

Our land they took

San land rights under threat in Namibia



**Land, Environment
and Development
(LEAD) Project**

LEGAL ASSISTANCE CENTRE

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- ▶ To equip individuals in San communities with skills and legal knowledge to enable them to provide a general legal advice service within their communities.
- ▶ To strengthen the capacity of communities to lobby for public services and participate in the law reform and policy development affecting their areas.
- ▶ To strengthen the capacity of San communities to resolve family and community disputes in an effective and inexpensive manner.
- ▶ To raise public awareness of new laws and outcomes of cases, particularly those with a significant gender or child protection focus.
- ▶ To bring public-interest test cases to court, thereby enforcing and protecting the rights of San communities to access land and public resources.
- ▶ To establish San community legal advice centres from where people can access information.

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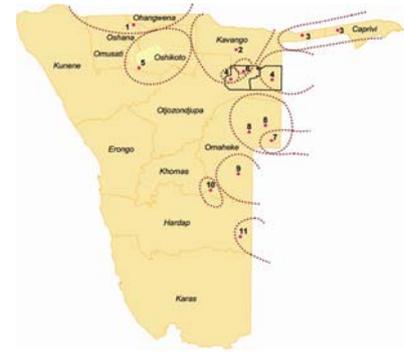
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I. INTRODUCTION



A. The San of Namibia

The San are the poorest and most marginalised minority group in Namibia, with little access to existing political and economic institutions.¹ Numbering between 30 000 and 33 000,² they are divided into several major and minor sub-groups, occupying some of the least valuable land, primarily in the north-east of the county. Among the most studied peoples in the world, the San have traditionally lived a highly mobile life of hunting and gathering in small family bands in some of the harshest desert conditions in the world. The Namibian San speak at least five languages, broken up further into 14 dialect groups.³

Their marginalised place in modern Namibia is the result of a series of events stemming from the impact of migration and colonisation on Southern Africa. While the San are among the original inhabitants of Namibia, they were pushed to the margins of their own lands by the southward migration of Bantu cattle herders, beginning around the sixteenth century. Ovambo, Kavango, Damara and Herero peoples spread out over the northern half of Namibia with vast herds of cattle.⁴ Not only did the cattle eat the grasses and destroy the waterholes, driving away the game that the San depended on, but the physically larger and more powerful Bantu peoples drove the San away from their herds, forcing them ever further to increasingly marginal land, unsuited for cattle. This was a violent process in which many San were killed.⁵ The San also resisted, killing both cattle and cattle herders. Henceforth, in the German colonial era, the San were reputed to be bandits

¹ James Suzman, *Minorities in Independent Namibia*, Minority Rights Group International, 2002.

² San population statistics fluctuate on every level. Some of this may have to do with identity switching, different census identification criteria, and frequent migration. See James Suzman, *An Assessment of the Status of the San in Namibia*, Legal Assistance Centre, Windhoek, 2001, p. 4. The population of many informal settlements changes from day to day. Other San live as squatters, and for various reasons squatter populations are not accurately stated. See also Thomas Widlock, *Living on Mangetti: Bushman Autonomy and Namibian Independence*, Oxford University Press, 1999, pp. 18-24, for an analysis of problems of “counting Bushmen”.

³ James Suzman, *An Assessment of the Status of the San in Namibia*, op. cit. n2, pp. 2, 3. There is some anthropological agreement on the classification of the various San peoples, but there is also considerable disagreement. This matter is beyond the scope of this paper concerned with land reform. The authors here recognise that there are hundreds of articles and reports written about the San in Southern Africa, including Namibia, many of them acknowledging that land is a serious problem. This report was commissioned in the context of the Government of Namibia’s stalled land reform programme and the general recognition that the San situation in Namibia is deteriorating each year that proceeds without an effective land reform programme.

⁴ J.S. Malan, *The Peoples of Namibia*, Rhino Publishers, 1995; Frieda-Nela Williams, *Pre-Colonial Communities of Southwestern Africa: A History of Owambo Kingdoms, 1600-1920*, National Archives of Namibia, 1991, pp. 51-93.

⁵ Robert Gordon, *The Bushman Myth: The Making of a Namibian Underclass*, Westview, 1992. German colonial authorities, usually meticulous in their record-keeping, were notably silent on the wholesale killing of San. German farmers routinely shot San suspected of stock theft. The Schutztruppe, German cavalry, engaged in 400 “Bushman patrols” in 1911-1912 alone. While many San were shot outright, others were captured and died in prison. Others died of starvation as their traditional hunting and gathering economy was disrupted (pp. 49-85).

and cattle thieves.⁶ Eventually many San wound up working for cattle herders, first black, then German and Afrikaner.

South African colonial policy was explicitly racist, organising native societies based on tribal groupings. While the Ovambo, Kavango, Damara and Herero received large “homelands” where they could continue their customary way of life – of course, under South African control – the San were dispersed widely in the “homelands” of these other peoples. Bushmanland, intended as a “homeland” for the San, was finally constituted on the edge of the Kalahari, but was occupied only by a few hundred Ju’hoansi, one San people, and never given self-governing status. Few of Namibia’s San ever had any ties to Bushmanland, so it was a “homeland” primarily for South African political purposes.

Finally, and disastrously, in the war for Namibian independence, many San enlisted in the South African armed forces, where they worked as trackers and soldiers, fighting against the South West Africa People’s Organisation (SWAPO), a liberation movement then, and Namibia’s governing party since independence in 1990. At independence the San were not only poor and marginalised, but also on the losing side of a bitter war. While thousands of San withdrew from Namibia along with the South African army, most stayed behind, often living on abandoned army bases, and many still live on those same bases, including Omega and Mangetti Dune.

Independence brought a spirit of reconciliation and a determination to build a new social order, erasing the remnants of colonial rule. A policy of land reform and redistribution was announced at the outset of SWAPO rule, but for various reasons very little land reform has been achieved in the 16 years since independence. Most black Namibians still live in the “homelands” created by the South African regime, these now being designated as “communal lands”. Between 3 000 and 4 000 white Namibians occupy almost half of the country’s farmland, while over one million blacks occupy the other half, impoverished and with little hope of making a living from that mostly degraded land.⁷ Since independence, thousands of blacks have moved from the communal lands to expansive squatter and informal settlements on the edges of every city in the country.

The San are marginalised even in this context. Most San have no work. Those who do, work mainly as farm labourers, for both white and black farmers, often in extremely poor conditions.⁸ Many families have lived on other people’s farms for generations and thus have lost much of their connection to their people. Farm work is not only poorly paid, but also unstable, and San workers move frequently from farm to farm. Only 15% of all San in the country live on San communal lands, where they have some undetermined legal right to live and carry on their traditional hunting and gathering activities. The rest live either on private farms or government-held land, or on Herero, Ovambo or Kavango communal lands.⁹ (See **Map 1: Locations of Namibia’s San populations in 2006**; and **Map 2: Bushman land dispossession during the mandate period, 1937 and 1980.**)

⁶ Robert Gordon, *ibid.*, goes the furthest in a challenge to the entire writing of Bushman history, arguing that the Bushmen are a political rather than an anthropological category, which applies for a wide-ranging group of indigenous peoples who resisted German occupation through acts of violence.

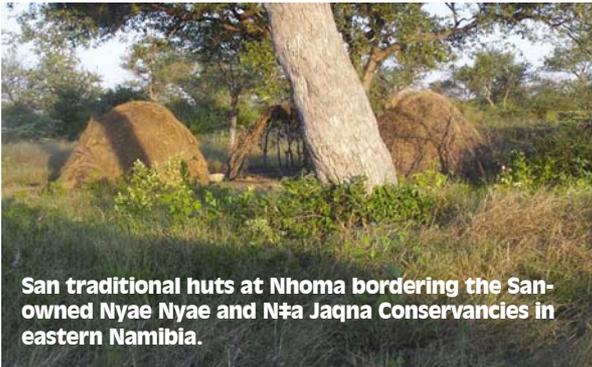
⁷ Sidney L. Haring, “Indigenous Land Rights and Land Reform in Namibia”, in Robert Hitchcock and Diana Vinding, *Indigenous Peoples’ Rights in Southern Africa*, International Working Group for Indigenous Rights, Copenhagen, 2004, pp. 63-81.

⁸ The “proletarianisation of the San” as farm labourers was extensive. Robert Gordon reports that over 1 200 farms had resident San workers in 1984, with 21 of these having more than 50 San in residence (workers and their extended families), 80 having more than 30 and the rest fewer than 30. This places several tens of thousands of San on farms 20 years ago, i.e. the majority of the San population (*op. cit.* n5: 170). The ‘farm experience’ therefore affects almost all San in Namibia: they are likely to have lived on one or more farms themselves, or their parents have.

⁹ Suzman, *An Assessment of the Status of the San in Namibia*, *op. cit.* n3, pp. 6-15.



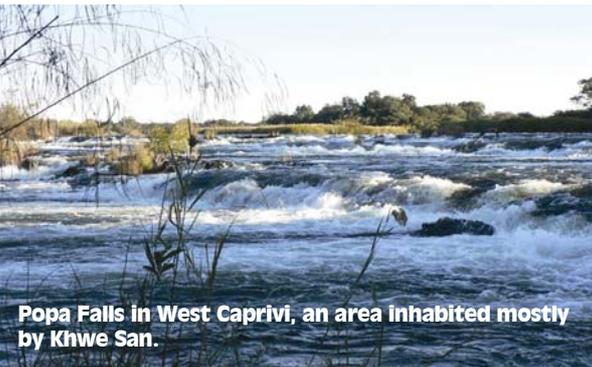
The Kalahari in the east. San ancestral territory.



San traditional huts at Nhoma bordering the San-owned Nyae Nyae and N'fa Jaqna Conservancies in eastern Namibia.



San village huts at Farm 6, Mangetti Dune.



Popa Falls in West Caprivi, an area inhabited mostly by Khwe San.

B. The study plan

Different San groups share problems of poverty, powerlessness, social disorganisation and marginalisation. In any agrarian society, the problems of poverty and marginalisation are never far removed from those of land and land tenure. The Namibian San groups have been dispossessed of most of their ancestral lands. On those lands they still occupy, there are almost always substantial issues of resource overuse, environmental degradation, occupation by non-San groups, illegal grazing, forced resettlement, the unclear legal status of communal lands, and even ongoing government threats to dispossess San of their lands.

The next four chapters deal with the threats to San lands in four distinct parts of the country, and with the legal issues raised by these threats. Common threads are an inadequate legal basis for San land tenure, an unwillingness on the part of the Namibian Government to defend San interests, and a lack of legal resources to defend San land rights. The law of San land rights is the subject of chapter 6.

West Caprivi, the home of primarily Khwe San, is the country's largest San-majority region, though with only 3 471 San in 1991.¹⁰ Most of the land in this region is gazetted as part of Bwabwata National Park, which places many San inside the park, with limited hunting, gathering and grazing rights. A few areas have been deproclaimed, placing about half of the San population outside the park proper, but still with the park encroaching on their lands and villages.

These San have been forced repeatedly

off their lands by war, most recently by the Namibian defence and security forces after a secession movement in East Caprivi in 1999 in which the San were not involved.

¹⁰ This statistic is the official 1991 Namibian census figure. Suzman, *ibid*, p. 6, provides a detailed table of official San population statistics from 1971, 1981 and 1991, which is carefully prepared. Local studies of San populations, however, often present sharply different population estimates, reflecting factors already discussed.

The Hai//om San, living in the area south of Etosha National Park, between Outjo and Grootfontein, constitute the largest San population in Namibia. As many as 9 000 Hai//om live in this region, primarily on white-owned farms. These San are landless, and as white farms are bought by farmers under the Affirmative Action Loan Scheme,¹¹ or expropriated by the Government for land reform purposes, they are also subject to mass unemployment and forced removal. The Hai//om, who speak the same language as the Damara, a Bantu people, were displaced by Damara and colonial settlers from the vast empty lands in and around Etosha after the 1950s. Several years ago, claiming Etosha as their ancestral land, Hai//om activists blockaded a main road and gates to the park, to which the state responded with teargas and mass arrests.

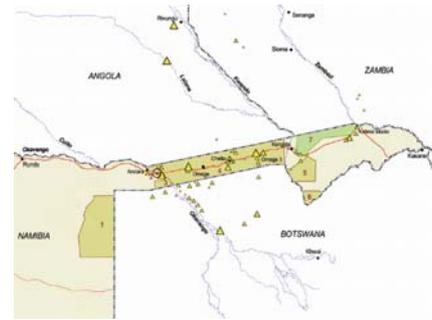
The San of former West Bushmanland (communal lands set aside for San occupation during the apartheid years), attempting to copy the Nyae Nyae Conservancy model of the San in the east, former East Bushmanland, recently organised themselves as the Nǀa Jaqna Conservancy. About 2 000 San live in the latter conservancy, representing several groups of !Kung, but also other San groups, including Angolan San brought to the area by the South African army during the war against SWAPO. West Bushmanland was heavily occupied by the South Africans, who left most of the San there upon withdrawing from the country. Several thousand San moved with the army to South Africa, where they still live in desperate rural poverty, but most remained at the army bases in West Bushmanland. Despite the long San presence, today these lands are bitterly contested, with Herero, Ovambo and Kavango cattlemen moving into the area, high numbers of illegal fences and farms being erected, and numerous property disputes ongoing.

The Ju/'hoansi, a sub-group of !Kung, live in Nyae Nyae, also an area of communal lands designated for San under apartheid. About 3 350 San live here, the vast majority Ju/'hoansi, their land rights relatively secure on what are officially Ju/'hoansi communal lands. These lands are now designated as Nyae Nyae Conservancy, which gives these San the legal right to use the natural resources of this land. Hunting concessions yield an income of about N\$600 (US\$85) per conservancy member, making this one of the most profitable conservancies in Namibia, and one that provides a 'model' for the use of wildlife to sustain local peoples in Africa. While a few Herero and Kavango cattle herders push into Nyae Nyae from the south and north, the San of Nyae Nyae are mostly left alone on their lands, and are the only San in Namibia whose 'ownership' of their land is uncontested, though what this 'ownership' means in terms of Namibian law has never been resolved.

These four regions were the focus of field visits in June 2006. They are by far the most populous San-inhabited areas in the country, home to at least 20 000 San, perhaps two-thirds of all San in Namibia. The rest live in other communal areas, especially the former Hereroland, or otherwise in resettlement projects, on private farms, especially in the Gobabis area, or in informal settlements on the peripheries of urban areas. While these others San populations will not be discussed further in this report, they are also subject to land-related issues and problems akin to those thus far described.

¹¹ Several hundred blacks have purchased formerly white-owned commercial farms with the help of a government-backed Affirmative Action Loan Scheme. Given that government acquisition of commercial farms for land reform purposes has been a slow process, and little resettlement has occurred, most 'land reform' in Namibia has been effected under this scheme.

II. THE KHWE OF WEST CAPRIVI



The lands of the Khwe of West Caprivi are ancestral: these San people have lived in this area for at least a few hundred years, giving rise to a clear issue of aboriginal title. These are communal lands: they were never alienated from San occupation, and never permanently occupied by whites. The legal status of the communal lands is still unresolved in Namibia. While the issue is complex, the Government of Namibia claims lawful ownership of the communal lands through South African law. However, South African law was racist, and also may not actually have deprived native people of their land titles under either British common law or international law when Namibia was under League of Nations and then United Nations mandate. The legal status of the communal lands is addressed in detail in chapter 6 of this report.

Khwe lands in West Caprivi are currently contested on two fronts mainly: first, the Mbukushu, a Kavango people, have migrated into Khwe lands in large numbers, claiming ownership; and second, the Namibian Government has gazetted most of these lands as part of Bwabwata National Park, thereby claiming ownership of Khwe communal land, and these lands also accommodate government resettlement projects and a prison farm at Divundu. These issues have been complicated by modern Namibian politics. For example, the former South African army base at Omega is presently the home of a 1 000 resettled people, whose future is unclear because the government land redistribution programme has stagnated. Also facing an uncertain future is the land north of Omega occupied by a large Namibian Development Corporation agricultural development, essentially a state farm, which has failed. (See **Map 3: San settlement in and around West Caprivi, 2006.**)

West Caprivi is an accident of colonial geography: a strip 40 km wide connecting Namibia with the Zambezi River, Zambia and Zimbabwe, and the Okavango Delta in Botswana. Sparsely populated by the Khwe, the area abounds with wild game, and is a potential tourist corridor to and from Namibia worth millions of dollars annually for the country's development. It also has adequate rainfall and therefore agricultural potential that could permit resettlement of Kavango or Ovambo groups now living in overcrowded communal areas to the west.

Muts'iku near Divundu is the largest Khwe settlement, with a population of over 1 000 Khwe and a few hundred Vasekele, a San people from Angola. Omega, Omega 3 and Chetto are the other large villages, each populated by around 600 Khwe. The remaining 13 Khwe settlements have much smaller populations, ranging from around 100 to a dozen or so. Lacking work opportunities, and with connections everywhere in Caprivi, Khwe move from place to place with some frequency.¹² Complicating matters, the San of Caprivi were divided into two separate governmental regions, with East Caprivi, with a population of

¹² Matthias Brenzinger, "Moving to Survive: Kxoe Communities in Arid Lands", Khoisan Forum, *Working Paper No. 2*, University of Cologne, Germany. This paper provides data on the population of each San settlement in West Caprivi.

about 400 Khwe, turned over to a different administrative region. In the east, along the Kwando River, the Mafwe, a Bantu people, also challenge Khwe land ownership.¹³

A. Resettlement on Khwe lands: Mbukushu migration into Caprivi

The first legal requirement of a claim of ancestral (or aboriginal) title is proof of exclusive and continuous occupation. This is challenged in West Caprivi by the Mbukushu, who claim both that the San are not a distinct people but subjects (formerly slaves) of the Mbukushu, and that the Mbukushu have also lived in Caprivi for hundreds of years. The Mbukushu, a Bantu people, moved south from Angola and Zambia at least a few hundred years ago and settled along the Okavango River that defines the western boundary of West Caprivi. Because they were a settled agricultural people and the interior of West Caprivi is without water, the Khwe, who were already present, moved back into the interior, and the interrelationship between the two peoples was not entirely hostile. But the Mbukushu are a physically stronger people, with a centralised political structure, and some Khwe were subjugated. Some were taken as slaves, and some intermarriage occurred as women were captured or otherwise joined the Mbukushu.¹⁴

During the war for independence the South African army essentially cleared West Caprivi for use as a military zone, or an 'empty' buffer area between the populated areas to the west and SWAPO bases in Angola and Zambia. At the same time it recruited Khwe men, settled them with their families on the bases in Caprivi and West Bushmanland, also a buffer zone, and removed the Mbukushu from West Caprivi.¹⁵

After independence in 1990 West Caprivi was used to resettle the Khwe and another San group, the Vasekele, most of whom were Angolans recruited into the South African army and brought to Caprivi and West Bushmanland.¹⁶ Sixteen resettlement blocks were delineated near the west bank of the Okavango River: 2 200 Khwe were resettled in nine blocks, and 600 Vasekele in seven blocks.¹⁷ Because both San groups were poor, and government assistance was inadequate, this resettlement had an irregular quality. Almost immediately, Mbukushu then living on the other side of the river crossed over and started settling near San villages, in many cases appropriating San farmland.¹⁸

While apparently the first Mbukushu immigrants asked Khwe Traditional Chief Kipi George for permission to farm on the Khwe land, which he granted, successive migrants did not seek his permission, perhaps indicating a challenge to his status as a traditional chief: for the Mbukushu the Khwe do not have a traditional chief, but only a headman

¹³ James Suzman, *An Assessment of the Status of the San in Namibia*, op. cit. n2, pp. 61-62.

¹⁴ Ina Orth, "Identity as Dissociation: The Khwe's Struggle for Land in West Caprivi", in Thekla Hohmann, *San and the State: Contesting Land, Development, Identity and Representation*, Rudiger Koppe Verlag, Köln, 2003, pp. 124-127. See also Julie Taylor, "Land, Resources and Visibility: The Origins and Implications of Land Mapping in Namibia's West Caprivi", M.Phil thesis, University of Oxford, 2005, pp. 25-36.

¹⁵ *Ibid.*, pp. 132-135.

¹⁶ Steven Robins, Elias Madzudzo and Matthias Brenzinger, *An Assessment of the Status of the San in South Africa, Angola, Zambia and Zimbabwe*, Legal Assistance Centre, Windhoek, 2001, p. 56.

¹⁷ World Wildlife Fund, *Report on Mbukushu Migration to Kxoe Use Areas to the East of the Okavango River*, June 1997, pp. 17-20. The population data for the Vasekele is reported to be 2 600 (p. 18), but this is so high that it must be a misprint. In "Moving to Survive", Brenzinger reports 600 which is probably more accurate. Suzman reports that most of these Vasekele have abandoned these lands which are now occupied by Mbukushu (p. 63).

¹⁸ *Ibid.*, pp. 17-18.

who serves under the authority of the Mbukushu chief.¹⁹ This remains a contested issue, with the election of a new Khwe traditional chief as yet unrecognised by the Kavango Regional Governor in 2006. The recognition of a Khwe chief would give that chief some authority over land under the Traditional Authorities Act, which local Kavango authorities do not want to grant.²⁰ This is consistent with the Namibian Government's refusal to recognise most of the San traditional authorities, in apparent violation of the Traditional Authorities Act.²¹

The migration of Mbukushu into West Caprivi could not have occurred without the Government's acquiescence and the lack of any legal structure through which to allocate or regulate the use of communal lands.²² After independence, poverty-stricken rural Namibians possessing little of value and with nothing to lose, moved onto supposedly 'vacant' or 'underused' communal lands in many parts of the country. While there are other victims of this process, the San peoples suffered from it most due to their practice of living in small groups, hunting and gathering across a vast territory, and not undertaking extensive farming activities. In the past some may have believed that the San did not have an interest in land, reflecting the view of European colonial powers that those who did not 'use' land could not have any right of land ownership. But by 1990 it was clear that all San groups, in their distinct traditional territories or *n!oresi*, did in fact have longstanding traditions of land occupation and use, which were appropriate to both their culture and the land. Typically, family bands returned to the same area year after year, and other bands recognised this 'use' of the land.²³

In stressing this point at the National Land Conference in 1991, the Ju/'hoansi delegation from East Bushmanland presented a map of their more than 200 clearly identified *n!oresi*.²⁴ The impact of their presentation was so powerful that the National Land Policy was specifically directed at "disadvantaged groups", including the San. The policy was couched in these terms because the Government, mindful of the impact of tribalism in the rest of Africa, and of the South African government's 'divide and rule' policy in relation to native peoples, did not want a land policy that restored specific ancestral lands to any named group.²⁵

Khwe lands in West Caprivi are of limited value as resettlement lands because there is little water away from the rivers, but the lands along the rivers are good agricultural lands. The failure of the Government to ensure a comprehensive land reform process has left the matter to local political forces, setting up a confrontation in West Caprivi between the Khwe and other groups, chiefly the Mbukushu and their Kavango relatives. Mbukushu, as well as Kavango and Ovambo people, simply move to communal lands in West Caprivi and settle, a process occurring also in other parts of Namibia. As long as the legal status of communal lands is unsettled, and the government is unwilling to protect San land rights, these activities are encouraged.

This takes an overtly hostile form in West Caprivi as local authorities deny not only Khwe land rights, but the very existence of the Khwe as a political and social unit.

¹⁹ Ibid., pp. 18-19.

²⁰ Traditional Authorities Act 17 of 1995 (on land allocation under the Act). Suzman, *An Assessment of the Status of the San in Namibia*, op. cit. n3, pp. 108-110.

²¹ Ibid.

²² Ibid., pp. 17-18.

²³ Kristyna Bishop, "Squatters in their Own Land: San Territoriality in Western Botswana", *Comparative and International Law Journal of Southern Africa*, Vol. 31 (1998), pp. 96-97.

²⁴ Robert J. Hitchcock, "Communities and Consensus: An Evaluation of the Activities of the Nyae Nyae Farmers Cooperative and the Nyae Nyae Development Foundation in Northeastern Namibia", report to the Ford Foundation and the Nyae Nyae Development Foundation of Namibia, 1992, pp. 96-99.

²⁵ National Lands Policy, 1991.

The various tribes in Namibia still share limited political power with the state within the communal lands. Under the Traditional Authorities Act,²⁶ chiefs and councillors exercise a wide range of functions, including local police and social control functions, and functions regarding the allocation of land and personal property held under customary law. At present no Khwe chief is recognised, despite Ben Ngombara having been elected and enthroned in an elaborate ceremony earlier in 2006. As the Traditional Authorities Act provides, legal recognition is conferred by the Regional Governor. Six months after this election Ngombara has not yet been confirmed.²⁷

Perhaps to weaken Khwe power in West Caprivi, the area was divided between the two administrative regions of Caprivi and Kavango. As Ngombara lives in Kavango, his election as chief must be confirmed by the Kavango Governor. Responsive to Mbukushu interests, the Kavango Governor has refused to confirm the elected Khwe chief, taking the position that the Khwe are not a separate tribe and thus are under the Mbukushu chief. This not only denies the Khwe legal existence as a tribe, but since the chief and his councillors control the allocation of traditional lands, this denies the Khwe any political and legal mechanism to allocate land rights to Khwe and to defend these rights.

With this unstable land tenure situation in West Caprivi, outsiders are able to move into the area and settle on any 'vacant' land they find, and there is no legal mechanism to force them out. While the Mbukushu present the greatest challenge to the Khwe, the Mafwe of East Caprivi have made similar claims to Khwe land, alleging that the Khwe are subjects of the Mafwe chief.²⁸

B. Government occupation of Khwe lands

For political, legal and economic reasons, the Government of Namibia claims ownership of all communal lands in the country based on its inheritance of South African title of these lands. This is a very complex legal matter, never tested in court, but one which has a great legal impact on land use in the communal lands. Landowners outside communal areas own their land as a freehold, and under Article 16 of the Namibian Constitution are entitled to state protection of their land rights. Blacks, however, could not hold legal title to lands under apartheid, and thus owned land 'communally' in an entirely distinct landholding system. At independence in 1990, therefore, the Namibian Constitution fully

²⁶ Section 7(d) of the Traditional Authorities Act 25 of 2000, which deals with the powers, duties and functions of chiefs or heads of traditional communities, states that chiefs and heads "shall perform such other powers and exercise such other duties or functions as may be conferred upon him or her by statutory law or the applicable customary law". The Communal Land Reform Act 5 of 2002 has conferred certain powers and duties to chiefs and heads in regard to the allocation of communal land.

²⁷ According to section 6 of the Traditional Authorities Act of 2000, the Minister of Regional and Local Government, Housing and Rural Development has to be satisfied that a chief or head of a traditional community has been designated in accordance with the Act. The Minister has to notify the Namibian President of such designation in writing. On receipt of such notice, the President shall recognise the chief or head of the traditional community. In the Khwe situation, the Regional Governor has to report to the Minister on traditional authority affairs in his region. Regional Governors function as advisors to the Minister. If a Regional Governor is not in favour of a newly elected Traditional Authority, he or she could influence the Minister's and ultimately the President's decision to recognise it, an example being the Khwe Traditional Authority.

²⁸ Suzman, *Assessment of the Status of the San in Namibia*, op. cit. n3, p. 61.

protected white lands but not black lands, in apparent violation of Article 10 guaranteeing “equal rights” to blacks and whites.²⁹

Besides the irony of Namibia taking an apartheid-era South African title to black lands, it is not clear whether South Africa (1) actually took title to the communal lands, or (2) if it did purport to do so, whether this was legal in view of the United Nations mandate, international law or British common law, all operating at the time as South Africa acted to deprive black Namibians of their traditional lands.³⁰ We will return to this issue in chapter 6.

The Namibian Government has proceeded as though it holds title to all the lands in West Caprivi and can use them at will, with no compensation nor regard for the land rights of the Khwe. Accordingly the Government has carried on resettlement programmes there that dislocate the Khwe on a number of fronts. The result is that the Khwe face very real possibilities of dispossession from their lands.

1. Omega and other government resettlement camps

First, and perhaps easiest to understand, the Government of Namibia took possession of former South African army bases, and in the post-independence dislocation resettled hundreds of people in these villages. Some non-San peoples also moved into West Caprivi, and into Omega and Chetto specifically. Furthermore, a large state farm north of Omega became the property of a parastatal, the Namibian Development Corporation, which operated almost entirely with workers brought in from outside the region.

These are troubled communities, which still lack a clear legal status. While Omega, with a population of close to 1 000, has been designated a “resettlement camp” and has a government staff on site to administer it as such, there is no work there at all, very few social services are offered, and local Ministry of Lands and Resettlement officials have no idea what the future holds for the settlement.³¹ The fact that land reform is stalled in Namibia means that the people of Omega will have to wait many years for further resettlement. In the meantime, besides there being no work for them, there are food shortages and a lack of fuel to operate the generator, the only source of electric power.³² This is resettlement at its worst – an existence with no economy, in complete isolation from the rest of Namibia, with no hope or plan for the future.

²⁹ Sidney L. Haring, “The Constitution of Namibia and the ‘Rights and Freedoms’ Guaranteed Communal Land Holders: Resolving the Inconsistency Between Article 16, Article 100 and Schedule 5”, *South African Journal on Human Rights*, Vol. 12 (1996), p. 467.

³⁰ *Ibid.*, pp. 478-479. It is now clear that international law protects indigenous people from being forcibly dispossessed of their land, regardless of the imposition of a colonial legal regime that carries with it some formal land-titling process. See John G. Sprankling, Raymond R. Coletta and M.C. Mirow, *Global Issues In Property Law*, Thomson West, St. Paul, 2006, pp. 11-21.

³¹ Suzman, *op. cit.* n3, gives the population of Omega as 730 in 2001, with 630 Khwe and 100 Vasekele. He also states that “several” Ovambo farmers were settled on Namibia Development Corporation (NDC) lands just north of Omega. The authors met with community leaders in June 2006, and in addition to San residents there are clearly significant numbers of non-San residents resettled at Omega. Population data in resettlement schemes is problematic because these populations are unstable, with large numbers of people coming and going, but also because substantial numbers of residents are simply squatting in resettlement camps, i.e. they are present without permission. It may also be that the Government of Namibia does not want to acknowledge that it is settling Mbukushu or others at Omega.

³² When the authors visited Omega, there was no electric power and there had not been any for at least six days. This meant that the water and sewage system was also not operating. A local Ministry of Lands and Resettlement official told us that Omega was “not a resettlement camp”, and that all those living there would ultimately be resettled elsewhere in Namibia.

Most Khwe and Vasekele living in Omega do not go out onto the land in search of game or veld foods. Like most of the San in Namibia, years of dislocation, military service and military resettlement have altered their relationship with the land. They reported that food aid was not forthcoming, and that they lived on *mieliemiel* (maize meal) or went hungry. No official of the Namibian Government has any idea what disposition will be made of the valuable former Namibia Development Corporation agricultural lands north of Omega, but it is clear that there is no plan to allocate these lands to San as farmers and it seems that no San are living or working there now.³³ Resettlement schemes in Namibia have failed due to a lack of infrastructure and support.³⁴ There are other government resettlement camps in army bases at Chetto (population 590) and Omega III (population 638), but to migrants these are not attractive locations, and anyway they are occupied by Khwe and Vasekele San. Other than the settlements along the Okavango River, this leaves only a few hundred Khwe living at about 18 additional settlements in West Caprivi. Resettlement camps, in other words, define Khwe living conditions in West Caprivi.

2. Divundu Prison Farm

The Namibian Government is capable of making very poor choices as it develops the country. One is its seizure of Khwe lands for use as a prison farm at Divundu, some of the most valuable agricultural lands in Khwe hands. Namibia is a large country, with vast stretches of land. Most of the country's people live in the northern communal lands and Windhoek, so the need for a large prison farm on some of the best land in the otherwise empty Caprivi Strip is baffling, but this is the confrontation that the Government set up in 1995, pitting its full force against Khwe Chief Kipi George. As with Omega, the Government claimed that since it owned the communal lands, it could take land for a prison without compensating the Khwe, or indeed without even seeking Khwe consent.

Chief Kipi George, who died in exile in Botswana in 1999, had modest plans to develop the land seized into a small campsite and tourist facility, N//goava-ca, at Popa Falls, a major tourist destination on the Okavango River. As if the prison was not sufficient intrusion, the Government also granted a PTO (permission to occupy) permit to a white-owned big-game hunting concession to put up a lodge, White Sands, immediately adjacent to the Khwe campsite. Again the Khwe were neither consulted nor compensated for this occupation of their traditional lands.

Kipi George and the Khwe Traditional Authority filed a lawsuit against the Government, alleging that it was the legal owner of these lands. The Khwe were represented by the Legal Assistance Centre (LAC), the only public interest law firm in the country. All parties clearly understood the legal significance of this case: it was the first legal action in Namibia alleging that the San held legal title to their lands based on ancestral occupation – a full-blown claim of aboriginal title, which, if successful, would easily apply to other peoples in Namibia too.³⁵

³³ The authors visited this farm and made every effort to determine what was going on there and what the plans for the NDC land is. It was not possible to get an answer. There are several dozen good houses on the NDC farm, and these are occupied by non-San persons – Ovambo according to Suzman.

³⁴ Sidney L. Harring and Willem Odendaal, *One Day We Will Be Equal: A Socio-Legal Perspective on the Namibian Land Reform and Resettlement Process*, Legal Assistance Centre, Windhoek, 2002.

³⁵ At about the same time, the Government of Namibia was also taking the position that it owned and could therefore dispossess the Himba, another Namibian people, from their communal lands at Epupa Falls, without compensation, in order to construct a hydro-electric dam. The Himba were also raising an issue of aboriginal title in defence of their lands. See Sidney L. Harring, "God Gave Us This Land: The OvaHimba, the

The legal action set out all the elements of an aboriginal title claim, beyond factual dispute. It must be clear in retrospect that the Government of Namibia had neither the wish nor the expertise to try this case. The 50-page motion (with appendices) set out a simple history of colonial domination of the Khwe who had occupied West Caprivi for as long as anyone had documented.³⁶ The Government settled the case, with the Khwe keeping their campsite and the Government occupying less land for a smaller prison farm.³⁷ The legal basis of the San claim of aboriginal title is discussed in chapter 6.

The PTO at White Sands saw the construction of a hunting camp, but the venture failed in the aftermath of the extension of the Angolan civil war into Caprivi in 1999, and the PTO expired. This land with its ruins still standing has reverted to the Khwe.

This start of the legal defence of San land rights disappeared into the next phase of Khwe-Government relations: in late 1998 and throughout 1999, about 1 000 Khwe led by Chief Kipi George fled to Botswana, where they were held at Dukwe refugee camp. The sudden flight of about 25% of the Khwe, led by their chief and abandoning their personal property and livestock, raises serious questions about the place of the Khwe within the Namibian state. The sad story is that the Namibian army was riding roughshod over Khwe communities in the context of the Caprivi secession movement and the Angolan civil war, apparently underscoring their distrust of the Khwe as citizens of Namibia and resettling old scores from the war for independence.³⁸ Some Khwe disappeared into the hands of the army during this period, raising questions of serious human rights abuses. At least 15 Khwe “disappeared” during this time and many believe that they were executed by the Namibian army.³⁹ The army in turn reports that they “escaped” to Angola, but their families do not believe this. Other Khwe were killed during several years of border warfare, and others had stories to tell about maltreatment at the hands of Namibian soldiers or security officials.

3. Bwabwata National Park

The final assertion of Namibian Government ownership of Khwe lands in West Caprivi is the gazetting of Bwabwata National Park, covering the entire West Caprivi except for the Omega area and the inhabited lands along the Okavango River. Virtually the entire land base of the Khwe has been incorporated into this park without the Khwe’s permission, indeed without even consulting them. About 1 500 Khwe live inside the park boundary. This new park is likely to be contested, particularly in the wake of the Hai//om blockade of Etosha National Park, another former San area, also taken by the apartheid government without compensation, with the San ejected so that tourists can

Proposed Epupa Dam, the Independent Namibian State and Law and Development in Africa”, *Georgetown Journal of International Environmental Law*, Vol. 32 (2001), p. XIV.

³⁶ Chief Kipi George et al. and the Government of Namibia et al., filed in the High Court of Namibia, 22 December 1997.

³⁷ Taking a short walk from the campsite, one encounters an imposing guard tower on the roadside, a jarring reminder to vacationers of the politics of land use in Namibia.

³⁸ Suzman, *op. cit.* n3, pp. 65-66. The secessionist movement in Caprivi has its own complexity, but was rooted in the non-San tribes of East Caprivi. See Maria Fisch, *The Secessionist Movement in Caprivi: A Historical Perspective*, Namibian Scientific Society, Windhoek, 1999.

³⁹ Gertrud Boden, “Caught in the Middle: Impacts of State Decisions and Armed Conflicts on Khwe Economy and Society in West Caprivi between 1998 and 2002”, in Thekla Hohmann, *San and the State*, *op. cit.* n14, pp. 161-204, at 171-175. See also National Society for Human Rights, *The Rights of Indigenous Peoples: The Kxoe People of Namibia*, Windhoek, 1996; and Werner Menges, “Fate of Missing Khwe 15 in Spotlight”, *The Namibian*, 25 July 2001.

enjoy viewing game in a pristine setting – without the native people who have always lived there. Indeed the newly elected (and unconfirmed) Khwe traditional chief, Ben Ngombara, has demanded that the Bwabwata National Park be deproclaimed, so the issue is being raised directly.⁴⁰ The Government originally included Omega in the park, even though the lands there are denuded and heavily settled, but the Omega area has since been deproclaimed.

On paper Bwabwata National Park is a model of a new concept of parks in Africa. Different 'use levels' were specifically included in the park plans, including continued use of the land by the 1 000 to 2 000 people still living within the park boundaries, and by another 2 000 or so living in deproclaimed areas, including Omega and Divundu. The other uses include grazing of smallstock (no cattle may graze outside the deproclaimed areas), gathering of food and palm thatch, perhaps certain kinds of hunting, and some concessions from big-game hunting and camping operations.⁴¹ It is a model of shared resource use, still in the planning stage.⁴² The problem is that the 'planning' has not included the Khwe as the traditional owners of the land within the park.

The park holds prospects for rapid economic development, but with little regard for Khwe rights. It is located just north of the Okavango Delta, an ever-developing tourist area. It connects a tourist circuit from Victoria Falls in Zimbabwe to the Okavango Delta in Botswana to Etosha in Namibia, offering future expansion into underdeveloped game areas in Angola and Zambia. The park is in the centre of an expansive international game reserve, potentially rivalling Kenya and Tanzania as a source of tourist dollars. It is completely unclear, however, what role the Khwe might play in this venture, and even whether they will ultimately be relocated outside the park.

Chief Kipi George had directly challenged government management of the Caprivi Game Reserve, Bwabwata's precursor, by applying for a conservancy – a legal entity giving members the right to use and sell the land's natural resources (see chapters 4 and 5 on the Nyae Nyae and N̄a Jaqna Conservancies). This request was denied out of hand on the grounds that a conservancy cannot be established inside a national park or game reserve.⁴³ While some individual Khwe may have been consulted, and some may even have approved of the scheme (26 are employed as game guards, this being significant employment in an area without jobs), the Khwe Traditional Authority was not consulted since the Government did not recognise it. The Ministry of Environment and Tourism took the position that it would meet with the Khwe only as individual citizens, not as members of the Khwe Traditional Authority.⁴⁴ This was due to the fact that the Ministry of Regional and Local Government had recognised the Mbukushu Traditional Authority which claimed the West Caprivi area.⁴⁵ The Khwe claim that the area was exclusively theirs before the South Africans turned it into a military zone.

⁴⁰ Chrispin Inambao, "Chief Guns for Park's Deproclamation", *The Namibian*, 28 August 2006, p. 1.

⁴¹ Ministry of Environment and Tourism (MET), "A Conservation and Tourism Development Vision for Caprivi", June 1998; and MET, "The Bwabwata National Park: Vision for the Future", 1999. The Cabinet approved this vision on 20 July 1999.

⁴² Karine Rousset, "To be Khwe Means to Suffer: Local Dynamics, Imbalances and Contestations in the Caprivi Game Park", unpublished MA thesis, Department of Social Anthropology, University of Cape Town, March 2003.

⁴³ Letter from U. Hiveluah, Permanent Secretary, Ministry of Environment and Tourism, to Chief Kipi George, 12 February 1996.

⁴⁴ Letter from T.C. Erkana, Permanent Secretary, Ministry of Environment and Tourism, to the West Caprivi Traditional Authority, 31 August 2001.

⁴⁵ Letter from Dr N. Iyambo, Minister of Regional and Local Government and Housing, to the Khwe of Divundu, dated 18 July 2001; and Helgard Patemann, *Traditional Authorities in Process: Tradition, Colonial Distortion, and Re-appropriation within the Secular, Democratic and Unitary State of Namibia*, Centre for Applied Social Sciences (CASS), Windhoek, 2002 – p. 67 for a discussion of the dispute over Khwe recognition.

West Caprivi was officially a game reserve (proclaimed in 1968) before the South African army took control, but it was essentially unmanaged and left to the Khwe who lived there. The Government's refusal to recognise the Khwe Traditional Authority meant that the Government did not consult with the Khwe as a people. Indeed it could not because they had no legal recognition as a distinct people under the Traditional Authorities Act.⁴⁶

Traditional Authorities are established in terms of the Traditional Authorities Act 25 of 2000, "... in order to advise the President on the control and utilisation of communal land and all such other matters as may be referred to it by the President for advice."⁴⁷ Traditional Authorities have wide-ranging legal authority within their respective traditional communities, including the right to allocate communal lands in conjunction with the Regional Communal Land Board.⁴⁸ Therefore, the recognition of a Khwe traditional chief carries with it inherent rights to allocate Khwe lands, in conjunction with either the Kavango or the Caprivi Communal Land Board. Moreover, the recognition of a Khwe chief recognises the fact that the Khwe are in fact a traditional community with all the rights that other such communities in Caprivi enjoy.⁴⁹

As there is no government recognition of the Khwe Traditional Authority, there is no legal body that the Government can use to share revenues from Bwabwata National Park with the Khwe. Given this situation, it should not be surprising that the Khwe do not trust the Government's promises to share with them resources within the park. The idea, for example, that local people need licenses or some other form of permission from the Ministry of Environment and Tourism to collect foods in the park, raises a host of issues about how poor and illiterate people might go about obtaining such licenses. The San throughout Namibia experience similar problems with the state and its bureaucracy: getting any sort of government document can be very difficult for a San individual.⁵⁰ Similarly, promises that the San can keep their animals are also not trusted. Finally, there is still the issue of ownership of Khwe lands. The Hai//om in Etosha also shared the park resources with the Government, and soon they were displaced, without compensation. As a result the Khwe are fully aware of the precarious nature of their legal position at Bwabwata. The demand of the newly elected Khwe Chief Ben Ngombara that the park be deproclaimed clearly raises the political stakes, especially with regard to the question of Khwe land rights within the park, but also with regard to the legal meaning of a "Traditional Authority" in terms of its territorial base on communal lands.

At the time of writing, Chief Ngombara is still not recognised by the Government. Among the key functions of a Traditional Authority in Namibia is the control of communal lands. There is a legal link between the recognition of the Khwe Traditional Authority and their right to land. The continued withholding of recognition allows the Government to continue denying the legitimacy of the Khwe as a people, which also extends to not recognising their land rights.⁵¹

⁴⁶ Joram /Useb, "One Chief is Enough! Understanding San Traditional Authorities in the Namibian Context", in Alan Barnard and Justin Kenrick, *Africa's Indigenous Peoples: First Peoples or Marginalized Minorities*, Centre for African Studies, University of Edinburgh, 2001, pp. 15-30.

⁴⁷ Article 102(5) of the Namibian Constitution.

⁴⁸ Communal Land Reform Act 5 of 2002.

⁴⁹ Among the major differences between the Traditional Authorities Act 17 of 1995 and Act 25 of 2000 is "a move toward the reference to a territory regarded as the communal area of a traditional community" (Patemann, op. cit. n45: 15).

⁵⁰ One of the authors picked up a San hitchhiker at Divundu who was travelling to Rundu, a distance of 240 km one way, to get a photograph taken for a government document.

⁵¹ While rumours abound, it is impossible to determine exactly what the Government of Namibia has in mind here. On the one hand, the Khwe Traditional Authority was allowed to hold an election in mid 2006, under the observation of the Namibia Electoral Commission, a fact that points to implicit recognition of the

The paradox here is that while international environmental groups are promoting a new model of national park development at Bwabwata, the Khwe, the area's traditional occupants, have no legal status whatsoever in the creation of this relationship. Under the circumstances the only action they can take is to oppose proclamation of the park.

C. Conclusion

The Khwe of West Caprivi have been disempowered on many levels by the Namibian Government's action and inaction. Dividing the Khwe lands between two administrative regions weakened their political power, and further damage was done by the Mbukushu denial of the existence of the Khwe as a traditional people, and by the Kavango Regional Government and Ministry of Regional and Local Government, Housing and Rural Development's backing of this position. The armed upheaval in West Caprivi in the late 1990s also pushed the Khwe back to the margins of society. They did effectively raise the issue of their aboriginal title to these lands in their challenge to the expansion of Divundu prison farm into their campsite for tourists, but this aboriginal title issue remains unresolved. The Khwe regard Bwabwata National Park as a threat to their traditional way of life, and related to the park land issue is that of adequate protection of Khwe rights within the park, which also remains unresolved.

At Omega and the other Khwe settlements there are high levels of poverty and hunger. An influx of outsiders to Omega and Divundu also challenges Khwe land rights.

Another issue as yet unresolved is that of the Vasekele position in West Caprivi. Amounting to a mere 10% of the region's San population, they are doubly marginalised as minorities within a minority.



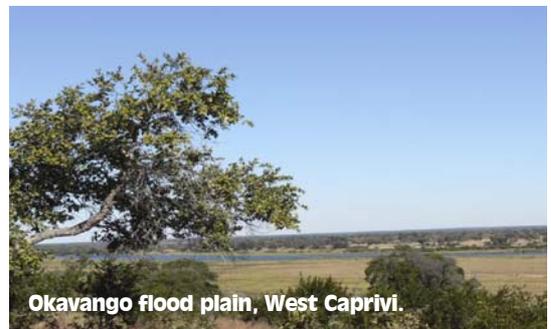
David Mushavenga (left) and Swabi Kamjyo, paralegals at WIMSA's office in Omega.



Divundu prison farm.



The South African Defence Force housing in Omega is now resettlement housing.



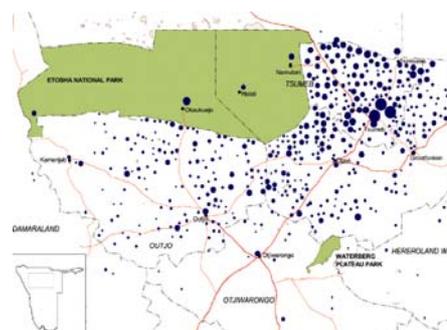
Okavango flood plain, West Caprivi.



San children playing in a wrecked Angolan army vehicle left in Namibia after a battle against UNITA in 2000.

existence of the Khwe Traditional Authority. Now it appears that the Government is delaying its recognition of the election of Chief Ben Ngombara. This position had been vacant since the death of Kipi George in 1999. This seven-year vacuum in leadership has weakened the Khwe.

III. THE HAI//OM OF ETOSHA



If the new Bwabwata National Park represents the future of park development in Africa, then Etosha National Park represents the past. Etosha, a national treasure, among the best game parks in the world, was seized from the Hai//om San between the 1930s and 1960s, without consultation with this indigenous population, who had lived there since time immemorial, but were displaced, sometimes violently. Over time these Hai//om became landless and relegated to the margins of white farms, where they worked as casual labourers, moving often from farm to farm.⁵² Now numbering over 9 000, this is the largest San population in Namibia. They are the San who closed off Etosha by blocking the road and incurring the wrath of the Government, which responded with teargas.⁵³ There is no question that the Khwe of West Caprivi are aware of the history of the Ministry of the Environment and Tourism at Etosha, no small factor in their distrust of the Ministry's plans for the 'new' Bwabwata National Park. While the Khwe have no recognised land rights, at least the lands of West Caprivi are communal lands and the Khwe can struggle for land rights there. The Hai//om, by contrast, have been completely displaced and have no communal lands at all.

The Hai//om speak the same language as the Damara, for reasons still unclear to anthropologists. Originally they lived in north-central Namibia, occupying a large swath of land from eastern Ovamboland, through Etosha and down into the central highlands.⁵⁴ In this position they had a long history of living near the Ovambo and Herero, as well as the German colonisers. While the Khwe and the !Kung had the protection of the Kalahari, and were far from settlements, the Hai//om did not. In addition, the fact that they spoke the same language as the Damara led some experts to conclude that they are "not really" San, although today they are recognised as a San people.

Of all the San peoples, the Hai//om alone had no traditional chief at the time of independence, but rather they had a Government-sponsored chief elected by a small number of Hai//om in the Outjo area south of Etosha. This has led to a leadership crisis, as many Hai//om do not recognise their current chief.⁵⁵ This leadership crisis has further weakened them as a people, making it more difficult for them to advocate for themselves against other groups.

⁵² Ute Dieckmann, *Hai//om Between the "Bushman Problem" and San Activism, Colonial Imaginations and Postcolonial Appropriations of Ethnicity in Namibia*, PhD dissertation, University of Cologne, 2005.

⁵³ James Suzman, "Etosha Dreams: An Historical Account of the Hai//om Predicament", *Journal of Modern African Studies*, Vol. 42, No. 2 (2004), p. 221.

⁵⁴ Thomas Widlock, *Living on Mangetti*, op. cit. n2, pp. 24-32, discusses the anthropological and historical work on the Hai//om.

⁵⁵ Joram Useb, "One Chief is Enough!", op. cit. n46, pp. 4-5; and Helgard Patemann, *Traditional Authorities in Process*, op. cit. n45, pp. 60-61.

A. The Hai//om dispossession from Etosha National Park

Etosha National Park is the ancestral land of the Hai//om. They have made traditional use of the land in this area throughout the history of the park, indeed Hai//om squatters are still being evicted. After the park was first fenced in the 1950s, resulting in the ejection of the Hai//om, they continued to cross the fence illegally, and were repeatedly caught and re-evicted.⁵⁶ Some of the most persistent ‘offenders’ were allowed to settle with their families at native locations within the park, and were sometimes offered employment as game rangers or trackers. But sympathetic park officials may have turned a blind eye to squatters there.⁵⁷ In Hai//om oral history, they have made continuous use of the park, often evading park officials with their considerable traditional bush skills. Etosha is replete with Hai//om place names and numerous maps detail Hai//om land use there.⁵⁸ Etosha population data indicates that 500-800 Hai//om lived there from the 1920s through to the present,⁵⁹ and that Hai//om goats and cattle grazed at the waterholes of Etosha into the 1950s. (See **Map 4: Etosha National Park cultural mapping project.**)

This history has obvious legal significance: the Hai//om have a claim to Etosha based on aboriginal title. The outline of this legal claim is not unlike that of the Khwe: the Hai//om have lived in the Etosha area since time immemorial and well before German colonisation. They had exclusive occupation and a livelihood from hunting and gathering in the park. Then, it either has to be argued that they were never excluded, relying on their continued occupation, or that their exclusion under South African law was unlawful under the United Nations mandate which required South Africa to govern for the benefit of the peoples of Namibia.⁶⁰

While it is not unprecedented for an indigenous people to ‘own’ a national park – Uluru and Kakadu National Parks in Australia are both owned by their indigenous occupants and leased to the Government with substantial development advantages to the respective tribes – it would be a difficult legal challenge.⁶¹ Because of the inequity of the Hai//om having no land, some compromises have been raised. One plan, never acted on, was to grant the Hai//om a concession to operate a potentially lucrative tourist camp in a remote corner of Etosha.⁶²

More recently, following the promise of accelerated land reform, has been the Government’s purchase of a block of farms near Etosha to be granted to the Hai//om for resettlement on at least a portion of their former lands. Such an arrangement might

⁵⁶ Ute Dieckmann, “The Vast White Place: A History of the Etosha National Park in Namibia and the Hai//om”, *Nomadic Peoples*, Vol. 5, No. 2 (2001), pp. 125-152.

⁵⁷ *Ibid.*, p. 230.

⁵⁸ Etosha National Park Cultural Mapping Project, “Etosha: Place of the People” and “Estimated Areas (territories) of Five Groups of Hai//om”, 2001.

⁵⁹ Ute Dieckmann, “The Etosha National Park: Life Within and the ‘Disappearance’ of the Hai//om”, unpublished paper, pp. 4-5, 11-12.

⁶⁰ Robert Gordon, “Can Namibian San Stop Dispossession of their Land”, in Edwin N. Wilmsen, *We Are Here: Politics of Aboriginal Land Tenure*, Berkeley: University of California Press, 1989, pp. 138-154, 153.

⁶¹ Graham Griffin, “Welcome to Aboriginal Land: Anangu Ownership and Management of Uluru-Kata National Park”, in Dawn Chatty and Marcus Colchester, *Conservation and Mobile Indigenous Peoples: Displacement, Forced Settlement and Sustained Development*, Berghahn Books, New York, 2002, pp. 362-376; and Phyllis B. Jackson, “National Parks and Indigenous Peoples”, *Colorado Journal of International Environmental Law and Policy*, Vol. 4 (1993), p. 502.

⁶² Suzman, “Etosha Dreams”, *op. cit.* n53, pp. 231-232.

be linked to Etosha in some way in the future, offering some development potential to the scheme. Currently the Government is purchasing two farms, Sachsenheim, already operating as a tourist lodge, and Operet, and has previously bought two others, Ruimte and Vergenoeg. The plan reportedly is to establish an area of 40 000 hectares for San resettlement adjacent to the north-east boundary of Etosha.⁶³ There is further discussion of possibly opening up the park to these farms, giving the Hai//om a potentially lucrative tourist operation connected to the park. On the one hand this is a positive step, but on the other hand, this is only a start considering that there are over 9 000 Hai//om living in the area, dispossessed, poverty-stricken and landless.

B. The Hai//om on farms south and east of Etosha

The average Hai//om lives and works on a number of farms during his or her lifetime. This is a life of poverty, hunger and frequent relocation. Wages are low and working conditions are poor. The farms near Etosha are among the most severely bush-encroached farms in the country, which limits their farming potential. Many Hai//om draw a meagre cash income cutting bush to make charcoal. Others simply live on farms without employment.⁶⁴ Changing agricultural methods, uncertainty brought about by the Government's land reform programme, Government's minimum wage laws and a shift to tourist farms has increased unemployment among farm workers.⁶⁵ Hai//om often worked for very low pay and the Government's efforts to improve the wages of farm workers have brought about massive unemployment among these workers, though many continue to be employed illegally for wages below the minimum.⁶⁶

A San oral history project has recorded some stories of these Hai//om, landless on their own land. Christina !Hanes, for example, was born in "in the bush" near Tsumkwe in 1918, and resided at Okaukuejo in Etosha in 1943, but lived most of her life on farms in the Outjo area. In her own words:

"We were working for the whites on our own land that they took from us. This was achieved because of our nomadic lifestyle. We lost most of our land because we did not know about putting up fencing and claiming land and such. When the Westerners came, they introduced fencing. They fenced off 'their' land and started farms. Because the open land was all gone, we were forced to work on their farms."⁶⁷

Elias Soroseb, born on the farm Otjitazu near Otjiwarongo in 1940, worked on 16 farms before ending up unemployed, poverty-stricken, and living with his children in Otjiwarongo.⁶⁸ Increasingly unemployed Hai//om migrate to the fringes of small agricultural towns in northern Namibia. (See **Map 5: Elias Soroseb's 16 moves.**)

⁶³ Christo Retief, "Shikale se Operet Onteien", *Die Republikein*, 3 July 2006.

⁶⁴ Yvonne Pickering and Christina Longden, *The Way it Used to Be: The Lives of Hai//om Elders by Hai//om Youth*, Working Group of Indigenous Minorities in Southern Africa (WIMSA), Windhoek, 2006. This book maps the life histories of nine Hai//om in the region just south and west of Etosha.

⁶⁵ Willem Odendaal, *Determination of the Feasibility of Conducting an Assessment of the Impact of Farm Worker Evictions on Farm Worker Livelihoods in Namibia*, Legal Assistance Centre, Windhoek, 2006.

⁶⁶ Ibid.

⁶⁷ Yvonne Pickering and Christina Longden, op. cit. n64, p. 4.

⁶⁸ Ibid., p. 7.

C. Tsintsabis: Government resettlement of the Hai//om

The displacement of the already landless Hai//om has given rise to some Government resettlement efforts, even in a situation where land reform has been stalled. Some of these efforts have been sponsored by foreign aid or NGOs.⁶⁹ The major resettlement project, Tsintsabis, is occupied by almost 800 Hai//om, 80% of the project population. While the population is overwhelmingly Hai//om, it also includes Damara, !Kung and even a few Ovambo, Herero and Kavango.⁷⁰ It has 196 households, simple cement-block houses built by the Government and some hand-built 'squatter-type' homes, and also encompasses informal settlements outside the village.

Tsintsabis is a former South African army base located at the boundary between the communal lands to the north and commercial farmlands to the south, at the end of a gravel road about 60 km north of Tsumeb. This isolation keeps the resettled Hai//om 'out of the way', but also limits economic opportunity to effectively nothing. Officially an "agricultural" settlement, the inhabitants are allocated small garden plots outside the village, but it is impossible to earn a living from these plots. Such basic government services as a school, a nursing station and a police post are present, and a small store and bottle-store, run by an Ovambo, complete the village.

There is no economy to speak of in the area. With no work, basic survival depends on the monthly pension of N\$300 (US\$43) paid to the elderly. Young men occasionally take on odd jobs, but also survive by means of illegal hunting and smallstock theft. Some farm workers living elsewhere in the area remit money to their families. A small camp, Tree-sleepers, built with donor funds on the outskirts of the village, has few campers and is far off tourist routes. The Government has established most resettlement projects far away from mainstream Namibian life, with few job opportunities, little training provided, no resources and no competitive marketing strategies, thereby dooming them to exist as rural pockets of poverty and hunger. This is not a model for successful land reform.⁷¹

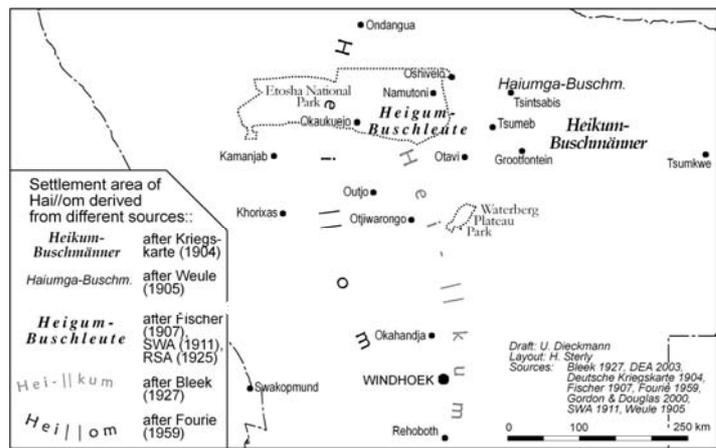
Sadly, despite the Government's efforts, Tsintsabis represents a failed model of rural resettlement that is all too common in Namibia. Without skills and support there is no way that the people resettled there can earn a living. Locating the project far away from any economic activity, in an out-of-the-way corner of Namibia, relegates it to a continued existence of poverty. People in the village are hungry and have no hope for the future. The smaller populations on large farms at Bravo and Excelsior have more potential for economic activity as farmers, but there has been no investment in training or agricultural machinery there, so such farms are also failing.

⁶⁹ The resettlement farms Oerwood, Bravo and Excelsior are nearby, accommodating 81, 80 and 50 people respectively. Stasja P. Koot, *Resettlement in Tsintsabis: Namibian Bushmen in a Changing World*, thesis, University of Utrecht, 2000, p. 52.

⁷⁰ Stasja P. Koot, *ibid.* This population data is unstable, as people come and go. Without jobs, there is nothing to hold people in Tsintsabis.

⁷¹ Sidney L. Harring and Willem Odendaal, *One Day We Will All be Equal: A Socio-Legal Perspective on the Namibian Land Reform and Resettlement Process*, Legal Assistance Centre, Windhoek, 2002.

D. Mangetti West (Farm 6): An informal Hai//om settlement



The Hai//om of Mangetti West are one of the most-studied San groups in the country, thanks to the work of anthropologist Thomas Widlock. Located about 40 km west of Tsintsabis, Mangetti West is one of a large block of government farms run by the now defunct Namibian Development Corporation (NDC) (the same parastatal that runs the government farm at Omega in West Caprivi). These were originally quarantine farms set up and run by the South African Government for the purpose of moving cattle from north of the Red Line into the white economy south of this line, but the NDC ran them as large-scale cattle farms.⁷² The NDC's demise means that this land is available for use, including for 'land reform' purposes.

Approximately 130 Hai//om live in an informal settlement on Farm 6 at Mangetti West.⁷³ They came here for different reasons, but the majority are displaced farm workers with nowhere else to go, most reporting a lifetime of living and working in the area. Most were born on farms, but a few raised in Hai//om communities in eastern Ovamboland were displaced with the Ovambo population expansion to the east.⁷⁴ No one can be certain how many such



⁷² Thomas Widlock, *Living on Mangetti*, op. cit. n2.

⁷³ Widlock reports a population of about 200 in the late 1990s, p. 4. We found only about 130 in June 2006. Other Hai//om live on nearby farms, with Widlock recording about 300 on the Mangetti West farms.

⁷⁴ Thomas Widlock, "Problems of Land Rights and Land Use in Namibia: A Case Study from the Mangetti Area", University of Namibia, Social Sciences Division, *SSD Discussion Paper No. 5*, March 1994.

informal squatter camps exist, nor the number of Hai//om living in each camp. As bleak as Tsintsabis may be, it offers decent housing and government services, none of which are offered at Mangetti West.

Like Tsintsabis, Mangetti West's location at the edge of the communal areas permits some access to hunting and gathering activities which is not available to San living on farms in more settled areas of Namibia. But few Hai//om still engage in these activities, which today can be summed up as 'desperate measures', engaged in only when people are hungry.⁷⁵ There is little work in Mangetti West other than some casual work for the NDC. People survive on government pensions. Given the alternative of life on a resettlement project like Tsintsabis, and continued displacement of Hai//om farm workers, a greater proportion of them will probably wind up in squatter camps.

One of the ironies of Mangetti West is that these displaced Hai//om are in fact living on state land that was formerly Hai//om traditional land. In a country with an expensive and stalled land reform effort, these 130 Hai//om could be settled exactly where they live now, on a good farm that the government already owns. But this is not the future that the people of Mangetti West expect: they are concerned that "their land" will be given to others, and that they will be displaced again.⁷⁶ Living outside mainstream political influences in the country, these Hai//om hear rumours that these farms are to be allocated to wealthy Ovambo individuals well connected to the SWAPO party and government. Another irony of land reform is that the Government itself dispossesses people living on farms it acquires, thus in the short term the Government's stalled land reform effort is creating more landlessness by dislocating farm workers who have no other place to go.⁷⁷ It may well be that the Government's purchase of farms north-east of Etosha is for the purpose of resettling these Hai//om. If they have an economic future, it is in small-scale farming, but presently, without land or money, this seems impossible.

E. Conclusion

The Hai//om traditional chief is recognised by the Government, but is a member of the SWAPO party, so there is much disagreement about his legitimacy.⁷⁸ But in any case, since the Hai//om have no traditional lands, the chief has no authority to allocate lands under the Traditional Authorities Act.

Like the Khwe in West Caprivi, the Hai//om of Mangetti West have at least three different aboriginal title arguments to put forward in negotiating for some kind of land allocation. Besides the claim to Etosha, which will be difficult to mount politically, there is also a claim to the government farms at Mangetti West and Mangetti East. These are state-owned lands in ancestral Hai//om territory, both of which Hai//om have occupied continuously, making a living there, but allegedly the South African authorities illegally

⁷⁵ During our field visit, the residents of Mangetti West claimed that it was no longer possible to hunt because they were not allowed to, and that it was increasingly difficult to collect veld food. Widlock reports that limited hunting is still possible, pp. 62-74.

⁷⁶ Thomas Widlock, "The Needy, the Greedy and the State: Dividing the Hai//om Land in the Oshikoto Region", in Thekla Hohmann, *San and the State*, op. cit. n14, pp. 87-119.

⁷⁷ Willem Odendaal, *Determination of the Feasibility of Conducting An Assessment of the Impact of Farm Worker Evictions on Farm Worker Livelihoods in Namibia*, op. cit. n65.

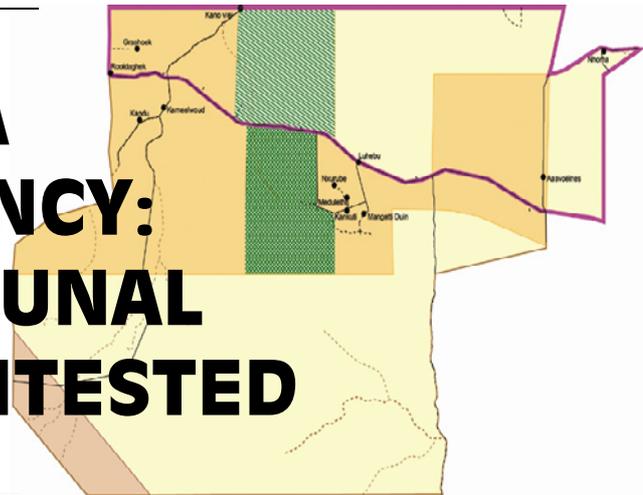
⁷⁸ A number of controversies exist in Namibia concerning the SWAPO Government's recognition of traditional chiefs. Many traditional chiefs belonging to minority political parties are unrecognised, while there are SWAPO party members recognised as "traditional chiefs" under controversial circumstances.

forced them off the farms. Finally, and much more complex, the Hai//om have some claim to traditional lands in the communal areas in the eastern part of former Ovamboland. The legal status of lands in the communal areas is complicated, but such lands are now administered by the Ovambo Traditional Authorities under the Traditional Authorities Act. As such, these lands are probably beyond the political or legal reach of the Hai//om.

The recent Hai//om assertion of these aboriginal title issues is clearly meant to move the Namibian Government to allocate land to them. While the National Land Policy⁷⁹ explicitly rejects restitution of ancestral land, it specifically commits “special support to all landless or historically disadvantaged communities” – as the Hai//om indisputably are on both counts. Thus the Hai//om have a legitimate expectation of major land allocation under this policy. Given the geographic position of former Hai//om lands in the centre of the country, their numbers as the largest San people in Namibia, and the large-scale infrastructural needs of a resettlement policy, this allocation is likely to be a significant and substantial undertaking that might well change the face of San life in Namibia. In any case, Hai//om poverty, landlessness and displacement force this issue of national land policy.

⁷⁹ The National Land Policy (1998: 14) states that, “Restitution of land rights abrogated by the colonial and South African authorities prior to Independence, will not form part of Namibia’s Land Policy.” However, this policy is committed to the provision of special support to all landless or historically disadvantaged persons and communities.

IV. NǀA JAQNA CONSERVANCY: SAN COMMUNAL LANDS CONTESTED



The former Bushmanland, now part of Namibia's Otjozondjupa Region, was originally, in the 1960s, a communal area set aside for the San. Unlike the other communal areas created under the Odendaal Plan during South African apartheid rule, Bushmanland was never self-governing, but rather a single administrative centre, Tsumkwe, in East Bushmanland, was created to administer the affairs of the San in the whole area. At the time of the Bushmanland's creation, there were probably only a few hundred San living there, primarily Ju/'hoansi, following their traditional hunting and gathering way of life. These people came to be concentrated around Tsumkwe, and soon ceased their traditional hunting and gathering activities. They are the subject of the next chapter.

Originally there was no division of Bushmanland, but different social conditions prevailed. East Bushmanland was the isolated traditional home of the Ju/'hoansi, whereas West Bushmanland, which was largely unoccupied, became a centre of South African army operations during the war for Namibian independence. San were brought to these bases from Angola, Caprivi, and the Ovambo and Kavango communal areas, and at independence in 1990 these relocated San remained on the army bases. Over 2 000 San, fearing retaliation, followed the army to South Africa,⁸⁰ but the rest remained at resettlement camps, primarily Mangetti Dune. About 2 000 San remain in this area, scattered among a number of remote camps and several larger settlements. Apart from a few Ju/'hoansi and perhaps a few other San who have lived in Bushmanland for centuries, all the San in West Bushmanland were either brought there by the South African army, or resettled there. They are not one San people, but include !Xu (also called Vasekele), Mpungu and !Kung.⁸¹ The fact of resettlement of different San populations means that there is not a cohesive population. Until the election of a !Kung traditional chief in 1998, there was no political leadership, and even now Chief John Arnold represents a varied !Kung constituency, composed of local and immigrant !Kung, with no common political tradition. He has no authority over other San peoples in the area.⁸²

⁸⁰ Steven Robins, Elias Madzudzo and Matthias Brenzinger, *An Assessment of the Status of the San in South Africa, Angola, Zambia and Zimbabwe*, op. cit. n16, pp. 8-10. The South African army reportedly withdrew from Namibia to its base at Schmidtsdrift near Kimberley in the Northern Cape, with 4 500 Khwe and Vasekele from Caprivi and West Bushmanland.

⁸¹ Suzman, *An Assessment of the San in Namibia*, op. cit. n3, reports that about 4% of the population of West Bushmanland was born there, with an additional 4% born in East Bushmanland. That leaves 54% born elsewhere in Namibia and 38% born in Angola (p. 40).

⁸² Arnold, a SWAPO supporter, was confirmed as chief of the !Kung, but his authority is limited to the !Kung.

The people of West Bushmanland are poor, and like the San in other parts of Namibia, they lack regular work. As almost all of them were relocated to the area, they have abandoned most traditional hunting and gathering activities. Some subsist from small-scale agricultural pursuits, smallstock or gardening. Few San have cattle. Like Omega in West Caprivi, the major villages are abandoned South African army bases, with basic housing still intact, but hardly any services. Mangetti Dune is the largest village, with a population of a few hundred.

Because West Bushmanland is both sparsely settled and located close to Kavango, Ovambo and Herero communal lands, there has been significant in-migration of non-San groups. Though the whole of former Bushmanland is a communal area created for San, non-San groups have brought cattle in, pushing the San off their lands and spoiling their waterholes. Two significant legal issues have emerged, as yet unresolved, which create an essentially lawless situation in West Bushmanland.

West Bushmanland's population is apparently about 2 000 – the illegal and itinerant nature of land occupation there obstructs a better count. The 1991 state census counted 2 358 people in central and West Bushmanland. As of 2000 Nꞑa Jaqna had 1 275 members. Around 120 non-San and up to 170 San living in the area opted not to join the conservancy.⁸³

A. Encroachment onto San communal lands

The Government claims to “own” all the communal lands in the country, but has never formulated adequate policies for administering these lands. The Commu-



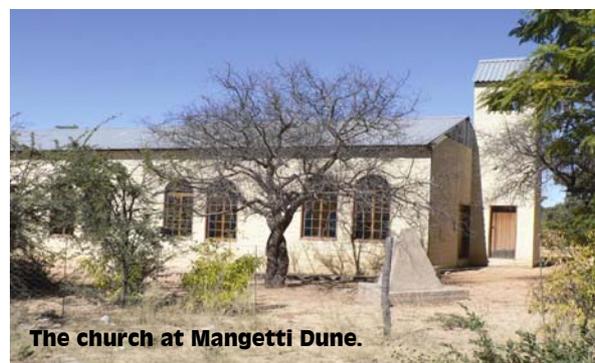
!Kung Chief John Arnold.



Illegal fencing within Nꞑa Jaqna Conservancy.



Resettlement housing at Mangetti Dune.



The church at Mangetti Dune.

⁸³ Thekla Hohmann, “We are Looking for Life, We are Looking for the Conservancy: Namibian Conservancies, Nature Conservation, and Rural Development – The Nꞑa-Jaqna Conservancy”, in Thekla Hohmann, *San and the State*, op. cit. n14, pp. 215-217. In the 1991 census the population of East and West Bushmanland was 87% San (Suzman, op. cit. n3, p. 40). It is clearly less today.

nal Land Reform Act was intended to provide a legal framework for the administration of communal lands, but this has clearly failed in West Bushmanland. It is not clear, for example, whether the Government is administering West Bushmanland for the benefit of the San, or whether equally for the benefit of any Namibian citizens desiring to move into the area with their cattle.

Some argue that Article 21(h) of the Namibian Constitution, providing that “All persons shall have the right to reside and settle in any part of Namibia,” gives anyone the right to settle in any communal area. But this interpretation, in treating all communal lands as “government land” freely available for any kind of settlement, does not support any right of existing communal landholders;⁸⁴ indeed it denies most communal landholders any property right at all, and seems inconsistent with the provisions of the Communal Land Reform Act that give the Traditional Authorities, in conjunction with the Communal Land Boards, the right to allocate customary land rights within communal areas.⁸⁵

In addition, a lack of coordination between the !Kung Traditional Authority and the Otjondjupa Communal Land Board, and a lack of capacity to administer this settlement on San communal lands, encourage an anarchistic form of ‘resettlement’ based on no principle other than ‘self-help’, a process that would reward the richest people or those capable of moving large cattle herds to other communal lands. Also, as private property (“commercial areas” outside communal areas) is protected by Article 16 of the Namibian Constitution, such properties encourage conflict between the people already living in the

⁸⁴ Sian Sullivan, “How Sustainable is the Communalizing Discourse of the New Conservation? The Masking of Difference, Inequality and Aspiration in the Fledgling Conservancies of Namibia”, in D. Chatty and M. Colchester, *Conservation and Mobile Indigenous Peoples: Displacement, Forced Settlement and Sustainable Development*, Berghan Books, New York and Oxford, 2002, pp. 158-187, at 166.

⁸⁵ Section 2 of the Communal Land Reform Act provides for the establishment of Communal Land Boards. Section 29(3) of the Act provides that a non-resident must apply to the Chief or Traditional Authority for a grazing right. Once this has been granted, the grazing right will be subjected to the conditions imposed by the Chief or Traditional Authority. The Chief or Traditional Authority may also withdraw this right at any time if this is in the interest of the residents, due to drought or any other reasonable cause. In fact, section 29 of the Communal Land Reform Act stipulates that the commonage of a traditional community is available for use by lawful residents for the grazing of their stock. While this right belongs to any resident of the community, certain circumstances exist under which the Chief or Traditional Authority may limit this right in terms of the kind and number of stock that may graze on the commonage. Regulation 10 provides that lawful residents may not have more than 300 large livestock or 1 800 small livestock grazing on the commonage at any time, and also regulates the area or areas of the commonage where the stock may be grazed, as well as the rotation of grazing over different areas.

In addition, the right of the commonage might be limited by the right of the Chief, Traditional Authority or Communal Land Board to use any part of the commonage for the allocation of a right under the Act. Also, the President has the right to withdraw and reserve any portion of the commonage for any purpose in the public interest.

The Act furthermore provides, in section 29(2), that a Chief or Traditional Authority may withdraw a resident’s grazing rights when he or she fails to observe the conditions imposed regarding the use of the commonage, for example when the resident has more than the prescribed number of cattle grazing on the commonage. He or she has a right to any other land, whether communal or not, of the same size or larger than the maximum size prescribed by the Minister under section 23. The Chief must also make sure that this other land has enough grazing for the person’s stock.

The following acts, among others, are prohibited, unless the Chief or Traditional Authority has given their written permission and the Communal Land Board has ratified this permission: erecting or occupying any building or structure on the commonage; ploughing or cultivating any portion of the commonage; living on or occupying any part of the commonage; obstructing access to any watering place on the commonage, or somehow interfering with the use of watering places, or damaging them; or doing something other than allowing lawful grazing on the commonage that prevents or restricts the other residents’ rights to grazing.

It is important to note that committing any of these prohibited acts is a criminal offence for which a person can be fined a maximum of N\$4 000 or imprisoned for a period of up to one year.

communal areas and people who move there. Government ownership of the communal lands also encourages environmental degradation, largely through overgrazing, as the settlers have no legal interest in the land. Clearly this is not a rational way to approach a resettlement policy.

All observers in West Bushmanland report that large herds of cattle of Herero, Ovambo and Kavango farmers have been moved onto San communal lands, and that the San lack the legal authority to evict them. For the San this means that the communal lands on which they live are beyond their control. This is true even though the !Kung have a recognised Chief, John Arnold, and a recognised Traditional Authority which should have as one of its responsibilities the administration of the San communal lands within its jurisdiction. The Chief has stated that he is powerless, and that repeated requests to the local police, the Ministry of Lands and Resettlement and the Ministry of Environment and Tourism have not resulted in any enforcement action to protect San lands.⁸⁶

The Communal Land Reform Act of 2002 is the primary law regulating the use of communal lands in Namibia.⁸⁷ Long awaited, it was expected to address a wide range of legal issues in the communal areas, and as the first legal statement on the communal lands following independence, it was hoped that it would provide a sound basis to protect the lands of black people in the communal areas. It has not done so.

Most significantly it failed to grant any definite legal status to black land rights in the communal areas. A general provision of the Act, section 17, asserts that “all communal land areas vest in the state in trust for the benefit of the traditional communities residing in those areas”. This might enable a traditional San community to sue the Government for breach of trust where the latter is either failing to protect San lands or using San lands to benefit some other group.⁸⁸ In the context of land reform, while Article 16 of the Namibian Constitution provides that the Government must compensate private landowners whose land it expropriates, there is a much weaker and largely untested parallel protection for traditional landholders in the communal areas, arguably violating Article 10 of the Constitution. Section 16(3) of the Act provides that compensation payable must be determined (a) by agreement between the Minister and the person concerned, or (b) failing such agreement, by arbitration in accordance with the provisions of the Arbitration Act 42 of 1965. Commercial landowners have full legal redress through the courts.

But, perhaps more significantly, individual black landholders have limited legal protection of their land rights under the Communal Land Reform Act. This means both a limited legal right to protect their land occupancy against outsiders, and no legal protections against the Government. For example, the Commercial (Agricultural) Land Reform Act 6 of 1995 provides that a private landowner, upon his or her land being earmarked for expropriation, can turn to a Lands Tribunal which would independently adjudicate just compensation matters. A similar dispute resolution mechanism does not exist under the Communal Land Reform Act. Instead, section 16(1)(c) of this Act provides that the President may, with the approval of the National Assembly and by proclamation in the *Government Gazette*, withdraw from any communal land area, subject to the

⁸⁶ Under the Communal Land Reform Act 5 of 2002, the primary law regulating the use of communal lands in Namibia, it seems clear that Chief John Arnold, with the support of the Otjozondjupa Communal Land Board, has the legal authority to remove illegal cattle farmers and their fences from San communal lands allocated under customary law. Apparently, therefore, what is happening here is a failure of the state to enforce the Act.

⁸⁷ Communal Land Reform Act 5 of 2002.

⁸⁸ Land, Environment and Development Project of the Legal Assistance Centre (LAC) and Advocacy Unit of the Namibia National Farmers Union (NNFU), *Guide to the Communal Land Reform Act*, LAC and NNFU, Windhoek, 2003, p. xv.

provisions of subsection (2), or from any defined portion thereof required for any purpose in the public interest. Subsection (2) in turn provides that “land may not be withdrawn from any communal land area under subsection (1)(c), unless all rights held by persons under this Act in respect of such land or any portion thereof have first been acquired by the State and just compensation for the acquisition of such rights is paid to the persons concerned.”

A number of concerns can be raised regarding sections 16(1) and (2) of the Act. Firstly, the President and Members of the National Assembly may have a direct or indirect interest in acquiring communal land. The nature of land reform, especially where contentious issues such as expropriation enter the picture, is such that the state will always be an interested party; indeed it will always be one of the parties in the process. This is another good reason for an independent Lands Tribunal to adjudicate communal land acquisition matters. Also, without appropriate legislation in place, it is likely that the Communal Land Reform Act will be challenged under Article 18 of the Constitution, which states, inter alia, that “... persons aggrieved by the exercise of acts and decisions shall have the right to seek redress before a competent Court or Tribunal”.

The question of the meaning of “in the public interest” in the context of communal land reform and the rights of minorities such as the San has not been addressed. The phrase “in the public interest” is open to interpretation and may weaken legal protection of communal landholders. For example, land expropriation for land reform purposes could be interpreted as being in the public interest, but disputes may arise as to whether the expropriation of a particular piece of land is in the public interest, such as developing small-scale resettlement farms in a gazetted conservancy. In this regard factors such as current and future land-use patterns, the real and potential benefit of a piece of land to the public, the financial costs to the state of expropriating a piece of land, the environmental condition of that land and the availability of other land for the same or a similar purpose, should be taken into account in reaching a decision on an expropriation. Furthermore, the protection of San minority rights may be in direct conflict with the “public interest” of larger groups.

It is evident that numerous factors have to be considered in targeting land for expropriation. It is recommended that land expropriation should be dealt with in accordance with set criteria. Ideally these would be contained in the Government’s policy documents.⁸⁹ The Government is bound to follow its own policy guidelines in decision-making unless there is a justifiable reason or grounds to deviate from the guidelines by virtue of Article 18 of the Constitution. The flexibility of a government policy (as opposed to an Act of Parliament) would allow the Government, without great expense, to amend or adapt the policy as circumstances require. For the sake of clarity and certainty it might be appropriate to include a provision in the Communal Land Reform Act directing the Government to consider the provisions of the relevant government policies.⁹⁰ In turn these policies must expressly include protections for the land rights of the San and other minority groups.

Under the Communal Land Reform Act, the Chief, the Traditional Authority and the Communal Land Board, acting together, are responsible for allocating communal land. It can be said that West Bushmanland and Nǀa Jaqna Conservancy are tests of the Act: if the rights of communal landholders are not challenged, they are easy to protect, but

⁸⁹ Willem Odendaal, *Our Land We Farm*, Land, Environment and Development Project of the Legal Assistance Centre, Windhoek, 2005.

⁹⁰ Ibid.

if these rights are challenged, and the law is powerless to protect them, then the law is ineffective.

This legal uncertainty places communal landholders at a great disadvantage in their efforts to make a living on their own land. They cannot, for example, acquire a mortgage for improving their housing, and they cannot take legal action in Namibia's courts against many types of land encroachment. Though they can take legal problems to the Traditional Authority, this channel is effective only if their dispute is with another member of the same community. They have virtually no protection against encroachments by the state.

The current situation in West Bushmanland illustrates the weakness of San land rights in the communal areas. An investigation of the movement of cattle into the area, commissioned by the Working Group of Indigenous Minorities in Southern Africa (WIMSA) based in Windhoek, reported in detail the movement of thousands of cattle into San lands. The scale of these movements shows that they are well financed and may involve government collusion.⁹¹ One factor strongly suggesting such collusion is that the movement of cattle into West Bushmanland entails moving cattle across the Red Line veterinary fence from the commercial farmlands to the communal land areas where cattle are worth far less.⁹² It does not make economic sense for farmers to reduce the value of their cattle by moving them to communal areas across veterinary fence unless they have somehow illegally breached the fence. As this fence separating the communal from the commercial herds looms very large in Namibia's colonial history, such a systemic breach of the fence is thus far unknown.⁹³ If the security of the fence is compromised by corruption, the whole export meat industry in Namibia is subject to collapse.

The situation in West Bushmanland has become chaotic as hundreds of Kavango, Herero and Ovambo have moved thousands of cattle onto San lands. Since this process is completely unregulated, and even unlawful, there is no good information on its scope: we do not know how many outsiders and how many cattle have moved into the area. It is process that has pushed the San to the margins of their lands, inhibiting their efforts to start or continue their own smallstock farming operations.⁹⁴ The Ovambo and Kavango herds are communal herds raised outside the Red Line area, whereas the Herero herds came from the commercial farmland side of the Red Line.

Few San in the area own cattle, but several do farm cattle belonging to others. Some San are smallstock farmers. Apart from these farming activities and a community-run campsite for tourists at Omatako, the San of West Bushmanland have no source of income at all.

⁹¹ Richard Pakleppa, "Report on Investigations of Controversial Land Allocations in Tsumkwe District West, Namibia, between June 16 and July 4, 2002", Working Group of Indigenous Minorities in Southern Africa (WIMSA), Windhoek, 2002.

⁹² Gottfried Wellmer, "Implications of the Red Line for the Namibian Economy", *Discussion Paper No. 2*, Civil Society Conference, Windhoek, 2001. Cattle on the commercial farms in Namibia are all vaccinated and free of disease. Traditionally, white cattle farmers believed that the African cattle north of the veterinary fence were a threat to their herds. Modern veterinary methods have undermined the need for the fence in some ways, but the presence of large herds of unvaccinated cattle in Angola and Zambia still promotes the continuation of the fence. Eliminating the differential price of black and white cattle is an important goal in Namibian agricultural policy, necessary to provide for the success of cattle farming in the communal areas.

⁹³ Richard Pakleppa, op. cit. n91.

⁹⁴ Richard Pakleppa, *ibid.* Once again, as in West Caprivi, due to the contested and political nature of population movement, and a weak governmental infrastructure, there is no reliable data on either the number of outsiders or of cattle that have moved into West Bushmanland. Also, both people and cattle move, so there may be large numbers of cattle present at times, but not all the time.

B. Nǃa Jaqna Conservancy

A communal conservancy is a legal entity that permits a group of members to share the natural resources on that land. These entities have become very popular in Namibia as a way to enable local inhabitants to derive an income from communal lands. Communal conservancies were first permitted by a law gazetted in 1996. Fifty conservancies were registered between 1998 and 2006, covering a total area of 118 705 km² and occupied by over 50 000 people.⁹⁵ Given the uncertainty of ownership rights in communal lands (see chapter 6), a conservancy is the closest many Namibians can get to a legal interest in the land they occupy.⁹⁶

As anthropologist Sian Sullivan points out, one underlying factor driving the creation of communal conservancies is that, in the absence of meaningful land rights for most black Namibians, the conservancy fills the void in three ways:

First, discussions over establishing conservancies have produced a much-needed outlet for debate regarding land redistribution Second, because two criteria for gazetting a conservancy are that its physical boundaries and community membership be defined, the situation is treated as one of establishing rights to land areas even though legally a “community” is only establishing rights to return on animal-wildlife in those areas. Third, ... because there has been a lack of an overriding legal procedural basis for establishing tenure rights to land in communal areas, the conservancy option has become the only means by which people can gain any apparent security of land.⁹⁷

Thus the members of a conservancy do not have a property interest in the land, but rather an interest in the wild animal resources produced on such lands. A whole range of social and environmental issues have led to the creation of the 29 conservancies, intending to give local people some control, though limited, over their environment, and some, usually very small, financial interest in taking care of the land.⁹⁸

These conservancies are heavily supported by NGOs and foreign aid, so it should not be surprising that poverty-stricken Namibians seized on the conservancy as one way to deal with their powerlessness and landlessness. The speed with which conservancies have been founded speaks both to the level of outside support enjoyed by the conservancy movement, and to the deep need it fills in the hearts of poor Namibians anxious to protect their meagre land rights.⁹⁹ It is still very early, but the process has been

⁹⁵ List provided by Shirley M. Francis, Executive Secretary, WWF/LIFE Plus Programme, Windhoek.

⁹⁶ Sian Sullivan, *op. cit.* n84. It should be noted that the Communal Land Reform Act of 2002 was passed after this report was written. It does contain some provisions to register customary land rights. It remains to be seen whether this Act will adequately address these concerns. Poor people may not have the means to take advantage of these registration provisions; the Government may not provide the necessary legal infrastructure to operationalise the CLRA.

⁹⁷ *Ibid.*, pp. 165-166.

⁹⁸ It should be clear that only two conservancies (of 50) generate anything near a substantial amount of income for their members. In 1999, Namibia's flagship conservancy, Torra, earned N\$1 041 or about US\$132 per member, and Nyae Nyae in 2003 about N\$600 or US\$85 per member. The next highest conservancy earned only N\$150 or US\$20 per member. (This data is given in Sullivan, *ibid.*, except for the Nyae Nyae data which appears in *New Era* newspaper of 16-18 February 2004, p. 17. In a country where many people in communal areas live on about US\$1 a day, even a few dollars of extra income is helpful. In addition, many conservancies provide jobs, either directly, with members working as game watchers or camp managers, or indirectly, with members working for white-owned concessions. See National Association of CBNRM Support Organisations (NACSO), *Namibia's Communal Conservancies: A Review of Progress and Challenges*, 2004, pp. 36-47.

⁹⁹ NACSO, *ibid.* NGOs have invested unknown millions of dollars in the various conservancies, making them extremely expensive development devices given the meagre earnings they generate. If there are

controversial and will require careful study and evaluation as the conservancies progress. Still, it seems clear that the conservancy as a legal construct has a number of serious legal deficiencies, starting with the underlying land ownership issue.¹⁰⁰

Local San at Nꞑa Jaqna see the conservancy as a means to prevent outside cattle farmers from taking their lands, and potentially as a way to derive some income. Thus creating the conservancy was a thinly veiled attempt to protect their land rights. The conservancy membership is overwhelmingly San, as is the leadership.¹⁰¹ Compared to some other conservancies in the country, Nꞑa Jaqna is poorly situated, with virtually no natural resources to manage. Parts of Nꞑa Jaqna are empty desert-type lands, overgrazed and eroded. Without the promise of donated game, there would be no purpose for the conservancy at all, i.e. no animals from which to derive an income. (See **Map 6: Nꞑa Jaqna Conservancy land use.**)

Nꞑa Jaqna Conservancy, almost coextensive with the area making up West Bushmanland, is heavily influenced by Nyae Nyae Conservancy, almost coextensive with the area making up East Bushmanland. The latter conservancy, among the first and best-financed in Namibia, is one of only three to turn a profit – from big-game hunting concessions. As outsiders placed increasing pressure on West Bushmanland, local San, working with NGOs and with the example of Nyae Nyae, believed that a conservancy of their own would help to protect their lands from outsiders, since the Government did not recognise their communal ownership. They registered a conservancy with 1 275 members, including only local San as members, i.e. excluding outsiders.

Unlike Nyae Nyae, which had substantial wildlife populations, the South African army had cleared Nꞑa-Jaqna of wildlife, shooting animals for sport. Therefore there are plans for reintroducing 4 000 wild animals and drilling new boreholes to accommodate them. In the grand plan these new big-game herds at Nꞑa-Jaqna will eventually connect with those at Nyae Nyae, Khaudom Game Reserve and Bwabwata National Park to the north, creating a vast wildlife area connecting to the tourist circuit extending from Etosha to Caprivi to the Okavango Delta, and producing substantial income for local residents. In theory, such a development would also stop the encroachment of outside cattle farmers and their illegal fencing.

Illustrative of the level of disorganisation, poor planning and political influence operating in present-day Namibia, the Ministry of Lands and Resettlement is planning to create up to 100 new farms of up to 1 500 hectares per unit, presumably for wealthy and politically well connected black cattlemen, across the northern half of Nꞑa Jaqna, within a proclaimed state forestry area, even as the Ministry of Environment and Tourism was planning to release 4 000 head of game.¹⁰² These 'plans' are totally incompatible: cattle destroy waterholes and make them useless for watering game; cattle must be fenced in,

substantial legal and political rights accruing to local residents, especially in the form of some recognition of land rights, this is of course another benefit. This issue arises in all other forms of development, including the resettlement schemes.

¹⁰⁰ Andrew Corbett and Clement Daniels, *Legislation and Policy Affecting Community-Based Natural Resource Management in Namibia*, Legal Assistance Centre, Windhoek, 1996.

¹⁰¹ Thekla Hohmann, *San and the State*, op. cit. n83, p. 224.

¹⁰² This government plan is part of a grand scheme to create farms in the communal areas. This is an approach to 'land reform' that denies the land rights of those already living and farming in the communal areas, by treating the land as 'state land', not as the land of small-scale farmers. Because the government must compensate for the expropriation of private commercial farms, it is drawn here to 'land reform' on the cheap, seizing communal lands and displacing the people who live there. This implies that communal landholders lack any legal right to land, and that communal lands are available for redistribution by the Government. See Brigitte Weidlich, "San Conservancy at Risk", *The Namibian*, 14 November 2006.

and the fences interfere with the natural movement of wildlife; and cattle eat the range clean, leaving no food for wildlife and also causing environmental degradation, which leaves the land unsuitable for wild game. The plan is also arguably illegal and should the proposed resettlement development go ahead, it could set a precedent for land issues in Namibia's conservancies, and would conflict directly with other government policies on conservancies, particularly those of the Ministry of Environment and Tourism. For example, section 31(4) of the Communal Land Reform Act states:

“... before granting a right of leasehold (the legal status of small farms on communal lands) in respect of land which is wholly or partly situated in an area which has been declared a conservancy in terms of section 24A of the Nature Conservation Ordinance, 1975, a communal lands board must have due regard to any management and utilisation plan framed by the conservancy committee concerned in relation to that conservancy, and such board may not grant a right of leasehold if the purpose for which the land in question is proposed to be used under such right would defeat the objects of such management and utilisation plan.”

Therefore, the protection that conservancies enjoy under the Act is that the Ministry's actions should have due regard to the existing laws of the country and the objectives of our lawmakers should be fulfilled.

In addition, Communal Land Board allocations of rights of leasehold for agricultural purposes may only be forthcoming in an area designated for such purposes in terms of section 30 of the Communal Land Reform Act, which states:

- (1) Subject to subsections (3) and (4) and section 31, a board may, upon application, grant to a person a right of leasehold in respect of a portion of communal land, but a right of leasehold for agricultural purposes may be granted only in respect of land which is situated within a designated area referred to in subsection (2).
- (2) The Minister, after consultation with the Traditional Authority and the board concerned, must designate by notice in the *Gazette*, in respect of the communal area of each traditional community, an area within which that board may grant rights of leasehold for agricultural purposes.

The designation should thus be made after consultation with the !Kung Traditional Authority and the Otjozondjupa Communal Land Board. In principle such areas cannot arbitrarily be declared as such, and specifically where the communities are opposed to such areas. Ironically, the National Resettlement Policy provides that the San should be one of the prime beneficiaries of the resettlement process. It states that “members of the San Community have endured exploitation and discrimination at the hands of their fellow citizens throughout history. At present the San are in the hands of farmers in both communal and commercial areas ... they are marginalised and subjected to unfair labour practices and inadequate shelter.”¹⁰³

Besides this legal and social impediment to the Government's plan, there are even more negative environmental and economic implications. It is unclear whether the Ministry of Lands and Resettlement has conducted an environmental assessment on the potential impact of small-scale farming on the area, or whether it is planning to do so. This is a desert area in which water is hard to find. It is also unclear whether the Ministry is planning to conduct a cost-benefit analysis to determine whether small-scale farming would be more beneficial to the community than income generated from future conser-

¹⁰³ Ministry of Lands, Resettlement and Rehabilitation (MLRR), *The National Resettlement Policy*, MLRR, Windhoek, 2001, pp. 3-4.

vancy activities. Boreholes will have to be drilled at costs of up to N\$100 000 each, paid for by marginal farmers already heavily indebted to the Government for their leaseholds. These farms will be marginal due to the lack of water, and unsaleable due to huge debt. The farming and water-use operations will threaten the biodiversity of the fragile environment. These farmers will be non-San, and they will bring their families as well as their workers into a San region with a population of only about 2 000, thereby changing the social and demographic structure of the conservancy. It is currently unclear how the San community here would benefit from the small-scale resettlement farming. A number of San expressed concern that they will not benefit from this resettlement development at all, and that instead they would become the farm workers of those who “come from the outside” to settle in the conservancy, resulting in the San once again being driven off their own lands.

Under the existing Communal Land Reform Act there is no provision to compensate communal land inhabitants for the loss of their land. In other words, there is no way that the San would be compensated for the loss of their lands should the small-scale resettlement farming development be implemented. In addition, the creation of these farms will weaken the conservancy, reducing its capacity for holding game and drawing income from game management.

The conservancy members still have no legal means to keep cattle farmers off the land because they do not own it. Each conservancy has its own detailed land-use plan (see Map 7), allocating different uses to different parts of the land. Substantial encroachment by cattle will violate Nꞛa Jaqna’s plan, but the plan is not self-enforcing. This leads to an obviously absurd set of conflicts: a conservancy is set up as an environment for wildlife, but the introduction of large numbers of cattle destroys that environment, making it unsuitable for the wildlife that the conservancy was created to sustain. As a practical matter, a conservancy unable to regulate inconsistent agricultural uses within its boundaries cannot remain a suitable environment for wildlife.

Despite the detailed land-use plan that a conservancy has to submit in order to be gazetted, there are no regulations outlawing farms in a conservancy, so this plan is fully ‘legal’, even if it makes no social or environmental sense. Small-scale farming in fact does occur in all conservancies. Indeed, the main intention underlying conservancies is that of facilitating the kind of environmental management that allows people and wild animals to share the land. This stems from a view among NGOs that until Africa can support its people adequately, there is no future for game. Accordingly a good conservancy plan provides for an adequate standard of living for the people living in the conservancy.¹⁰⁴ But large-scale cattle farming on up to half of the land is inconsistent with the existing San plan for Nꞛa Jaqna Conservancy, as it is a plan based on a large-scale release of game.

This plan to develop substantial farming operations in West Bushmanland was not the Government’s first attempt to use the region for a national purpose without regard to the needs of its inhabitants. In 2001 the Government announced a plan to erect a refugee camp in the area to accommodate up to 18 000 refugees from countries such as Angola and the Democratic Republic of Congo. Again the impact of so many foreigners in an area populated by fewer than 2 000 San would be to push the San back further into the corners of their own land.¹⁰⁵ The San are pushed aside by larger groups, and are unable to protect their personal or property rights. While this plan was withdrawn, it

¹⁰⁴ NACSO, *op. cit.* n98, pp. 10-29.

¹⁰⁵ Robert J. Hitchcock, “Anthropological Study on the Potential Impact of Refugees in M’Kata, Namibia”, report to the UN High Commissioner for Refugees, Windhoek, 1 November 2001.

illustrates that the Government viewed San lands in West Bushmanland as belonging to the state and available for resettlement by other peoples.

Nṱa Jaqna Conservancy was expanded to include almost all of West Bushmanland. While it might be expected that this would conflict with the interests of cattle herders still moving large herds into the region, it also caused conflict between Nṱa Jaqna and Nyae Nyae Conservancies – or between two San peoples.

We have seen that the boundaries of the communal lands were set by the Odendaal Commission in 1964. Although this line is completely artificial and colonial in conception, it has an absolutely clear significance in Namibian property law: on one side of the boundary the land is privately held under registered land titles, mostly by white farmers. On the other side the land is held ‘communally’ with, as we have seen, no adequate legal definition of communal property rights in Namibian law. As a conservancy is a legal body that can be incorporated into a communal area and must have a “defined membership”, the defined members have a legal right to the natural resources of the land, but still no legal right to the land itself.

The conflict with Nyae Nyae, however, did not concern a colonial boundary as there was no legal boundary between East and West Bushmanland. Rather, East Bushmanland was where the Ju/’hoansi lived, and West Bushmanland was where, in general, they did not live, so leaving enough vacant land for the South African army to occupy and use as bases. The local San had to reconstruct their historical use of these lands in order to determine where the boundary might be. The actual land in question was not occupied, so it was a question of asking local villagers how the land had been used and where local boundaries were. Since the area in dispute was large, it was not the area of one particular village or family. Discussions over these boundary lands began in 2000 and were not resolved until 2006. The intensity of these discussions reveals the seriousness of the land issue to the San.¹⁰⁶ Nhoma, another boundary area village, north of the disputed area, chose to remain outside both conservancies.¹⁰⁷

C. Conclusion

Since the rights of San to communal lands are unclear, the conservancies become a type of land right, and disputes over boundaries are to be expected. These are nothing less than land ownership disputes. At the same time, setting up disputes between San groups does not help the San succeed in negotiations with the state for increased land rights. Rather, it further factionalises and impoverishes them.

A conservancy, by definition, must have a management committee. In addition to the role of Traditional Authorities, the management committee is a governing body that might represent the most functioning government body in the area. While Nyae Nyae has a well-established Traditional Authority, that of the !Kung of West Bushmanland was recognised only recently. John Arnold was elected as Chief of the !Kung Traditional Authority, the only such authority in the district. Part Herero and a SWAPO supporter, Arnold’s ability to represent diverse San interests is contested. Other San groups have

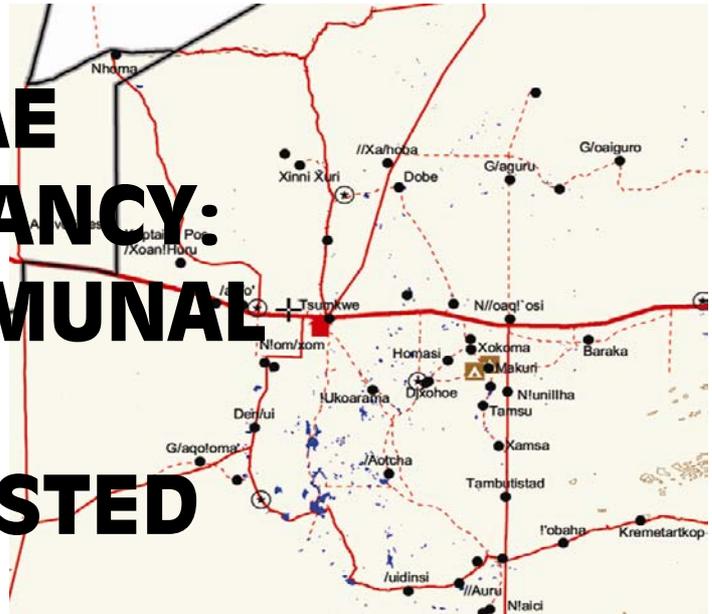
¹⁰⁶ Thekla Hohmann, *San and the State*, op. cit. n83, pp. 226-230. There are conflicting accounts of this border dispute and its meaning, reflecting some conflict between these San groups.

¹⁰⁷ Also reflecting local conflict, it is unclear why a poor community of a few dozen San would choose to stay outside of both conservancies, given the income, resources and land rights that might accrue from membership. We discussed this with knowledgeable parties in Tsumkwe in June 2006, but again there was no clear answer.

representatives on the management committee of the conservancy, creating overlapping and potentially conflicting political authority in the conservancy area. Arnold has been powerless to prevent further encroachments of cattle herders, leading to rumours that he is in a secret agreement with them. In any case this Traditional Authority is weak and ineffective in negotiating San land issues: it is unable to stop the encroachments of cattle farmers, and to protect San land rights. Moreover, in its early stages the conservancy produces almost no income – to be divided among over 1 200 members. With no game yet reintroduced, it is likely to be a long time before this conservancy sees real income.

As meaningful land reform languishes in Namibia, West Bushmanland continues to be exposed to the illegal introduction of cattle due to its proximity to neighbouring communal lands. Without clearly defined legal rights to land in the communal areas, there is always the possibility of conflict over land. The uncertainty of stalled land reform promises places increased pressure on the San of West Bushmanland, but also on their Herero, Kavango and Ovambo neighbours. If anything, the stalling of land expropriation in the commercial areas puts more pressure on the communal lands. The proximity of West Bushmanland to other communal areas is a potential source of conflict, and the Government's inaction exacerbates this potential for conflict by pitting groups of poor people against each other.

V. NYAE NYAE CONSERVANCY: SAN COMMUNAL LANDS UNCONTESTED



The Ju/'hoansi have lived in East Bushmanland for hundreds of years, carrying on traditional hunting and gathering activities in this remote region of the Kalahari Desert. At the time of the Odendaal Commission, this area was set aside as the communal lands of the “Bushman” (the term in use during South African rule), named “Bushmanland” – just as each of the other “homelands” was named after the people they were intended to accommodate.¹⁰⁸ At the time, in the mid 1960s, there were probably no more than 400 Ju/'hoansi living here, but the South African plan was to relocate all San from wherever they lived in Namibia to Bushmanland.¹⁰⁹ This was the basis of apartheid: rigid racial separation for both blacks and whites.

These original inhabitants of Nyae Nyae are among the most traditional of the San peoples, but anthropologists report that by the 1960s most of their traditional hunting and gathering activities had ceased.¹¹⁰ Small-scale subsistence activities persisted, most often due to people being hungry, but the vast majority of the Ju/'hoansi settled at Tsumkwe, the new administrative centre, where they lived on government food aid.¹¹¹ Because the area was remote and these communal lands were set aside for the Ju/'hoansi, these are the only San in Namibia living uncontested on their own lands, i.e. communal lands administered by their own Government-recognised Traditional Authority, headed by their own Chief. In 1998 they incorporated the remaining Ju/'hoansi communal lands into Nyae Nyae Conservancy, the first conservancy in Namibia, coextensive with the area occupied by Ju/'hoansi, hence the conservancy has come to be a major economic and social force here.¹¹² (See **Map 7: Nyae Nyae Conservancy land use.**)

¹⁰⁸ On the Odendaal Plan see John Mendelsohn, Alice Jarvis, Carole Roberts and Tony Robertson, *Atlas of Namibia*, David Philip, Cape Town, 2002, p. 137.

¹⁰⁹ Joram /Useb, in “One Chief is Enough!”, op. cit. n46, reports that in the early 1970s the South Africans announced that all San must move to Bushmanland and accept the Ju/'hoansi chief as their leader. The Hai/om protested that they didn't speak the same language.

¹¹⁰ L. Marshall, *The !Kung of Nyae Nyae*, Harvard University Press, Cambridge Mass., 1976. Richard F. Lee, *The !Kung San: Men, Women and Work in a Foraging Society*, Cambridge University Press, Cambridge, 1979, involved research with the same people, just across the Botswana border from Nyae Nyae.

¹¹¹ Robert Gordon, *The Bushman Myth*, op. cit. n5, “Bushmanland Fabricated” (chapter 19), pp. 175-181.

¹¹² James Suzman, *An Assessment of the Status of the San in Namibia*, op. cit. n2, p. 43.

A. The Ju/'hoansi and their lands

The Ju/'hoansi at Nyae Nyae are among the most-studied anthropological subjects in the world. This is not only because they have historically presented a picture of a 'perfect' subject – hunters and gatherers, nearly naked, living in small family groups – but because of an association with John Marshall, a great anthropologist with a social conscience who not only studied the Ju/'hoansi, but also recognised their poverty-stricken and exploited human situation and decided to work with them to engage the rapid social change they were confronting.¹¹³

Even in the 1950s, the romantic view of traditional San, living in family bands and traversing the Kalahari in search of game and veld foods, was past. As Robert Gordon has clearly shown in his groundbreaking analysis, *The Bushman Myth*, the San were exposed to various outside forces that decimated them by the mid-20th century.¹¹⁴ The San of the 1950s were living on the margins of society, subsisting on a mixed economy of government food aid, foraging, small-scale agriculture, pastoralism and wage labour. While the Ju/'hoansi were among the most remote of the San peoples of Namibia, and thus much less impacted by the weight of colonialism, by no means were they unaffected. German cattle farmers even then were farming past the boundaries of their territories, and Herero and Ovambo cattle farmers had been pushed further into their lands by German and Afrikaner colonial expansion.

The Odendaal Commission's creation of the "Bushman" homeland placed an administrative centre, Tsumkwe, in Ju/'hoansi lands for the first time, and most of them settled there. Like many other resettlement schemes in the country, Tsumkwe became a rural slum. The unemployed Ju/'hoansi had nothing to do, and easy access to alcohol, and massive social disorganisation settled in. Studying this place, John Marshall believed that the Ju/'hoansi had to decide their own future, but, considering the possible models, he thought that a mixed economy of foraging, small-scale agriculture and pastoralism made the most sense. In 1981-82 the first groups of Ju/'hoansi left Tsumkwe to return to their *n!ores* (traditional territories) to settle in small villages, raise crops, tend some stock, and forage the desert for veld food.¹¹⁵ While a good deal of traditional knowledge had probably been altered or lost, many elders at Tsumkwe were raised on traditional lands in the Kalahari in the 1920s and 1930s, or earlier, and had good memories of their *n!ores* as well as their customary law.¹¹⁶

Access to their traditional lands meant not only access to the territory itself, but also access to their traditional cultures. Movements around the land during the cycle of the Kalahari year involved different kinds of traditional food-gathering activities. Two hundred *n!ores* have been identified in north-eastern Namibia, and there may be a 100 more. A right to live in and use the land in a *n!ore* is inherited from parents, but can

¹¹³ The story of John Marshall's work with the Ju/'hoansi can be found in Robert J. Hitchcock, "Communities and Consensus: An Evaluation of the Activities of the Nyae Nyae Farmers Cooperative and the Nyae Nyae Development Foundation in Northeastern Namibia", op. cit. n24.

¹¹⁴ Robert Gordon, *The Bushman Myth*, op. cit. n5.

¹¹⁵ Arno Leffers, in *Gemsbok Bean and Kalahari Truffle: Traditional Plant Use by Ju/'hoansi in North-Eastern Namibia*, Gamsberg Macmillan, Windhoek, 2003, clearly shows the extent of the survival of this traditional knowledge. This book is a guide to the traditional uses of hundreds of plants, produced by an ethno-botanist working with the Ju/'hoansi.

¹¹⁶ Axel Thoma and Janine Piek, "Customary Law and Traditional Authority of the San", *Paper No. 36*, Centre for Applied Social Sciences (CASS), Windhoek, 1997, documents interviews with Ju/'hoansi about their customary law.

also be acquired through marriage or a fictive relationship known as a 'name relationship'.¹¹⁷ The *kxa/ho*, literally meaning 'sand surface', is the other Ju/'hoansi land tenure concept, encompassing all of the *n!ores* or all lands of the Ju/'hoansi. A *n!ore* is a named place which may be used for residing on or as a hunting and gathering place. Each residential *n!ore* has one or more eating places, called *m/hosi*, which may be shared with neighbouring *n!ores*. Each residential *n!ore* also has a *!age/ho* or hunting place, and a more private gathering place close to the village, called a '*m/ho*, translated as 'the gathering area that is behind you'. This is a complex land-use scheme devised over centuries to ensure that people were spread across a vast area so as to protect scarce desert resources from overuse.¹¹⁸

The return of the Ju/'hoansi to their *n!ores* and the establishment of small-scale rural economies there led to the creation of their first organisation, the Ju/Wa Farmers Union, intended to assist with local development activities, such as purchasing of small-stock and seeds, and provision of agricultural training. But, perhaps more importantly, it also meant that the Ju/'hoansi were organised in a way that other San were not. Large amounts of outside donor support went to advise the San in this venture at Tsumkwe.¹¹⁹

B. Ju/'hoansi at the National Land Conference

Out of the Ju/Wa Farmers Union, and with the assistance of John Marshall and people he mobilised, came the effective Ju/'hoansi presence at the National Land Conference in Windhoek in 1991.¹²⁰ At this point, one year after independence, there was no clear national land policy, but the major peoples of Namibia, being the Ovambo, Kavango, Herero, Damara and Nama, clearly expected that they would reclaim some or all of their former lands from the white settlers. This was understood by all parties during the war for independence. An anti-colonial war is inherently fought over land, which represents the patrimony of the people.

For various reasons, many did not see the San as a significant party to this process. Some reasons for this have been given above, e.g. many San fought in the South African army, but a further reason was that the San had lived a nomadic life, hunting and gathering, often (but not always) on the margins of the country, and hence were not seen as 'owning' land, and correspondingly of having any claim to land or land rights. While this view had colonial roots, some of the black peoples whose own cultures were agricultural held the same view. As we have seen in Caprivi, some Kavango and Ovambo believed that the San were marginal peoples living under the protection of Kavango and Ovambo traditional leaders. Herero, Ovambo and Kavango groups had long been moving their cattle further and further into the Kalahari Desert, increasingly onto San lands. The San's

¹¹⁷ Robert J. Hitchcock, "Communities and Consensus: An Evaluation of the Activities of the Nyae Nyae Farmers Cooperative and the Nyae Nyae Development Foundation in Northeastern Namibia", op. cit. n24, p. 96.

¹¹⁸ Ibid.

¹¹⁹ Ibid. The Ford Foundation funded some of the work of the cooperative. This report includes, at pp. 17-42, a detailed history of development activities at Nyae Nyae, and here we rely on that account.

¹²⁰ National Land Conference, papers, Windhoek, 1991. Hitchcock, pp. 98-99, reports that the Ju/'hoansi made several recommendations, including the prescient observation that "It is not good for the land to have too many cattle; it is better to take good care of a few cattle, off take the rest, and use the proceeds to establish water points and support the health of the land" (p. 98).

land rights had been ignored in this process, with in-migrants seeing San lands as 'vacant' and open to more productive uses. Many San groups overtaken by this settlement process had moved onto Herero and Ovambo farms, just as the Hai//om had moved on to German and Afrikaner farms. These San became farm workers, often working for no pay, or alternatively they simply lived on the farms.¹²¹

At first, as seen with the Hai//om, but also with all other San groups, the movement of other peoples' cattle further and further onto San lands was not immediately a conflicting use. As cattle moved in, the San just moved elsewhere. As long as cattle use was light and seasonal, there was plenty of land for both cattle and San. The San could live on the margins of a pastoral society while continuing to hunt and gather. The problem with this model was that it was inconsistent with sustained and intensive pastoralism: heavy cattle grazing destroyed traditional San hunting and gathering activities. But this was not evident to the San until it was already too late to reverse the process, especially considering that the cattle farmers had both political power and weapons.

For some years the San subsisted on the margins of this economy, sometimes stealing or killing cattle or smallstock. But the settlers and colonial authorities then hunted down the San and killed or imprisoned them. Just as the German-Herero War produced a claim of genocide, the war on the Hai//om and other San groups also approached genocide. Unlike for the German-Herero War, there are no casualty statistics, but it is clear that in some San populations the majority were killed in this process. The most affected were the Hai//om, but all San living in the path of an expanding cattle economy were impacted in this way.¹²²

While unexpected, the San presence at the National Land Conference transformed the discussion, probably in two ways. First, not only did the San present papers, detailing their claims and their hope for land reform in Namibia, but they also presented a large and carefully drawn map, clearly depicting about 200 *n!ores*, their traditional territories, in East Bushmanland. This document clearly established that the San used the land and had a clearly defined relationship with their land, and therefore must have land rights.¹²³ Second, this San presence probably had the impact of changing the National Land Policy that grew out of this conference. Land reform is ordinarily based on restitution: the people who worked the land at the time of colonialism should have the right to reclaim their lands. The call for land reform throughout the world is based on this simple justice. Land reform in Kenya, South Africa and even, rhetorically at least, Zimbabwe, are based on restitution of lands to the original inhabitants. But the National Land Conference explicitly rejected this policy: "Restitution of land rights abrogated by the colonial and South African authorities prior to independence will not form a part of Namibia's land policy."¹²⁴ This rejection is a direct recognition of the potential for significant San land claims in the rich central and north-central regions of Namibia, not only against the white farmers there, but against Damara, Ovambo, Kavango and Herero communal lands.

¹²¹ James Suzman, *An Assessment of the Status of the San in Namibia*, op. cit. n2, pp. 33-36.

¹²² Robert Gordon, *The Bushman Myth*, op. cit. n5.

¹²³ The map can become an important legal document for indigenous people who lack access to legal land titles. While formal land titles are registered under a complicated and expensive governmental process, the map is a representation of indigenous peoples' use of the land that lives in the minds of traditional people. As such, indigenous maps loom large in all indigenous land claims. Indigenous mapping is now occurring widely, in all parts of the world. See Julie Taylor, "Land, Resources and Visibility: The Origins and Implications of Land Mapping in Namibia's West Caprivi", op. cit. n14.

¹²⁴ National Land Conference, 1991. See also National Land Policy, 1998.

The political impact of the land policy was ‘softened’ by the following sentence: “However, this policy does commit the special support to all landless or historically disadvantaged communities.” This sentence remains meaningless after 16 years of independence. On the one hand, there can be no question that it was understood to apply to the San as well as others, as the San are largely landless (except for the Ju/’hoansi) and clearly historically disadvantaged. But on the other hand, the land policy has been immobilised and there has been no meaningful distribution of land to either the landless or the disadvantaged, and clearly no special recognition of the needs of the San. Extensive poverty is pervasive in the communal areas of Namibia and the failure of land reform has hurt all poor people, San and non-San alike.

C. Nyae Nyae Conservancy

While the Ju/Wa Farmers Union was the first and most effective San organisation in Namibia, ultimately it was reconstituted as Nyae Nyae Conservancy. The NGOs behind the organisation were among the first to see the utility of the legal conservancy, enacted into law in 1996. But there were other problems with the Farmers Union.

Given that John Marshall had to act with his best judgement and experience in the 1960s and 1970s, it is impossible to criticise him for his view that small-scale agriculture, pastoralism, and hunting and gathering constituted the future of the Ju/’hoansi, but the whole question of agrarian development in rural Africa is now among the great challenges of the 21st century. Quite simply, the “green revolution” of the 20th century did not reach Africa, and African agriculture is now less productive than it was 50 years ago.¹²⁵ Not only is small-scale farming not profitable in rural Africa, but it often fails, resulting in malnutrition, if not starvation, among farmers and their families – an obscene result of 12-hour days of tilling soil in the scorching heat.

Black farming in the communal lands in Namibia is no exception. Of the blacks in former Ovamboland, 53% have no income at all today, and live entirely from what they produce.¹²⁶ The average income in the communal areas is little more than the meagre subsistence level of US\$1 per day. The agricultural potential of the Kalahari is much less than that of the more developed communal areas of northern Namibia.

Once it was obvious that the traditional hunting and gathering life cycle of the Ju/’hoansi could not be sustained, there were only a few choices available. Marshall worked closely with the Ju/’hoansi, and to his great credit, made every effort to encourage them to determine their own future as a people.¹²⁷ The problem with this model is that the Ju/’hoansi’s own decision-making was limited by both history and experience. Rural Namibia is an agricultural society and the only models that San had seen were small-scale agriculture and stock farming. In an agricultural society, agriculture is survival and land is wealth, and there is simply no other way to see the world. In addition, at this time South African authorities were challenging the Ju/’hoansi land rights. In 1976 East Bushmanland was declared a nature conservation area.¹²⁸ The Ju/’hoansi made their own decision, but

¹²⁵ John Brohman, *Popular Development: Rethinking the Theory and Practice of Development*, Blackwell, Oxford, 1996, pp. 210-216.

¹²⁶ John Mendelsohn, Selma el Obeid and Carole Roberts, *A Profile of North Central Namibia*, Gamsberg Macmillan, Windhoek, 2000, 62-67.

¹²⁷ Robert J. Hitchcock, “Communities and Consensus: An Evaluation of the Activities of the Nyae Nyae Farmers Cooperative and the Nyae Nyae Development Foundation in Northeastern Namibia”, op. cit. n24, p. 17.

¹²⁸ *Ibid.*, p. 30.

it was the only decision to be made if they wanted to assert control over their lands. There were no real alternatives.

Though the Ju/Wa Farmers Union – later reconstituted as the Nyae Nyae Farmers Cooperative – did not succeed, it did establish some Ju/'hoansi as small farmers, and to this day in the isolated settlements of Nyae Nyae, small plots of millet and corn are evident, and goats and even a few cattle are seen near the Ju/'hoansi villages. A cattle fund ambitiously purchased cattle to enable the Ju/'hoansi to commence with cattle farming, but this is a poverty-stricken rural environment, with very few cattle and goats, and clearly cattle farming is not a viable agricultural economy for East Bushmanland.¹²⁹

For Marshall the agricultural economy meant that the Ju/'hoansi would be productive on their own lands, and not reduced to playing the traditional 'bushmen' role for tourists and big-game hunters. It is ironic that today Nyae Nyae Conservancy is one of the most profitable conservancies in Namibia, drawing an income of about N\$600 (US\$85) per year per member, and the money comes from big game hunting concessions (95%) and tourism (5%).¹³⁰ The conservancy's income derives entirely from managing this beautiful part of the Kalahari for viewing and hunting big game, bird-watching and "seeing the Bushmen". There is one small white-owned tourist lodge with camping facilities in Tsumkwe.

The story of the abrupt shift in development focus from the Ju/Wa Farmers Union and Nyae Nyae Farmers Cooperative to Nyae Nyae Conservancy is both a long, complicated and politically charged story and a simple one. The long story is a detailed history of the activities of NGOs in the changing environment of Namibia (and Africa) in the 1980s and 1990s. The short version is simply that agricultural development was impossible for the Ju/'hoansi, given their land, their values and the newly promulgated Nature Conservation Amendment Act 5 of 1996, which provided a legal framework for both protecting Ju/'hoansi land rights and providing a small income for them. This framework befitted the newly developing politics of land use in rural Namibia, protecting both traditional people and animals, in an environment that tourists want to see and that NGOs are willing to subsidise.¹³¹ It is impossible to calculate the amount of money spent on developing this model at Tsumkwe since the 1970s.

Visiting Tsumkwe today, one is struck by the absence of the San in their own administrative centre. Hundreds of Kavango, Ovambo, Herero and Damara have moved there for government jobs. At the entrance to the village the Nyae Nyae Conservancy has an office and a craft shop. The office has some information on "camp sites", but the camp-sites are undeveloped bush sites, with a few signs to help people find them. The craft shop is largely empty, containing only a few crafts. A large donor-funded craft centre next door is also largely empty. The only two shops are run by outsiders. There is no petrol station, except for the state-owned station catering mainly for the Government's own fleet of vehicles. Ambitious plans are being carried out to develop a petrol station staffed with San mechanics and personnel as a training programme backed by NGO funding. Government offices are staffed mostly by non-San outsiders, as is the school. The one tourist lodge is located in the Tsumkwe townlands area, so it does not need a license from Nyae

¹²⁹ John Mendelsohn and Selma el Obeid, *The Communal Lands in Eastern Namibia*, Namibian Nature Foundation Windhoek, 2002. A map at p. 36 reveals very low densities of cattle (1 to 5 per square kilometre) at Tsumkwe and Baraka, and the same low density of goats at Tsumkwe. The rest of the area has no cattle.

¹³⁰ Utaara Hoveka, "Nyae Nyae Brings in Some Pickings", *New Era*, 16-18 February 2004, p. 17.

¹³¹ Brian Jones and Marshall Murphree, "The Evolution of Policy on Community Conservation in Namibia and Zimbabwe", in David Hulme and Marshall Murphree, *African Wildlife and Livelihoods: The Promise and Performance of Community Conservation*, James Curry, Oxford, 2001, pp. 38-58.

Nyae Conservancy, and it is constructing a bush camp in a San village outside the conservancy. While many Ju/'hoansi still live in Tsumkwe, more live in about 20 surrounding bush settlements, most with just a few huts and a few dozen people. These settlements have no economy at all, and people are hungry, subsisting largely on pension remittances. Some traditional hunting and gathering still goes on, but largely to alleviate poverty and hunger. Most hunting is illegal because game in the conservancy is hunted by outside concessions, so bringing rich foreigners to Tsumkwe merely to shoot an elephant, kudu or other trophy animal.

D. Ju/'hoansi land rights

Nyae Nyae Conservancy gives its 752 registered members a right to income from the land's natural resources. Nyae Nyae is rich in game and water pans which attract bird life, including spectacular flocks of flamingos. While the Government claims to 'own' the land in all the communal areas, there has been no effort to resettle or otherwise use Ju/'hoansi lands in Nyae Nyae Conservancy, with the exception of the Tsumkwe settlement.

The conservancy has 27 employees and an active management, with the Ministry of Environment and Tourism maintaining an office in Tsumkwe. Since Nyae Nyae is a model of a successful conservancy, the Government is heavily invested in its success. The staff and local field office have substantially been able to defend conservancy lands from cattle encroachment, though Kavango and Herero cattle do still move into the area. In the context of modern Namibian politics, the Ju/'hoansi at Nyae Nyae have secured their communal land rights.

The resettlement of more than a 1 000 Herero from Botswana, with their cattle, at Gam, south of Nyae Nyae, initially involved substantial encroachment of cattle into the conservancy. Now, a government cattle fence with staffed gate, together with enforcement by game rangers, have effectively stopped this encroachment, unlike the situation at N#a Jaqna in the west. In a kind of reverse logic, but illustrative of the legal and social impact of conservancies in Namibia, there is a movement to establish Ohungu conservancy at Gam, in an overgrazed, wildlife-depleted and degraded environment. The Herero at Gam have seen the success of Nyae Nyae Conservancy in terms of the money it has brought to its Ju/'hoansi community, and they too want access to the resources that a conservancy can bring.

E. Conclusion

Any conclusion drawn from Nyae Nyae is difficult to apply to other San communities. While Nyae Nyae stands as the most successful defence of San land rights in Namibia, its situation is so unique – its isolation, the huge investment of NGOs and other outside funds, a relatively strong Ju/'hoansi Traditional Authority with effective organisation among the people, its tourism potential, and its history as "Bushmanland", the communal lands of the San people – that it is hard to generalise principles that might be applied elsewhere. Its secure land base is clearly what the other San groups in Namibia want.

Yet at Nyae Nyae this has translated into rural poverty and a conservancy income of only N\$600 a year (about US\$85) for each of its 720 members, who live in isolated villages with rich big-game hunters paying thousands of dollars to shoot the area's wild animals. There is an active Ju/'hoansi political culture in Nyae Nyae, with an active management team as well as a Traditional Authority, but this positive state of affairs has not translated into jobs for Ju/'hoansi in Tsumkwe's government offices, nor into a voice in national politics. The Government's sustained respect of Ju/'hoansi land rights is clearly attributable to the presence of NGOs as well as to the political and economic utility of preserving Nyae Nyae as "Bushmanland". This situation has held since independence and might continue, but changing events in future could still jeopardise these lands. The same population pressure that has led to the government encroachment onto the San lands in West Bushmanland and at Gam could come to affect Nyae Nyae if the political winds change. Finally, continued mineral and diamond prospecting at Nyae Nyae could threaten San land rights since the state claims ownership of mineral rights and existing mining laws do not protect the rights of traditional landowners.

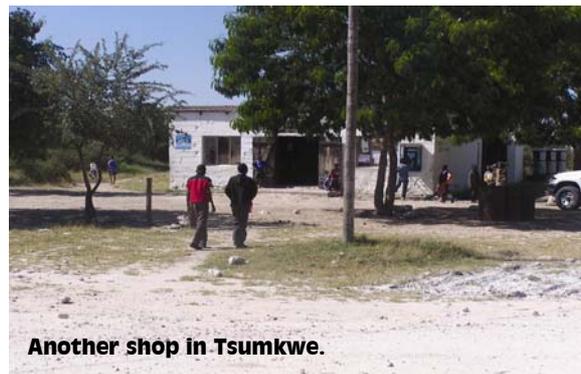
It is not clear how much the Nyae Nyae success story is helping to move forward the granting of San land rights elsewhere in the country. The Namibian Government's complete failure to accord the same communal land rights to West Bushmanland's Nǀa Jaqna Conservancy, which are lands threatened on virtually every possible front, offers little hope for San land rights in the rest of the country.



Tsumkwe's main road.



A shop in Tsumkwe.



Another shop in Tsumkwe.



San children at Baraka.



Ju/'hoansi Chief Bobo.

VI. SAN LAND RIGHTS UNDER THE COMMON LAW, CUSTOMARY LAW AND INTERNATIONAL LAW

The failure of the existing Namibian land law, and of the Government of Namibia to protect San land rights, raises the question of San land rights under customary law and international law. As a foundational principle, it now seems clear that indigenous peoples the world over have some indigenous or aboriginal title to their lands under customary or international law. The law on this issue is very complex and still evolving, but the colonial-era idea that tribal peoples could simply be displaced from their lands in order to yield to a higher level of use by whites, or by some king or a modern state, is consistent with early 21st-century ideas of property, human rights and international law.¹³² Each claim of aboriginal title is unique, because it is rooted in the history of each particular indigenous people's dispossession, in the colonial history of each nation. The courts of Namibia have never rejected the concept of aboriginal title, but the case has not been litigated to fully define the existence and scope of aboriginal title in Namibia.

A. The Constitution of Namibia and the communal lands

Namibian history defines the broad scope of the argument. Beginning with the most recent events, the sudden end of the war for independence and the hasty adoption of the Constitution in 1990, the whole question of land tenure in the post-apartheid era was deliberately left undetermined. The history here is only too well known: under apartheid,

¹³² The literature on aboriginal title under international or customary law is voluminous, including many dozens of articles and books. Kent McNeil, *Common Law Aboriginal Title*, Oxford University Press 1989, and James Anaya, *Indigenous Peoples in International Law* (2nd edition), Oxford University Press, 1996, are the seminal treatises in this area. For an argument on aboriginal title in Africa, see T.W. Bennett and C.H. Powell, "Aboriginal Title in South Africa Revisited", *South African Journal of Human Rights*, Vol. 15 (1999), p. 449. San in both South Africa and Botswana are also making land claims based on aboriginal title. Kristyna Bishop, "Squatters on their own Land: San Territoriality in Western Botswana", *Comparative and International Law Journal of South Africa* Vol. 31 (1998), p. 92, and Steven Robins, "NGOs, Bushmen and Double Vision: The #Khomani San Land Claim and the Cultural Politics of Community and Development in the Kalahari", in Thekla Hohmann, *San and the State*, op. cit. n14, pp. 365-400.

formal land titling was a legal process reserved almost entirely for whites. For blacks, a separate system of land tenure was legally required, this being communal land ownership, with the communal lands occupied by blacks, but with no legal right to buy or sell. Thus apartheid structured the land law of the 'new' Namibia.¹³³

The Constitution of the Republic of Namibia is full of contradictions in addressing the constitutional status of land rights in the communal lands. Legally, conflicting provisions in a national constitution create legal ambiguities that have to be resolved by an appropriate legal process, either amendment or judicial decision. To begin with, Article 16 protects the right of "all persons to acquire, own and dispose of all forms of immovable and movable property". The political centrality of this clause is obvious: it protects freehold property owners, who are predominantly white, and was fundamental to the political agreement that gave Namibia its independence from South Africa. But at the same time, the word "all" appears twice in this clause, which refers to "all" persons having the right to acquire, own and dispose of "all" forms of property. Given that the meaning of the word "all" is easily understood, and that communal property was in the hands of about 70% of the Namibian population at the time of writing the Constitution, it should be obvious that communal land ownership is fully protected by Article 16.¹³⁴ "All forms of property" should clearly mean all forms of property held in Namibia in 1990, including communal property. But the Government has denied that this is the case, apparently in violation of the Constitution.

Two other clauses would seem to support or even strengthen this argument. The Preamble to the Constitution states that the purpose of the Constitution is to promote equality to restore rights so long denied by colonialism, racism and apartheid law.¹³⁵ This language is not law, but a statement of legal policy that provides a framework for understanding the meaning of the rest of the Constitution. Clearly, and understood by all, the denial of land rights to the peoples of Namibia by colonialism, racism and apartheid was one of the most egregious of the many violations of human rights under apartheid. It led to the impoverishment of the peoples of Namibia on their own lands. In an agricultural society, land is human life itself.

Article 10 simply provides that "All persons shall be equal before the law." This simple statement on its face obviously applies to all law in Namibia, including the Constitution itself, the nation's formative legal document.¹³⁶ Reading only the Preamble with Article 16, it is impossible not to conclude that the legal rights of black people in the communal lands are as well protected by the Constitution as the legal rights of freeholders, predominantly white people on commercial farms. This is especially true in that it was impossible under apartheid for blacks to acquire the same legal land titles that whites held. For the Namibian Constitution to enshrine such inequality and illegality into Namibian law is unthinkable, especially considering – and remembering the Preamble – that among other things, it was the land lost to the peoples of Namibia that gave rise to the legal order under colonial, racist and apartheid rule.

The Namibian Government in turn relies on Article 100 and Schedule 5 to argue that it "owns" the communal lands, comprising over 50% of Namibian land, occupied by 70% of the national population, including many San. Article 100 provides that "land, water and

¹³³ Sidney L. Harring, "The Constitution of Namibia and the 'Rights and Freedoms' Guaranteed Communal Land Holders: Resolving the Inconsistency Between Article 16, Article 100 and Schedule 5", *op. cit.* n29, analyses more fully the legal and political contradictions in the Namibian Constitution.

¹³⁴ Constitution of Namibia, Article 16.

¹³⁵ *Ibid.*, Preamble.

¹³⁶ *Ibid.*, Article 10.

natural resources ... shall belong to the state if not otherwise lawfully owned".¹³⁷ The simplest view is that this provision implicitly recognises communal land ownership as "lawfully owned", hence having no relevance to Article 16 at all. It should also be recognised that Article 16 is one of the "fundamental human rights and freedoms" enumerated in Articles 5 through 25 of the Constitution, and that it therefore has precedence over Article 100 in interpreting the Constitution. Or, put another way, Article 100 must be read in such a way that it defers to the fundamental human rights and freedoms of Articles 16 and 10.

Schedule 5 provides that "all property in the ownership and control ... of the Government of the Territory of South West Africa or South Africa ... shall vest in or be under the control of the Government of Namibia."¹³⁸ Following the same logic as in Article 100, this applies only to property "owned" or "under the control" of the South African or South West African Governments. If the South African Government did not in fact "own or control" the communal lands, Schedule 5 confers no "ownership or control" on the Government of Namibia. But there is an even stronger argument that Schedule 5 cannot convey any land title to the Government of Namibia. The language of Article 10, providing for equality, read together with the anti-colonial, anti-racism, anti-apartheid language of the Preamble, makes clear that the Government of Namibia cannot accept a racist, apartheid-era definition of land ownership from South Africa for incorporation into the Constitution or any Namibian law. The Government of Namibia cannot argue that it owns the communal lands because the South African Government deprived the black people there of all of their land rights. Such an argument is inconsistent with the Namibian Constitution; it is unconstitutional. The Constitution itself directly spells this out in Article 23: "The practice of racial discrimination and the practice and ideology of apartheid ... shall be prohibited ..."¹³⁹ This is clear as both law and policy: apartheid-era laws and practices are in themselves illegal. The apartheid-era system of legal titling of white lands but not black communal lands is currently illegal under Namibian law and this inequality must be redressed.

There is also an argument that the South African Government lacked authority under the League of Nations and United Nations mandates to take black land. Under international law, the terms of the guardianship required not merely the protection of the peoples of Namibia, but positive legislation to advance them to a fully self-governing political status. Therefore the apartheid-era assertion of South African state title over black lands, and the separate system of black land ownership, were illegal all along, and no good title can ever pass from an unlawful title.¹⁴⁰

This same principle applies to Article 21(h) providing that "All persons shall have the right to ... reside and settle in any part of Namibia." This Article clearly redresses the apartheid-era and colonial pass laws, but has no impact at all on the law of property. It confers no right to settle on the property of others. Giving different protection to white property held under a South African land title and property held by blacks under communal or customary title is a violation of Article 10.

Although the Government of Namibia was able to develop a National Land Policy in 1998, it has been less successful in implementing it. One difficulty is that the legal basis of land rights in the communal lands, occupied by and supporting up to 70% of the national population, has not been adequately defined, nor are the legal rights of

¹³⁷ Ibid., Article 100.

¹³⁸ Ibid., Schedule 5.

¹³⁹ Ibid., Article 23.

¹⁴⁰ Robert Gordon, "Can Namibian San Stop Dispossession from their Lands", *op. cit.* n60, 153.

these people adequately protected. In some areas these lands are protected by political processes, or by powerful Traditional Authorities or Regional Communal Land Boards, but these are not a substitute for adequate legal protections. In other areas, especially those occupied by less politically powerful or less well-connected peoples, such as the San, there have been clear violations of land rights, either by the Government itself, or by other peoples acting without legal authority, facilitated by the Government's failure to protect the rights of communal landholders.

B. San land rights under aboriginal title

Unfortunately, given this failure, the San and other minority peoples of Namibia must look to customary or international law to protect their land rights. This is not an ideal legal solution because it pits different native peoples against one another, often in factually complex historical and anthropological arguments about who the 'original' occupants were. Even when this is clear, the concept of aboriginal title tends to favour some groups while disadvantaging others. This is especially true of groups displaced by colonialism itself. For this reason the National Land Policy rejects the concept of restitution of ancestral lands. There is also considerable evidence that different peoples, including Nama, Damara, Ovambo, Herero, Kavango and San, contested lands in northern Namibia as far back as the 1600s at least, rendering their respective physical locations at the time of German colonial occupation an accident of history rather than proof of long-standing occupation.¹⁴¹

There is no single legal test for aboriginal title, a concept existing in both Namibian common law and international law. At the most basic level, aboriginal title is best defined as a legal right to land incurred by indigenous peoples through occupation and use.¹⁴² As a common law right, it accrues because indigenous people had land rights at the time of colonial occupation, but were unable to title their property through colonial legal processes: the notions of registration, surveys, freeholds and even individual ownership simply did not feature in the land rights of preliterate societies, and colonial legal regimes did not recognise such rights.

As a matter of international law, the idea that only modern legal regimes had land laws and all other land rights were inferior is clearly based on colonial and euro-centric legal notions that modern international law should not only not recognise, but also embrace the idea that all people who live on land under their own traditional laws must have a legal right to that land.¹⁴³ Even under the common law or Roman Dutch law, such people would acquire legal rights by prescription.

While the foundational principle of aboriginal title is simple, the contours of this right are quite complex. Each aboriginal title case is fact-specific. For example, it is not enough just to hand over the land; the land must be used for earning a livelihood. Aboriginal title does not inherently require exclusive use of the land, and in principle can be shared, but overlapping and distinct usages by different peoples raises 'fact issues'

¹⁴¹ Much is made of the fact that the German maps of the 19th century do not agree on the locations of the respective peoples of Namibia. In fact, the arrival of the Germans may well have caused some peoples to move ahead of German occupation, or, in reverse, to move to take advantage of German protection. It is beyond the scope of this report to analyse these greatly contested histories of occupation.

¹⁴² Kent McNeil, *Common Law Aboriginal Title*, op. cit. n32.

¹⁴³ S. James Anaya, *Indigenous Peoples in International Law*, op. cit. n32, pp. 141-147.

that make it more difficult to prove aboriginal title.¹⁴⁴ *Mabo*¹⁴⁵ and *Delgamuukw*,¹⁴⁶ the two leading aboriginal title cases in Australia and Canada respectively, also hold that the aboriginal title may be extinguished by the Crown either through law or through some clear assertion of title or act of dominion inconsistent with indigenous land ownership. While this means that aboriginal title can in fact be unilaterally extinguished, without compensation, it is also clear that if a legal action is sufficient, it must in fact be *legal*, as well as clear and unambiguous. In any case, both *Mabo* and *Delgamuukw* involve aboriginal title allegedly extinguished by Australian and British colonial powers in the 19th and early 20th centuries, when the power of the sovereign to extinguish indigenous rights was very different under international law to what it is now. The Spanish Sahara¹⁴⁷ case would hold that under modern international law, indigenous peoples own their lands at conquest and these lands are not 'vacant' nor subject to occupation and ownership by any foreign power. This would invalidate many South African actions purported to extinguish aboriginal title in Namibia.

And, never to be forgotten in any aboriginal title case, is the fact that European occupation of the colonial settler states and the forcible dispossession of the indigenous peoples of their lands has never been the basis of any aboriginal title case. That is, the land actually occupied by white settlers is held to have been legally placed in white hands, whatever the legal process. This is the effect of the principle that a *de facto* assertion of legal power over indigenous peoples that is inconsistent with their aboriginal title effectively extinguishes this title.¹⁴⁸

This is relevant in Namibia too: perhaps the most obvious place to start is with a recognition that probably most of the 4 000 commercial farms are beyond the reach of an aboriginal title case. Whatever the process, the legal registration of these land titles extinguishes aboriginal title. While there was obviously all kinds of dishonesty, fraud and violence in that process, the farms were legally titled, and those titles have been recognised for many years.¹⁴⁹ A distinction might be drawn, however, between the farms created by German law and those created by South African law, with the argument that the League of Nations mandate required the protection of the native peoples of Namibia and prohibited exploitation of them and their lands.

Since aboriginal title is a fluid and expanding concept, the statements above only set out the basic framework of the legal debate. Under common law, the law evolves as each court grapples to use it appropriately in each new national context. South Africa, for instance, dealt with the issue of the illegal seizure of native lands by permitting land

¹⁴⁴ There is a substantial body of literature on research for the documentation of complex land occupation issues. See Peter Sutton, *Native Title in Australia: An Ethnographic Perspective*, Cambridge University Press, 2003.

¹⁴⁵ *Mabo v. State of Queensland* 107 ALR 1 (1992). An annotated version of the case is Richard Bartlett, *The Mabo Decision*, Butterworths, Sydney, 1993. A detailed analysis of *Mabo* including its international significance is Peter Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism*, University of Toronto Press, 2004. Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo*, Aboriginal Studies Press, Canberra, 2006.

¹⁴⁶ *Delgamuukw v. British Columbia* [1997] 3 SCR 1010. Stan Persky, *Delgamuukw*, Greystone Books, Vancouver, 1998, includes a commentary on the aboriginal title issue.

¹⁴⁷ *Advisory Opinion on Spanish Sahara* [1975] 1 ICJR 12.

¹⁴⁸ *Wik Peoples v. Queensland* (1996) 187 CLR 1.

¹⁴⁹ In *Bennell v. State of Western Australia* [2006] FCA 1243, 19 September 2006, the Noongar people prevailed in an aboriginal title case against the State of Western Australia, but specifically did not ask for aboriginal title over lands held in fee simple (freehold in Namibia) by private individuals. Rather, it was an action to recognise an aboriginal title interest in lands that remained in government hands. This would concede that private acquisition of title prevails over an aboriginal title claim.

claims enacted by the Restitution of Land Rights Act 22 of 1994, based on the restitution of lands taken illegally after the enactment of the Natives' Land Act of 1913. The 1994 Act provides for limited land claims that are relatively recent historically, but does not permit them for most white-owned lands in South Africa, acquired well before 1913.¹⁵⁰ The Constitutional Court of South Africa, though not recognising aboriginal title as it exists in other common-law countries, did come close to doing so by holding that rights to land under indigenous law constitute a "customary law interest", and by giving the Richtersveld Nama people a right to land for purposes of the South African Restitution Act.¹⁵¹ While Namibia's courts or Parliament might want to consider such developments, the law in this country is to be shaped by the application of these customary and international laws to the unique Namibian situation.

Each San people has a unique aboriginal title case, depending on both their respective patterns of land use and the different colonial legal processes that took San lands in the different parts of Namibia.

1. The Khwe of West Caprivi

Not the simplest of San aboriginal title cases, this is the only instance to date of such title being claimed through legal proceedings. Chief Kipi George sued the Government of Namibia to secure a judgement that Khwe lands at Divundu were owned by the Khwe under aboriginal title. The Government settled the case, so the issue was never decided in court. Still, the fact that the issue of aboriginal title was raised in a case establishes that it is a legal argument available to Namibian San, and as this argument was not adjudicated, it can be taken to the courts again.

Like most aboriginal title cases, the Khwe case is based on simple facts: The Khwe ran a small campsite at Popa Falls on the Okavango River. Without their permission, the Government built a prison farm nearby and sought to expand it by removing the campsite. By then the Government had also granted a Permission to Occupy (PTO) permit for a white-owned lodge near the prison. Moreover, this was a contested area, with Mbukushu moving across the river and settling on Khwe lands, also without their permission. When Chief Kipi George and the Khwe Traditional Authority raised their objections to these encroachments at Divundu, they were ignored, with the Government taking the view that these communal lands were state lands, available to the Government for any purpose.¹⁵²

Andrew Corbett, then Director of the Legal Assistance Centre, represented Chief George. His aboriginal title argument is preserved in the court record. At the outset, on behalf of Chief George and the Khwe Traditional Authority Corbett sued the Government and sought a declaration that the applicants were the "owners" of the land, adding the Registrar of Deeds as the fourth respondent for legal and symbolic reasons. To cover additional bases for argument, the lawsuit called for alternative remedies based on the

¹⁵⁰ Laboni Amena Hoq, "Land Restitution and the Doctrine of Aboriginal Title: Richtersveld Community v. Alexkor Ltd and Another", *South African Journal of Human Rights*, Vol. 15 (1999), p. 449.

¹⁵¹ T.M. Chan, "The Richtersveld Challenge: South African Finally Adopts Aboriginal Title", in Robert Hitchcock and Diana Vinding, *Indigenous Peoples' Rights in Southern Africa*, International Work Group for Indigenous Affairs, Copenhagen, 2004, pp. 114-133, at 121. In spite of the Constitutional Court's careful use of language, this is, in fact, a recognition of aboriginal land title as having evolved under the common law of South Africa. Since aboriginal title is a common law right, it will evolve differently in different common law countries, consistent with different histories and legal regimes.

¹⁵² Ina Orth, "Identity as Dissociation: The Khwe's Struggle for Land in West Caprivi", *op. cit* n14, pp. 121-159. This is a general history of San occupation of the region. This case is discussed briefly at 152.

theory that the Khwe had a usufructuary right to the land, and also that the Government of Namibia held the land in trust on behalf of the Khwe.

Chief George made the case for aboriginal title directly in his affidavit. First, he set out the legislative history of Caprivi. This relatively short account made clear that no legislation had ever deprived the Khwe of their land title, but their title was in question due to an inconsistent and confusing series of laws, with the country's respective governments trying to assert legal authority over the region, but without actually infringing on the living conditions or land uses of its inhabitants. Thus the Khwe's ownership and right of occupation of their lands had never in fact been extinguished.

Chief George then described the traditional Khwe use of the lands in question. First, he argued that the Khwe Traditional Authority represented the Khwe community, "a cohesive aboriginal traditional community with its own distinct and separate identity":

"We are recognized as a San community with its own distinct culture, language and traditions, with our own community leadership structures and our own traditional laws which set us apart from our Mbukushu neighbours to the west and the Basubia and Mafwe communities in Eastern Caprivi."¹⁵³

He went on to list – needing two full pages – Khwe activities on these traditional lands since, at the latest, 1 July 1890, the date of Germany's acquisition of Caprivi, the first colonial assertion of dominion over the land. Among others, he listed these activities:

"... residing on the land, hunting, fishing, gathering veld foods, prepared medicines, built shelters, burnt the land, conducted ceremonies, enjoyed recreation, maintained sacred sites, cared for the land, and exchanged materials taken from the land with neighbouring groups, used their language there, and had place names in their own language."

Finally the Chief stated that the Khwe "asserted ownership over the land".¹⁵⁴

The last section of his affidavit included documentation from anthropologists and historians substantiating the claims that the Khwe had long occupied these lands and that the German and South African colonial authorities had never dispossessed them. Attached to the affidavit was a report by Matthias Brenzinger entitled "Moving to Survive: Kxoe Communities in Arid Lands", dated 1997,¹⁵⁵ which carefully documents the Khwe's use of their traditional lands in Caprivi. Five maps in the report show the extent of Khwe occupation of this region, and make clear that they are a distinct traditional group which has never resorted under Mbukushu control.¹⁵⁶

Nothing has changed since this case was filed and settled in 1997, except for the proclamation of Bwabwata National Park. Since the Khwe's right to continue living in their accustomed places within the park is explicitly recognised, it would be difficult to argue that the proclamation of the park somehow extinguishes their land and occupancy rights. Clearly the issue has been avoided, but obviously it still looms, since any Khwe

¹⁵³ Affidavit of Kipi George, 1997, p. 11.

¹⁵⁴ Ibid., pp. 11-15.

¹⁵⁵ Matthias Brenzinger, "Moving to Survive: Kxoe Communities in Arid Lands", op. cit. n12.

¹⁵⁶ In order to maintain a claim under aboriginal title, the Khwe must prove that they are the occupants of the land. If the Mbukushu had asserted a similar land claim, then a court would have to conduct extensive hearings based on anthropological or historical evidence to establish occupation. It is also possible that two or more groups claiming aboriginal title could agree on their respective historical occupancies, or to divide the land under claim.

person who is excluded from the park, or whose hunting, fishing or gathering rights in the park are limited, could sue the Government of Namibia for breach of aboriginal title. As long as Khwe occupation of the park is not challenged, there is no clear government action to extinguish their title. Further, as the park was proclaimed only recently, few activities have been undertaken thus far to constitute the area as a national park proper, so there may yet be conflict with the Khwe over land use. But the Ministry of Environment and Tourism has voiced its determination to respect San land rights and render the park a model of cooperation between national parks and local populations.

2. Hai//om aboriginal title

Each aboriginal title claim stands on its own facts, with questions of colonial land use and occupation producing significant differences between claims. Such differences are most clearly evinced in the case of the Hai//om, who have three different aboriginal title arguments that turn on three different forms of colonial dispossession.

(a) Hai//om aboriginal title to commercial farms

The claims of the Hai//om, as well as other San living in the commercial areas, are the most difficult for raising aboriginal title. Under ordinary circumstances, the granting of titles to settlers clearly manifests as an extinguishment of aboriginal title, no matter how much violence and illegality the titling process involves. But in Namibia, because the farms are very large and San occupancy was not necessarily extinguished by farming activities, the San coexisted with commercial farming for generations. As long as cattle densities were not too high, traditional San hunting and gathering activities could continue on the farms. Farmers even allowed existing San settlements to stay put, sometimes in exchange for labour. The Wik case brought in Queensland, Australia, established that the granting of a pastoral lease, the Queensland version of a farm, but obviously with a lessor legal title, does not necessarily extinguish aboriginal title, given that traditional aboriginal activities could be carried on after the granting of such leases due to low population densities and different types of usages.¹⁵⁷

The situation in Namibia is similar. Of course, the passage of time and increased population densities led within a few generations to a cessation of many traditional practices, but not all. Each commercial farm has its own history and longstanding relationship with its San population. While there are few cases of farms being returned to their aboriginal owners, this is not unheard of, and in South Africa today it is happening increasingly.¹⁵⁸ Thus there may be some arguments directed at the process by which specific farms were acquired, especially if very late in the colonial process, such as into the 1950s. The fact that Hai//om have continuously occupied the farms in question may give rise to a claim of aboriginal title.

¹⁵⁷ *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1. Peter Butt and Robert Eagleson, *Mabo, Wik, and Native Title*, The Federation Press, Sydney, 1998.

¹⁵⁸ The Restitution of Land Rights Act of 1994 sets out a legal process through which blacks dispossessed of their lands after 1913 can seek restitution, either for the land itself or for monetary damages. A substantial number of farms, especially on the borders of Zimbabwe and Mozambique, fall into this category, although most white farms in South Africa date back to long before 1913.

(b) Hai//om aboriginal title to Etosha National Park

There is an aboriginal title claim to Etosha National Park, factually and well-documented in the work of Ute Dieckmann.¹⁵⁹ As with the Khwe, Hai//om use of Etosha is very clearly documented as from the beginning of the colonial period. The Hai//om and some other San were left alone in Etosha, north of the Police Line, to carry on their own way of life, entailing, among other things, hunting and gathering, building huts, and maintaining the clans and chiefs, undisputably well into the 1950s (and even the '60s). The Hai//om still regard Etosha as “their” land, and blockaded the park’s entrances in an effort to enforce as well as publicise their claim.¹⁶⁰ It is also clear that some other San groups used Etosha at the time of German colonisation, but this does not defeat the Hai//om claim: Etosha is extensive and all usage of it will have to be documented.

The initial proclamation of Etosha as a national park specifically included the Hai//om. To the racist South Africans, the Hai//om came with the landscape, as a feature of its wildlife. There is very clear language to this effect in early park reports.¹⁶¹ So, until well into the 1960s, the Hai//om lived in Etosha, where they hunted, gathered veld food, held religious ceremonies, married, buried their dead and carried on their traditional life. In so large an area, the Hai//om were able to move beyond the European use of the park, even after they were “evicted.”

After the 1960s the argument becomes more difficult but not impossible to define. One basis for argument is that the Hai//om were never ejected from Etosha, but still live there and therefore still hold aboriginal title to the land.¹⁶² This is supported by the fact that following their “eviction”, hundreds of Hai//om remained in the park as “squatters”, with the park authorities turning a blind eye. Another basis is that while the South African authorities may have tried to exclude the Hai//om from the park, their actions were illegal under both common and international law, stemming from the unique character of the South African mandate under international law, which required them to administer South West Africa for the benefit of its inhabitants. Because Etosha is still government land, it could be returned to the Hai//om without displacing other people. This is especially true given the development in the world of shared regimes of national park ownership and management.

c. Hai//om claim to Mangetti West, other government farms and Hai//om traditional lands in former Ovamboland

The Hai//om lived widely in eastern and southern communal lands in the north, which the Odendaal Commission allocated as “Ovamboland”. The German and South African authorities had set these lands aside simply as “communal lands” for the indigenous people living north of the Police Line, but this description does not properly explain the politics of this action. For the Germans, the “Police Line” was the edge of any attempt

¹⁵⁹ Ute Dieckmann, “The Vast White Place: A History of the Etosha National Park in Namibia and the Hai//om”, op. cit. n56, p. 125.

¹⁶⁰ James Suzman, “Etosha Dreams”, op. cit. n53, pp. 221-238.

¹⁶¹ This language, often comparing the San to animals, is so offensive that the authors will not quote it. It can be found in citations to the work of Dieckmann and Gordon herein.

¹⁶² Ute Dieckmann, “The Etosha National Park”, op. cit. n59, clearly shows that the Hai//om always lived in Etosha and were never ejected. This research is also incorporated into Dieckmann’s PhD dissertation, “Hai//om Between the ‘Bushman Problem’ and San Activism: Colonial Imaginations and Postcolonial Appropriations of Ethnicity in Namibia”, University of Cologne, 2005.

at German colonial government. The indigenous people north of that line lived on their own land under their own law. The German authorities did not care what tribes people belonged to, and there was no assertion that this land was for the Ovambo as opposed to any other native people. Apparently the Hai//om lived apart from the Ovambo, under their own chiefs, which would give rise to an aboriginal title claim in these communal lands. Competing Ovambo land use, which is certainly arguable, would give rise to a competing claim, or perhaps a shared claim. This would have to be determined with careful use of anthropological, historical and indigenous oral history evidence. There are clearly strong political feelings in Namibia about the rights of various groups to their own communal areas, and it is clear that the Ovambo would vigorously resist Hai//om land claims in the area constituting former Ovamboland.¹⁶³ There is also competing anthropological and historical evidence of Ovambo occupation, pitting one people against another, which is exactly what the National Land Policy sought to prevent in denying land restitution based on former occupation.

The Government of South Africa took control of a great deal of communal land in this area and converted it into large quarantine farms, which became large state farms at independence. Through section 5 of the Namibian Constitution took title to these farms as state property (distinct from communal lands), and has administered them ever since. San, mostly Hai//om, live on these farms and are about to be displaced as the Namibian Development Corporation sells the land. The Hai//om and other San groups may have an aboriginal title claim to these farms as Hai//om or other San communal lands taken by the Government for use as a quarantine farm, which use has expired. This invokes the argument that the aboriginal title was never extinguished by this “temporary” use, which was not inconsistent with aboriginal occupation and use, especially since many Hai//om lived and worked on these farms continuously through the entire period of South African rule.

A group of about 130 unemployed Hai//om farm workers live as squatters on the Mangetti West government farm. Their headman insists that he was born in this area, that the lands are the traditional lands of the Hai//om, and that he has no other place to go. Anthropologist Thomas Widlock has documented this community at Mangetti West, their traditional use of the land and their land claim.¹⁶⁴ While much Hai//om land is now in the hands of white farmers, much of it is not. While Etosha is a national park, the former quarantine farms are not. Farming is not a use that inherently extinguishes aboriginal title, as some farming and grazing activity is not inconsistent with a Hai//om use that might involve seasonal migration. Other Hai//om live on other government farms in the area.

There is also the related issue of a Hai//om aboriginal title claim to Hai//om lands in the former Ovamboland. The South African authorities’ designation of these lands as “communal lands” of the Ovambo may be argued to have extinguished Hai//om aboriginal title. In any case, as we have seen, the question of who ‘owns’ the communal lands is unresolved, so there is no question that the Hai//om or any other group might have an

¹⁶³ An underlying issue is the San belief that they are indigenous to Namibia whereas the Bantu peoples there (Ovambo, Kavango, Herero and Damara) are not. This is not a legal issue in relationship to aboriginal title because the occupation of these peoples dates back to well before colonisation –1600 to 1800 at the latest – thus it is clear that for purposes of aboriginal title, these groups have land rights in Namibia.

¹⁶⁴ Thomas Widlock and Dagman Widlock, “The Hai//om of eastern Ovamboland and the Lands Issue”, report on the national conference on the future land policy of Namibia, Windhoek, 25 June to 1 July 1991. The Widlocks argue for national legislation to deal with the landlessness of the San at Mangetti West, which was the purpose of this conference. Fifteen years later this has not happened.

aboriginal title within a communal area. The legal creation of a communal area is also a colonial exercise of legal and political power, and might violate the rights of other aboriginal groups. A resolution of competing aboriginal land claims can be factually complex, but in other parts of the world such resolutions have been achieved. Competing claims between Hai//om and Ovambo are no more difficult to resolve than those between Khwe and Mbukushu or Ju/'hoansi and Herero.

3. Ju/'hoansi aboriginal title in East Bushmanland

The claim of aboriginal title of the Ju/'hoansi at Nyae Nyae is probably the strongest in Namibia. Here we have a traditional San people who have lived on these lands since time immemorial, and these lands have been set aside as the communal lands of the Ju/'hoansi of former Bushmanland. Not even the Government of Namibia would now dare challenge the Ju/'hoansi title to the lands at Nyae Nyae, and these are the only San in Namibia who live undisturbed on their own traditional lands with no threat of removal, displacement or in-migration of outside groups. Strong NGO support and the establishment of Nyae Nyae Conservancy, backed by the presence of the Ministry of Environment and Tourism, have placed the Ju/'hoansi in a powerful political position.

There is no evidence at all that aboriginal title to these lands has ever been extinguished. The German and South African authorities never extended their occupation into East Bushmanland and the Ju/'hoansi have always lived there.¹⁶⁵ Even the creation of an administrative centre at Tsumkwe did not impact on Ju/'hoansi life when they left the settlement to return to their traditional lands. Thus we have at Nyae Nyae a factually perfect case for a claim of aboriginal title. The case is so perfect that it is highly unlikely that the Government would ever do anything to intrude on this Ju/'hoansi land and so provoke legal action.

4. San aboriginal title in West Bushmanland

Some strong arguments from East Bushmanland are also available for West Bushmanland, but they may be factually more difficult to prove since the aboriginal occupation of West Bushmanland is contested. For the few Ju/'hoansi living in West Bushmanland, the legal argument for aboriginal title is exactly the same as for East Bushmanland: these are communal lands occupied by the Ju/'hoansi since before colonial occupation, to which their aboriginal title was never extinguished.

!Kung and Hai//om living in West Bushmanland may also have a claim of aboriginal title based on their historical occupancy. Their traditional lands clearly extended into this region from the north and west, but their occupancy patterns have yet to be documented. This is also true of some of the San now living in Ovambo and Kavango communal areas, who may historically have occupied areas in West Bushmanland.

There is no legal reason, however, for aboriginal title to land not being shared, just as land was shared by San and Bantu peoples in pre-colonial times. Native people were never static, and since different peoples used the land in different ways, they migrated through each others' lands all the time. What is required here in an aboriginal title case

¹⁶⁵ One of the authors of this report knows a retired white cattle farmer, now in his mid 80s, who tried his hand at farming in the Tsumkwe area in the 1950s. His efforts to farm there were unsuccessful for a number of reasons, one being that no infrastructure, such as accessible roads, clinics or veterinary services, existed in this area at the time. In addition, the prospective farmer experienced heavy cattle losses due to lions.

is a documentation of these overlapping uses and an agreement on sharing the land. Regular seasonal use, as is common among hunting, fishing and gathering peoples, does give rise to a claim of aboriginal title. Seasonal use entails that a particular people uses particular lands for particular purposes seasonally as they move about the lands. San *n/oresi* (traditional territories) clearly delineate both seasonal and shared uses. The documentation of these uses is complex, but has been achieved in equally complex land claim litigation in the Australian desert.¹⁶⁶

But only about 8% of the San in West Bushmanland have historical ties to the land. The remainder moved to this area only in the last 25 years, and since aboriginal title flows from historic occupancy at the time of white settlement or initial displacement, these San do not have a claim of aboriginal title to these lands. They are still poverty-stricken and dispossessed peoples, but such circumstances do not constitute an argument for aboriginal title. Patterns of occasional migration as opposed to regular seasonal occupancy and use, which might be argued for some San from Angola and other parts of Namibia, are not ordinarily sufficient to support a claim of aboriginal title.

5. Other San aboriginal title issues

The four specific San aboriginal title arguments most often raised in Namibia have been discussed above, but, given the wide-ranging patterns of San land occupancy, there may be others. Bands of !Xo and Nharo have lived in Hereroland and Aminuis for generations, and have a claim to aboriginal title of their lands there. Bands of San now living in Angola may have land rights in the former Ovamboland and Kavango Region. San now living in West Bushmanland may have land claims in other parts of Namibia, and San living in Botswana may have aboriginal title claims in Hereroland or Caprivi. These have not been researched, and consequently cannot be evaluated here at all.

Each claim of aboriginal title is based on a detailed analysis of San occupation and land use as well as colonial dispossession. It takes detailed anthropological and historical research to establish the factual basis of each land claim. It cannot be established at this point which groups might have been occupying land in Namibia at the time of colonisation or colonial occupation. The colonisation process itself spanned at least 40 years in different parts of the country, and some parts in fact were never occupied by Europeans.

C. Conclusion

Claims of aboriginal title under the common law are measures of last resort, representing a failure of existing political institutions to adequately address the land reform issue. The overriding issue is that San lack a legal right to land in most of Namibia. The current administration of land in the communal areas has not been of much benefit to the San. The establishment of conservancies may offer some benefit to the San, but does not adequately protect their land rights. The Government's long-promised land reform has not materialised, either in general or in any way that benefits the San. Various resettlement schemes have been slow to develop and are then under-supported, leaving the beneficiaries living hungry and poverty-stricken in rural slums. San squatter camps have spread around Namibia, on the outskirts of towns and villages in the north and in former

¹⁶⁶ Peter Sutton, *Native Title in Australia: An Ethnographic Perspective*, op. cit. n144, 2003.

Hereroland and Ovamboland, and on abandoned military bases. Because the San are both a minority and marginalised people, they are pushed aside in the struggle for scarce land resources in Namibia. Effective government land reform measures could address San land issues and obviate the need for aboriginal title claims.

The growing claim of a right to land through aboriginal title is one way to argue for land in the absence of statutory land rights. Aboriginal title does not depend on Namibian or South African recognition of the San as a traditional people, but rather it depends on the common law recognition of some legal title or usufructuary occupancy right to the lands they have occupied since before colonial occupation. The roots of aboriginal title lie in common law, international law and natural law, but aboriginal peoples must have some legal right to the lands that they have occupied historically, given their legal inability to file for a formal title under racist and colonial legal systems. The failure of the Namibian Government to accommodate San land rights has the effect of forcing the San to resort to claims of aboriginal title, both in self-defence and as an affirmative statement of their legal and political rights against the modern Namibian state.

VII. CONCLUSION AND RECOMMENDATIONS

On the whole, Namibian San live a life of poverty and dislocation. While different San peoples face different situations, there is a depressing common presence of poverty, which begins with being landless, often on their own lands. Government policies since independence, some well-meaning and some ignorant of San needs, have not helped. Poor information and inconsistent policy implementation has exacerbated this situation. Change is clearly needed in a number of areas.

A. Who owns the land?

The issue of ownership of San lands came up in every community visited in this study. The Government of Namibia's assertion that it "owns" all communal lands raises many difficult questions and justifiably threatens San communities as well as individuals. It may have a similar effect on other peoples, but the San are uniquely powerless and outside the political sphere. The Communal Land Reform Act, intended to resolve some of the difficult issues of land tenure in the communal areas, has also proved inadequate. Can the Government remove San from their communal lands without compensation? Can it resettle outsiders on San communal lands, with or without compensation? Can it create a national park from San lands? A prison farm? Can a San chief expel outsiders from San communal lands? Do San living on state land have traditional land rights?

All of these legal questions could be settled in court, but the Government could also enact legislation to do so. If the communal lands are vested in the state but held in trust "for the benefit of the communal land-holders" then there should be additional legislation detailing how these trust lands must be administered for the benefit of the respective communities. These are not just difficult legal problems, but also they are uncertainties leading to dangerous and chaotic situations on the land by pitting groups of poor people against each other in competition for scarce land and resources.

The Communal Land Reform Act's provisions that enable Traditional Authorities to administer communal lands are quite worthless if the Government does not recognise Traditional Authorities and empower them to enforce communal land laws. Unless the Government acts promptly to set up a statutory and administrative framework for the administration of San communal lands, there is going to be political and legal chaos with potential to destabilise the Government's land reform measures. This is particularly likely in West Bushmanland and Caprivi.

In keeping with basic principles of international law, and recognising that the communal areas of Namibia have been owned by their occupants for hundreds of years, Namibia should declare, as a matter of national policy, that the communal lands belong to their traditional occupants and were wrongfully alienated from them under colonial apartheid rule. The Government could then establish a statutory regime for the administration of those lands for the benefit of the people who live there through the existing

Traditional Authorities Act and/or the Communal Land Reform Act. The same statutes should clearly state that any land taken by the state for purposes of development must be acquired legally under Article 16 of the Namibian Constitution which gives these lands the same protections as commercial agricultural land.

Whatever action the Government takes to rectify the status quo, it is clear to us that the outcomes should include: (1) a clear legal status for San lands; (2) San governmental institutions to administer their lands; and (3) an adequate law-enforcement mechanism to protect San lands from encroachment. Regarding the latter, the situation that Chief John Arnold faces in West Bushmanland is unconscionable. A chief who allocates communal land under the Communal Land Reform Act has to be able to call on local police and other government bodies, such as the Regional Communal Land Board, to enforce San land law.

B. Land reform

Many San live on their own traditional lands in communal areas, but others do not. Those fortunate enough to live in communal areas still face encroachment from other groups, competing for scarce farming and grazing land. More than a million black people live in the communal areas. These areas are overcrowded and competition for land is not good for anybody. There must be an effective land reform programme which makes more land in the commercial areas available for resettlement by San and other groups. Effective land reform will reduce pressure on San in West Bushmanland and West Caprivi.

The Hai//om and other San groups, especially in the northern and eastern commercial areas, need land. This requires a comprehensive land reform scheme that will both acquire good land and support San and other black farmers in setting up new farms and enterprises. The whole area near Etosha could be redeveloped around a concept of San tourism schemes or other economic development endeavours that would allocate existing farmlands to the San and also take tourist pressure off the fragile environment of Etosha.

The San at Mangetti West (Farm 6) clearly stated that they were willing to share this land with their Ovambo neighbours. Thus far the models of land reform have been unimaginative and lacking in infrastructure, support and training for black farmers. The agricultural colleges of Namibia have not developed forms of agricultural education appropriate to the new types of farming that have to be created in these areas. A better land reform plan is needed – one that settles San and other black farmers on land and also empowers them to farm successfully. Most San on Farm 6 are farm labourers who were forced off the farms employing them, so they do have farming experience.

The current land reform process is stalled, and is not making enough land available to resolve difficult land questions in the communal lands. The Government needs a clear plan, with definite specific plans for specific groups of people. A 'one size fits all' land reform solution is simply inappropriate for Namibia with its numerous ethnic groups and complex history of land occupancy and use. The lack of planning for land reform to benefit each group has created an environment in which rumours flourish, and cynicism and hopelessness have set in.

1. Bwabwata National Park

The Government's failure to consult with the Khwe in the planning of Bwabwata is indicative of a broad disregard for San rights in government circles. The place to start in addressing the historic denial of San land rights in Namibia is Bwabwata, with the recognition that this national park is located on Khwe land. In other words, this recognition

should be the starting point in a discussion of the park's future. There are plenty of models to draw on in this discussion, but whatever it entails, it must begin right now.

We have noted that several countries have established cooperative national park schemes on native lands that provide both income and training to native peoples. The failure of Etosha National Park to offer a secure future for its Hai//om residents must serve as a warning to planners at Bwabwata. The San should be able to reside at any place of their choosing in Bwabwata, and the park must be carefully managed to protect their existence there.

But the problem is not just the park. The deproclamation of Omega and the farms at Divundu does not mean that those areas are beyond the scope of the park. Omega is an area of 10 km² completely surrounded by the park. Divundu comprises 10 km of farms along the Okavango River, but small farms which lack resources. These Khwe regions are poor, and the success of Khwe farmers may well depend on resources within the park.

Chief Kipi George sought to create a communal conservancy in West Caprivi so that the Khwe would own the natural resources now in the park. This was denied on the grounds that a conservancy cannot be created within a park because the Ministry of Environment and Tourism has jurisdiction over the natural resources of national parks. Thus the Khwe in Bwabwata lack the control over their lands that the Ju/'hoansi have at Nyae Nyae. All of these issues should be renegotiated.

2. Etosha National Park

The Hai//om still live in Etosha National Park, officially as "squatters" in the workers' living areas, formerly the black locations at each gate and camp. Etosha is still essentially the same park that the South African Government created in the 1950s. As such it represents the thinking of another era. It is time for the new nation to re-conceptualise this park, even as we hold it out to the world as one of the great wildlife preserves in Africa.

As stated above in our discussion of Bwabwata National Park, there are now models in the world of jointly owned national parks, with land either shared with indigenous peoples or owned by indigenous peoples and leased to the state for park purposes. Any such re-conceptualisation of Etosha must include a strong Hai//om presence as this park is located on their lands.

There are any number of ways to ensure this presence, and any number of forms it could take. Apparently one resettlement project is already on the cards: the Government is able to acquire commercial farms bordering Etosha, and is looking at resettling Hai//om there and then gradually extending the park to include these new Hai//om lands. Existing tourist facilities in the park could be removed or supplemented by new tourist facilities run wholly or partially by the Hai//om on their new lands. No aspect of this envisaged undertaking at Etosha is cast in stone; it can grow and change with the changing needs of the Namibian people.

3. San land conservancies

Both communal conservancies and national parks loom large in the future of San peoples in Namibia. Because many San live in remote areas, they occupy some of the richest animal habitats in southern Africa. The conservancy movement, community-based natural resource management and other plans offer much promise for San development. These programmes have to be supported, but also carefully researched and monitored, to be sure that San choices are respected and that these institutions truly benefit the San.

There are clearly some critical issues looming. Tourism is a risky and difficult economic development strategy with some clear costs to the San. Indeed few San actually work in the tourist enterprises on their lands. The long-term economic benefit to the San offered by hunting, i.e. paying the San for the offtaking of game, is another matter requiring close monitoring.

Finally, the disjunction between land rights and natural resource rights in the communal conservancies has to be addressed by means of statutory law. The situation in Nṁa Jaqna Conservancy is due to the conservancy having natural resource rights with no legal connection to land rights. Though legally possible, this it is not a good way to manage environmentally sensitive lands. Put another way, the communal conservancies must have the legal authority to administer their own lands, with the support of their respective Traditional Authorities and Communal Land Boards, to meet the needs of the conservancy members in accordance with their management plans. The issue of communal land rights must be directly addressed in conservancy law.

4. Resettlement villages

We visited Tsintsabis, Omega and Mangetti Dune, three of a dozen or more San resettlement projects in northern and eastern Namibia. It is impossible to draw any conclusion other than that these resettlement schemes must be re-conceptualised and re-planned using a different model. There is no work in these schemes, and beneficiaries are hungry. Traditional San livelihood is impossible under such conditions. These resettlement villages may be necessary as an intermediate measure before meaningful land reform can be accomplished, but they exist as rural slums and thus should not be viewed as functioning models of San economic development.

The simplest corrective measure is to connect these resettlement schemes more directly with land reform, providing more land, sufficient for more extensive farming operations, more support and more training. But the villages are too large to keep farmers close to their lands, so some restructuring is still necessary.

It is worth stating here that we reported in detail on these resettlement projects in 2002,¹⁶⁷ and still nothing has changed in resettlement policy or planning. A Ministry of Lands and Resettlement official at Omega was even unaware that Omega is a resettlement project, and had no idea at all what would happen to the people there, who are all concerned about their future but get no official answers to their queries.

C. Reforming governmental administration

1. Improved government planning and communication

The San are a marginal and powerless people. The Namibian state, like any other, is vast and powerful. The San want basic respect from their Government, and basic information about their situation. They have the impression that the Government ignores them, and that the government is both distant and dishonest in dealing with them. The Government should maintain an open and honest relationship with San communities, giving forthright answers to San questions.

¹⁶⁷ Sidney L. Harring and Willem Odendaal, *One Day We Will All be Equal*, op. cit. n71.

Particularly damaging, and the subject of much discussion and discord in Namibia, are the all too common rumours of fraud and favouritism in the land reform process. Rumours fly in an atmosphere of secrecy and distrust, but are dispersed with transparency and honesty. Given that land is wealth in any agrarian society, the Government's land reform programme has the potential to enrich powerful and politically well-connected people. Rumours abound of politicians, ministers and friends being enriched by this programme. In an agrarian society, land is wealth, therefore the land reform programme offers great potential for unjust and unlawful enrichment of a few at the expense of the poor people these programmes are designed to help. It is entirely the responsibility of the Government and specifically the Ministry of Lands and Resettlement to maintain transparency and honesty in the land reform programme.

A careful and public planning process would go a long way to ensuring transparency, and would also enable the poor and landless to gauge what is likely to happen to them. Further it would help the Government administer its land reform programme with minimal waste and inefficiency. This cannot be said to be occurring at present.

2. Improving San access to the Government of Namibia

The reverse of making the Government more open in and accountable for the general process of land reform is to empower the San to be more politically active, with capacity to hold the Government more accountable. This is not an easy process given many years of underdevelopment in San areas and the poor educational levels of most San.

There are several ways to achieve this aim of making San more politically active. Each relevant ministry, for example, could have an official or office specifically tasked to locate and hear San concerns, and transmit them to the relevant officials, and then to follow up to ensure the necessary responses to these concerns. While Namibia has an Ombudsman serving all peoples of Namibia, there could also be an Ombudsman serving San only, with offices in the San areas. Or, a 'Land Ombudsman' could be appointed to serve all landless peoples in the communal areas, or to represent the needs and concerns of poor people in the land reform process.

3. Capacity-building in San communities

As mentioned above, the San are not only poor and unrepresented, but also uneducated, lacking training and skills in almost every area. This is not only an impediment to San development, but also to Namibian development. There can be no meaningful land reform without capacity-building. Namibia is an agricultural country, yet none of its agricultural colleges are developing training programmes to meet the small-scale agricultural needs of the communal areas.

Many San children live far away from the nearest school. Basic education must reach every San community. Children also need access to basic health care and food to be strong and healthy enough to learn.

There are basic community institutions helping to provide a safe and nurturing environment for children in San communities. To the extent that the resettlement schemes, home to thousands of San, exist as rural slums, with high levels of alcoholism and violence, basic social service institutions have to be developed and made available to assist. To the extent that land is life and wealth in any agrarian society, the whole notion of 'land for the landless' is a commitment to remaking the entire social order, reversing 100 years of colonial domination and a legacy of poverty and racism.

4. Strengthening the role of Traditional Authorities in sustainable land-use issues

Traditional Authorities have certain duties with respect to sustainable land use:¹⁶⁸

- ▶ To assist and cooperate with the Central Government, Regional Councils and Local Authority Councils in the execution of their policies, and to keep the members of the traditional community informed of developmental projects in their area.
- ▶ To ensure that the members of the traditional community use the natural resources at their disposal on a sustainable basis, and in a manner that conserves the environment and maintains the ecosystems for the benefit of all persons of Namibia.

The implications of the Traditional Authorities Act for the compilation of regional land-use plans are clear: Traditional Authorities must be fully involved in the planning of land use and development in their areas. In addition they must be sensitised to sustainable resource management and how this must be implemented in their communities. It is their duty under the law to ensure sound resource management.

5. Better training, coordination and support for implementing and enforcing the Communal Land Reform Act

While the Communal Land Reform Act came into force only on 1 March 2003, it can be expected that some problems exist in its implementation. However, for the Act to have the desired impact on the communal areas, the Ministry of Lands and Resettlement, as its implementers should take cognisance of the problems and constraints that Communal Land Boards and Traditional Authorities experience in applying its provisions. For example, the Otjozondjupa Communal Land Board lacks reliable transport which makes it difficult to perform its duties.¹⁶⁹ In addition this board reports that traditional leaders do not have a good understanding of the Act and thus find it difficult to apply.¹⁷⁰ It is clear that without proper logistical support to Communal Land Boards and a better understanding of the Act, its intended goal of implementing an orderly land reform process in communal areas will not be met.

D. A final note: Law, social change and San rights

There can be no question of how long a way Namibia has come in the 16 years since independence. A new Constitution is in place, setting a framework for a new legal order, but as we have seen, while law has great power as a force for social change, it also sets significant constraints. Though Namibia is a new nation with a new legal order, many laws, especially the land laws, are deeply rooted in the apartheid-era social order. Even if

¹⁶⁸ Ministry of Lands, Resettlement and Rehabilitation, *National Land Use Policy*, 2002.

¹⁶⁹ Otjozondjupa Communal Land Board, *Annual Report 2004*, Ministry of Lands, Resettlement and Rehabilitation, Windhoek, p. 67.

¹⁷⁰ Ibid.

the law is well-meaning and adequately meets social needs, it is limited by both human capacity and entrenched interest groups. No one can question the difficult challenges that the Traditional Authorities Act and the Communal Land Reform Act face, but these Acts address difficult social questions in remote parts of Namibia. The current day-to-day operation of these laws falls far short of the needs of the different peoples in the communal areas. For the San specifically, given their marginal place in Namibian society, a greater legal effort must be made to achieve the goal of giving land to the landless and disadvantaged. This is necessary both to provide the San with means to live with dignity on their own land, and to empower them to participate fully in Namibian society.

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APPENDIX A: TABLES

TABLE 1: **San language groups which lost land after the Odendaal Commission**

Ju/'hoansi	While the creation of Bushmanland went some way to secure Ju/'hoansi territorial integrity, the demarcation of its borders cut the Nyae Nyae area in three. The northern part was incorporated into Kavango, with the Khaudom area eventually being proclaimed a national park and its resident San communities being relocated to the military bases at Aasvoëlnes and Nhoma in Central Bushmanland. The southern part of Nyae Nyae was incorporated into Hereroland East, which was extended as far as Gam.
Hai//om	Although most Hai//om lived in and around the area that now constitutes Etosha National Park and the Tsumeb and Outjo commercial farms, significant populations of Hai//om were disenfranchised through the expansion of Ovamboland into their territories north of Etosha. However, as will become clear, San living north-west of Etosha in the Ngandjera area have largely been integrated into Ngandjera society (Felton 1997). Small numbers of Hai//om also found themselves living in southern Kavango.
Mpungu/ Kavango !Kung	The Mpungu/Kavango !Kung traditionally occupied a wedge of land stretching southwards from the Angolan border to the Owambo <i>omuramba</i> near Tsintsabis. This entire area was split and incorporated into Kavango and Ovamboland respectively. While low population densities and small numbers of migrants meant that the San retained a degree of autonomy in the southern parts of these reserves, in the northern parts most !Kung became cheap labourers attached to Kavango households and living on the peripheries of larger settlements.
Au//eisi (Omaheke Ju/'hoansi)	Despite much of the Au//eisi land falling within the boundaries of commercial farms around Gobabis, large areas of their territory remained intact until they were incorporated into Hereroland. After its founding in 1923, the Epukiro Reserve was extended periodically. After Odendaal, all traditional Au//eisi territories in eastern Omaheke as far north as Gam came under the control of the Herero/Mbanderu Traditional Authorities. By independence none of the Omaheke's estimated 6 000 San speakers retained <i>de jure</i> rights to land.
Nharo	Although the bulk of the Nharo population lived across the border in Botswana, Nharo territory traditionally extended into the central and southern Omaheke in Namibia. For the most part their territory in Namibia was incorporated into commercial farms, and the remaining areas into Hereroland East, the Corridor and Aminuis.
Southern !Xo	Like the Nharo, the majority of southern !Xo lived and still live in Botswana, however those living in Namibia found their traditional territories incorporated into Aminuis and the Corridor, and placed under Herero or Tswana control.

TABLE 2: San languages and dialects by location in Namibia

SAN LANGUAGE	DIALECT GROUP	REGION
!Kung	!kung (//'HengaKxausi and Omatako !kung)	Otjzondjupa Omaheke Kavango
	Mpungu OvaKwangala	Kavango Omusati, Oshana, Ohangwena, Oshikoto ("the 4 'O' Regions")
	!Xu (Vasekele)	Otjzondjupa Kavango Caprivi
	Ju/'hoansi	Otjzondjupa Omaheke
	Omaheke Ju/'hoansi (+ Au//eisi, Makaukau and Auen)	Omaheke
!Xo	N//usan	Omaheke
Khoe	Nharo	
Kxoe	//XoKxoe //Omkxoe BugaKxoe BumaKxoe	Kavango Caprivi
Hai//om (Khoekhoegowab)	Keren	Oshikoto Kunene
	Kwankala	Kavango Oshikoto
	!Kung-Hai//om	Kunene Oshikoto

TABLE 3: San populations by area, 1971-1991

ENUMERATION AREA	No. of San 1991	No. of San 1981	No. of San 1971
Commercial farming areas			
Omaheke Region – Gobabis District	4 132	4 837	5 212
Otjozondjupa Region – Grootfontein District	3 878	4 461	3 815
Otjozondjupa Region – Otjiwarongo District	291	444	0
Kunene Region – Outjo District	487	1 827	1 347
Oshikoto Region – Tsumeb District	3 838	3 506	3 888
Other commercial farming districts	295	844	890
<i>Total San population in commercial farming areas</i>	<i>12 921 (47.5%)</i>	<i>15 908</i>	<i>15 152</i>
Communal areas (San majority)			
Tsumkwe District (former East Tsumkwe)	3 350	2 245	459
Eastern Kavango and West Caprivi	3 471	2 738	92
<i>Total San in communal area majority populations</i>	<i>6 821 (25%)</i>	<i>4 983</i>	<i>551</i>
Communal areas (San minority)			
Omaheke Region (former Hereroland East)	2 431	1 734	711
Otjozondjupa Region (former Hereroland West)	654	627	219
Kavango Region	2 434	2 672	3 778
The 4 'O' Regions (former Ovamboland)	1 684	2 790	1 814
<i>Total San in communal area minority populations</i>	<i>7 203 (26.5%)</i>	<i>7 823</i>	<i>6 522</i>
Other communal areas	284	727	561
<i>Total San in communal areas</i>	<i>7 487</i>	<i>8 550</i>	<i>7 083</i>
Other areas (urban, etc.)	284	0	0
TOTAL SAN POPULATION	27 229	29 441	22 786

Sources: **Marais 1984** and **CSO 1994 (1991 census data)**.

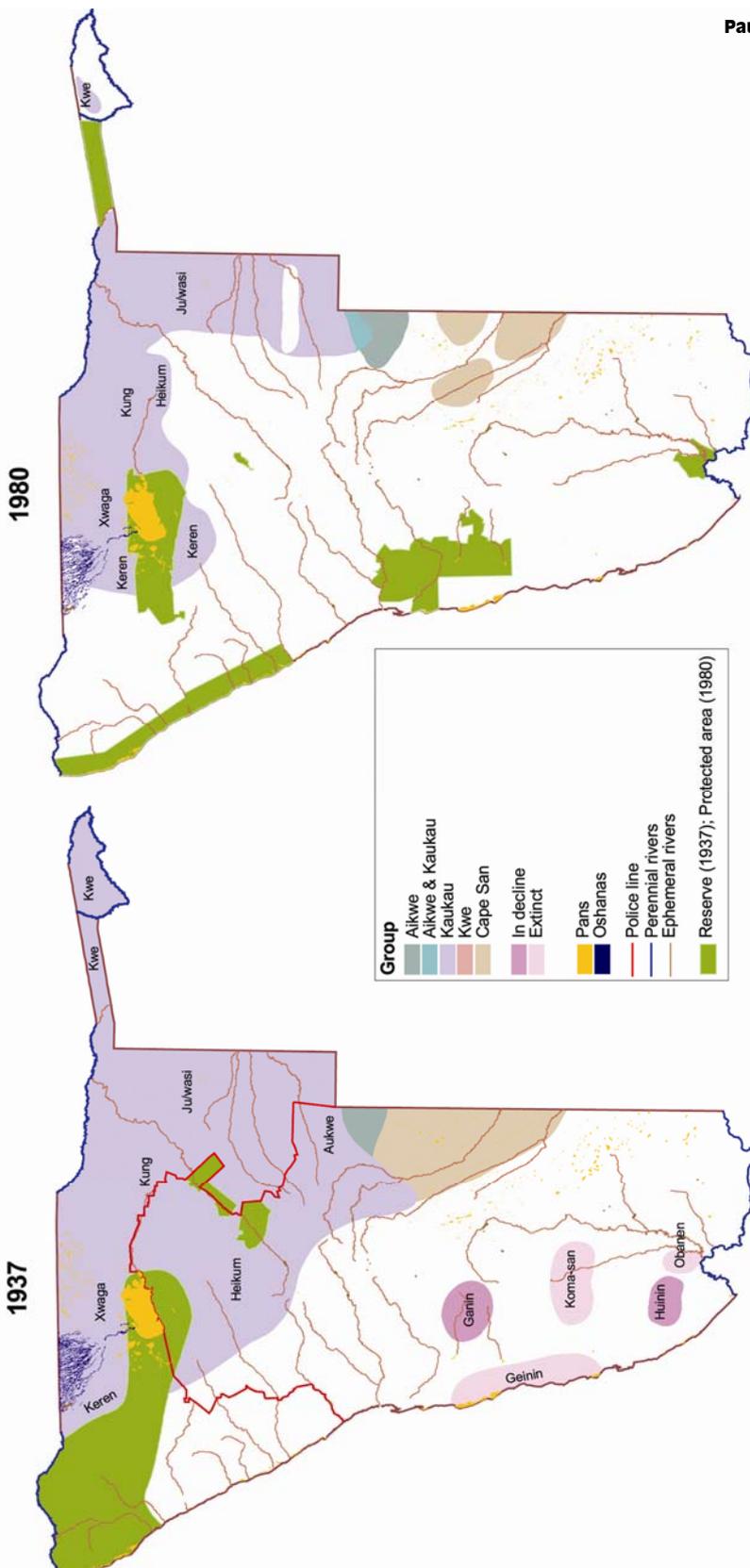
TABLE 4: The major San settlements in Namibia

SETTLEMENT	NO. OF KXOE	NO. OF VASEKELE IKUNG
Mutciku	1 020	182
Omega	630	100
Chetto	590	0
N//am//xom	103	0
Omega 3	638	0
Mashambo	119	0
Others	432	0
<i>Sub-total</i>	<i>3 523</i>	<i>282</i>
East Caprivi – between Kwando River and Katima Mulilo		
Wayawaya	121	0
Others	311	0
West of Kavango River		
Mugudi (near Andara)	56	0
TOTAL	4 011	0

Source: **Brenzinger 2001.**

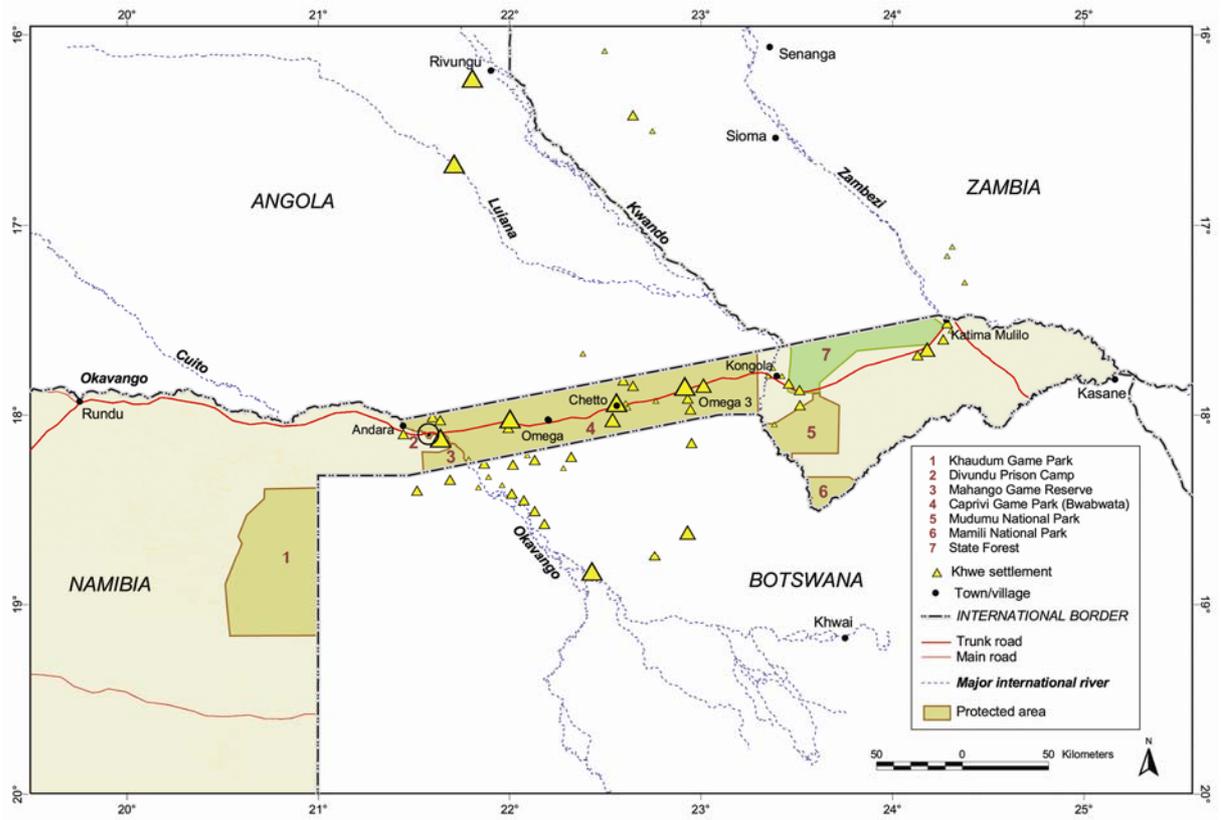
Map 2: **Bushman land dispossession during the mandate period – 1937 and 1980**

Though not entirely accurate, these maps are valuable indicators of territorial disposition.

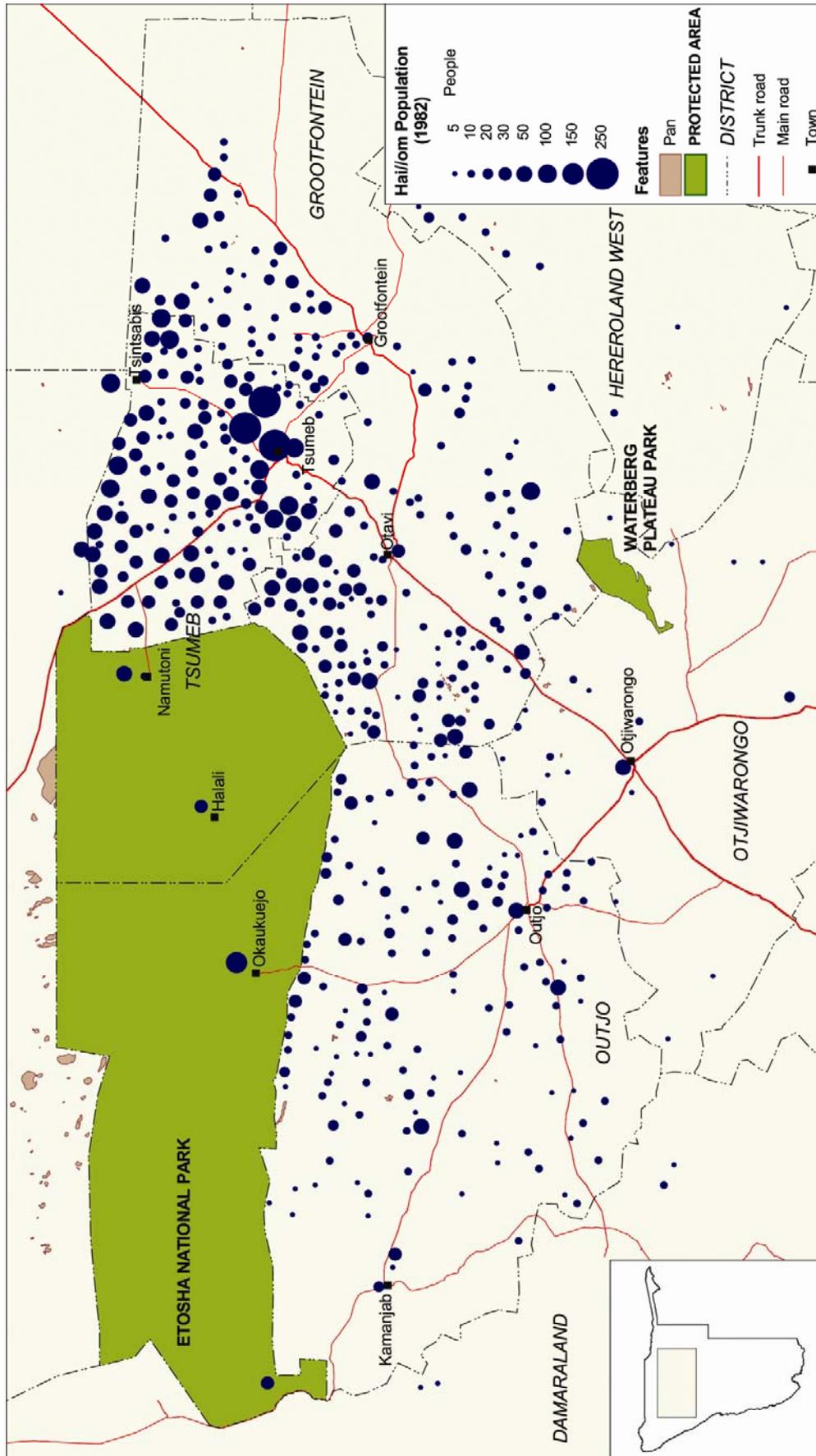


Adapted from Paul Glass, "Die Bushmänner in Deutsch-Südwestafrika", PhD dissertation, Königsberg University, 1939; and Kuno Budack, "Die Volker Südwestafrikas", Die Allgemeine Zeitung, Windhoek, 6 June 1980.

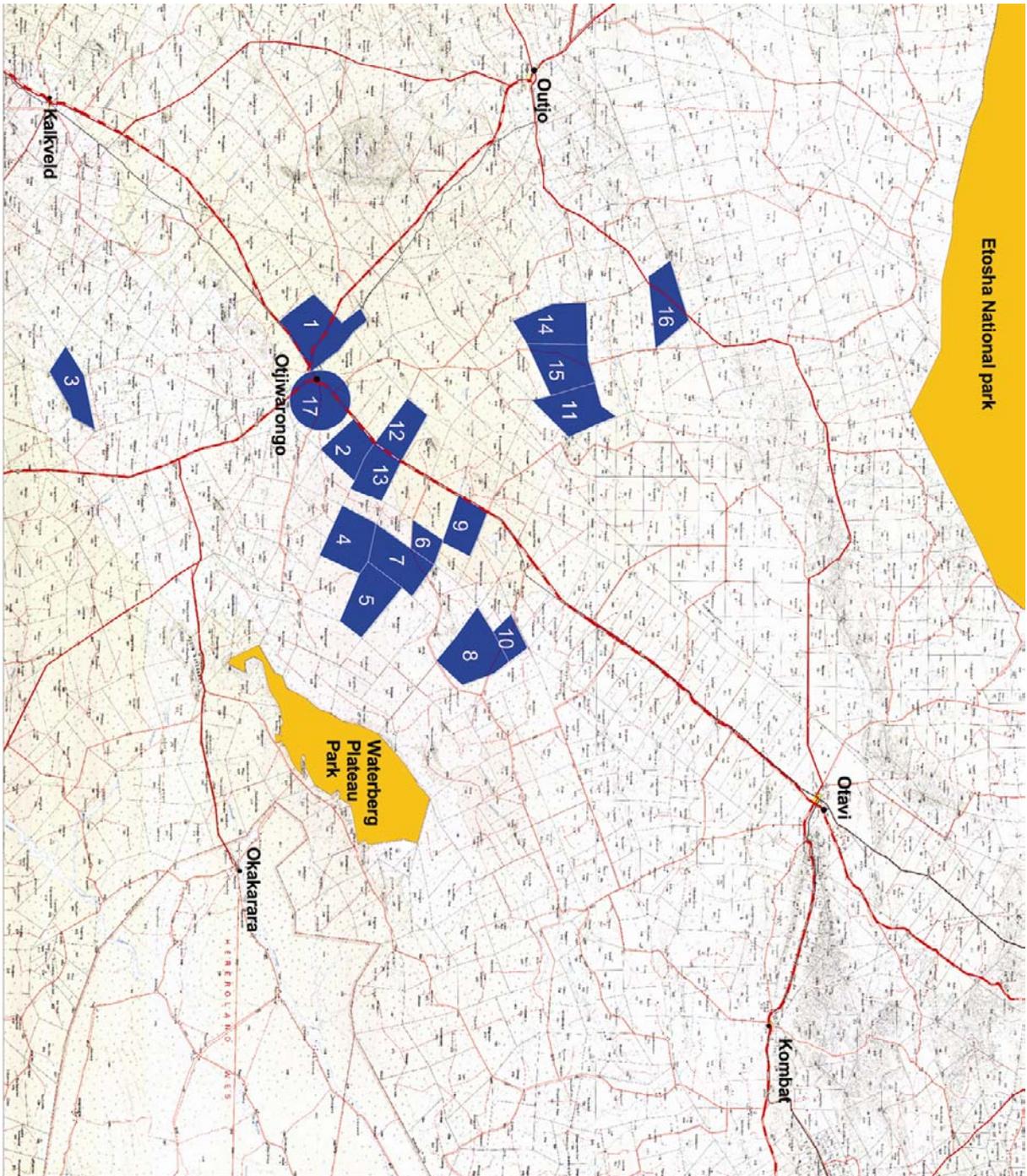
Map 3: San settlement in and around West Caprivi, 2006



Map 4: Etosha National Park cultural mapping project



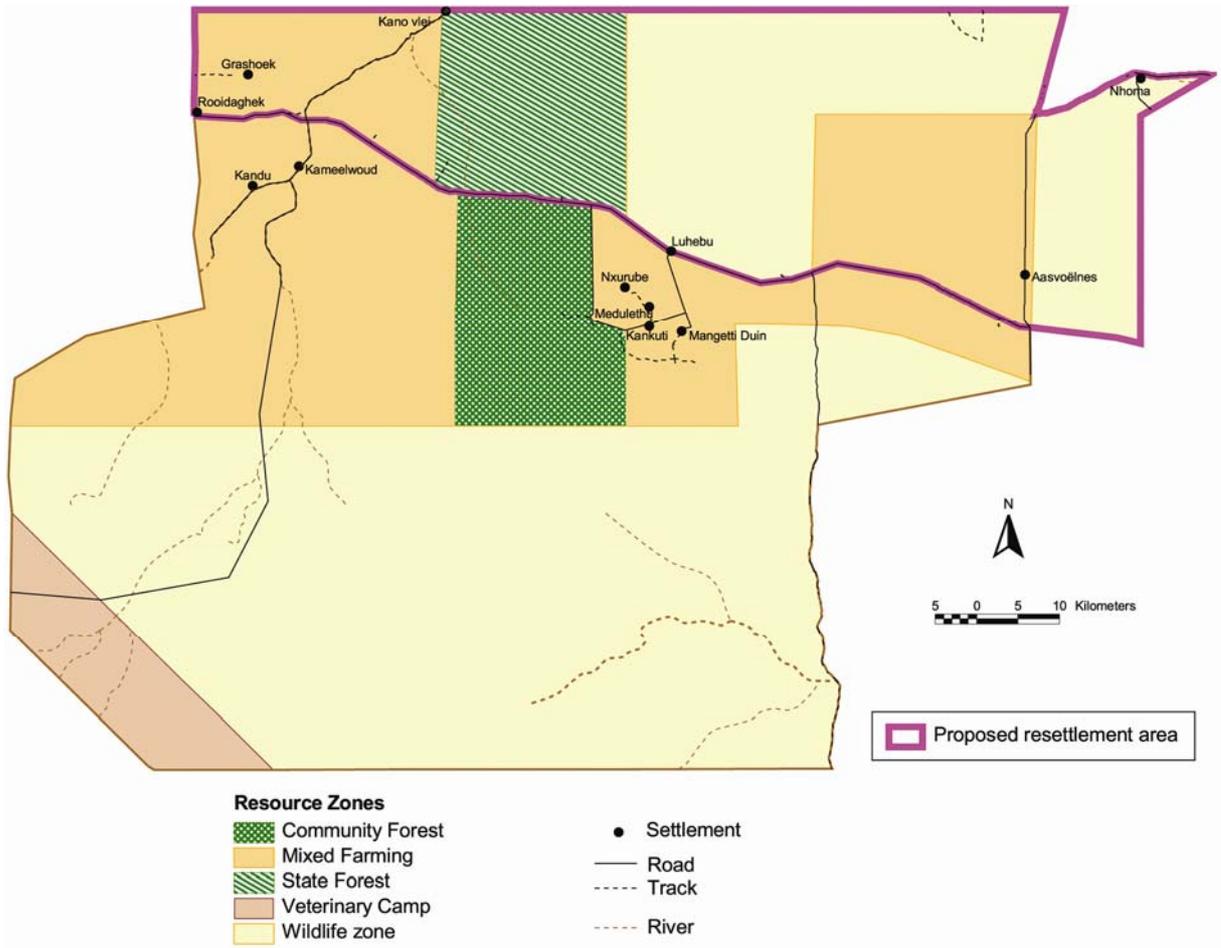
Map 5: Elias Soroseb's 16 moves



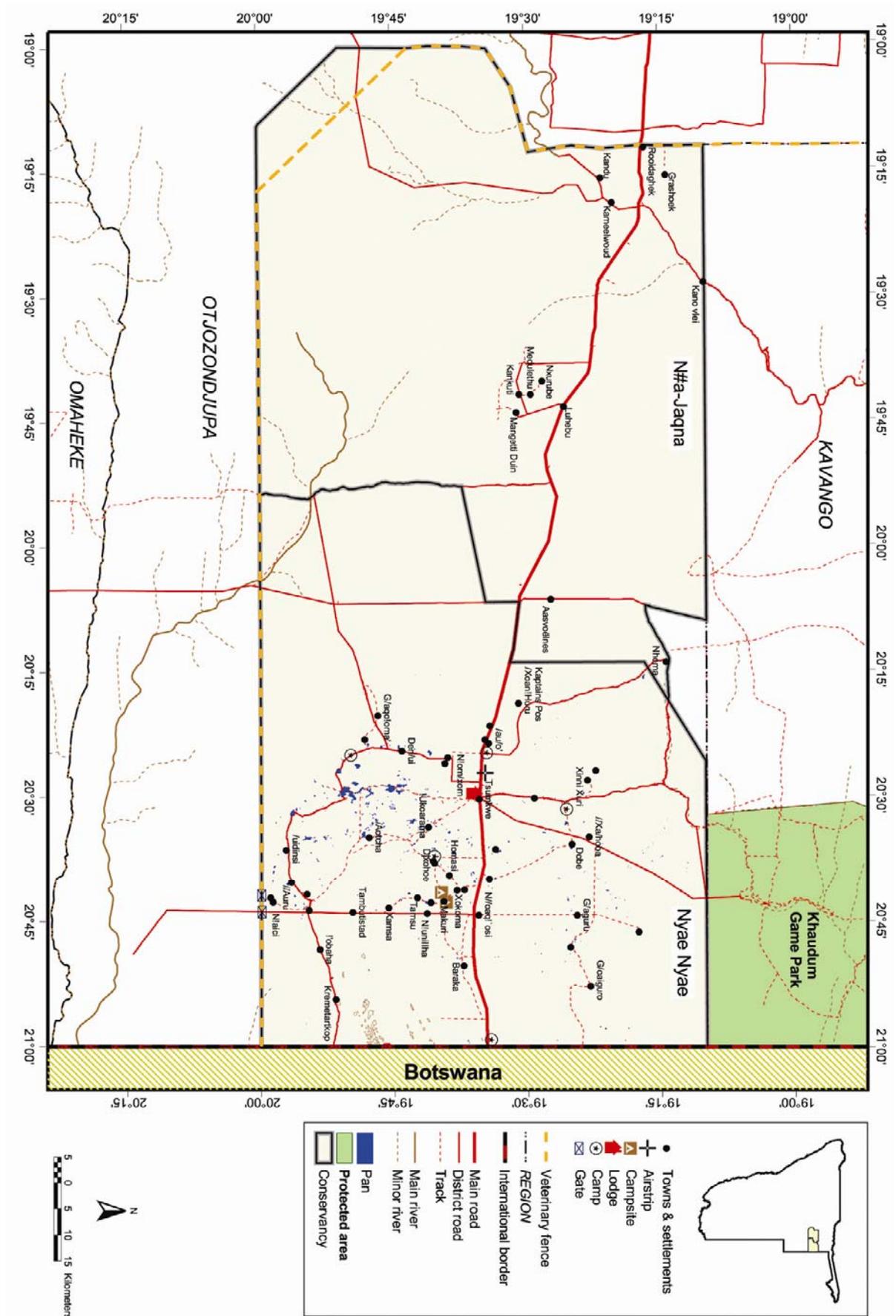
Elias Soroseb

Farm/Place
1 Ojitarongo
2 Honiqberg
3 Okonjima
4 Petos ('Aloegrove' vicinity)
5 Ojenga Vlaktes
6 //Krauros (Gelukwater)
7 Okarinbanda
8 Oros
9 Schwerborn
10 Karukondono
11 Belvedere
12 Drukwerk
13 Wagner
14 Fresnaye
15 /Anasun (Goedbegin)
16 Lazy Spade
17 Ojitarongo

Map 6: N̄a Jaqna Conservancy land use



Map 7: Nyae Nyae Conservancy land use





LEGAL ASSISTANCE CENTRE