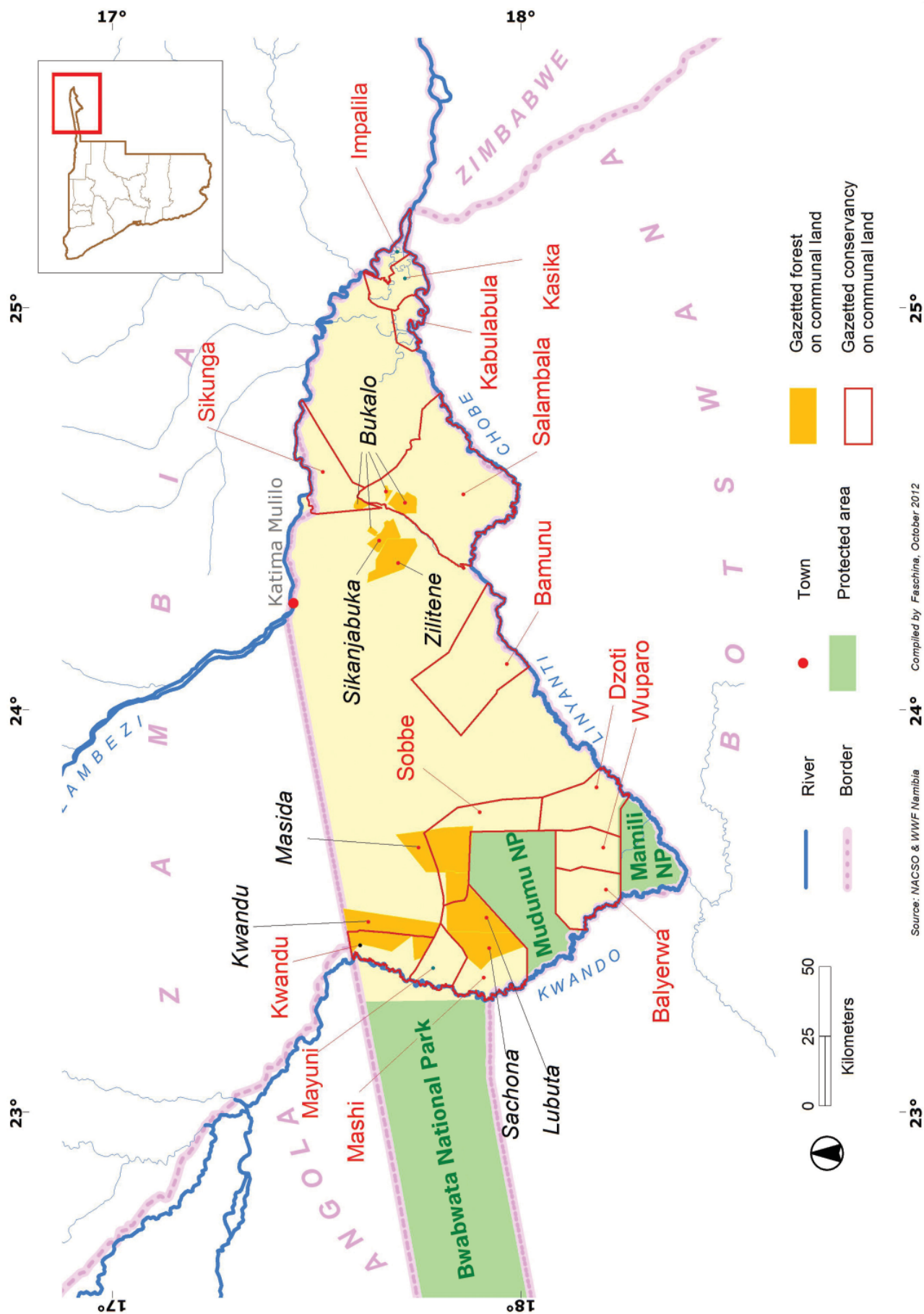
I. Introduction

Caprivi Region in north-eastern Namibia has a distinct character. It came into being as a historical anomaly; a mistake in German colonial planning based on the belief that this strip of land would connect the German colony of South West Africa with Germany's East African colony of Tanganyika via the Zambezi River – which is not navigable beyond Victoria Falls located a few hundred kilometres to the east.¹ Most of Namibia is a desert, whereas Caprivi lies entirely in a tropical zone consisting of a well-watered and fertile mix of rivers, swamps and forests. Caprivi's peoples are descendants of Zambian kingdoms, and their languages are unrelated to the other languages of Namibia. Being remote from the rest of the country, Caprivi's traditional social and political structures are stronger, and loom larger in modern development and planning.² By the same token, the Namibian State and its institutions are weaker in Caprivi than in the rest of the country.³

¹ Maria Fisch, *The Caprivi Strip during the German colonial period, 1890 to 1914*, Out of Africa Publishers, Windhoek, 1999.

² Wolfgang Zeller, "Neither Arbitrary nor Artificial: Chiefs and the Making of the Namibia-Zambia Borderland", unpublished paper.

³ Wolfgang Zeller and Bennett Kangumu, "Caprivi Under Old and New Indirect Rule: Falling off the Map or a 19th Century Dream Come True?", in Henning Melber (ed.), *Transitions in Namibia: Which Changes for Whom?*, Nordic Africa Institute, Uppsala, 2007.



While apartheid-era economies moved many Namibians to jobs in mining or commercial agriculture, a larger proportion of Caprivians remained on their own land, hence they are less dispersed into other regions of the country, and have interacted less with other Namibian peoples. East Caprivi was a remote homeland under the infamous Odendaal Plan.⁴ In the war fought for Namibia's independence, Caprivi initially had its own movement for independence, which ultimately merged with the South West Africa People's Organisation (SWAPO).⁵ Caprivi is the poorest region of Namibia, with its average household income levels being about half of those in the rest of the country. While there are large disparities in the distribution of wealth throughout Namibia, in the Caprivi, though not everyone is poor, poverty is more widespread than it is in the rest of the country. Rural residents of Caprivi have little access to jobs and cash, and depend mainly on cropping, livestock, piecework, wages, pensions and the use of a variety of natural resources.⁶ This region also has the sad distinction of having the highest prevalence of HIV/AIDS in the country (with a rate of about 40%, which is roughly double the average rate in the other high-prevalence regions), and accordingly, the lowest life expectancy in the country (about 40 years of age for men and 50 for women).⁷

All of this is related to the Caprivi Uprising of 1999 when a group of armed Caprivians, constituting the Caprivi Liberation Front, attacked government installations in Katima Mulilo (the region's capital and the only proclaimed town in the region) in an attempt to secede from Namibia and form their own nation. The Namibian army quickly defeated the uprising: officially nine lives were lost, but dozens are still missing, and hundreds were jailed and tortured.⁸ The trials of over 100 of those accused of treason are still ongoing 13 years later.⁹ This uprising forced the central government to pay increased attention to the integration of Caprivi into the rest of the nation. In turn this has exaggerated local political and social tensions. The uprising was instigated by members of the Mafwe ethnic group, which generally supports the opposition party, the Democratic Turnhalle Alliance (DTA). The other major ethnic group in Caprivi, the Masubia, generally supports SWAPO.

⁴ J.H. van der Merwe, *National Atlas of South West Africa*, Directorate of Development Co-ordination, South West Africa, Windhoek, undated, map 39.

⁵ The national liberation movement and the ruling party since 31 March 1990 when the South African colony of South West Africa became the independent Republic of Namibia.

⁶ S.A. Long, "Livelihoods in Conservancy Study Areas", in S.A. Long (ed.), *Livelihoods and CBNRM in Namibia: the Findings of the WILD Project – Final Technical Report of the Wildlife Integration for Livelihood Diversification Project (WILD)*, prepared for the Directorate of Environmental Affairs and Parks and the Directorate of Wildlife Management, Ministry of Environment and Tourism, Windhoek, 2004, quoted in Brian T.B. Jones and Jonathan I. Barnes, *Preparing for REDD in dryland forests: Investigating the options and potential synergy for REDD payments in the Miombo eco-region – Namibian Country Study*, International Institute for Environment and Development, London, 2009, p. 22.

⁷ John Mendelsohn and Carole Roberts, *An Environmental Profile and Atlas of Caprivi*, Gamsberg Macmillan Publishers, Windhoek, 1997.

⁸ Maria Fisch, *The Secessionist Movement in the Caprivi: A Historical Perspective*, Namibia Scientific Society, Windhoek, 1999. The secessionist movement, the Caprivi Liberation Front, maintains a website from exile in the USA and Denmark. The Namibian Government denies reports of widespread human rights abuses, torture and killing, and insists that the missing persons have gone into exile.

⁹ Amnesty International (Namibia), "Justice Delayed is Justice Denied: The Caprivi Treason Trial", August 2003 (accessible at www.amnesty.org/en/library/asset/AFR42/001/2003/en/89f49492-d6f2-11dd-b0cc-1f0860013475/afr420012003en.pdf).

This ethnic rivalry has a political impact across Caprivi as the government is seen to be more supportive of Masubia interests than of Mafwe interests. To this day there are deep feelings of enmity between these two peoples.¹⁰

Given these unique facts, the questions pertaining to communal land use, land reform and development in Namibia are best studied in Caprivi. One might ask, if the situation in Caprivi is truly anomalous, would it not be better to study these issues in areas of the country which reflect the national situation more typically? Well, several reasons make Caprivi a uniquely appropriate place to study the “land problem”, as it might broadly be called, in Namibia.

Firstly, while the land reform issue in Namibia is driven by the domination of primarily white-owned commercial farms in the centre of the country, almost half of the land in Namibia is communally owned, not privately owned. Virtually all authorities on the broad issue of “land reform” have pointed out that without careful attention and improvement of land use and agricultural practices in the communal areas, there can be no meaningful land reform in the commercial areas.¹¹ Thus, the whole question of how land is used in the communal areas and how that use can be made both more efficient and more supportive of the communities living in these areas can be seen as central to the problem of communal land reform. There are over one million people living on communal lands in Namibia – far too many for either effective resettlement in the commercial areas or absorption into the urban economy, so these people must be able to live productive lives with adequate income in their communal villages.¹² Because Caprivi is the poorest region in the country, and because it is entirely communal land with well-organised traditional villages and great agricultural potential, Caprivi is an appropriate place in which to ask important questions about the prospects of communal land in Namibia in the future. This is perhaps increasingly important in view of the Millennium Development Goals that the Government of Namibia has embraced.¹³

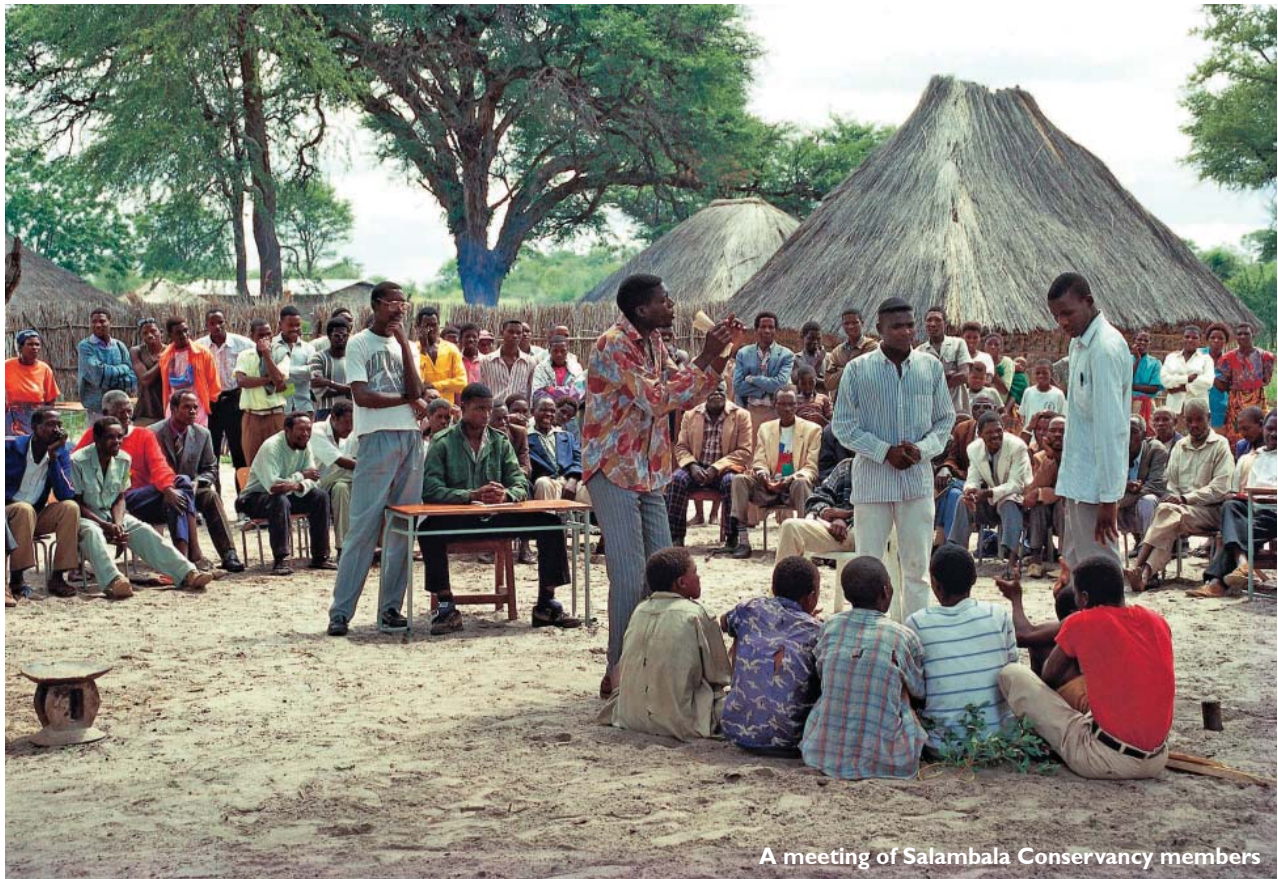
Secondly, Namibia is now in the forefront in southern Africa in the communal conservancy movement. Community-based natural resource management (CBNRM) is a well-developed programme, financed by NGOs and foreign governments – chiefly those of Germany and the United States – but backed by the Namibian Government and legislation that encourages communities to incorporate themselves as communal conservancies and community forests, giving them certain ownership rights over natural resources, but not over the land itself.

¹⁰ This tribal division was so serious that the South African authorities commissioned an anthropologist to write a report on it (*Report of the Commission of Inquiry to define and inquire into the boundary dispute existing between the Masubia and Mafwe tribes in the Eastern Caprivi*, South West Africa Administration, Windhoek, 1982), apparently with the intention of trying to exploit these divisions in order to advance their “divide and conquer” policy of playing African peoples against each other. Another recent example of this antagonism between the Mafwe and Masubia was the SWAPO regional conference held to elect delegates in Caprivi: the process was subjected to ethnic tension which forced the ruling party’s leadership to nullify the result and order a rerun (“Swapo’s Caprivi conference nullified”, *The Namibian Sun*, 16 August 2012).

¹¹ This literature is discussed in Sidney Harring and Willem Odendaal, “*One Day We Will All Be Equal*”: A Socio-Legal Perspective of the Namibian Land Reform and Resettlement Process”, Legal Assistance Centre, Windhoek, 2002.

¹² Ibid.

¹³ *Environment for Development, Development for Environment: Millennium Development Goals*, Ministry of Environment and Tourism, Windhoek, undated. Eight of the goals relate to the eradication of extreme poverty and hunger.



This makes these communal conservancies complex legal institutions in their own right.¹⁴ In theory this is intended both to empower these villages politically and to enable communal farmers to supplement their income, thereby improving communal livelihoods. There are currently 13 registered conservancies in Caprivi. Moreover, Caprivi has seven communal forests – another form of conservancy but resorting under the Ministry of Agriculture, Water and Forestry.¹⁵ This growth of the CBNRM “movement”, entailing more and more conservancies and community forests as well as more and more experience, presents a greater opportunity for evaluating this movement.¹⁶ Accordingly, Caprivi is an appropriate place to evaluate the success of CBNRM and its relationship to communal agriculture.

¹⁴ Andrew Corbett and Clement Daniels, “Legislation and Policies Affecting Community Based Natural Resources Management in Namibia,” Social Sciences Division, University of Namibia, Windhoek, 1996; and Andrew Corbett and Brian Jones, “The Legal Aspects of Governance in CBNRM in Namibia”, paper presented at the CASS/PLAAS Second Regional Meeting on the Legal Aspects of Governance in CBNRM, University of the Western Cape, Cape Town, 16-17 October 2000.

¹⁵ The Forest Act of 2001 clarifies the concept of “community forest”, but such forests existed under customary law. A further complication is that a community forest can exist within a communal conservancy, leaving some natural resources (e.g. trees and bushes) under the control of the communal forest, and other natural resources (i.e. wildlife) under the control of the communal conservancy (Andrew Corbett, “Community Forestry and the New Forestry Act: A Focus on Interpretation and Implementation”, paper prepared for the German Development Service, October 2002).

¹⁶ Stephen Turner, “A Crisis in CBNRM: Affirming the Commons in Southern Africa”, paper presented at the 10th IASCP Conference, Oaxaca, August, 2004; and Sian Sullivan, “Gender, Ethnographic Myths, and Community Based Conservation in a Former Namibia Homeland”, in Dorothy L. Hodgson, *Rethinking Pastoralism in Africa*, James Currey, Oxford, 2000.

Thirdly, there are various legal problems underlying the communal lands in Namibia – as in the rest of Africa generally. Communal lands are often held without formal legal title.¹⁷ In fact, this is the major factor that distinguishes communal farming from commercial farming as economic enterprises. Under customary law, instead of legal title, communal landholders hold some kind of land-use right, allocated and administered by the local chiefs and councillors.¹⁸ This situation has gradually been changing since the introduction of the Communal Land Reform Act 5 of 2002, and requires study. These chiefs and councillors, for example, are now incorporated into the formal government at the local level and are paid for their services under the Traditional Authorities Act 25 of 2000. Various layers of governmental power have also moved into this area. Legal authority for the allocation and administration of communal lands is now shared by traditional authorities and regional communal land boards resorting under the Ministry of Lands and Resettlement, and this is causing some tension between traditional authorities and communal land boards. At Independence in 1990, the national government claimed ownership of all the communal lands in Namibia, but it is unclear whether it holds these lands outright or rather in trust for the various communities, and the legal basis of its claim is also unclear.¹⁹ This situation has led to uncertainty and even chaos in local land use in many parts of the country. To the extent that communal land rights are inferior to commercial land rights, this situation potentially undermines communal land ownership and communal agriculture in Namibia. Conservancies have some legal use rights over game, but not to land, minerals, water and forests. On the other hand, community forests give communities management rights over forests and grasslands. These different statutorily-created institutions have added another complex and sometimes confusing layer to the land rights issue, and this can be addressed in Caprivi.

Fourthly, since its inception in 1998, the Salambala Conservancy, one of the richest in Namibia, has been involved in prolonged litigation initiated by some of its residents who are challenging the conservancy's right to evict them and their cattle from the "core area" which is central to the conservancy plan. A detailed case study of this conservancy, through the lens of this lawsuit, illustrates many of these issues.

The fifth reason is related to all of the previous four: because of Caprivi's isolation, the relationships and interaction between the central government and its various ministries, the regional government, NGOs, traditional authorities, the communal land board, conservancies, community forests and the various communities are more direct and easier to follow, which makes it easier to study how they interact to structure land use in a single region of Namibia.

The quoted words in the title of this report, "God stopped making land!", are the words of a farmer in the disputed core wildlife area in Salambala Conservancy. The meaning of this statement is twofold: he believes that there is no other land available for him, and that the conservancy members have to make do with the status quo and stop fighting for change.

¹⁷ Andrew Corbett and Brian Jones, "The Legal Aspects of Governance in CBNRM in Namibia", 2000 (op. cit.).

¹⁸ Sidney L. Harring, "The Constitution of Namibia and the Land Question: The Inconsistency of Schedule 5 and Article 100 as Applied to Communal Lands with the 'Rights and Freedoms' Guaranteed Communal Land Holders", in *South African Journal on Human Rights*, No. 12 (1996), p. 467.

¹⁹ The Communal Land Reform Act 5 of 2002 has provided some clarity on the state's relationship with communities living in communal areas: section 17 states that all communal land areas vest in the state in trust for the benefit of the traditional communities residing in those areas. However, in some government circles, a misconception remains that all communal land is state land.

II. Caprivi Region: General Background

To give an idea of the difficulty of doing research in rural Namibia, we will begin with Caprivi Region's basic population data. It is not clear how many people live in Caprivi, nor where exactly they live. In 1997, Mendelsohn and Roberts reported a population of 90 422, a figure derived from the official government census of 1991 and an estimate of 110 700 based on an aerial count of households in the region in 1996.²⁰ The Caprivi Regional Poverty Profile produced in 2004 estimated a total regional population of 79 826, of which 28% was urban and 72% was rural.²¹ Katima Mulilo, the administrative centre of Caprivi, is the only proclaimed urban area in the region.²² In the "Integrated Land Use Plan for Caprivi" produced

²⁰ John Mendelsohn and Carole Roberts, *An Environmental Profile and Atlas of Caprivi*, Gamsberg Macmillan Publishers, Windhoek, 1997, p. 13. This population discrepancy of over 20% is inexplicable and obviously raises basic questions about the integrity of government data.

²¹ National Planning Commission, *Regional Poverty Profile: Caprivi Region*, 2004, pp. xix-xxi.

²² There is a substantial rural migration to Katima, evidenced by growing informal settlements around the city. The rapid influx of both government activity and private commerce since the insurrection and the end of the border war with Angola has spurred rapid economic development there (Wolfgang Zeller, "Danger and Opportunity in Katima Mulilo: A Namibian Border Boomtown at Transnational Crossroads", in *Journal of Southern African Studies*, Vol. 35, No. 1, March 2009, pp. 133-154).

for the Ministry of Lands, Resettlement and Rehabilitation in 2001, a population of 116782 was projected for 2010.²³ The preliminary results of the 2011 population and housing census released in April 2012 put the estimated total population of Caprivi at 90100 (46300 women and 43800 men).²⁴ A comparison of the 1991 census with the preliminary results of the 2011 census reveals a negative growth rate over the last 20 years.²⁵ Situated south of the Zambezi River, north of the Chobe River and east of the Kongola River, the region is surrounded by swamplands, but much of the centre is agricultural.²⁶ Caprivi supports what may be the most vibrant communal farming in Namibia – indeed, it is the only region of Namibia that virtually feeds itself.²⁷

Besides fields of maize and millet, locally known as *mahangu*, each village has herds of cattle and goats.²⁸ The average family is composed of 4.7 individuals and has 15.7 “large-stock units” (a combined measure of cattle and goats, counting five small-stock units as one large-stock unit).²⁹ This means there are more cattle than people, and the traditional African cattle culture is very much alive in Caprivi.³⁰ While the land area of Caprivi is small, the population is also small, meaning that there is less overcrowding than in the north-western regions of Oshana, Oshikoto, Ohangwena and Omusati, for example. Still, all usable agricultural land is occupied and intensely farmed. Each family cultivates an average of only 1.8 hectares.³¹ There is no place to move new farmers into Caprivi, and no place for existing farmers to move to if forced off of their traditional lands.

Few other places in Namibia have people, livestock and wild animals living in such close proximity. The vast swamps of Caprivi and neighbouring Zambia, Botswana and Angola hold some of Africa’s most untouched wild animal habitats.³² While this is good for tourism, especially when visually combined with the traditional thatched-hut villages that appear every few kilometres, it poses hardship for communal farmers. Herds of elephants regularly trample their millet fields, and lions, hyenas, leopards and other animals carry off their livestock. This is a clear problem with communal agriculture in Caprivi. It juxtaposes the “tourist Africa” of wild animals and picturesque villages and the poverty-stricken lives of the

²³ Ministry of Lands, Resettlement and Rehabilitation, “Integrated Land Use Plan for Caprivi”, July 2001, p. 20.

²⁴ Republic of Namibia, “Namibia 2011 Population and Housing Census Preliminary Results”, National Planning Commission, Windhoek, April 2012.

²⁵ One possible explanation for this is the change of the regional boundary between the Kavango and Caprivi after the 1991 census: Kavango Region was extended towards the east, which means that the population of Mukwe Constituency is now enumerated as part of Kavango. Other explanations could be that HIV/AIDS – Caprivi having the highest prevalence rates of all regions in Namibia – has impacted on population growth, and/or that many people fled from Caprivi after the 1999 uprising.

²⁶ John Mendelsohn and Carole Roberts, *An Environmental Profile and Atlas of Caprivi*, Gamsberg Macmillan Publishers, Windhoek, 1998 edition.

²⁷ John Mendelsohn, *Farming Systems in Namibia*, Namibian National Farmers’ Union, Windhoek, 2006, pp. 33-39.

²⁸ John Mendelsohn and Carole Roberts, 1998 (op. cit.), “Farming in Caprivi” (Chapter 6), pp. 26-29.

²⁹ National Planning Commission, *Regional Poverty Profile: Caprivi Region*, 2004, pp. xix-xxi.

³⁰ Caroline Ashley and Christopher LaFranchi, “Livelihood Strategies of Rural Households in Caprivi: Implications for Conservancies and Natural Resource Management”, *DEA Research Discussion Paper No. 20*, Directorate of Environmental Affairs, Ministry of Environment and Tourism, Windhoek, August 1997, pp. 17-22.

³¹ National Planning Commission, *Regional Poverty Profile: Caprivi Region*, 2004, p. xxi.

³² John Mendelsohn and Carole Roberts, 1998 (op. cit.), “Wild Animal Resources” (Chapter 7), pp. 30-33.

residents of Caprivi's conservancies. If a lion eats a cow or goat, the family that needed the cow or goat for basic subsistence is further impoverished.

The fact that most Caprivians are so close to communal agriculture has a distinct impact on the shape of poverty there. Although Caprivi is the poorest region in Namibia, there is less malnutrition there than in any other region. The poor, it seems clear, are at least likely to eat. With most of the population living in traditional villages without electricity, and with few jobs, it is difficult to buy the other necessities of life. Indeed, the differences are striking: the average annual household income in Caprivi is less than half of the average in the rest of Namibia, at N\$5 763 per family, which is less than US\$1 000. According to the Caprivi Regional Poverty Profile of 2004, 40% of the region's households are poor, and 7% are extremely poor.³³ Life expectancy is just over 40 years of age, the lowest in Namibia, due in large part to the 40% HIV/AIDS infection rate.

The high HIV/AIDS prevalence is directly tied to the question of who lives in Caprivi. Caprivian peoples are closely related to Zambian ethnic groups. Indeed, the intense political, economic and social rivalry between the Masubia and the Mafwe has an unclear origin: both groups trace to the Lozi of Zambia, who have occupied the area for hundreds of years. The border, drawn in 1908, is a colonial border dividing the Lozi of Zambia from their relatives in Namibia.³⁴

While Namibia has a number of ethnic peoples,³⁵ and a number of rivalries between these peoples fed by historical events, the Masubia and the Mafwe have an extraordinarily fractious relationship.³⁶ They live in different parts of Caprivi, have little to do with each other, and each has taken the position that the other has no right to live in Caprivi and should leave – an impossibility in the modern world. This rivalry was so serious that the South African authorities commissioned a detailed anthropological study – that failed to shed much critical light on the issue.³⁷ The immediate impact of the Caprivi Liberation Front's rebellion is that a large proportion of Mafwe leadership are in exile, in prison or living in fear.³⁸ These divisions are still sharp, and have an impact on politics, rural development and land. In general, Masubia live to the east and south of Katima Mulilo, and the Mafwe live to the west and south-west. Many from both groups live in Katima Mulilo, which is now also the home of a large governmental bureaucracy imported from the rest of Namibia, particularly Ovambo, who are heavily represented in government employment.

³³ National Planning Commission, *Regional Poverty Profile: Caprivi Region*, 2004, p. xxiii-xxi. The data in these paragraphs is drawn from this report.

³⁴ K.F.R. Budack, *Report of the Commission of Inquiry to define and inquire into the boundary dispute existing between the Masubia and Mafwe tribes in the Eastern Caprivi*, South West Africa Administration, Windhoek, 1982.

³⁵ J.S. Malan, *Peoples of Namibia*, Rhino Publishers, Wingate Park, South Africa, 1995, lists 11 "peoples" of Namibia.

³⁶ A recent example of this antagonism between the Mafwe and Masubia was a SWAPO regional conference held to elect delegates in Caprivi: the process was subjected to ethnic tension which forced the ruling party's leadership to nullify the result and order a rerun ("Swapo's Caprivi conference nullified", *The Namibian Sun*, 16 August 2012).

³⁷ K.F.R. Budack, 1982 (op. cit.).

³⁸ Assuming an adult Mafwe population of perhaps 15 000, of whom half are men and half are women, the arrest of 300 Mafwe men, and the exile of a larger number, means that as many as 15-20% of the adult males, among them the most politically active and educated, have been removed from the local environment.

This marginalisation continues in the central government's planning for Caprivi. The core strategy appears to be based on eco-tourism, and manifests itself both in parks and in the creation of communal conservancies. This takes advantage of established tourist routes to Victoria Falls in Zimbabwe and Chobe National Park in Botswana, both sites being just over the border from Namibia. Increased trade with Zambia, and indeed all of central Africa, is possible with the completion of the German-financed Trans-Caprivi Highway, but this is still very underdeveloped, perhaps due to Zambia's poor road network and the war in the Democratic Republic of the Congo. All who know Caprivi acknowledge its great agricultural potential, but no major developments on that front have occurred.

There are no commercial farms in Caprivi and there was no white settlement there. Caprivi was always indigenous land, and the basic settlement patterns are at least 100 years old. The villages still look like traditional ones, with mud and straw huts being the typical form of housing. Over 80% of the regions inhabitants are without electricity. Because Caprivi is well watered (except in the north-west), there are fewer government boreholes than in the rest of Namibia, meaning that both people and animals get their water from traditionally dug wells or open water. Most Caprivians eat fish – many nearly every day – a cheap source of protein for the diet of poor people, and one that is absent in most of Namibia.

Caprivi has always been marginalised. It was never fully integrated into the German colony of South West Africa. The British initially attempted to rule the area from Botswana before the South African Administration began to rule it, first from South Africa and later from Windhoek. It was a labour reserve, but never contributed much labour to either South African or Namibian mines. There are few wage jobs, and perhaps 70% of the population work outside the formal labour force, primarily on farms of a few hectares.

Farming practices are still very traditional and the yield is low. Traditional seeds are saved and used, and little fertiliser is applied. Ten percent of the land is prepared for crops by hand, while 48% is prepared using oxen/donkeys and the rest by a combination of these methods. Only 40-46% of the households own plows, and 42% of all farmers crop less than one hectare of land – 47% between one and four hectares and 11% over 4 hectares. Given these small farming operations, it should not be surprising that government pensions are the largest source of income in Caprivi, followed by cash generated by the sale of cattle. Most of the crops are used for subsistence or traded, and do not generate any cash income.³⁹

Four traditional authorities are the primary political and legal institutions governing the agricultural lands in rural Caprivi. These are basic institutions of local government, financed by the central government. Each has a chief and a *khuta* (council), meeting in its own building and applying tribal law to local matters, including land allocation and disputes. The Masubia Traditional Authority sits in Bukalo, and the Mafwe Traditional Authority is based in Chinchimane. To these, two others have been added, namely the Mayeyi at Sangwali and another Mashi Traditional Authority at Choi. Both of these were created out of the original Mafwe Traditional Authority, and there is still considerable ill feeling there. Not only does the Mafwe Traditional Authority see these new authorities as illegitimate, but also it believes that they were formed by the ruling party, SWAPO, in an effort to divide the Mafwe, who are political opponents, and weaken their traditional institutions.

³⁹ National Planning Commission, *Regional Poverty Profile: Caprivi Region*, 2004, p. 9.



III. Communal Conservancies in Caprivi

This is the environment in which the communal conservancies came to play a leading role in poverty alleviation, development planning, and agricultural and commercial development in Caprivi. Beginning with the gazetting of the Salambala Conservancy in 1998, to date 13 conservancies have been gazetted in the region. The 2012 estimate of the total population of the 13 conservancies is 35 000. The entire population of Caprivi is about 100 000 and the population of Katima Mulilo is about 40 000, so the conservancy population represents about half of the region's rural population. Namibia's rural development policy for Caprivi is substantially invested in these conservancies. Conservancies make up 52% of all communal land in Namibia,⁴⁰ and 18.8% of Namibia's total land area. This figure is higher in Caprivi, with 3782km² or just over 26% of the region's land being conservancy lands.⁴¹

⁴⁰ The total communal land area is estimated at 298 200km², of which 155 205km² are conservancy lands (NACSO, *Registered Communal Conservancies in Namibia*, June 2012, available at www.nacso.org.na).

⁴¹ Caprivi has a total land area of 14528km². All this data is calculated from data in the National Planning Commission's *Regional Poverty Profile: Caprivi Region* (2004: xviii) and NACSO'S *Registered Communal Conservancies in Namibia* (op. cit.). The total conservation area in Caprivi is much larger if the recently established Mudumu North Complex Conservation Area and the Mamili National Park are included in this calculation, and if the total area covered by Caprivi's seven community forests is included. There is also a considerable amount of overlapping of conservancy and community forest areas in Caprivi.

The communal conservancies are complex legal institutions which are subject to a range of contradictions in the law governing communal land rights. While the dominant emphasis of the communal conservancy movement is on the dual role of protecting natural resources and providing incomes for conservancy members, the underlying land tenure problems threaten the stability of many conservancies. Unravelling these contradictions requires some analysis.

The starting point for the creation of communal conservancies is the so-called “tragedy of the commons”.⁴² This theoretical model, rooted in both logic and law in the idea that private property is necessary for economic development, holds that common property is inefficient because each communal landholder not only has no incentive to protect the whole, but in fact has an interest in overusing this property in order to maximise personal income. Thus, communal landholders can be expected to overgraze communal property, overuse croplands to the point of exhaustion, and, in the case of natural resources, appropriate as much as possible for themselves.

Communal conservancies were designed to provide an opposite incentive, that is, to give communal landholders a property interest in the natural resources of the conservancies, but not in the land. In return, they were expected to protect these natural resources, ensuring an abundant wildlife and plant population, which, in turn, would draw high-end tourists and hunters to Namibia.

Ironically, another part of the model actually began with the commercial farmers. As income from cattle, goats and sheep declined, increasing numbers of Namibian farmers turned to raising game for high-end hunting ventures. Namibian law facilitated this by providing that the landowner also owned the game on his land. In order to improve the quality of this hunting, groups of farmers banded together to form “conservancies” in the commercial areas – i.e. “freehold conservancies”.

At Independence this created a set of problems. Black land and white land was under two completely different legal regimes. White land was freehold and black land communal. This distinction then manifested in every area of national development. In the area of wildlife management, whites “owned” the wildlife on their lands, while blacks did not; the government claimed ownership of the communal lands and the wildlife there. Therefore, blacks had no incentive to protect wildlife. If anything, black poverty could be temporarily offset by shooting game and eating the meat. At the time of Independence, game populations in communal areas were highly stressed and conservation in the communal areas became a serious objective.

The communal conservancy model was in wide circulation around southern Africa as from the 1980s. Different forms of it were applied in different areas, with dozens and now hundreds of publications written. It is a complex programme and no two conservancies are alike. The emphasis on communal conservancies in development in Caprivi provides an opportunity to discuss both the details of different conservancies and the impact of the conservancy programme as a whole.

⁴² Hardin, “The Tragedy of the Commons”, in *Science (New Series)*, Vol. 162, No. 3859 (13 December 1968), pp. 1243-1248. The theory has been challenged for, among other reasons, being rooted in capitalist ideology and being, at the height of the Cold War, anti-communist. It also assumes that communal lands are unregulated by traditional peoples, ignoring customary law as a force in structuring rural land use in traditional societies.

On the one hand, communal conservancies provide income – sometimes large amounts – into isolated rural communities in which jobs are few and there is little money. Most of this money comes from three sources: big-game hunting concessions, tourism and NGO contributions. On the other hand, these funding sources share a feature which renders them highly unstable as funding sources for conservancies: all are based on wildlife, while local economies are heavily based on small-scale agriculture. This conflict has implications for any long-term development plans that do not emphasise local agriculture.

In its basic definition, a “communal conservancy” is a legal body, composed of a clearly defined membership, with a clearly defined geographical boundary within a communal land area. In addition, a conservancy has rights and duties in respect of the consumptive and non-consumptive use and sustainable management of game in such conservancy, to enable its members to derive benefits from such use and management.⁴³ It must have a management plan, a governance plan and a plan for distributing its income. Once these plans are in place, the conservancy must be approved by the Ministry of Environment and Tourism, whereafter it is “gazetted”, i.e. recorded in the *Government Gazette*.⁴⁴ This is a very flexible form of institution and each conservancy has a wide range of choices regarding these matters.

The great legal and social complexity of the conservancy unit requires substantial outside support for the work of creating and then running each unit its early years. In practice this means that “outsiders”, i.e. NGOs based in Windhoek, must go into the applicable rural communities for years to do the basic research, consult with the communities, assist with formulating governance plans which are both legal and representative, organise meetings and transport to meetings, train staff, keep accounts and interface with various government ministries – very difficult tasks in a country with great poverty, poor education, very under-developed local government, vast distances and poor roads in the rural areas. There is no question that, on one level, this effort is ‘heroic’.

On another level this effort is based both on the need to conserve wildlife – rather than on the need for sustainable subsistence agriculture – and on great promises of increased community wealth flowing from hunting and tourism, and particularly increased high-end tourism.⁴⁵ However, there is a finite number of wealthy Europeans and Americans who can pay thousands of dollars to shoot an elephant (standing right in front of them – an obscene act of sportsmanship somewhat akin to shooting a cow). Antelope species, which pay much less, at least offer the prospect of a challenging shot.⁴⁶ And, on the eco-tourism front, only a few people in the world can pay N\$2 000 a day or more to stay at Namibia’s luxury lodges.

⁴³ Section 24A(4) of the Nature Conservation Amendment Act of 1996.

⁴⁴ NACSO, *Namibia’s Communal Conservancies: A review of progress and challenges in 2009*, p. 11.

⁴⁵ There is a voluminous body of literature on community-based tourism in Namibia. On one level, in a highly stratified and racially structured social order with vast wealth flowing into a white tourist industry, paying attention to strategies for channelling tourism into black areas is a sound policy. On the other hand, tourism is a difficult industry – see, for example, Dilys Roe, Maryanne Gried-Gran and Wouter Schalken, “Getting the Lion’s Share from Tourism: Private Sector-Community Partnerships in Namibia”, International Institute for Environment and Development (IIED), London, June 2001.

⁴⁶ Caroline Ashley, Jon Barnes and Tim Healy, “Profits, Equity, Growth and Sustainability: The Potential Role of Wildlife Enterprises in Caprivi and Other Communal Areas of Namibia”, *DEA Research Discussion Paper No. 2*, Directorate of Environmental Affairs, Ministry of Environment and Tourism, Windhoek, August 1994.

This is the economic basis of the entire communal conservancy movement. A few crafts, a few campsites and a few animals shot for local meat bring in only a tiny fraction of the income.

In the short run, money flows into each conservancy because NGOs and the government put money into the conservancy programme.⁴⁷ In rural communities with few jobs, five, ten or twenty jobs are created. But there are hundreds of thousands of people living in the communal conservancies and the conservancy movement is the major development model being applied. It would seem that whatever the short-term benefits – and these have been substantial in some conservancies – the model is not viable in the long term as a development model. This said, it might be one option for development in a few well-located communities.

The conservancy programme resorts under the Ministry of Environment and Tourism, communal lands under the Ministry of Lands and Resettlement, and communal agriculture and the community forest programme under the Ministry of Agriculture, Water and Forestry. Besides the obvious bureaucratic problems caused by this diffusion of responsibility, the underlying problematic issue of land ownership remains unresolved. The residents of communal conservancies have some kind of ownership right over wildlife, but this does not extend to the land itself, nor to minerals, fishing and perhaps forests on that land.

There are communal conservancies all over Namibia, but most of them are in two core areas: the north-west (Kaokoland and Damaraland) and the north-east (Caprivi, Kavango and Bushmanland). Both are remote areas with superb wildlife habitats and room for people and animals. (In the context of what is happening in Africa, Namibia is in the unique position of still having people and animals living together, due to the small population and considerable numbers of wildlife.) The conservancy movement started in north-western Namibia.

Both of these areas are anchored by national parks – among the best in Africa. Etosha National Park dominates the wildlife environment of north-west Namibia; it is the heart of a great desert ecosystem that spreads west through Kaokoland and Damaraland. Similarly, the Okavango Delta and the Chobe National Park in Botswana define the wildlife environment of north-east Namibia. Kavango and Caprivi both adjoin this region of Botswana, and sections of the delta ecosystem extend into Namibia. Here, unlike in Etosha, the wildlife is not fenced in because the area is both too vast and too inaccessible; the vast waterlands and swamps of Caprivi cannot be fenced. So, in Caprivi, Namibia does not have even the nominal control of the wildlife that it has in Etosha and nearby areas. Animals can easily walk from Zambia across Namibia to Botswana in just a few days.

All of the conservancies in Caprivi border the swamplands, providing a pristine visual environment with plentiful opportunities for viewing wildlife. These swamplands, in turn, enclose five national parks – three in Namibia, one in Botswana and one in Zambia. This means that these conservancies are extensions of these national parks. Since the parks are all unfenced, the game moves freely from park to conservancy.

⁴⁷ Samson Mulonga and Carol Murphy, “Spending the Money: The Experience of Conservancy Benefit Distribution in Namibia up to Mid-2003”, *DEA Research Discussion Paper No. 63*, Directorate of Environmental Affairs, Ministry of Environment and Tourism, Windhoek, October 2003; and Carol Murphy and Lynn Halstead, “‘The Person with the idea for the campsite is a hero’: Institutional Arrangements and Livelihood Change Regarding Community-Owned Tourism Enterprises in Namibia”, *DEA Discussion Paper No. 61*, Directorate of Environmental Affairs, Ministry of Environment and Tourism, Windhoek, 2003.

A. Land Rights in Communal Conservancies

Sian Sullivan has argued that one reason that the communal conservancies have become so popular in communal villages is that these institutions provide some kind of proxy for “land rights” which do not otherwise exist.⁴⁸ Thus, many internal

conservancy issues really pertain to land rights, but this fact is often disguised in discussions of other conservancy-related matters. Nonetheless, the underlying issue is that the majority of Namibians live on the communal lands with no more rights to their land than they held under the South African apartheid-era regime.

In this context, the well-understood distinction in Roman Dutch or common law between “public” and “private” lands is essentially meaningless. This is especially true in a country where half of the land is “communal land” and over half of the population has unsecured rights to live on that land. The Government of Namibia, 22 years after Independence, has done little to clarify the legal status of the communal lands, even in the wake of the Communal Land Reform Act 5 of 2002. Indeed, government actions in relation to the communal lands have been rather vague.

The Constitution of Namibia is absolutely clear about the protection of private property, but is vague about the protection of people’s rights to their communal landholdings. Article 16(1) clearly protects “all” forms of property, but neither the government nor any court has ever held that this includes *communal* property – despite the clear meaning of the word “all” which appears twice in the first sentence of this Article, and despite the reference to property owned “in association with others”: “*All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others ...*”.⁴⁹

Initially after Independence, the government claimed that all communal land was “state land”, and that communal landholders could be removed at will, without compensation. Two events, reported on extensively, challenged this government position: the Himba people’s refusal to move to make way for a proposed dam at Epupa Falls (north-west); and the Khwe San community’s refusal to abandon their campsite at Popa Falls (north-east) to make way for a prison farm on the same site and a private safari camp near the falls. Although neither case resulted in a final legal ruling, there were clear signs that the government was rethinking its position. No official pronouncement ever followed, but the notion that the government was holding communal lands “in trust” for the people who lived there evolved from these cases.



Pylons erected on communal lands in Caprivi deprive some communities of large tracts of land and certain land rights.

⁴⁸ Sian Sullivan, “Gender, Ethnographic Myths and Community Based Conservation in a Former Namibian Homeland”, in Dorothy Hodgson, *Rethinking Pastoralism in Africa*, James Curry, Oxford, 2000.

⁴⁹ Sidney L. Harring, “The Constitution of Namibia and the Land Question”, 1996 (op. cit.).

This was also the South African stance on its “native trust” lands. Since legally one cannot take any land title that is greater than the grantor held, and since the Namibian Government inherited South African land law, this stance would follow from Namibia’s taking of the former South African title.

This is an important development because lands held in trust, although technically “owned” by the trustee, are held entirely for the benefit of the beneficiaries. If a trustee breaches this trust agreement by using the land in some other way, then the trustee is entirely responsible for damages in a court of law. Yet, apparently no such compensation has ever been paid in a Namibian court, even though, since Independence, the government has clearly taken a great deal of communal land away from its traditional owners for other purposes – examples being the railway across the former Ovamboland and the new power line across Kavango and Caprivi.⁵⁰

Even more threatening than the government’s taking of communal land by virtue of it being “state land” is the view that the right bestowed by Article 21(h) of the Constitution to “reside and settle in any part of Namibia” means that any citizen can freely settle on *communal* land anywhere in the country because it is “state land” or “public land”: this provision does not grant any right to settle on the *property* of another. Poor people with cattle have been moving onto the communal lands of other poor people – which might be expected in a cattle-based economy particularly – claiming a constitutional right to do so,⁵¹ but this claim obviously denies other citizens living on communal land any secure right to property on that land.

A communal conservancy, however, has a defined membership, a marked boundary and a management plan. This gives the members some power against outsiders who move onto their land. Thus, creating a conservancy is one way that a local community can protect itself, and at least some of its resources, from outsiders in an environment where land rights are not clearly defined and there is poor access to the legal system.

The government has not taken clear positions on these matters, but rather has left such matters to local action (or inaction). The result has been chaos in many parts of the country. The structures for dealing with such matters legally have also been unclear. The Traditional Authorities Act 25 of 2000 gives the traditional authorities jurisdiction over land matters. For example, section 2(c) of the Act gives traditional authorities the power to ensure that their respective traditional communities use the natural resources at their

⁵⁰ The Caprivi link connects Namibia to the electricity networks of Zambia, Zimbabwe, the Democratic Republic of the Congo, Mozambique and South Africa, thereby creating an alternative route for power imports and exports to and from neighbouring countries. The link is also meant to ensure a reliable power supply to Caprivi, which has now been connected to the Namibian grid. Caprivi previously received electricity from Zambia. An interesting observation when travelling through Bwabwata National Park in western Caprivi and through some of the conservancies in eastern Caprivi is that communities still live in close proximity to the pylons and power lines, yet at night continue to use firewood for cooking and basic illumination. The power lines have brought no benefits to the applicable communities, and it is doubtful that they have received any compensation for the loss of the land now occupied by the pylons.

⁵¹ Some lawyers find this level of argument inadequate, but we have to remember that the Namibian Constitution, like any other, is a living document, embodying the legal hopes and dreams of a people, so it has a central place in popular culture. The notion that the communal lands are owned by the Namibian people as a whole and that citizens can therefore occupy and use them at will has had an obvious popular appeal in the years following apartheid.

disposal on a sustainable basis. But a traditional authority has jurisdiction over its own people only; if people of a neighbouring tribe move in, they are not under the jurisdiction of the local traditional authority. They may request permission to use the lands of a neighbouring authority, but this creates a set of legal issues that stretches the reach of traditional law.

Under the Communal Land Reform Act, land boards were created to deal with these types of land disputes. The boards, composed of members of various branches of government as well as local representatives, are either not trained or not supported well enough, and have limited powers to handle sometimes legally complex land disputes.

Another legal problem for a communal conservancy is that land rights are not protected by the conservancy, but rights to wildlife are. This elevates one kind of property right and diminishes another. In this context, the distinction between public and private property becomes meaningless, and distinctions between types of property become exaggerated.⁵² When this shift occurs in an isolated rural environment, occupied by poor people with little access to law and legal institutions, it distorts both property rights and law within a very fragile social structure.

This legal problem is also distorting the basic rural economic structure, which, in a land of poor people, is life-threatening. There is a real threat of hunger in much of rural Namibia, and drought aid is a regular feature in Namibia's communal areas. For example, in July 2012 the Cabinet approved relief aid of N\$32 million to feed people and livestock in four drought-stricken constituencies in Kunene Region.⁵³ In recent years, uncommonly high rainfall has made flood aid a constant feature in Caprivi, Oshana and Omusati Regions. This aid has included relocating communities to safe areas, and giving them food, shelter, blankets, mosquito nets and water purification tablets to prevent the outbreak of diseases. The communal conservancies vest the poor peoples' property rights in wildlife, and not so much in their traditional agriculture. While wildlife clearly has some capacity to feed poor people, it is a poor substitute for farming. The core economic activity of rural Namibia is still subsistence farming, which feeds many people, even if it is supplemented by pension income, casual labour and conservancy income. Whereas wildlife is attractive to European and American donors and NGOs, rural agriculture is often not. Virtually all of the communities that create communal conservancies are, at their core, agricultural communities. Because agricultural land is not well protected by existing property rights, whereas wildlife is well protected as conservancy property, the whole structure of the rural economy is biased against traditional agriculture. As a result, large amounts of development money continue

⁵² There is a substantial and growing body of literature on the declining significance of the public/private distinction in property law – see, for example, Sidney L. Haring, “Multicentrism in Law: The Legal Structuring of Land Reform in Southern Africa, Globalization and Legal Theory”, in Marek Zirk-Sadowski, Mariusz Golecki and Bartosz Wojciechowski (eds.), *Multicentrism as a Emerging Paradigm in Legal Theory*, Peter Lang, Frankfurt, 2009.

All “private” property is held subject to public law – law that can diminish or eliminate private property rights under a large number of conditions, including eminent domain, taxation, national emergency and various public use rights. Public property is also subject to limitations by law, with different segments of the public enjoying different levels of rights. Communal lands are a distinct type of land tenure system that is neither public nor private, but rather “communal”; these lands belong to particular communities. The fact that these communities are “tribal” gives them another layer of rights under tribal law. There is another large body of literature on property law under various systems of tribal customary law.

⁵³ Selma Shipanga, “Namibia: Drought Relief for Kunene”, in *The Namibian*, 20 July 2012.

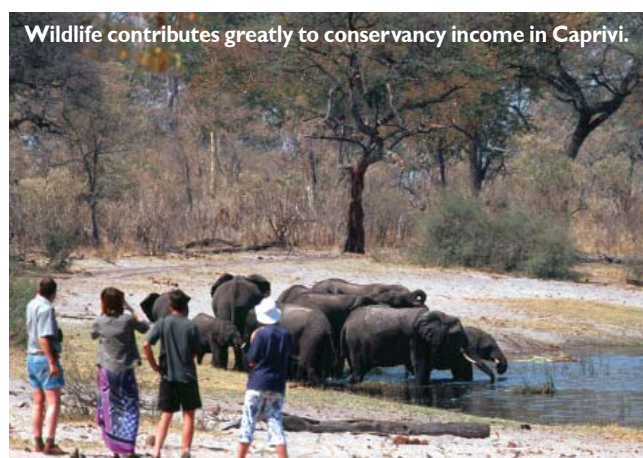
to flow to the tourism sector, including conservancies for protecting wildlife, while lesser amounts flow to rural communities, including conservancies, for developing subsistence agriculture.⁵⁴

The Millennium Challenge Account (MCA) Namibia Compact, which provides funding grants for public investments in education, tourism and agriculture (livestock and indigenous natural products), exemplifies this disparity in funding for wildlife vs agriculture. The MCA was set up in 2008 by the Governments of Namibia and the USA as partners acting through the Millennium Challenge Corporation (MCC). The MCA makes US\$304,5 million available for development in the target sectors in Namibia, over and above the current government allocations and assistance from other development partners. Of this total amount, US\$66,96 million is allocated to the tourism sector, and US\$46,97million to the agricultural sector.⁵⁵

B. The Economics of Conservancies

The chance to acquire some level of legal recognition of the rights of poor people to the natural resources on their land, and perhaps some proxy for land rights, is one of the two major considerations that move Namibians to form conservancies. The other is economic. Many poor people consider conservancies to be a route to economic betterment. Although the record in this regard is clearly mixed, conservancies brought in a total of over N\$42 million in 2009 – roughly N\$750 000 per conservancy. Even if we consider only the cash income of over N\$20 million in total, this amounts to about N\$360 000 per conservancy.⁵⁶ While this is a small amount by some standards, it represents a major infusion of cash into communal villages which have very little cash besides pension payments.

But, on close examination, the record becomes much more mixed. Very few conservancies make most of the money that comes in, and some have next to no income. Many – or even most – conservancies are heavily dependent on money and other forms of support from



⁵⁴ According to the Millennium Challenge Account (MCA) Namibia Compact, Namibia has the potential to become one of Africa's leading tourism economies over the next decade. The contribution of travel and tourism to GDP is expected to increase from 14.5% (US\$1 051,7 million) in 2008 to 20.7% (US\$2 967,9 million) by 2018, and from 18.2% (77 000 jobs) to 23.7% (129 000 jobs) of total employment in the same period. According to the World Travel and Tourism Council, growth in the travel and tourism economy was expected to be 5.9% in 2008, and to average at 7.7% per annum over the next 10 years, which ranks the Namibia tourism industry eighth out of 176 countries in the growth forecast. (Source: MCA-Namibia at www.mcanamibia.org/proj_projectpages.php?projectid=3&projectname=Tourism)

⁵⁵ MCA Namibia Agriculture Project Description, April 2009, p. 7; and MCA-Namibia at www.mcanamibia.org.na/.

⁵⁶ NACSO, *Namibia's Communal Conservancies: A review of progress and challenges in 2009*, pp. 20-23.

NGOs; indeed they would not function without this assistance. For most conservancies the sources of income are very limited. Chief among the income sources are trophy hunting concessions: one rich German or Texan hunter might pay a conservancy N\$115 000 for the right to shoot an elephant or a lion, and this can even be the only source of income for the whole year. Other conservancies are more broadly dependent on high-end tourism through joint-venture lodges. Torra, the richest conservancy in Namibia, earns over N\$2 million a year, most of it from its joint venture with Wilderness Safaris, a luxury eco-tourism venture. Kwandu Conservancy in Caprivi earned N\$352 086 in 2011, of which N\$342 550 came from hunting. Its total expenses were N\$333 395, of which the bulk, i.e. N\$289 480, went to salaries, leaving a surplus of N\$22 984 for distribution among the 4300⁵⁷ members. According to the Kwandu Conservancy Committee, the conservancy has lost hunting income over the last few years because it has not been able to secure a professional hunter for the conservancy. In 2008, a dispute with a potential lodge developer in the Kwandu area resulted in the deal going sour and the investment being withdrawn. With no secure hunting deal and no joint-venture agreement for a tourism facility, a conservancy becomes vulnerable in the current global tourism climate. The experience of Kwandu Conservancy exemplifies this vulnerability.

For the Salambala area in Caprivi, the model was apparently the highly profitable joint-venture agreement between Lianshulu Lodge, regarded as one of the best lodges in Namibia, and Balyerwa Conservancy to the west of Salambala.⁵⁸ The terrain and wildlife opportunities in the area are equally strong, and such a lodge has the potential to bring hundreds of thousands of dollars a year into the conservancy, along with dozens of jobs.

Before continuing this discussion, it is appropriate to underpin it with some statements about the instability of high-end tourism as a basis for any development plan. The issue is not whether rich hunters shooting elephants for trophies is sustainable, but rather it is whether it is sound to base any rural development strategy on such 'tourism'. Tourism in Namibia, for example, experienced a sharp decline as a result of the worldwide recession that started in 2008. For most people, eco-tourism is more palatable than elephant hunting, but only a small proportion of the world's population can afford to travel to Namibia and stay in lodges that cost N\$1 600, N\$2 100 or N\$3 000 a day. So, if rural Namibia's economic development depends on this, it is a dangerous strategy.

In 2007, eight conservancies earned N\$500 000 or more in cash, 16 earned between N\$100 000 and N\$500 000, and 12 earned less than N\$100 000 (about US\$15 000). At the time, this amounted to 36 conservancies, and the remaining 14 either earned nothing or failed to report any income.⁵⁹ This income does not include donor funding. In 2007 and to date, about half of the conservancies made/make either very little money or no money,

⁵⁷ This figure of 4300 is in fact inaccurate: in its progress reports, the Namibian Association of CBNRM Support Organisations (NACSO) normally records the approximate number of people living in a conservancy, which often creates the impression that this is the number of actual members, but in reality, only 1800 of the 4300 inhabitants of Kwandu Conservancy are actual members, as only 1800 have registered with the Kwandu Conservancy Committee to become members. Officially, only registered members are entitled to receive benefits from a conservancy.

⁵⁸ NACSO, *Namibia's Communal Conservancies: A review of progress and challenges in 2009*, p. 74.

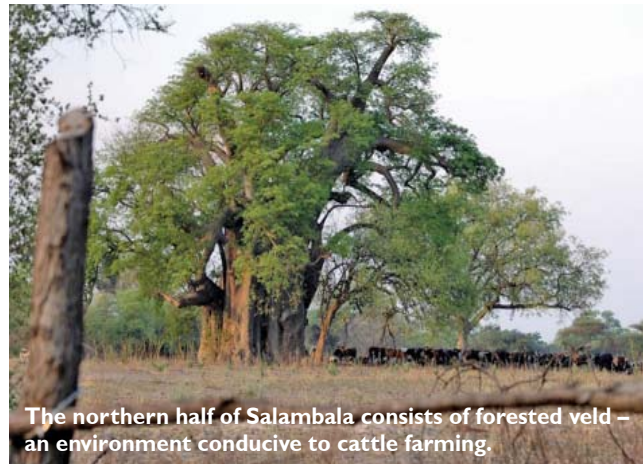
⁵⁹ To date in 2012, 76 conservancies throughout Namibia have been gazetted.

although it must be borne in mind that new conservancies have not yet had a chance to make money. Of the N\$22 000 000 paid out in cash in 2007, the largest expenditures were for jobs, i.e. the salaries of those running the conservancies.⁶⁰ In 2007, 27 conservancies paid a total of 154 full-time and 50 part-time staff. Donor support paid 141 additional full-time salaries.⁶¹ These cash payments are clearly a benefit in poor villages, but they also raise the question of where interests might lie in such a scheme: there is a clear economic incentive not only for a community to have a conservancy, but also for some people within the community to gain control of it so that they can control the flow of money.

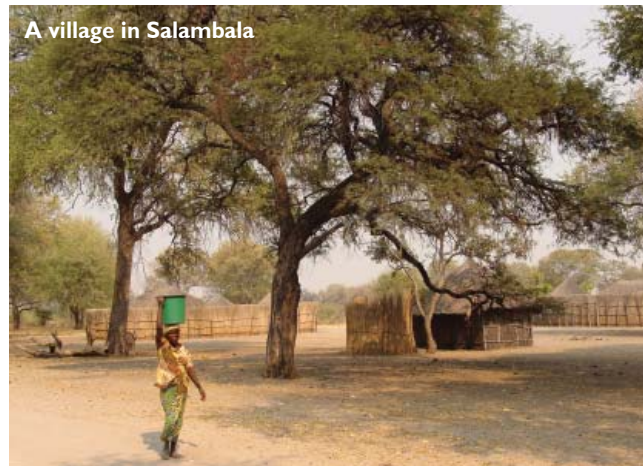
C. Salambala Conservancy

Every conservancy is different by virtue of both the local conditions and the wide variety of choices that the members can make. Salambala, the third conservancy formed in Namibia after Torra and Nyae Nyae, is an iconic model of the success of the conservancy movement in Namibia. One of the largest conservancies in the country, its success in running its craft shop and two campsites has made it one of the richest too. Salambala is a model conservancy not only for Caprivi but for the entire country, thus it has been the subject of much research. The southern part (approximately half) of Salambala's typically Caprivian landscape is situated in a low-lying swampland, especially wet near the Botswana border, and the northern part consists of forested veld. Immediately across the border in Botswana is

Chobe National Park, one of the most well-known wildlife areas in the world. Since the border is unfenced – the Chobe River is the border⁶² – Chobe's wildlife have free access to Salambala.



The northern half of Salambala consists of forested veld – an environment conducive to cattle farming.



A village in Salambala

⁶⁰ Conservancies are exempted from paying tax, therefore 100% of the benefits from wildlife are retained locally – see, for example, Dilys Roe, Fred Nelson and Chris Sandbrook (eds), "Community management of natural resources in Africa: Impacts, experiences and future directions", in *Natural Resource Issues*, No. 18, International Institute for Environment and Development, London, 2009.

⁶¹ NACSO, *Namibia's Communal Conservancies: A review of progress and challenges in 2009*, p. 56.

⁶² Namibia and Botswana have a long history of confrontation on the Chobe River which forms the border between the two countries. In a recent incident, the Botswana Defence Force opened fire on Caprivians on the river, accusing them of poaching game in Chobe National Park – see, for example, Imon Liseli, "Caprivi Governor cautions against illegal entry into foreign land", *The Caprivi Vision*, 13 August 2012.

Covering 930 hectares, Salambala is home to just over 8 000 people, of whom about 3 500 are conservancy members⁶³ – therefore about 4 500 residents (non-members) do not share the conservancy benefits.⁶⁴ Salambala encompasses the village of Bukalo, home of the Masubia Traditional Authority, the political core of the Masubia people. Almost all of its populace is Masubia; only one of the 18 villages in the conservancy is a Mafwe village. Intermarriage between Masubia and Mafwe – and other peoples in the area – is common.

The history of the conservancy traces directly from the desire of the Masubia Traditional Authority to protect the Salambala forest from overgrazing and environmental degradation, starting in the mid 1960s.⁶⁵ Prior to that time, the area was the private hunting preserve of the Masubia royal family, but the rapid social change of the 1960s left them unable to control the use of the forest. Uncontrolled hunting, by both sport hunters and subsistence hunters, had decimated the wildlife. In addition, farmers moved their grazing cattle herds into the forest where they had never been before, and in the process, chopped down trees to build kraals and homesteads, and to plough cropping fields. In addition – as is the norm when cattle graze in a forest – the cattle destroyed much of the forest's wildlife habitat, degraded its ecology by destroying the forest floor and eating all the grass and young trees, and hence blocked natural regeneration. Erosion followed and the forest thinned.

The Masubia chiefs offered the forest to the colonial government for the creation of a national park. When the government rejected the offer – ostensibly on the ground it was too expensive – the chiefs offered it as a conservation area instead, but that offer was also rejected. In retrospect, these rejections were probably due to the South African authorities simply having no interest in developing Caprivi. Although a major opportunity was lost in terms of wildlife conservation, the rejections meant that the land remained communal land of the Masubia. The wildlife conservation model at the time, as practised in Etosha and the Kruger National Park in South Africa, involved fencing animals in and local people out, which created a tension in development that continues to this day.⁶⁶

The colonial government's refusal to implement any means to conserve the Salambala forest meant that the community's desire for some kind of conservation status was still being articulated when the idea of communal conservancies came to the fore in Namibia. Given the size and location of Salambala, it made perfect sense for the NGOs organising the original communal conservancies to focus on Salambala as one of the first in the country.

⁶³ Carol Murphy, "Who Will Benefit from Tourism and Wildlife Management? Conflict Management in Salambala Conservancy, Namibia (Case Study 1)", in Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management: Case Studies and Lessons Learned*, Food and Agriculture Organisation of the United Nations, Rome, 2007.

⁶⁴ Many Masubia have more than one residence – often one in a village and one in Katima Mulilo, and occasionally another at a cattle post. Accordingly, the question of residence comes into play in determining the proportion of the population living in the area who actually belong to the conservancy. In general, the issue of non-members not being considered part of the conservancy and thus not getting any benefit from the conservancy raises important questions about 'legitimacy' in many conservancies.

⁶⁵ Carol Murphy, "Summary of Participatory Livelihoods Workshops with Salambala Conservancy (February 2002)", *WILD Working Paper No. 9*, Wildlife Integration for Livelihood Diversification (WILD) Project, Ministry of Environment and Tourism, 2002.

⁶⁶ Kenneth Matengu, "The Quest for Sustainable Community-Based Tourism in Salambala Conservancy, Caprivi Region, Namibia", Master's thesis, University of Joensuu, Finland, 2001, pp. 9-11; and Carol Murphy, "Who Will Benefit from Tourism and Wildlife Management", 2007 (op. cit.), pp. 20-22.

Good documentation of this process exists, and it presents a troubling history that probably carries the roots of the present crisis. The Masubia Traditional Authority was solidly behind the conservancy proposal, apparently with the goal of protecting the Salambala forest, but also perhaps with the ulterior motive of forcing out ‘squatters’ – if this is the appropriate term for those who move into communal lands without permission. The Authority had clearly lost control of the forest as hundreds of cattle herders moved in without permission from anyone. This creates a clear picture of a traditional authority that lacked the capacity to allocate land use in its communal lands. At the same time, this was the only legal body having such authority, which illustrates that customary law had broken down in Caprivi. Literally, nobody was in charge of the Salambala communal land. Creating a conservancy raised the possibility that a new legal body of this kind, backed by NGOs in Windhoek and outside Namibia, could control the area for the benefit of the Masubia Traditional Authority.

More of this issue of control emerges in documents on the creation of the conservancy. Each of the 18 villages located within its borders was supposed to elect representatives to the conservancy committee, and they had to be present in meetings to design the conservancy, make critical decisions about land use and governance, and carry the information back to the villages. However, some people attended the first meeting/s as representatives, and then never attended again, rendering memberships unstable. Only a few representatives showed up at critical meetings, therefore many of the village communities had no idea of the decisions being made.⁶⁷

Besides governance decisions, some critical decisions about land use had to be made at an early stage. The basic structure of conservancies differs from one to the next, but all conservancies are formed by agricultural villages, thus care has to be taken to preclude conflict between wildlife and domestic animals.⁶⁸ Salambala conservancy would have a “core area”, being the forest, which would be home to the wildlife – i.e. wildlife would be reintroduced into the forest.⁶⁹ To create a suitable wildlife habitat, the farmers and herders would have to vacate the core area. The plan was that they would return to their “ancestral villages”, i.e. the villages from which they originally came.⁷⁰ In turn, the 18 villages, located around the edges of the core area, would continue their farming and herding activities – important means by which these agricultural people meet their basic daily needs.

⁶⁷ There is some dispute over the extent of community involvement in the conservancy. On the one hand, there is no question that the IRDNC and other NGOs invested considerable time and energy in facilitating (or creating) a participatory process. There are extensive records of such meetings – see, for example, Carol Murphy, “Summary of Participatory Livelihoods Workshops with Salambala Conservancy”, 2002 (op. cit.). On the other hand, there was clearly a struggle to achieve a participatory process due to different people joining and then dropping out of the process, with some villages poorly represented at meetings. The conservancy is very large, distances are great, and there is little transport.

⁶⁸ In a survey in 2002, 31% of the respondents stated that the major disadvantage for the conservancy community was “livestock killed by wildlife” (“Salambala Conservancy, Caprivi: Summary of Results of WILD Project/ EEU CBNRM and Livelihoods Household Survey, 2002”, *WILD Working Paper No. 12*, 2002).

⁶⁹ The “core area” totals 14 000 hectares.

⁷⁰ Kenneth Matengu, “The Quest for Sustainable Community-Based Tourism in Salambala Conservancy, Caprivi Region, Namibia”, 2001 (op. cit.), pp. 71-72. This view of “ancestral villages” oversimplifies the traditional village culture of the Masubia. People typically have several ancestral villages, and may even currently have homes in several villages. In addition, the land in each village is fully allocated, so that people and cattle from the core wildlife area cannot simply move elsewhere without causing substantial dislocations of others.

Clearly some undercurrents of dissatisfaction were present, as well as general apathy and alienation. From the start, some people made an obvious point: they – and their cattle – lived in the core area, and did not want to move out. Their exact numbers are unknown, but about 200 people (constituting 17 families) and several thousand head of cattle lived in the core area at the time. They had moved into this area in the previous 10-30 years because the grazing in their ancestral villages was overcrowded, and more and better grass was available in the core area. They clearly knew that moving back to their villages would impoverish them and simultaneously create new conflict over the lands that they would need to occupy in the villages, which other farmers and herders were using at the time.

With this conflict simmering on the surface, the Salambala Conservancy Committee moved forward, and gazetted the conservancy. The Masubia Traditional Authority met, and the *Khuta* (legislative council) voted to expel the farmers and herders from the core area. Notices were sent out and trucks were sent to move them. Sixteen of the 17 families were removed in this way; one refused to move. Two outsiders then took advantage of the depopulation and moved with their cattle onto the vacated land, and one family moved back. In the end, four extended families remained in the core area with cattle numbering in the hundreds at least.

Incredibly, the conservancy was gazetted despite its basic wildlife management plan being inoperable due to the core area being not only not vacant, but also heavily grazed and unsuitable for game.⁷¹ While the cattle continued grazing, the conservancy went ahead with negotiations with a foreign safari company to erect a tourist camp in the core area, which would pay hundreds of thousands of dollars to the conservancy. The negotiation process went as far as an application to the Ministry of Lands for a permission to occupy (PTO) lease. With the negotiations and posturing ongoing, one of the herders moved his kraal and herd directly onto the PTO site, obviously to make the point that the conservancy and the government were in no position to lease this land because it was not under their control. The safari company withdrew its offer and abandoned the Namibian market. In its letter of withdrawal, the company expressed disappointment that the government was not in a position to remove the herders, and implicitly raised questions about the government's capacity to create a legal environment that would support this kind of tourism development.⁷²

At this point the Masubia Traditional Authority apparently gave up on the idea of removing the herders, and instead, together with the conservancy, sued three of the herders – in the High Court in Windhoek, some 1 300 km away but the only court available – for damages as well as an eviction order. Several sets of papers were served, and the three herders emerged represented by one of Namibia's leading law firms. Then, after 2002, no action was taken at all, and the case remains unprosecuted to this day. This case sheds a lot of light on the problems surrounding land tenure, livelihoods and communal conservancies. At the same time, the conservancies are legal institutions operating within a complex legal structure, but a structure which, as this case illustrates, barely reaches the rural corners of Namibia.

⁷¹ This apparently means that Salambala Conservancy was gazetted illegally, since a viable wildlife plan is a legal requirement for any conservancy. Although clearly there was such a plan, it was inoperable at the time of the gazetting.

⁷² Kenneth Matengu, "The Quest for Sustainable Community-Based Tourism in Salambala Conservancy, Caprivi Region, Namibia", 2001 (op. cit.), pp. 71-72.

D. The Salambala Case

Namibia's existing 76 communal conservancies are legal entities, acting under the authority of the Namibian Government. Given the complex land-use matters under their control, the large area of land that they collectively occupy, and the fact that they are home to a large proportion of Namibia's population, legal disputes are to be expected. Counteracting such disputes is the difficulty that poor people have in accessing the country's legal system: there are few lawyers in rural Namibia, and their fees are beyond the reach of most Namibians.



Conservancies depend on natural resources for many purposes, such as grass for building huts.

The Salambala court case's origins precede the registration of the conservancy in June 1998; the case stemmed from the conservancy's creation process. At first, 17 families lived in the core wildlife area, 16 of which moved out as the conservancy process moved forward in 1997. Two outsiders then moved onto the vacated land, and later, one family which had moved out, moved back, bringing the total of families in the core area to four.⁷³ This small group actively resisted being moved from the area, even after a meeting convened by the Caprivi Regional Governor in July 1998.

The objections of this disaffected group are well documented in what is now recognised as a fraudulent petition said to be authored by the group, and a detailed letter written by Sinvula Fidelis Mujiwa and addressed to the Minister of Environment and Tourism. As Sinvula in fact authored both documents, the arguments overlap. The petition, dated 15 July 1997, preceded the letter, dated 25 July. The letter is the more detailed document.

Sinvula claimed that his right to live in the core area was constitutionally protected by Articles 13(1) (protecting the privacy of the home), Article 16(1) (protecting property rights and inheritance), Article 21(1)(a) (protecting the right of all Namibian citizens to freedom of speech) and Article 21(1)(h) (the right to reside and settle in any part of Namibia).

He went on to attack the legitimacy of the Nature Conservation Amendment Act of 1996 which provides for the establishment of communal conservancies. His objection was rooted in the idea that a group of people living in a communal area could not constitute a conservancy, and then exclude others for their own benefit, with the knowledge of the relevant traditional authority. He also argued that the conservancy's advisors were outsiders.⁷⁴ He maintained that he favoured development, but that such development should not hurt "other people's feelings".

He objected to being hauled into a court of law (i.e. the Masubia Traditional Authority) to be deprived of his lands, and pointed out that two of his brothers had died in exile.

⁷³ Chris Weaver, Living in a Finite Environment (LIFE) Programme (of the World Wildlife Fund), memorandum to Maria Kapere, Directorate of Environmental Affairs, 20 January 1998. The case file contains a copy of this memo along with the other documents cited in this section concerning the case.

⁷⁴ The conservancy constitution was drafted by the management committee under the guidance of the Legal Assistance Centre (LAC). The LAC also facilitated a two-day workshop with the management committee to develop a draft constitution based on the conservancy's goal, objectives and management mandates.

Emotionally, he appealed to the Minister to allow him to remain on his “ancestral land”, and concluded that removing a person from his ancestral land is a very serious offence to the Constitution of the Republic of Namibia.⁷⁵

The petition took more or less the same position, and was apparently co-authored by Sinvula and Christoph Nzwile. Of 304 signatories purporting to object to the creation of the conservancy, only 149 were members of the conservancy. Most of the other 155 were children or dead people, and many of the members’ signatures were fakes. In addition, some living adults whose names were on the petition denied having signed it.

Nevertheless, on 7 July the Caprivi Regional Governor convened a meeting of about 80 people to try to resolve the dispute, but his effort failed. The four individuals representing the four families were then summoned to the *Khuta*, which ordered the eviction.⁷⁶

Apparently two of the remaining residents, namely Masibi and Masubiana, had some form of communal land right in the core area, whereas the two strongest objectors, Nzwile and Sinvula, did not. The latter two belonged to families which had moved out of the core area years before, but moved back in order to “preserve” their rights. Under Masubia traditional law, they no longer had land rights in the area for two reasons: firstly, if a land use is abandoned for five years, it is forfeited – a rule that makes sense in areas used for intensive agriculture; and secondly, under Masubia law there is no automatic right of inheritance of family land. Rather, upon the death of the holder of the land right, the children must ask the *Khuta* to reallocate the right, which neither Nzwile nor Sinvula had done. Nonetheless, Sinvula claimed 6000 hectares of “ancestral land” in the core area. A further problem in Sinvula’s case was that all the dates were in dispute: he claimed that his family had moved out in 1985 and moved back in 1992, whereas others claimed that his family had moved out in 1975 and that he did not move back until 1996.⁷⁷

The Regional Governor, apparently for political reasons, backed the four and refused to approve the conservancy.⁷⁸ But the conservancy moved ahead anyway, and in February 1998, the Minister of Lands, Resettlement and Rehabilitation sent letters to the four ‘holdouts’, demanding that they move from the core area.⁷⁹ They responded by hiring a lawyer.⁸⁰ In a letter addressed to the Permanent Secretary of Lands, Resettlement and Rehabilitation dated 7 April 1998, Windhoek attorney R.N. Metcalfe, acting for four Masubia residents of the core area (Thomas Mambiana, Petrus Masibi, Fidelus Sinvula and Christoph Nzwila) as well as a non-resident of the core area (Daniel Chaka), both challenged the legality of the

⁷⁵ Sinvula Fidelis Mujiwa, letter addressed to the Minister of Environment and Tourism, 25 July 1997.

⁷⁶ Chris Weaver, LIFE Programme, letter to Leon van Rooyen, Deputy Director of Conservation, Ministry of Environment and Tourism, 11 August 1997, detailing a chronology of these events.

⁷⁷ Ibid., p. 2.

⁷⁸ This was the upshot of the Governor’s meeting with the Masubia Traditional Authority at Bukalo on 15 July 1997, which he convened to resolve the conflict over the core wildlife area. The Governor, of Mafwe descent, was a member of the Democratic Turnhalle Alliance (DTA), SWAPO’s opposition, whereas both the Masubia Traditional Authority and the Conservancy were SWAPO supporters. In blocking the conservancy, the Governor was impeding a Masubia assertion of control over the area.

⁷⁹ Minister of Lands, letter to Christoph Nzwila dated 19 February 1998. (Identical letters were sent to each of the other three residents of the core area.)

⁸⁰ The obvious question arising here is how the defendants would pay their lawyer – a confidential matter. It seemed that none of the defendants had the financial means to pay him, but the amount of “ancestral land” claimed was substantial, and sufficient to cover almost any legal bill.

conservancy and announced that not only would his clients not move, but also they would resist any attempts to remove them from the core area.

A number of specific objections were listed in Metcalfe's letter, including, *inter alia*, the following:

- 1) The conservancy committee is not at all representative of the community.
- 2) No property consultations were undertaken with the members of the community affected by the plans to establish the conservancy.
- 3) The constitution of the conservancy has been imposed ... by extraneous sources.
- 4) No minutes exist re the meeting called for the adoption of the constitution and/or discussion of the contents.
- 5) Persons who reside outside the Salambala area have been placed on the management committee.
- 6) The clients and their families have been residing in the area for the past forty years.

Two months later, the conservancy was gazetted without regard to these objections, but clearly with officials being aware of them. In fact, there was a flurry of activity in response to this legal threat, in both Windhoek and Caprivi. The Masubia Traditional Authority offered a point-by-point rebuttal of the charges, concluding with the assertion that complainants Sinvula and Nzwila did not in fact live in the core area, but had moved their cattle in only recently, as others had moved out for the establishment of the conservancy. Mambiana had lived in the core area, and had not only accepted N\$2 000 to cover the expenses of moving out, but also had then taken up the conservancy's offer of employment as a game guard, for a monthly salary of N\$475.⁸¹

Fencing of some parts of the core area followed.⁸² This, two months later, prompted another letter from attorney Metcalfe to the Ministry of Lands, demanding that the fences be removed, and threatening, if they were not removed, to approach the High Court for relief including an order to restore the cattle farmers' right to possess the land.⁸³ An internal memorandum circulated in the Ministry of Environment and Tourism (the ministry responsible for the conservancy) denied that the Ministry of Lands had the power to order such a removal, relying on Regulation 54 of the Bantu Areas Land Regulations of 11 July 1969 (a South African colonial-era regulation) which gave "the Bantu Commissioner or his authorized representative ..." the power to "cause to be erected beacons, pegs or other indicators ... to indicate the limits of the land so demarcated, whereupon all rights to such land previously enjoyed by any person other than the holder of the land so demarcated shall be deemed to have lapsed".⁸⁴

⁸¹ Munitenge Royal Establishment, letter to the Minister of Lands, Resettlement and Rehabilitation, 7 April 1998.

⁸² On 19 February 1998, His Royal Highness K.M. Liswani III wrote to the Minister of Lands requesting her support for the fencing of the core wildlife area of 14 000 hectares. The reason given for such fencing was to minimise conflict potentially arising from competing land uses such as livestock grazing.

⁸³ Attorney Metcalfe, letter to the Minister of Lands, 8 June 1998.

⁸⁴ Michaela Figueira, Coordinator of the Environmental Legislation Project, Ministry of Environment and Tourism, 27 May 1998.

This somewhat bizarre use of the colonial statute was apparently intended to support the proposition that the law authorised putting in such boundary markers, but did not authorise their removal. The fact that the Masubia Traditional Authority and the Ministry of Lands had authority over the land should have provided sufficient power in itself.

The Traditional Authority responded with its own letter, raising the spectre of uncontrolled violence if this small group was permitted to take any action to block the creation of the conservancy. The Authority complained that the real intention was to destabilise its own authority. It further complained that one of these same four individuals had helped to block a sugar plantation project at Lake Liambezi in 1994.⁸⁵ A further letter from the Traditional Authority to the local Chief of Police complained that these individuals were harbouring secessionists, an accusation that nothing in the record supports, and one that is clearly inflammatory in the context of the Caprivi uprising in the same year.⁸⁶

The Caprivi insurrection of 1999 put a hold on these matters until 2001 when the case became active again. At this point, the Legal Assistance Centre (LAC) was acting for the Masubia Traditional Authority and the Salambala Conservancy in requesting that the Minister of Lands evict the now three remaining residents of the core area – Thomas Mambiana, having moved out on his own accord, was no longer a party to any further legal action. The LAC was clear in its strategy, indicating in a letter that, since it was unclear what the legal interest of either the Traditional Authority or the conservancy was in the disputed land, it would seek a writ of *mandamus*⁸⁷ against the Government of Namibia to force the Ministry of Lands to evict these residents.⁸⁸ Putting the land issue at the core of the dispute, the attorneys for the three families (and an added fourth family) claimed that their clients had a right to their land under Article 16(1) of the Constitution, and asked what compensation might be offered to the families if they agreed to move.⁸⁹

The case had come full circle back to the underlying failure of Namibian law to either fully acknowledge the legal status of the majority of Namibians who live on communal land, or to provide the communal conservancies with meaningful legal control over the lands within their respective borders. The implications of the case are staggering for the continued effectiveness of all conservancies in Namibia: if people can simply ignore the legal requirements of the conservancy and do whatever they want with their land, then the conservancies cannot carry out their function of providing a habitat for wildlife, and cannot implement a land-use plan that allows for people and animals to live in close proximity, and cannot protect the agricultural base of the hundreds of villages in the conservancies. If the traditional authorities have legal power to allocate communal land, but cannot enforce this power, then their power over the communal lands is completely undermined. If the conservancies are legal entities with legal power over natural resources, but cannot

⁸⁵ Munifenge Royal Establishment to Salambala Management Committee, 15 May 1998

⁸⁶ Masubia Traditional Authority, letter to the Chief of Police, Katima Mulilo.

⁸⁷ A writ of *mandamus* is a court order commanding, for example, that a government agency or individual perform, or refrain from performing, a particular act, the performance or omission of which is required by law as an obligation.

⁸⁸ LAC, letter to W. Oosthuizen, Government Attorney, 20 July 2001.

⁸⁹ LAC, letter to Salambala Conservancy, 12 November 2002 (summarising a telephone conversation with attorney Metcalfe, representing the remaining occupants).

enforce this power in court, then the conservancies are not viable. And, if the Namibian legal system cannot effectively process land disputes such as this one, then the entire rule of law is undermined. While this case is complex, it is of only ordinary complexity given the law of land tenure in Namibia.

The case reached a stalemate as of 2010 – nine years after being filed, 13 years after the events leading to its inception. Its complexity and a lack of resources rendered it stagnant.⁹⁰ It should be obvious that – 22 years after Independence – it is important that the Namibian courts finally decide on the full range of questions posed by this case: What precisely are communal land rights in Namibia? What is the extent of the legal power of the traditional authorities over communal lands? Does article 16(1) of the Constitution protect communal property rights? Does Article 21’s recognition of a right to reside anywhere in Namibia provide any kind of land right? Do “ancestral” land rights constitute a legal right to land outside of the customary land law as administered by the traditional authorities? How do traditional authorities decide land issues involving disputes between people living under them and “outsiders” (i.e. those not living under the same traditional authority)?



Namibian legislation gives gazetted conservancies user rights over wildlife.

⁹⁰ Since 2010, the LAC has made several efforts to convene a meeting with the conservancy committee chairperson to discuss the way forward, but without success. A meeting eventually took place between the committee, the newly elected chairperson and the LAC in June 2012.

E. The Masubia Traditional Authority

There are currently about 49 government-recognised traditional authorities in the country. Their powers derive from both the Constitution of Namibia⁹¹ and customary law.⁹² The Traditional Authorities Act 25 of 2000 governs the operations of these

bodies. The traditional authorities are a basic unit of local government, paid by the state and charged with a wide range of functions of local government.⁹³ These include legal functions: each traditional authority functions as a community court⁹⁴ with its own jurisdiction.⁹⁵ For example, routine cases of poaching in Salambala Conservancy are brought to the *Khuta* for adjudication.⁹⁶

In the area of land law, the traditional authorities have the power to allocate communal land,⁹⁷ and to resolve disputes concerning communal land.⁹⁸ This is an important power in a country where communal land constitutes almost half of all the land. Since communal conservancies, by definition, are located on communal lands, all such conservancies in Namibia are on lands allocated by traditional authorities. While the conservancies have a property right in respect of wildlife, this does not extend to the land itself; the land is under the legal control of the traditional authorities.

This control of the land, however, varies greatly from region to region, and within each region, depending on the strength of each traditional authority. There are dangers in both



⁹¹ Article 102 of the Constitution provides for, inter alia, the establishment of a Council of Traditional Leaders to advise the President on the control and utilisation of communal land.

⁹² Article 66 of the Constitution acknowledges customary law to the extent that it is not in conflict with the Constitution nor any other statutory law.

⁹³ Under the governing statute, each traditional authority has 14 paid positions: one chief, one secretary and 12 members of the *khuta* (council). This provides a lot of jobs for poverty-stricken rural Namibia.

⁹⁴ A traditional authority has to apply for recognition as a community court in accordance with the Community Courts Act 10 of 2003

⁹⁵ In terms of section 12 of the Community Courts Act, a community court has jurisdiction to hear and decide on a matter if:

(a) the cause of action of such matter or any element thereof arose within the area of jurisdiction of that community court; or

(b) the person or persons to whom the matter relates are in the opinion of that community court closely connected with the customary law.

⁹⁶ Alternatively, the poacher could be charged under statutory law.

⁹⁷ Chapter IV of the Communal Land Reform Act 5 of 2002 deals with the allocation of rights in respect of communal land.

⁹⁸ Section 3(1)(b) of the Traditional Authorities Act gives a traditional authority the power to “administer and execute the customary law of [its] traditional community”; section 3(3)(b) gives it the power to “hear and settle disputes between the members of the traditional community in accordance with the customary law of that community”; and section 3(3)(c) gives it the power to “make customary laws”.

directions: if the traditional authority is weak, then nobody has legal control over the land of a conservancy in its jurisdiction; and if it is strong, it can exercise control over the land, even if that control is inconsistent with the legal purposes of the conservancy. In the case of Salambala, the Masubia Traditional Authority had never allowed cattle herders into the forest, i.e. the core wildlife area, but herders, ignoring the Traditional Authority, simply moved in. The Traditional Authority apparently had insufficient traditional power to force them to move out.

The reason for this is unclear. A traditional authority can apply a broad range of formal and informal sanctions. In general, when young people move from their villages to cities, their traditional authority's power over them declines. The dispute in Salambala, however, occurred in an isolated rural area, only a few kilometres from the offices of the Masubia Traditional Authority.

Moreover, all but one of the disputants are Masubia.⁹⁹ At some point after the dispute arose, Fidelus Sinvula switched his allegiance from the Masubia Traditional Authority to the Mafwe Traditional Authority based in Chinchimane. Almost all of the members of Salambala Conservancy are Masubia, and the few Mafwe members live far from the core area – in a far corner of the conservancy. At one point the Masubia Traditional Authority attempted to force Mafwe out of the conservancy, but was unsuccessful – again.

This dispute with a Mafwe community, namely the community of Sikanjabuka village, is also instructive in the context of the dispute over the core area, in that the Masubia Traditional Authority again proved ineffective in intervening in Salambala Conservancy matters. In 2000 when the conservancy first made an annual payment of N\$2500 to each of the 18 villages in the conservancy, the Masubia Traditional Authority objected to any payment to Sikanjabuka unless the village came under its authority rather than remain under the Mafwe Traditional Authority at Chinchimane. Sikanjabuka is situated on the far western edge of the conservancy, in an area occupied by both Mafwe and Masubia. Nothing in the Salambala Constitution limits membership to any particular ethnic group – in fact, no such action would be permissible under the Namibian Constitution. This action apparently meant that the Masubia Traditional Authority viewed Salambala Conservancy as being under its jurisdiction, when in fact it is gazetted by the Namibian Government. The conservancy committee subsequently made the payment.¹⁰⁰

A year later a similar payment was made, this time without objection. But in 2005, the Masubia Traditional Authority objected again, and ordered the conservancy committee to halt the payment. The village appealed to the Regional Governor who called a meeting and ordered payment – as indeed he was required to do because there was no legal basis for withholding this payment.¹⁰¹

In the meantime, in 2003, the Masubia *Khuta* allocated land that traditionally belonged to Sikanjabuka to two Masubia villages nearby. Deeming this allocation a Masubia attack

⁹⁹ Notes taken by the LAC in a meeting with the conservancy committee at Ngoma on 17 June 2009.

¹⁰⁰ Carol Murphy, "Who Will Benefit from Tourism and Wildlife Management? Conflict Management in Salambala Conservancy, Namibia (Case Study 1)", in Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management: Case Studies and Lessons Learned*, Food and Agriculture Organisation of the United Nations, Rome, 2007, pp. 21-23.

¹⁰¹ Ibid., pp. 23-24.

on Mafwe land, the Mafwe Traditional Authority in Chinchimane met with the Masubia *Khuta* at Bukalo to resolve the dispute. Such a face-to-face meeting between these *Khutas* is rare because of longstanding animosity. The matter was resolved with the land being returned to the Sikanjabuka community.¹⁰²

This attempt by the Masubia Traditional Authority to control Salambala Conservancy was as illegal as it was misguided; it could not have succeeded in a country where the members of many conservancies hail from different tribes, and where the law requires treating all citizens equally. The fact that the Masubia Traditional Authority even tried to do this indicates its desperation to gain the control it sought. This desperation may have been exaggerated by the Authority's previous failure to exercise control over the herders in the core area. Nonetheless, the twin defeats clearly undermine the Masubia *Khuta*'s authority over the conservancy.

Each traditional authority exercises legal power under its own traditional community's customary law *and* under Namibian statutory law. Customary law, in turn, depends on the strength of local custom.¹⁰³ Traditionally, a chief and a *khuta* could give orders that they could expect would be followed. Thus, ordinarily, a chief's resolution of a land dispute would end with the parties deferring to his orders without any need for the Namibian State to intervene.¹⁰⁴ Since Independence, however, this power has clearly eroded in most of the country's traditional communities. This is probably especially true in the remote regions where most of the communal conservancies are located, namely Damaraland, Kaokoland, Bushmanland and Caprivi.

Given the fact that the state is weak at local level, it can be difficult or even impossible for a traditional authority to exercise its authority under Namibian state law. For example, it is not clear that a traditional authority can get the Namibian police to carry out an eviction which has been ordered under customary law. Since all communal conservancies are on communal lands (by definition), the underlying land law in these conservancies is most often very weak.

The Masubia Traditional Authority ordered the cattle herders in the Salambala core area to remove themselves and their cattle to their "ancestral" villages. Almost all of them – 16 out of 17 families – heeded the order and left the area. But one extended family did not leave, and others ("outsiders") then moved into the area. The Masubia Traditional Authority issued a final eviction order on 16 July 1997.¹⁰⁵ Four residents have become the subjects of the conservancy's court case, but it is not clear that they are the only residents remaining in the core area.

This is because family structures are both complex and extended, and because cattle-herding arrangements within families (called "*mafisa*" in Caprivi) can involve putting cattle

¹⁰² Ibid.

¹⁰³ There is a large body of literature on customary law in southern Africa. Max Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (Manchester, 1955), still a classic in legal anthropology, describes basic Lozi customary law, which in local variation is the law of the Masubia, Mafwe and Lozi peoples.

¹⁰⁴ Helgard Patemann, *Traditional Authorities in Process: Tradition, Colonial Distortion and Re-Appropriation with the Secular, Democratic and Unitary State of Namibia*, Centre for Applied Social Sciences (CASS), University of Namibia, Windhoek, 2002.

¹⁰⁵ Decision of the Masubia Traditional Council, July 16 1997.

under the control of relatives for many years.¹⁰⁶ And, since herding has seasonal variations, it is not a simple matter to determine how many cattle farmers, how many cattle and how many families are living in the core area. The evidence suggests that the herding arrangements were uncontrolled, and that this upset the Masubia Traditional Authority, perhaps because the apparent lack of control undermined its authority. The conservancy plan offered one legal means to clear the core area of cattle and cattle herders, given the Traditional Authority's failure to do so.

On the other hand, forced removal, being the obvious legal solution, was not particularly popular even within the conservancy; the only survey reports that only 10.7% of Salambala respondents favoured this option. Most believed that the area was a grazing area and that people should be able to live wherever they liked.¹⁰⁷ Kenneth Matengu, the only scholar who has studied Salambala in detail, even argued that the core area was sufficiently large to accommodate both wildlife and cattle,¹⁰⁸ but this belief is inconsistent with the basic ecological research undertaken by NGOs for formulating the conservancy management plan: ecologically, wild animals require large areas in which to move about. One of the cattle herders who refused to move, namely Petrus Masibi – the only long-term resident of the core area who thus has clear communal land rights to his farm – was a member of the conservancy and supported its objectives. He remained in the area because his farm is well placed for his 200 cattle.¹⁰⁹

Thus, the underlying problem is that the support organisations that assisted in creating the conservancy did not pay adequate attention to the area's basic economy of subsistence agriculture. Representative members of each of the 18 villages met to discuss the benefits of the proposed conservancy, but they did not have a clear sense of how the conservancy would impact on the traditional agricultural practices in which every extended family was engaged. As the promised benefits failed to materialise, the issue became one of protecting a poverty-stricken local economy.

In return for clearing the core wildlife area, the communities expected substantial economic benefits that did not materialise. Although Salambala is among the wealthiest conservancies, almost all of its income comes from the fees paid by a few hunters who shoot big game at up to N\$115 000 per head.¹¹⁰ Thus, an income of even N\$500 000 a year

¹⁰⁶ Kenneth Matengu, "The Quest for Sustainable Community-Based Tourism in Salambala Conservancy, Caprivi Region, Namibia", 2001 (op. cit.), p. 69. Under the *mafisa* arrangement, a herder, often living far away from the owner of the cattle, herds the owner's cattle, and keeps one out of every three calves in return. After some years, ownership of the herder's herd becomes very complex because the herder's cattle is mixed with the cattle of multiple owners, and also, over the years, cattle from the herder's herd is placed in the care of other herders. This method reduces poverty and shares the wealth of the cattle culture.

¹⁰⁷ Ibid., p. 72.

¹⁰⁸ Ibid.

¹⁰⁹ Chris Weaver, LIFE Programme, letter to Leon van Rooyen, Deputy Director of Conservation, Ministry of Environment and Tourism, 11 August 1997, detailing a chronology of these events. In 2009, Masibi sold *mahangu* grown on his field to the Red Cross to feed the flood victims who were temporarily settled near Bukalo.

¹¹⁰ This amount is based on a 2009 Wuparo Conservancy price list for a trophy elephant. In 2009, Wuparo had a quota to shoot six elephants at N\$115 000 per head. This amount excludes the fee that the professional hunter charges his/her client.

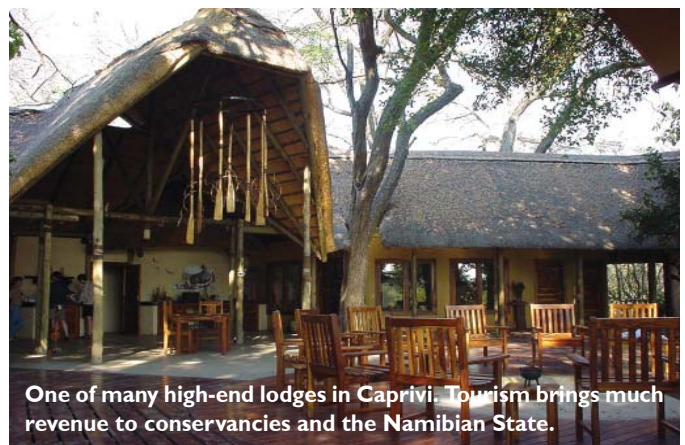
represents very little activity, i.e. merely the shooting of a handful of elephants and some smaller animals that wander across the Chobe River from Botswana. As the border with Botswana is unfenced, animals are plentiful, even without the core wildlife area serving its intended purpose. While the conservancy funds a small staff, and runs a craft shop and two campsites, these represent only a few jobs in this large area with 3500¹¹¹ conservancy members. The annual distribution of “profits” from this hunting meant a lump sum grant of N\$2000 to each of the 18 villages – and to the Traditional Authority.¹¹² This sum does little to help families living on the breadline. Thus, the legitimate question of what good the conservancy does for the families’ daily lives was not easily answered, and the people who had chosen to remain in the core area were not deemed to be a problem at all.

It seems safe to say that no communal conservancy can be created without some support from the local traditional authority. It also seems safe to say that communal conservancies provide economic support to traditional authorities – perhaps an appropriate payment for governmental services at least. There is a symbiotic relationship between these structures, with the communal conservancy promising money and jobs to a traditional community, more or less under some regulation by the traditional authority.

Indeed, Salambala Conservancy performs a small range of governmental functions, under the overall jurisdiction of the Masubia Traditional Authority. This role is somewhat analogous to that of a conservation directorate of a local municipality, with employees functioning independently but broadly under municipal auspices. This analogy is imperfect, but we are describing overlapping and interrelated layers of government activity.

F. The Namibian State in Rural Caprivi

The question of governance naturally follows from this failure of law. The Namibian State is weak in the rural areas, just as the rule of law is weak in rural areas.



I. Regional Communal Land Boards

The Communal Land Reform Act 5 of 2002 establishes regional communal land boards whose tasks are, inter alia: to control the allocation and cancellation of customary land rights by chiefs and traditional authorities; to decide on applications for rights of leasehold; and to

¹¹¹ Estimate number members at registration, 2012 data.

¹¹² Kenneth Matengu, “The Quest for Sustainable Community-Based Tourism in Salambala Conservancy, Caprivi Region, Namibia”, 2001 (op. cit.).

create and maintain registers for the allocation, transfer and cancellation of customary land rights and rights of leasehold.¹¹³ The Act has not changed the authority of the traditional authorities in any other respect.¹¹⁴ In fact, the Act stresses that traditional leaders will continue to play a central role in the administration of communal land generally and customary land specifically, thus the allocation of communal land still requires the consent of traditional leaders.¹¹⁵

The Caprivi Communal Land Board has not yet involved itself in communal land disputes; its work to date has been chiefly administrative. For example, the board has been overseeing the customary land administration system to ensure that the traditional authorities' land allocations meet the legal requirements in respect of regulating land sizes and approving leaseholds – the successor to permissions to occupy (PTOs), a function formerly administered nationally in Windhoek and now devolved to the regions through the regional land boards.

The plan for the land boards was both to regionalise decision-making on land use in the communal areas, and to begin to incorporate the traditional authorities' decision-making into local government. This is of increasing importance given the central place of land in the country's politics and economy. But local government in Namibia has very limited capacity, and customary land matters are very complex, which results in a substantial gap between the broad authority of the regional land boards and their limited capacity for dealing with such matters.

The Caprivi Communal Land Board came into existence after the dispute in the core area of Salambala began, but still it could have resolved the dispute had it chosen to do so. It seems, however, that the regional land boards lack the capacity to take on traditional land disputes. Given the difficulty of tracing the history of traditional land disputes, how representative the situation is at Salambala is unclear. It may be that the Mafwe Traditional Authority is able to exercise better control over traditional land matters in Mafwe villages, or it may be that the Salambals dispute involves a particularly aggressive group that could resist traditional authority anywhere in the country.

2. The Ministry of Lands and Resettlement

All land in Caprivi is communal land, except for a few areas taken for governmental or municipal. The political call for "land reform" is a major issue in the rest of Namibia, whereas almost all Caprivians live on their traditional lands, and few have any desire to claim land in the former commercial farming areas in central Namibia as part of any "land reform" movement.¹¹⁶

¹¹³ Communal Land Reform Act 5 of 2002, section 3.

¹¹⁴ Communal Land Reform Act 5 of 2002, section 2, dealing with the powers and operation of the communal land boards.

¹¹⁵ Wolfgang Werner, *"What has happened has happened": The Complexity of Fencing in Namibia's Communal Areas*, Legal Assistance Centre, Windhoek, 2011, p. 25

¹¹⁶ In 2007, the Ministry of Lands and Resettlement established regional resettlement committees in the northern communal areas of Caprivi, Kavango, Ohangwena, Oshikoto, Oshana and Omusati Regions with the aim of assisting people in these regions to resettle in commercial farming regions. By 2009 the Caprivi Resettlement Committee had received only two applications for resettlement.

The Ministry of Lands and Resettlement has a detailed “Integrated Land Use Plan for Caprivi”, one component of which is the promotion of small-scale commercial agriculture.¹¹⁷ In 1997, Cabinet approved the Small Scale Commercial Farms Development Programme in communal areas. The objective of this programme is to develop under-utilised or virgin land for agricultural purposes. In 1999, the Ministry of Lands, Resettlement and Rehabilitation commissioned a study to identify under-utilised land, and a total of 4956100 hectares were identified in eight regions, namely Caprivi, Kavango, Ohangwena, Oshikoto, Oshana, Omusati, Otjozondjupa and Omaheke. The Ministry of Land and Resettlement receives financial and technical support through the Namibian-German Cooperation to implement its land reform programme in communal areas. The Kreditanstalt für Wiederaufbau (KfW) provides funding in the form of a Basket Fund administered by the Ministry. Among the objectives of the Basket Fund is the development of Namibia’s communal areas to achieve improved land productivity and more secure tenure rights.¹¹⁸

In Caprivi in 2007, an area of 148084 hectares was designated in Sibbinda Constituency for small-scale commercial farming (SSCF), and 81 farming units were surveyed and gazetted – on average this amounts to about 2000 hectares per unit. In this area, which supports about 30000 cattle, there are 65-70 cattle posts. This SSCF area overlaps with Sobbe Conservancy and Masida Community Forest. This land-use overlap, being the result of a poor consultation process with the relevant stakeholders, has caused conflicts between Sobbe Conservancy, whose members do not want the development of small-scale farms in the area, and the neighbouring Makanga village whose members have formed the Makanga Cattle Ranch Cooperative to support the development of small-scale farms in the area. On the one hand, the conflict between Sobbe Conservancy and the Makanga community stems partially from a border dispute between the two when the boundary had to be determined during the gazetting of the conservancy.¹¹⁹ On the other hand, the Makanga Cattle Ranch Cooperative claims that the increase in wildlife due to the presence of Sobbe Conservancy has increased foot-and-mouth disease in the area, which has led to the closure of Meatco. They cited the Mayeyi people as an example of communities in the area who now live in abject poverty because their cattle cannot be sold in the area due to veterinary controls to halt the spread of foot-and-mouth disease.¹²⁰

Fifteen of the surveyed farms have been allocated to a private company, namely Namibia Agriculture and Renewables. It is speculated that many households moved onto the surveyed land parcels after the designation. Of the 180 land parcels allocated for private farms, only about 35 could be allocated, but arrangements have yet to be made to relocate the people and cattle now occupying the 35 farms. An additional obstacle for the SSCF project is that the Mafwe, Mayeyi and Mashi Traditional Authorities have diverse views as to who should benefit from the project.¹²¹

¹¹⁷ Ministry of Lands, Resettlement and Rehabilitation, “Integrated Land Use Plan for Caprivi”, July 2001, pp. 38-56.

¹¹⁸ GOPA, KfW and Ambero Consultants, “Road Map for the Development of Small-scale Farming Areas on Communal Land in Namibia”, report prepared for the Ministry of Lands and Resettlement, July 2012, p.5.

¹¹⁹ Interview with Sobbe Conservancy Committee at the conservancy office on 26 July 2012.

¹²⁰ Interview with the Likwana Farmers Association in Katima Mulilo on 31 July 2012.

¹²¹ GOPA, KfW and Ambero report, 2012 (op. cit.), p. 9.

According to the project consultants from GOPA (an independent private consulting company operating around the globe), people across the targeted area are in agreement that local residents should be the primary beneficiaries of the SSCF project.¹²²

Namibia's SSCF programme as a whole is challenged by a number of factors, including insufficient funds for developing infrastructure (especially boreholes), overlapping land uses, existing customary land rights and illegal fencing in the designated areas. In addition, criteria for allocating rights of leasehold and a payment system for lease rentals have yet to be developed.¹²³

Nevertheless, the national movement for land reform has raised the argument that some communal lands are under-utilised, and that Caprivi as a well-watered region has great agricultural potential – for a very different kind of agriculture than is currently practised by Caprivians. Discussion about using intense agricultural production means to farm tropical crops such as sugar-cane has met with resistance. Indeed, Fidilus Sinvula, one of those occupying the Salambala core wildlife area, resisted a large sugar plantation scheme at Lake Liambezi that would also have displaced traditional landholders. Such agricultural development schemes are difficult given that most tropical crops are currently in depression as a result of over-production in long-developed plantations or smallholder regimes in other parts of Africa, Latin America and Asia. Large-scale cattle farming on 2000 hectares would far outweigh the present cattle operations of all Caprivian farmers except the biggest.

3. The Ministry of Agriculture, Water and Forestry

The Ministry of Agriculture, Water and Forestry (MAWF) is tasked with the promotion, development, management and utilisation of agricultural, water and forestry resources. This will be done chiefly through the Ministry's "Green Scheme".¹²⁴ Logically, this Ministry is also responsible for formulating and implementing agricultural policy in Namibia.

In 1995, the Ministry of Agriculture, Water and Rural Development (MAWRD) (now named MAWF) produced a "National Agriculture Policy White Paper". This policy aims to provide an enabling environment for increased food production by smallholder producers, as a means to improve employment opportunities, incomes, household food security and the nutritional status of all Namibians.¹²⁵ The policy states that the northern communal areas offer the greatest potential for agricultural intensification and diversification.¹²⁶ Two of the main objectives of this policy are to improve the profitability of agriculture and increase investment in agriculture.¹²⁷

However, despite promises of increasing investment in the agricultural sector, there has been a long-term decline in such investment since the late 1990s. By 2009/10, the national

¹²² Ibid.

¹²³ Interview Pieter Nangolo, SSCF Project Coordinator, Ministry of Lands and Resettlement, 4 February 2010.

¹²⁴ MAWF, "Green Scheme Policy", 2008, p. 1.

¹²⁵ MAWRD, "National Agriculture Policy White Paper", 1995, p. i.

¹²⁶ Ibid., p. 14.

¹²⁷ Ibid., p. ii.

budget share going to Agricultural Affairs and Services had halved since 1992/93.¹²⁸

In 1994, the commercial farming sub-sector contributed an estimated 7.8% to the Gross Domestic Product (GDP), and accounted for 72% of agriculture's total contribution to the economy. From 1987 to 1994, the communal farming sub-sector contributed an average of 2.6% to the GDP.¹²⁹ In 1994, the agricultural sector contributed a total of 10.4% to the GDP. By 2007, the total agricultural sector¹³⁰ accounted for 5.9% of the GDP.¹³¹ While the national economy as a whole grew by 4.1% between 1995 and 2007, the agricultural sector grew by less than 1.7%. Over the same period, subsistence agriculture grew by only 0.4%.¹³²

Viewed against the data cited above, it can be concluded that the economic performance of Namibia's national agricultural sector has been declining since Independence. Moreover, there is little evidence to suggest that the government's main initiatives – the Green Scheme,¹³³ the National Horticulture Development Initiative and the Livestock Levy – are delivering positive results.¹³⁴ Namibia still imports, for example, over 50% of the country's supply of cereals and horticulture products.¹³⁵

Nonetheless, despite its economic decline, the agricultural sector remains an important employment creator and safety net for many households in rural areas. The National Household Income and Expenditure Survey (NHIES) of 2003/04 found subsistence farming to be the main source of income for 48% of all rural households in the country. In Caprivi, 17.8% percent of all households relied directly on subsistence farming as their main source of income.¹³⁶ (The preliminary findings of the NHIES of 2009/10 indicate that the figure of 48% for all rural households has dropped to 40%, whereas for Caprivi households it has increased from 17.8% to 24.3%.¹³⁷)

What has become increasingly clear over the years is that, despite having an Agriculture Policy, the MAWF lacks an agricultural implementation strategy for the communal areas.

¹²⁸ Robin Sherbourne, *Guide to the Namibian Economy 2010*, Institute for Public Policy Research, Windhoek, 2010, p. 47.

¹²⁹ MAWRD, "National Agriculture Policy White Paper", 1995, p. 2.

¹³⁰ Before 2007, the national budget distinguished between commercial and subsistence farming, and commercial farming contributed over two-thirds of the total output of the agricultural sector.

¹³¹ MAWF, "Green Scheme Policy", 2008, p. 1.

¹³² Robin Sherbourne, *Guide to the Namibian Economy 2010* (op. cit.), p. 79.

¹³³ One of the major Green Scheme projects in Caprivi is the Kalimbeza National Rice Project. This project covers a total of 193 hectares, but it is said to be lagging behind because only 28 hectares are cultivated (George Sanzila, "Caprivi Battle is on against tribalism", in *New Era*, 24 May 2012). Two more Green Scheme projects are planned: one at Sangwali in Wuparo Conservancy and the other at Bukalo on the floodplains (Jones and Barnes, *Preparing for REDD in dryland forests: Investigating the options and potential synergy for REDD payments in the Miombo eco-region*, 2009, op. cit.).

¹³⁴ Large-scale commercial irrigated agricultural developments have been planned for Caprivi for some 30 years. According to Jones and Barnes (ibid. p. 23), these developments have been politically motivated and poorly planned, and none has ever come to fruition, mainly because of the extreme distance of the region from markets for inputs and produce.

¹³⁵ Republic of Namibia, *Fourth National Development Plan (2012/13 to 2016/17) (NDP4)*, National Planning Commission, Windhoek, 2012, p. 106.

¹³⁶ Republic of Namibia, *National Household Income and Expenditure Survey (NHIES) 2003/04: Final Report*, National Planning Commission, Windhoek, p. 33.

¹³⁷ Republic of Namibia, "National Household Income and Expenditure Survey (NHIES) 2009/10: Provisional Figures", National Planning Commission, accessed at www.npc.gov.na/publications/NHIES_2009-2010_provisional_tables.pdf (p. 14).

As a result, the communal conservancy programme has become the dominant plan for rural development in many of Namibia's communal areas, creating a perception that the government has put wildlife ahead of agriculture.¹³⁸ In fact, in a region with as plentiful a wildlife population as Caprivi, the wildlife soon begins to destroy crops, thereby putting the applicable conservancies at direct odds with agricultural development.

The MAWF maintains 10 agricultural extension offices in Caprivi. These are designed to work with small farmers to introduce new farming methods and to improve agricultural efficiency. Bearing in mind that the core economic activity in every conservancy is agriculture, a vital amount of small-scale agriculture is critical to conservancy members' wellbeing. The Ministry has not made a significant contribution to this effort, and agriculture languishes in the Caprivi conservancies.

Indeed, with farming methods varying greatly from region to region in Namibia, the very purpose of having so many extension offices is to enable the MAWF to remain up to date on agriculture under local conditions. Improved varieties of seed and basic fertiliser, crop rotation, planting and harvesting methods can all play big roles in small-scale agriculture. Peasant agriculturalists often repeat the basic farming methods employed over centuries, resulting in low yields, hunger and impoverishment. The MAWF has focused its efforts on large-scale commercial agriculture because of the domination of this form of agriculture in the Namibian economy, leaving subsistence farming behind.

4. The Ministry of Environment and Tourism

Caprivi has two national parks, namely Mudumu and Mamili, and shares a third, Bwabwata (the former Caprivi Game Park), with Kavango. These parks are all directly adjacent to the Okavango Delta in Botswana, this delta region being one of the most developed wildlife and tourist regions in Africa. Namibia was one of the first countries in the world to insert the protection of the natural environment into its Constitution (Article 95). The Ministry of Environment and Tourism (MET) is in charge of both the Mudumu and Mamili National Parks, as well as the communal conservancies. It maintains a large office in Katima Mulilo, Caprivi, and has a wide range of functions. It works very closely with the relevant NGOs in matters relating to the conservancies.

Due to its prominence in the all-important tourist sector, the MET is much more open and communicative than other ministries. Its website provides copious information and is well organised. This Ministry enjoys a great deal of support from international donors. Although the north-west and Etosha National Park receive more of the MET's attention than other parts of the country, the Ministry has a large presence in Caprivi.

¹³⁸ In an interview with members of the Likwama Farmers Association in Katima Mulilo on 31 July 2012, one member condemned the creation of the Kavango Zambezi Transfrontier Conservation Area (KAZA), claiming that, were KAZA to succeed, this would deprive Caprivians of their ancestral rights to use the land for agriculture and cattle. Another participant in the interview stated that he does not know of any successful conservancy in Namibia that has effectively reduced the poverty of the local people, and that agriculture supports more people than conservancies do. A third participant felt that the conservancy programme only benefits foreigners involved in hunting and tourism, while the locals are made to believe that their support for conservancies will improve their livelihoods.

The MET is clearly focused on wildlife, the environment and tourism, and not on either agriculture or land reform. This is not a criticism of the Ministry, for its ambit was planned this way. However, the dichotomy of the MET having charge of wildlife but not of either people or land is glaring in its work in Caprivi. Tourism has surpassed agriculture in terms of its GDP contribution to the Namibian economy. While there is no question that the MET is not fully aware of the need for rural development, and its commitment to supporting the communal conservancies is a major step to that end, subsistence agriculture is not a major concern in this loop. In fact, as has been pointed out, the communal conservancies now protect more land – and probably more wildlife – than do all the national parks put together. This indicates that more and more of the core responsibility of the MET could shift to these conservancies in future.

Indeed, as tourism development in the national parks becomes limited by overcrowding and the increasingly obvious limitations of the financially struggling Namibia Wildlife Resorts, which runs the formerly MET-run park lodgings, more tourism will shift to the communal conservancies, which offer a much broader range of activities, run by a more diverse group of operators. This is, of course, subject to the limitations of tourism development as an economic force in Namibia: if tourists stop coming to this country, it is over. Agriculture is not subject to such a change.



Caprivi conservancies offer uncrowded camping spots – as opposed to crowded ones in national parks.

5. The Namibian Police

Namibia has a strong, centralised police institution – a throwback to the days of South African rule. Police stations are everywhere, but distances are great and transportation is poor, so there may be no response to a call to the police. Police training, particularly in matters not having to do with criminal justice, is poor. It is often beyond the capacity of a local police station to intervene in a land matter, especially one involving communal land rights. As the influence of the traditional authorities declines – or disappears, as in disputes between different peoples – there is less and less legal authority in many land disputes.

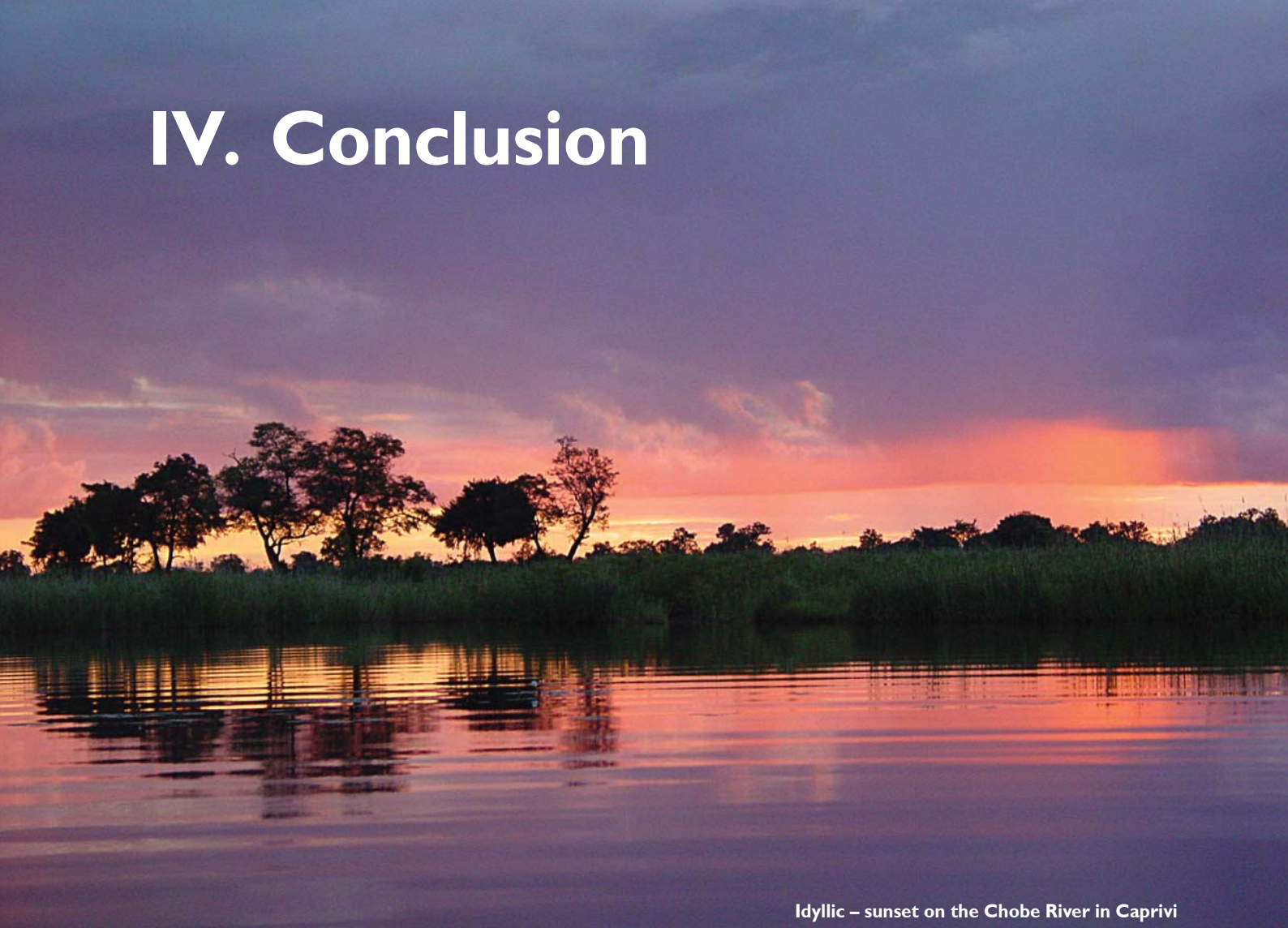
In Caprivi, the shadow of the secessionist movement still colours the police institution. The police station in Katima Mulilo was the first target attacked, and police officers were killed there. Many police officers are Ovambo, and are stationed in Caprivi to protect the authority of the central government. More than 1 000 Mafwe are either in jail or in exile as a result of the failed secession attempt, and suspicions still linger.

The police, it appears, are reluctant to carry out an eviction order for a traditional authority. The Ministry of Environment and Tourism has its own law enforcement in the form of game rangers, but these officers are narrowly empowered to enforce wildlife protection laws, not to remove cattle or farmers from a conservancy.¹³⁹ Therefore, there is a rather substantial law enforcement gap in the communal conservancies.

These government functions are all intended to integrate Caprivi Region into the rest of Namibia, for obvious political and economic reasons, following both from the separatist movement and from the Caprivi's long identification with the opposition DTA party. The regional governorship is now securely in the hands of SWAPO, and, given the importance of conservancies in national rural development plans, no governor today would interfere with the creation of a new conservancy.

¹³⁹ Conservancies also have game guards, but by law they have no enforcement powers, e.g. they cannot arrest poachers.

IV. Conclusion



Idyllic – sunset on the Chobe River in Caprivi

The core of the rural Namibian economy is subsistence agriculture, and this will be the case for a long time to come. While tourism, and not agriculture, has become one of the nation's largest sources of foreign exchange, subsistence agriculture, and not foreign exchange or tourism, feeds a very large proportion of the people of Namibia. This said, it must be evident that the core effort apropos rural development in the communal areas of Namibia has to be in the area of improved subsistence agriculture. This can occur on a number of fronts, beginning with both the system of land tenure and improvements in basic agricultural production. In Caprivi, most fields are prepared, planted and cultivated by hand, using saved seed, no fertiliser and no irrigation. These fields span a few hectares of communal land, often located in several places, remote from villages.

The 13 communal conservancies in Caprivi cover an extensive area of the region, including much of the best agricultural land and most of the villages. Thus, the conservancies encapsulate much of Caprivi's agricultural core – for better or worse. On the surface there is relatively easy money available for these conservancies in that high-value game wanders in from the nearby parks in Namibia, Botswana, Zambia and Zimbabwe. This game then becomes “owned” by the applicable conservancy, and can be sold to a foreign hunter of big game, in terms of a Namibian hunting concession. With fees of N\$115 000 or more for

such high-value game as elephants, lions, buffalo and leopards, and N\$5 000 to N\$10 000 for even antelope species, even a badly managed conservancy can earn several hundred thousand Namibian dollars a year from this sale of game. This can make the conservancies seem more profitable and better functioning than in fact they are.

Other forms of tourism development, such as campsites, craft shops and joint venture lodges, are present in many of these conservancies, but they have a more varied history. These institutions build more community capacity and employ more people, actually using tourism to promote rural development in the classic sense. There is no question that Caprivi has some potential for tourism, and even considerable potential, but tourism is an unpredictable source of rural development funds. The war and insurrection of 1998/99, for example, set tourism development back years in Caprivi. The shifting of tourism from troubled Zimbabwe to Zambia and Namibia during the social unrest in Zimbabwe is a good example of such instability.

Whatever the success of Salambala Conservancy, there is no question that the legitimate needs of its agriculturalists were not adequately addressed by the conservancy plan, nor were these people adequately incorporated into the conservancy polity. When a gazetted communal conservancy starts moving agriculturalists off its land, this means, at a base level, that one more government-constructed institutions are seeking control of traditional lands for the implementation of a government programme. Traditional landholders have rights under both customary law and Namibian state law that have never been adequately addressed. Defining any conservancy as a “community” oversimplifies the complex social divisions that exist in rural Namibian society. Indeed, if only half of the residents of Salambala – and fewer in some other conservancies – are members, what are the interests of the other half? To what “community” do they belong? How is it legitimate to pay a portion of the members of the “community” money earned by the local conservancy but withhold payment from others?

While each situation is unique – because each community holding customary land rights has a different history – the issue of customary land rights has to be addressed globally before the communal conservancy movement can proceed much further. The Salambala core wildlife area case might be one case that can help define the applicable law, but it is also sufficiently unique to Caprivi that it might take more cases, in different parts of the country, to better legally define customary land rights under both customary law and state law.

The difficulty of the legal issues raised here cannot be underestimated.¹⁴⁰ It is not just a question of courts creating a clear legal framework for customary land rights in Namibia; it is also a question of the local capacity to incorporate these legal norms into local land-use practices. For example, the communal land boards were created by the Communal

¹⁴⁰ The original constitutional compromise of 1990 sidestepped the whole question of communal land rights – see Sidney L. Haring, “The Constitution of Namibia and the Land Question”, 1996 (op. cit.). Sidney L. Haring and Willem Odendaal, in *Kessl: A New Jurisprudence of Land Reform in Namibia*, Legal Assistance Centre, Windhoek, 2008, analyse the legal collapse of the land reform process in the commercial areas. Clever Mapaure, in “Jurisprudential Aspects of Proclaiming Towns in Communal Areas in Namibia”, Master of Laws thesis, University of Namibia, 2008, analyses another aspect of the legal uncertainty in communal lands.

Land Reform Act of 2002 to provide for a legal body to resolve communal land issues, but they have not yet demonstrated the ability to do so. While the traditional authorities have virtually parallel authority to these land boards under the Traditional Authorities Act of 2000, it seems clear that the ability of the traditional authorities to carry out these functions is becoming increasingly stressed as rural Namibian society becomes more diverse and more exposed to the outside, and as rural people move more often, and as land questions become more complex. And, obviously, with two government institutions having parallel authority to deal with communal land matters, it can be expected that conflict will arise between them.

Making the situation even more complex is the fact that, whatever the underlying issues of communal land ownership or use rights may be, the communal conservancies do not have any right to the land at all. Rather, they have a *property right* to the wildlife. This frames the Salambala land-use conflict exactly: while the conservancy has a right to the wildlife, the cattle herders are destroying the land that is the habitat of the wildlife – and this land is beyond the jurisdiction of both Salambala Conservancy and, apparently, the Masubia Traditional Authority. This makes for a simply intolerable result. While the situation at Salambala is extreme, this is only because of the length of the dispute. Other conservancies face similar conflicts, with the law seeming equally irrelevant.¹⁴¹

Whatever one might want to assert about the layers of complexity of land rights under the current system, the conflicts in rural Caprivi – and probably those in much of the rest of Namibia – have progressed beyond the capacity of local institutions to resolve them. Too much land is at stake, involving too many people, with too many conflicting interests. It may be that the primary reason that more of these disputes have not yet surfaced is the poverty of rural Namibia and the lack of access to lawyers. Within communal conservancies, the presence of NGO advisors has clearly provided for mediation in such disputes, which is a good thing, but this mode of operation has inherent limitations.

Every communal conservancy is unique, and it is important not to overstate the situation in Salambala in relationship to the communal conservancy movement in rural Namibia. If anything, the large size and wealth of Salambala makes it atypical, in that most of the other conservancies don't have this level of resources to fight over. But everywhere in the conservancy movement there are resources, and where there are resources, there is potential for conflict over those resources. What is important about Salambala is that a number of its disputes have been made public, so they can be the subjects of study. Indeed, in spite of all these disputes, Salambala is still among the most profitable of all the communal conservancies in the country, surely indicating that high levels of dispute are not inconsistent with some other measures of success.

In addition to the whole range of questions as to whether the communal conservancy is the most appropriate form of rural development in Namibia, there is the contradiction

¹⁴¹ Conservancies frequently report that cattle are brought in by outsiders, and are taken to graze in areas needed for wildlife. In another conservancy, a tour operator has set up a permanent tented camp which he advertises on his website without any legal right to do so. Meanwhile, the conservancy is attempting to recruit another tour company for a joint-venture agreement – which no company can agree to while another company is operating nearby without any such agreement.

between rural development being based on any complex legal institution and the lack of legal capacity in rural Namibia. There simply are not enough trained legal officers to administer any kind of land regime in the communal areas. Salambala is located 1 300 km from Windhoek. There are almost no lawyers in Katima Mulilo, and no courts above the level of local magistrates' courts, or in other words, no courts of competent jurisdiction in a complex land case.

The lack of legal capacity, coupled with an inadequate legal framework, undermines the potential of the conservancy as a social, economic and legal unit. This could easily be remedied with new resources for both lawyers and enforcement, for example by giving communal game guards and officers of the Ministry of Environment and Tourism limited police powers – as many other countries have done. With the substantial investment made in Namibia's community conservancies, this would be a modest step towards strengthening the community conservancy as an institution.

Finally, we observe that while there are many legal problems with conservancies on the ground, few of these problems have moved to the courts, making the case of Salambala unique. On the one hand, this is testament to the capacity of the community conservancies to solve their own problems, and to the vitality of the traditional courts to resolve local legal issues. On the other hand, however, this probably reflects the lack of access to state legal institutions as discussed in this report. The future success of the communal conservancies requires better integration of these two legal orders.

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