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

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1 Introduction

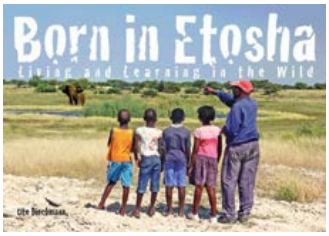
> … we are all connected to God through the land, plants and animals.
>
> – **Jan Tsumib**[1]

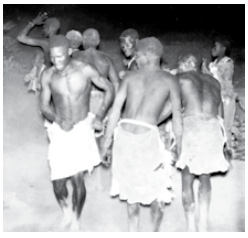
When a country's legal system falls short in recognising its indigenous peoples and marginalised communities' claims to ancestral land rights, they have to find innovative legal remedies when litigation becomes their only option to assert their rights. Currently, the Hai||om people who belong to the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

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

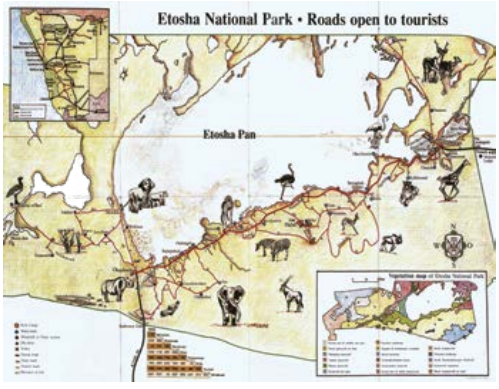
2 The Hai||om are the largest San grouping in Namibia, with an estimated adult population of 6 200. See paragraph 16 of Ute Dieckmann's affidavit in *Jan Tsumib and Others v Government of the Republic of Namibia and Others*.

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





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



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

Community members have sought legal remedies for their dispossession. To do so they have asked for the support the Legal Assistance Centre (LAC), a public interest law firm concerned with the promotion of justice for all Namibians, which is duty bound in terms of its mandate to assist the Hai||om people to ventilate their legal rights over ENP and the Mangetti West block.[5] In 2015, the LAC, instructed by eight members of the Hai||om community, submitted a court application asking the High Court of Namibia to allow the applicants to bring a representative action claim on behalf of all the Hai||om people in order to determine their rights over their ancestral land. After several delays, the application for representative action was finally heard on 26–29 November 2018.[6]

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

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

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

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

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

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

of ENP, which has a total area of approximately 23 150 square kilometres.[8] The selection proceedings were prompted because of inability or unwillingness on the part of the Government of the Republic of Namibia (GRN) and the Hai||om Traditional Authority[9] to assist the Hai||om to regain rights in their ancestral land. The main question that the applicants asked the High Court in November 2018 was: "How should the Hai||om people approach [the] Court to assert their rights?" The applicants argued that the best and only way to assert their rights would be through a representative action brought on behalf of the Hai||om people.[10] If they were not permitted to represent the Hai||om people in the proposed action, they argued, it would be almost certain that the action would never be brought. The rights of the Hai||om would then go unprotected and unfulfilled.[11]

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

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

8 Record 20-21 paragraph 30.1.

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

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

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

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

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

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

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

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

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

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

2 Themes pertaining to ancestral and claims

2.1 Marginalisation, cultural survival and indigenous peoples

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

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

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

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

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

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

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

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

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

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

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

22 CCJ, 2006, at 201.

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

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

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

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

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

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

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

25 Transcripts p. 69.

26 Transcripts p. 7.

of the applicants' self-identification are also referred to in the First Applicant's Founding Affidavit. Furthermore, the Hai||om are also recognised as a distinct group, evidenced by the existence and recognition of the Hai||om Traditional Authority[27] and international organisations. Finally, the fact that the Hai||om experience subjugation, marginalisation, dispossession, exclusion or discrimination is also clearly stated in their application.[28]

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

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

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

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

28 Transcripts p. 70.

29 Transcripts p. 71.

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

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

32 Transcripts pp. 116–117.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39 Ibid. at para. 8.

40 Ibid. at para. 9.

41 Ibid. at para. 27.

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

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

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

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

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

43 Transcripts p. 128.
44 Transcripts p. 129–132.
45 Transcripts p. 133.

The applicants argued that it had not been shown that the applicants or the Hai||om peoples' rights had been extinguished, and alternatively, that even if the Court was persuaded by the respondents' argument that those rights had been extinguished, it did not preclude the certification of the claims, in particular Claims 5 and 6, but also potentially also Claims 1 to 4.[46]

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

To support their argument, the applicants' lawyers referred to the *Sparrow case* as the most important Canadian case with regard to extinguishment and the leading case for establishing whether legislation has the effect of extinguishing indigenous rights, or simply regulating them. The Court argued that in the *Sparrow case*, nothing in the Canadian Fisheries Act or its detailed intension had the effect of extinguishing the Indian Aboriginal rights to fish. The permits were seen as controlling the fisheries, not defining underlying property rights. Based on this, Indians had an existing Aboriginal right to fish. These principles were also applied again in *R v Gladstone*. However, as the applicants argued that if the Court would follow this route of weighing up the legislation[47] as either establishing extinguishment or regulation, the Hai||om may have a more difficult case to argue because of the bundle of rights approach. The applicants' lawyers argued that the interpretation of the legislation and the context in which it has been applied is entirely consistent with a governmental intention of regulating rather than extinguishing the Hai||om people's rights. In the case of a bundle of rights, however, it may be more difficult to ascertain that they still have the right to determine the purpose for which the land can be used, and by extension it would also be more difficult to establish the scope of "survival" for the other rights that make up the bundle of rights which constitute the indigenous rights over the ENP. Acknowledging the difficulties, the applicants' lawyers noted that the bundle of rights route would only lead to an academic exercise, as in any case the applicants had no intention to change the use of the ENP.[48]

46 See description of the six claims mentioned earlier in this chapter.

47 With regard to regulating the Hai||om's land use, the government was mainly referring to the Nature Conservation Ordinance 4 of 1975.

48 The First Applicant states in his Founding Affidavit that they support the conservation and tourism activities conducted presently in Etosha National Park, and that they support the fact that there are anti-poaching activities in a park that is regarded at present as a national asset (see transcripts of hearing on 26 November, p. 6).

The lawyers were therefore of the opinion that the ACHPR's report in the *Endorois case* was a better and easier route to follow when establishing the test of extinguishment. The test applied by the ACHPRs' report in the *Endorois case* states that "members of indigenous peoples who have unwillingly left their traditional lands or lost possession thereto even though they lack the legal title unless the lands have been under good faith transferred to third parties" still retain their rights. Applying this ruling to the *ENP case* would mean that the Hai||om's rights to ENP have not been extinguished. In the case of transferring rights to third parties, applying the ACHPR's logic, the Hai||om would still be entitled to restitution or compensation.[49]

International and comparative jurisprudence highlights the fact that the question of land rights is often an issue of restoring lands that were taken under the past discriminatory colonial enterprise and linked to a continuing denial of indigenous peoples' rights. In the context of Namibia, international and comparative jurisprudence shows that despite the acquisition of the lands by the colonial powers prior to independence, the original rights of the concerned indigenous marginalised communities have not been extinguished. It also means that post-independence laws, norms and policies need to address, recognise and promote these ancestral land rights of marginalised indigenous communities, even if some of the legacy is to be blamed on colonial occupation. Indeed, the "survival" of customary indigenous land rights also means that when indigenous communities were forced out of their land in more recent years, they were still the legal owners of their ancestral territories, and as such should have been considered as the legal occupiers of these lands with all the legal consequences that such ownership entails, including restitution and compensation.

2.3 Cultural rights to land and natural resources

An important evolution of international and regional law concerning ancestral land claims is the recognition of the fundamental connection between cultural survival and land rights. This broader approach to cultural rights integrates indigenous peoples' claims that cultural rights are part of their way of life, which includes access to land central to their own culture. Under international law there is now strong robust jurisprudence, notably emerging from the Inter-American Court of Human Rights, highlighting that possession should constitute title to land property.[50] This

49 Transcripts p. 147–150.

50 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79 (2001); *Moiwana Village v Suriname*, Inter-Am. Ct. HR (ser. C) No. 124 (2005); *Yakye Axa Indigenous Community v Paraguay*, Inter-Am. Ct. HR (ser. C) No. 125 (2005); *Sawhoyamaxa Indigenous Community v Paraguay* (2006); *Saramaka People v Suriname*, Series C No. 172 (2007); *Xákmok Kásek Indigenous Community v Paraguay*, Series C No. 214 (2010); *Kichwa People of Sarayaku v Ecuador*, Series C No. 245 (2012); *Kaliña and Lokono Peoples v Suriname* (2015).

jurisprudence highlights the importance of recognising indigenous peoples' rights to land and natural resources as an essential element of their cultural rights. In *Centre for Minority Rights Development (Kenya) & Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya,* popularly known as "the *Endorois case*", the ACtHPR defined culture as:

> that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups and in that it encompasses a group's religion, language, and other defining characteristics.[51]

In that case, the Endorois community claimed that their forced removal was a violation of their right to culture, and more particularly their "right to cultural integrity". The "right to cultural integrity" introduces a broader understanding of culture, which includes the economic, social and spiritual aspects of a culture. The ACHPR has also highlighted the importance of land rights to ensure the cultural integrity of indigenous peoples, notably referring to the right to religion and the right to health.[52] The ACHPR concluded that for indigenous peoples, traditional possession of land "has the equivalent effect as that of a state-granted full property title" and "entitles indigenous people to demand official recognition and registration of property title," adding that: "the jurisprudence under international law bestows the right of ownership rather than mere access."[53] "It is also of the view that even if the Game Reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need."[54] The ACtHPR also noted the strong connection between cultural rights and rights to ancestral lands in the *Ogieks case*, noting that article 17 of the African Charter proclaiming cultural rights is intrinsically connected to access to ancestral territories for marginalised indigenous communities, as these territories are fundamental areas to practise and maintain their culture.[55]

The international law approach of recognising the connection between cultural survival and land rights is not a development that has been adopted by the GRN. Their strategy regarding property rights is to show that the Hai||om did not hold and exercise rights in land in common as a collective rights holder, but that the

51 Communication 276/03 (the Endorois case), para 241 (http://www.achpr.org/communications/decision/276.03/).

52 African Commission on Human and Peoples' Rights, 'Communication 276/2003: *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*', 2010.

53 Ibid. at para. 204.

54 Ibid. at para. 215.

55 *Ogiek case*, at para. 178.

historical and anthropological record of the applicants shows that land rights were held and exercised by smaller kinship groups. The GRN also argued that the rights were held by family groups, typical in relation to land surrounding waterholes, and the argument is developed that insofar as members of the Hai||om people seek to assert rights in land, this should be done by the different family groupings that it is argued actually held and exercised those rights; and that it does not follow that all the family groups have a collective claim to the ancestral land. The government is clearly using a proprietarian approach towards establishing land rights, embedded in a discourse of exclusive and individual titles and far removed from the more holistic development in international law that moves away from this exclusive proprietarian property ideology.

The applicants base the fifth claim on the cultural and religious rights on both the right to culture and the freedom to practise religion under the Constitution, as well as international law, where the African Charter is the most important treaty dealing with rights to culture; the applicants also refer to the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Racism, the Convention on the Rights of the Child, and the Convention on Biological Diversity.[56] The main argument that is put forward by the applicants' lawyers using provisions under international law is that the Hai||om have been deprived of their right to practise their traditional way of life which is dependent on access to and the use of their ancestral land and its resources.[57] In other words, the applicants are using international law to make the claim that a right to culture is inextricably linked to their access, use and enjoyment of their ancestral land. The claim the applicants are putting forward is to seek a remedy for the violation of their right to practise their culture on their ancestral land. In this context it is relevant to note that the right to culture as expressed in the Namibian Constitution is very similar to the right to culture as affirmed in the African Charter. It would therefore only be logical to apply the legal approach and interpretation to cultural rights as being closely connected to land and natural resources for marginalised indigenous communities.

2.4 Right to participation, consultation and development

The most recent international policies regarding the establishment of protected areas or wildlife reserves now fully recognise that indigenous peoples' land rights have to be fully protected, respected, and promoted.[58] This paradigm shift in

56 Transcripts p. 255–256.

57 Transcripts p. 256.

58 See for example *Concluding observations of the Committee on the Elimination of Racial Discrimination: Sri Lanka, 14/09/2001*, in connection with a national park in Sri Lanka: the Committee called on the state to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources".

nature conservation means that whereas in the past, mere consultation with local indigenous communities was required, now, in line with the principles of human rights law, the unqualified recognition of the land ownership rights of indigenous peoples in international environmental law is not only ethically desirable, but also a legal prerequisite for the protection of natural resources.[59] States can no longer claim that conferring protected status on areas permits the curtailment of indigenous peoples' land rights. Such curtailments are not only out-dated and ineffective according to the most recent environmental conservation evidence, but also in conflict with human rights law. What is emerging from this intersection of environmental law and human rights law is the need to ensure that indigenous peoples are full participants in efforts to protect natural resources. It is therefore incumbent upon states and environmental agencies to fully respect indigenous peoples' land ownership.

Best practices regarding indigenous peoples and protected areas strongly suggest that it is now acknowledged that ownership, rather than co-management or consultation, is the single most important incentive to sustained community-based conservation.[60] This is becoming evident in both environmentally based research and the integration of human rights principles within the environmental sphere.[61]

The shortfall is to separate conservation status from the issue of land tenure. It has been demonstrated that unsound tenure and governance conditions not only put indigenous peoples in acute socioeconomic and cultural danger, but ultimately lead to negative environmental impacts. Protected areas are one of the main issues addressed under the Convention on Biological Diversity (CBD). For example, Decision VII/28, adopted by the 7th Conference of Parties to the Convention on Biological Diversity (COP) in 2004, provides that "the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for, the rights of indigenous [peoples] consistent with national law and applicable international obligations."[62] This language has

59 The UN General Assembly adopted the *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples* which reaffirms and recognises, among other things, "the significant contribution of Indigenous Peoples to the promotion of sustainable development" and ecosystem management, including their associated knowledge.

60 See Decision VII/28 on Protected Areas, adopted at the 7th Conference of Parties to the Convention on Biological Diversity in 2004: the CBD COP decided that "the establishment, management and monitoring of protected areas should take place with the full and effective participation, and the full respect for the rights of, indigenous and local communities consistent with domestic law and applicable international obligations."

61 Several global organisations – including the International Union for the Conservation of Nature (IUCN), United Nations Educational, Scientific and Cultural Organization (UNESCO), and the World Bank – are increasingly linking global sustainability to the rights and interests of indigenous peoples.

62 Decision VII/28 Protected Areas, at para. 22, in *Decisions Adopted by the Conference of Parties to the Convention on Biological Diversity at its Seventh Meeting*, UNEP/BDP/COP/7/21, pp. 343–364.

been repeatedly affirmed by the COP.[63] The CBD decisions have also highlighted that the establishment of indigenous-owned and -managed protected areas is an effective way of protecting biodiversity. Moreover, in 2014, the COP adopted a decision that addresses Article 10c in relation to protected areas. It explains, first, that "Protected areas established without the prior informed consent or approval and involvement of indigenous [peoples] can restrict access to and use of traditional areas and therefore undermine customary practices and knowledge associated with certain areas or biological resources."[64] It adds that "Customary sustainable use of biological diversity and traditional knowledge can contribute to the effective conservation of important biodiversity sites, either through shared governance or joint management of official protected areas or through indigenous and community conserved territories and areas." This again emphasises the need for a collaborative and consent-based approach to protected areas or recognition of indigenous peoples' own conservation initiatives within their territories.[65]

In recent years several countries have recognised the rights of indigenous peoples over part of their ancestral lands from which they had previously been removed when such territories were gazetted as natural protected areas. These countries have come to recognise that indigenous peoples have legal claim to such territories as they were wrongly expelled from, and that such land rights should be translated into rights to ownership of some portion of the gazetted area to exercise some form of co-management over the running of such natural reserves.

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63 See e.g. Decision X/31, para. 32(c).

64 Decision XII/12, Plan of Action on Customary Sustainable Use of Biological Diversity, at para. 9: "Protected areas established without the prior informed consent or approval and involvement of indigenous and local communities can restrict access to and use of traditional areas and therefore undermine customary practices and knowledge associated with certain areas or biological resources. At the same time, conservation of biodiversity is vital for the protection and maintenance of customary sustainable use of biological diversity and associated traditional knowledge. Customary sustainable use of biological diversity and traditional knowledge can contribute to the effective conservation of important biodiversity sites, either through shared governance or joint management of official protected areas or through indigenous and community conserved territories and areas. Community protocols and other community procedures can be used by indigenous and local communities to articulate their values, procedures and priorities and engage in dialogue and collaboration with external actors (such as government agencies and conservation organizations) towards shared aims, for example, appropriate ways to respect, recognize and support customary sustainable use of biological diversity and traditional cultural practices in protected areas."

65 See also id. at p. 8, Tasks, 3(i), containing one of the action points listed in the programme of work annexed to this decision, which further illustrates the consent requirement as well as the explicit linkage to human rights norms more broadly, and mandating compiling examples of best practice that "Promote, in accordance with national legislation and applicable international obligations, the full and effective participation of indigenous [peoples], and also their prior and informed consent to or approval of, and involvement in, the establishment, expansion, governance and management of protected areas, including marine protected areas …".

For example, this often includes revenue sharing and access to employment within the natural reserves. The establishment of these co-management agreements is usually the direct consequence of the legal recognition of the right of indigenous peoples over some part of the protected areas. These recent developments are a vivid illustration of the need to consider indigenous peoples as partners in the ultimate goal of protection of the environment and the natural reserve. In the context of Namibia, this means that the concerned communities should be regarded as legal owners of the protected areas and also as partners in the co-management of these parks. Co-management and benefit-sharing are natural consequence of the recognition that the marginalised indigenous communities have rights to their ancestral lands.

The impact of tourism is another significant issue concerning the rights to ancestral land for indigenous peoples. Across Africa, many of the traditional ancestral territories of indigenous peoples, often being places of extreme natural beauty and wildlife, have been turned into tourism parks. By way of example, this was one of the main issues at stake in the *Endorois case* examined by the ACHPR. The Endorois had lost access to parts of their ancestral territory when a game reserve was established with several game lodges, roads and a hotel around Lake Bogoria. A central argument of the government was that tourism would bring significant resources to the region. The government highlighted the fact that the project for tourism around Lake Bogoria was seen as a potentially positive development, and that all revenue raised by the game reserve was used to support development projects carried out by the County Council for the area. One of the arguments put forward by the government was that the establishment "of a Game Reserve under the Wildlife laws of Kenya is with the objective of ensuring that wildlife is managed and conserved to yield to the nation in general and to individual areas in particular optimum returns in terms of cultural, aesthetic and scientific gains as well as economic gains as are incidental to proper wildlife management and conservation."[66] The ACHPR examined this claim, balancing it with the current situation faced by the Endorois, who since having lost access to their ancestral land had been plunged into poverty and pushed to the brink of cultural extinction. Consequently, the ACHPR found that the GRK had violated several of the rights of the indigenous community, noting that "the contested land is the site of a conservation area, and the Endorois—as the ancestral guardians of that land—are best equipped to maintain its delicate ecosystems"; and that "the Endorois are prepared to continue the conservation work begun by the Government …" The Commission concentrated on two principal issues: 1) the extent to which the community had (or had not) been consulted prior to the establishment of the wildlife reserve on their territories; and 2) whether such development provided benefits to the community concerned. The Commission found that the lack of

66 Ibid. at para. 178.

"meaningful participation" by the Endorois, who "were informed of the impending project [on their land] as a *fait accompli*", was a violation of the right to development. The Commission found that the government had violated the right of the indigenous community to their culture, land, and development. It rejected the argument put forward by the government that the community's rights should be "sacrificed" in the name of development, tourism and conservation. Instead, the Commission underscored that a fair balance should be struck ensuring that the community would also benefit from and participate in these developments.

The applicants in the *ENP case* are seeking the right to freely develop Etosha's land; alternatively, they seek that their consent be obtained on future decisions, and preferential access to employment opportunities and royalties, compensation and access, reasonable access to the Etosha lands, and similar relief around the profits and proof of the accounts.[67] Their claims are based on the dispossession of their lands that was done without the consultation of the Hai||om, which is in violation of international law. Furthermore, the applicants argue they have an intrinsic right to development based on Article 22 of the African Charter and the right of people to self-determination established in the ICCPR and the International Covenant on Economic, Social and Cultural Rights.[68] With regard to the issue of participation, the applicants also took note of how the United Nations Human Rights Commission interpret Article 27 of the ICCPR by quoting as follows:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous people. That right may include such traditional activities as fishing or hunting and their right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation [emphasis added] of members of minority communities in decisions which affect them.[69]

Overall, under international law, including both human rights law and environmental law, there is a strong support for the rights of indigenous peoples to directly participate in, benefit from and consent to any development taking place on their ancestral lands, and this includes development connected to tourism and wildlife protection.

67 Transcripts p. 254.

68 Transcripts p. 253.

69 UN Human Rights Committee, General Comment No. 23: The Rights of Minorities, 1994/04/08, par 7.

3 Conclusion

We started this chapter by pointing out that the applicants have brought an application for representative action in the High Court of Namibia due to the limitations of Namibia's jurisprudence on *locus standi*. The application was an essential step for enabling the Hai||om people to ventilate their legal rights over areas of ENP and Mangetti West block at a future action trail. We conclude by pointing out that litigation could allow the Hai||om to assert the importance of their ancestral rights with regard to cultural survival as well as to obtain recognition with regard to their ancestral connection to ENP as an indigenous people. Asserting their ancestral rights through a court of law is thus important not only for their cultural rights, but also in terms of their right to development, allowing them to be part of the GRN's decision-making structure vis-à-vis nationally important economic activities centred on tourism and wildlife. The case put forward by the Hai||om is not only important for them, but for the whole country, as it will define the way claims to ancestral land rights should be approached, and how Namibia should integrate the rights of its indigenous and marginalised communities in the legal framework of the country.