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Ancestral land claims: Why bygones can't be bygones

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1 Introduction

The occurrence of land dispossession during Namibia's colonial occupation is an undisputed historical fact. Sadly, the history of conquest and dispossession, of forced removals and a racially skewed distribution, has left the country with a complex and problematic legacy.[1] Unsurprisingly, calls from communities who during Namibia's colonial and apartheid occupation forcibly and arbitrarily lost the lands, territories and resources they had traditionally occupied have come to dominate national discourse in recent times.

Calls for the restoration of ancestral land in Namibia clearly relate to issues of justice, redress and accountability. Such calls, while grounded in reflection upon past events, do not amount to the apportioning of blame and or the exacting of revenge.[2] Rather, they emanate from the inalienable right to an effective remedy for victims of human rights violations as guaranteed in numerous human rights instruments. As noted by the UN Human Rights Committee in its General Comment No. 31: "Without reparation to individuals whose Covenant rights have been violated, the obligation to provide effective remedy … is not discharged".[3] This statement affirms the jurisprudence of many human rights bodies, which increasingly attaches importance to the view that effective remedies imply a right of the victims and not

1 South Africa Human Rights Commission, *Report of the SAHRC Investigative Hearing Monitoring and Investigating the Systemic Challenges Affecting the Land Restitution Process in South Africa*, 2013, p. 1.

2 Young, I.M., 'Responsibility and Global Labor Justice', *Journal of Political Philosophy*, Vol. 12, No. 4, 2004, p. 375.

3 Human Rights Committee, 'General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 2004, para. 16.

only a duty for states.[4] As it is expressed in common legal parlance, "where there is a right, there is a remedy" – *ubi jus ibi remedium.* This phrase suggests that the very notion of a right is inextricably linked to an enforceable claim.

Viewed from this vantage point, the appointment of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution by President Geingob on 21 February 2019 should be hailed as a bold, necessary and welcome initiative. Under international human rights law, the state is regarded as the primary duty bearer to respect, to protect and to fulfil human rights. These obligations likewise extend to instances of collective harm suffered by a group of persons and or communities as clarified by the African Commission on Human and Peoples' Rights (the African Commission) in its General Comment No. 4. In this General Comment the African Commission, amongst others, clarifies that: "State Parties have an obligation to provide redress for collective harm."[5] Calls for the restoration of ancestral land undoubtedly fall in this category. Thus, by appointing the Commission, President Geingob has set into motion his government's effort to comply with its human rights obligations to redress the historic injustice of land dispossessions, as required by international human rights law. It must be stressed, though, that the appointment of the Commission is by no means a matter of goodwill or benevolence on the part of the Government of the Republic of Namibia (GRN).

The appointment of the Commission is consistent with the GRN's human rights obligation to right historical land injustices. However, the appointment of the Commission does not mean that the issue of ancestral land has dissipated or become less relevant. In fact, the contrary is true. The *raison d'être* of the Commission is to inquire into why the restoration of ancestral land should be entertained. Point 1(l) of the Commission's Terms of Reference, impressively, tasks the Commission with inquiring and reporting on:

> […] how the claim [for] ancestral land should be premised on the human rights principle and standards guaranteed in the Namibian Constitution as well as international and regional human rights instruments binding on Namibia.[6]

This requires that the Commission must give guidance on complex concepts such as aboriginal title, constitutional and legislative hurdles for reparations, and best practices on reparation programmes, amongst others. These and other related issues are discussed in this chapter.

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4 UN General Assembly, 'Report to the General Assembly on reparations for gross human rights violations and serious violations of international humanitarian law', 2014, para. 16.

5 African Commission on Human and Peoples' Rights, 'General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)', 2017, para. 50.

6 See Government Notice No. 59: 'Appointment of Commission of Inquiry into Claims of Ancestral Land Rights and Restitution and its terms of reference', 15 March 2019.

The primary contention of this chapter is that the dispossession of indigenous communities/populations from their ancestral lands during colonial times constituted a gross human rights violation. This argument unfolds over six parts.

Following the overview provided in this introduction, section 2 serves to set the scene and tone of the discussion. It highlights the reality of land dispossession as it occurred in Namibia and reflects on the various methods employed to achieve such despicable ends.

Section 3 deals with the racist and discredited doctrine of *terra nullius*, which formed the basis of land dispossession at the advent of colonialism. It then proceeds to strongly argue for the development and invocation of aboriginal title in the Namibian legal system to redress historical land injustices.

Section 4 considers the groundbreaking jurisprudential work of the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights, specifically the evolutionary and expansive interpretation adopted by that court to the concept of "property rights" with a view to obtaining land justice for indigenous communities/populations. This is juxtaposed with the overly cautious "escapist approach" followed by Namibia's Superior Courts when it comes to historic land injustice issues – an approach that is found to be wanting in that it is at variance with the trend of international human rights law and jurisprudence. Attention in this section also falls on the decision of the African Court on Human and Peoples' Rights in favour of the Ogiek community. It presents the expansive meaning attached to property (as guaranteed in Article 14 of the African Charter) by this Court, and argues for a similar approach to be adopted in respect of Article 16 – the sister article of the Namibia Constitution.

Section 5 makes the point that litigation is not ideal for redressing claims for historical land injustices. In this regard, Namibia's narrow and exclusionary rules of *locus standi*, as well as the adversarial nature of litigation, are flagged as the major hurdles for seeking reparation through the courts. As an alternative, land restitution models from South Africa, achieved through mediation and negotiations, are presented as the kind of administrative reparation programmes Namibia must begin to consider.

Section 6 contains a warning against the danger of relegating legitimate ancestral claims to frivolous phrases such as "Let bygones be bygones". It is argued that such an attitude and approach to something so fundamental runs the risk of being hijacked for political ends.

2 Land dispossession in Namibia

This section will not attempt to a give a historical narration of land dispossession in Namibia as it occurred during colonial times. However, it will recount some instances of land dispossession to highlight the fact that colonialism and apartheid

were accompanied by massive and widespread land alienation for the benefit of the colonial settlers. This is done in order to set the scene and point to the connection between land dispossession and human rights which is argued in greater detail in the subsequent sections.

Dispossession of land was central to colonialism and apartheid. To begin with, the colonial settlers considered uninhabited territories as *terra nullius* and obtained title of such territories by occupation. Where the territory was inhabited, it was obtained by cession or conquest, i.e. through the barrel of the gun and through "trickery".[7] Land dispossession was also given legitimacy through the law. For instance, the Imperial Ordinance Concerning the Expropriation of Natives in the South-West African Protectorate of 26 December 1905 set the legal framework and basis for the expropriation of ancestral land. Three months later, the Proclamation of the Governor of German South West Africa of 23 March 1906 ordered the expropriation of the property of Hereros, and Zwartbooi- and Topnaar-Nama. Similarly, the Proclamation of the Governor of German South West Africa of 8 May 1907 allowed for the expropriation of the property of the Witbooi-, Rooinasie-, Bondelzwarts- and Swartmodder-Nama.[8]

The South African colonial regime continued and perfected what the Germans had started when they took over. The dispossession of black people became a major policy of the racist apartheid regime, and was legitimised through an arsenal of apartheid laws and regulations. These included the Native Administration Proclamation (No. 11 of 1922), the Native Reserve Proclamation, the Development of Self-Government for Native Nations in South-West Africa Act (No. 54 of 1968) (an offshoot of the Odendaal Commission), and the Representative Authorities Proclamation (No. 8 of 1980).

These abhorrent pieces of legislation served as the basis for the forced removal of many indigenous communities from their ancestral homes. The forced removal of the Hai||om people from Etosha Game Park in 1954 serves as stark reminder in this regard. The impassioned and painful effects the eviction had on this community is vividly captured in the case for the reclaiming of Etosha National Park by the Hai||om people in the High Court. The heads of arguments of the Legal Assistance Centre (LAC), which represented the claimants in this case, give vivid accounts of how this community was rounded up, bundled into trucks and maltreated on that fateful day in May 1954. One bewildered old lady reportedly wandered off into the wilderness and was never seen again. Families were separated and people were forcibly taken as farm labourers for surrounding farmers. Others were reportedly simply dumped outside the gate of the Park.

Colonialism and apartheid incontrovertibly had an overwhelmingly devastating impact on Namibia, leaving the country with highly unequal patterns of land and

7 *Daniels v Scribante and Another* 2017 ZACC 13, para. 14.

8 Hillebrecht, W., 'The expropriation of the land and livestock of the Ovaherero and Nama by the German State, Original legal texts and partial translation' (unpublished manuscript), Windhoek, 2017.

property ownership, and a spatial legacy that locks the majority of the population into poverty traps.[9] For instance, statistics released by the Namibia Statistics Agency in 2018 revealed that most of the arable, productive commercial land in the country is still owned by white persons, who account for a mere 6% of the total population.[10] In stark contrast to the descendants of those who were dispossessed, the descendants of the settler immigrants are the more affluent persons in the country. Conversely, the groups who suffered the brunt of land dispossession, i.e. the San, Nama, Damara, Topnaars and others, are today at the lower end of the socioeconomic spectrum.[11] This fact cannot be made light of as a mere historical coincidence.

Such statistics, sadly, confirm that independence has hitherto failed to reverse the loss of land experienced by the various indigenous communities. The skewed patterns of land and property ownership of colonial and apartheid times remain virtually unchanged. The prime reason for this can arguably be traced back to the resolution adopted at the 1st Land Conference in 1991. At this Conference is was resolved that:[12]

> […] the complexities in redressing ancestral land claims [renders the] restitution of such claims in full […] impossible.

However, this resolution has come to haunt the nation. The reality in which we live is that some 28 years after the adoption of the impugned resolution, the affected communities are even more resolute in their calls for reparations and the restitution of the ancestral land, territories and resources their ancestors lost during the colonial and apartheid period. Such calls give credence to the claim of Hannah Arendt:[13]

> We can no longer afford to take that which was good in the past and simply call it our heritage, to discard the bad and simply think of it as a dead load which by itself time will bury in oblivion. The subterranean stream of Western history has finally come to the surface and usurped the dignity of our tradition. This is the reality in which we live. And this is why all efforts to escape from the grimness of the present into nostalgia for a still intact past, or into the anticipated oblivion of a better future, are vain."

Admittedly, the further the terrible historical injustices recede into the past, the harder it becomes to trace lines of accountability.[14] The effects of those historical injustices, as aptly pointed out by Kofi Anan, are undiminished:[15]

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9 *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture, 04 May 2019, for His Excellency the President of South Africa*, p. 10.

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

11 Ibid., pp. 77–78.

12 See Consensus Resolution 2 of the 1991 Land Conference.

13 Arendt, Hannah, *The Origins of Totalitarianism,* The World Publishing Company, Ohio, 1973, p. 10.

14 Annan, Kofi, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Durban, 31 August – 8 September 2001.

15 Ibid.

> The pain and anger [of land dispossession] are still felt. The dead, through their descendants, cry out for justice. Tracing a connection with past crimes may not always be the most constructive way to redress present inequalities, in material terms. But man does not live by bread alone.

These statements strongly affirm that calls for the restoration of the ancestral land and territories lost during colonial time cannot be discarded as "backward-looking", vengeful or frivolous. These are calls for justice and redress. The dispossessed indigenous communities/populations had an inalienable right over the lands and territories they occupied upon the arrival of the colonial settlers. Phrased differently, these indigenous communities/populations had aboriginal title to the lands and territories they occupied upon the arrival of colonial settlers. This begs the questions: What is aboriginal title? Is aboriginal title recognised in the Namibian legal system?

These are but some of the questions that will have to be answered before an entitlement to reparation and restitution for dispossessed ancestral land can be addressed in the country.

3 Invoking aboriginal title to repair historical land injustice

The doctrine of aboriginal title can be traced to common law jurisdictions, such as Canada, the United States, Australia and New Zealand, where the history of colonisation and interaction between aboriginal and non-aboriginal peoples is prominent.[16] Aboriginal title is also sometimes referred to as native title, indigenous title or Indian title. Bennett and Powell describe aboriginal as follows:[17]

> Aboriginal title (or native title as it is also called) is a right in land, one vesting in a community that occupied the land at the time of colonisation. Once such a title is established, the claimants may vindicate their land or, if it has been expropriated without adequate reimbursement, claim compensation.

Significant aboriginal title litigation in the mentioned jurisdictions produced stellar victories for indigenous peoples and bolstered their resolve to reclaim their ancestral land. As far back as 1835, the *Mitchel v United States* case in the U.S. was one instance of such litigation. In this matter, the U.S. Supreme Court clarified that by means of aboriginal title:[18]

16 Ülgen, Özlem, 'Developing the Doctrine of Aboriginal Title in South Africa: Source and Content', *Journal of African Law*, Vol. 46, No. 2, 2002, p. 147.

17 Bennett, T.W. & C.H. Powell, 'Aboriginal Title in South Africa Revisited', *South African Journal on Human Rights*, Vol. 15, No. 4, 2004, p. 449.

18 *Mitchel v United States* 34 US (9 Peters) 711, para. 745.

> [...] Indians [indigenous people] were protected in the possession of the lands they occupied [at the time of colonisation], and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.

Importantly, the court stressed that Indian property rights, and by extension that of all indigenous peoples, were *'as sacred as the fee simple*[19] *of whites'*.[20] indigenous peoples, were *'as sacred as the fee simple of whites'*.[21]

The *Mitchel* ruling is in stark contrast with the view that indigenous people were supposedly way too low on the scale of social organisation to uphold their claims of indigenous land rights as purported in the *Re Southern Rhodesia* case. Such racist views provided the colonial settlers with justification to deny indigenous people their traditional rights and interests in land. For instance, Lord Sumner speaking for the Privy Council in this infamous case said:[22]

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.

This thinking was undoubtedly informed by the colonial conception of private property rights and the doctrine of *terra nullius.* The colonial conception of private property rights as individual rights coupled with the doctrine of *terra nullis* justified the non-recognition and denial of pre-existing aboriginal use and the occupation of lands.[23] In legal terms this meant that aborigines had no interests in or rights to land, and that the state had no obligations to recognise any such interests and rights.[24]

The racist and discredited doctrine of *terra nullius* has since been rejected under international law and certain domestic laws. The much-celebrated judgments of the International Court of Justice (IJC) in its Advisory Opinion on *Western Sahara* and *Mabo* of the Australian Supreme Court serve as prime authority in this regard. To a

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19 Fee simple is an American and English common law property term. The Free Legal Dictionary defines fee simple as follows: "The greatest possible estate in land, wherein the owner has the right to use it, exclusively possess it, commit waste upon it, dispose of it by deed or will, and take its fruits. A fee simple represents absolute ownership of land, and therefore the owner may do whatever he or she chooses with the land. If an owner of a fee simple dies intestate, the land will descend to the heirs."

20 *Mitchel v US*, para. 746.

21 Ibid.

22 [1919] AC 211 (PC), pp. 233–234.

23 Ülgen, Özlem, 'Developing the Doctrine of Aboriginal Title in South Africa: Source and Content', *Journal of African Law*, Vol. 46, No. 2, 2002, p. 135.

24 Ibid.

lesser extent, the South African Constitutional Court, in its *Richtersveld* decision, also dealt with the matter. Similarly, the judgment of the Namibian Supreme in *Kashela* in 2017 arguably indirectly touches on issues related to aboriginal title.

The ICJ critically examined the concept of *terra nullius* in its Advisory Opinion on Western Sahara on the request by the UN General Assembly on 13 December 1974. By way of resolution, the General Assembly requested the ICJ to advise on whether: *"[…] Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain was a territory belonging to no one (terra nullius)?"*[25] The ICJ answered this question in the negative. The Advisory Opinion of the Court on the issue of *terra nullius* is instructive and warrants full quotation:

> […] whatever differences of opinion there have been among jurists […] territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers.[26]

The court was unanimously of the opinion that Western Sahara at the time of colonisation by Spain in 1884 was not *terra nullius*.[27] The doctrine of *terra nullis* was similarly rejected by the Supreme Court of Canada in the case of *Guerin v The Queen*. In this case, the Court held that aboriginal title (in this instance called Indian title) is an independent and pre-existing legal right, not created by any executive order or legislative provision, but deriving from the historic occupation and possession of lands by aboriginal peoples.[28] Importantly, the Court described and characterised the nature of the Indians' interest in their land as an inalienable right.[29] The judicial development concerning aboriginal title in Canada has led to the constitutional protection of a range of aboriginal rights in the Canadian Constitution. For instance, section 35 of the Canadian Constitution Act of 1982 expressly recognises and affirms the existence of aboriginal and treaty rights of the aboriginal peoples of Canada.[30] Most recently, in 2014, in what is hailed as a landmark decision, the Supreme Court of Canada reportedly for the first time declared that a specific group has aboriginal title to Crown land.[31] In this case, *Tsilhqot'in Nation v British Columbia*,[32] the Court held that the Tsilhqot'in Nation,

25 See UN General Assembly Resolution No. A/RES/3292(XXIX).
26 See I.C.J., 'Western Sahara: Advisory Opinion of 16 October 1975', para. 80.
27 Ibid. at para. 83.
28 *Guerin v The Queen* (1984) 2 SCR at 376.
29 Ibid., p. 336.
30 See section 35(1)–(4) and section 35.1.
31 Eyford, Douglas R., *Advancing Aboriginal and Treaty Rights*, Aboriginal Affairs and Northern Development, Canada, 2015, p. 6.
32 2014 SCC 44, [2014] 2 S.C.R. 256.

a semi-nomadic grouping of six bands, had aboriginal title over the disputed area they had historically occupied; and further, that British Columbia had breached its duty to first meaningfully consult and engage the Tsilhqot'in Nation in respect of the logging started on their lands.[33]

The most striking dismissal of the doctrine of *terra nullius*, to echo Ülgen, has come from Australia.[34] In *Mabo v Queensland*, the High Court rejected the legal fiction that Australia was uninhabited territory at the time of British settlement in 1788. Denial of aboriginal land rights on this basis was found to be "unjust and discriminatory" and inconsistent with international obligations and standards.[35] Among other holdings, *Mabo* required that native title to communal lands must be determined by reference to traditional laws and customs, and not with respect to colonial legal processes that native people did not have access to.[36] The *Mabo* judgment, as aptly observed by Bennett and Powell, had repercussions far beyond the shores of Australia.[37]

The ancestral land claim instituted by the Richtersveld people and decided by the superior courts of South Africa is most relevant to the topic under discussion.

By way of background, the Richtersveld people claimed that they are entitled to the exclusive beneficial occupation and use of the land in question, the Richtersveld, on the grounds that they hold aboriginal title to the said land. The portion of land taken from them in the 1920s contained valuable diamond deposits. The dispossession allegedly happened without any compensation. They accordingly claimed restitution in terms of the Restitution of Land Rights Act.[38] After their dispossession, the land was registered in the name of a state-owned company, Alexcor Limited. Alexcor and the government contended that any rights in the land which the Richtersveld community may have had prior to the annexation of the land by the British Crown were terminated by the annexation.

Importantly, the High Court affirmed that the concept of *terra nullius* – the mark of imperialist paternalism – had no place in the South African constitutional dispensation. However, the Court expressed doubt as to whether the doctrine of aboriginal title forms part of South African law and as such did not decide on this point. The Court eventually found that the Richtersveld people had no rights of ownership in the land in question after its annexation in 1847, and also that

33 See *Tsilhqot'in Nation v British Columbia*.

34 Ülgen, Özlem, 'Developing the Doctrine of Aboriginal Title in South Africa: Source and Content', *Journal of African Law*, Vol. 46, No. 2, 2002, p. 146.

35 *Mabo v Queensland* (No. 2) (1992) 175 CLR 1, para. 42.

36 Harring, Sidney L., 'The Constitution of Namibia and the Rights and Freedoms' Guaranteed Communal Land Holders: Resolving the Inconsistency between Article 16, Article 100, and Schedule 5', *South African Journal on Human Rights*, Vol. 12, 1996, p. 467.

37 Bennett, T.W. & C.H. Powell, 'Aboriginal Title in South Africa Revisited', *South African Journal on Human Rights*, Vol. 15, No. 4, 2004, p. 454.

38 See the Restitution of Land Rights Act (No. 22 of 1994), as amended; restitution of a right in land is defined in section 1 of the Act as the restoration of a right in land or equitable redress.

the dispossession of the land after 1913 was not as a consequence of racially discriminatory laws, as required by the Restitution of Land Rights Act.[39] Upon appeal, both the Supreme Court of Appeal and the Constitutional Court upheld the Richtersveld people's assertion that they used the land in accordance with their indigenous customs. On this basis, both courts accordingly ordered that the land in question be returned to the community. The courts differed, however, regarding whether such a claim should be evaluated through the lens of the common law, or that of customary law. The Constitutional Court decisively ruled that the ancestral land claim of the Richtersveld people must be scrutinised in accordance with their prevailing customary laws at the time that the dispossession occurred. The Court held that while in the past, indigenous law was seen through the common law lens, it must now be seen as an integral part of South African law. It follows that in this instance, the law to be considered was the indigenous Nama law, in terms of which land was communally owned by the community. After careful consideration of the evidence adduced, by Court held that:[40]

> The real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law.

It is worth noting that the South African Constitutional Court did not directly address the issue of aboriginal title. The country thus remains a potential candidate for the assertion of aboriginal title.[41] The Court did, however, rule on a very important derivative element related to aboriginal title, namely, extinguishment. On this point, the Court ruled that the annexation of Richtersveld did not extinguish the right of ownership which the Richtersveld people possessed over the disputed land.[42] It appears that the approach of the Court in this judgment has, albeit implicitly, found resonance in Namibia.

In Namibia, a case is currently being heard in which Hai||om applicants are claiming recognition as an indigenous people, and reparation for the loss of their ancestral lands in Etosha National Park (see the chapters by Odendaal et al. and Dieckmann in this publication). Other than that, no legal action has at yet been taken to assert aboriginal title. The closest action in this regard relates to the matters

39 *Richtersveld and Others v Alexkor Ltd and Another* (LCC151/98) [2001].

40 *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18, paras. 49–62.

41 Bennett, T.W. & C.H. Powell, 'Aboriginal Title in South Africa Revisited', *South African Journal on Human Rights*, Vol. 15, No. 4, 2004, p. 450.

42 *Richtersveld and Others v Alexkor Ltd and Another* (LCC151/98) [2001], para. 82.

raised in the case of *Kashela v Katima Mulilo Town Council*.[43] In this case the plaintiff, Agnes Kahimbi Kashela, took issue with the Katima Mulilo Town Council (KTC) for having dispossessed her, without compensation, from her communal land she inherited from her deceased father in terms of the Mafwe customary law and norms. After the alleged dispossession, the KTC rented out a portion of the disputed piece of land and was also planning to sell some of the rented portions. Ms Kashela claimed N$2 415 000.00, inclusive of the rental money she was entitled to as reasonable and just compensation. Her claim was based on section 16(2) of the Communal Land Reform Act (No. 5 of 2002),[44] as well as the Namibian Constitution's Article 16(1), which guarantees property rights, and Article 2, which provides that property may only be expropriated upon payment of just compensation.

The KTC, needless to say, opposed the claim, in the main averring that the customary rights that the claimant held in the land in question ceased to exist when Katima Mulilo was declared a township in 1995. The High Court agreed with this argument. It also held that the claim for compensation was misdirected in that it lay against the state and not the KTC. Ms Kashela's claim was accordingly dismissed.

Upon appeal, the Supreme Court found the very opposite. The Supreme Court, in a decision that is not perfect, but is nevertheless welcomed, opted to decide this matter without reference to Article (16), thus avoiding the opportunity to clarify the meaning and scope of the concept of property as guaranteed in that article. It preferred to rather resurrect Schedule 5(3) of the Constitution in resolving the dispute. At the risk of regressing, it is worth pointing out that a Schedule, as noted by Harring, cannot add or subtract substantive rights set forth in other parts of a constitution.[45] The Namibian Constitution contains eight schedules. None of these matters was constitutionally necessary: all could simply have been adopted by statute immediately upon the convening of the National Assembly. However, they were included in the Constitution because they were urgent.[46] It is difficult not to agree with Harring's sentiments regarding Schedule 5, which in his view should be read:

> [...] as nothing more than a housekeeping measure defining the scope of the transfer of extensive governmental property from South Africa to Namibia, mostly lands and buildings held for governmental purposes. Schedule 5 is not a complete legal definition of the law of any form of property, communal or otherwise, for constitutional purposes, equal to Art 16, although it can be used for interpretive

43 (I 1157/2012) [2017] NAHCMD 49 (01 March 2017).

44 The subsection provides that 'Land may not be withdrawn from any communal land area under subsection (1)(c), unless all rights held by persons under this Act in respect of such land or any portion thereof have first been acquired by the State and just compensation for the acquisition of such rights is paid to the persons concerned'.

45 Harring, Sidney L., 'The Constitution of Namibia and the Rights and Freedoms' Guaranteed Communal Land Holders: Resolving the Inconsistency between Article 16, Article 100, and Schedule 5', *South African Journal on Human Rights*, Vol. 12, 1996, p. 475.

46 Ibid.

> purposes. Therefore, Schedule 5 can neither define, nor define away communal or any other property rights protected under Art 16. Rather, it defines fully which South African state property 'vests' in the Government of Namibia.[47]

This notwithstanding, the decision of the Supreme Court is significant in respect of the extinguishment of customary land rights. The Court held:

> It cannot be correct that the State's succession to communal land areas at independence extinguished the communal land tenure rights that subsisted in that land such that the interference with them would not attract a remedy within the scheme created by para (3) of Schedule 5, regardless of whether or not it falls within the ambit of Art 16(2).[48]

This judgment arguably holds the potential to advance the restoration of ancestral land claims in the country. There is a strong argument to be made that colonialism did not extinguish the right of communal ownership the various indigenous communities enjoyed under their pre-existing indigenous laws. It must follow, therefore, that the pre-existing customary land laws under which indigenous communities/populations held their land communally must be constitutionally recognised and accorded a legal status,[49] thereby making a case for the doctrine of aboriginal title. Once established in our law, this doctrine will have significant implications for the state's administration of land. If it is accepted that the state (or one of its organs) does not own a particular tract of land that it happens to control, then it will follow that the state may be obliged to return the land to the aboriginal titleholder or, possibly even more importantly, account for its past management.[50] The *Agnes Kashela* judgment most definitely calls for a revisiting of the concept of property.

4 Towards a purposive understanding of the "property" clause (Article 16)

Many commentators have lamented the fact that Article 16 of the Constitution mainly protects private property. This might be the reason why in the *Agnes Kashela* case, the Supreme Court was implored to adopt a purposive interpretation of Article

47 Ibid.

48 *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15/2017) [2018] NASC (16 November 2018), para. 68.

49 Harring, Sidney L., 'The Constitution of Namibia and the Rights and Freedoms' Guaranteed Communal Land Holders: Resolving the Inconsistency between Article 16, Article 100, and Schedule 5', *South African Journal on Human Rights*, Vol. 12, 1996, p. 473.

50 Bennett, T.W. & C.H. Powell, 'Aboriginal Title in South Africa Revisited', *South African Journal on Human Rights*, Vol. 15, No. 4, 2004, pp. 484–485.

16[51] – in other words, to direct that Article 16 applies broadly to all forms of property rights, and specifically that Ms Kashela's interest in the piece of communal land was grounded in Mafwe traditional customary law. As noted earlier, the Court opted to resolve this matter via Schedule 5(3). The approach adopted by the Court is, with respect, unsatisfactory. The Court's chosen route does not resolve the question of whether property as framed in Article 16 is wide enough to accommodate land collectively owned by indigenous communities. Guidance should thus necessarily be sought elsewhere. In this regard, the work of African and Latin American human rights bodies is instructive. In Africa and Latin America, regional human rights mechanisms have been instrumental in addressing indigenous peoples' rights, particularly to lands and territories.

The Inter-American Commission and Inter-American Court have contributed extensively to the understanding and development of indigenous peoples' rights, particularly in areas of collective land rights and the duty of states to consult. These bodies have both interpreted the American Convention on Human Rights as a living document in this regard.

For instance, in the case of *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001),[52] the Inter-American Court of Human Rights interpreted the American Convention on Human Rights in a progressive and expansive manner. Central to the analysis was whether Article 21 of the American Convention protected the right to communal lands. Article 21 provides: "Everyone has the right to the use and enjoyment of his property." The Court found that protection of communal lands was obtained through an "evolutionary interpretation of international instruments for the protection of human rights".[53] The Court accordingly held that the right to property included indigenous peoples' property rights as originating in indigenous tradition and that the State (Nicaragua) therefore had no right to grant concessions to third parties with respect to indigenous land.

The African Commission expressly drew from the *Mayagna (Sumo) Awas Tingni Community* judgment in the *Endorois*[54] case. The Commission held that the rights, interests and benefits that traditional African communities have in their traditional lands constitute "property" under the Charter. This presupposes that special measures may have to be taken to secure such "property rights". One such measure is the granting to indigenous traditional African communities of full title to their territory in order to guarantee its permanent use and enjoyment; as opposed to granting them a privilege to use land, which can be withdrawn by the state

51 *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15/2017) [2018] NASC 409 (16 November 2018), para. 32.

52 Inter-Am. Ct. H.R. (ser. C) No. 79, 1 148 (Aug. 31, 2001).

53 Ibid. at para. 148.

54 *Centre for Minority Rights Development (Kenya), Minority Rights Group International and Endorois Welfare Council (On Behalf of the Endorois Community) v Kenya* (276/2003).

or trumped by the real property rights of third parties.[55] Through an expansive interpretation in a manner consistent with international law, the Commission ruled that "property right" includes traditional African customary land as well as ancestral land. The Commission accordingly found that the actions of the Kenyan government had violated the provisions of the African Charter relating to Article 14 (property rights) in that the:[56]

> [...] property of the Endorois people has been severely encroached upon and continues to be so encroached upon. The encroachment is not proportionate to any public need and is not in accordance with national and international law.

The domino effect and the much-needed cross-fertilisation of progressive jurisprudential thinking is also discernible in the judgment in *African Commission on Human and Peoples' Rights v Republic Of Kenya*[57] (also referred to as the *Ogiek case*) of the African Court on Human and Peoples' Rights (2017). The case centred around the routine eviction of the Ogiek people from the Mau Forest by the Kenyan government, purportedly because such evictions were needed to preserve the natural ecosystem of the forest. The African Commission on Human and Peoples' Rights, which brought the case on behalf of the Ogiek people, argued that the evictions violated several rights of the Ogiek people as guaranteed under the African Charter on Human and Peoples' Rights, including the right to property as guaranteed in Article 14 of the Charter.[58]

The Court clarified that the right to property as guaranteed by the Charter applies to individuals, groups and communities alike. It thus caters for both individual and collective property rights. The Court interpreted the right in light of Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This article recognises and guarantees indigenous peoples' "right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership".[59] The Court accordingly found that the expulsion of the Ogiek from their ancestral lands against their will, without prior consultation, constituted a violation of Article 14 of the African Charter.[60] In recognising the Ogiek's communal property rights over their ancestral land, the judgment arguably protects not only Africans who define themselves as indigenous people, but all rural dwellers who own land on the basis of customary law.[61]

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55 Ibid. at paras 185–206.
56 Ibid. at para. 238.
57 Application No. 006/2012, 27 May 2017.
58 *Ogiek case*, paras 6–10.
59 See Article 26 of the UNDRIP.
60 *Ogiek case*, paras. 114–131.
61 Claridge, Lucy, *Briefing: Victory for Kenya's Ogiek as African Court sets major precedent for indigenous peoples' land rights African Commission on Human and Peoples' Rights v the Republic of Kenya*, Minority Rights Group International, 2017, p. 8.

The *Endorois* and *Ogiek* cases, in particular, are profoundly significant for Namibia. Like Kenya's Constitution, the Namibian Constitution does not recognise collective rights. This notwithstanding, both the African Commission and the African Court on Human and Peoples' Rights, in the *Endorois* and *Ogiek* cases respectively, recognised these peoples' claims over their ancestral lands under Article 14 of the African Charter. This was done through adopting an expansive and evolutionary interpretation of the concept of the right to property. The adoption of a similar approach in Namibia is not far-fetched, and would indeed be warranted.

A purposive reading and interpretation given to the right to property by the Court provides great relief for those who may want to claim their ancestral lands as part of the right to property under Article 16. Article 26 of the UNDRIP, which has been ratified by Namibia, is accordingly part of the country's body of law in terms of Article 144 of the Constitution. This article, significantly, affirms that all treaties binding upon Namibia, as well as "general rules of public international law", are incorporated into Namibia domestic law. In sum, the concept of property as guaranteed under Article 16 cannot be confined to the Western, private ownership paradigm. The indigenous forms of land tenure, as historically and currently practised, must be fully recognised, protected and accorded Article 16-status. Doing so cannot be viewed as placing "undue emphasis on article 16", as stated by the Deputy Chief Justice.[62] The contrary is true. In fact, it is deeply concerning that the court in this instance appeared wholly oblivious to the jurisprudential trend of international and regional human rights bodies in this regard.

The international cases presented in this chapter serve as persuasive authority for embracing a broad and purposive meaning to the land rights and interests guaranteed as property under Article 16 of the Namibian Constitution. In this regard, an inevitable objection that would have to be overcome is that foreign judgments are not binding on Namibia's courts. Such an objection must, however, be weighed against the powerful arguments of principle and equity that informed the decisions in these cases.[63]

5 Administrative reparation programmes

Calls for the restoration of ancestral land in Namibia, as noted earlier, relate to issues of redress and accountability. It is worth reiterating that such calls are inextricably linked to the inalienable right to an effective remedy for victims of human rights violations, as guaranteed in numerous human rights instruments.

62 *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15/2017) [2018] NASC 409 (16 November 2018), para. 69.

63 Bennett, T.W. & C.H. Powell, 'Aboriginal Title in South Africa Revisited', *South African Journal on Human Rights*, Vol. 15, No. 4, 2004, p. 451.

The international legal basis for the right to a remedy and reparation became firmly enshrined in the elaborate corpus of international human rights instruments now widely accepted by states. Among the numerous international instruments are the Universal Declaration of Human Rights (Article 8); the International Covenant on Civil and Political Rights (Article 2); the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 14); and the Convention on the Rights of the Child (Article 39).[64] The relevance of Article 5 of the African Charter of Human and Peoples Rights, international humanitarian law and international criminal law must also be borne in mind in this regard. The right to a remedy and reparation for victims of human rights violations was affirmed by the UN General Assembly in its Resolution 60/147 adopted on 16 December 2005. In fact, on 29 September 2011, the UN Human Rights Council adopted a resolution in which it decided to appoint, for a period of three years, a Special Rapporteur with the mandate to promote truth, justice, reparation and guarantees of non-recurrence of atrocities.[65] Article 18 and Article 25 of the Namibian Constitution must also be added to this list.

Calls for reparations and the restitution of ancestral land can therefore not be divorced from human rights. In this context, the guideline of the African Commission in respect of the right to property and the concomitant obligations of state parties to the Charter in respect of this right, is instructive. The African Commission clarified that State parties to the Charter are obliged to:[66]

> [...] ensure that members of vulnerable and disadvantaged groups, including indigenous populations/communities who are victims of historical land injustices, have independent access to and use of land and the right to reclaim their ancestral rights, and are adequately compensated for both historical and current destruction or alienation of wealth and resources."

According to Pablo de Greiff,[67] an effective remedy is best achieved through administrative reparation programmes as opposed to litigation. For the claimants, such programmes are preferable to judicial procedures because they offer faster

64 See UN General Assembly in its Resolution 60/147: 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', UN Doc. A/RES/60/147 (https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx).

65 See Human Rights Council Resolution 18/7: 'Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence', UN Doc A/HRC/RES/18/7 (https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/166/33/PDF/G1116633.pdf?OpenElement).

66 See Guideline 55(f) of the African Union's Principles and Guidelines on the Implementation of ESC Rights in the African Charter.

67 The former Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence.

results, attract lower costs, demand relaxed standards of evidence, and involve non-adversarial procedures and a higher likelihood of receiving benefits.[68]

Indeed, the limits of litigation as a means to redress historical land injustices has been illustrated in the recent *Tsumib v Government of the Republic of Namibia* case.[69] In this case, eight members from the Hai||om community sought permission from the court to be allowed to take legal action as representatives of their community to reclaim Etosha National Park and the Mangetti area as their ancestral land rights. To this end, they submitted six distinct claims on behalf of the Hai||om people.[70] The case was thrown out without the Court considering the merits thereof on the basis that the plaintiffs did not have the necessary *locus standi* to represent the Hai||om people. Namibia's current law on standing is very restrictive. For example, it does not recognise class actions in which one or more plaintiffs litigate on behalf of themselves and other similarly situated persons. The *Tsumib* judgment is disturbing and indeed regrettable. This case presented the Court with an ideal opportunity to develop the archaic rules on standing so as to espouse the value, spirit and purport of the Namibian Constitution. It appears that Namibian courts are not ready to take such a bold step and to break new grounds. The message from the judgment in *Mabo v Queensland* to the courts in this regard is unambiguous:[71]

> If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in [old age principles and rules that perpetuate inequality and limit access to justice].

The conservatism of our courts invites those seeking redress for historical land injustices to explore extrajudicial means to obtain an effective remedy. In this regard, examples from South Africa serve as proof that much more land justice can be achieved through meaningful engagement and constructive dialogue. In fact, section 13 of the South African Restitution Act[72] provides that complex and overlapping land claims should preferably be settled through mediation and negotiation. To this end, two best practices are presented.

The records shows that intensive and constructive negotiations between 1996 and 1998 involving many interested groups culminated in the settlement of the historic Makuleke land claim in the Kruger National Park. The Makuleke community was forcibly removed from their ancestral lands within Kruger National Park in 1969. A settlement agreement was reached on 30 May 1998 between the Makuleke

68 UN General Assembly, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence', 2014, UN Doc. A/69/518, para. 4.

69 (A 206/2015) [2019] NAHCMD 312 (28 August 2019).

70 See Chapter 6 by Odendaal et al. herein.

71 *Mabo v Queensland* (No 2) (1992) 175 CLR 1, para. 41.

72 Restitution of Land Rights Act (No. 22 of 1994) as amended.

community, six national ministers, the Northern Province provincial government and SANParks. The agreement, an example of effective social cooperation between government bodies and land claiming communities, contains many historic elements. In essence, the agreement determines that:[73]

- indigenous communities will participate in the management of sensitive environments;
- indigenous communities have rights of ownership;
- indigenous communities are equal partners with SANParks; and
- mineral rights will be reserved in favour of the state (but with prospecting and mining prohibited to protect the area's ecological integrity, and if mineral rights are ever privatised, the community will have a preferred right to acquire them).

Another best practice worth highlighting is the historic Ae!Hai Kalahari Heritage Agreement between the South African government and representatives of the Mier and ǂKhomani San communities. In terms of the agreement, six farms (totalling around 35 000 hectares) to the south of the Kgalagadi Transfrontier Park, and nearly 60 000 hectares of land within the park, were restored to the ǂKhomani San and Mier communities in 2002. The agreement committed the parties to establishing and developing a contractual park, the Ae! Hai Kalahari Heritage Park, on 28 May 2002. In terms of this agreement, the park is managed by a Joint Management Board with representatives from the Mier and ǂKhomani San communities and SANParks. The agreement also provides for the implementation of ǂKhomani San resource use and cultural rights, a three-way revenue sharing agreement for the !Xaus Lodge, future socioeconomic benefits, and the donation of game to the ǂKhomani San; SANParks is responsible for day-to-day conservation management.[74]

Namibia can learn much from these best practices. The sitting Commission on Ancestral Land Claims have received various claims from communities for the restoration of their ancestral land and territories they previously occupied. For instance, the Khwe people are laying claim to Bwabwata National Park, and the Hai||om people are demanding the return and/or enjoyment of their land rights in respect of Etosha National Park. The Topnaar people, similarly, are claiming ownership of Namib Naukluft National Park, Sperrgebiet National Park and Dorob National Park and demanding compensation for the loss of their land and the resources they originally owned. The /Khomanin Damara likewise are laying claim to Daan Viljoen National Park as their ancestral home from which they were forcibly evicted during the South African colonial period.

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73 Makuleke Land Claim, 'Meeting Report, Joint Meeting of Environmental Affairs & Tourism Portfolio Committee; Agriculture, Land & Environmental Affairs Select Committee', 17 February 1999 (available at https://pmg.org.za/committee-meeting/5638/).

74 See *Kalahari Gemsbok National Park: Park Management Plan for the period 2016 – 2026* (2016) (https://www.sanparks.org/assets/docs/conservation/park_man/kalahari-management-plan.pdf); and the presentation of Mr Fundisile Mketeni: CEO SANPARKS, Land Claims Sharing Models 30 August 2016. Available at https://slideplayer.com/slide/13804698/.

These and other claims submitted to the Commission present the country with complex and formidable challenges. Given the complexity of these claims, it is clear that mutually acceptable outcomes should much rather be sought out of the court system through meaningful engagement between the affected parties. Litigation, by its very nature is less suited to achieving such desired outcomes. The conceptualisation, design and implementation of targeted administrative reparation programmes appear to be the preferred vehicle to redress historical land injustices. Examples of such programmes serve to illustrate their feasibility. As the adage goes, "Where there is a will, there is a way".

Inasmuch as the South African Programme of Land Restitution is presented as a best practice, the pitfalls and shortcomings of the programme as flagged in the Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, chaired by the former Deputy President, Kgalema Motlanthe, are worth noting. Some of the administrative reparation programmes in South Africa reportedly rendered the process "personality-driven", ad hoc, and vulnerable to corruption. Furthermore, in an attempt to speed up the process, claims were bunched together, creating artificial communal property associations in the process. In so doing, the Commission ignored the definition of a "community" whose members are eligible to apply for restitution.[75]

It must also be stressed, however, that the preference expressed for the establishment of administrative reparation programmes does not imply that the powers of the courts in such matters should be ousted, as such a proposition would in any event be unconstitutional. The Supreme Court and the High Court are vested with inherent jurisdiction to hear any matter.[76] The suggestion, with reference to administrative reparation programmes, is that recourse to the court system should be the last resort.

Efforts to redress colonial injustices in Namibia cannot be resolved by placing premium reliance on the very laws which caused such injustices. Following the *Tsumib* judgment, there is a strong case to be made for exploring and investing in restorative justice processes as a means of achieving reconciliatory justice for colonial and/or historic land injustices in Namibia.

6 Conclusion

The right of indigenous communities/populations to their lands, territories and resources is recognised under international law. As such this right must be respected, protected and fulfilled by states, including Namibia. The case law of the African Commission on Human and Peoples' Rights, the African Court on Humans

75 Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, Chairperson Kgalema Motlanthe, November 2017, pp. 233–235.

76 See Article 78(4) of the Namibian Constitution.

and Peoples' Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights, amongst others, affirm the fact that indigenous land rights are recognised and guaranteed within the international human rights system. These human rights bodies adopted an evolutionary and expansive interpretation of the concept of "property rights". Such an expansive interpretation, as has been shown, allows for the right to property as guaranteed in the Namibian Constitution and the African Charter, which Namibia has ratified, to include ancestral lands and territories as well as African customary law land tenure systems within the ambit of property rights. It is highly regrettable that the Namibian apex court opted to shy away from making a similar ruling when called upon to do so.

Calls for the restoration of ancestral land in Namibia are consistent with international and regional law and human rights law and jurisprudence. A contrary interpretation would be inconsistent with the ethos of rationality, equality, non-discrimination, fairness and "justice of all" which permeates the preamble and substantive structures of the Namibian Constitution.[77]

Repairing historical land and other injustices necessarily calls for a new mind set and paradigm – one that is anchored in international human rights law. In other words, what is required is an approach that recognises human rights as setting the ground rules for obtaining reparation for historical injustices. Such a paradigm recognises that calls from indigenous communities/populations for reparations are neither frivolous nor vengeful. Furthermore, they are far from being disguised get-rich-quick schemes or, worse still, calls for charity. These calls have graduated into entitlements, and cannot be viewed otherwise, as doing so would be disingenuous and insensitive – and downright dangerous. Examples from other parts of the world involving unresolved land claims which have escalated into ethnic conflicts demonstrate the dangers of leaving such claims unresolved in the hope that they will eventually be forgotten.[78] Calls for the restoration of ancestral land can therefore not be 'swept away with frivolous phrases such "Let bygones be bygones". Adopting such an attitude and approach to matters of historical land injustice would be at our own peril.

77 *S v Van Wyk* 1993 NR 426 (SC) at 456G-H.

78 Shelton, Dinah, 'Reparations for human rights violations: how far back?', *Amicus Curiae*, Issue 44, November/December 2002, p. 3.