

# San land rights in Namibia: Current national processes and community priorities

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## 1 Introduction

During 2017, the Office of the Vice President: Division Marginalised Communities and the United Nations Department of Economic and Social Affairs carried out five regional consultations targeting San communities. The aim was to identify, prioritise and discuss thematic issues, including education, consultation, representation, discrimination, health, culture, language and land. At each of the five consultations, attended by 30 to 40 San leaders and community members, the issue of land was overwhelmingly chosen as the number one priority. This prioritisation of land by the San participants reflects a growing dissatisfaction expressed in Namibia's public life, national media and social media over the last decade concerning the demand for, allocation of, and management of land.<sup>1</sup>

1 Werner, W., 'Land Tenure and Governance on Communal Land in Namibia', paper presented at the Second National Land Conference, Windhoek, 2018.

There has been substantial progress in many areas of land governance since Namibia's independence in 1991, including the development of appropriate national legislation and policies, land acquisition for resettlement, investments in communal areas, and regional consultations on land planning and land reform by the Ministry of Land Reform (MLR). However, the concerns of San groups, and the aforementioned negative public sentiments regarding land, are reinforced by the limited success of Namibia's resettlement programme<sup>2</sup> (despite significant interventions by the MLR in a number of areas) and shortcomings in the management of communal land,<sup>3</sup> amongst other issues.

Moreover, San people in Namibia, who speak six languages within the Khoesan languages grouping,<sup>4</sup> with an estimated total population of 40 000,<sup>5</sup> are certainly the worst-affected of Namibia's ethnic groups in terms of landlessness and historical dispossession of land.<sup>6</sup> They also continue to face extreme marginalisation, and have lower overall indicators than other Namibian ethnic groups in many areas, including economic development, educational attainment and political representation.

Namibia's San groups live on communal land, commercial farmland and resettlement farms, and in protected areas and, increasingly, peri-urban and urban areas. Each of these land types presents challenges and opportunities for realising land rights, some unique to the San, and others which affect many Namibians.

On communal land where San are the majority, principally the Ju|'hoansi of Tsumkwe East and the !Kung of Tsumkwe West, management rights are well established through traditional authorities, the Communal Land Reform Act (No. 5 of 2002), and conservancy and community forest legislation. However, pressure from encroachment into their lands in the forms of illegal settlement, illegal grazing and illegal fencing continues to be high. On communal land where San are a minority, their representation and participation in land-related decisions, tenure rights and complaint resolutions tend to be limited. These groups include the !Kung and Hai||om of Ohangwena, Oshana, Omusati and Oshikoto Regions, the †Kao||Aesi, Naro, !Xóo and !Kung of eastern Omaheke, and the Khwe of Kavango East and Zambezi.

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2 Odendaal, W. & W. Werner, 'Financing Resettlement and Securing Tenure: Are Leasehold Agreements the Key to Success?', *Livelihoods after Land Reform Policy Brief No. 2*, Land, Environment and Development Project of the Legal Assistance Centre, Windhoek, 2010.

3 Becker, H., 'Namibia's moment: Youth and urban land activism', *Review of African Political Economy*, 2016 (<http://roape.net/2016/01/18/namibias-moment-youth-and-urban-land-activism/>).

4 Consisting of the Hai||om, !Kung (also referred to as !Xun and !Xung), Ju|'hoansi, Khwe, Naro and !Xóo (also referred to as !Xoon). There are also distinct sub-groups such as the †Kao||Aesi (or southern Ju|'hoansi), Vasekela (!Kung of northern Namibia), †Akhoe (a Hai||om sub-group) and 'N|oha (related to the !Xóo).

5 Various sources including the LAC/DRFN's 'Scraping the Pot' (Dieckmann et al. 2014) cite this number based on established estimates. However, the Division Marginalized Communities estimates up to 80 000 San in Namibia based on household food distribution.

6 Dieckmann, U., M. Thiem, E. Dirkx & J. Hays (eds), *"Scraping the Pot": San in Namibia Two Decades After Independence*, Legal Assistance Centre and Desert Research Foundation of Namibia, 2014.

Within areas of commercial farmland, the San are often landless or employed as labourers (formally or informally, as are many Namibians) and have increasingly moved to peri-urban and urban informal settlements. These groups include the Hai||om of Otjozondjupa and southern Kunene Region (for example moving to Outjo and Grootfontein), the Khwe of Kavango East and Zambezi (often moving to Rundu and Katima Mulilo) and †Kao||Aesi, Naro, !Xóo and !Kung of Omaheke Region (many of whom are found in Gobabis). Peri-urban and urban areas provide better access than many rural areas to services and livelihood opportunities but present challenges, especially within informal settlements, in terms of tenure security, service provision, sanitation, planning, and security. These challenges are commonly experienced by all Namibians in such areas.

Otjozondjupa, Omaheke, Oshikoto, Ohangwena, Kunene, Zambezi and Kavango East and West have both individual and group state resettlement farms with majority San populations. Group schemes emerged after independence in response to the need to accommodate large numbers of landless people, but have fallen out of favour due to the generally poor outcomes for residents and their lack of sustainability.<sup>7</sup> Despite this, the San in particular have continued to be resettled in group schemes, and hence have been resettled in groups far more than individually. San groups found on resettlement farms in the areas mentioned above benefit from increased land security and sometimes from significant government support,<sup>8</sup> though there remains a lack of clarity over land tenure (as the resettlement farms are in effect owned by the state<sup>9</sup>) and frequent deficiencies in planning, service provision and support to ensure sustainable livelihoods.

Lastly, a significant proportion of the Khwe population reside within Bwabwata National Park. While they remain on their ancestral territory, there is considerable tension between the Khwe, who perceive themselves to be the rightful owners of the land and desire to improve their livelihoods, and the conservation authorities, whose policies and management are focused on protecting wildlife within the park.

At the time of writing, several processes within the Government of the Republic of Namibia (GRN) related to both San groups and land were underway. These include developing strategies, policy, and implementation plans related to resolutions that emerged from the Second National Land Conference held in 2018. Moreover, the GRN has established a Presidential Commission of Inquiry to examine questions surrounding ancestral land in Namibia, and a draft White Paper on the Rights of Indigenous Peoples in Namibia that, having been reviewed by the Attorney General's Office in 2019, awaits possible debate and approval by Cabinet. Adoption

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7 Werner, W. & W. Odendaal, *Livelihoods after land reform: Namibia country report*, Legal Assistance Centre, Windhoek, 2010, pp. 24–25.

8 In particular from MLR, as well as from the Ministry of Agriculture, Water and Forestry and the Office of the Vice President: Division Marginalised Communities.

9 The Ministry of Land Reform has considered a number of solutions, including the Flexible Land Tenure Act, but the issue remains unresolved at the time of writing in late 2019.

of this white paper would lead to specific policy and national planning in relation to San and other indigenous peoples or marginalised communities in Namibia.

The current situation in regard to future land policies and programmes relevant to the San is thus fluid and multifaceted, but there is potential for Namibia to better realise aspects of human rights and land rights – such as improving tenure security, enhancing livelihoods and reducing landlessness – for San groups in Namibia in the coming years.

The purpose of the first part of this chapter is to provide an overview of the current status quo in terms of national processes, policies and legislation relating to San populations in Namibia, primarily but not solely focused on land issues. The second part condenses feedback and recommendations from San groups consulted during the fieldwork conducted for this chapter, specifically concerning land and related service provision in relation to the resolutions of the Second National Land Conference.

## 2 An overview of current legislation and institutions related to San groups

The Constitution of the Republic of Namibia is progressive in nature, and provides protections for equality and freedom from discrimination (Article 10), rights to culture, language and tradition (Article 19), and recognition of customary law (Article 66) as having the same status as statutory law, insofar as it is not in conflict with the Constitution and statutory laws.

Namibia's Constitution affords limited rights over land and resource management for communities, but states that "Land, water and natural resources below the surface of the land ... shall belong to the State if they are not otherwise lawfully owned" (Article 100). Hence, the GRN takes the position that communal land is ultimately state land.

However, recent court cases have tested this argument to show that communal land is held in trust by the GRN for the various traditional communities living on it, and the GRN has to ensure that its actions reflect the interests and desires of those traditional communities. This argument relies on Article 124 and Schedule 5 of Namibia's Constitution, which deal with the transfer of immovable property upon independence, and Section 17 of the Communal Land Reform Act.<sup>10</sup>

Namibia follows a monist approach, hence binding international law and international agreements form part of the national law of Namibia (Article 144). Other than the Constitution, the following national legislation is generally relevant to San land governance:

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<sup>10</sup> *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15/2017) [2018] NASC 409 (16 November 2018).

- a) The Communal Land Reform Act (No. 5 of 2002) (and amendments), which provides for the allocation of customary land rights and leaseholds to communities for farming and residential units through the decisions of the communal land board and the traditional authority of the area. It also provides for fines for illegal grazing and fencing. Notably, however, the Act does not permit group tenure under customary law, to the detriment of the San, whose customary land governance was based on allocations to family and village groups, rather than individuals.<sup>11</sup>
- b) The Agricultural (Commercial) Land Reform Act (No. 6 of 1995) (and amendments), through which the government acquired agricultural land in order to resettle landless individuals – “foremost ... Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices”.
- c) The Traditional Authorities Act (No. 25 of 2000), which sets out the requirements for the recognition and roles of traditional leaders and their councillors, including their duties in administering the allocation and management of communal land.
- d) The Nature Conservation Amendment Act (No. 5 of 1996), which governs the formation and management of conservancies, principally of interest for the San-majority Nyae Nyae and Nꞑa Jaqna conservancies.
- e) The Forest Act (No. 5 of 2002), which similarly governs the formation and management of community forests (also established in the Nyae Nyae and Nꞑa Jaqna Conservancies), as well as fines for illegal usage of natural resources.

The following acts are relevant in specific circumstances:

- f) The Access to Biological and Genetic Resources and Associated Traditional Knowledge Act (No. 2 of 2017), which allows for the recognition and protection of the rights of local communities over their genetic and biological resources and associated traditional knowledge.
- g) The National Heritage Act (No. 27 of 2004), which provides for “the protection and conservation of places and objects of heritage significance and the registration of such places and objects”.
- h) The Flexible Land Tenure Act (No. 4 of 2012), which allows for three stages of tenure. The first stage of tenure does not require surveying of the area in question, but still allows for improved inheritance rights and bankability of land, therefore greatly improving access and reducing costs of tenure. The Act is likely to play a greater role in the coming years in securing tenure rights in informal settlements and potentially in state resettlement farms.

In addition, the National Land Policy (1998) provides guidance in terms of tenure and management rights, including: the inclusion of rights over renewable natural resources on the land, when used sustainably; the recognition of various types of land right, including customary, leasehold, freehold, licences, certificates and permits, and state ownership; and exclusive tenure rights, including for co-operatives.

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11 This type of customary allocation is still understood by the San, for example the *//aih* practised in some areas, and the “*!nores*” in Tsumkwe East.

The National Resettlement Policy (2001) identifies the San as a specific target group for resettlement (and notably, it is one of the few documents following up on the identification of San as deserving beneficiaries of resettlement in the 1991 Land Conference).

A number of GRN ministries have, to a greater or lesser degree, commenced with specific activities regarding the San. In relation to land, the Ministry of Land Reform is involved in policy development and project implementation, especially regarding technical support to group resettlement farms. The Office of the Ombudsman has been involved in a number of human rights issues concerning San groups, including land issues, has published a handbook on indigenous peoples' rights in Namibia, and between 2012 and 2014 led the development of the first draft of the White Paper on the Rights of Indigenous Peoples in Namibia.

The principal institution with regard to the San is the Division of Marginalised Communities (DMC) within the Office of Veterans Affairs, Disability Affairs and Marginalised Communities (OVADAMC) in the Office of the Vice-President. Its strategy is to “ensure sustainable livelihood of the marginalized communities, to restore community organization of the marginalized communities and to ensure education and training for the marginalized communities” (NPC, 2015).<sup>12</sup>

Championed by the then-Deputy Prime Minister of Namibia, Dr Libertina Amathila, a San Development Programme was approved by the Cabinet in 2005. This programme existed under the Office of the Deputy Prime Minister until 2009, when the Cabinet elevated the programme to the Division of San Development (DSD). By this point, the remit of the programme also included the Ovatue and Ovatjimba (pastoralist groups with similarities to the Ovahimba who reside in north-west Namibia). However, the budget for the division remained limited, meaning that most interventions were local rather than national. Initially, a working group of relevant line ministries was formed to coordinate implementation around issues affecting these communities, but these meetings were not continued in later years.

Since moving to the Office of the Vice President under the Government of President Hage Geingob in 2015, the DSD's budget has substantially increased – though as with many parts of the GRN, this has recently been cut due Namibia's economic downturn.<sup>13</sup> The DSD is now placed under the supervision of the Deputy Minister of Marginalised Communities, Honourable Royal |Ui|o|oo, a San member of Parliament. He is the only San political representative within GRN besides the current regional councillor in Tsumkwe.

The DMC (and previously the DSD) has overseen considerable improvements in the level of engagement with and attitudes towards marginalised communities by national and local government. These have included greater participation of

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12 National Planning Commission, 'Strategy to Mainstream the Marginalized Communities, Developed', 2015 (<https://www.npc.gov.na/?p=823>).

13 Kahiurika, Ndanki, 'Govt trims funding for marginalised students', *The Namibian*, 22 August 2019 (<https://www.namibian.com.na/82295/read/Govt-trims-funding-for-marginalised-students>).

marginalised communities in GRN programmes, increased focus and awareness of civil servants regarding such groups, and improvements in the language used to describe such groups within the GRN.

Livelihoods and education projects run under the DMC and its predecessors have shown a mix of successes and failures (though it should be noted that, in general, civil society projects with the San are also well known for experiencing difficulties). In the case of resettlement projects and land disputes, while gains have been seen (such as the scaling up of agricultural production on the Farm Ondera group resettlement project in Oshikoto), there are questions to be raised regarding the limited levels of service provision and poverty reduction fostered under DMC resettlement projects, and the adequacy of consultations with San groups in regard to land issues.

In terms of directly developing policy, the DMC had little to show from its inception until initiating the process of revising the draft White Paper on the Rights of Indigenous Peoples in 2016, which had remained stagnant since being drafted under the Office of the Ombudsman in 2014.

## 2.1 The draft White Paper on the Rights of Indigenous Peoples

The Universal Periodic Review report of 2011 recommended that Namibia “formulate a white paper in accordance with the United Nations Declaration on the Rights of Indigenous Peoples”, and that it should also take into consideration recommendations from the Committee on the Elimination of Racial Discrimination, the International Labour Organization (ILO) and the African Commission’s Working Group on Indigenous Populations/Communities.<sup>14</sup> Accepting this recommendation, Namibia tasked the Office of the Ombudsman with developing the draft White Paper, with support from the International Labour Organization PRO169 Programme and the Legal Assistance Centre of Namibia. A final draft was completed and disseminated within GRN offices in late 2014, but not taken further.

In 2016, a cooperation agreement was concluded between the DMC and the United Nations Department of Economic and Social Affairs. This enabled a series of national and local consultations regarding the White Paper with GRN representatives and indigenous communities, resulting in substantial redrafting of the White Paper. The final draft of the White Paper was submitted to the Office of the Attorney General in May 2019 for review and subsequent consideration by the Cabinet for approval. Until its approval and translation into a policy or action plan, the GRN will continue to lack an overarching framework and coordination strategy when it comes to the country’s San, Ovatie and Ovatiimba communities.

The White Paper refers in particular to those three groups who, due to their high levels of marginalisation and inequality, have been targeted under DMC

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14 United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review: Namibia*, A/HRC/17/14.

programmes. The White Paper gives broad coverage of specific issues faced by indigenous peoples in Namibia, and includes recommendations based in national policy and international treaties.

The objectives and recommendations of the White Paper include:

- recognising indigenous peoples and ensuring the protection and promotion of their rights;
- strengthening institutional frameworks and improving coordination;
- ensuring effective consultation, participation and representation;
- improving access to land and ensuring secure land tenure (which includes issues around improving tenure, resettlement and consultation);
- ensuring equal access to quality education for indigenous peoples and protecting and promoting indigenous languages;
- promoting respect for cultural diversity and traditional knowledge of indigenous peoples;
- ensuring accessible, quality and flexible health services for indigenous peoples;
- ensuring food security, access to employment and sustainable livelihoods;
- advancing gender equality for indigenous peoples; and
- improving the monitoring of programmes targeting indigenous peoples.

Should the White Paper be approved by Cabinet, it will form the basis for the drafting of future policy, or may be directly translated into a policy. It will also immediately provide guidance for GRN offices, ministries and agencies for delivering current and future programme implementation.

## 2.2 “Marginalised communities” versus “indigenous peoples” in Namibia

The GRN does not recognise the term “indigenous peoples” as commonly defined in international law. In common with a number of African states, the GRN considers all “formerly disadvantaged” Namibians, i.e. those not of European descent, to be indigenous. The GRN therefore uses its preferred term, “marginalised communities”, for groups that are considered to be disadvantaged, particularly in economic terms, though also in relation to social and educational factors.

Despite this, GRN officials have alluded to the term “marginalised communities” being analogous to “indigenous peoples” in various speeches and documents. Indeed, the terms are often used interchangeably in international contexts, for example in Namibia’s reporting on human rights to the international community, including annual addresses to the United Nations Permanent Forum on Indigenous Issues.<sup>15</sup> The Office of the Ombudsman, civil society, and national media often use the term “indigenous peoples”, and again, some GRN ministries adopt it for international

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15 Republic of Namibia, ‘Statement By Honourable Royal J. K. /Ui/O/Oo, MP, Deputy Minister: Marginalised Communities’, 2017 (<http://papersmart.unmeetings.org/media2/14684112/namibia.pdf>).

reports. Additionally, the current Head of State, President Hage Geingob, has referred to the use of “marginalised communities” as being disagreeable, as have San leaders,<sup>16</sup> in the context of national development goals, and on the basis of the perception that marginalisation “must not be permanent otherwise it becomes a state of mind”.<sup>17</sup>

Hence, “indigenous peoples” appears to be slowly becoming a more acceptable term in the Namibian context. Its usage can also be justified by the definition of indigenous peoples adopted by the African Commission on Human and People’s Rights (ACHPR), to which Namibia is a signatory.<sup>18</sup> The ACHPR’s definition differs slightly from the United Nations definition of indigenous peoples in order to better suit the African context. Nevertheless, despite the increased prominence of the term “indigenous peoples,” the GRN has yet to grapple with the differences between marginalised communities and indigenous peoples, which are not synonymous terms.

The use of the term “indigenous peoples” would align Namibia with international norms, and would be a positive step in recognising and realising an area of human rights often avoided by governments in Africa. However, in that eventuality, other Namibian groups may also seek national recognition as indigenous peoples. For example, Ovahimba are regularly, and the Nama less regularly, referred to as indigenous peoples in international contexts, but neither population is served by the DMC programmes, as they are not considered to be marginalised communities.

In Namibia, identification as a marginalised community signifies a requirement for additional GRN support, but in general, the term “indigenous peoples” does not automatically imply this. However, these two terms are currently somewhat conflated. Therefore, the increased adoption of the term “indigenous peoples” in Namibia, especially if replacing the term “marginalised communities”, may necessitate a differently phrased and better quantified definition of which groups in the country require increased investment and support.

### 3 An overview of current national processes related to San land

In October 2018, Namibia held the long-awaited Second National Land Conference. While delayed and subject to some political controversy in the run up to the event, the conference nevertheless signified the GRN’s willingness to engage on the often thorny and emotionally charged issues of land governance and reform in the

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16 Xaogub, Francis, ‘“Don’t call us marginalized” ... San communities claim discrimination’, *The Namibian*, 17 June 2019 (<https://www.namibian.com.na/189643/archive-read/Dont-call-us-marginalised--San-communities-claim-discrimination>).

17 *New Era*, ‘Geingob’s trip to Tsumkwe explained’, 28 May 2015 (<https://neweralive.na/posts/geingobs-trip-tsumkwe-explained>).

18 African Commission on Human and Peoples’ Rights (ACHPR) & International Work Group for Indigenous Affairs (IWGIA), *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities*, ACHPR & IWGIA, Copenhagen, 2005, p. 89.

country. Twenty-seven years earlier, in 1991, the first land conference, the National Conference on Land Reform and the Land Question, set out newly independent Namibia's approaches to land policy and pressing land issues, including the GRN's refusal to entertain the complications of ancestral land claims.

One of the outcomes of the first national land conference was twenty-four statements of consensus, clarifying the outcomes of discussions and public submissions in regard to commercial and communal land, service provision, and policy.<sup>19</sup> A number of San groups were represented at the 1991 land conference, in particular the Ju|'hoansi of Nyae Nyae, whose traditional leader addressed the audience.<sup>20</sup> Of particular relevance to the San, the 1991 *National Conference on Land Reform and the Land Question: Consensus Document* included the following statements (abbreviated and excluding the specific recommendations under each statement):<sup>16</sup>

- 2) **Ancestral rights** ... given the complexities in redressing ancestral land claims, restitution of such claims in full is impossible.
- 4) **Underutilised land** ... abandoned and underutilised commercial land should be reallocated and brought into productive use [note that this excludes communal land]
- 9) **Land tenure** ... Evaluate the legal options concerning possible forms of land tenure consistent with the Constitution.
- 10) **Farm workers** ... should be afforded rights and protection under the labour code.
- 12) **Access to communal land** ... in a particular communal area the rights of intending farmers from outside the area need to be reconciled with the rights of the local community having access to that land.
- 13) **Disadvantaged communities** ... disadvantaged communities and groups, in particular the San and the disabled, should receive special protection of their land rights.
- 19) **Illegal fencing** ... illegal fencing of land must be stopped and all illegal fences be removed.

As observed in this and other chapters in this publication, despite progress in a number of areas concerning land policy and programmes, and improvements in terms of San peoples' human rights and their economic development, a number of the good intentions embodied in the 1991 'Consensus Document' remain only partially realised, and in some cases not applied.

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19 Office of the Prime Minister, *National Conference on Land Reform and the Land Question: Consensus Document*, 1991 (<http://www.mlr.gov.na/documents/20541/290353/Conference+Consensus+Document+%28Booklet+and+Programme%29.pdf/dfa21c58-1112-49e8-b22e-54d09e77cf52>).

20 Biesele, Megan & Robert K Hitchcock, *The Ju/'hoan San of Nyae Nyae and Namibian Independence: Development, Democracy, and Indigenous Voices in Southern Africa* (Paperback Edition), Berghahn Books, New York and Oxford, 2013.

San groups were also well represented in the 2018 Second National Land Conference, which provided an opportunity for a broadly inclusive cross-section of stakeholders to submit and in some cases present their views on all aspects of land governance and reform in Namibia. Since 1991, five San traditional authorities have been recognised by the GRN under the Traditional Authorities Act,<sup>21</sup> and their chiefs and councillors attended, alongside a number of younger community representatives invited by the MLR and the DMC. Presentations and comments by San delegates were well received by the audience, and conversations between San representatives and politicians appeared to be promising.

As with the 1991 conference, a set of resolutions was agreed upon by participants. This time there were 40 resolutions – some with numerous sub-sections – reflecting the myriad challenges and disputes that have fermented regarding land governance in Namibia in the years since independence. The published *Resolutions of the Second National Land Conference, 1st-5th October 2018*<sup>22</sup> contains many areas relevant to the San. The resolutions are more comprehensive in detail and cover a broader range of issues than had been included in the first conference. The San themselves have experienced considerable social, economic, cultural, and geographic change, such that while they were historically most affected by issues in communal areas and commercial farmland, significant portions of San populations are now present in urban areas and within resettlement areas. Thus, an even larger set of the resolutions are relevant to the San.

Resolutions of the 2018 National Land Conference that are of particular interest to San groups include, in brief:<sup>23</sup>

- 3) Resettlement policy and criteria;
- 4) Pre- and post-resettlement support;
- 6) Access to land by women, youth, war veterans, Botswana returnees and persons with disabilities;
- 7) Farmworkers (including generational farmworkers);
- 8) Disadvantaged communities;
- 11) Land allocation & administration by traditional authorities & communal land boards;
- 13) Land rights registration in communal areas;
- 14) Illegal fencing in communal areas;
- 15) Access to communal land;

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21 The Hai||om, !Kung, Ju'hoansi, ǀKao||Aesi and !Xóo have recognised traditional authorities. The Khwe remain the largest San group without a recognised traditional authority, and the Naro of Omaheke are also seeking recognition.

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

23 Note that the resolution document provides significant detail on these subjects.

- 16) The impact of climate change on productivity;
- 18) Wildlife conservation and utilisation rights;
- 20) Residential land within national parks;
- 23) Tenure insecurity for urban informal settlement;
- 37) Definition of ancestral land (economic, cultural & spiritual); and
- 38) Ancestral land rights and claims.

The resolutions, while not binding, are considered to be official policy guidance. Rather than being mere recommendations, they therefore do carry weight in terms of policy and programme development.

While consultation processes resulting from the Second National Land Conference are being carried out and the findings collated, an initial draft implementation plan has been developed aimed at promoting the objectives of the resolutions, though this plan is not currently available to the public. The degree to which such objectives will be realised remains to be seen, since processes to formulate and implement strategies are still ongoing. However, at the time of writing, nine months after the conference, more straightforward resolutions such as the imposition of spot fines for illegal fencing have not yet been acted upon.

Where significant activity has taken place in the public eye is in the formation of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution, a 15-member commission formed by the Office of the President and working in conjunction with the MLR. The Commission carried out a series of consultations, including the participation of a San representative from the Office of the President, in Namibia's regions during mid-2019 in order to gather public input on issues of ancestral land, including claims. This process has garnered significant input by some San communities, with the Khwe of Kavango East and Zambezi receiving national media attention.<sup>24</sup> The process and potential outcomes of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution is described in detail in chapter 7 of this book.

## **4 Consultations with San communities concerning the Resolutions of the Second National Land Conference**

The drafting of this chapter gave rise to an opportunity to engage San groups in Namibia's regions with the outcomes of the Second National Land Conference. The Legal Assistance Centre engaged with the DMC and the MLR, and agreed to hold a series of one-day consultations with San leaders and community members in:

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<sup>24</sup> Namibian Broadcasting Corporation, 'Kwee [sic] San community wants ownership of Bwabwata National Park', 2019 (<https://www.nbc.na/news/kwee-san-community-wants-ownership-bwabwata-national-park.21453>).

- Otjiwarongo, for western Otjozondjupa Region and southern Kunene Region (including San communities bordering Etosha National Park), with Hai||om and !Kung<sup>25</sup> participants;
- Tsumkwe, for eastern Otjozondjupa Region (Tsumkwe West / Nyae Nyae Conservancy and Tsumkwe East / Nṁa Jaqna Conservancy), with Ju|'hoansi and !Kung participants;
- Gobabis, for Omaheke Region, with ṁKao||Aesi, Naro and !Xóo participants;
- Divundu, for Kavango East and Zambezi Regions, including Bwabwata National Park, with Khwe and !Kung participants; and
- Oshakati, for Oshana, Omusati, Oshikoto (including San communities bordering Etosha National Park), Ohangwena and Kavango West regions, with !Kung and Hai||om participants.

DMC staff and community representatives agreed upon a list of 15 to 18 San attendees for each session, alongside four or five local and national government staff, depending on the location.

While, as previously mentioned, San representation at the conference had been relatively good, knowledge about the content of the Second National Land Conference resolutions was relatively limited among the San representatives at these consultations. Similarly, as internal planning processes following the conference within the Presidency and the MLR have not been well publicised, little was known about the outcomes of the conference. This is likely to have been exacerbated by the fact that access to information via newspapers, radio broadcasts and contact with GRN officials in rural areas can be very limited, and by literacy and language barriers.

The consultations were therefore also an opportunity to disseminate the outcomes of the Second National Land Conference, and discuss possible future policy and programmatic changes by the GRN, as well as to gather reactions and recommendations from the San representatives who took part. This feedback will be presented to the High Level Committee, established by the President to ensure implementations plans are developed and actioned from the Second National Land Conference resolutions and consultations.

The discussion points were based on a questionnaire, formulated from the resolutions of the Second National Land Conference that were relevant to San groups, which was distributed to participants before the consultations. Participants presented their answers to the questionnaire, along with any other related issues, in the morning sessions. Group discussions in the afternoon were based on priorities that had been identified in the morning's discussions.

While discussions were on the whole comprehensive and lively, some difficulties were encountered. Not all participants had received the questionnaire beforehand, due to geographic remoteness and capacity limitations on the part of local GRN staff. It became clear on occasion during the consultation sessions that not all of those

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25 Also referred to as !Xun and !Xung.

participants who had received the questionnaire before the meetings had had access to adequate translations, and some questions had therefore been misunderstood.

As previously mentioned, these consultations were an opportunity to focus solely on San representatives, which had not been possible in the comprehensive conference process involving all stakeholders. As a result, the comments and recommendations below capture the views of selected San representatives and communities, and may not reflect the best efforts by the GRN and civil society across the country, or the impact of factors beyond immediate control, such as Namibia's current drought and economic recession.

Such consultations are understandably one of the limited opportunities to air local issues to officials in a group setting. Self-reflection regarding issues within San groups is therefore not evident in this section. Further research and discussion are required regarding any shortcomings within San groups, such as challenges with respect to the organisation and coordination of effective representation, and to participation and community engagement regarding the issues raised in the consultations. It should also be recognised that the summary below presents direct feedback from San groups, and therefore does not constitute a comprehensive or balanced analysis of the issues at hand. The topics covered include:

- land tenure;
- infrastructure and training;
- resettlement;
- generational farm workers;
- the veterinary cordon fence and livestock movement;
- relationships with traditional authorities and communal land boards;
- illegal fencing, grazing, and poaching;
- climate change;
- ancestral land and national parks;
- conservation and wildlife; and
- urban land.

This summary will also form part of a report presented to GRN partners on the outcomes of the consultations. (The relevant resolutions from the Land Conference are given in brackets.)

## 4.1 Land tenure

(Resolutions 3, 8, 18)

Lack of tenure rights was a primary concern for most participants. Interestingly, in three consultations, participants felt they had rights over land, despite seemingly knowing that in terms of legislation this may not be the case. This disconnect between perception and legal reality may reflect the strong attachment to the land felt by these participants, and/or the lack of information regarding tenure provided to them. Other participants did not know whether or not they had any right to be

on the land they are settled on, and wanted to have their tenure rights clarified. Several consultations highlighted the need for training on land-related policies and legislation.

Barriers to tenure security specified during consultations include discrimination against San people by other ethnic groups and in land allocation processes, the limited relevance to San groups of selection criteria and processes for resettlement (including difficulties in obtaining documents, resources for applications and farm investments, and recognition of prior learning as farm labourers), and limited local availability of information on the resettlement process and application documents.

Participants identified the lack of representation by a traditional authority as an important barrier to land allocation and tenure. In some areas there was no San traditional authority, and San community representation was perceived as poor within the local non-San traditional authority (an issue expanded upon in section 4.6 of this chapter). Concerns were also raised about the stability of customary tenure rights, as in some cases, traditional authorities or local headman had recognised an individual's land rights, but had later reallocated such land due to perceptions of its being underutilised (which may result from a lack of resources or from cultural and personal choices about 'appropriate' land use), or because of personal disagreements, changes in chiefs or headmen, or for motives of personal gain.

In several sessions in areas where participants had been resettled, the lack of tenure negatively impacted the bankability of land. The inability to present a deed meant that participants were unable to access loans, resulting in reduced willingness and ability to invest in and sustainably manage the land. The promotion of group leaseholds for communities was discussed as a possible solution to the lack of tenure, though it would not be suitable in all circumstances.

In communal areas, San participants similarly stated that greater tenure security would promote investment and improve resource management. They believed that enhanced tenure rights would better enable San communities to leverage enforcement mechanisms to protect their land from illegal fencing, grazing, or poaching. A number of participants also drew a link between strengthening tenure and strengthening traditional knowledge, culture, and San languages. San groups have a strong cultural attachment to land, and their traditional livelihoods, as well as many facets of San culture, reflect the importance of their close relationship with land and natural resources. Others suggested that encouraging San youth to have more secure tenure over land would encourage investment and entrepreneurship.

Relatively few specific direct action steps to improve tenure were identified during the consultations. However, many of the action steps for other topics covered below would also result in strengthened tenure rights.

### **Suggested action steps:**

- sensitise GRN staff regarding San communities;
- improve dissemination of resettlement information and application forms;

- provide information and training to improve the understanding of San groups in regard to land legislation, processes, and rights; and
- provide a form of tenure right, such as a deed or flexible form of tenure, that would enable the assertion of rights and bankability of land for San groups on resettlement farms, in communal areas and, where applicable, within national parks.

## 4.2 Infrastructure and training

(Resolutions 3, 4, 6)

Feedback from all the consultations highlighted the need for more investment in infrastructure and training in agricultural skills in order to manage the land effectively.

Feedback from different regions made it clear that levels of GRN and civil society support for training and infrastructure differ significantly from area to area. In some areas, such as Nyae Nyae Conservancy, long-term civil society and GRN support in the form of training and, to a lesser degree, tools and infrastructure, has been provided, though community members still perceive themselves to be in need of more support. Other areas receive almost no support. The contrasting levels of support, and limited sustainability where support is delivered, demonstrate the need for more scrutiny regarding the scale, types and appropriateness of investments in infrastructure and training for San communities. There are also wider implications regarding whether an enabling environment exists for the groups receiving such investments to succeed. This could include factors such as market access, land capacity and productivity, prevailing approaches to livelihoods, climate, education and service provision.

Similarly, while there is obviously high demand for increased training and infrastructure provision, the outcomes of resettlement projects in Namibia are on the whole not attaining the intended targets of self-sufficiency and growth. Questions therefore remain over whether the types and volume of support are insufficient, or whether new models of resettlement should be investigated.

It would be pertinent to review current trends and the recent history of support to San communities on a national scale, including the performance of group and individual resettlement, to analyse gaps in methods and barriers to success.<sup>26</sup>

Regarding resettlement farms, participants noted that even if the GRN provides land, both access to capital and support for tools and infrastructure are often weak to non-existent, limiting the resettlement farms' productivity. Additionally, they noted that farms acquired for resettlement are often not productive at the time of acquisition (which might well have been the reason for their having been made

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<sup>26</sup> Some reviews have been conducted, for example regional assessments of the Desert Research Foundation of Namibia's support to San resettlement farms in Omaheke Region. It should also be noted that many San engaged in small-scale agriculture are not generational farmers, therefore their adoption of successful agricultural practices is slower than it is for groups which have historically engaged in farming on a larger scale.

available for sale), and that successfully farming on low quality land requires higher levels of skills and resources than most San possess.

Participants suggested diverse infrastructural needs across all farming areas: water infrastructure; fencing to help prevent encroachment and illegal grazing; electrical infrastructure; houses, schools and clinics; and generally improved service provision to resettlement farms. At several of the consultations, participants highlighted the need to improve road infrastructure, communications (particularly mobile telephone coverage and local transport availability), and community halls for meetings and youth activities.

Training requirements suggested by participants included a wide range of subjects, notably general agriculture, animal husbandry, livestock vaccination, apiculture, aquaculture, poultry farming, marketing and commercialisation, arts and crafts marketing focused on San women, and vocational training, particularly for livelihood projects aimed at San youth. The need for training in natural resource management was emphasised in all the consultations. This wide range of training requirements reflects a broader desire to achieve diversified livelihoods and build skills that are difficult to attain in the arid, low-resource areas that are common in Namibia.

Where support for training does exist, for example within conservancies and some resettlement farms, there was also a sense that there needs to be more communication and consultation in order to better direct and tailor that support.<sup>27</sup>

### **Suggested action steps:**

- in view of the vastly differing levels of support for infrastructure and training found from location to location, identify and implement a basic level of training support for all San groups;
- carry out a community-based review of infrastructure and training needs in established San communities, with an approach and timeline for the provision of support in identified priority areas; and
- invest substantially in training and infrastructure for many San communities in both resettlement farms and communal areas with a view to the economic integration of San groups.

## **4.3 Resettlement**

(Resolutions 3, 4, 5, 6)

San representatives at the consultations generally perceived the benefits of the resettlement programme for San groups to be limited, mentioning a variety of issues. These focused on two areas: the barriers to becoming a successful San

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27 Within conservancies, training and acquiring skills should be also considered an indirect benefit derived from land; the measurement of land utilisation should not be limited to assets and tangible production alone.

applicant for individual resettlement, resulting from the nature of the application requirements, perceived discrimination against San applicants, and inadequate access to information; and the lack of investment and service provision for resettled San communities required for them to improve their livelihoods.

For example, they stated that there is little support for San people to apply for resettlement, and that access to information and resources to do so is often restricted. Participants stated that there was a common perception in San communities that San applications for individual resettlement are not successful because of discrimination,<sup>28</sup> despite the resettlement criteria of the National Resettlement Policy of 2001 specifying that resettlement is intended for applicants with no land, no livestock, and no income. There is also concern that, because of their having inadequate access to information regarding the application process, applications by San people are not completed properly. Some stated that it appeared that beneficiaries of resettlement were regularly people who already had access to land, rather than the landless people who were most in need. Some participants also stated that the criteria of the Affirmative Action Loan Scheme (AALS)<sup>29</sup> were not strictly adhered to, since it was often those with resources who were approved for loans, while applications from those most in need were not successful. Participants asserted that those who already had significant income should be referred to other lending resources.

Participants living on group resettlement farms asked for clarification of current and future land tenure rights – clarification that is especially important in view of the current lack of recourse for encroachment by other groups into their land. Participants also mentioned the limited investment in and renovation of infrastructure on resettlement farms.

### **Suggested action steps:**

- improve identification of vulnerable and marginalised groups by the MLR and ensure they have access to resettlement as defined in Namibia's land policies;
- as the resettlement policy is meant to address the needs of marginalised communities, including the San, ascertain why this appears not to have been achieved, despite the “no land, no livestock, no income” resettlement criteria, and tailor the policy to address the needs of marginalised communities;

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28 Regarding this perception, though relatively populous in some areas, the San comprise less than two percent of Namibia's total population, so on a proportional basis, resettlement allocation would be low overall. On the other hand, resettlement (according to the first National Land Conference and later policies) was explicitly intended to benefit the San due to their acknowledged dispossession and resulting landlessness. Additionally, the San have continued to be resettled on group resettlement schemes rather than being individually resettled, despite the MLR having ceased to promote group resettlement. While individual resettlement in Namibia has not reaped great benefits for its beneficiaries, group resettlement is probably even less effective in improving the livelihoods of beneficiaries. See Werner, W. & W. Odendaal, *Livelihoods after land reform: Namibia country report*, LAC, 2010.

29 The AALS targets emerging commercial farmers to enable them to acquire land in commercial areas.

- as the criteria and application procedures are perceived to be complicated and therefore have the effect of limiting opportunities for resettlement for the San, ensure that information is communicated by the MLR in a method, time, and language suitable for San groups to effectively participate in resettlement; and
- clarify current and future tenure rights of those who have been resettled on both group and individual resettlement farms.

#### 4.4 Generational farm workers

(Resolution 7)

The issue of generational farm workers was of particular concern to San people in the Otjiwarongo and Gobabis meetings. Participants pointed out that generational farm workers experienced an extreme lack of access to land and labour security. There was also concern about farm owners not being honest and simply evicting long-term workers without paying them the benefits to which they are entitled.

The primary request by San participants was that the policy regarding the resettlement of farm workers be closely adhered to. They urged GRN officials to consult with traditional authorities and local headmen in cases in which potential disputes regarding farm workers are identified, as they often know who the farm workers are and how many years they have lived on given farms. The fact that GRN funds are transferred to the farm owner, who is then responsible for severance and pension payouts to the workers, was flagged as being problematic, since there is no follow-up monitoring by the GRN of the payments made by the farm owner to former workers.

San participants also requested that the GRN should ensure that when they acquire a farm for resettlement, generational farm workers who have applied for resettlement should be prioritised for land allocation.

##### **Suggested action steps:**

- improve the implementation of current policies for generational farm workers, including by consulting with traditional authorities and local headmen;
- monitor farm owners regarding pay outs made upon the eviction or retirement of farm workers; and
- prioritise generational farm workers for resettlement.

#### 4.5 The Veterinary Cordon Fence and livestock movements

(Resolution 10)

To comply with disease control regulations, meat from north of the Veterinary Cordon Fence (VCF) (also known as the “Red Line”) cannot be exported overseas. Due to the large number of small-scale farmers on communal land north of the VCF, it is mainly discussed in the context of northern Namibia, where many communal

farmers call for the removal of the VCF. In contrast, San groups who may be affected by such a move, principally the Hai||om, expressed concerns over the potential reduction in control over animal movements such an action would have, resulting in increased stock theft, the spread of animal disease amongst wildlife and livestock, and increased poaching.

The potential removal of the VCF is generally presumed to apply only to the north-central areas of Namibia, and if this were to be the case, it would not affect San groups in Tsumkwe West and Tsumkwe East, who are bordered by the VCF to the south and west. However, the resolution concerning the removal of the VCF only mentions the fence as a whole, not specific sections. The removal of the VCF in its entirety would have implications for San groups in Tsumkwe West and Tsumkwe East, who highlighted that they are opposed to any changes to the VCF due to the uncontrolled movement of domestic animals, illegal settlement, illegal fencing, and illegal grazing already occurring in their areas. They claim that these occurrences have resulted in increased unsustainable land use, for example through over-grazing. They requested improved control of the VCF through patrols and prosecution.

The participants in Tsumkwe mentioned market competition as another possible concern. Changes to the veterinary cordon fence might open up the market, such that emerging San farmers north of the fence in the Tsumkwe area may lose out in terms of land, resources, and market access to communities moving into the area from south of the fence with more farming experience and resources, and greater livestock numbers. They are concerned that this would reduce the prospects of successful farming livelihoods for San people, and lead to the exploitation of San as labourers and the destruction of natural resources in their area. These concerns are based upon current pressure from illegal settlement and grazing and the history of San exploitation on farms in neighbouring regions. While not explicitly mentioned by the Hai||om, they might be exposed to similar risks.

Nevertheless, some participants in Tsumkwe agreed that there could be benefits to opening up the market, given they that want to eventually commercialise their livestock production. They discussed improving quarantine infrastructure and processes to improve access to markets, but noted San-specific barriers to entry into those markets.

### **Suggested action steps:**

- ensure that San communities are fully informed and properly consulted during planning processes related to moving the VCF in order to identify and mitigate risks;
- ensure regular patrols of the VCF by the police and/or veterinary services, and ensure prosecution for the illegal transport of animals across the fence; and
- investigate ways to improve quarantine processes for small-scale farmers north of the VCF.

## 4.6 Relationships with traditional authorities and communal land boards

(Resolution 11)

### *San traditional authorities*

Participants in areas with recognised San traditional authorities made substantial suggestions for improving relations and activities with their traditional authority. These primarily included the need for regular community meetings and workshops on specific issues with the traditional authority, and holding consultations before the traditional authority makes important decisions.

There were also suggestions that meetings should be held at regular intervals, for example on a quarterly basis, including both meetings between the community and traditional authority, and sessions for traditional authority councillors to report back to the Chief and community members on work they have done. Traditional chiefs or councillors present at the consultations largely agreed with these suggestions. Traditional authority chiefs, for their part, proposed that community members should volunteer to assist the traditional authority and heed calls to attend meetings, so as to facilitate their work.

Participants highlighted that traditional authority chiefs need to visit the villages and informal settlements where their communities are situated. However, they conceded that traditional authority travel allowances were often insufficient to achieve this regularly.

Participants in Tsumkwe suggested that systems to improve accountability and performance of the duties of traditional authorities should be required as a matter of customary law, as should induction training for traditional chiefs and councillors on their duties and due process. Tsumkwe West participants stated they would like five-year terms and regular elections to be instated to prevent the same councillors from serving indefinitely. Other participants suggested that the GRN should assist communities to engage in a higher level of scrutiny or the application of selection criteria when choosing leaders and representatives, in order to respond to the need for more persuasive and motivated spokespeople in San communities.

Some participants complained that headmen and traditional authorities do not always interact well with young women and the youth, especially when the youth propose new ideas.

### *Non-San traditional authorities*

Participants' relationships with non-San traditional authorities varied from area to area. In Otjiwarongo, participants stated that they had largely good relations with neighbouring traditional authorities. In Omaheke Region, however, participants requested government mediation to assist traditional authorities in the region

to work together with the San community, as well as GRN intervention to ensure that correct procedures are followed by non-San traditional authorities when dealing with San groups to ensure equality and respect. They also suggested that neighbouring traditional authorities should meet annually without GRN officials presiding over meetings, in order to improve resource sharing and information.

San participants from Kavango East and Zambezi regions reported having good relationships with traditional authorities in Zambezi due to historical ties, but poor relations in Kavango East due to land and leadership disputes.<sup>30</sup> The Khwe stated that they want to be represented by their own traditional authority and to follow their own customary laws. They would want leadership and governance training for this traditional authority when established.

Participants in Tsumkwe had variable relations with neighbouring Herero traditional authorities, with several issues highlighted regarding land disputes, as well as illegal settlement and grazing, though they voiced a willingness to improve communication.

San groups consulted in Oshakati reflected on the need for improved oversight of non-San traditional authorities to ensure that they act in accordance with law and policy when dealing with San people. They stated that they would prefer their own traditional authority due to their poor relations with and lack of equitable treatment by other traditional authorities in their areas.

### *Communal land boards*

Participants generally reported reasonable relations with their communal land board (CLB) members. However, despite training provided in previous years for communal land board (CLB) members by, among others, MLR and LAC, a number of challenges were highlighted by participants. Some complained that they lacked representation on the boards. In particular, participants in Tsumkwe and Gobabis questioned the CLBs' information-gathering and decision-making, citing inadequate representation on the CLBs and a lack of understanding of the issues in their areas.

There was agreement that the CLB or the MLR, together with the regional resettlement committee and with the assistance of the traditional authority, should hold meetings with communities to explain in detail how the institutions and policies of land allocation work. Participants also advocated for regular community and traditional authority meetings with the CLB, with perhaps three being scheduled per year.

At several consultations, San representatives stated that the CLB did not work well with the San because they did not take into account the specific context of interacting with San groups. For example, under the regulations of the Communal Land Reform Act, a public notice regarding the allocation of land must be displayed

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30 Despite meeting the requirements of the Traditional Authorities Act, and applying for recognition on multiple occasions, a Khwe traditional authority has never been given recognition. Thus, the Khwe fall under the Mbukushu Traditional Authority.

for a minimum of seven days at the CLB office, and the public have seven days to lodge complaints with the CLB regarding that allocation. However, this short display period, the need to have read government postings, and the requirement that complaints be submitted in writing are all significant barriers for remote communities in which significant numbers of people are illiterate, and where communications are poor. Participants therefore called for a policy requiring consultation by the CLB in villages or settlements before allocations to non-residents are made.

Additionally, participants perceived the CLB's approvals of land allocation to be unequal between San and non-San groups. They encouraged the traditional authorities and the CLBs to monitor each other's decisions more closely, to ensure accountability and follow-up. Interestingly, it is clear from these discussions that the participants feel that CLBs wield considerable power on land allocation, rather than acting as bodies ensuring "checks and balances". Overall, it is unclear whether this assumption stems from a lack of information, or from actual experience, though complaints in some areas, detailed below, would suggest that the latter is the case.

Participants from Tsumkwe West stated that the CLB did not always act in accordance with the Communal Land Reform Act and did not work well with the traditional authority. They also emphasised that land allocation laws and land management plans should be followed to avoid the allocation of land that is unsuitable for farming, for example in wildlife zones and corridors. The ongoing issues of illegal fencing and illegal grazing in contravention of the Communal Land Reform Act and the Forest Act were repeatedly highlighted. Despite rulings by the High Court against individuals responsible for illegal fencing in Tsumkwe West and illegal grazing in Tsumkwe East, these issues have not been effectively dealt with by the CLB, the police, the MLR or the Ministry of Environment and Tourism (MET).

### **Suggested action steps:**

- ensure that traditional authorities hold at least a minimum number of community meetings and workshops per year on priority issues for each area, and ensure that accountability mechanisms are in place;
- ensure that there is consultation by traditional authorities with communities before important decisions are taken;
- ensure sufficient travel allowances for traditional authorities to effectively consult with their community members;
- ensure that information is communicated by CLBs in a method, time and language that is suitable for San groups to effectively participate in decision-making, including the use of radio, television broadcasts and video over social media (principally Whatsapp);
- provide training for newly appointed traditional authority chiefs and councillors and for communities on land allocation processes, and make similar information available to communities through radio broadcasts and other media;

- examine the situations where San groups are living as minority populations, and formulate actions to ensure that non-San traditional authorities respect and represent the interests of the San community there, providing mediation as needed; and
- work towards the recognition of a Khwe traditional authority under the Traditional Authorities Act.

## 4.7 Illegal fencing, grazing and poaching

(Resolution 14)

Illegal fencing, illegal grazing, and poaching were of particular concern for San participants from Tsumkwe East, Tsumkwe West and Bwabwata National Park. They emphasised the need for the strict application of national law and the formulation of appropriate customary laws, the promotion of awareness in the community regarding regulations and procedures to address illegal fencing, illegal grazing and poaching, and collaboration between community members, traditional authorities, the GRN, and civil society.

Participants living in Bwabwata National Park stated that neighbouring traditional authorities allowed people to move into the park and bring cattle, despite this being illegal. This is being done without the consent of the Khwe and others living there, yet no actions have been taken in response by the GRN. They accused such intruders of also engaging in poaching within the park, and furthermore reported that San are more often targeted for questioning by anti-poaching units than other groups. Complaints were also made about the inappropriate conduct on the part of anti-poaching units and police in settlements within the park. Additionally, participants requested that rather than bringing in workers from other areas, the GRN should employ more San as border guards and rangers to limit poaching and illegal fencing and grazing, as they have in-depth knowledge of the area and suffer from high unemployment in their communities.

Participants from Tsumkwe West stated that they want a freeze on the allocation of land by the CLB, the traditional authority and the MLR in order to get a clearer picture of the extent of illegal fencing, grazing and settlement in Tsumkwe West. They felt that this was necessary in light of the lengthy delays in investigating these issues and the lack of implementation of removal orders, and the lack of adherence to VCF regulations. In the longer term, they highlighted the need to limit the number of livestock in the area in accordance with sustainability regulations. It should be noted that High Court rulings regarding illegal fencing and illegal grazing have been made in favour of both Nꞑa Jaqna Conservancy in Tsumkwe West and Nyae Nyae Conservancy in Tsumkwe East, though these have not alleviated the specific cases or wider challenges due to lack of enforcement.

San participants from Omaheke, Oshana, Omusati, Ohangwena and Kavango West regions, including those on resettlement farms, stated that illegal fencing

had limited their access to land they had been allocated. Due to their not having their own traditional authority and lacking representation on the non-San traditional authority, they were not assisted by local institutions in dealing with these issues.

**Suggested action steps:**

- ensure timely investigation into complaints and the application of national law in cases of poaching and illegal fencing, grazing and settlement on communal land, in protected areas, and on resettlement farms;
- take steps to systemically improve cooperation between government ministries and stakeholders in combatting poaching and illegal fencing, grazing and settlement;
- organise consultations to improve relations between San communities and law enforcement and anti-poaching units, to improve cooperation and intelligence gathering;
- declare a moratorium on land allocations, fencing permits and livestock movement into Tsumkwe West (and other areas where significant illegal activity occurs) until such time as the situation has been evaluated and controlled; and
- ensure GRN support to minority San communities, including through mediation, where land disputes occur.

## 4.8 Climate change

(Resolution 16)

Participants from all areas agreed that they experience the effects of climate change in the forms of changing weather patterns and decreased rainfall. Those from Tsumkwe requested more outreach and information from the GRN and the MET, and particularly for more information about GRN funding for climate change adaptation and mitigation. They also highlighted the importance for their community and for other stakeholders of using the ancestral knowledge of San elders about the land in order to improve sustainability and adaptation strategies in their areas and beyond.

Participants residing in Bwabwata National Park stated that restricted access to areas of the park limits traditional subsistence activities during drought and climate change-related events, worsening the effects on the area's San population. They also emphasised that climate change impacts not just livestock and agriculture, but also the wild animals and plants which are important to their traditional livelihoods and to value of tourism and hunting concessions. Because of its disproportionate impacts on already-vulnerable communities, and particularly communities that rely on the land for their livelihoods, they requested training, funds and other resources to mitigate and adapt to climate change.

**Suggested action steps:**

- improve the delivery of information on climate change and strategies for mitigation and adaptation;
- improve the dissemination of information about funding opportunities related to climate change;
- research and recognise the importance of San traditional knowledge that is relevant to sustainable land and resource management, and climate change mitigation and adaptation.

## 4.9 Ancestral land and national parks

(Resolutions 18, 20)

The issue of national parks was only covered in detail in the Otjiwarongo, Oshakati and Divundu meetings, in reference to the Hai||om peoples' historical occupation of Etosha National Park, and the current Khwe occupation of Bwabwata National Park. Issues concerning both national parks are described in detail in other chapters.

Issues raised regarding Etosha included the Hai||om only being allocated one tourism concession, which together with resettlement farms that have been assigned to the Hai||om south of Etosha is not enough to compensate for the scale of the loss of their ancestral land.<sup>31</sup> Hai||om participants remarked that they currently receive no benefits from the sole concession they have, or royalties from businesses in Etosha, despite the park being on their ancestral land.

Additionally, participants expressed the desire for a museum about Hai||om history and culture within Etosha or close by, both to provide tourism income and as a means for Namibians and San youth to learn about Hai||om history, culture and way of life. Questions were also raised regarding whether the National Heritage Council might be able to facilitate discussions to investigate benefit-sharing agreements between San groups and owners of private land – especially established lodges – that contain San heritage sites used for tourism.

At the Otjiwarongo consultation, !Kung representatives from the Otjituuo area, where they are a minority group and are often relatively isolated from service provision and participation in national meetings, voiced their desire for a tourism or a hunting concession within both Waterberg Park and the large private Eden Game Farm.

In regard to Bwabwata National Park, Khwe representatives stated that the demarcation and fencing of the core wildlife area was carried out by the GRN without adequate consultation with the community. In 2016, this core area was further extended, again without adequate community consultation. This restriction of access severely limits the seasonal collection of veld foods, access to traditional medicine, and the application of other traditional knowledge and cultural livelihood

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31 The Hai||om were evicted from Etosha National Park by the former colonial government.

practises. They also asserted that Bwabwata is their ancestral territory, and they are concerned about their lack of tenure within the park. They would wish their children to be able to inherit land rights in the area.

Furthermore, the participants in the Divundu meeting stated that while the MET works directly with the Kyaramacan Association<sup>32</sup> (the local community association within Bwabwata National Park), they also want headmen in the area to be receiving information first-hand as the representatives of their villages. This would improve the perceived lack of San autonomy in the region regarding their ancestral land.

As was the case with Etosha National Park, the lack of tourism concessions in Bwabwata was of concern to the community (though at least one concession is in the process of being developed). Additionally, the Khwe requested greater employment for the local community within the park, highlighting the benefits of utilising traditional knowledge for park management, patrols, and the operation of tourism activities.

### **Suggested action steps:**

- increase tourism concessions and, where appropriate, hunting and gathering concessions to San communities within territories previously occupied by San groups;
- acquire land to compensate for the loss of territories previously occupied by San groups;
- improve access to employment opportunities for San groups within territories they currently occupy or previously occupied;
- facilitate discussions between San groups and landowners or tourism operators working in San heritage sites or territories they previously occupied;
- hold consultations with San communities to find solutions allowing for increased access to protected areas, in order to protect their cultural practices and traditional livelihoods; and
- request the MET to consult with and provide information to headmen within Bwabwata National Park directly, rather than solely via the Kyaramacan Association.

## **4.10 Conservation and wildlife**

(Resolution 18)

Participants from areas bordering Etosha National Park stated that they do not receive many benefits from conservation and wildlife due to their lack of land tenure and lack of benefits from the park.

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32 The Kyaramacan Association is a community association organised along similar lines to a conservancy, hence it represents all community members, not exclusively the Khwe.

Those in Tsumkwe agreed that they receive benefits from conservation and wildlife both directly and in kind. However, they expressed concerns regarding issues of human–wildlife conflict, stating that they believe that trophy hunting is increasing elephant aggression, and that drought is exacerbating human–wildlife conflict by limiting food and water resources.

Participants from Bwabwata National Park also receive some benefits from conservation and wildlife both directly (e.g. meat and community income from trophy hunting) and in-kind (e.g. a limited number of employment opportunities). However, they expressed concern that there is no compensation when livestock or crops are damaged by wildlife, and some believed that the disadvantages of living in a conservation area outweighed the benefits. These disadvantages included restrictions on movement, dispossession of land, and limitations and conflicts regarding livelihood activities. They considered that benefits may be improved through closer cooperation between the GRN and communities within the park.

#### **Suggested action steps:**

- identify ways to improve cooperation with San communities and their participation in conservation and wildlife management, including through community consultation, employment and investigated options for joint management plans;
- review compensation procedures for human–wildlife conflict within national parks; and
- strengthen monitoring and reporting of human–wildlife conflict in protected areas.

## **4.11 Urban land**

(Resolution 22)

In the Namibian context, the provision of land to the landless is often focused on resettlement in rural areas. However, the provision of urban land should also be considered given population trends and economic conditions. Issues of urban settlement were discussed in the Otjiwarongo and Gobabis meetings. In these regions, significant proportions of San populations live in urban and peri-urbans areas, mostly in informal settlements. One issue reported concerning urban settlements was that it is a common occurrence that one person leases a plot, but too many people live on it and it becomes overcrowded, due to the housing needs of extended family. They requested that this should be considered in the allocation of urban land to San people when assessing the demand for such land, and deciding on allocation quantities, occupation conditions, and monitoring requirements.

Participants also highlighted the extent of land grabbing in municipal areas where formal access to land is not established. For this reason, where the demand for urban land is high, processes for formal allocation should be fast-tracked.

Participants in Gobabis related that despite living for many years in the same location in informal settlements, and feeling some sense of tenure, they realised

that legally they lacked any right to the land and could face eviction at any time. They requested that mechanisms for applying for tenure and programmes for land allocation in such informal areas be implemented more widely, especially for marginalised communities.

### **Suggested action steps:**

- conduct research into conditions in informal San settlements in known San population centres (including Gobabis, Outjo and Otjiwarongo), with a view to designing policy and interventions;
- give consideration to urban land allocation in lieu of rural resettlement where requested by community members;
- fast-track processes of land allocation in urban areas experiencing high growth in informal settlements; and
- consider options to process urban tenure for marginalised communities, with the support of the DMC and the MLR.

## **5 Conclusion**

At the time of writing – less than a year after the Second National Land Conference and with its outcomes still being finalised, and with the potential Cabinet approval of the Draft White Paper on the Rights of Indigenous Peoples in Namibia in the coming months – the land rights of San people, along with the relevance of national legislation and policy to their lives, is potentially subject to considerable positive change. However, the situation is fluid and its outcome remains unknown, which lends itself to conjecture rather than to clear conclusions.

In reviewing the status quo, Namibia has various land and resource legislation and policies that, while often not specific to San needs, should provide a range of protections to ensure the wellbeing of San communities. Namibia is also one of the few African states to have established a specific government institution, in the form of the DMC, to attend to issues affecting groups such as the San.

However, the quality and extent of implementation and enforcement of the relevant legislation and policy has been inadequate. This has been the case due to a complex range of interwoven factors, from a lack of resources and inadequate consultation with affected communities, to discrimination against and exploitation of the San. In some areas and instances, these failures emerge merely from neglect; in others, national law and policy have been flagrantly disregarded.

The lack of overarching policy and coordination mechanisms within the GRN to deal with groups such as the San remains a severe impediment to remedying gaps in implementation and ensuring sustained progress. Ultimately, this presents a considerable barrier to the GRN's stated aim of having an inclusive "Namibian House", and to the attainment of the goals of the UN 2030 Agenda for Sustainable Development, which pledges to "leave no one behind".

Two general findings can be drawn from the consultations. First, there is inadequate information dissemination both to and from San communities. Consequently, at times there is a lack of understanding in GRN circles regarding the needs of San groups and appropriate approaches to related policy and implementation, and similarly a lack of understanding in San communities regarding relevant policies and processes, and about how to effectively interact with GRN offices and agencies. Secondly, in some areas of land governance and reform, consultation with San groups by policy makers and local institutions would assist them to understand how current institutions could better serve such groups.

The consolidated conclusions from the consultation topics include the following:

- Twenty-eight years after the First National Land Conference, dispossession of land and landlessness are still key issues for the San in Namibia.
- There is a need to enhance and clarify tenure rights for San communities in respect of all land classifications.
- Traditional authorities and communal land boards significantly vary in their effectiveness for land allocation decisions affecting San people.
- Current national legislation regarding illegal activities affecting San communities on communal land, in protected areas and on resettlement farms is not being adequately implemented.
- Despite changing lifestyles and livelihoods, San culture and traditions retain important links to land and resources, which should inform policy making and implementation.
- San demand for urban land in regional centres is growing.

It is clear from the Second National Land Conference and the consultations for this chapter that many of the conference resolutions are relevant to issues facing the San, thus the San must be active participants in the ongoing national, regional and local consultation, planning and implementation processes. The responsibility to ensure that this participation is wide-ranging and takes into account the issues of literacy, language, geography and other barriers, lies partly with the GRN and partly with the San, who must ensure discussion of the issues within their groups, interaction with their representatives and submission of their views to the GRN.

Further, the potential adoption of the White Paper on the Rights of Indigenous Peoples, developed in a participatory manner and with bearing on both national circumstances and international treaties, presents an internationally progressive position by the Republic of Namibia regarding indigenous peoples and marginalised communities. Whether the outcomes, in terms of legislative and policy changes and ensuing implementation, are effective remedies remains to be seen. What is abundantly clear in the midst of these processes is that San people themselves have given thorough consideration to their situations and the factors affecting their communities, and have many of the answers to the challenges they face.