

**OVAHERERO TRADITIONAL AUTHORITY (OTA)**

**OUHONAPARE WOMANANENO WOVAHERERO**



**POSITION PAPER ON LAND  
AND  
RELATED MATTERS**

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## Foreword

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The First National Land Conference of 1991 failed to address the important issue of the restitution of ancestral land. In fact, even the implementation of the resolutions that were adopted at that conference has been a dismal failure. We give government a score of 40% in this regard, after 27 years of spending enormous resources.

Therefore, a complete paradigm shift is needed with regard to the Government's approach and thinking about land and related matters. There is sufficient evidence that ancestral land was violently and fraudulently taken from the Ovaherero, Nama, Damara and San people of Namibia, and an important principle of restorative justice is that what was stolen or taken without permission must be returned to its rightful owners. This process needs to be re-negotiated going forward to attain lasting solutions in the interest of genuine reconciliation and nation building. It is a core principle that restitution of ancestral land should be the foundation of any sustainable policy on land and agrarian reform.

There are certain generic and standard **values** which OTA believes must guide the behaviour of persons and institutions that are involved in land

and agrarian reform initiatives, so that the outputs and outcomes will be worthy and useful to the cause. These values are:

- (a) Fairness, justice and equity,
- (b) Transparency
- (c) Restoration of dignity and the
- (d) Preservation of culture.

The chapters have been organised around **six key principles** which encapsulate the foundation of the OTA land policy. These fundamental principles should guide the programmes that will restore ancestral land and related assets to the descendants/heirs of the original owners. They are:

- i) Restitution of Ancestral Land Rights,
- (ii) Restoration of Sacred Sites,
- (iii) Differentiation of Settlement vs Resettlement programmes,
- (iv) Land and Resource Tenure Security,
- (v) Land and Agrarian Reform and
- (vi) Land Resources Governance.

Specific recommendations have been made and it is our conviction that the implementation of our recommendations will usher a new era of sustainable agrarian reform in Namibia.

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# Chapter 1

## Introduction

At independence, Namibia inherited skewed land ownership, land rights, land usage and land tenure arrangements. Most indigenous Namibians have access only to their commonage land that was allocated through the creation of post-genocide reserves in the 1920s and the Bantustanisation programme of the mid 1960s, the Odendaal Plan.

After independence, many indigenous Namibians have made claims to land but for a variety of reasons and arguments. This is understandable because all of them were emerging from a colonial era where they were subjected to the same oppressive and exploitative laws. However, there are significant differences with regard to these land claims, especially when it comes to ancestral land rights and needs for redistributive land reform programmes to address skewed land ownership.

This paper will thus show that the German and South African colonial administrations violently and fraudulently dispossessed indigenous Namibians, especially the Ovaherero people, of their ancestral land and livestock. Moreover, explicit and specific expropriation and extermination orders by Germany, which led to the genocide of the Ovaherero and Nama people and wholesale land dispossession during the period of 1904 to 1908. In addition, these colonial crimes have destroyed the Ovaherero and Nama culture and dignity, and banishment them to exile.

Land is an important asset because it is primarily a means of production; but it is also a source of wealth and value, a status symbol and a means of social and political influence. In the Namibian context, the indigenous people owned land across the entire country before the arrival of the European colonizers. Land and other moveable and immovable assets were dubiously transferred from their indigenous owners into the hands of the colonizers, more so in the geographic space south of the Veterinary Cordon Fence (also formerly referred to as the Police Zone). Now, 28 years after independence, this historical injustice regarding land has not yet been resolved.

This paper thus aims to present the principle position of the Ovaherero Traditional Authority (OTA) about land and related matters in Namibia. The OTA position is informed by the fraudulent and violent historical acts of ancestral land dispossession by the German and South African colonial administrations; accordingly, it seeks to lay down fundamental principles that must guide the actions which will restore the ancestral land and related assets of the indigenous people to the descendants/heirs of the original owners. Overall this position paper promotes the interests of the people of Namibia who are dispossessed of their ancestral lands and whose cultures are destroyed through land dispossession, mass killings, genocides and banishment. Thus restitution of ancestral lands and restoration of cultures remain a central tenet of the OTA position paper.

There are certain generic and standard values which OTA believes should guide the behavior of persons and institutions that are involved in land and agrarian reform initiatives, so that the outputs and outcomes will be worthy and useful to land restitution of ancestral lands and sustainable agrarian land reform. These values are:

- a) **Fairness, justice and equity:** all Namibians must be treated fairly, reasonably and impartially without favouritism or discrimination. However, equity requires that there must be special considerations that take into account the special historical realities that have created different sets of conditions for different people: the colonial acts of dispossession were not applied equally to all ethnic groups, and thus any proposed solutions must take this into account.
- b) **Transparency:** there should be honesty and openness which stand up to public scrutiny. There should thus be no secrecy. For instance, annual land governance reports and list of land reform beneficiaries should be publicly available.
- c) **Restoration of dignity:** the human worth and respect of our people were destroyed during colonialism. There should therefore be deliberative efforts to restore such dignity so that the people can walk tall again in the land of their birth.
- d) **Preservation of culture:** The people's culture, as the sum-total of their way of life, was ruthlessly destroyed by the colonisers. Therefore, the underlying intentions of land and agrarian reform should always be to restore and preserve the people's culture.

The chapters of this Position Paper have been organised around **six principles** which encapsulate the foundation of the OTA land policy, namely:

- i). **Restitution of ancestral land rights.** The ancestral land of the Ovaherero that was taken violently and fraudulently must be returned lawfully and amicably to the descendants/heirs of the original owners. Evidence will be presented in **Chapter 2** to prove that, at the advent of colonialism in 1884, the Ovaherero owned large tracts of land in the central parts of what is now known as Namibia. The Extermination Order of 2 October 1904 destroyed the life and limb of the Ovaherero people, and the subsequent expropriation orders of 1905 and 1907 dispossessed our people (Ovaherero and Nama) of their land, settlements and sacred sites, as well as moveable assets such as livestock (cattle in particular) and cultural artefacts.

The cumulative effects thereof are the severe reduction of the Ovaherero population, their scattering in the Diaspora, the destruction of their socio-economic base, as well as the loss of their identity, human dignity, culture and religion.

The lingering effects, as found by various studies on Holocaust survivors, are that the offspring are vulnerable to the effects of stress and are more likely to experience symptoms of post-traumatic stress disorder (PTSD). These descendants may also be at risk for age-related metabolic syndromes, including obesity, hypertension and insulin resistance.

**Chapter 5** thus argues the case for restitution and presents an international legal framework to justify this. The South African legislation on the restitution of ancestral land is presented as a case study, including the implementation challenges and lessons to be learned in this regard.

**Chapter 3** deals with some of the relevant resolutions of the 1991 Land Conference, while **Chapter 4** presents a legislative overview of land dispossession legislation from the German colonial period up to the present.

- ii). Religion and Sacred sites. The Ovaherero practise an African religion that is centred on the holy fire (okuruuo) and graves (ozongungu) as a way of communicating with their ancestors. These sacred places of religious practices were mostly destroyed, left to neglect and while some are located on farms that are currently owned by descendants of the previous colonisers. Thus, restitution must be holistic to cover these aspects as well. Specific recommendations are made in the relevant chapter.
- iii). **Settlement vs Resettlement.** OTA is of the view that the word “resettlement” is currently being used erroneously to refer to the process of allocating farmland to all Namibians. However, a clear distinction should be made: there are those Namibians, such as the Ovaherero, Nama, Damara and San that lost their ancestral land and are thus homeless in many respects; they must therefore first be **re-settled** on their original land to bring them on par with those that did not lose ancestral land.

This process will be referred to as **re-settlement** and will apply strictly to those Namibians that lost their ancestral land. By contrast, settlement applies to those Namibians that did **not** lose their ancestral land due to colonial dispossession, but who need to be moved elsewhere for other reasons such as overcrowding, overgrazing, drought, natural disasters and so forth. This is referred to as redistributive land reform in the literature, while resettlement has a restitutive aspect to it.

This distinction between **settlement** and **resettlement** is thus crucial.

- iv). **Land and Resource Tenure security.** Title deeds are important legal instruments for conferring ownership rights to those that live on the land or uses land resources. For privately owned land, such as commercial farms, the tenure is secure, but for those in communal areas, the situation needs to be reformed. The concepts of individual and commonage rights to land and land resources will be discussed and specific recommendations will be made.
- v). **Land and agrarian reform.** Generally, land reform must seek to improve the way that land is distributed, owned and utilised, based on the values described above. More broadly, agrarian reform encompasses land reform, but it addresses additional aspects such as, but not limited to: profitable and sustainable farming operations, education and training, rural credit, marketing and access to markets, as well as farming technology. The objective is to increase farming output and productivity to improve national food security and self-sufficiency.

**Chapter 6** deals with land and agrarian reform principles, and discusses the shortcomings of the current “willing seller, willing buyer” policy which has made farmland prices unaffordable beyond the productive value of the farmland. It also talks about commonage (tenure) rights, support packages for farmers after their settlement and resettlement, the problems associated with the sub-division of farmland below the economic unit size for the specific agro-ecological zones, the development of under-utilised farmland in communal areas, and support for farmers who have privately acquired commercial farmland using own resources. This covers a wide spectrum of issues as part of agrarian reform.

- vi). **Land and Land Resources Governance.** All ideas and initiatives about land and agrarian reform will be futile without an appropriate governance framework, especially the legal and institutional frameworks regarding the identification and allocation of farmland for resettlement and settlement. The current arrangement where the Minister is the final arbiter in land and land related matters,

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is fatally flawed and is contrary to the principles of good governance, especially in dealing with accountability and the separation of powers.

**Chapter 7** discusses land and land resources governance, and argues that by having two separate pieces of legislation for freehold (commercial) and communal land, Namibia lost sight of a central tenet in land and land resources governance which is to create a unitary policy and institutions that are geared towards a single objective. The chapter also presents an alternative governance framework where the Minister is essentially replaced by Parliament as the final governance authority on land, land resources and related matters.

Three of the above principles, namely sacred sites, settlement vs resettlement, and land /land resource tenure security, do not form separate chapters, but are covered under the chapters dealing with the other principles.

**Chapter 8** concludes the paper, while specific recommendations are presented in **Chapter 9**.

## Chapter 2

# Historical Overview of Land Dispossession

### 2.1 Introduction

This section describes the extent of the land occupied by the Ovaherero people at the advent of colonisation in circa 1884, as well as the genesis of land and livestock dispossession, and the banishment, displacement and incarceration in concentration camps during the period from 1904 to 1915, following the genocide of 1904-1908. A brief history of the bantustanisation under the South African apartheid regime is also highlighted.

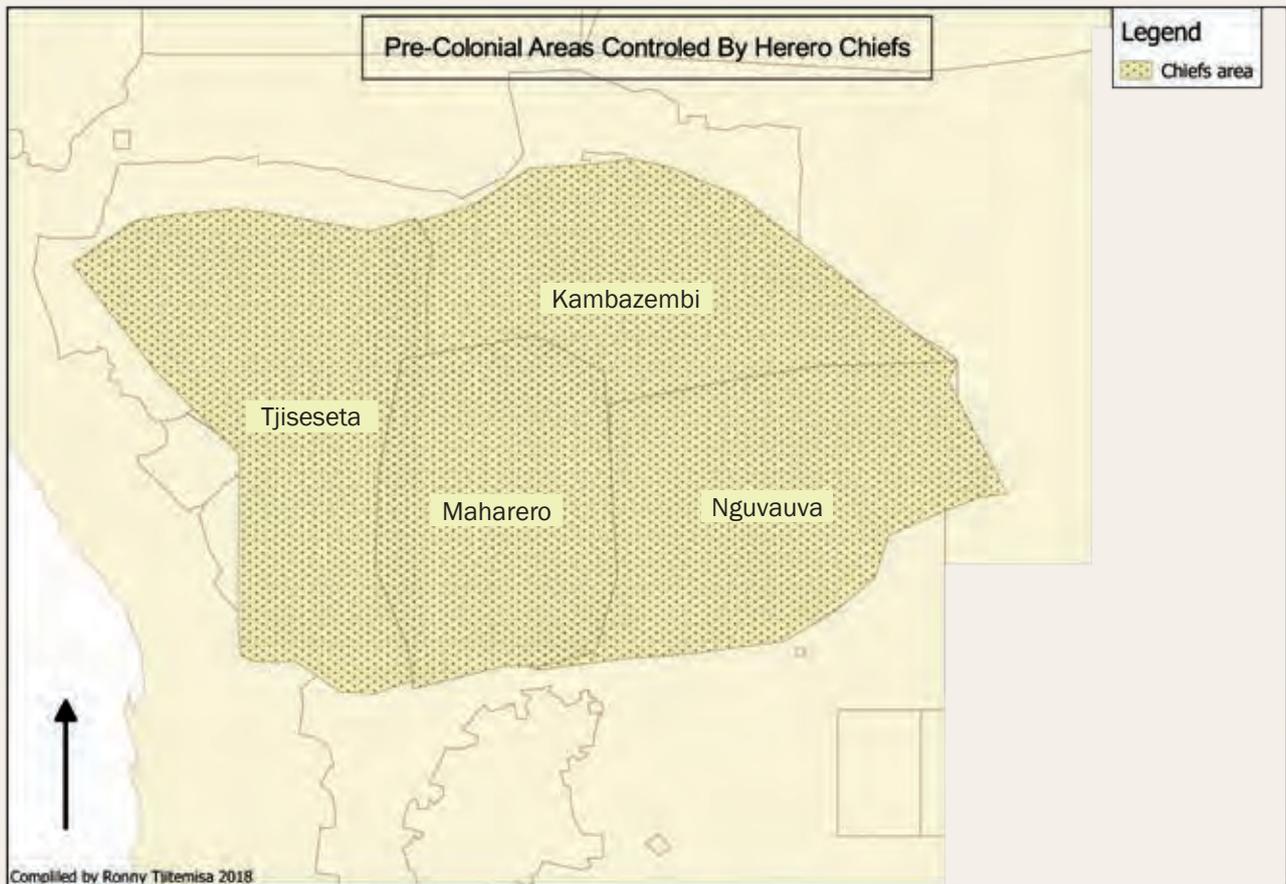
### 2.2 The Loss of Lives

The Extermination Order issued by General Lothar von Trotha on 2 October 1904 reduced the Ovaherero population by 80 000 persons, so that only about 15 000 survived the genocide. This significant population reduction left many vacant parcels of land, thus making it easy for the German colonisers to grab land without much resistance. While the native land expropriation order of 1905 dispossessed all former Ovaherero land.

### 2.3 Geographical Settlement Patterns in Pre-colonial Namibia

At the advent of the scramble for Africa in 1884, central Namibia was largely occupied by the Ovaherero, Damara, Nama, San and Baster people. The focus of this paper is on land inhabited by the Ovaherero at that time.

The land inhabited by the Ovaherero can be divided into four main portions (Gewald, 1999), (Figure 1).



**Figure 1: Pre-colonial areas inhabited by the Ovaherero**  
**(Source: Gewald (1999))**

Each of the four main regions of Hereroland was controlled by one of the four principal Ovaherero Chiefs (Gewald, 1999), namely:

- a) **Ombara Manasse Tjiseseta** controlled Omaruru (Okozondje), Otjimbingwe, Usakos, Otjitambi, Outjo, Otavi, Kalkveld, and Ombondeze (Willhelmstal). Omaruru and Otjimbingwe were the main settlements in this area at that time.
- b) **Ombara Maharero kaTjamuaha** controlled Okahandja, Khomas Hochland (including Windhoek), Otjituezu, Okorukambe, Otjinene, Okamatangara, Omatako, Omuramba waNdjou (Kalkveld), Otjimbingwe and Otjongombe. The capital of Hereroland was Okahandja. Other significant settlements were Windhoek (Otjomuise), Otjituezu, Omburo, Otjosazu, Ovikokorero and Okandjoze.
- c) **Ombara Kambazembi** controlled the area north of Okamatangara (near Okondjatu), Okamatapati, Otjituuo, Otjivanda (Grootfontein). Some of the land under his control overlapped with that of Maharero in the Omatako and Enguruvau (Hochveld) area. Otjozondjupa (Waterberg) was Kambazembi's capital centre. Other significant settlements under his jurisdiction were: Omambonde, Otjituuo, Okanjande, Okakarara, Ohamakari and Okozongominya.



In the northwest, the Swartbooi Namas inhabited the areas of Kamanjab and Otjitambi, while the Topnaars inhabited the Zesfontein area (Ohamuheke). The San people inhabited the area of Etosha, as well as the area stretching from north of Otavi and Tsumeb up to the southern border of the Ovambo areas north of Etosha, and the Ovahimba/Ovatjimba areas in the west of Etosha (Troup 1950). Other San tribes inhabited areas from Tsumkoe towards the Batawana people of Tsau in present-day Botswana.

## **2.4 Land Dispossession Prior to 1904**

Land grabbing by settlers increased rapidly after 1897 following the decimation of the Ovaherero livestock caused by the Rinderpest epidemic of 1896 (Gewald, 1999). German settlers (government, companies and traders) bought land fraudulently at prices ranging from 50 Pfennings to 1 Mark per hectare (ha), while land sold by companies among the settler community was traded between 1 and 5 Marks/ha. The colonial government demanded between 30 Pfennings and 1.5 Marks when disposing of land (Werner, 1989).

By 1902/3, land ownership had changed dramatically. The entire colony covered a total area of 83.5 million ha of land, of which only 31.4 million ha (approximately 38% of entire country) was left in the hands of Africans. The remaining 52.1 million ha (72%) was in the hands of German settlers: 29.2 million ha was owned by concession companies, 19.2 million ha owned by the colonial state, and 3.7 million ha owned by individual white settlers (Werner, 1989).

Of the 31.4 million ha owned by Africans, approximately 13 million ha was inhabited by Ovaherero (Bridgman, 1981). Moreover, the construction of the railway line from Swakopmund to Windhoek in 1903 removed 3.5 million ha from the land owned by the Ovaherero (Bridgman, 1981).

As the White settlers continued to grab more land, the number of White settler farmers increased from 1774 persons in 1895 to 4640 in 1903. At the beginning of 1904, the value of German moveable and immoveable properties was estimated at 20 million Marks (Werner, 1983).

## **2.5 Land Dispossession between 1904 and 1915**

The colonial government issued a formal expropriation order that was signed on 26 December 1905, thereby expropriating all the land owned by the Ovaherero. Furthermore, another proclamation was signed on 23 March 1906, but became effective on 7 August 1906 (Werner, 1989), to expropriate all the “moveable and immoveable tribal property” of the Ovaherero north of the Tropic of Capricorn. Thus, officially, the Ovaherero became propertyless and were denied any access to land before 1915 (Werner, 1989).

By 1913, the number of farms occupied by European settlers had increased to 1331, covering a total area of 13.5 million hectares. These farms were occupied by 1042 whites of whom 914 were Germans, while the remainder were mainly Afrikaners (Boers).

## **2.6 Livestock Dispossession**

In 1890, the Ovaherero possessed more than 150,000 head of cattle. However, they lost approximately 60,000 cattle due to the Rinderpest epidemic of 1896, thus leaving them with around 90,000 head of

cattle. The official cattle census in 1896 showed that there were 45,898 head of cattle in Ovaherero hands, whereas 44,487 head of cattle were in the hands of 1,051 German farmers (Bracht, 2015).

Between 1902 and 1904, an additional 10,000 head of cattle were fraudulently transferred to Germans (Werner, 1989). The value of German cattle in early 1904 was valued at about 14 million Marks. Between 1907 and 1912, the Ovaherero were not permitted to farm with livestock.

In 1913, white settlers owned 90% of the large livestock population (183,167 of 205,643), whereas the Ovaherero owned only 10% (22,476). With regard to small livestock, the entire indigenous population owned only approximately 30% of the national herd, or 300,000 of 1,000,000 small stock.

## 2.6 Displacement after 1915

In 1915, the Union of South Africa became the new colonial authority, following the start of World War I in 1914, during which time Germany lost all her colonies. South Africa established the first temporary grazing reserves for the Ovaherero and Damara people at Orumbo, Okatumba, Furstenwalde and Augeikas (near Windhoek).

In early 1918, the Otjohorong Native Reserve was established as the first official native reserve under the Union of South Africa. Thereafter, several pockets of land were demarcated for the establishment of Ovaherero native reserves at the periphery of settler-occupied lands or in ecologically marginal parts of their ancestral land.

## 2.7 Displacement

Following the Battle of Ohamakari on 11 August 1904 and the subsequent extermination order of 2 October 1904, several surviving Ovaherero sought refuge in neighbouring communities and countries in Southern Africa. Ombara Otjitambi Samuel Maharero entered Botswana at Xau Xau in Ngamiland in 1904.

A small group of approximately 1000 Ovaherero led by Chief Daniel Kariko went northwards and later arrived in Walvis Bay, from where they travelled to South Africa (Bridgman, 1981). Another group ended up at Tsabong in southwestern Botswana in 1905.

From Ngamiland and Walvis Bay, some Ovaherero went to South Africa between 1905 and 1907 to work in mines; their descendants are currently living in Vryburg, Mafikeng, Lephalela and Johannesburg.

Ever since 1946, there has been a continued desire among the Ovaherero living in Botswana to return to Namibia. Over the years, small groups and individuals returned to Namibia, especially during the 1970s and 1980s. The biggest group returned to Namibia in 1994 and was settled at Gam in the Otjozondjupa region.

Currently, a process of registration is underway to repatriate willing Namibians living in Botswana to return to their mother land in Namibia. It is however not clear where and how this group will be **re-settled**. Will it again be at Gam in the Kalahari Desert with its poisonous plant (otjikurioma), or will Government **resettle** these descendants of the original inhabitants of the unlawfully confiscated ancestral on some of the commercial farms which it is currently buying to **settle** politically connected individuals from the North?

## Chapter 3

# The First National Land Conference of 1991

### 3.1 Background

The political environment leading to the attainment of Namibia's independence in 1990 and the misguided one-sided Policy of National Reconciliation were to a large degree responsible for the current unacceptable state of affairs with regard to ancestral land. As people emerging from a brutal colonial dispensation, there was a great measure of goodwill and trust amongst Namibians whose honourable intentions were to move forward together in peaceful co-existence and harmony.

Unfortunately, the outcome of the 1991 national land conference was a flawed compromise with adverse consequences for those Namibians who had lost their ancestral land during the colonial period. They have thus been denied their inalienable rights in terms of the principles of restorative justice.

### 3.2 The Conference Resolutions

The 1991 land conference adopted 24 resolutions that laid the basis for land reform in Namibia for the past 28 years. Unfortunately, the conference failed to adopt a resolution for the restoration of ancestral land rights. Consequently, the communities that lost their ancestral land have been derided and treated with contempt for continuing to raise this crucial matter.

Furthermore, the Namibian government has dismally failed to implement most of the 24 resolutions; the OTA has thus awarded the Namibian government a generous overall score of 40% in this regard. **Table 1** below is an extract of the 1991 Resolutions that are relevant to the Six Principles underpinning the OTA Land Policy.

The intention with the freehold land was to enact relevant legislation to facilitate re-distribution of such land to all Namibians, but with special focus on the San, farm-workers and women. **There is no special mention of Namibians who lost ancestral land during the colonial period. This political fact and reality, that some Namibian traditional communities were dispossessed and expelled from their ancestral land while others were not, continues to be completely and deliberately ignored.** Not a single policy or legislation enacted after independence makes any mention of ancestral land as a valid special consideration.

On the other hand, the focus on non-title deed land was on tenure reform and the administration thereof

**Table 1: Relevant Resolutions of the 1991 National Land Conference**

Resolution	Remarks
<b>A: Title Deed Areas</b>	
1. Ancestral land claims and restitution claims in Namibia were not entertained, citing complexities of overlapping claims between indigenous communities. This was a regrettable compromise position among the various stakeholders at the time, and many premised their compromise on healing the nation. However, this compromise came at a price to those indigenous Namibian communities whose land was dispossessed.	The ancestral land discussion has been suppressed and not a single policy or legislation makes reference or even acknowledges this historical fact despite recommendation in a Cabinet Resolution that ancestral land should receive priority in the resettlement programme.
2. It was resolved that foreigners should not be allowed to own land in Namibia but should rather have user rights guided by foreign investment protection treaties.	This resolution was not heeded as foreigners with links to politicians continue to buy land.
3. It was resolved to expropriate excessive and under-utilised land as well as land belonging to foreign absentee landlords.	Two or three expropriations took place but were not based on the agreed criteria of absenteeism, excessive and/or under-utilised land, but purely as political revenge against the farmers.
4. Land Tax be introduced on freehold land to generate revenue and entice productive use of land.	Land tax was introduced indiscriminately across the board creating a tax burden on the previously disadvantaged, although the latter can apply for partial exemption.
5. Introduction of Affirmative Action Loan Scheme to facilitate acquisition of freehold land by large-scale communal farmers.	This is implemented by Agribank to facilitate access to land for some, but those with high incomes do not qualify
6. Access of small-scale farmers to freehold land through a settlement scheme to be administered by government.	Real intended beneficiaries are overlooked in favour of some elites and those with political connections.
<b>B: Non-Title Deed Areas</b>	
1. That communal land be preserved, expanded and further developed.	Communal areas have not been developed and expanded as intended, poor water provision to virgin lands. Minimal attempts were carried out through the Programme for Communal Land Development.
2. Role of Traditional Leaders in land allocations and administration and the need to develop legislation to facilitate this process.	In areas with overlapping traditional authorities, land allocation/ administration is a minefield, infested with political favouritism.
3. Land Boards must be instituted by law to be accountable to government and the local traditional communities (Resolution no. 18(c)).	The powers of Land Boards have been watered down as the last decision is with the National Committee and the Minister

4. Illegal fencing of communal land be addressed, and all illegal fences be removed. (Subsequent Moratorium on illegal fencing in 1996 with no effect) (Resolution no. 20).	Implementation of this resolution was not effective as politicians make themselves guilty of this practice
5. Dual grazing rights: those large-scale communal farmers who acquire freehold land should not be allowed to keep livestock in communal areas (Resolution no. 21).	This resolution could not be up-held, and thus dual grazing continues
6. Land tenure issues were referred to a Technical Committee for further investigation (Resolution no. 9).	The only rights to individuals that have so far been allocated are in respect of homesteads, crop fields, kraals and grave yards; and leaseholds to non-customary land uses; groups rights are being piloted without policy
<b>C: Special Groups</b>	<b>Remarks</b>
1. San Communities	Group settlement schemes
2. Farmworkers	Marginalised
3. Rights of women to land and inheritance	Favoured under settlement schemes
4. Ex-combatants	Were later introduced

# Chapter 4

## Legislative overview

Under German rule, large areas of the land of the indigenous population of Namibia were confiscated, using land policies formulated in 1892, on the premise that after the demarcation of the so-called “native reserve” the colonial authorities would gradually acquire the remainder of the Territory by proclamation as Crown Land<sup>1</sup>. The Imperial proclamations of 1898 and 1903 made provisions for the establishment of reserves for occupation by indigenous population groups. But due to the outbreak of the First World War in 1914, the German colonial administration did not manage to complete implementation of this policy because they lost control of South West Africa.

Upon the termination of German rule in 1915, there were few such areas of the native reserve created by the imperial proclamation of 1898 and 1903. These areas included the Basters of Rehoboth, the Nama of Berseba and the area of Okombahe allocated to a Damara group for their loyalty during the 1904 rebellion<sup>2</sup>. Other Nama groups were also allocated residential and grazing right in 1907.

By contrast, the northern area of Namibia, such as Kaokoveld, Ovambo, Kavango and Zambezi areas, had not been directly affected by German colonial administration and were still occupied by indigenous groups at this stage<sup>3</sup>. As there was no White settlement in Kaokoland, Ovambo, Kavango, and Zambezi and since the people in those regions were not involved in the rebellion of the Nama and the Herero against the German regime in 1904, the inhabitants of those areas were not affected.

In taking over responsibility in 1915 because of the Peace Treaty of Versailles, the South African Government commenced with passing laws relating to the reservation, setting apart and control of land for the indigenous population of Namibia.

### 4.1 Crown Land Disposal Proclamation, 1920 (Proclamation 13 of 1920)

In terms of this proclamation, the Crown Land Disposal Ordinance, 1903, of the Transvaal, was amended and applied to South West Africa and empowered the Administrator to reserve Crown land, inter alia for the use and benefit of aboriginal natives<sup>4</sup>. According to this Act, the land held by the German colonial administration effectively became Crown Land of South West Africa, with the South African Parliament retaining authority over land rights. The Act stated that no grant of any title, right of interest in state land or minerals, within South West Africa could be made without the authority of parliament.

In 1920, a proclamation of the Governor-General of South Africa authorised the Administrator of South West Africa to set aside Crown Lands as reserves for the use and benefit of aboriginal natives, coloured persons and Asiatics<sup>5</sup>. This proclamation was followed by the institution of the Native Reserves Commission

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<sup>1</sup> LAC, pg. 1

<sup>2</sup> *ibid*, pg. 7

<sup>3</sup> (Report of the Commission of Enquiry into South West African Affairs (Odendaal Report) at 67)

<sup>4</sup> LAC, pg. 2

<sup>5</sup> LAC, pg. 4

which was appointed to investigate the control, size and conditions of existing reserves and to advise on the establishment of permanent native reserves. This culminated in the promulgation of further legal instruments namely the Native Administration Proclamation of 1922<sup>6</sup>.

## 4.2 Native Administration Proclamation of 1922

The proclamation granted certain powers to the Administrator, specifically section 16. In terms of this section, the Administrator may whenever he deems it desirable set aside areas as native reserves for the sole use and occupation of natives generally or for any race or tribe of natives and the inhabitants thereof shall be subject to such restrictions and to such regulations as he may prescribe.

In terms of section 20 of the proclamation regulations were made and published in Government Notice 68 of 22 May 1924 in terms of which inter alia,

- a) The magistrate is required to exercise in his district the general control over reserves established under the aforesaid proclamation.
- b) The magistrate is required to divide, where necessary, the reserves into wards and to place each ward under the control of the headman;
- c) The magistrate is empowered, inter alia, to make allotments of lands situated in the aforesaid reserves.
- d) A headman is prohibited from making any allotment of land, either to new comers or by way of redistribution of land already occupied or of depriving any person of any land or of granting permission to any person to reside in a reserve, except upon an express order of the magistrate.
- e) The native was prohibited to change his residence without the permission of the magistrate.

The significance of highlighting the above postulated powers as set out in the regulations is to portray the nature of land tenure system. It is very clear that blacks (natives as herein referred to) never owned land and the powers to alienate such land never vested in their community as common heritage assets. Their chiefs or headman were disempowered, and such powers were assigned to the Magistrate.

By relying on the provisions of section 16 of the Native Administration Proclamation of 1922, the Administrator decided to set aside further areas as native reserves for the sole use and occupation of natives generally. In 1923, the rights granted to certain groups of natives by the previous German administration in the following areas were reconfirmed<sup>7</sup>;

- (i) Berseba Reserve,
- (ii) Bondels Reserve,
- (iii) Bergdama Reserve, Okombahe
- (iv) Zessfontein Reserve,
- (v) Franzfontein Reserve,
- (vi) Soromas Reserve,

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<sup>6</sup> *ibid*, pg. 4

<sup>7</sup> *ibid*, pg. 11

Furthermore, following areas were reserved for native occupation for the first time:

- (i) Neuhof Reserve,
- (ii) Tses Reserve,
- (iii) Ovitoto Reserve,
- (iv) Otjituuo Reserve,
- (v) Epukiro Native Reserve,
- (vi) Aminius Reserve

In the following subsequent years, the following reserves were established:

Area	Year
Gibeon Native Reserve	1924
Otjohoronggo Native Reserve	1925
Otjimbingwe Native Reserve	1926
Waterberg East Native Reserve	1936

### **4.3 South-West African Native Affairs Administration Act, 1954 (Act No. 56 of 1954)**

This Act transferred the administration of “native affairs” from the Administrator (as provided for in Native Administration Proclamation of 1922) to the responsible Minister of South Africa, carried into effect an important change to all land reserved before or after its commencement.

In terms of section 4 (1) and (2) of the Act, the land reserved and set apart for the sole use and occupation of natives, and that land, and any other land or area in the territory which has at any time prior to the commencement of this Act be so reserved or set apart and shall be vested in the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act 18 of 1936). It is therefore very clear that the ownership of land reserved and set apart before or after the commencement of this Act for the sole use and occupation by natives has been vested in the South African Development Trust. For the analysis of these legislative pathways, it means that the issue of ownership of land never passed to the indigenous people. The land remained in the Trust where the Trustee was the South African Prime Minister.

### **4.4 The Odendaal Commission**

On 11 September 1962, the South African Prime Minister established the Commission of Enquiry into South West African Affairs (Commonly referred to as the Odendaal Commission). The main focus of the Commission was to investigate the promotion of the material and moral welfare and the social progress of the inhabitants of South West Africa and to make recommendations for a five-year plan for the accelerated development of the various non-white groups of South West Africa.

One of the core issues which emanated from the Commission Report was the recommendation for the creation of the homeland for each population group in which it alone would have residential, political and

language rights to the exclusion of other population groups, so that each group would be able to develop towards self-determination without any group dominating or being dominated by another<sup>8</sup>.

It further recommended the consolidation of the existing active reserves in order to create “a permanent and stable homeland for each of the various population groups such as the *Basters, Damara, Nama, Herero, Tswana, Bushmen, Ovambo, Okavango, Kaokovelders, East Caprivians and Whites*, with a view to working towards an increasing degree of self-government for each of these homelands.” The commission made recommendations regarding the boundaries of each of these “homelands” as well as the forms of government which should be instituted in each.

The Commission further recommended that when Legislative Councils (which were realized through the promulgation of the Representative Authorities Proclamation, 1980 (AG. 8/1980)) for each homeland had been established, the land within the boundaries of the homeland should be transferred to the Legislative Council “in trust for the population” and that the Legislative Council should be authorized, with the permission of the State President of the Republic of South Africa, to release certain parts of the land added to each of the homelands for alienation to individual citizens (which refers to citizens of the respective homelands)<sup>9</sup>.

The core principle here is that even though the Legislative Councils would have power over the land in homelands, they will only own it in trust for population. Again, there is no element of private ownership. Even though the Commission suggested private ownership subject to the approval of the State President of South Africa, it is quite difficult to determine whether this was even realized.

#### **4.5 Development of Self-government for the Native Nations of South West Africa Act, 1968 (Act No. 54 of 1968).**

In 1969, the South African Parliament acted on the recommendations of the Odendaal Report by passing the Development of Self-government for Native Nations in South West Africa Act, No. 54 of 1968, which was intended “to develop in an orderly manner to self-governing nations and independence”. As a result, this Act recognized Damaraland, Hereroland, Kaokoland, Okavangoland, the Eastern Caprivi, and Ovamboland as areas for the different native nations of South West Africa. In terms of section 2 of this Act, the land referred to in the aforesaid South West African Native Affairs Administration Act, 1954, were, together with other land not previously reserved, reserved and set apart in respect of the different “native nations”.

In 1978, the administration of the South African Bantu Trust in respect of land located in South West Africa was transferred to the Administrator General of South West Africa, who became the Trustee of the Trust. However, ownership of the native reserves which fell under the South African Bantu Trust remained with the Trust<sup>10</sup>.

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<sup>8</sup> LAC, pg. 18

<sup>9</sup> *ibid*, pg. 20

<sup>10</sup> LAC, pg. 25

#### **4.6 Subdivision of Agricultural Land Act 70 of 1970, as amended**

The main purpose of this Act was to principally prohibit the subdivision of the agricultural land unless the consent has been obtained from the Minister of Agriculture. The Act further provides for statutory procedures and fees to be levied for any subdivision.

#### **4.7 Representative Authorities Proclamation, 1980 (Proclamation AG. 8 of 1980)**

The next major legal development concerning control of the communal areas was the Representative Authorities Proclamation, 1980 (AG. 8/1980), which authorised the establishment of second-tier representative authorities for eleven population groups: Basters, San, Zambezians, Coloureds, Damaras, Ovahereros, Vakavango, Namas, Aawambo, Batswana and Whites. Each representative authority could have a legislative authority with the power to make laws on a list of defined matters (as well as the power to make laws on other matters, with the consent of the Administrator-General) and an executive authority with administrative power over defined matters.

The defined matters included control over the acquisition, alienation, grant, transfer, occupation and possession of the communal land of the population group concerned. As noted, representative authorities were established for the different population groups, and empowered to make ordinances in respect of the Communal land of that population group, the ownership of the land in question passed from the South African Development Trust (as the South African Native Trust had been renamed) to the Government of the territory (LAC, pg. 27). It appears that the ownership of this land did not pass from the Government of the Territory to the individual representative authorities.

The Representative Authorities Proclamation, 1980 and all the proclamations establishing representative authorities under its terms were repealed in their entirety by the Namibian Constitution<sup>11</sup>.

The Namibian Constitution clearly transferred ownership of all the communal lands which previously vested in any governmental authority, including South African, South West African and “second-tier” representative authorities- to the Government of Namibia in a broad omnibus provision regarding the ownership of government assets.

#### **4.8 Agricultural Land Reform Act, (Act No.6 of 1995)**

The focus of this Act is to provide for the acquisition of agricultural land by the State for purposes of land reform and for the allocation of such land to Namibian citizens who do not own or otherwise have the use of any or of adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.

It is important to note that the underlying criteria guiding the State acquisition of such land is owed to the fact that such land is either offered for sale or such land has been classified as under-utilized or excessive or acquired by the foreign nationals in contravention with statutory provisions. In consideration of land offered for sale, the guiding principle is the “willing-buyer, willing seller” dogma. In all instances, the guiding principles in determining the purchase price is the fair compensation for the land so acquired by the State whether the basis of such acquisition is due to excessive land or unutilized land or foreign owned.

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<sup>11</sup> LAC, pg. 29

The other object of the Act is to vest in the State a preferential right to purchase agricultural land for the purpose of the Act. It is assumed that “for purposes of the Act” means that the State will be granted with such preferential right so as to enable it to acquire land for purposes of land reform. In terms of preferential right of acquisition by the State, the owner of any land shall first offer such land for sale to the State before offering it to any third party.

Other critical parts of the Act are: the restriction of land acquisition by foreign nationals, and government acquisition by means of expropriation when it is in the public interest. It is important to note that all these statutory provisions are geared towards the realization of one thing; to fast-track government land acquisition for redistribution to Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.

#### **4.9 Communal Land Reform Act, (Act No. 5 of 2002)**

This Act provides for the allocation of rights in respect of communal land. It establishes Communal Land Boards and provides for the rights and powers of traditional leaders and Communal Land Boards in relation to communal land.

The Communal Land Boards established in terms of the Act are empowered to exercise control over the allocation and the cancellation of customary land rights by Chiefs or Traditional Authorities. The rights which may be accorded in terms of the Act are customary land rights and rights of leasehold. In terms of customary land rights, this entails a right to a farming unit, a right to a residential unit or a right to any other form of customary tenure that may be recognized by the Minister.

It is important to note that just as much as the colonial dispensation, the Communal Land Act vest ownership of the communal land in the State in trust for the benefit of the traditional communities residing in those areas. It further prohibits the conferment of a right of freehold ownership in respect of any portion of communal land. The Act further prohibits fencing of the Communal Land and introduces statutory sizes of the land which may be held under customary land rights.

The striking aspect of the Act is the fact that it has narrowly defined the scope and content of customary land rights restricting it to “farming and residential unit rights” while at the same time emptying it (customary land rights) of its full ownership title. This is the same attitude of the colonial government, which is merely granting “a native” a living space while attaching nothing much to the land in terms of tenure security. The current Communal Land Act has repealed all the colonial legislative framework highlighted above even though it still carries all the hallmarks of the colonial legislative frameworks in so many aspects especially with regard to the continuous practice of denying the existence of the right of full ownership of undivided commonage assets. The only thing which the Act has done away with is the dismantling of the tribal geographical areas.

## 4.10 National Resettlement Policy

Given the fact that the State has legislative mechanism in terms of Agricultural Land Reform Act, (Act No.6 of 1995) to acquire land for redistribution, it needs further mechanism to redistribute such acquired land. The government of the Republic of Namibia has therefore adopted a National Resettlement Policy.

In terms of the policy, the government has set up an order of priority of beneficiary groups which are:

- The San Community,
- Ex-soldiers,
- Returnees,
- Displaced persons,
- People with disabilities and
- People from overcrowded areas.

The policy further states that the applications for resettlement are judged on the basis of their economic status. It further classified the categories of potential settlers as follows:

- People who have neither land, income nor livestock,
- People who have neither land nor income, but few livestock,
- People who have no land but have income or livestock owners but need land to be resettled on with their families and to graze their livestock.

It is very clear that a resettlement policy and subsequently the resettlement programme lack “**land restitution**” as a guiding principle in terms of land reform. The resettlement program focuses more on socio-economic status rather than historical consideration of land dispossession

**It is equally abundantly clear that the Government’s resettlement policy is manifestly skewed in favour of specific beneficiary groups, and this will result in changing the spatial demographics of the country as an intended or unintended consequence.**

It is beyond all logic that the descendants of those that lost land due to colonial dispossession and genocide are not included in the list of beneficiaries who should enjoy priority in the allocation of land for resettlement. Instead, priority is given to “returnees” or “People from overcrowded areas” of north-central Namibia whose inhabitants never lost an inch of their ancestral land to colonisers!

# Chapter 5

## Restitution of Ancestral Land Rights

### 5.1 Introduction

This chapter first examines the rationale for ancestral land claims. It then explores international institutional and legal frameworks that can be adapted for the Namibian conditions to enable an amicable and mutually acceptable determination and settlement of such claims. Brief findings and recommendations conclude the chapter.

### 5.2 The Rationale

The adjective “ancestral” is derived from the noun “ancestor”, which refers to one’s forebears, or the parents of one’s parents down a few generations. Thus, in the case of the Ovaherero, ancestral land is that land which was supposed to be inherited from their ancestors; it is their heritage. It was shown in chapter 2 that the ancestors bequeathed large tracts of land, which they had inhabited for several centuries, long before Europeans landed on African shores.

According to Göcke (2013), the indigenous people’s identity is rooted in their relationship to land, and thus for them to preserve their cultures, they need control over their ancestral land and natural resources. However, the ownership and control over most of their ancestral lands were forcefully taken away from them; this forms the basis for their inherent ancestral land rights, i.e. rights that are rooted in the use and ownership of the land by indigenous peoples since time immemorial, until such rights were violated by the colonial powers.

The violation of ancestral land rights was done through conquest, cession, or occupation of their lands as *terrae nullius* (Göcke, 2013). The concept of *terrae nullius* entails the acquisition of title to land by assuming that the land had previously belonged to no one. The consequences for the indigenous people have been total deprivation of and removal from such land, marginalisation, poverty, and the loss of culture and identity.

Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes that indigenous peoples “have the right” to their ancestral lands. Therefore, when it is established that ancestral land rights were historically violated, the logical restorative course of action is to initiate a transparent process of restitution of such ancestral land rights (Göcke, 2013; Feiring, 2013).

**Thus, for 28 long years since independence and freedom, Namibia has failed its international obligations in this regard.**

### 5.3 International Legal Framework

There are special legal instruments for the protection of indigenous/ ancestral rights, namely: (i) the International Labour Organization (ILO) *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention No. 169), and the (ii) *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) which was adopted by the General Assembly in 2007.

Furthermore, the general human rights norms and instruments at international level can be adapted to the special situation of indigenous peoples. Some of these legal instruments are the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD).

Article 13 of the *ILO Convention No. 169* calls upon States to “respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands [...] which they occupy or otherwise use”, and Article 14 (1) of the *ILO Convention No. 169* stipulates the duty to recognise “[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy”.

The Preamble of the *UNDRIP* recognizes “the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources”. Thus, indigenous peoples must be given control over their ancestral land and the natural resources to enable them to preserve and strengthen their cultures and traditions, as well as to promote their development in accordance with their needs.

Art. 25 of *UNDRIP* affirms the indigenous peoples’ right “to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands”.

### 5.4 Ancestral Land in Namibia

It was shown in Chapter 2 that the Ovaherero inhabited large tracts of land before the European colonisers arrived in Namibia. It has also been shown how much of this ancestral land was violently and fraudulently acquired by European colonizers. That pre-colonial land constitutes what is referred to as the Ovaherero ancestral land.

Therefore, all the ancestral land that was taken away from the Ovaherero must be restored to the descendants/ heirs of the original owners. The methods for the restitution of these ancestral land rights is presented in the sections below.

### 5.4.1 Loss of Culturally and Historically Sacred Sites

Many of the graves as well as culturally and historically sacred sites are located on commercial farms that are currently owned by former colonizers. These sites must be identified and returned. In the event that these commercial farms cannot be returned, parcels of land of an appropriate size should be carved out so that servitudes and *usufructs* (and other rights of use) can be registered to convert them into special purpose land parcels, with adequate access roads and paths to such heritage sites.

### 5.4.2 Time Frame for Ancestral Land Claims.

It has been shown that the alienation of the Ovaherero ancestral land by Europeans began in 1883 (Werner, 1989, 1993). Therefore, the year 1883 should be regarded as the appropriate base date for the determination of ancestral land ownership for purposes of assessing claims for the restitution of ancestral land rights. Further research should thus establish accurate ancestral land ownership patterns in 1883 so that such information can be used to objectively adjudicate ancestral land right claims.

The second aspect of the time frame deals with the period within which the claims must be lodged, calculated from a specific base date determined by legislation or proclamation. In South Africa, the period is three years. Based on the South African experience and lessons learned, the Namibian time frame should be open-ended.

## 5.5 Case Study: South Africa

Many countries in the world (e.g. South Africa, Australia, India, Philippines, USA, etc.) have come up with policies and legislation to deal with ancestral land claims. For instance, South Africa enacted the Restitution of Land Rights Act of 1994, as amended in 2014, *“To provide for the restitution of rights in land in respect of which persons or communities were dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith.”*

The South African act established the *Commission on Restitution of Land Rights* and *The Land Claims Court*, and prescribes several procedures that must be followed to verify and process the ancestral land claims. These claims arise from the expropriation of ancestral land that was carried out in terms of the colonial Land Act of 1913. Several claims have so far been settled.

According to the South African act, a “right in land” means *“any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question;”*

**The South African Commission on Restitution of Land Rights has the power to:**

- receive and acknowledge receipt of all claims for the restitution of rights in land lodged with it in terms of this Act;
- take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims;

- advise claimants of the progress of their claims at regular intervals and upon reasonable request;
- report to the Court on the terms of settlement in respect of successfully mediated claims;
- define any issues which may still be in dispute between the claimants and other interested parties with a view to expediting the hearing of claims by the Court;
- monitor and make recommendations concerning the implementation of orders made by the Court ;
- make recommendations or give advice to the Minister regarding the most appropriate form of alternative relief, if any, for those claimants who do not qualify for the restitution of rights in land in terms of this Act;
- refer questions of law and interpretation to the Court;
- ensure that priority is given to claims which affect a substantial number of persons, or persons who have suffered substantial losses as a result of dispossession or persons with particularly pressing needs;

The Commission must first attempt to mediate between the parties to the land claims dispute, but when no settlement can be reached, it must refer the matter to the Land Claims Court, which is empowered to determine:

- the restitution of any right in land in accordance with the Act;
- the appropriate compensation in terms of the Act;
- the person that is entitled to ownership of the land in question.

The South African model is thus comprehensive and defines clear legal and institutional frameworks for the restitution of ancestral land rights. This two-step process of using the commission first and then court when there is amicable solution in order to settle ancestral land rights can be adapted for the Namibian situation.

### **5.5.1 Relevance, Process, Achievements and Challenges: South Africa**

South Africa was selected as a case study because of its historical and political similarities with Namibia. The indigenous people in both countries were robbed of their ancestral land in almost identical fashion, yet, unlike Namibia, South Africa has enacted legislation to define the problem of ancestral land and how the rights to such land can be assessed and restored.

According to Du Plessis (2004), in cases where the restitution of land rights by the provision of the actual land lost is not possible, for valid reasons, the alternative remedies are:

- Provision of alternative land
- Payment of compensation
- Priority development assistance
- A combination of the above options.

**Some of the challenges that were experienced in South Africa are (Du Plessis, 2004):**

- **Onerous information requirements:** The level of evidence needed to settle a claim causes the process to be resource-intensive and cumbersome
- **Duplication of institutional roles:** There are three institutions involved in the processing of claims, namely the Commission, the Court and the Department of Land Affairs; each institution has developed its own rules and procedures to deal with land claims. This causes confusion and frustration.
- **Nature of settled claims:** The majority of settled cases followed the simpler and faster option of paying compensation, instead of restoring the real ancestral land. Compensation does not address the racially skewed patterns of land ownership and this defeats the purpose of restoring ancestral land.
- **Legal constraints:** The “willing buyer, willing seller” principle is the basis for acquiring land from owners, but this slows down the restitution process and increases costs.
- **Group & communal claims:** Most rural land claims involve many people and large tracts of land which have more complex developmental challenges. This makes the processing of such claims very complex.

## 5.6 Options for land access in the Namibian context

Once the ancestral land rights have been determined through the institutional and legal processes proposed above, there will be various options for the restitution of such rights, depending on the nature of the current land use.

The first option is to expropriate all the land that has been proven as ancestral land, and to return it to members of the traditional communities whose ancestors were its original owners. This is the direct form of restitution. In particular sacred sites (including grave sites) should be donated to concerned communities. A maximum of 10 hectares and a minimum of 5 hectares should be considered.

The second option will be to determine the monetary value of the claim and then compensate those communities in cash and/or kind. The communities can then use such alternative resources to buy their own land or to use them for other developmental initiatives, or both.

Hybrid models can be developed to combine various options for specific communities.

The South African case study shows that if the actual ancestral land that was dispossessed cannot be returned for valid reasons, then there are several alternative remedies that can be considered in this regard. It is high time that Namibia as a nation started to take concrete measures to address the gross injustice of colonial land dispossession which, effectively, was the rationale for the wholesale genocide of 80% of the Ovaherero people by the German colonizers.

This racially skewed pattern of land ownership occasioned by the racist and brutal policies/ practices of the colonial administrations of both Germany and South Africa, cannot be allowed to stand any longer in the name of a policy of “National Reconciliation” – which continues to benefit only the descendants of the former colonizers. The time for restorative justice to the victims of German and South African land dispossession is **NOW!**

# Chapter 6

## Land and Agrarian Reform

### 6.1 Productive Land Value

Land is an important and vital natural resource, not only for economic development, but also for the social well-being of every living human being. The importance of land to an individual depends on many factors such as the level of education, socio-economic background, living standard and financial status, to mention but a few.

However, due to the increasingly competitive business environment, many people now appreciate that land is an important productive asset on their balance sheet from an investment point of view, rather than just as a pure natural resource. Therefore, people are no longer interested in merely living on land for its own sake, but they want to own land in order to add value to it so that they can make it more productive. Financial institutions are influencing the price of land by relying primarily on the principle of “Willing Seller, Willing Buyer”.

### 6.2 Willing Seller, Willing Buyer

Article 23 of the Namibian constitution stipulates the “*willing seller, willing buyer*” principle which has significantly contributed to the escalation of farm land prices, way above the productive land value. The sellers are driven mostly by the profit motive regardless of the real agricultural land value of the specific farms. Consequently, land in Namibia has become unaffordable even to the Namibian Government which is supposed to procure land for a just and fair land re-distribution programme.

### 6.3 Sub-division of Commercial Farm Land

The sub-division of agricultural farm land in Namibia is on the increase. This practice contributes to the escalation of land prices and it compromises the sustainability and profitability of the farms. This is because it adversely affects the productive value of the sub-divided piece of land when it is smaller than that needed for an economic unit in a particular agro-ecological region.

Thus, contrary to popular belief, the sub-division of agricultural land does not increase the supply of affordable land that can be purchased by the Namibian government and/or AALS candidates. Instead, it frustrates government’s long-term objective to acquire a total of 15 million ha of commercial farm land by the year 2030.

### 6.4 Diversification

The assessment and valuation of commercial farm land is traditionally and pre-dominantly based on livestock farming without taking into account the overall or the potential productive land value that can be stimulated through diversification.

Thus, the valuation of agricultural farm land, and the cash flow projection when assessing the owner or buyer's repayment ability, must consider the available productive capacity as well as other potential income generating activities of that land from diversification and value addition perspectives.

## **6.5 Development of communal land**

The objectives of land reform cannot only be achieved through the purchasing of commercial agricultural land for the resettlement programme as defined today. This option is costing the Namibian government a lot of money each year for the purchase of the land and the maintenance of water and fencing infrastructure on those farms.

Large chunks of the communal areas are currently either un-developed or under-developed, and this limits the farmers' ability to utilise this land to its full productive capacity. The lack of options for people in the communal areas to move to the surrounding open agricultural land for farming expansions results in over-grazing, livestock mortalities and conflicts amongst the communities over the scarce available resources.

It is thus important to identify such un-developed or under-developed land so that it can be fully developed by providing the necessary basic infrastructure. Once these parcels of land are fully developed, they can be properly demarcated into economic units with various sizes that depend on the agro-ecological regions in which they are located.

Priority for re-settlement must be given to the communities in close proximity to these newly developed areas. This will enlarge the communal grazing areas and thereby increase the productive land value of the communal farming areas. It will also save the state millions of dollars which can be used for other land reform purposes.

## **6.6 Post Resettlement/Resettlement Support Packages**

The beneficiaries under both the settlement and resettlement schemes enter a completely new commercial farming set up with its unique challenges and opportunities, and they therefore require maximum technical and financial support from the state with co-funding by the private sector and donor agencies to help them become more productive on their land.

The government in collaboration with relevant stakeholders must design sustainable support strategies for those settled and resettled on commercial land. A total loan package at zero interest rate must be made available for each beneficiary in order to support growth, sustainability and overall productive value of this land.

Efforts must be made to provide technical skills, monitor, evaluate farming progress and performance of those loans, and make recommendations for corrective measures where necessary. Ongoing research must be conducted in the agricultural and related sectors to explore current and future best farming practices.

## 6.7 Support for private land acquisitions

Previously disadvantaged Namibians who are privately buying agricultural land in Namibia are enhancing the government's efforts to achieve its land reform objectives. However, these people are operating and managing their farms without any government support to increase productive land value, which would ultimately stimulate national economic growth by increasing agricultural contributions to the GDP.

The Affirmative Action Loan Scheme must be overhauled completely in order to support the increasing number of previously disadvantaged Namibians who are buying commercial farmlands with their own resources. Government should consider to fully subsidise (100%) freehold land portions equivalent to the average hectareage given for free to resettlement programme beneficiaries. This will significantly ease pressure on the communal land.

The financing of the farmland must be subsidised by charging very low interest rates of no more than 2% per annum over 25-30 years. Enabling conditions must be created through the provision of extension services, agro processing and value addition initiatives in order to improve the productive land value.

# Chapter 7

## Land Resources Governance

### 7.1 Introduction

Good land governance is a prerequisite to the effective management of land for the benefit of those of who live on it. Good land governance, in post-colonial Namibia, ought to be premised, primarily, on the principle to redress the wrongs of colonial dispossession and to restore the rights of those who lost land and related assets such as flora (source of fruits, berries, medicine), fauna (source of protein, medicine and religious practices), water, minerals as well as movable assets such as livestock, and also those who can no longer practice their religions as they lost access to the graves of their ancestors.

### 7.2 Rationale

The rationale of a good land governance model is to address:

- ✓ Fairness and Justice
- ✓ Transparency and Accountability
- ✓ Integrated Resource Management
- ✓ Eradication of Poverty
- ✓ Restoration of Dignity to the Land dispossessed Masses
- ✓ Restitution and Redress of Past Wrongs, including the unresolved Ovaherero and Nama Genocide Question
- ✓ Tenure Security
- ✓ Enhancement of Social Security (including water, food, & energy)

### 7.3 Evolution of governance institutions in Namibia

#### 7.3.1 Precolonial era

Various indigenous peoples had their own systems of dealing with communal assets such as access to land for grazing, hunting and other uses. The trusteeship for land vested in community leadership whereas the ownership vested in the whole community.

#### 7.3.2 German Colonial era

By design and with the quest for *Lebensraum*, the objective of the governance frameworks was to soften the locals by religious means, conquest, genocide, dispossession and economic development of the settlers and their colonial homeland.

### 7.3.3 South African Apartheid Regime era

The Apartheid regime of South Africa, as a proxy of the League of Nations, and later the United Nations, perfected the German model by further dispossession of the indigenous people and further enhancing the cheap labour pool concentrated in so-called reserves. These institutions therefore served the agenda of the *Arm Blanke Vraagstuk* to empower poor Whites at the expense of the indigenous people. The regime intended to clone their apartheid structures by making Namibia a fifth province of South Africa.

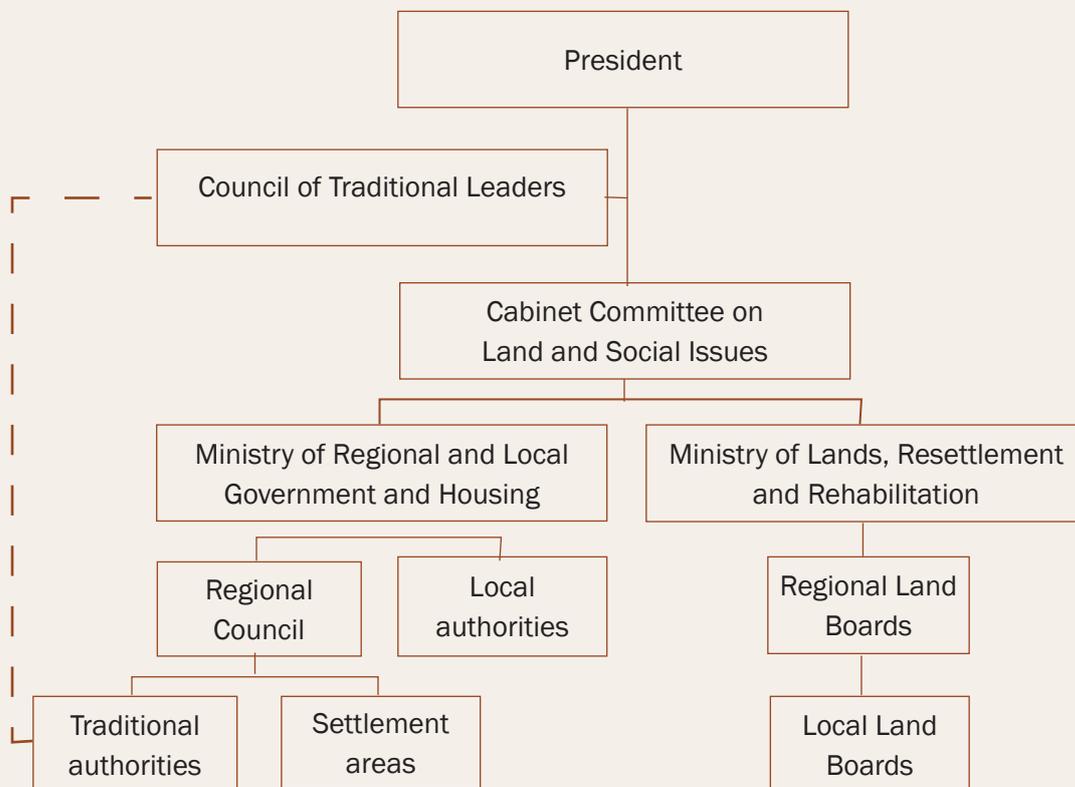
### 7.3.4 Post-Colonial Namibian era

At independence, Namibia was lauded to have adopted probably the most advanced constitution in any post-colonial setup. With its separation of powers, the constitution had a Bill of Rights that protects inter alia, the right to property, as prescribed by the so-called 1982 principles of the Five Western Powers which included Germany.

Namibia promulgated two separate pieces of legislation, one for Communal Land and the other for Commercial Land. In doing that, Namibia lost sight of a central tenet in land governance, namely, that of a unitary policy and the creation of institutions that are geared towards a single objective.

### 7.3.5 Current institutional arrangements

As **Figure 3** shows, the Executive is the final arbiter in land related matters, with only a symbolic role for the Council of Traditional Leaders. There is no role for Parliament.



**Figure 3: Current land governance model**

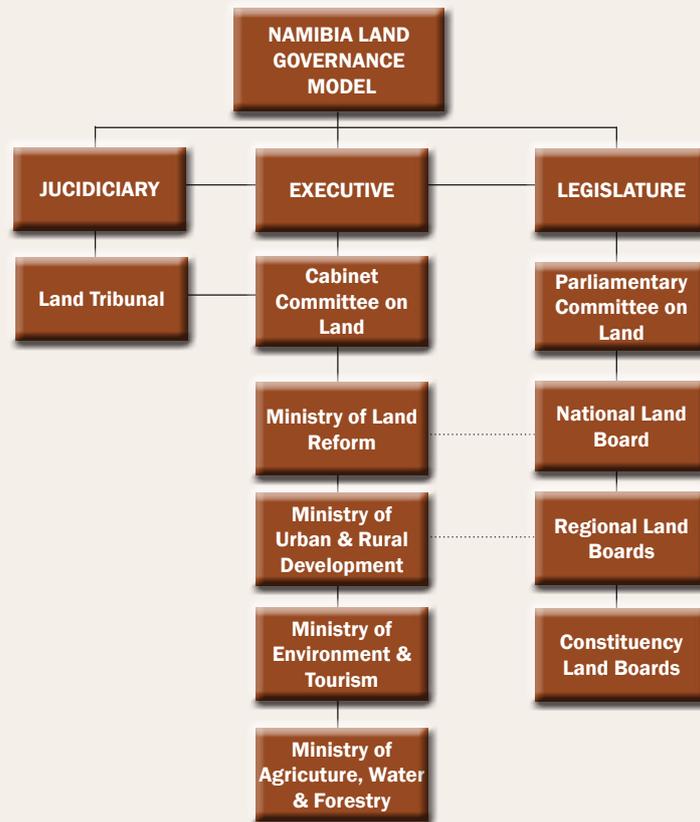
### 7.3.6 Impact of the current institutional dispensation

Furthermore, land governance institutions in Namibia:

- compromised the rights of its indigenous people who were dispossessed and massacred.
- upheld the *Willing Seller Willing Buyer* concept almost as if it was a religion, but forgetting that the land was not bought in the first place.
- almost over-regulated the Communal Land sector as opposed to the Commercial Land sector that was left to market dynamics.
- of late, the land governance model in Namibia seems to drive an agenda of social engineering by resettling communities from the Northern Regions, especially Oshana, Ohangwena, Oshikoto and Omusati at the expense of those that were dispossessed and are living in poverty within the regions south of the Veterinary Cordon Fence.

### 7.4 Proposed Land Governance Model

The alternative land governance model is shown in Figure 4 below.



**Figure 4: The alternative land governance model**

The OTA is thus convinced that the proposed institutional setup will enhance land governance in the long term. Below is an explanation of the proposed governance model.

#### **a) NATIONAL LAND BOARD**

This institution will be appointed by Parliament, and will have the following functions: to determine the land allocation criteria, as well as to regulate land prices and allocate land.

#### **b) REGIONAL LAND BOARD**

**This institution reports to the National Land Board. It will** comprise regional representatives of Traditional Authorities, farmers' unions, private sector, Regional Councils, NGOs, CBOs etc. It will review the land allocation decisions of the Constituency Land Board.

#### **c) CONSTITUENCY LAND BOARD Reports to Regional Land Board**

**This institution reports to the Regional Land Board. It will** comprise constituency representatives of Traditional Authorities, farmers' unions, private sector, Regional Councils, NGOs, CBOs etc. It will process land allocation applications, and will submit their recommendations to the Regional Land Board.

#### **d) MINISTRY OF LAND REFORM**

This Ministry will be responsible for land and agrarian policies. It will administer these policies. They will also be the repository of land ownership records.

#### **e) MINISTRY OF URBAN & RURAL DEVELOPMENT**

This Ministry will be responsible for the development and administration of urban and peri-urban land policies.

#### **f) LAND TRIBUNAL**

This institution will report to the High Court of the Republic of Namibia. It will consider and adjudicate on appeals and disputes.

## Chapter 8

### Conclusion

At the advent of the scramble for Africa in 1884, central Namibia was largely occupied by the Ovaherero, Damara, Nama, San and Baster people. However, the focus of this paper is on land inhabited by the Ovaherero at that time.

The Ovaherero people lost all their ancestral land and most of the livestock at the hands of German settlers, by way of the extermination and expropriation orders. Some parts of the land were later returned, into which the Ovaherero were concentrated as so-called native reserves. Some Ovaherero genocide victims are still in the Diaspora and wish to return to their ancestral land.

The demand for the restitution of ancestral land, inclusive of all the sacred and historical sites, is a genuine call that is based on the inalienable right of the Ovaherero people. This matter requires thorough rethinking in order to develop amicable and sustainable solutions.

The First National Land Conference of 1991 failed to address the crucial issues of the restitution of ancestral land. This had a detrimental effect on the livelihoods of those Namibians that have been dispossessed of their ancestral land by the colonisers. Furthermore, the Namibian government managed to implement only 40% of the 24 resolutions of the conference, thus making the Second National Land Conference vitally important.

There are international legal instruments for the restitution of ancestral land rights, and these can be adapted for the Namibian situation to provide a legal basis for the restitution of ancestral land. South Africa is a relevant case study in this regard, despite the challenges that have been experienced in the implementation of that country's Land Restitution Act.

Land reform must be considered in its broader agrarian context to make it sustainable. Land is a means of production and thus efforts must be made to increase productive value. Land valuation must move away from relying on the "*willing seller, willing buyer*" principle but must instead be based on the productive capacity of the land. Under-developed and under-utilised communal land should be provided with the necessary basic infrastructure to provide some relief to the currently overcrowded and overgrazed communal areas.

Appropriate financial support packages must be provided at zero interest rate to newly settled/re-settled farmers to help them increase the productivity of their farming operations. Equally, individuals using own resources to buy farms must also be financially supported with financial packages at close to zero interest.

An appropriate resource governance framework is crucial to ensure profitability and sustainability of the land and agrarian reform process. Transparency and accountability are key principles, and thus institutions that are involved in land allocation should report to Parliament rather to an individual Minister – whose current officials are of the opinion that transparency in the land allocation process is politically not advisable!

## Chapter 9

### Recommendations & Policy Statements

It is thus recommended that Namibia's new National Policy on Land and Related Matters must consider and contain the following:

- 9.1. There must be a restitution of ancestral land rights of those Namibians who lost land because of colonial dispossession and genocide.
- 9.2. Fair and transparent processes and institutions must be established to verify and determine the ancestral land rights claims.
- 9.3. The Second National Land Conference should not be the arbiter about whether or not ancestral land rights should be recognised and restored. At best, the Conference should resolve to set up a panel of experts that will draft the policy and legislation for formulating due processes and setting up competent institutions to deal with this crucial issue.
- 9.4. Lessons learned from countries such as South Africa should inform the search for the final solutions to the ancestral land question.
- 9.5. The first remedy for restitution should be the return of the actual land that was expropriated. In the event that this is proven by competent institutions that it may not be possible in some cases, there should be alternative remedies such as, but not limited to, the provision of alternative suitable land, monetary compensation, development assistance, or an appropriate hybrid of all these and other suitable options.
- 9.6. Land prices in Namibia must be capped and controlled at agricultural productive value only, and this should be the guideline which land owners will be using to put their land on the market for sale. This will replace the current "willing seller, willing buyer" principle. Controlling and restricting land prices to agricultural land value only, will prevent land speculations and this will stimulate and encourage occupation and cultivation of land, transfer of skills and knowledge as well as succession planning that will give meaning to increasing productivity on agricultural land in Namibia.
- 9.7. The Government must adopt agricultural productive value to agricultural land in Namibia and both the Ministry of Land Reform and Agribank must harmonise all relevant factors and formulas that qualify productive valuation for standardised implementation. All financial institutions must comply herewith and adopt this valuation methodology for all their future financing transactions of land in Namibia. No seller must be allowed to sell his/her farm land in the market (publicly or privately) above the productive value of his/her land.
- 9.8. The land policy must be clear on exemptions given for an application for sub-division of any agricultural land in Namibia, which application must be considered for approval or otherwise by

the land tribunal committee first. Any sub-division related transaction which compromises the productive farming capacity of the farm, the ability of the owner to farm productively and the productive value of the land, must be declined.

Acceptable economic units of agricultural lands in different agricultural zones must be determined and both the remaining and the sub-divided portions must conform to the standards and be of productive economic units. Heavy penalties or taxation must be imposed for sub-division of agricultural land into different portions to discourage this tendency by private land owners to speculate with land at the expense of the landless majority, and to encourage the availability of agricultural land of productive value and its economic unit on the market.

Sub-division of agricultural farm land by the Ministry of Land Reform into different portions or farming units for either settlement or re-settlement is not exempted but must also honour these standards to enhance both productive value of land and its economic unit.

- 9.9. Valuation of agricultural farm land and the cash flow projection when assessing the owner's or buyer's repayment ability must fully consider the available productive capacity and other potential income generating activities of that land, from the perspectives of diversification and value addition.
- 9.10. Unproductive land in the communal areas must be identified, and then be fully developed by providing all the basic infrastructure. They must then be demarcated into economic units depending on the agro-ecological zones in which they are located. Allocation priority must be given to the communities currently living in those areas to be re-settled there first, with such allocation being done by the local traditional authorities. People in the communal areas must be given title deeds so that they can legally own the land on which they live so that they are in a position to add value to the land.
- 9.11. Land should not only be appreciated from the productive value point of view, but a high degree of consideration must also be given to the socio-economic value perspective. Those that were impacted negatively by historical dispossessions must be given special preference and considerations.
- 9.12. The Namibian government, in collaboration with relevant stakeholders must design sustainable support strategies to those farmers that have been settled and resettled on commercial land. A total loan of N\$500 000.00-N\$1 000 000.00 @ 0 % per annum must be made available for each beneficiary, to promote growth, sustainability and overall productive value of this land.

The Ministry of Land Reform must intensify efforts to provide technical skills as well as to monitor and evaluate farming progress and performance of those loans, and make commendations for corrective measures where necessary. The Ministry must also conduct regular research in the agricultural and related sectors regarding the current and future best farming practices, and to share such findings with the settled and resettled farmers.

- 9.13. The entire Affirmative Action Loan Scheme must be overhauled in order to encourage and appreciate an increasing number of black Namibians who are buying commercial farmland, thereby easing

pressure on the communal land. The financing of this farmland must be at subsidised interest rates that are fixed at less than 2% per annum over 25-30 years. In addition, GRN should convert the current paper guarantee of 30% into an actual grant that will subsidise the farm purchase price for up to 50%.

The state must create enabling conditions through the provision of extension services, agro processing and other value addition initiatives that will encourage and keep agricultural producers in farming so that they can improve the productive value of their land. Regular research must also be done and shared.

- 9.14. The alternative land governance model in **Figure 4** must be implemented so that Parliament (the Legislature) will become the final arbiter of land and related matters, and for the Minister and Cabinet to execute this in their capacity as the Executive.
- 9.15. There must be two distinct land reform programmes, namely a settlement programme that applies to those Namibians that did not lose their ancestral land due to colonial dispossession. Secondly, there must be a re-settlement programme that will apply strictly to those Namibians that lost their ancestral land

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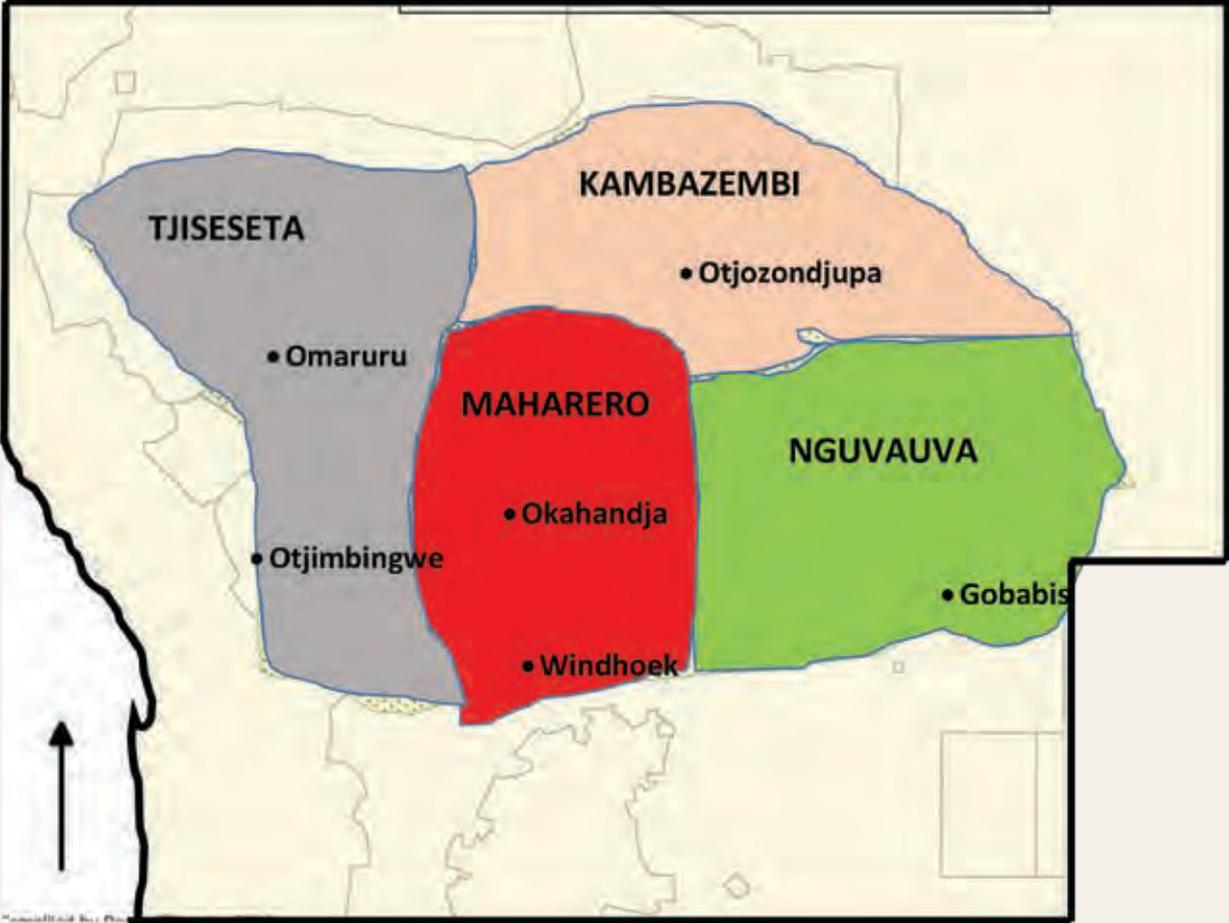
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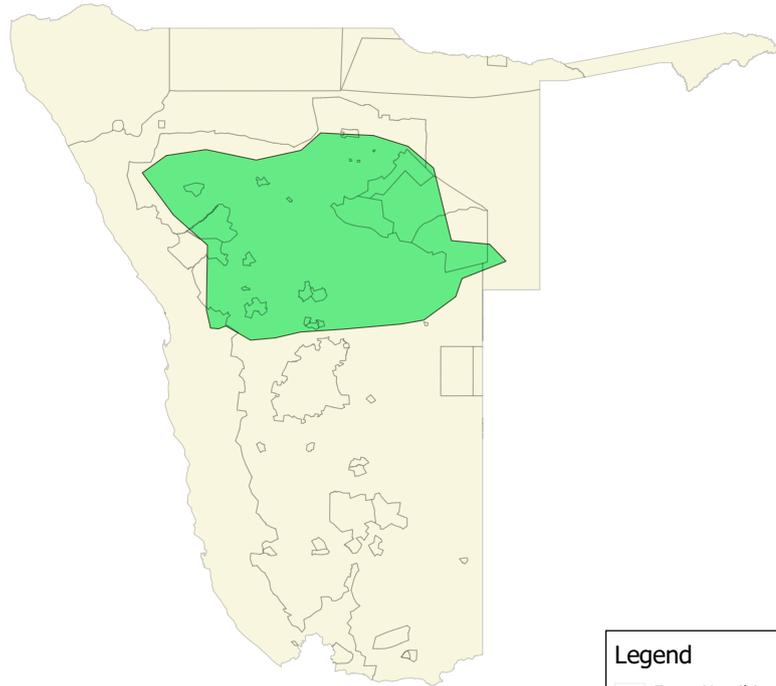
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### Pre-Colonial Hereroland Boundary



**Legend**

- FarmsNamibia
- Land allocations in 1955
- Pre Colonial Herero Land Boundary

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